INTRODUCTION

Concurrences get little respect. They are at best ignored and at worst criticized. Substantial attention is devoted to the majority opinions of courts, particularly the Supreme Court, and perhaps rightly so, that being the law. Dissents too have their admirers; the tradition of the Great Dissenter speaking over the shoulders of the full court to the future understandably tugs at our emotions and minds. But it apparently has been difficult to see the significance or majesty of a concurrence.

And yet, sometimes in the law, concurrences can be everything. They are the signal of seismic rumblings in the law as well as the invitation to clamor for legal change.

Beginning in the summer of 2013, the country — indeed, the world — was treated to an ongoing string of revelations from a rogue former National Security Agency operative, Edward Snowden, regarding the widespread, even breathtaking, nature of NSA spying both at home and abroad. Lawsuits quickly challenged one aspect of that spying, the NSA’s collection of metadata concerning the telephone calls of millions and millions and millions of people. The Foreign Intelligence Surveillance Court (FISC) had approved the massive data collection, but the question was whether the FISC had gotten the law right. One federal district court held yes, relying on the Supreme Court’s 1979 decision in *Smith v. Maryland*, holding that it is not a “search” within the meaning of the Fourth Amendment if the government gets “caller ID” information. *Smith* rested on the “third-party” doctrine, the idea that one has no expectation of privacy in information conveyed to a third party.

---


2 Metadata is information about who is called, and when, as opposed to the “content” of the actual phone call. An ongoing record of lawsuits filed against the NSA is available from ProPublica. See Kara Brandeisky, NSA Surveillance Lawsuit Tracker, ProPublica, http://projects.propublica.org/graphics/surveillance-suits.

But another federal district court held no, arguing that the Supreme Court’s decision in Smith had been undermined by a subsequent Supreme Court decision, Jones v. United States, holding that the government did conduct a search when it engaged in long-term GPS tracking. Many have argued that Smith’s continuing vitality turns on the interpretation of Jones.

Whether the Supreme Court’s decision in Jones calls into question its decision in Smith turns on the concurring opinions in Jones — and in particular Justice Sotomayor’s sole concurrence — not on the majority opinion. The majority opinion, rooted in common law trespass doctrine, had nothing to say about Smith. But the concurring opinions took time to discuss the impact of advancing technology on Fourth Amendment rights. Justice Sotomayor’s opinion was unique. She joined the majority opinion, providing a necessary fifth vote for the view that a physical trespass — the GPS had been installed on the suspect’s car — necessarily involved a Fourth Amendment search. But she went on to say:

[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. E.g., Smith, 442 U. S., at 742 . . . This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers.

Concurring justices can be pivotal in the cases in which they write, and to the extent they are, their opinions can take on outsize significance. That is notwithstanding the fact that it is unclear Justice Sotomayor actually was pivotal in Jones — the other four concurring justices also were focused on advancing technology and the Fourth Amendment, but it is not apparent that they were willing to take on the third-party doctrine. In a sense that’s the point, here, though. Potentially pivotal concurring justices, whether they are in fact or not, often exercise authority well beyond what their solo votes would suggest. For ex-

---

ample, Justice Sotomayor’s concurrence has already been cited 119 times, or in 19% of all cases that cite to any part of *Jones*. Justice Sotomayor’s concurrence already has been cited X times.

To the extent concurrences garner attention at all in the scholarly literature or the public arena, it is mostly disdain. No one likes a “fractured” court. Concurring opinions muddy the law. Concurring justices put their egos ahead of collegiality and coherence. These, for example, are the sentiments of the Chief Justice, who has vowed to seek consensus, and to persuade his colleagues to relinquish going their separate ways. His views on the subject are hardly unique.

Concurrences, and in particular pivotal concurrences, a concept we introduce here, implicate two fundamental features of collegial courts — American and otherwise.

First, there is the question of whether to allow separate opinions at all. Some jurisdictions do not; they suppress separate opinions. Other jurisdictions mandate separate opinions, issuing their judgments *seriatim*. Still others, like the United States, opt for something in between. Once allowed, separate opinions can take on a life, and a force, of their own.

Second, pivotal concurrences speak to the fundamental bind of lower courts in jurisdictions that are both hierarchical and follow the principle of *stare decisis*. Suppose that a lower court can predict that if it follows a binding precedent from a higher court, its judgment ultimately will be reversed. What is that court properly to do? This phenomenon is at its apex when the lower court can predict with confidence that the Supreme Court will overrule itself.

This Article argues that the general neglect of concurring opinions is a mistake: concurring opinions mediate beneficial tradeoffs between the advantages of *seriatim* and suppressed systems, and between predictive and precedential understandings of judicial decisionmaking. They alleviate the difficulty of accommodating many desirable but often-competing virtues of a judicial system. By permitting concurrences,

---

6 See, e.g., Berkelow (discussing the difficulties challenges that divided courts present to onlookers and lower courts trying to determine precedent); Schwartz, Hoover Institution (discussing the virtues of unanimity and criticizing the current Court for its lack thereof); Ledebur (arguing for the wholesale abolition of concurring opinions on the Court).

7 See Rosen, *Roberts’s Rules* (stating that in an interview Roberts declared it “his priority . . . to discourage his colleagues from issuing separate opinions: ‘I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they’re writing separately, about the effect on the Court as an institution.’”).
even where they muddy the law, courts optimally balance transparency, legitimacy, clarity, stability, and economy.

Indeed, this Article takes a decidedly contrarian stance: Potentially pivotal concurrences are so important that the disdain for fractured courts might be an outright error. Coherence in the law is a lovely thing. But it also can be, like foolish consistency, the hobgoblin of little minds. Pivotal concurrences suggest that the seeming clarity and coherence of law is effervescent. Law is never static; it is always becoming. Pivotal concurrences send important signals not only of what the law is, but what it can be.

The thesis of this Article is that concurring opinions are the pulse and compass of legal change. They let us know that it is happening, and signal its possible direction. Concurring opinions contain information about judges’ present understanding of what the law actually is. And these present understandings, in turn, motivate litigants, their lawyers, and lower courts, to seek legal change. Concurrences, in their own vital way, help the legal world turn round.

To prove our case, first we develop a new taxonomy of concurring opinions: plurality concurrences, pivotal concurrences, and plain vanilla concurrences. Plurality concurrences occur when a collegial court cannot agree on a single rationale to explain its judgment. As a result, the court splinters, perhaps 4-1-4, with a sole justice concurring in judgment only. There is an extant literature on plurality concurrences, which understandably garner great attention in the lower courts, which must struggle to make precedential sense of them. Pivotal concurrences, on the other hand, are something that — as far as we can discern — we identify for the first time in the literature. Pivotal concurrences are an odd phenomenon by which a crucial member of a court majority nonetheless writes separately, sometimes contradicting what the majority itself says.

Then, we show that contrary to what the Supreme Court says should happen, lower courts (and presumably the litigants in those courts), take pivotal concurrences seriously, when they should not. Under existing Supreme Court precedent, pivotal concurrences are like junk DNA; lower courts must disregard them and follow a majority opinion. But we show that to the contrary, lower courts take pivotal concurrences quite seriously.

We validate our thesis empirically, discovering that pivotal concurrences are cited at nearly the same rate that plurality concurrences are, and far more often than non-pivotal, non-plurality concurrences. We also discover that, when lower courts cite to pivotal concurrences, they do so in greater depth than plain vanilla concurrences. In order to dis-
cern this, we created and analyzed a novel dataset of 480 five-vote-majority Supreme Court cases with concurrences, and all lower-court citations to those concurrences.

Our data suggest that concurrences, and particularly pivotal ones, play an unanticipated and substantial role in the law. Lower courts cite them, pour over them, and read the tea leaves concerning what they say about the direction of the law. We expand on this conclusion by examining at length one example of such a pivotal concurrence, the separate opinion of Justice Kennedy (joined by Justice O'Connor) in United States v. Lopez.

What this study makes clear is that pivotal concurrences are a crucial and understudied feature of our legal landscape. They show how informal mechanisms can alleviate tension between competing formal legal rules. Because of concurrences, courts are better able to balance the tradeoffs between seriatim against suppressed decision-making, to toggle between precedential and predictive modes of interpreting precedent. While many condemn fractured opinions, we show them in a better, and instructive, light. They are the beacons and harbingers of legal change.

Part I of this Article explains the tradeoffs involved in the decision to allow or ban separate opinions. Here, we draw from the practices of judicial decisions the world over. These examples show how allowing concurring and dissenting opinions offers transparency and clarity, but at the perceived threat to legitimacy given that it shows legal disagreement.

Part II then focuses on the United States. We have a mature legal system, in which disagreement is tolerated with little threat to legitimacy. It was not always so, and over time the Supreme Court has cycled between the poles of suppression and seriatim opinions. Focusing on the puzzle of the documented breakdown in consensus on the Supreme Court in the first part of the twentieth century, we show that consensus and acquiescence among the justices collapsed in constitutional cases. Here, the value of disagreement was seen as essential to the future of the law. This is the value separate opinions further.

Part III turns to internal court values, and the tension between predictive and precedential decisionmaking, setting the stage for the empirical study that follows. The rule in the federal courts is that judges must not predict, they must follow precedent. If that is true, pivotal concurrences should not matter at all, and should be ignored.

In Part IV, however, we show that pivotal concurrences are a force in the law. This is our empirical Part. Despite the mandate of the Supreme Court effectively to ignore pivotal concurrences, which are
meaningless in a precedential system, lower courts devote outsized attention to them.

Part V concludes, connecting the role of pivotal concurring opinions to the very reason consensus broke down on the Supreme Court. In a mature and established legal system, where the legitimacy of judicial review is not at stake, consensus is not as important as disagreement. Consensus does signal stability, but the law is always changing. And in that process, concurring opinions — especially pivotal ones — play a central role.
I. THE CHOICE TO ALLOW SEPARATE OPINIONS

All court systems must make a fundamental decision: whether to allow dissenting and concurring opinions. Although such opinions have a long history in the United States, courts around the globe vary notably with regard to their amenability to separate opinions. Nonetheless, of late there has been some convergence. In articles on the opinion-writing practices of the Canadian and United States Supreme Courts, Peter McCormick and Todd Henderson make the point that opinion-writing practices are not “random,” or “neutral”; they betray “an understanding by the members of the court of their role.” Convergence shows courts struggling to balance the internal and external factors that drive the decision to allow or suppress individual decisions. Understanding these tradeoffs highlights the underappreciated benefits of concurrences — and the dialogic relationship between actors in a legal system more generally.

A. Seriatim, Suppressed, and Hybrid Courts

1. Seriatim Courts

It was traditional in many Commonwealth countries — e.g., New Zealand, Australia, South Africa, and India — for judges to write opinions seriatim. Under that practice, each judge was expected to produce his or her own opinion disposing of the case before the court. Once the opinions are published, one reads them determine the “holding” from the locus of authority among all of the individual opinions. This system has the advantage of giving a more fine-grained information about each judge’s view of the law, but at the cost of an easily identified holding embodied in a single opinion for the court.

No one seems to know precisely why seriatim opinion writing became the practice, but it is justified — and has at times been expected — for reasons of transparency and judicial accountability. Thomas Jefferson, who favored the practice in the United States and deplored John Marshall for eliminating it on the Supreme Court, called judges “lazy or timid” for failing to express their own views. As quaint as the practice may seem today — and there is evidence it is falling out of favor in some respects globally — it had something going for it intellectually. On a seriatim court judges do not deliberate formally; they read, listen, think and then write independently. Thus, precedent is particularly weighty, because it represents a consensus independently reached. For similar reasons, individual opinions may come to hold lesser or

---

8 Cite articles, parens to capture key quotes from my notes.

9 But not so much Ireland. McWhinney 607
greater sway over time, as doctrinal lines mature and are developed in subsequent cases.

2. Suppressed Courts

In other countries, particularly those with a civil law tradition, courts speak with one, and only one, voice. Separate opinions are neither invited nor allowed. In such systems there are no concurrences and no dissents. This, for example, is the practice in France and Italy, and many European constitutional courts operate this way.10

Separate opinions in these jurisdictions are suppressed in part as a matter of tradition. In France, for example, judicial bodies spoke for the king, the roi de justice, who could only exercise one will — and thus but one voice. Suppression is also more compatible with the broader civilian tradition, in which judges do not (ostensibly) make law. Rather, judges are thought to merely apply codified law, and therefore it is easier to speak of a single, authoritative application of that law.

Today, however, suppression of separate opinions is justified primarily in terms of the authority or legitimacy of the court and the clarity of its rulings. Single opinions of the European Court of Justice, for example, are “defended on the ground of the need to build up the court’s authority by presenting a united front and as a defence against political pressure.”11 The Italian Constitutional Court considered allowing anonymous dissents, but rejected the idea because it presented “too pluralistic a view of the Constitution.”12 Others complain that dissenting opinions might “undermine[s] the authority of the decisions of the Court” and provide “a reduced incentive for judges to seek the broadest possible consensus.”13

Of course, it is more difficult to win unanimity than a majority, with important effects. First, unanimous opinions are likely to rest on a narrower basis; the more votes that are needed, the more moderate a ruling will tend to be, because each marginal judge added to the opinion will

---

10 See Raffaelli at 18-20 (describing the practices of European courts with policies of strict suppression). In Italian courts, dissents may be recorded, along with their justifications, but those dissents are sealed and are not made available to the public. Raffaelli, 18. For a more detailed discussion of the Italian judiciary, see generally The Italian constitutional court, 51. In the European Union, the rule of suppressed opinions is also followed in Belgium, Luxembourg, Malta, the Netherlands, and Austria. Raffaelli, 17-20. See also generally Pasquino (contrasting judicial review as it exists in continental Europe with the practice in the United States).


12 Ferejohn & Pasquino (citing The Gavel and the Robe, The Economist).

13 The Italian Constitutional Court, 51
be able to extract from the majority some concessions, which under common assumptions will narrow the holding.\textsuperscript{14} It also will exert some pressure on the rationale — perhaps making it less precise as judges can agree to a holding stated only at a higher level of abstraction.\textsuperscript{15}

Suppressing separate opinions takes the focus off the judge and places it squarely on the court. It is sometimes said that in systems allowing for separate opinions — particularly the United States — there is a cult of personality surrounding certain individual judges. This phenomenon fuels a circle (vicious or otherwise) in which judges feed their public persona by writing more separate opinions. If judges cannot write separately, they remain somewhat more anonymous, and the voice is that of the court.

3. **Hybrids**

Although the description thus far suggests polar opposite types, in reality there is a spectrum between these extremes, and recent history has observed a movement toward the middle. It is not difficult to understand why. Systems that are strictly seriatiem or suppressed choose to foster some values at the expense of others — for example, transparency over legal clarity, or vice versa. What we see, though, is that it is not easy to trade off these values, so legal systems try to accommodate them.

Courts that traditionally suppress opinions have demonstrated some tolerance for dissent. The German Constitutional Court decided to allow dissenting opinions, or *sondervotum*, in 1969, though they are still rare in practice. The German Court, in turn, served as a model for current constitutional courts in the Czech Republic, Hungary, Bulgaria, and Croatia.\textsuperscript{16} Dissent is now permitted, in various forms, in many countries that have been influenced by the Anglo-American judicial system, including India, Pakistan, and Israel.\textsuperscript{17} China, which until recently issued only short and conclusory opinions, recently acted to permit dissenting opinions in certain situations.\textsuperscript{18}

Even on courts that still adhere to a strict system of unanimity, there are alternative vehicles for ensuring that contrary views are expressed. The judges of the Italian Constitutional Court speak with one voice, but the opinion itself is published in the academic journal *Giusprudenza Costitutionale*, accompanied by critical commentary by aca-

\textsuperscript{14} See Kornhauser (case space).
\textsuperscript{15} See Staudt, Epstein and Friedman; Pasquino.
\textsuperscript{16} Laffranque.
\textsuperscript{17} Laffranque.
\textsuperscript{18} Speech by Wan Exiang.
demics and interested third parties. Similarly, the European Court of Justice issues only one opinion, but it publishes the views of the Advocate General, which stands in for separate opinions by expressing contrary arguments.

In some seriatim countries, especially among Commonwealth nations, the tradition of writing separately may be slipping away. Australia is intriguing in this regard. Some Chief Justices have tried to achieve greater consensus and fewer separate opinions. Informal conferencing was encouraged, and then — beginning in 1998 — Chief Justice Gleeson held formal conferences. This practice may have paved the way for a period of unprecedented unity on the High Court, from 2009-11, following the ascension of Gleeson’s successor Chief Justice Robert French in 2008 (and the corresponding departure of Judge Michael Kirby, Australia’s “Great Dissenter”). In that period, the High Court decided almost half its cases by issuing one joint opinion. There was a bit of a reversal in 2012; the High Court reached consensus less than 17% of the time that year. Still, the rate of dissent continued to decline, with just under a third of cases receiving any dissenting opinion in 2012.

Historically and at present, the United Kingdom demonstrates ongoing tension between the seriatim and suppressed models. Even with its strong seriatim tradition, at times the need for clarity and legitimacy has created the need for suppression. Lord Mansfield, Lord Chief Justice of the King’s Bench, did away with seriatim judgments in the late 1700s, particularly in commercial cases. As Mansfield (or rather, conspicuously, “the Court”) stated in *Milles*, “the great object in every branch of law, but especially in mercantile law, is certainty.”

Historically and at present, the United Kingdom demonstrates ongoing tension between the seriatim and suppressed models. Even with its strong seriatim tradition, at times the need for clarity and legitimacy has created the need for suppression. Lord Mansfield, Lord Chief Justice of the King’s Bench, did away with seriatim judgments in the late 1700s, particularly in commercial cases. As Mansfield (or rather, conspicuously, “the Court”) stated in *Milles*, “the great object in every branch of law, but especially in mercantile law, is certainty.”

19 The Italian Constitutional Court, 50-51. Pasquino, 10-11.
20 [Cite]
21 Lynch, “By Nature, High Court Judges are Seldom in Agreement”
22 Lynch, “By Nature, High Court Judges are Seldom in Agreement”
23 [Update for post-2012 data]
24 Milles v. Fletcher, 1 Doug 231, 232 (1779). See generally Henderson, 2007 S.Ct. Rev. at 295. Because plaintiffs had significant liberty to select forum — and because judges were paid by the case — Mansfield’s switch from seriatim to suppressed was also a bid for relevance in a competitive and fast-changing legal market. Surveying historic fee structures in the English courts, Klerman finds that fees were a “significant component[] of total judicial income. For the judges with the fattest fee income, fees composed more than a third of their total official compensation. For most of the other judges, fees provided between 10 and 20 percent of their incomes.” 74 U. Chi. L. Rev. at 1189.
in the heyday of Imperial power which dictated a clear pronouncement for subject peoples not attuned to the institutions and conventions of their Imperial masters.” For related reasons, the intermediate criminal courts in the U.K. did not issue separate opinions: “To the criminal, punishment is bitter enough, without the salt of a favourable but impotent dissenting opinion being rubbed into the wound.”

But watch: even in those eddies of suppression, there remains pressure to revert to seriatim treatment. Today dissents are allowed in intermediate criminal appeals, albeit only with the permission of the presiding judge. Similarly, under pressure to reform its practices, the Privy Council, too, decided in 1966 to allow no more than one dissent, a practice that has been termed perhaps the worst of all worlds.

This paradigmatic tension is in full display on the U.K.’s new Supreme Court. The Law Lords, who traditionally delivered opinions seriatim, were replaced in 2009 by an independent Supreme Court. The Supreme Court has generally maintained the seriatim tradition, but there are signs that it has been moving toward greater collaboration among the Justices. For example, a very high percentage of its decisions, and perhaps as many as eighty percent, are unanimous.

Three things are apparent from this brief survey of opinion writing practices. First, there are a number of values in play: transparency, clarity, independence, consensus, and perceived legitimacy. Second, those values often conflict, leading to a mixture of models that attempt to juggle them as best as possible as circumstances require. Finally, opinion writing practices are driven as much by external forces, or at least the perception of them — the way the public and litigants will view the lawmaking process and its resultant product — as by any norms internal to the hierarchical system.

---

25 Ginsburg, Wash U L Rev.
26 Alder. On all this see RBG, McWhinney, Alder.
27 Raffaelli (Directorate-General) at 29. For instance, Brenda Hale, Baroness Hale of Richmond, formerly one of the Law Lords and now (at the time of this writing) a member of the Supreme Court, reported in 2010 that “I was not alone in finding when I first arrived [at the Supreme Court] that colleagues did not really expect one to comment on the draft in depth and in detail in the way in which, for example, Law Commissioners were expected to comment on draft consultation papers and reports. But we are certainly doing more of that now.
28 In early 2010, Chris Hanretty recorded that “out of fifty seven judgements reported . . . ten involved a dissenting opinion” (meaning the remainder were decided unanimously. http://ukscblog.com/dissenting-opinions-in-the-uksc/. Nonetheless, the right to dissent remains a treasured (and staunchly defended) aspect of English jurisprudence. See, e.g., Lord Kerr of Tonaghmore, Dissenting Judgments — Self Indulgence or Self Sacrifice.
II. THE UNITED STATES SUPREME COURT AND THE EXTERNAL VALUE OF DISSENT

Which brings us to the United States, where the use of separate opinions reveals an entirely different value to separate opinions. Throughout history the Supreme Court of the United States cycled between the poles described above, for many of the same reasons. Ultimately, though, the Court adopted its own familiar hybrid regime, in part because transparency became essential to acknowledge and motivate legal change, particularly in constitutional cases. Separate opinions, as we will explain, are both the result of, and catalyst for, legal change. In this Section we focus primarily on dissenting opinions; below we take up the critical but neglected case of concurring opinions.

A. Ebb and Flow

1. The Early Years

A story is told, in which John Marshall brought unity to a seriatim court, and there matters rested until the mid-1900s, when consensus shattered. While reality is messier, the familiar story is largely correct: John Marshall did persuade his colleagues to abandon seriatim opinion writing, and that held up tolerably well until the early 1900s. In doing so, he followed the lead of the Virginia Court of Appeals, where Chief Judge Edmund Pendleton imported Mansfield’s practice of “making up opinions in secret and delivering them as the Oracles of the court.” For the sake of a unified front, Marshall would suppress his own disagreement even from opinions he wrote. From 1801 to 1806, the Court handed down sixty-seven decisions, five of which were seriatim (and all but two of the others were written by Marshall). Marshall expressed his preference for speaking with one voice in an article he published anonymously in a Philadelphia newspaper in 1819, a response to criticism of Marshall’s opinion in McCulloch v. Maryland:

The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the

President Jefferson’s 1804 appointee to the Court, William Johnson, tried to change things, but only with limited success. As noted, Jefferson deplored the practice of delivering one opinion of the Court, calling it “an opinion is huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous . . . by a crafty chief judge, who so- phisticates the law to his own mind, by the turn of his own reasoning.” Writing to Jefferson in 1822, Johnson recounted his struggles beginning with his 1805 concurrence in *Huidekoper’s Lessee v. Douglass*:

Some case soon occurred in which I differed from my brethren, and I thought it a thing of course to deliver my opinion. But, during the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other, and the loss of reputation which the Virginia appellate court had sustained by pursuing such a course. At length I found that I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all.

Until 1823, no Justice other than Johnson had written more than eight separate opinions, concurring or dissenting. Between 1805 and 1822 there were only twenty-four concurrences total, twelve of which were written by Johnson.

Under Marshall’s successors, separate opinions were only somewhat more common. From the time of Marshall until the Court of Charles Evans Hughes (beginning in 1930), the ratio of separate opinions to majority opinions was approximately ten percent. This ratio ranged from a high of 18% on the Taney Court to a low of 7% in the Courts

30 CITATION. He was responding to criticism published by his arch-enemy, the then Chief Judge [title?] of the VA Court of Appeals, Spencer Roane. See TWOTP at xx.

31 Morgan, 3 Wm & Mary at 358. Jefferson’s complaints were echoed most enthusiastically by Virginia’s Judge Roane, who wrote under pseudonym to attack the Court’s Republican judges, including Johnson, for their apparent complicity with the Federalist agenda. Morgan, 3 Wm & Mary at 358.

32 Here, Johnson was referring to how Pendleton’s successor, and Marshall’s arch-enemy, Judge Spencer Roane, had reversed Pendleton’s practice of one opinion for the court. Morgan, 3 Wm & Mary at 354-55.

33 Morgan, 363 and n. 85.

34 Morgan, 365 & n.44.

35 That is, the number of separate opinions divided by the total number of opinions for the court, excluding per curiam opinions and dissents and concurrences without an opinion. Kelsh, 77 Wash. U. L. Quarterly at 177-78.
of Marshall and Edward D. White, but the writing of separate opinions remained relatively low throughout. Similarly, the total “nonunanimity rate” remained relatively constant, rarely rising above 20%, from the beginning of the Marshall Court to the early-1930s.36

Despite this modest increase in the rate of separate opinion writing after Marshall’s death, the practice remained both rare and limited by contemporary standards. Separate opinions had little impact in part because, until the early 1900s, they were just that: a justice writing on his own.37 Ideological blocs, which today manifest themselves in a principal majority opinion accompanied by a principal dissent, were relatively nonexistent. And even the 18% high-water mark of the Taney Court falls well below the modern rate of separate opinions, which has averaged around 50% in recent years.38

2. The Breach

Then, the collapse.

At some point in the first half of the twentieth century, the opinion writing practices of the justices of the Supreme Court shifted dramatically. This change can best be seen visually in a figure from the article that effectively “broke” the story, Walker, Epstein and Dixon’s On the Mysterious Demise of Consensual Norms in the United States Supreme Court. While this change in opinion-writing practice had received glancing attention, no one had attempted to systematically pick apart what accounted for the breakdown in consensus.

In Figure 1, which takes the Walker et al time series and extends it to the present, one can readily see why Walker, et al. identified 1941 as the date for the rupture. Before 1941 there were an average of 8.5 dissenting opinions for each one hundred majority opinions; after that date the number jumped to seventy-three. Although it is less sharp, concurrences show a similar jump.

---

36 Kelsh, 175-76.
37 Cite?
38 See infra.
3. Return to the Seriatim Court?

The phenomenon that took off in 1941 only gathered speed in the ensuing years. In sharp contrast to the Supreme Court in the early 1900s, the justices were unanimous during October Term 2012 only 49% of the time; for 2011, the number was 44%. In addition, change point analysis suggests concurrences shot up in the 1960s and continue to hover around 40%. 39

This change in opinion writing practices, escalating through the late twentieth century and beyond, has led some to suggest the Supreme Court has returned to its seriatim opinion writing habits of old. 40 In 1957, Bernard Schwartz remarked of the growing trend that “if carried to its extreme, the right to concur or dissent leads back . . . to the prac-

---

39 ADM support? Tech appendix?
40 Some of the Court’s leading figures have been explicit about the turn toward separate opinions. Justice Scalia, in 1994 explained, “To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one’s colleagues . . . is indeed an unparalleled pleasure.” Scalia, 33-44. He should know; he has been one of the justices most willing to strike out on his own. See The Statistics (Nov, 2012); The Statistics (Nov, 2011); The Statistics (Nov. 2010). Of course, Justice Scalia has led the conservative wing of the Court for some time, a fact that partially explains his tendency to write separately. But Sandra Day O’Connor, long the median justice, echoed the sentiment in 2003, engaging in vast understatement: “While unanimity is most certainly a goal of the present-day Court, it does not overwhelm our other goals.” Maveety, Choral Court.
tice of seriatim opinions.” In a piece on opinion writing published in 1990, Justice Ginsburg asked:

Has our Supreme Court drifted from its once customary middle way — an opinion of the court sometimes accompanied by a separate opinion — toward the Law Lords’ patter of seriatim opinions, each carrying equal weight?” Perhaps most important, our current Chief Justice, who has made it his mission to do better, has asked the same: “Nowadays you take a look at some of our opinions and you wonder if we’re reverting back to the English model, where everybody has to have their say.”

Recent years have seen no change in this trend. In the 2012 Term, 54% of total opinions written were either dissents (52) or separate con- currences (40). This is virtually unchanged from 57% in the 2000 Term, or 54% a decade earlier in the 1990 term.

B. Puzzle: Breakdown of the Norm of Consensus

Why, though, did the Court become so fractured? We suggest here that prior scholarly attempts to answer this question are only partly cor- rect. The Court fractured in the early twentieth century because it no longer could maintain the illusion of agreement in the face of rapid social changes, which put pressure on long-standing constitutional doctrine. Separate opinions were both the result of this pressure, and at the same time drove constitutional change.

1. Theoretical Hypotheses: Focus on the Chief Justice

Walker et al. did more than establish that the norm of consensus had been broken; they made a systematic effort to explain why it occurred. They identified one factor in particular that was most likely re-
sponsible for the breakdown in the norm of consensus: the leadership of the Chief Justice. William Howard Taft, the former President, who was Chief Justice from 1921-30, legendarially deplored disagreement among the justices. He chaired the American Bar Association Committee that drafted the 1924 Canon of Judicial Ethics, which stated:

> It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote the solidarity of conclusion and the consequent influence of judicial decisions . . . . Except in case of conscientious difference of opinion on fundamental principle, dissents should be discouraged.\(^45\)

While Taft was Chief, his Court hewed to the rule of suppression. During the 1921 to 1928 Terms, the Taft Court was unanimous a whopping 84% of the time, a figure that would be unheard of today.

Walker et al. conclude that the breakdown of consensus occurred two Chief Justices later, under Harlan Fiske Stone, who became Chief in the critical year of 1941. Walker et al. noted that, unlike his predecessors, Stone actually welcomed dissent because “sound legal principles . . . never sprang full-fledged from the brains of any man or group of men.”\(^46\) Stone thus concluded it is not “the appropriate function of a Chief Justice to attempt to dissuade members of the Court from dissenting.”\(^47\) Walker et al. tell us: “Stone’s leadership appears to be a prime cause of the Court changing from an institution emphasizing

Letter from William Howard Taft to Senator A. Owsley Stanley. The Act was strongly motivated by the perceived need to insure “vertical supremacy”: the elevation of the Supreme Court over state and local governments. However, Friedman and Delaney point out that “horizontal supremacy” was an equally important corollary to the act, which not only elevated the federal court over state and local courts, but also elevated the Supreme Court over other federal courts and other branches of the federal government, by expanding its discretion and fundamentally changing its role in the creation of the law. Friedman and Delaney at 1165-1166. But the apparent demise occurred some fifteen years after the adoption of the Judges’ Bill, so that seemed an unlikely culprit.

Walker, et al. also considered and rejected the explanation that changes in the Court’s caseload, as well as factors about the justices themselves such their relative inexperience and the Court’s ideological mix, caused the increase. It was certainly the case that in the period after 1941, many of the justices were new. Following the failure of Franklin Roosevelt’s Court-packing plan in 1937, most of the conservative justices resigned, allowing FDR to appoint eight new justices to the Court between 1937 and 1943. Yet, for a variety of reasons, Walker, et al. rejected these factors as explanatory.

---

\(^{45}\) [Cite]

46 Chief Justice Harlan F. Stone, Memorandum for the Court, Jan. 13, 1944.

47 Id.
consensus to one characterized by a high level of individual expression.\textsuperscript{48}

2. The Norm of Acquiescence

Two excellent articles published in 2001 proved that what had looked like consensus in the period up until 1941 was actually something quite different: justices suppressing their disagreement to present a public face of consensus. The change was not from agreement to disagreement, for the justices had long disagreed. But for many of the same reasons we have seen around the globe, the justices kept this disagreement from public view for the sake of external legitimacy.

Relying (respectively) on the docket books of the Waite and Taft Courts, Epstein et al. and Robert Post showed that disagreement was frequent on those courts, but the justices worked to hide it behind the public face of their opinions. During the Waite Court (1874-88), Epstein et al. proved that although less than ten percent of the decisions published in this period contained a dissent, the number at conference was closer to forty percent. Similarly, during the 1924 Term, the justices were unanimous seventy-four percent of the time, a level “unimaginable today.”\textsuperscript{49} But this apparent agreement came at a cost: of over one thousand cases decided by published opinion between the 1922 and 1928 Terms, some thirty percent required a vote change by a justice who originally disagreed in conference.\textsuperscript{50}

Of course, changed votes are also consistent with persuasive opinion authors \textit{convincing} their colleagues of their view’s merit, but correspondence of the justices makes clear they were simply suppressed their existing disagreement from the pages of the United States Reports. Oliver Wendell Holmes was characteristically colorful on the subject, calling these cases “shut-ups,” verbiage Louis Brandeis himself adopted. Brandeis wrote then–law professor Felix Frankfurter that “There are reasons for withholding dissent, so that silence does not mean actual concurrence. (1) All depends on how frequent one’s dissents have been when the question of dissenting comes, or (2) how important the case . . . I sometimes endorse an opinion with which I do not agree, ‘I acquiesce,’ as Holmes puts [it] ‘I’ll shut up.’”\textsuperscript{51}

\textsuperscript{48} \textit{Id.} at 384
\textsuperscript{49} \textsuperscript{[Cite]}
\textsuperscript{50} \textsuperscript{[Cite]}
\textsuperscript{51} Similarly, Hughes told then–Associate Justice (and relatively frequent dissenter), Stone: “I choke a little at swallowing your analysis, still I do not think it would serve any useful purpose to expose my views.” See also Walker et al. (quoting Chief Justice Taft saying, “I don’t approve of dissents generally, for I think in many cases where I differ from the majority, it is more important to stand by the Court and give its judg-
The justices did this, as Post’s article indicates, both to preserve internal collegiality and to maintain a unified face for public consumption — either for the clarity of the law or the credibility of the Court. Thus, Judge Learned Hand described “an image of unity expected to produce “the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”\textsuperscript{52} Or, as Justice Butler wrote Justice Stone, “I shall in silence acquiesce. Dissents seldom aid us in the right development or statement of the law. They often do harm. For myself I say: ‘Lead us not unto Temptation.’”\textsuperscript{53}

3. \textit{The Wrong Chief Justice}

Subsequent scholarship, though, suggests that Walker et al. blamed Stone unfairly for the collapse of the norm of consensus, or acquiescence. The norm of acquiescence actually began collapsing before Stone took the center chair, on the watch of his predecessor, Charles Evans Hughes.

In placing Hughes in Taft’s camp on the unanimity question, Walker et al. worked a little too hard to step past his views to the contrary. Although they are right that Hughes ran a tight Conference, and that he personally dissented seldom, he was nonetheless much more tolerant of dissent. He uttered one of the more famous statements of its virtue, in a 1928 book, published before he became the Chief Justice “A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court may have been betrayed.” As Chief, Hughes felt that “[w]hen unanimity can be obtained \textit{without sacrifice of conviction}, it strongly commends the decision to public confidence.” But when conviction was at stake, then “merely formal” unanimity “is not desirable . . . whatever may be the effect upon public opinion at the time.” “This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges.”

Empirical evidence suggests that a gradual deterioration in the norm of acquiescence began during Hughes’s tenure as Chief Justice. Both Caldeira and Zorn’s structural break-points analysis and Hendershot’s justice-level (rather than case-level) analysis,\textsuperscript{54} indicate

\textsuperscript{52} [Cite]

\textsuperscript{53} [Cite]

\textsuperscript{54} Hendershot et al, look at the total number of concurring and dissenting votes in cases rather than the percentage of cases that contain at least one concurrence or dissent.
that, as Hendershot et al say, “substantial increases in concurring and dissenting votes take place prior to the Stone Court” and that generally there is a “more incremental rate of change across the Hughes, Stone and Vinson Courts.”

C. Explaining the Breach

Although empirics suggest when the norm of consensus broke down, they have not explained why, in part because that scholarship suffers from a certain ahistoricism. The period in question was one of the most volatile for the Supreme Court in all of American history. The norm of acquiescence shattered when powerful social forces led to fundamental disagreement about the course of constitutional doctrine, and constitutional cases were the one area where at least some justices believed it necessary for disagreement to be on display. That was because constitutional law serves as a mediator of public views regarding the construction of society, and so the various views on that subject required airing.

The late 1800s through the mid-1900s played host to a political and class war in the United States. The Populist and Progressive movements supported, and won passage of, a number of dramatic social and economic legislation, including the income tax, minimum wage laws, maximum hour laws, and widespread regulation of vital national industries.

Conservatives, believing such laws reflected economic theories that were socialist if not communist, viewed them with alarm. The fact that the laws in question were adopted by majority rule did little to placate them. They sought recourse in the Constitution. As then-Senator and soon-to-be Supreme Court Justice George Sutherland said, “The written constitution is the shelter and the bulwark of what might otherwise be a helpless minority.”

Tasked with interpreting the “written constitution,” the Supreme Court became the eventual focus for this conflict. The Court struck down many of these laws conservatives deplored, such as the now-

---

55 Accord Caldeira and Zorn “point to the distinct possibility of an earlier, more gradual change in norms.”

56 The nearest recognition one finds in empirical literature regarding the tumult that is going on in the country is this observation by Caldeira and Zorn about their conclusion that the change in norms may have occurred prior to 1941: “Indeed, some anecdotal evidence, such as Taft’s frustration with Brandeis, Holms, and Stone in the late 1920s, and the conflict over the first New Deal in the middle of the Hughes Court, supports the idea of an earlier shift in norms.”

57 TWOTP 172

58 47 CONG. REC. 2793.
famous 1906 decision in *Lochner v. New York*. Decisions during the *Lochner* era made the Court a major issue in the 1912 and 1924 elections; indeed, Theodore Roosevelt ran against the Court and the Republican Taft as a Bull Moose in 1912, guaranteeing Democrat Woodrow Wilson’s victory. The fight over Franklin Roosevelt’s Court-packing plan following the 1936 election was arguably the defining moment for the Court in American history. Major treatises — sometimes diatribes — about the justices were written, including Charles Grove Haines’s *The American Doctrine of Judicial Supremacy* and Charles Warren’s magisterial three-volume work, *The Supreme Court in United States History*.

These controversies significantly affected the justices’ opinion-writing practices. Two of history’s “great dissenters” — John Marshall Harlan and Oliver Wendell Holmes — emerged during this time. Harlan dissented in 1895 from the Court’s decision striking down the income tax. Both wrote in dissent in *Lochner*. Holmes and Brandeis, later joined by Stone, dissented in many notable cases.

Both sides of this judicial controversy saw that an important war was on. Taft wrote just a month before a massive stroke: “Of course we have a dissenting minority of three in the Court. I think we can hold our six to steady the Court. Brandeis is of course hopeless, as Holmes is, and as Stone is.” (He also told his brother that despite his illness “I must stay on the Court in order to prevent the Bolsheviki from getting control.”)59 The other side saw it similarly. Hoover urged Stone to step down from the Court and take a Cabinet position. Stone declined, writing to a former clerk, “You know the battle of ideas that is going on in the Court and consequently how difficult it would be for me to abandon the fight for anything else.” The left had its voting bloc of three, but the right eventually had its own bloc — the famous Four Horsemen of the early New Deal Court.

Moreover, it wasn’t just any cases that engendered dissent, it was constitutional cases. Brandeis, in private correspondence with then-Professor Felix Frankfurter, explained that although “there is a good deal to be said for not having dissents,” in some cases — important ones — they were warranted. Brandeis first classed as “important” “whether its constitutionality or construction,” and then later elaborated: in most cases “[y]ou want certainty and definiteness & it doesn’t matter terribly how you decide so long as it’s settled.” In “constitutional

59 Post, supra note, at 1325. See also id. at 1326 (“Of course we have a dissenting minority of three in the Court. I think we can hold our six to steady the Court. Brandeis is of course hopeless, as Holmes I, and as Stone is.”)
cases,” however, “since what is done is what you call statesmanship, nothing is ever settled — unless statesmanship is settled & at an end.” This “nothing is ever settled,” point was one of pique among the conservatives, as Taft wrote privately to Henry Stimson:

The three dissenters act on the principle that a decision of the whole Court by a majority is not a decision at all, and therefore they are not bound by the authority of the decision, which if followed out would leave the dissenters to be the only constitutional law breakers in the country.60

We can see this point graphically in Figure 2, in which we have plotted separately the concurrence and dissent rate for constitutional cases, using data from the Supreme Court database. Although we have not plotted this together with non-constitutional cases, if one simply eyeballs this Figure compared to Figure 1, the time series above, it is apparent that dissent and concurrence rates shoot up in constitutional cases.

![Figure 2](image_url)

Figure 2 is particularly striking when considered in historical context. The Supreme Court’s docket over these decades helps explain why constitutional cases drove rates of dissents and concurrences. Although

---

60 [Cite]
the 1941 Court was dominated by Franklin Roosevelt’s appointees, who largely agreed on the scope of economic liberty, the Court increasingly fractured in cases presenting fresh constitutional questions: those alleging violations of civil liberties. Thus, the dissent rate rose in the early 1940s. But the rate of dissent dropped in the late 1940s, which saw three Truman appointees replace three active civil libertarians, Stone, Murphy and Rutledge. Truman’s appointees were widely seen as ineffectual political cronies, and the late 1940s was dubbed by commentators “The Passive Period.” That passive period came to a notable end with Brown v. Board of Education, in 1954, and a slew of cases on communism, in 1957. By 1962, the year that Frankfurter was replaced by liberal Justice Goldberg, giving Warren’s faction a clear majority, the Warren Court was in full bloom. Hence the next upward spike. And things were never quite the same thereafter.

Finally, this tension between maintaining public legitimacy and expressing fundamental disagreement is at least suggested when one lines up the plot of dissenting (and concurring) opinions against some of the more significant events in this period. The controversial opinions of 1895 show a spike in dissent, and so too throughout some of the key years of the Lochner era. There is some quiet around the controversial election of 1912 and just after during World War I. Then, trouble breaks out again — the Court’s first decision striking the Child Labor Law in 1918, its second in 1922 and then in 1923 striking down the federal minimum wage law. Then, again, some quiet after the 1924 election until the difficulties begin anew over the New Deal. In other words, a rising tide of separate opinions — mostly dissents — with troughs of quiet when the justices are under public scrutiny.

As Robert Post points out, it is hardly surprising that the dissents drop off during periods in which the Court is the center of controversy, particularly because important “reform” suggestions would have changed fundamentally how the Court did business. For example, one notable proposal in 1923 would have required supermajority votes to strike down laws, something that actually was adopted in some states.

---

61 As Arthur Schlesinger described it, “[t]he Justices [were] not divided on political issues but on the understanding of their function.” Schlesinger, Fortune, at xx. By this he meant that some who had fought the Old Court believed judicial activism was inappropriate no matter what the issue. But for others, the role of the judge varied depending on the sort of issue. It was Chief Justice Stone who set out the theory for this “double standard,” in his famous Carolene Products footnote four. See 304 U.S. at 152 n.4.

62 One of the most prominent of these proposals was submitted in February of 1923, when Senator William E. Borah of Idaho proposed a requirement that seven of
Thus, if the justices cared at all for the autonomy of their institution, it would make sense that they would work especially hard to reach agreement when the institution itself was threatened.

D. The Value of Dissensus

History lets us see the extent to which constitutional adjudication drove dissensus, and focusing on constitutional adjudication lets us understand why dissensus may have occurred. Dissent in big-ticket constitutional cases serves two important functions. It plays an extremely important signaling function to the world outside the Court. And it also helps, ironically, to smooth the process of constitutional change.

Start with signaling. It is precisely because nothing was ever “settled” in constitutional cases — or at least in the minds of the dissenters — that the dissents were particularly important, not internally (for the justices already knew how one another felt), but as signals to the outside world. Consider in that regard this 1898 editorial from the Albany Law Journal, complaining petulantly about just this point:

A dissenting opinion is to some extent an appeal by the minority from the decision of the majority — to the people. What can the people do? They can’t alter it; they can’t change it; right or wrong, they must respect and obey it. Why shake the faith of the people in the wisdom and infallibility of the judiciary? Upon the respect of the people for the courts depends the very life of the Republic.

As Robert Post explains, however, and as the events of 1937 made quite clear, “Such a crude distinction between courts and the people, between law and politics, is very difficult to sustain in a democracy.” Because of its constitutional rulings, and fueled by the separate opinions that brought it into relief, the Court was beset by public pressure throughout the first part of the twentieth century. This pressure was critical to bringing about the familiar constitutional change described above.

In an important article contrasting the separate opinion writing practices of the United States Supreme Court and the constitutional
courts of Europe, John Ferejohn and Pasquale Pasquino, describe this process of signaling, public pressure, and legal change as “external deliberation.” Internal deliberation occurs to influence those within the court; external to influence outsiders. Ferejohn and Pasquino show that, in European constitutional courts, there is relatively little engagement with outsiders — for example, such courts have even less oral argument — but extensive internal deliberation to come to a common consensus. In the United States Supreme Court, by contrast, the focus is external: there is relatively little attempt to achieve consensus on the Court, but much posturing for an external audience.

There are tradeoffs between internal and external deliberation, and “something is lost in every tradeoff.” Ferejohn and Pasquino believe — as do Chief Justice Roberts and the many courts around the globe that suppress separate opinions — that playing to an outside audience politicizes the Court, leads to a cult of individual justices, and muddies the law. As they put it, “the exposure of internal divisions in the Court may encourage political actors to respond politically by trying to reshape or pack the Court rather than persuade its members.”

But is external deliberation so harmful? Even as they critique the phenomenon, Ferejohn and Pasquino also catalog the virtues of external deliberation, and these values highlight the rise of separate opinion-writing in the United States Supreme Court. “The open display of competing viewpoints invites the attentive and affected public to discuss, argue, petition for new laws, and otherwise work to shape the controverted policies.” They think such deliberation is appropriate for “complex and emotional issues such as abortion, euthanasia, and affirmative action.” And they may be right: on many issues of constitutional law, focusing on internal rather than external deliberation may be an exercise in trying to persuade the unpersuadable, when the issue really needs to be worked out in the broader body politic.

A deep body of scholarship discusses the role of social movements in changing constitutional meaning in this country, and describes the dialogue that occurs between these social movements and the Supreme Court. Discussing the twentieth century history of abortion rights in the United States, Ferejohn and Pasquino say “[I]n the sequence of cases from Roe to Casey, the multiple opinions offered by the various Justices are best understood as attempts to persuade the state legislature, interest groups, members of Congress, and the people themselves about what kind of abortion policies ought to be permitted under the Constitution.” It is precisely the social foment that Ferejohn and Pasquino

63 [Cite]
deplore that moved the law from *Roe* to *Casey* to where it is today. Indeed, on Ferejohn and Pasquino’s own account, it is the very act of dissent that whips up the protests.

Dissent serves a second function, one that — contrary to the assumptions underlying the suppression of separate opinions — can enhance the Court’s legitimacy and smooth the process of constitutional change. The argument here is counterfactual, and thus difficult to prove. But imagine the New Deal Court overruling *Carter Coal* one year after publishing it, in *Jones & Laughlin Steel*, without any dissent in *Carter Coal*. Imagine the same when the Court overruled its decision in *Gobitis* requiring students to salute the flag in *Barnette* in three years. Imagine *Roe* being overruled with no dissent expressed.

All of these sudden turns would be difficult to explain to the public without a pattern of dissent. It is the struggle that is visible on the Court that seems to justify the justices changing direction. One imagines it would be difficult to do the same if the Court turned on a dime with no warning. We lack the understanding of sudden and vital change in foreign courts, but would be interested to know how this is handled. Perhaps constitutional change does not occur often precisely because of the turmoil it causes when it occurs unexpectedly.

---

64 And, consider this ironic point. In cases like *Webster* and *Casey*, Justice Scalia (dissenting) rues the “carts full of mail from the public, and streets full of demonstrators” that he believes the decision in *Roe* caused. *Webster v. Reproductive Health Servs.*, 535. On the Ferejohn and Pasquino account, it may well have been the dissents — not the majority — that whipped up the public.

65 *See infra.*
III. THE PECULIAR STATUS OF CONCURRENCES

As we saw at the outset of Part One, choosing between seriatim opinion writing and the suppression of separate opinions involves a tradeoff. Heretofore, the discussion has focused more on dissents than concurrences, because it was around dissenting opinions that the debate over the norm of consensus occurred. But our ultimate task is to understand concurrences, and in particular pivotal and plurality concurrences. Concurrences are almost universally disliked, and with good reason. They destroy clarity in the law and seem incongruous with the dominant “precedential” model of the legal system. For these reasons, the Supreme Court has tried to dissuade — even prohibited — lower courts from making much of concurring opinions, except in the rare case of a plurality opinion. In the next Part, we show this has not worked. Now it is important to know why the Court tried.

A. Contempt for Concurring Opinions

Everyone understands dissents. Imagine a Supreme Court case in which the initial vote at conference is not close — say, 8-1. A dissenting opinion will not change the doctrine, but it might attract considerable attention. Think here of Justice John Marshall Harlan’s solo opinion in *Plessy v. Ferguson*. An 8-1 dissent effectively emphasizes how roundly rejected the dissenting Justice’s views were, more so than would even a unanimous 9-0 decision. And in important cases like *Plessy*, the dissent can frame a contest for the future. Is anyone likely to notice a concurrence similarly?

Compared with dissents, concurrences can look like judicial sour grapes. “If the opinion had been assigned to me,” the opinion can appear to read, “I’d have written it differently.” As a result concurrences — especially in near-unanimous cases — combine the precedential value of law review articles with the collegiality of op-ed columns, which is to say: minimal on both counts.

Since the late 1960s, the concurrence rate of the United States Supreme Court has shot up, much like dissents did in the 1940s. Empiricists attribute this to poor leadership of Chief Justice Warren Burger, but as with the erroneous fingering of Chief Justice Stone in the case of dissents, there is again reason to be skeptical. For one thing, while Burger is acknowledged to have been a weak leader of the Court, no one thinks the same of his successor, William Rehnquist, though the spectacle of a fractured Court continued in full force during his tenure. For another, the evidence suggests that the flood of concurrences be-

66 163 U.S. 537 (1896).
gan earlier, during Earl Warren’s tenure. Most likely, the same factors that drove increased dissent have influenced rates of concurrences as well.\textsuperscript{67} Beginning in the late 1950s and early 1960s, the Court found itself (or thrust itself) in the middle of a host of thorny issues, from abortion rights to voting rights to the rights of criminal suspects. These issues divided the nation and, not surprisingly, the Court. And that led to more concurrences.

Still, concurrences are disliked, and the current Chief Justice would prefer to stamp them out. It is important, though, to sort out the reasons for this dislike. And figure if any of them has merit.

A common refrain is that fracturing the rationale in a case undermines the Court’s credibility. In an interview in \textit{The Atlantic} with Jeffrey Rosen, Chief Justice Roberts justified his search for greater harmony: “If the Court in Marshall’s era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have.”\textsuperscript{68} This obviously is one of the factors that leads courts in other countries to seek to suppress separate opinions. This is what drove Marshall to banish seriatim opinions, a decision that surely cemented the Supreme Court’s institutional legitimacy.

The difficulty with this view is that today’s Court is not Marshall’s Court; it is one of the most established and successful constitutional courts in the world. During the period to which Roberts alludes — the Chief Justiceships of Warren Burger and William Rehnquist — the supremacy of the Court was breathtaking. It drove social policy on a host of contentious issues, forced the resignation of a sitting President, and decided the 2000 presidential election. It is true the Court’s polling numbers have slipped in recent years. But one might be somewhat skeptical that the dip is because of the proliferation of separate opinions, or that the overall credibility of the Court is in any risk of being undermined in a way that would make the Court analogous to that in Marshall’s time.

Unlike dissenting opinions, concurrences are unlikely to do much to disturb the public credibility of the Supreme Court. Dissents may, especially in a controversial case, cast doubt on the legitimacy or stability of the Court’s ruling. That was the motivation for seeking unanimity in \textit{Brown v. Board of Education}. The justices frequently have found them-

\footnote{Indeed, Caldeira and Zorn maintain that there is a relationship between dissenting and concurring behavior, with a rise in the former predicting an increase in the latter.}

\footnote{[Cite]}
selves the subject of controversy when handing down decisions with strong dissents, particularly when the Court is divided 5-4. But one properly is skeptical that the public even is aware that the justices have divided on the basis of their rationale rather than the ruling itself.

The stronger argument against concurrences, and the more common one, is that they destroy legal clarity. If legal clarity is the issue, concurrences are actually worse than dissents. While dissents have a “more pronounced” impact on legal change should a dissent be adopted, it is clear that relatively few dissents turn into majority opinions. On the other hand, the more fractured the Court is as to the ratio decidendi, the more difficult it is to know what the law is. Commentators are virtually uniform in contempt for concurrences on this score.

B. Eschewing Prediction

To see why concurrences are so troubling, it is useful to contrast two internal models of lower-court decisionmaking: precedential and predictive. The governing model is that of precedent: following the rules set out by higher courts in past cases. In some cases, however, lower courts may be tempted to try to predict what higher courts will do in the future.

Consider that almost all common law courts have two defining structural characteristics: (1) hierarchical structure and (2) adherence to the principle of stare decisis. These two features of common-law jurisdictions (and American courts in particular) are interrelated and often contradictory. If a lower court seeks to avoid reversal, it may want to predict what the higher court will do at the expense of following existing

---

69 Lynch notes that “[t]he use of opinions expressed in concurring concurring judgments is undoubtedly the way in which much subtle and incremental change occurs in the law. We would expect the frequency with which dissent assists the development of legal principles to be less — however, the actual extent of change which a dissent may assist to bring about is likely to be much more pronounced.” Lynch, 751. Lynch also quotes Canadian Supreme Court Justice Claire L’Heureux-Dube stating “even the most ardent defender of dissenting opinions will be compelled to admit that in most cases, it is the majority opinion which blazes the law’s trail.” Lynch, 753.

70 “Concurring speeches where the same outcome is reached by different routes raise some of the same issues as dissents and indeed may create more serious technical problems in relation to legal certainty.” Alder 240; Ferejohn and Pasquino (“Critics of the practice of the USSC in opinion-writing since 1937 point to a diminution in the value of judicial precedent as a guide to future decisions, and a consequent increase in the problems of the business man and of they lawyer who must advise him.”) Berkelow at 304-05 (“[t]he first and most obvious consequence of pluralities is that they create uncertainty, unpredictability, and unclear guidance to administrators and those attempting to comply.” Accord 352-53; see also Liptak (accusing the Court of “faux unanimity”: delivering prolific concurring opinions that provide majority votes, but no clear guidance).
precedent; if a lower court follows the strict precedential rule, it may get reversed. The lower court is thus put into a bind, because the interests of hierarchy and precedent may occasionally conflict. That tension is exacerbated where, as in the United States, the court of last resort is permitted to overrule itself.

The precedential model mandates that cases be decided on the \textit{then-existing} rule of law as it is embodied in controlling and persuasive sources of authority. The role of the lower court judge is to discern what that rule is by reading the extant sources of law — no prediction is allowed. In a common law system a main source of law is the decisions of higher courts. To a judge engaging in precedential decisionmaking, if a proposition does not have five Supreme Court votes in a case supporting it, it is not the law. If it does have five votes, then dissenting opinions and concurrences are junk DNA. From the standpoint of a judge applying the precedential model, concurrences accompanying a five-vote majority opinion cannot affect the rule of a case, and they can therefore be safely ignored.

By contrast, the predictive model looks to any and all sources of information to answer the following question: If this case were put to the Supreme Court tomorrow, how would they decide it? At one extreme (and it is indeed an extreme), a lower court judge could look at extrajudicial statements by higher court judges for hints of what the law would be today. But even if one confined oneself to formal judicial statements, lower court judges could still read the tea leaves — for example, by reading concurrences or dissents written since a key precedent was decided — to discern how a higher would likely dispose of a case.

1. \textit{The Classic Example: Barnette}

The classic example of the tension between the precedential model and the predictive model is the short span between the Supreme Court’s twin decisions in \textit{Minersville School District v. Gobitis} \footnote{310 U.S. 586 (1940).} and \textit{West Virginia State Board of Education v. Barnette} \footnote{319 U.S. 624 (1943).}. In \textit{Gobitis}, the earlier of the two cases, the Supreme Court ruled 8-1 that children of Jehovah’s Witnesses did not have a First Amendment right to abstain from reciting
the Pledge of Allegiance and saluting the flag. But shortly after it was decided, *Gobitis* was undermined. In *Jones v. City of Opelika*, a three members of the *Gobitis* majority dissented and stated unequivocally that they believed *Gobitis* had been wrongly decided. In many ways, especially if one simply counts votes, this triple about-face is even more startling than Justice Owen Roberts’s “switch in time that saved nine.” Additionally, two other members of the *Gobitis* majority had stepped down from the Court and were replaced with members whose views, while unknown, might have been expected to favor overruling *Gobitis*. This expectation was strengthened by the intense media criticism *Gobitis* had engendered.

Because of these changes in the composition of the Court, as well as the changes of heart regarding the legal merits of the Jehovah’s Witnesses’ constitutional challenge, many commentators predicted that *Gobitis* would be overruled soon after it was decided. Sure enough, as predicted, the Supreme Court overruled *Gobitis* just three years later, by a 6-3 vote in *Barnette*.

But what makes *Barnette* so interesting for purposes of this Article is what the *lower* court did. The three-judge district court that heard *Barnette* in the first instance not only predicted that the Supreme Court would overrule *Gobitis*, it decided the case expressly on that basis. In other words, the lower court’s rationale for not adhering to *Gobitis* was that the Supreme Court would soon overrule that decision. This prediction therefore led the lower court not to adhere to the otherwise-binding precedent, *Gobitis*. The predictive model calls to mind what Justice Brennan sought to instill in his law clerks when he asked them what the most important number in the law was — he held up his open hand and told them to learn to count to five, because that many votes make the law.

Although it is rare to see the predictive model employed as brazenly as it was by the district court in *Barnette*, the phenomenon persisted after that case. That is at least partly because the *Barnette* Court did not pass judgment on what the lower court had done in the case, and so it left open the possibility that it was permissible for lower courts to preemptively overrule Supreme Court cases.

---

76 316 U.S. 584 (1942).
77 Id. at 623-24 (Black, Douglas, Murphy, JJ., dissenting) (“Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided.”).
78 See infra Part V.
79 Dorf, supra, at 661-62.
2. Scholarly Debate: Caminker and Dorf

Evan Caminker identifies\(^8\) three circumstances when we might prefer prediction to adherence to precedent: when predictions are likely to be accurate,\(^8\) when lower court judgment can help dissuade a higher court from a bad rule,\(^8\) and when the information giving rise to the prediction is particularly reliable.\(^8\) When a lower court can predict with confidence what the higher court will do, when the lower court’s independent judgment is likely to influence the higher court, and when predicting does not require relying on disfavored data, Caminker believes

---

\(^8\) Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994). According to Caminker, the choice whether to employ the predictive model turns on three factors: “a comparison of correspondence probabilities [i.e., predictive power] between the two models, the extent to which the court’s independent legal judgment would favorably influence the superior court’s ultimate decisionmaking, and the extent to which the court’s prediction would rely on disfavored data [e.g., changes in the ideological composition of the higher court].” *Id.* at 67.

\(^8\) This factor is relevant because one of the chief fears about the predictive model is that lower courts will anticipatorily overrule higher courts but do so *incorrectly*. Such an outcome creates both uncertainty in the law and more work for the higher court to overrule the lower court, particularly for courts with discretionary dockets, like the Supreme Court. However, Caminker argues, when prediction is very accurate and precedent is very unclear, prediction is superior. This observation is especially true of higher courts with discretionary dockets, like the Supreme Court. In that circumstance, the Court need not take any action to leave in place a correct lower-court decision. By contrast, even a summary reversal requires time to decide and write.

\(^8\) Caminker’s idea is that lower courts, freed from slavish adherence to precedent, could provide the higher court with reasons to change its mind. In this way, lower courts’ independent legal judgment can be combined, like the judgments of Condorcet’s jurors. *See generally* Marquis de Condorcet, *Essai sur l’Application de l’Analyse à la Probabilité des Décisions Rendues à la Pluralité des Voix*. But this is a non sequitur: there is no clear reason why lower courts must depart from precedent to provide higher courts with their independent legal judgment: we could just as easily implement a rule requiring lower courts to follow precedent and at the same time express their view of the merits notwithstanding that precedent.

\(^8\) Caminker argues that prediction should rely only on what was said in judicial opinions. This serves to minimize the one reason many people instinctively reject the predictive model, a concern that a Supreme Court Justice could give a speech at a local Kiwanis club, express doubt about an opinion she had previously signed onto, and thereby actually *effect* a change in the law. The third factor also dovetails with the first: disfavored data may be so considered because of its unreliability. According to Caminker, “non-adjudicatory pronouncements and general ideological commitments have fairly weak predictive value for specific cases.” *Id.* at 70. An offhand comment in an interview may not signal a complete change of heart, whereas a judge’s concurrence or dissent is very likely to reflect her all-things-considered view of the matter.
the predictive model is likely to promote the values of judicial economy, uniformity, and proficiency.84
dCaminker’s biggest critic on this issue is Michael Dorf. According to Dorf, there exist essentially no circumstances in which it is desirable for lower courts to decide cases by predicting what a superior court will do.85 Dorf reaches this conclusion based on a series of critiques of the predictive model. First, he notes that the predictive model is irreconcilable with a universally applicable model of legal reasoning, which is to say that the hierarchically superior court can never engage in predictive reasoning, so the lower court should not either.86 But more practically, Dorf objects to the use of the predictive model on the grounds that it undermines the rule of law. For Dorf, “An expressly prediction-based model would undermine the ideal of impersonal justice by merging law and politics.”87 Dorf believes the predictive model of legal reasoning is not a model of legal reasoning at all, but rather a model of the complicated interplay between substantive law and judicial politics. Dorf claims that to argue from political facts about the judges deciding the case to legal reasons for deciding the case one way or the other is to make a category error. This point is borne out by observation: not even

84 Judicial economy boils down to how many times courts as a whole have to consider a particular issue. Id. at 36-37. All else being equal, it would be better if judges only had to answer a given question two times rather than three, assuming they got it right both ways. Uniformity describes the degree of correspondence between the decisions of, for example, the various Circuit Courts of Appeal. Id. at 38-41. If one model or another creates fewer circuit splits, we might prefer that model solely on that basis. Proficiency describes the relative institutional advantage that higher courts enjoy when deciding pure issues of law. Id. at 41-43. Abstract questions of legal doctrine, as opposed to factfinding and evaluation of the credibility of testimony and evidence, are the province of appellate courts in general and the Supreme Court in particular. Thus, leaving the ultimate legal question to the Supreme Court will maintain the judicial division of labor and ensure that the most competent decisionmaker decides new questions first.

85 Dorf does endorse the use of predictive reasoning by (1) Circuit Justices in deciding whether to impose a stay on a case pending certiorari and (2) federal courts sitting in diversity. But in the former case, it is not lower courts that are engaging in prediction. And in the latter case, lower courts are prediction not what hierarchically superior court would do, but rather what parallel courts would do.

86 According to Dorf, the predictive model runs afoul of H.L.A. Hart’s concept of the law as a universal enterprise shared by all participants. See H.L.A. HART, THE CONCEPT OF LAW 102 (3d ed. 2012) (“Perhaps the simplest [example] is the expression, ‘It is the law that . . .’, which we may find on the lips not only of judges, but of ordinary men living under a legal system, when they identify a given rule of the system.”).

a novice lawyer arguing a case before the Supreme Court would make the mistake of appealing explicitly to a change in membership to overrule a prior case.

Consider Dorf’s view in light of what happened in 2006. Justice Sandra Day O’Connor, who tended to be in the majority in 5-4 decisions during her time on the court, was replaced by Justice Samuel Alito, who was thought to be more conservative than Justice O’Connor — particularly on the question of what restrictions could be placed on the availability of abortions. Justice O’Connor had joined the majority opinion in *Stenberg v. Carhart*, which upheld certain types of “partial-birth” abortions, but Justice Alito was thought not to endorse *Stenberg*. A predictive model might say that the law changed the day Justice Alito received his commission, because he could be expected to join with the four minority Justices from *Stenberg* to overrule it. But this outcome seems perverse, since it was a purely political act — the appointment of a Supreme Court Justice — that occasioned the change in the substance of the law. And the Supreme Court has thus far declined to overrule *Stenberg*.

Yet, despite this disagreement, there is also common ground. Even when these three factors all point in favor of prediction rather than adherence to precedent, Caminker argues that it is never appropriate to engage in anticipatory overruling, as the lower court in *Barnette* did. Anticipatory overruling is troublesome because it undermines national uniformity in the law. Thus, by insisting that the Supreme Court


89 *Stenberg* was later sharply limited, but not expressly overruled, by *Gonzales v. Carhart*, 550 U.S. 124 (2007), a 5-4 decision with Alito in the majority.

90 There is another critique of the predictive model: it undermines the hierarchy of federal courts. Under the precedential model, the prerogative to overrule superior court precedent belongs exclusively to that superior court. Under the predictive model, lower courts may overrule superior court precedents whenever they are sufficiently convinced the superior court will eventually do so itself. But particularly when superior courts are vested with discretionary dockets, the power *not* to reconsider its own precedents, even if their overruling is all but a *fait accompli*, is an important privilege. It can allow superior courts to benefit from observation and criticism of the old rule while it is still in practice. Indeed, the predictive model can ensnare superior courts in the dubious exercise of error correction not of substantive law but of mere prediction. That is, if lower courts predict superior court decisionmaking *incorrectly*, the superior court must rule on the same issue twice: the first time, and again to correct the poor prediction.

91 See Caminker on uncertainty and the possibility that predictions might be wrong.

92 *Id.* at 70-72.
retain the sole prerogative to overrule itself, the limitation on anticipatory overruling promotes uniformity.\footnote{Indeed, it promotes both (1) geographic uniformity, by enforcing the same rule in every circuit, and (2) temporal uniformity, by ensuring that when legal change does occur, it happens all at once as opposed to in drips and drops. \textit{Id.} at 71.}

To summarize, under the right circumstances, the predictive model can promote judicial economy, uniformity, and proficiency. However, it can also upset the rule of law and the hierarchical structure of a judicial system. In other words, there are reasons to believe that everything other than the majority opinion should be ignored or even suppressed.

3. The Supreme Court Chooses Precedent: \textit{Shearson}

This question is not merely academic. In a largely overlooked 1989 case, \textit{Shearson/American Express, Inc. v. McMahon}, the Supreme Court spoke explicitly to the precedent-versus-prediction question and instructed lower courts to adhere strictly to existing precedent. While it is perhaps unsurprising that the Supreme Court would seek to reinforce the weight of its own precedent, the consequence of the Court’s pronouncement was to limit the formal usefulness of concurrences.

The question presented in \textit{Shearson} was one the Supreme Court had already decided, in a case called \textit{Wilko v. Swan}. But \textit{Wilko} was already on the ropes. In a 1987 case, \textit{McMahon}, the Supreme Court strongly criticized the logic of its own holding in \textit{Wilko}, but did not overrule it. Clearly, the two cases sat in tension with one another.

What was a lower court to do? If bookmakers took bets on Supreme Court cases, the odds on \textit{Wilko} surviving another decade would have been long. \textit{McMahon} suggested that if the Supreme Court got a chance to overrule \textit{Wilko}, it would do so. But \textit{Wilko} was still the law of the land. So lower courts were presented with a difficult choice: follow \textit{Wilko} and get reversed or follow \textit{McMahon} and fail to apply relevant — and binding — precedent.

\footnote{Whether contractual agreements to arbitrate could apply to claims brought under Section 12(2) of the Securities Act of 1933.}

\footnote{346 U.S. 427 (1953).}

\footnote{\textit{Shearson/American Express Inc. v. McMahon}, 482 U.S. 220 (1987).}

\footnote{In \textit{McMahon}, the Supreme Court ruled that claims brought under a parallel provision of a securities statute — Section 10(b) of the Securities Exchange Act of 1934 — could be arbitrated. And the claims in \textit{McMahon} were difficult to distinguish on principle from the claims in \textit{Wilko}.}

\footnote{\textit{Id.} at 233 (“Even if \textit{Wilko’s} assumptions regarding arbitration were valid at the time \textit{Wilko} was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC’s oversight authority.”).}
In 1988, in Shearson, the Fifth Circuit was presented with just that decision.\textsuperscript{99} Several investors sued Shearson claiming securities fraud under Section 12(2), and Shearson moved to compel arbitration. The Fifth Circuit explained its dilemma: “The McMahon majority opinion does not expressly overrule Wilko; the precise issue . . . was not before the court. Nevertheless, the reasoning in McMahon completely undermined Wilko.”\textsuperscript{100}

Presented with this choice between following precedent and avoiding reversal — by predicting how the Supreme Court would rule in the next case — the Fifth Circuit claimed it was doing the former, while actually doing the latter. The Fifth Circuit attempted to reconcile its decision with the principle of stare decisis by asserting that it was adhering to a new, broad rule announced by McMahon.\textsuperscript{101} But its own opinion belied that characterization. In a parenthetical, it quoted one of its own prior cases for the proposition that “McMahon undercuts every aspect of Wilko v. Swan . . . ; a formal overruling of Wilko[] appears inevitable — or, perhaps, superfluous.”\textsuperscript{102}

On certiorari, the Supreme Court was not fooled. The Court recognized the Fifth Circuit’s opinion for what it was: an anticipatory overruling by a lower court of otherwise binding Supreme Court precedent. After doing just what the Fifth Circuit predicted and overruling Wilko, Justice Kennedy, writing for the Court, took aim at the lower court’s breach of the strict hierarchy of federal courts.

We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing Wilko. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.\textsuperscript{103}

\textsuperscript{99} Rodriguez de Quijas v. Shearson/Lehman Brothers, Inc., 845 F.2d 1296 (5th Cir. 1988).

\textsuperscript{100} Id. at 1298 n.4. The Fifth Circuit noted that the McMahon Court had explicitly rejected the possibility of overruling Wilko: “‘While stare decisis concerns may counsel against upsetting Wilko’s contrary conclusion under the Security Act, we refuse to extend Wilko’s reasoning to the Exchange Act.’”

\textsuperscript{101} Id. at 1299 (“‘The Supreme Court opinion in McMahon, which binds us here, turns solely on the adequacy of arbitration to resolve securities disputes. It does not distinguish between the Exchange Act and the Securities Act.’”)

\textsuperscript{102} Id. at 1298 (quoting Noble v. Drexel Burnham Lambert, Inc., 823 F.2d 849, 850 n.3. (5th Cir. 1987)).

\textsuperscript{103} Rodriguez de Quijas v. Shearson/Am. Express, 490 U.S. 477 (1989).
This rebuke constitutes the Supreme Court’s considered judgment on whether lower courts should prioritize precedent over prediction, or vice versa. The Supreme Court came down squarely on the side of the precedential model. Nevertheless, it is worth noting that the Fifth Circuit’s correct prediction compelled the Supreme Court’s disposition of the case: “Affirmed.”

C. Concurrences and Prediction

While the Supreme Court says it opts for a precedential model, its actions may speak louder than its words. Concurrences in closely divided cases underscore the tension between the predictive and precedential models of judicial decisionmaking. By revealing information that can be useful under the predictive model but not under the precedential model, concurrences (and, in different ways, dissents) can provide lower-court judges with temptation to predict rather than to apply precedent only in a backward-looking fashion. Thus, one would expect that the same Court that decided Shearson would control its own production of concurring opinions. But just the opposite has happened.

To see the problem, it is useful to develop a new taxonomy of concurring opinions. In the traditional nomenclature of the literature on judicial decisionmaking, there are two types of concurrences: concurrences in the judgment only (also known as special concurrences) and concurrences in the opinion (also known as general or regular concurrences). This distinction has a doctrinal importance: if a judge concurs in the majority opinion, her vote counts in favor of the majority opinion — even if she writes a separate opinion. On the other hand, if a judge concurs only in the judgment, her vote counts only for purposes of the decretal disposition and not for purposes of determining whether the majority opinion was joined by a majority of the court.

There is another way to cut the concurrence cake, however. In addition to “plain vanilla” concurrences — those that are neither of the categories below — one can identify two central and important types of concurrences. One is a subset of the general concurrence and the other of which is a subset of the special concurrence.

Plurality concurrences arise when a judge concurs in the judgment, there is only a plurality opinion (that is, there is no majority opinion), and the concurring judge writes a separate opinion. Plurality concurrences arise most frequently in the Supreme Court when the Justices are

104 Of course, formally speaking, Justice Kennedy’s comment about the Fifth Circuit’s decision to predict that Wilko would be overruled is nonbinding dicta, since it was not necessary to the outcome of the case, which affirmed the Fifth Circuit’s judgment.

105 See Part IV, infra.
divided 4-1-4 on an issue. Although the Court is split, the Justice in the middle will have joined one side or the other in the judgment only, thus giving that side the votes it needs to decide the case. When that happens, we call the 4-vote opinion announcing the judgment of the Court the “plurality” opinion, and we call the lone vote in the middle a “plurality concurrence.”

Plurality concurrences are thus a subset of special (not general) concurrences.

Pivotal concurrences, heretofore unnoticed in the literature, occur when there is a majority opinion, one or more judges concur in the majority opinion but also write separately, and that judge’s vote is numerically necessary to give the majority opinion enough votes to become binding precedent. Pivotal concurrences are thus a subset of general (not special) concurrences.

Pivotal and plurality concurrences are the seismographic indicators that the fault lines between the seriatim and suppressed models, on one axis, and the precedential and predictive models, on another, are active. Seriatim courts issue reams of plurality concurrences, with the costs described in Parts I and II. Suppressed courts never issue either pivotal or plurality concurrences, with different but nevertheless substantial costs.

Meanwhile, under the precedential model, pivotal concurrences should be treated as sideshows. If the precedential model dominates in lower courts, pivotal concurrences — which by definition accompany a five-vote majority opinion — should have no impact on lower courts and little impact on future cases. On the other hand, if the predictive model survives in the lower courts even after Shearson, we should be able to observe lower courts relying in various ways on pivotal concurrences.

To understand why this is so, it is helpful to understand how different types of concurrences work in practice, and particularly from the standpoint of a hypothetical pivotal justice: Justice Swingvote.

1. Plurality Concurrences and Prediction

Start with plurality concurrences. Assume the vote is split 4-4 and Justice Swingvote must cast the deciding vote. But she doesn’t think either side has the right approach; instead, she would decide the case on one narrow issue. So she joins neither opinion, but writes a special concurrence favoring one of the two outcomes — enunciating her narrower rationale. There is thus no majority opinion, and the four-vote opinion whose disposition Justice Swingvote joins becomes the plurality opinion.

---

106 Plurality concurrences are thus a subset of special concurrences, because they can only arise when the concurring Justice joins the judgment but not the opinion of the four-vote plurality.
opinion; Justice Swingvote’s opinion becomes the plurality concurrence.

How are future courts to interpret this case? The Supreme Court answered this question — or tried to — in *Marks v. United States*. In *Marks*, the Supreme Court stated that, “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”

This rule can prove somewhat unwieldy in practice. What exactly constitutes the narrowest grounds for a decision? Answering that question can be especially hard when the various alternatives are not aligned neatly on a one-dimensional policy line. Consider the circumstance in which there are three plausible rules that might decide a case — call them X, Y, and Z. If adopted, X and Y would affirm the lower court, while Z would reverse. If four Justices endorse X in a plurality opinion, and a fifth Justice endorses Y in a plurality concurrence, the *Marks* outcome can be completely unclear. Unless X is just a stronger version of Y, lower courts will be forced to choose between X, endorsed by the plurality opinion but obviously not supported by five votes, and Y, arguably the median view but perhaps explicitly rejected by a majority of the Court. Unlike with a five-vote majority opinion, determining which opinion is the *Marks* winner is a non-trivial task that can implicate the full panoply of interpretive legal skills.

Worse yet, in some ways the *Marks* rule is deeply bizarre. It is purely a fiction that there were five votes for the “narrowest grounds” because some of the votes may have been for a “bundle” of interrelated propositions, and they may not be severable. That is, it may be the case that no five justices agreed to anything.

The problem goes right to the heart of precedent versus prediction. Viewed from that standpoint, the *Marks* rule looks like nothing so much as an attempt at prediction. It is essentially invites lower courts to guess at what five justices might agree to, hypothetically, if presented

---

108 Id. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, Powell, and Stevens, JJ.)).
109 This is arguably what happened in *Missouri v. Seibert*, 542 U.S. 600 (2004). Justice Kennedy adopted Y, a rationale explicitly rejected by a majority of the Court. But in the absence of a clear *Marks* winner, many lower courts have followed Kennedy’s rule.
110 Caveat that *Marks* doesn’t always track predictive model.
with a series of propositions. But, as explained, the Supreme Court has roundly rejected the idea that lower courts should do anything of the sort. This line of inquiry pits *Marks* against *Shearson*, without clear resolution.

One way to understand the *Marks* rule is as an exercise in counterfactual hypothetical reconstruction of the assignment and opinion-writing process. Let us say that, in the same case as above, it was obvious at the post-argument conference that Justice Swingvote was the swing vote in the case. And further assume that the assigning Justice — by convention, the senior-most justice in the majority — wants to keep Swingvote in his own camp. He would do well to assign the opinion to Swingvote. Presumably, Swingvote would draft the opinion along the lines of her plurality concurrence from the example above, and presumably the other four would prefer to join that opinion, giving it a majority, than maintain the gridlock. It is only through poor strategic assignment, on this theory then, that plurality concurrences arise. And the *Marks* rule is thus a way to reconstruct what would have happened if the “correct” assignment had been made in the first instance.

This feature of the *Marks* rule — that it is an attempt to predict what might happen in a future case — means that *Marks* is an anomaly within the precedential model. It creates a fictitious holding and treats it as precedential. In many ways, this is just what the predictive model does. But despite its difficulty in application, the *Marks* rule has persisted right alongside the rule of *Shearson*, which prohibits prediction. Surely *Marks* survives because it is intuitively attractive: by providing a rule of decision, *Marks* promotes judicial economy.

2. *Pivotal Concurrences: No Answer of Any Sort*

Imagine if, instead of concurring only in the judgment, Justice Swingvote had joined the plurality opinion. Her extra vote would transform the plurality opinion into a majority opinion. But imagine she still wrote her concurrence, and still said she would prefer her own version of the rule.

Formally, the majority opinion holds. It has five votes. It is the law, and Justice Swingvote’s opinion is a pile of words with no impact. Formally. In this situation, the law treats Justice Swingvote’s pivotal concurrence as junk DNA. But that may prove to be a mistake, because her pivotal views may govern the next case. And herein lies the conundrum for lower court judges.

---

111 Indeed, Justin Marceau suggests that in practice the Supreme Court often subsequently adopts as the rule whatever view became most popular with the Courts of Appeals, making the exercise a circular one.
For lower courts, what the Supreme Court has required of them in treating plurality and pivotal concurrences makes all the difference. With the plurality concurrence, lower courts are invited to apply the *Marks* rule as an exercise in quasi-prediction. With pivotal concurrences, though, the rule of five votes expressly prohibits them from doing so. Even still, failing to follow Justice Swingvote’s opinion is an invitation to an overruling.

In sum, a key feature of the distinction between pivotal and plurality concurrences is that it is visible only from the standpoint of the precedential model. To a judge engaged in predictive decisionmaking, there is no difference between the two: both pivotal and plurality concurrences are persuasive evidence of how the pivotal justice will vote in a future case. But from a precedential standpoint, the use of the *Marks* rule in plurality cases means that such concurrences effectively control the holding of the case. Pivotal concurrences, meanwhile, are ignored.

D. Pivotal Concurrence Case Study: United States v. Lopez

To demonstrate how pivotal concurrences can take on a life of their own, consider *United States v. Lopez*, a 5-4 case in which the Court, for the first time in over a half-century, struck down a federal statute for exceeding Congress’s powers under the Commerce Clause. The statute in question, the Gun-Free School Zones Act of 1990, made it a crime to possess a firearm in a school zone, regardless of whether that firearm had ever passed through interstate commerce. In a closely watched case that was front-page news at the time of its decision, five justices voted to strike the law down. The case is a useful example because it is both constitutional and salient.

Chief Justice Rehnquist assigned the opinion to himself, and wrote a opinion that acknowledged the Court’s long history of forbearance of statutes purportedly authorized by the Commerce Clause, but ultimately rejected that history and wrote a new chapter in constitutional doctrine. In conclusion, Rehnquist stated:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The

112 *See Shearson/Am. Express.*
113 *514 U.S. 549 (1995).*
114 In the Epstein & Segal sense. [Cite]
broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.115

In short, Rehnquist wrote broadly and was clear that his approach would represent a break with the path of constitutional development to that point.

But Rehnquist’s sweeping opinion was accompanied by a more modest, and less categorical, statement written by Justice Kennedy and joined by Justice O’Connor — both noted centrists. Justice Kennedy made no attempt to hide his qualms with the majority’s approach, stating at the outset of his concurrence:

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today’s decision, but I join the Court’s opinion with these observations on what I conceive to be its necessary though limited holding.116

This language is key, and it tells us that Justice Kennedy’s concurrence is pivotal. He states not only that he views the Court’s holding as limited (presumably, if its limited nature were patent, no concurrence would be necessary) but also that he has “some pause” about the decision.

The rest of the opinion confirms that it applies a different legal standard than does the majority. In providing his rationale, Justice Kennedy reviewed the entire history of Commerce Clause jurisprudence, drawing on The Federalist, the speeches of Daniel Webster, the history of Gordon Wood, and more. Justice Kennedy also took pains to note that the Court’s decision did not overturn key rulings on the scope of the Commerce Clause such as Heart of Atlanta Motel, Inc. v. United States, 379 U. S. 241 (1964), Katzenbach v. McClung, 379 U. S. 294 (1964), and Perez v. United States, 402 U. S. 146 (1971). Justice Kennedy’s opinion thus took a more measured approach than did Chief Justice Rehnquist’s.

115 514 U.S. at 567 (citations omitted).
116 Id. at 568 (Kennedy, J., concurring).
Lower courts took notice. They cited to Justice Kennedy’s concurrence more often than they did to other concurrences, and when they did, they were more likely to examine the case in depth. But beyond the mere numbers, look at how lower courts described the majority opinion as compared with Justice Kennedy’s pivotal concurrence. In one of the first cases to consider the scope of *Lopez*’s holding, the Third Circuit cited to Justice Kennedy’s concurrence to refute the argument that *Lopez* had drastically changed the course of Commerce Clause jurisprudence:

We, however, do not believe that *Lopez* calls for federal courts to supplant Congressional judgments with their own. That would, indeed, be a profound departure from prior law, and it is important to keep in mind that Justices Kennedy and O’Connor, who fully concurred in the majority opinion, did not view the majority that way. Rather, Justices Kennedy and O’Connor counseled “great restraint” before a court finds Congress to have overstepped its commerce power, and believed the Court’s opinion to have been a “necessary though limited holding.” *Lopez*, ___ U.S. at ___, 115 S.Ct. at 1634 (Kennedy, J., concurring). Thus, despite protestations to the contrary, the winds have not shifted that much.

Other courts similarly relied heavily on Justice Kennedy’s concurrence. The Eighth Circuit, for example, relied on the concurrence for the proposition that *Lopez* did not overrule *Katzenbach v. McClung*, *Wickard v. Filburn*, or any other Commerce Clause case.

The Sixth Circuit was most overt in its reliance on Kennedy’s concurrence, a fact that Judge Boggs, in dissent took note of. In *United States v. Wall*, a criminal defendant challenged the constitutionality of Congress’s criminalization of the ownership of a “gambling business”

---

117 *Lopez* was cited 2364 times over 18 years, for a rate of 131 citations per year (using 2013 as an endpoint; compare this with an overall mean of 72.5 for all decisions and 97 for all pivotal). Out of these 2364 citations, the concurring opinions were cited 243 times (0.103, as compared with a mean of 0.094 for all pivotal concurrences). 85 (0.35) of these citations examined the concurrence (depth of treatment = 4). In comparison, the mean rate at which lower courts examined pivotal concurrences was 0.154. See Part IV, infra.


119 See *United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996) (upholding Access Act against Commerce Clause challenge).
on the theory that Congress had exceeded its Commerce Clause powers under *Lopez*. The majority disagreed, noting:

> Until the Supreme Court provides a clearer signal or cogent framework to handle this type of legislation, this court is content to heed the concurrence of two Justices that the history of Commerce Clause jurisprudence still ‘counsels great restraint.’ *Lopez*, ___ U.S. at ___, 115 S.Ct. at 1634 (Kennedy, J. concurring).\(^{120}\)

Judge Boggs, dissenting in relevant part, channeled the precedential model and objected to the majority’s apparent dabbling in prediction. Judge Boggs noted:

The concurring opinion of Justices Kennedy and O’Connor in *Lopez* only amplifies the uncertain dimensions of congressional power. These two Justices indicated they believe that *Lopez* does not “call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.” *Lopez*, ___ U.S. at ___, 115 S.Ct. at 1637 (Kennedy, J., concurring). It must be stressed, however, that *Lopez* is not a plurality opinion, with a majority merely concurring in the result that the statute is unconstitutional. Both Justices Kennedy and O’Connor fully endorsed the majority opinion written by Chief Justice Rehnquist. Therefore, I read the Kennedy-O’Connor concurrence to sound a note of caution about the scope of *Lopez*, not a note of paralysis.\(^{121}\)

Judge Boggs most likely found it necessary to stress that Justices Kennedy and O’Connor both fully joined the majority opinion in order to bolster his argument, which relied more heavily on the majority opinion in *Lopez* than did the Sixth Circuit’s majority opinion in the same case. But Judge Boggs, too, recognized that Justice Kennedy’s concurrence acts to limit *Lopez*’s reach: “Because of the uncertainty surrounding *Lopez*, and especially in light of the caveats contained in the Kennedy-O’Connor concurrence, the district courts and the courts of appeals face the problem of how to implement Lopez without overstepping their authority.”\(^{122}\)

---

\(^{120}\) United States v. Wall, 92 F.3d 1444, 1452 (6th Cir. 1996).

\(^{121}\) Id. at 1455 (Boggs, J., concurring in part and dissenting in part).

\(^{122}\) Id. (emphasis added).
López thus provides an example of a pivotal concurrence at work. First, it fits the formal pattern: López was a 5-4 case, one of the justices in the majority wrote a concurring opinion (in this case, joined by another justice in the majority, Justice O’Connor), and the concurrence states that it would adopt only a limited version of the majority’s holding. Thus, Kennedy’s concurrence is pivotal. That feature caused lower courts, in the immediate wake of López, to look not only at the majority opinion (which formally controls), but also at the pivotal concurrence (which is formally just junk DNA). That phenomenon is remarkable, and we believe it is heretofore unremarked upon in the literature.

E. The Utility Function of Justices

The fact that other courts go so far as to rely on pivotal concurring opinions indicates why justices might write them at all. Influential concurring opinions surely bolster judicial reputations. What’s the point of sitting on the Court if one cannot have an impact on the law? And because the mathematics of majority opinion writing put the most power into the hands of the justice who has the option of writing a pivotal or plurality concurrence, it may be prohibitively difficult to suppress all pivotal concurrences. So attractive is the pivotal pen that the Chief Justices’ success to date is remarkable. (There is some suggestion in the literature that Chiefs achieve this harmony earlier in their careers, only to have it dissipate over time.)

Consider a simple model of rational judicial thought. If one is drafting the majority opinion, and has relatively free sway in doing so, this surely is the position to prefer. But it is not always available. On a divided Court, then, one can attain just as much influence, if not more, by writing separately. Because, to quote one author, that opinion could “control the future.”

In fact, just this sort of reasoning can govern the choice of whether to concur specially or regularly, to join the majority or not. Under the rule of Marks v. United States, in cases with no majority opinion, the precedent going forward is the narrowest grounds for decision on which five justices agree. As a result, the holding in a plurality case is often stated in a concurrence rather than in the plurality. As Berkelow points out, if a swing justice is sure that her concurrence would state the narrowest grounds for deciding the case and that it is logically consistent with the plurality’s rationale, the optimal course is not to join the majority:

[I]f a justice knows he can control the future by author-

\[123 \text{[Cite]} \]
\[124 430 \text{U.S. 188 (1977).} \]
ing a single concurrence and we follow *Marks* to make it controlling, would it not be rational for a judge to do so? He has an opportunity for disproportionate influence by writing separately.\(^\text{125}\)

On the other hand, if one suspects that an opinion will not be a *Marks* winner in this sense, the rational choice might be to write a pivotal concurrence. Which is to say that a justice can gain a strategic advantage by joining the majority opinion but writing separately, depriving the majority opinion of its practical force. Those separate opinions — which we are calling pivotal concurrences — are, formally, the junk DNA of the law. They are ignored for purposes of *stare decisis* and formally carry no more weight than a law review article written by a Supreme Court Justice. But for eager litigants hoping for legal change, those pivotal concurrences carry great weight. And, as explained below, lower courts can rely on this seeming junk DNA to *predict* the Supreme Court’s behavior in future cases, even if they are occasionally reprimanded for doing so.

To examine this phenomenon more comprehensively, we turn now to empirics. We have classified, categorized, and analyzed the impact of pivotal and plurality concurrences. In so doing, we seek to shed light not only on the still-raging battle between advocates of transparency and uniformity in judicial decisionmaking but also to better understand the motivations that individual justices face when they make the increasingly common choice to write separately.

\(^\text{125}\) Berkelow at 304-05; accord 352-53 (“If this theory of judge self-interest is true, however, why we ever get majorities must be explored.”)
IV. QUANTIFYING CONCURRENCES

Observing the way lower courts cite to concurrences can cast light on the ways in which lower courts engage in predictive decisionmaking, and therefore on the advantages and disadvantages of seriatim, rather than suppressed, decisionmaking. The more courts predict, the more they will examine, rely on, and incorporate into the mix of the law separate opinions. If lower courts become consumers of pivotal concurrences, demand for separate opinions goes up. Under such circumstances, Supreme Court justices have good reason to write in a way that is inconsistent with their formal vote. And it calls into question the coherence of a predictive model.

In this Part we analyze the rate at, and manner in, which lower state and federal courts cite to U.S. Supreme Court concurrences of each type: pivotal, plurality, and otherwise. As described below, we find that lower courts cite to pivotal concurrences at a rate much higher than for non-pivotal, non-plurality concurrences. Indeed, lower courts appear to cite to pivotal concurrences at nearly the rate they cite to plurality concurrences. That conclusion contradicts the prediction of the precedential model that lower courts will ignore pivotal concurrences as junk DNA. To the contrary, lower courts seem to take pivotal concurrences quite seriously.

A. A New Dataset on Concurring Opinions

To do this, we created a limited universe of cases. First, we queried the Supreme Court Database for all cases between 1946 and 2012 matching the following conditions: five-vote majority with at least one Justice in the majority authoring a concurring opinion. This yielded 480 cases. We then hand-coded these concurrences in these cases to determine whether they were pivotal, plurality, or neither (referred to throughout as “plain vanilla”).

Using this universe of cases, we harvested all lower-court citations to each of the 480 cases, totaling 668,357 citations to these decisions by federal and state trial and appellate courts. We also developed a method to parse the text of the citing decisions to determine whether they cited specifically to the concurrence or only to the majority or plurality opinions.126 In total, lower courts we coded as citing to an accompanying concurrence in 34,223 decisions. Concerning each citation, we catalog the identity of the citing court (i.e., whether the court is state or federal, trial or appellate), the date of the citing decision, the depth of the analysis (as coded by Westlaw), and whether the treatment is positive or neg-

126 This method is described more fully in the Appendix.
ative (again, per Westlaw). We used the Supreme Court database to identify whether the decision was based on constitutional grounds.\footnote{A decision was coded as “constitutional” if \text{authorityDecision1} or \text{authorityDecision2} was coded as 1 (judicial review, federal) or 2 (judicial review, state).} Finally, we coded salience using Epstein and Segal’s measure of whether the decision appeared on the front page of the \textit{New York Times}.\footnote{Lee Epstein and Jeffrey A. Segal, \textit{Measuring Issue Salience}, 44 \textit{Am. J. Pol. Sci.} 66 (2000). Whether the decision appears in the CQ’s \textit{Guide to the Supreme Court}’s list of landmark cases is used as a robustness check. \textsc{David Savage}, \textit{Guide to the Supreme Court}, 5th ed. 2010. Both of these measures are available through the 2009 Term.}

Our expectation was that lower courts focus more on the suppos-edly “junk” concurrences than a strict adherence to a precedential model would suggest. In particular, if judges are attempting to predict the Supreme Court’s decision, we should see citation to pivotal concurrences at a higher rate than non-pivotal, non-plurality concurrences. Moreover, if judges are using pivotal concurrences to support a predictive argument, such concurrences should be discussed with greater depth than non-pivotal, non-plurality (“plain vanilla”) concurrences. In other words, citations to pivotal concurrences should be more likely to be “Examined”\footnote{\textit{Depth of treatment} = 4.} than plain vanilla concurrences. We expect this because there is something intuitive and perhaps superior about a predictive approach in some circumstances. The very factors cited in favor of a system of precedent can recommend prediction not only in general but also in particular cases, some of which we highlight below. Similarly, we expect plurality concurrences to be cited more than pivotal concurrences, if only because they are always necessary to determine the holding of the case.

\textbf{B. Analysis}

Of the 480 decisions discussed above, 178 (37.1\%) were accompanied by plurality concurrences, 200 (41.7\%) were accompanied only by pivotal concurrences, and 73 (15.2\%) were accompanied by “plain vanilla” concurrences. The remaining 29 decisions were accompanied by mixed concurrences (meaning that multiple Justices wrote concurrences of different types or the concurrence was coded as both plurality and pivotal). These were excluded from the analysis for the sake of clarity.\footnote{The 21 decisions deemed to be accompanied by “mixed” concurrences are those in which one Justice issued a plain vanilla concurrence and another issued a pivotal or plurality concurrence, or alternatively, a concurrence could be classified as both pivotal and plurality. In the 20 decisions where different Justices issued different types of...}
Figure 3 displays the distribution of these decisions over time, categorized by concurrence type. Before 1970, few five-vote-majority decisions in which at least one Justice in the majority authored a concurring opinion were issued each year — less than 10 per year. At the beginning of the Burger Court, such decisions dramatically increased, peaking at 18 in 1986. The relatively high absolute number of opinions continued during the beginning of the Rehnquist Court, even as the Court’s workload (as indicated by the dashed blue line) steadily declined. Overall, during the Rehnquist Court, closely divided decisions accompanied by concurrence comprised 7.3% of all opinions on average, per term. This figure is similar to the averages during the Burger and Roberts Courts (6.0% and 6.5%, respectively), though substantially higher than in during the Vinson and Warren Courts (4.4% and 2.4%, respectively).
We examine lower court citation of these concurrences at the federal and state level, by both trial and appellate courts. During the 66 years captured by the data, lower courts cited to concurrences accompanying these five-vote-majority cases in 34,218 decisions. Citations by federal judges account for the bulk — 24,569 (71.8%) — with frequency evenly split between the district and circuit courts (see Table 1). State appellate courts cited to concurrences relatively less frequently (9,649) and state trial courts significantly less so (651).

<table>
<thead>
<tr>
<th>Level</th>
<th>Federal</th>
<th>State</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appellate</td>
<td>12,132</td>
<td>8,998</td>
<td>21,130</td>
</tr>
<tr>
<td>Trial</td>
<td>12,437</td>
<td>651</td>
<td>13,088</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>24,569</strong></td>
<td><strong>9,649</strong></td>
<td><strong>34,218</strong></td>
</tr>
</tbody>
</table>

As a first cut at the data, we examine simple citation of the decision; in other words, how many times does a lower court cite to a concurrence for support (regardless of depth of treatment)? As illustrated in Figure 3, these decisions were culled from across a 66-year period; to control for the fact that lower courts have had more time and opportunity to cite to older concurrences, the total number of citations to concurrences are standardized by the age of the decision as of 2013, the year the data were collected. Summary statistics for this measure are provided in Table 2.
Table 2. Summary Statistics for Simple Citation of Concurrences

<table>
<thead>
<tr>
<th>Type</th>
<th>Mean</th>
<th>Median</th>
<th>Min.</th>
<th>Max.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>2.859</td>
<td>0.771</td>
<td>0</td>
<td>51.5</td>
<td>73</td>
</tr>
<tr>
<td>Pivotal</td>
<td>4.046</td>
<td>1.557</td>
<td>0</td>
<td>58</td>
<td>200</td>
</tr>
<tr>
<td>Plurality</td>
<td>4.603</td>
<td>2.133</td>
<td>0</td>
<td>65</td>
<td>178</td>
</tr>
<tr>
<td>Total</td>
<td>4.073</td>
<td>1.563</td>
<td>0</td>
<td>65</td>
<td>451</td>
</tr>
</tbody>
</table>

Note: These data do not include “mixed decisions, in which there are multiple concurrences of different types, or cases in which the concurrence was classified as “Plurality & Pivotal.”

By these measures, plurality concurrences — as expected by the conventional story — are more frequently cited than pivotal or non-pivotal, non-plurality (plain vanilla) concurrences. In addition, lower court treatment of pivotal concurrences seems to differ substantially from treatment of plain vanilla concurrences. Difference-in-means tests confirm that statistical significance of this observation.131

But this cannot tell the whole story. Focusing only on the situations in which a lower court cites to a concurring opinion misses the opportunities in which the lower court could have cited a concurrence but chose not to.

This creates a selection effect that may seriously bias our perception of the utility of concurrences. For example, consider a situation in which two concurrences were cited five times each by lower courts. Using the measure discussed above would lead us to believe that these two types of concurrences were seen by the lower courts as equally important or useful. Assume now that the decision accompanied by the first concurrence was cited on 10 different occasions and the decision accompanied by the second was cited on 100. This casts the comparative utility of the two concurrences in an entirely different light. Using the simple citation measure alone has the potential to dramatically overstate the importance of some concurrences.

To correct for this, we conceptualize these missed opportunities as the instances in which a lower court cited to the majority (or plurality) opinion in the case but not the concurrence.132

---

131 We tested the statistical significance of the difference in means using both a rank sum (Mann-Whitney) test and a two-sample t-test. The difference in means between treatment of plain vanilla and pivotal concurrences was significant at the \( p < 0.05 \) level; the difference in means between plurality and pivotal concurrences was significant at the \( p < 0.1 \) level. The results of both tests are located in the technical appendix.

132 Arguably, the universe of “missed opportunities” is wider than this. One can imagine a situation in which a case dealt with an issue for which a Supreme Court decision was relevant, but yet the lower court chose not to cite it precisely because (as may be the case in a plurality opinion) the holding was particularly unclear or difficult to
se missed opportunities, however, may overcorrect for the selection bias inherent in the first measure. Concurrences need not be comprehensive in their approach to the issue at hand. Pivotal concurrences, in particular, are likely to focus on the decision’s effect on an emerging area of law or a complicated issue not addressed by the majority. In such cases, lower court judges might cite a majority opinion for an issue unrelated to that discussed by the concurrence. As a result, the pool of lower court decisions used to define the denominator of the rate may be overinclusive.

With this in mind, we turn to the full dataset of 668,357 lower court citations to assess whether pivotal concurrences are cited at different rates than non-pivotal, non-plurality concurrences. Citation rates and other summary statistics for the three types of concurrences are provided in Table 3. Of the 403,386 opportunities to cite the pivotal concurrence, lower courts did so in 14,855 decisions, resulting in a citation rate of 3.7%. This rate is lower than the plurality rate — an unsurprising result given that plurality concurrences, under the Marks rule, may be much more important to determining the holding. Notably, however, the pivotal citation rate is also significantly greater than the plain vanilla, which is again what a predictive view of judging suggests.  

<table>
<thead>
<tr>
<th>Type</th>
<th>Mean</th>
<th>Median</th>
<th>Std. Dev.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>0.0278</td>
<td>0</td>
<td>0.1644</td>
<td>130,375</td>
</tr>
<tr>
<td>Pivotal</td>
<td>0.0368</td>
<td>0</td>
<td>0.1883</td>
<td>403,386</td>
</tr>
<tr>
<td>Plurality</td>
<td>0.1170</td>
<td>0</td>
<td>0.3214</td>
<td>134,596</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>0.0512</td>
<td>0</td>
<td>0.2204</td>
<td>668,357</td>
</tr>
</tbody>
</table>

This difference in citation patterns is exacerbated when looking at lower courts’ citation of constitutional decisions (see Table 4). Although citation rates for all concurrences are higher in constitutional cases, the difference is most pronounced with respect to lower courts’ treatment of pivotal concurrences. Whereas lower courts cited all pivotal concurrences at a rate of 3.7%, this doubles — increasing to 7.2%

interpret. Alternatively, if the lower court is worried about being overturned, they may avoid citing a particularly unclear opinion to avoid detection by the Supreme Court.

The statistical significance of this difference was confirmed by a two-tailed t-test, which was significant at $p < 0.0001$ (see technical appendix).

Such citations comprise 292,298 (43.7%) of the 668,357 total lower court citations.
— in constitutional cases. We find, in contrast, that increases in the plain vanilla and plurality rates to be relatively small in comparison. Citation to plain vanilla concurrences increases from 2.8% to 3.8%; plurality opinions, even less so, from 11.7% to 12.0%. At 7.2%, the pivotal citation rate is significantly distinct from both plain vanilla and plurality citation rates.\textsuperscript{135} It is also differs significantly from the pivotal citation rate in lower courts’ citations to non-constitutional decisions (1.7%) (see Table 4).\textsuperscript{136}

Table 4. Citation of Constitutional and Non-Constitutional Decisions by Lower Courts

<table>
<thead>
<tr>
<th>Type</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Constitutional Decisions</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plain Vanilla</td>
<td>0.0376</td>
<td>0.1902</td>
<td>44,575</td>
</tr>
<tr>
<td>Pivotal</td>
<td>0.0721</td>
<td>0.2586</td>
<td>145,270</td>
</tr>
<tr>
<td>Plurality</td>
<td>0.1200</td>
<td>0.3250</td>
<td>102,453</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>0.0836</td>
<td>0.2768</td>
<td>292,298</td>
</tr>
<tr>
<td><strong>Non-Constitutional Decisions</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plain Vanilla</td>
<td>0.0227</td>
<td>0.1490</td>
<td>85,800</td>
</tr>
<tr>
<td>Pivotal</td>
<td>0.0170</td>
<td>0.1292</td>
<td>258,116</td>
</tr>
<tr>
<td>Plurality</td>
<td>0.1072</td>
<td>0.3094</td>
<td>32,143</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>0.2600</td>
<td>0.1592</td>
<td>376,059</td>
</tr>
</tbody>
</table>

The relatively small changes in the plurality treatment rate may be the result of the fact that, when lower courts cite plurality decisions or concurrences, they cite most frequently to cases involving constitutional issues. Of the 134,596 total citations to decisions accompanied by plurality concurrences, 102,453 (76.1%) involved a constitutional issue. In comparison, only 68% of plurality opinions issued by the Court are constitutional in nature. In other words, the lower courts are citing to constitutional plurality decisions at a higher rate than the Supreme Court is promulgating them. Compare this with the fact that only 44,575 (34.2%) of 130,375 citations to decisions accompanied by plain vanilla concurrences and 145,270 (36.0%) of 403,386 decisions accompanied by pivotal concurrences were constitutional in nature. Both percentages fall below the proportion of decisions accompanied by plain

\textsuperscript{135} These differences in mean citation rates are significant at $p < 0.001$. Full results from the two-tailed t-test displayed in the technical appendix.

\textsuperscript{136} This difference is statistically significant at $p < 0.0001$. Full results from the two-tailed t-test are available in the technical appendix.
vanilla and pivotal concurrences actually issued by the Court—42.5% and 61.5%, respectively (see Table 5).

**Table 5. Constitutional Decisions by Issued by the Supreme Court as Compared with Lower Courts’ Citation to Constitutional Decisions**

<table>
<thead>
<tr>
<th></th>
<th>5-4 Supreme Court Decisions</th>
<th>Lower Court Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Constitutional</td>
<td>Total</td>
</tr>
<tr>
<td>Plain Vanilla</td>
<td>31 (42.5%)</td>
<td>73</td>
</tr>
<tr>
<td>Pivotal</td>
<td>123 (61.5%)</td>
<td>200</td>
</tr>
<tr>
<td>Plurality</td>
<td>121 (68.0%)</td>
<td>178</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>275 (57.3%)</strong></td>
<td><strong>451</strong></td>
</tr>
</tbody>
</table>

Citation rates are even higher when lower courts rely on salient five-vote-majority decisions.\(^{137}\) As indicated in Table 6, pivotal concurrences are cited at a rate of 9.0% — almost two and a half times higher than for pooled salient and non-salient cases. The plain vanilla rate increases from 2.7% to 6.0%; citation to plurality concurrences increases the most dramatically, from 11.7% to 17.4%.\(^{138}\) As with constitutional cases, the pivotal citation rate for salient decisions is significantly higher than the plain vanilla rate but lower than the plurality citation rate.\(^{139}\) The pivotal citation rate in salient cases is also significantly different than in non-salient cases (2.8%).\(^{140}\)

**Table 6. Citation of Salient Decisions by Lower Courts**

<table>
<thead>
<tr>
<th>Type</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salient Decisions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plain Vanilla</td>
<td>0.0598</td>
<td>0.2371</td>
<td>18,575</td>
</tr>
<tr>
<td>Pivotal</td>
<td>0.0902</td>
<td>0.2865</td>
<td>53,299</td>
</tr>
<tr>
<td>Plurality</td>
<td>0.1744</td>
<td>0.3795</td>
<td>27,411</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>0.1078</strong></td>
<td><strong>0.3101</strong></td>
<td><strong>99,285</strong></td>
</tr>
</tbody>
</table>

---

\(^{137}\) Recall that salience is coded dichotomously as whether or not a Supreme Court decision appears on the front page of the *New York Times*. Citations to salient decisions comprise 14.6% of all.

\(^{138}\) Again, the differences in citation rates are statistically significant (see technical appendix).

\(^{139}\) This difference in mean citation rate was significant at the \(p < 0.0001\) level in a two-tailed t-test. The full results are displayed in the technical appendix.

\(^{140}\) This difference in mean citation rate was significant at the \(p < 0.0001\) level in a two-tailed t-test. The full results are displayed in the technical appendix.
Unlike their citation to constitutional Supreme Court decisions, lower courts cite to salient decisions at a lower rate than those decisions are promulgated by the Supreme Court (see Table 7). For example, although 65 of the 193 decisions accompanied by a pivotal concurrence were coded as salient (33.7%), citations to these decisions comprise only 13.3% lower courts’ total citations. A similar pattern is seen with decisions accompanied by both plain vanilla and plurality concurrences. The difference is particularly pronounced in decisions accompanied by plain vanilla concurrences. Whereas 19 (26.8%) of 73 Supreme Court decisions were coded as salient, the lower court cited to such decisions at a much lower rate (14.7%).

Table 7. Salient Decisions by Issued by the Supreme Court as Compared with Lower Courts’ Citation to Salient Decisions

<table>
<thead>
<tr>
<th></th>
<th>Supreme Court Decisions</th>
<th>Lower Court Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Salient</td>
<td>Total</td>
</tr>
<tr>
<td>Plain Vanilla</td>
<td>19 (26.8%)</td>
<td>73</td>
</tr>
<tr>
<td>Pivotal</td>
<td>65 (33.7%)</td>
<td>193</td>
</tr>
<tr>
<td>Plurality</td>
<td>43 (25.3%)</td>
<td>170</td>
</tr>
<tr>
<td>Total</td>
<td>127 (29.3%)</td>
<td>434</td>
</tr>
</tbody>
</table>

Note: The numbers listed in the totals columns diverge from those provided in Table 5. This is due to the fact that salience data is available on the Supreme Court database website through only the 2009 Term.

The rate at which lower courts cite pivotal concurrences accompanying salient constitutional cases is, perhaps unsurprisingly, the highest pivotal rate discussed to this point. Of the 40,421 citations to such decisions, lower courts referenced pivotal concurrences roughly 10% of the time (see Table 8). We additionally find that the pivotal citation rate is significantly greater than the plain vanilla citation rate (6.2%) but significantly smaller than the plurality citation rate (16.7%).

---

141 Both two-tailed t-tests are significant at $p < 0.0001$. Full results are presented in the technical appendix.
Table 8. Citation of Salient Constitutional Decisions by Lower Courts

<table>
<thead>
<tr>
<th>Type</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Salient Constitutional Decisions</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plain Vanilla</td>
<td>0.0623</td>
<td>0.2418</td>
<td>18,834</td>
</tr>
<tr>
<td>Pivotal</td>
<td>0.1011</td>
<td>0.3014</td>
<td>40,421</td>
</tr>
<tr>
<td>Plurality</td>
<td>0.1677</td>
<td>0.3736</td>
<td>23,334</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>0.1129</td>
<td>0.3165</td>
<td>79,589</td>
</tr>
<tr>
<td><strong>All Other Decisions</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plain Vanilla</td>
<td>0.0226</td>
<td>0.1487</td>
<td>110,626</td>
</tr>
<tr>
<td>Pivotal</td>
<td>0.0292</td>
<td>0.1685</td>
<td>360,515</td>
</tr>
<tr>
<td>Plurality</td>
<td>0.1052</td>
<td>0.3068</td>
<td>110,492</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>0.0424</td>
<td>0.2015</td>
<td>581,633</td>
</tr>
</tbody>
</table>

As with salient decisions, the lower courts cite salient constitutional decisions at a lower rate than the rate at which such decisions are promulgated by the Supreme Court (see Table 9). This is true across the board, but the difference is most pronounced with respect to decisions accompanied by pivotal concurrences. Whereas roughly a quarter of these decisions were both constitutional and salient, the lower courts cite to them at a rate of 10.1%.

Table 9. Salient Constitutions Decisions Issued by the Supreme Court as Compared with Lower Courts’ Citation to Salient Constitutional Decisions

<table>
<thead>
<tr>
<th>5-4 Supreme Court Decisions</th>
<th>Lower Court Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Salient &amp; Constitutional</td>
</tr>
<tr>
<td>Plain Vanilla</td>
<td>12 (16.9%)</td>
</tr>
<tr>
<td>Pivotal</td>
<td>48 (24.8%)</td>
</tr>
<tr>
<td>Plurality</td>
<td>33 (19.4%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>93 (21.4%)</strong></td>
</tr>
</tbody>
</table>

**Note:** The numbers listed in the totals columns diverge from those provided in Table 5. This is due to the fact that salience data is available on the Supreme Court database website through only the 2009 Term.

Citation rates alone — while interesting — tell us very little about the manner in which the lower courts are using these concurrences. The dichotomous coding of citation (i.e., whether the concurrence was cited or not) captures all manner of treatment, from a simple string cite to an in-depth examination of the opinion. If judges are using pivotal concurrences predictively, we would expect to see more in-depth treatment of decisions when citing to a pivotal, as compared to a plain
vanilla, concurrence. In other words, conditional on citing a concurring opinion, the predictive theory of judging posits that a lower court’s depth of treatment of a pivotal concurrence will be higher than its treatment of a plain vanilla concurrence.

To test whether pivotal concurrences were actually given more extensive treatment by lower courts, we assessed the rate at which decisions accompanied by such concurrences were coded as “Examined” (i.e., depth of treatment = 4) by Westlaw, conditional on the citation of the concurring opinion (see Table 10). Note, however, that Westlaw takes all discussion of the cited decision into account. As a result, this measure does not capture the level of discussion devoted to the concurring opinion specifically. With this in mind, we proceed with some caution and the understanding that measure employed represents an imperfect proxy at best.

By this metric, lower courts’ treatment of pivotal concurrences — which are examined at a rate of 12.0% — more closely resembles treatment of plurality concurrences (12.5%) than plain vanilla ones (9.7%). In fact, the difference between depth of treatment of these two types of decisions, conditional on the citation of concurrence, is statistically indistinguishable. The difference between lower court treatment of pivotal and plain vanilla concurrences is clear and statistically significant.

Table 10. Rate at Which Lower Courts “Examined” (Depth of Treatment = 4) Decisions Accompanied by Concurrence

<table>
<thead>
<tr>
<th>Type</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>0.0966</td>
<td>0.2954</td>
<td>3,625</td>
</tr>
<tr>
<td>Pivotal</td>
<td>0.1203</td>
<td>0.3253</td>
<td>14,855</td>
</tr>
<tr>
<td>Plurality</td>
<td>0.1245</td>
<td>0.3302</td>
<td>15,743</td>
</tr>
<tr>
<td>Total</td>
<td>0.1197</td>
<td>0.3246</td>
<td>34,223</td>
</tr>
</tbody>
</table>

Notably, this stark difference between treatment of plain vanilla and pivotal opinions is weaker when examined in constitutional cases alone. Although the treatment rate for decisions accompanied by pivotal concurrences increases from 12.0% to 12.6%, the difference between that rate and the treatment rate for plain vanilla concurrences actually decreases.

142 Using a two-tailed t-test comparing the difference in depth-of-citation rates, we fail to reject the null hypothesis that the two rates are the same ($t = 1.1215, p = 0.2621$). The full results are included in the technical appendix.

143 We were able to reject the null hypothesis that pivotal and plain vanilla concurrences were “examined” at the same rate using a two-tailed test ($t = -4.2513, p < 0.0001$). Again, the full results are included in the technical appendix.
creases, making the treatment rates statistically indistinguishable (see Table 11). Notably, however, the treatment rate of decisions accompanied by plurality concurrences actually decreases from 12.5% to 11.5%.

Table 11. Rate at Which Lower Courts “Examined” (Depth of Treatment = 4) Decisions Accompanied by Concurrence in Constitutional Cases

<table>
<thead>
<tr>
<th>Type</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>0.1163</td>
<td>0.3207</td>
<td>1,676</td>
</tr>
<tr>
<td>Pivotal</td>
<td>0.1264</td>
<td>0.3324</td>
<td>10,471</td>
</tr>
<tr>
<td>Plurality</td>
<td>0.1149</td>
<td>0.3189</td>
<td>12,296</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>0.1199</td>
<td>0.3249</td>
<td>24,443</td>
</tr>
</tbody>
</table>

The difference in treatment rates for plain vanilla and pivotal concurrences is noticeably more stark when examining citation to salient decisions. The treatment rate for pivotal concurrences is the highest among the three at 16.8%; the plain vanilla treatment is the next largest at 13.7%, followed by a plurality treatment rate of 12.5% (see Table 12).

Table 12. Rate at Which Lower Courts “Examined” (Depth of Treatment = 4) Decisions Accompanied by Concurrence in Salient Cases

<table>
<thead>
<tr>
<th>Type</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>0.1386</td>
<td>0.3457</td>
<td>1,111</td>
</tr>
<tr>
<td>Pivotal</td>
<td>0.1681</td>
<td>0.3740</td>
<td>4,807</td>
</tr>
<tr>
<td>Plurality</td>
<td>0.1254</td>
<td>0.3313</td>
<td>4,781</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>0.1199</td>
<td>0.3531</td>
<td>10,699</td>
</tr>
</tbody>
</table>

The pivotal treatment rate is at its highest — 17.0% — when the lower court has cited a pivotal concurrence accompanying a Supreme Court decision that is both salient and constitutional (see Table 13).

---

144 The decrease in difference results in a loss of statistical significance in a two-tailed t-test.
145 The difference in treatment rates is statistically significant at $p < 0.01$ using a two-tailed test. Full results available in the technical appendix.
146 The differences between the pivotal and plain vanilla treatment rates, as well as the pivotal and plurality treatment rates, are statistically significant using two-tailed t-tests. See the technical appendix for details.
This rate is significantly higher than both the treatment rate for plain vanilla (14.1%) and plurality (12.5%) concurrences.147

Table 13. Rate at Which Lower Courts “Examined” (Depth of Treatment = 4) Decisions Accompanied by Concurrence in Salient Constitutional Cases

<table>
<thead>
<tr>
<th>Type</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>0.1408</td>
<td>0.3458</td>
<td>987</td>
</tr>
<tr>
<td>Pivotal</td>
<td>0.1701</td>
<td>0.3758</td>
<td>4,085</td>
</tr>
<tr>
<td>Plurality</td>
<td>0.1251</td>
<td>0.3310</td>
<td>3,914</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>0.1473</strong></td>
<td><strong>0.3545</strong></td>
<td><strong>8,986</strong></td>
</tr>
</tbody>
</table>

Taken together, the data presented here provide strong support for a predictive theory of lower court judging. Lower court treatment of pivotal concurrences indicates that such opinions are cited at higher rates and in greater depth (for the most part) than their plain vanilla cousins. This tends to be especially true when the original Supreme Court decision involved judicial review or was especially salient or both. Such markers also make issues ripe for future review and, as a result, predictive behavior by lower court judges.

This analysis, however, is little more than a first cut at a very rich and complex dataset. In future iterations of this paper, we plan to examine changes in citation patterns over time. An initial foray into such an analysis is included at the end of the technical appendix. We also expect to conduct a more robust analysis of the importance concurrence type of citation by estimating both citation and treatment using a selection or double-hurdle model.

147 The differences in treatment rates are both significant at $p < 0.0001$ using two-tailed t-tests. The full results are located in the technical appendix.
V. CONCURRENCES AND LEGAL CHANGE

The Supreme Court says to ignore pivotal concurrences, yet it can’t stop writing them. (And it has given the lower courts odd instructions for what to do with plurality concurrences, but keeps writing those too.)

Given their difficulties, why not abandon concurrences altogether? As with his long-ago predecessor John Marshall, this is what Chief Justice Roberts would do, in as many cases as possible. He would make it his “priority” “to discourage his colleagues from issuing separate opinions.” And he has said he will assign opinions to the justice able to attract the most votes.

But what would the Chief Justice’s agenda achieve, even assuming he can pull it off (which our data, presented above, suggest he has not)? Advocates insist consensus is for the best, as it will impose greater clarity, for longer.

What those who attack concurrences as undermining legal clarity seem to miss is that achieving lasting clarity requires a super-strong commitment to stare decisis, one that is essentially unenforceable and therefore almost unimaginable. The justices must not only suppress disagreement in the present case. They must do so in the case that follows, and the one that comes after that. And they must ensure that their successors do the same. That was the very thing the Progressive Era justices said they could not do, especially in constitutional cases.

To see this, consider Morehead v. New York ex rel. Tipaldo. There the Court split sharply on the question of whether the state of New York was constitutionally permitted to implement a minimum wage law. The majority followed the Court’s precedent in Adkins v. Children’s Hospital, based more fundamentally on Lochner, and found the wage law unconstitutional. However, writing in dissent, Justice Hughes argued that liberty of contract was not an absolute right, and the wage law should be upheld so long as “the end is legitimate and the means appropriate.”

But suppose Justice Hughes and his co-dissenters had simply joined the majority, providing the desired consistency. Then, when the next minimum wage case came to the Court one year later, in West Coast Hotel Co. v. Parrish, Justice Hughes would face a dilemma: continue to adhere to Adkins even though a majority on the Court no longer supported it, or flip the Court itself. The cost of stability of the latter alternative is

---

149 Tipaldo, 298 U.S. at 631.
enormous. It is precisely why *stare decisis* is not an inexorable command in constitutional cases.

This may explain something noted in empirical studies of separate opinions, which is that concurring opinions appear to rise the longer a justice is on the Court and the longer she has sat with the same colleagues. As questions come to the Court, especially a stable natural Court, cleavages will appear among even those with seeming ideological consistency. It is one thing to agree on outcomes and quite another to have a perfectly congruent view of reasons. And, as time passes and those reasons become dispositional, maintaining togetherness gets all the harder.

In urging his Court to join together more often, the Chief Justice has said “A justice is not like a law professor, who might say, ‘This is my theory . . . and this is what I’m going to be faithful to and consistent with,' and in twenty years will look back and say, ‘I had a consistent theory of the First Amendment as applied to a particular area.' . . . Instead of nine justices moving in nine separate directions . . . it would be good to have a commitment on the part of the Court to acting as a Court, rather than being more concerned about the consistency and coherency of an individual judicial record.”\(^{150}\)

But contrast the Chief Justice’s hopes with the reasons justices themselves give — publicly — for writing separately. In an intriguing article, Kelsh documented the stated reasons for departing from the Court’s opinion. Over time, the justices went from being apologetic about the “misfortune” of disagreeing to simply doing so. Oftentimes it was the “importance” of the case or its consequences that justified the departure. But increasingly, “consistency” became the reason — *not* with the Court, but with one’s own views. Thus, Justice Bradley began one concurrence by explaining:

> Whilst I concur in the conclusion to which the court has arrived in this case, I think it proper to state briefly and explicitly the grounds on which I distinguish it from the *Slaughter-House Cases* . . . . I prefer to do this in order that there may be no misapprehension of the views which I entertain in regard to the application of the fourteenth amendment to the Constitution.\(^{151}\)

Similarly, Justice Field justified his separate opinion in another case:

> I . . . make this special concurrence in the opinion of the

\(^{150}\) Rosen, 4, Atlantic

\(^{151}\) Bartemeyer v. Iowa, 85 U.S. 129, 135 (1873) (Bradley, J., concurring).
majority because of language in it expressing approval of the positions taken by the court in *Louisiana v. Jumel*, from which I dissented . . . . I adhere to my dissenting opinions in those cases, and in concurring in the judgment in this case I do not in any respect depart from or qualify what I there said.152

The point here is that, in order for a norm of suppression to hold, disagreement suppressed as to the rationale must continue to be suppressed, even when what at one point was dicta could later become the very ground on which the decision will turn. One must suppress one’s views, not as an academic exercise, but when lives and fortunes are at stake. That is much to ask of a judge.

As the Court’s role shifted from the resolver of individual disputes to lawgiver for the nation, suppression became all the more difficult to justify. Taft, a tireless advocate for the Judges’ Bill, understood the change in role. “The chief duty in a court of last resort is not to dispose of the case, but it is sufficiently to elaborate the principles, the importance of which justify the bringing of the case here at all, to make the discussion of those principles and the conclusion reached useful to the country and to the Bar in clarifying doubtful questions of constitutional and fundamental law.”153 And while Taft could square this new role with his distaste of dissents, Robert Post makes the point that this was not sustainable in a world in which legal principles will not stand still.

Concurring opinions can smooth the process of legal change and thereby enhance the Court’s credibility. To see this, return, once more, to the decision in *Morehead v. New York ex rel Tipaldo*. When, on June 1, 1936, the Supreme Court decided in *Tipaldo* that New York’s minimum-wage law was unconstitutional, it shocked the country. After all, its 1934 decision in *Nebbia v. New York*, upholding New York’s minimum-price law for milk, had suggested the opposite. Republicans in Congress joined Democrats in condemning the decision, which surely strengthened the Democrats going into the 1936 election. But then, in the middle of the Court-packing fight, the Court seemed to flip again, upholding Washington state’s minimum-wage law for women in *West Coast Hotel v. Parrish*. This was part of the “Switch in Time that Saved Nine,” Justice Owen Roberts’s seemingly incomprehensible flip that brought ridicule down upon him and the Court and called into question its sepa-

152 *In re Ayers*, 123 U.S. 443, 509 (1887) (Field, J., concurring).
153 Letter from William Howard Taft to Charles P. Taft, 2nd (Nov. 1, 1925) (Taft Papers, Reel 277).
ration from politics. Years later, in a confidential letter Roberts gave to Felix Frankfurter before his death, he explained his vote in *Tipaldo* on the ground only that New York had not asked the Court to overrule its prior decision in *Adkins*. There is reason to question the truth of this assertion. But suppose that it were true, and suppose Roberts had merely emphasized as much in a published concurring opinion in *Tipaldo*. One suspects that the course of constitutional history would have looked somewhat different. Rather than a dramatic switch in time, there would have been the perfectly ordinary and observable flow of judicial dispositions. That fact alone speaks in favor of concurring opinions, especially when they are pivotal.

Not to deny the Chief Justice his due. Opinions with a higher number of signers are likely to do less, to decide cases on narrower grounds. This might be a good thing. Opinions have doubled in length over the last half-century and are full of far more than needs be said to decide a matter. The Court seems to have forgotten at times that its role in making law still is adjunct to deciding a tangible case or controversy. More votes and narrower decisions is a fine thing to which one might aspire. One might ask, however, whether incrementalist goals could be achieved more directly, and more cheaply, than at the cost of transparency.

Even granting the incidental benefits of increased unanimity, the law is unlikely to stand as still as Chief Justices Taft and Roberts have

154 The letter from Roberts is the basis of a tribute Frankfurter later wrote for his colleague, which quoted Roberts explaining that the facts “make it evident that no action taken by the President in the interim had any causal relation to my action.” Frankfurter, 315. Michael Ariens has questioned the honesty of this account, speculating that Frankfurter may have made up the letter after the fact as part of an attempt to shore up the legitimacy of the Court and defend it from accusations of overt political engagement. See Ariens. But see Friedman (defending Frankfurter’s account and answering Ariens’s arguments regarding the Roberts letter). Frankfurter’s account does comport with the majority opinion in *Tipaldo*, which explicitly declined to consider the constitutionality of Adkins, finding that the plaintiff was “not entitled and [did] not ask to be heard upon the question whether the Adkins Case should be overruled.” *Tipaldo* at 605.

155 [TWOTP 204, 230 & notes.](#)

156 See infra Part III.

157 In 2010, Adam Liptak reported in the *New York Times* that the Court had reached an all time high in the median length of majority opinions, at 4,751 words — especially impressive when contrasted with the 1953 level of below 2000 words. Ryan C. Black and James F. Spriggs II find that median opinion length has moved cyclically over time, hitting lows of approximately 1000 words (and sometimes less) in the early 1800s and 1900s, and highs of 3000 or more in the 1830s, at the turn of the 20th century, in the 1940s, and at present. See Black & Spriggs, 634-36 & Fig. 2.
desired. Distinctions will exist in the grounds for decision, and in later cases those distinctions will govern. Leaving them unexpressed ... which could injure the Court’s reputation more, or of continuing to suppress disagreement at the cost of justice. Neither cost seems worth bearing for the benefit of apparent agreement.

By revealing the fault lines within a voting majority, concurrences do much more. By calling those fault lines into relief, concurrences drive litigation toward them. And in doing so, they not only smooth or make coherent the process of legal change, they also fuel it.

In condemning concurrences, Ferejohn and Pasquino make an odd point, one that seems to prove just the opposite. By revealing these fault lines “the state of law can remain unsettled, [and] hopeless and futile activities may be needlessly encouraged.” They seem to have in mind here the constant attack on Roe by state statutes limiting abortion rights. But the change in the Court’s doctrine from Roe to Casey suggests that there was nothing “futile” about legislative activity in the intervening years. Wherever one stands on abortion, the reality on the ground is that they are less available as a consequence of this legal change.

Economic models of adjudication explain why the law will move toward visible fault lines. Plaintiffs with something at stake will be far more inclined to pursue appeals if they know they might muster the necessary votes than if they think they are rolling the dice or spitting in the wind. Thus, plaintiffs with cases that turn on the fault will pursue their appeals; others will abandon them.

In this way, the concurring justices signal precisely where they would like the law to move, and encourage litigants to bring them cases to take it there. This request for future cases may be quite explicit. For example, in Federal Election Commission v. Beaumont, the Court struck down a challenge to a federal restriction on corporate campaign contributions. However, Justice Kennedy’s concurrence suggested that he might join the dissenting justices to strike down such limits applied to a different set of facts in a different case. He stated: “Were we presented with a case in which the distinction between contributions and expendi-

---


159 This function is also frequently a strong feature in dissents. See Baird & Jacobi, How the Dissent Becomes the Majority, 59 DUKE L.J. at 186 (2009) (applying empirical analysis to show how “dissents can signal how to frame future litigation to create a more persuasive line of reasoning that encourages at least some judges in the previous majority coalition to consider a different argument when deciding on the merits”).
tutes under the whole scheme of campaign finance regulation were under review, I might join Justice Thomas’ dissenting opinion.160

Indeed, the Chief Justice, a man of acknowledged conservative impulses, may find he has a tension on his hands. As must now be clear, to discourage separate opinions is either to discourage legal change, or to have it happen abruptly and without notice. Deeply concerned as he appears to be with the Court’s institutional integrity, the latter is likely to cause real concern. Perhaps for that reason he has stressed a preference for gradual change in the law. But he also surely wants that law to change in many areas, such as campaign finance and race. It may not be possible to have it both ways.

---

160 Beaumont, 539 U.S. at 164 (Kennedy, J., concurring).
## TECHNICAL APPENDIX

### Results of Difference-of-Means Tests

#### A. Results of Rank Sum and T-Tests for Difference in Means of Lower Court Simple Citation of Concurrences

##### A.1. Rank Sum (Mann-Whitney) Test for Simple Citation (Standardized)

<table>
<thead>
<tr>
<th>Type of Concurrence</th>
<th>N</th>
<th>Rank Sum</th>
<th>Expected</th>
<th>z-score</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>73</td>
<td>8,388.5</td>
<td>10,001</td>
<td>-2.793</td>
<td>0.005</td>
</tr>
<tr>
<td>Pivotal</td>
<td>200</td>
<td>29,012.5</td>
<td>27,400</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plurality</td>
<td>178</td>
<td>36,753.5</td>
<td>33,731</td>
<td>1.907</td>
<td>0.057</td>
</tr>
<tr>
<td>Pivotal</td>
<td>200</td>
<td>35,877.5</td>
<td>37,900</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

##### A.2. Two-Sample T-Test for Simple Citations (Standardized, Logged Values) (assuming unequal variances)

<table>
<thead>
<tr>
<th>Type of Concurrence</th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>72</td>
<td>-0.194</td>
<td>0.187</td>
<td>(-0.567, 0.179)</td>
<td>-2.57</td>
<td>0.0113</td>
</tr>
<tr>
<td>Pivotal</td>
<td>199</td>
<td>0.362</td>
<td>0.108</td>
<td>(0.149, 0.575)</td>
<td>(121.39)</td>
<td>0.0399</td>
</tr>
<tr>
<td>Plurality</td>
<td>177</td>
<td>0.663</td>
<td>0.099</td>
<td>(0.469, 0.857)</td>
<td>2.0624</td>
<td>0.0399</td>
</tr>
<tr>
<td>Pivotal</td>
<td>199</td>
<td>0.362</td>
<td>0.108</td>
<td>(0.149, 0.575)</td>
<td>(373.59)</td>
<td></td>
</tr>
</tbody>
</table>

#### B. Two-Tailed T-Test of Difference in Mean Citation Rate Using the Full Dataset, by Concurrence Type (assuming unequal variances)

<table>
<thead>
<tr>
<th>Type of Concurrence</th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>130,375</td>
<td>0.0278</td>
<td>0.0005</td>
<td>(0.0269, 0.0287)</td>
<td>-15.49</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>403,386</td>
<td>0.0368</td>
<td>0.0003</td>
<td>(0.0362, 0.0374)</td>
<td>(533,759)</td>
<td></td>
</tr>
<tr>
<td>Plurality</td>
<td>134,596</td>
<td>0.1170</td>
<td>0.0009</td>
<td>(0.1152, 0.1190)</td>
<td>86.65</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>403,386</td>
<td>0.0368</td>
<td>0.0003</td>
<td>(0.0362, 0.0374)</td>
<td>(166,478)</td>
<td></td>
</tr>
</tbody>
</table>

#### C. Two-Tailed T-Tests of Mean Citation Rates, Constitutional Decisions
C.1. Two-Tailed T-Test of Difference in Mean Citation Rate, Constitutional Decisions by Concurrence Type (assuming unequal variances)

<table>
<thead>
<tr>
<th>Type of Concurrence</th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>44,575</td>
<td>0.0376</td>
<td>0.0009</td>
<td>(0.1902, 0.2586)</td>
<td>-30.57</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>145,270</td>
<td>0.0721</td>
<td>0.0007</td>
<td>(0.0707, 0.0734)</td>
<td>(99,637.3)</td>
<td></td>
</tr>
<tr>
<td>Plurality</td>
<td>102,453</td>
<td>0.1200</td>
<td>0.0010</td>
<td>(0.1180, 0.1201)</td>
<td>39.25</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>145,270</td>
<td>0.0721</td>
<td>0.0007</td>
<td>(0.0707, 0.0734)</td>
<td>(187,963)</td>
<td></td>
</tr>
</tbody>
</table>

C.2. Two-Tailed T-Test of Difference in Mean Pivotal Citation Rate in Constitutional versus Non-Constitutional Decisions (assuming unequal variances)

<table>
<thead>
<tr>
<th></th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Constitutional</td>
<td>258,116</td>
<td>0.0170</td>
<td>0.0002</td>
<td>(0.0165, 0.0175)</td>
<td>-90.08</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>Constitutional</td>
<td>145,270</td>
<td>0.0721</td>
<td>0.0007</td>
<td>(0.0707, 0.0734)</td>
<td>(403,384)</td>
<td></td>
</tr>
</tbody>
</table>

D. Two-Tailed T-Tests of Mean Citation Rates, Salient Decisions

D.1. Two-Tailed T-Test of Difference in Mean Citation Rates, Salient Decisions by Concurrence Type (assuming unequal variances)

<table>
<thead>
<tr>
<th>Type of Concurrence</th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>18,575</td>
<td>0.0598</td>
<td>0.0017</td>
<td>(0.0564, 0.0632)</td>
<td>-14.21</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>53,299</td>
<td>0.0902</td>
<td>0.0012</td>
<td>(0.0878, 0.0926)</td>
<td>(38,773.1)</td>
<td></td>
</tr>
<tr>
<td>Plurality</td>
<td>27,411</td>
<td>0.1744</td>
<td>0.0023</td>
<td>(0.1699, 0.1789)</td>
<td>32.32</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>53,299</td>
<td>0.0902</td>
<td>0.0012</td>
<td>(0.0878, 0.0926)</td>
<td>(43,890.8)</td>
<td></td>
</tr>
</tbody>
</table>
### D.2. Two-Tailed T-Test of Difference in Mean Pivotal Citation Rate in Salient versus Non-Salient Decisions (assuming unequal variances)

<table>
<thead>
<tr>
<th></th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Salient</td>
<td>347,637</td>
<td>0.0282</td>
<td>0.0002</td>
<td>(0.0277, 0.0288)</td>
<td>-71.4677</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>Salient</td>
<td>53,299</td>
<td>0.0902</td>
<td>0.0012</td>
<td>(0.0876, 0.0926)</td>
<td>(400,934)</td>
<td></td>
</tr>
</tbody>
</table>

### E. Two-Tailed T-Tests of Mean Citation Rates, Salient Constitutional Decisions

#### E.1. Two-Tailed T-Test of Difference in Mean Citation Rates, Salient Constitutional Decisions by Concurrence Type (assuming unequal variances)

<table>
<thead>
<tr>
<th>Type of Concurrence</th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>18,834</td>
<td>0.0623</td>
<td>0.0019</td>
<td>(0.0586, 0.0661)</td>
<td>-14.89</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>40,421</td>
<td>0.1011</td>
<td>0.0015</td>
<td>(0.0981, 0.1040)</td>
<td>(35,785.6)</td>
<td></td>
</tr>
<tr>
<td>Plurality</td>
<td>23,334</td>
<td>0.1677</td>
<td>0.0024</td>
<td>(0.1629, 0.1725)</td>
<td>23.2412</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>40,421</td>
<td>0.1011</td>
<td>0.0015</td>
<td>(0.0981, 0.1040)</td>
<td>(40,830.2)</td>
<td></td>
</tr>
</tbody>
</table>

#### E.2. Two-Tailed T-Test of Difference in Mean Pivotal Citation Rate in Salient Constitutional Decisions versus All Other Decisions (assuming unequal variances)

<table>
<thead>
<tr>
<th></th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Other Cases</td>
<td>360,515</td>
<td>0.0292</td>
<td>0.0002</td>
<td>(0.0287, 0.0298)</td>
<td>-73.5152</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>Salient Constitutional Cases</td>
<td>40,421</td>
<td>0.1011</td>
<td>0.0015</td>
<td>(0.0981, 0.1040)</td>
<td>(400,934)</td>
<td></td>
</tr>
</tbody>
</table>
F. Two-Tailed T-Test of Difference in Depth-of-Treatment Rates, All Decisions (assuming unequal variances)

<table>
<thead>
<tr>
<th>Type of Concurrence</th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>3,625</td>
<td>0.0966</td>
<td>0.049</td>
<td>(0.0869, 0.1062)</td>
<td>-4.2513</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>14,855</td>
<td>0.1203</td>
<td>0.0027</td>
<td>(0.0878, 0.0926)</td>
<td>(43,890.8)</td>
<td></td>
</tr>
<tr>
<td>Plurality</td>
<td>15,743</td>
<td>0.1245</td>
<td>0.0026</td>
<td>(0.1193, 0.1297)</td>
<td>1.1215</td>
<td>0.2621</td>
</tr>
<tr>
<td>Pivotal</td>
<td>14,855</td>
<td>0.1203</td>
<td>0.0027</td>
<td>(0.0878, 0.0926)</td>
<td>(30,538.8)</td>
<td></td>
</tr>
</tbody>
</table>

G. Two-Tailed T-Test of Difference in Depth-of-Treatment Rates, Constitutional Decisions (assuming unequal variances)

<table>
<thead>
<tr>
<th>Type of Concurrence</th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>1,676</td>
<td>0.1163</td>
<td>0.0078</td>
<td>(0.1010, 0.1317)</td>
<td>-1.1904</td>
<td>0.2340</td>
</tr>
<tr>
<td>Pivotal</td>
<td>10,471</td>
<td>0.1264</td>
<td>0.0032</td>
<td>(0.1201, 0.1328)</td>
<td>(2,289.45)</td>
<td></td>
</tr>
<tr>
<td>Plurality</td>
<td>12,296</td>
<td>0.1149</td>
<td>0.0029</td>
<td>(0.1093, 0.1206)</td>
<td>-2.6574</td>
<td>&lt;0.01</td>
</tr>
<tr>
<td>Pivotal</td>
<td>10,471</td>
<td>0.1264</td>
<td>0.0032</td>
<td>(0.1201, 0.1328)</td>
<td>(21,874.1)</td>
<td></td>
</tr>
</tbody>
</table>

H. Two-Tailed T-Test of Difference in Depth-of-Treatment Rates, Salient Decisions (assuming unequal variances)

<table>
<thead>
<tr>
<th>Type of Concurrence</th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>1,111</td>
<td>0.1386</td>
<td>0.0104</td>
<td>(0.1182, 0.1590)</td>
<td>-2.5213</td>
<td>&lt;0.05</td>
</tr>
<tr>
<td>Pivotal</td>
<td>4,807</td>
<td>0.1681</td>
<td>0.0054</td>
<td>(0.1575, 0.1787)</td>
<td>(1,761.92)</td>
<td></td>
</tr>
<tr>
<td>Plurality</td>
<td>4,781</td>
<td>0.1255</td>
<td>0.0048</td>
<td>(0.1161, 0.1349)</td>
<td>-5.9032</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>4,807</td>
<td>0.1681</td>
<td>0.0054</td>
<td>(0.1575, 0.1787)</td>
<td>(9,460.53)</td>
<td></td>
</tr>
</tbody>
</table>
I. Two-Tailed T-Test of Difference in Depth-of-Treatment Rates, Salient Decisions (assuming unequal variances)

<table>
<thead>
<tr>
<th>Type of Concurrence</th>
<th>N</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>95% C.I.</th>
<th>t-score (d.f.)</th>
<th>p-value (two-tailed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain Vanilla</td>
<td>987</td>
<td>0.1408</td>
<td>0.0111</td>
<td>(0.1191, 0.1626)</td>
<td>-2.3366</td>
<td>&lt;0.05</td>
</tr>
<tr>
<td>Pivotal</td>
<td>4,085</td>
<td>0.1701</td>
<td>0.0060</td>
<td>(0.1586, 0.1817)</td>
<td>(1,589.35)</td>
<td></td>
</tr>
<tr>
<td>Plurality</td>
<td>3,914</td>
<td>0.1252</td>
<td>0.0053</td>
<td>(0.1148, 0.1356)</td>
<td>-5.6822</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>Pivotal</td>
<td>4,085</td>
<td>0.1701</td>
<td>0.0060</td>
<td>(0.1586, 0.1817)</td>
<td>7,941.15</td>
<td></td>
</tr>
</tbody>
</table>

**Trends in Citation Rates Over Time**

Citation rates also (unsurprisingly) fluctuate over time. Even taking time into account, however, we find that, for much of a decision’s life, pivotal concurrences appear to be cited at higher rates than plain vanilla concurrences. As expected, this difference is least pronounced when looking at the entire set of lower court citations. Figure 14 plots citation rates for plain vanilla, pivotal, and plurality concurrences in each year following the promulgation of a five-vote-majority Supreme Court decision accompanied by concurrence through out the 66 year span of the dataset. The green dashed line indicates plurality citation rates; the maroon dotted line, the pivotal citation rate. The solid blue line plots the plain vanilla rate.

In the first 10 years of a decision’s life, pivotal and plain vanilla citation rates are distinct but converging, and they appear to be very similar (if not the same) between 10 and 30 years after the date of decision. After this point, however, pivotal concurrences are once again cited at a higher rate. Note that the fluctuations past the 40-year mark are the result of decreasing numbers of lower court citations to an ever-shrinking pool of 5-4 decisions.
The contrast between pivotal and plain vanilla citation rates is more distinct for a longer period of time in constitutional and salient cases. Figure 15 displays the same information as Figure 14 but is restricted to only the life cycles of constitutional decisions. As Table 2 would suggest, citation rates for all three types of concurrences are generally higher, and the difference between the pivotal and plain vanilla rates is greater. As in Figure 14, the citation rates gradually decrease as the decision ages (with a slight uptick in citations of plain vanilla concurrences at roughly the 30-year mark).
Finally, pivotal citation rates are also noticeably higher than plain vanilla rates across the life of salient decisions, as expected based on Table 6. Unlike in constitutional cases, however, the pivotal rate remains higher than the plain vanilla rate well past the 30-year mark. Note also the plurality citation rate. Unlike in Figures 14 and 15, the plurality citation rate appears to increase over time, though not monotonically so. This effect is, perhaps, a reflection of the *Marks* rule, in combination with the reality that the plurality concurrence generally provides that narrowest grounds for the decisions. Over time, then lower courts increasingly acknowledge this, to the effect that citations to the plurality concurrence increase over time. If this is true, however, the absence of this pattern across constitution cases — or the entire set of cases — is puzzling.
Figure 16. Life of a Decision in Salient Cases