DIVIDE & CONCUR: SEPARATE OPINIONS & LEGAL CHANGE

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To the extent concurring opinions elicit commentary at all, it is largely contempt. They are condemned for muddying the clarity of the law, fracturing the court, and diminishing the authoritative voice of the majority. But what if this neglect, or even disdain, of concurring opinions is off the mark? In this article, we argue for the importance of concurring opinions, demonstrating how they serve as the pulse and compass of legal change. Concurring opinions let us know what is happening below the surface of the law, thereby encouraging litigants to push the law in particular directions. This is particularly true of a type of concurrence we identify here for the first time: the "pivotal" concurrence. Pivotal concurrences occur when one or more members of a court majority also choose to write separately, undercutting the majority's rule in the case. Under the Supreme Court's "rule of five," lower courts ought to disregard pivotal concurrences and adhere to the majority opinion. But as we show here, that is hardly the case.

Utilizing a dataset created for this purpose, we demonstrate that pivotal concurrences are more common than one might think, are becoming yet more so, and—despite the Supreme Court's admonition to the contrary—are taken quite seriously by lower courts. Especially in constitutional, salient cases, lower courts appear to disregard a binding majority

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opinion in favor of the path offered by the concurrence. Rather than condemning this, we rely on the historical development of concurrences to show the vital function they play in motivating and smoothing the way for legal change. Contrary to conventional wisdom, we argue, there is beauty in a fractured court. Precisely in those cases that are most high-stakes and most contentious, it is important that the Justices reveal their individual views. Those views send essential signals to litigants and lawyers about where legal change is possible and where it is not, helping both to temper expectations and to move the law itself.

INTRODUCTION

Concurring opinions get no respect. Majority opinions garner most of the spotlight—and rightly so, given their status as binding law.[1] Dissents too have their admirers—not only because they present the case against the majority, but because there is something romantic about the idea of the Great Dissenter, speaking beyond today's majority to the future.[2] When it comes to concurrences, though, commentators have struggled to see their significance or majesty.

Indeed, when concurrences garner attention at all, it is often disdain.[3] That disdain is understandable. Even at their best, concurring opinions can read as gratuitous declarations; at worst they muddy the law. No one likes a "fractured" court. Concurring justices are thought to put their egos ahead of collegiality and coherence. They undercut the authority of a court speaking with a unified voice.[4] Expressing concerns like these early in his tenure, Chief Justice John Roberts vowed to seek consensus and to persuade his colleagues to relinquish going their separate ways.[5]

But what if this neglect, or even disdain, of concurring opinions is off the mark?

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1 *See* Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1694 (2014) ("[I]n most appellate courts . . . important issues of law [are] settled by majority decision[.]").

2 *See* ALAN BARTH, PROPHETS WITH HONOR 3 (1974) ("Like a seer, the dissenter sometimes peers into the future."); Benjamin N. Cardozo, *Law and Literature*, *in* JURISPRUDENCE IN ACTION 27, 48 (1953) (describing dissenters as heroic "gladiator[s] making a last stand against the lions"); *infra* note 91.

3 *See, e.g.*, Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After* Rapanos, 15 VA. J. SOC. POL'Y & L. 299, 299 (2008) (discussing the difficulties that divided courts present to onlookers and lower courts trying to determine precedent); Michael W. Schwartz, *Our Fractured Supreme Court*, POL'Y REV., Feb.–Mar. 2008, at 3–7 (discussing the virtues of unanimity and criticizing the current Court for its lack thereof); David O. Stewart, *A Chorus of Voices*, 77 A.B.A. J. 50, 50 (1991) (asking whether concurring opinions should be seen as "useless carbuncles on the body legal, permitting individual justices to indulge their egos, vent their spleen, and give advisory opinions on issues not before the Court"); Linas E. Ledebur, Comment, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PA. ST. L. REV. 899, 901, 914–21 (2009) (arguing for the wholesale abolition of concurring opinions on the Court).

4 *See infra* note 97 and accompanying text (collecting sources).

5 *See* Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC, Jan.–Feb. 2007, at 105 (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.'").

The thesis of this Article is that the importance of concurring opinions far exceeds the credit they get. Concurring opinions are the pulse and compass of legal change. They let us know what is happening below the surface of the law and signal its direction. Law is never static; it is always in flux. Concurrences send important signals both about what the law actually is, and also what it can (or is unlikely to) become. Concurrences, in their own vital way, help the legal world turn round.

That is particularly true of a type of concurrence heretofore unnoticed in case law or legal literature: the "pivotal" concurrence. Pivotal concurrences occur when one or more members of a court majority also choose to write separately, undercutting the majority's rule in the case. Under the Supreme Court's "rule of five," pivotal concurrences are vestigial.[6] Lower courts ought to disregard them and adhere to the majority opinion.[7] But in practice, that is hardly the case: pivotal concurrences carry far more than their assigned weight.

Consider, if you will, the Supreme Court's "revolutionary" 5–4 decision in *United States v. Lopez*.[8] In 1995 the Justices shocked the legal world by striking down a federal statue for the first time since the New Deal on the ground that it exceeded Congress' power under the Commerce Clause.[9] Chief Justice William Rehnquist assigned the opinion to himself, making clear his approach represented a break from the path of constitutional law to that point: "Admittedly, some of our prior cases have taken long steps down th[e] road"[10] "to convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further."[11] Many read the decision as indicating a notable change

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6 *See infra* subpart II.A.

7 *See* Maryland v. Wilson, 519 U.S. 408, 412–13 (1997) (stating that a rule did not constitute binding precedent because it was contained in a concurrence).

8 514 U.S. 549 (1995); *see* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (describing the decision as "revolutionary").

9 *Lopez*, 514 U.S. at 567–68; *see* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 128–29, 128 n.9 (describing commentators' shock at the decision and noting that the last time the Court had struck down a statute on these grounds was nearly sixty years earlier in *Carter v. Carter Coal Co.*, 298 U.S. 238, 297–310 (1936)).

10 *Lopez*, 514 U.S. at 567.

11 *Id.*

in the balance of federal power.[12] Yet, five years later Glenn Reynolds and Brannon Denning accurately characterized the situation in the lower courts, asking, "*What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*"[13]

Lopez's glancing impact should not have come as a surprise to anyone who focused on the concurrence Justice Anthony Kennedy authored on behalf of himself and Justice Sandra Day O'Connor, two of the five Justices in the *Lopez* majority. In it, Justice Kennedy said that the Court should exercise "great restraint" before ever striking down an act of Congress on Commerce Clause grounds.[14] He called the holding "limited" and 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* and *Katzenbach v. McClung*.[15]

Lower courts often looked to the Kennedy concurrence to limit *Lopez*'s scope. It was cited over two thousand times in the next eighteen years.[16] In *United States v. Wall*, for example, the Sixth Circuit considered a criminal defendant's challenge to the constitutionality of Congress's criminalization of the ownership of a "gambling business," on the theory that Congress had exceeded its Commerce Clause powers under *Lopez*; the court was not buying it (note the citation):

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12 *See, e.g.*, Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 168 (1996) ("[The *Lopez* Court's] abrupt departure from established practice has turned a safe stronghold into a new battleground for constitutional litigation."); Douglas W. Kmiec, *Wising Up: Supreme Court Restores the Constitutional Structure*, CHI. TRIB. (May 2, 1995), http://articles.chicagotribune.com/1995-05-02/news/9505020047_1_supreme-court-constitutional-order-national-regulation [https://perma.cc/B5BN-J83D] ("Lopez is the first step in nearly 60 years toward the restoration of a constitutional order premised upon a national government of enumerated and, therefore, limited powers.").

13 Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez*, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 371 (finding that "lower courts have tended to limit *Lopez* to its facts, rather than using it as a springboard to enforce a more robust theory of federalism").

14 *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring).

15 *Id.* at 568, 573–74; *see* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (holding that Congress was within its powers under the Commerce Clause in enacting the public accommodations provisions of the Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (holding that Congress was within its powers under the Commerce Clause in extending the public accommodations provision of the Civil Rights Act of 1964 to restaurants serving interstate travelers or serving food, a substantial portion of which has moved in interstate commerce).

16 This figure was confirmed via the citing references tool on Westlaw.

> 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).[17]

In case you are nodding your head in agreement with what the Sixth Circuit did, stop and think a moment. The vote in *Lopez* was 5–4. *The majority had spoken.* As the Justices have made clear repeatedly, five votes are the law and any opinion garnering those votes is to govern. Only when there is no clear majority might a concurrence carry weight.[18] But that was not the case here. So why was anyone following Justice Kennedy's lead, rather than the Chief Justice's? Dissenting in *Wall*, Judge Danny Boggs made just this point:

> 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.[19]

As we demonstrate (by analyzing a dataset we created for these purposes), the nature of the lower courts' reaction to Kennedy's pivotal concurrence in *Lopez* is not unusual. Pivotal concurrences are more common than one might think, are becoming yet more so, and—despite the Supreme Court's admonition to the contrary—lower courts take pivotal concurrences quite seriously.

The central point here is that concurrences—particularly pivotal concurrences—are a crucial and understudied feature of our legal landscape. Rather than the excess verbiage of judges who cannot control the need to speak separately, at the expense of the clarity and authority of the law, they are essential beacons and harbingers of legal stasis and legal change alike. They signal to litigants and lawyers where there are possibilities for movement in the law, and where there are not, which issues to bring to court and which to avoid.

The important role concurrences play is even more instructive given that they hardly are an essential part of a legal sys-

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17 United States v. Wall, 92 F.3d 1444, 1452 (6th Cir. 1996).

18 Marks v. United States, 430 U.S. 188, 194 (1977). The *Marks* rule is discussed more extensively below in section II.A.2.

19 *Wall*, 92 F.3d at 1455 (Boggs, J., concurring in part and dissenting in part).

tem. To the contrary, separate opinions are prohibited in many parts of the globe.[20] Even in the United States, they were a rare occurrence for many years after the Founding, coming into their own only in the early twentieth century during an era of great legal turmoil.[21] Again, this late birth of frequent separate opinions was no accident—it was an essential part of the process of rapid legal change. To this day, separate opinions—particularly pivotal concurrences—signal when the law is ripe for movement. Thus, instead of ignoring or condemning concurrences, we should be endeavoring to understand what function they serve, and why they get written when they do. That is the point of this Article.

Part I draws from practices of courts around the globe to explain the tradeoffs involved in the decision to permit or prohibit separate opinions. These examples show how allowing concurring and dissenting opinions provides a certain amount of judicial transparency, at the cost of clarity and judicial authority. For most of its first one hundred plus years, the Supreme Court of the United States leaned much more toward clarity and authority, but by 1941 that system of restraint had gone by the boards. Separate opinions became business as usual. Why, precisely, this was the case, however, has remained unclear.

In Part II we begin to look for an answer to the role of separate opinions—and particularly concurrences—by focusing on the lower courts' decisions to follow such opinions. The Supreme Court of the United States has indicated quite clearly what lower courts are to do with concurrences: ignore them, except in the rare case in which a court is so fractured that there is no majority opinion.[22] Courts are to follow precedent, not engage in guesswork as to where the law is headed. Yet, as we show by analyzing a novel database of Supreme Court concurrences and all lower court citations to them between 1946 and 2012, lower courts do not follow instructions. Instead, they cite and discuss pivotal concurrences at much higher rates than they do for non-pivotal concurrences, even after controlling for other factors. In short, the lower courts think there is something valuable going on in certain concurring opinions, so much so that they appear to consult them for direction even when told they have no formal precedential value.

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20 *See infra* section I.A.1.
21 *See infra* subpart I.B.
22 *See infra* subpart II.A.

Part III then returns to the history of the growth of separate opinions in the early 1900s to offer a hypothesis about what motivated their rise, and what that rise says about the importance of pivotal concurrences. This was the period when the Supreme Court fractured in the face of monumental legal challenges to legislation adopted to ameliorate and manage the effects of the Industrial Revolution. During the troubled decades of the early twentieth century, concluding with President Franklin Roosevelt's attempt to pack the Supreme Court in 1936, the Justices abandoned an internal (and largely unknown until unearthed by political scientists) "norm of consensus."[23] Which is to say, until the early 1900s, the Justices intentionally suppressed disagreement among themselves, keeping it from public view to bolster the clarity of the law and the authority of the Court itself. But the issues that confronted the Justices in the early 1900s were so important that dissent no longer could be suppressed, and liberal and conservative voting blocs burst into public on the Court.

The fracturing of the Court in the early 1900s occurred in salient, constitutional cases.[24] In these cases, the Justices concluded, it was important to let the world know where the fault lines among them rested, in part to drive litigation to the Court to move the law, and in part to signal the need for social change. This phenomenon persists to the present day. In salient cases—particularly constitutional ones—when the Supreme Court fractures, the lower courts take notice. Rather than simply following majority opinions, as the Justices have told them to, they work hard to read the tea leaves, focusing closely on concurrences as their guide to the future.

We conclude, normatively, by bucking common wisdom. There is, we argue, beauty in a fractured court. Precisely in those cases that are most high-stakes and most contentious, it is important that the Justices reveal their individual views. Because, revealed or not, those are the views that will govern the decision of later cases. Displaying those views publicly sends essential signals to litigants and lawyers about where legal change is possible, and where it is not, helping both to temper expectations and to move the law itself.

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23 *See* Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 362, 366 (2001) [hereinafter Epstein et al., *Norm of Consensus*]; *infra* note 195 and accompanying text.

24 *See infra* note 195 and accompanying text.

I
THE CHOICE TO ALLOW SEPARATE OPINIONS

All court systems must make a fundamental decision whether to allow dissenting and concurring opinions. In separate 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."[25] Historically, courts around the globe have varied considerably in their amenability to separate concurrences and dissents. Subpart I.A looks to global "*per curiam*" and "*seriatim*" systems for information as to why one might favor separate opinions or suppress them. Subpart I.B then describes how the United States evolved in its own somewhat unique way, with one opinion denominated that of "the Court," surrounded by separate opinions. Subpart I.C puts the point sharply: why, in the United States, do we tolerate concurrences, which do not exist under *per curiam* and *seriatim* systems, and which are widely condemned even here?

A. *Per Curiam*, *Seriatim*, and Hybrid Courts

1. Per Curiam *Courts*

In many countries, particularly those with a civil law tradition, separate opinions are not allowed. Courts speak "*per curiam*,"[26] with one and only one voice: there are no concurrences and no dissents. This, for example, is the practice in France and Italy; many European constitutional courts operate similarly.[27]

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25 Peter McCormick, *Structures of Judgment: How the Modern Supreme Court of Canada Organizes Its Reasons*, 32 DALHOUSIE L.J. 35, 41 (2009); *accord* M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 285–86 (concluding that how the Supreme Court communicates its decisions reflects the Court's power and therefore depends upon the Court's goals).

26 In the United States, courts use the phrase "*per curiam*" to refer to opinions that are signed not by one judge but by the entire court. We mean something slightly less formal: an opinion is *per curiam* for our purposes to the extent it is the sole opinion in a case, unaccompanied by dissent or concurrence.

27 *See* Rosa Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States*, at 18–19, Pol'y Dept. C, Citizens' Rights and Const'l Affairs, PE 462.470 (Nov. 2012) (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. *Id.* at 18. For a more detailed discussion of the Italian judiciary, see generally THE ITALIAN CONSTITUTIONAL COURT 51 (Servizio Studi & Ufficio Stampa eds., Clare Tame trans., 4th ed. 2002). In the European Union, the rule of *per curiam* opinions is also followed in Belgium, Luxembourg, Malta, the Netherlands,

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.[28] Suppression also is more compatible with the broader civilian tradition, in which judges (ostensibly) do not make but merely *apply* codified law.[29]

Today, however, the suppression of separate opinions is justified primarily as enhancing 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."[30] The Italian Constitutional Court considered allowing anonymous dissents, but rejected the idea because it presented "too pluralistic a view of the Constitution."[31] Others express concern that dissenting opinions might "undermin[e] the authority of the decisions of the Court" and provide "a reduced incentive for judges to seek the broadest possible consensus."[32]

Suppressing separate opinions keeps the focus on the court as an institution. 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.[33] This phenomenon, it is argued, fuels a circle

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and Austria. Raffaelli, *supra*, at 17, 19–20. *See generally* Pasquale Pasquino, European Constitutional Courts and USSC: Some Differences (Nov. 1, 2007) (unpublished manuscript) (on file with author) [hereinafter Pasquino, European Constitutional Courts] (contrasting judicial review as it exists in continental Europe with the practice in the United States).

28 Pasquino, European Constitutional Courts, *supra* note 27, at 8.

29 *See* McCormick, *supra* note 25, at 40 (explaining that civilian codes are understood to be objective, that judges are expected simply to apply the code to the facts, and that judicial decisions are not supposed to have precedential value in the same or lower courts).

30 Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 ARB. INT'L 223, 232, n.48 (2004) (quoting John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 OXFORD J. LEGAL STUD. 221, 234 (2000)) (internal quotation marks omitted).

31 John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1696 (2004); *see* Michele Taruffo & Massimo La Torre, *Precedent in Italy*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 141, 145 (D. Neil MacCormick & Robert S. Summers eds., 1997) (noting disagreement among scholars over the virtues of permitting dissenting and concurring opinions).

32 THE ITALIAN CONSTITUTIONAL COURT, *supra* note 27, at 51.

33 *See* Ferejohn & Pasquino, *supra* note 31, at 1672–73, 1697 (contrasting European judges, who are "not able to develop ideologically distinct public personalities" with Justice Antonin Scalia, who, through "strident dissent[s]" sought

in which judges feed their public persona by writing more separate opinions. If judges cannot write separately, they remain in the background, and the court's opinions stay in the foreground.

2. Seriatim *Courts*

In sharp contrast to *per curiam* systems, Commonwealth countries—e.g., New Zealand, Australia, South Africa, and India—traditionally wrote opinions *seriatim*.[34] Under that practice, each judge is expected to produce her own opinion disposing of the case before the court.[35] Once the opinions are published, one reads them all to determine the "holding" from the locus of authority among the individual opinions.[36] The *seriatim* system has the advantage of providing 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.[37] Thomas Jefferson, who favored the practice and deplored John Marshall for eliminating it on the United States Supreme Court, called judges "lazy or timid" for failing

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to "persuade the public, or parts of it, as much as he [did] his fellow Justices"); *see also* THE ITALIAN CONSTITUTIONAL COURT, *supra* note 27, at 51 (noting that allowing dissenting opinions may lead to "excessive 'personalization' of constitutional judgments"); John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 159–61, 170–71 (1999) (noting that developments during the Taney Court contributed to a focus on the views of individual Justices).

34 Edward McWhinney, *Judicial Concurrences and Dissents: A Comparative View of Opinion-Writing in Final Appellate Tribunals*, 31 CAN. B. REV. 595, 601–09 (1953). *But see id.* at 607–08 (noting that the Irish Supreme Court had only once, since 1937, failed to deliver a single opinion for the court); Kurt H. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, 8 AM. J. COMP. L. 415, 416 (1959) ("In the Irish Republic, no dissent may be announced . . . in cases where the Supreme Court decides a question involving the constitutional validity of a law.").

35 Raffaelli, *supra* note 27, at 8 n.1.

36 *See* WILLIAM D. POPKIN, EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES 10 (2007) (describing locating a majority opinion as a "collaborat[ion]" between bench and bar "to reach a decision based on their efforts to apply legal principle (the common law) to the individual case"); *see* Henderson, *supra* note 25, at 292–93 (noting that the sum of the separate opinions "would amount to the legal rule in the case").

37 *See* Henderson, *supra* note 25, at 293–94. Henderson notes that although the origins of *seriatim* practice are unknown, the separate oral delivery of each judge's opinion may reduce the appearance and perhaps the incidence of corruption or collusion, and may hold each judge accountable, providing an incentive to work hard. *Id.*

to express their own views.[38] As quaint as the practice may seem today—and, as we will see, 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.[39] Thus, precedent is particularly weighty, because it represents a consensus independently reached.[40]

3. *The Tension*

These systems represent polar opposites, and the choice between them entails significant tradeoffs. *Seriatim* systems are transparent, but at the cost of notable loss of clarity.[41] *Per curiam* systems have clarity and authority in abundance, but do not reveal what is going on in each judge's mind.[42] Thus, even within each system there have been those who advocated moving toward the other, particularly when the need to capture one set of values was particularly compelling.[43]

The United Kingdom has long felt the tension, abandoning its *seriatim* tradition when circumstances warranted. Lord Mansfield, Lord Chief Justice of the King's Bench, did away with *seriatim* judgments during the late eighteenth century, particularly in commercial cases.[44] As Mansfield (or rather, conspicuously, "the Court") stated in *Milles v. Fletcher*, "The great object in every branch of law, but especially in mercantile

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38 Alder, *supra* note 30, at 238; *see also* McWhinney, *supra* note 34, at 609 ("Jefferson thought that there should be a rule requiring the judges to announce seriatim their opinions in each case . . . .").

39 *See* McCormick, *supra* note 25, at 38 (describing *seriatim* decision as "the practice whereby every member of a multi-judge appeal panel delivers a full free-standing set of reasons, each writing as if nobody else were doing so, their 'votes' for and against the appeal being totalled to generate an outcome").

40 *Cf.* JAMES SUROWIECKI, THE WISDOM OF CROWDS xix–xx (2005) ("Paradoxically, the best way for a group to be smart is for each person in it to think and act as independently as possible.").

41 *See* Henderson, *supra* note 25, at 298–99 (arguing that "seriatim opinions add[ ] a layer of confusion" because they lack "binary win-loss character," making it more difficult to ascertain the rule of the case, and to determine the strength of precedent).

42 David Currie notes that although *per curiam* opinion writing may "strike us as both tidier and more powerful . . . seriatim opinions actually may give us a better basis for predicting later decisions." DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 14 n.61 (1985).

43 *See, e.g.*, Ruth Bader Ginsburg, *Remarks On Writing Separately*, 65 WASH. L. REV. 133, 133 (1990) (noting that some in the civil law world have come to support separate opinions, and that judges in the United States may learn from jurists abroad to exercise greater restraint before writing separately).

44 *See* Henderson, *supra* note 25, at 294.

law, is certainty."[45] The Privy Council, which gave advice to the King on legal questions from the colonies, also spoke with one voice.[46] "There were 'policy considerations 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.'"[47] For related reasons, the intermediate criminal courts in the U.K. did not issue separate opinions: "To the criminal, punishment itself is bitter enough, without the salt of a favourable but impotent dissenting judgment being rubbed into the wound."[48]

Even in these eddies of *per curiam* practice, however, there remained pressure to revert to *seriatim* treatment. Today in the U.K., dissents are allowed in intermediate criminal appeals, albeit only with the permission of the presiding judge.[49] Similarly, 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.[50]

Australia also has moved toward consensus. Informal conferencing among the justices of the Australian High Court was encouraged, and then—beginning in 1998—Chief Justice Gleeson held formal conferences.[51] This practice may have paved the way for a period of unprecedented unity on the High Court, from 2009 through 2011, following the ascension of

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45 Milles v. Fletcher [1779] 99 Eng. Rep. 151, 152. *See generally* Henderson, *supra* note 25, at 295. Because plaintiffs had significant liberty to select a forum—and because judges were paid by the case—Mansfield's switch from *seriatim* to *per curiam* was also a bid for relevance in a competitive and fast-changing legal market. Henderson, *supra* note 25, at 296–98; *accord* Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1189 (2007) (describing contemporary competition among judges, for fees, which were a "significant component[ ] of total judicial income").

46 *See* McWhinney, *supra* note 34, at 599 ("In theory, since the Judicial Committee [of the Privy Council], as they themselves noted, only 'advise' the Crown, they must present united counsel to the Crown . . . .").

47 Ginsburg, *supra* note 43, at 135 (quoting LOUIS BLOM-COOPER & GAVIN DREWRY, FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY 82 (1972)).

48 Ginsburg, *supra* note 43, at 135 (quoting BLOM-COOPER & DREWRY, *supra* note 47, at 81).

49 Ginsburg, *supra* note 43, at 135.

50 Alder, *supra* note 30, at 235.

51 *See* Michael Kirby, Justice of the High Court of Austl., Ten Years in the High Court–Continuity and Change 26 (Oct. 17, 2005), http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_1005.pdf [https://perma.cc/FE7U-4GGC] (describing Gleeson's practice of holding conferences after "virtually every case" to discuss "issues and tentative impressions"); *see also* Andrew Lynch, *The Gleeson Court on Constitutional Law: An Empirical Analysis of Its First Five Years*, 26 UNSW L.J. 32, 49 n.57 (2003) (noting that informal conferencing between justices did take place prior to Gleeson's arrival).

Gleeson's successor Chief Justice Robert French in 2008 (and the corresponding departure of Judge Michael Kirby, Australia's "Great Dissenter").[52] In that period, the High Court decided almost half its cases by issuing one joint opinion.[53] There was a bit of a reversal in 2011; the High Court reached consensus less than 17% of the time that year.[54] Still, the rate of dissent continued to decline, with just under a third of cases receiving any dissenting opinion in 2012.[55]

Conversely, courts that traditionally suppress opinions have demonstrated some tolerance for dissent. The German Constitutional Court first allowed dissenting opinions, or *sondervotum*, in 1970, though they are still rare in practice.[56] The German Court, in turn, served as a model for current constitutional courts in the Czech Republic, Hungary, Bulgaria, and Croatia.[57] 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.[58] China, which until recently issued only short and conclusory opinions, recently acted to permit dissenting opinions in certain situations.[59]

Even on courts that still adhere to a strict system of unanimity, there are other ways to ensure that contrary views are expressed. The judges of the Italian Constitutional Court speak with one voice,[60] but the opinion itself is published in the academic journal *Giurisprudenza Costituzionale*, accompanied

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52 Andrew Lynch, *By Nature, High Court Judges Are Seldom in Agreement*, AUSTRALIAN (Feb. 17, 2012), http://www.theaustralian.com.au/business/legal-affairs/by-nature-high-court-judges-are-seldom-in-agreement/news-story/8ee78efbbca176b726eac82ed559ddc2 [https://perma.cc/X6DS-EKYE] [hereinafter Lynch, *By Nature*].

53 *Id.*

54 *Id.*

55 Andrew Lynch & George Williams, *The High Court on Constitutional Law: The 2012 Statistics*, 36 UNSW L.J. 514, 515 tbl.A (2013).

56 Raffaelli, *supra* note 27, at 22 (noting that although dissenting opinions were initially used extensively, by 2012 they were utilized in only 6% of cases); *see also The Gavel and the Robe*, ECONOMIST, Aug. 7, 1999, at 33, 34 (describing Germany's approach, which allows a "tally of votes cast and dissenting opinions to be published alongside the court's judgment").

57 Julia Laffranque, *Dissenting Opinion and Judicial Independence*, 8 JURIDICA INT'L 162, 165 (2003).

58 *Id.*

59 H.E. Wan Exiang, Vice President of the Supreme People's Court of China, Judicial Reform in China, Latest Developments and Potential Challenges: Remarks (Sept. 25, 2007), http://www.oas.org/en/media_center/speech.asp?sCodigo=07-0115 [https://perma.cc/LV34-63LY].

60 THE ITALIAN CONSTITUTIONAL COURT, *supra* note 27, at 50–51 (noting that there is no official means of knowing whether a decision is unanimous, nor how individual judges voted).

by critical commentary by academics and interested third parties.[61] Similarly, the European Court of Justice issues only one opinion, but it publishes the views of the Advocate General, which may stand in for separate opinions by expressing contrary arguments.[62]

B. The "Customary Middle Way": The Practice of the United States Supreme Court

In contrast with systems that struggled to accommodate competing values, the Supreme Court of the United States early on settled into its own unique hybrid. There is always an opinion "for the Court." And yet, separate views are permitted as well. In this way, the authority and clarity of the judgment are obtained, while still allowing for transparency. In 1990, Justice Ruth Bader Ginsburg referred to this as the "customary middle way."[63]

For well over one hundred years, this middle way tilted heavily toward consensus. And then, sometime in the late 1930s, that longtime equilibrium collapsed. Something happened. Not only did separate opinions become common, but we saw the emergence of opinions opposing the majority on behalf of a "bloc" of Justices.[64] This was (and remains) a sharp deviation from practices elsewhere around the world.

1. *The Early Years*

The Supreme Court originally adhered to the English *seriatim* tradition.[65] But John Marshall changed that.[66] He persuaded his colleagues to follow the lead of the Virginia Court of Appeals Chief Judge Edmund Pendleton, who had imported Mansfield's practice of issuing one opinion for the Court.[67]

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61 Pasquino, European Constitutional Courts, *supra* note 27, at 10–11.

62 Raffaelli, *supra* note 27, at 33–35 (noting disagreement among scholars as to whether the Advocate General's views serve as an effective substitute for separate opinions).

63 Ginsburg, *supra* note 43, at 149.

64 The emergence of voting blocs on the Court is discussed *supra* section I.B.2.

65 Alder, *supra* note 30, at 238.

66 SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 20 (Scott Douglas Gerber ed., 1998). In truth, publishing an opinion of the Court was a burgeoning practice in the pre-Marshall Court, with such opinions constituting at least half of all opinions between 1794 and 1799. POPKIN, *supra* note 36, at 62–63. This practice was consolidated under Chief Justice Marshall, however. Herbert A. Johnson, *Judicial Institutions in Emerging Federal Systems: The Marshall Court and the European Court of Justice*, 33 J. MARSHALL L. REV. 1063, 1066 (2000).

67 Henderson, *supra* note 25, at 304, 313–14; McWhinney, *supra* note 34, at 609.

Marshall sacrificed his own views to entrench the practice, suppressing his own disagreement even in opinions he authored for the Court.[68] Marshall expressed his preference for speaking with one voice in an article he published pseudonymously in a Philadelphia newspaper in 1819, a response to criticism of his opinion in *McCulloch v. Maryland*[69]:

> 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 opinion of all.[70]

President Jefferson deplored the practice of delivering one opinion of the Court, writing, "An opinion is huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous . . . by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning."[71] He appointed a man after his own beliefs, William Johnson, to the Court.[72] But despite Johnson's efforts, until 1823 no other Justice had written more than eight separate opinions, concurring *or* dissenting.[73] Between 1805 and 1822 there were only twenty-four concurrences total, twelve of which were written by Johnson himself.[74] Writing to Jefferson in 1822, Johnson recounted his

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68 *See* Henderson, *supra* note 25, at 316 ("Although Marshall dissented occasionally, he generally led by example and acquiesced to the compromise position."); Donald G. Morgan, *The Origin of Supreme Court Dissent*, 10 WM. & MARY Q. 353, 369 (1953) (quoting Justice Johnson who wrote he was not surprised to see Marshall "delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote"); *see also id.* at 356–63 (detailing Marshall's pursuit of harmony and unity on the Court regardless of any private disagreements among the Justices).

69 17 U.S. (4 Wheat.) 316 (1819).

70 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 320 (1919). He was responding to criticism published by his arch-enemy, Spencer Roane, a Justice of the Virginia Court of Appeals. For historical context, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE 82–83 (2009) [hereinafter FRIEDMAN, THE WILL OF THE PEOPLE].

71 Morgan, *supra* note 68, at 358 (quoting Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *in* 12 THE WORKS OF THOMAS JEFFERSON 175, 177–78 (Paul Leicester Ford ed., 1904)). 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, *supra* note 68, at 357–58.

72 Morgan, *supra* note 68, at 353–54 (noting that Johnson "spearheaded" the Jeffersonian "movement for free expression" in the form of dissents); *accord* Henderson, *supra* note 25, at 317–18 (noting that although dissents were somewhat successful at breaking Marshall's grip on the court, there was still only approximately one dissent for every twenty-five decisions during this period).

73 Morgan, *supra* note 68, at 363 & n.35.

74 *Id.* at 366 & n.48.

struggles beginning with his 1805 concurrence in *Huidekoper's Lessee v. Douglass*[75]:

> 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.[76]

Under Marshall's successors, separate opinions became somewhat more frequent, though they were still a relative rarity. From the Marshall Court until the Hughes Court (beginning in 1930), the ratio of separate opinions to majority opinions was roughly 10%.[77] This ratio ranged from a high of 18% on the Taney Court to a low of 7% in the White Court,[78] but 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.[79]

Moreover, throughout this time, separate opinions had little impact, in part because—until the turn of the twentieth century—they were (for the most part) just that: a Justice writing on his own.[80] Ideological blocs, which today manifest themselves in a principal majority opinion accompanied by a principal dissent, were infrequent.[81]

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75 7 U.S. (3 Cranch) 1 (1805).

76 Morgan, *supra* note 68, at 369.

77 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, *supra* note 33, at 176–77 nn.238–39 & chart B.

78 Kelsh, *supra* note 33, at 177.

79 *See infra* Figure 1.

80 Kelsh, *supra* note 33, at 166–69. The handful of Justices who penned many of the early dissents (Johnson, Daniel, Clifford, and Harlan) "nearly always wrote only for themselves" and were each the "dominant dissenter of their times." *Id.* at 169.

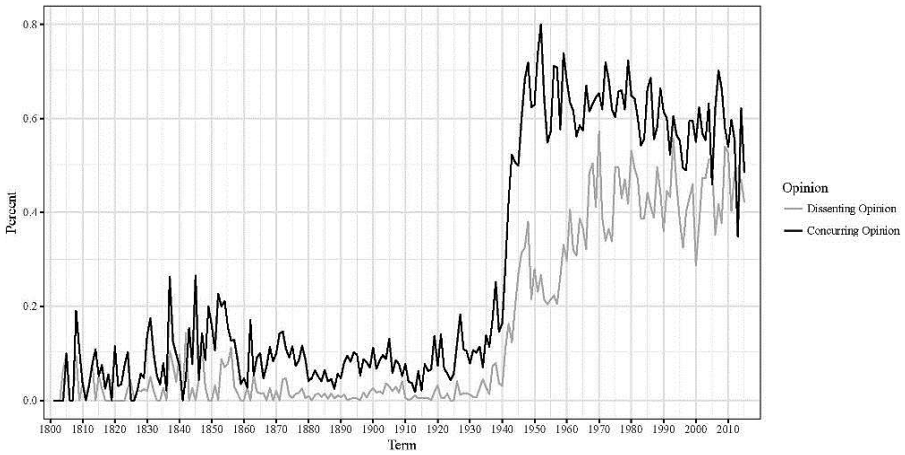
81 Justices did, in fact, begin dissenting in blocs far before the twentieth century, although the practice was relatively rare. During the Taney Court, for example, Justices dissented in three- and four-Justice blocs in all but four years of Chief Justice Taney's twenty-eight-year tenure. Susan Navarro Smelcer, The Evolution of Dissent in the United States Supreme Court 94 fig.3.9 (2015) (unpublished Ph.D. dissertation, Emory University) (on file with authors). Of the 229 cases in which at least one Justice dissented and offered a rationale (of the 1,667 decided during Taney's tenure), 177 (78.3%) were solo authored, 25 (11.1%) were joined by one Justice, 18 (8.0%) were joined by two Justices, and 6 (2.7%) were joined by three Justices. *Id.* at 91.

2. *The Breach*

Then, this relative unity collapsed.

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 is clearly visible in Figure 1, which plots concurring and dissenting opinions as a percentage of all Supreme Court decisions from 1800 through 2015.[82]

FIGURE 1. RATES OF DISSENTING AND CONCURRING OPINIONS



In Figure 1, 1941 jumps out.[83] 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.[84] Although it is less sharp, concurrences show a similar jump.

Moreover, as ground-breaking work by Herman Pritchett showed in 1948, the Justices had begun to vote in blocs.[85] Pritchett began to catalog those voting blocs, by demonstrating the patterns of agreement among the Justices. Table 1, for

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82 These data were collected from LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 252 tbl.3-2, 258 tbl.3-3 (6th ed. 2015) and THE SUPREME COURT DATABASE, http://scdb.wustl.edu/ [https://perma.cc/7LRF-DG6Z].

83 *See* Thomas G. Walker, Lee Epstein & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 363–64 (1988) ("[C]onsensus norms did not gradually erode, but were abruptly shattered [during the 1941 term].").

84 Averages calculated from data provided in EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM, *supra* note 82, at 252 tbl.3-2, 258 tbl.3-3.

85 *See* C. HERMAN PRITCHETT, THE ROOSEVELT COURT 23–45 (First Quadrangle 1969) (1948) (explaining how the Court had fractured into liberal and conservative blocs leading up to 1941).

example, is Pritchett's summary of the 1939 and 1940 Terms[86]: (We have added dark lines to make clearer the bloc structure.)

TABLE 1. NUMBER OF AGREEMENTS AMONG SUPREME COURT JUSTICES IN CONTROVERSIAL CASES, 1939 AND 1940 TERMS (IN PERCENTAGES)

Justice	**McReynolds**	**Roberts**	**Hughes**	**Stone**	**Reed**	**Frankfurter**	**Murphy**	**Black**	**Douglas**
McReynolds	–	64	64	41	35	31	38	24	24
Roberts	64	–	75	51	45	45	39	37	36
Hughes	64	75	–	78	63	64	53	49	49
Stone	41	51	78	–	81	84	75	69	69
Reed	35	45	63	81	–	86	80	79	79
Frankfurter	31	45	64	84	86	–	91	85	84
Murphy	38	39	53	75	80	91	–	89	89
Black	24	37	49	69	79	85	89	–	100
Douglas	24	36	49	68	79	84	89	100	–

3. *Return to the* Seriatim *Court?*

The phenomenon that burst into public view in 1941 gathered speed in the ensuing years as separate concurrences became frequent as well. In sharp contrast to the Supreme Court in the early 1900s, the Justices were unanimous during October Term 2014 only 40% of the time. Concurrences rose sharply in the 1960s; today they continue to hover between 40% and 50% (see Figure 1 above).[87]

This change in opinion writing practices has led some to suggest the Supreme Court had returned to its *seriatim* opinion writing habits of old. In 1957, Bernard Schwartz remarked of the growing trend that "[i]f carried to its extreme, the right to concur or dissent leads back . . . to the practice of . . . *seriatim* opinions."[88] 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 for the court sometimes accompanied by a separate opinion—toward the Law Lords' pattern of seriatim opinions, each carrying equal weight . . . ?[89]

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86 C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890, 894 tbls.6, 7 (1941).

87 *See* EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM, *supra* note 82, at 258 tbl.3-3.

88 BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 356–57 (1957).

89 Ginsburg, *supra* note 43, at 149.

Perhaps most important, our current Chief Justice, who has sought greater unanimity, has asked the same: "[N]owadays, 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."[90]

C. Why Concurrences?

These expressions of concern about the fracturing of the Court raise the question of why we allow concurring opinions. What function do they serve? They do not exist at all in *per curiam* systems; even when dissent is permitted to some degree, concurrences are non-existent. And, strictly speaking, concurrences do not exist in *seriatim* systems either. It is true that in *seriatim* systems each justice writes separately, but that only underscores the point: no opinion is, strictly speaking, a "concurrence." Concurrences are the particular curiosity of the United States' hybrid middle way. A judge who agrees with the Court's resolution of a case, still feels the need to (and is permitted to) express his or her own views as to the rationale. Perhaps concurrences are the accidental by-product of Chief Justice John Marshall's pushing the Supreme Court from a *seriatim* practice to consensus: it might have seemed a step too far to bar other Justices from writing altogether. But that hardly explains the persistence of the practice, and its explosion in the twentieth century.

Everyone seems to understand dissents. They are a principled call for change, an insistence that all is not right. A dissenting opinion will not alter the doctrine now, but it might attract adherents in the future.[91] Think, for example, of Justice John Marshall Harlan's solo opinion in *Plessy v. Ferguson*, decrying the doctrine of separate but equal.[92] He was outvoted

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90 Rosen, *supra* note 5, at 106.

91 *See* Cardozo, *supra* note 2, at 49 ("The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years."); Henderson, *supra* note 25, at 340–41 ("[D]issent allows lower courts, lawyers, and politicians to measure the weight of the opinion and to plan a political or legal counterattack. . . . Dissent undermines the force of an opinion, and allows opponents to hope for the day when they will control the Court."); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1347 (2001) (noting that although dissent cannot alter the "binding and dispositive force of the Court's judgment on the parties before it," strong dissents may have a significant impact on the public); Raffaelli, *supra* note 27, at 15 ("Dissents can thus play an essential role in the future development of the law: in some cases, they may eventually become the majority opinion, or influence it.").

92 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

8–1, but the loneliness of his voice over time served only to underscore the moral clarity of the position for which he argued. The importance of dissenting has been acknowledged worldwide, even where the strong norm of consensus controls.[93]

But what conceivably explains concurrences? Even in places that have allowed dissent, concurrences remain off the table. And there are compelling reasons why. Concurrences destroy the clarity and authority of a majority opinion, without adding the principled disagreement of a dissent. Compared with dissents, concurrences appear as judicial sour grapes. "If the opinion had been assigned to me," the concurring judge can appear to write, "I'd have written it differently."

That is why, even in the United States, which allows concurrences, a common complaint is that fracturing the rationale in a case undermines the Court's credibility. 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."[94]

An even stronger argument against concurrences, and the more common one today, is that they destroy legal clarity.[95] Relatively few dissents turn into majority opinions.[96] 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.[97] But since the late 1960s, concurrences

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93 *See, e.g.*, Raffaelli, *supra* note 27, at 12 (noting that dissents have been permitted in both civil law and common law countries).

94 Rosen, *supra* note 5, at 105.

95 *See* Andrew Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, 27 MELB. U. L. REV. 724, 750 (2003) [hereinafter Lynch, *Rewards*].

96 Raffaelli, *supra* note 27, at 15 ("[M]ost dissenting opinions never find their way into a subsequent final judgment.").

97 *See* Alder, *supra* note 30, at 240 ("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."); Berkolow, *supra* note 3, at 354 (noting that when the Court speaks with one voice, it can "assure clarity of the law, which provides guidance to the legal community, predictability and stability" and that writing separately undermines this); Ginsburg, *supra* note 43, at 148 ("More unsettling than the high incidence of dissent is the proliferation of separate opinions with no single opinion commanding a clear majority"); Lynch, *Rewards*, *supra* note 95, at 750 ("A profusion of substantially similar concurring opinions serves less purpose than a clear statement of dissent and is more harmful to the coherence of the law that the court lays down."); McWhinney, *supra* note 34, at 614 ("Critics of the practice of the United States Supreme Court in opinion-writing since 1937 point to a diminution

have only become more frequent, much like the dissents have since the 1940s. Why?

II
THE PECULIAR STATUS OF CONCURRENCES

Concurring opinions not only muddy the law and undermine the authority of the Court; they also put lower courts in an impossible bind. If the Justices offer different rationales, and if in doing so indicate that the law is headed in a direction other than that indicated by the majority opinion, must the lower court still follow the majority opinion at the risk of reversal, or can it follow the concurrence? Subpart II.A explains how lower courts get trapped between adhering to a majority opinion, though they know they will be overruled, or ignoring "precedent" in favor of a "prediction" as to what the higher court will say. The Supreme Court ostensibly has adopted a "do as I say not as I do" posture, effectively instructing lower courts to ignore most of the concurrences the Justices continue to write. Subpart II.B offers a new taxonomy of concurrences to indicate in which cases the lower courts face this tension most acutely. We distinguish "pivotal," "plurality," and "vanilla" concurrences, with pivotal concurrences being the real culprit. Then, in subpart II.C, we underscore the depth of the tension lower courts face by showing that lower courts cite surprisingly often to pivotal concurrences, despite the Supreme Court's indication that they have no weight. We do this using a database we created of citations to Supreme Court concurrences written between 1946 and 2012.

A. The Dilemma for Lower Courts

To understand the problem of concurrences for lower court judges, put yourself in the position of a federal court of appeals judge. It is common wisdom that lower courts do not like to be reversed. The obvious way to avoid reversal is to follow binding Supreme Court precedent. But suppose that, despite what precedent tells you, you believe the Court itself is likely to follow not the majority opinion in a prior case, but a decisive *concurring* opinion written by a swing Justice. At that point you are between a rock and a hard place. Should you follow the majority opinion, anticipating reversal? Or should you buck

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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 the lawyer who must advise him.").

the majority opinion in favor of the concurrence and avoid reversal—while at the same time awarding victory to the side that ultimately will prove to have deserved it?

Although the Supreme Court has never spoken directly to this issue, the Court's answers to related questions indicate its view that lower courts should follow the majority opinion, despite whatever writing might be on the wall. In the balance of this Part we make the case that lower courts must follow binding precedent and ignore concurring opinions, even if they are sure they will be reversed.

1. *The Rule of Five*

It is an essential feature of common law collegial courts, including nearly every court in the United States, that a decision by majority vote is binding.[98] Litigants in an individual case are of course bound by the voting with respect to the judgment or the disposition of the case—affirm, reverse, vacate. But to what extent does majority rule extend beyond the judgment to the *holding* or *rationale* for a particular case?[99] This question is particularly critical for courts like the Supreme Court that have discretionary dockets, because they review only a small fraction of the cases decided by the lower courts they supervise.[100] The question is surprisingly unexamined, both in the literature and by the Supreme Court itself, but a pretty definitive answer can be inferred from what has been said on related issues.[101]

As a practical matter, garnering five votes for an opinion is critical. Justice Brennan was fond of teaching his law clerks,

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98 *See* Waldron, *supra* note 1, at 1698 ("And in the United States, the fact that courts use [majority decision] is the crucial assumption on which the whole politics of judicial appointments turns.").

99 See FREDERICK SCHAUER, THINKING LIKE A LAWYER 44–60 (2009) (discussing the difficulties that arise when determining the scope of a precedent). Schauer writes, "It is easy to *say* that a court is expected to follow a past decision . . . but it is rarely easy to say what counts as a past decision." *Id.* at 44.

100 EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM, *supra* note 82, at 67, 82 tbl.2-6 (noting that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and detailing the Court's low rates of discretionary review).

101 For proposals on how lower courts should rule in these situations, see Igor Kirman, Note, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2085, 2105 (1995) (proposing accommodating concurring opinions to the extent they are numerically necessary to the judgment and compatible with the rule stated by the majority); Tristan C. Pelham-Webb, Note, *Powelling for Precedent: "Binding" Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 695, 733 (2009) (noting confusion in the lower courts and counseling against giving precedential value to concurrences that conflict with majority opinions).

and even his fellow Justices, "how to count to five."[102] By that he meant that the way to make binding law was to garner five votes for a single opinion, rendering it the opinion for the Court—binding on lower courts and, except when explicitly overruled, the Supreme Court itself. When five Justices join an opinion, the opinion's author writes not for herself but for a "court."

The Court itself has made clear the binding nature of the rule set out in majority opinions. In *Hutto v. Davis*, a *per curiam* Court warned: "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."[103] And in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court's test for overruling asked not whether a prior *decision* should be overturned, but whether a particular *rule* should be.[104]

The Court also has stressed that, as against a majority opinion, concurrences are not the law. For example, *Maryland v. Wilson*[105] was a follow-on case from *Rakas v. Illinois*, which held that individuals in an automobile not their own lacked standing to challenge a search of that vehicle.[106] In *Rakas*, Justice Lewis Powell (with Chief Justice Warren Burger), joined Justice Rehnquist's opinion for the Court, but also wrote a

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102 Katharine Q. Seelye, *With Gentle Humor, Brennan Is Buried*, N.Y. TIMES (July 30, 1997), http://www.nytimes.com/1997/07/30/us/with-gentle-humor-brennan-is-buried.html [https://perma.cc/C7UM-252R] ("'While I was with him, he might tell me some things that were true, like how to count to five,' Mr. Souter recalled, referring to the magic number of votes needed for a majority opinion."). *See, e.g.*, Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099, 1102 (1997) ("The most important rule, he would declare, is the 'rule of five'—i.e., the Court decides cases by a majority vote of at least five Justices."); *see also* Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763–67 (1995) ("Some clerks understood Brennan to mean that it takes five votes to do anything, others that with five votes you could do anything.").

103 454 U.S. 370, 375 (1982) (per curiam).

104 *See* 505 U.S. 833, 854 (1992) ("Thus, for example, we may ask whether the *rule* has proven to be intolerable simply in defying practical workability, . . . whether the *rule* is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, . . . whether related principles of law have so far developed as to have left the old *rule* no more than a remnant of abandoned doctrine, . . . or whether facts have so changed, or come to be seen so differently, as to have robbed the old *rule* of significant application or justification . . . ." (emphases added) (internal citations omitted)).

105 519 U.S. 408 (1997).

106 *See* 439 U.S. 128, 148–50 (1978).

separate concurrence.[107] In *Maryland v. Wilson*, Maryland relied on Justice Powell's concurrence in *Rakas* to argue that the Fourth Amendment rules applicable to automobile searches were less protective even than the majority in *Rakas* had held.[108] Again writing for the Court, Chief Justice Rehnquist rejected Maryland's argument for relying on a mere concurrence, which could not "constitute[ ] binding precedent."[109]

In short, the rule of five indicates both that opinions attracting five (or more) Justices are binding on lower courts, and that concurrences—even concurrences from Justices who join a majority opinion—do not "constitute[ ] binding precedent." Combined, these two sides of the rule teach lower courts that they must obey majority opinions, and that they should not follow concurrences at odds with those majority opinions.

2. *The* Marks *Rule*

Lest there be residual doubt, the exception proves the rule. When no opinion has garnered a majority vote, and thus there is only a plurality, the Justices have told lower courts they then should look to concurring opinions to determine the holding of a case. That is, unlike majority opinions, plurality opinions are binding neither on the Supreme Court nor on lower courts.[110] Rather, cases with only a plurality decision are governed by the *Marks* rule, which states, "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.'"[111] Thus, *Marks* explic-

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107 *Id.* at 150 (Powell, J., concurring). Justice Powell frequently used concurrences to exercise "soft" judicial power over the future development of the law, including in 5-4 cases. Pelham-Webb, *supra* note 101, at 749.

108 *Wilson*, 519 U.S. at 412 ("Maryland . . . argues that we have already implicitly decided this question by . . . Justice Powell's statement in *Rakas v. Illinois*, 439 U.S. 128 (1978) . . . .").

109 *Id.* at 413.

110 *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987) ("As the plurality opinion in *MITE* did not represent the views of a majority of the Court, we are not bound by its reasoning." (footnote omitted)); *see also* Altria Grp., Inc. v. Good, 555 U.S. 70, 96 (2008) (Thomas, J., dissenting) ("The majority does not assert that the *Cipollone* plurality opinion is binding precedent, and rightly so. Because the 'plurality opinion . . . did not represent the views of a majority of the Court, we are not bound by its reasoning.'" (quoting *CTS Corp.*, 481 U.S. at 81)); Texas v. Brown, 460 U.S. 730, 737 (1983) ("While not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue.").

111 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, Powell, and Stevens, JJ.)).

itly invites attention to concurring opinions—but only in the relatively rare instances in which there is no majority. And *Marks* itself made clear that its rule applies "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices."[112] Otherwise, lower courts are tossed back upon the rule of five.[113]

In practice, both lower courts and the Supreme Court itself have struggled to apply the *Marks* rule.[114] What exactly constitutes the narrowest grounds for a decision? Identifying the rule in a *Marks* case requires close reading of multiple opinions that may point in different directions.[115] Even when the answer is not indeterminate, it may be obscure and therefore encourage differing interpretations in the lower courts. Figuring out which opinion constitutes the rule under *Marks* can be especially hard when the various alternatives are not aligned neatly on a one-dimensional policy line. *Marks*'s practical difficulties highlight one of the key disadvantages to *seriatim* models—lack of clarity—and in doing so emphasize the value of the rule of five for all other concurrences. The rule of five gives lower courts clear guidance—be bound by the majority opinion, not the concurrence.

3. Shearson *and Anticipatory Overruling*

Further support for the view that the Supreme Court would not think well of a rule instructing lower courts to follow a concurrence rather than the associated majority opinion is that the Court has frequently rebuked lower courts for engaging in "anticipatory overruling" even when the lower courts know full

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112 *Id.*

113 Richard Re has argued that the *Marks* rule should be abandoned altogether in view of its practical difficulties. *See generally* Richard M. Re, Beyond the *Marks* Rule (Jan. 5, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620 [https://perma.cc/3UKS-HU6E] (arguing that the *Marks* rule should be abandoned and that only propositions garnering majority support should be precedential).

114 *See, e.g.*, Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 48–49 (2010) (noting uncertainty in how to apply the *Marks* rule following a fractured Court in *Missouri v. Seibert*, 542 U.S. 600 (2004), and pointing out that "[b]y sending confusing messages, the Justices run the risk of losing control over the direction of the law altogether.").

115 Indeed, Justin Marceau has found 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. *See* Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933, 975 (2013) ("[T]he available cases suggest that lower courts play an important role in defining the scope and application of prior Supreme Court plurality decisions.").

well that a pre-existing majority opinion will not spell the outcome of the present case.[116]

The anticipatory overruling cases present lower courts with a dilemma much like the one described above. What if the Supreme Court has, in case #1, handed down a rule, but later—in case #2—the Court (without explicitly disturbing its prior holding in case #1) seriously calls the earlier rule into question. Should the lower court follow the rule in case #1, which technically is still binding? Or should it read the tea leaves, and follow the clear implications of case #2?

The Supreme Court resolved this question in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*,[117] holding that lower courts must not anticipatorily overrule binding Supreme Court opinions. In *Shearson*[118] the Fifth Circuit faced a question the Supreme Court already had decided, in a case called *Wilko v. Swan*.[119] By the time the lawsuit in *Shearson* was filed, though, *Wilko* was already on the ropes. In a 1987 case, *Shearson/Am. Express Inc. v. McMahon*, the Supreme Court strongly criticized the logic of its own holding in *Wilko*, though it did not overrule it.[120]

Confronted with this dilemma, the Fifth Circuit chose disingenuousness: it pretended to follow *Wilko* even while disregarding it. 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*

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116 Scholars have debated the merits of anticipatory overruling in limited circumstances. *See, e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 82 (1994) (arguing that "[t]he orthodox view that prediction is inherently incompatible with the judicial function must be revisited"); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 715 (1995) (arguing that although judges may find it tempting to make predictions, "[t]hey should resist the temptation because the prediction model undermines the rule of law by over-emphasizing the role of individual judges").

117 490 U.S. 477 (1989).

118 Rodriguez de Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d 1296 (5th Cir. 1988).

119 346 U.S. 427 (1953). The question was whether contractual agreements to arbitrate could apply to claims brought under Section 12(2) of the Securities Act of 1933. In *Wilko*, the Court held that predispute agreements could not be enforced to compel arbitration of a claim arising under Section 12(2). *Id.* at 438.

120 In *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. 482 U.S. 220, 234 (1987). And the claims in *McMahon* were difficult to distinguish on principle from the claims in *Wilko*.

. . . ."[121] Thus, the lower court attempted to resolve the dilemma by asserting that it was simply adhering to a new, broader rule announced by *McMahon*.[122] 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."[123]

The Supreme Court recognized the Fifth Circuit's opinion for what it was—following the clear implications of *McMahon*, rather than simply applying the binding majority in *Wilko*—and put the kibosh on it. In *Shearson*, the Supreme Court did indeed overrule *Wilko*.[124] But after doing so, Justice Kennedy, writing for the Court, chastised the Fifth Circuit for anticipatorily overruling a Supreme Court decision, rather than waiting for the Justices to do so:

> 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.[125]

Shearson thus reaffirmed the importance of the rule of five, by making clear that the prerogative not to follow a binding five-vote majority of the Supreme Court rests only with that Court, even if other opinions cast doubt on the validity of the prior majority opinion. The Justices have frequently invoked that rule.[126] Indeed, in subsequent cases, the Supreme Court has applauded lower courts for following the rule of *Shearson*—

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121 *Shearson*, 845 F.2d at 1298 (footnote omitted). 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 . . . ." *Id.* at 1298 n.4 (quoting *McMahon*, 482 U.S. at 234).

122 *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.").

123 *Id.* at 1298 (quoting Noble v. Drexel Burnham Lambert, Inc., 823 F.2d 849, 850 n.3. (5th Cir. 1987)).

124 Rodriguez de Quijas v. Shearson/Am. Express, 490 U.S. 477, 485 (1989).

125 *Id.* at 484.

126 *See, e.g.*, Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (per curiam) ("[I]t is this Court's prerogative alone to overrule one of its precedents." (quoting United States v. Hatter, 532 U.S. 557, 567 (2001))); Jaffree v. Bd. of Sch. Comm'rs of Mobile Cty., 459 U.S. 1314, 1316 (1983) (granting a stay from a judgment of a district court which was contrary to clear Supreme Court precedent, stating, "[u]nless and until this Court reconsiders the foregoing decisions, they appear to control this case").

even as it reversed them for doing so.[127] This is directly analogous to the logic of a lower court choosing to follow a concurrence in the same case as the binding majority.

4. *The Implausibility of the Alternative*

In addition to these three doctrinal indications that lower courts must follow five-vote majority opinions as opposed to concurrences that undercut them, there is also a weighty counterfactual that makes the point. Imagine the question comes to the Supreme Court in its naked form. There is a litigant at the Supreme Court whose position in a case was squarely foreclosed by a five-vote majority opinion, but the lower courts went instead with the views of a concurring Justice who also had joined the majority. And imagine the Justices were asked what the lower court should have done: followed the majority or the lone concurrence. Is it easy to imagine the Justices holding that the lower court acted properly in following the concurrence rather than the five-vote majority? Everything in the discussion that has preceded this belies the possibility, as does one's sense of discomfort for the poor lawyer forced even to make the argument.

In short, although the Supreme Court has not said so squarely, it seems readily apparent that as between a five-person majority and a lone concurrence (that also joined the majority), lower courts are to follow the former.

B. A Taxonomy of Concurrences

There is only one problem: lower courts do not seem to listen. There is every indication that the lower courts often ignore the rule of five and go looking for the binding rule elsewhere—particularly in those lone concurrences.[128]

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127 That is exactly what happened in *Agostini v. Felton*, 521 U.S. 203 (1997), in which the petitioners urged the Court to reverse its prior decision in *Aguilar v. Felton*, 473 U.S. 402 (1985). In ultimately agreeing to do so, the Court noted that "[t]he views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law." 521 U.S. at 217. The Court nevertheless concluded that, despite the correctness of the lower courts' decision to follow the Supreme Court's teaching in *Shearson*, "[a]dherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued vitality," and on that basis reversed. *Id.* at 237–38.

128 *See* Pelham-Webb, *supra* note 101, at 707–12 (describing instances in which lower courts adopted Justice Powell's pivotal concurring opinions as controlling).

To get a handle on this behavior from lower courts, we need a taxonomy of concurrences, so that we can then look to see what lower courts are doing.

In the traditional nomenclature of the literature on judicial decision-making, there are two types of concurrences: concurrences in the judgment only (also known as special concurrences) and concurrences in the opinion as well as the judgment (also known as general or regular concurrences).[129] In the former case, the concurring Justice signs on to the disposition of the case, but not to the majority (or plurality) opinion. In the latter, more common, case the concurring Justice joins both the disposition of the Court and also the majority opinion.[130] This distinction has doctrinal importance, because a Justice who signs on to the disposition but not the opinion cannot count for the rule of five to apply.[131]

There is, however, another way to cut the concurrence cake—one that is more apt to the discussion at hand. Our taxonomy of concurrences has a heretofore unnoticed addition: pivotal concurrences.

Plurality concurrences occur when a judge concurs in the judgment but writes separately, robbing the plurality opinion of a majority. This situation is when *Marks* applies. Plurality concurrences arise most frequently in the Supreme Court when four Justices form a plurality and are joined in the judgment by one other Justice.[132] 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 issue a judgment resolving the case, but not the votes for the

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129 *See, e.g.*, Kirman, *supra* note 101, at 2084.

130 Particularly in lower courts, judges do not always follow the strict rules described above when deciding how to style their separate opinions. *See, e.g.*, United States v. Davis, 785 F.3d 498, 533 n.1 (11th Cir. 2015) (en banc) (Martin, J., dissenting) (styling a concurrence in the judgment as a "dissent" because of the extent of his disagreement with the majority regarding one non-dispositive issue); United States v. Cotterman, 709 F.3d 952, 971 (9th Cir. 2013) (en banc) (Callahan, J., concurring in part, dissenting in part, and concurring in the judgment) (concurring in the judgment and disposition but styling his opinion as "dissenting in part").

131 *See* EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM, *supra* note 82, at xxv ("[J]ustices who join [regular concurrences] are full-fledged members of the majority opinion coalition, while those joining [special concurrences] are not.").

132 Of the 221 Supreme Court cases argued between 1945 and 2015 in the Supreme Court Database that did not result in a single opinion for the Court, 130 (~59%) were decided by five Justices voting for the judgment. Fifty-three cases (~24%) were decided by six Justices voting for the judgment, and 25 cases (~11%) were decided by seven Justices voting for the judgment. The rest (~6%) are divided among four, eight, and nine Justices voting for the judgment. *See* THE SUPREME COURT DATABASE, *supra* note 82.

rule of five to apply. When that happens, we call the four-vote opinion announcing the judgment of the Court the "plurality" opinion, and we call the lone vote in the middle a "plurality concurrence."[133]

A *vanilla concurrence*, by contrast, is an opinion of a Justice who does join the Court majority but also decides to write separately nonetheless. The opinion is vanilla because it has no impact. Formally, it counts for nothing.[134]

A *pivotal concurrence* is a subset of the vanilla concurrence in which, had the writing Justice not joined the majority opinion, there would be no majority. Thus, pivotal concurrences arise when there *is* a majority opinion, one or more judges concur in the majority opinion but also writes separately, *and* that judge's vote is numerically necessary to give the majority opinion enough votes to become binding precedent. The opinion is "pivotal" in the sense that without the votes of the pivotally concurring Justices, there would be no majority opinion, and *Marks* would apply.

Suppose the Supreme Court decides a case 7–2. Of the seven-Justice majority, two Justices concur. In our taxonomy, it does not matter if they join the majority opinion, or simply join the majority disposition but write separately. Either way, there is a solid five-person majority. Thus, they have authored plain vanilla concurrences. Contrast that with the situation in which three Justices concur, joining both the majority opinion and one joint concurrence. In this situation, had the three not joined the majority opinion, we would be in a plurality *Marks* situation. This is a pivotal concurrence.

These pivotal concurrences are curious beasts. Why do Justices choose to write them? Consider a Justice Swingvote, who sits in the middle of a 4–1–4 court. It is easy to see why Justice Swingvote might simply join the majority, and not write a separate opinion, in the name of authority and clarity. It is also easy to see why, in this situation, he might want to write separately, and not join the majority opinion. If he has very different views from the other four on his side of the case, he will want to express them. Especially in the confused world of *Marks*, his separate opinion might be taken as the law itself.[135]

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133 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.

134 *See, e.g.*, Maryland v. Wilson, 519 U.S. 408, 412–13 (1997) (noting that a statement "contained in a concurrence" did not "constitute[ ] binding precedent").

135 *See* Ledebur, *supra* note 3, at 900 (noting the possibility that an opinion signed by a single Justice can become binding precedent).

And even if not, in depriving the other four of a majority opinion, he leaves the issue open enough for possible reconsideration.

But why would Justice Swingvote join the majority *and* write separately at the same time—particularly if Swingvote's opinion undercuts what the majority had to say? It is one thing if Swingvote writes alone only to note some specially determinative fact, or to indicate disagreement on a subsidiary issue. It is quite another if Swingvote seems to be talking out of both sides of his mouth.

Take the curious case of *Thornton v. United States*.[136] *Thornton* asked whether *New York v. Belton*'s[137] "automobile exception" to the Fourth Amendment's prohibition on warrantless searches applied even after the driver of the automobile had departed the vehicle and then was taken into custody.[138] In *Belton* the Supreme Court held that if the police arrest the driver of an automobile, the car can be searched without a warrant incident to a lawful arrest, whether or not there was any cause to believe evidence would be found.[139] *Belton* was a problematic decision from the start: the rationale for a search incident to lawful arrest is to keep the arrestee from destroying any nearby evidence or grabbing a weapon to harm an officer.[140] But if the suspect is immediately handcuffed and put in the back of a police car, that rationale makes no sense.[141] *Thornton* was worse yet, for before the arrest even occurred the suspect had left his vehicle and was walking away—and then after the arrest was cuffed and put in the squad car.[142]

Still, writing for a five-Justice Court,[143] Chief Justice Rehnquist straightforwardly extended the *Belton* rule and held that the search incident to a lawful arrest exception applied in

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136 541 U.S. 615 (2004).

137 453 U.S. 454 (1981).

138 *See Thornton*, 541 U.S. at 617.

139 *Belton*, 453 U.S. at 460–61.

140 *See* Arizona v. Gant, 556 U.S. 332, 338 (2009) ("The exception [to the warrant requirement] derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations."). These twin interests are sometimes referred to as "*Chimel* rationales," as articulated in *Chimel v. California*, 395 U.S. 752, 764–65 (1969); *see, e.g.*, *Gant*, 556 U.S. at 338.

141 *See Belton*, 453 U.S. at 465–66 (Brennan, J., dissenting) (citing *Chimel*, 395 U.S. at 764) ("When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel*'s limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband.").

142 *Thornton*, 541 U.S. at 617–18.

143 Except as to one footnote. *See id.* at 616; *id.* at 624 (O'Connor, J., concurring).

such circumstances.[144] Justice Scalia wrote an impassioned separate opinion arguing that the *Belton* rule made no sense (for the reasons just offered), and suggesting that he would adopt an alternative rule barring warrantless searches of automobiles "incident to arrest," unless there was some cause to believe evidence would be found in the car.[145]

But it was Justice O'Connor's vote that may have mattered most. She *joined* the *Thornton* majority extending the *Belton* rule, but authored a one-paragraph concurrence *agreeing with Justice Scalia.* Which was it? Five Justices for *Belton* (and its extension)? Or not? Justice O'Connor explained only that:

> I write separately to express my dissatisfaction with the state of the law in this area. . . . While the approach Justice Scalia proposes appears to be built on firmer ground, I am reluctant to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit.[146]

Quite understandably, Justice O'Connor's decision left the state of the law deeply uncertain.

Justice O'Connor's decision is a strange one. She could have let go of the fact that *Belton*'s continuing vitality was not squarely presented (the Justices do that often enough), and reached the merits of Justice Scalia's proffered alternative. Or she could have insisted on rebriefing and reargument to address the question squarely. Instead, she provided the essential fifth vote to make *Thornton* the law, while at the same time undercutting it entirely. It is little surprise that five years later, in *Arizona v. Gant*, a version of Justice Scalia's approach prevailed.[147] But in the interim, the rule of five required lower courts to apply a test they knew full well no longer had majority support on the Court.

Notice how pivotal concurrences like Justice O'Connor's in *Thornton* display a sharp tension between what the Justices say and what they do. The rule of five suggests that the Justices consider themselves a *per curiam* Court. The "Opinion for the Court" is just that. It speaks for all the Justices. But the

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144 *Id.* at 623–24 ("So long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest.")

145 *Id.* at 625–32 (Scalia, J., concurring in judgment).

146 *Id.* at 624–25 (O'Connor, J., concurring in part) (citation omitted).

147 *See* Arizona v. Gant, 556 U.S. 332, 351 (2009) (holding that the police may search the passenger compartment of a vehicle incident to a recent occupant's arrest if it is reasonable to believe the arrestee might access the compartment or that the vehicle contains evidence of the offense of arrest).

Justices *act* like they are a *seriatim* Court, in that they continue to write separate opinions that call out for recognition. If not, why write them? This conflict is cast in sharp relief in the case of pivotal concurrences.

Pivotal concurrences bear explaining. Until we know what motivates them, we cannot understand why Supreme Court Justices continue to write them, and how we should think about them. We take up this question in Part III. But first, we turn to empirical data to show that although all indications are that lower courts are supposed to adhere to majority rules and ignore pivotal concurrences, often quite the opposite is occurring.

C. The Lower Courts' Response to Pivotal Concurrences

When faced with a pivotal concurrence, do lower courts take heed of the rule proposed in that separate opinion, or do they adhere to the authority of the majority opinion? If lower court judges viewed the Supreme Court as a strictly *per curiam* court, pivotal concurrences—which by definition accompany a five-vote majority opinion—should have no impact on lower courts and little impact on future cases. Yet, as we saw from the *Lopez* example that opened this piece, lower courts—under some circumstances—plainly take pivotal concurrences seriously.[148] They act as though the Justices are writing *seriatim*, and it is their job to determine independently what is the governing rule. How frequently does that happen?

1. *Quantifying Concurrences*

To get at the question of how lower courts treat concurrences—and pivotal concurrences in particular—we created a new dataset containing over a half million citations to 480 randomly-selected Supreme Court cases that included concurrences. Those 480 cases spanned sixty-six years, from 1946 to 2012. Citations to those concurrences came both from state and federal courts, at both the trial and appellate levels.[149]

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148 *See supra* notes 17, 19 and accompanying text.

149 During the sixty-six 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 of these—24,569 (71.8%)—with the frequency evenly split between the district and circuit courts. State appellate courts cited to concurrences relatively less frequently (9,649) and state trial courts significantly less so (651). In addition, we accounted for whether that treatment was positive or negative (i.e., whether the lower court followed or distinguished the decision). All such coding is taken from the Westlaw database. In addition to the two variables described, we also included the year of citation,

To create our main *independent* variable of interest—the type of concurrence—we hand coded the concurrences in our 480 Supreme Court cases into the three categories introduced above: vanilla, pivotal, and plurality. Our protocol was as follows: We read the opinions in each of our 480 cases. If no opinion garnered at least five votes, we coded the accompanying concurrence as a plurality concurrence. If, on the other hand, there was an opinion joined by at least five Justices and at least one of those Justices authored a concurrence, we read the majority opinion and the concurrence to determine whether the concurrence stated a different "rule of the case" from the majority opinion. If so, and if the number of Justices joining that concurrence could have deprived the Court's opinion of its majority status had they not signed on to it, we classified the concurrence as pivotal; if not, we classified it as vanilla.[150] Table 2 indicates the types of concurrences we classified, as compared with the more traditional nomenclature for concurrences:

TABLE 2. TAXONOMY OF CODED CONCURRENCES IN 5–4 DECISIONS

	Articulates Alternative Rule	**Does Not Articulate Alternative Rule**
Joins Majority Opinion	Regular concurrence (Pivotal)	Regular concurrence (Plain Vanilla)
Does Not Join Majority Opinion	Special concurrence (Plurality)	

To assess the influence of concurrence type on lower court decision making, we used two different *dependent* variables: *total citations* and *citation rate*.

Total citations are simply the total *number* of citations a concurrence garnered since the date it was published. Of course, this presents a bit of a problem, because the lower

information the citing court, and the "depth of treatment." Westlaw's "depth of treatment" feature tracks how much discussion an opinion devotes to a particular citation. For our purposes, we were only interested in whether a citation was "examined" by the instant opinion, meaning that the court engaged in an "extended discussion of the cited case, usually more than a printed page of text." *Keycite Depth of Treatment*, subheading to *How to Check Citations*, WESTLAWNEXT, http://lscontent.westlaw.com/images/content/wlncitations10.pdf [https://perma.cc/T35A-GVVX]. Throughout this analysis, we use depth of treatment as a robustness check for our primary analysis.

150 Additional detail on our coding methods and data is available in the Technical Appendix (available upon request from the authors).

courts have had more time and opportunity to cite to concurrences that have been in existence for a longer period of time. To account and control for the varying age of the cases in our data set, we standardized the number of citations by the decision's age.[151]

We also calculated the *rate* at which concurrences were cited by lower courts, calculated as the number of citations to a concurrence divided by the total number of citations to the decision overall.[152] As an example: if *Smith v. Jones* is cited a total of 100 times by the lower courts, and 10 of those citations also cite to the concurrence in *Smith v. Jones*, the citation rate would be 0.10 or 10%.[153]

The question we sought to answer was whether lower courts pay attention to—or even follow—pivotal concurrences, despite the doctrinal argument we advanced above that they should ignore them and adhere to the majority rule. As we have seen, if lower courts act in accordance with the Supreme Court's *de jure* role as a *per curiam* court, lower courts should ignore pivotal concurrences entirely.[154] Even if concurrences in general have some interest to lower courts—perhaps because they phrase an idea in a particularly clear way—we still should expect that pivotal concurrences would be cited by lower courts at rates *no higher* than they cite vanilla concurrences.[155] In both situations, five-vote opinions serve as the binding precedent.

On the other hand, if lower court judges approach the Supreme Court as a *de facto seriatim* court—either to avoid reversal, or because they feel at liberty to discern the governing rule on their own—they would attempt to identify what rule to follow based not only on majority opinions but also pivotal con-

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151 To standardize these data, we divided the total number of citations to the concurring opinion by the opinion's age as of 2013, the year our data were collected.

152 In Westlaw, citations to concurrences are always a proper subset of total citations to a decision, because citations to only concurrences appear as hits for citations to the majority decision in the absence of narrowing criteria.

153 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 over-inclusive.

154 *See supra* subpart II.A.

155 Formally, we would not be able to reject the null hypothesis that lower court treatment of vanilla and pivotal concurrences are distinguishable.

currences.[156] In this case, we expect to see citation to pivotal concurrences at a higher rate than vanilla concurrences.[157]

Finally, in either event we expect plurality concurrences to be cited more than pivotal concurrences, if only because evaluating plurality concurrences is *always* necessary under *Marks* to determine the holding of the case.[158]

2. *Pivotal Concurrences: The Empirical Evidence*

We begin with a perhaps surprising fact: pivotal concurrences are the most common type of concurrence in 5–4 cases.[159] If Supreme Court Justices do not want lower courts to pay attention to them, one might think they would avoid writing them. But that is not the case. Pivotal concurrences (about 42%) outnumber vanilla concurrences (about 15%) by a nearly three-to-one margin in five-vote-majority cases. (The remainder, about 37%, were plurality concurrences.) Figure 2 displays change in number of pivotal concurrences written over time in our dataset, expressed as the proportion of all concurrences accompanying 5–4 decisions. From this you can see that pivotal concurrences are not uncommon phenomenon in Supreme Court decisions since the 1940s, and that even as the Supreme Court's caseload has dropped substantially, pivotal concurrences have remained common—thus as a percentage matter becoming a more pervasive part of the legal landscape.

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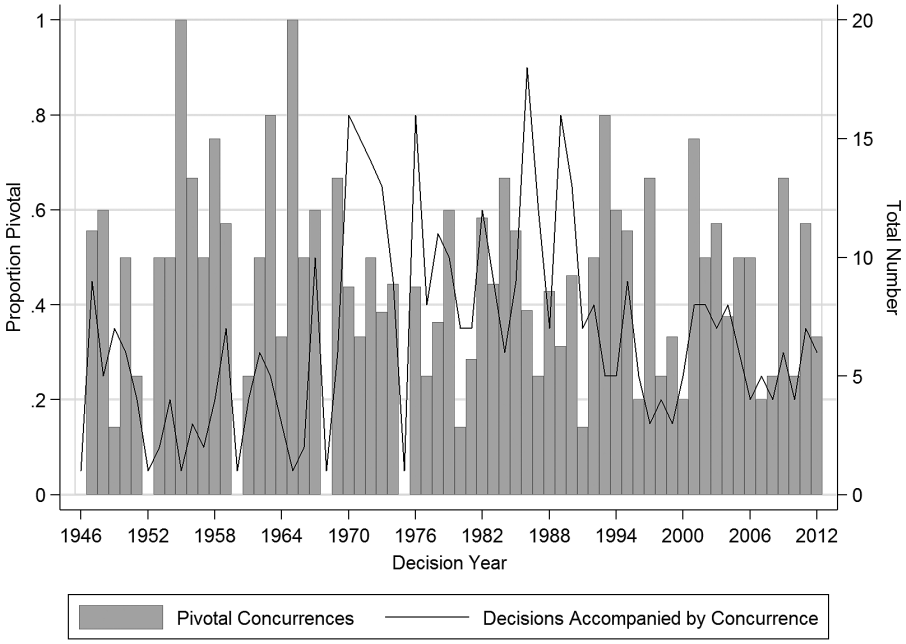
156 *See supra* pp. 3–5.

157 And if judges were using pivotal concurrences to support arguments based in *seriatim* reasoning, such concurrences should be discussed with greater depth than vanilla concurrences. In other words, citations to pivotal concurrences should be more likely to be "Examined" (as Westlaw calls it) than plain vanilla concurrences. We use the "depth of treatment" as a robustness check of our analysis throughout.

158 *See supra* note 107 and accompanying text.

159 Of our 480 cases, 178 (37.1%) were accompanied by plurality concurrences, 200 (41.7%) were accompanied only by pivotal concurrences, and 73 (15.2%) were accompanied by "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 with respect to different issues in the case). These were excluded from the analysis for the sake of clarity.

FIGURE 2. PROPORTION OF PIVOTAL CONCURRENCES IN 5–4 DECISIONS



Analyzing these adjusted data, and consistent with our hypothesis, we find that lower courts cite to pivotal concurrences significantly more frequently than they do to vanilla concurrences. Table 3 displays the mean and median number of total times lower courts cited each type of concurrence (adjusted for age).[160] Even by this rough measure, pivotal concurrences are cited significantly more often than are vanilla concurrences, and nearly as often as plurality concurrences.

TABLE 3. TOTAL CITATION OF CONCURRENCES BY LOWER COURTS

Type	Mean	Median
Vanilla	2.9	0.8
Pivotal	4.0	1.6
Plurality	4.6	2.1
Total	**4.1**	**1.6**

As these citation counts make clear, lower courts treat pivotal concurrences differently from how they treat vanilla con-

160 As defined above, the *total citations* variable is adjusted by the age of the original Supreme Court decision. *See supra* pp. 35–36.

currences.[161] If anything, they treat them more like plurality concurrences, which—under *Marks*—lower courts are required to consult in divining the governing rule. This provides some support for our hypothesis that the lower courts are looking to pivotal concurrences for guidance as to the governing rule, rather than simply adhering to the rule of five.

But total citations do not tell the whole story. It could be that pivotal concurrences are cited more often simply because they are present in the sorts of cases that also are cited most frequently. Thus, we need to control for the frequency with which the case containing the concurrence is cited.

To address this possibility, we assess whether pivotal concurrences are cited at different *rates* than are vanilla concurrences. As shown in Table 3, lower courts cited pivotal concurrences in 3.7% of the opinions in which they cited the case itself, as compared to a rate of 2.8% for vanilla concurrences.[162] The discrepancy between the citation rates for pivotal and vanilla concurrences again suggests that lower courts treat the two types of concurrences differently, notwithstanding the lack of any formal legal reason to do so. At the same time, the pivotal rate is lower than the plurality rate—an unsurprising result given that plurality concurrences, under the *Marks* rule, are necessary to determine the holding of a case.[163]

TABLE 4. CITATION RATES BY LOWER COURTS

Type	Mean	Std. Dev.	N
Vanilla	0.03	0.16	130,375
Pivotal	0.04	0.19	403,386
Plurality	0.12	0.32	134,596
Total	**0.05**	**0.22**	**668,357**

This analysis, however, still is incomplete, in that it might be omitting an important variable. An observant reader might

161 Difference-in-means tests confirm the statistical significance of these observations. 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.

162 The statistical significance of this difference was confirmed by a two-tailed t-test, which was significant at $p < 0.001$.

163 *See supra* section II.A.2. We find similar results when conducting this analysis based on "Depth of Treatment" of the opinion accompanied by a pivotal concurrence. For more information, see the Technical Appendix (available upon request from the authors).

notice that the cases we have discussed to this point tend to be constitutional cases with important social and political ramifications. This raises the important question whether the phenomena we are capturing is spurious—that is, these citation patterns simply are a by-product of the lower courts citing more frequently to constitutional, salient cases in general. (This is just a more refined version of the point we made just above.) This is not an unreasonable concern, as prior studies have shown that constitutional and salient cases are more likely to be cited by lower courts than others, all else being equal.[164]

To disentangle these effects, we employ a simple, log-linear ordinary least squares (OLS) regression model, regressing the log citation rate (our dependent variable) on concurrence type and issue importance (our independent variables).[165] By using OLS, we can control for issue importance (i.e., constitutional cases and salient cases) to estimate the independent effect of concurrence type on citation rates.[166]

If pivotal concurrences have an independent effect—that is, if such opinions have an intrinsic importance separate from the fact of the case's salience or constitutional nature—then we would expect to see a positive and significant relationship between the presence of a pivotal concurrence and the citation rate, even after controlling for those features of a case. Table 5 displays the results of three variations of this model (as robustness checks).[167]

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164 *See* THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 118 tbl.7.1 (2006).

165 The standardized citation rate for all citations (i.e., those that are mentioned, cited, discussed, and examined) and for the rate at which lower courts *examine* the concurrence is heavily skewed. To conform to the OLS assumption that the dependent variable is normally distributed, we use the log of the standardized citation rate.

166 The estimating equation takes the following form: Concurrence type is coded dichotomously (one if the concurrence is pivotal, zero if otherwise), as is salience (one if the issue is salient, zero if otherwise) and if the decision addressed a constitutional issue (one if constitutional, zero if otherwise). In addition, we include an interaction term in order to control for decisions that are *both* salient and involve a constitutional issue. Further, we employ robust standard errors.

167 Standard errors are listed below the coefficients. *Model 1* compares the effect of a pivotal concurrence to a plain vanilla concurrence (excluding plurality concurrences). *Model 2* compares pivotal concurrences to plurality concurrences (excluding plain vanilla concurrences). Finally, *Model 3* includes all concurrence types, comparing the effect of pivotal and plurality concurrences on citation rate to plain vanilla concurrences (the omitted reference category).

TABLE 5. OLS REGRESSION OF CITATION RATE

	(1) Comparing Pivotal to Vanilla	(2) Comparing Pivotal to Plurality	(3) Comparing Pivotal and Plurality to Vanilla
Pivotal	0.594**	-0.215	0.599**
	(0.200)	(0.141)	(0.199)
Plurality	-		0.826**
			(0.200)
Vanilla	(omitted reference category)	(omitted reference category)	(omitted reference category)
Salience	-0.055	0.148	0.049
	(0.257)	(0.246)	(0.219)
Const. Issue	0.291	0.426*	0.324*
	(0.226)	(0.179)	(0.165)
Salience* Const. Issue	0.728*	0.294	0.504†
	(0.345)	(0.297)	(0.272)
N	**292**	**394**	**464**

The results of the three models largely support the hypothesis that the *type* of concurrence influences the extent to which the opinion will be cited by lower courts, even after controlling for salience and constitutional issues. As suggested above, pivotal concurrences will produce more citations than vanilla concurrences. This expectation is borne out by the positive and statistically significant coefficient for *pivotal* in *Model 1* (β = 0.594). While this effect is small when the case is neither salient nor constitutional, it is amplified in salient and constitutional cases.[168] In salient constitutional cases, a pivotal concurrence is predicted to receive 3.75 citations per year—that is, 2.75 more citations per year than a vanilla concurrence, holding all else equal.

In addition (and as expected), pivotal concurrences are less likely to be cited than plurality opinions, although this finding is less robust and we are unable to reject the null hypothesis

168 The marginal effect of a variable is the effect that a one-unit change in the independent variable would exert on the dependent variable. Calculating the marginal effect of a variable when using a log-linear model is slightly more complicated, as the one-unit change (without any additional transformation) reflects a change in terms of the log value of the dependent variable. As a result, marginal effects in log-linear models must be transformed to the inverse log, such that $\Delta_y = e^{c\beta}$, where $c = 1$ (the one-unit change) and β is the coefficient for the variable of interest. Note that this means that the marginal effects will be non-linear.

that plurality and pivotal opinions are cited at the same rate—which in and of itself would support our broader point about the importance of pivotal concurrences.[169] Taken together, plurality opinions are expected to receive 0.46 more citations per year than pivotal opinions.[170]

This difference is even greater when the issue is both salient and constitutional in nature. In this situation, a vanilla concurrence is estimated to receive 2.28 citations per year, holding all else equal. Pivotal concurrences, however, are expected to receive 4.16 citations per year. This divergence is even greater for plurality opinions, which are predicted to be cited 5.22 times per year.

This simple analysis confirms, in a more rigorous way, the result initially suggested by our descriptive analysis: pivotal concurrences are cited notably more often than vanilla concurrences, and that difference is magnified in high-profile and constitutional cases. Indeed, in some instances pivotal concurrences are treated as more akin to plurality concurrences. All this is strongly suggestive of the fact that rather than simply adhering to majority rules when pivotal concurrences are present, lower courts take account of the pivotal concurrences in resolving the case before them.

* * * * *

All of this returns us to the questions with which we began. Why are these concurrences written? What function are they serving? If it were up to Chief Justice Roberts, he would—much like John Marshall himself—"make it his priority . . . to discourage his colleagues from issuing separate opinions."[171] If he has indeed tried, the evidence suggests he has failed. Lower courts appear to pay attention to concurrences—partic-

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169 Recall that, in *Model 2*, plurality opinions are the omitted reference category. In other words, the coefficient for *pivotal* reflects predicted effect on citation rate *as compared to* lower courts' treatment of plurality opinions. In *Model 2*, this coefficient is negative, meaning that pivotal opinions are predicted to be more lightly cited than plurality opinions. This effect, however, is not statistically significant. This means that we are unable to reject the null hypothesis that plurality and pivotal opinions are cited at the same rate.

170 As noted, *Model 3* includes pivotal, plurality, and plain vanilla opinions, using plain vanilla as the omitted reference category. Both the coefficients for *pivotal* ($\beta_{pivotal} = 0.599$) and *plurality* ($\beta_{plurality} = 0.826$) are positive and statistically significant, but of different magnitudes. When written in non-salient, non-constitutional cases, we estimate pivotal concurrences to receive 0.82 more citations per year than plain vanilla opinions, holding all else equal (1.82 total). Plurality opinions, on the other hand, are estimated to be cited 1.28 more times per year than plain vanilla opinions (2.28 total).

171 Rosen, *supra* note 5, at 105.

ularly pivotal concurrences—on a regular basis, giving those concurrences credit where the Justices would have them deny it. Why is this so? What functions are served by these concurring opinions, such that Justices keep writing them despite widespread grumbling about them, and lower courts keep paying attention to them? It is to these questions that we now turn.

III
CONCURRENCES AND LEGAL CHANGE

To identify the role of concurrences, particularly pivotal concurrences, we now return to the puzzle we left hanging at the end of Part I. Why did consensus fracture on the Supreme Court around 1941, leading to a sharp rise in separate opinions? This was, after all, a peculiar time for this fracturing to reveal itself. Franklin Roosevelt's Court-packing plan failed in 1937.[172] By 1943, though, Roosevelt had—while losing the battle—won the war.[173] He had appointed seven ostensibly like-minded Justices.[174] One might have supposed this would be a time of harmony on the Court. Yet, this was not the case. Instead, intra-Court disagreement was so sharp that the popular media seized on it as a notable story.[175] By examining why separate opinions shot up in this period, we can shed some light on the role concurrences—particularly pivotal concurrences—play today.

Building on the work of prior scholars, we will show that the rise in separate opinions actually began somewhat earlier than 1941 and was motivated by the fights over constitutional meaning and government power that were central to early twentieth century history. We will explain the important role that separate opinions came to play in facilitating the dramatic legal change that occurred during that time, especially in high-profile, constitutional cases. Not only is this consistent with our empirical findings, but—as we will demonstrate—to this

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172 FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note 70, at 196. Roosevelt sought to pack the Court with as many as six additional Justices. The ensuing debate over the plan "riveted the nation for five months." *Id.* For a comprehensive historical and political account of Roosevelt's plan, see *id.* at 195–236.

173 *See id.* at 234 ("Roosevelt obtained enough appointments to transform the Court entirely and the new justices changed the Constitution through interpretation.").

174 *See id.* By 1943, the only non-Roosevelt appointees remaining were Justice Owen Roberts and Justice Harlan Stone. *Id.*

175 *See, e.g.*, Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 73 (noting that, while the Justices were politically aligned, they diverged on the question of the Court's proper function).

day the citation to pivotal concurrences is particularly high in these salient, constitutional cases. Our discussion focuses initially on dissenting opinions, because that is where the historical debate began.[176] But that discussion will lead us to see the special role of concurrences, both then and now—and particularly pivotal concurrences—in signaling and motivating legal change. We conclude by offering a theory of why Justices on the Supreme Court continue to write pivotal concurrences, despite condemnation by so many of a fractured Court.

A. The Collapse of "Acquiescence"

Although scholars initially set out to explain what seemed to be a sudden rise in disagreement on the Supreme Court in 1941, other scholarship confirmed that something very different had happened. What this is—and its timing—bears importantly on our question of the function of separate opinions.

First, it was not that "consensus" on the Court broke down—i.e., that the Justices had just started disagreeing with one another—but rather that the Justices began to give public voice to long-standing, pre-existing disagreements. It turns out the Justices had been *intentionally suppressing* their disagreement from public view in order to present a unified face, just as we see on *per curiam* courts.[177] Path-breaking research demonstrated that prior to the early twentieth century the norm on the Court was not so much "consensus" as "acquiescence": dissenting Justices went along with the majority to present a common front.[178]

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176 *See* Henderson, *supra* note 25, at 283–84 (discussing historical disagreements among Supreme Court Justices over the proper role of dissents).

177 *See* Gregory A. Caldeira & Christopher J. W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 878 (1998) ("[Taft and Hughes] emphasized the importance of collective judgments and of suppressing dissent for the good of the whole . . . ."); Post, *supra* note 91, at 1328 ("Although division and tension within the Court was high [during the 1929 term], it nevertheless decided cases with a degree of unanimity that would be quite unimaginable today.").

178 Post, *supra* note 91, at 1344–45 (attributing the high rate of unanimity in the Taft Court to a "norm of acquiescence"). It was through this norm that the Justices negotiated potential conflicts between their intellectual perspectives and their perceived obligations of solidarity. *Id.* at 1346; *see infra* note 192 and accompanying text.

The evidence of this acquiescence norm was found in the docket books of the Waite[179] and Taft[180] Courts. Those docket books made clear that although less than ten percent of the published decisions of the Waite Court (1874–1888) contained a dissent, *the disagreement at conference was closer to forty percent.*[181] Indeed, of the more than one thousand *unanimous* 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.[182]

Although in theory votes changed between conference and publication of a decision could be the product of persuasion, or even just a struggle with a large caseload—the Court in this period did not have the same *certiorari* discretion to hear cases it has today[183]—the correspondence of the Justices during this time indicated they were actively suppressing their existing disagreement from the pages of the United States Reports.[184] Oliver Wendell Holmes was characteristically colorful on the subject, calling these cases "shut-ups," which is to say that rather than publishing his views to the contrary, he would simply stay mum.[185] Holmes's protégé, Louis Brandeis, himself adopted this approach.[186] Brandeis wrote to then–law professor Felix Frankfurter that "there are reasons for withholding dissent, so that silence does not mean actual concurrence . . . I sometimes endorse an opinion with which I do not agree, 'I acquiesce'; as Holmes puts [it] 'I'll shut up.'"[187]

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179 *See* Epstein et al., *Norm of Consensus*, *supra* note 23, at 362, 366 (arguing that the norm of consensus among members of the Court manifested itself through "public unanimity in the face of private conference disagreements").

180 *See* Post, *supra* note 91, at 1332–33, 1340 (concluding that higher rates of unanimity in decisions than at conference demonstrates a willingness among the Justices to disagree in private, but a reluctance to do so in public).

181 Epstein et al., *Norm of Consensus*, *supra* note 23, at 366.

182 Post, *supra* note 91, at 1332–33. In an additional twelve percent of cases, at least one Justice had to overcome uncertainty for the Court to achieve unanimity. *Id.*

183 The Supreme Court's certiorari jurisdiction was created by the Certiorari Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (codified as amended in scattered sections of 28 U.S.C.) (commonly referred to as the "Judges' Bill").

184 Henry Abraham refers to the Justices' willingness to decide contrary to their own lights as "bargaining" among Justices who were "willingly constrained by group and institutional concerns." HENRY J. ABRAHAM, THE JUDICIAL PROCESS 235 (7th ed. 1998).

185 Post, *supra* note 91, at 1342 (quoting Stone Papers).

186 *Id.* at 1341, 1343 n.230 (quoting Holmes Papers).

187 Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 328. Similarly, Hughes told then-Associate Justice (and relatively frequent dissenter) Stone the following: "I choke a little at swallowing your analysis, still I do not think it would serve any useful purpose to expose my views." ABRAHAM, *supra* note 184, at 235.

It also became clear that the Justices were doing this for many of the same reasons we have seen around the globe for adopting a *per curiam* practice.[188] The clarity of the law and the credibility of the Court seemed to demand it.[189] 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.'"[190] Or, as Justice Butler wrote Justice Stone, "I shall in silence acquiesce. Dissents seldom aid in the right development or statement of the law. They often do harm. For myself I say: 'Lead us not into temptation.'"[191]

Moreover, the breakdown in acquiescence did not occur in one fell swoop in 1941, but actually over a decade earlier and happened more gradually. Chief Justice Taft, who served from 1921 to 1930, was a fanatic about suppressing disagreement from the public eye.[192] But his successors—Charles Evans Hughes and Harlan Fiske Stone—believed Justices should feel free to express their deeply-felt differences.[193] Empirical stud-

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188 *See* Post, *supra* note 91, at 1274 ("Justices of the Taft Court felt presumptively obligated to join Court opinions, even if they disagreed with their content, so as to preserve the influence and prestige of the Court."). Post points to evidence that dissent was suppressed during the 1920s to "fend off external attacks," including congressional proposals to limit the Court's ability to overturn acts of Congress as unconstitutional. *Id.* at 1314–15. Interestingly, he notes that "the Court may actually have striven harder to preserve unanimity as internal rates of dissensus at Conference increased." *Id.* at 1345.

189 *See id.* at 1344 ("The Justices preserve their differences, but they each assume that in the absence of strong reasons, these differences should be put aside so that the Court can present a united front to the public . . . .").

190 *Id.* (quoting LEARNED HAND, THE BILL OF RIGHTS 72–73 (1958)).

191 ABRAHAM, *supra* note 184, at 235.

192 WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 61 n.63 (1964). Taft often "tried to turn a dissenting opinion into silent acquiescence." ABRAHAM, *supra* note 184, at 235. He wrote, "I don't approve of dissents generally . . . [I]t is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way." Walker, Epstein & Dixon, *supra* note 83, at 381. Taft had chaired the American Bar Association Committee that drafted the 1924 Canon of Judicial Ethics, which stated the following: "It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. . . . Except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort." ABA Canon of Judicial Ethics, Canon 19 (1924), *reprinted in* LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 137 (1992).

193 Stone believed that "[s]ound legal principles . . . never sprang full-fledged from the brains of any man or group of men," and concluded it is not "the appropriate function of a Chief Justice to attempt to dissuade members of the Court from dissenting." Walker, Epstein & Dixon, *supra* note 83, at 379 (quoting ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 608, 629 (1956)). Hughes believed that "[w]hen unanimity can be obtained *without sacrifice of con-*

ies suggest that public disagreement on the Court started to become common during Hughes' tenure,[194] and that rather than a sharp break in 1941, there was a "more incremental rate of change across the Hughes, Stone and Vinson Courts."[195] As we will see, dissenting voting blocs were starting to appear even during Taft's tenure, much to his chagrin.

In short, the Justices were not actually so unified until 1941. Rather, they had tried to shield their disagreement from the public, and this was cracking apart in the early decades of the twentieth century.

B. Why Acquiescence Collapsed

The question is why this was happening. And here, the answer lies not in empirical data, but in history. Looking only to the numbers misses the fact that there was something quite profound going on at the time, which explains the Justices' concern for public confidence in the first place.

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 pieces of dramatic social and economic legislation, including the income tax, minimum wage laws, maximum hour laws, and widespread regulation of vital national industries.[196] Conservatives, believing such laws reflected economic theories that were socialist if not communist, viewed them with alarm.[197] 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."[198]

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viction, it strongly commends the decision to public confidence," but when conviction *was* at stake, Hughes felt that "merely formal" unanimity "is not desirable . . . whatever may be the effect upon public opinion at the time." CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 67 (1928) (emphasis added).

194 *See* Caldeira & Zorn, *supra* note 177, at 888, 892 (finding an increase in dissents during the tenures of Taft and Hughes).

195 Marcus E. Hendershot et al., *Dissensual Decision Making: Revisiting the Demise of Consensual Norms Within the U.S. Supreme Court*, 66 POL. RES. Q. 467, 468 (2013) (examining the total number of concurring and dissenting votes cast rather than the percentage of cases that contain at least one concurrence); *accord* Caldeira & Zorn, *supra* note 177, at 892 (noting that the data "point to the distinct possibility of an earlier, more gradual change in norms").

196 FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note 70, at 168–71.

197 *See id.* at 171–73.

198 47 CONG. REC. 2800 (1911) (Statement of Sen. Sutherland).

Tasked with interpreting the "written constitution," the Justices of the Supreme Court became caught in—indeed central to—this conflict. Court decisions invalidated many of these laws conservatives deplored, such as the now-famous 1906 case of *Lochner v. New York*.[199] Decisions during the *Lochner* era made the Court a major issue in the 1912 and 1924 elections.[200] Hughes's tenure as Chief Justice, smack in the middle of all this, was one of the most volatile for the Supreme Court.[201] And the fight over Franklin Roosevelt's Court-packing plan following the 1936 election, triggered by judicial decisions in these contentious areas, was arguably the defining moment for the modern Court.[202]

The struggle on the Court over these issues was intense. Taft, who was quite ill, wrote his brother that "I must stay on the Court in order to prevent the Bolsheviki from getting control."[203] 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 know how difficult it would be for me to abandon the fight for anything else."[204]

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199 198 U.S. 45, 53, 64 (1905) (invalidating a New York state statute limiting the number of hours bakers were permitted to work on the grounds that it violated "the right of contract").

200 Theodore Roosevelt ran against the Court and the Republican Taft as a Bull Moose in 1912, guaranteeing Democrat Woodrow Wilson's victory. FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note 70, at 167, 179. In the Election of 1924, the Progressive Party candidate, Robert LaFollette, attacked the Court but was ultimately defeated by Republican Calvin Coolidge. *Id.* at 180–81.

201 Indeed, Caldeira and Zorn, two political scientists who identify the Hughes Court as the relevant time period in which acquiescence collapsed, hit the nail on the head in one sentence they utter in passing: "Indeed, some anecdotal evidence, such as Taft's frustration with Brandeis, Holmes, 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." Caldeira & Zorn, *supra* note 177, at 892. ("Anecdotal" hardly begins to describe what is well-established historical fact.)

202 WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 162 (1995) ("[N]o event has had more momentous consequences than Franklin Roosevelt's message of February 1937."). Leuchtenburg notes that the struggle resulted in "acceptance of a substantial change in the role for government," the "reordering of property rights," and the appointment of Justices more protective of civil rights. *Id.* As a result, virtually all of the Bill of Rights was later incorporated into the Fourteenth Amendment and an expansive reading of the Commerce Clause made possible an expansive role for the federal government. *Id.*

203 Post, *supra* note 91, at 1325–26 (quoting Letter from William Howard Taft to Horace Taft (Nov. 14, 1929) (Taft Papers, Reel 315) and Letter from William Howard Taft to Horace Taft (Dec. 1, 1929) (Taft Papers, Reel 316)).

204 *Id.* at 1321 (quoting Letter from Harlan Fiske Stone to Milton Handler (Feb. 17, 1929) (Stone Papers)).

And it was this struggle on the Supreme Court that significantly affected the Justices' opinion-writing and opinion-publication practices. Two of history's "great dissenters"—John Marshall Harlan and Oliver Wendell Holmes—emerged during this time.[205] Harlan dissented in 1895 from the Court's decision striking down the income tax.[206] Both wrote in dissent in *Lochner*.[207] Holmes and Brandeis, later joined by Stone, dissented in many notable cases.[208] Just a month before he had a massive stroke that ultimately lead to his replacement by Hughes, Taft wrote: "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."[209]

Little surprise then that public expressions of disagreement tended to be reserved for *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.[210] Brandeis first classed as "important" "whether it's 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 is settled."[211] In "constitutional cases," by contrast, "since what is done is what you call statesmanship, nothing is ever settled—unless statesmanship is settled & at an end."[212]

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205 The first Justice Harlan earned a reputation as a "Great Dissenter" for his dissents in constitutional cases which frequently reached the Court after 1891. LOREN P. BETH, JOHN MARSHALL HARLAN 164 (1992). Justice Holmes earned the title "The Great Dissenter" following his dissent in *Lochner v. New York*, 198 U.S. 45 (1905). BARTH, *supra* note 2, at 6; *see also* Kelsh, *supra* note 33, at 170 (describing the Four Horsemen, which consisted of Justices Pierce Butler, Willis Van Devanter, George Sutherland, and James McReynolds, as a bloc of Justices who "repeatedly emphasized the limited regulatory powers of state governments").

206 Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 638 (1895) (Harlan, J., dissenting), *majority opinion superseded by constitutional amendment*, U.S. CONST. amend. XVI.

207 Lochner v. New York, 198 U.S. 45, 65 (1905) (Harlan, White, & Day, JJ., dissenting); *id.* at 74 (Holmes, J., dissenting).

208 Kelsh, *supra* note 33, at 169–70.

209 Post, *supra* note 91, at 1325–26 (quoting Letter from William Howard Taft to Horace Taft (Dec. 1, 1929) (Taft Papers, Reel 316)).

210 *Id.* at 1351 (quoting Urofsky, *supra* note 187, at 314).

211 *Id.* at 1345, 1351 (quoting Urofsky, *supra* note 187, at 328, 314).

212 *Id.* at 1351 (quoting Urofsky, *supra* note 187, at 314).

C. The Value of Dissensus: Signaling and Smoothing

Now that we see how the Court was moving away from a *per curiam* model at the turn of the twentieth century, and more Justices were starting to write separate opinions in constitutional cases, it is time to examine what role those separate opinions played. We begin by discussing dissents and move to concurrences.

Dissent in big-ticket constitutional cases served (and serves) two important functions. It provides an important signaling function to the world outside the Court. And it helps, ironically, to smooth the process of constitutional change.

Those who wrote the dissenting opinions focused on the signaling function they served. For Brandeis, it was precisely because nothing was ever "settled" in constitutional cases that the dissents were particularly important. Not internally (for the Justices already knew how one another felt), but as indicators to the outside world about the possibility of a different constitutional vision.[213] We now understand that in a constitutional democracy, dissents such as these can prove to be rallying cries for social movements that eventually achieve constitutional change.[214] The dissents that Taft and his conservative colleagues so deplored fanned the fires of constitutional change that occurred beginning in 1937. And the same has proven true in other areas of constitutional contention, be it the death penalty, abortion, or gender and race equality, among others.[215]

Indeed, suggest John Ferejohn and Pasquale Pasquino, the signaling function of separate opinions may be especially important in "complex and emotional issues such as abortion,

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213 *See* BARTH, *supra* note 2, at 3–4 ("[A] dissent of this sort is not an attempt to win over one's colleagues . . . . The most that the dissenter can hope to do . . . is to persuade contemporaries off the court that his associates were mistaken, to mobilize public opinion against them . . . .").

214 As Robert Post explains, and as the events of 1937 themselves made quite clear, "Such a crude distinction between courts and the people, between law and politics, is very difficult to sustain in a democracy." Post, *supra* note 91, at 1357. For example, Post and Reva Siegel note that, in fact, Justice Scalia used his dissents to "mobilize critics of the decision." Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 399 (2007). Justice Scalia fully recognized "the practical and expressive power of judicial decisions does not shut down politics; it can instead inspire Americans to struggle passionately to shape the exercise of judicial review." *Id.*

215 *See generally* LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., Brennan Center for Justice, 2015) (discussing the role of the courts in shaping public discourse to effect constitutional change).

euthanasia, and affirmative action."[216] In such cases, "[t]he open display of competing viewpoints invites the attentive and affected public to discuss, argue, petition for new laws, and otherwise work to shape these controversial policies."[217] For example, "in 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 legislatures, interest groups, members of Congress, and the people themselves about what kind of abortion policies ought to be permitted under the Constitution."[218]

Dissent serves a second function as well: smoothing the path of constitutional change. This function is at first counterintuitive, given that dissent can fan the flames of opposition. But the path of the law would seem impossibly erratic without dissents to telegraph which way the Justices might head. Consider the Justices' path on the issues that were critical to FDR's Court-packing plan and its rejection. In *Carter v. Carter Coal Co.*, in 1936, the Supreme Court, by a 5–4 vote, limited Congress's power to regulate commerce with interstate effects.[219] Just one year later, after the Court-packing plan was announced, the Court reversed direction on the question in *Jones & Laughlin Steel*.[220] Imagine the New Deal Court overruling *Carter Coal* just one year after releasing it, without any dissent in *Carter Coal*. Dissents pave the way, in the public mind, to understand that there is disagreement, and that because of it the law can be in flux.

Indeed, absent clear expressions of where the Justices stand, sudden reversals undermine judicial legitimacy, a point that was on full display in the New Deal Court's path on minimum wage and maximum-hours laws. In a string of cases reaching from *Lochner* forward, the Justices tacked back and forth on the constitutionality of legislation regulating hours, wages and prices. For example, in 1923, in *Adkins v. Chil-*

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216 Ferejohn & Pasquino, *supra* note 31, at 1699.

217 *Id.*

218 *Id.*

219 The majority struck down a statute authorizing local boards to determine coal prices, wages, and hours, finding that the Commerce Clause did not include the power to control the conditions in which coal is produced before it becomes an article of commerce. Carter v. Carter Coal Co., 298 U.S. 238, 297–306 (1936). Writing separately, Chief Justice Hughes agreed with the majority that labor provisions exceeded any proper regulation of commerce, but found that other provisions related to the marketing of coal sold in interstate commerce were severable and should be upheld. *Id.* at 317–23 (Hughes, C.J., writing separately).

220 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). For a discussion of the decision, see FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note 70, at 226–27.

dren's Hospital, the Supreme Court struck down a federal minimum wage law as a violation of liberty of contract.[221] In *Nebbia v. New York* (1934), however, the Supreme Court upheld New York's minimum price regulation on milk, in a 5–4 decision written by Justice Owen Roberts that seemed to pave the way for a reversal on minimum wages.[222] Thus, there was widespread shock when, on June 1, 1936, the Justices struck down New York's minimum wage law in *Morehead v. New York ex rel. Tipaldo*, with Justice Roberts (again silently) joining the majority—offering no attempt to reconcile his previous views.[223] Yet, the very next year, again as part of the "switch," *Adkins* was flatly overruled in *West Coast Hotel v. Parrish*, with Justice Roberts silently switching his vote from *Tipaldo*.[224] The result? Widespread derision and serious skepticism that anything other than politics was driving the outcomes.

The critical point here is that for all the concern about how dissenting opinions disrupt a court's legitimacy, they play an important role. Dissenting opinions speak over the head of the majority to the public at large, indicating room for possible legal change, and motivating social movements to achieve it. And they help pave the way for that change in observers' eyes.

D. The Special Value of Concurrences: Identifying Fault Lines

But what about concurrences? As we noted at the outset, dissents have their fans precisely for the romantic *cri de coeur* they represent. And, dissents do not really fragment a court's reasoning or muddy the law's clarity; they represent the voices of those who disagree. On the other hand, as we have seen, critics believe concurrences do messy up a court's rationale for its actions, leaving confusion about the current status of the law.[225]

In truth, concurrences—and particularly pivotal concurrences—play a parallel role to dissents, and perhaps a more important role at that. Dissents speak to the people, and the future, but often at quite a distance. Given stare decisis and other factors, majority decisions, especially major ones, seldom

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221 261 U.S. 525, 562 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

222 291 U.S. 502, 538–39 (1934).

223 298 U.S. 587, 609 (1936).

224 *West Coast Hotel*, 300 U.S. at 400.

225 *See supra* note 97 and accompanying text (collecting sources).

are overruled, and even more seldom in short order.[226] Concurrences, on the other hand, can do their work more quickly. Concurrences point out possible directions for *immediate* legal movement, encouraging lawyers and litigants to focus their efforts in those directions.

Start with legal change: even more than dissents, concurring opinions can smooth the process of change and thereby enhance the Court's credibility. To see this, consider again the decision in *Morehead v. New York ex rel. Tipaldo*, which shocked the country by finding New York's minimum-wage law unconstitutional.[227] Then, just a year later but in the middle of the Court-packing fight, the Court *upheld* Washington state's minimum-wage law for women in *West Coast Hotel v. Parrish* due to Justice Owen Roberts's seemingly incomprehensible flip. What was going on here? 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*.[228] Had he been asked, he said, he would have voted the other way, as he did in *West Coast Hotel*. Though some question the truth of this assertion,[229] suppose that it were true, and suppose Roberts had merely said 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.

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226 For example, between 1800 and 2005, the Supreme Court overruled only 233 decisions (less than 1% of the more than 25,000 cases heard). On average, twenty-six years passed between the promulgation of the original decision and its overruling. EPSTEIN ET AL., COMPENDIUM, *supra* note 82, at 226 tbl.2-17, 252 tbl.3-2 (original analysis).

227 FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note 70, at 205 (describing shock, indignation, and disappointment following the ruling).

228 Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 314–15 (1955).

229 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* Michael Ariens, *A Thrice Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 624–25 (1994). *But see* FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note 70, at 499 n.326 (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." Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 605 (1936).

Indeed, Justice Roberts's silence in *Tipaldo* stands in sharp contrast to what Justice O'Connor did in the *Thornton* automobile search case, in which she agreed with the reasoning of the dissent, but voted with the majority because the relevant issues had not been briefed.[230] It is true that her voting one way while expressing skepticism about the law in the other direction was peculiar. But at least she was candid about her reasoning. Everyone watching could understand that the law was likely to change, as it did a few years later in *Arizona v. Gant*. Concurrences keep changes in the law from appearing as an incomprehensible bolt from the blue.

Concurrences do much more than smooth over legal change, however; they also invite it in important ways. Consider, in this regard, Justice Scalia's concurring opinion in *Thornton*, in conjunction with Justice O'Connor's own opinion in the case.[231] Together they signaled a new way forward, and made clear that there was substantial interest on the Court in moving in that direction. That emboldened litigation that led ultimately to the Supreme Court replacing the original *Belton* automobile search rule with a new one in *Arizona v. Gant*.

Concurrences spell the path toward legal change, letting litigants know precisely what issues to push. In *Georgia v. Randolph* a sharply divided Supreme Court decided that if police seek consent to search a residence, and one occupant says yes but another says no, the "no" prevails.[232] Justice Breyer, roughly in the middle of the *Randolph* Court, joined the majority opinion. But he also concurred, in a separate opinion that advanced a multi-factor test for when police could ignore someone saying "no" to a consent search.[233] His many factors included the presence of a claim of domestic violence.[234] Little surprise, then, that shortly thereafter *Randolph* was largely

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230 *See supra* notes 136–46 and accompanying text.

231 *See supra* notes 145–46 and accompanying text.

232 547 U.S. 103, 106 (2006) ("[A] physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.").

233 In contrast to the majority's categorical rule, Justice Breyer advocated a consideration of the "totality of the circumstances" in each case and stated that "were the circumstances to change significantly, so should the result." *Id.* at 126 (Breyer, J., concurring). Breyer provided the critical fifth vote necessary to create a majority. Justice Stevens, who also joined the majority, wrote a concurrence as well. Chief Justice Roberts, Justice Scalia, and Justice Thomas dissented. Justice Alito took no part in the decision. *Id.* at 105.

234 *Id.* at 126–27 (Breyer, J., concurring) ("In [the domestic abuse] context, an invitation (or consent) would provide a special reason for immediate, rather than later, police entry.").

confined to its facts, in a case that involved allegations of domestic violence.[235]

Sometimes, the invitation to bring the new cases can 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.[236] 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 expenditures under the whole scheme of campaign finance regulation were under review, I might join Justice Thomas' dissenting opinion."[237]

The critical point here is that the critics' desire to limit concurring opinions in order to provide greater clarity to the law is quixotic, because that clarity may be both illusory and wrongheaded. It is illusory because absent a super-strong commitment to *stare decisis* on the part of Justices who suppress their concurrences, a later case is likely to divide the court precisely along the fault lines the concurrence would have suggested. In that later case, there likely will be a majority for precisely the proposition on which the concurrence was silent. It is hard to imagine that majority voting against its preferences just because of a prior opinion. And it is wrongheaded because revealing the fault lines is precisely what moves the law.

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.[238]

Indeed, the Chief Justice, who has been sharply critical of dissensus on the Court, in reality 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

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235 *See* Fernandez v. California, 134 S. Ct. 1126, 1134 (2014) (holding that when the police lawfully arrest or detain the objecting occupant, they may then search the residence). Notably, Justice Breyer joined the majority. *Id.* at 1129.

236 539 U.S. 146, 152–63 (2003).

237 *Id.* at 164 (Kennedy, J., concurring in the judgment).

238 *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1, 27–29 (1984) (hypothesizing that outcomes in litigated cases tend toward fifty percent plaintiff victories due to selection effects).

without notice. Deeply concerned as he appears to be with the Court's institutional integrity, the latter is likely to cause real concern. But even more problematic, the Chief Justice surely wants that law to change in many areas, such as campaign finance and affirmative action. To see that happen, he needs to encourage litigation along the lines he would like to see the law move. Thus, it may not be possible to have it both ways.

E. Important Cases and Pivotal Concurrences

If what we have suggested so far is true, then we would expect pivotal concurrences to play their largest role in salient, constitutional cases, in which there is the most at stake. And that is in fact what the data suggest.

We saw in subpart II.C that the increased citation rates for pivotal concurrences (vis-à-vis vanilla concurrences) remain even after controlling for the influence of the case's constitutional nature and salience. Our multivariate OLS model found that pivotal concurrences are cited 82% more often than are vanilla concurrences when all variables are included (4.16 versus 2.28 citations per year), and that the citation rate for pivotal concurrences is statistically indistinguishable from the rate even for plurality concurrences.

But what is most telling is how often lower courts actually refer to these pivotal concurrences in these constitutional and salient cases. As shown in Table 6 below, courts cite to pivotal concurrences in constitutional cases more than *four times* as often as they cite pivotal concurrences in non-constitutional cases (7.2% versus 1.7%).[239] And though citation rates for other types of concurrences are higher in constitutional cases as well—and not particularly surprisingly given the stakes in these cases—the difference is less pronounced (3.8% versus 2.3% for vanilla and 12% versus 10.7% for plurality).[240]

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239 Constitutionality was coded per the Supreme Court Database. *See* THE SUPREME COURT DATABASE, *supra* note 82.

240 The relatively small change in the plurality citation rate may be because more than three-quarters of lower court citations to plurality concurrences are in constitutional cases. 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 vanilla and pivotal concurrences issued by the Court—42.5% and 61.5%, respectively.

TABLE 6. CITATION RATE OF CONSTITUTIONAL AND NON-CONSTITUTIONAL DECISIONS BY LOWER COURTS

Type	Mean	Std. Dev.	N
Constitutional Decisions			
Vanilla	0.04	0.19	44,575
Pivotal	0.07	0.26	145,270
Plurality	0.12	0.33	102,453
Total	**0.08**	**0.28**	**292,298**
Non-Constitutional Decisions			
Vanilla	0.02	0.15	85,800
Pivotal	0.02	0.14	258,116
Plurality	0.11	0.32	32,143
Total	**0.26**	**0.16**	**376,059**

Turning to important (salient) cases, we find a similar pattern. As shown in Table 7, pivotal concurrences in salient cases are cited more than three times as often as are pivotal concurrences in non-salient cases (9.0% versus 2.8%). And again, while courts cite all concurrences more often in salient cases—and again, not surprisingly—the effect is significantly more pronounced for pivotal concurrences than it is for either vanilla (6.0% versus 2.7%) or plurality concurrences (17.4% versus 11.7%).[241]

TABLE 7. CITATION RATE OF SALIENT DECISIONS BY LOWER COURTS

Type	Mean	Std. Dev.	N
Salient Decisions			
Vanilla	0.06	0.24	18,575
Pivotal	0.09	0.29	53,299
Plurality	0.17	0.38	27,411
Total	**0.11**	**0.31**	**99,285**
Non-Salient Decisions			
Vanilla	0.02	0.15	107,885
Pivotal	0.03	0.16	347,637
Plurality	0.10	0.30	106,415
Total	**0.04**	**0.20**	**561,937**

Putting it all together, we find that rates of citation to pivotal concurrences are highest for cases that are both constitutional and salient. Pivotal concurrences accompanying salient

241 Again, the differences in citation rates are statistically significant ($p < 0.001$).

and constitutional cases are cited approximately three-and-a-half times as often (rising to 10.1% from 2.9%) as are pivotal concurrences in all other types of cases (including cases that are either *only* constitutional *or* high-profile). And just as with the previous categories, citation rates to all concurrences are higher for salient and constitutional cases, but the increase in citation rate is less pronounced for vanilla (6.2% versus 2.3%) or plurality (16.8% versus 10.5%) concurrences. These are fairly dramatic differences.

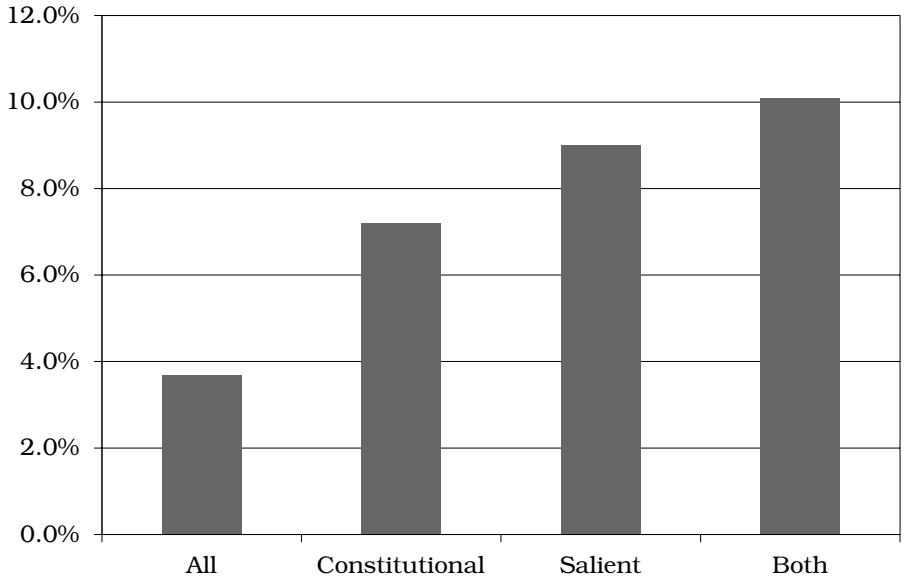
TABLE 8. CITATION RATE OF SALIENT CONSTITUTIONAL DECISIONS BY LOWER COURTS

Type	Mean	Std. Dev.	N
Salient Constitutional Decisions			
Vanilla	0.06	0.24	18,834
Pivotal	0.10	0.30	40,421
Plurality	0.17	0.37	23,334
Total	**0.11**	**0.32**	**79,589**
All Other Decisions			
Vanilla	0.02	0.15	110,626
Pivotal	0.03	0.17	360,515
Plurality	0.10	0.31	110,492
Total	**0.04**	**0.20**	**581,633**

That means that courts are most likely to cite pivotal concurrences in cases that are both constitutional and high-profile. Indeed, for cases that are non-salient and non-constitutional, lower courts cite to pivotal concurrences at rates only slightly higher than they do for vanilla concurrences. But for cases that are both salient and constitutional, there is a marked difference between how likely lower courts are to cite pivotal and vanilla concurrences. Figure 3 shows the increased citation rates to pivotal concurrences in cases that are high-profile, constitutional, and both.[242]

242 We find similar results when this analysis is performed using "Depth of Treatment" as the primary variable. The full analysis is available from the authors upon request.

FIGURE 3. CITATION OF PIVOTAL CONCURRENCES BY LOWER COURTS, BY TYPE OF CASE



The empirical data are quite telling regarding the story we have told. The Supreme Court's "norm of acquiescence"—its attempt to function largely as a classic *per curiam* court—shattered in the face of substantial disagreements following the Progressive Era and into the New Deal.[243] This happened in salient, constitutional cases because that is where the battle was being fought: over the meaning and constraints of the Constitution. And in those cases, the *seriatim* practice of writing separate opinions signaled, invited, and smoothed the process of constitutional change.

To this very day, those are the cases in which the Justices are least able to control their urges to write separately. In which they seem to care least about a fractured court. And when they do write separately, these are the concurrences that get cited the most.

This, as we have argued, makes sense. It is these concurrences that signal the direction of legal change (or dead ends, per the *Lopez* example with which we began), and that smooth the way for that change when it occurs. These concurrences play a very significant role, as the lower courts seem to appreciate fully.

243 *See supra* subpart III.B.

F. Coda: Why Pivotal Opinions Are Written

By now, it seems apparent why the Justices write separate opinions in the volume they do. Still, it is useful spelling it out, because it reveals some of the conditions under which we would most expect to see them be written.

Consider a simple model of rational judicial thought. One's clear preference would be to draft the majority opinion, and particularly along the lines one would like.[244] But that option is hardly available in most cases. On a divided Court, however, one can still exert substantial influence by writing separately. Because, to quote one author, that opinion could "control the future."[245]

This possibility of having influence with a concurring opinion is clearly strongest with a plurality concurrence. Under the rule of *Marks v. United States*,[246] 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. Thus, 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. As Berry et al. explains:

> [I]f a [J]ustice knows he can control the future by authoring 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.[247]

But now we can see the appeal of pivotal concurrences: if one suspects that a concurring 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 pivotal concurrences carry great weight, signaling the course of the law to litigants eager for change. And, as we have

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244 *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 41 (2002) (elevating judges' policy preferences to be the most important determinant of judicial decision-making).

245 Berkolow, *supra* note 3, at 305.

246 430 U.S. 188, 193 (1977).

247 Berkolow, *supra* note 3, at 305 ("If this theory of judge self-interest is true, however, why we ever get majorities must be explored."); *accord id.* at 352–53 (concluding that the *Marks* doctrine "should incentivize separate [judicial] opinions").

seen, lower courts pay attention to them, despite the fact that they ought to have no weight. It is easy to see why Justices do not abstain given these incentives.

CONCLUSION

In making the case here, we realize we are swimming against the tide. Concurrences are oft ignored by commentators; when they garner attention it is to condemn the fragmentation of the Court and the egos of those who feel they must write separately. And certainly, the phenomenon we identify here, of pivotal concurrences, is—on its face at least—quite odd. Why would a Justice join a majority opinion only to undercut it at its very moment of birth?

What we hope to have shown is that common wisdom may well be wrong. Concurrences have an important role to play. They signal the direction of possible legal change. And nothing does that more so than a pivotal concurrence, which exposes the fault lines in the law, and gestures directly to a fault line on the Court, where change can occur.