
Introduction

During his introductory remarks at Judge Samuel Alito's Supreme Court confirmation hearings, Senate Judiciary Committee Chairman Arlen Specter referred to Justice Robert H. Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (1952):

This hearing comes at a time of great national concern about the balance between civil rights and the president's national security authority. The president's constitutional powers as commander in chief to conduct electronic surveillance appear to conflict with what Congress has said in the Foreign Intelligence Surveillance Act. This conflict involves very major considerations raised by Justice Jackson's historic concurrence in the Youngstown Steel seizure cases . . . where [he] noted, quote, "What is at stake is the equilibrium established in our constitutional system." (Specter 2006)

Jackson's concurrence has been called "the greatest single opinion ever written by a Supreme Court justice" (Levinson 2000), establishing the starting framework for analyzing all future foreign relations and individual liberties problems.

Youngstown involved a labor dispute in the steel industry during the Korean War. President Harry S. Truman issued an executive order directing the secretary of commerce to seize the steel mills and keep them operating. Truman argued this was a necessary action to prevent "a national catastrophe which would inevitably result from a stoppage of steel production" (582). The Court overturned the order, holding that presidential authority "must stem either from an act of Congress or the Constitution itself" (585). According to the Court, the Commander in Chief Clause does not give the president "ultimate power" to "take possession of private property in order to keep labor disputes from stopping production" (587). That power belongs only to Congress.

In his concurrence, Jackson contended that the president's powers "are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress" (*Youngstown* 1952, 635). He conceived of three categories:

1. Where the president acts pursuant to express or implied authorization of Congress, in which case his authority is at its maximum;
2. Where the president acts in the absence of either a congressional grant or denial of authority, in which case “there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain” (637); and
3. Where the president acts adversely to the express or implied will of Congress, in which case his power is “at its lowest ebb” (637).

Jackson’s concurrence has been widely relied on in later decisions (Paulsen 2002). For example, *Dames & Moore v. Regan* (1981) involved Jimmy Carter’s response to the taking of American hostages in Iran. The Court relied on Jackson’s tripartite framework to uphold President Carter’s power to order the transfer of Iranian assets out of the country, to nullify attachments of those assets, and to require that claims would be settled by arbitration rather than by U.S. courts. The Court quoted Jackson’s concurrence, stating “[b]ecause the President’s action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is ‘supported by the strongest of presumptions and the widest latitude of judicial interpretation’” (674).

The lasting impact of Jackson’s concurring opinion underscores the potential importance of concurrences. Why are they written? What systematic impact do these opinions have? A concurring opinion is one written by a judge or justice, in which he or she agrees with the conclusions or results of the majority opinion filed in the case “though he states separately his views of the case or his reasons for so concurring” (Black 1991, 200). When justices write or join a concurring opinion, they demonstrate that they have preferences over legal rules and they are responding to the substance of the majority opinion. Concurrences provide a way for the justices to express their views about the law, and to engage in a dialogue of law with each other, the legal community, the public, and Congress. “[C]oncurring voices produce the legal debate that furthers the intellectual development of the law on the Supreme Court” (Maveety 2005, 139). By studying the process of opinion writing and the formation of legal doctrine through focusing on concurrences, this book provides a richer and more complete portrait of judicial decision making. First, I code concurring opinions into different categories and examine why a justice writes or joins a particular type of concurrence rather than silently joining the majority opinion. Second, I provide a qualitative analysis of the bargaining and accommodation that occurs on the Supreme Court in order

to further understand why concurrences are published. Finally, I assess the impact that concurring opinions have on lower court compliance and on the Supreme Court's interpretation of its own precedent.

Court Opinions Matter

Legal scholars study the opinions of the Court, dissecting the language in an effort to understand the law. Practitioners analyze and study the content of Court opinions in order to provide legal advice to their clients, using cases to predict what courts will do in a specific case that has yet to come before them. It is the rationale used in the past that provides the guidance for the future. Thus, the words used, the reasoning employed, the rationale given, and the tests devised by the Court, are important to understand. Where do they come from? How do judges agree on the language used in opinions?

There has been a long-standing debate about how researchers should study judicial behavior. Attitudinalists¹ argue that the best way to understand how judges make decisions is through a scientific, empirical approach, focusing on case outcomes and specifically on the votes of individual justices (see, e.g., Schubert 1959; Spaeth 1965; Ulmer 1959). Legally oriented scholars suggest that, in order to understand judicial behavior, we must study the language of opinions (see, e.g., Mendelson 1963). Although there continues to be disagreement, many judicial scholars have recognized the real-world importance of the content of Supreme Court opinions.

The Opinion of the Court is the core of the policy-making power of the Supreme Court. The vote on the merits in conference determines only whether the decisions of the court below will be affirmed or reversed. It is the majority opinion which lays down the broad constitutional and legal principles that govern the decision in the case before the Court, which are theoretically binding on lower courts in all similar cases, and which establish precedents for future decisions of the Court. (Rohde and Spaeth 1976, 172)

Thus, court *opinions* matter, not just the vote on the merits, and understanding how the opinion writing process works is central to explaining the development of the law. How is legal precedent formed? How are Supreme Court opinions developed? These are questions that have become central to judicial scholars.

Previous literature has focused on explaining case outcomes or the behavior of individual justices (see, e.g., Pritchett 1948; Rohde and Spaeth 1976; Schubert 1965; Segal and Cover 1989; Segal and Spaeth 1993, 2002). According to the

attitudinal model, judicial outcomes reflect a combination of legal facts and the policy preferences of individual justices. “Simply put, Rehnquist vote[d] the way he [did] because he [was] extremely conservative; Marshall voted the way he did because he [was] extremely liberal” (Segal and Spaeth 1993, 65). In short, ideology matters. However, the empirical evidence is based on the justice’s final vote on the merits; thus it does not explain how opinions are crafted. In fact, Spaeth (1995) observed, “opinion coalitions and opinion writing may be a matter where nonattitudinal variables operate” (314).

With this in mind, recent literature has focused on examining the factors that shape Court opinions (see, e.g., Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). These proponents of the strategic model have shown that preferences alone do not account for the choices that justices make. “Instead, their decisions result from the pursuit of their policy preferences within constraints endogenous to the Court. These constraints primarily stem from institutional rules on the Court, which give the Court its collegial character” (Maltzman et al. 2000, 149). In other words, although the justices want to maximize their policy preferences and see those policy preferences reflected in the law, they are *not* unconstrained. “Rather, justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act” (Epstein and Knight 1998, 10). For example, the opinion writing process on the Court is affected by the informal rule that Court opinions constitute precedent only when supported by a majority of the justices. This means that the justices, when writing the majority opinion, have to take into account the preferences of their colleagues and cannot write the opinion solely for themselves.

Scholars have studied the assignment of the majority opinion, the writing of the majority opinion, the justices’ choice of what bargaining tactics to use, and the decision of each justice to join the majority decision. However, the final goal has not been achieved: “explaining the actual content of Court opinions” (Maltzman et al. 2000, 154). This is the challenge I take up in this book, specifically by focusing on concurring opinions.

Concurrences versus Dissents

After the Court hears oral arguments, it meets in private to discuss the cases and to vote. Under Court norms, if the chief justice is in the majority, he assigns the opinion. If the chief is not in the majority, the senior justice in the majority assigns the opinion. After the opinion is assigned, the majority opinion author writes a first draft, which is then circulated to the other justices.

During the opinion writing process, a justice has various options. First, the justice can join the opinion. This means he agrees with the majority opinion and does not want any changes. Second, the justice can ask the opinion writer to make changes to the opinion, bargaining with the opinion writer over specific language contained in the draft. Third, the justice can write or join a regular concurrence, which is a concurrence agreeing with the result and with the content of the opinion. Fourth, a justice can write or join a special concurrence, which is a concurrence that agrees with the result, but does not agree with the rationale used by the majority opinion writer. Fifth, the justice can write or join a dissent.

In this book, I focus solely on concurrences because concurring opinions raise a theoretical puzzle for scholars of the Supreme Court and provide a unique opportunity to differentiate between voting for the outcome versus voting for the opinion. Because concurring opinion writers agree with who wins the case, yet are still not satisfied with the legal rule announced in the opinion, concurring opinions are more difficult to understand than dissents. Dissents disagree with both the outcome and the legal reasoning of the majority opinion, and previous research shows dissents are primarily the result of ideology, specifically the ideological distance between the justice and the majority opinion writer (see Wahlbeck, Spriggs, and Maltzman 1999). On the other hand, when a justice writes or joins a concurring opinion, one asks: “Why undermine the policy voice of a majority one supports by filing a concurrence?” (Maveety 2005, 138).

Additionally, concurrences have more authority than dissents. In fact, the rules and policies of the case may be less the result of what the majority opinion holds than the interpretation of the opinion by concurring justices (see Maveety 2005). Moreover, a Court opinion is not necessarily “perceived . . . as a discrete resolution of a single matter but as one link in a chain of developing law” (Ray 1990, 830). Thus, the concurrences bracketing the majority opinion may shape the evolution of the law as they limit, expand, clarify, or contradict the Court opinion.

Concurrences and Judicial Signaling

To effectuate the rule of law, one must be able to identify controlling legal principles. Furthermore, because few Supreme Court cases can answer all questions about an issue, lower court judges must interpret the decision in order to apply it. In *Roe v. Wade* (1973), the Court held that the right to privacy included a woman’s right to choose whether or not to have an abortion, but did not address spousal consent, parental consent, or Medicaid funding. Thus, lower courts had to interpret *Roe* to apply it to these

situations. Obviously, the majority opinion itself can communicate to the lower courts how to apply the rules, tests, and general principles contained in the opinion, and, in fact, “[p]art of the precedential system is the signaling function to lower courts” (Berkolow 2008, 303).² Former Chief Justice Rehnquist argued that “an appellate judge’s primary task is to function as a member of a collegial body which must decide important questions of federal law in a way that gives intelligible guidance to the bench” (Rehnquist 1992, 270). However, sometimes the Court deliberately leaves legal questions open, with the intention of resolving them in future cases. Other times, the controlling legal principle is difficult if not impossible to extract from the majority opinion. When justices write or join concurring opinions, they are often revealing their support and understanding of the majority opinion and their preferences regarding the particular legal issue. “[A] concurring author . . . offers an internal commentary on the court’s judgment, throwing partial illumination on the otherwise obscure process that creates majorities” (Ray 1990, 783).

Based on the foregoing, I argue that concurrences are a form of judicial signaling, where judges use the signals contained in concurring opinions to interpret the majority opinion and apply it to the case before them.

This idea of judicial signaling is closely tied to the Supreme Court agenda setting literature. Scholars have emphasized the extent to which the work of the justices can be understood as “cues” or “signals” to outside actors as to the Court’s interests and the possible direction that it wishes to take the law (see Baird 2007; Pacelle 1991; Perry 1991). Concurrences are the perfect vehicle for sending cues to other actors because concurring opinions are not the product of compromise as are majority opinions. A justice writing or joining a concurrence can explain “with greater precision [his] relationship to a majority opinion or holding” (Ray 1990, 829). A concurring opinion writer may signal to the other justices and the legal community the extent to which he agrees with the rationale of the majority opinion and how much support he may give in the future. For example, in *Morse v. Frederick* (2007), the Court addressed whether a school principal may, consistent with the First Amendment, restrict student speech at a school event when that speech is reasonably viewed as promoting illegal drug use. In *Morse*, a student was suspended from school for displaying a banner reading “Bong Hits 4 Jesus” across the street from his school during the Olympics torch relay. Chief Justice Roberts, writing for the majority, concluded that the principal did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it. The majority found that Frederick’s “Bong Hits” banner was displayed during a school event, which made this a “school speech” case rather than a normal speech case.³

Although the Court concluded that the banner's message was "cryptic," it was undeniably a "reference to illegal drugs" and it was reasonable for the principal to believe that it "advocated the use of illegal drugs."

Justice Thomas wrote a concurrence, arguing that students in public schools do not have a right to free speech and that *Tinker v. Des Moines Community School Dist.* (1969), a case in which the Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (506) should be overruled.⁴ Basically, Thomas did not believe the majority decision went far enough and signaled his willingness to overrule *Tinker* and his belief that the First Amendment does not protect student speech in public schools. He was quite transparent in his concurrence, specifically stating that he "join[s] the Court's opinion because it erodes *Tinker's* hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so" (*Morse* 2007, 2636).

Justice Alito, joined by Justice Kennedy, wrote a concurrence agreeing with the majority opinion, but communicated his understanding that the opinion "goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use" and that "it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue" (2636). Thus, Alito and Kennedy signaled the limited holding of the majority opinion, specifically that they would not be willing to extend the reasoning of the case to situations in which the speech could be classified as political or social speech.

In this scenario, the lower courts must interpret the majority opinion, and, in addition to reading and analyzing the majority opinion, they may also rely on the two concurring opinions in order to understand how to apply *Morse* to the case before them. The two concurrences communicate the parameters of the Court's opinion, the desired take on the majority opinion they are joining, and the preferences of the justices. These concurrences highlight the difference between voting for the *result* and voting for the *opinion*. One scholar argues:

[J]ustices care most about the underlying legal principles in an opinion, rather than just which side wins the case. The justices want legal policy to reflect their policy preferences because they understand that it is those policies that ultimately influence distributional consequences in society. It is the legal rule announced in an opinion (not which party won the case) that ultimately serves as referents for behavior and alters the perceived costs and

benefits decision makers attach to alternative courses of action. (Spriggs 2003)

Concurrences provide justices with discretionary opportunities to voice their legal perspectives, and, although there are opportunity costs involved with writing a concurring opinion, justices increasingly choose to write them in the modern era. Table 1.1 presents the proportion of cases with at least one concurrence versus the proportion of cases with at least one dissent for the Warren, Burger, and Rehnquist Courts and Figure 1.1 displays this information graphically. During the Warren Court, the proportion of cases with at least one concurrence was .317 and the proportion of cases with at least one dissent was .631. During the Burger Court, the proportion of cases with at least one concurrence jumped to .436 and then went down slightly during the Rehnquist Court to .427. During the Burger Court, the proportion of cases with at least one dissent was .638, whereas the proportion of cases with at least one dissent went down to .586 during the Rehnquist Court.

Why does a justice write or join a concurring opinion rather than silently joining the majority? What factors influence this decision? What do concurrences tell us about the opinion writing process on the Supreme Court? What do they tell us about the bargaining and accommodation that occurs? Do published concurring opinions have an impact on lower court

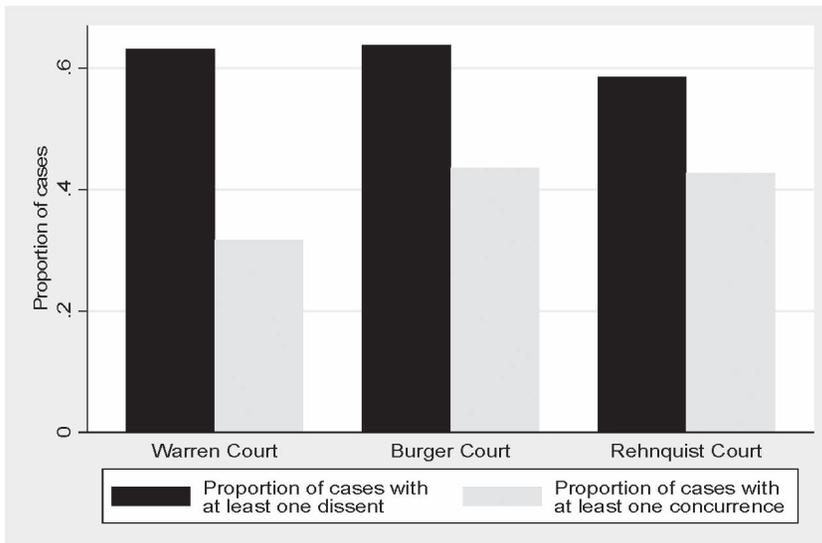


Figure 1.1. Proportion of Cases with at Least One Concurrence Versus Proportion of Cases with at Least One Dissent.

Table 1.1. Proportion of Cases with at Least One Concurrence Versus Proportion of Cases with at Least One Dissent

| <i>Court</i> | <i>Total number of cases</i> | <i>Number of cases with concurring opinions</i> | <i>Proportion of cases with at least one concurrence</i> | <i>Number of cases with dissenting opinions</i> | <i>Proportion of cases with at least one dissent</i> |
|--------------|------------------------------|---|--|---|--|
| Warren | 1,792 | 568 | .317 | 1,131 | .631 |
| Burger | 2,404 | 1,048 | .436 | 1,533 | .638 |
| Rehnquist | 1,860 | 794 | .427 | 1,090 | .586 |

Note: The Rehnquist Court numbers are through the 2004 term.

compliance and even the Supreme Court itself? I address each of these questions in the following chapters.

The Importance of Concurrences

Concurring opinions are important for many reasons. First, a concurrence can transform a majority opinion into a plurality. A plurality opinion is one in which a majority of the Court agrees to the result, but less than a majority of the justices agree to the reasons behind the decision. The plurality opinion generally is regarded as a source of uncertainty and instability in the law, creating confusion in lower courts that are bound to follow the precedent established by the Supreme Court. In fact, scholars argue that plurality opinions disrupt the signaling function to lower courts (see Berkolow 2008) and, in fact, one study shows that lower courts are less likely to comply with Supreme Court plurality opinions than majority opinions (Corley 2009). Thus, understanding how concurrences develop and why they are written is crucial to understanding how the rule of law develops, since rule-of-law values require that individuals be able to identify controlling legal principles.

Second, concurring opinions may undermine the force of a unanimous Court. The Court recognized the importance of a unified response in *Brown v. Board of Education* (1954), a case in which the Supreme Court held that racial segregation in public schools was unconstitutional. In *Brown*, Chief Justice Warren wished to avoid concurring opinions. “He wanted a single, unequivocating opinion that could leave no doubt that the Court had put Jim Crow to the sword” (Kluger 1977, 683). Scholars have argued that a decision accompanied by a concurrence speaks with less authority than a single unanimous opinion (see Ray 1990) and a recent study found that cases with a larger number of concurring opinions are more likely than other cases to be overruled by the Supreme Court in the future (Spriggs and Hansford 2001).

A third reason concurring opinions are important is that they may contribute to the development of the law. An example is Justice O’Connor’s concurrence in *Lynch v. Donnelly* (1984). In *Lynch*, the Court found that a city’s Christmas display, which included reindeer, a Christmas tree, colored lights, a season’s greeting banner, and a nativity scene, did not violate the Establishment Clause.⁵ In reaching its decision, the Court applied a three-prong test, called the *Lemon* test,⁶ finding that the city had a secular purpose for the display, the primary effect was not to advance religion, and that there was no undue administrative entanglement. Justice O’Connor joined the majority, but wrote a separate concurrence criticizing the Court’s reliance on *Lemon*. She proposed a new test, the “endorsement test,” to replace the purpose and effect prong of the *Lemon* test by asking “whether the govern-

ment intends to convey a message of endorsement or disapproval of religion” and whether the practice in question has the “effect of communicating a message of government endorsement or disapproval of religion.” Later, in *County of Allegheny v. American Civil Liberties Union* (1989), the Court used O’Connor’s endorsement test, finding that the display of a crèche inside a county courthouse violated the Establishment Clause because it had “the effect of promoting or endorsing religious beliefs.”

Fourth, a concurring opinion can improve the majority opinion. “[H]uman nature being what it is, nothing causes the writer to be as solicitous of objections on major points as the knowledge that, if he does not accommodate them, he will not have a unanimous court, and will have to confront a separate concurrence” (Scalia 1994, 41). According to Justice Scalia:

The dissent or concurrence puts my opinion to the test, providing a direct confrontation of the best arguments on both sides of the disputed points. It is a sure cure for laziness, compelling me to make the most of my case. Ironic as it may seem, I think a higher percentage of the worst opinions of my Court—not in result but in reasoning—are unanimous ones. (Scalia 1994, 41)

Justice Ginsburg agrees with Scalia, arguing that “[t]he prospect of a . . . separate concurring statement pointing out an opinion’s inaccuracies and inadequacies strengthens the test; it heightens the opinion writer’s incentive to ‘get it right’” (Ginsburg 1990, 139).

Furthermore, some argue that concurrences reflect democratic values. “[D]isagreement among judges is as true to the character of democracy, and as vital, as freedom of speech itself. . . . Indeed, we may remind ourselves, unanimity in the law is possible only in fascist and communist countries” (Fuld 1962, 926). Thomas Jefferson complained about unanimous opinions “huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning” (Scalia 1994, 34). In fact, Jefferson wrote to Justice William Johnson in 1822, urging him to return to the English practice of individual opinions. “That of seriatim argument shows whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself, instead of pinning it on another’s sleeve” (Scalia 1994, 34).

Finally, writing a concurrence can be personally satisfying to the justice.

To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one’s colleagues; to address precisely the points of law

that one considers important and *no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure. (Scalia 1994, 42)

Thus, concurrences may be more revealing than justices' majority opinions because they are not the product of compromise (see Wahlbeck, et al. 1999). For example, Justice Frankfurter remarked that “[w]hen you have to have at least five people to agree on something, they can't have that comprehensive completeness of candor which is open to a single man, giving his own reasons untrammelled by what anybody else may do or not do if he put that out” (Phillips 1960, 298). Such analysis, moreover, might assist in discovering meaningful distinctions between justices of similar ideological beliefs. Additionally, because a concurrence indicates how a particular justice views a given issue, it may provide insight into how that justice may be expected to vote in the future. Given the significant legal and institutional consequences associated with concurring opinions, it is important for scholars to understand why a justice writes or joins a concurring opinion rather than silently joining the majority opinion. Moreover, it is important to understand what effect, if any, concurring opinions have on the lower courts and the Supreme Court.

Separate Opinion Writing and the Supreme Court

The Supreme Court is a powerful institution, co-equal with the other branches of government and prestigious enough that even though it is possessed of neither “purse, nor sword,” the public accepts its rulings on matters ranging from abortion to sexual orientation, to even settling the dispute of who won the presidency. Although the Court makes decisions “within a legal framework” (Baum 2007, 2) there is no doubt that it is a political institution. The decisions handed down by the Supreme Court affect us in our everyday lives. Thus, it is important to understand how the justices reach these decisions. However, the justices operate in relative secrecy, discussing cases in private, without television cameras and reporters. Although recently this shroud of mystery has been penetrated (see, e.g., Lazarus 1998; Schwartz 1996; Woodward and Armstrong 1979), the predominant way the public has to understand the process by which the Supreme Court reaches its decisions is through its written opinions. Unlike Congress and the president, the Court must explain and justify its decisions and its policies in writing. The majority opinion of the Court is precedent that is binding on the lower courts. It becomes the law of the land, having an impact far beyond the parties in the litigation.

One reason for the power and prestige of the Court is the unanimity it exhibited in so many of its pivotal early rulings. Prior to the appointment of Chief Justice John Marshall, each justice delivered an opinion in each case, known as *seriatim* opinions. Marshall ended this practice because he believed that one opinion representing the decision of the Court would increase the Court's prestige and legitimacy. In fact, Marshall placed such a high value on a united front that not only did he go along with opinions that were contrary to his own view, he even announced some. Chief Justice Roberts decided to use Marshall as a model during his first term on the Supreme Court (Rosen 2006). Roberts believes that the unanimity achieved by Marshall is important to the legitimacy and credibility of the Court.⁷ According to Roberts:

There weren't a lot of concurring opinions in the thirty years when Marshall was the chief justice. There weren't a lot of dissents. And nowadays, you take a look at some of our opinions and you wonder if we're reverting back to the English model where everybody has to have their say. It's more being concerned with the jurisprudence of the individual rather than working toward a jurisprudence of the Court. (Rosen 2006, 224)

Are we back to *seriatim* opinions, as Roberts suggests? In the past fifty years, the number of separate opinions (concurrences and dissents) has increased dramatically. The predominant explanation for this increase has been framed in terms of institutional norms (see, e.g., Caldeira and Zorn 1998; Haynie 1992; O'Brien 1999; Walker, Epstein, and Dixon 1988). For example, Walker et al. attribute the increase in concurrences and dissents to the failed leadership of Chief Justice Stone.

Attitudinalists explain concurrences primarily as a function of policy preferences (see, e.g., Segal and Spaeth 2002).

Those who join the majority opinion are ideologically closer to the opinion writer than those who write regular concurrences; regular concurren-ers, in turn, are ideologically closer to the majority opinion writer than special concurren-ers; and to complete the picture, special concurren-ers are ideologically closer to the majority opinion writer than are justices who dissent. (Segal and Spaeth 2002, 386–87)

On the other hand, proponents of the strategic model understand concurring opinions as part of the majority opinion coalition process. For example, Maltzman, et al. (2000) found that justices are less likely to write or join a concurrence if the author has cooperated with them in the past.

Although this line of scholarship has greatly enhanced our understanding of concurrences, it has either merged concurrences with dissents or has lumped concurrences together, basically treating them the same. I argue that the factors that influence a justice's decision to write or join a concurrence are different depending on the type of concurrence (the type of signal) being written.

Additionally, studies to date have ignored the effect of the rise of dissensus. Is the practice of separate opinion writing leading to a loss of confidence in the Court and in turn a lack of compliance by lower courts? Scholars argue that a decision that is accompanied by a concurrence speaks with less authority and can undermine the policy voice of the majority (Maveety 2005; Ray 1990). Moreover, concurring opinions are inconsistent with traditional consensus norms (Walker et al., 1988) and they represent "modes of conflict on the Supreme Court" (Caldeira and Zorn 1998, 877). Specifically, the argument is that the majority opinion is weakened by the presence of concurring opinions (see, e.g., Hansford and Spriggs 2006; Spriggs and Hansford 2001) and, consequently, the Supreme Court and the lower courts will be more likely to treat a precedent accompanied by a concurrence negatively. However, no one has examined the content of concurrences in an effort to explain whether the *type* of concurrence influences lower court compliance. The assumption in the previous literature is that all concurrences disagree with the majority opinion, and in fact, are similar to dissents. However, some concurrences support the majority opinion and others do not. For example, a concurring opinion may clarify the outcome of the case and strengthen the result. However, a concurrence can also detract from the impact of the majority opinion by disagreeing with the reasoning of the majority and pointing out the flaws of the opinion. Thus, differentiating between the types of concurrences can illuminate the true impact they have on treatment by subsequent courts.

Types of Concurrences

In order to systematically study Supreme Court opinions, datasets for the U.S. Supreme Court categorize or "code" opinions. This allows researchers to quantitatively assess decision making. To date, opinions are simply coded as either liberal or conservative. However,

[a] decision to support Bakke's admission to the Davis's medical school represents a range of possible outcomes, from prohibiting race from being used as a factor (the Stevens position) to ruling that the state has a compelling interest in using race but the Davis

program is not narrowly drawn to meet that interest. Alternatively, ruling for Davis also represents a range of possible outcomes, not a single point on a scale. Since the decision on the merits only decides whether Bakke gets admitted, ruling for him means that Davis's program is to the right of a justice's indifference point, while ruling against him means that California's program is to the left of a justice's indifference point. (Segal and Spaeth 2003, 35)

Thus, Segal and Spaeth recognize that "by not coding concurrences in comparison to majority opinions, [they] do lose some information" (35). By understanding the content of the concurrences that are written or joined by the justices and understanding where they part company with the majority opinion, we gain a deeper understanding into the factors that influence justices' decision making and opinion writing and how the justices use concurrences to signal other actors. Two previous studies provide insight into how the justices use concurrences to signal other actors. I briefly discuss each of these works below and how they inform the typology I use in the present study.

In the *Manual on Appellate Court Opinions*, Witkin identifies the following different types of concurring opinions with illustrations: "Attempt to Expand Holding or To Supplement Reasoning," "Offering Different Theory to Support Conclusion," "Attempt to Limit or Qualify Holding," "Concurrence in Judgment Without Opinion," "Reluctant Concurrence," and the "Unnecessary Concurring Opinion." He also provides advice regarding their use, such as cautioning a judge against writing the concurrence in judgment without opinion. "This uninformative statement should be used sparingly. If the disagreement is not substantial, the main opinion ought to be signed; if the disagreement is substantial, the reason should be stated" (Witkin 1977, 223). Moreover, he argues that:

[the] concurrence in its broadest sense is based on the right to participate in the formulation of the decision and opinion; and the collegial process is designed to explore and reconcile differences until a joint statement of the conclusion is drafted. Concurrences based on different grounds, or adding something that the majority refuses to accept, are justifiable; but a separate concurring opinion covering the same ground in a different way seems justifiable only after a genuine effort has been made to have the substance of the material incorporated into the main opinion. (Witkin 1977, 225)

Ray (1990) identifies the following concurrences: limiting, expansive, emphatic, and doctrinal. She then presents a qualitative analysis of the uses

to which members of the Rehnquist Court have put the concurrence and then considers the effect of the concurrences on the Court's decision making process. She concludes that the concurrence can serve as an "instrument of judicial discourse," allowing "at once the principled expression of divergent views and the occupation of common ground" (Ray 1990, 831).

Thus, in the present study I code concurrences into the following categories: expansive; doctrinal; limiting; reluctant; emphatic; and unnecessary.⁸ This typology is based on the categories described by Witkin (1977) and Ray (1990). I discuss each category below and provide examples of how each type is used in Supreme Court decision making.

The first category, the *expansive concurrence*, attempts to expand the holding or to supplement the reasoning of the majority opinion. It is "used to enlarge a holding by suggesting its application beyond the bounds of the majority opinion" (Ray 1990, 781). For example, in *Young v. U.S.* (1987) the Court held that an attorney for a party that is the beneficiary of a court order might not be appointed as a prosecutor in a contempt action that alleges the order was violated. Justice Blackmun concurred, stating: "I join Justice Brennan's opinion. I would go farther, however, and hold that the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process" (*Young v. U.S.*, 1987, 814–15).

The second category is the *doctrinal concurrence*, which is a concurrence that offers a different theory to support the Court's result. This is the "right result, wrong reason" concurrence (Ray 1990, 800). This concurrence generally rejects the entire foundation of the Court's opinion, concurring in the judgment but for an entirely different reason. Thus, these concurrences disagree with the majority opinion, even though the opinion writer agrees with the final outcome of the case (who wins and who loses). For example, in *Connecticut v. Barrett* (1987) Justice Brennan wrote: "I concur in the judgment that the Constitution does not require the suppression of Barrett's statements to the police, *but for reasons different from those set forth in the opinion of the Court*" (530, italics added).

The third category is the *limiting concurrence*, a concurring opinion that attempts to limit or qualify the holding. The opinion writer argues that certain parts of the majority's discussion were unnecessary or thinks the Court has gone too far in its reasoning or conclusions. The "concurrer acts to rein in the doctrinal force of the majority" (Ray 1990, 784). The concurrence may limit the majority opinion to the particular circumstances of the case under review or may "take the majority to task for addressing an issue not properly before it" (Ray 1990, 785).

For example, in *Colorado v. Connelly* (1987), Justice Blackmun wrote:

I join Parts I, II, III-B, and IV of the Court's opinion and its judgment. I refrain, however, from joining Part III-A of the opinion. Whatever may be the merits of the issue discussed there . . . that issue was neither raised nor briefed by the parties, and, in my view, it is not necessary to the decision. (171)

Another example is found in *Clarke v. Securities Industry Ass'n* (1987). In that case, Justice Stevens, joined by Chief Justice Rehnquist and Justice O'Connor, wrote:

Analysis of the purposes of the branching limitations on national banks demonstrates that respondent is well within the "zone of interest" as that test has been applied in our prior decisions. Because I believe that these cases call for no more than a straight-forward application of those prior precedents, I do not join Part II of the Court's opinion, which, in my view engages in a wholly unnecessary exegesis on the "zone of interest" test. (409–10)

The tendency for these limiting concurrences is toward contraction. Moreover, a limiting concurrence can signal to the lower court that support for the majority decision is not high, and provide a rationale for the lower court to not comply with the case.

The fourth category is the *reluctant concurrence*. Here, the opinion writer makes it clear that he does not want to join the majority's decision, but feels compelled to, perhaps because of precedent or because of a desire to produce a majority opinion on an important issue. An example is found in *Pope v. Illinois* (1987). In *Pope*, petitioners were convicted of obscenity under Illinois law when they sold certain magazines to police. They appealed based on the jury instruction given, which was that the jury must determine that the magazines were without "value" to convict and in order to make that determination, they must judge how the magazines would be viewed by ordinary citizens in the State of Illinois. The Court held that the proper inquiry was not whether an ordinary member of any given community would find value in the allegedly obscene material, but whether a reasonable person would find such value in the material.⁹ Justice Scalia concurred with the opinion, writing:

I join the Court's opinion with regard to an "objective" or "reasonable person" test of "serious literary, artistic, political, or scientific value," [citations omitted] because I think that the most faithful assessment of what *Miller* intended, and because we have not

been asked to reconsider *Miller* in the present case. I must note, however, that in my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. (504–05)

Scalia concluded his concurrence by stating that “[a]ll of today’s opinions, I suggest, display the need for reexamination of *Miller*” (505).

Another example is Justice Brennan’s concurrence in *Mathews v. United States* (1988). In *Mathews*, the petitioner was convicted for accepting a bribe. The trial court refused to instruct the jury as to entrapment because the petitioner did not admit all of the elements of the crime. In the majority opinion, the Court discussed the elements for a valid entrapment defense, which are government inducement of the crime and lack of a predisposition on the part of the defendant to engage in the criminal conduct. Predisposition focuses on whether the defendant was an “unwary innocent” or an “unwary criminal.” Although he joined the majority opinion, which held that a defendant is not precluded from an entrapment instruction even if he denies one or more elements of the crime, Justice Brennan had dissented four times in cases holding, as *Mathews* did, “that the defendant’s predisposition to commit a crime is relevant to the defense of entrapment” (66). Although it was clear from his concurrence that his views had not changed, he acknowledged that “I am not writing on a clean slate; the Court has spoken definitely on this point” (67). Thus, he “bow[ed] to stare decisis” (67).

The fifth category is the *emphatic concurrence*, which emphasizes some aspect of the Court’s holding (see Ray 1990), and functions largely as a means of clarification. For example, in *INS v. Cardoza-Fonseca* (1987), INS began proceedings to deport Cardoza-Fonseca, and she applied for two forms of relief in the deportation hearings— asylum and withholding of deportation. An immigration judge denied her requests, finding that Cardoza-Fonseca had not established a “clear probability of persecution,” which the judge believed was the standard for both claims. The Supreme Court held that a person is entitled to the discretionary relief of asylum if he shows he cannot return home because of “persecution or a well-founded fear of persecution” and a person is entitled to the mandatory relief of withholding deportation if he demonstrates a “clear probability of persecution” if he returns home. Blackmun’s concurrence in *INS v. Cardoza-Fonseca* (1987) emphasized his understanding that the majority opinion directed the INS to appropriate sources to help it define the meaning of the “well-founded” fear standard and that the meaning would be refined in later litigation. Thus, the justice who writes or joins an emphatic concurrence is clarifying his or her understanding of the opinion.

Another example is provided by Justice Powell's concurrence in *F.C.C. v. Florida Power Corp.* (1987, 245). In this case, three cable operators alleged that the rates charged by utility companies for using utility poles for stringing television cable were unreasonable. The FCC set new rates under the Pole Attachments Act and the utility company filed suit, claiming the Act violated the Fifth Amendment's takings clause. The Supreme Court held that the Act did not constitute a "taking." Justice Powell concurred, "writ[ing] only to state generally my understanding as to the scope of judicial review of rates determined by an administrative agency."

Finally, the last category is the *unnecessary concurrence*, which is a concurrence in judgment without opinion. According to Witkin (1977), this type of concurrence "produces all the evils of a concurring opinion with none of its values; i.e., it casts doubt on the principles declared in the main opinion without indicating why they are wrong or questionable" (223). This type of concurrence could mean that the concurring justice does not agree with the principles in the majority opinion, or that he agrees with them but not with the reasoning or authorities set forth to support them, or that he agrees with only some of the principles, or that he neither agrees nor disagrees, or that he objects to something in the opinion (perhaps a quote, humor or satire, or even punishment of a litigant) and withholds his signature because the majority opinion writer would not take it out. However, because the justice has not revealed why he or she is concurring, one is left to speculate regarding the possible reason.

Outline of the Book

In order to understand concurring opinion writing on the U.S. Supreme Court, in Chapter 2 I use the typology mentioned earlier to explain why a justice writes or joins a concurring opinion rather than silently joining the majority. This typology is important because it shows the way the justices engage in a dialogue about the law and communicate their relationship to the majority opinion and their preferences about legal rules. By categorizing concurrences into different types and distinguishing between concurrences, I show that some concurrences support the majority decision, whereas others do not. Some concurrences contract the majority decision, whereas others expand the reach of the majority decision. My theory is that different types of concurrences are influenced by different factors, which I show by using a multinomial logit model.

In Chapter 3, I provide a qualitative analysis of the bargaining and accommodation that occurs on the Supreme Court in order to understand

why concurrences are published. When are efforts at bargaining successful and when do they fail? Do concurring opinions result from failed negotiations? Using the private papers of Justices Harry A. Blackmun and Thurgood Marshall, I show that, although policy objectives clearly affect the justices' behavior, there are other factors that come into play.

In Chapter 4, I assess the impact that concurring opinions have on lower court compliance. Additionally, I examine the impact that concurring opinions have on the Supreme Court's interpretation of its own precedent. I show that concurrences do matter, but that it is important to understand what type of concurrence accompanies a majority opinion.

Using the foregoing methodologies, I show the value of exploring the content of concurrences. Treating concurrences as disagreement or lumping concurrences together without differentiating between them camouflages the true influence of attitudinal and nonattitudinal factors. The factors that influence a justice's decision whether to write or join a concurrence are different depending on what type of concurrence is being written. Specifically, the decision to write or join a particular type of concurrence is a complex decision that involves justice-specific, case-specific, and institutional factors. By examining the memoranda between Blackmun and Marshall and the other justices and the memoranda from their clerks, additional insight is gained into the bargaining and accommodation that occurs on the Supreme Court, with an emphasis on how concurring opinions are created. Finally, the justices of the Supreme Court, by using concurrences as judicial signals, have the potential to influence the impact that the majority decision has on lower courts and on how the Supreme Court treats its own precedent in the future. This book shows the importance of differentiating between the impact a justice has by joining the majority on the merits vote and the impact the justice has in the actual language used in the concurrence he or she writes or joins. All of this demonstrates the importance and necessity of taking a first step toward that final goal: explaining the actual content of Court opinions.