

Motivations for the Use of Concurring Opinions on the U.S. Supreme Court

Dissertation

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Abstract

While some behavior on the United States Supreme Court is formally required, other choices are wholly up to the discretion of each individual justice. One such discretionary choice is the choice to author a concurring opinion, which agrees with the outcome of a case but add to, subtract from, or emphasize a point within the legal doctrine provided by the majority opinion. Thus, choices about concurring opinions provide a valuable opportunity for examining judicial motivations. This dissertation examines justices' motives for both whether and when they circulate a concurrence to their colleagues, as well as whether they choose to publish it along with the Court's opinion. The hypotheses are derived from two types of motivations – individual and collective. Tests of these hypotheses were conducted using data from the 1970 through 1979 Court terms, collected primarily from the personal papers of Justices Harry Blackmun and William Brennan. I use a split population event history model to test hypotheses about whether and when a justice first circulates a concurring opinion. I then use a logistic regression model to test hypotheses about whether a justice chooses to withdraw a written concurrence; this analysis is, of course, dependent upon the justice already having written a concurring opinion. In both sets of analyses I find that Supreme Court justices are motivated not only by their individual preferences about legal policy, but also by individual non-policy

preferences, such as workload, and collective preferences about the institutional status of the Court, such as maintaining the Court's legitimacy.

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Chapter 1: Introduction

On March 25, 1980, the Supreme Court announced its decision in *United States v Crews*, an appeal involving whether a warrantless arrest made without probable cause necessitated the exclusion of in-court identification testimony by the victim of an armed robbery which the defendant was alleged to have committed. Though cases involving constitutionally protected civil liberties provisions are generally considered to be the most contentious of cases brought before the Supreme Court, the justices unanimously decided against exclusion of the in-court identification testimony. Although unanimous with respect to the outcome of the case, however, the justices were fragmented as to the legal rationale for the decision. Two concurring opinions were issued along with the opinion of the Court, one written by Justice Powell and a second by Justice White. In general, concurring opinions agree with the outcome of the decision but provide additional or alternative reasoning for the decision that is not contained in the majority opinion. The apparent unanimity over the outcome of the *Crews* case obscures a highly divided Court with respect to the legal holding of the decision. This case is one of many that beg the question addressed by this dissertation: if justices agree about the outcome of a case, what motivates them to author or refrain from authoring concurring opinions?

In *Crews*, the rationales provided by the three opinions, that of the majority opinion, as well as Justices Powell and White's concurring opinions, provide distinct reasons for

the decision. Justice Powell's concurrence, which Justice Blackmun joined, only disagreed with a specific component of the majority opinion; thus, Justice Powell joined the substance of most of the majority opinion, while his brief concurrence detailed his disagreement with the majority opinion's treatment of two previous cases. Justice White's concurring opinion, which was joined by both Chief Justice Burger and Justice Rehnquist, disagreed with the majority opinion about whether in-court identification testimony could ever be excluded. Unlike Justice Powell, Justice White joined no part of the majority opinion. Thus, Justice White's concurrence actually provided an alternative rationale for the entirety of the majority opinion, whereas Justice Powell's concurrence only disagreed with a small section of the majority opinion. This illustrates that concurring opinions are not equally critical of majority opinions, and, likewise can be utilized in different manners.

If we examine the *Crews* case from a closer vantage point, namely the personal papers of Justice Blackmun, we find that Justices Powell and White were not the only justices who wrote concurring opinions. Justices Rehnquist and Stevens also wrote concurrences; however, they were withdrawn prior to the publication of the Court's decision. Thus, out of four written concurring opinions in *Crews*, only two were made public along with the opinion of the Court. This too causes one to wonder about the justices' motivations for either withdrawing or publishing the concurring opinion they had written. As shown by this case, it is not a foregone conclusion that a justice who writes a concurrence will necessarily make it public. Are withdrawn concurring opinions associated with successful attempts by the concurring justice to affect the legal policy

contained in the majority opinion? Or are there other reasons why a justice might withdraw a concurrence?

The final noteworthy observation about this case also comes from Justice Blackmun's personal papers. Though Justices Rehnquist, White, Stevens, and Powell all wrote concurring opinions, they all did so at different points in the case's decision-making process. Justice Rehnquist wrote his concurrence a mere five days after the first draft of Justice Brennan's majority opinion was circulated, while Justice Powell, the last to write a concurring opinion, did so over two months after Justice Rehnquist's concurrence. In between the writing of those two concurring opinions, Justice White wrote a concurring opinion, Justice Rehnquist withdrew his concurrence, and Justice Stevens both wrote and withdrew his own concurring opinion. Additionally, though Justice Powell was the final justice to author a concurrence, he had also been the first justice to join the lion's share of Justice Brennan's draft majority opinion. Due to the variation in when during a case's decision-making process a justice chooses to write a concurring opinion, we must ask whether this variation is meaningful in assessing a justice's motivations for writing. Indeed, are justices who write a concurring opinion early in the process, as Justice Rehnquist did in *Crews*, motivated by the same considerations as are justices who write concurrences later in the process, as Justice Powell did in *Crews*?

Brief Overview of Dissertation

This dissertation addresses the broad question of judicial motivations: what motivates Supreme Court justices to make the choices they do? Unlike elected officials, Supreme

Court justices do not have to consider their chances for reelection when making choices about how to act, as they are appointed to life terms. Instead, the primary motivation of Supreme Court justices is presumed to be policy-oriented, in that the justices act so as to achieve legal policy¹ as close as possible to their preferences. As an end, however, “policy” is much less clear, and thus less easily measured, than is attaining reelection. Additionally, it is rare that Supreme Court justices can unilaterally affect legal policy; instead, Supreme Court decision-making, which produces legal policy, is collective in nature, whereas seeking and attaining reelection is much more individualistic. Not only is a particular justice’s most preferred legal policy often unclear and his ability to achieve it dependent upon the choices of other justices, justices are also constrained by the institutional rules and norms of Supreme Court decision-making when working to achieve their legal policy goals. Thus, any study of individual judicial motivations must take into account the collective nature of Supreme Court decision-making.

This introductory chapter will describe concurring opinions, the process through which concurring opinions come about, and the importance of analyzing concurring opinions, both as an avenue for examining judicial motivations and because of the relevance of concurrences themselves. The second chapter in this dissertation will address more fully the theory and literature associated with judicial motivations more broadly, and concurring opinion-writing specifically. The first empirical chapter,

¹ Throughout this dissertation, I use the term “legal policy” so as to allow for the interconnectedness of law and policy, and thus do not assume that justices are motivated by either the law or policy, but rather some combination of the two.

Chapter 3, will analyze both whether a justice chooses to write² a concurring opinion in a case, and if so, when during the decision-making process they first circulate the concurrence. Chapter 4 will address the second decision point within the concurring process – the decision about whether or not to publish the concurrence. As an addendum to the analyses in Chapters 3 and 4, Appendix B will provide a comparison among multiple statistical models of concurring opinion-writing, varying the structure of the model, to determine whether and to what extent modeling choices affect the substantive results and conclusions drawn. Lastly, Chapter 5 will conclude this dissertation with a summary and discussion of the empirical implications as well as a discussion of avenues for future research.

Concurring Opinions and Judicial Motivations

Concurring opinions are those that agree with the outcome of a case, namely, which party wins, but add to or subtract from the legal doctrine stated in the majority, quibble over phrasing, provide a rebuttal to the dissenters, or even provide an alternative doctrine. Though the authors of concurring opinions agree with the outcome of the case, they may or may not agree with the doctrine put forth in the majority opinion. The doctrine of a decision is what sets legal policy, and thus is the primary avenue through which justices can achieve their legal policy goals. Indeed, “[t]he central significance of the Court’s

² Since it is impossible to measure exactly when a justice chooses to write a concurring opinion, I use a justice’s date of circulation for the concurrence as the date he “wrote” the concurrence. Even though, admittedly, “write” is less precise than “circulate,” there are times throughout the dissertation when I will use the terms interchangeably, since what I am interested in examining is motivations for writing, as there are specific resource costs to writing that are absent for circulating an already-written concurring opinion.

opinion lies in its doctrinal power” (Cross and Tiller, 2007, p. 266), and thus concurrences may rob the opinion of the Court of some of its power, meaning that concurring opinions are not meaningless, with respect to the potential legal policy impact of a decision.

In contrast to concurring opinions, dissenting opinions disagree with the majority over the outcome of the case. While both concurring and dissenting opinions are a form of dissensus, they are motivated by different processes, as dissenting opinions disagree with the outcome of case, and thus typically also the doctrine put forth in the majority opinion, whereas concurring opinions at least agree with the case’s outcome. Studies of increased dissensus on the Court generally include both forms of dissensus; however, my dissertation only considers the motivations of justices in their decision to write or refrain from writing concurring opinions. It is the motivations for a justice expressing dissensus based on the case’s doctrine that I seek to examine here; motivations for expressing disagreement about the case’s outcome are left for future research.

Furthermore, the issuance of concurring opinions is not a rare phenomenon. “In the past fifty years, the number of separate opinions (concurrences and dissents) has increased dramatically” (Corley, 2010, p. 13). *Table 1.1* shows the increase in the proportion of cases with at least one concurring opinion over time. Some scholars have argued that this is due to a breakdown in consensual norms (see Epstein, Segal, and Spaeth [2001], Caldeira and Zorn [1998], and Gerber and Park [1997]). If increased dissensus is robbing the Court of some of its institutional power or legitimacy, it is important to examine the circumstances under which justices are willing to write separate

Table 1.1: Cases with Published Concurring Opinions from 1900-1999, by Decade³

	Lowest Proportion of Cases with at least one Concurrence in a Single Term	Average Proportion of Cases with at least one Concurrence per Term, Over the Decade	Highest Proportion of Cases with at least one Concurrence in a Single Term
<i>1900s</i>	1.4%	2.46%	4.0%
<i>1910s</i>	0.0%	0.57%	1.8%
<i>1920s</i>	0.0%	1.02%	4.0%
<i>1930s</i>	0.6%	3.23%	7.9%
<i>1940s</i>	3.0%	17.93%	28.2%
<i>1950s</i>	16.1%	20.66%	27.8%
<i>1960s</i>	26.6%	35.21%	48.4%
<i>1970s</i>	30.9%	40.8%	49.6%
<i>1980s</i>	35.5%	42.05%	51.6%
<i>1990s</i>	32.5%	41.36%	54.0%

opinions; it also begs the question of whether justices are individually concerned with the Court's institutional status, or whether due to a collective action problem, their decisions are made, in reality, regardless of their potential negative effect on the Court as an institution. Indeed, "[t]he transformation of the Court's jurisprudential tradition from consensus to discord has been accompanied by a shift in focus from the Court as a unitary institution to the Court as an assemblage of distinctive individuals" (Ray, 2002, p. 194). Even at the outset of the Supreme Court, there were disagreements about how to best deal with differing opinions among justices. Chief Justice Marshall arguably "sought to

³ The data for this table is based on information reported in Table 3-3 of Epstein et al (2003).

enhance the Court's institutional authority by presenting one opinion" (Markham, 2006, p. 929), whereas President Jefferson "believed that individual reputation was the only mechanism short of impeachment for maintaining a life-tenured judge's accountability to the public" (Markham, 2006, p. 930). It could be argued what Chief Justice Marshall was more concerned with the Court's collective institutional status whereas President Jefferson was primarily concerned with individual accountability. This tension between the collective Court and the individual justice is one that this dissertation explores throughout its analyses.

One question some Court scholars ask is whether concurring opinions individually and the rise in dissensus more broadly, are merely indications of an increased level of "judicial egocentrism" (see Nygaard [1994-1995], Caldeira and Zorn [1998], and Maveety [2005]). Certain types of concurrences do appear to have little function, such as those that criticize a dissenting or concurring opinion or those expressing "pithy annoyance with other members of the Court" (Turner and Way, 2003, p. 151). However, not all concurring opinions are of the aforementioned type. Additionally, while "[s]ome judges are more prone to indulge their individuality than others" (Ginsburg, 1990, p. 142), writing a "separate opinion is a confirmation of individual attention to the issues at stake and is indicative of a proper discharge of judicial responsibility" (Stephens, 1952, p. 396). It seems, then, that there is a tension between individuality and consensus; too much individuality can be perceived as mere egocentrism, while too much consensus may lead to the perception that judicial decisions are perfunctory and ill-reasoned, as

“[r]outine publication of seemingly unchallenged opinions would destroy these indicia of judicial competence and assiduity” (Stephens, 1952, p. 398).

There does appear to be a necessity for some individual opinions, but only when the benefits outweigh the collective costs; when the collective costs outweigh the potential benefits, justices should, arguably, exercise self-restraint (see ZoBell, 1959). As then-judge Ginsburg (1990, p. 150) notes, “Judges on appellate tribunals... live daily with the competing claims or demands of collegiality and individuality. It is up to each judge to keep those claims in fair balance.” Indeed, Supreme Court justices have both an “individual judicial responsibility to the Court, and [an] institutional responsibility to the people” (ZoBell, 1959, p. 213-214). Similarly, the difference between “good faith dissension” and “dissension in the sense of quarrelsomeness” is important, as “[p]ersonal differences among members of a tribunal, if so strong as to affect judicial capacity, are damaging to the administration of justice, and when known are certainly damaging to the prestige of the tribunal” (Stephens, 1952, p. 400).

Concurring opinions, and indeed, all individually signed opinions, give the author the opportunity to form a “public judicial identity” (see Markham, 2006, p. 945), which may give justices too strong an incentive to write separately. “What has changed in the last half century,” Markham argues, “is the Justices’ tendency to write separately for seemingly personal (as opposed to purely jurisprudential) reasons” (2006, p. 931). This personal, or perhaps more aptly termed, egotistical, use of concurring opinions is diametrically opposed to the so-called “cult of the robe” which describes how justices don a cloak of impartiality and possess an “aura of institutional wisdom” when they put

on their robes (Markham, 2006, p. 926). According to Markham, there is a definite tension between individuality and institutionalism, and “there comes a point at which the Justices’ individual personae eclipse their collective institutional role” though that point is one that should be avoided (2006, p. 942).

The choice to author a concurring opinion is a highly individualized choice, in that a justice is neither beholden to write nor expected to incorporate other justices’ preferences into his opinion if he does choose to write. As Justice Scalia stated, writing for oneself, rather than writing for the Court as a whole, such as is the case in both concurring and dissenting opinions, “is indeed an unparalleled pleasure” (Scalia, 1994, p. 10). Hence, by examining justices’ choices about concurring opinions, we are able to delve more deeply into the motivations for each individual justice’s choices to either write or refrain from writing a concurring opinion, as concurrences “are the ones potentially less likely to be shaped by compromise to please other justices, and, therefore, are the opinions best suited for understanding the motivations for and consequences of actions by particular justices” (Turner and Way, 2003, p. 141). Individual motivations for concurring are not limited to legal policy, as concurrences do not appear to be purely a function of ideological disagreement (see Maveety, 2005). Since legal policy disagreement alone cannot explain why justices choose to write concurring opinions, as the majority of concurrences do not affect the legal policy impact of a decision, there must be additional individual motivations for concurring. Thus, this dissertation is not limited solely to legal policy based motivations.

Contrary to the individual incentives for authoring concurring opinions is the collective pressure for “judges to make some compromise on their underlying dimensional preferences, and not to issue *seriatim*⁴ opinions, in order to create a clearer governing legal standard” (Cross and Tiller, 2007, p. 268). Thus, justices’ individual preferences do not provide the sole motivation for or against writing concurring opinions. Instead, justices must weigh the costs and benefits of writing a concurrence; these costs and benefits include not only individual costs and benefits, but also those of a collective nature. In her study of the Burger and Rehnquist courts, Maveety found that “the Rehnquist Court’s members were committed to what they saw as accurate interpretation of a legal issue but were still mindful of the Court’s institutional legitimacy” (2005, p. 143). Institutional legitimacy is imperative, as without it, “courts find it difficult to serve as effective and consequential partners in governance” (Gibson, Caldeira, and Baird, 1998, p. 343). If justices are indeed cognizant of and responsive to the Court’s collective best interest, published concurring opinions occur when “Justices [assert] a personal, or individual, responsibility which they viewed as of a higher order than the institutional responsibility owed by each to the Court, or by the Court to the public” (ZoBell, 1959, p. 203).

Thus, as there are potentially simultaneous motivations to both concur and refrain from concurring, concurrences provide us with the opportunity to probe the relationship between a justice’s individual motivations and the collective preferences of the Supreme

⁴ By definition, *seriatim* opinions are “a series of opinions written individually by each judge on the bench, as opposed to a single opinion speaking for the court as a whole” (*Black’s Law Dictionary*, 1999, p. 1119)

Court as an institution. Since a “judge [may] be better off compromising on some issues in order to join a majority than in refusing to compromise and issuing a lonesome opinion” (Cross and Tiller, 2007, p. 268), by examining the circumstances under which a justice views himself as better off by either writing or refraining from writing, we can gain a clearer picture of the multiple considerations by which justices are motivated, as well as more information about the relationship between individual and collective motivations. It is up to each individual justice to “constantly weigh the clearest expression of their individual views against the claims of the institution, precision against accommodation, [and] conscience against consensus” (Ray, 1990, p. 831). Concurring opinions are perhaps the best test of how justices go about weighing these considerations, as there are clearly both individual and institutional ramifications associated with concurring opinion-writing behavior. Thus, an analysis of judicial decisions relating to concurrences is well suited for examining how Supreme Court justices deal with competing motivations for their behavior.

The implications of this research are much more far-reaching than merely concurring opinions, in that I am using concurring opinions not as the focus of the research, but as a window through which to examine judicial motivations. Because of the individualistic nature of concurring opinions, they provide an excellent avenue for examining whether and how justices respond to collective motivations, in addition to their individual motivations. It is thus expected that the conclusions drawn here will be applicable to other components of judicial decision-making. Additionally, this dissertation will provide implications about the extent to which Supreme Court justices behave individually or act

in a manner that is constrained by the institution in which they are operating, which is highly relevant in the nomination of new justices, as the more individualistic the justices are, the higher the stakes in the nomination and confirmation of an appointee. Indeed, as the extent to which justices' choices are determined by their individual preferences and goals decreases, the importance of each individual justice becomes less significant. In other words, this dissertation provides a look at the relationship between individuality and collectivity on the U.S. Supreme Court by examining justices' choices with respect to concurring opinions.

What Are Concurring Opinions?

In order to study judicial motivations using decisions involving concurring opinions on the U.S. Supreme Court, we must first place concurrences in their proper context. This involves making several points for clarification. When scholars refer to “separate opinions” they are often combining both dissenting and concurring opinions. This, however, is not the case for my dissertation; instead, I focus solely on concurring opinions, though through further research, could similarly examine judicial motivations through the lens of dissenting opinions. Additionally, throughout the literature, there are differences in whether an author is referring to a concurring vote or a concurring opinion. This distinction is necessary, as there are several divergent costs associated with joining a concurrence versus writing one. Furthermore, especially with respect to a concurrence's effect on lower court interpretation of a decision, there is a difference between regular and specially concurring opinions. Lastly, scholars focus almost exclusively on

concurring opinions that are published along with the opinion of the Court. However, this is not the universe of concurrences, as some are withdrawn prior to the announcement of the Court's decision. All four of these distinctions will be discussed in this sub-section.

As Maveety (2003, p. 180) notes, "declining consensus norms have bifurcated judicial policy goal-seeking into two, at times mutually exclusive dimensions: policy in case outcomes, and policy in doctrinal rules." Not only has the interplay between outcome and doctrinal preferences remained understudied, justices' motivations and choices over doctrinal preferences have also lacked sufficient scholarly research. Focusing on concurring opinions can provide insight into the doctrinal component of judicial preferences and decision-making. However, the proliferation of concurring opinions brings up a question regarding whether justices who write these opinions are acting solely in their own self-interest; if so, what do justices hope to gain from authoring a concurrence? Conversely, if not self-interest, what is motivating Supreme Court justices to author concurring opinions?

While it is plausible to consider Supreme Court justices' choices about the outcome of a case as motivated by their self-interest in attaining their preferred legal policy, over both the short-term and long-term, there are other decisions that have a murkier link to individual self-interest. Specifically, consider the decision to author a concurring opinion. While a justice's vote in a particular case indicates his preference over the case's outcome, justices also have preferences over the doctrine a case puts forth as law. Previous scholarship has often focused on outcome preferences, rather than doctrinal

preferences (but see Lax [2007] and Lax and Cameron [2007] for a discussion on preferences over legal quality – the doctrine). However, it is the doctrine put forth in the majority opinion that provides guidance for lower courts’ decisions and sets long-term legal policy for the nation. Thus, doctrinal preferences can be thought of as relevant to shaping legal policy over the long-term, while outcome preferences are only relevant to one specific case.

Secondly, and perhaps most relevant to hypotheses about whether justices are constrained by their workload, we must define what constitutes a concurring opinion. During the time in this study it was not uncommon for justices to add a statement that they “concur in judgment” to the end of the majority opinion, without stating their reasons for not joining the majority opinion itself. For the sake of this dissertation, I distinguish between a concurring vote and a concurring opinion. I examine only motivations for *writing* concurring opinions, which, by my definition must include a rationale for their decision. Thus, “concur in judgment” votes are excluded from this study. In the future, I would like to examine a more fully specified model of behavior concerning both concurring votes and opinions, which would include not only writing concurrences, but also joining them. Additionally, a model examining both concurring opinions and votes would also be better suited to examining the aforementioned “concur in judgment” votes that lack the rationale necessary to be considered an actual concurring opinion for the purpose of this dissertation.

Additionally, justices are free to join concurring opinions, just as they are free to join the majority opinion. Again, though, since there are potentially different motivations for

joining a concurrence versus writing one, I am limiting this analysis to writing. In the future, it would be helpful to examine whether and how motivations for writing or joining a concurring opinion differ, as well as consider those choices in relation to the choice of joining the majority opinion.

A third distinction that must be discussed when studying concurring opinions is whether the difference between regular and special concurrences is meaningful or noteworthy for the purposes of the study in question. For definitional purposes, a regular concurrence is one where the writing justice also joins the majority opinion, whereas when a justice writes a special concurrence he withholds his vote from the majority opinion. For the sake of this dissertation, no distinction between the two types of concurrences will be made. This is primarily due to the fact that in the justices' papers, the type of concurrence is often unclear at the time of circulation, as the justices themselves are not necessarily set, at the initial time of circulation, about which type of concurrence they are writing. Additionally, they occasionally change the concurrence's type during the opinion-writing process. For example, on one occasion, Chief Justice Burger first joined the majority opinion and later circulated a regular concurrence. Subsequently, he revised his concurrence and stated that based on his revisions it was no longer possible for him to join the majority opinion too, thus changing his opinion from a regular to a special concurrence (example taken from memos contained in Justice Brennan's personal papers).

Lastly, when we speak of concurring opinions, we must decide whether we are solely referring to those that are published along with the majority and minority opinions, or

whether we mean to include concurrences that were written and circulated among the justices, but were withdrawn at some point prior to the publication of the Court's opinion. If the circulation of a concurring opinion is primarily, or even occasionally, motivated by the preference to affect the content of the majority opinion, we would expect that when such an accommodation is made, the justice who initially circulated the concurrence would be likely to withdraw their concurrence. Thus, if we ignore concurrences that were written and circulated, but not published, we are omitting an important aspect of the motivations for and uses of concurring opinions – namely, all attempts at using concurrences to bargain with the majority opinion author that successfully resulted in accommodation.

Both published and withdrawn concurrences may have influence, though in different ways. For example, the overuse of published concurrences may inhibit both legal clarity and the consistent application of the law. “The ability of a collegial court to ... speak in one, articulate voice may affect the court's efficacy within the judicial hierarchy, and is, at bottom, a central feature of legitimacy and the rule of law” (Landa and Lax, 2009, p. 947). The excessive use of concurring opinions in a single case can result in a plurality opinion,⁵ which “by its very nature, represents the most unstable form of law” (Kimura, 1992, p. 1594). This instability is primarily due to the uncertainty regarding what the binding precedent of the decision holds, which diminishes the precedential value of the legal principles (Kimura, 1992). As Berkolow (2007) described it:

⁵ A plurality opinion is “[a]n opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion” (*Black's Law Dictionary*, 1999, p. 1119).

The Latin maxim *misera est servitus ubi jus est aut vagum aut incognitum* means that ‘law performs miserably when it is vague and uncertain.’ The judicial world of pluralities and concurrences often enslaves us to the misery of not finding any clarity. (p. 300)

Perhaps creating even more confusion is the instance in which “the views of a single Justice [expressed in the form of a concurring opinion] have, at times, been given precedential value by lower courts” (Kirman, 1995, p. 2085). One example of this would be Justice Harlan’s concurrence in *Katz v. United States* (1967) introducing a “reasonable expectation of privacy” standard to the Fourth Amendment, “which has since become more influential than the opinion of the eight-Justice majority” (Kirman, 1995, p. 2084).

On the other hand, the use of concurring opinions may, in moderation, “contribute to the improvement or progress of the law” since “they may provoke clarifications, refinements, [or] modifications in the court’s opinion” (Ginsburg, 1990, p. 143). Furthermore, even unwritten concurring opinions may have similar effects of improving the quality of the majority opinion simply because of their potential to be written (Stephens, 1952). Additionally, in some instances “one clearly expressed view is better than many unclear views” even if it is in the form of a concurrence (quoted in Kirman, 1995, p. 2084, from a telephone interview with U.S. Court of Appeals Judge Alex Kozinski). As Ray (1990, p. 780) put it, “such an opinion may offer the clearest possible expression of an individual justice’s views, unhampered by the accommodation of a colleague’s position.” It seems, then, that concurring opinions can potentially be helpful

in clarifying the majority opinion's rationale, but that their overuse creates the potential for more confusion than clarification.

Even the use of concurrences in moderation can have consequences for a decision's interpretation at the hands of lower court judges, however. For example, "[i]f a decision is supported by a large majority and has no dissent, lower court judges may reasonably assume that application of that case's reasoning is expected in the lower courts, perhaps because there is no reasonable alternative" (Johnson, 1987, p. 333). When concurring opinions provide a competing legal basis for a decision, lower courts may take this as a signal that there may be more than one way to dispose of the case before them. In other words, lower courts may be less likely to go against the Supreme Court when they perceive the Court to have been united in its decisions (Johnson, 1987). Thus, it is essential that in an assessment of the motivations for writing or refraining from writing a concurring opinion withdrawn concurrence be included in the analysis, as the motivations for withdrawing a concurrence would be indeterminate if all withdrawn concurrences were entirely excluded from a consideration of justices' motivations with respect to their decision involving the use of concurring opinions.

The Process of Concurring

The decision-making process on the United States Supreme Court is primarily conducted behind closed doors. After oral arguments, which are open to the public, the public has no knowledge of the decision-making process until the opinion of the Court is announced. Often, it takes weeks or even months for the Court to reach its final decision.

To many, this process appears to be fairly straightforward; however, the fact that only the justices of the Supreme Court are privy to the entire process obscures the actual nature of the process of Supreme Court decision-making. Within a few days after oral arguments, the justices meet in secret to discuss their tentative positions on the case's outcome, as well as their individual rationales. Shortly after this initial sorting into majority and minority coalitions, the majority opinion author is assigned by either the Chief Justice, if he is in the majority coalition, or the most senior justice in the majority coalition, if the Chief Justice is absent from the majority coalition. Generally, some time elapses before the assigned majority opinion author circulates the first draft of the majority opinion. At this point, justices are free to join the draft opinion, write their own opinion, or make suggestions about changes to the draft majority opinion. Over the next few weeks, memos among the justices are frequent⁶, as the justices continually update their decisions about whether to write or join an opinion based on changes to already-existing opinions and choices made by the other justices.

Once all the justices have either written or joined an opinion, and there are no more changes to be made to any of the opinions, the final decision is announced and the opinions are published. Between the initial sorting into coalitions and the announcement of the decision, justices are free to change their minds, with respect to both the outcome and the rationale they support. The initial conference vote that allows the sorting to take place is non-binding; however, the justices typically have a good idea of their views on

⁶ Even in cases that have high levels of agreement among the justices over the content of the majority opinion, every justice who joins the majority opinion must write a memo indicating such.

the case at that time. Obviously, if too many justices change their outcome vote, the initial majority and minority coalitions may reverse. All this shows that decision-making on the Supreme Court is not only a fluid, dynamic process, it is also inter-dependent; a decision made by a single justice often affects the decisions made by the remaining justices. In contrast to acting as “nine little law firms⁷” who make decisions autonomously, the justices must take into account the preferences and behavior of the other justices.

By focusing on the outcomes of Supreme Court cases, as is the trend among judicial politics scholars, the dynamic nature of Supreme Court decision-making is obscured. Since most case outcomes can be identified as either liberal or conservative, it seems reasonable that justices are motivated by their preference for either a liberal or conservative outcome. However, the ideological outcome of a case is accompanied by the *ratio decidendi*, or the rationale for the decision, in written form. Not only do justices have preferences over the direction of the outcome (who wins and who loses), they also have preferences over what is included in the majority opinion. A justice has several recourses available to him if he is dissatisfied with either the outcome or the rationale of a decision. The three most common options are to either write or join a dissenting, specially concurring, or regular concurring opinion. For instance, if a justice disagrees with both the outcome and the rationale of a decision, he may write or join a dissenting opinion. Similarly, if a justice disagrees with the rationale, but agrees with the outcome

⁷ This term has been used to illustrate the independence of the operations in each of the justices’ chambers primarily by Justice Powell, but also by Justice Harlan (see Stewart, 1982).

of the case, he may write or join a specially concurring opinion. Lastly, the justice who is only partially dissatisfied may join the opinion of the Court, but write or join a regular concurring opinion so as to add something that was omitted from the rationale specified in the opinion of the Court or even simply to emphasize a particular aspect of the majority opinion. However, even if a justice decides to write a concurring opinion, he may later decide not to publish the opinion and instead join either the opinion of the Court or another justice's opinion. Thus, even decisions regarding writing concurring opinions fail to be stationary; instead, the decision is both fluid and interdependent upon other justices' choices. Up until the decision of the Court is announced, justices can and do change their minds regarding both whether they are going to write separately and which opinion(s) they are going to join. (For analyses of voting fluidity on the U.S. Supreme Court, see Hagle and Spaeth [1991] and Maltzman and Wahlbeck [1996].)

The Importance of Studying Concurring Opinions

In addition to providing a window into judicial motivations more broadly, concurring opinions themselves are worth examining for several reasons. First, the fact that justices have the option to write a concurrence, even if they choose not to do so, arguably affects the bargaining process over the content of the majority opinion. Secondly, though concurring opinions do not generally set legal policy precedent, there are cases in which they do influence the state of the law. Lastly, publicized dissensus more broadly, as well as concurring opinions as a specific example of dissensus, have implications in discussions of political discourse and judicial transparency.

There are two ways in which the possibility of writing a concurring opinion can influence the bargaining process over the content of the majority opinion. First, justices always have the option to write a concurrence, thus presenting a realistic option in opposition to joining the majority opinion, but without changing the justice's vote on the case's outcome. The fact that there is a credible option may induce majority opinion authors to accommodate a justice's preferences regarding the content of the majority opinion. If justices were presented with only two choices, joining the majority opinion or joining the dissenting opinion, they would have significantly less leverage to wield in trying to bargain with the majority opinion author, as in most cases, if a justice threatens to join the dissent, this would not be viewed as a credible threat since a justice's preferences about the case's outcome would most likely constrain his choices. Since concurring opinions have the potential to weaken the doctrinal power of the majority opinion by providing alternative rationales for the decision that lower court judges may be tempted to follow (see Johnson [1987] and Ray [1990]), majority opinion authors have an incentive to minimize concurrences. Thus, "the mere prospect of a separate writing renders the writer of the majority opinion more receptive to reasonable suggestions on major points" as "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, p. 9).

A second way in which concurring opinions can influence the content of the majority opinion is through presenting arguments that go against, clarify, or refine the majority opinion. Even the mere possibility of separate opinions has "no doubt raised the caliber

of judicial opinions substantially just because they might have been written” (Stephens, 1952, p. 404). Justice Scalia goes so far as to assert that “[t]he most important internal effect of a system permitting dissents and concurrences is to improve the majority opinion” (1994, p. 9). Concurring opinions are tests of the majority opinion’s accuracy and adequacy; without them, the majority opinion author would have less incentive to produce the best possible opinion (Ginsburg, 1990).

The fact that concurring opinions, both those written and the ones that could have been written, potentially affect the content of the majority opinion, which sets the legal policy precedent for the nation, is reason enough to examine the circumstances under which concurrences are written. By having an understanding of when and why justices write concurring opinions, as well as whether they publish or withdraw their written concurrence, we can likewise better understand when and how concurrences are likely to affect the content of the majority opinion.

In addition to affecting the legal policy content of the majority opinion, concurrences may also have an effect on the state of the law, through either the lower court interpretations of the Supreme Court’s decision or through future Supreme Court decisions. Occasionally, “a separate concurring opinion has the effect of shaping the future law, not because it announces a different rule from that of the Court’s opinion, but simply because it expresses that rule much more felicitously” (Scalia, 1994, p. 5). Similarly, under certain circumstances, a concurring opinion may be treated as a case’s precedent. A second example of this, in addition to the aforementioned *Katz* concurrence, would be Justice Powell’s concurring opinion in *Regents of the University of California v*

Bakke (1978), though in *Bakke*, unlike in *Katz*, there was no clear majority opinion, only a plurality opinion. Though uncommon, this possibility incentivizes both the writing of concurrences and the accommodation of justices' preferences about the content of the majority opinion. It is primarily up to the lower courts to determine which concurring opinions to treat as precedent, which potentially leads to confusion. It has been suggested that lower courts should only "lend precedential weight to some [regular] concurrences that clarify, restate, and summarize, but that do not otherwise depart from, the majority opinion" (Kirman, 1995, p. 2119). Additionally, "a concurring [opinion] also dilutes the force of a majority opinion and, consequently, its authority" (Ray, 1990, p. 783). Thus, if a justice does not agree with the majority opinion, he may offer the lower courts a viable alternative to the doctrine put forth in the majority opinion, again incentivizing the authoring of a concurring opinion. Indeed, every time a justice chooses to author a concurring opinion, he "is in a position to strengthen or weaken the impact of that majority decision" which means that "concurrences provide the justices with a tool to effectuate their policy preferences" (Corley, 2010, p. 98-99).

Under certain circumstances, a special concurrence may make it so that there is no majority opinion; instead, the case is decided by a plurality of the justices, rather than by a majority. This was the case in *Bakke*, as discussed above. Arguably, there are at least three reasons plurality opinions are less than ideal:

First, the fact that an opinion is supported by only a plurality of the Court may compromise its professional and public acceptance. Second, within the Court itself, a no-clear-majority decision will carry less precedential

value. Third, a plurality opinion often fails to give definitive guidance as to the state of the law to lower courts. (Davis and Reynolds, 1974, p. 62)

Among legal scholars, there are numerous arguments about the most appropriate way for lower courts to interpret and apply plurality decisions, but there does not appear to be a definitive consensus (for example, see Berkolow [2007], Weins [2007], Kimura [1992], and Thurmon [1992]).

Concurrences may also have an effect on future Supreme Court cases. “Concurring and dissenting opinions do not describe the unsettled regions of the law by metes and bounds, but they do serve as warning flags to mark some recognized areas of doubt” (Stephens, 1952, p. 409), which may “embolden counsel in later cases to try again and to urge an overruling” (Scalia, 1994, p. 5). Thus, there may be long-term consequences of concurring opinions, specifically related to the interpretation of a decision in the hands of the lower courts.

Dissensus on the U.S. Supreme Court appears to have started becoming more prevalent around the Stone Court era (see Walker, Epstein, and Dixon [1988] and Caldeira and Zorn [1998]). Until then, consensus, rather than dissensus, was the norm on the Supreme Court. As reported in Epstein, Segal, and Spaeth (2001, p. 376), “justices of the nineteenth (and perhaps into the twentieth) century did seem to hide their private disagreements from the public, [indicating] that a norm of consensus did, in all likelihood, exist.” While numerous studies distinguish between dissenting and concurring opinions, both “involve justices’ publicly expressing their disagreements with

the Court's majority" (Aliotta, 1988, p. 275) and thus both are indications of a lack of consensus. Dissensus, however, may also have positive effects. Justice Scalia argues:

By enabling, indeed compelling, the justices of our Court, through their personally signed majority, dissenting, and concurring opinions, to set forth clear and consistent positions of both sides of the major legal issues of the day, this system has kept the Court in the forefront of the intellectual development of the law. (1994, p. 7)

Concurring opinions have both potential costs and potential benefits, with respect to publicizing dissensus on the Court. However, "[i]n spite of their potential to fracture majorities, concurring voices produce the legal debate that furthers the intellectual development of the law on the Supreme Court" (Maveety, 2005, p. 139). The justices themselves are thus charged with determining whether and when the benefits of concurring outweigh the costs (see ZoBell, 1959).

Furthermore, "[d]isclosure of the vote forces each member of the court to take responsibility and justify the position he takes before his colleagues, the parties, and the public in general," thus leading to the assertion that "[p]ublic control of the courts is weakened if dissents are hidden" (Nadelmann, 1959, p. 430). Thus, published concurring opinions also provide public accountability for individual justices. Even though Supreme Court justices serve life terms, their public reputation remains at stake throughout their tenure (see Ginsburg [1990] and Scalia [1994]). For example, Justice Blackmun received letters criticizing his opinion in *Roe v Wade* (1973) for years after the decision (Harry A. Blackmun Papers, Boxes 68-85).

However, there are arguably costs to publicizing dissensus, in the form of either concurring or dissenting opinions. As previously discussed, accountability is heightened by individually signed opinions; however, “this accountability carries with it a cost in the Court’s ability to appear independent and above the political fray, and detracts from the notion of the Court as something greater than the nine individuals who comprise it” (Markham, 2006, p. 926). While Markham (2006) argues that the costs of individually signed opinions outweigh the benefits, the practice of the Supreme Court is to publish individually signed opinions in the vast majority of cases.⁸ Though Markham is specifically discussing the practice of signing majority opinions, one would expect there to be a link between the practice of signing majority opinions and signing individual opinions as well. If the Court were only to issue unsigned opinions of the Court, it might follow that they would also eschew concurring and dissenting opinions, giving way to a form of forced unanimity in order to further the Court’s collective status at the expense of individual accountability. However, as Justice Douglas remarked, “Disagreement among judges is as true to the character of democracy as freedom of speech itself” (1948, p. 105). Thus, to maintain both individual accountability and collective institutional status, the justices must consider their individual preferences and goals, as well as the collective preferences of the Court.

⁸ During the 2009 term, according to the 2010 Year-End Report on the Federal Judiciary, which is available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>, the Supreme Court only issued four per curiam opinions, which are, by definition, unsigned. Conversely, 73 signed opinions of the Court were issued.

Overview of Dissertation

The four remaining chapters of this dissertation proceed as follows. In Chapter 2, I begin by discussing judicial motivations in a broad sense, paying particular attention to the three primary models of judicial behavior common in the literature. Preference-based, strategic, and new institutionalist models are all discussed, first with respect to generalized judicial behavior, and later regarding specific expectations about behavior associated with concurring opinions. I then describe the theoretical framework for my dissertation, which frames judicial behavior as simultaneously weighing the individual and collective costs and benefits of the decision to concur. In brief, justices are theorized to have preferences both with respect to legal policy and in regards to the Court as an institution. Individual and collective motivations are then discussed in terms of how this framework stems from the aforementioned three models of judicial behavior, with respect to concurring opinions. The final sections of Chapter 2 provide broad discussions of my expectations about whether justices will circulate a concurrence, when they do so, and whether they choose to publish their concurrence, as suggested by my theoretical framework of individual and collective motivations.

Chapter 3 details specific hypotheses about both whether and when justices will circulate concurring opinions, as motivated by justices' individual and collective preferences. Using a split-population event history analysis, I simultaneously test both sets of hypotheses. I primarily collected the data for this analysis, as well as for the analysis in Chapter 4, through examining Justices Blackmun and Brennan's personal papers, which include Court memorandum, draft opinions, and other information, and are

housed at the Library of Congress in Washington, D.C. Based on the results of the analysis in Chapter 3, I find that collective preferences about the institutional status of the Court constrain individual legal policy preferences, and that justices are also influenced by non-policy preferences.

The second decision-point within the process of concurring is analyzed in Chapter 4. I develop and test hypotheses, again motivated by justices' individual and collective preferences, about whether a justice chooses to publish or withdraw his written concurrence. This analysis allows for a more in depth consideration of conflicting long-term individual legal policy goals and collective Court preferences. As in Chapter 3, the results of this analysis indicate that justices are cognizant of and responsive to collective concerns, and thus temper their actions that would otherwise be expected to be motivated solely by individual goals.

The final chapter of my dissertation discusses the results of the entirety of the concurring opinion-writing process, both the decisions about circulating and those about publishing. Additionally, I discuss the implications of the findings, as well as avenues through which to further investigate the exact nature of the relationships found. Furthermore, I include a discussion of avenues for future research, both those stemming directly from this dissertation, and those related in a broader sense to this project.

Additionally, I provide further information in the two appendices accompanying this dissertation. Appendix A describes the original data collection process in more detail, as well as examples of the papers via which the data were collected. Appendix B then provides an additional empirical analysis as a comparison of the results of the dynamic,

two-decision point process found in Chapters 3 and 4 with a static, single decision-point process, as is common in the judicial politics literature. This comparative analysis allows us to answer questions such as whether it is necessary to explicitly model the dynamic nature of Supreme Court decision-making, or whether static models adequately summarize the dynamic process.

Chapter 2: Literature Review & Theoretical Framework

Before addressing the question of why justices write concurring opinions, it is imperative to first discuss the theories relating to why justices behave the way they do on the U.S. Supreme Court. Few legal scholars would dispute that Supreme Court justices are motivated by some combination of preferences and goals; what is in dispute is what type(s) of preferences and goals motivate the justices' behaviors. This chapter of the dissertation will first discuss the three primary types of models of judicial behavior described in the literature, as well as the foundational motivations upon which the models are based. The motivations for judicial behavior as proposed by these models generally can be broken down into the following four classifications: legal policy preferences, short-term strategic legal policy motivations, long-term strategic legal policy motivations, and other considerations. After briefly discussing each of the three types of models of judicial decision-making, I will proceed to describe the classification scheme I use as the theoretical basis for my hypotheses about concurring-writing behavior, as well as how each of the four aforementioned models fits into my classification scheme. Lastly, I will describe how judicial motivations vary according to the different aspects of the decision to utilize a concurring opinion.

Models of Judicial Decision-Making

Preference-Based Models

The first motivation for a justice's behavior is classified as the justice's preferences. When motivated purely by their preferences, justices are assumed to be behaving sincerely, or engaging in position taking (see Segal and Spaeth, 1993). These preferences may be based upon justices' conceptualizations of the law, their beliefs about what would be good policy, or some combination of the two. Many political scientists give little if any credence to the expectation of legal scholars that the law factors into the decision-making of Supreme Court justices. For example, empirical analyses have found that justices adhere to precedent and original intent only when it is in line with their personal policy preferences (see Segal and Spaeth [1996] and Howard and Segal [2002], respectively). Similarly, there is the suggestion that "[i]f justices can always find a precedent to match their own preferences, then they can couch their personal preferences in the rhetoric of precedent without having to modify their underlying position on a case" (Knight and Epstein, 1996, p. 1033; see also Spriggs and Hansford [2002]). Even though it may be true that a justice can find a precedent in line with his preference, regardless of what his preference is, Richards and Kritzer argue that "the central role of law in Supreme Court decision making is not to be found in precedents that predict how justices will vote in future cases" (2002, p. 306). Instead of legal precedent providing the basis for the influence of legal arguments, Gillman suggests that "[t]he entire structure of legal education and the nature of the judicial process in the United States is premised on the assumption that, one way or another, law matters" (2001, p. 466).

In contrast with a model of the primacy of policy preferences, Epstein and Kobylka found that “the law and the legal arguments grounded in law matter, and they matter dearly” (1992, p. 302). Furthermore, they assert that “the law constrains and guides, at least to some extent, the decisions [judges] tender. Insofar as this is the case, the common behavioral assumption – that judges are political actors who seek to maximize their policy preferences – must be seriously questioned” (Epstein and Kobylka, 1992, p. 302-303). Additionally, “[a]ppeals court judges appear to defer to clearly defined law and precedent regardless of their personal political preferences” (Songer, Ginn, and Sarver, 2003, p. 155). This deference to the law may in part be due to judges internalizing respect for the law during their education and experiences (Songer, Ginn, and Sarver, 2003).

Instead of the law, the primary assumption of most political science models of judicial decision-making is that “each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences” (Rohde and Spaeth, 1976, p. 72). As Rosenberg put it, “[f]or many political scientists, the legal method is a smokescreen for disguising the policy preferences of judges” (1999, p. 637). More specifically, while examining the Supreme Court’s interpretation of precedent, Hansford and Spriggs likewise note that the justices’ motivations regarding the interpretation of precedent are based on “the justices’ ultimate desire to influence societal outcomes in ways consistent with their preferences” (2006, p. 124-125). Furthermore, based on their empirical analyses, they find that “the justices interpret precedent with a

keen eye toward moving existing policy closer to their preferred policies” (Hansford and Spriggs, 2006, p. 126). While at one time, merely intimating that policy preferences drove judicial decisions was akin to committing heresy, Segal and Spaeth make it clear that “[p]olicy making is certainly not a subversive activity. It merely involves choosing among alternative courses of action, where the choice binds the behavior of those subject to the policy maker’s authority” (2002, p. 6).

Leaving aside, for the moment, the exact nature of judicial preferences, be they legal or policy in origin, it is necessary to discuss what is meant by “sincere” behavior. Justices’ decisions that are based solely on their own legal policy preferences and not on the possible decisions of other actors, either on the Supreme Court or outside of it, are considered to be non-strategic, or sincere. In other words, strategic behavior is interdependent in that “an individual’s action is, in part, a function of her expectations about the actions of others” (Epstein and Knight, 1998, p. 12) while sincere behavior is independent as it is only based on the individual’s preferences. This sincere model of judicial decision-making is referred to as the Attitudinal Model, which holds that “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices” (Segal and Spaeth, 2002, p. 86). Similarly, the Legal Model of judicial decision-making rests upon the premise that Supreme Court justices, and indeed, all judges, make their decisions according to the facts of the case presented to them, in light of the justice’s interpretation and application of the law. Though the Attitudinal and Legal Models obviously disagree about the impetus behind a justice’s preferences, both models posit that decision-making stems from a justice’s

conceptualization of good policy or good law. Thus, throughout this dissertation, I will use the term “preference-based models” to encapsulate the primary basis for both the Attitudinal and Legal Models of judicial decision-making.

Much scholarship has been devoted to trying to disentangle the effects of legal preferences from those of policy preferences (see, for example, Bailey and Maltzman [2008], McAtee and McGuire [2007], Songer, Ginn, and Sarver [2003], Gillman [2001], and Schauer [1999] at the Supreme Court level, Johnson [1987] at the lower federal courts levels, and Brace and Hall [1997] on state supreme courts). There is no definitive answer to the question of whether justices’ preferences are primarily based upon the law or their policy preferences. However, as both ideological preferences and preferences involving the use, interpretation, and application of the law can lead to sincere, non-strategic position-taking behavior on the part of the justices, it is unnecessary for the sake of this dissertation to differentiate between the two. Indeed, regardless of whether law or policy is the primary basis of justices’ preferences, justices may act sincerely based on those preferences, and that is the premise of preference-based models of judicial decision-making. Hence, as this dissertation does not seek to determine whether a justice’s sincere behavior is based on legal or policy preferences, I thus use the term “legal policy” throughout the dissertation so as to acknowledge the fact that the law, policy, or a combination of both may be driving a justice’s preferences, and likewise provide the motivations for their choices.

According to these preference-based models, justices make decisions based on their own legal policy preferences, irrespective of the preferences, decisions, and actions or

potential actions of other justices or actors outside of the Court. If a justice is motivated solely by his own preferences, he is said to be acting sincerely. More recently, the Attitudinal Model has been extended to include strategic decision-making (see Segal and Spaeth, 2002); however, in my dissertation, I make a distinction between sincere and strategic preference-based motivations. The latter will be discussed in the subsequent two sections of the dissertation. Before discussing strategic legal policy motivations in more detail, I would be remiss to omit a discussion of the current literature aimed at determining whether and the extent to which justices behave strategically rather than sincerely. While the strategic models of judicial decision-making do not necessarily preclude sincere behavior by justices, they do seem to suggest that sincere behavior is shortsighted, inefficient, or less sophisticated (see, for example, Epstein and Knight [1998] and Caldeira, Wright, and Zorn [1999]). Thus, scholars have attempted to determine whether justices are primarily acting based upon sincere legal policy preferences or strategic behavior aimed at achieving the best possible legal policy, given the constraints under which all judges operate (see, for example, Caminker [1998], Hettinger, Lindquist, and Martinek [2004], and Hammond, Bonneau, and Sheehan [2005]).

While in the next section of this chapter I discuss judicial preferences as related to decisions about authoring concurring opinions, I will provide a brief preview here. If justices are acting sincerely in their decisions about whether or not to write a concurring opinion, we would expect that the justices are basing their decision solely on their preferences, irrespective of the other justices' actions or possible actions. Assuming

justices are solely making decisions based on their sincere preferences, I would expect a justice to write a concurring opinion if no one opinion adequately disseminates his preference in a case. Similarly, I would expect a justice to refrain from writing a concurring opinion if he substantially agrees with another justice's opinion. Concurring opinions, under a sincere legal policy preference model, are no more than a manifestation of each justice's preferences in any given case, leaving concurring opinions as direct evidence of a justice's preferred position in a case.

Strategic Models

In juxtaposition with preference-based models of judicial decision-making, strategic models assume that while justices are motivated by their legal policy preferences, they behave so as to maximize their chance of achieving the actualization of their preferred positions. Since appellate courts in the United States are multi-member bodies, a single judge may not be able to put his preferred legal policy into a court's legal holding; however, through strategic interaction with his colleagues, he may be able to affect the court's eventual legal holding so that it is closer to his preferred position than it would have been otherwise. These strategic models of judicial decision-making vary in the extent to which it is assumed justices behave strategically, but they all stem from rational choice literature, which when applied to the Supreme Court and its justices posits that "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, p. 10).

Thus, instead of justices' behaviors being a direct manifestation of their sincere legal policy preferences, as under preference-based models, justices' choices according to strategic models reflect their expectations regarding which behavioral choice is most likely to lead to the legal policy closest to their own preference.

Though other justices' actions and potential actions are perhaps the most obvious considerations under strategic models, these models include other elements as well. Indeed, "[j]ustices must also consider the preferences of other political actors, including Congress, the president, and even the public" (Epstein and Knight, 1998, p. 13). Scholars have found that the Supreme Court as an institution does consider potential congressional or presidential response to its decisions, and at times, may modify its collective behavior based on the expected response (see, for example, Clark [2009] and Bergara, Richman, and Spiller [2003]). Additionally, there is some evidence that the Supreme Court is attentive to public opinion, which may also influence decision-making (see, for example, McGuire and Stimson [2004], Flemming and Wood [1997], and Mishler and Sheehan [1993]).

Strategic models are most often constrained to include only short-term, intra-case strategy, or strategic decisions made within a particular case. My dissertation extends the idea of strategic behavior to include long-term, inter-case strategy as well; this second facet of strategic behavior will be discussed in the following sub-section. For definitional purposes, short-term strategy is aimed at influencing the outcome and doctrine in the case at hand, while long-term strategy is aimed at influencing future cases or future interpretations of cases, hence the intra- versus inter-case descriptions. The literature on

short-term, intra-case strategy is abundant; the next several paragraphs will discuss this facet of strategic models in more detail.

Justices can engage in intra-case strategic decision-making at multiple points throughout the process of deciding a case. Even at the gate-keeping stage of judicial decision-making, justices can strategically consider whether they expect the case to be decided in line with their preferences; if a justice thinks this is unlikely, he may vote to deny certiorari so as to keep a precedent that he disagrees with from being set (see Caldeira, Wright, and Zorn, 1999). In conference, both the Chief Justice and the most senior associate justice may have an incentive to pass on their vote in order to increase their likelihood of assigning the majority opinion (see Johnson, Spriggs, and Wahlbeck, 2005). Similarly, Chief Justices may use forward thinking in their assignment of the majority opinion author so as to strategically influence the content of the majority opinion by assigning a justice who is more likely to write an opinion ideologically proximate to the Chief's preferred position (see Rohde, 1972). Even in writing a majority opinion, justices may act strategically, such as to try to achieve as many agreements as possible among the remaining justices (see Epstein and Knight, 1998) or to preemptively respond to other justices' possible criticisms of the draft opinion (see Maltzman, Spriggs, and Wahlbeck, 2000). Strategic models have perhaps been used most frequently in analyses of justices' behaviors after the draft of the majority opinion has been circulated; bargaining over the content of the opinion often involves strategic calculations, including but not limited to whether the majority opinion author is likely to accept certain changes or whether a justice is merely bluffing that he will write a separate opinion if he is not

accommodated (see Maltzman, Spriggs, and Wahlbeck, 2000). The justices may even on occasion be strategic about when they announce the opinion of the Court; in at least one case during the 1970s, the justices decided to move a decision's announcement date so as to better facilitate press coverage about the decision, as indicated by memos contained in Justice Blackmun's personal papers (Boxes 68-85; see also Mauro, 2005, p. 1044). Each of these strategic behaviors is aimed at influencing the case at hand in one way or another.

According to strategic models of judicial decision-making, a justice writes a concurring opinion because he believes that is his best course of action for achieving legal policy closest to his preferred position. There are a number of reasons a justice may believe a concurring opinion is his best course of action, which will be discussed in greater detail in the Theoretical Framework section of this chapter. However, two common intra-case strategic motivations for writing a concurring opinion are the belief that the concurring opinion can compel the majority opinion author to accommodate the concurring opinion author's preferences and the attempt at writing a concurring opinion to try to gain the agreement of enough of the remaining justices so as to have the concurring opinion become the court's majority opinion. Obviously, both motivations for writing concurring opinions have implications for affecting the legal policy put forth in the Court's eventual majority opinion.

New Institutional Models

While most strategic models of judicial decision-making are primarily, though not necessarily exclusively, interested in explaining justices' strategies regarding the legal policy put forth in the majority opinion of a single case, new institutionalist models of judicial decision-making add additional considerations to the strategic mix. There is definitely some overlap between strategic and new institutionalist models, particularly in that a justice's long-term strategy over future legal policy must consider the Court's institutional status in order to best actualize the justice's legal policy preferences (for example, see Epstein and Knight [1998]). However, new institutionalist models, in contrast with other strategic models of judicial decision-making, emphasize not the primacy of a justice's legal policy preference, but rather, the institutional constraints under which Supreme Court justices operate. Whereas in strategic models of judicial decision-making, the end goal of justices is primarily legal policy actualization, new institutionalist models suggest that justices' goals, and thus motivations, are more broad, in that while institutional position may affect a justice's choices with respect to his legal policy preferences, it may also provide for other goals and motivations for behavior. At times, strategic models of judicial decision-making are considered to be a type of new institutionalist model (see Clayton and Gillman, 1999a). However, in this dissertation I will be making a distinction between strategic new institutionalist models (which is what I refer to as strategic models) and non-strategic new institutionalist models. This sub-section will discuss the latter, while the previous sub-section described the former.

The definition of “institution” in new institutionalist models is broad, in that it includes “not only fairly concrete organizations, such as governmental agencies, but also cognitive structures, such as the patterns of rhetorical legitimation characteristic of certain traditions of political discourse” and additionally allows for “concrete political choices ... to have important consequences, intended and unintended” (Smith, 1988, p. 91). O’Brien describes it in this manner:

Institutionalization is a process by which the Court establishes and maintains its internal procedures and norms.... Institutionalization reflects justices’ interactions, vested interests, and responses to the Court’s distinctive history and changing political environment. It remains a central force, conditioning judicial behavior. (2003, p. 106)

Thus, these models incorporate the institutional rules and norms associated with Supreme Court decision-making, as well as consider the long-term consequences of judicial choice.

To distinguish these models from the previous discussion of strategic models more generally, there are two primary departures. First, new institutionalist models introduce the concept of long-term, inter-case strategy as more than just a means for achieving legal policy. As Brigham stated, “As opposed to a focus on maneuvers abstracted from action, like attitudes, an institutional investigation relies on the actual parameters within which actions take place” (1999, p. 22). For example,

Legitimization is viewed as an institutional imperative for courts, serving both as a source of judicial inertia and a requirement for justification of

particular judicial decisions and practices. Justification in turn compels courts to be highly sensitive and adaptive to their professional, cultural, economic, and social contexts. To this extent, new institutionalists tend to see doctrinal innovation as a product of more organic and structural political processes rather than as the function of formal institutional mechanisms such as the judicial selection process or political acts of noncompliance alone. (Clayton and Gillman, 1999b, p. 4)

Second, non-policy motivations are also often added as potential influences on a justice's decisions. I will first address the long-term strategic components of the new institutionalist models, most of which are shared with the strategic models, and then move on to a discussion of the non-policy motivations.

There are several specific ways in which the Court's institutional placement is relevant, specifically with respect to justices' choices about concurring opinions. First, the Supreme Court is at least somewhat reliant upon the public's confidence in and respect for the Court for having its decisions followed. Secondly, the Supreme Court's co-equal status with Congress may affect the Court's decisions, as Congress has the potential to overturn statutory decisions by the Court, initiate the process of amending the Constitution to attempt to overturn constitutional Court decisions, and also controls the Court's size, appellate jurisdiction, and funding; thus, the Court may have additional incentive to maintain its legitimacy in the eyes of Congress. Lastly, the Court's position within the federal judiciary may also be influential in the Court's decisions, as part of its purpose is to provide legal clarity and guidance to the lower courts. These are the three

key aspects of the Court's status as a legitimate institution on which I will focus my discussion here, with respect to new institutionalist models of Supreme Court decision-making.

Public confidence in the Supreme Court, or the broader conceptualization of general institutional legitimacy, is perhaps the most abstract aspect of the Court's institutional position. While it is true that the Supreme Court lacks both the purse and the sword, and thus can neither bribe nor coerce support for its decisions, the Supreme Court is the institution with the highest, most stable levels of public support (for a discussion of public support, see Caldeira and Gibson, 1992). However, it is important to note that in analyses of judicial decision-making, what is important to consider is whether the justices themselves view legitimacy as potentially in jeopardy; the actual effect of a decision on the Court's long-term legitimacy is irrelevant, as it is the justices' perceptions that are influencing their decisions. Thus, for the purposes of this dissertation, though other scholars have examined the question of whether decisions affect institutional legitimacy (for example, see Grosskopf and Mondak [1998] and Mondak and Smithey [1997]), I will focus on whether the justices believe legitimacy to potentially be in jeopardy, depending on their choices.

Though public confidence in the Court contributes to its institutional legitimacy, there are at least two other components as well. For each component, a different source is a distinct evaluator of the Supreme Court's legitimacy, or lack thereof. First, there is the public's evaluation of the Supreme Court's legitimacy. I will refer to this aspect of legitimacy as public confidence. If the public has a lack of confidence in the Supreme

Court as an institution, the Court's decisions may go unenforced (see Carrubba [2009] and Caldeira [1986]). The Supreme Court at least in part relies on the public to follow its decisions; if the public views a decision specifically or the Court more generally as an institution as illegitimate, they may be less likely to follow the Court's decision(s). The justices themselves have at times acknowledged the necessity of courting the public's confidence, both explicitly in speeches, interviews, or symposia (for example, see Rehnquist, 2003), and tacitly through their behavior on the bench (for example, the unanimous decisions in *Brown v Board of Education I and II* [1954 and 1955, respectively]). Additionally, "the evidence suggests that public opinion exercises important influence on the decisions of the Court even in the absence of changes in the composition of the Court " (Mishler and Sheehan, 1993, p. 96). Thus, the public serves as one source of evaluation of the Supreme Court's institutional legitimacy.

Secondly, lower courts, both federal and state, may evaluate the legitimacy of both the Supreme Court as an institution and individual decisions. If a lower court views either the institution or a decision as illegitimate, they may be less likely to follow the Supreme Court's directives. The relationship between the Supreme Court and lower courts, however, goes beyond legitimacy; indeed, Supreme Court legitimacy in the eyes of the lower courts is only a small part of the relationship. This relationship will be discussed further later in this section, and it has stronger, broader implications for justices' motivations regarding the efficacy of the Supreme Court, rather than merely its legitimacy. Indeed, the Supreme Court's efficacy is dependent on more than its legitimacy; thus, the relationship between the Supreme Court and lower courts will, in

this dissertation, be referred to under the broader “efficacy” designation, which in part includes legitimacy in the eyes of the lower courts. The efficacy of the Supreme Court will be discussed more fully later on in this section.

The third source of evaluation of the Supreme Court’s institutional legitimacy is that of Congress and the president. Both the legislative and executive branches of the United States government can potentially affect the impact and implementation of Supreme Court decisions. For example, Congress has the ability to override Supreme Court decisions through different legislative avenues while the president often has the ability to employ a certain level of discretion in his charge of enforcing Supreme Court decisions. If either views the Supreme Court as institutionally illegitimate, or even a particular decision as illegitimate, the Court’s decision may be effectively if not technically overruled. The new institutionalist models of judicial decision-making explicitly examines “how judicial attitudes are themselves constituted and structured by the Court as an institution and by its relationship to other institutions in the political system at particular points in history” (Gillman and Clayton, 1999, p. 2). In these models, justices are still presumed to be acting so as to achieve legal policy that is closest to their preferred position, but the model additionally relates these “attitudes and case facts to the institutional and environmental context” and reframes “the goal of the decision maker to include self-interest as well as the attainment of public policy outcomes” (Brace and Hall, 1993, p. 919).

Due to the Supreme Court’s institutional position, justices may well consider long-term legitimacy concerns when they are choosing a course of action within an individual

case. Though I hypothesize that institutional considerations are relevant and influential in justices' decisions regarding the use of concurring opinions, I do not attempt to distinguish among the three aforementioned sources of the evaluation of the Court's institutional legitimacy. Instead, I leave that for future research.

In addition to potentially affecting the Court's institutional legitimacy in the long-term, concurring opinions may also have a more direct long-term effect in that they may influence how future cases before the Supreme Court are decided. Thomas Jefferson, a proponent of *seriatim* opinions, opined that the more justices who support a particular outcome and rationale, the more weight the decision should have (as quoted in ZoBell, 1958). Ray appears to extend Jefferson's position to specifically incorporate concurring opinions, when she states that concurring opinions "dilute the force of a majority opinion, and, consequently, its authority" (1990, p. 783). If this is indeed true, the likelihood that the Supreme Court decides future cases in line with a case that was accompanied by concurring opinions would be expected to decrease as the number of concurring opinions increases. Similarly, when the use of concurring opinions in a case results in a plurality opinion, justices may feel less bound to the precedent than they would if the decision had garnered the votes necessary to be the opinion of the Court (Davis and Reynolds, 1974). While Hansford and Spriggs (2006) find that the number of specially concurring opinions in a case does not have a significant effect on its future interpretation at the hands of the Supreme Court, there have been times when the rationale in a concurring opinion was

later used as the basis for a majority opinion.⁹ In other words, concurring opinions may not systematically affect future Supreme Court decisions, but they do have to the potential to do so. It may be a small probability, but if a justice views the potential benefit of a concurring opinion that may affect future Supreme Court decisions, however unlikely it is to actually achieve the desired effect, to outweigh the costs associated with writing the concurrence, then the justice may still write with the hope that one day a future Court will vindicate his position. As Stephens writes:

If stare decisis were applied in the United States as a strict rule of law there would be less reason for disseminating the views of individual judges; but since the decision is not the law, and indication of likelihood and probable direction of change becomes important. (1952, p. 409).

Furthermore, Stephens notes that concurring opinions can “serve as warning flags to mark some recognized areas of doubt” within a region of law (1952, p. 409). Similarly, Supreme Court Justice William O. Douglas has stated that “law ... is the prediction of what decree will be written by designated judges on specified facts” (1948, p. 104), which, when taken with the aforementioned conceptualization of concurring opinions, may mean that decisions issued with concurring opinions indicate to attorneys, who may in the future bring cases before the Supreme Court, where there are “areas of doubt” that may decrease the predictive accuracy of the Court’s rationale. Since the Supreme Court is limited to accepting cases that have been appealed, rather than choosing their cases

⁹ Perhaps the most well known instance of this is Justice Harlan’s concurrence in *Katz v United States* (1967) advocating for an “expectation of privacy” standard.

from the universe of possible cases, justices who express certain areas as “in doubt” may be attempting to influence which cases are brought before it.

Concurring opinions may specifically be motivated by certain long-term goals, such as “reserv[ing] an issue for resolution in a future case and context”, “propos[ing] future avenues for development of the law”, or “counsel[ing] immediate alteration of the new law” (Ray, 1990, p. 783). Justices who are unable to convince a majority of the current Court to support their position may use a concurring opinion as a way to undermine the majority opinion in the hope that a future Court more in line with the justice’s preferences will one day revisit the issue. Like dissenting opinions, concurrences may at times be “an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error which the [concurring] judge believes the court to have betrayed” (Hughes, 1936, p. 68).

Most recently, the Supreme Court accepts fewer than 100 cases for review per term (see Roberts, 2010). While the Supreme Court is the most visible court in the nation, it is the lower federal courts that hear the vast majority of cases involving federal questions (Cross, 2007). Lower federal courts are viewed as agents of the Supreme Court, in that they are to follow the legal guidelines, most often in the form of the doctrine within the majority opinion, handed down by the Supreme Court (see Songer, Segal, and Cameron, 1994). Thus, since the Supreme Court hears relatively few cases when compared to the lower federal courts, justices on the Supreme Court may want to affect the long-term citation of the case currently before them in the hands of the lower federal courts in order

to actualize legal policy closest to their preferred position. Justices may be able to affect the lower court's use of a decision through concurring opinions.

The Supreme Court as an institution generally prefers that the lower federal courts follow its decisions. However, individual justices, in certain cases, may prefer that the lower courts actually shirk from the legal policy put forth in the majority opinion. Since Johnson (1987) finds that lower courts are more likely to follow Supreme Court decisions the greater the size of the majority coalition, one might also consider that concurring opinions could have a similarly diminishing effect on the legal weight the lower courts place on a majority opinion. Additionally, "concurrences provide a commentary on the decisions that they accompany and may aid lower courts in interpreting and applying such decision" (Kirman, 1995, p. 2084), though the concurring and majority opinion authors may not agree on how the majority opinion should be interpreted and applied, thus allowing the author of the concurrence to potentially shape how the majority opinion is used by the lower courts. Furthermore, lower courts do occasionally treat concurring opinions as legal precedent (Kirman, 1995).

Preference-based and at least some strategic models suggest that ideological preferences are, if not the exclusive motivation for judicial decision-making, at least the primary motivation that dominates all other potential motivations (see Segal and Spaeth [1993] and Epstein and Knight [1998]). However, this premise obscures two important facts about the Supreme Court and its justices. First, the justices do not make decisions in a vacuum; instead, "institutional settings are an omnipresent feature of [the justices'] attempts to pursue a preferred course of action" either through the justices' strategic

calculations or their deference to institutional rules and norms” (Gillman and Clayton, 1999, p. 3). Second, beneath their robes, Supreme Court justices are humans, as the justices themselves have acknowledged (for example, see Powell, 1975). These two facts, combined with Maveety’s finding that “separate opinion writing is not obviously a function of membership in an ideological bloc” (2005, p. 142), lead to my inclusion of additional motivations for judicial decision-making on the Supreme Court, even though they are typically heavily discounted if not entirely ignored within much of the judicial politics scholarship.

However, the new institutionalist models integrate these multiple facets of the motivations of Supreme Court justices by focusing on “the relationship of attitudes and case facts to the institutional and environmental context, and by reforming the goal of the decision maker to include self-interest as well as the attainment of public policy outcomes” (Brace and Hall, 1993, p. 919). Thus, it is the new institutionalist models’ framework that provides the primary theoretical foundation for this dissertation, as it theorizes that judicial decision-making is “not merely the collective expression of individual attitudes or policy preferences but a complex interaction of values and structures” (Hall and Brace, 1989, p. 394), as well as incorporates the idea of judicial self-interest, which I extend to include more fundamental aspects of human self-interest, such as collegiality, workload pressures, and reputation.

As previously discussed, the Supreme Court’s institutional position may affect justices’ decisions if they are cognizant of the potential long-term implications of their choices. However, not all facets of the Supreme Court’s institutional setting are related

to its legal policy output. Instead, some of the Court's rules and norms may motivate justices' choices independent of working towards actualizing their legal policy goals. For example, increases in the numbers of law clerks and technological advances have been shown to influence the number of opinions on which a justice can realistically be working by decreasing the time and energy costs associated with writing opinions (see Best, 2002), which is both a change in Supreme Court rules and an illustration of a fundamental human preference, as opposed to solely a judge's preference, to be constrained by time costs. Additionally, Supreme Court justices, though highly educated and trained in the legal profession, still exhibit motivations similar to those of everyday people, such as ambition, ego, and a preference for good working relations. As S. Sidney Ulmer stated, "Supreme Court justices are neither anointed priests, removed from knowledge of the stress of life, nor impersonal vehicles of revealed truth" (1960, p. 629). Hence, it should not be expected that Supreme Court justices would suppress their individual characteristics, such as a tendency towards sarcasm or verbosity, once they are appointed to the Court. Thus, I do not assume that every justice is motivated in the same way by the same things; in other words, not all judicial motivations revolve around a particular case, set of policy preferences, or even the law. Instead, some judicial motivations are more individualistic, and may vary from justice to justice in their strength or applicability.

Theoretical Framework

Preference-based, strategic, and new institutionalist models of judicial decision-making, when applied specifically to the decisions regarding concurring opinions, all provide expectations about the justices' behaviors. Based on these models, justices have motivations both to write concurring opinions and to refrain from writing concurring opinions. Generally speaking, collective Supreme Court motivations are for self-restraint, while individual motivations can be either for or against utilizing a concurrence. The conception of judicial behavior as motivated by both individual and collective preferences is less than prominent within political science judicial scholarship. However, within legal scholarship, this theoretical framework appears to have added importance. For example, it is considered a given that "the nation is not overly interested in the views of any *individual* justice; it is, however, deeply concerned about the views of the Supreme Court as an *institution*" and that "when the Court bends its will to the task, it is possible, even with the most sensitive issues, to subordinate individual differences enough to achieve, if not unanimity, at least a forceful voice speaking for the Court as an institution" (Davis and Reynolds, 1974, p. 81), thus illustrating the perceived tension, particularly within the legal community, between the individual and the collective institution. Furthermore, one legal scholar asserts, "Collective thought is more than an academic abstraction about the nature of a court; it is a mandatory goal. I view it as an intrinsic aspect of the 'Supreme Court' established by article III" (Monaghan, 1979, p. 23). Hence, I am using theory that primarily originated within the legal field and its scholarship to further our empirical knowledge about judicial motivations and behavior.

As models of behavior in general, and those of judicial decision-making more specifically, are meant to provide meaningful ways to classify and understand behavior, the distinction between individual and collective motivations provides a clear picture of the multiple motivations justices may have regarding using concurring opinions. This framework is simple, in that there are only two primary types of motivations, but it is not overly simplistic in its expectations. Unlike Bennett (1990), I do not propose that justices are either individually or institutionally minded. Rather, I suggest that Supreme Court justices simultaneously have both individual and collective motivations, and thus their behavior is dependent upon the relationship in terms of influence between individual and collective motivations. Indeed, this framework provides increased clarity in examining justices' choices, specifically in relation to their decision to use or not to use concurring opinions. Each classification of motivations will be discussed in detail in the following section of this chapter, with respect to each of the three components of concurring opinion behavior. First, though, I will discuss how the preference-based, strategic, and new institutionalist models comport with the theoretical framework I am using as the basis for my dissertation.

Individual Motivations

Judicial behavior that is aimed at either expressing or actualizing a justice's legal policy preferences is considered to be an individualistic motivation, as the justice is concerned only about his own legal policy preferences, and not about the potential effects his choices may have on the status of the Court as an institution. Proceeding from this

conceptualization of individual motivations are both short-term, intra-case strategic and long-term, inter-case strategic behaviors. For this component of individual motivations, I borrow most heavily from the preference-based and strategic models of judicial decision-making.

Additionally, individual motivations can also be unrelated to a justice's legal policy preferences. Such non-policy motivations may be related to the justice's position on the Court, such as adhering to collegial norms, or may be similar to those any person would be likely to experience, such as workload pressures. The non-policy component of individual motivations comes primarily from the new institutionalist models of judicial decision-making.

Collective Motivations

In addition to individual motivations, I suggest that justices are also both conscious of and responsive to collective preferences about the long-term status of the Supreme Court as an institution. In contrast to individual considerations, justices who act based on collective motivations consider not the impact their choice would have on their own preferences, but rather the impact their choice would have on the collective Court. Obviously, a question here is whether collective consequences are enough to deter justices from engaging in behavior that is detrimental to the Court as a whole, particularly when such behavior would be of benefit to an individual justice. My conceptualization of collective motivations relies primarily on the new institutionalist models of judicial decision-making, in that it considers the Supreme Court's place in the larger process of

setting legal policy for the nation. Indeed, lower courts, the public, Congress, and the president are all important actors within the larger process, and thus it would be “short-sighted” of the justices to disregard these other actors.

My primary departure from the new institutionalist models, in framing motivations as either individual or collective in nature, is to address more directly the competing motivations of Supreme Court justices. Additionally, this theoretical framework allows for an open discussion of why we would expect individual justices to be responsive to collective motivations, rather than to push maintaining the Court’s collective status off onto other members of the Court, and thus resulting in a classic collective action problem. While the new institutionalist models do include collective motivations in their models of judicial decision-making, they do not seem to address the dichotomy between individual and collective motivations, with respect to collective motivations possibly presenting a collective action problem. An exception to this is found primarily in scholarship coming from the legal community. For example, as early as 1974, it was acknowledged that “institutional, ideological, and personal factors” were all influential in frustrating “the achievement of consensus within the Court” (Davis and Reynolds, 1974, p. 81). Thus, my theoretical framework, considering judicial motivations to be either individual or collective, provides for a more thorough consideration of the often-competing nature of individual and collective motivations on the U.S. Supreme Court than do the primary models of judicial behavior prevalent in the discipline of political science.

Theories of Concurring Behavior

The following three sub-sections describe the general expectations of concurring behavior in line with the theoretical framework proposed above. There are three components of the concurring process, each of which has distinct theoretical expectations. Thus, I will discuss each component and its corresponding motivations for concurring behavior in turn. *Table 2.1*, on the following page, provides a brief summary of the motivations and preferences associated with each of the three components of the concurring process. The first component is a consideration of whether a justice chooses to circulate a concurring opinion. The second is if a justice does circulate a concurrence, when during the decision-making process do they choose to do so? The final component of a model of concurring opinion-writing behavior is whether a justice chooses to publish a written concurrence. As previously noted, while some motivations are applicable to all three components, other motivations are relevant only for one or two of the components. Thus, a discussion of each component is necessary to understand the theoretical expectations about each component of concurring opinion-writing behavior. Because the first discussion of the individual and collective motivations will be assuredly the most detailed, I have separated the motivations for whether a justice chooses to author a concurrence into three separate sections. Each of the final two components, when a justice writes and whether a justice publishes a concurring opinion, will have its own section.

Table 2.1: Relevance of Judicial Motivations, by Decision Point¹⁰

	Whether a justice circulates a concurrence	When a justice circulates a concurrence	Whether a justice publishes a concurrence
<i>Individual Sincere Legal Policy Preferences</i>	X	X	X
<i>Individual Short-Term Strategic Legal Policy</i>	X	X	
<i>Individual Long-Term Strategic Legal Policy</i>	X		X
<i>Collective Long-Term Strategic Legal Policy</i>	X		X
<i>Individual Non-Policy Motivations</i>	X	X	X

The Decision to Write: Individual Motivations

Supreme Court justices have several potential motivations about concurring opinions that are individualistic in nature. First, their decisions regarding whether or not to concur may be based on their sincere legal policy disagreement with the majority opinion author. According to Maveety, “[t]he attitudinal model, which generally eschews the importance of opinions’ doctrinal content, accommodates concurrence mainly as an indication of a less strongly-held ideological preference by members of a majority vote coalition” (2003, p. 174). If the justices are indeed motivated solely by their sincere legal policy

¹⁰ An “X” indicates that the class of motivations on the left is relevant for a justice’s decision, at each of the three decision points described in this dissertation.

preferences, concurring opinions occur as an expression of a justice's legal policy preferences and are not intended to affect the content of the majority opinion, the decisions of the other justices, how the lower courts interpret the decision, or how future Supreme Courts use the decision. The concurrence may indeed influence these things, but such influence is not the intent of the author if he is engaging solely in expressing their legal policy preferences. Scholars may question the point in concurring if a justice has no expectation of affecting the legal policy associated with the case; however, concurring opinions are "confirmation of individual attention to the issues at stake and [are] indicative of a proper discharge of judicial responsibility" and provide a test for said responsibility (Stephens, 1952, p. 396), and thus are not entirely purposeless as expressions of a justice's legal policy preference in a case.

Justices may also be motivated to write concurring opinions in order to influence either the legal policy put forth in the majority opinion or the decisions of other justices. These intra-case strategic motivations, like the aforementioned expression of legal policy preferences, are individualistic in nature in that the justices are attempting to actualize their individual legal policy preferences through the opinion of the Court. Both the authoring of a concurring opinion and even the threat of authoring a concurrence can induce accommodation by the majority opinion author, since "the mere prospect of a separate writing renders the writer of the majority opinion more receptive to reasonable suggestions on major points" (Scalia, 1994, p. 41). Indeed, as Murphy stated:

To bargain effectively, one must have something to trade and also a sanction to apply if the offer is rejected or if there is a renege on a promise

[...] the most significant items a Justice has to offer in trade are his vote and his concurrence¹¹ in an opinion. (1964, p. 57)

Thus, justices' motivations in authoring concurring opinions may be to directly affect the content of the opinion of the Court.

Similarly, justices may be motivated to author a concurring opinion based on its potential for influencing other justices' decisions. Within the context of Supreme Court decision-making, justices are not faced with a dichotomous choice of either joining or not joining the majority opinion. Instead, each justice is faced with a range of options, including the option to write his own opinion, whether it be a concurring or dissenting opinion. By writing a concurrence, one justice may be able to convince a fellow justice that a certain reasoning is legally more correct than or preferable to another opinion's reasoning, thus influencing which opinion that justice eventually joins. Extend this influence a bit further and it is feasible that a justice may be able to hijack the majority opinion from the initial author by writing a concurring opinion that is joined by a majority of the justices, thus making it the Court's opinion.¹² From an individual justice's standpoint, this may be a "best case scenario" for a written concurring opinion influencing the other justices' decisions within a particular case, as it results in the concurring justice achieving additional control over the content of the majority opinion. (For a discussion on whether and the extent to which majority opinion authors hold an

¹¹ Here, Murphy is using the term "concurrence" as "agreement" with or joining of the majority opinion, not as a separate opinion agreeing with the case's outcome.

¹² Interestingly, concurring opinions on the Canadian Supreme Court manage to "sway the signatures of enough members of the panel to become the judgment of the Court" about one-tenth of the time (McCormick, 2008, p. 163), which appears to be a significantly higher rate than in the United States Supreme Court.

advantage in deciding the legal policy content of the majority opinion, see Lax and Cameron [2007] and Hammond, Bonneau, and Sheehan [2005].)

Justices may have additional individualistic motivations for writing a concurring opinion that are long-term strategic in nature, as opposed to strategy aimed at influencing the content of the majority opinion in a particular case. Long-term motivations include any motivations aimed at influencing something (or even someone) other than either the legal policy within a case's majority opinion or the other justices' choices within the case; these motivations include strategy aimed at influencing lower court decisions, future Supreme Court decisions, or other political actors. By writing a concurring opinion, a justice may be attempting to influence how the lower federal courts interpret or apply the majority opinion (see Kirman, 1995). Additionally, even though concurring opinions generally express "the views of a single Justice [they] have, at times, been given precedential value by the lower courts" (Kirman, 1995, p. 2085). This may indeed be an ideal long-term strategic use of a concurring opinion, at least for the justice who authored the concurrence, since he has successfully actualized his preferred legal policy through the lower courts' uses of his concurring opinion. However, such a scenario may simultaneously have an adverse effect on the collective preferences of the Supreme Court, which may minimize a justice's willingness to try to usurp the precedential value of the majority opinion by writing a concurring opinion. This potential influence of collective motivations will be discussed in more detail in the next sub-section.

Another potential long-term individualistic motivation for authoring a concurring opinion may be aimed at influencing future Supreme Court decisions. There is some

evidence, though it is a bit mixed, that decisions with concurring opinions are more likely to eventually be overturned than are decisions without concurrences, possibly because “concurrences lower the credibility of a precedent and offer alternative legal rationales” (Spriggs and Hansford, 2001, p. 1105). Additionally, there is “support for the argument that Supreme Court justices use concurrences to communicate their understanding and support of the majority decision to each other, and that this communication influences how justices react to the precedent in the future” (Corley, 2010, p. 93). Thus, concurring opinions, like dissenting opinions, may be, as Chief Justice Hughes put it, appeals to “the brooding spirit of the law” and issued in the hope that justices on a future Court will see fit to issue a decision in line with what was proposed in the concurrence.

A third long-term individually strategic motivation for concurring may be using a concurring opinion to signal other political actors, such as Congress or the president. Although constitutional decisions can be overruled only through amending the Constitution, Congress can more easily reverse the Supreme Court’s statutory decisions. Hausegger and Baum (1999) study the interesting phenomenon of the Supreme Court issuing “invitations” to Congress to overrule specific decisions. Though they note that dissenting opinions can be used to ask Congress to act to reverse the majority’s decision, there seems to be no reason to think that concurring opinions could not be used in a similar manner. In other words, a justice may author a concurring opinion not as an attempt to influence the other justices’ decisions within that case, but rather to influence Congress’ decisions in the wake of the Court’s decision.

Justices may also be motivated by individualistic non-policy considerations in their decisions about whether or not to author a concurring opinion. Irrespective of the extent of their disagreement with the content of the majority opinion, justices may author concurring opinions so as to increase their reputation or prestige among certain audiences (see Baum [2006] and Schauer [1999]). Concurring opinions may be one avenue through which justices are able to gain individual attention, and thus if attention, reputation, and prestige are indeed goals, justices may be motivated to author a concurrence even in cases where their disagreement with the legal policy in the majority opinion is minimal. Justice Jackson, in his dissenting opinion in *Craig v Harney* (1947), confirms the plausibility of this idea when he writes, “nothing in my experience or observation confirms the idea that [a judge] is insensitive to publicity. Who does not prefer good to ill report of his works?” Furthermore, an appellate court judge acknowledges that there may be incentives for separate opinion-writing since:

Each of us secretly hope to someday be accorded the recognition of having held the correct position in the face of opposition; or to have been the author of a famous, oft-quoted opinion; or perhaps even to have been ... vindicated by a later, and obviously more enlightened, court. (Nygaard, 1994-1995, p. 42)

Additionally, justices may be motivated by their preference to maintain collegial relationships with the justices in their choice to author a concurring opinion. In order to incentivize collegiality, some sanction may on occasion be necessary. Concurring opinions may be able to be used as sanctions for two distinct reasons. First, as previously

mentioned, they may minimize the impact of the majority opinion. Second, they may criticize a justice in front of the justice's peers or audiences. The first rationale can be used only against the majority opinion author, whereas the second rationale can be used against any justice, though it is probably most likely to be used against the majority opinion author.

The possibility of using concurrences as a sanction notwithstanding, under what circumstances might such a sanction be utilized? Justices who violate collegial norms, either by authoring concurring opinions unnecessarily or by using concurrences too frequently or sharply as criticisms of other justices and their opinions, may be those justices who are sanctioned by having concurring opinions written against them. For example, Justice Douglas expressed his displeasure with Justice Whittaker's "smart-alecky" opinion (Ulmer, 1960, p. 629), indicating that justices, like other individuals, may be irritated with certain tones contained in written opinions. Such displeasure could easily have motivated Justice Douglas to write a "rebuttal" to Justice Whittaker, in the form of a concurring (or other type) of opinion. On the other hand, however, Judge Fuld, of the Court of Appeals of the State of New York, suggests that judges are less susceptible to persnickety phrasing when he states:

The slings and arrows of outraged dissent, cutting though they may be, leave no deep scars; you see, we on the bench ... are prone to become calloused and hardened to what the nonjudicial mind might regard as the sharpest of barbs. (1962, p. 924)

Thus, it may be that Supreme Court justices are immune to the “barbs” contained in concurring opinions, though Justice Douglas’ memo indicates that this may not always be the case.

From an individual motivations perspective, a justice may be motivated to refrain from writing a concurring opinion due to his workload, relative inexperience on the Court, or deference to collegiality norms. Even though Supreme Court justices often use their clerks to draft opinions (see Wahlbeck, Spriggs, and Sigelman, 2002), there are still time-costs associated with choosing to write an additional opinion, leaving justices with the choice of choosing to author a concurring opinion in only one of two cases, for example, when ideally they would prefer to write a concurring opinion in both cases. Though “[s]ome judges are more prone to indulge their individuality than others, [they] all operate under one intensely practical constraint: time” (Ginsburg, 1990, p. 142). Similarly, since Chief Justices appear to consider a justice’s current workload and the average time it takes them to draft a majority opinion when deciding to whom to assign a majority opinion (see Slotnick, 1979), if a justice wants to author majority opinions, which seems likely as the author may have additional agenda-setting control over the content of the majority opinion (see Bonneau, Hammond, Maltzman, and Wahlbeck, 2007), a justice may prefer to minimize his workload so as to maximize his chances of being assigned additional majority opinions.

A justice’s inexperience on the Court may motivate his decisions through several potential avenues. First, an inexperienced justice may be less likely to be able to handle a significant workload, resulting in the aforementioned time-cost considerations. Second,

inexperienced justices may be less certain about when concurring opinions will or will not be viewed as acceptable by the other justices, an uncertainty that may motivate the less experienced justice to refrain from concurring if he is uncertain about whether he will be sanctioned for his concurrence. In other words, it may take new justices time to become acquainted with the collegiality expectations of the Court. A final possibility, and one not associated with collegiality, is that with experience, justices' legal policy preferences become more strongly held, and thus more experienced justices are less likely to want to compromise than less experienced justices.

If collegiality norms do indeed exist on the Supreme Court, we might expect that justices will at times exercise self-restraint in writing concurring opinions so as to conform to that norm of collegiality (for a discussion of collegiality on the Court, see Maltzman, Spriggs, and Wahlbeck [2000], Meinke and Scott [2007], and Cross and Tiller [2007]). It has been argued that focusing solely on legal policy preferences as a motivation for judicial behavior obscures a "collegiality effect and its moderation of individuals' ideological preferences" (Cross and Tiller, 2007, p. 258). Thus, collegiality norms may affect an individual justice's decision about whether or not to write a concurring opinion through any or all of the aforementioned avenues.

As discussed in this sub-section, individual motivations may influence Supreme Court justices' decisions about whether or not to author concurring opinions. While individualistic preference-based, short-term strategic, and long-term strategic considerations may motivate justices to author concurring opinions, individual non-policy considerations may motivate justices to either author or refrain from authoring

concurrences. Collective preferences, on the other hand, only provide motivations for refraining from authoring a concurring opinion. These collective motivations will be discussed in the following sub-section. Though not directly examined in this dissertation, it has been suggested that the increase in separate opinion-writing is indicative of a “shift from the institutional to personal nature of opinion writing [which] was also evidenced in Justice Breyer’s subtle and inadvertent rhetorical slip in *South Central Bell v Alabama*, when he used the pronoun ‘I’ instead of ‘we’ in a majority opinion” (Markham, 2006, p. 932, footnotes omitted). Thus, the question becomes whether collective institutional concerns truly do act as constraints on individual behavior, or whether individualism on the Supreme Court has overtaken an emphasis on the collective institution.

The Decision to Write: Collective Motivations

The institutional preferences of the Supreme Court as a collective whole can motivate individual justices to refrain from authoring concurring opinions. Perhaps the most intriguing question here is whether individual justices are indeed motivated by collective considerations, or whether individual justices pass off responsibility about the Court’s institutional status to the other justices, thus perpetuating a collective action problem. If individual justices are not responsive to collective motivations, this has potential implications for long-term Court legitimacy and efficacy. The justices themselves appear to acknowledge their individual responsibilities for furthering the Court’s collective image; then-judge Ginsburg asserted that “[c]oncern for the well-being of the court on which one serves, for the authority and respect its pronouncements command, may be the

most powerful deterrent to writing separately” (1990, p. 142). Similarly, an appellate court judge stated, “we typically give much thought to intracourt relations and collegiality, and each of us exercises great care that we behave as a court – not just as individual judges” (Nygaard, 1994-1995, p. 41). Additionally, one justice is quoted as saying, “We read the newspapers and see what is being said.... We know if there is a lot of public interest; we have to be careful not to reach too far” (quoted anonymously in Clark, 2009, p. 973). However, whether their actions speak as loud as their words is another question entirely. In this sub-section, I will discuss the ways in which collective Court motivations may influence individual justices’ decisions in their use or non-use of concurring opinions.

As previously discussed, long-term strategic motivations include the public’s confidence in the Supreme Court as well as its continued efficacy in overseeing the lower federal courts. In the eyes of the public, concurring opinions may make decisions appear overly contentious, thus destroying the “much cherished illusion of certainty in the law and of infallibility of judges” (Stone, 1942, p. 78). Furthermore, “continual or repeated dissension tends to weaken the Court in the esteem and confidence of the public” (ZoBell, 1959, p. 212). ZoBell continues:

All too frequently, the multiple opinions of the Court *seem* (and appearance is the important thing here) to represent statements of the extreme positions of advocates of a variety of different possible dispositions of an issue. This is something foreign to what people would

like to observe in a Court constituted to resolve the differences brought there by suitors. (1958, p. 213)

If the public views concurring opinions as ideologically motivated, they may view them, and possibly the decisions they accompany, as illegitimate. Thus, justices may consider refraining from writing concurrences in order to promote either a specific decision's legitimacy or the Court's institutional legitimacy. Questions that arise here are with respect to what constitutes "too much" or "continual" dissensus, particularly in the form of concurring opinions. Additionally, justices may have different conceptions of the circumstances under which concurrences should be withheld, leading to the possibility that there is variation across justices in responsiveness to collective motivations due to differing ideas of what could be detrimental to the Court as a whole.

Additionally, justices may be motivated to suppress a potential concurrence due to long-term implications for the Court's continued efficacy. Concurring opinions have the potential to influence lower court interpretations of Supreme Court decisions, as well as to influence the public's view of the Court as a legitimate, less political institution. While the overuse of concurrences is apt to be detrimental for the Court's legitimacy, even the use of concurrences in moderation can have consequences for a decision's interpretation at the hands of lower court judges. For example, "[i]f a decision is supported by a large majority and has no dissent, lower court judges may reasonably assume that application of that case's reasoning is expected in the lower courts, perhaps because there is no reasonable alternative" (Johnson, 1987, p. 333). Conversely, when concurring opinions provide a competing legal basis for a decision, lower courts may take

this as a signal that there may be more than one way to dispose of the case before them. In other words, lower courts may be less likely to go against the Supreme Court when they perceive the Court to have been united in its decisions (Johnson, 1987). This may, however, give some justices an additional incentive to give in to their individual preference for writing a concurrence, so as to undermine the decision's legal weight, even if it would be better for the Court's long-term efficacy to suppress it, as was discussed in the previous sub-section.

Another related long-term efficacy concern is legal clarity. Concurring opinions may be "invidious with respect to legal clarity" (Maveety, 2005, p. 138) due to muddying the waters, so to speak, of what constitutes the intended interpretation and application of the majority opinion. Concurrences that result in the Court issuing a plurality decision are perhaps the most detrimental to legal clarity, as a "plurality decision, by its very nature, represents the most unstable form of case law" (Kimura, 1992, p. 1594). Cases that either potentially or actually result in a plurality opinion provide an opportunity to directly pit individual motivations against collective motivations; this noteworthy situation will be further explored in the following sub-section.

A final collective concern may be in relation to the Court's position in the federal government. The Court's relationship with Congress and the president may also pose problems for the Court's continued institutional status, for multiple reasons. First, it may be that Congress provides the Court, by way of introducing Court curbing legislation, with "a credible signal about waning judicial legitimacy" (Clark, 2009, p. 972). Additionally, since the Court, to at least some extent, is dependent upon Congress and the

president for the implementation of their decisions, justices may not wish to directly oppose the other branches of the federal government unless the Court presents a fairly unified front. Indeed, it may be that, similar to the lower courts, Congress and the president are less likely to attempt to check the Court if the Court is acting as a whole, rather than is ideologically fractured. There is general empirical support for the supposition that there is an institutional constraint, as it has been found that, with respect to votes over a case's outcome, "justices do adjust their decisions to presidential and congressional preferences" (Bergara, Richman, and Spiller, 2003, p. 248), though the frequency of such adjustments remains in question. Specifically, "the justices can act in a sophisticated fashion when they need to do so. But the institutional protections granted the Court mean that with respect to Congress and the presidency, they almost never need to do so" (Segal, 1997, p. 42-43). Regardless, the Court's relationship with Congress and the president provides an additional component to the Court's collective long-term institutional status.

Collective Court motivations, such as preferences both for continued legitimacy and for efficacy in the lower federal courts, give individual justices reasons to refrain from writing concurring opinions. The tension between individual motivations for writing, specifically those based on legal policy preferences, and collective motivations to refrain from writing is one that this dissertation is aimed at examining more fully. The next subsection describes what is perhaps the most illuminating example of this tension, as well as provides more concrete consequences for both possible decisions – writing or refraining from writing a concurring opinion.

The Decision to Write: An Illustration of Competing Motivations

For a moment, consider as an example of the potential for competing collective and individual motivations those cases where the majority coalition is minimum winning over the case's outcome.¹³ In these cases, each justice in the majority coalition has additional bargaining leverage over the majority opinion author, due to each justice's joining of the majority opinion being an absolute necessity for the opinion to be the opinion of the Court rather than merely a plurality opinion (for a discussion of bargaining leverage and accommodation, see Chapter 4 in Maltzman, Spriggs, and Wahlbeck, 2000). The tension between individual and collective motivations, in such a case, is perhaps at its apex, because both motivations are theoretically capable of exerting very strong motivational force, either for or against action in the form of a concurrence. From a collective standpoint, plurality opinions may be an indication of a breakdown of the judicial role (see Novak, 1980), as they are contradictory to the Court's primary function of providing "institutional pronouncements [to] guide and bind the process of adjudication both in the state courts and in the lower federal courts" (Davis and Reynolds, 1974, p. 61).

Additionally, "plurality decisions lead to lower compliance [in the lower courts], resulting in the erosion of the Court's credibility and authority as a source of legal

¹³ A majority coalition is considered minimum winning over the case's outcome if a single justice defecting from the majority coalition would revoke the coalition's majority status. In most minimum winning coalitions, there is a one-vote difference between the majority and minority coalitions (5-4, for example). However, in the early 1970s, due to membership changes and illness, the Court occasionally only had eight justices hearing a case; under this circumstance, a 5-3 split among the justices would be considered minimum winning, as if one justice leaves the majority coalition, the result is an evenly divided Court and there is no actual majority coalition.

leadership and, ultimately, the influence of the Court being diminished” (Corley, 2009, p. 44). Thus, plurality opinions may be detrimental both to the Court’s legitimacy in the eyes of the public and to their efficacy in the lower courts.

Conversely, a justice who writes a concurring opinion when there is no majority opinion¹⁴ may have the opportunity to have his opinion used as precedent by the lower courts, due to the “narrowest grounds” doctrine, which was set forth in *Marks v US* (1977). According to the narrowest grounds doctrine presented in *Marks* (1977), whichever opinion provides the “narrowest grounds” for the Court’s decision on the outcome is to be considered the decision’s binding precedent, regardless of the number of justices joining the “narrowest” opinion. Thus, a justice who authors a concurring opinion may in actuality be writing the legal precedent for the case, if the case results in a plurality opinion and his opinion is found to be the “narrowest” grounds for the decision. This situation pits the individual motivation for actualizing a justice’s preferred legal policy directly against the collective motivation for having a majority of the Court joining the opinion for the Court.

Plurality opinions are possible in any case, not just cases with a minimum winning coalition over the case’s outcome. Thus, the tension between individual and collective motivations is not relegated to a position of rarity. Unless the draft majority opinion has already been joined by a majority of the justices, a concurring opinion has the potential to

¹⁴ There are several ways in which a decision can result in no majority coalition, but all involve at least one specially concurring opinion. For example, if the majority coalition includes six justices, but only four of them agree to the draft majority opinion, while the remaining two justices write and join a special concurrence, this results in no majority opinion, and the Marks doctrine would be applicable in determining whether or not to give the special concurrence precedential value.

keep the draft opinion from attaining majority status. Indeed, even if the draft opinion does have a majority of the justices' votes attached to it, the justices are free at any time to withdraw their "join" votes, again giving a concurring opinion the opportunity to restrict the Court's decision to that of a plurality rather than a majority. Hence, justices are simultaneously exposed to the often-opposing motivations of both individual and collective preferences when they are faced with the decision to either write or refrain from writing a concurring opinion.

The Decision of When to Circulate

This dissertation is not directed solely at examining *if* a justice authors a concurring opinion in a specific case, but also *when* during the decision-making process he first circulates the concurrence. The question of when is important for determining the potential purpose(s) the justice had in mind when he decided to write the concurring opinion. If a justice wants to use a concurrence as a bargaining chip to try to induce accommodation by the majority opinion author, it would not serve the justice well to first circulate the concurrence near the end of the bargaining process. Indeed, "authors who have already secured a winning coalition have little incentive to make additional changes to the opinion" (Maltzman, Spriggs, and Wahlbeck, 2000, p. 105). Thus, if a justice intends to use a concurrence primarily as a bargaining tool, the concurrence would be best circulated near the beginning of the bargaining process and before the majority

opinion has achieved four “join” votes.¹⁵ Thus, justices’ motivations regarding the timing of their decision to circulate a concurring opinion are primarily either sincere or short-term strategic in nature, both of which are individual motivations. Collective motivations depend upon a concurring opinion being published; thus, there is no general expectation, independent of individual motivations, for when a justice will concur based solely upon collective motivations.

Conversely, concurring opinions may be used to try to influence the state of the law in the future. This future influence could take either of two primary forms. First, “separate opinions possibly weaken the precedential basis of an opinion” (Maltzman, Spriggs, and Wahlbeck, 2000, p. 68). Secondly, on occasion concurring opinions have actually “exercised a greater effect on subsequent cases than the majority opinions that they accompany” (Kirman, 1995, p. 2084). For example, the “reasonable expectation of privacy” doctrine was first introduced in Justice Harlan’s concurring opinion in *Katz v US* (1967); this doctrine is now more influential than the majority opinion that was signed by the remaining eight justices (Power, 1994). While concurrences aimed at bargaining clearly must be circulated earlier in the decision-making process, rather than later, concurring opinions used for influencing the future state of the law do not have a clear timing aspect. It seems plausible, though, that in general this second type of concurrence would be circulated later in the process than would the bargaining type, due to the

¹⁵ Since the majority opinion author presumably agrees with the draft opinion he has written, only four additional “join” votes are necessarily to procure the five votes necessary, when the entire Court is participating in a case, to have a majority opinion.

possibility of waiting until the majority opinion is more stable¹⁶ to formally respond to it in the form of a concurring opinion. However, concurrences used to influence the state of the law may not always be issued in reaction to a stable majority opinion; rather, a justice may have a solid indication after the conference vote of where the other justices stand and thus be able to fashion such a concurrence prior to the majority opinion achieving stability.

A third use of concurring opinions involves purely reactive concurrences. These concurrences are circulated after bargaining between a justice and the majority opinion author has reached an impasse. Thus, rather than trying to influence bargaining, as was described by the first use of concurrences, these concurring opinions are the result of failed attempts at bargaining. It is expected that these responsive concurrences will, in general, be authored later in the decision-making process. Clearly, the timing of the circulation of a concurring opinion provides additional information about the motivations for and intended use(s) of the concurrence.

From a theoretical standpoint, there appears to be no reason why collective Court motivations should influence when a justice chooses to author a concurring opinion. Instead, the distinction in motivations is one between the expression of sincere preferences and the strategic use of concurring opinions to affect the case's legal policy content. Since only published concurrences can affect the state of the law in the long run, individual long-term strategic motivations, like collective motivations, are

¹⁶ By "stability of the majority opinion" I mean that the majority opinion is no longer going through significant substantive changes. A majority opinion is considered "stable" once bargaining over its content and accommodation on the part of the author has leveled off.

inconsequential at this stage of the decision-making process. Thus, motivations for when a justice authors a concurring opinion can be broken down into sincere and strategic motivations. While concurring opinions motivated by sincere preferences are likely to occur at any point after oral arguments, in general the author must have a good sense of whether his own preferences diverge sufficiently from those in the majority opinion before deciding to author a concurrence. Thus, it is expected that, on average, concurring opinions written as an expression of legal policy preferences will occur somewhat later in the process, due to uncertainty about what the exact content of the majority opinion will be. Conversely, if a justice is strategically attempting to influence either the content of the majority opinion or the votes of his colleagues, he has incentive to write a concurring opinion earlier in the process. Thus, the examination of when a justice first circulates his concurring opinion provides additional insight into the frequency with and extent to which justices use concurrences in a strategic versus sincere manner.

The Decision About Publication

The final decision-point within the concurring opinion-writing process presents itself as the decision about publication. It is important to distinguish between circulated, unpublished concurring opinions, and concurrences that are written and published, because the two choices may be used to achieve different goals. This distinction, although rarely made in political science scholarship, has not been completely ignored. Instead, it has been argued that “[t]he writing of a minority opinion is one thing; its publication is another. It is possible to argue for the writing of such opinions and against

their publication” (Stephens, 1952, p. 401).¹⁷ This seems to suggest a realization that the effects of written concurrences are distinct from the effects of published concurring opinions, and thus we, as well as judges, must weigh the costs and benefits associated with both writing and publishing independently. However, Stephens goes on to acknowledge that if “the promise of publication is a major inducement to the writing of dissenting opinions, it is idle to argue that they should be written but not published” (1952, p. 401).

Not every written concurrence is published along with the majority opinion and any dissenting opinions. This decision is obviously contingent upon a justice’s earlier decisions; if a justice never writes a concurring opinion, he cannot choose to publish one. The decision about publication, though it occurs after the decision to write a concurrence, is not necessarily irrelevant at the time a justice first chooses to circulate his concurring opinion. Indeed, part of a justice’s considerations in deciding whether or not to write a concurring opinion may be his estimation as to whether he is likely to publish his concurrence. If concurring opinions do indeed have a cost associated with their writing, such as a depletion of resources, justices may be unwilling to write a concurrence that they view as unlikely to be published. However, since even Supreme Court justices are unable to perfectly predict the decisions of their colleagues, it is expected that a justice will continually re-evaluate his assessment of whether the concurring opinion he has already authored is still necessary to publish. Indeed, it has been reported that “Justice Brandeis was known to have a cache of completed separate opinions (‘replete with the

¹⁷ It should be noted that when referring to “minority” or “dissenting” opinions, Stephens is, in actuality, referring to both concurring and dissenting opinions.

most exquisite detail of citation') withheld from publication so as not to inhibit the Court's decisiveness" (Markham, 2006, p. 932). It may be, however, that "[t]here is nothing harder for the literate and voluble man to do than to keep quiet, except to throw away perfectly good published work when it is set for the printer" (Frank, 1958, p. 403), thus providing additional reason to publish a written concurrence, even if publication is not absolutely necessary to achieve a justice's goals.

While the majority of written concurring opinions are published as a concurrence, there are other possibilities. I found that during the 1970s, approximately 6% of written concurring opinions were withdrawn prior to the announcement of the majority opinion. In most of these instances, the author of the withdrawn concurrence joined the majority opinion. Though quite rare, there are occasions when written concurring opinions were eventually published as either the majority opinion or a dissenting opinion, depending on the decisions of the other justices. For example, a justice may circulate a concurrence, only to have four other justices join his concurring opinion, thus making it by de facto the Court's majority opinion; this, obviously, is entirely dependent upon the choices of the four justices who may or may not join the concurring justice's opinion, and as this occurrence is very rare, it seems unlikely that justices actually attempt to take over the majority opinion assignment via the circulation of a concurring opinion. Thus, only written concurring opinions that are not published as any type of opinion (concurring, majority, or dissenting) are considered "withdrawn." Concurrences can be withdrawn at any point after they are written; some are withdrawn within a day of being authored, while others are withdrawn only days prior to the announcement of the Court's decision.

Table 2.2: Final Disposition of Circulated Concurring Opinions

	Raw Frequency	Relative Frequency
<i>Published as Concurring Opinion</i>	752	6.61%
<i>Withdrawn (Justice Joined Another Opinion)</i>	54	92.04%
<i>Published as Majority Opinion</i>	4	.49%
<i>Published as Dissenting Opinion</i>	7	.86%
Total	817	100%

For a table of descriptive statistics about concurring opinions and their eventual publication outcomes, see *Table 2.2*.

After a justice has written a concurring opinion, his motivation for publishing the concurrence may, but does not necessarily, differ from his motivation to write it. For example, a justice who authors a concurrence as an attempt to induce accommodation by the majority opinion author can no longer be motivated by that same short-term strategy in his decision about publication, as published concurring opinions cannot affect the legal policy put forth within the majority opinion since the majority opinion itself has been published and thus is unable to be changed, as written. However, the justice may still be strategically motivated in his publication decision if, instead of publishing the concurrence because of sincere disagreement with the majority opinion, he publishes it as an attempt to affect the lower court's interpretation of the majority opinion or the response of Congress, the president, or the public to the decision. Thus, while individual

intra-case strategy is not a motivation for publishing a concurring opinion, both long-term strategy and sincere preferences can be reasons for deciding to publish (or withdraw) a concurrence.

Furthermore, non-policy motivations may also enter in to a justice's decision to publish a concurring opinion. As the public is unaware of circulated, unpublished concurring opinions, if a justice wishes to build up his reputation among his target audiences, he must publish his concurrence. Likewise, only published concurrences can influence lower court decision-making, detract from the public's confidence in the Court, or influence Congress or the president's response to the decision. Because of this, it is at this juncture that the tension between individual and collective motivations is perhaps at its apex in the decision to publish, as it is only published concurring opinions that can affect the Court's collective status. Similar to the decision to write, in the decision to publish a concurring opinion collective Court preferences motivate justices to withdraw their opinions, whereas individual motivations generally provide an impetus for publication. At this point in the concurring process, individual motivations include sincere opinion expression, long-term strategy, and non-policy motivations; as previously mentioned, short-term, intra-case strategic motivations are irrelevant.

Though withdrawing a concurring opinion or publishing it as a concurrence are the two most frequent outcomes for a written concurrence, they are not the only two possible outcomes for a written concurrence, rather, they are the only choices the authoring justice has unilateral control over. Both having a concurrence published as the majority opinion and having it published as a dissenting opinion are dependent on the choices of the other

justices.¹⁸ Therefore, in discussing a justice's motivations for his actions with respect to publishing or withdrawing a written concurring opinion, we cannot extrapolate motivations to instances involving a concurrence being published as something other than a concurring opinion. However, since one motivation for writing a concurrence may be to have the concurring opinion become the Court's majority opinion by essentially stealing votes from the initial draft opinion of the Court, we cannot exclude what justices may view as a successful result of their writing a concurrence. In other words, the rare occurrence of a concurring opinion achieving enough votes to become the Court's majority opinion is in itself a phenomenon worth investigating, as it is potentially a manifestation of successful strategic maneuvering.¹⁹ However, due to the very small probability of a concurrence becoming the majority opinion, it may be that such an examination is either unwarranted or lacks utility, as there may be little to systematically examine or explain.

The analysis of justices' choices about concurring opinions provides us with the opportunity to examine the tension between individual and collective motivations, as well as how motivations vary across the different stages of decisions about concurring

¹⁸Justices can and do change their vote over the case's outcome; these outcome-vote switches typically occur without the justice writing an opinion, however. During the ten year period in my analysis, it was more common for a justice whose concurring opinion ended up being published as a dissenting opinion to have had the direction of the Court switch around him rather than to have changed his own vote over the case's outcome. Indeed, in five of the seven instances where a justice circulated concurrence that ended up being published as a dissent the justice did not change his vote over the case's outcome.

¹⁹ It cannot be assumed, however, that all concurring opinions that become majority opinions were authored strategically, since it is possible that a sincere expression of a justice's preferences, through the authoring of a concurrence, could achieve the votes necessary to take over the status of the majority opinion.

opinions. For example, a “strategically placed concurring opinion ... can thus occasionally illuminate issues which might otherwise be relegated to the obscurity of a footnote” (Davis and Reynolds, 1974, p. 75), leading to the publication of the concurrence having the potential to affect future cases by drawing additional attention to the issues raised by the concurrence. However:

Frequent indulgence in the luxury of expressing individual views can undermine the very special value of concurring and dissenting opinions.

Used too often, the separate opinion can assume the character of the repeatedly uttered cry of ‘wolf,’ and cease to be viewed as a signal that *here* is an issue worthy of attention. (Davis and Reynolds, 1974, p. 75)

Since justices are presumed to be forward thinking, it is expected that they consider their likelihood of publishing a concurrence at the time they are first choosing whether or not to write. We can gain additional information about why a justice decided to write a concurring opinion by looking at when he chose to write. The last decision point is then the choice of publishing a written concurrence; this provides us with an even clearer glimpse into the tension between individual and collective motivations.²⁰ Thus, by examining the multiple points of decision involving the use of concurring opinions on the U.S. Supreme Court we are able to further investigate the motivations of Supreme Court justices. By gaining a clearer picture of the justices’ motivations, we can then deduce

²⁰ Due to the relative rarity of circulated concurring opinions becoming either majority or dissenting opinions, my analysis of whether a circulated concurrence is published will only include the dichotomous choice between withdrawing or publishing the concurrence. This choice will be explained further in Chapter 4.

and test hypotheses about other types of decisions on the U.S. Supreme Court, which we can use to build knowledge about judicial behavior more generally.

Chapter 3: Empirical Analysis of Whether and When a Justice Circulates a Concurring Opinion

If a justice is not satisfied with the doctrine put forth in the draft majority opinion, he has several options available to him. Writing a specially concurring opinion is one of the harshest critiques of the draft majority opinion available to a justice, second only to defecting from the majority coalition to join the dissenting coalition (see Maltzman, Spriggs, and Wahlbeck, 2000). While defecting to the dissenting coalition is a harsher critique of the majority opinion, it is, essentially, the result of a decision based on a distinct dimension of the case than is the decision to use a concurrence to critique the majority opinion. As discussed in earlier chapters, justices have preferences about both the case's outcome and the doctrine put forth in the majority opinion; one decision-process motivates the former, while another motivates the latter. Thus, defecting to the dissenting coalition would be motivated by a justice's outcome preference, where a concurring opinion would be motivated by a justice's doctrinal preference. Two additional options for expressing dissatisfaction with the majority opinion include making a suggestion about changes to the draft majority opinion's content or, taking the suggestion a step further, threatening to either write a concurrence or defect unless certain changes are made. This chapter examines both when during a case's decision-making

Table 3.1: Number of Circulated Concurrences in each Case in my Dataset

Number of Circulated Concurrences	Number of Cases	Percentage of Cases
<i>Zero</i>	767	57.93%
<i>One</i>	374	28.25%
<i>Two</i>	134	10.12%
<i>Three</i>	36	2.72%
<i>Four</i>	11	.83%
<i>Five</i>	1	.08%
<i>Six</i>	1	.08%
Total	1,324	100%

process a justice chooses to author a concurring opinion as well as what motivates his choice to write. *Table 3.1* shows the maximum number of concurring opinions circulated, but not necessarily published, for the cases in my dataset.

Much of the Supreme Court literature suggests that concurring opinions are motivated by legal policy disagreement and/or a desire to influence the content of the eventual opinion of the Court (for example, see Segal and Spaeth [2002] and Epstein and Knight [1998]). However, when testing hypotheses about these motivations, there are two predominant shortcomings in the vast majority of the judicial decision-making literature. First, scholars generally only include published concurring opinions in their analyses, which excludes concurrences that successfully induced accommodation by the majority opinion author, as after accommodation there remains little motivation to publish a

circulated concurrence. This is problematic since in order to draw inferences about judicial motivations it is imperative that there be no systematic exclusion of concurring opinions that are motivated primarily by a single type of motivation. Systematic exclusion of concurring opinions motivated by a specific goal would result in at least some level of systematic bias in any empirical analysis. Indeed, in most analyses, one sub-type of motivation, namely intra-case strategic bargaining over the legal policy content of the majority opinion, is most likely to motivate the majority of the withdrawn and thus excluded concurrences.

A second impediment with using the typical model of judicial choice found in current literature is that when a justice first chooses to author a concurring opinion is also omitted from the models. Knowing when a justice writes a concurrence is highly beneficial in determining what may be motivating his choice. For example, justices who write early in the process are more likely to be engaging in bargaining than are justices who write later in the process, as it has been found that “[o]nce at least a majority of justices have joined the [draft] majority opinion, authors are less likely to accommodate” (Maltzman, Spriggs, and Wahlbeck, 2000, p. 121). Thus, it makes strategic sense to circulate a concurring opinion before the draft opinion has achieved majority status if a justice is motivated to write by intra-case legal policy goals. By including non-published concurrences and examining not only whether a justice writes, but also when he chooses to write, this chapter’s analysis addresses two potential obstacles to gaining a clearer understanding of judicial motivations, particularly with respect to choices about using concurring opinions.

Influences on Whether and When a Justice Circulates a Concurring Opinion

Though judicial motivations can be categorized as based on either individual or collective preferences, justices can have multiple types of individual or collective motivations for a single behavior. Since some influences on whether and when a justice writes a concurring opinion may have multiple underlying motivations, it may not be possible to completely isolate which type of motivation is influencing a justice's behavior in a specific instance. However, by examining a justice's motivations for writing a concurring opinion at multiple decision-points, we are able to gain a clearer indication of whether justices' choices about concurrences are indeed influenced by both individual and collective preferences.

The empirical analysis of concurring opinions included in this chapter is two-fold; it includes an analysis of both whether a justice writes a concurring opinion, as well as when they first choose to write, or circulate,²¹ that opinion. Due to the differing nature of the two dependent variables, the first being a dichotomous measure of whether the justice

²¹ Since it is impossible to ascertain when a justice actually decides to write a concurrence, the date a concurrence was first circulated is used to approximate the date a justice decided to write the concurring opinion. While it is possible that justices occasionally draft a concurring opinion without circulating it, in examining Justice Brennan's personal papers, it became apparent, at least in his case, that such an occurrence was extremely rare. Over the course of ten terms, only one uncirculated concurrence was identified. Additionally, the term "write" is utilized most frequently within judicial politics scholarship, even when what is actually being analyzed is more accurately described as "circulating" or "publishing." "Write" appears to be used to describe multiple types of behavior; for my dissertation it is noted that the more accurate term with respect to concurring opinion behavior is "circulate", though "write" and "circulate" will be used interchangeably, while acknowledging that the term "write" is less precise.

wrote a concurrence, and the second a count of the number of days since the case was orally argued, both theoretically and methodologically two sets of hypotheses are necessary. I will first discuss the hypotheses relevant for the analysis of whether a justice writes a concurring opinion, and subsequently the hypotheses for when a justice first circulates a concurring opinion. A brief summary of the variables and hypotheses for both analyses is provided on the following page, in *Table 3.2*.

Hypotheses for Whether a Justice Circulates a Concurrence

As discussed in the previous chapter, there are several sub-types of individual motivations that may be influential in a justice's decision about whether or not to write a concurring opinion. I will cluster my individual motivation hypotheses according to the three sub-types so as to consider similar motivations concurrently. In the order I will discuss them, the three sub-types of individual motivations are as follows: short-term legal policy motivations, which include both sincere and strategic behavior, non-policy motivations, and long-term strategic legal policy motivations. Additionally, justices may be motivated by collective Court preferences to refrain from writing concurring opinions. As these collective motivations are generally juxtaposed with individual long-term legal policy motivations, I will discuss individual long-term legal policy motivations in the same section as collective motivations.

Table 3.2: Variables and Hypotheses for both Components of the Split Population Event History Analysis²²

	“Whether” Logit Analysis	“When” Duration Analysis
<u>Individual Legal Policy Motivations</u>		
<i>Ideological Distance to Majority Opinion Author</i>	+	+
<i>Extreme Majority Opinion Author</i>	+	+
<i>Issue Area Experience</i>	+	+
<i>Case Salience</i>	+	+
<i>Tenure</i>	+	+/-
<i>Multiple Laws</i>	+	–
<i>Per Curiam Opinion</i>	–	–
<i>Unanimous Court</i>	–	–
<u>Individual Non-Policy Motivations</u>		
<i>Publications</i>	+	n/a
<i>Reciprocity</i>	+	+
<i>Workload</i>	–	–
<i>Days Until Term Ends</i>	+	+
<u>Collective vs Individual Motivations</u>		
<i>Number of Concurrences Already Written</i>	–	n/a
<i>Overturns Precedent</i>	+/-	+
<i>Declares Congressional Law Unconstitutional</i>	+/-	+
<i>Minimum Winning Coalition</i>	+/-	+/-
<i>Draft Majority Opinion Joined by Majority</i>	+/-	+/-

²² For the Logit analysis, a “+” indicates a hypothesized positive relationship between the independent and dependent variables, while a “–” indicates a hypothesized negative relationship. A “+/-” indicates competing hypotheses of both types of relationships. For the Duration analysis, a “+” indicates that the independent variable is hypothesized to increase the hazard of writing, resulting in a justice writing earlier in the process. Conversely, a “–” indicates that the independent variable is hypothesized to decrease the hazard of writing, resulting in a justice writing later in the process. Again, a “+/-” indicates the presence of competing hypotheses.

Justices' short-term legal policy preferences motivate them to make decisions based on their preferred legal policy with respect to a specific case; sincere behavior is in response to legal policy disagreement, while strategic behavior is that which is used to potentially affect the outcome and doctrine of a particular case. When motivated solely by short-term legal policy preferences, justices are considering their behavior only in light of the case at hand; they do not consider how their decision may affect the Court's collective long-term efficacy and legitimacy, or even the long-term use of the decision in the case at hand. Instead, justices are acting so as either to state their preference or achieve policy as close as possible to their preferred position within each case. The first set of hypotheses is derived from theories of judicial behavior as short-term preference maximization on the U.S. Supreme Court.

At its heart, Supreme Court decision-making is a collective effort, though not every justice is assumed to be equally influential in determining the collective output. While there remains some autonomy, justices do not make their choices in a vacuum; one justice's choice has the potential to influence other justices' choices. One key relationship is that between the majority opinion author and the other justices. Though there is debate over whether and the extent to which majority opinion authors wield additional control over the content of the majority opinion itself, (see, for example, Bonneau et al [2007] and Lax and Cameron [2007]), "[a]ny opinion 'can be written in an infinite number of ways,' and thus the opinion in any multimember court reflects the analysis, style, and use of supporting authorities of the opinion writer" (Monaghan, 1979, p. 22).

Indeed, judicial politics literature suggests that the ideological relationship between a justice and the majority opinion author is a primary consideration for a justice who is deciding whether or not to write a concurring opinion. The greater the ideological distance between the majority opinion author and a justice, the more likely it will be that the two justices disagree about the legal policy content of the majority opinion. Thus, it would be a justice's short-term preference to write a concurring opinion, either to try to strategically attempt to induce accommodation by the majority author or to affect how the doctrine in the majority opinion is perceived and implemented in the long-term. Strategic motivations are not the sole type of motivation related to ideological distance, however; it may be that justices do not write to attempt to influence, but rather do so to express their disagreement. This would be considered sincere opinion expression. Either a sincere or a strategic motivation leads to an expectation of a higher probability of writing as the ideological distance between the majority opinion author and a justice increases.

Hypothesis 1: The greater the ideological distance between a justice and the majority opinion author, the greater the likelihood the justice will write a concurring opinion.

Even controlling for the ideological distance between a justice and the majority opinion author, whether the majority opinion author is the most extreme justice in the majority coalition is potentially an important consideration for the decision to write a concurring opinion. It seems plausible to suggest that extreme majority opinion authors may be more susceptible to a counter-opinion being used to wrest the majority opinion

assignment from the initial author, and thus have less control over the content of the majority opinion than do their non-extreme colleagues.

Hypothesis 2: A justice will be more likely to write a concurring opinion when either of the two²³ most extreme justices is the majority opinion author.

Not only is a justice's ideological relationship with the majority opinion author pertinent to the decision to write, a justice's own preferences may be stronger in some cases than in others. For example, as justices become more experienced within a particular issue area, they may develop their own idiosyncratic preferences regarding something as simple as phrasing or as important as a precise legal policy doctrine. In other words, experienced justices may be less willing to compromise and thus more inclined to pursue their short-term preferences, while inexperienced justices may be more deferential to their more experienced colleagues due to their own preferences in the issue area not being as strong. Additionally, it may be that justices choose to write more frequently on issues that are particularly salient to their audience(s), thus developing expertise so as to increase their reputation, which leads to the potential for a reciprocal relationship between issue area expertise and writing concurrences. A third possible effect of issue area expertise is that justices with greater expertise in the case's issue area have lower costs associated with writing. I will be discussing workload costs, specifically, in the following set of hypotheses, but there may be diminished costs for

²³ There are always two extreme members on the Court, a liberal extremist and a conservative extremist. If either the most liberal or the most conservative member of the Court is the majority opinion author, the author is considered extreme.

writing concurring opinions in issue areas in which a justice is already an expert. For all these reasons, my expectation for *Hypothesis 3* is as follows.

Hypothesis 3: The greater a justice's expertise in a case's issue area, the more likely he is to write a concurring opinion.

Likewise, justices may be more inclined to act on their short-term preferences in important cases. Salient cases appear to evoke somewhat different behavior from the justices, at least with respect to their reliance on legal arguments made by the litigants (i.e. see McAtee and McGuire, 2007). Specifically with respect to the uses of concurring opinions, justices may be more willing to put forward the cost of writing a concurrence when the case is important to them. Similarly, in salient cases justices may feel more compelled to express their own opinion, even if it only varies slightly from the majority opinion. As one critic of concurring opinions suggests, “most concurring opinions [could] be introduced with the statement, ‘I write separately because this is a damned interesting case and the majority opinion was assigned to someone else’” (Stewart, 1991, p. 30). Additionally, justices may be more likely to write concurrences to try to bargain over the content of the majority opinion in salient cases. Thus, it is expected that the decision to write a concurring opinion be influenced by case salience, though the influence itself may be through a number of different possible avenues.

Hypothesis 4: A justice will be more likely to write a concurring opinion in salient cases.

Scholars have often hypothesized that there is a “freshman effect” on the Supreme Court; as justices acclimate to their new role and colleagues, their behavior may change (see Hagle [1993] for a discussion of the literature, as well as Bowen and Scheb [1992] and Brenner [1983]). While this hypothesis has received mixed support, it does seem to be a plausible influence on the decision to use concurring opinions. There are two potential underlying motivations that may be tapped by this variable. First, and similarly to the expectation regarding justices’ levels of issue area expertise, the longer a justice is on the Court, the stronger his preferences may become. This would be indicative of a short-term legal policy motivation.

Secondly, tenure’s influence on concurring opinion-writing may be due to long-term collegiality concerns, as new justices are personally less familiar with the preferences and personalities of the other Court justices. Such relative unfamiliarity may lead new justices to defer to their colleagues, as criticizing the majority opinion by writing or publishing a concurring opinion may make new justices appear to be unwilling to compromise or difficult to get along with and thus jeopardize their good standing with their colleagues, which has the potential to influence a justice’s ability to pursue his preferences over the long-term. Similarly, new justices may be less confident of their ability to engage in the bargaining process until they are more familiar with their colleagues, resulting in their hesitancy to pursue their short-term preferences. Whether length of service on the Court motivates justices based on short-term legal policy or long-term collegiality preferences, both lead to the hypothesis that newer justices will be less likely to concur.

Hypothesis 5: A justice who is new to the Court will be less likely to write a concurring opinion.

Additionally, cases that involve multiple legal provisions, laws, or issues may be more likely to have concurrences written due to their complexity. Generally, the more complex a case, the more likely it will be that justices will disagree over some facet of the legal policy content in the majority opinion. It seems plausible that the greater the likelihood for disagreement in a case, the greater the likelihood that a justice will disagree to the extent that a concurring opinion is warranted. The higher likelihood for disagreement may also increase the potential for circulated concurring opinions to influence the content of the majority opinion. Thus, the justices may be motivated by either sincere or short-term strategic legal policy to write concurring opinions in cases where there are multiple legal provisions or issues.

Hypothesis 6: A justice will be more likely to write a concurring opinion in cases that have multiple legal provisions or issues.

Conversely, cases decided by a per curiam opinion²⁴ are generally considered unnoteworthy or “routine” (i.e. see Mishler and Sheehan, 1993, p. 90). Indeed, per curiam opinions are typically brief; many consist of only a few lines of text. Thus, it is sensible to consider that justices may not feel it necessary to voice disagreement through

²⁴ A per curiam opinion is an opinion that constitutes the opinion of the Court but does not identify the individual justice who wrote the opinion (see *Black’s Law Dictionary*, 1999, p. 1119).

authoring a concurring opinion in such relatively unimportant cases. As Wasby et al. state, the “[u]se of a per curiam ruling rather than a signed opinion may indicate that a case is considered routine or non-controversial, at least to the majority deciding it” (1992, p. 36). Along these lines, in a memo Justice Brennan referred to *Dukes v Warden* (1972) as a “pip-squeak case” (William J. Brennan, Jr. papers, Box I: 277), indicating the case’s relative lack of importance. Though that particular case was not decided by a per curiam opinion, cases decided per curiam are more likely to be unimportant than are cases that result in a signed opinion. Additionally, in a memo to Justice Brennan regarding *Codd v Velger* (1977), Justice Stewart summarized his view on per curiam opinions as follows: “It is my view, however, that the function of a Per Curiam is to apply existing and settled law to a specific fact situation, in a straightforward and expeditious way” (William J. Brennan, Jr. papers, Box I:412). Regardless of the exact nature of per curiam opinions, it seems likely that cases decided per curiam are decided in this manner for a reason that would also decrease the likelihood of concurring opinions.

Hypothesis 7: A justice will be less likely to write a concurring opinion in cases where the majority opinion is authored per curiam.

Similarly, it has been posited that cases that are decided unanimously are inherently “easy” (see Pritchett, 1941). Though Epstein, Segal, and Spaeth (2001) provide evidence that it was a “norm of consensus” that induced more unanimity than did “easy” cases, since the Court had already taken on a norm of dissensus by the 1970s, it is still plausible that some cases are “easier” to decide than are others, and that these “easy”

cases are more likely to be decided unanimously. Thus, if the justices were in unanimous agreement about the outcome of a case at the conference vote, based on either the idea that unanimous cases are “easier” or the probability that justices have lower bargaining leverage when the justices are unanimous about the case’s outcome, a justice will be less likely to author a concurring opinion.

Hypothesis 8: A justice will be less likely to write a concurring opinion in cases where the justices unanimously agree about the outcome of the case.

The following four hypotheses are derived from the theory that justices are also motivated by non-policy goals. For example, while in general attorneys tend to be less timid than the average individual about speaking in public, we have no reason to expect every Supreme Court justice to be equally outspoken about their opinions. Instead, some justices frequently appear at law schools, on television, or in other public venues, while others prefer to remain more anonymous. Additionally, justices’ publication rates in law school reviews, journals, or newspapers also vary. While both public speaking events and publication rates are presumably an indication of a justice’s willingness to express his opinion and, perhaps, also of a justice’s readiness to engage in attention-seeking behavior, data on the justices’ public engagements during the 1970s are not readily available, and thus only academic publications are used for the following hypothesis. As concurrences are both discretionary and generally individualistic rather than a collective effort, they are essentially an expression of the authoring justice’s opinion, and thus I

hypothesize they will be motivated by a process similar to the choice to author academic publications.

Hypothesis 9: A justice who is active in expressing his opinion outside of his judicial duties will be more likely to write a concurring opinion.

In addition to the ideological distance between a justice and the majority opinion author, previous interactions between the two may also influence a justice's decision to concur. This influence, too, has multiple motivations for the same behavior. All things being equal, most people prefer to have an amicable relationship with their colleagues. Thus, justices may try to maintain collegiality on the Court; conversely, they may also be influenced by justices who they view as having violated the Court's collegial norms. In *Deepsouth Packing Co. v. Laitram Corp.* (1972), in a memo to Justice White, the majority opinion author, Justice Brennan asks, "Should 'not inconsistent with' in the last line read 'consistent with', or am I nit-picking?" (William J. Brennan, Jr. papers, Box I: 269). This statement illustrates that Justice Brennan did not want to be overly critical about a minor detail; most likely, other justices have similar expectations, which would presumably include overly critical concurring opinions. Since concurrences can detract from the long-term interpretation of a decision, in general justices do not write concurrences without good reason. As Justice Scalia stated, "I regard such [unnecessary] separate opinions as an abuse, and their existence as one of the arguments against allowing any separate opinions at all" (1994, p. 1). However, justices may disagree over what constitutes a "good reason" to write a concurrence.

The overuse of concurring opinions may be considered detrimental to the Court as a whole, either by way of its legitimacy or the interpretation of its decisions. Hence, if one justice frequently writes concurrences when a particular justice is the majority opinion author, the author may view that justice as violating a Court norm. Retaliation could come later, when their positions were reversed; perhaps when the justice who has previously written numerous concurrences is the majority opinion author, the previous author whose opinions were criticized by the concurrences may decide to criticize the current author in turn by writing and possibly publishing a concurring opinion. While not seeking to influence the legal policy in the case at hand, by writing a concurrence in retaliation for another justice overusing concurring opinions, the justice may still be acting strategically, but for the long-term good of the Court. Thus, justices may be simultaneously motivated by their non-policy preference regarding good working relations with the other justices and by their long-term collective preferences for continued Court efficacy and legitimacy.

Hypothesis 10: A justice will be more likely to write a concurring opinion the more the current majority opinion author has previously written concurrences against the justice's own majority opinions.

As with a preference for a good working environment, all things being equal, most individuals prefer not to be overworked, though each individual may have a different conception of how much work is too much. There is no reason to expect anything different from Supreme Court justices. Since concurring opinions are wholly

discretionary, justices who choose to write a concurrence are choosing to make more work for themselves. Additionally, by choosing to write a concurring opinion in Case X, for example, a justice may be precluding himself from having the time to also write in Case Y. In other words, even if justices are unlikely to reach their threshold of what constitutes “too much” work, there is still a time-cost associated with writing an additional opinion, for concurring opinions are characterized by “a considerable investment of time and energy, [and other] limited resources on any national high court” (McCormick, 2008, p. 140). Thus, a justice’s current workload is hypothesized to influence a justice’s decision to write a concurring opinion.

Similarly, as the end of the term draws near, justices may want to keep their workload as low as possible, which could similarly affect their decision to author a concurring opinion. Additionally, the justices may have made vacation plans based on the average date by which all cases have been decided, and thus may have an incentive not to prolong the end of the term. For example, on June 7, 1976, Chief Justice Burger wrote a memo to the Court noting, “Since we want to get the Brennans on that Ferry by July 4 (?), my door is open for conferences on this case to explore any needed accommodation” (William J. Brennan, Jr. papers, Box I:396).

Hypothesis 11: A justice who currently has a high workload will be less likely to write a concurring opinion.

*Hypothesis 12: A justice will be less likely to write a concurring opinion the closer it is to the end of the term.*²⁵

The final set of hypotheses is linked to both potential individual and collective motivations. In some hypotheses, the two motivations are indistinguishable since both lead to the same behavior, in other hypotheses the two motivations lead to divergent expectations about a justice's choice to utilize a concurring opinion. For example, an influence on a justice's decision to concur that may be motivated by both individual and collective preferences is the number of concurring opinions that have already been written. For this influence, both types of motivations lead to the decision not to concur, though for different reasons. First, the mere presence of multiple concurrences increases the likelihood that a justice agrees with one of the circulated concurring opinions. This would reduce the probability that a justice would deem it necessary to write an additional concurrence since his short-term preferences were already maximized by an already existing concurring opinion. In *Pruneyard Shopping Center v Robins* (1980), Justice Powell seems to suggest this when he writes in a memo to Justice Brennan, the majority opinion author, "It is possible that I may write a brief concurring opinion, particularly if there is no other writing" (William J. Brennan, Jr. papers, Box I:516).

Secondly, concurring opinions have the ability to fracture the majority coalition to a point where there is no clear majority opinion; rather, the Court issues a plurality opinion that, while determining the outcome of the case at hand, does not set precedent for future

²⁵ As the end of the term nears, the number of days until the end of the term decreases. Thus, the hypothesized direction for this coefficient is positive.

Supreme Court or lower court cases. Furthermore, cases with multiple concurring opinions may appear to the public to be more ideologically driven, and thus less legitimate. One Supreme Court justice acknowledged, “Once the public ceases to believe that the Court is not a political institution, they will no longer support the Court” (quoted anonymously in Clark, 2009, p. 973). Since the Court lacks both the purse and the sword, the effectiveness of its decisions often rests on the opinions at least appearing to have a firm legal basis. As justices may be unwilling to put forth the time and effort necessary for writing a concurrence if they know beforehand that are unlikely to publish it, it is expected that even though it is the number of published concurrences, rather than the number of written ones, that has implications for long-term Court legitimacy, justices may still consider the number of already-written concurring opinions when deciding whether or not to author one of their own due to their long-term preference goals.

Hypothesis 13: The greater the number of concurring opinions that have already been written, the less likely a justice will be to write a concurring opinion.

Additionally, justices may be motivated by their individual preferences to concur so as to attempt to either shape the content of the majority opinion or the lower courts’ interpretations of the decision, but by their collective preferences to suppress concurrences in cases that overturn Supreme Court precedent or a congressional statute. While cases that overturn precedent or a congressional statute are often salient, they are not necessarily so. These cases, though, may present a different challenge to the justices, in that Congress sets the Court’s jurisdiction and pay, and thus the Court may not want to

appear either closely divided or ideologically motivated in cases that directly involve congressional statutes. Hence, justices may be more cautious about writing concurring opinions in cases that overturn precedent or rule a congressional law as unconstitutional, as motivated by their long-term preference goals.

Since written, unpublished concurrences have no way to detract from either Congress' or the public's view of the Court, it may seem unlikely that concurring opinions will be less likely to be written in these types of cases. However, justices may be unwilling to put forth the time and effort necessary to write a concurring opinion if they feel it is unlikely that they will publish the opinion, leading to the above expectation. On the other hand, if cases involving an alteration of precedent or a declaration of unconstitutionality are inherently more salient to the justices, or if justices do not consider the likelihood of publication at the time they choose to write and circulate a concurrence, they may actually be more likely to author concurring opinions in such cases, based on their individual preferences. Thus, it is unclear how cases involving overturning precedent or making a declaration of unconstitutionality will affect a justice's decision to author a concurring opinion. For each of these types of cases, either individual or collective preferences may motivate a justice's decision, though it is unclear which motivation would be dominant.

Hypothesis 14a: A justice will be less likely to write a concurring opinion in cases that overturn precedent.

Hypothesis 14b: A justice will be more likely to write a concurring opinion in cases that overturn precedent.

Hypothesis 15a: A justice will be less likely to write a concurring opinion in cases that rule a congressional law as unconstitutional.

Hypothesis 15b: A justice will be more likely to write a concurring opinion in cases that rule a congressional law as unconstitutional.

Similarly, the initial conference vote over a case's outcome may influence a justice's decision to write a concurring opinion. As previously discussed, concurrences generally do not hold the weight of law. The exception to this is the "narrowest grounds" doctrine, though its application has been questioned by various scholars (see Thurmon [1992] and Weins [2006]). The Supreme Court established this narrowest grounds doctrine in *Marks v United States* (1977), which states that when the Court is fragmented so that no single opinion is signed by a majority of the justices, "the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." Thus, the narrowest grounds doctrine is most commonly applicable in cases that are 5-4 decisions, with at least one specially concurring opinion.²⁶ However, it is possible for a 6-3 decision to invoke the narrowest grounds doctrine if two justices cast specially concurring votes. This can be analyzed through examining whether or not the majority opinion has yet achieved a majority of the votes; if the draft majority opinion still lacks enough votes for it to attain the status as the majority opinion, the possibility of writing a concurrence motivated by its potential status as precedent based on the

²⁶ Since by definition, authors of special concurrences withhold their vote from the majority opinion, while authors of regular concurrences also attach their name to the majority opinion, only the former can change the status of the primary opinion from a majority to a plurality.

narrowest grounds doctrine is still relevant. Concurring opinions authored in an attempt to induce the application of the narrowest grounds doctrine are motivated by individual preferences.

Nonetheless, though a justice may have an incentive to write and publish a concurring opinion so that it holds the weight of law under the narrowest grounds doctrine, highly fragmented decisions are generally frowned upon by Supreme Court justices, Court watchers, politicians, scholars, and the public. Not only are such decisions difficult for lower courts to interpret, they may also be detrimental to the public's view of the Court as an institution. Thus, justices may have competing motivations regarding publishing concurring opinions in closely divided decisions, as a justice's collective Court preference may be best achieved by suppressing a concurrence, while individual preferences would be best achieved through writing and publishing a concurring opinion. Similarly to *Hypotheses 14* and *15*, written, unpublished concurrences have no bearing on lower court interpretations or the views of the public, but justices may not want to write a concurrence knowing that it is unlikely they will actually publish it. In *Kelley v. Southern Pacific Co.* (1974), Justice Powell indicated that he would be willing to join Justice Marshall's draft majority opinion only if his vote was necessary for the opinion to be backed by a majority (Justice William J. Brennan, Jr. papers, Box I: 349), thus indicating that justices are aware of whether the draft majority opinion has yet attained majority status. It turned out that due to a concurrence by Justice Stewart, Justice Powell's vote was necessary to obtain a majority; thus, Justice Powell ended up joining the majority opinion, even though it appears that his short-term preference would have

been to withhold it. These competing individual and collective motivations leads to the following competing hypotheses.

Hypothesis 16a: A justice will be more likely to write a concurring opinion when the majority coalition is minimum winning.

Hypothesis 16b: A justice will be less likely to write a concurring opinion when the majority coalition is minimum winning.

Hypothesis 17a: A justice will be more likely to write a concurring opinion when the majority opinion has yet to be joined by a majority of the justices.

Hypothesis 17b: A justice will be less likely to write a concurring opinion when the majority opinion has yet to be joined by a majority of the justices.

Hypotheses for When a Justice Circulates a Concurrence

The timing of justices' decisions to author concurring opinions also provides information about their motivations for writing. For example, if a justice writes early in a case's decision-making process, he is more likely to be attempting to influence what the majority opinion author includes in the Court's opinion, and thus is motivated by his intra-case strategic goals, than if he were to write later in a case's decision-making process. Conversely, if a justice writes later in the process, after the content of the majority opinion is fairly settled, it is less likely he is motivated by intra-case strategic goals, and rather is engaging in either long-term strategy or sincere opinion expression. While short-term goals may be the primary motivations for when a justice writes, long-term preference motivations may not be entirely irrelevant. The hypotheses for this part

of the analysis will be discussed in the same order as were the hypotheses for whether a justice writes a concurring opinion. However, it should be noted that there are no definitive collective motivations with respect to when a justice write a concurring opinion, as for concurrences to be detrimental to the Court's collective status, the concurrence must be published. Thus, the final set of hypotheses is motivated by individual preferences, though due to the potential for collective consequences, if a concurrence is published, justices may still consider the potential ramifications of a published concurrence even as they are deciding when to write a concurrence.

The ideological distance between a justice and the majority opinion author is not only relevant for the decision to write; it may also influence when a justice writes a concurring opinion. One could imagine that when two justices' preferred legal policy preferences diverge greatly, it is unlikely that the one who is authoring the majority opinion will end up accommodating the other justice. Thus, the non-majority author justice may write a concurring opinion early in the decision-making process knowing that accommodation is unlikely. Conversely, it may be that justices who are ideologically proximate to the majority opinion author are more likely to wait, in order to better determine the likelihood or actuality of accommodation. If accommodated, or if they agree fully with the majority opinion author's initial draft, there is no need for the justice to write a concurring opinion. If, however, the justice finds that after attempting to induce accommodation through other means there is still a disagreement between himself and the majority opinion author, he may at that time write a concurring opinion. Justices who

are motivated by their short-term goals to affect the content of the majority opinion have an incentive to write earlier, rather than later.

Hypothesis 1: A justice will be more likely to write a concurring opinion early in the decision-making process the more ideologically distant he is from the majority opinion author.

Justices who are attempting to take over the status as majority opinion author are more likely to act early in the decision-making process to try to convince a majority of the justices that his opinion is preferred to the current draft majority opinion prior to the other justices finalizing their own decisions about whether to join the draft majority opinion. If indeed justices are trying to hijack the majority opinion authorship, they may believe they have a better chance of doing so if the current majority opinion author is the most ideologically extreme member. Thus, it is expected that extreme majority opinion authors are more likely to face concurring opinions written earlier in the decision-making process than are non-extreme opinion authors.

Hypothesis 2: A justice will be more likely to write a concurring opinion early in the decision-making process when the majority opinion author is extreme.

It seems plausible to suggest that as justices become more experienced in an issue area, they may become more proprietary about their own ideas, preferences, and opinions, which may lead to the justice having a lower threshold for disagreement. Similarly, a justice who is experienced in an issue area, but was not assigned the majority

opinion, may feel that he is better suited to writing the opinion for the Court, and thus attempt to take over the majority opinion by circulating an alternative opinion early in the decision-making process. Furthermore, if issue area expertise decreases the time-cost associated with writing a concurrence, a justice may be able to circulate earlier in the decision-making process. All three rationales are motivated by short-term individual preferences and lead to the same expectation.

Hypothesis 3: A justice will be more likely to write a concurring opinion early in the decision-making process when he is an expert in the issue area.

Similarly, the salience of a case may decrease a justice's disagreement threshold, meaning that he is more willing to express his disagreement in a salient case than a non-salient case. However, this lower tolerance for disagreement may affect the bargaining process from both the majority opinion author's perspective and the perspective of the remaining justices. Indeed, it may be that the majority opinion author is less likely to accommodate based on weaker threats, and thus concurring opinions are the most effective way to bargain, particularly in salient cases. If this is the case, we might expect justices to use concurrences as bargaining tools earlier in the process than they typically would, as they are not taking the time to attempt to bargain using other tools first. Furthermore, justices may prefer to author majority opinions in salient cases, and thus have an increased incentive to try to take over the majority opinion by writing a concurring opinion early in the process, in hopes of attaining enough votes for it to become the opinion of the Court.

Hypothesis 4: A justice will be more likely to write a concurring opinion early in the decision-making process when the case is salient.

As justices become more experienced, both within a particular issue area and with their colleagues, they may utilize concurring opinions in different ways than do less experienced justices. With respect to general Supreme Court experience, there are two possible expectations regarding the use of concurring opinions by justices who are newer to the Court. First, newer justices may engage in less bargaining due to their relative unfamiliarity with the other justices. If this is the case, we might expect newer justices to write concurring opinions later in the decision-making process, as the concurrences would be a response to the majority opinion rather than an attempt at inducing accommodation. On the other hand, justices who are not very familiar with their colleagues may not be as adept at bargaining with the majority opinion author through suggestions or threats, and thus be inclined to circulate concurring opinions early in the decision-making process to show that they are serious about not joining the majority opinion. Due to the two possible situations under which newer justices may operate, two competing hypotheses about the behavior of new justices are stated. Both scenarios would appear to be motivated by short-term individual goals.

Hypothesis 5a: A justice with less time on the Court will be less likely to issue concurring opinions early in the decision-making process.

Hypothesis 5b: A justice with less time on the Court will be more likely to issue concurring opinions early in the decision-making process.

In difficult cases, such as those involving multiple laws, justices may be more likely to disagree with the majority opinion author. However, due to the potential for multiple areas of disagreement, they may be more likely to wait to see how the majority opinion author works through each component of the case. Cases with multiple laws may increase the uncertainty level of a justice, making it more attractive to wait until things are more settled rather than to write a concurring opinion early in the decision-making process.

Hypothesis 6: A justice will be less likely to write a concurring opinion early in the decision-making process when the case involves multiple laws.

Conversely, as cases decided by a per curiam opinion are generally less important, justices may have a higher disagreement threshold and hence be less willing to author a concurring opinion unless they are faced with a high level of disagreement with the majority opinion author. Both hypotheses are grounded in short-term preference motivations.

Hypothesis 7: A justice will be less likely to write a concurring opinion early in the decision-making process when the majority opinion is written per curiam.

Furthermore, unanimous cases may present justices with less incentive to try to bargain with the majority opinion author, as the justices are all in agreement about the disposition of the case. The likelihood of hijacking the majority opinion authorship

would be lower in unanimous cases, thus making writing a concurring opinion early in the decision-making process less attractive.

Hypothesis 8: A justice will be less likely to write a concurring opinion early in the decision-making process when the justices unanimously agree on the case's disposition.

Non-policy motivations may also enter into a justice's decision about when to author a concurring opinion. If a justice writes a concurring opinion based on the majority opinion author's previous use of concurring opinions, the justice may know early on in the decision-making process that he wishes to write a concurring opinion for that reason. Justices who are motivated more strongly by the majority opinion author's previous use of concurring opinions against their own majority opinions may be less influenced by the extent of their actual disagreement in the case at hand, and thus would not need to wait to determine the extent of that disagreement. However, if justices are motivated to engage in this tit-for-tat type strategy only in cases for which they are uncertain whether or not to write, there may be no clear timing element with this motivation, as a reciprocity motivation may have only marginal influence but equally affects decisions motivated by other individual goals. The former expectation, though, leads to *Hypothesis 9*, while the latter supposition would lead to a hypothesis of a null finding.

Hypothesis 9: A justice will be more likely to write a concurring opinion early in the decision-making process if the current majority opinion author has previously used concurring opinions against the justice's past majority opinions.

Both workload and end of term considerations may affect the timing of a justice's choice to author a concurring opinion. As a justice's workload increases, or it gets closer to the end of the term, a justice may wait longer to determine whether a concurring opinion is absolutely necessary; in other words, justices' thresholds for disagreement may be higher when they are up against the wall, in terms of either workload or the approaching end of the term. In *Pipefitters v. United States* (1972), Justice Burger wrote to Justice Brennan, who was the majority opinion author, "Please note me as dissenting. I do not know whether I will have time to write" (William J. Brennan, Jr. papers, Box I: 262). Justices may indeed put off the decision to write until later when they are under time pressure, due to either a high workload or the approaching end of the term.

Hypothesis 10: A justice will be less likely to write a concurring opinion early in the decision-making process the higher his current workload.

Hypothesis 11: A justice will be less likely to write a concurring opinion early in the decision-making process the closer it is to the end of the term.

Though the final hypotheses are those potentially motivated by either individual or collective preferences in the decision to write a concurrence, only the individual preferences are hypothesized to motivate when a justice writes a concurring opinion. Similarly to the logic regarding salient cases, justices may have lower thresholds for disagreement in cases that alter precedent or declare a congressional law as unconstitutional. Additionally, it seems likely that due to the potential long-term ramifications of concurring in such cases, if justices are going to concur, they would be

more likely to do so early in the process so as to maximize the potential bargaining influence of the concurring opinion on the content of the draft majority opinion. In other words, in cases that either overturn precedent or make a declaration of unconstitutionality, justices may write concurring opinions earlier in the decision-making process, even though they have low probabilities of actually publishing their concurrences, as a fishing expedition of sorts, to see if there are any “bites” by the other justices. Again, in order to use a concurrence to maximize potential influence over opinions or choices within a case, a justice must write early in the decision-making process.

Hypothesis 12: A justice will be more likely to write a concurring opinion early in the decision-making process when the case alters precedent.

Hypothesis 13: A justice will be more likely to write a concurring opinion early in the decision-making process when the case declares a congressional law as unconstitutional.

Justices may have the best chance of taking over the authorship of the majority opinion when the majority coalition is minimum winning. Similarly, they may have more incentive to provide a strong bargaining statement by writing a concurring opinion early in the decision-making process so as to maximize their influence over the content of the majority opinion. However, it is also plausible that justices prefer to decrease the appearance of disagreement in cases decided by a minimum winning coalition, and thus would be unlikely to publish a concurring opinion. If such is the case, they may be unwilling to write a concurrence unless they are in very strong disagreement with the

majority opinion, and will only write after all other bargaining tactics have been exhausted. Similar logic applies to authoring a concurring opinion prior to the draft majority opinion being joined by a majority of the justices. While it may be more likely a justice would be able to successfully use a concurring opinion for bargaining purposes, which would occur earlier in the decision-making process, it is also possible that a justice is unlikely to write a concurring opinion before he is more certain that publishing a concurring opinion would not be detrimental to the Court as a whole, such as in cases that are decided by minimum winning coalitions or plurality opinions. Justices who take advantage of their increased bargaining leverage are primarily motivated by short-term individual preferences, while justices who do not are constrained by their collective Court preferences.

Hypothesis 14a: A justice will be more likely to write a concurring opinion early in the decision-making process when the majority coalition is minimum winning.

Hypothesis 14b: A justice will be less likely to write a concurring opinion early in the decision-making process when the majority coalition is minimum winning.

Hypothesis 15a: A justice will be more likely to write a concurring opinion early in the decision-making process when the draft majority opinion has not yet been joined by a majority of the justices.

Hypothesis 15b: A justice will be less likely to write a concurring opinion early in the decision-making process when the draft majority opinion has not yet been joined by a majority of the justices.

Methods

Data Collection

The original data used in this paper were compiled through the use Justice Blackmun's personal papers, which are housed at the Library of Congress. Justice Blackmun kept detailed opinion log sheets, which indicated the date a justice joined or circulated an opinion, as well as if and when the justice withdrew his join or circulation. Examples of the documents used in collecting the data are provided in Appendix A. Justice Brennan's personal papers, which are also housed at the Library of Congress, were used to verify any information that was conflicting, confusing, or questionable in Justice Blackmun's opinion log sheets. Due to time and availability constraints, the data consist of all orally argued cases heard by the Supreme Court during the 1970 through 1979 terms that resulted in a signed or per curiam opinion²⁷. The unit of analysis is each individual justice within each case.²⁸

²⁷ Even after using Justices Blackmun and Brennan's papers, and even double-checking information in Justices Douglas and Marshall's papers, all of which are all housed at the Library of Congress, to construct the data, there were still cases that contained missing information. These 34 cases were subsequently dropped from analysis, resulting in a total of 1,324 cases in the analysis. A description of the reasons these cases were omitted from the analyses is contained in Table A.1 in Appendix A.

²⁸ Due to the rarity of a majority opinion author writing a concurrence, as well as the lack of meaningful values for the ideological distance and reciprocity variables, the majority opinion author in each case was excluded from the analysis. Thus, for every case that was heard by the full Court, the analysis includes the decisions of eight justices throughout the decision-making process. While justices cannot simultaneously be in the minority coalition and write a concurrence, during the 1970s it was actually more common for a justice to circulate a concurring opinion along with a memo indicating his vote change over the outcome than for the justice to change his vote over the outcome and then later circulate a concurring opinion. Thus, it is necessary to include justices who are in the minority coalition as "at risk" for concurring, even though the justice

Over that ten-term period included in my data, 820 concurring opinions were circulated, with 754 of them resulting in a published concurrence, five becoming published majority opinions, and seven published as dissenting opinions; the remaining 54 concurrences were withdrawn at some point prior to the announcement of the Court's decision. An extension of this data could be constructed to include all of Justice Blackmun's tenure on the Court, which would consist of the 1970 through 1993 terms. The original data were then supplemented with data from Harold J. Spaeth's judicial databases.²⁹

Measurement of Variables

Table A.1 in Appendix A details the measurement and sources of the data used in this analysis, as well as some general descriptive statistics for the independent variables. Descriptive statistics for the independent variables that specifically relate to whether and when a justice circulates a concurring opinion are provided on the following page in *Table 3.3*. Each justice's concurring opinion-writing descriptive statistics are then provided in *Table 3.4* in this chapter.

The two primary sources are the personal papers of Justices Blackmun and Brennan and Harold J. Spaeth's judicial databases. It was necessary to collect original data from the justices' papers in order to identify concurring opinions that were written but never published, as well as to determine the date each concurrence was first circulated. The

would be simultaneously circulating a concurrence and switching into the majority coalition over the case's outcome.

²⁹ The Supreme Court databases compiled by Harold J. Spaeth can be found at the following website: <http://www.cas.sc.edu/poli/juri/sct.htm>.

Table 3.3: Descriptive Statistics of Circulating a Concurring Opinion, by Independent Variable*

	Raw Frequency	Relative Frequency	Average Days	Minimum Days	Maximum Days
<i>Salient Cases</i>	198	12.52%	91.55	3	243
<i>Non-Salient Cases</i>	619	6.99%	82.36	6	260
<i>No Majority **</i>	458		83.35	3	260
<i>Have Majority **</i>	359		86.16	9	226
<i>Minimum Winning **</i>	160		98.48	8	260
<i>Not Minimum Winning **</i>	657		81.2	3	239
<i>Declares Statute Unconstitutional</i>	118	11.86%	90.32	13	225
<i>No Declaration of Unconstitutionality</i>	699	7.4%	83.62	3	260
<i>Overtakes Precedent</i>	25	10.29%	99.2	8	196
<i>Does Not Overturn Precedent</i>	792	7.76%	84.12	3	260
<i>Unanimous On Outcome **</i>	199		75.41	9	225
<i>Not Unanimous On Outcome **</i>	618		87.54	3	260
<i>Unanimous at Conference</i>	153	7.09%	72.74	9	207
<i>Not Unanimous at Conference</i>	664	8.02%	87.31	3	260
<i>Per Curiam Opinion **</i>	45		54.98	3	156
<i>Not Per Curiam Opinion **</i>	772		86.31	6	260
<i>Multiple Laws At Issue</i>	204	8.17%	86.1	8	243
<i>Single Law At Issue</i>	613	7.67%	84.08	3	260
<i>Extreme Majority Opinion Author</i>	159	7.65%	65.82	14	188
<i>Non-Extreme Majority Opinion Author</i>	658	7.87%	89.12	3	260
Write (Total)	817	7.82%	84.58	3	260

* The raw frequency is the number of concurring opinions circulated. The relative frequency is the number of concurring opinions circulated relative to the number of total justice-cases with the specified value of the independent variable. Average days reports the average number of days at which the concurrences were circulated, while minimum days reports the earliest day after oral arguments a concurrence was circulated and maximum days reports the latest day after oral arguments a concurrence was circulated.

** These variables are non-constant within a case and are measured at the time the concurring opinion is authored; thus, there is no “relative frequency” as it would be biased due to having multiple time points within a case.

Table 3.4: Descriptive Statistics of Circulating a Concurring Opinion, by Justice*

	Raw Frequency	Relative Frequency	Average Days	Minimum Days	Maximum Days
Black	8	8.79%	74.88	3	135
Blackmun	119	9.97%	79.8	19	226
Brennan	76	6.49%	77.93	21	225
Burger	79	6.75%	96.92	11	260
Douglas	52	8.5%	73.52	3	179
Harlan	19	19.39%	85.84	15	184
Marshall	55	4.66%	87.93	3	205
Powell	112	11.19%	94.38	34	257
Rehnquist	44	4.37%	90.84	8	251
Stevens	71	11.99%	82.68	24	243
Stewart	84	7.25%	78.7	3	239
White	98	8.32%	82.57	3	185

** The raw frequency is the number of concurring opinions circulated. The relative frequency is the number of concurring opinions circulated relative to the number of total justice-cases with the specified value of the independent variable. Average days reports the average number of days after oral arguments at which the concurrences were circulated, while minimum days reports the earliest day a concurrence was circulated and maximum days reports the latest day a concurrence was circulated.*

justices' papers were also used to measure time-varying variables, such as whether the draft majority opinion had yet been joined by a majority of the justices, throughout the decision-making process of each case. Without the use of the justices' papers, it would have been impossible to capture the dynamic nature of the decision to write a concurring opinion.

In order to measure the ideological distance between the majority opinion author and each remaining justice, it is first necessary to estimate ideal points for every justice. I

determined each justice's ideal point by calculating the percentage of the cases in which the justice voted in a liberal direction within each of 13 broadly categorized issue areas. The 13 issue areas were identified using the Spaeth database, as were the number of liberal votes cast within each issue area. The absolute value difference in ideological scores was then computed between each justice and the assigned majority opinion author.

The first variable that is theoretically new to the literature about Supreme Court decision-making is that of whether the majority opinion author is one of the two most extreme justices on the Court. This variable was constructed by determining each justice's placement on an ideological continuum, based on the percent of the time the justice votes in a liberal direction in each of 13 separate issue areas, which were identified through the Spaeth database. Thus, a justice who is one of the two extreme justices in the first issue area is not necessarily extreme in a second issue area. In 267 of the 1,324 cases, the majority opinion author was coded as "extreme."

While issue area experience in itself is not a new variable, it generally is standardized across justices, so that the number of opportunities a justice has had to write an opinion within an issue area is taken into account. However, I do not standardize issue area experience, because I theorize that with every additional opinion written in an issue area, the justice gains additional experience. Thus, the number of opportunities for writing is irrelevant. Additionally, all forms of opinion-writing are included in this measurement – majority, concurring, and dissenting opinions. Again, I theorize that both discretionary and non-discretionary opinion-writing increases a justice's experience within an issue area. Hence, this variable is calculated by using the Spaeth database to identify the

number of opinions – majority, concurring, or dissenting – that each justice had previously written in the case at hand’s issue area. There are 122 distinct issue areas used for this variable; they are more narrowly constructed than the two previous uses of issue areas. Because this variable only includes previously written opinions, it varies over time, though it can only increase.

Whether or not a case was salient was determined by using Epstein and Segal’s New York Times measure (see Epstein and Segal, 2000). According to their measure, a case was salient if it appeared on the front page of the New York Times after the decision was announced.

Due to the probability that justices encounter the steepest learning curve in their first year on the Court, the Tenure variable is calculated by logging of the number of years a justice has served on the Court plus one. It is necessary to add one to the number of years a justice has served on the Court since the log of zero is undefined. Logging a justice’s tenure allows for the addition of another year of tenure to be more influential at the beginning of a justice’s tenure than at the end. In other words, I expect the difference between a tenure of two and three years to be more significant than the difference between a tenure of 18 and 19 years.

Cases that involve multiple laws were identified through the use of the Spaeth database’s “laws” variable.

The Per Curiam variable is used somewhat differently in my dissertation, as it is a time-varying independent variable. I used Justice Blackmun’s opinion log sheets and Justice Brennan’s papers to determine whether the most recent circulation of the majority

opinion draft was in per curiam form. It is readily apparent when an opinion has been circulated per curiam, as the introductory language is different than that of signed majority opinions.

The Unanimous variable was also measured using both Justices Blackmun and Brennan's papers. It, too, is a time varying covariate, and measures whether or not the vote over the outcome of the case was unanimous at points in time throughout the decision-making process of a case.

The variable measuring a justice's publication habits off the Court is theoretically new to the literature. I constructed this variable by calculating the number of books, articles, book reviews, and other academic publications written by each justice over the course of their lifetime. Court-mandated publications, such as the Chief Justice's end of term reports, were excluded from the calculation of this variable, as they are not indicative of a justice's discretionary choice to write. These publications were identified through the use of Wilson Web, an online reference database.

Although some scholars have included various forms of variables assessing the relationship between two justices, aside from their ideological compatibility, my conceptualization of reciprocity is somewhat unique. I measure this variable by calculating the percentage of the time the current majority opinion author has written concurring opinions over the past two terms when each of the other justices was the majority opinion author. Thus, this is a dyadic variable that updates every term.

Each justice's workload was determined by calculating the number of opinions – majority, per curiam, concurring, and dissenting – on which a justice was currently

working. This variable can and does change over the course of a case's decision-making process, as some opinions may be withdrawn, others may be published, and still others may be assigned or begun. Justices Blackmun and Brennan's papers were utilized to identify per curiam, majority, and concurring opinions, while the Spaeth database was used to identify dissenting opinions.

Since not every term ends on the same date, I used August 15th of each year as the end date for the preceding term. While August 15th is significantly later in the summer than most terms actually end, choosing a single end date is necessary since the justices themselves do not know exactly when a term will end, and thus using the date the term actually ended would introduce bias into the model.

The Number of Concurrences Already Written was identified through Justices Blackmun and Brennan's papers. This is a time-varying covariate and is sensitive to both additional circulations of concurrences as well as concurrence withdrawals.

Both the Overturns Precedent and Declares a Congressional Law Unconstitutional variables were taken directly from the Spaeth database's "alt_prec" and "uncon" variables, respectively.

The final two variables, Minimum Winning Coalition and Draft Majority Opinion Joined by a Majority, are both time-varying. Justices Blackmun and Brennan's papers were utilized to determine whether the majority coalition was minimum winning over the case's outcome. A minimum winning outcome coalition is one where a single justice changing his vote regarding the case's outcome would result in the majority coalition no longer having majority status. The most common minimum winning coalition over the

outcome is when the Court's vote is 5-4; however, 5-3 and 4-3 votes are also minimum winning majority coalitions over the case's outcome.

Justices Blackmun and Brennan's papers were also utilized to determine when the draft majority opinion was joined by enough justices to give it majority status. Generally speaking, this means that the draft majority opinion has received four "join" votes, as the author of the draft opinion is assumed to join it as well. If the Court is deciding a case with fewer than nine justices, a draft majority opinion has achieved majority status once a majority of the voting justices have joined it. While this variable generally only changes in a positive direction, meaning a draft opinion goes from not having a majority to having a majority, on some occasions justices will withdraw their "join" vote, thus removing the draft opinion's majority status.

Empirical Model

This analysis is focused on examining whether and when Supreme Court justices circulate concurring opinions. In the preceding pages, I have discussed the hypotheses relevant to each component of the empirical model – both whether a justice circulates a concurrence, and when he does so. Thus, an empirical model that tests both sets of hypotheses is necessary in order to examine justices' motivations for concurring.

Event history analysis, also referred to as survival or duration analysis, is used to examine questions about when an event occurs. In this analysis, the event in question is the writing of a concurring opinion. The dependent variable in an event history analysis is the number of days that an individual has survived prior to experiencing the event.

Multivariate event history analysis allows researchers to calculate the “risk” of an individual experiencing an event at any given time, given a certain set of covariates (Box-Steffensmeier and Jones, 2004). For this analysis, once a justice experiences the event of writing, he is no longer a part of the analysis in that particular case. While it is possible for a justice to withdraw a concurrence and later write again, it is unlikely that the second concurring opinion would be unrelated to the first in its composition. Thus, a second concurrence could be motivated differently.³⁰

Event history analysis also allows for the incorporation of time-varying covariates, or covariates that have values that change over time (Box-Steffensmeier and Jones, 2004). Since the Supreme Court’s decision-making process is dynamic, covariates do not necessarily retain the same value throughout a case. Instead, some covariates, such as whether the majority coalition is minimum winning, can take on different values at different points within a single case’s decision-making process. Since the primary research question of this analysis includes a question of when a justice first writes a concurring opinion, modeling the process through event history analysis is appropriate.

One of the key assumptions the standard event history analysis makes is that every observation, or individual, eventually experiences the event (Box-Steffensmeier, Radcliffe, and Bartels, 2005). While this assumption is generally valid when the event in question is death, it is not an appropriate assumption for modeling the writing of concurrences. Thus, it is necessary to utilize a split-population event history model, as it

³⁰ Event history models can include repeated events; however, having a concurrence withdrawn and re-circulated is a very rare phenomenon and occurred in only a handful of cases. Thus, it seems unnecessary to model a justice’s choice to write a second concurrence in a case where he had already written one concurring opinion.

relaxes the assumption that every individual will write a concurring opinion. The split-population model not only estimates the risk of a justice writing a concurring opinion over time and based on the values of the specified covariates, it also estimates the probability that a justice will write a concurrence. In other words, a split-population model provides results for both the questions of whether a justice writes a concurrence and when they do so. A split-population model “produces two sets of simultaneously estimated coefficients” (Scherer, Bartels, and Steigerwalt, 2008, p. 1041; see also Box-Steffensmeier and Jones [2004]); one set for whether a justice writes, and the second for when a justice writes. It is important to note that while some covariates may influence both whether and when a justice writes a concurrence, the split-population model allows for each covariate to have different effects on the “whether” and “when” components of the model. Additionally, the “whether” and “when” equations do not have to be identically specified; some covariates may affect only whether a justice writes, while others may affect only when a justices writes. The “whether” analysis utilizes a standard logit estimation, while the “when” analysis estimates the hazard rate, or risk of concurring, using a Weibull distribution.³¹

Throughout the judicial politics literature, it is not uncommon to see empirical models with clustered standard errors. What is uncommon, however, is a firm theoretical or empirical basis for choosing whether to cluster on case, justice, or term. Arguably, any or all of the three theoretical clusters could potentially artificially deflate a model’s

³¹ Weibull models are parametric in nature and while model diagnostics have been developed for those analyzed through Bayesian techniques (see Cancho, Ortega, and Bolfarine [2009] and Gu, Sinha, and Banerjee [2011]), diagnostics for models analyzed through maximum likelihood techniques have not yet been fully developed.

standard errors due to not considering that the observations are not entirely independent. Additionally, some scholars will include dummy variables for justice, term, and/or natural court. Due in part to the small percentage of concurring opinions in my split population model, the model itself is rather sensitive to the different specifications; because of this as well as the lack of a clear choice regarding both clustering and the inclusion of dummy variables, I have chosen to use the least complicated model, which means I have not included dummy variables for justice, term, or natural court, and have not clustered the standard errors in any manner. Future research will be used to determine how robust the results of the model I am reporting are by utilizing several different modeling strategies, such as nested choice models, other forms of duration models, and multilevel models, to empirically evaluate similar questions to those asked and addressed in this dissertation.

Results

Supreme Court justices confront the decision to author a concurring opinion throughout each case's decision-making process. In the 1,324 cases in this study, there were 817 concurrences written. This analysis seeks to answer questions about why justices write concurring opinions, through analyzing both whether and when during the decision-making process they first circulate a concurrence. *Table 3.5* provides the results of the split population event history analysis of whether and when justices circulate concurring opinions. I will first discuss the results of the "whether" component of the split population analysis, and subsequently the "when" component.

Table 3.5: Split Population Event History Analysis of Whether and When a Justice Circulates a Concurring Opinion

	“Whether” Logit Analysis Coefficients & (Standard Errors)	“When” Duration Analysis Coefficients & (Standard Errors)
<i>Ideological Distance to Majority Opinion Author</i>	2.59 (1.42)	.14 (.12)
<i>Extreme Majority Opinion Author</i>	-.1 (.45)	-.15* (.06)
<i>Issue Area Experience</i>	.02 (.02)	< .001 (.003)
<i>Case Salience</i>	.45 (.38)	-.07 (.05)
<i>Tenure</i>	.83** (.22)	.16** (.04)
<i>Multiple Laws</i>	.11 (.4)	.05 (.06)
<i>Per Curiam Opinion</i>	.49 (.78)	-.07 (.1)
<i>Unanimous Court</i>	-.58 (.49)	-.09 (.07)
<i>Publications</i>	-.5** (.17)	—
<i>Reciprocity</i>	2.49 (1.37)	-.06 (.21)
<i>Workload</i>	-.14** (.04)	-.02* (.008)
<i>Days Until Term Ends</i>	-.008** (.003)	-.004** (<.001)
<i>Number of Concurrences Already Written</i>	-.38* (.16)	—
<i>Overtakes Precedent</i>	-.62 (1.1)	.02 (.18)
<i>Declares Law/Statute Unconstitutional</i>	.76 (.48)	.001 (.07)
<i>Minimum Winning Coalition</i>	1.93* (.76)	.36** (.07)
<i>Draft Majority Opinion Joined by Majority</i>	2.06** (.71)	.41** (.06)
<i>Constant</i>	-2.41** (.8)	4.18** (.24)
<i>Splitting Parameter³²</i>	.4** (.01)	—

** Significant at the p<.01 level.

* Significant at the p<.05 level.

Log-Likelihood: -6817.57

Number of Justice-Cases (Observations): 10,404

Number of Court Cases: 1,324

Number of Concurrences: 817

³² The coefficient of the splitting parameter being significantly different than “1” indicates that a split population model is preferred over a more general Cox regression model.

Logit “Whether” Analysis

Several of my hypotheses about whether a justice writes a concurring opinion are supported by the data. First, while ideology does enter into a justice’s considerations, as indicated by the positive, significant ideological distance variable and potentially the negative, significant number of concurrences variable, this one facet of short-term preferences does not overwhelm a justice’s other motivations. Instead, strategy, both intra- and inter-case, also appears to influence a justice’s decision to author a concurring opinion. The positive, significant variable for whether the majority coalition is minimum winning suggests that justices are more likely to engage in bargaining with the majority opinion author through the use of concurring opinions when the majority coalition is minimum winning, which is an additional indication that justices are motivated by their short-term preferences. Conversely, justices are less likely to author a concurring opinion if the draft majority opinion has yet to be joined by a majority of the justices; this suggests that justices are concerned about the long-term ramifications concurring opinions may have if there is no clear majority opinion. Taken together, these two results seem to indicate both statistically and substantively that while justices make use of increased bargaining leverage in minimum winning coalitions, they still consider the long-term effect a plurality opinion could have on future interpretations of the decision or the Court’s legitimacy. In other words, justices’ individual legal policy motivations are constrained by their collective Court motivations; individual non-policy motivations are also influential. The fact that justices are also less likely to author a concurring opinion the more concurrences have already been written may be an additional indication that

justices consider the long-term effects multiple concurrences may have on lower court interpretation and the Court's reputation as a whole.

Both short- and long-term individually strategic considerations are rooted in judicial self-interest; the goal of each is to have both short- and long-term legal policy as close to the justice's preferred position as possible. Another potential strategy for achieving the best possible legal policy position in the long-term involves making sure that concurring opinions are not overused, to the detriment of the Court as a whole. Thus, one justice may choose to retaliate, in the form of a concurrence, against another justice who has previously overused concurring opinions. The positive, significant coefficient for the reciprocity variable supports the hypothesis that a justice who has previously been concurred against by the current majority opinion author is more likely to write a concurring opinion. One could imagine, though, this tit-for-tat relationship devolving into an ever-increasing number of concurrences, which could result in the status of the Court being diminished, which is exactly what the justices prefer to avoid, in the long-term. This is one relationship between justices that could be further examined through game theoretic models; at what point does a tit-for-tat strategy result in an increase, rather than a decrease, in the number of concurring opinions?

The results also suggest that not all the judicial motivations that influence decisions about whether to author a concurring opinion are related to a justice's legal policy preferences, either in the short- or long-term. Indeed, as a justice's tenure on the Court increases and as his workload decreases a justice becomes more likely to author a concurring opinion, both as hypothesized. However, in opposition to my hypothesis

about end of term pressures, justices are actually significantly more likely to circulate concurring opinions the closer it is to the end of the Court's term. I will discuss some possible implications of this finding in the conclusion of this chapter.

While both workload and time until the end of the term have little to no potential ideological component, it may be that justices who have been on the Court longer develop better bargaining strategies, especially among colleagues they have worked with over extended periods of time. However, one could expect that better bargaining strategies would result in fewer concurrences being authored, rather than more, which is what the results suggest. Instead, justices who have been on the Court longer may be more comfortable criticizing their colleagues, as they are familiar with the Court norms about bargaining, collegial relations, and the uses of concurring opinions, which has no clear relationship with a justice's short- or long-term preference motivations. Lastly, the number of publications a justice has is significantly related to their decision to write a concurring opinion. However, the relationship is in the opposite direction as hypothesized; justices who publish more books, articles, or other academic materials are actually less likely to author a concurring opinion. While one could suggest that perhaps the two activities compete with one another, in order to examine that hypothesis it would be necessary to examine each justice's publication habits by year.

In summary, in their decision about whether to write a concurring opinion, justices are motivated by both short- and long-term preference goals to author concurrences. Additionally, collective preferences about the institutional status of the Court as a whole also serve to motivate justices' decisions about using concurrences, except these

motivations act as constraints. While the status of Court is a collective, rather than individual goal, individual justices do appear to act so as to maximize the Court's future status as a legitimate, efficacious institution. Furthermore, justices are also motivated by non-policy goals when they decide whether or not to write a concurring opinion. All three types of motivations are necessary to provide a more complete understanding of justices' decisions regarding authoring a concurring opinion.

Duration "When" Analysis

Knowing what influences a justice's decision to write a concurring opinion only provides part of the story. The point in the decision-making process at which a justice writes a concurring opinion is also important for determining a justice's motivations for writing the concurrence. For example, concurring opinions written earlier during the decision-making process are better tools with which to effectively bargain, thus more effective for achieving short-term, intra-case preference goals, whereas concurrences written later in the decision-making process are more likely to be the result of failed accommodation on the part of the majority opinion author.

The duration analysis results show that in cases where the majority coalition is minimum winning, a justice is more likely to write a concurring opinion early in the process, which seems to indicate either that justices are acting so as to exert more influence over the content of the majority opinion knowing that they have additional leverage due to the minimum winning nature of the coalition or that justices try to assume the position of majority opinion author by writing a concurrence that is meant to compete

with the draft majority opinion for the votes of the other justices. Either scenario would involve a justice's intra-case strategic use of a concurrence to further his own short-term legal policy goals.

Justices who have been on the Court longer are also more likely to write a concurrence early in the decision-making process. This may be indicative of longer tenured justices being more familiar with how to best use concurring opinions, either so as to induce accommodation by the majority opinion author or to attempt to assume greater control of the majority opinion by becoming its author. Again, either use of concurrences by justices with longer tenure on the Court involves justices behaving short-term strategically about their use of concurring opinions.

Contrary to *Hypothesis 2*, justices are not more likely to strategically circulate a concurrence early in the process when the majority opinion author is extreme. Indeed, the exact opposite is true; a justice is more likely to write a concurring opinion later in the decision-making process when the majority opinion author is extreme. A justice's motivation for this behavior remains unclear, and thus is fodder for subsequent analyses.

While justices act strategically so as to maximize their bargaining leverage in minimum winning coalitions, this does not hold true for when the draft majority opinion has yet to be joined by a majority of the justices. Only if a draft majority opinion has already been joined by a majority of the justices is a justice more likely to author a concurring opinion early in the process. This is counterintuitive from a short-term strategic perspective; bargaining power is higher prior to the draft majority opinion having been joined by a majority of the justices, meaning justices who write concurring

opinions at that point have increased leverage to wield. However, if justices are unlikely to write a concurrence if they know they are unlikely to publish it, this result is more understandable.

From a long-term individual preference maximization perspective, a justice may wait until he is more certain that he will be likely to publish a concurrence before he will even write one. In other words, if his concurring opinion would result in having a plurality opinion, he may forgo writing a concurrence due to his collective preferences about the Court's long-term institutional status. If, however, the draft majority opinion has already been joined by a majority of the justices, it is unlikely that a justice's concurring opinion would result in having a plurality rather than a majority opinion and thus a justice is less constrained by his collective Court preferences. Thus, it appears that while justices are not afraid to act in their short-term interests so as to increase their bargaining power in cases in which the majority coalition is minimum winning, they are less likely to take advantage of their increased bargaining leverage if it could potentially affect the status of the Court's opinion as a majority opinion, which would not be in their collective interest.

As expected, having a high workload decreases the likelihood of a justice authoring a concurrence early in the decision-making process. This indicates that justices are more willing to wait for accommodation, or its lack thereof, when facing pressures associated with a high workload. It seems that justices who face such pressures are less likely to put forth the additional effort to engage in strategic behavior aimed at maximizing their short-term preferences when such actions may not be absolutely necessary; instead justices wait to see if they will be accommodated without having to author a concurring

opinion, and if not, write closer to the end of the decision-making process. These non-policy motivations do appear to affect the extent to which justices are willing to act on their short-term preference motivations.

Conversely, though, the approaching end of term does not have a similar influence to that of workload. Instead, justices are both less likely to write concurring opinions in general and less likely to circulate them earlier in the case's decision-making process in cases orally argued and decided earlier in a term than in those argued and decided later in the term. This is the exact opposite of my hypothesized relationship. One possible reason for this may be that cases occurring later in the Court's term are somehow different from cases occurring earlier in the Court's term. Additionally, there is the possibility that end of term pressures increase concurrence-writing due to writing a concurring opinion actually being the least time consuming option. Justice Stevens, in a memo to Justice Brennan, the author of the primary dissent in *National League of Cities v Usery* (1976), seems to lend credence to this possibility, as he stated, "Although I agree with your analysis and think you have written an excellent and persuasive opinion, I am reluctant to join it only because I am not sure that I completely share some of your extremely strong criticism of other decisions of the Court. Perhaps if time were available, I could review those cases and join you, but believe I will simply rest on the brief dissent which I have prepared" (William J. Brennan, Jr. papers, Box I:381). While Justice Stevens was in the dissenting coalition, there is no reason to think a similar scenario could not arise in the majority coalition.

As with the decision to write a concurrence, justices' decisions regarding *when* to write are affected not only by their short-term legal policy preferences, but also by collective preferences and non-policy motivations. Justices' individual legal policy preferences are constrained by both their collective preferences about the Court's status and their own non-policy goals. Understanding how these three types of motivations affect justices' decisions involving concurring opinions provides additional insight into the impetus behind other judicial decisions.

Conclusion

Examining not only whether a justice writes a concurrence, but also when they choose to write provides a glimpse of a justice's motives for utilizing concurring opinions. Since concurrences themselves generally lack precedential value, Supreme Court justices are motivated to write concurrences by more than their ideological preferences about the outcome and doctrine in each case. Indeed, justices are also motivated by their collective preference for the Court to retain its reputation, legitimacy, and effectiveness in overseeing the compliance of lower courts as well as by other non-policy goals similar to those of any ordinary individual.

Additionally, while justices can and do use concurrences in a strategic manner, there are both short- and long-term strategies; justices employ both in their decisions about whether and when to write a concurring opinion. However, not all the motivations for the uses of concurring opinions are strategic; indeed, justices' decisions regarding concurrences are also motivated or constrained by non-strategic factors, such as

workload. Justices' motivations for using a concurring opinion are multi-faceted; their decisions about concurrences are motivated by both short- and long-term legal policy goals as well as other non-policy factors.

Short-term strategic policy preference maximization on the Supreme Court would be expected to include justices' taking advantage of increased bargaining leverage when presented with the opportunity. However, this individual motivation is tempered by the collective motivation of preferring to maximize the Court's legitimacy, reputation, and influence over the lower courts' interpretations of decisions. This result is shown in the analysis of whether a justice writes a concurrence by the fact that though justices are more likely to author concurring opinions when the majority coalition is minimum winning, they are less likely to do so before the draft majority opinion has been joined by a majority of the justices. Similarly, the more concurrences that have already been written, the less likely it is that a justice will author a concurrence, though the motivation for this is less clear, as it could also be that the more concurrences have already been written, the more likely it is that a justice will agree with one of them and thus not need to write his own concurrence. Additionally, while justices are willing to take advantage of their increased bargaining power when the majority coalition is minimum winning by quickly writing a concurrence, they are unwilling to do so prior to the draft majority opinion being joined by a majority of the justices, as shown by the duration analysis of when justices choose to write a concurring opinion.

Taking the "if" and "when" results together, it seems clear that justices weigh both individual and collective motivations; legal policy preferences attained in a single case do

not necessarily outweigh the potential for the Court's reputation, legitimacy, or control over the lower courts' interpretation to be diminished. Justices not only care about the legal policy put forth in the case at hand, they also care about how the Court's position in future cases will be viewed by the public, the lower courts, or the other branches of government. This tension between individual and collective long-term preference actualization will be further examined in the following chapter through an analysis of whether a justice chooses to publish his written concurrence. Since only published concurrences have the potential for affecting the Court's efficacy, it is a necessary second step to also examine the circumstances under which some concurring opinions are published while others are withdrawn.

Furthermore, time considerations, such as workload and the closeness of the end of the term, affect both if and when a justice chooses to author a concurring opinion. When justices are more pressed for time not only are they less likely to choose to author a concurrence, they are also less likely to use a concurring opinion as a form of short-term strategic bargaining early in the decision-making process. Instead, concurrences written by justices who are either overworked or facing a nearing end of the term are used in a responsive manner, only if the justice feels it is absolutely necessary. Both types of time constraints appear to decrease a justice's disagreement threshold, meaning that they are more willing to suppress their inclination to voice relatively minor disagreements with the majority opinion than they would otherwise. Thus, both long-term preference goals and non-policy motivations constrain a justice's willingness to act in their own short-term interest. Legal policy preferences in a specific case, while they may dominate a justice's

decisions about the case's outcome, are not the only motivation for writing or suppressing a concurring opinion.

Chapter 4: Empirical Analysis of Whether a Justice Withdraws his Written Concurrence

Since writing a concurring opinion does not necessitate publishing a concurring opinion, justices may have different motivations for their choices about whether or not to publish a concurrence that they have already written than they had for the initial choice of whether or not to write. There are actually four possible outcomes for written concurrences. First, a written concurrence could be published as a concurring opinion. Secondly, the concurrence could be withdrawn and the justice could join another opinion. A third possibility, and perhaps the ideal scenario for the concurring justice, is for the concurrence to attract enough votes to become the Court's majority opinion and be published as such. The final possible outcome is for the concurrence to be published as a dissenting opinion, which could either be due to the justice changing his vote on the outcome or to other justices shifting their outcome votes so as to reverse the majority and minority coalitions. While the latter two possible outcomes are interesting phenomena in and of themselves, since the concurring justice does not have control over either justices joining his concurrence or the court shifting around him, neither eventual outcome is entirely in his control. Thus, as this is a study of motivations, I will be focusing on each justice's motivations for and subsequent choice to either withdraw or publish his concurring opinion. Additionally, out of 817 written concurring opinions, only four were

Table 4.1: Final Disposition of Circulated Concurrences, by Justice

	Published as Concurrence	Withdrawn	Published as Majority	Published as Dissent	Total Written
<i>Black</i>	8 (100%)				8
<i>Blackmun</i>	112 (94.12%)	7 (5.88%)			119
<i>Brennan</i>	71 (93.42%)	4 (5.26%)		1 (1.32%)	76
<i>Burger</i>	71 (89.87%)	6 (7.59%)		2 (2.53%)	79
<i>Douglas</i>	50 (96.15%)	1 (1.92%)	1 (1.92%)		52
<i>Harlan</i>	19 (100%)				19
<i>Marshall</i>	52 (94.55%)	2 (3.64%)		1 (1.82%)	55
<i>Powell</i>	104 (92.86%)	8 (7.14%)			112
<i>Rehnquist</i>	41 (93.18%)	3 (6.82%)			44
<i>Stevens</i>	65 (91.55%)	5 (7.04%)	1 (1.41%)		71
<i>Stewart</i>	75 (89.29%)	9 (10.71%)			84
<i>White</i>	84 (85.71%)	9 (9.18%)	2 (2.04%)	3 (3.06%)	98
Total	752 (92.04)	54 (6.61%)	4 (.49%)	7 (.86%)	817 (100%)

published as the majority opinion and only seven as a dissenting opinion; thus, both final outcomes are very rare events. *Table 4.1*, above, summarizes the final publication outcomes of written concurring opinions according to each justice. For the analysis in this chapter, the four and seven instances described above will be omitted from the data, so as to focus exclusively on judicial motivations for and against publishing an already-written concurring opinion as a concurrence.

The choice to withdraw a concurring opinion can occur at any time after it has been written; in the ten-year period of my study, one concurring opinion was withdrawn later on the same day it was initially written, though on average, withdrawn concurrences lasted around 20 days after being written before being withdrawn. Essentially, justices continually update their decision about withdrawing their written concurrence, in that whenever circumstances change – a new draft majority opinion is circulated, for example – they again consider whether to retain their use of a concurring opinion or to withdraw it. For example, in *Gilligan v Morgan* (1973), Justice Powell wrote a concurring opinion on June 6, 1973; five days later, on June 11th Justice Blackmun wrote a concurrence, at which point Justice Powell decided to withdraw his concurrence and join Justice Blackmun's concurrence instead. This continuous decision process technically does not end until the decision is publicly announced, though generally the justices come to a consensus about whether a decision is ready to be announced a few days prior to its actual announcement.

As the decision to publish or withdraw a concurrence is contingent upon having already written a concurring opinion, a justice's motivation for writing may be relevant in

determining his motivation for withdrawing their concurrence. Since intra-case strategic motivations for writing a concurring opinion would, if the concurrence is successful in achieving the desired results, render the continuation and publication of the concurrence inconsequential with respect to that initial motivation to write, we may expect that one motivation for withdrawing a concurring opinion would be based on the relative success of the concurrence as a bargaining tool. Other motivations for writing a concurring opinion, however, may necessitate publishing the concurrence for the motivation to be effectual. Thus, understanding why a justice initially wrote his concurring opinion and the circumstances at the time which he chose to write are imperative to assessing a justice's motivations for publishing or withdrawing his written concurrence. Similarly, determining a justice's motivations for publishing or withdrawing a concurrence may give us additional insight into how frequently the justices are successful in utilizing concurring opinions as bargaining tools.

For example, if a justice writes a concurring opinion early in the decision process of a case, he could be either attempting to influence the content of the majority opinion or expressing his disagreement with the content of the majority opinion in a sincere manner. While looking only at the decision to write, we cannot distinguish between these two possible motivations. However, each motivation for writing leads to different likelihoods of publication. A justice whose only motivation to write a concurrence is to influence the majority opinion, regardless of whether the content of the majority opinion is changed, has no legal policy incentive to publish the concurrence, as publication has no bearing on the actual content of the majority opinion. The justice may, however, still publish the

concurrence so as to maintain a credible threat of publication for future concurring opinion and cases. Otherwise, majority opinion authors would have little reason to accommodate if both accommodation and a lack of accommodation would lead to the concurrence being withdrawn. Conversely, a justice whose sole motivation for writing is to express sincere legal policy disagreement over the case's doctrine has no incentive to withdraw his concurrence, unless the disagreement becomes moot. The theoretical basis for this dissertation does not suggest that justices have single motivations for their decisions; however, one motivation may be dominant, and thus more readily ascertained in the context of concurring opinion writing and publishing decisions. *Table 4.2* provides brief descriptions of how the motivations for writing translate into motivations for publishing, as measured by each of the variables in this analysis.

In general, justices whose sole motivation to write a concurring opinion is intra-case strategic will, as discussed above, be less likely to publish their concurrences, though they will publish their concurrences on occasion so as to maintain a credible bargaining tool. If, however, the dominant motivation is to influence the content of the majority opinion author, but there are other motivations as well, the expectation regarding publication changes depending on the strength of the secondary motivation(s). Conversely, justices whose sole motivation to write is long-term individually strategic will always publish their concurrence, as long-term strategic legal policy goals cannot be met unless the concurring opinion is published, as long-term goals require other actors, such as lower court judges, Congress, or the public, to be aware of the concurring opinion. Similarly, if a justice writes a concurrence based on his sincere legal policy

Table 4.2: Summary of Motivations, in Relation to Independent Variables and both the Decision to Circulate and the Decision to Publish/Withdraw

	Motivation to Circulate	Motivation to...	Withdraw/ Publish	Rationale
Ideological Distance to Majority Opinion Author	Individual Sincere or Short-term Strategic	Individual Sincere	Publish	Expression of Legal Policy Disagreement
Expertise	Individual Sincere or Short-term Strategic	Individual Sincere or Non-Policy	Publish	Legal Policy Disagreement and/or Reputation
Case Salience	Individual Sincere or Short-term Strategic	Individual Sincere	Publish	Expression of Legal Policy Disagreement
Tenure	Individual Sincere or Short-term Strategic	Individual Sincere, Strategic, or Non-Policy	Publish	Less Likely to Make a “Mistake” by Writing
Timing of Concurrence	Individual Short-term Strategic (early) or Sincere (late)	Individual Sincere or Strategic	Publish	If Wrote Later, Less Likely to Have Changed
Workload	Individual Non-Policy	Individual Non-Policy	Publish	Will only have Written if Necessary
Time to End of Term	Individual Non-Policy	Individual Non-Policy	Publish	Will only have Written if Necessary
Reciprocity	Individual Non-Policy	Individual Non-Policy	Publish	Publication Necessary to be a Sanction
Number of Concurrence Joins	None	Individual Non-Policy	Publish	Collegiality Concerns
Number of Concurrences	None	Collective Confidence, Efficacy, & Legitimacy	Withdraw	Appears Highly Political; Creates Confusion in Lower Courts
Overturms Precedent	Prospective to Publication Decision	Collective Confidence	Withdraw	Appears Highly Political
Declares Congressional Law Unconstitutional	Prospective to Publication Decision	Collective Confidence and Legitimacy	Withdraw	At Odds with Congress and/or President
Minimum Winning Coalition	Individual Short-term Strategic	Collective Confidence and Efficacy	Withdraw	Appears Highly Political; Higher Incentive to Shirk
Draft Opinion has No Majority	Individual Short- or Long-Term Strategic	Individual Long-Term Strategic OR Collective Confidence, Efficacy, & Legitimacy	Publish OR Withdraw	“Narrowest Grounds” Doctrine OR Appears Highly Political; Creates Precedent Confusion

disagreement, I expect his likelihood of publication to increase as the likelihood of the disagreement becoming moot decreases. Unlike short-term strategic motivations, justices who are motivated to write by sincere legal policy disagreement have an incentive to publish their concurrence, as their intent is not to influence the content of the majority opinion, but rather to express their own opinion about the legal doctrine for the decision.

There are several reasons a justice may choose to withdraw a concurring opinion, but similarly to the motivations for writing a concurrence, these reasons can be classified as either individually or collectively motivated. The first set of hypotheses about expected behavior regarding the decision to withdraw or publish a concurring opinion is based on individual motivations, while the second set is founded upon collective motivations. All hypotheses are discussed in terms of the likelihood of being withdrawn; thus, if the likelihood of being withdrawn is expected to increase, the likelihood of publishing the concurring opinion is expected to decrease.

Hypotheses

Individual Motivations

Individual motivations for withdrawing a concurring opinion are those for which a justice is acting in his own best interest, generally, but not exclusively with respect to his legal policy preferences. Non-policy goals, such as furthering their reputation or working under time constraints, can also be a factor in the justices' decisions about publication. Unlike collective motivations, individual motivations are not concerned with the long-term institutional stature of the Court or about the Court's efficacy over the lower courts,

but rather with the justice's personal legal policy preferences or non-policy goals. For purposes of clarity, I will discuss the hypotheses about individual motivations in three sub-groupings of possible individual-level motivations about whether or not to publish an already-written concurring opinion. The first sub-group contains hypotheses that deal with expectations about justices' choices that are motivated by their sincere ideological preferences. The second sub-group then contains hypotheses about a justice's non-policy motivations for publishing a concurrence. Although some hypotheses fit into more than one of these three sub-groups, these groupings are theoretically meaningful in that the justices have multiple potential motivations for publishing their concurring opinion. *Table 4.2*, as previously shown, provides a summary of the motivations for publishing or withdrawing a concurring opinion; the sub-groups within the individual motivations are referred to, respectively, as "Sincere" and "Non-Policy."

Legal policy disagreement is considered the primary, if not only influence on justices' decisions, including their decision to author a concurring opinion (see Segal and Spaeth [2002] and Epstein and Knight [1998]). Since the vast majority of studies involving concurring opinions only examine concurrences that are eventually published as concurring opinions, the decision between withdrawal and publication is obfuscated throughout the current literature on Supreme Court decision-making. Thus, the influence of legal policy disagreement on the decision to publish a concurring opinion remains untested. The first four hypotheses all, to one extent or another, stem from a justice's potential sincere legal policy disagreement with the content of the majority opinion. Sincere legal policy disagreement, in relation to concurring opinion writing, can be

viewed as position taking. Unlike the decision to write a concurrence, the decision to publish cannot be motivated by short-term strategic goals, as concurring opinions are published along with the final opinion of the Court and thus are incapable of influencing either the content of the majority opinion or the decisions of the other justices.

There have been several attempts at pinpointing the location of the doctrine contained in the majority opinion in ideological space, so as to have a more precise measure of the level of disagreement each justice is expected to have with the majority opinion.

However, there are several possible locations for the majority opinion's doctrine.

According to the bargaining model formulated by Lax and Cameron (2007), the majority opinion author has some degree of monopoly power due to his agenda setting privilege.

Conversely, in a model proposed by Hammond, Bonneau, and Sheehan (2005), the median justice of the Court has monopoly power over the location of the majority opinion in doctrine space. Furthermore, Clark and Lauderdale (2010) find empirical support for the proposition that majority opinions are generally located at the ideal point of the median justice in the majority coalition through the development of a method that can specifically be utilized for measuring the placement of the majority opinion in one-dimensional policy space. However, they only examine two areas of law and thus note that further research is necessary to determine whether their measurement model is applicable to other areas. Thus, since there is no single accepted measure of the ideological placement of the majority opinion, many Court scholars use the ideological placement of the majority opinion author as a proxy for the ideological placement of the

majority opinion (see, for example, Collins [2008], Hettinger, Lindquist, and Martinek [2004], and Maltzman, Spriggs, and Wahlbeck [2000]).

The greater the ideological distance between the majority opinion author and a given justice, the greater the likelihood of legal policy disagreement. Thus, if a justice who wrote a concurring opinion is ideologically distant from the majority opinion author, he may have written as a sincere expression of that disagreement. If so, we may expect the justice to be less likely to withdraw the concurrence. However, simply because the justice wrote the concurrence as an expression of disagreement and not as an attempt to influence, the concurring opinion may still have induced accommodation by the majority opinion author. Hence, there is a possibility that a sincere expression of legal policy disagreement in the form of a concurrence will result in the content of the majority opinion changing so as to make the root of the disagreement moot. Still, though, the greater the ideological distance between a concurring justice and the majority opinion author, we may expect that accommodation become less and less likely. Therefore, I hypothesize that the ideological distance between a concurring justice and the majority opinion author will potentially matter in the decision about withdrawing a written concurrence for two reasons. First, the ideological distance may be informative about whether a justice initially had written a concurring opinion as a form of sincere legal policy disagreement, making publication more likely. Second, and concurrently with the first, I expect accommodation by the majority opinion author to be less likely the greater the ideological distance between himself and the concurring justice, also making publication more likely. These both lead to my first hypothesis.

Hypothesis 1: The greater the ideological distance between the majority opinion author and the concurring justice, the less likely the concurring justice will be to withdraw his concurring opinion.

In addition to generalized legal policy disagreement, if the concurring justice is an expert in the case's issue area, legal policy differences may be magnified. There are two possible reasons for this. First, justices who are experts within an issue area may be particularly attached to that area of law and thus may be less willing to go along with another justice's phrasing or preferences. Likewise, expert justices may have a higher incentive to publish a concurring opinion so as to speak to their audience, since expertise would, presumably, be viewed positively by the legal audiences of the justices. In other words, for issue areas to which a justice is particularly attuned, he may be less willing to compromise and thus more likely to publish a concurrence. Secondly, it may be that justices have developed their expert status at least in part by writing extra opinions. Since expertise is garnered through opinion writing, and one form of opinion is a concurrence, it may be that it is actually a justice's propensity to write in a particular issue area that is earning him the expert status. Regardless of whether justices are experts because they have previously written or have previously written because they are experts, I expect expertise to have a negative relationship with the likelihood of withdrawing a concurring opinion, which is articulated in *Hypothesis 2*.

Hypothesis 2: A justice who is an expert within the case's issue area will be less likely to withdraw a concurring opinion.

Similarly, legal policy disagreement between a concurring justice and the majority opinion author may be exacerbated in cases that are especially important to either or both justices. In salient cases, for example, justices may in general be less likely to compromise (see Unah and Hancock [2006]), leading to the increased likelihood of published concurring opinions. If one of the reasons for withdrawing a concurrence is indeed based upon being accommodated by the majority opinion author, in cases where the majority opinion author is less likely to accommodate we would expect there to be fewer withdrawn concurring opinions. Additionally, justices may be more likely to be motivated by reputational goals in choosing to author a concurring opinion if the case is salient, either to themselves or to their audiences. Both of these expectations lead to *Hypothesis 3*.

Hypothesis 3: A justice will be less likely to withdraw his concurring opinion in cases that are salient.

Additionally, justices who have been on the Court longer may have stronger legal policy preferences, regardless of the case's salience or issue area. Thus, we may expect that more experienced justices will be less likely to withdraw their concurring opinions due to holding stronger views than their less experienced colleagues. There is a second potential avenue through which a justice's tenure may influence his decision to withdraw their concurrence that is unrelated to a justice's legal policy preferences. Instead, it may be that with experience, justices are better able to gauge how their colleagues will act

throughout a case, and thus are less likely to be faced with unexpected changes that would make publication undesirable. In other words, experienced justices may be less likely to write unnecessarily, and thus may be more likely to publish the concurrences that they do write. Both avenues of influence lead to my fourth hypothesis.

Hypothesis 4: The longer a justice's tenure on the Court, the lower the likelihood that he will withdraw his concurrence.

A justice's motivation for writing a concurring opinion may also have influence in his decision to withdraw it, due at least in part to whether the written concurrence accomplished its desired purpose. For example, if a justice writes a concurrence in order to try to influence the content of the majority opinion, he may be more likely to withdraw the concurring opinion than he would be if he had initially written the concurrence as a way to build his own reputation among his audiences. This is because concurring opinions written as attempts to influence the content of the majority opinion have the possibility of being successful without publication, whereas only concurrences that are published can be successful in building a justice's reputation. Thus, it is important to consider the motivation to write a concurring opinion when hypothesizing about a justice's likelihood of withdrawing his concurrence. Even concurring opinions that result in accommodation by the majority opinion may not all be withdrawn, though, because "as one Justice put it... 'it would break [his] law clerk's heart' to withdraw his concurring opinion, even though his concerns had been adopted in a revised majority

opinion” (Kirman, 1995, p. 2100). However, it is still expected that accommodation is more likely to lead to a withdrawn concurrence than is a lack of accommodation.

Since justices who wish to influence either the content of the majority opinion or their fellow justices have an incentive to write earlier rather than later in order to maximize the concurrence’s potential influence on the decision-making process of a case, I hypothesize that when a justice wrote a concurring opinion will be informative as a way of controlling for a justice’s motivation for writing. Additionally, justices who write earlier in the process have less information about both the final content of the majority opinion and their fellow justices’ decisions in the case. Thus, there is a greater likelihood of something changing so as to make publication less attractive the earlier in the decision-making process a justice initially writes. Furthermore, justices who write later in the case’s decision-making process are, all things being equal, more likely to sustain legal policy disagreement with the majority opinion author than are justices who write earlier the process, since those who write earlier are more likely to be accommodate than are those who write later. These rationales all lead to *Hypothesis 5*.

Hypothesis 5: The earlier in the decision-making process a justice initially wrote his concurring opinion, the higher the likelihood that he will withdraw his concurrence.

The second sub-type of individual motivations in the decision to withdraw or publish a concurring opinion is related to a justice’s non-policy goals. As discussed in previous chapters, justices’ non-policy goals include, but are not limited to, furthering their reputation within their audience groups, preserving collegial relations with their

colleagues, and maintaining a reasonable level of work. As a justice's expertise may be related to his reputation within a specific issue area, *Hypotheses 2 and 3* each have the potential to include a reputational motivation component. Similarly, and as discussed in the previous chapter, some justices may be more likely to speak to their audiences than other justices. It may be that there is a general willingness to engage in legal debate; if so, we may expect that justices who engage in publishing academic articles or other academic materials would also be more likely to publish concurring opinions. This expectation leads to the sixth hypothesis.

Hypothesis 6: A justice who is active in expressing his opinion outside of his judicial duties will be less likely to withdraw his concurring opinion.

As discussed in the previous chapter, justices may use concurring opinions to sanction the majority opinion author in a case for over-using concurrences in previous cases. It may be that merely writing a nit-picky concurrence is a strong enough sanction, or it may be that publishing the concurring opinion is necessary for it to discourage future nit-picky concurrences. If it is the case that in order for the sanction to be meaningful, the concurrence must be published, I expect that the tit-for-tat relationship described in the previous chapter will also hold true for influencing whether or not a justice withdraws his concurring opinion. This leads to *Hypothesis 7*.

Hypothesis 7: The higher the proportion of concurrences written by the case's majority opinion author against the concurring justice while the concurring justice was

the majority opinion author in previous cases, the lower the likelihood that the concurring justice will withdraw his concurrence.

Another individual motivation regarding the choice to publish or withdraw a concurring opinion is tangential to collegiality but does not necessarily have a norm associated with it. After a justice has written a concurrence, other justices are free to join the concurrence, though there is no expectation of accommodation. If the justice who wrote the concurrence chooses to withdraw it, the other justices who had joined the concurrence may be left in the position of no longer having an opinion with which they agree. Those justices may then be forced to either join another opinion or write their own; regardless, the justice who withdrew the concurrence may be putting the justices who had joined his concurrence in a bit of a rough spot, especially if the concurring opinion was withdrawn at the last minute. In *Hawaii v. Standard Oil Company of California* (1972), Justice Stewart withdrew his concurring opinion to join Justice Marshall's majority opinion, leaving Justice White having to choose further action, as he had joined Justice Stewart's concurrence. Justice White subsequently wrote a memo to Justice Marshall stating "Since Brother Stewart has scuttled his own canoe and is now sharing yours, please let me aboard too," indicating that he would like to join the majority opinion (Justice Brennan's papers, Boxes I:260 and I:261). This is not to say that a concurring justice must consider the preferences of the justices who have joined his concurrence, but rather that he may consider the effect withdrawing the concurrence will

have on the justices who had joined his concurring opinion. This possibility is the eighth hypothesis.

Hypothesis 8: A justice will be less likely to withdraw his concurring opinion when other justices have joined his concurrence.

Though withdrawing a concurring opinion may save a justice some time, due to no longer needing to revise a draft concurrence, the workload cost in publishing a concurrence seems to be negligible. This appears to be due to two facets of concurring opinion writing. First, justices who author concurrences are not expected to accommodate other justices' positions in their concurring opinion and thus re-drafting concurrences is not nearly as time intensive as re-drafting a majority opinion can be, particularly if multiple justices have asked for accommodation. Secondly, there are generally fewer drafts of concurring opinions; new drafts of concurrences are most frequently in response to updated drafts of the majority opinion and typically are not completely re-written. Hence, the greatest time-cost of writing a concurrence is paid at the time of the initial draft, while subsequent drafts require much less revising than do re-circulated majority opinion drafts. That stated, it may be that justices who have a high workload or are facing end of term pressures are less likely to write a concurrence unless they have a higher level of certainty that they will publish it. Consequently, it may be that justices who have a high workload or are under the pressure of the approaching end of term are more likely to be extra cautious in writing concurring opinions, and will thus be less likely to withdraw a concurrence. This leads to my ninth and tenth hypotheses.

Hypothesis 9: The higher a justice's workload was at the time he wrote his concurring opinion, the less likely he will be to withdraw his concurrence.

Hypothesis 10: The closer it was to the end of the term at the time a justice wrote his concurring opinion, the less likely he will be to withdraw his concurrence.

Collective Motivations

Similarly to the motivations for and against writing concurring opinions, the collective motivations with respect to the decision to publish are hypothesized to act as constraints on the justices' individual preferences. Thus, collective motivations are expected to increase the likelihood of withdrawing a concurring opinion. As previously discussed, collective motivations include confidence in the eyes of the public, efficacy over the lower courts, and the Court's institutional legitimacy with respect to Congress and the president. Because the public, the lower courts, Congress, and the president generally remain unaware of withdrawn concurring opinions, only concurrences that are published can be detrimental to the Court's collective goals. Thus, if individual justices are cognizant of and responsive to the Court's collective goals, it is expected that their decisions regarding concurring opinions will be most strongly motivated by collective goals at the publication stage. However, as discussed previously, if justices are forward-thinking when they choose to author a concurrence, they may be less likely to write a concurring opinion if they have a low expectation of actually publishing it. Thus, collective motivations may also influence the decision to write. Again, though, collective motivations appear most prominently at the publication decision point.

With respect to public confidence in the Court, since the public may consider decisions that have multiple opinions to be motivated more by policy than by law, the justices may attempt to minimize the number of separate opinions, including concurrences, in each case. Also, the presence of multiple concurring opinions may draw additional attention to a decision, thus increasing the decision's visibility in the eyes of the public. Such an increase in public salience may evoke a negativity bias in the public, as individuals who disagree with a Court decision generally hold stronger opinions than do those who agree with a decision, resulting in "a relatively small percentage of the public [triggering] a measurable decline in confidence" (Grosskopf and Mondak, 1998, p. 652). Similarly, the greater the number of opinions issued in a case, the more potential there is for either confusion or deliberate shirking at the lower court level in subsequent cases. Multiple opinions may give lower court judges a rationalization for subverting Supreme Court precedent, regardless of whether or not the subversion is legally justifiable.

There is a potential individual motivation component to this hypothesis as well. Similarly to the discussion of the parallel hypothesis in Chapter 3, the greater the number of concurring opinions in a case, the greater the likelihood that the justice agrees with at least one of them, and thus no longer needs to publish his own concurrence. As was the case in *Crews*, justices occasionally write a concurrence only to withdraw it and join a concurrence written at a later date by another justice. Thus, regardless of whether the motivation is primarily collective or individualistic, it is expected that justices will be affected the number of other concurring opinions that have been written in their

consideration of whether or not to withdraw their own concurrence. This leads to *Hypothesis 11*.

Hypothesis 11: The greater the number of concurring opinions that have been written in a case, the more likely it will be that a justice will withdraw his concurrence.

Furthermore, cases that overturn Supreme Court precedent may also be considered less legally warranted in the eyes of the public. When there is a public outcry condemning a decision as “activist,” there is typically little concern among the general public as to whether judicial activism was used in a legitimate fashion; instead, the public fixates on the label “activist” and its negative connotation. Similarly to the rationale for the previous hypothesis, cases that overturn precedent may be more visible to the public and thus likewise be susceptible to a negativity bias. Hence, justices may be more cautious in their decisions about concurring opinions when a case overturns precedent so as not to negatively affect the Court’s long-term institutional status in the eyes of the public. This brings us to *Hypothesis 12*.

Hypothesis 12: A justice will be more likely to withdraw his concurrence when a case overturns precedent.

Similarly, justices may be cautious in issuing concurring opinions when a case declares a congressional law unconstitutional since doing so may pit the Court directly against Congress and the president. Ruling a law as unconstitutional in itself is bold enough; to call further attention to the decision by promulgating numerous opinions may

be unwise. Furthermore, there may be a reciprocal relationship between public confidence in the Court and striking down congressional statutes, as Clark (2009, p. 981) finds that “as the level of public support for the Court decreases, the Court strikes down fewer laws.” This may indicate that Supreme Court justices are aware that declarations of unconstitutionality can be detrimental not only to Supreme Court-Congress relations, but also to the public’s confidence in the Court, and modify their behavior accordingly when confidence is already low. Thus, concurring opinions may exacerbate the detrimental effect declarations of unconstitutionality potentially have on both Supreme Court-Congress relations and public confidence. This leads to my thirteenth hypothesis.

Hypothesis 13: A justice will be more likely to withdraw his concurrence when a case declares a law as unconstitutional.

The final two hypotheses for this analysis have both individual and collective motivations, which directly compete against each other. In both of these instances, what is good for the individual is bad for the collective Court, and vice versa. Hence, these hypotheses present a direct test of whether collective goals actually constrain a justice’s individual motivations for publishing a concurring opinion. Referring again to a justice’s motivation for initially writing a concurrence, if the majority outcome coalition is minimum winning, a justice has a higher individual incentive to write so as to take advantage of his increased bargaining leverage.

Similarly, if the draft majority opinion has not yet received the votes necessary for it to be the opinion of the Court, a justice may write so as to attempt to have his

concurrence become the de facto legal holding for the lower courts under the “narrowest grounds” doctrine, or, again, to utilize his increased bargaining leverage to his best advantage. Conversely, in both instances, a published concurring opinion may be detrimental to the Court’s collective long-term status, making writing less attractive due to a higher likelihood of withdrawal. A concurrence in a case where the majority coalition is minimum winning or in a case that has no majority opinion may highlight the perceived politicization of the decision in the eyes of the public, create confusion or incentive for shirking in the lower courts, or de-legitimize the Court with respect to Congress and the president. The same competing motivations are equally, if not more so, relevant to the decision about publication, since as previously stated, only published concurrences can affect the collective Court’s institutional status.

At this decision juncture, however, there is an important divergence between the two scenarios, since the individual motivation for concurring in order to take advantage of increased bargaining leverage is distinct from the individual motivation for concurring in order to try to set the legal precedent for the lower courts under the “narrowest grounds” doctrine, as the latter necessitates publication whereas the former does not. Thus, the tension between individual and collective motivations is presumed to be strongest under the scenario where the concurring opinion is preventing a majority opinion for the Court. There does still exist, however, tension between the two sources of motivations when the majority outcome coalition is minimum winning, as “[t]here is nothing harder for the literate and voluble man to do than to keep quiet, except to throw away perfectly good published work when it is set for the printer” (Frank, 1958, p. 403), suggesting that, in

general, justices be hesitant to withdraw a written concurrence even if withdrawal is warranted. In other words, once a justice writes a concurring opinion, he may be loath to withdraw it, simply because he has put forth the effort into writing it. Thus, the following two pairs of hypotheses provide for the competing nature of the potential for simultaneous individual and collective motivations, each pointing towards different choices.

Hypothesis 14a: A justice who initially wrote his concurring opinion when the majority outcome coalition was minimum winning will be more likely to withdraw his concurring opinion due to collective Court motivations.

Hypothesis 14b: A justice who initially wrote his concurring opinion when the majority outcome coalition was minimum winning will be less likely to withdraw his concurring opinion due to individual motivations.

Hypothesis 15a: A justice who initially wrote his concurring opinion before the draft majority opinion attained enough votes to be the opinion of the Court will be more likely to withdraw his concurring opinion due to collective Court motivations.

Hypothesis 15b: A justice who initially wrote his concurring opinion before the draft majority opinion attained enough votes to be the opinion of the Court will be less likely to withdraw his concurring opinion due to individual motivations.

Methods

Data & Measurement

As with the previous analysis, the analysis in this chapter is based on data collected from Justices Blackmun and Brennan's personal papers, which are housed in the Library of Congress. Data were collected on every orally argued case within the October Term 1970 through 1979 terms. Written concurring opinions were identified primarily through the use of Justice Blackmun's opinion log sheets, while additional data were found within Justice Brennan's case files, as necessary. After excluding cases for which crucial data was missing, a total of 817 concurring opinions were written across 549 cases. Of those 817 concurring opinions, 54 of them were withdrawn, 752 were published as concurring opinions, four were published as majority opinions, and seven as dissenting opinions. As previously shown, *Table 4.1* provides the descriptive statistics for each concurrence's final disposition, by justice, while *Tables 4.3* and *4.4*, on the following pages, provide the descriptive statistics regarding publication or withdrawal for each of the independent variables.

The independent variables for this analysis are almost identical to those included in the previous chapter's analysis. *Table 4.5* provides a summary of the measurement of each of the independent variables for this analysis. One very important note, however, is that these variables were measured at the time the concurring opinion was first written; this is necessary due to the fact that justices must continually update their decision about whether or not to withdraw their concurrence, making it difficult to measure changes in the independent variables on a daily basis. Additionally, I argue that by measuring some

Table 4.3: Descriptive Statistics for Continuous Variables

	Concurrence Published			Concurrence Withdrawn		
	10 th Percentile	Average	90 th Percentile	10 th Percentile	Average	90 th Percentile
Distance to Majority Opinion Author	.016	.25	.556	.056	.261	.538
Tenure	1.1	2.15	3.09	.69	2.04	2.99
Timing of Writing	52.03	77.91	95.11	37.67	62.97	87.88
Reciprocity	0	.1	.23	0	.12	.26
Workload	3	9.25	16	3	8.24	15
Time to End of Term	45	118.85	231	49	147.67	275

of the independent variables based on when a justice first wrote his concurrence, we can gain further insight into whether the justice's initial motivation for writing has changed.

For example, though both minimum winning coalition and whether the draft majority opinion has achieved majority status, are measured at the time a justice writes his concurring opinion, it could be argued that the variables should also be measured at the time a justice chooses to withdraw or publish his concurrence, since neither variable remains static in every case. However, though it would be ideal to include the measurement of each variable both at the time of writing and the time of the decision

Table 4.4: Descriptive Statistics for Discrete Variables

	Concurrence Published		Concurrence Withdrawn	
	<i>Raw Frequency</i>	<i>Relative Frequency</i>	<i>Raw Frequency</i>	<i>Relative Frequency</i>
Justice has Less than Average Experience in Issue	256	93.09%	19	6.91%
Justice has Average Experience in Issue	248	93.58%	17	6.42%
Justice has More than Average Experience in Issue	248	93.23%	18	6.77%
Salient Case	189	95.94%	8	4.06%
Non-Salient Case	563	92.45%	46	7.55%
Highest Level of Outside Publications	112	92.56%	9	7.44%
Lowest Level of Outside Publications	83	90.22%	9	9.78%
Concurrence Not Joined	530	93.31%	38	6.69%
Concurrence Joined by One Justice	150	93.75%	10	6.25%
Concurrence Joined by More than One Justice	72	92.31%	6	7.69%
No Other Concurrences	529	92.64%	42	7.63%
One Other Concurrence	165	93.75%	11	6.25%
More than One Other Concurrence	58	98.31%	1	1.72%
Overturms Precedent	21	84.00%	4	16.00%
Does Not Overturn Precedent	731	93.60%	50	6.40%
Declaration of Unconstitutionality	110	95.65%	5	4.35%
No Declaration of Unconstitutionality	642	92.91%	49	7.09%
Minimum Winning Outcome Coalition	143	93.46%	10	6.54%
Greater Than Minimum Winning Outcome Coalition	609	93.26%	44	6.74%
Draft Opinion Has Majority	407	90.65%	42	9.35%
Draft Opinion Does Not Have Majority	345	96.64%	12	3.36%

Table 4.5: Variable Measurement and Data Source for Publication Analysis

	Measurement	Time of Measurement	Data Source
<i>Timing of Concurrence</i>	Number of Days Post-Oral Arguments	At time Concurrence was Written	Justices' Papers
<i>Tenure</i>	Number of Terms, plus one, the Justice has Served, Logged	By Term	
<i>Ideological Distance to Majority Opinion Author</i>	Ideological Distance Between the Concurring Justice and the Author of the Majority Opinion, Based on Percent Liberal Vote in the Case's Issue Area	At time Concurrence was Written	Based on Percentage Each Justice Voted in the Liberal Direction in each of the 13 Issue Areas in Spaeth Judicial Database
<i>Case Salience</i>	Whether the Case Appeared on the front page of the New York Times	By Case	Epstein & Segal's New York Times Measure
<i>Expertise</i>	Number of Opinions Previously Written within the Case's Issue Area	By Case	Based on Opinions Identified in the Spaeth Judicial Database
<i>Workload</i>	Total Number of Opinions on Which the Justice is Working	At time Concurrence was Written	Justices' Papers
<i>Time to End of Term</i>	Number of Days until the End of the Term	At time Concurrence was Written	Justices' Papers
<i>Reciprocity</i>	Percentage of Previous Cases in which Current Majority Opinion Author wrote a Concurrence while Concurring Justice was the Majority Opinion Author	By Case	Based on Concurrences Identified in the Spaeth Judicial Database
<i>Concurrence Joins</i>	Number of Justices Who Have Joined the Concurrence	Total Join Votes	Justices' Papers
<i>Number of Concurrences</i>	Number of Concurrences Written and not (yet) Withdrawn	At time Concurrence was Written	Justices' Papers
<i>Overturms Precedent</i>	Whether the Decision Overturms Precedent	By Case	Spaeth Judicial Database Variable
<i>Declares Congressional Law Unconstitutional</i>	Whether the Decision Makes a Declaration of Unconstitutionality	By Case	Spaeth Judicial Database Variable
<i>Minimum Winning Outcome Coalition</i>	Whether the Majority Outcome Coalition is Minimum Winning	At time Concurrence was Written	Justices' Papers
<i>Draft Opinion has Majority</i>	Whether the Draft Majority Opinion has Achieved a Majority of the Votes	At time Concurrence was Written	Justices' Papers

regarding publication, there are practical limitations to including the values of either variable at the time a justice chooses to withdraw or publish his concurrence. First, though we can ascertain the date a justice chooses to withdraw his concurring opinion through the justices' personal papers, the choice to publish is an on-going choice, in that each day a justice faces the choice of withdrawing his concurrence or allowing it to continue. If a justice fails to withdraw his concurring opinion prior to the publication of the Court's decision, the concurrence is also published. Thus, it would be necessary to utilize an event history type model to allow for time varying covariates; however, as it is not the timing of withdrawal or publication that is of interest, an event history model is unwarranted.

Empirical Analysis

Due to the dichotomous nature of the dependent variable, a logistic regression model was utilized. While we may expect that the likelihood of withdrawal may be different across either justices or cases, there is no standard clustering scheme within the judicial politics literature. Unlike the split population model in Chapter 3, the logistic regression model is not overly sensitive to whether or how the standard errors are clustered. The differences in which coefficients are statistically significant across models are expected, as the changes in significance are correlated with whether the variable in question is a justice- or case-specific variable. Additionally, as shown in *Table 4.6*, all the results that are statistically significant in the model without clustered standard errors are also statistically significant in at least one of the two models with clustered standard errors.

Table 4.6: Logistic Regression Analysis of the Influences on Whether a Justice Withdraws His Concurring Opinion

	Coefficient (Unclustered Standard Error)	Coefficient (Standard Error Clustered by Justice)	Coefficient (Standard Error Clustered by Case)
<i>Ideological Distance to Majority Opinion Author</i>	.616 (.775)	.616 (.517)	.616 (.719)
<i>Expertise</i>	.178 (.206)	.178 (.215)	.178 (.194)
<i>Case Salience</i>	-.795 (.418)	-.795** (.223)	-.795 (.433)
<i>Tenure</i>	-.412 (.213)	-.412* (.202)	-.412* (.182)
<i>Timing of Concurrence</i>	-.036** (.01)	-.036** (.011)	-.036** (.009)
<i>Publications</i>	-.07 (.135)	-.07 (.176)	-.07 (.145)
<i>Reciprocity</i>	.957 (1.215)	.957 (1.065)	.957 (1.016)
<i>Workload</i>	.01 (.042)	.01 (.031)	.01 (.037)
<i>Time to End of Term</i>	-.0004 (.003)	-.0004 (.003)	-.0004 (.003)
<i>Concurrence Joins</i>	-.092 (.199)	-.092 (.222)	-.092 (.199)
<i>Number of Concurrences</i>	-.097 (.288)	-.097 (.26)	-.097 (.235)
<i>Overturms Precedent</i>	1.352* (.633)	1.352* (.542)	1.352 (.768)
<i>Declares Law Unconstitutional</i>	-.587 (.504)	-.587 (.413)	-.587 (.548)
<i>Minimum Winning Outcome Coalition</i>	-.335 (.406)	-.335 (.412)	-.335 (.42)
<i>Draft Opinion has Majority</i>	-.838* (.372)	-.838 (.451)	-.838* (.381)
<i>Constant</i>	1.009 (1.141)	1.009 (1.131)	1.009 (1.044)

** Significant at the p<.01 level.

* Significant at the p<.05 level.

Number Concurrences (Observations) = 806

Log-Likelihood = -174.385

Thus, while I am reporting all three sets of standard errors – with no clustering, clustered by justice, and clustered by case – I will be discussing the statistically significant results for the unclustered model in the following sections.³³

Results

The results of the logistic regression model are presented in *Table 4.6*.³⁴ I will first focus my attention on the individual motivations hypotheses, secondly the collective motivations hypotheses, and lastly address the competing motivations hypotheses. I will conclude this section with a discussion of how both individual and collective motivations are important in a justice's decision to publish or withdraw his concurring opinion.

With respect to the justices' individual motivations for publishing, there are three hypotheses that are supported at the $p < .1$ level of significance, using a two-tailed hypothesis test. The salience of the case, the length of time a justice has been on the Court, and the time at which a justice initially chose to write his concurring opinion are all significantly related to a justice's choice about whether or not to withdraw his

³³ It could also be argued that a selection model is necessary to account for the fact that each justice chooses whether or not to circulate a concurrence, and only those justices who choose to do so are included in the model of whether or not the concurring opinion is published as a concurrence. However, there are several reasons not to utilize a selection model here. First, Heckman selection models are sensitive to model specifications and violations of assumptions, including a normality assumption (see Winship and Mare, 1992, p. 341). Second, there is currently no model that incorporates a duration model into the "selecting" equation, and, as I argue throughout this dissertation, it is necessary to take the timing of a justice's choice to concur into account.

³⁴ For the logit analysis, withdrawing a concurrence is coded as "1" while publishing a concurrence is coded as "0." Thus, the logit coefficients should be interpreted as the effect on the probability a justice withdraws his concurring opinion.

concurrence. I will address each of these in turn, before turning to a discussion of the noteworthy hypotheses that failed to achieve statistical significance.

Concurring opinions written in salient cases are less likely to be withdrawn than concurrences written in non-salient cases. The exact mechanism for this is unknown, though there are several possibilities. First, as previously discussed, justices' legal policy preferences may be more strongly held in salient cases, due to the case's legal or political importance. This could foster justices being less willing to compromise on their legal policy position, furthering the publication of concurring opinions due to heightened legal policy disagreement. A second possible rationale is that salient cases provide justices with a better opportunity to speak to their audiences and build their own reputation. This also would lead to an increased likelihood of the publication of concurring opinions, as withdrawn concurrences cannot further a justice's reputational goals, nor can they be used to speak to a justice's audience.

Additionally, I find that justices who have been on the Court longer are significantly less likely to withdraw their concurring opinions. This indicates one or more things. First, it suggests that more experienced justices may have a better sense of when concurring opinions will be successful in inducing accommodation by the majority opinion author, and thus do not waste their time-resources on writing concurrences that are unlikely to be published. In other words, more experienced justices are more skilled at using tools other than concurrences as bargaining chips, and thus are less likely to write concurring opinions that will need to be withdrawn because of their arguments becoming moot due to accommodation by the majority opinion author. The second

possibility is that justices' preferences become more strongly held the longer they serve on the Court. Either or both rationales would lead to finding a significant, negative relationship between a justice's tenure and his likelihood of withdrawing a concurring opinion.

It is unsurprising that the earlier a justice writes his concurring opinion, the more likely he is to withdraw it, for two distinct reasons. First, since the decision-making process over the course of a case is a fluid, dynamic process, things change over the course of that decision-making process. Hence, it is reasonable to expect that in most cases the earlier a justice writes a concurring opinion, the more changes there will be prior to the announcement of the Court's decision. Secondly, if a justice is attempting to use his concurrence to influence other justices, including but not limited to the majority opinion author, if he succeeds, the concurring opinion may no longer be necessary, particularly if the majority opinion author accommodated the concurring justice's legal policy views. Conversely, if a justice's attempt at using a concurrence to influence fails, he may reevaluate the purpose of his concurrence; if he chooses to publish his concurring opinion, his motivation is no longer short-term strategic, but rather of another type of motivation, as by definition short-term strategic motivations are aimed at influencing within the case at hand. Instead, publication could then be motivated by sincere legal policy disagreement or by a preference to maintain a credible threat of publication in the eyes of the other justices for use in future cases and concurring opinions.

The significant negative relationship between time of initial writing and likelihood of withdrawing the concurrence also has implications for justices who first wrote their

concurring opinions later in the decision-making process. Typically, since more justices have made decisions about which opinion(s) they will join or write, justices who circulate concurrences later in the decision-making process either are responding to legal policy disagreement or are engaging in long-term strategy. Regardless of which of these two motivations is actually driving a justice's choice to write, both necessitate publication in order for the motivation to write to be fulfilled. Furthermore, by writing later in a case's decision-making process, a justice is likely to face fewer changes to the legal policy content of the majority opinion, the votes and opinions of the other justices, or other case related characteristics. Thus, it is not surprising that justices who write concurring opinions later in the decision-making process are less likely to withdraw their concurring opinion.

Perhaps the most intriguing non-significant variable is that of the ideological distance between a concurring justice and the majority opinion author. The insignificant coefficient indicates that concurring justices who are ideologically proximate to the majority opinion author are equally as likely to withdraw their concurrences as concurring justices who are ideologically remote from the majority opinion author. Thinking about this result in light of a justice's motivation for writing a concurrence, if we assume that full accommodation leads to the withdrawal of the concurrence, this seems to suggest that justices who are ideologically proximate to the majority opinion author are no more likely to be accommodated by the majority opinion author than are justices who are ideologically more remote. In other words, the likelihood of using a concurrence to successfully induce accommodation is unrelated to the distance between a

justice and the majority opinion author. In Chapter 3, I found that the ideological distance between the majority opinion author and a justice was significantly related to whether a justice chose to write a concurring opinion; the implications of the two empirical models, the split population event history model described in the previous chapter and the logistic regression analysis from this chapter, will be discussed as taken together in the following chapter. Thus, there will be a more complete discussion of the effects of ideological distance throughout the concurring writing process in Chapter 5 of this dissertation.

Moving to the results of the collective motivation hypotheses, we find that justices are more likely to withdraw their concurring opinions in cases that overturn precedent. Interestingly, there is no significant relationship detected between declarations of unconstitutionality and the likelihood of withdrawal. This appears to beg the question about the difference in long-term effects; as previously discussed, declarations of unconstitutionality have obvious implications for Court-Congress relations, whereas such is not necessarily the case when overturning precedent. One might wonder what the mechanism is behind the justices' behavioral differences in the two scenarios; this question will be discussed further in the final chapter of my dissertation, with respect to implications and avenues for future research.

The last set of hypotheses for this analysis contained competing hypotheses, where judicial behavior could be expected to further either individual or collective goals, but not both. The significant, negative relationship between the status of the draft majority opinion as the opinion of the Court and the likelihood of withdrawal indicates that if a

justice writes a concurrence after the draft majority opinion has been joined by a majority of the justices, the concurring justice is less likely to withdraw his concurrence. This suggests that justices are both cognizant of and reactive to the detrimental effect plurality opinions have on the Court's long-term institutional status. It could also be that justices who write concurrences after the draft majority opinion has achieved majority status have a different motivation for writing than do justices who write before majority status has been achieved. In other words, this may indicate that these concurring opinions are more reactive in nature, rather than being an attempt to proactively influence the majority opinion author or other justices. Conversely, and perhaps because they have a lesser long-term implications, justices do not withdraw their concurring opinion at different rates depending on whether or not the majority coalition is minimum winning at the time which they first circulated their concurrence.

Figures 4.1 through 4.4 provide visual comparisons of how changes in the significant independent variables affect the probability that a justice withdraws his concurring opinion. *Figure 4.1* depicts the effect of the timing of the initial writing of a concurring opinion on the probability of withdrawal, controlling for whether the case overturns precedent and whether the draft majority opinion had achieved majority status at the time the concurrence was written. In *Figure 4.1*, as well as the following figures in this chapter, all the remaining variables were held at their median or mode. As shown, a concurring opinion that was circulated fewer than 20 days into the case's decision-making period and prior to the draft majority opinion achieving majority status in a case that overturns precedent has the highest probability of withdrawal, at around 70%.

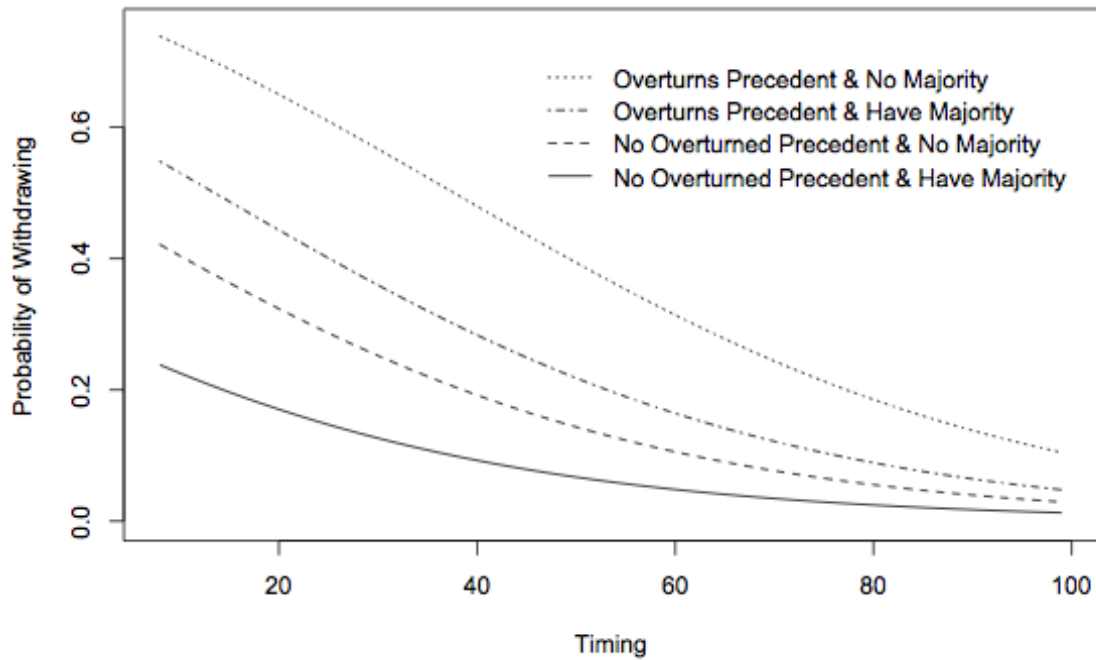


Figure 4.1: Probability of Withdrawing a Written Concurrence by When the Concurrence was First Circulated, Varying Whether the Case Overturns Precedent and Whether the Draft Majority Opinion has a Majority

Conversely, a concurrence that was circulated approximately 95 days into the case's decision-making period and after the draft majority opinion had achieved majority status in a case that does not overturn precedent has the lowest probability of withdrawal, at just over 0%. *Figure 4.2* is similar to *Figure 4.1*, except that it controls for the salience of a case rather than whether the case overturns precedent.

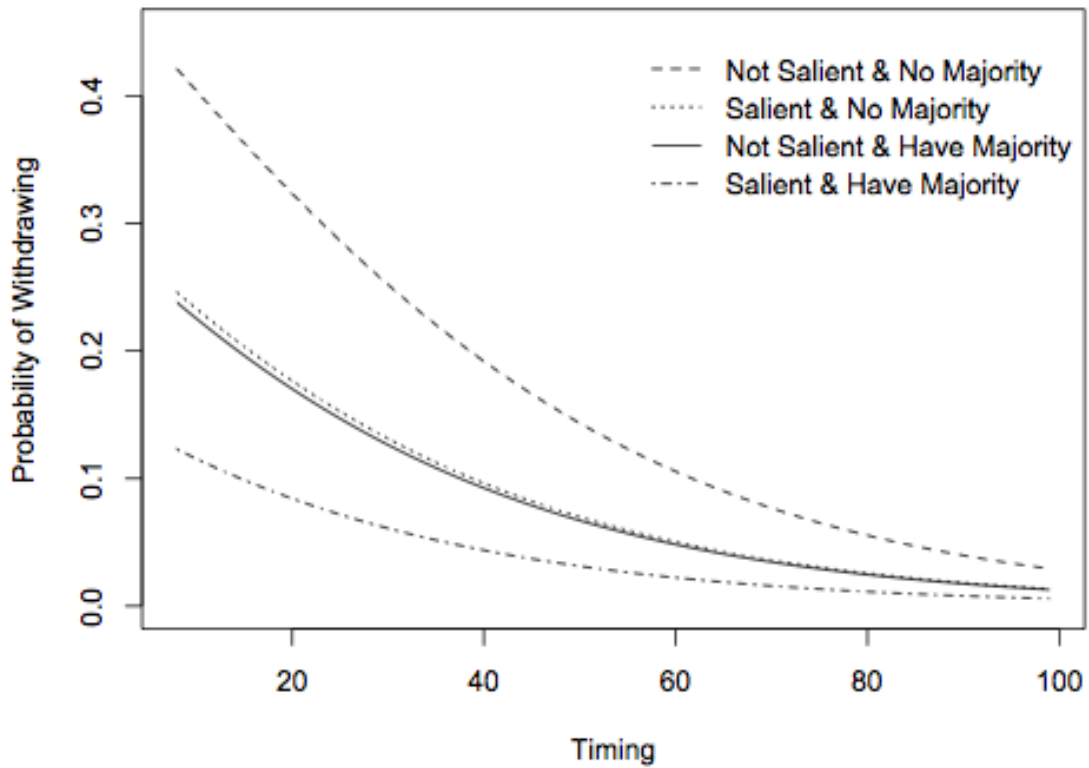


Figure 4.2: Probability of Withdrawing a Written Concurrence by When the Concurrence was First Circulated, Varying Whether the Case is Salient and Whether the Draft Majority Opinion has a Majority

In *Figure 4.2*, however, the timing of the initial circulation of the concurring opinion is most impactful in non-salient cases where the concurrence was circulated prior to the draft majority opinion receiving the necessary votes to have a majority behind it. However, when we look at the y-axis, we see that Timing has a greater substantive impact in *Figure 4.1* than in *Figure 4.2*.

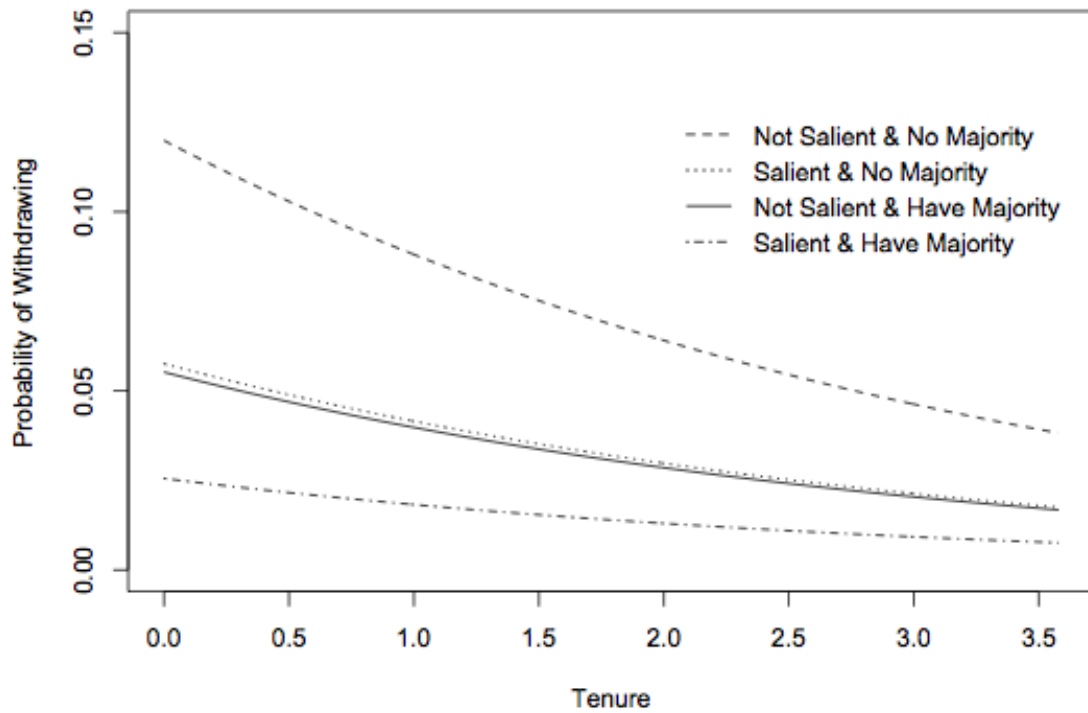


Figure 4.3: Probability of Withdrawing a Written Concurrence by a Justice's Tenure, Varying Whether the Case is Salient and Whether the Draft Majority Opinion has a Majority

Perhaps most striking in *Figures 4.3* and *4.4*, which show the Tenure variable on the x-axis and control for case salience and either whether the draft opinion has achieved majority status or whether the case overturns precedent, is that the negative effect of increasing tenure on the probability of withdrawing a concurrence is strongest in non-salient cases, as indicated by the very sharp slopes of the non-salient lines in both figures.

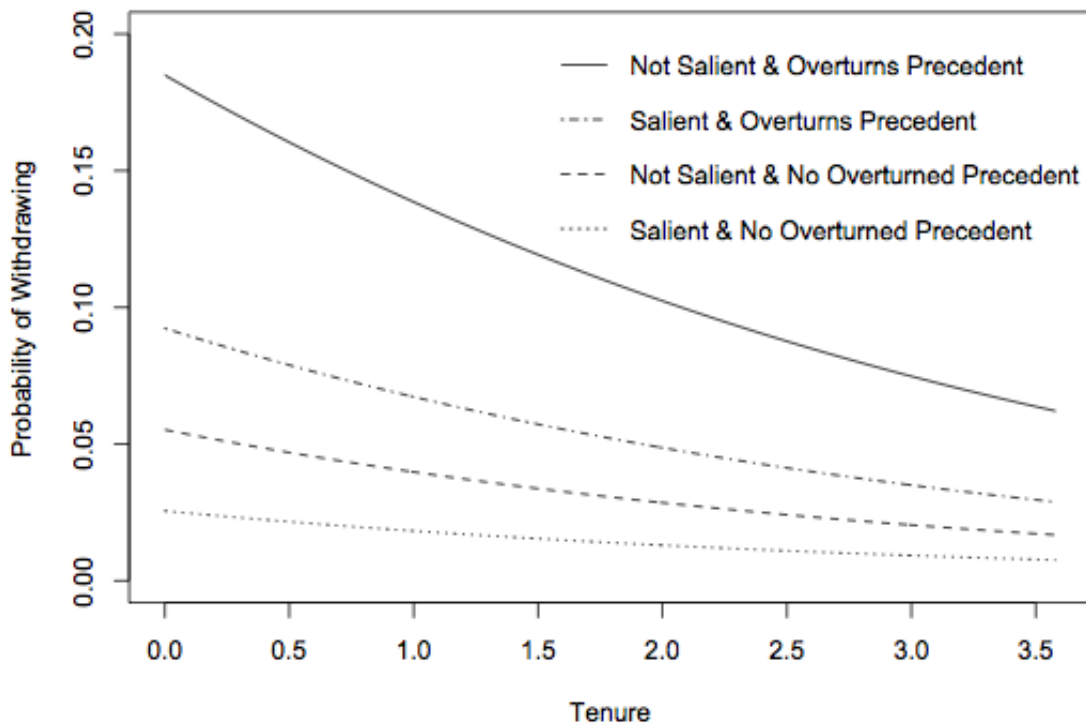


Figure 4.4: Probability of Withdrawing a Written Concurrence by a Justice's Tenure, Varying Whether the Case is Salient and Whether the Case Overturns Precedent

Conclusion & Discussion

The results of this analysis indicate that justices do have multiple motivations for publishing or withdrawing an already written concurring opinion. As a published concurrence cannot influence the decision-making process within a case, since the decisions have already been finalized at the time of publication, at this decision point justices' legal policy preferences cannot be met through short-term strategy. Instead, in

terms of legal policy preferences, the decision to publish a concurring opinion can be motivated by a justice's sincere legal policy preferences, which would amount to position taking, or long-term strategic goals, such as influencing the lower courts. Case salience and possibly a justice's tenure on the Court appear to accentuate legal policy disagreement so that a justice is less likely to withdraw his concurrence in salient cases and the longer he has been on the Court.

A potentially noteworthy implication of the significant negative coefficient on the variable measuring the time within a case's decision-making process at which a justice wrote his concurring opinion is that when a justice circulates a concurrence early in the process, he is significantly more likely to withdraw it. This implies that majority opinion authors could (or, in a rational choice sense, perhaps even should) view early concurrences as less credible threats to the long-term significance of the doctrine put forth in the majority opinion. At this point, it is unknown whether majority opinion authors treat all concurrences as equally likely to be published, or whether they are more responsive to some concurring opinions than to others, perhaps based on the timing of the writing, the concurrence's author, or the content of the concurrence. All these questions provide fodder for future analyses and would necessitate the inclusion of both published and withdrawn concurring opinions in the data.

Based on this analysis alone, it is difficult to determine the potential for long-term strategic legal policy actualization through the use of published concurrences, except in the rare instance of the narrowest grounds doctrine being relevant. Since this is such a rare occurrence, this study does not include a strong test of whether justices are motivated

by long-term strategy aimed at achieving their preferred legal policy position in the lower courts. In order to more fully examine the potential long-term legal policy motivations for publishing a concurrence, it seems necessary to examine the content of concurring opinions, as the content may indicate more precisely whether the justice is attempting to provide lower courts with the opportunity to utilize his concurrence, rather than the majority opinion, as legal precedent. There already exists a body of work aimed at categorizing concurring opinions (see, for example, Ray [1990], and Corley [2010]); thus, one could incorporate concurrence typology into this analysis in order to provide a more complete test of a concurrence's potential for use as a vehicle of long-term legal policy preference actualization.

Similarly, one could examine the content of concurring opinions to determine whether justices use them as vehicles for signaling Congress or the president, as an attempt to affect legal policy through a different avenue. Hausegger and Baum (1999) find that Supreme Court justices will occasionally use the majority opinion to signal Congress, so that the justices can attempt to achieve both good law and good policy. It seems to be a logical extension that a concurring opinion could be utilized in a similar manner. Perhaps one of the most fruitful extensions of this analysis would be to consider whether a justice chooses a regular or a specially concurring opinion. The distinction is particularly meaningful for long-term motivations, as either type can potentially be individually motivated as an attempt to influence future legal policy, while specially concurring opinions can be considered to be more detrimental to collective long-term

concerns, as they have the potential to fracture the majority coalition so that a plurality opinion is issued instead of a majority opinion.

An additional extension of this analysis could allow for further examination of judicial motivations by considering whether or not a justice was actually accommodated by the majority opinion author instead of using ideological distance and the timing of the circulation of the concurrence as proxies. Without knowing whether a justice was accommodated, we cannot be certain why he withdrew their concurrence; it may be that “even when a justice was not satisfactorily accommodated, he or she would not necessarily write separately.... [because] the justices, when considering their options, take into account the impact the opinion will have on the legal community” (Corley, 2010, p. 70). Thus, to more fully examine judicial motivations, particularly with respect to their choices about publishing a written concurrence, we must fully consider the actions of the other justices, and particularly those of the majority opinion author.

This analysis does, however, provide a test of whether justices are constrained by long-term collective Court considerations, such as legitimacy and efficacy. I find that in their decision about whether to publish a concurring opinion, justices are both cognizant of and responsive to the potential negative effects of their decision on the Court’s long-term institutional status, particularly when a concurring opinion may mean the difference between a plurality and a majority opinion. It is perhaps telling that in the decision about publication, the only significant long-term collective hypothesis is that justices are more likely to withdraw their concurrence if they first wrote when the draft majority opinion only had a plurality of the votes behind it. Arguably, plurality opinions are a failure of

the Court's primary role, to "guide and bind the process of adjudication both in the state courts and in the lower federal courts" (Davis and Reynolds, 1974, p. 61), and thus potentially represent the strongest deleterious effect on the Court's status as an institution. This may be the impetus for justices being responsive to the need for a majority opinion, but not responding to other long-term collective Court considerations, such as in the instances where the majority coalition is minimum winning or when there are already multiple concurring opinions written. It may also be, however, that if there are circumstances present under which the Court's long-term stature may be diminished, justices choose not to write a concurring opinion in the first place, and thus never reach the publication decision. This possibility will be discussed more fully in the subsequent chapter, where I discuss the implications of the models in both this chapter and the previous chapter when taken together.

On its own, this analysis shows that justices must weigh their individual motivations for publishing a concurring opinion against the more collective motivations for withdrawing a concurrence. In the next chapter, I will discuss the implications of this analysis when considering that the decision to publish is the second decision-point within a two-stage process.

Chapter 5: Conclusion

In this dissertation, I have conceptualized judicial behavior about the use of concurring opinions to be a dynamic process with two primary decision points, with both decisions motivated by a combination of individual and collective preferences. I model the decision to write a concurrence as distinct from the decision to publish one, though I do expect the decision to write to have some effect on the decision to publish. I hypothesize that justices have, to one degree or another, differing motivations for writing versus publishing a concurring opinion. Thus far, I have discussed the results of the models for the two decisions separately; I will now discuss the results of the two models, as well as their implications for judicial behavior, taken together. A summary of the statistically significant results from both models is provided in *Table 5.1* on the following page. I will first provide a discussion of individual motivations, which includes both legal policy and non-policy oriented motivations, and then will proceed to discuss collective motivations. Subsequently, the remainder of this chapter will then discuss avenues for future research.

Table 5.1: Summary of Statistically Significant Results³⁵

	Probability of Circulating	Timing of Circulation³⁶	Probability of Withdrawing
<u>Individual Legal Policy Motivations</u>			
<i>Ideological Distance to Majority Opinion Author</i>	+	n.s.	n.s.
<i>Extreme Majority Opinion Author</i>	n.s.	—	n/a
<i>Issue Area Experience</i>	n.s.	n.s.	n.s.
<i>Case Salience</i>	n.s.	n.s.	—
<i>Tenure</i>	+	+	—
<i>Multiple Laws</i>	n.s.	n.s.	n/a
<i>Per Curiam Opinion</i>	n.s.	n.s.	n/a
<i>Unanimous Court</i>	n.s.	n.s.	n/a
<u>Individual Non-Policy Motivations</u>			
<i>Timing of Circulation</i>	n/a	n/a	—
<i>Publications</i>	—	n/a	n.s.
<i>Reciprocity</i>	+	n.s.	n.s.
<i>Workload</i>	—	—	n.s.
<i>Days Until Term Ends</i>	—	—	n.s.
<i>Number of Concurrence Joins</i>	n/a	n/a	n.s.
<u>Collective vs Individual Motivations</u>			
<i>Number of Concurrences Already Written</i>	n.s.	n/a	n.s.
<i>Overturms Precedent</i>	n.s.	n.s.	+
<i>Declares Federal Statute Unconstitutional</i>	n.s.	n.s.	n.s.
<i>Minimum Winning Coalition</i>	+	+	n.s.
<i>Draft Majority Opinion Joined by Majority</i>	+	+	—

³⁵ A “+” indicates a statistically significant positive relationship, whereas a “-” indicates a statistically significant negative relationship. “n.s.” denotes an insignificant relationship, while “n/a” indicates that the variable was not included in that particular model.

³⁶ For the duration analysis of when a justice circulates a concurring opinion, a positive coefficient indicates an increase in the hazard of concurring, which means the justice is more likely to write earlier in the decision-making process.

Conclusions & Implications

Broadly speaking, this dissertation aimed to build upon and expand knowledge about judicial motivations. More specifically, I asked whether justices are simultaneously cognizant of and responsive to both individual and collective motivations. As concurring opinions are individualistic in nature, they provide an excellent avenue through which to examine the competition between individual and collective motivations. As I have found throughout the empirical analyses, individual justices are indeed motivated by both individual and collective goals. Rather than each justice assuming his or her individual decisions will be unlikely to affect the Court's long-term institutional status, I found that each justice does consider the potential effect on the collective Court. This is not to say that individual preferences and goals do not matter. On the contrary, justices do behave in expected manners with respect to individual motivations; in addition to being responsive to collective Court concerns, justices also make decisions based on their sincere legal policy preferences, intra-case strategic goals aimed at influencing the content of the majority opinion, and non-policy considerations such as workload and collegiality. I will now discuss the specific results and implications of the analyses contained in this dissertation as a whole, first those pertaining to individual legal policy motivations, secondly motivations stemming from individual non-policy goals, and lastly those relating to collective motivations. For each sub-section, I will first provide an overview of the conclusions and implications, and will then discuss the specific results and their implications in more detail.

Individual Motivations: Legal Policy

In general, the previous analyses indicate that Supreme Court justices' decisions about using concurring opinions are motivated in part by their legal policy preferences. These motivations can be either sincere expressions of legal policy disagreement or short-term, intra-case strategic in an attempt to influence the legal policy content of the majority opinion. While it is unsurprising that legal policy preferences matter on the Supreme Court, it may be surprising to some that these preferences do not appear to overpower the justices' other motivations, at least with respect to concurring opinions. Indeed, after controlling for several factors that may increase or decrease justices' disagreement thresholds, ideological disagreement with the majority opinion author, as measured by the ideological distance between the two justices, is only a significant predictor of whether justices will write a concurring opinion, and not when in the process they first circulate their concurrence or whether they publish it. However, a number of the variables hypothesized to exacerbate or mitigate disagreement between the majority opinion author and the other justices are significant at one or more stages of the concurring process, thus indicating that legal policy disagreement is an important influence in whether justices write a concurring opinion, when they first circulate it, and whether they publish it.

Though I have not attempted to disentangle justices' choices based on sincere expression of versus strategic attempts at actualizing legal policy preferences, by considering three distinct choices regarding concurring opinions, namely, the choice to write, when a justice circulates, and whether the concurrence is published, we are able to

glean information about the potential for strategic behavior in the use of concurring opinions. As the timing of when a justice chooses to circulate his concurring opinion provides information about whether or not the justice is potentially engaging in strategic behavior by attempting to influence the content of the majority opinion or other justices' choices, we can make inferences about the extent to which justices behave strategically. For example, the longer a justice has been on the Court, the more likely it is that he will circulate a concurrence earlier in a case's decision-making process, indicating that he may be more willing to act strategically than would justices who are newer to the Court. Conversely, there does not appear to be a strategic element to ideological disagreement between a potentially-concurring justice and the majority opinion author, as ideological distance is not significantly related to when a justice chooses to circulate a concurrence.

As concurring opinions provide an avenue through which justices can express their own legal policy preferences, we would expect concurrences to be, at least in part, motivated by a justice's legal policy disagreement with the majority opinion author. As concurring opinions also have the potential to induce accommodation by the majority opinion author, we might also expect that, once a justice has written a concurrence, the closer ideologically he is to the majority opinion author, the more likely it is that the concurring justice's preference will be accommodated so as to preempt the necessity of publishing the concurrence. While the first expectation is supported by my analysis in Chapter 3, Chapter 4's analysis does not support the second expectation. The substantive effects of ideological distance vary according to the values of other variables. To briefly summarize, the effect of ideological distance is greatest at times when the majority

coalition is not minimum winning and has not yet achieved the necessary votes for the draft opinion to be the opinion for the majority. Under this scenario, going from an ideologically proximate justice to an ideologically distant justice increases the likelihood of circulating a concurring opinion by seven-fold. Conversely, in the opposite scenario, where the draft opinion has been joined by a majority of the justices, and the majority coalition is minimum winning, moving from the least ideological distance to the greatest about doubles the expected probability that a justice will write a concurrence. Comparing the two situations, justices making decisions under the latter conditions are uniformly more likely to circulate concurring opinions than are justices making decisions under the former conditions, regardless of ideological distance. Indeed, moving between the two conditions actually has a larger substantive effect on the likelihood of writing than does ideological distance. Additionally, in Chapter 4's analysis, I found that ideological distance is not significantly related to when during the case's decision-making process a concurrence is first written. In other words, ideologically distant justices are equally likely to write a concurring opinion early in the decision-making process as are ideologically proximate judges. This appears to indicate that ideological distance does not influence the likelihood that a justice will attempt to use a concurrence as a bargaining tool.

By considering the results of these models together, I find that a legal policy disagreement motivates justices to write concurring opinions, but does not affect how they use the concurrence, such as to bargain, or whether they eventually publish it. This is an intriguing finding, as since justices who are ideologically distant from the majority

opinion author are more likely to write a concurrence, but no more likely to write early in the decision-making process, this suggests that, controlling for the other variables in my model, ideological distance is primarily a measure of a justice's sincere disagreement rather than an indication of the likelihood that a justice engages in short-term strategic behavior. Obviously, this is something that needs additional exploration; there are a number of ways that this finding could be more fully investigated, such as including concurrence types in the model or examining how else a justice is corresponding with the majority opinion author, both before and after writing the concurrence.

There are several factors that I hypothesized would either exacerbate or mitigate legal policy disagreement. The first of these is case salience. I hypothesized that justices would be more likely to write concurring opinions, utilize them early in the decision-making process as a bargaining tool, and publish their concurrences in salient cases. Only the last of these hypotheses is supported by my analyses. Justices are no more likely to write a concurrence in salient cases than they are in non-salient cases; similarly, they are no more likely to utilize concurring opinions early in the decision-making process in salient versus non-salient cases. Instead, salience influences only the likelihood of publishing a written concurrence. Indeed, justices are about twice as likely to publish a concurrence in a salient case as in non-salient cases.

There are a few possible implications to draw from these results. First, it may be that majority opinion authors are less likely to be accommodative in salient cases, thus leading to the higher likelihood of publishing a written concurrence when a case is salient. It may also be that in salient cases, justices are less likely to withdraw their

concurrences so as to further their reputation among their audiences. Salient cases may provide justices with an opportunity to widen their audience or to speak directly to an audience to whom the case is salient.

A third implication is that in salient cases justices may be more influenced by the potential long-term strategic goals of actualizing their legal policy preferences through the interpretation of the decision at the hands of the lower courts. It may be that justices' long-term legal policy motivations are stronger in salient cases, and thus they are more willing to attempt to influence the lower courts through concurring opinions when the case is salient. This could potentially be tested by examining the content of concurrences in more detail, as both the extent of the legal policy differences between the concurring justices and the majority opinion author as well as what the concurrence is advocating would be important for analysis purposes.

Lastly, and similarly to the first, the concurring justice may be more firm in his preferences in salient cases, and be less likely to yield to the compromise necessary to join the majority opinion. This may also have additional support due to justices not attempting to use concurrences to bargain early in the decision-making process significantly more in salient cases; perhaps justices are aware that either their own or the majority opinion author's legal policy preferences are less open to bargaining and accommodation, and thus justices are less inclined to attempt to bargain. A study examining rates of attempted bargaining through means other than concurring opinions could potentially provide illumination on the veracity of this particular implication.

Similarly to the hypothesized influence of case salience, I also suggested that issue area expertise could exacerbate legal policy differences between a justice and the majority opinion author. While there are multiple reasons for this, I expected that the more expertise a justice had in the case's issue area, the more likely he would be to write a concurring opinion, to use it as early in the decision-making process as a bargaining tool, and to publish his written concurrence. All three of these expectations fail to receive support in my models. Even though there may be a reciprocal relationship between concurring opinion-writing and expertise, justices who are experts in the case's issue do not make decisions about concurrences in a manner significantly different from their less experienced colleagues.

In addition to experience within a particular issue area, justices may also gain general experience the longer they are on the Supreme Court. I hypothesized that justices who have relatively little experience on the Court will be less confident about when it is appropriate to write a concurring opinion, as well as potentially less efficient in their use of time, and thus less likely to write concurrences. Additionally, less experienced justices were hypothesized to be less likely to utilize concurring opinions in an intra-case strategic manner early in the decision-making process, as well as be more likely to withdraw their written concurrences, due both to uncertainty about the norms associated with concurring behavior and a lesser ability to ascertain the likelihood a concurrence will be published at the time the concurrence is initially written. All three of these expectations are supported by the data. As a justice's tenure on the Court increases, the probability he writes a concurrence also increases, as does his use of concurring opinions

as bargaining tools early in the decision-making process. Conversely, his probability of withdrawing his written concurrence decreases. Justices with the most years on the Court are more than twice as likely to publish their concurring opinions as justices who are new to the Court.

These results seem to indicate that experienced justices are more likely to attempt to bargain with the majority opinion author, but are not necessarily more successful than their less experienced colleagues, as accommodation would be expected to result in withdrawing the concurrence, whereas experienced justices are actually less likely to withdraw their written concurring opinions. There is another possibility, however. With experience, justices may realize the utility in maintaining a credible threat of publishing their written concurrences, and thus are more likely to write early in the process so as to attempt to induce accommodation, but, if not accommodated, are more likely to publish their concurrence than are similarly non-accommodated inexperienced justices. Again, this dynamic could be studied more fully through an examination of the justice's actions both before and after he chooses to write his concurrence. In other words, Court memoranda could be used to determine whether a justice was actually accommodated, and thus we could test whether, in light of refused accommodation, experienced justices are at that point more likely to publish their concurrence than are less experienced justices.

Individual Motivations: Non-Policy

On the Supreme Court, there are a number of non-policy preferences that justices may hold. Non-policy preferences can be related to working conditions, such as collegiality and time pressures, or to furthering a justice's own aura or reputation. I found in the analyses contained in earlier chapters that non-policy preferences do matter, and that, like ordinary people, Supreme Court justices are motivated by more basic preferences in addition to their legal policy preferences. More specifically, collegiality norms and a justice's workload both constrain justices' decisions about utilizing concurring opinions, though the collegiality norm appears to operate at least in part through a tit-for-tat reciprocal relationship.

Perhaps primarily due to the specific non-policy related variables included in my analyses³⁷, non-policy motivations are not significantly related to whether a justice publishes a concurring opinion, but they are influential in both whether and when a justice circulates a concurrence. Indeed, aside from reputational goals, for which there is no direct measure in my analyses, the link specifically between the choice about publishing a concurrence and non-policy motivations is less than clear. Instead, non-policy motivations were expected to be significant in the earlier decision points on the concurring process, the decisions of whether and when to write a concurrence. Referring again to judicial reputation, it may be that certain other significant predictors of the decision to publish may be tapping into a justice's reputational goals. For example,

³⁷ It may be that if other non-policy variables were included in the analyses, they would or could be significantly related to publication decisions; in other words, simply because none of the non-policy related variables I included were significant does not mean that non-policy motivations are definitely irrelevant for decisions about publication.

justices who have been on the Court longer are less likely to withdraw written concurrences; similarly, justices are less likely to withdraw concurring opinions when the case is salient. Both of these may have reputational goal components; perhaps longer-tenured justices are more likely to be attempting to build their reputation and salient cases may provide better vehicles through which to increase a justice's reputation.

One of the newer variables included in my model is that conceptualizing the idea that justices who violate Court norms by writing concurrences excessively or unnecessarily may be subjected to a tit-for-tat strategy of reciprocity so as to discourage the justice, in the future, from continuing to violate Court norms with respect to concurring opinions. While I hypothesized that the previous use of concurring opinions by the current majority opinion author against each of the remaining justices could potentially influence whether a justice write a concurrence, when they do so, and whether they publish the concurring opinion, I was unsure whether publication was necessary for the sanction to be an effective deterrent to future concurring opinion-writing by the current majority opinion author. The data support the first expectation only; there does appear to be a reciprocal use of concurring opinions on the Supreme Court, even controlling for ideological disagreement as measured by the distance between the majority opinion author and the other justices. If the current majority opinion author has frequently concurred against one of the other justices when that justice was the majority opinion author, that justice is more likely to write a concurring opinion in the current case. However, the justice who has concurred in the current case is no more likely to publish the concurrence than is a justice who has not previously had his majority opinions concurred against by the current

majority opinion author. This may indicate that writing a concurrence is a sufficient sanction, even though it may not be published. Thus, internal pressures to refrain from excessively concurring appear to be enough; making the sanction public might actually result in negative long-term consequences for the Court as an institution, whereas keeping the sanction internal eliminates the possibility of collective Court consequences. This idea of reciprocal concurring opinions could also be investigated more fully by incorporating the concurrence typology into the model, as concurring opinions that express extensive disagreement with the legal policy content of the majority opinion would be less likely to be motivated by a tit-for-tat strategy of reciprocity. Too, it may be that reciprocity is applicable only on the margins; it may give a justice just enough of an additional reason to write a concurrence, when he was otherwise on the fence about writing.

As concurring opinions, particularly those motivated by sincere legal policy disagreement, are an expression of a justice's opinion, some justices may be more likely to engage in such expression than others. Considering that writing articles, books, book reviews, and concurring opinions are all discretionary choices, I hypothesized that similar processes, such as a predilection for expressing one's opinion, would drive discretionary writing both on and off the Court. However, my analyses did not support this hypothesis. Indeed, justices who were prolific writers off the Court were actually *less* likely to author concurring opinions. There are a couple avenues through which this finding could be investigated further. First, it may be that justices do not have the time to engage in both forms of discretionary authorship and, instead, must choose between writing

discretionary opinions on the Court and publications off the Court. This could be examined through a more detailed measurement of off-Court publication activities on a yearly basis to see if an inverse relationship does exist. Secondly, this finding could imply that justices have different views on the role of Supreme Court justices, both off and on the Court. Role conceptions have been studied both on the Supreme Court (see Gibson, 1978) and on state Supreme Courts (see Wold [1974] and Allen and Wall [1993]). It may be that justices who frequently write outside of the Court have different role conceptions of judicial behavior than do justices are less prolific writers. This speculation could potentially be further examined through analyzing the content of justices' non-Court writings to see if they are advocating for a certain role orientation; previous literature on role conceptions could also be extended to try to explain why justices who frequently write off the Court are less likely to write concurring opinions on the Court. One final possibility for this result is the small number of justices in my analyses; it may be that the result is driven more by the idiosyncratic publication tendencies of the justices on the Court during the 1970s, rather than being viewed as indicative of a broadly applicable underlying mechanism.

Though all Supreme Court justices have clerks to assist them with both research and opinion writing, there is still a finite amount of time during which opinions can be written. Thus, it seems reasonable to expect that justices will weigh the opportunity costs of writing an additional concurring opinion against the perceived benefits of concurring, and that if the costs outweigh the benefits, the justice will refrain from writing. Time is one pressure that all the justices face, though they may not all be equally affected, in that

some justices simply may be more efficient at opinion-writing than others. A justice's tenure on the Court, as well as his experience in the case's issue area, may decrease the opportunity costs associated with writing a concurrence. However, even after controlling for these factors, the number of opinions on which a justice is currently working is also expected to be influential in the justice's determination of whether the benefits of writing a concurrence outweigh the costs. While a justice's workload does affect whether a justice writes a concurring opinion, as well as when during the decision-making process he writes, workload does not have a significant effect on whether a justice publishes his concurrence. According to my analyses, the higher a justice's workload, the less likely it is that the justice will write a concurrence, but if he does write, he is more likely to do so later in the decision-making process.

The effect of workload on circulating a concurring opinion appears to be strongest at the low end of the workload spectrum; moving from having a workload of four opinions in progress to a workload of seven has a substantively greater effect than moving from a workload of 24 to one of 27. The primary implication here is that justices with higher workloads are less likely to use concurring opinions as a bargaining tool. This suggests that, if concurrences are indeed one of the most effective bargaining tools available to the justices, justices with high workloads may be less effective at bargaining. Additionally, majority opinion authors may be able to view threats to concur issued by justices with higher workloads as less credible than threats issued by justices with lower workloads. Indeed, justices may have an incentive when it comes to bargaining leverage to keep their workload down, so as not to inhibit their credibility in threatening to concur.

Due to the expectation that justices feel more pressured to finalize case decisions as the end of the term approaches, I hypothesized that the approaching end of term would have effects on justices' decisions about concurring opinions similar to the effects of an increased workload. However, the results of the models were unexpected, as they indicate that justices are actually more likely to write concurring opinions as the end of the term approaches, and in addition, they are more likely to write concurrences early in the decision-making process later in the term. The approaching end of term has no significant influence on whether a justice publishes his written concurrence, however.

While not in line with my hypotheses, these results could indicate that cases decided later in the term are somehow different from cases decided earlier in the term. It may be that an unmeasured factor, such as legal complexity or uncertainty, is in fact influencing both when a case has its oral arguments and when the decision is finalized. Additionally, it may be that Justice Brandeis' observation, as noted in Hutchinson (1980, p. 148), that not only do justices become "fatigued" towards the end of a term, but they also become "hasty" is indeed accurate. The combination of fatigue and hastiness may actually help explain why justices are more likely to write concurring opinions, and to write them early in the decision-making process as the end of the term nears, as they may be less likely to fully weigh the costs and benefits of concurring and simply want to have the case completed, and find concurring to be the most expedient way of dealing with the case.

Collective Motivations

In addition to individual motivations for or against writing a concurring opinion, I hypothesized that justices will also be motivated by the collective preference for maintaining the Court's institutional legitimacy, which also includes efficacy over the lower courts and the public's confidence in the Court. Each of the following substantive implications has collective ramifications, even if the data support a different type of motivation, as all of the following present tests of whether justices are responding to collective motivations or another type of motivation. Generally speaking, collective motivations against publishing concurring opinions are opposed by individual long-term strategic motivations for publishing a concurrence. This provides a test of whether justices' individual preferences are in actuality constrained by their collective preferences. Indeed, I find this to be the case.

Interestingly, the decision about publication is not the only decision point to be significantly motivated by collective preferences. Indeed, justices are even less likely to write a concurrence prior to the draft majority opinion achieving the votes necessary to attain majority, rather than plurality, status. This perhaps should not be surprising if we view justices as capable of considering the likelihood that they will publish their concurrence even when they are considering whether or not to write it in the first place. In other words, it appears that justices are motivated by collective preferences, and that they are forward-thinking, in that collective motivations are influential even at the stages prior to when a decision would actually become detrimental to the Court.

First, consider the influence of other concurring opinions. My analysis in Chapter 3 indicates that the greater the number of concurring opinions in a case, the less likely a justice is to write his own concurrence. However, as the analysis in Chapter 4 shows, a justice's decision about publishing his concurring opinion is not significantly influenced by the number of other concurrences in the case. While there are two potential motivations for justices not to write additional concurring opinions, the insignificant result in the publication model suggests one over the other. From an individual motivation standpoint, justices may be less likely to write a concurrence when there are other concurring opinions simply due to the increased likelihood that they already agree with one of the opinions that has already been written. Conversely, it could be that justices are motivated not to write additional concurrences based on collective motivations, so as to not make the decision appear even more fractured and potentially ideologically driven.

While the analysis in Chapter 3 cannot distinguish between these two possible motivations, since justices are no less likely to withdraw their written concurring opinions in cases that have other concurrences, it seems that justices are less concerned with the possible institutional ramifications of having multiple concurring opinions in a single case. It may be that justices do not view concurrences as being detrimental to the Court's legitimacy unless there are other factors involved, such as perhaps making a declaration of unconstitutionality or overturning precedent. In future analyses, it should prove fruitful to examine the full range of a justice's choices for justices in the majority coalition – joining the majority opinion, joining a concurring opinion, or writing a

concurring opinion – so as to examine more closely whether justices are less likely to write concurring opinions when there are other concurrences due to individual or collective motivations.

I suggested that when the Court either declares a congressional law to be unconstitutional or overturns precedent justices will be more attuned to potential collective consequences, as these types of decisions may be particularly salient to other actors, such as the lower courts and Congress, who evaluate the Court's collective status. Thus, I hypothesized that in such cases justices will be less likely to author concurring opinions, knowing that they will be less likely to publish their concurrence, if they are indeed motivated by collective concerns. On the other hand, due to the increased salience, it may be that justices are more likely to write concurring opinions based on individual motivations, such as legal policy disagreement or reputational goals. Additionally, I hypothesized that in both types of cases, justices would be less likely to publish their concurrences, again due to collective motivations. While neither type of case significantly influences a justice's decision about writing, either whether or when they write, justices are more than three times as likely to withdraw concurring opinions in cases that overturn precedent. This implies that justices are no less likely to use concurring opinions as bargaining tools in cases that overturn precedent, but that they are less likely to actually publish their concurrences. This, too, begs the question of whether the majority opinion author should thus discount concurring opinions written in such cases as less than credible threats of concurring. Another question, here, is the impetus for justices to be more likely to withdraw their concurrences in cases that overturn

precedent, but not those cases that make declarations of unconstitutionality. Both types of cases would appear to be similar in their possibility of being detrimental to the Supreme Court's institutional status, but, according to my analyses, justices do not behave similarly with respect to publishing their concurrences in both types of cases. It may be that justices have internalized a norm about overturning precedent, whereas the possibility that Congress or the president *may* be displeased is a more ambiguous possibility. In other words, justices may be more concerned with the collective status of the Court in cases that overturn precedent simply because the overturning of precedent has already been determined, whereas in cases that overturn congressional laws or statutes, the possible long-term affects on the collective Court are only a mere possibility.

The final two variables I will discuss provide the most direct competition between individual and collective motivations. In both situations what benefits an individual justice, either through bargaining leverage or long-term strategy, is at least hypothetically detrimental to the collective Court. Interestingly, as with declarations of unconstitutionality and overturning precedent, the two situations result in varying responses by the justices. When the majority coalition, according to the outcome vote, is minimum winning, each justice in the majority coalition has increased bargaining leverage, as every vote is necessary to maintain a majority. In this situation, justices are both more likely to write concurring opinions and more likely to use them early in the decision-making process so as to attempt to induce accommodation. However, minimum winning coalitions may signify heightened contentiousness and thus serve to signal the public that the decision is more ideologically driven. Additionally, lower courts may be

less likely to follow decisions made by a minimum winning coalition. Either response would likely be exacerbated by the presence of concurring opinions in addition to the minimum winning coalition.

Conversely, justices are no less likely to publish concurrences that were written when the majority coalition was minimum winning. This leads to the inference that justices view the individual benefits of writing a concurrence to outweigh the collective costs in cases where the majority coalition is minimum winning. Thus, majority opinion authors must view concurrences written when the majority coalition is minimum winning as likely to be published, since withdrawing a concurrence is a fairly rare, though not trivial, occurrence. Furthermore, based on these results it seems that justices who circulate concurring opinions in cases where the majority coalition is minimum winning are no more likely to be accommodated than justices who use concurrences in non-minimum winning conditions. This is an intriguing implication, as one would think that majority opinion authors would be more likely to accommodate in minimum winning situations; however, it may be that due to increased bargaining leverage, more bargaining takes place without the issuance of a concurrence, and thus when concurring opinions are written they signify a deeper divide between the concurring justice and the majority opinion. Similarly, the fact that a case is being decided by a minimum winning majority coalition may indicate the contentiousness of the issue, also leading to a higher expectation of disagreement.

A related scenario is one that occurs in every case; until the drafted majority opinion has received four “join” votes it has not yet achieved the status of being an actual

majority opinion that speaks for the collective Court. As in cases where the majority coalition is minimum winning, justices have stronger bargaining leverage prior to the draft opinion achieving majority status, as votes are still needed to be secured in order to assure that there is a majority opinion, rather than a mere plurality opinion. However, unlike in minimum winning instances, justices are actually less likely to write concurring opinions prior to the draft opinion achieving a majority status. Additionally, justices write concurring opinions later in the decision-making process when the draft opinion has not achieved majority status. Both of these results are indicative of justices being more responsive to collective concerns than to their individual preferences. This inference is further supported by the results of the publication model, as discussed in Chapter 4; justices are more likely to withdraw their concurring opinions if they first wrote their concurrence prior to the draft opinion achieving majority status. Thus, justices appear to be cognizant of and responsive to the very real possibility that the use of a concurring opinion may make achieving a majority opinion for the Court an impossibility.

While the collective consequences of concurring opinions in cases where the majority coalition is minimum winning are more ambiguous, the consequences are not nearly as ambiguous when the majority coalition on the outcome cannot agree on a majority opinion, and thus the case is decided by a plurality. Since plurality opinions have a legal impact different from majority opinions, concurrences that fracture a majority so as to force a plurality opinion have much more concrete consequences with respect to the collective Court than do concurring opinions in cases where the majority coalition is minimum winning, but the concurrence does not make a majority opinion an

impossibility. Obviously, here is a place where the distinction between a regular and a specially concurring opinion is particularly meaningful. While I do not distinguish between the two types of concurrences in my dissertation, in future research I intend to address questions involving the varying types of concurring opinions.

Avenues for Future Research

The research contained in this dissertation only begins to address the complexities of judicial motivations within the dynamic process of Supreme Court decision-making. There appear to be several fruitful projects that stem directly from this work, as well as additional analyses that are more tangential to this analysis. I will first discuss two direct extensions of the analyses presented here, and then move on to more broad avenues for future research.

The first potential extension of this dissertation would include utilizing the already existing literature on concurrence typology (for example, see Corley, 2010) to examine whether justices' individual and collective motivations differ depending on whether a concurrence criticizes or supports the majority opinion and also whether the justice utilizes his concurring opinion in place of, instead in addition to, joining the majority opinion. As Corley stated, "In short, all concurrences are not the same. Some concurrences support the majority decision, whereas others do not. Some concurrences contract the majority decision while others expand the reach of the majority decision" (2010, p. 97). Thus, it may be that collective motivations are more likely to constrain individual preferences under certain circumstances, such as when the concurrence

substitutes a completely different rationale for the decision for the rationale in the majority opinion. Conversely, perhaps “zinger” concurring opinions, those that emphasize one aspect of the majority opinion or are a rebuttal to the dissent, for example, are motivated exclusively by individual rather than collective preferences. Thus, by incorporating concurrence typology into the analyses presented in this dissertation, we may be able to gain an even clearer picture of when collective Court motivations act as constraints on individual justices’ preferences.

It may be that a fine-grained measure of concurrence typology, as proposed by Corley (2010) is not necessary, but rather that the distinction between regular and special concurring opinions provides the most meaningful information. Since, by definition, regular concurrences on their own cannot affect whether the opinion of the Court achieves majority status or is relegated to plurality status, majority opinion authors, as well as the potentially-concurring justices may behave differently based on whether their separate opinion is in the form of a regular or special concurrence. Thus, it seems pertinent to examine concurrence typology in both manners; using a more finely grained approach to describing concurring opinions, and also examining justices’ behaviors with respect to the obvious dichotomy between regular and special concurrences.

A second extension of this analysis could include an even more fine-grained analysis of the dynamic nature of Supreme Court decision-making.³⁸ Specifically, I could include other forms of bargaining, such as suggestions, threats, and wait statements issued by the

³⁸ I would like to thank Paul J. Wahlbeck for this suggestion, which was based on a presentation of Chapter 4 at the 2011 Midwest Political Science Association meeting in Chicago, Illinois.

justices into the model, thus examining more directly the use of concurrences as bargaining tools or as responses to failed attempts at bargaining. Such an analysis would be beneficial in digging more deeply into the question of sincere versus strategic individual motivations, as it would allow us to place concurring opinions within the entire bargaining process. Additionally, more precise responses to concurring opinions, particularly the responses of majority opinion authors, could be assessed. This would allow an inquiry into the relative success of concurrences as a form of bargaining over the content of the majority opinion. We could then examine whether justices are more or less likely to be successful in certain circumstances, as well as whether different justices have different success rates, and, if so, what might explain those differences. Furthermore, we could use this analysis to examine whether certain bargaining tactics, such as the use of concurrences, vary in their success rate based on who the majority opinion author is. There are many aspects of the dynamic bargaining process that remain under-explored; this is but one.

An analysis that would not necessarily directly extend from this dissertation is one that examines whether and the extent to which different justices are motivated by the same factors, but to different degrees. For example, it may be that some justices are quite concerned about the Court's collective status, whereas others do indeed assume that their individual choices will not have long-term collective ramifications.

More concretely, in cases that are both salient and overturning precedent, some justices may be primarily motivated by individual preferences (case salience) while others may primarily be motivated by collective concerns (overturning precedent).

Indeed, the majority of studies of judicial behavior assume that all justices are equally and similarly affected by the same variables. Instead, it may be that due to unmeasurable factors, such as a justice's role conception, some justices are influenced more strongly than other justices by certain factors. This could be examined through multilevel analyses of judicial behavior, either concurring behavior specifically or another type of behavior. By determining how individualistic justices are as far as how certain factors influence their behavior, we could reach implications regarding the extent to which individual idiosyncrasies, rather than measurable characteristics, affect a justice's decision-making. Potentially, this could influence how well we can generalize across courts and for future courts, as if decision-making on collegial courts is highly idiosyncratic, according to the individual judges on the court, we would be less able to generalize about judicial behavior. Conversely, if collective decision-making is only minimally affected by the individual judges' proclivities, then the importance of the individual judge is diminished, leading to implications for appointing judges.

The final two prospective avenues for future research would entail utilizing the rich comparisons available by analyzing multiple national high courts in a comparative perspective. There are several questions tangential to this dissertation that could be explored more fully in this manner. First, there is the question raised in the introduction: what are the implications of publicized dissensus, specifically relating to both institutional legitimacy and individual judicial responsibility? Obviously, since, aside from the Court under Chief Justice John Marshall at the beginning of the 19th Century, the U.S. Supreme Court has at least in theory always operated under a norm of publicized

dissensus, we cannot fully examine the affects of publicized dissensus by examining the United States alone. Instead, from a comparative perspective, we could examine national courts of last resort that have either rules or norms suppressing dissensus, and compare those courts with courts that have no restriction on publicizing dissensus.

Similarly, a comparative analysis could be used to further investigate the relationship between collective and individual motivations on courts of last resort. Indeed, it may be that under certain conditions, perhaps specifically involving the extent of the court in question's independence or legitimacy, collective motivations dominate individual motivations; conversely, in courts that enjoy both high levels of independence and high levels of public confidence, collective motivations are not nearly as influential. Such an analysis could potentially answer questions involving the effect of certain institutional factors on court decision-making, thus leading to direct implications about how to create a judiciary that is more conscious of its collective role than shaped by the individual proclivities of its justices, if indeed that is what is normatively desired.

This dissertation has provided a foundation for examining judicial motivations through dynamic decision-making models. Additionally, it suggests that Supreme Court justices weigh costs and benefits associated with their decisions, as associated with their individual and collective motivations. There are many avenues through which we can continue to examine the dynamic nature of Supreme Court decision-making to more accurately draw conclusions about judicial motivations. Through examinations of judicial motivations, we can then make inferences about the extent to which individuality on the Court matters, which leads to implications for the Supreme Court appointment and

confirmation process. Thus, this dissertation's contribution to Supreme Court scholarship is two-fold. First, it takes seriously the dynamic, inter-dependent structure of decision-making on the Court and shows that by omitting this dynamic structure, we can draw invalid conclusions.³⁹ Second, it succinctly conceptualizes Supreme Court decision-making as motivated by two, often-competing motivations: individual and collective. By considering Court decision-making in this way, we can more fully understand the competing pressures, from both individual and collective sources, faced by Supreme Court justices.

Conclusion

The entirety of this dissertation has been focused on examining judicial motivations with respect to each justice's choices about concurring opinions. As shown in the introductory discussion of *United States v Crews* (1980), concurring opinions can be and are issued at different points within a case's decision-making process, and, additionally, not all written concurrences become public knowledge through their publication along with the opinion of the Court. Closely examining whether a justice writes a concurrence, when he first circulates it, and whether the concurrence is eventually published provides information about the justices' motivations. More specifically, I have conceptualized

³⁹ The dynamic, inter-dependent structure of Supreme Court decision-making is included in the analysis in Chapter 3. Additionally, in Appendix B, I examine whether it is indeed necessary to account for the aforementioned structure, or whether a static model can adequately and accurately summarize decisions about concurring opinions. As described in Appendix B, it is necessary to include the dynamic, inter-dependent nature of Supreme Court decision-making in order to draw inferences about judicial motivations and behavior.

judicial motivations as categorized as either individual or collective. The majority of judicial politics scholarship considers individual motivations associated with legal policy preferences as the dominant, if not exclusive, motivation of Supreme Court justices. However, based on the analyses contained in this dissertation, it is apparent that there is more to judicial motivations than purely individualistic legal policy motivations. Indeed, Supreme Court justices' choices with respect to concurring opinions are also motivated by individual non-policy and collective preferences. Thus, this dissertation has shown that both individual non-policy preferences and collective Court preferences do matter, at least for decisions about concurring opinions, and thus, future scholarship should examine whether and to what extent these additional motivations affect other aspects of Supreme Court decision-making.

Appendix A: Data Collection & Measurement

The vast majority of the data involving the timing of justices' decisions came from Justice Blackmun's opinion log sheets. Justice Blackmun, or his secretaries, retained detailed notes for every case about when decisions were made, based on memos circulated throughout the case. Digital photographs were taken of all of Justice Blackmun's opinion log sheets over his tenure on the Court, which includes the 1970 through 1993 Court terms. However, only the opinion log sheets for the 1970 through 1979 terms were used for the analyses in this dissertation.

Figure A.1 shows the opinion log sheet for *United States v Crews* (1980), the case that was discussed in the introduction to this dissertation. As shown in *Figure A.1*, Justice Blackmun's log is quite detailed; it even includes descriptions of the requested changes justices had asked of Justice Brennan, the majority opinion author. Over time, Justice Blackmun's opinion log sheets became more detailed. Early in his tenure on the Court, he generally did not include notations regarding memos; instead, the opinion log sheets only contained dates of when a justice circulated or joined an opinion. *Figure A.2* provides an example of one of Justice Blackmun's earlier opinion log sheets, in *Dyson v Stein* (1971).

BRENNAN, J. 70C

No. 78-777 *United States v. Crews*

Assigned: 11/9/79 Announced: 3/25/80

LFP joins all but pp. 11-14-2/12/80 Circulated: 12/13/79
 PS joins all but pt. 10
 JPS joins 2/22/80 Recirculated: 12/14/79
 PS joins 2/22/80 2/12/80
 2/14/80
 2/24/80
 2/22/80
 2/29/80
 3/5/80

PS will join w/changes 2/26/80; H&B ok join all but 10/10/80; 15 original copies
 CJ is w/ LFP & JPS - 11/10/80; LFP can't join pt. 10 2/7/80; JPS wants change 2/10/80
 WTB responds to WAR 12/19/79; WTB clarifies memo 1/5/80; LFP asks more changes
 PS may join 12/13/79 LFP will join w/changes 12/19/79; WTB still has trouble 12/19/79
 T/B out 11/6/79; WAR agreed result but has trouble 12/13/79

Concurrences:

WAR (typed)	12/18/79
WAR (typed)	12/18/79
WAR (typed)	12/19/79
WAR	12/20/79
BRW (in result) w/ H&B	1/2/80
BRW (in result) w/ WAR, CJ	1/3/80
JPS (in pt)	1/6/80
JPS (pt)	2/9/80
BRW, w/ CJ, WAR (in result)	2/16/80
BRW (in result) (revision), w/ H&B	2/21/80
BRW (in result), w/ WAR	2/23/80
LFP, w/ H&B	2/25/80
LFP (1st draft?) w/ CJ (+ CJ joined BRW)	3/17/80
LFP, w/ CJ (in pt)	3/20/80
BRW, w/ CJ, WAR (in result)	3/21/80
LFP, w/ H&B	

Figure A.1: Justice Blackmun's Opinion Log Sheet for *United States v. Crews* (1980)

No. 41 - *Dyson v. Stein* BLACK, J.

Assigned: 11/24/70 Announced: 2/24/71

CJ joins 12/2/70
 BRW concurs in result 12/14/70
 HAB joins 12/28/70
 JMH joins 1/6/71

Circulated: 11/27/70

Recirculated:

Concurrences: WJB (in result) Circulated: 12/10/70

Dissents:	Circulated:
WOD	12/1/70
WOD	12/31/70
WOD	1/4/71
WOD	1/6/71
WOD	2/8/71

Figure A.2: Justice Blackmun's Opinion Log Sheet for *Dyson v Stein* (1971)

In the instances when Justice Blackmun's opinion log sheets were missing information, such as the opinion assignment date in *Figure A.3* (*McDaniel v Barresi* [1971]) or Justices Brennan and White's majority opinion join dates in *Figure A.4* (*Vermont v New York* [1972]), I examined Justice Brennan's papers to attempt to fill in the missing data. The majority of the information missing from Justice Blackmun's opinion log sheets was found in Justice Brennan's papers; if I could not find the information in Justice Brennan's papers, I also examined Justice Blackmun's case files, as well as the personal papers of Justices Marshall and Douglas, as applicable. All four justices have their papers housed at the Library of Congress, aiding in locating the missing information whenever possible. *Table A.1* shows the number of cases that were omitted from the analyses for each of several different reasons. In total, 34 out of 1,358 orally argued cases had to be dropped from the analyses due to missing information or other complications.

In addition to the justices' papers at the Library of Congress, I also utilized Harold J. Spaeth's judicial database for several variables, as well as for calculating additional variables. Furthermore, for the case salience variables, I utilized Epstein and Segal's New York Times measure of case salience. The collection and measurement of every variable in the analyses in Chapters 3 and 4 is described in *Table A.2*.

No. 420 - *McDaniel v. Barresi* THE CHIEF JUSTICE

Assigned: ?

Announced: 4/20/71

Circulated: 4/2/71

Recirculated:

PS joins 4/5/71

HAB joins 4/6/71

JTH joins 4/6/71

BRW joins 4/6/71

WJB joins 4/7/71

TM joins 4/7/71

Concurrences:

Circulated:

Dissents:

Circulated:

Figure A.3: Justice Blackmun's Opinion Log Sheet for *McDaniel v Barresi* (1971)

DOUGLAS, J.

No. 50 Orig. - Vermont v. New York

Assigned: 3/6/72

Announced: 4/24/72

TM joined 3/23/72

LFP joined 3/25/72

Circulated: 3/20/72

HAB joined 3/29/72

Recirculated:

Concurrences:

Circulated:

Dissents: 2

WHR w/PS, CJ

Circulated: 3/27/72 (2)

Figure A.4: Justice Blackmun's Opinion Log Sheet for Vermont v New York (1972)

Table A.1: Information about Cases Omitted from the Analyses

Reason for Omitting Cases from the Analyses	<i>Number of Cases Omitted</i>
<i>Missing “Join” Dates (to determine when the draft majority opinion achieved majority status)</i>	13
<i>Missing Information about Vote Switches (to determine when the majority coalition was minimum winning and/or unanimous)</i>	3
<i>Missing Information about Concurrences (either their circulation date, their withdraw date, or both)</i>	6
<i>Missing the Circulation Date for the Draft Majority Opinion</i>	3
<i>All the Opinions in the Case were Virtually Identical to all the Opinions in Another Case</i>	4
<i>Miscellaneous</i>	5
Total	34

Table A.2: Collection and Measurement of Variables

	Measurement	Data Collection
<i>Ideological Distance to Majority Opinion Author</i>	Each justice's ideology was computed by calculating the percentage of the time each justice voted in a liberal direction in each of 13 different issue areas, broadly defined, in the previous term; the range is from 0% to 100% liberal; the absolute difference between each justice and the majority opinion author was calculated.	Voting direction was based on the "dir" variable in the Spaeth database; the 13 separate issue areas are those indicated in the "value" variable in the Spaeth database.
<i>Extreme Majority Opinion Author</i>	If the majority opinion author is either the most liberal or the most conservative participating member in a case, as determined by his ideological score (see above), this variable takes on a value of "1"; in 267 of the 1,324 cases the majority opinion author was extreme.	
<i>Issue Area Experience</i>	This variable was calculated by determining the number of opinions (majority, concurring, and dissenting) a justice had previously written in each of 122 more narrow issue areas; this variable ranges from a minimum of "0" to a maximum of "52".	Both the number of opinions written and the 122 issue areas were identified using the Spaeth database; the 122 issue areas are based on the "issues" variable in the database, which was recoded to collapse similar issues, as described in the data's codebook.
<i>Case Salience</i>	Salient cases take on a value of "1"; 200 of the 1,324 cases are considered salient.	Epstein and Segal's New York Times measure of case salience was utilized. ⁴⁰ This variable is coded as "1" if the case appeared on the front page of the New York Times the day after it was decided; otherwise, the variable takes on a value of "0".
<i>Tenure</i>	This variable takes the log of the number of terms (plus one) each justice has served on the Court.	
<i>Multiple Laws</i>	If the case involves multiple laws, this variable takes on a value of "1"; 316 of the 1,324 cases considered multiple laws.	This variable is taken directly from the Spaeth database's "laws" variable.
<i>Per Curiam Opinion</i>	If the most recent circulation of the draft majority opinion is per curiam, this variable takes on a value of "1".	Justice Brennan's personal papers were used to clarify whether and when an opinion changed to or from a per curiam.
<i>Unanimous Court</i>	If the Court is currently in agreement as to the disposition of a case, this variable takes on a value of "1".	Justice Blackmun's opinion logs were used to determine whether and when the justices were in agreement.
<i>Publications</i>	The number of articles, book reviews, books chapters, books, and other publications a justice wrote over his lifetime; the variable was then reduced to four categories – high, above average, below average, and low publication levels.	Publications by each justice were found by searching WilsonWeb (www.hwwilson.com); mandatory publications by the Chief Justices were omitted from the count.

Continued

⁴⁰ Epstein and Segal's data for case salience can be found at the following website:
<http://epstein.law.northwestern.edu/research/salience.html>.

Table A.2 continued

	Measurement	Data Collection
<i>Reciprocity</i>	This variable is a percentage of the time the current majority opinion author has written concurring opinions over the past two terms when each of the other justices was the majority opinion author; the range is 0% to 73%.	Published concurrences were identified using the Spaeth database.
<i>Workload</i>	This variable is a count of the total number of opinions (majority, per curiam, concurring, and dissenting) a justice is working on; this variable ranges from a minimum of “0” to a maximum of “33”.	Opinions were identified through both the Spaeth database and Justice Blackmun’s opinion logs.
<i>Days Until Term Ends</i>	This variable is calculated by subtracting August 15, 19** from the current date in each case; August 15 th was chosen as the latest date in which a decision would be announced based on the Court’s decision patterns in the 1970s. ⁴¹	Justice Blackmun’s opinion logs provided information about the pertinent dates in a case (i.e. the date at which the draft majority opinion had been joined by a majority of the justices).
<i>Number of Concurrences Already Written</i>	The variable is based on the number of concurring opinions that have already been written, but not yet withdrawn, at any given point during a case; a value of “3” indicates that three or more concurrences have been written, while values of “0”, “1”, and “2” indicate 0, 1, and 2 concurrences have been written.	The number of concurring opinions currently in circulation was determined by using Justice Blackmun’s opinion log sheets, which indicate both the date a concurrence was written and the date it was withdrawn (if applicable).
<i>Overturs Precedent</i>	If the decision overturns precedent, this variable takes on a value of “1”; 30 of the 1,324 cases overturned precedent.	This variable is taken directly from the Spaeth database’s “alt_prec” variable.
<i>Declares Law/Statute Unconstitutional</i>	If the decision declares a congressional law as unconstitutional, this variable takes on a value of “1”; 126 of the 1,324 cases made a declaration of unconstitutionality.	This variable is taken directly from the Spaeth database’s “uncon” variable.
<i>Minimum Winning Coalition</i>	If the majority coalition is currently minimum winning, this variable takes on a value of “1”.	Justice Blackmun’s opinion logs were used to determine whether and when the majority coalition was minimum winning.
<i>Draft Majority Opinion Joined by Majority</i>	If the draft majority opinion has been joined by a majority of the justices, this variable takes on a value of “1”.	Justice Blackmun’s opinion logs were used to determine whether and when the draft majority opinion was joined by a majority of the justices.

⁴¹ Though August 15th is, during most terms, significantly beyond the last decision-making day of the term, as long as the assumption that the justices are affected by the approaching end of term in the same way on the same date each term, the date at which the “end of term” is formally measured will not affect the substantive results. If, however, June 1st means different things in different terms, with respect to how pressured justices feel about the approaching end of term, any arbitrary “end of term” date will be problematic. However, the alternative would be to use the last day of each term, but this is also problematic, as the justices do not know exactly when the term will end, particularly the earlier in the term it is.

Appendix B: Addendum to Chapters 3 and 4

Although the distinction between collective and individual motivations is not predominant within judicial politics scholarship, scholars have made certain inferences about judicial motivations in using concurring opinions as grounded in preference-based, strategic, and new institutionalist models of judicial decision-making. In this section I will discuss how the implications based on the empirical results of those models about concurring opinion behavior are either in concert with or contradictory to the results of the analyses in this dissertation. It is important to recall that none of the following models or their analyses take into account the timing of the decision to write a concurrence or concurring opinions that were written but never published.

Purely preference-based models, such as the Attitudinal Model, conclude that concurring opinion-writing decisions are motivated by legal policy disagreement. These models infer the following about justices:

Those who join the majority opinion are ideologically closer to the opinion writer than those who write regular concurrences; regular concurrenrs, in turn, are ideologically closer to the majority opinion writer than special concurrenrs; and to complete the picture, special concurrenrs are

ideologically closer to the majority opinion writer than are justices who dissent. (Segal and Spaeth, 2002, p. 387)

Thus, according to preference-based models of judicial decision-making, concurring opinions, and the decisions about whether one is written, when it is written, and whether it is published, should primarily be a function of legal policy disagreement. Preference-based models do suggest that justices' preferences may be stronger in some cases than in others, leading to the implication that case factors, such as salience or issue area, may also influence justices' choices about using concurring opinions. Additionally, these models typically eschew strategic interaction as an explanation for justices' decisions, as, with specific reference to concurring opinion-writing behavior, "[t]he frequency with which the justices write special opinions, which barely average a single joiner, bespeaks a lack of persuasive interaction. 'Influence' seems to be a function of like-mindedness" (Segal and Spaeth, 2002, p. 404).

In Hammond, Bonneau, and Sheehan's strategic model of Supreme Court decision-making, the authors propose that concurring opinion behavior depends "on where the draft majority opinion lies in relation to each justice's ideal point and to the location of the status quo policy rather than simply on the ideological distances among the justices, as argued by Segal and Spaeth" (2005, p. 262). The primary implication of their model, like preference-based models, such as the Attitudinal Model articulated by Segal and Spaeth, is that decisions about concurring opinions are primarily driven by legal policy disagreement, but are more complex than a simple relationship between the majority opinion author and each possibly-concurring justice. However, it is additionally noted

that individual justices may have idiosyncratic responses to majority opinion locations, as some justices may be more tolerant of disagreement than other justices (Hammond, Bonneau, and Sheehan, 2005, p. 262). However, this supposition is not empirically tested, leaving their primary conclusion to be that justices' decisions are based primarily on their ideal points, and potentially their idiosyncratic tolerance levels for legal policy disagreement.

A second conceptualization of a strategic model of judicial decision-making focuses primarily on justices' choices regarding bargaining over the content of the majority opinion, but also acknowledges that such strategy must take place under certain institutional constraints. In this strategic model, concurring opinions are viewed as motivated by a mix of ideological and strategic considerations. While one of the foundations of a strategic bargaining model of judicial decision-making is the timing of the justices' choices, integrating a justice's choice to concur into the decision-making process has not been given sufficient treatment. For example, while the empirical results in Spriggs, Maltzman, and Wahlbeck's model indicate that salience increases the likelihood of a justice writing a concurring opinion, they suggest that this is due to "justices issu[ing] bargaining statements when cases are more salient" (1999, p. 501). However, in order to test whether case salience increases the likelihood that a justice writes a concurrence as a bargaining tool, we must include a measure of when during the decision-making process a justice issued the concurring opinion, as concurrences written later in the decision-making process are less likely to be motivated by short-term bargaining goals.

Additionally, Turner and Way (2003, p. 166) state that concurrences “illustrate where compromise could not be met in the majority opinion” which assumes that concurring opinions are primarily if not exclusively driven by legal policy disagreement. Similarly, it is also suggested “that those justices who circulated a separate opinion were accommodated less often by the author since their incidence of joining the majority was lower than for other justices” (Spriggs, Maltzman, and Wahlbeck, 1999, p. 502). However, this conclusion does not consider whether a justice wrote a concurrence early enough in the process so as to give adequate time to the majority opinion author to decide whether or not to accommodate the concurring justice’s position. Indeed, the timing of the circulation of a concurring opinion is an important consideration in examining whether and why majority opinion authors accommodate some justices, but not other justices.

In their examination of the likelihood a justice will write a specific type of concurring opinion, Way and Turner (2006) discuss the potential long-term ramifications of concurrences, specifically legal clarity and institutional legitimacy. Again, however, there is no inclusion of non-published concurrences in their model. They conclude that “[i]t may be that members of the Rehnquist Court are more committed to what they see as the accurate interpretation of a particular issue and/or case than they are to the overall institutional legitimacy of the Court” (Way and Turner, 2006, p. 313). This conclusion is based on the sheer frequency of concurring opinions that attempt to weaken the majority opinion; however, without examining the circumstances under which justices choose to either publish or withdraw their concurring opinion, it is left unclear the extent to which

justices act in their own individual interest at the expense of the Court's collective interest.

While new institutionalist models focus on the interplay of case facts, legal policy preferences, and institutional structures, the models generally consider these influences to be primarily, if not exclusively, individual in nature. For example, one study utilizing a new institutionalist framework expects that "electoral incentive[s], formal institutional arrangements and decisional procedures, and risk-taking propensities" all affect the rates of dissensus in state supreme courts (Hall and Brace, 1989, p. 399). The link proposed between each of these factors and dissensus rates is individual, in that each factor is related to a single judge's best interest, rather than the best interest of the court as a whole. Thus, while Hall and Brace find support for non-policy related hypotheses, these results are still individual in nature and do not take into account the possibility that judges are have both individual and collective motivations for their behaviors.

In general, all the aforementioned models of judicial decision-making rely heavily, if not entirely, on the conceptualization of judicial motivations as individualistic. Smith warns of the explication necessary to avoid "the errors of assuming that all can be explained in terms of individual or group calculations" when he suggests that analyses should be focused "on the dialectical interplay of meaningful decisions and structural constraints" (1988, p. 103). In this dissertation, I have attempted to follow that prescription by placing decisions about concurring opinion within the larger context of the decision-making process, as well as by considering the potential effect concurrences may have, or be viewed by the justices to have, on the Court's long-term institutional

status. However, at this point one may wonder whether the differences between the typical conclusions drawn from preference-based, strategic, and new institutionalist models of judicial decision-making and my own models presented in this dissertation are simply due to varying Court terms, cases, justices, and independent variables, rather than to differences in the conceptualization of the concurring opinion decision-process. Thus, I will next provide a test of what, if any, differences in implications are made between the analyses presented in Chapters 3 and 4 and an analysis of the same cases and data, but without the inclusion of time-varying covariates, when in the process a justice chooses to write a concurrence, and unpublished concurring opinions. Specifically, this analysis will address the question of what, if anything, we are missing by treating the decision to write concurring opinions as a static process, as measured only at the time the entire decision is published by the Court.

In order to provide the most accurate comparison, where the structure of the decision-making process is the primary difference in models, I will utilize, as much as is possible, the variables from the analyses presented in the previous two chapters. Of course, by omitting the dynamic nature of the process, some variables are measured in a different manner for this analysis. For a description of the variables contained in the previous models that are either excluded entirely or measured differently for this analysis, as well as an explanation of the differences, please see *Table B.1*.

Due to the dichotomous nature of the dependent variable, logistic regression is the appropriate method of analysis. However, since we might expect a justice to behave similarly across cases, or justices within a case to behave similarly, scholars often cluster

Table B.1: Explanation of Variables either Excluded or Measured Differently for this Analysis

Variable	Inclusion in Which Earlier Model(s)	Measurement in Earlier Model(s)	Measurement for this Analysis
<i>Days Until End of Term</i>	Whether Writes When Writes Whether Publishes	Time varying; At time concurrence was written	From date of decision
<i>Number of Other Concurrences in Case</i>	Whether Writes Whether Publishes	Time varying; At time concurrence was written	At time of final decision
<i>Number of Concurrence Joins</i>	Whether Publishes	Total number of join votes for concurrence	Not Included: Not applicable for decision to write
<i>Timing of Concurrence</i>	Whether Publishes	Number of days into decision-making process when concurrence written	Not Included: Cannot be measured based on final vote data
<i>Minimum Winning Coalition</i>	Whether Writes When Writes Whether Publishes	Time varying; At time concurrence written	Based on final outcome coalition
<i>Draft Opinion has Majority</i>	Whether Writes When Writes Whether Publishes	Time varying; At time concurrence written	Not Included: Endogeneity issues if included at time of case's decision

the standard errors on either the justices or the cases. There is no single dominant error structure utilized in analyses of individual justice behavior on the U.S. Supreme Court. Thus, for ease in comparing and contrasting the earlier two models with the model contained in this chapter, I am reporting the basic logistic regression results, with the

Table B.2: Comparison of Logistic Regression Results for Whether a Justice Publishes a Concurring Opinion, with Variations to the Error Structure

<i>Variable</i>	Coefficient (Unclustered Standard Error)	Coefficient (Standard Error Clustered by Justice)	Coefficient (Standard Error Clustered by Case)
<i>Ideological Distance to Majority Opinion Author</i>	.444* (.196)	.444* (.187)	.444* (.187)
<i>Extreme Majority Opinion Author</i>	-.05 (.102)	-.05 (.129)	-.05 (.089)
<i>Case Salience</i>	.508** (.096)	.508** (.094)	.508** (.087)
<i>Overturms Precedent</i>	-.037 (.237)	-.037 (.243)	-.037 (.204)
<i>Declares Congressional Law Unconstitutional</i>	.334** (.114)	.334* (.172)	.334** (.098)
<i>Multiple Laws</i>	-.003 (.09)	-.003 (.095)	-.003 (.08)
<i>Unanimous Outcome</i>	.073 (.086)	.073 (.183)	.073 (.078)
<i>Per Curiam Opinion</i>	-.221 (.174)	-.221 (.162)	-.221 (.163)
<i>Expertise</i>	.029 (.058)	.029 (.069)	.029 (.055)
<i>Tenure</i>	-.208 (.108)	-.208* (.102)	-.208 (.112)
<i>Workload</i>	-.024* (.009)	-.024** (.007)	-.024* (.01)
<i>Time Until End of Term</i>	-.003** (<.001)	-.003** (<.001)	-.003** (<.001)
<i>Reciprocity</i>	.48 (.383)	.48 (.449)	.48 (.377)
<i>Publications</i>	-.009 (.11)	-.009 (.046)	-.009 (.111)
<i>Minimum Winning Outcome Coalition</i>	-.306** (.113)	-.312 (.191)	-.306** (.1)
<i>Number of Other Concurring Opinions</i>	.337** (.043)	.337** (.042)	.337** (.046)
<i>Constant</i>	-3.085** (.535)	-3.085** (.348)	-3.085** (.551)

** Significant at the p<.01 level.

* Significant at the p<.05 level.

Log-pseudolikelihood = -2598.96
Number of Justice-Cases (Observations) = 10,377

results of the individual justices' dummy variables (minus a dummy for Chief Justice Burger) excluded, in *Table B.2*, along with a comparison of the results of two additional models of this analysis, with variation to the error structure. The only variable with differences in statistical significance across models was the dichotomous indicator for whether the initial conference vote for the case resulted in a minimum winning majority coalition, which is statistically significant in two out of the three models.

There are two primary questions here. First, are there differences between the static model of concurring opinions presented here and the results obtained from the analyses in Chapters 3 and 4? If so, that leads to a second question as to which type of model is preferred. Due to the dynamic nature of Supreme Court decision-making, I argue that it is necessary to model a justice's choice to circulate a concurring opinion based on the information he has at the time of his choice, thus indicating the preference for dynamic models of Supreme Court decision-making. Additionally, as we reach different conclusions about justices' motivations based in part on whether we include the dynamic structure and in part on whether we include withdrawn concurring opinions as part of our analysis, I also argue that we cannot exclude written but withdrawn concurrences from models of concurring opinion-writing behavior, as this systematically excludes a sub-set of concurrences and the corresponding motivations for our analysis.

The first question I will address is whether we are indeed losing information about justices' motivations, with respect to concurring opinion-writing behavior, when we omit a sub-set of concurring opinions, specifically those that are withdrawn prior to the publication of the Court's decision, from our analyses, as well as treat the process as

static rather than dynamic. Thus, I will discuss the potential implications of this model and contrast them with the implications from the two models in the previous chapters that are aimed at examining the same phenomenon.

The statistically significant positive coefficient for the Ideological Distance variable could be inferred to indicate that legal policy disagreement is indeed significantly related to the issuance of concurring opinions. Substantively, going from an ideologically proximate majority opinion author to an ideologically distant one, setting the other independent variables at their means or modes, leads to an increase of only about 1% in the predicted probability of publishing a concurrence. However, based on the static model, we cannot determine whether justices who are ideologically distant from the majority opinion author are more likely to write concurring opinions, or whether justices who are ideologically more proximate to the majority opinion author are more likely to withdraw their concurrences, presumably due to being accommodated by the majority opinion author. The earlier models allow us to answer this question. While ideological distance matters in the decision to write concurring opinions, it is not a significant influence in whether a justice publishes his concurrence. This seems to indicate that ideological distance is not a significant predictor of whether the majority opinion author will accommodate a justice who has authored a concurring opinion, as it seems likely that accommodation would be more likely to result in a withdrawn concurrence than would no accommodation.

The significant positive relationship between case salience and the probability of issuing a concurring opinion could be interpreted in at least two different ways. In

predicted probability terms, a justice's probability of publishing a concurrence increases by about 3% in salient cases, as compared with non-salient cases. The model does not, however, provide enough information to be able to determine why justices are more likely to publish concurring opinions in salient cases. Indeed, we are left with at least two possibilities. First, one might assume that justices are less likely to compromise their legal policy preferences in salient cases, resulting in the higher likelihood of both writing and publishing concurring opinions. However, as shown in previous chapters, this is not quite supported. While justices are more likely to publish written concurrences in salient cases, they are no more likely to write a concurring opinion. Secondly, one could interpret the significant relationship between concurring opinion-writing and case salience to indicate that justices attempt to utilize concurring opinions as bargaining tools in these cases, but that majority opinion authors are less likely to accommodate in salient cases. If such were the case, we would expect case salience to be related to having a higher likelihood of writing early in a case's decision-making process. However, as shown in the analysis in Chapter 3, case salience has no significant relationship with when a concurrence is first circulated, indicating that justices are neither more nor less likely to attempt to use concurring opinions as a bargaining tool early in a case's decision-making process in salient cases.

With the Overturns Precedent and Declares a Law to be Unconstitutional variables, the model presented in this chapter has implications that directly contradict the conclusions of the models in Chapters 3 and 4. While Overturns Precedent is insignificant in the model presented here, it has a significant positive relationship with

whether a concurring opinion is withdrawn (presented in Chapter 4). Conversely, while Declares a Law to be Unconstitutional was insignificantly related to all three components of the models in the previous chapters, the analysis in this chapter yields a significant positive relationship with the likelihood a justice issues a concurring opinion. An explanation of how the models can reach such differing conclusions is warranted. With respect to cases that overturn precedent, according to descriptive statistics, justices have a 6% expected likelihood of withdrawing a concurring opinion in cases that do not overturn precedent, while that likelihood increases to 20% in cases that do alter precedent. However, cases that overturn precedent are relatively rare, and thus the four instances in which justices withdrew their concurring opinions in a case that overturned precedent provide little weight in the analysis in this chapter, leading to the insignificant finding. Conversely, again based on descriptive statistics, justices are somewhat less likely to withdraw concurring opinions in cases that make a declaration of unconstitutionality. However, the relationship is insignificant, according to the model in Chapter 4. Due at least in part to declarations of unconstitutionality being more common than overturning precedent, and perhaps also to the higher correlation between case salience and declarations of unconstitutionality, this chapter's empirical model shows a significant positive relationship between declaring a congressional law as unconstitutional and issuing a concurring opinion. When we examine each decision individually, however, we find no relationship between declaring a congressional law to be unconstitutional and either writing or publishing a concurrence.

As per the results of this analysis, justices are less likely to issue concurring opinions in cases where the outcome coalition is minimum winning. However, in Chapter 3, the results of that analysis indicated that justices are actually more likely to write concurrences when the outcome coalition is minimum winning, and also more likely to write earlier in the decision-making process, suggesting that bargaining may be heightened when the majority coalition is minimum winning. We can make sense of these divergent results by considering two important differences in the models. First, more concurring opinions are written when the outcome coalition is minimum winning in the earlier analyses, as the inclusion of time-varying covariates allows the model to take into account whether justices have switched their vote on the outcome, thus changing whether the majority coalition is minimum winning.

Secondly, even though there is no significant relationship between minimum winning coalitions and withdrawing concurring opinions, the descriptive statistics do indicate a slight difference in withdrawal rates. This may be in part due to the aforementioned relationship between having a minimum winning coalition and writing earlier in the decision-making process, as writing earlier has a significant negative effect on the probability that a justice withdraws his concurrence. Thus, because justices are more likely to circulate concurring opinions earlier in the decision-making process when the majority coalition is minimum winning and concurrences written earlier in the process are more likely to be withdrawn, the static model may be picking up on this fact in its results about minimum winning coalitions.

The implications for the differing results are potentially far-reaching. While the static model implies that justices are less likely to utilize concurring opinions, more likely to be accommodated by majority opinion authors, or attentive to the potential long-term collective ramifications of a plurality decision, the results of the models presented in Chapters 3 and 4 can be taken to show that justices are actually more likely to use concurring opinions as bargaining tools in cases where the majority coalition is minimum winning. Since a relatively large percentage of cases are decided by minimum winning coalitions⁴², it is important to understand how the decision-making process may or may not work differently in these cases.

Lastly, the analysis in this chapter finds a significant relationship between the number of concurring opinions issued in the case and the likelihood that a justice will write a concurring opinion; substantively speaking, this relationship is rather large when compared with the other variables. In cases with no concurring opinions, the predicted probability of a justice publishing a concurrence is about 4%, while if there are four other concurring opinions this probability increases to almost 14%. This variable only measures other justices' concurring opinions, so it is not introducing bias into the model by including the dependent variable as part of the measurement of an independent variable. However, these results still contradict those of the models in previous chapters. I suggest that the differences in the results and corresponding implications come from two sources, based on inadequacies of the static model. First, if the presence of

⁴² During the 1970s, approximately 20% of cases were decided by minimum winning outcome coalitions. In 2001 and 2002, approximately 28% of cases were decided by minimum winning outcome coalitions. (Epstein et al, 2003)

concurrences is another indication of case salience or difficulty, it may be that we are more likely to see either no concurring opinions or several concurrences; one justice's choice to write a concurrence may increase the likelihood of other justices' writing concurrences as well. The model presented in the chapter is not capable of testing for this phenomenon, however. Secondly, and similarly, because this chapter's model does not examine when a justice writes a concurring opinion, we do not know which justice wrote first, and thus are using the presence of yet-unwritten concurrences to predict whether a justice will write his own concurring opinion.

In sum, there are some variables for which a static model of judicial-decision making which does not include withdrawn concurrences actually leads to incorrect implications about judicial behavior. Additionally, there are questions about motivations that static models are simply not able to address, leaving the implications of such models less certain. In order to assess justices' motivations, we need to incorporate the dynamic nature of their choices; each justice does not operate in a vacuum, and thus we must account for the fact that other justices' choices, which can and do change over the decision-making process of a case, can affect a particular justice's choices about writing a concurring opinion.

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