Explaining Plurality Decisions

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Many of the Supreme Court’s most important decisions, such as those involving executive power and the constitutionality of abortion regulations, are decided by plurality decision. Plurality opinions result when five or more Justices agree on the result in a particular case but no single rationale or opinion garners five votes. Many Justices, including William Rehnquist and Ruth Bader Ginsburg, have addressed the problems created by plurality opinions, such as interpretive difficulties in determining the Court’s holding, but few scholars have addressed plurality decisions other than in passing.

In the first empirical analysis examining the occurrence of plurality decisions, the authors present two statistical models to examine a variety of ideological, collegial, contextual, and legal factors to determine which factors are most likely to lead to plurality decisions. The case-level model draws on data for every Supreme Court case decided between the 1953 and 2006 Terms of the Supreme Court. The results of the study are illuminating. For example, a case is more likely to result in a plurality decision if it involves an issue of constitutional interpretation with respect to a civil liberties issue and lower court conflict did not influence the decision to grant certiorari. Importantly, the empirical results of the case-level model indicate that ideological forces bear no relationship to the occurrence of plurality decisions, and strategic considerations only appear in cases which have a minimum winning coalition.

In addition, the authors estimate an individual-Justice model that measures which factors are most likely to lead to votes by Justices to concur in the judgment, which is the key ingredient for a plurality opinion. The opinion author’s ideological distance from and prior lack of cooperation with a particular Justice both play a large role in whether the Justice joins the majority and separately concurs or votes to concur in the judgment. Unlike the case-level model, these results show that the Justices’ ideological orientations influence their decisions to concur in the judgment. In addition, many of the same factors found influential in the case-level model are also found to influence Justices’...
decisions to concur in the judgment. Given the importance of plurality decisions to understanding the Supreme Court, this Article provides the basis for further normative evaluations of whether plurality decisions harm the development of the law and how such decisions should be interpreted by lower courts.

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INTRODUCTION

The Supreme Court of the United States has been at the forefront in deciding cases in areas such as the proper scope of executive power,1 the constitutionality of various criminal punishments under the Eighth Amendment,2 and the appropr-
ate scope of state abortion regulations.³ In each of these important areas, majority coalitions on the Court have failed to form or have broken down and produced plurality decisions.⁴ Plurality decisions occur when a majority of Justices agree upon the result or judgment in a case but fail to agree upon a single rationale in support of the judgment.

A prominent example of a plurality decision is Regents of the University of California v. Bakke, in which the Court addressed the constitutionality of a special admissions program at the University of California at Davis Medical School that set aside 16 spots in a 100-student entering class for a special class of minority and “disadvantaged” applicants who had less than a 2.5 cumulative undergraduate grade point average.⁵ The Court struck down the admissions program on equal protection grounds, but no single opinion of the Court garnered five votes. Justice Powell, who penned the opinion announcing the judgment of the Court, stated that quota programs are unconstitutional because they discriminate against non-minority applicants on the basis of race.⁶ However, according to Justice Powell, race can be used as a consideration or “plus” factor in admissions so long as it does not foreclose consideration of non-minority applicants or set aside certain seats for minority groups.⁷ A group of four other Justices (Blackmun, Brennan, Marshall, and White) would have held the Medical School’s program constitutional under an intermediate scrutiny standard of review.⁸

In a landmark case interpreting the scope of the Equal Protection Clause, the Court failed to reach agreement on a single rationale in support of its judgment. For the next twenty-five years, courts and scholars could not agree on the controlling legal rationale of Bakke because of the deeply fragmented nature of the Court that decided the case.⁹ By 2002, lower courts had divided on the role of race in college admissions, leading the Court to grant certiorari in two cases involving the constitutionality of University of Michigan admission programs.¹⁰ Rather than determining and then relying on the holding in Bakke—the case most directly on point—the Court instead analyzed the two University of Michigan admission programs under a variety of equal protection precedents. In fact, the Court expressly declined to say in Grutter v. Bollinger which of the

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⁴. See, e.g., Hamdi, 542 U.S. at 508; Ewing, 538 U.S. at 14; Casey, 505 U.S. at 843–44; Harmelin, 501 U.S. at 961.
⁶. See id. at 307.
⁷. See id. at 316–18.
⁸. See id. at 357–62 (stating that “classifications established for ostensibly benign purposes” must be justified by “an important and articulated purpose”).
opinions in Bakke was controlling because the issue had “so obviously baffled and divided the lower courts that ha[d] considered it.”

Examples abound of important cases decided by plurality decision, particularly over the past fifty years. The Justices have almost uniformly agreed that plurality decisions are problematic for a variety of reasons. As then-Judge Ginsburg stated: “More unsettling than the high incidence of dissent is the proliferation of separate opinions with no single opinion commanding a clear majority.” Justice Powell, whose vote contributed to the fragmented decision in Bakke, explained that plurality opinions “may promote disrespect for the Court as a whole and more emphasis on ‘vote counting.’ Failure of the Court to settle on a rationale for a decision invites perpetual attack and reexamination.”

Scholars and judges advance a variety of explanations for the occurrence of plurality opinions, but none have been empirically tested. Judge Frank Easterbrook proposes one prominent explanation based on the difficulty and salience of cases heard by the Supreme Court: “It is easy to reach agreement on easy cases, but the Court does not decide many easy cases. Its certiorari jurisdiction allows it to select cases that seem interesting or important, the very cases most apt to produce divisions.” Another explanation is that divergence among the ideological positions of the Justices on certain issues leads to deeply fragmented coalitions. According to this idea, the Court essentially delays definitive resolution of a legal question instead of forging an “uneasy compromise of conflicting views.” This hypothesis could account for the repetitive occurrence of plurality opinions in cases involving the Eighth Amendment’s prohibition on “cruel and unusual punishments.” These explanations for the occurrence of plurality opinions, plus many more, will be empirically tested in this Article.

Part I of this Article introduces plurality opinions, including a discussion about the frequency of plurality decisions and which Justices are most responsible for their occurrence. Part II explains why identifying the factors that contribute to the issuance of plurality opinions is important to scholars who study the Supreme Court, as well as to lawyers and judges. Part III introduces the case-level model that explains which factors affect the occurrence of
plurality decisions. Part IV presents the results of our individual-Justice model to determine what influences an individual Justice’s decision to join the majority coalition, join the majority and concur, or concur in the judgment in any particular case—the latter of which is the decision that forms the basis for a plurality decision. Finally, Part V summarizes our research findings, presents their broader significance, and suggests avenues for future research.

I. INTRODUCING PLURALITY DECISIONS

Plurality decisions result when at least five Justices agree on the result in a particular case but no single rationale or opinion garners five votes. The opinion that receives the largest number of votes among those supporting the result favored by the majority of Justices is generally labeled as the plurality opinion. Other opinions supporting that result (but not the plurality’s reasoning) are ordinarily identified as opinions concurring in the judgment.

Historically, plurality decisions by the Supreme Court have been relatively rare: during the 145 Terms between 1801 and 1955, the Supreme Court issued only 45 plurality decisions. However, during the 54 Terms from 1953 to 2006, the Supreme Court issued 195 plurality opinions, approximately 3.4% of the 5,711 total cases decided during the period. While the frequency of plurality opinions dramatically increased in the 1940s and 1950s, the occurrence of plurality opinions between 1953 and 2006 has remained fairly steady, with a moderate increase during the 1970s when Warren Burger served as Chief Justice. During the 1970 Term, for example, the Court produced fifteen plurality decisions, or exactly one-third of the total number of such decisions during the 155-year period from 1801 through 1955. Nonetheless, the median number of plurality opinions per Term during the period from 1953 through 2006 equals 3, and the mean number of plurality opinions is nearly identical at the beginning of this period (1953 through 1962) as it is at the end (1997 through 2006), at 2.3 and 2.4 per Term, respectively. Figure 1 displays the percentage of cases resulting in plurality opinions per Term from 1953 to 2006.

The presence of one or more concurring opinions, however, does not result in a plurality decision. To the contrary, a simple concurring opinion indicates that the Justice writing separately agrees with the legal rule and its application in the majority opinion but that there is some aspect of the case worthy of further discussion. Therefore, the binding rule in a case in which there are no

19. The data are derived from THE SUPREME COURT DATABASE, http://scdb.wustl.edu/index.php (last visited Apr. 8, 2009). Except where otherwise noted, all data used in this Article are derived from THE SUPREME COURT DATABASE.
20. See id.
opinions concurring in the judgment and one or more concurring opinions is provided by the opinion of the Court. In contrast, when four or fewer Justices agree to the rationale supporting a judgment and one or more Justices writes an opinion concurring in the judgment, the result is a plurality decision; an opinion concurring in the judgment is the functional equivalent of a dissent from the plurality’s reasoning even if it represents agreement with the result reached in the case. The Court’s rule for interpreting plurality decisions, announced in the 1977 case of *Marks v. United States*, is consistent with the account of concurring opinions described above: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .’” No comparable interpretive rule exists for decisions in which one or more Justices write a simple concurrence.

Figure 2. Percentage of Cases with Concurring Opinions, 1953–2006 Terms

The foundation, therefore, of the plurality decision is the choice made by one or more of the nine Justices to write an opinion concurring in the judgment. The number of plurality decisions in any particular Term is thus dependent on the number of cases in which an opinion concurring in the judgment is written during that Term. Of course, the converse is not true. No plurality decision results, even if one or more of the Justices authors an opinion concurring in the judgment, if five or more Justices are willing to join a single opinion (or at least parts thereof). Nonetheless, no account of plurality decisions is complete without examining the frequency of and factors influencing a Justice’s decision to write an opinion concurring in the judgment. Although a Justice’s decision to join the majority, join the majority and concur, or write an opinion concurring in the judgment will be the focus of our individual-Justice model in Part IV, it is useful as an initial step to depict the frequency of both concurring opinions and opinions concurring in the judgment in each of the Terms between 1953 and 2006.

Figure 2 depicts the frequency of both simple concurrences and opinions concurring in the judgment. A few observations are of note. First, the rate of both types of separate opinions steadily increased between 1953 and the mid-1960s. Prior to 1959, the percentage of cases with concurrences in the judgment averaged 17.5%, but it increased to 26.2% thereafter. Second, simple concur-
rences were more prevalent than concurrences in the judgment prior to the mid-1960s, but the disparity disappeared by 1971. In fact, from 1971 through 2006, the number of cases with concurrences in the judgment (25.2%) was almost equivalent to the number with simple concurrences (25.5%). Third, the degree of Term-to-Term variation did not evidence much change over the 1971–2006 time period.

In addition to these temporal patterns, Figure 3 shows that individual Justices joined or authored separate opinions at substantially different rates. The average Justice in Figure 3 concurred in the judgment in 5.5% of all cases decided by the Supreme Court. At the low end of the spectrum are Justices Warren, Clark, Whittaker, and Rehnquist, who concurred in the judgment 2.1%, 2.9%, 3.4%, and 4.3% of the time, respectively. Meanwhile, Justices Thomas, Blackmun, 

Figure 3. The Percentage of the Time Justices Concur in the Judgment, 1953–2006 Terms

24. The data for this figure are derived from THE SUPREME COURT DATABASE, see supra note 19, which identifies when each Justice authored or joined an opinion concurring in the judgment. A Justice must have participated in a minimum of ten plurality decisions to be included in this figure. A replication dataset is available on request to the authors.
Scalia, and Harlan concurred in the judgment in 7.7%, 7.8%, 8.9%, and 9.9% of cases, respectively.

A slightly different picture emerges when considering only the universe of 195 plurality decisions between 1953 and 2006. Each plurality decision contained approximately 2 opinions concurring in the judgment, as compared to an average of 0.47 concurrences in the judgment in cases with a majority. On average, the Justices serving between 1953 and 2006 concurred in the judgment about 25.3% of the time in plurality decisions. Justice Thomas, who concurs in the judgment at the fourth-highest rate among members of the Supreme Court that have served since 1953, concurred in the judgment in 46.2% of all cases that resulted in a plurality decision, the highest rate of all Justices in the study. Chief Justice Rehnquist, by contrast, concurred in the judgment in only 14.6% of all cases resulting in a plurality decision during his service on the Court.

Even Figure 3, which displays the rate at which individual Justices concur in the judgment in plurality decisions and all cases more generally, does not necessarily indicate which Justices are most responsible for plurality decisions. Responsibility for a plurality decision cannot necessarily be assigned to a Justice who often concurs in the judgment, even when a plurality decision results, if other members of the Court also vote to concur in the judgment in those cases. By the same token, a Justice who rarely concurs in the judgment may bear disproportionate responsibility for plurality decisions if a large percentage of her votes result in pluralities and she is alone in concurring in the judgment. With that analysis in mind, Figure 4 applies a measure originally developed by Jeffrey Segal and Harold Spaeth, in which responsibility for a plurality decision is defined as the degree to which a Justice contributes to such a decision. Under this measure, a Justice can only be considered responsible if she voted to concur in the judgment in a particular case. A Justice’s responsibility for a plurality opinion, in turn, is determined by counting the number of votes by which the winning coalition is short of achieving a majority (for example, if the plurality coalition consisted of four Justices and eight or nine Justices participated in the case, then this value would equal one) divided by the total number of Justices in a particular case who concurred in the judgment. For instance, the responsibility score for a Justice in a case equals one if the winning coalition was one vote short of a majority coalition


26. For consistency and clarity, a “winning coalition” is defined as a coalition of five or more Justices who agree on the judgment or outcome of a case, even if the members of the coalition cannot agree on the controlling legal reasoning. A “winning coalition,” therefore, includes any members of the Court who write or vote to join a plurality or majority opinion, a simple concurrence, or a concurrence in the judgment. On certain issues and in certain situations, it can also include members of the Court who “concur in part and dissent in part” or “concur in the judgment in part and dissent in part.”

27. See Segal & Spaeth, supra note 25, at 388–90.
and only that Justice authored an opinion concurring in the judgment. The responsibility index, displayed in Figure 4, is the median value of a Justice’s responsibility scores in all cases in which she participated in a plurality decision.

Figure 4 presents a different picture than Figure 3 with respect to the responsibility of particular Justices for plurality decisions. Justice Thomas, who concurred in the judgment most often when plurality decisions resulted, has a responsibility index of 0.58, while Justice Ginsburg, who concurred in the judgment relatively rarely when plurality decisions resulted, has a responsibility

Figure 4. The Responsibility of Individual Justices for Producing Plurality Decisions, 1953–2006 Terms

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28. The data for this figure are derived from THE SUPREME COURT DATABASE, see supra note 19. To be included in Figure 4, a Justice must have participated in at least ten plurality decisions. A replication dataset is available on request to the authors.
index of 1. The responsibility index of one for Justices Ginsburg and Stevens means that, when they concurred in the judgment and a plurality decision resulted, only one additional vote was necessary for a majority coalition and they authored a solo opinion concurring in the judgment. Meanwhile, Justices Blackmun, Brennan, Burger, Frankfurter, Harlan, Marshall, Rehnquist, Souter, and Whittaker have the lowest responsibility indexes of all Justices serving on the Supreme Court between 1953 and 2006 with scores of 0.5.

Finally, the assignment of opinions by the Chief Justice can theoretically play a role in the frequency of plurality decisions. If the Chief Justice does not carefully consider the positions of the other Justices at conference and assigns the opinion to a colleague who is unlikely to apply a rationale in a case that can garner four other votes, a plurality decision is likely to result. Some Justices are simply better than others at building and maintaining majority coalitions. In verbally announcing his plurality opinion in *Chavez v. Martinez*, Justice Thomas sarcastically joked that he was a “consensus builder.” There is some truth to the underlying premise that particular Justices hold positions on some legal issues that are not compatible with the views of colleagues, rendering them poor opinion authors when those issues arise. If a prevailing norm on the Supreme Court is consensus when possible, as many commentators point out, a Chief Justice makes a poor strategic decision in assigning an opinion in a closely divided case to a colleague who is deficient at holding together coalitions or would apply a rationale in a case that is incompatible with his or her colleagues. In view of the importance of opinion authors, Figure 5 identifies the Justices who most often authored plurality opinions.

The results from Figure 5 are fascinating, if not extraordinary. First, Justice Ginsburg, who is tied with Justice Stevens with the highest responsibility index for plurality decisions, has a perfect record through 2006 at building and maintaining majority coalitions when she is the opinion author for the winning coalition. Meanwhile, Justice Frankfurter, who has frequently been described as

The “primary opinion author for the winning coalition” is the author of either the plurality or majority opinion for the Court.

The data for this figure are derived from The Supreme Court Database, see supra note 19. A Justice must have written at least ten majority opinions to be included in Figure 5. A replication dataset is available on request to the authors.
a prototypical judicial minimalist, was one of the worst Justices in recent history at maintaining majority coalitions, as 7.1% of his 84 opinions after 1953 resulted in plurality decisions. Finally, those popularly referred to as the “swing votes” on recent Courts, such as Justices Powell, Kennedy, and O’Connor, are collectively slightly below average in maintaining majority coalitions with plurality decisions in 4.7%, 3.2%, and 4.0%, respectively, of their writing assignments for the Court. Of course, the relatively high proportion of plurality opinions for “swing Justices” might be a result of the well-known strategic practice by opinion assigners (typically the Chief Justice) of assigning majority opinions to Justices ideologically close to the median member of the Court when the Court is closely divided in a case.

The foregoing figures and discussion demonstrate that plurality decisions are complicated and poorly understood events. No existing research empirically identifies the conditions under which plurality decisions are most likely to occur, despite a variety of possible causes. It is also unclear why certain Justices play a prominent role in producing plurality decisions, either as the lead opinion author or as a Justice concurring in the judgment, while others are particularly skillful at building or maintaining coalitions. It is to these questions and others that we will turn later in the Article.

II. WHY STUDY PLURALITY DECISIONS?

The foregoing discussion raises an obvious question: if only 3.4% of the cases before the Supreme Court result in plurality decisions, then why study them? Though plurality decisions are relatively rare events, especially as the Supreme Court’s plenary docket has declined precipitously over the past twenty years, plurality decisions provide a rare window into the breakdown of bargaining and coalition-building among Justices. In addition, plurality decisions tend to occur in difficult and highly salient cases, such as in the areas of civil rights and civil liberties—areas in which the law is often unclear and the Justices’ ideological proclivities are most relevant. Of course, civil liberties and civil rights cases are also the fodder of numerous scholarly articles in the


36. See supra note 19 and accompanying text.


legal literature, so a better understanding of how those cases are decided can yield important insights about a hotly debated field. For those who study judicial decision making in particular, an understanding of why coalitions fracture or fail to form can be useful in understanding how bargaining occurs and coalitions form in the first place.

Ever since Walter Murphy posited in his seminal 1964 book, *Elements of Judicial Strategy*, that the majority opinion author exercises substantial control over the final opinion produced by the Supreme Court, both political scientists and legal scholars have studied the formation of coalitions on multi-member courts, including the Supreme Court. Coalition formation and maintenance refers to the stage of a court’s decision making process between opinion assignment and the final vote regarding a case. During this time, “the majority opinion writer attempts to write an opinion that will attract a majority of the Justices’ votes; other Justices may write concurring or dissenting opinions for which they may also seek support.” A sophisticated opinion author has two goals: (1) to craft an opinion that is as close as possible to the author’s preferred legal rule or policy, and (2) to author an opinion that is acceptable to at least four other Justices so that it becomes a majority opinion. Though these goals are sometimes in tension, a strategic opinion author knows that other Justices “are likely to have some tolerance for opinions that, while preferable to the legal status quo, diverge from their most preferred policies.” As several recent studies demonstrate, both the primary opinion author for the winning coalition and pivotal Justices on the Court (especially the median Justice in the winning

39. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 84 (1964) (discussing the importance of the assignment decision).


42. Id.

43. See EPSTEIN & KNIGHT, supra note 40, at 96 (“Given the requirement of a majority for the establishment of precedent and the fact that it would be difficult to imagine any case in which the opinion writer fully agreed with the majority on every point, all opinions of the Court are . . . the product of strategic calculation.”); MALTZMAN, SPRIEGG & WAHLBECK, supra note 40, at 6–10 (describing the opinion-writing process and arguing that an opinion author “tries to draft an opinion that reflects both his or her own policy goal and the preferences of the expected majority coalition”); JEFFREY A. SEGAL ET AL., THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM 348 (2005) (discussing an opinion author’s need to “take into account the views of at least four other [Justices]”); Chris W. Bonneau et al., Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court, 51 Am. J. Pol. Sci. 890, 890–91 (2007) (arguing that opinion authors exercise significant control over final opinions, but that policy preferences of the median Justice and the current legal status quo are also factors that influence the opinion); Jeffrey R. Lax & Charles M. Cameron, Bargaining and Opinion Assignment on the U.S Supreme Court, 23 J.L. ECON. & Org. 276, 276 (2007) (positing a “game-theoretic model of bargaining” on the Court whereby the opinion author can “move an opinion away from the median without provoking a winning counteroffer”).

44. Bonneau et al., supra note 43, at 891.
A study of plurality decisions examines the flip side of coalition formation: the breakdown or failure of coalitions. If every Justice insisted that an opinion drafted by a colleague be perfectly consistent with his or her own ideological preferences, then the result would be a plurality decision in a substantial proportion of the Supreme Court’s plenary docket. Undoubtedly the norm of consensus, though considerably weaker than it once was, plays a role in minimizing plurality decisions. Justice Powell pointed out this norm to his law clerks, telling them that “each Justice has a responsibility to the Court as an institution to help form a majority wherever this can be done without sacrifice of principle or conviction. The Court is not best served by plurality or fractionated opinions.” The bargaining among the opinion author and other members of the tentative majority coalition also helps determine whether the Court’s final opinion is a majority or plurality decision. Indeed, as Jeffrey Segal, Harold Spaeth, and Sara Benesh have argued, when the opinion author fails to hold together a majority coalition, the author may be to blame for “fail[ing] to bargain effectively because she gives primacy to his or her own policy preferences,” or because she is “unable to effect the necessary compromises” with other Justices.

A sophisticated empirical study of plurality decisions will disclose the conditions under which coalitions on the Supreme Court are most likely to fracture and dissolve. By definition, plurality opinions result when some conditions crucial to coalition formation or maintenance are absent. Discovering and explaining those conditions will lead to greater refinement and understanding of the various models of coalition formation and bargaining.

Yet another reason to study plurality opinions stems from their indeterminacy and lack of clarity. Clear, understandable precedent is necessary to “reduce[] transaction costs and wasted judicial effort, and encourage[] like cases to be treated alike—the bedrock of equality and fairness.” By creating multiple rationales in favor of a single judgment, a plurality decision by the Supreme Court leaves lower courts without ample guidance. An example is the Court’s recent decision in *Rapanos v. United States*, in which the Court split 4–1–4 on the proper standard to apply to determine if wetlands are “waters of the United

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46. See *supra* note 43.
47. See *supra* note 31.
States” under the Clean Water Act.\(^{51}\) Justice Scalia, writing for three other Justices, reversed and remanded on the ground that “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.”\(^{52}\) Justice Kennedy, on the other hand, wrote an opinion concurring in the judgment in which he stated that a wetland need only have a “significant nexus” with a navigable body of water to be covered by the Act.\(^{53}\) Lower courts, not surprisingly, have struggled to find the controlling legal rule in \textit{Rapanos}. The First and Eighth Circuits have interpreted \textit{Rapanos} to permit regulation under the Clean Water Act if \textit{either} the plurality’s or Justice Kennedy’s standard is met.\(^{54}\) Meanwhile, the Seventh, Ninth, and Eleventh Circuits have held that Justice Kennedy’s opinion in \textit{Rapanos} provides the controlling legal standard because it constitutes the “narrowest grounds” for decision under the \textit{Marks} rule.\(^{55}\)

In other words, a plurality decision in a seminal case can have a profound impact on the development of law in a particular area. In a recent study, Pamela Corley found that “plurality decisions distort the signaling function of the Supreme Court, creating uncertainty regarding the precedential value of the decision.”\(^{56}\) In an empirical model examining 63 plurality decisions and 110 non-plurality decisions by the Supreme Court between 1976 and 1986, Professor Corley found that “the probability of positive treatment” decreases by 28% and the “the probability of negative treatment” increases by 42% over the baseline when a lower court is interpreting a plurality opinion issued by the Supreme Court.\(^{57}\) One reason for this effect is that a plurality decision may be perceived by lower courts as less authoritative than a majority decision.\(^{58}\) Another is that plurality opinions, especially those like \textit{Rapanos}, “create confusion by failing to provide clear guidance to the lower courts.”\(^{59}\) Some scholars have gone so far as to suggest that plurality opinions do “more to confuse the current state of the law than to clarify it.”\(^{60}\) Ultimately, the ambiguity and confusion created by plurality decisions can lead lower courts to “experiment

\(^{52}\) \textit{id.} at 742 (plurality opinion).
\(^{53}\) \textit{id.} at 779 (Kennedy, J., concurring in the judgment).
\(^{54}\) See United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009); United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006); \textit{see also} United States v. Lucas, 516 F.3d 316, 325 & n.8 (5th Cir. 2008) (holding that a trial court did not abuse its discretion in giving an instruction incorporating the standards from both the plurality’s and Justice Kennedy’s opinions in \textit{Rapanos}).
\(^{55}\) See United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006).
\(^{56}\) Corley, \textit{supra} note 31, at 40.
\(^{57}\) \textit{id.} at 43.
\(^{58}\) \textit{See id.} at 40.
\(^{59}\) \textit{id.}
\(^{60}\) Davis & Reynolds, \textit{supra} note 15, at 62.
with alternative rules and outcomes based on their own criteria,"\textsuperscript{61} which can lead to an altered evolution of the law.

Finally, the study of plurality decisions has practical implications. Although there are various theoretical approaches for understanding Supreme Court decision making, a burgeoning literature presents clear support for the strategic model.\textsuperscript{62} As mentioned previously, a strategic Chief Justice will want to know what types of cases are most likely to lead to fractured results so that he can be especially careful in assigning those opinions. Similarly, a strategic opinion author will be better prepared for division if she knows that a case before the Court has characteristics that make it especially likely to result in a plurality decision. As Epstein and Knight explain, the Justices are “strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act.”\textsuperscript{63}

Similarly, strategic attorneys can use the results of our empirical models to identify in which cases they should be particularly sensitive to division on the Court. When the universe of judges who will hear a case is known ahead of time, strategic attorneys will craft their legal arguments in an attempt to get a majority of a court to agree to their position.\textsuperscript{64} That often means directing arguments in a brief to influence certain members of a court, especially those that are likely to be the key or “swing” votes in an appeal. A rational litigant before the Supreme Court will also seek the filing of various amicus curiae briefs to sway the Justices in favor of one position or another.\textsuperscript{65} In other words, if a skilled Supreme Court advocate knows that the characteristics of her case are particularly vulnerable to produce deep divisions on the Court, legal strategy in a case might be altered. For example, rather than risk a deeply fractured Court, a skilled advocate might advance a less aggressive legal theory that is likely to garner five votes and thus lead to clear, binding precedent.

Accordingly, while plurality decisions constitute a small percentage of the Supreme Court’s plenary docket in any given Term, there is much to be gained from studying them both as an academic matter and for purposes of practical application. In the next Part, we will introduce our case-level model, which

\textsuperscript{61} Corley, \textit{supra} note 31, at 34.

\textsuperscript{62} See, e.g., Epstein & Knight, \textit{supra} note 40 (presenting a strategic account of Supreme Court decision making); Maltzman, Spriggs & Wahlbeck, \textit{supra} note 40, at 130–37 (describing constraints on the coalition-building process provided by the viewpoints of other Justices); David R. Stras, \textit{The Incentives Approach to Judicial Retirement}, 90 Minn. L. Rev. 1417, 1425–29 (2006) (discussing the rational choice model).

\textsuperscript{63} Epstein & Knight, \textit{supra} note 40, at xiii.

\textsuperscript{64} See id. at 88–95 (describing how pitching a case differently can lead to five votes); Richard J. Lazarus, \textit{Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar}, 96 Geo. L.J. 1487, 1496–97 (2008) (describing the reasons for the success of the United States Solicitor General before the Supreme Court).

\textsuperscript{65} See Epstein & Knight, \textit{supra} note 40, at 46–47 (discussing the importance of amicus briefs in the Court’s decision to grant certiorari).
identifies the case characteristics that contribute the most to the issuance of plurality decisions by the Supreme Court.

III. THE CASE-LEVEL MODEL

The objective of this Article is to test the argument that certain ideological, collegial, legal, and contextual factors lead to plurality decisions. The unit of analysis for the case-level empirical model is each case decided by the Court. The dependent variable in this model, **Plurality Opinion**, is dichotomous and equals one if the case was a plurality decision and zero otherwise. Most of the data in the model come from *The Supreme Court Database* created by Harold Spaeth.66 The dataset in this Article includes all orally argued cases decided between the 1953 and 2006 Terms that resulted in signed opinions.67 Of the 5711 cases in the dataset, the Court decided 195 (3.4%) by plurality decision. We estimate this model with logistic regression, as is appropriate for dichotomous dependent variables, and use robust standard errors.68

A. RESEARCH DESIGN AND HYPOTHESES

Many aspects of the Supreme Court’s decision making processes have been studied extensively by political scientists and legal scholars. Scholars, for instance, have examined how the Supreme Court sets its agenda through the certiorari process.69 Others have studied the bargaining and negotiation among the Justices in plenary cases, including the formation and maintenance of coalitions.70 Still others have studied the influence of oral argument sessions on the eventual decisions made by the Justices in plenary cases.71 The case-level model considers the factors employed in the foregoing studies, as well as others, in determining which are most likely to contribute to a plurality decision by the Supreme Court. In doing so, four general categories of factors are considered in the model: ideological, collegial, legal, and contextual.

66. *See supra* note 19. A replication dataset is available on request to the authors.

67. Per curiam opinions were excluded from the model because it is impossible to measure the ideological position of the primary opinion author for the winning coalition in instances in which the per curiam opinion author is unknown, which is the case for many such opinions released between 1953 and 2006.

68. *See generally* J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 34–84 (1997) (presenting models for analyzing binary outcomes). The statistical results are comparable in a rare events logit model, which is appropriate for some skewed dependent variables. *See generally* Gary King & Langche Zeng, Logistic Regression in Rare Events Data, 9 POL. ANALYSIS 137 (2001) (describing methods for analyzing rare events data).


70. *See supra* notes 39–49 and accompanying text.

1. Ideological Factors

The ideology of Justices makes a difference as to the positions they advance in cases. Proponents of the attitudinal model posit that the Justices will decide cases in alignment with their ideology and sincerely held voting preferences. In other words, Justices will act to advance their ideological preferences, regardless of other constraints such as precedent, text, or the views of the political branches. Although the strategic model, which has become the dominant paradigm for studying the decision making of Supreme Court Justices, emphasizes that institutional rules constrain the Justices’ decisions, it still recognizes the primacy of ideological preferences in explaining the choices they make. Empirical studies demonstrate that the ideological preferences of Justices influence nearly every aspect of decision making on the Court, including the decision on the merits of a case, voting to grant certiorari, bargaining and negotiating over legal doctrine, overruling precedent, and whether to join a majority opinion.

It would be surprising, therefore, if ideological factors did not also play some role in plurality decisions. Consistent with the coalition-building literature, our hypothesis is that the greater the ideological distance between the primary opinion author for the winning coalition and the rest of the coalition, the greater the probability that a plurality decision will result. The ideological locations of the Justices are identified using the ideal point estimates created by Andrew Martin and Kevin Quinn, who used a dynamic Bayesian item response model to estimate the relative ideological location of each Justice in each year of his or her service on the Court. The independent variable in the case-level model,
Opinion Author Distance from Coalition, is the absolute value of the difference in the Martin–Quinn scores between the primary opinion author for the winning coalition and the median of the final winning coalition. The median Justice of the winning coalition is used to measure the coalition’s ideological location because recent research indicates the median Justice is particularly influential in determining outcomes and the content of opinions.

The coalition-building and bargaining literature also suggest that ideologically polarized or heterogeneous coalitions slow coalition formation and produce more separate opinions. In a recent article, Nancy Staudt, Barry Friedman, and Lee Epstein argue that consequential decisions are more likely to occur in ideologically homogeneous coalitions in part because “[t]he authority of a majority coalition of ideologically dispersed Justices is further minimized by the ability of each Justice to write his or her own opinion explaining the judgment. When the preferences are homogeneous, indeed identical, there is little incentive to write separately.” In other words, “ideological dispersion will result in a muddied explanation or fragmented majority.” Thus, our hypothesis is that the greater the ideological heterogeneity in the winning coalition, the greater the likelihood of a plurality decision. The independent variable, Ideological Heterogeneity of Coalition, is the standard deviation of the

Martín-Quinn Scores, http://mqscores.wustl.edu/measures.php (click on “2006 MQ Scores Data”) (last visited Sept. 4, 2010). Martin–Quinn scores measure Justices along an ideological continuum using a Bayesian item response model. Larger positive Martin–Quinn scores indicate that a Justice is more conservative and larger negative scores indicate that a Justice is more liberal. The most liberal Justice to have served during the span from 1937 to the 2006 Term was Justice Douglas (who scored the minimum value of −6.424 in the 1974 Term), and the most conservative was Justice Rehnquist (who scored a 4.297 in the 1975 Term).

81. The winning coalition includes all Justices voting for the majority outcome, including the primary opinion author for the winning coalition, those Justices joining the opinion of the primary author, and Justices who concurred in the judgment.

82. See Bonneau et al., supra note 43, at 890–91 (finding “some support for the claim that the median can dictate outcomes”); Charles Cameron, Jee-Kwang Park & Deborah Beim, Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice, 93 MINN. L. REV. 1820, 1844 (2009) (describing the majority median approach); Frank B. Cross & Stefanie Lindquist, The Decisional Significance of the Chief Justice, 154 U. PA. L. REV. 1665, 1679–80 & n.94 (2006) (citing a study that “suggests that the substantive content is controlled by the median member of the majority coalition, regardless of who drafts the opinion”); Carrubba et al., supra note 45, at 7–8 (showing the median of the winning coalition is more important than the median on the Court); see also Neal Devins, Ideological Cohesion and Precedent (Or Why the Court Only Cares About Precedent When Most Justices Agree with Each Other), 86 N.C. L. REV. 1399, 1438 n.225 (2008) (suggesting that “the preferences of the median member of the majority coalition is a better bellwether for how the Court will rule than are the preferences of the median member of the Court”).

83. See Maltzman, Spriggs & Wahlbeck, supra note 40, at 143.

84. See Tom S. Clark, Measuring Ideological Polarization on the United States Supreme Court, 62 POL. RES. Q. 146, 147 (2009).

85. The authors use the term consequential to “indicat[e] that certain cases, as a relative matter, make or change the law in significant ways.” Nancy Staudt et al., On the Role of Ideological Heterogeneity in Generating Consequential Constitutional Decisions, 10 U. PA. J. CONST. L. 361, 364–65 (2008).

86. Id. at 370.

87. Id. at 371.
2. Collegial Factor

Scholars recognize that decision making on the Supreme Court is best characterized as a “collegial game,” meaning Justices pursue their preferred legal and policy goals but do so within the constraints imposed by the institutional rules and norms of the Court. Judicial decision making is interdependent in the sense that one Justice’s decision in a case is often influenced by the preferences and anticipated choices of her colleagues. This idea is referred to as the “Collective Decision-Making Postulate,” which posits that “Justices will try to secure opinions that are as close as possible to their policy positions by basing their decisions in part on the positions and actions of their colleagues.”

Bargaining, negotiation, persuasion, and compromise are therefore involved as the Justices maneuver through the various stages of judicial decision making in an attempt to secure favorable legal and policy outcomes. Research shows that all aspects of decision making on the Court, including voting on certiorari, voting at conference, bargaining with majority opinion authors, accommodating Justices’ concerns in draft majority opinions, joining majority opinions, and writing separately, are influenced by strategic concerns.

Drawing on this literature, our hypothesis is that the occurrence of a plurality decision will depend on the prior relationship between the primary opinion

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88. See supra note 80.
89. In order to estimate properly the effect of the ideological heterogeneity variable, controls are included for the size of the final winning coalition because there is a strong correlation between coalition size and ideological heterogeneity. For example, unanimous voting coalitions will have high heterogeneity because they include all Justices on the Court. To ensure that the variable for ideological heterogeneity is not picking up the effect of coalition size, we include two dichotomous variables drawn from The Supreme Court Database, supra note 19: Minimum Winning Coalition equals one if the winning coalition was the minimum coalition necessary to avoid an equally divided Court (e.g., 5–4), and Unanimous Coalition equals one if the winning coalition included all Justices voting in a case (e.g., 9–0). These two variables are coded as zero for all other coalition sizes.
90. See Maltzman, Spriggs & Wahlbeck, supra note 40, at 148; see also Epstein & Knight, supra note 40, at 96.
91. Maltzman, Spriggs & Wahlbeck, supra note 40, at 17.
95. See Maltzman, Spriggs & Wahlbeck, supra note 40, at 100; Wahlbeck, Spriggs & Maltzman, supra note 79.
96. See Maltzman, Spriggs & Wahlbeck, supra note 40, at 148.
If the author has previously been uncooperative with her colleagues—specifically by writing concurrences in the judgment frequently—then other Justices in the winning coalition are more likely to write separately and generate a plurality decision. **Author’s Lack of Cooperation** is determined by first calculating each individual Justice’s percentage of cases in which she wrote or joined a concurrence in the judgment in a particular Term when voting with a winning coalition. Because this percentage is likely to depend in part on a Justice’s ideology, ideological influence is purged by regressing the foregoing percentage on the absolute value of the distance between a given Justice and the median member of the Court (using Martin–Quinn scores) in that Term. The residual from the regression model—which is equivalent to a Justice’s lack of cooperation in a particular Term that is not explained by ideology—is then lagged one Term in order to derive the **Author’s Lack of Cooperation**. Larger values for this variable indicate an opinion author who, for reasons unrelated to her ideological extremity, more frequently wrote concurrences in the judgment in cases decided during the previous Term.

3. Legal Factors

While ideology and collegiality play an important role in determining the outcome of cases, so too do legal norms and constraints. Legal scholars have long maintained that judges are constrained by such legal factors as text, legal reasoning, and precedent. Of course, legal factors such as stare decisis operate differently depending on the specific circumstances of a case. Many scholars and judges maintain, for instance, that stare decisis has greater influence in statutory cases than in constitutional cases. Because of the strong form of stare decisis applied in cases of statutory construction, our hypothesis is

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98. Because ideology strongly influences Justices’ votes, see Segal & Spaeth, supra note 25, at 312–26 (providing an empirical analysis of the attitudinal model in Supreme Court decisions on the merits in search and seizure cases), Justices who are ideologically distant from one another are in part less likely to vote with one another for ideological reasons.

99. See supra note 80 and accompanying text.

100. Because this variable is lagged one Term, there is no value for a Justice’s first Term on the Court. In other words, an **Author’s Lack of Cooperation** is set at 0 for his or her first Term on the Court (which is slightly above the median value for this variable).


102. See Stras, supra note 62, at 1419.

that the Court will be less likely to issue plurality opinions in statutory cases. The case-level model empirically tests this hypothesis by including two dummy variables from *The Supreme Court Database*: Constitutional Interpretation equals one for cases involving constitutional interpretation, and Common Law/Review of Administrative Action equals one for cases involving common law adjudication or the review of an administrative action. Each variable is coded zero for statutory cases.

A second legal variable examines whether the Supreme Court granted certiorari in order to resolve a lower court conflict. Two of the three considerations for granting certiorari in Supreme Court Rule 10 are whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” and “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.” Because conflict among the lower courts is a somewhat objective criterion for granting certiorari, it is likely that a Justice’s vote to grant in such a circumstance is based less on ideological preferences and more on a desire to maintain uniform, national legal standards. In other words, it is less likely that a Justice has voted strategically to grant certiorari when a circuit split exists. A recent study demonstrates, for example, that Justices are less likely to grant certiorari based on ideological concerns when a case involves lower court conflict. Our hypothesis, therefore, is that a plenary case involving lower court conflict will be less likely to result in a plurality decision. The independent variable in the case-level model, Case Involves Lower Court Conflict, is a dummy variable equaling one if lower court conflict was the reason for granting certiorari and zero otherwise.

A third legal variable relates to the Court’s treatment of plurality opinions. Prior to the Supreme Court’s opinion in *Marks v. United States*, the precedential value of plurality opinions was ambiguous. In interpreting plurality decisions, many courts concluded prior to *Marks* that only the result reached in the

104. See *supra* note 19. Specifically, the “authdec1” and “authdec2” variables are used to determine the interpretational basis for a case. Any case labeled as both constitutional and either statutory or administrative in *The Supreme Court Database* is coded as a constitutional case in our data.

105. *Sup. Ct. R.* 10(a), (b).

106. See Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. Pol. 1062, 1069 n.9 (2009) (suggesting that conflict among the lower courts can be measured); Stras, *supra* note 37, at 980–81 (arguing that lower court conflict is the “most objective indicia of certworthiness”).


109. This variable is derived from *The Supreme Court Database*, see *supra* note 19. We coded a case as involving conflict if the Court’s opinion identifies federal court conflict (or federal court conflict and the resolution of an important question) as the reason for granting certiorari.

case, rather than the rationale of any of the opinions, was binding in future cases.\textsuperscript{111} As Part II of this Article demonstrates, prior to the late 1940s, the precedential value of plurality decisions was not of great concern, given how few plurality decisions existed.\textsuperscript{112} As the Court began to issue more plurality opinions, however, the problem of interpretation of such opinions became more acute. Thus, in \textit{Marks}, the Court stated that "\textit{[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ‘}"\textsuperscript{113} It is an understatement to say that courts have struggled mightily to find the controlling legal rule by applying \textit{Marks}. \textit{Rapanos}, discussed above, is but one example among many.\textsuperscript{114}

The \textit{Marks} rule may also potentially “incentivize separate opinions.”\textsuperscript{115} In particular, a strategic Justice knows that a separate opinion concurring in the judgment has the potential to provide a binding legal rule under \textit{Marks}. Although a norm of consensus (though much weaker than in the early 20\textsuperscript{th} century) exists on the Court,\textsuperscript{116} Justices can potentially enhance their policy influence by writing separately rather than compromising their preferences by joining a majority opinion that does not fully reflect their preferred legal approach. In other words, other than collegiality and institutional legitimacy concerns, what incentive do Justices have for compromise when they know that under \textit{Marks} there is a substantial probability that a separate opinion concurring in the judgment will be construed as controlling in future cases?\textsuperscript{117} Our hypothesis, therefore, is that for cases decided after \textit{Marks}, the probability of a plurality decision increases because of the potentially perverse incentive it creates to write separately. The independent variable, \textit{Case Decided After Marks v. U.S.}, is a dichotomous variable taking on a value of one in any case decided after \textit{Marks} and zero otherwise. Though this variable is categorized as legal in our model because it resulted from a change in the law, we view it more as a “law as opportunity” effect—meaning the Justices can use law as a vehicle

\begin{itemize}
\item \textsuperscript{111} See Mark Alan Thurmon, Note, \textit{When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions}, 42 DUKE L.J. 419, 420 & n.3 (1992).
\item \textsuperscript{112} See also id.
\item \textsuperscript{113} 430 U.S. at 193.
\item \textsuperscript{114} See supra notes 51–55 and accompanying text; see also United States v. Heron, 564 F.3d 879, 884 (7th Cir. 2009) (concluding that the \textit{Marks} rule is not applicable to \textit{Missouri v. Seibert}, 542 U.S. 600 (2002), because Justice Kennedy’s opinion in that case was not on a narrower ground than the plurality opinion).
\item \textsuperscript{115} Melissa M. Berry et al., \textit{Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos}, 15 VA. J. SOC. POL’LY & L. 299, 352 (2008).
\item \textsuperscript{116} See supra note 31 and accompanying text.
\item \textsuperscript{117} That observation, of course, assumes that the opinion concurring in the judgment is clearly “narrower” than the plurality opinion and the other opinions concurring in the judgment, and that lower courts will give equivalent stare decisis value when a plurality decision results, neither of which is certain in many cases. See supra notes 56–61 and accompanying text.
\end{itemize}
to advance their policy preferences—rather than a “law as constraint” effect—in which law, among other things, serves to limit the available, legally defensible alternatives in a case.\textsuperscript{118}

4. Contextual Factors

The final independent variables in the case-level model are contextual factors. The conceptual linkage among these variables is that they relate either to the difficulty of deciding a case or to the institutional position occupied by the opinion author. Contemporary models of Court decision making generally recognize that these case- and Justice-specific contextual attributes influence the process of decision making and the outcomes of cases.\textsuperscript{119}

Our first contextual variable relates to the Chief Justice’s institutional position on the Court. As the Court’s task leader, he is responsible for such duties as assigning most majority opinions,\textsuperscript{120} facilitating the discussion of cases at conference,\textsuperscript{121} and generally maintaining a collegial and efficient work environment.\textsuperscript{122} Most scholars thus conclude that the Chief Justice acts in ways to “enhance the legitimacy of the Court’s opinions, promote harmony on the bench, and ensure that the Court completes its work in a timely fashion.”\textsuperscript{123} Others also point out that one of the Chief’s main institutional responsibilities is the promotion of “Court cohesion.”\textsuperscript{124} Consistent with these claims, research shows, for instance, that the Chief Justice is less likely to write separate opinions,\textsuperscript{125} is less prone to bargain aggressively with majority opinion authors,\textsuperscript{126} and is more inclined to preemptively accommodate colleagues’ legal positions in the first draft of his majority opinions.\textsuperscript{127} One of the clearest pieces of empirical evidence for the Chief’s pursuit of goals beyond policy-based concerns is the strong influence of organizational needs (such as the efficient processing of cases and the equitable distribution of majority opinions) on his assignment of majority opinions.\textsuperscript{128} Indeed, the Chief’s pursuit of these instit-

\begin{itemize}
  \item[\textsuperscript{118}] See \textit{Hansford \\& Spriggs, supra} note 101, at 40 (positing a theory of stare decisis under which “the vitality of a precedent can both provide an opportunity for the Court . . . and represent a constraint on the Court’s choices”).
  \item[\textsuperscript{119}] See \textit{Maltzman, Spriggs \\& Wahlbeck, supra} note 40, at 21–25.
  \item[\textsuperscript{122}] See Cross \\& Lindquist, \textit{supra} note 82, at 1685–86 (discussing Chief Justice Rehnquist as an “able administrator, who was able to create a more collegial decision-making environment”); Danelski, \textit{supra} note 121, at 147–48 (describing the Chief Justice as “first among equals” with a “unique opportunity for leadership” on the collegial Court).
  \item[\textsuperscript{123}] Wahlbeck, \textit{supra} note 120, at 1735.
  \item[\textsuperscript{124}] See Cross \\& Lindquist, \textit{supra} note 82, at 1677–79.
  \item[\textsuperscript{125}] See Collins, \textit{supra} note 97, at 163–64; Wahlbeck, Spriggs \\& Maltzman, \textit{supra} note 97, at 503.
  \item[\textsuperscript{126}] See \textit{Maltzman, Spriggs \\& Wahlbeck, supra} note 40, at 83–84.
  \item[\textsuperscript{127}] See \textit{id.} at 119.
  \item[\textsuperscript{128}] Maltzman \\& Wahlbeck, \textit{supra} note 35, at 556–58.
\end{itemize}
tional needs exerts a more pronounced influence on his opinion assignment decisions than ideological concerns. 129 We therefore hypothesize that when the Chief Justice is the primary opinion author of the opinion for the winning coalition, he will be less likely to produce a plurality decision, because he will go to greater lengths than other members of the Court to forge consensus and avoid a fractured majority. Chief Justice Opinion Author is therefore coded as one when the Chief Justice is the primary opinion author for the winning coalition and zero otherwise. 130

A common theme in prior discussions of plurality decisions is that they are a necessary and justifiable symptom of the difficulty of cases before the Supreme Court. 131 A case may be “difficult” for several reasons, including its political or legal salience, legal complexity, or multidimensionality. Research indicates that the foregoing factors affect Supreme Court decision making in a variety of respects. For instance, in salient or complex cases, studies show that Justices are more likely to write separately, 132 take longer to join majority opinions, 133 rely more on their ideological predispositions, 134 and are less responsive to stare decisis. 135 We thus expect that plurality decisions will be more prevalent in difficult cases.

We use five variables common to the judicial politics literature to capture different aspects of case difficulty. The first variable, Amicus Brief Filings, assesses the volume of amicus curiae activity in a case. It captures case difficulty because the number of amicus briefs relates to the legal complexity, legal ambiguity, and political salience of a case. 136 Prior research demonstrates that the number of amicus briefs filed by interest groups “influences litigation success” by shaping doctrinal change and in persuading the Court to grant plenary review at the certiorari stage. 137 In particular, Paul Wahlbeck, James Spriggs, and Forrest Maltzman, in addition to Paul Collins, show that cases with

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129. Id. at 559–61; see Wahlbeck, supra note 120, at 1736 (stating that Chief Justice Rehnquist assigned opinions more in line with “organizational needs” than “strategic policy considerations”).

130. See The Supreme Court Database, supra note 19.

131. See Easterbrook, supra note 14, at 805–07.

132. See Collins, supra note 97, at 164; Wahlbeck, Spriggs & Maltzman, supra note 97, at 502–03.

133. See Maltzman, Spriggs & Wahlbeck, supra note 40, at 146–47 (showing that in politically salient cases Justices are at less “risk” of joining the majority coalition).


135. See Johnson et al., Oral Advocacy, supra note 71, at 492–502 (showing that the effect of the quality of oral arguments on Justices’ votes is conditional on the salience of a case).

136. See Maltzman, Spriggs & Wahlbeck, supra note 40, at 22, 45–46; Collins, supra note 97, at 151–52 (arguing that beyond signaling a case’s saliency, broad amicus participation itself adds complexity and ambiguity to a case for the Justices).

137. See Collins, supra note 97, at 144.
more amicus briefs are accompanied by a larger number of separate opinions.\footnote{138} Our hypothesis is that the more amicus briefs filed in a particular case, the greater the likelihood of a plurality decision. Because amicus brief filings have been steadily rising over time, the independent variable in the model, Amicus Brief Filings, is calculated by taking the number of amicus briefs filed in a given case, subtracting the average number of amicus briefs filed during the Term in which the case was decided, and dividing that number by the standard deviation of the number of amicus briefs filed during that Term.\footnote{139}

Whether reargument is ordered by the Supreme Court in a plenary case is another way to measure case difficulty.\footnote{140} Though a decision by the Supreme Court to order reargument can be a product of a number of considerations, including the addition of a new Justice on the Court, the Supreme Court tends to grant reargument in the most legally complicated, highly salient, and politically contentious cases.\footnote{141} An example of a politically salient case that was reargued during the 2009 Term is \textit{Citizens United v. Federal Election Commission},\footnote{142} in which the Court asked the parties to brief an additional question relating to the continued viability of two of its election law precedents governing corporate contributions to political candidates: \textit{Austin v. Michigan Chamber of Commerce}\footnote{143} and \textit{McConnell v. Federal Election Commission}.\footnote{144} \textit{Citizens United} was one of the most important and highly salient cases before the Supreme Court during the 2009 Term and led to a deeply fragmented Court, though it did not result in a plurality decision, because different combinations of at least five Justices joined every part of Justice Kennedy’s majority opinion for the case.\footnote{145}

\footnote{138} See id. at 146; Wahlbeck, Spriggs & Maltzman, supra note 97, at 500–03 (using the number of amicus briefs as a measure of political salience and finding that Justices are more likely to write or join concurrences for politically salient cases).

\footnote{139} In other words,

\[
\frac{\text{number of amicus briefs filed in Case X} - \text{average number of amicus briefs filed in Case X’s term}}{\text{standard deviation of number of amicus briefs filed in Case X’s term}}
\]

For a given case, this measure denotes the number of standard deviations above or below the mean number of amicus briefs filed in a given Term. Data on the number of amicus briefs filed per case are taken from Hansford & Spriggs, supra note 101, for cases decided between the 1953 and 1999 Terms. Data for later cases are from Thomas G. Hansford & Kristen Johnson, Interests and Institutions: The Causes and a Consequence of Organized Interest Activity at the U.S. Supreme Court (Aug. 2008) (unpublished manuscript) (data on file with authors), available at http://research.allacademic.com/meta/p_mla_apa_research_citation/2/7/9/5/2/p279521_index.html. We thank Professor Hansford for providing us with these updated data on amicus brief filings.


\footnote{141} See id.

\footnote{142} 130 S. Ct. 876 (2010).

\footnote{143} 494 U.S. 652 (1990).

\footnote{144} 540 U.S. 93 (2003).

\footnote{145} 130 S. Ct. at 886.
Indeed, since 1970, at least eleven cases have been reargued that resulted in plurality decisions, and one study has shown that reargument is more likely to occur when the conference vote results in a minimum winning coalition. Accordingly, our hypothesis is that if a case is reargued, it is more likely to result in a plurality decision. The independent variable in the model, *Case Reargued*, is a dichotomous variable that equals one if the case was reargued and zero otherwise.

The next variable for case difficulty is *Multidimensionality of a Case*, which measures the number of legal issues and provisions involved in a case. The variable is the sum of the number of legal provisions and legal issues dealt with in the primary opinion for the Court. Our hypothesis is that the larger the number of legal issues and provisions involved in a case, the greater the likelihood that a plurality decision will result. The hypothesis is premised upon the fact that, all else being equal, the greater the number of issues and legal provisions in a case, the more room for disagreement among the Justices.

A variable is also included for whether a case involves civil liberties or civil rights. Pamela Corley has noted that “plurality decisions are important to study because they tend to occur in highly salient issue areas such as civil liberties and civil rights.” The *Supreme Court Compendium*, a useful source of Supreme Court-related statistics, has also identified this phenomenon. Some scholars argue that cases involving hot-button political or social issues, such as


148. We realize that *Case Reargued* may suffer from some endogeneity with our dependent variable, *Plurality Opinion*, because the Court often orders reargument in cases where the Court is already closely divided. *See* Hoekstra & Johnson, * supra* note 140, at 356 (finding that a case with a minimum winning coalition is more likely to be reargued).

149. *See* The *Supreme Court Database*, * supra* note 19. The “LAW” variable is used to determine the number of constitutional provisions, statutes, or court rules at issue in a case, while the “ISSUE” variable counts the number of distinct legal issues in a decision. One commentator suggests that The *Supreme Court Database* undercounts the number of legal issues and provisions involved in a case. *See* Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 Hastings L.J. 477, 479 (2009). Assuming measurement error in The *Supreme Court Database*’s coding of issue categories is random and is uncorrelated with the other independent variables in the case-level model, then the only statistical effect is to attenuate the coefficient on the *Multidimensionality* variable.

150. Prior research shows, for instance, that Justices are more likely to change their minds about the outcome of complex cases between the conference and final vote in a case. *See* Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 Am. Pol. Sci. Rev. 581, 589 (1996). Measuring the relationship between voting fluidity and a range of variables, the Maltzman and Wahlbeck study found that “[t]he likelihood that a [J]ustice will be fluid in a complex case is 25% greater than the likelihood of changing in an easy case.” *Id.*


those involving civil liberties, are more likely to result in plurality decisions because the ideological preferences of the Justices are most likely to drive their decisions in these areas.\footnote{153}{See Maltzman, Spriggs & Wahlbeck, supra note 40, at 89; Collins, supra note 97, at 164–65; Collins, supra note 134, at 868–70.} Our hypothesis, therefore, is that if a case involves civil liberties, it is more likely to result in a plurality decision. The independent variable, \textit{Civil Liberties Case}, equals one if a case is in the area of civil liberties or civil rights and zero otherwise.\footnote{154}{See The Supreme Court Database, supra note 19. Specifically, this Article uses the “VALUE” variable from The Supreme Court Database, and we count any case involving criminal procedure, civil rights, First Amendment, Due Process, or privacy as a civil liberties case.}

The final measure of case difficulty in the case-level model is whether the Supreme Court invalidated a federal statute as unconstitutional. Though a post hoc measure, our hypothesis is that cases in which the Court strikes down a federal statute tend to be legally controversial and difficult, which will increase the likelihood of a plurality decision. The independent variable, \textit{Opinion Invalidates Federal Law as Unconstitutional}, is a dichotomous variable, which equals one if the Court strikes down a federal statute on constitutional grounds and zero otherwise.

Finally, the case-level model includes three control variables. As control variables, we do not hypothesize whether they increase or decrease the occurrence of plurality decisions, and they are included because they ensure that the coefficients of the independent variables of interest in the model are not biased. The first, \textit{Size of the Plenary Docket}, accounts for the sizeable drop in the Supreme Court’s plenary docket since the 1986 Term to determine if the decrease in plenary cases has had any impact on the frequency of plurality decisions.\footnote{155}{See Stras, supra note 37, at 950. The number of plenary cases before the Supreme Court has plunged from 153 signed opinions in 1986 to just 74 such opinions in 2002 and 2003. \textit{Id.}} This variable equals the number of orally argued cases producing a written opinion in a Term. The second control variable, \textit{Time until End of Term}, captures whether the pressures at the end of the Term affect the prevalence of plurality decisions. It is measured by the number of days from oral argument in a case to July 1, the traditional date by which the Court finishes all of its business in any given Term. To control for any remaining effects stemming from the passage of time we include the variable, \textit{Term of Court}, which assumes the numeric value for the Term in which the Court decided a case.\footnote{156}{The data for these variables are from The Supreme Court Database, see supra note 19.}

\section*{B. RESULTS}

The case-level model predicts that the occurrence of plurality decisions is due to ideological, collegial, legal, and contextual factors. This section discusses the results of our statistical analysis, which shows whether and to what extent each of the independent variables in the model is associated with plurality decisions.
The last column of Table 1 provides a summary of our predictions. The results of our statistical analysis are reported in Tables 2 and 3, with the former presenting the coefficient and standard error for each independent variable and the latter indicating the magnitude of the effect of each statistically significant variable in terms of predicted probabilities.158

| Table 1. Summary Statistics for Variables in the Case-Level Model of Plurality Decisions on the U.S. Supreme Court, 1953–2006 Terms157 |
|-------------------------------------------------|-----------------|-----------------|----------------|----------------|
| Hypothesized Effect                              | Mean            | Std. Dev.       | Minimum        | Maximum        |
| **Ideological Factors**                          |                 |                 |                |                |
| Opinion Author Distance from Coalition           | 1.45            | 1.43            | 0              | 7.78           |
| Ideological Heterogeneity of Coalition            | 1.92            | 0.57            | 0.21           | 4.13           |
| **Collegial Factor**                             |                 |                 |                |                |
| Author’s Lack of Cooperation                     | 0.0004          | 0.04            | −0.1           | 0.14           |
| **Legal Factors**                                |                 |                 |                |                |
| Constitutional Interpretation                    | 0.38            | 0.48            | 0              | 1              |
| Common Law/Review of Administrative Action       | 0.11            | 0.31            | 0              | 1              |
| Case Involves Lower Court Conflict               | 0.2             | 0.4             | 0              | 1              |
| Case Decided After Marks v. U.S.                 | 0.53            | 0.5             | 0              | 1              |
| **Contextual Factors**                           |                 |                 |                |                |
| Chief Justice Opinion Author                     | 0.11            | 0.31            | 0              | 1              |
| Opinion Invalidates Federal Law as Unconstitutional | 0.01          | 0.11            | 0              | 1              |
| Amicus Briefs in Case                            | 0.04            | 1.04            | −1.1           | 9.99           |
| Civil Liberties                                  | 0.53            | 0.5             | 0              | 1              |
| Multidimensionality of a Case                    | 2.29            | 0.8             | 1              | 11             |
| Case Reargued                                    | 0.03            | 0.16            | 0              | 1              |
| **Control Variables**                            |                 |                 |                |                |
| Time Until End of Term                           | 167.6           | 69              | 0              | 793            |
| Size of the Plenary Docket                       | 123.2           | 27.7            | 65             | 163            |
| Term of Court                                    | 1978.8          | 14.1            | 1953           | 2006           |

157. In the “Hypothesized Effect” column of Table 1, a “+” indicates that we predict that the likelihood of a plurality opinion will increase as the independent variable increases, while a “−” predicts the opposite effect. The model does not contain a hypothesized effect for the three control variables, but they are included because they may correlate with other independent variables of interest in the model and thus their inclusion minimizes the possibility of biased coefficients.

158. All predicted probabilities in this paper were calculated using CLARIFY: Software for Interpreting and Presenting Statistical Results, available at http://gking.harvard.edu/stats.shtml (last visited Sept. 25, 2009) (as implemented in STATA 9), which uses simulation analysis to account for both estimation and fundamental uncertainty in a data analysis. See generally Gary King, Michael Tomz &
Our hypotheses regarding ideology and collegiality suggest that the occurrence of plurality decisions is dependent in part on the ideological composition of the winning coalition, and the prior relationship between the primary opinion author for the winning coalition and the remaining Justices in the coalition. With respect to ideology, for example, we hypothesized that plurality decisions are more likely to occur when the primary opinion author is ideologically distant from the rest of the winning coalition and when the coalition is ideologically heterogeneous.160

Surprisingly, the results of the case-level model do not suggest that the ideological or collegial factors influence the occurrence of plurality decisions. Given that other studies have found a connection between the ideological

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient (Robust S.E.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opinion Author Distance from Coalition</td>
<td>−0.73 (.067)</td>
</tr>
<tr>
<td>Ideological Heterogeneity of Coalition</td>
<td>0.103 (.133)</td>
</tr>
<tr>
<td>Author’s Lack of Cooperation</td>
<td>2.333 (1.779)</td>
</tr>
<tr>
<td>Constitutional Interpretation</td>
<td>1.171* (.215)</td>
</tr>
<tr>
<td>Common Law/Review of Administrative Action</td>
<td>.653* (.300)</td>
</tr>
<tr>
<td>Case Involves Lower Court Conflict</td>
<td>−0.488* (0.277)</td>
</tr>
<tr>
<td>Case Decided After Marks v. U.S.</td>
<td>−.251 (.281)</td>
</tr>
<tr>
<td>Chief Justice Opinion Author</td>
<td>−.089 (.248)</td>
</tr>
<tr>
<td>Opinion Invalidates Federal Law as Unconstitutional</td>
<td>.562 (.400)</td>
</tr>
<tr>
<td>Amicus Briefs in Case</td>
<td>.105* (.059)</td>
</tr>
<tr>
<td>Civil Liberties</td>
<td>.421* (.202)</td>
</tr>
<tr>
<td>Case Reargued</td>
<td>.637* (.296)</td>
</tr>
<tr>
<td>Multidimensionality of a Case</td>
<td>−.165 (.103)</td>
</tr>
<tr>
<td>Time Until End of Term</td>
<td>.001 (.001)</td>
</tr>
<tr>
<td>Size of the Plenary Docket</td>
<td>.001 (.003)</td>
</tr>
<tr>
<td>Term of Court</td>
<td>.009 (.001)</td>
</tr>
<tr>
<td>Constant</td>
<td>−22.805 (20.879)</td>
</tr>
<tr>
<td>Number of Observations</td>
<td>5,711</td>
</tr>
</tbody>
</table>

* p ≤ .05 (one-tailed test for directional hypotheses and two-tailed test for non-directional controls)

Our hypotheses regarding ideology and collegiality suggest that the occurrence of plurality decisions is dependent in part on the ideological composition of the winning coalition, and the prior relationship between the primary opinion author for the winning coalition and the remaining Justices in the coalition. With respect to ideology, for example, we hypothesized that plurality decisions are more likely to occur when the primary opinion author is ideologically distant from the rest of the winning coalition and when the coalition is ideologically heterogeneous.160

Surprisingly, the results of the case-level model do not suggest that the ideological or collegial factors influence the occurrence of plurality decisions. Given that other studies have found a connection between the ideological


159. The dependent variable in the case-level model is a dummy variable, which equals one if a case resulted in a plurality decision and zero otherwise. This table omits two control variables included in the statistical model relating to the size of the final winning coalition. See supra note 89. The coefficient and standard error for each are: Minimum Winning Coalition 0.957 (0.160) and Unanimous Coalition −2.156 (0.401).

160. See supra section III.A.1.
preferences of Justices and nearly every other aspect of the Court’s decision making outputs—from which cases get selected for review to how the Court interprets precedent—it is worth discussing why such a connection is apparently not observed in the context of plurality decisions.

Even if ideological or collegial factors are influential in leading individual Justices to concur in the judgment (as we find in Part IV), such factors may be alone insufficient to generate plurality decisions because of the prevalence of large winning coalitions. Of the 5,711 cases examined in the case-level model, 36.5% of the cases were decided unanimously and an additional 11.1% of the cases have only one dissenter. Ideological or collegial factors might lead one or two members of a winning coalition to write or join a concurrence in the judgment, but large winning coalitions require as many as five Justices to write or join an opinion concurring in the judgment before a plurality decision results. Having such a high number of Justices concur in the judgment is unusual because Justices vote to concur in the judgment only about 8% of the time. Thus, the force of ideology would have to be enormous to cause plurality decisions in more than a trivial percentage of the nearly 50% of cases in the data set involving 8–1 or 9–0 votes.

One might conjecture that ideological or collegial forces might only matter when a minimum winning coalition exists—in other words, when a case is decided on a 5–4 vote. To test the significance of the ideological and collegial variables under that scenario, each of the independent variables in the case-level model was interacted with Minimum Winning Coalition, the dichotomous dummy variable in the case-level model to control for coalition size. We find that Author’s Lack of Cooperation is significant when interacted with Minimum Winning Coalition. When an author has been uncooperative, the probability of a plurality decision is 0.056 (95% C.I. 0.026, 0.103), but a cooperative author has only a 0.027 (95% C.I. 0.012, 0.052) probability of producing a plurality decision. We, however, do not find that ideological forces correlate with plurality decisions, even when the coalition is minimum winning.

In contrast to the ideological and collegial factors, the results of our statistical analysis suggest that two of the three legal variables in the case-level model

161. See supra notes 75–79 and accompanying text.
162. Data are derived from The Supreme Court Database, see supra note 19.
163. Of the 34,865 votes of individual Justices in the model, 2793 were votes to join or author an opinion concurring in the judgment. Data are derived from The Supreme Court Database, see supra note 19.
164. See supra note 89.
166. A cooperative author is defined as a Justice who is two standard deviations below the mean on the Author’s Lack of Cooperation variable. Meanwhile, an author is defined as uncooperative if she is two standard deviations above the mean on this variable. For this simulation, all other independent variables were held constant at their means (or modal values for dichotomous variables).
influence the frequency of plurality decisions. First, the results show that, consistent with the idea that precedent presents a greater constraint in statutory cases, plurality decisions are less likely to occur in statutory cases, as compared to either cases interpreting the Constitution or involving common law adjudication or review of administrative agency action. This effect is observed in the positive coefficients for Constitutional Interpretation and Common Law/Review of Administrative Action. The model predicts that the probability of the Court issuing a plurality decision is 0.019 in statutory cases, but this probability increases to 0.035 and 0.057 in common law or agency review and constitutional cases, respectively.168 These numbers may seem inconsequential in absolute terms, given the infrequency of plurality decisions, but the change in probability is substantial. For instance, constitutional cases are 200% more likely to result in plurality decisions than statutory cases.

Second, we hypothesized that cases involving lower court conflict would be less likely to result in plurality decisions because the Court is more prone to place such cases on the plenary docket as a result of legal needs rather than ideological preferences.169 The results of the case-level model are consistent with this hypothesis, as the probability of a plurality decision decreases from 0.019 when conflict is not present to 0.012 when lower court conflict is

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Predicted Probability</th>
<th>95% C.I.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baseline Scenario</td>
<td>0.019</td>
<td>[.011, .030]</td>
</tr>
<tr>
<td>Constitutional Interpretation</td>
<td>0.057</td>
<td>[.039, .080]</td>
</tr>
<tr>
<td>Common Law/Review of Administrative Action</td>
<td>0.035</td>
<td>[.018, .061]</td>
</tr>
<tr>
<td>Case Involves Lower Court Conflict</td>
<td>0.012</td>
<td>[.005, .022]</td>
</tr>
<tr>
<td>Amicus Briefs in Case</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Low Filings</td>
<td>0.017</td>
<td>[.010, .026]</td>
</tr>
<tr>
<td>High Filings</td>
<td>0.023</td>
<td>[.013, .038]</td>
</tr>
<tr>
<td>Not Civil Liberties Case</td>
<td>0.012</td>
<td>[.007, .019]</td>
</tr>
<tr>
<td>Case Reargued</td>
<td>0.036</td>
<td>[.015, .073]</td>
</tr>
</tbody>
</table>

167. Each of the independent variables in Table 3 is set at its mean (or modal value for a dummy variable) to calculate the probability under the Baseline Scenario. For purposes of the simulation, the variable Amicus Briefs in Case is varied two standard deviations about its mean to determine the predicted probabilities of a plurality decision for the low and high amicus brief filings scenarios. Any variable that was not statistically significant at p \( \leq 0.05 \) (one-tailed test) was excluded from this table.

168. See supra note 158 for an explanation of how the predicted probabilities were calculated. All other independent variables are held constant at their means (for continuous variables) or modes (for dummy variables), and then the independent variable of interest is varied.

169. See supra notes 105–08 and accompanying text.
involved. Accordingly, a case involving lower court conflict is 58.3% less likely to result in a plurality decision.  

Finally, the case-level model tests our hypothesis that plurality decisions are more likely to occur after *Marks v. United States* because the “narrowest grounds” principle enunciated in that case for determining the holding of the Court may give Justices an enhanced incentive to concur in the judgment. The data do not support our hypothesis that plurality decisions are more likely to result after *Marks*, as there is virtually no difference in the rate of plurality decisions before and after *Marks*.

The fourth group of factors relate to case difficulty. Our hypothesis is that plurality decisions are more likely to occur in difficult cases, and our model employs five variables common to the judicial politics literature to capture different aspects of case difficulty. The statistical analysis supports our expectations for three of the five contextual variables. First, the greater the number of *Amicus Brief Filings* in a case (relative to the other cases from the same Term), the higher the likelihood of a plurality decision. The predicted probability of a plurality decision increases from 0.017 to 0.023 in cases of low, rather than high, amicus brief filings. Second, cases that are reargued are 89.5% more likely to result in plurality decisions, with those reargued having a 0.036 predicted probability of a plurality decision and those not reargued falling at the baseline probability of 0.019. Third, a case involving civil liberties or civil rights issues is 58.3% more likely than a case involving other issue areas to result in a plurality decision. Meanwhile, the two other variables for case difficulty, *Opinion Strikes Federal Law as Unconstitutional* and *Multidimensionality of Case*, appear unrelated to the occurrence of plurality decisions.

The model also tests for whether an opinion authored by the Chief Justice is less likely to result in a plurality decision. Our hypothesis is that when the Chief Justice is the author for the winning coalition, a plurality decision is less likely to occur because of the Chief Justice’s institutional role within the Court. The data, however, do not support that hypothesis, nor are any of the control

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170. The likelihood that a plurality decision will result is unaffected by the jurisdictional basis of a case—that is, whether it reaches the Court by certiorari, mandatory appellate, or original jurisdiction. Two dummy variables were inserted into the case-level model and a third was excluded to serve as a baseline for comparison; neither was found to be statistically significant.

171. For an explanation of how low and high amicus brief filings are defined for purposes of the simulation, see *supra* note 139.

172. In addition, the presence of the federal government as a litigant does not influence the occurrence of plurality decisions. To test this effect, two dummy variables were inserted into the case-level model, one for the United States as appellant and another for it as appellee. The lack of any effect on the frequency of plurality decisions could be due to the uncertainty about the predicted direction of the effect. On the one hand, cases involving the federal government as a litigant may be more complex or salient, increasing the likelihood of a plurality decision. On the other hand, it is possible that the Court might defer to the federal government on the merits of a case, especially given the success of the United States as petitioner at the certiorari stage and in influencing other outputs of the Court, thereby reducing the likelihood of a plurality decision.
variables included in the model for time-related effects correlated with the frequency of plurality decisions. \textsuperscript{173}

An additional way to examine the degree to which the independent variables influence the occurrence of plurality decisions appears in Figure 6. Rather than consider each of the variables in isolation, as in Table 3, this figure presents three hypothetical case scenarios combining various independent variables identified as having a significant relationship to plurality decisions in the statistical analysis. Scenario 1 represents a case in which the case-level results predict that

\textsuperscript{173} The case-level model also tests for two other possible contextual effects related to the institutional positions of certain members of the Court. First, we examined whether freshman opinion authors (those who are in their first or second Term on the Court) are more or less likely to author plurality opinions, finding no difference between them and their more senior colleagues. Additionally, we looked beyond the so-called freshman effect to see if Justices who have been on the Court longer author plurality opinions at different rates than other Justices (we used a quadratic formulation that included a variable for the number of years a Justice has served on the Court and the square of this variable). Both institutional variables relating to the tenure of Justices were unrelated to plurality decisions. Second, we examined whether plurality decisions are more or less likely to occur during Terms in which there are a larger number of new Justices on the Court. We included a variable in our model for the number of freshman Justices on the Court, finding that it had no effect on plurality opinions. An alternative measure, the median number of years of service for all sitting Justices on the Court in a particular Term, was also unrelated to the occurrence of plurality decisions.
a plurality decision is unlikely to occur, whereas Scenario 3 is one in which the results predict that a plurality decision is likely to occur. Scenario 2, by contrast, depicts an average case. Figure 6 demonstrates that the independent variables exert a sizable effect on whether a majority coalition fails to form. Cases falling under Scenario 1, for instance, result in pluralities only 0.7% of the time, whereas those falling under Scenario 3 do so 12.8% of the time.\textsuperscript{174} The change in the likelihood of a plurality decision across these two scenarios is sizable, with the percentage changing by 1729%.

In short, the case-level model shows that the occurrence of plurality opinions is strongly related to the legal and contextual features of a case. To adumbrate the individual Justice analyses in Part IV, the Justices’ ideological positions and collegial interactions also play a role in producing plurality opinions because they influence whether and when Justices cast votes concurring in the judgment.

C. CASE-LEVEL MODEL WITH ORAL ARGUMENT DATA

Other than judicial opinions, oral arguments are one of the most visible aspects of the Supreme Court’s decisional process. Many scholars dismiss oral arguments as mere window dressing,\textsuperscript{175} but recent studies demonstrate that they matter.\textsuperscript{176} According to one study, a Justice is more likely to vote for the litigant whose lawyer delivered a stronger oral argument, even after controlling for a host of other variables related to case outcomes.\textsuperscript{177} Other research shows that the Justices’ votes can be predicted by the questions they ask at oral arguments,\textsuperscript{178} and that Justices use oral arguments to gather information relevant to deciding a case.\textsuperscript{179}

Drawing on political science and cognitive psychology literature, a recent paper by Ryan Black and Timothy Johnson develops a measure of case salience based on the level of engagement by individual Justices at oral argument sessions.\textsuperscript{180} They claim that the arguments are essentially information-harvesting opportunities for the Justices, and that the number of questions asked

\textsuperscript{174} Scenario 1 is a statutory, non-civil liberties case with lower court conflict, a low number of amicus briefs, and no reargument. Scenario 3, by contrast, is a constitutional, civil liberties case without lower court conflict, with a large number of amicus briefs, and with reargument. All other variables were set at their means for continuous variables or modes for dichotomous variables.

\textsuperscript{175} See Segal & Spaeth, supra note 25, at 280–81 (stating that “[t]he extent to which [oral argument] affects the [J]ustices’ votes is problematic” and expressing skepticism about the degree that oral argument influences decision making on the Court); Thomas G. Walker & Lee Epstein, The Supreme Court of the United States: An Introduction 105–06 (1993) (suggesting that oral arguments may be relevant but “[p]robably few [of the Justices’] minds are significantly changed”).

\textsuperscript{176} See supra note 71.


\textsuperscript{178} See Johnson et al., Inquiring Minds, supra note 71, at 169.

\textsuperscript{179} See Timothy R. Johnson, Oral Arguments and Decision Making on the United States Supreme Court ch. 2 (2004); Johnson et al., Oral Advocacy, supra note 71, at 523–25.

\textsuperscript{180} See Ryan Black & Timothy R. Johnson, Salient to Whom? Rethinking the Measurement of Issue Salience (unpublished manuscript) (on file with authors).
during an oral argument is a valid measure of salience because it will distinguish cases with “broader policy implications” and those involving a greater number of external actors from those that are less important. Adjusting their data to the varying membership of the Court and the nonparticipation of Justices in some cases, Johnson and Black introduce the first actor-based approach to case salience.

Following their lead, the independent variable, Number of Words at Oral Argument, is incorporated into the case-level model using the Johnson and Black data. The specific measure is the average number of words spoken per Justice at oral arguments for a given case. This variable has a mean of 448 words and a standard deviation of 112.8. The oral argument data cover a sample of cases decided between the 1998 and 2006 Terms, and thus the variable’s relationship to plurality decisions is estimated for the 643 cases for which data are available. The other variables from Table 2 are retained, except for those that were excluded for methodological reasons. Given the small number of cases in this estimation sample, the results are somewhat tentative.

Consistent with other measures of case difficulty, our hypothesis is that the greater the number of words spoken by members of the Court, the greater the likelihood that a plurality decision will result. The data support our expectation, and the coefficient is positive and statistically significant at p < 0.05 (one-tailed test). Substantively speaking, the model predicts that cases in which the number of words spoken by the Justices at oral argument sessions is two standard deviations above the mean for a given Term have a 1.6% chance of resulting in a plurality decision, whereas those falling two standard deviations below the mean result in a plurality decision only 0.3% of the time.

IV. The Individual-Justice Model

The case-level model tells only part of the story about plurality decisions. As Marks implicitly acknowledges, a plurality decision occurs only if one or more Justices write separately to concur in the judgment and four or fewer of the remaining Justices in the winning coalition agree on a single rationale for the judgment. By examining what causes individual Justices to make the decision to join the majority, join the majority and concur, or concur in the judgment

181. Id. at 8.
182. See id. at 4–5, 9–10.
183. See id. at 9 (“Our data are the 3026 oral arguments beginning with the 1979 term and ending with the 2007 term.”). We would like to specially thank Timothy Johnson and Ryan Black, who shared their oral argument data with us for purposes of writing this Article. The data are on file with the authors.
184. Due to collinearity and perfect prediction, we had to drop a number of variables from this version of the model. Specifically, we excluded Unanimous Opinion, Common Law/Review of Administrative Action, Opinion Invalidates Federal Law as Unconstitutional, Case Reagreed, and Case Decided After Marks v. U.S.
185. As with our other predicted probabilities, we use CLARIFY. See supra note 158.
186. See supra notes 21–23 and accompanying text.
in particular types of cases and under certain conditions, the individual-Justice model studies the decision that ultimately leads to a plurality decision: the decision by one or more Justices to write or join an opinion concurring in the judgment.187

The individual-Justice model includes the votes of every Justice who voted with the winning coalition for each of the 5711 cases in the study.188 The dependent variable in the model is categorical based on the alternative votes available to each Justice in every case to join the majority, join the majority and concur separately, or author or join an opinion concurring in the judgment.190 Given the categorical nature of the dependent variable, the study employs a multinominal logit model in which the baseline dependent variable category is each Justice’s decision to concur in the judgment, and each of the coefficients represents the effect of an independent variable on a Justice’s decision to concur in the judgment rather than choose an alternative disposition. Of the 34,865

187. The Supreme Court Database contains the individual votes of each of the Justices in every case from the 1953 Term through the 2006 Term. See supra note 19.

188. The primary opinion author for the winning coalition is, of course, excluded from the individual-Justice model.

189. The exclusion of dissenting Justices from the individual-Justice model does not appreciably affect the statistical results or result in selection bias, because the statistical model used, the multinominal logit, is effectively a series of linked logit models. See J. Scott Long, Regression Models for Categorical and Limited Dependent Variables 148–50 (1997).

190. For consistency throughout the Article, a decision to join the majority and write or join a simple concurring opinion is referred to as “concurring separately.” The reason is that joining the majority opinion is technically referred to as “concurring,” and thus our nomenclature avoids confusion between the options to join the majority opinion and join the majority and write separately.

191. For the 5711 cases in the model, each Justice’s vote was obtained from The Supreme Court Database, see supra note 19. The unit of analysis was case citation and split vote. A replication dataset for the individual-Justice model is available on request to the authors.

192. The individual-Justice model makes an assumption known as the “independence of irrelevant alternatives” (IIA). That concept refers to the multinominal logit model’s assumption that the odds of an outcome occurring do not depend on the other outcomes in the model. The multinominal logit model is appropriate for a dependent variable if the outcome categories of the dependent variable “can plausibly be assumed to be distinct and weighed independently in the eyes of the decision maker.” J. Scott Long & Jeremy Freese, Regression Models for Categorical Dependent Variables Using Stata 243 (2d. ed. 2006). In the individual-Justice model, we assume that Justices do not view joining the majority, concurring, concurring in the judgment, and dissenting as representing close substitutes for one another. In other words, each choice represents a distinct legal alternative to the Justices. Although there are several ways to test for violations of this assumption, they are not reliable. According to two prominent methodologists, “these tests . . . often give inconsistent results and provide little guidance to violations of the IIA assumption.” J. Scott Long & Jeremy Freese, Regression Models for Categorical Dependent Variables Using Stata 191 (2001). One could alternatively estimate a stereotype logistic regression model, which relaxes the IIA assumption. We estimated a stereotype logistic model on the data and found that the results for the comparison of voting to concur in the judgment rather than join the majority were quite similar to those reported in Table 5 (the main difference was that Cases Decided After Marks v. U.S. was statistically significant and Freshman Justice was not). In addition, a comparison of the Akaike’s Information Criterion (AICs) between the stereotype and multinominal models indicates that the multinominal logit fits the data better. For a discussion of the stereotype logistic regression model, see J. Scott Long & Jeremy Freese, Regression Models for Categorical Dependent Variables Using Stata 277–91 (2d. ed. 2006).
votes of individual Justices in the model, 2793, or 8.0%, were votes to join or author an opinion concurring in the judgment.193

A. RESEARCH DESIGN AND HYPOTHESES

Similar to the case-level model, the individual-Justice model examines the effect of various ideological, collegial, legal, and contextual factors on the decision by Justices to concur in the judgment. The independent variables in the model are identical to those examined in the case-level model with several exceptions.

First, the model includes two new ideological variables to replace Opinion Author Distance from Coalition and Ideological Heterogeneity of Coalition. Because the goal of the individual-Justice model is to explain the votes of each Justice, rather than those of the Court as a whole, the appropriate focus of the model is a given Justice’s ideological orientation. The first new ideological variable, Justice’s Ideological Distance from Opinion Author, is measured as the absolute difference in the Martin–Quinn scores between the primary opinion author for the winning coalition and the Justice whose vote is being examined. In their book analyzing the “collegial game” on the Supreme Court, Forrest Maltzman, James Spriggs, and Paul Wahlbeck show that the “ideological proximity” of a Justice to the author of an opinion influences a Justice’s decision regarding whether and how to bargain with the opinion author and even the choice of whether to join the majority coalition.194 Others explain that Justices are more likely to write separately when they are ideologically distant from the opinion author.195 Consistent with the coalition-building literature, our hypothesis is that the greater the ideological distance between the primary opinion author for the winning coalition and a particular Justice, the greater the probability that the Justice will write or join a separate opinion, including a concurring opinion or an opinion concurring in the judgment.

The other ideological variable, Justice’s Ideological Extremity, measures the absolute value of the difference between a particular Justice’s Martin–Quinn score and the score for the median Justice in the winning coalition for a case.196 As Tom Clark explains, existing empirical work suggests that ideologically-divergent Justices will be less likely to agree to a single opinion.197 Meanwhile, others have shown that the median Justice in the winning coalition is the pivotal Justice on the Court for the development of legal doctrine, meaning that Justices close to the median should be less likely to concur in the judgment.198 Thus, our hypothesis is that the greater the value of Justice’s Ideological Extremity, the higher the likelihood that a Justice will author or join an opinion concurring in the judgment.

193. Data are derived from THE SUPREME COURT DATABASE, see supra note 19.
195. See Collins, supra note 97, at 163; Wahlbeck, Spriggs & Malzman, supra note 97, at 501.
196. See supra notes 45 and 82 for why the median of the winning coalition is used for this variable.
197. See Clark, supra note 84, at 147.
198. See Carrubba et al., supra note 45, at 2–4.
Second, the collegiality variable from the case-level model is modified to examine the primary opinion author’s relationship with each Justice voting with the winning coalition in a case. In calculating this variable, each pairing of two Justices is examined to determine the percentage of time each concurred in the judgment when the other authored the primary opinion for the Court. Because the resulting percentage depends on the ideological affinity between the two Justices, the ideological component of the variable can be eliminated by regressing the initial percentage on the absolute value of the difference in the Justices’ Martin–Quinn scores. The residual from the regression—which is the proportion of concurrences in the judgment not due to ideological distance—is then lagged one Term in order to derive Author’s Lack of Cooperation. Larger values for this variable indicate a primary opinion author for the winning coalition who, for reasons unrelated to ideological distance, more frequently wrote concurrences in the judgment in cases when the other Justice authored the primary opinion for the Court.

Third, two variables are added to account for the institutional position of certain Justices on the Court. Based on the argument regarding the Chief Justice’s desire to promote the institutional integrity of the Court, it is our prediction that the Chief Justice will be less likely to concur in the judgment than other members of the Court in order to maintain consensus and avoid the issuance of plurality opinions. Chief Justice is coded as one if the Chief Justice casts the vote and zero otherwise. The second variable incorporating institutional position, Freshman Justice, is coded as one if a Justice is in the first two Terms of service on the Court and zero otherwise. Scholars have long argued that Justices require a few years to adjust to the Court and thus initially take on a “following rather than [a] leading” role. Studies show, for example, that freshman Justices are less likely to write separate opinions, more likely to change their votes on the outcome of cases during the writing of opinions, more likely to manifest inconsistency in their voting patterns, and more likely to follow precedent. We thus hypothesize that freshman Justices will be less likely to concur in the judgment than their more senior colleagues.

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199. See supra note 98 and accompanying text.
200. As with the case-level model, an Author’s Lack of Cooperation is set at zero for a Justice’s first Term on the Court. An alternative way to measure this variable would be to examine an author’s cumulative level of cooperation in all Terms prior to the one in question. The results of such a measure are comparable to those that are reported here.
201. See supra text accompanying notes 120–30.
203. See Collins, supra note 97, at 162.
204. See Maltzman & Wahlbeck, supra note 150, at 589 (estimating the simulated probability of a freshman Justice as 2.3% compared to 1.8% probability for a benchmark Justice).
207. The results are for the most part invariant to including control variables for the size of the final winning coalition (in other words, adding a dummy variable for unanimous coalitions and one for
B. RESULTS

The central choice for Justices who agree with the result reached by the majority is whether to join the majority opinion (and possibly concur separately) or to author or join a separate opinion concurring in the judgment. As

Table 4. Summary Statistics for Each Justice’s Decision To Concur in the Judgment in Cases Decided During the 1953–2006 Terms

<table>
<thead>
<tr>
<th>Factors</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Hypothesized Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideological Factors</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice’s Ideological Distance</td>
<td>2.33</td>
<td>1.82</td>
<td>0</td>
<td>10.63</td>
<td>+</td>
</tr>
<tr>
<td>from Opinion Author</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice’s Ideological Extremity</td>
<td>1.37</td>
<td>1.38</td>
<td>0</td>
<td>7.78</td>
<td>+</td>
</tr>
<tr>
<td>Collegial Factor</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Author’s Lack of Cooperation</td>
<td>0.003</td>
<td>0.125</td>
<td>-0.248</td>
<td>0.94</td>
<td>+</td>
</tr>
<tr>
<td>Legal Factors</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constitutional Interpretation</td>
<td>0.36</td>
<td>0.48</td>
<td>0</td>
<td>1</td>
<td>+</td>
</tr>
<tr>
<td>Common Law/Review of Administrative Action</td>
<td>0.1</td>
<td>0.31</td>
<td>0</td>
<td>1</td>
<td>+</td>
</tr>
<tr>
<td>Case Involves Lower Court Conflict</td>
<td>0.21</td>
<td>0.4</td>
<td>0</td>
<td>1</td>
<td>−</td>
</tr>
<tr>
<td>Case Decided After Marks v. U.S.</td>
<td>0.54</td>
<td>0.5</td>
<td>0</td>
<td>1</td>
<td>+</td>
</tr>
<tr>
<td>Contextual Factors</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chief Justice</td>
<td>0.11</td>
<td>0.32</td>
<td>0</td>
<td>1</td>
<td>−</td>
</tr>
<tr>
<td>Freshman Justice</td>
<td>0.09</td>
<td>0.28</td>
<td>0</td>
<td>1</td>
<td>−</td>
</tr>
<tr>
<td>Opinion Strikes Down Federal Law as Unconstitutional</td>
<td>0.01</td>
<td>0.11</td>
<td>0</td>
<td>1</td>
<td>+</td>
</tr>
<tr>
<td>Amicus Briefs in Case</td>
<td>0.03</td>
<td>1.03</td>
<td>−1.09</td>
<td>9.99</td>
<td>+</td>
</tr>
<tr>
<td>Civil Liberties Case</td>
<td>0.52</td>
<td>0.5</td>
<td>0</td>
<td>1</td>
<td>+</td>
</tr>
<tr>
<td>Multidimensionality of a Case</td>
<td>2.29</td>
<td>0.82</td>
<td>0</td>
<td>11</td>
<td>+</td>
</tr>
<tr>
<td>Case Reargued</td>
<td>0.02</td>
<td>0.15</td>
<td>0</td>
<td>1</td>
<td>+</td>
</tr>
<tr>
<td>Control Variables</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time Until End of Term</td>
<td>167.3</td>
<td>69.4</td>
<td>0</td>
<td>793</td>
<td>N.A.</td>
</tr>
<tr>
<td>Size of the Plenary Docket</td>
<td>122.9</td>
<td>27.8</td>
<td>65</td>
<td>163</td>
<td>N.A.</td>
</tr>
<tr>
<td>Term of Court</td>
<td>1979.1</td>
<td>14.2</td>
<td>1953</td>
<td>2006</td>
<td>N.A.</td>
</tr>
</tbody>
</table>

minimum winning coalitions). In minimum winning coalitions, Justices are more likely to join the majority than concur in the judgment, and they are more likely to concur separately than concur in the judgment. In a unanimous coalition, by contrast, they are less likely to concur separately than concur in the judgment. Each of these results is statistically significant at p ≤ 0.05.

208. As in the case-level model, we do not propose directional hypotheses for the three control variables. See supra text accompanying notes 155–56.
evident in column 1 of Table 5, every factor linked to the occurrence of plurality decisions in the case-level model also is related to why individual Justices concur in the judgment. In addition, the individual-Justice model uncovers several contextual factors that were not statistically significant in the case-level analysis, such as the fact that the Chief Justice is less likely to concur in the judgment than join the majority opinion. Of particular significance, a Justice’s ideological orientation is one of the key factors influencing the frequency of concurring in the judgment.

Table 5. Multinomial Logit Regression of Each Justice’s Decision To Join the Majority Opinion or Concur Separately, as Opposed To Concur in the Judgment, in Cases Decided During the 1953–2006 Terms

| Variable                                                       | Join Majority         | Concur Separately |
|                                                               | Coefficient (Robust S.E.) | Coefficient (Robust S.E.) |
| Justice’s Ideological Distance from Opinion Author            | -.171* (.012)          | -.093* (.017)        |
| Justice’s Ideological Extremity                               | -.066* (.014)          | -.024 (.021)         |
| Author’s Lack of Cooperation                                  | -.755* (.139)          | -.631* (.214)        |
| Constitutional Interpretation                                 | -.621* (.050)          | -.089 (.071)         |
| Common Law/Review of Administrative Action                    | -.392* (.074)          | -.137 (.108)         |
| Case Involves Lower Court Conflict                            | .184* (.060)           | .027 (.084)          |
| Case Decided After Marks v. U.S.                             | -.075 (.076)           | -.435* (.111)        |
| Chief Justice                                                 | .455* (.074)           | -.037 (.110)         |
| Freshman Justice                                              | .187* (.080)           | .213 (.109)          |
| Opinion Invalidates Federal Law as Unconstitutional          | -.190 (.154)           | -.061 (.204)         |
| Amicus Briefs in Case                                         | -.109* (.018)          | .032 (.022)          |
| Civil Liberties Case                                          | -.478* (.047)          | .004 (.068)          |
| Case Reargued                                                 | -.624* (.119)          | .242 (.145)          |
| Multidimensionality of a Case                                 | -.062* (.024)          | -.012 (.034)         |
| Time Until End of Term                                        | -.001* (.000)          | -.000 (.000)         |
| Size of the Plenary Docket                                    | -.003* (.001)          | -.002* (.001)        |
| Term of Court                                                 | -.003 (.003)           | .027* (.004)         |
| Constant                                                      | 9.907 (5.607)          | -52.368* (8.120)     |
| Number of Observations                                        | 34,865                 |                      |

*p ≤ 0.05 (one-tailed test for directional hypotheses and two-tailed test for non-directional controls)

209. The dependent variable in this model is the decision of each Justice in the winning coalition to join the majority, concur separately, or concur in the judgment. Voting data are obtained from The Supreme Court Database, supra note 19. The coefficient for each of the independent variables represents the effect of that variable on the likelihood of a Justice taking the action labeled at the top of the column (for example, join majority) as opposed to concurring in the judgment.
In contrast to the case-level model, the ideological and collegial variables manifest a pronounced relationship with a Justice’s decision to concur in the judgment. Justices

Table 6. The Effects of Independent Variables on the Probability of a Justice Concurring in the Judgment

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Predicted Probability</th>
<th>95% C.I.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baseline Scenario</td>
<td>0.075</td>
<td>[.067,.083]</td>
</tr>
<tr>
<td>Justice’s Ideological Distance from Opinion Author</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proximate</td>
<td>0.052</td>
<td>[.046,.058]</td>
</tr>
<tr>
<td>Distant</td>
<td>0.130</td>
<td>[.114,.147]</td>
</tr>
<tr>
<td>Justice’s Ideological Extremity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proximate</td>
<td>0.069</td>
<td>[.062,.077]</td>
</tr>
<tr>
<td>Distant</td>
<td>0.088</td>
<td>[.078,.099]</td>
</tr>
<tr>
<td>Author’s Lack of Cooperation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cooperative</td>
<td>0.063</td>
<td>[.055,.071]</td>
</tr>
<tr>
<td>Uncooperative</td>
<td>0.089</td>
<td>[.080,.100]</td>
</tr>
<tr>
<td>Constitutional Interpretation</td>
<td>0.127</td>
<td>[.116,.137]</td>
</tr>
<tr>
<td>Common Law /Review of Administrative Action</td>
<td>0.106</td>
<td>[.092,.120]</td>
</tr>
<tr>
<td>Case Involves Lower Court Conflict</td>
<td>0.064</td>
<td>[.056,.072]</td>
</tr>
<tr>
<td>Chief Justice</td>
<td>0.050</td>
<td>[.042,.059]</td>
</tr>
<tr>
<td>Freshman Justice</td>
<td>0.063</td>
<td>[.053,.074]</td>
</tr>
<tr>
<td>Amicus Briefs in Case</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fewer than Average Case</td>
<td>0.067</td>
<td>[.060,.075]</td>
</tr>
<tr>
<td>More than Average Case</td>
<td>0.091</td>
<td>[.080,.102]</td>
</tr>
<tr>
<td>Not Civil Liberties Case</td>
<td>0.049</td>
<td>[.044,.054]</td>
</tr>
<tr>
<td>Case Reargued</td>
<td>0.124</td>
<td>[.099,.156]</td>
</tr>
<tr>
<td>Multidimensionality of Case</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Narrow</td>
<td>0.071</td>
<td>[.063,.080]</td>
</tr>
<tr>
<td>Broad</td>
<td>0.084</td>
<td>[.074,.095]</td>
</tr>
<tr>
<td>Time Until End of Term</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Few Days</td>
<td>0.065</td>
<td>[.057,.074]</td>
</tr>
<tr>
<td>Many Days</td>
<td>0.086</td>
<td>[.075,.098]</td>
</tr>
<tr>
<td>Size of Plenary Docket</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Small</td>
<td>0.065</td>
<td>[.055,.075]</td>
</tr>
<tr>
<td>Large</td>
<td>0.087</td>
<td>[.076,.097]</td>
</tr>
</tbody>
</table>

In contrast to the case-level model, the ideological and collegial variables manifest a pronounced relationship with a Justice’s decision to concur in the judgment. Justices

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210. The Baseline Scenario in Table 6 is one in which each independent variable is set at its mean (or modal value for a dummy variable). Any variable that was not significantly related to a Justice’s decision to concur in the judgment (rather than choose one of the other voting options) at $p \leq 0.05$ was excluded from this table. CLARIFY was used to generate predicted probabilities. See supra note 158.
who are ideologically distant from the primary opinion author for the winning coalition are dramatically more likely to concur in the judgment. As Table 6 shows, the frequency of a Justice concurring in the judgment increases by 150.0% (from a probability of 0.052 to 0.130) when a Justice is ideologically distant from the primary opinion author for the winning coalition rather than ideologically proximate. The role of ideology is further illustrated by Figure 7, which graphs the probability of a Justice concurring in the judgment for the full range of values for the ideological distance variable. The figure demonstrates that as ideological distance between a Justice and the primary opinion author increases, the greater the likelihood that the Justice will concur in the judgment.

211. The x-axis is a Justice’s ideological distance from the primary opinion author for the winning coalition, which is measured as the absolute value of the difference between the Martin–Quinn scores for that Justice and the primary opinion author. As before, predicted probabilities were calculated using CLARIFY. See supra note 158.

212. In Table 6, “ideologically proximate” is defined as two standard deviations below the mean and “ideologically distant” as two standard deviations above the mean for Justice’s Ideological Distance from Opinion Author. In determining predicted probabilities for each independent variable, all other variables are set to their average values (mean values for continuous variables and modal values for dummy variables).
The second ideological variable, *Justice’s Ideological Extremity*, shows that Justices who are ideologically distant from the median Justice in the winning coalition concur in the judgment more often than Justices who are ideologically proximate to the median justice. Justices who are ideologically proximate to the median Justice in the coalition concur in the judgment in approximately 6.9% of their votes, while those more distant do so 8.8% of the time.\(^{213}\) Figure 8 illustrates the effect of ideological extremity by plotting the probability of a concurrence in the judgment as a function of a Justice’s ideological extremity. In comparing Figures 7 and 8, it is clear that the effect of ideological extremity, while meaningful, is smaller in magnitude than that produced by a Justice’s ideological distance from the primary opinion author. In short, the results in the individual-Justice model indicate that plurality opinions—which are a direct result of one or more

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\(^{213}\) We define proximate and distant Justices as, respectively, those who are two standard deviations below and above the mean on this variable.

\(^{214}\) The x-axis represents the degree to which a Justice is ideologically extreme on the Court, as measured by the absolute value of the difference in Martin–Quinn scores between that Justice’s ideological position and the ideological position of the median Justice in the winning coalition.

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**Figure 8. The Effect of a Justice’s Ideological Extremity on the Decision To Concur in the Judgment**

![Figure 8](image-url)
concurrences in the judgment—are related to ideological forces.

In addition, the variable included to test past collegial interaction between the primary opinion author and each of the other individual Justices in the winning coalition—Author’s Lack of Cooperation—has a pronounced effect on the frequency of concurrences in the judgment. When a Justice encounters an opinion author who has previously been uncooperative with her—that is, where the opinion author has frequently written concurrences in the judgment when that Justice was authoring the Court’s opinion—she concurs in the judgment 8.9% of the time. That percentage decreases to 6.3% if the author has previously been cooperative.\textsuperscript{216} This effect appears in Figure 9, where a healthy correlation is observed between the level of past cooperation and the probability of a concurrence in the judgment.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure9.png}
\caption{The Effect of the Opinion Author’s Prior Lack of Cooperation with a Justice on That Justice’s Probability of Concurring in the Judgment\textsuperscript{215}}
\end{figure}

\textsuperscript{215} The x-axis represents the prior level of cooperation between the primary opinion author and a given Justice based on the degree to which the author, in the previous Term, wrote concurrences in the judgment when the other Justice was authoring the primary opinion for the winning coalition of the Court. Purged of ideological influences, larger positive scores indicate an author who has been less cooperative with a Justice.

\textsuperscript{216} For an explanation of how cooperative and uncooperative authors are defined for purposes of the simulation, see supra note 166.
Table 5 also indicates that nearly all of the contextual and legal factors in the individual-Justice model correlate with why Justices concur in the judgment rather than join the majority. In fact, only two variables, whether an opinion invalidates a federal statute as unconstitutional and whether a case was decided after *Marks*, fail to provide evidence for our hypotheses. Although there is variation in the magnitude of their substantive effects, the other legal and contextual variables, individually and collectively, have a pronounced relationship with concurrences in the judgment. The substantive magnitude of each independent variable’s effect on the probability of a Justice concurring in the judgment is shown in Table 6. For example, consider the variables related to the difficulty of a case—in cases that are reargued, have more amicus briefs, involve a civil liberties issue, or deal with a wider array of legal issues, the predicted probability of a Justice concurring in the judgment increases by 65.3% (from 0.075 to 0.124), 35.8% (from 0.067 to 0.091), 53.1% (from 0.049 to 0.075), and 18.3% (from 0.071 to 0.084), respectively.

The data also indicate that the institutional positions of Justices influence whether they concur in the judgment rather than join the majority opinion. Whereas the case-level model did not show that the Chief Justice is better than other Justices at avoiding plurality decisions when serving as the primary opinion author, the individual-Justice model indicates he is less likely than other Justices to concur in the judgment. Many commentators have argued that the Chief Justice behaves differently than other members of the Court due to his role as leader and administrator, causing him to more closely consider institutional concerns such as maintaining majority coalitions. The empirical results support that claim: the Chief Justice concurs in the judgment only 5.0% of the time, while other Justices concur in the judgment in 7.5% of cases. Freshman Justices are also slightly less likely to concur in the judgment, doing so only 6.3% of the time, as compared to 7.5% of the time for Justices who have been on the Court for more than two Terms.

In addition, the model demonstrates that legal factors also play an important role in whether Justices concur in the judgment. The model predicts that, in constitutional rather than statutory cases, the probability that a Justice will concur in the judgment jumps from 0.075 to 0.127. Similarly, the predicted probability that a Justice will concur in the judgment in a common law case or review of an agency action is 0.106. Moreover, in cases involving lower court
conflict, Justices concur in the judgment about 6.4% of the time, but do so about 7.5% of the time when conflict is absent.

Examining each of these variables in isolation from one another (looking at the effects of changes in one variable while holding all others constant at their average values) is a bit artificial in that Justices do not encounter each of the factors separately in the cases that they decide. Instead, they vote in cases involving various combinations of these factors. Accordingly, Figure 10 depicts the predicted probability of a Justice concurring in the judgment for three hypothetical case scenarios. Scenario 1 depicts a freshman Chief Justice who is ideologically close to the primary opinion author for the winning coalition and not ideologically extreme; has cooperated with other Justices in the past; and is voting in a case that involves statutory interpretation, a non-civil liberties issue, low case difficulty (that is, few legal issues and provisions, low amicus filings, and not reargued), lower court conflict, and was argued near the end of a Term with a relatively small docket size. It is, in other words, a situation in which the model would predict that Justices will not be likely to concur in the judgment. Scenario 3, by contrast, illustrates a setting in which Justices would be likely to concur in the judgment: a nonfreshman Associate Justice who is ideologically distant from the primary opinion author for the winning coalition and ideologically extreme; is dealing with a primary opinion author who has been uncoope-
tive with her in the past; and is voting in a case involving constitutional interpretation, a difficult (that is, numerous legal issues and provisions, many amicus briefs, and was reargued) civil liberties issue that was not granted because of a lower court conflict, and was argued near the beginning of a Term with a large docket size. Scenario 2, by contrast, depicts an average case and Justice, for which the model would predict a middling rate of concurring in the judgment.

The combined influence of the variables in Figure 10 is notable. In Scenario 1, in which few votes to concur in the judgment are expected, the model predicts that Justices will cast such a vote only 0.70% of the time. In Scenario 3, in which Justices are expected to concur in the judgment at a higher rate, the model predicts that they do so 47.8% of the time. These comparisons provide further evidence that ideological, collegial, legal, and contextual factors play an important role in the critical decision made by Justices of whether and when to concur in the judgment.

Column 2 of Table 5 also answers another relevant question as to why plurality opinions occur: if a Justice wishes to write separately, then why concur in the judgment rather than join the majority and concur separately? As discussed above, the hypothesized ideological, collegial, legal, and contextual factors manifest a strong relationship with a Justice’s decision to concur in the judgment rather than join the majority. But the question is: Do those same factors discriminate between Justices who concur separately rather than concur in the judgment?

The results of the individual-Justice model reveal that ideological differences and collegial interactions among the Justices explain that decision. The relative risk of a Justice concurring in the judgment, rather than concurring separately, is 1.21 when a Justice is ideologically proximate to the primary opinion author for the winning coalition, and increases sizably to 2.11 when the Justice

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220. In Scenario 1, the two ideological distance measures and lack of cooperation are set at two standard deviations below the mean, while they are set at two standard deviations above the mean for Scenario 3. Any variable not mentioned in the text describing the scenarios was set at its mean for a continuous variable or its mode for a dummy variable.

221. Scenario 2 involves a nonfreshman Associate Justice who is of average ideological distance from the primary opinion author and the median Justice in the winning coalition, and is voting in a statutory, non-civil liberties case of average case difficulty not involving lower court conflict that was orally argued at the average time until the end of a Term with an average docket size.

222. See LONG, supra note 68, at 79–82, 168–70, for a discussion of relative risk ratios, which are basically relative probabilities. One can see how they work by observing the predicted probabilities of concurring and concurring in the judgment for Justice’s Ideological Distance from Opinion Author. When a Justice is ideologically proximate to the author (two standard deviations below the mean on the variable), the model predicts the probability that the Justice will concur in the judgment and concur as 0.052 and 0.043, respectively. The relative risk of concurring in the judgment, as opposed to concurring, is therefore 0.052/0.043, which equals 1.21. Meanwhile, if a Justice is ideologically distant from the author (two standard deviations above the mean on this variable), the model predicts that Justices concur in the judgment and concur with a probability, respectively, of 0.129 and 0.061. This latter relative risk ratio is 0.129/0.061, for a relative probability of 2.11.
is ideologically distant from the author. Thus, when the author is ideologically proximate to a Justice, for example, the Justice is 1.21 times more likely to concur in the judgment than concur separately, but that statistic jumps to 2.11 with high ideological distance between the two. Figure 11 illustrates the relative risks of the two options for Justices as a function of their ideological distance from the primary opinion author.

The foregoing decision is also influenced by a Justice’s ideological extremity and past collegial interactions with the opinion author. With respect to ideological extremity, the relative risk for an ideologically extreme Justice to concur in the judgment rather than concur separately is 1.60, while that figure drops to 1.47 for non-ideologically extreme Justices. The effect of Justice’s Ideological Extremity is illustrated in Figure 12, in which the upward sloping line

Figure 11. The Relative Risk of a Justice Concurring in the Judgment, Rather than Concurring Separately, Due to Ideological Distance from the Primary Opinion Author

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223. To calculate the predicted probabilities we used CLARIFY, and held other variables constant at their means (for continuous variables) or modes (for dichotomous variables). See supra note 158 for a discussion of CLARIFY.

224. For those Justices who are not ideologically extreme (two standard deviations below the mean on Justice’s Ideological Extremity) the probabilities for concurring and concurring in the judgment are 0.047 and 0.069, respectively. For Justices who are extreme (two standard deviations above the mean), those probabilities jump to 0.055 and 0.088.
indicates that Justices are slightly more likely to concur in the judgment rather than concur as they become ideological outliers, but the substantive magnitude of the effect is considerably smaller than for Justice’s Ideological Distance from Author.

The relative probability of a Justice concurring in the judgment rather than concurring separately also increases considerably based upon past collegial interactions. The relative risk for a Justice that encounters a cooperative primary opinion author is 1.29, but this figure increases to 1.78 when a Justice encounters an uncooperative author. In other words, Justices are more likely to concur in the judgment rather than concur separately when they encounter uncooperative authors. Figure 13 graphically displays this relationship.

In contrast, few of the legal or contextual characteristics influence the decisions of Justices to concur in the judgment rather than concur separately. The only exceptions are that Justices are more likely to concur in the judgment in

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225. For cooperative authors (two standard deviations below the mean on Author’s Lack of Cooperation), a Justice has a 0.049 probability of concurring and a 0.063 probability of concurring in the judgment, whereas these probabilities increase, respectively, to 0.050 and 0.089 when an author has not been cooperative (two standard deviations above the mean on the variable) with a Justice in the past.
cases decided after *Marks v. United States* and less likely to do so if they are freshman Justices. Substantively speaking, the probability of a Justice concurring in the judgment rather than concurring separately is 1.5 times greater after *Marks*. Meanwhile, freshman Justices are only 1.2 times more likely to concur in the judgment than concur separately, while Justices who have been on the Court longer are 1.5 times more likely to do so. Most of the legal and contextual variables in the individual-Justice model therefore help in understanding the decision of Justices to concur in the judgment rather than join the majority, but fail to illuminate why Justices concur in the judgment rather than concur separately. Instead, the model demonstrates that ideological forces and past collegial interactions are the dominant reasons why a Justice concurs in the judgment rather than concurs separately.

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226. Prior to *Marks*, the model predicts that Justices will concur in the judgment and concur at about the same rate—in 7.0% and 6.9% of their votes, respectively, for a relative risk of 0.99. Meanwhile, after *Marks* the model predicts that Justices concur in the judgment and concur 7.5% and 5.0% of the time, respectively, for a relative risk of 1.5.

227. Freshman Justices concur in the judgment and concur, respectively, with a probability of 0.063 and 0.051, while those probabilities for more experienced Justices are 0.075 and 0.05.
C. INDIVIDUAL-JUSTICE MODEL WITH ORAL ARGUMENT DATA

As discussed in section III.C, oral arguments are a fundamental part of the decision making process at the Supreme Court. Scholars, for example, have argued that oral arguments are an important way for the Justices to gather information about a case for use in making decisions.228 Ryan Black and Timothy Johnson, meanwhile, have demonstrated that the number of words spoken by a Justice during oral argument is a reliable method of measuring the salience of a case to that given Justice.229 They make the intuitive claim that the more a Justice speaks during oral argument, the higher the Justice’s interest in the case. Using the data gathered by Black and Johnson,230 the Number of Words Spoken by a Justice at Oral Argument counts the number of words each Justice spoke during the oral argument of a case. The oral argument data cover only a portion of the cases in our individual-Justice model, so the estimation sample includes only the 4,007 Justice votes in the cases for which oral argument data are available.231

The statistical analysis supports the expectation that the greater the number of words spoken by Justices during oral argument, the higher the probability that they will concur in the judgment. The coefficient on the Number of Words Spoken by a Justice at Oral Argument is negative and statistically significant when comparing whether Justices join the majority rather than concur in the judgment. Holding all other variables in the model constant, Justices who speak quite often during oral argument of a case are over 1.64 times more likely to concur in the judgment than those who do not speak often.232

V. DISCUSSION OF EMPIRICAL RESULTS

This Article began with a straightforward but as of yet unanswered question: Why do plurality decisions occur in some of the most high-profile and significant cases before the Supreme Court? The question is important even though plurality decisions occur relatively infrequently. As Chief Justice William Rehnquist stated: “There must be an effort to get an opinion for at least a majority of

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228. See Johnson et al., Inquiring Minds, supra note 71, at 244; Johnson et al., Oral Advocacy, supra note 71, at 461–64.


230. Data are on file with the authors.

231. The variable, Case Decided After Marks v. U.S., is excluded from the analysis due to multicollinearity. All other independent variables from Table 5 are included in the statistical analysis.

232. All variables are held constant at their means for continuous variables or modes for dummy variables, and the oral argument variable is varied by two standard deviations above and below its mean to calculate the predicted probabilities. At two standard deviations above the mean for Number of Words Spoken by a Justice at Oral Argument, the predicted probability that a Justice who speaks often will concur in the judgment is 0.064, while that statistic drops to 0.039 at two standard deviations below the mean for that variable.

It bears mentioning, however, that Number of Words Spoken by a Justice at Oral Argument is not statistically significant when comparing the probability that a Justice will concur in the judgment rather than concur separately.
the Court in every case where that is possible, in order that lower court judges and the profession as a whole may know what the law is without having to go through an elaborate head-counting process.”233 One of the Court’s principal functions is to set binding, uniform precedent, and the Court has arguably failed in that mission when it issues a plurality opinion in which it is difficult, if not impossible, to find the controlling rationale for the Court. The interpretive rule for plurality decisions, as enunciated in the 1977 case of Marks v. United States, is notoriously difficult to apply and even impenetrable at times. Determining which opinion constitutes the “narrowest grounds” when there are numerous opinions from which to choose has not only perplexed the lower courts, but has led to frustration for the Court as well.234

Given the importance of plurality decisions, the question is when, and under what circumstances, they occur. Answering this question yields new insights into the dynamics of judicial decision making and the building and maintenance of coalitions on the Court. Both issues have been of keen interest to judicial politics scholars over the past several decades. The relevance of the question is also of practical concern to legal practitioners, who can use the information to tailor their arguments accordingly when case conditions are more likely to lead to a deeply divided Court. Justices too can use the information in the opinion-drafting process in order to attain consensus, perhaps by authoring a narrow opinion to avoid a plurality decision. Finally, explaining the causes of plurality decisions can lead to a better understanding of their legal consequences.

Determining the causes of plurality decisions requires evaluating hypotheses relating to ideological, collegial, legal, and contextual factors. Moreover, rather than just evaluating these hypotheses at the case level to determine the systematic contributors to plurality decisions, a comprehensive study must also examine those factors in light of an individual Justice’s decision to concur in the judgment, which is the key ingredient in creating plurality decisions. A plurality decision can occur only when one or more Justices write separately to advance a different rationale for the result.

This Article estimates statistical models to determine the degree to which the hypothesized factors relate to two dependent variables: a case-level variable for whether a case resulted in a plurality decision and an individual-Justice-level variable for whether each Justice voted to join the majority opinion, join the majority and concur separately, or concur in the judgment. The statistical results provide considerable evidence for our hypotheses and yield novel and interesting insights about plurality decisions.

The case-level model reveals that legal and contextual factors are reasonably predictive of plurality decisions. Plurality decisions are less likely to occur in


234. See Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (declining to find the controlling legal rule from Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978), because the issue had “so obviously baffled and divided the lower courts that have considered it”).
statutory cases, which is logical given that nearly all Justices agree that stare
decisis plays a more robust role in such cases. Furthermore, cases involving
lower court conflict—which are presumably placed on the plenary docket in
most cases due to concerns about uniformity rather than the correctness of the
lower court decision or the future course of the law—are less likely to result in
plurality decisions. In the contextual realm, the measures of case salience and
complexity, such as the number of amicus briefs and words spoken at oral
argument, increase the likelihood of plurality decisions. In contrast to the
individual-Justice model, however, ideological and collegial factors have little
influence on the occurrence of plurality decisions at the case level.235

The individual-Justice model—which examines the factors underlying the
decision of a Justice to concur in the judgment rather than join the majority or
join the majority and concur separately—provides considerable empirical sup-
port for our hypotheses. In this model, ideological incompatibility between the
primary opinion author for the winning coalition and a Justice, a Justice’s
ideological extremity, and an opinion author’s lack of cooperation with a
Justice, all influenced whether, and how often, a Justice concurs in the judg-
ment. In fact, they represent the predominant factors that explain a Justice’s
decision to concur in the judgment rather than join the majority and concur
separately. Similar to the case-level model, nearly all of the legal and contextual
variables also influence whether Justices concur in the judgment. For instance,
the difficulty of a case—as represented by the number of amicus briefs filed in a
case, and whether a case is reargued, involves a civil liberties issue, and has
multiple legal issues or provisions involved—increases a Justice’s propensity to
concur in the judgment. Similarly, the decision to concur in the judgment is
influenced by legal factors such as whether a case involves issues of constitu-
tional interpretation or lower court conflict.

CONCLUSION

Chief Justice Rehnquist and Justices Lewis Powell and Ruth Bader Ginsburg
have spoken to the serious problems created by plurality decisions. As this
Article shows, plurality decisions often arise in the most important and divisive
cases before the Supreme Court, such as those involving the constitutionality of
state abortion regulations and the scope of executive power. This Article
provides the first empirical treatment of the factors influencing the occurrence
of plurality decisions by the Supreme Court. While other scholars have exam-
ined in passing the interpretive rule governing plurality decisions found in
Marks v. United States, or treated the subject in discussing particular plurality
decisions, no other Article systematically examines them in this fashion. As
discussed above, the findings in this Article address an issue that judicial

235. For a discussion of why the ideological and collegial factors do not play much of a role in the
frequency of plurality decisions at the case level, see supra text accompanying notes 160–66.
politics scholars have been pursuing for decades: how coalitions form and how and why they tend to break down in certain situations.

The Article’s findings also open a multitude of avenues for further research. For instance, further work should be done on the precedential value of plurality decisions in the lower courts, both at the state and federal levels. The difficulty of finding the “narrowest grounds” of many plurality opinions has been recognized by many courts, including the United States Supreme Court. But are plurality opinions systematically accorded less precedential value, or even ignored altogether by the lower courts? Similarly, determining the factors influencing the occurrence of plurality decisions is relevant, perhaps even essential, to comprehensively evaluating the normative ramifications of plurality decisions for the Court and for the development of federal law. In other words, should plurality decisions be discouraged by changing the institutional rules and norms of the Court? Those questions, and many others, can now be explored.