Introduction

On March 4, 1998, the United States Supreme Court issued a unanimous ruling in the same-sex harassment case *Oncale v. Sundowner Offshore Services* (1998). At issue was whether Title VII's protection against workplace discrimination "because of . . . sex" applies to harassment between members of the same sex. Joseph Oncale was employed as a roustabout on an oil platform in the Gulf of Mexico and was subjected to humiliating sex-related actions by some of his co-workers in front of the rest of the crew. He complained to supervisory personnel, but received no relief and eventually resigned. Oncale filed suit in federal district court, alleging that he was discriminated against because of his sex. The district court, relying on a Fifth Circuit Court of Appeals decision in *Garcia v. Elf Atochem North America* (1994), held that he had no cause of action because same-sex sexual harassment claims are never cognizable under Title VII. The Fifth Circuit affirmed, and the Supreme Court granted certiorari.

Although lower courts "[had] taken a bewildering variety of stances" on whether Title VII prohibits same-sex sexual harassment cases,[1] the Court unanimously held in *Oncale* that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex" (*Oncale*, 79).[2] According to the majority opinion written by Justice Antonin Scalia (ibid., 79), "[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from coverage of Title VII." Thus, *Oncale* definitively and unanimously set the precedent for analyzing same-sex harassment claims.

Why were the justices able to reach complete agreement in *Oncale*? More broadly, how do we explain decisions where conservative justices agree with liberal justices on potentially contentious issues? Media accounts routinely paint a portrait of a deeply ideologically divided Court. For example, a recent article argued that patterns of law clerk hiring "amplify the ideological rifts on a polarized court" (Liptak 2010). Another account, discussing oral

arguments during the 2010 term, began with the statement, "An ideologically divided Supreme Court wrestled Wednesday" with an Establishment Clause case (Biskupic 2010). Similarly, a news report on an oral argument during the 2008 term opened with the claim, "The Supreme Court yesterday split along a familiar ideological battle line in its consideration of the Voting Rights Act" (Barnes 2009). And an article about the confirmation of Justice Elena Kagan in the summer of 2010 had this to say: "'I am sorry, but not surprised, to see the partisan split on her nomination, because that reflects the ideological battleground that is going on [on] the Supreme Court today,' [Senator Arlen] Specter [D-PA] said. The court, like Congress, regularly divides along conservative-liberal lines. That split may appear even more political in the year ahead" (Savage 2010).

As these examples demonstrate, most media accounts of the Supreme Court focus on divisions among the justices, and, as we detail, most scholarly studies seek to explain the reasons behind them. Is public discourse about disagreement on the Court misplaced? Notably, Justice Stephen Breyer in an interview on NPR's *Fresh Air* (2010) recently lamented the political tone of most accounts of the Court:

> The press's job is to take those decisions that usually have very great visibility because they're political so they're in the newspaper. But you should remember, first of all, that probably thirty to forty percent of our decisions are unanimous, that the five-fours account for maybe twenty, twenty-five percent, and it isn't always the same five or the same four, and so we discuss and it isn't always a sure thing. . . . Of course, it's understandable that the press in writing about the Court and political scientists in describing the Court want to describe this in ordinary political terms.

In many ways, as Breyer suggested, split decisions are understandable given that the setting in which the justices operate points toward division rather than consensus. On the modern Court, almost all cases decided stem from the certiorari process and are selected precisely because they present difficult, complex legal questions. Moreover, the justices are appointed for life and so are formally insulated from both the public and the elected branches of government. Given their place at the apex of the judicial system, they possess a great deal of power and independence. It is perhaps unsurprising, then, that the prevailing view is of a Court that hears tough cases and hands down correspondingly divided decisions.

Viewing the Court as hopelessly divided is nothing new. An October 8, 1972, article in the *New York Times* about the start of the 1972 term was entitled "Swing Man on the Supreme Court: The Court is in Two Factions Now,

and Justice White is in the Middle" (Liebman 1972). Similarly, a June 28, 1987, *Chicago Tribune* article about Justice Lewis Powell's retirement in 1987 suggested that Powell was more influential in shaping the Court's decisions than were either of the two chief justices he served with, William Rehnquist and Warren Burger, "because he so often sat in the middle of the ideological divide of the nine-member court" (Tybor 1987). Such narratives suggest that the Court is bitterly split along ideological lines on most issues and renders its decisions accordingly.

The problem with this view is that it is simply incorrect. Thus, the first contribution this book makes is to demonstrate that, contrary to conventional wisdom, the Court reaches consensus more often than not. In fact, roughly *one-third* of the Supreme Court's decisions have been unanimous each term since 1953. As Figure I.1 shows, between 1953 and 2004 the proportion of unanimously decided cases varied each term but stayed consistently between 30 and 50 percent. During the early years of the Rehnquist Court, the percentage of unanimous cases steadily increased, reaching an all-time high of 51 percent during the 1997 term. Although the rate of unanimity declined to 37 percent during the last year of Rehnquist's tenure, the data

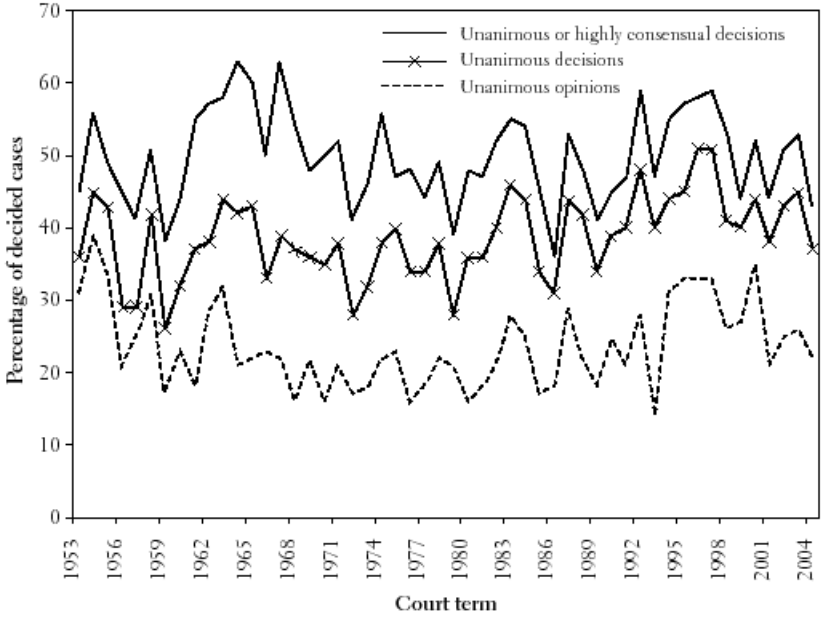

Figure I.1. Reaching consensus: Decisions of the U.S. Supreme Court, 1953–2004

still reveal that a substantial proportion of the Court's decisions were decided without a dissenting vote.

If we examine the Rehnquist Court's cases more closely, we see that many of those that resulted in unanimous outcomes were decidedly important. For example, during the 1996 term the justices unanimously upheld a New York law prohibiting assisted suicide against an Equal Protection challenge (*Vacco v. Quill*, 1997); unanimously determined the standard for when police can constitutionally conduct a "no knock" entry (*Richards v. Wisconsin*, 1997); unanimously agreed that the retroactive cancellation of provisional credits allowing early release for inmates violates the *Ex Post Facto* Clause (*Lynce v. Mathis*, 1997); and unanimously ruled that the Constitution does not require that a lawsuit against a sitting president be deferred until the president's term ends (*Clinton v. Jones*, 1997). In each case, the justices rendered a unanimous decision concerning an important question of constitutional law—including one that affected the sitting president.

Another substantial proportion of cases each term are decided with only one justice dissenting, which we define as a "highly consensual" case. As Figure I.1 reveals, the reality is this: *a majority of the Court's decisions every term are unanimous or highly consensual*. Indeed, while the overall average of unanimous or highly consensual cases for the period under study was 50 percent, in some terms the justices reached complete or near unanimity in nearly two-thirds of the cases decided. These findings suggest that, again, conventional wisdom concerning division on the Court is fairly misplaced.

Whereas a unanimous vote in a case may reflect one type of agreement among the justices, it may also obscure other types of disagreement. When one justice votes with the Court on the outcome of a case but disagrees with the reasoning of the others, he or she may issue a separate opinion—called a concurrence—to express that disagreement. We take into account separate opinions, including concurrences, because of their potential legal and political impact: they "may shake public confidence in the judiciary by bringing into question the certainty of the law" (Walker, Epstein, and Dixon 1988, 387). Any disagreement over the majority opinion "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends" (Hand 1958, 72). And while dissents are more clearly detrimental to the authority of majority opinions, concurrences can be equally damaging. In fact, if a decision of the Court is accompanied by a concurring opinion that does not support the majority opinion, lower courts are less likely to comply with it (Corley 2010). Similarly, lower courts are less likely to follow

plurality opinions—those in which a majority of the justices concur in the result but not in the reasoning (Corley 2009).

Accordingly, in addition to defining consensus on the basis of votes on the merits, we define it in terms of *opinion* consensus. Figure I.1 also reflects the proportion of cases during the study period that were decided with opinion unanimity, meaning that there was only one institutional opinion of the Court, with no dissents and no concurrences. On average, the Court reached opinion unanimity in one out of four cases, and while unanimity was not as prevalent in opinion writing as it was in votes on the merits, during a number of terms the Court issued a single opinion in one out of three cases. Yet again, the data on both opinion and voting unanimity shown in Figure I.1 belie conventional wisdom.

The book's second contribution is to *explain* the high level of consensus on the Court. We do this by constructing a model reflecting the variety of forces that concurrently influence the Court's decisions. According to the dominant model of Supreme Court decision making, the justices base their votes on their ideological attitudes and values (Segal and Spaeth 1993, 2002). There is little doubt that ideology substantially influences individual justices. But if the justices vote ideologically, why do liberals and conservatives ever agree, and why do they reach consensus and, indeed, unanimity, so frequently? Scholars currently do not possess a clear answer to this question, and consequently unanimous cases present an intriguing and perplexing puzzle. Are they simply outliers or are they those that the Court, in retrospect, should not have spent its valuable time on? Are these cases uninteresting, concerning relatively boring issues of law? Or is it possible that their frequency suggests that we still have much to learn about how the Supreme Court decides cases, especially as a collective body? In fact, Segal and Spaeth (1993, 2002) provided neither an analysis of nor an explanation for unanimous cases. However, according to one scholar, "If we exclude a large proportion of cases from our analysis, claiming that we cannot predict or explain them because of their unanimity, we are certainly missing a large part of the behavior of the Supreme Court. We are then left guessing what happened in those cases" (Benesh 2003, 124). Thus, we offer here the first comprehensive explanation for why justices who are often described as highly polarized reach the same legal conclusions so often.

Existing scholarship on the Court gives primary attention to the ways in which ideological, strategic, and legal considerations influence the choices made by justices. Political scientists devote considerable attention to the attitudinal model, which contends that "legal rules governing decision making

(e.g. precedent, plain meaning) in the cases that come to the Court do not limit discretion. . . . [B]ecause the Supreme Court is the court of last resort, the justices . . . may freely implement their personal policy preferences" (Segal and Spaeth 2002, 111). Other scholars posit that the justices are influenced by strategic considerations (Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). According to the strategic model, justices "take into account the effects of their choices on collective results when they vote on outcomes and write or support opinions. . . . Because of this motivation, the positions they take may differ from the positions they most prefer" (Baum 1997, 90). Proponents of the legal model (e.g., Bailey and Maltzman 2008; Richards and Kritzer 2002) assert that justices are heavily influenced by legal norms, which come from socialization in law school and the legal community, and therefore they use accepted tools of legal reasoning that include legal text, legislative intent, and precedent to make principled rather than results-oriented decisions. Hence, the process of legal reasoning can lead them away from their sincere policy preferences.

Most studies of the U.S. Supreme Court focus on determining which of these models best captures judicial decision making. We argue instead that consensus on the Court is a reflection of multiple, concurrently operating influences. In particular, it can be understood only by recognizing the multitude of factors that influence the justices in every single case. Rather than single out a specific group of factors as the primary explanation for consensus, we argue that various potential influences all operate in each case and, many times, in a complex, interactive fashion.

First and foremost, our theory of consensus highlights the important interaction between attitudes and law. There is considerable research showing that attitudes are the driving force behind the decisions of the Supreme Court (Hagle and Spaeth 1993; Howard and Segal 2004; Segal and Cover 1989; Segal et al. 1995). We support this view, but at the same time we recognize that legal considerations shape the Court's decisions both by directly affecting them and by enabling or constraining the extent to which attitudes operate in each case. Specifically, while attitudes are always in play, in some cases the justices' ability to vote their preferences is constrained by legal forces. Furthermore, a central benefit of our comprehensive theory of consensus is that it highlights how legal and attitudinal factors simultaneously influence the Court's decision making, and recognizes how the overall weight of each may vary from case to case.

We place a heavy emphasis on the interplay between attitudes and law, but we believe that strategic considerations also influence the Court's

ability to achieve consensus. Additionally, we take into account institutional changes that we believe influence the degree of consensus that the Court is able to achieve, as well as a number of case-specific factors. Institutional developments—such as the external political environment and internal procedures—vary over time and can affect the way justices think about a case. In addition, not all cases are created equal, and we posit that variation among them contributes to whether the Court is able to reach agreement. The key to understanding consensus, then, is recognizing the multitude of diverse factors that together influence the justices. We propose that these forces stem from five broad categories—attitudinal, legal, strategic, institutional, and case-specific—and only by taking into account all of them can we truly understand why consensus occurs.

The book's third contribution is to test empirically whether the justices reach agreement when the legal answer is simply more obvious and clear. While a number of scholars propose that legal clarity explains consensus on the Supreme Court (e.g., Goldman 1969; Klein 1984; Pritchett 1941), this claim has never been empirically or systematically tested. For example, Pritchett (1941, 890) argued that unanimity results when "the facts and the law are so clear that no opportunity is allowed for the autobiographies of the justices to lead them to opposing conclusions." He then ignored unanimous decisions in his analysis of judicial behavior because he assumed that legal factors sufficiently explained them, and perhaps in part because measuring legal clarity is so difficult. We therefore present a mechanism for capturing the level of uncertainty and ambiguity facing the justices with regard to the strongest legal answer in each case, to determine whether Pritchett's assumption is correct. That is, instead of measuring law in terms of the influence of precedent, text and intent, or different canons of construction, we measure the level of legal certainty in each case to determine how law influences decision making. We then empirically test this measure and find that it helps us to understand the influence of legal factors on Supreme Court decision making as well as when the Court is most likely to reach consensus and unanimity.

The Importance of Understanding Consensus

Some of the most important Supreme Court decisions of the past one hundred years have been unanimous. This is no accident. Justices realize that consensual decisions on important and potentially divisive topics can carry more weight. Consider *United States v. Nixon* (1974), in which the

Court unanimously ordered President Richard Nixon to turn over tapes and other records relating to White House conversations that had been subpoenaed as part of a criminal investigation. According to an article in *Time* magazine (1974), "Definitely and unanimously, the court ended President Nixon's effort to withhold evidence from Special Prosecutor Leon Jaworski in the Watergate case. . . . The presence on the court of three conservative Nixon appointees . . . effectively pre-empted any charge that the President had been the victim of his liberal enemies. As if to emphasize the strictly legal, nonpolitical nature of its decision, the court did not once refer to the ongoing impeachment inquiry." The article noted that, during the discussion of the case, "Chief Justice Burger . . . suggest[ed] that the interests of the nation—and of the court—would best be served by a unanimous decision."

In *Brown v. Board of Education* (1954)—in which racial segregation in public schools was held to be unconstitutional—the Court also recognized the importance of a unified response. Chief Justice Earl Warren "wanted a single, unequivocating opinion that could leave no doubt that the Court had put Jim Crow to the sword" (Kluger 1977, 683). Scholars routinely suggest that the unanimity Warren secured helped insulate *Brown* against subsequent challenges. For example, Smith (2005, 118) argued: "*Brown's* core holding was never subjected to serious challenges. A unanimous Supreme Court decision saw to that." Motley (1979, 316) made a similar argument: "A divided Court might have rendered the decision unenforceable in many communities, or in any event in more communities than those in which resistance was actually encountered after the unanimous decision. The unanimity of the *Brown* decision was essential to its viability and added immeasurably to its ultimate acceptance by most Americans." The end result was a decision that irrevocably changed American society and for which to this day the Court, led by Chief Justice Warren, is credited with declaring segregation "inherently unequal" with a single, commanding voice.

Although many have noted the importance of unanimity in *Brown*, the following memo, which accompanied Chief Justice Burger's first draft of the majority opinion in *Swann v. Charlotte-Mecklenburg Board of Education* (1971), demonstrates that unanimity was also valued in subsequent cases involving racial segregation as an aid in the implementation process:

> I am sure it is not necessary to emphasize the importance of our attempting to reach an accommodation and a common position, and I would urge that we consult or exchange views by memorandum or both. Separate opinions, expressing divergent views or conclusions will, I hope, be deferred until we have exhausted all other

efforts to reach a common view. I am sure we must all agree that the problems of remedy are at least as difficult and important as the great Constitutional principle of *Brown*. (quoted in Epstein and Knight 1998, 99–106)

Studies of other countries note the importance of consensus among policy makers on the likelihood of the public accepting a government and its policies. Numerous studies of Japan highlight its "consensual governance" style (e.g., Haley 1992; Rohlen 1989; Samuels 1987) as well as the fact that this consensual approach is heavily supported by both the public and government bureaucrats (e.g., Aberbach et al. 1990; Richardson and Flanagan 1984). In a broad study of governmental legitimacy, Anderson and Guillory (1997) examined citizen support for eleven European democracies and found that support for government among political losers is higher when there is a greater amount of consensus in the decision making process itself. Alternatively, levels of support fall when government systems operate in a more purely majoritarian manner. Finally, social psychological studies of small-group decision making suggest that attempts to achieve consensus and unanimity can have important consequences for the decision makers themselves. Those seeking unanimity express a higher degree of satisfaction and more agreement with the group's ultimate decision (e.g., Miller 1989; Schweiger, Sandberg, and Ragan 1986).

Increased public support for consensual government decisions provides the additional benefit of allowing a government more freedom to craft policy proposals and potentially solve vexing social problems. Since the time of Rousseau and Locke, political philosophers have argued that people can remain free even though subject to the decisions of government. As long as those decisions reflect broad consensus, they necessarily reflect the desires of free individuals. Consensus thus legitimates the actions and policies of a democratic polity. In the realm of U.S. foreign policy, George (1980) argued that long-term support for a policy requires a national consensus on its legitimacy. The greater the degree of national consensus, the more freedom presidents possess to pursue their short- and long-term policy goals. Similarly, Mooney and Lee (2000) found that policy making on issues of morality is much more constrained when there is dissensus among the public as opposed to when there is consensus. Hence, increased consensus allows policy makers more freedom to determine policy content. Smoke (1994) also suggested that the existence of a national consensus can enable policy makers to make broad policy changes and ensure that these changes enjoy legitimacy and broad support.

Without consensus, policy makers must tread more carefully as to the size and scope of their proposals and must pay more attention to the possibility that their ideas will receive little support, be viewed as illegitimate, or both. Research on the U.S. Supreme Court in particular finds that nonconsensual decisions run the risk of implementation problems or even outright noncompliance (e.g., Johnson and Canon 1984; O'Brien 1996). For example, O'Brien (1996, 336), argued that "less agreement and more numerous and longer opinions invite uncertainty and confusion about the Court's rulings, interpretation of law, and policy-making," which, he said, leads to instability and confusion as to the rule of law itself. At his retirement, Justice Byron White urged his colleagues to think about how the Supreme Court's decisions influence lower courts: "I hope the Court's mandates will be clear, crisp, and leave those of us below with as little room as possible for disagreement about their meaning."[3]

Others find that nonunanimous decisions suffer a greater risk of being overruled by the Supreme Court in the future "because non-consensus lowers the credibility of an opinion and signals the possibility of future legal change" (Spriggs and Hansford 2001, 1104). For example, in *Payne v. Tennessee* (1991), concerning the admissibility of victim impact evidence during the sentencing phase of a death penalty case, Chief Justice Rehnquist explained the majority's decision to overturn the Court's previous decisions in *Booth v. Maryland* (1987) and *South Carolina v. Gathers* (1989) in part based on the following considerations: "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by members of the Court in later decisions, and have defied consistent application by the lower courts" (*Payne*, 828–830). Nonunanimous Supreme Court decisions are also in greater jeopardy of being overridden by Congress than are unanimous decisions (Eskridge 1991; Hettinger and Zorn 2005).

These realities suggest that it is important for us to understand the sources of consensus and how it is achieved (Smoke 1994). If consensually based governmental policies can increase support both for particular policies and for the government as a whole, understanding how governmental bodies arrive at consensual decisions—particularly unanimous ones—becomes imperative. Furthermore, previous research on the U.S. Supreme Court suggests that disagreement among the justices increases the likelihood of challenges to the Court's very authority. Thus, understanding how the justices reach unanimity and consensus is essential to understanding the Court's role in the political process and in preserving the rule of law.

Chapter Overview

The U.S. Supreme Court is currently entrenched in an era of dissensus. During the 1800s and early 1900s, it operated under a norm of consensus, but this norm broke down during the mid-twentieth century. How did this breakdown occur? In Chapter 1, we show how the Court transitioned from a collective body to a body composed of a collection of individuals. Specifically, we highlight a number of what Orren and Skowronek (2004) have termed "distinguishable events" that brought about "durable shifts" in the extent to which consensus could be achieved. We trace these trends by an extensive examination of the Supreme Court during the Roosevelt Court—the "critical juncture" or moment in time when we argue the Court shifted from consensus to dissensus (Pierson 2004). Our analysis is predicated primarily on an original investigation of the private papers of Justices William O. Douglas and Harlan Fiske Stone. We argue that various institutional changes instituted during the Roosevelt Court affected the Court's decision making processes and brought about and entrenched a "dissensus revolution" in which individual expression went from virtual nonexistence to the norm. Understanding how dissensus became entrenched illustrates just how difficult it has become for modern justices to agree on anything. However, as explained earlier, even in the modern era of dissensus, consensus still occurred quite frequently during the study period. Thus, in subsequent chapters we explore how, once started on the dissensus path, the justices were ever able to agree.

In Chapter 2, we explicate our comprehensive model of consensus on the U.S. Supreme Court, beginning with a review of the literature that demonstrates the importance of policy preferences, strategic considerations, and legal factors in judicial decision making. We discuss previous attempts to understand Court consensus and then propose our model; we also discuss the notion of legal certainty as a mechanism for understanding the influence of law on judicial decisions. Chapter 2 ends with a detailed explanation of how we operationalized each of our independent variables.

Chapter 3 begins our empirical examination of the factors that influence the Supreme Court's likelihood of achieving unanimity and consensus in an era of dissensus. We focus on votes on the merits and find that, in addition to particular strategic and case-specific factors, consensus and unanimity are shaped by attitudinal and legal considerations.

Whereas Chapter 3 defines consensus in terms of the justices' votes on the merits, Chapter 4 takes into account separate opinions and defines consensus

in terms of *opinions*. Since a unanimous vote may obscure true disagreement among the justices, especially disagreement over legal doctrine, we investigate when the justices are less likely to feel the need to write separately. We therefore apply our theory of judicial decision making to the question of whether these same influences help to explain consensus in opinion writing. Again, we find that opinion consensus is largely a function of attitudinal and legal considerations as well as some strategic and case-specific factors.

Taken together, Chapters 3 and 4 provide strong support for our main argument, which is that consensus on the U.S. Supreme Court is a function of multiple, simultaneously operating factors that add to the story of how the justices reach agreement. First and foremost, we find a connection between attitudes and law: when the level of legal certainty facing the justices is high, attitudes are more constrained and consensus and unanimity are more likely. However, divisions are more likely when the level of legal certainty is low. Furthermore, consensus occurs more frequently in certain strategic contexts. In particular, unanimity on the merits is more likely when the chief justice authors the majority opinion, but opinion consensus is less likely when the Court declares a statute unconstitutional. Finally, case-specific factors matter: voting and opinion consensus are both more likely when the case concerns a non-civil-liberties or non-politically salient issue, and/or is decided in a liberal direction. Understanding consensus, then, necessitates taking into account the multitude of forces that operate on the Court in each case.

The findings presented in Chapters 3 and 4 necessarily raise an additional, important question: In an era of dissensus, when the Supreme Court's docket is almost entirely discretionary, why does the Court decide to hear so many cases that result in unanimous or highly consensual opinions? Chapter 5 explores why the Court grants certiorari to cases that are ultimately decided unanimously. We examine cert pool memos for all cases granted and decided during the 1986 term. Based on our exploration of the substantive conclusions reached by the memos' authors as to each case's certworthiness, we offer some initial findings and conclusions on the differences between ultimately unanimous cases and non-unanimous cases at the certiorari stage. Overall, our investigation suggests that unanimous cases appear to be those in which the justices believed it was important to clarify the law and issue a final, national ruling on an issue of great importance, and for which a single, unified answer could be reached.

Chapter 6 offers a review of our findings and an exploration of their broader implications. In particular, we highlight the need for studies of judicial decision making to take into account the totality of forces that influence

judges, including attitudinal, legal, strategic, and case-specific factors. We also discuss what we have learned about unanimous opinions: they are not uninteresting, but rather involve important legal issues that the justices feel are necessary to decide and for which they could agree on a single legal answer. Thus, these cases speak to the role of the Court in clarifying the law and in reinforcing the rule of law across the nation.