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Amici Curiae and Dissensus on the U.S. Supreme Court

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A great deal of empirical research has focused on explaining why U.S. Supreme Court Justices partake in nonconsensual opinion writing. However, little attention has been paid to the role of organized interests in contributing to a Justice's decision to write or join a separate opinion. I argue that a Justice's decision to engage in this behavior is a partial function of interest group amicus curiae participation in the Court. By providing the Justices with a myriad of information regarding how cases should be resolved, organized interests create ambiguity in the Justices' already uncertain decision making, at the same time providing them with a substantial foundation for concurring or dissenting opinions. I subject this argument to empirical validation by examining the Justices' decisions to author or join regular concurring, special concurring, and dissenting opinions during the 1946–1995 terms. The results indicate that organized interests play a considerable role in increasing dissensus on the Supreme Court.

I. Introduction

Why do U.S. Supreme Court Justices join or write separate opinions? Scholars pursuing this line of inquiry stress a variety of factors. Some argue that the decision to write separately is motivated primarily by ideological differences between the majority-opinion author and the individual Justice (e.g., Segal &

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Spaeth 2002:386). Others posit that institutional constraints, such as occupying a leadership position, shape this choice (e.g., Ulmer 1986), while another group of scholars assert that these decisions are motivated by strategic calculations (e.g., Epstein & Knight 1998:76; Murphy 1964:61).[1] Combining these elements, Wahlbeck et al. (1999) provided an integrated model of separate opinion writing, finding that each of the aforementioned perspectives offers partial leverage over these decisions. Curiously absent from much of this previous research, however, is a consideration of the idea that organized interests might affect the decision to write or join a separate opinion. Indeed, this is particularly surprising given the large amount of attention focused on interest groups in other aspects of the Court's decision making. For example, it is well established that interest group amicus curiae[2] briefs increase the likelihood that the Court will agree to fully review a case (Caldeira & Wright 1988; Perry 1991). Similarly, at the merits stage, several analyses show that interest group amicus curiae participation influences litigation success, whether the amici participate by filing briefs (Collins 2004a; Kearney & Merrill 2000; but see Songer & Sheehan 1993) or in oral arguments (Johnson & Roberts 2003). Additionally, numerous studies provide evidence that amici curiae are effective in shaping doctrinal change in the Court (e.g., Epstein & Kobylka 1992; Samuels 2004; Vose 1959). Despite the sizable extant literature indicating that amicus briefs shape the Justices' decision calculi, little attention has been paid to theoretically and empirically examining the role of amicus curiae briefs in influencing nonconsensual behavior on the Court. The purpose of this article is to fill this void.

Investigating this relationship is significant for a number of reasons. From a methodological standpoint, establishing the underlying concept that accounts for the influence of amicus briefs with regard to the decision to

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[1]In addition to the literature examining the individual Justices' decisions to author or join a separate opinion, a separate method of inquiry examines the aggregate patterns of opinion writing on the Court (e.g., Caldeira & Zorn 1998; Danelski [1960] 2002; Smyth & Narayan 2006; Walker et al. 1988), attributing the rise in dissensus on the Court to the weakening of consensual norms, changes in leadership styles, and increasing bureaucratic institutionalism.

[2]Amicus curiae is literally the Latin for "friend of the court." Amicus curiae briefs are legal briefs filed by entities other than the direct parties to litigation that frequently speak to legal and/or policy issues not addressed by the litigants. Despite the neutrality implied by their name, these briefs are, in fact, adversarial in nature, almost always advocating for a particular disposition in the Court. Substantial evidence exists that the briefs are read (e.g., Breyer 1998; Douglas 1962; O'Connor 1996; see also Collins 2004a; Kearney & Merrill 2000; Samuels 2004).

write or join a separate opinion is critical in that it avoids the pitfalls associated with invalid causal inferences (King et al. 1994:110). In failing to provide a comprehensive theoretical justification for why amicus briefs might contribute to nonconsensual opinion writing, prior research has, in effect, placed the cart before the horse by measuring without knowing first what it is measuring (Sartori 1970:1038). This has resulted in an unfortunate lacuna between theory and methods, which this article intends to redress.

More substantively, understanding the relationship between amicus briefs and dissensus is imperative in that it illuminates a neglected avenue of interest group effectiveness. Although an interest group would surely prefer that a unanimous Court endorse the positions it espouses, influencing a Justice's decision to write separately is not without its own benefits. Although separate opinions are without precedential value, they nonetheless serve to highlight weaknesses in the majority opinion, present means to distinguish the majority opinion for future litigation, and suggest alternative interpretations of the majority opinion, in addition to increasing the likelihood that the majority's precedent will be reversed (e.g., Spriggs & Hansford 2001). As such, an interest group that is unsuccessful at persuading the majority to adopt its position can nonetheless achieve a partial victory by contributing to a Justice's decision to write or join a separate opinion, which might be particularly beneficial if the group is involved in repeated litigation.

Finally, this analysis speaks to the ability of the Court to overcome its so-called countermajoritarian difficulty. Whereas traditional notions of this conundrum focus primarily on the Court's isolation from the public and its nondemocratic nature (e.g., Bickel 1962), Bennett (2001) presents an alternative perspective, highlighting the ability of the Court to engage in a dialogue with the public. According to this view, greater utility is derived from considering how the Court engages in democratic conversation, rather than focusing solely on its institutional features. Bennett argues that the two primary means available to the Court to partake in this type of constitutional colloquy are its receptivity to amicus participation and the presentations the Justices make to the public through their opinions. Amicus briefs, it is argued, provide a medium for the Justices to interact with nonparties to a case, while judicial opinions permit the Justices to expound on the reasons for their decisions. Consequently, both foster democratic involvement in the legal system. Indeed, this might be particularly true for separate opinions, which can soften disappointment with the Court's majority opinion by illustrating to members of the thwarted public that their position is supported by at least a minority of the Court. Thus, much can be gained by exploring the

interplay between these two methods for redeeming the nondemocratic nature of the Court, particularly with regard to how the primary mechanism for democratic input into the judiciary (amicus briefs) might be related to the Court's primary instrument for democratic output (opinions).

I begin with a discussion of the literature that has considered the role of amicus briefs in shaping a Justice's decision to write or join a separate opinion, concluding that previous studies have utilized amicus participation narrowly, viewing the briefs as merely signaling the political salience of the case. I then provide a case study of *Metromedia v. San Diego* (1980) and present my theory of why amicus briefs are expected to contribute to concurring and dissenting behavior, informed in part by my analysis of *Metromedia*. In brief, I argue that by providing the Justices with a myriad of information regarding how cases should be resolved, organized interests create ambiguity in the Justices' already uncertain decision making, while simultaneously providing the Justices with a substantial foundation for a concurring or dissenting opinion. Next, I subject my hypothesis to empirical validation by examining the individual Justices' decisions to write or join regular concurring, special concurring, and dissenting opinions during the 1946–1995 terms. The results indicate that organized interest amicus curiae participation plays an important role in escalating dissensus on the Court.

II. The Influence of Amicus Curiae Briefs on Concurrences and Dissents

Previous research investigating why judges author or join separate opinions commonly includes a measure of amicus participation as a proxy for a case's political salience, finding that separate opinion writing is more likely in cases attracting a large number of amicus briefs (e.g., Hettinger et al. 2004; Maltzman et al. 2000; Wahlbeck et al. 1999). Amicus participation, it is argued, signals to jurists that the case has substantial public policy implications, having been briefed by entities that are not parties to the case, but who nonetheless believe the case will affect their interests (Hettinger et al. 2004:58). This surrogate for a case's political salience was reevaluated by Epstein and Segal (2000) and found to be faulty in several regards. First, it suffers from content bias by overemphasizing civil rights and liberties cases, which contain the highest levels of amicus participation (e.g., Collins 2005), to the detriment of other issue areas, such as economics and federalism. Second, it is affected by recency bias since it overcounts contemporaneous

cases more than older cases, due to the rise in amicus participation over time (e.g., Kearney & Merrill 2000). Third, it suffers from time dependency, again as a result of the increasing frequency with which amicus briefs are filed.[3]

Adding to the concerns addressed by Epstein and Segal (2000), two further objections can be raised involving the use of amicus briefs as a measure of salience with specific regard to the decision to author or join a separate opinion. First, scholars pursuing this line of research explicitly seek to examine an individual jurist's decision to write or join a separate opinion. By implication, these studies use the number of amicus briefs filed in each case (or some derivation thereof) to measure a case's political salience to the individual judge. However, amicus participation in a case does not imply that the case is salient to a particular jurist; instead, it denotes that the case is salient to those organized interests who filed the briefs. That a case is important to frequent amici, such as the American Civil Liberties Union and Americans for Effective Law Enforcement, does not provide compelling evidence that the dispute is salient to an appellate court judge. Accordingly, in order to capture a case's salience to the individual judge, scholars are best served by introducing a judge-specific measure of a case's import. Second, and most importantly, studies relying on the number of amicus briefs as a proxy for a case's political salience ignore the informational role of amici curiae. In other words, prior research emphasizing amicus briefs as a surrogate for salience has offered only an incomplete explanation for the influence of amicus briefs on the decision to write separately. Whatever information the briefs might contain regarding the salience of a case, the legal and policy information provided by amicus briefs is at least as theoretically important, if not more important, as the signals sent by the amici regarding a case's import. Although the political salience of a case might catch the Justices' attention, the substantive informational content of the amicus briefs can provide the Justices with the fuel to help promote a separate opinion. To more clearly see this point, consider *Metromedia v. San Diego* (1980).

In that case, the Supreme Court adjudicated a dispute involving a San Diego ordinance that effectively eliminated the erection of billboards within city limits, with the exception of advertising related to goods and services

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[3]Recency bias and time dependency are related in the above example; however, these two criticisms of salience measures are not always concomitant. For example, a hypothetical salience measure that overcounts cases decided by the Warren Court would suffer from time dependency, but not recency bias.

sold onsite. San Diego argued that the ban was a constitutionally permissible use of its police powers since it eradicated the potentially hazardous effects on motorists created by distracting signage, while improving the appearance of the city. In turn, Metromedia argued that the ban violated its First Amendment rights to free speech and expression. The central issue for the Supreme Court revolved around the ordinance banning both commercial and noncommercial advertising, the latter including political and social messages that traditionally carry more extensive First Amendment protections than commercial speech.[4] Metromedia was well aware of this fact. However, it knew that, because it did not engage in political speech itself, but instead leased billboard space to others who might partake in such speech, it would be tricky for Metromedia to credibly argue the political speech issue. Consequently, Metromedia's attorneys, including former Solicitor General Theodore Olson, called on the American Civil Liberties Union (ACLU), a renowned advocate for the First Amendment, to file an amicus brief addressing the political speech aspects of the case (Ennis 1984:607). Joining the ACLU in supporting Metromedia's position were a diverse group of amici, including the American Newspaper Publishers Association (ANPA), the Pacific Legal Foundation (PLF), the Outdoor Advertising Association of America (OAAA), and Robert and Barbara Pope, who operated a small, family-owned outdoor advertising business in the city. The amici supporting San Diego also represented varied interests, with equal, if not more substantial, clout than the appellant amici, comprising President Carter's Solicitor General; Hawaii, Maine, and Vermont; the City and County of San Francisco; the National Institute of Municipal Law Officers (NIMLO); and seven California cities.

Each of the amici supplied the Court with distinct insights into the case's potential legal and political ramifications. The liberal ACLU briefed the Court regarding the First Amendment issue as it pertained to the suppression of political speech, while the conservative PLF highlighted the commercial law implications of the decision, arguing that the ordinance violated the Fifth Amendment's prohibition against the deprivation of property without due process of law. The ANPA argued that the First Amendment is absolute, thus prohibiting any governmental interference with the

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[4]See, e.g., *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976), noting that, while purely commercial speech enjoys First Amendment protection, it does not enjoy such protection on an equal footing with noncommercial speech.

dissemination of information, political or otherwise. The OAAA presented the Justices with statistical evidence regarding the effects of upholding the ban for the industry at large, while the Pope brief attempted to connect a human face with the regulation by explaining how the ban affected small business owners. Supporting San Diego, Solicitor General McCree argued that the ban was a perfectly permissible use of the city's police powers and discussed how invalidating the ordinance would undermine the federal Highway Beautification Act of 1965. Likewise, Hawaii, Maine, and Vermont, who joined a single brief, noted that if the Court invalidated the San Diego law, it would render similar bans in those states unenforceable. The City and County of San Francisco argued that the appropriate standard for evaluating the law's constitutionality was not the rigorous strict scrutiny standard, but the more relaxed rational basis test. Further, San Francisco contended that the case was not really about the First Amendment, but instead involved a zoning regulation with only an incidental relation to political speech. The seven California cities presented evidence that outdoor advertising would continue in San Diego even with the ordinance in place, albeit on a smaller scale, offering the Court a potential route to sidestep the First Amendment issue. NIMLO argued that the proper pronouncement was to defer to the desires of democratically elected city councils who have determined that such bans are consistent with the preferences of their constituents.

On July 2, 1981, the Supreme Court announced its plurality decision, finding that, while San Diego had a valid justification for enacting the ban, the ordinance violated the First Amendment since it prohibited both commercial and noncommercial speech, the latter enjoying a higher level of constitutional protection.[5] In his plurality opinion, Justice White explained that because the regulation allowed for the advertising of goods sold onsite, it favored commercial speech at the expense of noncommercial speech, including expression involving political and social commentary (453 U.S. 590, at 513). Thus, it is clear that White's opinion relied heavily on arguments presented by the Metromedia amici, most notably the ACLU.

Justice Brennan wrote a concurring opinion, joined by Justice Blackmun, arguing that the ordinance was inconsistent with the First Amendment because it amounted to a total prohibition on billboard advertising in the

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[5]While the Court was only able to reach a plurality as to its rationale, a 6–3 majority of the Justices agreed that the ban was invalid under the First Amendment.

city (453 U.S. 490, at 522).[6] As such, Brennan incorporated the arguments of the ACLU, OAAA, and the other appellant amici by endorsing the view that billboards are a valuable medium for expression warranting strict First Amendment protection (453 U.S. 490, at 523). Additionally, Brennan rejected the position of the seven California cities that outdoor advertising would continue in the city with the ordinance in place (453 U.S. 490, at 525), as well as the Solicitor General's argument that striking down the ban would render the federal Highway Beautification Act unenforceable (453 U.S. 490, at 534).

Three Justices authored dissenting opinions in *Metromedia*. Justice Stevens opined that it was a constitutionally permissible use of San Diego's police powers to totally prohibit billboards, so long as an exception for the advertising of onsite goods and services existed (453 U.S. 490, at 541). In so doing, he plainly rejected the ANPA's stance that the First Amendment is absolute, while endorsing NIMLO's argument that the proper role of the Court in matters involving local laws is to defer to the desires of democratically elected councils who believe the bans useful for improving the appearance of the city (453 U.S. 490, at 552). Justice Burger's opinion highlighted his belief that the plurality erred in its decision by trampling on subject matter traditionally reserved for local authority—protecting the safety of motorists and enhancing the appearance of an urban area (453 U.S. 490, at 556). Like Stevens, Burger's opinion relied heavily on arguments advanced by NIMLO, the Solicitor General, and the city and state amici. Finally, Justice Rehnquist authored a brief dissenting opinion, positing that aesthetic justification alone is sufficient to totally ban outdoor advertising (453 U.S. 490, at 570). Like his fellow dissenters, Rehnquist embraced the San Diego amici in concluding that "little can be gained in the area of constitutional law, and much lost in the process of democratic decision making, by allowing individual judges in city after city to second-guess such legislative or administrative determinations" (453 U.S. 490, at 570).

Metromedia v. San Diego provides important insights into the role of amici curiae in the Supreme Court for three reasons. First, it is a clear example of how arguments supplied by amici bring to light the broader legal and political ramifications of a decision, in the process presenting the

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[6]The primary distinction between Brennan's concurrence and White's plurality opinion rests in Brennan's belief that the case involved the issue of whether municipalities could totally ban outdoor advertising, while the plurality did not focus on that specific question.

Justices with numerous alternative and reframed arguments that might not otherwise be available to them. Second, it highlights how the Justices utilize this information as the basis for both majority and separate opinions. Finally, and perhaps most importantly, the examination of *Metromedia* reveals the need for systematic analysis to determine whether amicus briefs influence the Justices' decisions to write separately. Although all the Justices' opinions reflect arguments advanced by the amici, only the Justices know for sure "whether and to what extent a decision rests upon what was said by an amicus" (Stern et al. 2002:664).

As the above analysis makes clear, amicus briefs do much more than signal a case's salience to the Justices. Instead, these briefs provide the Justices with legal and policy argumentation that frequently expands on the reasoning presented by the direct parties to litigation. For example, Spriggs and Wahlbeck (1997), in their analysis of amicus briefs filed during the 1992 term, find that almost 70 percent of amicus briefs supply the Justices with information not provided by the direct parties to litigation and that the Justices frequently utilize this information in majority opinions. Similarly, there is clear evidence that the Justices make use of amicus briefs in concurring and dissenting opinions: during the Rehnquist Court era (1986–1995), citations to amicus briefs appeared in almost 20 percent of nonunanimous cases with at least one amicus brief (Kearney & Merrill 2000; see also Epstein et al. 1994).[7] This point is also reflected in analyses of individual cases. Akin to the discussion of *Metromedia* above, Parker (1999) finds that amicus briefs constitute a substantial basis for the Justices' concurring opinions in both *Washington v. Glucksberg* (1997) and *Vacco v. Quill* (1997). Far from merely signaling the salience of those cases, amicus briefs provided the Justices with alternative perspectives on the assisted suicide issue, conveying extremely diverse viewpoints as to the correct application of the law in those cases (see also Behuniak-Long 1991 on the role of amicus briefs in *Webster v. Reproductive Health Services* 1989).

Insofar as amicus briefs provide the Justices with novel argumentation regarding the correct application of the law in a case, the briefs create

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[7]This percentage likely underrepresents the true extent to which the arguments of amici appear in the Justices' separate opinions. As O'Connor and Epstein (1983; see also Samuels 2004) note, the Justices may adopt arguments or respond to amicus briefs without making a direct reference to the briefs.

ambiguity for the Justices. In cases without amicus participation, there are essentially two perspectives for the Justices to consider (those of the petitioner and respondent). However, when amicus briefs are present in a case, the Justices are the recipients of information that expands the scope of the conflict (e.g., Schattschneider 1960). For example, in *Metromedia*, the amici offered the Justices a plethora of information regarding the correct application of the law, framing the issue alternatively as one involving the First Amendment (e.g., ACLU, ANPA), the Fifth Amendment (PLF), and having the potential to affect existing federal (Solicitor General) and state policies (Hawaii, Maine, and Vermont), in addition to raising separation of powers concerns (e.g., NIMLO). Although one can only speculate, it is doubtful that these issues would have been raised without the participating amici. By raising such issues in the Court, amicus briefs confound the Justices' already uncertain decision making. This uncertainty is argued to contribute to a Justice's decision to write or join a separate opinion (e.g., Snyder 1959; Wrightsman 2006:100). In cases without amicus participation, the scope of the conflict is narrow and the Justices generally only consider issues raised by the litigants (e.g., Epstein et al. 1996). In cases with amicus participation, the scope of the conflict is broad because the amici bring new issues to the Justices' attention. By introducing or expanding on issues the direct litigants were able to raise only in abbreviated form, amici make it difficult for the Justices to determine the correct application of the law in each case. In this sense, because amicus briefs update the Justices' information priors as to the intricacy of a case, it is expected that the Justices will become increasingly attentive to these issues and, recognizing their ambiguity, will seek to shape the direction of the policy pronounced in the case (e.g., Snyder 1959). Since only a single Justice can author the majority opinion, if a Justice desires to shape the content of the Court's policy, while avoiding bargaining with the majority-opinion author, he or she is relegated to authoring a separate opinion (e.g., Scalia 1994). As Justice Ginsburg (1990:148) notes, "[h]ard cases do not inevitably make bad law, but too often they produce multiple opinions." Insofar as the reduction of uncertainty in decision making is only accomplished when options are eliminated (Casagrande 1999:7), amicus briefs, by presenting the Justices with information that might be otherwise unavailable to them, act to overload the Justices' cognitive processes (e.g., Robertson 1980). This leads to increased uncertainty, which is expected to increase the likelihood of writing or joining a separate opinion.

In addition to bringing issues to the Justices' attention that have the potential to light the fires of dissensus, amicus briefs also provide a substan-

tial basis from which a Justice can cultivate a separate opinion. In so doing, amicus briefs marginalize the resource costs of engaging in nonconsensual behavior as the Justices are able to draw the justifications for this behavior from the arguments of the organized interests. Since partaking in nonconsensual behavior requires the Justices to expend resources that might be spent otherwise—for example, dealing with certiorari petitions and authoring assigned opinions—choosing to dissent or concur is costly. By presenting the Justices with a foundation for a separate opinion, amicus briefs can reduce the costs of writing separately. Taken as a whole, by increasing the already ambiguous nature of the Court's information environment and by providing the Justices with a well-researched basis for a separate opinion, I argue that amicus curiae briefs will significantly influence a Justice's decision to engage in this type of dissensus. Accordingly, I expect that as the number of amicus curiae briefs in a case increases, so, too, will the likelihood that a Justice will author or join a separate opinion.

III. Data and Methods

To test this hypothesis, I examine whether each Justice, excluding the majority-opinion author, wrote or joined a regular concurring, special concurring, or dissenting opinion during the 1946–1995 terms.[8] Regular concurring opinions reflect agreement with both the outcome of the case and the reasoning used by the majority to justify that outcome, but expound on the majority's reasoning. Special concurring opinions reflect agreement with the outcome of the case, but not the majority's reasoning for that outcome. Dissenting opinions reflect disagreement with both the outcome of the case and the majority's reasoning for reaching that outcome.[9] The data on the Justices' nonconsensual behavior were obtained from the Spaeth

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[8]Majority-opinion authors are excluded from consideration as their inclusion would introduce bias into the model, given that I am attempting to explain a Justice's decision to write or join a separate opinion. Simply put, majority-opinion authors have no such options available to them.

[9]Spaeth (2002, 2003) reports over 99 percent intercoder agreement with regard to the classification of regular concurring, special concurring, and dissenting opinions, indicating a clear line between these types of separate opinions. For other analyses that distinguish between these types of opinions, see, e.g., Collins (2004b) and Wahlbeck et al. (1999).

(2002, 2003) databases. I utilize the Justice-vote as the unit of analysis.[10] Because each Justice has four available choices (join the majority, author or join a dissenting opinion, author or join a regular concurring opinion, or author or join a special concurring opinion), it is necessary to employ a statistical model that estimates the effects of independent variables on a nominal dependent variable. Accordingly, I use multinomial probit, which models a single decision among two or more unordered alternatives (e.g., Greene 2000:871).[11] Since the multinomial probit model estimates the likelihood that a Justice will make a particular decision (dissent, regularly concur, or specially concur), relative to a base decision (join the majority), it yields three estimates. Thus, the results of the model will indicate the effects of the independent variables on the probability change from: (1) joining the majority to authoring or joining a dissenting opinion; (2) joining the majority to authoring or joining a regular concurring opinion; and (3) joining the majority to authoring or joining a special concurring opinion.[12] To control for the nonindependence of observations in the data (in that there are, on average, eight observations for each case), robust standard errors, clustered on case citation, are employed.[13] To account for any temporal dependence in the data, I include a dummy variable for each Supreme Court term save one in the model (Beck et al. 1998). This allows the model to capture factors such as alterations in the Court's agenda (Pacelle 1991),

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[10]More specifically, the observations under analysis include the votes of all Justices in orally argued cases. Such cases were identified using the case citation plus split vote as the unit of analysis.

[11]The multinomial probit model is preferable to the multinomial logit model as it relaxes the assumption of the independence of irrelevant alternatives (e.g., that the likelihood of authoring a regular concurring opinion is independent of the likelihood of authoring a special concurring opinion). When the multinomial logit model is employed in place of the multinomial probit estimator, the results are substantively identical.

[12]As alternatives to the multinomial probit model, I also ran models using binary probit, ordered logit, and stereotype logit. In addition, I ran the multinomial probit model with two alternative specifications of the dependent variable. First, I scored the dependent variable as follows: 0 = join majority; 1 = join regular concurring opinion; 2 = author regular concurring opinion; 3 = join special concurring opinion; and 4 = author special concurring opinion. Second, I operationalized it as: 0 = join majority; 1 = author or join regular or special concurring opinion; and 2 = author or join dissenting opinion. The results of those models do not substantively alter the findings presented here.

[13]As an alternative, I clustered on Justices. Those results are substantively identical to the model presented here.

the increase in amicus participation over time (Collins 2004a), and the composition of the executive and legislative branches (Epstein & Knight 1998).[14] Since factors other than amicus curiae briefs shape a Justice's decision to write or join a separate opinion, I include several control variables in the model.

Decades of research on Supreme Court decision making reveals the paramount importance of ideological preferences in shaping the choices Justices make (e.g., Pritchett 1948; Schubert 1965; Segal & Spaeth 2002). Because the majority-opinion author wields substantial control over the content of the majority opinion (e.g., Maltzman et al. 2000:35; Rohde & Spaeth 1976:172), the extent to which a majority opinion is acceptable to a Justice will depend in large part on the ideological proximity between the majority-opinion author and that Justice. As such, I expect that as the ideological distance between a Justice and the majority-opinion author increases, so, too, will the likelihood that a Justice will author or join a separate opinion. To measure the ideological distance between each individual Justice and the majority-opinion author, I utilize a measure derived from each Justice's Martin and Quinn (2002) score. These scores are based on a dynamic item response model with Bayesian inference and thus vary over time.[15] To measure the ideological distance between each Justice and the majority-opinion author, I created a variable, labeled IDEOLOGICAL DISTANCE, which is the absolute difference between each Justice's ideology score and that of the majority-opinion author.[16] Higher values on this variable reflect increased ideological distance between a Justice and the majority-opinion author. Accordingly, the expected direction of this variable is positive.

In addition to ideological considerations, past research indicates that a Justice is more likely to exhibit nonconsensual behavior if the case is legally

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[14]As an alternative method to capture any temporal dependence, and in particular the increase in amicus participation over time, I also ran the model including a counter variable (scored such that: 1946 = 0, 1947 = 1, 1948 = 2, etc.). These results do not substantively differ.

[15]It is important to note that because these scores are derived from the Justices' votes, an endogeneity problem might exist with their use. However, since an individual Justice's decision to write or join a separate opinion is not equivalent to the decision to cast a liberal or conservative vote, the scores constitute a reasonably independent measure of ideology for the purpose at hand. When the Segal and Cover (1989) scores are used in place of the Martin and Quinn scores, the results do not substantively differ.

[16]For per curiam cases, I use the ideology score of the median Justice in the majority as a surrogate for the majority-opinion author's ideology score.

complex (e.g., Wahlbeck et al. 1999). In such cases, it is difficult for the majority-opinion author to adequately address the multiple concerns of each individual Justice, thus making separate opinion authorship more likely. I derived a measure of LEGAL COMPLEXITY for each case based on a factor analysis of the number of issues raised in the case and the number of legal provisions relevant to the case, following Wahlbeck et al. (1999). A factor analysis of these two variables produced a single factor with an eigenvalue greater than one. The expected sign of this variable is positive, indicating that a Justice is more likely to write or join a separate opinion in a legally complex case.

Just as a Justice might decide to author or join a separate opinion in legally complex cases, so, too, might a Justice choose to exhibit this nonconsensual behavior in cases in which the majority overrules a precedent or declares a law unconstitutional. To be sure, the Supreme Court rarely overrules itself; instead, deference to precedent is a norm on the Court (e.g., Spriggs & Hansford 2001). When the majority chooses to overrule a previous decision, it is expected that a Justice will be inclined to write or join a separate opinion in order to signal his or her unhappiness with this norm violation. Similarly, the Court rarely declares local, state, and federal laws unconstitutional; rather, the Justices generally defer to the elected branches of government. For example, during the 1946–1995 terms, the Court declared local, state, and federal laws unconstitutional less than 8 percent of the time (Spaeth 2002, 2003). In those instances where the majority breaks from the Court's traditional support for the constitutionality of such laws, the expectation is that a Justice will be more likely to write or join a separate opinion to indicate his or her discontent with the majority's decision to do so. As an indicator of LEGAL SALIENCE, I create a variable scored 1 if the majority formally altered precedent or declared a local, state, or federal law unconstitutional and 0 otherwise (as identified in the Spaeth 2002, 2003 databases). The expected sign of this variable is positive, indicating that a Justice is more likely to write or join a separate opinion in such legally salient cases.

Several scholars note that attributes of the individual Justice, independent of ideology, influence the decision to write or join a separate opinion. First, studies reveal that jurists who are new to the bench are less inclined to partake in nonconsensual behavior due to acclimation issues involving time management (e.g., Hettinger et al. 2003) and because their policy preferences are not yet well developed (Brenner 1983). As such, I expect that Justices new to the Court will be less likely to write or join a separate opinion than those later in their careers. To test this hypothesis, I include a variable

labeled FRESHMAN in the model, scored 1 if a Justice has served less than two full terms on the Court and 0 otherwise.[17]

In addition to the freshman effect, scholars note that Chief Justices are less likely to concur or dissent (e.g., Brenner & Hagle 1996; Wahlbeck et al. 1999). As leaders, Chief Justices are thought to refrain from dissenting and concurring opinion authorship in order to demonstrate norms of consensus. As Justice Ginsburg (1990:150) notes, upon his elevation to Chief Justice, Rehnquist substantially reduced the frequency of his nonconsensual behavior in an attempt to restore norms of collegiality to the Court. To test this hypothesis, I include a variable labeled CHIEF JUSTICE, scored 1 for Chief Justices Vinson, Warren, Burger, and Rehnquist, and 0 for all other Justices (and for Rehnquist prior to the 1986 term). The expected sign of this variable is negative, indicating that Chief Justices are less likely to author or join a separate opinion.

To account for the fact that Supreme Court Justices are, in effect, participants in a repeated game (e.g., Murphy 1964:38; Wahlbeck et al. 1999:496), I examine the extent to which past cooperation influences a Justice's decision to write or join a separate opinion. The expectation is that a Justice is less likely to engage in nonconsensual behavior if he or she has cooperated with the majority-opinion writer in the past. I adopt my measure of cooperation from Wahlbeck et al. (1999:500) by calculating the percentage of the time the majority-opinion author joined a separate opinion written by another Justice in the previous term. To cleanse this variable of ideological compatibility between Justices, I regressed the percentage of the time the majority-opinion writer joined another Justice's separate opinions on IDEOLOGICAL DISTANCE and use the residuals from that regression as a proxy for COOPERATION. If a Justice did not serve on the Court during the previous term, this variable is scored 0. Higher values represent greater past cooperation (after controlling for ideology). Accordingly, the expected sign of this variable is negative, indicating that a Justice is less likely to write or join a separate opinion if he or she has cooperated with the majority-opinion author in the past.

To measure the number of amicus briefs filed in each case, I include a variable labeled AMICUS CURIAE BRIEFS. The data on the number of amicus briefs filed in each case were derived from the Kearney and Merrill (2000)

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[17]There is no generally accepted length of time to measure the freshman effect: periods tested in existing research range from one to five years. Following Hettinger et al. (2003) and Wahlbeck et al. (1999), I use the two-term measurement.

amicus database. Unlike Wahlbeck et al. (1999), I do not standardize this variable. Those authors sought to measure the political salience of a case and, as such, standardizing the number of amicus briefs in a case was appropriate for their analysis. However, as I am associating amicus participation with increased ambiguity regarding the correct application of the law, and with a reduction in the costs of writing separately due to the possibility that the briefs may serve as a foundation for a separate opinion, standardization is undesirable.[18]

As previously mentioned, past research indicates that jurists are more likely to write or join separate opinions in salient cases (Hettinger et al. 2004; Maltzman et al. 2000; Wahlbeck et al. 1999). In relatively unimportant cases, a Justice might go along with the majority opinion for the purpose of appearing consensual. However, in salient cases, a Justice is more likely to write separately in an attempt to shape the legal rules announced in a case. Unfortunately, scholars have failed to determine whether this behavior is due to the case's salience to the public or due to the case's salience to the individual Justice. To remedy this, I include two measures of salience in the model: one tapping into the salience of the case to the individual Justice and the other serving as a proxy for the salience of the case to the general public.

According to Epstein and Segal (2000:68), the most desirable property of a measure of salience is its contemporaneousness; that is, relevant to the Justice at the time the case is being decided. According to Benesh and Spaeth (2001), it is even more paramount that a variable attempting to measure salience to the individual Justice actually does so (i.e., the variable taps salience to the individual Justice, not to the editors of constitutional law books or the authors of law review articles). In an effort to provide a surrogate for case salience to the individual Justice, I created a variable that is the number of separate opinions each Justice penned prior to the case at hand in each of the issue areas identified in the Spaeth (2002, 2003) databases, divided by the number of cases falling into that issue area in which the Justice participated. Thus, this variable is a dynamic measure of salience, calculated as a proportion. For example, if a Justice wrote 10 separate opinions in a particular issue area having 20 opportunities to do so, this variable is scored 0.5. For the next case in that issue area, if the Justice wrote separately, this variable is scored 0.524. If the Justice did not write separately, this variable is

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[18]However, to investigate whether this variable is affected by outlier values, I ran an alternative specification by logging the AMICUS CURIAE variable. The results proved substantively identical to those presented here.

scored 0.476. Majority opinions were excluded from consideration because they may be assigned to a Justice regardless of whether that issue area is important to that Justice; instead, the most predominant force affecting opinion assignments relates to a Justice's ideological proximity to the Chief Justice or the most senior Justice in the winning coalition (Brenner 1990). Those dissenting and concurring opinions that a Justice joined (as opposed to wrote) were excluded because the former behavior constitutes less of a public commitment to the development of law within an issue area than writing the opinion oneself (e.g., Collins 2004b).[19] Clearly, this variable is an imperfect surrogate for measuring a case's salience to the individual Justice. However, it is contemporaneous and, while it might suffer from content, recency, and temporal biases, these do not necessarily diminish the variable's utility. After all, it is expected that an individual Justice will view some issues as more important than others (content bias), and those views are likely to become ingrained over time (recency and temporal biases) as a result of experience with an issue area (e.g., Prislin 1996).[20] In addition, this variable captures the tendency of particular Justices to habitually concur and/or dissent within a particular issue area, such as Justice Douglas in free expression law.[21] Further, given that past behavior is a strong predictor of future behavior, its endogenous nature makes the test for whether amicus briefs influence the decision to write or join a separate opinion conservative: if a case's salience to the individual Justice explains a substantial amount of

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[19]The operationalization of this variable is generally consistent with approaches to measuring salience that ask respondents to self-identify issues relevant to them (e.g., Krosnick 1988) in that the Justices self-identify salient issues by making a public commitment to the development of the law through opinion writing. As Justice Ginsburg put it, "public accountability through the disclosure of votes and opinion authors puts the judge's conscience and reputation on the line" (1990:140). Further, its operationalization is consistent with psychological research measuring salience that stresses experience with an issue and the development of a vested interest with the issue (e.g., Prislin 1996).

[20]In addition to these concerns, an additional methodological issue surrounding this variable also exists. Namely, it treats Justices who have served prior to the 1946 term as never having written a separate opinion prior to the 1946 term, as a result of data limitations (i.e., I do not have data prior to the 1946 term). Although this variable is still capable of serving as a proxy for salience to those Justices, this is potentially problematic. Accordingly, I ran an alternative model excluding those Justices (Black, Burton, Douglas, Frankfurter, Jackson, Murphy, Reed, and Rutledge). None of the results decidedly altered.

[21]See, e.g., *Dennis v. United States* (1951), *Miller v. California* (1973), *New York Times v. Sullivan* (1964), *New York Times v. United States* (1971), and *Roth v. United States* (1957).

variance with regard to this decision, the influence of amicus briefs should be weak at best. The expected sign of this variable, labeled SALIENCE TO THE JUSTICE, is positive in direction, indicating that a Justice is more likely to write or join a separate opinion in cases that are salient to that Justice.

Having created a variable that taps into a case's salience to the individual Justice, it is also necessary to operationalize a variable that measures a case's import to the public. Measuring the importance of a case to the general public is significant because even if the Justice has little personal interest in an issue area, that Justice might recognize that the public views the case to be especially notable. Inasmuch as a Justice might be concerned with the public's impression of a case (or lack thereof), the public import of a case might contribute to a Justice's decision to write or join a separate opinion. Chief Justice Burger, in a memo to Justice Black, illustrates this point nicely when he writes: "I do not really agree but the case is narrow and unimportant except to this one man. . . . I will join up with you in spite of my reservations" (quoted in Wahlbeck et al. 1999:497). As Burger makes clear, despite his own doubts, his decision to forgo authoring a separate opinion stemmed from the fact that the case was not especially salient to the public. As a measure of SALIENCE TO THE PUBLIC, I rely on whether the case appeared on the front page of the *New York Times* on the day after the decision (Epstein & Segal 2000). This variable is scored 1 if the case made the front page of the *Times* and 0 if it did not. Although far from perfect, this is an appropriate proxy for public salience in that it is contemporaneous and does not suffer from content, recency, or temporal biases.[22] Table 1 reports the summary statistics for the independent variables.

IV. RESULTS

Table 2 reports the results from the multinomial probit that predicts whether a Justice authored or joined a dissenting, regular concurring, or special concurring opinion during the 1946–1995 terms. The model correctly predicts almost 70 percent of those decisions for a percent reduction

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[22]As an alternative proxy for a case's salience to the public, I also estimated a model using the *Congressional Quarterly* list to capture a case's importance. None of the results significantly altered.

Table 1: Summary Statistics

Variable	*Mean*	*SD*	*Minimum*	*Maximum*
Amicus Curiae Briefs	2.05	3.62	0	78
Ideological Distance	2.26	1.89	0	10.55
Legal Complexity	–0.168	0.852	–0.572	10.35
Legal Salience	0.088	0.283	0	1
Salience to the Public	0.150	0.357	0	1
Salience to the Justice	0.180	0.213	0	1
Cooperation	0.243	1.86	–2.07	8.48
Freshman	0.010	0.30	0	1
Chief Justice	0.111	0.314	0	1

in error of 38 percent.[23] Of the 47,206 Justice observations, 10,101 (21.4 percent) involved the Justices authoring and joining dissenting opinions, 1,852 (3.9 percent) involved the Justices authoring and joining regular concurring opinions, and 2,750 (5.8 percent) involved the Justices authoring and joining special concurring opinions. As Table 2 reveals, strong support is shown for the amicus curiae hypothesis. Even when controlling for alternative explanations, the likelihood (relative to joining the majority) that an individual Justice will author or join a dissenting opinion increases by 1 percent as the number of amicus briefs increases from its mean value (two amicus briefs) to one standard deviation above the mean (six amicus briefs). Similarly, the probability of authoring or joining a regular or special concurring opinion increases by about 0.2 percent and 0.5 percent, respectively, with this same change (from two amicus briefs to six). Although these changes in predicted probability may appear relatively small, it is important to recall the relative infrequency with which the Justices engage in this type of nonconsensual behavior. Although Justices author or join dissenting, regular, and special concurring opinions in a nontrivial number of cases, this nonconsensual behavior constitutes only a small percentage of their voting behavior. For example, Justices author or join special concurring opinions less than 6 percent of the time. With that in mind, a 0.5 percent change in predicted probability should appropriately be viewed as a relatively strong

[23]Percent reduction in error is based on the tau statistic, which compares the percentage of correctly classified observations to the null model of random assignment based on the underlying distribution of observations across all four categories of the dependent variable. The use of tau is appropriate because it accounts for the distribution of nonmodal cases (e.g., Reynolds 1984).

Table 2: Multinomial Probit Model of a Justice's Decision to Write or Join a Separate Opinion, 1946–1995 Terms

Variable	*Dissenting Opinion*	*Regular Concurring Opinion*	*Special Concurring Opinion*
Amicus Curiae Briefs	0.014*** [+1.0]	0.009* [+0.2]	0.018** [+0.5]
	(0.004)	(0.005)	(0.006)
Ideological Distance	0.214*** [+7.4]	0.087* [+0.2]	0.286*** [+4.4]
	(0.032)	(0.050)	(0.041)
Legal Complexity	0.035** [+0.5]	0.055** [+0.2]	0.026 [n.s.]
	(0.014)	(0.021)	(0.021)
Legal Salience	0.087* [+0.3]	0.284*** [+1.5]	0.372*** [+3.3]
	(0.042)	(0.059)	(0.056)
Salience to the Public	0.375*** [+6.1]	0.579*** [+3.1]	0.433*** [+2.6]
	(0.035)	(0.054)	(0.050)
Salience to the Justice	1.35*** [+5.2]	1.36*** [+1.3]	1.39*** [+1.8]
	(0.049)	(0.069)	(0.065)
Cooperation	–0.033 [n.s.]	–0.020 [n.s.]	–0.158*** [–2.0]
	(0.031)	(0.049)	(0.041)
Freshman	–0.226*** [–4.2]	0.023 [n.s.]	–0.153*** [–0.7]
	(0.035)	(0.048)	(0.048)
Chief Justice	–0.277*** [–4.7]	–0.218*** [–0.6]	–0.298*** [–1.6]
	(0.031)	(0.048)	(0.043)
Constant	–1.64***	–3.06***	–2.96***
	(0.105)	(0.165)	(0.137)
Model Diagnostics			
Wald χ^2	3,282.2***	Percent Correctly Predicted	69.5
N	47,206	Percent Reduction in Error	38.4

Baseline category is joining the majority opinion. Numbers in parentheses indicate robust standard errors, clustered on case citation. Numbers in brackets are marginal effects. Marginal effects represent the percentage change in the likelihood of observing a Justice write or join a dissenting, regular concurring, or special concurring opinion, relative to joining the majority, corresponding to a shift in the value of the independent variables. Marginal effects were calculated altering the variables of interest from 0 to 1 for dichotomous variables and from the mean to one standard deviation above the mean for continuous variables, holding all other variables constant at their mean or modal values. Model includes 49 temporal dummy variables (results not shown). n.s. = not significant. *$p < 0.05$; **$p < 0.01$; ***$p < 0.001$ (one-tailed tests).

predictor of this behavior. Moreover, in those cases where a great number of amicus briefs are filed, the impact of the briefs on the decision to write or join a separate opinion is especially enhanced. For example, in a case in which 30 amicus briefs are filed, a Justice is 8 percent more likely to write or join a dissenting opinion, 1 percent more likely to write or join a regular concurring opinion, and 4 percent more likely to author or sign onto a special concurring opinion, compared to a case in which no amicus briefs

are filed. As the Court is seeing more and more cases in which a relatively high volume of amicus briefs are filed (Kearney & Merrill 2000), it is likely that we will continue witnessing a rise in nonconsensual behavior throughout the Roberts Court era.[24]

Turning to the control variables, as expected, a Justice's ideological proximity to the majority-opinion author is a powerful predictor of nonconsensual behavior, particularly with regard to dissents. Consider, for example, Justices Scalia, Stevens, and Rehnquist during the 1995 term. If Chief Justice Rehnquist authored the majority opinion, the likelihood that Scalia would author or join a dissenting opinion is 10 percent, compared to 20 percent for Stevens. Clearly, a Justice's ideological distance from the majority-opinion author offers a great deal of leverage over the decision to write separately.

In addition to a Justice's ideological proximity to the majority-opinion author, other attributes of the individual Justices influence the decision to write or join a separate opinion. First, the results indicate that Justices are less likely to author or join dissenting and special concurring opinions during their first terms on the Court, relative to later in their judicial careers. However, the results do not support the freshman effect with regard to regular concurring opinions. Nonetheless, as with U.S. court of appeals judges (e.g., Hettinger et al. 2003), U.S. Supreme Court Justices appear to undergo acclimation effects, as is evident by the relative infrequency with which they author or join dissenting and special concurring opinions. Similar to freshman Justices, but for a different theoretical reason, Chief Justices are less likely to write or join separate opinions. Relative to an Associate Justice, a Chief Justice is 5 percent less likely to dissent, 1 percent

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[24]To further investigate whether amicus participation serves as a proxy for a case's salience and/or complexity, I correlated these variables. Pearson correlations are as follows: SALIENCE TO THE JUSTICE = 0.016; SALIENCE TO THE PUBLIC = 0.286; LEGAL SALIENCE = 0.094; and LEGAL COMPLEXITY = 0.005. Spearman nonparametric correlations are as follows: SALIENCE TO THE JUSTICE = 0.027; SALIENCE TO THE PUBLIC = 0.224; LEGAL SALIENCE = 0.095; and LEGAL COMPLEXITY = 0.009. Biserial correlations, which concern the relationship between a dichotomous variable and a count variable (e.g., Gradstein 1986), are as follows: SALIENCE TO THE PUBLIC = 0.368; LEGAL SALIENCE = 0.134. As these results illustrate, regardless of the estimation technique used to evaluate the relationships, amicus briefs are not especially highly correlated with these variables. In addition, I examined whether the amicus hypothesis only applies to cases in which the Justices receive amicus briefs supporting both parties to the case by including a variable in the model that captures those situations in which amicus briefs were submitted supporting only one party. That variable failed to achieve statistical significance for any of the choices in the model and the AMICUS CURIAE BRIEFS variable remained significant, suggesting that the scope of the conflict is expanded even in cases attracting amicus briefs on only one side of the dispute.

less likely to regularly concur, and 2 percent less likely to specially concur. This provides strong evidence for the contention that, seeking to restore norms of consensus to the Court, Chief Justices refrain from authoring or joining separate opinions more often than their colleagues.

In addition to these institutional constraints, the results indicate that strategic considerations motivate a Justice's decision to write separately. In particular, cooperation, which accounts for the interpersonal dynamics between two Justices, decreases the likelihood that a Justice will write or join a special concurring opinion, although it does not appear to influence the decision to write or join a regular concurring or dissenting opinion. For example, after controlling for ideological compatibility between Justices, when Ginsburg authored the majority opinion in 1995, Stevens, who joined Ginsburg in 8 percent of separate opinions during the previous term, was likely to specially concur in 7 percent of such cases. Conversely, Rehnquist, who joined Ginsburg in no separate opinions during the previous term, was likely to specially concur in 9 percent of cases.

Attributes of the cases also motivate a Justice's decision to write or join a separate opinion. Compared to a case in which the Court's majority does not declare a law unconstitutional or alter a precedential decision, a Justice is 0.3 percent more likely to dissent, 1.5 percent more likely to regularly concur, and 3 percent more likely to specially concur, presumably to signal his or her unhappiness with the norm violations that occur in such legally salient cases. Similarly, the Justices are more likely to write or join dissenting and regular concurring opinions in legally complex cases. In a case where there is only a single issue or legal provision, a Justice is predicted to write or join a dissenting or regular concurring opinion 20 percent and 3 percent of the time, respectively. However, in the most legally complex cases, these figures increase to 27 percent and 7 percent.

Finally, the results also indicate that the salience of a case—both to the individual Justice and to the public—is an important determinant of the decision to write or join a separate opinion. Beginning with a case's salience to the individual Justice, the results reveal that, compared to an issue area in which a Justice authored no separate opinions prior to the case at hand (SALIENCE TO THE JUSTICE = 0), for an issue area in which a Justice authored separate opinions in half the opportunities to do so (SALIENCE TO THE JUSTICE = 0.5), the probability of that Justice authoring or joining a dissenting, regular concurring, or special concurring opinion increases by 12 percent, 3 percent, and 4 percent, respectively. In cases that appeared on the front page of the *New York Times*, a similar trend manifests: the probability of

writing or joining a separate opinion increases by 6 percent for dissenting opinions and 3 percent for regular and special concurring opinions in publicly salient disputes (as compared to nonsalient cases). Thus, it is clear that the Justices respond to case salience as it effects them individually and as it relates to the general public's interest in a case. Further, these represent especially strong factors in the decision to author or join a separate opinion.

V. Conclusions

Writing in 1960, E. E. Schattschneider began his famed treatise on the interest group system in U.S. politics by discussing a fight that broke out in Harlem and inadvertently resulted in a riot. Schattschneider's purpose of the story was to highlight that every conflict has two parts: "(1) the few individuals who are actively engaged at the center and (2) the audience that is irresistibly attracted to the scene" (1960:2). Although those who are at the center of conflict no doubt play an important role in shaping its course, it is the members of the audience who, according to Schattschneider, "do the kinds of things that determine the outcome of the fight" (1960:2).

Though Schattschneider's analogy was primarily intended to highlight the important role interest groups play in defining the scope of the conflict in the electoral arena, a more apt analogy regarding interest groups in the courts was perhaps never written. Each case presented to the U.S. Supreme Court involves at least two entities who have been involved in the dispute since its incarnation. For the most part, these litigants have defined the scope of the conflict in the trial and intermediate appellate courts.[25] Unhappy with the outcome in the appellate court, one of these litigants appeals to the Supreme Court, which agrees to hear the case. At this point, the audience becomes irresistibly attracted to the scene. That audience—organized interests—becomes directly involved in the conflict through filing amicus curiae briefs. Once this audience becomes involved, the scope of the conflict grows. The amici provide the Justices with a myriad of information regarding the correct application of the law in a case. At the same time, these friends highlight different perspectives on the broader policy concerns implicated by the case. By providing the Justices with novel argumentation that might

[25]Interests groups do participate as amicus curiae in lower courts (e.g., Martinek 2007) and at the Supreme Court's certiorari stage (e.g., Caldeira & Wright 1988), though this participation is much less frequent than in the Supreme Court's decisions on the merits.

otherwise be unavailable to them, amici make the application of the law in the case ambiguous. Determining whether this ambiguity plays a role in shaping the outcome of the fight was the purpose of this research.

The results indicate that even after controlling for alternative explanations that influence a Justice's decision to write or join a dissenting, regular concurring, or special concurring opinion—most notably a case's political salience to both the individual Justice and the public—organized interest amicus curiae participation increases the chances a Justice will write or join a separate opinion. As such, the major implication of this analysis should be clear: organized interests do far more than signal a case's political salience to the Justices. Instead, by presenting alternative perspectives as to how cases should be resolved, and at the same time providing the Justices with a foundation for a separate opinion, amicus curiae participation plays a significant role in increasing dissensus on the U.S. Supreme Court.

References

Beck, Nathaniel, Jonathan N. Katz, & Richard Tucker (1998) "Taking Time Seriously: Time-Series-Cross-Section Analysis with a Binary Dependent Variable," 42 *American J. of Political Science* 1260.

Behuniak-Long, Susan (1991) "Friendly Fire: Amici Curiae and *Webster v. Reproductive Health Services*," 74 *Judicature* 261.

Benesh, Sara C., & Harold J. Spaeth (2001) "Salient to Whom? A Measure of Salience to the Justices," paper presented at the meeting of the American Political Science Association. Chicago, IL.

Bennett, Robert W. (2001) "Counter-Conversationalism and the Sense of Difficulty," 95 *Northwestern Univ. Law Rev.* 845.

Bickel, Alexander M. (1962) *The Least Dangerous Branch: The Supreme Court at the Bar of Politics.* Indianapolis, IN: Bobbs-Merrill.

Brenner, Saul (1983) "Another Look at Freshman Indecisiveness on the United States Supreme Court," 16 *Polity* 320.

—— (1990) "Measuring Policy Leadership on the US Supreme Court: A Focus on Majority Opinion Authorship," in H. J. Spaeth & S. Brenner, eds., *Studies in U.S. Supreme Court Behavior.* New York: Garland.

Brenner, Saul, & Timothy M. Hagle (1996) "Opinion Writing and the Acclimation Effect," 18 *Political Behavior* 235.

Breyer, Stephen (1998) "The Interdependence of Science and Law," 82 *Judicature* 24.

Caldeira, Gregory A., & John R. Wright (1988) "Organized Interests and Agenda Setting in the U.S. Supreme Court," 82 *American Political Science Rev.* 1109.

Caldeira, Gregory A., & Christopher J. W. Zorn (1998) "Of Time and Consensual Norms in the Supreme Court," 42 *American J. of Political Science* 874.

Casagrande, David G. (1999) "Information as Verb: Re-Conceptualizing Information for Cognitive and Ecological Models," 3 *Georgia J. of Ecological Anthropology* 4.

Collins, Paul M., Jr. (2004a) "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation," 38 *Law & Society Rev.* 807.

—— (2004b) "Variable Voting Behavior on the Supreme Court: A Preliminary Analysis and Research Framework," 25 *Justice System J.* 74.

—— (2005) "Friends of the Supreme Court: Examining the Influence of Interest Groups in the U.S. Supreme Court, 1946–2001," Ph.D. dissertation, State University of New York at Binghamton.

Danelski, David J. [1960] (2002) "The Influence of the Chief Justice in the Decisional Process," in W. F. Murphy, C. H. Pritchett, & L. Epstein, eds., *Courts, Judges, and Politics*, 5th ed. Boston, MA: McGraw-Hill.

Douglas, William O. (1962) "Transcript of Conversations Between Justice William O. Douglas and Professor Walter F. Murphy," Cassette Number 9: May 23, 1962. On file with the Seeley G. Mudd Manuscript Library, Princeton University.

Ennis, Bruce L. (1984) "Effective Amicus Briefs," 33 *Catholic Univ. Law Rev.* 603.

Epstein, Lee, & Jack Knight (1998) *The Choices Justices Make*. Washington, DC: CQ Press.

Epstein, Lee, & Joseph F. Kobylka (1992) *The Supreme Court and Legal Change: Abortion and the Death Penalty*. Chapel Hill, NC: Univ. of North Carolina Press.

Epstein, Lee, & Jeffrey A. Segal (2000) "Measuring Issue Salience," 44 *American J. of Political Science* 66.

Epstein, Lee, Jeffrey A. Segal, & Timothy Johnson (1996) "The Claim of Issue Creation on the U.S. Supreme Court," 90 *American Political Science Rev.* 845.

Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, & Thomas G. Walker (1994) *The Supreme Court Compendium: Data, Decisions, and Developments*. Washington, DC: CQ Press.

Ginsburg, Ruth Bader (1990) "Remarks on Writing Separately," 65 *Washington Law Rev.* 133.

Gradstein, Mark (1986) "Maximal Correlation Between Normal and Dichotomous Variables," 11 *J. of Education Statistics* 259.

Greene, William H. (2000) *Econometric Analysis*, 4th ed. Upper Saddle River, NJ: Prentice Hall.

Hettinger, Virginia A., Stefanie A. Lindquist, & Wendy L. Martinek (2003) "Acclimation Effects and Separate Opinion Writing in the U.S. Courts of Appeals," 84 *Social Science Q.* 792.

—— (2004) "Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals," 48 *American J. of Political Science* 123.

Johnson, Timothy R., & Matthew M. C. Roberts (2003) "Oral Arguments, Amici Curiae, and the Attitudinal Model," paper presented at the annual meeting of the Midwest Political Science Association. Chicago, IL.

Kearney, Joseph D., & Thomas W. Merrill (2000) "The Influence of Amicus Curiae Briefs on the Supreme Court," 148 *Univ. of Pennsylvania Law Rev.* 743.

King, Gary, Robert O. Keohane, & Sidney Verba (1994) *Designing Social Inquiry: Scientific Inference in Qualitative Research.* Princeton, NJ: Princeton Univ. Press.

Krosnick, Jon A. (1988) "The Role of Attitude Importance in Social Evaluation: A Study of Policy Preferences, Presidential Candidate Evaluations, and Voting Behavior," 55 *J. of Personality & Social Psychology* 196.

Maltzman, Forrest, James F. Spriggs II, & Paul J. Wahlbeck (2000) *Crafting Law on the Supreme Court: The Collegial Game.* Cambridge, UK: Cambridge University Press.

Martin, Andrew D., & Kevin M. Quinn (2002) "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999," 10 *Political Analysis* 134.

Martinek, Wendy L. (2007) "Amici Curiae in the U.S. Courts of Appeals," 34 *American Politics Research* 803.

Murphy, Walter F. (1964) *Elements of Judicial Strategy.* Chicago, IL: Univ. of Chicago Press.

O'Connor, Karen, & Lee Epstein (1983) "Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation," 8 *Justice System J.* 35.

O'Connor, Sandra Day (1996) "Henry Clay and the Supreme Court," speech delivered to the Henry Clay Memorial Foundation. Available at ⟨http://www.henryclay.org/sc.htm⟩.

Pacelle, Richard L., Jr. (1991) *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration.* Boulder, CO: Westview Press.

Parker, Frederick R., Jr. (1999) "*Washington v. Glucksberg* and *Vacco v. Quill*: An Analysis of the Amicus Curiae Briefs and the Supreme Court's Majority and Concurring Opinions," 43 *Saint Louis Univ. Law J.* 469.

Perry, H. W., Jr. (1991) *Deciding to Decide: Agenda Setting in the United States Supreme Court.* Cambridge, MA: Harvard University Press.

Prislin, Radmila (1996) "Attitude Stability and Attitude Strength: One is Enough to Make it Stable," 26 *European J. of Social Psychology* 447.

Pritchett, C. Herman (1948) *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947.* New York: Macmillan.

Reynolds, Henry T. (1984) *Analysis of Nominal Data.* Newbury Park, CA: Sage Publications.

Robertson, Roby D. (1980) "Small Group Decision Making: The Uncertain Role of Information in Reducing Uncertainty," 2 *Political Behavior* 163.

Rohde, David W., & Harold J. Spaeth (1976) *Supreme Court Decision Making.* San Francisco, CA: W.H. Freeman.

Samuels, Suzanne Uttaro (2004) *First Among Friends: Interest Groups, the U.S. Supreme Court, and the Right to Privacy.* Westport, CT: Praeger.

Sartori, Giovanni (1970) "Concept Misformation in Comparative Politics," 64 *American Political Science Rev.* 1033.

Scalia, Antonin (1994) "The Dissenting Opinion," 19 *J. of Supreme Court History* 33.

Schattschneider, E. E. (1960) *The Semisovereign People: A Realist's View of Democracy in America.* New York: Holt, Rinehart, and Winston.

Schubert, Glendon A. (1965) *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946–1963.* New York: Free Press.

Segal, Jeffrey A., & Albert D. Cover (1989) "Ideological Values and the Votes of U.S. Supreme Court Justices," 83 *American Political Science Rev.* 557.

Segal, Jeffrey A., & Harold J. Spaeth (2002) *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK: Cambridge University Press.

Smyth, Russell, & Parish Kumar Narayan (2006) "Multiple Regime Shifts in Concurring and Dissenting Opinions on the U.S. Supreme Court," 3 *J. of Empirical Legal Studies* 79.

Snyder, Eloise C. (1959) "Uncertainty and the Supreme Court's Decisions," 65 *American J. of Sociology* 241.

Songer, Donald R., & Reginald S. Sheehan (1993) "Interest Group Success in the Courts: Amicus Participation in the Supreme Court," 46 *Political Research Q.* 339.

Spaeth, Harold J. (2002) *The Vinson-Warren Supreme Court Judicial Database, 1946–1968 Terms*. Available at ⟨http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm⟩.

—— (2003) *The Original United States Supreme Court Database*. Available at ⟨http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm⟩.

Spriggs, James F., II, & Thomas G. Hansford (2001) "Explaining the Overruling of U.S. Supreme Court Precedent," 63 *J. of Politics* 1091.

Spriggs, James F., II, & Paul J. Wahlbeck (1997) "Amicus Curiae and the Role of Information at the Supreme Court," 50 *Political Research Q.* 365.

Stern, Robert L., Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller (2002) *Supreme Court Practice: For Practice in the Supreme Court of the United States*, 8th ed. Washington, DC: Bureau of National Affairs.

Ulmer, S. Sidney (1986) "Exploring the Dissent Patterns of the Chief Justices: John Marshall to Warren Burger," in S. Goldman & C. M. Lamb, eds., *Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts*. Lexington, KY: Univ. Press of Kentucky.

Vose, Clement E. (1959) *Caucasians Only: The Supreme Court, the N.A.A.C.P., and the Restrictive Covenant Cases*. Berkeley, CA: University of California Press.

Wahlbeck, Paul J., James F. Spriggs II, & Forrest Maltzman (1999) "The Politics of Dissents and Concurrences on the U.S. Supreme Court," 27 *American Politics Q.* 488.

Walker, Thomas G., Lee Epstein, & William J. Dixon (1988) "On the Mysterious Demise of Consensual Norms in the United States Supreme Court," 50 *J. of Politics* 361.

Wrightsman, Lawrence S. (2006) *The Psychology of the Supreme Court*. Oxford, UK: Oxford Univ. Press.

Cases Cited

Dennis v. United States, 341 U.S. 494 (1951).

Metromedia v. San Diego, 453 U.S. 490 (1980).

Miller v. California, 413 U.S. 15 (1973).

New York Times v. Sullivan, 376 U.S. 254 (1964).

New York Times v. United States, 403 U.S. 713 (1971).
Roth v. United States, 354 U.S. 476 (1957).
Vacco v. Quill, 521 U.S. 793 (1997).
Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).
Washington v. Glucksberg, 521 U.S. 702 (1997).
Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).