

MOBILIZING DISSENSUS ON THE U.S. SUPREME COURT

Paul M. Collins, Jr.
Department of Political Science
Maxwell School of Citizenship and Public Affairs
Syracuse University
Syracuse, New York 13244-1020
pmcollin@maxwell.syr.edu

ABSTRACT

Prior to the 1940s, U.S. Supreme Court justices rarely exhibited nonconsensual behavior. However, over the last 60 years, the number of dissenting and concurring opinions has risen dramatically. While a great deal of empirical research has focused on explaining this phenomenon, little attention has been paid to the role of organized interests in contributing to a justice's decision to write separately. I argue that a justice's decision to write or join a separate opinion 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 with regard to the correct application of the law in a case, at the same time providing the justices with a substantial foundation for a concurring or dissenting opinion. 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 1946-2000 terms. The results indicate that organized interests play a significant role in mobilizing dissensus on the Supreme Court.

PAPER PREPARED FOR DELIVERY AT THE 59TH ANNUAL MEETING OF THE NEW YORK STATE
POLITICAL SCIENCE ASSOCIATION, NIAGARA, NY, APRIL 15-16, 2005

Organized interest amicus curiae¹ participation significantly influences the decision making of U.S. Supreme Court justices in a number of ways. At the certiorari stage, interest group amicus curiae briefs increase the likelihood that the justices will agree to fully review a case (Caldeira and Wright 1988). At the merits stage, interest group amicus curiae participation influences litigation success, whether the amici participate by filing briefs (Collins 2004a; Kearney and Merrill 2000) or in oral arguments (Johnson and Roberts 2003). In addition, organized interests also shape the individual justice's decision making. Collins (2005) finds that the influence of amicus curiae briefs on the choices individual justices make is not mediated by ideology (i.e., dependent upon the congruence of the information in the briefs with the policy preferences of the justices), but instead, that amicus briefs are able to persuade even ideologically-driven justices to support the positions advocated in the briefs. Further, Collins (2005) finds that amicus briefs increase the variance in the justices' decision making as a result of the briefs creating ambiguity with regard to the correct application of the law in a given case. Despite the relatively large extant literature that indicates amicus briefs shape the justices' decision calculi, little attention has been paid to examining the role of amicus curiae briefs in influencing nonconsensual behavior on the Court. The purpose of this paper is to fill this void.

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 those previous studies have incorrectly used amicus participation as a surrogate for a case's political salience. Next, I offer a case study of *Metromedia v. San Diego* (1980) to illustrate how amicus briefs influence the decision to write separately and, following this, I formally lay out my hypothesis with regard to

¹ 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, policy, and separation of powers issues not addressed by the direct parties to litigation. Despite the fact that their name implies neutrality, these briefs are, in fact, adversarial in nature, almost always advocating for a particular disposition in the Court (Collins 2005).

amicus participation and concurring and dissenting behavior. I then subject my hypothesis to empirical validation by examining the individual justice's decisions to write or join regular concurring, special concurring, and dissenting opinions during the 1946-2000 terms.² The results indicate that organized interest amicus curiae participation plays an important role in mobilizing dissensus on the Court. I close with a brief conclusion section.

AMICUS CURIAE PARTICIPATION: A MISAPPLIED SURROGATE FOR SALIENCE

Although scholars have not provided a solid theoretical explanation for including amicus curiae participation in models of judicial dissensus, several studies have utilized the number of amicus briefs filed in a case as a proxy for a case's political salience (e.g., Hettinger, Lindquist, and Martinek 2004; Maltzman, Spriggs, and Wahlbeck 2000; Wahlbeck, Spriggs, and Maltzman 1999). Using this measure as a surrogate for salience is, however, problematic. Specifically, each of these studies seeks 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 the case is salient to a particular jurist; instead it denotes that the case is salient to those organized interests who filed the briefs (e.g., Benesh and Spaeth 2001). In other words, that a case is salient to frequent amici, such as the American Civil Liberties Union, Americans for Effective Law Enforcement, and the American Federation of Labor-Congress of Industrial Organizations, does not provide any evidence that the case is salient to an appellate court judge. Accordingly, those analyses that use amicus participation to measure salience to the individual jurist

² 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 the outcome of the case and the majority's reasoning for reaching that outcome. The term "dissensus" is used to denote all nonconsensual behavior (that is, authoring or joining dissenting, regular concurring, and special concurring opinions).

have done so inappropriately.³ That amicus participation does not provide a valid measure of salience to the individual justice, but nonetheless increases the likelihood that a justice will author or join a separate opinion, begs the question: why are the justices more likely to engage in nonconsensual behavior in cases with amicus curiae participation?

A THEORETICAL FOUNDATION FOR THE INFLUENCE OF AMICUS CURIAE PARTICIPATION ON A JUSTICE'S DECISION TO WRITE OR JOIN A SEPARATE OPINION

This section provides a theoretical explanation for why amicus curiae briefs might influence a justice's decision to write or join a separate opinion that is completely distinct from the notion that amicus participation signals salience to the individual justice. For purposes of illustration, I begin with a case study of *Metromedia v. San Diego* (1980). This analysis will reveal both the types of information amicus briefs supply to the justices, as well as how the justices use this information in their nonconsensual opinions. Following this, I present the theoretical foundation, derived in part from this case study, for the expected influence of amicus briefs on a justice's decision to author or join a concurring or dissenting opinion.

On October 14, 1980, the Supreme Court noted probable jurisdiction⁴ in *Metromedia v. San Diego*. The case involved a City of San Diego ordinance that would serve to effectively eliminate the erection of outdoor advertising displays within the city.⁵ San Diego argued that the ordinance was fully within its police powers because the ban on outdoor advertising both eliminated hazards to

³ This argument is similar in spirit to that provided by Benesh and Spaeth (2001) regarding Epstein and Segal's (2000) use of whether a case attracted front page coverage in the *New York Times* as a proxy for salience. In short, Benesh and Spaeth argue that the *New York Times* surrogate measures salience to the editors of the *Times*, not to the individual justices.

⁴ When the Supreme Court determines that a case "on appeal" should be fully briefed and argued, it does so with an order noting probable jurisdiction. This process is very similar to the more common certiorari procedure: both appellate routes require only a vote of four justices and the petitions are virtually identical in form (e.g., *Eaton v. Price* [1959]; Stern et al. 2002: 332-338).

⁵ The ban did, however, allow for the advertising of goods and services sold on-site, along with a small number of other exceptions.

motorists brought about by distracting signs and improved the appearance of the city. Metromedia, along with several other companies engaged in the outdoor advertising business, argued that the ban violated its First Amendment rights to freedom of speech and expression. For the Supreme Court, the case centered around the fact that the San Diego ordinance banned both commercial and non-commercial advertising, the latter including social and political messages that traditionally carry more substantial First Amendment protections than commercial speech.⁶

This fact was not lost on Metromedia and its fellow appellants. However, they knew that, because they did not engage in political speech themselves, but rather leased billboard space to others who might engage in such speech, it would be difficult for them to credibly argue the political speech issue before the Court. Accordingly, Metromedia's attorneys, including former Bush Administration Solicitor General Theodore Olson,⁷ enlisted the aid of the American Civil Liberties Union (ACLU), a celebrated First Amendment advocate, to file an amicus curiae brief arguing the political speech aspects of the case (Ennis 1984: 607). In addition to the ACLU's amicus brief, four others were filed in support of Metromedia, representing a diverse spectrum of groups including the conservative Pacific Legal Foundation (PLF) and the American Newspaper Publishers Association (ANPA). Five amicus briefs were filed in opposition to Metromedia's position, representing amici with equal, if not more substantial, clout as the ACLU, including President Carter's Solicitor General, the states of Hawaii, Maine, and Vermont, and the National Institute of Municipal Law Officers (NIMLO), an organization comprised of local law officials representing over 1,500 municipalities located throughout the United States.

⁶ See, for example, *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 non-commercial speech. See also *Central Hudson Gas and Electric v. Public Service Commission* (1980).

⁷ Olson served as Solicitor General from June of 2001 to July of 2004.

Each of these amici supplied the Court with unique insights into the potential legal and policy ramifications stemming from the decision. While the liberal ACLU focused on the First Amendment issue as it involved the suppression of political speech, the conservative PLF centered its arguments on the commercial law ramifications that might result from upholding the San Diego law, going so far as to claim the law violated the Fifth Amendment's prohibition against the deprivation of property without due process of law. The ANPA took a broader stance than the ACLU, arguing that the First Amendment is absolute, thus barring any governmental interference with the dissemination of information. The two remaining amicus briefs in support of Metromedia were filed by the Outdoor Advertising Association of America (OAAA), a trade association of the outdoor advertising industry, and by Robert and Barbara Pope, proprietors of a small, family-owned outdoor advertising business in San Diego. While the Popes' brief highlighted the detrimental effects upholding the San Diego law would have on small business owners like themselves, thus putting a human face on the regulation, the OAAA presented the Court with statistical evidence involving the ramifications of upholding the ordinance for the industry at large, including a historical discussion of the billboard industry in America. Clearly, each amicus offered the Court novel information that might not otherwise be available to it.

Supporting the San Diego ordinance, the Carter Administration's Solicitor General, Wade McCree, argued that the ban was a perfectly acceptable exercise of the city's police powers and highlighted for the Court the potential problems that might arise for the federal Highway Beautification Act of 1965, should the Court determine that the San Diego regulation was invalid. Similarly, the states of Hawaii, Maine, and Vermont, who joined a single amicus brief, noted to the Court that, should it opt to invalidate the San Diego ordinance, such a decision would also judicially invalidate the statewide ban on commercial advertising in Maine, and render similar bans in Hawaii and Vermont unenforceable. Amici City and County of San Francisco submitted a brief to the

Court arguing that the proper standard for considering the ban was not the rigorous strict scrutiny standard, but instead a more relaxed rational basis test.⁸ 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 freedom of speech, plainly framing the case differently than appellant amici ACLU and ANPA. In the amicus brief filed by seven California cities, evidence was presented suggesting that commercial advertising would continue in the city even with the ordinance in place, albeit on a much smaller scale, thus offering to the Court a potential means to sidestep the First Amendment issue. In NIMLO's amicus brief, it was argued that the proper Court decision in the case was to decline to accept the view that a billboard is a distinct and valuable medium for expression, thus requiring stringent First Amendment protection, and instead to defer to the desires of democratically-elected city councils who have determined that such bans are beneficial to their constituents. Though the San Diego amici offered very different arguments than the amici supporting Metromedia, they, nonetheless, offered the Court distinctive insights into the legal and policy ramifications stemming from the outcome of the case.

The Supreme Court announced its decision on July 2, 1981. Unable to reach a majority, a plurality of the Court determined that, although the City of San Diego had a legitimate reason for enacting the ban, the ordinance violated the First Amendment because it restricted both commercial and non-commercial speech, the latter enjoying a greater degree of protection.⁹ Writing for the plurality, Justice White explained that, because the ban allowed for the advertising of goods and

⁸ Strict scrutiny is the most rigid level of scrutiny used by the Court to evaluate alleged violations of First Amendment law in cases involving issues of freedom of speech and expression. To survive this level of scrutiny it must be shown that a law is narrowly tailored to serve a compelling government interest. Conversely, the rational basis test evaluates a law to determine only if it is reasonably related to a legitimate government interest; if such a finding is made, the law is not in violation of the First Amendment.

⁹ Although 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.

services sold on-site, it favored commercial speech at the expense of non-commercial speech, such as speech involving political and social activism, which is traditionally accorded a greater degree of First Amendment protection.¹⁰ As such, the White’s opinion relied heavily on the arguments provided by appellant amici, most notably the American Civil Liberties Union.

In his concurring opinion, Justice Brennan, joined by Justice Blackmun, expressed the view that the San Diego ordinance violated the First Amendment because it amounted to a total prohibition of outdoor advertising in the city.¹¹ In so doing, Brennan relied heavily on the arguments of the ACLU, OAAA, and the other appellant amici by accepting the position that billboards are a valuable medium of expression warranting stringent First Amendment protection.¹² In addition, Brennan rejected the argument of the seven California cities – that outdoor advertising would continue in the city, even with the ban in place¹³ – as well as that of the Solicitor General, who argued striking down the ban would render the federal Highway Beautification Act unenforceable.¹⁴

In addition to Brennan’s concurring opinion, three justices wrote dissenting opinions in the case. Justice Stevens argued that the total prohibition of billboards in the city, with the exception of those billboards advertising goods and services sold on site, was a constitutionally permissible use of the city’s police powers.¹⁵ In so doing, Stevens rejected the ANPA’s stance that the First

¹⁰ 453 U.S. 490, at 513 (1995).

¹¹ 453 U.S. 490, at 522 (1995). The primary distinction between Brennan’s concurrence and White’s plurality opinion is that Brennan believed the case involved whether municipalities could totally ban outdoor advertising, while the plurality did not focus on that specific issue.

¹² 453 U.S. 490, at 523 (1995).

¹³ 453 U.S. 490, at 525 (1995).

¹⁴ 453 U.S. 490, at 534 (1995).

¹⁵ 453 U.S. 490, at 541 (1995).

Amendment is absolute, at the same time endorsing the view of NIMLO that the proper role of the Court in adjudicating disputes such as these is to defer to the desires of democratically elected city councils who believe such bans are advantageous to improving the appearance of the city.¹⁶ Justice Burger dissented on the grounds that the plurality's decision was an unwise use of judicial power because it trampled on subject matter traditionally reserved to local authority – protecting the safety of motorists and enhancing the environment of an urban area.¹⁷ Thus, as with Stevens, Burger relied heavily on arguments presented by NIMLO, the Solicitor General, and the city and state amici. Finally, Justice Rehnquist also dissented, arguing, in a very brief opinion,¹⁸ that the plurality erred in its ruling because aesthetic justification alone is sufficient to justify a total ban on billboards.¹⁹ As with Stevens and Burger, Rehnquist also relied heavily on the arguments of the appelle 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.”²⁰

Metromedia v. San Diego provides unique insight into the role of amici curiae in the Supreme Court for three reasons. First, it provides 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 justices with numerous alternative and reframed arguments that might not otherwise be available to them. Second, it highlights how the justices frequently use this information as the basis for both majority and separate opinions. Finally, and perhaps most importantly, the analysis of *Metromedia*

¹⁶ 453 U.S. 490, at 552 (1995).

¹⁷ 453 U.S. 490, at 556 (1995).

¹⁸ Rehnquist's dissent is only 385 words long.

¹⁹ 453 U.S. 490, at 570 (1995).

²⁰ 453 U.S. 490, at 570 (1995).

reveals the need for systematic analysis in order to determine whether amicus briefs influence the justices' decisions to write separately. While all of 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; see also Collins 2005).

As the above analysis makes clear, amicus briefs do much than signal the salience of a case to the justices. Instead, amicus briefs provide the justices with legal, policy, and separation of powers argumentation that frequently expands on the argumentation 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 that almost 70% of amicus briefs provide the justices with information not addressed by the direct parties to litigation and that the justices frequently make use of this information in majority opinions. Similarly, Epstein et al. (1994: 582) and Kearney and Merrill (2000) find that the justices make use of amicus briefs in concurring and dissenting opinions. For example, Parker (1999) finds that amicus briefs constituted 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, providing the justices with extremely diverse viewpoints as to the correct application of the law in those cases.

That amicus briefs provide the justices with novel argumentation regarding the correct application of a law in a case suggests that the briefs create 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 in the case, framing the issue as one involving the First Amendment

(e.g., ACLU, ANPA), the Fifth Amendment (PLF), a case with the potential to effect existing federal (Solicitor General) and state policies (Hawaii, Maine, and Vermont), as well as a separation of powers case (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 already uncertain decisions the justices make regarding the application of the law in a case. This uncertainty is argued to contribute to a justice's decision to write or join a separate opinion. 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, Segal, and Johnson 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 issues or expanding on issues the direct litigants were only able to make in abbreviated form, amici make it difficult for the justices to determine what the correct application of the law is in each case. As Justice Ginsburg (1997: 148) notes "[h]ard cases do not inevitably make bad law, but too often they produce multiple opinions."

In addition to bringing issues to the justices' attention that have the potential to light the fires of dissensus, amicus briefs also provide a substantial basis from which a justice can cultivate a separate opinion. In so doing, amicus briefs marginalize the resource-costs of engaging in non-consensual behavior as the justices are able to draw the justifications for this behavior from the arguments of the organized interests. Because 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. Just as technological and administrative changes might contribute to the rise of dissensus by reducing the costs of writing separately,²¹ so too can amicus briefs. Taken as a whole, by bringing issues to the

²¹ For example, Martin and Soroka (2004) argue that the rise of dissensus on the Court can be attributed in part to improvements in office technology, the creation of the Supreme Court Legal Office, and the increase in the number of law clerks since 1940.

justices' attention that create ambiguity with regard to the correct application of the law and by providing the justices with a well-researched basis for a separate opinion, I expect that amicus curiae briefs will significantly influence a justice's decision to write or join a separate opinion. Accordingly:

Amicus Curiae Hypothesis: 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.

DATA AND METHODS

To test this hypothesis, I examine whether each justice, excluding the majority opinion author,²² wrote or joined a regular concurring, a special concurring, or a dissenting opinion during the 1946-2000 terms. The data on the justices' nonconsensual behavior were obtained from the Spaeth (2002, 2003) databases. I utilize the justice-vote as the unit of analysis.²³ Because each justice has four choices available (join the majority, author or join a dissenting opinion, author or join a regular concurring opinion, and 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 logit, which models a single decision among two or more alternatives (e.g., Greene 2000: 857).²⁴ Since the multinomial logit 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. So, the results of the model will indicate the effects of the independent variables on the probability change from: 1) joining the

²² 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. When majority opinion authors are included in the sample, the results do not substantively differ.

²³ 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.

²⁴ Because the multinomial logit model assumes 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), it was necessary to determine if this assumption is valid. Accordingly, I performed a Hausman-McFadden test for the model reported in Table 1 (Hausman and McFadden 1984). The results indicated that the assumption of the independence of irrelevant alternatives was not violated.

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.²⁵ To control for the non-independence 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. Since factors other than amicus curiae briefs no doubt 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 and Spaeth 2002). Because the majority opinion author has substantial control over the content of the majority opinion (e.g., Maltzman, Spriggs, and Wahlbeck 2000: 35; Rohde and 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 (Segal and Spaeth 1993: 252; Wahlbeck, Spriggs, and Maltzman 1999: 495). To measure the ideological distance between each individual justice and the majority opinion author, I utilize a measure based on each justice's Martin and Quinn (2002) scores. These scores are based on Bayesian ideal point estimation and have been shown to have substantial face validity, outperforming the most obvious alternative, the Segal and

²⁵ As alternatives to the multinomial logit model, I also ran the model using ordered logit and binary logit. None of the results substantively altered. In addition, I ran the multinomial logit model with an alternative specification of the dependent variable. Instead of using the four category dependent variable reported in Table 1, I created a seven category dependent variable scored such that 0 = join majority; 1 = author regular concurring opinion; 2 = join regular concurring opinion; 3 = author special concurring opinion; 4 = join special concurring opinion; 5 = author dissenting opinion; and 6 = join dissenting opinion. The results of that model do not substantively differ with regard to the amicus curiae variable: for each of those choices, amicus briefs significantly increase the likelihood of engaging in nonconsensual behavior.

Cover (1989) scores (Martin and Quinn 2002).²⁶ 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.²⁷ Higher values on this variable reflect an increase in the 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 also indicates that a justice is more likely to exhibit nonconsensual behavior if the case is legally complex (e.g., Wahlbeck, Spriggs, and Maltzman 1999). In such legally complex 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. To control for the *Legal Complexity* of each case, I operationalized a variable scored 1 if the case involved more than one issue or legal provision, as identified by the Spaeth (2002, 2003) databases, and 0 otherwise. 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 choose to author or join a separate opinions 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., Brenner and Spaeth 1995). When the majority chooses to overrule a previous decision, it is expected that a justice will be likely to write separately in order to signal his or her unhappiness with this norm violation. Similarly,

²⁶ It is important to note that, because these scores are derived from the justices' votes, an endogeneity problem might exist with their use. However, because 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. Further, because the scores are dynamic (the Segal and Cover scores are not), their use is desirable to capture changes in the justices' preferences that might occur over time. When the Segal and Cover scores are used in place of the Martin and Quinn scores, the results do not substantively differ.

²⁷ For per curiam cases, I used the median ideology score of the justices in the majority as a surrogate for the majority opinion author's ideology score.

the Court rarely declares local, state, and federal laws unconstitutional; instead the justices generally defer to the elected branches of government. For example, during the 1946-2000 terms, the Court declared local, state, and federal laws unconstitutional less than 8% of the time. In those instances in which 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.²⁸ 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.

In addition to the legal complexity and legal salience of a case, past research also indicates that jurists are more likely to write or join separate opinions in cases that are salient to them (Hettinger, Lindquist, and Martinek 2004; Maltzman, Spriggs, and Wahlbeck 2000; Wahlbeck, Spriggs, and Maltzman 1999). In cases that are unimportant to the individual justice, he or she might go along with the majority opinion for the purposes of appearing consensual. However, in those cases that are salient to a justice, that justice is more likely to write separately in an attempt to shape the legal rules announced in a case. Above, I have argued that amicus briefs are an inappropriate proxy to measure the salience of a case to the individual justice. As such, an alternative measure is necessary. According to Epstein and Segal (2000: 68), the most desirable property of a measure of salience is that it be contemporaneous; 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 justices actually does so (i.e., the variable taps salience to the individual justice, not to organized interests or the editors of the *New York Times*). In an attempt to provide a proxy of case salience to the individual justice, I created a

²⁸ Formal alterations of precedent and declarations of unconstitutionality were obtained from the Spaeth (2002, 2003) databases.

variable that counts the number of separate opinions each justice wrote prior to the case at hand in each of the 13 issue areas identified in the Spaeth (2002, 2003) databases. 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). Although this variable is an imperfect surrogate for case salience, because of its endogenous nature, it is contemporaneous (i.e., it is observable prior to the Court's disposition of a case) and, more importantly, it varies by justice, thus tapping into salience to the individual justice, not to the Court as a whole, to organized interests, or to newspaper editors. 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 case salience explains a substantial amount of 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 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.

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 likely to partake in nonconsensual behavior due to acclimation issues involving time management (e.g., Hettinger, Lindquist, and Martinek 2003) and because their policy preferences are not yet well-developed (Brenner 1983; Collins 2004b). As such, I expect that justices new to the Court will be less likely to write or join a separate opinion than 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.²⁹ In addition to the freshman effect, scholars also note that chief justices are less likely to concur or dissent (e.g., Brenner and Hagle 1996; Wahlbeck, Spriggs, and Maltzman 1999). As leaders, chief justices are said 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 measure the number of amicus briefs filed in each case I include a variable labeled *Amicus Curiae*. The data on the number of amicus briefs filed in each case was derived from the Kearney and Merrill (2000) amicus database for the 1946-1995 terms. I collected additional data on amicus participation to update the data to the 2000 term, following the collection procedures employed by Kearney and Merrill. Unlike Wahlbeck, Spriggs, and Maltzman (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, because 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.

²⁹ 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, Lindquist, and Martinek (2003) and Wahlbeck, Spriggs, and Maltzman (1999) I use the two term measurement.

RESULTS

*** Figure 1 About Here ***

Prior to presenting the results from the multinomial logit model, it is useful to examine the frequency of both amicus curiae participation and nonconsensual opinion writing in the Court. To do this, Figure 1 reports the number of cases with separate opinions and amicus curiae participation, by term, during the 1946-2000 terms.³⁰ Figure 1 provides strong circumstantial evidence that a relationship exists between amicus participation and dissensus on the Court. Overall, the correlation between cases with amicus participation and cases with separate opinions is 0.51.³¹ For the post-Warren Court era (1969-2000), the period of time in which amicus participation became a mainstay in the Court, this correlation rises to 0.64. Although Figure 1 appears to demonstrate a robust correlation between amicus participation and separate opinion writing, it does not account for other factors that contribute to nonconsensual behavior on the Court.

*** Table 1 About Here ***

To provide this information, Table 1 reports the results from the multinomial logit model that predicts whether a justice authored or joined a dissenting, regular concurring, or special concurring opinion during the 1946-2000 terms.³² During this time period, 10,851 (21%) justices authored and joined dissenting opinions, 2,129 (4.1%) justices authored and joined regular concurring opinions, and 2,979 (5.8%) justices authored and joined special concurring opinions. As

³⁰ To facilitate interpretation, I also plot the total number of orally argued cases the Court disposed of each term during the time frame under analysis.

³¹ The pairwise correlation coefficient for these variables is significant at the 0.001 level.

³² To control for the fact that amicus curiae participation in the Court increased dramatically during the time period under analysis, the model was also run using the multinomial logit adaptation of the least-squares dummy variable (LSDV) method to control for the fixed effects of Supreme Court terms. To do this, I included a dummy variable for each term save one. The results do not substantively differ. As an alternative method to capture 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.). Those results do not substantively differ.

Table 1 reveals, strong support for the amicus curiae hypothesis is offered. 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 1.3% as the number of amicus briefs increases from its mean value (two amicus briefs) to one standard deviation above the mean (six amicus briefs).³³ Similarly, the likelihood of authoring or joining a regular or special concurring opinion increases by 1% with this same change (from two amicus briefs to six). While these changes in predicted probability might appear to be relatively small, it is important to recall the relative infrequency with which the justices engage in this type of nonconsensual behavior. While 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 regular concurring opinions only 4% of the time. With that in mind, a 1% change in predicted probability should appropriately be viewed as a relatively strong predictor of this behavior.

Turning now 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 1999 term. If Chief Justice Rehnquist authored the majority opinion, the likelihood Scalia will author or join a dissenting opinion is 19%, compared to 30% 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 with the majority opinion author, other attributes of the individual justices also 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.

³³ Marginal effects were calculated in XPost (Cheng and Long 2004).

However, the results do not lend support for the freshman effect with regard to regular concurring opinions. Nonetheless, as with Circuit Court of Appeals judges (e.g., Hettinger, Lindquist, and Martinek 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, the results also indicate that chief justices are less likely to author or join separate opinions. For example, relative to an associate justice, a chief justice is 5% less likely to dissent, 1% less likely to regularly concur, and 2% less likely to specially concur. As such, strong evidence is provided 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. The results also indicate that justices are more likely to author or join separate opinions in issue areas that are politically salient to them. For example, compared to an issue area in which a justice authored no separate opinions in the past, for an issue area in which a justice authored 10 separate opinions, the probability of that justice authoring or joining a dissenting, regular concurring, or special concurring opinion increases by 5.5%, 0.8%, and 1.3%, respectively.

Finally, attributes of the cases also motivate a justice's decision to write or join a separate opinion. Compared to a case in which the justices deal with a single issue and legal provision, in a legally complex case, a justice is 3.3% more likely to dissent and approximately 1% more likely to author or join a regular or special concurring opinion. Similarly, a justice is more likely to author or join a separate opinion in cases in which the majority declares a law unconstitutional or alters a precedential decision, likely to signal his or her unhappiness with the norm violations that occur in such legally salient cases.

CONCLUSIONS

Writing in 1960, E.E. Schattschneider began his famed treatise on the interest group system in American politics with a discussion of a fight that broke out in Harlem and inadvertently resulted

in a race 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). While those who are at the center of conflict no doubt play an important role in shaping its course, it is 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 conflict since its incarnation. For the most part, these litigants have defined the scope of the conflict in the trial and intermediate appellate courts.³⁴ Unhappy with the outcome in the appellate court, one of these litigants appeals to the Supreme Court, who agrees to hear the case. At this point the audience become irresistibly attracted to the scene, recognizing the importance of the case for society at large. The audience – organized interests – becomes directly involved in the conflict by 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 case, at the same time highlighting different perspectives on the broader policy concerns implicated by the case. By providing the justices with novel argumentation that might otherwise be unavailable to the justices, 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 paper.

The results indicate that, even after controlling for alternative explanations that influence a justice's decision to write or join a dissenting, regular concurring, and special concurring opinion –

³⁴ It is important to note that interests groups do participate as *amicus curiae* in lower courts (e.g., Martinek 2005) and at the Supreme Court's certiorari stage (e.g., Caldeira and Wright 1988), though this participation is much less frequent than in the Supreme Court's decisions on the merits.

most notably a case's political salience to the individual justice – 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 much more than signal a case's political salience to the justices. Instead, by presenting alternative perspectives as to how cases should be resolved, at the same time providing the justices with a foundation for a separate opinion, amicus curiae participation plays an important role in mobilizing dissensus on the U.S. Supreme Court.

REFERENCES

- Benesh, Sara C., and Harold J. Spaeth. 2001. "Salient to Whom? A Measure of Salience to the Justices." Presented at the annual meeting of the American Political Science Association, Chicago.
- Brenner, Saul. 1983. "Another Look at Freshman Indecisiveness on the United States Supreme Court." *Polity* 16: 320-28.
- _____. 1990. "Measuring Policy Leadership on the United States Supreme Court: A Focus on Majority Opinion Authorship." In Harold J. Spaeth and Saul Brenner. eds. *Studies in U.S. Supreme Court Behavior*. New York: Garland.
- Brenner, Saul, and Timothy M. Hagle. 1996. "Opinion Writing and the Acclimation Effect." *Political Behavior* 18: 235-61.
- Brenner, Saul, and Harold J. Spaeth. 1995. *Stare Indecisus*. Cambridge: Cambridge University Press.
- Caldeira, Gregory A., and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *American Political Science Review* 82: 1109-27.
- Central Hudson Gas and Electric v. Public Service Commission, 447 U.S. 557 (1980).
- Cheng, Simon, and J. Scott Long. 2004. "XPost: Post-Estimation Interpretation Using Excel." <http://www.indiana.edu/~jslsoc/xpost.htm> (March 29, 2005).
- Collins, Paul M., Jr. 2004a. "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation." *Law and Society Review* 38: 807-32.
- _____. 2004b. "Variable Voting Behavior on the Supreme Court: A Preliminary Analysis and Research Framework." *Justice System Journal* 25: 57-74.
- _____. 2005. *Friends of the Supreme Court: Examining the Influence of Interest Groups in the U.S. Supreme Court, 1946-2001*. Binghamton University. Typescript.
- Eaton v. Price, 360 U.S. 246 (1959).
- Ennis, Bruce L. 1984. "Effective Amicus Briefs." *Catholic University Law Review* 33: 603-9.
- Epstein, Lee, and Jeffrey A. Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science* 44: 66-83.
- Epstein, Lee, Jeffrey A. Segal, and Timothy R. Johnson. 1996. "The Claim of Issue Creation on the U.S. Supreme Court." *American Political Science Review* 34: 845-52.
- Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker. 1994. *The Supreme Court Compendium: Data, Decisions, and Developments*. Washington: CQ Press.

- Ginsburg, Ruth Bader. 1990. "Remarks on Writing Separately." *Washington Law Review* 65: 133-50.
- Greene, William H. 2000. *Econometric Analysis*. 4th Edition. Upper Saddle River: Prentice Hall.
- Hausman, Jerry, and Daniel McFadden. 1984. "Specification Tests for the Multinomial Logit Model." *Econometrica* 52: 1219-40.
- Hettinger, Virginia A., Stefanie A. Lindquist, and Wendy L. Martinek. 2003. "Acclimation Effects on the United States Courts of Appeals." *Social Science Quarterly* 84: 792-810.
- . 2004. "Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals." *American Journal of Political Science* 48: 126-37.
- Johnson, Timothy R., and 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.
- Kearney, Joseph D., and Thomas W. Merrill. 2000. "The Influence of Amicus Curiae Briefs on the Supreme Court." *University of Pennsylvania Law Review* 148: 743-855.
- Maltzman, Forrest, James F. Spriggs, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court*. Cambridge: Cambridge University Press.
- Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. 10:134-53.
- Martin, Paul, and Stuart Soroka. 2004. "Dissent and the Decline of Unanimity on the U.S. Supreme Court: Methodological Issues and Alternative Explanations." Paper presented at the annual meeting of the American Political Science Association, Chicago.
- Martinek, Wendy L. 2005. "Amicus Curiae in the U.S. Courts of Appeals." Paper presented at the annual meeting of the Southern Political Science Association, New Orleans.
- Metromedia v. San Diego, probable jurisdiction noted, 449 U.S. 897 (1980); 453 U.S. 490 (1980).
- Parker, Frederick R. 1999. "*Washington v. Glucksberg* and *Vacco v. Quill*: An Analysis of the Amicus Curiae Briefs and the Supreme Court's Majority and Concurring Opinions." *Saint Louis University Law Journal* 43: 469-542.
- Pritchett, C. Herman. 1948. *The Roosevelt Court*. New York: Macmillan.
- Rohde, David W., and Harold J. Spaeth. 1976. *Supreme Court Decision Making*. San Francisco: W.H. Freeman.
- Schattschneider, E.E. 1960. *The Semisovereign People: A Realist's View of Democracy in America*. New York: Holt, Rinehart, and Winston.
- Schubert, Glendon. 1965. *The Judicial Mind*. New York: Free Press.

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83: 557-65.

Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge: Cambridge University Press.

———. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.

Spaeth, Harold J. 2002. *The Vinson-Warren Supreme Court Judicial Database, 1946-1968 Terms*. East Lansing: Department of Political Science, Michigan State University.

———. 2003. *The Original United States Supreme Court Database, 1953-2001 Terms*. East Lansing: Department of Political Science, Michigan State University.

Spriggs, James F., and Paul J. Wahlbeck. 1997. "Amicus Curiae and the Role of Information at the Supreme Court." *Political Research Quarterly* 50: 365-86.

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

Vacco v. Quill, 521 U.S. 793 (1997).

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

Wahlbeck, Paul J., James F. Spriggs II, and Forest Maltzman. 1999. "The Politics of Dissents and Concurrences on the U.S. Supreme Court." *American Politics Quarterly* 27: 488-514.

Washington v. Glucksberg, 521 U.S. 702 (1997).

Figure 1. Number of Cases with Nonconsensual Opinions and Amicus Curiae Briefs, 1946-2000 Terms

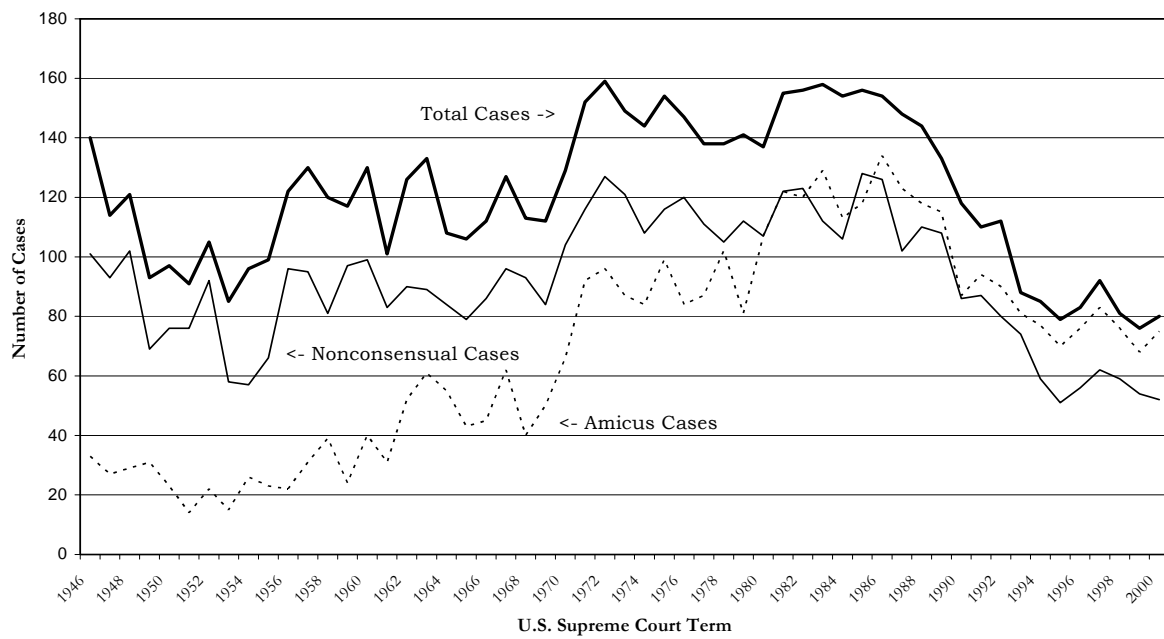


TABLE 1. MULTINOMIAL LOGIT MODEL OF A JUSTICE'S DECISION TO WRITE OR JOIN A SEPARATE OPINION, 1946-2000 TERMS

Variable	Dissenting Opinion	Regular Concurring Opinion	Special Concurring Opinion
Amicus Curiae	.025** [+1.3] (.004)	.059** [+0.9] (.006)	.051** [+1.0] (.006)
Ideological Distance	.206** [+6.6] (.007)	.086** [+0.2] (.013)	.168** [+1.3] (.011)
Legal Complexity	.222** [+3.3] (.035)	.270** [+0.9] (.074)	.189* [+0.7] (.064)
Legal Salience	.176** [+1.4] (.052)	.576** [+2.6] (.091)	.641** [+3.8] (.081)
Salience to Justice	.037** [+3.1] (.002)	.031** [+0.6] (.004)	.032** [+0.7] (.003)
Freshman	-.272** [-3.8] (.044)	-.098 [n.s.] (.081)	-.236* [-0.9] (.075)
Chief Justice	-.409** [-5.2] (.038)	-.469** [-1.1] (.081)	-.562** [-1.9] (.070)
Constant	-1.91** (.029)	-3.35** (.057)	-3.18** (.048)
<u>Model Diagnostics</u>			
Wald χ^2	1,864.79**		
Pseudo R²	0.036		
N	51,655		

Numbers in parentheses indicate robust standard errors, clustered on case citation. Numbers in brackets indicate marginal effects. 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.

* $p < .01$; ** $p < .001$ (one-tailed tests).