

EXTREME DISSENSUS: EXPLAINING PLURALITY DECISIONS ON THE UNITED STATES SUPREME COURT *

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Plurality decisions on the Supreme Court represent extreme dissensus where no clear majority is formed for any one controlling rationale for the final disposition. Studying these decisions is important because they erode the Court's credibility and authority as a source of legal leadership, and because they provide broader lessons about judicial decision making. This article presents the first systematic analysis of plurality decisions. We test three possible explanations for plurality decisions—a lack of social consensus, “hard” cases, and strategic interactions during opinion writing. We find splintering increases when the Court reviews politically salient and constitutional issues, and when there was dissensus on the lower court, while it decreases when the chief assigns the opinion and when the Court is ideologically heterogeneous.

Why does the Supreme Court issue plurality decisions? Although there have been many studies addressing consensus and dissensus on the Supreme Court (e.g., Haynie, 1992; O'Brien, 1999; Walker, Epstein, and Dixon, 1988; Epstein, Segal, and Spaeth, 2001), no one has analyzed the causes of plurality decisions, which represent extreme dissensus. In this article, we combine existing theories in law and political science to offer a preliminary theoretical account of plurality decisions on the United States Supreme Court, providing the first systematic empirical analysis of the causes of pluralities.

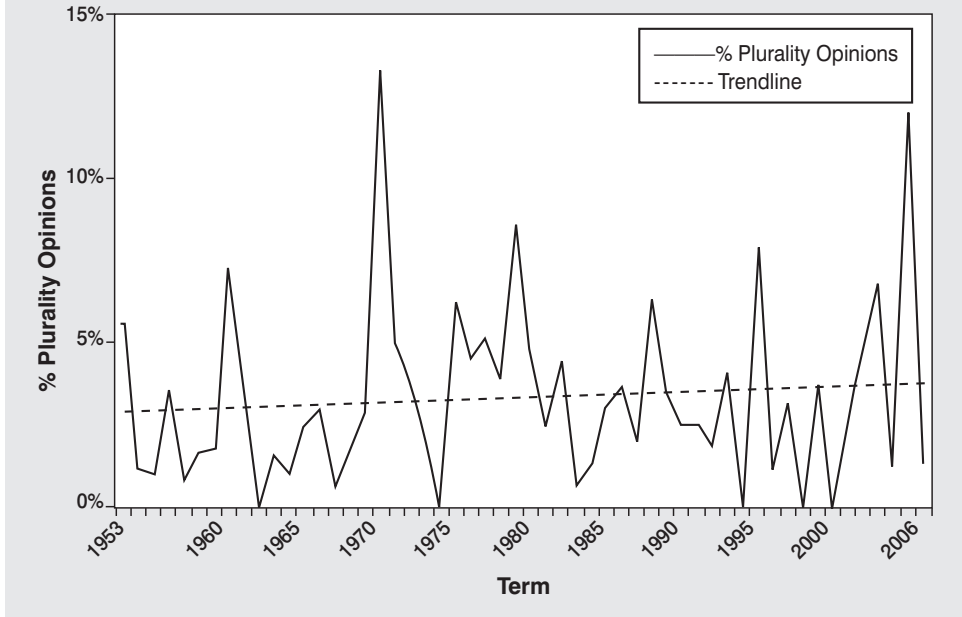
Plurality decisions are those in which the Court is unable to generate a single opinion that is supported by a majority of the justices. In fact, cases with plurality opinions have at least three opinions, each relying on different legal theories.

Plurality decisions are unique because of a conceptual gap between the legal rule and the outcome. In “simple majority” decisions, a numerical majority of Justices agree on both a single legal rule and a single outcome. On the other hand, in plurality decisions, no single legal rule carries the support of all of the concurring Justices. Instead, at least two coalitions of concurring Justices articulate different legal rules in an attempt to justify the same outcome (Kimura, 1992:1595).

Before 1956, plurality decisions “could be considered an insignificant statistical aberration” (U.S. Department of Justice, 1988:1). Specifically, before 1955 the Court handed down 45 plurality decisions, with 35 of those decisions rendered after 1900

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Figure 1
Percentage of U.S. Supreme Court Plurality Opinions: 1953-2006.



and 27 handed down between 1938 and 1955 (U.S. Department of Justice, 1988:1). However, since 1955, there have been 213 plurality decisions (see Epstein et al., 2007). Figure 1 depicts the proportion of plurality decisions from 1953 to 2006 (Epstein et al., 2007). During this time, the mean proportion was 3.3 percent (four plurality decisions per term). And while there were a handful of terms without any plurality decisions, the per-term high occurred in 1970 when the justices decided 16 cases by judgment—13 percent of the total number of cases that term. To be sure, 1970 is somewhat anomalous due to the Court's successive membership changes: the appointment of Chief Justice Warren Burger only one year prior, Justice Blackmun's first full term, and the simultaneous declines and departures of Justices John Marshall Harlan II and Hugo Black (see, e.g., Ward, 2003:178-82). Yet there were a number of other terms where the justices issued plurality decisions between 5 and 12 percent of the time: 1953 (6 percent); 1960 (7 percent); 1971 (5 percent); 1975 (6 percent); 1977 (5 percent); 1979 (9 percent); 1982 (5 percent); 1988 (6 percent); 1995 (9 percent); 2002 (5 percent); 2003 (7 percent); and 2005 (12 percent). Overall, the trendline in Figure 1 shows that plurality opinions have been slightly increasing over the period under study.

While plurality decisions are a relatively low proportion of the Court's caseload in a given year, it is important to understand them for three reasons: 1) plurality decisions do not necessarily provide clear guidance to lower courts; 2) plurality decisions are not always perceived as authoritative as majority decisions; and 3) pluralities

represent a breakdown in judicial decision making, providing a unique opportunity to gain insight into the Supreme Court's decision-making process.

First, the ramifications of plurality opinions go beyond the relatively small number of cases in which they appear. The doctrine of *stare decisis* assumes a majority court decision and requires lower courts to defer to the legal rule supporting the outcome. However, plurality decisions do "more to confuse the current state of the law than to clarify it" (Davis and Reynolds, 1974:62). Without clear guidance, lower courts face difficulty in interpreting the Supreme Court's decision and applying the proper rule to the case before them. "Faced with ambivalent signals and discrete, often contradictory rationales, lower courts feel compelled to guess how a majority of Justices would resolve the particular legal issue presented" (Novak, 1980:758).

Consider *Rapanos v. U.S.* (2006), where the Supreme Court construed the term "navigable water" under the Clean Water Act. Justice Antonin Scalia, writing for a four-justice plurality, concluded that wetlands are "navigable waters" subject to the act if they have a "continuous surface connection" to an adjacent waterway that itself is "a relatively permanent body of water connected to traditional interstate navigable waters" (p. 2213). Thus, the Court vacated and remanded the case for further proceedings in accordance with the opinion. Justice Anthony Kennedy concurred in the judgment; however, in his view, to demonstrate that a wetland is a "navigable water" the government "must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries" (p. 2249). Justice Kennedy disagreed with the plurality's standard, but applying the "significant nexus" test to the facts of the case, he did agree with the result.

Four justices dissented and Justice Stevens wrote the dissent concluding that wetlands are "navigable waters" if they satisfy the applicable definition in the regulations of the Army Corps of Engineers. These justices dissented because this requirement did not depend on the specific facts of the case. In addition, the dissent argued that wetlands are "navigable waters . . . in all . . . cases in which either the plurality's or Justice Kennedy's test is satisfied, . . . [the Clean Water Act would apply] if *either* of those tests is met" (p. 2265).

After *Rapanos*, lower courts have disagreed over which opinion controls. The Ninth Circuit Court of Appeals and the Seventh Circuit Court of Appeals have concluded that Kennedy's concurrence provides the governing rule and is, thus, controlling (see *Northern California River Watch v. City of Healdsburg*, 2006; *U.S. v. Gerke Excavating Inc.*, 2006). However, the First Circuit Court of Appeals held that wetlands are "navigable waters" if the standard of either the plurality or Kennedy's is met (see *U.S. v. Johnson*, 2006). Hence, Scalia's plurality opinion was not treated as precedent consistently across lower courts.

A second reason why it is important to examine plurality decisions is because plurality decisions are not always perceived as authoritative as majority decisions, and, in fact, lower courts are less likely to comply with plurality decisions than majority decisions (Corley, 2009). For example, in *Eastern Enterprises v. Apfel* (1998), the Court

struck down a retroactive application of the Coal Industry Retiree Benefit Act of 1992. The four-justice plurality opinion decided the case based on the Takings Clause. Justice Kennedy's special concurrence reached the same result, but instead concluded there was a violation of due process. The Second Circuit Court of Appeals held that the Supreme Court decision establishes "no law of the land because no one standard commands the support of a majority" (*U.S. v. Alcan Aluminum Corp.*, 2003).

In 1977 the Supreme Court attempted to clear up the confusion by providing guidance to the lower courts for interpreting plurality decisions. In *Marks v. United States* (1977), the Court clarified that when no five justices agree on a single rationale, the holding of the Court may be viewed as the position taken by those justices who concurred in judgment on the narrowest grounds. However, this rule has met with limited success in the lower courts (Hochschild, 2000; Thurman, 1992) in part because it can be difficult to discern the narrowest grounds and the Supreme Court itself has not consistently applied the *Marks* test (see Hochschild, 2000).

Third, plurality decisions represent a breakdown in judicial decision making. Although a majority of the justices agree on the outcome, they cannot agree on the legal rule justifying that outcome and, consequently, "[e]ach plurality decision . . . represents a failure to fulfill the Court's obligations" (*Harvard Law Review*, 1981:1128). Thus, they offer a unique opportunity to gain insight into the Supreme Court's decision-making process—as it is influenced both by the behavior of individual justices as well as by broader political forces in society.

Given that plurality decisions lead to lower levels of compliance, arguably resulting in the erosion of the Court's credibility and authority as a source of legal leadership and, ultimately, the influence of the Court being diminished, it is imperative that we understand the circumstances under which they occur. This investigation should also teach us some broader lessons about decision making on the Court. Thus, we embark on the task of explaining plurality decisions on the U.S. Supreme Court.

EXPLAINING PLURALITY DECISIONS

Below, we present our theoretical expectations involving the factors that lead to plurality decisions. Legal scholars have suggested three potential causes of plurality decisions, but no one has combined them theoretically or systematically tested these proposed explanations. These potential causes are as follows: The Supreme Court's decision will be more likely to result in a splintered outcome when the case is "hard," when there is a lack of social consensus on basic values and issues, and as a result of strategic interactions between the justices at the opinion-writing stage of the Court's decision-making process. This article combines those explanations to propose a coherent account of pluralities and then empirically tests this account.

"Hard" Case. One explanation for the occurrence of plurality decisions is that the case is "hard." Bloom (2008) argues that "[p]lurality decisions . . . often aris[e] in difficult cases with no easy answers" (p. 1416). Additionally, Justice Ruth Bader Ginsburg (1990) notes that "[h]ard cases do not inevitably make bad law, but too often

they produce multiple opinions” (p. 1948). As these quotes highlight, if a case is difficult, it is logical to expect more divisions. When there are no easy answers, justices are more likely to disagree about how to resolve the case before them, leading to conflicting legal rules and rationales. There are cases in which there are equally plausible arguments on both sides and cases in which there is a stronger side and a weaker side (see Kerr, 2009). Although we expect that all cases decided by the Supreme Court have a certain degree of difficulty, we believe that some cases are harder than others. With plurality decisions, at least five of the justices agree with respect to the ultimate disposition of the case, but disagree on the appropriate rationale. Thus, when a case is “hard,” a justice is more likely to disagree with the reasoning of the other justices and, consequently, to feel compelled to articulate those reasons in a separate opinion. Thus, we hypothesize that plurality decisions are more likely when cases are “hard.”

Social Consensus Theory. Another proposed explanation for plurality decisions is the social consensus theory (see *Harvard Law Review*, 1981; U.S. Department of Justice, 1988). Consensus theories include those social theories that emphasize the persistence of shared values and norms as the fundamental characteristics of societies. According to these theories, “social changes occur slowly . . . because they reflect large-scale shifts in attitude as community beliefs evolve” (Bernard, 1983:2). In fact, former Supreme Court Justice Sandra Day O’Connor stated that significant legal victories usually reflect an emerging social consensus (O’Connor, 2003).

Thus, according to this theory, plurality decisions merely reflect the split in society over issues of general public interest. Specifically, plurality decisions result from “strongly held personal convictions . . . ‘in controversial, emotionally charged areas of the law, such as obscenity, capital punishment, and affirmative action,’ areas where there is not complete societal agreement” (U.S. Department of Justice, 1988:17). For example, in *Frontiero v. Richardson* (1973) the issue before the Court was whether the military could use gender in determining whether dependents of military personnel were eligible for benefits.¹ The Court held that the military’s benefit policy was unconstitutional because there was no reason why military wives needed benefits any more than similarly situated military husbands. The plurality opinion applied strict-scrutiny review to the issue, arguing that a heightened standard of review was necessary given America’s “long and unfortunate history of sex discrimination.”²

Concurring in the judgment, Justice Lewis Powell declined to decide whether heightened scrutiny should be applied to discrimination based on sex. Joined by Justice Harry Blackmun and Chief Justice Warren Burger, Powell left this question open. It was enough for him that the policy failed the rational-basis test, or low-level scrutiny used in a prior sex-discrimination case, *Reed v. Reed* (1971). Specifically,

¹ Sharon Frontiero was a lieutenant in the United States Air Force who applied for housing and medical benefits for her husband, claiming him as a dependent. Although husbands could claim their wives as dependents and get benefits automatically, a wife had to prove that her husband was dependent on her for more than half of his support to receive benefits. Sharon’s husband did not qualify under this rule and, accordingly, he was denied benefits.

² The Court uses three levels of scrutiny when determining the constitutionality of a statute: rational basis, intermediate, and strict (see, e.g., Epstein and Walker, 2007:620-21).

Powell's concurrence in *Frontiero* noted that state legislatures were still considering the ratification of the Equal Rights Amendment. Thus, Powell argued that it was not necessary to reach the issue of whether classification according to sex was subject to strict scrutiny. One scholar argued that "Justice Powell's position can be interpreted as an attempt to allow a controversial question time to settle into a consensus. The plurality decision thus resulted because of an absence of social consensus on issues of gender discrimination" (*Harvard Law Review*, 1981:1138). This leads us to hypothesize that plurality decisions are more likely in cases that lack a social consensus.

Strategic Interactions Between the Justices. Finally, it has been suggested that the relationships and interactions between the justices explain cases where the Court fails to form a majority (see McWhinney, 1953). The final product of the Court, the written opinion, is a result of a collaborative process. Thus, the dynamics between the justices should help explain plurality decisions and, specifically, the relationship between the justices and the way they interact. In particular, justices must pay attention to strategic considerations at the opinion-writing stage of the Court's decision-making process (Epstein and Knight, 1998). Justices must not only work to see their personal preferences adopted, but also ensure that their colleagues' views are accommodated enough to retain the majority coalition. We test the impact of collegial constraints in three ways.

First, since plurality decisions result from a split among the majority coalition, with justices agreeing with the outcome, yet disagreeing with the rationale, we test how the ideological composition of the majority coalition influences the likelihood that the Court issues a plurality decision. Majority opinion writers must guard against two types of defecting justices: those who may defect on the outcome and join the dissent and those who may defect on the legal reasoning and decide to author a concurrence. While much of the existing literature focuses on how majority opinion authors guard against those who may defect by dissenting, majority opinion writers must also be concerned about concurrences. A concurrence "can ultimately serve as a sanction by articulating the flaws in the majority opinion" (Spriggs, Maltzman, and Wahlbeck, 1999:488). In the case of a plurality opinion, special concurring opinions (or opinions concurring in the judgment) are of particular concern; the justices' inability to agree on the legal reasoning may undermine the Court's ability to perform its role of providing final, national answers to important legal questions. As a result, we posit that majority opinion writers behave strategically to minimize the likelihood of plurality opinions by accommodating their colleagues' preferences.

According to the literature, an opinion writer is more willing to accommodate when the conference majority is ideologically heterogeneous (see Segal and Spaeth, 2002; Maltzman, Spriggs, and Wahlbeck, 2000). "[I]deologically more heterogeneous majority . . . coalitions lead to greater efforts by authors to build coalitions" (Maltzman, Spriggs, and Wahlbeck, 2000:118). Simply put, majority opinion authors must work harder to maintain a stable coalition and to persuade coalition members to agree to their legal reasoning when the coalition itself is highly heterogeneous. A het-

erogeneous coalition must bargain among itself to identify a position that is acceptable to each individual member's preferences while, at the same time, reflective of the broader coalition's views. Majority opinion writers thus circulate more drafts when the majority coalition is more heterogeneous (Wahlbeck, Spriggs, and Maltzman, 1998). Because a heterogeneous majority coalition has been found to result in more bargaining and accommodation, we expect that plurality decisions are less likely when the majority coalition is ideologically heterogeneous and more likely when the majority coalition is homogeneous.

Second, a justice's position on the Court influences the effect that justice has on consensus. Specifically, both the chief justice and the median justice influence the final product of the Court (Murphy, 1964; Epstein and Knight, 1998). The assignment privilege of the chief can be used to maximize his utility in policy terms. Justice Byron White commented: "I think it is very fair for a Chief Justice to assign opinions to people who (a) are on his side; (b) will do the job the way the Chief Justice would best like it done . . . [and] more accurately or better reflect the sentiment that he would like to see reflected" (Schwartz, 1983:460-61). Both theoretical accounts (Hammond, Bonneau, and Sheehan, 2005) and empirical analyses (Maltzman, Spriggs, and Wahlbeck, 2000) corroborate the strategic aspect of opinion assignment suggested by Justice White.

However, the effect of the chief's ability to assign the opinion may go beyond the ideology of the outcome. It may also influence consensus on the Court. As the leader of the Court, the chief justice may use his assignment prerogative to achieve consensus (Walker, Epstein, and Dixon, 1988). According to Murphy (1964): "When in agreement with the majority, the Chief Justice can assign the opinion to the most moderate member, hoping that his mild statement of the doctrine may prevent defections or even gain adherents" (p. 84). Chief Justice Roberts, for instance, explained how he uses his power to assign opinions to breed consensus: "Say someone is committed to broad consensus, and somebody else is just dead set on 'My way or the highway. And I've got five votes, and that's all I need.' Well, you assign that [case] to the [consensus-minded] person, and it gives you much better chance, out of the box, of getting some kind of consensus" (Rosen, 2007:110). The chief justice's strategic position to assign the opinion should, thus, reduce the likelihood of splintering on the Court. Accordingly, we expect cases where the chief assigns the opinion to be less likely to result in a plurality.

Additionally, Slotnick's (1978) analysis of self-assignment finds that chiefs are both more likely to assign themselves unanimous opinions and less likely to author opinions in highly divided cases. The chief can also author an opinion that guards against other justices defecting, writing an opinion in such a way that the chief accommodates the wishes of the other justices and prevents special concurrences. The chief is in a special position given his institutional role and, consequently, is less likely to write concurring and dissenting opinions (Brenner and Heberlig, 2002), perhaps because he is likely to believe that writing dissenting and concurring opinions will reflect a lack of

leadership on the Court. O'Brien (1999) explained that Rehnquist wrote fewer dissenting and concurring opinions after becoming chief. Other research has shown that chief justices are less likely to write or join special concurrences (Wahlbeck, Spriggs, and Maltzman, 1999). Given the chief's institutional role and his concern with the Court issuing an authoritative opinion, we expect cases in which the chief justice self-assigns, and thus writes the opinion, to be less likely to result in a plurality.

Finally, whether the median justice is the opinion author may also influence the ability to build and maintain a stable majority coalition. Although existing scholarship has done much to explain the extent to which the median justice influences the content of the majority opinion (Westerland, 2003; Bonneau et al., 2007; Lax, 2007), with few exceptions it has not analyzed the ability of the median justice to achieve consensus. To understand the role of the median justice in achieving consensus, it is helpful to think further in terms of bargaining and accommodation and the ability of the opinion author to build a coalition. As discussed above, the majority opinion writer should be more accommodating when the majority coalition itself is heterogeneous. Furthermore, the identity of the majority opinion writer should also play a role. Specifically, Maltzman, Spriggs, and Wahlbeck (2000) find that opinion authors who are ideologically distant from the majority coalition will be more likely to accommodate their colleagues.³ Ideologically distant justices have more of an incentive to respond to the demands of their colleagues and ensure that the final opinion is acceptable to the entire majority coalition than ideologically proximate justices. On the other hand, ideologically proximate justices may feel less of a need to engage in the "collegial game" and more freedom to write an opinion that reflects their personal preferences. We therefore expect that if the median justice is the majority opinion writer, he will be less likely to accommodate the other justices' preferences, and, accordingly we expect cases in which the median justice authors the opinion to be more likely to result in a plurality.

DATA AND METHODS

To provide an empirical test of our hypotheses, we use the Spaeth (2007) database and include all cases (plurality and nonplurality) that were orally argued and decided by the Court during the 1953-2006 terms. Our unit of analysis is the individual case. Our dependent variable is *Plurality*, which equals 1 if the decision resulted in a plurality decision, 0 otherwise. Plurality decisions account for 3.14 percent of the total observations.

To gain some perspective regarding the data, Table 1 shows the behavior of the chief justice in cases resulting in a plurality decision. For comparison, the column on the right provides the same statistics for the average associate justice. The data indicate that the behavior of the chief justice is different from his colleagues in three major ways. He is twice as likely as the average associate justice to join the plurality opinion, and the average associate is twice as likely to write a dissent and four times as likely to register an

³ Alternatively, Brenner and Spaeth (1988) find that, during the Warren Court, marginal justices who were selected as opinion writers were no more likely to maintain the original voting coalition.

Table 1
The Behavior of the Chief Justice and the Average Associate Justice in
Cases with Plurality Opinions, 1953-2006

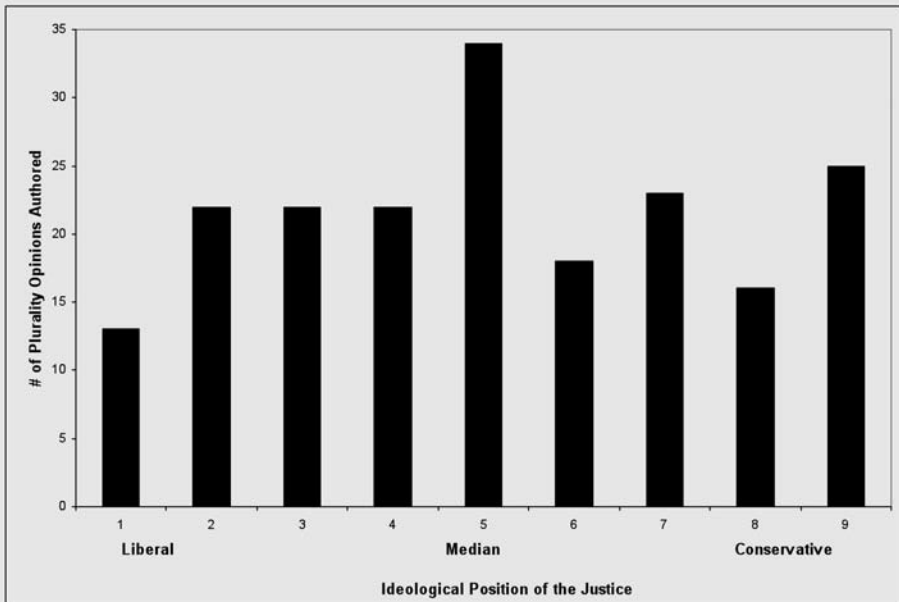
	The Chief Justice	The Average for Associate Justices
Authored the plurality opinion	12%	11%
Joined the plurality opinion	50	26
Wrote a special concurring opinion	3	12
Joined a special concurring opinion	5	5
Wrote a regular concurring opinion	1	2
Joined a regular concurring opinion	2	.5
Wrote a dissenting opinion	9	15
Joined a dissenting opinion	14	17
Other	4	11.5

opinion concurring in the judgment. The chief justice is by far the least likely of all the justices to write or join the special concurring opinion causing the splintering, but he is just as likely to author the plurality opinion as the average associate justice. At least facially, the data support the theory that the chief works toward consensus by striving to sustain the opinion that gets the most support among the justices. In fact, when in the majority, the chief either wrote or joined the plurality opinion 87 percent of the time. He is overwhelmingly in favor of the opinion that gets the most support on the Court, conceivably aiming (to no avail in those particular cases) for consensus.

Additionally, we present the distributions of plurality and special concurring opinions. Figures 2 and 3 present the number of such opinions authored by justices in different positions on the Court. Figure 2 indicates that the median justice (position 5) is most likely of all justices to author a plurality opinion. In fact, other than the most conservative of the justices, who wrote almost a similar share of the plurality opinions, the median wrote in some cases twice and even three times as many plurality opinions as the other justices. In addition, Figure 3 indicates that justices in median positions are more likely to write special concurring opinions. The median and the two justices next to the median (positions 4-6) authored 95 (over 45 percent) of the special concurring opinions in cases that resulted in plurality opinions.

Thus, the data indicate that justices in the median positions are more likely to either write a plurality opinion or lead to one by registering a special concurring opinion. Conversely, justices with more extreme ideologies and the chief justice are less likely to write a special concurring opinion. Although the data provide useful information, to understand the relative influence of any particular variable we must subject the individual variables to multivariate controls. Thus, we turn our attention to the multivariate model.

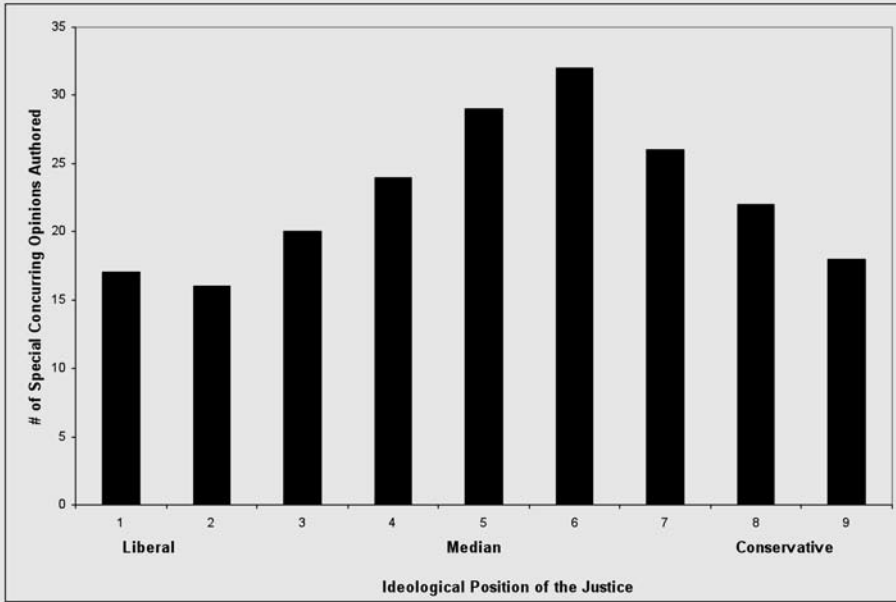
Figure 2
Number of U.S. Supreme Court Plurality Opinions Authored by
Justices' Ideological Position: 1953-2006.



To test factors that influence the likelihood of a plurality decision on the Supreme Court, we operationalize our independent variables as follows. First, we suggest that legally complex cases with multiple legal questions or issues in dispute indicate a “hard” case, in which the likelihood of a plurality decision should increase. In cases involving a high level of legal complexity, the range of possible legal outcomes is expanded, and agreement among the justices must be reached across a multitude of issues. The more legal issues in question, the more difficult it is for the justices to agree on the rationale for the outcome. According to Hettinger, Lindquist, and Martinek (2006), “Complex cases raising multifaceted issues requiring sophisticated analysis . . . can often result in disagreement.” As a result, the more legal complexity in the case, the greater the likelihood of dissensus (see Wahlbeck, Spriggs, and Maltzman, 1999). Therefore, our measure of *Complexity* is the total number of legal issues and laws each case addresses (Spaeth, 2007).

Second, we argue that the presence of amicus briefs indicates that the case is “hard.” Although amicus briefs provide a mechanism for outside parties to influence a particular case by giving them a platform through which to express their arguments to the Court, amici also serve the crucial function of alerting the justices to alternative legal issues and arguments (see Collins, 2008a). By introducing and expanding on issues, amici make it difficult for the justices to reach agreement on the reasoning of the case. More amici, and thus additional issues or legal arguments for the justices to consider, lead to a higher likelihood of a plurality decision. Our measure of *Amicus Briefs* is the total number of amicus briefs filed in each case.

Figure 3
Number of U.S. Supreme Court Special Concurring Opinions Authored by Justices' Ideological Position: 1953-2006.



Third, we believe that dissensus on the merits in the last lower court that heard the case indicates a “hard” case. Overall, the dissent rate on the Courts of Appeals is extremely low (Goldman, 1975; Hettinger, Lindquist, and Martinek, 2006) and so the fact that one judge disagreed with the majority opinion generally indicates that the case is more difficult. Lindquist and Klein (2006) explained: “[W]e would typically expect to find judges expressing disagreement only when they feel quite strongly that the majority is wrong. Naturally, their feelings often have an ideological basis, but if judges act on the goal of legal soundness, then they will frequently reflect legal reasoning as well” (p. 142). Although it is clear that dissent signals disagreement with the majority opinion, a concurrence also may indicate “some level of dissatisfaction with the majority’s resolution of the case” (Hettinger, Lindquist, and Martinek, 2006:18). Specifically, a concurring opinion often disagrees with the reasoning of the majority opinion. Thus, *Lower Court Dissensus* measures whether the decision in the court immediately below the Supreme Court contained a dissent or concurrence.⁵

⁵ Although the Spaeth (2007) dataset contains a variable denoting whether there was dissent in the lower court, there are two potential problems using this variable as coded. First, the variable does not take into account concurring opinions in the lower court. Since concurrences reflect disagreement over the correct legal reasoning, excluding concurrences may obscure real conflicts over the correct application of the law. Second, the variable in the Spaeth dataset reflects whether the Supreme Court noted there was a dissent in the lower court, not whether there actually was a dissent in the lower court. Thus, using the Spaeth (2007) variable misses the many times when a lower-court judge voiced a dissenting opinion, but the Court declined to mention this dissent. As a result, to accurately measure whether there was dissensus in the lower court, we read each lower-court opinion and coded whether there was a dissent or a concurrence.

Fourth, we believe that constitutional cases should be harder than statutory cases. The language of statutes is generally more detailed and less ambiguous than the language contained in the Constitution, and, consequently, it is easier for the justices to agree on the meaning when they are interpreting statutes (see Kritzer, Pickerill, and Richards, 1998). Although there may be some constitutional cases that are easier than statutory cases, in general we expect constitutional cases to be harder. To test the difference between constitutional and statutory cases, we created three variables from Spaeth (2007). *Constitutional Issue* is coded 1 if the case was based on a constitutional issue (0 otherwise). We also created two other dichotomous variables. The first, *Other Issue*, is coded as 1 if the case had neither a constitutional nor a statutory basis (e.g., supervisory authority over lower courts). The second, *Statutory Issue*, is coded 1 if the case decided a statutory issue and 0 otherwise. Our model includes both the *Constitutional Issue* and the *Other Issue* variables, using *Statutory Issue* as the baseline category.

To summarize, we argue that the above variables indicate the level of difficulty facing the justices as they decide the case before them. We expect that as the level of difficulty, how “hard” a case is, increases, the likelihood of the Supreme Court reaching a plurality decision rather than a majority decision increases.

As stated previously, in addition to “hard” cases, another proposed explanation for plurality decisions is the social consensus theory. According to this theory, plurality decisions merely reflect the split in society over issues of general public interest. Our first social-consensus-theory variable reflects whether the case concerned a *Civil Liberties and Rights* issue. As a report by the Attorney General’s Office (U.S. Department of Justice, 1988) stated, the increase in civil liberties and rights cases, which divide society, may lead to more dissensus on the Court: “[E]fforts at compromise are increasingly fruitless in the face of strongly held personal convictions when the Court is more frequently involved. . . . [in] areas where there is not complete society agreement” (p. 17). Thus, the extreme dissensus reflected by plurality opinions may merely be a function of the Supreme Court reflecting an existing split in the broader society (see also *Harvard Law Review*, 1981). In particular, the DOJ’s report highlighted issues such as obscenity and affirmative action, two vexing civil-liberties issues, which also have enormous social consequences and have led to strong citizen debate. We therefore created a dummy variable reflecting whether the case concerned a civil liberties and rights issue, as denoted by the Spaeth (2007) dataset. In addition, we include a variable for *Political Salience*, using the *New York Times* measure (Epstein and Segal, 2000).⁶ These are cases with a high degree of salience to external political actors, the public, and the Court, and will be more likely to expose divisions among the justices.⁷ As Grossman and Wells argue, “There is no a priori reason to expect . . . justices to be united on politically contentious issues that divide the country” (1989:59).

⁶ These are cases that a) led to a story on the front page of the *New York Times* on the day after the Court handed down the decision; b) were the lead cases in the story; and c) were orally argued and decided with an opinion.

⁷ Although scholars have used amicus briefs as a proxy for the importance of a case (see e.g., Maltzman, Spriggs, and Wahlbeck, 2000; Wahlbeck, Spriggs, and Maltzman, 1999), Collins (2008b) finds that the relationship between amicus briefs and decision making is most consistent with theories of information overload. Thus, it is not appropriate to use amicus briefs as a proxy for salience for the Court’s decisions on the merits. In our dataset, the *Number of Amicus Briefs Filed* variable and the *Political Salience* variable are only correlated at .25.

Finally, scholars have proposed that the relationship and interactions between the justices influence whether the Court issues a plurality decision. To test our hypothesis regarding the ideological composition of Court, we created a measure of the *Ideological Heterogeneity* of the Court. Since pluralities are a result of the justices in the majority voting coalition failing to reach consensus regarding the opinion, we measure *Ideological Heterogeneity* as the standard deviation of the Martin-Quinn scores of the majority coalition.⁸ We also tested the effects of *Median Author*, which equals 1 when the author is the median justice⁹ (0 otherwise); *Chief Justice Assigns to Other Justices*, which gets the value of 1 when the chief justice assigns the opinion to the other justices (0 otherwise); and *Chief Justice Self-Assigns*, which equals 1 when the chief justice assigns the opinion to himself (0 otherwise).¹⁰ The reference category is when the senior associate justice assigns the opinion. Finally, given that the chief justice occupies a unique administrative and leadership role on the Court, and different chiefs may use their position and prerogatives differently, we control for whether who the chief justice is matters when it comes to plurality decisions. We include Chief Justices Warren, Burger, and Rehnquist as dummy variables in the model, excluding Roberts as the baseline for comparison. Since our dependent variable is dichotomous, we employ logit regression.

RESULTS

What factors influence the likelihood of a plurality decision? We tested three proposed explanations for how the Court fails to produce a majority decision: the social consensus theory, an explanation based on whether the case is “hard,” and an explanation based on the interactions between the justices. Table 2 presents the results of the logit regression as to what factors increase or decrease the likelihood of failure of the Court to form a majority, and Table 3 presents a variety of predicted probabilities associated with each of the statistically significant variables.¹¹ We find that cases involving civil liberties and rights issues are more likely to result in a splintered decision than cases involving other issues. In fact, if a case involves a civil liberties and rights issue as compared to a case that does not, the predicted probability of the Court handing down a plurality decision increases by 47 percent. These are controversial, emotionally charged areas of law in which reasonable people disagree over the answer,

⁸ Martin-Quinn scores are measures that place the Supreme Court justices on a common ideological scale. They do so for each justice since 1937, and the scores are estimated using merits votes from the Supreme Court Judicial database. Thus, the scores are based on actual judicial behavior. Moreover, the scores are dynamic, which allows the position of each justice to evolve over time (Martin and Quinn, 2002).

⁹ We identified the median justice based on the “justice” variable in the Martin-Quinn database, which is defined as the justice most likely to be the median. When the “mow” (Majority Opinion Writer) variable in the Spaeth database was the median justice for that term, the value entered was 1, 0 otherwise.

¹⁰ We identified the majority opinion assigner based on the “moa” (Majority Opinion Assigner) variable in the Spaeth database.

¹¹ The dependent variable, Plurality, is coded 1 if the Supreme Court decision was a plurality decision and 0 otherwise. Since plurality decisions are such a low proportion of the total cases decided each term, we also employed a rare-events logit. The results were substantially similar; thus, we present the results from the logit regression.

Table 2
Logit Model of Plurality Decisions on the
Supreme Court, 1953-2006

Variable	Coefficient	P-value*
<i>“Hard” Case</i>		
Level of Legal Complexity	-.026 (.092)	.387
Lower Court Dissensus	.283 (.157)	.036
Number of Amicus Briefs Filed	.006 (.012)	.309
Constitutional Issue	1.232 (.215)	.000
Other Issue	.453 (.275)	.050
<i>Social Consensus Theory</i>		
Civil Liberties and Rights Issues	.378 (.202)	.031
Politically Salient Case	.409 (.186)	.014
<i>Strategic Interactions Between the Justices</i>		
Ideological Heterogeneity	-.593 (.146)	.000
Chief Justice Assigns to Other Justices	.392 (.182)	.016
Chief Justice Self-Assigns	-.498 (.256)	.033
Median Justice Author	.340 (.256)	.093
<i>Control Variables</i>		
Warren	-.677 (.505)	.180
Burger	-.042 (.480)	.930
Rehnquist	-.288 (.489)	.557
Constant	-2.923 (.635)	.000

N = 5933; Robust standard errors clustered on case citation; Wald $\chi^2=178.86$; Prob > $\chi^2 = .000$
*Based on one-tailed tests where directionality hypothesized.

and it appears that the Court reflects that split in society. In addition, cases that are salient to external political actors, the public, and the Court are more likely to result in a fractured decision. Specifically, the probability of a plurality decision also increases by 53 percent if the case involves a politically salient case versus a non-politically

Table 3
Predicted Probability of Plurality Decision

Variable	Predicted Probability of Plurality Decision	% Change
Lower-Court Dissensus	.020	+33%
Constitutional Issue	.050	+233%
Civil Liberties and Rights Issue	.022	+47%
Political Salient Case	.023	+53%
Ideological Heterogeneity (1 SD above mean)	.012	-27%
Chief Justice Assigns to Other Justices	.010	-33%
Chief Justice Self-Assigns	.009	-40%

Baseline predicted probability = .015 (computed by holding all continuous variables at their mean values, while holding all discrete variables at their modal values, with the exception of Civil Liberties and Rights issue and CJ Assigns to Other Justices, which are set at 0).

salient case. These cases involve contentious issues that divide the country, and it is not surprising that the justices are divided as well.

The findings also lend some support to the “hard” case theory. Three variables, *Constitutional Issue*, *Other Issue*, and *Lower Court Dissensus* appear to influence whether the Court issues a plurality decision. When a case involves a constitutional issue or an issue that is neither constitutional nor statutory, the Court is more likely to issue a plurality decision, as compared to a statutory issue. Specifically, when the case involves a constitutional issue, the predicted probability of the Court handing down a plurality decision increases by 233 percent. In addition, if the lower-court judges indicate the case is a difficult one by dissenting or concurring, the Supreme Court is more likely to find the case difficult as well, and the case is more likely to result in a plurality. However, the *Number of Amicus Briefs Filed* and the *Level of Legal Complexity* do not appear to influence whether the Court issues a plurality decision.¹² It may be that while greater amici do present a wider range of legal options for the justices to choose from, their relative low cost to produce and increasing volume over the years have

¹² The *Number of Amicus Briefs Filed* and the *Level of Legal Complexity* are only correlated at .25. However, we ran the regression with only one of these variables and the results were the same.

lessened their potential substantive impact on clerks and justices who are pressed for time and inundated with information. Similarly, legal complexity, as measured by the total number of legal issues and laws in a given case, may also be less important to justices and clerks who are able to narrow and prioritize the focus of cases to fewer issues or even a single issue at either the agenda-setting or opinion-writing stage—either as a time-saving device or as an attempt to make “hard” cases somewhat “easier.” Hence, “legally complex” cases may not be as complex as the measure would suggest.

Given that the content of the opinion is a result of a collaborative process between the justices, it is not surprising that the failure to reach consensus is also influenced by the interactions between the justices. Specifically, when the majority coalition is more ideologically heterogeneous, the Court is less likely to issue a fractured opinion. While this may seem counterintuitive, this result is consistent with the prior literature on coalition formation, which has found that increased heterogeneity leads to increased bargaining and accommodation. In fact, if the ideological heterogeneity of the Court increases by one standard deviation above the mean, the likelihood of a plurality decision decreases by 27 percent. Thus, perhaps paradoxically, majority opinion writers will work harder to preserve a more heterogeneous and necessarily more fragile coalition. At the same time, however, opinion authors will be less likely to accommodate colleagues who are ideologically close. Additionally, when the chief justice assigns the opinion to the other justices versus the senior associate justice assigning the opinion, the Court is less likely to reach a plurality opinion, decreasing the likelihood by 33 percent, and when the chief justice self-assigns the opinion versus the senior associate justice assigning the opinion, the likelihood of the Court issuing a plurality decision decreases by 40 percent. The opinion assignment prerogative of the chief justice allows him to secure an opinion close to his ideal point (Maltzman, Spriggs, and Wahlbeck, 2000), but it also provides him with a tool to reach his goals as the leader of the Court. Paramount among those goals is consensus.

To fully appreciate the effect of these variables, a hypothetical may be more appropriate. For example, if Burger is the chief justice but does not assign the case (and, therefore, does not write the opinion), the Court is ideologically homogeneous, the case involves a civil liberties and rights issue, the case involves a constitutional issue, the case is politically salient, and the lower-court decision contained either a concurrence or a dissent, the probability of a plurality decision is .306 (compared to the baseline probability of a plurality decision, which is .015).

Surprisingly, we find no relationship between plurality decisions and the lack of leadership on the part of any of the chief justices—Warren, Burger, or Rehnquist. This may be due to the fact that associate justices can also exhibit leadership, or a lack thereof, at various times—such as when a chief is new as Hugo Black did with Earl Warren, or when a chief is ill and often absent such as in Rehnquist’s final term—or on specific issues. Finally, it does not appear that there is a relationship between plurality decisions and the median justice writing the decision.

CONCLUSION

Plurality decisions are important for their implications for lower courts and for policy makers in the other branches. When the Supreme Court fails to generate a controlling precedent, the result arguably is an erosion of the Court's credibility and authority as a source of legal leadership. In this article, we have provided the first comprehensive theoretical account and systematic empirical analysis of plurality decisions on the United States Supreme Court. Specifically, we tested three different possible explanations. The first explanation is whether a case is "hard," and the idea is that the complexity of the law accounts for the difficulty of the Court to avoid extreme dissensus. According to the social consensus theory, it is the subject matter raised by the case that accounts for the Court's inability to reach consensus. Socially contentious topics prove hard for justices to resolve. Finally, the third explanation is that the appearance of plurality opinions is due to the dynamics of the interactions between the justices.

We found that the subject matter of the case significantly affects the likelihood of plurality decisions. Topics that are contentious in society at large seem to have a similar effect on Supreme Court justices. When they review cases involving civil liberties and rights issues, justices are more likely to disagree to such an extent that they are unable to form a majority to support a particular rationale. Likewise, splintering in the Court's opinions increases when the case is salient. Cases with a high degree of salience to the public and to political actors are those that raise issues more likely to expose divisions on the Court. Indeed, justices are not necessarily more united than the general public and its representatives on those contentious issues.

Somewhat contrary to conventional wisdom, indicators of a legally intricate case, such as legal complexity or the number of amicus briefs filed, have little effect on fragmentation of the opinion-writing process. Nonetheless, when the Court reviews a case on constitutional grounds, plurality decisions appear more frequently, and when there is dissensus on the lower court, the Court is more likely to hand down a plurality decision.

Finally, strategic behavior on the part of individual justices affects the likelihood of extreme dissensus. When the Court is ideologically heterogeneous, the Court is less likely to issue a plurality decision. This finding leads to some interesting normative implications. On the one hand, our results suggest that even in the face of ideological polarization, the Court can achieve consensus in a case on both the outcome and the legal reason directing that outcome. Strategic interactions between the justices have real consequences, as justices are not completely unfettered actors. Rather, justices must gain the agreement of a majority of their colleagues to render a binding decision, and our results suggest that justices will work in the face of ideological polarization to achieve this goal. On the other hand, increased bargaining and accommodation may undermine the reach and import of a decision. Since a heterogeneous majority coalition must strive to find common points of agreement, the case may in the end be decided on narrower grounds than a case decided by a more homogeneous majority coalition. Similar to the arguments advanced by Staudt, Friedman, and Epstein

(2008), our findings suggest that a decrease in plurality opinions may also be accompanied by opinions that are less consequential overall. The question thus becomes whether it is better for the Court to avoid plurality opinions that may cause confusion in the law or better for the Court to render decisions that have the potential to significantly impact the law.

In addition to explaining plurality decisions, this study also provides insight into the chief justice and his goals. As a leader, the chief justice encourages consensus. When he is in the majority, he assigns the opinion. Apart from trying to secure an opinion as close as possible to his ideal point, the results of this study indicate that the chief considers consensus when assigning. His choice of the opinion writer is guided, at least in part, by whether he anticipates the author to successfully form a coalition. Indeed, when assignment is done by the leader of the Court, the author of the opinion is much more likely to successfully garner the support of the justices. Underscoring the importance of consensus for the chief justice is the fact that his colleagues, the ideologically moderate among them in particular, are far more likely to author plurality opinions or register opinions concurring in the judgment.

In sum, this research provides substantial insight into the factors that contribute to the likelihood that the U.S. Supreme Court will issue a plurality decision. The Supreme Court's credibility and authority as a source of legal leadership are eroded by plurality decisions and, thus, the ramifications of those opinions go beyond the particular cases in which they are issued. In addition, by studying cases in which judicial decision making breaks down, this research also allows us to better understand how a justice's position on the Court contributes to his or her influence on the interactions among the justices. More specifically, we have a better understanding of the role the chief plays in the intricate process of coalition building on the Court. **jsj**

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