**The Impact of Court Diversity and Case Complexity On the Incidence
of Non-Unanimous Norwegian Supreme Court Decisions**

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Abstract

The Norwegian Supreme Court has experienced significant increases in the sociopolitical diversity among justices. Most central in the present study is an effort to determine whether or not increasing levels of diversity affect the decisional outputs of the Norwegian high court in two divergent ways: (1) Based on the assumption that a diverse set of justices will have a wide array of political preferences, a more diverse court should produce more non-unanimous decisions, and (2) a greater diversity among justices will likewise prompt fewer non-unanimous decisions by reducing extremism. Several covariates are included as relevant control variables. In the ensuing analysis both hypotheses find substantively meaningful support through logit and path models.

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> Once the essential professional qualifications are met, it would *be
> to the advantage of the Court* if its composition reflected a wide
> breadth of experience from different areas of the country,
> professional backgrounds from different areas of legal practice,
> and, furthermore, if it had a more balanced proportion of women to
> men. (Chief Justice Carsten Smith, 1998: 101, italics added).

Introduction

In this is a paper we seek to explore the impact of socio-political diversity on the

decisional behavior of the Høyesterett, the Norwegian Supreme Court. Former Chief Justice

Carsten Smith has stressed the importance of diversification of the collection of justices serving

on the High Court for a very long time. In spite of the generally egalitarian Norwegian culture,

males populated national governing bodies, including the Supreme Court. While females held

parliamentary positions and had a presence in executive departments, not until 1968 was a

woman appointed to the Supreme Court, when Lilly Bølviken was tapped to fill a vacancy. Of

course, one appointment does not diversity make, and there has been significant progress in

appointing more and more women to the High Court. The recently retired Chief Justice Tore

Schei was supportive of recruiting more females, and presumably the newly selected Chief

Justice, Toril Marie Øie, will promote gender equity.

While adding women to the ranks of justices is an admirable goal, achieving

diversification requires a broader perspective. Granted, elevating female justices to the High

Court perhaps has been the single most important manifestation of support for greater diversity

on the bench. Indeed, seven of the twenty Supreme Court justices are now female, including the

Chief Justice, Toril Marie Øie. Considering the effect only of women, their addition to the High

Court can increase heterogeneity only so much; it necessarily plateaus when there are an equal number of men and women serving as Supreme Court justices. We will return to this problem in the data and methodology section of the paper.

In the meantime, we note that in the process of recruiting justices, the Norwegian Judicial Appointments Board seeks

> … a broad recruitment of justices, such that justices who are appointed have prior knowledge from various areas of community and legal life (Innstillingsrådet, 2012).

Presumably, this goal is born of the recognition that different life experiences yield different perceptions and emphases that should gain voice in the Court's decisional outputs. Accordingly, an exclusively male decision-making body will not benefit from the inclusion of the "voices" of women. Given that concern, a good deal of research has been focused on teasing out the impact of heterogeneity by employing an independent dummy variable of gender (Boyd et al., 2010; Peresie, 2005). However, coding males as 0 and females as 1 results in a simplistic and truncated operationalization of heterogeneity because surely there are additional salient sociopolitical interests that might be considered relevant to reflect the "prior knowledge from the various areas of community and legal life."

In the spirit of transparency, we confess that we too have produced such "simple" analyses of diversity (Grendstad et al., 2015). We have also developed a multivariate measure of heterogeneity that captures a diversity measure of greater complexity than a dichotomous variable (Shaffer et al., 2015; Schaeffer, 2013). Nevertheless, apart from measurement issues, notions of diversity are expressed in terms of group representation, and that begs identifying the concepts of group representation.

Former Chief Justice Carsten Smith justifies a more heterogeneous set of justices to ensure

> … fairness and to ensure representation of different segments of the population, a wider and more varied breadth of knowledge about the different aspects of people's lives, and the reflection of values in Supreme Court decisions (Smith, 1998:101).

Achieving this goal may rest, at least in part, on our understanding of group representation. Much of the literature identifies three types of group representation: (1) descriptive, (2) substantive, and (3) symbolic representation.

Mansbridge (1999) makes the case for *descriptive* representation, and Pitkin (1967) asserts that if decision makers are recruited from groups in proportion to their occurrence in the nation's population, then group value preferences will inform the deliberations of a policy-making body. For instance, including a significant percentage of ethnic minorities in a decision-making body should foster inclusion of views in policy outputs. Similarly, descriptive representation applies to the representation of women, so that a critical mass of female justices would be expected to assure the promotion of "women's issues" (Bühlmann and Schädel, 2012; Lu and Bremming, 2014). While the effects of the increased proportion of Norwegian Supreme Court female justices is minimal (Grendstad et al., 2015), others have reported that the inclusion of women on other courts has been significant in cases addressing sex discrimination, at least in the area of employment law (Boyd 2010, et al.; Songer et al., 1994).

S*ubstantive* representation demands a bit more than matching the presence of groups in society with that on a court. Instead, substantive representation assumes that decision makers not only share the views of the group they "represent," but they are also *accountable* to the group. Simply put, the "group's voice is articulated and heard in the policy process" (Weldon, 2011:32). Arguably, the inclusion of any given group, although necessary, might not be sufficient (Jeong,

2013). Public officials must attend to "substantive representation of policy concerns" (Hero and Preuhs, 2010). Quite obviously, popular control of Norway's Supreme Court justices is a reach, given that their tenure in office is well protected until the age of 70 when they are required to retire. That said, a justice's socio-political background, their life experiences. may engender a sense of accountability to the mix of their group memberships. Accordingly, some evidence has been produced suggesting that African American justices are more liberal than white justices (see for example Haire and Moyer, 2015; Kastellec, 2013; Morin, 2014).

Finally, *symbolic* representation, unlike descriptive representation, does not assume that groups need to have a "voice" in a deliberative process. In addition, decision makers need not be accountable to their own groups, as substantive representation requires. Instead, symbolic representation occurs when group members believe that they are "fairly and effectively represented" (Schwindt-Bayer and Mishler, 2005:407). For instance, this notion of fair play can promote "… legitimacy gains associated with minority voices being represented in the U.S. Congress … (Banducci et al., 2004:552). Of course, such "gains" would be present in courts, as well as legislative bodies.

As suggested above, the literature on diversification frequently identifies an underrepresented group, such as women, and either asserts or hypothesizes that male and female policy behavior is divergent, and therefore, gender equity should be promoted. Similar claims have been made with respect to ethnic minorities. As we mentioned above, although this line of inquiry is of great value, it may employ an oversimplified notion of diversity, especially since individuals may maintain a number of salient group identities. Indeed, if this were not the case, a gender gap would be expected to emerge in a much greater number of cases in which gender is

assumed be especially relevant. We shall operate on the assumption that judicial behavior is, at least in part, a function of multiple group identifications. In other words,

> Old binaries of one race or the other, one language or the other, one religion or the other will mean less to the kid who grew up celebrating Christmas, Hanukkah, and Kwanzaa and whose best friend is Muslim and speaks French fluently (Lewis and Cantor, 2016:8).

An example of expanding our focus beyond the "old binaries" is Haire and Moyer's (2015) analysis employing an interaction between ethnicity and gender, occasionally referred to in the literature as "intersectionality," demonstrating that *African American female* justices can behave differently than both white males and females. Here, we shall expand the combinations of sociopolitical groupings to assess the impact of diversity on the decisional behavior of Norway's Supreme Court.

For present purposes we shall treat diversity as a group phenomenon, not one describing an individual. Rather than express heterogeneity as reflected in a dichotomous variable, such as male-female, center-periphery, etc., the indicator of choice will tap the diversity of the Norwegian Supreme Court collectively by incorporating a greater number of politically salient group memberships. In this fashion we do not simply rely on "old binaries" in our assessment of heterogeneity's impact upon decisional behavior. If the Supreme Court is to "mirror the polity," then an array of preferences must inform judicial decision making so that a number of "voices" shape policy outcomes.

In this study the *collective behavior of judicial panels* serves as the dependent variable, specifically whether or not a decision was *unanimous or non-unanimous*. Consequently, rather than explain the votes cast by individual justices, the product of group deliberation is the analytical focus. From this perspective

> … attitudes are typically formed in interpersonal environments in which influential positions on issues are in disagreement and liable to change (Johnsen and Friedkin, 2011:28).

Thus, while Court incumbents may bring attitudes reflective of their group memberships to the bench, the ensuing social *interaction* among justices can moderate those initial value preferences. Interaction among judicial colleagues in a diverse attitudinal context might well improve the quality of the judicial process. Presumably, a greater number of "voices" can produce an "average" of the multiplicity of policy preferences in a way that is qualitatively better than that resulting in a homogeneous set of justices. Simply put,

> … diverse systems should perform better because of the effect of averaging across all the factors. That's one reason why diversity's benefits are often inescapable (Page, 2011:182.

To summarize, increased diversification of the Supreme Court may produce two seemingly contradictory impacts on the likelihood on non-unanimous votes. On the one hand, greater heterogeneity could bring greater variations of life experiences into the hurly-burly of the decisional process, which in turn, could increase disagreement, resulting in a greater proportion of non-unanimous decisions. On the other hand (and somewhat counterintuitively), a more diverse Court may reduce policy polarization with the end result being lower levels of dissent within panels.

In the former instance, we presume that representation of a greater number of salient socio-political interests will be incentive for those decision makers to vote differently. For example, with respect to gender diversity, if women bring a "different voice" to the Court, then presumably, they will vote differently than their male colleagues, thereby increasing the probability of non-unanimous votes. Thus,

Hypothesis #1: The greater the socio-political diversity of the Supreme Court, the *greater* the likelihood of a non-unanimous decision.

In the latter case, the counterintuitive hypothesis that heterogeneity can lead to an increased likelihood of unanimity relies heavily upon the social psychology concept of individual interactions that occur within a group context. To be sure, a greater mix of divergent policy preferences should flow from greater diversity. Nevertheless, decisions must be rendered, necessitating negotiation and accommodation, which could encourage justices to find common ground.

As Sunstein has argued, extreme position taking in the judiciary can promote extremism:

> … extreme movements are shown by DDD and RRR panels, in the sense that judges, on such panels, are especially likely to vote in line with ideological stereotypes. (Sunstein, 2009:146-147; see also Keating et al., 2016).

By way of contrast, he finds that politically divided judicial panels (i.e., panels composed of 2 Democrats and 1 Republican - DDR; or 2 Republicans and 1 Democrat appointee - RRD) are not so likely to embrace extreme positions (Sunstein, 2009:24). The counterintuitive bottom line is that increasing diversity can diminish polarization and extremism, an assumption central to our theoretical perspective concerning the impact of diversity at the aggregate level of the judicial panel.

Hypothesis #2: The greater the socio-political diversity of the Supreme Court, the *lower* the likelihood of a non-unanimous decision.

Politically Relevant Covariates

While the primary focus is on the effect of diversity upon panel level behavior, a number of factors should contribute to an explanation of non-unanimous voting on the Norwegian Supreme Court. For example, in the analysis reported upon below, the data base includes only *economic* issues, in which there is a relatively high incidence of dissent (Bentsen, 2015). Given

that only disputes over public and private economic interests are addressed, the magnitude of the economic relevance present in the case at hand might produce disagreement among justices, which might yield greater panel dissent rates. Therefore,

Hypothesis #3: The greater the economic relevance of a case, the greater the likelihood of a non-unanimous decision.

Since a left-right ideological factor might be linked to decisional behavior regarding cases involving public-private economic disputes, the involvement of the Government in the appointment of justices might have tipped the political balance on the Court. For much of the time frame of this study, the Ministry of Justice managed the choice of justices, and quite possibly those selected by socialist and non-socialist governments could prime the outcome in such cases (Grendstad et al., 2015; Grendstad, 2011). In an effort to render the Court more autonomous, a Judicial Appointments Board (seated in Trondheim and therefor geographically separated from Oslo, the nation's center of political gravity) was instituted in 2002 to manage applications and forward a list of the three most qualified applicants. The Ministry of Justice was left with a reduced role in the nomination process. It was expected to select the top ranked nominee from the list proffered by the Judicial Appointments Board and then recommend that nominee to the King in Council. With the attenuated link with of the Government we hypothesize the following:

Hypothesis #4: Panels comprised of a majority of Supreme Court justices chosen *after* the judicial appointment reform went into effect will be less likely to render non-unanimous rulings.

In addition to Court reform, leadership can foster dissent. For instance, during Carsten Smith's tenure as Chief Justice, discussion and debate were encouraged. Of course, with any increased exchange of legal perspectives disagreement may be more likely to emerge, and while Carsten Smith was Chief Justice there was a dramatic uptick in the number of non-unanimous

decisions (Grendstad et al., 2015:70-72; Bentsen, 2015). Therefore, we hypothesize that greater instances of non-unanimity took place during the Smith years.

Hypothesis #5: If a case was adjudicated during Carsten Smith's tenure as chief justice, it will be more likely to produce a non-unanimous decision than a case heard during other terms.

Regarding the public-private division on economic issues, naturally a conflict of this nature could easily arise in Supreme Court deliberations. Furthermore, given the potential division along pro-public/pro-private lines, the public party needs to "… weigh its resourcefulness as a litigant and the principle question of the case against the odds of losing" (Fagernæs, 2007; Skiple et al., 2016). In this context the government as litigant arguing the pro-public position in the case might prevail more often than the private interest, given that the government typically enjoys a significant resource advantage. Thus, we offer the following hypothesis:

Hypothesis #6: If a case was brought to the Supreme Court by a public plaintiff, it will be less likely to produce a non-unanimous decision than a case appealed by a private plaintiff.

Yet another significant reform concerns the Court's power to control its merits docket. The criminal procedure reform in 1995 required a litigant to initiate an appeal in an intermediate court, rather than exercising the previous right to appeal directly to the Supreme Court (Matningsdal 1996; Sunde 2015). As a consequence, an increasing frequency of litigants were effectively exhausted at the lower levels of the appellate process, choosing to pursue only those appeals in which they might reasonably expect success and/or appeals in cases where they had little choice but to soldier on. Furthermore, the Supreme Court could "cherry pick" cases it wished to hear, allowing it to pay greater attention to more difficult disputes to resolve. As one scholar has noted, "… intermediate courts siphon off the routine cases and leave the tougher ones for resolution by the supreme court" (Peterson, 1981:419); and almost by definition, more

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difficult cases produce more disagreement. Consequently, the number of criminal cases brought to the Norwegian Supreme Court declined dramatically, thereby appreciably reducing the Court's overall caseload. And with the decline in its caseload, the likelihood of the Court issuing non-unanimous decisions increased. Indeed, in non-European courts, fewer dissenting opinions are rendered when the caseload is high (Songer et al., 2011; Wahlbeck et al., 1999; Walker et al., 1988). Therefore:

Hypothesis #7: If a case was adjudicated after the reform of the criminal appeals process, it will be more likely to produce a non-unanimous decision than a case heard prior to the reform.

As indicated above, less complicated "easy" cases concerning "settled law" can be heard and resolved by an intermediate court. More difficult or complicated cases can involve quite a range of issues that are likely to increase disagreement, resulting in more dissent (Bentsen, 2014; Lindquist, et.al., 2007). Therefore, in five-member panels hearing cases of greater complexity there will be a greater likelihood of non-unanimous decisions.

Hypothesis #8: The greater the complexity of a case, the greater the likelihood of a non-unanimous decision.

Data and Methodology

The following analysis is based on 814 cases in which there was a public-private economic dispute during the 1963-2012 period (Skiple et al., 2016).[1] In this data base unanimous decisions were handed down 71.8% of the time, while a non-unanimous verdict was rendered in 28.2 % of the cases. If at least one justice on a five-member panel dissented, a (1) was recorded, while a unanimous vote was coded a (0) for the panel. This dichotomous indicator is the dependent variable in the ensuing analysis.

For the primary independent variable of interest, sociopolitical diversity, corresponding to Hypothesis 1 and Hypothesis 2, we adopt an indicator of "fractionalization," a measure employed in a number of sociological, political and economic studies (Annett, 2001; Esteban and Ray, 2008). Naturally, deciding which groups should be included in a diversity score is not always self-evident (Fearon, 2003). We focus on five different salient sociopolitical clusters, beginning with appointing government (socialist or non-socialist), a factor often found to be significantly correlated with Supreme Court votes (Grendstad et al., 2011; Skiple et al., 2016). Clearly, gender must be included, since a great deal of stress has been placed upon recruiting more women to the judiciary. Likewise, region (Oslo- Periphery) has been relevant to secure a representative geographical distribution of justices and has on occasion been found to be pertinent to decisional behavior (Grendstad et al., 2011). A number of scholars have noted a pattern of "government friendliness" among a number of justices (Kjønstad, 1999; Fleischer, 2006). We use whether or not a justice had prior service in the Legislation Department in an effort to tap government friendliness, a measure often linked to Court voting behavior (Grendstad et al., 2015). Finally, whether or not a justice had toiled in academia can serve to affect his or her decision in a number of cases (Grendstad et al., 2015). Furthermore, former academics may be more prone to engage in more discussion with greater levels of disagreement, a phenomenon that may give rise to an increase in the number non-unanimous decisions.

There are 32 combinations of these five factors (i.e., 2^5), for which we calculate the proportion in each combination, which presumably captures a unique social, political and personal experience. For each year the proportions serve as inputs to the fractionalization measure estimated by the formula 1 – the Herfindahl index (Alesina, et al., 2003):

$$\text{FRACT}_j = 1 - \sum_{i=1} s_{ij}^2,$$

> FRACT_j = Fractionalization Index for year j, and
> s_{ij} = Proportion of justices in year j for group i (i = 1...N)

For any finite population, the fractionalization index ranges from 0 to a value approaching 1.0.

Fractionalization scores of 0 would mean that all justices were in only 1 of the 32 combinations

(e.g., socialist appointee, male, Oslo, Legislation Department, non-academic). If there were two

groupings (e.g. male-female with all other traits identical), then diversity would be computed as

.5 ([$1.0 - (.5^2 + .5^2)$]). As the Court is distributed over a greater number of combinations, the

fractionalization index increases at a decreasing rate (Shaffer et al., 2015). During the time

period under investigation, the Supreme Court reaches a maximum of 20 justices. If these 20

justices were distributed over 20 different combinations, the maximum possible diversity score

would be .950.

Hypothesis 3 is offered in order to determine the degree to which dissent is associated

with economic issues, largely because all of the cases involve a private-public economic conflict.

We include two dichotomous indicators: High economic relevance is assigned 1, otherwise it is

coded 0, while medium economic relevance is coded 1, otherwise a 0. At first blush, this

specification may seem perplexing. However, each relevance designation tapped a somewhat

different set of cases. High economic relevance typically involved taxation cases, while medium

economic relevance covered a greater variety of cases. The hypothesis anticipates that both

measures are positively associated with non-unanimous panel decisions.

Hypothesis 4 proposes that non-unanimous decisions are generated, at least in part, by

whether or not a majority of the Court was selected *after* the reform of the appointment process.

Those appointed after reform are coded 1, otherwise a 0.

For hypothesis 5, a 0 is recorded if the case is heard prior to Carsten Smith's term on the Court, and 1 otherwise.

Similarly, for Hypothesis 6, if a case were heard after the reform increasing the Court's control of its merits docket was made, it was coded 1, otherwise 0.

Testing hypothesis 7 required coding a 0 if the appealing litigant was a private party and a 1 if a public party.

Hypothesis 8 is offered in order to determine whether or not case complexity increases the likelihood of non-unanimous decisions being handed down. For present purposes we include two indicators in the ensuing analysis: (1) the total number of words in written decisions and (2) the number of legal references in the legal decisions. Both measures should capture aspects of the extent to which Court opinions are complex.

Descriptive statistics and expected relationships for all variables included in the analysis are reported in Table 1.

[Table 1 Goes Here]

To test the eight hypotheses, a logit analysis is performed, given that the dependent variable is dichotomous (unanimous or non-unanimous). In addition, since the dependent variable is a panel level indicator, individual justice characteristics are not included.[2]

Findings

In Table 2 the logit analysis results are reported for the eight hypothesized relationships. The Wald X^2 of 86.49 is significant at the p = .000 level with a corresponding pseudo R^2 of .168. Most dramatically, the sociopolitical diversity of the Supreme Court offers strong support for Hypothesis 2, namely that greater levels of heterogeneity *reduce* dissent in the form of non-unanimous panel decisions. Consistent with Sunstein's reasoning that increasing diversity can

lead to diminished polarization and extremism, enabling a diverse body may aid justices in

finding common ground *prior* to rendering a decision. Consequently, Hypothesis 1 cannot be

confirmed; before claiming the case is closed, however, we shall return to the matter as to

whether or not heightened diversification can contribute to a greater likelihood of dissent on a

panel. For court diversity and the other independent variables, the conditional marginal effects

are represented in Figure 1.

[Table 2 Goes Here]

[Figure 1 Goes here]

The importance of diversity is not simply statistically significant but exhibits a profound

substantive impact on the probability of a non-unanimous panel vote (See Figure 2). For the

lowest category of fractionalization, the probability of a panel dissent is .621, and drops steadily

to a low of .113 for the highest level of diversity, a dramatic decline over the range of

fractionalization of -.508. This finding offers very strong support for Sunstein's proposition that

greater diversity in a deliberative body can diminish extremism and promote negotiation and

compromise.[3] Without question the logit results present a strong, negative *direct* effect of

fractionalization on panel dissent. In the ensuing section of the paper, a more nuanced role of

diversity will be offered.

[Figure 2 Goes Here]

With regards to the salience of economic conflict, Medium Economic Relevance is

clearly linked to dissent at the p = .000 level (Hypothesis 3), while High Economic Relevance

also is positively associated with non-unanimous decisions at the (p < .05 level (Hypothesis 3)).

Quite naturally, in adjudicating what are often controversial public-private economic conflicts it

seems quite likely that greater levels of economic relevance will produce an increased incidence

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of non-unanimous decisions, at least on non-tax issues. In those cases, if a decision is not characterized by medium economic relevance, the probability of dissent is .206, increasing to .493, a difference of .287, when the case is characterized by medium economic relevance, a relationship represented in Figure 3. By way of comparison, when high economic relevance is absent, the probability of a non-unanimous decision is .221, while the presence of high economic relevance increases the odds to .319, an increase of only .098 (See Figure 4).

[Figure 3 Goes Here]

[Figure 4 Goes Here]

The only other independent variable exhibiting a statistically significant relationship with dissent is one measure of case complexity, Complex Words (Hypothesis 8). Allowing this variable to range from its lowest to highest observed values, the probability of a non-unanimous decision moves for .059 to .983, an increase of .924 (See Figure 5). As the number of politically salient issues grows, rendering a case decidedly more complicated, the likelihood of a non-unanimous vote shoots up dramatically. Although other factors exert a statistically significant effect on panel dissent, complexity indicator of case complexity appears to display far greater theoretical significance than any other independent variable included in the analysis.

[Figure 5 Goes Here]

This finding makes good theoretical sense, since a case that appears straightforward, and thus "easy," should encourage unanimous decision-making. For those cases with multiple contested issues, on the other hand, justices may find reasons for significant levels of disagreement, thereby producing a striking increase in the incidence of non-unanimous votes. Particularly curious is the inconsequential impact of Complex Legal References, which is a count of the number of legal facts reflected in written opinions. Although the legal model argues that

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justices weigh the legal facts of a case in order to reach a conclusion, the number of legal issues cited has no bearing on dissent. Alternatively, the number of words may capture a range of issues of a more general policy, rather than "legal" nature, thereby intimating that an attitudinal model interpretation may be a more cogent representation of the process observed.

The results of the logit analysis fail to confirm Hypotheses 4 through 7. Reform of the appointment process has not elevated more or less disagreeable justices to the Supreme Court (Hypothesis 4), suggesting that the selection of justices was no more or less ideological or government friendly than those recruited under the old appointment system.

Indicating a certain amenability to dissent among his colleagues, Carsten Smith

> argued that a good dissent often in a brilliant way helps us better understand the extent of the decisions and also makes important contributions to ongoing debates about essential legal issues (Smith 1975, in Bentsen, 2015:1).

And an increase in dissent rates has been observed during Smith's tenure as Chief Justice. The logit results, however, do not confirm that the likelihood of dissent was appreciable greater during his chief justiceship (Hypothesis 5)

Although cases brought to the Court by public plaintiffs were expected to result in greater unanimity, in the preceding analysis, no empirical support was produced for this hypothesis (Hypothesis 6). A similar failure is observed for Hypothesis 7. Routine criminal cases were decided by intermediate courts, thereby allowing the justices of the High Court to review more vexing cases, there as no relationship found between the removal of routine criminal appeals to the lower appellate courts and the probability of panel dissent (Hypothesis 7).

A Funny Thing Happened on the Way to a Conclusion

Ordinarily, one might stop here and simply conclude that the sociopolitical diversity of the Norwegian Supreme Court dramatically lowers dissent on five-member panels adjudicating

cases with a public-private conflict on economic issues, but a caveat is in order. The model

specification might be improved to provide a more nuanced understanding of the role of

diversity. For instance, the preceding analysis tested for *direct* effects, which can be illustrated as

follows:
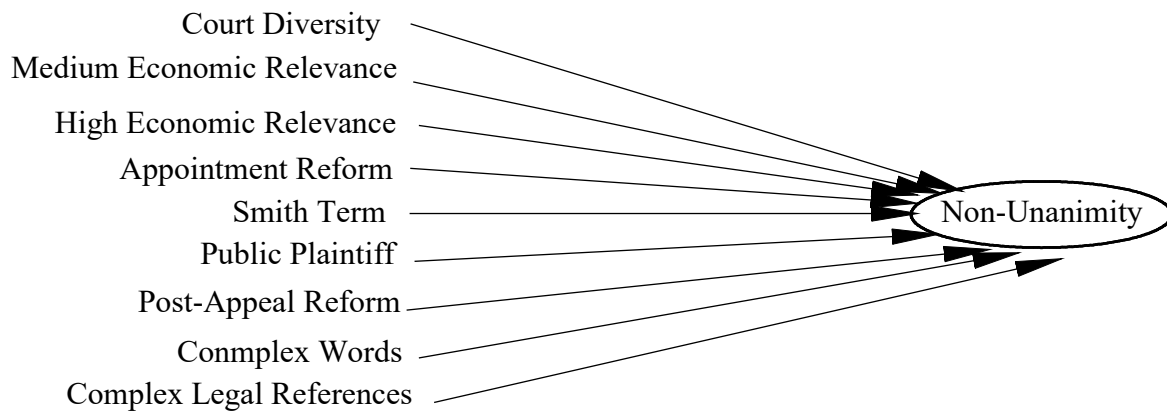
Under this specification, the logit subroutine estimates coefficients measuring the impact of one

individual variable while controlling the remaining independent variables. Taking the analysis

this far is a constructive and informative first step. Nevertheless, reporting only direct effects

may oversimplify our interpretation and fail to elucidate a more complex set of relationships.

As an alternative model specification including primarily those independent variables

exhibiting a statistically significant relationship with non-unanimity, we offer the following

simple path model:

Proposed Path Model
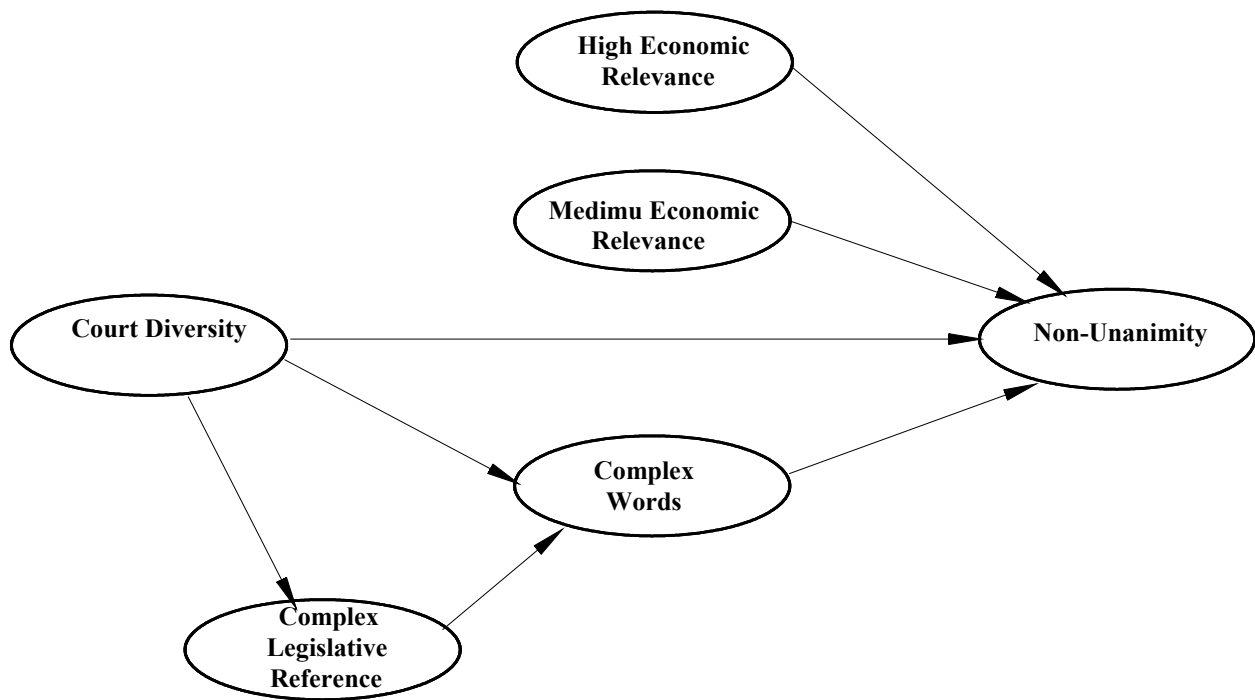
In addition to the direct effects on panel dissents, we hypothesize that sociopolitical diversity exerts an effect through case complexity. Logically, Court diversity could result in a greater number of issues and legal points being reflected in opinions handed down. On the basis of gender diversity, Haire and Moyer report that

> panels made up of two nontraditional judges are estimated to produce majority opinions that address about 10 percent more points of law (11.1) than opinions from all white male panels (Haire and Moyer, 2015).

Moreover, the impact of diversity appears to apply to the *quality* of Court decisions.

> When a group is composed of like-minded individuals, members tend to focus on shared information and reach consensus on a position that potentially fails to identify errors (Sunstein 2003, in Haire and Moyer, 2015).

Essentially, we are proposing a model in which sociopolitical diversity exerts a direct effect on the case complexity measures, which directly impact the non-unanimity of panel decisions.

If all the model variables were interval data, a path analysis estimated with regression equations would yield an appropriate set of outcomes. However, some independent variables could be treated as interval level measures, whereas others are dichotomous. Therefore, an application of generalized structural equation modeling (Hox and Bechgar, 1998), is best suited to estimate the model with both direct and indirect effects.[4]

In this model specification, diversity is treated as the exogenous variable, and is antecedent to complexity measures and panel dissent. The heterogeneity of the Supreme Court is in place on day one of a new session, complex words and complex legal references emerge prior to the vote and panel decision grounded in the merits. Where this specification departs from the logit results reported in Table 2 is in the expectation that a diversity of justices (a babble of legal voices) leads to increased complexity, which could prompt disagreement and an increased incidence of non-unanimous decisions being handed down.

The generalized structural equation estimation is displayed in Figure 6. The positive direct effects of complex words and economic relevance on non-unanimity continue to be positive, and the direct effect of diversity remains negative. Most importantly this path model reveals a *positive* effect of diversity upon non-unanimity, essentially owing to the fact that it is mediated by case complexity, which potentially reflects multiple concerns that prompt a non-unanimous decision. The initial logit analysis in Table 2 can offer no support for such an interpretation, while the path model reveals this more complex role of diversity in panel behavior.

 So, how does a case take on complexity? Of course, litigants can appeal a case on a variety of grounds, but this is not just about the parties with skin in the game. Here the attitudinal model may provide a useful insight. A collection of justices reflecting considerable diversity will

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embrace a number of policy preferences, and should actually perceive greater complexity in the cases brought before them (see, for example, McGuire and Palmer 1995, 1996 on the U.S. Supreme Court justices' ability to increase the number issues of a case). The discovery of more policy themes would be incentive to write lengthy opinions. In summary, diversity has a negative *direct effect* on panel dissent, but it also generates the *political basis for finding greater complexity*, and that leads to an increased probability of a non-unanimous decision. The takeaway point is that with *positive* and *negative* effects, both Hypotheses 1 and 2 are confirmed.[5]

[Figure 6 Goes Here]

Conclusion

With respect to a direct impact upon panel dissent, case complexity, as tapped by the complex words indicator, is shown to have the most powerful effect. Remarkably, the likelihood of a non-unanimous decision is only .059 at the lowest value of complex words, and skyrockets to.983 when complexity is at its maximum value, a difference of .924. We suggest that dissent rises dramatically when the increasing number of issues and prolonged deliberation, reflected in the increasing length of written opinions, conspire to render non-unanimous decisions.

Given that the universe of cases analyzed in this study address economic issues with a public versus private conflict, medium economic relevance and high economic relevance dichotomous measures were included in the logit models. The latter indicator is sensitive to taxation policy, while the former includes a more varied set of economic concerns. Both measures were significantly and positively linked to the probability of a non-unanimous panel

decision, although the impact of medium economic relevance was, by far, more substantively meaningful.

Perhaps the most fascinating set of results emerge for court diversity. Over the last several decades the Norwegian Supreme Court has become much more heterogeneous, as groups not previously represented on the Bench, such as women, experienced a growing presence among the collection of justices. We created a fractionalization measure for the entire Court, rather than for each panel on the grounds that all twenty justices set the sociopolitical tone of the Court, not a short-lived panel. Given that the five-member panels are recreated on a weekly basis we assume that their impact may be ephemeral. Over the range of cases, the collective diversity of the Supreme Court may be most salient.

In addition, diversity is not simply a function of "old binaries," such as male-female or center-periphery, as operationalized in much of the extant literature. While research findings of this nature are vitally important, there is another way of modeling the heterogeneity of a decision-making body. Rather than create individual level dichotomous variables, such as gender, fractionalization is computed for each session in a fashion that is based upon 32 distinct combinations of five sociopolitical factors.

Employing conventional strategy, a logit model was estimated producing an initial result that offers strong support of Hypothesis 2, namely that increased diversity reduces the likelihood of a non-unanimous decision. For the lowest level of diversity, the probability of dissent is .621 and declines steadily to .113 when fractionalization is at its peak. The negative relationship is highly consistent with Sunstein's theory that diversity is the basis of diminished polarization and extremism. Apparently, high levels of Court diversification promote a need to work toward a compromised negotiation on multiple policy viewpoints.

As important as this finding is, it may only offer a glimpse of the tip of the iceberg. In an effort to go beyond merely estimating *direct* effects, a generalized structural equation model is estimated to delineate multiple paths of the impact of sociopolitical diversity. As captured in Figure 6, fractionalization continues to display a strong, negative effect upon panel dissent. However, diversity prompts greater case complexity, which in turn, increases the likelihood of a non-unanimous decision, as indicated above. Therefore, Supreme Court diversity exhibits a strong *positive*, *indirect effect* upon panel dissent. The more nuanced path model illustrates that sociopolitical diversity exerts both *positive* and *negative* influences on the probability of a non-unanimous decision, a seemingly counterintuitive outcome. Future research may explore much more fully increasingly intricate and nuanced models of non-unanimity, ones that go well beyond testing for statistically significant direct effects.

Notes

[1] For the ensuing analyses, some missing data lowers the total N.

[2] Of course, a much greater number of independent variables could be in the model, since we have a substantial data base. However, we prefer to include independent variables which appear to have a theoretical foundation. In addition, a barefoot empiricism approach including a raft of variables, does not improve upon the results reported.

[3] In the logit model the fractionalization of the entire Supreme Court, rather than for each panel, is utilized as the indicator of diversity, since we contend that the nature of Court norms is pervasive. Most importantly, five-justice panels are usually reorganized every week. This means that one five-justice panel hears one, maybe two, and in rare occasions, three cases per week, depending on the size and complexity of the case. In any event, using panel diversity yields the same basic results, except that appeal reform was significantly, if not strongly, related to dissent.

[4] A simpler alternative would be an application of binary mediation, see Iacobucci, 2008, 2012; and Baron, et.al., 1986. Under binary mediation, the estimated coefficients can be standardized (Jasti, et.al., 2008). Application of binary mediation yields a result consistent with the one reported here.

[5] Note that in Figure 6, the total effect is .024. Running a simple logit with non-unanimity as the dependent variable and fractionalization as the lone independent variable, results in a non-significant coefficient. If this were as far as the analysis went, one would infer that sociopolitical diversity is irrelevant to panel level decisional behavior!

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Table 1. Variables in Logit Equation

	Mean	Std, Dev.	Min	Max	Expected Relationship
Dependent Variable					
Non-Unanimity	.280	.449	0	1	--
Independent Variables					
Court Diversity	.840	.074	.656	.924	+/-
Medium Economic Relevance	.225	.418	0	39	+
High Economic Relevance	.391	.488	0	1	+
Reform Majority	.072	.259	0	1	-
Smith Term	.187	.390	0	1	+
Public Plaintiff	.378	.485	0	1	-
Post-Appeal Reform	.400	.490	0	1	+
Complexity (Complex Words)	3469.673	1926.517	576	12404	+
Complexity (Legal References)	6.160	4.409	0	39	+

Table 2
Logit Regression Model of Non-Unanimous Decisions
1963-2012

Independent Variable	Coefficient	(Hypothesized direction)
Court Diversity	-6.381****	(+)
Medium Economic Relevance	1.323****	(+)
High Economic Relevance	.500**	(+)
Reform Majority	-.095	(−)
Smith Term	.201	(+)
Public Plaintiff	-.101	(−)
Post-Appeal Reform	-.355	(+)
Complex Words	.001****	(+)
Complex Legislative Reference	.007	(+)
Intercept	1.942	
Wald Chi2	86.49****	

Pseudo R^2 = .168; R = .410
N=769

* p < .10; ** p < .05; *** p < .01; **** P = .000

Figure 1: Conditional Marginal Effects with 95% CIs

Figure 2: Probability of Non-Unanimity by Court Diversity
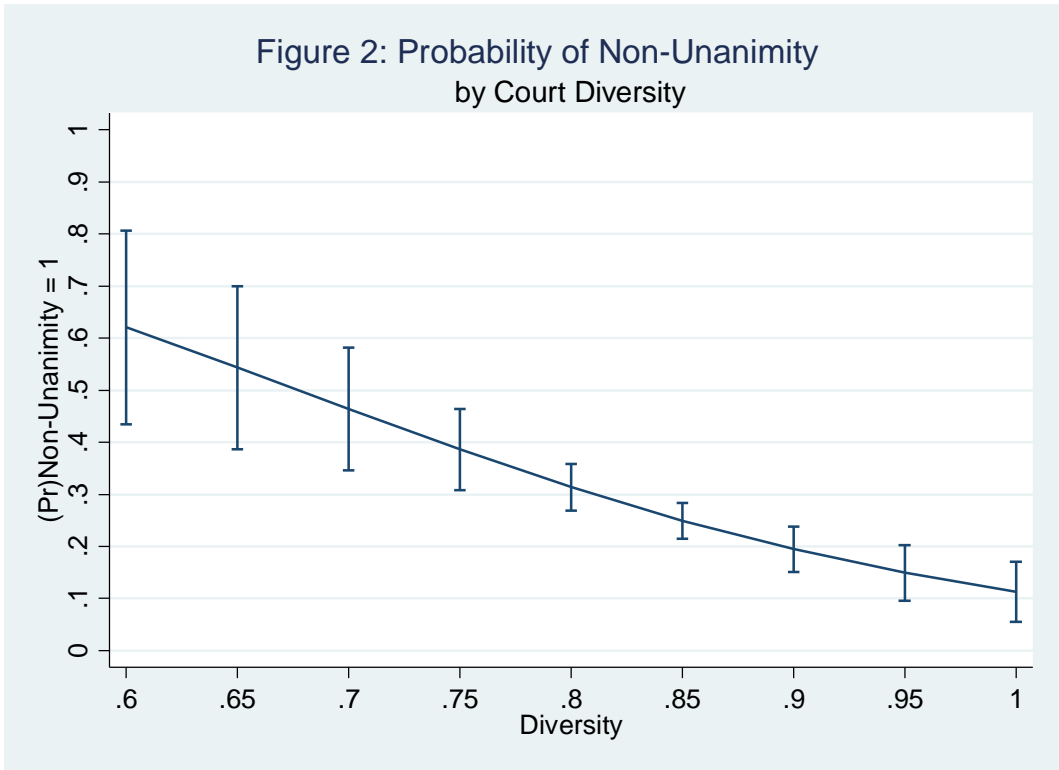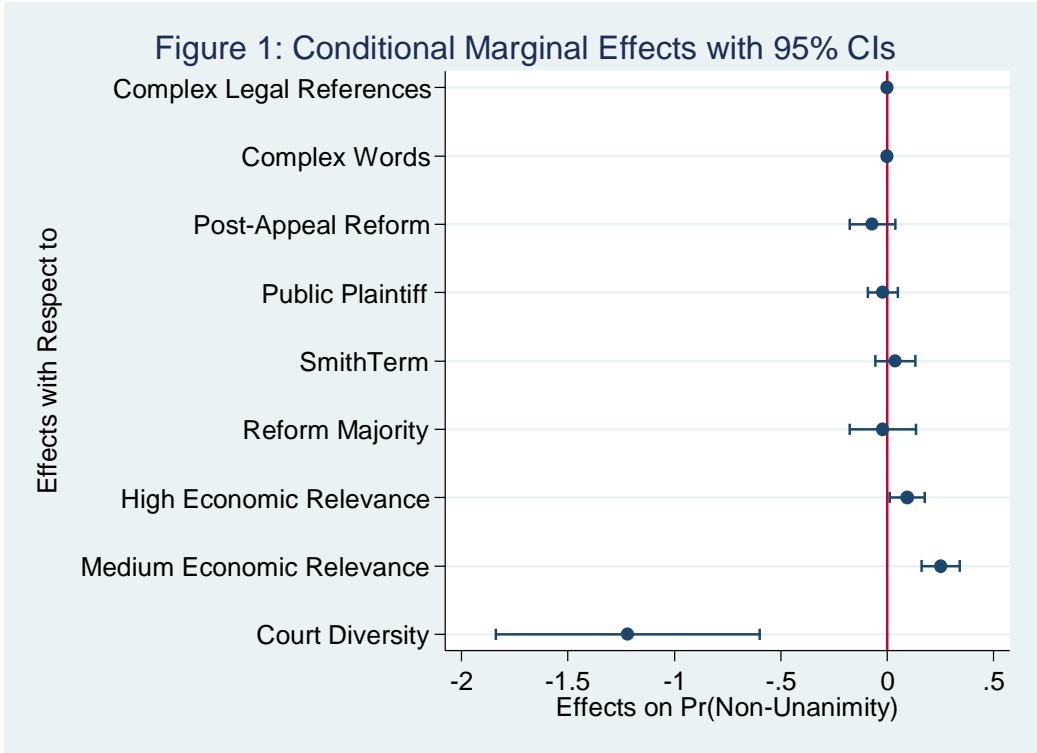
Figure 3: Probability of Non-Unanimity
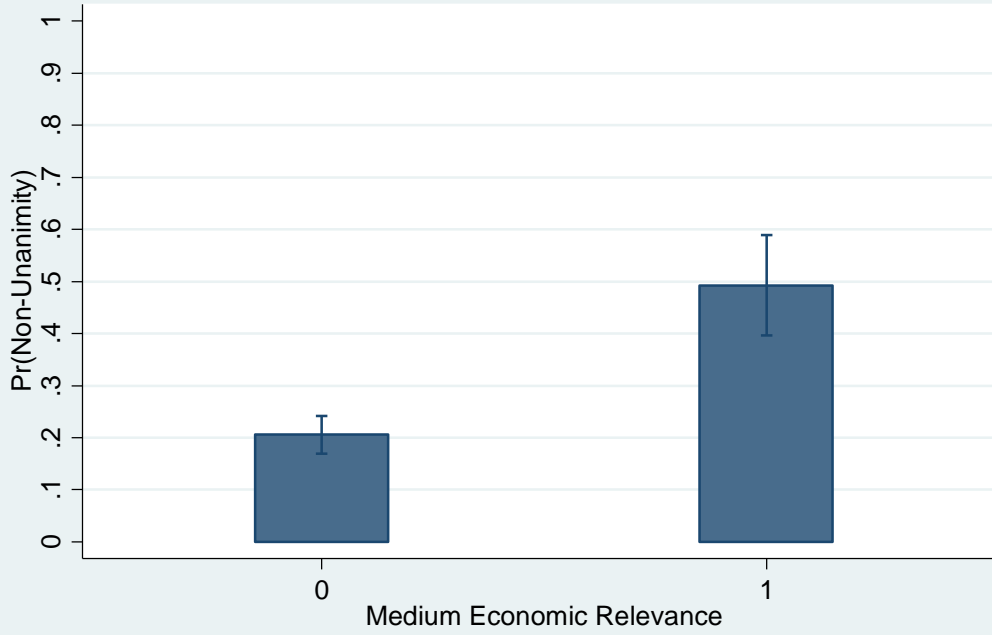by Medium Economic Relevance

Figure 4: Probability of Non-Unanimity
by High Economic Relevance

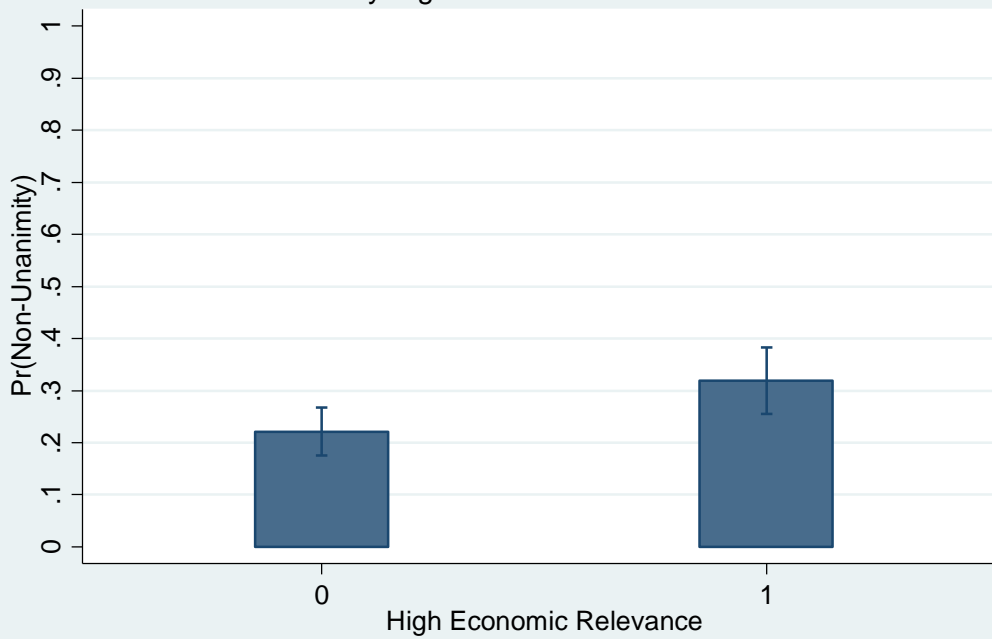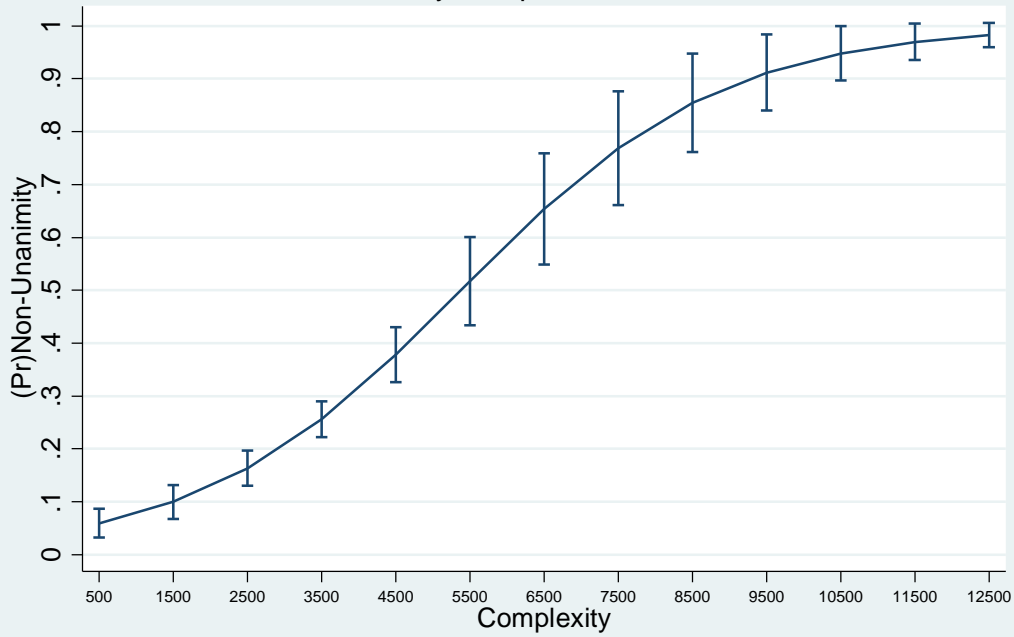Figure 5: Probability of Non-Unanimity
by Complex Words

Figure 6
Non-Unanimity Path Model

Direct Effect = -.463
Indirect Effect = .439
Total Effects = -.024