Institutional Rules and Decision Making on the U.S. Supreme Court

A THESIS
SUBMITTED TO THE FACULTY OF THE GRADUATE SCHOOL
OF THE UNIVERSITY OF MINNESOTA
BY

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IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
Doctor Of Philosophy

August, 2009

ABSTRACT

The U.S. Supreme Court, an unelected body, wields authority over issues at the heart of our democratic system (e.g., voting rights, abortion, etc.). This project examines how the Court's rules and norms influence the choices justices make. Using pre-existing datasets and previously unanalyzed archival data from the justices' personal papers, I investigate the influence of the decision-making process on the positions justices take, both at conference and on the final merits, and how justices decide which cases to accept for review. Given justices' unelected status, life tenure, and penchant for secrecy, it is important that we improve our understanding of judicial decision-making. My dissertation seeks to further our understanding of the interplay between institutional rules and decision-making on the Supreme Court.

Acknowledgements

Contents

List of Tables

List of Figures

Chapter 1

Introduction

The U.S. Supreme Court, like other political institutions, has rules, procedures, and norms that govern how the Court conducts its business. These institutional rules produce a particular decision-making process in which Supreme Court justices translate their policy preferences into votes and other decisions. Building on previous work, I investigate whether the Court's internal decision-making process shapes justices' positions and ultimately their final decisions on the merits in Chapters 2 and 3.

Chapter 2 contains the first systematic examination of how justices' early positions in a case compare to how they vote on the merits of a case for the first time at conference. I gain leverage on this by using the personal papers of Justices Harry A. Blackmun and Lewis F. Powell. The papers contain a measure of their private, pre-oral argument preferences, which I then compare to their conference votes. These data allow me to gain new insight into the intervening institutional factor, oral arguments, by isolating this stage in the decision-making process in a way not previously possible. More specifically, I test whether the information gained from these proceedings influences the positions justices take and the likelihood that justices' positions remain consistent from before oral arguments to after.

Chapter 3 further explores whether and how the process the Supreme Court uses to make decisions influences the positions justices take and the stability of their positions while a case is under review. It brings the findings of Chapter 2 to bear on the voting fluidity literature, which examines the conditions under which Supreme Court justices switch the disposition of their votes on the merits. More specifically, I investigate

2

whether there is a relationship between position switching, which occurs when a justice changes her position from before oral arguments to after, and vote switching, which occurs when a justice alters her vote from conference to the final vote on the merits. The analysis thus improves our understanding of these two consecutive stages of the Court's decision-making process and their impact on the Court's final decisions.

In addition to the Court's internal decision-making process, the Supreme Court is constitutionally embedded in a system of separated and shared powers. Scholars argue that this separation of powers system functions as an external institutional structure which also influences the decisions justices make, particularly given the Court's reliance on external actors to enforce its decisions as established by the Constitution. In the final chapter, I examine whether the Court varies the distribution of the cases it accepts for review due to consideration of how external actors will react to the Court's likely decisions. In particular, I test whether the external constraint imposed by the preferences of Congress and the president as well as the ideological homogeneity of the justices influence the allotment of statutory versus constitutional cases and cases originating in state versus federal courts that the Court accepts for review each term.

Chapter 2

The Positions Justices Take

Introduction

There is a long-standing body of work in political science that studies the specific processes of how actors make decisions. For example, scholars have examined how the structure of debate in Congress (e.g., germaneness rules, time limits, etc.), particularly in the House, influences how members of Congress think about pending legislation. More generally, at every stage of a decision-making process, political actors must choose a course of action they deem most appropriate given their preferences. The interaction between institutional decision-making processes and actors' preferences is crucial to understanding the U.S. political system more generally. However, to fully understand this interaction, actors' initial preferences in a given situation are needed, but scholars often do not have such data.

The sub-field of judicial politics is no exception. Judicial scholars continue to investigate the link between justices' private, sincere preferences and their decisions. While scholars have gained some traction on this issue by having successfully demonstrated the existence of internal bargaining and voting fluidity (e.g., Maltzman et al. 2000; Maltzman and Wahlbeck 1996b), the difficulty of capturing sincere preferences has prohibited a full understanding of how justices' positions evolve during the decision-making process.[1]   However, new data in the form of justices' positions recorded before the

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[1] The term 'voting fluidity' is used in the Supreme Court literature to describe when a justices' vote changes from conference to the final vote on the merits (e.g., from affirm to reverse).

decision-making process on the merits begins allow me to test more directly whether the institutional decision-making process influences the positions justices take.

To illustrate how this works, consider *U.S. v. Martinez-Fuerte* (1976),[2] in which the Court was asked to decide whether routine stops at fixed checkpoints near the Mexican border violated the Fourth Amendment's protection from unreasonable searches and seizures. Prior to oral arguments on this consolidated case, Justice Blackmun stated in his private notes that he "would conclude that both cases should be affirmed" (meaning that he wanted to uphold the lower court's decision).[3] He goes on to say his reasoning was that he "would affirm the CA 9 case in light of what has heretofore been decided and on the ground that the general area warrant adds nothing." This memo, dated April 23, 1976, was written three days before oral arguments. Ultimately, Justice Blackmun voted to reverse at conference on *Martinez-Fuerte*, thus diverging from his pre-oral argument position.

The fact that Justice Blackmun changed his position in *Fuerte* suggests the institutionalized process of decision-making on the Court can affect justices' positions. Knowing how Blackmun intended to vote prior to oral arguments allows me to compare this tentative position with his post-argument vote on the merits at conference, thereby examining the potential influence of the decision-making process on justices' actions. To test whether his behavior in *Martinez-Fuerte* translates to cases more generally, I investigate the degree to which two justices' positions (Justices Blackmun and Powell) remain consistent from before oral arguments to their votes at conference.

The paper proceeds as follows. I begin with a brief discussion about the relationship between preferences and decision-making processes generally. Second, I describe the pre-oral argument notes I use and the preferences they contain. Next, I summarize past work on voting fluidity to put into context how to understand position fluidity at another stage of the decision-making process. Subsequently, I briefly review the theoretical reasons why the intervening factor, oral arguments, may influence justices' positions. I then lay out the hypotheses I test. In the following section, I summarize the

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[2] 428 U.S. 543.

[3] Pre-oral argument notes of Justice Harry A. Blackmun. *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976). Papers available from the Library of Congress. The private nature of these statements suggests that they are closer to sincere preferences than has been previously available. I address this more fully later in the paper.

data I use to test the hypotheses and then detail the results of the analysis. I conclude with a discussion of the how the findings relate to the work on judicial decision-making more generally, as well as what the results suggest about the role of the Court's most public proceedings, which occur between the pre-oral argument memos and conference.

Political Preferences and Decision-Making

Preferences lie at the core of work on decision-making. A significant portion of political science research involves, in some form or other, the relationship between actors' preferences and how these preferences relate to the decisions they make. Scholars generally concur that a preference concerns the "relation imposed by an individual on two alternatives placing one ahead of the other in terms of desirability" (Riker 1982, 296). While it is frequently assumed that actors are goal oriented (see e.g., Morrow 1994; Bianco 2001), identifying actors' goals can be very difficult. Often political scientists "deduce actors' goals from observing their prior behavior or by experimentation. We then assume actors will continue to pursue the goals we have deduced they pursued in the past" (Morrow 1994, 17). In other words, with the exception of experiments and panel studies, the general practice is to make assumptions about actors' preferences based on past behavior or theoretical expectations about behavior, in less formal work.

A disadvantage of this practice is that it relies on revealed, not sincere, preferences. Sincere preferences are an actor's *true* preferences over outcomes, whereas revealed preferences consist of the information inferred about an actor's preferences based on her actions (e.g., Szmer and Songer 2005). The problem lies in the fact that there are conditions under which sincere preferences may not be equivalent to revealed preferences, i.e., when actors behave strategically. "If [actors] are non-strategic...it follows that they always behave sincerely, i.e., vote for their most preferred policy...On the other hand, a[n] [actor] who behaves strategically *may* vote for a policy that is not her most preferred" (Martin 1997, 6-7). As such, when there is a possibility of strategic behavior, assuming revealed preferences are identical to sincere preferences is inappropriate.

Past work provides substantial support for the notion that institutional incentives or strategic reasons may prompt actors not to act solely according to their sincere preferences (e.g., Aldrich 1995; Bianco 2001; Downs 1957; Maltzman et al. 2000). For

example, scholars have shown that in responding to the structure of the agenda and voting procedures, members of Congress may engage in sophisticated or strategic voting in an effort to achieve a more desirable outcome than would have resulted had they voted sincerely (e.g., Riker 1982; Strom 1990). Furthermore, the median voter theorem demonstrates that candidates have an incentive to position themselves at the location of the median voter in a two-party system even if their true preferences lie elsewhere (Downs 1957). Similarly, during the opinion drafting stage in the U.S. Supreme Court, justices sometimes make accommodations in order to persuade colleagues and sometimes change their minds about which opinion they will join (Maltzman et al. 2000), indicating that their observed actions may not fully correspond to their sincere preferences. Again these examples illustrate that inferring sincere preferences from actors' prior behavior may be problematic. However, scholars have generally had to rely on assumptions and deductions about actors' revealed preferences because there was no feasible way to build a dataset with relevant actors' sincere preferences.

Relying on revealed preferences, such as statements made during floor debate in Congress, instead of on sincere preferences, may also obscure the influence of the decision-making process since the influence may have taken place prior to the revelation of a preference. Theoretically, comparing actors' sincere preferences to the decisions they make would test the influence of the decision-making process. However, given that elected officials and other elites are unlikely to participate in experiments or panel studies that scholars often use to assess the sincere preferences of the mass public (e.g., Nelson et al. 1997; Goren 2005), these two methods are less applicable when studying the preferences of elites. One solution is to utilize archival data to gain insight into an actors' thoughts. I do so here. Specifically, new data found in Supreme Court justices' personal papers contain information about their positions at the beginning of the merits stage of the decision-making process. Because these preferences are privately recorded prior to oral arguments, which is the first time the Court as a whole engages in thorough analysis of the merits of a case, they provide an unparalleled opportunity to examine the role the decision-making process plays in the positions justices take during the stage surrounding these proceedings.

Pre-Oral Argument Preferences

The pre-oral argument notes of Justices Blackmun and Powell are closer to the gold standard of measuring sincere preferences than has previously been possible, allowing me to track their positions from before the decision-making process begins and compare them to their subsequent actions. More specifically, in a sample of cases, Blackmun and Powell dictated or wrote notes prior to oral arguments that summarized relevant information about a case as well as their tentative preferences for how the cases should be decided.[4] For example, after discussing the case, the briefs, etc. for several pages, Justice Blackmun would often conclude with a statement like, "I thus would affirm," which conveyed his preference at the time of the note (see Figure 2.1).[5] Greenhouse (2005) describes the pre-argument memos as "offering his unvarnished personal reaction to the debates swirling around him," making them "among the most valuable documents in the Blackmun case files" (31).

Not all Blackmun's positions were concrete. Sometimes he expressed the tentativeness of his pre-argument position as is evidenced by statements like, "As of now, I am inclined to reverse, but I may be persuaded otherwise."[6] It is also clear from his notes that Blackmun thought oral arguments could be persuasive. For example, at the end of one pre-argument memo he says, "Thus I am inclined, at the moment at least, to reverse and remand for further proceedings. It may well be that I shall be contrarily persuaded by the oral argument."[7] It is telling that he explicitly raises the possibility of being persuaded by oral arguments. Similarly, Justice Powell also believed these proceedings could contain vital information, as is evidenced by the fact that he frequently noted his opinion was "subject to the argument and conference discussion."[8]

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[4] Justice Blackmun's pre-oral argument notes cover more cases than do Justice Powell's notes. I elaborate on the differences between Blackmun and Powell's pre-oral argument notes in the data and methods section below. As a result of these differences, Justice Blackmun's notes provide the primary basis for the analysis conducted here while Powell's notes serve as a check on the findings from the Blackmun data.

[5] Pre-oral argument notes of Justice Harry A. Blackmun. *Juidice v. Vail*, 430 U.S. 327 (1977). Papers available from the Library of Congress.

[6] Pre-oral argument notes of Justice Harry A. Blackmun. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). Papers available from the Library of Congress.

[7] Pre-oral argument notes of Justice Harry A. Blackmun. *Port of Portland v. United States*, 408 U.S. 811 (1972). Papers available from the Library of Congress.

[8] Pre-oral argument notes of Justice Lewis F. Powell. *Garner v. United States*, 424 U.S. 648 (1976). Papers available from the Powell archives at Washington and Lee University.

Figure 2.1: Pre-Oral Argument Memo Example
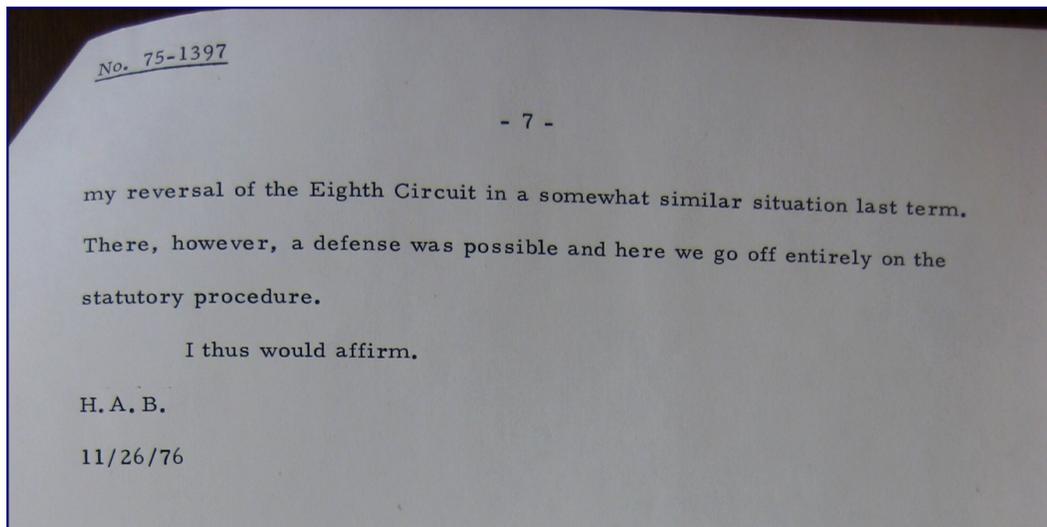
These notes were part of the justices' personal case files. They were not circulated outside of chambers and references to clerks were in the third-person, suggesting that the memos were "notes to self."[9]   The private nature of these memos means justices would not need to be concerned about others' reactions or to be guarded in their statements. This makes them ideal candidates for measuring pre-oral argument preferences (Knight and Epstein 1996a; Johnson 2004). Importantly, I do not claim these are necessarily truly sincere preferences, despite their private nature. However, they are certainly closer to sincere preferences than the types of data analyzed in the past, such as conference votes.[10]

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[9] For example, he would often describe a point his clerk made in the bench memo with candor such as, "What Ben is concerned about, however, is what he regards as false representations on the part of the prosecutor. My own reaction is just the opposite." (Pre-oral argument notes of Justice Harry A. Blackmun. *Donnelly v. Dechristoforo*, 416 U.S. 637 (1974). Papers available from the Library of Congress.)

[10] This measure is problematic, as conference votes take place in front of their colleagues, come after oral arguments, and determine the initial majority coalition, which in turn contributes to the assigning of a majority opinion author. As a result, there are incentives not to vote sincerely at conference, making it impossible to discern the true nature of justices' preferences from their conference votes. The pre-oral argument memos do not share these problems. Furthermore, the memos are dated, which provides documentation that they were in fact pre-oral argument thoughts.

These data allow me to test whether the process the Court uses to decide cases influences justices' positions. If a justice does not vote how he planned to vote according to his pre-argument preference, this could be because he has changed his preference or because he has changed his mind about how best to pursue his preference. While evidence has suggested that justices' preferences change over time (Epstein et al. 1998), these two scenarios are observationally equivalent since I cannot determine with certainty whether the preferences expressed in the pre-oral argument memos are truly sincere. However, the data do permit me to make several advances in our understanding of Supreme Court decision-making, as well as more generally how interactions with others may alter how political actors make decisions. Indeed, my analysis extends the work on voting fluidity (e.g., Maltzman and Wahlbeck 1996b; Dorff and Brenner 1992), which I address in the next section, to an earlier stage of the decision-making process. Second, I test the movement of political actors' positions as they work their way through the Court's decision-making process. Finally, I build on previous work by reexamining the informational role of oral arguments, the primary intervening factor that justices encounter between when they recorded their pre-argument preferences and when they voted at conference in a new and more direct way.[11]   Specifically, using data of this nature allows me to isolate the effects of the intervening factor, oral arguments, because these proceedings, and the ensuing conference vote, take place prior to other intra-court influences (e.g., the bargaining and accommodation which takes place during the opinion writing process (Maltzman et al. 2000)).

Vote Switching and Judicial Decision-Making

Understanding preferences is only half the story. It is also important to understand what may drive actors to change their positions during a decision-making process. On the Court it is clear the institutionalized process used affects how cases are ultimately decided on the merits. For example, Supreme Court decisions on the merits are governed by majority rule, and this majority rule system has consequences documented throughout the literature (e.g., Epstein and Knight 1998; Maltzman et al. 2000). That

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[11]   Conference votes are used since they are the first recorded measure of justices' positions since the pre-oral argument memos. Conference is followed by the opinion drafting and circulation stage which culminates when all justices have signed on to one of the written opinions.

is, the fact that it takes five of the nine justices to set precedent in a given case has an impact on the way decisions are reached (e.g., Epstein and Knight 1998). Furthermore, the votes cast at conference following oral arguments establish a tentative majority coalition which determines who assigns the majority opinion author (e.g., Maltzman and Wahlbeck 1996a). The majority opinion author is particularly important because she articulates the Court's position in the case and outlines the specific precedent being established. As a result, the majority opinion author must work to maintain a majority coalition throughout the opinion drafting process, which may require bargaining with other justices and accommodating their preferences (Maltzman et al. 2000).

Scholars have documented the fact that justices sometimes change their votes between conference and the final vote on the merits (e.g., Maltzman and Wahlbeck 1996b; Maltzman et al. 2000; Brenner 1989; Dorff and Brenner 1992).[12]   While justices are fairly consistent in how they vote throughout the decision-making process, they exhibited vote switching in an average of 7.5 percent of cases during the Burger Court, representing a significant minority of the Court's docket (Maltzman and Wahlbeck 1996b). Evidence suggests that vote switching is fueled by strategic policy considerations like the desire to influence precedent set by the Court (Maltzman and Wahlbeck 1996b; Maltzman et al. 2000). As a result, a justice in the minority at conference is more likely to change her vote than someone already a part of the majority (Maltzman and Wahlbeck 1996b).

Maltzman et al. (2000) show that justices often change their votes as a result of attempts at bargaining with one another through internal memos and opinion drafts. This negotiation process takes many forms, e.g., suggestions about revising a draft, the preemptive accommodation of others' preferences by the opinion author, ultimatums, etc., but takes place via interaction between and among the justices during the opinion drafting stage. Bargaining, accommodation, and fluidity more generally are based on both justice-specific and case-specific factors like the ideological distribution of the justices and the coalitions, the complexity of the case, and the size of the initial coalition (Maltzman and Wahlbeck 1996b; Maltzman et al. 2000).

While past work has demonstrated the conditions under which justices change their votes during the opinion writing stage, the most important explanatory factors of fluidity

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[12] This type of vote switching is possible because votes cast at conference are non-binding.

during this period (e.g., coalition size, ideological distribution of the justices, etc.) are not directly applicable to the stage surrounding oral arguments. However, given that previous work has shown justices strategically respond to each others' preferences within the institutional structure in which they interact, I expect interaction with colleagues and other actors during the oral arguments stage would also influence the positions justices take. During this time, between when justices take pre-argument positions, up through when they vote at conference, oral arguments are the only intermediate step in the decision-making process. As a result, I focus on examining the role these proceedings may play in explaining the type of position switching described in *Martinez-Fuerte* above. More specifically, by comparing justices' pre-oral argument preferences to their votes at conference, I am able to investigate the intervening role of oral arguments, the Court's institutionalized form of public deliberation, in a new and more direct way than was previously possible.

While legal scholars disagree about the role oral arguments play, there are several reasons to suggest these proceedings can be influential in the positions justices take.[13]

Some have argued for several decades that these proceedings provide important information to justices (e.g., Wasby et al. 1976), and this idea has been supported by more recent work. Indeed, these proceedings provide a source of novel information about the case and indications of their colleagues' preferences (Johnson 2004; Johnson et al. 2008b). Not only do justices procure relevant information at oral arguments but they also collect additional information not found in briefs submitted by the parties, using it in their internal discussions, and even referencing this information in written opinions (Johnson 2004). Similarly, justices are responsive to the quality of arguments presented during these proceedings (Johnson et al. 2006). That is, justices are more likely to vote in favor of the litigant who presents better substantive arguments.

Finally, another compelling reason to believe oral arguments play an important role as a part of the decision-making process is that justices themselves say they do. For example, Justice Anthony Kennedy gave his opinion on the role of these proceedings in an interview by saying, "Does oral argument make a difference? Of course it makes

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[13] For example, proponents of the attitudinal model contend that oral arguments do not influence justices' votes (see Johnson (2004) for a more detailed discussion). The seminal work on the attitudinal model, Segal and Spaeth (2002), argues that these proceedings do not "regularly, or even infrequently, determin[e] who wins and who loses" (280).

a difference."[14]   Former Chief Justice Rehnquist also believed in the importance of these proceedings, describing his opinion with the following: "if an advocate is effective, how he presents his position during oral argument *will* have something to do with how a case comes out" (Rehnquist 2001, 244, emphasis in original). Furthermore, Chief Justice Rehnquist also thought that oral arguments could be *persuasive*. In his book on the Supreme Court he said, "In a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench. The change is seldom a full one-hundred-and-eighty-degree swing, and I find that it is most likely to occur in cases involving areas of law with which I am least familiar" (Rehnquist 2001, 243-4). Given that justices themselves assert that these proceedings are important and that oral arguments provide justices with unique information about cases and their colleagues' preferences (Johnson et al. 2006, 2008b; Johnson 2004), I expect that in a significant minority of cases, justices change their minds about how they will vote after participating in oral arguments, resulting in position fluidity.

Hypotheses

Based on the theoretical expectations and empirical evidence contained in the literature, as well as the memos themselves, I develop hypotheses about the relationship between pre-argument positions and conference votes. It is clear from the pre-oral argument memos that Justice Blackmun usually read the primary briefs on the merits (e.g., both parties' briefs and relevant *amicus* briefs, particularly the Solicitor General's if he participated in this way). During the early part of his tenure on the Court, Justice Powell's pre-oral argument memos were often written further in advance, meaning he had not always read the merits briefs.[15]   However both justices' opinions, while often somewhat tentative, are backed by a preliminary analysis of the case and its components. Therefore, in general, I expect pre-oral argument preferences will be good predictors of justices' votes on the merits. This is reflected in the following hypotheses:

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[14]   From an interview with Justice Kennedy in the film "The Supreme Court of the United States" (York Associates, 1997). Quoted in O'Brien (2008), 254.

[15]   See the analysis section for more detail on the differences between the justices' memos.

PRE-ORAL ARGUMENT PREFERENCE HYPOTHESIS: Justices will be more likely to vote in the direction tentatively expressed in their pre-oral argument memos.

This serves as a baseline for the model. While I argue that the decision-making process influences the positions justices take, it is likely that justices' initial opinions are fairly difficult to change. After all, they are some of the foremost legal minds who have reviewed the cases privately before oral arguments, so it would be unusual for them to be won over by the attorneys' arguments or be persuaded to vote differently than they had planned by other factors with high frequency, particularly when we know that often they did not think the attorneys presented their cases well (Johnson et al. 2006).[16]

While they may sometimes have a relatively firm preference in a case before oral arguments, both Justice Blackmun's and Justice Powell's pre-oral argument memos reveal this is not always true. Indeed, the justices mentioned issues about which they were uncertain as well as the tentativeness of their initial opinions in the memos.[17] This suggests there is often the *possibility* they may change their minds after receiving additional information. As argued above, a key source of additional information is oral arguments (Johnson 2004; Johnson et al. 2006, 2008b). In particular, evidence shows that justices are more likely to vote in favor of the litigant who presents higher quality oral arguments (Johnson et al. 2006). Given this, I argue that even after controlling for pre-argument preferences, the quality of oral arguments will influence justices' conference votes. More specifically:

ORAL ARGUMENT QUALITY HYPOTHESIS: Justices will be more likely to vote in favor of the side that presented higher quality oral arguments.

Data and Methods

To test these hypotheses, I first use data gathered from Justice Blackmun's private notes as well as data from the Expanded Burger Database (Spaeth 2006a). Justice Blackmun

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[16] Furthermore, oral arguments could strengthen a justice's resolve to vote a certain way, a point to which I will return.

[17] As I discuss below, Powell expressed uncertainty regarding his pre-argument position much more frequently than Blackmun.

recorded pre-oral argument memos on a much more frequent basis than did Justice Powell.[18]   As a result, I primarily rely on Justice Blackmun's pre-oral argument positions when conducting the analysis, and I use Powell's pre-argument memos to replicate the overall findings from the Blackmun data. This replication provides an important test of the generalizability of the findings in my primary analysis.

Because I am interested in testing the influence of oral arguments on position consistency, I exclude any cases that were not argued orally before the Court. I then use all cases on which Justice Blackmun took a clear pre-oral argument position, with the unit of analysis being each docket number.[19]   I first run a cross-tabulation of Blackmun's pre-oral argument positions and his conference votes. After this, I test my hypotheses by modeling his conference vote. Here, the dependent variable for the first model is Justice Blackmun's conference vote on the merits, coded 1 when he voted to affirm and 0 when he voted to reverse.[20]   Because the dependent variable, Blackmun's conference vote on the merits, is dichotomous, I use logistic regression.

The first independent variable, *Pre-Oral Argument Preference*, measures Justice Blackmun's positions on the merits of cases before oral arguments. This variable is coded 1 when he expressed an intention to vote to affirm in the pre-argument memo and 0 when he expressed an intention to reverse.[21]   His pre-oral argument position was to affirm in 44 percent of cases and to reverse in 56 percent of cases. Justice Blackmun took a clear pre-argument position on 674 of the docket numbers during the

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[18]   In addition to occurring more frequently, Justice Blackmun's pre-oral argument memos contain very crisp, clear statements of pre-oral argument positions, whereas significantly fewer of Justice Powell's memos contained such statements. Thus, the nature of the Blackmun data lend themselves to more stringent coding procedures and, due to the "unvarnished" statements of pre-oral argument positions, represent a more conservative test of my hypotheses.

[19]   I coded Justice Blackmun's pre-oral argument preferences quite conservatively. More specifically, only very overt statements like "I am inclined to reverse" or "Thus, I would reverse" were coded as pre-oral argument positions. If Blackmun mentioned a policy position, e.g., that he supports abortion rights, I did not use this to infer his preference on this particular case.

[20]   In order to isolate the effects of oral arguments, reargued cases are excluded from the analysis at this point. This eliminates only nine docket numbers where Blackmun took a pre-oral argument position.

[21]   In order to examine the reliability of the coding of Blackmun's pre-oral argument positions, an intercoder reliability analysis was conducted. A research assistant coded a sample of 150 docket numbers (approximately 10 percent of my sample) for whether Blackmun took no position, his position was to affirm, or his position was to reverse. The intercoder agreement was 82.6 percent, while the expected agreement was 34.2 percent. The kappa statistic was 0.735 ($p<0.001$), indicating "substantial agreement" by conventional standards (Landis and Koch 1977).

1970-81 terms that the Expanded Burger Database has his recorded conference vote, representing approximately 39 percent of these cases for which his conference vote is available.[22]

The second key independent variable is the *Respondent Oral Argument Quality Advantage.* While participating in oral arguments, Justice Blackmun took notes on the arguments being presented and regularly assigned a grade to each attorney (see Johnson et al. 2006). Johnson et al. (2006) provide evidence which suggests Blackmun's grades are based on the quality of the substantive arguments presented, rather than simply the presentational style of the attorneys. Furthermore, their results indicate these grades are significant predictors of justices' votes on the merits even after controlling for other traditional predictors, suggesting that oral arguments play an influential role in justices' votes on the merits.[23]   As such, the grades are used as a measure of the quality of oral arguments, allowing me to test the influence of these proceedings on justices' positions while controlling for justices' pre-argument preferences. I measure this variable

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[22] Because a pre-oral argument preference is not available for all cases, it is important to determine if Justice Blackmun recorded a pre-oral argument preference in certain types of cases more than others. To test whether the sample of cases with a pre-oral argument position is biased in some way, I ran a logistic regression where the dependent variable equals 1 for cases on which Blackmun took a pre-oral argument position and 0 otherwise. I subject this dependent variable to a number of factors that might affect when Justice Blackmun would take a pre-oral argument position. Specifically, I test his *certiorari* vote, his ideological compatibility with the lower court, whether the case was legally salient, whether the case concerned multiple legal provisions, and the type of issue the case concerned (civil liberties, economic, or other). These independent variables were all taken directly from the Expanded Burger database except Blackmun's ideological compatibility with the lower court. Following the practiced outlined by Bailey et al. (2005), this variable equals 1 times Justice Blackmun's Martin-Quinn score when the lower court's decision was coded as being in a conservative direction in the Expanded Burger database. When the lower court's decision was in a liberal direction, Justice Blackmun's Martin-Quinn score was multiplied by -1. I grouped Spaeth's issue areas criminal procedure, civil rights, First Amendment, due process, privacy, and the commercial speech subcategory of attorneys are coded as civil liberties cases. Unions, economic activity, and federal taxation are grouped as economic cases. Finally, judicial power, federalism, miscellaneous, and the remaining attorneys cases are coded as "other issues." The model suggests that Justice Blackmun was slightly more likely to take a pre-oral argument position on economic cases as opposed to civil liberties cases (see Table A.1 in the Appendix). For example, his predicted probability of taking a position increases approximately 7 percent (from 0.36 to 0.43, a statistically significant difference at the 95 percent level) on economic cases versus civil liberties cases. In sum, the sample of cases on which he took a pre-oral argument position may slightly over-represent economic cases but an increase in probability of this magnitude is not large enough to be concerning or to significantly limit the substantive generalizability of these findings. Furthermore, I control for issue area, when it makes sense to do so from a theoretical perspective, such as in Table 2.3.

[23] More specifically, the results presented in Johnson et al. (2006) show that Blackmun's attorney grades predict other justices' votes on the merits in addition to his own.

using Justice Blackmun's grading scheme for evaluating attorneys.[24]   Specifically, *Respondent Oral Argument Quality Advantage* equals the average grade for all attorneys arguing for affirmance (respondent) minus the average grade for all attorneys arguing in favor of reversal (petitioner).[25]   The median of this variable is 0, while the mean is 0.36 with a standard deviation of 6.15. By coding the way I described, as the *Respondent Oral Argument Quality Advantage* increases, I expect that Justice Blackmun will be more likely to vote to affirm at conference, as outlined in the ORAL ARGUMENT QUALITY HYPOTHESIS.[26]

The model also includes three control variables. I control for the *Number of Days* that elapsed between the date of the pre-argument memo and the date oral arguments were heard. While the median number of days is 5, the mean is 12.8 with a standard deviation of 25.1. The possibility of other factors influencing Justice Blackmun's preferences about a case are naturally greater as the time between the memo and arguments increases. However, as previously noted, it is clear from reading the memos that they generally contain Justice Blackmun's assessments of cases after having read the briefs on the merits and his clerk's bench memo. He typically mentions these explicitly. However, given the variance in the amount of time between the memo and arguments, it is an important control. Next, I control for the *Distance to the Median Justice*. This control

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[24] Justice Blackmun used three different grading scales during his tenure on the Supreme Court, one of which was a standard 100 point scale. I transform the other two grading scales to the 100 point scale using the conversion developed by Johnson et al. (2006).

[25] This includes those attorneys arguing as *amicus curiae*. The results are substantively similar if *amicii* are excluded or if the maximum grade for each side is used.

[26] There is a possibility that Justice Blackmun gave higher grades to attorneys for whom he anticipated voting, thereby creating an endogeneity problem. However, since the pre-oral argument memos indicate how Justice Blackmun intended to vote, I can use these to test whether he gives higher grades to attorneys for whom he anticipated voting. Using the Johnson et al. (2006) model of oral argument grades, when I include Blackmun's pre-oral argument position, it is not a statistically significant predictor of the oral argument grades. (I exclude their variable capturing his ideological compatibility with the attorney since this is tapping a very similar concept.) This suggests his intention to affirm or reverse before oral arguments does not lead him to award the side he favors a higher grade, thereby providing evidence against the possibility of endogeneity. Johnson et al. (2006) get around the endogeneity concern by excluding Blackmun's votes on the merits from their analysis (although including his votes did not alter the substantive findings). In doing this, they find that his grades predict other justices' final votes on the merits, suggesting that the grades have validity external to Justice Blackmun himself. As mentioned above, I also conduct a validity check on my results by running the same models using Justice Powell's pre-oral argument positions. It is important to note, however, that the evidence of voting fluidity presented in Table 2.1 is *not* subject to this endogeneity concern because it does not involve Blackmun's litigant grades.

accounts for the possibility that Justice Blackmun's voting behavior may be influenced by his location in the internal ideological distribution of the justices (e.g., Maltzman et al. 2000). I measure this variable by taking the absolute value of the difference between the Martin-Quinn scores of the median justice and Justice Blackmun (Martin and Quinn 2002). Finally, I also include a dummy variable for the presence of a *Minimum Winning Certiorari Coalition*, which controls for the potential dynamics resulting from a minority granting coalition. This variable equals 1 if only four justices voted to grant *certiorari* according to the Expanded Burger database and 0 otherwise. Using docket numbers as the unit of analysis, the model is run on the 590 observations for which data across all variables are present.[27]

Results

To examine whether Justice Blackmun exhibited position fluidity during this earlier stage of the decision-making process, Table 2.1 presents a cross-tabulation of his stated pre-oral argument preferences and his conference votes. This provides a preliminary assessment of the relationship between pre-oral argument positions and conference votes.

Table 2.1 indicates Justice Blackmun usually adheres to his pre-oral argument preference when voting at conference. Indeed, his pre-argument positions correspond to his conference votes quite well, bolstering the face validity of his pre-oral argument opinions. However, over 11 percent of the time he changed his mind and votes opposite his pre-argument intention once he gets to conference. This represents a substantively significant portion of the time, and suggests that oral arguments may play an influential

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[27] Justice Blackmun took a pre-oral argument position in 703 cases. As mentioned above, his conference vote is recorded in the Expanded Burger database for 674 of these cases. I am missing data from two sources: the Spaeth database and the oral argument notes. Missing data from the Spaeth database is primarily due to missing information in the justices' papers (e.g., missing docket sheets, missing votes, etc.). Furthermore, Justice Blackmun's oral argument notes do not always contain grades for every attorney. In particular, if one side's attorney grade is missing, I cannot compare the other side's grade to it and the observation is excluded. Additionally, Blackmun's oral argument notes are not available for some cases, e.g., because he was not present for arguments. Oral argument notes are the primary source of missing data. However, I also lose observations due to missing *certiorari* votes, making it impossible to determine if only four justices voted to grant in a case. I have no reason to suspect that the missing information is in any way systematically biasing my analyses. For example, when I run a cross tab of the full 674 cases on which he took a pre-oral argument position and his conference vote is available, it shows he alters his pre-oral argument preferences approximately the same proportion of the time (12.3 percent with 674 cases and 11.4 percent with 590 cases).

Table 2.1: Cross-Tab of Blackmun's Pre-OA Positions and Conference Votes

		HAB's Pre-OA Position		
		Reverse	Affirm	Total
HAB's Conference Vote	Reverse	307	42	349
	Affirm	25	216	241
	Total	332	258	590

role in justices' votes on the merits. The evidence presented here also resonates with Chief Justice Rehnquist's statement about the persuasive power of these proceedings. When Justice Blackmun changes his mind about how to vote at conference, it is possible his sincere preference truly changes. However, it is also possible he decided, for strategic or other reasons, not to simply reveal his private preference by voting in accordance with it. If it is the latter, this would still indicate the structure of the decision-making process created a reason to behave strategically, thereby suggesting the decision-making process itself can influence the positions justices take. Either way, the data suggest Blackmun's *position* changes in a significant minority of cases.

In order to examine the potential role of oral arguments in Blackmun's position switching, I test the influence of his pre-argument preferences and the relative quality of oral arguments on his conference votes on the merits. These results are presented in Table 2.2. Overall, the results provide support for the idea that oral arguments influence justices' positions on the merits at conference.

First, the evidence supports the PRE-ORAL ARGUMENT PREFERENCE HYPOTHESIS. Specifically, the predicted probability of voting to affirm given that his pre-oral argument preference was to affirm is 0.83 (with all other variables set at their median or modal values).[28] However, this predicted probability decreases dramatically to 0.07 when Justice Blackmun's pre-argument preference was to reverse, a statistically significant difference at the 95 percent level. The probability of him voting to *reverse* given that he planned to affirm before oral arguments is 0.17, while his probability of doing so given that he planned to reverse is 0.93, which is also a statistically significant difference at the 95 percent level. The higher predicted probability of voting to reverse given that

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[28] All predicted values are calculated using the Long and Freese (2006) SPost series of commands. Other variables are held at their median or modal values unless otherwise noted.

Table 2.2: Logit Results for Blackmun's Conference Votes on the Merits

Variable	Coefficient	Std. Err.
Pre-Oral Argument Position	4.176*	0.277
Number of Days Between Pre-OA Note and OA	-0.002	0.005
Respondent OA Quality Advantage	0.052*	0.021
Distance from HAB to Median Justice	0.367	0.456
Minimum Winning Cert Coalition	-0.001	0.293
Constant	-2.668*	0.300
N		590
Log-likelihood		-199.659
$\chi^2_{(5)}$		398.715

* $p \leq 0.05$

his pre-oral argument preference was to reverse compared to the respective probability of voting to affirm reflects the fact that Justice Blackmun was more likely to change his vote from affirm to reverse rather than changing from reverse to affirm (see Table 2.1).

Second, the results are consistent with the ORAL ARGUMENT QUALITY HYPOTHESIS. As the quality of the arguments supporting affirmance increase relative to the quality of arguments presented in favor of reversal, so too does Justice Blackmun's probability of voting to affirm at conference. The predicted probabilities for the influence of the relative advantage of the respondent are presented in Figures 2.2 and 2.3. Again, when Justice Blackmun's pre-oral argument preference was to affirm and the relative quality of the oral arguments on each side was equal (the median value), the predicted probability of his voting to affirm at conference is 0.83. If the difference between the respondent's arguments and petitioner's arguments is at the 90th percentile favoring the respondent, this probability increases to 0.88. However, if the respondent's oral argument quality advantage is at the 10th percentile, thus strongly favoring the petitioner, the predicted probability of Blackmun voting to affirm decreases to 0.77. These differences are all statistically significant at the 95 percent level. Additionally, when interpreting the substantive significance of these findings it is important to bear in mind that the ORAL ARGUMENT QUALITY HYPOTHESIS is supported even though I control for Blackmun's pre-oral argument position. Given the strong relationship between the

pre-argument position and conference vote, it is indeed substantively important that I demonstrate the influence of another factor, oral argument quality.

Figure 2.2: Predicted Probability of Affirming at Conference Given Pre-OA Position = Affirm
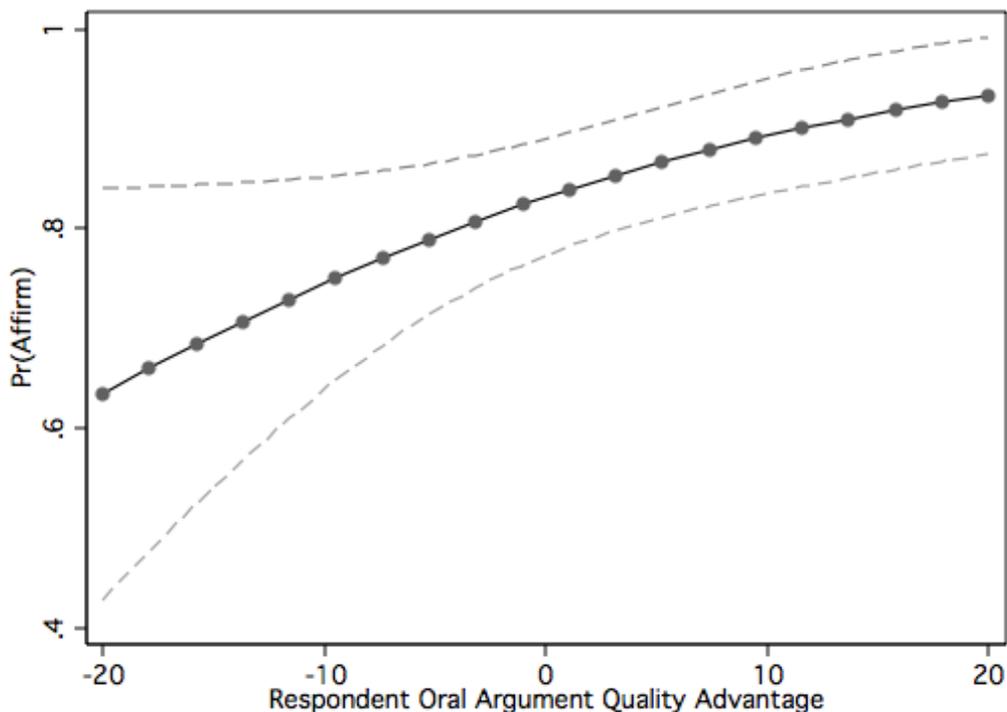
Importantly, these results suggest that the quality of oral arguments can strengthen or weaken Blackmun's resolve to vote the way he stated in his pre-oral argument memo, meaning the effect is not one-sided (i.e., serving only to reinforce or only to challenge his pre-argument preference). However, a probability of 0.77 means that Justice Blackmun is still more likely to vote in accordance with his pre-oral argument preference even when one side presents far better arguments than the other side during the proceedings. In other words, although the relative quality of each side's oral arguments does significantly affect Justice Blackmun's conference vote, his pre-argument position generally carries the day.

What does the model suggest about the influence of oral argument quality on the

Figure 2.3: Predicted Probability of Affirming at Conference Given that Pre-OA Position = Reverse
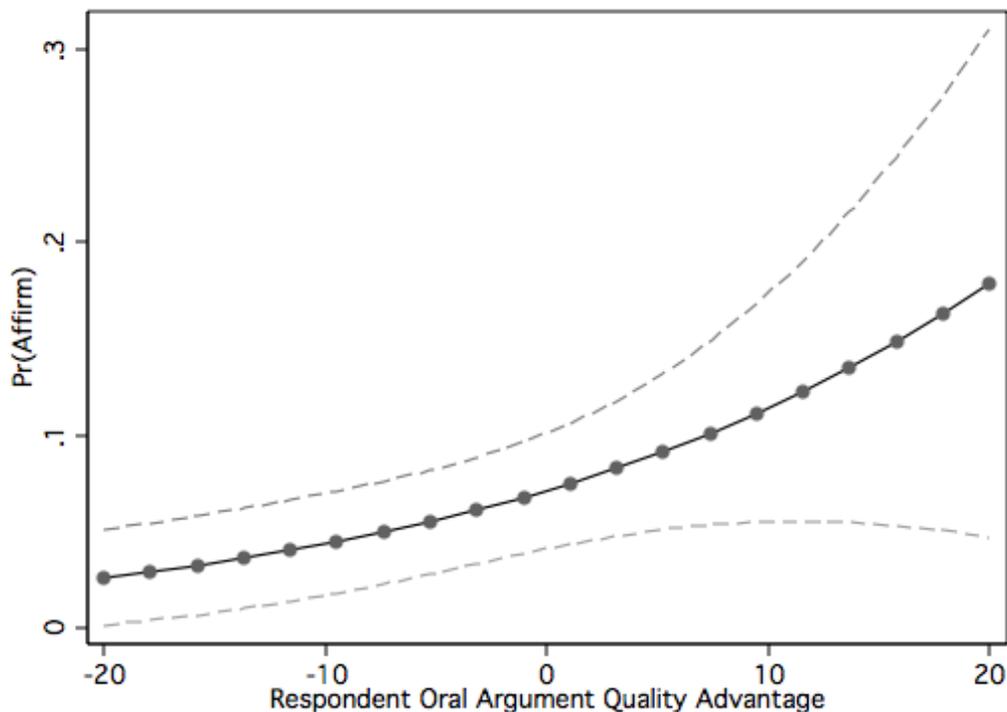
probability of Blackmun voting to affirm at conference given that he planned to reverse according to his pre-argument memo? When Justice Blackmun planned to reverse and the quality of oral arguments was equal between the two sides, his predicted probability of voting to affirm, and therefore changing his position, is quite low at 0.07 (see Figure 2.3). If the respondent's oral argument advantage is at the 10th percentile, meaning it strongly favors the petitioner, the predicted probability decreases to 0.05. This probability increases to 0.10 if the respondent oral argument advantage is at the 90th percentile. These differences are all statistically significant at the 95 percent level. Again, the evidence suggests that the quality of arguments presented by one side relative to the opposition influences Justice Blackmun's conference votes, thereby supporting the ORAL ARGUMENT QUALITY HYPOTHESIS. Finally, none of the control variables included exhibit a statistically significant influence on Justice Blackmun's conference

vote.[29]

While the above model shows that the pre-oral argument preference is often consistent with the conference vote, the more important and interesting question is whether factors at oral arguments led Justice Blackmun to change his mind about how to vote in a given case. To explore this phenomenon, I ran a second logistic regression designed to examine whether the relative quality of oral arguments are persuasive to the extent that they facilitate justices voting differently from how they intended to vote before these proceedings. Here I code the dependent variable as 1 if Justice Blackmun deviates from his pre-oral argument preference, changing from affirm to reverse or reverse to affirm when he votes at conference, and 0 otherwise.

If justices are persuaded by information conveyed during oral arguments, this could come from two primary sources: the attorneys and other justices (Johnson 2004). Previous work suggests that justices learn about each other's preferences during the course of these proceedings, which is valuable information for the coalition formation and opinion drafting processes (Johnson 2004; Johnson et al. 2008b). More specifically, Johnson (2004) shows that justices are particularly attentive to the median justice during oral arguments (see also Johnson et al. (2008a)). This is intuitive given that the median justice's vote is often required in order to maintain a majority coalition. Importantly, oral arguments are the first major time that justices have the opportunity to gauge their colleagues' positions on the merits of a case (Frederick 2005; Johnson 2004). Thus, these proceedings represent a crucial opportunity to assess the median justice's preferences. This type of information gathering allows justices to make strategic calculations regarding coalition formation and the opinion drafting process (e.g., Maltzman et al. 2000).

Along these lines, I submit that the level of attention paid to opinions expressed by the median justice, whether implicitly or explicitly expressed, during oral arguments indicates that a justice may be open to persuasion by his colleagues. It is also possible that such attention could be driven by the anticipation of conflicting views on the case.

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[29] I also ran the model including Blackmun's *certiorari* vote. This added control was not statistically significant, nor did it change the substantive conclusions of the model. I do not include it because I contend that Blackmun's pre-oral argument position, recorded after the *certiorari* stage, encompasses any information that may be gained from considering his *certiorari* vote and the results support this contention.

However, I test this expectation via this additional hypothesis:

> ATTENTION TO MEDIAN HYPOTHESIS: As the number of references to the
> median justice in the oral argument notes increases, justices will be more
> likely to change their minds about how to vote on the merits.

To test this hypothesis, I incorporate an additional independent variable, the *Number of References to Median*, which counts the total number of times Justice Blackmun made a note about the median justice's substantive comments or positions in the notes Blackmun took during oral arguments.[30]   The median for this variable is zero references per case. Approximately 22 percent of cases have one or more references to the median justice. It ranges from 0 to 4. A justice's level of attention to the median would not necessarily predict the disposition of his vote, but increased attention to a colleague may suggest he is gathering information that may alter how he votes.

Oral argument quality is measured differently in this model to correspond with the new dependent variable. Here it equals the average grade for attorneys arguing on behalf of the side Blackmun opposed in his pre-oral argument memo minus the average grade for attorneys arguing on the side Blackmun supported according to his pre-argument preference. This captures whether the side to which Blackmun switches persuaded him to do so by out doing its opposition at oral arguments.

In addition to the controls from the first model, I include six other control variables that relate specifically to the possibility of position fluidity. First, as is common in the fluidity literature, I control for whether Justice Blackmun is in either his first or second term on the Court (Maltzman and Wahlbeck 1996b). It is possible that his freshman status would lead to increased position fluidity due simply to his newness on the Court and the uncertainty that accompanies a new job. As such, the *Freshman Justice* variable equals 1 in the 1970 and 1971 terms and 0 otherwise. Second, I include a measure of the legal complexity of the cases before the Court. The variable, *Multiple Legal Provisions*, is coded as 1 when the Expanded Burger Database lists a case as having more than one legal provision at issue and 0 otherwise. These cases could

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[30]   Special thanks to Tim Johnson for providing this data. During the 1977 and 1978 terms, Justice Blackmun has the highest probability of being the median justice (Martin and Quinn 2002). Thus, for these two terms, I use the count of the number of references to the justice closest to the median that Blackmun recorded in his oral argument notes.

generate greater fluidity as a result of their more complex nature (Benesh and Spaeth 2007). Third, a control was added to capture the legal salience of a case since justices may be less open to persuasion on salient issues. *Legal Salience* is coded as 1 when a case ultimately contains a declaration of unconstitutionality or a formal alteration of precedent (Maltzman et al. 2000). Otherwise, it equals zero. These data come directly out of the Expanded Burger Database.

Fourth, I include a control for Blackmun's ideological compatibility with the lower court. Following Bailey et al. (2005) the variable, *Lower Court Compatibility*, equals 1 times Justice Blackmun's Martin-Quinn score when the lower court produced a conservative outcome according to the Expanded Burger Database (see Martin and Quinn 2002). Alternatively, this variable equals -1 times Blackmun's Martin-Quinn score when the lower court's decision was coded as liberal in the Expanded Burger Database. This captures Blackmun's ideological propensity to support the lower court's decision, where a higher number indicates a greater compatibility with the lower court's position. Finally, I control for the type of case. I code *Civil Liberties Issue* as a 1 if the Expanded Burger Database shows that the case addresses a civil liberties issue and 0 otherwise.[31]

Other Issue is similarly coded as a 1 if the Expanded Burger Database indicates that the case addresses judicial power, federalism, miscellaneous issues, and the attorneys cases (excluding the commercial speech subcategory).[32]

The results of the second model are presented in Table 2.3. Oral argument quality is a statistically significant predictor of whether Justice Blackmun's position on the merits remains consistent from before oral arguments to after these proceedings. Figure 2.4 depicts predicted probabilities for various levels of oral argument quality advantages. For example, the predicted probability of Justice Blackmun changing his mind is 0.11 when there is no difference between the quality of the two sides' arguments. If the quality difference for the side Blackmun opposes in his pre-oral argument memo is at the 10th percentile, which is a 7 point advantage for the side he supports before arguments, his predicted probability of defecting from his pre-argument position decreases to 0.08,

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[31]   This includes the following Spaeth issue areas: criminal procedure, civil rights, First Amendment, due process, privacy, and the commercial speech subcategory of attorneys. Including issue area control variables should also mitigate concern about the sample of cases on which Blackmun took a clear pre-oral argument position.

[32]   Unions, economic activity, and federal taxation are grouped as economic cases, which is the excluded category.

Table 2.3: Logit Results for the Consistency of Blackmun's Expressed Preferences

Variable	Coefficient	Std. Err.
OA Quality Advantage for Side Opposed Pre-OA	0.046*	0.023
HAB's References to Median Justice	0.038	0.184
Number of Days Between Pre-OA Note and OA	-0.006	0.008
Distance from HAB to Median Justice	0.842	0.722
Minimum Winning Cert Coalition	0.124	0.314
Freshman Justice	-0.325	0.853
Multiple Legal Provisions	0.046	0.334
Legal Salience	-0.629	0.554
Lower Court Compatibility	-0.045	0.143
Civil Liberties Issue	0.043	0.321
Other Issue	-0.151	0.478
Constant	-2.363*	0.402

N	533
Log-likelihood	-181.047
$\chi^2_{(11)}$	8.837

* $p \leq 0.05$

Figure 2.4: Predicted Probability of Switching Positions
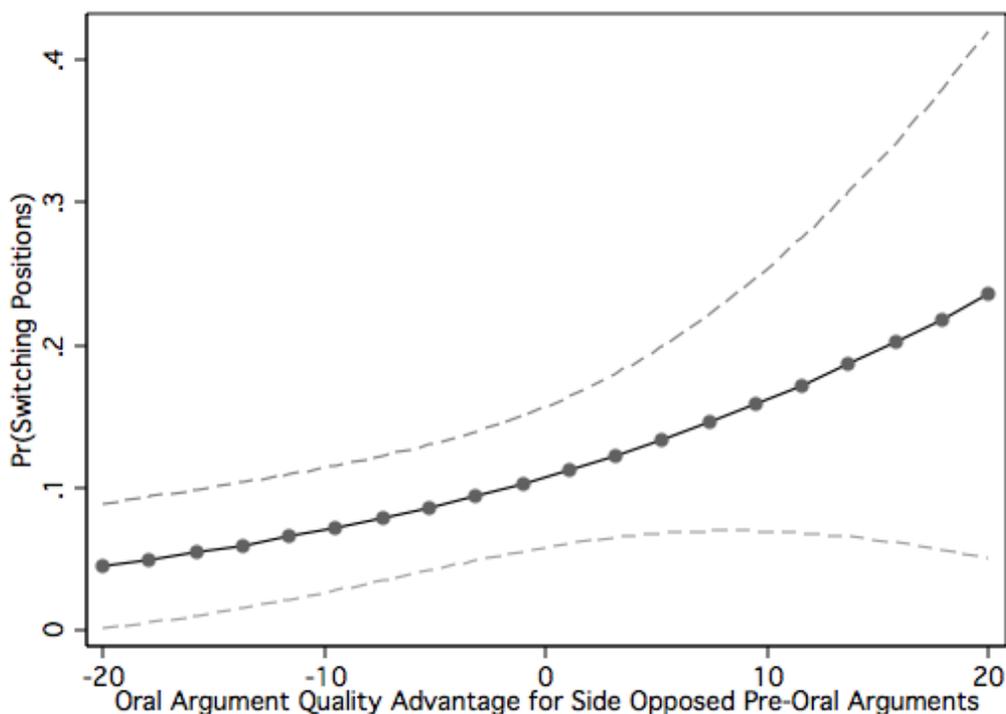
a statistically significant difference at the 95 percent level. This probability increases to 0.15 given the 90th percentile of oral argument advantage for the side Blackmun opposes in his pre-argument memo, which corresponds to an 8 point advantage for the side he opposes before oral arguments (and is a statistically significant difference from the previous predicted probability at the 90 percent level).[33]   Although on the whole, Justice Blackmun was fairly unlikely to abandon his pre-argument preferences, these results provide additional support for the ORAL ARGUMENT QUALITY HYPOTHESIS. In particular, he was more likely to change his position when higher quality oral arguments were presented on behalf of the side to which he was opposed in his initial pre-oral argument memo.

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[33]   While the p-value on the coefficient for this variable is less than 0.05, the test of the difference between these two particular predicted probabilities is statistically distinguishable from 0 at the 90 percent level.

Finally, I do not find support for the ATTENTION TO MEDIAN HYPOTHESES. Additionally, all of the control variables are statistically insignificant except the number of days between Blackmun's pre-oral argument memo and the date of oral arguments. The predicted probabilities for this variable suggest that recording his pre-oral argument preferences further in advance may correspond to increased an likelihood of adhering to that position at conference.

Justice Lewis F. Powell

As a preliminary test of the generalizability of the above findings, I ran a similar analysis using Justice Powell's pre-argument positions. Powell took a pre-argument position on 178 of the docket numbers during the 1972-1982 terms for which the Expanded Burger Database has a recorded conference vote, representing approximately 11 percent of the cases for which his conference vote is available.[34] His pre-oral argument position was to affirm in 37 percent of cases and to reverse in 63 percent of cases.[35] Since the data are only available for a relatively small sample of cases, I consider this replication to be a supplement to the primary analysis conducted using the more extensive Blackmun data. However, I submit that any further tests of my hypotheses using data from another justice help assess the generalizability of the findings and therefore are important to

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[34] As with the Blackmun data, I ran a logistic regression where the dependent variable equals 1 for cases on which Powell took a pre-oral argument position and 0 otherwise. Incorporating the same independent variables as before, the model is shown in Table A.2 found in the Appendix. The model shows that Powell was more likely to take a position when he had voted to deny the case at the *certiorari* stage. More specifically, the predicted probability of taking a position increases from 0.11 when he had voted to grant to 0.16 when he had voted to deny review, a statistically significant increase at the 95 percent level. Additionally, the predicted probability of Powell taking a pre-argument position increases slightly when when he is more ideologically predisposed to disagree with the lower court's decision. For example, moving from the maximum level of ideological compatibility with the lower court to the median level of compatibility increases the predicted probability from 0.08 to 0.12, a statistically significant difference at the 95 percent level.

[35] This generally corresponds to the fact that he was more likely to take a position in cases with which he was less ideologically compatible with the lower court. In order to examine the reliability of the coding of Powell's pre-oral argument positions, an intercoder reliability analysis was conducted. A research assistant coded a sample of 75 docket numbers (approximately 10 percent of my sample) for whether Powell took no position, his position was to affirm, or his position was to reverse. The intercoder agreement was 80.0 percent, while the expected agreement was 39.7 percent. The kappa statistic was 0.668 (p<0.001), indicating "substantial agreement" by conventional standards (Landis and Koch 1977).

carry out.[36]

I first examined whether Justice Powell also exhibited position fluidity. Like Black-mun, Table 2.4 shows that Powell generally voted in a manner consistent with his pre-argument preference at conference. However, the data reveal Powell did not always adhere to his pre-argument position when voting at conference, which is also consistent with the Blackmun findings. In particular, Powell voted opposite his pre-oral argument position approximately 9 percent of the time. Thus, position fluidity during this earlier stage in the decision-making process occurs in a non-trival proportion of cases and is not isolated to a single justice. Since oral arguments take place after pre-argument positions are recorded but before conference, the presence of position switching lends support to the idea that these proceedings may influence the positions justices take.

Table 2.4: Cross-Tab of Powell's Pre-OA Positions and Conference Votes

		LFP's Pre-OA Position		
		Reverse	Affirm	Total
LFP's Conference Vote	Reverse	93	11	104
	Affirm	3	46	49
	Total	96	57	153

Next, I re-test the PRE-ORAL ARGUMENT PREFERENCE HYPOTHESIS and the ORAL ARGUMENT QUALITY HYPOTHESIS. The dependent variable in the first model is again 1 if he affirms at conference and 0 if he votes to reverse, and I include the same independent variables.[37] Since Justice Powell did not record evaluations of the relative quality of arguments presented during these proceedings, I rely on Justice Blackmun's grades for the *Respondent Oral Argument Quality Advantage* variable.[38] Using docket number as the unit of analysis, the model is run on the 153 observations for which data across all variables are present.[39] The results show that Justice Powell is more likely to

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[36] Previous work (e.g., Johnson et al. 2005) has also relied on a smaller secondary sample for testing the generalizability of results.

[37] I replicate the previous models as closely as possible.

[38] Importantly, Johnson et al. (2006) show that Blackmun's grades predict other justices' final votes on the merits, indicating that they capture the relative quality of the arguments presented in a way not merely limited to Blackmun himself.

[39] Once again missing data is primarily the result of missing information in the justices' papers. See footnote 27 for a more complete discussion.

vote in accordance with his pre-argument preference, which supports the PRE-ORAL ARGUMENT PREFERENCE HYPOTHESIS (see Table 2.5). For example, his predicted probability of voting to affirm at conference, given that his pre-argument preference was also to affirm is 0.79. This probability decreases dramatically to 0.02 when his pre-oral argument preference was to reverse, representing a statistically significant difference at the 95 percent level. However, *Oral Argument Quality Advantage* is not statistically significant, nor are any of the control variables in the model.[40]

Table 2.5: Logit Results for Powell's Conference Votes on the Merits

Variable	Coefficient	Std. Err.
Pre-Oral Argument Position	5.513*	0.857
Number of Days Between Pre-OA Memo and OA	-0.001	0.007
Respondent OA Quality Advantage	-0.066	0.053
Distance from LFP to Median Justice	1.787	1.559
Min Winning Cert Coalition	1.127	0.680
Constant	-5.250	1.318
N	153	
Log-likelihood	-38.535	
$\chi^2_{(5)}$	114.813	

* $p \leq 0.05$

As I note above, Powell recorded a pre-oral argument position far less frequently than did Blackmun. When he did indicate a position, it was often somewhat vague and accompanied by a qualifying statement of the tentativeness of his preference. For example, he expressed his tentativeness by saying "I am inclined, quite tentatively, to agree with the CA 6 majority" in one case[41] and "subject to further consideration, I lean toward agreement with CA 6" in another.[42] This more prominent and more frequent uncertainty surrounding Powell's pre-argument positions suggests the need to

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[40] I also ran the model including Powell's *certiorari* vote. This added control was not statistically significant, nor did it change the substantive conclusions of the model. As I note above, I contend that Powell's pre-oral argument position, taken after the *certiorari* stage, encompasses any information that may be gained from considering his *certiorari* vote.

[41] Pre-oral argument notes of Justice Lewis F. Powell. *Parker Seal Company v. Cummins*, 429 U.S. 65 (1976). Papers available from the Powell archives at Washington and Lee University.

[42] Pre-oral argument notes of Justice Lewis F. Powell. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978). Papers available from the Powell archives at Washington and Lee University.

account for his uncertainty.[43]   Consequently, I coded for whether his position was to affirm or reverse, but I also coded each case where he took a position for whether he expressed a substantial degree of uncertainty. I argue that the influence of the decision-making process may be moderated by the uncertainty surrounding a pre-oral argument position. In applying it to the model of Powell's position consistency, I expect that the influence of oral arguments on the positions he takes may be conditioned on his level of uncertainty. It is rather intuitive that as certainty about a given position increases, the likelihood of an intervening factor like oral arguments influencing a justice's position decreases. As such, I test an additional hypothesis:

CONDITIONAL INFLUENCE OF ORAL ARGUMENTS HYPOTHESIS: The influence of oral arguments on a justice's position increases in the presence of uncertainty.

I subsequently examined the consistency of Justice Powell's positions from before oral arguments to after. In this model, the dependent variable equals 1 if he changes his position from before arguments to conference and 0 otherwise. While the hypothesis above outlines my theoretical expectations about the relationship between uncertainty and the influence of oral arguments, I test one aspect of it by examining whether an increase in Powell's attentiveness to the preferences of the the median justice when he is uncertain about a case increases the likelihood that he will switch his position from before arguments to after. In other words, I investigate whether this directional relationship, which is derived from the above hypothesis, is supported by the data. As such, the model also contains two new variables, *Position Uncertainty* and *Position Uncertainty X Median References.*

Position Uncertainty is a dummy variable that equals 1 when Powell expressed a

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[43] I did not code Blackmun's pre-argument positions for uncertainty because, as previously mentioned, his positions were much more clear and in general less ambiguous than Powell's. I submit that modeling Blackmun's position consistency without uncertainty and finding a statistically significant influence from oral arguments represents a higher standard than including an interaction with uncertainty because it it demonstrates a relationship between oral arguments and their impact on Blackmun's positions across all cases. The Powell data facilitate an imperfect replication of the Blackmun results, but given the limited nature of pre-oral argument position data, they are the best and only available source of which I am aware.

more substantial degree of uncertainty about his pre-argument position and 0 otherwise.[44]   In coding for uncertainty, I looked for the presence of qualifying words or phrases such as a mention that he was "not at rest" or that his position was "quite tentative." Approximately 13 percent of cases were coded as containing uncertainty.[45]

I also create an interaction term, *Uncertainty X Number of References to Median*, by multiplying *Position Uncertainty* and *Number of References to Median*.[46]

The evidence presented in Table 2.6 provides support for the CONDITIONAL INFLU-ENCE OF ORAL ARGUMENTS HYPOTHESIS. For example, in the presence of uncertainty, an increase in the number of references to the median justice from 0 to 1, also increases the predicted probability of switching positions from 0.15 to 0.54, a statistically significant difference at the 90 percent level.[47]   Similarly, moving from 1 reference to the median justice to 2 references when there is uncertainty corresponds to a large increase (0.54 to 0.89, which is a statistically significant difference at the 95 percent level) in the predicted probability that Powell switches positions. For Powell, the results indicate that although he was generally unlikely to abandon his pre-argument position, when his pre-oral argument position was uncertain, increased attentiveness to the median justice during oral arguments significantly increases the probability of switching positions.

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[44] I coded for uncertainty in a given position relative to Powell's other pre-argument positions. As I note above, his positions generally contain more ambiguity than Blackmun's.

[45] In order to examine the reliability of the coding of Powell's uncertainty surrounding his pre-argument positions, an intercoder reliability analysis was conducted. A research assistant coded a sample of 60 docket numbers (approximately 30 percent of my sample of cases on which he took a pre-oral argument position) for whether Powell expressed uncertainty in his pre-argument position. The intercoder agreement was 90.0 percent, while the expected agreement was 79.3 percent. The kappa statistic was 0.516 (p<0.001), indicating that I can reject the null that the agreement between coders occurred by chance. All cases with coding discrepancies were subsequently reviewed to rectify any disagreement, and the coders came to clear conclusions about which way to code the data. Therefore, I am confident in the reliability of this variable.

[46] I also ran the model using the same independent variables as in Table 2.6 but also including all the independent variables from the corresponding Blackmun model, as well as an additional interaction term, *Uncertainty X OA Quality Advantage*, which tests whether the relative quality of the arguments presented by each side influences the likelihood of switching positions in the presence of uncertainty. *Legal Salience* was dropped from this model due to a lack of variance on this variable given the smaller number of observations. Like the model presented in the main text, this model suggests that in the presence of uncertainty, an increase in the number of references to the median justice corresponds to an increase in the predicted probability of switching positions (see Table A.3 in the Appendix). However, given the substantively similar results, I report a more parsimonious model in the main text out of cautiousness regarding the balance between the number of observations versus the number of independent variables in the data can sustain.

[47] Recent work has demonstrated the importance of using predicted probabilities to examine the statistical significance of interaction terms (e.g., Ai and Norton 2003; Brambor et al. 2006).

This suggests that these proceedings can serve as an intervening factor which influences justices' positions.[48]

Table 2.6: Logit Results for the Consistency of Powell's Expressed Preferences

Variable	Coefficient	Std. Err.
OA Quality Advantage for Side Opposed Pre-OA	-0.005	0.057
LFP's References to Median Justice	-0.475	0.963
Number of Days Between Pre-OA Memo and OA	0.000	0.008
Distance from LFP to Median Justice	-0.324	2.007
Uncertainty	1.312	0.982
Uncertainty X Median References	2.365	1.433
Intercept	-2.852	1.372
N	142	
Log-likelihood	-29.113	
$\chi^2_{(6)}$	19.174	

After conducting additional analyses using the Powell data, the results provide two primary pieces of evidence which suggest that the influence of the decision-making process, oral arguments in particular, on the positions justices take is not limited to Justice Blackmun. First, Table 2.4 demonstrates that Justice Powell, like Justice Blackmun, exhibits position switching during the stage in which oral arguments occur. Second, while more limited in terms of the number and kind of observations, the results presented in Table 2.6 suggests that under certain conditions, Justice Powell was also influenced by the oral arguments component of the decision-making process. The precise nature of this influence appears to be somewhat different, but both justices responded to the information contained in these proceedings by altering their positions on the merits in a "significant minority" of cases. As such, the evidence demonstrating the influence of the decision-making process on the positions justices take goes beyond one justice.

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[48] Again, I also ran the model including Powell's *certiorari* vote. This added control was not statistically significant, nor did it change the substantive conclusions of the model. Furthermore, I contend that *Lower Court Compatibility* captures an initial propensity for Powell to affirm or reverse.

Discussion

The pre-oral argument positions of Justice Blackmun and Justice Powell provide the opportunity to examine the evolution of justices' positions on the merits and the role of the decision-making process in a way not previously possible. Past work has adeptly shown that justices engage in vote switching during the opinion drafting stage (e.g., Maltzman and Wahlbeck 1996b). The evidence presented here, however, is the first systematic demonstration of position fluidity at the stage surrounding oral arguments, and as such, these results highlight the importance of this part of the decision-making process. More generally, the findings suggest that the Court's internal decision-making process shapes the positions justices take.

Many factors in the decision-making process have been identified by the literature as influencing the positions justices take (e.g., institutional constraints, the preferences of other actors, relevant precedent, etc.). Here I investigated one factor in particular, the institutionalized deliberative process on the Court: oral arguments. I was able to isolate the effects of these proceedings by controlling for justices' pre-argument positions. The results provide strong evidence that oral arguments play an important role in Supreme Court decision-making. For example, Justice Blackmun was more likely to vote in favor of the side with higher quality oral arguments even after controlling for his pre-oral argument preference.

Attitudinalists have argued that preferences, and preferences alone determine how justices vote (Segal and Spaeth 2002). Alternatively, the strategic model argues that the mechanism through which justices translate their preferences about cases into votes also involves consideration of others' preferences and institutional constraints (e.g., Epstein and Knight 1998; Maltzman et al. 2000). In this paper, I first tested the empirical veracity of one aspect of the attitudinal model by comparing justices' pre-oral argument preferences to their conference votes on the merits. The data show that Justice Blackmun, for example, voted opposite his pre-argument position in approximately 11 percent of cases. This proportion corresponds to Chief Justice Rehnquist's quotation above suggesting that oral arguments are influential in a "significant minority" of cases. This position switching suggests that at a minimum, either preferences are shaped by the Court's internal decision-making process or that justices behave strategically at this

stage, which indicates that the structure of the decision-making process has created an incentive to do so. Both of these implications support the perspective that the structure of the decision-making process can have an impact on the outcomes generated by it. I do not contend, however, that justices' preferences going into the decision-making process are unimportant. Instead, jusitces' preferences clearly play a very significant role in how they vote as is evidenced by the fact that Justice Blackmun voted in a manner consistent with his privately stated pre-argument preferences about 89 percent of the time. However, these findings present a challenge to the attitudinal model's strict contention that the decision-making process is not influential in the positions justices take because they only vote their sincere preferences, which the attitudinal model argues are stable during the decision-making process.

This work also speaks to the debate about the Court's deliberative nature. The results indicate that the Court's deliberative process influences the nation's unelected branch of government. Despite the absence of a direct electoral connection, the evidence supports the idea that the information gained during oral arguments can be influential, which suggests that the positions justices take are informed by the decision-making process. As such, the Court's most public proceedings are not simply window dressing, but rather they are a meaningful step in the decision-making process which can have an impact on the Court's policy decisions.

The pre-oral argument memos provide a unique opportunity to examine how justices translate their preferences into votes. The results presented here are just one way in which these measures can be used. In the future I plan to investigate how the fluidity documented here fits into the larger decision-making timeline. More specifically, I will test whether the presence of fluidity from before oral arguments to conference influences the likelihood of voting fluidity between conference and the final vote on the merits. Furthermore, I plan to explore the overall content of these memos, which should help illuminate the ways in which justices analyze information about cases. This future work will build on this paper and previous scholarship to yield a more complete understanding of the decision-making process on the Supreme Court.

Chapter 3

Position Consistency and Voting Fluidity

"A case is more than its outcome, and the parts that came before deserve some attention for the role they played in contributing to the final result."

—Nancy Kassop (1993, 53)

Introduction

From the time a case is placed on the U.S. Supreme Court's docket to when justices announce their decision, the case advances, step by step, through the Supreme Court's institutionalized decision-making process. This decision-making process shapes how business is conducted in the nation's chief judicial institution. As Kassop suggests, examining a case's journey through the decision-making process may further illuminate justices' individual votes, as well as how the Court arrived at its final decision. I bring this argument to bear on the topic of voting fluidity. Vote fluidity occurs when a justice changes her vote on the merits between conference and the final decision. I argue that justices' positions on a case prior to conference provide insight into their subsequent behavior. In particular, I contend it is important that we consider how the degree to which justices' previous positions were consistent at earlier stages of the decision-making process may serve as an important indicator of the likelihood that their positions will

remain stable in the latter portion of the process. Understanding the conditions under which justices' positions shift throughout the decision-making process will provide a more complete understanding of justices' final votes on the merits and, ultimately, the policy outcomes they produce.

Past work demonstrates that Supreme Court justices switch positions from before oral arguments to when they vote on the merits at conference in approximately 11 percent of cases, suggesting that justices' positions are shaped by the Court's internal decision-making process (Ringsmuth 2009). This resonates with evidence which documents bargaining and accommodation during the opinion drafting stage of the decision-making process. More specifically, Maltzman et al. (2000) show that majority opinion authors strategically make attempts to accommodate their colleagues' preferences and that justices sometimes seek to influence the content of the majority opinions by bargaining with the opinion author. This thorough demonstration of internal bargaining on the Court also supports the idea that justices' positions are at somewhat impacted by the institutional decision-making process on the Court. In particular, at the opinion drafting stage, justices' positions are influenced by interactions with their colleagues and the institutional structure within which decisions are made (Maltzman et al. 2000).

While we know factors occurring during the opinion drafting stage (e.g., bargaining, the ideological distribution of the justices, etc.) have an impact on whether justices' conference votes and final votes reflect the same disposition (Maltzman et al. 2000; Maltzman and Wahlbeck 1996b), previous scholarship has not addressed how justices' positions leading up to the opinion drafting stage might be influential. I do so here. New data containing justices' pre-oral argument preferences make it possible to measure position fluidity by comparing these pre-argument positions to justices' votes on the merits at conference (Ringsmuth 2009). As a result, I investigate whether and under what conditions previous position fluidity is related to voting fluidity during the opinion drafting stage. This investigation explores the link between these two stages of the decision-making process in a way not previously possible. Given evidence of the influence of the internal decision-making process on justices' positions (e.g, Maltzman and Wahlbeck 1996b; Maltzman et al. 2000) and position fluidity earlier in the process (Ringsmuth 2009), it is important that we understand the relationship between previous position consistency and voting behavior during the final stage of the process.

The paper proceeds as follows. I begin with a brief discussion of past work on voting fluidity. Second, I review the evidence of position fluidity during the stage surrounding oral arguments and argue it is important that we understand how this previous fluidity relates to vote switching. Next, I lay out the hypotheses I test. I then describe the data and methods I use and then present the results of the analysis. I conclude by discussing the implications of the findings for our understanding of the positions justices take.

Voting Fluidity

Data from justices' personal papers reveal that Supreme Court justices across the ideological spectrum switch their votes on the merits (from affirm to reverse or vice versa) between conference and their final votes in a non-trivial number of cases (Maltzman and Wahlbeck 1996b). In the first comprehensive multivariate study of its kind, Maltzman and Wahlbeck (1996b) argue that this phenomenon, called "voting fluidity" in the literature, is a function of strategic policy considerations, uncertainty surrounding a case, and the Court's institutional structure.

First, in terms of strategic policy considerations, findings indicate that the ideological distribution of the justices across the majority and minority coalitions and the size of coalitions are both important factors in explaining when fluidity will occur (Maltzman and Wahlbeck 1996b). For example, as a justice moves ideologically closer to the other coalition's opinion author compared to the opinion author for the coalition of which the justice was a member at conference, the likelihood of voting fluidity increases. Similarly, vote switching is more likely as justices get closer to the opposition coalition and farther from their own initial coalition. Additionally, justices are less likely to switch votes when they were a part of a minimum winning coalition at conference. These results support the characterization of justices as strategic political actors who recognize the interdependent nature of collective decision-making and take institutional structure into account (e.g., Murphy 1964; Epstein and Knight 1998).

Second, increased uncertainty surrounding a case also influences voting fluidity (Howard 1968; Maltzman and Wahlbeck 1996b). In general, uncertainty about a case increases the the probability of vote fluidity. For example, justices are more likely to switch votes in complex cases compared to relatively straightforward cases (Maltzman

and Wahlbeck 1996b). However, being in the minority at conference on a complex case corresponds to a reduced likelihood of voting fluidity (Maltzman and Wahlbeck 1996b). Additionally, evidence suggests that freshman justices, who may possess greater uncertainty about pending cases due to their lack of experience on the Supreme Court, are more likely to exhibit voting fluidity (Maltzman and Wahlbeck 1996b; Dorff and Brenner 1992).

Third, scholars argue that institutional factors may impact justices' propensity to switch their votes (e.g., Howard 1968; Brenner and Dorff 1992; Maltzman and Wahlbeck 1996b). More specifically, justices in the minority coalition at conference have an increased probability of changing their votes, which would result in support for the majority's position (Maltzman and Wahlbeck 1996b). Howard (1968) contends that this stems from minority justices wanting to maintain the Court's legitimacy by limiting the amount of dissension. Furthermore, evidence suggests that for justices in the minority at conference, the relative size of the two coalitions is important (Maltzman and Wahlbeck 1996b).[1]   In particular, as the size of the dissenting coalition decreases, a justice in the minority at conference will be more likely to exhibit voting fluidity.

In the early voting fluidity literature, scholars modeled fluidity from different perspectives. That is, some focused on switches from the minority into the majority (e.g., Dorff and Brenner 1992) or vice versa (e.g., Hagle and Spaeth 1991). As a result, Maltzman and Wahlbeck (1996b) include an additional model which tests whether the relationships they detected in the comprehensive model of fluidity are conditional on the direction of vote switching (i.e., from minority to majority or majority to minority). In general they find that substantive conclusions regarding the influence of policy considerations, uncertainty, and institutional considerations do not change significantly when accounting for the direction of fluidity. However, the results indicate that the effects of strategic policy considerations intensify when a justice is in the minority at conference (Maltzman and Wahlbeck 1996b).[2]

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[1]   See Maltzman and Wahlbeck (1996b) for a discussion of the theoretical perspective from social psychology which supports this idea.

[2]   Uncertainty is an exception. As mentioned above, the influence of uncertainty becomes negative when a justice is in the minority (Maltzman and Wahlbeck 1996b).

Previous Position Fluidity

Since Maltzman and Wahlbeck (1996b) published their study of voting fluidity, new evidence has emerged which reveals that another type of fluidity occurs on the Court. That is, by comparing justices' pre-oral argument preferences, found in their personal papers, with their votes on the merits at conference, the data demonstrate that justices exhibit position fluidity in a significant minority of cases prior to the opinion drafting stage (Ringsmuth 2009). In other words, position fluidity occurs when a vote at conference is opposite a justice's stated pre-oral argument position. I use the term position fluidity in part to distinguish it from voting fluidity but also because the pre-argument indication of a justice's preference comes as a statement of a tentative position as opposed to a vote. Position fluidity represents a phenomenon relatively analogous to voting fluidity, which occurs later in the decision-making process, in that both point to the influence of the Court's internal decision-making process on justices' positions due to a lack of position consistency. Importantly, I do not argue that a lack of position "consistency" is necessarily a problem. Rather, evidence indicates that both types of fluidity occur for systematic reasons which are tied to the flow of new information (e.g., from colleagues, oral arguments, etc.), which characterizes justices as responsive to this information.

Evidence suggests that the likelihood of position fluidity in this earlier stage of the decision-making process is influenced by the institutionalized practice of oral arguments, which occurs between when justices recorded pre-argument positions and their votes at conference (Ringsmuth 2009). Previous work has considered these two forms of fluidity in isolation. In other words, it is clear that fluidity occurs throughout the decision-making process, but it remains unclear whether fluidity at these two stages is related. That is, does prior position switching increase or decrease the likelihood of voting fluidity in the final stage, or is there no discernible relationship? I investigate this question by testing a new model of voting fluidity which builds on the model from Maltzman and Wahlbeck (1996b) by including previous fluidity as an independent variable.

In developing this new model of voting fluidity, two competing expectations regarding the relationship between the occurrence of position fluidity and voting fluidity can be derived from relevant theoretical perspectives. First, previous position switching could correspond to a greater likelihood of voting fluidity. For example, the uncertainty

surrounding a case may prompt a justice to change his mind about how to resolve it. A justice's initial pre-oral argument position may represent a gut reaction to the case at hand and while a justice may be persuaded to vote the opposite direction by information gathered during oral arguments, he may change his mind once he sees the opinion drafts, thus returning to his initial beliefs about the case. In other words, given that a justice exhibited a willingness to change his position on a case earlier in the decision-making process, he may be open to doing so again. However, it is also plausible that once a justice has switched positions, he would be reluctant to change his position once again. That is, since justices' positions are generally very consistent from before oral arguments to after (Ringsmuth 2009), it would be unlikely that there would be an additional inducement powerful enough to precipitate switching positions yet again. Given these competing theoretical expectations, I first test a preliminary model which explores the frequency with with position fluidity and voting fluidity occur in the same case and the relationship between the two phenomena.

In addition to whether a justice has exhibited position fluidity previously in the case, a justice's ideological compatibility with the lower court may also influence the propensity of engaging in voting fluidity. Since the time that Maltzman and Wahlbeck (1996b) published their article on voting fluidity, methodological advancements have allowed scholars to measure political actors' preferences in ways not previously possible. This in turn makes it feasible to incorporate a measure of a justice's ideological congruence with the lower court's decision. I submit that, all else equal, a liberal justice is predisposed to support a liberal lower court ruling, as a conservative justice would be more likely to agree with a conservative lower court ruling. As such, I test whether ideological compatibility has an impact on the likelihood of voting fluidity with the following hypothesis.

> LOWER COURT COMPATIBILITY HYPOTHESIS: A justice will be more likely to switch votes as ideological compatibility with the lower court's decision decreases.

I also reexamine two of Maltzman and Wahlbeck's hypotheses using updated measures. I do not dispute their expectations. Rather, I take the opportunity to retest these hypotheses based on the availability of new measures of justices' policy preferences. Like

them, I argue that strategic policy considerations influence the positions justices take. I then expect that a justice will generally end up in the coalition that best represents his policy preferences. Since the justice writing an opinion is primarily responsible for the policy positions articulated by the written opinion, the ideological congruence between a justice and the opinion authors represents a key indicator of the role policy considerations may play in justices' voting behavior. As such, I restate Maltzman and Wahlbeck's hypothesis here:

> AUTHOR DISTANCE HYPOTHESIS: The closer a justice is ideologically to the person writing the opinion for his or her conference coalition as compared to the author of the opposing opinion, the less likely the justice is to switch.

Second, I revisit Maltzman and Wahlbeck's COALITION PLACEMENT HYPOTHESIS. This hypothesis is based on the idea that a justice's location within the ideological distribution of justices in a conference coalition may influence the likelihood of voting fluidity. Although an opinion author is primarily responsible for the substance of an opinion, the justices in a coalition may attempt to influence or bargain over the language or other aspects of the opinion Maltzman et al. (2000). As a result, the policy position articulated in an opinion may reflect the ideological composition of the coalition, leading to the following hypothesis restated here:

> COALITION PLACEMENT HYPOTHESIS: The closer a justice is ideologically to his conference coalition as compared to the opposing coalition, the less likely the justice is to switch.

Data and Methods

In conducting this analysis, I begin with data used by Maltzman and Wahlbeck (1996b). To it I add data gathered from Justice Blackmun's private notes containing his pre-argument positions. These data contain all clearly stated pre-oral argument positions during the 1970-81 terms on Court. I test the hypotheses on data on Justice Blackmun due to its availability.[3]   While testing these hypotheses on one justice is not

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[3] Justice Powell also took pre-oral argument positions. However, his positions were significantly less clear and crisp than Blackmun's. The clarity of Blackmun's pre-argument positions make them ideal candidates for subsequent analysis like the one conducted here.

ideal, these pre-argument positions offer a rare opportunity to explore the link between justices' positions before the opinion drafting stage and their voting behavior during this period. Furthermore, all justices on the Burger Court, the period under study in Maltzman and Wahlbeck (1996b), engaged in voting fluidity, ranging from switching votes in 5.8 (Justice Stevens) to 14.9 (Justice Black) percent of cases. The fact that all justices switched votes in a non-trivial proportion of cases during this period, combined with evidence that both Blackmun and Powell switched positions during the stage surrounding oral arguments, provides substantial reason to expect that examining the relationship between fluidity at these two stages using data from Blackmun's papers is not inappropriate.

Additionally, I incorporate updated versions of key strategic variables, as well as a measure of ideological compatibility with the lower court. I test the hypotheses using the same dependent variable employed by Maltzman and Wahlbeck which captures voting fluidity. It equals 1 if a justice switches the disposition of his vote from conference to the final decision he supports.[4] Alternatively, this variable equals 0 if a justice's vote is consistent between conference and the Court's final decision (e.g., affirm-affirm or reverse-reverse). Due to the dichotomous nature of the dependent variable, I employ logistic regression.

The first key independent variable, *Previous Fluidity*, measures whether Justice Blackmun's vote at conference was consistent with his pre-argument position. This variable is coded as 1 when his position changed from before oral arguments to conference and 0 when he voted in accordance with his pre-argument position at conference. Justice Blackmun exhibited previous position fluidity in 62 cases, representing approximately 11 percent of the cases in this analysis.

The second independent variable is *Lower Court Compatibility*, which captures Blackmun's ideological compatibility with the lower court. Following Bailey et al. (2005), the variable equals 1 times Justice Blackmun's Martin-Quinn score[5] when the lower court produced a conservative outcome according to the Expanded Burger

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[4] Justices' final "votes" are not cast in a conference meeting but rather are expressed via their support for a written opinion. However, they are often referred to as final votes on the merits or report votes.

[5] See Martin and Quinn (2002) for a complete discussion of these dynamic measures of justices' ideal points.

Database (Spaeth 2006a). Alternatively, this variable equals -1 times Blackmun's Martin-Quinn score when the lower court's decision was coded as liberal in the Expanded Burger Database. This captures Blackmun's ideological propensity to agree with the lower court's decision, where a higher number indicates a greater compatibility with the lower court's position. The LOWER COURT COMPATIBILITY HYPOTHESIS leads me to anticipate a negative relationship between this variable and the dependent variable.

Third, I include the independent variable, *Author Distance.* This variable measures the ideological compatibility between Justice Blackmun and the opinion author(s) in a given case. Following Maltzman and Wahlbeck (1996b), the general formula for this variable is the absolute value of the distance between Justice Blackmun and the opinion author for the coalition he was in at conference minus the absolute value of the distance between Blackmun and the closest opinion author for the coalition he opposed at conference.[6] I use Martin-Quinn scores to make these calculations (Martin and Quinn 2002).[7] This variable construction yields a positive value when Blackmun was closer to the opposition's opinion writer than to the opinion author for the side he supported at conference and a negative value when Blackmun was ideologically closer to his coalition's opinion author compared to the opposing side's opinion writer. The variable equals zero if Blackmun was located equidistant both opinion authors. As such, I expect *Author Distance* to be positively related to voting fluidity.

The fourth key independent variable, *Coalition Placement*, captures whether a justice is a member of the expected coalition based on the ideological makeup of the coalitions. Again this variable is constructed based on the formula employed by Maltzman and Wahlbeck (1996b) and is updated using Martin-Quinn scores. More specifically, I first calculated the median of both the majority and minority conference coalition. If Justice Blackmun's ideological rank using Martin-Quinn scores was at his initial coalition's median or more extreme, I coded this as +1. Alternatively, if Blackmun's ideological rank was between the two coalition medians, it was coded as 0. However, if

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[6] For unanimous conference coalitions, I created an opposition referent score since no minority opinion author exists. The referent score equals the Martin-Quinn score of the most ideologically extreme justice plus 0.5. I add 0.5 because theory suggests any minority coalition would be located beyond the most extreme justice on the opposite side since this justice did in fact sign onto the majority opinion. For decisions coded as liberal in the Expanded Burger Database, the most extreme justice was most conservative justice and vice versa for conservative decisions (Spaeth 2006a).

[7] Maltzman and Wahlbeck (1996b) used issue-specific percent liberal scores.

his ideological rank was equal to the opposition coalition median or more extreme, I coded this as -1.[8]   In accordance with the above hypothesis, I expect that as *Coalition Placement* increases, the likelihood of voting fluidity will decrease.

The remaining independent variables included in the model replicate Maltzman and Wahlbeck (1996b) directly.[9]   *Freshman* equals 1 for each of Blackmun's first two years on the Court and 0 otherwise. Next, *Minority Coalition Member* accounts for whether a justice voted with the minority coalition at conference. If Blackmun was a member of the conference minority, the variable equals 1, otherwise it equals 0. This variable accounts for the possibility that the likelihood of vote switching depends in part on the type of conference coalition of which a justice was a member.

In addition to these justice-specific variables, I also incorporate the case-specific attributes directly from Maltzman and Wahlbeck (1996b). *Minimum Winning Coalition* concerns the vote margin at the conference on the merits. The variable equals 1 for cases where the majority coalition prevailed by one vote or less. It equals 0 otherwise. This variable controls for the potential influence of a very close or very lopsided conference vote. Next, I include *Case Complexity* to account for the natural propensity for an increased likelihood of fluidity in more complex cases. Complexity is measured by a case's factor score produced by the factor analysis of the number of issues in a case, the number of relevant legal provisions, and the number of written opinions coinciding with a case, which all load onto a single factor (Maltzman and Wahlbeck 1996b). Additionally, *Landmark* accounts for the likely decrease in fluidity that coincides with particularly salient cases on which justices tend to have more crystallized opinions. This variable equals 1 if a case is listed on the Epstein et al. (2003) list of landmark cases and 0 otherwise.

The variable *Dissent Size* captures the potential influence of the size of the minority conference coalition. It equals 4 if Justice Blackmun is the lone dissenter and 3 if Blackmun and one other justice dissented at conference. Furthermore, *Dissent Size*

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[8]   For unanimous conference coalitions, *Coalition Placement* was coded as +1 when Justice Blackmun's ideological rank using Martin-Quinn scores was at the coalition median or more liberal and 0 when his ideological rank was more conservative than the coalition median for cases decided in the liberal direction. The opposite is true for cases decided in the conservative direction. Additionally, -1 is never used for unanimous cases.

[9]   Maltzman and Wahlbeck (1996b) included two variables concerning the chief justice which are excluded here since Blackmun was an Associate Justice during his tenure on the Court. Additionally, the variable on issue expertise is excluded due to its colinearity with other variables in the model.

equals 2 if Blackmun and two justices were in the minority and 1 if three justices joined Blackmun in dissenting at conference. This variable is coded as 0 when Blackmun was in the majority at conference. This coding scheme is designed to account for the possibility that justices may be more likely to switch votes when they are members of a relatively small minority coalition (Maltzman and Wahlbeck 1996b). Finally, I include the variable, *Unanimity*, to control for the possibility that justices would be less likely to exhibit voting fluidity when the conference vote on the merits was unanimous. This variable equals 1 when there was a unanimous conference vote, and 0 otherwise. Using docket numbers as the unit of analysis, the model is run on the 537 observations for which data across all variables are present.

Results

Before proceeding to the full model, I first ran a cross-tabulation to illuminate the relationship between previous fluidity and voting fluidity. Table 3.1 shows that there are cases where Blackmun was fluid at both stages. Among cases where Blackmun exhibited previous fluidity, he went on to switch votes in 14 percent of cases, whereas the proportion of cases with voting fluidity when there was no previous fluidity is approximately 4 percent. Furthermore, a chi-square statistic suggests that the two variables are not independent ($\chi^2 = 10.0, p = 0.002$). This provides preliminary evidence that previous fluidity increases the likelihood of observing vote switching between conference and the Court's final decision.

Table 3.1: Cross-Tab of Blackmun's Position Consistency at Both Stages

		HAB's Voting Fluidity		
		No Switch	Switch	Total
HAB's Previous Fluidity	No Switch	468	19	487
	Switch	43	7	50
	Total	511	26	537

The cross-tab also reveals that position switching, which has been tied to the influence of oral arguments (Ringsmuth 2009), affects Blackmun's final votes on the merits. That is, when Justice Blackmun changed his position from before oral arguments to

after, he typically did not deviate from this post-oral argument position. As such, this further underscores the notion that justices' positions are influenced by the Court's internal decision-making process and the importance of capturing the oral arguments stage of the process in particular. In cases where position fluidity and vote switching both occur, I submit that this should not be taken as evidence that the influence of oral arguments is fleeting but rather as additional support for the idea that justices' positions evolve as the institutionalized decision-making process unfolds.

To better understand the relationship between these two types of fluidity, I ran a logistic regression which includes other factors known to influence voting fluidity.[10] The results are presented in Table 3.2. In general, the findings signal the importance of incorporating information about justices' previous position-taking into models of voting behavior in later stages of the decision-making process.

Table 3.2: Logit: Blackmun's Vote Fluidity

Variable	Coefficient	Std. Err.
Previous Fluidity	2.346*	0.596
Lower Court Compatibility	-0.368	0.251
Author Distance	0.343*	0.088
Coalition Placement	0.080	0.379
Minimum Winning Conference Coalition	-0.385	0.619
Case Complexity	0.005	0.260
Landmark	0.362	0.858
Freshman	0.300	0.899
Minority Coalition Member	0.810	0.987
Dissent Size	0.676	0.372
Unanimity	-1.454	1.109
Constant	-4.041*	0.460
N	537	
Log-likelihood	-75.213	
$\chi^2_{(11)}$	57.746	

* $p \leq 0.05$

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[10] Given that voting fluidity occurs relatively infrequently, I also ran the models using the rare events logit commands developed by Tomz et al. (1999). Doing so yields substantively similar results for both models.

The results indicate that Blackmun was more likely to switch his vote during the opinion drafting stage when he had previously changed his position in the case. For example, holding all variables at their median or modal values, the predicted probability that Justice Blackmun exhibits vote fluidity is 0.01. This probability increases to 0.13 when prior fluidity had occurred. This difference in predicted probabilities is statistically significant at the 90 percent level and represents an important substantive.[11]

Second, the evidence indicates that as the ideological distance between Justice Blackmun and the opinion author for the opposing conference coalition decreases, he is more likely to switch votes. This supports the AUTHOR DISTANCE HYPOTHESIS. In particular, when Blackmun was equidistant from both opinion authors, the predicted probability of engaging in voting fluidity is 0.02. This probability doubles to 0.04 when Blackmun was closer to the opposition opinion writer.[12]   Also according to expectations, the probability of vote switching decreases to less than 0.01 when he was closer to his conference coalition's opinion author.[13]   Differences in these three predicted probabilities are all statistically significant at the 95 percent level. As such, the updated *Author Distance* variable, which uses Martin-Quinn scores, reinforces the findings in Maltzman and Wahlbeck (1996b).

The model did not provide significant support for the COALITION PLACEMENT HYPOTHESIS or the LOWER COURT COMPATIBILITY HYPOTHESIS. Additionally, none of the control variables exhibit a statistically significant influence on the dependent variable.[14]

Thus far, I have captured the presence of prior position fluidity with a simple dichotomous variable indicating that it did or did not occur. However, this fails to account

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[11]   While the p-value on the coefficient for this variable is less than 0.001, the test of the difference between these two particular predicted probabilities is statistically distinguishable from 0 at the 90 percent level.

[12]   This represents a one standard deviation increase in *Author Distance* from 0.

[13]   This represents a one standard deviation decrease in *Author Distance* from 0.

[14]   By replicating the Maltzman and Wahlbeck (1996b) model as closely as possible, my model contains a fairly large number of independent variables given the sample size and distribution of the dependent variable. To address this, I plan to collect more data in the future, which would minimize this limitation. At present, however, I note that if I decrease the number of independent variables by excluding *Unanimity, Landmark,* and *Lower Court Compatibility* (or any combination thereof) the results are substantively similar to what I report here for both models. I selected these three variables based on the theoretical expectations provided by Maltzman and Wahlbeck (1996b), i.e., they were not significant predictors or were not included in the case of *Lower Court Compatibility*.

for the two different ways a justice could switch positions. The first way previous fluidity could occur is if a justice's pre-oral argument position was to affirm the lower court's decision and he deviated from this position at conference by voting to reverse. Alternatively, a justice's pre-argument position might indicate that he preferred to reverse but he voted to affirm the lower court's ruling at conference instead. It is important to investigate whether these two types of previous fluidity influence the likelihood of a justice subsequently switching his vote differently.

Scholars have long argued that justices are reversal-minded (e.g., Ulmer 1972; Palmer 1982; Krol and Brenner 1990; Boucher and Segal 1995). This line of work has demonstrated that justices are more likely to vote to grant *certiorari* in cases where their preference is to reverse. This error correction strategy stems from the incentive to alter cases with which justices disagree, thus establishing precedent that is in accordance their policy preferences, while allowing cases with which justices agree to remain at the status quo instead of taking up space on the docket to affirm lower court decisions.

In addition, evidence indicates that justices are more likely to switch from affirm to reverse, rather than the opposite, in the stage surrounding oral arguments (Ringsmuth 2009). In the case of voting fluidity, the pull toward reversal may lead a justice who has switched from affirm to reverse in the previous stage to be less likely to switch positions again. On the other hand, I submit that the opposite may be true for cases on which a justice has switched in the other direction. That is, a reversal-minded justice may be less likely to maintain a preference for affirmance when his position has been previously fluid. More specifically, I expect that a previous switch from reverse to affirm would enhance the likelihood of vote switching.[15]   This is reflected in the following hypothesis.

> PREVIOUS REVERSE TO AFFIRM SWITCH HYPOTHESIS: Justice Blackmun
> is more likely to change his vote when he has switched his position from
> reverse to affirm during the previous stage.

The cross-tabulation displayed in Table 3.3 provides preliminary support for the above hypothesis. I first examined the bivariate relationship between the direction of

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[15] As mentioned above, some past work measures changes in justices' votes by whether they switched from being in the minority to the majority or vice versa. I cannot conduct an analogous test here because I do not know which disposition a majority of justices supported prior to oral arguments.

prior position fluidity and vote switching by running a cross-tabulation. The modal cell consists of cases on which there is no fluidity at either stage, however, the data suggest that a previous switch from reverse to affirm increases the likelihood of subsequent vote switching, while a previous switch from affirm to reverse corresponds to a lack of subsequent vote switches.[16]

Table 3.3: Cross-Tab of HAB's Vote Fluidity and Direction of Previous Fluidity

| | | HAB's Vote Fluidity | | |
		No Switch	Switch	Total
	No Switch	468	19	487
HAB's Previous Fluidity	Reverse to Affirm	12	7	19
	Affirm to Reverse	31	0	31
	Total	511	26	537

In order to capture the directionality of prior position switching and test this additional hypothesis more rigorously, I created a dummy variable, *Previous Switch from Reverse to Affirm* which I substitute for its non-directional counterpart from the previous model. I coded this variable as 1 if Justice Blackmun had previously switched positions from reverse to affirm and 0 otherwise. As such, in accordance with my hypothesis, I expect a positive relationship between this variable and the likelihood of vote fluidity. Otherwise, the model specification is identical to that of Model 1. The results for Model 2 are displayed in Table 3.4. The findings provide support for the PREVIOUS REVERSE TO AFFIRM SWITCH HYPOTHESIS and are otherwise generally consistent with the previous model, with a few small differences which I note below.

First, I find that the directionality of previous switches in positions influences the likelihood of observing vote fluidity. In particular, the predicted probability of vote fluidity occurring when no previous fluidity has taken place and all other variables are held at their median or modal values is approximately 0.01. This predicted probability

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[16] Although I have a theoretical expectation that a prior switch from affirm to reverse would reduce the likelihood of vote fluidity, I am unable to directly test this since all cases in my sample in which Blackmun switched positions from affirm to reverse prior to the opinion drafting stage correspond to a subsequent lack of voting fluidity, thus perfectly predicting the dependent variable. However, this provides preliminary evidence to expect that a previous switch from affirm to reverse decreases the likelihood of a subsequent vote switch.

Table 3.4: Logit: Blackmun's Vote Fluidity - Model 2

Variable	Coefficient	Std. Err.
Previous Switch from Reverse to Affirm	4.800*	0.896
Lower Court Compatibility	-0.830*	0.324
Author Distance	0.334*	0.097
Coalition Placement	0.224	0.405
Minimum Winning Conference Coalition	-0.612	0.695
Case Complexity	0.027	0.278
Landmark	0.509	0.890
Freshman	0.004	0.998
Minority Coalition Member	1.169	1.068
Dissent Size	0.616	0.397
Unanimity	-2.948*	1.416
Constant	-4.333*	0.512
N	537	
Log-likelihood	-65.588	
$\chi^2_{(11)}$	76.994	

* p≤0.05

increases, as expected, to 0.58 when there has been previous fluidity from reverse to affirm, representing a statistically significant difference at the 95 percent level. In sum, a previous switch from reverse to affirm corresponds to a significantly higher likelihood of a vote switch. These findings indicate that in addition to whether previous fluidity has occurred, the direction of the prior position switch is also important.

The findings regarding *Author Distance* are substantively similar to the previous model, indicating that as the distance between Blackmun and the opinion author for his conference coalition decreases relative to the distance to the opposing coalition's opinion author, so too does his likelihood of switching votes. Additionally, the results modestly support the expectations of the LOWER COURT COMPATIBILITY HYPOTHESIS. That is, the likelihood of vote fluidity decreases as ideological compatibility with the lower court increases. For example, the predicted probability of observing vote switching when all variables are held at their median or modal values is approximately 0.01, indicating that voting fluidity is an unlikely occurrence. However, when Blackmun's ideological compatibility is at its highest level, this already low probability decreases to less than 0.003, a statistically significant decrease at the 95 percent level. Alternatively, the predicted probability increases to 0.04 when Blackmun's compatibility with the lower court is at its low, however this difference is not statistically significant. While not overwhelming evidence, these findings suggest that ideological compatibility with the lower court has a negative on voting fluidity.

Furthermore, Model 2 also suggests that a unanimous conference coalition decreases the likelihood that Justice Blackmun engages in vote switching. For example, the already low predicted probability of voting fluidity when all variables are at their median or modal values, 0.01, decreases to less than 0.001 when the conference coalition was unanimous. This difference, while relatively small in magnitude, is statistically significant at the 90 percent level. None of the other control variables are statistically significant in this model.

Discussion

This paper takes a first step toward understanding the link between previous position fluidity and voting fluidity on the U.S. Supreme Court. The data reveal that there are

cases in which Justice Blackmun switched positions twice: once when his conference vote on the merits deviated from his pre-argument position, and then a second time when he supported the same disposition as he did prior to oral arguments in the Court's final decision. I argue that the new evidence which demonstrates that justices' positions are not always consistent from before oral arguments to their votes at conference invites the opportunity to investigate how this previous stage in the decision-making process influences a similar phenomenon during the final stage of the process. In doing so, we gain insight into the conditions under which justices' positions remain stable throughout the steps of the decision-making process, which ultimately illuminates justices' final decisions on the merits and, by extension, how the Court sets legal policy. The findings indicate that there is a relationship between the degree to which a justice's position remains stable earlier in the decision-making process and the likelihood of position consistency during the final stage. More generally, as Kassop's quotation argued, the evidence suggests that what has occurred previously as a case progressed through the decision-making process is important for understanding the voting behavior of Supreme Court justices.

The results presented here demonstrate that accounting for previous position fluidity is important for fully understanding the conditions under which vote switching occurs. In particular, the findings indicate that the direction of previous fluidity determines its impact on vote switching. A previous switch from supporting a reversal to supporting an affirmance increases the likelihood of observing vote fluidity. In reexamining the phenomenon of voting fluidity, I also find that increased ideological compatibility with the lower court decreases the likelihood of vote switching. Additionally, the findings regarding the influence of strategic policy considerations generally reinforce the substantive conclusions of Maltzman and Wahlbeck (1996b). Finally, these results also support the contention that the positions justices take while a case is being reviewed are influenced by the Court's internal decision-making process (e.g., Maltzman and Wahlbeck 1996b; Maltzman et al. 2000; Ringsmuth 2009).

Although these models focus on Justice Blackmun's voting behavior due to the availability of data, the results strongly suggest that a relationship exists between previous position fluidity and the subsequent consistency of conference and final votes on the merits. Of course, it can be dangerous to make strong inferences from a limited sample,

however, I have no theoretical reason to expect Justice Blackmun's behavior to differ from that of his colleagues in this respect. Nevertheless, if a sufficiently large sample of pre-oral argument positions is discovered in other justices' personal papers, it would be important to test the generalizability of these findings.

Chapter 4

Strategic Agenda Control on the U.S. Supreme Court

> PERRY: *Did your chambers act strategically in the cert. process?*
>
> CLERK: *Oh yes. (C53)*[1]

Justices as Gatekeepers

Marks' (1989) dissertation on the relationship between the Court and Congress in *Grove City College v. Bell* (1984)[2] and Eskridge's (1991b) seminal piece on the "Court / Congress / president game" fueled a debate among judicial politics scholars about the explanatory power and viability of the separation of powers theoretical framework and its applications to judicial behavior (e.g. Johnson 2003; Segal and Spaeth 2002; Segal 1997).[3] While this debate is in many ways still ongoing, critics argue that empirical evidence of the influence of the separation of powers on judicial outcomes has been somewhat weak (Segal 1997). Since the separation of powers framework has primarily been tested with respect to its bearing on the merits stage of judicial decision-making,

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[1] Quoted in Perry (1991): 198, based on an interview with a Supreme Court clerk.

[2] 465 U.S. 555

[3] This list is certainly not exclusive. Many other early separation of powers pieces such as Gely and Spiller (1990) and Ferejohn and Shipan (1990) also contributed to the development of this literature. Additionally, Murphy (1964) discusses the potential for political checks on the Court from external actors.

this paper reexamines the separation of powers argument by applying it to the *certiorari* stage of Supreme Court decision-making.

In short, the separation of powers perspective argues that due to the Court's lack of enforcement capacity, justices must take into account the external political landscape (and how their decisions will be received by external actors) in order to safeguard the Court's legitimacy (e.g., Murphy 1964). That is, when the Court is ideologically extreme relative to external actors, it may need to moderate its actions to more closely match the preferences of Congress and the president, otherwise the Court risks having its decisions overturned, ignored, or other Court-curbing measures pursued. However, justices need not be characterized as forsaking values like setting good legal policy in order to argue that the separation of powers structure influences judicial decision-making. Instead the separation of powers theoretical perspective can be viewed as one factor out of several that the justices consider when making decisions.

While the Court is a powerful institution, the Court's authority is not absolute. Chief Justice John Marshall first formally asserted the Court's power to "say what the law is" via judicial review in *Marbury v. Madison* (1803).[4] However, this authority has been challenged by external actors. For example, after the Court's decision in *Worcester v. Georgia* (1832)[5] regarding whether Georgia had the authority to regulate relations between its citizens and members of the Cherokee Nation, President Andrew Jackson is reported to have said, "John Marshall has made his decision; now let him enforce it." According to the separation of powers framework, the Court is aware that its decisions will not be unconditionally upheld by external actors. As such, this perspective argues that the justices will attempt to avoid a situation like that which resulted after the *Worcester* decision. The justices could preemptively retreat when handing down a decision in the context of a hostile Congress or president, meaning they could acquiesce to the preferences of external actors at the merits stage. However, they have at least one other strategy at their disposal. When making decisions on which cases to accept for review, justices can use the ideological configuration of the external political landscape as a navigational tool. More specifically, justices can use their discretion at the *certiorari* stage to minimize the degree to which the Court is announcing decisions that are likely

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[4] 5 U.S. 137

[5] 31 U.S. 515

to draw the negative attentions of Congress or the president.

Justices on the U.S. Supreme Court are in the rare position of being their own gatekeepers. Since the Court has almost complete discretion over its docket, justices can ignore some issues while choosing to take up others. This agenda setting power is manifest through the Court's acceptance of approximately 70-80 cases each term despite the burgeoning number of *certiorari* petitions (approximately 10,000 each term). Furthermore, there is no expectation that the Court will resolve all salient legal questions in any given term, so the Court is relatively free to ignore even salient issues. Therefore, justices have the flexibility to pursue some issues while abstaining from others. Second, because the Court receives so many petitions, it is well known that the odds of any particular case being accepted are low. This provides cover for the Court to deny cases that it considers risky due to separation of powers (or other) concerns. When whittling down the thousands of petitions to fewer than 100 accepted cases, justices have a significant amount of room to manuever. Third, the Court's *certiorari* process is sheltered from public scrutiny. That is, the justices meet privately to discuss and vote on *certiorari* petitions. The final decision of whether a case is accepted is released to the public but the justices are under no obligation to offer an explanation for why they rejected certain cases.[6] In sum, the *certiorari* stage offers the Court a politically safe opportunity to minimize its vulnerability by adjusting the types of cases it accepts based on the external political landscape or other considerations.

The hypotheses I test in this paper stem from the strategic model and the separation of powers framework. The strategic model argues that justices have policy preferences, they recognize the interdependent nature of decision-making and make choices accordingly, and that their choices are structured by the institutional setting in which they find themselves (e.g., Murphy 1964; Epstein and Knight 1998; Maltzman et al. 2000). Following this line of argument, the separation of powers literature addresses the influence of the external constraint that the justices face (e.g., Marks 1989). This approach has most frequently been tested on the merits stage, examining the influence of external constraint on the final outcomes of cases (e.g., Eskridge 1991b; Knight and Epstein 1996b; Segal 1997). Here I apply the expectations derived from the separation of powers

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[6] For example, in *Browning v. U.S.* (1988) the Supreme Court denied *certiorari* without an explanation stating simply, "The petition for writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit is denied."

perspective to the *certiorari* stage.

External Constraint and the Predictors of the *Certiorari* Decision

Although most frequently examined at the merits stage, the external separation of powers context theoretically influences the Court's agenda as well. Based on the separation of powers literature, Epstein et al. (2002) posit that the Court allocates space on its docket according, at least in part, to the Court's position relative to external actors.[7] During times in which the Court is constrained by the ideological positions of Congress and the president, the Court is expected to take on a higher percentage of constitutional cases at the expense of statutory cases and vice versa when the Court is unconstrained (Epstein et al. 2002). Statutory cases are associated with the possibility that Congress may attempt to override the Court's decision by passing new legislation that contradicts the Court's position or seek to tie the Court's hands in other ways by removing jurisdiction, etc. Epstein et al. (2002) argue that the Court's authority of judicial review on constitutional cases is stronger given its role as the final interpreter and defender of the Constitution. Since statutory cases involve interpreting rules or statutes generated by other political actors, members of the Court may, as strategic political actors, be concerned about how their actions will be interpreted by other relevant actors, particularly with respect to enforcement of the Court's decisions. Therefore, the Court may use its ability to vary its agenda, taking into account the level of the separation of powers constraint over time, as a strategic device. This strategic maneuver provides political cover for the Court, making it less likely, all else equal, that a decision made by the Court will be challenged by Congress or the president.

Additionally, the relative ideological homogeneity of the justices each year may affect the way they choose to allocate docket space (Epstein et al. 2002). All else equal, as the number of justices signing onto a majority opinion increases, the Court makes a stronger statement with its decision. Consequently, the Court may be able to reduce the risk of an override by handing down unanimous or near-unanimous decisions even during times of constraint (e.g., Eskridge 1991a; Marshall 1989). As a result, when

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[7] Also see Epstein and Knight (1998) for a discussion of this argument.

contemplating how a decision will be treated once it is handed down, justices may also consider the size they would expect a majority coalition to be if a case reached the merits stage (Epstein et al. 2002). While a justice may not have directly control over the ideological distribution of the Court, she can certainly attempt to anticipate the size of coalitions and take this under consideration when deciding which types of cases to accept. In this way, the internal dynamics on the Court may also shed light on the distribution of cases accepted by the Court for review each year.

Pioneered by Tannenhaus and his colleagues cue theory offered an early account of how justices select cases. In essence, cue theory argues that, due to the massive number of cert petitions each term, the justices (and their clerks) must rely on "cues" in cert petitions that signal which cases are potentially important and worthy of consideration (Tanenhaus et al. 1963). Tanenhaus et al. argue that the Court is more likely to accept cases with one or more cue(s). In particular, they find that when the government seeks review, there is dissension in lower courts, or a civil liberties issue is present, the likelihood of the Court accepting a case is increased (Tanenhaus et al. 1963). Similarly, Ulmer (1983, 1984) reinforce the influential role of conflict, both between the circuits and conflict between the precedents of the Court and lower courts, in increasing a case's chances of being selected for review. In sum, scholars have successfully demonstrated that the Court is receptive to the federal government's requests for review and that the Court seeks to clarify conflict in lower courts.

While agenda setting questions are certainly not new to the literature, no clear consensus exists about how justices decide which cases to accept at the *certiorari* stage (e.g., Perry 1991). Building on past work, I reexamine the external constraint model of agenda setting, focusing on the way the justices allocate space on the docket at the macro-level.[8] Applying the separation of powers account, I expect that the Court will shift the composition of its docket according to the level of external constraint it faces, as well as the internal homogeneity of the justices (Epstein et al. 2002; Epstein and Knight 1998).[9] Previous work has focused on the division between constitutional and

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[8] I adopt the Epstein et al. (2002) approach because I contend that it most efficiently provides the data necessary to test my hypotheses. More specifically, it allows me to capture the choices justices make about the types of cases they accept for review without the extremely time-intensive process of gathering data on the thousands of *certiorari* petitions denied each year.

[9] While the Court may only select from cases that have been petitioned for review by external parties, I contend that the Court generally has ample room to maneuver during this agenda setting stage and

statutory decisions (Epstein et al. 2002). Again the argument being that the Court's authority is strongest when ruling on constitutional issues. It is widely accepted that it is the Court's role to interpret the Constitution. As a result, external actors will be less likely to attempt to challenge the Court's authority when it focuses on constitutional cases. Unlike constitutional issues on which the Court has primary authority, the Court shares its authority over statutory issues with lawmakers. Therefore, Congress is much more likely to attempt to counteract a Court decision in which lawmakers think the Court has interpreted a statute in a manner in which they did not intend. In sum, the Court's authority is strongest, or least vulnerable, in the realm of constitutional decisions. As such, the Court may redistribute the relative space it allocates to constitutional versus statutory cases in accordance with the level of external constraint. My hypothesis is formally stated below.

> EXTERNAL CONSTRAINT HYPOTHESIS: As the level of external constraint on the Court increases, the Court will accept more constitutional rather than statutory cases.

I reexamine this hypothesis using updated measures of the external ideological configuration of the Court, Congress, and the president (Judicial Common Space (JCS) (Epstein et al. 2007) and Common Space scores (McCarty et al. 1997)).[10]

Second, I test the possibility that the constraint felt by the Court is also a function of the likelihood of congressional action at any point in time. When the two chambers of Congress are distant from one another ideologically, I expect that they will be less likely to come together and initiate action that might compromise a decision made by the Court. Alternatively, if the chambers are ideologically proximate to one another, the transaction costs of reaching an agreement are lower, thereby increasing the chances of congressional action. As such, when the likelihood of congressional action is relatively high, the Court may be more cautious with its agenda, causing it to accept more constitutional cases relative to statutory cases. However, if the likelihood of congressional action is relatively low, the Court may have more room to maneuver, leading it

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has demonstrated a willingness to exercise this discretion given that the distribution of cases accepted for review does vary over time. For example, during the period under study here, the percentage of cases that were constitutional ranges from 9 to 53 percent with an average of 33 percent.

[10] Epstein et al. (2002) use Segal-Cover scores (Segal and Cover 1989) and support scores provided by the Americans for Democratic Action.

to accept more statutory cases than it otherwise would. These expectations follow from the separation of powers framework and lead to the following hypothesis:

IDEOLOGICAL DISTANCE BETWEEN CHAMBERS HYPOTHESIS: As the ideological distance between chambers increases, the Court will accept fewer constitutional cases.

Third, I also consider the possibility that the Court's homogeneity will influence its docket as well (Epstein et al. 2002). The degree to which the justices' preferences are closely aligned corresponds to the likelihood of rendering unanimous or near-unanimous decisions versus decisions backed by a minimum winning coalition. Handing down a unanimous or near-unanimous decision symbolizes a united front, reinforcing the weight of the Court's opinion in a case (e.g., Eskridge 1991a; Marshall 1989). For example, when the Court unanimously rejected President Nixon's claim of unrestricted presidential privilege in *U.S. v. Nixon* (1974),[11] the justices sent a clear message to the President that he needed to release the tapes and documents he had been withholding from the investigation.[12] Given the turbulence surrounding the Watergate investigation, the effect of the decision could well have been different had the Court ruled only 5-3 against Nixon. Indeed, a dissenting opinion may have given the President grounds on which to critique the majority opinion, and perhaps even delayed his resignation from office.

In general, handing down unanimous or near-unanimous decisions is another option available to the Court to increase the authority of its decisions and to help ensure that its decisions are enforced (Eskridge 1991a). However, due to the ideological variability of the justices on the bench at any given time, the Court is not always in a position to render near-unanimous or unanimous decisions. I argue that the degree of homogeneity on the Court will influence the division between constitutional and statutory cases among those cases accepted (Epstein et al. 2002). More specifically, I expect that when the Court is relatively homogeneous, the justices will be able to take more statutory cases (relative to the number of constitutional cases) under the assumption that the Court's decisions will most likely be backed by a strong majority. Alternatively, when the Court is relatively heterogeneous, the justices will take more constitutional cases because their

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[11] 418 U.S. 683

[12] The decision was only 8-0 because Justice William Rehnquist did not participate.

authority is stronger on these cases, therefore a unanimous or near-unanimous decision is less crucial. As such, I hypothesize:

> INTERNAL HOMOGENEITY HYPOTHESIS: As internal homogeneity on the Court increases, the justices will take fewer constitutional cases.

Additionally, I expand on previous analysis by investigating an alternative specification of the types of cases that comprise the docket. Instead of only examining constitutional versus statutory cases, I also explore the distribution of federal versus state cases. This division may more accurately capture the shifts in the proportions of the agenda due to external constraint because federal cases are linked to federal laws passed by Congress while state cases are not. In order to test whether a similar process is at work in the division between federal and state cases, I examine the same hypotheses with respect to this alternative dependent variable. For example, if the Court is concerned about maintaining its legitimacy in the face of a hostile Congress, taking more state cases may help prevent the Court from taking actions of which Congress would disapprove. In this specification, I test whether parallel expectations apply to the distribution of federal and state cases each year. This analysis is more exploratory since, to my knowledge, this is the first time these external constraint and internal homogeneity variables have been brought to bear on the distribution of state versus federal cases.

Data and Methods

In order to test my hypotheses, I model the types of cases accepted by the Court each year from 1947-2005 at the aggregate level. I test the model with two dependent variables. The first is the percentage of cases granted that are constitutional. Following Epstein et al. (2002), constitutional cases are cases which are classified by the Spaeth Database (Spaeth 2006b) to be primarily based on the Court's authority of judicial review at the national or state level. Alternatively, cases in which the Court interpreted a federal statute, treaty, court rule, executive order, administrative regulation, or administrative rule are classified as statutory cases.[13]   During the 59 years included in the

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[13] Based on correspondence with Profesor Harold Spaeth, I include only cases where the major focus is either constitutional or statutory construction. This means I exclude cases where authdec1 is coded 3, 6, or 7.

data set, the percentage of cases that were constitutional ranged from 9 percent to 53 percent with an average of 33 percent, while the percentage of cases that were statutory ranged from 47 percent to 91 percent with an average of 67 percent. These data allow me to test whether the docket shifts between more statutory or constitutional cases depending on the level of external constraint and the likelihood of congressional action.

The second dependent variable is similar but uses the percentage of state cases relative to federal cases. This is defined by whether a case originated in a federal or a state court. The percentage of cases that were federal ranged from 54 percent to 90 percent with an average of 79 percent, while the percentage of cases that were state ranged from 10 percent to 46 percent with an average of 21 percent. Since both dependent variables are continuous measures, I employ OLS regression.

Next I construct a series of independent variables to test the hypotheses outlined above. First, I create a variable that captures the *Level of External Constraint* faced by the Court. Based on the spatial configuration of the Court, the president, and both chambers of Congress, this is coded 0 if the Court median is located between the median in at least one chamber of Congress and the president's ideal point. When the Court is located between external actors, it is relatively unconstrained since the external actors' preferences are at cross-purposes (Eskridge 1991b). Otherwise, if the Court median is most ideologically extreme relative to the president and the medians in both chambers of Congress, the level of external constraint equals the absolute value of the ideological distance between the Court median and the closest chamber of Congress, using Judicial Common Space scores (Epstein et al. 2007) and Common Space scores (McCarty et al. 1997) respectively. I use the distance to the closest chamber of Congress since it is Congress that would most likely initiate any counteraction against decisions made by the Court.

Second, I also include the absolute value of the ideological distance between the Senate and House medians using Common Space scores in order to measure the *Ideological Distance Between Chambers*. This is intended to tap the relative likelihood of the two chambers coming together to counter a decision made by the Court. Third, to test the Internal Homogeneity Hypothesis, I include the mean-centered[14]   standard

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[14]   I subtracted each standard deviation from the mean standard deviation across the data set. I transform the value by multiplying by negative one so that it measures homogeneity as opposed to heterogeneity.

deviations of the justices' JCS scores each year multiplied by negative one to measure the Court's level of *Internal Homogeneity*. This will allow me to track the degree to which the sitting justices' preferences are relatively congruent over time.

In addition to these key independent variables, I include two control variables based on factors identified in the literature as also influencing the *certiorari* process. These controls are in the form of percentages since the unit of analysis is each calendar year. First, I include a control for the proportion of accepted cases for which the Court cited conflict in lower courts as the reason for granting *certiorari* (Tanenhaus et al. 1963). Second, I also measure the percentage of accepted cases each year in which the federal government is a party (Tanenhaus et al. 1963).

Results

I report results for the model of the percentage of accepted cases that are constitutional in Table 4.1. Overall, the results provide support for two of the three hypotheses. First, consistent with the EXTERNAL CONSTRAINT HYPOTHESIS, as the level of external constraint increases, so too does the percentage of cases that are constitutional (p=0.029, one-tailed).[15]   Table 4.2 contains the predicted values for several levels of external constraint generated by SPost. When the Court is unconstrained, and all other variables are held at their median values, the predicted value of the percentage of accepted cases that are constitutional is 34 percent. Among the years that the Court is constrained,

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[15]   After running diagnostics on the model, I discovered that the 1968 term on the Court contains the largest value on the *Level of External Constraint* variable and is an influential observation. If this observation is excluded from the model, the *Level of External Constraint* variable is no longer statistically significant. However, the results for the *Internal Homogeneity* variable are substantively similar when the influential observation is excluded. The *Level of External Constraint* for 1968 is 0.288 while the rest of the sample ranges from 0 to 0.258, with mean of 0.037, due to the fact that the Court was unconstrained 38 out of the 58 years, and a standard deviation of 0.065. The 1968 term also contains the maximum value on *Internal Homogeneity* at 0.124 while the rest of the sample ranges from -0.083 to 0.118 with a mean of -0.002 and standard deviation 0.060. The analysis is run on population data, making it unclear how to deal with this situation. If it were an observation in a sample, it could be easily excluded as an outlier or influential observation. However, since this is not the case, it is not clear that simply excluding this observation is appropriate. Certainly, though, it suggests that the results regarding the *Level of External Constraint* must be cautiously interpreted. Investigating this observation further, I calculated the percentile that the value for 1968 would represent in the sample of years excluding 1968. The percentiles are as follows. *Percent Constitutional* 83rd percentile, *Ideological Distance Between Chambers* 62nd percentile, *Percentage of Cases with Conflict* 23rd percentile, *Percentage of Cases with Federal Government as Party* 93rd percentile.

the median level of constraint is 0.104 (representing the ideological distance between the Court and the closet chamber of Congress). Using this median level of constraint, the predicted value is that the Court would accept 37 percent constitutional cases and 63 percent statutory. Finally, at the maximum value of constraint, 0.288, the predicted value increases to constitutional cases comprising 42 percent of the docket, eight percent higher than when the Court is unconstrained. The differences in predicted values are all statistically significantly different at the 90 percent level. If the Court accepts 75 cases in one term, an eight percent swing would correspond to an additional six constitutional cases. These predicted values suggest that the level of external constraint has an influence on the division of the docket between constitutional and statutory cases. Indeed, the results suggest that as constraint increases, the Court is likely to increase the proportion of constitutional cases relative to statutory cases.

Table 4.1: Percentage of Accepted Cases Each Year that are Constitutional

Variable	Coefficient	Std. Err.
Level of External Constraint	0.269*	0.138
Ideological Distance: House to Senate	0.015	0.175
Internal Homogeneity	-0.837**	0.196
Percentage of Cases with Conflict	-0.249**	0.093
Percentage of Cases with Fed. Gov. as a Party	-0.200**	0.086
Intercept	0.452	0.045
N	59	
R^2	0.412	
$F_{(5,53)}$	7.434	

* $p \leq 0.05$, one-tailed

** $p \leq 0.05$, two-tailed

I also find substantial support for the INTERNAL HOMOGENEITY HYPOTHESIS. As internal homogeneity increases, the percentage of accepted cases that are constitutional decreases ($p < 0.01$, two-tailed). Again Table 4.2 provides several predicted values. When the level of internal homogeneity is at its minimum and the level of external constraint is at its maximum (and all other variables are held at their medians), the constitutional cases are predicted to comprise 48 percent of the docket. However, when homogeneity is at its minimum and the Court is unconstrained, the predicted value of constitutional

Table 4.2: Predicted Values for Percentage of Accepted Cases that are Constitutional

Specified Values of IVs	P.V.	90 %	C.I.
Min. Homogeneity and Max. Constraint	0.48	0.41	0.55
Min. Homogeneity and if Constrained, Median Value	0.43	0.39	0.46
Min. Homogeneity and Unconstrained	0.40	0.37	0.43
Median Homogeneity and Max. Constraint	0.42	0.36	0.48
Median Homogeneity and If Constrained, Median Value	0.37	0.34	0.39
Median Homogeneity and Unconstrained	0.34	0.32	0.36
Max. Homogeneity and Max. Constraint	0.30	0.24	0.37
Max. Homogeneity and if Constrained, Median Value	0.25	0.21	0.30
Max. Homogeneity and Unconstrained	0.23	0.18	0.27

cases decreases to 40 percent. Next, if the Court's homogeneity is at its median value and the Court is unconstrained, the predicted value of constitutional cases is 34 percent, compared to 42 percent when the level of constraint is at its maximum.[16]   Moving to when homogeneity and the level of external constraint are both at their maximum values, the predicted value of constitutional cases is 30 percent. This decreases to 23 percent constitutional cases when homogeneity is at its maximum but the Court is unconstrained.[17]

The analysis provides evidence that the level of internal homogeneity on the Court has an impact on the division between statutory and constitutional cases on the docket. Again, results indicate that as homogeneity increases, the Court accepts fewer constitutional cases and instead takes more statutory cases. This suggests that justices consider the likelihood of near-unanimous or unanimous decisions when deciding which types of cases to accept for review. Coupled with evidence that larger majority coalitions decrease the risk of attempts at congressional overrides (e.g., Eskridge 1991a; Marshall 1989; Epstein et al. 2002), these findings provide support for the notion that justices assess the impact of the Court's internal ideological homogeneity on how decisions made by the Court may be treated by external actors.

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[16]   Note, these predicted values are the same calculations described above when discussing the effects of various levels of constraint when all other variables are held at their medians.

[17]   These differences are all statistically significant at the 95 percent level.

The results do not support the Ideological Distance Between Chambers Hypothesis. Finally, the two control variables, the percentage of cases in which the Court noted conflict in the lower courts as a reason for granting *certiorari* and the percentage of cases to which the federal government is a party also have a statistically significant impact on the dependent variable. More specifically, as the percentage of cases with conflict noted increases, results indicate that the Court takes fewer constitutional cases (p=0.01, two-tailed). Second, as the percentage of cases in which the federal government is a party increases, the results suggest that this corresponds to the Court accepting more statutory cases relative to constitutional cases (p=0.02, two-tailed).

Table 4.3: Percentage of Accepted Cases Each Year from State Courts

Variable	Coefficient	Std. Err.
Level of External Constraint	0.014	0.117
Ideological Distance Between House and Senate	0.145	0.152
Internal Homogeneity	0.385**	0.168
Percentage of Cases with Conflict	-0.325**	0.087
Percentage of Cases with Federal Government as a Party	-0.349**	0.112
Intercept	0.357	0.040
N		59
R^2		0.41
$F_{(5,53)}$		7.371

** $p \leq 0.05$, two-tailed

Next, I turn to the results from the model of the percentage of accepted cases that are state versus federal. These are reported in Table 3. Of the substantive independent variables, only the *Internal Homogeneity* is statistically significant in this model. More specifically, as internal homogeneity on the Court increases, the Court is more likely to accept an increased percentage of state cases relative to federal cases (p=0.026, two-tailed). Table 4 contains predicted values for several levels of internal homogeneity. When the justices are most heterogeneous, and all other variables are held at their median values, the predicted value for the percentage of accepted cases originating in state courts is 18 percent. This predicted value increases to 21 percent when homogeneity is at its mean level. Finally, when internal homogeneity is at its maximum, the predicted

value for the percentage of accepted cases originating in state courts is 26 percent. The differences between these levels of homogeneity are statistically significant at the 95 percent level. In general, the results indicate that while the percentage of accepted cases originating in a state court is typically substantially lower than that of cases originating in federal courts, the percentage of cases originating in state courts is influenced by the degree to which the Court is a homogeneous body in any given term.

Table 4.4: Predicted Values for Percentage of Accepted Cases from State Courts

Specified Values of IVs	Predicted Value	95 %	C.I.
Minimum Homogeneity	0.18	0.15	0.21
Mean Homogeneity	0.21	0.19	0.23
Maximum Homogeneity	0.26	0.21	0.31

I do not find support for the idea that the *Level of External Constraint* or the *Ideological Distance Between Chambers* influences the distribution of state and federal cases reviewed by the Court. This lack of support suggests that, with the exception of homogeneity, the division between the percentage of accepted cases originating in state versus federal courts is driven by a different process than the one used to determine the division between constitutional and statutory cases. The results raise the possibility that a federalism issue is at play since the Court is more likely to intervene in cases originating in state courts when the justices are relatively ideologically homogeneous. Finally, the two control variables do significantly influence the dependent variable. First, as the percentage of cases with conflict noted by the Court when granting *certiorari* increases, results indicate that the Court takes fewer state cases ($p<0.01$, two-tailed). Second, as the percentage of cases in which the federal government is a party increases, the results intuitively suggest that this corresponds to the Court accepting more federal cases relative to state cases ($p<0.01$, two-tailed). However, future work is required to better understand the conditions under which the Court adjusts the relative space it allocates to state versus federal cases.

Discussion

The analysis in this paper suggests that the Court adjusts the content of its docket at the macro-level, increasing or decreasing the percentage of accepted cases that are constitutional, depending on the level of external constraint and internal homogeneity. More specifically, the percentage of accepted cases that are constitutional increases when the level of external constraint increases and this percentage decreases when internal homogeneity increases. Additionally, when the Court's internal homogeneity increases, the Court is more likely to accept an higher percentage of cases that originated in state courts relative to cases originating in federal courts. The findings regarding the internal homogeneity of the Court provide important evidence that justices strategically respond to the Court's internal dynamics. In sum, these results indicate that Supreme Court justices use their discretion at the *certiorari* stage to alter the distribution of cases it accepts at the macro-level based on the level of external constraint and the internal homogeneity of the justices.

The results support the idea that separation of powers concerns influence judicial decision-making at the *certiorari* stage and suggest that future research along these lines would increase our understanding of the Court's role in the U.S. system of separated powers, as well as judicial decision-making more generally. Furthermore, this study provides additional evidence that justices behave strategically at the *certiorari* stage, encouraging future research in this area as well. In future work it will also be important to delve more deeply into cases that involve both federal statutes and constitutional questions. This analysis represents two perspectives on the distribution of cases accepted for review, but there are certainly other approaches that may shed light on the manner in which the U.S. Supreme Court sets its agenda.

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Appendix A

Supplemental Tables

Table A.1: **Logit Results for Blackmun's Decision to Take a Pre-OA Position**

Variable	Coefficient	Std. Err.
HAB Cert Vote	-0.044	0.114
Legal Salience	-0.135	0.161
Multiple Legal Provisions	0.082	0.119
Civil Liberties Issue	-0.292	0.116
Other Issue	-0.217	0.161
Lower Court Compatibility	-0.091	0.051
Constant	-0.247	0.129
N	1708	
Log-likelihood	-1131.921	
$\chi^2_{(6)}$	11.295	

Table A.2: Logit Results for Powell's Decision to Take a Pre-OA Position

Variable	Coefficient	Std. Err.
LFP Cert Vote	-0.424	0.187
Legal Salience	-0.022	0.261
Multiple Legal Provisions	0.027	0.189
Civil Liberties Issue	0.098	0.193
Other Issue	0.204	0.249
Lower Court Compatibility	-0.181	0.090
Constant	-1.925	0.219
N	1634	
Log-likelihood	-553.867	
$\chi^2_{(6)}$	8.951	

Table A.3: Logit Results for the Consistency of Powell's Expressed Preferences

Variable	Coefficient (Std. Err.)	Coefficient (Std. Err.)
OA Quality Advantage for Side Opposed Pre-OA	0.015	-0.010
	(0.064)	(0.091)
LFP's References to Median Justice	0.784	-1.568
	(0.404)	(1.492)
Number of Days Between Pre-OA Memo and OA	-0.09	-0.024
	(0.014)	(0.021)
Distance from LFP to Median Justice	-4.238	-2.402
	(2.32)	(3.250)
Min Winning Cert Coalition	0.568	2.020
	(0.751)	(1.082)
Lower Court Compatibility	0.492	0.543
	(0.398)	(0.538)
Freshman Justice	1.942*	2.522*
	(0.912)	(1.268)
Multiple Legal Provisions	-1.909	-2.022
	(1.266)	(2.357)
Civil Liberties Issue	-0.097	0.436
	(1.051)	(1.607)
Other Issue	1.986	3.748*
	(1.170)	(1.790)
Uncertainty		2.002
		(1.626)
Uncertainty X OA Quality Advantage		0.161
		(0.194)
Uncertainty X Number of References to Median		4.468*
		(2.086)
Constant	-1.103	-3.802
	(2.082)	(2.551)
N	141	141
Log-likelihood	-27.864	-19.368
$\chi^2_{(10)}$, $\chi^2_{(13)}$	21.51	38.50

* $p \leq 0.05$