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Strategic Policy Considerations and Voting Fluidity on the Burger Court

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Justices are strategic actors. This is particularly evident when they change their votes between the original conference on the merits and the Court's announcement of the final decision. We predict that such voting fluidity may be influenced by strategic policy considerations, justices' uncertainty over issues involved in a case, the chief justice's interest in protecting his prerogatives, and other institutional pressures. To test our hypotheses, we explore the occurrence of fluidity on the Burger Court (1969–85). Using logistic regression, we show that justices' decisions to change their votes stem primarily from strategic policy considerations. In limited instances, the decision to switch can be attributed to either uncertainty or institutional pressures. Our findings suggest that the decision of a justice to join an opinion results from more than his or her initial policy preferences; final votes are influenced as well by the politics of opinion writing.

> Justices, unlike computers, do not react automatically or always "stay put"....
>
> —Chief Justice Warren Burger,
> letter to Justice William O. Douglas,
> July 27, 1972

As Chief Justice Burger suggests, Supreme Court justices change their votes. They may reconsider the vote they cast at the initial conference on the merits at any time before the Court's final decision is announced. Justice William Brennan, for example, once told Justice Potter Stewart, "I voted the other way at conference but you've convinced me" (Brennan 1969). What prompts a justice to change positions? Murphy (1964) suggests that the answer rests, at least in part, in the strategic interaction among justices. After all, the key resource that policy-minded justices have at their disposal is their vote and opinion—and these can be used as bargaining chips to affect the content of the Court's opinion. It thus seems likely that justices might switch their votes in response to draft opinions as they attempt to obtain final Court opinions consistent with their views.

The nature of this strategic interaction is frequently seen in exchanges over opinion passages. Justices often ask the opinion author to address their concerns by modifying the draft opinion through the addition of a phrase or the deletion of a few sentences. These requests are frequently presented as a condition for joining the opinion. Justices tacitly threaten to withhold support if the changes are not made; indeed, they may refrain from joining the opinion and may instead write or join a concurring or dissenting opinion. At times, justices are more blunt. After asking Justice Hugo Black to make two additions to his majority opinion, Justice Potter Stewart threatened to join John Harlan's dissent: "At the risk of seeming unreasonably stubborn, I am still unwilling to join your opinion so long as it contains the view expressed in the phrase 'over a long period of time' in the 6th line on page 12. Perhaps I had better wait to see John Harlan's separate opinion" (Stewart 1969). Ultimately, Black altered the draft opinion, and Stewart switched from the position he first expressed at conference and joined Black's opinion.

Even though Chief Justice Burger and most judicial scholars recognize that justices alter their votes, our understanding of why and when they switch positions is still limited. Indeed, since the first discussion of justices' strategic behavior by Murphy (1964), very little empirical work has been done to examine the nature of this strategic interaction (Epstein and Knight 1995). In this paper, we articulate and test a comprehensive model of why justices do not always "stay put." We argue that justices' decisions to alter their votes are potentially shaped by three factors: strategic policy considerations, uncertainty about the legal issues involved in a case, and institutional pressures and considerations inherent in the Court.

VOTING FLUIDITY

Fluidity is not the norm on the Court, but neither is it rare: During the 1946–75 period, a justice was likely to switch his or her vote from affirm to reverse or from reverse to affirm 7.3% of the time (Dorff and Brenner 1992).[1] Nevertheless, over half of Supreme Court cases decided during the six terms covered in Brenner (1980) had at least one instance of fluidity. Following the landmark work by Howard (1968), several studies have attempted to examine and explain empirically the occurrence of fluidity (Brenner 1980, 1982; Dorff and Brenner 1992; Hagle and Spaeth 1991). The explanations these authors offer have focused primarily on the attributes of individual justices and case characteristics, such as a justice's freshman status, the size of the majority coalition, and the salience of the case. We build upon previous analyses of voting fluidity in three respects.

First, we examine the relationship between strategic policy considerations and changing votes. In spite of the

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[1] During the 1946–55 period, a justice changed his vote from affirm to reverse (or vice versa) 9% of the time (Brenner 1980), and during the 1956–67 period, 10% of the time (Brenner 1982).

insight that voting fluidity provides judicial scholars in investigating the strategic interaction among justices, most studies do not explore the role of policy considerations. The only study that has tested that role (Hagle and Spaeth 1991) finds a significant bivariate relationship between the occurrence of fluidity and the juxtaposition of the author's and the voting justice's ideology. Other studies investigate other ideologically related hypotheses, such as whether fluidity is less prevalent among outcome-oriented, liberal justices or in cases with liberal outcomes (Dorff and Brenner 1992), but they do not address whether justices change positions because they are ideologically closer to the opposing writer than to the writer assigned the opinion for their original positions.

Second, with a single exception (Dorff and Brenner 1992), previous analyses of fluidity have not attempted to test a multivariate model. Instead, they have used bivariate analysis to isolate factors related to the frequency of voting fluidity, such as justices' length of experience on the Court. By examining the effect of one factor at a time, most previous work has not disentangled the effects of the multiple influences on fluidity. Multivariate controls allow us to assess the independent influence of numerous factors potentially affecting justices' votes. Conclusions drawn from previous bivariate analyses may not hold when multivariate controls are in place.

Third, we expand the scope of previous research to include all cases decided during the Burger Court (1969–85) and all instances in which a justice voted on the initial decision either to affirm or reverse.[2] Previous studies have tended to focus solely on either the tendency of justices to switch into the minority or on their propensity to join the majority. Although Brenner (1980, 1982) did assess the frequency of both types of fluidity, no study has yet developed a comprehensive model of fluidity. For example, although Dorff and Brenner (1992) use a multivariate model, their analysis is based on a limited data set assessing only the votes of justices who initially sided with the minority. In contrast, Hagle and Spaeth (1991) limit their analysis to justices originally voting with the majority; and Brenner, Hagle, and Spaeth (1989) look solely at fluidity that changes the outcome of a decision. All of these studies present important instances of fluidity, but none captures the complete range of fluidity that can occur. Collectively, therefore, they provide only a partial account of the politics of Court decision making. By building on these earlier important works, we hope to develop a more complete model of the politics of fluidity and to expand our understanding of Court dynamics.

FLUIDITY AND THE DELIBERATIVE PROCESS

Voting fluidity on the Supreme Court presents a paradox to judicial scholars. Although Chief Justice Burger asserts that justices do not act "automatically," the dominant explanations of judicial behavior virtually lead us to expect justices to do so. At the very least, vote switching seems inconsistent with dominant explanations of Court behavior (Howard 1968). The attitudinal model of Court decision making suggests that preferences alone account for the behavior of Supreme Court justices (Segal and Spaeth 1993, 65).[3] Indeed, attitudinalists view justices as " 'naive' decision makers who always vote their unconstrained attitudes" (Epstein and Knight 1995, 2). They argue that justices make decisions exclusively on the basis of their fixed preference concerning the case outcome, and the Court's written opinions are therefore just "post-hoc rationalizations" of their earlier decision on the merits, cloaking their true motivations (Frank [1930] 1970, Schubert 1965, Segal and Spaeth 1993). If this is an accurate depiction of judicial decision making, reevaluation of a justice's position and subsequent vote change as a result of the Court's deliberation and circulation of draft opinions is an anomaly. If justices have a clear set of policy preferences or attitudes that they apply in reaching the decision on the merits, what explains vote change?

In this article, we suggest a more nuanced role for the influence of policy preferences on justices' votes. In particular, we suggest that justices' votes may change while they are considering a case because of the context of the decision-making process. At least three elements of that process are likely to convince justices to alter previously held positions. First, their preferences are not always firm on every issue. Such uncertainty leaves them open to the persuasion of their fellow justices during the decision-making process. Second, the dynamics of the coalition-building process—in which opinions are drafted and amended—can often entirely reshape the nature of the Court's ruling and reasoning, thereby making the outcome more or less attractive to the justices. Third, institutional considerations may encourage justices to change their votes for reasons that are independent of their policy concerns. We elaborate each of these competing influences below.

Consider first the effects of justices' uncertainty about the legal and political issues raised in a new case. Justices may not have strong policy preferences about every issue that comes before the Court, and the policy implications of the case may not be apparent until the majority opinion is drafted. As a result, we might expect a justice who does not have fixed views on a given issue to switch his or her vote during deliberation of the case, perhaps after being persuaded by a fellow justice

[2] Previous studies of Court fluidity have focused on fluidity during the Vinson and Warren Courts and the early years of the Burger Court. The opportunity to study fluidity during the entire Burger Court has only recently been provided by the release of Justice Thurgood Marshall's and Justice William Brennan's papers.

[3] While the attitudinal model may be the most prominent model of Supreme Court decision making, other scholars have maintained that preferences alone do not account for the actions of Supreme Court justices. For example, the decision to grant certiorari depends in part upon non-attitudinal factors, such as the interests of the solicitor general (Tanenhaus et al. 1963) or the need to correct errors made by lower courts (Provine 1980, Songer 1979, Ulmer 1984). Likewise, the chief justice's assignment of cases depends in part upon organizational demands upon the Court (Maltzman and Wahlbeck 1996a). Court decisions on the merits are also influenced by legal precedent (George and Epstein 1992), party resources (Songer and Sheehan 1992; but see Sheehan, Mishler, and Songer 1992), and attorney experience (McGuire 1995).

(Howard 1968, Murphy 1964). Murphy explains that "judges can be persuaded to change their minds about specific cases as well as about broad public policies, and intellectual persuasion can play an important role in such shifts" (1964, 44). The importance of persuasion is reflected in a memo from Justice Harlan to Justice Black about his decision to change his vote in *Detroit and Toledo Shore Line* v. *United Transportation Union* (1969). Harlan wrote Black, "As one of those whose Conference vote was to reverse this case, I am persuaded by your opinion that affirmance is the proper result" (Harlan 1969). Preferences, in short, may be endogenous to the decision-making process. Rather than acting on sincerely held preferences brought to the bench, justices' views about particular cases may be susceptible to influence during the process of deliberation.

Although a decision to change a vote may reflect an evolution of thinking after the initial conference vote, we suspect that an important source of fluidity may be the nature of the opinion drafts that are circulated. Justices and members of the legal community care about more than the decision to reverse or affirm: they care about the legal rules articulated in the opinions. After all, these legal rules not only affect the litigants in a specific case, but also establish guidelines or referents that will affect similarly situated parties (Spriggs 1996, Wahlbeck 1994). The Court's opinions can therefore be seen as broad policy statements. What these opinions say, of course, depends upon both the policy views of the opinion author and the composition of the coalition expected to sign the opinion. Thus, fluidity in a justice's vote is likely to reflect a response to the opinion circulated after the conference on the merits.

Take, for example, *Wardius* v. *Oregon* (1973). In this case, Justice Brennan's docket books reveal that Justice Rehnquist initially voted with the minority. Nevertheless, on March 14, 1973, he circulated an explanatory note: "I voted to affirm in this case at Conference, but before writing a dissent to Thurgood's proposed opinion I think I will wait to see if anything narrower ... is written" (Rehnquist 1973). On June 4, Justice Marshall circulated a new draft with a cover letter stating that "since the Court appears hopelessly splintered on the disposition of petitioner's contentions concerning the state's exclusionary rule, I have decided that it may be best to leave this question for another day" (Marshall 1973). On June 6, Marshall's decision to limit the breadth of his opinion was rewarded when Rehnquist joined his opinion to reverse. Rehnquist's vote in this case clearly reflected something other than a desire to affirm the decision of the lower court. Instead, Rehnquist was willing to abandon his preferred outcome in order to ensure that the majority opinion was narrowly drawn. Thus, Rehnquist changed his vote once the opinion as crafted by Marshall more closely reflected his preferred policy outcome. Changes in draft opinions may yield changes in justices' votes.

Beyond such strategic interactions among opinion authors and their coalitions, institutional considerations might also be at play in leading justices to change their votes. As members of a nine-justice bench, Supreme Court justices are potentially susceptible to a variety of pressures beyond policy preferences. First, the visibility of each justice's vote exerts unique pressures on the Court. Justices on the Court, like individuals in all institutions, may feel uncomfortable remaining outside the dominant group. As a result, justices may change their votes from the minority to the majority because of small-group influences that are independent of policy preferences. Second, justices may feel constrained by concerns about the effects of the Court's decisions. This constraint is potentially enhanced by producing a unanimous opinion from the bench (Johnson and Canon 1984).

In sum, preferences alone—independent of the process of reaching decisions on the Court—cannot explain why justices change their votes. Indeed, according to Howard (1968), such voting fluidity suggests the need to refine the attitudinal model: "If a vote or an opinion has changed in response to a multiplicity of intracourt influences before its public exposure, how reliable is that vote or opinion as an indicator of attitude, ideology, or if one pleases, predilection?" (p. 44). In our view, a model of voting fluidity must take into account both policy preferences and these "intracourt influences."

EXPLAINING FLUIDITY

Fluidity stems from the strategic interaction among justices. We therefore expect justices to switch to the opinion that best represents their policy preferences and we expect this relationship to hold even after subjecting it to controls for issue uncertainty, the chief justice's interest in leading the Court, and other institutional considerations. We address each of these in turn.

Policy Considerations

The strategic model portrays justices as responding to the positions articulated by other justices. As a result, we expect justices to sign the opinion that is closest to their own policy preferences (Epstein and Mershon 1993, Rohde and Spaeth 1976, Segal and Spaeth 1993). Previous findings on voting fluidity are consistent with this expectation. For example, Hagle and Spaeth (1991) show that nearly 75% of the time when a justice switches from the majority to the minority, s/he is ideologically closer to the marginal justice in dissent than to any member who sides with the majority (p. 122). Similarly, Brenner and Spaeth (1989) and Brenner, Hagle, and Spaeth (1989) show that minimum winning coalitions are most likely to break up when the marginal justice in the majority is closer to the dissenters than to any member of the majority. In these instances, the marginal justice is likely to switch and undermine the initial majority's victory.

The extent to which a particular opinion reflects a justice's policy preferences depends upon three factors. First, the views of the authors writing majority and dissenting opinions are important. After all, as Justice William Brennan once wrote to Chief Justice Burger, "[My] votes are tentative depending upon what is written pro and con" (Brennan 1971). Because the justices who write opinions have a disproportionate capacity to shape

the final opinion (Murphy 1964), the following hypothesis seems reasonable:

HYPOTHESIS 1: *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, the ideological composition of the original coalition may influence a justice's final vote on a case. Although authors clearly have a significant influence over a particular opinion, the justices who make up a coalition can also substantively affect the opinion they expect to sign (Epstein and Knight 1995, Murphy 1964, Schwartz 1996). Authoring justices frequently respond to the concerns articulated by other potential coalition members by adopting their suggestions. Justice Stewart, for example, once reported to the conference that he "restructured this opinion somewhat, in an effort to meet the difficulties expressed" by other justices (Stewart 1970). Thus, as justices attempt to retain a majority, the views they articulate in an opinion may be moderated by a desire to appease another justice. This leads us to expect the following:

HYPOTHESIS 2: *The closer a justice is ideologically to the original coalition as compared to the opposing coalition, the less likely the justice is to switch.*

Third, the size of the initial coalitions is likely to be important. If the initial majority coalition is a minimum winning coalition, authors on both sides will recognize the fragility of their coalitions and thus be particularly responsive to the concerns of those justices forming the original coalition. Until the opinion commands a "Court" of five justices, the author has an incentive to accommodate other justices to reach a majority (Biskupic 1995, Riker 1962). This leads to the following hypothesis:

HYPOTHESIS 3: *A justice is less likely to switch votes if the initial majority coalition was a minimum winning one.*

Uncertainty

There are, of course, alternative explanations to account for a justice's decision to switch his or her vote. A plausible hypothesis is that the justice did not fully understand the issues involved in a particular case when casting the initial vote. Indeed, in his ground-breaking study of fluidity on the Court, Howard (1968) suggests uncertainty as a factor that could account for such voting fluidity: "Shifting perspectives appear to have been a function of additional thought and homework, by a clerk or a justice, into issues that were only partially perceived at first because of inadequate argument, briefs, or time" (p. 47). This is supported by statements of justices indicating how they reached results contrary to their original positions—"mature reflection" or "research and labor" convinced them to change votes (Harlan 1970, Marshall 1969).

A justice's uncertainty should vary with both the case and the justice. When a case is particularly complex and thus raises multiple legal issues, the likelihood that a justice will understand all aspects of the case at the time of the initial vote is low. Justice William Douglas suggested this to the conference in *Dandridge* v. *Williams* (1969):

> I voted to reverse. As you will recall, the decision by the three-judge court was on the Equal Protection Clause that I think did not sustain the Court's position. . . . I have now concluded that the case was rightly decided below, not for the constitutional reason but because of the federal statute and the Supremacy Clause. I am, therefore, changing my vote to affirm (Douglas 1969).

Thus, we hypothesize the following:

HYPOTHESIS 4: *The more complex the case, the more likely a justice is to switch.*

Conversely, a justice's level of certainty will be highest when the case is highly salient. In these cases, the justice's positions will be relatively fixed, and the likelihood that new information will alter a justice's opinion is relatively low (Brenner and Palmer 1988). Consistent with this finding are Brenner's (1980, 1982) and Hagle and Spaeth's (1991) findings that fluidity is not more likely in a case that is particularly salient. We expect little fluidity in highly salient cases, but justices may be more willing to acquiesce to a contrary opinion in cases that are not seen as important. In fact, Dorff and Brenner (1992) show that justices are more likely to switch from the minority to the majority if the case is not salient. This leads us to expect the following:

HYPOTHESIS 5: *The more salient the case, the less likely a justice is to switch.*

Uncertainty is also likely to reflect a justice's judicial experiences and personal expertise. The longer a justice has served on the Court, the more likely he or she is to understand all of the relevant issues when casting the initial vote on merits. In contrast, "it is not uncommon for a new justice to undergo a period of adjustment . . . before his voting behavior stabilizes into observable, not to mention predictable, patterns" (Howard 1968, 45). Consistent with this claim, Dorff and Brenner (1992) find that freshmen justices are more likely to switch than are their senior colleagues (but see Hagle and Spaeth 1991). Conversely, a justice's relative expertise in an issue area will also likely affect the propensity to switch. Presumably, justices with substantive expertise in a particular area are more likely to cast an informed vote at the initial conference than are their colleagues who have only a passing familiarity with a particular type of case. These expectations lead to two further hypotheses:

HYPOTHESIS 6: *Freshmen are more likely to switch than are more senior justices.*

HYPOTHESIS 7: *Policy experts are less likely to switch than are justices with less expertise in an issue area.*

Institutional Considerations

The chief justice is in a unique institutional position. Unlike other justices on the Court, the chief justice has the prerogative to assign the Court's opinion when s/he

is in the majority. This prerogative is one of the chief's most important sources of power (Maltzman and Wahlbeck 1996a, Murphy 1964, Rohde 1972, Rohde and Spaeth 1976, Segal and Spaeth 1993, Slotnick 1979). For this reason, it may be in the chief justice's strategic interest to switch from the minority to the majority after conference. Although judicial scholars have not studied the frequency of such strategic behavior, anecdotal evidence from the justices' papers and chronicles of Court politics have suggested that Chief Justice Burger frequently engaged in such behavior (Woodward and Armstrong 1979). For example, in an unpublished opinion, Justice Douglas accused Burger of trying to control the opinion assignment by altering his vote in *Roe* v. *Wade*:

> The Chief Justice represented the minority view in the Conference and forcefully urged his viewpoint on the issue. . . . Hence traditionally the senior Justice in the majority—who in this case was not myself—should have made the assignment of the opinion . . . . The cases were, however, assigned by the Chief Justice (Douglas 1972a).[4]

In addition to changing his or her vote to control the assignment, the chief may feel additional institutional pressures to vote with the majority. As the leader of the Court, s/he may seek to present the Court as unified and himself or herself as the leader. As a result, we might expect the chief to subordinate his or her policy preferences and switch to side with the majority. Regardless of why the chief moves from the minority to the majority, there is good reason to propose the following:

HYPOTHESIS 8a: *The chief justice is more likely than other members to switch from the minority to the majority.*

Conversely, the chief justice will want to retain control of the opinion and will rarely switch from the majority to the minority:

HYPOTHESIS 8b: *The chief justice is less likely than other justices to switch from the majority to the minority.*

The power of the chief to assign the majority opinion is not the only institutional feature of the Court. For two additional reasons, the nature of the initial voting coalitions might increase the probability that justices will switch their votes. First, Supreme Court scholars have maintained that the impact of Court decisions is enhanced when the Court rules overwhelmingly, sending a clear signal to lower court judges and other implementers (Howard 1968, Johnson and Canon 1984, Murphy 1964). As a result, Howard (1968) argues that minority coalition justices frequently alter their votes because of their loyalty to the Court as an institution. The size of the voting coalitions may affect justices' desire to change their votes for unconscious reasons as well. Indeed, social psychologists have maintained that an individual's perception of the appropriate conclusion is most likely to change when he or she is one of few dissenters (Asch 1951, 1952; Hare 1976). The influence of the majority is particularly intense in small groups (Hare 1976). Brenner and Dorff (1992) argue that this is why justices are more likely to switch from dissenting to concurring than from concurring to dissenting. This leads to a final set of hypotheses consistent with these expectations:

HYPOTHESIS 9a: *Justices who vote in the conference minority are more likely to switch than justices who are members of the conference majority.*

HYPOTHESIS 9b: *Justices who dissent are more likely to switch to the majority opinion if relatively few justices are dissenting.*

HYPOTHESIS 9c: *If the Court is unanimous on the initial conference vote, justices will be less likely to switch.*

DATA AND METHODS

Our analysis is based upon cases decided by the Burger Court (1969–85 October terms).[5] By comparing the initial conference vote of each justice to his final vote, we were able to identify instances of fluidity. To determine the conference vote of each justice, we relied upon the docket books of Justice William Brennan. These docket books provide a highly reliable record of how each justice voted in conference, especially when the vote supported either affirmation or reversal (Maltzman and Wahlbeck 1996b). To determine the final vote of each justice, we used Spaeth (1994a).

If a justice voted to affirm at the initial conference on the merits and eventually supported reversal in the final decision or, alternatively, initially voted to reverse but ultimately affirmed the lower court, we coded the justice's action as fluid.[6] If the justice voted either to affirm or reverse initially as well as in the final decision, we portrayed the justice's vote as stable. If a justice voted for an outcome other than to reverse or affirm (for example, to "dismiss as improvidently granted" or vacate) at either vote, the justice's pair of votes was excluded from the analysis. During the Burger Court, there were 18,411 pairs of individual votes. Of these, 2,899 (15.7%) were excluded from our analysis because of a vote for a position other than to affirm or reverse or

[4] Based on an examination of the justices' conference vote, some might question Justice Douglas's assertion that he was not the senior associate justice in *Roe*. In fact, at least according to his records, he was the most senior justice in the coalition that favored striking down the abortion laws. In a letter to Chief Justice Burger, he explained why he was not the senior associate justice: "The reason Bill Brennan, not I, represented the consensus at the first Conference on the Abortion Cases was that I thought at the time that the cases—at least Georgia's—could be disposed of on Equal Protection grounds—a theory that did not hold up on further study" (Douglas 1972b).

[5] We limited our analysis to cases that were orally argued before the Court and in which the Court released a signed opinion. We omitted per curiam decisions, memorandum decisions, and decrees. We also excluded those cases in which no clear majority existed at the initial conference because there was a tied decision or because a majority of the Court voted for an outcome other than to reverse or to affirm. The docket sheets for the 57 cases missing from Brennan's records are also excluded. Finally, we excluded those cases that did not fit into one of the 12 substantive issue areas that Spaeth (1994a) identified. (See footnote 8.)

[6] We limited our analysis to those instances in which a justice initially voted to affirm or reverse because in these instances the docket books of the justices are most reliable (Maltzman and Wahlbeck 1996b). If we included in our analysis votes that were neither to affirm nor to reverse, what would appear to be fluidity could indeed simply reflect docket-book coding errors.

because the majority supported such a position. Another 53 vote pairs were omitted because the conference vote was tied.[7] Because our dependent variable is dichotomous (identifying whether a justice changed his or her vote after the original conference on the merits), we used a logistic regression model (Aldrich and Nelson 1984, King 1989). The hypotheses suggest that a justice's decision to switch depends upon a series of justice- and case-specific variables.

Next, we describe how we constructed the independent variables necessary to test the hypotheses of voting fluidity.

Justice-Specific Attributes

Author Distance. To assess the ideological distance between a justice and the authors of the majority and minority opinions, we calculated an issue-specific ideological score for the compatibility between each justice and both the majority opinion author and the dissent author closest to the justice in question. To determine this score, we used twelve substantive value groups identified by Spaeth (1994a).[8] For each of these groups, we calculated the percentage of cases in which each justice voted for the liberal outcome (Epstein et al. 1994, Table 6-1). We calculated author distance by subtracting the difference between each justice and the author on the other side of the case from the distance between each justice and the author on the side the justice initially supported.[9] When a justice was closer to the opposing writer than to the justice writing the opinion for the side a justice initially supported, our measure produces a positive value. If the writers were equidistant from a justice, the author distance is zero. If a justice was closer to the writer for the side s/he initially supported than to the opposition writer, the measure is negative. Hypothesis 1 leads us to expect fluidity to be positively related to author distance.

Coalition Placement. To determine a justice's position in relation to the coalitions that formed at the initial conference, we compared each justice's issue-based ideological rank with the mean rank for both the minority and majority coalition that formed at this conference.[10] We gave a justice a placement score of +1 if his or her ideological rank was either at the initial coalition's mean or was located between that mean and the rank most closely associated with the outcome supported by the conference coalition, that is, one for liberal outcomes and nine for conservative outcomes.[11] If a justice's rank was located between the mean member of the two coalitions that initially formed, the justice's position was coded as 0. If a justice's rank was located between the opposition coalition mean and the rank identified with the outcome supported by that coalition, we coded the justice's placement as −1.[12] Hypothesis 2 leads us to expect a negative correlation between fluidity and coalition placement.

Freshman. Any justice who had served less than two full years when the oral argument was heard was coded as 1. All others were coded as 0.[13] Hypothesis 6 leads us to expect a positive correlation between freshman status and fluidity.

Expertise. To measure whether a justice had substantive policy expertise, we calculated an issue-specific opinion ratio (OR) for each justice.[14] The OR is based on the total number of majority opinions, dissents, and concurrences written by each justice during his or her entire tenure on the Supreme Court.[15] More specifically, the OR is the number of cases in which a justice wrote an opinion, dissent, or concurrence, divided by the number

[7] Although we excluded votes that were neither to affirm nor to reverse from our dependent variable, several of our independent variables are based upon the size and makeup of the coalitions that formed on the initial merits vote, i.e., minimum winning coalitions. Excluding votes other than affirm and reverse from the calculation of those independent variables would obviously create a tremendous amount of measurement error. A justice's vote to dismiss a case does not mean that the other justices were unaware of how this justice would have voted if the Court had opted to decide the case. Justices frequently voice more than one preference at the conference. A justice might say, for example, that s/he favors dismissal, but would also support an affirmation of the lower court decision. While we could have omitted the entire case if this problem arose, this would raise questions about the generalizability of the findings. In 492 cases during the Burger Court, a justice voted for an outcome that was neither to reverse nor to affirm. To keep these cases in our analysis, we opted to substitute a justice's final vote for any initial vote that was for an outcome other than to reverse or to affirm.

[8] Spaeth (1994a) identifies 13 value groups. His 13th group consists of miscellaneous cases. Because of the ambiguous nature of this value area, we dropped these cases from our analysis.

[9] If a case was unanimously decided, no justice served as a referent for the opposition author. To solve this problem, we created an opposition author referent score. This score is the polar opposite of the outcome that was reached. If the Court unanimously voted for a conservative outcome, the opposition author ideology score was treated as 100% liberal. Conversely, if the Court voted unanimously for a liberal outcome, the opposition-author ideology score was treated as 0% liberal. This method is similar to Hagle and Spaeth's (1991, 122) treatment of unanimous cases.

[10] This procedure is analogous to a Wilcoxon rank-sum test that determines whether the median of two groups is similar. We used it to develop an indication of the coalition's ideological composition. On the basis of each justice's liberal support score, we assigned a rank of 1 to 9 to each justice on each of the 12 issue areas (Spaeth 1994a). We then summed the ranks of justices in each coalition and divided by the number of justices.

[11] We derived the ideological direction of the case outcome from Spaeth (1994a).

[12] If a case was unanimously decided, we created an opposition coalition referent score. This score is the polar opposite of the opinion that was reached. If the Court unanimously voted for a liberal outcome at its initial vote, justices who were more liberal than the mean of all justices were given a +1 placement score. Justices who were more conservative than the mean were given a 0 placement score. No justice was given a −1 score on a unanimous case. A similar coding scheme was employed for unanimous cases with a conservative outcome.

[13] To calculate each justice's length of tenure, we compared the oral argument date and the anniversary of the justice's Senate confirmation (Epstein et al. 1994, Table 4–12).

[14] Each justice was given a unique opinion ratio for each of 133 narrow issue areas that Spaeth (1994a) identifies. To select the 133 issues, we relied upon the 263 issue categories that Spaeth names and then grouped those issues that Spaeth reports as being related. For example, the five specific issue areas that Spaeth identifies as related to federal transportation regulation (railroad, boat, truck, pipeline, and airline) are grouped together.

[15] For justices Black and Douglas, we used the total number of opinions written since 1953 because this variable was generated from Spaeth (1994a), whose data begins in 1953.

of like cases that had reached the Court since that justice's appointment. Since the OR takes into account all opinions written by each justice over his or her Supreme Court career, it is insensitive both to a justice's ideological position relative to colleagues and to the chief justice's assignment decisions. If a justice's OR was more than 1.65 standard deviations above the mean OR for the justices serving when a case was heard, we considered the justice a specialist in that issue area.[16] If a justice was a specialist in an issue area relevant to a particular case up for assignment, that justice was coded as 1. Others were coded as 0. Hypothesis 7 leads us to expect a negative relationship between expertise and fluidity.

Chief Justice. To see whether the chief justice acts differently from other members of the Court, we created two additional dummy variables. The first is a dummy variable to designate the chief. The second variable designates the chief justice when s/he initially voted with the minority. Because the chief has a strategic interest in changing a minority vote to a majority vote, we call this variable *Strategic Chief*. Hypothesis 8a suggests a positive correlation between the chief's being in the minority (*Strategic Chief*) and switching his final vote. Hypothesis 8b suggests a negative correlation between the chief and fluidity in other circumstances.

Minority Coalition Member. If a justice was a member of the minority coalition at the conference on the merits, this variable was coded as 1; otherwise it was coded as 0. Hypothesis 9a leads us to expect a positive relationship between conference minority voters and fluidity.

Case-Specific Attributes

Minimum Winning Coalition (MWC). If a case was decided at conference by a margin of one vote or less, it was coded as 1; otherwise it was coded as 0. Hypothesis 3 suggests that when a case is decided by a minimum winning coalition, justices will be less likely to switch.

Case Complexity. We anticipate that a justice will be more likely to switch in cases that raise complex legal issues than in simpler cases. Although numerous measures of case complexity exist, no one measure fully captures the concept of complexity. Thus, we measured case complexity by factor analyzing three indicators and then used each case's factor scores as a measure of complexity. The joint variance, we argue, best captures case complexity. The first measure was the number of issues raised by a case.[17] The second was the number of legal provisions relevant to a case.[18] The third was the number of opinions released in a case.[19] Factor analysis of these three indicators produced a single factor with an eigenvalue of greater than 1. Since we presume that complex cases raise more issues, pertain to more legal provisions, and result in more opinions than do simpler cases, Hypothesis 4 leads us to expect our factor scores to be positively related to voting fluidity.

Case Salience. Hypothesis 5 predicts that a justice will make a more informed decision at the initial conference if the case is highly salient. Thus, fluidity should be rare in salient cases. As an indicator of case salience, we used the Epstein et al. (1994, Table 2-10) list of landmark cases. If a case was included on the list, it was coded as 1; otherwise it was coded as 0.

Dissent. To test the hypothesis that a justice who initially votes with the minority will be more likely to join the majority if relatively few justices initially voted to dissent (Hypothesis 9b), we created a dissent-size variable. If a justice was the only dissenter, this variable was 4. If two justices voted to dissent, the variable was 3; if three justices dissented it was 2; and if four justices dissented it was 1. We reversed the direction of our dissent count because all justices who voted with the majority were given a 0 for their dissent count. Our expectation is that our dissent variable will be positively correlated with a justice's decision to switch his or her vote.

Unanimity. If every participating member of the Court initially voted with the majority, it was coded as 1; otherwise it was coded as 0. Hypothesis 9c suggests that a justice is unlikely to switch to the minority if the Court was initially unanimous. Thus, we expect a negative coefficient.

FINDINGS

Table 1 provides an overview of our dependent variable. The table shows how frequently each of the 13 justices who served on the Burger Court changed his or her vote after the initial conference. During the Burger Court, at least one justice changed positions in 36.6% of the cases, while individual justices switched their votes 7.5% of the time. The table also shows that there was considerable variation by type of vote and across members. Whereas the average justice who voted with the minority at the initial conference changed his or her vote 18.1% of the time, a justice who initially voted with the majority was likely to switch 4.6% of the time. Justice Black switched 14.9% of the time and Justice Marshall 10.7%, but Justice Stevens switched only 5.8% of the time.

Table 2 presents the estimated coefficients and significance levels for a maximum likelihood logit model

[16] The decision to use 1.65 standard deviations should result in a 5% likelihood that a justice will specialize in an issue area. During the natural court that began with Sandra Day O'Connor's appointment, for example, 31 of the 133 issue areas (23.3%) had no specialist, while 71 areas (53.4%) had a solitary specialist. In 28 areas (21.1%), two justices were specialists, and three areas (23%) had three specialists.

[17] We relied here upon Spaeth's (1994a) case classification system. Spaeth classifies each case by 263 issues. The variable we employed is a count of the number of issues that Spaeth identifies for each case. During the Burger Court, this count ranged from one to three.

[18] This number is a count of the legal provision variable in the Spaeth (1994a) data set. For the cases included in our analysis, the count ranges from one to six.

[19] The number of opinions was derived from Spaeth (1994a). Specifically, we counted for each case the number of justices who wrote a majority, concurring, or dissenting opinion. If a joint opinion, joint dissent, or joint concurrence was written, we assume that only one additional opinion, dissent, or concurrence was written. The maximum number of opinions that any case had during the Burger Court was seven.

TABLE 1. Frequency of Vote Changes (Fluidity), by Conference Status and Justice

Justice	Percent Fluidity When in Conference Majority	Conference Minority	Overall Percent Fluidity
Black	11.5%	24.4%	14.9%
Blackmun	4.0	20.5	6.7
Brennan	5.1	15.7	8.5
Burger	4.3	17.8	6.3
Douglas	8.2	11.4	9.6
Harlan	5.4	27.3	8.6
Marshall	7.6	18.2	10.7
O'Connor	5.6	13.6	6.8
Powell	3.9	20.5	6.2
Rehnquist	3.3	23.4	8.9
Stevens	4.4	10.4	5.8
Stewart	3.8	18.2	6.5
White	3.3	22.5	6.2
AVERAGE	4.6	18.1	7.5

Note: This table shows how frequently each of the 13 justices who served on the Burger Court changed his or her vote after the initial conference. This is calculated by dividing the number of cases in which the justice changed votes by the justice's total number of conference votes in the majority coalition, the minority coalition, and overall.

predicting whether a justice would switch votes. The statistically significant chi-square test of the log-likelihood ratio allows us to reject the null hypothesis that each of our independent variables, except the constant, is equal to 0. The pseudo-R^2 (36.2) demonstrates that the model explains the variance in fluidity moderately well. The model correctly classifies 94.3% (14,582) of the cases. Compared with predicting that a justice would never switch, the proportional reduction in error associated with the model is 24.7%.

We find strong support for the expectation that fluidity is a function of strategic policy calculations (Table 2). All three measures of a justice's ideological placement are statistically significant. The coefficient of the author-distance variable suggests that justices are more likely to switch if they are ideologically distant from the writer of the opinion to which they initially committed and ideologically proximate to the opposition writer. These findings provide empirical support for Hypothesis 1. The effect of the coalition placement score is also suggestive of the effects of policy preferences. The closer justices are to the opposition coalition, and the farther they are from their own coalition, the more likely they are to switch. This is consistent with Hypothesis 2. If the initial majority coalition is a minimum winning coalition, this also affects the likelihood of fluidity. Justices are less likely to switch if the original coalition was of minimum winning size. This suggests that in crafting opinions with the initial support of a minimum winning coalition, both majority and dissenting opinion writers are likely to attend to the preferences of their initial supporting coalition in order to hold it together.

To illustrate the substantive effect of the statistically significant independent variables reported in Table 2, we ran several simulations of the likelihood that a justice would switch. We held all significant independent variables constant except one, and the results in Table 3 show how each independent variable affects the likelihood that a justice would change his vote after the initial merits conference.[20]

TABLE 2. Logistic Regression of Vote Fluidity (model 1)

Variable	Coefficient	Standard Error
Policy		
Author distance (Hypothesis 1)	0.061***	0.002
Coalition placement (Hypothesis 2)	−0.459***	0.054
Minimum winning coalition (Hypothesis 3)	−0.337**	0.113
Uncertainty		
Case complexity (Hypothesis 4)	0.112***	0.036
Landmark (Hypothesis 5)	0.071	0.155
Freshman (Hypothesis 6)	0.266*	0.132
Expert (Hypothesis 7)	−0.152	0.113
Institutional		
Chief Justice	−0.089	0.154
Strategic Chief (Hypothesis 8)	0.166	0.275
Minority coalition member (Hypothesis 9a)	0.913***	0.185
Dissenters (Hypothesis 9b)	0.382***	0.070
Unanimity (Hypothesis 9c)	−0.143	0.130
Constant	−3.030***	0.067
Number of cases	15,459	
−2 × Log likelihood ratio	5271.491***	
Reduction of error	24.700	
Percent correctly classified	94.300	
Pseudo-R^2	36.200	

*significant at .05 (one-tailed test)
**significant at .01 (one-tailed test)
***significant at .001 (one-tailed test)

The importance of such policy calculations is illus-

[20] The benchmark probability is the likelihood of a vote change when the value of each variable is set at its mean or, in the case of a dichotomous variable, at the mode. By setting the values of our independent variables at various levels and then changing them one at a time, it is possible to observe the effect of each variable. For example, to simulate the probability of a justice changing his or her vote when s/he is closer to the writer of the opinion s/he initially supported than to the nearest justice writing on behalf of the other side ("closer to ally"), we set the author distance score at −96.8. This score would occur if a justice were perfectly aligned with the author s/he initially supported and if the nearest opposition writer were on the opposite end of the ideological spectrum. The simulation for the justice who is initially "closer to opponent" is calculated by reversing the placement of the authors. For the "closer to opponent" simulation, the author distance score is set at 85.5. The simulated probability of the "equidistant" justice is based upon an author distance score of 0. The simulated probabilities for coalition placement, number of dissenters, conference minority, and freshman justices are calculated for the categories specified in the table. For the simulated probability for the most complex cases, the complexity score is set at one standard deviation above the mean. Thus, the factor value for the "hard" complex case simulation is set at 0.97. This is compared to the "easy" case simulation where we set the complexity score at the minimum observed factor value of −0.98. This is about one standard deviation below the mean.

TABLE 3. Simulated Probability of Vote Change

Characteristics	Probability
Benchmark	.018
Author distance	
Closer to ally	.000
Equidistant	.046
Closer to opponent	.898
Coalition placement	
Far side of initial coalition	.013
Between coalitions	.021
Far side of opposite coalition	.033
Minimum winning coalition	.013
Case complexity	
Easy	.016
Hard	.020
Freshman Justice	.023
Dissenters	
3 Justices	.077
1 Justice	.152
Minority coalition member	.044

trated in these results. Whereas the justice who is equidistant between the authors switches 4.6% of the time, a justice with ideological views similar to those of the justice authoring the opinion within the original coalition is likely to change his or her vote 0.01% of the time. The likelihood of fluidity is 89.8% if the justice is ideologically proximate to the writer of the opposing opinion and distant from the writer authoring the opinion for the vote the justice initially cast. Similar patterns appear for the coalition placement score. Justices who are farther from the opposing coalition than from their initial coalition's mean ideological score are likely to switch 1.3% of the time. Conversely, justices who are on the far side of the opposing coalition's ideological mean are likely to switch 3.3% of the time. If the initial majority coalition is a minimum winning coalition, however, the probability of switching drops from the 1.8% benchmark to 1.3%.

In contrast, the model provides mixed support for the uncertainty hypotheses, no support for our expectation about the influence of the institutional factors unique to the chief justice, but strong support for our expectation about the general influence of institutional factors. Hypotheses 4–7 (predicting the effects of case complexity, case salience, justice experience, and justice expertise) suggest that varying degrees of uncertainty across cases and justices might affect voting fluidity. The results provide support for only two of these hypotheses. As indicated in Table 2, our measure of case complexity is significantly related to justices' decisions to switch votes. The likelihood that a justice will be fluid in a complex case is 25% greater than the likelihood of changing in an easy case. This outcome provides support for Hypothesis 4.

Contrary to Hypothesis 5, justices are not less likely to switch in salient cases.[21] We suspect that this is true because in salient cases opinion authors discourage fluidity by making an extra effort to accommodate each justice who is inclined to support their position. Epstein and Knight's (1995, 34) finding that in important cases opinion authors circulate more draft opinions is consistent with such an explanation. Consistent with Hypothesis 6, freshmen justices are significantly more likely to switch than are their more senior colleagues, as reflected in Table 2. Whereas the benchmark justice switched 1.8% of the time, the freshman justice switched 2.3% of the time (see Table 3). Contrary to Hypothesis 7, however, experts were just as likely as their colleagues to switch their votes. Although it is contrary to our hypothesis, this finding is understandable. Substantive experts are likely to be concerned with an opinion's content. Thus, experts may be just as willing as their less experienced colleagues to use their votes as leverage to encourage various opinion authors to write legal rules consistent with their preferences. This may lead them to change their votes even though their original votes were based upon a clear understanding of the law.

The statistical insignificance of the chief justice and strategic chief coefficients indicates that, contrary to Hypothesis 8, Chief Justice Burger did not act differently than did his colleagues. There is no evidence that Burger routinely changed his vote from the minority to the majority in order to control the opinion assignment. Although it is conceivable that the chief did switch his vote to control the assignment on a few salient cases, there is no general pattern to that effect.[22]

Institutional considerations also appear to have a powerful influence on justices decisions to switch votes. Justices who initially sided with the minority were more likely to switch their votes than those who sided with the majority (Hypothesis 9a). Compared to the benchmark, a justice was more than twice as likely to change positions when he or she was in the conference minority. The model supports Hypothesis 9b; for justices initially siding with the minority, the likelihood of joining the majority increased as the size of the minority coalition shrank. The simulated probabilities illustrate these dynamics. A justice who was one of three members of the minority had a 7.6% chance of switching. For a lone dissenter, however, the likelihood of switching more than doubled, to 15.2%. The negative but statistically insignificant unanimity coefficient in our model, however, does not support Hypothesis 9c.

Previous attempts to identify the causes of fluidity have focused on votes that altered the initial outcome, on justices who initially voted with the majority, or on

[21] Nevertheless, some might suspect that salience explains fluidity only in combination with ideological distance. To test this, we reran the model so that salience interacted with both the writer and coalition placement variables. Both of these variables were insignificant, and all the variables that were significant in Table 1 retained their significance.

[22] One might argue that we have minimized the effect of the chief justice switching to the majority by exclusively examining conference votes to affirm or reverse. Conventional wisdom suggests that Burger, more frequently than any other justice, passed at conference. By not expressing a position at conference, Burger remained flexible and could join the majority and thus assign the majority opinion. According to Brennan's record of Burger's conference votes, he passed in 3.1% of the 2,065 cases in which he participated. This was the highest pass rate on the Court; Hugo Black's rate of 1.7% was the next highest. Burger's pass rate was significantly higher than those of all other justices taken together.

justices who initially voted with the minority. Implicit in these studies is the idea that different sets of factors lead a justice to switch in different directions, thus requiring that directions of fluidity be modeled separately. For instance, if ideology led a justice to engage in conformity voting (changing a vote from the minority to the majority), and uncertainty led a justice to engage in counterconformity voting (changing a vote from the majority to the minority), the development of a general model would not make sense.

After we developed a general model of vote change that encompasses the full range of fluidity, we estimated a second model to test whether the influence of the factors we identified is conditional on the direction of fluidity (Table 4). This model includes all the variables used in the first model, which then interact with a dummy variable to signify whether a justice initially voted with the minority. The first model's variables interaction with a minority dummy variable enables us to test whether these variables have significantly different effects on conformity and counterconformity voting.[23]

The results suggest that the effects of most of the variables are not conditional on the direction of fluidity. Nevertheless, the model does suggest that there are significant differences between the processes for switching from majority and minority opinions. Two of the three policy variables (author distance and minimum winning coalition) are statistically significant and in the predicted direction. Members of the minority are even more likely than members of the majority to switch if they are ideologically closer to the opposing author than to the author of the opinion with which they initially sided. They are also slightly less likely to change their votes if there is a minimum winning coalition. In general, these results suggest that strategic policy considerations are magnified for justices who are in the minority, but the significance of uncertainty is diminished. This is demonstrated by the statistically significant and negative case complexity variable. We suspect that this results from the fact that justices who initially cast a minority vote may hold more intense convictions than the average majority justice and thus are less susceptible to the persuasion of their colleagues.

TABLE 4. Logistic Regression of Vote Fluidity (model 2)

Variable	Coefficient	Standard Error
Policy		
Author distance (Hypothesis 1)	0.053***	0.002
Coalition placement (Hypothesis 2)	−0.553***	0.070
Minimum winning coalition (Hypothesis 3)	−0.189	0.132
Uncertainty		
Case complexity (Hypothesis 4)	0.203***	0.042
Landmark (Hypothesis 5)	0.119	0.187
Freshman (Hypothesis 6)	0.344*	0.165
Expert (Hypothesis 7)	−0.102	0.148
Institutional		
Chief Justice	−0.056	0.151
Strategic chief (Hypothesis 8)	0.064	0.287
Minority coalition member (Hypothesis 9a)	1.324***	0.276
Dissenters (Hypothesis 9b)	0.225**	0.095
Unanimity (Hypothesis 9c)	−0.074	0.129
Minority coalition		
Author distance × minority coalition	0.018***	0.004
Coalition placement × minority coalition	0.117	0.113
MWC × minority coalition	−0.562*	0.245
Case complexity × minority coalition	−0.241**	0.078
Landmark × minority coalition	−0.069	0.332
Freshman × minority coalition	−0.243	0.275
Expert × minority coalition	−0.111	0.233
Constant	−2.999***	.072
Number of cases	15,459	
−2 × Log likelihood ratio	5,224.733***	
Reduction of error	26.500	
Percent correctly classified	94.500	
Pseudo-R^2	36.700	

*significant at .05 (one-tailed test)
**significant at .01 (one-tailed test)
***significant at .001 (one-tailed test)

CONCLUSION

Although fluidity on the Supreme Court is relatively rare, our findings suggest that it occurs in a predictable fashion. Whether joining the majority or defecting to the minority after an initial vote on the merits, the probability that a justice will switch is captured by a multivariate model of fluidity. While legal uncertainty might also make justices' initial conference votes more tenuous, our results suggest that voting fluidity is more likely to be conditional on policy and institutional considerations. Calculations about preferred policy outcomes and institutional motivations seem to lead justices to review their initial positions and occasionally to join the opposite coalition.

While strategic policy considerations affect justices in both the majority and minority, it is clear that these considerations play a more important role for justices who initially cast dissenting votes. A justice who initially dissented is more likely to change his or her vote if the conditions are ripe than is a justice in the majority. We suspect that the greater emphasis that minority justices place on these considerations stems from the fact that the majority opinion author has little incentive to be responsive to the suggestions of a dissenter. Since the

[23] Because our institutional variables (unanimity and number of dissenters) already take into account whether a justice is part of the minority at the initial merits conference, we are unable to repeat these two variables. The strategic chief variable also takes into consideration whether the chief initially voted with the minority. Thus, we do not repeat this variable in our second model.

majority opinion becomes the law of the land, justices who wish to shape the law have an incentive to be part of the majority. Consistent with this theory is the fact that justices who initially voted with the majority switched only 4.6% of the time, and justices who initially dissented switched 18.1% of the time (see Table 1).

These results shed light on the dynamic nature of coalition building within the Court. Although Murphy's (1964) classic study argues that decision making on the Court is a dynamic process in which justices bargain over preferred outcomes, judicial scholars often attribute judicial behavior to factors exogenous to the decision-making process. But our model suggests that fluidity is, at least in part, a response to the initial set of opinions and coalitions that emerges after the first conference. First, the content of the opinion and the position of its author are important: Justices who find themselves ideologically closer to the opposing coalition, for example, are more likely to switch than those who ideologies differ significantly. Second, the size of the initial coalition is also important. When defecting to the minority is likely to leave a justice isolated in the minority, s/he is less likely to defect; when joining the majority means escaping a small minority, however, a justice is likely to switch votes. Modeling fluidity to include switching both into and out of the majority thus gives us a broader perspective on the dynamics of coalition building on the Court.

Although this study makes clear that justices are willing to change their votes because of their policy preferences and their strategic calculations, it is important to note that changing a vote is probably the most drastic action a justice can take. Writing a concurrence or making a simple suggestion to an opinion author are strategic actions that are probably more common than is changing votes. Nevertheless, our understanding of these activities is based on only anecdotal evidence. Supreme Court scholars have made few attempts to study systematically the nonvoting activities in which justices engage. Of course, opinion authors themselves are also likely to act strategically. It seems reasonable to expect that under some conditions opinion authors would be willing to accommodate their colleagues, and in other instances they would be likely to use their position to implement their own goals. To develop a richer understanding of judicial behavior than the attitudinal model affords, a more thorough explanation of the coalition-building and opinion-writing processes is needed.

Over the past twenty years, scholars of the Court have articulated and refined an "attitudinal model" that has had a tremendous amount of explanatory power. As a result, few scholars have attempted to test empirically the model of strategic interaction that Murphy articulated in 1964. Recently, students of the Court have proposed building upon the attitudinal model by recognizing the kinds of strategic calculations that Murphy suggested dominate on the Court (Epstein and Knight 1995). Our findings provide strong support for moving the study of judicial politics beyond the attitudinal model.

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