CONTROLLING THE LAW:
AGENDA SETTERS, MEDIAN VOTERS, AND THE STATUS QUO ON THE U.S. SUPREME COURT

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Abstract

Students of the Supreme Court have advanced two theories of what most influences the content of a majority opinion on the Court. Some scholars argue that the author of the majority opinion controls the Court’s decision-making agenda, and so can determine which policy gains a majority, at least within the limits of what some Court majority finds acceptable. Other students of the Court have suggested that the Court’s median justice effectively dictates the content of the majority opinion: whatever policy the median justice most wants, she can get. In this paper, we characterize these competing models – that we call the “agenda control” model and the “bench median” model, respectively – and then test them empirically with data on Supreme Court decision-making during the Burger Court. While we find substantial evidence for both models, the agenda control model gains somewhat greater support. This suggests that opinions on the Court are driven by the interaction of two key factors: the policy preferences of the majority opinion author and the median voter’s valuation of the draft majority opinion relative to the legal status quo.
I. Introduction

After a half-century of research on decision-making on the U. S. Supreme Court, the most central question remains unanswered: Which policy will be prescribed by the Court’s majority opinion in a case? Answering this question is critical because the majority opinion on the case establishes the rule of law. It is not surprising, therefore, that many scholars have investigated the influence of the Court’s opinions on the nation’s political, social, and economic life (Canon and Johnson 1998). However, to understand the development of a majority opinion, and thus of the resulting law, we need to know which justice typically most influences the content of the Court’s opinion. It is a matter which is so important that Segal and Spaeth raised it as a key issue in their conclusion to *The Supreme Court and the Attitudinal Model Revisited* (2002, 434): “Are majority opinions written at the median of the Court (or perhaps at the median of the decision coalition), or does the opinion writer have special influence? If the opinion writer has special influence, is it because he or she has the final option of making a take-it-or-leave-it proposal?”

Unfortunately, these questions have been largely neglected by public law scholars and judicial process scholars alike. Of course, the public law scholars have long examined how and why various justices write and react to certain opinions, but such research has been primarily descriptive. In fact, the public law literature seldom advances explicit theories or operational models of how and why justices write one opinion rather than another, nor does this literature advance theories of how the justices interact when crafting majority opinions.

For judicial process scholars, who normally have greater interest in developing general theories and operational models, the lack of attention to Segal and Spaeth’s questions may reflect a widespread belief that the justices’ policy preferences, just by themselves, largely determine the Court’s behavior. As a result, and because of the institutional requirement that a majority of the
Court must join an opinion before it has the force of law, a number of scholars have even insisted in recent years that it must be the median justice who effectively dictates outcomes (see, e.g., Martin, Quinn, and Epstein N.d.). The increasing prominence of this view is nicely reflected in Spiller’s assertion about the development of the law on the Supreme Court: “Once the median is proposed, no other proposal will beat it, and it becomes the outcome” (Spiller 2000, 943).

Arguments about the centrality of the median justice have lent support to several further claims. One claim is that the opinion assigner is likely to assign the majority opinion authorship to the median justice in order to gain the critical fifth vote, at least in minimum-winning (5-4) cases (Rohde 1972; Rohde and Spaeth 1976; Maltzman, Spriggs and Wahlbeck 2000; though see Brenner 1982; Brenner and Spaeth 1988). This emphasis on the median is also consistent with models of the appointment and confirmation process that focus on the location of the Court median relative to the president’s preferences and to the median of the Senate (Moraski and Shipan 1999; Shipan and Shannon 2003). In fact, and perhaps most importantly, this focus on the median justice has even led to claims that the arguments in the literature about the importance of the opinion assignment process (e.g., Murphy 1964; Epstein and Knight 1998; Maltzman, Spriggs and Wahlbeck 2000) are overstated; as Lax and Cameron (2001, 2) pointed out, for example, it is not obvious that assignments should matter. For example, if bargaining inevitably drives the position of cases to the ideal point of the median voter, it does not matter who writes the initial opinion and thus it does not matter who makes the assignment….If the price of forming a majority coalition is always the same, why does it matter who writes the check?

Here we challenge the claim that the median justice alone dictates the content of opinions. Instead, we hypothesize, and demonstrate empirically, that a sophisticated majority opinion author can take advantage of the fact that justices are likely to have some tolerance for opinions that, while preferable to the legal status quo, nonetheless diverge from their most-preferred policies. To reach this conclusion, we characterize two competing models (see Hammond, Bonneau,
and Sheehan 2005) regarding which justice controls the content of the final opinion. We call the first the “agenda control” model. In this model, the justice writing the majority opinion has substantial, albeit constrained, decision-making authority to craft the majority opinion and thus the law. The opinion author is constrained because the other justices – and most critically, the median justice – can choose not to join a draft majority opinion, thereby denying it majority support. The second model is a median-voter model, as outlined above, which predicts that final outcomes will reflect the preferences of the median justice on the Court; the Court’s choice will be whatever policy the median justice most prefers. We call this the “bench median” model.

Because the two models make divergent predictions about which sets of justices will be most likely to join the majority opinion, we can compare the voting records of the justices to determine which model has greater empirical support. In an examination of the voting records of 11 justices over a 14-year period for the Burger Court (1969-1986), we find greater empirical support for the agenda control model than for the bench median model.

II. Two Theories of Majority Opinion Writing and Coalition Building

The two theories of majority opinion formation examined here share a number of features; these common features facilitate the development of operational models that are directly comparable and testable. In this section, we first describe these common features and then discuss how the two models differ. Each model has a different rationale, and it is important to note that each rationale has clear roots in the judicial politics literature on Supreme Court decision-making.

Common Features. The agenda control and bench median models have six fundamental features in common. First, it is assumed that Supreme Court decision-making takes place on a single issue dimension. We will normally interpret this dimension as involving liberal/conser-
ervative judicial ideologies. However, it does not matter whether the dimension actually represents judicial ideologies or instead evokes something else, such as the justices’ views on what constitutes “good law.” What is important for our purposes is simply that the decision-making on each case occurs on a single dimension, however this dimension is conceptualized. This unidimensionality assumption is amply supported by the recent empirical literature; see, e.g., Grofman and Brazill (2002) and Martin and Quinn (2002).

Second, it is assumed that each justice has single-peaked preferences on the issue dimension: each justice has an “ideal point” – a best possible policy – on this dimension, and the desirability of other policies for the justice drops monotonically the farther the policies diverge in either direction from the justice’s ideal point. That is, the farther a draft opinion is from the justice’s ideal point, the less he or she likes it. This idea, that the actions of justices are shaped in part by how close proposed policies are to what they personally most prefer, is consistent with assumptions made by many of the landmark studies in judicial politics (e.g., Schubert 1965; Rohde and Spaeth 1976; Segal and Spaeth 2002).

Third, it is assumed that justices have complete information about the location of each justice’s ideal point. It is not unreasonable to believe that justices who have served together for several years have substantial knowledge regarding the location of each other’s most-preferred policies. Consistent with this assumption is Chief Justice Rehnquist’s claim that, “Each of us soon comes to know the general outlook of his eight colleagues” (1987, 294).

Fourth, it is assumed that justices are rational, in the sense that each justice makes choices intended to produce a majority opinion as close as possible to his or her ideal point. This assumption has roots going back to Rohde and Spaeth (1976) and arguably even to Murphy (1964).
Fifth, it is assumed that decision-making by rational justices involves reference to a *status quo policy*. If the status quo policy is not incorporated in each justice’s decision-making calculus, a justice might unwittingly make decisions on a case (e.g., voting for certiorari) which leave him worse off, given the final majority opinion which results, than he would have been had he made some alternative decisions (e.g., by voting against certiorari and thereby preventing the case from being heard by the Court in the first place). Self-defeating actions like these would be ruled out in any model that assumes that justices are rational. In general, a justice will be expected to join the majority when he or she prefers the majority opinion to the status quo policy that would otherwise remain in effect from a plurality opinion. (Because the concept of a “status quo policy” for Supreme Court decision-making may be seen as the most novel of our assumptions for some judicial process scholars, we further examine and justify the concept in part III.)

Sixth, justices in both models are willing to support a draft opinion even when it is not located precisely at their respective ideal points. There are several reasons why a justice may tolerate an opinion that he or she views as less than ideal. Most importantly, justices understand that opinions not backed by a Court majority are not generally treated as precedents (Murphy 1964, 23; Canon and Johnson 1998; Epstein and Knight 1998, 96; Maltzman, Spriggs and Wahlbeck 2000, 16).\(^1\) If all the justices insisted on their own ideal points, on most cases there would be a plurality opinion and perhaps as many as nine separate opinions. However, if the justices routinely failed to generate majority opinions, the power of the Court, in both the judicial system and the larger political system, might be diminished. So while a justice might consider writing

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\(^{1}\)Prior to 1977, a plurality opinion would not establish precedent. In 1977, however, the Supreme Court in *Marks v. United States* ruled that “the holding of the Court may be viewed as the position taken by those members who concurred on the narrowest grounds.” Thus, plurality opinions might create a precedent (see Maltzman, Spriggs, and Wahlbeck 2000, 16; Westerland 2003). However, it is not always clear to the majority opinion author what the narrowest-grounds doctrine might turn out to be (especially since any concurring or dissenting opinions are likely to be written after the content of the majority opinion is largely settled), hence we think that the majority opinion author will strive for a majority opinion whenever possible.
an opinion at his or her own ideal point, and consider voting only for such an opinion, if this behavior prevents a Court majority from forming on behalf of some compromise opinion, with the result that the status quo policy would remain in effect, a rational justice would agree to support the compromise merely if it is better than the status quo. In addition to this institutional constraint on the Court, and thus on each justice’s behavior, limits on each justices’ time and resources (variables not explicitly incorporated in either model here) might often preclude them from crafting an alternative to the draft majority opinion.2 Finally, justices may tolerate an opinion that they view as less than ideal if there is some kind of norm of reciprocity by which justices tacitly agree to give the majority opinion author some discretion.3

Given the first five assumptions, we can see that both models share what amounts to the standard set of assumptions that characterize spatial models of politics among rational actors. The sixth assumption – tolerance and acceptance of a policy that is not at one’s own ideal point – might seem to be more unique to the judicial context of the Supreme Court, but it actually involves a common problem in most legislative settings as well. For example, in a chamber with legislators who have divergent preferences, the problem for legislative leaders is how to construct a majority on behalf of some single policy that can defeat the status quo. Hence, we think that this assumption addresses what is actually a widespread problem in political life.

It is beyond these six assumptions, however, that the agenda control and bench median models begin to show their differences.

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2 Lax and Cameron (2001) explicitly incorporate the cost of opinion writing in a formal model of Supreme Court decision-making. Spiller (2000) also recognizes that “writing costs” may enhance the power of the justice who has been assigned to write the majority opinion.

3 Consistent with a norm of reciprocity is Maltzman, Spriggs, and Wahlbeck’s (2000, 83) finding that when a justice is uncooperative with an author, that author is less likely to cooperate when the roles are reversed in future cases. Violation of such a norm is suggested by the observation by one of Justice Scalia’s former clerks that his reluctance to compromise had “completely alienated” Sandra Day O’Connor and “lost her forever” (Garrow 1996, 69).
The agenda control model. Many scholars have argued that the justice who writes the Court’s majority opinion disproportionately affects the opinion’s content and thus the law (Rohde 1972; Brenner 1982, 1990, 1993; Slotnick 1978, 1979; Epstein and Knight 1998; Segal and Spaeth 2002; Maltzman and Wahlbeck 2004). Indeed, a reading of this literature on opinion assignment and opinion writing suggests that many of these scholars have something like an “agenda control” model in mind, albeit perhaps only implicitly. These arguments have thus led a number of these scholars to view the Chief Justice’s opinion-assignment authority, when he is in the conference majority, as one of the office’s most important sources of power (Murphy 1964). Similar observations have also been made by the justices themselves. As Justice Fortas once noted, “If the Chief Justice assigns the writing of the Court to Mr. Justice A, a statement of profound consequence may emerge. If he assigns it to Mr. Justice B, the opinion of the Court may be of limited consequence” (Fortas 1975, 405).

In the agenda control model, the opinion author has the power to propose a majority opinion, and each other justice is assumed to respond passively by supporting the author’s proposal if that proposal is no further from his or her own ideal point than is the status quo; no justice will respond actively by proposing some alternative opinion (such as one closer to his or her own ideal point). However, although justices are willing to support the author’s draft even if it is not at their respective ideal points, this does not necessarily mean that author will be able to dictate an opinion located at his or her own ideal point; as Rohde and Spaeth pointed out, the majority opinion author “is not…a free agent who can simply write the opinion to satisfy solely his own preferences” (1976, 172). Instead, the opinion author will craft an opinion that, while as close as possible to his or her own ideal point, nonetheless manages to attract the support of a Court majority. Gaining the support of a Court majority requires gaining the support of the median justice,
and this in turn requires that the opinion be better for the median justice than the status quo. Thus, when justices are willing to support an opinion because it is an improvement over the status quo policy, even if the opinion is not at their respective ideal points, this means that the opinion author does not need to draft an opinion at the median justice’s ideal point.

Part IV provides further details on where the opinion will be written, given the relative locations of the opinion author’s ideal point, the median justice’s ideal point, and the status quo.

**The Bench Median Model.** The agenda control model presumes that each justice (other than the opinion author) is willing to join a draft opinion as long as he or she simply considers it no worse than the status quo. But because the justices determine their own decision-making procedures, any agenda control power is something that the justices themselves decide to grant; if they refuse to give the opinion author any agenda control power, he or she will have none.

What happens if the justices are not inclined to be so passive and deferential to the author of the majority opinion but instead respond more actively? To answer this question, consider what might happen if the opinion author drafts an opinion that is not at the median justice’s ideal point. In this case, there will always be other justices, including the median justice herself, with an incentive to draft another opinion which is closer to the median justices’ ideal point. Given such an alternative opinion, the median justice would prefer to support it: she prefers this alternative to the original draft majority opinion since it is closer to her ideal point. Indeed, as we will later demonstrate (in part IV), there will always be enough other justices who would also support this alternative opinion that it would become the *de facto* majority opinion. But if this *de facto* majority opinion is not itself at the median justice’s ideal point, this process could be repeated: some justice would have an incentive to write yet another alternative opinion which is even closer to the median justice’s ideal point, and as before, there will be a majority of justices, in-
cluding the median justice, who would support this new alternative. The logic of this process implies – it is a consequence of the classic median voter theorem (Downs 1957) – that the only opinion not subject to this kind of upset is an opinion precisely at the ideal point of the median justice. Hence, the final majority opinion would directly reflect the preferences of the bench median. It is for this reason that we refer to this logic as the “bench median” model.

III. ON THE CONCEPT OF THE “STATUS QUO” IN SUPREME COURT DECISION-MAKING

The concept of the status quo in Supreme Court decision-making is a critical part of both the agenda control and bench median models. Although the importance of the status quo is implied by some aspects of the literature on Court decision-making, it has not usually been an explicit component of this literature. Hence, the concept bears further discussion and explanation.

Almost every form of purposive human reasoning seeks to create a state of affairs that the individual expects to be better than, or at least as good as, the current state of affairs. The critical importance of the status quo is well understood by a wide range of decision-making theorists. For economists, the status quo has been the benchmark against which possible changes in benefits and costs of alternative policies are compared (Samuelson and Zeckhauser 1988; Quattrone and Tversky 1988). Behavioral economists and psychologists regularly portray preferences as reference based. For instance, the notion of loss aversion is a central feature of how individuals make choices; as Rabin (2002, 9) put it, loss aversion is “the sensation of loss relative to status quo and other reference points.” In fact, psychological experiments have demonstrated that avoidance of losses is often a greater concern than the possibility of gains (Kahneman and Tversky 1984). In political science, the notion of the status quo is an essential component of most rational-choice theories of legislative politics (Krehbiel 1998). Even formal models of bounded-
rational decision-making (Bendor, Diermeier, and Ting 2003) employ a status quo that lets their actors know whether their own decisions are leaving them better off, or worse off, than before.

In sum, the status quo is a standard element of a wide range of theories of decision-making. Furthermore, the critical role of the status quo is acknowledged by those who serve on the Supreme Court. For example, the importance of the status quo in the calculus of justices was made clear in a private written exchange between Justices Brennan and Marshall during the crafting of the *Pennsylvania v. Muniz* (1990) opinions. Brennan justified his majority opinion by asserting:

> As you will recall, Sandra forced my hand by threatening to lead the revolution…. the opinion still describes the ‘routine booking question’ exception in narrow terms, and *in my view it leaves the law no worse off than it already was before*, since every circuit has already found such an exception to exist. (Brennan 1990, emphasis added)

In other words, Brennan was willing to draft a majority opinion that was acceptable to the Court median (Justice O’Conner) as long as it did not move the law in what he and Marshall considered an undesirable direction from the legal status quo.

Moreover, those who practice before the Court realize that justices use the status quo as a referent when evaluating potential changes in the law. For example, in accounting for his success in arguing before the Supreme Court, former deputy solicitor general Larry Wallace explained, “You have to show them why your answer to the case is not something that will do damage to the law” (Mauro 2003, 57). He understood that Brennan was not the only justice who could tolerate an outcome as long as it left the law “no worse off than it already was before.”

In our view, models that lack a status quo are dangerously divorced from any political context, and hence their conclusions are often suspect. Nevertheless, the status quo has rarely been incorporated in models of judicial decision-making.\(^4\) Instead, judicial opinions are often attributed by judicial scholars to the justices’ preferences over the competing alternatives presented in

\(^4\)A recent exception to this point is Epstein and Shvetsova (2002).
the case, as articulated by the opposing sides during oral argument (see McGuire, Smith, and Caldeira 2004) or by the majority and dissenting opinions (see Maltzman and Wahlbeck 1996). This focus on competing alternatives may seem not unreasonable given that the Court is an adversarial forum. In each case, however, there is always a third option, which is to reaffirm the status quo, e.g., by upholding some prior judicial policy. Thus, the value of the two alternatives to various justices should be interpreted in terms of the extent and direction of their departures from the status quo. Those models as currently formulated, in other words, do not fully capture the significance of the policies actually being offered to the majority.  

For our two models, then, the status quo represents the current state of the law that some justices may be trying to change and other justices may be trying to maintain. The current state of the law may be complex and may vary from case to case, but the key issue is always what has been considered “legal” in the country. For example:

- Some prior decision by the Court might constitute a clear and unequivocal precedent for the Court and for the rest of the country, and an appeals court might have upheld this precedent, but an appellant is now challenging this precedent (perhaps because the appellant thinks that the Court’s composition has changed so much that the new Court will overrule the old precedent). The legal status quo here would simply be the old precedent. An example of this is that the status quo for Brown v. Board of Education (347 U.S. 483) was Plessy v. Ferguson (163 U.S. 537).

- Some prior decision by the Court might constitute a precedent for the Court, but one or more appellate courts might have interpreted the precedent differently, so that the law currently in effect in this circuit (or in these circuits) would now be different from what the precedent specified. The legal status quo here might thus be a kind of “composite,” or “mosaic,” of different legal conditions, with a different legal condition holding in each of the circuits where the original precedent was successfully challenged, and perhaps with the original precedent still holding in the circuits where the precedent was not successfully challenged. An example of this is the status quo addressed by the Court in the University of Michigan’s affirmative action programs (Grutter v. Bollinger, 539 U.S.

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5 In fact, we would argue that the Court is not even restricted to three options, which are the status quo plus the arguments of the plaintiff and defendant. The reason is that majority opinions may include policies that are not advocated by either the plaintiff or the defendant (see, e.g., McGuire and Palmer 1995), but the McGuire-Smith-Caldeira model would not allow this.
306, and Gratz v. Bollinger, 539 U.S. 244). The Court’s decision here resolved the conflicts that existed among a number of circuits.6

- The Court may have articulated a precedent, but an appellate court may have attempted to redefine it. An example of this is the Court’s decision to reaffirm Miranda in Dickerson v. U.S. (530 U.S. 428). Although the Supreme Court had consistently required that suspects be given their Miranda rights prior to interrogation, the 4th Circuit ruled in Dickerson that a 1968 law was constitutional when it stated that failure to be read one’s rights did not necessarily mean a statement was involuntary. The Court’s decision in Dickerson overturned the 4th Circuit’s ruling and restored the status quo ante.

- For a case that interprets a statute or agency regulation that has never been considered by the Supreme Court, the state of the law would be some appellate court’s decision regarding the meaning of the statute or regulation in question. An example of this would be the Court’s 2002 decision in Chevron v. Echazabal (536 U.S. 73). In this case, the Court overturned the 9th Circuit ruling that the Equal Employment Opportunity Commission’s (EEOC) regulation that a permissible employment standard was a requirement that a worker’s disability on the job not pose a "direct threat" to his health exceeded the EEOC’s authority under the Americans for Disability Act. The 9th Circuit felt that the EEOC’s interpretation was not broad enough and did not provide workers the protections to which they were statutorily entitled. The Supreme Court’s ruling effectively undermined the status quo created by the 9th Circuit and restored the law to what the EEOC had tried to establish via its regulation.

Although this list is not exhaustive, it illustrates the variables which might plausibly affect the current legal state of the law in the country. What is critical is that if the Court does not take up this case, this state of the law will remain in effect. For a justice, then, a case simply represents an opportunity either to change this previously-established state of the law or to protect and maintain the previously-established state of the law.

When a justice votes to accept a case for the Court’s consideration, it is an indication that this justice wants to change the state of the law (i.e., change the status quo). This is true even when the justice wants to affirm a decision of a lower court; that is, he or she thinks there is some way in which the legal state of affairs can, from his or her own viewpoint, be further im-

proved. For example, a circuit court’s decision usually applies only to its own circuit but the justice may want to extend the decision to the rest of the country.

It might be argued that once the Court accepts a case, this means that the justices have already decided to upset the status quo, and thus that the status quo has no further relevance to their decision-making. But this would be an erroneous conclusion. For example, due to the Court’s long-standing “rule of four,” as few as four justices can force the Court to hear a case, but the remaining five justices might want to maintain the status quo and so would support an opinion reaffirming the prior state of the law. The Dickerson case cited above is an instance in which the Court accepted a case but then decided to reaffirm the status quo. In fact, the Court might even decide to protect the status quo simply by dismissing a case as improvidently granted (D.I.G.) that it had already accepted. In other words, just because the Court accepts a case does not mean that the Court will necessarily change the status quo or that the status quo is irrelevant for the rest of the Court’s decision-making process on the case.7

For our purposes here, the exact nature and origins of the status quo is less important than the fact that each justice uses it as a benchmark for determining where he or she wants to change judicial policy (assuming the justice wants to change it at all). If justices did not have some idea about the location and value of the status quo, they could not judge whether the draft majority opinion is “good enough” to support. In effect, then, when deciding a case or deciding whether to support some draft opinion, each justice asks himself or herself, “Does this opinion leave me

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7It might be argued that even if a Court majority wants to reaffirm precisely the same general rule that was in some previous Court decision, the facts of the new case will almost inevitably be somewhat different, which may sometimes mean (or perhaps even usually means) that the precise nature of the reaffirmed status quo will differ at least a little, because the doctrine which the Court reaffirms will presumably contain some reference to the implications of the new case facts that were under consideration. So in this sense, it may be that even the most status-quo oriented Court will, at times, end up changing the status-quo policy at least a tiny amount.
at least as well off as the status quo?” If the answer is “yes,” then the justice will join the opinion. If the answer is “no,” the justice will not join the opinion.

IV. ILLUSTRATING THE MODELS

These descriptions of the agenda control and bench median models are at a rather high level of generality, and to thoroughly understand how they work, and to understand the empirical test that we propose, it is necessary to work through some graphical illustrations.

Consider Figure 1, which shows the ideal points of nine justices on an issue dimension. We can see that there are 7 justices located to the left of the status quo policy – denoted SQ – and two to the right of the status quo policy. If the majority opinion author has some control over the Court’s decision-making agenda, what outcome would we expect? If a justice were unconstrained, he would presumably write the opinion exactly at his ideal point; thus, Justice J1 in Figure 1 would write an opinion at his ideal point of J1. The Court, however, is a collegial institution, and so the opinion writer must obtain the support of four other justices in order to command a majority on the Court. Hence, if Justice J1 is the majority opinion writer, he will have to make some concessions and write an opinion that, while preferable to SQ, is not at his ideal point.

[Figure 1 about here]

In the agenda control model, it is assumed that other justices respond passively to this draft majority opinion. In particular, it is assumed that if the justice views the majority opinion draft as either better than or the same as the SQ, he or she will join the opinion, but if the draft majority opinion is worse than the SQ for the justice, he or she will not join the opinion. In neither case do any of the justices who are not the majority opinion author try to advance an alternative to the draft majority opinion. So where should Justice J1 write the majority opinion?
It is essential to recognize that all majority coalitions must include the median justice on the Court: in a unidimensional setting, it is the median justice who can supply the fifth vote for an opinion, and if she refuses to support the opinion, there will always be at least four additional justices who would also refuse to support the opinion. But if the median justice does supply the fifth vote, the support of the last four justices will not be necessary. Thus, for majority support to be gained, the opinion must be written inside the median justice’s “preferred-to set,” which is the set of policies that the median justice, denoted $J_{\text{med}}$, prefers to SQ; in our notation, the opinion must lie inside $W_{J_{\text{med}}}(SQ)$. Thus, in Figure 1, if Justice $J_1$, Justice $J_2$, or Justice $J_3$ is the opinion writer and the median justice is Justice $J_5$, the majority opinion writer will have to write the majority opinion at the location of $\ast$, which lies just inside the outside (left-hand) boundary of $W_{J_{5}}(SQ)$. Since this policy at $\ast$ lies inside the preferred-to sets of Justices $J_1$ through $J_5$, all of these justices – they comprise a majority of the Court – will support the policy. In effect, the policy at $\ast$ is a better outcome for these justices than SQ, even though it is more liberal (too far to the left) than Justice $J_4$ or Justice $J_5$ would have most preferred, and more conservative (too far to the right) than Justices $J_1$, $J_2$, and $J_3$ would have most preferred.

Note that Justices $J_6$ through $J_9$ would all refrain from joining the majority in this case because the opinion at $\ast$ is worse for them than SQ: Justices $J_6$ and $J_7$ would both prefer a more liberal (leftward) outcome than SQ, but the opinion at $\ast$ is somewhat too liberal (too far to the left) for their tastes; hence, they both prefer SQ to $\ast$. And Justices $J_8$ and $J_9$ prefer a more conservative outcome (farther rightward) than SQ. Hence, the draft opinion at $\ast$ in Figure 1 would be supported by five justices ($J_1$ through $J_5$) and opposed by four justices ($J_6$ through $J_9$): it follows that there would be a 5-4 final vote on the majority opinion.
Using the same logic, we can see what happens if the opinion author is Justice J₄ or Justice J₅. If Justice J₄ writes the majority opinion, he is free to write it at his ideal point, and the same is true for Justice J₅ (the median justice). The reason Justices J₄ and J₅ can do this is because their ideal points lie inside $W_{J₅}(SQ)$, which means that the opinions at J₄ and J₅ are better for Justice J₅ than SQ. Note also that an opinion at the ideal point of either Justice J₄ or Justice J₅ lies inside $W_{J₂}(SQ)$, so Justice J₆ would also join the opinion. On the other hand, the justices who prefer SQ to an opinion at either J₄ or J₅ — these are Justices J₇, J₈, and J₉ — would not join.

Finally, what happens if the opinion is assigned to Justice J₆ or Justice J₇? As in the case of Justice J₄ and Justice J₅, both Justice J₆ and Justice J₇ can write an opinion at their respective ideal points since both of their ideal points lie inside $W_{J₆}(SQ)$, the preferred-to set of the median justice. In these two cases, Justices J₁ through J₇ would join the majority since an opinion at J₆ or J₇ lies inside the preferred-to sets of Justices J₁ through J₇; on the other hand, Justices J₈ and J₉ would continue to oppose the Court’s opinion. So in Figure 1, if Justice J₆ writes the opinion at J₆, this opinion will be supported by seven justices (J₁ through J₇) and opposed by two justices (J₈ and J₉); hence, there would be a 7-2 vote. And if Justice J₇ writes the opinion at J₇, the outcome would be precisely the same: the opinion would be supported by seven justices (J₁ through J₇) and opposed by two justices (J₈ and J₉), producing another 7-2 final vote.

In sum, for the Figure 1 example, the agenda control model predicts that if Justice J₁, J₂, or J₃ is the majority opinion writer, each would write the opinion at *, whereas if Justice J₄, J₅, J₆, or J₇ is the majority opinion writer, each would write the opinion at his or her own ideal point. And each of the remaining justices would support the opinion if it is closer to his or her ideal point than SQ, and would not join it if it is farther from his or her ideal point than SQ.⁸

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⁸If the SQ is precisely at a justice’s ideal point, we assume that the justice would support the opinion in order to further entrench his or her most-preferred policy in law.
How does the bench median model differ? The agenda control model presumes that each justice other than the opinion author responds *passively* to the draft opinion: if the draft is better for the justice than SQ, the justice will support it, while if the draft is worse for the justice than SQ, the justice will not support it. In contrast, justices in the bench median model who are dissatisfied with the draft majority opinion are assumed to respond in a more active manner. If a draft majority opinion is not at $J_{\text{med}}$, this means that there exist some justices (always including the median justice) who could write an alternative opinion which they like better and which could attract majority support. But if actually drafted, this counter-opinion would be worse than the initial draft for some other justices. These latter justices would have to defend themselves by crafting their own counter-counter-opinion which could regain majority support, but only an opinion even closer to $J_{\text{med}}$ could accomplish this. Such a back-and-forth process will converge on a policy at $J_{\text{med}}$: it is the only equilibrium policy. Thus, it is the median justice, and only the median justice, who controls the shape of the Court’s opinion. Note that this final policy at $J_{\text{med}}$ may differ significantly from the opinion originally drafted by the majority opinion writer.

To illustrate this logic via Figure 1, suppose Justice $J_1$ is the majority opinion writer and initially drafts an opinion at *. This opinion is better than SQ for Justices $J_1$ through $J_5$, but worse than SQ for Justices $J_6$ and $J_7$. Justices $J_6$ and $J_7$ do want to move policy from SQ toward the left, but not as much as the policy at *. Hence, Justice $J_7$ (for example) might then write a counter-opinion at, say, $J_7$. Note that this counter-opinion at $J_7$ is closer to the median justice’s ideal point at $J_5$ than is the draft majority opinion at * (i.e., $|J_7 - J_{\text{med}}| < |* - J_{\text{med}}|$): as shown at the bottom of the Figure 1 diagram, the policy at * lies outside the $W_{J_5}(J_7)$ preferred-to-set (that is, outside the set of policies that the median justice, $J_5$, prefers to the counter-opinion at $J_7$). In response, Justice $J_1$ might write a counter-counter-opinion at $J_4$, for example, which is designed to
win back the support of the median justice: note that $J_7$ lies outside the $W_{J_5}(J_4)$ preferred-to set, which means that $J_4$ is closer to $J_5$ than is $J_7$. This process would continue until the opinions converged on $J_5$, the ideal point of the median justice. Thus, in a situation where the original opinion writer is not granted agenda control powers by his or her fellow justices, the opinion will always end up at $J_5$. This is true regardless of who writes the majority opinion.

With a majority opinion now located at $J_5$ in Figure 1, Justice $J_5$ would of course support this opinion. Furthermore, the justices to the left of $J_5$ – that is, Justices $J_4$, $J_3$, $J_2$, and $J_1$ – would all support this opinion at $J_5$ as well: for each justice, the policy at $J_5$ lies inside their preferred-to sets of SQ (i.e., for each justice $j$, $|X_j - X_{med}| < |X_j - SQ|$). Hence, the opinion at $J_5$ would gain the support of a Court majority. Moreover, the opinion at $J_5$ would lie inside the preferred-to set of Justice $J_6$ as well. This opinion at $J_5$ would thus gain the support of six justices ($J_1$ through $J_6$) since $J_5$ lies inside all their preferred-to sets, and it would be opposed by three justices ($J_7$ through $J_9$) since $J_5$ lies outside all their preferred-to sets; hence, there would be a 6-3 final vote.

Table 1 summarizes the predictions that can be derived from the preference configuration in Figure 1. The table demonstrates that regardless of who is assigned to write the majority opinion, the outcomes under the bench median model are identical. The table also demonstrates that if either Justice $J_4$ or $J_5$ is assigned to write the opinion, the voting alignments will be identical under both models. The critical distinction between the two models thus involves the behavior of Justices $J_6$ and $J_7$: it is whether Justices $J_6$ and $J_7$ join the majority opinion that will ultimately allow us to distinguish the impacts of the two models.9

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9Every justice on the majority’s side of SQ and outside $J_{med}$’s preferred-to set, $W_{J_{med}}(SQ)$, will have a preferred-to set which automatically includes every point acceptable to the median justice. Thus, the median member of the majority coalition – the MMC – will automatically prefer to SQ those outcomes which are derived from both the bench median and the agenda control models. For example, in Figure 1, the MMC is $J_4$. This justice never finds the out-
To illustrate, if Justice J₆ joins the majority when the author is Justice J₃, it is reasonable to conclude that the bench median model was operative and that the draft majority opinion was at J₅. Under the agenda control model, after all, opinion author J₃’s opinion would have been at *, which is worse for Justice J₆ than SQ, hence Justice J₆ would not have joined the majority. Since Justice J₆ did in fact join the majority when the author is Justice J₃, we can conclude in this instance that the agenda control model was not operative and that the bench median model was operative. Similar predictions can be made for each alternative configuration of the justices’ preferences and the status quo.¹⁰

V. TWO HYPOTHESES

As we have just demonstrated, these two spatial models of coalition behavior on the Supreme Court can be used to produce deductions about where the majority opinion will be located and who will support or oppose this majority opinion. These deductions can then be used to ascertain whether the agenda control model or the bench median model better explains the behavior of the justices on the Court.

From the agenda control model we can derive the following testable hypothesis:

*The Agenda Control Hypothesis: A justice’s willingness to support the majority opinion depends upon whether he or she prefers the status quo to the point that is closest to the opinion come favored by the majority to be less desirable than the SQ. This is what renders almost impossible the testing of Westerland’s (2003) prediction that it is the MMC who is able to dictate the content of the opinions.¹⁰ Note that we have been assuming that the majority opinion writer does only the bare minimum to gain the support of a Court majority. However, it has often been remarked that justices sometimes try to construct coalitions which are larger than absolutely necessary (e.g., as with *Brown v. Board of Education*). Thus, in Figure 1, opinion writer Justice J₁ might write an opinion just inside the outside boundary of Wⱼ₄(SQ): a policy here should gain the support of all seven majority-side justices, whereas the policy at *, which is predicted by the agenda control model, would only gain the support of five justices, J₁ through J₅. Thus, even if no majority-side justices defect to the minority side and dissent, it might simply be an indication that the majority opinion writer is trying to gain a larger-than-absolutely-necessary coalition, perhaps for external political reasons. Alternatively, an author might try to build an over-sized coalition to curry goodwill from his colleagues on future cases. Since we have no way of knowing when an opinion writer will try to gain an “over-sized” (i.e., larger than absolutely necessary) coalition, we will ignore this possibility and test the prediction that opinion writers are trying only to get the support that is absolutely necessary for a policy as close as possible to his or her ideal point. This will bias our results against our hypotheses.
author and that the median justice would support.

Formally, the agenda control model assumes that a justice will join the majority opinion if 
\[ |X_j - *| \leq |X_j - SQ|, \]
where \( X_j \) is the location of the ideal point of the \( j^{th} \) justice who is not the median justice, and * is the location of the majority opinion writer’s draft opinion. This draft opinion will be at the majority opinion author’s ideal point when his or her ideal point lies inside \( W_{J_{med}}(SQ) \); if the author’s ideal point is outside \( W_{J_{med}}(SQ) \), the draft opinion will be the point, *, that is inside \( W_{J_{med}}(SQ) \) but as close as possible to the author’s ideal point.

Because the bench median model is based on the notion that the final opinion will be located at the median justice’s ideal point, we can also derive the following testable hypothesis:

The Bench Median Hypothesis: A justice’s willingness to support the majority opinion depends on whether he or she prefers the status quo to the median justice’s ideal point.

Formally, we expect here that a justice would support the majority opinion if 
\[ |X_j - X_{med}| \leq |X_j - SQ|, \]
where \( X_{med} \) is the location of the median justice’s ideal point and \( X_j \) is the location of the ideal point of the \( j^{th} \) justice who is not the median justice.

VI. MEASURES AND DATA

To ascertain whether the agenda control or bench median model best characterizes Supreme Court decision-making, we examine every case for which a majority opinion was released during the Burger Court (1969-1986). Overall, we analyze the 19,362 votes that were cast by individual justices, excluding the majority opinion author, in 2,499 cases.

To test the two models we need a proxy for the location of each justice’s ideal point and for the location of the status quo policy. For the justices’ ideologies we employ two different measures. First, we calculate the percentage of cases in which each justice voted in a liberal direction for each Spaeth value area of a case in the term prior to the one in which the case was decided.
This measure has three desirable properties. First, it has been commonly used and validated (Rohde and Spaeth 1976; Segal and Spaeth 2002; Maltzman, Spriggs and Wahlbeck 2000). Second, it recognizes that distinct ideological dimensions may characterize different issue areas. Third, by updating the measure on a yearly basis we can take into account some of the ideological shifts that might occur during a justice’s tenure on the bench. Given this measure, we calculate each justice’s ideological distance from the Court median.

Although the proportion of the time a justice votes in a liberal direction has several desirable properties as a measure of ideology, it also has a potentially serious flaw: the measure fails to take into account the constraints that structure a justice’s inclination to vote in a liberal or conservative direction. Most importantly, it fails to take into account how changes in the Court’s agenda might affect a justice’s voting history. Hence, we also employ the ideological ratings that Martin and Quinn (2002) computed via a Bayesian Markov Chain Monte Carlo procedure which accounts for temporal constraints that may bias a measure based simply upon the proportion of the time a justice votes in a particular direction.

We also need a measure of the location of the status quo for each case. To construct this measure we rely upon a combination of the lower court decision and the justices’ certiorari votes. Because a justice generally votes to grant cert when he or she is interested in reversing or other-

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11 Spaeth assigns cases to 13 different substantive “value” (i.e., issue) areas, such as First Amendment, privacy, civil rights, and criminal process. One of the 13 areas is “miscellaneous.” Cases in this category were dropped from our analysis. If a case raised more than one value, we took the mean of the justice’s ideology in the value areas. Such a treatment is consistent with Maltzman, Spriggs, and Wahlbeck (2000).

12 Since our variable is based on prior voting behavior, we lack a measure of ideology for a justice’s first term on the Court. For these justices, we rely upon the ideology estimates calculated by Johnson, Spriggs, and Wahlbeck (N.d., fn.19). These estimates are based upon each justice’s overall ideology score in each of the 12 issue areas, their Segal/Cover scores (Segal et al. 1995), and the Poole-Rosenthal NOMINATE score for the President who nominated them and the median Senator who served when they were confirmed.

13 Because the results using both ideology measures are nearly identical, the reports in the descriptive tables (Tables 2 and 3) are based on just the first measure. Descriptive tables based upon Martin and Quinn (2002) are available from the authors. In Table 4 we run models using both measures of ideology. While the Martin and Quinn (2002) measure is not issue specific, it does a very good job of predicting the voting behavior of justices in civil liberties and civil rights cases. Although the scores do not perform as well in other areas, they tend to perform better than do other non-issue-specific ideological measures.
wise altering a decision of the lower court (Caldeira and Wright 1988, 1120; Perry 1991; Epstein and Knight 1998, 27, 80), a justice’s willingness to grant certiorari helps indicate the location of SQ. In particular, we identify SQ as the midpoint between two justices, one of whom votes for cert and one of who votes to deny. More specifically, we first identify the justice who is most likely to agree with the lower court and who also supports cert. In spite of this justice’s predisposition, it seems reasonable to suspect that this justice does not like where the lower court placed the law. Nevertheless, this justice’s predisposition leads us to suspect that he or she is the justice who voted for cert and was the closest to the SQ. We then identify the justice who is closest to this justice, who voted to deny cert and who is closest to the lower court ruling.\textsuperscript{14} We assume that SQ is located at the midpoint between these two justices.\textsuperscript{15}

Figure 2 helps demonstrate how the measure is constructed. Assume that the lower court ruled in a “liberal” direction. Thus, the first step in the measure’s creation is to identify the most liberal justice who voted to grant cert. In Figure 2 this is Justice J\textsubscript{5}. Then we identify the justice closest to J\textsubscript{5} but who voted to deny cert. This is Justice J\textsubscript{4}. We then assume that SQ is located at the midpoint between these two justices. As a result, in Figure 2, |J\textsubscript{4} – SQ| = |J\textsubscript{5} – SQ|.

[Figure 2 about here]

With these measures in hand, we can now describe how we construct our tests. If the agenda control model accurately accounts for who controls the majority opinion, we would ex-

\textsuperscript{14}The direction of the lower court ruling is based upon Spaeth (2001).

\textsuperscript{15}Admittedly, this is an imperfect measure of the status quo, but no perfect measure appears to exist. We believe that this is the best measure available for two reasons. First, even though a justice who is normally sympathetic with the position embraced by the lower court, but seeks to reverse, is unlikely to be at the status quo point, she is nonetheless likely to be closer than a justice who is normally hostile to the position embraced by the lower court. Second, a justice who votes to deny cert is more likely to approve of the SQ than a justice who supports cert. Hence, it seems reasonable to conjecture that the SQ is likely to fall between these the two justices. One possible concern with using the justice who supports a cert grant and is most likely opposed to cert and the justice who wants to deny cert and is the most likely to support the granting of cert to identify the location of the SQ is that strategic considerations may distort this measure (see Lax 2003; Caldeira, Wright and Zorn 1999). To the extent that this concern is true, the probability that we will find support for either the agenda control model or the bench median model is diminished. The fact that we will find support for both of these models gives us more faith in our SQ measure.
pect the opinion to be crafted as close as possible to the author’s most preferred point but within the Court median’s preferred-to-set. To identify this preferred-to-set, we determine the distance between the status quo measure just described and the median justice’s ideal point. Any point that is within this distance of the median, in either direction, is considered to be in the median justice’s preferred-to-set, and the opinion author will seek to locate the Court’s final opinion inside this preferred-to-set in order to attract majority support.

If the opinion author’s ideal point falls inside the median justice’s preferred-to-set, \( W_{J_{5}}(SQ) \), which we have calculated, we assume that the opinion will be written at the author’s ideal point, as the agenda control model leads us to expect. Using our empirical measures we calculated that the majority opinion should have been written at the author’s ideal point in 72.8% of the cases (1,722 out of 2,389) in our sample.\(^{16}\) If the author’s ideology score suggests that he or she would prefer an outcome more liberal than what the median would tolerate (i.e., if the author’s ideal point would fall outside \( W_{J_{med}}(SQ) \)), we assume the opinion is located at the liberal end of the median’s preferred-to-set; in Figure 1 this would be the policy at the lefthand boundary of \( W_{J_{5}}(SQ) \). If the author is more conservative than what the median would tolerate (again, if it would fall outside \( W_{J_{5}}(SQ) \)), we assume the opinion is located at the conservative end of the median’s win set; for example, if we were to assume a left/right mirror image of Figure 1 (not shown), this would the policy at what would now be the righthand boundary of \( W_{J_{5}}(SQ) \).\(^{17}\)

Given our measures for the status quo and the justices’ ideal points, we then create a dummy variable for each model. The first dummy variable, \textit{AUTHOR ACCEPTABILITY}, is used in testing

\(^{16}\)We identified these 1,722 cases using the issue-specific percentage-liberal ideology score. When we used the Martin-Quinn ideology score, we calculated that the majority opinion should have been written at the author’s ideal point 62.7% of the time.

\(^{17}\)For 20.6% of the cases we place the opinion at either the liberal or conservative end of the median justice’s win set. In 7.3% of our observations, the majority opinion author is located on the opposite side of the status quo as the justice we identify as the median. In these instances, we place the opinion where the status quo itself is located. We presume for these cases that the case outcome reaffirms the status quo.
the agenda control model. It indicates whether a justice has an ideology score that is closer to
the point that the sophisticated opinion author would select than to the status quo. In Figure 1,
for example, if Justice J₁, J₂, or J₃ was the author and so would be expected to strategically locate
the opinion near the lefthand border of the median justice’s (Justice J₅) preferred-to-set (e.g., at
the policy at *), we would give Justices J₁ through J₅ a 1 and give Justices J₆ through J₉ a 0. If
the agenda control model accurately accounts for what happens on the Court and if Justice J₁, J₂,
or J₃ is the author, we would expect Justices J₁ through J₅, for whom AUTHOR ACCEPTABILITY=1,
to actually support the majority opinion that Justices J₁, J₂, and J₃ would produce.

To test the bench median model, we create a second dummy variable, MEDIAN
ACCEPTABILITY, to denote those instances in which a justice is closer to the bench median than to
the status quo. In Figure 1, for example, Justices J₁ through J₆ would be given a 1 for MEDIAN
ACCEPTABILITY since they should prefer Justice J₅’s most-preferred policy to the status quo. In
contrast, Justices J₇ through J₉ would be given a 0 for MEDIAN ACCEPTABILITY since they would
withhold their vote from the majority opinion.

For each model, the key question is whether the justices who are predicted to join the major-
ity opinion actually do so at a higher rate than those predicted not to join the majority opinion.

VII. RESULTS

We analyze the 18,419 votes that were cast by individual justices, excluding the majority opinion
author, in 2,389 cases. Overall, 77.8% of the votes were cast in support of the majority in these
cases.¹⁸ The first column in Table 2 highlights the relationship that exists between our independent
variables (AUTHOR ACCEPTABILITY and MEDIAN ACCEPTABILITY, using the percent-liberal

¹⁸ We exclude observations associated with cases where there is no author (e.g., a per curiam opinion) or where Spaeth (2001) does not report a cert vote or the direction of the lower court ruling. In all our calculations, regular concurrences are treated as “joining” the majority opinion, while special concurrences are treated as “dissents.”
measure), and the dependent variable (did the justices actually support the majority opinion or not?). For the agenda control model, we expected that the justices for whom AUTHOR ACCEPTABILITY=1 would support the majority opinion at a significantly higher rate than the justices for whom AUTHOR ACCEPTABILITY=0. For the bench median model, we expected that the justices for whom MEDIAN ACCEPTABILITY=1 would support the majority opinion at a significantly higher rate than the justices for whom MEDIAN ACCEPTABILITY=0.

[Table 2 about here]

Table 2 shows that 83.6\% of the justices who were closer to the author’s opinion than to the status quo (AUTHOR ACCEPTABILITY=1) actually joined the majority. In contrast, only 68.2\% of the justices who were closer to the status quo than to the sophisticated author’s opinion (AUTHOR ACCEPTABILITY=0) actually joined the majority opinion. This difference becomes even larger if we drop from the analysis cases where the bench was unanimous. Whereas 73.7\% of the justices for whom AUTHOR ACCEPTABILITY=1 on non-unanimous cases actually joined the majority, only 53.6\% of the justices for whom AUTHOR ACCEPTABILITY=0 on these non-unanimous cases actually joined the majority opinion. These patterns lend credence to the agenda control model.

For the bench median model, Table 2 shows that 81.5\% of the justices who were closer to the median justice than to the status quo (MEDIAN ACCEPTABILITY=1) actually joined the majority opinion. In contrast, only 67.9\% of the justices who were closer to the status quo than to the median (MEDIAN ACCEPTABILITY=0) actually joined the majority opinion. This difference becomes even larger if we drop the unanimous cases. Whereas 70.6\% of the justices who were closer to the median than to the status quo on non-unanimous cases (MEDIAN ACCEPTABILITY=1) actually joined the majority opinion, only 53.5\% of the justices who were closer to the status quo than to
the median on these non-unanimous cases (\text{MEDIAN ACCEPTABILITY}=0) actually joined the majority opinion. These patterns lend credence to the bench median model.

Thus, both models have some empirical support, which demonstrates the importance of the status quo in the justices’ decisions whether to join the majority. But the fact that Table 2 supports both models illustrates the difficulty of distinguishing the two models. Indeed, if the justices’ preferences on the cases in our dataset resembled those in Figure 1 and if Justice J₁, J₂, J₃, J₄, or J₅ were the author, we would expect these five justices to vote the same under both models; the only justices in Figure 1 whose actions would be different in the two models are Justice J₆ when Justice J₁, J₂, or J₃ is the author and Justice J₇ when Justice J₆ or J₇ is the author.

For this reason, we focus on just those justices whose willingness to support the majority opinion should differ under the two models. Thus, in Table 3 we examine only those justices whose ideal points (a) were closer to the point where a sophisticated author would locate an opinion than to the status quo, but not closer to the median than to the status quo, and those whose ideal points (b) were closer to the median than to the status quo, but not closer to the point where a sophisticated author would locate an opinion than to the status quo. Of the 18,419 individual votes in our dataset, only 2,583 votes can be used to differentiate between the agenda control and bench median models in the way that is indicated here. When these justices were closer to the point where a sophisticated author would locate the opinion than to the SQ, but not closer to the median justice than to the status quo, the justices joined the majority 84.7% of the time. In contrast, when these justices were closer to the median than the SQ, but not closer to the point where a sophisticated author would place the opinion than to the SQ, the justices joined the majority less frequently – 71.3% of the time. (The difference between these two scenarios is sig-
significant at the p<.001 level.) The actions of these justices suggest that the agenda control model does somewhat better in accounting for the justices’ behavior than does the bench median model.

[Table 3 about here]

Even stronger inferences can be drawn from pitting the bench median and agenda control models directly against each other. We employ a non-nested hypothesis-testing approach (Clarke 2001; Westerland 2003). This approach is useful for two reasons. First, each of our models employs a unique covariate. Whereas the agenda control model suggests that a justice’s decision whether to support the majority opinion will depend on the justice’s preferences for the policy at * relative to the status quo, the bench median model suggests that a justice’s decision whether to support the majority opinion will depend on the justice’s preference for the median’s ideal point relative to the status quo. Neither model suggests that a justice’s willingness to join the majority will be conditioned upon a justice’s relative location to both the policy at * and the ideal point of the median justice. If we followed the common practice of including all the independent variables from all the models to allow for a “race among the variables” in a single equation, the result would be an equation without theoretical grounding.

Second, our two independent variables (AUTHOR ACCEPTABILITY and MEDIAN ACCEPTABILITY) have similar (albeit not identical) components. As a result, if we artificially nested the models, our estimates would stem from data which are plagued by multicollinearity. The non-nested strategy eliminates this problem.

Table 4 evaluates the two models, showing the effect that a sophisticated author (columns 1 and 3) and the median justice (columns 2 and 4) have on each justices’ decision to join the final opinion. The first two columns are based upon the independent variable calculated from the percent-liberal scores; the third and fourth columns are based upon the Martin-Quinn ideology
scores. In both models we predict the probability that a justice will join the majority opinion.\textsuperscript{19} If a justice’s relative location to where a sophisticated author would craft the opinion is the better predictor of a justice’s behavior (\textit{AUTHOR ACCEPTABILITY}), this implies that the agenda control model is the better one for describing who controls the majority opinion. But if a justice’s relative location to the median justice and the status quo (\textit{MEDIAN ACCEPTABILITY}) is the better predictor of a justice’s behavior, this implies that the bench median model is better for describing who controls the majority opinion.

[Table 4 about here]

As Table 4 shows, both models have substantial explanatory power: for both models, the relevant non-nested independent variable is statistically significant. For the agenda control model, justices who were closer to the point where a strategic author was likely to craft the majority than to the status quo were more likely to support the majority. For the bench median model, justices who were ideologically closer to the median justice than to the status quo were more likely to join the majority. These findings reflect the fact that the behavior of the justices is often identical under both models.

To ascertain which model is better, we use the Bayesian Information Criterion (BIC). The BIC compares two models by looking at the ratio of marginal likelihoods. The BIC is an efficient mechanism for comparing non-nested models (Bartels 1997, Clarke 2001). In this particular instance the BIC is useful because we are not interested in testing the hypothesis that the outcome is located at the point where a sophisticated author would place the opinion and simultaneously at the median author’s ideal point. The objective when selecting models is to minimize the

\textsuperscript{19}Because our dependent variable is dichotomous, a logit model is the appropriate estimator. Since there are multiple votes in each case, it is possible that a residual for one justice’s decision to join the majority in a case is correlated with another justice’s same decision in that case. To control for this, we employ a robust variance estimator clustering on each justice (Kennedy 1992). We have also run the models by clustering on each case (rather than each justice). The results are similar.
BIC. Thus, the best model will be the one with the smallest value of the BIC statistic. The bottom row in Table 4 shows that a justice’s proximity to the point where a strategic author would craft the majority opinion (a policy at *) relative to the status quo (AUTHOR ACCEPTABILITY) is a better predictor for a justice’s decision to join the majority opinion than a justice’s proximity to the median justice relative to the status quo (MEDIAN ACCEPTABILITY). Regardless as to whether one utilizes issue specific or Martin-Quinn ideology scores, the agenda control model fits better. That the behavior of the justices comports better with the agenda control model than the bench median model thus suggests that the opinions of the Court frequently reflect more than just the median justice’s ideal point.

VIII. CONCLUSION

The judicial politics literature has long recognized that the power of the Supreme Court stems primarily from its capacity to influence, through its written opinions, the actions of Congress, the President, lower courts, interest groups, and the general public. Even so, this literature has yet to develop an adequate understanding of how and why the Court selects the content of its opinions. Most judicial scholars have assumed that the opinion author is a key agenda setter. But an argument can be made that the majority opinion will be written at the ideal point of the Court’s median. Indeed, this seems more consistent with the general thrust of the attitudinal model, which emphasizes the overwhelming impact of the justices’ own attitudes or preferences on the Court’s opinions. We have shown, however, that the final opinion coalition is shaped by the sophisticated behavior of the majority opinion author. Even though the median justice typically supports the Court’s opinions, the opinions are not always at the median’s ideal point. Thus, the opinion

20 Although the agenda control model fits better with both measures, when one utilizes Martin-Quinn ideology scores, there is not a statistically significant difference in marginal effects. This is what accounts for the nearly identical AUTHOR ACCEPTABILITY and MEDIAN ACCEPTABILITY coefficients in the two Martin-Quinn models.
author appears to retain some discretion over the location of the final opinion, presumably because the other justices compare potential opinions to the status quo when making their choices.

Judicial politics scholars who approach the Court from a more positivist perspective have rarely incorporated the status quo in their models. This is in stark contrast to at least two decades of research on another collegial decision-making body – the U.S. Congress. Here, applications of the basic spatial model have shown how rules allocating agenda control often allow pivotal legislators (such as party leaders) to move the location of policy outcomes away from the preferences of the median. And as Hammond, Bonneau, and Sheehan (2005) have similarly suggested for the Supreme Court, by recognizing that the justices make decisions based on their understanding of the position of their ideal points relative to the status quo, it appears that we can develop models that provide a better understanding of the development of the law.

Students of psychology and economics have long recognized that the choices one makes depend upon more than the individual’s preferred outcome. Central to both disciplines is the idea that humans make choices relative to the current state of affairs. For this reason, the choices made at one time are frequently central to the choices one made at a subsequent time (Pierson 2004). Nevertheless, judicial behavior scholars have frequently treated Supreme Court justices as acting in a vacuum that is independent of the past. The justice’s choices are frequently portrayed as reflecting nothing more than the preferences each justice brings to the decision making process; whatever happened previously with the law, including the establishment of one or more precedents, supposedly does not matter. It is this portrait that has frequently created a schism between those who study the development of the law from a legal perspective and those who explore it from a behavioral perspective.
Although we are not in a position to challenge those who argue that the precedent established by the Supreme Court is not a constraint upon the Court (Brenner and Spaeth 1995; Spaeth and Segal 1999), the status quo that is established by the lower courts (and that is frequently shaped by the decisions of the Court) does play a role in shaping (albeit not determining) the development of the law. In other words, even though justices may not be bound by precedent, justices condition their decisions on whether they want the status quo to be upheld or changed.

Our findings also suggest that majority opinion authors negotiate with their colleagues to reach an opinion as close to their preferred outcomes as possible, but one that is also acceptable to the Court median and no worse than the status quo. Because justices care both about the content of the opinion and about the influence of Court decisions on the status quo law, opinion writers have a significant impact on the policy choices in their opinions. Inevitably, this is one the reasons why strategic considerations frequently shape the opinion assignment process (Brenner 1982, 1990, 1993; Maltzman and Wahlbeck 2004; Lax and Cameron 2001).

Although our tests reveal something about the relative power of the agenda control and bench median models, both models perform reasonably well. While it is beyond the scope of this paper, future work needs to help distinguish what the conditions are that might evoke one model rather than another (see Spiller 2000). We suspect, for example, that the relative power of these models may vary when we control for the salience and complexity of the underlying cases (see Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). It is also possible that the nature of the personal relationship that exists between the majority opinion author and the median justice may influence whether one model or the other is more powerful.

Neither model performs perfectly: on occasion, the votes of the justices cannot be explained by their relative position to the status quo and either the location of the bench median or the point
where a sophisticated opinion author would place the opinion. Indeed, of the 19,437 judicial votes in our analysis, justices joined the majority 3,317 times (17%) despite being closer to the SQ point we calculated than to the median justice or to the point at which we would expect a sophisticated author to locate the opinion. This failure on the models’ part presumably reflects a variety of factors, including measurement errors (for the justices’ ideologies and for the status quo), strategic mistakes made by the justices in the decision-making process, the fact that opinion writers may find value in building over-sized coalitions, and other factors that inevitably shape human decisions. Future research must explore the nature of these apparent “failures.”

Judicial behavior scholars have frequently analyzed the final votes that justices cast at the merits stage. But it is the content of the Court’s opinions, rather than the disposition of each case, that establishes the law and serves as a guidepost for those responsible for enforcing the law and for citizens who look to the Court for guidance in making decisions. We find that preferences, the agenda setting power of the majority opinion author, and the legal context defined by the status quo collectively shape the justices’ decisions and the development of the law.

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21 This 3,317 (17%) figure is the number of votes when using the percent liberal scores as a measure of ideology. If one uses Martin-Quinn ideology scores, the number of votes that cannot be explained by either the justice’s relative position to the median or to the opinion author’s sophisticated choice drops to 2,225 out of 19,437 (11.4%).
References


Mauro, Tony. 2003. "High Court Farewell: The Supreme Court's most prolific arguer during the 20th century reminisces about ways the institution has changed." American Lawyer. May 14.


Table 1: Summary of Outcomes for Figure 1

<table>
<thead>
<tr>
<th>Author</th>
<th>Bench Median Model</th>
<th>Agenda Control Model</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Outcome Location</td>
<td>Joining Justices(^1)</td>
</tr>
<tr>
<td>J(_1), J(_2), or J(_3)</td>
<td>J(_5)</td>
<td>J(_1) - J(_6)</td>
</tr>
<tr>
<td>J(_4)</td>
<td>J(_5)</td>
<td>J(_1) - J(_6)</td>
</tr>
<tr>
<td>J(_5)</td>
<td>J(_5)</td>
<td>J(_1) - J(_6)</td>
</tr>
<tr>
<td>J(_6)</td>
<td>J(_5)</td>
<td>J(_1) - J(_6)</td>
</tr>
<tr>
<td>J(_7)</td>
<td>J(_5)</td>
<td>J(_1) - J(_6)</td>
</tr>
</tbody>
</table>

\(^1\)Joining could be in the form of either joining the majority opinion or a regular concurrence.

\(^2\)Dissenting could be in the form of either a formal dissent or a special concurrence.
Table 2: Do the Expected Justices Join the Majority Opinion?\(^1\)

<table>
<thead>
<tr>
<th></th>
<th>All Burger Court Cases(^2)</th>
<th>Non-Unanimous Burger Court Cases(^3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall</td>
<td>77.8%</td>
<td>65.6%</td>
</tr>
<tr>
<td>AUTHOR ACCEPTABILITY = 1</td>
<td>83.6%</td>
<td>73.7%</td>
</tr>
<tr>
<td>AUTHOR ACCEPTABILITY = 0</td>
<td>68.2%</td>
<td>53.6%</td>
</tr>
<tr>
<td>Difference</td>
<td>15.4***</td>
<td>20.1***</td>
</tr>
<tr>
<td>MEDIAN ACCEPTABILITY = 1</td>
<td>81.5%</td>
<td>70.6%</td>
</tr>
<tr>
<td>MEDIAN ACCEPTABILITY = 0</td>
<td>67.9%</td>
<td>53.5%</td>
</tr>
<tr>
<td>Difference</td>
<td>13.6***</td>
<td>17.1***</td>
</tr>
<tr>
<td>N</td>
<td>18,419(^4)</td>
<td>11,872(^4)</td>
</tr>
</tbody>
</table>

\(\*<.05, \**<.01, \***<.001\)

1 The location of each justice is based upon the issue-specific voting ideology measure (see footnote 16).
2 The 18,419 votes included in our analysis are spread over 2,389 cases.
3 The 11,872 non-unanimous votes included in our analysis are spread over 1,530 cases.
4 The opinion author is excluded from these tabulations.
Table 3: Do the Expected Justices Join the Majority Opinion (Key Justices Only; All Cases)?

<table>
<thead>
<tr>
<th></th>
<th>Number of Votes</th>
<th>Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>AUTHOR ACCEPTABILITY=1 &amp; MEDIAN ACCEPTABILITY=0</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Join Majority</td>
<td>283</td>
<td>84.7%</td>
</tr>
<tr>
<td>Don’t Join</td>
<td>51</td>
<td>15.3%</td>
</tr>
<tr>
<td>Total</td>
<td>334</td>
<td>100.0%</td>
</tr>
<tr>
<td><strong>MEDIAN ACCEPTABILITY=1 &amp; AUTHOR ACCEPTABILITY=0</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Join Majority</td>
<td>1,604</td>
<td>71.3%</td>
</tr>
<tr>
<td>Don’t Join</td>
<td>645</td>
<td>28.7%</td>
</tr>
<tr>
<td>Total</td>
<td>2,249</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

1 The location of each justice is based upon the issue-specific voting ideology measure (see footnote 16).

2 The author is excluded from these tabulations.
Table 4: Logit Estimates of the Probability of Joining the Majority Coalition, and a Bayesian Information Criterion (BIC) Comparison of the Two Models

<table>
<thead>
<tr>
<th>Percent Liberal Issue-Specific Ideology Measure</th>
<th>Martin-Quinn Ideology Measure</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUTHORS ACCEPTABILITY</td>
<td>Agenda Control Model</td>
</tr>
<tr>
<td></td>
<td>Bench Median Model</td>
</tr>
<tr>
<td>.863***</td>
<td>.738***</td>
</tr>
<tr>
<td>(17.25)</td>
<td>(17.90)</td>
</tr>
<tr>
<td>MEDIAN ACCEPTABILITY</td>
<td>---</td>
</tr>
<tr>
<td></td>
<td>.730***</td>
</tr>
<tr>
<td>Constant</td>
<td>.751***</td>
</tr>
<tr>
<td>.764***</td>
<td>(22.00)</td>
</tr>
<tr>
<td>(22.00)</td>
<td>(18.24)</td>
</tr>
<tr>
<td>Observations</td>
<td>18,419</td>
</tr>
<tr>
<td>BIC</td>
<td>-567.098</td>
</tr>
<tr>
<td></td>
<td>-360.772</td>
</tr>
</tbody>
</table>

*<.05, **<.01, ***<.001

1 Robust-standard errors were employed (clustered on the case).
2 The difference of 206.326 (using the percent-liberal measure) in the BIC provides very strong support for the agenda control model over the bench median model. The difference of 25.001 (using the Martin-Quinn measure) in the BIC provides very strong support for the agenda control model over the bench median model.
Figure 1: A Portrait of the Opinion Formation Process in a Unidimensional Issue Space

Note: The preferred-to sets of $J_1$, $J_2$, and $J_3$ extend leftward off the page.
Figure 2: Spatial Demonstration of the Identification of the SQ Based upon Certiorari Vote
(Assuming the Lower Court Ruled in a Liberal Direction)