

The Swing Justice

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In the Supreme Court's most closely divided cases, one pivotal justice can determine the outcome. Given this fact, judicial scholars have paid substantial attention to the swing justice. This article makes two theoretical contributions to the study of the swing justice and this justice's resulting influence on case outcomes. First, we show that in a substantial number of cases, the justice that casts the pivotal vote is not the median justice on the Court. Second, we argue that the swing justice will typically rely less on attitudinal considerations and more on strategic and legal considerations than the other justices on the Court. The analysis suggests that even among the Court's most closely divided decisions, which are typically thought to reflect the Court's most ideologically driven outcomes, the pivotal swing vote is significantly less likely to reflect attitudinal predispositions and more likely to reflect strategic considerations, such as the public's preferences, and case-specific considerations such as the position advocated by the Solicitor General. The theory and findings suggest that a failure to consider the unique behavior of a pivotal actor—whether on the Supreme Court or any other decision-making body—can lead to incorrect conclusions about the determinants of policy outputs.

By a 5-to-4 decision, the numerical division by which it struck down the New York Minimum Wage Law for Women and Children last June, the Supreme Court today held constitutional a similar statute of another state . . . But while the numerical division was the same, the line-up was changed. Justice Owen J. Roberts switched from the “conservative” to the “liberal” side and turned what for fourteen years had been a minority view, into the controlling opinion of the court. (*The New York Times*, March 30, 1937)

Justice Owen Roberts's famous “switch in time” highlights a central fact of Supreme Court decision making—in a closely divided case, one pivotal justice can determine the direction of the outcome (Ho and Quinn 2010a).¹ The importance of the swing justice has not been lost on observers of judicial politics. Based on her numerous pivotal votes in 5-to-4 decisions, Rosen once dubbed Justice Sandra Day O'Connor “a majority of one” (2001, 32). After O'Connor's retirement, Solicitor General Paul Clement expressed a similar sentiment about Justice Kennedy, stating, “The court now is going to be just as conservative or just as liberal as Justice Kennedy” (Cato 2007). Scholars of judicial politics have also long

examined the pivotal role of the swing justice and placed great importance on predicting the identity and locating the policy position of the justice most likely to represent the median on the Court (Bailey 2007; Grofman and Brazill 2002; Martin, Quinn, and Epstein 2005). Although debate exists over the extent to which the median justice serves as a controlling influence on the ideological content of the Court's opinions (e.g., Carrubba et al. 2012; Clark and Lauderdale 2010; Hammond, Bonneau, and Sheehan 2005; Lax and Cameron 2007), scholars uniformly accept the importance of the median justice for the *disposition* of case outcomes. As Martin, Quinn, and Epstein explain, “the median justice will . . . be the choice of the Court's majority” (2005, 1278).

Yet, despite the importance applied to the median (or swing) justice, the behavior of this justice is not well understood. We seek to make two theoretical contributions related to the swing justice in Supreme Court decision making. First, we propose that researchers must consider the swing justice in *two* different forms. Scholars often view the justice who occupies the ideological middle position on the Court each term as synonymous with being the swing (or pivotal) justice.

¹An online appendix with supplementary materials for this article is available at www.journals.cambridge.org/jop. All data and materials necessary to reproduce the numerical results are available at <http://dvn.iq.harvard.edu/dvn/dv/Enns>.

While this justice will often be pivotal, the term-specific median justice does not always cast the fifth majority, or deciding, vote (Lauderdale and Clark 2012; Martin, Quinn, and Epstein 2005). Based on this finding, we consider two scenarios: when the term-specific median justice on the Court casts the swing vote and when a justice that typically votes in a more ideological manner casts the pivotal fifth majority vote.²

Second, we believe that in both of these categories—when the swing justice is the term-specific median on the Court *and* when the swing justice is not the median—the swing justice will typically base his or her decision on different considerations than the other justices. In the former category, the relative ideological neutrality of this median swing justice implies that his or her ideological predisposition should be a less influential guide for decision making compared to the other justices (e.g., Collins 2008). A swing justice in the latter category, by contrast, becomes the pivotal vote when a justice is uniquely influenced by considerations specific to the case that contrast with his or her ideological predisposition. Thus, although we posit two different mechanisms (ideological neutrality and unique attention to case-specific considerations), regardless of whether the swing justice is the median on the Court or typically a more ideologically extreme justice, we predict that this pivotal vote will be the least responsive to attitudinal considerations and most responsive to legal and strategic factors.

We argue that the theoretical foundations underlying the swing justice's unique decision making raise important questions about the study of the Supreme Court. Many existing studies assume (often implicitly) that justices, on average, make their decisions based on the same considerations.³ We show, however, that this is unlikely to be the case. If the justice that casts the deciding vote relies *less* on ideology and *more* on legal and strategic considerations, conventional analyses will often lead to incorrect inferences about the nature of Supreme Court decision making. Consider a closely divided case where eight justices vote based on attitudinal considerations, but the pivotal swing justice votes

based on both attitudinal *and* strategic considerations (such as the swing justice's perception of public opinion). An individual-level analysis would likely conclude that the justices overwhelmingly vote based on attitudinal considerations even though the swing justice, and thus the case outcome, incorporated strategic considerations. Alternatively, case-level and aggregate time-series analyses of the Court's decisions might exhibit a substantial influence of public opinion in this scenario, but these approaches could also suggest an inaccurate conclusion—that all justices were influenced by the mass public. If the swing justice relies on attitudinal, strategic, or case-specific considerations to a different extent than the other justices, justice-level analyses cannot adequately capture the substantive motivations underlying case outcomes, and conventional case-level studies are unable to fully explain the decision making of individual justices.

Consistent with these expectations, the findings in this article make several contributions. First, the results advance the ongoing debate about the influence of the mass public on the Court (e.g., Casillas, Enns, and Wohlfarth 2011; Epstein and Martin 2011; Giles, Blackstone, and Vining 2008) and whether this influence varies across justices (e.g., Flemming, Bohte, and Wood 1997; Giles, Blackstone, and Vining 2008; Mishler and Sheehan 1996). In particular, the results suggest that the Court's decisions generally reflect changes in prevailing public sentiment in large part because of the unique behavior exhibited by the pivotal swing justice. Second, the findings contribute to a vast literature documenting the important impact of the Solicitor General's legal arguments, as the data suggest that the Solicitor General's influence on the Court manifests itself by influencing the swing justice. Finally, the results offer an important complement to the attitudinal model of Supreme Court decision making (Segal and Spaeth 1993, 2002). Research on the attitudinal behavior of Supreme Court justices has led to significant advances in how scholars and observers understand the Supreme Court. We aim to add to this research by demonstrating important and systematic differences across justices in the relationship between their attitudinal predispositions and the probability of supporting a liberal or conservative disposition, with the weakest observed relationship for the swing justice.

The subsequent section develops our theoretical argument for why the swing justice should often base his or her decisions on different considerations than other justices. The first part of the analysis identifies the justice that cast the pivotal fifth majority vote (i.e., the swing justice) for *each* case from 1953 to 2009. We then test our prediction that the votes of

²The claim that the swing justice is not always the median justice may seem intuitive. After all, it has never been the case that a particular justice has voted with every majority coalition. Yet, whether implicitly or explicitly, scholars often treat the swing justice as synonymous with the median. In contrast to this tradition, we propose that systematic factors often lead a justice who is not the median to cast the pivotal vote. We offer a theory of this behavior and show that the nonmedian (or ideological) swing justice holds important implications for the conclusions we draw about Supreme Court decision making.

³For notable exceptions, see, e.g., Bartels (2006, 2010) and McAtee and McGuire (2007).

swing justices tend to reflect a different combination of considerations than the votes of the other justices. We focus on four empirical implications of the theory—the influence of justice ideology, public opinion, separation-of-powers constraints, and amicus curiae positions filed by the Solicitor General. As noted above, the findings revise some conventional wisdom about Supreme Court decision making. The conclusion discusses the implications of these findings for the study of the Supreme Court as well as other decision-making bodies, such as the U.S. Congress.

How Does the Swing Justice Decide?

Following past research, we define the swing justice as the one who casts the pivotal fifth majority vote in each Supreme Court case (Martin, Quinn, and Epstein 2005). We operationalize the swing justice as the fifth-most likely to have joined the majority based on the justices' typical ideological predispositions. In the context of a liberal (conservative) decision, for example, we define the fifth-most liberal (conservative) justice in the majority coalition as the pivotal swing vote. In a 5-to-4 decision, the swing vote comes from the justice that was least likely to join the majority (or, conversely, the most likely to defect).

This measurement strategy holds important implications for our argument. Scholars have often asked whether a particular justice, such as Justice Reed (Anonymous 1949), Justice Powell (Blasecki 1990), Justice Kennedy (Schmidt and Yalof 2004), or Justice O'Connor (Rosen 2001) was *the* pivotal justice on the Court. Others have focused on the ideological position of each justice during each term, suggesting that the justice in the ideological middle is the swing vote (Grofman and Brazill 2002; Martin and Quinn 2002). We acknowledge that the median justice is the most likely justice to cast the deciding vote. However, when theorizing how the swing justice decides, we believe it is too limiting to constrain the swing justice to be the term-specific median justice. Indeed, Martin, Quinn, and Epstein (see also Lauderdale and Clark 2012) conclude, “during a non-trivial fraction of the years in our data . . . another Justice(s)—and not merely the so-deemed ‘median’—played a crucial role in Court decisions” (2005, 1304). The fact that the justice in the ideological middle does not always cast the pivotal vote suggests that we must consider two types of swing justices: a median swing justice (when the pivotal swing vote comes from the term-specific median justice) and an ideological swing justice (when the pivotal vote comes from a justice that typically votes in a more ideological

manner). Below, we discuss the theoretical and analytical implications of these two types of swing justices.

Median Swing Justice

Martin, Quinn and Epstein offer a straightforward definition of the median justice, noting, “the ‘median’ Justice . . . is the Justice in the middle of a distribution of Justices, such that . . . half the Justices are to the right of (more ‘conservative’ than) the median and half are to the left of (more ‘liberal’ than) the median” (2005, 1277). In addition to being the most moderate member of the Court relative to the other justices (Bartels 2009; Segal and Spaeth 2002), during the period of our analysis, the median has typically represented the most moderate justice in an absolute sense (Martin and Quinn 2002). This ideological neutrality holds important implications for how the median swing justice's vote—and thus the case outcome—is decided.

Two theoretical predictions present themselves. First, the attitudinal model (Segal and Spaeth 1993) implies that the votes cast by the median justice reflect a strong ideological preference for legal policy outcomes near the *middle* of the ideological continuum. In other words, the median justice relies on ideology to the same extent as other justices but has a different (i.e., more moderate) ideal point. As Segal et al. explain, the attitudinal model “supposes that the ideological values of jurists provide the best predictors of their votes” (1995, 812). The model does not make an exception for justices in the middle. Instead, the model (at least implicitly) assumes that the median swing justice relies on ideology to the same extent as other justices. Thus, the attitudinal approach suggests two patterns when analyzing the median swing justice. First, the relationship between justice ideology and the probability of a liberal vote should be just as strong near the ideological middle as with a more ideologically extreme justice. Second, we should observe other potential influences on vote choice (such as strategic or legal considerations) to be weak and roughly equivalent across justices (Segal and Spaeth 2002, 351).

We believe, however, that it is important to consider a second model of the median swing justice's behavior.⁴ Instead of a strong ideological preference for moderate legal outcomes, the median swing justice may not prioritize ideology as much as the other justices.

⁴A third possibility is that the median swing justice appears in the middle because this justice has different ideological positions on different issues, voting in a liberal direction on some types of cases and a conservative direction in others. To mitigate against the possibility that this explains our results, we allow the median swing justice to differ across issue categories.

Although most Supreme Court justices tend to vote consistent with their attitudinal predispositions (Segal and Spaeth 2002), the median swing justice may place more emphasis on strategic and case-specific considerations, such as oral arguments or the Solicitor General's amicus briefs, and less emphasis on ideology than the other justices. Extensive research on conceptual and integrative complexity shows that ideological moderates tend to rely on more information sources (and less on ideology) than ideologically extreme individuals when making decisions (Suedfeld 2010; Suedfeld et al. 1994; Suedfeld and Rank 1976; Tetlock, Armor, and Peterson 1994). If applied to decision making on the Court, this research would suggest that justices near the ideological middle, and the median swing justice in particular, do not support the liberal position in some cases and the conservative position in other cases because they have a strong ideological predisposition for legal outcomes near the middle of the policy spectrum. Rather, conceptual and integrative complexity suggests that these justices' votes reflect a broader set of considerations than ideologically extreme justices.⁵ Thus, in contrast to the above predictions based on the attitudinal model, we expect less reliance on attitudinal considerations and more reliance on strategic and legal considerations as we move from more ideologically extreme justices to the median swing justice.

This is a simple, yet important prediction. Although scholars have typically evaluated the attitudinal model at the individual justice level (Segal and Cover 1989; Segal et al. 1995; Segal and Spaeth 2002), as noted above, many studies conclude that if justices, on average, rely on ideology, case outcomes also reflect attitudinal considerations. Segal and Spaeth, for example, describe the attitudinal model as, "the best explanation of the *Court's* decisions" (2002, 351; italics ours).⁶ We acknowledge that justice ideology matters

for case outcomes, but given the ideological neutrality of the median swing justice, we predict that ideology matters the *least* for the deciding vote. Although scholars have not examined the median swing justice specifically, recent research offers some support for these predictions. Bartels (2006; 2011) argues that less "attitude strength" attenuates the impact of justices' ideological preferences, and Collins (2008) shows that more ideologically neutral justices exhibit less voting consistency.⁷ Furthermore, Mishler and Sheehan (1996) argue that the decisions of the median justice should be most responsive to public opinion. Of course, other strategic and legal considerations can also influence the justices' decisions (e.g., Bailey and Maltzman 2008, 2011; Bartels 2009; Black and Owens 2009; Epstein and Knight 1998; Richards and Kritzer 2002). We predict that these considerations will exhibit the strongest relationship with the median swing justice's vote.

Ideological Swing Justice

Despite past attention to the median swing justice, there are also cases when a more ideologically extreme justice (i.e., nonmedian justice) casts the pivotal vote (Martin, Quinn, and Epstein 2005). We label this justice the "ideological swing justice." Justice Stevens's vote in *Irizarry v. United States* (2008), a statutory case involving the Federal Rules of Criminal Procedure, offers an example of an ideological swing vote. Justice Stevens (widely considered the most liberal justice on the Court at the time) voted in the liberal direction in 75% of nonunanimous criminal procedure cases.⁸ Yet, in *Irizarry*, Stevens joined the conservative voting bloc of Justices Scalia, Thomas, Alito, and Chief Justice Roberts in a 5-to-4 (and seemingly conservative) decision rejecting a challenge to stringent criminal sentencing. Furthermore, Justice Kennedy, who the Martin-Quinn scores assign a (term-specific) probability of one of occupying the Court's ideological center during that term, voted with the liberal minority. If we were to order the justices on a single dimension from most liberal to conservative, it appears that in *Irizarry*, Stevens leapfrogged to the right of Kennedy and cast the pivotal

⁵Past research has reached mixed conclusions regarding whether moderate Supreme Court justices are more likely to display higher levels of integrative complexity (Gruenfeld 1995, Tetlock, Bernzweig, and Gallant 1985), but these studies rely on written opinions to measure what considerations motivate the justices. The written opinions, of course, may reflect considerations other than a single justice's preference over the disposition.

⁶Segal and Spaeth (1993, 256–60) do evaluate the ability of the attitudinal model to predict case-level outcomes, but, consistent with the current argument, their findings suggest that the relationship between the attitudinal model and case outcomes may be more complex than often acknowledged. For example, they correctly predict just 58% of the cases they examine and their analysis of whether past voting behavior predicts subsequent case outcomes exceeds conventional levels of significance in just over half of their analyses.

⁷Congressional scholars have also found that moderates in Congress are less likely to rely on ideology (Fleisher 1993; Fleisher and Bond 2004; Kingdon 1989). As Kingdon explains, "Ideologues of the left and right have an easy time using ideology as a guide . . . But ideology is somewhat less useful for the person in the middle" (1989, 269).

⁸We use the Supreme Court Database to define the specific issue category ("issue") and the ideological direction of a justice's vote ("direction").

vote in the conservative direction. Our theoretical aim is to account for situations where a justice that typically votes in a more ideological manner leapfrogs a more moderate justice and casts a vote in the opposite direction of his or her typical ideological orientation.

One possible explanation for these observed deviations from ideological voting is that cases may not fall along a single ideological continuum. For example, even if Stevens typically votes in a liberal direction, it may be that cases involving the Federal Rules of Criminal Procedure represent a unique attitudinal dimension to the justices, and Stevens is the (right-leaning) median justice in this issue area. Our analysis below, however, suggests that issue-specific voting preferences do *not* fully explain these deviations. We allow ideology to vary across issue areas, and we continue to find that the most ideologically extreme justices sometimes cast the pivotal vote against their ideological predisposition.⁹ Given the prominence of attitudinal voting on the Court, it might seem surprising that an ideologically extreme justice would ever join four justices to form a majority against his or her predisposition. In particular, why would a justice depart from his or her ideological preference in a particular case, only to return to a pattern of ideological voting in a subsequent case, while a different justice then deviates from his or her predisposition?

We believe this behavior can be reconciled with two seemingly uncontroversial assumptions. First, we propose that justices *sometimes* react to case-specific considerations, such as the legal facts of the case, oral arguments, or the Solicitor General's amicus briefs in a nonattitudinal way. Second, we propose that the nine justices can react to these case-specific considerations in a heterogeneous manner. Thus, while most justices typically vote in an ideologically motivated manner, in some cases one justice (or more) may be uniquely influenced by the details and context of the case. We believe these two propositions are consistent with the

existing literature on the Supreme Court. Given the unique backgrounds and experiences of the justices, it would be surprising if they responded identically to case-specific considerations (Bailey and Maltzman 2011, 65). Quite simply, the justices are human actors that are likely to approach the varying case contexts confronting the Court from different perspectives and attach variable weights to nonattitudinal considerations both within and across individual cases. Indeed, numerous scholars have shown that justices react to case-level factors, such as oral arguments, precedent, or the legal facts of the case in a heterogeneous manner (Bailey and Maltzman 2008; Hurwitz, Mishler, and Sheehan 2004; Johnson, Spriggs, and Wahlbeck 2007; Segal 1986). Furthermore, psychological considerations can further complicate the ways justices reach their decisions (Baum 2012). As Bailey and Maltzman explain, "historical context and personal experiences affect the legal values of justices, but the connections are imperfect and unpredictable" (2011, 81).

If we allow that considerations beyond ideological motivations *sometimes* influence the justices and that these considerations affect them in a heterogeneous way, several important predictions emerge. First, if case-specific considerations are consistent with the justices' ideological motivations, justices have no reason to deviate from their ideology. In this scenario, the swing justice will be the median on the Court. However, if a justice considers case-specific factors that run counter to his or her ideology, the resulting vote may depart from this pattern. Suppose, for example, that a conservative justice assigns some importance to the Solicitor General's amicus brief. Also suppose, for a particular case, that the Solicitor General's amicus brief supports a liberal outcome. If the conservative justice attaches sufficient weight to this consideration such that it becomes more important than his or her ideological predisposition, we would predict a liberal vote from this justice. We would not, however, expect all justices to vote in a liberal direction, as not all justices should be equally influenced by this consideration. In fact, given the importance justices customarily attach to ideological considerations (Segal and Spaeth 2002), we expect that most justices will rely on their ideological predispositions at the expense of case-level considerations (or will interpret case-level considerations in a manner that is consistent with their predispositions). Given that ideological motivations provide a consistent guide to most justices' decision making (especially those that are more ideologically extreme), we propose that the ideological swing justice is in a position to

⁹An examination of Stevens's voting behavior also suggests that his vote in *Irizarry* cannot be explained by a separate attitudinal dimension. In *Irizarry*, the petitioner argued that the trial judge was obligated to provide advance notice to authorities (especially in the context of a plea agreement) when considering a deviation from the Sentencing Guidelines with a more stringent prison term. Stevens's majority opinion, however, declared that no such advance notice was required because the Court's previous decision in *United States v. Booker* (2005) established that the Sentencing Guidelines were purely advisory. Yet, Justice Stevens dissented (in part) in *Booker*, objecting to that majority's decision changing the Sentencing Guidelines from being mandatory to advisory. Stevens's decision to join four predominantly conservative justices (in contrast to his previous dissent), suggests that nonattitudinal considerations influenced him to become the pivotal vote against his customary liberal colleagues.

cast the pivotal vote precisely because, in contrast to the other justices, this justice placed additional weight on nonattitudinal considerations.¹⁰ Importantly, just like Stevens returned to a liberal pattern of voting after *Irizarry*, in subsequent cases, we expect this justice will return to his or her typical pattern of ideological voting.

Our assertion that justices respond to case-level considerations in a heterogeneous manner suggests that in a subsequent case, a different consideration—unique to that case—may appeal to a different justice. Of course, in many cases, no case-level considerations are sufficiently salient to produce deviations from ideological voting. However, when such deviations emerge, we expect to observe substantial variation in which justice casts an ideological swing vote. In practice, we will see that it is impossible to measure the myriad case-specific considerations that a justice may choose to consider. However, we identify several observable implications that are consistent with this argument. First, we expect to find that in a nontrivial number of cases, the pivotal swing vote does not come from the median justice. Although evidence that more ideologically extreme justices sometimes cast the swing vote does not speak to the mechanisms that produce this result, failure to observe a substantial number of instances of an ideological swing justice will indicate that our theoretical argument is inaccurate. Second, we rely on Solicitor General amicus briefs as a measure of a salient and well-established case-specific consideration that is available during the entire period of our analysis. We expect a stronger relationship between the Solicitor General amicus brief and the ideological swing justice's vote. Finally, we consider the potential influence of the nonattitudinal considerations of the public mood and separation-of-powers considerations on the ideological swing justice.

Analysis: The Heterogeneous Influence of Case-Specific, Strategic, and Attitudinal Considerations

We have argued that ideological neutrality is a key to understanding the median swing justice's voting behavior. Less guidance from ideological considerations should correspond with increased reliance on

strategic and legal considerations. By contrast, we propose that the ideological swing justice is often uniquely influenced by case-level considerations to cast a vote that deviates from his or her ideological predilection. The analysis proceeds in two steps. First, we identify the swing justice (i.e., the justice that casts the pivotal vote) for each orally argued decision from 1953 to 2009. We also determine whether the swing justice was the median on the Court (i.e., a median swing justice) or a more ideologically extreme member of the Court (i.e., an ideological swing justice). Second, we test our hypothesis that the predictors of vote choice vary systematically across justices, with the pivotal swing justice (whether the median on the Court or a more ideologically extreme justice) being the most likely to rely on factors other than attitudinal considerations.

Identifying the Swing Justice

We seek to identify, *for each case*, which justice cast the pivotal fifth majority vote. As noted above, we operationalize the swing justice as the fifth-most likely to have joined the majority based on the justices' typical ideological predispositions and the direction of the case outcome. We acknowledge that the justice in the ideological middle each term is more likely to be the swing vote than more extreme justices, but we also expect that the term-specific median justice will *not* correspond with the case-specific swing justice in a substantial number of cases.

To identify each justice's general ideological position, we turn to the measures developed by Martin and Quinn (2002). The Martin-Quinn scores offer a well-established contemporaneous measure of the justices' revealed preferences that vary dynamically over time. Importantly, the strength of the Martin-Quinn model is its ability to produce a reliable, robust measure of the justices' ordinal positions on the Court each term (Ho and Quinn 2010b)—precisely the information that we require to identify the swing justice.¹¹ We do, however, make one change to the original Martin-Quinn scores and do not assume that the justices' ideological positions are fixed across all issue areas on the Court's docket (Lauderdale and Clark 2012). Instead, we build on the strategy of Martin and Quinn

¹⁰This does not imply, however, that the ideological swing justice votes contrary to his or her ideological predisposition as a conscious attempt to become the pivotal voter.

¹¹Additionally, the item response theory (IRT) model is not sensitive to nonrandom changes in the Court's agenda-setting decisions over time (Ho and Quinn 2010b; Martin and Quinn 2005).

(2005) and estimate the scores for each of eight separate issue areas on the Court's docket.¹² We refer to these measures as the issue-specific Martin-Quinn scores.

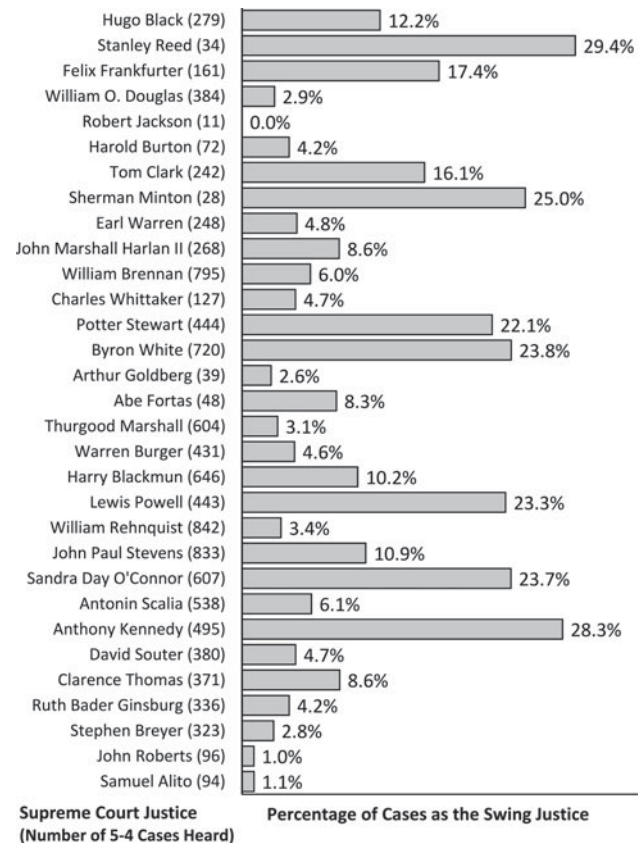
If we have accurately identified the ideological positions of the justices, we would expect that our measures predict justice votes. Indeed, among all 5-to-4 decisions since 1953, if—based on our issue-specific Martin-Quinn scores—we assumed that the four most liberal justices always vote in a liberal manner while the four most conservative justices support the opposing side of each case, we would correctly predict 86% of these eight justices' votes.¹³ If our measurement strategy correctly identifies the pivotal justice, we might also expect that the median and ideological swing justices take significantly longer, on average, to join the majority coalition. This expectation is consistent with our argument that the swing justice typically relies on more considerations than other justices as well our claim that the swing justice is the least likely to join the majority coalition. As we report in online supplementary Appendix 6, following Maltzman, Spriggs, and Wahlbeck (2000) and using data from Wahlbeck, Spriggs, and Maltzman (2009), we find that this is indeed the case. These results offer further support for our measurement strategy.

Figure 1 offers descriptive evidence of the swing justice's shifting identity. Looking at all justices serving on the Court from the 1953 to 2009 terms, the figure reports the percentage of 5-to-4 decisions that each justice represented the pivotal swing vote during his or her tenure on the bench. We see that justices typically thought of as the median justice, such as Powell, O'Connor, and Kennedy, tend to cast a higher proportion of decisive votes in 5-to-4 decisions. Yet, consistent with expectations, even more ideologically extreme justices sometimes cast the deciding vote against their ideological preferences. Although a majority of swing votes come from the moderate, issue-specific median justice, a more ideologically extreme justice casts the pivotal swing vote in approximately 23% of all cases and 45% of 5-to-4 cases during this time period.

¹²See the online supplementary appendix for a discussion of these categories and evidence that our measurement strategy is robust to alternate issue groupings.

¹³Although this value reflects an improvement over the standard Martin-Quinn scores, considering past evidence of similarities across issue areas (Casillas, Enns, and Wohlfarth 2011, 76; Martin and Quinn 2005), not surprisingly, the predictive capacity of the standard Martin-Quinn scores is still impressive.

FIGURE 1 The Percentage of Cases In Which Each Justice Cast the Pivotal Swing Vote during the Justice's Tenure on the Supreme Court, among 5-to-4 Decisions, 1953–2009



Note: The number in parentheses after the justice's name reflects the total number of 5-to-4 decisions in which the justice cast a vote.

Analyzing the Unique Behavior of the Swing Justice

In this section, we test our theoretical expectation that the swing justice, on average, relies less on attitudinal considerations and more on case-specific and strategic considerations than the other justices. We focus on four empirical implications of our argument—the influence of justice ideology, public opinion, separation-of-powers constraints, and the Solicitor General's amicus curiae briefs. The Solicitor General's amicus arguments offer an important measure of case-specific information (Bailey, Kamoie, and Maltzman 2005; Black and Owens 2011, 2012; Pacelle 2003; Wohlfarth 2009). This is a salient measure of case-level information that is both a well-established predictor of the justices' behavior and is available for our entire period of analysis. Public opinion and the separation-of-powers offer

measures of institutional constraint on the justices (Casillas, Enns, and Wohlfarth 2011; McGuire and Stimson 2004; Mishler and Sheehan 1996; Segal, Westerland, and Lindquist 2011). Each factor should exhibit its strongest relationship with the votes of the swing justice.

One analytic challenge we face is the fact that the nature of the Court's docket changes over time (Baum 1988), in part, because cases appealed to the Court are endogenous to the Court's ideological composition (McGuire et al. 2009). The problem results because strategic litigants consider the costs of litigation and the probability of success (Songer, Cameron, and Segal 1995). As a result, the ideological direction of the Court's affirmances will be disproportionately more liberal (conservative) as the Court itself becomes more conservative (liberal) (McGuire et al. 2009).¹⁴ This "affirmation bias" is of particular concern because McGuire et al. (2009) show that it is most consequential for the justices closest to the ideological median. In other words, including affirmances would bias the results of the justices near the ideological middle, perhaps leading to incorrect inferences about the behavior of the median swing justice. Thus, we follow past research (Casillas, Enns, and Wohlfarth 2011; McGuire and Stimson 2004; McGuire et al. 2009) and only analyze reversals (which account for 64% of Supreme Court cases).¹⁵ Our unit of analysis is the individual justice vote among all cases that reversed the lower court's ruling. The analysis begins in 1953 and extends through the 2007 Court term.¹⁶

Variables

Our dependent variable represents the ideological direction of each justice vote in each case. We code a "1" for votes that reflect liberal policy positions and

a "0" for conservative votes. Due to the binary dependent variable, we estimate logistic regression models. We also estimate robust standard errors, clustered on each Supreme Court term, to account for the possibility of correlated errors within each term. To measure the general tenor of public opinion, we include Stimson's (1991) updated measure of the public's policy mood. Public mood is a longitudinal indicator of how the public's preferences shift over time along the standard liberal-conservative dimension—that is, the degree of public support for more or less government (Stimson 1991). Mood is the most reliable measure of the public's general political orientation and is commonly adopted in literature examining public opinion and the Supreme Court (Casillas, Enns, and Wohlfarth 2011; Giles, Blackstone, and Vining 2008; McGuire and Stimson 2004; Mishler and Sheehan 1993). Higher values reflect a more liberal public, and thus we expect a positive relationship between public mood and the probability of each justice casting a liberal vote.

In order to measure the Solicitor General's influence as *amicus curiae*, we include a predictor that identifies the ideological direction of the Solicitor General's voluntary *amicus* arguments and those cases where the Office did not file a brief. We first identify all those cases where the Solicitor General submitted a voluntary *amicus* brief and the party supported by the Solicitor General. We then utilize the ideological direction of the lower court's decision to infer the direction of each Solicitor General brief, coding a "1" for those briefs advocating a liberal position and a "-1" for conservative arguments.¹⁷ Lastly, we assign a "0" for all observations in cases where the Solicitor General did not participate as voluntary *amicus curiae*. We expect a positive relationship with the dependent variable.¹⁸

We include several predictors to account for other potential influences on the justices' voting behavior. First, each model uses Cameron and Park's (2009)

¹⁴Evidence of this "affirmation bias" is quite prevalent. For example, if we analyze only affirmances, the Warren Court appears more *conservative* than the Rehnquist Court, voting to affirm the lower court's ruling in a conservative direction in a greater percentage of cases.

¹⁵As we report in online supplementary Appendix 1 (Figures A-1 and A-2), this decision does not substantively alter our conclusions, but theoretically, the loss of information from dropping affirmances is less problematic than the bias that might result from including these observations.

¹⁶We end this analysis in 2007 because our separation-of-powers variable does not extend beyond this term. Given the need to identify the median, we analyze cases for which nine total votes were cast. We use data from the Supreme Court Database's Justice Centered data organized by docket (2011 Release 01). The data are available at: <http://scdb.wustl.edu/>.

¹⁷A liberal Solicitor General brief, for example, supports the petitioner when the Court reviews a conservative lower court decision or when the Solicitor General supports the respondent following a liberal lower court decision. We use the "lcDispositionDirection" variable in the Supreme Court Database to identify the direction of the lower court's decision. In less than 10% of the voluntary amici, the Solicitor General does not clearly support a litigant. Due to the inability to definitively determine the ideological direction of these arguments, we code them as if the Solicitor General did not participate.

¹⁸Since we have no theoretical reason to expect liberal and conservative Solicitor General briefs to have a differential effect, using an ordinal variable to estimate the influence of the Solicitor General has the advantage of estimating the average influence of the Solicitor General with the most parsimonious model specification.

measure of justice ideology to account for each justice's general political preferences. Judicial scholars have widely used the Segal-Cover scores as an indicator of justice ideology because they provide an exogenous indicator of each justice's political orientation based on editorial evaluations during the nomination and confirmation process (Segal and Cover 1989). Cameron and Park (2009) improve upon these scores by incorporating additional information—the political ideology of the appointing president as well as ideological information available for the five Supreme Court nominees who were previously members of Congress, the three nominees for Chief Justice who served as Associate Justices, and the 19 nominees who served on the U.S. Courts of Appeals. We recode these scores such that higher values reflect more liberal preferences, and thus (with the exception of the swing justice) we expect a positive relationship with the likelihood of casting a liberal vote.¹⁹

We also account for the possibility that the justices make decisions based on separation-of-powers (SOP) considerations. Following the spatial theory outlined by Owens (2010) and Segal, Westerland, and Lindquist (2011), this predictor captures when a justice is theoretically constrained by the president and Congress. When the justice's ideal point is more ideologically extreme relative to *both* Congress and the president, the justice might adjust his or her voting behavior to avoid the potential for a reversal of the Court's decision. We use the ideological preference estimates created by Bailey (2007) to identify the ideal points of each justice, president, and the median members of each chamber of Congress during the 1953 to 2007 terms.²⁰ Since these ideological measures were generated on a unified ideological space, we may employ them to make interinstitutional comparisons.²¹ First, we compute the ideological distance between each justice and the nearest institutional pivot when that justice is either more conservative or more liberal than the president and both chambers of

Congress. Next, we multiply this distance by “-1” when the justice is more liberal than the president and Congress and we assign a “0” to all observations where either the president or one chamber of Congress is more ideologically extreme than the justice. This yields a predictor where positive (negative) values reflect justices that are more conservative (liberal) than the nearest institutional pivot and thus constrained in a liberal (conservative) direction. Lastly, we standardize each justice's SOP score to a mean of zero (and retain the original variance).²² Our specific predictions for the influence of SOP on the justices are somewhat unclear. On one hand, our prediction that the median swing justice will rely more on nonattitudinal considerations suggests an increased relationship between the SOP measure and the probability of a liberal vote. On the other hand, previous research has argued that these constraints influence justices in certain subsets of cases (see, e.g., Segal, Westerland, and Lindquist 2011), and so our focus on the entire docket may not uncover such evidence. We also account for the potential that the justices' votes might systematically vary based on the issue area in each case. Thus, we create a series of dummy variables, one for each of the following issues appearing on the Court's docket: civil liberties and rights, economic activity, and judicial power.²³

Analysis of All Cases

Using the variables described above, we estimate seven separate regressions. The first is a standard model of Supreme Court decision making that includes *all* justices. By following the standard practice of including all justices, this model does *not* account for the potentially unique behavior of the swing justice. This baseline model allows us to assess whether our inferences about the determinants of Supreme Court outcomes differ when we *do* account for this swing justice. To evaluate the hypothesized

¹⁹As we report in the online supplementary Appendix 4, all statistical results and inferences are robust to alternate measures of the justices' preferences.

²⁰We match the ideal points for the president, House, and Senate based on the calendar year that the justices handed down each decision. Our subsequent conclusions are also robust to utilizing alternative indicators of the pivotal actors in Congress, including the majority party median and filibuster pivot. Online supplementary Appendix 3 reports these results.

²¹The Judicial Common Space scores (Epstein et al. 2007) represent a prominent alternative for institutional preference estimates. We utilize the Bailey scores because they do not impose the assumption of temporal stability (see, e.g., Binder 2008).

²²If we did not take this step, the most ideologically extreme justices would be those who faced the strongest institutional constraint. Given the importance of justice ideology for voting, regardless of the potential influence of SOP constraints, we would observe justices voting against the institutional constraint in favor of their ideological predisposition. We obviate this problem by assigning the same mean SOP score to all justices. This strategy preserves the over-time variation in the distance between each justice and the nearest institutional pivot but purges the SOP measures of the average ideological position of each justice. As a result, we can assess whether justices' tendency to vote in a liberal direction changes as the distance between the justice and the nearest institutional pivot increases or decreases over time.

²³See the online supplementary appendix for a discussion of issue category coding and additional robustness checks.

heterogeneity in justice decision making, we assign the justices to one of five ordinal positions and estimate a separate model for each justice position. Position 5 corresponds with the swing justice, and we estimate a separate regression for each type (i.e., median or ideological). Position 4 reflects the two justices who, based on their issue-specific Martin-Quinn scores, were adjacent to the issue-specific median position. Position 3 corresponds with the second closest justices (on each side) to the Court's median (for each issue area). The same pattern continues for the remaining positions, with Position 1 indicating the justice farthest from the swing justice in a liberal direction and the justice farthest in a conservative direction. We have two predictions based on these analyses. First, we expect that the swing justice (whether the median or ideological) will systematically differ from the conventional model that combines all justices. Such a result will imply that an analysis of all justices can produce misleading conclusions about the factors that relate to the swing justice's vote and thus the case outcome. Second, we predict that the relationship between ideology and votes will be weakest for the swing justice, and the relationship between other considerations and votes will be strongest for the swing justice. More specifically, our argument implies that as we move farther away from the swing justice (i.e., toward the most ideologically extreme justices at Position 1), the impact of ideology should increase and the influence of public opinion, the Solicitor General, and the SOP constraint should decrease.

Figure 2 allows us to evaluate these predictions. This figure presents the average marginal effect and corresponding 95% confidence intervals from the seven regressions described above (all justices, the median and ideological swing justices, and the four other ideological positions). We report the average marginal effect (AME) because this offers a summary measure of the relationship between each predictor and the probability of a liberal vote that is suitable for intergroup comparisons (Mood 2010). Our predictors of primary interest are justice ideology, policy mood, Solicitor General amicus briefs, and SOP constraints. We display the AME (by justice position) for each of these predictors in separate subfigures.²⁴ The labels on the y-axis of each subfigure indicate the separate regressions for each justice position.

First, we consider the relationship between justice ideology and the probability of casting a vote in the liberal direction (Panel a). We have

scaled the Cameron-Park scores across justice positions to a common variance so that any differences across models do not reflect different variances in ideology.²⁵ Looking at the results for all justices (the top row), we see the expected positive and significant relationship between ideology and the justices' voting behavior. The data suggest that if we shifted from Chief Justice Burger (who corresponds with the 20th percentile on the Cameron-Park scores) to Justice Brennan (who corresponds with the 80th percentile), we would expect an increase between 0.19 and 0.24 in the probability of a liberal vote.²⁶

If, as implied by the attitudinal model, the median swing justice bases his or her vote on strong ideological convictions for moderate legal outcomes, we should observe an AME similar to the all justices analysis.²⁷ However, if the ideological neutrality of this justice reflects a greater reliance on other considerations (i.e., integrative complexity), then we should observe a smaller AME. The results are decidedly in line with the latter prediction, as the estimates are statistically different with a much weaker estimated relationship for the median swing justice. When we examine the median swing justice, the estimated effect of shifting justice ideology from Burger to Brennan is less than a third as large (0.06 versus 0.21) and the 95% confidence interval around this estimate ranges from -0.004 to 0.130. Looking at the ideological swing justice, we observe a significant, negative relationship between ideology and vote choice. Although the negative coefficient is the result of our coding, this effect nevertheless reinforces the contention that for the ideological swing justice, ideology *cannot* influence vote choice—these justices have become the swing justice precisely by casting votes that are contrary to their typical ideological predispositions.

Our second hypothesis relates to the pattern across justice positions. As we move from the justices adjacent to the swing justice (Position 4) to the most ideologically distant justices (Position 1), we predict an

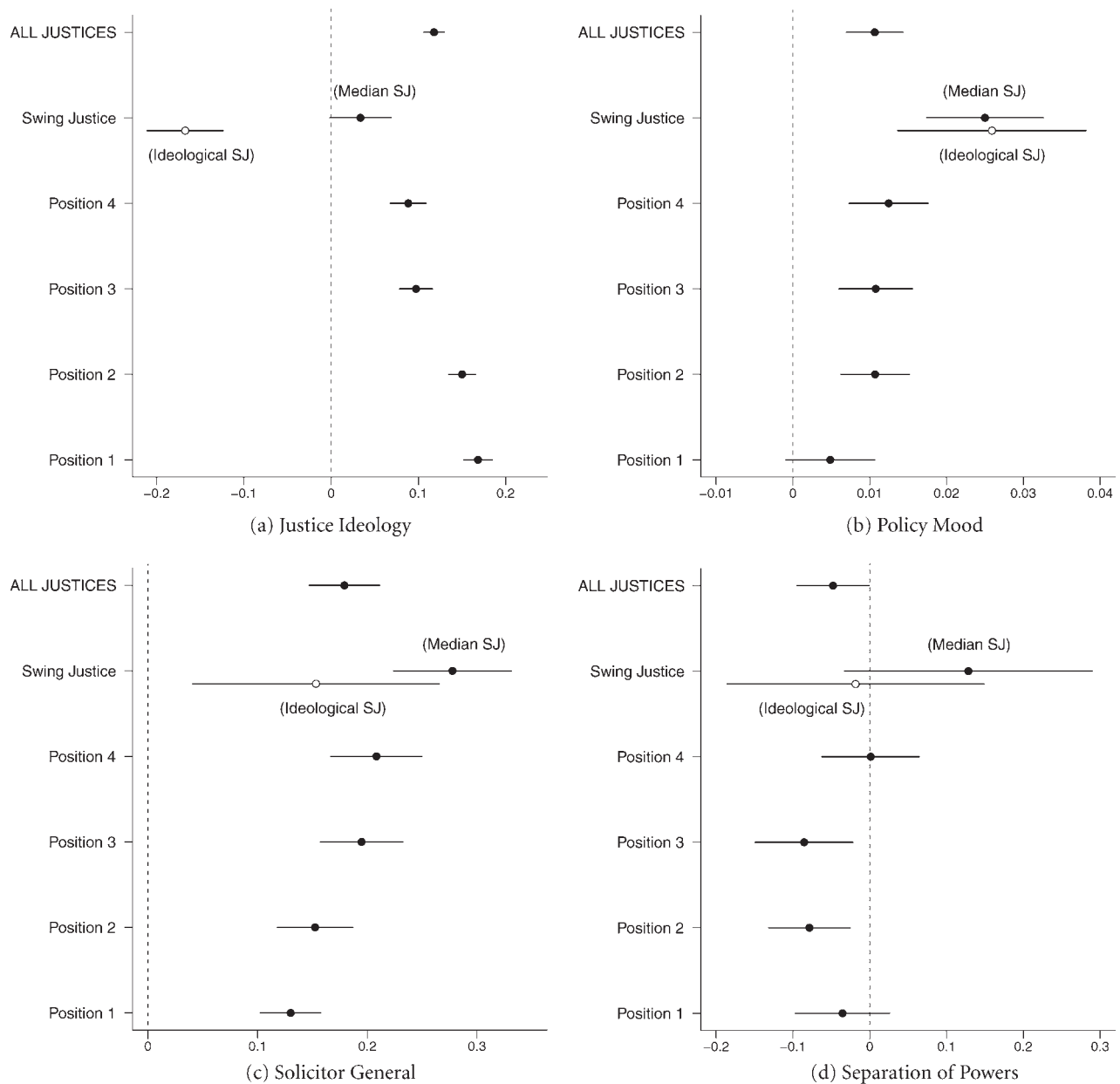
²⁵Online supplementary Appendix 4.3 offers further evidence that different variances in ideology across justice positions do *not* explain the results.

²⁶These values reflect the 95% confidence interval. Following Hanmer and Kalkan (2013), all predicted probabilities are calculated based on all observed values in the data.

²⁷In fact, we might expect that a minor shift in ideology around the median (e.g., from moderate conservative to moderate liberal) would have a greater increase on the probability of a liberal vote than a minor shift in ideology from a more extreme justice (e.g., from extreme conservative to slightly less conservative). Thus, statistically speaking, underestimating the relationship between ideology and vote is not a problem for the median swing justice.

²⁴Full results are reported in the Table A-1 of the online supplementary appendix.

FIGURE 2 The Average Marginal Effect (with 95% Confidence Intervals) for ALL JUSTICES and by Justice Position among All Cases That Reversed the Lower Court’s Decision



Note: The average marginal effect is based on separate logistic regressions. The top row (ALL JUSTICES) reports the average marginal effect based on a regression that includes all justices participating in each case. Each subsequent row reports the results for specific justice positions, based on proximity to the median position. Position 4 corresponds with the two justices that are the closest ideologically to the Court’s median. Position 1, by contrast, corresponds with the justices that are farthest ideologically. Table A-1 in the online supplementary appendix reports the full regression results.

increasingly stronger relationship between justice ideology and the probability of a liberal vote. We do not hypothesize significant differences *across* every individual justice position. Instead, we expect a monotonic pattern of increasing reliance on ideology. This is precisely the pattern we observe. To further evaluate the visual impression, we also estimated a model that

interacts ideology with an ordinal variable that corresponds with justice position. Not surprisingly, the results reveal a significant interaction effect, indicating that the monotonic increase across coefficients is significantly different from zero. Although these findings are consistent with some research on the Supreme Court (Bartels 2011; Collins 2008) and psychological theories of

integrative complexity (Suedfeld 2010), the heterogeneous relationship between justice ideology and the probability of a liberal vote offers an important complement to the implicit predictions of the attitudinal model (Segal and Cover 1989, Segal and Spaeth 2002).

Panel (b) reports the results for policy mood. Again, consistent with past research, the top estimate shows a significant relationship between public opinion and the justices' votes. A shift from the relatively liberal public mood observed in 1960 to the more conservative mood in 1980 predicts a decrease in the probability of a liberal vote between 0.09 and 0.19. Our first prediction is that the median justice will rely on public opinion more than the average justice. Consistent with Mishler and Sheehan (1996), this is precisely what we observe. Confidence intervals of the two estimates do not overlap, indicating that the relationship between public mood and vote choice is significantly different. Furthermore, the magnitude of the difference is quite large. For the median swing justice, the same shift in opinion from 1960 to 1980 predicts a decrease between 0.22 and 0.43 in the probability of casting a liberal vote. We also see the expected pattern across justice positions, with a decreasing AME for public opinion when shifting to a position that is more ideologically distant from the swing justice. In fact, for the justices farthest from the pivotal justice, we cannot conclude that the relationship between opinion and justice vote is different than zero.

The relationship between public mood and the votes of the ideological swing justice is also of note. Although the relationship between public opinion and the probability of a liberal vote is typically weaker for nonmedian justices (i.e., Positions 1 through 4), when a nonmedian justice becomes an ideological swing justice by casting a pivotal vote against his or her ideology, the relationship between public opinion and vote choice is positive, significant, and roughly equal in magnitude to that of the median swing justice. For this result to emerge, justices whose votes typically do *not* correlate strongly with public opinion must be more likely to cast a vote that correlates with public opinion when they deviate from their general ideological predisposition. Although our theoretical predictions for the ideological swing justice focused on case-specific legal considerations, this pattern does not necessarily conflict with our argument. We hypothesized that more ideologically extreme justices will deviate from their typical ideological predispositions when they consider case-specific considerations that contrast with their ideology. It is possible, however, that these nonattitudinal

considerations complicate, as opposed to clarify, the decision of the ideological swing justice. Suppose, for example, that a justice who typically votes in an ideological manner feels as though the Solicitor General's argument in an amicus brief (reflecting a contrary ideological position) is particularly compelling. Instead of persuading the justice to vote against his or her ideology, the Solicitor General brief might represent a competing consideration. It is not controversial to assert that justices can face competing motivations when deciding a case (e.g., Baum 1997). Furthermore, psychologists show that competing considerations produce ambivalence (e.g., Hass et al. 1991; Kaplan 1972), which leads individuals to rely *less* on both competing considerations (e.g., Basinger and Lavine 2005; Lavine 2001).

If competing considerations do not offer a clear directional signal, as long as justices place some value on institutional maintenance (e.g., Davis 2011; McGuire and Stimson 2004), we believe it is plausible that the resulting uncertainty will often lead the ideological swing justice to place more weight on *not* jeopardizing institutional legitimacy.²⁸ In other words, the uncertainty produced by ambivalence may make avoiding a controversial decision a salient consideration. This argument is consistent with our prediction that the ideological swing justice relies more on case-specific factors and with the statistical results exhibiting a *greater* relationship with public mood and a *weaker* relationship between the ideological swing justice's votes and both justice ideology and the Solicitor General (discussed below). Another implication of ambivalence (and resulting uncertainty) is increased time to sign onto the majority opinion. If competing considerations do increase ambivalence for the ideological swing justice, we would predict that this justice takes longer to reach a decision and joins the majority opinion later than other justices. In a supplementary analysis (reported in online supplementary Appendix 6), we show that controlling for justice and case fixed effects, the length of time it takes to join the majority opinion is significantly greater for the ideological swing justice. This result is consistent with the ambivalence argument, but we are cautious about this

²⁸We do not reject the possibility that justices respond strategically to institutional considerations. A significant literature suggests that justices behave strategically to either influence (Davis 2011) or at least not significantly deviate from (Casillas, Enns, and Wohlfarth 2011) public opinion. However, even if strategic motivations are completely tertiary, the ambivalence that results from cross pressured decisions should increase reliance on public opinion.

interpretation for two reasons. First, because we cannot observe justice ambivalence, our evidence is indirect. Second, as we discuss below, our other measure of strategic considerations (SOP constraint) only partly supports this explanation.

Next, we look at the Solicitor General's amicus arguments (Panel c), which offer an indicator of case-specific information that previous scholars widely agree often influence the justices' behavior. Consistent with expectations, the relationship between the ideological direction supported by the Solicitor General's amicus briefs and the justices' votes appears to be strongest for the median swing justice. In particular, a liberal Solicitor General amicus brief (relative to a conservative Solicitor General brief) increases the probability of a liberal vote from the median swing justice between 0.43 and 0.61. The expected change when we analyze all justices is about two-thirds as large (0.35 versus 0.52) with a 95% confidence interval that ranges from 0.29 to 0.40. The impact of the Solicitor General's amici also exhibits the expected monotonic decrease when shifting sequentially across justice positions that are more ideologically distant from the median swing justice. The data, however, do not exhibit a greater relationship between the Solicitor General's arguments and the votes of ideological swing justice. Although this result does not support our predictions for the ideological swing justice, as noted above, this result *is* consistent with the idea that when justices cast a pivotal vote against their ideological predisposition, instead of offering a clear signal, influential case-level considerations can produce ambivalence.

Lastly, the results for the SOP constraint largely follow the previous findings. Although neither the negative AME for all justices nor the positive AME for the median swing justice are statistically different from zero, these two estimates are statistically different from each other. In other words, we cannot conclude that the relationship between SOP considerations and the probability of a liberal vote by the median swing justice is different from zero, but we can conclude that the relationship for the median swing justice is different from the relationship between SOP considerations and the votes of all justices. Additionally, with the exception of the estimate for the most extreme justices, we again observe the expected monotonic shift in AMEs across justice positions. We do not, however, see any evidence that the votes of the ideological swing justice correspond with SOP considerations. In fact, the AME is negative. This result is surprising given our discussion above that ambivalence produced by case-level considerations might lead ideological swing justices to place greater weight on considerations of institutional main-

tenance. It is important to remember, however, that existing research generally finds the strongest evidence of a SOP effect when considering only cases involving federal judicial review and predicting whether the Court overturns an Act of Congress, especially when examining institutional maintenance in constitutional cases (e.g., Segal, Westerland, and Lindquist 2011).²⁹ Indeed, when we analyze a comparable subset of cases, the AME for the ideological swing justice becomes positive and of substantial magnitude.³⁰ Although by no means conclusive, this result is consistent with our above suggestion that ambivalence may increase reliance on strategic considerations among the ideological swing justice.

In 77% of the cases we analyzed, the pivotal swing vote corresponded with the issue-specific median justice. The data strongly support our predictions for this median swing justice and also our general expectations for heterogeneity across the other justice positions (i.e., a monotonic shift across justice positions among most predictors). The results for the ideological swing justice are less consistent with expectations. Based on psychological research on ambivalence (e.g., Basinger and Lavine 2005) and the Court's strategic considerations (e.g., McGuire and Stimson 2004), it is *possible* to interpret the findings as consistent with our argument. However, our inability to observe justice ambivalence leads us to emphasize the tentative nature of this claim. Following the analysis below of 5-to-4 decisions, we discuss our conclusions concerning the ideological swing justice in more detail.

Analysis of 5-to-4 Decisions

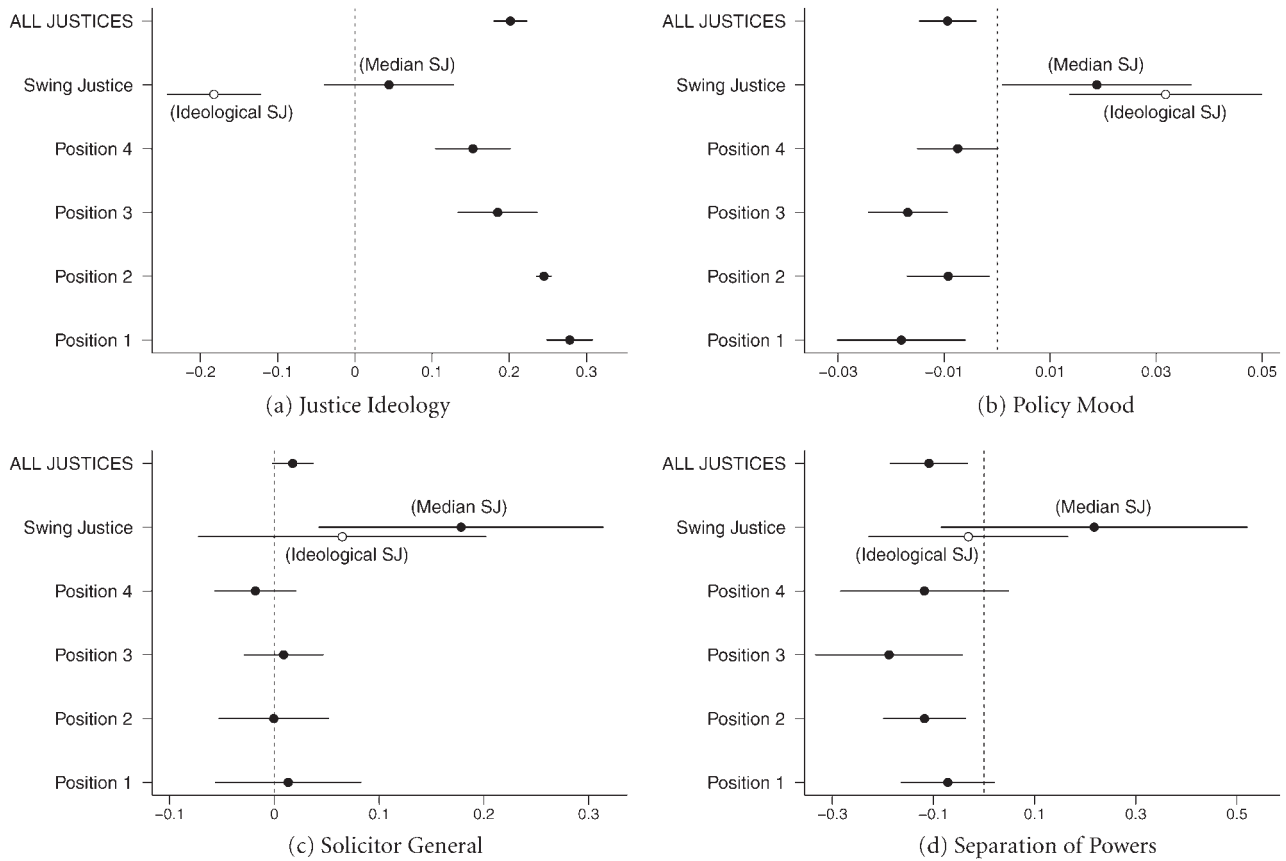
In this section, we analyze all 5-to-4 decisions that reversed the lower court's ruling. The focus on 5-to-4 decisions not only offers the most direct assessment of the behavior of the swing justice, but these cases represent an important component of the Supreme Court's decisions. Since 1946, 17% of all Supreme Court cases—and 37% of “landmark decisions” (Savage 2010)—have been decided by one vote. Furthermore, within the last two decades, in more than half of the Court's landmark decisions, only five justices joined the majority coalition.

Figure 3(a) reports the estimated relationship of ideology across each justice position for these cases.

²⁹SOP constraints could also have a more nuanced impact on the Court, such as inducing the justices to obfuscate the language of majority opinions (Owens, Wedeking, and Wohlfarth 2013).

³⁰For this analysis, we analyzed all judicial review at the federal level, based on the Spaeth data set coding of authorityDecision1=1 and authorityDecision2 =1.

FIGURE 3 The Average Marginal Effect (with 95% Confidence Intervals) for ALL JUSTICES and by Justice Position among All 5-to-4 Decisions That Reversed the Lower Court’s Decision



Note: The average marginal effect is based on separate logistic regressions. The top row (ALL JUSTICES) reports the average marginal effect based on a regression that includes all justices participating in each case. Each subsequent row reports the results for specific justice positions, based on proximity to the median position. Position 4 corresponds with the two justices that are the closest ideologically to the Court’s median. Position 1, by contrast, corresponds with the justices that are farthest ideologically. Table A-2 in the online supplementary appendix reports the full regression results.

We cannot reject the null hypothesis that the votes of the median swing justice are not systematically related to that justice’s ideological predisposition. Among the most closely divided cases that often exude the impression of contentious, politically motivated decision making, on average the pivotal vote *does not* appear to reflect ideological considerations. Furthermore, the relationship between the ideological swing justice and his or her ideology again demonstrates how this justice, by definition, votes contrary to ideological expectations. Finally, as the justices become more distant from the swing justice, ideological predispositions increasingly correspond with their vote choice.

The relationship for public mood follows a similar (but inverted) pattern. Both the median and ideological swing justices are more likely to issue liberal votes among 5-to-4 decisions as public opinion becomes more liberal. Furthermore, with the excep-

tion of justices at Position 2, the AME for public mood across justice positions exhibits a largely decreasing monotonic relationship when moving toward the justice most ideologically distant from the swing justice. Importantly, when analyzing only 5-to-4 cases (as opposed to all cases), the data show that public opinion has a significant relationship *only* for the swing justice. In other words, while an analysis of all justices would indicate that justices vote *against* public opinion in the most closely divided cases, an analysis of the pivotal vote (whether from the median or ideological swing justice) indicates a positive and significant relationship with the public’s mood.

The results for the Solicitor General and SOP constraint (Figures 3(c) and 3(d), respectively) are not as defined, but they largely follow the same patterns. In particular, the expected effects for the median and ideological swing justice are the largest, and the

relationships for the median swing justice are statistically different from all justices combined. Thus, even though the monotonic shifts across justice positions are not as pronounced as in the previous analyses, we again see compelling evidence that when the median justice casts the pivotal vote, this justice appears to rely on different considerations than the other justices.

Taken together, the analyses provide considerable support for our argument about the unique behavior of the swing justice. Whether analyzing all cases or only closely divided 5-to-4 decisions, the common thread among all empirical models is the appearance of significant heterogeneity across justices on the Court. This heterogeneity holds particularly important implications for the median swing justice. The statistical results for the ideological swing justice appear more complex. Nevertheless, we believe our focus on the ideological swing justice carries important implications for the study of Supreme Court decision making. Few would dispute that Chief Justice John Roberts cast the pivotal swing vote in *National Federation of Independent Business v. Sebelius* (2012) to support the Obama administration's signature health care legislation. Consistent with Lauderdale and Clark (2012), we have shown that this type of behavior is more common than previously thought. Since 1953, we estimate that more than 20% of all cases were decided by a justice voting against his or her ideological predisposition. At a minimum, scholars should recognize the existence of ideological swing votes and account for this behavior (and the heterogeneity on the Court in general) in future analyses.

Conclusions and Implications

Scholars and observers of the Supreme Court have long recognized that the fifth justice to join the majority coalition is critical for case outcomes. Even before the importance of the median position was formalized by Hotelling (1929) and Black (1948), observers understood the potential influence of the swing justice. In 1923, for example, Senator Simeon D. Fess argued that the Supreme Court "should not be able to set aside [a legislative act] as unconstitutional by a five-to-four vote. It might mean making a law void by so narrow a decision that *one man is umpire*" (*New York Times*, March 31, 1923; emphasis added). Our goal has been to better understand the motivations behind the votes of those justices in a position to "umpire" a decision.

Past research has generally assumed that the swing justice is the term-specific median on the

Court and that this justice bases his or her decision on the same considerations as the other eight justices. We have argued, however, that scholars should view the swing justice as a case-specific concept. While the term-specific median justice casts the pivotal vote in more than half of all 5-to-4 decisions, more extreme justices account for 45% of these pivotal swing votes. Furthermore, the swing justice appears to consistently base his or her vote on different considerations than other justices. The results suggest that whether the swing justice represents the moderate center of the Court or a more extreme ideological position, this justice's votes correspond more closely with public opinion and less with personal preferences than the other justices. Additionally, when the median on the Court casts the swing vote, this justice appears to place additional weight on the Solicitor General's arguments and perhaps also on the ideological positions of the elected branches. This heterogeneity holds important implications for how we understand Supreme Court outcomes. For example, even when we see overwhelming evidence that justices follow attitudinal considerations, the justice who casts the pivotal vote seemingly relies on other factors with great frequency. Equally as important, the relationship between justice ideology and justice vote is substantially less for the pivotal swing justice than revealed by a standard analysis of all justices. While this result may not be surprising, given the relative ideological neutrality of the median swing justice, it holds important implications for how we interpret the attitudinal model.³¹ For good reason, the attitudinal model has become perhaps the most prominent and influential way of thinking about the behavior of Supreme Court justices. At the same time, if we want to fully understand the Court's policy outputs, it is not enough to analyze how the justices, on average, reach their decisions. We must also understand the behavior of the justice who casts the deciding vote.

In addition to advancing our general understanding of Supreme Court decision making, the findings are particularly important for how we understand the relationship between the mass public and the High Court. Not only do the votes of the swing justice correspond more closely with public opinion than the other justices, but in the Court's most closely divided cases, it is only for the pivotal vote that we observe

³¹When analyzing all reversals and affirmances (see online supplementary Appendix 1), we do find a significant relationship between ideology and the votes of the median swing justice, but this relationship continues to be much weaker and statistically different than the other justices.

a significant relationship with the public's preferences. The unique behavior of the swing justice also presents important implications for the literature examining the Solicitor General before the Court, as the results suggest that the median swing justice's vote corresponds more closely with the Solicitor General's legal recommendation than more ideologically extreme justices.

Our theory and findings also hold implications for the study of other decision-making bodies. Consider, for example, the U.S. Congress. It is well known that certain legislators can be pivotal in the policy making process (e.g., Krehbiel 1998; Wiseman and Wright 2008). Yet, research on Congressional decision making often analyzes all members of Congress together (e.g., Lee, Moretti, & Butler 2004; Levitt 1996). Certainly, understanding the behavior of Congressional representatives, on average, is an important endeavor. Yet, we might also want to know whether the pivotal legislators, who are in a position to sway the law one way or the other, behave in a unique manner (see, e.g., Fleisher 1993, Gordon 2001). Although identifying the pivotal legislator on a committee or in the chamber may pose a challenge, we believe our findings for the pivotal swing justice suggest that if we want to understand who influences policy outputs in Congress, we cannot only look at representative behavior, on average—we must also understand the potentially unique behavior of the pivotal members.

The analysis also raises new questions for the study of judicial behavior. Recent literature has significantly advanced our understanding of the role of precedent and legal factors in Supreme Court decision making (Bailey and Maltzman 2008; Bartels 2009; Fowler and Jeon 2008; Friedman et al. 2012). Our argument predicts that as new measures of these concepts emerge, we will observe additional sources of heterogeneity across justices. Another important consideration is whether these results are consistent across time. Scholars largely agree that the political environment in Congress has become more polarized (Binder 2003; McCarty, Poole, and Rosenthal 2006) and that this polarization has influenced the mass public (e.g., Hetherington 2009; Levendusky 2009). To date, there has been little research into the extent that political polarization influences Supreme Court decision making. It will be important to learn whether the majoritarian influence of the swing justice that we have observed has persisted or diminished as American politics have become more polarizing. Finally, this study presents important implications for the study of the ideological content of the final legal rule articulated within each Supreme Court case. Recent research highlights the importance of the case disposition when

arguing that internal bargaining over the final ideological content of each decision's legal justification generally reflects the location of the median of the majority coalition (Carrubba et al. 2012; Clark and Lauderdale 2010). While our findings are fully compatible with this argument, this study suggests that in order to fully understand the determinants of the disposition connected to the internal bargaining—that ultimately determines the ideological content of a legal rule—scholars must also pay attention to the unique considerations guiding the vote of the swing justice.

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