

# The Swing Justice\*

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## Abstract

The median justice on the U.S. Supreme Court represents an important influence on judicial policy, as one justice can cast the deciding vote to swing a case outcome in a particular direction. In contrast to previous research, we argue that the identity of this pivotal justice varies significantly from case-to-case. Specifically, we propose that heterogeneous motivations can often lead to voting coalitions where a justice becomes the pivotal swing vote by relying more on case-specific considerations and less on ideology than the other justices. To test our theory of heterogeneous decision making, we identify the pivotal swing justice in the context of each case. We then analyze all votes cast in Supreme Court decisions since the 1953 term. Consistent with expectations, we demonstrate that in general, as well as in the most closely divided 5 to 4 decisions, the swing justice in each case attaches a greater importance to legal arguments while issuing votes that rely less on ideology than the other justices on the Court. We also show that the swing justice is uniquely responsive to strategic considerations. Overall, this study suggests that many of the Court's tangible policy outputs have been pivotally determined by a justice exercising considerations beyond his or her general ideological predisposition.

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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. (March 30, 1937, *The New York Times*)

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 & Quinn 2010). 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, Jeffrey Rosen once dubbed Justice Sandra Day O’Connor “a majority of one.” 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). As Martin, Quinn & Epstein (2005, 1278) explain, “the median justice will...be the choice of the Court’s majority.”

Scholars of judicial politics have long examined the importance of the median justice, producing numerous theories to explain how this justice might often serve as the controlling influence on the outcomes and ideological content of the Court’s opinions (e.g., Lax & Cameron 2007, Martin, Quinn & Epstein 2005). Indeed, scholars debate whether the median justice directly controls the subsequent content and legal rule within a majority opinion, constrains the opinion author with the threat of defecting to the minority (Hammond, Bonneau & Sheehan 2005, Schwartz 1992), or merely affects the distribution of justices and, as a result, the location of the median of the majority coalition (Carrubba, Friedman, Martin & Vanberg N.d., Clark & Lauderdale 2010). Nevertheless, the importance of the median justice for the *direction* of the case outcome is uniformly accepted. Accordingly, existing studies have placed great importance on predicting the identity and locating the policy position of the justice most likely to represent the median on the Court for the duration of each term (Bailey 2007, Grofman & Brazill 2002, Martin, Quinn &

Epstein 2005).

Yet, despite the theoretical importance applied to the median (or swing) justice, the behavior of this justice is not well understood. Existing studies generally assume (often implicitly) that the identity of this pivotal actor is largely constant across the range of the Court's docket for the duration of the term and that the swing justice bases his or her decisions on the same factors as the other eight justices. Such assumptions are sensible when attempting to predict the likely direction of the Court's decisions prior to the justices' formal consideration of a dispute (see, e.g., Owens 2010). However, we contend that when the justices consider the dispute, their heterogeneous reactions to legal and strategic considerations lead the identity of the swing justice, and thus the composition of the majority coalition, to shift across cases. As a result, if we wish to understand the motivations that produce the Court's tangible policy outputs, the swing justice should be conceptualized as a case-specific phenomenon. Furthermore, we must allow that this case-specific swing justice follows different decision making criteria than the other justices.

Individual-level analyses that do not account for these case-level voting dynamics involving the swing justice can potentially lead to the wrong inferences about the motives behind the Court's decisions. 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. Given the institutional dynamics on the Court (i.e., one justice can decide the outcome) and our theory of heterogeneous decision making, we suggest that scholars must pay particular attention to the changing identity of

the swing justice and the unique factors that might influence the swing justice's decisions.

Our primary focus is 5 to 4 decisions, but we will see that our attention to the swing justice holds implications for decision making in all cases. The subsequent section develops our theoretical argument for why the swing justice should often base his or her voting decision on different considerations than other justices in each case. We then begin the analysis by testing our hypothesis that the identity of the pivotal swing justice varies from case-to-case. In doing so, we use data on the justices' voting behavior from the 1953 to 2009 Court terms and identify the swing justice (i.e., the case-specific median justice). For 5 to 4 cases, we operationalize the swing justice as the justice in the majority coalition who is most likely to defect for ideological reasons.<sup>1</sup> We are able to show that this case-specific swing justice is often not the ideological, term-specific median on the entire Court, even among closely divided decisions. The analysis then tests our expectations regarding heterogeneity in the determinants of individual justices' voting decisions, focusing, in particular, on two empirical implications of the theory—the influence of public opinion and amicus curiae positions filed by the solicitor general (SG). Looking at 5 to 4 decisions in addition to all cases, we demonstrate that the swing justice who casts the pivotal vote is more likely than the other justices to vote consistent with public opinion and the position advocated by the SG's amicus brief. Furthermore, we show that although the Court's decisions typically exude the impression of politically motivated decision making, many collective outcomes have been pivotally determined by a justice *not* exercising his or her general ideological predisposition.

These findings advance the ongoing debate about the influence of the mass public on the Court (e.g., Casillas, Enns & Wohlfarth 2011, Epstein & Martin 2011, Giles, Blackstone & Vining 2008) by offering the first glimpse of the micro-foundations of the relationship between public opinion and Supreme Court decisions. Our results suggest that the Court's decisions generally reflect changes in prevailing public sentiment precisely because of the

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<sup>1</sup>Below, we discuss our strategy for operationalizing the swing justice in other coalition sizes.

unique behavior exhibited by the pivotal swing justice. The findings also contribute to a vast literature documenting the important impact of the solicitor general's legal arguments, as the data illustrate how the SG's non-attitudinal influence on the Court manifests itself in a heterogeneous manner. The SG, in other words, represents the most influential external actor on judicial policy, but only appears to lead some justices to abandon their ideological preferences in any given case out of a respect for the Office's legal credibility. Finally, this paper holds important implications for the study of judicial decision making. If we are to understand the policy outputs of the Supreme Court, our theories and analyses must pay particular attention to the justice who casts the pivotal vote. We show that heterogeneous decision making not only matches descriptive pictures of judicial behavior, but analyses that allow for heterogeneous motivations can more effectively represent the data and lead to new insights about Supreme Court decision making.

## **The Swing Justice and Heterogeneous Decision Making**

Most empirical studies emphasize the role of ideological motivations on judicial decision making (e.g., Segal & Spaeth 2002). Yet, extensive evidence exists that important legal (e.g., Bailey & Maltzman 2008, Bartels 2009, Richards & Kritzer 2002) and strategic (e.g., Epstein & Knight 1998) considerations can shape the justices' votes. In addition to these considerations, legal academics emphasize the significance of the specific facts present in a given case (Ruger, Kim, Martin & Quinn 2004). Our theoretical approach seeks to unite these perspectives to better understand the behavior of the swing justice. Our theoretical argument builds on three assumptions. First, consistent with past research, we assume that justices are policy-seeking actors that primarily rely on ideological motivations (Bailey 2007, Martin & Quinn 2002, Maltzman, Spriggs & Wahlbeck 2000, Segal & Spaeth 2002). Second, we contend that the additional information that justices incorporate into their decisions is, in part, a function of case-specific non-attitudinal factors,

such as precedent, oral arguments, and amicus curiae briefs.<sup>2</sup> Finally, and perhaps most importantly, we propose that these additional considerations influence the justices in a heterogeneous manner.

We do not expect these propositions to be controversial. Despite the ubiquity of the attitudinal model, few would argue that additional considerations *never* matter. Although the justices' ideological preferences are sure to influence their votes in a great number of cases, it is likely that other legal considerations shape the decision making of a select number of justices within the context of a single case. For example, literature suggests that precedent (e.g., Bailey & Maltzman 2008), oral arguments (e.g., Johnson 2004, Johnson, Wahlbeck & Spriggs 2006), amicus briefs (e.g., Collins 2004, Collins 2008), and the solicitor general's legal arguments (e.g., Black & Owens 2011, Pacelle 2003) can influence the justices' decision making. Additionally, given the unique backgrounds and experiences of the justices, it would be surprising if they responded identically to such case-specific considerations. Indeed, Johnson, Wahlbeck & Spriggs (2006) show that justices' responsiveness to oral arguments depends on the ideological proximity between the justice and the litigant. We might also expect other sources of variation in the importance applied to oral arguments. For example, the grade Justice Harry Blackmun assigned to indicate the quality of each attorney's arguments (Johnson, Wahlbeck & Spriggs 2006) signals the importance Blackmun applied to oral arguments (Strum 2000, 298). Contrast this with Justice Clarence Thomas who has not asked a question during oral argument for five years. Although we cannot definitively know the importance Thomas assigns to oral arguments, his apparent lack of engagement (Johnson, Black & Wedeking 2009; Liptak 2011; Strum 2000, 298) suggests that he is much less likely to be influenced by these arguments than other justices on the Court.

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<sup>2</sup>As we explain below, our theory allows strategic considerations, such as the mass public's preferences or the ideological position of other branches of government, to enter into the justices' decision making, but our argument does not depend on strategic behavior.

The same opportunity for heterogeneous influences exists among other case-level factors. Consider the justices' potential reliance on precedent. In their path-breaking study documenting the importance of legal factors, Bailey & Maltzman (2008) demonstrate that legal precedent acts as an important constraint on the justices' decision making. These scholars also suggest that this effect is not uniform among all justices on the Court, as precedent exhibits a meaningful impact on some justices but not others. Furthermore, Hurwitz, Mishler & Sheehan (2004) show that justices are more likely to rely on precedent early in their tenure on the Supreme Court. If case-specific considerations such as precedent and oral argument exhibit differential effects across individual justices in general, the diverse set of case facts present across the range of the Court's docket should only amplify this heterogeneity. In sum, the presence of different case contexts as well as varying sensibilities, personalities, and priorities among justices should lead them to incorporate additional, non-attitudinal considerations in a heterogeneous manner.

If we allow that considerations beyond ideological motivations *sometimes* influence Supreme Court justices and that these considerations affect the justices 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 and the attitudinal model will predict their votes. Furthermore, in this scenario, the term-specific median justice on the Court will always cast the pivotal swing vote and the direction of the Court's decisions will align with this justice's attitudinal disposition. However, if a justice considers case-specific factors that run counter to his or her ideology, the resulting vote may depart from the prediction of the attitudinal model. Suppose, for example, that a conservative justice assigns some importance to oral argument or the solicitor general's amicus curiae brief. Also suppose, for a particular case, that the most compelling oral argument or the SG's amicus brief supports a liberal outcome. If the conservative justice attaches sufficient weight to either of these considerations 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. Our assumption of heterogeneous decision making implies that not all justices will be equally influenced by case-specific legal considerations. In fact, given the importance justices attach to ideological considerations, we expect that most justices will rely on their ideological predispositions at the expense of case-level considerations. Because most justices vote in a consistently ideological direction, the conservative justice in the previous example likely holds a unique influence on the direction of a closely divided decision. By deviating from his or her ideological predisposition, this justice would be in a position to change the composition of the majority coalition, which otherwise would follow the justices' ideological predispositions. This observation illustrates an additional prediction of our theory—the swing justice will typically be in a position to cast the pivotal vote *because* this justice places greater weight than the other justices on case-specific considerations that conflict with his or her ideology. In other words, heterogeneous decision making predicts that the swing justice's decisions will typically correspond more closely with case-level considerations and less closely with ideology than the other justices.

Heterogeneous decision making also speaks to how considerations of institutional maintenance may enter Supreme Court decision making (e.g., Clark 2009, Clark 2011, Segal, Westerland & Linquist 2011). Strategic considerations, such as prevailing public sentiment or separation-of-powers considerations, could represent an additional case-level factor that justices sometimes consider in addition to their ideology. However, attention to legal considerations (as described above) could, in-and-of itself, lead to an increased reliance on strategic considerations. This prediction, which builds on psychological theories of ambivalence, holds as long as justices place some value on maintaining institutional legitimacy. When individuals face competing considerations, psychologists refer to this as ambivalence (e.g., Hass, Katz, Rizzo, Bailey & Eisenstadt 1991, Kaplan 1972). Furthermore, ambivalence leads to less reliance on the competing considerations. As Basinger & Levine (2005, 171) explain,

Ambivalent [i.e., competing] opinions are held with less confidence and less clarity, and are more difficult to retrieve from memory, than relatively one-sided opinions (Alvarez & Brehm 1995, Bargh, Chaiken, Govender & Pratto 1992, Huckfedlt & Sprague 2000, McGraw, Hasecke & Conger 2003). Consequently they are less stable and exert less impact on political choice than univalent opinions (Lavine 2001, Zaller & Feldman 1992).

Understanding ambivalence is important because we have argued that the swing justice will typically be in a position to cast the pivotal vote because this justice faces competing considerations (i.e., ideological predispositions *and* salient case-level factors). These competing considerations will produce ambivalence and, in turn, diminish the justice's reliance on both. When competing considerations do not offer a clear directional signal, as long as justices place some value on institutional maintenance, we predict the resulting ambivalence will lead the swing justice to place more weight on *not* jeopardizing institutional legitimacy.<sup>3</sup>

To summarize, the above argument leads to three hypotheses. First, heterogeneous decision making should lead to shifting voting coalitions that depend on a changing identity of the pivotal swing justice. As a result, we should observe a substantial number of cases where the justice that casts the swing vote is *not* the term-specific median justice on the Court. Second, the swing justice should rely more on legal and strategic considerations than the other justices. Third, we should observe less correspondence between ideology and the direction of the swing justice's vote. The following examples help to illustrate our general argument and these predictions.

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<sup>3</sup>We 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 & Wohlfarth 2011) public opinion. However, even if strategic motivations are completely tertiary, the ambivalence that results from heterogeneous decision making should increase reliance on public opinion.

## Examples of Heterogeneous Decision Making

First, we consider Justice Clarence Thomas. Among non-unanimous criminal procedure decisions through the 2009 term, Thomas voted in the conservative direction 88 percent of the time. Despite his obvious tendency to vote in the conservative direction, Justice Thomas cast the pivotal vote in the *liberal* direction in several 5 to 4 decisions. In cases involving the Sixth Amendment Confrontation Clause (*Melendez-Diaz v. Massachusetts* (2009)), Fourth Amendment protection against a warrantless search & seizure (*Arizona v. Gant* (2009)), and Sixth Amendment right to a trial by jury (*Blakely v. Washington* (2004)), Thomas represented the pivotal swing vote in support of a traditionally liberal position. Of the 23 cases in these specific issue areas during his tenure, these were the *only* liberal votes Thomas cast.<sup>4</sup> Although we do not claim to know the exact motivations behind Justice Thomas's votes, these outcomes suggest that something about these cases led Thomas to incorporate more than his ideology into his vote and the result turned the Court's ruling in the liberal direction.

Justice Stevens's vote in *Irizarry v. United States* (2008), a statutory case involving the Federal Rules of Criminal Procedure, offers a similar example. Not surprisingly, Justice Stevens (widely considered the most liberal justice on the Court at the time) voted in the liberal direction 75 percent of the time in criminal procedure cases. Yet, 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. The petitioner, after pleading guilty of violating federal law and receiving the maximum 60-month prison sentence allowed by statute, challenged the sentencing on the basis that it exceeded the 41- to 51-month range recommended by the Federal Sentencing Guidelines. In particular, the petitioner argued that the trial judge was obligated to provide advance notice to authorities (especially in the context of a plea agreement) when

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<sup>4</sup>We use the Supreme Court Database to define the specific issue category ("issue") and the ideological direction of a justice's vote ("direction") for each case.

considering a deviation from the Sentencing Guidelines with a more stringent prison term. Stevens's majority opinion 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 had previously dissented in *Booker*, objecting to that majority's decision changing the Sentencing Guidelines from being mandatory to advisory (specifically objecting that the Court should defer to Congress). If we take Stevens's dissent as an indication of his preferences, it appears that the legal precedent set in *Booker* contrasted with his personal preference. Stevens's decision to join four predominantly conservative justices in this manner suggests that the legal context of the case influenced him to become the pivotal (and seemingly non-attitudinal) vote against his customary liberal colleagues.

More centrist justices also display evidence of non-ideological voting when casting the pivotal vote. Throughout much of her tenure, most observers viewed Justice Sandra Day O'Connor's votes as consistently projecting a moderate conservative influence on the Court's decisions. Indeed, a cursory examination of her voting record supports this assertion. Among non-unanimous decisions across the four most common issue areas on the Court's docket during her tenure (criminal procedure, civil rights, economic activity, and First Amendment), O'Connor issued conservative votes in at least 60 percent of the cases (that she participated in) within each individual issue area. In particular, O'Connor supported the conservative side in 79 percent of non-unanimous criminal procedure cases and 69 percent of decisions involving economic activity. Yet, O'Connor as the swing justice exhibited behavior that significantly contrasted with her general voting record. When casting the critical fifth majority vote (among all non-unanimous decisions), O'Connor supported a traditionally conservative position just 57 percent of the time in criminal procedure cases, 46 percent among civil rights issues, in 34 percent of First Amendment cases, and 30 percent of decisions involving economic activity. Thus, while O'Connor's entire tenure generally portrays a moderate justice that consistently leaned in the conservative

direction, the descriptive data suggest that additional, non-attitudinal considerations often shaped her votes when serving as the critical fifth vote in the majority coalition.

These examples help illustrate two points. First, if our goal is to predict the direction of a justice’s vote, the attitudinal model does an impressive job. For non-unanimous decisions, knowing the general ideological predisposition of Thomas and Stevens allows us to predict nearly 90 percent and 80 percent of their votes in criminal procedure cases, respectively. We also see, however, that the justice who casts the critical swing vote will perhaps often incorporate information beyond purely attitudinal considerations. Whether we observe Thomas or Stevens presumably crossing sides, or O’Connor who observers typically associated as the fulcrum of the Court’s balance of power, the least likely justice to join the majority coalition in numerous decisions appears to consider more than his or her ideology. Put differently, non-attitudinal motivations appear to manifest themselves in a heterogeneous manner, operating differently from both justice-to-justice and case-to-case. If this pattern is systematic, as we predict, many of the Court’s important and most closely divided policy decisions will not always be consistent with the expected outcome based solely on the Court’s ideological, term-specific median.

## Identifying the Swing Justice

To test our theory of heterogeneous decision making, we must identify the swing justice. Following previous research, we define the swing justice as the one who casts the pivotal vote in each Supreme Court case (Martin, Quinn & Epstein 2005). We differ from past research, however, by operationalizing the swing justice at the case level. Despite the theoretical focus on the “decisive vote” (Blasecki 1990, 531), previous scholarship has considered the swing justice as a relatively fixed and term-specific concept. For example, scholars have often asked whether a particular justice, such as Justice Reed (Anonymous 1949), Justice Powell (Blasecki 1990), Justice Kennedy (Schmidt & Yalof 2004), or Justice O’Connor (Rosen 2001) was *the* swing 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 (Baum & Devins 2010, Martin, Quinn & Epstein 2005).<sup>5</sup>

Our approach seeks to identify, *for each case*, which justice casts the pivotal fifth majority vote. Specifically, we operationalize the swing justice as the fifth-most likely to have joined the majority based on the justices' ideological predispositions and the case outcome. In the context of a liberal (conservative) 5 to 4 decision, for example, we define the most conservative (liberal) justice in the majority coalition as the pivotal swing vote—the justice that was least likely to join the majority coalition (or, conversely, the most likely to defect) for ideological reasons.<sup>6</sup> We acknowledge that the justice in the ideological middle is more likely to be the swing vote than more extreme justices, but our theory of heterogeneous decision making predicts that the term-specific median justice will *not* correspond with the case-specific swing justice in a substantial number of cases.

The validity of this measurement strategy depends on two conditions. First, we must be able to identify the relative ideological position of each justice. Second, justices must typically vote consistent with this (observed) ideology. To identify the ideological position of the justices in each case, we turn to the measures developed by Martin & Quinn (2002). The Martin-Quinn scores offer a contemporaneous measure of the justices' revealed preferences. The measurement strategy behind these ideological preference indicators offers several important advantages. Most notably, the Martin-Quinn scores are effective predictors of the justices' votes across the range of issues on the Court's docket and they allow the justices' ideal points to vary over time. Furthermore, the item response theory (IRT) model used to generate the measures is not sensitive to non-random changes in

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<sup>5</sup>Edelman & Chen (2007) define the the swing justice as the justice most likely to defect based on past patterns of justice coalition formation. Their approach follows a similar intuition as ours, but we cannot use their measure because they do not estimate the case-level swing justice.

<sup>6</sup>When extending the focus to all decisions, we define the swing justice as the fifth-most likely to have joined the majority coalition based on a rank order of the justices' ideal points starting from the ideological direction of the Court's decision.

the Court’s agenda-setting decisions over time (Martin & Quinn 2005). 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 & Clark 2011). Instead, we build on the strategy of Martin & Quinn (2005) and estimate the Martin-Quinn model across four separate issue areas of the Court’s docket: Civil Rights, Criminal Procedure, Economic Activity, and Civil Liberties.<sup>7</sup> We refer to these measures as the issue-specific Martin-Quinn scores.

Of course, substantial research supports our second assumption, that justices vote largely based on their ideological preferences (Segal & Spaeth 2002). Modeling the Court’s political composition (or the ideological preferences of the individual justices) is now widespread among empirical political science and legal studies (Law & Zaring 2010). Nevertheless, Figure 1 helps to verify the importance of justice preferences. Using the issue-specific Martin-Quinn scores, we assigned each justice during each Court term an ordinal position from most liberal to most conservative. Figure 1 displays the percentage of 5 to 4 cases that the justices in each issue-specific ideological position on the Court (from most liberal to most conservative) voted in the liberal direction.<sup>8</sup> The figure indicates a substantial amount of ideological voting, with the most liberal justices almost always casting a vote in the liberal direction and the most conservative justices rarely doing so. Among

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<sup>7</sup>Using the Supreme Court Database (<http://supremecourtdatabase.org/>), we split the data into the four broad issue areas. We rely on the “issueArea” variable (Civil Rights: “issueArea” = 2; Criminal Procedure = 1; Economic Activity = 7-14; Civil Liberties = 3-6). These issue distinctions represent substantively distinct issue areas that also include a sufficient number of cases on the Court’s docket to generate meaningful and reliable estimates of the justices’ issue-specific preferences. We utilize the most recent data, which begin with the Vinson Court in 1946. With the exception of Chief Justice Earl Warren, every justice serving on the Court during the 1953 term was appointed to the Court prior to that term. Thus, by utilizing data from the previous terms, we can produce more accurate ideological estimates.

<sup>8</sup>We classify liberal and conservative using the “direction” variable in the Supreme Court Database. Since the Martin & Quinn (2002) model estimates do *not* utilize the ideological

all 5 to 4 decisions since 1953, if you 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, you would correctly predict 85.6 percent of these eight justices' votes.<sup>9</sup> Given the perception that politics motivates the Court's most closely divided cases, this result is not surprising. Yet, we take this as strong evidence in support of the presumption that the justices' votes primarily reflect their ideological predispositions.

[Figure 1 About Here]

## Who Casts the Swing Vote?

With evidence to support the two assumptions underlying our measurement strategy, we now examine the identity of the swing justice within the context of each case. The descriptive data suggest that our measure holds face validity. We begin by reporting the percentage of cases that the justices in each ideological position represent the swing vote among all 5 to 4 decisions. Figure 2 reports these statistics from the 1953 to 2009 terms. Several patterns stand out from the data in the figure. First, we see that the overwhelming proportion of swing votes come from the moderate, term-specific median justice. Given Figure 1 and past research on attitudinal voting (e.g., Segal & Spaeth 2002), it is not surprising that the median justice on the Court during each term is most likely to represent the swing vote. Again, not surprisingly, we see that the justices adjacent to the median are the next most likely to be the swing vote. The middle three justices account for more than 70 percent of swing votes in 5 to 4 decisions. We also see, however, that even the direction of the decision, Figure 1 offers a particularly stringent assessment of the predictive capacity of our issue-specific Martin-Quinn scores.

<sup>9</sup>This value represents an almost negligible (one percent) improvement over the standard Martin-Quinn scores. Given past work on similarities across issue areas (Martin & Quinn 2005), the impressive performance of the standard Martin-Quinn scores is not surprising. For theoretical reasons, we continue to rely on the issue-specific scores, but we take this result as a strong affirmation of the traditional values.

most extreme justices sometimes represent the swing justice in a case and cast the deciding vote *contrary to their general ideological preferences*. This is an important result that is consistent with heterogeneous decision making.

[Figure 2 About Here]

Figure 3 offers another indication of the shifting identify of the swing justice. Looking at all justices serving on the Court from 1953 to 2009, the figure reports the percentage of 5 to 4 decisions that each justice represents the 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 ideologically extreme justices cast the deciding vote against their ideological preferences.

[Figure 3 About Here]

## Testing Heterogeneous Decision Making

In this section, we test our theoretical expectation that the swing justice, on average, exhibits uniquely non-attitudinal behavior and a greater reliance on case-specific considerations compared to the other justices in each case. We focus on two empirical implications of the theory—the influence of public opinion and the SG's amicus curiae briefs on the swing justice. The SG's amicus arguments offer an important measure of case-specific legal information (Black & Owens 2011, Pacelle 2003, Wohlfarth 2009). Public opinion, by contrast, offers a measure of institutional constraint on the justices (Casillas, Enns & Wohlfarth 2011, McGuire & Stimson 2004, Mishler & Sheehan 1996). Not only do we expect the swing justice to rely more on case-specific legal considerations, but we predict that the ambivalence produced by these considerations will often lead to increased attention to institutional maintenance. Thus, public opinion and the SG's amicus arguments—two well-established considerations that are known to influence the justices' decision making independent of their ideological preferences—offer a critical test of our theory. Each factor

should exhibit its greatest impact on the swing justice in the context of each case.

In the subsequent models, we first consider the role of the swing justice among only 5 to 4 decisions and then broaden the analysis to include all cases. The initial 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 percent of all Supreme Court cases—and 37 percent of “landmark decisions” (Savage 2010)—have been decided by one vote. Furthermore, within the last two decades, the Court has issued opinions in roughly half of its most politically salient and controversial cases with a mere five justices in the majority coalition (Savage 2010).

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, Vanberg, Smith & Caldeira 2009). The problem results because strategic litigants seeking to maximize their prospects of prevailing on the merits are more likely to bring cases decided by the lower court in a liberal (conservative) direction to a conservative (liberal) Supreme Court. Yet, strategic litigants cannot perfectly predict the intensity of the Court’s ideological preferences. These errors create an “affirmation bias”—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). Evidence 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. However, examining only reversals avoids this affirmation bias and provides sensible results, with the Warren Court typically voting in a liberal direction and the Rehnquist Court often voting in the conservative direction. This affirmation bias is of particular concern because McGuire et al. (2009) show that it is most consequential for the six justices closest to the ideological median. Since we use the ideological direction of the justices’ votes as the dependent variable, including affirmances would bias the results

of the justices closest to the ideological middle, leading to incorrect inferences about the behavior of the swing justice. Thus, we follow McGuire et al. (2009) and Casillas, Enns & Wohlfarth (2011) and only analyze reversals (which account for roughly 64 percent of all cases before the Court).<sup>10</sup> Our unit of analysis is the individual justice vote among all cases that reversed the lower court’s ruling.<sup>11</sup>

The time period of the analysis begins in 1953 and extends through the 2007 Court term.<sup>12</sup> 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 logit 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. We begin with a standard model of Supreme Court decision making that does *not* account for the case-specific swing justice. This baseline model allows us to assess whether our inferences differ when we *do* account for this swing justice. 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 general public’s preferences shift over time

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<sup>10</sup>We drop affirmances from the data because, theoretically and empirically, the loss of information is less problematic than the bias that would result from including these observations. Nevertheless, some readers may be interested in the results when including affirmances. The results are largely equivalent. Specifically, among 5 to 4 decisions, the only difference for the *Ideological* swing justice is that the influence of the SG emerges as statistically significant. That is, if we analyzed all cases, support for heterogeneous decision making for the *Ideological* swing justice becomes *stronger*. For the *Median* swing justice, where the effects of affirmation bias should be strongest, the magnitude of the interaction terms is slightly diminished. Not surprisingly, the endogeneity of litigant behavior and resulting affirmation bias would lead us to underestimate the influence of the predictors on the *Median* swing justice.

<sup>11</sup>We use data from the Supreme Court Database’s Justice Centered data organized by docket (2010 Release 01). The data are available at: <http://scdb.wustl.edu/>.

<sup>12</sup>We end this analysis in 2007 because our SOP variable does not extend beyond this term.

along the standard liberal-conservative dimension—that is, the degree of public support for ‘more’ or ‘less’ government (Stimson 1991). Stimson’s policy mood is the most reliable aggregate measure of the public’s general political orientation and is commonly adopted in literature examining the impact of public opinion on the Supreme Court (Casillas, Enns & Wohlfarth 2011, Giles, Blackstone & Vining 2008, McGuire & Stimson 2004, Mishler & Sheehan 1993). Higher values reflect a more liberal public, and thus we expect public mood to have a positive impact on 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 SG’s voluntary amicus arguments and those cases where the Office did not file a brief. We first identify all those cases where the SG submitted a voluntary amicus brief and the party supported by the SG’s argument. We then utilize the ideological direction of the lower court’s decision to determine the ideological direction of each SG brief, coding a “1” for those briefs advocating a liberal position and a “-1” for conservative arguments.<sup>13</sup> Lastly, we assign a “0” for all observations in cases where the SG did not participate as voluntary *amicus curiae*. We expect this variable to exhibit a positive impact on the dependent variable.<sup>14</sup>

We include several predictors to account for other potential influences on the justices’

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<sup>13</sup>A liberal SG brief, for example, supports the petitioner when the Court reviews a conservative lower court decision or when the SG 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 percent of the voluntary amici, the SG does not clearly support either the petitioner or respondent. Due to the inability to definitively determine the ideological direction of these amicus arguments, we code the observations associated with these cases as if the SG did not participate.

<sup>14</sup>Since we have no theoretical reason to expect liberal and conservative SG briefs to have a differential effect, using an ordinal variable to estimate the influence of the SG has the advantage of estimating the average influence of the SG with the most parsimonious model specification. This decision is supported by the fact that the Bayesian Information Criterion (BIC) is lower

voting behavior. First, each model uses Cameron & Park's (2009) 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 & Cover 1989). Cameron & Park (2009) improve upon the Segal-Cover scores by incorporating additional information into this important measure—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 previously served on the U.S. Courts of Appeals. Thus, while utilizing additional information on justice ideology, the resulting measures continue to offer the desirable property of an indicator that is not endogenous to the justices' votes. 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 justices' likelihood of casting liberal votes.

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 & Linqvist (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.<sup>15</sup> Since these ideological measures were generated on a

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The results also do not change when coding the invited amici along with the voluntary briefs.

<sup>15</sup>We match the ideal points for the president, House, and Senate based on the calendar year that the justices handed down each decision.

unified ideological space, we may employ them to make interinstitutional comparisons.<sup>16</sup> 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).<sup>17</sup> Our specific predictions for the influence of SOP on the justices are somewhat unclear. On one hand, our expectation that ambivalence should lead the swing justice to rely more on strategic considerations predicts a positive and significant coefficient for the swing justice. On the other hand, previous research has argued that these constraints might only influence justices in certain subsets of cases (see, e.g., Segal, Westerland & Linqvist 2011), and so our focus on all issue areas may not uncover such evidence.

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<sup>16</sup>The Judicial Common Space scores (Epstein, Martin, Quinn & Segal 2007) represent a prominent alternative for institutional preference estimates using the Poole & Rosenthal (1997) Common Space scores to anchor all ideal points on a single ideological space. We utilize the Bailey scores because they do not impose the assumption of temporal stability (see, e.g., Binder 2008).

<sup>17</sup>If 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 overtime 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.

As an additional set of case-specific control predictors, we 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.<sup>18</sup> Model 1 in Table 1 presents the results of this baseline model, among the Court's 5 to 4 decisions.<sup>19</sup> The baseline results, which do not account for the impact of the swing justice, reveal several statistically significant predictors. As expected, a justice's ideological predisposition does significantly predict his or her votes, as a more liberal (conservative) justice is more likely to cast liberal (conservative) votes. The model also presents surprising results for the public mood and SOP constraint predictors. This baseline model suggests that a justice is more likely to cast a conservative vote when confronted by more liberal public opinion or a liberal SOP constraint. It appears that the Court's most closely divided cases reflect primarily politically driven decision making—even at the expense of public opinion and the preferences of other institutions.

[Table 1 About Here]

However, our central argument suggests that such a baseline model might improperly conceal significant heterogeneity in the justices' votes and that we should not assume that the case-specific median (i.e., swing justice) makes his or her decision based on the same considerations as the other justices. Failing to account for this heterogeneity could produce incorrect inferences about the determinants of the Court's decisions. To test this proposition, the following analysis allows the determinants of the justices' votes to differ for

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<sup>18</sup>Cases primarily involving issues of federalism represents the baseline issue category. We code issues based on the "issueArea" variable in the Supreme Court Database. Civil Liberties cases involve Criminal Procedure, Civil Rights, First Amendment, Due Process, Privacy, and Attorneys. The Economic Activity category includes Unions, Economic Activity, and Taxation.

<sup>19</sup>Models of Supreme Court voting commonly include fixed effects to account for systematic differences between justices. We do not include such controls because a justice's Cameron Park score is constant across his or her tenure, and is thus redundant with fixed effects.

the swing justice. Using the strategy outlined above, we create a dummy variable to identify the swing justice within each case. We assign a “1” to the justice that represents the swing vote and a “0” for all remaining justices in the case. Furthermore, the models account for two general types of swing justices—when the case-specific median is also the term-specific median (*Median Swing Justice*) and when, as a result of shifting voting coalitions, a more ideologically extreme justice (*Ideological Swing Justice*) casts the deciding vote. Each case only has one swing justice, but we believe it is important to allow for the possibility that an ideologically extreme justice who casts the pivotal vote against his or her ideological predisposition may respond to different considerations than when the term-specific median justice on the Court casts the pivotal vote. We hypothesize that both swing justices will differ from the other eight justices, but including two separate dichotomous variables avoids the assumption that they differ in identical ways. We interact these two dichotomous swing justice indicators with each of the predictors in the baseline model. Although we are particularly interested in the influence of public opinion and the SG’s amicus arguments, this specification allows us to assess whether the determinants of the swing justice’s votes are significantly different than the other justices for all standard predictors.

Model 2 in Table 1 displays three columns of statistical estimates for our swing justice model among 5 to 4 decisions. The left-most column of Model 2 reports the results for the constitutive terms in the model and the next two columns report the interaction terms for the *Median* and *Ideological* swing justices, respectively. Thus, the left column reflects the expected relationship between the predictor variables and the probability of a liberal vote for the eight justices that did not cast the deciding vote. The coefficients in the next two columns model whether the relationship between the predictors and the probability of a liberal vote is distinct for each type of swing justice.

The results indicate that the swing justice does indeed exhibit non-attitudinal voting behavior that is distinct from the other justices in the context of each 5 to 4 case. First, we observe a heterogeneous effect of ideology on the individual votes of the justices. Con-

sistent with the results from the baseline model, all non-swing justices display a positive, significant impact among 5 to 4 decisions. Among these eight justices, a standard deviation shift in the liberal direction predicts a 0.26 increase in the probability of a liberal vote in a closely divided case.<sup>20</sup> However, a justice’s ideological predisposition exhibits a substantively different relationship among the swing justice’s votes. Not only does the model yield a negative and significant interaction effect, the resulting impact of ideology on the *Median Swing Justice* is statistically indistinguishable from zero. Additionally, as we report in the Supplementary Appendix, this interaction (as well as the other interactions we discuss) is significant across the range of observed predicted values.<sup>21</sup> For the *Ideological Swing Justice*, the votes are, by definition, negatively related to the ideology predictor—these justices have become the swing justice by casting votes that are contrary to their ideological predispositions. Thus, the direction of this coefficient is not informative. However, the magnitude of this effect is important to consider.<sup>22</sup> Moving the ideology of the *Ideological Swing Justice* one standard deviation in the liberal direction predicts a 0.22 *decrease* in the probability of a liberal vote. This magnitude is almost equivalent to the expected *increase* in the probability of a liberal vote for the same shift among the other eight justices.

Next, we look at the SG’s amicus arguments, which offer an indicator of case-specific legal information available to the justices. Again, we observe a heterogeneous effect. The SG exhibits no discernible impact on nearly all justices in the majority coalition. Yet, the SG amicus predictor does have a meaningful (and its largest) effect on the *Median*

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<sup>20</sup>We use CLARIFY (Tomz, Wittenberg & King 2003) to compute all predicted probabilities, holding other predictors at their observed mean.

<sup>21</sup>In logistic regression models, the interaction effect is conditional on the values of the predictor variables (Ai & Norton 2003). The Supplementary Appendix reports these conditional marginal effects. The results reinforce the findings discussed in the text.

<sup>22</sup>A large magnitude would suggest that ideologically extreme justices are systematically voting against their ideological predisposition. A small magnitude, by contrast, would suggest that most of this effect stems from moderate justices, who are ideologically close to the median on the Court.

*Swing Justice*. Liberal SG amicus positions significantly increase the probability that this swing justice will cast a liberal vote. In the presence of a SG amicus brief advocating a liberal policy position, the *Median Swing Justice* is likely to cast a liberal vote with a 0.64 probability. In contrast, the data demonstrate that the probability of a liberal vote by this justice when the solicitor general submits a conservative amicus brief is only 0.29. The coefficient for the *Ideological Swing Justice* is positive, but we cannot conclude that it is different than the other eight justices. Thus, contrary to expectations, we cannot conclude that the *Ideological Swing Justice* responds uniquely to case-specific legal considerations. This null result may, however, indicate that we do not have a measure of the legal considerations that are most salient to the *Ideological Swing Justice*. The results below, offer some support for this conclusion.

The model includes two measures of strategic constraint—public opinion and SOP considerations. Although the swing justice might respond directly to these constraints, we have suggested that ambivalence created by competing legal and ideological considerations would also lead to an increased reliance on strategic considerations.<sup>23</sup> First, we focus on the results for public opinion. Consistent with the baseline model, the first column below the Model 2 heading shows that the eight non-swing justices tend to vote contrary to public opinion. This is not the case, however, for the swing justice. Whether the swing justice reflects the term-specific median on the Court or is a more ideologically extreme justice, we observe a positive and significant interaction effect. Furthermore, the substantive influence of public opinion is quite large. The probability of a liberal vote by the *Median Swing Justice* increases by 0.34 across the observed range of public mood. The

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<sup>23</sup>Because we cannot observe whether justices face competing considerations, if swing justices are more responsive to public opinion or the SOP constraint, we cannot definitively conclude that ambivalence produced this result. As noted above, in some cases the swing justice may respond directly to these constraints. Importantly, although we cannot directly observe why the swing justice responds more to strategic considerations, both mechanisms are consistent with our theory of heterogeneous decision making.

effect of public mood on the *Ideological Swing Justice* exhibits an even greater impact, with the probability of a liberal vote by this justice increasing by 0.56 when moving from the most conservative to most liberal value for public mood across the observed range.<sup>24</sup> This result is consistent with our expectation that the swing justice incorporates non-attitudinal considerations into his or her decision making in a different manner than the other justices in each case.<sup>25</sup>

We also see evidence that the *Median Swing Justice* responds to shifts in the SOP constraint. Given that past SOP research has typically focused on specific issue areas, our expectations for this variable were uncertain. Nevertheless, the results suggest that a SOP constraint exhibits differential effects on the justices. In contrast to the negative coefficient for the eight non-swing justices, both swing justices display a positive coefficient. This coefficient is only significant for the *Median Swing Justice*, but further analysis of this the interaction (in Figure A-3(d) of the Supplementary Appendix) indicates the *Ideological Swing Justice* interaction is significant across a substantial range of the observations. Thus, even though we were not able to uncover the specific legal considerations that the *Ideological Swing Justice* might respond to, we have found substantial evidence that this justice (as well as the *Median Swing Justice*) rely on different considerations than the other justices.

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<sup>24</sup>A standard deviation shift of public mood leads to an expected change in the probability of a liberal vote of 0.08 and 0.13 for the *Median* and *Ideological* swing justices, respectively.

<sup>25</sup>A critique of research on the relationship between public opinion and Supreme Court decisions is the failure to control for the possibility that the justices' ideological preferences shift over time in response to the same forces that influence public opinion. This critique is unlikely to apply to our results. If shifting ideologies explained the relationship between public opinion and justice votes, we would expect the justices' votes to consistently reflect public opinion, not just when casting the pivotal vote. To further evaluate this claim, we also followed the strategy of Casillas, Enns & Wohlfarth (2011) and instrumented justice ideology as a function of the "social forces" known to influence the public's policy mood. The results are consistent with previous models indicating that the swing justice responds uniquely to public opinion in the expected direction.

Finally, we do not observe any significant differences between the justices in terms of how the justices vote across issue areas. Although these are important control variables, this null finding is consistent with Edelman, Klein & Lindquist's (2008) conclusion that different issue areas do not explain different voting coalitions.

## **Predicting the Swing Justice's Votes**

As an additional test of our argument, we evaluate each model's ability to predict the observed vote of the swing justice. If our hypothesis is correct, the swing justice model (Model 2) should improve our ability to predict the swing justice's behavior. The overall model statistics reported at the bottom of Table 1 suggest that the model fit improves slightly when we allow the influence of predictors to differ for the swing justice. But these statistics do not directly address whether Model 2 improves our ability to predict the swing justice's vote. To do this, we evaluate the Receiver Operating Characteristic (ROC) curve for the swing justice for each model. Instead of assuming a particular decision threshold, the ROC curve plots the proportion of correct predictions for all possible cut-points. The y-axis corresponds with the proportion of "1's" correctly predicted (Sensitivity) and the x-axis corresponds with the proportion of "1's" that are incorrectly predicted (1 - Specificity) (Metz 1978, King & Zeng 2001). If the model performs as well as chance, all observations would fall along the diagonal. If the model always predicts the swing justice's vote correctly, we would observe a dot in the upper-most left-hand corner. Thus, the closer ROC curve is to this corner, the better the model predicts the swing justice's observed vote. Values below the diagonal indicate that the model performs worse than chance.

Figure 4 reports the ROC curves for the swing justices, based on the two models reported in Table 1. The standard model (Model 1) corresponds with the black line and the gray line reflects the predictions of the swing justice model (Model 2). First, we consider the results for the baseline model. Although the overall model fit is quite good, when we focus explicitly on the model's ability to predict the swing justice's vote, this model performs

equal to or worse than mere chance across all thresholds. This result indicates that among 5 to 4 decisions, a conventional model provides an excellent prediction of the behavior of the eight non-swing justices, but it is rather poor at predicting the vote of the justice that casts the pivotal swing vote. The results for our second model—allowing the determinants of the swing justice’s vote to differ from the other justices—offers a very different picture. Not only does our ability to predict the vote of the swing justice significantly improve ( $p=0.000$ ), but our predictions are better than chance across all values.<sup>26</sup> Among closely divided cases, we must model heterogeneous decision making if we want to understand the behavior of the justice who casts the deciding vote in each case.

[Figure 4 About Here]

## Justice-by-Justice Analysis

While the empirical results exhibit systematic differences between the swing justice and the other eight justices in each case, we want to be sure that the heterogeneity producing these results is consistent with our theoretical argument. To evaluate this heterogeneity, 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 (*Median* or *Ideological*). Position 4 reflects the two justices who, within each case, were ideologically adjacent to the swing justice (i.e., the justice in the majority and the justice in the minority that were closest to the swing justice). Position 3 corresponds with the second-closest justices (on each side) to the swing justice. The same pattern continues for the remaining positions, with position 1 indicating the justice in the majority and the justice in the minority who were the farthest ideologically from the swing justice. While the separate regressions are less efficient than the interaction approach used in the previous analysis, these regressions allow us to compare the expected relationship between the predictor variables and the probability of a liberal vote across each of these positions. We have argued that the

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<sup>26</sup>The total area under the two curves is 0.72 and 0.43. These values differ from the values reported in Table 1 because these values only apply to the swing justice (not overall model fit).

justice who casts the pivotal vote should be the most responsive to legal and strategic considerations and the least responsive to ideological concerns. Additionally, as we move farther away from the swing justice (i.e., toward position 1), we expect the influence of public opinion, the SG, and the SOP constraint to decrease as justices increasingly rely on their ideological predisposition. The absence of such a pattern would provide evidence *contrary* to our argument.

Figure 5 reports the average marginal effect (x-axis) of public opinion, ideology, the SG, and SOP constraint for each of the justice positions (y-axis). We report the average marginal effect (AME) because this offers a summary measure of each predictor’s general impact on the probability of a liberal vote that is suitable for intergroup comparisons (Mood 2010). We report confidence intervals around the estimated AME, but we do not hypothesize significant differences *across* justice positions. The previous analysis demonstrates that the relationship between these four predictors and the probability of a liberal vote is statistically different for the *Median Swing Justice* (and in the case of public opinion and ideology, for the *Ideological Swing Justice*). This further analysis allows us to explore the nature of this result. Specifically, we predict that the AME will be greatest for the swing justice and that the AME will decline monotonically as the justices increasingly diverge (ideologically) from the swing justice.<sup>27</sup>

Figure 5(a) reports the results for public mood. The average marginal effect of public opinion on each justice position follows the expected 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, the influence of public mood on each

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<sup>27</sup>While we have no reason to expect statistically significant differences from one justice position to the next, our theory does predict a statistically significant decline in the expected influence of the predictors across increasingly divergent justices. After estimating an interaction between an ordinal justice position variable and each predictor, the data (and the conditional marginal effects) offer strong support for this prediction.

of the other justices exhibits a monotonically decreasing effect when moving toward the justice most ideologically distant from the swing justice. Thus, consistent with expectations, public opinion displays a heterogeneous effect among all justices on the Court and exhibits its most meaningful impact on the swing justice. The influence of ideology follows a similar (but inverted) pattern. Consistent with the previous analysis, the votes of the *Median Swing Justice* do not appear to be systematically related to that justice's ideological predisposition. 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. However, as the justices become more distant from the swing justice, ideological predispositions increasingly influence their vote choice.

The results for the SG and SOP constraint (Figures 5(c) and 5(d), respectively) largely follow the same patterns. The trend across justices is not as defined, but we see the largest estimated effects for the *Median Swing Justice* and declining influence as we move away from the swing justice. The influence of the SG on the justices in Position 3 represent an exception to this pattern. Although this estimated relationship, as expected, is less than the AME for the *Median Swing Justice*, our argument does not account for the fact that the influence of the SG is greater for Position 3 than Position 4. Also of note, unlike the results for public opinion and ideology, the *Ideological Swing Justice* is much closer to the other justices, particularly compared to position 4. As we note in the discussion of the Table 1 results, we cannot conclude that the *Ideological Swing Justice* responds uniquely to the SG and SOP constraint. Overall, however, the results in Figure 5 conform to the predicted pattern of heterogeneity.

[Figure 5 About Here]

## All Cases

The data display substantial differences for the case-specific swing justice among 5 to 4 decisions. We are also interested in whether these effects apply to all cases in general. For

this part of the analysis, we code the swing justice in a similar manner as before—the fifth-most likely justice to have joined the majority coalition based on the ideological direction of the Court’s decision. Thus, in a 7 to 2 liberal decision, we would identify the swing justice as the fifth-most liberal justice in the seven-justice majority coalition. We estimate identical model specifications as in the analysis of 5 to 4 decisions, only now we include all of the Court’s decisions that reversed the lower court’s ruling.<sup>28</sup>

Table 2 reports two models for all cases—a baseline specification and a model that analyzes the unique behavior of the swing justice. The baseline specification reported in Model 1 displays several important effects. Although the magnitude of the ideology coefficient is smaller than among only 5 to 4 decisions, not surprisingly, justice ideology exerts a significant and important influence on judicial decision making. In contrast to 5 to 4 cases, the impact of public mood is positive and significant, as the justices are more likely to issue liberal votes as public opinion becomes more liberal. Similarly, the probability of a liberal vote increases when the SG supports a liberal outcome. We also see more systematic differences across issue areas when we analyze all cases.

We are most interested, however, in assessing whether the heterogeneity in decision making that we observed in 5 to 4 decisions applies to all cases. The results in Model 2 indeed suggest that across all cases the swing justice exhibits voting behavior that is distinct from the other justices. Both the *Median* and *Ideological* swing justices rely less on their ideological predispositions than the other eight justices.<sup>29</sup> Similar to the results when examining only 5 to 4 decisions, the probability of a liberal vote by the *Ideological Swing Justice* decreases by 0.22 when shifting that justice’s ideal point one standard deviation in

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<sup>28</sup>We drop all decisions with a recusal (or vacancy) that resulted in less than nine justices participating in a given decision to avoid having to make assumptions about the location of the swing justice when an even number of justices voted on a decision. Nevertheless, when we include all cases, the results are the same.

<sup>29</sup>As with 5 to 4 decisions, we report the interaction effect across the range of observed predicted probabilities in the Supplementary Appendix. These results reinforce the findings of Table 2.

the liberal direction. Additionally, although the SG’s amicus arguments have a meaningful impact on the non-swing justices, we observe a significantly greater effect on the *Median Swing Justice*. The magnitude of the SG’s effect on the likelihood of a liberal vote among non-swing justices increases by 0.18 when comparing a case where the SG did not file a brief to one where the Office supported a liberal policy position. For the *Median Swing Justice*, the corresponding probability of issuing a liberal vote increases by 0.28. Public opinion also exhibits a greater impact on both the *Median* and *Ideological* swing justice. The data demonstrate that a standard deviation change in public opinion leads to an expected change of 0.04 in the probability of a liberal vote by the non-swing justices. In contrast, a similar change in public opinion yields an expected increase of 0.12 and 0.14 in the likelihood of a liberal vote by the *Median* and *Ideological* swing justice, respectively.

[Table 2 About Here]

Overall, the empirical results support our theoretical argument of heterogeneous decision making. Whether examining only the closely divided 5 to 4 decisions or all cases on the Court’s docket, the *Median* and *Ideological* swing justices appear to systematically respond to different considerations than the other eight justices. As we report in the Supplementary Appendix, we obtain further evidence of the swing justice’s unique behavior across all cases if we analyze the ROC curve for the swing justice and if we estimate a justice-by-justice analysis.

## Conclusions and Implications

The fifth justice to join the majority coalition has long been recognized as critical for the outcome of a Supreme Court case. The Court itself has established the norm that a Court majority is necessary to articulate and establish a meaningful legal precedent. 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*” (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 ideological, 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 46 percent of these pivotal swing votes. Furthermore, the swing justice consistently bases 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 position, this justice is more attentive to public opinion and less concerned 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 arguments of the SG and perhaps also on the ideological positions of the elected branches. These findings hold when we analyze 5 to 4 decisions as well as all cases. 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 often relies on other factors. If we want to 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 vote 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. The University of Pennsylvania’s *Journal of Constitutional Law* recently hosted a symposium on the Judiciary and the Popular Will. Lee Epstein

and Andrew Martin (2011) titled their contribution, “Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why).” We believe the results in this paper offer a new answer to their question. Our analysis overwhelmingly suggests that, “Yes, public opinion influences the Supreme Court.” Furthermore, we are much closer to knowing why: the evidence suggests that case outcomes generally reflect changes in popular will precisely because public opinion influences the pivotal justice’s vote.

Heterogeneous decision making also presents important implications for the literature examining the solicitor general before the Court. Judicial scholars have long demonstrated that the SG is the most successful actor on the merits of Supreme Court cases. Yet, this study suggests that the micro-foundations of the SG’s legal influence also reflect heterogeneous decision making. The results, in particular, suggest two important implications for understanding the SG’s legal influence. When a justice’s ideological preferences diverge from the position advocated by the SG in a closely divided 5 to 4 case, not all justices are effectively persuaded to abandon their ideology out of respect for the SG’s presumed legal credibility. Additionally, a moderate swing justice within many cases on the Court’s docket might often place a greater weight on the SG’s legal recommendation compared to more ideologically extreme justices.

Of course, other factors may also matter. Recent literature has significantly advanced our understanding of the role of precedent and legal factors in Supreme Court decision making (Bailey & Maltzman 2008, Bartels 2009, Fowler & Jeon 2008). Our argument predicts that as new measures of these concepts emerge, we will observe additional sources of heterogeneity.<sup>30</sup> Another important consideration is whether these results are consistent across time. Scholars largely agree that the political environment in Congress has become

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<sup>30</sup>While the inclusion of these variables might offer a more nuanced understanding of how the swing justice responds to legal considerations, there is no reason to expect that over time changes in the public’s mood or the SOP constraint significantly correlate with the case-specific legal considerations, and so including these should not change our other results.

more polarized (Binder 2003, McCarty, Poole & 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. This study also presents important implications for the study of the ideological content of the final legal rule articulated within each Supreme Court case. Recent research argues 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. N.d., Clark & Lauderdale 2010). While our findings are consistent with this argument, heterogeneous decision making suggests that in order to fully understand the determinants of the disposition that produces 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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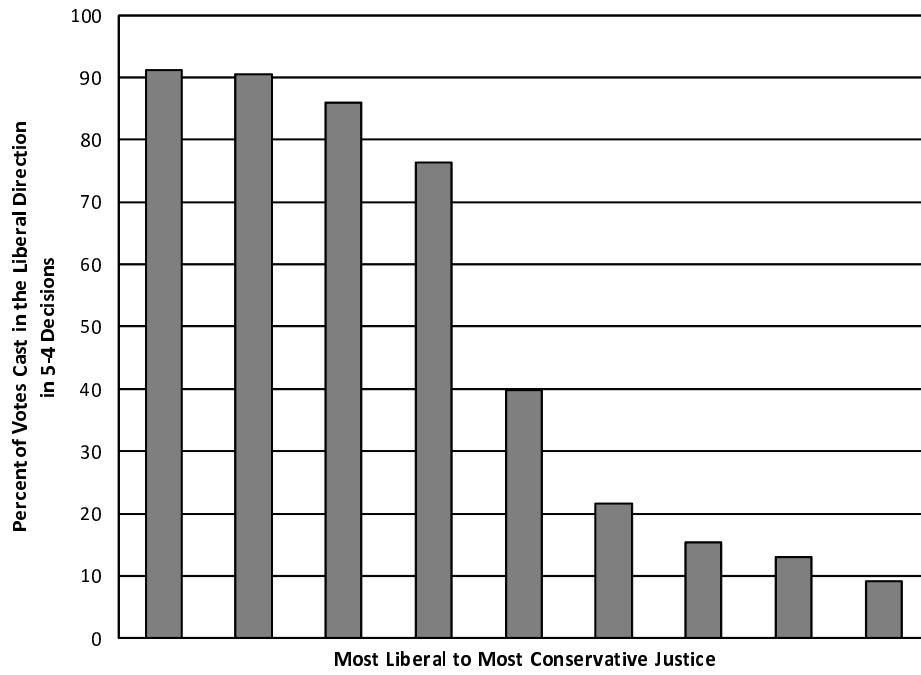


Figure 1: The Percentage of Votes Cast in a Liberal Direction among all 5 to 4 decisions, 1953–2009. Each bar corresponds to one of the nine justices who cast a vote, ordered from most liberal to most conservative.

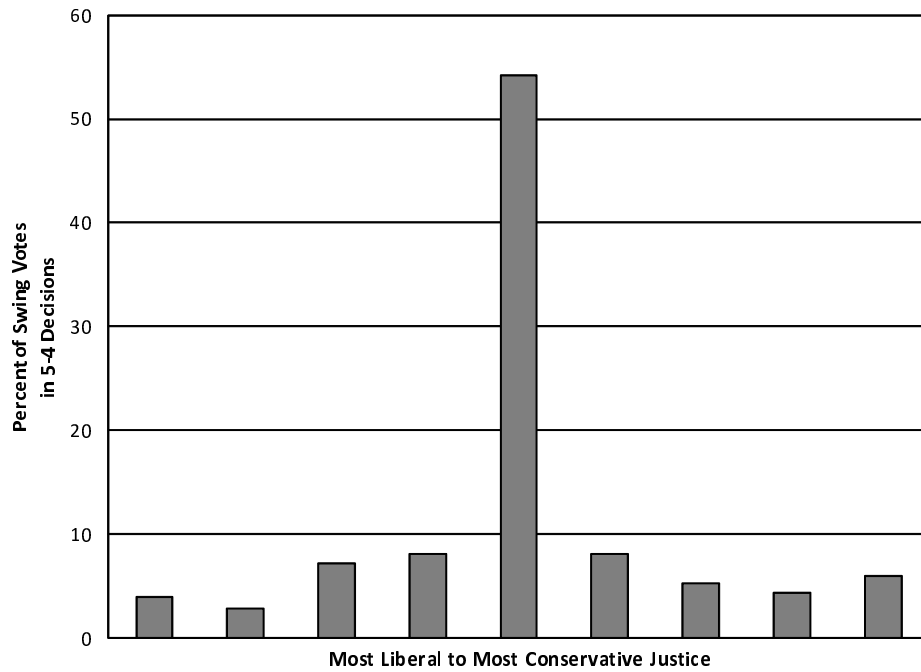
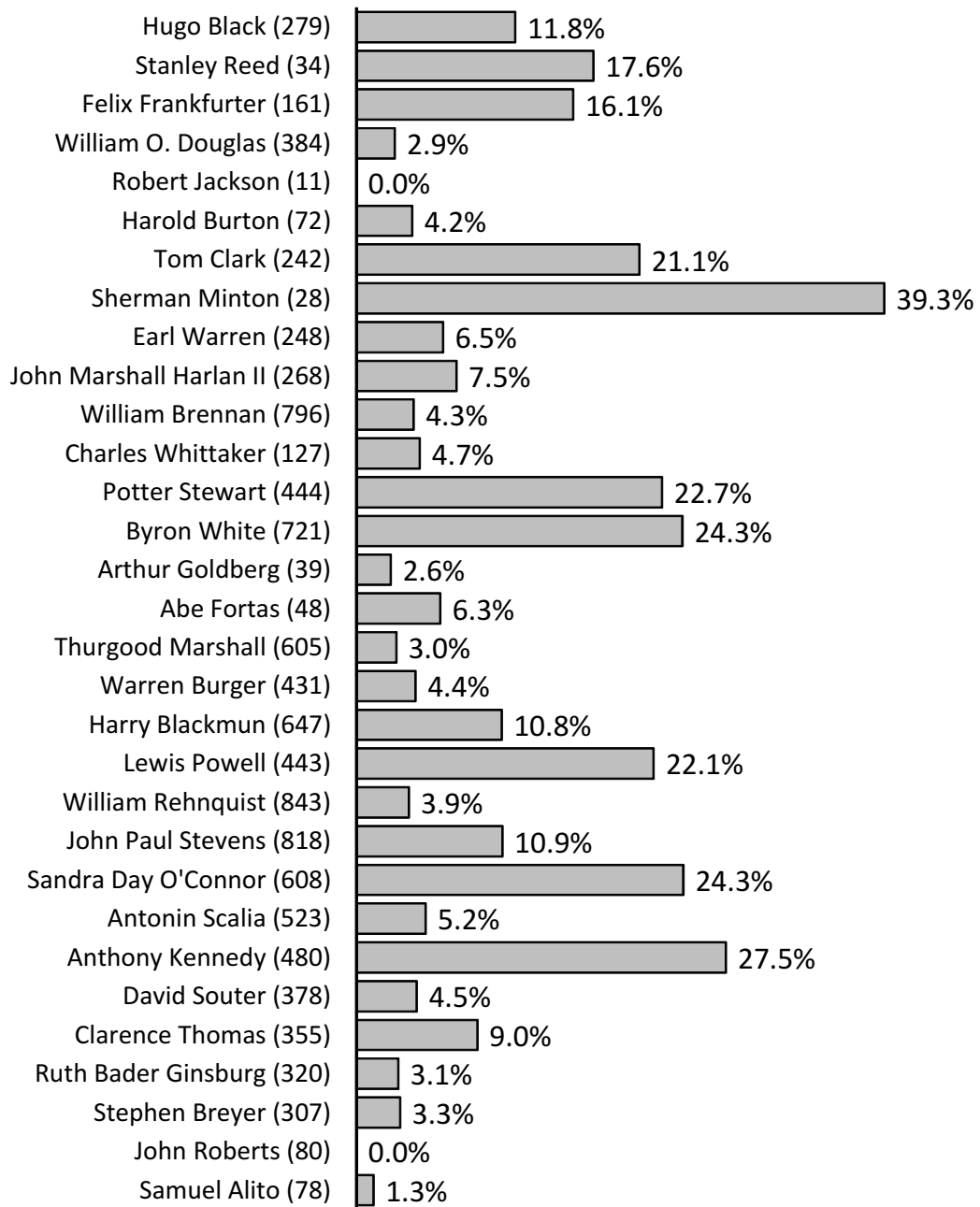


Figure 2: The Percentage of “Swing Votes” among all 5 to 4 Decisions, 1953–2009. Each bar corresponds to one of the nine justices who cast a vote, ordered from most liberal to most conservative.



**Supreme Court Justice (Number of 5-4 Cases Heard)      Percentage of Cases as the Swing Justice**

Figure 3: The Percentage of Cases Each Justice Cast the Pivotal Swing Vote During the Justice’s Tenure on the Supreme Court, Among 5 to 4 Decisions, 1953–2009<sup>31</sup>

<sup>31</sup> *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.

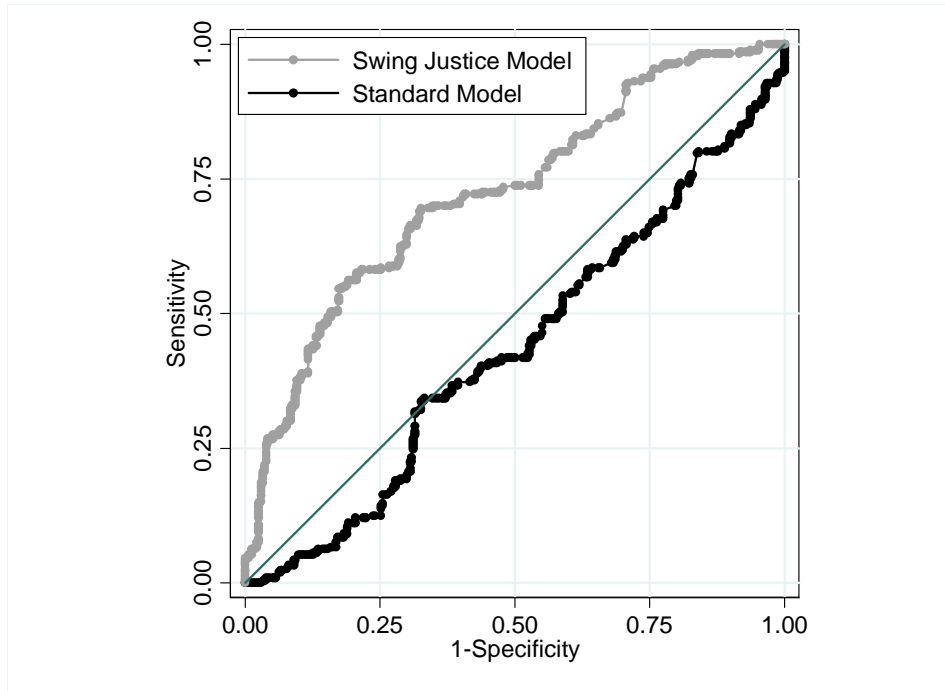
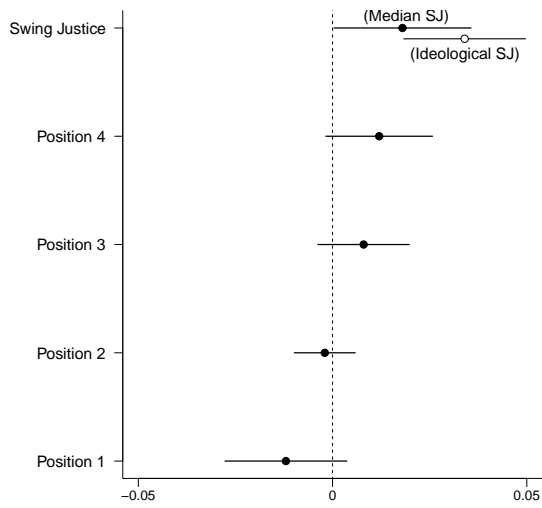
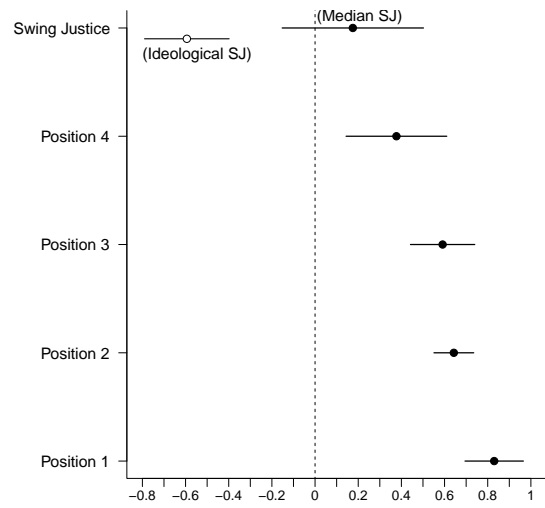


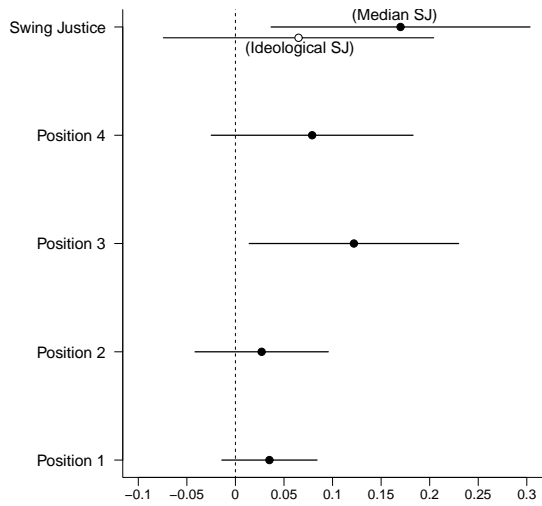
Figure 4: ROC Curves for Swing Justices: Standard Model versus Swing Justice Model among 5 to 4 Decisions, 1953–2007.



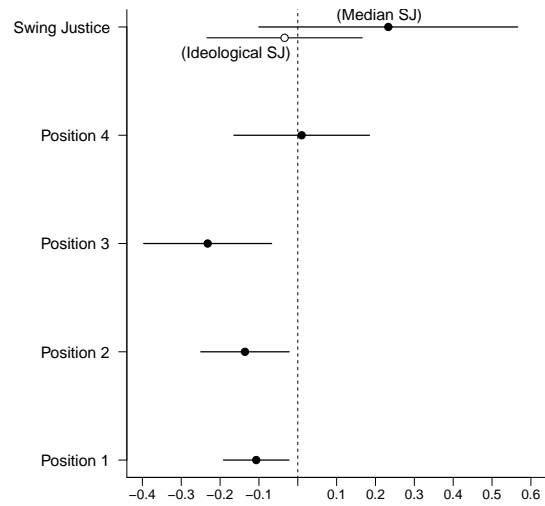
(a) Mood



(b) Justice Ideology



(c) Solicitor General



(d) SOP

Figure 5: The Average Marginal Effect (with 95% Confidence Intervals) by Justice Position, Among 5 to 4 Decisions<sup>32</sup>

<sup>32</sup>Note: The average marginal effect is based on separate regressions for each justice position, where for each case, the justice position indicates proximity of the justices in the majority and the minority to the swing justice. Thus, position 4 corresponds with the two justices (one on each side of the swing justice) that are the closest ideologically to the swing justice. Position 1, by contrast, corresponds with the justices (one on each side of the swing justice) that are farthest ideologically.

Table 1: The Determinants of Liberal Votes by Supreme Court Justices among 5 to 4 Decisions, 1953 to 2007

	Model 1:	Model 2:		
	Standard Model	Swing Justice Model		
		<i>Interactions</i>		
		× Swing Justice (Median)	× Swing Justice (Ideol.)	
Justice Ideology	2.83* (0.23)	3.28* (0.27)	-2.47* (0.87)	-6.21* (0.75)
Solicitor General	0.09 (0.05)	0.02 (0.06)	0.77* (0.35)	0.30 (0.37)
Public Mood	-0.05* (0.01)	-0.07* (0.02)	0.15* (0.05)	0.23* (0.06)
SOP Constraint	-0.55* (0.19)	-0.62* (0.22)	1.70* (0.82)	0.45 (0.63)
Judicial Power	-0.18 (0.12)	-0.21 (0.13)	0.80 (1.20)	0.14 (0.58)
Economics	-0.33* (0.11)	-0.37* (0.13)	1.40 (1.01)	0.07 (0.67)
Civil Liberties	-0.16 (0.11)	-0.18 (0.11)	0.98 (0.97)	0.17 (0.64)
Swing Justice (Median)		-10.52* (3.51)		
Swing Justice (Ideological)		-13.94* (3.46)		
Constant	3.03* (0.82)	4.38* (1.06)		
Log Pseudolikelihood	-3431.70		-3291.06	
McFadden's Pseudo R <sup>2</sup>	0.14		0.18	
% Correctly Classified	67.08		69.16	
Area Under ROC Curve	0.756		0.779	
N	5,759		5,759	

The dependent variable reflects decisions by individual justices to support a liberal outcome among cases that reversed the lower court's decision. Interaction terms for Model 2 are reported in separate columns. Swing Justice (Median) indicates the justice who cast the deciding vote was also the term-specific median justice on the Court. Swing Justice (Ideological) indicates the Swing Justice was *not* the term-specific median on the Court. Two-Tailed Significance Levels: \*  $p < .05$ . Standard errors (clustered by term) in parentheses.

Table 2: The Determinants of Liberal Votes by Supreme Court Justices among All Cases, 1953 to 2007

	Model 1:	Model 2:		
	Standard Model	Swing Justice Model		
		<i>Interactions</i>		
		× Swing Justice (Median)	× Swing Justice (Ideol.)	
Justice Ideology	1.53* (0.09)	1.67* (0.09)	-1.10* (0.28)	-4.26* (0.53)
Solicitor General	0.81* (0.08)	0.77* (0.07)	0.54* (0.11)	-0.17 (0.25)
Public Mood	0.05* (0.01)	0.04* (0.01)	0.08* (0.02)	0.10* (0.04)
SOP Constraint	-0.22* (0.11)	-0.24* (0.11)	0.57 (0.30)	0.25 (0.45)
Judicial Power	-0.85* (0.18)	-0.84* (0.18)	-0.13 (0.17)	-0.11 (0.44)
Economics	-0.41* (0.17)	-0.43* (0.17)	0.06 (0.16)	0.15 (0.35)
Civil Liberties	-0.27 (0.17)	-0.28 (0.16)	0.01 (0.16)	0.17 (0.32)
Swing Justice (Median)		-4.64* (0.96)		
Swing Justice (Ideological)		-6.15* (2.10)		
Constant	-2.28* (0.54)	-1.83* (0.53)		
Log Pseudolikelihood	-19666.88		-19478.46	
McFadden's Pseudo R <sup>2</sup>	0.08		0.09	
% Correctly Classified	64.10		64.86	
Area Under ROC Curve	0.692		0.701	
N	31,119		31,119	

The dependent variable reflects decisions by individual justices to support a liberal outcome among cases that reversed the lower court's decision. Interaction terms for Model 2 are reported in separate columns. Swing Justice (Median) indicates the justice who cast the deciding vote was also the term-specific median justice on the Court. Swing Justice (Ideological) indicates the Swing Justice was *not* the term-specific median on the Court. Two-Tailed Significance Levels: \*  $p < .05$ . Standard errors (clustered by term) in parentheses.