THE INFLUENCE CASE STRENGTH ON SUPREME COURT DECISION MAKING

By

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ABSTRACT

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The Supreme Court sits at the top of the United States legal system, and despite its position, researchers do not possess a systematic way to assess the contemporaneous influence of law on judicial decision making. This is problematic, given research findings over the past two decades that reveal law *does* impact judicial decision making. In this dissertation I argue that bench memoranda provide a solution to this issue. I use Justice Harry Blackmun's bench memoranda, authored by his law clerks to provide an evaluation of each party's legal argument based on the information provided from merits and amicus curiae briefs to create a measure of case strength. This measure helps to distinguish the legal aspects of judicial decision making to determine which litigant has a stronger case. With this measure I demonstrate that Supreme Court justices can be constrained by law when it acts contrary to their policy preferences. I also show that an attorney's position that is more strongly supported by law can help overcome a poor oral argument performance. Additionally, I examine how law impacts other aspects of the decision making process, and show that justices' bargaining responses to the majority opinion are dependent on the how strongly the law supports the majority's position. Lastly, I demonstrate the richness of these bench memoranda data by showing that the quality of amicus briefs significantly impacts the likelihood of success for the position in which they advocate.

To my mom, I owe you everything

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CHAPTER 1

INTRODUCTION

On October 30, 1987, Charles Acevedo walked out of an apartment in Santa Ana, California, placed a small paper bag in the trunk of his car, and drove away. Police, from a tip received by a drug enforcement agent, had strong reason to believe the apartment Acevedo had exited from contained a sizable amount of marijuana. On this basis, they subsequently stopped Acevedo, opened his trunk, and located and opened the paper bag, which contained marijuana. Acevedo was arrested and charged with possession with intent to distribute. Did the police, in conducting a warrantless search of Acevedo's trunk and the paper bag, violate his Fourth Amendment right against unreasonable searches and seizures? In January 1991, the U.S. Supreme Court sat to hear arguments in *California v. Acevedo* on this question.

This was not the first time the Court had taken up the topic. A number of existing precedents – some stretching back more than 60 years – offered potential ways to resolve the constitutionality of Acevedo's search. On the pro-search side, for example, the Court had previously held that probable cause was sufficient to allow a search both of a car (*Carroll v. U.S.* [1925]) and of containers or packages found within the car (*U.S. v. Ross* [1982]). Yet the Court had also held that personal luggage briefly coming in contact with a trunk (*U.S. v. Chadwick* [1977]) as well as baggage actually being transported in it (*Arkansas v. Sanders* [1979]) could not be searched without a warrant – though the car itself could be.

Acevedo provides a poignant example of the difficulties facing appellate courts in a common law system. Precedents, the currency of such a system, are supposed to guide – and perhaps constrain – case outcomes. If, however, the law is ambiguous, then the guidance becomes more ambiguous and the constraint weaker. What is more, cases like *Acevedo* are more the norm as opposed to the exception. Oftentimes the law is ambiguous and Supreme

Court justices and other appellate judges must simply choose a side to prevail even if cloaked in uncertainty. Judges are regularly faced with difficult choices between competing precedents and other aspects of law. On top of this, most appellate judges decide hundreds of cases each year, so they must make these decisions quickly, and efficiently each term.

This difficulty also filters down to researchers who seek to understand how and why judges arrive at one choice versus another, which represents a foundational aspect of judicial decision making. Researchers recognize a host of factors that influence judges' decisions including personality traits (Black et al. 2019; Epstein and Knight 2013; Hall 2018), policy preferences (Segal and Spaeth 1993), case characteristics (Black and Owens 2009; Caldeira and Wright 1988; Caldeira, Wright and Zorn 1999), and the law (Bailey and Maltzman 2008; Hansford and Spriggs 2006; Richards and Kritzer 2002). While scholars have reliable measurements and indicators for most of these topics, systematically accounting for law and legal influence has proven difficult.

To help aid scholarship and develop our understanding of judicial processes, in this dissertation I create, validate, and demonstrate the significance of a novel measure of case strength from Justice Harry Blackmun's bench memos. These data will enhance how scholars assess the impact of law on judicial decision making on the U.S. Supreme Court, a topic that has fascinated researchers for decades. My approach has a number of desirable characteristics that significantly improve upon existing approaches. First, the data for my measure comes directly from materials actually used by justices in cases. In particular, I analyze new and unique archival data - bench memoranda, prepared for Justice Harry Blackmun by his clerks prior to oral arguments. As I explain in greater detail below, bench memos provide a unique perspective on the relative strengths of competing legal arguments in a case. Second, because the bench memos are written immediately prior to oral argument, they represent a strictly contemporaneous assessment of legal quality that does not depend upon how opinions are subsequently "treated" by other courts or political actors.

These data will provide scholars with an unparalleled view of the relative strengths of the legal arguments being made by each side immediately before the Supreme Court begins to decide a case. Such data can be used to operationalize legal strength, a concept that existing scholarship acknowledges as being important but difficult to measure. As such, my research has the potential to impact decades worth of scholarship that has struggled to properly measure law. To demonstrate the utility and necessity of this measure in judicial behavior research, I address three questions throughout the dissertation. First, I address a novel, yet significant question in the literature: What happens when law and ideology come in conflict in a case? Next, I reevaluate existing research questions to demonstrate the importance of incorporating the contemporaneous influence of law on multiple aspects of the judicial process including: Does law impact Supreme Court justices' decisions on the merits? Does legal strength influence the opinion bargaining process? I also demonstrate the richness of these data by examining what factors make an effective amicus brief.

In this introduction, I review existing approaches to incorporating law into the study of judicial politics. I also provide background on bench memos including why they are useful for capturing case strength and descriptive details on the specific data I am using.

1.1 The Law and Judicial Politics

Law or politics? This debate has been the main event in the field of judicial politics for decades. Throughout its history, judicial politics has been muddled in controversy as to how research on the courts should be approached. Epstein and Knight (2000) detail the history of the discipline and the sharp divides that arose between "traditional" public law scholars and behavioralists. These divisions were both methodological and theoretical; public law researchers studied the influence of law on judicial behavior qualitatively, and behavioralists deployed quantitative methods to document the influence of "politics," which, depending on the decade, has been called attitudes, ideology, or preferences.

The attitudinal approach, as it would eventually be coined (Segal and Spaeth 1993),

emerged as the prevailing framework for studying judicial politics. Near the turn of the century the strategic model began to gain traction, which acknowledged the importance of preferences in judicial outcomes, but unlike the attitudinal model, did not simply view justices as "politicians in robes" (Epstein and Knight 2013, 14). Instead, the strategic approach allows for influence of non-attitudinal constraints, which scholarship has shown to include things like institutional norms (Maltzman, Spriggs and Wahlbeck 2000), public opinion (McGuire and Stimson 2004), and the law (George and Epstein 1992), to name only a few.

Despite the fact that schoalrs moved past the attitudinal approach to recognize that justices are influenced by more than policy preferences they struggled to adequately account for legal influence. One of the difficulties that plagues researchers is that of observational equivalence. While law is often thought of as a constraint on justices pursuing their policy preferences, this is not always the case. Oftentimes, law and justices' policy preferences align and when this happens, that is law and attitudes predict the same behavior, it is impossible for researchers to determine which factor is driving that behavior.

The earliest attempt to try and distinguish between law and policy preferences was conducted by the pioneers of the attitudinal model, Segal and Spaeth (1996). They theorized if justices truly respect precedent as they claim, voting behavior in cases that follow a landmark decision should demonstrate respect for said decision, particularly by justices who dissented in the original case. For example, Justices White and Rehnquist dissented in the Court's landmark decision in *Roe v. Wade* (1973). According to Segal and Spaeth's (1996) theory, White and Rehnquist should accept this decision and vote in favor of a woman's right to privacy in progeny cases like *Planned Parenthood v. Danforth* (1976) or *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1991). Instead, they found that 90 percent of the votes cast were consistent with an attitudinal as opposed to legal account, with only two out of fifteen justices showing even modest evidence of being influenced by

precedent (see also Spaeth and Segal (2001)). Subsequent work also identified a number of concerns regarding Segal and Spaeth's (1996) research design, which some argued biased finding support for preferential votes (Brisbin 1996; Bailey and Maltzman 2008). To address these concerns, scholars began to take different approaches to documenting law's influence. Three distinct but complementary lines of research are particularly noteworthy.

Richards and Kritzer (2002) were some of the first to attempt a new approach to disentangling law and preferences. They introduced the concept jurisprudential regime theory (JRT). According to Richards and Kritzer (2002), landmark cases establish new regimes, which establish "which case factors are relevant for decision making" (305). Put differently, Richards and Kritzer (2002) zone in on landmark cases that establish tests (e.g., the *Lemon* Test) or rules. These tests provide a framework for what aspects of the case facts are relevant for the justices' decision. Because these relevant factors are established prior to the case the Court is deciding, JRT provides another opportunity to falsify the legal model. Jurisprudential regime theory (JRT) has been applied to a number of distinct areas (Luse et al. 2009; Richards and Kritzer 2002; Kritzer and Richards 2003; Richards, Smith and Kritzer 2006), but its usage is not without controversy. For one, JRT rests on the assertion that the Court's decisions result in "revolutionary" change. That is, once a new rule or test is established by a Court opinion, the justices immediately apply this test in all future cases. Bartels and O'Geen (2014) demonstrate that this is typically not the case. In fact, most decisions lead to a more gradual change, and at times decisions that should lead to change actually result in relative stability.

Beyond the theoretical concerns of JRT, a more practical limitation is that regimes are, by design, specific to a narrow substantive issue area where the Court has established tests Moreover, one also must know which regime is dominant at a particular point in time, which often only becomes clear after the Court has issued several decisions in an issue area. As a result, it becomes impossible to incorporate JRT-style legal influence into analyses that spans

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across a host of issue areas or attempts to explain case outcomes in a contemporaneous (i.e., as they are decided) manner. This approach, then, would not be viable for trying to address the Court's dilemma in *Acevedo*, for example, without leaning heavily on what happened *after* the decision was released.

A second approach comes from the collaborative work of Hansford and Spriggs (2006), who argue that policy-minded justices "treat" existing precedents with a view towards not just their own ideological preferences but also the previous treatment of that precedent – a concept they label "vitality." This approach teaches us much about how the Court develops legal policy through the expansion, limitation, and even overruling of its own precedents (Spriggs and Hansford 2001). Yet for all it teaches us about the impact of law, its practical usefulness is somewhat lacking. Consider, again, the leading example this chapter, *Acevdeo*. Adopting vitality as a predictor for what the Court would do is not impossible, but poses a number of challenges. One could, for example, examine the table of authorities for the parties' briefs in a case to determine the overall vitality of Supreme Court precedents cited by each side. But, as Hansford and Spriggs' work tells us, citing a precedent is not the same thing as interpreting it. Indeed, both petitioner and respondent briefs in *Acevedo* cite all four of the most relevant precedents mentioned earlier. This means any variation between the petitioner and respondent's vitality score will be driven by peripheral precedents that one brief happens to mention. Only a content analysis that determined how each brief "treated" each precedent would yield an appropriate vitality measure. Such work is possible, but would be difficult to practically (and reliably) accomplish across any substantial number of cases.

The third approach, is the most recent and sophisticated, offered by Bailey and Maltzman (2008). The authors' goal is to distinguish between the political and legal aspects of First Amendment issues. To do this, the authors develop the concept of bridging observations, which shared issues between the Supreme Court and legislative and executive branches. More specifically, they are cases voted on by the justices and also commented on, or sometimes

voted on, by Members of Congress and/or the President. So long as elected officials' positions are less influenced by law than the votes of Supreme Court justices (2008, 373-374), then Bailey and Maltzman are able to identify just who is influenced by law and how much legal influence exists. The difficulty with this approach is being able to identify and incorporate these bridging observations into their data. Politicians feasibly comment on hot topic First Amendment issues that Bailey and Maltzman (2008) use, like freedom of speech, press, and religion. However, these cases comprise less 7.65% of all of the Supreme Court's cases from 1946 to the 2017 term (Epstein et al. 2019), which is to say the vast majority of the Court's cases are topics that are unlikely to warrant politicians' attention. Additionally, this data limitation is exacerbated by the fact that if the House or Senate are not voting on a more mundane issue, they are even less likely to be making public statements on it. In short, the scope of cases available to analyze is necessarily limited.

To be clear, I do not argue that we need to show that law "matters." To the contrary, the seminal works discussed make it difficult for one to plausibly claim that judges are little more than legislators in robes. That being said, where the discipline continues to lag behind is in providing researchers with measures that allow them to validly and reliably document the impact of law when conducting their analyses.

An example illustrates. Johnson, Wahlbeck and Spriggs (2006) argue that an attorney's performance during oral argument influences his likelihood of winning a justice's vote. To show this relationship, Johnson and colleagues draw from the grades given to attorneys by Justice Blackmun during oral argument. This finding was controversial, as it challenged the conventional wisdom; to wit, Segal and Spaeth state that oral arguments do not "regularly, or even infrequently, determine who wins and who loses" (2002, 280). And, despite Johnson, Wahlbeck and Sprggs' (2006) thorough and careful empirical analysis, they themselves concede that "it is possible that attorneys get higher grades in cases in which they have the 'better' legal position" (2006, 108, n24). Though they go on to argue for why they do not

believe this is true, absent being able to measure the quality of the underlying legal claim, there is ample reason to be skeptical of the finding (see also Lax 2012; Budziak and Lempert 2015). In Chapter 2, I will examine this criticism using my novel measure of case strength.

Even a decade later this continues to be a problem confronting the literature. Black et al. (2015), for example, show that justices are more likely to rule in favor of the party whose brief contains less emotional language as it undermines their credibility. This could be true, but it might also be the case that higher quality legal positions are easier to articulate in briefs, thereby making it less imperative to invoke emotional language. The research I propose here would fill a critical need in the literature and allow for both the testing of new theories and claims about decision making and, perhaps just as importantly, re-testing a variety of existing ones with more appropriate measures. Having outlined the intellectual merit of measuring legal quality, I turn next to discussing how bench memos can provide this information.

1.2 The Benefit of Bench Memos

How should scholars measure legal quality or case strength? In a world without resource constraints, one might impanel a group of skilled attorneys, who would review all briefs in all cases prior to being decided. These attorneys would assess the strength of each argument made by a litigant and then, perhaps, offer an overall summary assessment of which side has the "better" case. Individual idiosyncrasies would be offset by having multiple raters, and by having the ratings performed before a case was decided to guard against possible post hoc bias. And, of course, such ratings would exist for all cases ever decided.

Although reality necessarily falls short of the ideal, using bench memos as a tool to rigorously assess case legal strength comes quite close to many aspects of a perfect measure. In short, bench memos are crafted by some of the best and brightest young lawyers in the country (Ward and Weiden 2006; Peppers 2006), who are tasked with both summarizing and evaluating the totality of information and arguments put forward in a case before the

Supreme Court. They make a dispositional recommendation in a case and support that justification with legal reasoning based on the arguments in the case.

Bench memoranda are written to prepare justices for oral arguments. They provide an initial evaluation of the legal arguments of each party in a case (based on briefs on the merits), as well as a description of amici, the justice's and Court's past treatment of precedent in the relevant area of case law, and will also even mention Congressional intentions on statues, and/or the legislative or the executive branch's preferences in a case. As described, these memos provide descriptions of multiple aspects of legal doctrine, important for truly determining the effect law has on judicial decisions (Bailey and Maltzman 2008). Additionally, these memos are written by clerks prior to when the case is orally argued. This prevents potential post hoc biases – conscious or otherwise – from being injected into the measure based on coding being done weeks, months, or even years after the Court had issued its decision in a case (Harvey and Woodruff 2013).

Although I am the first to draw upon bench memos, existing work shows how archival materials – especially those generated by law clerks – can be of value to scholars. In the context of Supreme Court agenda setting, for example, what little guidance the Court provides into its decision making suggests that legal conflict is an important factor in its decision to grant discretionary review (see, i.e., Supreme Court Rule #10).[1] Yet coming up with a reliable and valid measure of conflict alluded scholars and significantly limited scholarly ability to systematically study agenda setting. Enter the role of certiorari memos, which are the agenda-setting equivalent of bench memos: documents prepared by law clerks when a case seeks Supreme Court review. Here, too, law clerks summarize the claims, provide an assessment of their strength, and, in particular, comment on the extent to which a claimed conflict is real or exaggerated. These data, gathered with extensive support from the NSF,

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[1]Supreme Court Rule 10 dictates the compelling reasons a justice should be compelled to grant review, including conflict amongst lower courts, a lower court incorrectly interpreted precedent, or a new legal question.

have been a tremendous boon to scholars and used extensively in published research (e.g., Black and Owens 2009, 2011, 2012*a*; Black and Boyd 2012, 2013; Black, Boyd and Bryan 2014).

1.3 Bench Memo Content

Beginning in 1972, the format of Justice Blackmun's bench memos took shape and remained consistent until the end of his career. The average length of Justice Blackmun's bench memos is 29.5 pages. The length breakdown and a description of each primary section that appears in every memo is shown in Figure 1.1.

Sometimes called the introduction, other times called the summary, each memo begins with a short overview of the case. It typically begins with the primary questions the litigants are asking the Court to answer followed by a brief description of the dispute. When the Summary section is longer clerks will also preview their dispositional recommendation and reasoning in this section. This section ranges from a half page to seven pages long, and averages just over two and a half.

After the summary section is the facts section, also referred to as background, or facts and proceedings below. Dependent on the complexity of the case, this section can be as short as one page or extend up to 19 pages. The Summary section takes up a more detailed recounting of the facts and the proceedings in the lower court. Highlights of this section include summaries of lower court opinions and, in particular, dissents. These sections read like the any Constitutional law textbook summary of the facts of the case.
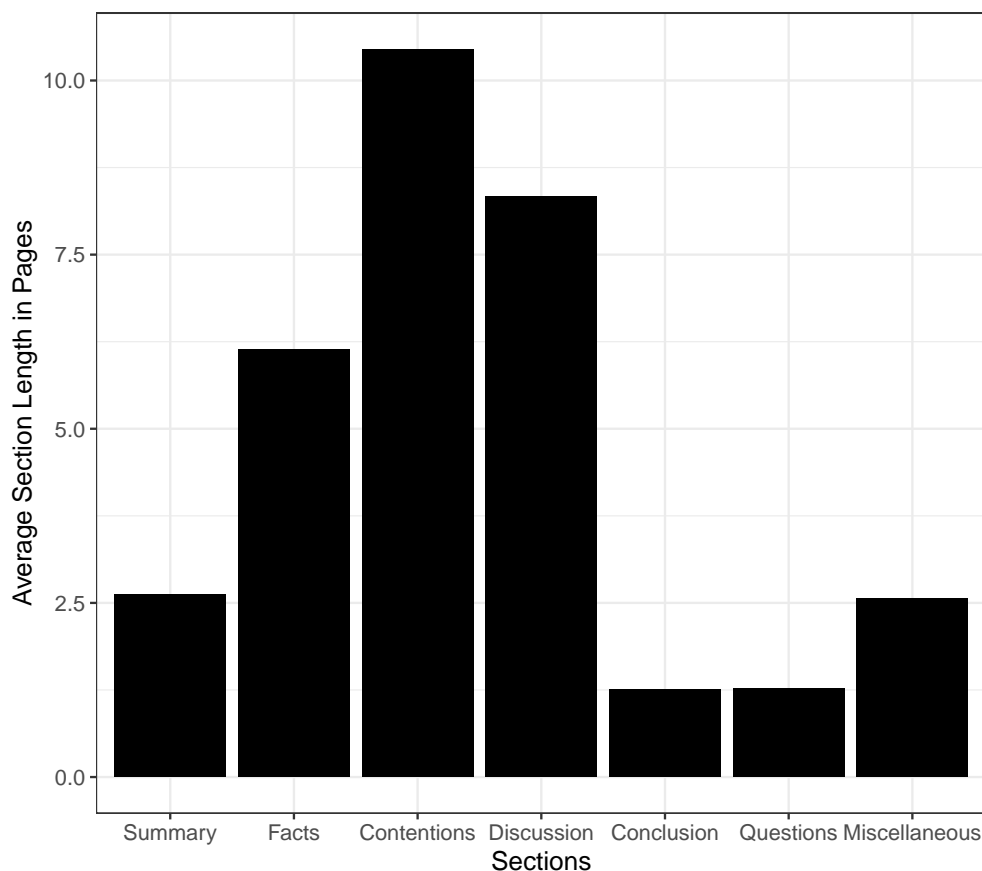
Figure 1.1: **Bench Memo Content**

After reviewing what has taken place to date, the bench memo addresses the contentions before the Court. As Figure 1.1 makes clear, the contentions section occupies the largest amount of space in most memos, comprising just over 10 pages on average, but the longest contentions section spans over 46 pages. In this section, the memo author summarizes the claims made by both parties in a case and amici.[2] This section typically is comprised of multiple subsections, as shown in Figure 1.2. The petitioner's and respondent's contentions sections are analogous to the arguments section in each litigant's merits brief because they provide justification as to why each party believes they should win. In *Acevedo*, for exam-

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[2]It is also worth noting that this section reports arguments made from reply briefs. Such data will be valuable as existing work focuses on arguments that appear in the parties' initial merits briefs, which fails to consider the iterative nature of appellate brief writing (e.g., Corley 2008; Black et al. 2015).

ple, the State of California argued that the Acevedo's paper bag should be given the same treatment as the car itself. As the memo author writes: "When resp[ondent] placed the bags of drugs in the Honda, the bag became as mobile as the vehicle it was in...Given probable cause to believe the vehicle contained a bag, and that bag contained illegal drugs, the officers should have been able to seize the bag and search it without a warrant" (7).

Immediately following each litigant's contentions is a description of the amicus briefs filed on behalf of them. If the OSG files an amicus brief for either party they have their own subsection separate from the rest of the briefs. As I explain in Chapter 3, clerks will provide commentary on the usefulness of certain amicus briefs. They will even instruct Justice Blackmun to spend considerable time reading them because they offer unique insights or they are superior to the litigant's brief.
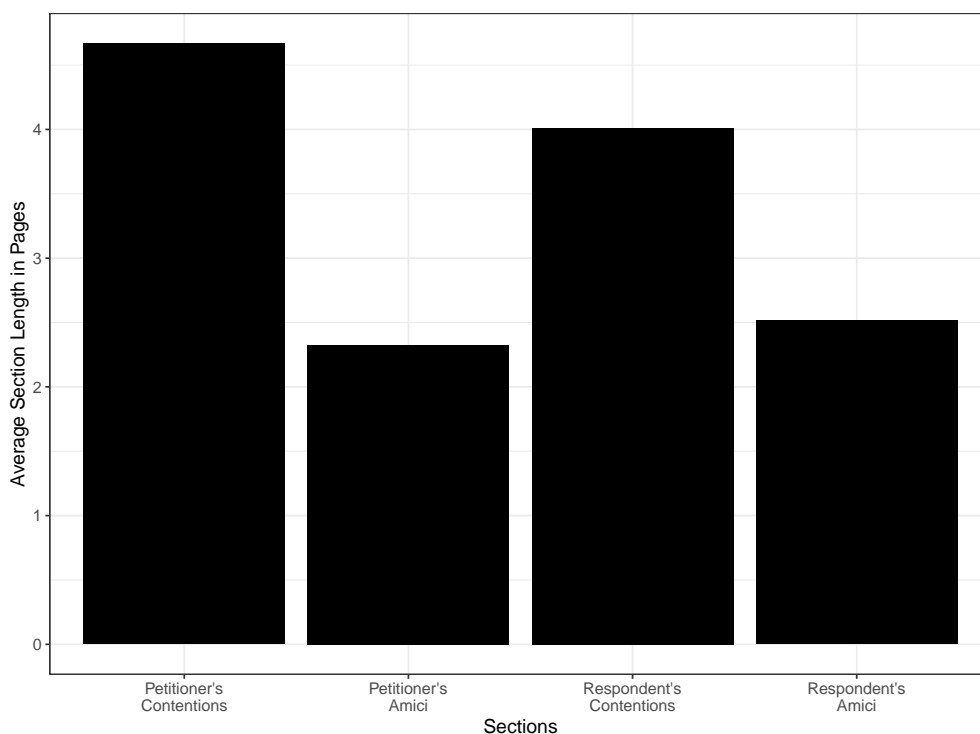
Figure 1.2: **Bench Memo Contentions Subsections**

Having described the scope of the legal claims being made, the memo author next discusses the relative strength of these arguments. This section is one of the most important

sections of the entire memo. It is where a clerk provides an analysis of both parties' legal arguments. The benefit of the bench memo, and discussion section in particular, over the individual merits briefs is that the clerks will bring to light any factually incorrect or reaching statements. In an effort to succeed before the Court, attorneys will sometimes overstate the relevance of a particular case or try and twist the interpretation of a particular statute ever so slightly. Take for example the case *Bonelli Cattle Co. v. Arizona* (1973), Justice Blackmun's clerk wrote: "I think that pet[itione]r has somewhat overstated the scope of the Bonelli decision id. the Ariz[ona] courts. Federal, Indian, other federal patent land, California, and Nevada issues are not properly before this Court (18)."[3] Or, *Gateway Coal Co. v. United Mineworkers* (1973), where Blackmun's clerk calls out both the petitioner and respondent for exaggerating the potential consequences of the Court's decision. "Pet[itione]r clearly overstates the dangers of chaos and Respondent clearly overstates the dangers of an arbitrator deciding, safety questions (16)."[4]

In addition to correcting anything misstated by the parties, the clerks will also touch on each legal question presented. They will discuss the pros and cons of each litigant's argument in light of past decisions by both the Court and Justice Blackmun, Congress's intent when they wrote particular statutes, and even interpreting the Constitution. All of their discussion leads to a final recommendation. In the case of *Acevedo*, the memo author found more strength in California's aforementioned claim versus one offered by Acevedo's attorney, who argued that a closed container should carry a higher expectation of privacy, especially once the automobile that is carrying it has been stopped (thereby eliminating exigent need for a warrantless search). She wrote: "The police saw resp[ondent] place the

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[3]Bench memorandum in *Bonelli Cattle Co. v. Arizona* (72-397). Located in the Supreme Court Case Files (Box 173, Folder #8) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

[4]Bench memorandum in *Gateway Coal Co. v. United Mineworkers* (72-782). Located in the Supreme Court Case Files (Box 175, Folder #2) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

brown paper bag in the trunk of his car...The police may search that area of the car and any container within it which is likely to contain the object of their search. Here, the police searched the trunk and the brown bag and discovered marijuana...I would admit the evidence" (16-17). The Discussion section is the second longest portion of the memo, and as shown by Figure 1.1, it averages just over eight pages.

Importantly, the bench memo provides a conclusion, which is generally around one page long. This conclusion is not just a recommended disposition in a case (e.g., affirm or reverse), but also a brief summary of the legal rationale to support that disposition. That is, what sort of justification should the Court use in its majority opinion to reach a particular outcome? In *Acevedo*, the clerk argued that a single rule should govern all automobile exceptions: so long as the police have probable cause to search an area of the car, then that probable cause extends to all containers located therein. This section, as I will explain in Chapter 1, is crucial for creating a measure of case strength. This final recommendation is the culmination of the complete and analyses of both litigants' arguments. It represents the litigant that has the stronger legal argument.

The majority of bench memos are also accompanied by questions written by the clerk directed towards both respondent and petitioner for Justice Blackmun to ask during oral arguments. Justice Blackmun would often scribble his own questions on these pages as well. Unfortunately, the availability of these question section in many cases is limited. They are hardly ever attached to the rest of the memo because Justice Blackmun actually would bring this page with him to oral argument. As a result, they sometimes did not make it back into the case folder. Yet, these pages are demonstrate the importance of bench memos to the way Justice Blackmun, and many other chambers on the Court function (Johnson, Stras and Black 2014; Peppers and Zorn 2008).

Finally, the miscellaneous section. This is not the name of an actual section in the bench memos, but a name I gave to represent the miscellaneous supplementary materials

clerks would occasionally attach to the end of a memo. Most often this takes the form of a written memo to provide new or updated information, sometimes a correction. In other circumstances, it is copies of newspaper clippings, maps, or relevant case material that cannot be accurately conveyed through text.

1.4 Discussion

In what follows, I will establish, validate, and apply my measure of case strength, a systematic, contemporaneous evaluation of legal doctrinal strength that can be used across multiple cases and terms from 1972 - 1993. With my measure of case strength and ancillary data, researchers will finally be able to understand the impact of law on judicial decisions, and its constraining, or encouraging, capacity for justices to pursue their preferred outcomes. This measure will provide the most comprehensive view to date of the the Supreme Court decision process, and fundamentally transform the way the way political scientists understand case outcomes and their policy consequences.

A measure of legal influence that can be used across terms and issue areas has alluded scholars for decades. My project fills this void and provides political scientists with a novel measure of legal quality to assess the impact of law on the Supreme Court decision making. This operationalization of legal influence will not only help answer fundamental questions of how justices are constrained by law and propose new theories. It will also allow scholars to reevaluate existing theories in light of this new measure.

CHAPTER 2

DOES LAW CONSTRAIN OR POLICY PREVAIL? THE EFFECT OF LITIGANT CASE STRENGTH ON U.S. SUPREME COURT DECISION MAKING

What could explain Justice Antonin Scalia, one of the most conservative voices on the modern Court, abandoning his policy preferences to be the critical fifth liberal vote in an important criminal rights case? Surprisingly, this is exactly where Scalia found himself in during the 1990 term in the case *Arizona v. Fulminante*. While in prison, Fulminante confessed to a confidential informant to his involvement unsolved murder in exchange for protection from threatening inmates. This confession and a subsequent confession to the informant's wife were used to indict Fulminante and charge him with first degree murder. The question brought to the Supreme Court to answer: were the confessions coerced and therefore unconstitutional? [1]

This was not the first time the Court had taken up the topic of coerced confessions. A number of existing precedents – some stretching back more than 100 years – offered potential ways to resolve the constitutionality of Fulminante's confession. The Court previously held that a confession was coerced when the police told a man if he did not confess they could not protect him from an angry mob waiting to lynch him (*Payne v. Arkansas* [1958]). Furthermore, the Court ruled that for a confession to be voluntary it must not be extracted under any threat of violence, nor obtained by promises from government officials (*Brady v. U.S.* [1970]), and any involuntary confession is inadmissible (*Bram v. U.S.* [1897]). Overwhelming precedent pointed towards voiding Fulminante's confession. The law is often ambiguous, but in this case, it appeared that there was ample evidence to support the respondent.

Scalia's vote *Fulminante* and other cases like it are tossed up to be random noise in data,

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[1]Bench memorandum in *Arizona v. Fulminante* (89-839). Located in the Supreme Court Case Files (Box 565, Folder #3) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

oftentimes unexplainable even with a host of factors researchers recognize as influencing judges' decisions including personality traits (Black et al. 2019; Epstein and Knight 2013; Hall 2018), policy preferences (Segal and Spaeth 1993), and case characteristics (Black and Owens 2009; Caldeira and Wright 1988; Caldeira, Wright and Zorn 1999). Past research recognizes the constraining capacity legal doctrine can exert on judges' decisions (Bailey and Maltzman 2008; Hansford and Spriggs 2006; Richards and Kritzer 2002), but what is missing is a reliable and systematic method to account for the *contemporaneous* influence of law on justices' decision making. A measure like this would achieve one of the discipline's primary goals, it would allow researchers to disentangle law and legal influences from politics. It would help explain Scalia's vote in *Fulminante*, and thousands of other policy antithetical votes on the Court instead of tossing them up to an unexplainable anomaly.

To better understand how judges arrive at their final decisions on the merits and how law impacts this decision, I analyze new and unique archival data - bench memoranda, prepared for Justice Harry Blackmun by his law clerks prior to oral arguments. Bench memoranda provide a unique perspective on the relative strengths of competing arguments in a case. They detail factual distinctions and sort out relevant precedents. Importantly, these memos also contain a final recommendation on how the case should be decided after weighing each party's argument. These memoranda provide an initial merits evaluation, untarnished by the bargaining process. I contend that this recommendation represents an assessment of the strength of each party's legal argument that can be used as an objective view of law to help explain votes in cases like *Fulminante*.

With this measure I examine the factors that influence the likelihood of a justice voting with his policy preferences. I demonstrate that law acts in both a constraining and liberating capacity. When law and policy conflict, a justice is significantly less likely to pursue his policy preferences. This relationship is conditional on a justice's ideology. Ideologically moderate justices like Powell, O'Connor, and Kennedy, are more likely to be constrained by the law

than their ideologically steadfast peers, like Scalia or Douglas. I also find that the Solicitor General and the litigants' resource advantages impact the likelihood of a policy vote.

My findings make two important contributions. First, using over 100,000 pages of originally collected bench memoranda I developed a measure of legal strength for the cases decided between the 1972 - 1993 terms. This provides a systematic way to assess the contemporaneous influence of law on decision making. Works by Bailey and Maltzman (2008); Bartels and O'Geen (2014); Hansford and Spriggs (2006); Richards and Kritzer (2002) demonstrate the importance of law on judicial decision making. Yet, as I will discuss in further detail below, most of these approaches rely on post hoc information to assess legal influence. Because bench memos are written immediately prior to oral argument, they represent an assessment of legal quality at the time of the decision. They do not rely on subsequent treatments, shifts in treatments, or other extra-judicial actors to evaluate each party's legal argument. What is more, my method of assessing legal quality can be used systematically across all issue areas for 22 terms of the Court; and using this measure I am able to demonstrate that law can constrain justices enough to vote against their ideological predispositions. Insight into this relationship is pivotal for understanding how the justices arrive at their decisions and, more generally, how one of the most powerful branches of government operates.

Next, I contribute to the long line of research that demonstrates the value of archival data in furthering researchers' understanding of the judicial process. Although my work is the first to draw upon bench memos, existing work shows how archival materials – especially those generated by law clerks – can be of value to scholars. In the context of Supreme Court agenda setting, for example, a reliable and valid measure of conflict alluded scholars and significantly limited scholarly ability to systematically study agenda setting. Enter the role of certiorari memos, which are the agenda-setting equivalent of bench memos: documents prepared by law clerks when a case seeks Supreme Court review. Here, too, law clerks summarize the claims, provide an assessment of their strengths, and, in particular, comment

on the extent to which a claimed conflict is real or exaggerated. These data, gathered with extensive support from the NSF, have been a tremendous boon to scholars and used extensively in published research (e.g., Black and Owens 2009, 2011, 2012a; Black and Boyd 2012, 2013; Black, Boyd and Bryan 2014).

In order to establish this link between legal case strength and the final recommendation of each bench memo, I begin by detailing what a bench memo is and the advantages of using this new data. I also discuss how scholars have captured legal influence and the impact of law in the past. To support my assertion that these memos capture the quality and strength of a case, I analyze the recommendation provided at the end of each memo to determine if indicators traditionally related to a superior legal argument, such as attorney experience and precedent vitality are related to this conclusion. Next, I demonstrate the importance and utility of this measure by examining if how law impacts justices' voting. Specifically, my results reveal that law can act in both a liberating and constraining capacity for a justice strategically pursuing his policy preferences (Epstein and Knight 2000).

2.1 The Law and Judicial Politics

Throughout its history, the field of judicial politics has been muddled in debate as to how research on the courts should be approached. The law versus politics dispute has been central to this controversy since the beginning. Originally, they were viewed as two mutually exclusive influences on judges' decision making. Depending on who you asked, judges were principled decision makers only swayed by the rule of law, or, on the contrary, judges were "politicians in robes" (Epstein and Knight 2013, 14) using symbols of law to disguise their true political preferences. Research has since moved on from this rival approach, the terminology has expanded - politics, attitudes, ideology, or preferences - but the relationship between law and politics still plagues researchers.

Law is often ambiguous. The song of precedent seldom sings in harmonious tone, but more commonly results in a cacophony of discordant voices. At the end of the day, one

of these voices will be chosen to prevail above the rest. This, of course, is the task facing Supreme Court justices and other appellate judges. Such individuals must make difficult choices among competing precedents; and they must do this efficiently. This difficulty also filters down to researchers who seek to understand how and why judges arrive at one choice versus another, which represents a foundational aspect of judicial decision making. The ambiguity of law also makes it difficult to measure. Additionally, law is not diametrically opposed to judges' attitudes, and when they point in the same direction it is exceedingly difficult to distinguish between the two. Not to mention, there are a host of other factors that also influence judicial decision making, like institutional norms (Maltzman, Spriggs and Wahlbeck 2000), public opinion (McGuire and Stimson 2004; Casillas, Enns and Wohlfarth 2011a), and personality traits (Black et al. 2019; Epstein and Knight 2013; Hall 2018).

Scholars seeking to disentangle the relative influence of legal considerations versus other factors (such as those identified above) have been plagued by the problem of observational equivalence. That is, if both law and attitudes predict the same behavior, then it is impossible to determine which is driving such behavior. Segal and Spaeth (1996) offered an innovative and influential approach by examining how dissenting justices in landmark decisions (such as *Roe v. Wade* [1973]) subsequently behaved in "progeny" cases (such as *Planned Parenthood v. Danforth* [1976]). Did such justices continue to adhere to their preferences and dissent, or did they accept the precedential value of the landmark case and join the majority? By their accounting, fully 90 percent of the votes cast were consistent with an attitudinal as opposed to legal account, with only two out of fifteen justices showing even modest evidence of being influenced by precedent (see also Spaeth and Segal (2001)). Subsequent work identified a number of concerns regarding Segal and Spaeth's research design, particularly a bias toward finding support for preferential votes (Brisbin 1996; Bailey and Maltzman 2008). To address these concerns, scholars began to take different approaches to documenting law's influence. Three distinct but complementary lines of research are particularly noteworthy.

The first of these approaches comes from Richards and Kritzer (2002), who introduce the idea of jurisprudential regimes. These regimes, according to Richards and Kritzer, establish "which case factors are relevant for decision making" (305). Jurisprudential regimes further provide an opportunity to falsify the legal model because the influence of these factors are distinct "from their influence in cases decided prior to the establishment of the regime" (305-306). Jurisprudential regime theory (JRT) has been applied to a number of distinct areas (Luse et al. 2009; Richards and Kritzer 2002; Kritzer and Richards 2003; Richards, Smith and Kritzer 2006), but its usage is not without controversy. Bartels and O'Geen (2014), for example, argue not all of the Court's outputs result in "revolutionary" JRT-like change, other decisions lead to more gradual change, or even result in relative stability. Beyond this concern, a more practical limitation of JRT is that regimes are, by design, specific to a narrow substantive issue area where the Court has established tests (e.g., the *Lemon* Test). Moreover, one must also know which regime is dominant at a particular point in time, which often only becomes clear after the Court has issued several progeny decisions in the same issue area. As a result, it becomes impossible to incorporate JRT-style legal influence into analyses that span across a host of issue areas or attempts to explain case outcomes in a contemporaneous (i.e., as they are decided) manner. This approach, then, would not be viable for trying to address the Court's dilemma in cases where the law is unclear without leaning heavily on what happened *after* the decision was released.

A second approach comes from the collaborative work of Hansford and Spriggs (2006), who argue that policy-minded justices "treat" existing precedents with a view towards not just their own ideological preferences but also the previous treatment of that precedent – a concept they label "vitality." This approach teaches us much about how the Court develops legal policy through the expansion, limitation, and even overruling of its own precedents (Spriggs and Hansford 2001). Yet for all it teaches us about the impact of law, its practical usefulness is somewhat lacking. In order to obtain the vitality estimate for each litigant's argument one

would have to examine not only which cases the petitioner and respondent mention in their briefs, but also analyze how they "treat" them. This is an extremely timeconsuming edeavour when applied to briefs but feasible if applied to bench memos, which summarize the primary contentions of briefs while cutting out superfluous information. While precedents are one of the main attributes of law justices must consider it is not the only one. Congressional intent, constitutional interpretation, and statutes and administrative laws all factor into their decision-making process. Only considering past Supreme Court decisions leaves an incompletel picture of law's influence on judicial decision making.

The third approach, offered by Bailey and Maltzman (2008) is the most recent and sophisticated yet and comes closes to truly disentangling law and preferences. This approach very cleverly uses bridging observations – cases both voted on by the justices and also commented or, less commonly, voted on by members of Congress and/or the President – to identify law's impact. So long as elected officials' positions are less influenced by law than the votes of Supreme Court justices (2008, 373-374), then Bailey and Maltzman are able to identify just who is influenced by law and how much influence exists. Crucially, however, this approach depends on being able to identify and incorporate bridging data for non-judicial actors. While it is easy to think of politicians voicing opinions on controversial topics such as equal protection or privacy, other issues like patent law will be more difficult to find on a regular basis. Additionally, this data limitation is exacerbated by the fact that if the House or Senate are not voting on a more mundane issue, they are even less likely to be making public statements on it. In short, the scope of cases available to analyze is necessarily limited.

It is clear from these past approaches that law matters. Using originally collected data I provide a fourth approach that captures which litigant has a superior legal argument according to law. This approach can be used systematically across all issue areas, incorporates all aspects of law and legal influence, and uses relevant information that was available at the

time of the decision.

2.2 The Benefit of Bench Memos

Capturing the strength each litigant's legal argument in a case is difficult task. The law is complex system of rules, statutes, and past court decisions and in order to efficiently and effectively complete this endeavor a deep understanding of the American legal system is required. In a world without resource constraints, one might impanel a group of skilled attorneys who would review all briefs in all cases prior to being decided. These attorneys would assess the strength of each argument made by a litigant and then, perhaps, offer an overall summary assessment of which side has the "better" case. Individual idiosyncrasies would be offset by random assignment and by having multiple raters. Ratings would be performed before a case was decided to guard against possible post hoc bias. And, of course, such ratings would exist for all cases ever decided.

Although reality necessarily falls short of the ideal, using bench memos as a tool to rigorously assess legal quality comes quite close to many aspects of a dream measure. In short, bench memos are crafted by some of the best and brightest young lawyers in the country (Ward and Weiden 2006; Peppers 2006). Generally, they all graduated in the top of their class from elite law schools and have experience clerking for lower federal court judges. Bench memos evaluate the strength of each argument, offer a summary of their overall assessment, and report which side has a better case. All of this is done prior to oral arguments based on the information provided in merits and amicus briefs.

I am using bench memos to asses case strength and while at the Supreme Court they serve this purpose they are also used to expedite the decision making process. Between litigants' merits briefs, reply briefs, supplemental briefs, and amicus briefs, the amount of information for one case can become overwhelming and Supreme Court justices are busy. Think of the briefs and other information provided by litigants in a case as a hot and boring baseball game in mid-July. Bench memos act as the Sports Center highlight reel, providing a comprehensive

yet concise overview of the case, while prioritizing the most important information. Justice Ruth Bader Ginsburg calls bench memos a "guided tour on the briefs," because in addition to breaking down the legal arguments and highlighting important information, they detail which briefs to read, to skip, and to skim (Peppers 2006, 199).
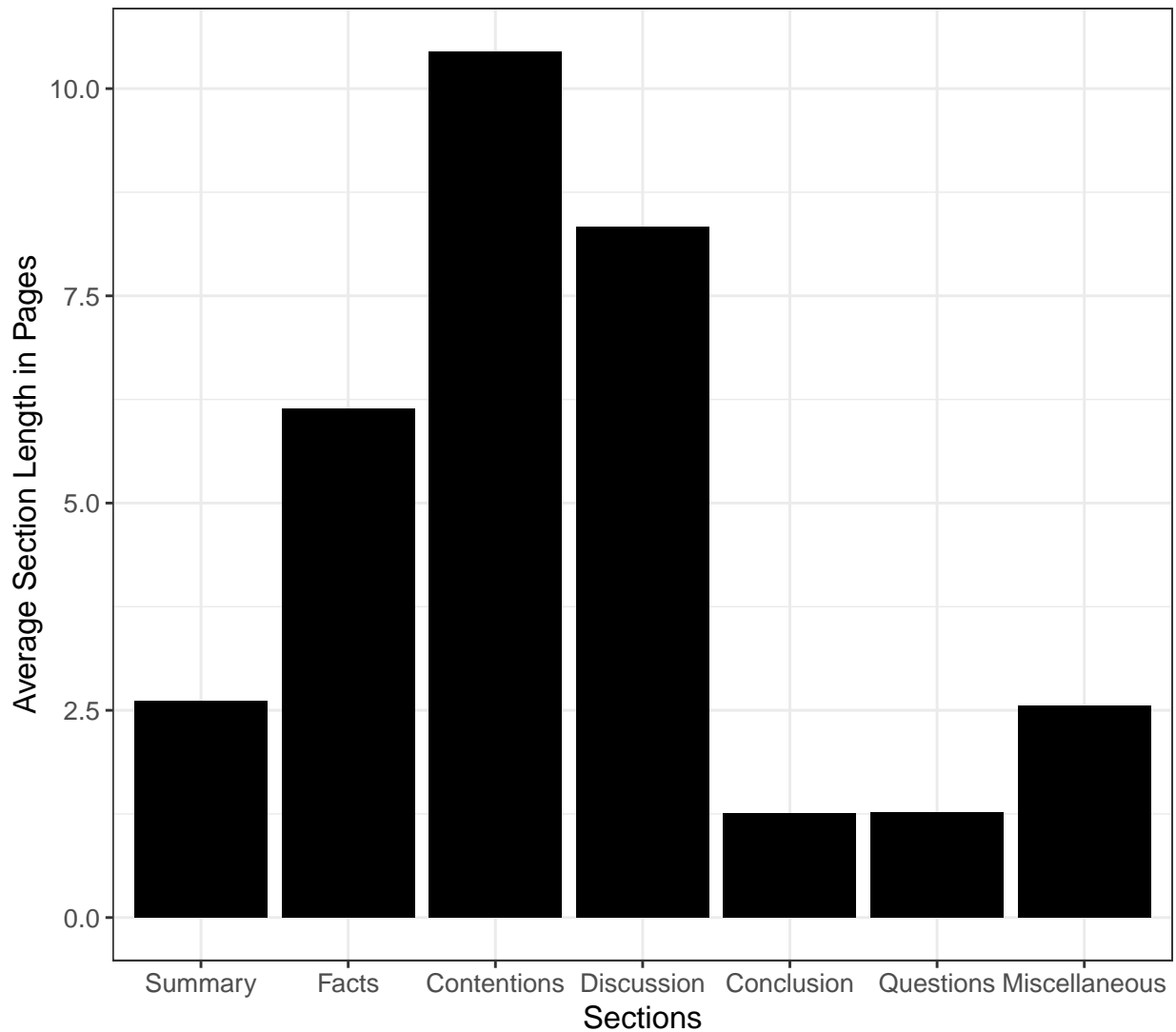
Figure 2.1: **Bench Memo Content**

The structure and length of memos vary by justice, they all include some of the same basic information. Figure 2.1 depicts the breakdown of Justice Blackmun's memos, which

average 29.5 pages.[2] Each memo begins with a very brief, typically just over two pages, summary of the case. The facts section details what has taken place to date, including the lower court proceedings and the basic fact pattern of the case. As Figure 2.1 shows, the contentions section occupies the largest amount of space in most memos, comprising about 35 percent of their length (just over 10 pages). This section typically includes the claims of each party and a discussion of their legal reasoning, as well as any unique or valuable information offered by amici. In *Fulminante*, for example, the State of Arizona argued that the "totality of the circumstance" fail to demonstrate coercion and even if they did the second confession to the informant's wife was given voluntarily. Alternatively, the respondent argues that the informant was in a position of power and therefore the situations was inherently coercive. Following a description of the scope of the legal claims being made, the discussion section provides a justification or rationale for their recommendation and how the Court should arrive at their final decision. The final section, and key to this paper, is the recommendation. This section is quite small relative to the total length of the memo because it is typically a short paragraph recapping their reasoning with a simple dispositional recommendation.

To demonstrate the benefit and efficiency of bench memos, consider Justice Blackmun's memos, which on average, contain 30 unique case citations. The contentions sections of his bench memos mirror the argument section in both of the litigants' briefs on the merits. The contentions section is the largest section of the bench memo, and includes 48 case citations on average (this includes repeated citations). Yet, this is less than half of the number of citations in the argument section of a single litigant's brief (Schoenherr and Black 2019).

In addition to consolidating important information for justices, bench memos have the added benefit of also vetting information and legal claims. Sometimes attorneys can overstate the relevance of a particular precedent to their case, or misstate the similarities (differences)

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[2]This figure was created with all memos with tables of content from the 1972 - 1993 terms.

in an attempt to bolster their claims. Regardless if this is done purposefully or because of lack of experience and knowledge, bench memos give clerks the opportunity to address and correct these claims. For example, in *McDonald v. City of West Branch, Michigan et al.* (1983), Blackmun's clerk McIntosh, in a rather blunt manner, points out the issues with the respondent's primary argument and goes on to detail how an amicus is somewhat more successful:

> Resp[ondents]s' attempt to distinguish *Alexander* and *Barrentine* is not so much unpersuasive as unintelligible. The EEAC's attempt is much more credible, but not very compelling...[3]

Corrections like these, along with all of the factual content, citations, analysis, and evaluations are encapsulated in a bench memo's final dispositional recommendation. That is to say the final recommendation is based on a myriad of legal considerations, and boils them down to a single recommendation. As a result, this recommended disposition favors the party that has a stronger legal position. Stated differently, the final recommendation supports the litigant with a higher quality legal argument. Therefore, I contend that this recommendation can be used as an indicator of legal quality.

2.3   Examining Case Strength

Before I can examine the influence of case strength on case outcomes, I must verify that bench memo recommendations favor the litigant with a higher legal quality, or a stronger legal argument. Bench memo data were collected by taking a photograph of each page of every bench memo from Justice Harry Blackmun's archives at the Library of Congress. These photos were then processed using optical recognition software to convert the photographs to

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[3]Bench memorandum in *McDonald v. City of West Branch, Michigan et al.* (83-219). Located in the Supreme Court Case Files (Box 406, Folder #3) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

raw text files. Recommendations were extracted from the summary and/or recommendation sections of each memo.

Not all recommendations in favor of the petitioner or respondent are created equal. Some memos are consistent in their recommendation and will advise reversal in the summary section and again at the end of the memo in the conclusion. Yet others are more wishy washy, they will indicate that it is a "tough" or "close" case. Some memos will even provide justification to support the petitioner *and* respondent because the law is unclear. In creating a measure of case strength there is a theoretical justification to think that a consistent reversal or affirmance recommendation is substantively different than an ambivalent recommendation. That is, a petitioner's legal argument or case strength can not be as strong if the respondent could also win supported by solid legal reasoning. To account for this variation I extracted the summary and recommendation sections from each bench memo and hand coded the certainty surrounding the recommendation on a five-point scale. One represents a strong affirmance and two represents a weak affirmance. Contrastingly, strong reversals take on the value of five and weak reversals are coded as four. Three represents cases dealing with questions that are so new and the law is underdeveloped, or the law is so ambiguous that the clerk can not make a single, clear, recommendation.[4,5]

To ensure that clerks are not crafting bench memos based on what they think Justice Blackmun wants to hear, I control for petitioner ideological compatibility. If bench memos represent the legal merit and quality of a litigant's position, they should not reflect Justice Blackmun's preferences. To estimate Blackmun's preference in a case, I follow past work

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[4]To see examples of the coding scheme please refer to the Appendix.

[5]Recommendations at the end of bench memos are very specific. Clerks will detail components of a case to be affirmed, reversed, and remanded to the lower court. Yet, for use as the dependent variable I do not have a theoretical reason to think that a reverse and remand favoring the petitioner is different from a straight reversal also favoring the petitioner. A reverse and remand does not signal uncertainty in the petitioner's legal reasoning. Using the *caseDisposition* variable from the Supreme Court Database, I follow past research and collapse affirm and deny/dismiss as outcomes favoring the respondent and all other outcomes as favoring the petitioner (there are no certifications outcomes in my data).

used to estimate the ideology of attorneys before the Court (Johnson, Wahlbeck and Spriggs 2006; Bailey, Kamoie and Maltzman 2005). First, I determine if the petitioner represents the liberal or conservative position in a case by examining the ideological direction of the lower court decision (Spaeth et al. 2018). Next, I use Martin and Quinn (2002) (MQ) scores to determine Justice Blackmun's ideology each term. Higher values indicate more conservative preferences. During this period, 1979 and 1993, Blackmun had drifted more liberal than his previous positions on the Court relative to his colleagues and his MQ score ranged from -1.94 to -.01 (Epstein, Martin, Quinn and Segal 2007; Martin and Quinn 2002; Owens and Wedeking 2012). Finally, if the lower court disposition is liberal, the petitioner represents the conservative position in a case and this variable is coded as Blackmun's MQ score. Alternatively, if the lower court decision was conservative, the petitioner represents the liberal position and this variable is coded as the negative value of his MQ score. If clerks are in fact writing bench memos in accordance with their boss's preferences, petitioner ideological compatibility should be a significant and positive predictor of law clerk's recommendations; however, since I argue that bench memos are an assessment of case strength, I do not expect this to have a significant coefficient.

The treatment of precedents is a primary component of assessing the strength of each party's legal argument (Hansford and Spriggs 2006). If a litigant is citing an overturned case or a precedent that has been repeatedly negatively cited by the Court's majority opinions, their argument will not be strong. Yet if they are positively citing cases that the Court has continuously upheld, their argument will be based on powerful precedent. To quantify the treatment of precedent I rely on Hansford and Spriggs's (2006) precedent vitality data and *Shepard's Citations* coding scheme. I coded the treatment of the precedent used in the petitioner and respondent's subsections of the contentions section in the bench memo. According to *Shepard's*, negative treatments are cited as being "distinguished," "criticized," "limited," "questioned," and "overruled;" and a positive treatment applies to any precedent

that is "followed." Following this scheme, I assign -1 to all negatively treated cases and 1 to positively treated cases. If the precedent is not legally interpreted or treated (i.e., included in a string citation) it receives a 0 (Hansford and Spriggs 2006). Table 2.1 displays an example of each type of treatment. Say, for example, these are all of the treatments for a petitioner's argument in a case. The treatment of each reference is multiplied by the vitality score for the term it was referenced and then summed (e.g., $(-1 * 3) + (0 * 1) + (1 * 39) = 36$). This sum is the petitioner's vitality score. This is done for the petitioner side and respondent side of each case in the sample.[6]

Given that case strength is coded as petitioner relief, I expect petitioner vitality to be positively related to legal quality and respondent vitality negatively related to legal quality. When the petitioner has a stronger legal argument, they are more likely to be favored in the final recommendation. That is, if the petitioner's argument is supported by cases that are being cited based on the way the Court has treated them in the past, the bench memo recommendation should reflect this strength and favor the petitioner. Conversely, if the

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[6]Precedent vitality has been validated by subsequent research (Black and Spriggs 2013; Hansford, Spriggs and Stenger 2013), and therefore offers the best way to quantify legal reasoning used by each party in the memos, however it does have some drawbacks. The vitality dataset only includes orally argued cases decided by the Court dating back to 1946. Therefore, any precedent cited in the bench memos disposed of without an oral argument between 1946 and the bench memo term, decided prior to 1946, or not decided by the Supreme Court, do not contribute to a litigant's vitality score, regardless of treatment. I coded a random sample of 80 of Justice Blackmun's bench memos between 1979 and 1993, which yielded 1,340 total case references. Of these, 667 are unique references. After merging with the vitality data (and Supreme Court database, see Spaeth et al. (2018)) I am left with 1,182 total case references (88%) across 60 bench memos or cases. The random sample is drawn from the 1979 - 1993 time frame due to the availability of other independent variables. This small data loss is due to a lack of vitality score for at least one party to a case. That is, all of the cases referenced or treated were (1) not orally argued before the Supreme Court, (2) were orally argued prior to 1946, (3) were decided by a lower federal court or state supreme court. While this data loss could create a bias, the loss of lower federal court and state supreme court cases are inconsequential since the Supreme Court is not bound by thier precedent. Additionally, Hansford and Spriggs (2006, 53) demonstrate that as precedents age they are less likely to receive any treatment at all, therefore once more cases are coded, data loss due to older cases being cited should be insignificant.

Table 2.1: Precedent Vitality Coding

Case Referenced	Reference Context	Treatment	Vitality
Oregon v. Elstad	This case is distinguishable from **Elstad** for two reasons. First, the second warnings were not adequate even standing alone. Had Eagan been given the standard Miranda warnings before his second statement, this would be a closer case. Second, considering the two sets of warnings together, their combined effect was inadequate.	-1	3
Maryland v. Louisiana	The Act pre-empts any state actions that impair either directly or indirectly FERC's power to regulate wholesale sales. See, e.g., **Maryland v. Louisiana**. 451 U.S. 725 (1981).	0	1
Swann v. Charlotte-Mecklenburg	In **Swann v. Charlotte-Mecklenburg Bd. of Ed.**, 402 U.S. 1 (1971), the Court rejected the argument that the equity powers of federal district courts had been limited by Title IV of the Civil Rights Act of 1964, holding that there was no suggestion in the statutory language of an intention "to restrict those powers or withdraw from courts their historic equitable remedial powers." Id., at 17. The same is true here.	1	39
		TOTAL:	**36**

respondent's argument is rooted in precedent with stronger vitality, I would expect the recommendation to favor the respondent.

The majority of the information in bench memos comes from briefs, namely litigants' briefs on the merits. It is important to consider how the attorneys that author these briefs can influence legal quality. As McGuire (1995) demonstrates, litigation experience before the Supreme Court significantly increases a party's likelihood of success because experienced attorneys are more likely to meet the justices' informational needs. This is also reflected in their certiorari success (Biskupic, Roberts and Shiffman 2014) and oral argument perfor-

mance (Johnson, Wahlbeck and Spriggs 2006), and brief writing skills (Black et al. 2015). Their experience and immense resources make them more prepared and knowledgeable (Black and Owens 2012*a*; Songer, Sheehan and Haire 1999), their arguments are viewed as more credible (Johnson, Wahlbeck and Spriggs 2006; McGuire 1995), and their writing more convincing (Black et al. 2015). For these reasons, I argue that experienced attorneys are better able to situate their case in the corpus of existing case law in a common law system, which establishes a stronger legal argument. To capture this experience, I use the number of previous appearances before the Supreme Court at oral argument for the petitioner and subtract the previous oral argument experience for the respondent. I expect attorney experience to be positively associated with legal quality. Positive values of this variable indicate that the petitioner's attorney has more experience, thus a higher quality legal argument.

I also include an indicator for amicus brief advantage - the difference in amicus briefs filed on behalf of the petitioner and respondent. At the agenda setting stage, amicus briefs convey the importance of the legal issues in a case (Caldeira and Wright 1988; Caldeira, Wright and Zorn 1999; Black and Owens 2009). At the merits stage amicus briefs reiterate litigants' arguments, but also contribute unique information and legal reasoning (Spriggs and Wahlbeck 1997*a*). What is more, justices find that amici make effective and sound legal arguments and will borrow language from briefs for majority opinions (Collins, Corley and Hamner 2015). Because of their ability to reinforce litigants' arguments and offer unique insight on legal issues, I argue that amicus briefs contribute to an increase in legal quality. The amicus advantage variable subtracts the number of amicus briefs filed on behalf of the respondent from the number of amicus briefs filed on behalf of the petitioner. I expect amicus advantage to be positively related to legal quality.

There are, of course, limitations to my findings, like past approaches to measuring law. First, the random sample relied on to examine legal quality is limited. Second, I recognize that any measurement is going to have potential drawbacks, and my estimate of case strength

is no different. For example, because law clerks author these memos, one might worry that any biases possessed by a law clerk would also be folded into any measure that uses bench memos as a data source. There are two variants to this concern. First, if a law clerk has his own agenda that he seeks to push upon his justice, then this will undoubtedly appear in a bench memo, which would be a key tool used to influence said justice. Second, and at the opposite end of the spectrum, if a law clerk is fully loyal to his employing justice, then the bench memo will be slanted to whatever ideological biases that justice has toward the subject matter.

Ultimately, I do not believe either version of this concern sinks my approach. Although it is undoubtedly true that law clerks have preferences about how cases are decided, it is quite different to say that they systematically try to sway how their justice votes at every single opportunity. The vast majority of Supreme Court law clerks have been vetted not just by a justice's trusted advisors (including former law clerks and the justice him or herself), but also generally by a lower circuit judge, for whom they also clerked. To wit, justices are more likely to pick clerks who have previously clerked for a lower court judge who is ideologically aligned with themselves (Ditslear and Baum 2001). And, the risks to such behavior are significant. Alienating one's justice would likely undermine the substantial professional benefits a former clerk stands to gain (e.g., lucrative private practice, opportunities in academia, etc.). Finally, as an objective manner, recent research utilizing campaign contributions reveals that many law clerks are not particularly extreme in their politics (Bonica et al. 2016). Additionally, clerks are very transparent and indicate when their personal preferences pull the in one direction but the law says otherwise, and often provide a recommendation supporting their personal preferences and another they believe is correct according to the law.

2.3.1 Methodology and Empirical Results

To estimate this model, I employ an ordered logistic regression model. This model is appropriate given the ordinal nature of the dependent variable. I fail to reject the null of the Brant Test, which means that the parallel regression assumption holds and an ordered logistic regression is preferred to a multinomial logistic regression. The results are shown in Table 2.2 below.

Petitioner vitality is in the positive expected direction and significant. This suggests that the treatment of precedent by the petitioner is an important factor in determining case strength. The petitioner must cite cases according to their vitality in order to achieve an advantage. To better understand this relationship the predicted probabilities are shown in the left panel of Figure 2.2. The x-axis represents petitioner vitality. Negative values suggest the petitioner is positively citing precedent that is outdated or has been overturned, or he is negatively citing vital cases. Larger positive values suggest that the petitioner is citing precedent accurately according to the Court's recent decisions. A one unit increase of petitioner vitality leads to an .33 percentage point increase in the likelihood of receiving a strong reversal. As petitioner vitality increases from the minimum value of -16 to the maximum value of 55 the likelihood of receiving a strong reversal recommendation increases by 24 percentage points or a 56 percent change.[7] Petitioner vitality has a slightly negative relationship on the likelihood of receiving a weak reversal recommendation. This may be due to the lack of small sample size, or because the law weakly favors the petitioner's legal argument but this is not represented by existing precedent but instead by other types of law.

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[7]Figure 2.2 shows that even if the petitioner positively cites "bad law" he has a nearly 50% chance of success. This is because the Supreme Court is reversal prone and reverses two-thirds of the cases that it hears (Epstein et al. 2019).

Table 2.2: Ordered Logistic Regression of Case Strength

Petitioner Vitality	0.0144*
	(0.008)
Respondent Vitality	−0.003
	(0.005)
Petitioner Experience Advantage	0.030*
	(0.013)
Petitioner Amicus Advantage	0.154
	(0.110)
Lower Court Disagreement	−0.551
	(0.558)
Petitioner Ideological Compatibility	0.489
	(0.288)
Strong Affirmance | Weak Affirmance	−1.642
	(0.769)
Weak Affirmance | Uncertain	−0.948
	(0.747)
Uncertain | Weak Reversal	−0.796
	(0.744)
Weak Reversal | Strong Affirmance	0.057
	(0.739)
Observations	65
AIC	187.419
Residual Deviance	167.419

Standard errors in parentheses

* denotes $p < 0.05$ for two-tailed test

As expected, there is a negative slope on weak and strong affirm recommendations suggesting that as the petitioner cites more vital cases positively or non-vital cases negatively the likelihood of the respondent receiving a favorable recommendation decreases. There is no relationship between uncertainty and petitioner vitality. In these cases the law is so close that the law clerk can not make a sound recommendation, which is likely reflected the citation patterns of precedent supporting each litigant.[8]

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[8]This is the least common type of recommendation and in my small sample there is only a single occurrence of uncertainty.
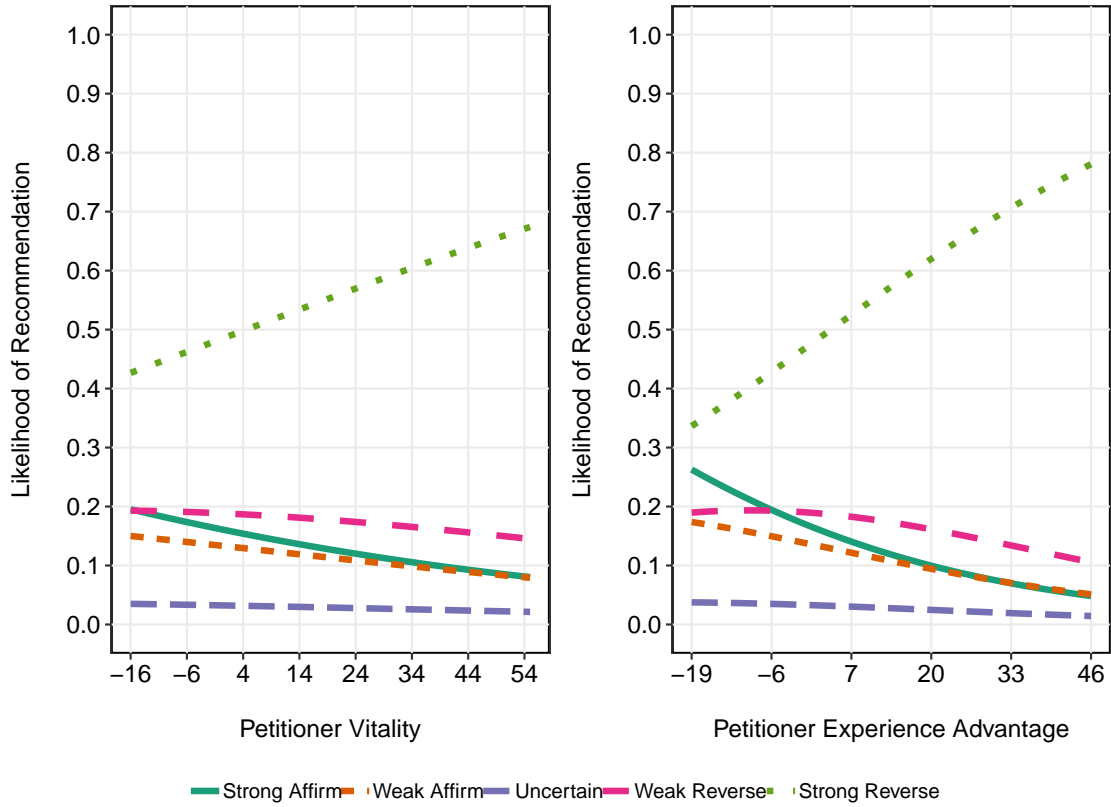
Figure 2.2: **Likelihood of Case Strength Across Petitioner Vitality** - The left panel displays the likelihood of case strength operationalized as a the five category scale of bench memo recommendations across the 95th percentile of petitioner vitality while holding all other variables at their mean and the dichotomous variable at its mode. The right panel depicts the likelihood of case strength across the 95th percentile of petitioner experience advantage while holding all other variables at their mean and the dichotomous variable at its mode.

To the right of the petitioner vitality panel in Figure 2.2 are the predicted values for the other significant predictor of case strength, petitioner experience advantage. Negative values on the x-axis represent that the respondent's attorney has more experience before the Supreme Court than the petitioner's attorney. A value of zero would suggest that the attorneys are equally matched, and positive values mean that the petitioner's attorney has argued more cases before the Supreme Court than the respondent. As expected, as the petitioner's attorney gains an experiential advantage the more likely the petitioner has a stronger case as represented by the dotted green line representing a strong reversal recommendation. More specifically, moving from the most disadvantaged to the most advantaged experienced

attorney arguing for the petitioner increases the likelihood of a strong case (strong reversal recommendation) by 44 percentage points, a 129 percent change. As expected, there is also a negative slope for strong and weak affirm recommendations. As the petitioner's attorney gains an experience advantage the respondent is less likely to have a stronger case. Moving from the most advantaged respondent to the most advantaged petitioner the likelihood of a strong affirm recommendation decreases from 27% to 5%, a 22 percentage point decrease, or a 82 percent change.

Returning to the table, respondent vitality is in the expected direction but fails to have a significant effect on case strength. This may be due to the fact that the petitioner has the first mover advantage. They get to choose how to frame the issue in the case (Wedeking 2010) and therefore also select the relevant case law to cite. The respondent is then forced to respond in ways that do not yield as vital of an argument.

Also in the expected direction, amicus advantage does not predict of legal quality. This may be due to the heterogeneity of parties that file amicus briefs, where quantity does not necessarily equal quality (Box-Steffensmeier, Christenson and Hitt 2013). While some amicus groups are large with extensive resources to craft well researched briefs, others are not. This may lead to diverse treatment or trust of this information, as some of it likely contributes to legal quality, while other amicus groups do not.

Lastly, the control for Justice Blackmun's ideology is indistinguishable from zero. This indicates that bench memos are not a simple reflection of Blackmun's policy preferences. This coupled with the other results of this model suggest that bench memos do in fact capture what I theorize to be case strength. I can now use this to understand how case strength impacts Supreme Court decisions. Do justices consider case strength when placing their votes; do litigants with stronger legal arguments in have a higher chance of success before the Court; and can justices who are predisposed to vote against them be swayed by the strength of their argument?

2.4 Policy vs. Preferences

To determine if justices' votes are influenced by law and the quality of a litigant's legal argument I examine a sample 2,927 individual justice-votes across 754 cases argued between 1972-1993 terms.[9] My dependent variable is policy vote, a dichotomous indicator that takes the value of 1 when a justice votes for the litigant he is ideologically aligned with and 0 when he places a counter-policy vote. This variable was coded using the Supreme Court Database (Epstein et al. 2019). If the lower court decision was liberal and a conservative justice votes to reverse, the dependent variable is coded as 1 because he voted in favor of a petitioner who is arguing a conservative position. If the same conservative justice voted to affirm, the dependent variable is coded as 0. Similarly, if the lower court ruling is conservative and a liberal justice votes to reverse the dependent variable takes on a value of 1, and if he votes to affirm it takes on the value of 0. I follow Johnson, Wahlbeck and Spriggs (2006) and exclude Blackmun's votes from the dependent variable because of the reliance on his archival materials to develop the indicator of legal quality. Justice Blackmun, and only Justice Blackmun, read the bench memos his clerks wrote, which in turn, could also influence his final vote. I aim to prevent any endogeneity by eliminating Blackmun from the model. It will also make it more difficult to find an effect for law in the analysis, yet the presence of a significant effect lends credence to the fact that bench memos are actually capturing the litigant with the superior legal argument.

My primary independent variable is law-policy conflict. My data and measure of case strength allow me to overcome the hurdle of observational equivalence and tease out what suggests should be the final outcome from the ruling a justice is predisposed to favor. Since the dependent variable is whether a justice placed a policy vote I recoded my five point ordinal measure of case strength to a five point ordinal measure of law-policy conflict. This

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[9]I merge my measure with Johnson, Wahlbeck and Spriggs's (2006) data to obtain certain independent variables.

variable takes on a value of 2 when law or the final recommendation at the end of a bench memo is strong (affirmance or reversal) and conflicts with a justice's ideological preferences. For a conservative justice, this conflict occurs when the lower court decision was conservative and the law strongly supports a reversal, as was the case for Scalia in *Fulminante*, or if the lower court made a liberal decision and the law strongly calls for an affirmance. This variable takes on a value of 1 under the same circumstances but when the law is not as strong (weak reversal or affirmance). When law is unclear there is not necessarily a conflict between the law and policy preferences so this variable is coded as 0. Alternatively, this variable is coded as -2 when law and policy converge and a justice is free to vote in line with his attitudes. This occurs for a conservative justice when the lower court rules conservatively and law strongly suggests an affirmance is in order; or when the lower court hands down a liberal ruling and law strongly favors a reversal. When the law moderately or weakly favors an outcome that aligns with a justice's policy preferences law-policy conflict is coded as -1. Similar to the agenda stage (Caldeira, Wright and Zorn 1999; Black and Owens 2009), I expect justices to be constrained when law and policy goals diverge and as a result, less likely to follow their preferences. When law and policy coincide, justices are free to vote as they desire with superior law and legal reasoning to support their choice.

Justices' ideological preferences are obviously consequential in their likelihood of placing a policy vote. Specifically, I expect that the ideological extremity of a justice's preferences influences the ability of law to act as a constraint. That is, justices with more entrenched ideological views, like Scalia or Douglas, are more likely to vote with their preferences, compared to their moderate colleagues, like O'Connor or Kennedy, the perennial "swing votes" on the Court (Martin, Quinn and Epstein 2004; Dwyer 2018). To account for this relationship I include ideological extremity coded as the absolute value of a justice's Martin and Quinn (2002) score. I also include a multiplicative term between ideological extremity and my primary independent variable of interest, law policy conflict. This is because justices

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who are ideologically extreme will be less easily swayed by law when it conflicts with their preferences.

In addition to examining which justices are constrained by law, I investigate if certain cases allow this relationship to persist. Justices are influenced by the public opinion, and alter their behavior in salient cases when they know the public is watching (Unah and Hancock 2006; Wahlbeck 2006; Lax and Cameron 2007; Casillas, Enns and Wohlfarth 2011a; Black, Sorenson and Johnson 2013). There are a number of methods to measure the salience of a case (Epstein and Segal 2000; Collins and Cooper 2012; Black, Sorenson and Johnson 2013; Clark, Lax and Rice 2015), theoretically Clark, Lax and Rice (2015) is the best option for this model. Their measure estimates salience prior to the Supreme Court hearing a case for oral argument. While Epstein and Segal (2000) and Collins and Cooper (2012) are both valid and reliable measures, they measure salience based on newspaper coverage of the final opinion, and are therefore are endogenous to what I am trying to measure.[10] Clark, Lax and Rice (2015) latent trait of salience based on coverage in the *New York Times*, *Washington Post*, and *Los Angeles Times* is included in the model and also interacted with law-policy conflict. As past research demonstrates, justices more likely to vote their preferences in salient, often controversial cases, and therefore less likely to be impacted by law.

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[10]Black, Sorenson and Johnson's (2013) measure would be ideal because it captures a justice-level measure case salience, but it is not available until the 1979 term.

Table 2.3: Control Variable Measurement

Variable	Measurement
OSG Policy Match	1 if the OSG argues in the direction of a justice's policy preferences, 0 otherwise
OSG Policy Mismatch	-1 if the OSG argues in the direction of a justice's policy preferences, 0 otherwise
U.S. Government Policy Match	1 if the U.S. Government argues in the direction of a justice's policy preferences, 0 otherwise
U.S. Government Policy Mismatch	-1 if the U.S. Government argues in the direction of a justice's policy preferences, 0 otherwise
Case Complexity	Factor analysis of the number of legal provisions in a case and the number of issues involved according to the Supreme Court Database (Johnson, Wahlbeck and Spriggs 2006)
Case Complexity × Law-Policy Mismatch	Factor analysis of the number of legal provisions in a case and the number of issues involved according to the Supreme Court Database × Law-Policy Conflict
Reversal Prone	1 if justice prefers to side with the petitioner, 0 otherwise
Resource Advantage of Preferred Litigant	Resource advantage of the litigant a justice prefers to side with − resource advantage of opponent (Collins Jr 2004, 2007)
Amicus Advantage of Preferred Litigant	Number of amicus briefs filed for the litigant a justice prefers − number of amicus briefs filed for their opponent (Collins 2008)

I also include a host of other control variables in the model. The variables and their measurement are listed in Table 2.3. I control for whether the Office of the Solicitor General (OSG) is arguing for or against a justice's preferences. The OSG, often referred to as the "Tenth Justice," is extremely successful before the Court and has the ability to garner votes from ideologically distant justices (Bailey, Kamoie and Maltzman 2005; Wohlfarth 2009; Black and Owens 2012*b*). Generally speaking, the U.S. government is successful before the Court (Johnson, Wahlbeck and Spriggs 2006), so I also control for whether a federal attorney is arguing for or against a justice's preferences. Case complexity may impact a justice's

likelihood to place a policy vote. The law in complex cases covering a host of issues or legal questions may be difficult to navigate, so instead of trying to, justices may revert to their underlying preferences. I also interact this with law-policy conflict expect that even when law and policy conflict, justices will increasingly vote with their preferences case grows in complexity. Next, I control for amicus and litigant resource advantages. Litigants with more resources can hire more skilled attorneys to write better briefs, and argue a stronger case before the Court (McGuire 1995; Songer, Sheehan and Haire 1999; Johnson, Wahlbeck and Spriggs 2006), which in return makes it easier for a justice to rule in their favor. Similarly, amicus briefs offer unique perspectives and legal arguments to a case (Hansford 2004) and influence justices' final votes (Collins 2008), so this provides alternative avenues to rule for a party that may not be included in their brief. Lastly, I control for the fact that justices are reversal prone given that two-thirds of the cases that come before the Supreme Court are reversed (Epstein et al. 2019).

2.4.1 Methodology and Empirical Results

My dependent variable, the likelihood of a policy vote, is dichotomous so I employ a logistic regression. The data are hierarchical with case level observations nested within each justice, with significant variation at level two. According to Clark and Linzer (2014), "random effects produce superior coefficient estimates when there are few units or observations per unit" (407). Given that for some justices the total number of observations is low, I follow Clark and Linzer (2014) and employ random effects.

The results of the logistic regression model with justice-level random effects on justices' likelihood of a policy-vote are shown in Table 3.2. Because of the non-linear nature of the model, I focus on the predicted values to address the results rather than strictly focusing on the coefficients. I begin with Figure 2.3, which addresses the likelihood of a policy vote across ideological extremism dependent on whether or not the law supports a justice's preferences.

Table 2.4: Logistic Regression Estimates with Justice-Level Random Effects

Law-Policy Conflict	−0.306*
	(0.039)
Ideological Extremity	0.080
	(0.056)
Ideological Extremity × Law-Policy Conflict	0.018
	(0.015)
Early Salience	0.089
	(0.066)
Early Salience × Law-Policy Conflict	−0.036
	(0.038)
OSG Policy Match	0.284*
	(0.144)
OSG Policy Conflict	−0.177
	(0.146)
U.S. Government Policy Match	0.021
	(0.151)
U.S. Government Policy Conflict	0.630*
	(0.144)
Case Complexity	0.031
	(0.106)
Case Complexity × Law-Policy Conflict	0.048
	(0.065)
Reversal Prone	0.453*
	(0.096)
Resource Advantage of Preferred Litigant	0.048*
	(0.010)
Amicus Advantage of Preferred Litigant	0.017
	(0.020)
Constant	0.317
	(0.188)
σ	0.382
	(0.103)
ρ	0.043
	(0.022)
Observations	2927
AIC	3486.211
BIC	3581.919
Log Likelihood	−1727.105

Standard errors in parentheses

* denotes p< 0.05 for two-tailed test
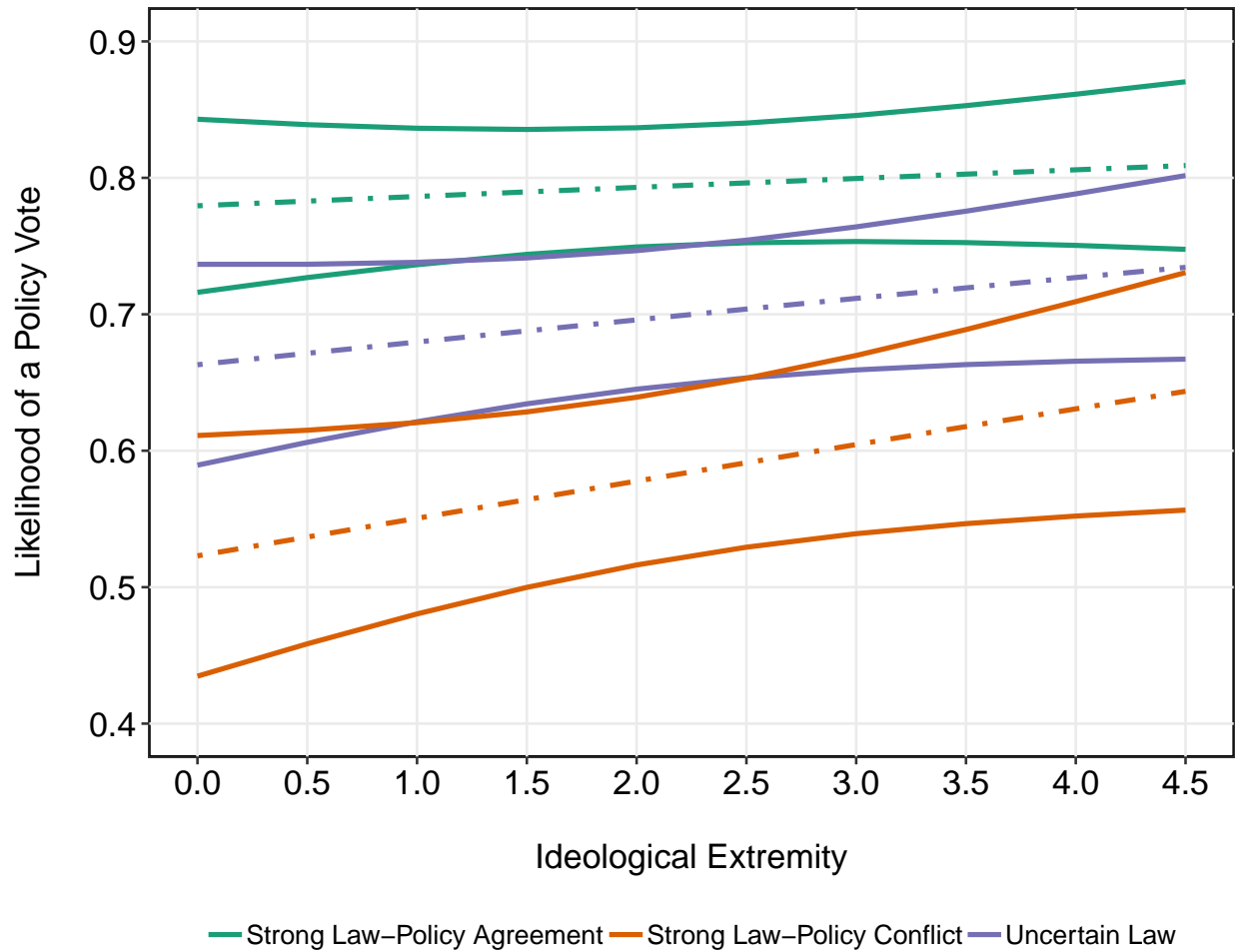
Figure 2.3: **Likelihood of a Policy Vote Across Ideological Extremity** - This graph shows the likelihood of a policy vote across the 95th percentile of ideological extremity. The dashed green line shows the likelihood of a policy vote when law and policy align. The dashed purple line displays the likelihood of a policy vote when the law is uncertain. The dashed orange line represents the likelihood of a policy vote when law and a justice's policy preferences come into conflict. The matching solid lines represent 95% confidence intervals. All variables are held at their medians.

I theorized that when law and policy conflict justices should be less likely to follow their preferences and that this effect should be stronger on ideologically moderate justices. The data bear this out. I find that when law and ideology are in opposition, all justices are significantly less likely to vote their preferences. This is shown in Figure 2.3.[11]

Despite overlapping confidence intervals, all three lines are statistically different from one

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[11]To aid with data visualization I only include strong law-policy agreement/conflict and uncertain law.

another. Additionally, uncertain law and strong law-policy conflict slopes are statistically different from strong law-policy agreement. As shown by the gentle slope of the green line, when law and policy are in agreement all justices are significantly more likely to vote with their policy preferences regardless of their ideological extremity. This differs from cases where law is ambiguous and in cases when law and policy are in disagreement where there is an upward slope suggesting that moderate justices are less likely to vote with their preferences than ideologically extreme justices. When law and policy conflict, a moderate justice has a coin-flip chance of following his ideology over law, 54%, however when law and ideology work together, this increases to 77%. This is a 23 percentage point increase or a 43% change. Even a justice with the most entrenched beliefs only maintains a 62% chance of voting with his preferences when law and policy diverge. The likelihood of a policy vote increases to 79% when law and policy agree, a 17 percentage point increase.

Figure 2.4 displays the two other variables interacted with case strength. The left panel of exhibits the results of the relationship between complexity and case strength. I hypothesized that as complexity increases the likelihood for a policy vote should also increase. I do not find support for this hypothesis. When law and policy conflict there is a slight increase across the range of case complexity, which is consistent with my hypothesis, however this increase is not statistically significant. What is more, when law and policy are in agreement there is a slight negative slope implying that despite the fact that law supports a justice's preferences his likelihood of voting with these preferences decreases as a case grown more complex. This relationship, however, is not statistically significant.
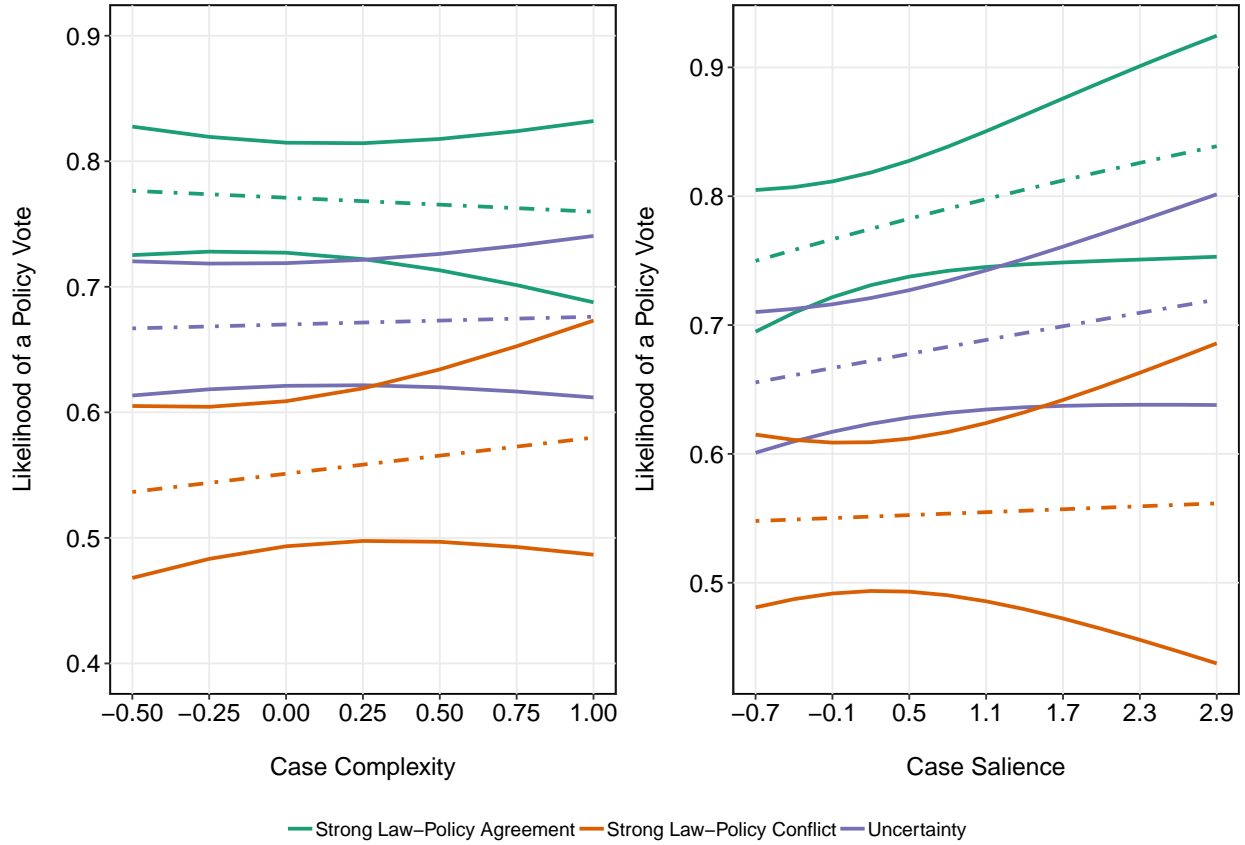
Figure 2.4: **Likelihood of a Policy Vote Across Case Complexity and Case Salience** - The left panel exhibits the results of the relationship between complexity and case strength and the right panel shows the relationship between case salience and case strength. The dashed green lines show the likelihood of a policy vote when law and policy align. The dashed purple lines display the likelihood of a policy vote when the law is uncertain. The dashed orange lines represent the likelihood of a policy vote when law and a justice's policy preferences come into conflict. The matching solid lines represent 95% confidence intervals. All variables are held at their medians.

Similarly, I do not find support for my case salience hypotheses. The coefficient on salience is positive as expected, but it does not have a significant effect on the likelihood of policy vote, regardless of the position of the law. The right panels of Figure 2.4 displays the relationship between case salience and, law-policy conflict, and the likelihood of a policy vote. As salience increases there is no significant increase in the likelihood of a policy vote regardless of legal constraint. The only differences that persist are between each level of conflict or agreement across case salience.

I do find that when a justice's preferred litigant gains a greater resource advantage over

their opposition that justice's likelihood of placing a policy vote significantly increases. Additionally, I find that when the Solicitor General argues in-line with a justice's policy preferences the likelihood of a policy vote significantly increases. Yet peculiarly, when the U.S. government argues against a justice's policy preferences he is more likely to vote with his preferences.

2.5 Discussion and Conclusion

In this paper, I set out to create a new indicator of legal quality that could be used systematically across all cases that span multiple terms regardless of issue area. I found this estimate to be related to other indicators of quality and moved on to determine if legal quality impacts case outcomes. Importantly, I demonstrate the ability to overcome the long faced challenge of observational equivalence by disentangling a legal-vote from a policy-based vote and find that law can significantly constrain a justice's propensity to vote his true preference in a case, but this constraining effect is conditional on how polarized a justice's attitudes are.

My findings contribute to the field's growing understanding that law and legal considerations impact justices' decision making (Bartels 2009; Bartels and O'Geen 2014; Bailey and Maltzman 2008; Black and Owens 2009; Hansford and Spriggs 2006; Richards and Kritzer 2002). This is a normatively important topic. As research has shown, most people are legal realists and recognize that justice's preferences influence their decision making, yet they still believe that justices make principled decisions and are not simply legislators in robes (Gibson et al. 2011). These findings demonstrate that justices' decisions, while influenced by their preferences, are principled and rely on law and legal reasoning.

As for the concern about clerks who have completely integrated their justice's thinking into their work, this version is, to be fair, more plausible. That being said, if this were true, these recommendations would not be able to predict other justices' votes on the merits, and they do. As shown by the case strength model in Table 3.2, case strength is a significant

predictor of justices' votes to reverse.

Despite these challenges, bench memos offer a new and unique opportunity to use the very same material justices used to evaluate cases. This systematic indicator of legal quality has many applications beyond the way it was used in this chapter, as I will demonstrate in Chapter 3.

CHAPTER 3

THE IMPACT OF CASE STRENGTH ON THE SUPREME COURT JUDICIAL DECISION MAKING PROCESS, A REEXAMINATION

There are a host of factors that researchers theorize to influence Supreme Court justices' decision making: policy preferences, personality traits, public opinion, and legal factors. A definitive consensus agrees that policy preferences are the primary determinant of justices' decision making. Researchers have reached this consensus by using systematic and reliable measures like Judicial Common Space (JCS) (Bailey 2007; Epstein, Martin, Segal and Westerland 2007) and Martin and Quinn scores (Martin and Quinn 2002). Measures also exist to reliably capture personality (Black et al. 2019; Hall 2018), and public opinion's relationship with the Supreme Court (Casillas, Enns and Wohlfarth 2011b; Durr, Martin and Wolbrecht 2000). Legal factors however, such as declaring a law unconstitutional at the lower court, a dissent at the lower court, or the position of the Office of the Solicitor General are typically used as a proxies for law, or in some studies, legal influences are simply ignored. This was the accepted practice for decades because judicial politics scholars lacked a measure that captured the contemporaneous influence of law on judicial decision-making. America's legal system is complex. It consists of rules, statutes, orders, and precedents from numerous branches and levels of government. To incorporate these numerous factors into a single measure is an arduous task.

In Chapter 1 of this dissertation, I establish a measure of case strength, which provides a contemporaneous and systematic measure of law. It is able to capture all of the relevant discrete, yet related components of law because it originates from bench memoranda. These memos are crafted by Supreme Court law clerks to summarize all relevant case facts, analyze the relevant case law cited in litigant and amicus briefs, and ultimately choose which party has the strongest case, or superior legal argument. This measure provides a method for

researchers to control for and examine how law influences or alters important relationships in judicial politics across the majority of orally argued cases for over twenty terms of the Supreme Court.

With this new measure it is also crucial to reexamine existing theories. It can be used to reevaluate past research when a measure of law was unavailable and confirm that existing conclusions hold in light of including a measure of law. In fact, some scholars have even called for the incorporation of the quality or strength of a litigant's legal arguments because they suspect it to be a significant confounder in judicial politics research (Budziak and Lempert 2015). They were unable to test this theory, however, because a measure of legal quality did not exist at the time they conducted their research.

I am not arguing that the incorporation of a contemporaneous measure of law into past and future models of judicial behavior will completely change our understanding of how Supreme Court justices make their decisions. Research is definitive that justices' policy preferences are the primary determinant of their behavior, but that is not to say that law does not matter. The discipline is removed from the time when judges were simply viewed as legislators in robes. Many scholars have shown the significance that different aspects of law have on judicial decision making (Bailey and Maltzman 2008; Bartels and O'Geen 2014; Hansford and Spriggs 2006; Richards and Kritzer 2002). Yet, those studies focused on demonstrating law's impact, they did not extend their applications to other aspects of the decision making process that law also effects. This was partially because they did not have the ability to do so, they were restricted to a certain type of case, a particular area of law, or the work would be too arduous to actually achieve. With this measure we can now examine a multitude of relationships and control for or examine the effect of law like we would ideology.

In what follows, I reevaluate two pieces of past research that examine different stages of the Supreme Court decision-making process to determine how or if law impacts this

process. First, I reexamine Johnson, Wahlbeck and Spriggs (2006) . The authors originally find that attorneys' oral argument performance is positively related to their success on the merits. I find that this relationship still persists but I also find that a litigant with an abysmal oral argument performance can still obtain a positive outcome before the Court if law supports their legal argument over their opponents. Next, I examine how law impacts the opinion bargaining process by reevaluating work by Maltzman, Spriggs and Wahlbeck (2000). In their analysis of strategic response to majority opinion drafts the authors found that justices are more likely to bargain when they are ideologically distant from the opinion author and more likely to write or or join a separate opinion, concurrence, or dissent if they are ideologically distant from the majority coalition. I find that law does influence this process. The strength at which the majority's opinion is supported by law is negatively related to a justice's likelihood to respond with a statement of joining or writing a concurrence.

3.1 The Influence of Oral Arguments on Case Outcomes

The Supreme Court is known for its secrecy. For many years the Court was a black box - cases would go in and decisions would come out but the in between as to how the justices arrived at these final decisions was unknown. Oral arguments were the peephole into this black box. They provided a glimpse into the Supreme Court decision-making process that gained the attention of journalists, Court watchers, and the public alike. Unlike the general public, as the field of judicial politics gained understanding of the Court, particularly by the aid of archival materials, researchers seemingly ignored oral arguments. Admittedly the justices themselves claimed that oral arguments were insignificant. Justice John Harlan referred to them as "little more than a traditionally tolerated part of the appellate process" (Harlan 1955; Roberts Jr 2005) and Justice Antonin Scalia called them a "dog and pony show" (Black, Johnson and Wedeking 2012).

The conventional wisdom that oral arguments were insignificant held for decades because researchers lacked a way to assess the independent impact of these proceeding until Johnson,

Wahlbeck and Spriggs (2006) collected Justice Harry Blackmun's oral argument notes, which included individual grades for each attorney that argued before the Court. They demonstrated that these grades are a reliable and valid measure of oral argument performance and then went on to show that attorneys' oral argument performance impacts the justices final decisions. They showed that the conventional wisdom was incorrect. Even the justices who claimed oral arguments were ineffectual, were in fact influenced by them.

Despite this research and progeny research (Black, Johnson and Wedeking 2012; Black, Sorenson and Johnson 2013; Gleason 2019; Jacobi and Schweers 2017; Johnson and Spriggs 2007; Johnson et al. 2009; Johnson, Black and Wedeking 2009; Ringsmuth, Bryan and Johnson 2013; Malphurs 2010) the finding that attorneys' oral argument performance significantly impacts case outcomes is still met with skepticism. In 2015, Budziak and Lempert published an article introducing simultaneous sensitivity analysis to the political science literature. They applied this method to Johnson, Wahlbeck and Spriggs's (2006) oral argument work to demonstrate that the relationship between oral argument performance and case outcomes is sensitive to a confounder. They postulate the missing confounder is "legal quality." They define legal quality as the "party with the more viable legal position," and claim, "a party who has the better oral argument is more likely to be defending a position of higher legal quality as reflected in records, briefs, and memoranda" (Budziak and Lempert 2015, 13, 17-18). Yet, all the authors are able to do is theorize because at that time they did not have a measure that would adequately capture all of the legal factors to determine which party had a stronger legal argument. Their desired "legal quality" confounder is analogous to my measure of case strength, which I will use to reevaluate Johnson, Wahlbeck and Spriggs's (2006) findings and test their confounder hypothesis.

3.1.1 Data and Measures

To test the relationship case strength exerts on Supreme Court case outcomes in lieu of attorneys' oral argument performances, my dependent variable is a justice's propensity to reverse a lower court's decision between the 1972 - 1993 terms.[1] If the Court voted to reverse, this variable is coded as 1, and 0 if they voted to affirm (Epstein et al. 2019). Justice Blackmun's votes are excluded from the dependent variable and analysis in general because of the reliance on his archives for both oral argument grades and case strength. Johnson and his colleagues excluded Blackmun's votes from their original analysis to avoid any endogeneity that might arise. Justice Blackmun could feasibly assign higher grades to attorneys he anticipated voting for. Similarly, Justice Blackmun, and only Justice Blackmun, read the bench memos his clerks wrote, which in turn, could also influence his final vote. By eliminating Blackmun from the model to prevent this endogeneity issue, it will make it more difficult to find an effect for case strength. Yet, the presence of a significant effect lends credence to the fact that bench memos are actually capturing case strength and not simply Justice Blackmun's preferences.

Johnson, Wahlbeck and Spriggs's (2006) primary independent variable is oral argument grades. Justice Blackmun recorded grades in his oral argument notes, sometimes accompanied with a brief description of the attorney. These grades were found to be related to other indicators of attorney quality like litigating experience and elite law school attendance. This variable takes both attorneys' oral argument grades and subtracts the respondent's from the petitioners. Therefore, larger values on this variable suggest that the petitioner performed better at oral argument. Based on their past findings, oral argument grades should be positively related to case outcomes, but according to Budziak and Lempert (2015), there should

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[1]Johnson, Wahlbeck and Spriggs's (2006) original analysis included the 1970 - 1993 terms. For this replication I only used cases for which a measure of case strength is available, which excludes the 1970 and 1971 terms. Blackmun's bench memos early in his career were evolving and inconsistent, therefore to incorporate legal quality, this analysis examines 1972 - 1993.

be no relationship after accounting for case strength.

The authors also control for justices' ideological compatibility with attorneys using Martin and Quinn (MQ) scores (Martin and Quinn 2002). Generally, negative values of MQ scores represent liberal voting behavior and positive values represent a conservative voting history. If the attorney argues for the liberal position, determined by the direction of the lower court's decision, this variable is the negative value of the justice's MQ score, and if the attorney makes a conservative argument a justice's MQ score is used so that higher values on this variable indicate higher ideological compatibility. Ideological compatibility and oral argument grades are also interacted in the model. Johnson, Wahlbeck and Spriggs's (2006) final results reveal that even if a justice is ideologically distant from an attorney's position in a case, a strong oral argument performance can still increase their likelihood of receiving a favorable vote.

The original model controls for case complexity. Complexity is the result of a factor analysis of the number of legal provisions in a case. The authors also interact complexity with oral argument grades with the expectation that oral arguments may be increasingly important in complex cases. Litigants have limited space to make their arguments in briefs, and if a case is exceedingly complex, they may need to clarify content that was unclear or absent from their brief. Therefore, an attorney's oral argument performance would reflect their ability to answer the justices' questions. The additional control variables included are listed in Table 3.1. For all but the last variable listed, there is an appellant and appellee version of the variable included in the model.

Additionally, I include case strength in the model. Just as its coding as a dependent variable in the first chapter, this is an ordinal variable coded as 5 if the law strongly supports the petitioner and overturning the lower court's ruling, 4 the law also supports a reversal but the law clerk was less certain in his recommendation, 3 if the case could go either way, 2 if the law supports an affirmance but there is some hesitation or uncertainty, and 1 if an affirmance

is strongly supported. If the petitioner's contentions are more supported by precedent and other aspects of the law, their likelihood for success should exceed the respondent's.

I also include two interaction terms including case strength. First, I interact case strength and oral argument grade. Budziak and Lempert (2015) suggest that oral argument performance is sensitive to, or may be conditioned by, case strength and that the litigant with legal reasoning more firmly grounded in precedent has an easier time explaining their argument in briefs, and finds it easier to justify his claims before the justices at oral arguments. This suggests that oral argument performance should matter less for litigants with superior legal quality because they will already have an advantage. I also interact legal quality with ideological compatibility. Past research demonstrates that the law matters (Richards and Kritzer 2002; Bailey and Maltzman 2008; Hansford and Spriggs 2006), and that legal factors can alter a justice's behavior regardless of his ideological preferences (Black and Owens 2009). I believe that legal quality can condition a justice's policy preferences. That is, a litigant with a superior legal argument is more likely to receive a justice's vote, regardless of their ideological compatibility.

Table 3.1: Oral Argument Control Variable Measurement

Variable	Measurement
U.S. Attorney	1 if non-Solicitor General U.S. attorney argues the case for the appellant/appellee.
Solicitor General	1 if the Assistant Solicitor General or actual Solicitor General argues the case for the appellant/appellee.
Washington Elite Attorney	1 if non-federal government attorney has a Washington DC address argues for the appellant/appellee.
Law Professor Attorney	1 if attorney is listed as a law school professor in the Martindale Hubbell directory in the year the year the case was argued or has a university address argues for the appellant/appellee.
Former Clerk Attorney	1 if attorney served as a clerk on the Supreme Court between 1921 and 1991 argues for the appellant/appellee.
Elite Law School Attorney	1 if the attorney attended an elite law school (Harvard, Yale, Columbia, Stanford, Chicago, Berkleley, Michigan, and Northwestern) argues for the appellant/appellee.
Difference in Litigating Experience	Log of the difference between petitioner and respondent's litigating experience.

3.1.2 Method and Results

The dependent variable is dichotomous, reverse or affirm. I use a logistic regression model with robust standard errors clustered on justice (Johnson, Wahlbeck and Spriggs 2006). Robust standard errors are included because I am modeling individual justice votes across multiple cases, which may lead to correlated errors by justice.

The results of the logistic regression are shown in Table 3.2. The middle column of the table displays Johnson, Wahlbeck and Spriggs's (2006) original model.[2] The right column displays the case strength model, which is the same as the original model with the addition of

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[2]This is their original model using the same sample of data as the case strength model from 1972-1993 to allow for easier comparison.

case strength and the interaction terms between case strength and oral argument grade, and case strength and ideological compatibility. Coefficients produced by maximum likelihood models are not useful for interpreting effect size but the results of the case strength model support Johnson, Wahlbeck and Spriggs's (2006) original findings. The coefficient direction and significance remain the same in the case strength model for all of the variables included in the original model.

With regard to model fit, the Akaike and Bayseian information criterion have smaller values for the case strength model, which suggest that this model is a better fit of the data. Percent correctly predicted is also improved by the case strength model. Another measure of fit is the area under the receiving operating curve (ROC). This is a discrimination measure that describes how well the model does at distinguishing the reverses (dependent variable equals 1) from the affirms (dependent variable equals 1) based on the parameters included in the model. The original model has a ROC value of .746. The case strength model is significantly better (p < .05) at discriminating between reverse and affirm outcomes with a ROC value of .773. To further discuss the model results I use plots of predicted values instead of the table of coefficients.

Table 3.2: Logistic Regression Model of the Justices' Propensity to Reverse

	Original Model	Case Strength Model
Case Strength		0.255*
		(0.032)
Case Strength * Ideological Compatibility		−0.033*
		(0.007)
Case Strength * Oral Argument Grade		−0.100*
		(0.014
Ideological Compatibility	0.352*	0.463*
	(0.031)	(0.037)
Oral Argument Grade	0.217*	0.463*
	(0.056)	(0.070)
Ideological Compatibility * Oral Argument Grade	0.055*	0.041*
	(0.007)	(0.007)
Case Complexity	0.180	0.064
	(0.101)	(0.102)
Case Complexity * Oral Argument Grade	−0.112	0.023
	(0.121)	(0.123)
U.S. Appellant	1.000*	0.929*
	(0..180)	(0.189)
U.S. Appellee	−0.953*	−0.896*
	(0.135)	(0.133)
SG Appellant	0.200	0.013
	(0.113)	(0.110)
SG Applee	0.076	−0.121
	(0.155)	(0.155)
Washington Elite Appellant	0.556*	0.571*
	(0.157)	(0.152)
Washington Elite Appellee	0.240	0.250
	(0.158)	(0.172)
Law Professor Appellant	−0.745*	−0.653*
	(0.185)	(0.215)
Law Professor Applee	−1.893*	1.919*
	(0.289)	(0.311)
Clerk Appellant	−0.243*	−0.355*
	(0.117)	(0.114)
Clerk Appellee	−0.359	−0.289
	(0.270)	(0.281)
Elite Law School Appellant	0.046	−0.052
	(0.109)	(0.113)
Elite Law School Applee	−0.040	0.102
	(0.086)	(0.082)
Difference in Litigating Experience	−0.104*	−0.117*
	(0.019)	(0.019)
Constant	0.251*	−0.541*
	(0.042)	(0.107)
N	2262	2262
AIC	2660.891	2567.978
BIC	2741.027	2648.114
Log Likelihood	−1316.445	−1269.989
Percent Correctly Predicted	70.11%	72.33%

Robust standard errors in parentheses

* denotes p< 0.05 for two-tailed test
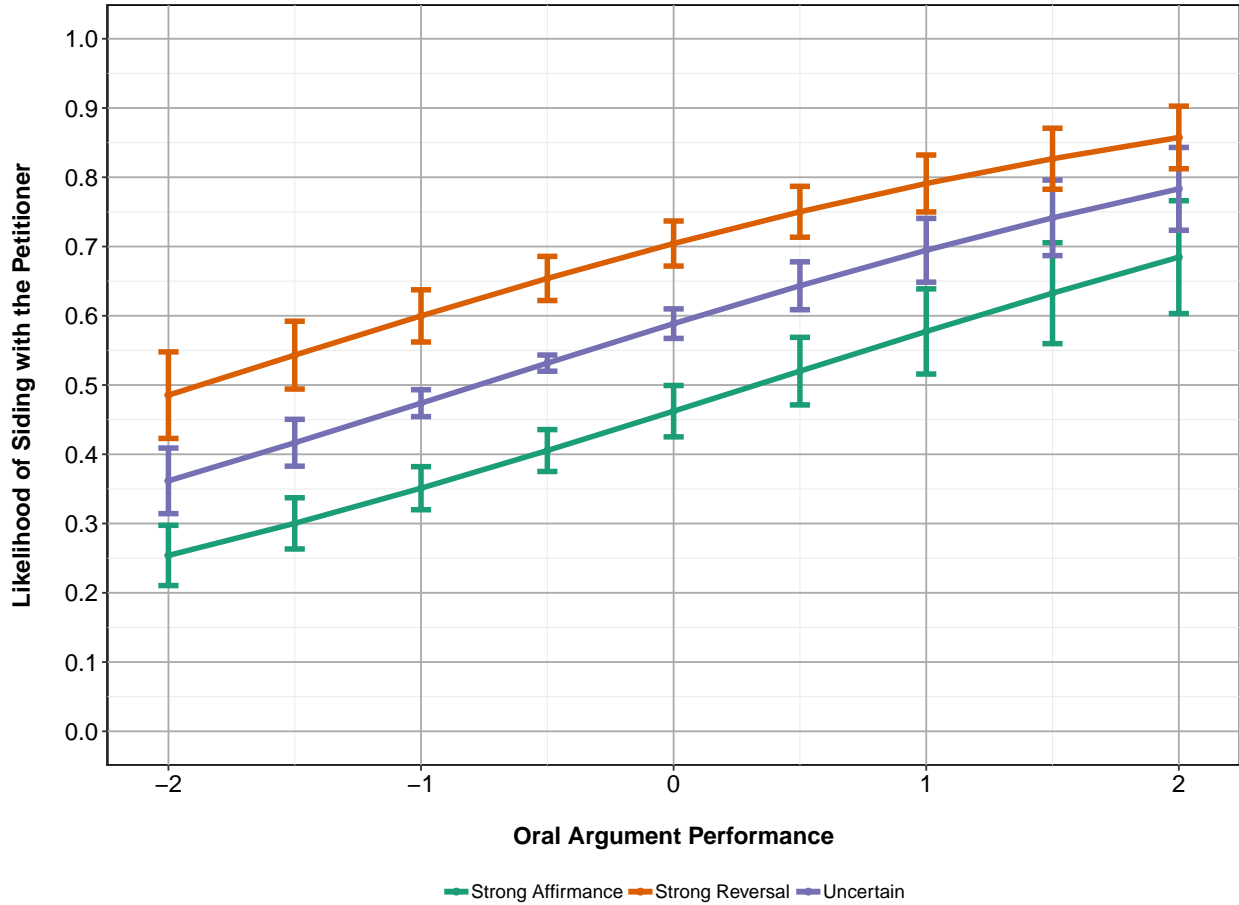
Figure 3.1: **Likelihood of a Reversal Across Oral Argument Performance** - The above plot shows the likelihood of siding with the petitioner for three levels of case strength across oral argument performance. The green line represents the law supporting a strong affirmance or a favorable outcome for the respondent. The purple line is when the law is uncertain and the case could go either way and the orange line represents cases when law favors the petitioner. The vertical bars are 95% confidence intervals. All other continuous variables are held at their means and categorical variables are held at their modes.

Figure 3.1 displays the likelihood of a justice voting for the petitioner at three different levels of case strength (strong affirmance, uncertain, and strong reversal) across oral argument grades.[3] Recall that oral argument grades are coded as the difference between the petitioner and respondent's grades, and higher values on this variable indicate a better performance at oral argument by the petitioner. The orange line demonstrates that even if the petitioner's oral argument performance is downright awful, if he has a stronger legal

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[3]I include three for ease of interpretation and visual clarity.

argument to fall back on, his likelihood of reversal, or winning his case, is 49%. This means a petitioner's attorney can make a complete fool of himself at oral argument and still have a 50-50 chance of a favorable outcome. That being said, in an average case that has equally matched oral advocates (oral argument performance equal to 0), if the petitioner has a superior legal argument it increases their likelihood of success by 24 percentage points, a 54 percent change. Even when the petitioner runs circles around the respondent during oral arguments and has a very good performance and is still favored, his odds of success increase by 17 percentage points, a statistically significant difference.

This finding lends some support to Budziak and Lempert's (2015) supposition that there is another factor, likely related to the legal strength of a case missing from Johnson, Wahlbeck and Spriggs's (2006) original analysis. This is not to say that oral argument performance does not matter. Oral argument performance is a positive and significant predictor of case outcomes. However, case strength can lead to a successful outcome for the petitioner even when oral argument performance is poor, and only the most exceptional oral argument performance can make up for an inferior legal argument.

Next, Figure 3.2 displays the relationship between case strength and ideological compatibility. I theorized that legal quality can help overcome ideological differences, and I find some support for this hypothesis. When a justice and the petitioner are at opposite ends of the ideological spectrum and the petitioner has a weak legal argument, his chances of winning are less than 12%. Yet, if the same petitioner were to have a strong legal argument, his chances of winning surpass 28%. While this is only a modest increase, these are ideologically extreme justices. Of the fifteen justices in the data, only Douglas, Marshall, and Rehnquist are this extreme. Take for example Chief Justice Burger, a staunch conservative throughout his career with a compatibility score that ranged between -1.25 and -1 for liberal litigants. When a liberal litigant petitioned the Court Justice Burger could be persuaded to vote in their favor if they possessed a stronger legal argument. This suggests that the law can have

a constraining effect on justices' decision on the merits. That being said, when a more ide-
ologically extreme justice (i.e., Douglas, Marshall, and Rehnquist) and the petitioner in a
case are ideologically congruent, the strength of a litigant's case is insignificant to their final
decision. This is consistent with the results from the first chapter that finds that ideological
extreme justices that also finds that law does not influence their final decision on the merits.
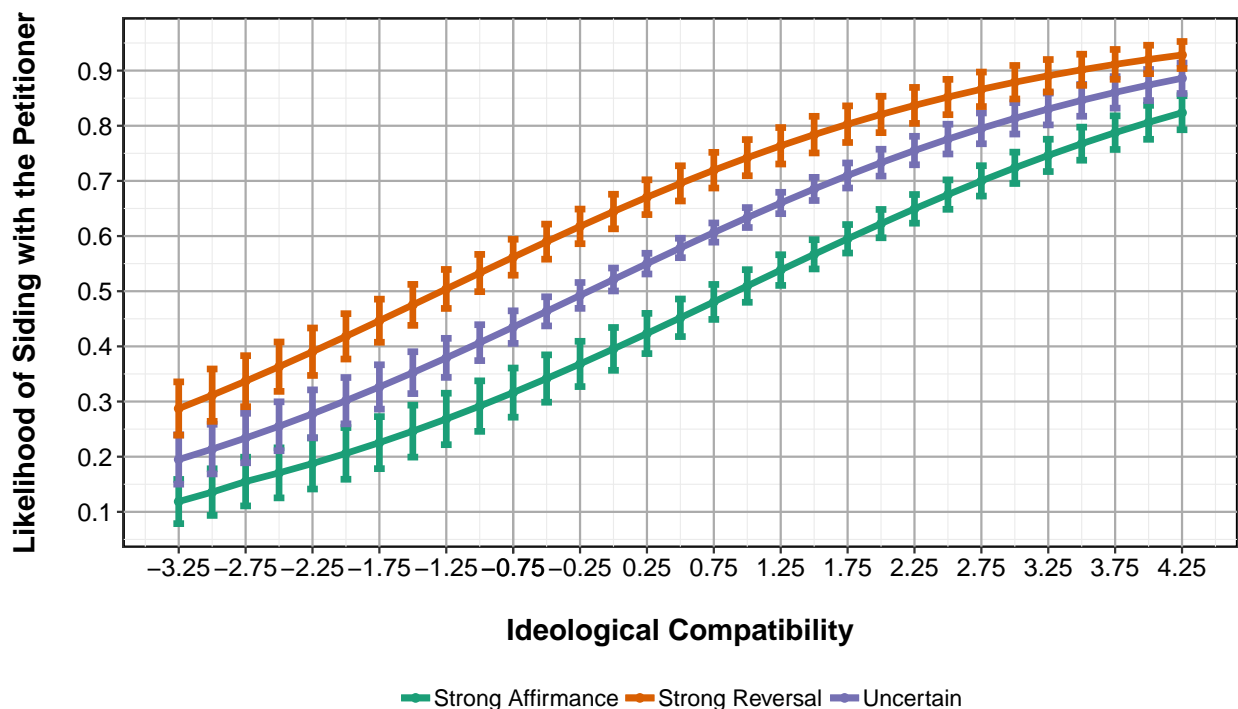
Figure 3.2: **Likelihood of a Reversal Across Ideological Compatibility** - The plot displays the
likelihood of a vote for the petitioner at three levels of case strength across ideological compatibility.
Vertical lines around that estimates are 95% confidence intervals. All continuous variables are held
at their means and categorical variables are held at their modes.

3.1.3 Discussion

The above findings demonstrate the importance of incorporating a measure of law such
as case strength into models of judicial decision making. An attorney whose argument has
the strong support of law is significantly more likely to succeed before the Court even if
their opponent performs better during oral arguments. Additionally, law has the ability to
constrain most justices from voting with their policy preferences. These findings do lend

support to Budziak and Lempert's (2015) hypothesis, but it does not discount Johnson, Wahlbeck and Spriggs's (2006) original findings. Oral argument performance still has a positive and significant effect on success before the Court. This means that skeptics of the importance and significants oral arguments, and even the justices themselves, are still influenced by these proceedings.

3.2 Case Strength and Strategic Responses to Majority Opinions

After oral arguments justices retire to their conference room where many decisions must be made before the public and litigants learn of the Court's final decision. First, the justices place their initial vote in order of seniority starting with the chief justice. Then, the chief or most senior justice in the majority coalition assigns the opinion. Although they placed their initial votes, their decisions are not set in stone. Once the opinion author completes the first draft of the opinion, he circulates it to the other justices, and they must decide how to respond. As Maltzman, Spriggs and Wahlbeck (2000) demonstrate, a justice can generally respond in one of seven ways: he can choose to (1) join the majority opinion, (2) issue a wait statement, (3) make a suggestion, (4) make a threat (5) state intentions to write a separate opinion, (6) join or circulate a concurrence, or (7) join or circulate a dissent. Many have examined how legal factors or discrete aspects of law influence the final decision on the merits (Bailey and Maltzman 2008; Bartels and O'Geen 2015; Hansford 2004; Richards and Kritzer 2002), however law's influence at earlier stages of the decision making process, like opinion bargaining, are still unsettled. While Maltzman, Spriggs and Wahlbeck (2000) control for policy preferences, strategic interactions, and contextual controls like when the case was heard, its salience, and who was assigned to author the opinion, they fail to account for legal reasons this bargaining may or may not take place.

There are theoretical reasons to believe that law influences the opinion bargaining process. Justices are seekers of their preferred policy position (Epstein and Knight 1998, 2000), but policy preferences likely play out on the poles of opinion bargaining. That is, for an average

case if a justice prefers to affirm (reverse) and the majority is reversing (affirming), it is unlikely justices will find themselves in the majority aside for some legal reason or he is on the fence. If for some reason he is in the majority and still prefers the to affirm (reverse), his likely response will be to sign-on or circulate a dissent. On the other hand, a justice that agrees with the disposition of the majority opinion but disagrees with certain legal aspects or reasoning behind the disposition less-drastic responses would be appropriate such as issue a wait statement, offer a suggestion, or articulate a threat to gain leverage for his bargaining. He may even circulate or join a concurrence if his policy preferences lead him to dispositionally agree with the majority but disagree as to the legal justification.

In this section I will reexamine Chapter 3: *Strategic Response to Draft Opinions* from Maltzman, Spriggs and Wahlbeck's (2000) book "Crafting Law on the Supreme Court: The Collegial Game" to determine if, and how, law and legal consideration impact the opinion bargaining process. After demonstrating that the chief justice strategically assigns majority opinions the authors seek to explain the bargaining that occurs after the first draft is circulated. They find the the ideological distance between the bargaining justice and the opinion author and coalition mean are significant predictors of the bargaining response. Ideological preferences should still predict bargaining, but law and opinion it supports should also influence this process. That is, justices do not just bargain over political policy but they also bargain over legal policy.

3.2.1 Data and Measures

Maltzman, Spriggs and Wahlbeck (2000) examine justices' responses to majority opinion drafts using data from the Burger Court (1969-1986) collected from the archives of Justice William Brennan.[4] They model strategic responses to opinions in two ways, the first is by

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[4]To include law and legal reasoning in the model, I will start my analysis with the 1972 term. My data come from Justice Harry Blackmun's bench memos and although Justice Blackmun was appointed to the Court only one year after Chief Justice Burger, his bench

using a simple dichotomous indicator coded as 0 if a justice joined the majority opinion and 1 if they chose to bargain in some way (1). This modeling strategy lacks the nuances of opinion bargaining. As Maltzman, Spriggs and Wahlbeck (2000) acknowledge, this dependent variable fails to distinguish between bargaining options, which is where I expect the law and the strength of a case to influence the justices' decisions.[5] Therefore, I will focus my attention on the second model. In this model the dependent variable is a categorical variable of members of the conference majority coalitions' first responses to majority opinion author's draft. As previously stated, the categories are: (1) justice joins majority opinion, (2) justice issues wait statement, (3) justice makes a suggestion, (4) justice articulate a threat, (5) justice signals he will join or circulate a separate opinion, (6) justice circulates or joins draft of concurring opinion, or (7) justice joins draft of dissenting opinion. Due to the categorical nature of this dependent variable, I follow the authors and employ a multinomial logistic regression model. This model estimates the likelihood of each outcome relative to a baseline category. I select the "join majority" category as the baseline since that is the only option that does not involve any bargaining.

The authors' primary independent variables of interest represent justices' policy considerations. The first is the issue-specific ideological distance between the majority opinion author and each justice of the original coalition for every case. This variable is the absolute value of the difference between a justice's percentage of liberal votes in a case-specific issue area (issue areas from Epstein et al. (2019)) and the majority opinion author's percentage of liberal votes in the same issue area. Also of interest is the coalition distance, which is the ideological distance between the mean of the conference majority coalition (excluding the author) and each justice. These ideology scores are also specific to each of the Supreme Court Database's twelve issue areas (Epstein et al. 2019). For both of these variables, as

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memos did not become consistent in their form or purpose until the 1972 term.

[5]The original dichotomous dependent variable model and the same model with the addition of my measure of case strength is available in Table B.1 in the appendix.

the ideological distance decreases, the less likely the bargaining justice will circulate a wait statement, submit a suggestion, make a threat, or will write or signal a concurrence or dissent.

The next set of key independent variables are used to examine strategic interactions between the justices. The first is the winning margin, which captures the number of votes needed to form a winning coalition. This is calculated by subtracting the number of justices who voted with the majority opinion assigner during conference from the number of justices necessary to form the winning majority. When the winning margin is large, which means the majority coalition is small and needs to gain or maintain justices, a justice should be less likely to circulate a draft of a concurrence or dissent, but more likely to circulate a wait statement, suggestion, threat, or signal he will write a separate opinion. The other strategic variable captures the repeated collegial game the justices engage in. A justice may be more hesitant to lend his support to a majority opinion if the author has not cooperated with him in the past. Therefore, a justice is more likely to engage in all bargaining options over signing the majority opinion if the author has not cooperated in the past. To measure this variable the authors calculated the percentage of the separate opinions written by the bargaining justice that were joined by the majority opinion author in the previous term and then regressed this percentage on ideological distance in order to ensure this variable is not a product of shared preferences. The residual of this model is then used to represent cooperation in the current models.

The authors also control for numerous contextual factors. For expediency, these are listed in the table below in Table 3.3, along with a description of how they are measured.

Table 3.3: Contextual Control Variable Measurement

Variable	Measurement
Political Salience	Number of amicus briefs over or under than the average number of amicus briefs for that term.
Legal Salience	1 if the Court struck down a law as unconstitutional, overturned, or altered precedent.
Case Complexity	Factor score from a factor analysis of the number of issues raised by the case, the number of legal provisions relevant to a case, and the number of opinions released in a case.
End of Term	Number of days when the opinion was assigned until July 1, which is traditionally the end of the Court's term.
Workload	Number of majority and separate opinions the justice was working on the day the first draft of the majority opinion was circulated.
Chief Justice	1 if the justice is the chief justice, 0 otherwise.
Freshman Author	1 if the justice was in their first or second term, 0 otherwise.
Expertise	Number of dissents or concurrences a justice wrote in a specific issue area divided by the number of similar-issue cases that made it to the Court in the preceding term.

I argue that a decision to join the majority unconditionally or write a dissent is primarily determined by a justice's policy preferences or their ideological distance from the majority opinion coalition. If a justice were compelled to vote with the majority at conference it is likely because he preferred the dispositional case outcome selected by the majority. Once the disposition is selected subsequent opinion decisions are related to the legal reasoning and justification to support the disposition. Therefore, any response by a member of the majority coalition other than to join the opinion are due, in part, to the strength of the law or legal reasoning supporting the majority's decision.

To account the relationship between law and the majority opinion's disposition I recode my case strength measure from Chapter One of this dissertation. This measure is derived

from Justice Harry Blackmun's bench memoranda. These memos are written after a case is granted review but prior to oral arguments. They contain a summary and analysis of the case at hand and make a final recommendation. This recommendation is twofold. It is dispositional in the sense that it says reverse or affirm, but it is also supported with the legal reasoning to support how the law leads to that decision. I use the dispositional recommendation to craft my measure of case strength. It is an ordinal measure coded one to five where one represents the law strongly support for an affirmance and five represents that the law strongly favors a reversal. To determine if the majority opinion position is supported by law, create a majority-law agreement variable. This variable takes on a value of 5 if the majority disposition is strongly supported by the law.[6] That is, if the majority writes an opinion to reverse (affirm) and the law strongly favors a reversal (affirmance). This variable takes on the value of 4 when the law weakly supports the majority's position. Like the original case strength variable, when the law neither supports nor opposes a particular position, this variable is coded as 3. It takes on a value of 2 when the law weakly opposes the majority's position and 1 when it is strongly in conflict with the majority's decision. A value of 1 represents when law suggests a reverse (affirm) and the majority affirms (reverses) the lower court's decision.

When the law is clear and strongly supports the majority's position there should be less to bargain over as far as the content of the opinion. Justices' archival materials reveal, justice's suggestions can be as simple as asking for a word change or omission or inclusion of a citation.[7] Therefore, when a justice agrees with the majority's disposition and the law strongly supports the same outcome, a join or offering a simple suggestion are the most likely

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[6]Majority disposition is determined by the *caseDisposition* variable from the Supreme Court Database.Epstein et al. (2019) All dispositions excluding 2 (affirm) and 9 (DIG) are coded as relief for the petitioner and 2 and 9 are coded as relief for the respondent.

[7]See, for example, Justice Sandra Day O'Connor's memo on February 12 ,1985, to Justice William Brennan in the case *Winston and Davis v. Lee* (83-1334). She asks him to omit the *Tennessee v. Garner* citation on page five of his opinion. If he complied she would be happy to join.

responses. When the law is less clear or not as strongly in favor of the majority's position this may give rise to apprehension. Therefore, a justice may issue a wait statement to see what other opinions circulate or even circulate or join a concurrence. Therefore, when the law weakly favors the majority's position, this means there could be other possible ways to justify the Court's legal position on an issue. This could result in the same dispositional outcome but for different reasons. When law and the majority opinion are in agreement the following should hold:

> ***Law-Majority Strong Agreement:*** If the law strongly supports the majority opinion, a justice should be more likely to join the majority, or make a suggestion. A justice should be less likely to issue a wait statement, articulate a threat, signal intentions for a separate opinion, or state intentions to author or join a concurring or dissenting opinion.

> ***Law-Majority Weak Agreement:*** If the law weakly supports the majority opinion, a justice should be more likely to circulate a wait statement or make a suggestion, signal intentions for a separate opinion, or state intentions to author or join a concurring opinion. A justice should be less likely to articulate a threat or state intentions to author or join a dissenting opinion.

Another scenario is when the law is unclear. In these instances the law could feasibly support the petitioner or respondent. This could have a number of effects on the justices. Those who are indecisive may be more likely to issue a wait statement to see how each opinion develops. Most likely, ambiguous law creates indecision amongst the justices and increases the likelihood of separate opinions. As a result, those who joined the original majority opinion may opt to write a concurrence or signal intentions for some type of separate opinion.

> ***Law-Majority Uncertain:*** If the law is ambiguous and feasibly supports the petitioner or the respondent, the likelihood of them responding with a wait state-

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ment, signaling with intentions for a separate opinion, or to join or circulate a concurrence should increase.

Finally, the majority's position may not always be in agreement with the position the law supports. However, the justices in the data already voted with the majority at conference indicating that they prefer this disposition. It is possible that through further scrutiny and discussion a justice could be compelled to switch their vote because they feel that the law constrains their preferences or because the initial draft of the majority opinion was not what they had in mind. If this occurs a justice has a number of possible options, they could wait to see how the opinions develop, threaten to write a separate opinion, of just abandon their initial vote for the minority. Weak and strong conflict between the law and the majority opinion should result in similar bargaining responses but with strong conflict leading to a higher likelihood because the law is less aligned with the majority's position.

> ***Law-Majority Weak Conflict:*** If the law weakly conflicts with the majority opinion, a justice should be more likely to issue a wait statement, signal to write a separate opinion, or declare intentions to circulate or join a dissent. He should be less likely to join the majority opinion or write a concurring opinion.

> ***Law-Majority Strong Conflict:*** If the law strongly conflicts with the majority opinion, a justice should be more likely to issue a wait statement, threaten to write a separate opinion, or declare intentions to circulate or join a dissent. He should be less likely to join the majority opinion or write a concurring opinion.

3.2.2   Method and Results

The dependent variable is nominal and made up of the seven ways in which a justice can respond to the majority opinion author's first draft: join, write wait statement, make a suggestion, make a threat, signal to write separate opinion, or state intentions to write or

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Table 3.4: Multinomial Logistic Regression Model of Justices' Strategic Responses to the Majority Opinion Author's First Draft

	Wait	Suggestion	Threat	Separate	Concur	Dissent
Legal Consideration						
Majority Coalition-Law Agreement	−0.029	−0.004	0.177*	−0.014	−0.144*	0.050
	(0.041)	(0.036)	(0.045)	(0.045)	(0.050)	(0.044)
Policy Preferences						
Author Distance	0.021*	0.027*	0.042*	0.035*	0.018*	0.026*
	(0.005)	(0.004)	(0.007)	(0.005)	(0.005)	(0.005)
Coalition Distance	0.010	−0.003	−0.022	0.010*	0.042*	0.003
	(0.014)	(0.012)	(0.013)	(0.004)	(0.007)	(0.007)
Strategic Interaction						
Winning Margin	−0.145*	0.071	0.200*	0.063	−0.159*	−0.057
	(0.045)	(0.044)	(0.056)	(0.056)	(0.054)	(0.038)
Cooperation	−2.964*	−2.176*	−1.689	−1.520	−2.583*	−2.663*
	(0.973)	(0.508)	(1.394)	(0.843)	(1.065)	(0.890)
Contextual Controls						
Political Salience	0.141	0.148*	0.188	−0.021	−0.068	0.146
	(0.097)	(0.075)	(0.121)	(0.054)	(0.096)	(0.097)
Legal Salience	0.064	0.109	−0.303	0.569*	0.210	0.153
	(0.267)	(0.142)	(0.366)	(0.180)	(0.317)	(0.243)
Case Complexity	−0.115*	0.239*	0.085	0.077	0.148*	0.050
	(0.043)	(0.065)	(0.100)	(0.043)	(0.044)	(0.079)
End of Term	0.002*	0.003	0.001	0.077	−0.001	0.004*
	(0.001)	(0.001)	(0.001)	(0.043)	(0.001)	(0.001)
Workload	0.001	0.011	−0.003	−0.006	−0.013	0.031*
	(0.024)	(0.029)	(0.025)	(0.016)	(0.018)	(0.010)
Chief Justice	−0.595*	−0.811*	−0.876*	0.158	−0.656*	−0.639*
	(0.180)	(0.181)	(0.172)	(0.107)	(0.146)	(0.104)
Freshman Author	−0.301	0.030	0.543*	−0.065	−1.160*	0.359
	(0.207)	(0.308)	(0.255)	(0.131)	(0.510)	(0.261)
Expertise	−0.063	−0.044	0.099*	0.137*	0.053	0.036
	(0.047)	(0.054)	(0.037)	(0.037)	(0.056)	(0.052)
Constant	−4.203*	−4.945*	−6.115*	−3.330*	−3.179*	−5.313*
	(0.670)	(0.535)	(0.481)	(0.338)	(0.538)	(0.580)
N	7563					
Log Likelihood	−6028.889					
AIC	12075.777					
BIC	12138.157					

Standard errors in parentheses

* $p < 0.05$

join concurring or dissenting opinion. To model this type of variable I utilize a multinomial logistic regression model. Multinomial logistic models estimate n-1 binary models for each category in the dependent variable excluding one category as the baseline. Joining the majority opinion is the baseline for this model. Additionally, like in the oral arguments model, Justice Blackmun's strategic behavior is excluded from this model in order to obtain conservative estimates that are not simply a result of Blackmun following the advice of his law clerks.

Each column in Table 3.4 represents one of the categories of the multinomial logistic regression model, excluding the baseline category. The coefficients from maximum likelihood are not useful for interpreting the effects so I will begin with Figure 3.3, which shows the average marginal effect of majority coalition-law agreement for each response type. More specifically each point estimate demonstrates the effect of moving from strong conflict to strong agreement between law and the majority opinion for each response type.
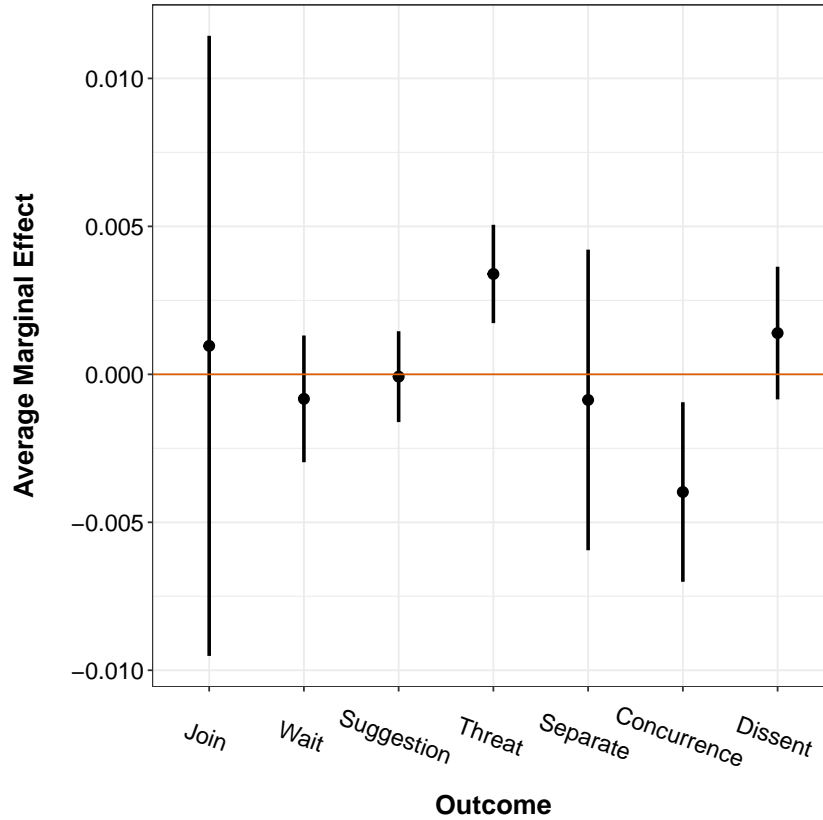
Figure 3.3: **Average Marginal Effect of Majority Coalition-Law Agreement on Bargaining Response** - Each point represents the average marginal effect of majority coalition-law agreement on each bargaining response. Vertical lines around that estimates are 95% confidence intervals. All continuous variables are held at their means and dichotomous variables are held at their modes.

As expected, as law-majority agreement becomes strong the likelihood of join increases. Similarly the likelihood of wait and suggestion decreases when the majority opinion is strongly supported by law, none of these relationships are statistically significant. Unexpectedly, as the support of the law for the majority opinion grows stronger the likelihood of a threat significantly increases. The likelihood of writing a separate opinion decreases as expected, but law-majority agreement does not have a significant effect on justices writing a separate opinion. It does however, exert a significant and negative effect on the likelihood of writing a concurrence. Strong majority-coalition and law agreement has an insignificant effect on the likelihood of a dissent.

To further examine the relationship between law majority coalition agreement and the

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likelihood of a justice responding with a threat, the relationship is plotted in the left panel of Figure 3.4. The x-axis shows the five levels of law majority coalition agreement and the y-axis is the likelihood of a justice responding with a threat. When there is strong conflict between the law and the majority's position the likelihood of a threat is 0.01. This likelihood increases to .02 when there is strong agreement. This unexpected finding may be a product of the terms included in the analysis. My data begin in 1972 and extend through 1986, which encompasses nearly the entire Burger Court. Chief Justice Burger succeeded Chief Justice Warren, whose leadership guided the country through significant liberal decisions in individual and civil rights; and many of the liberal justices on the Court who served with Warren were determined to maintain the significant changes they helped decide. As a result, Justices Brennan and Marshall would join the conservative majority in order to try and control the opinion content, but if it drifted too far from their reach they would be forced to dissent (Woodward and Armstrong 1979).
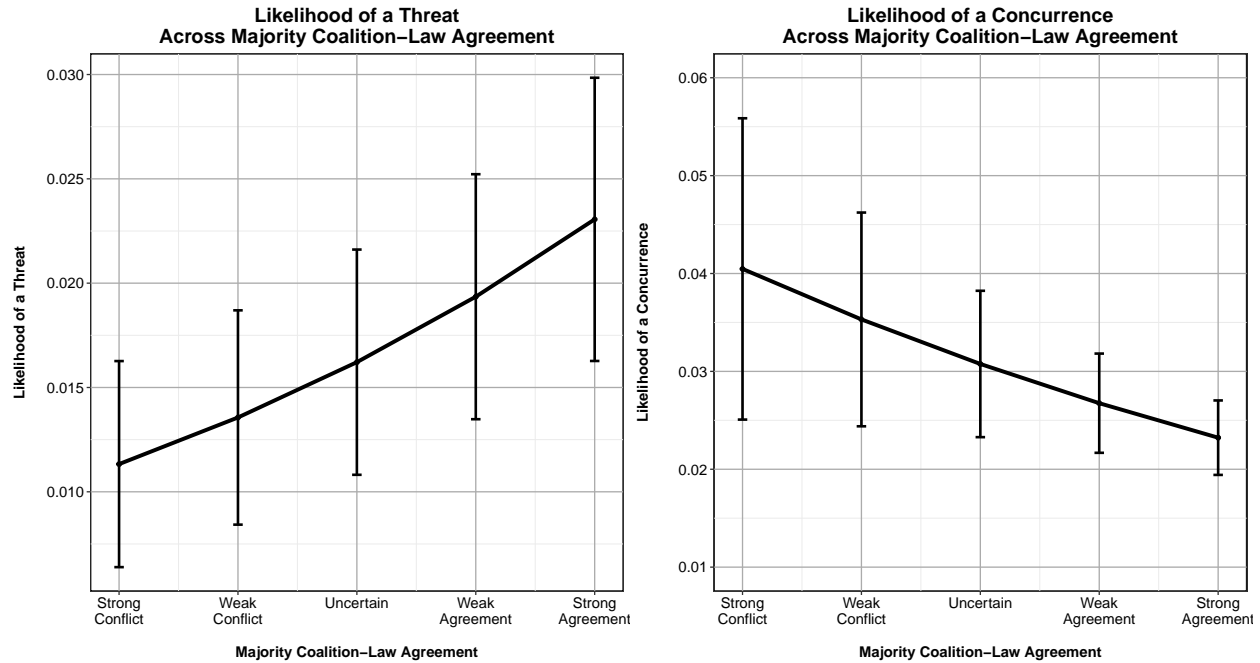
Figure 3.4: **Likelihood of Threatening and Conurring Responses Across Majority Coalition-Law Agreement** - The left panel displays the likelihood of a threatening response given the different levels of majority-law agreement. The right panel shows the likelihood of a concurrence across the same range. Vertical lines around that estimates are 95% confidence intervals. All continuous variables are held at their means and dichotomous variables are held at their modes.

The right panel displays the relationship between the likelihood for a concurrence and majority coalition-law agreement. As law's support for the majority's position grows stronger, the likelihood of a concurrence decreases from 0.04 to 0.02. This is consistent with Pamela Corley's (2010) work. Corley writes, "Concurrences provide justices with discretionary opportunities to voice their legal perspectives" (2010, 8). Specifically, she finds that ideological compatibility between a justice and the majority opinion author has virtually no effect on a justice's likelihood to author a concurrence. This is because a concurrence is the inability to reach the same legal justification for the same disposition. When the law strongly supports the majority's decision this means that the law clearly points in one direction, thus creating a consensus among the judges.

Multinomial regression models can be difficult to understand and interpret the results, so to provide further insight I created a dichotomous indicator of each level of majority coalition-

law agreement to examine the predicted probabilities of each level of majority coalition-law agreement exerts on each type of bargaining response. These are shown in Figure 3.5 and 3.6.[8]

Figure 3.5 shows the likelihood a justice joins the majority opinion across the different levels of majority coalition-law agreement. I hypothesized above, when law and legal reasoning support the majority opinion, justices should be more likely to join the majority. This influence should be greatest when there is strong agreement. I find support for this hypothesis. When the law and majority opinion are in agreement at any level, a justice is significantly more likely to join the majority opinion than when the law is uncertain. There is not a statistical difference in the likelihood of joining the majority opinion when the law supports the majority's position and when it is in disagreement. As previously discussed, this represents justices who will vote with the majority regardless of law and legal reasoning because their policy preferences compel them to do so.

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[8]The coefficient table for this model can be found in the appendix, Table B.2.
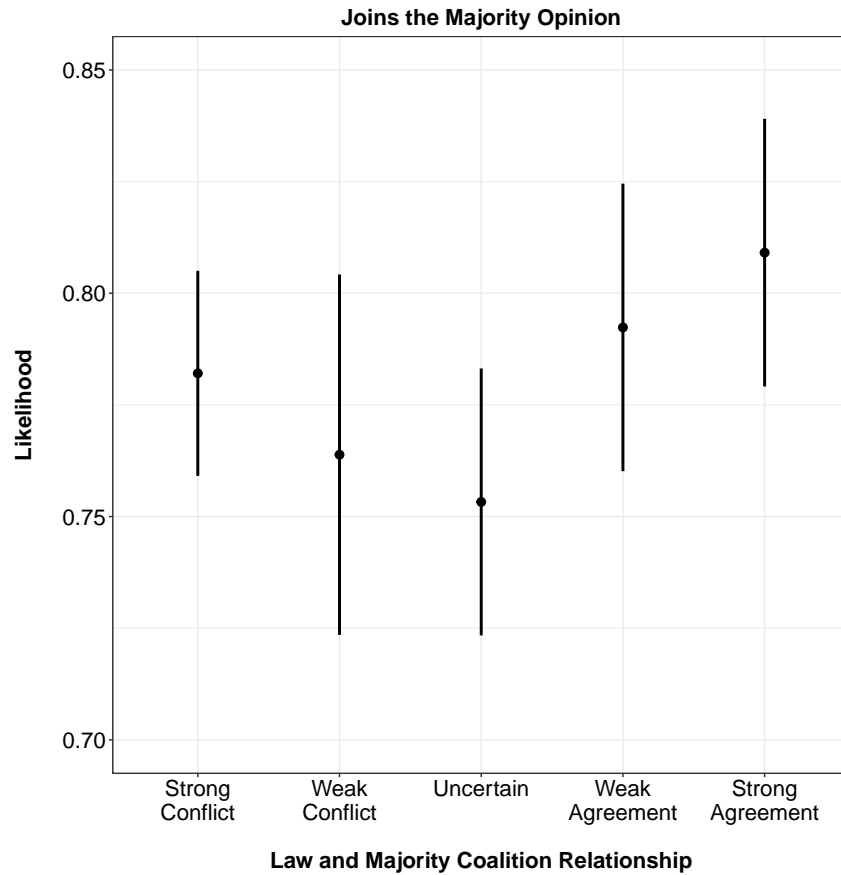
Figure 3.5: **Likelihood of Joining the Majority Across Majority Coalition-Law Agreement** - These are the predicted values of joining the majority opinion at each level of majority opinion-law agreement. Vertical lines around that estimates are 95% confidence intervals. All continuous variables are held at their means and dichotomous variables are held at their modes.
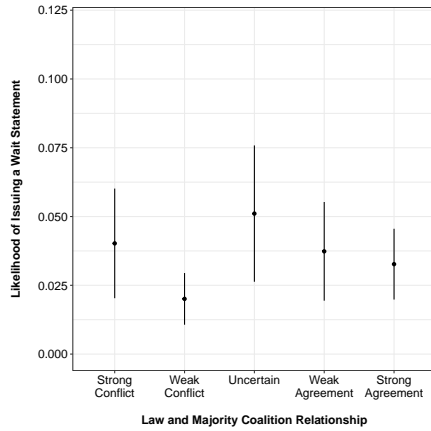
(a) Likelihood of a Wait Statement
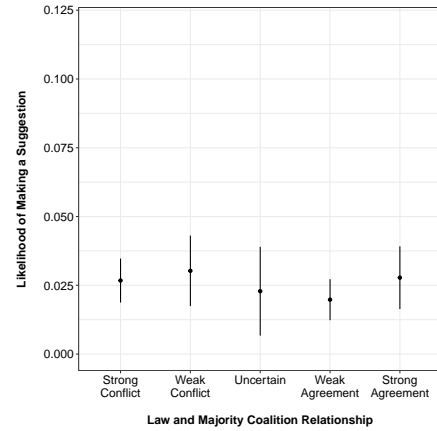
(b) Likelihood of a Suggestion
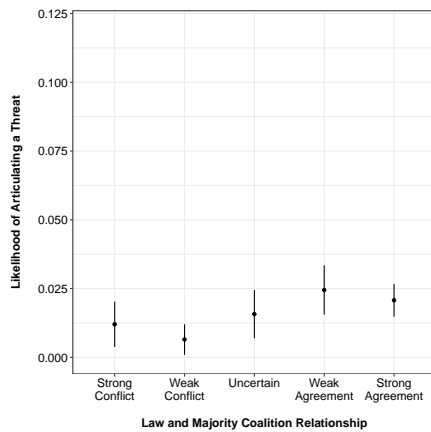
(c) Likelihood of a Threat
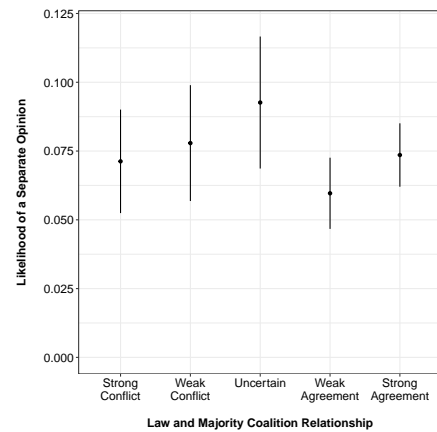
(d) Likelihood of a Separate Opinion
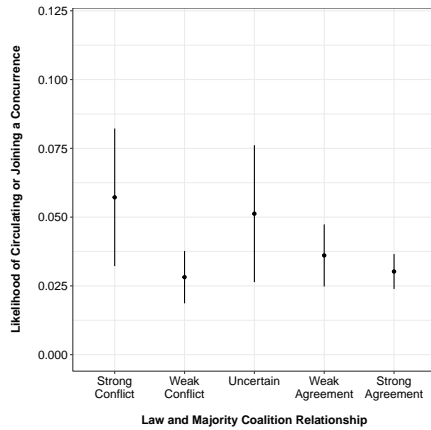
(e) Likelihood of a Concurrence
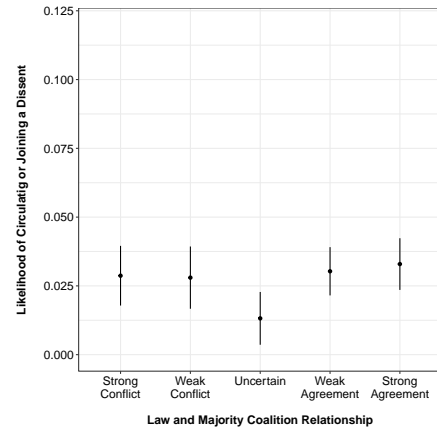
(f) Likelihood of a Dissenting Opinion

Figure 3.6: **Predicted Probabilities of Bargaining Responses Across Across Majority Coalition-Law Agreement** - The plots above show the predicted probabilities of each bargaining response across each level of majority-law agreement. Vertical lines around that estimates are 95% confidence intervals. All continuous variables are held at their means and dichotomous variables are held at their modes.

Figure 3.6 displays the predicted values for the six other response types. The first plot in the figure displays the likelihood of issuing a wait statement across the different levels of majority coalition-law agreement. I hypothesized that strong conflict, weak conflict, uncertainty, and weak agreement should all result in a higher likelihood of a wait statement because there is some level of disagreement or wavering support between law and the majority's position, and strong agreement should result is a lower likelihood of a wait statement. I find that that when the majority's position is strongly supported by law, a justice that originally joined the majority at conference is significantly less likely to issue a wait statement than when the law is uncertain. However, I find that when law and the majority's position disagree slightly, a justice is significantly less likely to issue a wait statement than any other level of law-majority agreement or disagreement.

The second plot in the top row of Figure 3.6 depicts the likelihood of a justice responding with a suggestion. I theorized that suggestions should be most likely when the majority's opinion is well supported by law. These suggestions can be simple word choice changes to more substantial changes related to the narrowness of the opinion, yet if the justice already voted for the majority's position and the law supports this position they should be less likely to want to change their position and more likely to want to work to improve the opinion and make it satisfactory. I do not find support for this hypothesis. The likelihood of making a suggestion across the range of legal support for the majority's opinion does not significantly differ. The lone exception is when there is weak agreement and a is justice significantly less likely to make a suggestion than strong or weak conflict. When there is only weak support for the majority's position a justice may be more likely to try and improve the opinion in another way other than a suggestion.

The final plot in the top row of the figure is the likelihood of a justice responding by articulating a threat. First, I suggested that justices should be less likely to articulate a threat when the law squarely aligns with the majority's position. I do not find support for

this hypothesis, and in fact, I find the opposite to be true. Any level of legal support of the majority opinion makes a justice significantly more likely to make a threat than any level of conflict. This result echoes the results discussed above, and again, may be a product of the time period being analyzed.

Moving to the second row of Figure 3.6, I find support for my hypotheses on writing separate opinions. I hypothesized that uncertainty and ambiguity in the law will increase the likelihood of writing separate opinions and I find that legal uncertainty significantly increases the likelihood of a justice responding by signaling to write a separate opinion compared to legal agreement with the majority opinion. This suggests that legal support for the majority opinion helps to maintain that coalition from divulging into separate opinions. Relatedly, I find that strong legal support of the majority opinion significantly reduces the likelihood of a justice authoring a concurrence relative to strong conflict.

Lastly, I do not find support for my hypotheses on dissenting opinion responses. I theorized that legal agreement should make dissents less likely and uncertainty or conflict should make them more likely. The plot reveals that the likelihood of a justice joining or circulating a dissent is the same regardless if the law conflicts with the majority opinion or agrees with the majority opinion, however uncertainty in the law leads to a significantly lower chance of a justice joining or circulating a dissent. This could be due to the fact that the uncertainty and ambiguity leads a justice to revert to his policy preferences. He already voted to join the majority opinion so why switch positions?

The results of the rest of the independent variables in the model remain the same as the original model run on the same sample.[9] Author ideological distance remains a significant and positive predictor of all bargaining options relative to joining the majority draft. Similarly, the chief justice is significantly less likely to bargain than join. There is an improvement of fit in the model that incorporates legal considerations. Specifically the AIC decreases from 12095.422 to 12075.777 and the BIC experiences a similar reduction from

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[9]The table of results from this model can be found Table B.3 in the Appendix.

12157.802 to 12138.157. According to Long (1997) any reduction in the BIC greater than 10 lends "very strong" evidence that my model that incorporates legal considerations is preferred over the original.

3.2.3   Discussion

The results above demonstrate that justices do not only bargain over policy but they bargain over legal policy. This is a novel and significant finding because it demonstrates that while justices will try to persuade one another to achieve their preferred outcomes (Epstein and Knight 2000), negotiations extend past the political preferences to legal policy. A justice will bargain to craft an opinion in the way that he believes the Court is producing the best legal policy. Perhaps this bargaining on legal policy relates to the narrowness or broadness in which the opinion is written, or it could have to do with implementation and execution for the lower courts to follow. These results pave the way for future research to examine the content and justification or reasoning for each type of response with regard to legal policy.

These findings, however, are not without limitations. First, my measure of case strength, and therefore majority coalition-law agreement, is only based on the dispositional recommendation at the end of the bench memos. It fails to take uncertainty of legal reasoning into consideration. Take, for example, the following recommendation from *United States v. Donovan* (1976):

> I find the SG's proposed rule too narrow and full of holes to adopt. The best standard would be the normal probable cause standard that is applied in most determinations. That has the advantage of consistency and predictability, since government officials are presumably accustomed to judging their actions under it. If you are troubled too much by the administrative difficulties that the SG alleges would be encountered under a probable cause standard, then I would opt for Judge Godbold's solution. In either case, the suppression as to Donovan and Robbins should be affirmed. If probable cause is the standard, you should probably affirm for Buzzacco, too. If it is Godbold's test, then a remand would be better for him. Finally, the case should be remanded for a determination of

whether the Government was in good faith when it failed to include the names of Merlo and Lauer in the inventory (20).[10]

All of the legal justifications point toward the same dispositional outcome, affirm in part and remand. That being said the clerk offers three possible methods for reaching that decision: (1) the OSG's, (2) "the normal probable cause standard," and (3) Judge Godbold's solution. My measure fails to take the variation in legal reasoning into account when they all point towards the same outcome. If one of these justifications led to a straight affirmance and another one a reverse, the measure would account for this discrepancy. This is feasibly what the justices are bargaining over when the vote in the majority initially, which may explain some of the less-intuitive results.

One other possible limitation is that I had to use the final majority decision from the Supreme Court Database to determine the direction of the majority opinion (Epstein et al. 2019). As I mentioned previously, the justices' initial conference votes are not set in stone and in some cases the majority does not remain the majority if the coalition does not maintain five votes. Therefore, by using the Supreme Court Database to determine the final majority decision I am making the assumption that the final majority and initial majority are the same. While this is not ideal, this is currently the only information that is available. Justices place their initial votes during a secret conference and this data is currently unavailable to researchers, however hopefully conference note data will be available soon thanks to ongoing research by Black and Johnson (2017).

3.3 Conclusion

In this paper I demonstrated that law is an important consideration for justices' decision making, not just on the merits but at multiple stages of the judicial decision making process. First, I showed that law as captured by the petitioner's legal case strength, has a significant

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[10]Bench memorandum in *United States v. Donovan* (75-212). Located in the Supreme Court Case Files (Box 239, Folder #4) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

effect on case outcomes. A litigant with an abysmal oral argument performance can still succeed before the Court if they have a strong case well supported by law and legal reasoning. Furthermore, a strong case can compel justices who are ideologically opposed to a litigant's position to vote for them.

Next, I showed that law impacts Supreme Court justices' response to the first draft of the majority opinion. That is, the strength of the relationship between law the its support of the majority's position significantly influences the type of bargaining a justice attempts to respond with after the first draft of the majority opinion circulates. More specifically, as law's support for the majority opinion increases, the likelihood of a threat significantly increases. Conversely, the likelihood of a concurrence significantly decreases.

My findings contribute to the field's growing understanding that law and legal considerations impact justices' decision making (Bartels 2009; Bartels and O'Geen 2014; Bailey and Maltzman 2008; Black and Owens 2009; Hansford and Spriggs 2006; Richards and Kritzer 2002). This is both a normatively and positively important topic. Normatively, based on the Constitution the Supreme Court is supposed to be a different type of branch of the federal government. While the majority of people are legal realists and recognize that justices' preferences influence their decision making they believe they make these decisions in a principled fashion based on laws and legal reasoning. They expect the justices to be more than legislators in robes (Gibson et al. 2011). While research previously discussed demonstrated that justices are more than their political counterparts in the other branches of government, this paper helped expand this evidence by incorporating law directly into the models.

These findings and application are important for positive empirical judicial politics research. As shown by both the Johnson, Wahlbeck and Spriggs (2006) and Maltzman, Spriggs and Wahlbeck (2000) applications, law is a significant predictor in both merits outcomes and bargaining decisions and not accounting for its influence could lead researchers to bias or inaccurate inferences. Other areas ripe for testing law's influence include justices' question

asking behavior during oral arguments, how justices write their opinions, or how the public perceives the Courts decisions.

CHAPTER 4

QUALITY VERSUS QUANTITY: AMICUS CURIAE BRIEF INFLUENCE AND DECISION MAKING ON THE UNITED STATES SUPREME COURT

Not all of the Supreme Court's cases are intriguing, page turning disputes. Most of their cases fly under the radar of the average person, but this does not mean they are inconsequential. Take for example *C & A Carbon Inc. v. Town of Clarkstown* from the Court's 1993 term. Clarkstown passed a local ordinance that required all waste flowing in or out of town to be processed at their waste processing plant at a fee of $81 per ton. C & A Carbon Inc., a local waste management company, was caught transferring pre-processed waste directly to the out of town landfill and then processing it to avoid Clarkstown's fees. Ultimately, Carbone sued the Town of Clarkstown alleging that the waste processing ordinance violated the Commerce Clause by disrupting interstate commerce.

In addition to reviving briefs from the litigants, the Court accepted three amicus briefs: two on behalf of the Town of Clarkston and one advocating for Carbon. Considering that most cases the Court agrees to hear have no amicus briefs filed for either party, the three briefs in this case demonstrate the broad implications of the Supreme Court's decision (Collins 2008). The Chemical Manufacturers Association (CMA) and the National Solid Wastes Management Association (NSWMA) filed on behalf of the town, however in relaying the information conveyed in these briefs in a bench memo to Justice Harry Blackmun, his clerk described NSWMA's brief as largely repetitive of the petitioner's arguments. This typically suggests that the brief does not offer much help to the justices' decision making. Conversely, the National Association of Bond Lawyer's (NABL) brief filed on behalf of Carbon was described as "an excellent brief, worthy of substantial attention."[1] In the end, it is possible

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[1]Bench memorandum in *C & A Carbon Inc. v. Town of Clarkstown* (92-1402). Located in the Supreme Court Case Files (Box 637, Folder #6) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

that the NABL's brief was effective with a 6-3 ideologically mixed majority ruling in favor of Carbon.

Past research demonstrates that the number of amicus briefs filed in a case can increase the likelihood of success of appearing before the Court (Black and Owens 2009; Caldeira and Wright 1988; Caldeira, Wright and Zorn 1999) as well increase the likelihood of a positive outcome (Collins 2008). Yet recent work suggests that prestige over quantity is important when outside interests advocate before the Court. Powerful advocates, like the Office of Solicitor General (OSG) or the American Civil Liberties Union (ACLU) are notorious for experiencing policy success before the Supreme Court as amici (Box-Steffensmeier, Christenson and Hitt 2013; Lynch 2004). Is this because they are repeat players, have extensive resources, or are simply better at constructing amicus briefs? The answer is likely all of the above, but critical questions remain unclear: what makes an effective or ineffective amicus brief and do effective briefs impact Supreme Court case outcomes?

I argue that effective amicus briefs are those that offer new and well constructed arguments to augment the litigants' merits briefs. That is, an effective amicus brief does not simply reiterate their party's merits brief, they should bring alternative legal justifications and implications to the Court's attention. It should also be concise. I will demonstrate that amicus briefs that are poorly written and regurgitate the same argument as the litigant are not particularly useful for the justices.

Additionally, I believe that effective briefs should have a significant impact on case outcomes regardless of the number of additional briefs that are filed in the case. Archival materials suggest that justices do not read all of the amicus briefs filed in a case and instead focus their attention on certain briefs, therefore these briefs should have a stronger impact on the justices' decision making.

I find that there are significant differences between amicus briefs that are effective, briefs that are neither effective or ineffective, and ineffective amicus briefs. Unsurprisingly, one of

the most effective brief writers is the Solicitor General. I also find that effective amicus briefs have a significantly greater impact on justices' voting behavior, even after controlling for the presence of other briefs. Additionally, I find that quantity over quality isn't necessarily preferred in all cases as it is at the agenda stage (Caldeira and Wright 1988; Black and Owens 2009). In fact, a poorly crafted amicus brief can significantly decrease a litigant's chances of obtaining a majority of the justices' votes.

This research makes three important contributions. First, the importance of this topic reaches far past academia. Judges and their clerks devote much of their time for each case reviewing the material provided in these briefs. Furthermore understanding how parties can write effective briefs is critical for legal practitioners. With a "dysfunctional Congress" outside interests continue to turn to the judicial branch to effect policy change (Binder 2015). This is evidenced by the growing number of amicus briefs submitted to the Supreme Court in recent terms. *The National Law Journal* cites that the second decade of the 2000s saw more than double the cases filed in the 1990s and the 2012 October term had a record 1,001 amicus briefs filed with an average of 14 per case (Franze and Anderson 2016). To file an amicus brief requires friends of the Court to spend significant time and financial resources, with some costing upwards of $100,000 (Ward 2007). Given the resources that are being used to influence the Supreme Court it is important for outside interests to understand the most effective way to achieve their goals. This research is the first step in understanding how to do this.

Next, my findings suggest that justices use amicus briefs for both policy and legal reasons. That is, my results suggest that effective or high caliber amicus briefs are not necessarily the briefs that appeal to a justice's policy preferences. Similarly, ineffective amicus briefs are not simply briefs that clash with a justice's preferences. This may suggest that outside interests should focus their attention on the diversity of legal arguments to support a particular litigant's position instead of pandering to the justices political preferences. Oftentimes,

effective briefs are those that offer a fresh take on the legal dispute between the parties and this array of legal arguments leads to successful outcomes.

Lastly, my findings shed new light on existing research. Spriggs and Wahlbeck (1997b) find, contrary to conventional wisdom, amicus briefs primarily repeat parties arguments instead of contributing unique arguments and when they do contribute unique arguments the Court is unlikely to use them to for their opinions. Conversely, Collins Jr, Corley and Hamner (2014) find that the majority of amici's information differs from the litigants' briefs. While I do not examine the arguments in each brief, I find that for an eight term sample, most of the briefs that clerks suggest to their justices to spend more time reading are those that either contribute unique information/arguments, or briefs that do a better job of explaining the litigants' arguments than the briefs on the merits. Although the Court may not frame their opinions around this rationalization, I find they still influence their final decision. Amici's re-framed or unique perspectives on the legal arguments in a case can demonstrate the broader impacts in which the justices' decisions will impact society.

To explain the difference between effective and ineffective amicus briefs and how they impact Supreme Court decision making, I begin by providing a discussion of existing literature on amicus briefs. Then, using unique archival data, I describe how I developed my amicus brief typology and validate it. Lastly, I examine how exactly these briefs impact Supreme Court justices' decision making on the merits.

4.1   The Influence of Amicus Briefs at the Supreme Court

Supreme Court justices are some of the most brilliant legal minds in the country. Yet, despite this fact, they are not experts in every area of law that comes before the Court. They may have practiced or specialized in one area in particular, like Justice Ruth Bader Ginsburg who is famous for her advocacy of womens' rights. Other justices were lifetime judges or social servants whose attention was always spread across a wide variety of cases but never an expert in on particular area, like Justice Brett Kavanaugh. In order for justices

gain the most information and make an educated decision Rule 37 was established. Rule 37 of the Supreme Court Rules allows outside interests to file briefs to influence both the agenda and merits decisions. Rule 37 Section 1 reads as follows:[2]

> An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.

Amicus brief research at the agenda stage unequivocally agrees that when outside interests file briefs they provide information by signaling to the Court the broad implications of the case. Whether the brief is filed in opposition to or in support of granting review, the information provided signals the same thing: the case is important and thus the Court's likelihood of granting review increases (Black and Owens 2009; Caldeira and Wright 1988, 1990). Similarly, at the merits stage amici are supposed to provide unique information not provided by the litigants, as the rule states. Yet research on whether friends of the Court actually accomplish this objective is mixed.

Early research on amicus briefs failed to find a significant relationship between the number of amicus briefs filed on the merits and successful outcomes (Songer and Sheehan 1993), or it was limited to specific contexts (Kearney and Merrill 2000). Some suggested this was because amici didn't always provide unique information as required by Rule 37 and instead reiterated the litigants' arguments (Spriggs and Wahlbeck 1997b).

More recent work demonstrates that respondents benefit more than petitioners from amicus brief filings and overall the ideological direction of the brief is a strong predictor of positive outcomes before the Court (Collins Jr 2004). As more liberal (conservative) briefs are filed, the likelihood of a liberal (conservative) outcome increases regardless of the ideological preferences of the justices (Collins 2008). Furthermore, as the total number of amicus briefs increase the variance surrounding the justices' votes also increases. Put

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[2]`https://www.law.cornell.edu/rules/supct/rule_37`

differently, as the briefs in a case increases it becomes significantly more difficult to predict how a justice will vote (Collins 2008). Furthermore, amicus briefs do not solely influence case dispositions. They also influence how the law is crafted via opinion content. Majority opinion authors will borrow content verbatim from amicus briefs while writing their opinions (Collins Jr, Corley and Hamner 2015). Using language directly from an amicus brief in a Supreme Court majority opinion and thus the law of the land.

This recent work confirmed what outside interests already believed, that amicus briefs influence Supreme Court justices. However, this research has maintained a narrow focus, primarily on the number of briefs and the ideological direction they make their argument relative to the justices' preferences. Most empirical quantitative research has failed to consider the heterogeneity among amicus briefs. The lone exception is the innovative work by Box-Steffensmeier, Christenson and Hitt (2013) that demonstrates when powerful, well-connected interest groups like the ACLU file amicus briefs, the justices notice and these groups are more likely to receive favorable outcomes compared to smaller outside interests. That is, powerful interest groups have prestigious reputations and are known for filing useful briefs. These findings are supported by clerks' personal statements. After briefs filed by the OSG, they devoted their attention to briefs filed by other government entities, the ACLU, followed by professional associations, and prominent academics or attorneys (Lynch 2004).

Clearly not all amicus briefs are created equal and as the number of amicus briefs filed continue to grow, clerks' time to spend on each brief decreases and they must prioritize. They do not have time to read every brief so they skim most and devote time to a select few (Lynch 2004). Clerks triage the briefs and all case documents for their justices, therefore if a busy law clerk only devotes one to two minutes on a brief, it is likely their boss will do the same, or less (Lynch 2004, 55). On first glance clerks claim they can uncover whether a brief is repetitive, which annoys them for wasting their time. Briefs that repeat the parties' claims or one another's argument not only violate Rule 37 but they are inefficient. Conversely, briefs

that warrant the clerks' or even the justices' attention are more efficient, relatively speaking. I argue that these amicus briefs that garner more attention impact Supreme Court case outcomes more than a general brief that is skimmed and discarded.

Unfortunately, the veil of secrecy that plagues all Supreme Court scholars prevents me from examining which amicus briefs are read versus skimmed by the clerks as they are received, and similarly, which briefs are read by the justices. To determine which briefs are worthy of the justices' time versus which ones are deemed unhelpful or repetitive I will use the next best thing, bench memoranda. Bench memos are written by Supreme Court law clerks after a case is granted review but before oral arguments. In order to prepare justices for their decision on the merits, bench memoranda summarize the facts of the case, each litigant's contentions, amici contentions, and provide an analysis of their claims. Some briefs' legal arguments comprise pages where other briefs are limited to the name of the amicus filer followed by a colon and the word "repetitive." And worse case scenario for an outside interest, sometimes amicus briefs do not even receive a mention, the clerk will start the amicus section by stating they will only discuss unique briefs and omit repetitive briefs.

Additionally, while clerks summarize each amicus brief and how it relates to the larger issues in the case they will also add their own commentary. Typical examples that suggest a quality brief worthy of their justice's time include:

– *This is an excellent brief, worthy of substantial attention.*[3]

– *This is a nice little amicus brief that you might want to look at.*[4]

– *This brief reiterates petitioner's arguments, except far more clearly than petr itself.*

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[3]Brief filed on behalf of the petitioner by the National Association of Bond Lawyers discussed on pg. 15 in the bench memorandum in *C & A Carbon Inc. v. Town of Clarkstown* (92-1402). Located in the Supreme Court Case Files (Box 637, Folder #6) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

[4]Brief filed on behalf of the petitioners by two individuals who previously served as jurors in a capital case discussed on pg. 15 in the bench memorandum in *Jonathan D. Simmons v. South Carolina* (92-9059). Located in the Supreme Court Case Files (Box 643, Folder #3) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

The brief adds two important arguments as well.[5]

Some briefs, however, do not deserve such praise. Some clerks air their frustration of their wasted time in reading certain briefs and will include commentary on unhelpful briefs. The majority of the commentary is on the repetitive nature of the amicus briefs but also commonly includes the following:

– *The nurse's brief is interesting, but not relevant to the question in front of the Court.*[6]

– *I found nothing helpful here.*[7]

– *This brief is disjointed and adds nothing new.*[8]

These comments can be used as a proxy to understand which briefs are effective and useful for the justices' decision making and which briefs are ineffective and simply waste their time. They provide for a way to determine the heterogeneity among amicus briefs and determine if quality briefs influence justices more than sheer quantity.

4.2   Assessing Effective Versus Ineffective Amicus Briefs

I theorize that positive commentary regarding amicus briefs in bench memoranda represent effective amicus briefs and negative comments represent ineffective amicus briefs. Before

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[5]Brief filed on behalf of the petitioner by the Office of the Solicitor General discussed on pg. 15 in the bench memorandum in *Estelle v. McGuire* (90-1074). Located in the Supreme Court Case Files (Box 590, Folder #1) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

[6]Brief filed on behalf of the respondent by the American Nurses Association discussed on pg. 34 in the bench memorandum in *Waters v. Churchill* (92-1450). Located in the Supreme Court Case Files (Box 638, Folder #2) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

[7]Brief filed on behalf of the petitioner by La Plata County discussed on pg. 18 in the bench memorandum in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation* (90-408). Located in the Supreme Court Case Files (Box 584, Folder #4) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

[8]Brief filed on behalf of the petitioner by the Association of the Bar of City of New York discussed on pg. 12 in the bench memorandum in *Medina v. State of California* (90-8370). Located in the Supreme Court Case Files (Box 596, Folders #6-8) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

I can examine the effect of accounting for heterogeneity in amicus briefs I must validate that this commentary actually represents effective and ineffective briefs by examining if these descriptions relate to other factors we associate with quality amici. To do this I use original data from Justice Harry Blackmun's bench memoranda located at the Library of Congress in Washington, D.C. Each page of the bench memoranda were photographed and then processed using optical character recognition software to convert the images to text files. Next, each amicus was tagged using extensible markup language tags, commonly referred to as XML tags to extract the discussion of each amicus brief. The commentary on each brief was then hand coded as 1 for a positive comment, 0 for no comment, and -1 for a negative comment. This coding of the type of comment will be used as the dependent variable in the validation model.

Additional information was also extracted from the bench memos to use to determine how this commentary relates to the effectiveness of the briefs. First is a count of how many interests cooperated to file a brief. 90% of clerks agree that cooperation is preferred because it reduces the amount of briefs filed for a particular case and because it reduces repetitive briefs. Some clerks suggest that briefs filed collaboratively between multiple parties enhances the value of a brief because it demonstrates a shared viewpoint, however most do not spend additional time on these briefs (Lynch 2004, 57, 61). The perceived efficiency of multifilers, but lack of extra attention suggests that multifiler briefs should be negatively related to negative commentary and may garner positive commentary.

The Office of Solicitor General (OSG) is the federal government's attorney at the Supreme Court and is known as a reliable and trusted source of information. "The Tenth Justice," as the OSG is often referred, files amicus briefs in order to inform the Court of the government's position in a case and the potential implications for the federal government in light of the Court's decision (Bailey, Kamoie and Maltzman 2005). Occasionally, the justices even ask the OSG to file a brief to obtain more information. In fact, parties supported by an OSG

amicus brief "exhibit spectacular success rates in cases before the Supreme Court" (Segal 1988, 142) (see also O'Connor (1982)). Clerks label the OSG as the most important amicus filer, not only because of the significance of representing the federal government, but also because his briefs are well-researched and excellently written (Lynch 2004, 47). The OSG is included in the model as a dichotomous indicator coded as 1 if the OSG wrote an amicus brief or joined an amicus brief and 0 otherwise. The presence of an OSG amicus should be positively related to quality and effective amicus briefs or positive commentary in bench memoranda and negatively related to critical comments.

The OSG is the federal government's attorney before the Court, but sometimes other U.S. government attorneys submit briefs. Departmental agencies will file briefs in cases that they will be particularly effected. The federal government experiences success as an oral advocate before the Court (Johnson, Wahlbeck and Spriggs 2006), and has great resources to support a well researched brief that the Court is interested in. Following the OSG and state governments, non-OSG federal government filers are the next most important amici (Lynch 2004, 49). Given the Court's institutional concern, like the OSG, the federal government's brief should be more likely to receive favorable comments and less likely to receive unfavorable comments. This variable is a dichotomous variable coded as 1 if the filer is part of the federal government and 0 otherwise.

Like the federal government, the justices also take an interest and concern as to how their potential decision will impact state governments (Lynch 2004). Unlike the federal government, however, there is significant variation in the quality of amicus briefs from states. States increase their likelihood of success as amici when there are ten or more together on a brief, but states individually do not fare well as amici. This is likely because states like California and New York have more experienced state attorneys general so they are able to help less experienced states write an effective brief. Given the special attention yet wavering quality it is unclear how effective or ineffective states' amicus briefs are before the Supreme

Court. To examine this relationship I include a variable coded as 1 if a state government appears on an amicus brief and 0 if no state is present.

To determine if effective amici are simply a reflection of Justice Blackmun's ideological alignment with their position, or if amici can provide a quality legal argument regardless of their position, I include a measure of ideological compatibility between the litigant an amicus filed in favor of and Justice Blackmun. To code this variable, first I determined whether the petitioner (respondent) represented the liberal (conservative) position based on the direction of the lower court's ruling. If the litigant represents the liberal position, any amici filed on behalf of the liberal litigant are coded as the negative value of Justice Blackmun's Martin and Quinn (MQ) score for that term. Any amici favoring the conservative litigant are then coded as Justice Blackmun's MQ score (Martin and Quinn 2002; Johnson, Wahlbeck and Spriggs 2006). I expect that amici that Justice Blackmun ideologically agrees with will be more likely to be perceived as effective and those he disagrees with as ineffective because they provide additional legal justification to vote in his desired direction.

Case salience is another factor that could potentially impact the quality or effectiveness of amici. Salient cases capture more attention, typically because they are interesting and they have the potential to impact more people. As a result, more outside interests are compelled to get involved. The greater number of amicus briefs should yield a greater likelihood of more effective briefs and a lower likelihood of ineffective briefs. To capture case salience I utilize Clark, Lax and Rice's (2015) measure of early case salience. Unlike traditional measures of salience that examine media coverage after a decision has been released by the Court, Clark, Lax, and Rice's (2015) early salience measure examines media coverage after a case has been granted review but prior to oral arguments, which is the same period when amicus briefs are being read and evaluated.

I also include an additional control variable in the model to determine whether an amicus was filed on behalf of the petitioner. Justices are predisposed to favor the petitioner in most

cases because The Court overturns two-thirds of the lower court decisions it reviews (Epstein et al. 2019). So to control for this favoritism and amici that file on behalf of that litigant, I include a dichotomous indicator that equals 1 when the amicus argues for the petitioner and 0 for the respondent.

4.3 Method and Results

Table 4.1: Multinomial Logistic Regression Model of Effective and Ineffective Amici

	Negative Comment	Positive Comment
Multifiler	-0.358*	0.003
	(0.144)	(0.009)
OSG	-1.181	1.065*
	(1.297)	(0.524)
Federal Government	-0.641	-0.099
	(0.939)	(0.483)
State Government	0.405	-0.911*
	(0.430)	(0.482)
Ideological Compatibility	-0.117	0.103
	(0.103)	(0.103)
Case Salience	-0.029	0.190
	(0.173)	(0.168)
Petitioner	0.226	-0.216
	(0.307)	(0.189)
Number of Amici Filed for Each Litigant	-0.219	-0.080
	(0.123)	(0.083)
Total Amici Filed	0.048	-0.033
	(0.069)	(0.053)
Constant	-2.688*	-2.496*
	(0.327)	(0.240)
N	2634	
AIC	1581.218	
BIC	1698.743	
Log Likelihood	-770.609	
Chi-Squared	60.952	

Standard errors in parentheses
* $p < 0.05$

The dependent variable in this model is a nominal variable with three categories: negative comment, no comment, or positive comment. Because the coding scheme has three categories, I model this using a multinomial logistic regression, which is best for nominal

dependent variables. Multinomial regression coefficients reveal the likelihood of a particular outcome of the dependent variable relative to a base category. In Table 4.1 the base category is no comment. The second column displays the likelihood of a negative comment for each independent variable relative to the baseline, and the third column shows the likelihood of a positive comment relative to no comment at all. The data consist of 2,634 amicus briefs filed in all cases with a bench memo between the 1986-1993 terms. To account for similarities that may occur at the case level, I cluster on the case.

The first row and second column of Table 4.1 reveals that as more groups join an amicus brief the likelihood of a negative comment versus no comment at all significantly decreases. To more clearly demonstrate this relationship the average marginal effects are shown in Figure 4.1. Figure 4.1 shows the average marginal effect of multiple groups cooperating on a brief on each amicus type while taking into account all relative odds among categories. Multifilers are significantly less likely than solo group-filers (nearly 1%) of receiving a negative or ineffective comment. Multifilers, however, do not gain a significant advantage as being an effective amicus brief.

The next row of Table 4.1 represents the effectiveness of the OSG as an amicus. As expected, when the OSG is an amicus a clerk is less likely to leave a negative comment relative to the base category, but this result is not statistically significant. There is a statistically significant increase in the likelihood of a positive comment when the OSG files or joins an amicus brief. This relationship is further demonstrated by the left plot in Figure 4.2 that shows the average marginal effect of the OSG filing an amicus brief on the effectiveness and ineffectiveness of the brief. If an amicus brief is filed by the OSG, it is 7% more likely to be a useful and effective brief for deciding the case than a non-OSG brief. The right plot in Figure 4.2 displays the marginal effect of an amicus brief filed by the state government on the different types of amicus briefs. As the clerks suggested, and research has shown, states do not write effective briefs. A brief submitted by a state government is 3% less likely to
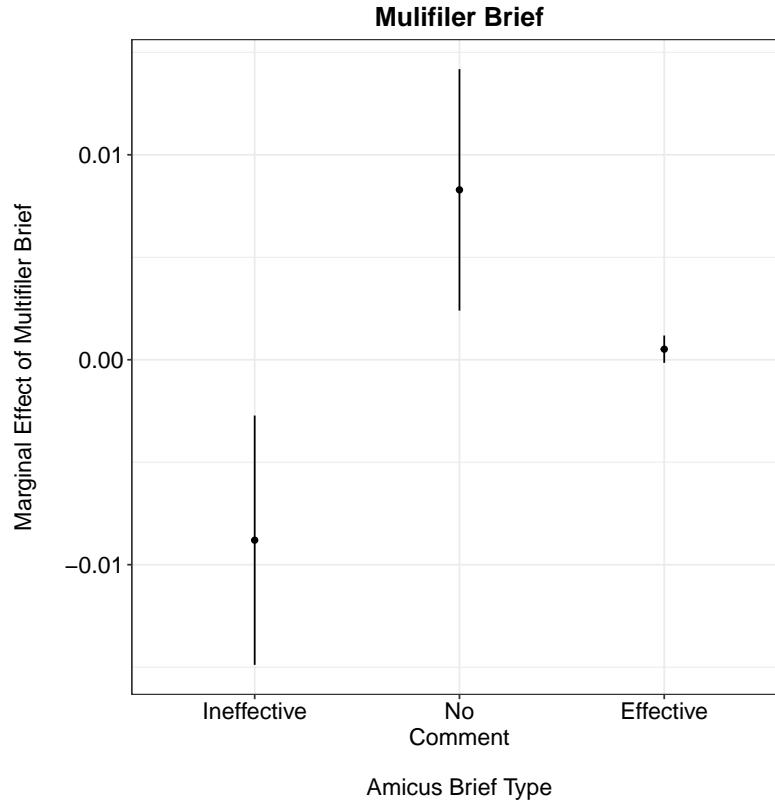
Figure 4.1: **Average Marginal Effect of Multifiler on Amicus Type** - This plot shows the average marginal effect of multifiler on three types of amicus briefs. Vertical lines represent 95% confidence intervals

receive a positive comment or be deemed an effective brief.

The other predictors in the model do exert a significant effect on brief type. Briefs filed by the federal government are not more or less effective than the typical non-federal government amicus. In fact, negative values in both columns suggest the federal government is less likely to receive a negative or positive comment making their briefs unworthy of mentioning, however this relationship is not statistically significant.

Ideological compatibility and case salience do not significantly predict amicus commentary but all coefficients are in the expected direction for positive and negative comments. Relative to the base category, the likelihood of deeming an amicus effective increases as ideological compatibility increases and case salience increases. Similarly the probability of an ineffective brief is negatively related to both of these variables. This suggests that an amicus does not have to support Justice Blackmun's policy preferences in order to be effective. Also,
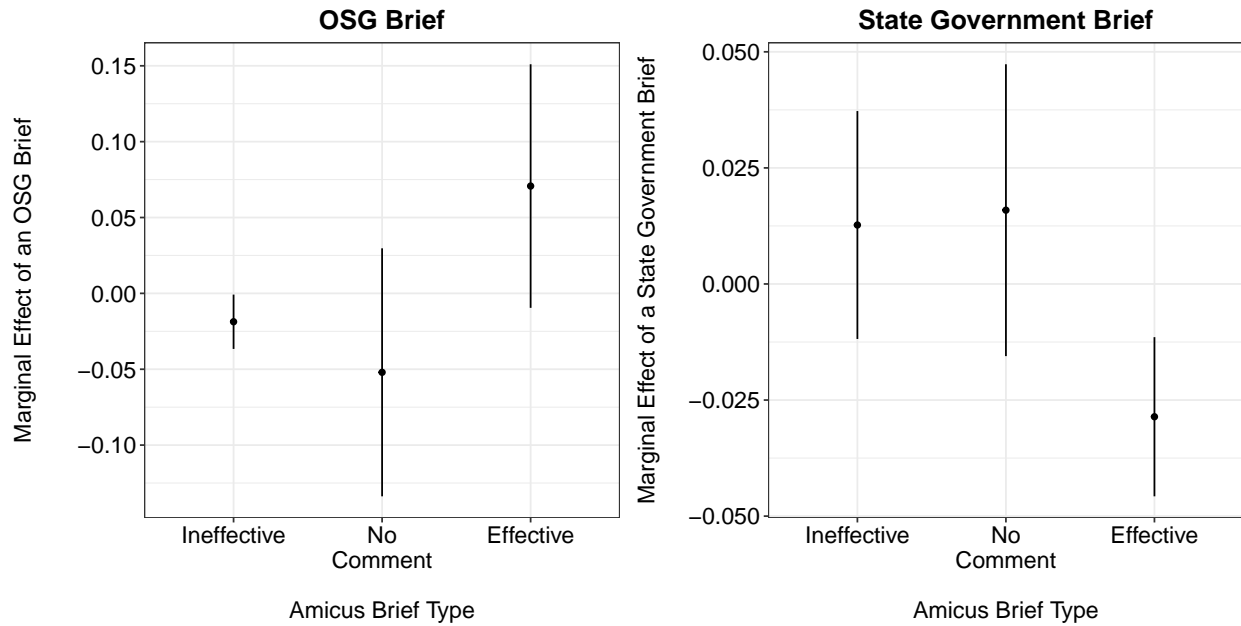
Figure 4.2: **Average Marginal Effect of OSG and State Government on Amicus Type** - The left plot shows the average marginal effect of an amicus brief filed by the OSG on amicus type. The right plot shows the average marginal effect of an amicus brief filed by a state government on amicus type. The vertical lines are 95% confidence intervals.

non-salient cases can also yield effective amici. None of the control variables significantly impact the likelihood of an amicus being effective or ineffective suggesting that the number of amici in a case or simply being the favored party impacts the effectiveness of the briefs filed.

The evidence for positive comments representing effective amici is supported with both the OSG being favored and state governments not being favored. The evidence for negative comments relating to ineffective amici is still supported, but somewhat less with mutlifiler briefs being negatively related to a critical comment. This is not surprising, however. While it is important to point out effective briefs for their justice to read, it is less consequential that Justice Blackmun know which briefs are bad or to avoid since he is unlikely to spend much time on them anyway. In the section that proceeds I will examine how effective and ineffective briefs impact Supreme Court case outcomes.

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4.4 Effective and Ineffective Amicus Briefs Influence on Supreme Court Case Outcomes

Now that I am able to account for some of the heterogeneity in amicus brief effectiveness I must determine how they impact case outcomes. That is, do amicus briefs that are higher quality or effective exert a greater impact on case outcomes compared to less effective amici? To do this, I merge my unique data discussed in the previous section with Collins's (2008) data of amicus influence on individual justices' voting behavior.[9] I reexamine Collins's (2008) original model in which he finds that the number of liberal amicus briefs significantly increases the likelihood of a justice placing a liberal vote, and similarly, the likelihood of a justice placing a liberal vote decreases as the number of conservative amicus briefs increases, regardless of a justice's individual ideology.

The dependent variable in the model is a justice's propensity to vote liberally. It is a dichotomous indicator that takes on the value of 1 if a justice places a liberal vote and 0 if the vote is conservative. This variable was coded using the Supreme Court Database decision direction variable (Epstein et al. 2019). I follow Collins (2008) and cluster on the case to account for case level similarities. Following others who have used archival data from particular justices, I exclude Justice Blackmun's votes from the analysis (Johnson, Wahlbeck and Spriggs 2006). This prevents any endogeniety that may arise. Justice Blackmun is the only justice who reads the bench memos crafted by his clerks. As a result, he could be predisposed to favor the outcome advocated by a particular amicus brief that his clerks called his attention to. Preventing possible endogeneity by removing Blackmun from the model will also be a more conservative test of my hypothesis because it will be more difficult to find an effect on the effective and ineffective amici.

Collins's (2008) has five primary variables of interest that I also include in my model.

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[9]These data were originally acquired form `http://www.psci.unt.edu/~pmcollins/data.htm` and consist of data originally collected by Collins (2008) and Kearney and Merrill (2000).

First, he includes a count of the number of liberal amicus curiae briefs (ACBs) filed in a case. He also includes a count of the number of conservative amicus briefs filed in a case. Ideological direction of the brief is determined by the lower court's decision direction. If the lower court decided a case liberally (conservatively), any briefs filed on behalf of the petitioner are coded as conservative (liberal) and any briefs filed in favor of the respondent are coded as liberal (conservative). The author hypothesizes that as the number of liberal briefs increases, the likelihood of a justice voting liberally in that case also increases and as the number of conservative amicus briefs increases, the likelihood of voting liberally decreases. While the author finds support for this hypothesis, he originally hypothesized that justices will be more effected by amici they are predisposed to favor. To account for this relationship the justices' Martin and Quinn scores are also included in the model and interacted with the number of conservative and liberal amicus briefs (Martin and Quinn 2002).[10]

Following the literature, Collins (2008) also includes an variable to indicate whether the OSG filed a liberal or conservative amicus brief. As previously discussed, the OSG is a trusted resource that is known for crafting well-written and well-researched merits and amicus briefs (Bailey, Kamoie and Maltzman 2005; Lynch 2004; O'Connor 1982; Segal 1988). Liberal OSG amicus briefs should increase the likelihood of a liberal vote and conservative OSG amicus briefs should decrease the likelihood of a liberal vote. Additionally, Collins (2008) also controls for the resource level of each litigant. Research on the "haves and have nots" before the Court stems from the theory that litigants with more resources, like the U.S. government or large businesses, have more resources to hire better attorneys to represent them (Songer, Sheehan and Haire 1999). Lastly, he controls for the lower court's decision direction. As previously mentioned, the Supreme Court is prone to reversal, to account for

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[10]Martin and Quinn scores typically take on negative values to represent liberal judicial behavior and positive values indicate conservative voting. Collins (2008) transforms MQ scores from the traditional scale to range from 0 to 10 with smaller values still relating to liberal voting and larger values related to conservative behavior. These are the MQ scores I also use.

this he includes an variable to represent whether the lower court's decision was liberal (1) or conservative (0) (Epstein et al. 2019).

To account for the number of effective and ineffective amicus briefs I include a count of the number of effective liberal briefs, effective conservative briefs, ineffective liberal briefs, and ineffective conservative briefs. I expect that effective liberal amicus briefs should increase the likelihood of a liberal vote and ineffective amicus briefs decreases the likelihood of a liberal vote. Conservative amicus briefs should have the opposite effect. Effective conservative amicus briefs should decrease the likelihood of a liberal vote and ineffective conservative amicus briefs should increase the likelihood of a liberal vote. Like Collins (2008), I believe that effective briefs should have a greater effect on the justices who are predisposed to be effected by them. Similarly, if justices read ineffective briefs advocating against their policy preferences, they should be even less impacted by its filing. To account for this relationship I also include an interactive term between my four effective and ineffective briefs and justices' MQ scores.

I also include an additional control in the model. I control for liberal case strength. As I have demonstrated throughout this dissertation, case strength has a significant impact on multiple aspects of judicial decision making, including the outcomes on the merits. A justice may vote liberally because the law more strongly supports that litigant's case.

4.5 Method and Results

The dependent variable is dichotomous coded as 1 if a justice voted liberally and 0 if he voted conservatively. To model this I use a logistic regression model with standard errors clustered on the case. The results of the effectiveness model are shown in the last column in Table 4.2. The middle column displays the results from Collins's (2008) original model using the same sample of data. Because these are maximum likelihood regression coefficients their significance and direction is interpretable by the table but their effect size is not. Instead of spending time interpreting these coefficients I will begin with primary results displayed in

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Figure 4.3.
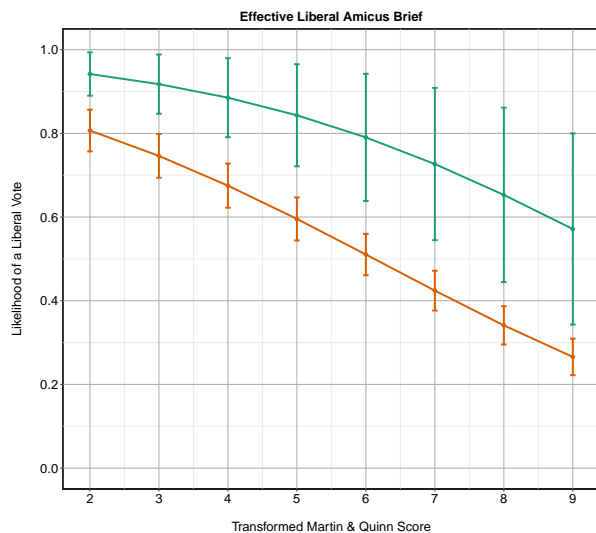
(a) Likelihood of a Liberal Vote Across MQ Scores for an Effective vs. Regular Liberal Amicus Brief
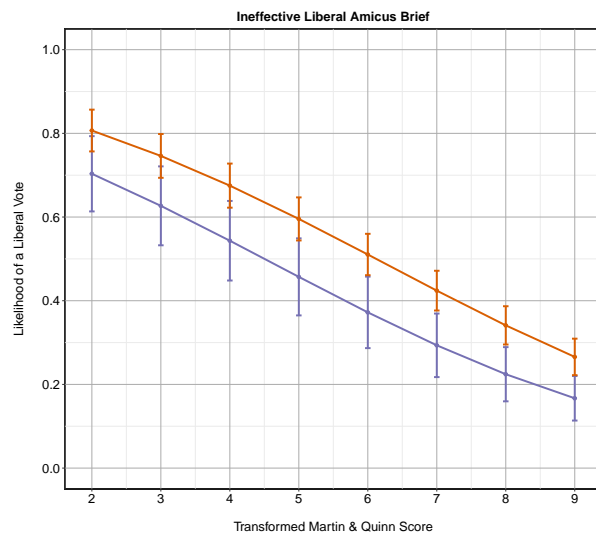
(b) Likelihood of a Liberal Vote Across MQ Scores for an Ineffective vs. Regular Liberal Amicus Brief
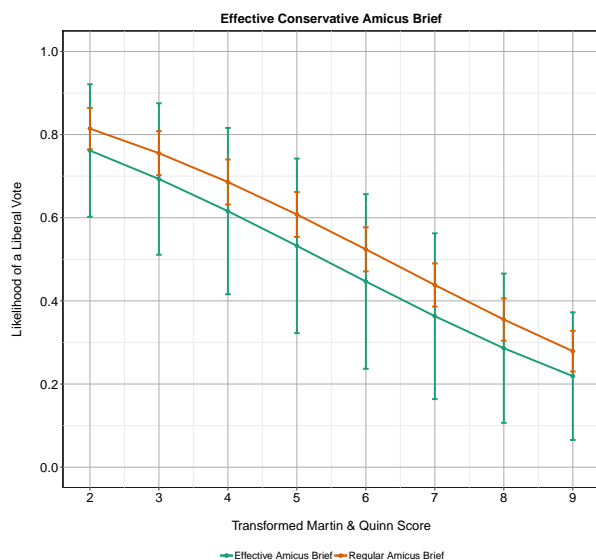
(c) Likelihood of a Liberal Vote Across MQ Scores for an Effective vs. Regular Conservative Amicus Brief
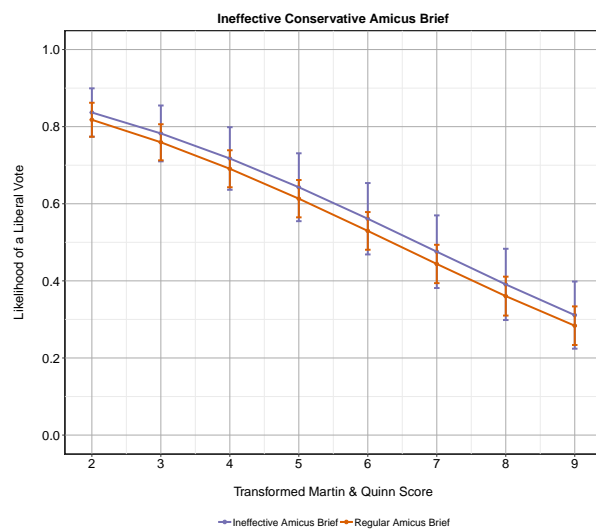
(d) Likelihood of a Liberal Vote Across MQ Scores for an Ineffective vs. Regular Conservative Amicus Brief

Figure 4.3: **Likelihood of a Liberal Vote Across MQ Scores Comparing Effective and Ineffective Amicus Briefs to Regular Amicus Briefs** - Each plot has the 95th percentile of the transformed Martin and Quinn scores along the x-axis an d the likelihood of a liberal vote on the y-axis. The orange line in each plot represents a single conservative or liberal amicus brief that is neither effective no ineffective. Green lines represent an effective liberal or conservative amicus brief and purple lines represent a single ineffective liberal or conservative brief. The vertical lines around that estimates are 95% confidence intervals. All continuous variables are held at their means and dichotomous variables are held at their modes.

Table 4.2: Logistic Regression Model of the Justices' Propensity to Vote Liberally

	Collins' Model	Effectiveness Model
Number of Liberal ACBs	0.119	0.109
	(0.068)	(0.086)
Number of Conservative ACBs	.034	0.027
	(0.072)	(0.084)
Transformed Martin & Quinn Score	-0.354*	-0.407*
	(0.025)	(0.028)
MQ Score * Liberal ACBs	-0.006	-0.012
	(0.009)	(0.012)
MQ Score * Conservative ACBs	-0.008	-0.006
	(0.010)	(0.012)
Liberal OSG ACB	0.392	0.520*
	(0.205)	(0.223)
Conservative OSG ACB	-0.626*	-0.478*
	(0.140)	(0.139)
Liberal Litigant Resource Level	0.025	0.057*
	(0.026)	(0.027)
Conservative Litigant Resource Level	-0.056	-0.071*
	(0.029)	(0.028)
Lower Court Decision Direction	-0.449*	-0.228
	(0.117)	(0.118)
Number of Effective Liberal ACBs		1.512*
		(0.572)
Number of Effective Conservative ACBs		-0.367
		(0.493)
Number of Ineffective Liberal ACBs		-0.659*
		(0.185)
Number of Ineffective Conservative ACBs		0.178
		(0.208)
Number of Effective Liberal ACBs * MQ Score		-0.192*
		(0.080)
Number of Effective Conservative ACBs * MQ Score		0.024
		(0.079)
Number of Ineffective Liberal ACBs * MQ Score		0.089*
		(0.025)
Number of Ineffective Conservative ACBs * MQ Score		-0.018
		(0.030)
Liberal Case Strength		0.436*
		(0.040)
Constant	2.754*	1.340*
	(0.369)	(0.380)
N	6899	6899
AIC	8458.755	7790.959
BIC	8533.985	7927.742
Log Likelihood	-4218.377	-3875.480
Chi-squared	405.176	481.637
Percent Correctly Classified	67.50%	71.84%

Standard errors in parentheses

* $p < 0.05$

Figure 4.3 shows the likelihood of a justice placing a liberal vote given a typical amicus brief, an amicus that receives no positive or negative commentary, versus an effective or ineffective amicus brief across the range of the justices' ideological preferences. Starting with the top left plot in the figure, the orange line represents a single liberal amicus brief and the green line represents a single liberal amicus brief that was deemed to be effective. Smaller values on the x-axis represent liberal justices and larger values are justices with a conservative voting record. When a typical amicus brief is filed on behalf of the liberal litigant, a liberal justice is predicted to vote liberally 81% of the time. When a liberal brief is determined to be an effective amicus brief, the likelihood of the same liberal justice voting liberally is 94%. This is a statistically significant increase of 13 percentage points.

This relationship persists across the ideological spectrum. For conservative justices represented by a transformed MQ score of 9, a regular liberal amicus brief only compels them to vote liberally 27% of the time. Yet, if there is an effective liberal amicus brief filed for the same case, the likelihood of a conservative justice voting liberally increases to 57%. This is a significant increase of 30 percentage points, a 111% change. While a liberal justice is predisposed to vote liberally regardless of the amici filed in the case, an effective liberal amicus brief significantly increases this likelihood. Contrary to my hypothesis, effective amici are most influential on conservative justices. A single liberal effective amicus brief makes a conservative justice more likely to vote liberally than conservatively. Thus, effective amicus briefs actually have a greater impact on justices who are predisposed to disagree with them.

The bottom left plot in Figure 4.3 shows the same relationship as above, but compares an effective conservative amicus brief to a regular conservative amicus brief. This relationship is in the expected direction with an effective conservative amicus brief making justices less likely to place a liberal vote than a regular conservative amicus. This effect, however, is not statistically different from a regular conservative amicus.

The right side of Figure 4.3 displays the relationship for ineffective amici. The top right

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plot shows the relationship between a regular liberal amicus brief (orange line) versus an ineffective liberal amicus brief (purple line). An ineffective amicus brief makes all justices significantly less likely to vote liberally than a regular amicus brief. For a liberal justice with a transformed MQ score of two, a single amicus brief for leads to a 80% likelihood of voting liberally, yet for the same case if the liberal brief is an ineffective brief this likelihood drops to 70%. This same significant relationship persists for conservative justices, with an ineffective amicus brief reducing the likelihood of a liberal vote from 27% to 17% compared to a regular amicus brief. This means, that a poorly written, poorly-researched, or repetitive brief can actually have the opposite effect of the interest groups' intentions by hurting their likelihood of policy success before the Court. The bottom figure shows the same relationship as above but with an ineffective conservative amicus brief compared to a regular conservative amicus brief. Again, like effective conservative briefs, the relationship between the two types of briefs are not significant but in the expected direction.

It may seems surprising that the predicted relationship only exists for liberal amici and not conservative interest groups, however during this time period the majority of the non-government amicus filers that clerks from both liberal and conservative chambers cited as submitting quality, well-written and well-researched briefs were from liberal interests (Lynch 2004). Specifically, the three primary non-governmental interest groups that clerks cited said they considered and reviewed more carefully were the ACLU, NAACP, and the AFL-CIO. The late 1980s and early 1990s preceded/were at the onset of the proliferation of the conservative legal movement that the Court experiences today (Teles 2012).

Returning to table, I find some discrepancies between Collins's (2008) original model and my model. As hypothesized, a liberal OSG amicus brief significantly increases the likelihood of a liberal vote, which fails to have a significant effect in the original model. Holding all variables at their means and dichotomous variables at their modes, the presence of a liberal OSG amicus brief increases the likelihood of a liberal vote from 46% to 56%. Similarly, a

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conservative OSG amicus brief significantly reduces the likelihood of voting liberally from 46% to 36%.

Also as hypothesized, liberal litigants' resource levels significantly increase the likelihood of obtaining liberal votes. In the Collins (2008) model this variable is in the hypothesized direction but fails to have a significant effect on the dependent variable. In both models conservative litigant resources significantly decrease the likelihood of a liberal vote. Additionally, the original model finds that the lower court decision direction has a statistically significant and negative effect on the likelihood of a liberal vote. That is, justices are significantly less likely to vote liberally if the lower Court's decision was liberal, however the effectiveness model does not find this to be the case. Lastly, liberal case strength is a positive and significant predictor of a justice's liberal vote. Holding all continuous variables at their mean and dichotomous variables at their modes, the likelihood of a liberal vote when the conservative litigant's argument is strongly supported by law and legal reasoning is 25%. The likelihood increases to 55% when the liberal litigant is more strongly supported by law. This is an increase of 30 percentage points or 120% change.

The bottom of the table shows the fit statistics of each model. There are reductions in both the Aikake and Bayesian Information Criterion (AIC and BIC). Both fit statistics penalize for the inclusion of additional variables, and even after this penalty the AIC and BIC both are reduced greater than 10, which represents a significantly better fit (Long 1997). Additionally, the effectiveness model correctly classifies 71% of the observations compared to the original model that has a classification rate of 67.5%. These fit statistics demonstrate that it is important to take into account not only the number of amicus briefs, but also the different types of amicus briefs when examining their influence on judicial decision making.

4.6   Discussion and Conclusion

In this paper I use novel data to demonstrate that heterogeneity exists in the effectiveness of amicus curiae briefs, and accounting for this heterogeneity is significant in understanding

how amicus briefs impact Supreme Court justices' decision making. Supreme Court Rule 37 requires all amicus filers to bring justices' attention to a relevant matter not already discussed by the merits briefs. I find that when briefs genuinely bring a new legal perspective they are more effective. More importantly, effective briefs can significantly influence how a justice votes. With the current, more conservative Court today, it is critical that a high quality liberal amicus brief carries the influence to make a conservative justice more likely to place a liberal over a conservative vote in a case.

I also bring to light new findings on how amici can negatively impact a litigant's chances for success. Ineffective liberal amicus briefs decrease the likelihood of liberal votes, and therefore the ability to obtain a majority. Previous research always suggested that more is more, but in actuality quality amicus briefs are much more important than sheer quantity at the merits stage. Practitioners before the Court have revealed that in recent years coordination between litigants and outside interests has grown to become much more prevalent and systematic (Ward 2007), and this synchronization will likely continue to grow as the length of litigants' briefs continues to decrease (SCOTUS 2019). Litigants must consider if a group wanting to file an amicus brief can be trusted to submit a quality brief that offers information and legal arguments that are absent from their merits brief.

There are, of course, limitations to my findings. First, I only examine the Court from 1986-1993, which captures the last term of the Burger Court and the beginning of the Rehnquist Court. While this analysis will eventually date back to 1972, this is still a limited period. It really only captures the beginning of the rise of amicus participation before the Court and the onset of groups working to file briefs together (Collins Jr 2004; Epstein et al. 2019). To put it into perspective, between the October term of 1986 and 1993 there were over 2,500 amicus briefs discussed in Justice Blackmun's bench memoranda; in the October 2015 term alone there were over 1,000 briefs filed. Strategies and the way outside interests research and craft their briefs may have changed since the 1993 term. That being said, Rule

37, the rule governing amicus participation has not changed and therefore the characteristics that make an effective amicus brief should remain the same. This research is the first step in providing a better understanding of what makes an effective amicus brief and how outside interests can best achieve their preferred outcomes before the United States Supreme Court.

Next, there are additional features related to amicus brief quality and effectiveness that must be considered. I was able to test general features of amicus briefs, namely if the filer is from the OSG, the federal government, or a state. This fails to account for experienced members of the Supreme Court Bar. In interviews with clerks Lynch (2004) reveals that clerks will spend extra time on briefs from well-known academics or attorneys. This is evidenced in the bench memos as well. For example, in *Turner Broadcasting Systems, Inc., et al. v. Federal Communications Commission* (1993) a clerk commented, "The most talked-about amicus brief in this case is the phone companies' brief filed by Laurence Tribe — with Ken Starr, Michael Kellogg, and Michael McConnell on brief."[11] This along with accounting for the frequency in which other interest groups submit briefs, and how well they are connected will provide more insight as to what is important in crafting an effective amicus brief (Box-Steffensmeier, Christenson and Hitt 2013).

Moving forward, it is also important to also consider attributes of the amicus itself. For example, is the amicus well written? This frequently appears as one of the comments of an effective amicus brief. As hard-working law clerks grind through piles of briefs, it would make sense that those that are easy to read would be effective. In fact, there are online forums and books discussing how firms can make their briefs more readable and check their brief's readability (Guberman 2011).[12] This fits with other research that demonstrates merit brief quality, including readability, significantly influences opinion content (Feldman 2015),

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[11]Brief filed on behalf of the petitioner by the Laurence Tribe discussed in the bench memorandum in *Turner Broadcasting Sys., Inc., et al. v. Federal Communications Commission* (93-44). Located in the Supreme Court Case Files (Box 643, Folder #6) of Justice Harry A. Blackmun in the Library of Congress, Washington D.C.

[12]`https://tinyurl.com/y2x6g4ef`

and the Court's opinion clarity can help enhance compliance among numerous groups (Black et al. 2016). Clear, quality writing in both of these instances increases influence.

CHAPTER 5

CONCLUSION

Much of the work on the Supreme Court acknowledges the need for a systematic measure to represent the law and legal doctrine, but this has been widely unavailable, and even seemed unattainable. I attempt to remedy that deficit by gathering bench memoranda in more than 3,020 cases and using those data to create a novel measure of legal quality. In so doing, I provide researchers with the opportunity to finally include a measure of legal doctrinal quality in their work. As I demonstrate his will provide an opportunity to test the influence of legal doctrine, update past research that has been done in its absence, and incorporate a proper indicator of the law in future work. Despite our best efforts to understand what goes into judicial decision-making, it is still unclear how the law and party's legal arguments factor into this calculus. With my measure of case strength and the data provided from bench memos, scholars will finally be able to understand how legal doctrine can constrain or encourage justices in pursuing favorable outcomes, fundamentally transforming the way we view the Court and how justices arrive at their decisions that can have significant policy consequences.

APPENDICES

APPENDIX A

CHAPTER 1 APPENDIX

Below are examples of the case strength coding scheme. All text comes from originally collected bench memos from Justice Harry Blackmun's archives located at the Library of Congress in Washington, D.C.

Strong Affirm Recommendation

- *Levitt v. Committee for Public Education & Religious Liberty* (1972)

  – I strongly feel that the decision below should be **affirmed**...

- *PFZ Properties Inc. v. Rene Alberto Rodriguez, et al.* (1991)

  – Petr argues that CA1 erred in holding that an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law does not present a substantive due process claim under §1983. I recommend that you **DIG** this case because petitioner has failed to allege any underlying constitutional right.

Weak Affirm Recommendation

- *David H. Lucas v. South Carolina Coastal Council* (1991)

  – My recommendation is that the Court **affirm**, finding that the Beachfront Management Act fell within the category of safety and health regulations that did not require compensation. If not, the Court could easily **DIG** the case. The permanent taking claim is not ripe, and the temporary taking claim was not decided below. As a final alternative, the Court could **remand to the SC CT** to decide whether this Act constitutes a nuisance, and if not was there a temporary taking.

- *Board of Governors of the Federal Reserve System v. Dimension Financial Corp., et al.* (1985)

  – Were it not for the deference due the Board's interpretation of the BHCA, resp[ondent]s would win this case hands down. Deference, especially with regard to what is necessary in order to "prevent evasions" of the Act, makes the case close. Still, I think the Board has gone too far in departing from the plain language of the statute, especially since Congress seems purposely to have chosen precise rather than open-ended terms in defining "bank." The BHCA may well need amendment along the lines recommended by the Board, but that is a task for Congress, not for the Board. I therefore recommend **affirmance**.

Uncertain Recommendation

- *Browning-Ferris Industries et al v. Kelco Disposal, Inc. et al.* (1988)

    - ***I have changed my mind several times concerning a final recommendation on this case and will probably change it again before oral argument.*** As things now stand, I think that the CA2 should be upheld, and that the Court should not apply the 8A's Excessive Fine Clause to punitive damages. As a matter of due process, I think that it should be up to the states to determine what standards are appropriate in setting limits on punitive damages, without interference from the federal courts, even if it means standards which have developed as a matter of common law, and which provide little guidance to juries. the question of punitive damages is one that should be decided in state legislatures, and that a decision from this Court requiring that legislatures enact standards, would have the effect of altering the legislative "playing field" to an improper degree. On the other hand, it might force the legislatures into acting. My gut feeling is that if this Court changes the basic rules, and says that punitive damages are not permissible unless awarded according to definite standards, the status quo will likely remain, meaning punitive damages will be unavailable in many states. But I may be completely wrong. ***I plan to continue thinking about this case, and will provide you with a supplemental memo if appropriate.***

- *Burrell, et al. v. McCray, et al.* (1975)

    - On the Eighth Amendment issue, ***I am up in the air***. If the CA is correct, it is not correct by much; if it is incorrect, it is not too far wrong.

- *Santa Fe Industries v. Green* (1976)

    - I think ***very strong arguments can be made for both sides of the question before the Court***. Although I have some/preference for the resps, I recognize that a decision going in favor of the petrs might well be correct. I might add that I have absolutely no doubt that the majority of the Court will reverse the court below. I hope that the decision of the Court will rest on the language of rule 10b-5 itself, rather than on the language of § 10(b). If the statute is interpreted to bar the suit, then I suspect that the Court will invalidate the SEC's proposed regulations -fcp deal with the problem. If those regulations are particularized and sufficiently focused, then perhaps many of the arguments raised against the expansion of 10b-5 itself will be blunted. The SEC should have the power to prevent the abuse of stockholders that "going private" allows.

Weak Reverse Recommendation

- *Patterson v. Warner* (1973)

– I don't think that the statute in question runs afoul of due process, but the **issue is close**. The proper equal protection analysis is the rational basis justification. There is no rational basis for a double bond requirement, where the posting of a single bond and/or court costs would suffice to protect the judgment awarded in the JP court. I'm not sure why any bond requirement is necessary for appeals from the JP court if they are unnecessary for appeals from a court of record, but that inquiry need not be made here. The double bond provision of the statute is violative of the Equal Protection Clause pursuant to Lindsey v Normet. in that it penalizes the appellant rather than simply protecting the appellee. RECOMMENDATION: *Reverse*.

- *Bryan v. Yellen* (1979)

  – I am troubled by giving res judicata effect to this collusive-looking, not-appealed state court judgment on an important issue of federal policy in any event. No one was in the suit to represent the federal interests or the interests e'j individuals who might benefit from enforcement of the federal 33 law. I think a public policy exception to res judicata should apply here and I would not give the state court judgment preclusive effect. In conclusion I think that the landowners should succeed on the merits on the basis of §6 of the Project Act, although I would be happy if the Court could find a way around §6. Section 6 is inconsistent with the general federal policy of limiting concentration of land ownership where the land is benefited by a federal water project. However, this inconsistency seems to have been intended. I do not think the landowners should prevail on a fairness or estoppel theory, and I do not think the Wilbur letter is entitled to much weight in interpreting the statute. I think the resps have standing and are not barred by res judicata. ***My weak recommendation is to reverse on the basis of §6***.

Strong Reverse Recommendation

- *James Kirkland Batson v. Kentucky* (1985)

  – I recommend that you vote to ***reverse*** the Kentucky Supreme Court's holding, but I recommend that you confront head on, and reject, the analysis in Swain that suggests that the purposeful exclusion of black jurors within the confines of a single trial cannot constitute a violation of the Equal Protection Clause. Since Swain was decided, the Court has adopted a broader view of the function of the jury and has come to see how entrenched and pernicious race-based attitudes are in the justice system. The experience with Swain's rule over the past generation counsels its rejection.

- *Ridgway, et al. v. Ridgway, et al.* (1981)

– I conclude that the decision of the Maine Supreme Judicial Court should be
  reversed. The Act gives servicemen complete freedom to name the beneficiaries
  of their choice, and makes use of a broad anti-attachment provision to ensure that
  those beneficiaries actually receive and enjoy the funds. This Court has held that
  virtually identical provisions bar state law community property claims. *Wissner
  v. Wissner*, 338 U.S. 655 (1950). The same analysis should be applied to the
  state divorce decree at issue in this case.

APPENDIX B

CHAPTER 2 APPENDIX

Table B.1: Logistic Regression Model of the Likelihood of Bargaining

	Coefficient (SE)
Legal Considerations	
Weak Conflict	−0.277*
	(0.108)
Uncertain	.057
	(0.099)
Weak Agreement	−0.173
	(0.176)
Strong Agreement	−0.098
	(0.147)
Policy Preferences	
Author Distance	0.029*
	(0.003)
Coalition Distance	0.009*
	(0.002)
Strategic Interaction	
Winning Margin	−0.008
	(0.036)
Cooperation	−2.143*
	(0.607)
Contextual Controls	
Political Salience	0.068
	(0.044)
Legal Salience	0.270
	(0.155)
Case Complexity	0.085*
	(0.023)
End of Term	0.001*
	(0.000)
Workload	0.001
	(0.008)
Chief Justice	−0.371*
	(0.062)
Freshman Author	−0.044
	(0.082)
Constant	−2.367*
	(0.276)
N	7563
AIC	7165.506
BIC	7227.885
Log Likelihood	−3573.753

Standard errors in parentheses

* $p < 0.05$

Table B.2: Multinomial Logistic Regression Model of Justices' Strategic Responses to the Majority Opinion Author's First Draft

	Wait	Suggestion	Threat	Separate	Concur	Dissent
Legal Considerations						
Weak Agreement	−0.776*	0.053	−0.683	0.010	−0.809*	−0.102
	(0.225)	(0.225)	(0.472)	(0.144)	(0.252)	(0.250)
Uncertain	0.254	−0.140	0.288	0.285	−0.092	−0.760
	(0.178)	(0.356)	(0.539)	(0.175)	(0.406)	(0.343)
Weak Conflict	−0.126	−0.346*	0.672	−0.234	−0.532	0.006
	(0.259)	(0.173)	(0.398)	(0.249)	(0.370)	(0.198)
Strong Conflict	−0.244	0.010	0.523	−0.004	−0.694*	0.105
	(0.161)	(0.176)	(0.298)	(0.180)	(0.296)	(0.180)
Policy Preferences						
Author Distance	0.021*	0.027*	0.042*	0.035*	0.018*	0.026*
	(0.005)	(0.004)	(0.007)	(0.005)	(0.005)	(0.005)
Coalition Distance	0.010	−0.003	−0.022	0.010*	0.042*	0.003
	(0.014)	(0.012)	(0.013)	(0.004)	(0.007)	(0.007)
Strategic Interaction						
Winning Margin	−0.145*	0.071	0.200*	0.063	−0.159*	−0.057
	(0.045)	(0.044)	(0.056)	(0.056)	(0.054)	(0.038)
Cooperation	−2.964*	−2.176*	−1.689	−1.520	−2.583*	−2.663*
	(0.973)	(0.508)	(1.394)	(0.843)	(1.065)	(0.890)
Contextual Controls						
Political Salience	0.141	0.148*	0.188	−0.021	−0.068	0.146
	(0.097)	(0.075)	(0.121)	(0.054)	(0.096)	(0.097)
Legal Salience	0.064	0.109	−0.303	0.569*	0.210	0.153
	(0.267)	(0.142)	(0.366)	(0.180)	(0.317)	(0.243)
Case Complexity	−0.115*	0.239*	0.085	0.077	0.148*	0.050
	(0.043)	(0.065)	(0.100)	(0.043)	(0.044)	(0.079)
End of Term	0.002*	0.003	0.001	0.077	−0.001	0.004*
	(0.001)	(0.001)	(0.001)	(0.043)	(0.001)	(0.001)
Workload	0.001	0.011	−0.003	−0.006	−0.013	0.031*
	(0.024)	(0.029)	(0.025)	(0.016)	(0.018)	(0.010)
Chief Justice	−0.595*	−0.811*	−0.876*	0.158	−0.656*	−0.639*
	(0.180)	(0.181)	(0.172)	(0.107)	(0.146)	(0.104)
Freshman Author	−0.301	0.030	0.543*	−0.065	−1.160*	0.359
	(0.207)	(0.308)	(0.255)	(0.131)	(0.510)	(0.261)
Expertise	−0.063	−0.044	0.099*	0.137*	0.053	0.036
	(0.047)	(0.054)	(0.037)	(0.037)	(0.056)	(0.052)
Constant	−4.203*	−4.945*	−6.115*	−3.330*	−3.179*	−5.313*
	(0.670)	(0.535)	(0.481)	(0.338)	(0.538)	(0.580)
N	7563					
Log Likelihood	−6028.889					
AIC	12075.777					
BIC	12138.157					

Standard errors in parentheses

* $p < 0.05$

Table B.3: Maltzman, Spriggs, and Wahlbeck's Original Model

	Wait	Suggestion	Threat	Separate	Concur	Dissent
Policy Preferences						
Author Distance	0.020*	0.026*	0.042*	0.035*	0.018*	0.026*
	(0.005)	(0.004)	(0.007)	(0.005)	(0.005)	(0.005)
Coalition Distance	0.009	−0.003	−0.021	0.010*	0.1*	0.003
	(0.014)	(0.012)	(0.012)	(0.004)	(0.007)	(0.007)
Strategic Interaction						
Winning Margin	−0.153*	0.070	0.241*	0.059	−0.197*	−0.044
	(0.043)	(0.045)	(0.053)	(0.048)	(0.051)	(0.038)
Cooperation	−2.959*	−2.175*	−1.734	−1.517	−2.572*	−2.676*
	(0.968)	(0.508)	(1.378)	(0.838)	(1.065)	(0.880)
Contextual Controls						
Political Salience	0.141	0.148*	0.198	−0.022	−0.078	0.147
	(0.097)	(0.075)	(0.121)	(0.053)	(0.098)	(0.097)
Legal Salience	0.049	0.107	−0.239	0.563*	0.135	0.178
	(0.278)	(0.139)	(0.363)	(0.185)	(0.319)	(0.251)
Case Complexity	−0.113*	0.239*	0.079	0.078	0.154*	0.047
	(0.043)	(0.065)	(0.100)	(0.043)	(0.044)	(0.081)
End of Term	0.002*	0.003	0.001	0.001	−0.001	0.004*
	(0.001)	(0.001)	(0.001)	(0.001)	(0.001)	(0.001)
Workload	0.001	0.011	−0.004	−0.006	−0.013	0.030*
	(0.024)	(0.029)	(0.025)	(0.016)	(0.017)	(0.010)
Chief Justice	−0.593*	−0.811*	−0.891*	0.159	−0.652*	−0.644*
	(0.179)	(0.181)	(0.168)	(0.105)	(0.139)	(0.105)
Freshman Author	−0.298	0.030	0.539*	−0.063	−1.109*	0.355
	(0.206)	(0.308)	(0.255)	(0.129)	(0.499)	(0.261)
Expertise	−0.063	−0.044	0.101*	0.137*	0.052	0.036
	(0.048)	(0.054)	(0.037)	(0.037)	(0.056)	(0.052)
Constant	−4.293*	−4.945*	−5.515*	−3.373*	−3.580*	−5.152*
	(0.603)	(0.546)	(0.452)	(0.397)	(0.434)	(0.518)
N	7563					
Log Likelihood	−6038.711					
AIC	12095.422					
BIC	12157.802					

Standard errors in parentheses

* $p < 0.05$

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