The Consistency of Judicial Choice

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Despite the fact that scholars of judicial politics have developed reasonably well-specified models of the voting behavior of U.S. Supreme Court justices, little attention has been paid to influences on the consistency of the choices justices make. Aside from the methodological problems associated with failure to account for heteroskedasticity with regard to the justices' voting behavior, I argue that variance in judicial choice is also of theoretical import. Simply put, by uncovering influences on the stability of judicial choice, a more complete understanding of judicial decision making is provided. I explore this possibility by developing a theoretical framework that identifies influences on the consistency of judicial choice, which are then subjected to empirical testing. I show that the stability of judicial decision making is affected by attitudinal and strategic factors, as well as the Court's informational environment. The result is a more fully integrated model of Supreme Court decision making.

The pursuit of consistency is arguably the driving force behind all decision making (Heider 1946). Within the legal realm, consistency plays a key role in both empirical and normative approaches to judicial choice. Empirically, the expectation of consistency is a primary tenet of the legal and attitudinal models.[1] Normatively, the desire for consistency on the part of jurists is said to contribute to a more just society as it reduces the appearance of inequality in the administration of justice (e.g., Coons 1987). Despite its prominent place in extant conceptions—and prescriptions—of legal decision making, consistency is often elusive. Nonetheless, researchers seeking to explain the behavior of judicial decision makers are necessarily motivated by the search for consistency within the behavior of judges. Indeed, the concept of consistency is a key aspect of all of science: it is predictability that guides the researcher towards his or her formulation of theories and hypotheses that later allow for generalization (Severin and Tankard 1997, 159).

Although consistency plays a pivotal role in understanding judicial behavior, few analyses explicitly deal with the concept (but see, e.g., Epstein et al. 1998; Spaeth and Segal 1999; Zorn and Caldeira 2003). This is unfortunate, for both judicial scholars (e.g., Baum 1994) and Supreme Court justices (e.g., Scalia 1997) recognize the desire for consistency in judicial decision making. But, by focusing primarily on how different types of variables influence the ultimate decisions of jurists, we are, in effect, missing a large piece of the puzzle. As Braumoeller notes, this lamentable lacuna in understanding the choices political actors make is primarily a consequence of political scientists' concentration on mean-centric causal phenomena, which has resulted in a distressing ignorance as to how variance-altering causes have the potential to provide researchers with "a more accurate and thorough description of the social and political world than they would otherwise possess" (2006, 269).[2] In short, a more complete comprehension of judicial behavior—and that of political actors

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[1]From the legal standpoint, precedent dictates that like cases must receive similar treatment, while the stability of preferences is a key assumption of the attitudinal model (e.g., Segal and Spaeth 1993, 69).

[2]Following Braumoeller (2006), by mean-centric, I am referring to the focus on variables that influence the mean of the distribution of a dependent variable, while variance-altering refers to those factors that cause a change in the variance of the distribution of that dependent variable (i.e., the consistency of choice). While there are a dearth of analyses that examine the influence of variance-altering causes with regard to judicial choice (but see Szmer and Songer 2005), such models have been employed in a variety of other contexts. For example, scholars have utilized heteroskedastic probit models (which capture the effect of variance-altering causes on a binary dependent variable) for unearthing the consistency of beliefs ranging from the use of political conflict (Clark and Nordstrom 2005) to attitudes towards abortion policy (Alvarez and Brehm 1995). Following these analyses, I utilize the heteroskedastic probit model to analyze consistency or inconsistency in the individual justices' decision making. For citations to other political science research utilizing statistical models that explicitly model variance, see the the online appendix at http://journalofpolitics.org/.

more generally—is achieved through the supplementary understanding of the variability in decision making. The purpose of this article is to contribute to our cognizance of the variability in judicial behavior by analyzing the circumstances under which the decision making of U.S. Supreme Court justices is more or less consistent.

An appreciation of the consistency of judicial choice is crucial as the variability in judicial decision making is systemic and has substantive implications for our understanding of the choices justices make. With regard to extant models of judicial decision making, I show that the attitudinal model is particularly applicable to ideologically extreme justices, and the model's predictive capabilities are especially enhanced in salient cases. With regard to strategic characterizations of the Court, I demonstrate that a justice's decision making becomes more stable as the length of a natural court increases because of increased certainty as to the preferences of her fellow justices. Additionally, I provide evidence of acclimation effects for Supreme Court justices, as well as organized interests' role in increasing the ambiguity in the justices' already uncertain decision making. Taken as a whole, in this article I make an important contribution to our understanding of the choices justices make—and those of political elites more broadly—by illustrating how both behavioral and institutional factors shape the consistency of choice.

In addition to the substantive motivations for unearthing the determinants of consistency in judicial choice, there exists an important methodological reason for examining variance in judicial decision making. Virtually all models of the justices' voting behavior utilize a dichotomous dependent variable (whether it is operationalized as liberal/conservative, reverse/affirm, or by some other means) and, accordingly, utilize maximum-likelihood techniques for statistical inference. But, if heteroskedasticity exists in a model based on maximum-likelihood inference, it leads to inefficient estimates of the model's parameter values, as well as biased estimates of the standard errors of those coefficients (e.g., Greene 2000, 517–21). In other words, unlike OLS regression in which heteroskedasticity leads to efficient, but biased estimates, in ML estimation heteroskedasticity leads to estimates that are both inefficient and biased, clearly a concern worthy of consideration.

Thus, for both theoretical and methodological reasons, an understanding of the consistency of judicial choice is important for a more complete comprehension of judicial voting behavior. In the next section, I develop and formulate several hypotheses related to the variance in the justices' decision making. I then subject my hypotheses to empirical testing using data on the justices' voting behavior during the 1946–95 terms. Following this, I present an interpretation and discussion of the findings. I close with a brief conclusion section discussing the relevance of this research, both normatively and empirically, as well as where future research might head.

Variability in Judicial Decision Making

The Justices

According to the attitudinal model of Supreme Court decision making, the justices' voting behavior is primarily motivated by their policy preferences (e.g., Segal and Spaeth 2002). Simply put, liberal justices vote liberally, while conservative justices vote conservatively. Clearly though, there exists substantial variability with regard to the extent of each justice's ideological extremism. What is the systematic effect of these differences? Research in social psychology tells us that—not surprisingly—decision makers with more extreme ideologies exhibit decreased variance in their behavior and that extreme attitudes are better predictors of behavior than more moderate ideologies (e.g., Krosnick and Petty 1995; Wicker 1969; see also Miller and Peterson 2004). To more clearly see this point with regard to the Court, consider moderate justices. The attitudinal model's prediction for moderates at the level of the individual vote is functionally equivalent to saying a moderate's voting behavior is unstable; that is, a moderate justice will not consistently cast either liberal or conservative votes. Rather, he or she will vote conservatively in any given case with the same probability of voting liberally. However, the attitudinal model predicts that justices with more extreme ideologies—be they liberal or conservative—will exhibit more consistent behavior. In other words, compared to a moderate justice, such as O'Connor, an extremely conservative justice, such as Thomas, should exhibit more predictable voting behavior (i.e., decreased error variance). Further, research by Rosenberg (1968) reveals that decision makers with relatively extreme attitudes are resistant to attempts at persuasion. This is particularly relevant vis-à-vis the Court, given the adversarial nature of the American legal system in which the justices are continually facing persuasion attempts. Accordingly, the expectation is that justices with

extreme ideologies will display more stable voting behavior.

Second, a justice's length of service on the Court might influence the consistency of his or her voting behavior. Past research using the justices' merits votes to test for acclimation effects has utilized one of two methodological strategies. First, several studies compare the voting behavior of new justices to their more experienced brethren (e.g., Brenner 1983; Heck and Hall 1981; Snyder 1958). However, this methodology is unable to provide evidence as to whether individual justices experience acclimation effects as a comparison between justices (one new to the bench, one more senior) does not establish variability over the length of a particular justice's tenure on the bench. A second line of research examines acclimation effects by comparing the voting behavior of individual justices during their first terms on the Court to later in their careers (e.g., Hagle 1993; Hurwitz and Stefko 2004; Pacelle and Pauly 1996). By essentially "making each justice his or her own control" (Hagle 1993, 1144), this strategy is able to provide evidence for or against acclimation effects for individual justices. However, the approach is not without its difficulties as it implicitly hypothesizes directional differences in a justice's voting behavior will manifest themselves over time. In other words, evidence of an acclimation effect is said to exist if, for example, we find that Warren voted conservatively 44% of the time in his first two years on the Court, compared to 32% for the remainder of his career on the bench, after controlling for the ideological direction of the lower court's decision (Hagle 1993). But, this strategy can miss important evidence of instability. For example, if Warren voted conservatively 42% of the time during his first term on the Court and 22% in his second term, no evidence for an acclimation effect would be provided (as the comparison of Warren's behavior during his first two terms would be identical to the remainder of his career: 32% liberal votes cast).[3] Clearly, however, Warren's voting behavior during his first two terms in this hypothetical example is variable, and this instability is exactly consistent with the claim of initial disorientation in the acclimation literature. In this sense, acclimation effects are not about directionality, but instead about instability. Examining the error variance in a justice's voting behavior offers perhaps the most appropriate manner to test for acclimation effects. If acclimation effects exist for Supreme Court justices, the expectation is that the variance in a justice's voting behavior will decrease as his or her tenure on the Court increases.[4]

The Cases

In addition to attributes of the justices, two case specific factors might also influence the variance in the justices' decision making. First, several studies suggest that a justice's attitudes operate particularly strongly in salient cases, as compared to relatively trivial disputes (Bartels 2005; Segal 1986, 939; Spaeth and Segal 1999, 309–11; Unah and Hancock 2006). Such is the case because landmark cases stand out on the Court's docket and are thus accorded a disproportionate amount of attention by the justices. This results in the justices asking more questions during oral argument, pressing for greater clarity on issues (Unah and Hancock 2006; see also Schubert et al. 1992). Further, a substantial body of research indicates that chief justices self-assign salient cases for the purpose of maximizing control over the ideological content of those opinions (e.g., Brenner and Arrington 2002; Epstein and Segal 2000; Segal and Spaeth 1993, 2002). Taken as a whole, this literature reveals that, when the justices view a case as salient, they are likely to become more cognitively engaged with that dispute, leading to more stable voting behavior. To be sure, there is no theoretical reason to expect issue salience to directly contribute to the directionality of an individual justices' voting behavior. Instead, a case's import should drive the consistency of that behavior. Accordingly, the expectation is that a justice's voting behavior will be more consistent in salient cases.

Second, I expect a justice's decision making will be particularly variable in complex cases. In cases that are technically complex, with multiple issues and legal provisions, the exact application of a justice's policy preferences is unclear. As such, there is substantial room for internal disagreement, thus decreasing the likelihood of observing attitudinally consistent behavior. For example, in a case with multiple issues, a justice might have ideologically incompatible preferences attached to each separate issue in the case (Bartels 2005, 10). Further, in

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[3]In point of fact, Warren voted conservatively 45% of the time during his first term on the Court and 34% during his second term (after controlling for the ideological direction of the lower court's decision per Hagle 1993).

[4]Further, using the heteroskedastic probit model to test for acclimation effects is particularly useful as it does not assume that the error variance in a justice's voting behavior is linear over the course of a justice's career, nor does it require a researcher to establish a somewhat arbitrary cutpoint as to when a justice has "fully acclimated" (for example, periods tested in existing research range from one to five years).

multidimensional cases, a justice is more likely to rely on contextual matters in formulating a coherent judgment strategy, such as ruling on narrow procedural grounds that may not implicate an attitudinal dimension (e.g., Tourangeau and Rasinski 1988, 310). Conversely, in cases with a singular issue or legal provision, a justice's ability to maximize the application of his or her policy preferences is enhanced. As Perry (1991, 40) observes, for every *Brown v. Board of Education* (1954) the Court decides, there is a *Brown v. Allen* (1952): those cases that deal with highly complex and numbered jurisdictional issues. The expectation is that a justice's voting behavior will be less consistent in complex cases.

The Informational Environment

Finally, two aspects of the informational environment at the Court are expected to influence the consistency of the justices' voting behavior. First, I expect that relatively high levels of interest group amicus curiae involvement will increase the variance in the justices' decision making. In cases without amicus briefs, there are effectively two perspectives for the justices to consider (those of the petitioner and the respondent). Conversely, when amicus briefs are present in a case, the justices are the recipients of information that alters the informational environment at the Court by expanding the scope of the conflict (e.g., Schattschneider 1960). By raising novel issues before the Court, amicus briefs have the potential to confound the justices' already uncertain decision making as to the correct application of the law in a case. This uncertainty is argued to lead to more variable behavior. In cases lacking amicus briefs, the scope of the conflict is circumscribed as the justices generally only consider issues raised by the litigants (e.g., Epstein, Segal, and Johnson 1996). In cases with amicus participation, the scope of the conflict is expansive as the amici alert the justices to new issues implicated by the dispute. By introducing issues or expanding on issues the litigants were only able to make in abbreviated form, amici make it difficult for the justices to pin down the correct application of the law. Further, recent research indicates that amicus briefs have a significant impact on the justices' decision making (Collins 2004; Kearney and Merrill 2000; but see Songer and Sheehan 1993). According to Kearney and Merrill (2000), by influencing the choices justices make, amicus briefs serve to attenuate the justices' attitudinal voting behavior. In other words, by inducing the justices to cast votes that are not necessarily consistent with their policy preferences, amicus briefs can serve to decrease the consistency of expected attitudinal behavior. Accordingly, the expectation is that the justices' voting behavior will be less consistent in cases attracting a relatively large amount of amicus curiae participation.[5]

Second, I expect that, as the tenure of a natural Court—a period of the Court that exhibits no membership change—increases, the justices' voting behavior will become more consistent. With each case decided by a natural court, the justices have an enhanced ability to predict the likely positions of the other justices. This is important because many Court opinions are the result of bargaining and accommodation among justices (Maltzman, Spriggs, and Wahlbeck 2000; Murphy 1964). Drawing on intuitions from strategic characterizations of the Court, Merrill (2003, 573) notes that as the length of a natural court increases, the justices will make fewer mistakes in predicting the positions of the other justices. If a justice is better able to predict the positions of her fellow justices, she can better realize the application of her own policy preferences in the case due to her improved ability to figure out how far her fellow brethren are willing to move on an issue. In this sense, with each case decided by a natural Court, a justice updates her probability estimates of the preferences of her fellow justices, allowing her to determine exactly where—spatially speaking—her fellow justices are willing to move to

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[5]One might argue that this hypothesis is only applicable to cases in which the justices receive amicus briefs supporting both parties to a case. However, this is not necessarily the case. The scope of the conflict is often expanded even in those cases in which amicus briefs are filed supporting only one litigant because those briefs draw the justices' attention to issues not addressed by the litigants, therefore altering the informational environment surrounding the case. For example, in *NAACP v. Claiborne* (1982), a case involving whether participants in a boycott can be held liable for damages that a business incurred through nonviolent means, three amicus briefs were filed for the petitioner, and none were filed for the respondent. In its brief, the AFL-CIO addressed whether an organization can be held liable for the criminal misconduct of its members, arguing that the imputed liability doctrine in commerce does not apply to political boycotts. The ACLU focused on the free expression issue in the case, arguing for an expansive interpretation of the First Amendment that encompasses economic boycotts. The American Jewish Congress spotlighted the conspiracy issue in the case, in addition to providing a detailed discussion as to the perceived illegality of the lower court's ruling on damages. As this case makes clear, even amici supporting only one litigant have the potential to influence the justices' decision making by raising new issues and reframing arguments already presented by the parties. In the cases under analysis with amicus participation, amicus briefs were filed on both sides of the dispute in 13% of cases and the average difference between liberal and conservative briefs was two briefs (standard deviation = 2).

obtain a winning coalition in line with her policy preferences. Simply put, if a justice can better realize the likely positions of her colleagues, this can increase her ability to determine how her own policy preferences dictate voting. In addition, Merrill (2003) notes that, as the length of a natural Court increases, the justices are increasingly likely to engage in cooperation, which in turn should make their decision making more stable as compared to a period of the Court with rampant membership change. To put it differently, in contrast to a Court in flux (i.e., one exhibiting great membership change), a justice on a Court in stasis (i.e., one exhibiting no membership change) has greater information regarding the preferences of her fellow justices, which implies that she will make fewer mistakes in realizing the application of her own policy preferences due to her improved certainty resulting from the lack of membership change on the Court. Consistent with this strategic account of judicial decision making, I expect that a justice's voting behavior will become more stable as the duration of a natural Court increases.

Data and Methodology

In order to test the validity of the proposed hypotheses, I examine the justices' voting behavior in all orally argued cases decided during the 1946–95 terms, using the justice-vote as the unit of analysis.[6] The dependant variable captures the ideological direction of the individual justices' voting behavior and is scored 1 for a liberal vote and 0 for a conservative vote. While I am primarily interested in evaluating influences on the consistency of the justices' voting behavior (i.e., the error variance), it is necessary to control for factors that influence the ultimate choices justices make (i.e., the liberal or conservative nature of the justices' votes). Accordingly, I use heteroskedastic probit, which simultaneously estimates the effect of independent variables on both the mean and variance of a binary dependent variable by relaxing the assumption that the variance is constant (as in a homoskedastic probit model) and, instead, allowing the variance to alter with respect to

[6]These data were obtained primarily through the Spaeth (2002, 2003) databases, with exceptions discussed below. Relevant votes were selected using the case citation plus split vote as the unit of analysis. The results of various alternative model specifications, highlighting the robustness of the results, are available in the online appendix.

predictor variables. The log likelihood function for the model is as follows:

$$\log L = \sum_{i=1}^{n} \left(y_i \log \Phi \left(\frac{X_i \beta}{\exp(Z_i \gamma)} \right) \right.$$
$$\left. + (1 - y_i) \log \left[1 - \Phi \left(\frac{X_i \beta}{\exp(Z_i \gamma)} \right) \right] \right)$$

Thus, the major difference between the likelihood function of the heteroskedastic probit model and that of the more common homoskedastic probit model is the inclusion of the variance model in the denominator of the unrestricted model (Alvarez and Brehm 1995, 1062). As such, the model provides two types of estimates: those related to the mean of the distribution of the dependent variable (i.e., the causes of liberal or conservative voting) and those related to the variance of the distribution of the dependent variable (i.e., the causes of consistent or inconsistent voting). If the effects of the variables expected to influence the consistency of the justices' decision making are constant, we cannot reject the null hypothesis of homoskedasticity and the model reduces to the standard probit model. If the effects of these variables are nonconstant, we can reject the null hypothesis of homoskedasticity and conclude that the model is systematically heteroskedastic.

To account for the fact the data is in time-series, cross-section format with a dichotomous dependent variable, I include a dummy variable for each Supreme Court term save one in the vote choice model (Beck, Katz, and Tucker 1998). While these are admittedly rudimentary controls, they enable the model to account for any temporal dependence that may be related to factors such as alterations in the Court's agenda (Pacelle 1991), the increase in amicus participation over time (Collins 2004), and the make up of executive and legislative branches (Epstein and Knight 1998). To control for the nonindependence of observations (the fact that there are approximately nine observations for each case in the data), I estimate the model using robust standard errors, clustered on case citation (e.g., Giles and Zorn 2000, 13).

To account for factors that influence the justices' choices (i.e., the mean vector), I include several controls. To measure the justices' *Attitudes*, I employ the Segal and Cover (1989) scores, as updated by Segal et al. (1995), which are based on editorial commentary appearing in newspapers regarding the justices' policy preferences made between their presidential nomination and Senate confirmation. This variable ranges from -1.0 (extremely conservative) to

+1.0 (extremely liberal). The expected sign of this variable is positive, indicating that justices with liberal policy preferences are more likely than conservative justices to cast liberal votes. To control for the Court's well-known practice of accepting cases on appeal it seeks to reverse (Perry 1991; Segal and Spaeth 1993), I include a variable labeled *Lower Court Direction*, coded 1 if the decision of the lower court the Supreme Court is reviewing was liberal in direction and 0 if it was conservative. The expected sign of this variable is negative, indicating that a justice is more likely to vote conservatively given that the lower court handed down a liberal decision. To capture the import of party resources in judicial decision making (Galanter 1974; Sheehan, Mishler, and Songer 1992), I utilize two variables: *Liberal Litigant Resources* and *Conservative Litigant Resources*. These are based on the status continuum of litigants adopted generally from Sheehan, Mishler, and Songer (1992; see also Collins 2004). That is, I ranked litigants, according to increasing resources, as follows: poor individuals = 1, minorities = 2, individuals = 3, unions/interest groups = 4, small businesses = 5, businesses = 6, corporations = 7, local governments = 8, state governments = 9, and the federal government = 10. It is expected that the sign of the *Liberal Litigant Resources* variable will be positive, indicating that a justice is more likely to vote liberally when an high-resource litigant advocates that position. Conversely, it is expected that the *Conservative Litigant Resources* variable will be negative in direction, indicating that a justice is more likely to vote conservatively when a highly capable litigant advocates the conservative position. Finally, four variables are included to account for the influence of amicus curiae participation on the justices' voting behavior (e.g., Collins 2004; Kearney and Merrill 2000).[7] *Liberal Amicus Briefs* and *Conservative Amicus Briefs* represent the number of liberal and conservative amicus briefs filed in each case. The expectation is that, as the number of liberal (conservative) amicus briefs increases, so too will the likelihood of observing a liberal (conservative) vote. To control for the influence of the Solicitor General (SG) as amicus curiae (e.g., Bailey, Kamoie, and Maltzman 2005; O'Connor 1983), two variables are used: *SG Liberal Amicus* and *SG Conservative Amicus*. These variables are scored 1 if the SG filed an amicus brief arguing the liberal or conservative position, respectively, and 0 otherwise. The expectation is that

a justice will cast a vote in line with the position advocated by the SG.

The variables expected to influence the consistency of the justices' voting behavior are operationalized as follows. To measure the individual justices' *Ideological Extremism*, I simply square each justice's Segal and Cover score. Higher scores on this variable reflect more extreme ideologies. Therefore, the expected sign of this variable is negative, indicating that justices with more extreme ideologies will exhibit more consistent voting behavior, as compared to their more moderate counterparts. To capture the possibility that a justice's voting behavior will become more stable over time, I include a variable labeled *Tenure* that is a simple count of each justice's length of service on the Court. The expected sign of this variable is negative, revealing a decrease in variability as a justice's tenure on the Court increases.[8] As a proxy for *Case Salience*, I employ the measure suggested by Brenner and Arrington (2002). That is, I include a variable scored 2 if the case appeared on both the *Congressional Quarterly* list of salient decisions *and* appeared on the front page of the *New York Times* following the decision,[9] 1 if the case appeared on one list (but not the other), and 0 if the case appeared on neither list. The expected sign of this variable is negative, indicating that justices will exhibit more consistent voting behavior in salient cases. Following Maltzman, Spriggs, and Wahlbeck (2000, 47), I derived a measure of *Case Complexity* based on a factor analysis of the number of issues raised in the case, the number of legal provisions relevant to the case, and the number of opinions released in the case; these three indicators produced a single factor with an eigenvalue greater than 1. The expected sign of this variable is positive, indicating that the justices' decision making is especially variable in complex cases. Two variables capture the informational environment at the Court. To account for the possibility that the justices' voting behavior is more variant in cases in which interest groups expand the scope of the conflict, a variable labeled *Total Amicus Briefs* is included. This variable represents the sum of the *Liberal* and *Conservative Amicus Brief* variables discussed above. The expected sign of this variable is

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[7]The data on amicus curiae participation come from the Kearney and Merrill (2000) amicus curiae database.

[8]Zorn and Caldeira (2003) note that this variable may also tap into whether the Segal and Cover scores, which are static, decay over the length of a justice's career (i.e., perform worse over time). If this variable is associated with measurement error with regard to the Segal and Cover scores, its expected sign is positive, indicating that increased error variance exists over time.

[9]The *New York Times* salience measure was created by Epstein and Segal (2000).

positive, indicating that the justices' decision making will be more variable in cases attracting a relatively large number of amicus briefs. To capture the possibility that the justices' decision making becomes more stable as the duration of a natural Court increases, I include a variable labeled *Prior Cases*, which is simply the number of orally argued cases each natural court disposed of prior to the case at hand. The expected sign of this variable is negative, indicating that, as the number of cases each natural Court disposed of increases, the justices will exhibit more consistent voting behavior.

Finally, following Zorn and Caldeira (2003), I include two additional control variables in the variance vector that account for measurement error in the justices' Segal and Cover scores. First, I include a variable, *Editorials*, that is the number of editorials the Segal and Cover scores are based on.[10] This variable is intended to capture the fact that the Segal and Cover scores are based on editorials that vary widely in number for each justice, from a low of two (Justices Goldberg, Marshall, and Whittaker) to a high of 47 (Justice Thomas). Due to this, I hypothesize that scores derived from a large number of editorials incorporate more information and therefore should be more accurate than scores derived from less editorials. Accordingly, I expect that this variable will be negatively signed, indicating that justices whose ideologies are estimated using more information will exhibit less variance than justices whose ideologies are estimated using less information, due to the measurement error associated with these scores. Second, I include a variable that indicates whether the dispute was a *Civil Liberties Case*, scored 1 if the case involved criminal procedure, civil rights, due process, the First Amendment, privacy, or attorneys, and 0 otherwise (e.g., Segal et al. 1995, 815). The purpose of including this variable is to account for the fact that the editorials from which the Segal and Cover scores are derived deal almost exclusively with civil rights and liberties issues (Segal and Cover 1989, 561). Accordingly, the expectation is that the sign of this variable will be negative, indicating that a justice's decision making is more consistent in civil liberties cases as a function of the Segal and Cover scores serving as a

[10]Because Segal et al. (1995) do not report the number of editorials from which Justices Ginsburg and Breyer's scores are derived, I use the mean number of editorials for the justices who sat on the same natural Court with Ginsburg and Breyer, excluding Thomas's score, who was an extreme outlier due to the media attention given to his nomination stemming from the Anita Hill scandal.

TABLE 1.   **Heteroskedastic Probit Results**

Predictor	Parameter Estimate
Choice Model	
Attitudes	.264 (.021)***
Lower Court Direction	−.211 (.022)***
Liberal Litigant Resources	.013 (.003)***
Conservative Litigant Resources	−.023 (.004)***
Liberal Amicus Briefs	.029 (.006)***
Conservative Amicus Briefs	−.019 (.006)***
SG Liberal Amicus	.183 (.034)***
SG Conservative Amicus	−.148 (.031)***
Constant	.048 (.059)
Variance Model	
Ideological Extremism	−.133 (.046)**
Tenure	−.004 (.002)*
Case Salience	−.115 (.045)**
Case Complexity	.022 (.029)
Total Amicus Briefs	.039 (.010)***
Prior Cases	−.0002 (.0001)*
Editorials	−.024 (.002)***
Civil Liberties Case	−.489 (.059)***
Model Diagnostics	
N	52,993
Wald χ^2	222.1***
Heteroskedasticity Test ($\chi^2_{df=8}$)	503.4***
Correctly Predicted	63.8
Reduction in Error	21.4

Dependent variable indicates the ideological direction of the individual justice's vote (1 = liberal, 0 = conservative). Numbers in parentheses indicate robust standard errors, clustered on case citation. Model includes 49 temporal dummy variables (results not shown). * $p \leq .05$; ** $p \leq .01$; *** $p \leq .001$ (one-tailed tests).

particularly precise measure of ideology in those cases.

Results

Table 1 reports the results of the heteroskedastic probit model. The model correctly predicts over 63% of votes for a percent reduction in error of 21% and, more importantly, provides substantial confirmation of heteroskedasticity. This is evidenced by the heteroskedasticity test, which compares the unrestricted heteroskedastic model to the restricted model (in which homoskedasticity is assumed) by way of the familiar likelihood ratio test (Alvarez and Brehm 1995, 1063), where L_0 is the log likelihood for the homoskedastic probit model, L_H is the log likelihood for the heteroskedastic probit model, and k is the number of estimated parameters in the variance portion of the model. Thus, the likelihood ratio is

LR = 2 × (L$_H$−L$_0$), which is distributed by χ^2 with k degrees of freedom. As this test statistic signifies, I can reject the null hypothesis of homoskedasticity, indicating that the heteroskedastic probit model provides a better fit than the restricted model.[11]

Turning first to the choice model, all of the variables are correctly signed and achieve statistical significance. Consistent with the attitudinal model's predictions, the more liberal a justice's policy preferences, the more likely that justice is to cast a liberal vote. In addition, the results indicate that, when the Supreme Court is reviewing a liberal decision, a justice is 17% more likely to vote conservatively than when the Court is reviewing a conservative decision.[12] With regard to litigant resources, the results affirm that, as a litigant moves up the resource continuum reported above, the justices are increasingly likely to support that litigant's position. For example, compared to an individual litigant, when the federal government argues the liberal position, it results in a 7% increase in the likelihood of observing a liberal vote. Finally, these results also reveal strong support for the role of amicus curiae briefs in shaping the justices' decision making. A one standard deviation change in the number of liberal amicus briefs (from one to three) results in a 4% increase in the likelihood of observing a liberal vote. Conversely, a one standard deviation change in the number of conservative briefs (from one to three) results in a 3% decrease in the likelihood of observing a liberal vote. When the Solicitor General files a liberal amicus brief, a justice is 14% more likely to vote liberally; when the SG files a conservative amicus brief, a justice is 12% less likely to cast a liberal vote.

Moving to the error variance part of the model, note that all of the variables—with the exception of the *Case Complexity* variable—are signed in the correct direction and achieve statistical significance. Beginning with attributes of the justices, several interesting findings emerge. First, the results corroborate the argument that ideological extremism reduces the variability in a justice's decision making. In other words, compared to a more moderate justice, an extremely liberal (or conservative) justice engages in more consistent voting behavior. This, of course, should be expected, given the strong support for the attitudinal model provided in the choice part of the

equation and has a fascinating implication. Namely, if extreme attitudes lead to more stable voting behavior, this suggests that factors that shape a moderate justice's decision calculus might be less consequential for more ideologically extreme justices. In this sense, the voting behavior of moderate justices might be more context dependent (e.g., more reliant on specific aspects of a case) as compared to justices with extreme ideologies.

In addition, note that, as a justice's length of tenure on the Court increases, the variability in that justice's decision making decreases. This is interesting for two reasons. First, it provides clear evidence in support of an acclimation effect for Supreme Court justices: relative to their first terms on the Court, justices later in their careers exhibit more consistent voting behavior, suggesting that Supreme Court justices, like other jurists, undergo an acclimation period. Second, the results speak to the robustness of the Segal and Cover scores with respect to their longitudinal utility. Because the Segal and Cover scores are static measures of policy preferences taken before a justice's first vote on the Court, a plausible expectation is that the scores' ability to predict votes should decrease over time (e.g., Zorn and Caldeira 2003). If this was the case, we would expect the sign of this variable to be positive, demonstrating an increase in error variance over time (i.e., that the Segal and Cover scores perform worse over time). However, these results suggest just the opposite. Instead, they provide evidence that a single measure of the justices' attitudes might be capable of accurately predicting the justices' votes over their entire careers (see also Zorn and Caldeira 2003; but see Epstein et al. 1998).

As expected, case salience decreases the variability in a justice's decision making. For example, in non-salient cases, conservative Scalia cast conservative votes 62% of the time; in cases that appeared on either the *Congressional Quarterly* list or on the front page of the *New York Times* (but not both), Scalia voted conservatively 72% of the time; in cases appearing on both lists, Scalia cast conservative votes in 78% of cases. From the perspective of the attitudinal model, this finding suggests that ideology plays a central role in salient cases, reducing the chances of observing nonattitudinal behavior. Further, this finding corroborates research in social psychology that reveals that attitude-behavior consistency especially enhanced when an individual views an issue as salient (e.g., Posavac, Sanbonmatsu, and Fazio 1997). Contrary to expectations, however, the results fail to provide support for my hypothesis regarding case

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[11]This central finding is confirmed by the alternative use of the asymptotically equivalent Wald test statistic (Wald χ^2, σ^2 = 200.5, significant at < .001).

[12]Marginal effects were calculated holding all other variables at their mean or modal values.

complexity. As such, it appears that the justices' decision making is not especially unstable in complex cases.

The results also indicate that the Court's information environment influences the justices' decision making. First, the findings provide support for my contention that the justices' voting behavior becomes more stable as norms of cooperation among the justices develop over time, which is consistent with a strategic model of judicial behavior. This suggests that justices on the Court engage in a type of repeated game: with each case decided on a Court without membership change, a justice has greater information regarding the preferences of her fellow justices, which implies that she will make fewer mistakes in realizing the application of her own policy preferences due to her improved certainty with regard to her position relative to the other justices. Turning to conservative Rehnquist for use as an example, while serving on the sixth natural Burger Court (1975–80), Rehnquist cast conservative votes in 70% of the first 100 cases decided by that Court, compared to 78% in the remaining 756 cases.

Second, the results also speak to the important role organized interests play in the Court. As the number of amicus curiae briefs increases, so too does the variability in the justices' decision making. By presenting information that might otherwise be unavailable to the justices, interest groups are able to expand the scope of the conflict, making the justices' decision making more variant than in cases with no (or less) amicus participation. For example, Warren voted liberally in 74% of cases in which no amicus briefs were filed. In cases with at least three briefs (approximately a one standard deviation change), Warren voted liberally only 62% of the time. Considered in conjunction with the results regarding amicus briefs in the choice model, this finding suggests that amicus briefs can persuade the justices to vote in accordance with the positions in the briefs and this persuasion increases the variability of the justices' behavior. As such, it appears that the predictive power of the attitudinal model is attenuated in cases with amicus participation. Further, these results are especially robust in light of the fact that a case's salience and complexity are controlled for. By accounting for these variables, particularly strong evidence is provided for the notion that it is interest group amicus briefs that increase the justices' uncertainly and not case-specific conditions that are related to why amicus briefs are filed in the first place, such as the number of issues and legal provisions raised in a case, as well as a case's salience

(e.g., Hansford 2004).[13] In other words, by controlling for factors related to why certain cases attract amicus participation, we can be especially confident that the results reveal that the justices' voting is inconsistent because of the number of amicus briefs filed in a case as opposed to attributes of the case that are attractive to organized interests.
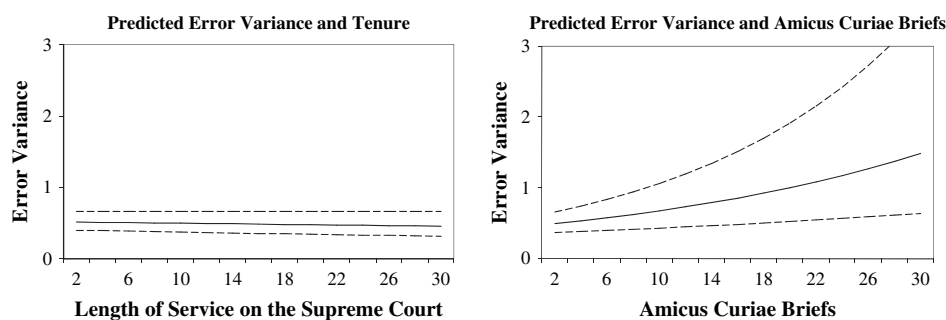
Finally, the two control variables indicate that systematic measurement error exists in Segal and Cover's proxy for judicial ideology. First, the parameter estimate of the *Editorials* variable indicates that Segal and Cover scores that are based on a relatively large number of editorials provide a better measure of the justices' attitudes than those scores based on only a few editorials in the sense that the score's ability to account for a justice's voting record is enhanced (see also Zorn and Caldeira 2003). Second, the coefficient for the *Civil Liberties Case* variable provides support for the contention that the Segal and Cover scores are particularly well suited for explaining the choices justices make in civil rights and liberties litigation.[14] Taken together, these results suggest that accounting for the possibility of measurement error in these scores should be taken seriously by researchers: failure to do so may lead to inefficient estimates of a model's parameter values and result in biased estimates of the standard errors of those values.

To more clearly see the substantive effects of variability in judicial decision making, consider Figure 1, which plots the predicted error variance, holding all other variables at their mean or modal values. The horizontal axis reflects a justice's length of tenure on the bench (left graph) and the number of amicus curiae briefs filed in a case (right graph), while the vertical axis represents predicted error variance. Confidence intervals are indicated by the dotted lines. Two important findings are revealed. First, while there is a statistically significant decrease in a justice's error variance over time, the substantive

[13]In addition, these findings suggest that researchers should be especially attentive to the pertinence of using amicus briefs as a proxy for a case's salience. In particular, if the number of amicus briefs filed in a case served as a surrogate for a case's salience, then the expected sign of the *Total Amicus Briefs* variable would be negative, indicating less error variance in cases with a relatively large number of amicus briefs. This expectation, however, does not comport with the results in Table 1, implying that, while amicus briefs might still serve as a somewhat noisy proxy for a case's broader import, their influence on the variability in judicial voting behavior is inconsistent with theoretical expectations of case salience.

[14]Alternatively, this variable could be interpreted to provide support for the notion that the justices rely more on their attitudes in civil rights and liberties cases, as compared to other issues areas appearing on the Court's docket.

FIGURE 1   Predicted Error Variance by Tenure and Amicus Curiae Briefs

impact of this decrease is fairly marginal. Thus, while Supreme Court justices do undergo periods of acclimation, the effects of acclimation in terms of error variance are not earth-shattering, likely because most justices have spent time on collegial courts at lower levels of the judiciary (Segal and Spaeth 2002, 182). Conversely, the substantive effect of an increasing number of amicus briefs is both significant and relatively large. Given that the Court is seeing more and more cases in which organized interests are participating as amici, this suggests that we may begin to witness an increasing number of decisions, such as *Lawrence v. Texas* (2003),[15] that appear to be aberrations from the standpoint of the attitudinal model (i.e., those decisions in which a conservative Court hands down a liberal judgment on significant matters of public policy).

Conclusions

Consistency plays a central role in the administration of justice. Through stable decision making, judges advance a number of normatively desirable goals that have profound effects on actors both internal and external to the legal system. Litigants and attorneys benefit from stability because the predictability of the law enhances their ability to make effective judgments about pursuing litigation (Peters 1996). Lower court judges profit from Supreme Court consistency since it augments their capacity to avoid making costly and reversible errors (Shavell 1995). For the public, consistent decision making increases confidence in the judicial system by reducing the appearance of inequality (Coons 1987), which in turn benefits judges because their decisions are more likely to be followed if the public views those decisions as legitimate (e.g., Canon and Johnson 1999). Despite

the central role of stability in the legal system, few have explicitly attempted to explain variability associated with judicial decision making. This article provides an initial foray into this line of research by investigating factors that influence the consistency of choice on the Supreme Court.

One of the central findings is that justices with extreme ideologies exhibit more stable voting behavior as compared to their more moderate counterparts. This manifests itself especially strongly in salient cases and becomes somewhat ingrained over the length of a justice's tenure on the bench. The implication of this finding is that, in a very real way, an ideologically extremist Court is a stable Court (particularly if the median voter is an extreme ideologue). This suggests that scholars and other court commentators should be especially attentive to the tension that exists between stability and ideological extremism. That is, while there is a clear normative desire for stability in terms of judicial choice, few express a normative preference for extreme ideological decision making. But, because intense ideological voting leads to stability, at least in the short-term (e.g., as long as a Court exhibits no membership change), this implies that acute ideological decision making can serve as a means to foster a normative end—stability. Recognizing this, critics of attitudinal voting will be best served by coming to terms with the inherent discord that exists between ideological voting and the desire for consistency. Simply put, there is at least one normatively desirable property that emanates from extreme ideological voting—consistency.

In addition to its normative implications, this research aims to contribute to empirical study of judicial decision making in a number of ways. First, it is important because it offers additional leverage over the explanatory power of the attitudinal model. Instead of focusing solely on *whether* judicial attitudes influence judicial decision making, this research provides evidence as to *under what circumstances*

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[15]In *Lawrence*, more than 30 amicus briefs were filed with the Court.

ideology structures the choices justices make. Second, this research suggests that decision making on the Supreme Court is best explained through a number of approaches. While empirical support for the attitudinal model is strong, ideology does not contribute to every justice's decision in every case. Instead, the justices' decision making is influenced by strategic considerations (norms of cooperation that develop over time), as well as justice-specific attributes, such as a justice's length of tenure on the Court. With regard to the latter, acclimation effects, this research moves beyond previous studies by utilizing a particularly rigorous and suitable methodology for detecting acclimation effects. Finally, by explicitly modeling the error variance in judicial decision making, this research offers a more complete understanding of voting behavior on the U.S. Supreme Court. Of course, this is not to say that we should wholly abandon the more common mean-centric approach to understanding judicial choice. Rather, the important point is that, by recognizing changes in variance as substantively interesting political phenomena, much can be learned about the choices judges, and other political actors, make (e.g., Braumoeller 2006). Further, modeling variance-altering causes holds the promise of offering leverage over theories that do not lend themselves to testing via the mean-centric approach. For example, additional pursuits into variance-altering factors might consider the uncertainty with which presidents select nominees to the federal bench and the consistency of their treatment by the senate. Similarly, researchers investigating lower courts can benefit from variance analysis by examining how changes in the makeup of the Supreme Court influence the consistency of lower court decision making. Assuming lower federal court judges have a genuine fear of reversal, we might expect that their decision making will become more consistent as the tenure of a natural Supreme Court increases. Conversely, it is plausible to expect increased uncertainty as to the likelihood of reversal when new justices join the Supreme Court, particularly if the new appointments replace pivotal swing voters. In short, understanding and analyzing the consistency of choice has the potential to offer us a more complete understanding of the behavior of political actors.

Acknowledgments

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