

Supreme Court Voting Change and Strategic Behavior

Scott R. Meinke
Assistant Professor
Department of Political Science
Bucknell University
Lewisburg, PA 17837
smeinke@bucknell.edu

Kevin M. Scott
Assistant Professor
Department of Political Science
Texas Tech University
Lubbock, TX 79409
kevin.scott@ttu.edu

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Abstract

This paper uses evidence of voting change among U.S. Supreme Court justices to examine the factors that shape the votes of the justices more generally. We argue that strategic behavior among justices should be visible in their changing merits voting patterns over time, just as it is in the fluidity of their votes during the decisionmaking process. Changes in the intracourt context of decisions—in particular, the changes brought about by membership changes in the Supreme Court—should affect the bargaining relationships among the justices and, as a result, lead to voting changes among the continuing justices. We test this proposition at two different levels of analysis: justices' annual aggregate civil liberties voting scores and their individual votes over time on the progeny of *Miranda v. Arizona*. At both levels, our results are mixed, but we provide partial support for the argument that the decisionmaking context on the Court is related to changes in voting choices. The findings provide new outcome-based evidence that the strategic model is operative on Supreme Court decisionmaking, at least under certain circumstances.

Studies of individual Supreme Court justices frequently address the “evolution” of justices’ views across their careers (e.g., Atkins and Sloope 1986 on Hugo Black; Hirsch 1981 on Felix Frankfurter; Ulmer 1979 on William O. Douglas). Justices grow (or appear to grow) more conservative or more liberal over their careers, and journalists have joined students of individual justices’ careers in attempting to explain these changes (e.g., Greenhouse 2005). But these efforts have not been matched by scholarly attempts to assess vote changes by all justices as a general phenomenon.¹ Scholars generally understand the potential sources of change in the behaviors of the justices, and the attention devoted to the changes in the Court’s aggregate outputs has been considerable. Nonetheless, insufficient attention has been devoted to understanding why individual justices change their positions.

We argue that understanding the sources of judicial voting change can shed important light on the factors which shape the votes of the justices more generally. We find that the behavior of the justices is sensitive to changes in their environment. In particular, membership changes offer the justices strategic opportunities which they did not have before, and they seize those opportunities. We conclude that their willingness to alter their observed behavior in response to changes in the decision-making environment adds to the evidence of the justices as strategic policy makers.

Voting Change and Supreme Court Justices

Most models of Supreme Court behavior treat the preferences of the justices as fixed and their votes in cases as a response to the issues that each case presents. Schubert (1962) characterized the justices’ preferences as representing ideal points (*i*-points) on a continuum and cases representing different stimuli (*j*-points) to which the justices reacted. Justices’ votes on the cases could be explained by knowing what stimuli the cases

¹ One limited exception is found in the work on the “freshman effect,” or the tendency for a justice’s decision behavior to shift after his/her early terms on the Court, which has long been of interest to judicial scholars (see Hagle 1993 and Hurwitz and Stefko 2004 for relatively recent examples).

represented and where the justices' ideal points lie. Little work has tested the assumption that justices' ideal points remain fixed over time. For example, the two major contemporary schools of judicial behavior, rational choice and attitudinal, do not tend to explicitly address the possibility that sincere preferences can change. Epstein, et al. (1998, 802-803) note that the attitudinal model (Segal and Spaeth 2002) does not demand that preferences remain stable over time, but most empirical tests of the model tend to assume that attitudes remain fixed. Reliance on measures of ideology (Segal and Cover 1989; Segal et al. 1995; Segal 1997) that remain fixed for the justices' careers makes the assumption of preference stability more explicit. Strategic models of judicial decision-making (Bergara, Richman, and Spiller 2003; Epstein and Knight 1998) encounter, in some ways, a more difficult proposition. If the justices are strategic actors, then their behavior may change for reasons unrelated to their attitudes. That is, justices may appear more conservative because they are attempting to craft opinions which are not reversed by a conservative Congress, for instance. But their sincere preferences may be growing more conservative as well. For scholars who believe the justices are strategic actors (or believe that the justices need to act strategically to secure policy outcomes nearest their ideal points), the challenge is not attitudinal stability per se, but understanding if behavior change is strategic change, pure preference change, or some combination of the two.

Collective Voting Change

Although the pure attitudinal and strategic frameworks do not deal directly with changes in voting behavior, scholars do have a relatively clear understanding of the possible sources of behavior change by the justices. Baum (1992) argues that there are three possible sources of change in *collective* voting behavior: membership change, individual position change, and issue change. The most obvious source of aggregate-level change in Supreme Court voting behavior is change in Court membership. Membership

change can influence the change in the Court's output in several ways. At the most obvious level, replacing one justice with another will change the votes on the Court: replacing Justice Marshall with Justice Thomas resulted in more conservative votes being cast by the Court. But membership change may also translate into issue change. Particularly as a coherent group of justices (conservative or liberal) emerge, membership change may change the ideological content of the cases the Court selects for review. This translation of membership change into issue change would not necessarily be linear. That is, adding one conservative justice will not necessarily make the Court's agenda more conservative. Membership change would only lead to issue change if that particular change creates a bloc of justices large enough to influence the Court's agenda.

Baum (1992) finds that membership change can account for most of the changes in the Court's output, but voting change by continuing justices does account for some of the change. Baum suggests that this voting change can stem from two sources: issue change and preference change. Issue change may occur in two ways. First, as suggested above, membership change can lead to issue change. Second, each case presents different issues from those raised in previous cases: issues evolve from basic questions (is the right to choose constitutionally protected?) to more difficult issues (can states impose waiting period on women seeking an abortion?) which may cause individual justices to vote differently. Regardless of the source of issue change, though, its effects on the justices should be consistent and not vary by justice. That is, as cases get harder (or easier), all of the justices should be more likely to vote in the conservative (or liberal) direction.

Collective voting change can also occur because of change in the justices' individual positions. Epstein, Hoekstra, Segal, and Spaeth (1998) argue that, even controlling for issue change, there is evidence of preference change (strictly speaking, there is change in revealed preferences). They argue that this finding suggests that some of the justices do

change their policy positions over the course of their careers on the Court. While some justices grew consistently more conservative (Reed, White) or liberal (Blackmun, Clark) over the course of their careers, other justices (Black, Douglas, Frankfurter, Powell, and Warren) exhibit somewhat more complex patterns. Epstein et al. suggest that such change may be driven by “members of their work and political milieus” or by shifts in public opinion (1998; 816).

Individual Voting Change

There appears to be evidence that all three influences--membership change, issue change, and position change--influence the collective output of the Court. Still, we do not yet have a clear theoretical framework to explain change in the behavior of *individual* justices. Two of the factors which influence collective change operate at the level of the individual justice: issue change and preference change. The attitudinal model would point to these two factors—changes in *i*-points and in *j*-points—and only these two factors as explanations for changing individual behavior. If justices have no reason to concern themselves with the preferences of their colleagues or with changes in the Court’s political environment, then the pure attitudinal perspective provides a full theoretical explanation for change. But if contextual factors do constrain justices, then issue and preference change are not the only possible sources of individual-level change for Supreme Court justices: shifts in the Court’s strategic context—both internal and external—may also lead to individual-level change. The Court’s internal context, which is our focus here, can be altered by changes in the Court’s membership. Replacing justices reconfigures the alignments of the justices, offering some justices previously unavailable opportunities to build majorities and denying others coveted bargaining positions at (or near) the median. If justices are ultimately interested in building majorities to obtain the best outcome under the circumstances, they may conceal their sincere preferences if they know that expressing

them will leave them in dissent and without any leverage on the ultimate shape of the majority opinion. This strategic calculation would lead some justices to change their votes within the new Court context.²

Analytically, the possible sources of individual behavioral change should follow different observable patterns. Issue change would alter the behavior of all of the justices. If the Court's case mix grew "harder"³ from one term to the next (due to membership change or due to the justices taking cases which ask different questions), then one would expect more conservative votes by all of the justices. Sincere preference change means that only some of the justices' preferences change, but those changes should follow distinct patterns (say, linear or curvilinear) and should not be driven by membership change. Strategic change would also mean that only some of the justices change, but the effect would not be linear (would not be the same over a series of terms); rather, it would be tied to change in a justices' position on the Court, brought about by membership change.⁴ Strategic change could also result, more idiosyncratically, from case-to-case changes in incentives for strategic behavior.

Much of the debate among law and courts scholars has revolved around whether the justices can be characterized as strategic actors. An enduring topic within this literature is the fluidity of decisions between conference and final merits votes (Epstein and Knight 1998, 65-79, 95-106; Howard 1968; Maltzman and Wahlbeck 1996b; Maltzman, Spriggs,

² It follows that membership change could alter the strategic situation in the opposite direction, depriving a justice of an incentive to behave strategically that was previously in place.

³ Perhaps driven by Schubert's phraseology, "harder" means it is harder for the justices to vote liberal, and easier means the reverse. We retain this terminology for ease of understanding.

⁴ Strategic change may also occur as a result of change in the Court's external political environment, but this would affect only the justices who, for example, move in and out of Congress's indifference interval as a result of change in congressional preferences.

and Wahlbeck 2000; Murphy 1964, 56-68).⁵ Studying incidences of vote changing *across* merits decisions may offer additional insight into the strategic behavior debate by tapping into an additional set of evidence. If changes in the Court's internal or external political environment affect changes in the justice's final votes, one can take that as evidence that the justices are sensitive to their environment and interested in building majorities in cases (and writing decisions which will withstand elite and public criticism). If strategic factors do not explain any of the behavioral changes, one may conclude that while the justices' behavior may change, such change is best explained by issue and preference change.

We examine behavioral change on two levels. First, we seek to explain changes in the justices' aggregate-level support for civil rights and civil liberties claims. We also look at case-to-case changes in justices votes on a particular line of cases: *Miranda v. Arizona* and its progeny. We follow a two-level strategy for several reasons. Perhaps most important, the justices might resist the appearance of changing at the level of the individual case. The justices put great stock, both in their opinions and in oral arguments, in *stare decisis* (Epstein and Knight 1996), and though the justices may not be particularly committed to respecting precedent (particularly those precedents which they disagree), they may be reluctant to advocate reversing a precedent, particularly if such a position may not have support of the majority. Accordingly, individual-case analysis may underestimate the true degree to which the justices conceal their preferences and act strategically to build majorities on the Court. Looking only at the justices' behavior in a line of cases may understate the true degree of strategic vote change by the justices.

At the same time, analysis of aggregate changes also has its limits. Foremost among these is the ability to control for issue changes. While we attempt to control for issue

⁵ Other fluidity research that does not fall within the strategic framework, particularly Brenner and Dorff 1992 and Dorff and Brenner 1992, also demonstrates that justices do modify their policy preferences on final merits votes.

changes, there are limits to any approach to doing so in aggregate analysis. Individual case analysis facilitates fine-tuned controls for the change in the precise factual situations from case to case. Looking at individual cases also allows for a more robust set of hypotheses, particularly related to case-specific indicators of strategic behavior. Justices engaged in strategic behavior certainly recognize that Court majorities and doctrines are built on a case-by-case basis, and their behavior should reflect that reality. Ultimately, we view the two approaches as complementary, allowing us to develop and test a range of hypotheses to explain how and why justices change their votes.⁶

Explaining Justices' Voting Changes

We have argued that the dynamics of Supreme Court decisions are more complex than a simple combination of issue change, membership shifts, and attitude change. Our argument points to an interaction between replacement-driven changes in the ideological makeup of the Court and position shifts among continuing justices. Even if justices' preferences remain constant over time, each new natural Court can place continuing justices in a new position relative to the other members. On a single issue dimension, replacement places a continuing justice either farther from or closer to the Court's median on that issue.⁷ Strategic justices should respond accordingly to the changing composition of the Court, modifying their votes where possible to preserve or expand their preferred legal policy outcomes when recurring questions appear before a new Court. This reasoning leads to our first hypothesis:

⁶ See Schmidt and Yalof 2004 for another Court voting analysis that compares similarly across two levels.

⁷ The exception is when replacement occurs but does not change the Court's median, though such replacements could be expected to make some more idiosyncratic contribution to strategic change since established personal interactions and bargaining relationships may change.

H1: Continuing justices should change their votes more from one term to the following term when the Court undergoes membership change, compared with terms when there is no membership change.

Not all membership changes are created equal. Membership changes that are most likely to lead justices to make strategic adjustments in their positions are those changes that lead to significant movement in the Court's median justice.

H2: When replacement brings about significant changes in the ideological center of the Court, continuing justices' position shifts should be larger.

We test these hypotheses in both empirical analyses, at the aggregate level and at the level of the individual case. The two empirical approaches give us two very different windows through which to view the effects of membership change on the strategy of continuing justices. Our hypotheses about the operation of strategic context and the control variables are specific to each level of analysis, and we outline them below.

Aggregate Civil Liberties Support

Hypotheses and Methods

The first aggregate-level test of our argument is in the model of change in justices' voting scores in the 1953-2003 court terms. In this data, support for our general argument should come in the form of justices moving differently in response to membership changes than they do at the start of a continuing natural court term. In addition to looking at the impact of membership changes and distinguishing the impact of significant membership changes (those which shift the Court's median), we also look at the *direction* of change in justices' civil liberties support from term to term. The analysis is separated into two models so that liberal and conservative justices can be studied separately and the effect of replacement on the ideological direction of vote change can be determined. The first model includes only those justices who lie to the left of the median justice in the previous term,

and the second model is limited to justices on the right. The significant-court-change variable is separated into liberal and conservative change dummy variables in each model. From the literature on strategic behavior at other stages in the Court's decision-making process (e.g., Epstein and Knight 1998; Maltzman and Wahlbeck 1996b), we expect that justices may modify their positions as they compromise on their sincere preferences in order to achieve the best possible outcome in the new court context.

H3: Justices on the opposite side of the median from the direction of the new court's movement (e.g., liberals on a court that becomes more conservative) should engage in strategic moderation and move in the direction of the Court's movement.

Note that a justice's movement in the opposite direction, if associated with replacement-based movement in the court median, could also suggest strategic behavior. Justices may find that replacement moves the Court's median far enough away from their preferences that strategic compromise is no longer a satisfactory outcome. In this situation, a justice would appear to move in the opposite direction, toward the extreme, as they choose to express their sincere preferences rather than engage in a strategic compromise.

We also control in both aggregate analyses for the justice tenure since prior work indicates that pure preference change over the career can significantly alter voting patterns (see Epstein et al. 1998). This variable is measured as the log of tenure, to account for the expectation that, other things being equal, justices change more in their first few terms on the Court (Hagle 1993).

We collected data for each justice-term from 1953 to 2003. We coded each justice-term for the tenure of the justice (the natural log of the number of terms they had served on the Court), whether there was a new natural Court, and the justice's distance (in positions)

from the median in the previous term.⁸ To calculate the justices' positions, we took their raw scores on civil rights and civil liberties scores for each term from the Supreme Court database (Spaeth 2005). Using the case citation as the unit of analysis, we calculated the percentage of times the justice supported the liberal position. Then, to control for issue change from term to term, we adjusted the raw civil rights/civil liberties support score by calculating the median change for all of the continuing justices *not counting the justice whose score was being adjusted*. The procedure used to calculate the justices' support scores follows the procedure adopted by Epstein, et al. (1998) with three important exceptions. First, for some justices (Burton, Frankfurter, Jackson, Reed) Epstein, et al. excluded the votes on criminal cases because their votes on those cases were occasionally inconsistent with their votes on other civil rights/civil liberties cases. We do not find this a necessary step because we pool the justices, so we prefer to use the same scores for all of the justices to ensure comparability. Second, Epstein, et al. exclude justices whose careers were incomplete. We include those justices, both because our inquiry requires that we use them to calculate the positions of all of the justices and because we are interested in justices' term-to-term changes and not specifically in the patterns across their careers. Third, Epstein, et al. follow Baum (1988, 1995) by adjusting scores to account for issue change by subtracting the median term-to-term change from each of the continuing justices. We modify this approach slightly by excluding the justice, whose adjustment is being calculated from the calculation of the median change.⁹ We do this to avoid including a justice's change in calculation of the issue change.

We differentiate between changes in natural courts and significant changes in the Court's alignment (Hypothesis 2) by calculating the effects of all membership changes and

⁸ The following terms were considered to be the first term of a new natural court: 1953, 1954, 1956, 1957, 1958, 1962, 1965, 1967, 1969, 1970, 1971, 1975, 1981, 1986, 1987, 1990, 1991, 1993, and 1994.

⁹ We thank Larry Baum for this suggestion.

significant membership changes in separate models. We define “significant” natural court changes as any replacement at time t that would, counterfactually, move the median of the court at $t-1$. An example: the median adjusted civil liberties score of the OT1990 court—the last court of Thurgood Marshall’s tenure—was .42. If Marshall is removed from this court and Clarence Thomas’ score from his first term is substituted, the OT1990 court’s median drops to .36. This change represents a significant court change in the conservative direction for OT1991. Other replacements that do not move the median of the Court in this formulation—even if there is an ideological contrast between the departing and arriving justices—are not coded as significant directional changes. We regard this as a conservative measure of replacement-based court change as it is confined only to those replacements dramatic enough to move the median of the previous court.¹⁰

Results

To test Hypotheses 1 and 2, we estimate the influence of membership change on voting score change. Justices who are further from the Court median may demonstrate more attitudinal instability, or their reaction to membership change may differ because their strategic context is different than that of the justices closer to the median. Table 1 presents the results of two models: the difference between the two is how change in the Court is conceptualized.

Table 1 Here

Model 1 looks at the impact of all membership changes on the absolute change in voting scores of the justices. If Hypothesis 1 is to be borne out, we would find a positive effect of membership change on voting scores. While existent, the effect is not statistically significant at conventional levels ($p=.094$, two-tailed test). Model 2 looks at the impact of

¹⁰ Terms with significant liberal changes include 1954, 1956, 1962, 1967, 1987, and 1993. Terms with significant conservative changes include 1969, 1970, 1971, 1975, and 1991.

significant membership changes (those which shift the median of the Court). The effect of significant membership changes on voting changes (in terms of both statistical significance and magnitude of effect) is somewhat greater: a significant membership change causes a 2% vote change. This provides confirmation of Hypothesis 2, and suggests that the justices react differently to significant membership changes, perhaps recognizing the change in the strategic context.¹¹

Using absolute change tells us little about the actual (directional) change made by the justices. Accordingly, we estimate models where the actual change in support for civil rights/civil liberties is the dependent variable. We expect that justices should engage in strategic moderation: as membership change shifts the Court to the right, for example, we expect liberal justices to become more conservative (Hypothesis 3). In this scenario, the justices' behavior diverges from their preferred position in order to maintain some leverage over the content of majority opinions. We also expect, however, that a point may arise where a justice grows uncomfortable with shifting to stay near the Court median, and may shift away from the Court. This would be sincere behavior.

Table 2 presents the results of these analyses. Strategic moderation would indicate that liberal justices (defined as those to the left of the median justice in the previous term), would grow more conservative as the Court shifts to the right, and conservative justices would grow more liberal as the Court shifts to the left.

Table 2 Here

We have partial confirmation of the strategic moderation hypothesis. Conservative justices do behave more liberally on civil rights/civil liberties issues as the Court median shifts to

¹¹ Two further notes are in order. First, the low amount of variance explained by either model should caution against anything more than tentative conclusions in the models. Second, membership change can obviously create issue change, which can lead to vote score change. We attempted to control for this possibility by using issue-adjusted scores, but doing so may absorb membership change. Re-running these analyses on uncorrected vote scores has no effect on the results in terms of statistical significance

the left. Strategic moderation would mean, though, that liberal justices behave more conservatively as the Court shifts to the right. We find the reverse: liberal justices behave more liberally as the Court shifts away from them, suggesting that liberal justices are more likely to engage in extremism (moving away from the Court median) than moderation.

Individual-Level Strategic Change: *Miranda* Progeny

The findings at the level of aggregate civil liberties voting provide at least partial support for the strategic change argument. We can further investigate strategic vote change at the level of individual votes. To do so, we build on the approach that Spaeth and Segal (1999; Segal and Spaeth 1996) have developed for assessing levels of precedential behavior on the Court (see also Brenner and Stier 1996; Songer and Lindquist 1996). Spaeth and Segal select Court decisions and identify their progeny; they then track the voting behavior of the justices who participated in the precedent-setting cases, examining progeny-case votes for consistency with the preferences expressed in the precedential cases. Although our immediate interest here is not in the preference/precedent debate, analyzing progeny provides a starting point for examining when and why justices change their revealed preferences.

Like Spaeth and Segal, we examine progeny votes for consistency over time, but our basic empirical approach differs substantially, reflecting our different substantive interest. Our precedent-and-progeny analysis lines up justices' votes on all of the progeny cases in chronological order and creates a variable that indicates whether a justice changed the direction of his or her vote (liberal-to-conservative or conservative-to-liberal) from one case to the next. As we explain below, we operationalize case and contextual factors and use them to construct a model that predicts the justices' vote changes over time. In other words, where Spaeth and Segal are interested in the consistency of a justice's vote with his or her original vote on the precedential case, we are interested in the consistency of a

justice's voting patterns over time and in when and why a justice might reverse positions from the previous vote. This vote-to-vote approach also permits us to study all of the justices who have voted on more than one progeny case instead of limiting our analysis only to those justices who voted on the precedent.

We examine one precedent—*Miranda v. Arizona* (1966)—and its progeny. This familiar precedent has the advantage of providing a particularly long series of progeny cases running from the Warren Court to the present, and as a civil liberties case, it provides a ready comparison to our aggregate civil liberties analysis. *Miranda* and its progeny also offer the advantage of relatively easily-controlled fact variations from case-to-case, an issue we address in more detail below.

Using a precedent-progeny approach requires a systematic method of identifying *Miranda* progeny. As previous authors have acknowledged, this is a difficult task; the selection of progeny is “far from an exact science” (Spaeth and Segal 1999, 25). We employ a modified version of Spaeth and Segal's selection method (1999) that we believe is reasonably accurate—and, equally important, transparent and replicable. Appendix A describes our case selection rules in detail, and Appendix B lists the *Miranda* progeny cases in our analysis.

Case-to-case vote change in the 64 cases selected for the analysis (*Miranda* plus 63 progeny) is analyzed using a pooled binary time-series cross-sectional logit analysis in which the unit of analysis is the justice-case (justice j 's vote in the case at time t) and the dependent variable is an indicator of vote change from $t-1$ to t (1=changed vote, 0=same vote).¹² In order to account not only for position change itself but also for the direction of position change, the model includes interactions of each of the hypothesized independent

¹² The raw data used for this analysis, with the exception of the author-coded fact variables, are from the Supreme Court Justice-Centered Judicial Databases (Benesh and Spaeth 2003a, 2003b, 2005), updated by the authors through the 2003 term with Spaeth 2005.

variables with an indicator variable for justice j 's position at $t-1$ (*liberal lag*, which equals 1 if justice j voted for a liberal outcome at $t-1$ and 0 if he/she voted for a conservative outcome). Separately calculating the effects of the independent variables where *liberal lag* equals 1 and where it equals 0 will allow us to specify whether a particular factor affects changes to liberal positions, changes to conservative positions, neither, or both.¹³

The data in the *Miranda* analysis were shown to be duration-dependent in likelihood ratio tests, so the duration dependence is corrected by the inclusion of a variable controlling for the duration of justice j in a stable voting position as of time t (see Beck, Katz, and Tucker 1998 on this general approach). This control not only addresses a methodological issue but also allows us to test the effect that the length of the justices' vote histories (indirectly, a measure of uncertainty [cf. Maltzman and Wahlbeck 1996b]) has on the stability of their position, a factor that we know affects the stability of long-term voting in Congress (Asher and Weisberg 1978; Meinke 2005).

Hypotheses

As in the aggregate analysis, the first hypothesis in the individual-level analysis of *Miranda* progeny votes is that justices should be more likely to change their positions when the Court's composition has changed significantly. Here, where vote switching on individual cases is the dependent variable to be explained, court change is operationalized as an indicator variable for the first progeny case decided after the start of each new natural court that brought a significant ideological shift. The expectation is that switching

¹³There are a handful of instances in which cases in the data set were decided on the same date (a total of nine cases across four dates). Each of these cases is a separate decision with a distinct *U.S. Reports* citation; in other words, they are not simply cases with differing docket numbers joined together for a decision (such cases are obviously treated in the data set as one decision). We have included votes on these distinct but simultaneously-decided progeny cases as separate sets of observations in the longitudinal analysis, ordering them consistently by their appearance in the *U.S. Reports*. The contextual variable, replacement-based change, is not affected by this decision, since none of the simultaneous cases happen to occur at the start of a "significant" new natural court, but the case-based variables, of course, continue to vary across these cases just as they do in cases not decided simultaneously.

will be more likely at those times, and the indicator variable is interacted with the liberal lag variable to determine whether the effect of court change is specific to the direction of vote change.

While the case selection rules should yield a set of cases that present the justices with similar *Miranda*-related questions, variations in the facts of the cases are likely to affect justices voting choices and, consequently, their propensity to reverse their positions. While the role of facts within a political understanding of judicial behavior has been established in a number of substantive areas (see, e.g., Segal 1985), there is reason to expect that factual differences are especially important in the area of confessions (Benesh 2002; Martinek and Benesh 2002). Facts related to the coerciveness of the interrogation and to access to counsel—since these issues were at the core of *Miranda*—should be especially important to voting consistency in *Miranda* progeny. The influence of facts leads to a pair of directional hypotheses:

H4a: As the fact pattern in a progeny case makes upholding a conviction easier than in the previous progeny case, vote change from pro-prosecution to pro-defendant should be more likely.

H4b: As the fact pattern in a progeny case makes upholding a conviction harder than in the previous progeny case, vote change from pro-defendant to pro-prosecution should be more likely.

The indicator variables for these fact changes are coded from four facts closely related to the holding in *Miranda*, two that make it easier to vote liberally in the progeny (if the defendant was not *Mirandized*, and if the defendant was questioned without an attorney after requesting one) and two that make it more difficult to vote liberally (whether the defendant waived his/her *Miranda* rights, and whether the questioning took place when the

defendant was not in custody).¹⁴ A variable was then created to describe the difficulty of voting liberally *in each case*: it equals 1 in the presence of facts making the liberal decision more difficult and the absence of facts making it easier, 0 in the presence of both types of facts or in the absence of both types of facts, and -1 in the presence of facts making the liberal decision easier and absence of facts making it more difficult. Finally, to test the above hypotheses as stated, we generated variables describing change in this case-difficulty variable. These variables, then, indicate whether the facts in the case at t made liberal voting easier, more difficult, or equally easy as it was at $t-1$ (the "equally easy" variable is the excluded category in the model).¹⁵

If strategic factors influence individual vote switching from one case to the next, then we may be able to uncover evidence of that switching through the opinion writing behavior in the cases. Majority opinion authorship, in particular, may reveal strategic behavior when it is associated with vote switching. Justices who author the majority opinion in a case may obtain that privilege through bargaining or even by writing a dissent that became a majority. Existing work suggests that strategy is a factor in opinion assignment but that it is far from the only factor (Maltzman, Spriggs, and Wahlbeck 2000). Still, if strategy affects opinion assignment, then the opinion author is at least more likely to be the n th justice in an n -justice majority coalition, and opinion authorship serves as a proxy for that position.

¹⁴ Other analyses of confessions cases at the level of lower courts, such as Benesh's study (2002), use a much more expansive set of fact variables. While appropriate for understanding whether lower courts respond to the Supreme Court's precedents, many of the fact variables reflect the outcome of the progeny cases themselves and would be tautological in studying the Court's own decisions. We instead confine ourselves to facts that are at the core of the original *Miranda* decision's holding.

¹⁵ Facts are coded from the fact summaries given by the majority opinion author. We code a factual circumstance as present *only* if it is clearly mentioned in the opinion. Future versions of this work will check the coding from the Court's opinion against alternative codings using the lower courts' summaries to determine and correct for any bias the Court's own opinion introduces.

H5: The author of the majority opinion in a case should be more likely to change positions on that case compared with the other justices.

In a similar way, any conception of decisionmaking that allows for bargaining and fluidity recognizes that justices may conceal their pure preferences and join a nascent majority coalition in order to craft a narrow holding or one that is less extreme than otherwise might have been built. We expect such situations to occur more frequently when the majority forms a minimum winning coalition, and this leads us to an additional expectation for how strategy manifests itself in vote change. In addition, we expect more pressure from the minority to persuade majority justices to change their votes when that case was decided by a minimum winning coalition. A 4-justice minority needing only one vote to gain a majority would, for example, invest more effort in bargaining than a 2-justice minority.

H6: A justice who joins a majority that constitutes a minimum-winning-coalition will be more likely to have changed positions from the previous case.

Results

We assess the relationship between these hypotheses and position changes based on the model in Table 3, described above. The results, first, reveal the expected effects of case facts on vote reversals: as case facts make a liberal vote easier, justices who voted conservatively at $t-1$ are more likely to switch to a liberal position and justices who had voted liberally at $t-1$ are less likely to make a switch to a conservative position, relative to cases that present no significant factual shift. Note here that the conservative-to-liberal effect is demonstrated by the direct effect of the “easier” variable, and the liberal-to-conservative effect is obtained by calculating the beta and standard error of the “easier” variable when the liberal lag variable equals 1 ($b=-.9646$, $se=.4481$). At the same time, the effects of fact changes that make a liberal vote more *difficult* are not statistically significant

for either type of change. In short, we find some support for the influence of fact patterns on *Miranda* progeny voting, and this evidence demonstrates, unsurprisingly, that elements of the attitudinal and/or legal decision-making models (Segal 1984; Segal and Spaeth 2002, 312-320) are at work in justices' confessions case decisions.

Table 3 Here

The expected operation of facts on *Miranda* progeny decisions also provides some reassurance that pure attitudinal and legal effects are controlled as we examine other influences that may indicate strategic behavior. The first of these, changes in the intracourt strategic context, is captured by the indicator variable for a new natural court that produced a significant ideological shift since the last decision. Our expectation—that justices will be more likely to change their voting positions when the Court's membership changes as they engage in strategic behavior—is partially supported. The interaction between court change and the liberal lag variable, which indicates the effect of court change on a liberal-to-conservative vote switch, is not statistically significant. However, the direct effect shows that justices who cast a conservative vote on the previous progeny case are more likely to switch to a liberal position when the court's membership has changed in ideologically significant ways since the last vote.¹⁶ This effect is significant below the .05 level in a one-tailed test, or at $p=.055$ in a two-tailed test. These results reveal an impact of membership change on continuing justices' choices, an effect that is above and beyond the possible influence of changing facts in the cases before the Court. In other words, the change in the Court's composition leads to changes in the way continuing justices express their preferences. This is, at a minimum, indirect outcome-based evidence suggesting

¹⁶ Note that, by design, our analysis excludes junior justices casting their first vote on a *Miranda* progeny; therefore, these results are not a reflection of the new justices' behavioral differences.

strategic activity, although we find that it affects only one type of behavioral change in this particular line of cases.

We have argued that two other variables should also provide some indication of strategic behavior when associated with vote change: majority opinion authorship and joining minimum winning coalitions (MWC). The evidence for the effect of both variables is weak, however. Majority opinion authorship does not make a conservative-to-liberal change any more (or less) likely. It *is* related to an increased probability of a liberal-to-conservative change, following our expectations, but the effect of authorship on this change is not statistically significant ($b=.6438$, $se=.6130$, $p=.15$ [one-tailed]). The relationship between vote change and joining a MWC is somewhat different: conservative justices at $t-1$ are significantly *less* likely to switch to form a liberal MWC, while liberal justices are a bit more likely to switch to form a conservative MWC, but the latter effect is not statistically significant at the .10 level ($b=.4420$, $se=.3956$, $p=.13$ [one-tailed]).

One final observation is in order on the model in Table 2. The correction for justices' durations in their stable voting positions also reveals an interesting substantive effect. As justices retain a consistent *Miranda* progeny voting position for a longer period of time, they become less likely to make a vote change. On the surface, this is a relatively obvious conclusion: justices who have held firmly to a position in the past are more likely to cling to that position going forward. But, in the context of the other factors controlled for in the model, this result indirectly implies some additional power for the attitudinal model since it shows that some justices' positions are simply "sticky," regardless of the situation. It also suggests a role for the vote history in reducing the uncertainty in justices' repeated decisions.

Discussion

Our theoretical argument points to a place for strategic factors in explaining changes in justices' merits voting choices and, ultimately, the Court's output. The two empirical analyses provide some support for that view. Membership changes obviously can change the Court's decisions, first, by replacing a retiring justice with a new justice who brings a very different ideology or judicial philosophy to the Court, or by changing the cert-granting dynamic and producing a different mix of cases for decision. But we have shown that membership change can affect the continuing justices as well. In the aggregate, membership change is associated with larger term-to-term movements among continuing justices. More revealingly, replacements that move the Court significantly to the left lead continuing conservative justices to follow the median to the left on civil liberties issues. Since we control for issue change from term-to-term, we take this movement as evidence of strategic accommodation in response to contextual change. More liberal justices on a Court that shifts right respond differently—they move significantly further to the left than they otherwise would. With issue changes controlled for, we still see some evidence of strategic movement in this change, since the movement to the extreme suggest that liberal justices are expressing their true preferences where they may have been moderating them before.

We find additional evidence of strategic behavior in the analysis of individual *Miranda* progeny votes. Justices who had voted conservatively are more likely to make a change to a liberal position when the Court's median moves. As in the first of the aggregate analyses (Table 1), we cannot show with this data that this movement is associated with a

particular direction of the Court’s median shift,¹⁷ but the results still show that the contextual shift leads to a different calculation for some justices.

The findings in support of a strategic account are somewhat limited in that we find different behavior among liberal and conservative justices. The data would point even more strongly toward a role for strategy if justices on the left and the right were similarly affected by changes in court membership. We note, though, that both the aggregate and the individual-level analyses (but especially the individual) are set in particular historical contexts that likely affect the results. It is not surprising, in retrospect, to find that on civil liberties issues, conservatives engage in some strategic accommodation while liberals do not: this finding comports with the fact that, for much of this period, the Court included a number of doctrinaire civil libertarians and fewer true doctrinaire “law-and-order” justices.¹⁸ We would not, therefore, assert that the liberal/conservative divide that we find at both levels of analysis is itself generalizable, although we are persuaded that the relationship between contextual change and continuing-justice behavior is likely to be a more generalizable finding.

It is also important that we find a role for strategy *alongside* attitudes; that is, when attitudinal factors are controlled. Our findings are in many places consistent with the attitudinal view of decisionmaking. For instance, we find that factual differences are important predictors of *Miranda* vote switches in both the conservative and liberal directions, just as a pure attitudinal argument would suggest. But the data also suggests a role for contextual changes in each analysis, changes that are distinct from issue change

¹⁷ In this framework, we cannot analyze the effects of each direction of “significant” court shifts on each type of vote switch—there are too few time points for each direction of change to capture enough variation on the dependent variable to estimate coefficients for interaction terms.

¹⁸ Although we have relatively large *Ns* because we pool observations, it is worth pointing out that we are dealing with panel data on relatively few individual justices—22 in the *Miranda* analysis and 29 in the aggregate analysis. Therefore, the particularistic behaviors of these justices in this issue area influence our findings more than if we were analyzing, say, members of the House of Representatives.

(for which we control) and attitude change (which would not move systematically with changes in Court context). All of the change that we find cannot easily be explained from the attitudinal viewpoint.

In short, we find some evidence that the strategic context of justices' decisions affects their final merits votes. This finding is important, first, because it brings to the debate over the strategic model new, outcome-based evidence of the strategic interactions that scholars have begun to establish using process-based evidence (esp. Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000). Perhaps more importantly, it demonstrates that observed changes in justices' voting positions result from factors *other* than changes in *i*- and *j*-points. This is an important step forward in our understanding of the forces which influence the behavior of Supreme Court justices. Knowing that observed behavior changes (Baum 1988, 1992, 1995; Epstein et al. 1998) should stimulate a desire to understand *why* justices' votes change. As a preliminary answer to that question, we conclude that while issue change and preference change certainly play a role, strategic factors can also cause the justices' behavior to change.

Appendix A

***Miranda* Progeny Case Selection Rules**

Spaeth and Segal (1999, 25-33) have outlined a method for progeny case selection that, very generally speaking, involves checking case syllabi for references to the precedent and expanding that list in some cases by using *Shepard's Citations* to identify other cases with citations to the precedent that also address the same core question. There is some subjectivity in the Spaeth and Segal approach, as there is with any progeny selection rules; Brenner and Stier (1996, 1038) have noted that Spaeth and Segal's selection rules relies in part on Harold Spaeth's encyclopedic knowledge of Court decisions.

Since Spaeth and Segal do analyze *Miranda*, one approach would be to adopt their list of progeny cases (1999, 193-194). However, we have to revisit their selection rules in order to expand their list to the present (recall that our analysis is not confined to original *Miranda* participants). We use our own modified selection rules to select cases across the full time period because of this problem and for two other reasons: (1) because we, like Brenner and Stier (1996), also wish to minimize the judgment calls required in our selection, and (2) like both Brenner and Stier and Songer and Lindquist (1996), we believe it is appropriate to include non-orally-argued cases, at least when they have enough information to allow us to assess the basis for decision as well as the voting alignments.

Our approach begins with a *Shepard's* search, followed by assessment of syllabus citations and more subjective judgments when necessary. The specific selection rules are as follows:

- 1) Using *Shepard's*, identify Supreme Court cases citing *Miranda* through OT2003.

- 2) Isolate all cases with a *Shepard's* analysis¹⁹ or with >1 unanalyzed citation in any opinion.
- 3) For cases without *Shepard's* analysis but with >1 unanalyzed citation, determine if the syllabus contains a *Miranda* reference.²⁰
- 4) Eliminate any case that has neither a syllabus reference to *Miranda* nor a *Shepard's* analysis.
- 5) Eliminate any case that has a *Shepard's* “distinguished” analysis with no other *Miranda* reference, since these cases are unlikely to focus on core *Miranda* issues.
- 6) Eliminate any case that hinges on a non-*Miranda* issue.
- 7) Eliminate any case that is resolved by a merits decision as well as *per curiams* without obvious voting positions indicated.

These rules, while admittedly complex, offer the advantage of being relatively replicable—the judgment about the progeny hinging on a *Miranda* issue is subjective, but it is relatively straightforward.

In the end, we arrive at a list of 63 cases (exclusive of *Miranda* itself, which is included in the analysis). This is nearly twice as many cases as Spaeth and Segal identify. If we subtract the seven cases decided after Byron White’s departure (presumably, the end of the Spaeth and Segal search) and the 8 *per curiam* decisions we include, we still have 16 more cases than Spaeth and Segal. Substantively, the most important differences between our two lists (in the Byron White era, at least) is that our selection rules encompass more

¹⁹ Previous precedent-progeny works use the *Shepard's* analysis in differing ways. Spaeth and Segal, for instance, “especially focus on those citations that contain an entry in the *Shepard's* analysis column, particularly if the entry reads ‘followed,’ ‘questioned,’ or ‘overruled’” . . . but they “also examine all the other entries that *Shepard's* uses” (1999, 28). Brenner and Stier limit themselves to “followed” cases only (1996, 1038). We cast a broad net first and narrow from there, taking a *Shepard's* analysis as a neutral initial indication that a case may be progeny.

²⁰ Either a full citation or reference to “*Miranda* warnings” in the syllabus is considered a reference.

second-generation progeny, particularly progeny of *Edwards v. Arizona* (1981).²¹ Spaeth and Segal's approach, then, is somewhat more selective than ours, but we prefer ours in this application for its more direct replicability.

Our method is, like any precedent-progeny decision rule, imperfect. One potential problem is that we miss cases that may be progeny but have no syllabus reference even to *Miranda* warnings. An example is *Brewer v. Williams* (430 U.S. 387) which, on the substance would appear to us to be a close progeny of *Miranda*, but is excluded under our rules. But Spaeth and Segal miss the *Brewer* case as well, so we and they share this potential problem.

²¹ Spaeth and Segal's method does not select out all of these grandprogeny, however.

Appendix B
Progeny of *Miranda v. Arizona*

Case Name	Decision Year	Decision Term	U.S. Reports Citation
<i>U.S. v. Patane</i>	2004	2003	542 U.S. 630
<i>Missouri v. Seibert</i>	2004	2003	542 U.S. 600
<i>Yarborough v. Alvarado</i>	2004	2003	541 U.S. 652
<i>Ferguson v. City of Charleston</i>	2001	2000	532 U.S. 67
<i>Dickerson v. U.S.</i>	2000	1999	530 U.S. 428
<i>Davis v. U.S.</i>	1994	1993	512 U.S. 452
<i>Stansbury v. California</i>	1994	1993	511 U.S. 318
<i>Minnick v. Mississippi</i>	1990	1990	498 U.S. 146
<i>Pennsylvania v. Muniz</i>	1990	1989	496 U.S. 582
<i>Illinois v. Perkins</i>	1990	1989	496 U.S. 292
<i>New York v. Harris</i>	1990	1989	495 U.S. 14
<i>Michigan v. Harvey</i>	1990	1989	494 U.S. 344
<i>Duckworth v. Eagan</i>	1989	1988	492 U.S. 195
<i>Pennsylvania v. Bruder</i>	1988	1988	488 U.S. 9
<i>Patterson v. Illinois</i>	1988	1987	487 U.S. 285
<i>Arizona v. Roberson</i>	1988	1987	486 U.S. 675
<i>Greer v. Miller</i>	1987	1986	483 U.S. 756
<i>Arizona v. Mauro</i>	1987	1986	481 U.S. 520
<i>Colorado v. Spring</i>	1987	1986	479 U.S. 564
<i>Connecticut v. Barrett</i>	1987	1986	479 U.S. 523
<i>Colorado v. Connelly</i>	1986	1986	479 U.S. 157
<i>Michigan v. Jackson</i>	1986	1985	475 U.S. 625
<i>Moran v. Burbine</i>	1986	1985	475 U.S. 412
<i>Wainwright v. Greenfield</i>	1986	1985	474 U.S. 284
<i>Oregon v. Elstad</i>	1985	1984	470 U.S. 298
<i>Smith v. Illinois</i>	1984	1984	469 U.S. 91
<i>Berkemer v. McCarty</i>	1984	1983	468 U.S. 420
<i>New York v. Quarles</i>	1984	1983	467 U.S. 649
<i>U.S. v. Gouviea</i>	1984	1983	467 U.S. 180
<i>Minnesota v. Murphy</i>	1984	1983	465 U.S. 420
<i>Oregon v. Bradshaw</i>	1983	1982	462 U.S. 1039
<i>South Dakota v. Neville</i>	1983	1982	459 U.S. 553
<i>Wyrick v. Fields</i>	1982	1982	459 U.S. 42
<i>California v. Prysock</i>	1981	1980	453 U.S. 355
<i>Edwards v. Arizona</i>	1981	1980	451 U.S. 477
<i>Estelle v. Smith</i>	1981	1980	451 U.S. 454
<i>Jenkins v. Anderson</i>	1980	1979	447 U.S. 231
<i>Rhode Island v. Innis</i>	1980	1979	446 U.S. 291
<i>Roberts v. United States</i>	1980	1979	445 U.S. 552
<i>Tague v. Louisiana</i>	1980	1979	444 U.S. 469
<i>Fare v. Michael C.</i>	1979	1978	442 U.S. 707
<i>North Carolina v. Butler</i>	1979	1978	441 U.S. 369

(Table continued on p. 29)

(Continued from p.28)

Case Name	Decision Year	Decision Term	U.S. Reports Citation
<i>Mincey v. Arizona</i>	1978	1977	437 U.S. 385
<i>Oregon v. Mathiason</i>	1977	1976	429 U.S. 492
<i>Doyle v. Ohio</i>	1976	1975	426 U.S. 610
<i>U.S. v. Mandujano</i>	1976	1975	425 U.S. 564
<i>Beckwith v. U.S.</i>	1976	1975	425 U.S. 341
<i>Michigan v. Mosley</i>	1975	1975	423 U.S. 96
<i>Brown v. Illinois</i>	1975	1974	422 U.S. 590
<i>U.S. v. Hale</i>	1975	1974	422 U.S. 171
<i>Oregon v. Hass</i>	1975	1974	420 U.S. 714
<i>Michigan v. Tucker</i>	1974	1973	417 U.S. 433
<i>Schneekloth v. Bustamonte</i>	1973	1972	412 U.S. 218
<i>Kirby v. Illinois</i>	1972	1971	406 U.S. 682
<i>Harris v. New York</i>	1971	1970	401 U.S. 222
<i>Jenkins v. Delaware</i>	1969	1968	395 U.S. 213
<i>Orozco v. Texas</i>	1969	1968	394 U.S. 324
<i>Darwin v. Connecticut</i>	1968	1967	391 U.S. 346
<i>Mathis v. U.S.</i>	1968	1967	391 U.S. 1
<i>U.S. v. Wade</i>	1967	1966	388 U.S. 218
<i>In re Gault</i>	1967	1966	387 U.S. 1
<i>Schmerber v. California</i>	1966	1965	384 U.S. 757
<i>Davis v. North Carolina</i>	1966	1965	384 U.S. 737
<i>Johnson v. New Jersey</i>	1966	1965	384 U.S. 719

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Table 1: Justices' Absolute Civil Liberties Support Score Change, 1953-2003 Terms

Model	All Membership Changes (1)	Significant Membership Changes (2)
Justice Tenure (logged)	-.0086 (.0051)	-.0081 (.0051)
Distance from Median $t-1$.0023 (.0026)	.0022 (.0027)
Court Change	.0113 [†] (.0065)	.0200* (.0088)
Constant	.0986*** (.0141)	.0974 (.0138)
R ²	.02	.03
N	429	429

Cell entries are OLS coefficients with robust standard errors (clustered on the justice) in parentheses.

[†]p<.10, *p<.05, **p<.01, ***p<.001, two-tailed tests

Table 2: Justices' Civil Liberties Support Score Change, 1953-2003 Terms

Model	Right of the Median (1)	Left of the Median (2)
Justice Tenure (logged)	-.0014 (.0081)	.0099 (.0101)
Distance from Median $t-1$.0130 [†] (.0069)	-.0219** (.0065)
Court Change (Liberal)	.0722* (.0282)	-.0077 (.0189)
Court Change (Conservative)	.0083 (.0223)	.0304* (.0111)
Constant	(-.0265) .0279	.0217 (.0218)
R ²	.06	.05
N	195	191

Cell entries are OLS coefficients with robust standard errors (clustered on the justice) in parentheses.

[†]p<.10, *p<.05, **p<.01, ***p<.001, two-tailed tests

Table 3: Vote Changes on *Miranda* Progeny Cases, 1966-2003

Variable	b (\hat{s})
Case Facts: Liberal Vote More Difficult	-.4804 (.3855)
Case Facts: Liberal Vote Easier	1.4558*** (.3988)
Significant Natural Court Change	1.1238* (.5862)
Majority Opinion Writer	.0504 (.3761)
Minimum Winning Coalition Member	-3.6771*** (.9565)
Liberal Vote t_{-1}	.8594** (.2747)
More Difficult * Liberal Vote t_{-1}	-.0624 (.5640)
Easier * Liberal Vote t_{-1}	-2.3904*** (.4684)
New Natural Court * Liberal Vote t_{-1}	-1.1922 (.8446)
Majority Writer * Liberal Vote t_{-1}	.5934 (.6732)
MWC * Liberal Vote t_{-1}	4.1191*** (.9902)
Stable Votes ^a	-.1284*** (.0323)
Constant	-.8785*** (.2347)
Wald χ^2 (12 d.f.)	311.87
Pr > χ^2	<.0001
N	542

Cell entries are logit coefficients with robust standard errors (clustered on the justice) in parentheses.

*p<.10, **p<.01, ***p<.001, two-tailed tests

^a Number of consecutive consistent votes cast by justice j as of time t .