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Delaying Justice: The Supreme Court's Decision to Hear Rearguments

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Some of the Supreme Court's most famous cases—from *Roe v. Wade* (1973) to *Brown v. Board of Education* (1954)—have been decided only after being held over and argued a second time. While few cases take this path, scholars have offered no systematic account for why the Court would ever take such a tack. We develop hypotheses about when reargument is most likely to occur, and test them on all formally decided cases between 1946 and 1985. More specifically, we focus on how justices' uncertainty about case outcomes affects the Court's decision to seek reargument. Our findings demonstrate that reargument is most likely to occur when multiple levels of uncertainty are present, even when we control for other factors that have been raised as explanations for this phenomenon.

Some of the United States Supreme Court's most visible cases have been argued a second time before the justices rendered final judgment (e.g., *Brown v. Board of Education* [1954], and *Roe v. Wade* [1973]). Yet, the reasoning behind the Court's decision to hear rearguments has only been studied incidental to more general discussions of Supreme Court decisionmaking, or as part of in-depth descriptions of specific cases. No systematic attempts have been made to reveal when and why the Court decides to request reargument. Is it because the justices seek information from the parties on issues not previously raised in the briefs or during oral arguments? Is it simply because one or more justices missed oral arguments? Both of these arguments are part of the received wisdom on why the Court sometimes seeks reargument (see O'Brien 2000; Lazarus 1999; Wasby et al. 1977).

While we believe that these factors might account for specific instances of reargument, no systematic explanation exists to account for the motives behind such requests more generally. To fill this void in our understanding of the Supreme Court's decisionmaking process we argue that when the justices are uncertain about either (1) the policy they individually wish to pursue, or (2) the policy that the Court will enunciate in its decision, reargument may help them reach a desired outcome. This account adds another piece to the puzzle that seeks to explain how the Supreme

Court ultimately decides cases that it hears. That is, while the Court uses reargument infrequently, we believe that understanding when and why it occurs tells us something important about the nature of the Court's deliberative process.

Theoretically, we concur with the research of Maltzman, Spriggs, and Wahlbeck (2000); Epstein and Knight (1998); Caldeira, Wright, and Zorn (1999); and Johnson (2001) who persuasively argue that scholars should pay greater attention to how policy develops on the Court, rather than simply pay attention to the final votes on the merits. Indeed, just as these scholars document how the deliberative process affects the Court's policy choices (e.g., the agenda setting stage, opinion assignment, opinion writing), we too seek to explain how justices pursue policy goals in a collective environment and under a given set of formal and informal rules. In other words, while reargument may be of interest in and of itself, we are also interested in it for what it can tell us about the nature of the deliberative processes on the Court. The insights we glean add to the growing body of literature showing that the justices are engaged in a "collegial" endeavor and do not act, as previously thought, like nine separate law firms (Maltzman et al. 2000).

Although most recent research rejects the idea that judges are unsophisticated actors who are unconcerned with the preferences of other actors, many still believe that when it comes to the final decision whether to affirm or reverse, justices know exactly what they prefer to do and are unconcerned with what others intend to do. That, at least, is how the leading proponents of the attitudinal model view the process (Segal and Spaeth 1993, 2002).¹ According to attitudinalists, Supreme Court justices, whose decisions cannot be overturned by a higher court, who serve for life, and who lack higher ambition, are simply unconstrained

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¹ Segal and Spaeth (1993, 2002) argue that justices may behave strategically and interdependently at all stages up to, but not including, the final votes on the merits. Thus, our argument that justices are concerned with the actions of the other justices is not necessarily inconsistent with the attitudinal model.

from voting their sincere preferences. While reargument takes place prior to the final vote on the merits, we believe the attitudinal model cannot provide an adequate explanation for such an action. First, the attitudinal model does not account for justices not knowing exactly what they would prefer to do in a given situation. Thus, the model does not account for individual justices' own uncertainty. Moreover, it cannot account for justices holding a case over for review because their colleagues seem uncertain about how they want to act. While attitudinalists argue that justices may behave strategically when voting to grant or deny *certiorari*, the justification they offer is that the justices would prefer to avoid cases they fear losing on the merits. But, once a case is accepted for review, such a decision can no longer be avoided. Thus, the argument offered by attitudinalists for strategic *cert.* behavior simply does not apply to rearguments. Our results speak directly to this continuing debate between proponents of the attitudinal model and proponents of the strategic model.

We test our theory of reargument using data from Spaeth's *Expanded Supreme Court Database* (1999), and *Burger Court Judicial Database* (2001). With these data, we develop measures reflecting the justices' own uncertainty, and other measures reflecting their uncertainty about how they believe their colleagues will act. In addition, we measure and test competing explanations for the decision to hold a case over. We analyze these data using a novel modeling technique (Rare Events Logistic Analysis) created by Tomz, King, and Zeng 1999 (see also King and Zeng 2001a, 2001b; and Johnson 2003) to determine the extent to which uncertainty about case outcomes increases the probability that a case will be held over for reargument.

UNCERTAINTY AND REARGUMENT

Our theory about reargument is based on two simple, yet intuitive, assumptions about decisionmaking by political actors. First, we assume that most decisions by political actors are made under the condition of risk. This means that an actor may not always be able to determine the best course of action to satisfy her own preferred outcome because she lacks sufficient information about other relevant actors' preferences. As Gibbons (1992: 143) notes, "In a game of incomplete information . . . at least one player is uncertain about another player's payoff function." Our first assumption, then, is that political actors often interact with one another with some degree of uncertainty.

Recent research suggests that this assumption applies to Supreme Court justices. First, justices' preferences can and do change over time (Epstein et al. 1998). Second, justices' preferences vary across issue areas (Epstein et al. 1996). Third, in order to build or maintain a majority coalition, opinion writers may need to make changes to the content of an opinion (Maltzman et al. 2000). To complicate matters further, justices may strategically misrepresent their policy views or their intentions to write a separate opinion in order to gain concessions from other justices—particularly the

majority opinion writer (Epstein and Knight 1998; Maltzman et al. 2000). Finally, the presence of new justices, whose views are less well known to the others on the Court, may cause additional uncertainty.

Beyond the uncertainty facing justices as they try to determine their colleagues' preferences, the legal complexity surrounding some cases may create additional uncertainty for the individual justices as they figure out their own position. For example, cases often encompass multiple laws or multiple issues (Spaeth 1999, 2001), which means that a justice may have different preferences over the outcome depending on which dimension is controlling (Maltzman and Wahlbeck 1996). Moreover, there may be so many different opinions and memos in circulation during the opinion writing process that it becomes unclear where the final policy outcome is headed (Maltzman et al. 2000). Overall, this combination of factors suggests that even though justices may generally be able to predict their colleagues' actions, they often possess some degree of uncertainty in particular cases (Maltzman et al. 2000).²

Our second assumption is that in order to overcome uncertainty, actors must gather information about the available policy choices and the preferences of those with whom they interact (Epstein and Knight 1998; Maltzman et al. 2000). Sometimes this information is readily available, and so a choice can be made quickly and efficiently. At other times, however, additional information may be needed before an actor can make a decision that best leads her toward her most preferred outcome. It is these latter cases about which we are concerned in this paper.

Certainly, Supreme Court justices have a plethora of information at their disposal to overcome uncertainty. For instance, litigants and *amici curiae* provide information in their briefs (Spriggs and Wahlbeck 1997; Epstein and Kobylka 1992), justices can obtain information during oral arguments (Johnson 2001) and they learn more about a case as memoranda are circulated during the opinion writing process (Maltzman et al. 2000).³ In most cases the information derived from these sources is enough to help the justices reach decisions close to their preferred goals. Sometimes, however, the justices arrive at conference with uncertainty about how their colleagues intend to act and, sometimes, how they themselves should act. When this occurs, a justice or a coalition of justices from the conference majority may push the Court for reargument to obtain additional information about the case. In the next section we discuss the conditions under which a majority may agree to do so.

² Consider *McClellan v. McSurely* (1978). In his conference notes for this case, Justice Powell writes: "No Court for any view. We discussed this miserable case for nearly two hours without any two of us agreeing." In a conference memo concerning the same case, Justice Stevens indicates that he has a "good deal of uncertainty about this case."

³ We recognize the possibility that uncertainty may possibly cause as well as be caused by the circulation of numerous opinions. However, for our purposes, we think it is important to consider the effect of this variable on the probability of reargument.

THE DECISION TO REARGUE

While the number of cases that are reargued is negligible, there are no formal limits on whether a case can follow this path. Thus, theoretically, any and all cases that the Court accepts for review could be reargued. Practically, however, there are constraints on how many cases can actually follow this path. First, although there is no specific rule governing the conditions under which a case will be reargued (see Krimbel 1989: 931-32; Stern et al. 1993: 627), the practical norm governing reargument requires that a member of the conference majority request such a course of action, and that a majority of justices agree (on the first point see Krimbel 1989; on the second, see O'Brien 2000: 9).⁴

Second, reargument presents opportunity costs by taking time that could be spent on other cases—cases that may result in a better outcome for one or more of the justices.⁵ Third, reargument may pose transaction costs since it may violate norms on the Court. Justice Douglas' reaction to Chief Justice Burger's request for reargument in *Roe v. Wade* illustrates this point. When Burger asked for this course of action Douglas was incensed, and threatened to make public a dissent that told, "what is happening to us and the tragedy it entails" (quoted in Lazarus 1999: 354). Douglas was particularly upset because the Court had a majority and he believed that the Chief simply wanted to hear rearguments so that he could procure the votes of Justices Powell and Rehnquist—the two newest members of the Court. Thus, Douglas felt the Chief's plan "dilute[d] the integrity of the Court and ma[de] the decisions here depend on the manipulative skills of the Chief Justice" (in Lazarus 1999: 354). Although Douglas ultimately withdrew his threat, the fact that he even raised it indicates that reargument may (1) violate Court norms, and (2) engender public opposition if the Chief's bad behavior was made public.⁶ Given the

potential costs associated with requesting reargument, the justices must give serious consideration as to whether this tack will help them obtain a more preferred outcome. In short, it is not a path they invoke lightly or frequently.

If reargument is potentially costly for the justices, then what possible advantage could be gained by doing so? We argue that the advantage is defined by the justices' desire to seek additional information that may help settle any lingering uncertainty about how to decide a case. Justice Blackmun seemed to follow this strategy in *Roe*. While he had many reasons for favoring reargument, Lazarus (1999) suggests that of paramount importance was that Blackmun wanted more information from the parties about the case. This is consistent with the literature that suggests information from litigants and *amici curiae* helps the justices make decisions (see, e.g., Johnson 2001; Spriggs and Wahlbeck 1997; Epstein and Kobylka 1992).

More generally we argue that, without the ability to reargue, the justices may feel obligated to hand down a decision during the current term—while uncertainty still exists—which could ultimately produce a suboptimal outcome. For instance, after numerous memos were circulated in *Sony Corporation v. Universal City Studios* (1984), and many of the justices were still uncommitted, Justice White sent a memo to Chief Justice Burger saying, "if this case is to come down this term, I prefer John's [Justice Stevens'] submission to any others. I would much rather, however, have the case reargued. It is important, and I would feel more comfortable if we could give the case more attention than time will now allow" (White 1983). Thus, we posit that reargument acts as an interruption in the Court's usual deliberative process. It allows the justices to seek additional information that may help them decide how they want to act and what course of action to pursue so that they can try to reach an outcome that is in line with their own goals.

Policy Outcome Uncertainty and Reargument

As noted above, our main hypothesis is that Supreme Court justices are most likely to utilize reargument when uncertainty exists about the ultimate policy that will be set by the Court. In this section we delineate hypotheses that focus on situations when the Court seeks reargument because the justices are uncertain about policy outcomes.⁷

⁴ Our own analysis of reargued cases reveals that it takes a majority of justices to take such an action. While these votes are not systematically recorded for each of the cases, in virtually all cases where Justice Brennan kept a record of the votes to reargue, reargument proceeded only after a majority agreed to do so.

⁵ By "better outcome" we mean that a justice must weigh the benefits of a policy obtained after a case is reargued against the benefits of a policy outcome obtained if the time that is used for reargument was spent on another case that may also help her reach a goal close to her policy preferences.

⁶ There is also evidence that the media might cover instances of a justice "going public" with her outrage over the majority's decision to seek reargument, which in turn may harm public perceptions of the Court. Following the Court's order to hear rearguments in *Patterson v. McLean Credit Union* (1988), the media covered the dissents by the minority justices who were opposed to reargument. Justice Stevens' dissent from the order requesting reargument, which was joined by Justices Blackmun, Brennan, and Marshall, was quoted in *The New York Times* as well as *Time*, *U.S. News & World Report*, *Newsweek*, and the *New Republic*. The *New York Times* article, quoting from Stevens' dissent stated, "that the Court's 'spontaneous decision' suggested it was seeking 'to cast itself adrift from the constraints imposed by the adversary process and to fashion its own agenda.' They [Justices Stevens, Blackmun, Brennan, and Marshall] said this would damage both 'the public's perception of the

Court as an impartial adjudicator' and 'the faith of victims of racial discrimination in a stable construction of the civil rights laws'" (*New York Times*, April 26, 1988, A:1). While this has happened only once as far as we can determine, it suggests that the media may find it worth reporting on if they are made aware when it happens. So, if an unhappy justice "goes public" with this kind of information, the media may report on it and the public may become disillusioned. This is certainly the kind of bargaining that Hibbing and Theiss-Morse (1995) find leads to distaste for Congress. Americans might begin to dislike or distrust the Court if they witness it engaging in such behavior on a regular basis.

⁷ Note that we only test hypotheses about aggregate Court behavior in this paper. While it is obviously desirable to test individual justice's decision to vote for reargument, such data only exist for some cases. Indeed, from

First, when the justices are closely divided over the outcome of a case during conference fewer justices must be convinced to switch their votes from the majority to the minority view in order to change the outcome. In the case of a minimum winning conference coalition, only one justice needs to switch her vote for this to happen. The same logic applies to reargument orders. When a minimum winning coalition exists after the conference vote only one justice from the majority must be convinced to support an order for reargument if she is wavering about how to ultimately vote in the case. When a larger majority is formed, the chances of a reargument occurring, or actually changing the outcome of a case, decrease because even if one justice defects the majority usually stays in tact—and can block such a request. Thus, because of the instability of a minimum winning conference majority, we expect:

Minimum Winning Coalition Hypothesis: Reargument is more likely to occur when the conference majority vote is minimum winning.

Second, justices who are nearer to the center of the Court are more likely than ideologically extreme justices to waver between the majority and the minority views. As a result, these moderate justices are more likely to switch positions in a case (e.g., Justices Powell, Stewart, and White). We are particularly concerned about cases when the median justice writes the opinion for the Court. When this happens, the outcome of a case is clearly tenuous because the opinion writer is ideologically the closest member of the majority to the minority coalition, and she may be interested in casting the fifth vote to reargue due to her indecision over the ultimate policy outcome in the case. To illustrate this point, we again turn to Justice Blackmun's behavior in *Roe*. Although he ultimately did not switch his vote, a key reason why the Chief Justice sought reargument was that he believed Blackmun might change positions after hearing additional arguments (Lazarus 1999: 350-55; O'Brien 2000: 8-9). Given the increased instability of the majority coalition when a potential swing justice writes the majority opinion, we therefore expect the following:

Median Justice Hypothesis: When the opinion writer is ideologically closer to the median a case is more likely to be slated for reargument.

Uncertainty about the overall strength of the initial (conference) majority coalition is another important factor that may lead the Court to seek reargument. When the opinion writer is ideologically distant from the other members of the conference majority that coalition is less stable than when the opinion writer is ideologically close to the other justices (see Murphy 1964; Maltzman et al. 2000). Ultimately, a coalition that is ideologically distant from the opinion writer

is less likely to agree on a particular outcome. While many tactics can be used to strengthen the coalition in this situation, we posit that a justice, or a group of justices, may determine that the case should be reargued in order to gather additional information that may help the majority coalesce around a particular issue. This leads us to predict:

Coalition Distance Hypothesis: When the opinion author is ideologically distant from the remainder of the majority coalition the Court is more likely to set a case for reargument.

In our sample of cases, the majority opinion author changes hands (between conference and the time a final decision is rendered) in about five percent of the cases. We argue that, while not a common occurrence, a change in majority opinion authorship after conference also increases the level of uncertainty about the legal and policy outcome of a decision. First, if an assignment is changed to a justice who initially authored a dissent, that justice still needs four colleagues to agree with her draft opinion. As a result, she may have to alter the substance of that opinion to keep the newly formed majority in tact. While we may not expect wholesale legal or policy changes, it is likely that substantive changes will be needed in order to secure the new coalition. Additionally, switching authors based on an initially mistaken assignment also creates uncertainty—especially if the author changes from an extreme justice to a more moderate justice (or vice versa). Thus, we argue that authorship changes increase uncertainty about the eventual outcome of a case. This leads us to hypothesize:

Authorship Change Hypothesis: When an opinion is re-assigned after the initial assignment is made at conference a case is more likely to be reargued.

Evidence from existing literature suggests that “strong” voting fluidity occurred in about 10 percent of all cases decided by the Vinson and Warren Courts (Brenner 1980). Our interest does not lie with the debate about what causes voting fluidity. Rather, we are concerned with what fluidity means for the level of uncertainty in a case. Given what we know about bargaining and accommodation during the opinion writing process (Maltzman et al. 2000), we expect defections from one coalition to another will ultimately lead to changes in the policy forwarded by the majority coalition. This is intuitive because, in most cases, the opinion author will have to make some changes in order to keep the new member of the coalition, and to retain those justices who originally joined with the author. This should therefore affect the level of uncertainty about the outcome of the case. Thus, we posit:

Voting Fluidity Hypothesis: When at least one justice switches votes in a case, the Court is more likely to set a case for reargument.

Research that focuses on acclimation effects suggests that it takes several terms for new justices to assimilate

Brennan's papers we were only able to locate votes on reargument in 37 cases. Thus, the best we can do is to test the conditions that lead the Court as a whole to seek reargument.

themselves to the Court (Hagle 1993; Howard 1968; Wood et al. 1998). One of the key findings of this literature is that new justices often exhibit more variation in their voting patterns during their initial years on the Court than they do once they have sat on the bench for several years. As such, the remaining justices' level of certainty about their new colleagues' preferences is diminished during their first term on the Court. This uncertainty is felt in each chamber, and therefore might lead the justices to want to hold cases over for review. We therefore posit that:

Natural Court Hypothesis: During terms that include at least one new justice, the Court is more likely to set a case for reargument.

Finally, when a case is particularly salient the justices' views are more frequently fixed and intensely held, which means that they are more likely to hold fast to their policy positions stated at conference. Past research indicates, however, that this leads justices to bargain more frequently before ultimately joining an opinion coalition (Spriggs, Maltzman, and Wahlbeck 1999). This bargaining, in turn, increases doubts about the policy outcome of that case. Moreover, in salient cases the justices may fear the extra scrutiny the majority opinion is likely to receive once the Court's decision is announced. This is precisely what happened in *INS v. Chadha* (1983). In his conference notes, Justice Powell captures Chief Justice Burger's fear that the legislative veto "is highly sensitive politically. Wish we could avoid the issue." Of course, the Court eventually had to hand down a decision, but only after the case was held over for reargument. After the conference vote finally held the veto unconstitutional, Burger sent around his opinion drafts (six in all) with a note saying that the issue was likely to attract, "microscopic—and not always sympathetic!—scrutiny from across the park [that is, in Congress]" (quoted in Epstein and Walker 2001: 263). For the foregoing reasons, we expect that:

Case Salience Hypothesis: The Court is more likely to hear reargument in politically and legally salient cases.

Case Characteristics and Reargument

We also realize that justices may call for reargument for reasons unrelated to uncertainty about the policy outcome in a case. For instance, they may seek reargument because they lack information about the issues under discussion in a case. This scenario is most likely to occur in complex cases where justices may be undecided about their position. When a case involves multiple legal dimensions justices may seek reargument if they do not have enough information to determine which dimension controls. Consistent with this argument is the finding that justices are more likely to change votes after the conference in cases involving multiple issues or legal provisions (Maltzman and Wahlbeck 1996). The number of separate opinions in a case may also serve as an indicator of increased case complexity. Specifi-

cally, we argue that as the number of memos and drafts being circulated between chambers increases, the greater the uncertainty the justices will have about the ultimate policy that the majority opinion will announce. Thus, we posit the following hypotheses regarding complex cases:

Case Dimensions Hypothesis: Cases with multiple issues or that implicate multiple laws are more likely to be reargued than cases that cover one issue or a single legal dimension.

Number of Separate Opinions: Cases that generate more opinions indicate greater policy uncertainty and thus should be associated with cases set over for reargument.

DATA AND METHODS

To test the above hypotheses we rely on Spaeth's *Expanded Supreme Court Database* (1999), and his *Burger Court Judicial Database* (2001), so that we can analyze all formally decided cases (with signed opinions) between 1946 and 1985 (after accounting for missing values, we have 5026 cases). Our dependent measure is coded 1 for cases held over for reargument and 0 otherwise. Normally logistic regression is an appropriate modeling choice for a dichotomous dependent variable like ours. However, Table 1 indicates that reargument occurs very rarely, as from 1946 to 1985, only 3.3 percent of all cases were reargued.⁸

The distribution on our dependent variable may pose a statistical problem for us because logistic regression underestimates the probability of a rare event occurring (King and Zeng 2001a, 2001b). In other words, the coefficient estimates in rare events are biased downward, affecting the constant term and the remaining coefficients as a result. Given this problem, King and Zeng propose a correction that lowers the mean square error of a model (2001a).⁹ While this solution is effective in many contexts, it is particularly useful "when the number of observations is small (under a few thousand) and the events are rare (under 5 percent or so)" (2001a: 158). Because our data meet these conditions, we employ this technique in conjunction with Stata 7.0 (Tomz, King, and Zeng 1999).

The model includes the following independent variables to measure uncertainty: (1) *Minimum Winning Conference Vote*; (2) *Ideological Distance Between Opinion Writer and*

⁸ These figures were derived from Spaeth (1999, 2001) and are based on all orally argued cases, with signed opinions, using docket number as the unit of analysis.

⁹ The ReLogit program "estimates the same logit model as the logit command, but with an estimator that gives a lower mean square in the presence of rare events data for coefficients, probabilities, and other quantities of interest" (Tomz, King, and Zeng 1999). We also estimated the model using the more familiar logit command. We note that the results of either estimation procedure are substantially similar—neither our substantive interpretation nor levels of statistical significance are affected by the decision. Since the ReLogit technique is more appropriate given the distribution of our data, we chose to present those results.

≡ TABLE 1
 NUMBER OF FORMALLY DECIDED REARGUED CASES BY THE
 U.S. SUPREME COURT 1946-85 (BY COURT ERA)

Court Era	Number of Cases	Percentage
Vinson Court	59	6.6
Warren Court	47	2.6
Burger Court	66	2.6
Total	172	3.3

Data obtained from Spaeth's *Expanded Supreme Court Data Base* (1999) and Spaeth's *Burger Court Judicial Database* (2001). The sample used for this table includes all orally argued cases decided with a signed opinion, using the docket number as the unit of analysis.

Court Median; (3) *Ideological Distance Between Opinion Writer and Majority*; (4) *Authorship Change*; (5) *Voting Fluidity*; (6) *Natural Court*; (7) *Case Dimensions*;¹⁰ (8) *Number of Opinions*; (9) *Political Salience*; and (10) *Legal Salience*. Full explanations of how we operationalize these variables, and sources for the data can be found in the Appendix. Additionally, descriptive statistics for all of the variables may be found in Table 2. This table also includes our expectations about how each variable should be signed.

Beyond our variables that measure either policy uncertainty or case specific uncertainty, we also account for an intuitive competing explanation for why the Court might choose to reargue a case. Anecdotal and media accounts (O'Brien 2000: 8-9; Woodward and Armstrong 1979) suggest that reargument is likely to occur when less than a full complement of the Court decides a case. For instance, Woodward and Armstrong (1979: 367) indicate that during the 1974 term, when Justice Douglas was in the hospital, the other justices agreed that any cases tied at 4-4 would be held over until the next term. To test this competing explanation, we include a measure of whether fewer than nine justices participated at conference (*Fewer than 9 Justices*). This variable is coded 1 if fewer than nine justices participated, while all other cases are coded 0.

RESULTS

The results from the analysis are presented in Table 3. Six of the eight variables that measure justices' uncertainty

about policy outcomes are statistically significant ($p < .05$) and are signed in the predicted direction. Consistent with our expectations, when the conference vote produces a minimum winning coalition the case is more likely to be held over for reargument. We argue that the justices recognize this situation as one where the outcome is uncertain because of the instability of the coalition, and they therefore use reargument to obtain more information. The ideological distance between the opinion writer and the Court median is also statistically significant. The negative coefficient suggests that as this distance increases the probability of reargument decreases. Additionally, the greater the distance between the opinion writer and the rest of the majority coalition, the greater is the likelihood that the case will be held over for reargument. In this situation, the opinion writer may have difficulty holding that coalition together and so may seek additional information—as Justice Blackmun did in *Roe*.

We also find evidence that when the assignment of the majority opinion changes following conference the probability of holding a case over for reargument increases. Finally, cases that are either politically or legally salient are more often reargued. Note that neither the existence of individual level voting fluidity, nor the fact that a new justice has joined the Court increases the probability of reargument.

Beyond uncertainty about policy outcomes, we find that uncertainty caused by case specific characteristics rarely leads the Court to reargue cases. Cases with multiple dimensions are not more likely to be reargued. While we hypothesized that cases with a greater number of opinions in circulation might increase the justices' propensity to take this tack, we find the exact opposite—a statistically significant, but negative coefficient. We can only speculate about this result. Perhaps it is clear at the outset in these cases that additional time will not help resolve any uncertainty or help build or sustain a majority. These may be cases where the justices have clearly indicated their lack of willingness to join the Court's opinion and so the opinion writer sees reargument as a futile strategy. Again, however, we can only speculate about this result. Overall, our main finding about uncertainty holds even when we control for an intuitive alternative hypothesis—that the Court holds cases over when it is not fully staffed.

Even though almost all of the key independent variables behave as expected, it is difficult to interpret the substantive effects of the coefficients in Table 3. As such, we calculated the predicted probabilities of the Court's decision to seek reargument (based on individual variables, as well as combinations of them). Note first, that when all of the variables are held at their mean or modal values, there is slightly more than a 1 percent (1.20) probability that the Court will slate a case for reargument. This indicates that the Court hears, on average, fewer than two rearguments per year.

Interestingly, none of our uncertainty variables, in isolation, dramatically increase the Court's propensity to set a case for reargument. When a minimum winning coalition exists at conference the probability increases to about four

¹⁰ Our measure of complex cases differs somewhat from that used by Maltzman et al. (2000). In their analysis, they create factor scores based on either (1) multiple legal provisions and multiple issues (the same variables from the Spaeth [1999, 2001] data we use), and/or (2) multiple legal provisions, multiple issues, and the number of opinions. They use the first measure when they are analyzing opinion writing in order to eliminate any endogeneity in the data. Since we believe the number of opinions authored in a case is a good reflection or indicator of policy uncertainty, we chose to separate that specific measure from the other two variables—multiple legal provisions and multiple issues. Those cases with either multiple issues or multiple legal provisions are coded 1 and all others are coded 0. Further, we chose *not* to factor analyze these remaining two variables in order to create our measure of complex cases and chose instead to simply score these as whether *either* multiple legal provision or a multiple issues were present.

≡ TABLE 2
 VARIABLES PREDICTED TO AFFECT THE SUPREME COURT'S DECISION TO DOCKET A CASE FOR REARGUMENT (1946-1985)

Variable	Mean/ Proportion	Min	Max	S.D.	Expected Direction
<i>Dependent Variable</i>					
Is the case Reargued?	0.03	0.00	1.00	0.18	
<i>Independent Variables</i>					
Minimum Winning Conference Vote	0.21	0.00	1.00	0.40	+
Ideological Distance Between Opinion Writer and Ct. Median	12.94	0.00	61.90	10.88	-
Ideological Distance Between Opinion Writer and Majority	14.84	0.02	75.50	11.35	+
Authorship Change	0.05	0.00	1.00	0.22	+
Voting Fluidity	0.47	0.00	1.00	0.50	+
Natural Court	0.06	0.00	1.00	0.24	+
Political Salience	0.16	0.00	1.00	0.37	+
Legal Salience	0.05	0.00	1.00	0.21	+
Case Dimensions	0.26	0.00	2.00	0.44	+
Number of Opinions	2.55	0.00	8.00	1.19	+
Fewer than 9 Justices	0.22	0.00	1.00	0.42	+

percent (3.95), when the median justice writes the opinion it increases to about 2 percent (1.66), and when the opinion author is the farthest away from the remainder of the majority coalition the probability is 6 percent. Additionally, when an opinion is reassigned, the propensity for reargument increases to just over 8 percent (8.36), when a case is politically salient the probability is nearly 2 (1.71) percent and when a case is legally salient the probability is nearly 4 (3.84) percent.

Even though none of the variables of interest substantially increase the Court's propensity to hear rearguments when considered in isolation, when considered in combination the effect is dramatic. When the median justice writes an opinion, and is ideologically distant from a minimum winning majority coalition (and the other variables are held at their mean or modal values), the probability of reargument increases to 23.38 percent. When these three conditions exist and the opinion is reassigned, the probability increases to a dramatic 69.11 percent. Further, when these four conditions are met, and the case is politically salient the probability of reargument jumps to 75.66 percent. Finally, when these five conditions are met and a case is legally salient, the probability of reargument is 91.61 percent! These findings demonstrate clear support for the hypothesis that as uncertainty about the policy outcome of a case increases, and when multiple factors contribute to this uncertainty, the Court is almost guaranteed to hear additional arguments in that case.

While no single case perfectly reflects all of the variables that have substantive effects on the Court's decision to reargue, many of them contain quite a few. One of the best examples is *Shapiro v. Thompson* (1969). In this case, we find five of our statistically significant variables that measure policy uncertainty are relevant. First, *Shapiro* was salient both legally and politically as it struck down state and D.C.

laws imposing residency requirements on welfare recipients. Moreover, the conference vote was minimum winning and the assignment of the opinion changed sometime after the first conference—from Chief Justice Warren to Justice William Brennan. On this issue Brennan was the median justice so, as we expected and found, being at or near the center of the Court may induce wavering between the majority and minority views. Overall, *Shapiro* is just one of the many cases that illustrate how these variables act in specific cases.

CONCLUSION AND DISCUSSION

This research begins to explain the conditions under which reargument is most likely to occur. We argue that, before she can decide what course of action will further her policy goals, a justice needs to be confident that she knows what actions her colleagues will take. In general, then, our results strongly suggest that the justices use reargument in order to resolve uncertainty about how they should act in light of the actions of their colleagues.

The above analysis does not address, however, the important question of whether reargument has an impact on how the Court makes decisions. While the data to test the impact are limited, we do find evidence that in these cases the justices clearly deal with issues raised during the rearguments in their opinions. For instance, in the 37 cases for which we have Justice Brennan's recorded votes on reargument, 78 percent of the majority opinions focus on the main issue about which the parties reargued. Additionally, more than 50 percent of all dissenting and concurring opinions in these cases focus on this issue. Although more analysis on the impact of reargument is necessary, these findings indicate that when uncertainty surrounds a case, the justices often have it reargued, and then actually utilize the

≡ TABLE 3

RARE EVENT LOGISTIC REGRESSION MODEL OF THE SUPREME COURT'S DECISION TO DOCKET A CASE FOR REARGUMENT (1946-1985)

Variables	Coefficient	Robust Standard Error	Significance (one-tailed test)	Expected Direction?
<i>Independent Variables</i>				
Minimum Winning Conference Vote	1.22	0.17	0.00	yes
Ideological Distance Between Opinion Writer and Ct. Median	-0.03	0.01	0.00	yes
Ideological Distance Between Opinion Writer and Majority	0.03	0.01	0.00	yes
Authorship Change	2.00	0.02	0.00	yes
Voting Fluidity	-0.03	0.17	0.44	no
Natural Court	0.40	0.30	0.09	yes
Political Salience	0.37	0.22	0.04	yes
Legal Salience	1.18	0.27	0.00	yes
Case Dimensions	0.23	0.18	0.10	yes
Number of Opinions	-0.12	0.07	0.05	no
Fewer than 9 Justices	0.19	0.20	0.17	yes
Constant	-4.18	0.24	0.00	

N = 5026

information they gather from these additional proceedings, as they make legal and policy decisions.

Overall, our findings beg the question as to why we should care about reargument? We believe that it is important to understand this tool because it can be used as a means for justices to pursue their most preferred policy goals. We also suspect that calls for reargument might be used as an implicit or explicit threat by justices who are unhappy with the direction of the Court's deliberations. Just as the threat of a dissent, or a separate opinion, may affect the authority of a Court decision, and thereby the opinion writer's willingness to incorporate various viewpoints, so too may the threat of reargument. Of course, as with all threats, some are more credible than others. A justice can attempt to affect the outcome of a Court decision by stating that she is planning on seeking reargument, but a solid majority might safely ignore such a threat—especially when the opinion writer is also certain about attaining his preferred outcome. But when the outcome of a case is less than certain, a majority of the justices may agree to hear further arguments before deciding.

More generally, we think our analysis of this specific tool sheds light on the ongoing theoretical debate about the nature of Supreme Court decisionmaking. There is one remaining persistent, and fundamental, disagreement between the two most prevalent theories of judicial behavior. Attitudinal models acknowledge that Supreme Court justices act interdependently except when it comes to the final vote on the merits (Segal and Spaeth 1993, 2002). According to these models, at the final stage, when deciding whether to affirm or reverse, the justices—who are appointed for life, whose decisions cannot be reversed by a higher court, and who lack higher ambition—can and do

vote exactly as their own beliefs and values dictate. In contrast, strategic accounts posit that every decision made by the justices, including the final votes on the merits, is ripe for strategic behavior because every choice the justices make is an interdependent one (Epstein and Knight 1998; Maltzman, et al. 2000).

In order to shed empirical light on this theoretical debate, scholars should focus not on those stages where both theories anticipate strategic and interdependent behavior, but instead on those stages where the expectations diverge. While we do not provide explicit evidence that reargument is a strategic tool, the decision to hold cases over for reargument is just such a place where this behavior may manifest itself. Indeed, in reargued cases, why did the justices not simply vote their sincere preferences, write whatever number of opinions was necessary (including partial concurrences or dissents), and move to another case? While reargument does not occur often, we cannot think of a single attitudinal explanation for why any justice would hold off voting her sincere preferences and, instead, hold a case over for review.¹¹ Moreover, we agree with Maltzman et al. (2000) who argue that the attitudinalists' emphasis on *votes* rather than *policy* may overlook some of the more interesting dynamics on the Court. By analyzing reargument, we believe we further scholars' understanding of how the justices, working together rather than as "nine separate courts" (Greenhouse, quoted in Baum 2001: 159), help shape the law. While Maltzman and his colleagues focus on

¹¹ We caution the reader that this article is not about the final vote on the merits, but we think it sheds important light on the validity of attitudinalists' claim that justices do not engage in strategic behavior with each other at these final stages in the decisionmaking process.

opinion assignment, opinion writing, and coalition formation, we believe that looking at reargument sheds additional light on the collegial game within in Court.

In the end, we demonstrate that uncertainty is important to understanding when the justices will seek reargument, but we note that our findings may only scratch the surface. Besides our assessment of the legal and political significance of the cases, we have not explored how forces external to the Court may (or may not) be related to the Court's decision to

hold cases over for reargument. Another important issue that future research might consider is how reargument changes the Court's opinions. By focusing simply on whether a case is held over for reargument, we may be underestimating the degree to which reargument provides time for justices to bargain with their colleagues about case outcomes. A more detailed analysis of the opinions that are crafted following reargument might provide important insight into how this tool changes the course of legal policy.

APPENDIX DESCRIPTION OF INDEPENDENT VARIABLES

Variable	Description
Conference Vote is Minimum Winning	All cases where the conference vote is 5-4 or 4-3 as well as any 5-3 or 4-2 decisions that reverse a lower court decision are coded 1 and all other cases are coded 0 (Spaeth 1999, 2001).
Ideological Distance between Opinion Writer and Court Median	The absolute value of the ideological distance between the opinion writer and the issue specific court median. Each justice's issue specific ideology scores are derived from Spaeth's 12-category scheme (Spaeth 1998: 68; see also Maltzman et al. 2000)
Ideological Distance Between Opinion Writer and Majority	The absolute difference between the opinion writer's issue specific ideology (Spaeth 1998: 68) and the conference coalition's mean ideology, excluding the opinion writer (see also Maltzman et al. 2000: 79)
Authorship Change	If an opinion has been reassigned after conference, the case is coded 1 otherwise 0. We rely on Spaeth's (1999, 2001) data, specifically the aut1st, aut2nd, and, aut3rd variables.
Voting Fluidity	If any justice switched votes between conference and final votes, this variable is coded 1, otherwise 0 (Spaeth 1999, 2001).
Natural Court	Terms where there is at least one new member are coded 1 and all other terms are coded 0 (Spaeth 1999, 2001).
Political Salience	If a case appears on the front page of the <i>New York Times</i> it is coded 1, and 0 otherwise (Epstein and Segal 2000).
Legal Salience	All cases where the Court struck down a law as unconstitutional or overturned an existing precedent are coded 1, and all others are coded 0 (Spaeth 1999, 2001).
Case Dimensions	Cases that contain either multiple legal provisions or multiple issues are coded 1, and otherwise 0 (Spaeth 1999, 2001).
Number of Opinions	The number of separate opinions authored in a case (Spaeth 1999, 2001).
Fewer than Nine Justices	Cases with fewer than nine justices at conference are coded 1, and 0 otherwise (Spaeth 1999, 2001).

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