Chapter 4

The U.S. Supreme Court's Strategic Decision-Making Process

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The U.S. Supreme Court is but one of three political institutions in the structure of the U.S. federal government. Within this system of separated powers it rules on the constitutionality of some of the nation's most important legal and political issues.[1] Since the turn of the twenty-first century alone, the Court has made decisions that affected the outcome of a presidential election (*Bush v. Gore*), universal health care (*National Federation of Independent Business v. Sebelius*), the rights of homosexuals (*Obergefell v. Hodges*), and the voting rights of minorities (*Shelby County v. Holder*). In making such decisions, the nation's highest court may be considered the most powerful of the three branches of the U.S. federal government.

This may be a controversial position, in view of the powers held by the elected branches at the federal level. Indeed, Congress has clear and important powers explicated in Article I of the U.S. Constitution, such as declaring war, deciding how to raise and spend money, and ratifying all international treaties. At the same time, the president is the nation's chief executive and commander in chief of the military. In short, while the U.S. Supreme Court hears and decides only about seventy-five cases per term, Congress and the executive branch wield their powers on a daily basis. Even so, given the issues on which the Court sets legal policy, it is not a stretch to suggest the justices do indeed wield a great deal of power.

Beyond the debate about the power of each branch, we note that the two elected branches often carry out their jobs in the public eye. Indeed,

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the president is the most visible political figure in the nation, and the work of Congress is covered regularly (at a minimum) by the mass media. In addition, three cable television channels and a radio network (C-SPAN, C-SPAN2, C-SPAN3, and C-SPAN Radio) are devoted to broadcasting floor debates and votes, as well as virtually all committee proceedings, for public viewing. In short, the elected branches enjoy clear power that is (by and large) conducted publicly and transparently on a daily basis.

In contrast, the work of the U.S. Supreme Court is conducted almost completely outside of the public eye, with the exception of one hour set aside for litigants to present oral arguments in most cases it decides, and the public announcement of its decisions.[2] As a result, the Court's decision-making process is largely opaque; the public therefore knows very little about how the justices reach the decisions that affect every part and every citizen of the United States. This chapter seeks to illuminate this process so that scholars, students of the Court, and Court watchers alike can gain a better understanding of how the justices conduct their business and come to terms with some of the most important legal and political decisions in our nation. We begin with a brief summary of our theoretical view of Supreme Court decision-making and then offer a short discussion of the politics surrounding how justices reach the Court. We devote the remainder of the chapter to an examination of the Court's internal decision-making process.

The Strategic Model of Decision Making

We view Supreme Court justices as political actors and strategic decision makers (Gely, Spiller 1990; Eskridge 1991a, 1991b; Ferejohn, Weingast 1992; Cameron 1993; Epstein, Knight 1998), which means their decisions are constrained by a host of factors (Epstein, Knight 1998; Maltzman, Spriggs, Wahlbeck 2000; Johnson 2004; Black, Owens 2012; Black et al. 2012). Specifically, when making decisions, policy-oriented justices must account for the preferences of their immediate colleagues, the preferences of actors beyond the Court, and institutional norms and rules that might affect the decisions that they can make. This section considers the three prongs of this model.[3]

Justices Are Goal-Oriented

An abundance of evidence suggests that Supreme Court justices have many different goals (see, e.g., Levi 1949; Cushman 1929; Baum 1997; Hensley, Smith, Baugh 1997; Epstein, Knight 1998). For example, it has been well documented that some justices seek principled decisions, or decisions that will sustain the Court's legitimacy (see Baum 1997; Walker et al. 1988). Though we agree justices may have many goals, we follow conventional wisdom in the study of judicial politics, which suggests the *main* goal of most Supreme Court justices is the attainment of policy in line with their personal preferences (Maltzman et al. 2000; Segal, Spaeth 2002). As Epstein and Knight (1998: 8) point out, "justices, first and foremost, wish to see their policy preferences etched into law."

The idea that policy is the main goal of Supreme Court justices is neither new nor controversial. Rather, this argument is well grounded in the work of legal realists such as Llewellyn (1931), and Frank (1949), and early judicial behavior scholars such as Pritchett (1948), Murphy (1964), Schubert (1965), and Segal and Spaeth (2002). Scholars have provided empirical support for this argument in several ways, three of which we address here. First, individual justices' voting patterns are very consistent over time. For instance, with the exception of two terms (1974 and 1977) Lewis Powell voted liberally in civil liberties cases no more than 43 percent of the time in any given term. Likewise, William Brennan's liberal support for civil liberties fell below 70 percent in only one term during his Court tenure (1969) (Epstein et al. 1996: 456). This consistency indicates justices pursue specific policy goals and rarely waver from doing so.

Beyond voting patterns, Johnson (2004) indicates that the vast majority of questions justices ask during oral arguments concern policy. After these proceedings, Epstein and Knight (1998: 30–32) demonstrate, almost 50 percent of all remarks made by justices during the Court's conference discussions concern policy, and 65 percent of statements in circulating memoranda during the opinion-writing process address policy considerations. These remarks include statements about legal principles the Court should adopt, courses of action the Court should take, or a justice's beliefs about the content of public policy. Finally, scholars who address the interaction between justices during the opinion-writing process (Murphy 1964; Epstein, Knight 1998; Maltzman et al. 2000) point to justices' bargaining statements during the opinion-writing phase of a case to demonstrate that policy considerations are the driving force behind justices' decisions.

Justices are Strategic

The attitudinal model of Supreme Court decision-making argues that justices are unconstrained in their ability to vote for their most preferred policy outcomes because they enjoy life tenure (Segal, Spaeth 2002). In other words, because justices do not face election or retention, and because they usually do not have higher political ambitions, they can vote

for their most preferred outcomes without consequence. In contrast, the strategic model suggests that although they pursue policy goals, justices cannot always make decisions that conform perfectly to their preferences. Rather, because five justices must usually agree on a decision to set precedent, justices must pay particular attention to the preferences, and likely actions, of their immediate colleagues. In short, Supreme Court justices alter their behavior in order to achieve their goals within the context of making decisions by majority rule.

A recent yet rich literature explores the extent and impact of internal bargaining between justices (see, e.g., Epstein et al. 1999; Maltzman et.al. 2000; Johnson et al. 2005; Ringsmuth et al. 2013). These works are progeny of Murphy (1964), who argued that justices are rational actors and act as such when deciding cases. The reason for this is obvious, as Murphy notes: "Since he shares decision making authority with eight other judges, the first problem that a policy oriented justice would confront is that of obtaining at least four, and hopefully eight, additional votes for the results he wants and the kinds of opinions he thinks should be written in cases important to his objectives" (Murphy 1964: 37).

Murphy did not systematically test his theory, but others have done so. For example, in an analysis of Justice Brennan's and Justice Marshall's private papers, Epstein and Knight (1995) demonstrate that over 50 percent of cases in one sample contained one or more bargaining statements between the justices.[4] In a later monograph, Epstein and Knight conclude that "law, as it is generated by the Supreme Court, is the result of short-term strategic interactions among the justices and between the Court and other branches of government" (Epstein, Knight 1998: 18).

Wahlbeck et al. (1998) support these findings in their empirical analysis of opinion circulation on the Court. They find that an opinion goes through more drafts at times of increase in the ideological heterogeneity of a majority coalition, in the number of suggestions given to the opinion writer by other justices, in the number of threats made to the opinion writer, or in the number of times other justices say they are yet unable to join an opinion. This suggests to Wahlbeck et al. that "opinion authors' actions are shaped by the interplay of their own policy preferences and the actions of their colleagues" (Wahlbeck et al. 1998: 312).

Wahlbeck and his colleagues also find evidence that the decision to join a majority opinion is a strategic choice as well (Wahlbeck et al. 1998: 296). Specifically, they demonstrate that the decision to join is determined by how acceptable a majority opinion is to a specific justice, whether that justice can attain concessions from the opinion writer, and the past relationship between the opinion writer and the justice deciding whether to join. Finally, Maltzman et al. (2000) provide evidence that how the chief

justice assigns opinions, how justices respond to initial opinion drafts, and how coalitions form are all processes grounded in strategic interaction.[5] This means that the process through which the Court makes decisions is a product of interactions and interdependencies between the justices. If justices simply voted for their most preferred outcomes, there would be no evidence of bargaining and accommodation behind the scenes of the decision-making process.

More recently Black, Schutte, and Johnson (2013) and Johnson et al. (2005) have demonstrated that justices use the rules of the game in a strategic manner. The former analyze how a justice can use threshold issues to keep the Court from deciding a case far from her or his preferred outcome.[6] In addition, Johnson and his colleagues find that chief justices (as well as senior associate justices) can and do manipulate the voting rules during the Court's conference discussions to move a decision closer to their preferred outcomes. Both of these recent works extend and enhance empirically the theoretical concept that justices are strategic political actors.

Justices Account for Institutional Rules

The final tenet of our account suggests that although justices are goal-oriented and consider their colleagues' preferences when making decisions, they must also account for the institutional context within which they decide cases (Danelski 1978; Slotnick 1978; Maltzman, Wahlbeck 1996). By institutions, we mean the rules (either formal or informal) that structure interactions between social actors (Knight 1992). In the context of the Court, legal institutions may constrain a justice's ability to make certain decisions. That is, the "rules of the game" may prevent the justices from always making decisions that equate with their most preferred outcomes. The reason for this is simple: Supreme Court justices comply with institutional rules and norms (like precedent) because the Court must at least have the aura of acting as a legal, nonpolitical, institution (Epstein, Knight 1998; Hoekstra, Johnson, 2003; Black, Owens 2009).

For instance, Knight and Epstein (1996) argue that justices adhere to the norm of respecting precedent. Although their findings are far from general (they analyze only thirteen cases), the evidence is nonetheless compelling. Indeed, if respect for precedent were not a norm, then Knight and Epstein would not have found evidence that the justices frequently discuss past cases in their private deliberations. That the justices make such references to precedents in private memos suggests that they act as if they themselves are constrained to follow these decisions. The question, however, is why the justices feel constrained by precedent. For Knight and

Epstein the answer is simple: "compliance with this norm is necessary to maintain the fundamental legitimacy of the Supreme Court" (Knight, Epstein 1996: 1029). In other words, they argue that if the Court frequently ignored its own legal precedents, then its credibility as a judicial institution might be questioned, and it could potentially lose legitimacy—its main source of power.

Respecting precedent is an informal norm, but the Court must also follow certain formal rules such as those set out in the constitution. Because the constitution gives Congress the power to override Supreme Court decisions, the justices must account for the preferences of Congress when deciding where to set policy in a particular area of law. Other codified rules are found in Article III of the U.S. Constitution; these include the Court's jurisdiction to hear certain cases,[7] the requirement that a party must have standing (*Flast v. Cohen* [1968]) to be heard in the Supreme Court, and that a case must be justiciable before the Court will consider ruling on it.[8]

Nomination and Confirmation

Before considering how strategic justices act when they join the U.S. Supreme Court, it is important to understand the journey they take to reach the nation's highest judicial bench. The reason is intuitive—given that justices are strategic political actors, the process of being nominated and confirmed is itself largely a story about these particular traits. As such, in this section we describe the president's decision to nominate a justice and the Senate's decision to confirm (or reject) the nominee. We turn first to the president's choice and support of a nominee. From there we turn to the Senate's role in the process.

The fundamental tension between the president's power to nominate and the Senate's constitutionally prescribed advice and consent role has led to many nomination showdowns. Examples abound, including the Supreme Court nominations of Robert Bork and Clarence Thomas and, more recently, prolonged battles between the Senate and Presidents Clinton, G.W. Bush, and Obama, over confirmation of nominees to the federal circuit courts of appeals. Despite the ideological and procedural minefield that judicial nominees face in the U.S. Senate, recent history teaches us that presidents usually succeed when they are given the opportunity to nominate someone to the Supreme Court (Cameron, Cover, Segal 1990; Abraham 1999; Yalof 1999; Baum 2013). Indeed, since 1900 only five out of sixty-three Supreme Court nominees have failed to make it through the Senate's confirmation process (Baum 2013: 41).

Because of the magnitude and importance of Supreme Court nominations, as well as the political battles that often ensue over them, political scientists and legal scholars have studied this process generally (Watson, Stookey 1995) and have investigated specific aspects of it, including how presidents choose nominees (Nemacheck, Wahlbeck 1998; Nemacheck 2007), how the ideological relationship between the president and the Senate affects the ideology of the eventual nominee (Moraski, Shipan 1999; Johnson, Roberts 2004), and what drives individual senators' confirmation votes (Segal, Cameron, Cover 1992).

Existing theoretical accounts of Supreme Court nominations and Senate confirmation votes teach scholars a great deal about interactions between the president and the Senate. Most generally, Mackenzie (1981) explores the political exchanges for all executive nominations, while Watson and Stookey (1995) analyze the political process for Supreme Court nominations. More recently, Bell (2002) has investigated the extent to which the increasing activity of interest groups has made the nomination and confirmation process more contentious overall and made it more difficult for presidents to get their nominees confirmed. Other scholars provide systematic evidence that supports these general studies.

Nemacheck and Wahlbeck focus on the initial phase of the process in their analysis of factors that presidents consider when creating short lists of possible nominees. They find that presidents' choices are "related to efforts to reduce uncertainty over the nominee's future behavior on the Court" (Nemacheck, Wahlbeck 1998: 20). More importantly for our study, these authors provide evidence that these choices are strategic because presidents account for the political environment generally and for the way the Senate may react to a nomination specifically. In other words, the ideological relationship between the president, the nominee, and the Senate plays a key role in the president's decision about whom to place on the short list (Nemacheck 2007).

Other theoretical and empirical work explores the president's explicit choice of nominees. This research focuses on the spatial dynamics of the confirmation game and finds that the alignment of the pivotal players (the president, the Senate, and the Court median) along an ideological continuum allows scholars to accurately predict the ideology of a president's chosen nominee (Moraski, Shipan 1999; Johnson, Roberts 2004). Additionally, scholars have learned a great deal about what drives aggregate Senate action on Supreme Court nominees, as well as what drives individual senators' confirmation votes. Binder and Maltzman (2002) suggest that the presence of divided government slows the confirmation process for lower court nominees, while Segal (1987) finds that confirmation battles

are as much about partisanship as they are about a struggle between the Senate and the president. Further, Massaro (1990) observes that ideological differences between the nominee and the Senate play a major role in almost all failed nominations. In line with Nemacheck and Wahlbeck's (1998) findings, this is an important point for us because it indicates that the president must consider how the Senate will react to the ideology of a chosen Supreme Court nominee.

Finally, Johnson and Roberts (2004) suggest that presidents can and do take action to support their nominees. In so doing, they clear the way for confirmation, even if the battles with the Senate are not always easy. In fact, when nominees are particularly controversial, presidents are clearly more willing to support them publicly. Table 4.1 corroborates this claim. Its data, which include all public presidential statements about a nominee from Tom Clark through Elena Kagan, demonstrate that those nominees considered the most controversial—including Robert Bork and Clarence Thomas—garner more support from their nominating president. And the result is clear: presidents support their nominees, and that support makes the nominee more likely to win confirmation in the Senate. Indeed, of the nominees in the sample, only three failed to garner the requisite votes to secure confirmation.

Once the president makes a choice, the process turns to the Senate. Scholars have spent a great deal of time analyzing the Senate with regard to Supreme Court nominees. For instance, Cameron et al. (1990) and Segal et al. (1992) use spatial models to analyze individual-level confirmation votes. Their initial findings (Cameron et al. 1990) indicate that a senator's vote is a product of the spatial distance between the nominee and a senator, the nominee's qualifications, and the political strength of the president. Segal et al. (1992) correct for a shortfall in the three colleagues' earlier work by including a measure of interest group involvement in their model. Importantly, they continue to find strong support for the hypothesis that senators' confirmation votes largely depend on the spatial distance between a nominee and the ideology of a senator's constituency.

In general, this literature demonstrates that the ideological relationships between the nominee and the Senate, and the president and the Senate, play a key role in the choices presidents make during the Supreme Court nomination process. Specifically, Nemacheck and Wahlbeck (1998) and Segal (1987) find that presidents consider how the Senate will react to their choice of Supreme Court nominees. Further, Moraski and Shipan (1999), Segal et al. (1992), and Cameron et al. (1990) use spatial models to explore how the ideological relationship between presidents, nominees, and the Senate determines who wins confirmation battles.

Table 4.1. The Frequency of Presidential Political Statements about Supreme Court Nominees

Nominee	*President*	*Qualifications*	*Public Opinion*	*Senate Pressure*
Clark	Truman	0	0	0
Minton	Truman	0	0	1
Warren	Eisenhower	2	0	1
Harlan	Eisenhower	1	0	2
Brennan	Eisenhower	0	0	0
Whittaker	Eisenhower	0	0	0
Stewart	Eisenhower	0	0	0
White	Kennedy	2	0	0
Goldberg	Kennedy	1	0	0
Forts (1)	Johnson	1	1	0
Marshall	Johnson	4	0	0
Fortas (2)	Johnson	2	0	0
Burger	Nixon	3	1	0
Haynsworth	Nixon	8	1	4
Carswell	Nixon	1	0	2
Blackmun	Nixon	0	0	0
Powell	Nixon	3	0	2
Rehnquist (1)	Nixon	3	0	2
Stevens	Ford	2	0	1
O'Connor	Reagan	3	0	0
Scalia	Reagan	10	0	3
Rehnquist (2)	Reagan	10	0	3
Bork	Reagan	28	9	33
Kennedy	Reagan	7	0	5
Souter	Bush	11	2	6
Thomas	Bush	12	12	5
Ginsburg	Clinton	4	1	2
Breyer	Clinton	3	0	0
Total		121	27	72

Source: Johnson, T.R., Roberts, J.M., "Presidential Capital and the Supreme Court Confirmation Process," *Journal of Politics*, Vol. 66(3), 2004, 663–683.

Agenda Setting and the Supreme Court

The U.S. Supreme Court is a passive institution that must wait for cases to come to it. In other words, the justices cannot introduce legislation as members of Congress do.[9] However, as strategic decision makers, justices

can do things that encourage litigants to submit cases presenting a particular question or issue area. In this section we briefly discuss the process by which cases are placed on the Court's docket. From there we focus on the key rule that governs agenda setting—the Rule of Four.

The Agenda Setting Process: A Brief Overview

A party who loses in a lower federal court or in a state supreme court (if the case involves a federal question) may appeal to the U.S. Supreme Court.[10] When the appeal, or petition, is submitted, the clerk of the Court provides notice to the respondent (i.e., the winner in the lower court). The respondent has the option to respond, waive the right of response, or do nothing at all. Most respondents choose the first option, whereupon both parties file briefed (written) legal arguments as to why the Court should or should not hear the case.[11] These briefs are then distributed to the justices' chambers for review. Over time there has been a clear increase in the number of petitions submitted to the Court. In fact, Figure 4.1 demonstrates a fivefold increase in the number of petitions submitted between 1935 and

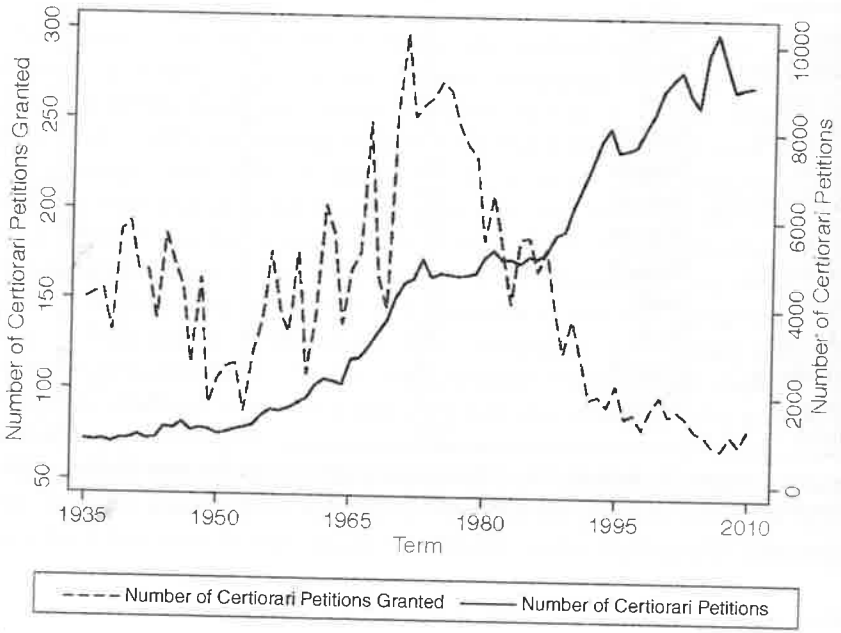

Figure 4.1. Number of Certiorari Petitions Filed and Granted at the U.S. Supreme Court, 1935–2010

Source: Epstein, L., Segal, J.A., Spaeth, H.J., Walker, T.G., *The Supreme Court Compendium*, Washington, 2011.

2010. Meanwhile, the number of cases granted review increased dramatically through the late 1970s but since then has fallen just as precipitously.

Once the parties submit their cert. briefs, the first hurdle to winning review by the Court is making the "discuss list." This list includes all the petitions for review that the justices will discuss and formally vote on during their weekly conference meetings. The chief justice creates the first draft of the discuss list.[12] Any associate justice can add a petition to the chief's list, but may not remove a case already on the list.[13] There is little data on the Court's agenda setting (or cert. process), but the justices are known to discuss a large number of possible cases each term. For instance, over the eight terms from 1986 to 1993 the Court discussed approximately 800 petitions per term (Black, Boyd 2013).

Conference voting at the cert. stage, like voting on case outcomes (see below), is sequential. The justice who places a case on the discuss list speaks first and usually offers a justification for granting a petition review. From there the nine vote on whether to review the case. They do so in descending order of seniority, with the chief justice considered the most senior. It takes four votes to grant review. If four votes are not forthcoming, the Court denies the cert. petition—in other words, the Court will not hear the case. Ultimately, this means the lower court decision remains the law. That said, such a denial does not mean the justices necessarily agree with the lower court decision. Rather, it simply means they could not agree to hear the present case.

The Rule of Four

As we note above, it takes four votes for the Court to hear a case. This important institutional rule is unique because it allows a minority of justices to both set the Court's agenda and change, rather than simply preserve, the status quo.[14] That is, by granting a hearing and by then issuing a ruling on a case from a lower court, the Supreme Court sets national doctrine by either applying the lower court's ruling to the entire country or by reversing the ruling of the lower court altogether. This is an important power for two main reasons. First, it acts as a sharp constraint on majority tyranny at the Court's agenda-setting stage. As Kurland and Hutchinson (1983: 645) put it, "The rule of four is a device which a minority of the Court can impose on the majority a question that the majority does not think it appropriate to address." The potency of this rule is not lost on the justices. As Justice Brennan (1973) put it, choosing cases is "second to none in importance." It also clearly worries at least one former justice: John Paul Stevens (1983: 19) has pointed out that "every case that is granted on the basis of four votes is a case that five members of the Court thought should

not be granted. For the most significant work of the Court, it is assumed that the collective judgment of its majority is more reliable than the views of the minority."

The historical record on the Rule of Four is incomplete (Stevens 1983; Revesz, Karlan 1988; O'Brien 1997; Epstein, Knight 1998; Hartnett 2000). We know, however, that it originated sometime after passage of the Evarts Act of 1891. This law established the circuit courts of appeals and codified that no right of appeal to the Supreme Court existed. The result was that the justices had much greater discretion over their appellate docket. As Hartnett (2000: 1657) put it, "thus was born the then revolutionary, but now familiar, principle of discretionary review of federal judgments on writ of certiorari." Although there is evidence justices relied on a minority certiorari rule through the late 1800s and early 1900s, its use did not become public until 1925, when Justice Willis Van Devanter appeared before the House Judiciary Committee during its hearings on the Judges' Bill.[15]

Van Devanter's purpose was to "assure Congress that increased control over its [the Court's] own docket would not lead to arbitrary dismissal of cases" (Robbins 2002). More specifically, to assuage the worry that the Court would reject cases that could be potentially important, Van Devanter explained:

> We always grant petitions when as many as four think that it should be granted and sometimes when as many as three think that way. We proceed upon the theory that, if that number out of nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted. (Cited in Robbins 2002: 12)

A decade later, Chief Justice Hughes reiterated Justice Van Devanter's response to the congressional concern that the Court might not take cases important for the law because of the justices' discretion over their docket. In a speech before the American Law Institute, he noted that "we are liberal in the application of our rules and certiorari is always granted if four justices think it should be, and, not infrequently, when three, or even two, justices strongly urge the grant" (Hughes 1937: 459). The point is that for at least the past eighty years, minorities of the justices have controlled the Supreme Court's agenda.

Existing empirical work on the Rule of Four focuses almost exclusively on how it affects the size of the Court's docket each term. For instance, Stevens (1983) argues that the Rule of Four comes into play in about 25 percent of all cases that make the discuss list. He concludes that many of these cases are probably unimportant and should therefore be left off of the plenary docket. O'Brien (1997: 786) obtains similar results in his analysis of Justice Marshall's docket books for the 1990 term. He finds that

22 percent of cases decided during this term were granted certiorari with only four votes.

Perry and Carmichael (1985) take the question of case selection a bit further by testing whether the Rule of Four protects "important" cases. According to their operationalization this does not happen because important cases almost always receive at least five votes for certiorari. The authors point out, however, that the Court should not abandon its long-lasting rule if it is interested in taking "nearly significant" cases.

While Perry and Carmichael suggest the Rule of Four protects somewhat important cases, the normative implication of Stevens's and O'Brien's findings is that the Court should consider abandoning this rule. For Stevens (1983), the quarter of all cases docketed with fewer than five votes presented an additional and unnecessary burden on him and his colleagues. Indeed, Stevens believes the Court should decide only the most important cases, so that the problem of overworked justices could be abated by only taking cases with a majority vote on certiorari.

Beyond the debate between legal scholars and justices, the Rule of Four has drawn scorn from the mass media when its incompatibility with majority rule has come to light in death penalty cases (Liptak 2007). A prisoner sentenced to death needs the vote of a simple majority or five justices to stay or postpone his or her execution, yet the Rule of Four allows a minority of justices to place a prisoner's appeal on the docket. This opens up the possibility that the Court could grant a prisoner's petition to appeal his or her sentence but simultaneously refuse to stay the execution that would, in the legal lexicon, "moot" the case if the prisoner were subsequently executed.

Certainly the normative implications of the Rule of Four are interesting, but this line of inquiry fails to address a fundamental question: why would a minority coalition want to place a case on the docket when five of their colleagues could either vote to "dismiss as improvidently granted" (DIG) on a case at the plenary stage, or simply outvote the minority at the merits stage? After all, on the surface the Rule of Four is incompatible with the rule that a simple majority of justices can vote to dismiss. As such, a preference cycle could exist whereby a case was continually granted and then dismissed (Riker 1988). The literature offers two explanations for why this does not happen on the Court. Regarding DIGs, Epstein and Knight (1998: 120) suggest a norm exists whereby the five justices who voted against certiorari cannot form the five-member coalition to DIG a case. While these scholars point out that this norm can be and has been violated, justices do not often do so. The result, we suspect, is that Rule of Four cases ultimately receive treatment similar to cases granted review with five or more votes.

With respect to the latter point, scholars have offered some answers, albeit not theoretically satisfying ones. For instance, in her analysis of case selection based on Justice Burton's docket sheets, Provine (1980: 157) finds "that the desire to be agreeable and the leadership responsibility felt by chief justices are the primary reasons some justices vote oftener for review in four vote cases than otherwise." She therefore concludes that "the hypothesis that four-vote cases reflect the presence of coalitions seeking review on the merits receives no support in this analysis" (ibid.: 158). This conclusion is based on the fact that the two most frequent members of four-vote certiorari coalitions were Justices Burton and Clark, who both were considered "affable and outgoing in their personal relationships" (ibid.: 156). The point for Provine is that there seems to be nothing strategic about Rule of Four cases, and that the key explanation for justices' joining these minority coalitions is a sense of friendship, a wish to be deferential to their colleagues, or a desire to lead the Court fairly (for chief justices).

The analysis provided by legal scholars is both theoretically and empirically unsatisfying. From a different angle, several political scientists have attempted to systematically analyze the Rule of Four. In his seminal work on Supreme Court agenda setting, Perry (1991) argues that justices do at times engage in strategic behavior during the certiorari stage, and the Rule of Four may encourage such behavior. Perry (1991, 98) also provides evidence that there are times when a coalition of four does not force a case onto the docket because the justices in that coalition know they will surely lose on the merits. This strategy is known as a defensive denial.

Epstein and Knight (1998) go a step further than Perry by providing convincing evidence to support the argument that the Rule of Four can be used for strategic purposes. As they point out: "The Rule of Four invites forward thinking. Policy oriented justices know that if they are to attain their goals they must take those cases they believe will lead to their preferred outcomes and reject those that will not." The key for Epstein and Knight, then, is that justices can use this rule to make "strategic calculations throughout the decision making process" (1998: 121).

In the end, the Court's agenda setting process, and the Rule of Four specifically, demonstrate clearly that the way an agenda is set has a great deal to do with the decisions made by institutions generally and by the U.S Supreme Court specifically. For our purposes, this part of the process fits squarely into the strategic model: policy-minded justices debate and decide which cases to hear, strategy is involved in making such decisions, and an institutional rule (the Rule of Four) is an integral part of the process.

Decision on the Merits: Litigant Briefs

Litigants lucky enough to have a case accepted for review by the Supreme Court submit a second round of briefs. Each brief is meant to convince the justices that a given party should win the case. In this section we briefly discuss the rules surrounding these briefs on the merits. From there we turn to the research that seeks to explain the extent to which written arguments affect the decisions justices make.

The Rules of Supreme Court Briefs

"Rules of the Supreme Court of the United States" is an 83-page document created by the Court that contains, among other things, several sections of detailed information on how to properly file, format, and write a brief. The real paper-shuffling begins once the Court has accepted a case: from this point the petitioner has forty-five days to file a merits brief, and the respondent's brief is required thirty days later. Petitioners are allowed to reply to the respondent's brief, but it must be submitted at least one full week before oral arguments are heard, and no more than thirty days after the respondent's brief is filed. Litigants may request extensions of these time frames, but "an application to extend the time to file a brief on the merits is not favored" (Rule 25.5).

In addition to a rigid time frame, the Court also outlines specifics for the formatting and length of briefs. As dictated by Rule 33, all briefs (merits, response, amicus) are printed on 60-pound paper in booklet format measuring 6 1/8th inches by 9 1/4th inches. These booklets are then bound by saddle stitch or perfect binding, and covered with 65-pound card stock paper of the appropriate color. Merits briefs for both petitioner and respondent are limited to 15,000 words and covered in light blue or red paper, respectively. The petitioner's reply brief is not to exceed 6,000 words, and should have a yellow cover. Each brief may include appendices of unlimited length; however, additional arguments should not appear in these appendices.[16]

One source of briefs not yet discussed is amicus groups. Amici, or friends of the Court, are most often interest groups or established organizations that file a brief in support of either side.[17] Such briefs are limited to 9,000 words, and should "bring to the attention of the Court relevant matter[s] not already brought to its attention by the parties" (Rule 37.1). Although limited in words, there is no limit to the number of separate amicus groups that can file. In the 2012 term, for example, multiple amicus briefs were filed in 67 of the 76 cases granted review. Amicus participation

ranged from zero to ninety-seven briefs—the former occurring in only two cases, and the latter supporting *Hollingsworth v. Perry* (2012), one of the term's two same-sex marriage cases.

Finally, Supreme Court rules dictate that forty copies of every single brief (petitioner, respondent, reply, and amicus) be delivered to the Court in hard copy, as per the rules explained above. Considering the hundreds—if not thousands—of pages filed for every case appearing before the Court, such strict rules are necessary to maintain any semblance of order and organization. With so much time, effort, and paper spent on brief writing—and subsequent reading—we next consider the extent to which briefs affect outcomes.

Do Briefs Affect Case Outcomes?

Litigant and amicus briefs serve two broad purposes: to provide information to the Court, and to set the bounds of policy space from which legal opinions can be drawn. The informational nature of briefs is evident, given the pure volume provided to the Court, but what sort of information is contained in these myriad pages? Tables 4.2 and 4.3 offer such insight by presenting a breakdown of issues briefed in a random sample of seventy-five Burger court civil liberties cases. Table 4.2 provides information on cases without amicus participation; note that litigant briefs most often address policy and constitutional issues, which is unsurprising given the description of justices as seekers of policy preferences (Epstein, Knight 1998; Segal, Spaeth 2002). Indeed, these two types of issue dominate litigant briefs and account for over 70 percent of all briefed issues.

Table 4.2. Types of Information Provided to the Supreme Court in Litigant and Amicus Briefs: Cases without Amicus Participation (n = 45 cases)[a]

Issue Area	*Arguments raised in Litigant Briefs*	*% of Briefs*[b]
Constitutional	118	31
Policy	154	40
External Actors	28	7
Precedent	49	13
Threshold	20	5
Facts	16	4
Total	385	100

[a] In the full sample of cases (75), 45 had no amicus participation. Therefore, the main source of information for the justices is the litigants' briefs.

[b] Percentages are rounded to the nearest whole number.

Source: Johnson, T.R., *Oral Arguments and Decision Making on the United States Supreme Court*, Albany, 2004.

Table 4.3 shows a similar trend: when both amicus and litigant participation are taken into consideration, the Court still receives the most information regarding policy and constitutional issues. Note, however, there are clear differences in the types of information provided by each brief. Most specifically, amicus briefs refer more often to precedent and external actors. This is, again, unsurprising because amici are by definition external actors—it makes sense that their briefs would inform the Court on their preferences as well as additional precedent that would support their preferences.

Table 4.3. Types of Information Provided to the Supreme Court in Litigant and Amicus Briefs: Cases with Amicus Participation (n = 30 cases)[a]

	Arguments Raised by			
Issue Area	*Litigant Brief Only*	*Amicus Brief*	*Litigant and Amicus Brief*	*Total*
Constitutional	18 (10%)	15 (9%)	140 (81%)	173 (34%)[b]
Policy	45 (19%)	28 (12%)	159 (69%)	232 (46%)
External Actors	3 (7%)	24 (53%)	18 (40%)	45 (9%)
Precedent	9 (23%)	25 (62%)	6 (15%)	40 (8%)
Threshold	10 (77%)	2 (15%)	1 (8%)	13 (3%)
Facts	1 (50%)	1 (50%)	0 (0%)	2 (0%)
Total	86 (17%)	95 (19%)	324 (64%)	505 (100%)

[a] Thirty cases contained at least one amicus brief.

[b] Percentages in the rightmost column are the total percentage of each issue type raised by the litigants or amici.

Source: Johnson, T.R., *Oral Arguments and Decision Making on the United States Supreme Court*, Albany, 2004.

Next, existing research demonstrates that legal briefs submitted to the Court often set the boundaries of a case by framing the issues for the justices (Lawrence 1990; Wahlbeck 1998). To this end, the legal model of decision-making posits that justices care about the law and are bound to it. Scholarly work in this area agrees. For example, Epstein and Kobylka (1992) examine legal change in the jurisprudence of abortion and death penalty cases. Though they consider factors such as public opinion and a changing political and social environment, they ultimately conclude that "it is the law and legal arguments as framed by legal actors that most clearly influence the content and direction of legal change" (ibid.: 8). Later work by Epstein, Segal, and Johnson (1996) examines briefs and opinions, concluding that the Court follows the doctrine of *sua sponte*—a norm disfavoring issue creation during opinion writing. Finally, Corley (2008) uses plagiarism software to detect when majority opinions "borrow" phrases

and sentences from litigant briefs. She finds that the quality of a brief—as defined by the experience of the writing attorney—positively affects the chances a justice will "borrow." Taken together, this line of research suggests that briefs directly impact the decision-making process by providing the Court with valuable information, and by constraining their choice-set by setting policy boundaries. We next consider ways the justices can seek out information rather than simply receive it.

Decisions on the Merits: Oral Arguments

In the Supreme Court's early days, great lawyers such as Daniel Webster, John Calhoun, William Pinkney, and Henry Clay often appeared before the justices. In this time period oral arguments were elaborate oratories, but more importantly, they often provided the justices with their only source of information about a case: briefs were rarely if ever submitted, and outside parties did not submit amicus curiae (friend of the Court) briefs as they do today. Because the justices placed no time limitation on the argument sessions, advocates sometimes spoke for many hours over multiple days. In one case, Davis (1940) points out, Webster and his rival argued for a full ten days. In stark contrast to contemporary arguments, historians suggest the justices rarely interrupted the advocates with questions or comments (compare Warren 1922 with Black et al. 2011).

Hearing arguments over many days was possible because the Court heard so few cases in its early days. However, its rising caseload soon made such indulgences impracticable. In addition, it seems that at some point, the justices could no longer handle such long sessions. As one biographer put it, Chief Justice John Marshall complained of boredom (Beveridge 1929) and Justice Joseph Story found the arguments "excessively prolix and tedious" (Hughes 1928). As a result, in 1849 they instituted Rule 53, which limited each attorney to a two-hour argument (Frankfurter, Landis 1928). At this time the justices also first required written arguments, consisting of an abstract of points and authorities (ibid.). Since 1970, the time allotted for these has been limited to thirty minutes per side.

The modern time constraints on oral arguments may be due to the abundance of information at justices' disposal prior to these open court sessions. Indeed, today they possess litigant briefs (Epstein, Kobylka 1992), amicus curiae briefs (Spriggs, Wahlbeck 1997), briefs on certiorari (Caldeira, Wright 1988), the media (Epstein, Knight 1998), and lower court opinions. Further, unlike in the Court's early days, when the justices were transfixed by the great orators (or put to sleep by boredom), they largely control the argument sessions today. Specifically, one analysis of 347 cases over four

recent terms included 43,000 utterances and 1.4 million words spoken by the justices (Black et al. 2011). It seems, then, that in modern cases the justices now speak as much as or more than the attorneys. The question is whether such questioning has any bearing on how the justices decide.

Do Oral Arguments Affect Justices' Decisions?

As with other aspects of the decision-making process, evidence accumulated over the last decade establishes that, generally, oral arguments play an integral role in the Court's decision-making process (Johnson 2004; Wrightsman 2008). For instance, Tables 4.4 and 4.5 show clearly that the justices gather many types of information by asking questions during oral arguments. First, as policy-oriented political actors, justices are clearly concerned with questions of policy. In cases without amici participation, 40 percent of the Court's questions focus on policy, and this figure increases to 43 percent when amici participate. Second, justices spend a great deal of time asking questions about the preferences of actors external to the

Table 4.4. The Focus of the Court's Questions during Oral Arguments by Issue Area and Source of Information: Cases without Amicus Participation (n = 45 cases)

	Oral Argument Questions About		
Issue Area	*Briefed Issues*	*New Issue*[a]	*Total*
Policy	330 (25%)	974 (75%)***	1,304 (40%)
External Actors	37 (3%)	1,122 (97%)***	1,159 (36%)
Precedent	82 (26%)	234 (74%)***	316 (10%)***
Threshold	40 (32%)	86 (68%)***	126 (4%)***
Total	631 (20%)	2,592 (80%)***	3,223 (100%)

[a] New issues are operationalized as those that were not raised in the briefs submitted prior to oral arguments. The Court raises them for the first time during these proceedings.

[b] Percents are in parentheses. They are calculated horizontally for each issue area.

[c] Percentages in the rightmost column are calculated for each issue type raised by the Court.

Note: T-tests in the columns labeled "New Issue" were conducted to determine whether the Court's focus during oral arguments is on new issues, or on issues first raised in the briefs. In Table 4.4. the test is run on the mean number of new questions versus the mean number of questions about briefed issues for each type. In the top half of the table the test is run on the mean number of new questions versus the mean number of questions about briefed issues for each type. In the bottom half of the table the tests are conducted between columns 4 and 5. T-tests were also conducted for the "Total" columns in each half of the table. The tests in this column compare the mean number of policy issues asked about during oral arguments with each of the other issues areas. * = difference is significant at 0.10 level; ** = difference is significant at the 0.01 level; *** = difference is significant at the 0.001 level (two tailed tests).

Source: Johnson, T.R. *Oral Arguments and Decision Making on the United States Supreme Court.* Albany, 2004.

Table 4.5. The Focus of the Court's Questions during Oral Arguments by Issue Area and Source of Information: Cases with Amicus Participation (n = 30 cases)

	Oral Argument Questions About				
Issue Area	*Litigant Brief Only*	*Amicus Brief Only*	*Litigant and Amicus Brief*	*New Issue*[a]	*Total*
Constitutional	18 (8%)	18 (8%)[b]	114 (50%)	78 (34%)	228 (10%)***[c]
Policy	53 (5%)	48 (5%)	232 (23%)	685 (67%)***	1,018 (43%)
External Actors	0 (0%)	10 (1%)	17 (2%)	760 (97%)***	787 (34%)
Precedent	7 (3%)	24 (11%)	4 (2%)	181 (84%)***	216 (9%)***
Threshold	3 (3%)	3 (3%)	1 (1%)	88 (93%)**	95 (4%)***
Total	81 (4%)	81 (4%)	368 (16%)	1,792 (76%)***	2,344 (100%)

[a] New issues are operationalized as those that were not raised in the briefs submitted prior to oral arguments. The Court raises them for the first time during these proceedings.

[b] Percents are in parentheses. They are calculated horizontally for each issue area.

[c] Percentages in the last column are calculated for each issue type raised by the Court.

Note: T-tests in the columns labeled "New Issue" are conducted to determine whether the Court's focus during oral arguments is on new issues, or on issues first raised in the briefs. The test is run on the mean number of new questions versus the mean number of questions about briefed issues for each type. In the bottom half of the table the tests are conducted between columns 4 and 5. T-tests are also conducted in the "Total" columns in each half of the table. The tests in this column compare the mean number of policy issues asked during oral arguments with each of the other issues areas. * = difference is significant at 0.10 level; ** = difference is significant at the 0.01 level; *** = difference is significant at the 0.001 level (two tailed tests).

Source: Johnson, T.R., *Oral Arguments and Decision Making on the United States Supreme Court*, Albany, 2004.

Court. Indeed, 36 percent of questions (1,159) fall into this category when amici are not present in a case (see Table 4.4). When amici participate, this share remains similar at 34 percent (787). Finally, justices raise questions about institutional constraints (precedent and threshold issues) they may face, but these queries are fewer than those about the other issues. Specifically, when amici participate, 13.7 percent of all questions focus on precedent or threshold issues, and 13.2 percent focus on these issues in cases without amici.

Beyond the information provided, there is evidence the quality of oral arguments advanced by attorneys during these proceedings affects justices' votes (Johnson, Wahlbeck, Spriggs 2006). Indeed, even justices predisposed to vote for a particular side (based on their ideological predilections) tend to vote more often for the side that offers better arguments in open court. Finally, there is mounting evidence that during oral arguments, justices foreshadow how they will decide (Shullman 2004; Roberts 2005; Johnson et al. 2009; Black et al. 2012). Such signals emanate from the number of questions justices ask the attorney on a given side of the dispute as well as from the emotive tenor of these questions. When justices give one side a harder time (by asking more questions) or when they ask that side questions using less pleasant language, it is more likely to lose the case.

Conversations with attorneys are not the only discussions justices engage in during oral arguments—they are prone to speak to one another as well. Anecdotally, Wasby, D'Amato, and Metrailer (1977: xviii) argue that "it is not surprising that the judges would use part of the oral argument time for getting across obliquely to their colleagues on the bench arguments regarding the eventual disposition of a case." The same authors conclude elsewhere that "another, less noticed function is that oral argument serves as a means of communication between judges" (Wasby et al. 1976: 418). Recent work corroborates these anecdotal findings. Black et al. (2012) provide systematic evidence that justices speak to (and often speak over) one another, listen to their colleagues' questions and comments, and use the oral arguments to predict the outcome of the case.

Overall, despite the conventional wisdom through the last decade of the twentieth century, scholars have now made clear that the hour-long sessions in open Court can and do affect the decisions justices make. They clearly elicit information from the attorneys that helps them decide. In addition, they make their positions clear in their manner of questioning and also speak to each other through their questions and comments. But what happens once the justices retire to the confines of the Marble Palace? We turn next to this question.

Decisions on the Merits: Conference Discussions

Chief Justice Roberts has publicly said: "We [the Court] are the most transparent branch of government. Everything we do that has an impact is done in public, ... You see our work in public at the Court. Our decisions are out there."[18] Interestingly, the chief's contention rests on the fact that the Court, unlike the elected branches, issues explicit public justifications (in the form of written opinions) for the decisions it makes. The problem with this argument is that the public aspect to which the chief refers is only the

end product. With the exception of the oral arguments (see the previous section), the decision-making process occurs behind closed doors in the marble palace. In this section we begin with an overview of the initial part of this process—the justices' conference discussions—and then turn to why these discussions are important for how justices decide.

Behind the Closed Door: The Process of Conference Discussions

During the term the justices sit for oral arguments on Mondays, Tuesdays, and Wednesdays, and hold private conference discussions on Wednesdays and Fridays. These discussions serve two purposes—choosing cases from the discuss list to set for future arguments, and voting on the cases that have already been argued. Here we are more concerned with the latter than the former (see the section on agenda setting for a discussion of the former).

Because the justices meet in conference twice a week, they use Wednesday conferences to discuss the merits (outcomes) of cases heard Mondays and Tuesdays. Friday conferences are therefore reserved for cases argued on Wednesdays.[19] These meetings, held in a conference room that adjoins the chief's chambers, are completely private: nobody is allowed in the room except the justices. If something is needed from outside the room the most junior justice calls to make the request.[20]

When conference begins, the chief justice presents the facts of the first case. From there he offers his personal view of the case and then casts his vote.[21] When the chief is done, the associate justices offer their views and votes in order of seniority. That is, the most senior associate justice presents and votes next, with each justice doing so until the Court's newest member finishes the discussion.[22] Usually the justices have a fairly good idea of how they will vote in the case, but there are times when they are less certain.[23] The justices repeat this process for each case argued during the current week.

The Importance of Conference Discussion and Votes

Scholars have emphasized for decades that conference votes are only the tip of the iceberg in the justices' business (see, e.g., Epstein, Knight 1998). However, the only data normally available to scholars are the conference votes.[24] Because there is so little information about the legal and policy issues the justices discuss during conference, scholars have largely ignored this part of the Court's decision-making process. But despite the paucity of research in this area, there is evidence to suggest the justices discuss the key aspects of cases they decide. Johnson (2004) demonstrates that

during conference, the justices clearly pick up on issues briefed by the parties and on issues discussed during oral arguments. More specifically, justices discuss policy options and key precedents during their private conference discussions. Similarly, Knight and Epstein (1996) find that the justices clearly discuss precedent at conference. For them, this suggests the justices believe they are bound by the norm of respecting past decisions. In short, although scholars do not yet have a full picture of what transpires during conference, these studies provide insights that eluded scholars and Court watchers alike until the past decades.

Beyond the discussions about the specific issues they must decide, conference is important because the way the justices vote determines who will ultimately write the majority opinion in a case. A chief justice who votes with the majority at the end of a case discussion is authorized to choose who writes the majority opinion.[25] This prerogative helps the chief justice influence the Court's agenda by selecting either an author whose opinion is close to his (or potentially her) own preferences, or one who will minimize the prospective policy loss if the chief's preferred outcome does not prevail (Epstein, Knight 1998; Maltzman et al. 2000). More specifically, as Maltzman et al. (2000) demonstrate, the justice who assigns the opinion has some power to set the agenda for the majority coalition because the writer gets the first move in the bargaining process. The chief exercises this discretion and guides the opinion toward his (or her) preferred position by assigning it to ideologically proximate justices, especially in important cases. In other words, despite the constraints by norms like equitable distribution of assignments, the chief justice has the power to choose who will articulate the Court's opinion and which lens a case will be decided through.[26]

There is clear evidence chiefs (and sometimes senior associates) act strategically to ensure the opinion assignment power. Johnson et al. (2005) note that Chief Justice Warren Burger was renowned for casting votes at conference that would allow him to control the Court's agenda through opinion assignment. Indeed, Burger often changed his initial votes to join the majority coalition, cast "phony votes" by voting against his preferred position, and sometimes declined to express an initial position at conference (see Woodward, Armstrong 1979; Epstein, Knight 1998). This behavior led one critical justice to point out that "all too damned often the Chief Justice will vote with the majority so as to assign the opinion, and then he ends up in dissent" (Schwartz 1990: 14).

Although many claimed that Burger attempted to manipulate the Court's agenda through opinion assignment, he was probably not the first chief to vote in this manner during conference. Indeed, Murphy (1964) traces sophisticated voting to control opinion writing to John Marshall.

Although short on supporting evidence, some argue that Marshall wrote opinions "even in cases where he dissented" (Schwartz 1993: 152). As Murphy (1964: 84–85) hypothesized of chief justices when they were the first to speak and the last to vote: "Thus, before he finally commits himself, he knows where each Justice stands—at least for the present—and which side will most probably win. If his own views are going to be in the minority, he can vote with the majority and retain the opinion-assigning authority."

Data drawn from the archives of Justice Lewis F. Powell (at Washington and Lee University) illustrate one particular strategy chiefs may use during conference—passing on their chance to cast the initial vote. Table 4.6 presents data on how often each justice passed up on an initial vote in a sample of cases decided during the Burger Court. It is clear that Burger, and then to a lesser extent Rehnquist (who became chief in 1986), passed on their initial vote significantly more often than associate justices did. In fact, Burger was more than twice as likely to pass as any other justice on the bench. Rehnquist is also interesting, as he passed ten times more often once he was elevated to chief. Certainly the senior associate justices (Justice Douglas and then Justice Brennan, in this sample) passed more often

Table 4.6. The Frequency with Which Justices Pass at Conference in a Random Sample of Cases from the 1971–1986 Terms

Justice	*Number of Passes*	*Percent of Conference Votes in which Justice Passed*
Warren Burger	121	11.7%
William Douglas	9	4.8%
William Brennan	18	1.5%
Potter Stewart	30	4.2%
Byron White	11	0.9%
Thurgood Marshall	6	0.5%
Harry Blackmun	6	0.5%
Lewis Powell	13	1.1%
William Rehnquist (as associate justice)	5	0.5%
William Rehnquist (as chief justice)	8	5.2%
John Stevens	11	1.2%
Sandra Day O'Connor	5	1.0%
Antonin Scalia	2	1.3%

Source: Johnson, T.R., Spriggs II, J.F., Wahlbeck, P.J., "Passing and Strategic Voting on the U.S. Supreme Court," *Law and Society Review*, Vol. 39(2), 2005, 349–377.

than their colleagues (with the exception of Justice Stewart) but not nearly as often as the chiefs.

The bottom line for us is that conference is the time when the justices finally speak candidly to one another about a case and cast their preliminary votes. Though scholars have given this part of the Court's decision-making process short shrift, we believe it is quite important and also fits squarely within our theoretical account. That is, justices have to work with their colleagues and deploy their knowledge of opinion assignment rules as they strive to reach consensus.

Decisions on the Merits: Opinion Writing

Once an opinion has been assigned, the writing process might seem straightforward, but this is not always the case. Keeping in mind that a majority-opinion author must write an opinion that pleases at least four other members of the Court, the task is best described as a dynamic and malleable process whereby justices strategically maneuver in an attempt to satisfy their policy preferences (Maltzman et al. 2000). In order to fully explicate the complexities of opinion writing, this section proceeds in three parts. We first provide a simple description of the process. Next, we summarize the two main (and competing) models of opinion writing, which define key actors who influence the final content of the majority opinion. We end the section with a case study of *Gannett v. DePasquale*—an exemplar of the opinion-writing and decision-making process.

Opinion Writing: A Step-by-Step Guide

Due to the volume of work and time constraints the Court faces in the modern era, many justices use their law clerks to draft initial versions of opinions (Wahlbeck, Spriggs, Sigelman 2002; Peppers 2006; Peppers, Zorn 2008). With the clerk's legwork in hand, the opinion author will prepare a first draft, which upon completion is circulated to the Court. At this point, justices are not bound by their stated policy preferences or votes at conference; instead, each has four options: to join the opinion immediately; to suggest some sort of change, via suggestion or threat; to announce an intent to wait before taking any action; or to circulate a concurrence or dissent (Maltzman et al. 2000: 9). Figure 4.2 breaks down how often justices take these specific tacks. Even a cursory glance at Figure 4.2 reveals the modal category is "join."

Figure 4.2 also reveals the myriad options available to a justice who does not immediately join the majority opinion. Note that Threat, Will

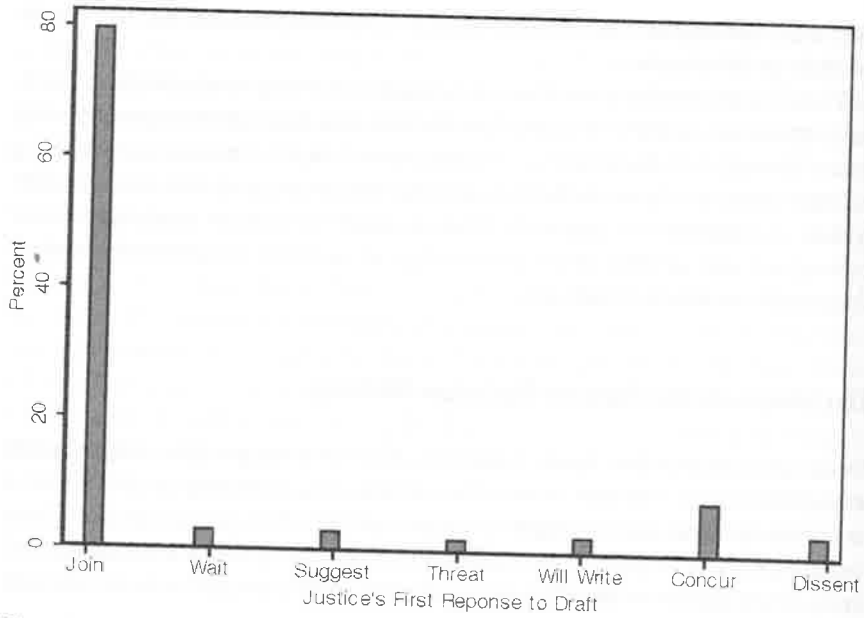

Figure 4.2. Justices' Responses to Initial Majority Opinion Draft Opinions

Source: Maltzman, F., Spriggs II, J.F., Wahlbeck, P.J., *Crafting Law on the Supreme Court: The Collegial Game*, New York, 2000.

Write, Concur, and Dissent all indicate a justice's intention or willingness to circulate a separate opinion, so the majority opinion author takes these indications particularly seriously. In particular, the existence of a well-crafted dissenting opinion has the potential (however small) to steal the majority, especially if it can satisfy the demands of the median justice (Lax, Cameron 2007). Because justices wish to see their policies etched into law, majority-opinion writers seek to mitigate such potential threats. Warding off a dissenting opinion, however, can be difficult. Lax and Cameron (2007) employ models from game theory to demonstrate how the costs of time and effort impact a would-be dissenter. In short, to prevent potential dissenting opinions from gaining traction, a majority-opinion author must craft a sufficiently high-quality opinion that captures the median justice.

No additional effort or response from an opinion's author is necessary when a justice immediately agrees to join the opinion. However, as demonstrated above, gaining the votes of justices who fall into the latter three categories (suggest a change, announce intent to wait, write separately) is a different matter. In these instances, scholars disagree about which justices exert the most influence over the opinion author, and therefore over legal policy.

Opinion-Writing Models

Scholars investigating an author's plight in the struggle to command a majority often model opinion content as a corollary of ideology, pointing to two key players: the Court's median member, and the opinion author her- or himself. The bench median model mirrors legislative models of the median-voter theorem in assuming that policy converges on the median voter—it is, after all, this voter who must be captured in order to gain a majority and thereby create policy (Black 1958). Applied to Supreme Court scholarship, the median justice, as the swing vote, may reject an opinion that falls too far from his or her ideal point. In fact, a majority opinion that does not perfectly satisfy the median justice gives the minority coalition an opportunity to craft such an opinion and capture this essential swing vote (Lax, Cameron 2007). Extensive work by Spriggs and Hansford (2001) provides empirical support for this model. Their findings indicate that, indeed, the Court median exerts influence over the majority opinion.

Beyond the Court median, the opinion author exerts influence on the substantive outcome of a case. This agenda-control model stresses the importance of an opinion author in pulling opinion policy away from the median and closer to his or her own ideal point (Murphy 1964; Rohde 1972; Rohde, Spaeth 1976; Slotnick 1978, 1979; Brenner, Spaeth 1988). Recent work by Bonneau et al. (2007) adds to this body of work by incorporating a legal status quo. In this model, a justice's decision to join an opinion is operationalized as a simple choice between the existing majority opinion and the lower court decision: any justice preferring policy offered in the majority opinion will sign on.

In sum, the rich body of literature on opinion writing provides ample evidence that the opinion author *and* the Court median exert particular influence over opinion content, and therefore policy. This is not to say the other seven justices are moot—to the contrary, the following example demonstrates the impact any single justice can have in this dynamic process.

Opinion Writing as a Dynamic Process

Historical documents available for *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979)—a case involving freedom of the press and courtroom access—offer clear insight into this dynamic process. To begin, the majority opinion was assigned to Justice Blackmun by Justice Brennan, which means that Justices Burger and Stewart were not in the majority when votes were counted at conference, but both Brennan and Blackmun were.[27]

On 4 April, Blackmun circulated a first draft of a majority opinion. The very next day Brennan signed the opinion after making a few minor sug-

gestions, Stewart made known his intention to write a dissenting opinion, White declared he would await Stewart's dissent before signing any opinion, and Stevens attempted to bargain with Blackmun. Specifically, Stevens believed Blackmun's opinion went too far in favor of First Amendment rights (freedom of press), rather than Sixth Amendment rights (right to a speedy and public trial), and was hoping Blackmun would back off from this stance. In the meantime, Marshall joined Blackmun's opinion, and thirteen days later Stevens joined Stewart's dissenting opinion on the exact day it was circulated, noting, "I may add a paragraph of my own." At this point, Blackmun was still two votes shy of commanding a majority.

Despite this deficit, Blackmun responded to Stewart's dissent with, "The dissent merits a mild response. I shall circulate it later today." Blackmun's three-page response highlights the key differences in how each coalition wanted to set policy. Blackmun, along with Brennan and Marshall, wanted to set a clear legal ruling that (1) carried a presumption of open access to trials as implied by the Sixth Amendment, and (2) considered preliminary hearings part of a trial. Stewart, and at this point Stevens, felt the Sixth Amendment's guarantee to a speedy and public trial was meant to protect the *accused*, not the public. Given this choice set, and despite his earlier preference to await Stewart's dissent, White joined Blackmun's opinion, creating a presumptive majority: Blackmun, Brennan, Marshall, White, and Powell. Although Powell had not yet declared any intentions, he had voted with this coalition at conference. Yet this was not how the majority opinion turned out.

On 8 May Chief Burger circulated a dissenting opinion and also declared he would sign on to Stewart's dissent. Rehnquist followed shortly thereafter. The following day, Powell sent a memo to Blackmun expressing doubts about how the majority opinion was taking shape. He too felt the crux of the issue was striking a correct balance between First and Sixth Amendment rights, but saw Blackmun's opinion as tilted too far in favor of the press. Faced with these dichotomous policy choices, Powell eventually joined Stewart's opinion and became the requisite fifth vote to transform that dissent into a majority opinion.

This example highlights two key aspects of the opinion-writing process. First, different justices employed different tactics in attempting to move policy closer to a preferred point. While White (the Court median) held out, some justices directly bargained with Rehnquist and Brennan while others wrote separate opinions. Second, the central debate concerned specific aspects of policy, and not simply a decision to reverse or affirm the lower court's ruling. This idea transcends the traditional liberal-conservative notion of decision-making to reveal a Court concerned with degrees and balancing rather than such simple dichotomizations.

Conclusion

U.S. Supreme Court justices are clearly political actors with policy preferences they seek to etch into federal law. However, their ability to always reach their preferred outcomes is limited by the fact that they do not make decisions in a vacuum and the fact that rules and norms of behavior govern their decision-making process. Despite the Court's uniqueness as an institution, it clearly shares these characteristics with other courts within and beyond the United States.

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Notes

1. It has invoked this power since Chief Justice John Marshall declared such power in *Marbury v. Madison* (1803).
2. Oral arguments and opinion announcements are technically public, but not fully so. The Courtroom holds only 250 seats for spectators, and cameras are not allowed during either proceeding. Today, of course, it is easier to hear what transpires in the Courtroom. Oyez.org makes these sessions available at the end of each week during the Court's term. These audio files can also be found at http://www.supremecourt.gov/.
3. Portions of this section are drawn from Johnson (2004), ch.1.
4. Epstein and Knight (1995: 22) are right to note that this number would probably be higher had they also had access to more than just Brennan and Marshall's papers for this study. Indeed, if they could have seen the private memos sent or received by all the justices who were on the Court during the time period of their sample, their hypothesis may have been supported with even stronger evidence.
5. Other scholars have provided evidence of strategic interaction at almost every stage of the Court's decision-making process, including during the agenda-setting (certiorari) stage (Caldeira, Wright, Zorn 1999), during oral arguments (Johnson 2004), and during conference discussions (Johnson, Spriggs, Wahlbeck 2005).
6. Threshold issues are defined as the requirements from Article III of the U.S. Constitution that there must actually be a case or controversy in order for the Court to decide a case.
7. The exceptions clause in Article III of the U.S. Constitution gives Congress the power to alter the Court's appellate jurisdiction as it sees fit.

8. That a case must be justiciable also stems from the Article III requirement that the Court can only decide cases and controversies. For instance, cases cannot be moot (*DeFunis v. Odegaard* [1974]), and must also be ripe for review (*Longshoremen's Union v. Boyd* [1954]).
9. For instance, at any time a member of Congress may write legislation limiting the right to choose abortion on demand. Though the politics of the House and Senate make it unlikely that any given piece of legislation will be brought to a vote, any member may still attempt to introduce such a law. Justices, however, must wait for a case to be brought to them. Only then may they take up the issue and work toward changing the law or maintaining the status quo.
10. Today almost all appeals come through the Court's certiorari (cert.) process. This legal term means literally "to be informed of, or to be made certain in regard to." The key for the justices is that cert. cases are part of the Court's discretionary docket. In other words, the justices do not have to decide these cases.
11. At this point outside parties may weigh in on whether the Court should take the case. These groups, called amici curiae (friends of the Court) affect the probability the justices will hear a case (see, e.g., Caldeira and Wright 1988).
12. The chief is often considered first among equals (Stevens 2011) but has some power at several points during the Court's decision making process. Creating the initial draft of the discuss list (more generally, being able to mold the Court's possible agenda) is considered one of these powers.
13. Prior to the discuss list the Court actually used a "dead list," which was the opposite of today's practice. The dead list included cases that were not going to be discussed or voted on by the justices. A case that was "dead listed" was automatically denied review by the Court.
14. Very few powers are granted to the minority in the federal government. Beyond the Rule of Four, the key power reserved to a minority is the filibuster in the U.S. Senate (see, e.g., Fang, Johnson, Roberts 2007).
15. In 1916, however, Congress passed a law that the Court interpreted as giving it discretion over whether or not it would hear appeals from state courts that raised federal issues. This was a major change, as Hartnett (2000: 1660) points out: "the Supreme Court produced a fundamental change in the relationship between itself and state courts in constitutional cases—a change far larger than Congress evidently anticipated. As we shall see, this was not the last time that the Court expanded its discretionary control over its caseload beyond that contemplated by Congress."
16. See, e.g., the joint appendix in one of the Court's famous libel cases—*Hustler Magazine v. Falwell* (1988).
17. Note that amici can file in support of a judgment rather than party; however, this is rare.
18. The Chief made this comments during a C-SPAN forum on in cameras in the courtroom. http://www.realclearpolitics.com/video/2011/06/27/chief_justice_roberts_worried_about_impact_of_cameras_in_scotus.html.
19. Note, however, that when the Court is in one of its two-week argument sessions the justices only hold Friday conferences.
20. The most junior justice (today it is Justice Kagan) must also answer the door if anyone knocks. This (semi-onerous task) was the duty of Justice Breyer from 1994 through January of 2006. His tenure as the junior associate justice was one of the longest in history.

21. All votes at conference are preliminary. That is, justices can and do change their votes between conference and the time the Court announces its final decision. Epstein and Knight (1998) demonstrate that at least one justice changes a vote in 50 percent of all cases.
22. From at least the time of John Marshall's tenure on the Court until the 1960s, the discussion of a case at conference started with the chief and concluded with the most junior justice, but voting proceeded in the opposite fashion (see Clark 1959). As Justice Brennan (1960: 402) described: "The junior justice votes first and voting then proceeds up the line to the Chief Justice who votes last." Sometime in the mid 1960s, however, this voting rule changed, and both discussion and voting in a case now proceeds based upon seniority, with the chief both discussing a case and voting first (see Rehnquist 2001: 254).
23. At the time of writing, the justices speak in this order: Chief Justice Roberts, Justice Kennedy, Justice Thomas, Justice Ginsburg, Justice Breyer, Justice Alito, Justice Sotomayor, and Justice Kagan.
24. These notes come from the papers of former justices. Both Justice Blackmun and Justice Brennan left their Court papers to the Library of Congress. Within these papers are docket sheets that note how each justice voted in each case the Court decided during Blackmun or Brennan's tenure on the bench.
25. If the chief is not in the majority, then the senior associate in the majority holds this power.
26. Justices do not specialize in particular areas of the law, and opinions are not assigned based on a justice's perceived expertise in an issue area; however, expertise may affect a chief's choice of assignment. For example, Brenner and Palmer (1988) suggest chiefs may call on colleagues who have more experience writing in a given area of the law. They do so in order to "ensure the smooth and efficient operation of the Court" (Maltzman, Wahlbeck 1996: 427).
27. This deduction is based on the seniority rule of opinion assignment discussed above.

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