

JUDICIAL PERCEPTIONS OF VOTING FLUIDITY ON STATE SUPREME COURTS*

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Changes in individual judges' votes regarding the proper outcome of a case before release of the court's final opinion, called judicial voting fluidity, are often seen as being driven by ideology but constrained by contextual and institutional considerations. Judges' own views of this matter have been largely neglected. Interviews of eighty-one justices sitting on thirty-five state supreme courts reveal that judges typically play substantial roles in each other's decision making. Voting fluidity is widespread and not uncommon, as is fluidity in the language of opinions. Although these judges do seek majority coalitions, their explanations of voting fluidity do not reveal strategic calculations driven by ideological preferences, but primarily show deference to other judges who possess superior legal expertise relevant to the case. These findings suggest limits to the ability of ideology to explain voting fluidity and call for greater consideration of small-group dynamics in models of judicial decision making.

Publicly issued court opinions are by far the largest policymaking tool of the judiciary. Court decisions obviously can have an enormous impact on the public and society. This is especially true for courts of last resort, whose decisions tend to have consequences far beyond effects on the particular litigants at hand. For this reason, scholars are interested in how judges on courts of last resort reach their final decisions. Judges on appellate courts often change their views as to the proper outcome of a case between the time they first consider the case and the time the court's final opinion is released to the public. The serious consideration of this "voting fluidity" was begun by Howard (1968), who explained that voting fluidity is a complex phenomenon that defies simplistic explanation and requires both quantitative *and* qualitative analysis to be fully understood.

Since Howard's seminal article, scholars have focused almost exclusively on quantitative analysis of voting fluidity. In this research, judges are seen as strategic actors who are primarily driven by ideological goals; that is, judges attempt to achieve case outcomes in accordance with the judges' preferred ideological and political attitudes (Brenner, 1980, 1982; Brenner, Hagle, and Spaeth, 1989; Brenner and Spaeth, 1988; Brenner and Dorff, 1992; Hagle and Spaeth, 1991), although those ideological goals are constrained by contextual and institutional considerations, including uncertainty about case outcomes, the salience of a case, court workloads, or a judge's seniority (Maltzman and Wahlbeck, 1996; Epstein and Knight, 1998; Maltzman,

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Spriggs, and Wahlbeck, 2000). Studies of state courts have similarly found that voting by state judges can be driven by attitudes but constrained by institutional features (Hall and Brace, 1992; Brace and Hall, 1993). However, no study of state courts has yet focused on the specific question of voting fluidity.

Few studies have directly examined how appellate judges themselves perceive the influence of various factors on their decision-making processes, and in particular how they perceive the internal relational dynamics present in the small groups that are their courts. As Howard (1968:47, 53) stated: “[N]o outsider really knows why judges change their minds . . . in any event, we are dependent upon what the judges say their perceptions are.” Perry (1991) examined U.S. Supreme Court justices’ own perceptions of the judicial process, but only as it pertains to the certiorari process. Others (Atkins, 1973; Howard, 1977; Cohen, 2002) examined judicial perceptions of the decision-making process, but each examined only three U.S. Courts of Appeals, and only one focused on voting fluidity. Other studies either confined discussion of the decision-making process to a much larger work (e.g., Cooper and Ball, 1996) or considered only a handful of prominent judges (e.g., O’Brien, 2003).

In only a few studies have justices on state supreme courts been interviewed, and these studies have been relatively limited in scope, covering only one or a few courts. Glick (1971) interviewed justices on only four state supreme courts (Louisiana, Pennsylvania, New Jersey, and Massachusetts) regarding their decision-making processes. Tarr and Porter (1988), who focused on institutional politics in regard to the role of the judiciary in state’s legal and political systems, interviewed the justices on only three state supreme courts (Alabama, Ohio, and New Jersey). Beiser (1973) examined only the Rhode Island Supreme Court, and Hall (1987) focused exclusively on the Louisiana Supreme Court. No similar project attempted to interview justices across a large number of state supreme courts in the United States, and no project at the state level specifically inquired about the phenomenon of voting fluidity. Thus, we are left with a largely unanswered question: What do state supreme court justices themselves perceive to be the influence of other judges on their decision-making processes, particularly as it pertains to voting fluidity? This study seeks to answer that question.

THIS STUDY

To study judicial perceptions of the role of various factors that might influence the judicial decision-making process, an interview questionnaire covering a variety of topics was constructed. Interview-request letters were sent to a total of 315 justices then serving on forty-seven state supreme courts in the United States; a telephone call followed up the written request. The justices were assured complete confidentiality and anonymity of their responses. Seventy-five in-depth telephone interviews were conducted; they averaged roughly between thirty and forty minutes in length. Another six judges sent written responses. The total of eighty-one responses from state supreme

court justices in thirty-five states resulted in a 25.7 percent response rate.¹ During and immediately after the interviews, the judge's answers were transcribed.

Of primary relevance to the present study are two adjacent questions, which sought to elicit from the respondents their views of the role of other judges in the judicial decision-making process. The two questions particularly pertained to the issue of voting fluidity, but the questions did not use that term so as to avoid confusion or disagreement over its technical meaning. The questions asked for examples to flesh out some more detail on the decision-making process, and the questions were open-ended so as not to lead the judges toward particular answers. The questions were presented as two subparts of a single question, as follows:

A. What role do other judges on your court play in your decision-making process? Please give an example if you can.

B. In what percent of cases have you changed your opinion regarding the proper outcome of a case based upon advice from other judges on your court? Please give an example if you can.

Although responses to other questions in the survey sometimes involved matters addressed by these two questions, only answers to these two specific questions will be considered here. Given the almost total lack of knowledge about voting fluidity on state supreme courts, this study is exploratory only and is largely descriptive in nature. The basic, and only, hypothesis guiding the study is that voting fluidity occurs; however, no predictions were made about the degree or nature of that voting fluidity.

In any survey research, there is an inherent concern about validity in relying on self-reported answers, and there are, perhaps, more objective methods of measuring voting fluidity, such as by comparing pre- and post-conference votes, or by coding which judges joined early opinion drafts before the final opinion. However, given the number of states in this study, the amount of time, travel money, research staff, and consent required for such an undertaking would be formidable obstacles. More important, however, such an approach would, at best, only indirectly access judges' own perceptions of their decision-making processes, which is the focus of the study here. In short, the simplest and best way social science has to explore what judges think about the inner workings of their minds and their courts is to ask them.

OTHER JUDGES' GENERAL ROLE IN DECISION MAKING

The large majority of judges (roughly 90 percent of the survey respondents) expressed highly positive views of their colleagues and stated that other judges have a significant

¹ Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

impact in the decision-making process. The adjective most commonly used (by twelve judges) was “important.” Most of them underscored the high degree of importance, using such terms as “pretty important,” “very important,” “enormously important,” or “extremely important.” Four judges termed the role of other judges as “significant,” and the terms “substantial,” “huge” and “big” were each used by three judges apiece. Other judges described the role of other judges as “very strong,” “major,” “great” and “absolutely critical.” As one judge explained, other judges played a “big part. At conference, it’s extremely important.” One judge went so far as to state that other judges are the *most* influential factor in the judicial decision-making process. The judge observed that “the written words of other judges are the most influential factor on me, both on the merits and in deciding what cases to take,” while at conference “almost always a judge will notice something . . . that I didn’t notice.” One chief justice specifically listed consensus and collegiality as important goals for the court, explaining, “We’re all one group, five of us. We seek consensus if at all possible. Our goal is to speak with one voice whenever we can. As chief I try to encourage and promote that. But we respect dissent in the spirit of collegiality.”

Only eight judges (roughly 10 percent of the respondents) expressed a view that other judges did *not* play a significant part in their decision making. One justice simply stated, “On rare occasions, a colleague might seek to persuade me towards another approach. I do not favor this.” Four judges who believed other judges did not play a significant role simply summarily stated that the role of other judges is “not really very much,” “very little,” “not a big role,” or “almost none.”

It is unclear from the judges’ answers whether collegiality on a court causes the judges to be more influenced by each other, or whether open-mindedness in general leads to collegiality on a court. It is likely the two phenomena are mutually reinforcing. It is also possible, although it did not appear in the judges’ responses, that collegiality is driven in part by ideological agreement on a court. These questions cannot be answered here, but in any event the important point is that collegiality and susceptibility to peer influence are highly related. A lack of collegiality was the primary reason given by the group of justices just noted as to why other justices did not significantly influence their decision making. For example, one judge observed, “When I first came on, no one spoke to each other, but they did write nasty, rotten, horrible memos. But that was the culture of the court and I had to get used to it. But those memos didn’t influence me much mostly because they were pretty nasty.”

Moreover, judges serving on the same court tended to possess a common perception regarding the lack of collegiality on their court. For example, of the eight justices who did not feel much influenced by other justices, six comprised three pairs of judges from the same court. One can see this in two responses from justices of the same court. One noted simply “Unfortunately, I work with unhelpful colleagues,” while the other who said the amount of other judges’ influence was “almost none” explained that geography hindered collegiality: “Our court barely speaks to each other. We have a long history of being very fractious. We all live in different cities,

and only see each other at conference. It's really seven islands in our court system." One can also see common perspectives of collegiality in the responses from four justices, all sitting on the same court, who were in unanimous agreement as to the *high* degree of influence the judges exert on each other on their court:

J14: Enormously important. Once an opinion circulates, we have a joke around here: it's like the opening of Jaws—"dum dum, dum-dum-dum-dum." The sharks are circling. I have people who pick through my English with agonizing precision and people who examine my public policy.

J15: Huge. We meet weekly around the table, we literally sit around that damn table ever week and talk to each other and beat each other up pretty badly and sometimes its bloody dirty ugly. But I'm astonished at how much I change my mind and I change others' minds.

J23: A very strong role. They're very experienced, and come from a diversity of backgrounds. I listen very carefully because they may have a point.

J24: Absolutely critical. Compared to the U.S. Supreme Court, where it's all done by clerks in chambers, we do a lot of sitting and talking together, and have a very high unanimity rate. At the U.S. Supreme Court, someone sends around an opinion and another judge says "I'll join parts II, IV-A and B but not C." It's the same on the Ninth Circuit. But we defer to each other.

Collegiality or lack of collegiality in a court culture is not necessarily permanent. For example, two judges of different courts each explained how the collegial nature of a court is heavily dependent on the personalities of the judges sitting on the court at any given moment; thus, it can change over time. One stated, "I've been on the court for over ten years, and looking back it just depends on the court you work with," while the other observed, "When I first came to the court, it was a very crisp discussion. I'd vote this way, and they'd get annoyed with me if I said, 'Well, have you thought about this?' You'd see people looking at their watches like they've got a golf game or something. But now at conference we have a free-for-all."

In short, the large majority of the state supreme court justices interviewed perceived other justices on their courts as playing a substantial role in their decision-making processes. It seems to be primarily only when a court suffers from a marked lack of collegiality that judges do not significantly affect each other's decision-making processes. We turn now to more specific comments as to the nature of this intrajudicial influence.

VOTING FLUIDITY AND OPINION FLUIDITY

A shift in a judge's preferred outcome before the final vote in a case has been generally referred to as *voting fluidity*. However, we need to differentiate between types of change. The concepts of *strong* fluidity and *weak* fluidity may be useful. Strong flu-

idity is a vote changed from affirm to reverse, or vice versa, whereas weak fluidity is a change in which a justice who has not taken a position moves to a specific vote to affirm or reverse (Brenner, 1980). Stated differently, “weak” fluidity is a shift from a neutral, undecided, or weakly committed position to a specific or firmly committed position. The survey question asked judges whether they “changed [their] opinion regarding the proper outcome of a case,” without using the term “voting fluidity,” in order to avoid confusion or disagreement over its technical meaning. Accordingly, neither did the survey question differentiate between strong and weak fluidity. Thus, even though the wording of the question attempted to limit confusion, nevertheless some judges might have interpreted “changing [one’s] opinion” to include both reversing one’s vote as well as moving from an uncommitted or tentative position to a specific or firm position, which might include abandoning a separate concurrence and, instead, joining a different concurrence or a majority opinion.

Another highly related concept examined here is *opinion fluidity*, changes to the text of a proposed written opinion for a court. In addition to seeking to persuade other judges to switch their preferred outcomes, a judge can seek the support of other judges for an opinion by modifying its proposed language. The desire to change or retain another judge’s vote regarding a preferred outcome is usually the primary, if not the sole reason why a judge changes the language of an opinion. Because votes can and do change depending on the shifting text of a proposed opinion, changes in an opinion to win over votes is an aspect of voting fluidity as well. Thus, in the survey question used, even though the term “proper outcome” might indicate “preferred winning litigant” to many readers, some judges might have interpreted the phrase to include not just the correct winning litigant, but also the correct language in the text of the written opinion. This makes it slightly difficult to separate opinion fluidity from voting fluidity, but the two are distinct concepts nonetheless, and both concepts will be considered here.

In short, given the various possible interpretations of the phrase “changing [one’s] opinion,” judges might view the phenomenon of “voting fluidity” in several ways: altering the language of an opinion, moving from an open to a specific position, or switching one’s vote as to the correct winning litigant. Numerous responses by the judges interviewed provide significant evidence that each of these phenomena—both strong and weak voting fluidity as well as opinion fluidity—occur regularly at the state supreme court level. The occurrence of these phenomena will be examined in more detail shortly. First, however, we must consider the primary reason fluidity occurs: the need for judges to gain enough votes for their preferred outcome in the case, or what researchers have called a “minimum winning coalition.”

Minimum Winning Coalitions. The judges generally expressed an awareness of the need to gain a minimum winning coalition. On the U.S. Supreme Court, the justices seek (and need to seek) at least a majority coalition, and they engage in strategic calculations as part of what has been called the collegial game (see Maltzmann, Spriggs, and Wahlbeck, 2000). Consonant with that finding, several state supreme court

judges stated that one of their necessary objectives is attaining a minimum winning coalition. Although no judge used that term, at least seven justices precisely quantified their goal as the “magic number” of votes needed to obtain a majority opinion, with comments like “I need 3 other votes,” “you have to have three votes,” “the magic number is three,” and “If all five agree, it doesn’t matter what the other four do.” These and other judges stated that they “may reconsider to accommodate differences”; a typical response was that “I need 3 other votes, so they always play a role. I can’t do anything by myself. Invariably they play a huge role because I have to get their vote.”

These quotations demonstrate that attaining a minimum winning coalition is a necessary and, thus, frequent goal among state supreme court justices. There are numerous strategies justices use in seeking these minimum winning coalitions (Maltzmann, Spriggs, and Wahlbeck, 2000). Elaboration of these strategies is not undertaken here, but generally judges can do only one of two things to persuade other judges to join a majority coalition: convince those judges of the correctness of a proposed *outcome* in terms of which litigant should win (voting fluidity) and persuade judges who already tend to agree with the preferred outcome of the correctness of the *reasoning* used to reach that outcome (opinion fluidity).

Voting Fluidity. Many judges not only expressed their willingness to change their preferred outcome before the final vote in a case, but stated that such change was not uncommon. At least ten judges clarified that they were willing to, and often did, change their vote specifically regarding their preferred winning litigant. This strong voting fluidity was indicated in remarks by three judges: “Sometimes their arguments are persuasive, even if initially you were thinking of going in a different direction,” “They give me something to think about to convince me I’ve gone the wrong way,” and “I was going to go one way, then I heard the institutional memory justice; I thought that made sense.” One judge noted his willingness to switch to the majority position, stating, “A number of times I won’t dissent because I’m convinced [by the majority opinion],” whereas two other judges noted their willingness to be converted to a dissenting view: “Sometimes, when the opinion is circulated, I’m prepared to vote with the majority, but the dissent makes a whole lot of sense,” and “Sometimes you’re persuaded by dissenting views.” Finally, two justices described strong voting fluidity more colloquially, “What I thought was white turns out to be black,” and “They say, ‘hey [first name of Justice], you missed something,’ and I go back and say ‘damn, they’re right.’”

Several judges stated that they were willing to be “influenced” or “persuaded,” or were open to changing their “opinion” or “mind” or “view.” This phenomenon was described by two judges who did not view it as “change” per se. One judge remarked, “Changing an opinion is not really accurate, because I try to keep an open mind all the time,” and the other noted “I can’t change an opinion that hasn’t formed.” Nevertheless, this open-mindedness toward case outcomes, and the corresponding movement from no position to a committed position in response to persua-

sion by other judges, is the very definition of weak voting fluidity. Moreover, at least seven judges made comments indicating that weak fluidity was more common than strong fluidity. They stated that their vote was more likely to be influenced by other judges when they were “in a neutral position” or “on the fence” with a “tentative” opinion or even “an opinion that hasn’t formed,” especially “on close issues” or “with the close cases.” The contrast between strong and weak fluidity is seen by the remarks of several judges. One estimated that “once I’ve gotten pretty solid in my opinion, it’s maybe 1-to-2 percent of the time” one’s preferred outcome changes. Another judge stated that when an opinion is “half-formed,” one’s opinion may change in as many as “50-70 percent” of cases. Two other judges remarked, “I rarely flip . . . If it’s tentative, judges have a huge bearing; if it’s not tentative, they have little or no bearing,” and “The influence of my colleagues is more in the cases where I go to conference undecided.”

Opinion Fluidity. The survey responses indicated the judges implicitly understood the distinction between voting fluidity and opinion fluidity. They stated that they often make “minor changes” or “write things a little different” or “add or change a small part” to garner another vote in support of their preferred reasoning or to retain such support rather than have a colleague concur separately. Moreover, at least eleven judges indicated that opinion fluidity occurs more often than voting fluidity. This can be seen in the remark that “I’m always reacting to other judges’ opinions; it’s always subject to flux. Generally your vote is in the ballpark; it’s the analysis that changes,” and in the observation that “once or twice” has influence from other judges “changed the outcome,” but that, “More common, there was a better way to get to X, so the opinion changed.” One judge stated, “Surely it’s under ten percent,” of cases where the outcome changes, “But to the extent a judge’s opinion narrows or alters an opinion, that’s a significantly higher percentage.” Another justice who estimated that voting fluidity (defined as changing the outcome) occurred in approximately 5 percent of cases also estimated that opinion fluidity was roughly four times as frequent, with a judge adding or altering a point in an opinion “maybe twenty percent of the time.” One other judge explained, “it may not be completely changing, but modifying what I otherwise would have wanted to do.”

Several judges explained that opinion fluidity is much more than merely tinkering with a word here or a phrase there. It includes rewriting all aspects of the opinion as a result of the “detailed comments on opinions circulated by others, even down to grammar.” As one judge remarked, “I have people who pick through my English with agonizing precision and people who examine my public policy.” Being willing to compromise on the language of an opinion means being willing to engage in extensive rewrites of drafts and to go through multiple complete revisions—even “three or four drafts”—before an opinion is finished. The result is that judges “beat each other up pretty badly and sometimes its bloody dirty ugly. . . . Everybody’s fingerprints are all over those opinions by the time it goes out of here.”

Although no judge admitted to “vote trading”—swapping votes on preferred outcomes—at least two judges conceded that judges engage extensively in something like “language trading.” That is, what is traded in exchange for a vote is not another vote but instead different language in the proposed opinion. As one judge observed, “I’ve left out things to pick up someone’s opinion and they’ve done the same for me,” and another stated:

John Adams said ‘Government is conversation.’ I agree. Listening is critical; being open-minded is a huge part of being a judge. Debate is our lifeblood. Maybe computers and the ease with which opinions can be changed have caused that. There’s an awful lot of language negotiation that goes on.

As this suggests, judges view the give-and-take involved in modifying the language of opinions as positive. One judge perhaps put it best: “I’ll circulate my proposed opinion to the other four judges in my division and vice versa. We’re all cross-pollinating in that regard. It’s just a good, healthy practice.”

One judge did note that regardless of the particular nature of the voting fluidity, compromise usually does not require that principle be sacrificed. The judge stated, “Most of our cases don’t implicate deeply held values, they’re more mundane than that, so it’s easy to change your mind.” In such situations, judges obviously feel relatively free to change their opinions; however, when what one judge called “deeply held values” are involved, a willingness to compromise does *not* mean that a judge will sacrifice principle merely for the sake of agreement to an outcome about which the judge “feel[s] very strongly.” As one judge noted, “We try to address each other’s concerns. We have the biggest fights over the most minor concerns—is it harmless or plain error? But we can frame the opinion in a way that we don’t have to focus on that.” Illustrating the earlier-noted point about minimum winning coalitions, the judge continued, “It’s not for agreement, it’s so we can get 3 votes,” to which the judge added, “But no one is conceding a point of conscience.”

Voting Fluidity Estimate. “Voting fluidity” *broadly defined*, thus, includes everything from minor changes in the language of an opinion to the extreme situation in which a lone dissenter ultimately convinces enough judges to adopt that initially dissenting view as the majority position. Two judges offered examples of this phenomenon, with one saying, “[S]ometimes when it’s 4-1 my dissent becomes the majority,” and another remarking “At conference, it’s not uncommon to listen to other judges and say ‘that’s a better way to go.’ We had a unanimous position, then one guy dissented, then it made sense and became a majority opinion.”

Recall that the survey asked the judges to estimate the frequency of their voting fluidity, phrased as how often they changed their opinion regarding the proper outcome of cases. Of the sixty-one judges (75.3 percent of the survey respondents) who provided a numerical estimate of voting fluidity, responses ranged from a low of

Table 1
Reported Voting Fluidity Rates

% Change	Frequency	% of Sample	% of Explanatory Responses
1.0	3	3.7	4.9
1.5	2	2.5	3.3
2.0	2	2.5	3.3
5.0	8	9.9	13.1
7.5	1	1.2	1.6
10.0	8	9.9	13.1
12.5	5	6.2	8.2
15.0	9	11.1	14.8
20.0	8	9.9	13.1
22.5	1	1.2	1.6
25.0	8	9.9	13.1
30.0	1	1.2	1.6
35.0	2	2.5	3.3
37.5	1	1.2	1.6
40.0	1	1.2	1.6
60.0	1	1.2	1.6
Answer	61	75.3	n=61
No answer	20	24.7	
Total	n=81	100.0	100.0

1 percent to a high of 60 percent;² the mean score was 15.7 percent, and the median score was 15 percent (see Table 1).

As was noted earlier, given the range of possible meanings of voting fluidity, some judges might have interpreted the question to refer to either opinion or voting fluidity, including whether voting fluidity was strong or weak. The responses thus mean that at least *some* type of voting fluidity occurs in approximately three out of every twenty cases. Because of the various manifestations of voting fluidity that judges might have included in their estimates, and given that the judges stated strong voting fluidity occurs less frequently than weak voting fluidity or opinion fluidity, 15 percent probably should be treated as an *uppermost* estimate of strong voting fluidity. On the other hand, given the judges indicated that weak fluidity occurs at a noticeably higher rate than strong fluidity, the 15 percent estimate probably more accurately describes the frequency of weak voting fluidity. Further, given that the judges indicated that opinion fluidity occurs at a still higher rate than any type of voting fluidity, 15 percent is probably a *lowermost* estimate for the occurrence of opinion fluidity. Nevertheless, the determination that some type of voting fluidity occurs in roughly, or at least, 15 percent of all cases, just under one-sixth, is a meaningful first estimate of judicial voting fluidity in state supreme courts. Interestingly, the wide range of estimates also demonstrates not just that different judges probably interpreted the ques-

² For judges who estimated a range, the midpoint of the range was taken as their point estimate.

tion to refer to different types of voting fluidity, but also perhaps that these judges vary widely in their *susceptibility* to voting fluidity, or differ widely in their *perception* of voting fluidity, or perhaps some combination of all three.

Twenty judges (24.7 percent of the survey respondents) either could not or did not want to provide a numerical estimate. For example, one judge simply stated, "It's hard to say," and another explained, "A percent would be nothing but a guess." No judges, however, stated they *never* changed their opinion regarding the proper outcome of a case in response to another judge's advice, even if such happened "only once or twice."

Importantly, statistical correlations conducted as part of a larger study showed *no* relationship between the rate of voting fluidity by a judge and a number of factors: the number of justices on the court, the method by which judges are retained in office, the percent of the docket that is discretionary, the total caseload per judge, the length of the judicial term in office, and the number of years the judge had served on the high court. The absence of a correlation with this last factor argues against suggestions of a "freshman effect," where inexperience increases the likelihood of voting fluidity (see Howard, 1968; Maltzman and Wahlbeck, 1996).

The presence of an intermediate appellate court was, however, negatively related to the rate of voting fluidity to a statistically significant degree ($p < .05$). In other words, voting fluidity occurred more often on courts without an intermediate appellate court below them. Judges on state high courts with an intermediate court reported a mean of 14.5 percent voting fluidity, whereas judges on high courts in states without an intermediate court reported a mean of 22.5 percent voting fluidity, an 8 percent difference. One possible explanation is that high courts in states without intermediate appellate courts generally must consider all cases appealed to them. This larger workload pressure gives judges on these courts a greater incentive to defer to a recommending judge's opinion rather than remain with their own initial inclinations and write separate opinions. However, arguing against this possible explanation is the fact that a large percentage of cases on these courts are "routine" cases with relatively clear-cut outcomes. This would suggest that greater initial consensus, and hence *less* voting fluidity, should occur on states without intermediate courts. Thus, as an alternative explanation, it is possible that in states with an intermediate court, the intermediate court's opinion, especially if well-reasoned, supplies a "ready-made" decision, which can quickly crystallize the views of the reviewing judges on the state's high court. Voting fluidity should be less likely to occur in such circumstances. However, because the correct explanation why voting fluidity occurs more often in states without intermediate appellate courts is unclear from the data here, future research will be necessary to address this question more definitively.

BASES OF PERSUASION

The judges' responses indicate that negotiations occur regarding the proper outcome of a case and the proper language used in the written opinion to support that out-

come. Yet both voting fluidity and opinion fluidity necessarily require some basis of persuasion on the part of a judge seeking to get other judges to join an opinion. Thus, regardless of the nature of the voting fluidity present, the question then becomes, "What are the bases of this persuasion?"

Although the survey questions did not specifically ask for the judge's perceptions of what influences *other* judges on the court, at least eight judges used the plural "we" when discussing the influences that persuade judges. This indicates these judges perceived a shared, common experience regarding the role of other judges and of voting fluidity. For example, as some of the judges remarked, "We all do listen to each other and are guided to a large extent by what other judges say," "I'm astonished at how much I change my mind and I change others' minds," and "We influence each other greatly." Only two judges implied someone on their court was influenced by something other than what influenced the responding judge. One judge stated, "One of the liberals often lets politics trump her liberalism," and another stated, "You'll have somebody that's just hell-bent for election." Thus, overall, the survey responses indicate that judges perceive the various bases of persuasion that occur in relation to voting fluidity apply not just to themselves, but to most other judges as well.

Forty-two of the judges (51.8 percent of the survey respondents) did not volunteer any specific or particular explanatory response or example regarding the basis of persuasion from other judges. Instead, they stated simply that they were "apt to have [one's] opinion changed" because they were "open" or "open-minded" and "try to keep an open mind" during "dialog" or "debate" in conference, and in "face-to-face time with the other justices," "both formally and informally," such as "at dinner . . . in the capitol." These judges explained that collegial decision making is a "dynamic process" of "give and take" where they "listen very closely" with "respect" and "readily share opinions." This practice is "enlightening and helpful" and "really vital to the whole process" because "it's always good to get other people's perspectives." In fact, collegial decision making "becomes like a jury." Thirty-four judges (42.0 percent of the survey respondents), however, were more specific as to the basis of persuasive power other judges exerted in causing voting fluidity to occur.

Expertise. The most common explanation by far, given by twenty-eight judges (66.7 percent of the judges who provided a more specific explanatory response or example), was simply that the responding judge deferred to some particular expertise possessed by the persuading judge. The type of expertise most commonly mentioned by the justices as influencing them was *legal* expertise (see Table 2). Within legal expertise, ten judges cited expertise in an issue area, nine cited general legal expertise, and six cited expertise in the particular case being considered. We now examine each of these categories in greater depth.

Ten judges (23.8 percent of explanatory responses) offered the explanation that judges come from "different backgrounds" in the law and, thus, possess legal expertise in certain issue areas. As one judge put it clearly, "I'm much more likely to have someone change my mind in an area of the law I'm less familiar with." Another said,

Table 2
Bases of Persuasion

Explanatory Response	N	% of Sample (n=81)	% of Explanatory Responses (n = 42)
None offered	42	51.8	
Expertise (total)	28	34.6	66.7
Issue-area expertise	10	12.3	23.8
General legal expertise	9	11.1	21.4
Case expertise	6	7.4	14.3
Life expertise	3	3.7	7.1
Institutional Factors	6	7.4	14.3
Ideology (clear)	2	2.5	4.8
Ideology (ambiguous)	6	7.4	14.3
Total	42	100.0	100.0

(42 examples listed by 39 judges)

“[W]hen I first came on the court. I asked senior judges for their expertise or to give me summaries of the development of the law, [as] we had some judges who were experts in certain fields; one had even written a treatise” and another stated that “we have some pretty good scholars.” The particular legal areas judges mentioned as examples of such issue-area expertise were “evidentiary and instruction issues”; “land use, or employment law”; “corporate and litigation experience”; “worker’s comp, civil defense”; “trial experience, public policy”; “trial” experience; “procedural expert[ise]”; “professional ethics”; and “business, or criminal, or family” law. Deference to an expert in an issue area is logically based on the deferring judge’s lack of expertise in that same issue area, something about which more than one judge was quite explicit. One judge frankly admitted, “Sometimes I come out of a case really not understanding it.” As another judge noted,

No one judge is strong in every area of law. One judge might be an expert in land use, or employment law. I might give some deference to him. We lean on each others’ strengths. We have a judge who wrote the public utility regulations when he worked for the governor, and they’re like Navaho to me.

The second most frequently mentioned basis of persuasion, noted by nine judges (21.4 percent of explanatory responses), was the *general* legal expertise of another judge or other judges, which might be superior to one’s own and, hence, could be persuasive. For example, a judge’s “age . . . and judicial experience,” or the fact a judge was the “senior judge,” could be persuasive. As one judge put it, “There’s a lot of

institutional memory because some judges have been here so long. Their input is invaluable. They play an important role. I was going to go one way and then I heard the institutional memory justice; I thought that made sense.” Not the legal expertise of any one judge but the combined legal knowledge and wisdom of the rest of the judges on the court might be influential. As one judge explained, “We all do listen and are guided to a large extent by what other judges say. I think about what other judges have to say. If I’m out there all by myself, I have to start thinking are they wrong or am I wrong?” Another stated, “My colleagues’ opinion weighs heavy, and if they disagree with me, it gives me considerable pause,” while another remarked “If I’m alone, I have to consider why I’m alone.” As other judges put it, “On any court you have some big judges and some not so big judges. The big judges move the other judges around . . . generally in my experience because of their ability to legal reason,” and “There are three judges that are influential with me and not because they’re better friends, but because they’re thoughtful, serious-minded persons, bringing a strong sense of commitment to the case.”

The third common type of legal expertise said to have induced judges to defer to another’s opinion in a case was expertise *on that particular case*. Six justices (14.3 percent of explanatory responses) stated that they would generally defer to the judge assigned to write the bench memo or opinion in the case because of “what *that* justice has found on a more detailed review.” As two other judges observed, “There is an inclination to go along with the assigned judge” because that judge “know[s] the record better and the law better.” This is obviously because the judge to whom a case has been assigned for analysis has become an expert on the facts and law in that particular case. Other judges on the court, having been assigned their own cases for analysis and reporting, either do not have the time to conduct research on cases assigned to other judges or do not bother to do so. Therefore, they often lean heavily on the recommendation of the judge who reports his or her analysis to the rest of the court. Commonly, then, the remaining judges on the court defer to what the reporting judge has recommended. As three judges noted, “If they’re assigned the opinion I defer to their opinion,” “I could be persuaded by the opinion writer,” and “The first person to speak in conference is the person assigned to the case. That’s clearly the most influential view in conference.” And, as is clear from the remarks of another judge, this may go further: “If a person assigned to write the majority opinion comes back with a contrary view, I’d change my vote 75-80 percent of *that* time. The chambers working on a case has substantially more info than any of us at oral argument.”

Moreover, at least two judges, quite conscious of the power they possess as a result of others’ deference, expressed an opinion that all judges realize the influence they possess when serving as the assigned judge. One of them put it this way: “In six out of seven of the cases, someone else is the reporting judge. I certainly seize the opportunity when I’m the reporting judge to frame the case as I want it seen. I assume

that other judges realize the opportunity to influence colleagues.” The other stated, “I try to listen to what my colleagues would do with a particular case and why they would do that,” and that when someone is the reporting judge, “You have a real chance to persuade your colleagues. If I’m the reporting judge, I have a lot of sway. If I’m not the reporting judge, I pay close attention to what they say.”

Beyond some type of legal expertise, the “diversity of backgrounds” or life expertise (or life experience) of other judges might be a factor that could lead a judge to be influenced by other judges’ views. Three judges (7.1 percent of explanatory responses) noted this element, which was stated both in general terms and more specifically. As to the former, a judge explained,

Other judges come to conference with their decisions set in stone, but I’ll change my mind. I’m an agonizer. . . . [E]verybody brings a different experience to the case, your own world view, and I don’t mean political, just how you grew up, jobs you’ve had, they tend to put cases in different boxes and it’s important to consider all those boxes before you make up your mind. I don’t consider that a fault, that’s a strength, although some people would consider it a fault.

As to the latter, another judge provided as an example that in a case “involving fencing farm animals, some of the judges grew up on farms and had strong opinions, so I went along with it.” One’s life experience could include one’s gender as well, with one judge noting, “A woman justice gives us a perspective on women’s issues—what are typically considered women’s issues—we wouldn’t otherwise have. She carries some pretty strong weight.”

Institutional Factors. Six judges (14.3 percent of explanatory responses) mentioned institutional factors as influencing their susceptibility to persuasion. Two judges indicated that a desire for consensus was important, implying that such consensus would bolster the legitimacy of the court’s decisions. As a chief justice explained, “We seek consensus if at all possible. Our goal is to speak with one voice whenever we can. As chief I try to encourage and promote that.” The other judge noted, “We make a real effort for institutional reasons to have unanimous or nearly so decisions. At the end of the day, we can get almost everyone on board.” Another judge also implied a desire for institutional legitimacy, but explained that this led to a *lack* of persuasiveness by other judges, stating “I don’t want to be lobbied. I want to frame my opinion dependent of others without someone else getting involved. It’s not fair to the parties.” Another judge implied concern about institutional legitimacy by desiring to predict public reaction to court decisions. That judge sometimes relied on a fellow judge who “was a former attorney general, a politician, so he has his hand on the public pulse.” Another judge believed compromise was necessary for an appellate court to function, remarking, “I don’t think you can write opinions in a collaborative process and always go your own way.” One other judge indicated that the institutional feature of judi-

cial elections sometimes causes a judge who is “just hell-bent for election” to pressure other judges to reach a particular outcome to maximize the likelihood of reelection.

Ideology. It may come as somewhat of a surprise that only two judges clearly mentioned ideology as a possible basis of persuasion; this is only 4.8 percent of the explanatory responses. One judge stated, “We try to get our opinion where the magic number is three, but one of the liberals often lets politics trump her liberalism. So I have to work on her from time to time,” while the other judge remarked, “We’re very split—there’s four activists and three conservatives.” Six other judges (14.3 percent of explanatory responses) arguably referred to ideology as a factor influencing judges. One judge referred to the “judicial philosophy” of other judges, while another judge spoke of judges who are “philosophically diverse from me,” and another spoke of “my own predispositions.” This element was also close to the surface in the remarks of another judge: “After being on the court awhile, . . . you focus on what your colleagues are going to do. . . . How does the philosophy of other court members play—It’s very important. You know automatically if you’ll be in the majority opinion.” One other judge stated that “when there’s something you really want, a change in the law, you want to write something so they’ll agree to it,” and another judge noted most cases do not (implying some do) “implicate deeply held values.”

One would need to treat the terms “philosophy,” “predispositions” “something you really want,” and “deeply held values” as synonyms for “ideology” to conclude that these judges were stating that the presentation of mutually shared ideological goals was a basis of persuasion when voting fluidity occurs. However, even if one interprets all these terms to refer to “ideology,” this equates to only eight judges in total (19.0 percent, or slightly under one-fifth, of the explanatory responses) in which ideology is mentioned as a basis of persuasion.

Skeptics might suggest that judges who did not, or said they could not, offer a more specific explanatory response failed to do so because they were attempting to conceal ideology as a basis of persuasion. This study cannot answer that question. However, the scarcity of proffered explanations clearly involving ideology, combined with the widespread explanations that *were* given, reveals that many, and perhaps most, state supreme court justices do *not* see themselves as changing votes in cases as a result of strategic calculations driven by ideological preferences. Instead, they simply seek to obtain what they perceive as the legally correct or perhaps legally best result. When these judges are uncertain about the legal correctness of the outcome they initially supported, they are generally open to being shown by someone with superior expertise that their initial views were mistaken. And as was noted earlier, several judges explained their susceptibility to persuasion was highest when their own opinion was either neutral or tentative, as one would expect, as when a judge said, “If it’s tentative, judges have a huge bearing; if it’s not tentative, they have little or no bearing.” In short, even if we were to assume without evidence that all the judges surveyed were concealing ideological bases of persuasion, this study importantly reveals that *there are other substantial bases of persuasion in voting fluidity, primarily legal expertise.*

CONCLUSIONS AND IMPLICATIONS

The results of this research provide a more thorough and clear picture of judicial decision making on state supreme courts than has been available. In addition, because of the large number of states from which respondents come and the relatively large number of judges surveyed, the results here are more generalizable than were earlier studies. The data support some earlier suspicions based on either theory or on studies of a few courts: voting fluidity is a not uncommon phenomenon across different appellate courts—indeed, it is widespread—and it is primarily a direct response to persuasion exerted by other judges on the courts. The term “voting fluidity,” however, must be understood to mean more than simply “changing one’s vote for a preferred winning litigant.” Broadly defined, the phenomenon of voting fluidity also includes fluidity of the language of opinions so as to win over votes, and also includes moving from an uncommitted position to a committed one. Any thorough picture of voting fluidity, thus, must include an examination of both strong and weak voting fluidity as well as opinion fluidity. Opinion fluidity occurs more frequently than weak fluidity, which in turn occurs more frequently than strong fluidity, but some type of fluidity occurs in about one-sixth of all cases on state supreme courts. A promising avenue of future research is to flesh out in even greater detail the differences between the nature and degree of these particular phenomena.

Of the three major possible influences of voting fluidity described by Maltzman and Wahlbeck (1996)—policy considerations, legal uncertainty, and institutional considerations—only the second factor, legal uncertainty, is given substantial support by the data here, with institutional considerations receiving only minor support and policy considerations (in the guise of ideology) even less support. Legal uncertainty regarding the outcome of the case was the basis for the widespread occurrence of voting fluidity, and legal expertise of other judges in response to that uncertainty was by far the most commonly mentioned basis of persuasion. Indeed, no type of voting fluidity could occur unless case outcomes possess legal uncertainty and judges are “open-minded” about case outcomes.

Regarding other possible factors, institutional considerations such as collegiality or consensus were mentioned by only a handful of judges, and only two judges clearly indicated that ideology played any role. It may be that these factors exert different degrees of influence in state supreme courts than in the U.S. Supreme Court. For example, given the relatively smaller array of legal issues that come before the U.S. Supreme Court, combined with generally high-quality litigant briefs there, larger staff support, and more frequent amicus briefs, it may be that U.S. Supreme Court justices need to rely less on each other’s particular expertise because of ample advice from staff, litigants, and amicus participants. This study cannot determine the validity of that speculation, but it is a promising avenue for future research. Moreover, there is a broader diversity of courts, judges, and issues in the state supreme courts of the United States than there is at the U.S. Supreme Court. Accordingly, the three bases of persuasion—expertise, institutional factors, and ideology—might play more

or less important roles in different contexts. Again, this study cannot answer that question, but pending further studies, the data here nonetheless provide an initial general, overall picture of the influence of these factors on voting fluidity in state supreme courts.

This study also adds further weight to the conclusions of scholars (Maltzman and Wahlbeck, 1996; Epstein and Knight, 1998; Maltzman, Spriggs, and Wahlbeck, 2000) that there are limits to the ability to explain voting fluidity as solely a function of ideological attitudes. This study further suggests that this limitation especially applies to *state* supreme courts. The data here support the contention that factors related to judges' ideological attitudes are only part of the explanation; contextual and institutional aspects surrounding a case must be considered as well. Contextually, the higher the degree of legal uncertainty by a judge, the more fluid that judge's vote will be, especially in response to other judges' legal expertise. This was, in fact, the basis for voting fluidity most strongly supported in the data here, which suggests that legal uncertainty is the predominant factor in voting fluidity. These results reinforce the need to include legal uncertainty as a key variable in examining voting fluidity, and challenge the claims of scholars who argue ideology is the predominant, if not sole, determinant of judicial voting behavior in all contexts. Institutionally, the absence of an intermediate appellate court increases voting fluidity on a court of last resort, as do judicial concerns about collegiality, legitimacy, and electoral interests. Thus, the data here strongly argue that any future studies of voting fluidity on state supreme courts must necessarily include contextual and institutional factors, especially the contextual factors of legal uncertainty and expertise.

Finally, moving beyond the limited focus on voting fluidity, this study provides important support for the argument that small-group dynamics have not been given the proper weight they deserve in broader overall studies of judicial decision making in which small-group dynamics are usually omitted, with relatively few exceptions (e.g., Epstein and Knight, 1998; Maltzman, Spriggs, and Wahlbeck, 2000). Of course, no picture of judicial decision making is complete without attitudinal and institutional variables, yet general models of judicial decision making must also include small-group dynamics. Most important, the research presented here strongly suggests that models of judicial decision making on appellate panels must include the nature and degree of influence of judges' legal uncertainty, legal expertise, nonlegal backgrounds, and life experiences *on each other*. This is not to say that small-group dynamics is a better approach to studying judicial decision making, but simply that small-group dynamics must be included in any adequate understanding of judicial decision making. **jsj**

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