Discerning the Goals of U.S. Supreme Court Justices

Lee Epstein, Washington University in St. Louis
epstein@artsci.wustl.edu

Andrew D. Martin, SUNY-Stony Brook
amartin@datalab2.sbs.sunysb.edu

Gregory A. Caldeira, Ohio State University
caldeira.1@osu.edu

Jeffrey A. Segal, SUNY-Stony Brook
jsegal@datalab2.sbs.sunysb.edu

Washington University, Political Science Working Paper #362

Prepared for presentation at the 1998 annual meeting of the Conference Group on the Scientific Study of Judicial Politics, East Lansing, MI. We gratefully acknowledge support from the National Science Foundation, SBR-9320284, SBR-9614130.
Discerning the Goals of U.S. Supreme Court Justices

The primary goals of justices in the decision making process are policy goals. Each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences.

—David W. Rohde and Harold J. Spaeth

I shall be talking about a policy-oriented judge or justice. By this term I mean a Justice who is aware of the impact which judicial decisions can have on public policy, realizes the leeway for discretion which his office permits, and is willing to take advantage of this power and leeway to further particular policy aims.

—Walter F. Murphy

What motivates justices of the U.S. Supreme Court? Despite the highly distinct theoretical approaches Rohde and Spaeth (1976) and Murphy (1964) bring to the study of decision making, they agree over the answer to this question: Justices seek to etch their policy preferences into law. Indeed, the notion that justices pursue policy is so firmly entrenched that it has dominated disciplinary studies ever since Pritchett penned The Roosevelt Court in 1948.

Even more to the point, this conventional wisdom has remained intact despite the occasional piece of evidence to the contrary. Knight and Epstein (1996a), for example, show that sole reliance on the policy goal cannot possibly explain why Chief Justice John Marshall took the steps that he did in Marbury v. Madison (1803); a complete understanding must incorporate the goal of maintaining institutional legitimacy, that is, of insuring that the Court remains a credible force in American politics—both in the eyes of the public and public officials. Likewise, Caldeira and Wright (1988) argue persuasively that it is difficult to understand why the Court accepts certain petitions for review and rejects others without considering the institutional legitimacy goal. In neither of these studies (nor others reaching the same sort of conclusion), it is worth noting, did the authors reject the notion of the importance of policy. What they argue instead is that other goals also come into play (see Baum 1997 for an insightful discussion).
Thus we ask: To what extent should we continue to place exclusive emphasis on the policy motivation to the neglect of others, such as the maintenance of institutional integrity? Addressing this question is not only of fundamental importance to all research enterprises that seek to explain the choices of judges, not to mention the course of law. It also could not come at a more timely point, for some scholars of law and courts are now rethinking models that hinge on the assumption of one goal (e.g., the attitudinal model, which views justices as “single minded seekers of legal policy”) and investigating those that do not, such as the strategic account of judicial decisions. On this account, (1) social actors make choices in order to achieve certain goals, (2) social actors act strategically in the sense that their choices depend on their expectations about the choices of other actors, and (3) these choices are structured by the institutional setting in which they are made (see, generally, Elster 1986). Seen in this way, the strategic account, unlike many other approaches to judicial decision making, is agnostic about actors’ goals: So long as the researcher posits goals a priori, this account is broad enough to encompass virtually any of the motivations that scholars have ascribed to judges (see, e.g., Ferejohn and Weingast 1992).

The application of strategic rationality to judicial politics is important to us in two regards. First, scholars invoking this account must decide whether to continue to rely on the policy motivation or posit others that may be relevant. By addressing questions about judicial goals, we hope to provide them with some guidance. Second, since the strategic account does not assume the existence of one particular goal, it enables us explore competing claims about the motivations of jurists. Here that exploration takes the form of a game-theoretic analysis of two possible goals—policy and institutional integrity—that justices pursue over decisions regarding case selection, specifically over whether or not to join dissents from denials of certiorari. Certainly we recognize that these motivations represent only two of the many possibilities that scholars and judges alike have identified (see Baum 1997 for others). But, since they are
considered particularly important within this literature (see, e.g., Caldeira and Wright 1988; Murphy 1962), have been the focus of substantial debates in recent years (compare e.g., Epstein and Knight 1997 and Gillman 1997), and may have distinct implications for the decisions the Court generates (see, e.g., Epstein and Walker 1995), we thought it particularly important to focus on them.

Our investigation into these motivations comes in four steps. First, we provide a brief overview of dissents from denials of certiorari—the empirical reference point of the paper. Next, we develop a game-theoretic model of the choices confronting justices over these dissents, which incorporates the goals of policy and institutional integrity. Third, we test the predictions generated by those models against data collected from public records and the private papers of Justices William J. Brennan, Jr., William O. Douglas, Thurgood Marshall, and Lewis F. Powell, Jr. Finally, we take stock of our results and suggest extensions of our basic research enterprise.

1. Threats to Dissent from Denials of Certiorari

To illuminate the goals of justices, we focus on one particular strategic interaction: threats to dissent from denials of certiorari.1 While there are several ways that these threats come about (see Epstein and Knight 1998, 59), Figure 1 presents a typical path. As depicted, the interaction begins when the Court initially votes to deny certiorari and a justice who wants the Court to grant cert (the Granter) must decide whether to circulate an opinion dissenting from its denial. If the Granter does not circulate such a dissent, then the interaction terminates; if the Granter chooses to circulate a dissent, then the Denier must make a decision: whether to acquiesce to the Granter and change her cert vote or to call the bluff of the Granter and do nothing. The Granter then faces the final decision node of the game—she must decide whether

---

1In this paper, we use the term “dissents from denials of certiorari” to represent dissents written by justices in response Court decisions that either deny certiorari or dismiss disputes for want of a substantial federal question. In future efforts, we plan to incorporate dissents that protest the Court’s failure to note a case for oral argument, such as those filed in response to “grant, vacate, and remand” orders or summary affirmances (reversals).
to publish the dissent or acquiesce to the Denier and withdraw the dissent. Thus, there are four possible outcomes in the cert dissent game: (1) The Granter does not circulate a dissent and the Court denies cert, (2) the Denier reverses her vote in response to the dissent from the cert denial and the Court grants cert, (3) the Court denies cert and the Granter publishes a dissent, and (4) the Court denies cert and the Granter acquiesces by failing to publish her dissent. All these outcomes, it is worth noting, have obtained—at least during the Burger Court years.2

1.1 Why Study Dissents from Cert Denials?

In all of this, the question remains: Why, of the many possible strategic interactions, do we focus on dissents from denials of certiorari for our exploration of judicial goals? We have three specific reasons. First, while scholars continue to debate whether justices act in an interdependent fashion at the merits stage (compare Segal and Spaeth 1993 with Epstein and Knight 1998), many have come to the conclusion that justices behave strategically with regard to the certiorari decision (see, e.g., Schubert 1959; Boucher and Segal 1995; Caldeira, Wright, and Zorn 1996). Even justices have acknowledged that they think prospectively at this stage in the process. Consider the circumstances surrounding North Carolina v. Wrenn (1974), which involved the sufficiency of an affidavit used to obtain a search warrant. After the Court voted to deny certiorari, Justice White circulated an opinion dissenting from that decision and Justice Marshall joined it. But shortly after Chief Justice Burger—an unlikely Marshall ally—also signed on to White’s dissent, Marshall retracted his join. In a memo to the Court, Marshall (1974) wrote,

---
2Perry (1991) and Epstein and Knight (1998) supply specific examples of each outcome; Figure 4 of this paper provides data for the 1971-1981 terms of the Court.
I joined Byron’s dissent. After reconsideration I conclude that, while I agree with what is stated in [White’s] opinion, I doubt it will end up as a majority view. I, therefore, will change my vote from grant to deny.

What this example, not to mention the burgeoning body of literature, suggests is that judicial specialists can focus on the certiorari dissent model we present momentarily without being distracted by whether our assumption of interdependent interaction is plausible. The same, of course, could not be said if we chose to focus on merits decisions.

The second reason goes directly to our concern with judicial motivations: Scholars may generally agree that justices are strategic with regard to the cert decision, but they disagree over what preferences Court members are trying to maximize. Many, perhaps the great bulk of analysts, argue that the answer is policy (see, e.g., Songer 1979; Boucher and Segal 1995); and, at least with regard to threats to dissent from certiorari denials, some justices agree. To them, the primary purpose of these dissents is to persuade a sufficient number of Deniers to change their votes to grants. Justice John Paul Stevens said as much in a rather odd opinion in which he complained about the practice:

Admittedly these dissenting opinions may have some beneficial effects. Occasionally a written statement of reasons for granting certiorari is more persuasive than the Justice’s oral contribution to the Conference. For that reason the written document sometimes persuades other Justices to change their votes and a petition is granted that would otherwise have been denied. That effect, however, merely justifies the writing and circulating of these memoranda within the Court; it does not explain why a dissent which has not accomplished its primary mission should be published (Singleton 1978, 945).

Other justices and their clerks concur: “After [the cert] conference...there were certainly attempts at persuasion... The major vehicle for this was a dissent from denial; I mean, those were addressed to the Court as much as they are to the public. The justices get a little more vituperative if it’s something where they want to see people swayed.” Another simply said: Dissents from denials “are often attempts to persuade other justices—at least threats of denials are” (quoted in Perry 1991, 171, 177).
And, yet, both scholars and justices also point to the importance of the institutional integrity goal at the cert stage. We have already noted Caldeira and Wright’s (1988) work on case selection decisions, which operates under the eminently plausible assumption that justices desire to chime in on the most pressing issues of the day to maintain their importance in the federal system. Justices too have made note of the institutional integrity goal in conjunction with the practice of threatening to dissent from cert denials. In providing an explanation as to why justices occasionally succumb to these threats, Justice Stevens had this to say:

It can be argued that publishing these dissents enhances the public’s understanding of the work of the Court. But because they are so seldom answered, these opinions may also give rise to misunderstanding or incorrect impressions about how the Court actually works. Moreover, the selected bits of information which they reveal tend to compromise the otherwise secret deliberations in our Conferences. There are those who believe that these Conferences should be conducted entirely in public or, at the very least, that the votes on all Conference matters should be publicly recorded. The traditional view, which I happen to share, is that confidentiality makes a valuable contribution to the full and frank exchange of views during the decisional process; such confidentiality is especially valuable in the exercise of the kind of discretion that must be employed in processing the thousands of certiorari petitions that are reviewed each year. In my judgment, the importance of preserving the tradition of confidentiality outweighs the minimal educational value of these opinions (Singleton 1978, 945).

Stevens thus highlights the price his colleagues pay when they publish a dissent from certiorari: Because these dissents may compromise the institutional integrity of the Court—after all, they do make public otherwise private information about the cert process—Deniers may acquiesce and join the Granter. In other words, it is conceivable that at least some justices believe that the trade-off between protecting the integrity of the Court’s deliberations and achieving a policy goal weighs in favor of the former. If that is so, they will reverse their initial vote to deny cert.

Surely, this debate over policy versus integrity motivations is substantively interesting, with clear implications for the way justices go about making their case selection decisions. But it is also one we can fully exploit for our investigation into judicial goals. As our game-theoretic analysis below indicates, depending on their goals, we would expect distinct behavior on the part of
justices who voted initially to deny certiorari. By translating these conceptual expectations into behavioral predictions we can assess them against data, thereby enabling us to answer our primary research question; namely, whether judicial specialists should continue to rely exclusively on the policy motivation.

Our final reason for focusing on dissents from cert denials has to do with a point we made at the onset: A primary objective of all inquiries into judicial goals is to gain a better understanding of the development of law. Since threats to dissent from the denial of cert have contributed to that development, it is incumbent on us to understand the motivations behind them. To see this point, we only need consider the many important cases to which the Court would have denied cert had it not been for the intervention of a threat to dissent from that decision: *Flood v. Kuhn* (1972), *New York v. Quarles* (1984), and *Bowers v. Hardwick* (1986), to name just a few.

2. The Cert Dissent Game

To model the tradeoff between the motivations of policy and institutional integrity, we posit the existence of two players, a Granter (Gr) and a Denier (Dn). Both players can take on one of two types: a Policy Type, who places individual policy goals (obtaining a grant of certiorari) over institutional integrity (making public otherwise private information about cert deliberations); and an Integrity Type, who prefers preserving institutional integrity to achieving policy goals. We further assume that while the justices know the basic structure of the game (see Figure 1), they have incomplete information about the type of justice against whom they are playing; in other words, they do not know with certainty whether their opponent is generally a Policy or Integrity type.

---

3In this paper, we focus exclusively on the motivations of Deniers; in a future effort, we hope to consider why Granters choose to circulate (or not) dissents from the denial of certiorari. For more on this point, turn to our discussion in Section 5.
Figure 2, a revised version of the basic cert game presented in Figure 1, captures this assumption of incomplete information by allowing Nature to make the first move. Specifically, Nature chooses a type for each justice from a lottery, which is common knowledge. With probability $\alpha$, the Granter and Denier are both Policy Types. With probability $\beta$, the Granter is Policy Type and the Denier is Integrity Type. With probability $\gamma$, the Granter is Integrity Type and the Denier is Policy Type. With probability $1 - \alpha - \beta - \gamma$, both justices are of Integrity Types. After the draw takes place, the Granter is revealed by her type (either Policy or Integrity) and the Denier is revealed by her type (either Policy or Integrity). Yet, the Granter is uncertain of the Denier’s type, and the Denier is uncertain of the Granter’s type.

From there the basic cert game enfolds, with the next move taken by the Granter. The Granter must decide whether to do nothing (D) or circulate a dissent (C). If the Granter circulates a dissent, the Denier must choose between reversing herself and granting cert (G) or ignoring the threat (I). If the threat is ignored, the Granter must decide whether to publish the dissent (P) or acquiesce (A). From this combination of possible actions, the four outcomes detailed earlier emerge:

2. Reversal (R). The Denier changes her mind and reverses her original vote to deny. Cert is granted.
3. Publication (P). The Denier ignores the threat posed by the dissent, and the Granter publishes the dissent. Cert is denied and the game ends.
4. Acquiescence (A). The Denier ignores the threat posed by the dissent, and the Granter acquiesces by not publishing the dissent. Cert is denied and the game ends.

—for notational convenience, we label the action and outcome spaces with an asterisk when the justice is of Integrity Type. For example, the actions D and D* both represent the Do Nothing action for the Granter. The first is for the Policy Type, and the second is for the Integrity Type. We label the outcome space in a similar fashion.
Given these four possible outcomes, we must define the preferences for each justice. To ease expected utility calculations below, we normalize the utilities for each justice; we also define ordinal utilities, from which to perform comparative statics. Note that for a particular realization of the game, the utilities must be cardinal because the justices make expected utility calculations.

For a Granter of Policy Type: \( u(R) > u(P) > u(A) > u(SQ) \), normalized to \( 1 > u(P) > u(A) > 0 \).

For a Granter of Integrity Type: \( u(R^*) > u(A^*) > u(P^*) > u(SQ^*) \), normalized to \( 1 > u(A^*) > u(P^*) > 0 \). For a Denier of Policy Type: \( u(SQ) > u(A) > u(P) > u(R) \), normalized to \( 1 > u(A) > 0 > u(R) \). For a Denier of Integrity Type: \( u(SQ^*) > u(A^*) > u(R^*) > u(P^*) \), normalized to \( 1 > u(A^*) > u(R^*) > 0 \).

The equilibrium concept we use to solve this game is Perfect Bayesian Equilibrium (Morrow 1994, 176), which is characterized by a set of strategies that are sequentially rational given the beliefs, and a set of beliefs that are characterized by the equilibrium strategies and Bayes Theorem whenever possible. For the cert dissent game, then, an equilibrium will consist of the following set of strategies and beliefs:

\[
\{ \text{Gr strategy at Node 1 if Policy Type, Gr strategy at Node 1 if Integrity Type; Gr Strategy at Node 3 if Policy Type, Gr Strategy at Node 3 if Integrity Type; Dn strategy at Node 2 if Policy Type, Dn Strategy at Node 2 if Integrity Type: Gr belief Pr(Dn Policy Type | I), Dn belief Pr(Gr Policy Type | C)} \}.
\]

With this notation, we can state the following theorem.

**THEOREM 1.** The belief /strategy combination \( \{C, C^*; P, A^*; I, G^*: 1, \alpha + \beta \} \) is a Perfect Bayesian Equilibrium (I) of the cert dissent game if Equation \([1]\) holds. Otherwise, \( \{C, C^*; P, A^*; I, I^*: \alpha + \gamma, \alpha + \beta \} \) is a Perfect Bayesian Equilibrium (II).

**PROOF.** To demonstrate that the above strategy / belief combination is a Perfect Bayesian Equilibrium, we work backwards up the game tree, and show that the strategy combinations are best responses. We then use Bayes Theorem to calculate beliefs given the equilibrium strategies.
At Node 3, a Policy Type Granter chooses P because \( u(P) > u(A) \). Similarly, at Node 3, an Integrity Type Granter chooses A* because \( u(A^*) > u(P^*) \). Let \( \sigma_{Gr} \) be the probability that the Granter plays P or P* at Node 3. At Node 2, a Policy Type Denier calculates the following expected utilities,

\[
\begin{align*}
E(G) &= u(R) \\
E(I) &= \sigma_{Gr} \cdot 0 + (1-\sigma_{Gr}) \cdot u(A) = (1-\sigma_{Gr}) \cdot u(A).
\end{align*}
\]

Note that \( u(R) \) is strictly negative, and \((1-\sigma_{Gr})\cdot u(A)\) is strictly positive. Thus, \( E(I) > E(G) \), which implies that a Policy-Type Denier always plays I. At Node 2, an Integrity-Type Denier calculates the following expected utilities,

\[
\begin{align*}
E(G^*) &= u(R^*) \\
E(I^*) &= \sigma_{Gr} \cdot 0 + (1-\sigma_{Gr}) \cdot u(A^*) = (1-\sigma_{Gr}) \cdot u(A^*).
\end{align*}
\]

An Integrity-Type Denier therefore plays \( G^* \) if \( u(R^*) > (1-\sigma_{Gr}) \cdot u(A^*) \). Rearranging terms, an Integrity Type Denier plays \( G^* \) if, \( \lceil u(R^*) / u(A^*) \rceil + \sigma_{Gr} > 1 \). The value \( \sigma_{Gr} \) comes from the equilibrium strategies and beliefs held by the Denier (calculated below using Bayes Theorem). Thus, \( \sigma_{Gr} = Pr(Gr \text{ plays } P \text{ or } P^*) = Pr(Gr \text{ Policy Type } | C) = \alpha + \beta \). Re-writing the inequality above, an Integrity Type Denier plays \( G^* \) if,

\[
\lceil u(R^*) / u(A^*) \rceil > 1 - \alpha - \beta. \tag{1}
\]

At Node One, both a Policy Type Granter plays C and an Integrity Type Granter plays C* because both are strictly dominant strategies.

Given these strategies, we can compute each player’s beliefs. We begin by calculating the Denier’s beliefs at Node 2, \( Pr(Gr \text{ Policy Type } | C) = \lceil Pr(C | Gr \text{ Policy Type}) \cdot Pr(Gr \text{ Policy Type}) \rceil / (Pr(C | Gr Policy Type) \cdot Pr(Gr Policy Type) + Pr(C | Gr Integrity Type) \cdot Pr(Gr Integrity Type)) = 1 \cdot (\alpha + \beta) / (1 \cdot (\alpha + \beta) + 1 \cdot (1 - \alpha - \beta)) = \alpha + \beta \). We can similarly calculate the
Granter's beliefs. First, assume that Equation (1) holds, then \[ Pr(Dn \text{ Policy Type} | I) = \frac{Pr(I | Dn \text{ Policy Type}) \times Pr(Dn \text{ Policy Type})}{Pr(I | Dn \text{ Integrity Type}) \times Pr(Dn \text{ Integrity Type})} = 1 \times (\alpha+\gamma) / [1(\alpha+\gamma) + 0(1-\alpha-\gamma)] = \alpha + \gamma. \]

Next, assume that Equation (1) does not hold. Then, \[ Pr(Dn \text{ Policy Type} | I) = \frac{Pr(I | Dn \text{ Policy Type}) \times Pr(Dn \text{ Policy Type})}{Pr(I | Dn \text{ Integrity Type}) \times Pr(Dn \text{ Integrity Type})} = 1(\alpha+\gamma) / [1(\alpha+\gamma) + 1(1-\alpha-\gamma)] = \alpha + \gamma. \quad \text{QED.} \]

**2.1 Discussion**

In Theorem 1 we posit the Perfect Bayesian Equilibrium of the incomplete information cert dissent game. Since Equation \([1]\) is uniquely defined by the Denier's preferences and the parameters that define the lottery, one and only one of the above equilibrium will exist. The first equilibrium (Equilibrium I) is a fully separating one, with each player revealing her type when pursuing equilibrium strategies: the Denier reveals her type with her strategy at the second node, and the Granter reveals her type at the third node. From these equilibrium strategies and the parameters that define the lottery, we can calculate the probabilities of observing outcomes of the cert dissent game. For Equilibrium I, they are as follows:

- \[ Pr(\text{Reverse of Cert Vote by Denier}) = 1-\alpha-\gamma \]
- \[ Pr(\text{Dissent Published}) = \alpha \]
- \[ Pr(\text{Circulate Dissent and Acquiesce}) = \gamma \]

The second equilibrium is semi-separating. The Denier's equilibrium strategies are pooling, as both Policy Types and Integrity Types ignore the circulated dissent. The Granter, on the other hand, reveals her type at the third node of the game. The probabilities of observing outcomes of the cert dissent game in Equilibrium II are:

- \[ Pr(\text{Reverse of Cert Vote by Denier}) = 0 \]
- \[ Pr(\text{Dissent Published}) = \alpha+\beta \]
- \[ Pr(\text{Acquiesce}) = 1-\alpha-\beta \]
The most obvious difference between the two equilibria is that in Equilibrium II the probability of observing a reversal of a cert vote is zero. In this instance, the Denier never changes her original vote. Moreover, the probability of observing a published dissent or acquiescence is larger than in Equilibrium I. Thus, depending on the values of the parameters of Equation \[1\], we expect to observe qualitatively different judicial behavior.

### 2.2 Comparative Statics

Under what conditions does Equation \[1\] hold? Because this equation determines whether Equilibrium I or Equilibrium II will be realized, we must address this question to generate predictions about the behavior of the justices. Doing so, though, requires us to provide some mathematical preliminaries.

Equation \[1\] is defined as: \[
\frac{u(R^*)}{u(A^*)} > 1 - \alpha - \beta.
\]
If this inequality holds, Equilibrium I is realized. If it does not, Equilibrium II is be realized. Equation \[1\] can be re-written: \[
\frac{u(R^*)}{u(A^*)} - (1 - \alpha - \beta) > 0.
\]
To simplify notation, let \(C = (1 - \alpha - \beta)\). Since \(\alpha\) and \(\beta\) are probabilities, \(C \in [0,1]\). We are thus interested in the properties of the function \(f[u(R^*), u(A^*)] = \frac{u(R^*)}{u(A^*)} - C\). Note that \(1 > u(A^*) > u(R^*) > 0\), which implies that the domain of \(f\) is a triangle. The first partial derivatives of this function are:

\[
\frac{\partial f}{\partial u(R^*)} = \frac{1}{u(A^*)}
\]
\[
\frac{\partial f}{\partial u(A^*)} = -\frac{u(R^*)}{u(A^*)^2}
\]

Hence, \(f\) is increasing in \(u(A^*)\) and decreasing in \(u(R^*)\) in its domain. By examining the second partial derivative of \(f\), it is clear that \(f\) has no local extrema in its domain.

The key to the comparative statics is to determine when \(f\) is positive. Let \(f[u(R^*), u(A^*)] = \frac{u(R^*)}{u(A^*)} - C = 0\). This implies, \(u(A^*) = \frac{1}{C}u(R^*)\), which defines a line which partitions the domain of \(f\). Figure 3, a display of this result, shows that the domain of \(f\) falls
within the thick triangle. For a particular value of C, the domain is partitioned by the line defined above. To the left (above) the line, f is negative, and Equilibrium I holds. To the right (below) the line, f is positive, yielding Equilibrium II. This follows directly from the partial derivatives above.

[Figure 3 about here]

By way of illustration, consider an example with fixed values. Let the probability of being a particular type be equal across types, implying \( \alpha = \beta = \gamma = 1/4 \). We are interested in finding when \( \left[ u(R^*) / u(A^*) \right] - 1/2 > 0 \). The result above tell us that points to the left of the line \( u(A^*) = 2 \cdot u(R^*) \) will produce Equilibrium II. Thus, for \( u(R^*) = .2 \) and \( u(A^*) = .8 \), \( \left[ u(R^*) / u(A^*) \right] - 1/2 = (.4/.6) - 1/2 = -.25 \), which is indeed negative. This implies that Equilibrium II holds. Similarly, for \( u(R^*) = .6 \) and \( u(A^*) = .8 \), \( \left[ u(R^*) / u(A^*) \right] - 1/2 = (.6/.8) - 1/2 = .25 \), implying that Equilibrium I holds.

2.3 Hypotheses

To generate predictions, we begin with the comparative statics on the function f. Using the mathematical results above, we note, first, that f is increasing in \( u(R^*) \). Holding all else constant, as the Denier’s policy cost associated with reversing one’s cert vote increases (implying \( u(R^*) \) decreases), the probability of observing Equilibrium II over Equilibrium I increases. This, coupled with the probabilities we posit above of observing particular outcomes, enables us to state the first prediction.\(^5\)

**HYPOTHESIS 1.** As the Denier’s policy costs associated with changing her cert vote increase (\( u(R^*) \) decrease), the likelihood of observing a reversal of cert vote by the Denier decreases and the likelihood of observing a published dissent and acquiescence increases.

\(^5\)We derive all the hypotheses in this section by comparing the probabilities of observing particular outcomes for each Equilibrium. For example, in Equilibrium, I the probability of observing a published dissent from denial is \( \alpha \). For Equilibrium II, the probability of observing the same outcome is \( \alpha + \beta \), which is strictly greater than \( \alpha \).
Hypothesis 1, in other words, comports nicely with standard political science conceptions of judicial decision making: The closer the distance between the political preferences of the Denier and the Granter, the more likely the Denier is to switch her vote and the less likely that the dissent will be published or retracted.

The mathematical results above also indicate that the function \( f \) is decreasing in \( u(A^*) \). Holding all else constant, as the Denier’s transaction cost associated with playing the cert dissent game increases (implying \( u(A^*) \) decreases), the probability of observing Equilibrium I over Equilibrium II increases. We can thus state the second hypothesis as follows.

**HYPOTHESIS 2.** As the Denier’s transactions costs associated with paying the cert dissent game increase (\( u(A^*) \) decrease), the likelihood of observing a reversal of the cert vote by the Denier increases and the likelihood of observing a published dissent or acquiescence decreases.

This hypothesis deals with the relative costs incurred by the Denier. It suggests that the Denier would prefer not to play the game; after all, she initially voted against granting cert. But, once the Granter circulates her writing, the Denier who has a vested interest in the interaction will incur some transaction cost (\( i.e., \) she may feel compelled to read new material or spend time reconsidering her decision). What we expect is that as this cost increases, the likelihood of the Denier reversing her vote increases, and the likelihood of the Granter publishing or retracting the dissent decreases.

In addition to hypotheses derived from analysis of the function \( f \), it is entirely plausible that certain justices are more willing to sacrifice institutional integrity than others. Accordingly, we can state two additional hypotheses associated with the parameters that define the lottery (\( i.e., \) observed judicial behavior will change, as the probabilities of Nature choosing different types of justices change). To generate these hypotheses, we use the constant \( C = (1-\alpha-\beta) \) parameter and note that as \( C \) increases, the probability of observing Equilibrium II over Equilibrium I increases. (Intuitively, one can think of the line in Figure 3 sweeping to the right as \( C \)}
increases.) Our first prediction comes from the parameter $\alpha$, which is the probability associated with the Granter being Policy Type.

**HYPOTHESIS 3.** As the probability of the Granter being a Policy Type increases ($\alpha$ increases, implying $C$ decreases), the probability of observing a reversal of the cert vote increases and the probability of observing acquiescence or a published dissent decreases.

The final hypothesis comes from the comparative static on the $\beta$ parameter.

**HYPOTHESIS 4.** As the probability of the Denier being an Integrity Type increases ($\beta$ increases, implying $C$ decreases), the probability of observing a reversal of the cert vote increases and the probability of observing acquiescence or a published dissent decreases.

Taken collectively, these expectations strike at the heart of our interest in judicial motivation. Hypothesis 3 centers on the type of justice who circulates the dissent from denial, suggesting that her colleagues will be more likely to switch their votes if they think that she is policy-motivated. That is because they believe she will be inclined to publish (rather than retract) her opinion if she does not obtain a sufficient number of votes. Hypothesis 4 concerns the Deniers, asserting that those who value integrity over policy are more likely to change their votes to prevent information about the cert process from becoming public.

3. Assessing the Hypotheses

However interesting the hypotheses, our investigation into judicial motivations cannot end here. For, as so many scholars have suggested (see generally Green and Shapiro 1994), the mere generation of predictions (even of the intuitive sort) can go only so far in helping us to discern the primary goals of justices. To accomplish this in full, we must assess our predictions against data—a non-trivial task as our discussion below indicates.

3.1 The Data

Our four hypotheses center on (1) the circumstances under which justices are likely to stick with or change their votes in response to dissents from certiorari denials and (1) the circumstances under which a dissent from a certiorari denial is likely to succeed (convince the
Court to grant cert) or not. For this paper we focus on the former, micro-level votes, specifically on the votes of Deniers (that is, the votes of those justices who wanted to deny cert in cases in which a Granter circulated a dissent from denial), which form our unit of analysis; and on vote reversal (from “deny” to “grant” or no reversal), which constitutes our dependent variable.

In what follows, we specify the procedure we used to (1) identify the relevant cases (those in which a justice circulated a dissent from the denial of cert) and (2) obtain the votes of Deniers in those cases. Section 4 describes the various measures of our independent variables, as well as the key findings.

3.1.1. Identifying Cases in which a Justices Dissented from a Cert Denial.

Because Spaeth’s U.S. Supreme Court Judicial Data Base includes cases in which a justice published a dissent from cert, it would seem to be a simple enough task to generate a list of the suits relevant to our study. But two kinds of dissents greatly complicate matters: those that go unpublished and those that succeed in forcing a cert grant. Since neither sees the light of day, we needed to move beyond the Data Base and other public records, and to the papers of the justices. Specifically, from the Brennan and Marshall collections in the Library of Congress, we were able to obtain the docket number of every case in which a justice circulated a dissent from cert denial—dissents that were published, retracted, and successful—between the 1971 and 1981.

---

*We excluded “boilerplate” or “stock” dissents—Brennan’s terms for the sorts of writings Marshall and/or Stewart and/or he filed in death penalty, double jeopardy, and obscenity cases that the Court refused to hear. Unlike most other dissents from cert denials, the purpose of these submissions was not to persuade the Court to hear the cases at hand (see Perry 1991; Epstein and Knight 1998). In fact, Brennan et al. typically did not even bother circulating them to their colleagues; rather, they simply filed them for inclusion in the public record. We also excluded:
  * one-line dissents—“Justice Brennan would grant cert.”
  * what the Court calls “footers”: “Justice Brennan would grant cert, believing there is s circuit conflict.”
  * Dissents from cert denials that wanted to “hold” the case.
terms, though for this paper we concentrate on the natural court occurring between the 1971 and 1975 terms (through Douglas’ retirement).\textsuperscript{7}

Figure 4 displays information about these three sorts of dissents.\textsuperscript{8} Note that, while published dissents predominate, the two others occur with some frequency. Especially interesting, we believe, is that nearly one out of every four dissents resulted in a success for the Granter.\textsuperscript{9}

\begin{figure}[htb]
\centering
\includegraphics[width=\textwidth]{figure4.png}
\caption{Figure 4 about here}
\end{figure}

3.1.2. Obtaining the Votes of Deniers and the Outcomes in Cases in which a Justice Circulated a Dissent from the Denial of Cert. With the list of cases in which a justice circulated a dissent from denial in hand, we turned to the tasks of identifying the units of analysis (the votes of deniers in these cases)\textsuperscript{10} and, ultimately, the dependent variable—whether or not the vote changed from a “deny” to a “grant.”

\textsuperscript{7}Our specific data collection procedures were as follows.

\begin{enumerate}
\item We began with the administrative folders in the Brennan and Marshall collections, which house dissents from cert denials, along with occasional memoranda over the dissent. We went through all these files for the 1971-1981 terms, coding every dissent and what occurred (including who dissented and, if revealed in the bargaining memoranda, who switched votes).
\item We went through all the Brennan/Marshall case files to ensure that we did not miss dissents that led to a cert grant.
\item We went to the Spaeth Data Base, pulled all dec_type 3 cases, looked up each case (via LEXIS searches) and eliminated excluded dissents (primarily “boilerplates”; see note 6).
\item We compared the remaining cases (on the Spaeth list) to the ones on the Library of Congress list. We took this last step to determine whether the Marshall/Brennan files were complete. Happily, there were no cases in the Spaeth Data Base that were not also in the Marshall/Brennan files. (Of course, there were dissents that were in the papers but not in the published records—those that were retracted or that led to a cert grant.) We can thus have a good deal of confidence in the data—that is, between these two justices, they seem to have kept every circulated dissent.
\end{enumerate}

\textsuperscript{8}Figure 4 displays data for the 1971-1981 terms; the results for the 1971-1975 terms parallel those for the entire period.

\textsuperscript{9}This finding, it is worth noting, may have serious implications for case selection models that fail to take into account dissents from cert denials (that is, for all existing models). While pursuing these implications is beyond the scope of this paper, we commend the challenge to others and discuss it in Section 5.

\textsuperscript{10}To be clear crystal clear, votes (not cases) are the units of analysis. So, if seven justices voted to deny certiorari in a given case, we would count that as seven votes (not one case.). For each vote, our task was to determine whether or not it changed from a deny to a grant (the dependent variable).
Because justices do not regularly report cert votes, we again relied on unpublished sources. From the Brennan, Douglas, Marshall, and Powell collections (including docket books, and case and administrative files), we were able to obtain the following information about cases in which the Court initially denied cert and a justice circulated a dissent: the initial cert vote, the identity of the justice(s) who circulated the dissent, the identity of the justices (if any) who changed their votes, and the outcome.\textsuperscript{11}

These data, in turn, enabled us to generate the units of analysis and the dependent variables. Specifically, we found that during the 1971-1975 terms, justices cast a total of 945 votes to deny cert in the 143 cases in which a justice circulated a dissent from the denial of cert. Of those 945 votes, 812 remained denials after circulation of the dissent (coded as 0); 133 changed from denials to grants (coded as 1).\textsuperscript{12}

4. Results

The question, of course, is whether the predictions from our formal analysis supply us with any leverage in understanding these votes, whether they remained the same or changed. It is to the task of answering this that we now turn.

4.1 Hypothesis 1. Policy Distance

Hypothesis 1 suggests that the closer the Denier is to the Granter in policy terms, the greater the likelihood of a vote switch. The explanatory variable, then, is policy preference compatibility, which we measured by (1) assigning each Granter and each Denier a policy score based on actual votes cast (the percent liberal votes cast in civil liberties and economics cases, as

\textsuperscript{11}Unfortunately we had to exclude about 20 cases from this study due to missing or illegible vote data. We hope to obtain the information necessary to include them in the next version of this paper.

\textsuperscript{12}It is worth noting that our data probably underestimate vote shifts. This is so because the docket sheets of many (if not most) of the cases we excluded (see note 11) were so marked up that we were unable to interpret them. Only by going back to the original sources will we be able to code votes over these petitions.
derived from the U.S. Supreme Court Database$^{13}$) and (2) taking the absolute value of difference between the policy scores of the Denier and the Granter. So, for example, in *Sarnoff v. Schultz* (1972) seven justices (Burger, Stewart, White, Marshall, Blackmun, Powell, and Rehnquist) voted to deny cert; Douglas and Brennan voted to grant cert, with Douglas circulating a dissent from the denial. In accord with our scheme, Douglas (the Granter) received a score 87.4, representing the percent of liberal votes he cast in civil liberties and economics cases; Burger obtained a score of 35.3; Stewart, 53.0; and so on (see note 13). To ascertain the policy distance between Douglas and each of the deniers, we then took the absolute difference between them (*e.g.*, For Douglas-Burger: $87.4 - 35.3 = 52.1$). We argue that the lower this policy distance, the higher the ideological compatibility. And the higher the compatibility, according to Hypothesis 1, the greater the likelihood of a vote switch.

To explore this relationship, we used logistic regression—with Equation 2 reporting the results (standard errors are in parenthesis). Given our coding scheme, a negatively signed and significant coefficient for policy distance would lend support to Hypothesis 1.

$$\text{Prob (vote switch) = } -0.856 + -0.033 \times \text{(Policy Distance)}$$

This is exactly what we observe. Just as our hypothesis suggests, the policy distance between the Denier and Granter is a significant determinant of cert vote switching: The lower the distance, the more likely that a reversal will occur. To put it in concrete terms, when a Douglas circulates a dissent from a denial of cert, a Brennan is more likely to change his vote (from deny to grant) than is a Rehnquist.

$^{13}$For this and all other variables derived from the Spaeth database, we used citation plus split vote as the unit of analysis (1971-1975 terms). The percentages of liberal votes cast for the nine justices included in this study are as follows: Burger, 35.3; Douglas, 87.4; Brennan, 80.0; Stewart, 53.0; White, 48.2; Marshall, 79.0; Blackmun, 44.0; Powell, 42.5; and Rehnquist, 28.5.
Of course, we recognize that this analysis is far from conclusive—it does not control for other potentially relevant factors; it focuses on a relatively short time period during one particular Court era; and, it excludes, for unavoidable reasons (see notes 11 and 12) a good many cases. And, yet, it is certainly suggestive. Just as our formal analysis (not to mention conventional wisdom) predicts, policy distance seems associated with vote shifts.

4.2. Hypothesis 2. Transaction Costs

Hypothesis 2 asserts that as the Denier’s cost of playing the game increases, she will be more likely to reverse her vote. To measure these costs, we used the total number of dissents from certiorari denials that the Denier (when she played the role of Granter) circulated between the 1971 and 1975 terms. This measure, we believe, captures the intuition behind the hypothesis: The more dissents written by the Denier, the higher the investment in the Court’s cert process, and the more likely she is to take seriously dissents filed by her colleagues. This investment of energy, in turn, should lead her to reverse her vote more often than those justices with less of an interest or stake in the game. In operational terms, then, the greater the number of dissents circulated as a Granter, the greater the likelihood of a vote reversal (from deny to grant) as a Denier.

Once again, we used logistic regression to assess this relationship, with Equation 3 depicting the results. As we can see, the data are compatible with the prediction: Justices with greater investments in the cert process are more likely to switch their votes. Moreover, as Equation 4 illustrates, this relationship holds even after we control for distance in policy preferences (Hypothesis 1)

\[
\text{Prob (vote switch)} = \text{-2.033 + .024 (N of Dissents) [3]}
\]

\[
(-.110) \quad (.005)
\]

\[14\] The figures for the nine justices are as follows: Burger, 2; Douglas, 91; Brennan, 6; Stewart, 2; White 26; Marshall, 8; Blackmun, 3; Powell, 5; and Rehnquist, 0.
\[
\text{Prob (vote switch) } = -1.054 + .025 \text{ (N of Dissents)} + -.0347 \text{ (Policy Distance)} \\
(\cdot 175) \quad (\cdot 005) \quad (\cdot 006)
\]

4.3. Hypotheses 3 and 4. Policy and Integrity Motivations

Hypotheses 3 and 4 center on motivations. Specifically, as the probability of the Granter being a Policy Type increases, the probability of observing a reversal of the cert vote increases (H3); concomitantly, as the probability of the Denier being an Integrity Type increases, the probability of observing a reversal of the cert vote increases (H4).

Assessing these hypotheses, then, required us to devise a measure of the types (Integrity and Policy) of justices playing the cert game. Given the concerns over validity we confronted in so doing, we settled on not one but two measures. The first is the number of special concurrences the justice wrote as a percentage of the time the justice voted in the majority. Special concurrences, unlike regular concurrences, have the ability to deprive the Court of a majority, which may well harm the Court’s prestige. Moreover, the justice who writes a special concurrence sacrifices institutional integrity in order to advance her own statement of what the law should be (see Abraham 1968; Giles 1977, 405). This measure, then, nicely characterizes the tradeoff suggested by our model.\textsuperscript{15} The second is each justice’s deference to precedent. When a precedent is established with which a justice disagrees, that justice must decide whether to defer to the precedent in subsequent cases or stick to her policy preferences. So, at least conceptually (see Knight and Epstein 1996b), this too characterizes the tradeoff between institutional integrity and policy goals that we seek to assess. To animate this variable, we relied on data from Spaeth and Segal (1999, table 9.1), which provides the percentage of time each justice votes in accord with precedent.\textsuperscript{16}

\textsuperscript{15}Again, we rely on the Spaeth Data Base, with the special concurrence data as follows: Burger, 5.5; Douglas, 12.4; Brennan, 5.4; Stewart, 5.1; White, 4.5; Marshall, 5.4; Blackmun, 6.0; Powell, 4.6; and Rehnquist, 3.7.

\textsuperscript{16}The percentages are as follows: Burger, 10.3; Douglas, .7; Brennan, 1.2; Stewart, 17.5; White, 13.4; Marshall, 1.1; Blackmun, 20.3; Powell, 27.3; and Rehnquist, 5.2.
In short (and in operational terms), we expect that vote switches will be more likely when the Granter is prone to write special concurrences or to ignore precedent (a Policy Type) (H3) and when the Denier is less prone to write special concurrences or to ignore precedent (an Integrity Type) (H4). The data, however, fail to support either of these expectations, regardless of which measure of Type we use. In fact, in both instances, the results of the logistic regressions worked in precisely the opposite direction from what we predicted: At least on our measures, Policy-Type Granters are less likely to bring about vote reversals than their Integrity-minded counterparts and Integrity-Type Deniers are more likely to stick with votes than their Policy-oriented counterparts.

What should make of these findings? Not much, as it turns out. The problem, as simple diagnostic work revealed, is that both measures of type are collinear with policy preferences—such that the correlation between Granter ideology (as measured by percent liberal votes cast in civil liberties cases) and the number of special concurrences written by the Granter is .883; that figure is a whopping -.938 for Granter ideology and the Granter’s precedent score. Thus, all we have shown for these data and for this set of justices, is that liberal Granters are less likely to generate vote changes and that liberal Deniers are more likely to reverse their votes.

5. Discussion

We started this paper with a simple question: To what extent should we continue to place exclusive emphasis on the policy motivation to the neglect of others, such as the maintenance of institutional integrity? The answer yielded by our formal analysis is that sole reliance on the policy goal may be misplaced. While it is occasionally true that different motivations will lead justices to make similar choices (thereby creating the problem of behavioral equivalence), this does not—at least in the theoretical world—hold for the cert dissent game. Rather our model implies that justices who value integrity over policy will behave in a fundamentally different ways than those who make the tradeoff in the other direction.
Unfortunately, operational and data-driven problems prevented us from fully assessing the predictions derived from our formal analysis. To be sure, we found evidence to support conventional notions about the importance of policy distance (as well as more unconventional ones, at least in this literature, about transaction costs). But simply because policy appears to be a significant factor in explaining vote reversals does not mean we should rule out the role the integrity motivation may also play. We cannot take this step until we develop a measure of Type that is conceptually and statistically distinct from ideology or expand the data set such that the relationship between our existing measures of Type and those for ideology is less collinear.¹⁷

Two final notes—both of which center on the substantive problem of dissents from denials of certiorari. First, for the reasons we provided at the onset, these dissents (and the ensuing interactions over them) are appropriate vessels to use for investigations into motivations of Supreme Court justices. But to view this form of behavior as a mere laboratory instrument would be to miss important features of the Court’s decision-making environment: These dissents occur with an unexpected degree of frequency (especially once one eliminates “boilerplates,” as we did; see note 6) and they successfully convert a “denial” to a “grant” nearly 25 percent of the time. Here we concentrated on one of these features—success in the form of micro-level vote shifts; in future efforts, we will consider success at the macro level, to which our existing formal model speaks; as well as the distinct question of why justices circulate these dissents in the first instance. This is especially worthy of study since we know that at least one justice votes to grant cert in nearly 50 percent of the petitions that the Court discusses and denies but that Granter file dissents in only a small fraction of these cases.

Second and relatedly, the very fact that these dissents regularly succeed in forcing a cert grant means that a non-trivial percentage (perhaps as high as 20 percent during some terms) of

¹⁷Given the dominance of Douglas as a Granter during the five-year period under analysis (see note 14 ), the latter is not an impossibility.
the Court’s plenary docket consists of cases that the justices initially rejected. And, yet, we can identify no existing models of the Court’s case selection process that take into account this form of internal bargaining. Given the data, it is now incumbent on scholars to contemplate, at the very least, how to begin to incorporate this feature into their decision-making analyses.

6. References


Marbury v. Madison. 1803. 5 U.S. 137.


Spaeth, Harold J. and Jeffrey A. Segal. 1999. Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court. Cambridge University Press.


Figure 1. The Basic Cert Dissent Game

Note: Gr= justice wanting to grant cert; Dn= justice wanting to deny cert.

**Figure 2.** Basic Cert Dissent Game with Incomplete Information

- **Granter Utility Function:**
  - $1 > u(P) > u(A) > 0$
  - $1 > u(A^*) > u(P^*) > 0$

- **Denier Utility Function:**
  - $1 > u(A) > 0 > u(R)$
  - $1 > u(A^*) > u(R^*) > 0$
Figure 3. Characterization of Equation \[1\]
Figure 4. Frequency of the Types of Dissents from Denials of Certiorari

Dissent from Cert Denial, 1971-1981 Terms (N=385)

- Fails and is Published: n=273, % = 70.9
- Fails and is Retracted: n=29, % = 7.5
- Succeeds: n=83, % = 21.6