A Rational Choice Theory of *Certiorari*: Hierarchy, Strategy and Decision Costs at the Courts

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A RATIONAL CHOICE THEORY OF CERTIORARI:
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by

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Abstract: This paper develops a rational choice model of Certiorari. The paper has two building blocks: first, that the Court does not make (either Certiorari or substantive) decisions in isolation. Instead, all Court's decisions are taken in a game with the other institutions of government (i.e. Congress, administrative agencies, the President, and the lower courts). Thus, modeling of this game is crucial to understand how Certiorari decisions are taken. Second, Certiorari would play no role if the making of decisions was costless. While there is substantial anecdotal evidence that such is the case, the important role of decision costs have not yet been introduced in the formal modeling of Court behavior. We show that decision costs provide discretion to the Appeal Courts. The extent of Appeal Courts' discretion depends on the magnitude of decision costs and on the disutility the Court gets from outcomes distant from its ideal point. Furthermore, decision costs at the Court imply that the Supreme Court is more responsive than lower courts to marginal changes in the composition of Congress. Finally, we show that in equilibrium, Cert is granted only if decision costs are stochastic.

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1. Introduction

The Supreme Court among all Courts in the US judiciary is the only one that can actually decide which cases to consider. This feature of the Court tends to bias most studies of Supreme Court decisions.\(^1\) There has been substantial political and legal research trying to understand the *Certiorari* decision and how it relates to the final decisions on the cases themselves.\(^2\) This literature, however, has focused almost exclusively on justices' voting strategies without considering further the interaction between the Supreme Court and the other institutions of government.\(^3\) A separate, but related, literature has focused on the extent by which lower courts follow changes in Supreme Court policies.\(^4\) This literature, however, has not modeled the relationship between lower court responsiveness and the extent of Supreme Court decision costs and its interaction with other institutions of government, and hence, with the *Certiorari* process.

In this paper we develop a rational choice model of *Certiorari* decisions which is based on an analysis of the interaction among the Supreme Court, the lower courts and Congress along the lines of Gely and Spiller (1990a, 1990b), Spiller and Gely (1990), and (1991). This research is related to a series of recent work that model the judiciary as it interacts with the other institutions of Congress. In particular, it is closely related to the work by Ferejohn and Shipan (1990), Marks (1988), and McCubbins, Noll and Weingast (1987), (1989). The model has two main building blocks: first, the Court does not make

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1. In Spiller and Gely (1991) there is a discussion of how it affects their econometric estimates of the determinants of Supreme Court preferences, and how they have tried to deal with that bias.


3. See, however, Caldeira and Wright (1988), who consider the role of organized interest groups in the *Certiorari* process.

4. See, for example, Gruhl (1980), Songer (1987) and Songer and Sheehan (1990) and references therein.
(either Certiorari or substantive) decisions in isolation. Instead, all Court’s decisions are taken in a game with the other institutions of government (i.e. Congress, administrative agencies, the President, and the appeal courts). Thus, the modeling of this game is crucial to understand how Certiorari decisions are taken. Second, Certiorari would play no role if the making of decisions was not an expensive activity. While there is substantial anecdotal evidence that such is the case, the crucial role of decision costs have not yet been introduced in the formal modeling of Court behavior.

II. The Model

We develop here a simple model of Supreme Court-Appeal Court-Congress interaction which is based on Gely and Spiller (1990a) and in particular on the single dimensional model of Spiller and Gely (1991). The reader is referred to those papers for further elaboration of the basic framework. The analysis in this section focuses on statutory rather than Constitutional issues. A discussion of Constitutional issues is given in Gely and Spiller (1990b). We leave for future research the analysis of the Certiorari process for Constitutional issues.

The Basic Assumptions

The analysis is based on several simplifying assumptions concerning the four players: the House, the Senate, the Appeal Court and the Supreme Court.

The first set of assumptions concerns Congressional preferences. It is assumed that Congress is a bicameral legislature, with both houses having well defined, single peaked and

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5 For expositional reasons the President and administrative agencies are left outside the framework, but, as Gely and Spiller (1990a) show, given the assumptions about individual preferences and strategies, their introduction would not change qualitatively the results. See, however, Spiller (1990b) for a framework where agencies and Presidential executive power play important roles.
stable preferences over a single dimensional policy space represented by the real line. The modern theory of Congressional institutions (e.g. Weingast and Marshall (1988), Shepsle and Weingast (1987, 1989)) suggests that committees have substantial power over the issues under their jurisdiction. In particular, because of their gate-keeping and veto power (i.e. they may block legislation from being introduced, as well as kill or modify legislation in conference), committee members' preferences may dominate issue specific legislation. Thus, the assumption about legislators' preferences is equivalent to assume full control of legislature outcomes by the relevant committees. See in this light, these assumptions may not drastically violate reality.

The second set of assumptions concerns the preferences of the Supreme Court. The Court is assumed to have well defined, single peaked and stable preferences over the policy space. The source of the Court's preferences, however, are different from those of the legislators. While legislators "vote their district," Supreme Court justices are not subject to reelection. We assume, then, that the Court's preferences are essentially ideologically based. The assumption about the Court's preferences is similar to assume that the Court is a single individual. This is a strong assumption. Since the framework of analysis in this proposal is single dimensional, however, it essentially implies that the median voter in the

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6 For extension of this framework to alternative models of congressional decision making, see Spiller (1990a).

7 See, however, Gilligan and Krehbiel (1988) for a different view of committees composition.

8 See Fiorina (1974), Kalt and Zupan (1984), Kau and Rubin (1979), and Peltzman (1984), for empirical tests of this proposition.

9 While the justices' monetary well-being may be unrelated to the issue in question, it is nevertheless reasonable to assume that they may have strong views about the substance of the case. Furthermore, political considerations form part of the appointment process, making it important to consider the political preferences of the justices. Thus, it is reasonable to assume that Supreme Court justices have stable preferences over the policy space.
Court is the decisive individual.\textsuperscript{10} We furthermore assume that the Court is free to make its decisions on a continuum, rather than just on a yes or no basis.\textsuperscript{11} Finally, the preferences of the Appeal Court are, as those of the Supreme Court, well behaved, and single-peaked on the single-dimensional policy space, $R$.

Each player, then, has an ideal point in $R$. We call $H$, $S$, $AC$ and $SC$ the ideal points of the House, the Senate, the Appeal Court and the Supreme Court respectively.

The third set of assumptions relates to the nature of Supreme Court decision costs. We assume that considering and making a decision on a case implies a cost equal to $T$. To simplify the analysis we first assume that $T$ is deterministic. Below we relax this assumption and explore the implications of stochastic decision costs. If the Court, then, makes a decision in the real line such that the outcome is $E$, and $E$ is valued by the Supreme Court as $U^SC(E)$, then the net gain from making the decision $E$ is $U^SC(E)-T$.\textsuperscript{12}

\textit{The Game}

\textsuperscript{10} This assumption, implies, however, that \textit{Cert} decisions are taken by the median voter, which may not be right as four justices are enough to force the Court to consider a decision. Furthermore, if the policy space was multi-dimensional, then the median voter theorem may not readily be applied. For a discussion of this issue as it applies to analyses of the Court see Easterbrook (1982). Spiller and Gely (1990), however, provide conditions under which the median voter result can be applied to a multidimension bargaining game between the Court and Congress.

\textsuperscript{11} There are several reasons why this assumption may be proper. First, the Court is free to interpret in its own way each case that comes to it. Second, the decision to grant \textit{cert} allows the Court to choose that case that fits its preferred outcome. Finally, it can use \textit{dicta} to call for a particular type of case. Note, however, that as shown in Spiller (1990b), would the Court constraint itself to decide cases on a yes or no bases, then the equilibrium will change.

\textsuperscript{12} It is clear that not only the Supreme Court incurs costs in making decisions, but also the lower courts and Congress as well. Decision costs for the lower courts are, to a large extent, irrelevant, as they cannot choose not to not to consider a case. Congressional decision costs, however, are quite important and real, and as the analysis of decision costs at the Supreme Court level shows, it would increase the discretion of the Supreme Court. Its treatment is left for future research, as introducing transaction costs at the legislative level would make the model substantially more complicated.
The focus is on policy-making. Policy can be made by a specific legislative act, by the actions of an administrative agency\textsuperscript{13}, or by a judicial decision. The role of the Appeal Court is to review administrative agencies' decisions, while that of the Supreme Court is to review the decisions of the Appeal Court. The judicial decisions define the policy that would take effect unless they are reversed by a joint action of the House and the Senate.

In the absence of a judicial system, and for that matter of a President and/or administrative agencies, the House and the Senate will bargain over the issue, and an outcome (weakly) in between the ideal points of the two chambers should arise as an equilibrium.\textsuperscript{14} That is, bargaining between the House and the Senate will bring about a legislative outcome, $X_L$, in the contract set between the House and the Senate.\textsuperscript{15}

There are many ways of modeling the interaction between Congress and the Courts. We propose a simple bargaining framework consisting of four stages. In the first stage an agency makes a statutory interpretation.\textsuperscript{16} In the second stage, the Court of Appeals makes a determination. In the third stage the Supreme Court decides whether to grant \textit{Cert}. If \textit{Cert} is granted, then the Court makes a policy determination. This policy then becomes the status quo for the bargaining game between the two houses of Congress that

\textsuperscript{13} As mentioned above, we assume away the role of the President. In a one dimensional policy space, introducing the President implies that reversing a Supreme Court decision requires the approval of the President as well. As discussed at length in the attached paper, the assumption does not qualitatively change the nature of the results.

\textsuperscript{14} The actual bargaining game played between the House and the Senate is irrelevant. All what is assumed is that the outcome will be Pareto efficient, and that the bargaining process cannot make any player worse off as compared to the status quo.

\textsuperscript{15} Depending on the nature of the bargaining game being played, there may or not exist a deterministic function relating the bargaining outcome to the ideal points of the two chambers and to the initial status quo.

\textsuperscript{16} If the case did not start with an administrative agency, then that decision can be seen as taken by a Federal or State District Court.
takes place in the fourth stage of the game. If Cert is not granted, however, the Appeal Court decision becomes the status quo in the fourth stage.

Bargaining between the two houses of Congress for an alternative policy outcome occurs then at the fourth and final stage of the game. The outcome of the final stage is the final policy outcome. If the House and the Senate agree on an alternative policy to that of the judiciary (whether that of the Supreme Court if Cert was granted or alternatively that of the Appeal Court if Cert was denied), then the Congressional decision becomes the law. If, instead, Congress cannot agree on an alternative policy, then the judicial decision becomes the law.

Solving the Game

To solve this game subgame perfection is assumed throughout. Subgame perfection allows us to solve the game backwards, as at each node of the game each player, before making a move, solves the game as it will evolve following its decision. It can then be seen that the equilibrium to this game has to be in the contract set between the House and the Senate (i.e., in between their ideal points). To see this consider a judicial decision that falls outside the contract set between the House and the Senate. Efficient congressional bargaining, then, implies that an outcome inside the contract set will be achieved. That is, the judicial decision will be reversed. If, however, the judicial decision falls inside the contract set, then, the judicial decision becomes the law.

Consider now the Supreme Court policy decision given that it has decided to grant Cert. Since the Court anticipates the bargaining outcome arising from any feasible decision, it will make its decision strategically, such that it will maximize its utility and not being

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17 The judiciary's choice of the status quo serves, then, as the initial bargaining point for the two houses of Congress. Observe, that since the bargaining outcome is both efficient and cannot make any of the houses of Congress worse off than the status quo, then the judicial decision sets limits to the set of feasible bargaining outcomes.
reversed. In other words, the Court will pick that point in the contract set between the House and the Senate that maximizes its own utility. Would the Supreme Court's decision be outside the contract set between the House and the Senate, it would trigger a legislative bargaining process, with its outcome almost surely being strictly inside the contract set.  

Thus, if the ideal point of the Court is outside the contract set, its optimal decision point is the closest boundary of the contract set. On the other hand, if the Court's ideal point is inside the contract set, then its optimal decision is its own ideal point.

There are, then, three possible equilibrium outcomes given that Cert has been granted (see Figure 1). First, if the ideal point of the Court, SC, is to the right of the contract set (represented in Figure 1 by the interval [H,S]) then the equilibrium is the upper bound of the contract set (S, in Figure 1). Second, if SC is to the left of the contract set, then the equilibrium is its lower bound (H, in Figure 1). Third, if SC is inside the contract set, then the equilibrium is given by SC.

Those three possibilities represent all the equilibria that can develop following the granting of Cert. The Court, then, when granting Cert will consider those outcomes as against the outcomes that could evolve if Cert would be denied. To solve the Court's Cert problem, consider a given Appeal Court decision, call it A. If Cert is not granted, then call G(A) the outcome of the congressional bargaining at the fourth stage of the game. G(A) must, by construction, belong to the contract set [H,S]. As mentioned above, then, the decision to grant Cert depends on whether or not U^{*c}(E) \geq U^{*c}(G(A))+T.

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18 To see this, consider a Court's decision outside the contract set. Call that point y=S+x, assume x>0 and S>H. Assuming symmetric utility functions, the outcome to the bargaining game between the House and the Senate has to be in the set [Max(S-x,H),S]. For exposition assume S-x>H. That the outcome cannot be to the left of S-x arises from the symmetry of the Senate's preferences and from the fact that the bargaining cannot make the Senate worse off than the status quo, y=S+x. That it cannot be more than S arises from the efficiency of the bargaining process. While S is a feasible solution to the bargaining, observe, however, that the Senate's initial offer would most certainly be S, while the House's initial offer would most certainly be S-x. Thus, it is reasonable to expect the bargaining outcome to be less than S.
There are, again, three possible regimes. Regime 1, when SC > Max(H,S); Regime 2 when SC < Min(H,S); and Regime 3 when Min(H,S) ≤ SC ≤ Max(H,S).

Consider, first, the equilibria that can develop in Regime 1. Let, M*, M* < SC, be such that U^sc(Max(H,S)) = U^sc(M*) + T. That is, if M* is the equilibrium without granting Cert, then the Supreme Court is indifferent between granting Cert and making the decision equal to Max(H,S), or not granting Cert and the outcome M* arising either because the Appeal Court decided M* = L∈[H,S], or because M* = G(A) when the Appeal Court decision A was not in [H,S].

See Figure 2a. Thus, in Regime 1, the Court will grant Cert only when G(A) < M*, that is, only in those cases that if Cert is not granted the equilibrium will be "too far" away from the best the Court can do, Max(H,S), where "too far" depends on the level of decision costs and on the Court's disutility from decisions far away from its ideal point (i.e. the shape of the utility function). If G(A) ≥ M*, then the Court will not grant Cert.

Consider, now, equilibria in Regime 2. Define N*, N*>SC, similarly, as such that U^sc(Min(H,S)) = U^sc(N*) + T. See Figure 2a. Thus, again, were G(A) be to the right of N* the Court will grant Cert and make the decision equal to Min(H,S).

Consider, finally, equilibria in Regime 3. Now, the area in which the Court will not grant Cert surrounds its ideal point. If absent Cert the equilibria will be "too far away" of its ideal point SC, the Court will intervene and make the outcome its own ideal point. Call, then, SC* and *SC the upper and lower bounds of the non-Cert region. SC* and *SC are given by the two solutions to U^sc(SC) = U^sc(x) + T, where SC*>SC>*SC, see Figure 2b. Thus,

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19 It is feasible that the solution to U^sc(Max(H,S)) = U^sc(x) + T, x* < SC, implies that x* < Min(H,S). In that case define M* = Min(H,S), because, from the previous discussion, no equilibria can be outside the segment [Min(H,S),Max(H,S)].

20 Again, would the solution to U^sc(Min(H,S)) = U^sc(x) + T imply x* > Max(H,S), then define N* = Max(H,S).

21 Again, would the solutions to U^sc(Min(H,S)) = U^sc(x) + T be outside [H,S], then define SC* = Max(H,S) and *SC = Min(H,S).
if \(G(A) \in [{*SC,SC*}]\), then \(G(A)\) becomes the equilibrium. If, however, \(G(A) \notin [{*SC,SC*}]\), then the equilibrium is SC.

Finally, consider the strategic moves of the Appeal Court. Assume, first that \(SC < \text{Min}(H,S)\). As discussed above all equilibria can only reside in the segment \([\text{Min}(H,S),N^*]\). If the Appeal Court would choose a point outside \([\text{Min}(H,S),N^*]\), then the Supreme Court would reverse it and bring the outcome inside the segment \([\text{Min}(H,S),N^*]\). Thus, there are three feasible outcomes: First, if the Appeal Court’s ideal point, \(AC\), is to the left of \(\text{Min}(H,S)\), then, it would make its decision, \(A\), as \(\text{Min}(H,S)\), and thus \(G(A)=A=\text{Min}(H,S)\). If, \(AC > N^*\), then \(A=N^*=G(A)\), as Congress would not be able to reverse the Appeal Court decision \(A=N^*\). Finally, if \(AC \in [\text{Min}(H,S),N^*]\), then \(A=AC\), and again \(A=AC=G(A)\), as \(A\) belongs to the contract set in Congress. Thus, the decision of the Appeal Court becomes the equilibrium.

Similar analysis imply that if \(SC > \text{Max}(H,S)\) there are three feasible equilibria, \(E\). First, \(E=AC\) when \(AC \in [M^*,\text{Max}(H,S)]\); \(E=\text{Max}(H,S)\) when \(AC \geq \text{Max}(H,S)\); and \(E=M^*\) when \(AC \leq M^*\). Finally, when \(SC \in [\text{Min}(H,S),\text{Max}(H,S)]\), then the three feasible equilibria are again: \(E=AC\) when \(AC \in [{*SC,SC*}]\), \(E=*SC\) when \(AC \leq *SC\) and \(E=SC^*\) when \(AC \geq SC^*\).

**Stochastic Decision Costs**

In this section we expand the model to allow for stochastic decision costs. In the previous sections we showed that with perfect information and exogenously given decision costs, the Supreme Court, in equilibrium, will not grant Cert to any case, as the Appeal Court will strategically chose its decisions from the no-Cert set. When decision costs are unknown to the Appeal Court, then Certiorari will be granted in those cases where decision costs are lower than expected. The Appeal Court, however, will take the distribution of decision costs into account in making its decision.

To show the workings of the model in this case, consider, for simplicity, a situation
where the ideal point of the Supreme Court, SC, is inside the congressional contract set.

Thus, if the Court grants Cert the outcome becomes SC. Assume, furthermore, that the ideal point of the Appeal Court is to the right of the congressional contract set. Assume, now that the preferences of the Appeal Court are given by $U^AC(x/AC) = -|x-AC|$, and those of the Supreme Court by $U^{SC}(x/SC) = -|x-SC|$. Let furthermore $T$ be given by $T = T^* + \nu$, with $F(\nu)$ ($f(\nu)$) being $\nu$'s cumulative distribution (density) function.\(^{22}\)

From the assumptions about Supreme Court preferences, the upper limit to the no-Cert region, $SC^*$, is given by $SC^* = SC + T^* + \nu$ for values of $\nu$ such that $SC + T^* + \nu \leq S$, where it is assumed as in Figure 2a that $S > H$. For those values of $\nu$ such that $SC + T^* + \nu > S$, $SC^* = S$.

As discussed above, sugbame perfection rules out Appeal Court decisions, A, outside the contract set $[H,S]$. We can then concentrate on $A \in [H,S]$. Thus, if $A > SC^*$ then the final outcome is SC, and the utility of the Appeal Court is given by $-(AC-SC)$. If, however, $A < SC^*$, then the Appeal Court’s decision becomes the final outcome, and the utility level of the Appeal Court is given by $-(AC-A)$. The Appeal Court’s tradeoff is as follows: It can make a decision relatively close to its ideal point but have a relatively high probability of being reversed (and hence of sustaining an outcome much distant from its ideal point), or choosing a decision which while being further away from its ideal point, it has a higher probability of not being reversed. It is straightforward to see, then, that the maximization of the expected utility of the Appeal Court implies that the optimal decision $A$ is given by

$$A^* = \begin{cases} SC + \frac{1 - F(A^* - SC - T^*)}{f(A^* - SC - T^*)} & \text{if } SC + \frac{1 - F(A^* - SC - T^*)}{f(A^* - SC - T^*)} \leq S \\ S & \text{if } SC + \frac{1 - F(A^* - SC - T^*)}{f(A^* - SC - T^*)} > S. \end{cases}$$

\(^{22}\) Observe that the distributional assumption may violate the fact that $T > 0$. The distribution of $\nu$ should actually be truncated with a lower bound $k > -T^*$. 

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The term \( \frac{F(x)}{f(x)} \) is the hazard ratio which is usually assumed, in the non-linear pricing literature, to be non-decreasing in \( x \). Thus, under that assumption we obtain that the optimal value of \( A \) is non-decreasing in \( T^* \) and \( SC \). That is, increases in the ideal point of the Supreme Court would (weakly) increase the optimal decision at the Appeal Court level, as will increases in Supreme Court decision costs. Similar analysis can be used to derive the equilibria for the other cases.

**Comparative Statics**

In this section we explore the extent by which the judiciary "reads election results" (Gely and Spiller (1990)) for the case of deterministic decision costs. The extension for the case of stochastic decision costs is straightforward. The main result that we want to show is that the Supreme Court is more responsive than the Court of Appeals to changes in Congressional preferences.

Whether the Supreme Court follows Congressional preferences depends on the location of its ideal point. If the ideal point of the Supreme Court is inside the contract set between the two houses of Congress (H,S), then, marginal changes in the composition of Congress would not have any effect on the no-Cert region, as long as \( *SC \) and \( SC^* \) are inside the contract set. See Figure 2a. Thus, since the final equilibrium is in the set \([*SC,SC^*]\) with the exact outcome depending on the exact location of the Appeal Court, neither the Supreme Court nor the Courts of Appeal read election results. Consider, instead, the situation where the ideal point of the Supreme Court is not inside the contract set between the two houses of Congress (see Figure 2a), say that \( SC > \text{Max}(H,S) \). Then the final equilibrium is in the set \([M^*,\text{Max}(H,S)]\) \([M^*,S]\) in Figure 2a), with the exact outcome depending on the location of the Appeal Court. If the ideal point of the Appeal Court is not in \([M^*,\text{Max}(H,S)]\), then both the Supreme Court and the Appeal Courts read election results, as, say, a marginal increase in \( \text{Max}(H,S) \) would bring also an increase in \( M^* \), and hence will
trigger changes in both Supreme Court *Cert* and case decisions, and in Appeal Court decisions as well. If, however, the ideal point of the Appeal Court is inside \([M^*, \text{Max}(H, S)]\), then marginal changes in \(\text{Max}(H, S)\) will trigger changes in Supreme Court policies, but not on those of the Appeal Court.

We have shown, then, that there are conditions under which the Supreme Court would follow the changes in the composition of Congress, but the Appeal Courts would not. Finally, it is straightforward to see that if the Appeal Courts follows changes in Congress so will the Supreme Court. To see this, observe that for the optimal policy of the Appeal Court to follow changes in the composition of Congress, the ideal point of the Appeal Court cannot be inside the no-*Cert* region. Thus, it is changes in the no-*Cert* region that triggers changes in the policies of the Appeal Court. But changes in the no-*Cert* region also changes the optimal policies of the Supreme Court. Thus, we have shown that a) under certain conditions the Supreme Court responds to changes in the composition of Congress but the Appeal Courts do not, and b) there are no conditions under which the Appeal Courts respond to changes in the composition of Congress but the Supreme Court does not. Thus, the Appeal Courts are less responsive to the electorate than the Supreme Court.

A second comparative statics result concerns the extent by which lower courts follow changes in the composition of the Supreme Court. From the previous discussion it is clear that changes in the composition of the Supreme Court would only matter if they change the no-*Cert* region. That is clearly the case in Regime 3, that is, where the ideal point of the Supreme Court is inside the congressional contract set. When SC is outside the contract set, though, the effect on the no-*Cert* set depends on the shape of the \(U^{SC}\) function. If, for example, \(U^{SC}(x) = -|x-SC|\), then, marginal changes in SC will not change the inside boundary of the no-*Cert* region.\(^{23}\)

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\(^{23}\) For example, let \(SC < \text{Min}(H, S)\), then, \(N^* = H + T\), which is independent of SC.
III. Final Comments

This analysis has several implications that are consistent with anecdotal evidence and some previous empirical analyses. First, observe that in the absence of forecast errors by the Appeal Court concerning the ideal points of Congress and/or of the Supreme Court, or on the magnitude of the Court's decision costs, the Supreme Court would never grant Cert as all Appeal Court decisions would be in the no-Cert range. Thus, this framework implies that the Court should grant Cert to only a small percentage of appealed cases per year. On the other hand, very active periods should follow changes in the composition of the Supreme Court or of Congress.

Second, even though Appeal Court judges may have very different ideological values as those of the Supreme Court justices, the current model predicts that Appeal Court judges, in general, would follow changes in Supreme Court views. Furthermore, this model suggests that Appeal Courts would also follow changes in the political composition of Congress, even though to a lesser extent than the Supreme Court. Thus, not only the Supreme Court reads election results (Gely and Spiller (1990a)), but Appeal Courts as well. However, since the effect of elections on Appeal Courts is through the Certiorari process, the extent by which Appeal Courts follow changes in the electorate depends on the magnitude of Supreme Court decision costs and on the degree of homogeneity of preferences in both houses of Congress.

Appeal Courts matter, then, as preferences of Appeal Court judges impact upon the final equilibrium. The extent of their discretion, however, depends on the magnitude of Supreme Court decision costs, T, on the Supreme Court's disutility from outcomes different

24 Several scholars have analyzed the extent by which lower courts follow the views of the Supreme Court. While some studies have found important lower court deviations from Supreme Court policies (e.g. Beatty (1972)), they tend to focus on a narrow period and on a narrow set of issues (e.g. civil liberties). Other studies, however, seem to have found support to the hypothesis that lower courts tend to follow Supreme Court policies, (e.g. Gruhl (1980), Songer (1987), and Songer and Sheehan (1990)).
from its ideal point, and on the extent of heterogeneity in Congress. The extent of
discretion of the Supreme Court depends, on the other hand, only on the degree of
heterogeneity in Congress. If both houses of Congress have similar preferences, then there
is no discretion left neither to the Supreme nor to the Appeal Courts.

While simple, then, this simple model seems to capture important features of the
Certiorari process. The model, however, can be extended in several dimensions. First, while
uncertainty was introduced at the level of decision costs, it can also be introduced at the
level of the political preferences of the Court. Introducing uncertainty over preferences
will allow us to develop not only a more realistic theory of the Cert process, but also we may
start dealing with the concept of Precedent as well. This, however, is left for future
research.

A second important extension is to consider individual justices votes, as in Spiller
(1990b) and (1990c). The main advantage of dealing with individual justices rather than
with a single justice court is that it will allow us to better understand the strategic
implications of the four members' rule for consideration of cases.
FIGURE 1
Equilibria Following Cert in a Single Dimensional Policy Space

Regime 2  Regime 3  Regime 1

SC₂  H  SC₃  S  SC₁

H = Ideal Point of the House
S = Ideal Point of the Senate
SC = Ideal Point of the Supreme Court
FIGURE 2A
Determination of the Cert Decision

H = Ideal Point of the House
S = Ideal Point of the Senate
SC = Ideal Point of the Supreme Court
N*, M* = Boundaries of No-Cert Set
T = Supreme Court Decision Costs

FIGURE 2B
Determination of Certiorari Decision

H = Ideal Point of the House
S = Ideal Point of the Senate
SC = Ideal Point of the Supreme Court
S*, SC* = Boundaries of No-Cert Set
T = Supreme Court Decision Costs

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REFERENCES


Peltzman, S, "Constituent Interest and Congressional Voting," 27 Journal of Law and


