

**Bargaining, Strategic Interaction,  
and Supreme Court Decision Making\***

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**Abstract**

I construct several game theoretic models to explain the process by which strategic actions affect the Court's decisions, and then apply these models to specific Court cases where bargaining has taken place. Building on the research of Epstein and Knight (1998), who utilize the personal notes of several past justices to show that bargaining takes place during both highly salient, and sometimes unimportant decisions, I demonstrate how interaction between justices ultimately plays a vital role in shaping the Court's policy outcomes.

When you have to have at least five people to agree on something, they can't have that comprehensive completeness of candor which is open to a single man, giving his own reasons untrammelled by what anybody else may do or not do if he put that out.

---- Felix Frankfurter

Justice Frankfurter's admonition suggests that to make policy as close as possible to their most preferred goals Supreme Court justices must often compromise with their colleagues. This being the case, bargaining becomes an essential component of how the Supreme Court makes decisions. Accounts on several levels – journalistic (Woodward and Armstrong 1979), theoretical (Murphy 1964), and empirical (Epstein and Knight 1998; Maltzman and Wahlbeck 1996b; Wahlbeck, Spriggs, and Maltzman 1998) – demonstrate that justices interact with each other and sometimes influence the decisions of their colleagues. For instance, some justices may attempt to convince their colleagues to switch their votes (Maltzman and Wahlbeck 1996b), while others may bargain over specific provisions within a draft of an opinion (Epstein and Knight 1995). Still others may form coalitions that work together on cases within the same issue area over time (Epstein and Mershon 1993; Epstein, Mershon, Segal, and Spaeth 1994). While these studies make it clear that justices act strategically when making decisions few works have taken the next step to determine exactly how these interactions lead to the final policy choices in the Court's majority opinions.

This paper invokes several simple game theoretic models in an effort to begin answering this question. My objective is to illustrate how, under certain conditions, interactions between justices can lead the Supreme Court to reach specific outcomes -- depending on who is bargaining with whom, and the nature of the justices' preference structures. While these models are purely theoretical representations of this process they are important because they provide testable hypotheses about how strategic interaction between justices affects Supreme Court

decision making. Before I present the models, however, I look to what we already know about the strategic behavior of justices. From there I explain the modeling techniques and payoff functions used in the models. Finally I present the models, and apply them to several anecdotal cases, to show how these games provide insight into our understanding of Supreme Court decision making.

### **Existing Literature and Research the Current Question**

In recent years the major focus of judicial scholars has shifted from an analysis of how justice's preferences are the sole determinant of their decisions (Rhode and Spaeth 1976; Segal and Spaeth 1993), to a concentration on how interaction between justices affects their ability to make their most preferred decisions (see e.g., Epstein and Knight 1998; Wahlbeck, Spriggs and Maltzman 1998; Caldeira, Wright and Zorn 1997; Hoekstra and Johnson 1997). This line of scholarship has produced clear evidence that justices act strategically in an attempt to make decisions in line with their policy goals.

All of these works stem directly from Murphy's *Elements of Judicial Strategy* (1964) and are ground in one key claim: as rational actors who want to see their policy goals forwarded justices must consider the preferences of their immediate colleagues when making decisions. The reason for this is obvious, as Justice Frankfurter notes. Murphy agrees, and argues that, "Since he shares decision making authority with eight other judges, the first problem that a policy oriented justice would confront is that of obtaining at least four, and hopefully eight, additional votes for the results he wants and the kinds of opinions he thinks should be written in cases important to his objectives" (1964, 37). Despite this claim, it took almost thirty years for scholars to test Murphy's most basic assumption. In just a short time, however, many works have demonstrated that bargaining takes place in almost every case decided by the U.S. Supreme

Court (Kornhauser, 1992a 1992b; Schwartz, 1992; Epstein and Knight 1995; Epstein and Knight 1998; Spriggs Wahlbeck and Maltzman 1997; Wahlbeck Spriggs and Maltzman 1998; Hoekstra and Johnson 1996 1997).

For instance, Epstein and Knight (1995) document that over 50 percent of cases in one sample contained at least one bargaining statement within the Court memoranda.<sup>1</sup> More important, and more compelling, they find evidence of strategic interaction, in one form or another, in almost 90% of the cases they analyze (1995, 24). These two findings suggest that as policy seeking, rational, actors Supreme Court justices exhibit strategic behavior during the Court's opinion writing process.

Wahlbeck, Spriggs, and Maltzman (1998) support Epstein and Knight's findings in their study of opinion circulation on the Court. Specifically, they are interested in the extent to which bargaining and accommodation take place between justices. They find that an opinion will go through many more drafts when the majority coalition is more heterogeneous, when more suggestions are given to the opinion writer, when more threats are made to the opinion writer, and when justices continue to say that they are unable to join an opinion. This suggests to Wahlbeck et al., that "Opinion authors' actions are shaped by the interplay of their own policy preferences and the actions of their colleagues" (1998, 312). In short, it is evident that the opinion writing process on the Court is one of bargaining, accommodation, and strategy.

Wahlbeck and his colleagues also find evidence of strategic interaction in the decision to

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<sup>1</sup> They are right to note (page 22) that this number would probably be higher had they also had access to more than just Brennan and Marshall's papers for this study. Indeed, if they could have seen the private memos sent or received by all of the justices who were on the Court during their sample, their assumption may have been supported with even stronger evidence.

join an opinion (1996). They show that the decision to join a majority opinion is made up of how acceptable that opinion is to the specific justice, whether that justice can attain concessions from the opinion writer, and the amicability of the relationship between the opinion writer and the justice who must decide whether to join. Gerber and Park (1997) suggest at least one explanation for all of this bargaining. Indeed, they demonstrate that when justices join the Court they are much less consensual than they were when they sat on a lower Court.

Many other scholars have added pieces to the puzzle of strategic interaction. For instance, Caldeira, Wright, and Zorn (1997) show that justices act strategically when deciding to grant or deny *certiorari*. Additionally, Hoekstra and Johnson (1996, 1997) suggest that the decision to rehear arguments in a case is a strategic tactic used by justices in an effort to alter minimum winning coalitions. The studies cited here (while by no means definitive) indicate that at every stage of the decision making process Supreme Court justices act in a strategic manner.

These works lead Epstein and Knight (1998) to offer the first major extension of Murphy's (1964) analysis. Using data obtained from the private papers of several Supreme Court justices they find overwhelming support for this account of decision making. Indeed, Epstein and Knight make a very convincing case that the justices engage in strategic maneuvering beginning with the decision to grant *certiorari* all the way to the point at which the final opinion is signed. As they note, "law, as it is generated by the Supreme Court, is the result of short-term strategic interactions among the justices and between the Court and other branches of government" (1998, 18). Overall, from Murphy (1964) to Epstein and Knight (1998), the literature that seeks to explain whether strategic interaction exists on the Supreme Court provides clear evidence that justices engage in this type of behavior when making decisions.

Despite the important findings stemming from this literature most work is still silent on

how to create generalizable models of intra-Court bargaining and strategic interaction. In other words this line of research suggests, without a doubt, that bargaining and accommodation take place on the Court, but it does not tell us how these processes affect the final policy decisions that the Court issues. This paper seeks to fill this gap. Specifically, I am interested in **how the interaction between justices leads to outcomes in the form of specific policy decisions**. To answer this question I model the process of bargaining and accommodation in its most basic form.<sup>2</sup> That is, using rudimentary game theoretic tools I seek a more general explanation for how bargaining and strategic interaction leads to certain policy choices, but not others. Thus, the models I employ incorporate what we already know about bargaining among the justices and offer a means by which we may more generally understand this phenomenon.

### **Modeling Strategies and Payoff Functions**

To formulate testable hypotheses about how bargaining specifically affects Supreme Court decisions I invoke three separate models. The game involves bargaining between two justices (the opinion writer and one undecided justice<sup>3</sup>). This game provides some insight into how the findings of Wahlbeck et al. (1996, 1998) play out. Indeed, Wahlbeck et al. provide compelling evidence that bargaining and accommodation often occur between an opinion writer and an undecided justice. However, they fail to show how this process ultimately translates into policy outcomes. From there, my focus turns to how interaction between more than two justices

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<sup>2</sup> I am not, nor do I claim to be a game theorist. Rather, I employ the tools of this trade for a limited purpose. The models utilized here, then, are meant to simply illustrate how the empirical findings to date (concerning strategic interaction on the Court) actually affect Court decisions. I leave it to others to take my findings and test them more rigorously.

<sup>3</sup> The term undecided here is defined as a justice who has not openly declared her vote during conference.

leads to outcomes. Finally, I explore the process by which two coalitions vie for one key swing vote. These interactions are akin to those that Epstein and Mershon (1993) explore as well as those that Epstein et al. (1994) are currently exploring. In short, when a coalition needs one (and sometimes two) votes to procure a majority, they bargain with justices who are currently undecided in a given case. Together, these three games allow me to draw some conclusions that can then be tested on larger samples of cases.

### *Information Conditions*

Before I explore the payoffs used in these models, note that all of my games assume that the interaction between justices takes place with complete and perfect information. I use these very strict conditions because of the nature of the Supreme Court. By this I mean that given the number of interactions between the justices, combined with the lengthy tenure that most justices serve, these assumptions are tenable. First consider the definition of complete information, which states that “the players payoff functions are common knowledge (Gibbons 1992, 55). On the Supreme Court this means that each justice knows every other justice’s payoff function for each type of case. For instance, after sitting with Justice Brennan for only a short time (not to mention several decades) one could easily discern that his payoff is quite high when he signs majority opinions in civil liberties cases that result in liberal outcomes (in favor of the individual). Overall, then, that the justices work with each other for many years, know each other’s previous decisions and votes, and also have strong personal relationships suggests that it is not a stretch to assume that they have complete information about everyone’s payoff functions.

Second, I assume that justices have perfect information. In game theoretic terms this means that, “at each move in the game the player with the move knows the full history of the play of the game thus far” (Gibbons 1992, 55). Again this definition is consistent with

interactions that take place on the Court. Indeed, when two justices bargain over one point in an opinion, for example, each possesses knowledge of what the other has asked for, as well as how each has reacted to previous demands. This knowledge may come from memoranda sent between the chambers, from phone conversations, or from opinion drafts sent to conference. In short, the justices can almost always look back and see where they currently stand as well as the path that they have taken to reach their present position. Therefore they likely possess perfect information.

Overall, it is not a stretch to invoke these highly restrictive information conditions.<sup>4</sup> While it may be desirable to relax these conditions in the future (obviously the justices do not always possess complete information), the models here are highly informative in their own right and more relaxed conditions here would confuse my point.

### *Payoffs*

When utility functions are easily identifiable -- like money -- defining payoff functions for players engaged in strategic interaction is straightforward. Indeed, the players' utility functions consist of a specific amount of money they wish to attain. Sometimes, however, defining utility functions is not as easy. For example, Supreme Court justices' main concern is achieving their most preferred policy outcomes (see e.g., Segal and Spaeth 1993; Epstein and Knight 1998). Preferences of this nature are more difficult to capture as there is no uniform value assigned to utility gained from achieving specific policy goals. The problem, then, is

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<sup>4</sup> However, the question may arise: If justices can anticipate any changes that their colleagues may ask for, why don't they just add these into the original opinion? The answer is that while they have a clear idea of their colleagues' preferences, they may not know how these translate into requests for specific policy wording or choice. Thus, the bargaining over specific policies and specific wording of opinions can and does take place.



translating these policy preferences into utility functions that can be generalized across justices.

Assuming that justices seek to maximize their preferred policy goals, the initial step in constructing payoffs is straightforward: if a justice receives her complete policy choice she should receive the highest utility. If, on the other hand, the same justice compromises her most preferred policy (meaning she moves away from her bliss point), she will enjoy less utility because she has given up part of her preferred policy as a bargaining concession. Given these assumptions a utility function for policy may take the following form:

- A** A justice obtains her most preferred policy outcome.
- B** A justice compromises and obtains only part of her preferred outcome.

where:  $A > B^5$

It is not enough to define payoffs in terms of how much of a preferred policy a justice may obtain, however. Rather, justices know that writing an opinion that achieves their most preferred outcome means nothing if a majority does not sign that opinion. To capture the added utility of policy with majority support, or the negative utility of writing a special concurring opinion or dissent, additional payoffs may result. Therefore, I modify the payoff structure in the following manner.

- A** A justice obtains her most preferred outcome in a majority opinion.
- B** A justice signs a majority decision but only obtains some of her preferred outcome.
- C** A justice writes a special concurrence or dissent.
- D** A justice negotiates and attempts to compromise, but no majority is reached.

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<sup>5</sup> There may be gradations in these outcomes. Indeed, a justice may compromise more or less, and therefore gain more utility under some circumstances. However, for the purposes of illustration, it is only necessary to know that A is greater than B.

where:  $A > B > C > D$ <sup>6</sup>

This payoff structure captures the range of outcomes that could ensue during the process of bargaining in any case. To see more explicitly why, I briefly explain what is encompassed in each payoff.

A justice's utility is greatest when the majority accepts her most preferred policy, but this payoff reflects several factors. First, placing policy in a majority opinion is important because only the majority speaks with the institutional authority of the Supreme Court. In short, if a justice wants to create policy that is considered the law of the land she must strive to have her policies written into majority opinions. Additionally, precedent is extremely important for justices (see e.g., Knight and Epstein 1996), and with rare exceptions is only set through majority opinions. This is another, equally important, reason why a justice strives to have her policy in the majority; she wants to affect future Court decisions as well as the current state of law.

Beyond the utility gained from seeing one's preferred policy etched into law, the legitimacy and integrity of the Supreme Court both increase when the justices hand down majority opinions instead of judgments of the Court.<sup>7</sup> Pritchett suggests that this is the case because increasing dissents weaken the Court's "institutional ethos" (1954, in Walker, Epstein,

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<sup>6</sup> Note that these payoffs are only ordinal in nature. This means that the intervals between the payoffs are not meaningful (Morrow 1992, 20). So while one justice may gain much more utility than another may if she obtains her most preferred outcome, the result would be the same. That is, A (no matter the magnitude) is always greater than B.

<sup>7</sup> Clearly, this may not be as important as obtaining one's most preferred policy outcome, but the evidence Murphy provides, combined with the arguments of Walker, Epstein, and Dixon (1988) and Comparato (1996) indicate that we should not ignore this aspect of the utility functions.

and Dixon 1988). The point is that without legitimacy the Court loses some degree of institutional power (see e.g., Adamany, 1973, and Marshall, 1987), which is important because the Court has no means by which to enforce its opinions. In other words, without legitimacy there is little hope that its decisions will be followed. Overall, many factors contribute to a justice's desire to have her policy written in a majority, and when they are combined she will always obtain the highest level of utility (captured by a payoff of "A").

If a justice joins a majority opinion, but compromises her preferred goals to achieve that majority, then she clearly loses some utility. This is intuitive because while she still speaks with the authority of the Court, sets precedent, and contributes to a high degree of legitimacy, she has moved away from her ideal policy outcome. Thus, while joining a majority clearly has benefits, if a justice compromises her most preferred policy to do so, she receives less utility (thus she obtains "B" and not "A").

If a justice dissents or only writes a special concurrence she loses even more utility for going against the majority. The resulting utility, then, must be less than if the justice joined the majority because the dissent, or special concurrence, does not carry the institutional authority of the Court. In short, by not joining the majority, the justice clearly gains less utility than those justices do in the majority (even if they have compromised) because her policy does not carry the weight of law. Thus, a dissent or special concurrence yields a payoff of "C" which is less than both "A" and "B."

Finally, if the justices negotiate with one another and a majority is not achieved then everyone receives the lowest payoff possible. This payoff may be seen as very small for a specific justice, or even negative if the Court affirms by default a lower court decision with which she does not agree. But, beyond the single justice, the entire Court gains the lowest utility

because if five justices cannot agree then no policy becomes good law and nobody moves closer to their preferred outcome (see the discussion above concerning Court legitimacy).<sup>8</sup> Therefore, in this situation every justice receives a payoff of “D.”

Overall, these information conditions, combined with the payoff structure are one way to define how interaction plays out between Supreme Court justices. With these set out, I now turn to the three models and apply them to several cases where bargaining took place.

### **The Models**

In this section I explicate three models in an effort to determine how the bargaining process plays out between justices. Each game represents a specific situation between two or more justices. After I solve each game I turn to an example to show the applicability of the models to actual negotiation on the Court.

#### ***Game I***

The first game is the simplest of the three, and is played between two justices: an opinion writer and an undecided justice. Additionally, note that the undecided justice possesses a copy of an opinion draft, and is a potential swing vote in a given case. In his first move he has two choices: sign the opinion in its present form or ask the opinion writer for changes before he signs it. If the undecided justice signs the opinion then the game ends and payoffs are assigned. However, if he asks for changes then the opinion writer must decide whether to make the changes to accommodate the undecided justice, which ends the game, or negotiate to keep the

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<sup>8</sup> I assume that the justices would prefer some policy rather than simply no policy outcome (see the above discussion on the relationship between judgments and Court legitimacy). It may be, however, that a justice could gain utility from having an equally divided Court, but this is a matter that can be dealt with in empirical tests. These models are still quite informative despite this caveat.

opinion in its current form. Next the undecided justice moves again, and either dissents because no changes were made (the game ends), or continues the negotiation. Finally the opinion writer must decide whether to make all the requested changes or make only those changes absolutely necessary to bring the undecided justice into the majority coalition. While this game provides no opportunity for additional persuasion or bargaining it represents, in its most basic form, the process of bargaining between two justices.

To demonstrate why, first consider that an undecided justice will almost never sign an opinion without revisions because she receives more utility if she holds out for some form of changes. This is intuitive both in the context of game theory generally, and in the context of bargaining on the Court specifically. Indeed, unless their preference structures are very similar (Justices Brennan and Marshall for example), justices will not often sign opinions without negotiation. In this case, if the undecided justice signs without revisions he receives less utility than if he asks the opinion writer to make changes.

To find the equilibrium in this game I turn to Figure 1 and begin with the second (and last) move of the opinion writer. At this point he chooses to make the minimum changes necessary to obtain the undecided justice's vote because it gives him a payoff of B which is greater than if he made all the requested changes. Seeing this, the undecided justice chooses to dissent in his second move because he receives a payoff of C with this move, and  $C > D$  (what he would receive from negotiating in his second move instead of dissenting). This threat to dissent is certainly credible at this point.<sup>9</sup> Therefore, the opinion writer consents to make some changes in his opinion for his first move. This holds because if the undecided justice dissents then the

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<sup>9</sup> If the undecided justice did not threaten to dissent or concur in judgment only, he would gain a payoff of D as opposed to C if he dissents. Thus, the threat is credible, and the opinion writer must try to stop this action.

opinion writer receives a payoff of D; by making some changes he receives a payoff of B. Then, in his first move the undecided justice asks for changes because he knows that the opinion writer's only credible move is to make the requested changes. Thus, equilibrium is achieved at **(B,B)**.

**[Figure 1 about here]**

The game played out in Figure 1, while simple, represents how many if not all Supreme Court opinions are written (see e.g., Wahlbeck et al. 1998).<sup>10</sup> To see this, consider the case of *Milkwagon Drivers Union v Meadowmoor Dairies* 312 U.S. 287 (1941) where the Court reconsidered its decision in *Thornhill v Alabama*, 310 U.S. 90 (1939). Specifically this case concerned whether picketing by strikers should be protected under the First Amendment. Walter Murphy (1964) suggests that bargaining took place in this case between Justice Murphy (the undecided justice) and the opinion writer Justice Frankfurter. The debate focused on the specific wording that Frankfurter used in his opinion.

The bargaining process between the two justices proceeded as follows.<sup>11</sup> Justice Frankfurter drafted an opinion in favor of an injunction prohibiting picketing by striking workers. Additionally, Justices Black and Reed wrote dissents condemning such an injunction. At the same time Justice Murphy was still undecided as to whose approach he favored, and he thought about writing his own separate opinion as well. Because Frankfurter and Black felt quite

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<sup>10</sup> Clearly this game could be more complicated. One could imagine the same game being played simultaneously between the opinion writer and several justices, with the choices in each individual game affecting the choices in every other game. Additionally, the game could be infinite, as the opinion writer could possibly continue to negotiate in his final move. But, again, the short and finite version of this game (between only two justices) makes the point just the same; final policy choices are the product of bargaining between the justices.

strongly about their positions, Murphy's clerk convinced him that his vote was vital, and he should wait and see whose position more closely conformed to his own preferences. The clerk told Murphy that the "...better and more effective approach is now to take advantage of your eminently strategic position. All three will try to woo you. Wouldn't it be better to work out your own views then pick the opinion that comes the closest." Additionally, the clerk pointed out the importance of Murphy's vote: "The name of Murphy in this case means much. It adds great weight to the opinion bearing it since you wrote *Thornhill*. I'd act accordingly." Murphy therefore worked out his position in private and kept silent until Frankfurter came to bargain for his vote.

Frankfurter circulated a draft of his opinion and Murphy liked the policy choice but disapproved of the "emotional overtones" in the opinion. Indeed, Murphy thought that Frankfurter should tone down the harsh language used in the opinion (presumably put in as a response to Black's strong opinion). As such, Murphy wrote Frankfurter a private memo in an effort to "improve" the opinion. And, if Frankfurter would make the improvements then Murphy consented to sign the opinion. Frankfurter in turn sent a memo to Murphy that included the following statement:

You know how eager I have been – and am – to have our Milk opinion reflect your specifically qualified expert view. You also know how anxious I am to add not one extra word, and especially not to say anything absolutely unavoidable by way of creating a heated atmosphere. So here is my effort to translate the various suggestions into terms that would fit into, and truly strengthen, our opinion.

In short, it seems that Frankfurter was willing to change his opinion in a way that he thought would suit Murphy, and in so doing was able to obtain a critically needed vote. One of the concessions that Frankfurter made (beyond quelling his strong language) was to specifically note

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<sup>11</sup>. This excerpt is taken from Murphy's *Elements of Judicial Strategy* (1964, 58-59) except where noted.

that the decision did not qualify *Thornhill* (the decision written by Murphy). Rather, the majority reaffirmed the earlier decision, and Frankfurter liberally quoted from Murphy's previous opinion to demonstrate "the consistency between the two cases."

The process that Murphy and Frankfurter went through conforms quite closely to the model outlined above. Indeed, Murphy wanted some specific changes before he would sign Frankfurter's opinion, and Frankfurter obliged his colleague in such a manner that the opinion would still remain close to his bliss point. While this anecdote does not allow me to generalize this model, it is suggestive of the way bargaining plays out on the Court. That is, by combining the empirical data that exists about bargaining between justices (e.g., Epstein and Knight 1998; Wahlbeck, Spriggs, and Maltzman 1998) with the above model, the picture of what takes place during this process becomes clearer. More specifically this raises several interesting questions about how opinions are written: how would different payoff structures affect this bargaining process?; what if different bargaining techniques were employed (e.g., persuasion, appeals to personal relationships); what if the game was allowed to go through several iterations? These and other questions arise from the explication of this model. Each can be tested systematically, and the answers provide even more insight into the Court's decision making process.

## ***GAME II***

The second game posits that there may be times when an opinion writer negotiates with more than one undecided justice to garner a requisite fifth vote (or more votes if desired). This scenario has many applications, including when the Court is so divided that it resorts to hearing reargument in a case (see e.g., Hoekstra and Johnson 1997). Additionally, it is particularly revealing for the current Court as the moderate faction has two and sometimes three members who can sway the direction of a decision.



Consider Figure 2. In this game the opinion writer bargains with more than one undecided justice in order to procure the necessary votes for a majority. More specifically, the opinion writer again needs at least one more vote for a majority, but would like to have all the undecided justices join the coalition.<sup>12</sup> In an effort to at least gain the vital fifth vote the opinion writer must choose between Policy X and Policy Y. From there, the first undecided justice decides whether to dissent or write a special concurrence. Next, the second undecided justice must make the same choice.<sup>13</sup> If neither of the undecided justices join the opinion writer's coalition, then she can alter her opinion or try to persuade these undecided justices that her decision is best left in its current form. From there, the undecided justices either accept or reject the changes or persuasive arguments offered by the opinion writer.

**[Figure 2 about here]**

Figure 2 demonstrates that little bargaining actually takes place in this game. Solving for the equilibrium it is clear that in his last move the second undecided justice must accept the changes or rationale offered by the opinion writer and sign the opinion in his final move (accept dominates reject). Moving up the tree the first undecided justice must also accept the opinion writer's persuasive arguments in his last move. Knowing this the opinion writer utilizes

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<sup>12</sup> Certainly this may seem counter-intuitive according to the theory of minimum winning coalitions (e.g., Riker 1962), but makes sense in terms of Supreme Court decision making. Indeed, some scholars argue that attaining a grand coalition (all nine justices) is preferable to a majority comprised of a minimum winning coalition (e.g., a 5-4 decision) because when more justices sign the an opinion, it may carry more institutional weight (see e.g., Comparato and Epstein N.d.).

<sup>13</sup> Although the justices usually decide simultaneously, I model the interaction sequentially. There may be some support for this as the opinion writer may go first to one justice, and afterwards go the second justice seeking the vital deciding vote.

persuasion because she gains more utility by keeping the decision in its current form. Again, moving up the tree, the second undecided justice then joins in his first move, and the first undecided justice joins in his first move as well. Thus, the opinion writer chooses her most preferred outcome in her first move – policy X – and the equilibrium is at “Policy X, Join, Join.” The assigned payoffs are **(A,A,B)** for the respective justices, which is the best that each of them could have hoped to achieve in this game.

To place this model into real terms I turn to the controversy surrounding the Pentagon Papers case (*New York Times v United States*, 403 U.S. 713) from the end of the Court’s 1970 term.<sup>14</sup> In June of 1971 the *New York Times* and the *Washington Post* published articles based on two Department of Defense documents concerning the *Gulf of Tonkin* incident. The U.S. government brought suit against the newspapers and requested an injunction to stop the publication of any more documents because the Pentagon claimed that dissemination of the information would “cause irreparable injury to the country’s national security.” Further, the government claimed the documents were top secret and therefore stopping their publication would serve a compelling government interest. Because of the importance and gravity of the situation, Epstein and Walker note that from initial suit, to final appeal, this case took only nine days to reach the Supreme Court. During this time span the trial court ruled in favor of the *New York Times*, the Second Circuit Court of Appeals reversed, and the District of Columbia Court of Appeals found in favor of the *Times* (Rudenstine 1996).

The interesting part of this case is surely what was contained in the secret Department of Defense documents, but an equally interesting aspect of the case is how and why the justices

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<sup>14</sup>. The background here all comes from Epstein and Walker (1995) unless noted.

ruled as they did -- against a prior restraint on printing the defense documents.<sup>15</sup> Initially, the Court was split over three key issues in this case: whether a prior restraint on the newspapers violated the First Amendment, whether to lift the injunction against further printing, and whether to allow the government to prosecute the papers after publishing the documents (if a prior restraint was ruled unconstitutional). On one side Justices Black, Brennan, and Douglas were against allowing any prior restraint, and they were also against the government prosecuting after publication. Thus, they sought to affirm the decision of the D.C. circuit. One reason Black took this position was that he believed the “President has deluded the public of Vietnam” (Rudenstine 298). While Douglas only indicated that he agreed with Black, Brennan added that the government had not met its heavy burden of proving why a prior restraint was necessary (Rudenstine 299).

After conference three justices remained undecided as to how they would ultimately vote. Justice Stewart wanted to look at the specific facts of the case (i.e., what was in the secret papers) to decide if the documents were sensitive enough to censor. In short, he was not sure whether the papers “presented any such threat” (in Rudenstine 299) but wanted to see the papers before making this decision. Along with Stewart Justices White and Marshall were undecided, but both were leaning toward allowing punishment after publication. However, Rudenstine notes that Marshall seemed inclined to reverse the D.C. circuit decision (299).

Finally, Justices Burger, Harlan, and Blackmun favored censoring the defense documents

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<sup>15</sup> The accounts of what each justice thought about this case, and how each thought he would vote, is drawn from a history of the Pentagon Papers case by Rudenstine (1996) This research is based on the personal papers of Justices Brennan, Marshall, and Douglas, so this historical account should provide an accurate picture of the justices’ preferences.

altogether. All three were concerned about two key points: 1) the legal doctrine used by the lower courts; and 2) that the case had been decided with too much haste. Thus, whichever of the already formed three-justice coalitions could procure two of the undecided votes (Stewart, White, or Marshall) would win the case.

In the end, Stewart decided that the documents were not sensitive enough to warrant a prior restraint, and White and Marshall were willing to sign on with Brennan, Black, and Douglas as well because this position was closer to their bliss points. Thus, in a *per curiam* decision, the Court ruled 6-3 against the prior restraint.<sup>16</sup> However, the case was closer than the vote suggests because of how the justices dealt with each other after conference. On one hand, Burger tried to convince the undecided justices that his position made sense by locking the questionable documents in the conference room (with posted guards) to give the impression that the documents were, and should remain, top secret. He also called for, and received, a re-hearing to give the undecided justices time to figure out their positions (hopefully in his favor – see Hoekstra and Johnson 1997). Douglas and Black, on the other hand, saw the case differently and went as far as to take the documents out of the conference room (against Burger's orders). This insinuated that the documents were not secret, and should not be treated as such.

These bargaining tactics (along with Black's decision on whether to overturn the injunction altogether, or do so with the stipulation that prosecution could be carried out after the documents were printed), conform to the game in Figure 2. Indeed, Black had to make this choice, and Stewart looked at the facts of the documents because he was unsure of how to rule.

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<sup>16</sup> As Epstein and Walker (1995) point out, each justice wrote either a separate concurring opinion, or a separate dissenting opinion. Thus, while the Court seemed clear that the government's request was an unconstitutional prior restraint, there still did not seem to be complete consensus between the brethren.

Similarly, Marshall also knew that voting against prior restraint altogether was closer to his ideal point than was allowing the articles to be censored after publication (even though this may have seemed a reasonable solution). Thus, he also voted with Black in the end.

Although little overt bargaining or discussion seems to take place given the quick end to the game in Figure 2, this is not the case. Indeed, bargaining and calculations about each justice's preferences lead to this outcome. So, even though the outcome is simple, it does not mean that the game is uninformative. Rather, it highlights two key points. First, the second undecided justice (Marshall) was willing to compromise his full policy choice to be a part of the majority. This conforms to the discussion of utility functions in the previous section. Second, the opinion writer still seems to have the ability to bring together majority coalitions. As Wahlbeck et al. argue, "we suspect that opinion authors strategically craft opinions that will result in both a decision and opinion that the majority find acceptable" (1998, 313). If this is the case, it is no wonder that the game ends after each player's first move. Indeed, if Wahlbeck et al. are correct, then the opinion writer in Game II wrote her opinion just so she could obtain one if not both of the undecided votes, and therefore put together a majority.

### ***GAME III***

The final game considers a situation when the bargaining turns to another unique situation on the Supreme Court. In this model, the justice's want to procure a unanimous decision, but one justice is unwilling to sign any opinion that creates a policy not exactly on her ideal point.<sup>17</sup> Two coalitions emerge – one liberal and one conservative – and each try to write

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<sup>17</sup> There are clearly times when the justices strive to have unanimous decisions in order to speak with one strong voice. One example of this type of behavior took place when the Burger Court decided *U.S. v Nixon* (1974).

an opinion that will bring the last justice into the grand coalition.<sup>18</sup> Figure 3 shows one way that this type of scenario might play out. In this game a liberal justice writes an opinion for a coalition of four justices. His choice is between writing an extremely liberal decision or writing one that more moderately reflects his preferences so that it satisfies as many justices as possible. After this move the undecided justice must choose to agree or disagree with the way in which the liberal justice writes his decision. If the undecided justice rejects the opinion draft then the justice writing for the conservative coalition has a chance to persuade the undecided justice to join the other four justice coalition. The conservative justice's decision is between writing a conservative opinion or one that is written moderately (much like the liberal justice's decision). Finally, the undecided justice must decide to accept or reject the opinion circulated by the conservative coalition. At this point the game ends and payoffs are assigned.

**[FIGURE 3 ABOUT HERE]**

Beginning with the undecided justice's last move, it is evident that agreeing with the conservative opinion is his dominant strategy (he either receives a payoff of B or C for this move, as opposed to D for rejecting the decision). Even if the undecided justice is not conservative it may be beneficial for him to sign this opinion to ensure that the Court speaks with one strong and unanimous voice. Moving up the tree to the conservative justice's move he clearly chooses to write as conservative an opinion as he can because it gives him the most utility, and he knows that if the undecided justice makes a move, it will be to sign this opinion.<sup>19</sup> Knowing that the conservative justice will write an opinion farther from his preferred point than

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<sup>18</sup> See footnote 11 for an explanation of why this situation may arise on the Court.

<sup>19</sup> A threat to reject the conservative decision is not credible in this case, because the undecided justice receives less utility if he would make that decision.

he would like, the undecided justice agrees with the liberal justice's decision in his first move (even if it is a moderate decision). This is intuitive because any opinion written by the liberal justice clearly gives the undecided justice more utility than a conservative opinion. Thus, in the game's first move the liberal justice writes an opinion that satisfies his own goals and those of the undecided justice. Additionally, the leader of the conservative coalition signs the opinion, as the main goal of the Court is to achieve a unanimous voice in this case.

This suggests that two equilibria exist in this game: the liberal justice either writes a liberal or moderate opinion and the undecided justice agrees with the choice (see Figure 3). While the liberal writer could write a more moderate order, that would more likely satisfy all members of the Court, he does not do so. Rather, he and the undecided justice both gain the most utility if he writes a liberal opinion and the more conservative justice signs because he still gains utility from this choice. In this game, then, the equilibrium is for the liberal coalition leader to write a liberal opinion, for the undecided justice to agree, and for the conservative justice to reluctantly sign so that the Court shows a strong and unanimous front. The resulting payoffs are **(A,A,B)** respectively.

A situation much like this occurred over the Court's policy choice in *Alexander v. Holmes County Board of Education* (396 U.S. 19 -1969).<sup>20</sup> This case dealt with the rapidity with which Southern states had complied with *Brown v The Board of Education* 347 U.S. 483 (1954), and came to the Court via an order Justice Black made while hearing the case in the Fifth Circuit. In his circuit decision Black argued that regions of the South were moving too slowly toward full desegregation and that therefore the words "with all deliberate speed" should be stricken from *Brown*. Specifically he wrote that this standard "has turned out to be only a soft

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<sup>20</sup>. The explication of this case is drawn from Yarbrough (1988) except where noted.

euphemism for delay” (399 U.S. 1219). Despite his desire to strike this standard immediately, Black noted that as a single justice he did not want to force compliance without the consent of his colleagues.

As a result of Justice Black’s order, the NAACP appealed to the full Supreme Court for a decision that would force immediate desegregation. The Court took the case at the beginning of its 1969 term, and had to decide whether to enforce the wishes of the Legal Defense Fund, or to allow the Mississippi School district to wait until December 1 when its existing desegregation plan was to be implemented.

After oral arguments the Court was divided. Black and Douglas were set to force full desegregation with no more delay, while Burger, Harlan, Stewart, and White wanted to allow the district to wait for its new plan to be implemented. The latter coalition felt that the Court should not act hastily with a decision because it would be logistically impossible to enforce absolute and immediate desegregation. Brennan was in the middle, but leaned toward Black’s position, and while it was clear that Marshall favored quick action, he was willing to allow the existing plans to be used if the desegregation would begin on a specific date (before January so the policy would take effect during the second semester).

Additionally, and despite their differences, the justices (especially Chief Justice Burger) wanted the Court to reach a unanimous decision because it had never been divided in a desegregation case (including *Brown*). In other words, they wanted the Court to continue its undivided support for absolute desegregation because the justices thought that without the Court’s absolute approval the South would not abide by its order. The problem in *Alexander* was how to keep Justice Black in the grand coalition because he made it clear at conference that if the Court would not strike the phrase “with all deliberate speed” from *Brown* he would dissent and



jeopardize the institutional integrity of the Court. This was a distinct possibility given Burger, Harlan, Stewart, and White's willingness to allow a further delay.

Chief Justice Burger drafted an opinion with White, Harlan, and Stewart, and circulated it to conference. Black was outraged and ready to dissent immediately, while Brennan, Marshall, and Douglas simply did not think the language in the Chief's order was strong enough. Thus, the latter three decided that Brennan should draft an opinion that would better satisfy their goals, and possibly bring Black into compliance so that the Court's decision could be unanimous. Black liked Brennan's draft, but also wrote (and circulated) a potential dissent in the event that Burger's order was accepted by a majority. Burger, Harlan, and White were angry about Black's order, but Burger was still willing to do anything to achieve a unanimous decision.<sup>21</sup>

In the end, Burger consented to sign Brennan's order with appropriate changes made to bring Black into the grand coalition.<sup>22</sup> Brennan included the explicit language that Black wanted – the words “with all deliberate speed” were removed from Court doctrine – and added that there would be no more delays in desegregating the Mississippi school district. The opinion argued that it was “the obligation of every school district...to terminate dual school systems at once and to operate now and hereafter only unitary schools (396 U.S. 19). In short, the Court ruled that the status quo was desegregation, not segregation, and that therefore the schools must act on this order immediately.

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<sup>21</sup>. Burger was concerned about being labeled a failure if he could not keep the Court unanimous in school desegregation cases (as his predecessor Warren had done). Thus, he was willing to sign an opinion that had the unanimous consent of his colleagues even if he did not fully agree with its ruling. This also suggests that the integrity of the Court, and personal prestige are part of the justices' utility functions.

<sup>22</sup>. However, Burger, and his colleagues all wrote separate concurrences along with the order.

While this final game, like the previous one, ends after Black's first move, it is quite informative about how the bargaining process took place in *Alexander*. Indeed, Black signed Brennan's opinion and unanimity was achieved. This type of interaction probably often takes place on the Court: two justices vie for one justice's vote and the "swing justice" decides the nature of the opinion (Black was clearly the swing in this case even though the goal was for a unanimous decision). Additionally, as noted above, this game may be informative for situations when some justices want to hear rearguments in a case, or when some justices want to add more votes to their minimum winning coalition. Ultimately, while the payoffs may change, and the issue area may differ, this model shows how the bargaining process between two coalitions leads to one outcome and not another.

### **Conclusions**

The explicit point of this paper is not to provide definitive models for Supreme Court decision making. Rather, the point is that judicial scholars must take another step forward toward testing how the strategic interaction that takes place between justices leads to policy outcomes. So, while the games are simple, and do not provide systematic support for how strategic interaction affects Supreme Court policies, they do teach us a key lesson about the importance of intra-Court bargaining. Indeed, the anecdotal accounts presented after each model demonstrate how the bargaining that we know takes place between justices (e.g., Epstein and Knight 1998; Wahlbeck et al. 1998) can and does lead to specific outcomes.<sup>23</sup> Combined with the empirical evidence in the extant literature, then, the models explicated here show that when justices engage in

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<sup>23</sup> Certainly, some bargaining may be different depending on the type of case (tax versus civil rights cases), but the idea is still the same. That is, almost all cases, no matter the degree of salience (see Epstein and Knight 1998) involve some sort of bargaining and strategic behavior on the part of the justices.

negotiation, persuasion, and bargaining over policies, the Court's final policy choices are affected.

This may seem like an obvious point, but the extant literature in judicial politics so far only tells us that bargaining takes place; it does not tell us how this process ultimately leads to specific outcomes. Although this paper only takes a small step ahead, it does move us in the right theoretical direction for furthering our understanding of the role that strategic interaction plays in the Supreme Court's decision making process. The point is that through these models we can begin to build better, more sophisticated, models and use them to systematically test the effects of bargaining and accommodation (Wahlbeck et al. 1998) on the Court. This is an important contribution to the literature because before we can determine how the bargaining leads to outcomes, we have to have some theoretical idea of how the process works.

In the end the application of these models to the specific cases here bears out Justice Frankfurter's suggestion about compromise and bargaining on the Court. However, for a theory of strategic interaction and bargaining to be fully generalizable, one must be able to apply models (these or similar ones) to many different situations. Thus, future research should focus on accomplishing this goal.

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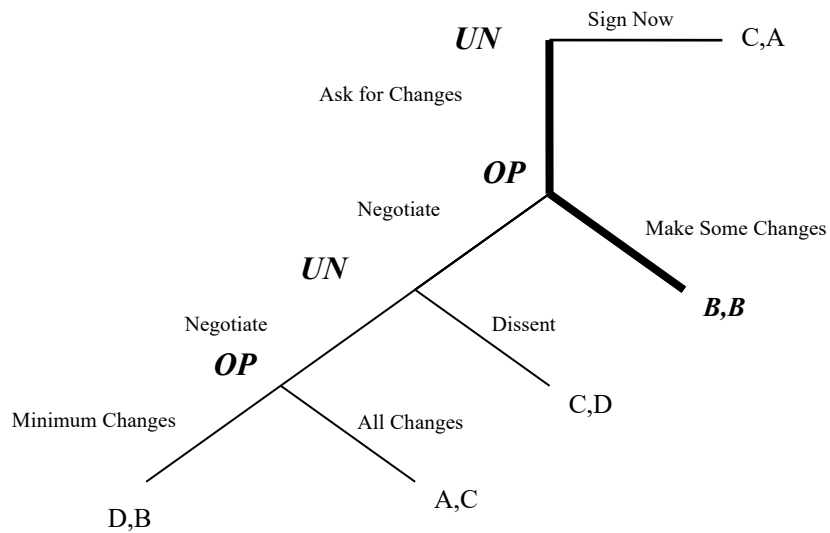
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**FIGURE 1:**  
**Bargaining Between an Opinion Writer and**  
**One Undecided Justice.**

**KEY:**

OP = Opinion Writer

UN = Undecided Justice

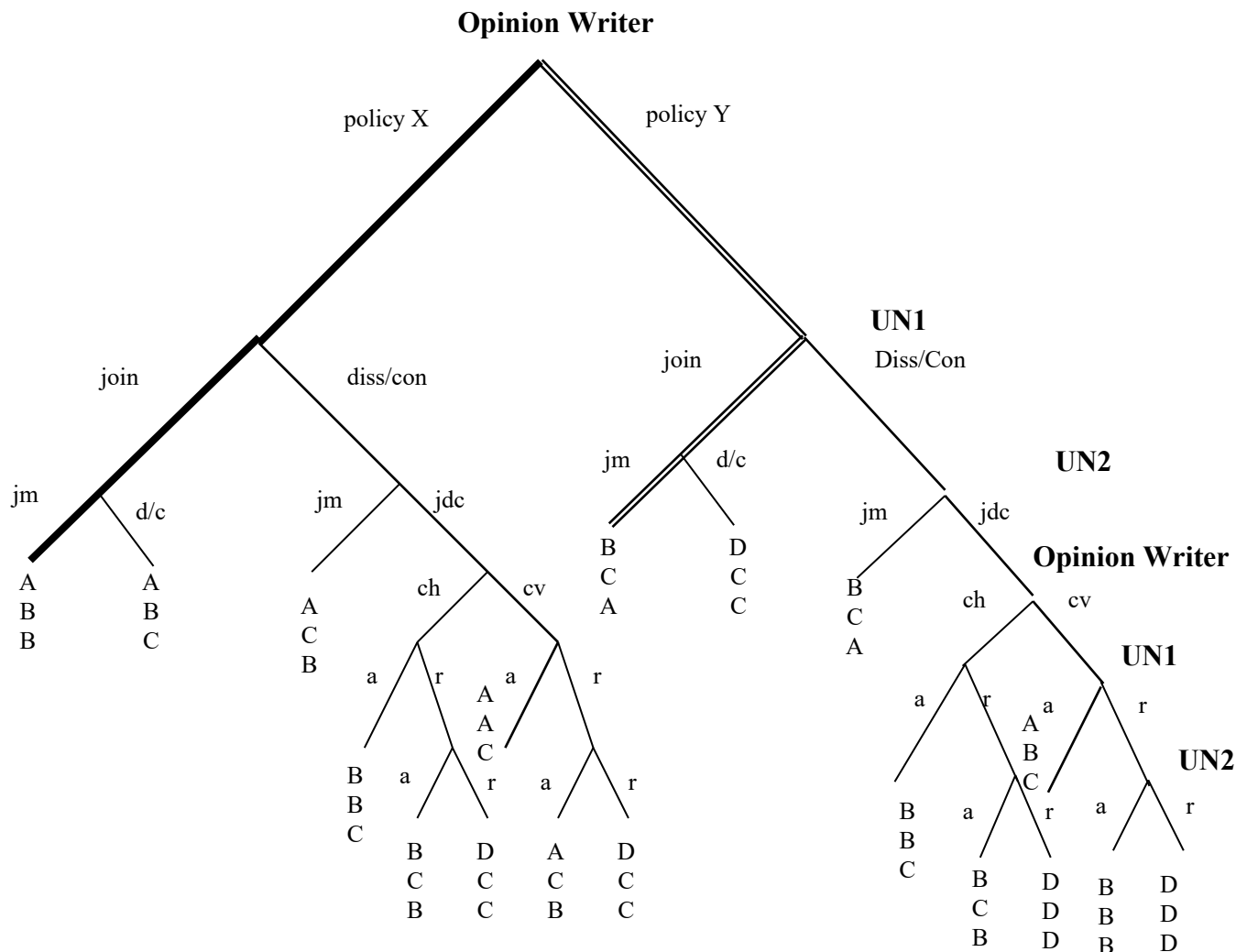
———— = Equilibrium Path

**Payoffs are in the order of moves**  
**(Undecided Justice, Opinion Writer).**

**Payoffs:  $A > B > C > D$**



**FIGURE 2: Bargaining Between an Opinion Writer and More than One Undecided Justice.**



**KEY:**  
 UN1 = first undecided justice  
 UN2 = second undecided justice  
 join=Join Majority  
 jm=Join Majority  
 diss/con=Dissent or Concur  
 jdc=Join Dissent or Concurrence  
 ch=Offer Changes to Opinion  
 cv=Use persuasion to convince colleagues that the opinion is best left in original form.  
 a=Accept changes or rationale for keeping opinion the same  
 r=Reject changes or rationale for keeping opinion the same  
 ————— = Subgame Perfect Nash  
 = = Off Equilibrium Nash

**Payoffs are in order of moves (opinion writer, UN1, UN2)**  
**Payoffs:  $A > B > C > D$**

