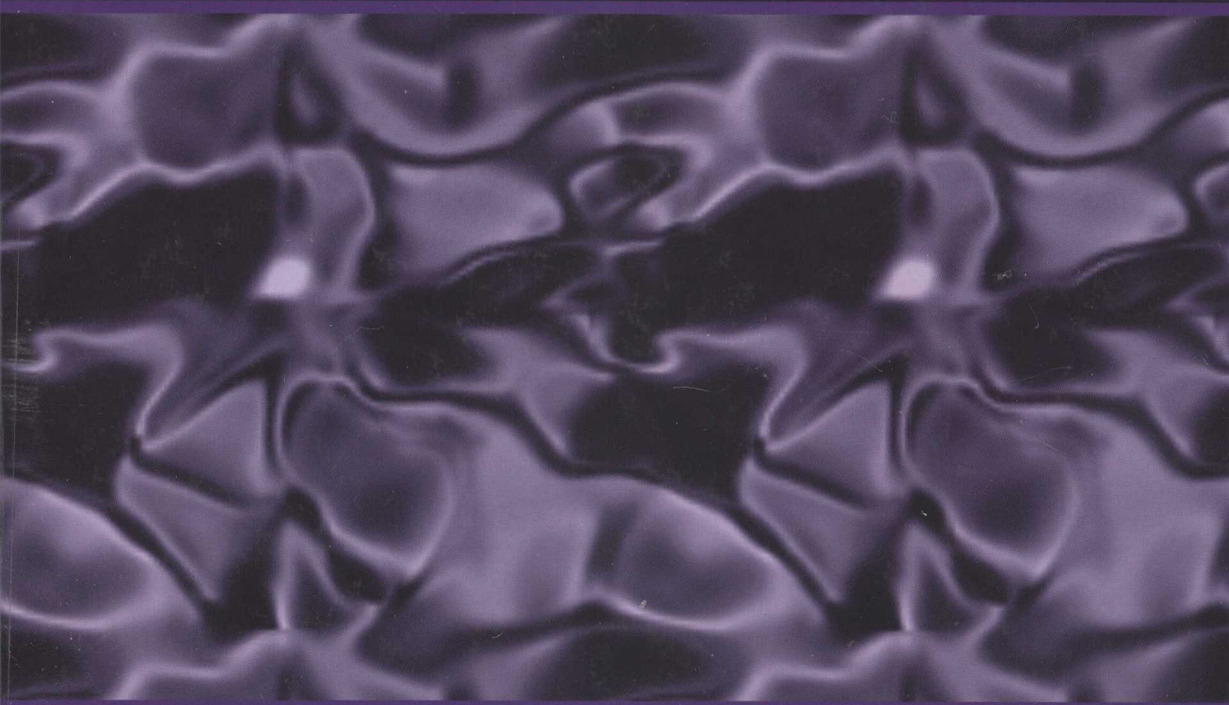
The Economics of Judicial Behaviour

VOLUME II

Edited by **Lee Epstein**



ECONOMIC APPROACHES TO LAW 38

The Economics of Judicial Behaviour
Volume II

Edited by

Lee Epstein

Provost Professor of Law and Political Science,
and Rader Family Trustee Chair in Law
University of Southern California, USA

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Part I
Collegial Courts

[1]

Sophisticated Voting and Gate-Keeping in the Supreme Court

Gregory A. Caldeira
Ohio State University

John R. Wright
Ohio State University

Christopher J. W. Zorn
Emory University

"Sophisticated voting" has a solid theoretical foundation, but scholars have raised serious questions about its empirical importance in real-world institutions. The U.S. Supreme Court is one institution where sophisticated voting should be common, but, paradoxically, where scholarly consensus about its existence has yet to emerge. We develop and test a formal model of sophisticated voting on agenda setting in the Supreme Court. Using data on petitions for certiorari decided in October term 1982, we show that, above and beyond the usual forces in case selection, justices engage in sophisticated voting, defined as looking forward to the decision on the merits and acting with that potential outcome in mind, and do so in a wide range of circumstances. In particular, we present strong evidence for sophisticated behavior, ranging from votes to deny a case one prefers to reverse to votes to grant cases one prefers to affirm. More importantly, sophisticated voting makes a substantial difference in the size and content of the Court's plenary agenda.

1. Introduction

Votes cast by members of collegial bodies do not always faithfully represent their true preferences. Faced with three or more choices, voters may forsake a first choice that has little chance of winning in order to prevent a least favorite alternative from winning. Typically called "sophisticated" or "strategic" voting, this behavior has solid theoretical footing, and scholars have discovered

We appreciate the assistance of the staff at the Reading Room of the Library of Congress for our work on the papers of Earl Warren, William O. Douglas, William Brennan, and Thurgood Marshall; and the staff at the Mudd Library at Princeton, for the papers of Justice John Marshall Harlan, Jr. Saul Brenner, Lee Epstein, James Hardin, Charles Smith, Jeff Segal, and several anonymous reviewers also offered helpful comments. Zorn also thanks the John M. Olin Foundation for their support of this research. The Law and Social Science and Political Science Programs of the National Science Foundation supported the collection of some of the data used in this article. An earlier version of this article won the 1997 American Judicature Society Award of the Law and Courts Section of the American Political Science Association.

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instances of it in legislatures and elections around the world (Abramson et al., 1992; Cain, 1978; Calvert and Fenno, 1994; Denzau, Riker, and Shepsle, 1985; Farquharson, 1969; Krehbiel, 1993; Krehbiel and Rivers, 1992; Riker, 1982, 1986; Volden, 1998).

Although most of the empirical research on sophisticated voting has dealt with legislatures or large electorates, sophisticated behavior is not unique to these institutions. The U.S. Supreme Court is one institution where sophisticated voting should be common, but, paradoxically, where scholarly consensus about its existence has yet to emerge (see Epstein and Knight, 1998; Spiller and Spitzer, 1996; but cf. Segal, 1997). We say paradoxically, because opportunities for strategic manipulation of the Court's plenary agenda are plentiful: the Court follows a sequenced, binary voting procedure for decisions on certiorari and the merits; the sifting of cases occurs out of sight, with no need to justify those decisions; cases are fungible; and decisions to grant plenary review usually presage the outcome on the merits. Thus the selection of cases is fertile soil for strategic manipulation, and the consequences for the Court's plenary agenda are potentially significant.

Our objective here is to investigate the role of the sophisticated behavior in setting the U.S. Supreme Court's agenda. Using data on petitions for certiorari decided in October Term 1982, we show that, above and beyond the usual forces in case selection, justices engage in sophisticated voting, defined as looking forward to the decision on the merits and acting with that potential outcome in mind, and do so in a wide range of circumstances. We present strong evidence for sophisticated behavior, ranging from votes to deny a case one prefers to reverse to votes to grant cases one prefers to affirm. Furthermore, sophisticated voting makes a substantial difference in the size and content of the Court's plenary agenda.

In Section 2 we describe sophisticated voting, weigh its theoretical and empirical importance, and evaluate previous research. In Section 3 we offer a model of sophisticated voting on the Court. Section 4 describes our data and addresses the central issue of measuring judicial preferences. We develop measures of the preferences of the justices, both individually and in the aggregate, which allow us to gauge strategic behavior. In Section 5 we consider sophisticated voting on certiorari at the individual level. By examining the interaction between the preferences of the individual justices and the balance of the Court, we demonstrate the influence of both ideological preferences and strategic concerns in voting on certiorari. In Section 6 we present evidence on the significance of sophisticated voting: a substantial number of cases qualified as "sophisticated" outcomes in which the Court denied certiorari because of forward-looking behavior by one or more of the justices.

2. Strategic Voting in Political Institutions

Political scientists typically characterize voters as "sophisticated" (or strategic) when they do not vote for their favorite alternative at one stage of a voting procedure in the hope of bringing about a more favorable outcome at a later stage. In contrast, voters are described as "sincere" when they always vote for

their favorite alternative at each stage of the voting procedure (e.g., Farquharson, 1969). This terminology, though fairly standard, is somewhat unfortunate in that it fails to distinguish between voters who have rationally looked ahead in the voting procedure and attempted to anticipate future outcomes from those who have not.[1] Voters can be sophisticated, in the sense that they are forward looking, but nevertheless optimally vote for their favorite alternative at the first stage of a voting procedure. Voters who vote for their first choices, therefore, are not necessarily engaging in nonstrategic behavior. Austen-Smith (1987), for example, has shown that with endogenous and decentralized formation of the agenda, an "optimally constructed agenda" makes sophisticated and sincere voting observationally equivalent.

Terminological ambiguities notwithstanding, Riker (1986) and others have provided important examples of sophisticated voting in political institutions. Yet Krehbiel and Rivers (1990) raise serious doubts about the empirical significance of sophisticated voting in legislatures. One problem is that sophisticated voting requires a "precise agenda fixed in advance and known to all participants" (Farquharson, 1969). The sequence of votes in legislatures, however, is often fluid and not known to all members. A second problem lies in identifying the true preferences of legislators. Ordeshook and Palfrey (1988), for example, demonstrate the difficulty of finding sophisticated voting with incomplete information about preferences. If many recorded votes are sophisticated, then legislative voting records will not be a reliable guide to legislators' true preferences. A third problem is that legislative procedures permit legislators to avoid sophisticated votes that might otherwise create problems with constituents.

The issues Krehbiel and Rivers (1990) raise might make the study of sophisticated voting on the Court untenable. Yet agenda setting in the Court comes closer than does Congress to meeting the conditions of sophisticated voting. First, justices know with certainty the subsequent branches in the tree after certiorari. Although they may not know precisely which issues the Court will decide, they will have a general sense of the alternatives. Since the Court's agenda is essentially fixed, unlike the situation Austen-Smith (1987) describes, it does not present problems of observational equivalence between sophisticated and naive behavior. Second, the opprobrium associated with sophisticated votes on the merits does not attach to the Court's agenda, in part because justices need not explain their positions. Third, justices deal with the same issues and a small number of individuals year after year, so knowledge about preferences is both easier to obtain and more likely to be accurate. Moreover, as Calvert and Fenno (1994) argue, sophisticated voting is possible if the actors possess even probabilistic knowledge of the agenda and preferences.

Despite the possibilities for strategic manipulation of the Court's agenda, scholars remain divided over the existence and extent of such behavior. Schubert (1959) claims that during the mid-1940s, liberal justices chose to grant

1. Standard definitions of sophisticated and sincere voting appear in Ordeshook (1992:75), and discussion of the confusion surrounding these concepts can be found in Baum (1997:90–91). We define the concept explicitly for our purposes in the next section.

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FELA petitions in which the lower court had decided against the worker, and in which the worker had a good chance of winning on the merits; and to deny certiorari in cases in which the lower court had favored the worker. Thus liberal justices engaged in sophisticated voting on FELA petitions. By contrast, Provine (1980) debunks the idea of strategic justices. During the Vinson and early Warren courts, conceptions of proper judicial behavior enforced jurisprudential criteria and "prevent[ed] the justices from exploiting possibilities for power-oriented voting on case selection" (Provine, 1980:172). Perry (1992) straddles the question of strategic behavior: the justices usually employ jurisprudential criteria; other times, ideological considerations come into play. Yet he also quotes justices and clerks who testify about various forms of strategic behavior.[2,3]

Palmer (1982) presents evidence for both policy-oriented and strategic behavior. Justices were more likely to vote for certiorari if they eventually voted to reverse on the merits—and if their side won on the merits (see also Brenner and Krol, 1989; Krol and Brenner, 1990). For cases decided on the merits during the Vinson Court, Boucher and Segal (1995:835) estimate the impact of a justice's policy preferences and the degree of support for his position within the Court on votes for or against certiorari: "[D]uring the ... Vinson Court a majority of the justices exhibited strategic voting behavior." Boucher and Segal claim evidence of aggressive grants but not of defensive denials.

The contradictions in previous work on sophisticated voting in the Court stem from several problems. First, prior work has lacked an adequate measure of judicial preferences; to detect sophisticated voting, we need to know where the justices stand initially. Second, previous studies have usually focused on cases decided on the merits rather than the full set of petitions. Selection bias plagues such samples; omitting cases never reviewed on the merits mitigates against finding evidence of sophisticated behavior. This omission is problematic for, as we shall see, much sophisticated voting involves denials of certiorari. Since

2. We have found many examples of "strategic recommendations" in memoranda from law clerks in the papers of Thurgood Marshall, John Marshall Harlan, Jr., and Lewis F. Powell. Consider a single example. Marshall's clerk raises strategic considerations in a memorandum on *Rust v. Sullivan* (89-1391) and *New York v. Sullivan* (89-1392):

> CA1 has ruled to the contrary of CA2 on a number of the claims. The lawyers are quite good, and the full range of potential arguments have been made. In the normal case, this would be a pretty clear grant. Here, though, I would deny. The rumor mill has it that SOC [Sandra Day O'Connor] has changed her vote in *Hodgson* and that the statute will be upheld in its entirety. If we can't win *Hodgson*, it's hard to imagine the abortion case we could win. This case has the First Amendment dimension, which might help us with AAS [Antonin Scalia] or AMK [Anthony M. Kennedy], but I doubt it. Because every abortion case on which cert is granted creates a new opportunity to overrule *Roe*, I would deny on defensive grounds. Tactical judgments aside, the case is a grant.

3. For state supreme courts, Hall (1992) finds persuasive evidence of the impact of electoral forces in judges' decisions in death penalty cases; liberal judges in such cases moderate their votes on the merits in order to minimize the chance of a future defeat at the polls.