HERESTHETICAL MANEUVERING ON THE US SUPREME COURT

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ABSTRACT

Can an apparent loser snatch victory out of the jaws of defeat? This question occupied the attention of the late William H. Riker during the last ten years of his career, and it is one that he answered in the affirmative: By constructing choice situations in order to manipulate outcomes, losers can become winners, and vice versa. Riker even coined a term, 'heresthetics', to describe this 'art of political manipulation'. But is Riker's rather large body of work the 'idiosyncratic' product of a 'singular genius' or can it serve as the 'foundation of a new theory of politics'? Scholars have recently raised this question, and not unreasonably so, for Riker's theory of heresthetics has yet to gain a serious foothold into the political science literature.

We develop a game-theoretic model, which enables leaders – in our case, Chief Justices – to engage in heresthetical manipulations. From this model, we deduce propositions about the circumstances that would lead them to invoke heresthetical devices, as well as the particular strategies we would expect them to employ. Finally, we explore the propositions against data amassed from the private papers of two former justices. Our results indicate that Riker's work was not the 'idiosyncratic' product of a 'singular genius' but rather can serve as the 'foundation of a new theory of politics'.

KEY WORDS ● heresthetics ● nested games ● political manipulation ● sequential equilibrium ● supreme court

Can an apparent loser snatch victory out of the jaws of defeat? This question occupied the attention of the late William H. Riker during the last ten years of his career (1983, 1984, 1986, 1990, 1993, 1996); and it is one that he answered in the affirmative: By constructing choice situations in order to manipulate outcomes – most notably, by adding alternatives, controlling

the agenda, and voting in a sophisticated fashion – losers can become winners, and vice versa. Riker even coined a term, 'heresthetics', to describe this 'art of political manipulation'.

But is Riker's rather large body of work the 'idiosyncratic' product of a 'singular genius' or can it serve as the 'foundation for a new theory of politics'? Schofield (2000: 434) recently raised this question, and not unreasonably so: Despite its developer's impeccable scholarly reputation, despite its extensive elaboration, Riker's theory of heresthetics never gained a serious foothold into the political science literature.[1] Or, as Schofield (2000: 434) put it, 'While many admire Riker's analyses, few have imitated them'.

What accounts for this omission is an intriguing question, with many possible responses. One pertains to the way in which Riker presented his theory. Even though heresthetics concerns itself with inherently strategic situations, Riker did not write down formal models, solve them, and derive equilibria; rather, he relied largely on case studies to do the heavy theoretical lifting and on readers to uncover models within them. Hence, from his work (Riker, 1986) on the debates between Abraham Lincoln and Stephen Douglas, we are expected to discover that 'a fundamental heresthetical device' for an evident loser is to 'divide the majority with a new alternative'; or from his classic studies of the amendment Adam Clayton Powell proposed to an education bill (1965, 1982, 1986), we are supposed to learn about the importance of sophisticated voting. What we do not learn is why the actors in these case studies selected the particular heresthetic device that they did rather than another. Nor do we know whether Riker describes equilibrium behavior that we should expect to observe in other cases that present similar circumstances or even what circumstances are sufficiently similar to produce a particular type of heresthetic behavior. The lack of answers to these questions, in turn, left scholars without a solid foundation on which to build. A related response centers on some of the assumptions that underlie Riker's discussions, particularly that actors possess complete and perfect information about the preferences and likely action of all other actors. This is even though Riker himself recognized that this assumption runs counter to the basic idea behind the art of political manipulation. As he wrote:

> If tastes or institutions are certain to induce a stable outcome, there is little the prospective loser can do to prevent prospective winners from arriving at the anticipated outcome. But

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1. Electronic searches turned up only six articles (Cohen, 1991; McLean and Bustani, 1999; Nagel, 1993, 1998; Paine, 1989; Weimer, 1992) and one dissertation (Carsey, 1995) that made extensive use of Riker's theory of heresthetics. There are several papers that do not explicitly mention heresthetics but run along similar lines (e.g. Calvert and Fenno, 1994). Finally, as one of the anonymous referees pointed out to us, several papers at the 2001 meeting of the Public Choice Society addressed the question of 'Heresthetics – Has the Riker Program a Future?'

> if stable outcomes are difficult to arrive at, or are not obvious, or do not exist, then it is possible for the prospective loser to rearrange politics to his advantage. This is what heresthetics is all about. (Riker, 1990: 50)

Not only is this probably an unrealistic assumption to make about many political interactions but it is also one that affects predictions about the use (or non-use) of various heresthetic devices (Krehbiel and Rivers, 1990).

We could develop these and other explanations more fully, but such would miss the more fundamental point: simply because Riker did not leave us with a complete theory of heresthetics does not mean political scientists should continue to ignore his ideas. To the contrary, if Riker was correct and potential losers regularly engage in the art of political manipulation, then we discount heresthetics at our own peril. That is because, as scholars readily acknowledge, most institutionalized political situations create winners and losers – so much so that our understanding of politics will remain impoverished if we fail to take into account how actors attempt to restructure choice situations to their own advantage (Calvert and Fenno, 1994). Seen in this way, Schofield's question – can Riker's stories serve as the 'foundation of a new theory of politics' or are they the 'idiosyncratic' product of a 'singular genius' – deserves serious attention.

In what follows, we give it that attention by, first, setting out a conceptual account of heresthetics that assembles the various maneuvers Riker investigated. Next, we use this account to develop a game-theoretic model, which enables a leader – in our case, the Chief Justice of the United States – to engage in heresthetical manipulations. From this model, we deduce propositions not only about the circumstances that would lead an actor to invoke heresthetical devices but also about the particular strategies we would expect him to invoke. Finally, we explore those propositions against data amassed from the private papers of two former Supreme Court justices.

1. 'The Art of Political Manipulation'

Riker spent the last years of his life writing considering the subject of winning in the face of apparent defeat. He sought to advance a rather simple proposition: leaders (and even their followers) succeed in political situations because they induce others to join them. Sometimes they accomplish this through verbal persuasion, that is, they convince relevant actors to change their minds. But, more typically, 'they win because they have set up the situation in such a way that other people will want to join them – or feel forced by circumstances to join them – even without persuasion at all' (Riker, 1986: ix). It is with this latter form of manipulation that heresthetics concerns

itself: not with the manipulation of the minds of other players but with redefining the structure of the game they jointly confront.[2]

How do political actors go about the task of heresthetically restructuring their world? Riker offered three answers to this question: adding alternatives, controlling the agenda, and voting in a sophisticated fashion – each of which merits consideration.

1.1 Adding Alternatives

Potential losers find themselves confronting a number of tricky choice situations. Among the most difficult, according to Riker (see also Paine, 1989), is when they are in the minority in a one-dimensional space. To see why (as well as how common this is in the work-a-day world of politics), consider a political actor, say the Chief Justice of the United States,[3] whose Court, at a private conference, is about to take a preliminary vote on the merits of a particular case over which two options exist: AFFIRM the decision of the court below or REVERSE it. This vote is preliminary to the extent that justices can change their minds about whether to AFFIRM or REVERSE. Typically such alterations come about after justices have read a draft of the opinion of

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2. We note that a *relativity* aspect necessarily exists to the ability of players to restructure the very game they are about to play. In fact, we can view restructuring one game (altering one institution) as a strategic move in some larger interaction within which the original game subject to the heresthetical maneuver is nested. What is thus a heresthetical move in the first game is but a strategic choice in the second. Seen in this way, the modeling challenge is to understand how a heresthetical manipulation can be a part of an equilibrium profile (i.e. to specify and solve the larger game). See Section 3.

3. We develop a model that enables political actors to engage in various heresthetical maneuvers focusing on the Chief Justice as a heresthetician. The Chief Justice, by virtue of various Court norms – including those governing seniority (the Chief's power to speak and vote first at the Court's private conference) and opinion assignments (the Chief's power to assign the opinion if s/he is in the majority, which occurs in over 80 percent of all cases) – has far greater opportunities to influence outcomes than other Court members. Second, focusing on all Court members would complicate the model (described in Section 3) and take up far more space than we have available to us. It is under a similar rationale that studies of Congress often identify one player to possess, say, agenda-setting power. That player can be a committee (Bendor and Moe, 1986; Shepsle, 1979; Shepsle and Weingast, 1987), a committee chair (Collie and Roberts, 1992; Schickler and Rich, 1997; Weingast, 1989), a bureau chief (Niskanen, 1971), or congressional leadership (Enelow, 1984; Sinclair, 1992) but not all members of the legislature at the same time. (An alternative approach allows, under a closed rule, a single agenda-setter to be selected at random from all members of a decision-making body; see Baron and Ferejohn, 1987, 1989.) Readers will note, however, that the model explicated in Section 3 *always treats every justice's behavior as strategic,* since all players engage in equilibrium behavior and update their beliefs in a Bayesian way. This approach is similar to those studies of Congress in which the membership responds in a strategic fashion to the agenda-setting efforts of the actor under analysis (see Banks, 1990; Eavey and Miller, 1984).

the Court, which contains the policy favored by the majority (Maltzman and Wahlbeck, 1996a). But the preliminary vote itself determines the outcome (i.e. affirm or reverse) that the opinion draft will adopt.

Further suppose that there are two members of this Court besides the Chief,[4] but it is the Chief who is the *primus inter pares* to the extent that s/he (1) speaks and votes first at conference and (2) is able to decide who will write the opinion of the Court if s/he is in the majority. Finally, assume that the Chief knows, with certainty, that the preference orderings are as follows (where P indicates 'strictly preferred to'):

Chief Justice: REVERSE P_c AFFIRM
Justice 1:   AFFIRM P_1 REVERSE
Justice 2:   AFFIRM P_2 REVERSE

This situation is a difficult one for the Chief because (1) s/he is not in the majority and (2) those in the majority will want to attain the outcome they desire with all due speed. Is there anything that the Chief can do to better his/her situation, assuming that Justices 1 and 2 will not change their minds over the reverse versus affirm decision?

To Riker, the answer is yes:[5] The Chief can attempt to divide the majority by adding a new alternative into the mix. Let us assume our Chief Justice does just that. He raises a procedural alternative; namely, that the Court should dismiss the dispute as moot.[6] Efforts to divide a solid majority seem to take two forms in Riker's work: adding alternatives and adding dimensions. Conceptually, these are quite distinct but in the hands of a heresthetician they are designed to have the same effect: to displace a sure winning outcome adverse to the heresthetician's preferences. For the sake of simplicity, we focus on adding alternatives; see Riker (1986) for examples of adding dimensions.

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4. There are, of course, nine members on the US Supreme Court. But, as we suggest later, a three-person model is (under certain circumstances) immediately generalizable to a Court of any size.

5. Some judicial specialists also answer this general question in the affirmative but they point to the PASS option; that is, the Chief Justice could decide against casting a vote to AFFIRM or REVERSE (i.e. s/he could PASS), wait for the other justices to vote, then vote with the majority so that s/he could assign the opinion in an attempt to ameliorate the policies that opinion contains (see Epstein and Knight, 1998; Maltzman et al., 2000). But, on Riker's account, passing would not be necessary: since it assumes that the justices have full knowledge of each other's preferences, the Chief would be able to obtain control of the majority opinion assignment by simply casting a vote to AFFIRM on the first round; s/he would have no need to PASS.

6. A case is moot if the controversy that created the dispute is no longer a live one. Courts refrain from deciding moot controversies on their merits; rather, they simply dismiss them as 'moot'.

Further suppose that the Chief's move reveals that the preference orderings for the three alternatives are:

Chief Justice: REVERSE P_c MOOT P_c AFFIRM
Justice 1:   AFFIRM P_1 REVERSE P_1 MOOT
Justice 2:   MOOT P_2 AFFIRM P_2 REVERSE

Hence, in the place of the certain outcome of AFFIRM, our Chief has created instability in the form of a cycle. If a vote pits AFFIRM (the initial winner) against, say, MOOT, MOOT will win. But the Chief Justice and Justice 2 will want to replace MOOT with REVERSE, and, to complete the cycle, Justices 1 and 2 will attempt to replace REVERSE with AFFIRM.

1.2. Controlling the Agenda

That our Chief Justice was able to create a cycle of preferences is important to the extent that he *may* have been able to displace the sure winner of AFFIRM. But, as our emphasis on 'may' indicates, adding the alternative does not necessarily guarantee that a majority vote will not ultimately produce AFFIRM, our heresthetician's least favored alternative. Rather, *depending on the order in which the decision-making body (here, the Court) takes up the various alternatives,* AFFIRM *may or may not result.*

And this is where the heresthetic maneuver of agenda control becomes critical. If our political actor is in a position to control the order in which various alternatives are considered, s/he can structure the situation to her/his advantage. In other words, just as s/he can use the heresthetic device of adding alternatives to induce instability, s/he can now invoke the agenda control maneuver to restore stability, but in a way that favors her/his interests.

To illustrate, let us return to our Chief Justice and suppose that s/he has added the procedural alternative such that the preference orderings are as we depict above and now reprint below:

Chief Justice: REVERSE P_c MOOT P_c AFFIRM
Justice 1:   AFFIRM P_1 REVERSE P_1 MOOT
Justice 2:   MOOT P_2 AFFIRM P_2 REVERSE

Assuming the Chief has complete control over the agenda, s/he can obtain her/his most preferred outcome (REVERSE) by proposing the agenda shown in Figure 1. If all justices vote sincerely, then MOOT beats AFFIRM at the first node, and REVERSE trumps MOOT at the second. In other words, the Chief – by adding an alternative and, then, controlling the agenda – succeeds in attaining her/his most preferred outcome without having persuaded her/his colleagues
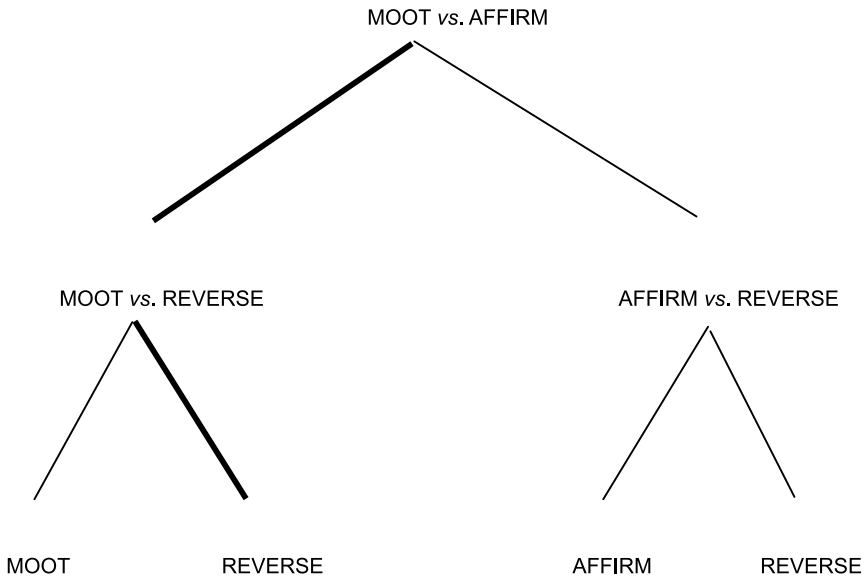
Figure 1. Controlling the Agenda on the Court with No Institutional Constraints and Sincere Voting

to change their underlying preferences; s/he simply restructured the situation to her/his advantage.

1.3. *Voting in a Sophisticated Fashion*

In a world that allows its leaders to set or control agendas free from institutional constraints, our previous example is quite apt; that is, leaders may be able to use the heresthetic device of agenda control to their advantage. But this state of the world does not often exist, at least not in the political realm. More typically, various institutional arrangements constrain leaders from ordering agendas willy nilly (Knight and Sened, 1995). Such is the case for congressional leaders (Calvert and Fenno, 1994), as it is for Chief Justices. More to the point, a norm on the Supreme Court constrains the Chief from setting up the agenda in the way Figure 1 depicts. He would be unable to pit a procedural alternative (such as, MOOT) against one on the merits of the dispute (such as, REVERSE); rather, the justices would first need to determine whether the case was in fact procedurally defective (such as, MOOT or not) before they proceeded to the merits vote (either REVERSE or AFFIRM) (Epstein and Knight, 1998; Stearns, 2000).
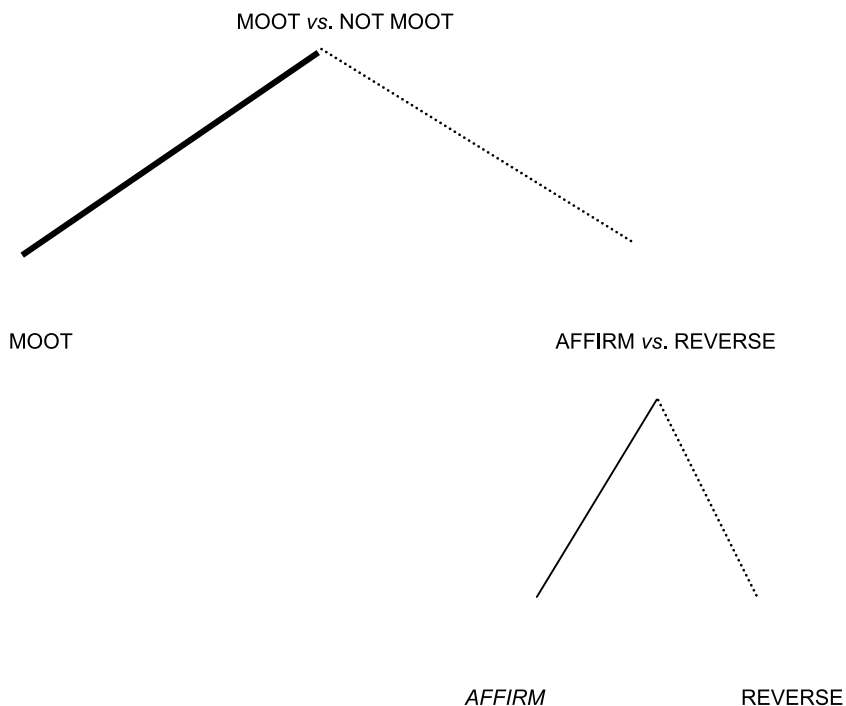
Figure 2. Voting in a Sophisticated Fashion over an Agenda Constrained by Institutional Norms

Note: If we assume the following preference orders, then MOOT results if the Chief Justice votes in a sophisticated fashion; if he votes sincerely, then AFFIRM obtains.

This fact of political life – that institutions often constrain the ability of actors to control agendas or issue spaces – does not necessarily spell disaster for apparent losers. For there is yet another device to which they can turn to further their goals when agendas or alternatives are fixed or partially fixed: the heresthetic of sophisticated voting (that is, voting in a way that does not reflect one's sincere preferences).[7]

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7. Riker refers to this as 'strategic' voting. We use the term 'sophisticated' instead to indicate the distinction between strategic and sophisticated voting – that sophisticated voting is a subset of strategic behavior. Specifically, a strategic actor is one who realizes that her/his success or failure depends on the preferences of other relevant actors and the actions s/he expects them to take, not just on her/his own preferences (Cameron, 1994). Those calculations may lead her/him to make choices that reflect her/his sincere preferences or to behave in a sophisticated fashion (that is, in a way that does not reflect her/his true preferences).

To see how this device may help the Chief's cause, consider Figure 2 in which we depict an agenda that follows from the Court's norms: the vote on procedure occurs before the vote on the merits. If the procedural vote succeeds (that is, if the Court agrees that the case is moot), then no decision on the merits follows; the case is simply dismissed. It is only by finding that the case is procedurally sound that a merits decision can occur. (Note that we continue to assume that the Chief Justice has set up this situation by adding the alternative of MOOT; if s/he has not done so, recall, AFFIRM emerges as the clear winner.)

As we can see, if all justices vote sincerely, then the Chief obtains her/his least preferred outcome of AFFIRM. That is because two of the three justices (the Chief and Justice 1) sincerely desire a decision on the merits and, thus, prefer NOT MOOT to MOOT. If, however, there is sophisticated voting on the Court – such that here the Chief Justice chooses MOOT over NOT MOOT – then the dispute dies without a vote on the merits. Of course, this is not the Chief's most preferred outcome but, by invoking the heresthetic device of sophisticated voting, s/he avoids her/his least desirable alternative of AFFIRM. And, given that AFFIRM appeared to be the clear winner from the onset, the Chief's ability to avert it should, as Riker would say (1986: 151), lead him to 'think himself wise'.

2. The Application of Heresthetics to the 'Real' World

From even this brief discussion emerges a point we made at the onset: the notion of heresthetics is a simple, even intuitive, one. After all, why wouldn't all potential losers attempt to restructure the situation to their advantage?

Certainly, Riker would say that they would and do; that the use of these heresthetic devices is commonplace. And yet the evidence is not so commonplace. Why have relatively few scholars investigated the notion of heresthetics? Earlier, we provided two answers: Riker's failure to generate testable, empirically-verifiable predictions and his reliance on some potentially troublesome assumptions. As he sets it out, Riker's theory behind heresthetics was not very amenable to large-scale, systematic assessment. His models served rather as rationalized stories fitted to particular cases. Accordingly, they produce no empirically falsifiable prediction unless their historical facts are shown to be wrong (see Mackie, 2001; cf. McLean, 2001).[8] We

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8. Potential complications are involved in specifying and solving the larger game to predict instances and methods of political manipulation. We may be unable to observe the identities of potential herestheticians, the preferences of all the players, possible random shocks affecting political processes and shaping players' beliefs, and so on. In other words, some institutional settings may be particularly well suited to the task of model building. The focus of our inquiry (the Supreme Court) is one but there are others.

address this limitation by modeling heresthetical maneuvering on the part of a Chief Justice but without regard to a specific incident or case of manipulation. Since this analysis reveals that the discrete heresthetics invoked in equilibrium depends on the parameters of the strategic interaction, we develop explicit predictions about the circumstances that would lead a Chief to resort to heresthetics, as well as about the particular device s/he would employ, and, in turn, explore those predictions against real-world evidence.

Second, Riker's assumption that actors have complete and perfect information about the preferences and likely actions of the other relevant actors. So, for example, when Lincoln asked Douglas the question of whether US territories could exclude slavery – what Riker (1986: 6) calls the most 'elegant example of the heresthetical device of splitting the majority' – Lincoln

> had to *know* that the Democratic party was sorely divided on this issue and was divided differently than on other dimensions, dimensions more favorable to Douglas' senatorial and presidential aspirations . . . Dividing the Democratic party (which, at the time, was the dominant party in national politics) may have seemed the only way to create an opportunity for the newly-formed Republican party to win the presidential election. *Knowing* Douglas' prominence and the distribution of opinion on slavery among the Democrats, Lincoln was able to devise a heresthetical maneuver that effectively undermined the presidential front-runner and divided the majority party. (Paine, 1989: 38, our emphasis)

Or when Powell introduced his amendment to an education funding bill, Riker (see also Denzau et al., 1985) assumes that Powell knew the Republicans would vote in a sophisticated fashion (voting for the amendment but, later, against the amended version of the bill) and that his 'victory' would be in symbol only.

And, yet, this assumption of perfect and complete information is problematic in any number of ways. First, it is probably an unrealistic one to make about at least some political interactions (Martin, 1998a), including those on the Supreme Court (Martin, 1998b; Segal, 1997). While we can imagine some situations in which all justices can predict the votes of all other justices and they all know this to be so (e.g. when they have sat together for many years), this will not always be the case.

Second, the complete and perfect information assumption can lead to (unnecessary) post-hoc explanations – with the battle over the Powell amendment a case in point. That Republicans voted in favor of an amendment they opposed seems to fit quite compatibly with the heresthetic account: Republicans probably wanted to kill the original version of the bill and recognized that the amended version would stand a better chance of defeat than the original. But that begs the question of why Powell proposed the amendment in the first place. Was he a poor heresthetician? Riker rejects this argument, and instead resorts to a 'home-style'-type claim: Powell proposed the amendment to curry favor with his constituents. So, according to Riker (1986: 127)

'people on one side [Powell and his followers] voted for a symbol, people on the other side [the Republicans] voted for an outcome; but both sides voted rationally'. Maybe. Or maybe Powell was less certain about the eventual outcome than Riker makes out; perhaps Powell even believed that a reasonable probability of winning existed, high enough to justify the cost of the possible failure of his heresthetical attempt.

Finally, the assumption has a fundamental (and, we believe, often problematic) impact on the sorts of predictions we can generate about heresthetical maneuvers. Krehbiel and Rivers (1990) make this point with regard to Riker's story about the Powell amendment, and it is equally evident from our treatment of the Chief Justice. Throughout the previous discussion, we assume the Chief had perfect and complete information about the preference orderings of his colleagues. But let us, for a moment, relax that assumption; specifically, suppose that the Chief felt fairly secure in his assessment of 1's preferences but not of 2's, such that:

> Chief Justice: REVERSE P_c AFFIRM
> Justice 1:   AFFIRM P_1 REVERSE
> Justice 2:   REVERSE P_2 AFFIRM? or AFFIRM P_2 REVERSE?

Under these circumstances, would our heresthetic Chief introduce the alternative of MOOT as we predicted s/he would if he were certain about 2's preferences? Perhaps not, for that step might actually leave her/him worse off – with her/his second choice of MOOT carrying the day, when 2 may actually prefer REVERSE. Furthermore, when uncertainty is present, the Chief may attempt to reorder the agenda by failing to vote (that is, casting a vote of PASS;), rather than casting a concrete vote (i.e. a vote to REVERSE or AFFIRM), and then – after 1 and 2 have stated their preferences – voting with the majority in order to ameliorate the policy contained in the opinion. But, under Riker's assumption of complete and perfect information, of course, it would make little sense for the Chief to 'PASS' under any circumstances. On the one hand, if the Chief knew that (1) s/he was going to lose and (2) Justice 1 and/or 2 preferred MOOT to AFFIRM, perhaps s/he would add the MOOT alternative as we suggested earlier. On the other hand, if s/he knew that (1) s/he was going to lose but that (2) both Justices preferred AFFIRM to MOOT, s/he could moderate the policy implications of an unavoidable decision to AFFIRM by voting with the majority (contrary to her/his sincere preferences) in order to control the decision over who would write the majority opinion (Epstein and Knight, 1998; Hammond et al., 1999; Maltzman et al., 2000; Murphy, 1964); there would be no need to pass since the same outcome would obtain regardless of her/his move.

In short, it is not simply Riker's failure to develop testable propositions from his theory that has led to its widespread neglect; it is also that the stories

he told hinged on a problematic assumption such that if investigations of heresthetic maneuvers are aimed at capturing slices of the real world, they are probably best off relaxing the assumption of complete and perfect information. At the very least, this is the tack we take below.

3. A Model of Heresthetical Maneuvers on the US Supreme Court

Thus far our discussion of heresthetics has been mainly in the abstract. It is now time to pour the concrete, and develop a model that enables political actors to engage in various heresthetical maneuvers, to use that model to develop behavioral predictions, and to explore those predictions against data. For our primary purposes are to determine whether real-world political actors (here, justices on the Supreme Court) purposefully manipulate the rules by invoking various heresthetical devices and to identify the circumstances that lead them to adopt one device over another. In other words and to put it more broadly, we hope to address Schofield's (2000: 434) question of whether Riker's stories are, in fact, able to serve as 'the foundation for a new theory of politics'.

The model we propose reflects that purpose. Although it is, in some regards, stylized to keep the problem tractable, it is otherwise and at its core, an accurate representation of the processes and options that exist on the Court, at least as scholars have described them (Epstein and Knight, 1998; Stearns, 2000). Moreover, it incorporates all three types of heresthetical maneuvers Riker proposed: We endow a leader, the Chief Justice of the United States, with powers that enable her/him to add alternatives, to control the agenda, and to vote in a sophisticated fashion – in other words, to engage in the art of political manipulation. Since Chief Justices possess these powers, such an endowment is not a stretch; actually, it stays close to empirical realities on the Court.

In this section, we describe the game played by members of a collegial court who must decide how to vote over cases pending before them. We then solve the game, which enables us to develop parameter-contingent expectations about heresthetical manipulation.

3.1. The Heresthetics Court Game

We begin by supposing the existence of a Court that consists of three justices, $I = 1, 2, 3$. The number indicates the order in which they speak and vote such that justice 1 is the Chief Justice, who votes and speaks first (s/he also assigns the opinion of the Court if s/he is in the majority); Justice 2, the most senior

associate justice, who votes and speaks second (and assigns the opinion of the Court if s/he is in the majority and the Chief Justice is not); and, Justice 3, who votes and speaks last.

The vote itself is over a case, which we only describe by two abstract alternatives: REVERSE and AFFIRM (without loss of generality, $x_{\text{reverse}} < x_{\text{affirm}}$, separated by some spatial distance, $x \in X \subseteq \Re^1$). The current state (which we denote as x_{sq}) – that is, the existing state of the law (precedent)[9] – would prevail if the case is not decided on the merits. We assume that a resolution of the case moves us (however marginally) away from the status quo and in opposite directions for the AFFIRM and REVERSE outcomes. A decision to AFFIRM when the Chief Justice votes with the majority and therefore has the opportunity to assign the opinion of the Court such that he may be able to ameliorate some of the policy consequences of a disposition adverse to his interests is denoted as x_{opinion}; $x_{\text{reverse}} < x_{\text{sq}} < x_{\text{opinion}} < x_{\text{affirm}}$.

Figure 3 lays out the voting procedure. As we can see, the Chief Justice (Justice 1) makes the first move. S/he can (1) vote to REVERSE, (2) vote to AFFIRM, (3) PASS (which would allow Justice 2 to vote first), or (4) raise a procedural alternative (such as mootness) that would stand as a barrier to the Court deciding the case on its merits. (From hereinafter we refer to option (4) as a 'SUPPRESS' attempt on the part of the Chief to signify her/his effort to deter the Court from deciding the substantive issue.) If the Chief selects alternative (1) or (2), then Justices 2 and 3 cast their votes to AFFIRM or REVERSE; if the Chief selects alternative (3), Justice 2 casts the first merits vote (to REVERSE or AFFIRM), followed by Justice 3. If, however, the Chief attempts to SUPPRESS, then Justices 2 and 3 must vote on that alternative first. Only if SUPPRESS fails is a vote on the merits taken.

Because SUPPRESSING a suit on its merits means only that the status quo policy prevails, the issue space relevant for our game is one dimensional. We assume that the justices' utility functions are single peaked and symmetric in $\Re^1$.

3.2. Solving the Game

As we have set it out, the game enables the Chief to invoke three heresthetical devices: SUPPRESS, which is akin to adding an alternative; PASS, which represents an attempt to set the agenda by reordering the voting procedure; AFFIRM or REVERSE, after a PASS or after a SUPPRESS attempt fails, which leaves open the possibility of sophisticated voting.

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9. To be more specific, X_{sq} represents the relevant Supreme Court precedent as it may have been marginally modified (or not) by the lower court decision on appeal in the extant case.
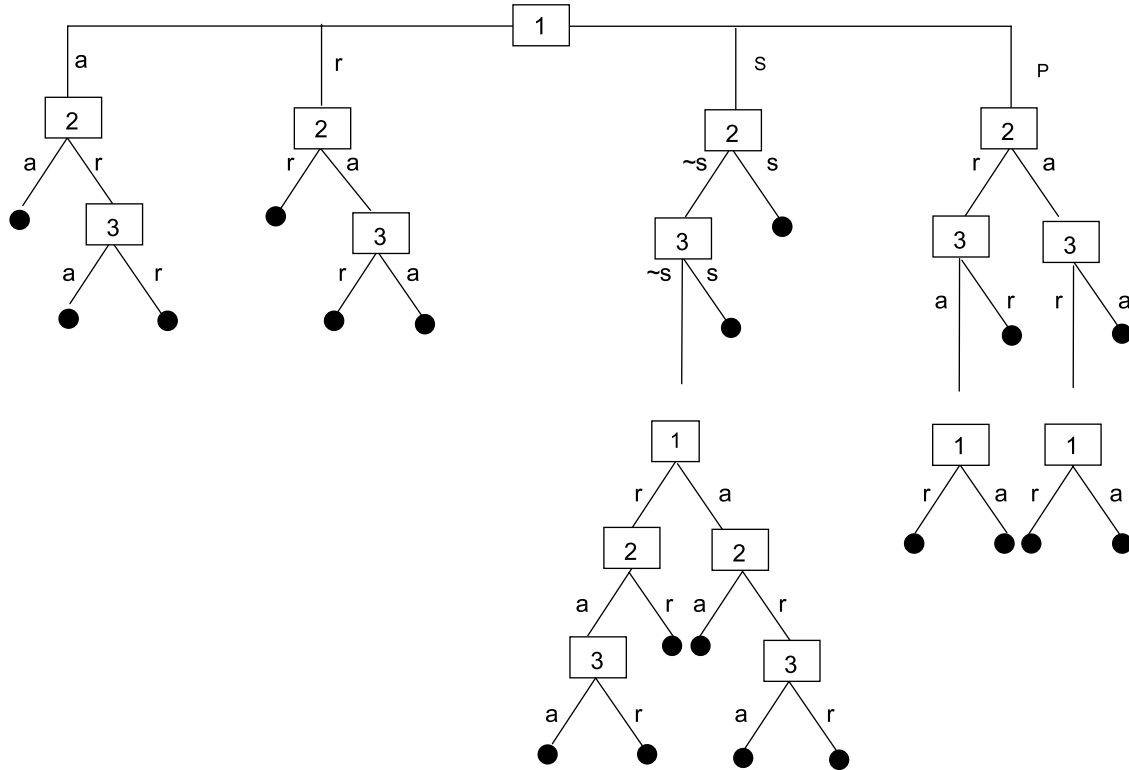
Figure 3. Extensive Form of Heresthetics Game

We could, of course, explore the use of all three devices against a range of preference profiles. But, given our interest in examining heresthetic maneuvers on the Court, the profiles of greatest concern are those in which the Court is divided (such that the Chief believes that, say, Justice 2 holds preferences converse to her/his) and the Chief Justice is uncertain about the position of the pivotal member, say, Justice 3 (such that the Chief is unsure of whether s/he is on the winning side of the vote). Hence, consider these four possible outcomes:

o_1: the vote is REVERSE
o_2: the Court fails to decide the case on its merits; the status quo prevails
o_3: the vote is AFFIRM; Justice 1 votes with the majority and assigns the opinion
o_4: the vote is AFFIRM; Justice 1 votes with the minority

And suppose that Justice 1 ranks the outcomes as follows: $o_1\,P_1\,o_2\,P_1\,o_3\,P_1\,o_4$; Justice 2 (who would assign the opinion if the Chief is in the minority and s/he is in the majority) has the opposite preferences: $o_4\,P_2\,o_3\,P_2\,o_2\,P_2\,o_1$. Further suppose that Justice 3's preferred point, x_3, is drawn from some continuous distribution, $f(x) \sim X$, and that this distribution is common knowledge among the players. Figure 4 depicts these four alternatives spatially. Cutpoints indicate half-distances in the policy space between the alternatives available to the Court; specifically,

$$a = \frac{o_1 + o_2}{2}, \qquad b = \frac{o_1 + o_4}{2}, \qquad c = \frac{o_2 + o_4}{2}, \qquad d = \frac{o_2 + o_3}{2},$$

and $e = \dfrac{o_1 + o_3}{2}$

From the reduced extensive form of this game, depicted in Figure 5, we can solve for the justices' equilibrium strategies and beliefs using the concept of a sequential equilibrium. Moving backwards, we start with the possible supports of sequential equilibria at information state 4 where Justice 1 makes her/his last move. There are two possible supports at 1's state 4 for us to consider, $\{r_4\}$ and $\{a_4\}$ (standing for REVERSE and AFFIRM, respectively), with the choice of 1 in this state dependent on what s/he expects Justice 3 to do in state 5. We know that Justice 3's choice in state 5, between o_1 and o_4, is determined
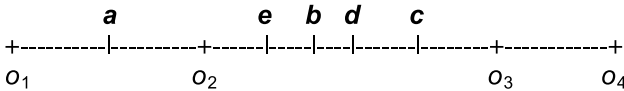

Figure 4. Spatial Representation of Four Alternatives

by the true location of her/his ideal point. τ in Figure 5 indicates the posterior probability of 3's ideal being to the left of b. Using π_i^j to denote a payoff to player i from outcome j, if the support of a sequential equilibrium in state 4 is $\{r_4\}$, then sequential rationality requires that

$$\tau\pi_1^1 + (1-\tau)\pi_1^4 \geq \pi_1^3, \qquad \text{or} \qquad \tau \geq \frac{\pi_1^3 - \pi_1^4}{\pi_1^1 - \pi_1^4}.$$

By Bayes' rule, τ must also satisfy the consistency condition; namely,[10]

$$\tau = \Pr\{x_3 \leq b | x_3 \in (-\infty, a] \cup [c, \infty)\} = \frac{F(a)}{F(a) + 1 - F(c)}$$

Combined, the two conditions imply that $\{r_4\}$ can be a support of a sequential equilibrium only if the parameters of the game are such that[11]

$$\frac{\pi_1^3 - \pi_1^4}{\pi_1^1 - \pi_1^4} \leq \frac{F(a)}{F(a) + 1 - F(c)} \qquad (1)$$

If we suppose that (1) holds, we can now consider the decision of Justice 2 in state 2. Two supports that are possible in state 2 are $\{s_2\}$ and $\{\sim s_2\}$. For $\{\sim s_2\}$ to be a support, it must be the case that

$$\pi_2^2 \leq (1-\gamma)\pi_2^2 + \gamma(\tau\pi_2^1 + (1-\tau)\pi_2^4) \qquad \text{or} \qquad \pi_2^2 \leq \tau\pi_2^1 + (1-\tau)\pi_2^4.$$

For this, the parameters of the game must satisfy the following constraint:[12]

$$\frac{\pi_2^2 - \pi_2^4}{\pi_2^1 - \pi_2^4} \geq \frac{F(a)}{F(a) + 1 - F(c)} \qquad (2)$$

Note that while condition (1) is specified for the payoffs of justice 1, condition 2 is specified for the payoffs of justice 2.

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10. We obtain this by considering Justice 3's earlier decision in state 3, given that s/he expects $\{r_4\}$ to follow. The third justice would vote against suppressing if one of these two hold: either $\pi_3^1 \geq \pi_3^2$, or $\pi_3^4 \geq \pi_3^2$, thus the probability that Justice 3 votes against suppressing, $\gamma = F(a) + 1 - F(c)$.

11. Or, normalizing the payoffs to justice 1 to the [0,1] interval, we can rewrite this condition as:

$$\pi_1^3 \leq \frac{F(a)}{F(a) + 1 - F(c)}$$

12. Or, performing the same normalization as in note 11 with regard to the payoffs of justice 1, condition (2) can be rewritten as

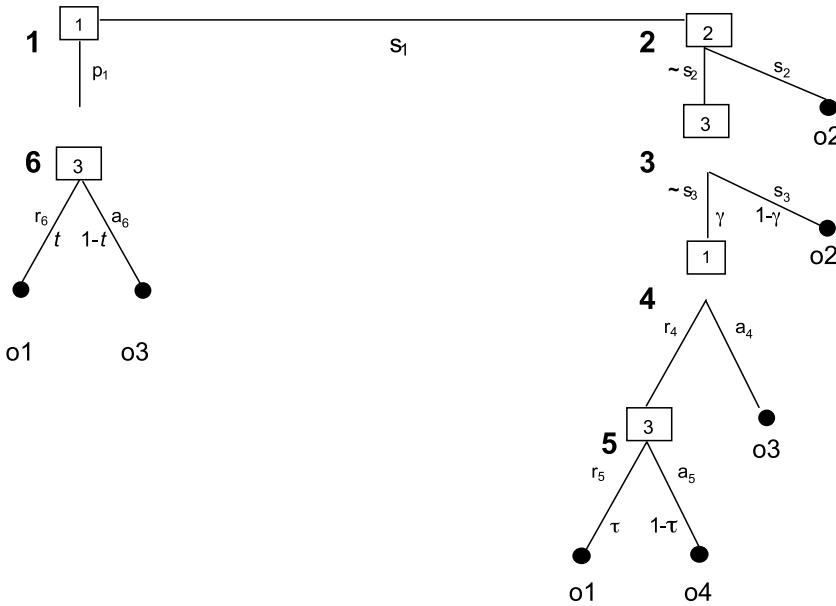$$1 - \pi_2^2 \geq \frac{F(a)}{F(a) + 1 - F(c)}$$

Figure 5. Reduced Extensive Form of the Heresthetics Game

Finally, supposing that both (1) and (2) hold, consider the decision of 1 at 1. Again, two supports are possible in this state, $\{p_1\}$ and $\{s_1\}$. Because the choice of 3 in state 6 between o_1 and o_3 is fully determined by the true location of her/his ideal point, the probability of her/his voting to affirm, t, can be obtained directly, $t = F(e)$. Then $\{s_1\}$ is a support of the sequential equilibrium that we are considering only if [13]

$$t\pi_1^1 + (1 - t)\pi_1^3 \le \gamma(\tau\pi_1^1 + (1 - \tau)\pi_1^4) + (1 - \gamma)\pi_1^2. \tag{3}$$

Depending on the combination of parameter values, several different sequential equilibria can contain the support $\{r_4\}$ (though for each given combination of parameters, such a sequential equilibrium scenario is unique). Condition (1) must hold in order for $\{r_4\}$ to be a support of an equilibrium. The combination of parameter values discussed earlier when, in addition to (1), (2) and (3) hold, corresponds to an equilibrium scenario

$$\{[s_1], [\sim s_2], \gamma[s_3], [r_4], \tau[r_5], t[r_6]\},$$

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13. With normalized payoffs, condition (3) will read as:

$$t - \gamma\tau \le (1 - \gamma)\pi_1^2 - (1 - t)\pi_1^3$$

where

$$\gamma = F(a) + 1 - F(c), \tau = \frac{F(a)}{F(a) + 1 - F(c)}$$

and $t = F(e)$. Table 1 describes the implications of this sequential equilibrium, as well as others (cases 1–4, which correspond to the support $\{r_4\}$ and cases 5–6, to the support $\{a_4\}$ in state 4); the Appendix shows the derivation. Note that conditions (3), (3′), and (3″) all indicate that the Chief values the status quo substantially more than the outcome of AFFIRM, even when ameliorated by her/his assignment of the majority opinion. Whenever these conditions hold, the choice of heresthetical maneuver for the Chief is to SUPPRESS; otherwise, s/he PASSES.

3.3. Substantive Implications of the Equilibrium Scenarios

While the equilibria vary in detail, they provide answers to the general predicament we have described throughout: what leaders can do to snatch victory out of the jaws of defeat. Here we gain particular insights into the actions a Chief Justice ought to take if (1) s/he confronts opposition on the Court from the senior associate (Justice 2); (2) s/he is uncertain about the preferences of the pivotal voter (Justice 3); and (3) Riker is correct in assuming that actors will attempt to restructure choice situations to their advantage. First, we learn that, under these conditions, we should almost never observe the Chief casting a concrete vote to AFFIRM or REVERSE; rather, s/he will attempt to control the agenda via a PASS or add an alternative by proposing to SUPPRESS the case. But – and this is a big but – s/he does not choose her/his particular heresthetic maneuver casually. Instead, and this takes us to a second insight, we should see him invoking distinct heresthetical devices based on the location of the status quo, that is, of existing precedent relative to her/his own ideal point and her/his beliefs about Justice 3's ideal point location. To wit: If the status quo is close to the Chief's ideal point, s/he will attempt to convince the Court to avoid deciding the dispute on its merits (i.e. s/he will propose the alternative of SUPPRESS). That is because the status quo is to her/his liking. So, rather than risk seeing her/his colleagues (potentially) move it far from her/his ideal, s/he will attempt to make the case 'disappear'. But, if the status quo is not favorable to her/his interests, while there is a chance that the pivotal vote may be on her/his side, s/he will attempt to reorder the agenda (by PASSING) and, then, cast her/his lot with the majority. Such would enable her/him, even in the worst case scenario, to control the opinion assignment, with an eye toward moving policy closer to his ideal point.

Table 1. Sequential-equilibrium Scenarios and Their Observable Implications

	Parameter values satisfy conditions	Sequential-equilibrium scenario	Observable implications	
			Chief Justice	Justice 2
1.	(1), (2), (3)	$[s_1]$, $[\sim s_2]$, $\gamma[s_3]$, $[r_4]$, $\tau[r_s]$, $t[r_6]$ Off the equilibrium path	Proposes to suppress; if that fails, votes to reverse	Refuses to support suppress proposal
2.	(1), (2), $\sim$ (3)	$[p_1]$, $[\sim s_2]$, $\gamma[s_3]$, $[r_4]$, $\tau[r_5]$, $t[r_6]$ Off the equilibrium path	Passes, then votes with the majority	
3.	(1), $\sim$ (2), (3)	$[s_1]$, $[s_2]$, $\gamma[s_3]$, $[r_4]$, $\tau[r_5]$, $t[r_6]$ Off the equilibrium path	Proposes to suppress; if that vote fails, votes to reverse	Supports suppress proposal
4.	(1), $\sim$ (2), $\sim$ (3)	$[p_1]$, $[s_2]$, $\gamma[s_3]$, $[r_4]$, $\tau[r_5]$, $t[r_6]$ Off the equilibrium path	Passes, then votes with the majority	
5.	$\sim$ (1), (3″)	$[s_1]$, $[\sim s_2]$, $\gamma'[s_3]$, $[a_4]$, $\tau'[r_5]$, $t[r_6]$ Off the equilibrium path	Proposes to suppress; if that fails, votes to affirm	Refuses to support suppress proposal
6.	$\sim$ (1), $\sim$ (3″)	$[p_1]$, $[\sim s_2]$, $\gamma'[s_3]$, $[a_4]$, $\tau'[r_5]$, $t[r_6]$ Off the equilibrium path.	Passes, then votes with the majority	

Table 2. Depiction of Hypotheses Generated by the Heresthetics-Court Game

When the Chief Justice Believes the Status Quo is in his Favor

	*Chief is certain about preferences of **pivotal** justice*	*Chief is uncertain about preferences of **pivotal** justice*
*Chief believes **senior associate** supports the status quo.*	Condition 1a prediction: VOTE	Condition 1b prediction: VOTE
*Chief believes **senior associate** does not support the status quo.*	Condition 1c prediction: VOTE	Condition 1d prediction: SUPPRESS

When the Chief Justice Believes the Status Quo is Not in his Favor

	*Chief is certain about preferences of **pivotal** justice*	*Chief is uncertain about preferences of **pivotal** justice*
*Chief believes **senior associate** does not support the status quo.*	Condition 2a prediction: VOTE	Condition 2b prediction: VOTE
*Chief believes **senior associate** supports the status quo.*	Condition 2c prediction: VOTE	Condition 2d prediction: PASS

These insights, thus, lead us to two interrelated and concrete hypotheses.

HYPOTHESIS 1a: *When Chief Justices (1) believe that the senior associates hold preferences converse to theirs, (2) are uncertain about the preferences of the pivotal justice, and (3) think that the status quo is in their favor, they will attempt to* SUPPRESS *the case. When conditions (1) or (2) do not hold they will cast a concrete vote (e.g.* AFFIRM *or* REVERSE*) on the merits of the dispute; when condition 3 is the converse, they will* PASS *(see Hypothesis 1b).*

HYPOTHESIS 1b: *When Chief Justices (1) believe that the senior associates hold preferences converse to theirs, (2) are uncertain about the preferences of the pivotal justice, and (3) think that the status quo is not in their favor, they will* PASS*. When conditions (1) or (2) do not hold they will cast a concrete vote (e.g.* AFFIRM *or* REVERSE*) on the merits of the dispute; when condition 3 is the converse, they will attempt to* SUPPRESS *the case (see Hypothesis 1a).*

As Table 2, which provides a simplified depiction of these hypotheses, makes clear Chief Justices will fail to cast a concrete vote under but two cir-

cumstances (Conditions 1d and 2d in Table 2). Note, though, that they will respond differently to those circumstances depending on whether they favor or oppose the status quo: Under the former, they will attempt to convince their colleagues to avoid deciding the dispute on its merits (SUPPRESS); under the latter, they will pass.

4. Empirical Exploration of the Predictions

Thus far, we have demonstrated – at least theoretically – that Chief Justices will deploy various heresthetical maneuvers when they face a hostile senior associate and are uncertain about the preferences of the pivotal justice. But do Chiefs, in the real world, act in this fashion? Or do they consistently ignore their potentially losing situation and behave no differently than they would if they believed winning to be a near certainty?

Surely we could undertake a large-*n* study to address these questions and, more specifically, to test our hypotheses. Given space limitations, however, we provide but a taste of how a systematic, large-scale empirical investigation might proceed, along with the conclusion we have reached from a smaller-scale inquiry focused on one Chief Justice, Warren E. Burger.[14]

Conducting that inquiry required us to animate the three explanatory variables enveloped in our hypotheses – whether or not the Chief (1) supported the status quo (existing precedent), (2) believed that the senior associate also supported the status quo, and (3) was certain about the preferences of the pivotal justice – and to collect data necessary to code the values of the dependent variable: whether Burger, during the Court's private conference, cast a VOTE, PASSED, or attempted to SUPPRESS the case. Beginning with the status quo, we turned to Spaeth and Segal's (1999) list of precedent-setting cases decided after Burger ascended to the Chief Justiceship.[15] From this list we were able to determine whether Burger favored the status quo in particular areas of the law: If he wrote or joined (without filing a concurrence) the

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14. We focus on Burger (1969–85 terms) because data on his conference behavior are available from two sources which scholars (Johnson, 1999; Maltzman and Wahlbeck, 1996b) have deemed especially reliable: the private papers of Justices William J. Brennan, Jr. and Lewis F. Powell, Jr. The Brennan collection is available in the Library of Congress, Washington, D.C.; the Powell papers are in the Law Library at Washington and Lee University.

15. In an effort to assess whether justices base decisions on precedent or their own policy preferences, Spaeth and Segal (1999) compiled a list of precedent-setting Supreme Court decisions and identified the 'progeny' of each. They define progeny as those decisions 'subsequent to the precedent whose issue(s) and factual circumstances closely resemble those in the precedent itself' (1999, 25). Given the procedures they used to identify the progeny, which they explain in some detail, we think it safe to assume that the progeny and the precedent-setting case take place in the same issue dimension.

majority opinion or judgement, we assume he favored the status quo as it was set in the precedent-setting case; otherwise, he did not.

Next, we considered the progeny, again as identified by Spaeth and Segal (1999), of those precedential cases and chose exemplars meeting the conditions outlined in Table 2. Hence, if the Chief Justice (1) believed that the senior associate was not in her/his camp over the status quo and (2) was uncertain about the preferences of the pivotal justice, then we would place the progeny of a case establishing favorable precedent (at least to Burger) in the Condition 1d box; the progeny of a case establishing precedent that Burger did not favor would fit in the Condition 2d box. And so on.

Determining (1) – that is, whether the Chief and senior associate held the same preferences over the status quo – is straightforward enough: If the Chief and the senior associate were in the same vote coalition in a Spaeth/Segal's precedent-setting case, we take it that Burger believed that he and the senior associate shared the same preferences. If they were not in the same coalition, then we have a situation akin to the one explored in our model (a chief and a senior associate with opposing preferences). Assessing (2) – that is, whether the Chief was uncertain about the preferences of the pivot – also is a relatively simple task. We begin by defining the pivotal voter as the justice without whom the Court was divided in half, *in the previous term*, in the general issue area under consideration. Such an operational definition strikes us as facially valid – after all, we are attempting to capture the information Burger had available at the time, with antecedent votes surely part of that pool – and easy to animate: If a new justice ascended to the Court or the median Court member (in the general issue area implicated in the case in the previous term) was a true moderate – taking, say, the liberal position, the previous term, in the 45–55 percent range – Burger may have been uncertain over the pivot's preferences.[16] As Table 3 shows, we were able to identify progeny following from the precedential case for all conditions except Condition 2a: In no precedent-setting cases meeting our criteria were both Burger and a senior associate in the same vote coalition when Burger was certain about the preferences of the pivotal justice.

Finally, for each progeny placed in a condition, we turned to Justices William J. Brennan's and Lewis F. Powell's notes of private conference discussions and their conference vote tallies. From these records, we were able to identify whether Burger (1) cast a concrete VOTE on the merits of the dispute or (2) PASSED or (3) attempted to SUPPRESS the case. In category (1) we

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16. We relied on Spaeth and Segal's (1999) identification of the issue presented in the case (e.g. Voting Rights) to locate it in a general category (Civil Rights). We then used the Spaeth US Supreme Court Judicial Data Base to assess the justices' relative liberalism in the general area (Spaeth, Harold J. [2001] The Original United States Supreme Court Database [available at http://www.ssc.msu.edu/~pls/pljp/sctdata1.html]).

Table 3. Assessing Hypotheses Generated by the Heresthetics-Court Game

When the Chief Justice Believes the Status Quo is in his Favor

	Chief is certain about preferences of **pivotal** *justice*	*Chief is uncertain about preferences of* **pivotal** *justice*
Chief believes **senior associate** *supports the status quo.*	Condition 1a prediction: VOTE *Press-Enterprise v. Superior Court*[a] (1986): VOTED	Condition 1b prediction: VOTE *Globe Newspaper v. Superior Court*[a] (1982): VOTED
Chief believes **senior associate** *does* not *support the status quo.*	Condition 1c prediction: VOTE *Thornburg v. Gingles*[b] (1986): VOTED	Condition 1d prediction: SUPPRESS *Rogers v. Lodge*[b] (1982): Attempted to SUPPRESS[c]

When the Chief Justice Believes the Status Quo is not in his Favor

	Chief is certain about preferences of **pivotal** *justice*	*Chief is uncertain about preferences of* **pivotal** *justice*
Chief believes **senior associate** *does* not *support the status quo.*	Condition 2a prediction: VOTE [No cases meeting the criteria for inclusion.]	Condition 2b prediction: VOTE *McKeiver v. Pennsylvania*[d] (1971): VOTED or PASSED on first round[e]
Chief believes **senior associate** *supports the status quo.*	Condition 2c prediction: VOTE *Davis v. Passman*[f] (1979): VOTED	Condition 2d prediction: PASS *Abood v. Detroit Board of Education*[f] (1977): PASSED

[a] Progeny of *Richmond Newspapers v. Virginia* (1980).
[b] Progeny *City of Mobile v. Bolden* (1980).
[c] Following the SUPPRESS attempt, Burger passed.
[d] Progeny of *In re Winship* (1970).
[e] Brennan recorded the Chief as casting a concrete vote; Douglas's notes show the Chief failing to vote until after the other justices had cast their votes.
[f] Progeny of *Elrod v. Burns* (1976).

include votes of AFFIRM and REVERSE, and variants thereof (reverse and remand) that Burger cast on the first round of voting; in category (2) we include only votes of PASS; and, in category (3) we follow Epstein and Knight's (1998) lead and include any proposal made by Burger – including claims about jurisdiction, justiciability, and standing or arguments about returning the case to the lower courts – that would lead the Court against deciding the dispute on its merits.

For all but one condition (2b) as Table 3 shows, the behavior predicted by our model held. Before turning to this 'error', though, let us consider instances when the Chief Justice was in the majority in the precedent-setting case (that is, when Burger favored the status quo). Beginning with the first half of the top table, we see that Burger, who wrote the opinion expressing the judgment of the Court in the precedential case of *Richmond Newspapers v. Virginia* (1980), cast concrete conference votes in *Richmond's* progeny, *Globe Newspaper* and *Press-Enterprise* (1986).[17] Such behavior is entirely in line with our predictions, for even though Burger may have been uncertain about the pivot in *Globe Newspaper* – O'Connor had just joined the Court and the median the term before in the general area of First Amendment had cast 45 percent of his votes in the liberal direction – the senior associate (Brennan) had voted with him in *Richmond Newspapers*.

The bottom half of the table presents quite distinct circumstances. In the precedent-setting case of *City of Mobile v. Bolden* (1980), involving an at-large electoral system for city commissioners, the Chief joined Justice Stewart's judgement but the senior associate, Brennan, did not. Thus, when the first progeny of *Bolden*, *Rogers v. Lodge* (1982), arose, Burger in all likelihood believed that Brennan's preferences would be converse to his own. The Chief's key consideration would then rest with the pivot: How certain was he over the pivot's preferences? The answer in *Rogers* was (probably) not very: O'Connor, a new Court member, was an unknown entity and the median the term before, Blackmun, had taken the liberal position in close to 45 percent of the cases. Under these circumstances, our model predicts that Burger – in an effort to preserve the status quo – would seek to suppress the case. And that is precisely what he attempted to do. Both Brennan's and Powell's conference notes indicate that Burger wanted to remand *Rogers* because the lower courts had 'inadequately' treated a particular aspect of the case. By the time *Thornburg v. Gingles* (1986), *Bolden's* second progeny arose, Burger was far more certain about the pivot: no new justices had ascended to the Court that term and he, along with Stevens, occupied the median position. Not surprisingly and despite the fact that Brennan had not been with him in *Bolden*, the Chief cast a concrete vote.

Let us now turn to those instances in which the status quo did not coincide with Burger's preferences. Over only one precedent-setting case meeting our criteria were the Chief and the senior associate at the time, Black, together in

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17. In *Richmond*, the Court considered whether a trial judge's order, issued at the request of a criminal defendant, to close a murder trial violated the First Amendment; in *Globe Newspaper*, it addressed the question of whether a state law, which required exclusion of the press and the public from the courtroom when a minor was testifying in a sex-offense trial, violated the First Amendment; in *Press-Enterprise*, it reviewed the actions of a magistrate who granted a defendant's motion to close preliminary proceedings to the public.

dissent: *In re Winship* (1970), involving the standard of proof used in juvenile proceedings. Because they were in the same vote coalition, by our criterion we would have expected Burger to cast a concrete vote in *Winship*'s progeny, *McKeiver v. Pennsylvania* (1971), regardless of the Chief's beliefs about the pivot. Based on Brennan's vote tally, that is the step Burger took: he voted to affirm. But, because Powell had not yet joined the Court, we sought to verify Brennan's records against those of Justice William O. Douglas, and they tell a different story. From Douglas's conference notes, it appears that Burger did not cast a vote directly after he stated his views on the case; rather he waited until all the others had voted before deciding to affirm.

Why did Burger, at least initially, refrain from voting when the senior associate and he agreed in the status quo establishing case of *Winship*? Although we can only speculate, one answer may be that Burger, knowing that Black was not in the best of health, viewed Douglas, and not Black, has the associate with whom he had to reckon.[18] Since Douglas and the Chief were not in the same coalition in *Winship, McKeiver* may be more appropriately classified as meeting Condition 2d. If that is so, Burger's PASS in *McKeiver* is entirely explicable.

Even more interesting, we believe, is the bottom half of Table 3, depicting the types of conditions on which our model explicitly focuses: when Burger did not favor the status quo and the senior associate held preferences converse to his. The precedent-setting case of *Elrod v. Burns* (1976) is illustrative: Burger dissented from a judgement written by Brennan, the senior associate at the time. While Brennan held that patronage dismissals violated the First Amendment, the Chief believed that their use was a matter reserved to the states or the people.

What steps Burger would take in the *Elrod* progeny, thus, hinged – according to our model – on his beliefs about the pivot. At least in the first post-*Elrod* case, *Abood v. Detroit Board of Education* (1977), it seems unlikely that the Chief had a clear sense of the route the pivot would take, for in the previous term White and Powell occupied the median position, casting roughly 50 percent of their votes in the liberal direction in First Amendment cases.[19] It is not surprising, then, that Burger passed at conference and, ultimately, cast his lot with the majority. This enabled him to assign the opinion to Stewart, who in turn authored an opinion sufficiently attractive to Burger

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18. Indeed, around the time the Court met on *McKeiver*, Black was, at least according to his wife, quite ill (Black, 1986: 254–5).

19. *Elrod's* second progeny, *Davis v. Passman* (1979), differed to the extent that Burger was probably far more certain about the preferences of the pivot. No new justices had ascended to the Court and the median member the term before in First Amendment cases, Blackmun, had cast two-thirds of his votes in the liberal direction.

that he was able to concur in judgment. Certainly the Chief would have pre-
ferred to decide the case on different grounds. But, by invoking the PASS, he
was able to salvage a partial victory in the face of certain defeat. Seen in this
way, Burger's action in *Elrod* is precisely the stuff of which heresthetics are
made: the Chief did not persuade any of his colleagues to change their
minds but rather sought to restructure the situation that they jointly con-
fronted to maximize his gain.

5. Discussion

At the onset of this article, we drew attention to Schofield's (2000: 434) ques-
tion: Is Riker's rather large body of work on heresthetics the 'idiosyncratic'
product of a 'singular genius' or can it serve as the 'foundation of a new
theory of politics'? Surely, the answer, at least with regard to judicial politics,
is that it is indeed foundational. From even our brief exploration of the
predictions generated by our model, we have little hesitation in concluding
that Burger was, in important ways, a Rikeresque heresthetician who
invoked various devices to preserve victories and snatch others from the
jaws of defeat.

But there is more. While we focused on a court, we believe our formal-
ization of Riker's notion of heresthetics is generalizable to many other
groups of decision-makers. Ours or a similar model would remain tractable
and would be able to generate usable predictions in circumstances in which
(1) the numbers of heresthetical manipulations and potential heresthet'icians
are limited, such as may be the case in small groups with relatively strong
institutionalized decision-making procedures and with a clear leader and
(2) long-term reciprocity or trading across issue dimensions is relatively
absent since the motives for the heresthetician's meddling with the rules
must be based on the outcome of the subsequent interaction. Given the
number of decision-making bodies – from congressional committees to
executive agencies to independent commissions – that may meet these condi-
tions, it strikes us as reasonable to draw a conclusion that transcends the
judicial context; namely, Riker's argument *may be* far more universally
applicable than the substantive focus of this article suggests.

Our emphasis on *may be* is no accident. To be sure, we have attempted to
outline systematically Riker's notions, to incorporate them into a model, to
produce testable propositions, and to explore those propositions against
data. But much work remains. We must now adapt our general approach
to other decision-making contexts, devise viable research designs to assess
systematically whatever predictions those approaches generate, and think
imaginatively and creatively about measures and data. Undoubtedly these
will be challenging tasks, though ones we fully commend to other scholars.

For, as we hope we have begun to demonstrate, to continue to ignore Riker's claims may be to continue to ignore a fundamental feature of politics, that is, how and to what end actors attempt to restructure choice situations to their own advantage.

APPENDIX: DERIVATION

If (1) holds but (2) does not, then (expecting $\{r_4\}$), Justice 2 would vote to suppress the case in state 2. In such a case, for $\{s_1\}$ to be the support in state 1 and for scenario 3 in Table 1 to hold, the following must be true:[20]

$$t\pi_1^1 + (1 - t)\pi_1^3 \leq \pi_1^2 \tag{3'}$$

If 3' does not hold, scenario 4 in Table 1 obtains. If (1) does not hold, the support of any sequential equilibrium in state 4 is $\{a_4\}$. We need to determine whether there are, in fact, sequential equilibrium scenarios that include this support.

Given $\{a_4\}$, Justice 3 in state 3 would vote against suppressing whenever $\pi_3^2 \leq \pi_3^3$, which occurs with probability $\gamma' = 1 - F(d)$.[21] By Bayes' rule, the following consistency condition on the probability τ' that Justice 3 prefers o_1 to o_3, even though she voted $\sim s$ must hold:

$$\tau' = \Pr\{x_3 \leq b | x_3 \geq d\} = \max\left\{0, \frac{F(b) - F(d)}{1 - F(d)}\right\}$$

This expression always equals 0 for the spatial structure we had assumed since $b < d$, and is consistent with $(\sim s)$.[22] Accordingly, we can move to the decision of justice 2 in state 2 and observe that, in this scenario, s/he will always refuse to suppress because $\pi_2^3 > \pi_2^2$ by assumption.

Finally, $\{s_1\}$ will be the support of a sequential equilibrium in state 1 only if[23]

$$t\pi_1^1 + (1 - t)\pi_1^3 \leq \gamma'\pi_1^3 + (1 - \gamma')\pi_1^2 \tag{3''}$$

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20. If payoffs are normalized, (3') is $t \leq (\pi_1^2 - \pi_1^3)/(1 - \pi_1^3)$.

21. Note, given that the Chief is expected to play $\{a_4\}$, that is, vote in a sophisticated fashion on his/her last move, some types of Justice 3 would vote to SUPPRESS precisely because they share the Chief's true preferences and support REVERSE.

22. For a spatial structure where $b > d$, the (normalized) consistency condition that needs to hold for a scenario including $\{a_4\}$ is $F(b) - F(d) \leq (1 - F(d))\pi_1^3$. For example, for linear utilities of players and when 3's ideal is drawn from a uniform distribution, this condition is guaranteed to hold when control by the Chief over opinion assignment does not bring the final policy closer to REVERSE than it is to AFFIRM which resulted from the merits vote.

23. For normalized payoff, this condition reads as

$$\frac{t}{1 - \gamma'} \leq \frac{\pi_1^2 - \pi_1^3}{1 - \pi_1^3}$$

REFERENCES

Abood v. Detroit Board of Education (1977) 431 U.S. 209.

Banks, Jeffrey S. (1990) 'Monopoly Agenda Control and Asymmetric Information', *Quarterly Journal of Economics* 105: 445–64.

Baron, David P. and John Ferejohn (1987) 'Bargaining and Agenda Formation in Legislatures', *American Economic Review* 77: 303–9.

Baron, David P. and John Ferejohn (1989) 'Bargaining in Legislatures', *American Political Science Review* 83: 1181–1206.

Bendor, Jonathan and Terry M. Moe (1986) 'Agenda Control, Committee Capture, and the Dynamics of Institutional Politics', *American Political Science Review* 80: 1187–1207.

Black, Elizabeth (1986) *Mr. Justice and Mrs. Black*. New York: Random House.

Calvert, Randall L. and Richard F. Fenno (1994) 'Strategy and Sophisticated Voting in the Senate', *Journal of Politics* 56: 349–76.

Cameron, Charles M. (1994) 'Decision-Making and Positive Political Theory (Or, Using Game Theory to Study Judicial Politics)', Paper delivered at the annual meeting of the Conference Group on the Scientific Study of Judicial Politics, Columbus, Ohio.

Carsey, Thomas M. (1995) 'Cleavages in United States Gubernatorial Elections', PhD dissertation, Political Science, Indiana University.

City of Mobile v. Bolden (1980) 446 U.S. 55.

Cohen, Youseff (1991) 'The Heresthetics of Coup Making', *Comparative Political Studies* 24: 344.

Collie, Melissa P. and Brian E. Roberts (1992) 'Trading Places: Choice and Committee Chairs in the U.S. Senate, 1950–1986', *Journal of Politics* 54: 231–45.

Davis v. Passman (1979) 442 U.S. 228.

Denzau, Arthur, William H. Rikker and Kenneth Shepsle (1985) 'Farquharson and Fenno: Sophisticated Voting and Homestyle', *American Political Science Review* 79: 1117–34.

Eavey, Cheryl L. and Gary J. Miller (1984) 'Bureaucratic Agenda Control: Imposition or Bargaining?', *American Political Science Review* 78: 719–33.

Edelman, Paul H. and Jim Chen (1996) 'The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics', *Southern California Law Review* 70: 63–102.

Elrod v. Burns (1976) 427 U.S. 347.

Enelow, James M. (1984) 'A New Theory of Congressional Compromise', *American Political Science Review* 78: 708–18.

Epstein, Lee and Jack Knight (1998) *The Choices Justices Make*. Washington, D.C.: CQ Press.

Globe Newspaper Co. v. Superior Court (1982) 457 U.S. 596.

Hammond, Thomas H., Chris W. Bonneau and Reginald S. Sheehan (1999) 'Toward a Rational Choice Spatial Model of Supreme Court Decision-Making: Making Sense of Certiorari, the Original Vote on the Merits, Opinion Assignment, Coalition Formation and Maintenance, and the Final Vote on the Choice of Legal Doctrine', Paper delivered at the annual meeting of the American Political Science Association, Atlanta, Georgia.

In re Winship (1970) 397 U.S. 358.

Johnson, Timothy R. (1999) 'Do Supreme Court Justices Utilize Information that They Obtain from Oral ARguments?', Paper delivered at the annual meeting of the Midwest Political Science Association, Chicago, Illinois.

Knight, Jack and Itai Sened (eds) (1995) *Explaining Social Institutions*. Ann Arbor, MI: University of Michigan Press.

Krehbiel, Keith and Douglas Rivers (1990) 'Sophisticated Voting in Congress: A Reconsideration', *Journal of Politics* 52: 548–78.

Mackie, Gerry (2001) 'Is Democracy Impossible?: Riker's Mistaken Accounts of Antebellum Politics', Mimeo, Research School of Social Sciences, Australian National University.

Maltzman, Forrest and Paul J. Wahlbeck (1996a) 'Strategic Policy Considerations and Voting Fluidity on the Burger Court', *American Political Science Review* 90: 581–92.

Maltzman, Forrest and Paul J. Wahlbeck (1996b) 'Inside the U.S. Supreme Court: The Reliability of the Justices' Conference Records', *Journal of Politics* 58: 528–39.

Maltzman, Forest, James F. Spriggs II and Paul J. Wahlbeck (2000) *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press.

Martin, Andrew D. (1998a) 'Congressional Decision Making and the Separation of Powers', *American Political Science Review* 95: 361–78.

Martin, Andrew D. (1998b) 'Public Policy, the Supreme Court, and the Separation of Powers', Paper delivered at the annual meeting of the American Political Science Association, at Boston, Massachussets.

McKeiver v. Pennsylvania (1971) 403 U.S. 528.

McLean, Iain (2001) 'Has the Riker Program any Life Left in It?', Paper delivered at the annual meeting of the Public Choice Society, at San Antonio, Texas.

McLean, Iain and C. Bustani (1999) 'Irish Potatoes and British Politics: Interests, Ideology, Heresthetic, and the Repeal of the Corn Laws', *Political Studies* 47: 817–36.

Murphy, Walter F. (1964) *Elements of Judicial Strategy*. Chicago, IL: University of Chicago Press.

Nagel, Jack H. (1993) 'Populism, Heresthetics and Political Stability: Richard Seddon and the Art of Majority Rule, *British Journal of Political Science* 23: 139–74.

Nagel, Jack H. (1998) 'Social Choice in a Pluralitarian Democracy: The Politics of Market Liberalization in New Zealand', *British Journal of Political Science* 28: 223–65.

Niskanen, W.A. (1971) *Bureaucracy and Representative Government*. Chicago: Aldine-Atherton.

Paine, Scott C. (1989) 'Persuasion, Manipulation, and Dimension', *Journal of Politics* 51: 36–49.

Press-Enterprise Co. v. Superior Court (1986) 478 U.S. 1.

Richmond Newspapers v. Virginia (1980) 448 U.S. 555.

Riker, William H. (1965) 'Arrow's Theorem and Some examples of the Paradox of Voting', in J. M. Claunch (ed.) *Mathematical Applications of Political Science*. Dallas: SMU Press.

Riker, William H. (1982) *Libereralism against Populism*. San Francisco: W. H. Freeman.

Riker, William H. (1983) 'Political Theory and the Art of Heresthetics', in Ada Finifter (ed.) *Political Science: The State of the Discipline*. Washington, D.C.: American Political Science Association.

Riker, William H. (1984) 'The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice', *American Political Science Review* 78: 1–16.

Riker, William H. (1986) *The Art of Political Manipulation*. New Haven: Yale University Press.

Riker, William H. (1990) 'Heresthetic and Rhetoric in the Spatial Model', in James M. Enelow and Melvin J. Hinch (eds) *Advances in the Spatial Theory of Voting*. Cambridge: Cambridge University Press.

Riker, William H. (ed.) (1993) *Agenda Formation*. Ann Arbor: University of Michigan Press.

Riker, William H. (1996) in Randall L. Calvert, John Mueller and Rick K. Wilson (eds) *The Strategy of Rhetoric: Campaigning for the American Constitution*. New Haven, CT: Yale University Press.

Rogers v. Lodge (1982) 458 U.S. 613.

Schickler, Eric and Andrew Rich (1997) 'Party Government in the House Reconsidered: A Response to Cox and McCubbins', *American Journal of Political Science* 41: 1387–94.

Schofield, Norman (2000) 'Core Beliefs in America at the War of Independence and at the Ratification of the Constitution', *Homo Oeconomics* 16: 433–62.

Shepsle, Kenneth A. (1979) 'Institutional Arrangements and Equilibrium in Multidimensional Voting Models', *American Journal of Political Science* 23: 27–59.

Shepsle, Kenneth A. and Barry R. Weingast (1987) 'The Institutional Foundations of Committee Power', *American Political Science Review* 81: 84–104.

Segal, Jeffrey A. (1997) 'Separation-of-Powers Games in the Positive Theory of Law and Courts', *American Political Science Review* 91: 28–44.

Segal, Jeffrey A. and Harold J. Spaeth (1993) *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.

Sinclair, Barbara (1992) 'The Emergence of Strong Leadership in the 1980s House of Representatives', *Journal of Politics* 54: 657–84.

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

Stearns, Maxwell L. (2000) *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making*. Ann Arbor, MI: University of Michigan Press.

Thornburg v. Gingles (1986) 478 U.S. 30.

Weimer, David L. (1992) 'Claiming Races, Broiler Contracts, Heresthetics, and Habits: Ten Concepts for Policy Design', *Policy Sciences* 25: 135–39.

Weingast, Barry R. (1989) 'Floor Behavior in the U.S. Congress: Committee Power Under the Open Rule', *American Political Science Review* 83: 795–815.

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