

**Modeling Motivations:
Decision-Making on the Argentine Supreme Court**

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Abstract

The consensus among most scholars of U.S. courts is that judges are policy seekers. Yet we know very little about what motivates judges in other parts of the world. To fill this gap, we use a simple game theoretic approach to generate a series of testable hypotheses about four ideal types of judges: loyalists, policy seekers, institutionalists, and careerists. Using original data on individual and collective judicial decision-making on the Argentine Supreme Court (1976-2000), we find evidence consistent with careerism. More generally, our findings provide a way of distinguishing among diverse motivations in contexts where little is known *ex ante* about the goals underlying judicial behavior.

Over the last decade, rational choice theory has become the new paradigm in the study of courts (Epstein and Knight 2002). Using separation-of-powers spatial models to capture inter-branch conflict, scholars hypothesize that judges strategically alter their decisions to avoid being overturned by the legislature (Epstein and Knight 1998; Ferejohn and Weingast 1992; Spiller and Gely 1990). More recently, the rational choice approach has been applied to examine courts in other institutional settings outside of the U.S. (see *e.g.* Iaryczower, Spiller, and Tomassi 2000; Vanberg 2000; 2005; Helmke 2002; 2005). The institutional diversity from comparative analyses provides a wealth of new opportunities for testing existing propositions and, more interesting still, for generating new hypotheses about how courts abroad function.

Our point of departure in this paper is to examine how the strategic framework can be expanded to take into account diverse judicial motivations in institutionally insecure contexts, such as Argentina. In addition to examining how institutions constrain actors, choice theoretic analyses require some understanding of judges' goals. Intuitively, answers to questions about judges' motivations will have some bearing on whether and to what extent strategic behavior occurs. In the literature on U.S. judicial politics, for example, the consensus is that judges are policy seekers (Baum 1997; Epstein and Knight 1998). In strategic studies of the U.S. Supreme Court it is thus standard to assume that judges seek to bring the law as closely into line with their preferences as they can without being overturned.

For many parts of the world, however, making a similar assumption about what underlies judicial behavior is premature. Consider Latin America. Over the last decade, courts in the region have captured the attention of citizens, politicians, international actors, and scholars alike. Yet, to date, there is little consensus over what goals Latin American judges seek to maximize.

While some scholars depict judges simply as expert clerks who mechanically match the facts of a case to civil codes (Merryman 1985:34-9; Rosenn 1987), others view them as budding legal activists who use the law to transform society (Nino 1992; Gargarella 1996). Still others see judges primarily as presidential lackeys (Larkins 1998), or as strategic actors who seek to build institutional legitimacy (Staton 2004).

The question we take up in the rest of the paper is whether it is possible to discern systematically among diverse judicial motivations. Rather than make an *a priori* set of assumptions about judicial goals in contexts beyond the U.S., we build on a technique used by Ferejohn and Weingast (1992) to develop a set of theoretically generated predictions that link observable patterns in judicial behavior to specific motivational stances. We then examine empirically these predictions using original individual and aggregate level data on judicial decisions handed down by the Argentina Supreme Court between 1976 and 2000.

Separation-of-Powers and the Theory of Strategic Defection

The separation-of-powers approach provides a simple, but powerful, framework for analyzing judicial behaviour. Applied first in a seminal paper by Brian Marks (1988), the tools of positive political theory have been used to explore how the constraints judges face shape the choices they make. The basic separation-of-powers model assumes a fixed, sequential structure involving a one or two dimensional policy space, single-peaked preferences, and complete and perfect information (Weingast and Ferejohn 1992; Spiller and Gely 1990). More recently, scholars have begun to consider the effects of informational asymmetries on inter-branch relations (Rogers 2001; Vanberg 2002; 2005; Helmke 2005; Carrubba 2005).

The particular *form* that strategic judicial decision-making takes (*i.e.* whether judges rule

in favor of the government or not), however, depends on the source of the inter-temporal conflict of interest a judge faces. When the main threat against judges stems from incumbent politicians, judges face incentives to support the government of the day, even if they do not share its preferences. This is the message of much of the American politics literature that treats judges as strategic decision-makers, interpreting laws passed by former legislatures in light of current majorities. In the American context, such a situation arises from the fact that judges possess secure tenure and, thus, often outlast the political majorities by whom they were appointed.

But imagine an alternative scenario in which judges do not enjoy such institutional protections and incoming politicians have wide discretion over removing their predecessor's judges. Argentina provides a textbook case. Despite formal constitutional provisions guaranteeing judges secure life tenure, during the cycle of political instability that plagued Argentina from the 1940s until the 1980s, Supreme Court justices were removed with every change in regime. During the last democratic transition in 1983, justices appointed by the military dictatorship (1976-1983) faced profound uncertainty about their individual fates.¹ Yet, even under democracy, Argentine judges' insecurity has persisted. Justices faced threats of individual removal and court-packing at the end of Raul Alfonsín's government² Under Carlos Menem's first government (1989-1995), opposition politicians made thirty-one separate requests to impeach some or all members of the Supreme Court (Octavio de Jesus and Ruscelli 1998). By the end of Menem's second administration, politicians across the political spectrum campaigned

¹ Despite the informal norm of automatic replacement following regime change, at the end of the last military regime (1981-1983) there were vigorous debates about keeping the military-era judges on the court to preserve the rule of law (Gabrielli 1986). Thus, although the military-era judges certainly had reason to fear that they would be removed from their posts, their fates were not entirely sealed.

² The threats against the judges occurred mainly during the last two years of Alfonsín's presidency. Between 1987 and 1989 the government and the opposition debated over whether to add new justices to the Court (Verbitsky 1993). Once Carlos Menem had captured the party nomination in 1988, he met repeatedly with the justices to assure them that he would respect the court's independence. However, the justices were hardly reassured (Larkins 1998).

to “re-make” the Court by impeaching individual justices, particularly those viewed as loyal to Menem.³

In this type of institutional setting, the inter-temporal conflict shifts to one in which judges are caught between an incumbent government, by whom they were appointed, and an opposition poised to come to power. Changing the source of the threat judges’ face, in turn, changes the form of strategic behavior. Specifically, judges who lack institutional security are likely share the preferences of the incumbent government, but may come to face incentives to strategically rule against it. Whether strategic defection occurs depends on three core conditions. First, judges must be sufficiently certain that the incumbent government is likely to lose power. Second, judges must be sufficiently uncertain about their fates under the successor government. If there is no credible threat, or if sanctions are absolutely certain, there is little reason to defect.⁴ Third, judges’ motivations must also be such that they care sufficiently about avoiding punishment. We argue that the first two sets of conditions were met in Argentina for three of the four periods under examination. The main question taken up below is whether, in such an environment, we can use patterns in justices’ behavior to say something more systematic about their motivations.

A Model of Judicial Motivations

We consider four ideal types of justices: loyalists, careerists, policy seekers, and institutionalists. The loyalist’s fealty to the incumbent government is her top priority, the careerist is willing to sacrifice policy outcomes for continuation in office, the policy seeker

Indeed, during this same period, Menem also reputedly blackmailed Justice Belluscio and offered an ambassadorship to Justice Caballero to get him to resign his post (Verbitsky 1993).

³ During Menem’s first term, however, the opposition lacked the requisite majority to impeach Menem’s appointees. Only at the end of 1990s, once Menem’s power began to erode, did the threat of impeachment thus gain credibility.

⁴ In addition, justices must believe that incoming politicians’ decision rests, to some extent, on judges’ behavior. For a formal signaling model that links strategic defection to incoming politicians’ uncertainty about the type of judge they face see Helmke 2005.

desires continuation in office but not at the expense of policy outcomes, and the institutionalist has the legitimacy of the court as her primary concern.

[Table 1 about here]

Table 1 presents a complete list of the pay-offs that each type of judge derives from the outcome of the case (whether the government wins or loses) and from the justice's individual decision (whether the judge votes in favor of or against the government). The loyalist, the policy seeker, and the careerist share the policy preferences of the government that appointed them, so all prefer pro-government outcomes to anti-government outcomes. Where these types differ is in the instrumental value they place on an anti-government individual vote as a means of avoiding individual-level sanctions from the incoming government, and whether or not they are willing to cast a vote contrary to their personal interests in order to achieve a better policy outcome.⁵ The fourth type, the institutionalist, is concerned with the institutional legitimacy of the court but not necessarily with the possibility of individual sanctions.⁶ Although this type also presumably shares the preferences of the appointing government, they are willing to vote against their personal preferences to ensure that the Court defects against the government once the incumbents start losing power.

[Figure 1 about here]

⁵ In Argentina, with the exception of the court-packing episode at the beginning of the 1990s, most of the threats against the justices have revolved around losing one's post. This occurred either via the informal norm of replacement following a regime change, blackmail or, less frequently, through impeachment or retirement provisions (*e.g.* as in the case of Justice Fayt in the late 1990s). Thus, although certainly these threats may have secondary consequences for the institution as a whole, they have been aimed primarily at the individual level.

⁶ The dynamics of establishing judicial legitimacy are only beginning to be understood. Thus, of the four types we consider, characterizing the preferences of the institutionalist is the most difficult. Here we follow an emerging theoretical literature on judicial legitimacy (*e.g.* Carrubba 2002; Staton, forthcoming), which treats the Court's majority opinions as the decisive factor influencing institutional legitimacy. Thus, for example, in the so-called "switch in time that saved nine," public disapproval for Roosevelt's court-packing plan depended on the Court's majority opinion shifting, not on each justice's individual behavior (see Caldeira 1987). Given the lack of settled opinion on the broader issue of how legitimacy gets established, of course, we acknowledge that there may be other ways of conceptualizing institutionalists that could make each individual justices' behavior more costly for the institution's reputation.

For the sake of simplicity, we start by assuming a homogenous court in which each type of judge must decide to rule in favor of or against the current government.⁷ Because judges are assumed to know both the prior moves of the other justices and the other justices' payoffs, we employ backwards induction to solve for subgame perfect equilibria (Morrow 1994:122).⁸ Table 2 summarizes the sequence of moves and equilibria for a court composed of each type of judge.

[Table 2 about here]

Loyalists. For a court composed of loyalists, the best outcome for each judge is to vote in favor of the current government and for the current government to win the case.⁹ Thus, there is a unique Nash equilibrium (outcome A, Figure 1) for the loyalist court in which all justices vote in favor of the government. In this case, whether a judge is pivotal in deciding the outcome of the case does not affect how a judge will vote. Regardless of what the other judges do, each judge is always strictly better off voting in favor of the government.

Policy Seekers. In courts composed of policy-seekers, no judge is willing to trade-off the overall outcome of the case to improve their individual fortune. Here, whether a judge is pivotal for the case outcome is crucial for determining how the judge votes.¹⁰ For judges that are pivotal, ruling in favor of the government is always the best response. Because the first judge is

⁷ Below, we relax the assumption of homogeneity.

⁸ Assuming that justices know other justices' prior moves is appropriate because in Argentina cases circulate sequentially. In future work we plan to develop models for each type based on incomplete information, but assuming complete and perfect information here provides a good starting point for analysis.

⁹ Although the ordering of the second and third best outcomes does not affect the results, the justification for this particular preference ordering is that it preserves the possibility that loyal judges are not necessarily "naive" (cf. Ferejohn and Weingast 1992). For example, one might imagine a context in which the outgoing government is able to reward loyalty even after leaving office. In such cases, loyalty to the current government would be driven by strategic rather than purely sincere reasons.

¹⁰ As such, the results here are roughly analogous to the Pay Raise Voting Game, in which legislators decide whether to give themselves a pay raise. Although all of the legislators want the pay raise, each faces a cost in voting for the pay raise. Thus, the first best option for each of the legislators is to be able to vote against the pay raise, but to have the other two legislators vote in favor of the pay raise. Under majority rule, this means that the pay raise passes, but that the individual legislator does not incur the cost of supporting it. Conversely, a legislator who votes for the pay raise will always incur a cost, regardless of whether the bill passes (Morrow 1994:124).

not pivotal, however, she will always be able to achieve her most preferred outcome by voting against the government.¹¹ Thus, the equilibrium outcome is one in which the court collectively continues to support the government, while a minority of justices defect against it (outcome E, Figure 1).

Institutionalists. Like the policy seeker, whether the institutionalist judge is pivotal for the case outcome is crucial for determining how this type of judge votes. But, once the incumbent government begins to lose power, the institutionalist prefers instead for the court's majority to rule against the government. Thus, a court composed of institutionalists provides a mirror-image to the policy-seeker court. In equilibrium, the last two judges are compelled to rule against the government, while the first judge is able to achieve his first best outcome by ruling in the government's favor (outcome D, Figure 1).

Careerists. The key difference between the careerist and the policy seeking judge is that the careerist puts more value on avoiding the individual costs of continuing to support the government at the expense of policy outcomes. Although the careerist would still prefer the government to win the case, she always prefers to vote against the government to avoid the possibility of being punished by the incoming government. As a result, the path-of-play equilibrium for a court composed of careerists in this game is the exact opposite from the loyalist court: each judge votes against the government, regardless of how the other two judges vote (outcome H, Figure 1).

¹¹ Although there are a total of four Nash equilibria in the policy seeker game: 1) judge 1 votes Anti, judges 2 and 3 vote Pro; 2) judge 2 votes Anti, judges 1 and 3 vote Pro; 3) judge 3 votes Anti, judges 1 and 2 vote Pro; 4) all three judges vote Anti, only the first equilibrium is sub-game perfect.

Taken together, the foregoing discussion allows us to distinguish among different types of judges based on observable patterns in behavior at the individual and aggregate levels.¹² Among a court composed of loyalists, neither individual nor collective support change if the government begins to lose power. Among policy-seekers, individual anti-governmental rulings increase as the government weakens, but anti-government outcomes do not. Conversely, on a court composed of institutionalists, we would expect anti-government outcomes to outpace anti-government votes. Finally, for a careerist court, we would expect judges to unanimously abandon a weakening government. Stated as testable propositions, the foregoing analysis leads to four hypotheses:

HYPOTHESIS 1. As governments weaken, individual judges' anti-government votes will not increase if judges are loyal servants, but individual level anti-government votes will increase if judges are careerists, policy seekers or institutionalists.

HYPOTHESIS 2. As governments weaken, anti-government outcomes will not increase for courts composed of loyal servants or policy seekers, but will increase for courts composed of careerists or institutionalists.

HYPOTHESIS 3. As governments weaken, unanimously pro-government outcomes will not decrease if the court is composed of loyal servants, but will decrease if the court is composed of careerists, policy seekers or institutionalists.

HYPOTHESIS 4. As governments weaken, unanimously anti-government decisions will not increase if the court is composed of loyal servants, policy seekers or institutionalists, but will increase if the court is composed of careerists.

¹² The game presented above matches the sequential procedures used on the Argentine Supreme Court, where cases are circulated among the justices, who may sign on to an existing opinion or write an opinion of their own. Justices issue their individual opinions in a specific order, with that order varying from case to case, and while the final result is observable (i.e., which justices signed which opinions), the sequence among the judges is not (Carrio 1996). This is not relevant for the loyalist or the careerist, where all justices face the same strategic situation. However, for the policy seeker and institutionalist, the equilibrium results are that some subset of the justices will support the government, depending on the order in which they receive the case. While we cannot identify the ordering of justices' votes for specific cases, as long as there is a distribution of orderings, so that judges may find themselves in a variety of different positions, we can conclude that all policy seeking or institutionalist judges will vote against the government at least sometimes.

The first and third hypotheses enable us to distinguish loyalists from their more disloyal counterparts, policy seekers, careerists and institutionalists. If we do find that justices are not loyalists, then the second hypothesis will allow us to distinguish careerists and institutionalists from policy seekers. Finally, the fourth hypothesis will allow us to identify whether defection is motivated by careerism or by institutionalism.

[Table 3 about here]

Table 3 summarizes the patterns of evidence associated with each type, and will guide us as we turn to an empirical analysis of data for evidence of judicial motivations.

Data and Methods

To evaluate these hypotheses, we use a subset of the data contained in the Argentine Supreme Court Dataset (ASCD).¹³ Our research design selects cases based on their political importance and then examines whether and how behavior changes in response to emerging threats. Given that the incentives for strategic defection are likely to be strongest in the most politically salient cases, we thus confine our analysis to cases that involved decrees passed by incumbent governments between 1976 and 1999.¹⁴ While we cannot measure judges' expectations about the threats they face directly, timing serves as a useful proxy for judges' beliefs both about the fate of the incumbent government and about their own prospects for punishment under an incoming government.

¹³ Based on the annual indices contained in the *Fallos de la Corte Suprema de Justicia de la Nacion* [The Decisions of the Supreme Court of Argentina], the original Argentine Supreme Court Dataset (ASCD) includes all cases from 1976 to 2000 in which the government was either named as a party in the case and/or in which an executive decree passed under the then-current government was named in a case. Whereas in the original dataset the judge is the unit of analysis, here each case serves as the unit of analysis.

¹⁴ This method of selection thus rules out cases in which the Court overturns old legislation, which may not represent the preferences of the incumbent government (cf. Dahl 1957). That said, we cannot be certain that all decree cases are equally important. We would therefore expect to see some percentage of cases decided solely on legal grounds (Ferreira Rubio and Goretti 1998), thus potentially muting our findings regarding changes over time. See the appendix for the number and types of decree cases per year.

Specifically, in each of the periods in which judges faced a credible threat at the hands of a successor government, the earliest possible date for which judges could have become aware of these threats was approximately two years before the end of the incumbent government's term. Under the military dictatorship, for example, there was great uncertainty about the exact timing and nature of a democratic transition (Munck 1998; O'Donnell and Schmitter 1986). However, beginning in 1981 the opening of a military dialogue with the opposition, mass human rights protests, a palace coup against Viola, and a failing economy contributed to the growing perception among political elites that the military regime was likely to give up power. During this period, debates over the costs to juridical stability of removing the military-era justices contributed to unprecedented uncertainty surrounding the status of the Court during a regime change (Gabrielli 1986).

Alfonsín's government began with strong popular support; but, during its last two years (1987-1989) it was increasingly crippled by labor strikes (McGuire 1997), mass protests, military rebellions, and successive rounds of hyper-inflation. The Radical party lost seats in the 1987 midterm elections, and the president's approval ratings fell steadily from 42% in April 1987 to 9% prior to the 1989 election (Catterberg 1991). Few observers expected the Radicals to retain power in the upcoming election, and the novelty of democratic succession made the justices' futures uncertain once again. Although automatic removals or impeachments were probably not seriously considered as an option, the opposition made little secret of plans to pack the court and exerted pressure over at least two justices (Belluscio and Caballero) to resign (Verbitsky 1993).

In contrast to his predecessor, Carlos Menem's popularity only grew during his first administration (Levitsky 2003; Stokes 2001). In 1993 the Peronist Party swept the midterm

elections. The 1994 constitutional reforms changed the presidential term from a single six-year term to two four-year terms, allowing Menem to win a second term in 1995 (Acuña 1995).

During Menem's first administration, threats of impeachments were thus not credible.

A very different story emerged in Menem's second term. In 1997, the Peronists lost the midterm elections while Menem's attempted bids for a second re-election split the Peronist party. During this period, the Argentine Supreme Court justices came under severe attack from candidates within and outside of the Peronist party. However, as the presidential campaign wore on, it also became increasingly clear that the implications for the Court were different depending on who won the election. As one official close to the Court put it "everyone knows that with de la Rúa (the Center-left opposition candidate) the [process of dealing with the Court] is going to be more institutional. But with Duhalde (the Peronist candidate) everyone is panicked."¹⁵ Thus, once Fernando de la Rúa emerged as the likely successor in mid-1999, the pressure on the justices remained, but was somewhat reduced.

With this background in place, we explore changes in judicial behavior using four series of data over time. Our data consists of 422 court cases and 2505 individual level votes handed down by 27 different justices between 1976 and 2000.¹⁶ For each case we calculate *Anti-Government Votes* as the percentage of votes that are against the government, as follows:

$$\text{Anti-Government Votes} = 100 * \frac{\text{Number of Justices Voting Against the Government}}{\text{Number of Justices Voting Against the Government} + \text{Number of Justices Voting For the Government}}$$

This operationalization serves two purposes; first, it avoids the potentially confounding influence of abstention by considering only pro- and anti-government votes, and second, it provides a

¹⁵ *La Nación*, May 15, 1999.

measure that is comparable across periods where the number of justices varies.¹⁷ We then look at the overall outcome of each case, defining *Anti-Government Outcome* as equal to one if the court's decision is against the government and as equal to zero if the court's decision is in favor of the government. Finally, we define *Anti-Government Unanimity* as equal to one if the court's decision is unanimously anti-government and equal to zero otherwise, and we define *Pro-Government Unanimity* analogously.

We examine the dynamics of all three series using locally weighted regression analysis (lowess) for the purposes of smoothing (Cleveland 1979).¹⁸ Thus, the figures shown below represent smoothed summaries of the original data series; the virtue of this procedure is that it allows us to discern patterns that would otherwise remain obscure in the original scatterplot. Because our hypotheses concern changes occurring over the lifespan of each regime, we conduct our analysis separately for the military dictatorship, the Alfonsín government, and both Menem governments.

As discussed above, the precise way in which judicial behavior changes depends on judges' beliefs about the threat they face and on their motivations. Our directional expectations thus change depending on the government being considered. We would expect incentives to strategically defect to increase during the final two years of the military, Alfonsín, and second

¹⁶ We exclude cases where it was not possible to identify the votes of all of the sitting justices and cases where it was not possible to determine the exact date of the ruling.

¹⁷ There were five seats on the court during the military regime and the Alfonsín government. The number rose to nine at the beginning of the Menem first administration. There is some variation even within these periods, however, as on several occasions after seats were vacated the court was not at full strength.

¹⁸ In a scatterplot of Y against X , for each value of X_i the lowess procedure generates a fitted value \hat{Y}_i from a regression of Y on X , where observations close to X_i receive higher weight, observations far from X_i receive lower weight, and observations sufficiently far from X_i receive no weight. The longer the span of points contained in each of these regressions, the smoother the resulting line will be. We follow Cleveland's suggestion and choose a span equal to 0.5, meaning that we employ half of the observations (with declining weights for observations that are far away) in the smoothing for each datapoint. This allows us to smooth the data while still allowing us to observe short-term fluctuations in the series.

Menem governments, but to decline for Menem's first government as its strength increases over time. With these expectations in hand, we can proceed to examine the evidence.

Results

We first analyze *Proportion of Anti-Government Votes*. As Table 3 indicates, if judges are loyalists then we would not expect to see changes in anti-government votes over time. However, if judges are strategically defecting with policy, institutional, or careerist motivations, then individual behavior will change over time. Figure 2 shows the changes in *Proportion of Anti-Government Votes* over time.¹⁹

[Figure 2 about here]

While there are some short-term fluctuations throughout the period examined, some clear trends are visible. In 1976, the first year of the military government, there were no decisions involving decree cases. The percentage of anti-governmental decisions gradually increases to approximately 30% between 1977 and 1981, but then increases sharply to over 50% in the eighteen months prior to the regime transition. A similar, if more variable, pattern is evident during Alfonsín's term. Here, anti-governmental decisions begin at around 10% in 1984, increase to about 40% by 1986, and then recede to about 20% by early 1988. However, in the last eighteen months of the Alfonsín administration, from early 1988 to mid-1989, the level of anti-governmental voting skyrockets to nearly 60%. For the first Menem government, which became stronger over time, we see the obverse of this pattern. Where the level of anti-governmental decisions starts at over 50% at the beginning of Menem's regime, it falls to around 30% by late 1991, declining to around 15% by the time of Menem's re-election in 1995. Toward the end of Menem's second term, however, the pattern of strategic defection returns. Following

the Peronist defeat in the 1997 elections through the early months of the presidential campaign the level of anti-governmental decisions doubles from approximately 25% to 50%, falling only as the prospects of de la Rúa's candidacy grow brighter in 1999. On the basis of this individual-level data, then, the evidence does not conform to the hypothesis that judges are uniformly loyalists.

It remains to determine whether judges' behavior is consistent with a court composed of policy seekers, careerists, or institutionalists. If justices are policy seekers, our theory predicts that changing level of anti-governmental voting should stop short of changing outcomes, as majorities should continue to support the government. By contrast, if justices are office- or institutionally-motivated, changing individual-level votes should be matched by changes in aggregate decisions; in the former case because justices are unwilling to support a weakening government even if that lack of support means that their policy preference is unrealized, and in the latter case because justices view anti-government outcomes as essential for the legitimacy of the court. Put another way, given that the percentage of *Anti-Government Votes* is changing over time, if we see stability in *Anti-Government Outcomes* then justices are behaving in a manner consistent with policy-seekers, while if we see stability in *Anti-Government Outcomes* then justices' behavior is consistent with that of either careerists or institutionalists. Figure 3 addresses this issue by presenting changes in *Anti-Government Outcomes* over time.

[Figure 3 about here]

In Figure 3 we see very similar patterns to those presented in Figure 2. Under the military the level of anti-government outcomes increases steadily from 0 to about 40% by early 1982, then jumps sharply to fluctuate between 50% and 75% during 1982 and 1983. Under

¹⁹ We note that the curve occasionally falls outside the range from 0% to 100%. This arises because the lowest procedure is based on fitted values, which may fall outside the range of feasible values. We can interpret negative

Alfonsín anti-government outcomes rise from 0% to about 50% by mid-1986, decline to about 20% by early 1988, and jump to almost 70% by the end of the regime in mid-1989. Under Menem's first government, the level of anti-government outcomes declines quickly to about 25% by late 1991, rebounds slightly during 1992 and 1993, and falls to less than 20% during 1994²⁰ In Menem's second term, by contrast, we see anti-government outcomes increasing sharply in the final year and a half before the election and then trailing off somewhat once De la Rúa is poised to secure the presidency. Because for all four administrations we also observe changes in outcomes, in addition to changes in individual votes, we can conclude that in all three periods justices' behavior is not consistent with the policy seeker hypothesis.

Finally, to distinguish whether judges' behavior implies careerist or institutionalist motivations, we turn to evidence concerning unanimous decisions. Figure 4 examines the level of pro- and anti-government unanimity in all four governments. The two series in Figure 4 serve different roles. Looking at *Pro-Government Unanimity* can corroborate our earlier conclusion that judges are not behaving like loyalists; if they are, then we expect to see no change in pro-government unanimity. More importantly, having already ruled out the possibility that judges are loyalists or policy seekers, examining *Anti-Government Unanimity* will enable us to distinguish between careerists and institutionalists. If judges are careerists then we would expect anti-government unanimity to change, but if judges are institutionalists then we would not expect anti-government unanimity to change.

[Figure 4 about here]

numbers as equivalent to 0%, and numbers above 100% as equivalent to 100%.

²⁰ At some times the level of anti-government outcomes actually exceeds the level of individual anti-government voting. This may seem paradoxical, but it is merely a function of the distribution of votes and outcomes. For example, consider two votes: 3-2 against the government and 5-0 in favor of the government. Then 50% of outcomes (1 of 2) are anti-government, but only 30% of individual votes (3 of 10) are anti-government.

Under the military we see a decline in the level of pro-government unanimity from nearly 100% to 30-40% by the end of the regime in 1983. For Alfonsín we see a decline from around 65% in 1984 to about 45% by 1986, then peaking at around 80% in early 1988 before declining dramatically to around 10% by the end of the regime in mid-1989. By contrast, in Menem's first term we see a significant increase in *Pro-Government Unanimity*, from around 20% at the beginning, holding steady between about 40% and 55% between 1990 and 1995, then increasing significantly to over 80% by the time of his re-election. The trend in Menem's second term offers additional evidence against the loyalist argument. Pro-government unanimity declines steadily throughout 1997 and 1998, increasing only slightly in mid-1999 as pressure against the justices softened.

Looking at the more decisive *Anti-Government Unanimity*, for the military we see an increase from zero to the mid-20% range in the first four years of the dictatorship to approximately 35% at the end of the dictatorship. The effect is similar, if again more variable under Alfonsín, with a fluctuating range from 0-25% from 1984 to 1987, a decline in early 1988, and a surge to 30% by 1989. Under Menem's first government *Anti-Government Unanimity* follows a reverse pattern, starting at around 50% in 1989, decreasing to about 25% in 1994, and falling to 0% by the end of his first term. In the second term, by contrast, unanimous anti-government decisions increase sharply in the final two years, from about 15% to 35%, declining only in the final months of the presidential race. Thus far, the evidence points to a pattern of individual and aggregate behavior that is most consistent with careerism.

Heterogenous Courts

Keeping the basic sequential structure of our original game, we conclude our analysis of judicial motivations by relaxing the assumption that courts are homogenous. As Table 4 shows, this expands the total possible number of courts from four to of sixty-four (including the four original homogeneous courts). Not surprisingly, increasing the number of equilibrium outcomes and the number of court types associated with each outcome has several interesting implications for our previous inferences.

[Table 4 about here]

Consider the equilibrium outcome A , originally associated with the pure loyalist court. Allowing for heterogeneity introduces an additional six types of mixed courts that result in each judge issuing a pro-governmental ruling. In terms of our first hypothesis, this appears to thus reduce substantially our ability to use individual-level anti-government votes to distinguish loyalists from other types of judges. Yet, on closer examination, we find that most of the mixed courts associated with the loyalist equilibrium are highly sensitive to changes in the order in which each type of judge receives the case. And, empirically, given that this order varies considerably from case to case in Argentina reduces greatly the problem of multiple equilibria. In sum, were we to have observed no significant increase in the level of anti-governmental decisions, our dilemma would have been limited to distinguishing between a pure loyalist court and one dominated by loyalists with a minority of institutionalists.

Under our original assumption that courts are homogenous, we were able to use patterns of change in the outcome of cases to distinguish policy-seeker and loyalist types from careerists and institutionalists. In a heterogeneous world, however, both the number of equilibria (A , B , C ,

E) and the number of mixed types ($n=33$) associated with stability in pro-governmental outcomes increases substantially. Simply put, compared to the initial research design, the absence of change at the case level no longer allows us to rule out the possibility that careerists or institutionalists sit on the court. With only this piece of the evidence, the most that we could conclude would be either that the court was not composed solely of careerists and institutionalists, or that neither of these two types dominated the court.

Fortunately, however, we return to much firmer ground drawing inferences from patterns of unanimity. As before, the only equilibrium outcome that leads to changes in unanimous anti-governmental rulings is *H*. Abandoning the homogenous assumption yields seven additional mixed courts. Even allowing for heterogeneity, though, we are still able to reduce substantially the range of motives associated with this pattern of behavior. Increases in anti-governmental unanimity, for instance, continue to allow us to rule out the possibility that even a single loyalist sits on the court. Moreover, for courts composed of the other three types of judges, the order in which different types of judges decide cases is again crucial. Specifically, for courts containing both institutionalists and policy-seekers to be indistinguishable from pure careerist types, we must assume both that policy-seekers rarely have the first move *and* that institutionalists rarely have the last move. The only mixed court that is entirely robust to changes in the order in which different types of judges receive the cases is one composed of a majority of careerists with a minority of policy-seekers. Thus, given our results, relaxing the assumption of homogeneity, only prevents us from distinguishing between a court composed entirely of careerists from one in which careerists outnumber policy-seekers.

Ultimately, it is debatable whether heterogeneity is, in fact, a more realistic assumption

than homogeneity, particularly in Argentina. Although assuming heterogeneity has intuitive appeal, if institutional constraints or legal culture consistently ensure that certain types of judges are selected, then perhaps homogeneity is a more defensible starting point. We thus remain agnostic on this point. What we can conclude is that, even after introducing the possibility of heterogeneity, our results remain largely consistent with a story of careerism. Although the competing common perception of Argentine judges as loyal servants continues to clash with our empirical findings, the broader theoretical result is how limited the effects are of having other types of judges are on a court dominated by either loyalists or careerists. Put differently, whether or not the occasional policy-seeker or institutionalist is appointed to a court operating in such an institutional context, matters little for the overall patterns of strategic behavior that emerge.

Conclusion

Building on the notion that judges who lack institutional security face incentives to act strategically, this paper develops several original hypotheses that help distinguish among four ideal typical judges: loyalists, policy-seekers, institutionalists, and careerists. Regardless of whether we assume that courts are homogenous and heterogeneous, we find substantial empirical support that most Argentine judges are motivated by a kind of survivalist careerism. Although this finding contradicts some portraits of the Argentine Supreme Court (Stotzky 1993), it is not entirely surprising. Given the tremendous institutional insecurity that Argentine judges face, it is plausible that judges who value policy or institutional outcomes over their own careers are not likely to reach the Supreme Court in such an environment, let alone to last on the bench for very long.

More broadly, understanding actors' goals in other parts of the world is an essential, if

daunting, part of expanding the comparative analysis of institutions. In the absence of clear ex ante information about what motivates judges, we develop a systematic technique for deriving individual motives from aggregate and individual patterns of behavior. The success of this method depends on the ability of a theory to generate unique behavioral predictions. Because the demands of such an approach are relatively high, this technique is unlikely to serve as a wholly satisfying substitute for independent knowledge of judicial goals. Yet, given that disagreements over what drives judicial behavior will likely only increase as the study of comparative judicial politics grows, our approach affords new leverage to sort out such debates. Simply put, just as the assumptions underlying our theories must reflect the empirical context one wishes to illuminate, theory can provide an invaluable tool whenever expert views compete.

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Table 1: Utility Functions for Different Judicial Types

Individual Vote	Case Outcome	Utilities for Justice Types			
		Loyal Servant	Policy Seeker	Institutionalist	Careerist
Pro-Government	Pro-Government	3	2	1	1
Pro-Government	Anti-Government	2	0	3	0
Anti-Government	Pro-Government	1	3	0	3
Anti-Government	Anti-Government	0	1	2	2

Note: Cell entries are ordinal utilities; 0=worst outcome, 3=best outcome

Table 2: Equilibria Outcomes for Different Judicial Types

Judicial Type	Sequence of Moves	Equilibrium
Loyalists	a-c-g	A
Policy Seeker	b-e-k	E
Institutionalist	a-d-j	D
Careerist	b-f-n	H

Table 3: Observable Patterns of Behavior for Different Judge Types

Judicial Type	Anti-Government Votes	Anti-Government Outcome	Pro-Government Unanimity	Anti-Government Unanimity
Loyal Servant	No Change	No Change	No Change	No Change
Policy Seeker	Change	No Change	Change	No Change
Institutionalist	Change	Change	Change	No Change
Careerist	Change	Change	Change	Change

Note: Other combinations are not predicted for any judge type.

Table 4: Equilibrium Outcomes By Court Composition

Equilibrium Outcome	Types of Court Compositions*
A	LLL; LIL; ILL; LLI; PPI; LPI; PLI
B	LLP; LLC; PIP; PCP; LPC; LIP; PLC; ILP; PPC
C	LPL; LCL; LPP; IPP; PCP; LCP; PIL; PCL; IPL
D	III; LII; ICI; IIC; LCC; LIC; LCI
E	PPP; PLL; PLP; CPL; PPL; CLP; CLL; CPP
F	PII; PIC; CII; ILI; CLC; CIC; ILC; CLI
G	IPI; IIL; CCL; CCI; PCI; ICL; CIL; CPI
H	CCC; CCP; PCC; CPC; IIP; ICP; IPC; CIP

*Note: L=Loyalist; P=Policy-Seeker; I-Institutionalist; C=Careerist

Figure 1: Intra-Court Strategic Defection Game

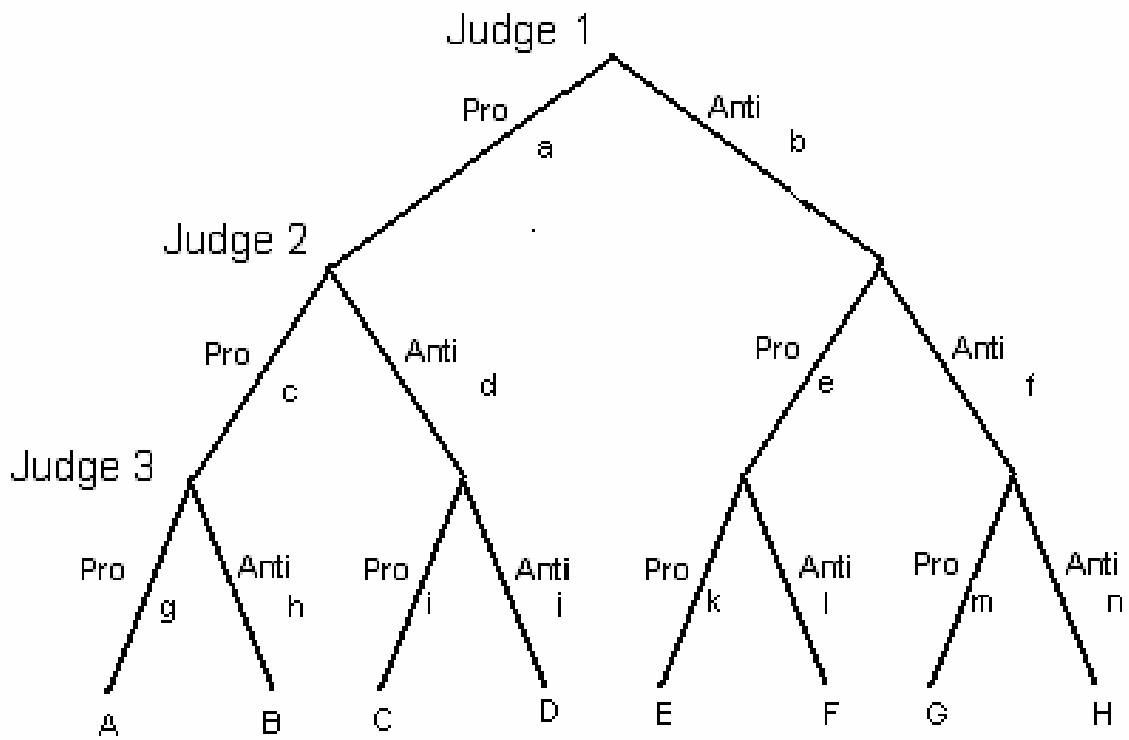


Figure 2: Changes in Anti-Government Votes over Time

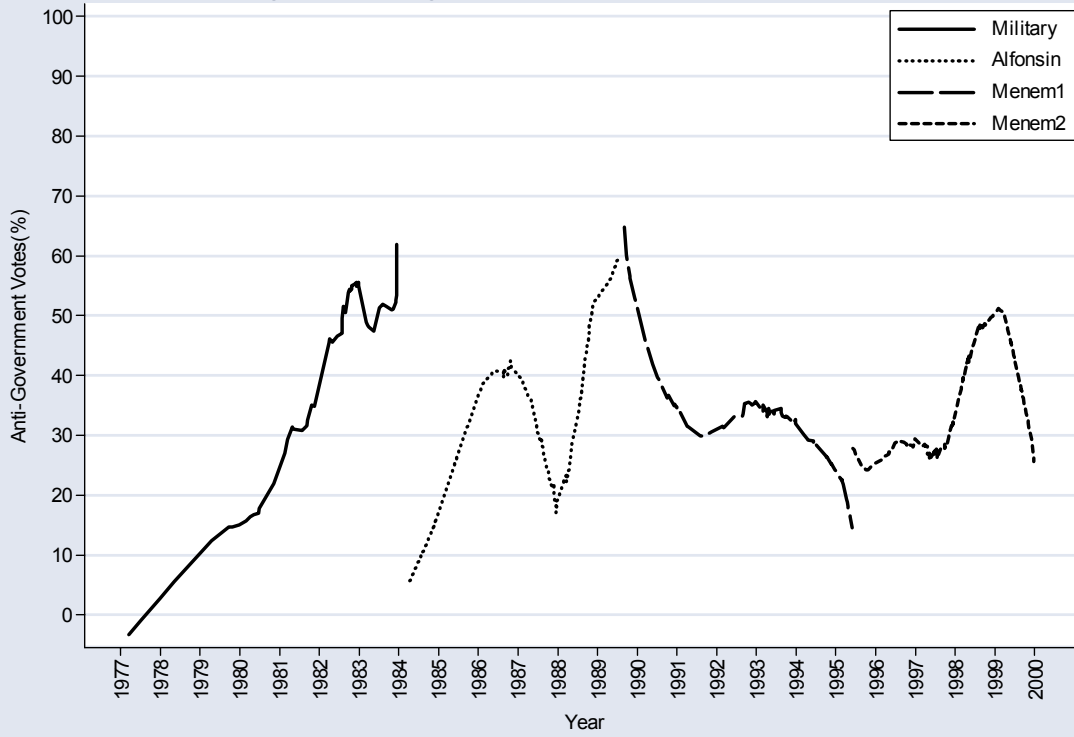


Figure 3: Changes in Anti-Government Outcomes over Time

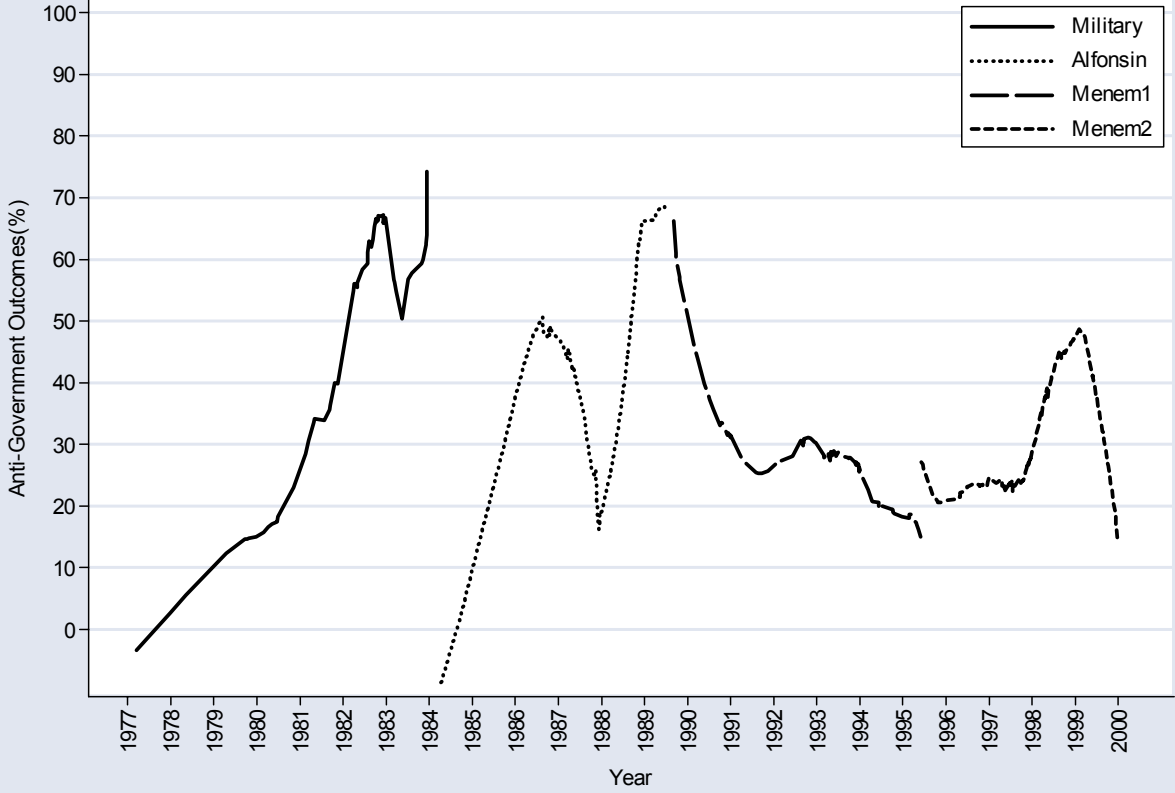


Figure 4: Pro and Anti-Government Unanimity over Time

