Supreme Court Agenda Setting:
Policy Uncertainty and Legal Considerations

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On November 2, 1992, the National Organization for Women (NOW) requested that the U.S. Supreme Court exercise its discretionary agenda-setting powers and review the lower court's decision in *NOW v. Scheidler* (No. 92-780). NOW asked the Court to apply the Racketeer Influenced and Corrupt Organizations Act (RICO) against a group of abortion protestors who allegedly combined to drive them out of business. The issue was important for a host of financial and symbolic reasons. Racketeering, generally, is a form of organized crime that extorts money from businesses through means of intimidation or physical violence. If the courts allowed abortion protestors to be prosecuted under RICO, the symbolic effect would be negative for the pro-life cause. Just as importantly, if RICO was applied to pro-life groups, those groups would have to dip further into their finances to defend themselves against additional causes of action. Simply put, the determination whether to apply RICO to pro-life groups had significant policy implications, and the Court's decision to hear the case would therefore have profound consequences.

When the justices met during their private conference to decide if they would hear the case, each of them faced significant uncertainty. If they voted to hear it, would they be a part of the Court majority that created precedent? Would the result reached by the Court generate a policy more favorable to them than the status quo? And what did the legal considerations involved in the case suggest? Before voting to grant review to this politically charged abortion case, justices needed to answer these questions.

Our goal here is not to examine the Court's abortion jurisprudence, nor is it to analyze how outside interests such as NOW influence the Court. These are topics that could, themselves, fill up numerous books. Instead, our goal is more limited. We seek to explain the conditions under which justices set the Court's agenda. We make three inter-related arguments. First, we

argue that justices make probabilistic decisions when setting the Court's agenda. They will cast their agenda votes based on the probability that the Court's eventual decision will result in a more favorable policy than currently exists. Second, we argue that legal considerations, such as lower court conflict, judicial review, and legal importance influence justices' agenda votes. Finally, and perhaps most importantly, we argue that policy and legal considerations *interactively* influence justices' agenda votes. When legal considerations and policy considerations point toward the same ends, a justice is freed up to follow his or her policy goals. But when the law points toward an outcome that the justice dislikes on policy grounds, she will often follow the law despite her policy misgivings. In short, we argue that policy and law jointly influence how justices set the Court's agenda with policy sometimes giving way to law.

Our results support our hypotheses. We find, first, that justices make predictions about likely policy outcomes and vote to grant review, in part, based on these predictions. More specifically, as a justice's probability of being made better off by the Court's merits decision increases, the justice becomes increasingly likely to vote to review the case. Second, we observe that legal considerations also influence whether justices review cases. The presence of important legal cues strongly drive up the probability a justice votes to review a case. And, finally, we find that policy and law interact, with law often times conditioning justices' policy behavior. Even justices who disagree entirely with the expected policy outcome of a case will vote to review it. These findings, of course, shed light on the Court's agenda setting process but they also highlight a broader aspect of judicial decision making, something we discuss more fully in the conclusion.

In what follows, we begin with a brief overview of the Court's agenda-setting process, with the aim to let readers "look under the hood" of the process. We then provide a more detailed description of our theoretical argument and the hypotheses we derive from it. We next explain

our data and results, and conclude with a discussion about Supreme Court agenda setting and judicial behavior more broadly.

The Nuts and Bolts of Supreme Court Agenda Setting

Modern Supreme Court justices have the discretion to determine which cases the Court will hear. Through a number of bills passed over the years, Congress has altered the Supreme Court's jurisdiction, changing the Court from one which was largely required to hear most of its cases (via mandatory jurisdiction) to one that could set its own agenda (via discretionary jurisdiction). When Congress passed the Judiciary Act of 1891, it eased the Court's workload burden by, first, creating the United States Courts of Appeals to hear all cases appealed from federal district courts and, second, carving out a small discretionary docket for the Supreme Court. As a result, with circuit courts hearing all appeals, justices had more power to select the cases justices they wanted to hear. Thirty-four years later, Congress passed the Judiciary Act of 1925 which removed much of the Court's remaining mandatory jurisdiction, leaving justices with even more power to set their own agenda. Finally, in 1988, Congress largely finished the job when it passed legislation that removed virtually *all* the Court's mandatory jurisdiction. Accordingly, today's justices can choose the cases they wish to hear, with little to no direction as to the types—or numbers—of cases before the Court (Owens, Stras, and Simon, forthcoming).

In a moment, we will address the factors that lead justices to grant review to cases, but for now, we begin by providing background on how the Supreme Court sets its agenda. The process begins when a litigant asks the Court to hear its case, which most frequently means filing a petition for a "writ of certiorari" with the Court (i.e., a "cert petition"). Each year, the Court receives thousands of cases seeking its review, but elects to hear fewer than one hundred. For example, during the Court's 2009-2010 session, justices received 8159 requests to review lower

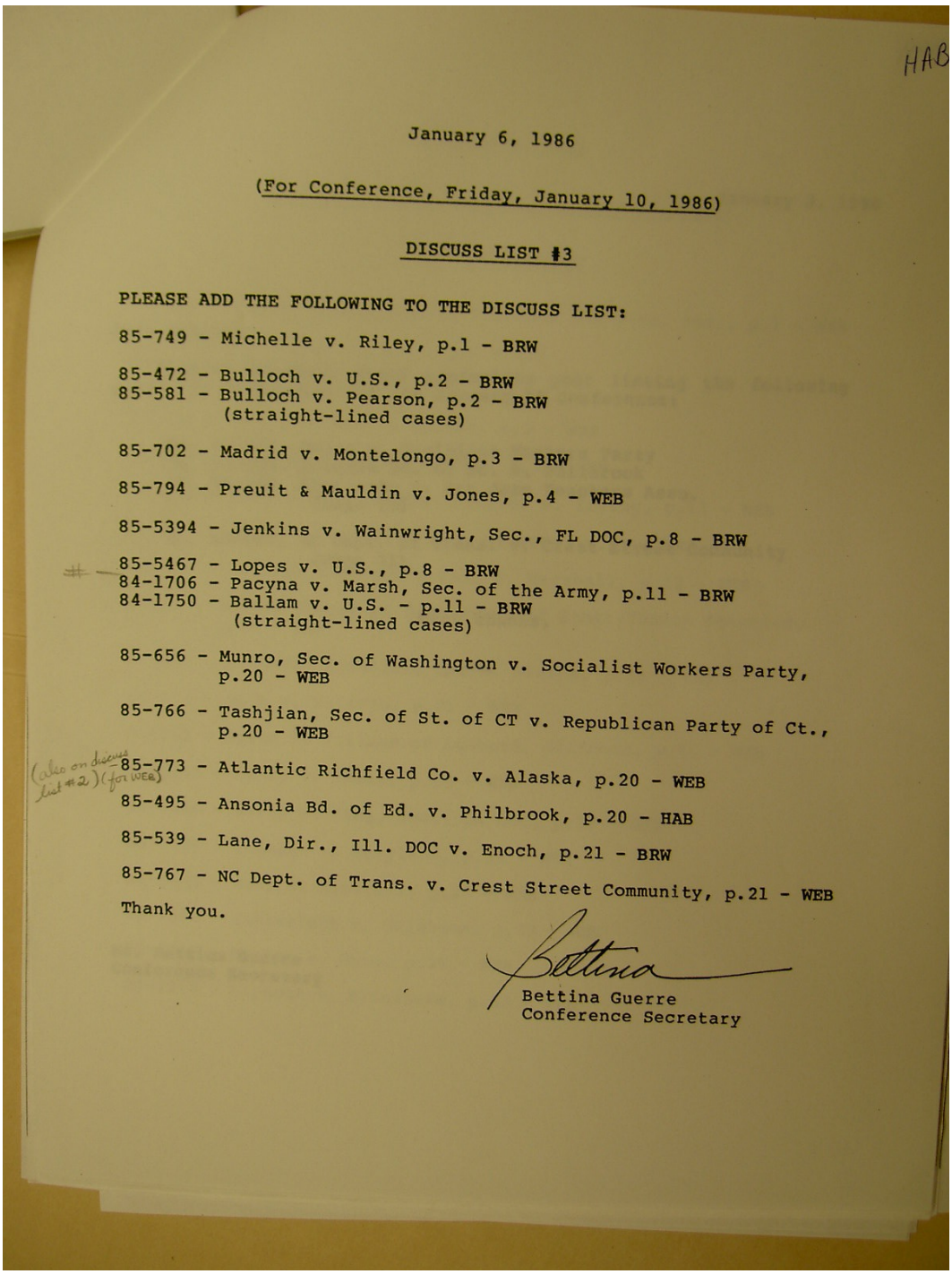
court decisions, but opted to hear only 82 of them (Roberts 2010, 9-10).

Given the large number of review requests, justices have been forced to rely heavily upon their law clerks to help them study and review cert petitions. Starting in 1972, a group of justices created the "cert pool" by combining the collective efforts of their law clerks (Ward and Weiden 2006).[1] Each clerk in the pool reviews a cert petition and reports back to the other justices and their clerks in the pool. That is, once the Court receives a petition, it is randomly assigned to one of the law clerks in the cert pool, who writes a preliminary memorandum (the "pool memo") to the justices in the pool. The pool memo summarizes the proceedings in the lower courts and all legal claims made in the petition and response. It concludes with a recommendation for how the Court should treat the petition (e.g., grant, deny, or some other measure).

Relying on the pool memo and other materials, the Chief Justice then circulates a list of the petitions he thinks deserve consideration and a vote by the Court at its next weekly conference. This list is called the "discuss list." (We provide an example of a discuss list below in Figure 1.) Associate justices can add petitions to the discuss list that they think deserve a discussion but they cannot remove from the list a petition that a colleague added.[2] Importantly, the Court summarily (i.e., without a vote) denies all petitions that do not make the discuss list.

[1] Each justice makes their own decision as to whether they want to participate in the cert pool. As of the Court's 2010 term, Justice Samuel Alito was the only justice known not to participate in it.

[2] It is worth pointing out that until 1950, the Court's default positions was that all petitions would be discussed and voted upon unless a justice put that specific petition on a list of petitions *not* to be discussed -- the ``dead list''. Any justice could revive a dead petition and remove it from this list. As the number of requests to the Court increased, though, such a scenario became increasingly untenable, leading the Court to reverse the default position (Ward and Weiden 2006, 115). Thus, whereas the default used to be that every petition was discussed unless shifted to the dead list, today, the default is that every petition will be denied summarily unless put on the discuss list.



HAB

January 6, 1986

(For Conference, Friday, January 10, 1986)

DISCUSS LIST #3

PLEASE ADD THE FOLLOWING TO THE DISCUSS LIST:

85-749 - Michelle v. Riley, p.1 - BRW

85-472 - Bulloch v. U.S., p.2 - BRW
85-581 - Bulloch v. Pearson, p.2 - BRW
(straight-lined cases)

85-702 - Madrid v. Montelongo, p.3 - BRW

85-794 - Preuit & Mauldin v. Jones, p.4 - WEB

85-5394 - Jenkins v. Wainwright, Sec., FL DOC, p.8 - BRW

85-5467 - Lopes v. U.S., p.8 - BRW
84-1706 - Pacyna v. Marsh, Sec. of the Army, p.11 - BRW
84-1750 - Ballam v. U.S. - p.11 - BRW
(straight-lined cases)

85-656 - Munro, Sec. of Washington v. Socialist Workers Party, p.20 - WEB

85-766 - Tashjian, Sec. of St. of CT v. Republican Party of Ct., p.20 - WEB

(also on discuss list #2)(for WEB) 85-773 - Atlantic Richfield Co. v. Alaska, p.20 - WEB

85-495 - Ansonia Bd. of Ed. v. Philbrook, p.20 - HAB

85-539 - Lane, Dir., Ill. DOC v. Enoch, p.21 - BRW

85-767 - NC Dept. of Trans. v. Crest Street Community, p.21 - WEB

Thank you.

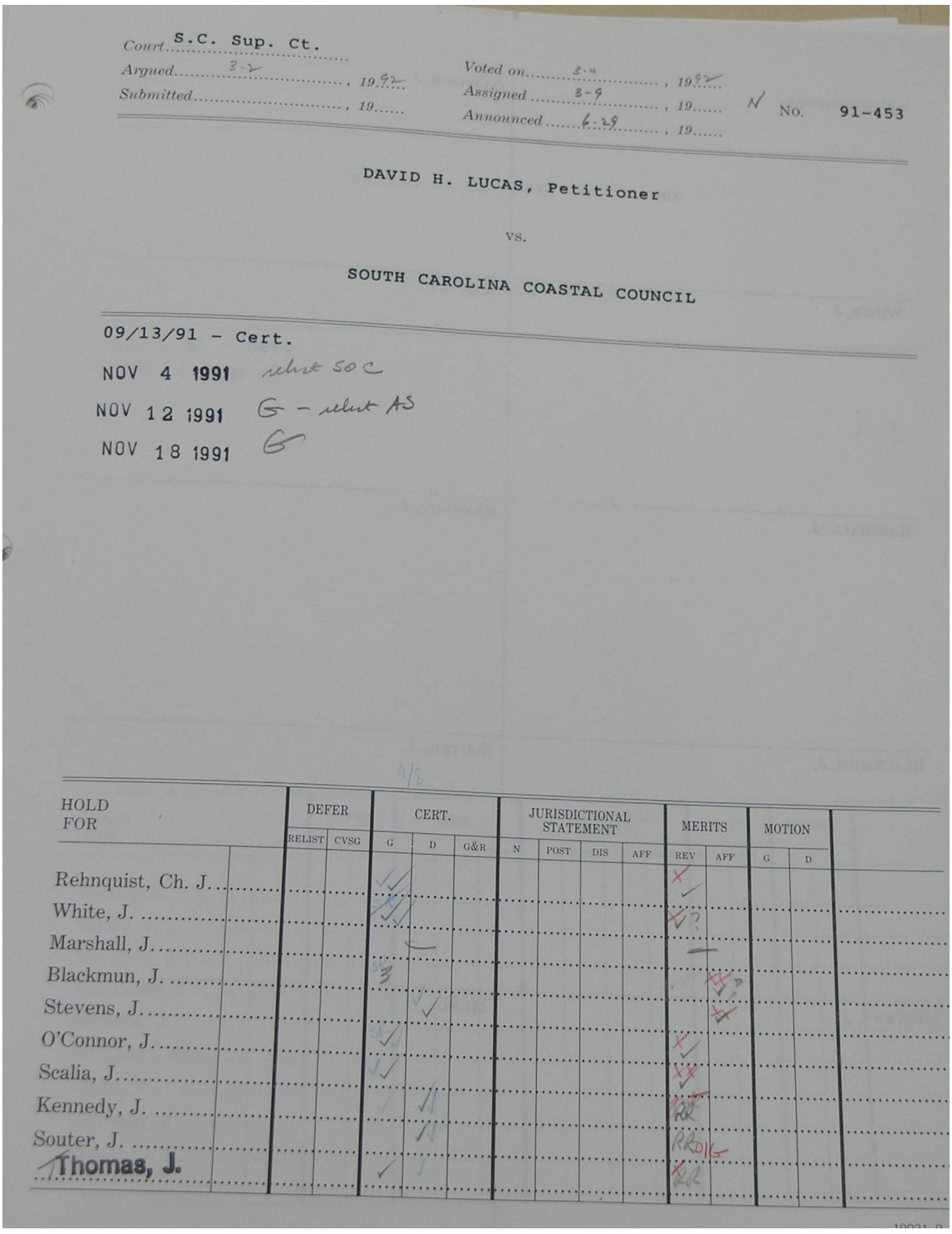
Bettina

Bettina Guerre
Conference Secretary

Figure 1: Discuss list for Court's Conference on January 10, 1986. Initials next to each case correspond to the justice who put the case on the discuss list. We obtained this document from the Papers of Justice Harry A. Blackmun, which are housed in the Library of Congress, Washington, D.C.

Each Friday, the Court holds a conference in which the justices discuss the cert petitions and vote on them. During this conference, the justice who placed the case on the discuss list (usually the Chief) leads off discussion of the petition. After presenting his or her views, the justice then casts an agenda vote. In order of seniority, the remaining justices state their positions and cast their votes. If four or more justices vote to grant review, the case proceeds to the merits stage.[3] Figure 2 illustrates, using the vote in *Lucas v. South Carolina Coastal Council*, how the justices record their votes during these conferences. As Figure 2 shows, the Court held two rounds of voting (Blackmun recorded the first round in standard pencil, and the second round in blue colored pencil). Chief Justice Rehnquist and Justices White, O'Connor, and Scalia voted to grant review in both rounds. Justice Blackmun voted to "Join-3" in the first round and then to reverse summarily in the second round. Justices Stevens, Kennedy, Souter, and voted to deny review in both rounds. Interestingly, we can see that Justice Thomas originally voted to grant review to the case but, in the second round of voting, switched his vote to deny. At any rate, because four justices cast grant votes, the Court granted review to the case and proceeded to the merits stage.

[3] Technically, the Court will grant review to a petition upon three grant votes plus one Join-3 vote (Black and Owens 2009*b*). A Join-3 vote is like a conditional grant vote: If at least three other justices vote to grant review to the case, the Join-3 vote is the equivalent of a grant vote. If fewer than three other justices vote to grant review, the Join-3 is treated as a denial.



Court S.C. Sup. Ct.
Argued 3-2 , 19 92
Submitted , 19
Voted on 3-4 , 19 92
Assigned 3-9 , 19
Announced 6-29 , 19
No. 91-453

DAVID H. LUCAS, Petitioner

vs.

SOUTH CAROLINA COASTAL COUNCIL

09/13/91 - Cert.
NOV 4 1991 relist 5-0 C
NOV 12 1991 G - relist AS
NOV 18 1991 G

HOLD FOR	DEFER		CERT.			JURISDICTIONAL STATEMENT				MERITS		MOTION	
	RELIST	CVSG	G	D	G&R	N	POST	DIS	AFF	REV	AFF	G	D
Rehnquist, Ch. J.			✓							X			
White, J.			✓							X			
Marshall, J.			—							—			
Blackmun, J.			3								X		
Stevens, J.				✓							X		
O'Connor, J.			✓							X			
Scalia, J.			✓							X			
Kennedy, J.				✓						R			
Souter, J.				✓						R			
Thomas, J.			✓							R			

Figure 2: Justice Blackmun's docket sheet in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Docket sheet comes from EpsteinSegalSpaeth2007. Case granted review with four votes to grant (Rehnquist, White, O'Connor, and Scalia. Justice Blackmun voted for summary reversal. Justice Stevens, Kennedy, Souter, and Thomas voted to deny review.

Certiorari votes are entirely discretionary and, unless divulged by the personal papers of a deceased or retired justice, are completely secret. Neither the public, Court staff, nor the justices' own law clerks are allowed in the conference room during these deliberations. This secrecy, plus the Court's lack of formal requirements for taking cases, leads us to our central question: under what conditions will justices vote to review a case?

A Theory of Supreme Court Agenda Setting

We argue that three broad considerations influence how justices set the Court's agenda. We believe that justices vote to grant review to cases when they expect policy gains from hearing the case. We also believe that they will vote to grant review to a case when certain legal factors counsel towards hearing it. And, finally, we believe that policy and legal considerations interact with each other and jointly explain Supreme Court agenda setting. We address each of these factors below.

Policy Considerations

Like many before us, we argue that justices are seekers of policy who want to etch their preferences into law (Epstein and Knight 1998). "Most justices, in most cases, pursue policy; that is, they want to move the substantive content of law as close as possible to their preferred position" (23). A number of influential studies highlight the role of policy in judicial decision making. For example, Maltzman, Spriggs, and Wahlbeck (2000) show that a justice's decision to respond to a majority opinion draft—and to accommodate colleagues' suggestions in those drafts—stem from ideological motivations. Martin and Quinn (2002), Bailey (2007), and Epstein et al. (2007) provide sophisticated empirical models to show that justices can be located spatially according to their revealed policy preferences. Of course, Segal and Spaeth (2002) win the prize for making the most forceful argument about the role of policy, stating that "the legal model and

its components serve only to rationalize the Court's decisions and to cloak the reality of the Court's decision-making process" (53). Even scholars who are sympathetic to the potentially constraining effect of law on justices concede that policy is the predominant motivation that drives justices (see, e.g., Richards and Kritzer 2002).

Yet, justices must pursue their policy goals in an interdependent environment in which their decisions are also a function of the preferences of those with whom they must interact. Most important for our purposes, justices must interact with their *colleagues* on the Court. This requirement (to acquire a majority to make binding precedent) influences justices' behavior throughout the decision making process (Bonneau et al. 2007; Maltzman, Spriggs, and Wahlbeck 2000). Chief justices and Senior Associate Justices who assign majority opinions do so to make favorable policy but also must keep the majority coalition together. Opinion writers must also make sure that their opinions reflect the preferences of their colleagues, lest they lose their support and find themselves writing in dissent. This means preemptively accommodating their colleagues and, when necessary, making changes to opinion drafts. In order to make binding precedent, justices must engage in such practices (Hansford and Spriggs 2006). They must predict how their colleagues will act throughout the decision making process. These and other studies, then, show that policy matters dearly to justices, but that they must also—at all times—consider how their colleagues' responses will impact their eventual policy success.

We believe that at the agenda stage, justices will engage in similar behavior: they will seek their policy goals but will also look to the behavior of their colleagues to determine whether they will be in the majority or in the minority in a case. That is, when deciding whether to grant review to a case, justices must consider and predict the likely behavior of their colleagues at the merits stage. To win on the merits, a justice must be able to join with at least four of her

colleagues. In short, they must *predict* the behavior of their colleagues when they set the Court's agenda, and determine whether their colleagues' predicted behavior at the merits stage will improve policy for them, or make worse policy than the status quo.

Numerous comments from justices and their clerks provide strong evidence to support the argument that justices are forward-looking agenda setters. Consider the following statement taken from Perry's (1991) seminal text on agenda setting:

> "I might think the Nebraska Supreme Court made a horrible decision, but I wouldn't want take to the case, for if we take the case and affirm it, then it would become a precedent" (Perry 1991, 200).

Clearly, this quote shows that justices base their agenda decisions, at least in part, on the existing status quo and the expectations about their colleagues' behavior. Similar types of comments can be found throughout the papers of former justice Harry A. Blackmun. Consider the following in *Dupnik v. Cooper* (No. 92-210), in which Blackmun's clerk advised him: "This is a defensive deny if nothing else." Or, look at *Freeman v. Pitts* (No. 89-1290) in which Blackmun's clerk stated: "[G]iven the current mood of the Court, I am not eager to see the petition granted." Indeed, consider the following quintessential quote from Blackmun's clerk in *Thornburgh v. Abbott* (No. 87-1344):

> "I think it pretty much comes down to whether you want to reverse the judgment below (the likely outcome of a grant). If you are pretty sure you do, you should vote to grant now. Otherwise, it's better to wait" (Epstein, Segal, and Spaeth 2007).

Empirical evidence confirms the reliability of these comments, supporting the notion that justices are forward-looking agenda setters who, we believe, make predictions about the likely behavior of their colleagues at later stages of the decision making process (Palmer 1982; Benesh, Brenner, and Spaeth 2002; Boucher and Segal 1995; Brenner 1979). Caldeira, Wright, and Zorn (1999) find that justices will be more likely to vote to grant review as they become increasingly

similar ideologically to the majority on the Court. Black and Owens (2009*a*) find, among other things, that justices who prefer the predicted merits outcome in a case (which they define as a point estimate that all justices know and can predict) to the status quo are roughly 75% more likely to grant review than those who are closer ideologically to the status quo.

We seek to build on these and other works by showing that justices make *probabilistic* forward-looking agenda-setting decisions. We examine how justices behave when they predict a *range* of possible merits outcomes rather than one specific outcome. In other words, rather than assuming that the Court's merits outcome can be reflected by the ideal point of, say, one justice (see, e.g., Black and Owens 2009*a*), we argue that justices predict the Court's merits outcome will fall within a certain range of probable outcomes. To be sure, it may be defensible to assert that actors know the policy location of the status quo and the preferences of colleagues with whom they must frequently interact. It is problematic, however, to assume that actors have complete and perfect information about the final result of the policy they will make -- especially when that policy must undergo treatment from other actors (such as their colleagues). Predictions will seldom be perfectly accurate, particularly when making decisions in multi-stage settings. What is needed is an approach that examines how justices make probabilistic predictions under conditions of uncertainty.

We argue that when the probability increases that the Court's expected merits decision will be better for a justice than the status quo, the justice will be more likely to vote to grant review to the case. Conversely, when that probability decreases, the justice will be less likely to vote to grant review to the case. The logic is obvious: justices will seek to open the gates and allow cases to proceed when their probability of winning at the merits increases, and they will be less likely to open those gates when the probability of winning on the merits decreases. This

gives rise to the following hypothesis:

Probabilistic Policy Hypothesis: A justice will become increasingly likely to vote to grant review to a petition as the probability increases that the Court's merits decision will be better policy for that justice than the status quo.

Legal Considerations

While policy considerations clearly are important for justices, so too are legal considerations. After all, justices are trained in the law and taught, like all lawyers, that the law is sacrosanct and must be followed. At the same time, other actors such as Congress, the president, the public, and the bar expect justices to respect the law. Since justices rely on these institutions to execute the Court's decisions and sustain its legitimacy, they must behave in a manner consistent with those expectations. So, justices wanting to make efficacious decisions must largely comply with predominant beliefs about proper legal behavior (Lindquist and Klein 2006).

What are these legal considerations that influence justices at the agenda stage? To answer this question, we reviewed two well-known studies on Supreme Court agenda setting—Perry (1991) and Stern et al. (2002). Both of these works illuminate the legal factors that influence justices' agenda votes. Perry (1991) gained insight into the Court's agenda behavior through a number of extensive interviews with justices and their clerks, while Stern et al. (2002) rely on years of experience within the Court and litigating before it. Perry argues that legal conflict and legal importance constitute two (empirically testable) legal variables, while Stern and his coauthors argue that judicial review exercised in the lower court is an important legal factor driving the Court's agenda. The importance of these factors has been verified by a number of studies (see, e.g., Black and Owens 2009*a*). Let us consider each of them more extensively.

One of the Supreme Court's most important duties is to resolve legal conflict among the lower courts. When multiple lower courts disagree on the proper interpretation of federal law, the

Court is expected to wade into the conflict and declare the correct interpretation of the law. Both the Court's own rules (see Supreme Court Rule 10) and statements by the justices themselves suggest that the presence of legal conflict drives up the likelihood that they will vote to grant review. Consider the following quote from an anonymous justice:

> "I would say that [cert votes] are sometimes tentative votes on the merits. Now I would say that there are certain cases that I would vote for, for example, if there was a clear split in circuits, *I would vote for cert. without even looking at the merits.* But there are other cases I would have more of a notion of what the merits were" (Perry 1991, 269) (Emphasis Supplied).

Empirical scholarship confirms the point. Lindquist and Klein (2006) argue: "[E]ven a cursory examination" of the Court's docket shows that policy implications alone do not explain Supreme Court agenda setting. "... justices [may] choose to hear [cases] not because they care so much about the policies involved but in order to clarify federal law [...]" (139). Other studies also show that the Court is more likely to grant review to cases that observe legal conflict than those that do not CaldeiraWright1988. Thus, we expect that a justice will be more likely to vote to grant review when the lower courts conflict with each other over how to interpret federal law:

Legal Conflict Hypothesis: A justice will be more likely to vote to grant review to a petition when the lower courts conflict over the proper interpretation of federal law.

At the same time, when a lower federal court exercises judicial review over a federal statute, the Supreme Court is expected to weigh in. When a lower federal court strikes down a federal law as unconstitutional, legal norms suggest the Supreme Court should review the decision (Stern et al. 2002, 244). Justices themselves have claimed that they owe Congress the duty to review whether, as the lower court determined, the statute is indeed unconstitutional. Thus, we expect the following:

Judicial Review Hypothesis: A justice will be more likely to vote to grant review to a petition when the lower court struck down a federal law as unconstitutional.

Case importance is a third legal consideration that can drive agenda setting. Perry's (1991) interviews show that justices believe they should review cases that are legally important. There are simply some issue that the broader public demands the Court resolve. Stated one justice:

> "Sometimes the people just demand that the Supreme Court resolve an issue whether we really ought to or not. That does affect us sometimes. We just feel that the Supreme Court has to decide" (Perry 1991, 259).

We expect that, all else equal, justices will be more likely to vote to grant review these legally important cases:

Legal Importance Hypothesis: A justice will be more likely to vote to grant review to a legally important petition.

The Conditional Influence of Law on Policy

To be sure, we believe that the independent effects of policy and law are influential and can explain much agenda setting behavior. Yet, it is likely that the interaction of the two considerations jointly explain agenda setting (and, likely, judicial behavior more broadly). Scholars are just beginning to examine how law and policy interact. Consider, for example, Johnson, Wahlbeck, and Spriggs (2006), who show that ideology and an attorney's quality of oral argumentation conditionally influence whether a party wins before the Court. Justices pursue their policy goals, of course, but are influenced by the legal argumentation proffered by the attorneys in a case. At the same time, Hansford and Spriggs (2006) show that precedent vitality (i.e., how strong a precedent is) can influence how justices go about seeking their policy goals when interpreting precedent. These studies suggest quite strongly that policy behavior can

be conditioned by the legal considerations in a case---and we have every reason to believe that such a dynamic occurs at the agenda stage.

Indeed, perhaps the key contribution made by Black and Owens (2009*a*) in their examination of agenda votes was the finding that policy and legal considerations *do* interact, and that legal factors sometimes force justices to behave contrary to their policy goals. Simply put, as judges, there are a number of legal considerations that must enter their decision calculus, considerations which can either trump their policy goals or aid them as they seek their policy goals. The conditioning effect can be positive or negative, depending on whether law and policy point toward the same or different ends. We apply the logic of this argument to our approach.

On the one hand, justices may wish to pursue their policy goals but find themselves *constrained* by legal considerations. Imagine a justice who wants to cast a defensive deny vote to protect the status quo policy: the justice knows that if she votes to grant review to the case, the full Court on the merits would be highly likely to make worse policy (from her standpoint) than the status quo. As such, for policy reasons, she would want to vote to deny review. Yet, consider what happens when she observes a considerable amount of conflict among the lower courts over the correct interpretation of the federal law. Will that same justice cling to her policy goals and vote to deny review to the case? We think not. Instead, her probability of voting to grant review will increase. That is, when justices want to deny review for policy reasons, legal considerations (such as legal conflict, judicial review exercised below, and legal importance) can drive up their likelihood of voting to grant review.

On the other hand, if justices' policy goals *accord* with what legal norms countenance, the law will *aid* and provide cover for their policy-seeking behavior. If there is a large probability that the Court's policy decision at the merits stage will improve the status quo, the

law will actually enhance the justice's desire to grant review to the case. Consider a justice who wants to grant review because she expects the Court's merits decision will make better policy for her than the status quo. Now consider what happens if the lower court that heard the case struck down a federal statute. The justice should become even more likely to vote to grant review than she otherwise would have been. She can, in short, vote to grant review to pursue her policy goals but claim to be following the law. Legal considerations can free her up to pursue her policy goals. This gives rise to the following hypothesis:

The Conditional Influence of Law Hypothesis: A justice with a small (or no) probability of being made better off by the Court's merits decision will nevertheless be more likely to vote to grant review to a petition when legal factors point toward review. Conversely, a justice with a large probability of being made better off by the Court's merits decision will be even more likely to vote to grant review to a petition when legal factors point toward review.

Data and Measures

To test our theory, we examined the private, archival records of former Justice Harry A. Blackmun.[4] While case outcomes (i.e., grant or deny) are publicly available for all cases, the votes of individual justices and knowledge of which cases made the discuss list are not. As a result, we needed to utilize archival data to obtain such information. We obtained these raw data from Epstein, Segal, and Spaeth (2007). Accordingly, we analyzed a random sample of petitions that made the Supreme Court's discuss list. Our unit of analysis is the justice vote. Our dependent variable is each justice's cert vote, which we code as 1 for grant and 0 for deny.[5]

Policy Measures. Our policy-based explanation for agenda setting examines the probability that a justice will be made better off by the Court's merits decision than the status quo. To quantify this variable, we measured four things: (1) each justice's policy preferences; (2)

[4] Black and Owens (2009*c*) show that Blackmun's papers are highly reliable.
[5] See Black and Owens (2009*a*) for additional details on how we constructed our sample and coded our dependent variable.

the status quo in each case; (3) the set of likely outcomes resulting from a predicted Court decision on the merits; and (4) the probability that the set of likely merits outcomes would be better for the justice (policy-wise) than the status quo.

We measured each justice's policy preferences by referring to the Judicial Common Space (JCS) and finding the justice's JCS score for the term in question (Epstein et al. 2007). The Judicial Common Space is a collection of scores used to measure the preferences of Supreme Court justices, members of Congress, and lower federal court judges. It provides an estimate of each justice's revealed preferences and allows scholars to estimate how liberal or conservative a justice behaved each year. By using the justice's JCS score for the term in question, we can quantify how liberal or conservative the justice was at the time of the agenda vote.

To measure the status quo in each case, we followed Black and Owens (2009*a*) and analyzed the JCS scores of the judges who sat on the lower federal court panel that heard the case. In particular, we coded the status quo as the JCS score of the median judge on the three-judge circuit court panel that heard the case below. In cases where a lower court judge filed a dissent or special concurrence, we coded the status quo as the midpoint between the two circuit judges in the majority. And, if the lower court reviewed the case *en banc*—as a full collection of the circuit judges rather than the standard three judge panels—we coded the status quo as the median judge in the en banc majority.

Measuring the set of likely outcomes resulting from a predicted Court decision on the merits was more tricky. Unlike existing studies, which largely claim that justices know precisely where in policy space the Court's merits decision will be (see, e.g., Owens 2010; Black and Owens 2009*a*), we argue that justices make probabilistic predictions about the location of that

policy outcome. That is, we believe justices can predict a range of likely outcomes and base their decisions to grant or deny on that range. But how do they determine that range of possible outcomes? We assume that to predict *future* case outcomes, justices look backwards at *previous* Court rulings on similar issues. To predict how the Court today will rule in a case, they will look at the Court's past track record dealing with similar cases.

To capture this set of likely outcomes, we began by reading the cert pool memos written in every petition so as to determine the issue in the case. Then, we used the Supreme Court Database to identify the last ten cases the Supreme Court decided on that same issue (our results are similar if we use values other than ten). Once we identified the Court's previous cases in that issue area, we needed to determine the ideological content of those cases. To do so, we looked to the members of the majority coalition in each of those cases. Carrubba et al. (2007) show that the policy generated in each case is determined by the preferences of the median member of the majority coalition (see also Clark and Lauderdale 2010). We adopted their approach and identified the JCS score of the median justice of the majority coalition for each of these previous cases.

Having located the medians of majority coalitions in similar previous cases, we then used a data smoothing procedure to back out the underlying distribution that was most likely to have given rise to these past outcomes. That is, using JCS values from the Court's previous cases as an input, we estimated the underlying policy distribution that generated those specific values. Then (finally!), to calculate the probability that the set of possible outcomes in the case would be better for the justices than the status quo we integrated across all values of the possible merits outcome where a voting justice would prefer that outcome over the status quo.

We appreciate the complexity of this approach and, to make it clearer to the reader,

illustrate it in Figure 3. Each panel shows the policy continuum, where values on the far left are most liberal and values on the far right are most conservative. Within each of the three panels, we show *SQ*, which is the status quo, the current state of legal policy related to the case. If the Court decided not to grant review in a case, this is what legal policy would look like. J_i represents a specific justice's most preferred policy outcome, which is often referred to as her "ideal point." *J'* represents the justice's indifference point—the point in policy space the justices likes equally to the status quo. The region between *SQ* and *J'* represent the range of policy outcomes that the justice would prefer to the status quo. Thus, when a potential policy outcome falls between *SQ* and *J'*, the justice prefers that policy to the status quo. Finally, the thick lines that form bell-shaped curves represent a justice's belief about what type of legal policy the Court would create if it were to grant cert the petition seeking review. Recall that the inputs for this distribution come from the location of the Court's previous decisions in cases with a similar issue.

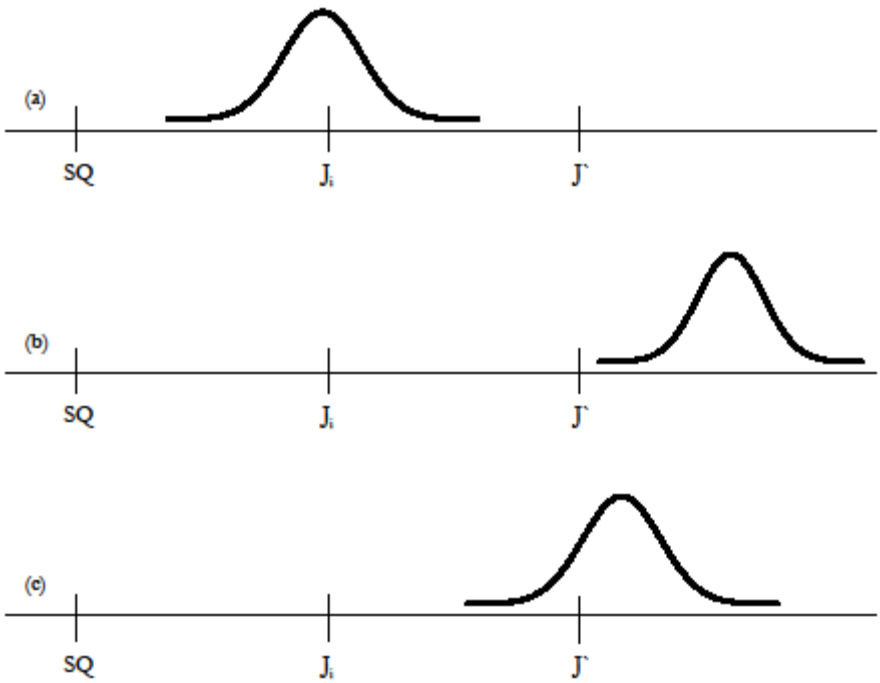


Figure 3: Spatial configurations of the legal status quo (*SQ*) a justice's ideal (J_i) and indifference ($J^{'}$) points, and hypothetical distributions of the merits outcome if the Court were to grant review and decide the case (thick bell-shaped lines).

Justice$_i$ will prefer the merits outcome over the status quo for any Court-made policy that falls between *SQ* and *J'*, since that policy will be closer to her estimated ideal point than is the status quo. As such, panel (a) of Figure 3 implies that our hypothetical justice would prefer all likely merits outcomes to the status quo. Her value of *Policy Improvement Probability* would therefore equal 1. (The entire area under the curve falls between *SQ* and *J'*.) In panel (b), since none of the curve falls between *SQ* and *J'*, *none* of the possible merits outcomes would improve policy for J_i. Accordingly, she would receive a value of 0 for *Policy Improvement Probability* (and would be quite unlikely to vote to grant review to the case). Finally, if the merits range took on the location presented in panel (c), J_i would prefer some values of the possible merits outcome distribution over the status quo. Under this configuration, the value of *Policy Improvement Probability* for the justice would equal the area under the curve between *SQ* and *J'*. As that value

of *Policy Improvement Probability* increases, so too will the likelihood that the justice will vote to grant review to the petition.

Legal Measures. To operationalize legal conflict, we include three variables: *Legal Conflict Alleged* , *Weak Legal Conflict* , and *Strong Legal Conflict* . We coded each of these variables by reading the law clerks' discussions in the cert pool memos. We coded *Legal Conflict Alleged* as 1 if the petitioner alleged the existence of conflict, but the law clerk found that assertion without merit. *Weak Legal Conflict* is coded as 1 if the petitioner alleged the existence of legal conflict but the law clerk tamped down the allegation and claimed instead that the conflict was minor and tolerable (it is coded as 0 otherwise). (Also called "shallow conflict," this occurs when the conflict includes few circuits or revolves around a conflict that the circuits themselves appear to be clarifying on their own.) We code *Strong Legal Conflict* as 1 (0 otherwise) when the petitioner alleges a conflict and the pool memo writer concurs in its presence and notes that the conflict is neither minor nor tolerable.

To measure judicial review, we created *Lower Court Exercises Judicial Review*, which takes on a value of 1 if the circuit court that heard the case below struck down a federal statute as unconstitutional; 0 otherwise.

To measure legal importance, we followed Black and Owens (2009*a*) and relied on three different measures, the first of which comes from the circuit court's opinion type. We code *Unpublished Lower Court Opinion* as 1 if the intermediate court's opinion was unpublished and 0 if published. Our second measure of legal importance comes from the pages of the *U.S. Law Week*, a legal periodical that seeks to "[alert] the legal profession to the most important cases and why they are important" (LexisNexis Source Information). We expect that, on average, legally important cases will generate summaries in U.S. Law Week while legally mundane cases will

not. We code *Case Media Salience* as 1 if there was a story written about the circuit court opinion; 0 otherwise. Finally, our third measure of legal importance turns on the number of amicus curie briefs filed in a case. When organized interests involve themselves in the agenda setting process, they send a signal to the Court that the case is important, especially since the cost of filing such briefs is high (Caldeira and Wright 1988). We suggest that as the number of groups filing amicus briefs increases, the perceived legal importance of the case should also increase. Accordingly, we coded *Outside Interest Participation* as the total number of amicus curiae briefs filed both in support of and in opposition to the petition. We explain below how we measured the interactive relationship between policy and law.

Finally, we also controlled for a variety of additional factors, such as whether the lower court decision was *en banc*, whether the United States supported or opposed review in the case, whether the circuit court of appeals reversed the court below it, and whether the circuit court decision observed a dissent by one of its judges in the case. As a statistical matter, it was important that we include these potential alternative explanations that might be related to the hypotheses we wish to test. Further, including these variables was important to maintain consistency with a long line of existing studies on Supreme Court agenda setting (e.g., Tanenhaus et al. 1963; Caldeira and Wright 1988; Caldeira, Wright, and Zorn 1999). Measurement details for these additional variables can be found in Table 0 in the appendix.

Methods and Results

Because our dependent variable is binary (i.e., takes on a value of yes or no for whether a justice voted to grant review) we estimate a logistic regression model. As the raw model results are difficult to interpret, we relegate the table of results to the appendix and turn directly to summarizing what our data say about our hypotheses. Recall that we proposed three basic

arguments: First, we argued that justices cast their agenda votes based on the probability that the Court's eventual merits decision will result in a more favorable policy than the status quo. Second, we asserted that justices weigh legal factors when making their agenda-setting decisions. Third, we clained that policy and legal considerations interact with one another, with policy goals sometimes tacking a back seat to legal considerations. We evaluate each in turn.

The Importance of Policy Considerations

Our initial argument was that, while casting their agenda votes, justices ask themselves: "How likely is it that this case will result in a policy improvement for me versus what currently exists?" When the justice believes there is a high probability of being made better off policy-wise, she will be more likely to vote to grant review. Our data confirm this hypothesis. Figure 4 illustrates. The horizontal axis represents the probability that the Court's merits decision in the case would result in a favorable policy gain for the justice. The vertical axis represents the probability that a justice will vote to grant review to the case.

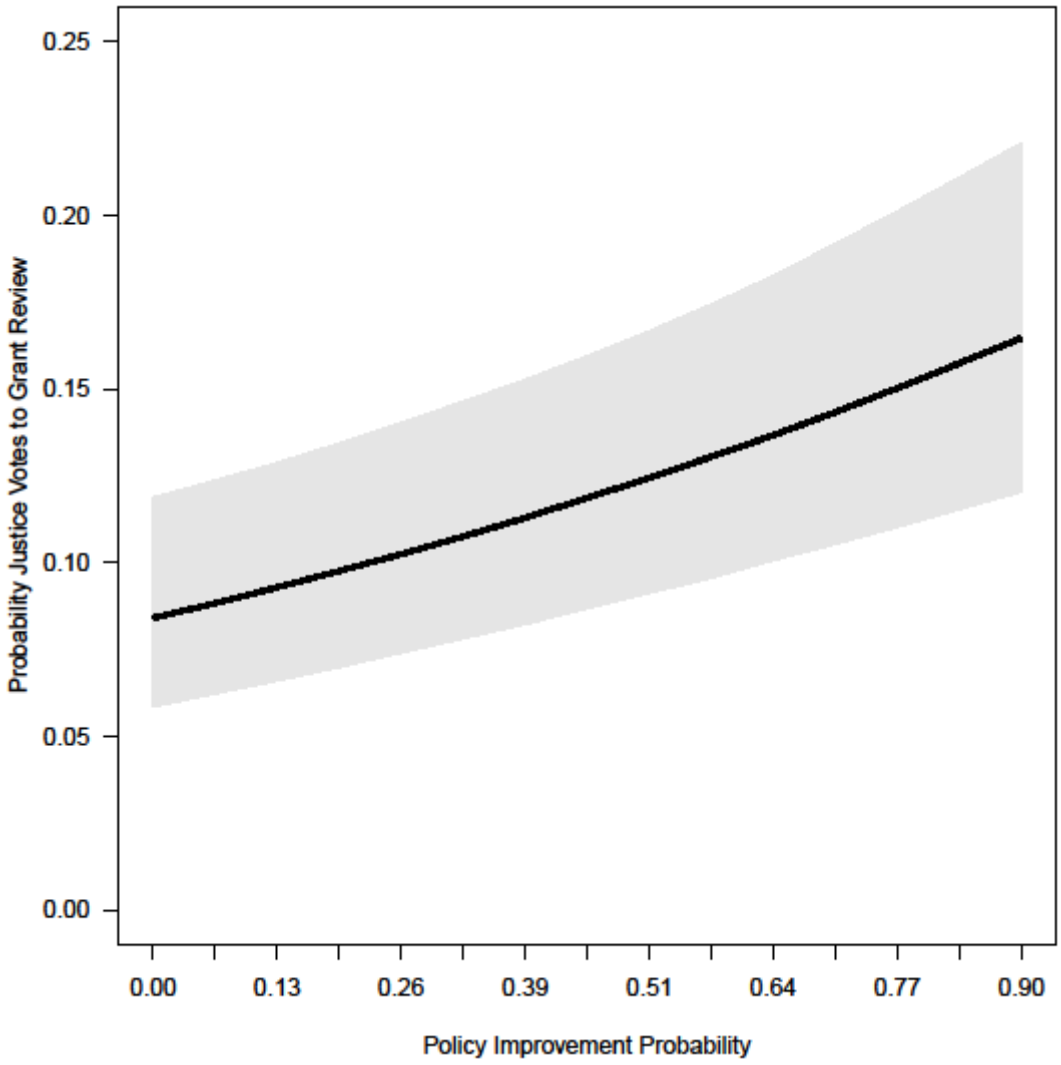


Figure 4: Predicted probability that a justice will vote to grant review (vertical axis), conditional on how likely it is that the Court's merits outcome will improve policy for her (horizontal axis). Small values on the x-axis mean it is unlikely a case will improve policy for a justice; high values correspond to the opposite. The gray shaded area summarizes the uncertainty around our specific probability estimates.

The slope of the line is positive, which indicates that as the predicted improvement in policy increases in probability, so too does the likelihood that a justice will vote to grant review to the case. This is exactly what our policy hypothesis suggested. More specifically, we estimate only an 8% chance that a justice votes to grant review when there is no chance that the case will result in a policy improvement for her. By contrast, when a justice is very confident that the case

will improve policy, the probability the justice votes to grant review doubles.

The Importance of Legal Considerations

While we believe policy considerations are important, we also argued that legal considerations matter. We hypothesized that when positive legal cues were present—such as legal conflict, judicial review, and case importance—justices would be more likely to vote to grant review. Conversely, when the case was legally unimportant—such as when its lower court opinion was unpublished—justices would be less likely to vote to grant review. Figure 5 illustrates our results for these variables.

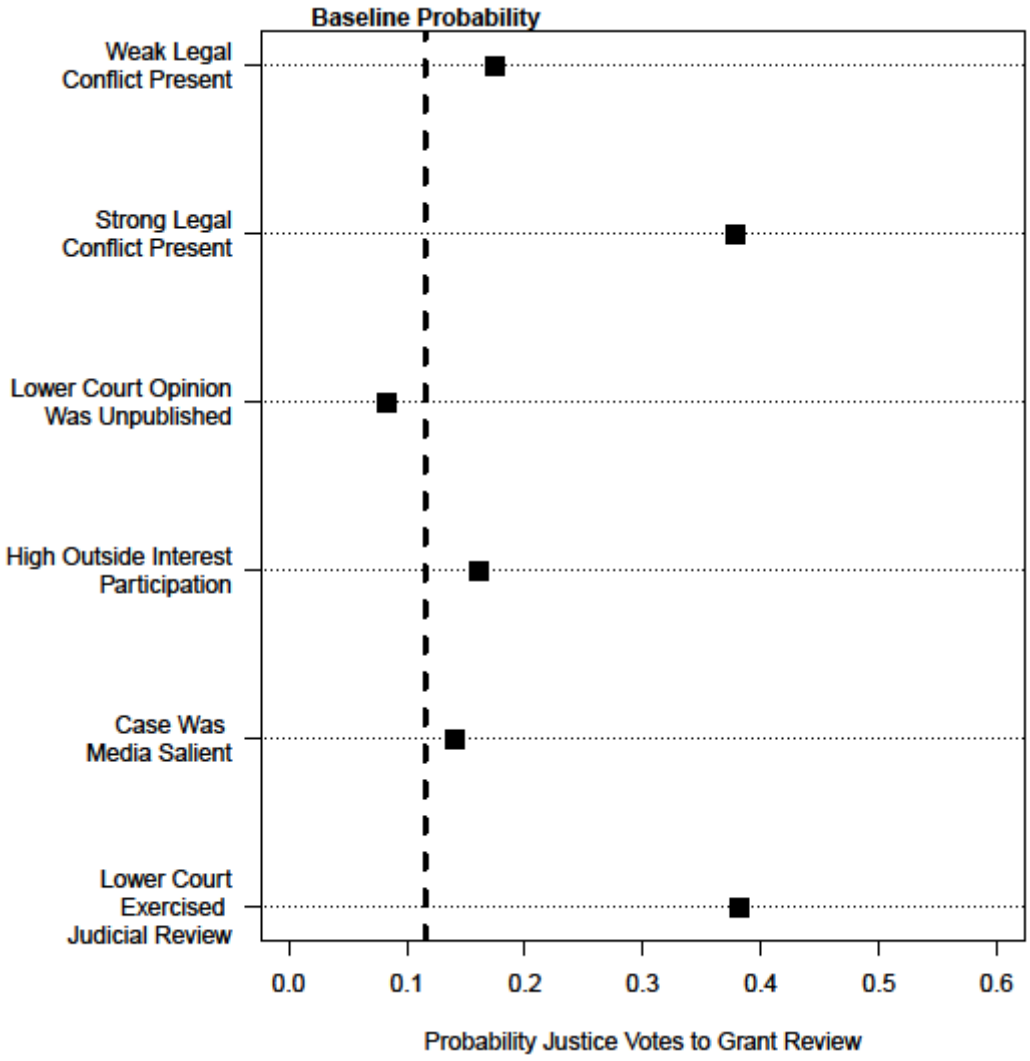


Figure 5: Predicted probability that a justice will vote to grant review (horizontal axis), conditional on various legal factors (vertical axis and squares on the plot). The dashed vertical line represent that baseline likelihood that a justice votes to grant review, when all variables are at their modal values in the data.

In Figure 5, we reverse the horizontal and vertical axes from the previous figure and display a justice's probability of voting to grant review on the horizontal axis. Each of our legal factors are labeled on the vertical axis and identified in the plot with a square point. This figure also includes (as a dashed vertical line) the "Baseline Probability" of a justice voting to grant.

This value simply reflects the probability a justice would vote to grant review in an "average" case. (Such a case has a low value of legal importance, which helps explain why the estimate is relatively low---only about 12%). Starting first with our legal conflict variables, we argued that when justices are confronted with a case in which the circuits are split as to the proper interpretation of law, they will need to intervene and clear up the conflict. Our results support this hypothesis. We predict an 18% chance that justices vote to grant review when "weak" conflict is present and a 38% chance when "strong" conflict is present. These are, of course, significant increases over the baseline probability of voting to grant, especially in those cases with strong conflict.

We also find a significant increase in the probability of voting to review a case when the lower court exercised judicial review and declared a federal law unconstitutional. We suspected that the Court would have an institutional incentive to make sure the lower court judges decided the case correctly. Our findings bear this out. We estimate a 38% chance that a justice will vote to grant review when judicial review has been exercised in the court below, which is more than triple the initial baseline probability.

Our measures of legal importance also perform as expected, though they are not nearly as strong as the other legal considerations. Recall that the non-publication of a lower court opinion suggests that a particular case is *unimportant*. As such, we argued that justices would be less likely to vote to grant review to lower court decisions that were unpublished. Consistent with our hypothesis, we find that justices are less likely to vote to grant review to unpublished decisions than the baseline opinion, which is published. We estimate only an 8% chance that a case decided with an unpublished opinion will convince a justice to support granting review. We find similarly modest effect sizes for our outside interests and media salience variables, whose

presence increase the likelihood of a justice voting to grant review to 16% and 14%, respectively.

The Conditional Relationship of Law and Policy

Thus far, our results focused on the independent role played by policy and legal considerations in affecting justices' agenda-setting votes. Yet, as we discussed above, we believe that these two factors interact to influence justices' votes. To test this account, we modified our initial statistical model. In particular, instead of treating each legal variable separately, we combined them into an index that summarizes the overall number of legal factors that might push the Court towards granting (versus denying) review. High values of the index mean the presence of multiple legal factors that support granting review, while low values indicate a lack of legal justifications for granting review. More specifically, we summed the values of weak conflict, strong conflict, lower court judicial review, case salience, and outside interest participation (converted to a dummy variable for any level of participation). We then estimated a statistical model that allowed us to evaluate how justices' policy behavior changes as a result of these legal considerations.[6] Figure 6 illustrates our results.

[6] We treated an unpublished opinion as a value of -1. Our re-estimated model excludes these specific variables in lieu of an index, which is interacted with our policy probability variable. Table 2 in the appendix presents parameter results.

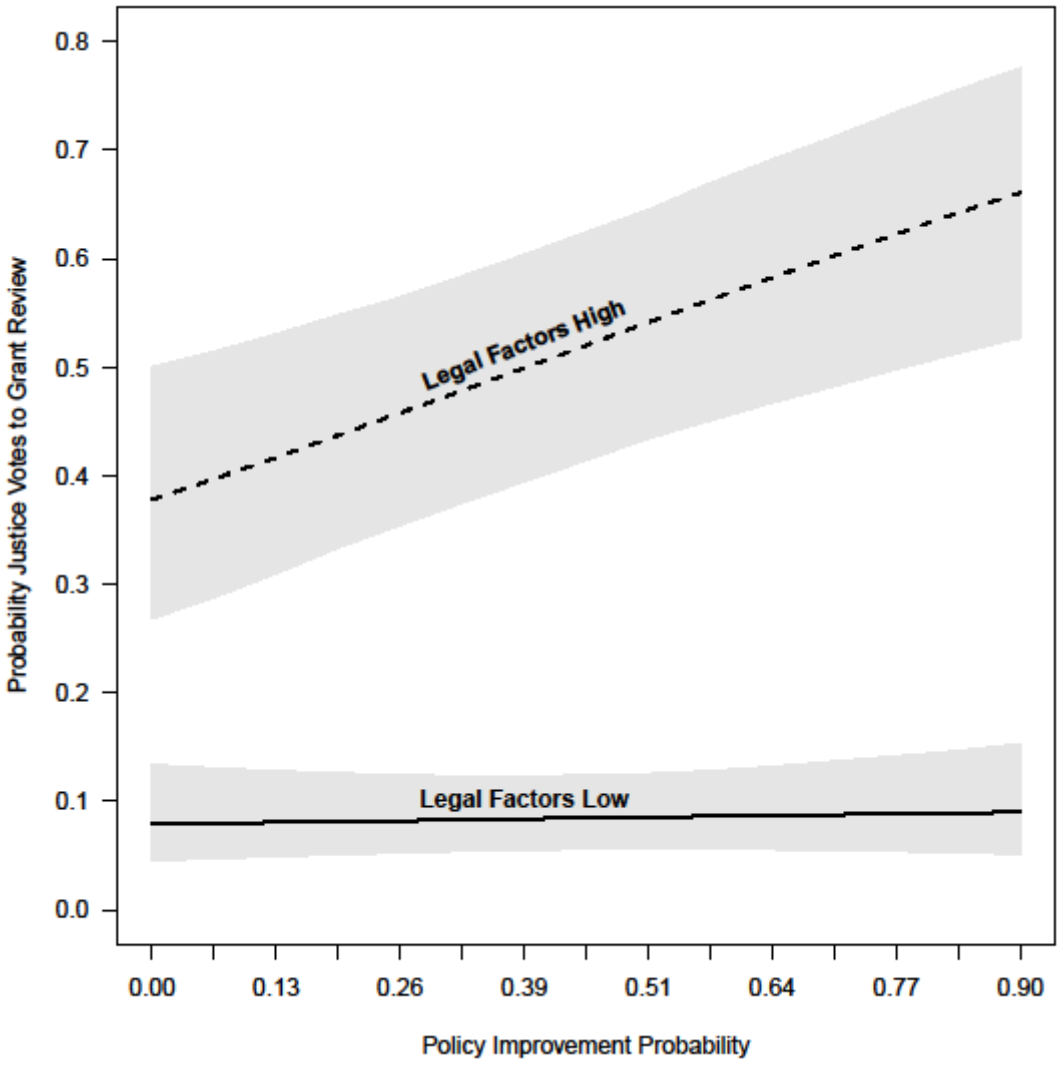


Figure 6: Predicted probability that a justice will vote to grant review (vertical axis), conditional on how likely it is that the Court's merits outcome will improve policy for her (horizontal axis) and whether there are many (dashed line) or few (solid line) legal factors that counsel towards granting review. Small values on the x-axis mean it is unlikely a case will improve policy for a justice; high values correspond to the opposite. The gray shaded area summarizes the uncertainty around our specific probability estimates.

The horizontal axis in Figure 6 shows the policy improvement probability on the horizontal axis and the likelihood a justice votes to grant review on the vertical axis. Figure 6 provides two different scenarios for comparison. More specifically, the Figure shows how policy considerations affect the probability of voting to grant review (a) when the law suggests the

justice should deny review, and (b) when the law suggests a grant is warranted. The solid line shows the effect of predicted policy improvement on a justice's vote when the legal factors in the case tend to suggest that the Court should *deny* review. For example, assume there is no legal conflict in a case, the lower court did not exercise judicial review, and the various indicators of case importance suggest the case is not legally important. As the flat slope of the line indicates, there is no appreciable effect for the policy improvement variable when legal factors suggest the justice should deny review. In other words, no amount of policy improvement can persuade a justice to hear the case when the law suggests it is not cert-worthy. That is, regardless of the value of policy improvement we estimate only an 8% chance that a justice will vote to grant review.

By contrast, the dashed line shows the effect of predicted policy improvement when the case presents the Court with a series of important legal cues such as conflict and overall case importance. In such cases, we observe a strong positive relationship between the policy improvement probability variable and the likelihood a justice votes to grant review. More specifically, when legal cues suggest a justice should grant review---*but the probability the Court will improve policy for the justice is zero*---the justice votes to grant 38% of the time. When, however, legal cues suggest a grant and *the probability is quite high* that the Court will improve policy for the justice, she is 66% likely to vote to grant review, a relative increase of nearly 75%.

Perhaps just as important, compare the behavior of a justice who will be made better off by the Court's decision when there are no legal cues to grant, with a justice who will be made worse off in a case where legal cues suggest she should grant review. In the former case, the justice votes to grant with an 8% probability. In the latter case, she votes to grant review with a 38% probability!

Put plainly, when looking at the law and policy jointly, it is apparent that legal considerations matter to justices at the agenda stage, and they matter dearly. When law and policy work together, justices can more freely pursue their policy goals. Yet, policy goals are often not enough. When justices should, from a policy perspective, seek to kill the petition, they nevertheless vote to open the gates in a significant number of instances. They do so, we believe, because legal considerations weight heavily on their minds. For justices, then, to achieve policy, they must also garner support from the law.

Discussion

What do these findings tell us about agenda setting on the Court, and judicial decision making more broadly? In a narrow sense, they tell us about the factors that matter to justices when they set the Court's agenda. Both policy and legal considerations influence the cases they put on the Court's docket. When a justice stands to be made better off in a policy sense by an expected merits decision, that justice will be more likely to vote to grant review to the case. At the same time, when legal considerations such as legal conflict, judicial review, and broader case importance are present, justices become much more likely to grant review to the case. Perhaps most importantly, though, these findings suggest that law can condition justices' policy goals. Justices, to be sure, will seek to etch their policy preferences into law, but when their behavior would be defined by nothing other than policy seeking, they give way. Justices, in essence, must be able to attach legal motivations to their policy behavior in order to proceed. Why this is the case, we cannot be sure, but what is clear is that policy alone cannot be enough to motivate justices at the agenda stage.

More broadly, these findings suggest that scholars should look for the influence of law on justices' decisions in other areas of the decision making process. We do not quarrel with the

notion, long confirmed in the literature, that justices are seekers of legal policy. Hundreds of articles and books show quite convincingly that policy goals fill justices' minds. Yet, we do believe that our results suggest that policy goals do not *exclusively* motivate justices. Why, after all, would justices care about legal factors at the agenda stage—so much so that they would vote to hear a case knowing that it would likely result in a policy loss for them—but then disregard such factors at later stages? To ask the question is to answer it: they would not. Instead, it is much more likely that legal factors motivate justices in manners heretofore unstudied. Perhaps legal considerations force justices to decide cases using different legal grounds than they otherwise would prefer. Perhaps the models social scientists have employed to examine the influence of law are simply too blunt to detect its role. These and other aspects of political jurisprudence must be studied further. For now, at least, it seems quite clear that policy considerations and legal considerations jointly influence justices' agenda votes.

Appendix

Variable Name	Coding
En Banc Lower Court Opinion	Was decision seeking the Court's review decided by a full complement of circuit judges (coded as 1) or a more common three judge panel (coded as 0)?
U.S. Supports Review	Did the U.S. seek review of the petition either as the petitioning party or as amicus curiae? 0 = no; 1 = yes.
U.S. Opposes Review	Did the U.S. oppose review of the petition either as the responding party or as amicus curiae? 0 = no; 1 = yes.
Lower Court Reverse Trial Court	Did the lower court reverse the initial decision of the trial court? 0 = no; 1 = yes.
Dissent in Lower Court	Was there a dissenting opinion present in the decision seeking review from the lower court? 0 = no; 1 = yes.

Table 1: Control variable names and coding rules.

	Coefficient	Robust S.E.
Policy Improvement Probability	0.848*	0.165
Legal Conflict Alleged	0.154	0.228
Weak Legal Conflict	0.484*	0.186
Strong Legal Conflict	1.534*	0.188
Lower Court Exercises Judicial Review	1.548*	0.398
Case Media Salience	0.225	0.172
Unpublished Lower Court Opinion	-0.361	0.418
Outside Interest Participation	0.188*	0.078
En Banc Lower Court Opinion	0.107	0.371
U.S. Supports Review	0.884*	0.226
U.S. Opposes Review	-0.184	0.198
Lower Court Reverse Trial Court	0.375*	0.159
Dissent in Lower Court	0.279	0.193
Constant	-2.545	0.229
Observations	3024	
Log Likelihood	-1577.189	

Table 2: Logistic regression model of whether a justice votes to grant (coded as 1) or deny review (coded as 0) in a cert petition. Standard errors are clustered on each of the unique 3024 dockets in our data. * denotes $p < 0.05$ (two-tailed test).

	Coefficient	**Robust S.E.**
Policy Improvement Probability	0.437	0.301
Net Legal Factors	0.486*	0.113
Policy Improvement Probability x Net Legal Factors	0.288	0.191
Legal Conflict Alleged	0.354	0.199
U.S. Supports Review	1.020*	0.220
U.S. Opposes Review	-0.221	0.197
Lower Court Reverse Trial Court	0.270	0.162
Dissent in Lower Court	0.273	0.202
En Banc Lower Court Opinion	-0.011	0.354
Constant	-2.317*	0.242
Observations	3024	
Log Likelihood	-1643.631	

Table 3: Logistic regression model of whether a justice votes to grant (coded as 1) or deny review (coded as 0) in a cert petition. Standard errors are clustered on each of the unique 3024 dockets in our data. * denotes $p < 0.05$ (two-tailed test).

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