

Ideology and Agenda-Setting at the U.S. Supreme Court

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September 26, 2017

Abstract

A timeless question about the Supreme Court is how much of its work is based on legal norms and how much is driven by the justices' personal ideologies. This article addresses that question by looking for upper and lower bounds on the effects of ideology on the justices' agenda-setting decisions. It finds that ideology is sufficient to predict more than two-thirds of the justices' agenda-setting votes and necessary to predict almost twenty percent of the votes. This means that over thirty-percent of cert votes—or roughly 800 votes in a single term—cannot be explained by ideology alone. To recover these boundaries, this article presents and estimates a structural model of voting at the certiorari (agenda-setting) stage. Compared to similar ideal point models of the subsequent decision to reverse or affirm on the merits, the certiorari stage has more data with less of a threat from selection bias. Ideal point estimates from cert are more stable than the traditional measures, and the model returns other substantively interesting quantities such as justices' individual preferences for taking lots of cases, measures of case importance, and whether the Court expects the law to move right or left if it takes the case. The result is not just better ideal points but also tools to measure the relative importance of ideology on the Supreme Court.

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Introduction

Perhaps the central question in the study of the Supreme Court as a political institution is the extent to which the justices are ideological and policy-minded and how much of their work is constrained by legal principle. Most studies of this question focus on the cases the Court reverses or affirms on the merits, but there are significant drawbacks to focusing attention solely on the disposition of cases. While parties appeal thousands of cases to the Court each year, the Court decides only a few dozen. Studying only those few cases means that scholars often ignore the bulk of the Court's work. What is more, since those cases are not randomly selected from the appealed cases, any measures derived from that subset will almost certainly be biased. This paper takes up the classic law or politics question but looks for answers where the Court does most of its work—the certiorari (agenda-setting) stage.

While certiorari rarely receives headlines, sophisticated observers and especially the justices themselves recognize the paramount importance of the Court's agenda-setting decisions. Justice Brennan called it “second to none in importance,” (Brennan Jr., 1972) while Justice Thurgood Marshall remarked that the power to *not* decide a case is “among the most important things done by the Supreme Court,” (Marshall and Tushnet, 2001) and a leading legal scholar of Supreme Court practice has suggested the Court's discretionary power over its docket “may be more important than what the Court decides on the merits.” (Hartnett, 2000, p. 1737). So, understanding how ideology affects certiorari is valuable in itself.

Qualitative evidence suggests justices care about both the intrinsic importance of the case as well as the likely case outcome, but they have been unable to compare their effects or provide relative weights (Perry, 1991). Previous empirical studies have considered these factors separately. Some have shown that specific factors—among them circuit splits, amicus briefs, and recommendations from the Solicitor General—signal that a case is important and should be considered (Caldeira and Wright, 1988; Ulmer, 1983, 1984). Alternatively, studies have looked at the relationship of cert votes to subsequent votes on the merits, finding a correlation between voting to grant cert and voting to reverse on the merits (Palmer, 1990). This article looks at case importance and ideology together and measures their relative importance for each cert petition. It finds that ideology is necessary to explain almost 20% of the cert votes and sufficient to explain more than two-thirds. Together these constitute a lower and upper bound on the importance of ideology in the cert process and a real advance to understanding how important ideology is at the Court.

To determine these boundaries, the article develops and estimates a structural model of voting at the certiorari stage that is built on the spatial model of voting that is at the heart of current models of elective, legislative, and judicial politics. These models assume political players have policy preferences that can be represented as an “ideal point” in some policy space. Policies are also points

in the relevant policy space, and the simple assumption is that actors prefer policies that are closer to their ideal points to policies that are farther away. This simple heuristic generates a wealth of testable hypotheses about different political institutions. The evaluation of these hypotheses often rely on estimates of these ideal points, and scholars have worked hard to generate such estimates for Congress, the Supreme Court, the British Parliament, and many others.

The model presented builds on existing ideal point models and differs in several ways from the more familiar Martin-Quinn scores (Martin and Quinn, 2002a) Obviously, the main difference is that the ideal points estimated here come from a different set of votes. The model itself contains three key modifications to adapt the standard model to the context of certiorari.¹ First, the model takes seriously the larger set of voting options at certiorari. As will be described more fully later, justices have three options instead of two at the certiorari stage. Second, the model accounts for justices' preferences for *clarifying law*: for replacing an unclear precedent with a clear rule. Third, justices differ in their willingness to take on cases in general. For instance, some may place a higher value on their leisure time than others.

The cert model presented here assumes that justices take cases because they are important, because the case offers a chance for ideological advancement, or both. Following the standard assumptions in the literature, it assumes that the justices' ideology is one-dimensional. While the model allows justices to place weight on ideology or importance and for cases to vary in their levels of intrinsic importance, it does not assume that these factors are relevant for any particular decision. When estimated, the model returns several different values of substantive interest. First, the model generates ideal point estimates that are more stable than those recovered from merits votes. These ideal points do not depend on dispositional votes, so future studies of the effects of ideology on disposition will benefit from a measure of ideology that does not depend on the dependent variable. In addition, the model returns substantively interesting information about justices' preferences for taking cases that comports with qualitative accounts and useful information about the anticipated ideological shift in the law and case importance. Specifically, the model predicts whether the justices anticipate the law to become more conservative or liberal if the Court takes the case.

Statistically, the model has many advantages over current measures of ideology at the Court. First, there are far more non-unanimous cert votes in a term than votes on disposition. Second, by introducing the Join-3 as an intermediate category, the cert model has more granular information about justices' preferences, which allows for more precise estimates. Third, insofar as certiorari is the selection process, running statistical models on the subsequent dispositional stage may introduce selection bias. To be sure, even the cases considered for certiorari are unrepresentative of the cases filed in lower courts across the country, and it is quite possible that even the results in this

¹Also, Martin-Quinn scores are based on a dynamic model, whereas my model is static. As such, it is more like the model from Clinton, Jackman, and Rivers (2004).

paper suffer from selection bias (Kastellec and Lax, 2008). Still, there is plainly *less* selection at cert than at disposition.

For these reasons, scholars would be much better off estimating ideal points from cert data than from votes on the merits, but data access is challenging as records of the certiorari process are difficult to obtain. Occasional information about individual votes drips out in the justices' public remarks or dissents from denials of certiorari, but in general, the only place to find the votes are the papers of the justices themselves.² While merits votes from the Founding to the present are easily accessible in the invaluable Supreme Court Database, agenda-setting votes are less accessible. This paper takes advantage of a hand-coded dataset culled from the Blackmun Archive (Epstein, Segal, and Spaeth, 2007). The data consist of the vote of every justice on every petition from 1986-1993 along with variables recovered from memos written to the justices that describe nearly every case.

In sum, this article takes up a central question in the Court's literature—the extent and influence of politics and ideology at the Supreme Court—in a new way. It focuses on the often-overlooked agenda-setting stage and applies a new model to an original dataset. The article not only sets out a better way to measure ideal points for justices, but also discovers upper and lower bounds on the relative effects of law and ideology at the Court.

Existing Approaches

Given its substantive importance, the process through which the Court grants the writ of certiorari—the mechanism through which the Court agrees to decide a case—scholars in both law and political science have examined the process. The best source of information on certiorari in general remains Perry (1991), which makes use of countless interviews with justices and clerks to provide a qualitative look at the process. Empirical scholars have narrowed in on specific questions over time. For instance Caldeira and Wright (1988), McGuire and Caldeira (1993), and Black and Owens (2009) look at how case-specific factors affect certiorari decisions. Caldeira, Wright, and Zorn (1999), Ulmer (1983), and Ulmer (1984) all find that the Court is more likely to take a case when there is a disagreement between lower courts or when a lower court splits from clear Supreme Court precedent. Similarly, Palmer (1982), Boucher and Segal (1995), Caldeira, Wright, and Zorn (1999), and Benesh, Brenner, and Spaeth (2002) consider whether cert votes are affected by the anticipated vote on the merits. Relatedly, Palmer (1990) finds that there is a strong tendency for justices to vote to grant petitions in cases where they will subsequently vote to reverse. While Boucher and Segal (1995), Caldeira and Wright (1988), Caldeira, Wright, and Zorn (1999), and Cameron, Se-

²For example, Provine (1980) explored the cert votes from the Vincent Court using Justice Burton's records, while Black and Owens (2009); Black and Boyd (2012a,b); Black, Boyd, and Bryan (2014) use data from Justice Blackmun's files.

gal, and Songer (2000) examine certiorari as a method the Court can use to induce compliance by lower courts. Other scholars, such as Harvey and Friedman (2009) and Owens (2010) have debated the existence and extent of Congress' influence on the Court's agenda.

Surprisingly, despite the wide-ranging interest in certiorari, scholars have yet to apply the tools of the scaling revolution to the cert process. This is surprising since the use of item response theory (IRT) models to estimate measures of ideology has become ubiquitous in the discipline. The project began with Poole and Rosenthal's efforts to scale congressional rollcall votes (Poole and Rosenthal, 1985), (Poole and Rosenthal, 1991). The technique has since been expanded to state legislatures, (Shor and McCarty, 2011), and the British House of Commons, (Kellermann, 2012), among other political institutions. Similarly, judicial politics scholars have used these tools to recover ideal point measures from the justices' votes to reverse or affirm lower courts on the merits (Martin and Quinn, 2002a) and (Bailey, 2007).³

These models rely on a spatial theory of voting that has roots that go back over three-hundred years. During the time of the French Revolution, supporters of the Ancien Regime sat on the right of the General Assembly while the revolutionaries sat on the left. Over the decades, supporters of monarchy continued to sit on the right side of the chamber while more revolutionary types sat on the left, while moderates were in the middle. For a century, "left" and "right" referred to the seating arrangements, but by the 1870s, French political parties adopted these words to describe their own policies. Modern spatial voting theory entered the mainstream of political science with the development of the median voter theorem (Black, 1948), (Downs, 1957).

Spatial voting theories begin with the assumption that policies may be represented as points in a space. For example, if politics is one-dimensional — say liberal and conservative — then policies may be placed on a line with more liberal policies to the left of more conservative policies. As with policies, individuals may also be identified as points within this space, with conservative legislators to the right of progressives. The point on the line that represents the legislator is her ideal point. The policy that occupies the same point as the legislator is that legislator's ideal policy.

Building from this heuristic, scaling models assert that individuals prefer policies "closer" to policies that are farther away. That is, when faced with a choice between two policies, *A* and *B*, a legislator prefers whichever policy is closer to her ideal policy. In a one-dimensional legislative context, the status quo policy is a point on the line, and the bill up for a vote represents a different policy that also sits on the line. The point exactly half-way between the status quo and the proposed policy is the cutpoint that divides legislators. All else equal, those on the proposal side of the

³In contrast, Segal and Cover (1989) develops measures of judicial ideology from newspaper editorials arising between the date of nomination and confirmation. By construction, these scores do not depend on any decision a justice makes as a justice. One advantage measures from cert votes has over newspaper based scores is that the model can be re-estimated for each justice in every term, whereas Segal-Cover scores provide a single number for every justice. How important this distinction is will vary by need.

cutpoint are closer to the proposed bill than the status quo and should vote Aye. Those on the other side of the cutpoint are closer to—and therefore prefer—the status quo. They should vote Nay.

A particularly prominent and user-friendly scaling model built on this spatial framework was provided by Clinton, Jackman, and Rivers (2004). Their model operationalized the spatial voting model by making individual legislator's utility from a given policy a function of the squared distance between her ideal point and that policy plus a random shock. By assuming the random shock has a standard normal distribution, it is straightforward to use a Bayesian probit model to jointly estimate the ideal points of the legislators and the cutpoints of the various rollcalls. The challenge is to ensure that the structural model is theoretically grounded in the institutional realities of the data generating process (Clinton and Meirowitz, 2003).

The construction and use of that model sets this article apart from other empirical studies of certiorari. The work most similar to this article is Black and Owens (2009), which also tries to examine case importance and ideology separately. Both projects assume a single dimension policy space with justices preferring petitions that would move the law “closer” to their own preferred policies. The major differences between their paper and the present effort are the underlying assumptions. Taking advantage of the flexibility of the scaling model allows me to proceed without making strong assumptions about the location of the status quo policy or the likely outcome of the policy if the Court grants cert. Further, this article examines behavior at the justice level rather than the Court level. In particular, this allows me to control for justices' different levels of willingness to vote for certiorari.

A Brief Overview of the Cert Process

Among the most important, nebulous, and political decisions the Court makes in any case is whether to take it in the first place. One scholar has suggested this discretionary power over its docket “may be more important than what the Court decides on the merits” (Hartnett, 2000, p. 1737). This is no mere speculation from those on the outside; the justices themselves recognize the importance of their powers: Justice Brennan called it “second to none in importance,” (Brennan Jr., 1972). while Justice Marshall remarked that the power to *not* decide a case is “among the most important things done by the Supreme Court” Marshall and Tushnet (2001).

For more than a century, the Supreme Court's docket was largely mandatory. In 1925, however, Chief Justice Taft and the other justices pressed for, and Congress passed, the Judges' Bill, which gave the Court a freer hand with which cases it took. While the bill did not eliminate the Court's mandatory jurisdiction entirely, Congress continued to whittle away at the remaining parts of it until by the late 1980s, the Court had almost complete discretion over the cases it took. This discretion operates through the writ of certiorari. The Court receives between 6,000-8,000 petitions

for the writ every year. From these, the Court will grant certiorari only about 1% of the time.

Granting the writ is a matter of pure discretion. The justices rarely provide reasons for their votes, and there is no clear formula for what makes a petition certworthy. The guidelines, such as they are, appear in Rule 10 of the Supreme Court's Rules. The Court professes an interest in resolving circuit splits, clarifying federal law, rebuking lower courts that misstate precedent and deciding important questions. Still the guidelines provide little useful guidance in practice. Indeed, Perry calls the criteria tautological.

The formal certiorari process begins when a party to a case files a petition. Given the number of petitions, the Court streamlines consideration of the petitions by way of the "cert pool." Not all justices participate in the cert pool. For the years considered in this paper, every justice save Justice Stevens participated in the pool.⁴ Those justices who do participate assign their clerks to contribute memos to the pool. The process works as follows. When a petition arrives, the Clerk of the Court assigns the memo to one of the clerks. That clerk reviews the case file and writes a memo to be circulated to all participating justices. The memo describes the facts of case, the arguments of the parties, the legal issues in question, and makes a recommendation as to whether or not to grant the petition. The memos are often the only information the justices have about the petitions, as even the most certworthy petitions get minimal review at the preliminary stage.

Once justices receive the memo, they create the "Discuss List." The Chief Justice gets things started by circulating a preliminary list of cases to discuss at the weekly conference. Any justice may add a case to the list on his own initiative by sending a request to the Chief. The list circulates throughout the week with cases being added or removed, and once finalized, all cases not on the list have the petitions summarily denied. Interestingly, the Court maintains a strong norm to not discuss petitions prior to conference. Those discussions at conference, though, are quite limited.⁵ The justices then vote on the petitions.

A justice may vote to deny the petition, grant it, or Join-3. The last of these options is something of a "timid grant" (Perry, 1991). It has utility because the Court follows a minority voting rule at the agenda-setting stage. The Rule of Four requires that it only takes four justices to support a petition for it to be granted. The Join-3 option simply says that a justice is willing to be the fourth vote. That is, it counts as a grant if three other justices vote to grant the petition, but it would count as a denial if two or fewer justices vote to grant. In the extreme case where two justices voted to grant and seven voted Join-3, the petition would be denied. If the Court grants the petition, the Court will take the case and subsequently decide it on the merits under majority rule.

⁴Currently, Justices Alito and Gorsuch are the only holdouts.

⁵One scholar estimated the Court spent less than 3.5 minutes discussing petitions back in 1949. It is likely that number has only shrunk in the intervening years thanks to the advent of the cert pool and the increase in petitions McElwain (1949).

Three Motivating Examples

Three cases from the Blackmun Archive are illustrative of different types of concerns that motivate the justices. Justices want to take important cases. They also want to promote their own policy preferences. This means trying to stop the Court from taking cases that will move the law away from a justice's ideal point or taking cases that will bring the law closer.

First, justices care about the intrinsic importance of cases. For example, when a case presents an issue over which the lower courts are divided, when the issue at stake is very consequential, or when lower courts flout the high court's precedent, the justices care. Importance is separate from the ideological concerns, and it is often a sufficient reason to take a case.

Take, for example, the Court's decision upholding the federal sentencing guidelines in *Mistretta v. United States*. The facts of the particular case were mundane: John Mistretta was found guilty of selling a controlled substance after he sold cocaine to an undercover agent for the Drug Enforcement Agency. The trial court sentenced him according to the newly enacted federal sentencing guidelines, and Mistretta appealed his sentence, arguing the guidelines were unconstitutional. District courts across the country were divided on whether the new guidelines were constitutional or not, which meant that no matter how the Court ultimately ruled, lots of defendants were going to have to be resentenced. That already large number was growing daily as trial courts across the country sentenced offenders. This was a case where the Court needed to act quickly. Accordingly, the justices voted unanimously to grant certiorari. Justice Scalia wrote the lone dissent. Presumably he knew that he would end up in the minority, but the case was too important for the Court to leave unresolved. So even though he would lose, he voted to grant.

Other times, even though the case seems to be certworthy on its own merits, the justices' ideological concerns trump. This "defensive denial" strategy is one through which a justice votes to deny a case because of the risk of making unfavorable law. Justices have been open about using such a strategy in interviews, though scholars of the Court have had mixed success in finding empirical evidence (Perry, 1991; Caldeira, Wright, and Zorn, 1999; Boucher and Segal, 1995).

Consider *Murray v. Giarratano*, where the Court held states do not have to provide lawyers in federal habeas proceedings in death penalty cases. The cert pool memo summarizing the petition suggested the lower court decision requiring states to provide lawyers conflicted with Supreme Court precedent. It also suggested that since the Fourth Circuit issued its opinion en banc, it the lower court's decision would carry a great deal of precedential force if left unreviewed. As a practical matter, the Fourth Circuit's decision would require Virginia to build and maintain a system to provide attorneys for capital offenders, which would be tremendously expensive. In the eyes of the clerk writing the memo, the case was a clear grant and the arguments the respondent made to the contrary "border[ed] on the absurd."

The view from Justice Blackmun's chambers was similar, though colored by Blackmun's op-

position to the death penalty. His clerk appended a two-page memorandum to the cert pool memo stating that she agreed that the petition “requires a grant of cert.” She said “the only rationale for denial would be a patently defensive one.” Justice Blackmun voted to deny certiorari, as did Justices Brennan, Marshall, and Stevens.

Just as sometimes the justices play defense, at other times, they may vote offensively to take less important cases that will move the law in their preferred direction. A possible example of such an “aggressive grant” is *Employment Division v. Smith*, perhaps the most important First Amendment Free Exercise case in decades. The respondent, Alfred Smith was a member of the Native American Church who ingested a small amount of peyote as a part of a religious ceremony. Although the amount was small and the purpose religious rather than recreational, it still violated his employer’s employment policies as well as Oregon state statutes. Accordingly, Smith was fired by the drug treatment center where he worked, and Smith applied for unemployment compensation from the state. The application was denied because the firing had resulted from Smith’s own “misconduct.” The Supreme Court of Oregon overturned this decision on First Amendment Free Exercise concerns, but the State appealed to the United States Supreme Court.

What is interesting for purposes of this paper is that the Court almost did not decide this case at all. The petition only made it onto the docket the first time thanks to Justice Blackmun casting a pivotal Join-3 vote. If Blackmun, who ended up in the minority in *Smith I* and *Smith II*, had simply voted to deny instead of Join-3, the Court would not have granted certiorari at all. But since Blackmun cast the pivotal vote, the Court granted cert and eventually sent the case back to the Supreme Court of Oregon. The justices wanted the Oregon court to answer whether or not the state constitution included a religious use exception to the drug laws. The Supreme Court of Oregon decided there was no such state exception but again held that the First Amendment to the federal Constitution did. The State appealed to the U.S. Supreme Court again, and the result was a Supreme Court decision that changed the course of the First Amendment.

Even when the case came back after a second review by the Oregon Supreme Court, it was not an obvious candidate for certiorari. The cert pool memo recommended denying certiorari. According to the memo, the case was a “bad vehicle” to answer the question presented, there was no clear circuit split, and that the case would have only a limited impact and precedential value in the future. The clerk who authored the memo can be forgiven for not anticipating the justices would use this case to remake First Amendment law. In considering the possible return of Smith for a second review at the Court, the clerk saw a case that was not that important, but the justices seemed to recognize a case that could be made important. With a better sense of the law the case could make, Justice Blackmun wanted no part of Smith on the second petition and voted to deny. Other justices appeared to have found an interest in making law.

The change in cert votes between *Smith I* and *Smith II* is instructive. The facts and questions

were unchanged from the first review to the second. Initially, Blackmun thought the question was worth the Court’s time, but O’Connor and Stevens did not. When the case returned, Blackmun recognized the Court was likely to go in a direction he would not support, so he voted to deny cert. In contrast, O’Connor and Stevens also had a new opinion about the possibilities of Smith. They seemed to think this case offered an opportunity to make new law. An internal memorandum from one of Justice Blackmun’s clerks explained the eventual certiorari grant in *Smith II* as the majority from Smith I thinking that “it would get to decide whether religious use of peyote is protected by the [F]ree Exercise Clause against state criminal prosecution.”

The Structural Model

Justices are $i \in \{1, 2, \dots, I\}$ with ideal points $x_i \in \mathbb{R}$,⁶ and cases are $j \in \{1, 2, \dots, J\}$. Let z_{ij} be justice i ’s vote at cert in case j . When presented with a case, each justice chooses an action $z_{ij} \in \{Deny, Join-3, Grant\}$. If the Rule of Four is satisfied—that is if at least four justices vote to grant or if three vote to grant and one more casts a Join-3—the Court takes the case, decides it, and issues a new policy.

In contrast to the usual assumption that policies are points on the real line, in this model, policies are random variables. This reflects the inconsistency and uncertainty inherent in the judicial hierarchy and the Court’s decision-making process. Consider first the policy that would result if the Court takes the case. From the perspective of the justices as they decide whether or not to accept the case at all, they almost certainly lack the information—merits briefs, amicus briefs, time to think through the issues and circulate opinions—to be certain of the eventual outcome. That said, they may have an idea about the range and probabilities of different possible outcomes. This uncertainty is straightforwardly represented by a random variable, \mathcal{P}_j , with finite mean and standard deviation, μ_{p_j} and σ_{p_j} .

When thinking of the status quo policy, it is important to keep in mind that the Court professes a desire to take cases to resolve splits in lower courts. The existence of a split is a clear indication that there is not a single status quo policy; rather, there is a range of policies that are applied differently in lower courts. Even when there is not a clear split, it may be that a statute or precedent is sufficiently unclear that the same rule, though stated identically in different jurisdictions, is applied unevenly. Under either interpretation, a better way to model current policy is as a random variable rather than a point. Therefore, denote the status quo as \mathcal{Q}_j , with finite mean and standard deviation, μ_{q_j} and σ_{q_j} , respectively.

Combining these two permits the model to account for the Court’s desire to “bring clarity” to the law. When the Court can resolve circuit splits and other status quo policies with high variances,

⁶As with all such models, it can easily be extended to a multidimensional frame.

it reduces the variance. Similarly, if the current law is relatively clear (low variance), then even if taking the case would likely mean that the new policy would be closer to a justice in expectation, if the new policy would introduce uncertainty (higher variance), the justice may be unwilling to make that trade.

To build out the model, begin with the policy concerns from which measures of ideology will emerge. The policy utility for justice i if the Court rejects case j is

$$\begin{aligned}
V_{ij}^{policy}(deny) &= \int_{\mathcal{Q}} -(x_i - q_j)^2 f(q_j) dq_j \\
&= \int_{\mathcal{Q}} -(x_i^2 + q_j^2 - 2x_i q_j) f(q_j) dq_j \\
&= -\left(x_i^2 + \mu_{q_j}^2 + \sigma_{q_j}^2\right) - 2x_i \mu_{q_j},
\end{aligned} \tag{1}$$

where $f(q_j)$ is the pdf of \mathcal{Q}_j . Similarly, if $g(p_j)$ is the pdf of \mathcal{P}_j , then, if the Court takes the case, the justice receives a policy payoff of:

$$\begin{aligned}
V_{ij}^{policy}(grant) &= \int_{\mathcal{P}} -(x_i - p_j)^2 g(p_j) dp_j \\
&= \int_{\mathcal{P}} -(x_i^2 - p_j^2 - 2x_i p_j) g(p_j) dp_j \\
&= -\left(x_i^2 + \mu_{p_j}^2 + \sigma_{p_j}^2\right) - 2x_i \mu_{p_j}
\end{aligned} \tag{2}$$

Define the net policy payoff from taking the case to be

$$\begin{aligned}
\theta_{ij}^{policy} &= V_{ij}^{policy}(grant) - V_{ij}^{policy}(deny) \\
&= x_i^2 + \mu_{q_j}^2 + \sigma_{q_j}^2 + 2x_i \mu_{q_j} - x_i^2 - \mu_{p_j}^2 - \sigma_{p_j}^2 - 2x_i \mu_{p_j} \\
&= \left(\mu_{q_j}^2 - \mu_{p_j}^2\right) + \left(\sigma_{q_j}^2 - \sigma_{p_j}^2\right) - 2x_i (\mu_{p_j} - \mu_{q_j})
\end{aligned} \tag{3}$$

Two parts of the final line in equation 3 are substantively interesting. The second term compares the variances of the status quo and proposed policies. As previously suggested, if the current policy has a high variance and the proposed policy will create a more consistent rule (low variance), then the net payoff from this piece is high. This would make every justice more likely to grant the petition. In contrast, if the current policy has a low variance and changing the law would introduce uncertainty, this term becomes negative, and every justice is more likely to deny the petition.

Finally, the third quantity interacts a justice's ideal point with the signed distance between the expected values of the two policies.⁷ Larger distances between policy options mean the magnitude of this term will increase because the difference within the parentheses will be larger. Note that if

⁷The part in parentheses is the item discrimination parameter in the traditional IRT framework.

the discrimination parameter is positive, then the expected value of future policy is larger than the status quo policy. That is, the policy the Court is expected to announce is to the right of the status quo.

Cases also vary in importance. For example, there is strong evidence that when the Solicitor General wants the Court to take a case, the Court does so. Similarly, when there is a lot of money at stake, when a federal statute is called into question, or when lower courts flout clear precedent, the Court takes notice. Most cases, however, are not intrinsically certworthy. Denote the intrinsic certworthiness of case j as κ_j . This is a case-specific payoff given to each justice for taking the case. Higher values of κ_j signal important cases, and when κ_j is large, it is more likely that every justice will vote to grant the case. On the other hand, some cases are such a waste of time, they could provide negative utility.

Finally, just as cases vary, justices differ in their preferences for taking cases. There are several possible reasons for this. First, justices differ in their views of the proper role of the Court. For instance, Byron White thought it was the Court's job to decide lots of cases, and in particular, to settle virtually all circuit splits. Other justices think the Court should save review for important issues of national concern where the Court can lead the way. Second, some justices may have more energy or be more efficient at writing opinions. If a justice is relatively young and eager, she may want to take lots of cases. If a justice is getting older and slowing down, spending the time to read all of the briefs and write the opinions may be more taxing. Similarly, if one justice places a premium on spending time at a vacation property in Florida while another lives in D.C. and enjoys working, the latter will likely want to take more cases than the former. The model accounts for these differences with a justice-specific constant, α_i . This term is effectively justice i 's opportunity cost for taking a case.

Define these non-policy benefits and costs for maintaining the status quo or taking the case as follows:

$$\begin{aligned} V_{ij}^{non-pol}(deny) &= 0 \\ V_{ij}^{non-pol}(grant) &= \kappa_j - \alpha_i \\ \theta_{ij}^{non-pol} &= V_{ij}^{non-pol}(grant) - V_{ij}^{non-pol}(deny) = \kappa_j - \alpha_i \end{aligned} \tag{4}$$

Now, define a latent variable

$$\begin{aligned} z_{ij}^* &= \theta_{ij}^{policy} + \theta_{ij}^{non-pol} + \epsilon_{ij} \\ &= \Lambda_j - \alpha_i - x_i G_j^{cert} + \epsilon_{ij} \end{aligned} \tag{5}$$

where $\Lambda_j = (\mu_{q_j}^2 - \mu_{p_j}^2) + (\sigma_{q_j}^2 - \sigma_{p_j}^2) + \kappa_j$, $G_j^{cert} = 2(\mu_{p_j} - \mu_{q_j})$, and $\epsilon_{ij} \sim \mathcal{N}(0, 1)$ is a random shock to a particular justice's utility in a particular case. In subsequent analysis, the Λ_j parameter

is referred to as the measure of *case importance* or *intrinsic certworthiness*. The term is the sum of non-ideological case-specific certworthiness, the reduction of variance, and the moderating effect.

To complete the model, recall that the qualitative evidence suggests justices treat the Join-3 vote as a “timid” vote to grant. This suggests that to cast such a vote, the justice must expect positive utility from taking the case, but not enough to cast a “strong” vote to grant. This interpretation suggests a level of sincerity on the part of the justices that seems strange given the curious nature of the Join-3 and the obvious strategic opportunities it would provide.

However, the assumption of sincerity is consistent both with the justices’ qualitative accounts and the data. Given the way the Join-3 operates, there is no strategic reason for the justice who votes last to ever cast a Join-3. If three justices have already voted to grant, it will function as a grant. If less than three have voted to grant, a Join-3 is functionally a deny. If justices use the Join-3 strategically, then there is little reason for justices at the end of the line to make use of the vote. And yet, in the data Justice Souter cast eighteen Join-3 votes as the junior justice in 1990. Justice Thomas cast seven as the junior justice in 1992, and Justice Ginsburg cast six as the junior justice in 1993. This behavior is strong evidence that the justices’ spoke truthfully to H.W. Perry when they called the Join-3 a “timid” vote to grant, and it strengthens the argument in favor of treating join-3 votes as an intermediate category.

Treating the Join-3 as a weak grant suggests using an ordered probit specification instead of the usual probit. But one cannot assume that all justices think of Join-3s in the same way. As with preferences over taking cases at all, Justices differ in how much they like to use the Join-3. For instance, in 1989, Justice Blackmun cast 45 Join-3 votes while Justice Stevens did not cast a single Join-3. This means the threshold that separates the Join-3 from the grant votes must be allowed to vary across justices and estimated accordingly. Denote the threshold level of utility required for justice i to move from a Join-3 to a solid Grant as λ_i .

Once this is done, the voting at the cert stage can be modeled as follows.

Model 1.

$$z_{ij}^{cert} = \begin{cases} 0 \text{ (Deny)}, & \text{if } z_{ij}^* < 0 \\ 1 \text{ (Join-3)}, & \text{if } 0 \leq z_{ij}^* < \lambda_i \\ 2 \text{ (Grant)}, & \text{if } z_{ij}^* \geq \lambda_i \end{cases} \quad (6)$$

Formal Comparison with Martin-Quinn Model

The most obvious difference between the above model and that from Martin and Quinn (2002) is that their model is dynamic, while the model above examines only a single period. Accordingly, I compare the cert model to the static version of the Martin-Quinn model, which reduces to that

of Clinton et al. (2004). After setting aside this obvious difference, several important distinctions remain.

The first is that their model describes the *disposition* of a case, while the present model examines the cert stage. Therefore, the set of possible actions is different. At disposition, the justices can either vote to *reverse* or *affirm* on the merits. Thus, in contrast to the cert model, the options at disposition are binary. Their model also differs in that the policy options facing the justices are points, $r_j, a_j \in \mathbb{R}$, for the policies that will result from reversing or affirming, respectively. In contrast, the certiorari model assumes that the policy options are random variables rather than points. That said, there are clear similarities. In both models, justice i has ideal point $x_i \in \mathbb{R}$, each justice chooses between policies based on a quadratic loss function, and both presume random, normal shocks to the justices utility functions.

The Martin-Quinn model asserts that justice i will vote to reverse in case j if $u_{ij}^{rev} > u_{ij}^{aff}$. Define a latent variable, y_{ij}^* , as follows:

$$\begin{aligned}
 y_{ij}^* &= u_{ij}^{rev} - u_{ij}^{aff} \\
 &= (a_j - x_i)^2 - (r_j - x_i)^2 - \epsilon_{ij} \\
 &= (a_j^2 - r_j^2) + x_i(r_j - a_j) - \epsilon_{ij} \\
 &= b_j + x_i G_j^{disp} - \epsilon_{ij}
 \end{aligned} \tag{7}$$

where $b_j = a_j^2 - r_j^2$ and $G_j^{disp} = 2(r_j - a_j)$.

The actual votes of the justices are then described by the following model:

Model 2.

$$y_{ij} = \begin{cases} 0 \text{ (affirm)}, & \text{if } y_{ij}^* < 0 \\ 1 \text{ (reverse)}, & \text{if } y_{ij}^* \geq 0 \end{cases} \tag{8}$$

The comparison between equation 5, describing the latent variable for certiorari, and equation 7, describing disposition, is instructive. In the former, there is a justice fixed-effect that measures how costly it is for a justice to take a case. In effect, it controls for different justices' preferences over docket size. Since there is no similar, theoretically compelling reason to think that justices have a preference to reverse rather than affirm, equation 7 does not include such a variable.

The case-specific constant, or difficulty parameter, is estimated in both models. The interpretation, however, differs between the two models. In the cert model, this parameter includes the difference between the variances of two different random variables and a certworthiness constant in addition to the difference of the squared expected values. In the disposition model, since there is no theoretical reason to prefer reversing and policies are points, the difficulty parameter is simply

the difference of squares.

These differences in interpretation matter if the researcher is interested in locating the cutpoint for or midpoints between policies. Under the standard model, the midpoint between the current status quo policy (from affirming) and the proposed policy (following reversal) is easily recoverable as

$$m_j = \frac{a_j}{G_j^{disp}} = \frac{a_j + r_j}{2}.$$

The analogous quotient from the cert model is

$$\frac{\Lambda_j}{G_j^{cert}} = \frac{\mu_{q_j} + \mu_{p_j}}{2} + \frac{(\sigma_{q_j}^2 - \sigma_{p_j}^2) + \kappa_j}{G_j^{cert}},$$

will not be at the midpoint because it is affected by the variance and certworthiness components of the fixed-effect. Further, this quantity is not a cutpoint at all, since individual justices have different reserve utilities. If every justice had the same utility threshold to move from a deny to a Join-3 and then from Join-3 to grant, then it would be straightforward to estimate a common cutpoint. But if justice A requires a larger payoff to vote to grant than justice B , then the expectation of a common cut-point vanishes.

Estimating the Model

To estimate the model, I follow the standard assumption that the error terms in equation 5 are independent. Under that assumption, the likelihood is

$$L(\Lambda, \alpha, \mathbf{G}, \mathbf{x}|\mathbf{z}) \propto \prod_{i=1}^I \prod_{j=1}^I \{\Phi(\Lambda_j - \alpha_i - x_i G_j)\}^{z_{ij}} \times \{1 - \Phi(\Lambda_j - \alpha_i - x_i G_j)\}^{(1-z_{ij})}.$$

As is the case with these kinds of ideal point models, the likelihood is not identified unless the researcher restricts parameters. But if estimated in a Bayesian context, such identification is not absolutely necessary. Instead, careful selection of priors guarantees a well-behaved posterior.

I place relatively uninformative priors on all parameters. Specifically, the priors on the justice-specific and case-specific parameters are all assumed to be $\mathcal{N}(0, 1)$. These priors are quite conservative. They incorporate no external information about the justices' ideologies or preferences over taking cases. Similarly, the priors build in no information about the relative importance of cases or their ideological valences.

Posterior distributions for individual parameters are recovered as in Clinton, Jackman, and Rivers (2004) with two modifications. First, the block of justice-specific parameters includes a

constant term in the cert model that is absent from their model. Second, I incorporate an additional step in the estimation algorithm to draw justices' individual thresholds between the Join-3 vote and agrant. The estimation process and diagnostics are detailed further in the accompanying appendix.

Data

The certiorari process unfolds behind closed doors, and the votes are not made public by the Court. Fortunately, over the years, justices have kept the records of these votes, which become accessible to scholars with the release of the justices' papers. The data for this study come from the papers of Justice Blackmun as maintained in the Blackmun Archive (Epstein, Segal, and Spaeth, 2007). The Archive contains the votes of every justice for every case from 1986 through 1993. A research assistant coded the cert votes from the Archive and the results were checked against similar coding efforts made by other scholars.

One of the advantages of these data is that there is so much of it, at least relative to the justices' votes on the merits. While merits votes are easily retrievable and the subject of much study, the Court's light caseload in recent years means that there are much less data to work with on the merits than at certiorari. Figure 1 below compares the number of non-unanimous certiorari petitions to the number of cases decided non-unanimously on the merits.⁸ The figure shows that in every period there are significantly more agenda-setting votes available for analysis than merits votes. In total, there are 2289 cert petitions in the dataset where the voting was not unanimous. This yields well over twenty-thousand votes across thirteen justices.

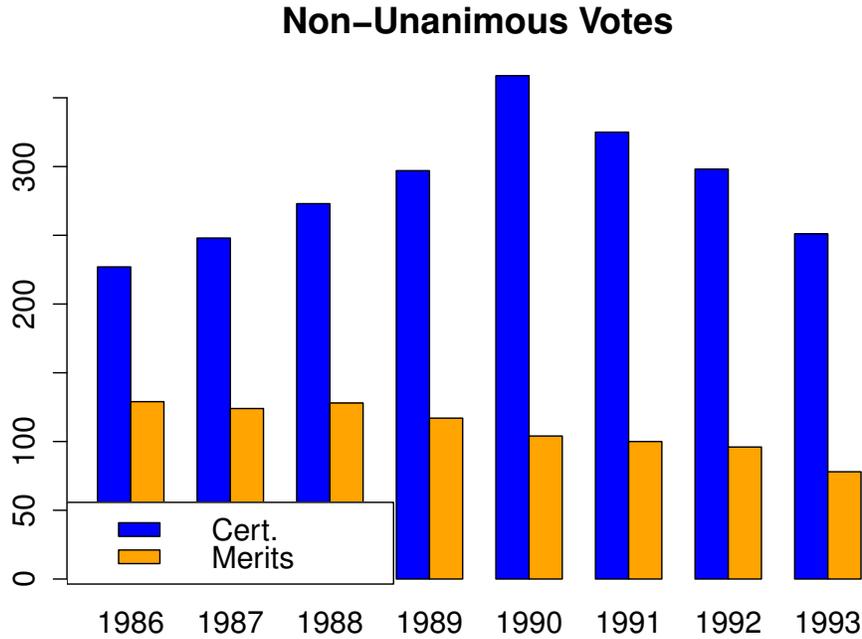
Unless otherwise noted, the results that follow come from the 1989 term. This year was selected because it was the third year of the natural court with Justice Kennedy as the junior justice. In addition, Congress passed the Supreme Court Case Selections Act in 1988, which made the Court's docket almost entirely discretionary. Thus by 1989, the Court had the same jurisdictional flexibility that it has today.

Validation

There are several reasons to be optimistic about recovering information from cert votes as compared to votes on the merits. As mentioned above, the most obvious advantage of scaling the agenda-setting votes is that there are so many more roll-calls in the preliminary round. In some years, there are more than three-times as many cert votes, which provides more information from which to derive ideal points. Second, since scholars can only observe merits votes for cases the

⁸Unanimous votes are removed from the analysis because they do not offer any way to differentiate among the justices.

Figure 1: There are Far More Non-Unanimous Votes at Certiorari than Disposition



Court selects from the cert round, ideal points based on dispositional votes come from a non-random sample of the possible cases. This is prima facie evidence that the ideal point measures will not be consistent. Examining the cert votes reduces the level of selection bias. Third, the intermediate category represented by the Join-3 vote provides additional information the estimation procedure can use to pin down the latent scale. Finally, ideology in the cert context is more interpretable, since the “facts” of a case are less salient. A justice may vote based on facts or policy at the merits stage, and the scholar cannot tell them apart. However, at the cert stage, the justices are not applying law to facts at all. They are simply focused on case importance and policy.

If, for these reasons, cert votes are a better source of information about justices’ ideologies, it remains to show that the model presented previously is the proper way to recover ideal points. The first order of business is to examine whether the model returns estimates that seem reasonable. There are four quantities that are of special interest, in particular. First, we must establish that the model returns measures that both seem plausible and do a good job of predicting votes. Second, there are the justices’ ideal points recovered from cert votes, x_i . Third, there is the measure of certworthiness represented by the case fixed-effect, or difficulty parameter, Λ_j . Finally, there is the justice fixed-effect that measures the reserve utility required to get a justice to do something other than deny a petition, α_i .

Classification Success

As an initial sanity check on the recovered ideology measures, figure 2 plots the correlation between the ideal points recovered by the cert model and those recovered from dispositional votes.⁹ Ideal points recovered from dispositional votes are widely considered to capture ideological positions along a liberal-conservative dimension. The figure shows that in every term between 1986 and 1992, the ideal points correlate at above .9. The strong correlation between the ideal points recovered from the cert model and the ideology scores from the merits votes suggests that the justices' votes in each period reflect similar ideological impulses. The figure also shows that 1993 is something of an outlier—though examination of the deviation is deferred to a later section.

Figure 2: High Correlation Between Ideal Points from Cert and Disposition

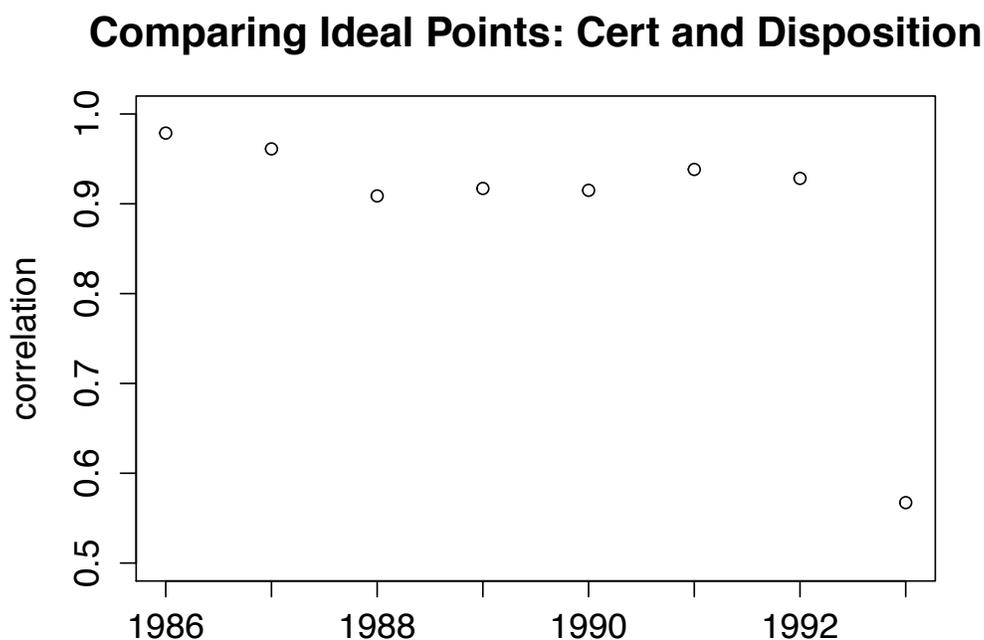


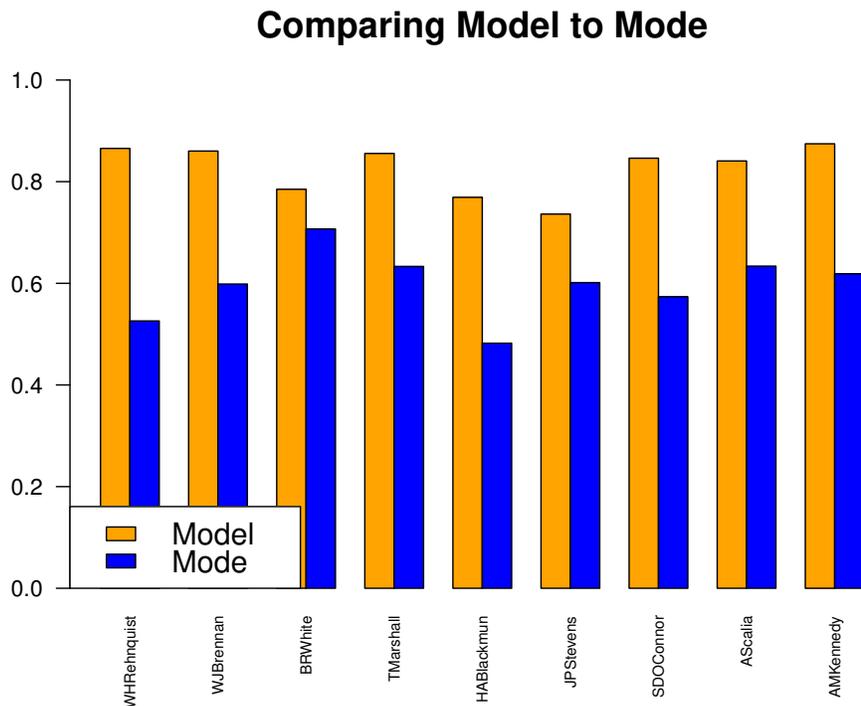
Figure 3 below compares the classification success rate for the model presented above compared each justice's modal vote. For example, Chief Justice Rehnquist voted to deny cert in just 156 of the 297 nonunanimous cert petitions included in the dataset for 1989.¹⁰ A naive model that predicted Rehnquist always voted to grant would correctly classify just over half of his cert

⁹These points are computed using the ideal package from the pscl library in R.

¹⁰While the model estimates Join-3 votes separately, for the analysis presented in this and the following sections, I treat Join-3 votes as votes to grant.

votes correctly. In contrast, the cert model correctly predicts well over 80% of the Chief’s votes. In the figure, the orange bars show that the model correctly classifies between 74% and 86% of each justice’s decision whether or not to deny the petition. The blue bars show the proportion of votes predicted by assuming the justice cast his most common vote on every petition. The figure clearly demonstrates that the model predicts cert votes better than a pure strategy of either “deny” or “grant.”

Figure 3: Model Predicts Better than the Mode



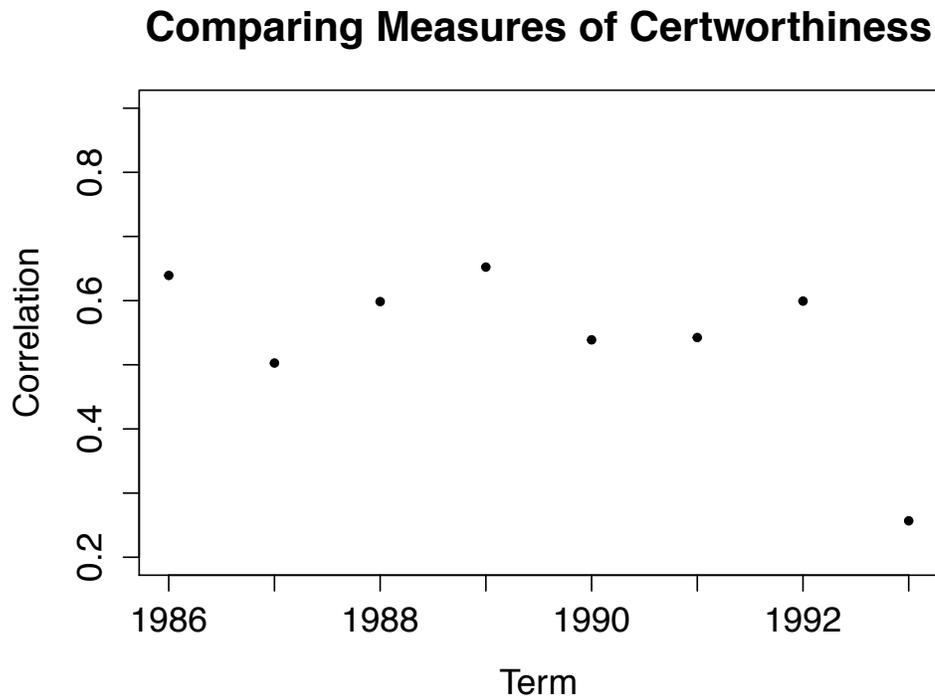
Measure of Certworthiness

One benefit of the cert model is that the difficulty parameter (the case fixed-effect) in the cert model now has a substantively interesting interpretation. It is plausibly a (noisy) measure of the certworthiness of each case. Recall from the discussion above that this parameter, Λ_j , includes both the intrinsic importance of a case along with the difference in variances of the underlying policy options, which represents the petitions’ possibility of bringing clarity to the law.

To see whether this term is a plausible measure of certworthiness, I first compare it to the measures of certworthiness in Black et al. (2012, 2014). Those papers employ a measure of certworthiness constructed on variables such as whether the lower court reversed, if there was a

constitutional claim, whether the petitioner was proceeding in forma pauperis, whether there was a civil liberties claim, and the number of amicus briefs. Figure 4 shows that the measures almost always correlate at between .5 and .7, again suggesting that there is a relationship between the intrinsic certworthiness measured by Black et al. and the structural model presented here.

Figure 4: Correlation Between Model’s Measure of Certworthiness and Alternative Measure



Further, there are reasons to prefer the case-importance measure derived from the cert model to other constructed metrics that rely on selected covariates. Previous empirical studies of certiorari usually collect data on the number of amicus briefs, the presence of a circuit split, or some other potential indicator of importance and use that in a regression where the dependent variable is either whether a justice votes for cert or whether the Court grants cert. These studies only examine case importance by proxy, as the actual subject of study is the presence of a split, the number of amicus briefs, etc. Second, these covariates may be misleading for several reasons. For instance, amicus briefs may signal more than case importance. For instance, a brief by the ACLU or the Chamber of Commerce may indicate that the case is ideologically charged. Similarly, several justices in the data always voted to grant cert in death penalty cases, believing capital punishment to be unconstitutional. Capital cases are presumably very important cases, but this practice seems to be at least in part the result of the justices’ policy views. But if *death penalty* was included as a covariate in a regression, would the result be properly interpreted as importance or ideology? In

such a case, the signal is distorted. The measure of case importance recovered from the cert model, however, already accounts for ideology, so the importance measures are plausibly undistorted by ideology.

Relatedly, circuit splits are difficult to account for. The Court prefers to let splits “percolate” in the lower courts. This gives different regions of the country the chance to experiment, and the hope is that the circuits will bring themselves in line organically after a period of reflection. If a split is “deep,” with several courts on different sides of an issue, the Court often feels compelled to intervene. On this account, a question is more important when there is a deep split. However, some questions are sufficiently important that even a “shallow” split is enough to grab the Court’s attention. The question then is how to code or understand circuit splits as an independent variable. A dummy variable would be unable to distinguish between deep and shallow splits, but even using the counts could provide misleading results.

The case-importance metric derived from the cert model, however, avoids these problems. Instead of measuring importance by coding and incorporating variables believed to signal importance, the model effectively considers case-importance to be the residual after accounting for ideology and the justices’ preferences over taking cases. The result is a continuous measure of case importance that could then be used to measure the importance of splits, amicus briefs, etc. While this would not eliminate the problem of coding and interpreting circuit splits, it would go a long way to understanding how much “importance” is signaled by other factors.

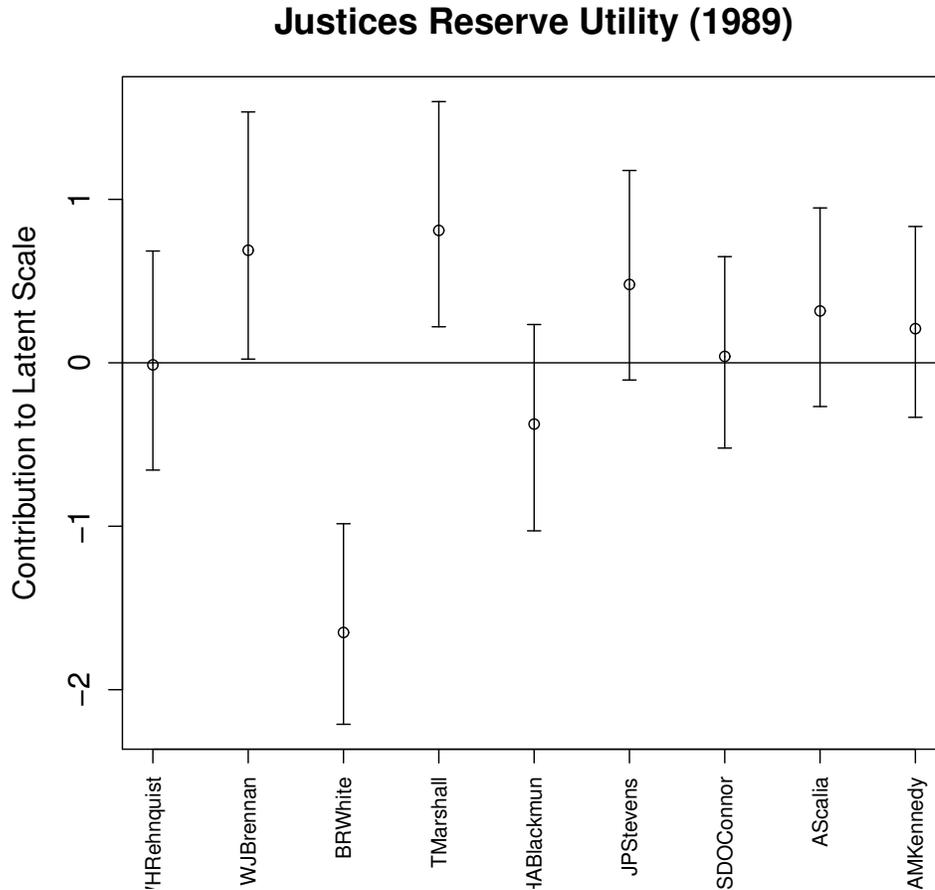
Preferences Over Docket-Size

Next, it is useful to check whether the justice fixed-effects are reasonable. The first test is to compare the results with qualitative accounts. Scholars and observers have noted Justice White’s preference to take lots of cases. Specifically, he believed the Court should almost always get involved if there was a clear circuit split. In terms of the model, this should imply that White had a very low reserve utility when compared to his colleagues. Figure 5 shows the mean and 95% credible intervals for the justices’ reserve utilities. As expected, Justice White had the lowest reserve utility indicating he favored taking more cases than other justices.

The second test is to see if the measure comports with theoretical predictions. A standard theoretical assumption in the judicial politics literature and maintained in this study is that justices are—to some extent—policy motivated. Since the Rehnquist Court was famously conservative, it seems reasonable that the more liberal justices would prefer to take fewer cases. Fewer cases means their ideological adversaries have fewer opportunities to work mischief. The way to keep cases from coming onto the docket is to vote to deny, which should indicate that liberal justices should have relatively higher reserve utilities. These expectations are also borne out in figure 5.

Justices Brennan and Marshall are significantly less likely to take cases than other justices.

Figure 5: Justices Have Different Thresholds for Denying Cases



Additionally, while it is important to note that the scale provides no meaningful information about the absolute magnitude of these effects, it is important that Brennan, White, and Marshall all have justice fixed-effects not just statistically different from zero but different from other justices. Statistically, this means estimates from a model that does not control for differences in justices' preferences for taking cases would be inconsistent. Substantively, it indicates that the justices have meaningfully different preferences over the size of the docket.

Finally, measures of the justices' reserve utilities should be—and generally are—stable. As will be shown graphically in the following section, measures of the justices' reserve utilities are just as stable as measures of ideal points with the exception of 1993. As seen in the previous sections, 1993 is a bit of a special case to be addressed in the discussion.

Stability of Measures and 1993

One additional piece of evidence in favor of the cert model is the stability of the recovered measures. Since ideology and preferences over the size of the docket should be roughly consistent over time, their corresponding measures should also be stable. Figure 6 below shows the correlation between three different measures over consecutive years. Notice that with the sole exception of the previously mentioned reserve utilities in the final year of the data, the scores are remarkably consistent.

Ideal points derived from merits votes in individual years are somewhat consistent, though in 1990 and 1993, the year-to-year consistency falls to about .8.¹¹ This suggests that when Souter joined the Court in 1990, the ideal points of the remaining justices—as revealed through the merits votes—shifted. They then remained relatively stable until 1993 when Ginsburg replaced White. In contrast, the ideal points for the remaining justices recovered from cert votes remained far more stable in 1990 and 1991.

One reason ideal points from certiorari are more stable than those from the merits votes is that the ideological distribution of cert petitions is likely far more consistent than the distribution of cases decided on the merits. Cases decided on the merits are a small, selected, and non-random subset of the petitions. As new justices join the Court, their preferences over the types of cases the Court should take will influence the docket, and the change in the docket's composition will change the ideal points recovered from dispositional votes.

This discussion points toward a possible explanation of what makes 1993 such an outlier. Recall from figure 2 that until 1993, ideal points recovered from cert votes correlated at above .9 with those recovered from merits votes. Similarly, the measures of each justice's reserve utilities seemed to change sharply in 1993, and the ideal points recovered from the merits votes also noticeably changed. The most likely cause of these deviations is a change in Court personnel.

Byron White left the Court in 1993. He was often the Court's median justice and was almost always the most likely vote in favor of certiorari. His departure from the Court had two effects. First, replacing White with the far more liberal Justice Ginsburg upset the justices' ability to predict the outcome of some cases. Second, since White was the most prolific advocate for taking more cases, following his departure, the Court immediately started taking fewer cases. As Justice White was almost always a part of any cert coalition, his willingness to vote to grant meant that petitions only had to find three other justices to support certiorari. By replacing him with Justice Ginsburg, whose frequency of voting to grant was more in line with the remaining justices, it became harder to assemble a four vote coalition. Cases that would have made the docket if White was still present

¹¹Of course, Martin-Quinn scores are remarkably stable, but that is a function of their estimation strategy. Their dynamic linear model smooths over changes from year to year.

Stability of Measures

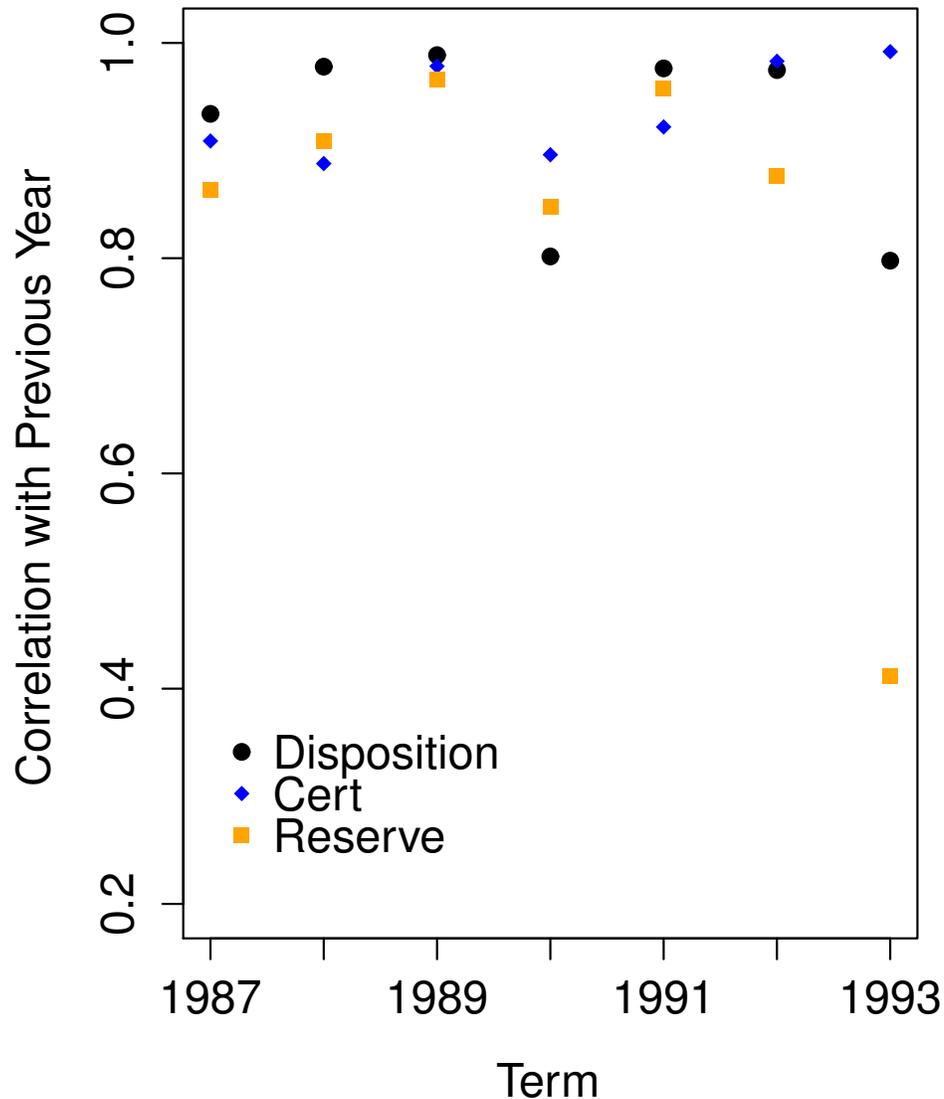


Figure 6: Measures of Ideology from Cert Are More Stable

to cast the fourth vote were instead denied. This changed the composition of the Court's docket, and likely influenced the ideal points recovered from the merits votes. In contrast, the petitions considered at cert were likely quite similar across the 1992 and 1993 terms. This explains why the year-over-year correlation of ideal points from the votes on the merits is only about .8, while the correlation for ideal points recovered using the cert model is .99. If we assume that the ideology should be roughly stable from year to year, this is evidence that the cert votes are better data from

which to recover ideal points.

The other interesting change in 1993 is that the justices' reserve utilities are not stable. While in previous terms, the utility threshold justices required to move from a deny to a Join-3 was relatively stable, things changed with the loss of Justice White. This behavior is consistent with the justices struggling to find a new certiorari equilibrium. When Justice White was on the Court, he was such a consistent supporter of certiorari that for the other eight justices, the question was whether there could be three votes from the eight. With White gone, the guaranteed vote was lost, and the dynamics of the process changed. Replacing White—the most vociferous dissenter in *Roe v. Wade*—with the co-founder of the Women's Rights Project at the ACLU may have suggested that the Court would move to the left. Consistent with this, Justice Stevens suddenly became the Court's most prolific supporter of certiorari while Chief Justice Rehnquist became far more reserved about taking cases.

Effects of Ideology on Justices' Cert Votes

There is a longstanding debate in both the law and political science literatures about the nature of judicial decision-making at disposition. Some argue that the justices are policy motivated, though there is a divide on the level of constraints the justices face as they seek to implement their preferences. Others think the justices are judges: Deciding cases by applying law to facts. One of the advantages of analyzing cert votes is that it sidesteps this debate by looking for the effects of ideology at the agenda-setting stage and estimating “legal” (case importance) and “policy” (ideal points and the discrimination parameter) factors simultaneously. Doing so allows the researcher to look for the relative effects of ideology on a justice's cert votes.

To see how, recall that the model estimates three quantities of interest for every vote for every justice. First, the model estimates the case importance, which is common to all justices. Second, it returns the justice-specific ideological payoff for a given case. The final relevant quantities provided by the model are the individual justices' thresholds that separate the utility required to vote to deny the petition or to cast a Join-3 vote. For a given vote, if the third quantity is greater than the sum of the first two, the model predicts the justice will vote to deny the petition.

The first two quantities add up to a justice's net utility for granting a particular petition, and it is easy to see what proportion of the given utility is due to ideology, but that is not the relevant question. The substantively interesting question is not ideology's contribution to utility but its effect on the justices' actions. Utility is unobserved and does not directly affect law. The justices' actions—the votes—are observed and shape the Court's docket. The question is what share of votes are due to ideology.

In some cases, this is easy to do. For example, if a case is of little intrinsic importance, the

importance measure would be insufficient to recommend a grant, but if the case provides the justice the promise of a large ideological payoff, the justice may vote to take the case. In this situation, ideology is necessary. Table 1 below sets out all of the possible combinations of votes, importance, and ideology. The top figure sets out the possibilities when the justice votes to grant (or Join-3). The example just offered is in the top-right corner of that figure. Ideology is a necessary factor when the case importance variable is insufficiently large to justify anything other than a vote to deny, but the justice votes to take the case. Similarly, in the lower figure, when case importance is high but the justice votes to deny the case, that would be attributed to ideology.¹²

Table 1: Necessity and Sufficiency of Ideology

Observe: Grant		Importance	
		Grant	Deny
Ideology	Grant	sufficient (overdetermined)	necessary & sufficient
	Deny		necessary
Observe: Deny		Importance	
		Grant	Deny
Ideology	Grant		
	Deny	necessary & sufficient	sufficient (overdetermined)

The table above suggests a way to find bounds for the effects of ideology. As a floor, ideology must affect at least those cases for which it is necessary. If a petition is not important enough to warrant a grant absent ideology and a justice votes in favor of certiorari, ideology was necessary and affected the justice’s vote. Similarly, if the justice votes to deny even though the case was important enough to warrant taking the case, ideology affected the vote. The set of cases for which ideology is necessary sets the floor of the effects of ideology. To find the ceiling of ideological effects, one must add back in the cases that are correctly predicted by both ideology and importance. Put differently, the floor of ideology is set by the cases for which ideology is necessary to explain the outcomes while the ceiling is the set of cases for which ideology is necessary or sufficient.

The existence of a floor is a limitation on a strong form of the legal model. If justices only focused on the concerns present in the rules—that is, if they were not ideological—the floor should be at zero. What is more, under a strong legalist account, the model should not be able to pick out meaningful ideal points. However, the model does seem to recover ideal points that track nicely with existing measures of ideology, and about one-fifth of all votes can only be explained with

¹²Note that the top-left cell in the lower picture is theoretically impossible since the case importance and ideological pieces are additive in the model. If both recommend grants, then there is no way to offset them to get to a deny other than the random shock.

reference to that ideology, as seen in figure 7 below. This finding is consistent with virtually all accounts of judicial behavior in political science that assert the preferences of judges tend to outweigh legal considerations. This is especially true of theories that deal specifically with the Supreme Court. Political science theories tend to assume that justices are almost purely ideological (Segal and Spaeth, 2002).

And yet, these results also challenge the strong form of the attitudinal model. That model builds from the dual facts that given judicial supremacy in a large swath of policy areas and the lack of meaningful accountability from the outside, justices are free to pursue their own preferences and do so. In comparison with merits votes, justices face even less accountability at certiorari. The votes are not made public, there is rarely any public dissent, and there is effectively no law governing the process. It would seem, then, that the justices should be at least as ideologically motivated at the cert stage as at the dispositional phase. And yet ideology, while important, is not sufficient to explain a large share of cert votes. As seen in the blue bars in figure 7 below, the measures of left-right ideology are only sufficient to explain about three-fifths of the justices' votes, which means that about 40% of the votes are not explained by ideology alone. This suggests that while ideology is certainly important, it is not the only thing that matters.

These bounds are substantively interesting and challenge at least the stronger forms of legal or attitudinal accounts of decision-making at the Court. Still, there is much room between the floor and ceiling, and it would be helpful to have a reasonable estimate of the actual effect. The challenge to recovering such an estimate is that many votes are overdetermined. These cases are “easy” for the justices because they do not have difficulty balancing ideology and importance. In easy cases, both importance and ideology point in the same direction and either would be sufficient to correctly classify the vote. In such cases one cannot tease out whether law or ideology is doing the work. The estimate must therefore come from considering the “hard” cases. Hard cases are primarily those for which ideology and importance point in different directions, and the justice has to balance importance against his personal preferences. Since ideology and importance are working against each other, these cases are hard for the justices.

While the data cannot say what proportion of easy cases are due to ideology or importance, they can reveal what share of the hard cases are driven by ideological concerns. This is a single number that is recoverable through the data. What is more, there are a large number of “hard” votes. For eight of the nine justices in the 1989 data, there are between 120-142 hard votes for each justice—more than 40% of all of these justices' cert votes. Justice White is an outlier with only fifty-five hard votes that term. There are three types of votes in this subset: instances where ideology is necessary and sufficient to correctly classify the vote, cases where importance is necessary and sufficient, and those where both ideology and importance are both necessary. This final group is made up of cases that fall within the bottom-right box in table 1 when we observe a vote to grant.

When Ideology is Necessary/Sufficient

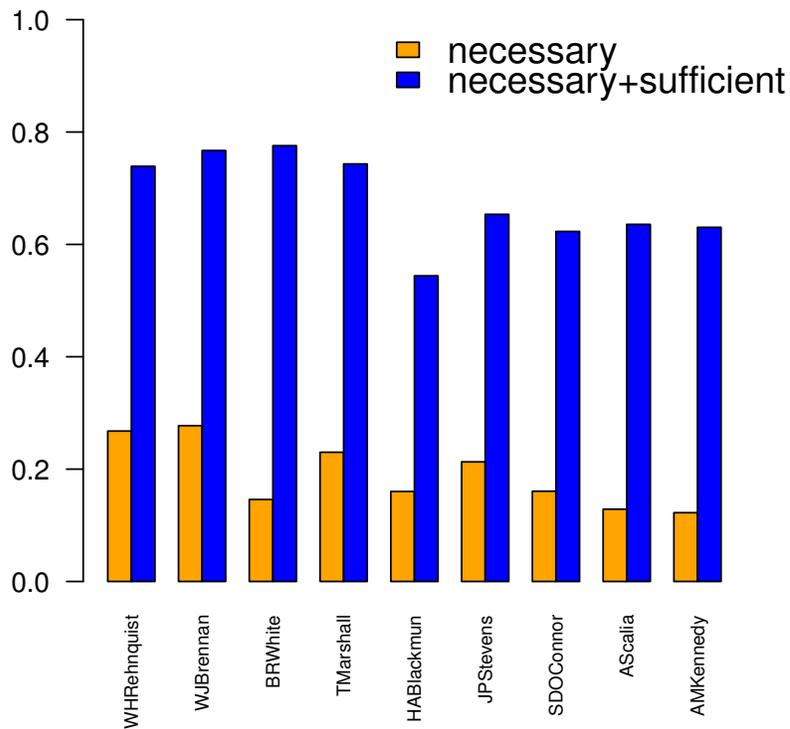


Figure 7: Setting Upper and Lower Bounds on Effects of Ideology

The share of hard cases for which ideology is necessary is the estimated share of cases for which ideology affects the case outcome and is shown in figure 8.

Unsurprisingly, the estimates for the most ideologically extreme justices—Rehnquist, Brennan, and Marshall—appear to be the most affected by ideology. For these justices, ideology is necessary in more than half of the hard votes. Justice Stevens is slightly less ideological with just under half of his hard votes explained by ideology. Justices Blackmun, O’Connor, Scalia, and Kennedy appear less ideologically driven. For them, ideology explains only about one-third of the hard votes.

The clear outlier in the figure is Justice White. More than three-quarters of his hard votes are attributable to ideology. Indeed, the share of his hard votes attributable to ideology is indistinguishable from the ceiling calculated previously. On the one hand, this makes sense, because as the median justice, White could expect more ideological gains than most other justices. Still, there are good reasons to think that this estimate for White is artificially high. For one thing, White has a surprisingly small number of hard votes to investigate. For other justices, hard votes make up between 42% and 49% of the individual justices’ votes. For White, less than 20% of his votes fall into this category, thus lowering the denominator. Second, White’s score here may be affected by

Proportion of Hard Cases Driven By Ideology

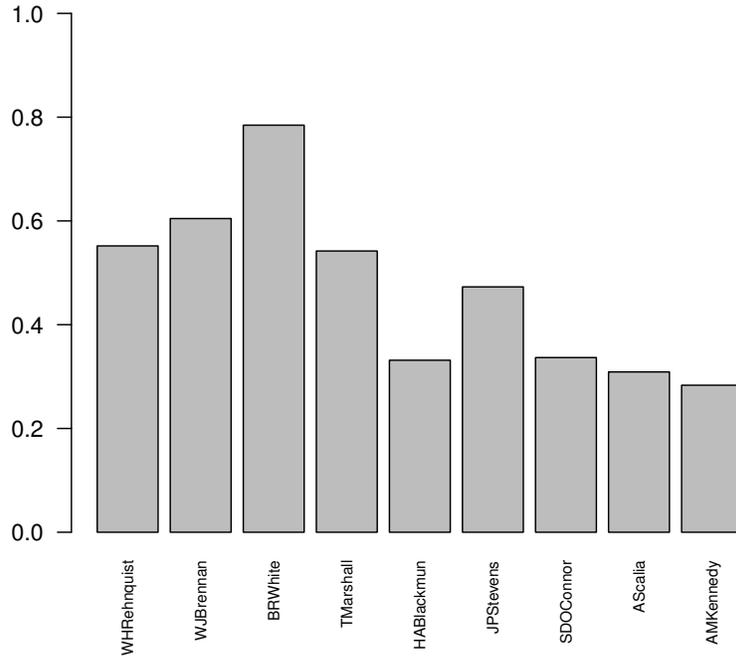


Figure 8: Estimating the Effects of Ideology on Certiorari Votes

the estimation procedure and the extremism of other justices. Recall from figure 5 that White has the lowest threshold of all the justices. Still, there are cases where another justice supports a grant but White does not. If that other justice is on an ideological extreme like Rehnquist or Brennan, the model will estimate a high enough case-importance parameter to push that justice's utility high enough to predict a vote. Doing so likely pushes case-importance above White's very-low threshold. But since the case only appeals to the ideological extreme, White—as a centrist—does not want to take the case. This negative ideological payout brings White's total expected net utility low enough to predict a deny vote. Notice, however, that while the ideological payoff explains the vote, White is ideologically reacting to an attempt to drive the law to an extreme. This suggests it would be a mistake to interpret figure 8 as evidence of some previously unnoticed extremism on the part of Justice White.

Whether one focuses on the subset of hard votes or looks at the calculated bounds on the full set of cert votes, one cannot escape the importance of ideology to the cert process. The presence of large ideological effects should come as no surprise to political scientists that have long assumed that justices pursue their own policy preferences from the bench. What should come as a surprise is that the effects are not as high as one would expect. Even the most aggressive estimates of the

effects of ideology leave about 30% of all non-unanimous cert votes—or roughly 800 cert votes—unexplained. Since even the most ideological justices appear to vote ideologically in about half of the cases, it seems plain something more than a simple left-right ideology is at work.

This raises questions for studies of decision-making on the merits as well. The standard assumption is that since the Court is unlikely to face any meaningful punishment for decisions it makes in most cases, the justices are free to pursue their own policy interests. At the certiorari stage, where the justices face even less risk of blowback, they seem to follow some sort of legal constraint in a majority of cert petitions. If the lack of meaningful accountability is the mechanism to drive the attitudinal model, then certiorari votes should be at least as ideological as merits votes. Or, equivalently, merits votes should be no more ideological than cert votes.

And yet ideological measures explain the vast majority of votes on the merits. Ideology seems to be a much stronger predictor at the merits stage than at certiorari. This suggests that, on average, the cases the justices do take are more ideologically charged than the average cert petition. Certainly, one would expect that ideological voting at certiorari would carry through to disposition. Cases that are ideologically charged at the agenda-setting stage are likely to remain charged when the Court decides the case. But to increase the share of ideologically driven votes at disposition, justices who voted according to the legally relevant principle of case-importance at certiorari must have started to vote ideologically on the merits.

This suggests two avenues for further study. First, the Court's final docket is meaningfully different from the set of cases appealed to the Court. The Court is choosing a politicized docket. Insofar as polarized decision-making on the merits threatens the Court's legitimacy, the Court has only itself to blame for choosing to take the most ideologically fraught cases. Further, the Court is offering selective guidance to lower courts and leaving large areas of law unexamined. This opens up room for examinations of the effects of the Court's selective interests on the development of law. Second, there is no clear explanation for why justices seem more willing to set aside ideological considerations to follow internal rules than they are when deciding cases. There could be many possible explanations. In cases of first instance, there would be no law to follow. Justices may have different interpretive philosophies that lead to different interpretations of substantive laws governing cases but nonetheless share a common interpretation of what makes a case important. Finally, justices may take their internal reputations and rules more seriously than supposed. Reputational concerns and fear of a majority changing the Rule of Four may allow justices to monitor each other for overly aggressive ideological voting at cert in a way that differs from votes on the merits. Whatever the mechanism, the shift in the descriptive power of ideology between the cert and dispositional stage seems a promising avenue for future study.

Conclusion

Scholars and lawyers have long been interested in just how much of the Court's work is based on law and how much is based on the justices' own politics. Previous studies have focused on the judgments and opinions issued by the Court in the set of cases it agrees to hear; this paper looks to the earlier agenda-setting stage to find answers. To do so, it develops and estimates a structural model of voting at certiorari using data from the Blackmun Archive. The model itself builds off of previous work in scaling roll-call votes but tailors the model to the peculiarities of the cert process. Certiorari is not only intrinsically interesting, but it also offers several advantages for judicial scholars. First, there are significantly more data, those data are far more consistent year-to-year, and the justices have less control over the available data. In contrast, there are far fewer dispositional votes each term, the substance of those cases changes frequently, and the estimates recovered from analyzing those votes will be plagued with selection bias.

Analysis of the data from 1989 suggests that ideology affects between about 20% and 68% of all cert votes. By focusing on the set of cases where case-importance and ideological concerns do not both suggest the correct answer, the article surmises that ideology affects about half of the votes for the most ideological justices—Rehnquist, Brennan, Marshall, and Stevens—and about a third of the votes for Blackmun, O'Connor, Scalia, and Kennedy. These results show that ideology is an inescapable part of judicial decision-making at the Supreme Court. However, they also show that ideology alone is insufficient to explain most of the justices' decisions at the agenda-setting stage. These results implicitly challenge both the legal and attitudinal models of judicial decision-making at the Court. The results also open a new avenue for research as it suggests that ideology becomes more important at the dispositional phase relative to certiorari.

September 26, 2017

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Appendix

The results presented assume a probit specification, so $\epsilon_{ij} \sim \mathcal{N}(0, 1)$ in equation 5. Estimating the remaining parameters from that equation requires assuming a prior distribution for each of the terms. I use uninformative normal priors across the board; thus Λ_j , α_i , x_i , and G_j^{cert} are all given priors of $\mathcal{N}(0, 5^2)$. The Gibbs sampler used to recover the posterior distribution of each parameter runs as described in Clinton, Jackman, and Rivers (2004). The primary difference between their estimation procedure and the cert model is the ordinal specification. To recover the individual justices' threshold cutoffs between Join-3 and grant votes— λ_i from model 1—I draw from $U(0, \underline{z}_i)$, where \underline{z}_i is the minimum value of z_{ij}^* across all $j \in J$ holding i fixed.

The algorithm is coded in R and after a burn-in of 50,000 cycles, the computer runs through the sampler another 400,000 times storing the output for every 800th observation. This leaves 500 draws from the posterior of each parameter. For the ideal point estimates, these thinned observations have AR(1) parameters averaging about 0.08 (max 0.11 Marshall).