The (Surprisingly Small) Role of Policy Preferences in Supreme Court Agenda-Setting

Ben Johnson[*]
Department of Politics
Princeton University

Abstract

Political scientists and many legal scholars have persuasively argued that Supreme Court justices are "single-minded seekers of legal policy." On this account, justices are focused on transforming the law to reflect their own policy preferences. This attitudinal theory has dominated judicial politics for decades, but this article argues that this story is incomplete and often wrong. It falters because it fails to distinguish between legal theory and policy preferences. Put simply, a jurist with a conservative legal theory will vote in a conservative direction not based on policy goals, but based on a faithful application of her best understanding of the law. Previous studies have largely been unable to untangle these different mechanisms. By focusing on the Court's agenda-setting procedures, this article isolates the effects of policy preferences on justices' decision-making and finds that justices only rarely subordinate law to policy.

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-motivated and how much of their work is instead guided by legal principle. The normative importance of the question is immediately apparent, since justices are unelected, have enormous discretion, and it is difficult—if not impossible—to overturn their decisions through traditional democratic processes. The bargain—from a political theory point of view—is that justices are empowered to wield such enormous power because they are trained, selected, and empowered to apply law created through the democratically accountable branches, not to make it up as they see fit as some super-legislature accountable to no one.

Nonetheless, the received wisdom in judicial politics is that the justices are "single-minded seekers of legal policy" (Epstein and Knight, 1997). While a strong view of this claim would argue justices alway seek their unconstrained policy preferences, scholars have come to recognize that justices are sometimes constrained by political realities. Some of these realities are internal to the Court, for example, concessions must be made to form and maintain a majority coalition. Other constraints are external: separation of powers concerns or the perceived willingness of the public at large to defy a ruling. While these constraints certainly limit justices' options, they do not challenge the core of the attitudinal story that justices are politicians in robes. Instead, they merely point out that as politicians, the justices must account for political reality in their actions.

In fairness, the attitudinal account has much to recommend it. The tradition is built on careful qualitative studies of the Court dating back to the Legal Realists of the early 20th century. And there is a wealth of empirical scholarship that supports attitudinalist claims built up by a wide range of scholars over decades. Both the theoretical and empirical insights of the last decades seem to support the theory that Segal and Spaeth described as follows, "[S]imply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal" (Segal and Spaeth,

1993).

The truth of this statement is so well-founded empirically, that at this point, it is almost self-evident. Still, while the statement may be true, it may not mean exactly what scholars have interpreted it to mean. The success of the attitudinal model has led scholars to develop "an almost pathological skepticism that law matters" (Friedman, 2006). This skepticism has led us into error.

Chief Justice Rehnquist may have been a conservative, but he was conservative in at least two ways. First, as a life-long Republican and a Nixon appointee, one might safely assume that Rehnquist was a political conservative and favored conservative *policies*. Second, as an originalist and fierce critic of theories of a "living constitution," the Chief Justice held a conservative *legal theory* (Rehnquist, 1976). When attitudinalists make the claim that Rehquist voted as he did because he was a conservative, they speak truly, but when they go further to claim that Rehnquist voted as he did out of a single-minded desire to promote conservative policies, they risk getting ahead of the data.

Most studies of the Court focus on the decision to reverse or to affirm on the merits, but there are significant drawbacks to focusing attention solely on the disposition of cases. First, there are concerns with the empirical limitations of any such study. 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 few cases are not randomly selected from the appealed cases, any measures derived from that subset will almost certainly be biased. Second, there are interpretive problems. A dispositional vote may be coded as liberal or conservative,[1] but that does not tell us whether the justice voted conservatively or liberally out of policy ambitions or according to her best understanding of the law. At disposition, votes motivated by policy and those controlled by legal theory are observationally equivalent.

To separate these two aspects of ideology, this article turns away from the disposi-

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[1]A coding decision fraught with peril and often subject to much debate.

tional votes to focus on the Court's agenda-setting process. This certiorari process—cert for short—sets the Supreme Court apart from all other federal courts in that the justices can pick whether or not to decide a particular case. Parties petition the Court for a writ of certiorari, and the Court may grant the writ and decide the case at its own discretion. The rules that govern the cert process are described below, but what is important about certiorari for present purposes is that the "law" of certiorari—so far as it exists—is contained within the Supreme Court's own rules[2] and the justices all share common views as to what makes a petition certworthy. There are no conservative or liberal divides on whether circuit splits should be resolved or whether the Solicitor General's view should be given great weight in the process. There is no originalist or living constitutionalist theory of certiorari. This creates an opportunity to pull apart the effects of legal theory and policy preferences. Justices all apply a common legal theory at certiorari, so if one estimates an ideal point model on the certiorari votes, resulting measures of justices' ideology should reflect their policy preferences rather than their idiosyncratic understanding of law.

The main contribution of this article is to examine the relative effects of law and ideology. I begin by canvasing a set of opinions and cert petitions that show a range of judicial motivations. Sometimes justices appear to be following the law even when their policy preferences point in another direction, while other times they use their power to pursue policy goals. The next section argues that existing measures of judicial ideology cannot distinguish between justices' legal theories and policy preferences. The following section turns to certiorari and argues that qualitative evidence suggests that justices share a common understanding of the law of certiorari even as they occasionally subordinate their legal analysis to their policy goals. I then turn to a quantitative examination of the effects of ideology on Supreme Court agenda-setting.

The empirical part of the article relies on two distinct models of judicial voting at certiorari. First, I write down and estimate a model of voting that assumes justices are solely

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[2]Sup. Ct. R. 10.

concerned with law. Second, I use a model of cert voting developed elsewhere in the dissertation that assumes the decision reflects a mixture of legal and policy considerations. I show that the law-only model does an excellent job of classifying cert votes and the inclusion of ideology provides only a minor improvement in predictive power. This suggests that the marginal impact of policy aims is relatively limited.

I then push the data further to try to pull apart the effects of law and ideology from the second model and place upper and lower bounds on the effects of justices' policy preferences. The lower bounds are largely consistent with the limited marginal effects of policy preferences found by contrasting the two models. The upper bound is high, but it is still noticeably lower than what one would expect based on studies of the dispositional votes. This suggests that policy motivation is incapable of fully explaining justices' behavior. Law matters.

To be clear, this article does not claim that justices are never policy-motivated. Indeed, it will show qualitative and empirical evidence that justices do sometimes pursue policy goals at certiorari. Instead, the claim is that justices are most often motivated by law; they apply a common standard to the facts before them. Often this fidelity to law governs their actions even when it contradicts their policy preferences.

Existing Models of Judicial Behavior

By far, the most influential theory of Supreme Court decision-making is the attitudinalist model. Segal and Spaeth (1993, 2002) set the table for scholars with the argument that justices are focused on pursuing their own policy goals. Their theory rests on three observations. First, justices face little to no oversight. Second, law is ambiguous and permits several possible outcomes. Third, justices care only about policy. At their strongest, these premises lead to two testable hypotheses: 1) law does not matter, and 2) external actors do not constrain the justices.

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Scholars have pushed back on the strong form of the attitudinalist model that offers these predictions. Epstein and Knight (1997) argue that not only do external actors limit the range of judicial options, justices face limitations within the judicial process, especially the need to build and maintain a majority coalition. Bailey and Maltzman (2011) argue that not only do some justices appear concerned with law—in the form of precedent—some are also sensitive to Congressional pressure and signals from the Executive branch.

Martin and Quinn (2002) offer a popular model of judicial decision-making at disposition. Their paper is famous for developing measures of ideology that appear consistent across time, but if isolated to a single year, their model reduces to the structural model of Clinton, Jackman and Rivers (2004). That model assumes actors are choosing between two policies, a status quo and a proposal. In the context of the Court, this translates to affirming or reversing the decision below. The structural model assumes justices are strictly policy-motivated, but as I show below, the statistical model is indistinguishable from one that assumes justices are motivated by their own views of what law is.

Important for my purposes, there is no reason to believe justices should be any less policy-focused at the cert stage than they are at disposition. Epstein and Knight (1997) make this point explicitly, but it follows directly from the assumptions that justices are both policy-motivated and strategic. Since they know granting certiorari will lead to a decision on the merits, as strategic actors, they can look down the game tree and consider the final policy outcomes that will result from their decisions on certiorari.

That said, certiorari has always fit a bit uneasily in attitudinalist accounts. Scholars 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 on the merits. Specifically, Caldeira and Wright (1988), McGuire and Caldeira (1993), and Black and Owens (2009) examine the effects of case-specific factors on the Court's certiorari decisions. Caldeira, Wright and Zorn (1999) and Ulmer (1983, 1984) find that the Court is more likely to grant certiorari when there is a split in the lower courts or when a

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lower court diverges from clear Supreme Court precedent. If these non-ideological factors drive the justices' votes, this is a direct challenge to attitudinalist claims.

The claim that external actors do not constrain justices has also come under examination in the cert context, as Harvey and Friedman (2009) and Owens (2010) have debated the existence and extent of Congress' influence on the Court's agenda. While that question remains open, other work fits more neatly with attitudinalist claims. Among such work, 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, and 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. This focus on the likely outcome of cases is consistent with a theory of justices focused on policy.

The two results could easily be resolved to conform with attitudinalist thinking if one were willing to think that justices face some sort of budget constraint that limits the number of cases they can take. Presumably, they would want to focus attention on only the most important cases that would also permit them to achieve their preferred policy outcomes. This would account for both previous findings and be consistent with qualitative work suggesting that justices care both about the importance of a case and the likely policy effects (Perry, 1991).

This article tries to pull apart the relative importance of law and policy preferences. 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 from the first chapter 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.

Sometimes Law and Sometimes Policy

Both in their written opinions and in their certiorari decisions, there is qualitative evidence to suggest that justices often follow the law where it leads them, even if it violates their priors or preferences. Similarly, there is qualitative evidence that justices pursue their policy goals even when "the law" would point to another outcome. The examples in this section serve primarily to complicate the attitudinalist story that law never matters and justices always pursue their policy goals, though perhaps subject to some constraints, such as from Congress, the Executive, or the need to build a majority.

The most commonly used, recent example of a justice claiming to follow the law over personal preferences is Justice Thomas' dissent in *Lawrence*, where he claims that were he a member of the Texas legislature, he would vote to repeal the law against consensual intimate contact between members of the same sex, but as a member of the Court, he could find no constitutional objection. Thomas called the statute "uncommonly silly," a direct reference to the dissent by Justices Stewart and signed by Justice Black in *Griswold*. Stewart claimed that '[a]s a matter of social policy, [he believed] professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution." And they did not believe Connecticut's birth control ban was unconstitutional, even though they too believed the law was "uncommonly silly."

One might also look to the concurring opinion by Justice Breyer (signed by Ginsburg) in *New Jersey v. New York*, a case that decided Ellis Island is largely part of New Jersey, not New York. Breyer begins by stating that "Many of us have parents or grandparents who landed as immigrants at 'Ellis Island, New York.' And when this case was argued, I

assumed that history would bear out that Ellis Island was part and parcel of New York. But that is not what the record has revealed. Rather, it contains a set of facts, ... which shows, in my view, that the filled portion of Ellis Island belongs to New Jersey." Here the justices were willing to turn their backs on their own family histories and prior expectations to reach the outcome they felt the law required. One should note that other justices dissented, believing Ellis Island belonged entirely to New York. There were plausible legal arguments that would have let Breyer and Ginsburg keep their family stories and prior expectations intact. Yet they followed the law as they saw it.

One could argue that Thomas, Stewart, and Black were all being disingenuous about their policy preferences or that Breyer and Ginsburg secretly wanted the Statue of Liberty to reside in New Jersey, but a more charitable reading is that in these cases, at least, the justices chose to follow the law where it led rather than trying to take the law where they wanted it to go. Of course, one could easily line up counter examples. For example, most legal scholars would agree that Bush v. Gore was not a particularly law-based decision.

Similar phenomena appear in the Court's cert practice. Three cases from the Blackmun Archive are illustrative of different types of concerns that motivate the justices. Justices want to take important cases, as Rule 10 of the Court's rules seems to require, that is, they want to follow the law of cert. 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 opposition 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.

Interestingly, 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 vote. If Blackmun, who ended up in the minority in *Smith I* and *Smith II*, had simply voted to deny, 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, however, 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."

These cases show that justices are not always and only about either law or policy. Sometimes they follow the law, and other times, they grab the law with both hands and yank it in their preferred direction.

The Problem of Observational Equivalence

The previous section held out a few cases where justices were relatively clear about their motivations. Of course, most of the time it is not so easy to credit justices' claims that they are simply doing lawyerly work. Consider *Obergefell*, where Chief Justice Roberts claimed that the Court's majority succumbed to the temptation "for judges to confuse our own preferences with the requirements of the law." His claim is that "the law" demanded a different outcome no matter what the justices' personally believed to be the best policy. But other may say that Roberts and the other dissenters were actually opponents of marriage equality, and they were simply voting for their policy preferences and hiding that fact in legal-speak. Similarly, they may disagree with Roberts's claim that the majority's opinion was policy-motivated instead of legally-reasoned. They might say that the majority got the law right. One could go through any number of such cases where policy preferences and legal theories lead to the same outcome. In such cases, it is impossible to tell whether the justice was merely following the law or pursuing policy goals.

This difficulty is shared by most measures of Supreme Court ideology. For instance, measures derived from the percent of decisions in a liberal or conservative direction. A justice may decide in a conservative direction because she prefers conservative policies or because she has a conservative view of law. The raw number of conservative decisions is the sum of cases decided by either channel. It cannot provide a breakdown of how many were produced by law and how many by policy.

Similarly, scores based on newspaper editorials (Segal and Cover, 1989) cannot tell the difference between support for a nominee's legal theories or policy preferences. One might expect the New York Times to be relatively more supportive of liberal nominees. It may even be fair to say—though it would be by no means obvious—that newspapers are more concerned with policy outcomes than judicial philosophies. That would mean the Times supports a liberal nominee who will reach decisions that enact progressive policies. But that does not mean that the nominee sets out to achieve liberal policies. Rather, it may mean

that the nominee has a progressive theory of law that will lead to liberal policy outcomes when applied in particular cases. Perhaps the Times is policy-motivated, but if so, it does not care how the justice gets to the preferred outcome, only that she does.

The Martin-Quinn model suffers from similar interpretive difficulties. In their model, justices are identified by their preferred policies $x_i \in \mathbb{R}$. In each case j, the justices face two policy options, $r_j, a_j \in \mathbb{R}$, that will result from reversing or affirming, respectively. Their model asserts that justice i will vote to reverse in case j if $u_{ij}^{rev} > u_{ij}^{aff}$. Define a latent variable, $y_{ij}^{\star}$, as follows:

$$
\begin{aligned}
y_{ij}^{\star} &= u_{ij}^{rev} - u_{ij}^{aff} \\
&= (a_j - x_i)^2 - (r_j - x_i)^2 - \epsilon_{ij} \\
&= \left(a_j^2 - r_j^2\right) + x_i\left(r_j - a_j\right) - \epsilon_{ij} \\
&= b_j + x_i G_j^{disp} - \epsilon_{ij}
\end{aligned}
\tag{1}
$$

where $b_j = a_j^2 - r_j^2$, $G_j^{disp} = 2(r_j - a_j)$, and $\epsilon_{ij} \sim \mathcal{N}(0,1)$ is a random shock. Thus, the probability that a justice votes to affirm is $\Phi\left(b_j + x_i G_J^{disp}\right)$.

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

Model 1.

$$
y_{ij} = \begin{cases} 0 \ (\textit{affirm}), & \textit{if } y_{ij}^{\star} < 0 \\ 1 \ (\textit{reverse}), & \textit{if } y_{ij}^{\star} \geq 0 \end{cases}
\tag{2}
$$

Compare this with a model based in the case-space where justices apply their legal understanding so the facts of a case.[3] Suppose cases emerge as some set of facts $f_j \in \mathbb{R}$. For concreteness, suppose the case involves federal regulation of the economy under the Commerce Clause. Cases further to the right impose less regulation, which increases as cases move to the left. As before, justices are represented by points on the line, $x_i \in \mathbb{R}$.

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[3]I borrow this point from Charles Cameron, Lewis Kornhauser, and Tom Clark.

However, now these points divide the line in two. Some case $f_j^1 < x_i$ involves a set of facts that the justice thinks is exceeds the federal government's authority, while a case $f_j^2 > x_i$ involves federal regulation the justice thinks is acceptable. In this framework, more conservative justices are to the right of more liberal justices, as liberal justices are willing to tolerate greater federal power under the Commerce Clause. Under this framework, each justice has an ideal rule:

$$
r(f_j, x_i) = \begin{cases} 0, & \text{if } f_j > x_i \\[2mm] 1, & \text{if } f_j \leq x_i \end{cases}
$$

Here, an outcome of 1 would be a conservative decision that the federal government has exceeded its authority.

Denote justice i's vote in case j as z_{ij}. Suppose justices are entirely motivated by following the law as they understand it. Then justices face the following utility calculus:

$$
u_{ij}(z_{ij} : f_j, x_i) = \begin{cases} 0, & \text{if } z_{ij} = r(f_j, x_i) \\[2mm] -\beta_j \, |f_j - x_i|, & \text{if } z_{ij} \neq r(f_j, x_i) \end{cases}
$$

Here, the β_j term captures the salience of case j. It recognizes that some cases are more important than others. Clearly, unless the case facts are exactly at the justice's cutpoint, she would vote according to the legal rule as she understands it. For example, if $x_i > f_j$, then $r(f_j, x_i) = 1$, and the justice should vote in the conservative direction by rule. If she does vote in the conservative direction, she receives a payoff of 0. If she votes in the liberal direction, she receives a payoff of $-|f_j - x_i|$.

If we introduce a random utility shock as in the Martin-Quinn model, each justice faces

$$
U_{ij}(z_{ij} : f_j, x_i) = \begin{cases} u_{ij}(z_{ij} : f_j, x_i) + \nu_{ij}, & \text{if } z_{ij} = 1 \\[2mm] u_{ij}(z_{ij} : f_j, x_i) + \eta_{ij}, & \text{if } z_{ij} = 0 \end{cases}
$$

where $\nu_{ij}, \eta_{ij} \sim \mathcal{N}(0, 1)$. We can write down a latent utility model as

$$z_{ij}^{\star} = u_{ij}(z_{ij} = 1 : f_j, x_i) - u_{ij}(z_{ij} = 0 : f_j, x_i) + \nu_{ij} - + \eta_{ij}$$

$$= \beta_j (x_i - f_j) + \nu_{ij} - + \eta_{ij}$$

$$= \beta_j x_i + B_j - \zeta_{ij}$$

where $B_j = -\beta_j f_j$ and $\zeta_{ij} = \eta_{ij} - \nu_{ij}$ is distributed $\mathcal{N}(0, 1)$. Now the model would simply be

Model 2.

$$z_{ij} = \begin{cases} 0 \ (liberal), & if \ z_{ij}^{\star} < 0 \\ 1 \ (conservative), & if \ z_{ij}^{\star} \geq 0 \end{cases} \tag{3}$$

Note that the probability of observing a conservative vote is now $Pr(z_{ij} = 1 | f_j, x_i) = Pr(\zeta_{ij} < (\beta_j x_i + B_j) = \Psi(\beta_j x_i + B_j)$, which is the same statistical model as Martin-Quinn. Both reduce to the three parameter IRT scaling model. This is unsurprising since in both cases, the models devolve into a set of justice-specific measures and a case-specific cutpoints. The statistical procedure is the same, as the algorithm looks for the best ways to allocate justices and cutpoints to describe the data in a single dimension.

Thus, the same statistical model applied to the same data yields two different interpretations. The Martin-Quinn model, building on the attitudinal model, assumes that the x_i terms represent the justices' ideal policies. The case space model assumes those terms represent the justices' views of law. The dispositional votes themselves cannot distinguish between these alternative interpretations.

Considering Certiorari

If dispositional votes cannot distinguish between policy and legal theory, perhaps there is hope if we look elsewhere. This section briefly describes the certiorari process, considers

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how it fits within the attitudinal framework, and argues that cert votes provide a view into the justices' behavior unobscured by divergent legal theories.

The agenda-setting process begins when a party asks the Court to review a decision from a lower court. The party files a petition for the writ of certiorari. The Court receives about 7,000 such petitions every year. Many of these petitions are obviously frivolous, and so each week the Court considers a few dozen more serious petitions in their weekly conference. For each petition, the justices may either vote to grant, deny, or Join-3. The Join-3 is an intermediate vote that the justices have described as a "timid" vote to grant. Following the Rule of Four, the Court grants any petition that at least four justices vote to grant or a petition for which three justices vote to grant and at least one other justice casts a Join-3 vote.

The Court describes the standard that justices apply to cert petitions in Rule 10 of the Supreme Court's Rules. It suggests that the Court pays special attention when lower courts disagree amongst themselves or when a lower court diverges from Supreme Court precedent. But in general, the Court is focused on taking "important" cases. Examining these vague guidelines, Perry (1991) called Rule 10 "tautological." Indeed, what is deeply interesting about certiorari, from a legal perspective, is how little law there is and how indeterminate the standards we do have are. Nonetheless, Perry and others have identified several factors that indicate importance. For instance, justices preferred to take cases that had been examined by a respected lower court judge or would be briefed by experienced Supreme Court litigators. They like to take issues of great importance, through preferably after several lower courts have had the opportunity to examine the issue. If those courts come to different conclusions, the justices all recognize the importance of resolving the split.

Perry is clear that at times justices do pursue policy goals through certiorari. Justices do look down the game tree and consider what would happen if the Court were to decide the case on the merits. In his book, justices admit to occasionally following a strategy

of "defensive denials" where they vote to deny a case that is certworthy in hopes that the Court will not take and decide the case in a way that would move policy in what the justice considers to be the wrong direction. *Murray*, described in the previous section, is an example of such a strategy.

Thus certiorari is similar to the dispositional phase because justices consider both the policy implications of their decisions and the law. To be clear, the law of certiorari is the Rule 10 standard as understood by the justices. What sets certiorari apart from disposition from the legal theory point of view is that the justices all have the same legal theory. They all agree, for example, that when the Solicitor General asks to have a case heard, the Court should take that request as strong evidence of importance. As for policy, the justices have the same policy concerns at certiorari as they do at disposition. They are the same people, and they have the same desires to shape the law. Further, as strategic actors, they recognize the future policy effects of their agenda-setting votes and may vote accordingly.

The key here is that any differences at certiorari are due to difference in policy preferences not legal theory, since they all share the same legal theory at certiorari. Therefore if one could measure the relative effects of the commonly recognized importance of a case and the effects of justice-specific policy preferences, it may be possible to capture the effects of policy preferences at certiorari in a way that is not possible at disposition.

Two Models of Supreme Court Agenda-Setting

The goal is to measure the relative importance of law and policy preferences at the Court. Doing so requires offering a working definition of "law" and "policy preferences." Law is generally understood to be the application of a rule or standard to a given set of facts. The trouble is that many justices have different ideas about what the rule or standard is or how it should be applied. These different views on the content of law are likely to be (strongly) correlated with policy preferences. Thus, ideology, as generally understood, seems to be

at the root of both legal theory and policy preferences. This makes teasing out the relative effects of law and policy preferences challenging, since the legal act presupposes a legal theory that flows from ideology. Or so it is at disposition as argued above.

At certiorari, things are different. There is no partisan theory of certiorari. Conservative originalists and Living Constitution progressives all agree that circuit splits should be resolved, the Solicitor General's requests should be given great weight, and that "important questions" should be answered, etc. The standards that govern certiorari are common to all, and so here, legal theory is separate from ideology. This allows for the following distinction to be maintained. At certiorari "law" is that which is common to all justices' decisions. The idea is that any justice would recognize the same standards and the same relevant facts and reach the same conclusions if the only considerations were legal. Law is common to all, and that which is common to all is law. In contrast, ideology is justice-specific. Further, by assumption, any justice-specific differences in individual decisions do not flow from divergent views of the law. Instead, the differences are more naturally attributable to policy preferences, e.g. defensive denials and aggressive grants.

The substantively interesting question is the relative effects of law and policy preferences so defined. This section attempts to answer that question in two ways. The first, and most natural, way to look for the effects of policy preferences is to compare a model that assumes justices are only interested in law with one that assumes they are interested in law and policy. The difference in classification success could be attributed to ideology. The second path forward is to try to pull apart the second model that accounts for law and policy to reveal the relative effects.

To this end, this section describes and estimates two models of decision-making at the agenda-setting stage. The first model assumes justices only care about law, in the form of case importance. The second model allows for justices to consider both importance and policy concerns.

Law-Only Model

In the law-only model, I let κ_j represent the importance of case j. In cases of low importance, justices should vote to deny; in important cases, they should vote to grant, and for cases of middling importance, justices may make use of the Join-3 vote, which has been described as a "timid grant." Justices are allowed to differ in how important a case must be in order to support the petition with either a Join-3 or a grant. Thus, we can let $v_{ij} \in \{\textit{Deny, Join-3, Grant}\}$ be justice i's vote in case j. Let α_i represent justice i's threshold between deny and Join-3 and λ_i be her cutoff between Join-3 and grant. Justice i's utility from granting case j is simply the difference between the case-importance measure and the justice's individual threshold to deny. The utility from denying cert is normalized to zero for all justices in all cases. Thus one can write down the following model. Let

Model 3.

$$
v_{ij} = \begin{cases} 0 \; (Deny), & \text{if } v_{ij}^{\star} < 0 \\[2mm] 1 \; (\textit{Join-3}), & \text{if } 0 \leq v_{ij}^{\star} < \lambda_i^{law-only} \\[2mm] 2 \; (Grant), & \text{if } v_{ij}^{\star} \geq \lambda_i^{law-only} \end{cases} \tag{4}
$$

where $v_{ij}^{\star} = \kappa_j - \alpha_i + \epsilon_{ij}^{law-only}$ and $\epsilon_{ij}^{law-only} \sim \mathcal{N}(0, 1)$. Notice that the law-only model is essentially the Rasch model with using a normal distribution.

Law + Policy Model

To introduce policy preferences, we move from the Rasch model to the 3-parameter IRT model with a twist. As before, justices are $i \in \{1, 2, ..., I\}$, but now they have ideal points $x_i \in \mathbb{R}$ along with cutpoints α_i and λ_i to divide denials from Join-3s and Join-3s from grants.[4] Cases are still subscripted with $j \in \{1, 2, ..., J\}$. Let z_{ij} be justice i's vote at cert in case j. When presented with a case, each justice chooses an action $z_{ij} \in$

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

{*Deny, Join-3, Grant*}. For purposes of the three-parameter IRT model, let D_j represent the difficulty parameter for case j and B_j represent the discrimination parameter.

Under the assumption of normal errors ($\epsilon_{ij} \sim \mathcal{N}(0,1)$), we can define a latent variable $z^\star = \alpha_i - D_j - B_j x_i + \epsilon_{ij}$. Then votes can be modeled as

Model 4.

$$z_{ij}^{cert} = \begin{cases} 0 \; (Deny), & \text{if } z_{ij}^\star < 0 \\ 1 \; (\textbf{\textit{Join-3}}), & \text{if } 0 \leq z_{ij}^\star < \lambda_i \\ 2 \; (Grant), & \text{if } z_{ij}^\star \geq \lambda_i \end{cases} \tag{5}$$

Notice that the probability of denying a case is $Pr\left(\epsilon_{ij} < D_j + B_j x_i - \alpha_i\right) = \Psi\left(D_j + B_j x_i - \alpha_i\right)$. This is essentially the three-parameter IRT model, but there is an additional constant term for each justice. The difficulty parameter D_j is the term common to all justices. Instead of measuring the difficulty of a question on a standardized test, it is measuring the importance of a case. The product of the discrimination parameter and ideal point capture the effects of a justice's policy preferences on the agenda-setting vote.[5]

Comparing the Models

I estimate both models using a Bayesian MCMC methods to draw from the posterior distributions of my parameters. After 50,000 initial runs through a Gibbs sampler, I run the model another 400,000 times collecting every 800th draw. The data are certiorari votes from 1988. The Blackmun Archive contains each docket sheet in pdf format. Research assistants hand-coded the votes into a database.

Figure 1 compares the classification success of three models. The black dots denote the fraction of votes one would correctly classify by always predicting the justice always casts his modal vote. For instance, Justice Brennan voted to deny certiorari in over 60% of cases.

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[5]I show elsewhere in the dissertation that this statistical model returns plausible measures of justices' ideology and thresholds.

A simple model that assumed Brennan always voted to deny would be correct just over 60% of the time. The purple represents the 95% credible intervals for the law-only model. For all justices save Byron White, the law-only model is significantly better at classifying votes than simply voting the mode. Similarly, the orange represents the credible intervals for the full model that includes policy preferences.
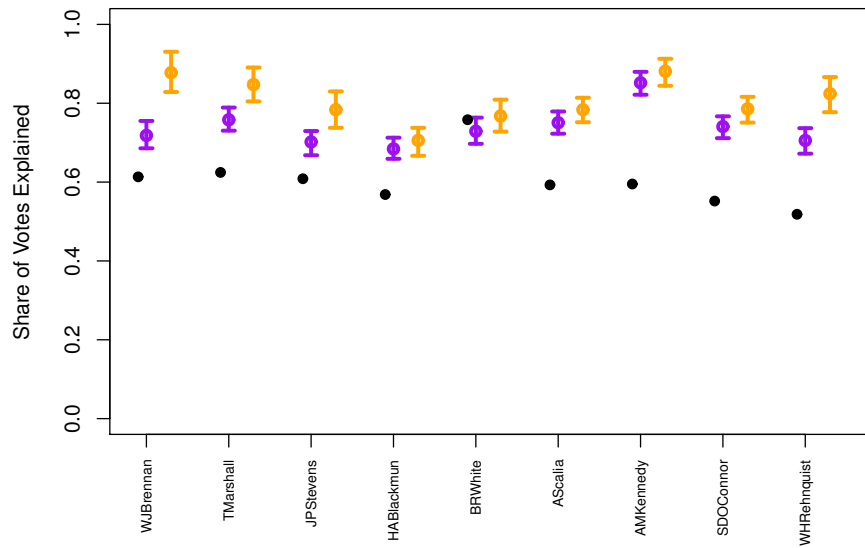

Figure 1: Comparing Mode, Law-Only, and Law+Policy - 1988

The difference in classification success between the law-only model and the model with policy preferences differs by justice. Figure 2 shows the range of differences between the classification success of the two models. For more than half of the justices in 1988, policy preferences makes no significant contribution to classification success. For the most ideologically extreme justices (Brennan and Rehnquist), the marginal contribution of ideology is still relatively modest.

It would be ideal to look for the marginal contribution of importance as a check. Unfortunately, doing so would require developing and estimating an ideology only model to contrast with the full model. The standard framework of Martin-Quinn is one such ideology-only model. However, as seen in equation 1, the ideology-only model includes

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a case-specific constant. This is the same constant that is in the full law + policy model
that captures case-importance. Accordingly, it is impossible to estimate an ideology-only
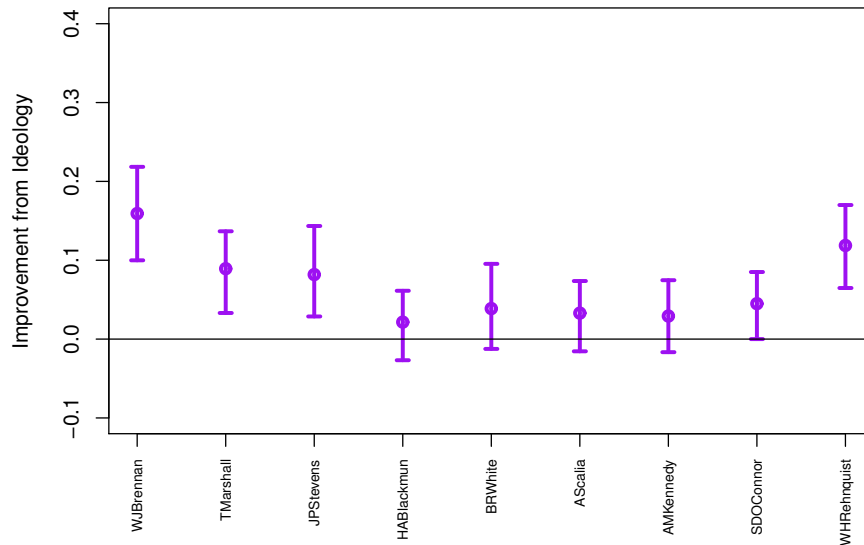model within their spatial framework.

Figure 2: Marginal Contribution of Ideology - 1988

Placing Bounds

Since it is impossible to estimate an policy-only model, the second-best possibility is to
make use of the definitions of law and policy provided above to decompose the model.
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 (difficulty parameter), which
is common to all justices: law. Second, it returns the justice-specific ideological payoff for
a given case: policy payoff. 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. Given these quantities, the law parameter and the ideological payoff
for a given justice and case can be compared to the justice's individual threshold and it is
possible to place bounds on the effects of policy preferences.

To see how consider the pictures in figure 3. For a given justice, any case can be placed on the xy-plane. The importance parameter—the case-specific constant—is the x-value while the policy payoff—the interaction term—provides the y-value. The dashed line in the top picture is the line where the sum of the importance and ideology values equal the justice's threshold. Accordingly the green section in the upper-right contains the set of cases that are sufficiently important and-or provide enough of an ideological payoff to warrant a vote to grant. Correspondingly, the pink section in the lower left contains the cases that are unimportant or give the justice a very negative ideological payoff.

The bottom picture separates out different types of decisions. In the top-right corner are the "easy grants." Cases in this pink region are so important, that even if there was no ideological payoff, the justice would vote to grant. Similarly, the ideological payoff for these cases is so high, the justice would vote to grant even if the case was of zero importance. In the bottom-left and also in pink are the "easy denies." These are the cases that are so unimportant and provide such a low (or negative) ideological payoff that both law and ideology push toward voting to deny. In the sets of easy cases—whether grants or denies—the action is overdetermined. At the top of the picture is a light-blue region labeled "aggressive grant." These are the cases that are not important enough on their own to warrant a vote to grant, but the justice anticipates a large enough ideological payoff to push him over the edge to vote to grant. In the bottom-right, the "defensive denial" set is the converse. These are cases that are important enough to warrant a grant, but the justice anticipates a policy loss and so votes to deny. The orange section in the top-left contains petitions that provide the justice with a significant policy payoff but are so unimportant the justice votes to deny certiorari. Similarly, the cases in the orange section in the center-right are those that will provide the justice with a small or even negative policy payoff but are so important the justice will likely vote to grant certiorari. The green triangle in the middle of these regions contains the set of cases that are of middling importance that also provide a modest ideological payoff. Neither importance nor ideology alone would get the justice to

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vote to grant, but in combination they are sufficient.

Votes that fall in the blue sections can be attributed to ideology. That is, ideology is necessary to explain why a justice reached the given decision. The pink regions are harder to classify since they are overdetermined. While it is true that ideology is sufficient to correctly classify these votes, so is importance. Put differently, one does not know whether such a vote is "ideological" since the case was so important that the justice was going to vote for it anyway. The best approach, then, is to consider alternative extremes and place bounds on the effects of ideology. At a minimum, ideology is necessary to explain the cases that fall within the blue regions. This provides a floor. At most, ideology can explain cases that fall within either the pink or the blue regions, which establishes a ceiling.

A purely legalistic model would assert that no cases fall within the blue regions. This would assume that the number of cases where policy preferences are necessary to explain the outcome is zero. A strong form of the attitudinal model would assert that no cases should fall in the orange regions, so case importance should never be necessary to explain votes. The data do not fully comport with either expectation.

Figure 4a shows the number of cases that fall within the various regions of figure 3b for each justice. The orange bars count the number of cases where the importance of a case overwhelmed the policy effects. The blue bars count the cases where policy considerations overrode case importance.[6] The pink bars show the cases where policy and case-importance considerations both pointed in the same direction. Notice that the existence of orange bars is inconsistent with the strong form of the attitutinal model. The blue bars are inconsistent with a purely legal account of decision-making. For a majority of the justices, there are more instances where case importance overcame policy concerns than there are where the justice ignored the importance to pursue policy aims. For every justice, law and policy most often pointed in the same direction.

The bottom figure compares the proportion of total cases for which policy preferences

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[6]Cases in the green triangle where both ideology and importance are necessary to explain a grant are included in both the orange and blue bars.

(a) Green region in the upper-right denote cases to be granted. The pink region in the lower-left contains cases to be denied.

(b) Blue regions include cases where ideology is necessary to the justice's decision. Orange regions are cases where importance in necessary. Both importance and ideology are necessary for green region. Pink regions include cases where the outcome is overdetermined.
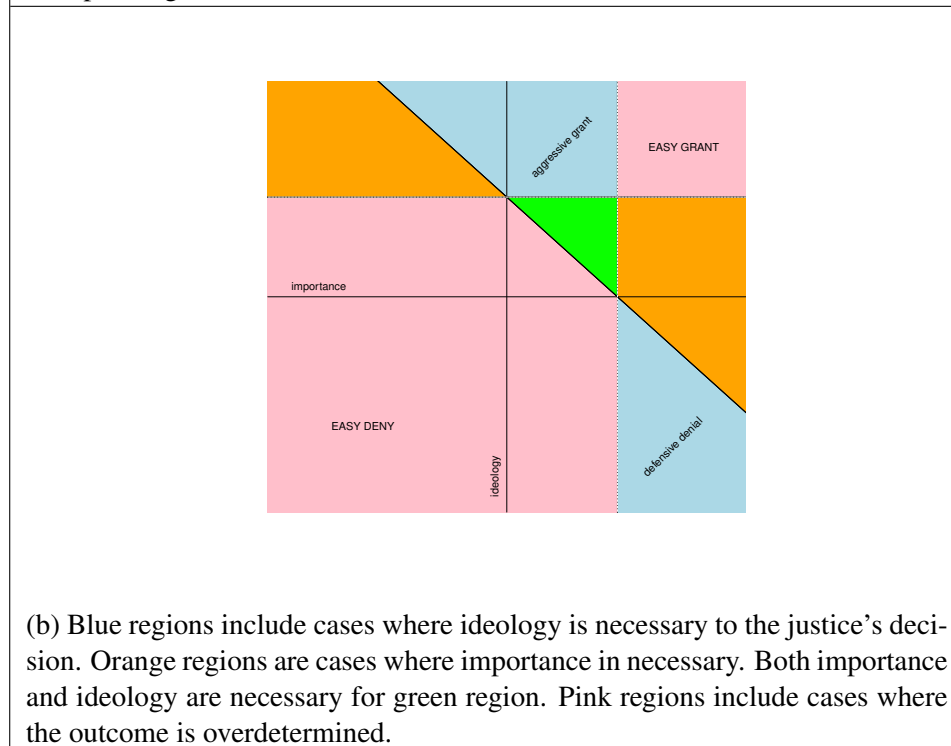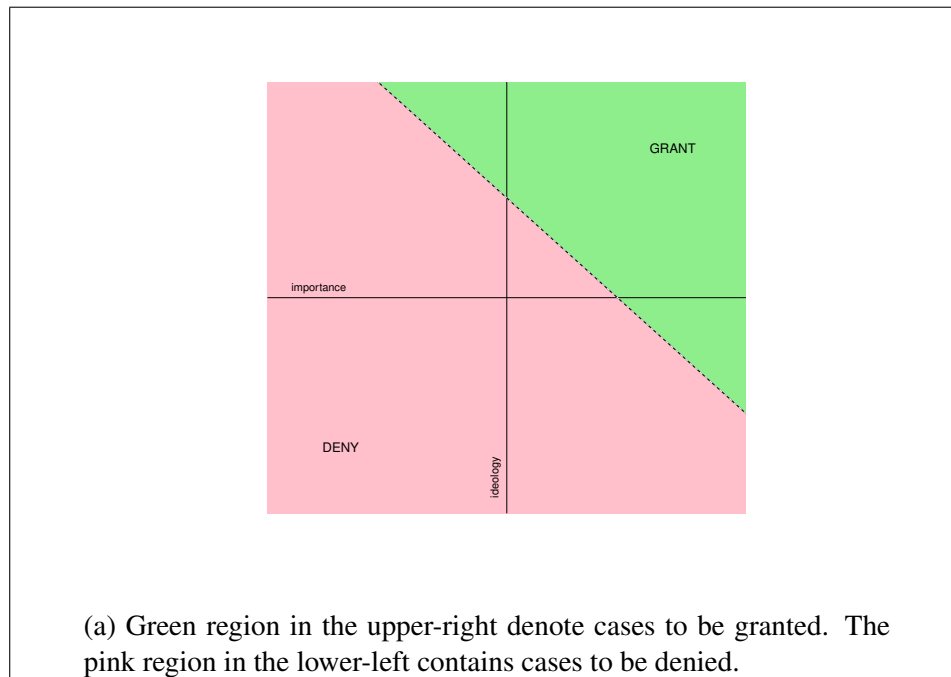
Figure 3: Assigning votes to law, ideology, or both.

are necessary to explain a vote to the set of cases for which it is either necessary or sufficient. That is, it compares the fraction of cases that fall within the blue regions in figure 3b with those that fall within either the blue or pink regions. This comprises a floor and a ceiling on the effects of policy preferences. There is a floor at about .2, which suggests that the purely legalistic account is not supported by the data. However, the ceiling is at about .69, which suggests a significant number of votes are not explained by ideology. The dashed line at .9 represents the share of dispositional votes correctly classified by ideology.
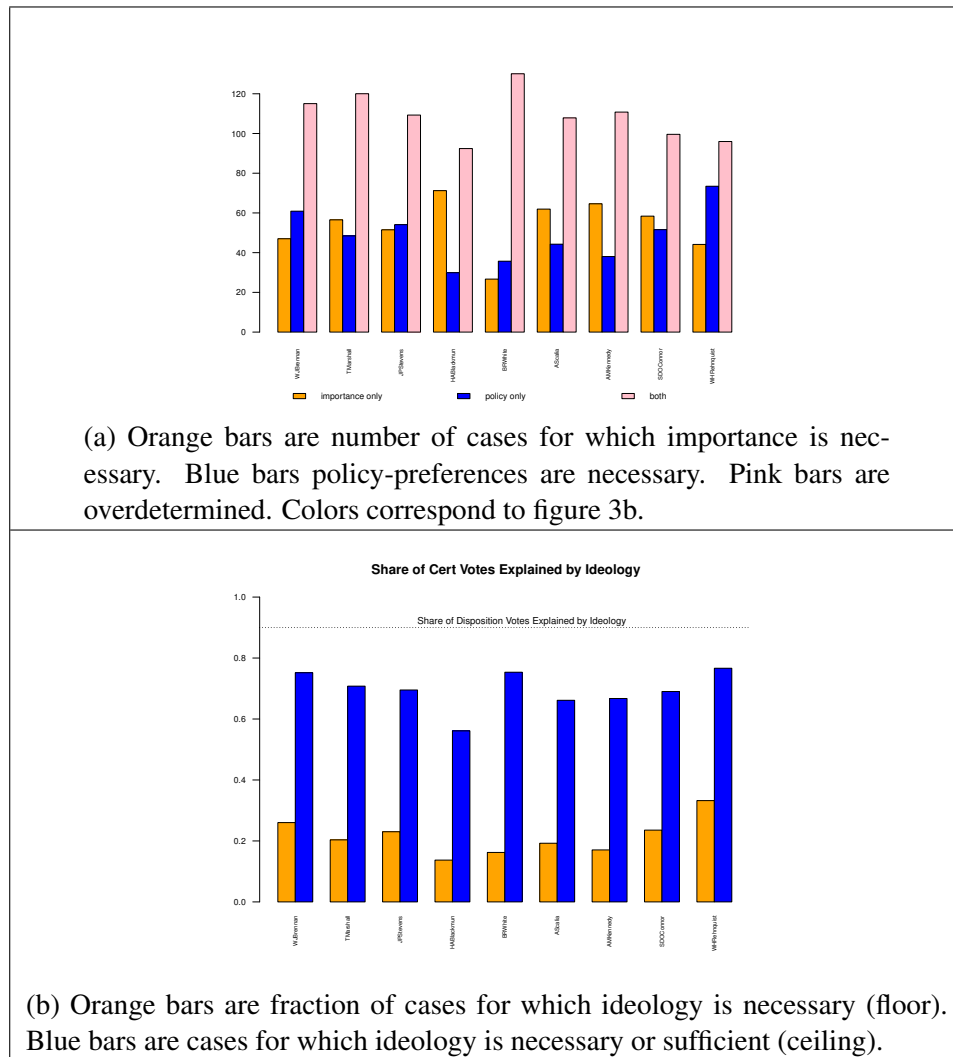

(a) Orange bars are number of cases for which importance is necessary. Blue bars policy-preferences are necessary. Pink bars are overdetermined. Colors correspond to figure 3b.

(b) Orange bars are fraction of cases for which ideology is necessary (floor). Blue bars are cases for which ideology is necessary or sufficient (ceiling).

Figure 4: Assigning votes to law, ideology, or both.

Conclusion

These results challenge the strong form of the attitudinal model. Recall that model proceeds from three premises. First, the Court faces little effective oversight or accountability. Second, the law is often indeterminate or unclear. Third, the justices are policy-motivated. In this framework, it is the lack of oversight and indeterminacy of law that frees the justices to pursue their policy ambitions.

In comparison with merits votes, justices face even less accountability at certiorari. The individual votes are not made public, and there is rarely any recorded dissent. The justices do not have to write or sign opinions giving reasons for their views. The process is so obscure many lawyers are entirely unaware of it. Further, there is effectively no law governing the process. The only rule that applies to it is written by the Court itself, and the leading authority on certiorari has called that rule "tautological." A petition is certworthy because the justices say it is certworthy. Thus the law governing cert is far more vague and undetermined than any law the justices will encounter on the merits. The conditions at certiorari are far more favorable for policy-motivated decision-making than they are on the merits. One should expect the justices to be *no more* policy-motivated at disposition than they are at certiorari.

Thus, the results here serve as something of an upper-bound on the role of policy preferences when the Court decides cases. 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 subdued their policy preferences in favor of the legally relevant principle of case-importance at certiorari must have started to vote ideologically on the merits even when the law would be more clear and there would be relatively more accountability.

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