

US Supreme Court Agenda Setting and the Role of Litigant Status

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Whether the “haves” come out ahead of the “have nots” in the judicial process is a topic of great interest for scholars of the judiciary. Although studies of lower courts have found that litigant status generally matters, research at the US Supreme Court is not of one voice, with conflicting results across several studies. Bringing a novel perspective to this debate, we analyze litigant status at the Supreme Court’s agenda-setting stage. Using archival data from the articles of Justice Blackmun, we find that litigant status influences the Court’s decision making but that the nature of the effect can be mitigated by the interplay between a justice’s ideology and the presence of interest group support. (*JEL* C00, K00, K40)

The elected branches of the federal government are generally not responsive to citizens who lack political or economic power (Mayhew 1974; Jacobson 2001). Though normatively questionable, the nature of politics explains this empirical reality. Legislators and executives must amass financial resources both to gain office and, once elected, wage and win legislative battles that allow them to be productive and remain in office. More often than not, these resources reside in the hands of powerful lobbying groups and other well-heeled individuals. In his seminal article, Galanter (1974) argued that, due to a variety of advantages, the “haves” are also more likely to prevail over the “have nots” in the judiciary.

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In the nearly 35 years of research following Galanter's contribution, numerous scholars have reexamined the topic of litigating parties, their differing amounts of resources and experience, and the influence that these differences have on the likelihood of parties' success in court. These studies have examined judiciaries at multiple institutional levels and locations, including trial courts (e.g., Rowland and Todd 1991; Dunworth and Rogers 1996), state supreme courts (e.g., Wheeler et al. 1987; Emmert 1991; Farole 1999; Brace and Hall 2001), federal courts of appeals (e.g., Songer and Sheehan 1992; Songer et al. 1999), and foreign courts (e.g., Haynie 1994, 2003; Dotan 1999; Smyth 2000; Flemming and Krutz 2002b). Although most of these studies have found that parties with greater levels of status are more likely to have judicial success, some have discovered that lesser resourced litigants actually hold an advantage (e.g., Haynie 1994, studying the Philippine Supreme Court) and others have found very few status advantages at all (e.g., Sheehan et al. 1992, studying the US Supreme Court, and Smyth 2000, examining the High Court of Australia; see also Epp 1999). These mixed findings confirm the necessity of examining litigant status across judicial institutions.

Although quite varied in institutional focus, nearly all the work examining the influence of litigant status on judicial success does so within one stage of a case—the merits stage. In studying appellate courts with some degree of discretion over the cases they hear, this choice to focus on the merits has important consequences—especially when the research presents inconsistent results. Such is the case for analyses of litigant status at the US Supreme Court. Although, as noted above, Sheehan et al. (1992) generally fail to find a litigant status effect, McGuire (1995) and Collins (2004, 2007) do.¹ Because the merits outcome is preceded by an agenda-setting decision, cases analyzed at the merits stage represent a nonrandom sample from the population of all cases. After all, at a high court, “agendas restrict and order alternatives and determine which groups have opportunities to pursue their interests and goals” (Brace and Hall 2001: 395) on the merits. Since systematic disparities based on status may limit access to certain groups, the danger becomes that by omitting the agenda-setting stage, researchers are actually underestimating the true magnitude of the litigant status effect. In short, status is likely critical in determining whether one will have his or her case reviewed at all.

In what follows we focus on the influence of litigant status at the US Supreme Court's agenda-setting stage. We find that although litigant status does affect the agenda-setting decisions of the justices, its influence is conditional. At the *petition* level, we demonstrate that the role of litigant status is generally not mitigated by the presence of interest group support for the weaker litigant.

¹These inconsistent findings might be partially reconcilable due to the different methodological approaches taken by the authors. The Sheehan et al. approach is to estimate separate models of success for each group of litigants (see Sheehan et al. 1992, table 4) and then perform a separate time series analysis to examine the aggregate effect of litigant status. Collins (2004, 2007) and McGuire (1995) pool all litigants together and understandably do not use a form of time series analysis.

This runs contrary to previous findings in the context of state supreme courts (Songer et al. 2000). When we turn our focus to *justice*-specific voting, however, our results indicate that the impact of interest groups is not constant across all justices but rather is conditional both on a justice's ideology and the petitioning litigant's status. This finding provides an important caveat to the seminal findings of Caldeira and Wright (1988), who suggest that interest group support is a general cue for all justices.

Taken as a whole, we make a novel contribution to the literature with regard to litigant status, Supreme Court agenda setting, and the conditional nature of the effect of justice ideology and interest group participation in this process. Like other recent studies on the Supreme Court's premerits stage decision making (e.g., Johnson 2004 [oral arguments], Maltzman and Wahlbeck 1996 [opinion assignment], and Wahlbeck et al. 1999 [the writing of dissenting and concurring opinions]), our research design and findings serve to develop a more fine-grained intricate understanding of Supreme Court decision making. And, as we will discuss in greater detail below, our results have important implications for American politics more generally.

The Conditional Theory of Litigant Status

We begin with the basic theoretical premise that courts, like other political institutions, are a venue for "haves" to favorably leverage their status differential against "have nots." In particular, resource-endowed litigants have expertise, bargaining credibility, flexibility in long-term strategy and litigation, continuity in legal services, and fewer cost and delay barriers (Galanter 1974; Grossman et al. 1999). In a legal system marked by high caseloads, long case resolution times, and increasingly institutionalized pressure for interparty bargaining and settlement, these advantages are especially troubling for weak litigants. They also mean that status disparities are likely to be operative throughout the litigation cycle, starting from the decision to file a case, to case negotiation, to decisions to appeal, and continuing through case resolution at the highest court in the nation, the US Supreme Court.

As we note above, a long line of scholarship before us has argued and found that these inequalities can (and often do) affect which side will ultimately prevail in a case. This reasoning can easily be extended to argue that these same disparities can influence the Supreme Court's initial decision to grant review in a case.² Endowed with nearly complete discretion over the composition of its agenda, the US Supreme Court's agenda-setting process is among the most selective of any US political institution. Since 1990, the Court has granted review in approximately 1% of the more than 8000 petitions that arrive on its

²Others before us have suggested that the weakest litigants are at a disadvantage during the Court's agenda-setting process. In particular, individuals filing a petition *in forma pauperis* (IFP) (Watson 2006) and those filing without the aid of a lawyer (*pro se*) (Smith 1999, 2001) are less likely to get their cases heard. Although we agree with this argument, we believe that the theory of litigant status implies that important differences also exist *within* non-IFP/non-*pro se* litigants.

doorstep each term (Epstein et al. 2007b). Each of these petitioners has lost in a lower court and is asking the Supreme Court for a writ of certiorari (cert). Before cert can be granted, however, at least four justices must vote to grant review during the Court's agenda-setting conferences (Rehnquist 2001). This process first starts with the creation of a "discuss list." The discuss list is drafted by the Chief Justice, who identifies petitions he thinks deserve discussion and a formal vote. The Chief circulates the list to the associate justices, who can each add (but not subtract) petitions to it. Those petitions not making the discuss list are summarily denied review.

Because of the sheer volume of cases flowing through the Court's doors, justices (and their law clerks) must utilize informational cues to help separate the chaff from the wheat. As Tanenhaus et al. (1963) suggest, "[t]he presence of any of these cues would warn a justice that a petition deserved scrutiny. If no cue were present, on the other hand, a justice could safely discard a petition without further expenditure of time and energy" (pg. 118). The dynamics of this sorting process, we suggest, should favor petitioners who can craft briefs that highlight the presence of positive cues while minimizing any negative ones (and vice versa for respondents).

For example, the Court provides some guidance to would-be petitioners in identifying what it looks for in selecting cases for review. Supreme Court Rule-10 suggests that the Court places a significant emphasis on reviewing cases in which the lower court decision presents a conflict between lower appellate court decisions or a decision of the Supreme Court on an important question. Of course, not all conflicts are created equal. There is a marked difference between merely alleging the existence of conflict and providing the Court with evidence of a *genuine* conflict. The latter involves demonstrating that "the issue has fully percolated among the lower courts, that the conflict is widespread, and that the conflict relates to an issue on which disagreement among the lower courts is intolerable" (Stern et al. 2002: 434). The ability and requisite background knowledge necessary to argue for the presence (as a petitioner) or absence (as a respondent) of genuine conflict is likely to be available only to those who frequently litigate before the Supreme Court (e.g., the federal and state governments) or who can afford to rent the services of those individuals and law firms that have.

The foregoing arguments paint a relatively bleak picture for resource-deprived litigants. Although the advantages of status are both numerous and potent, previous research suggests that the impact of a status differential can be lessened by several factors. We focus on two particularly important conditioning factors: judicial ideology and interest group support.³

³There are other factors that are less germane to the agenda-setting decision. For example, one offsetting institutional component is the existence of IFP status, whereby state and federal courts allow litigants below a certain income and bank account level to be excused from many of the filing fees and procedural requirements throughout the court system. If an IFP petitioner's case is granted review, then the Court assigns an experienced attorney to represent the litigant. In one of the most famous examples of this practice, Charles Gideon, an indigent prisoner, submitted a handwritten

The petitions before the Court represent the future vehicles the justices will use to craft legal policy. Although it borders on a truism to suggest that justices have preferences over what legal policy will look like, a logical consequence of this is that justices should also care about what types of interests are granted a final opportunity to seek justice before the Court. In analyzing US district court judges' decision to grant or deny standing to sue, Rowland and Todd (1991) find that judges appointed by Democrats rule in favor of "underdogs" at a higher rate than their Republican-appointed counterparts. At the Supreme Court's merits stage, McAtee and McGuire (2007) find that "the combined effects of ideology and litigant status reveal that liberal justices favor the social and economic underdogs, while more conservative justices support the interests of wealthier, institutional litigants" (pg. 271). In short, our expectations track those of Ulmer (1978), who notes, "[i]n making decisions to grant or deny formal review, liberal justices are predisposed to support underdogs over upperdogs while conservative justices are predisposed in the opposite direction" (pg. 903).

Beyond the role of judicial preferences, external support for a weak litigant's case is also thought to strengthen his or her chances of success. In the judicial context, this support most often comes in the form of *amicus curiae* (friend of the court) briefs filed at both the agenda-setting and the merits stages. During the Court's agenda-setting decision, amici could serve one of several functions. First, it could be the case, as suggested by Caldeira and Wright (1988), that amici simply act as yet another positive cue for the Court. Because of the costs of preparing a brief and the uncertainty over whether the case will be granted review, amicus activity is relatively rare. The presence of a brief, then, sends a signal to the Court that a particular petition likely contains issues worthy of the Court's time. In other words, it is not so much the content or arguments within a particular brief, but rather its sheer existence that is important. If this argument holds, then regardless of the status differential between the litigating parties, the statistical effect of an amicus brief should be to uniformly increase the likelihood of review (i.e., an intercept shift).

A second potential role for agenda-setting amici is an informational one (Collins 2004, 2007, 2008a,b). By this logic, the main contribution amici offer is additional legal arguments not found in the litigating parties' briefs as to why the petition should be granted review. Such arguments might, as we suggest above, appeal to the existence of an intolerable legal conflict on a question of broad importance. If this description characterizes the role of amici at the cert stage, then we should expect to find a conditional relationship between the presence of amici and the status differential between the litigating parties. In particular, the effect of amicus briefs should increase as the status gap between the litigants increases. This is because the briefs of weaker litigants should contain less well-formulated arguments than those of strong litigants, which

letter to the Court seeking review. After granting his petition, the Court appointed future Supreme Court justice Abe Fortas—then a prominent Washington, DC, attorney—to represent Gideon.

creates the opportunity for amici to make up the difference.⁴ This hypothesis tracks the empirical findings of [Songer et al. \(2000\)](#), who, in analyzing the merits decisions of several state supreme courts, find that the presence of amicus support helps the “have nots” more than it helps the “haves.”

Third, and finally, it could be that the informational role of amici is ultimately conditioned by a judge’s policy preferences. The previous hypothesis suggests the informational effect will be equally strong for justices with both liberal and conservative policy preferences. However, if our argument regarding judge ideology is accurate, then we should also expect that justices of a particular policy persuasion will weigh the presence of the information provided by amici differently. Borrowing from the social psychological perspective (see, e.g., [Kunda 1990](#); [Bramen and Nelson 2007](#)), justices might engage in a form of motivated reasoning whereby they discount additional information that conflicts with their previously formed views toward the litigants. As a result, we would expect to see liberal justices more likely to grant review when the petitioner is weak and there is amicus participation supporting him or her. A justice’s conservative colleague, however, should severely discount this information to the point where it does not significantly enhance the weak petitioner’s likelihood of receiving a grant vote. When a petitioner is strong, by contrast, these expectations should be reversed, with a conservative justice capitalizing on the additional information and the liberal justice discounting it.⁵

Measuring Litigant Status

In investigating the impact of litigant status on litigation success, previous attempts have ranked parties by their relative status. Most research, as reviewed in [Table 1](#), has placed litigants into one of multiple categories for litigant resources.⁶ [Wheeler et al. \(1987\)](#) first provided a ranking of four types of litigants: individual litigants, small businesses, business corporations, and government parties. This scale was later modified to expand the types of parties (e.g., [Sheehan et al. 1992](#); [Songer and Sheehan 1992](#); [Songer et al. 1999](#)).

⁴We note that cue and informational explanations are not entirely mutually exclusive. It could be the case, for example, that the benefit of amici decreases steeply as the status gap closes but then stabilizes for some set of values.

⁵Merits-level analyses of this hypothesis have found mixed support. [Spriggs and Wahlbeck \(1997\)](#) find that the 1992 Court, which was relatively conservative in ideological makeup, was more likely to accept amicus arguments that supported conservative legal positions as opposed to liberal ones. In a more complete test, however, [Collins \(2008b: 106–113\)](#) finds that a justice’s ideology is generally unrelated to the impact a particular amicus brief will have upon him or her.

⁶Some work has divided litigants into two categories—“haves” and “have nots”—and compared the two ([Rowland and Todd 1991](#); [Brace and Hall 2001](#)). This is functionally equivalent to approaches taken in work on the US Supreme Court’s agenda setting, which includes a variable for whether the US government seeks review ([Caldeira and Wright 1988](#); [Caldeira et al. 1999](#)). Inclusion of these variables pools all nonfederal government petitioners into a single monolithic category, thereby assuming that poor individuals have the same status as, for example, state governments.

Table 1. Litigant Status Rankings (weakest at top) Used in Six Articles Analyzing the Impact of Litigant Status on Judicial Decision Making

Wheeler et al. (1987)	Sheehan et al. (1992)	Songer and Sheehan (1992)	Songer et al. (1999)	Collins (2004, 2007)
Individuals	Poor individuals	Underdog individuals	Individuals	Poor individuals
Small businesses	Minority individuals	Other individuals	Businesses	Minorities
Local/state government	Other individuals	Businesses	Local/state government	Individuals
US government	Unions	Big businesses	US government	Unions/interest groups
	Small businesses	Local/state government		Small businesses
	Other businesses	US government		Businesses
	Large corporations			Corporations
	Local government			Local government
	State government			State government
	US government			US government

Although certainly providing a more intricate understanding of party positions and resources than those that simply assign litigants as “haves” or “have nots,” the scaled rankings remain a “pragmatic solution” (Wheeler et al. 1987: 413), weakened at times by arbitrariness and overgeneralization. Despite these concerns, scholars are in widespread agreement as to the general ordering of the parties within the scales: individuals are the least powerful and have the smallest number of resources while at the same time have the greatest stakes when they are involved in litigation and appeals; businesses have the next level of power because they are better organized than individuals and have a greater pool of resources to pursue litigation. Finally, governments, owing to their nearly limitless pool of resources and frequency with which they litigate, are thought to be the most powerful litigants.

As depicted in Table 2, we adopt a classification scheme that assigns each petitioner and respondent to one of nine categories, an approach largely similar to Collins (2004, 2007).⁷ This scale is particularly attractive because of its careful placement of interest groups, a step that other research has failed to make (e.g., Sheehan et al. 1992; McGuire 1995; McAtee and McGuire 2007). In addition, the scale’s multileveled accounting of governmental parties recognizes the importance of these actors in litigation, something that has been duly noted in the party capability theory literature (e.g., Kritzer 2003).

Table 2. Litigant Status Rankings (weakest to strongest) That Include Interest Groups and Organizations. These Rankings Were Used to Create Our Petitioner Status Variable, Which Measures the Status Differential between the Petitioner and the Respondent

Litigant status	Representative examples
Poor individuals	Prisoners, IFP parties
Other individuals	Disgruntled employee, disabled veteran, private attorney
Unions/interest groups	San Francisco Arts & Athletics Association
Small businesses	47th Street Photo, Sequoia Books
Businesses	Globe Newspaper Co., Corning Glass Works, Inc.
Big businesses	Burlington Northern Railroad, Trans World Airlines, CitiCorp
Local government	City of Rolling Meadows, Illinois
State government	Wisconsin Department of Revenue, Montana Board of Pardons
US government	National Labor Relations Board, Federal Communications Commission

⁷We make two minor departures from Collins’ coding scheme. First, because lower court opinions do not consistently or reliably identify the race of the litigants, we omit the “minorities” category from the list. Second, in lieu of the small business, business, and corporation trichotomy, we coded small business, business, and big business. We follow Songer and Sheehan (1992) and code a business as a “big business” if it is a railroad, bank, manufacturing company, insurance company, airline, or oil company. As others before us, our goal in coding “big business” versus the other two categories is to “identify those businesses that are assumed to represent large national corporations and presumably have greater litigation and financial resources than smaller ‘mom and pop’ businesses” (Farole 1999: 1049).

Data and Measures

To study the role of litigant status in the Supreme Court's certiorari process, we focus first on the overall outcome of petitions for cert and then turn to individual justice voting behavior. To conduct this research, we analyzed a subset of petitions considered by the Court. Using the conference discuss lists in Justice Harry A. Blackmun's files, we developed a list of all nondeath penalty⁸ docket numbers for cert petitions that made the discuss list during the 1986, 1987, 1991, and 1992 terms—a total of 1577 unique docket numbers.⁹ The data used for our analysis ultimately consist of 447 randomly selected petitions (a 28% sample) that provide us with 3798 justice votes.

The discuss list represents the population of petitions eligible to receive grant votes from individual justices, meaning that all petitions that fail to make the discuss list are summarily denied review. Of course, as the formation of the discuss list is nonrandom (Caldeira and Wright 1990), there is an initial selection process that, owing to methodological limitations, we do not account for.¹⁰

Despite this limitation, we ultimately believe that this selection process biases the data included in our sample *against* finding the results we report below. This stems from the fact that although a significant portion of the petitions seeking review are filed by indigent petitioners (59% of the petitions filed during the terms of our analysis), only 25% of the petitions on the Court's discuss list are from indigents; this difference is statistically significant ($p < 0.001$). Thus, incorporating the formation of the discuss list would only increase the number of times that an indigent—the weakest petitioner—would lose to a stronger respondent, which would strengthen the results we find. This is consistent with the argument of Songer and Sheehan (1992), who note “[f]rivolous

⁸During the terms analyzed, all death penalty petitions were automatically added to the discuss list. Moreover, when the Court voted on these petitions, it was the standing policy of Justices Brennan and Marshall to vote to grant the petition, vacate the death penalty portion of the lower court decision, and remand the case for further proceedings (Woodward and Armstrong 1979; Lazarus 2005). Because this process vastly differs from that of nondeath penalty cases, we removed all capital cases from our sampling population.

⁹The Appendix A provides extensive details on how the data were parsed down before leading to the final data set of cert petitions from which we sampled.

¹⁰We note that although a Heckman-style selection model might seem like the obvious answer here, it is ultimately inappropriate. This stems from the fact that its estimation depends upon the existence of at least one variable that is related to the selection equation (here, i.e., discuss list or not) but is also wholly *unrelated* to the outcome equation (here, grant or deny from the discuss list). Failure to specify a proper exclusionary restriction can yield biased parameter estimates and erroneous inferences (Brandt and Schneider 2007; Freedman and Sekhon forthcoming). Our examination of the limited number of previous studies on the Supreme Court's discuss list (Caldeira and Wright 1990; Schoen and Wahlbeck 2006) did not identify a single variable whose effect was likely confined to only the creation of the discuss list.

Another potential solution has been proposed in work by Sartori (2003), who develops an estimator that is identified by assuming that the error terms across both equations are equal and thus allows the user to include identical variables in the selection and outcome equations. However, as we note in the text, although all justices have an eventual say in forming the Court's discuss list, its creation is largely dominated by the Chief Justice. As a result, we have some reason to believe that one of Sartori's assumptions—that the selection and outcome have the same causes—might not hold.

appeals by individuals inflate the winning percentages of governments and businesses” (pg. 256).

To isolate the influence of litigant status, we canvassed over 40 years of literature and include a myriad of control variables that previous research has suggested are related to the cert vote decision (e.g., [Tanenhaus et al. 1963](#); [Ulmer et al. 1972](#); [Brenner 1979](#); [Songer 1979](#); [Caldeira and Wright 1988](#); [Caldeira et al. 1999](#)). This is a necessary step since “[b]efore influence can be inferred, we must show that an actor in the Court’s environment had an independent impact after controlling for other factors” ([Segal and Spaeth 1993](#) :237).

As we discuss above, over the years, scholars have developed a set of “cues” or factors that the Court relies upon to help isolate petitions worthy of the Court’s limited docket space. Accordingly, we control for the following cues:¹¹

- Allegation and presence of legal conflict
- Participation of the Solicitor General as *amicus curiae*
- Ideological direction of the intermediate court decision
- Presence of a dissenting opinion at the intermediate court level
- Reversal of the trial court by the intermediate court
- Publication status of the intermediate court opinion (unpublished or published)
- Whether the petitioner made a constitutional claim
- Whether the petition concerned civil liberties issues
- Number of *amicus curiae* briefs filed in support of the review-seeking party.¹²

The details on the coding of these variables are provided in Table 3. The source for nearly all these variables is various parts of the cert memorandum, which is prepared by a law clerk who works in the chambers of a cert pool-participating justice.¹³

¹¹Some earlier studies have also included controls for the previous litigating experience held by each attorney ([McGuire and Caldeira 1993](#); [Flemming and Krutz 2002b](#)). Although microfiche of the Supreme Court’s records and brief identify the attorneys in paid petitions, the only copy for IFP petitions is the one retained by the Supreme Court’s own library. As such, we are unable to directly parse out the role of attorney experience in the Court’s cert process.

¹²There is mixed support for the notion that *amicus* briefs filed in *opposition* to a cert petition affect the Court’s decision to grant review. Although [Caldeira and Wright \(1988\)](#) originally find evidence that opposing *amicus* briefs increase the likelihood of review, in a reanalysis of the same data (and two additional terms), [Caldeira and Wright \(1998\)](#) find no relationship. As a practical matter, the rarity with which opposing briefs are filed (fewer than 1% of all petitions in our data) would result in very low cell frequencies for our maximum likelihood analysis ([Long 1997](#): 54). Accordingly, we are unable to examine the extent to which counteractive lobbying behavior by interest groups—an important component at the merits stage ([Solowiej and Collins 2009](#))—exists at the agenda-setting stage.

¹³A clerk might attempt to exert influence by omitting or manipulating basic factual elements from the pool memo. We ultimately have no evidence to believe that this is a problem with our data. [Ward and Weiden \(2006: 133–134\)](#) document particular concerns raised by the pool justices during the Burger Court years about the reporting of dissenting opinions and the names of judges participating in a particular case. In our own review of the intracourt memoranda, we saw no evidence of similar complaints during the Rehnquist Court years encompassed in our study.

Table 3. Variable Codings Used in Statistical Analysis

Variable name ^a	Coding	Expected direction
Alleged Conflict	Was conflict between the lower court decision and a decision of the Supreme Court or a federal court of appeals alleged? (0 = no, 1 = yes)	+
Actual Conflict	Conditional on conflict being alleged, does pool clerk state that the conflict is real? (0 = no, 1 = yes)	+
US Amicus Position	-1 = Solicitor General opposes granting as amicus, 0 = Solicitor General not amicus, 1 = Solicitor General recommends granting or is not opposed to granting as amicus	+
Lower Conservative	0 = Liberal intermediate court decision, 1 = conservative intermediate court decisions	-
Lower Reversal	0 = Intermediate court does not reverse trial court, 1 = intermediate court reverses trial court	+
Lower Dissent	0 = No dissent in intermediate court, 1 = dissenting opinion in intermediate court	+
Constitutional Claim	0 = No constitutional claim made by petitioner, 1 = constitutional claim made by petition	+
Civil Liberties	0 = Petition does not involve Spaeth value code 1-6, 1 = petition does involve Spaeth value code 1-6. This definition comes from Segal and Spaeth (2002) .	+
Lower Unpublished	0 = Intermediate court opinion was published, 1 = intermediate court opinion was not published	-
Petitioner Amicus Briefs	Number of amicus curiae briefs filed in support of granting review in a given petition	+
Ideological Distance ^b	Absolute value of the difference in the Martin-Quinn score of the voting justice and the median justice on the Court, also identified by Martin and Quinn	-
Justice Ideology ^b	Martin-Quinn score for the justice during the term in which the petition was reviewed	N/A
Ideological Congruence ^b	Interaction of Lower Conservative with Justice Ideology	-
Petitioner Advantage	See Table 2	+

N/A, not applicable.

^aInteraction terms are the product of their constitutive elements.

^bThe variable is measured at the justice level and as such is only included in the model where the dependent variable is the justices' votes (Table 5).

Additionally, there were only a handful of minor corrections made by Justice Blackmun's clerks to basic factual information contained within the pool memos, which leads us to believe that any suspicious patterns in factual errors had been stamped out during the terms of our study.

Following a long line of literature examining party status differentials (e.g., Songer and Sheehan 1992; McCormick 1993; McGuire 1995, 1998; Collins 2004), we operationalize Petitioner Advantage as the difference between the values of petitioner status and respondent status in a given petition.¹⁴ Our Petitioner Advantage variable has a theoretical range of -8 to 8 . A value of -8 means that a poor individual is petitioning for cert against a federal government respondent, whereas a value of 8 means that the roles of those parties are reversed. The variable has a mean of roughly -2 , and a standard deviation of approximately 5 , meaning that the average petition in our sample tends to favor the respondent more than it does the petitioner. Of the 447 petitions in our sample, the petitioner is favored—regardless of by how much—in 31% of the petitions. The respondent is favored in 62%, and the parties are of equal status in the remaining 7% of all petitions.

We also examine whether the effect of litigant status is mitigated by interest group support for the weaker party. In particular, Songer et al. (2000) demonstrate that weaker litigants in state supreme courts benefit much more than stronger litigants when an interest group supports them. To test this in the context of the Supreme Court's agenda-setting stage, we include the variable Petitioner Advantage \times Petitioner Amicus, which is an interaction of the petitioner's advantage with the number of briefs filed in support of the petition. If the hypothesis is supported, the presence of amicus briefs for the petitioner should be particularly influential when the petitioner is weak.

The Court's Decision on the Petition for Cert

We begin by examining the decision of the Court as a whole to grant or deny cert in each petition. Accordingly, our dependent variable, whether a petition is granted cert, is coded as 0 if it is denied and 1 if it is granted. In our sampled data, around 31% of the 447 petitions were granted review. Because the outcome is whether the Court grants or denies a petition, we estimate a logistic regression model with robust standard errors.¹⁵ The parameter estimates for the model are reported in Table 4.

The control variables perform as expected or are not significant. More generally, the model's overall performance is strong. It correctly predicts around 79% of the petitions and reduces prediction errors by around 31%. Since our variable of interest includes an interaction term, we cannot directly interpret the results from the table alone (Ai and Norton 2003; Kam and Franzese 2007; Berry et al. 2010). Because of this, we follow the advice of others (King et al. 2000; Brambor et al. 2006) and turn to stochastic simulations (similar to Clarify;) to understand the substantive nature of our results.

We start first with the substantive significance of Petitioner Advantage, which we display in Figure 1. Holding all other variables at their median values, the

¹⁴The Appendix A discusses the robustness of Petitioner Advantage and details alternative measurement strategies.

¹⁵Specifying asymptotic standard errors does not alter our results.

Table 4. Logistic Regression Model of Petition Outcome

Variable	Coefficient	Robust SE
Alleged Conflict	0.331	0.333
Actual Conflict	2.281*	0.310
US Amicus Position	1.535*	0.614
Lower Conservative	0.330	0.351
Lower Reversal	0.203	0.296
Lower Dissent	0.429	0.308
Constitutional Claim	-0.230	0.280
Civil Liberties	-0.491	0.310
Lower Unpublished	-0.427	0.352
Petitioner Amicus Briefs	0.366*	0.167
Petitioner Advantage	0.154*	0.036
Petitioner Advantage \times Petitioner Amicus	-0.031	0.035
Constant	-1.587*	0.361
Observations	447	
Log likelihood	-196.037	
Pseudo R^2	0.288	
% Correctly predicted	79.0	
PRE	31.4	

PRE, proportional reduction in error; SE, standard error.

* $p < 0.05$ (two-tailed test).

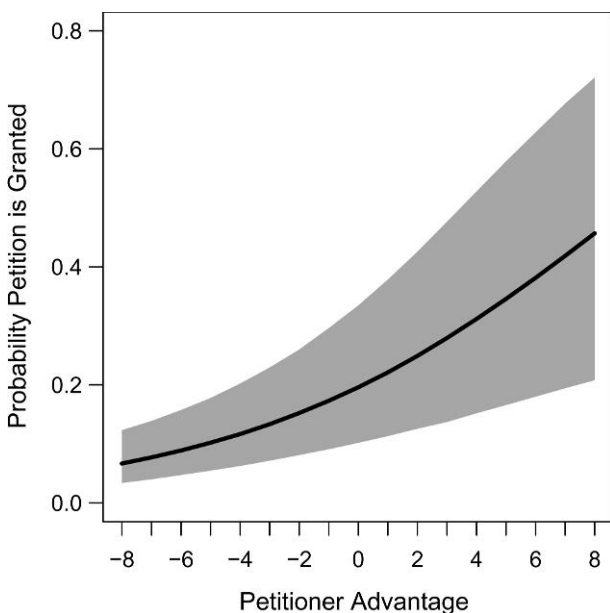


Figure 1. Probability That the US Supreme Court Grants Cert in a Petition, Conditional on Petitioner's Advantage in Status. All Other Variables Are Held at Their Median Values. The Shaded Gray Area Represents the 95% Confidence Interval Around the Mean. These Values Were Calculated Using Stochastic Simulations.

likelihood of granting review runs from 0.07 when the petitioner is weakest compared with the respondent to 0.46 when the petitioner is strongest against a weak respondent—more than a six-fold increase in the probability of granting review.¹⁶ This confirms our intuitions about the role of litigant status and provides some of the first evidence that litigant status does have a meaningful impact on the likelihood that the US Supreme Court will grant review.¹⁷

We turn next to considering whether this litigant status effect can be mitigated by the presence of interest group support for the petitioning party. The relevant results are portrayed in the two panels of Figure 2. The top panel shows the probability that, conditional on the value of Petitioner Advantage, a petition will be granted with zero, one, and two amicus briefs. Recall that the informational role of amici hypothesis implies that weaker litigants will disproportionately benefit versus their stronger counterparts when it comes to the presence of amicus briefs. If this hypothesis was supported by our data, then the vertical distance between zero briefs and one or two briefs should be largest on the left side of plot (when petitioner advantage is -8) and then decreasing sharply in size as the petitioner's advantage increases. Our results only provided weak support for this expectation. As the top panel indicates, for over half of the entire range of Petitioner Advantage, the slope of the zero amicus briefs line is nearly identical to that of the one amicus brief line. The lines do slightly converge, however, once the petitioner goes from being the weaker party to being the stronger party.

To bring additional clarity to this relationship, we calculated the difference in probability between a petition with one versus zero amicus briefs. This quantity, along with its 95% confidence interval, is plotted in the bottom portion of Figure 2. Substantively speaking, this value is the size of the advantage afforded to petitions with amicus support, conditional on the petitioner's relative status. The most striking aspect of this plot is the overall flatness of the amicus advantage. Indeed, there is actually a small *increase* in the size of the amicus advantage as a petitioner gets stronger. A petitioner who is significantly weaker than the respondent (e.g., a value of -7) will have a 0.05 increase in the probability of having his petition granted with the presence of a single amicus brief versus having none. This advantage increases to 0.06 if the petitioner

¹⁶The 95% confidence intervals around these point predictions are [0.03, 0.12] and [0.21, 0.72], respectively. Note that the width of the confidence intervals for the predicted probability generally increases as Petitioner Advantage becomes larger. Overlapping confidence intervals for mean point predictions do not necessarily mean that no statistically significant difference exists between two quantities. The real value of interest, the difference in the probability, has a separate distribution with its own mean and confidence interval (Austin and Hux 2002; Epstein et al. 2006). For our estimates, the difference in probability for any two values of Petitioner Advantage is statistically significant at the 95% level.

¹⁷It could be that our findings are driven by the high proportion of petitions filed by criminals on the Court's docket. We address this concern in two ways. First, by sampling from the discuss list, we eliminate a large portion of frivolous petitions since they do not make the discuss list. Second, we reestimated both the petition and the justice models on a data set that excluded all criminal cases. The results at the petition level remain virtually identical. See Note 20 for details on the changes at the justice vote level.

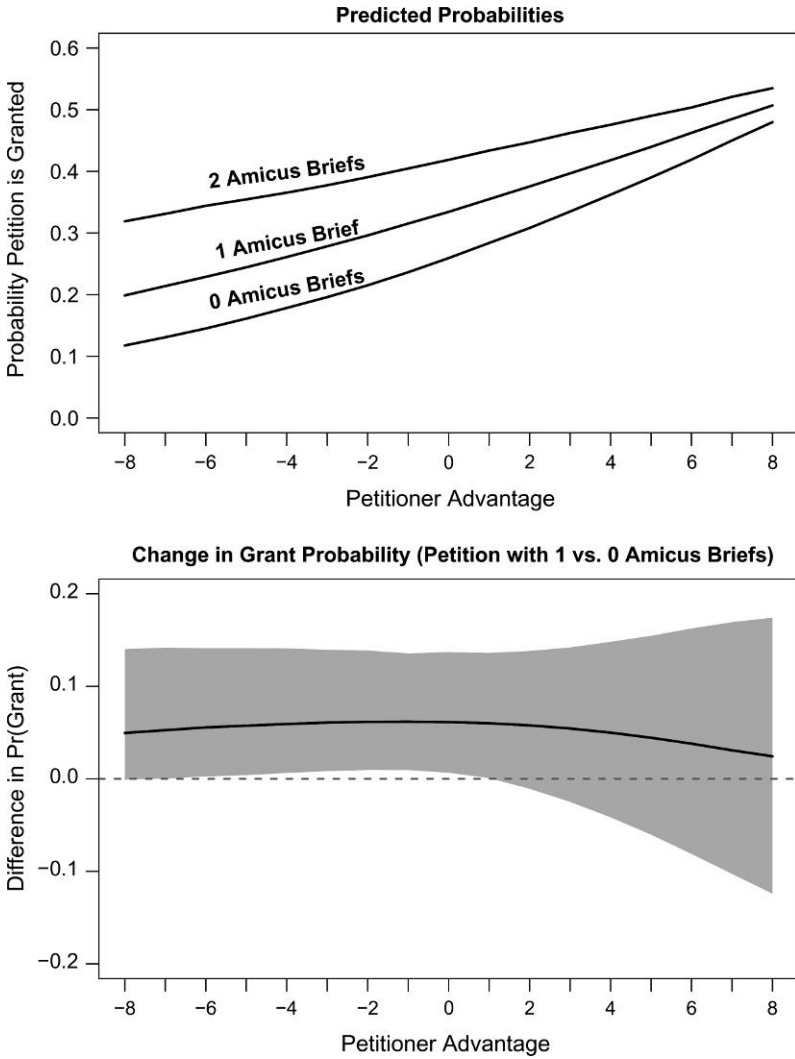


Figure 2. Probability That the US Supreme Court Grants Cert, Conditional on Petitioner’s Advantage in Status and Level of Interest Group Support for Petitioner (top panel) and Difference in Probability between a Petition with One Amicus Brief and Zero Amicus Briefs, Conditional on the Level of Petitioner Advantage (bottom panel). All Other Variables are Held at Their Median Values. The Shaded Gray Area in the Bottom Panel Depicts the 95% Confidence Interval. These Values Were Calculated Using Stochastic Simulations.

is actually slightly stronger than the respondent (e.g., a value of +1). As the petitioner’s advantage increases beyond +1, however, the 95% confidence interval for the amicus advantage always contains zero, meaning that there is no systematic advantage at this level of Petitioner Advantage.

From our perspective, these results provide only limited support for the informational role of amici at the agenda-setting stage. That is, our results indicate that a “weak” petitioner gets some benefit, whereas a “strong” petitioner

gets no benefit. These results are far from conclusive, however. In particular, our theory—and the previous results of [Songer et al. \(2000\)](#)—suggests that the weakest petitioner (e.g., a -8) should get more support than someone who is somewhat stronger (e.g., a -4), and our results show that among the class of weak petitioners, there is some evidence to support the opposite conclusion.

The Justices' Votes on the Petition for Cert

Although analyzing the petition-level outcome is instructive, we believe that disaggregating the data analysis to justice votes is even more important. Since the Court's membership regularly changes, knowing about the behavior and preferences of individual justices with regard to litigant status provides us far more predictive power and allows us to test hypotheses about how justice-level characteristics such as their ideology influence justices' cert votes and condition the impact of litigant status. This level of analysis is thus key since a finding of litigant status differences also reflects "the values, ideological preferences, and prejudices" ([Sheehan et al. 1992](#): 464) of the justices serving on the Court.

Accordingly, we seek to test two additional hypotheses discussed above. First, to tap into the intuition that liberal justices may be more likely to support underdog litigants than conservative justices, we interact Petitioner Advantage with Justice Ideology, a variable we operationalize as a justice's Martin-Quinn score ([2002](#)) for the term in which a petition was reviewed. Our second hypothesis, which we derived from the literature on motivated reasoning, implies that the informational role of amicus support is conditioned by a justice's ideology. We test this hypothesis statistically by interacting Petitioner Advantage, Petitioner Amici, and Justice Ideology.¹⁸

From the 447 petitions in the previous model, we obtain a total 3798 justice votes. Our dependent variable is the dichotomous vote to grant (coded as 1) or deny (coded as 0) a petition, which we obtained from the docket sheets of Justice Blackmun ([Epstein et al. 2007a](#)). The parameter estimates for our logistic regression model are reported in [Table 5](#). Before returning to stochastic simulations to examine the substantive nature of the variables, we note that the control variables continue to perform in a manner consistent with previous research.¹⁹ Additionally, judging from in-sample measures of model fit, the

¹⁸In moving to the justice level, we include two additional control variables to account for other influences on the justices' votes. These variables tap into a justice's presumed desire to review decisions that reach an outcome that is ideologically opposed to her own preferences (Ideological Congruence) and also the idea that justices evaluate the prospects of their desired legal policy prevailing at the merits stage (Ideological Distance) when casting cert votes ([Black and Owens 2009](#)). Both variables and their measurement are described in [Table 3](#).

¹⁹The Appendix A provides additional details on several recoding rules we used in creating this dependent variable. We also reestimated the model with alternative specifications of the standard errors, including asymptotic, justice clustered, and petition clustered (results available upon request). Most importantly, the nature of the substantive results we discuss below is not dependent upon one's choice of error structure.

Table 5. Logistic Regression Model of Justice Vote

Variable	Coefficient	Robust SE
Alleged Conflict	0.247*	0.107
Actual Conflict	1.603*	0.097
US Amicus Position	1.077*	0.201
Lower Conservative	0.143	0.109
Ideological Congruence	-0.209*	0.055
Lower Reversal	0.368*	0.095
Lower Dissent	0.205*	0.095
Constitutional Claim	-0.169	0.091
Civil Liberties	-0.116	0.097
Lower Unpublished	-0.247*	0.116
Ideological Distance	-0.170*	0.042
Justice Ideology	0.116*	0.042
Petitioner Amicus Briefs	0.384*	0.063
Petitioner Advantage	0.066*	0.011
Justice Ideology × Petitioner Advantage	0.025*	0.006
Petitioner Advantage × Petitioner Amicus	-0.032*	0.014
Justice Ideology × Petitioner Amicus	0.017	0.031
Justice Ideology × Petitioner Amicus × Petitioner Advantage	0.021*	0.007
Constant	-1.453*	0.136
Observations	3798	
Log likelihood	-1851.070	
Pseudo R^2	0.183	
% Correctly predicted	76.5	
PRE	17.4	

PRE, proportional reduction in error; SE, standard error.

* $p < 0.05$ (two-tailed test).

model performs well. It correctly predicts around 77% of the justices' votes and achieves a 17% reduction in error.

In fleshing out the substantive implications of our statistical model, our primary goal is to characterize the two hypotheses discussed above. We first consider the interplay between a justice's ideology and litigant status. This relationship is portrayed in Figure 3, which shows the predicted probability of a grant vote, conditional on the level of a petitioner's advantage for three values of justice ideology. Although likely not coming as a surprise to many, the strength of these ideological results is telling. They indicate that even when it comes to agenda setting, liberal justices are, empirically speaking, more likely to be protectors of the weak than conservative justices. The most liberal justice, in our data Justice Marshall, has a 0.34 probability of voting to grant review when the petitioner is at his weakest. Contrast this with the most conservative justice, in our data Chief Justice Rehnquist, who has only a 0.05 probability of voting to grant review in the same petition. Interestingly, our results suggest that the median justice in our data, Justice Kennedy, behaves in a manner that is more similar to an extreme conservative than an extreme liberal and votes to grant review with a probability of only 0.11.

We continue to observe a strong ideological effect across higher values of petitioner status as well. An increase in the petitioner's status decreases the

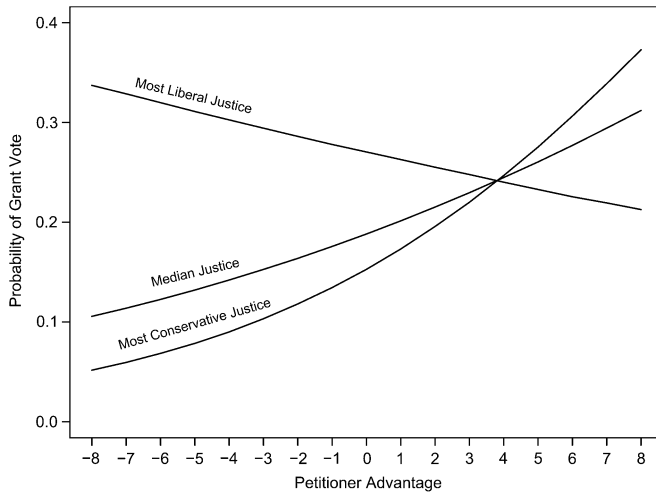


Figure 3. Probability That a Justice Votes to Grant Cert, Conditional on his Ideology and the Petitioner's Status Advantage. To Preserve the Figure's Readability, We Omit Confidence Intervals Around the Point Estimates; However, Differences across the Values of Justice Ideology Are Statistically Significant for the Majority of the Range of Petitioner Advantage. All Other Variables Are Held at Their Median Values. These Values Were Calculated Using Stochastic Simulations.

likelihood that a liberal justice will grant review and correspondingly increases the likelihood that a conservative justice will grant review. For the case of an extremely strong petitioner, such as when the federal government is the petitioner and a poor individual is the respondent, the ordinal relationship among the justices is preserved, but the magnitude of the difference is smaller, as demonstrated by the very slight vertical distance between the lines on the far right side of the figure.²⁰

We next add the component of amicus support into the mix. In the previous figure, we held all variables at their median values, which for the number of pro-petitioner amicus briefs is zero. To evaluate the mitigating effect of amicus support on litigant status, we simply alter the counterfactual to include a single amicus brief and calculate the difference in predicted probability for a petition with and without an amicus brief. This yields the advantage in probability that a petition receives when an amicus brief is filed, again conditional on litigant status and justice ideology, and is graphically depicted in Figure 4.

Starting with the top panel of Figure 4, we see that a liberal justice's probability of voting to grant increases by 0.30 when an amicus brief is present and the value of Petitioner Advantage is at -8 . Contrast this with his more

²⁰In Note 17, we state that there are no differences at the petition level when one excludes criminal petitions from the sample. At the justice level, the only difference we note is a lessening of the negative slope of the line for the most liberal justice in Figure 3. Excluding criminal petitions makes the line almost entirely flat. The other justices' lines are unchanged. Additionally, the results from Figure 4 remain unchanged.

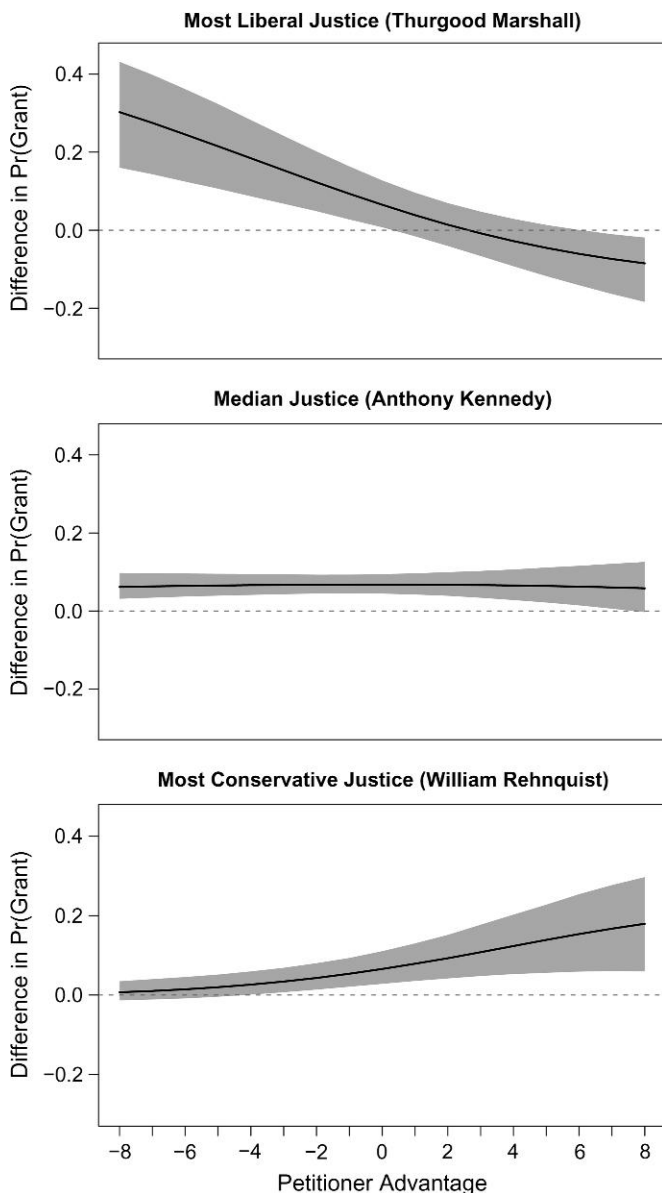


Figure 4. Change in Probability That a Justice Votes to Grant Cert in a Petition with One versus Zero Amicus Briefs, Conditional on Justice Ideology (panels) and Petitioner's Advantage in Status (x axis). The Shaded Gray Area Depicts 95% Confidence Intervals Around This Change. All Other Variables Are Held at Their Median Values. These Values Were Calculated Using Stochastic Simulations.

moderate colleague whose increase is only 0.06 and the most conservative justice for whom the magnitude of the effect is not statistically different from zero. Moreover, as a petitioner's status increases, the magnitude of the effect for the

liberal justice first decreases until the petitioner is slightly favored (+1), where it then becomes indistinguishable from zero. Most interestingly, for petitioners who are much stronger than the respondents opposing them (i.e., where Petitioner Advantage equals +7 and +8), the amicus brief actually acts as a *negative* cue and results in a modest decrease in the probability that the liberal justice votes to grant review.²¹ For the median justice, the flatness of the line suggests that there is no difference in the amicus advantage regardless of how strong or weak the petitioner is. For all values of Petitioner Advantage, the median justice's probability of voting to grant increases by 0.06 or 0.07 when an amicus brief is present. Finally, for the most conservative justice, the magnitude of the amicus difference is clearly increasing in petitioner advantage. When the petitioner is moderately weaker (−4), the advantage is an anemic 0.03. When the petitioner is the strongest, however, that advantage increases by a factor of six to 0.18. Taken together, the results provide clear support for the *conditional* version of the informational role of amicus participation. This result is both new to literature and contrary to the dominant explanations for the role of amicus participation at the cert stage (e.g., Caldeira and Wright 1988).²²

Discussion

Although the study of political inequality's impact on the decision making of governmental institutions is an important topic, empirical research on these effects in the judiciary has largely been confined to examining outcomes on the merits. As we have discussed in this paper, this omission is not trivial. The vast theoretical underpinnings of “haves” versus “have nots” should apply to cert just as much (if not more) as they do to cases reviewed on their merits. Litigant advantages such as in resources, strategy, and experience are invaluable to “haves” in navigating the Court's cert procedures and making effective arguments for why their cases should (or, in the case of respondents, should not) be granted. And, indeed, the Supreme Court's agenda-setting process provides, in many ways, an unfiltered opportunity for disparities in litigant status to influence success, something that is generally not present in merits-based studies.

To summarize, we find, consistent with the theory that “haves” will come out ahead in litigation, that litigant status does indeed matter in the Court's agenda-setting process. All other things being equal, weak petitioners battling strong respondents at cert face a particularly uphill battle to have their cases granted review. Our research also adds a new layer of complexity to this debate by finding that the previously suggested roles of interest group support, both as an

²¹ For a +7 value of Petitioner Advantage, the mean difference is −0.07 with a 95% confidence interval of [−0.16, −0.01]. For a +8 value of the variable, the mean and confidence interval are −0.09 and [−0.18, −0.02], respectively.

²² A logical extension of this argument would be to examine the role of amicus status in the agenda-setting process. Though certainly a worthy endeavor, the creation and empirical testing of a scale that differentiates among various interest groups is beyond the scope of this project and the capabilities of our data.

agenda-setting cue *and* as a mitigator of litigant status, are, at best, incomplete. Instead, we demonstrate the existence of a strong ideological dimension for both litigant status and interest group support.

Although we are confident that these results make an important contribution to the literature on litigant status and Supreme Court agenda setting, they are not without some potential caveats that we would be remiss not to briefly discuss. Although we gain significant empirical leverage in our ability to analyze, for example, genuine legal conflict by using the private articles of Justice Blackmun, their usage is not without potential limitations. Chief among them is that the time period for our analysis is one when most members of the Supreme Court had quite conservative preferences. As such, when we evaluate the role of litigant status treating the Court as a unitary actor, the results from Figures 1 and 2 suggest that the Court is biased against the “have nots.” However, when we turn to an analysis of individual justice votes at cert, we learn that this is *not* an attribute of the Court generally, but rather, the result of aggregating justices’ individual preferences and voting behavior. The addition of several more liberal justices, per our findings, would almost surely diminish the magnitude—or potentially reverse—the Court-level result that we find.

A more historically sensitive view of the Court’s treatment of the “have nots” provides facial support for this intuition. During Chief Justice Warren’s tenure on the Court from 1953 to 1969, the Court granted review and handed down famous minority-protecting decisions such as *Brown v. Board of Education* and *Miranda v. Arizona*, and the majority of justices had reputations for generally being very cognizant of advancing the rights of the politically weak (Grossman et al. 1999; Segal and Spaeth 2002). The Court’s internal procedures during this time also made it more open to low status litigants. For example, Warren actively encouraged his law clerks to act as surrogate counsel for indigent petitioners (Lane 2003).

If the justices’ ideological preferences are time sensitive, then there are good reasons to believe that other relevant political factors could be as well. By this we mean that the terms of our study encompass a time period when the executive branch—and the Department of Justice within it—was politically conservative. Though we leave this notion for future scholars, we can imagine, for example, obtaining different results during the tenures of Presidents Johnson, Carter, or Clinton. These more liberal administrations might be both less likely to seek review of cases it lost in the intermediate courts and more likely to support review of cases that present an opportunity to advance the rights of individuals in both criminal and civil matters. This would change the content of the stream of petitions arriving at the Court during that particular time period and could alter the results we find.

These provisos aside, our results have important implications for the study of American politics more generally. It is difficult to credibly take issue with the idea that the legal policy created by the Court is a function of the justices’ policy preferences. The findings presented above also suggest that the impact of ideology traces back to the first moment that the Court reviews and acts on a case. On a Court with only nine sitting justices, slight membership change over

a short period of time can dramatically shift the tone of the legal policy created by the Court. For example, with the departures of liberal justices Warren, Fortas, Black, and Harlan from 1969 through 1971 and their replacement with conservative justices, the Court became a very different institution, with regard to litigant status and otherwise. This reality offers some additional insights into why nominations to the Court are so contentious and ideologically motivated (Epstein and Segal 2005; Epstein et al. 2006) and why candidates' philosophies regarding judicial nominations are a mainstay of presidential campaigns. As such, future membership changes to the Court, especially those that would replace conservative justices with liberal justices, may well present very good news to weak litigants seeking to gain access to the Court and a rallying point for the well-heeled parties opposing low-status litigants.

Our study also provides us with a greater understanding of the political context for the Court's decisions. The status of litigants is connected to the types of issues that are brought to the Court and the arguments that are subsequently made by those parties (Sheehan et al. 1992). Ultimately, then, disparities in litigant status will have a sweeping influence on the type and character of the Court's national policy output. As Flemming and Krutz (2002a) cogently argue, "[i]f the process through which a high court places cases on its plenary docket is shaped or influenced by the political and economic inequalities of its society, then those parties in positions of power and privilege will have a hand in directing the path of the law" (pg. 812).

Appendix A

Sample Selection

We started with all docket numbers that made the Court's discuss list during the 1986, 1987, 1991, and 1992 terms. From Justice Blackmun's files, we recorded an initial 3072 unique docket numbers. We removed docket numbers that were appeals (215) and those that were GVRs (decisions by the Court to grant, vacate, and remand a case), summary affirmances, or summary reversals (292).

We removed GVRs as they present a unique challenge in assessing who has won. Although it means that the petitioner has, at least for time being, won (because the lower court's decision has been vacated), GVRs are typically issued because the petition is closely related to a recent decision of the Court. Without assessing the relationship between each GVR'ed petition and the "main" Supreme Court case, it is impossible to determine whether the petitioner will ultimately win. This also depends, of course, on how the intermediate court behaves with regard to the GVR, which is potentially endogenous to the Court's decision to issue a GVR in the first place. Ultimately the large number of moving parts and distinctness of the GVR data-generating process counsels in favor of setting this issue aside for future research.

We also removed 29 dockets that were not on the discuss list for cert (i.e., when they were only on the list for discussion of IFP status). We excluded 92 docket numbers where we lacked either a pool memo or a docket sheet. This

left us with a total of 2444 cert petitions. We also removed the 867 dockets that were death penalty decisions (see text for rationale), which results in a final population of 1577 docket numbers.

Justice Vote Coding

We followed (Spaeth 2001) and coded votes to “Join-3” as votes to grant. Recoding Join-3 votes as missing data does not alter any of our statistical or substantive results. The docket sheets had missing values for some observations, which is why the vote number is less than the expected number of votes from a full nine-member court (i.e., $447 \times 9 = 4023$). We also excluded from our analysis a small percentage of justices’ votes that did not map onto a dichotomous grant/deny framework. Our data ultimately consist of 3798 votes, which is a difference of 225 votes. These “losses” of votes include GVRs (35), nonparticipation (10), no vote recorded on docket sheet or vote unclear (18), vote missing (justice not yet appointed) (78), or the final vote was one of the following: “hold” (48), “call for the views of the Solicitor General” (29), “relist” (2), “summarily reverse” (3), or “pass” (2).

The Petitioner Advantage Variable

We coded this variable based on the cover sheet of the cert pool memo that provides the litigant names and a short parenthetical that often contains pertinent information about the identity of the litigant. When this was insufficient, we then turned to the clerk’s discussion of the facts of the petition and history below, which generally fleshed out who the parties were.

We have performed a variety of auxiliary analyses to assess whether our key results are being driven by a particular value of litigant status difference in our litigant status scale. To this end, we reestimated the petition-level model 17 times, each time omitting a particular value of Petitioner Advantage (i.e., exclude -8 , then exclude $+8$, then exclude -7 , etc.), to see if the results we obtained were sensitive to this exclusion. None of our results regarding either the litigant status or the interaction between status and amicus support changed, which suggests that our results are not being driven by a particular value of litigant status.

One alternative way to conduct our analyses would be to include both Petitioner Status and Respondent Status in the models. We opt not to use this approach for substantive and methodological reasons. Substantively, like those before us, we are interested in litigant status as a relative, and not absolute, variable. Methodologically, in working with these data, we find that there is a negative and statistically significant correlation between petitioner and respondent status ($\rho = -0.62$, $p < 0.001$), which introduces multicollinearity into our analyses. Given the large number of times a prisoner or individual is pitted against the government, this is not surprising. The skewed nature of the Court’s docket also means that this correlation is not some statistical artifact of our sample but rather a characteristic of the population itself.

A second analysis alternative would be to include a dummy variable for each petitioner-respondent pairing. The main issue this presents is a lack of

data in the population. Given nine different levels of status, we would need to include 80 additional variables in the model (omitting one as a baseline), one for each pairing (e.g., level 9 vs. level 9, level 9 vs. level 8, level 8 vs. level 9, etc.). This would bring the total number of covariates in the model to approximately 90, which would require *at least* doubling our sample to include 900 petitions. This also assumes that we would be able to find ample data where, for example, an interest group is petitioning against a union (and vice versa). We suspect that one could code all petitions considered during the entirety of the Rehnquist Court and still not have enough observations to perform this analysis.

More damaging, however, we would be unable to test a main contribution of this article—the conditional hypotheses—if we utilized a dummy variable approach. Adding a single interactive term to a model with 80 indicator variables would require estimating another 80 terms—one for each combination of the conditioning variable (e.g., Amicus Support) and the litigant status dummy. This would bring the total number of parameters to be estimated to roughly 180.

References

- Ai, Chunrong, and Edward C. Norton. 2003. "Interaction Terms in Logit and Probit Models," 80 *Economic Letters* 123–9.
- Austin, Peter C., and Janet E. Hux. 2002. "A Brief Note on Overlapping Confidence Intervals," 36 *Journal of Vascular Surgery* 194–5.
- Berry, William D., Jacqueline H. R. DeMeritt, and Justin Esarey. 2010. "Testing for Interaction in Binary Logit and Probit Models: Is a Product Term Essential?" 54 *American Journal of Political Science* 248–266.
- Black, Ryan C., and Ryan J. Owens. 2009. "Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence," 71 *Journal of Politics* 1062–75.
- Brace, Paul, and Melinda Gann Hall. 2001. "'Haves' versus 'Have Nots' in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases," 35 *Law & Society Review* 393–417.
- Brambor, Thomas, William Roberts Clark, and Matt Golder. 2006. "Understanding Interaction Models: Improving Empirical Analysis," 14 *Political Analysis* 63–82.
- Bramen, Eileen, and Thomas E. Nelson. 2007. "Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes," 51 *American Journal of Political Science* 940–56.
- Brandt, Patrick T., and Christina J. Schneider. 2007. "So the Reviewer Told You to Use a Selection Model? Selection Models and the Study of International Relations." Unpublished manuscript dated 4/23/07 and downloaded from http://www.utdallas.edu/pbrandt/pbrandt/Research_files/cprobit_20070423.pdf on 6/29/09.
- Brenner, Saul. 1979. "The New Certiorari Game," 41 *Journal of Politics* 649–55.
- Caldeira, Gregory A., and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court," 82 *American Political Science Review* 1109–27.
- . 1990. "The Discuss List: Agenda Building in the Supreme Court," 24 *Law & Society Review* 807–36.
- . 1998. "Organized Interests Before the Supreme Court: Setting the Agenda." Unpublished Paper delivered at the Annual Meeting of the American Political Science Association.
- Caldeira, Gregory A., John R. Wright, and Christopher J.W. Zorn. 1999. "Sophisticated Voting and Gate-Keeping in the Supreme Court," 15 *Journal of Law, Economics, & Organization* 549–72.
- Collins Jr., Paul M. 2004. "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation," 38 *Law & Society Review* 807–32.

- . 2007. "Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs," 60 *Political Research Quarterly* 55–70.
- . 2008a. "Amici Curiae and Dissensus on the U.S. Supreme Court," 5 *Journal of Empirical Legal Studies* 143–70.
- . 2008b. *Friends of the Court: Interest Groups and Judicial Decision Making*. New York: Oxford University Press.
- Dotan, Yoav. 1999. "Do the 'Haves' Still Come Out Ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice," 33 *Law & Society Review* 1059–80.
- Dunworth, Terence, and Joel Rogers. 1996. "Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991," 21 *Law & Social Inquiry* 497–592.
- Emmert, Craig F. 1991. "Litigants in State Supreme Court Judicial Review Cases: Participation and Success," 14 *Justice System Journal* 486–93.
- Epp, Charles R. 1999. "The Two Motifs of Why the Haves Come Out Ahead and its Heirs," 33 *Law & Society Review* 1089–97.
- Epstein, Lee and Jeffrey A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. New York: Oxford University Press.
- Epstein, Lee, Jeffrey A. Segal, and Harold J. Spaeth. 2007a. "Digital Archive of the Papers of Harry A. Blackmun." <http://epstein.law.northwestern.edu/research/BlackmunArchive.html> (accessed January 23, 2008).
- Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker. 2007b. *The Supreme Court Compendium: Data, Decisions, and Developments*. 4th ed. Washington, DC: CQ Press.
- Epstein, Lee, René Lindsädt, Jeffrey A. Segal, and Chad Westerland. 2006. "The Changing Dynamics of Senate Voting on Supreme Court Nominees," 68 *Journal of Politics* 296–307.
- Farole Jr., Donald J. 1999. "Reexamining Litigant Success in State Supreme Courts," 33 *Law & Society Review* 1043–58.
- Flemming, Roy B., and Glen S. Krutz. 2002a. "Repeat Litigators and Agenda Setting on the Supreme Court of Canada," 35 *Canadian Journal of Political Science* 811–33.
- . 2002b. "Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses," 64 *Journal of Politics* 232–48.
- Freedman, David A., and Jasjeet S. Sekhon. Forthcoming. "Endogeneity in Probit Response Models." *Political Analysis*. Manuscript draft dated 6/8/2008 and downloaded from <http://www.stat.berkeley.edu/census/heckprob.pdf> on 6/29/09.
- Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Changes," 9(1) *Law & Society Review* 95–160.
- Grossman, Joel B., Herbert M. Kritzer, and Stewart Macaulay. 1999. "Do the 'Haves' Still Come Out Ahead?" 33 *Law & Society Review* 803–10.
- Haynie, Stacia L. 1994. "Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court," 56 *Journal of Politics* 752–72.
- . 2003. *Judging in Black and White: Decision Making in the South African Appellate Division, 1950-1990*. New York: Peter Lang Publishing, Inc.
- Jacobson, Gary C. 2001. *The Politics of Congressional Elections*. 5th ed. New York: Longman.
- Johnson, Timothy R. 2004. *Oral Arguments and Decision Making on the United States Supreme Court*. Albany, NY: SUNY Press.
- Kam, Cindy D., and Robert J. Franzese Jr. 2007. *Modeling and Interpreting Interactive Hypotheses in Regression Analysis*. Ann Arbor, MI: University of Michigan Press.
- King, Gary, Michael Tomz, and Jason Wittenberg. 2000. "Making the Most of Statistical Analyses: Improving Interpretation and Presentation," 44 *American Journal of Political Science* 347–61.
- Kritzer, Herbert M. 2003. "The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?" in H.M. Kritzer and S.S. Silbey, eds., *In Litigation: Do the "Haves" Still Come Out Ahead?* Stanford, CA: Stanford University Press, 342–370.
- Kunda, Ziva. 1990. "The Case for Motivated Reasoning," 108 *Psychological Bulletin* 335–58.
- Lane, Cristina. 2003. "Pay Up or Shut Up: The Supreme Court's Prospective Denial of In Forma Pauperis Petitions," 98 *Northwestern University Law Review* 335–66.
- Lazarus, Edward. 2005. *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court*. Reissue edition ed. New York: Penguin Books.

- Long, J. Scott. 1997. *Regression Models for Categorical and Limited Dependent Variables*. Thousand Oaks, CA: Sage Publications.
- Maltzman, Forrest, and Paul J. Wahlbeck. 1996. "May it Please the Chief? Opinion Assignments in the Rehnquist Court," 40 *American Journal of Political Science* 421–33.
- Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999," 10 *Political Analysis* 134–53.
- Mayhew, David R. 1974. *Congress: The Electoral Connection*. Fredricksburg, VA: Yale University Press.
- McAtee, Andrea, and Kevin T. McGuire. 2007. "Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?" 41 *Law & Society Review* 259–78.
- McCormick, Peter. 1993. "Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992," 26 *Canadian Journal of Political Science* 523–40.
- McGuire, Kevin T. 1995. "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success," 57 *Journal of Politics* 187–96.
- . 1998. "Explaining Executive Success in the U.S. Supreme Court," 51 *Political Research Quarterly* 505–26.
- McGuire, Kevin T., and Gregory A. Caldeira. 1993. "Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court," 87 *American Political Science Review* 717–26.
- Rehnquist, William H. 2001. *The Supreme Court*. Revised and updated ed. New York: Vintage Books.
- Rowland, C.K., and Bridget Jeffery Todd. 1991. "Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts," 53 *Journal of Politics* 175–85.
- Sartori, Anne E. 2003. "An Estimator for Some Binary-Outcome Selection Models Without Exclusion Restrictions," 11 *Political Analysis* 111–38.
- Schoen, Ryan, and Paul J. Wahlbeck. 2006. "The Discuss List and Agenda-Setting on the Supreme Court." Unpublished manuscript presented at the 2006 Annual Meetings of the Southern Political Science Association in Atlanta, GA.
- Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.
- . 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Sheehan, Reginald S., William Mishler, and Donald R. Songer. 1992. "Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court," 86 *American Political Science Review* 464–71.
- Smith, Kevin H. 1999. "Justice For All? The Supreme Courts Denial of *Pro Se* Petitions for Certiorari," 63 *Albany Law Review* 381–425.
- . 2001. "Certiorari and the Supreme Court Agenda: An Empirical Analysis," 54 *Oklahoma Law Review* 727–73.
- Smyth, Russell. 2000. "The 'Haves' and the 'Have Nots': An Empirical Study of the Rational Actor Party Capability Hypothesis in the High Court 1948–99," 35 *Australian Journal of Political Science* 255–74.
- Solowiej, Lisa A., and Paul M. Collins Jr. 2009. "Counteractive Lobbying in the U.S. Supreme Court," 37 *American Politics Research* 670–99.
- Songer, Donald R. 1979. "Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari," 41 *Journal of Politics* 1185–94.
- Songer, Donald R., Ashlyn Kuersten, and Erin Kaheny. 2000. "Why the Haves Don't Always Come Out Ahead: Repeat Players Meet Amici Curiae for the Disadvantaged," 53 *Political Research Quarterly* 537–56.
- Songer, Donald R., and Reginald S. Sheehan. 1992. "Who Wins on Appeal? Uppercuts and Underdogs in the United States Courts of Appeals," 36 *American Journal of Political Science* 235–58.

- Songer, Donald R., Reginald S. Sheehan, and Susan Brodie Haire. 1999. "Do the "Haves" Come out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988," 33 *Law & Society Review* 811-32.
- Spaeth, Harold J. 2001. *The Burger Court Judicial Database: (1969-1985 Terms)*. East Lansing, MI: Michigan State University.
- Spriggs II, James F., and Paul J. Wahlbeck. 1997. "Amicus Curiae and the Role of Information at the Supreme Court," 50 *Political Research Quarterly* 365-86.
- Stern, Robert L., Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller. 2002. *Supreme Court Practice*. 8th ed. Washington, DC: The Bureau of National Affairs.
- Tanenhaus, Joseph, Marvin Schick, Matthew Muraskin, and David Rosen. 1963. "The Supreme Court's Certiorari Jurisdiction: Cue Theory," in G.A. Schubert, ed., *Judicial Decision-Making*. New York: Free Press, 111-132.
- Ulmer, S. Sidney. 1978. "Selecting Cases for Supreme Court Review: An Underdog Model," 72 *American Political Science Review* 902-10.
- Ulmer, S. Sidney, William Hintz, and Louise Kirklosky. 1972. "The Decision to Grant or Deny Certiorari: Further Considerations of Cue Theory," 6 *Law & Society Review* 637-44.
- Wahlbeck, Paul J., James F. Spriggs, II, and Forrest Maltzman. 1999. "The Politics of Dissents and Concurrences on the U.S. Supreme Court." 27 *American Politics Research* 488-514.
- Ward, Artemus, and David L. Weiden. 2006. *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. New York: New York University Press.
- Watson, Wendy. 2006. "The U.S. Supreme Court's *In Forma Pauperis* Docket: A Descriptive Analysis," 27 *Justice System Journal* 47-60.
- Wheeler, Stanton, Bliss Cartwright, Robert A. Kagan, and Lawrence M. Friedman. 1987. "Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970," 21 *Law & Society Review* 403-46.
- Woodward, Bob, and Scott Armstrong. 1979. *The Brethren: Inside the Supreme Court*. New York: Simon & Schuster.