

Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process*

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Objective. We investigate whether informational cues differentially affect a petition for review at each stage of the U.S. Supreme Court's agenda-setting process. We specifically test how the cost of identifying a cue and the degree of information provided within it affect the cue's impact. *Methods.* We use a random sample of archival data obtained from the private papers of Justice Harry A. Blackmun to jointly analyze the Court's discuss list and final outcome decisions. *Results.* Confirming our expectations, we find that both positive cues and negative cues play different roles across the two stages of the Court's agenda-setting process. *Conclusions.* These findings are noteworthy since they suggest that the impact of some commonly studied case attributes differs between when a case is selected for the initial level of review versus when it is added to the Court's plenary docket.

The scene is so common as to border on being cliché. Having lost in a trial or lower appellate court, an attorney vows to fight the unjust ruling and, if need be, take her case all the way to the Supreme Court. While this generally makes for good television, it is far removed from reality. Each year, the Court receives thousands of cases seeking its review, but generally agrees to hear fewer than 100. During the Court's 2009–10 session, for example, it received 8,159 filings, but heard arguments in only 82 of them (Roberts, 2010:9–10). Most litigants, then, should not be especially surprised that the Court will ultimately not hear their case. What might be surprising, however, is that by the Court's own internal decision-making process, it is also unlikely to spend even a single minute discussing the case as a collegial body.

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Agenda setting on the modern Supreme Court begins with the creation of the “discuss list.” An internal mechanism of the Court’s own creation, petitions that fail to make this initial cut are automatically denied review without receiving a formal recorded vote. Petitions that *do* make this list, however, remain eligible for review and are the first cases that will encounter the Court’s coveted collegial decision-making process. In short, making the discuss list is a selective and necessary step for petitions that may ultimately be selected for review by the Court.

With only limited exceptions (e.g., Provine, 1980; Caldeira and Wright, 1990), existing studies of agenda setting tend to ignore the role of the discuss list. We believe this oversight is unfortunate since, as we discuss in further detail below, the formation of the discuss list represents a key stage in the Court’s complicated and highly secretive and discretionary agenda-setting stage. In what follows, we provide a comprehensive investigation of the Court’s agenda-setting process that jointly examines the setting of the discuss list and the final decision to grant or deny review. We begin by first describing the stages in the Court’s agenda-setting process, including the development and evolution of the discuss list. In order to meet its burdens in these pre-merits stages, we argue that the Court must rely on informational cues. While we expect the cues traditionally found in agenda-setting studies to operate in both the formation of the discuss list and, for those making the list, in the outcome of the final agenda-setting vote, the size and direction of these effects will often be stage specific. Our hypotheses, then, examine how informational shortcuts—i.e., “cues”—might differentially affect a petition at each stage of the process.

To test this account, we use archival data collected from the private papers of Justice Harry A. Blackmun. Our analysis reveals that both positive cues and negative cues play different roles across the two stages of the Court’s agenda-setting process. These findings are noteworthy because they suggest that the impact of some commonly studied case attributes differs between when a case is selected for the initial level of review (i.e., the discuss list) versus when it is added to the Court’s plenary docket (i.e., the final agenda-setting vote).

The Role of the Discuss List in the Case-Selection Process

The complex process of “deciding to decide” that we know today has evolved over the last century, largely due to changing pressures on the Court and the rise of different institutional mechanisms for dealing with those pressures. Until 1935, the Court gave full conference consideration to every case seeking review (Ward and Weiden, 2006). Chief Justice Hughes began the norm of creating a special list in 1935. Eventually labeled the “dead list,” it contained cases that were considered too frivolous or insubstantial to warrant Court discussion (Ward and Weiden, 2006; Caldeira and Wright, 1990). Importantly, however, the default behavior of the Court was to assume that all petitions were worthy of discussion and a formal vote.

By 1950, this presumption had been reversed and the dead list was replaced by the discuss list. With the creation of a discuss list, a practice that continues today, the Chief Justice and the other justices focus instead on composing a list of petitions worthy of discussion during the Court's weekly conference meetings (Ward and Weiden, 2006; Provine, 1980). The discuss list is initially created by the Chief Justice. After the Chief circulates the first draft, each associate justice can add (but not subtract) petitions to the list. All petitions not making the Court's discuss list are, without a formal vote, unanimously denied review.

By placing a case on the discuss list, a decision is made to allocate the Court's time to it during conference as well as the justices' time in preparation for that conference. All petitions making the discuss list are circulated among the chambers prior to the weekly conference, providing a minimum of a few days of additional time for individual chambers to do further in-depth research on the cases.

Discuss list petitions represent the first time that justices will interact and deliberate over cases as a collegial body. At conference, the justice responsible for placing a case on the discuss list is the first to speak and vote on that case. The Court then proceeds in the same way it does during the merits deliberation after oral argument, in descending order of seniority. Petitions on the discuss list must receive at least four grant votes in order to be given a full merits review; otherwise they are denied.

The Differential Value of Case Cues in Agenda Setting

Although the agenda-setting stage provides justices with the cases they will ultimately use to set national legal policy, it is also one of the most tedious duties because of the volume of cases that seek the Court's review. To minimize this burden, justices look for shortcuts that allow them to overcome what could be an overwhelming demand on their time and still accomplish their legal and policy goals. As Tanenhaus et al. suggest, informational cues play a critical role by serving to 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" (1963:118).

Building upon the initial insights of Caldeira and Wright (1990) and Provine (1980), we expect that case cues will, at a basic level, be operative at both stages of the Court's agenda-setting process. After all, this discuss list formation process is primarily about justices identifying, from a very large pool of candidates, the potential "needles in the haystack." If the Court is convincingly influenced by cues during the final vote to grant review, then we should have no trouble expecting the same to be true during the discuss list formation stage. With thousands of petitions to decide on (compared to just hundreds at the final voting stage) and without the luxury of collegial deliberation, justices are certainly in a low-information, high-time pressure environment while forming the discuss list.

We suggest that, at least for a subset of cues, the strength of their influence will fluctuate—as opposed to being constant—across the two stages of the process. This differential impact stems from two different attributes of a cue: (1) the depth of information it provides and (2) the cost—in terms of time—required by the Court to identify whether that particular cue is present.

During the creation of the discuss list, we expect that the Court will primarily rely upon cues that are relatively inexpensive in terms of the time required to identify their presence. As a result, the Court will give primary—though not exclusive—consideration to cues that are relatively superficial. However, once that initial cut has been made, the usefulness of such limited cues is reduced because the cases that remain will likely have but limited variation in the presence/absence of these coarse cues. As a result, the justices will lean more heavily on more informative cues as a petition moves further through the agenda-setting process. While these cues require more effort to evaluate, such a trade-off is made possible by the fact that the pool of cases that need to be analyzed has been dramatically reduced.

We turn first to describing four low cost cues that provide the justices with minimal but still useful information about the merit of a given petition. As we suggest above, these are cues that can be quickly determined from only a cursory examination of each case. Consider, first, whether there was a dissenting opinion filed in the lower court. As most cases come out of the federal circuit courts, where dissent is relatively rare, the simple presence of a dissenting opinion is, on face value alone, somewhat extraordinary. But, without digging deeper into the substance of the majority and dissenting opinion, the informational value of this cue is necessarily limited. While it is clear that some discord is present among the judges, a reviewing justice does not know whether this disagreement is superficial or related to something of broader potential interest to the Court.

A second and related attribute is whether the court below the Supreme Court reversed the decision of the court of first instance. Just as a dissenting opinion indicates some “horizontal” disagreement among judges on a court, the reversal of the trial court is a statement of “vertical” dissent between the two courts. Much like a dissenting opinion, it is rare, easy to observe, and offers a coarse way of identifying a case that might be worthy of further study by the justices.

In contrast to these two positive cues, whether the lower court opinion is unpublished is a negative cue. As unpublished opinions lack precedential value within their home circuits, they are often short and lack the type of analysis and argumentation that would provide the Supreme Court with a useful starting point for resolving an important legal question.

Our final low cost, low value cue comes from the content of the petitioner’s brief. Although the Supreme Court provides relatively little guidance about its criteria for selecting cases, it does note the importance of selecting cases to resolve legal conflict (Supreme Court Rule 10). The simplicity of this statement belies the complexity and subjectivity involved in assessing whether

conflict exists. It is one thing for a savvy attorney to allege the existence of conflict. To prove that the conflict is worthy of the Court's attention is qualitatively different. To do so requires 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). Still, to the extent the petitioning party alleges that some conflict exists, this is likely to satisfy a minimal requirement in the mind of the justices weighing whether the case is worthy of the Court's docket space.

Our argument is that these cues are easy to assess and provide a very basic way of dividing the mountain of cases seeking the Court's review. Because the quality of the information is limited, however, the usefulness of the cue will be higher at the discuss list stage than during the final agenda-setting vote. Accordingly, for each of these variables, we hypothesize that while their presence will systematically affect both the likelihood of a case making the discuss list and its eventual granting of review, the effect will be strongest at the discuss list stage. For lower court dissent, trial court reversal, and conflict alleged, we expect a positive effect. For unpublished opinions, we expect a negative effect.

Beyond these low cost, low value cues, there are also several cues that are still relatively easy to observe but have a higher informational value. Consider, for example, when the U.S. Solicitor General (SG) makes a recommendation in a case for which she is participating as an *amicus curiae*. Identifying the course of action suggested by the SG is as simple as reading the last paragraph of her brief. And, although this information is easy to obtain, its value to the justices is high. This stems from the expertise, professionalism, and repeat player status enjoyed by the SG (e.g., Bailey, Kamoie, and Maltzman, 2005; McGuire, 1995).

Because of the SG's unique institutional relationship with the Court, we suggest the presence of any type of recommendation by the SG will result in a higher likelihood that the case in question is added to the discuss list. Once the case reaches that stage, however, the content of the SG's specific recommendation will become important. When the SG recommends denial, we expect to observe a negative effect on the likelihood of review being granted. Conversely, when the SG recommends granting review, we expect to see a positive effect. The key difference between these expectations and those described for the low cost, low value cues is that for the SG-related cues, we continue to expect them to exert a strong impact on the final outcome whereas with the low value cues, we expect that their usefulness—and, as a result, impact—will decrease in moving from the discuss list to the final outcome stage.

While the SG may very well be the most important outside actor who participates in cases, she is not, of course, the only one. Indeed, as Caldeira and Wright (1988) meticulously document, outside interest groups provide the Court with positive evidence of a case's importance. Subsequent research

shows that the presence of interest group support is especially useful in leveling the playing field between litigants with a resource advantage (i.e., the “haves”) and those who are resource poor (i.e., the “have nots”) (Songer, Kuersten, and Kaheny, 2000), including during the Court’s agenda-setting process (Black and Boyd, 2012). In particular, these amici briefs can easily provide an information-gap filling role (e.g., Collins, 2004, 2008) by offering additional legal arguments not found in the litigating parties’ briefs. Because weak litigants’ briefs are likely to be less well argued than those by strong litigants, the presence of amici can help make up this difference.

We suggest that amici help weak litigants in this positive way throughout both stages of the agenda-setting process but we also expect that this effect is at its strongest in the discuss list formation stage. As we describe above, after a petition makes the discuss list, justices and their chambers are faced with researching a list of cases that has suddenly decreased from in the thousands to in the hundreds. This decreased burden means that justices likely are more willing to utilize their chamber resources to independently fill information gaps that exist in weak petitioners’ briefs rather than relying exclusively on the amicus arguments. This sort of luxury simply is not likely to be an option when a petition has not yet made the discuss list.

Finally, we consider high cost, high value cues. These cues provide the Court with information that is—or is close to being—dispositive with regards to whether a case should be granted review. Such power comes with a cost, however, since gaining access to this cue is time consuming. We suggest that determining the true nature of the alleged legal conflict in a case is representative of such a cue. As we note above, conflict is undoubtedly an important factor in the Court’s agenda-setting decision. Attorneys know this, of course, and have an incentive to attempt to portray even the most minor circuit split as needing immediate intervention by the Court. The task of assessing the validity of the claims being made by the attorney requires a careful analysis of potentially conflicting opinions which could easily span across a variety of jurisdictions and even decades worth of time. Consistent with our argument above, given the high cost, high value nature of this cue, we expect that while it will operate at both stages of the agenda-setting process, the true nature of the alleged conflict will be most important for the Court when it makes the final decision to review the petition.

Data and Measurement

To test these expectations we analyzed a sample of petitions considered by the justices. While case outcomes are publicly available for all cases that seek the Court’s review, information about whether a case makes the discuss list is not. To bridge this gap we draw upon the private papers of Justice Harry A. Blackmun, which contain copies of the Court’s secret discuss lists. We began

by randomly sampling 447 nondeath penalty petitions from the Court's 1986, 1987, 1991, and 1992 terms that made the discuss list. We then supplemented this sample with 280 (again nondeath penalty) petitions that did not make the discuss list during the 1992 term.¹

Operationalizing our differential cue hypotheses requires the inclusion of several variables. As a general matter, we draw extensively from the pool memos contained in the Blackmun papers as our primary source for these variables. Beyond providing a reliable (Black and Owens, 2009b), convenient, and centralized data source, they have the added substantive benefit of being the primary materials used by the justices themselves in the agenda-setting process.² Starting with characteristics of the lower court opinion, we code *Lower Dissent* as 1 if the pool memo in a case indicated the presence of a dissenting opinion in the lower court, 0 otherwise. Similarly, *Lower Reversal* takes on a value of 1 if, in summarizing the lower court proceedings, the pool author notes that the intermediate court reversed the trial court. We code 0 otherwise. *Lower Unpublished* is coded as 1 if the pool memo describes the lower court opinion as being unpublished.

To determine the extent of legal conflict present in a case, we code three mutually exclusive dummy variables. First, if the author of the pool memo notes that the petitioner alleges the presence of conflict but concludes that this allegation is without merit, then we code *Alleged Conflict* as 1. If no conflict is even alleged, then this variable takes on a value of 0. If conflict is alleged, acknowledged by the pool author, but then subsequently discounted as not being ready for the Court to review it, then we code *Weak Conflict* as 1. Finally, if conflict is alleged by the petitioner, acknowledged by the pool author and not subsequently discounted, then we code *Actual Conflict* as 1.³

¹During the terms, we analyze death penalty cases that were subject to a separate agenda-setting process. In particular, they were automatically added to the discuss list. While we sampled from these terms due to data availability when we commenced this project, beyond what we speculate about in the conclusion of this paper, we have no reason to believe using other available terms would yield substantively different results.

In the rare instances where the docket sheet records the terminal petition outcome as a "Call for Response" (CFR), "Call for the Views of the Solicitor General" (CVSG), hold, summary reversal, or relisting, we exclude it from our study, since the petition does not fit within our framework treating discuss list formation and final review outcomes as dichotomous events.

²During the terms of our study, all justices except Justice Stevens participated in the Court's cert pool. Despite the lack of participation in the pool of this one justice and his clerks, we have every reason to believe that the pool memos provide an excellent source of information about the overall Court process. For many of the variables coded from these memos, the underlying information of interest—e.g., dissent or reversal below—is objective, meaning the pool memos simply serve a convenience function. While a pool clerk could plausibly attempt to influence this process by omitting or manipulating basic factual elements in the pool memo, our review of Blackmun's files and intracourt memoranda reveal no evidence of this during the Rehnquist Court years of interest to us here.

³As the coding of these latter two variables requires some level of judgment on the part of the coder, we subjected them to an intercoder reliability analysis. The weak conflict reliability is "substantial" and the strong conflict reliability is "near perfect" according to a commonly used metric (Landis and Koch, 1977:165).

We include two variables to tap into the participation and, more importantly, specific recommendation of the Solicitor General. *U.S. Amicus Supports Grant* takes on a value of 1 when the SG files an amicus brief recommending that the Court grant review in a case. Similarly, *U.S. Amicus Opposes Grant* is coded as 1 if the SG opposes the granting of review. We code both of these variables using the pool memo. The implicit (and omitted) baseline category is when the SG is not participating as amicus.

In terms of our interactive amicus and litigant status hypothesis, we measure two constitutive components. We code *Petitioner Amicus Briefs* as the number of briefs filed in support of the petitioner.⁴ To measure litigant status we take two steps. First, we adopt a classification scheme that assigns each petitioner and respondent to one of nine categories (Black and Boyd, 2012). These categories are: poor individuals, individuals, unions or interest groups, small businesses, businesses, big businesses, local governments, state governments, and the U.S. government. The weakest category—poor individuals—is coded as 1 whereas the strongest category—the U.S. government—is coded as 9. This approach is largely similar to Collins (2004). With these individual party scores in hand, we follow previous literature (e.g., McGuire, 1995; Collins, 2004) and compute *Petitioner Advantage*, which is the numerical ranking of the petitioner minus the respondent's. Large values imply a strong petitioner versus a weak respondent and small values denote the opposite.

Beyond our key variables of interest, we also control for several potential confounding factors identified by several decades of agenda-setting research. We include *Constitutional Claim*, which takes on a value of 1 if the petitioner alleges that her constitutional rights have been violated by the decision of the lower court, 0 otherwise. Relatedly, *Civil Liberties* is coded as 1 if the case raises a legal question that falls into the areas of criminal procedure, due process, the First Amendment, civil rights, privacy, or attorneys. We follow the Supreme Court Database's coding rules for making this determination.

Finally, several studies have noted the role of policy-based determinants in the Court's agenda-setting decisions (e.g., Caldeira, Wright, and Zorn, 1999; Black and Owens, 2009a). To control for the Court's desire to reverse ideologically discrepant outcomes, we include *Lower Court Policy Agreement*. We follow Johnson, Wahlbeck, and Spriggs (2006) and Bailey, Kamoie, and Maltzman (2005) and code this variable as the positive or negative value of the median justice's ideal point across all subject areas (as estimated by Martin and Quinn (2002) for each term). Positive values will occur when there is agreement between the median's preferences and the lower court outcome (i.e., the median is conservative and the lower court decision is conservative

⁴While Caldeira and Wright (1988) find evidence that opposing amicus briefs increase the likelihood of review, later expanded work (Caldeira and Wright, 2009) finds no relationship. This mixed support, along with the rarity with which opposing briefs are filed by interest groups (less than one percent of our data's petitions), make it impractical for us to examine here the potential counteractive interest group lobbying behavior in the entire agenda-setting stage at the Court (but see Solowiej and Collins 2009 for a merits-stage analysis).

or the median is liberal and the lower court decision is liberal). Conversely, negative values occur when there is an incongruence.

Methods and Results

Our dependent variables are (1) whether a petition is initially added to the discuss list and (2) whether, after being placed on the discuss list, it is ultimately granted review. Both of these variables are coded from raw archival data provided by Epstein, Segal, and Spaeth (2007). For our statistical modeling, we turn to a selection-based approach that allows us to simultaneously consider these two processes.⁵ Because of the high degree of substantive and theoretical overlap between our selection stage (i.e., being added to the discuss list) and the outcome stage (i.e., the final agenda-setting vote), a traditional Heckman-style selection model is inappropriate.⁶

In its place, we follow the advice and insights of Sartori (2003) and use a statistical estimator that is more appropriate for this type of inquiry. Whereas the traditional Heckman model is identified through the exclusionary variable, Sartori's estimator is identified by assuming that the error terms across both equations are equal. This allows the user to include identical variables in the selection and outcome equations. As Sartori explains:

My identifying assumption rarely will be perfectly true, but it is likely to be reasonable exactly when the researcher believes that identical explanatory factors influence selection and the subsequent outcome of interest. More specifically, the assumption is likely to be a close match to reality when three conditions hold: (1) selection and the subsequent outcome of interest involve similar decisions or goals; (2) the decisions have the same causes; and (3) the decisions occur within a short time frame and/or are close to each other geographically (2003:112).

Applying these conditions to the Court's agenda-setting decisions, we contend all three are satisfied. First, the creation of the discuss list is the Court's initial opportunity to dedicate additional plenary Court time and discussion to reviewing a case. The outcome decision of ultimately granting or denying a petition also involves this consideration (albeit on a larger scale). Second, both processes are driven by the same set of variables as identified by the

⁵The alternative would be to assume that the error terms for these two decisions are uncorrelated and estimate two independent models (Caldeira and Wright, 1990). This assumption is almost certainly false and, given that better methodological alternatives now exist, we do not take this tack here.

⁶For the Heckman probit model with sample selection to be identified beyond functional form it requires the existence of (at least) one exclusionary variable (StataCorp, 2009:688). This is a variable that is related to the selection equation but wholly unrelated to the outcome equation. When this exclusionary restriction is not satisfied, it creates omitted variable bias in the outcome equation and can yield erroneous inferences and biased parameter estimates (Brandt and Schneider, 2007; Freedman and Sekhon, 2010). As we argue above, the overlap between these two processes nearly guarantees that such a variable does not exist.

TABLE 1

Sartori Selection Model of Discuss List Formation (Selection) and Final Cert Vote Result (Outcome).

Variable	Coefficient	Standard Error
Selection: Does Petition Make Discuss List?		
Alleged Conflict	0.180	0.116
Weak Conflict	0.559*	0.159
Actual Conflict	1.816*	0.312
U.S. Amicus Supports Grant	6.289*	0.320
U.S. Amicus Opposes Grant	6.201*	0.219
Lower Reversal	0.108	0.184
Lower Dissent	0.570*	0.200
Lower Unpublished	-0.328*	0.111
Petitioner Advantage	0.028	0.019
Petitioner Amicus Briefs	0.567*	0.205
Petitioner Advantage × Petitioner Amicus	-0.138*	0.048
Constitutional Claim	0.199*	0.116
Civil Liberties	-0.180	0.139
Lower Court Policy Agreement	-0.327*	0.119
Constant	-0.944*	0.151
Outcome: Does a Discussed Petition Receive Review?		
Alleged Conflict	0.037	0.182
Weak Conflict	0.687*	0.172
Actual Conflict	2.067*	0.213
U.S. Amicus Supports Grant	1.740*	0.623
U.S. Amicus Opposes Grant	-0.283	0.548
Lower Reversal	0.106	0.156
Lower Dissent	0.452*	0.164
Lower Unpublished	-0.359*	0.153
Petitioner Advantage	0.074*	0.017
Petitioner Amicus Briefs	0.358*	0.115
Petitioner Advantage × Petitioner Amicus	-0.059*	0.027
Constitutional Claim	0.038	0.134
Civil Liberties	-0.280*	0.142
Lower Court Policy Agreement	-0.135	0.109
Constant	-1.854*	0.156
Observations	727	
Log Likelihood	-3,348.893	

NOTE: *denotes $p < 0.10$ (two-tailed test).

literature and described in detail above, which is precisely why we cannot estimate the canonical selection model. As for the timing of the decisions, the discuss list, initiated by the Chief Justice, is circulated just days before the justices meet in conference to vote on petitions (O'Brien, 2005:196). Given that these conditions are satisfied, we proceed below by estimating a Sartori selection model.

Parameter estimates from our model are reported in Table 1. The table alone provides support for our hypotheses, including the signs on our key

coefficients being in the expected direction. However, since our hypotheses rely not just on the statistical significance of the coefficients but also on the relative size of the effects between the two stages of the selection process, we turn next to graphical representations of the size of these effects. We begin with evaluating the impact of low value, low cost cues. Our hypothesis was that these factors would have a stronger influence on the discuss list stage. Figure 1 depicts the predicted probability that a petition will have a particular outcome in the Court's agenda-setting process for our *Lower Dissent* and *Lower Unpublished* variables. Recall that we had suggested these cues are low cost (i.e., easy to determine) but also low value in terms of the quality of information they provide the justices with.⁷

Within each bar, the various shadings denote the probability of a specific outcome. In particular, gray represents the likelihood that a petition is denied without being added to the discuss list. White area denotes that a petition makes the discuss list but is subsequently denied. Last, black indicates a petition succeeds in both stages of the process: it is added to the discuss list and then ultimately granted review.

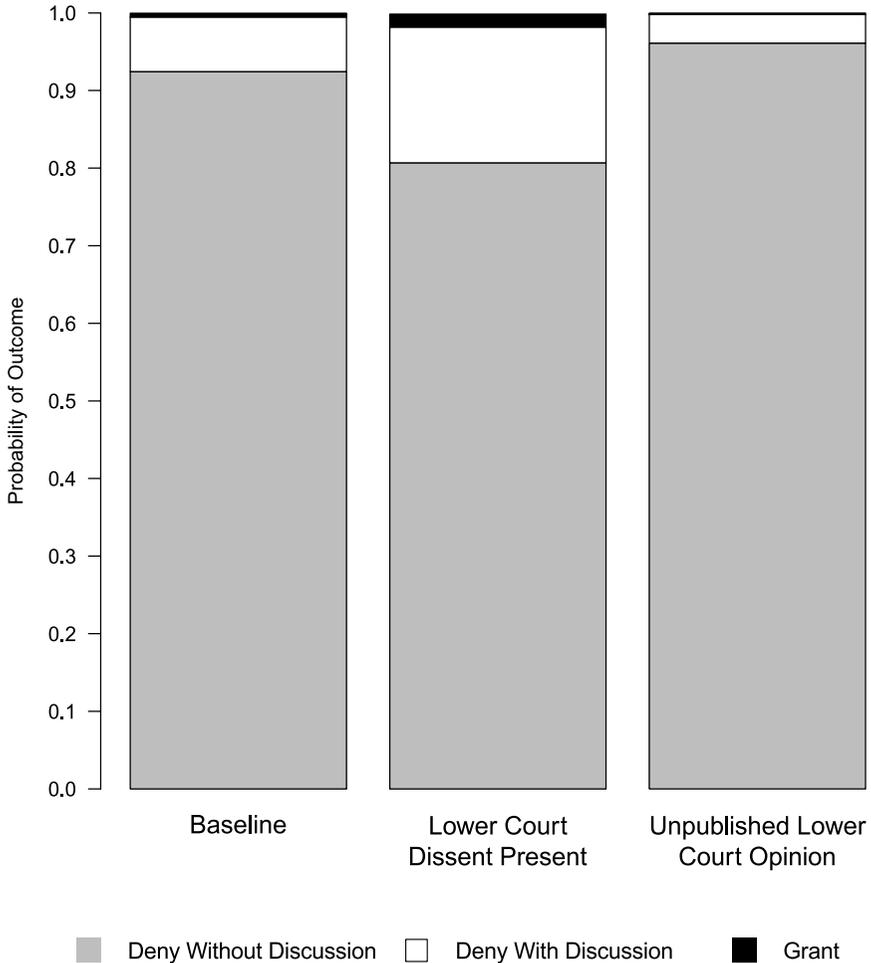
The results presented in Figure 1 provide broad support for our hypothesis. Starting with the baseline case, which lacks a dissenting opinion in the lower court and is decided via a published opinion, we estimate a 0.92 probability that such a petition is denied without review, a 0.07 probability that it makes the discuss list and is denied, and only a 0.01 probability that it is granted review. When we add the presence of a low information cue, we had hypothesized that both the probability of making the discuss list and being granted review would increase, but that the bulk of the probability increase would go to the discuss list stage (i.e., the case is still denied review). Our results support this conjecture. Focusing on the middle bar in the figure, we now estimate only a 0.81 probability that the petition is denied review without making the discuss list—i.e., a decrease in probability of 0.11. But how does this 0.11 get redistributed in terms of the outcome? As the figure makes clear, the vast majority of it goes towards the case making the discuss list but failing to clear the secondary hurdle of being granted review. Indeed, while the estimated probability of the former occurring jumps to roughly 0.18, the latter only increases to a still anemic value of 0.02. Thus, disagreement among the judges who decided the case provides some information to the justices, but only enough information to decide that the case might be worth a slightly longer look.

The right bar in the figure shows the substantive impact when a case seeking review was decided by an unpublished (and nonprecedential) opinion in the lower court. Here, too, we focus on comparing this bar with the baseline bar, which presents the likelihood of each outcome in a petition decided

⁷We suggested that a lower court reversal of the trial court decision may also function as a low cost/low value cue. However, we fail to find a significant relationship for this variable at either stage of the process.

FIGURE 1

Impact of Lower Court Opinion Characteristics on Petition Probabilities



NOTE: The left (baseline) bar represents the modal petition, which does not contain a dissenting opinion and whose lower court opinion was published. The middle and right bars adjust those values, respectively. We obtained these estimates through stochastic simulation where all other variables were set at their modal or mean value, as appropriate.

via a published opinion. Once again, we find support for our hypothesis. The likelihood that an unpublished opinion is denied without making the discuss list is roughly 0.96, compared to a published opinion, which has a 0.92 probability. This difference between the two—i.e., 0.04—comes almost exclusively from a reduction in the probability that the petition makes the discuss list, which drops from 0.07 in the published case to 0.04 in the unpublished case.

These results provide strong evidence that low cost/low information cues are used by the Court in making the initial cut at what cases will receive even the scantiest attention. However, once this cut has been made, the usefulness of these cues decreases dramatically. As we describe above, however, participation by outside interests—especially the Solicitor General—provide a low cost but high information cue that the Court should use in both stages of its decision making.

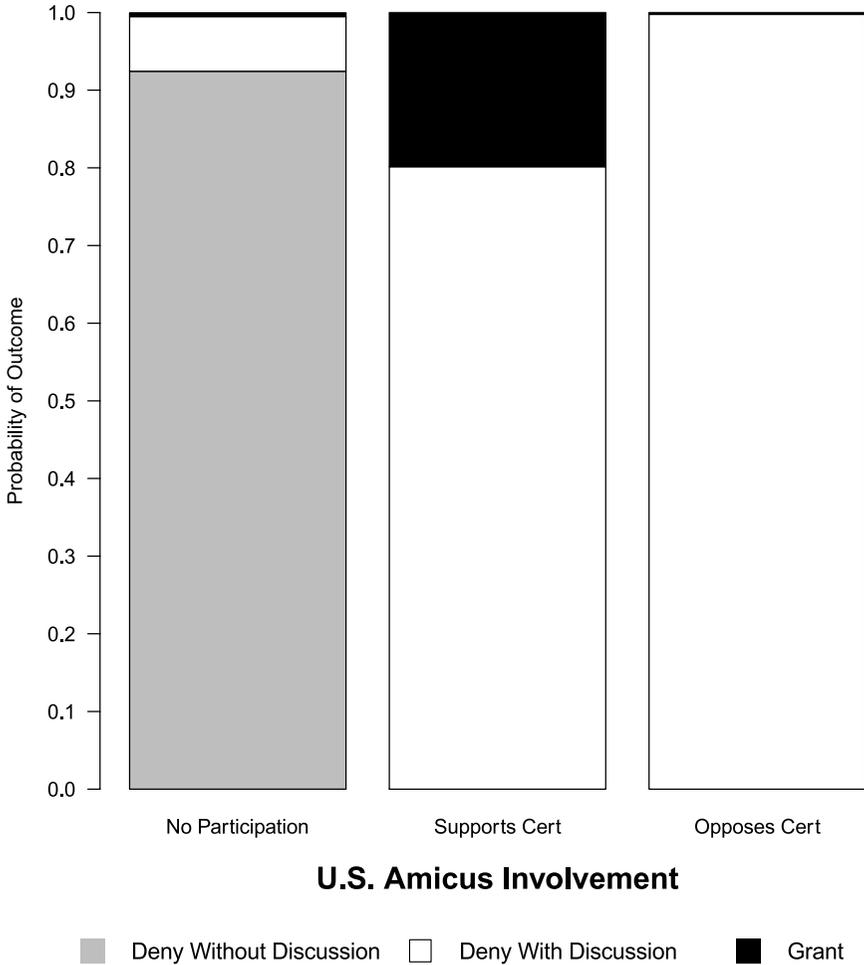
Figure 2 illustrates this. Here the baseline probability (i.e., left bar) remains identical from the previous figure. Denial without discussion is, by far, the most likely outcome (0.92). Next comes denial after discussion (0.07) followed finally by granting review (0.01). In comparing the baseline category with the two counterfactuals, which present the probabilities when a case has the SG's support (middle bar) and opposition (right bar), one fact is immediately apparent: the utter lack of probability that such a petition with any recommendation made by the SG is denied without at least first making the discuss list.

Given the salience of the SG, this is not especially surprising. More impressive, however, is the overwhelming weight given to the type of recommendation the SG offers. Consistent with earlier accounts of the SG's agenda-setting influence, we find a strong relationship for both positive and negative SG recommendations. To wit, when the SG supports granting review in the case, we estimate a 0.20 probability that the Court ultimately votes to grant review. While this number might not seem especially overwhelming, it is important to remember that we started with a baseline case where the likelihood of granting review was only 0.01. The results when the SG opposes granting review are nothing short of astounding. We estimate a 0.998 probability that the Court will vote to deny review after discussing it when the SG opposes the granting of review. Both of these results are consistent with our initial conjecture that a low cost/high information cue will operate strongly at both stages of the Court's agenda-setting process.

While the SG is a unique type of outside interest, we had also hypothesized that, consistent with previous findings, other amici would also impact the Court's decision making. This literature further suggests that the presence of amicus briefs would work to mitigate the impact of a status differential between the petitioner and the respondent. In particular, amicus briefs might offer the higher quality type of argumentation that is typically reserved for repeat players. The value of this amicus benefit, then, would be especially high for resource poor litigants but not as useful for those that are resource rich.

Both the observance of the resource level of each litigant and the presence (or absence) of an amicus brief constitute low cost cues that offer a modest amount of information for the justices. Accordingly, we had expected to find that their presence would be most important when the Court was making its initial determination of which petitions to discuss and which to summarily deny. The three panels of Figure 3 illustrate our results.

FIGURE 2
Impact of U.S. Support on Petition Probabilities

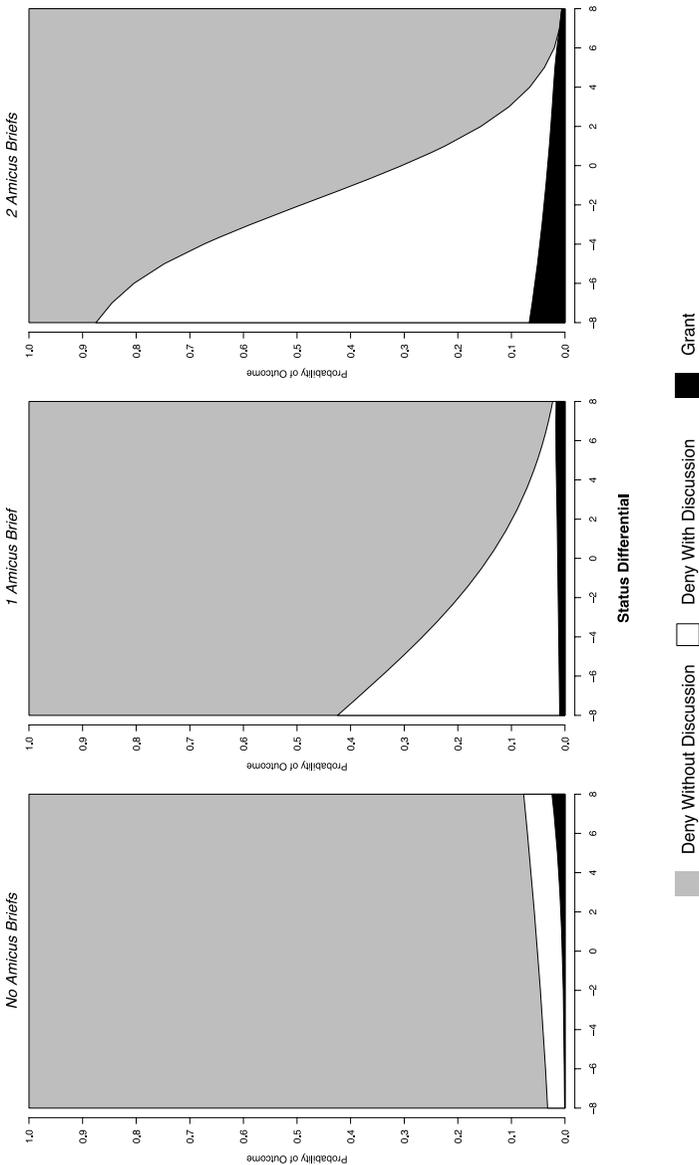


NOTE: The left bar represents the modal petition, which does not contain an amicus brief from the United States. The middle bar represents when the United States recommends granting review. The right bar illustrates when the United States opposes granting review. We obtained these estimates through stochastic simulation where all other variables were set at their modal or mean value, as appropriate.

The left panel plots the likelihood of each outcome when there are no amicus briefs in a case, conditional on the level of resource advantage the petitioner possesses over the respondent (i.e., the x-axis). As the panel makes clear, in this rather routine petition, we have a strong expectation that it will be denied without any discussion. Note that we also observe an effect for the

FIGURE 3

Impact of Amicus Support and Resource Advantage on Petition Probabilities



NOTE: The left panel represents the modal petition, which contains zero amicus briefs supporting the petitioner. The middle and right panels represent when there are one and two briefs for the petitioner, respectively. The x-axis in all three panels represents the resource advantage the petitioner possesses over the respondent. We obtained these estimates through stochastic simulation where all other variables were set at their modal or mean value, as appropriate.

role of litigant status here. That is, when a petitioner has a strong resource advantage over the respondent, there is a small increase in the likelihood that the petition will be discussed and potentially granted review.

As the middle and right panels make clear, the presence of amicus briefs for the petitioner strongly conditions the impact of the petitioner's resource advantage. The most dramatic difference is the marked increase in the probability that cases where the petitioner is weakest—but aided by a single amicus brief—will first make the discuss list before being denied. While a case with a weak (i.e., -8) petitioner and no amicus briefs has a 0.97 probability of being denied review without making the discuss list, the probability that this occurs for a petition with a single amicus brief drops by nearly 60 percent to a value of only 0.57. But, as the figure also demonstrates, this effect is conditional. As the petitioner closes the resource gap with the respondent, the usefulness of the amicus brief cue diminishes. If we hold constant the resource level and compare the strongest petitioner with one amicus brief versus the strongest petitioner with zero amicus briefs, our results actually suggest the former is *more* likely to be denied review without discussion than is the latter (the specific probabilities are 0.97 and 0.92, respectively; $p = 0.04$). In other words, an amicus brief actually acts as a (not especially strong) negative cue when the petitioner is overwhelmingly more powerful than the respondent.

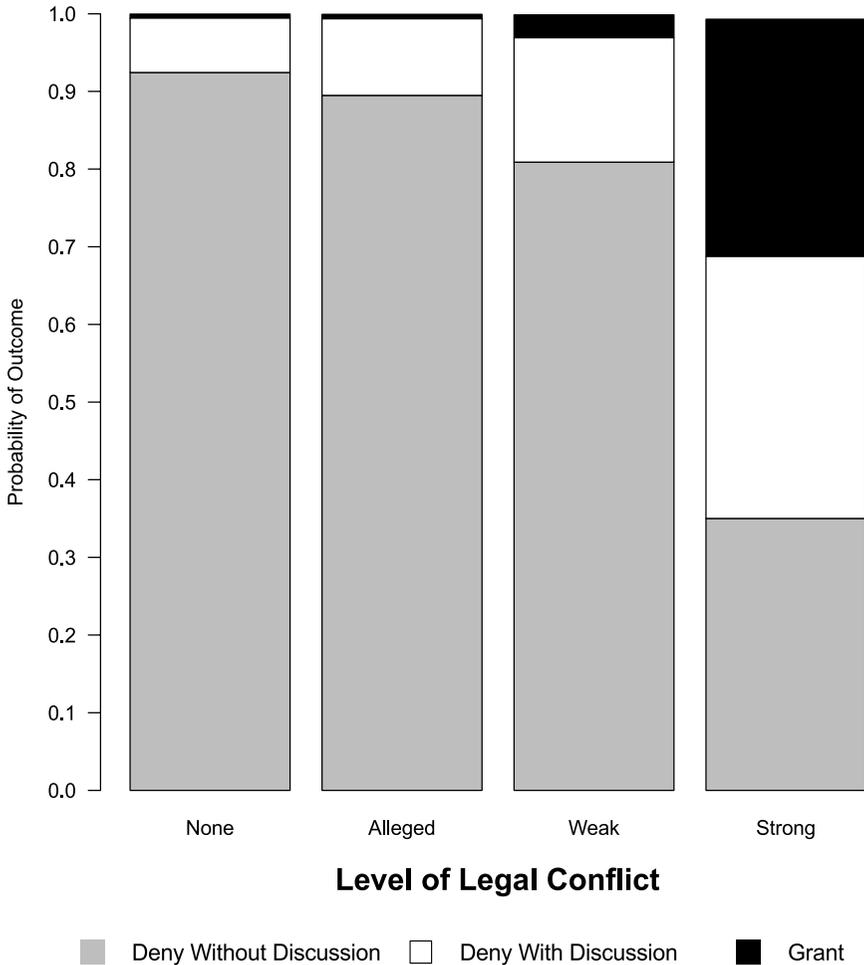
Results from the right panel, which shows probability estimates when there are two amicus briefs, are even stronger. Such a high level of external support all but guarantees that cases submitted by resource poor petitioners will at least be discussed by the Court. Moreover, we also observe a stronger impact on the probability that such petitions will be granted review. Recall that our weakest petitioner had only a 0.001 probability of being granted review with zero amicus briefs present. When two briefs are present, however, we estimate a 0.07 probability that review is granted. While the grant probability (i.e., the black area) appears to get smaller as the petitioner gains resources, this visual difference is outside conventional levels of statistical significance ($p = 0.13$).

Finally, we consider the role of legal conflict. Our initial argument suggested that the allegation of conflict would act as a low cost/low value cue whereas ascertaining the true nature of the alleged conflict constituted a high cost/high value cue. Figure 4 presents our results.

Consistent with our hypothesis, the mere allegation of conflict is a low cost/low value cue. Visually this effect is documented by comparing the "None" and "Alleged" bars in the figure. The probability of making the discuss list but still being denied increases from 0.07 in a case when conflict is not alleged to 0.10 when it is. We fail to find systematic evidence that the simple allegation of conflict has any effect on the Court ultimately granting review in a case.

We had also suggested the evidence pertaining to the true extent of the alleged conflict, while requiring a significant investment in time, would prove to be more useful in the final agenda-setting vote. Here, too, the data support

FIGURE 4
Impact of Legal Conflict on Petition Probabilities



NOTE: The left bar represents the modal petition, which alleges conflict that is rejected by the pool author as not being important. The middle and right bars represent when the pool author deems the conflict weak or strong, respectively. We obtained these estimates through stochastic simulation where all other variables were set at their modal or mean value, as appropriate.

our hypothesis. Consider the two columns on the right hand side of the figure. The weak conflict bar represents when conflict is alleged by the petitioner and, in reviewing the claims being made, the pool memo author notes that while some tension exists in the lower courts, the conflict does not require

intervention by the Court.⁸ The rightmost bar—i.e., “Strong”—shows probabilities when the pool author notes the existence of a conflict and does nothing to discount the importance of it. In the former case, we find that weak conflict has a systematic impact on the Court’s eventual likelihood of granting review. The probability of review jumps from only 0.006 when conflict is merely alleged to a value of 0.03 when it is weak. Thus, we find some evidence that even the watered down version of this cue influences the final agenda-setting outcome. When strong conflict is present, the evidence overwhelmingly supports the idea that this cue influences the grant or deny outcome. Our results suggest the Court will vote to grant review with a 0.31 probability when the pool author concludes a real conflict is present among the lower courts.

Conclusion

The foregoing confirms the importance of informational cues on the Supreme Court’s agenda-setting process. More importantly, it simultaneously extends this cue theory argument by revealing that the size of these effects is, at times, stage specific. In particular, we find that, as hypothesized, the Court will rely primarily upon low cost cues that provide limited information in making the initial cut of cases from its docket. As it moves to the final agenda-setting decision, however, it is willing to invest more time in harvesting high value cues from the materials before it. These cues, in turn, are highly predictive of what cases the Court will eventually select for review.

Beyond this novel extension of cue theory, our findings also have important implications for our substantive understanding of agenda setting. First, our account provides a complete, start-to-finish analysis of the Court’s highly selective agenda-setting process. The discuss list is a tool created by the justices, for the justices, but previous work has either studied it in isolation or ignored it altogether. That we find support for our differential cue theory demonstrates how this process is an important aspect of agenda setting and worthy of additional study.

Second, the effect of participation by outside groups—i.e., *amicus curiae*—is certainly more complex than previous efforts have recognized. Rather than providing a uniform and constant effect on the process, our data suggest the presence of amici is ultimately most beneficial to resource-poor petitioners and primarily allows those petitioners to have a chance at having their case discussed, even if the Court is no more likely to grant review in it.

For all that we believe our study does to inform, we would be remiss if we ignored some of its limitations. Unlike much of the Court’s business, because the discuss list’s formation is not characterized by individual justice behavior that is observable for each petition, we are limited in our ability to speak about

⁸Some of the justifications provided by pool authors for this include: the conflict is shallow, is likely to resolve itself, is relatively new, or is only likely to affect a limited number of cases.

how individual justice preferences, ideology, and strategy contribute to overall outcomes in this part of the Court's agenda-setting process. In addition, our data, like nearly all studies of Supreme Court agenda setting, are limited in their time frame. While we expect the informational needs of the Court in agenda setting to be consistent (if not increasing) with time, more variability in terms and institutional dynamics would certainly be interesting to study. However, this sort of expansion will only be possible as more justices retire and their papers become publicly available for study.

Beyond extending this analysis to other terms, some of our other results would also benefit from additional and more in-depth study. Take, for example, our findings concerning the role played by the U.S. government. As we note above, we find that the Court is highly responsive to the views of the SG. While this influence is not without its limits (Black and Owens, 2011), it is an important regularity in the Court's agenda-setting process. Our analysis, however, does not attempt to unpack *why* we observe it. Indeed, the literature has suggested a variety of potential mechanisms that include preference congruence (Bailey, Kamoie, and Maltzman, 2005), repeat-player status (McGuire, 1995), and the unique institutional role the SG occupies as the so-called "Tenth Justice" (Caplan, 1987), to name only a few.

In a broader perspective, this study brings important empirical insight as to how complex the Court's agenda-setting stage really is, a fact that Court watchers have long known. As a purely substantive matter, providing a complete accounting of the Court's agenda-setting process helps advance scholarly understanding of the complicated (and highly secretive) way in which justices select the cases that will be used to change legal policy in the U.S. Thus, to the extent the discuss list represents a key stage in the agenda-setting process for the justices, this study suggests it is important that our models also account for it.

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