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Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions

Ryan C. Black[1] and Ryan J. Owens[2]

Abstract

Given scarce resources, Supreme Court justices hear cases that maximize their auditing capacities. The authors argue that justices rely on the identity of lower court judges and the ideological disposition of lower court decisions to decide which cases to review. The authors find justices are most likely to audit disagreeable lower court decisions rendered by ideologically disagreeable panel judges and are least likely to review agreeable lower court decisions rendered by ideologically agreeable panel judges. Furthermore, when faced with the same ideologically disagreeable lower court decision, justices are less likely to review decisions made by ideological allies than those by ideological foes.

Keywords

judicial hierarchy, agenda setting

How can justices most profitably spend their scarce resources auditing lower court decisions? Recent studies of Supreme Court agenda setting suggest that justices review lower court decisions, in large part, to ensure that the Court renders decisions that improve policy for them (Black and Owens 2009a; Caldeira, Wright, and Zorn 1999). Thus, conservative justices unchain the Court to overrule liberal lower court decisions while liberal justices investigate and scrutinize conservative lower court decisions to supplant them with liberal precedent. Despite the theoretical and methodological simplicity attached to such assumptions—not to mention their empirical support—it is quite likely that when auditing lower court decisions, Supreme Court justices examine not only the *ideological disposition* of the lower court decision but also the *ideological composition* of the panel of lower court judges rendering that decision. Justices will devote their finite auditing capacity to the most offensive lower court decisions. Determining which cases are most offensive requires a focus on both the message sent by the lower court (i.e., the ideological disposition) and the identity of the message sender (i.e., the composition of the lower court panel).

Building on existing scholarship (Cameron, Segal, and Songer 2000), we argue that justices rely on the identity of lower court judges on the panel making the decision as well as the disposition of the lower court decision to aid them in deciding which cases to review. That is, while the ideological disposition of the lower court decision matters, not all conservative or liberal dispositions tell the same story. Conservative justices are likely to react more aggressively to liberal lower court decisions rendered by liberal lower court panels than liberal decisions rendered by conservative lower court panels. Conversely, liberal justices should behave more aggressively toward conservative decisions rendered by conservative lower court panels than from panels consisting of liberal judges. The reason, we argue, stems from the signal sent by the lower court. Lower court dispositions at odds with the lower court judges' general ideological proclivities are likely to be perceived as more credible signals about the "right" legal outcomes. Justices faced with ideologically unpleasant lower court decisions will be more likely to let them stand if rendered by ideological allies. In short, we argue that sender identity and ideological congruence jointly influence justices' agenda setting behavior.

To test this account, we examine a random sample of 358 agenda-setting petitions decided across the first eight terms of the Rehnquist Court (1986–1993). Our results confirm our hypotheses. Justices are most likely to audit ideologically incongruent lower court decisions rendered

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by ideological foes and are least likely to audit ideologically congruent decisions rendered by lower court allies. At the same time, justices are more likely to review ideologically incongruent lower court decisions made by ideological foes than those rendered by lower court allies. Simply put, justices expend their scarce resources auditing lower court decisions that are the most likely to offend them and that provide the most utility from review, and they do so by examining both the ideological disposition of the case and the identity of the lower court judges.

In what follows, we describe how Supreme Court justices set the Court's agenda. We then examine how the Court may use its scarce resources to examine the behavior of lower court judges, building off important theoretical contributions by Cameron, Segal, and Songer (2000) and others (Lindquist, Haire, and Songer 2007; Haire, Lindquist, and Songer 2003). We then explain our data and methods, present our results, and conclude with a discussion of how these results reflect larger features of Supreme Court–lower court interactions.

Supreme Court Agenda Setting

Supreme Court justices have vast discretion to set the Court's agenda as they see fit. Indeed, in many ways, the procedure by which the Court sets its agenda allows justices maximum leverage to investigate and review lower court behavior (Caldeira, Wright, and Zorn 1999). There are few exogenously imposed rules on justices' agenda decisions, those decisions occur in nearly complete secrecy, and the affirmative votes of only four of nine justices are required to trigger review. Combined, these features largely free up justices to audit and corral wayward lower courts.

There are little to no formal rules that command the Supreme Court's agenda decisions.[1] With little restriction since 1925, justices enjoyed the flexibility to set the Court's agenda. Supreme Court rule 10 states simply that the Court is likely to hear cases that involve conflicts among the lower courts or cases that involve important issues. These factors, of course, are quite vague. Whether a "conflict" exists can be unclear. And even when conflict is clear, justices may disagree whether the conflict is tolerable or demands attention. Indeed, if we believe former Justice Byron White, the Court frequently denied review to cases where important conflict was present (Stern et al. 2002). Conflict, then, certainly matters, but justices may convince themselves of its insignificance. Like conflict, legal importance surely is critical, but it is conceptually broad. Justices may be unable (or unwilling) to rank order petitions based on perceived importance, especially when so many cases before the Court are important. Simply put, while rule 10 imposes general guidelines, they are not dispositive and, in fact, are broad enough to provide justices with substantial flexibility.

Anonymity, like flexibility, is a virtue for justices as they set the Court's agenda and audit offensive lower court decisions. When justices set the Court's agenda, they cast votes entirely in secret (until divulged years later in the personal papers of a former justice). Neither the public nor Court staff nor the justices' own law clerks are allowed in the conference room during these deliberations. The only publicly observed part of the agenda-setting process is the ultimate outcome of the vote—whether the petition or appeal is granted or denied review. The public never observes how many justices voted to grant or deny review, nor does the public learn *why* the justices voted accordingly. Except in the relatively rare instance of a dissent from the denial of certiorari, each justice's specific vote on a petition (and his or her corresponding reasons) is unknown. As such, justices can choose to review cases precisely to audit wayward circuit courts—and they can do so without offering a public justification.

Finally, a low voting threshold to trigger review allows justices to audit lower courts more easily. Only four or more justices must vote to grant review to hear a case, rather than the majority of five it requires to do nearly everything else on the Court. As Lax (2003) points out, this Rule of Four standard makes it easier for the median justice to audit lower court decisions. Combined, flexibility, anonymity, and Rule of Four voting enhance justices' powers to audit lower court decisions. How justices employ these tactical powers, use their scarce resources, and supervise lower courts is the focus of the remainder of this analysis.

Strategic Auditing under Limited Resources

Research finds that justices grant review to lower court decisions so as to improve legal policy. For example, Palmer (1982) discovers that justices strategically set the Court's agenda by placing cases on the docket that they believe they will win, while keeping off the docket those cases they are likely to lose. Other studies argue that justices are "situational" strategic actors (Baum 1997, 80). That is, affirm-minded justices strategically anticipate the Court's likely merits ruling and strategically select cases for review (Benesh, Brenner, and Spaeth 2002; Boucher and Segal 1995; Brenner 1979). Additional studies show that justices clearly take cases to improve lower court policy. For example, Caldeira, Wright, and Zorn (1999) demonstrate that justices are more likely to grant review as they increasingly become ideologically aligned with the Court's average ideological tendencies, with the implicit thought that review will create better policy for them. Black and Owens (2009a) find the same: justices are 75 percent more likely to vote to review cases when they expect the Court to make better policy on the merits than the existing status quo.

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While these studies tell us quite a bit about agenda setting, they largely ignore the composition of the lower court and the information it communicates (but see Cameron, Segal, and Songer 2000; Lindquist, Haire, and Songer 2007; Haire, Lindquist, and Songer 2003; Perry 1991). Certainly, justices are more likely—on average—to expend judicial resources on ideologically incongruent lower court decisions. Yet lower court ideological composition is likely to condition this drive to review. That is, conservative justices might be less likely to audit liberal lower court decisions adopted by conservative judges than liberal decisions rendered by liberal judges. Simply put, signaling theory is likely to explain this relatively overlooked aspect of Supreme Court agenda setting.

Signaling theory explains the conditions under which receivers rely on the information provided to them by senders. Given an asymmetry in information between sender and receiver, signaling theory holds that the receiver relies on shortcuts to determine the credibility of the sender's signal. If the sender and receiver generally share the same worldview or desire the same outcomes, the receiver has good reason to trust the information conveyed by the sender. Alternatively, if the sender and receiver hold competing worldviews, the receiver will discount the information *except* when it is contrary to the sender's self-interest (Calvert 1985; Bailey, Kamoie, and Maltzman 2005). In cases where the sender forwards information that contravenes her usual position or her sought-after outcome, the receiver can credibly rely on that information.

Three recent studies apply signaling theory to the Supreme Court. The first examines the conditions under which Supreme Court justices rely on the information provided to them by the U.S. solicitor general (SG). Bailey, Kamoie, and Maltzman (2005) argue that justices will rely on SG information when they agree with the SG on ideological grounds as well as when the SG presents the Court with information that contravenes her usual ideological position. The authors find that justices who are ideologically proximate to the SG are quite likely to vote consistent with her position. Justices vote with the SG 78 percent of the time when they are ideologically proximate but only 52 percent of the time when they are ideologically distant from her. At the same time, justices key in on the SG's information when it meets the other test of credibility—the value of biased information. When the SG files an amicus brief supporting an outcome that the justice believes runs counter to the SG's ideological orientation, the justice supports her 83 percent of the time.

More important for our purposes is Cameron, Segal, and Songer (2000), which develops a signaling model to generate predictions about how the Supreme Court will allocate its limited docket space.[2] While developed in the specific context of the decision to admit evidence resulting from a search and seizure, general aspects of the study's hypotheses are applicable across issue areas. In particular, the authors examine how the Court uses signals and indices to determine which cases to review. When a lower court renders a decision that accords with Supreme Court ideology in a case, the Supreme Court need not rely on indices to determine whether to review. That is, the signal (here, admitting the evidence) tracks with the Court's goals. On the other hand, when the lower court renders a decision that the Supreme Court dislikes (i.e., it sends a signal of which the Court is skeptical), justices will rely on unmanipulable indices to verify the veracity of the lower court's signal. In short, when the reviewing Court has reason to question the credibility of the signals sent by the lower court, it will become more likely to audit that lower court.[3]

Lindquist, Haire, and Songer (2007) similarly examine the conditions under which the Court audits lower court decisions. Employing an institutional perspective, the authors find that the Supreme Court reviews more circuit court decisions when the median judge on the circuit becomes more ideologically distant from the median justice and when the circuit itself observes higher rates of conflict, such as more dissents, more reversals, and a higher rate of reversal by the Supreme Court in recent terms. These findings, the authors state, suggest that the Court "expend[s] its institutional resources strategically to enhance the effects of its auditing activity" (Lindquist, Haire, and Songer 2007, 620).

Cameron, Segal, and Songer (2000) and Lindquist, Haire, and Songer (2007) are rich studies with many virtues that demand expansion using contemporary data and a broader focus. For starters, Cameron, Segal, and Songer examines only search and seizure petitions—a narrow and potentially unique issue area (Epstein and Mershon 1996). Moreover, because of data limitations at the time—which now have been rectified—Cameron, Segal, and Songer were unable to control for a variety of alternative explanations for why petitions are granted review. Indeed, the study's empirical results include only policy-based explanations for granting review, a focus that misses the importance of legal factors at the agenda stage (Perry 1991; Black and Owens 2009a).

Similarly, Lindquist, Haire, and Songer (2007) examine the number of cases the Court heard per term from each circuit rather than the decision to review each specific *case* decided by a panel. We know from looking at the Court's internal cert pool memos (Epstein, Segal, and Spaeth 2007) and from interviews with justices and their clerks (Perry 1991) that justices consider the identity of the judges sitting on the lower court panel. That is, because of limitations in data availability, both Cameron, Segal, and Songer (2000) and Lindquist, Haire,

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and Songer (2007) were forced to use the Court outcome as the unit analysis as opposed to the individual (private) vote of each justice. As such, the studies could not speak to the auditing behavior of conservative and liberal justices, which is our focus here.

Using updated measures and unique archival data, we apply the important theoretical insights from Cameron, Segal, and Songer (2000) and examine how signaling theory influences justices' agenda votes. Our first expectation is that justices should be more likely to review cases that are ideologically incongruent with their personal policy preferences. As we note above, a host of studies show that justices set the Court's agenda with the goal of imposing their policy preferences on the law. As such, we expect the following:

> *Ideological compatibility hypothesis:* Conservative justices will be more likely to vote to review liberal lower court decisions, while liberal justices will be more likely to vote to grant review to conservative lower court decisions.

At the same time, the identity of the lower court judges rendering the decision is likely to matter. Conservative (liberal) justices are likely to defer to conservative (liberal) lower court judges. That is, signaling theory tells us that receivers should trust the information submitted to them by senders with whom they generally agree. Accordingly, justices should be more willing to defer to the decisions of proximate lower court judges and, thus, less likely to review their decisions.

> *Sender identity hypothesis:* Conservative justices will be more likely to defer to conservative lower court judges and less likely to defer to liberal lower court judges. Conversely, liberal justices will be more likely to defer to liberal lower court judges and less likely to defer to conservative lower court judges.

The critical component to signaling theory—and the chief contribution made by Cameron, Segal, and Songer (2000)—is the interaction of these two features (also see Bailey, Kamoie, and Maltzman 2005). That is, sender identity *and* the signal sent work together to support or subtract credibility. Justices should be least likely to review favorable decisions by ideologically friendly judges. Conversely, they should be most likely to review unfavorable decisions by ideologically unfriendly judges. And perhaps most important for purposes of this article, we expect justices to be less likely to audit disagreeable lower court decisions when rendered by ideological allies rather than ideological foes. In other words, the identity of the lower court judges can serve to mitigate against review. This gives rise to the following hypothesis:

> *The conditional effect of sender identity hypothesis:* Given that a lower court decision is ideologically incompatible with a justice, the justice will be less likely to review a decision rendered by a panel of judges with whom she or he agrees ideologically than one rendered by a panel with whom she or he disagrees ideologically.

Measures and Data

To examine justices' strategic auditing, we randomly sampled 358 paid non-death-penalty petitions coming out of a federal court of appeals that made the Supreme Court's discuss list during the 1986–1993 terms.[4] Our dependent variable is each justice's dichotomous cert vote. We code a grant vote as 1 and a deny vote as 0 (N = 3,024).[5] Our source for the justice votes is the docket sheets of Justice Harry A. Blackmun, which we obtained from Epstein, Segal, and Spaeth (2007).[6]

Our main theoretical claim is that justices' agenda-setting votes are influenced by the interplay among a decision outcome (i.e., its liberal or conservative nature), the policy preferences of the judges who reached that decision, and, finally, the policy preferences of the Supreme Court justice weighing the decision to grant review. As we noted above, justices should be most likely to review ideologically incongruent decisions rendered by ideologically incongruent judges and least likely to review ideologically congruent decisions adopted by ideological allies. At the same time, we expect that—given an ideologically incongruent lower court decision—a Supreme Court justice will be more likely to vote to audit the panel of ideological foes than the panel of ideological allies.

To operationalize our hypotheses we needed three primary pieces of information: a measure of Supreme Court justices' policy preferences, a measure of lower court judges' policy preferences, and a determination of whether the lower court decision was liberal or conservative. To determine the ideological preferences of each Supreme Court justice and lower court judge, we relied on the oft-used Judicial Common Space (JCS; Epstein et al. 2007), which places Supreme Court justices on the same measurement scale as federal circuit court judges, with scores ranging from negative (*liberal*) to positive (*conservative*).

To measure the ideological composition of the lower court, we analyzed the JCS scores of the judges who sat on the federal circuit panel (i.e., the lower court) that heard the case. In the usual (unanimous) three-judge panel decision, we coded the location of the lower court decision as the JCS score of the median judge. In cases with a dissent or a special concurrence—where only two circuit judges constituted the winning coalition—we coded the ideological composition of the law court as the midpoint between the two judges in the majority. If the lower court decision was en banc, we coded the status

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quo as the median judge in the en banc majority. When district court judges sat by designation on the circuit panel, we followed Giles, Hettinger, and Peppers (2001) and coded the district court judge's ideal point consistent with norms of senatorial courtesy.

Finally, to determine the ideological disposition of the lower court decision—whether it was liberal or conservative—we followed the coding protocol identified by Spaeth (2006) and identified the winning party within a particular issue area. For example, in criminal procedure cases a decision was liberal if the criminal defendant prevailed below and conservative if the government won.

We also control for a host of other factors shown to influence justices' agenda decisions. Our first control examines the role of legal conflict. As noted above, Supreme Court rule 10 states that when two or more lower courts diverge over the interpretation or application of the law, the Court will be more likely to review the case. Previous scholars have found support for the influence of legal conflict on the Court's agenda decisions (Perry 1991; Caldeira and Wright 1988). To account for legal conflict, we include three variables: *alleged conflict*, *weak conflict*, and *strong conflict*.[7] All of these variables are derived from the law clerks' discussions in cert pool memos,[8] which we obtained from Epstein, Segal, and Spaeth (2007).[9] *Alleged conflict* takes on a value of 1 if the memo writer notes that the petitioner has claimed a conflict among the circuits. *Weak conflict* is coded as 1 if the petitioner alleges legal conflict and the law clerk suggests that the conflict is minor and tolerable. This occurs most often when the conflict includes few circuits (i.e., is a shallow split). *Strong conflict* is coded as 1 when the pool memo writer notes the existence of conflict that is neither minor nor tolerable.[10]

A second factor that is likely to influence a justice's agenda vote turns on whether the lower court judges struck down a law as unconstitutional. Perry (1991) suggests that when the lower court strikes down a federal law, justices believe themselves compelled to examine the lower court decision to ensure its correctness. As such, we include *lower strike*, which takes on a value of 1 if the reviewing court struck down a federal statute as unconstitutional; 0 otherwise.

We also control for the importance of a case. Both Perry (1991) and Stern et al. (2002) highlight how legal importance can influence a justice's decision to grant review to a case. To operationalize legal importance, we rely on three different measures. Our first measure comes from the lower court's opinion type. Courts of appeals judges are allowed to dispose of easy or mundane cases through a brief opinion (usually no more than a few sentences) that they declare to be unpublished. Supreme Court Justices are hesitant to review such decisions because of their nonprecedential nature.[11] As such, we code *lower unpublished* as 1 if the lower court's opinion was unpublished. Our second measure of legal importance comes from the pages of the *U.S. Law Week*, a legal periodical that seeks to "[alert] the legal profession to the most important cases and why they are important" (LexisNexis Source Information). We expect that legally important cases will generate summaries in *U.S. Law Week*, while legally mundane cases will not. We code *U.S. Law Week article* as 1 if there was a story written about the circuit court opinion; 0, otherwise. Finally, our third measure of case importance turns on the number of amicus curiae briefs filed in a case. Participating in Supreme Court decisions is expensive. The stakes must be high if actors elect to bear the costs to engage the system (Caldeira and Wright 1988). Accordingly, we coded *amicus briefs* as the total number of amicus curiae briefs filed both in support of and in opposition to the petition.

We further control for the position of the United States in the case. If the United States asks for review either as petitioner or through participation as amicus curiae, we code *U.S. supports petition* as 1; 0 otherwise. Conversely, *U.S. opposes petition* takes on a value of 1 when the United States is the respondent to a petition or files a brief in opposition to the granting of review as amicus curiae. We code *lower en banc* as 1 if the decision of the lower court was en banc (i.e., when the full circuit hears and votes on the case).[12] *Lower reversal* takes on a value of 1 if the court immediately below the Supreme Court reversed the decision of the court below it (usually a trial court). *Lower dissent* takes on a value of 1 if a judge in the court immediately below the Supreme Court wrote a dissenting opinion in the case. Finally, we code *justice–Supreme Court median distance* as the absolute value of the difference between the voting justice's JCS score and the JCS score of the median justice on the Court during the term in question.

Method and Results

As our dependent variable is dichotomous, we estimate a logistic regression model. To account for the repeated observations within each docket (and potential lack of independence within each docket), we cluster our standard errors on each of the 358 dockets in the sample. Parameter estimates for the model are reported in Table 1. We note that the model correctly predicts over 75 percent of our observations and achieves a modest (19 percent) reduction in error over a naive guessing model.

A cursory examination of the table reveals that many of the control variables perform as expected. In the presence of strong or weak conflict, justices are more likely to vote to grant review to a case. If the United States supports review, justices are more likely to vote to hear the case. If the lower court reversed the decision of the

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Table 1. Logistic Regression Model of Justice Agenda-Setting Votes

Variable name	Coeff.	Robust *SE*
Alleged conflict	0.179	0.234
Weak conflict	0.479*	0.191
Strong conflict	1.508*	0.197
U.S. supports petition	0.897*	0.231
U.S. opposes petition	−0.138	0.209
Lower reversal	0.329*	0.166
Lower dissent	0.291	0.198
Lower strike	1.514*	0.419
Lower en banc	0.145	0.393
Lower unpublished	−0.402	0.428
Amicus brief	0.177*	0.079
U.S. Law Week article	0.231	0.177
Justice–Supreme Court median distance	−1.016*	0.210
Lower court liberal	0.249	0.173
Lower opinion median	0.071	0.388
Justice JCS	−0.974*	0.235
Lower court liberal × lower opinion JCS	−0.221	0.558
Lower opinion JCS × justice JCS	−0.703	0.742
Lower court liberal × justice JCS	1.520*	0.269
Lower court liberal × lower opinion JCS × justice JCS	−0.641	0.952
Constant	−1.971*	0.250
Observations	3,024	
Log likelihood	−1548.483	
Pseudo-R^2	.170	
Percentage correctly predicted	75.1	
Proportional reduction in error	18.9	

Note: JCS = Judicial Common Space. Standard errors clustered on docket number are reported in the third column.
*$p < .05$ (two-tailed).

tribunal below it, justices are more likely to hear the case as well. Consistent with earlier findings (Black and Owens 2009a; Owens 2010), justices are more likely to vote to grant review to cases as the amount of amicus curiae briefs filed at the agenda stage increases and when the circuit court exercised judicial review over a federal statute. And, similar to Caldeira, Wright, and Zorn (1999), we find that justices become increasingly likely to vote to grant review to a case when they become ideologically closer to the median justice.

More importantly, we find substantial evidence to support our main theoretical claims—that justices expend their scarce judicial resources to audit those lower court decisions most offensive to them and that they are more likely to review offensive decisions rendered by ideological foes than those by ideological allies. As the model contains several interactive terms, whose statistical and substantive significance cannot be assessed from the coefficient and standard error estimates alone (Ai and Norton 2003; Kam and Franzese 2007), we follow the advise of others and graphically portray our results (King, Tomz, and Wittenberg 2000; Brambor, Clark, and Golder 2006).

Recall that our hypotheses contain three moving parts: (1) the policy preferences of the judges on the lower court, (2) the policy preferences of the voting justice, and (3) the ideological direction of the lower court's decision. Figure 1 graphically presents the combinations of these complicated interactions, showing the predicted probability that either a conservative or liberal Supreme Court justice votes to audit a lower court decision, conditional on the policy preferences of the lower court judges and the ideological disposition of their decision.[13]

Consider first the behavior of a conservative justice, such as former Chief Justice Rehnquist. Which cases is Rehnquist most likely to review? We theorized that Rehnquist would be most likely to review liberal decisions rendered by liberal lower court judges and least likely to review conservative decisions rendered by conservative lower court judges. That is, we expect a justice's voting behavior to be conditioned by her or his overall agreement with the panel's general ideological predilections as well as the specific ideological disposition in the case. Our results support our hypothesis. As the top panel of Figure 1 shows, a conservative justice will vote with a 0.21 probability to review a liberal lower court decision rendered by a majority panel of liberal judges. On the other hand, that same conservative justice is least likely to review a conservative panel's conservative decision. The predicted probability of a grant vote drops to 0.06 when a conservative lower court panel renders a conservative decision.

Liberal justices exhibit similar behavior. As the bottom panel of Figure 1 shows, a liberal justice will vote with a 0.23 probability to review a conservative panel's conservative decision. Conversely, that same liberal justice is much less likely to review a liberal panel's liberal decision. Indeed, when a liberal lower court panel renders a liberal decision, the predicted probability that a liberal justice vote to audit the case plummets by roughly 70 percent to an anemic value of 0.07. Simply put, both conservative and liberal justices are more likely to go out of their ways to audit ideologically opposed decisions rendered by ideological foes.

Of course, while these results are informative, they are not especially surprising. More interesting for our purposes is the examination of justices' votes in "mixed" cases. Are justices, consistent with Cameron, Segal, and Songer (2000), willing to give a "pass" to certain lower court panels rendering ideologically incongruent decisions?

To address this question, we begin by focusing on conservative justices deciding whether to review liberal

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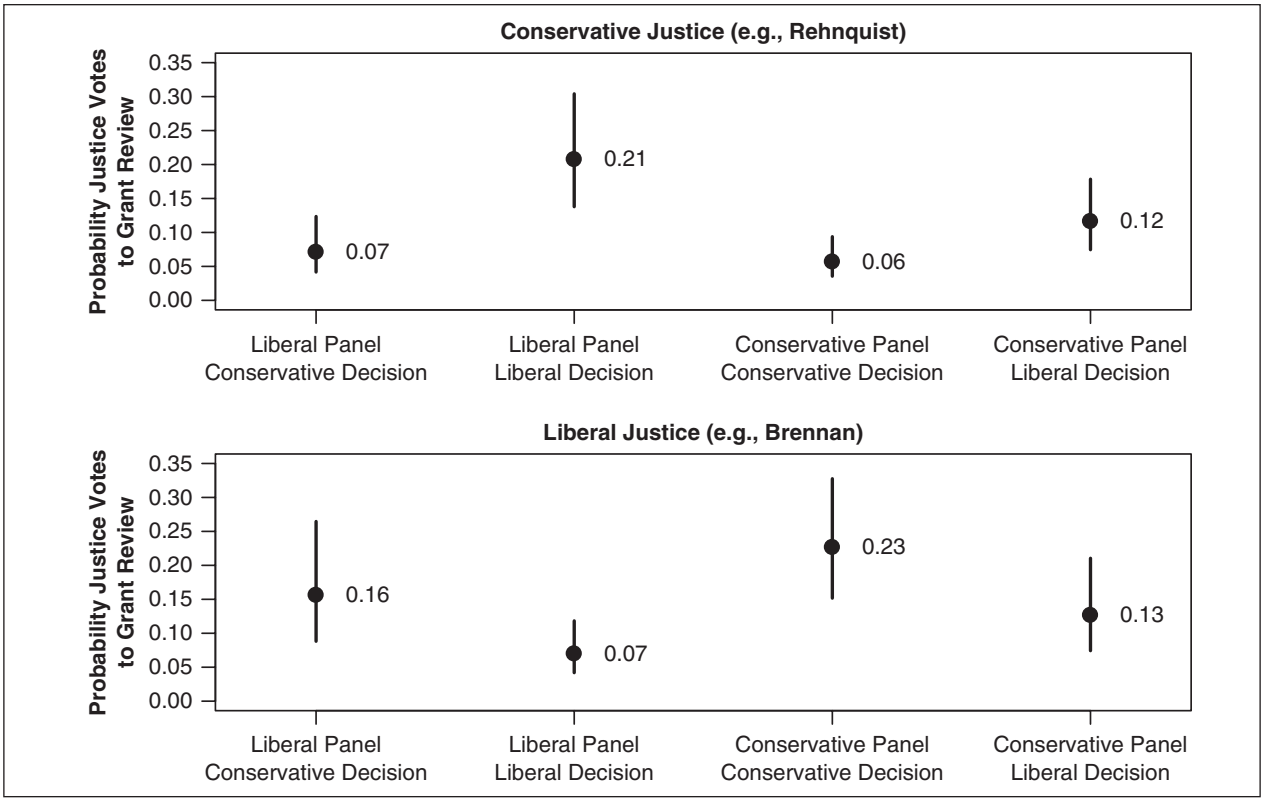

Figure 1. Probability a conservative or liberal Supreme Court justice votes to audit a lower court decision, conditional on the policy preferences of the lower court judges and the ideological disposition of their decision

decisions. Conservative justices are more likely to review liberal decisions by liberal panels (0.21) than liberal decisions made by conservative panels (0.12)—a statistically significant difference.[14] We find similar results when we next examine the behavior of conservative justices facing liberal panels. Liberal lower court judges fare better with conservative justices when they shed their sincere preferences and render conservative decisions. More specifically, given that the lower court panel consisted of liberal judges, a conservative justice is three times more likely to review liberal decisions (0.21) than conservative decisions (0.07). In a similar vein, we also obtain expected results when we focus on the behavior of *conservative justices* facing *conservative panels*. A conservative justice is twice as likely to review a conservative panel's liberal decision than that same conservative panel's conservative decision (0.12 vs. 0.06).

Combined, then, the results for conservative justices tell exactly the story we expected: conservative justices are least likely to review conservative lower court decisions rendered by conservative ideological allies and most likely to review liberal lower court decisions rendered by liberal ideological foes. At the same time, the identity of the lower court panel rendering the decision can mitigate that justices' desire to review. This is particularly important in instances where a liberal decision arose from a conservative panel. Justices appear to give these panels a pass, taking the decision as a signal about the proper state of the law.

We turn, next, to the behavior of liberal justices, specifically, liberal justices deciding whether to review conservative decisions. Liberal justices are less likely to review a conservative decision rendered by a liberal court (0.16) than one rendered by a conservative court (0.23). While these results accord with our expectations, postestimation analysis reveals that the difference between the two predicted probabilities, while clearly in the expected direction, escapes statistical significance.[15] What about the behavior of *liberal justices* facing *conservative panels*? Consistent with our findings regarding the behavior of conservative justices, conservative lower court judges fare better with liberal justices when they, too, shed their sincere preferences and render liberal decisions. Liberal justices have a 0.23 predicted probability of voting to review a conservative panel's conservative decision but a 0.13 probability of voting to review that same panel's liberal lower court decision—a difference that is statistically significant. Put simply, a liberal justice gives her or his conservative lower court foes a "pass" when they rule consistent with her or his preferences rather than their own.

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Finally, we obtain expected results when we focus on the behavior of *liberal justices* facing *liberal panels*.[16] A liberal justice is significantly more likely to review a liberal panel's conservative decision (0.16) than a liberal panel's liberal decision (0.07).

Combined, these results are nearly identical to the results we obtained when examining the agenda behavior of conservative justices and tell the story we expected. Liberal justices are least likely to review liberal lower court decisions made by ideological allies and most likely to review conservative lower court decisions rendered by ideological foes. At the same time, the identity of the lower court panel rendering the decision can mitigate that justice's desire to review.

The behavior of justices, then, leads us to confirm our hypotheses. Holding all else equal, justices are most likely to review ideologically opposed decisions and least likely to review ideologically friendly decisions. More importantly, however, we find that justices pay attention both to sender identity and the signal being sent. When the signal opposes the justices' ex ante preferences in a case, sender identity matters. If an unfavorable signal is sent by a panel with whom the justices typically agree, the justices are more likely to allow that decision to stand. Conversely, when the unfavorable signal is sent from a sender with whom the justices generally disagree, the decision is more likely to be audited. These results accord with the important contribution made by Cameron, Segal, and Songer (2000).

Conclusion

We began this article with a straightforward question: how can justices most profitably spend their scarce resources auditing lower court decisions? We argued that justices will rely on the identity of the lower court judges as well as the disposition of the lower court decision to aid them in deciding which cases to review. Our results confirm our theoretical intuition. Justices are most likely to audit disagreeable lower court decisions rendered by ideologically disagreeable judges and least likely to review agreeable lower court decisions rendered by agreeable judges. We also discovered that when faced with ideologically incongruent lower court decisions, justices consider sender identity: they are more likely to review ideologically incongruent decisions rendered by ideological foes than incongruent decisions rendered by ideological allies. In short, when justices decide whether to review lower court decisions, they jointly consider both sender identity *and* ideological congruence.

One potential implication of these results is that they set out a plausible strategy for lower court panels who wish to avoid the ire of justices with incongruent policy preferences: render your decision in a counterideological manner.[17] Such an action, of course, is not costless to a lower court panel. Indeed, the panel must believe that likelihood of review and the consequences of the presumed reversal that accompanies it exceed the cost of issuing a decision that likely goes against the panel's sincere policy preferences. That circuit court judges profess only limited confidence in their ability to predict which cases will be granted review by the Court (Bowie and Songer 2009) only serves to further complicate their potential strategic calculation (also see Klein and Hume 2003; Songer, Ginn, and Sarver 2003).[18]

While we leave further investigation of these matters for future research, the unescapable bottom line from our data and analysis is that there are well-defined, systematic features on which justices rely when setting the Court's agenda, namely, the ideological disposition of the lower court's decision and the identity of the lower court judges who render that decision.

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Notes

1. In a small handful of cases arising from three-judge district courts, justices are obligated to review the judgment of the lower court. Nevertheless, these disputes do not involve circuit court panels, and the number of these appeals in recent years has dropped "precipitously"—in some years, dipping into single digits (Stern et al. 2002, 472-73). In addition, the Court is obligated to hear the few cases that arise under its original jurisdiction, but those cases do not involve lower courts.
2. Cameron, Segal, and Songer's (2000) model also generates predictions about the behavior of lower court judges, but as their focus is on the Court's agenda-setting decisions, they do not test the lower court hypotheses.
3. In a related piece, Haire, Lindquist, and Songer (2003) find that circuit courts are roughly 3 percent less likely to reverse trial court decisions that conflict with the trial judge's ideology than those that accord with it. That is, a circuit panel is roughly 3 percent less likely to reverse a case decided liberally by a Republican trial judge.
4. We sample petitions from the Court's discuss list because these are petitions that have a nonzero probability of being granted since at least one justice deemed it worthy of some discussion. We examine only petitions from federal courts of appeals because there are no measures that map state supreme court justices on the same ideological scale as U.S. Supreme Court justices. We exclude capital petitions

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because during the period of our study, they were treated differently from their noncapital counterparts. Capital cases were automatically added to the discuss list. Once there, it was standing policy for Justices Brennan and Marshall to vote to grant the petition, vacate the death penalty, and remand the case (Woodward and Armstrong 1979). We obtained the discuss lists for each term in our sample from the Blackmun Papers at the Library of Congress. These lists provide detailed information of the docket numbers that made the discuss list, the conferences at which the dockets were discussed, and the justices who placed the cases on the list.

5. The online supplement (at http://prq.sagepub.com/supplemental/) contains additional details about recoding decisions we made in gathering our data. The supplement also contains the results of an additional model where our dependent variable is whether the Court—as a whole—granted review in a particular case.
6. Black and Owens (2009b) demonstrate that Blackmun's records provide a valid and reliable indicator of the Court's agenda-setting vote.
7. We code separate variables for weak and strong conflict for two reasons. First, we have ample reason to believe that not all legal conflicts are created equal. As Stern et al.'s renowned text on practice before the Supreme Court notes, a genuine conflict (what we label a strong conflict) 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). Second, recent scholarship on Supreme Court agenda setting also employs such a measurement approach (Black and Owens 2009a). We should note that there is not a specific number of circuits needed to be "in conflict" before we code conflict as strong or weak. All that is necessary to code conflict as strong is that the cert pool memo writer notes that some conflict exists and fails to discount it in any fashion. Conversely, all that is necessary to code weak conflict is for the memo writer to note the existence of conflict but then cast some doubt on the extent or importance of the conflict. This can be done by stating that the conflict exists but is shallow, or unimportant, or unclear.

   We included both "actual" conflict (weak or strong) and "alleged conflict" to fit within the broader literature on Supreme Court agenda setting. Two important agenda-setting articles, Caldeira and Wright (1988) and Caldeira, Wright, and Zorn (1999) examine both alleged conflicts (when the petitioner alleges a conflict between or among the circuits) and real conflicts (those where the staff of the *New York University Law Review* concluded that alleged conflicts were, in fact, present). Since we operate within a literature that has been built and pushed forward, in part, by these articles, we thought it wise to control for alleged conflict as well. Alleged conflict and weak conflict (or strong conflict) could both equal 1 in the models. However, it is important to note that it is impossible for both weak conflict and strong conflict to be simultaneously coded as 1.
8. The cert pool is a labor-sharing agreement whereby each appeal or petition for certiorari is randomly assigned to one of the participating justices' law clerks. This law clerk (the pool memo writer) drafts a memorandum about the petition that summarizes the facts of the case, summarizes the arguments made by the parties (and amici), and concludes with a discussion that recommends how the Court should treat the petition. Currently, all the justices save Justices Stevens and Alito participate in the cert pool.
9. As Black and Owens (2009a, 1069-70) point out, there is little to fear from systematic clerk bias in the pool memos. Clerks know that their colleagues will review each memo they draft and will punish (or at least recommend punishment) for ideological transgressions. What is more, the randomization of the cert pool will largely mitigate against any ideological basis.
10. Because coding the level of conflict required some judgment on the part of the coders, we conducted an intercoder reliability study for these variables. Our weak conflict measure had 86.7 percent agreement ($\kappa = .640$), and our strong conflict measure had 93.3 percent agreement ($\kappa = .814$). Both values of Kappa are statistically significant ($p < .001$) and correspond to "substantial" and "near perfect" agreement by a commonly used metric (Landis and Koch 1977, 165).
11. Indeed, in *Calderon v. United States* (no. 91-6685) the pool memo writer argued that the Court should not grant review to the petition because the case was not legally important, as the lower court decision was unpublished: "I recommend denial [the lower court's] decision is unpublished and therefore no 'rule' was created by the case."
12. In rare cases, a dispute will be heard or reheard en banc by the full complement of judges sitting on the circuit (George 1999; Ginsburg and Falk 1991). Giles, Walker, and Zorn (2006) find that lawyers are likely to seek rehearing en banc when the ideological position of the panel vis-à-vis the circuit majority increases, when the district court judge below agreed with their position, or when a dissenting panel judge agreed with their position. Judges, however, are most likely to seek—and obtain—rehearing for legal reasons, such as when intracircuit conflict exists, or in other legally salient cases (also see Giles et al. 2007). It is possible that, given the importance the lower court judges attached to the case, Supreme Court justices would be more likely to review it.
13. To define conservative or liberal for both justices and the lower court panels, we use the tenth (liberal) and ninetieth (conservative) percentile values of the appropriate variables.
14. While there is overlap between the confidence intervals for these counterfactuals, the overlap is around the specific point estimates and *not* the difference between the two

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values, which has a separate distribution. Thus, a significant difference can still exist in the presence of point estimate interval overlap (Goldstein and Healy 1995; Austin and Hux 2002; Cumming and Finch 2005). To make this determination (and all others that we make below), we use our simulation results to examine the actual distribution of the difference between two hypothetical values.

15. The difference in predicted probabilities that a liberal justice reviews a conservative decision rendered by a liberal panel and one rendered by a conservative panel is –0.07 (–0.20, 0.07).
16. There are two additional possible counterfactual differences that we have not discussed. First, consider the comparison between a conservative panel with a liberal decision versus a liberal panel with a conservative decision. We exclude this comparison since both panel composition and decision direction change, which precludes assessing any meaningful hypothesis. Second, in evaluating the potential difference between a liberal panel issuing a conservative decision versus a conservative panel issuing a conservative decision, postestimation analysis reveals that no statistically significant difference exists for either conservative or liberal justices.
17. There are, of course, other methods by which lower court judges could avoid overrides. The literature on strategic instrumentalism provides a good discussion of these actions (see, e.g., Schanzenbach and Tiller 2006; Tiller and Spiller 1999).
18. At the opposite end of the spectrum of strategic aptitude, it is also possible that lower court judges *already* deploy counterideological opinions to escape review by the Court (and, consequently, are simply playing coy with academic interviewers). If this were the case, then it would be likely that the effect sizes we report here are *underestimated*. We thank an anonymous reviewer for pointing this out to us.

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