

Join-3 Votes and Supreme Court Agenda Setting*

Ryan C. Black

rcblack@wustl.edu

Assistant Professor of Political Science

Michigan State University (beginning August 2009)

Ryan J. Owens

ryan_owens@gov.harvard.edu

Assistant Professor of Government

Harvard University

ONLINE SUPPLEMENT ATTACHED TO END OF THIS DOCUMENT

June 8, 2009

*We thank Tim Johnson, Michael Lynch, Tony Madonna, Andrew Martin, Jim Spriggs, and Justin Wedeking for providing helpful comments.

Abstract

Since the early twentieth century, the Rule of Four has required the assent of at least four justices for a certiorari petition to receive full review by the Supreme Court. This rule changed during the 1970s, when justices began to cast “Join-3” votes. Despite the significance of these votes, scholars have simply treated them as votes to Grant review. We analyze the conditions under which justices cast Join-3 votes and determine whether it is appropriate to treat them as Grant votes. Our results show that collegiality and uncertainty drive the decision to cast Join-3 votes and that it is inappropriate to pool Join-3 and Grant votes together. We discuss alternative coding practices for agenda-setting scholars.

1 Introduction

Melvin Hicks was a minority supervisor at a minimal security prison in Missouri. His termination, and the eventual Supreme Court decision reviewing it, not only dramatically impacted civil rights law, but also highlighted the importance of an overlooked but increasingly important agenda-setting tool on the United States Supreme Court—the Join-3 vote.

Hicks worked for five years as a correctional officer and supervisor at Saint Mary’s minimal security prison. In 1983, the State of Missouri investigated the administration of Saint Mary’s. While remediating management problems, Saint Mary’s terminated Hicks’s employment. Hicks subsequently filed suit in federal court, alleging that his termination was race-based in violation of Title VII of the 1964 Civil Rights Act. Hicks claimed that over a twelve-month period, Saint Mary’s received numerous complaints about white officers, yet fired only one. On the other hand, it fired twelve black officers during the same time.¹

The district court judge ruled against Hicks, but the Eighth Circuit reversed, finding that his termination was improper. Saint Mary’s then sought and received a writ of certiorari from the Supreme Court. Existing law suggested that the Court would apply a complex, three-staged process to determine the propriety of Hicks’s termination (and would likely find it to be improper). The Court, however, broke with precedent and in a 5-4 decision, altered the law in a way that made it more difficult for individuals like Hicks to prevail against their former employers.²

Hicks clearly deserves scholarly treatment for its jurisprudential implications. That over 9000 federal and state court decisions and 819 law review articles cite or discuss the

¹The facts of the case come from the Supreme Court’s preliminary certiorari memorandum in the case.

²*Saint Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993).

case emphasizes its legal relevance.³ Yet, *Hicks* also demands attention because of how it made its way to the Supreme Court—by a little-known but important agenda-setting vote called a “Join-3” vote. When the Court met in conference to decide whether to grant review to the case, only Chief Justice Rehnquist, Justice White, and Justice Scalia voted in the affirmative, leaving the petition one vote shy of the four votes required by the Court’s Rule of Four. Justice Souter, however, circumvented the rule by casting a Join-3 vote, which had the effect of triggering review.⁴

Of course, Justice Souter’s Join-3 vote in *Hicks* is not the only time a justice cast a critical Join-3 vote. Far from it. At some point or another, nearly every recent justice has cast a Join-3 vote, sometimes in a manner that triggers review. For example, in *Dugger v. Adams*, 489 U.S. 401 (1989), only Justices White, O’Connor, and Kennedy voted to grant review. Chief Justice Rehnquist’s Join-3 vote triggered review, whereupon the Court held that habeus corpus litigants must challenge jury instructions in state tribunals or else waive their claims. *U.S. v. Thompson*, 504 U.S. 505 (1992) received full review only after Justice Blackmun’s Join-3 vote. *Thompson* affected commercial and tax law, as the Court defined what it means to “make” a firearm. Finally, only upon the Join-3 votes of Justices O’Connor and Souter did the Court hear *Doggett v. U.S.*, 505 U.S. 647 (1992) and hold that long delays in prosecution violate defendants’ rights to a speedy trial under the Sixth Amendment.

Indeed, the Join-3 vote has become a widely used agenda-setting tool. For example, after mining the archival records of Justice Thurgood Marshall, O’Brien (1997*a*) found that justices cast Join-3 votes in over 25 percent of all cases granted plenary review during the

³Shepard’s search performed April 14, 2008.

⁴Under normal circumstances, the Rule of Four demands at least four votes to bring about review (Leiman 1957). Three Grants votes plus a Join-3, however, will occasion such review. While the precise origins of the Join-3 vote are unknown—the best guess is that they originated during Chief Justice Burger’s ascension to the Court (O’Brien 1997*a*, 788-789)—they became firmly established by the mid 1970s.

1979-1990 terms. O'Brien also found that nearly 12 percent of the cases granted review made the docket as a direct result of a Join-3 vote (1997, 798).

Despite the frequency with which justices cast Join-3 votes—as well as their potential to alter legal doctrine and the Rule of Four—empirical scholarship glosses over them.⁵ To the extent that studies account for Join-3 votes at all, they treat them as Grant votes. For example, in their analysis of Supreme Court agenda-setting, Cordray and Cordray (2008, 18) note: “We treated all ‘Join-3’ votes as votes to grant because they function as such.” In an earlier work, the same authors state: “. . . a Join-3 vote functions in the same manner as a vote to grant review. When a justice votes to grant certiorari (or to note probable jurisdiction over an appeal), this vote is precisely a statement of willingness to join at least three colleagues in setting the case for full review” (Cordray and Cordray 2001, 781). These authors are not alone in pooling Join-3 and Grant votes together. One of the most widely used public data sources, the Expanded Burger Court Database, does the same (Spaeth 2001).

We have two goals in this paper. First, we seek to explain the conditions under which justices cast Join-3 votes. Second, we challenge contemporary coding practices that treat Join-3 votes as the equivalent of votes to Grant review. To achieve these goals, we present an empirical model of Supreme Court agenda-setting that incorporates Grant votes, Deny votes, and Join-3 votes as options available to justices. Our results show that collegiality and uncertainty drive justices' decisions to Join-3. At the same time, we find that the conditions which influence justices to cast Grant votes do not equally influence their decision to cast Join-3 votes, which suggests that pooling the two types of votes together is inappropriate. Indeed, we find that pooling the votes depresses the substantive effects of key covariates.

We proceed by explaining Supreme Court agenda-setting—its mechanics and the determinants thought to drive it. We then theorize the conditions under which justices

⁵O'Brien (1997*a*) is the only published study to empirically examine them. The study, however, does not model the conditions under which justices cast Join-3 votes.

should cast Join-3 votes. Afterwards, we test our hypotheses and present our results. Having explained the factors that motivate justices to cast Join-3 votes and assessed the implications of coding methodologies, we conclude with a decision about how Supreme Court scholars should treat Join-3 votes in the future.

2 Explaining Supreme Court Agenda Setting

Every year, Supreme Court justices and their law clerks sift through thousands of requests from litigants who want the Court to review their case, looking to separate those petitions that deserve treatment by the Court from those that do not. During its 2004 term alone, the Court faced nearly 8600 such requests (Epstein et al. 2007, 75). Of course, institutional constraints limit the number of cases the Court can actually hear. In recent years it has reviewed precious few of the petitions appealed to it—roughly one percent. Just how this process functions is the subject of this section.

2.1 The Agenda Setting Process

The Court’s agenda-setting process begins when a party loses her case in a lower court, wants the Supreme Court to review that decision, and files a petition for a writ of certiorari or an appeal with the Court.⁶ Once the petition for certiorari and all accompanying briefs are filed, the Supreme Court Clerk’s office circulates this material to the justices’ chambers. Each cert petition is then assigned to the cert pool, which consists of the law clerks from seven

⁶For the purposes of our study, the process begins after a litigant has decided to seek review of his case. Recent work, however, highlights the importance of studying the decision to appeal a lower court decision (Hume 2007; Zorn 2002). Additionally, to preserve space we provide only a thumbnail sketch of the process. For more, see Stern et al. (2002) or Perry (1991).

of the justices' chambers.⁷ The purpose of the cert pool is to divide up the petitions into manageable numbers so that the law clerks have enough time to draft adequate summaries of and make recommendations regarding each case. The cert pool memo is then sent out to each justice's chambers where they and their law clerks review them.

Prior to each conference (during which the Court discusses cert petitions), the Chief Justice circulates a list with the names of all petitions he thinks the Court should discuss. Other justices can add cases to this list but no one can remove cases.⁸ Once finalized, the Chief sends out this list to the full Court. Called the "discuss list," it provides the names of all cases the Court will discuss at the next conference. That is, the justices discuss whether the Court should grant cert to each of the cases on this list. Cases that do not appear on the discuss list are summarily denied cert by the Court.

Voting takes place at the Court's conference meetings, which occur roughly once every two weeks. The justice who placed the case on the discuss list—generally the Chief Justice—begins the discussion, stating why he thinks the Court should grant full review. That justice then casts his or her vote. In descending order of seniority, the remaining justices do the same. Before it is accepted by the Court and scheduled for a full merits review, the petition must garner the support of at least four justices (Rehnquist 2001).

⁷On the current Roberts Court, all justices but Justices Stevens and Alito participate in the cert pool. During the terms of our analysis (1986-1993), Justices Brennan, Marshall, and Stevens did not participate in the cert pool.

⁸A justice can remove a case from the list that s/he placed on it, but other justices are then free to put the case back on it.

2.2 The Decision to Grant Review

While justices have suggested that subjective factors largely drive agenda-setting—after 16 years of service, Justice Brennan labeled it as “inherently subjective” (Brennan 1973, 481)⁹—over forty years of social scientific studies have established a number of factors that strongly predict whether the Court will grant review to a case (see, e.g., Tanenhaus, Schick and Rosen 1963; Ulmer, Hintz and Kirklosky 1972; Brenner 1979; Songer 1979; Caldeira and Wright 1988; Caldeira, Wright and Zorn 1999). These predictors can be summed into the following four broad theoretical categories: Legal conflict, the exercise of judicial review below, issues of legal or social importance, and policy considerations.

2.2.1 Legal Conflict

A key obligation of the Supreme Court is to resolve legal conflict. Legal conflict occurs when two or more lower courts diverge over the interpretation or application of the law. Both the Court’s own rules (see Supreme Court Rule 10) and statements made by the justices themselves suggest the importance of legal conflict as a predictor of review. As Chief Justice Rehnquist once stated:

“One factor that influences every member of the Court is whether the case sought to be reviewed has been decided differently from a very similar case coming from another lower court” (Rehnquist 2001, 234).

Empirical scholarship, too, shows that conflict is a strong predictor of Grant votes among justices. For example, when analyzing which cases were granted review during the 1982 term, Caldeira and Wright (1988) found that the presence of conflict in the lower courts resulted in dramatic increase in the probability that the Court would grant review—from 0.01 in cases without conflict to 0.33 in cases with it. Other studies have found similar

⁹Chief Justice Rehnquist called it “rather subjective [...] made up in part of intuition and in part of legal judgment” (Rehnquist 2001, 234).

results. Ulmer (1984), for example, found that conflict, along with other contextual factors, leads to a dramatic increase in the probability of review. Caldeira and Wright (1990) show that the presence of conflict predicts both a case's placement on the discuss list, as well as its eventual review.

2.2.2 Exercise of Judicial Review

The exercise of judicial review in the lower courts also impacts justices' agenda votes. When a lower federal court strikes down a federal law as unconstitutional, legal norms compel the Supreme Court to grant review to the case. The Court, it is argued, must hear the case to ensure that appropriate deference is given to Congress. The words of justices themselves belay the point. Stated one justice:

“[I]f a single district judge rules that a federal statute is unconstitutional, I think we owe it to Congress to review the case and see if, in fact, the statute they've passed is unconstitutional” (Perry 1991, 269).

Legal practitioners echo the sentiments of the justices, as well. As Stern et al. (2002) state: “Where the decision below holds a federal statute unconstitutional or where a federal statute is given an unwarranted construction in order to save its constitutionality, certiorari is usually granted because of the obvious importance of the case” (244). In short, when the lower courts strike down an act of Congress, there are strong norms on the Court to review that decision.

2.2.3 Legal and Social Importance

Legally and socially important cases are also more likely to be reviewed. As a law clerk noted in one petition's cert pool memo, “[Even though] there is no potential for conflict, patent issues decided by [the Court of Appeals for the Federal Circuit] qualify for cert because of their importance” (Cert Pool Memo in no. 89-243, 9). Empirical studies support the claim that importance leads to a higher Grant rate. For example, Caldeira and Wright (1988)

show that the presence of amici curiae briefs filed at the agenda setting stage leads to a higher probability the Court will review the case. Justices are more likely to grant review to cases where the stakes are high—cases that serve as effective policy making vehicles. By bearing the costs to participate in the proceeding, organized interests show that the case has important distributional consequences. Other factors of legal and social importance, such as the nature of the lower court’s decision and the presence of the Solicitor General also predict Grant votes (Caldeira, Wright and Zorn 1999).

2.2.4 Policy Considerations

Last but more assuredly not least, policy considerations impact the agenda-setting process. Justices select cases to craft national legal policy. Choosing the wrong case could have severe negative consequences for a justice’s conception of what the law should look like. Indeed, evidence from the Court’s internal documents suggests that justices and their clerks are well aware of such considerations. In the markup to one pool memo, a Blackmun clerk told the justice: “I am reluctant to recommend granting here because I am uncertain about what the Court as presently constituted would do with this question” (Cert Pool Memo in no. 90-918, 9).

Support for the claim that policy considerations motivate agenda-setting comes from more than anecdotes, however. A host of empirical scholarship has found ample evidence for the systematic role played by policy considerations at the agenda-setting stage. Songer (1979) finds that justice use policy cues to decide which cases to review. Palmer (1982) finds that justices are both reverse-minded and strategic when they set the Court’s agenda. Others have argued that affirm-minded justices strategically anticipate the Court’s likely merits ruling and vote with that outcome in mind (Benesh, Brenner and Spaeth 2002; Boucher and Segal 1995; Brenner 1979). Of the studies finding that policy considerations impact justices’ agenda votes, Caldeira, Wright and Zorn (1999) is perhaps the most sophisticated. The authors find that justices are more likely to vote to Grant as they increasingly favor the

merits outcome and are more likely to deny review as they dislike that policy. That is, the more (less) ideologically proximate a justice is with the majority, the more (less) likely she is to grant review (Caldeira, Wright and Zorn 1999).

3 Explaining Join-3 Votes

While previous scholarship on agenda-setting suggests the importance of the four broad factors mentioned above, the extent to which these—and other—factors influence Join-3 votes has escaped judicial scholars. Generally, what little is known about the Join-3 vote comes from the justices themselves.¹⁰ In his seminal book on agenda-setting, Perry (1991) interviewed five sitting justices on a host of topics—including their views and use of Join-3 votes. From these interviews, two factors emerge as potential motivators of Join-3 votes: Collegiality and uncertainty.

Collegiality influences how justices behave. For example, Spriggs, Maltzman and Wahlbeck (1999, 83) show that justices who have cooperated with a colleague in the past are less likely to try and exact demands from that justice when she is the opinion author. On the other hand, justices who have been uncooperative in the past are much more likely to respond negatively to an author’s draft. Murphy (1964) argues that justices can “build up a reservoir of good will for later use” by acting collegially, as such behavior may later “win reluctant votes from colleagues on other issues” (1964, 52-53). Similarly, in his study on the D.C. Circuit Court, Judge Harry T. Edwards argues that judges on collegial courts have a common interest in coming to the correct legal conclusions and that collegiality “plays an important part in mitigating the role of partisan politics and personal ideology” in that pursuit (Edwards 2003, 1645). Collegiality, then, has shown itself to be important as the Court decides cases.

Collegiality may play a similar role in the Supreme Court’s agenda-setting process

¹⁰But see O’Brien (1997*a,b*).

(Cordray and Cordray 2001). Indeed, one justice has made clear that Join-3 votes might be the result of a desire to be collegial.

I'll sometimes say that I join three. It is often on a case that I feel perhaps should be granted cert., but it's also a case where I almost feel like why waste the time. We have so many other important things to do. But if someone else feels more strongly about it, I sometimes will join three (Perry 1991, 167-168).¹¹

If justices use the Join-3 vote as a collegial tool, we expect the following relationship:

Collegiality Hypothesis: A justice who has been cooperative in the past is more likely to cast Join-3 votes.

Uncertainty also influences how justices behave. For example, in their analysis on voting fluidity on the Burger Court, Maltzman and Wahlbeck (1996) find that uncertainty leads justices to change their votes between the original conference on the merits and the Court's final opinion coalition. Similarly, Hoekstra and Johnson (2003) find that justices

¹¹Even though this quote suggests that justices are likely to Join-3 only when three of their colleagues have voted to Grant review, that relationship is not dispositive. Justices can cast a Join-3 vote at any time in the voting queue, whether they are the first to vote or the last to vote. In other words, the decision to cast the Join-3 vote is not conditional on three justices already having voted. Only the *effect* of a Join-3 is conditional. Indeed, if the Join-3 was directed at a particular colleague, we would expect it to be most commonly used after the petition had amassed three votes to Grant, which obviously requires that at least three justices have already voted. In examining the data, however, we find that 14 percent of all Join-3 votes are cast by the *first* justice to vote in the queue. Including the second and third justices in the queue raises this percentage to nearly 40 percent, which suggests that justices frequently decide to cast Join-3 votes *before* their colleagues voice their votes. The online supplement provides a graphical depiction of this and several other descriptive aspects of the Join-3 vote.

are more likely to put a case over for reargument as the amount of uncertainty in the case increases. And, Johnson, Spriggs and Wahlbeck (2005) find that the Chief Justice is more likely to pass (put off his vote for some time) when he is uncertain about how his colleagues will vote at conference. By passing, the chief can observe his colleagues' votes to determine how he should vote so as to assign the majority opinion.

We argue that uncertainty might explain why justices cast Join-3 votes. The words of the justices themselves suggest as much. Stated one justice:

[...] [T]he way [a Join-3 vote] is generally used is that it is a timid vote to grant. At times there maybe doubt about something. [...] It is kind of a hardy in-between vote (Perry 1991, 168).¹²

Similarly, when asked what a Join-3 vote meant to him, Chief Justice Rehnquist replied that Join-3 votes are more circumspect than grants. They allow justices to switch their votes later in the voting process with more ease:

[M]y sense has always been that [a Join-3] is a more tentative vote than a "grant," and that if there are three to join, the person who casts the vote may nonetheless reconsider it (O'Brien 1997*a*, 788).

In short, uncertainty may throw off justices' typical calculations and force them to act more tentatively.

Uncertainty may result from at least four phenomena. First, uncertainty can arise from a justice's unfamiliarity with the Court's procedures. The longer a justice serves, the more comfortable she likely becomes with the Court's procedures and the institutional tools at her disposal. The literature suggests that justices face a learning curve after they join the

¹²Similar language appears in the pool memo markup done by Justice Blackmun's law clerks. Even though a Blackmun clerk recommended granting review in her memo to the cert pool, when adding a hand written note for Blackmun's eyes only she wrote, "My hesitancy [about the petition] inspires me to recommend to you a [Join-3]—but I'm pretty confident the votes will be there to grant" (Cert Pool Memo in no. 87-1372, 12).

Court. Looking at the early voting behavior of justices Warren through O'Connor, Hagle (1993) found evidence that some justices go through what he calls an "acclimation effect" (see also Maltzman, Spriggs and Wahlbeck 2000). Simply put, justices early on may be less likely to use "non-traditional" votes as they learn the Court's procedures and become more comfortable about their role serving on it. That is, we expect the following:

Freshman Hypothesis: A freshman justice is less likely to cast a Join-3 vote than a non-freshman justice.

A second form of uncertainty comes from the procedural complexity of the case. Complex procedural factors may muddle the substantive policy issues at play in a case. With diminished knowledge of the case's policy implications, justices may not have a firm grip over the likely policy. Thus, how they should vote becomes less clear—they may need to cast tentative votes. By clouding the substance of a case, procedural complexities might make it less likely that a justice would cast a firm Deny or Grant vote; instead, they might resort to the Join-3.

There is at least anecdotal evidence to suggest that procedural complexity impacts how justices view cases at the agenda-setting stage. In one case, the pool writer told the Court that the proceedings below were so complicated that he was not sure how the Court could approach the case: "It is difficult to discern what happened below and what [appellant] wants this Court to do" (Cert Pool Memo in no. 86-586, 1). If procedural complexity drives justices' Join-3 votes, we expect the following:

Procedural Complexity Hypothesis: A justice is more likely to cast a Join-3 vote in a procedurally complex case.

A lack of clarity over the expected outcome might similarly lead to a Join-3 vote. When justices cannot determine the likely outcome—or, more precisely, are uncertain as to what the likely outcome will be—they might be more inclined to cast a tentative vote such as a Join-3. Thus, we suggest:

Policy Heterogeneity Hypothesis: A justice is more likely to cast a Join-3 vote as the identity of the median justice becomes less clear.

A final cause of uncertainty arises from the similarity of policy alternatives. When it is difficult to differentiate between the status quo and the expected policy that will arise if the Court grants review, justices may become less certain about how best to achieve their policy goals. Indeed, as Johnson, Wahlbeck and Spriggs (2006, 100) note: “Political actors cannot determine which course of action will foster the outcomes they prefer unless they have sufficient information about the likely effects of alternative choices available to them.” As it becomes more difficult to distinguish between the status quo and expected policy, justices may take more tentative stances and cast Join-3 votes. That is:

Outcome Separability Hypothesis: A justice is more likely to cast a Join-3 vote as the ideological distance between the status quo and expected policy decision on the merits decreases.

3.1 Data and Measurements

To test these hypotheses, we randomly sampled 358 paid non-death penalty petitions that made the Supreme Court’s discuss list during the 1986-1993 terms that were appealed from a federal court of appeals.¹³ From these 358 petitions we recovered a total of 3024 justices

¹³We sample petitions from the Court’s discuss list because these are petitions that have a non-zero 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 current data only allows comparisons between Supreme Court justices and federal court of appeals judges. We exclude capital petitions because during the time period of our study, they were treated differently than their non-capital counterparts. The Court automatically added capital cases to the discuss list. Once there, Justices Brennan and Marshall always voted to grant the petition, vacate the death penalty, and remand the case (Woodward and Armstrong 1979; Lazarus 2005).

votes, 119 of which were Join-3 votes.¹⁴ We obtained data on the justices’ votes from the digital images of Justice Harry A. Blackmun’s docket sheets, which we retrieve from Epstein, Segal and Spaeth (2007). We operationalize our variables the following ways.¹⁵

3.1.1 Legal Conflict

Turning first to the role of legal conflict, we include a series of dummy variables: **Alleged Conflict**, **Weak Conflict**, and **Strong Conflict**. All of these variables are derived from the law clerks’ discussions in pool memos. **Alleged Conflict** is coded as 1 if the petitioner in the case alleges a conflict below; 0 otherwise. **Weak Conflict** is coded as 1 if the law clerk, while assessing the alleged conflict, suggests that immediate review is not necessary; 0 otherwise. This occurs, most often, when the conflict is relatively new (and might resolve itself) or includes few circuits (in the parlance of the Court, the split is “shallow”). **Strong Conflict** is coded as 1 when the pool memo writer acknowledges a clear and deep split; 0

¹⁴Following Spaeth (2001), we code votes to “note probable jurisdiction” (in appeals) as votes to grant. Similarly, we code “dismiss” votes and votes to “dismiss for want of jurisdiction” (also in appeals) as votes to deny. This coding scheme produces our sample of 3024 justice votes, which falls 198 votes short of the theoretical maximum for a nine-member body voting on 358 petitions (i.e., $358 \times 9 = 3222$). 66 of these missing values arose because fewer than nine justices sat on the Court (i.e., vacancy or non-participation) or because Justice Blackmun’s docket sheets had missing entries. The remaining 132 missing values were votes to call for the views of the Solicitor General, votes to hold over the petition to a later date, or some other action that is not directly mappable onto a trichotomous framework. Rather than arbitrarily code these votes, we simply counted them as missing data. For similar reasons, we opted to exclude from our analysis petitions where the outcome was to grant, vacate, and remand.

¹⁵The online supplement to this paper also provides descriptive statistics for these measures.

otherwise.¹⁶

3.1.2 Exercise of Judicial Review

We coded **Intermediate Strike** by reviewing the pool memo to determine if the author noted the lower court's exercise of judicial review of a federal statute. If the author noted such a decision, the variable takes on a value of 1; 0 otherwise.

3.1.3 Legal and Social Importance

Moving to the category of general legal and social importance, we include a variety of relevant variables.¹⁷ One key indicator of a case's importance is the position of the U.S. Solicitor General (SG). As the attorney for the U.S. and a repeat player (McGuire 1995), the SG knows which cases are worthy of pursuing (Pacelle 2003). Accordingly, if the Solicitor General filed a petition for cert, appeal, or an amicus brief urging review, we coded **U.S. Supports** as 1; 0 otherwise. On the other hand, if the Solicitor General was respondent or appellee in the case, or filed an amicus brief urging the Court to deny review, we coded **U.S. Opposes** as 1; 0 otherwise. The omitted baseline category, then, reflects those instances when the U.S. does not participate in the case.

We also code several variables based on the content of the opinion in the circuit court.

¹⁶This approach is similar to the utilized by Caldeira and Wright (1988), who used law students to assess the presence of actual conflict in cert. petitions. Our approach has the added advantage of coming directly from the main materials used by justices themselves. Because this variable requires some judgment on the part of the coder, we conducted an intercoder reliability study for these variables. We note that all three measures are reliable by common standards. The complete results are reported in the online supplement.

¹⁷Since Perry observes that various types of case importance overlap (1991, 254), we combine social and legal importance. Though disentangling social, legal, and political salience is an important empirical task (Collins 2008), it is ultimately not necessary for our purposes.

When a circuit court judge dissents from the panel decision, that dissent can signal that the panel decision is not legally sound or that it is ideologically incongruent with the Supreme Court majority’s preferences (Cross and Tiller 1998). We code **Intermediate Dissent** as 1 if a judge in the circuit court wrote a dissenting opinion in the case; 0 otherwise. By a similar logic, circuit court reversals of trial court decisions, a relatively rare event (Hettinger and Martinek 2006, 90), highlight a potential lack of clarity in the law. **Intermediate Reversal**, then, takes on a value of 1 if the circuit court reversed the decision of the court below it; 0 otherwise.

En banc decisions in the circuit courts are also infrequent and often related to a case’s importance (George 1999; Giles, Walker and Zorn 2006; Giles et al. 2007). We include **Intermediate En Banc**, which is coded as 1 if the circuit court reviewed the case en banc; 0 otherwise. As another indicator of importance, we code whether or not the circuit court opted to publish its decision in the federal reporter. While limited evidence suggests that judges might use opinion publication as a political instrument (Law 2005), we make the simple argument that *on average* an unpublished case will be less important than its published counterpart. As such, we code **Intermediate Unpublished** as 1 if the lower court opinion was unpublished; 0 if the court chose to report it.

Relatedly, to differentiate the importance among published circuit court opinions we follow the general tack of Epstein and Segal (2000) and turn to the pages of *U.S. Law Week*, a legal periodical that provides coverage of federal cases. This periodical “[alerts] the legal profession to the most important cases and why they are important” (LexisNexis Source Information). Following Caldeira and Wright (1998), we code **U.S. Law Week Article** as 1 if the legal periodical wrote a story about the circuit court opinion; 0 otherwise.

Lastly, we include **Amicus Briefs**, which measures the total number of amici briefs filed in support of and in opposition to the petition, as portrayed in the docket’s cert pool memo. Amicus activity—especially at the agenda-setting stage—provides a signal to justices regarding the legal breadth and importance of a petition (Caldeira and Wright 1988).

3.1.4 Policy Considerations

To measure how policy influences whether justices cast Join-3 votes, we utilize the Judicial Common Space (JCS) (Epstein, Martin, Segal and Westerland 2007) to derive preference scores for justices, the location of the status quo, and the expected policy location of the Court's merits decision. The predicted policy location of the Court's merits decision is coded as the JCS score of the median justice of the Court for the term in question.¹⁸ The status quo is the JCS score of the median judge of the majority coalition on the circuit panel that heard the case.¹⁹ We further code the difference between the expected policy location of the Court's decision on the merits and a voting justice's JCS score, which we label as **Median Distance**. Similarly, **Status Quo Distance** is the ideological distance between the justice and the status quo. Finally, we measure **Issue Distance** as the ideological distance between the justice and the JCS score for the median of the majority opinion coalition within an issue area (using the Spaeth **value** variable) in the previous three terms.

¹⁸We estimated a host of models relying on different predicted policy locations, ranging from previous majority opinion writers to median members of the majority winning coalition in previous issue areas in the same cast. Ultimately, the results are nearly identical across these models. We use the median measure as post-estimation measures of model fit such as the Bayesian Information Criterion suggest that it provides the best fit to the data.

¹⁹In cases with a dissent or a special concurrence, where only two circuit judges constituted the winning coalition, we coded the status quo as the midpoint between those two judges in the majority. In en banc decisions, we coded the status quo as the median judge in the en banc majority. Where federal district court judges sat by designation, we followed Giles, Hettinger and Peppers (2001) and coded the district court judge's ideal point consistent with norms of senatorial courtesy.

3.1.5 Factors Specific to Join-3 Votes

Above, we hypothesized that collegiality and uncertainty drive Join-3 votes. To operationalize **Collegiality**, we turned to existing studies that measure the topic. These studies examine the rate of agreement between pairs of justices (Spriggs, Maltzman and Wahlbeck 1999; Maltzman, Spriggs and Wahlbeck 2000). Unlike joining an opinion written by a colleague, however, the Join-3 vote is generally not directed at a particular justice.²⁰ As such, using an agreement score is inappropriate for our purposes. Instead, we measure **Collegiality** as the number of times in the previous two terms that a justice authored a special or regular concurrence divided by the number of cases in which that justice was in the majority opinion coalition. This follows the opinion-writing literature, which argues that justices who author fewer separate opinions are more collegial than those who frequently author such opinions (Spriggs, Maltzman and Wahlbeck 1999; Maltzman, Spriggs and Wahlbeck 2000).

To operationalize the freshman effect we include **Freshman Justice**, which follows the standard in the literature and takes on the value of 1 when the voting justice served less than two full terms when the petition received its final grant or deny vote; 0 otherwise (Maltzman, Spriggs and Wahlbeck 2000).

To measure procedural complexity, we turned to the pool memo written in each case. The variable **Procedural Complexity** is the overall percentage of the pool memo (measured in pages) that is devoted to discussing the procedural history of the case. Petitions with longer procedural histories, on average, are likely to be more complex.

Policy Heterogeneity is measured as the interquartile range of the issue-specific

²⁰Evidence for this claim comes from descriptive aspects of how Join-3 votes have been used. *See* note 11 above. Additional support comes from the voting recommendations made by Justice Blackmun’s law clerks, who specifically suggest a Join-3 vote as opposed to a Grant or Deny vote. That is, they do not couch their recommendation in a conditional context such as, “If Justices Marshall or Stevens need a fourth vote, Join-3.”

medians that we calculated for our **Issue Distance** variable.²¹ Mixed opinion coalitions create a larger range of issue medians. As this distribution takes on a flat form, the interquartile range will become larger. As the distribution takes on a narrower nature (with a high peak), the interquartile range becomes smaller. Larger values thus suggest that it will be difficult to determine the median justice in the case (and thus, the likely merits outcome). Smaller values suggest that the median justice in the case is clearly known and, thus, so is the predicted outcome. We contend that when **Policy Heterogeneity** increases, justices should be more likely to cast a Join-3 vote.

Finally, **Outcome Separability** is coded as the absolute value of the ideological distance between the likely merits outcome (the median justice) and the status quo. Smaller values for this variable mean that the ideological difference between the status quo and likely merits outcome is difficult to discern, while larger values mean they are easily distinguishable. Smaller values of **Outcome Separability** should increase the policy-based uncertainty and also increase the likelihood that a justice votes to Join-3.

3.2 Methods and Results

Our dependent variable is a justice’s agenda-setting vote, which has a trichotomous nature: Deny, Join-3, or Grant. This dependent variable allows us not only to test the conditions under which justices Join-3, but also to test the literature’s commonly-held assumption that Join-3 votes are the equivalent of Grants. Given our dependent variable, we estimate an alternative-specific multinomial probit model. The “alternative-specific” nature of the model refers to its inclusion of a specific independent variable (or variables) that allow(s) for identification of the error correlation among voting alternatives (Long and Freese 2006, 313-315). This variable obviates the requirement of independence of irrelevant alternatives

²¹Recall that **Issue Distance** is the ideological distance between the justice and the JCS score for the median of the majority opinion coalition within an issue area in the previous three terms.

(IIA) in the standard multinomial logit model.²² The alternative-specific multinomial probit model is commonly deployed when studying the decisions of individual voters in countries with several political parties (Alvarez and Nagler 1998; Quinn, Martin and Whitford 1999). The alternative-specific variable in these party selection models typically is the ideological distance between an individual voter and the different candidates. We adopt that strategy, exchanging justices for voters and likely policy outcomes for candidates.²³

²²If Join-3 votes are like Grants—as the conventional wisdom suggests—then IIA is violated and a standard multinomial logit model would be the wrong statistical model to apply. While some scholars deploy tests such the Hausman-McFadden or Small-Hsiao tests to assess IIA, we follow the advice of Long and Freese (2006, 243-244), who, in citing a long list of simulation studies, counsel specifically *against* relying upon these tests.

Note further that we elect not to estimate an ordered regression model due to the parallel regression assumption, which prohibits a covariate from having a different impact across the range of alternatives (Long and Freese 2006, 197-198). Since this is the assumption we wish to test (i.e., that Join-3 is the same as Grant), this family of models also is inappropriate.

A final option would be to estimate a traditional dichotomous logistic or probit regression model, coding the dependent variable as 1 if a justice votes to Join-3 and 0 otherwise. This approach is taken by Lax, Wahlbeck and Maltzman (2004) in an unpublished conference paper. We believe, however, that for purposes of our study, it is potentially problematic to pool Grant and Deny votes together as zeroes.

²³More specifically, we suggest that justices voting to Deny hope to retain the status quo, which we specify above as **Status Quo Distance**. Justices voting to Grant hope to change the location of the policy from the status quo. We suggest above, in describing **Issue Distance**, that justices will look to see how the Court has decided previous cases in the same issue area in attempting to estimate the likely policy outcome for a given petition. Finally, for the Join-3 vote we capitalize on the uncertainty in whether the petition will achieve enough votes to be granted review. Justices casting Join-3 votes likely believe that

We report the results from our model in Table 1 below.²⁴ The baseline category is a Deny vote, which means that the parameter estimates show the effect of a variable on the probability of moving from a Deny vote to a Join-3 vote (upper portion of table) or a Deny vote to a Grant vote (lower portion of table).²⁵

[Table 1 about here]

While Table 1 compares Deny votes with Join-3 votes and Deny votes with Grant votes, we seek a *simultaneous comparison* of all three outcomes. Figure 1 and Figure 2 provide such a comparison. Each figure displays the magnitude of the independent variables'

the petition's agenda-setting coalition will be minimum winning (i.e., only four total votes to Grant), which in turn might lead them to believe the merits coalition will be small, as well. As the merits coalition approaches minimum winning, the median justice's importance increases and we suggest that is where a Join-3 voting justice will believe the merits outcome will end up should the Court grant review (identified above as **Median Distance**).

²⁴The model was estimated in Stata 10 using the `asmprobit` command with robust standard errors. The results are largely unchanged if we estimate the model with asymptotic standard errors instead. The **Weak Conflict** variable is no longer significant at the 0.05 level in the Deny to Join-3 equation ($p = 0.06$) but the **Intermediate Unpublished** variable is statistically significant ($p = 0.04$). There are no inferential differences in the Deny to Grant equation. We also estimated the model including fixed effects for justices. This, too, did not change our results and did not result in an appreciable increase in the model's fit.

²⁵**Policy Distance**, reported at the very top of the table, is measured on the same scale for each potential alternative (see note 23), thus resulting in a single parameter estimate. It is negatively signed and statistically significant, which suggests that as the distance between a justice and the policy outcome increases, the probability of a justice choosing that particular outcome decreases. This result is consistent with previous research on policy-minded voting at the agenda-setting stage (Caldeira, Wright and Zorn 1999).

effects on the likelihood a particular justice chooses one voting category.²⁶

[Figure 1 about here]

[Figure 2 about here]

We turn first to our hypotheses explaining the conditions under which justices Join-3, and find generally supportive results. We hypothesized that collegial justices would be more likely to cast Join-3 votes. Our data support our hypothesis. Justices who frequently author separate opinions are less likely to Join-3 than justices who write fewer separate opinions.²⁷ A two standard deviation increase in *Collegiality* (that is, more separate opinions) lowers the probability of a Join-3 vote by 0.016, a relative change of approximately 45 percent. *Collegiality*, then, plays a fairly substantial role in the decision to cast Join-3 votes.²⁸

²⁶The baseline probabilities, provided in the upper-right corner of the figures, are calculated holding all variables at their modal or mean values. For our data this means there is conflict alleged but none (either weak or strong) acknowledged by the pool memo author. All other dummy variables equal 0, as well.

²⁷These justices, as the figure shows, are also less likely to vote to Grant, as well.

²⁸One potential concern with this finding is that voting order might matter—that justices voting last might have more opportunity to cast collegial votes. We are unfazed by this concern, however, as justices tend to vote “mechanically” at conference. That is, they come in to conference with their minds made up regarding how they will vote and typically cast those votes accordingly, regardless of how their colleagues have voted. As former Chief Justice Rehnquist once stated: “[A conference is] not a bull session in which off-the-cuff reactions are traded, but instead a discussion in which considered views are stated,” frequently with “little interplay” among the justices (Rehnquist 2001, 254-55). When justices do switch their votes at conference, it is typically in response to an updated recommendation from the Solicitor General.

We next hypothesized that uncertainty would lead justices to cast Join-3 votes. On this score, our results are supportive but mixed. We used four variables as proxies for uncertainty and find support for two of them. We hypothesized that freshman justices would be less likely to Join-3 than non-freshman justices, given their unfamiliarity with the internal mechanics of the Court. The bottom row of Figure 1 supports this hypothesis. Freshman status depresses the probability of voting to Join-3 by 0.02.²⁹ We also find modest support for **Policy Heterogeneity**. As the range of issue-specific medians increases (i.e., the median justice in the issue area becomes less well-defined), so too does the likelihood of a Join-3 vote. A two standard deviation increase above the mean results in approximately a 40 percent decrease from the baseline probability that a justice votes to Join-3. We find no support for **Procedural Complexity** or **Outcome Separability**, however.

While some of the factors that lead justices to Join-3 also lead them to Grant, a close inspection of the data shows that the apparent similarities between the two vote choices are outnumbered by their differences. In fact, the underlying differences are so poignant that we argue it is inappropriate to treat the votes the same. To highlight our point, consider the role **Strong Conflict** plays in the decision to Grant. The presence of strong conflict results in a 0.29 *decrease* in the probability a justice votes to Deny and a corresponding *increase* (+0.29) in the probability that the same justice will vote to Grant. The presence of strong conflict, however, fails to predict Join-3 votes.

Other variables that influence a justice’s decision to Grant also fail to exert significant influence on their decision to Join-3. Of the fifteen variables not specific to Join-3 votes in our model, only two perform statistically in the same manner (i.e., are significant) across both

²⁹Of course, freshman justices are less likely to vote to Grant as well. Freshman status reduces the probability of a Grant vote by 0.05. One plausible explanation for this finding is that new members to the Court are less sure about what precisely makes a case “certworthy” or not. This is consistent with anecdotal observations of Justice Blackmun’s uncertainty during his early years on the Court (Woodward and Armstrong 1979).

Join-3 votes and Grant votes, which suggests that Join-3 votes are the result of a different decision process than Grant votes.

4 The Practical Consequences of Pooling Votes

In the previous section we provided empirical evidence that the Join-3 and Grant votes are driven by different factors. While the most appropriate strategy is to treat them as distinct entities and estimate a model similar to ours, this strategy might not be practical in some contexts. There are, for example, some important limitations to the `asmprobit` model as currently implemented in Stata. The `SPost` series of commands implemented by Long and Freese (2006), for example, provide tools for generating predicted probabilities with confidence intervals for a wide range of models (e.g., logit, ordered probit, etc.) but as currently programmed do not return similar quantities for the `asmprobit` model. This is due to the fact the model is estimated via simulation rather than traditional maximum likelihood techniques in Stata. Because of this, agenda-setting researchers must likely decide how to treat Join-3 votes. In this section we compare the two most likely (and frequently used) strategies: pooling Join-3 and Grant votes together or, alternatively, treating them as missing data and omitting them from the analysis. Both of these approaches yield a dichotomous dependent variable, for which we fit logistic regression models using the covariates identified above.³⁰

[Table 2 about here]

³⁰In the multinomial model we had three policy outcomes. Here we have only two—the status quo or likely merits outcome. To operationalize this concept we use `Merits Outcome Closer`, which takes on a value of 1 if the ideological distance between a justice and the merits outcome (the Court median) is smaller than the ideological distance between the justice and the status quo. If the opposite is true, the variable is coded as 0.

We compare the results of our two models in Table 2.³¹ This table reports the percent change in the baseline probability that a justice votes to Grant review. While there are no statistically inferential differences between coding Join-3 votes as Grant votes or omitting them from the analysis (i.e., the variables' statistical significance does not change across coding schemes), there are notable differences in the estimated size of the variables' effects. For example, if one codes Join-3 votes as votes to Grant, **Weak Conflict** increases the likelihood that a justice votes to Grant by 53.4 percent above the baseline probability. By contrast, if one omits Join-3 votes from the analysis, the magnitude of **Weak Conflict**'s substantive effect increases to 64 percent, a difference of roughly 11 percent. Coding decision also plays a role in the effect of **Strong Conflict**. The magnitude of **Strong Conflict**'s substantive effect rises from a 254 percent increase over the baseline probability to a 303 percent increase over the baseline probability. Which is to say that pooling Join-3 votes with Grants depresses the substantive effect by 49 percent. Indeed, for seven of the nine variables that are significantly related to a justice's agenda-setting vote, coding a Join-3 vote as a Grant depresses the magnitude of the variable's substantive effect.

³¹Simply comparing the magnitude of the coefficients across the models is not appropriate given that the dependent variable is different across the two models. Comparing the unadjusted marginal effects would also be misleading because the baseline probabilities from the two models are different. With a Join-3 recoded as a Grant vote, the baseline probability is 0.085; omitting the Join-3 vote lowers this probability to 0.066, a decrease of roughly 22 percent. For completeness, however, we provide tables with the parameter estimates for these models and a figure containing the unadjusted substantive (marginal) effects in the online supplement.

5 Discussion and Recommendations

How, then, should scholars proceed in analyzing the Court’s agenda-setting process? The most appropriate strategy is to treat Join-3 votes as distinct votes and estimate an alternative specific multinomial regression model such as ours. This strategy, however, may not always be practical. At the very least, in assembling a dataset of justices’ votes, scholars should code the votes in a manner that preserves the identity of Join-3 votes. This, of course, reflects good coding practices, as the researcher can later collapse categories together with ease (Epstein and Martin 2005). Alternatively, researchers should estimate their traditional dichotomous models and calculate substantive effects by pooling Join-3 votes *and* omitting them from their dataset, making sure to highlight the differences that exist across the two models.

The rebirth of agenda-setting scholarship is real and marked. As we witness the evolving maturity of this literature, however, we must ensure that we are confident in the assumptions we make. In this paper, we sought both to examine the role of Join-3 votes on the Court’s agenda-setting process and to ascertain whether it is appropriate to treat the Join-3 as a vote to Grant review. While we had substantial success in explaining what drives justices to Join-3, it is perhaps more remarkable that we find ourselves questioning contemporary coding practices. Contrary to the literature’s standard assumption, Join-3 votes are not driven by the same factors that motivate justices to Grant. Accordingly, scholars analyzing the Court’s agenda stage should follow the advice we outline here.

References

- Alvarez, R. Michael and Jonathan Nagler. 1998. "When Politics and Models Collide: Estimating Models of Multiparty Elections." *American Journal of Political Science* 42(1) [January]:55–96.
- Benesh, Sara C., Saul Brenner and Harold J. Spaeth. 2002. "Aggressive Grants by Affirm-Minded Justices." *American Politics Research* 30(3):219–234.
- Boucher, Jr., Robert L. and Jeffrey A. Segal. 1995. "Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court." *Journal of Politics* 57(3):824–837.
- Brennan, William J., Jr. 1973. "The National Court of Appeals: Another Dissent." *University of Chicago Law Review* 40(3):473–485.
- Brenner, Saul. 1979. "The New Certiorari Game." *Journal of Politics* 41(2):649–655.
- Caldeira, Gregory A. and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *American Political Science Review* 82(4):1109–1127.
- Caldeira, Gregory A. and John R. Wright. 1990. "The Discuss List: Agenda Building in the Supreme Court." *Law & Society Review* 24(3):807–836.
- Caldeira, Gregory A. and John R. Wright. 1998. "Organized Interests Before the Supreme Court: Setting the Agenda." Unpublished Paper delivered at the annual meeting of the American Political Science Association.
- Caldeira, Gregory A., John R. Wright and Christopher J.W. Zorn. 1999. "Sophisticated Voting and Gate-Keeping in the Supreme Court." *Journal of Law, Economics, & Organization* 15(3):549–572.
- Collins, Jr., Paul M. 2008. "Amici Curiae and Dissensus on the U.S. Supreme Court." *Journal of Empirical Legal Studies* 5(1):143–170.

- Cordray, Margaret M. and Richard Cordray. 2001. "The Supreme Court's Plenary Docket." *Washington and Lee Law Review* 58:737–794.
- Cordray, Margaret M. and Richard Cordray. 2008. "Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits." *Ohio State Law Journal* 69(1):1–51.
- Cross, Frank B. and Emerson H. Tiller. 1998. "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals." *Yale Law Journal* 107(7):2155–2176.
- Edwards, Harry T. 2003. "The Effects of Collegiality on Judicial Decision Making." *University of Pennsylvania Law Review* 151:1639–1690.
- Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal and Chad Westerland. 2007. "The Judicial Common Space." *Journal of Law, Economics, & Organization* 23(2):303–325.
- Epstein, Lee and Andrew Martin. 2005. Coding Variables. In *Encyclopedia of Social Measurement*, ed. Kimberly Kempf-Leonard. Vol. 1 Burlington, MA: Academic Press pp. 321–327.
- Epstein, Lee and Jeffrey A. Segal. 2000. "Measuring Issue Saliency." *American Journal of Political Science* 44(1):66–83.
- Epstein, Lee, Jeffrey A. Segal and Harold J. Spaeth. 2007. "Digital Archive of the Papers of Harry A. Blackmun." Available online at <http://epstein.law.northwestern.edu/research/BlackmunArchive/>.
- Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth and Thomas G. Walker. 2007. *The Supreme Court Compendium: Data, Decisions, and Developments*. 4th ed. Washington, D.C.: CQ Press.
- George, Tracey E. 1999. "The Dynamics and Determinants of the Decision to Grant En Banc Review." *Washington Law Review* 74:213–274.

- Giles, Michael W., Thomas G. Walker and Christopher Zorn. 2006. "Setting a Judicial Agenda: The Decision to Grant En Banc Review in the U.S. Courts of Appeals." *Journal of Politics* 68:852–866.
- Giles, Michael W., Virginia A. Hettinger, Christopher Zorn and Todd C. Peppers. 2007. "The Etiology and Occurrence of En Banc Review in the U.S. Courts of Appeals." *American Journal of Political Science* 51:449–463.
- Giles, Michael W., Virginia A. Hettinger and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54(3):623–641.
- Hettinger, Virginia A., Stefanie A. Lindquist and Wendy L. Martinek. 2006. *Judging on a Collegial Court: Influences on Federal Appellate Decision-Making*. University of Virginia Press.
- Hoekstra, Valerie and Timothy R. Johnson. 2003. "Delaying Justice: The Supreme Court's Decision to Hear Rearguments." *Political Research Quarterly* 56(3):351–360.
- Hume, Robert J. 2007. "Administrative Appeals to the U.S. Supreme Court: The Importance of Legal Signals." *Journal of Empirical Legal Studies* 4(3):625–649.
- Johnson, Timothy R., James F. Spriggs, II and Paul J. Wahlbeck. 2005. "Passing and Strategic Voting on the U.S. Supreme Court." *Law & Society Review* 39(2):349–377.
- Johnson, Timothy R., Paul J. Wahlbeck and James F. Spriggs, II. 2006. "The Evaluation of Oral Argumentation Before the U.S. Supreme Court." *American Political Science Review* 100(1):99–113.
- Law, David S. 2005. "Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit." *University of Cincinnati Law Review* 73(3):817–866.

- Lax, Jeffrey R., Paul J. Wahlbeck and Forrest Maltzman. 2004. "I Will if You Will: "Join Three" Votes and Agenda Setting in the Supreme Court." Unpublished Paper Presented at the 2004 annual meeting of the American Political Science Association.
- Lazarus, Edward. 2005. *Closed Chambers: the Rise, Fall, and Future of the Modern Supreme Court*. Reissue edition ed. New York: Penguin Books.
- Leiman, Joan Maisel. 1957. "The Rule of Four." *Columbia Law Review* 57(7):975–992.
- Long, J. Scott and Jeremy Freese. 2006. *Regression Models for Categorical Dependent Variables Using Stata*. 2nd ed. College Station, TX: Stata Press.
- Maltzman, Forrest, James F. Spriggs, II and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press.
- Maltzman, Forrest and Paul J. Wahlbeck. 1996. "Strategic Policy Considerations and Voting Fluidity on the Burger Court." *American Political Science Review* 90(3):581–592.
- McGuire, Kevin T. 1995. "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success." *Journal of Politics* 57(1):187–196.
- Murphy, Walter F. 1964. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.
- O'Brien, David M. 1997a. "Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket." *Journal of Law and Politics* 13:779–808.
- O'Brien, David M. 1997b. "The Rehnquist Court's Shrinking Plenary Docket." *Judicature* 81(2):58–65.
- Pacelle, Richard. 2003. *Between Law and Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation*. Texas A&M University Press.

- Palmer, Jan. 1982. "An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions." *Public Choice* 39:387–98.
- Perry, Jr., H.W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.
- Quinn, Kevin M., Andrew D. Martin and Andrew B. Whitford. 1999. "Voter Choice in Multi-Party Democracies: A Test of Competing Theories and Models." *American Journal of Political Science* 43(4) [October]:1231–1247.
- Rehnquist, William H. 2001. *The Supreme Court*. Revised and updated ed. New York: Vintage Books.
- Songer, Donald R. 1979. "Concern for Policy Outputs as a Cue for Supreme Court Decisions of Certiorari." *Journal of Politics* 41(4):1185–1194.
- Spaeth, Harold J. 2001. *The Burger Court Judicial Database: (1969–1985 Terms)*. East Lansing, MI: Michigan State University.
- Spriggs, II, James F., Forrest Maltzman and Paul J. Wahlbeck. 1999. "Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts." *Journal of Politics* 61(2):485–506.
- Stern, Robert L., Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller. 2002. *Supreme Court Practice*. 8th ed. Washington, D.C.: The Bureau of National Affairs.
- Tanenhaus, Joseph, Marvin Schick and David Rosen. 1963. The Supreme Court's Certiorari Jurisdiction: Cue Theory. In *Judicial Decision-Making*, ed. Glendon A. Schubert. New York: Free Press pp. 111–132.
- Ulmer, S. Sidney. 1984. "The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable." *The American Political Science Review* 78(4):901–911.

- Ulmer, S. Sidney, William Hintz and Louise Kirklosky. 1972. "The Decision to Grant or Deny Certiorari: Further Considerations of Cue Theory." *Law & Society Review* 6(4):637–644.
- Woodward, Bob and Scott Armstrong. 1979. *The Brethern: Inside the Supreme Court*. New York: Simon & Schuster.
- Zorn, Christopher J.W. 2002. "U.S. Government Litigation Strategies in the Federal Appellate Courts." *Political Research Quarterly* 55(1):145–166.

Variable	Coefficient	Robust S.E.
<i>Alternative-Specific Variable</i>		
Policy Distance	-0.006*	0.001
<i>From Deny to Join-3</i>		
Alleged Conflict	0.042	0.155
Weak Conflict	0.306*	0.149
Strong Conflict	1.052*	0.266
U.S. Supports	0.486*	0.237
U.S. Opposes	-0.210	0.113
Intermediate Reverse	0.256*	0.097
Intermediate Dissent	0.189	0.125
Intermediate Strike	0.981*	0.397
Intermediate Unpublished	-0.638	0.334
Intermediate En Banc	0.211	0.204
Amicus Briefs	0.157*	0.039
U.S. Law Week Article	0.114	0.121
Procedural Complexity	-0.002	0.004
Policy Heterogeneity	-0.009*	0.003
Freshman Justice	-0.932*	0.233
Collegiality	-0.035*	0.009
Outcome Similarity	0.006	0.003
Constant	-1.706*	0.381
<i>From Deny to Grant</i>		
Alleged Conflict	0.136	0.112
Weak Conflict	0.418*	0.120
Strong Conflict	1.277*	0.260
U.S. Supports	0.680*	0.168
U.S. Opposes	-0.166	0.093
Intermediate Reverse	0.262*	0.088
Intermediate Dissent	0.239*	0.101
Intermediate Strike	1.313*	0.309
Intermediate Unpublished	-0.308	0.191
Intermediate En Banc	0.092	0.153
Amicus Briefs	0.147*	0.044
U.S. Law Week Article	0.169*	0.082
Procedural Complexity	-0.003	0.003
Policy Heterogeneity	-0.006*	0.003
Freshman Justice	-0.632*	0.167
Collegiality	-0.028*	0.009
Outcome Similarity	0.003	0.002
Constant	-1.224*	0.309

Table 1: Alternative Specific Multinomial Probit Regression Model of Justice Agenda-Setting Votes. * denotes $p < 0.05$ (two-tailed test). The baseline category is a Deny vote. $N=358$ petitions and 3024 justice votes.

Variable	Join-3 as Grant	Join-3 Omitted	Difference
Alleged Conflict	<i>Variable not significant</i>		
Weak Conflict	53.4	64.0	-10.6
Strong Conflict	254	303	-49.0
U.S. Supports	116	130	-14.0
U.S. Opposes	<i>Variable not significant</i>		
Intermediate Reversal	41.7	40.9	+0.8
Intermediate Dissent	29.4	31.8	-2.4
Intermediate Strike	255	309	-54
Intermediate En Banc	<i>Variable not significant</i>		
Intermediate Unpublished	<i>Variable not significant</i>		
Amicus Briefs	17.3	16.9	+0.4
U.S. Law Week Article	23.0	27.8	-4.8
Outcome Closer	63.2	72.5	-9.3

Table 2: Percent change in baseline probability of a Grant vote given the presence of additional voting cues, conditional on the treatment of Join-3 votes. The parameter estimates and marginal effects used to calculate these values are available in the online supplement.

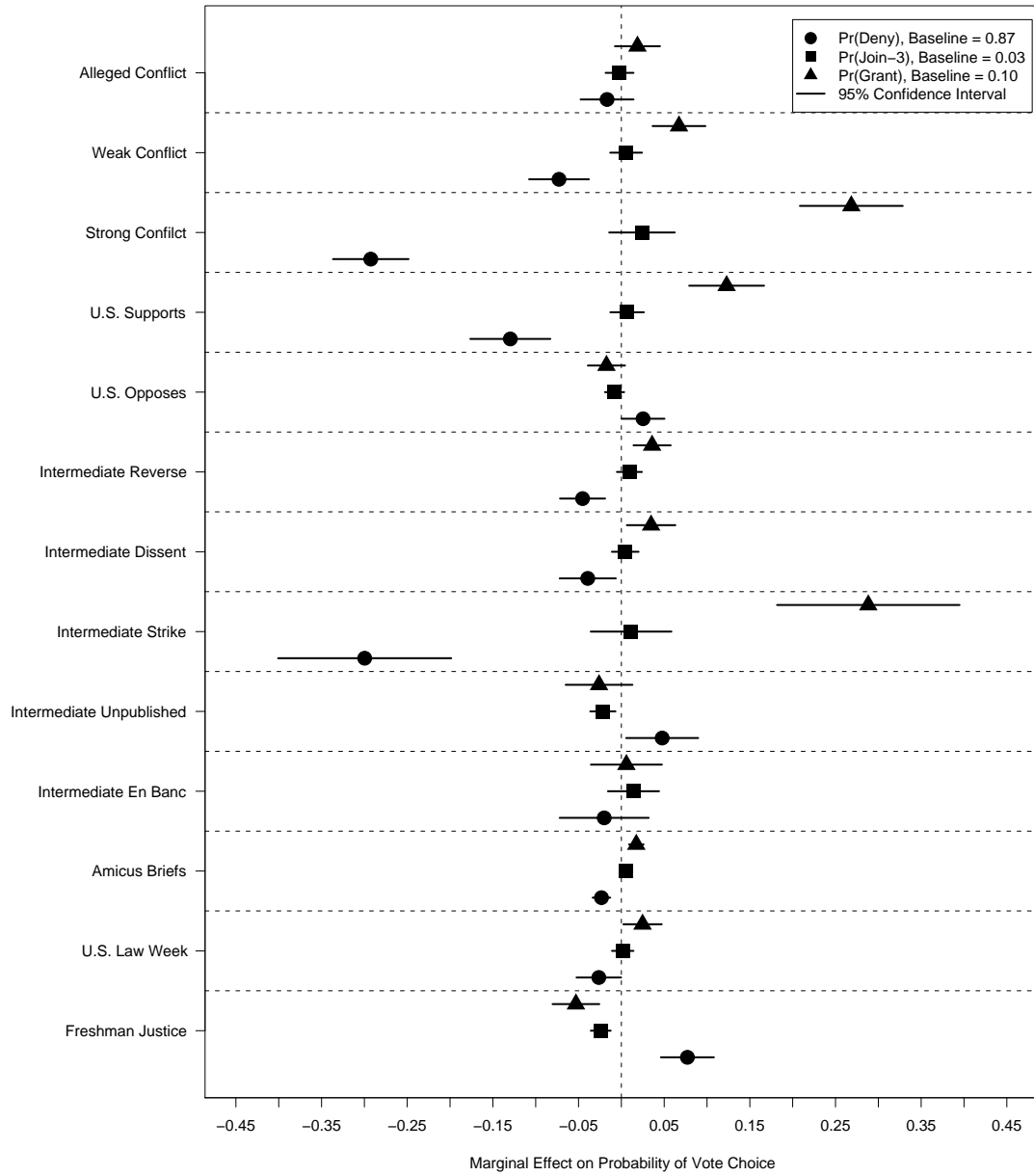


Figure 1: Dotplot comparison of the substantive effects of independent variables on the likelihood a justice votes to Deny, Join-3, or Grant in a petition. Effect magnitudes calculated as marginal effects, holding all other variables at modal or mean values.

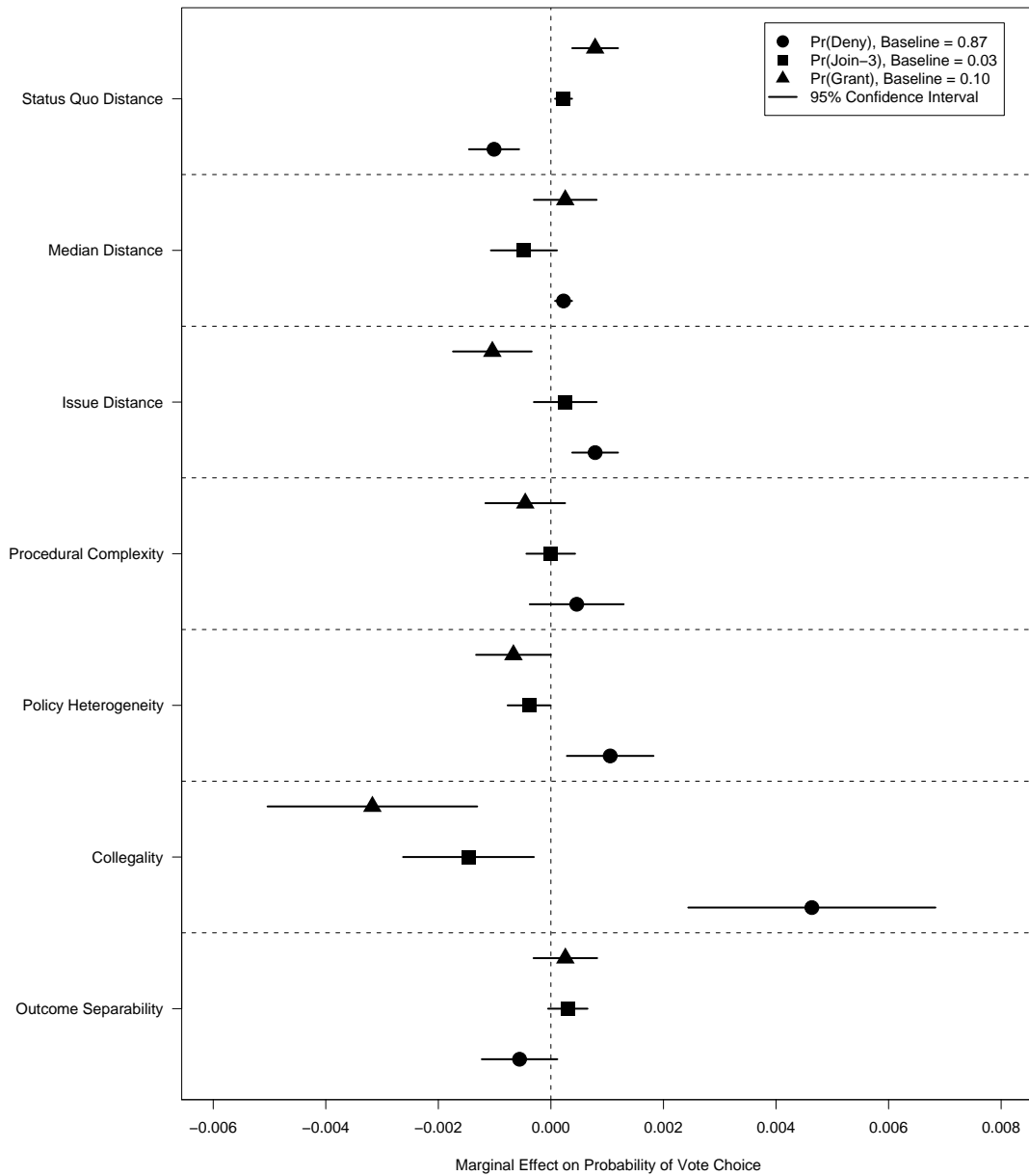


Figure 2: Dotplot comparison of the substantive effects of independent variables on the likelihood a justice votes to Deny, Join-3, or Grant in a petition. Effect magnitudes calculated as marginal effects, holding all other variables at modal or mean values.

Join-3 Votes and Supreme Court Agenda Setting

Online Supplement*

June 8, 2009

*The following information, in addition to the data and code necessary to replicate the results in the paper, will be posted on the authors' websites.

Appendix A: Usage of Join-3 Votes

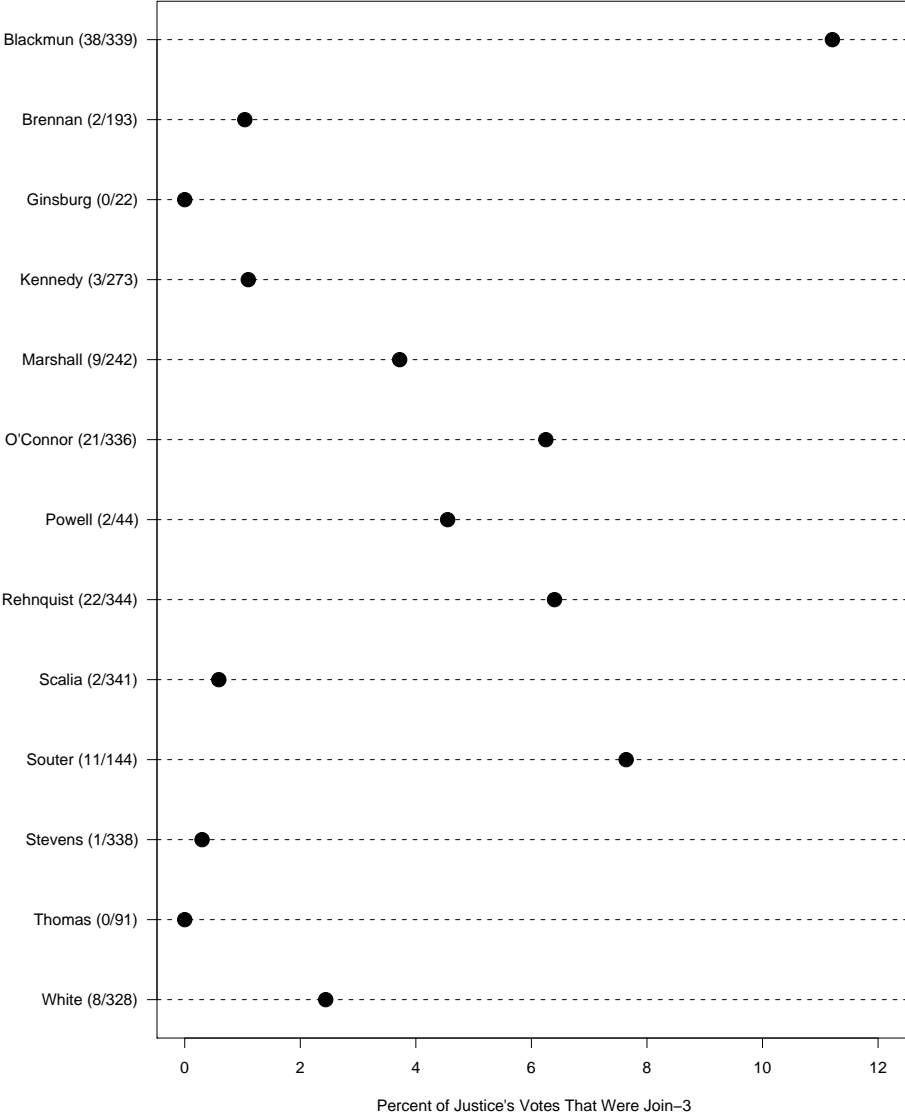


Figure 1: Percentage of Join-3 votes per justice. Numbers in parentheses are actual number of Join-3 votes cast by the justice over the total number of votes cast in our sample.

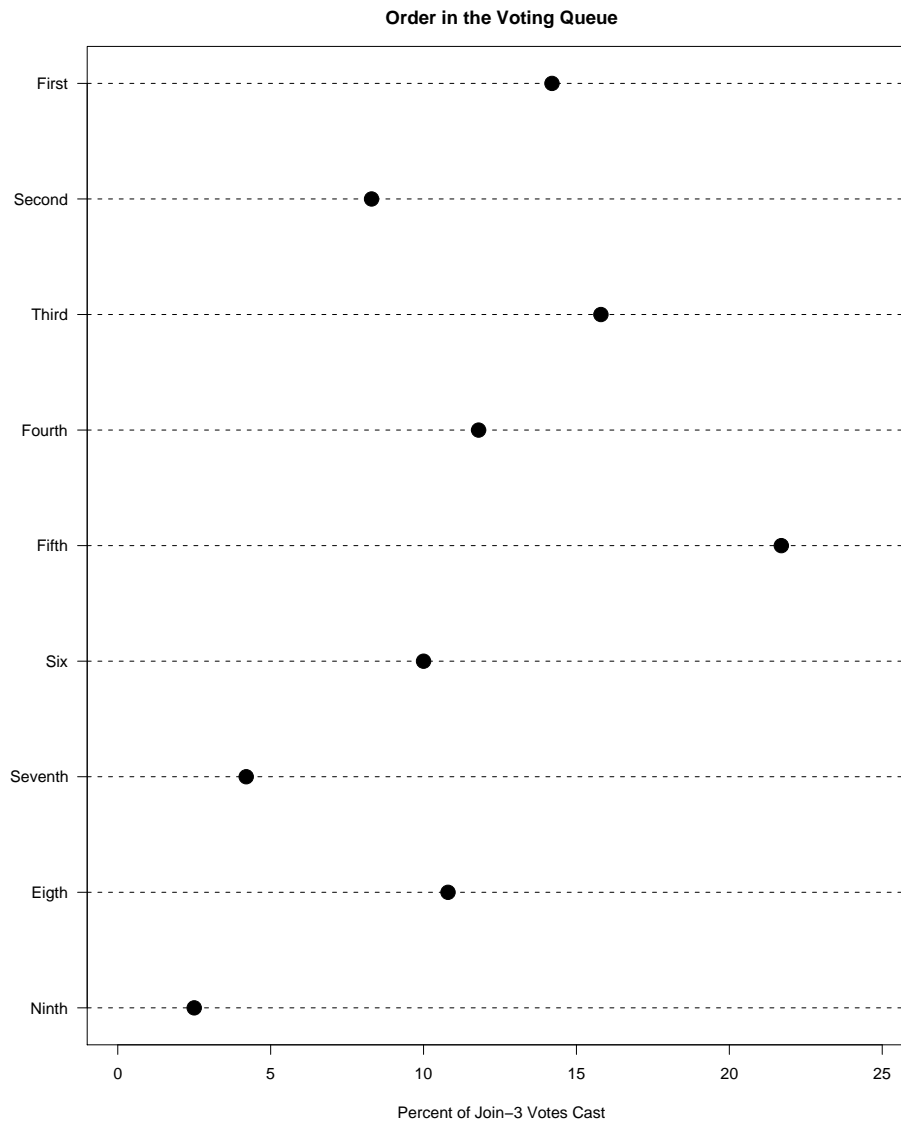


Figure 2: Percentage of Join-3 votes by location in the Court's voting queue. The total number of Join-3 votes cast is 119 votes across 97 petitions.

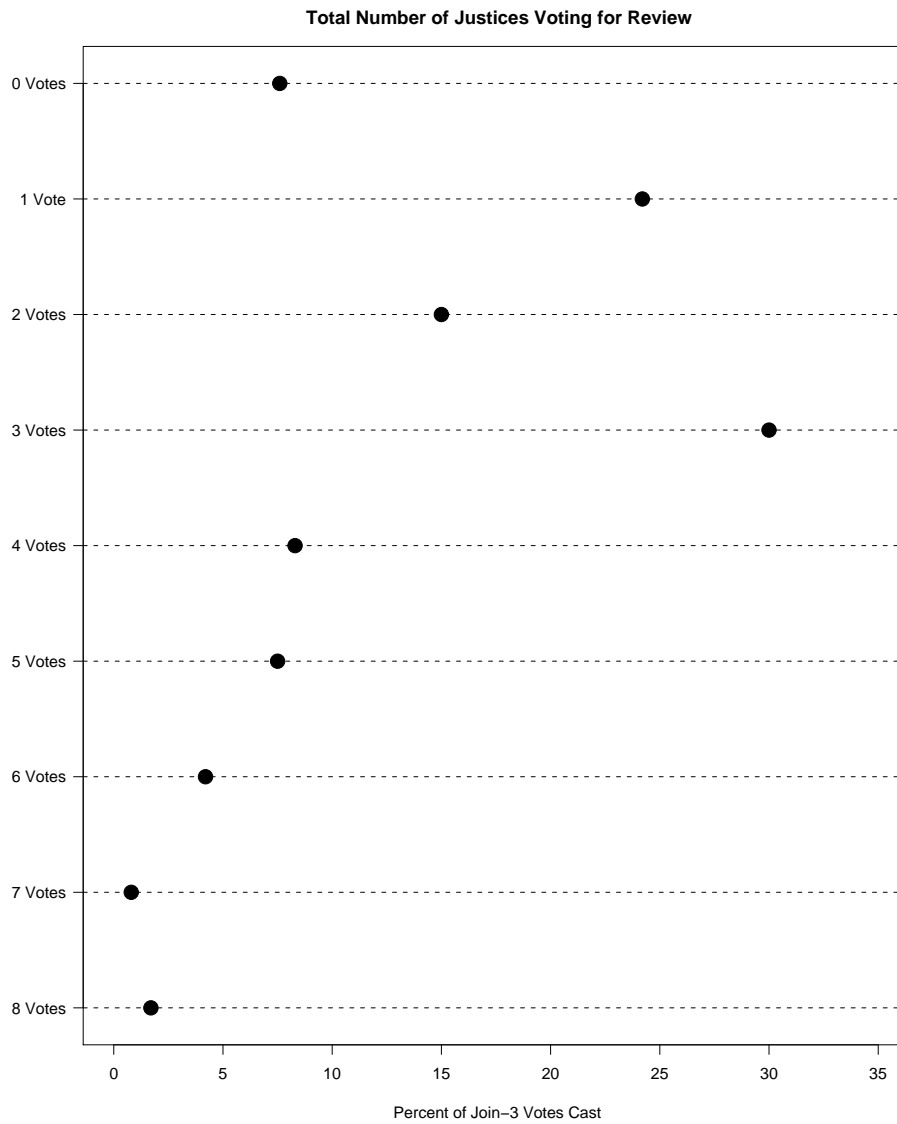


Figure 3: Percentage of Join-3 votes by total number of Grant votes in a petition. The total number of Join-3 votes cast is 119 votes across 97 petitions.

Appendix B: Independent Variables (Measured at Petition Level)

Variable	Mean	Std. Dev.
Alleged Conflict	0.793	0.406
Weak Conflict	0.271	0.445
Strong Conflict	0.304	0.461
U.S. Supports	0.134	0.341
U.S. Opposes	0.243	0.43
Intermediate Reverse	0.416	0.494
Intermediate Dissent	0.243	0.43
Intermediate Strike	0.045	0.207
Intermediate En Banc	0.056	0.23
Intermediate Unpublished	0.064	0.246
Amicus Briefs	0.388	1.111
U.S. Law Week Article	0.313	0.464
Observations		358

Appendix C: Intercoder Reliability of Conflict Variables

To assess the reliability of our coding of **Alleged Conflict**, **Weak Conflict**, and **Strong Conflict**, we took a sample of 45 petitions from our dataset and one author who had not initially coded the petitions went back and coded for these variables. The results from the reliability analysis are reported below. Note that * denotes $p < 0.001$. By the standard metric used to interpret the Kappa statistic, the values for Alleged Conflict and Weak Conflict are “substantial” while the value for Strong Conflict is “almost perfect.” This metric comes from Richard J. Landis and Gary G. Koch, “The Measurement of Observer Agreements for Categorical Data,” *Biometrics* 33:159-174 (1977).

Variable	Agreement %	Expected Agreement %	Kappa Value
Alleged Conflict	86.7	63.1	0.639*
Weak Conflict	86.7	63.0	0.640*
Strong Conflict	93.3	64.2	0.814*

Appendix D: Practical Consequences of Pooling Votes

Table 2 of the article presents a comparison of the substantive effects for pooling Join-3 and Grant votes versus omitting Join-3 votes from the analysis. Although we caution against directly comparing either the magnitude of the coefficients or the unadjusted marginal effects (see note 31), we present this information for completeness.

Parameter Estimates for Combining Join-3 and Grant Votes

Variable	Coefficient	Std. Error
Alleged Conflict	0.144	0.145
Weak Conflict	0.479*	0.121
Strong Conflict	1.531*	0.114
U.S. Supports	0.884*	0.123
U.S. Opposes	-0.179	0.112
Intermediate Reverse	0.388*	0.091
Intermediate Dissent	0.285*	0.110
Intermediate Strike	1.535*	0.218
Intermediate En Banc	0.087	0.195
Intermediate Unpublished	-0.365	0.226
Amicus Briefs	0.189*	0.039
U.S. Law Week Article	0.228*	0.097
Outcome Closer	0.550*	0.093
Constant	-2.526*	0.152
Observations	3024	
Log Likelihood	-1577.024	
Pseudo R^2	0.154	

Table 1: Logistic regression model of justice vote, coding Join-3 votes as Grant votes. * denotes $p < 0.05$ (two-tailed test). Asymptotic standard errors are reported in in the right hand column.

Parameter Estimates for Omitting Join-3 Votes

Variable	Coefficient	Std. Error
Alleged Conflict	0.198	0.159
Weak Conflict	0.541*	0.130
Strong Conflict	1.636*	0.121
U.S. Supports	0.929*	0.127
U.S. Opposes	-0.175	0.119
Intermediate Reverse	0.373*	0.096
Intermediate Dissent	0.298*	0.116
Intermediate Strike	1.656*	0.224
Intermediate En Banc	0.028	0.208
Intermediate Unpublished	-0.245	0.235
Amicus Briefs	0.181*	0.041
U.S. Law Week Article	0.265*	0.102
Outcome Closer	0.598*	0.099
Constant	-2.848*	0.166
Observations	2905	
Log Likelihood	-1426.659	
Pseudo R^2	0.170	

Table 2: Logistic regression model of justice vote, omitting Join-3 votes. * denotes $p < 0.05$ (two-tailed test). Asymptotic standard errors are reported in in the right hand column.

Unadjusted Marginal Effects

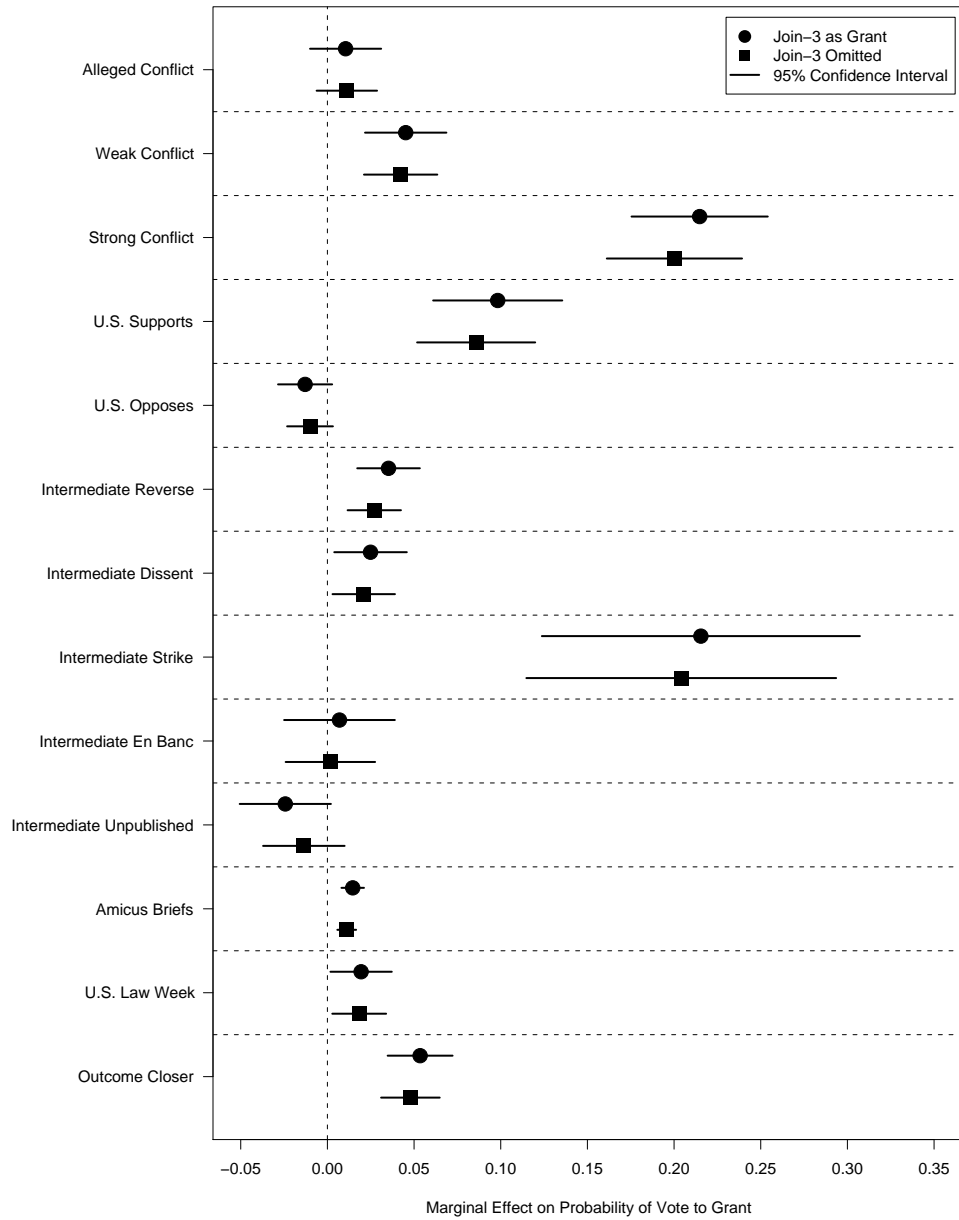


Figure 4: Dot plot comparison of the marginal effects for recoding Join-3 votes as Grant or omitting them from the data analysis. Parameter estimates for the models generating this figure are located in Table 1 and Table 2 of this supplement.