American Politics Research
2017, Vol. 45(3) 435–456

DOI: 10.1177/1532673X17692519
journals.sagepub.com/home/apr
SAGE

How Supreme Court Justices Supervise Ideologically Distant States

Amanda Clare Bryan[1] and Ryan J. Owens[2]

Abstract

Because the Supreme Court can decide only so many cases per term, justices carefully target which cases they hear and which parties they supervise. We focus on their decisions to hear cases involving states as parties. We believe justices use the agenda power to target states with whom they disagree ideologically. Granting review allows justices to keep an eye on wayward states and to remind them of the ever-present threat of Supreme Court review. The results support our theory. Justices are significantly more likely to grant review to cases involving ideologically unfriendly states—and these results are exacerbated in salient cases. These findings suggest justices are more aggressive agenda setters than commonly believed. In addition, the findings suggest that even the so-called federalism revolution of the Rehnquist Court was driven by policy goals.

Keywords

Supreme Court, states, agenda setting

When it comes to setting the Supreme Court's agenda, justices may be more ideologically aggressive than commonly believed. Studies tell us that justices are more likely to grant review to a case when they expect to profit ideologically

[1]Loyola University Chicago, Chicago, IL, USA
[2]University of Wisconsin, Madison, WI, USA

Corresponding Author:
Amanda Clare Bryan, Loyola University Chicago, Coffey Hall 329, Chicago, IL 60660, USA.
Email: abryan2@luc.edu

from the Court's decision on the merits (Caldeira, Wright, & Zorn, 1999). And, they are more likely to review lower court decisions and judges that are incongruent with their ideological preferences (Black & Owens, 2012b; Cameron, Segal, & Songer, 2000). But do they also, at the agenda stage, target *parties* for ideological reasons? We believe they do, particularly when the parties are important policymakers, like states. We believe justices are more likely to vote to grant review to cases involving states that are ideologically distant from them than those that are ideologically close. Granting review to cases involving ideologically distant states accomplishes two goals: First, the justice may be able to keep an eye on wayward states and reign in unsavory policies. Second, even if the Court does not rule against such states, those states are reminded of the ever-present threat of Supreme Court review which, in turn, may influence their behavior.

The data support our theory. Looking at the effect of state public opinion on justices' agenda behavior, we find that liberal justices are more likely to vote to review cases dealing with conservative states. Conservative justices follow suit. They are more likely to vote to review cases involving liberal states. What is more, the effects of state mood are enhanced when the case is salient. That is, justices are more likely to target ideologically distant states for supervision when the case at issue is highly salient. Importantly, we retrieve these results even while accounting for variables scholars typically employ to explain justices' agenda setting votes. This suggests that justices target states as parties independent of standard agenda setting accounts.

These findings are important for at least three reasons. First, they show how justices aggressively set the Court's agenda. That justices target ideologically distant states is something scholarship has not yet examined systematically but is consistent with the theory that justices seek to make policy. Second, the results suggest that scholars who study Supreme Court agenda setting should examine the characteristics of various actors at the agenda stage. If justices target certain parties, perhaps they also consider the characteristics of other actors—like lawyers—when setting the agenda. Third, the results question the purity of the Federalism Revolution during the Rehnquist Court era. Some of the loudest cries in favor of state sovereignty during that time came from conservative justices on the Supreme Court. Yet, even they systematically used federal power to supervise states with whom they disagreed ideologically. Our results question whether the justices were indeed faithful federalists.

In what follows, we begin by briefly describing existing knowledge about the factors that lead justices to set the Court's agenda. We then discuss how and why justices might rely on policy cues about the states to set the Court's agenda. So there is no confusion, we reiterate that we believe justices target

wayward states because it allows them to keep tabs on such states and remind those states of the threat of review. We then test our theory empirically. After explaining our results, we conclude with a discussion about what our findings mean for scholarly understanding of the Court and agenda setting.

Maximizing the Policy Value of Granted Cases

Supreme Court justices have the discretionary power to determine which cases the Court will hear. When a petition for certiorari is filed with the Court, it gets assigned to a law clerk in the cert pool. The clerk, who is the pool memo writer for that case, reads the petition, summarizes it, and recommends to the Court (or, at least to the justices in the cert pool, which today is all but Justice Alito) whether it should hear the case (Perry, 1991; Stern, Gressman, Shapiro, & Geller, 2002). These recommendations typically focus on the legal ramifications of the case, but often discuss policy-based and strategic matters (Black & Owens, 2009). Relying on those memos and their own views of the case and of the law, justices vote at conference to determine whether the Court will hear the case. So long as at least four justices vote to hear a case, the Court will review it (O'Brien, 1997).

This discretionary power to set the Court's agenda frees justices up to review cases they believe are the best vehicles to accomplish their goals. While justices may have multiple goals (Baum, 2006), empirical scholarship to date focuses primarily on justices' policy goals. The ultimate expression of the policy motive, of course, is found in the work of Segal and Spaeth (2002). But even most rational choice scholars assert that justices' primary goals are to obtain their preferred policy (Maltzman, Spriggs, & Wahlbeck, 2000). As Epstein and Knight (1998) state: "Most justices, in most cases, pursue policy; that is, they want to move the substantive content of law as close as possible to their preferred position" (p. 23).

Despite the perceived importance of the policy goal, scholars still do not fully understand how, at the agenda stage, justices target parties for ideological reasons.[1] To be sure, a number of studies focus on justices' ideological goals at the agenda stage. Caldeira et al. (1999) find justices are more likely to vote to grant review to cases as they become increasingly similar ideologically to the Court majority: Justices want to make policy that accords with their policy beliefs, and they are better able to do so when they are part of the Court's majority. Black and Owens (2009) find justices who prefer the expected merits outcome to the status quo are 75% more likely to grant review than when they prefer the status quo. Caldeira and Wright (1988) find the Court is more likely to review salient cases, ostensibly because justices want to decide cases with a broad policy impact (see also Benesh, Brenner, &

Spaeth, 2002; Boucher & Segal, 1995; Palmer, 1982). But left out of these and other important studies is the question—how do the policy views of the parties fit into all this?

Only a small handful of studies focus on the identity (let alone the policy views) of parties at the agenda stage. For example, some look at how justices interact with the Solicitor General at the agenda stage (Black & Owens, 2011; Pacelle, 2003). One study examined how the Court treated petitions to review obscenity decisions based on the identity of the parties involved. The study found that the Court tended to deny cert petitions from individuals, theaters, and bookstores (McGuire & Caldeira, 1993). Black and Owens (2012a) find that, when determining which cases to review, Supreme Court justices consider the ideological characteristics of lower court *judges* (see also Cameron et al., 2000; Lindquist, Haire, & Songer, 2007). While supportive of our general argument, these studies tell us little about how justices rely on general policy cues about *parties*.[2]

State Policy Mood and Supreme Court Agenda Setting

Why would justices consider parties' policy views at the agenda stage? As we stated above, the literature suggests justices are motivated to pursue their policy goals. So, it makes sense that they would think about policy matters at all stages of their decision-making process. Moreover, the Court has a small docket, which requires justices to maximize the value of the cases they decide. From 1986-1993, the Court heard an average of only 123 cases per term (and in recent years that number has dwindled to 70-80 cases).[3] Given the norms of holding oral argument and engaging in extensive briefing and opinion writing, it is unlikely the Court could hear and decide many more cases—even if it wanted to (Coan, 2012).

Thus, justices must maximize the policy value of the cases they do hear (Black & Owens, 2012a; Perry, 1991). As Stern et al. (2002) point out, the Court today is asked to review nearly 10,000 cases per term. The justices and their clerks simply do not have the time to read each cert petition and analyze the ideological leanings of the parties involved. They must make fairly quick decisions about those cases and about those parties. And to do so, they rely on policy signals about the states' ideological leanings. Justices have only so much time—they must make the best of it.

Reviewing ideologically distant states has two policy benefits for justices. First, it allows them to supervise wayward states. We suspect that when a justice and a state share the same worldview, the justice has good reason to trust the decisions of the state in its policymaking form. That is, the justice

will be more willing to defer to such states and not feel the need to expend scarce resources (i.e., docket space) to review the policies emanating from that state. On the contrary, if the justice and the state hold competing worldviews, the justice is likely not to trust that state and may, therefore, be willing to expend scarce resources to review the policies that state makes. Indeed, we know that justices behave this way when reviewing lower courts (Black & Owens, 2012a; Cameron et al., 2000). It is reasonable to believe they also behave this way when determining whether to target certain parties.

Second, reviewing such states reminds state actors that the threat of Supreme Court review is real and constant, and can thereby dissuade states from objectionable behavior. The threat of review may be enough to induce at least some compliance (Lax, 2003). Actual auditing can induce compliance (Cameron et al., 2000). Occasional auditing mixed with the very real threat of future auditing, then, may help justices to dissuade states from engaging in objectionable behavior. As Haire, Lindquist, and Songer (2003) put it (while talking about auditing lower courts), the Supreme Court expends "its institutional resources strategically to enhance the effects of its auditing activity" (p. 620). In short, the threat of review, coupled with the occasional review, is a Sword of Damocles hanging over the heads of the states, leading them to behave more in line with what the justices want.

This theory accords with the delegation literature. Scholarship shows that principals are more likely to give their agents increased discretion when they agree. Huber and Shipan (2002) find that when the legislature does not trust an agency, it "will not want to give free rein over policy to the agency, but instead will prefer to constrain the agency by filling enacting legislation with specific policy details and instructions" (p. 332). Epstein and O'Halloran (1994) argue that Congress tends to delineate the boundaries of agency authority more clearly when the two are ideologically distant (see also Bawn, 1997). Scholarship on agency creation makes similar arguments (Lewis, 2003). Indeed, numerous studies point to how agency self-interest and the possibility of noncompliance leads the elected branches to attempt to control agencies (e.g., Bawn, 1995; Huber, Shipan, & Pfahler, 2001; Lewis, 2008; McCubbins, Noll, & Weingast, 1987; Moe, 1985; Shipan, 2004; Weingast & Moran, 1983; Wood & Waterman, 1994). Certainly, states are not agents of the Supreme Court; yet the logic from the delegation literature is similar: Given scarce resources, justices will rely on state ideological signals to determine whether to review cases in which they are involved.

For our purposes, a critical signal on which justices might rely to determine whether a state is ideologically "trustworthy" and in need of review turns on state public opinion. State public opinion is a strong indicator of policy output (Enns & Koch, 2013; Erikson, Wright, & McIver, 1993). It

influences who gets elected as well as the policies those elected actors create. For example, Soss, Schram, Vartanian, and O'Brien (2001) find conservative states were more likely to adopt strict sanction policies after the welfare devolution in 1996. Brace, Sims-Butler, Arceneaux, and Johnson (2002) find public mood influences state policies like hate crime legislation, affirmative action, and environmental policy. Brace and Boyea (2008) find state mood strongly influences the voting behavior of elected state court judges in death penalty cases. The list could go on. The bottom line, though, is that liberal citizens tend to elect liberals who support liberal policies. Conservative citizens tend to elect conservatives who support conservative policies.

Some states, therefore, are ideologically more agreeable to some justices than others. Justices are likely to be less skeptical of states that are ideologically similar to them and more skeptical of states that are ideologically different than them. Conservatives will be skeptical of liberal states; liberals will be skeptical of conservative states. And their agenda votes, we believe, will reflect that. Thus, we expect *a liberal (conservative) justice will be increasingly likely to vote to review a case involving a state whose citizens are more (less) conservative.*

Before we proceed, we pause to address one question: Are justices aware of the ideological proclivities of the states and their citizens? We believe they are, and strong circumstantial evidence supports that belief. Justices' private comments to each other show familiarity with the states; indeed, some of the justices' comments reveal a highly specific knowledge of state facts. For example, in *Schneble v. Florida* (1971) (68-5009), Justice Rehnquist told his colleagues, "I noticed in the *Washington Post* this morning a story to the effect that Governor Askew of Florida had granted a moratorium on all executions until January 1, 1973 . . . " (Wahlbeck, Spriggs, & Maltzman, 2009). Similarly, in *Swann v. Charlotte-Mecklenburg Board of Education* (1971) (70-281), Justice Brennan told Chief Justice Burger that he observed

> signs that opposition to *Brown* may at long last be crumbling in the South. The recent inaugural addresses of the new Governors of Georgia and South Carolina, and at least some of the newspaper surveys reported in the last month give concrete encouragement that this may be the case . . . (Id.)

In *Roe v. Wade* (1973) (70-18), Justice Blackmun told Chief Justice Burger he wanted the Court's decision to "come down no later than the week of January 15 to tie in with the convening of most state legislatures." The Court's opinions also show familiarity with the states and their characteristics. Consider *Atkins v. United States*, 536 U.S. 304 (2002). Writing for the Court, Justice Stevens provided considerable information about the states:

> In 1990 Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998 . . . Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon (316).

In dissent, Justice Scalia discussed the number of states that allowed such executions. In *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court cited to a study on state variation in health care access. These and other examples indicate justices generally are aware of states' activities. Justices learn about the states from the news and from case briefs. Justices referenced the news in many of their private communications to one another. In *City of Mobile v. Bolden* (77-1844) (1980), Justice Marshall sent a *New York Times* article to all the justices, stating, "Attached is a copy of an article in yesterday's *New York Times* concerning the latest developments in our *Mobile* case." In *First National Bank v. Bellotti* (1978) (76-1172), Justice Stewart circulated a memo stating, "You will be interested in the enclosed copy of the lead editorial in this morning's *Wall Street Journal*, if you have not already seen it." Justices also obtain general policy cues about the states from briefs. Through repeated actions with the states, justices come to know them. The states appear before the Supreme Court more than any other actor other than the federal government (Gleason & Provost, 2015; Owens & Wohlfarth, 2014).

To summarize, then, we believe justices seek to effectuate their policy goals at the agenda stage. They target for review those states with whom they disagree ideologically. Doing so allows them to supervise wayward states and impose the very real threat of future review which can, in turn, dissuade objectionable state behavior.

A Federalism Revolution or Policy Cloaked in Principled Language?

While our approach focuses on agenda setting, the findings we generate also speak to an additional debate, one that focuses on the oft-repeated claim that the Rehnquist Court ushered in a "federalism revolution" (see, for example, Calabresi, 2001; Chemerinsky, 2001; Colker & Brudney, 2001). As readers are certainly aware, federalism is a constitutional principle arising from the fact that the states preceded the national government. The states ratified the U.S. Constitution with the understanding that powers not granted to the national government by the Constitution or implied therefrom, remained with

the states. Federalism thus focuses on the proper balance of power held by the states and the national government. It means that states and the national government are somewhat independent from one another, with each having a claim to sovereignty within their own sphere.

Chief Justice Rehnquist and the other conservative justices on the Rehnquist Court are often credited with being pro-federalism and pro-states' rights, and for reinvigorating the constitutional role of federalism. Scholars point to the Rehnquist Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), *Printz v. United States*, 521 U.S. 898 (1997), and *United States v. Morrison*, 529 U.S. 598 (2000) as evidence that Rehnquist and his colleagues were pro-states' rights. After all, the cases seemed to have neutered decisions like *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) and *Wickard v. Filburn*, 317 U.S. 111 (1942) which expanded the commerce clause at the expense of the states. Rehnquist and his conservative allies, they claim, were pro-states' rights and turned the tide in favor of the states.

Yet, if this is true, those justices should have reviewed states as parties in a consistent manner. That is, while *Lopez* and the other cases we cited certainly did revisit the proper boundaries between state and national government, it is unclear whether they were the federalism revolution their supporters suggested. Were they, instead, short-lived one-offs? Did Chief Justice Rehnquist and the other justices who supported this counter-revolution actually display a preference for federalism, or did they simply support states that advocated conservative policies? After all, deference to state sovereignty demands that justices defer to states even when they disagree with them ideologically. So, for example, a federalist justice would defer to states like Massachusetts, Hawaii, and New York as often as they defer to states like Alabama, Utah, and Texas. The states' ideological proclivities ought not to matter.

Our results, then, can shed light on whether these so-called federalism justices actually were federalism-minded or not. If we discover that justices voted to review states for ideological reasons—as our theory predicts—that would suggest that the "federalism revolution" was not truly about federalism.

Data and Measures

To test our theory, we examined justices' private agenda votes in all 624 paid, non-death penalty petitions that made the Court's discuss list from 1986 to 1993 in which a state was a party.[4] These 624 petitions amount to every petition on the discuss list involving a state as party during those years.[5] We drew on Justice Harry Blackmun's private agenda documents, made publicly available by Epstein, Segal, and Spaeth (2007). These online Blackmun papers

cover the years 1986-1993. We coded more than 5,400 individual justice votes and a host of other relevant factors.[6] Approximately 55% of our cases involved states as petitioners; 45% involved states as respondents. Our data include cases appealed from state supreme courts (about 48% of our data) and from the federal circuits (about 52% of our data).

Dependent Variable

Our dependent variable measures whether each justice cast a vote to hear a case. (Our unit of analysis is the justice vote.) We focused on justices' final agenda votes. That is, we ignored initial votes, such as a vote to hold a petition or call for a response. We coded the variable 1 when the justice cast a grant vote or a Join-3 vote, or voted to note probable jurisdiction in an appeal. We coded it 0 when the justice cast a deny vote; a vote to dispose of the case summarily; a vote to grant, vacate, and remand; or a vote to dismiss for want of federal question.[7]

Independent Variables

Our main covariate of interest is the interaction between state public mood and each justice's ideology. To measure *State Public Mood*, we looked to Enns and Koch (2013). Enns and Koch employ multilevel regression and poststratification (MRP) to create dynamic (i.e., over-time) state-level estimates of public mood in the vein of Stimson (1999).[8] They aggregated information from more than 740,000 survey respondents to create state-level public opinion on matters of federal issues. These estimates reflect state citizens' demands for more or less government or nationally relevant policy issues. We used the first dimension of their estimate (which taps into general liberalness/conservativeness). We interact *State Public Mood* with *Voting Justice Ideology*, which we measured using Martin–Quinn scores (Martin & Quinn, 2002).

We also examined whether justices were more likely to display their policy-driven behavior in salient cases. If, as we argue, justices set the Court's agenda to accomplish their policy goals, the interaction between *State Public Mood* and *Voting Justice Ideology* will be greater in salient cases. So, we include a triple interaction term that includes *State Public Mood* × *Voting Justice Ideology* × *Salience*. To measure *Salience*, we rely on past work which conceptualized salience as legal importance (Black & Owens, 2009). We therefore include a dummy variable for whether the case was included in *US Law Week's* discussion of important cases prior to the Court's agenda vote.

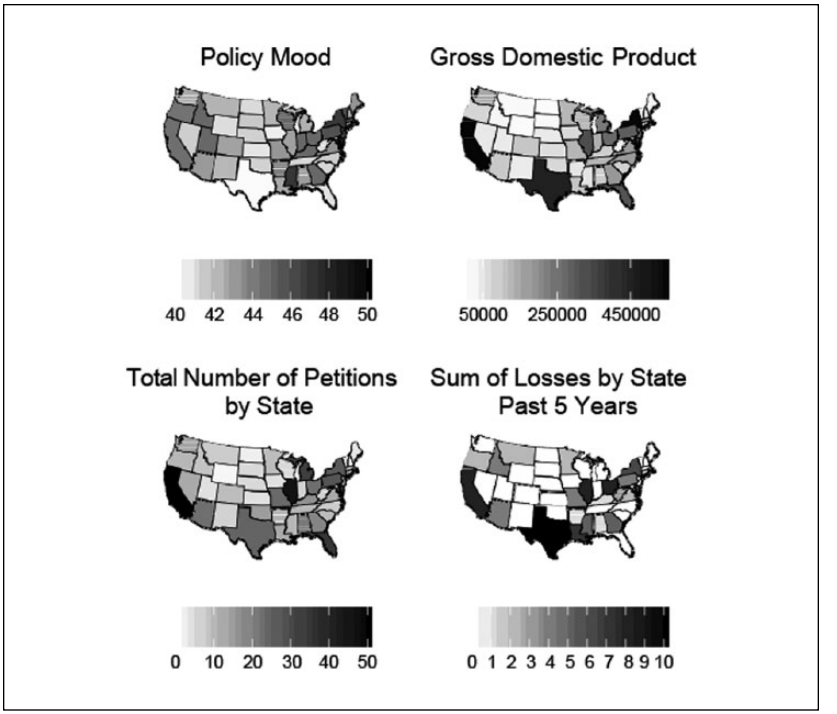

Figure 1. Relative values of independent variables of interest in 1993.
Note. Darker shading indicates higher values.

Figure 1 presents choropleth maps of our independent variable of interest in 1993 (the final year in our sample) as well as other descriptives about the states.[9] Note first the top left panel plotting state policy mood. Lighter gray indicates more conservative states; the darker the shading, the more liberal the state. Not surprisingly, states like California, Oregon, and Maine stand out as liberal, whereas states like Utah, Wyoming, and West Virginia are more conservative.

Figure 1 also portrays several other variables. The bottom left panel of Figure 1 depicts the number of petitions in our sample which came from each state. While we do not control for this number, the panel is instructive in understanding the distribution of the data in our analysis. The top right panel shows the states' gross domestic products in 1993. Finally, the bottom right panel of the figure displays the sum total of cases in the past 5 years where a state was reversed by the Supreme Court.

We controlled for a host of additional factors found to influence justices' agenda votes. We controlled for whether the case came to the Court on *Appeal* or certiorari. We coded *Appeal* as 1 when the cert pool memo labeled the case as an appeal and 0 when it labeled it as a cert petition. We next controlled for the presence of a *Lower Court Dissent*. To do so, we again relied in the cert pool memo in the case. If the memo writer noted a dissent in the lower court, the variable takes on a value of 1; 0 otherwise. If the *Lower Court Struck* a law as unconstitutional, *Lower Court Struck* equals 1; 0 otherwise. Following Black and Owens (2009), we next looked at the conflict among the circuits. If the cert pool memo described some circuit conflict as existing but not yet ripe or otherwise referred to it as superficial, we code *Weak Conflict* as 1; 0 otherwise. If the pool memo writer described circuit conflict as existing and real or important to resolve, we coded *Strong Conflict* as 1; 0 otherwise. We also accounted for whether the *Petitioner Was a State* or *Respondent Was a State*. If, according to the pool memo, a state was petitioner, *Petitioner Was a State* takes on a value of 1; 0 otherwise. If a state was respondent, *Respondent Was a State* takes on a value of 1; 0 otherwise. If the U.S. Solicitor General filed an amicus brief recommending the case be granted, *US Advocated Grant* takes on a value of 1; 0 otherwise. If the Solicitor General filed an amicus brief recommending the case be denied, *US Advocated Deny* takes on a value of 1; 0 otherwise. We looked to the cert pool memos to determine the Solicitor General's involvement.

We also examine the cert pool memos to count the total number of amicus briefs involved at the cert stage. We next examined the direction of the lower court decision in the case. *Liberal Lower Court Decision* examines whether the decision in the court below, using the Supreme Court database coding rules, was liberal. If so, we code the variable as 1; 0 otherwise.[10] We accounted for the *State's Previous Losses* over the last 5 years. This variable measures the total number times a state appeared as a party before the Supreme Court and lost on the merits in the past 5 years.[11] We included this control to account for any state-to-state variation in the amount of oversight any state receives from the Court that might not be captured by our independent variables of interest. We control for whether the lower court issued a liberal decision and interacted that variable with justices' ideology. This is important because past research suggests that justices are at least partially motivated to pursue their ideological goals during the cert stage (Black & Owens, 2009; Boucher & Segal, 1995; Hammond, Bonneau, & Sheehan, 2005). We also accounted for *State GDP*, which is simply a measure of the state's gross domestic product each year.[12] We expected that justices will be less likely to review cases from states with greater resources, as they are likely to have made better factual

Table 1. Logistic Regression of Justices' Votes to Grant Certiorari.

	Coefficient	Robust *SE*
Public Mood × Ideology × Salience	0.016*	0.007
Public Mood × Justice Ideology	0.013*	0.006
Salience × State Public Mood	−0.038*	0.018
Salience × Justice Ideology	−0.648	0.337
State Public Mood	−0.002	0.014
Case Salience	1.941*	0.778
Voting Justice Ideology	−0.664*	0.296
Lower Court Decision Was Liberal	−0.028	0.099
Lower Court Liberal × Ideology	0.320*	0.069
Lower Court Dissent	0.389*	0.059
Lower Court Strike	0.192*	0.054
Weak Conflict	0.111	0.104
Strong Conflict	1.287*	0.118
Petitioner Was a State	0.904*	0.288
Respondent Was a State	0.459*	0.233
Case on Appeal	0.795*	0.088
Total Amicus Briefs Filed	0.402*	0.050
US Advocated Grant	1.421*	0.167
US Advocated Deny	−0.468	0.299
Total Losses in Past 5 Years	0.057*	0.012
State GDP	−9.20e-07*	2.43e-07
Constant	−1.924*	0.616
Observations	5,576	
Log Likelihood	−2,725.430	

Note. Dependent variable = 1 if justice voted to grant; 0 if deny. Robust standard errors clustered on voting justice. GDP = gross domestic product.
*$p < .05$ (two-tailed test).

records and arguments in the lower courts and perhaps generate more credible legal arguments that justices are less obliged to review.[13]

Results

Because our dependent variable is dichotomous, we estimate a logistic regression model, clustering the robust standard errors on the voting justice.[14] Table 1 presents the results.[15] As Table 1 shows, justices target ideologically distant states when determining whether to grant review to cases involving those states. And we retrieve these findings even while accounting for standard agenda setting variables.

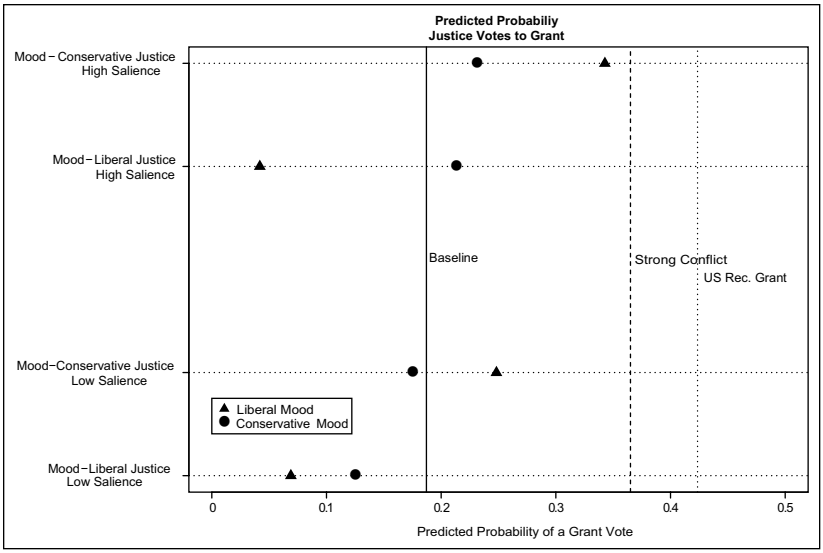

Figure 2. Predicted probability that a justice votes to grant cert at a low (conservative), or two standard deviations below the mean (triangle), and maximum or two standard deviations above the mean (liberal, circle), values of mood.
Note. See the online appendix for table of probability differences.

We present predicted probabilities in Figure 2. The *y* axis describes the variable of interest. The *x* axis depicts the predicted probability a justice votes to grant review at low/conservative (circle), and high/liberal (triangle) values of public mood.[16] All other variables are set at their means or modes as appropriate.[17] The solid vertical line is the baseline probability (pr = .17) the average justice votes to review a case on the discuss list.[18]

For ease of interpretation in our three-way interaction, we present the predicted probability for both liberal and conservative justices in salient and non-salient cases. Beginning at the bottom of the figure, liberal justices are less likely to grant cert in low salience cases than the average justice overall. That said, liberal justices have a slightly higher probability of granting review in a case emanating from a conservative state (pr = .12 [.05, .20]) than a liberal one (pr = .07 [.04, .10]).[19] Compare this to the effect of mood for conservative justices. When a state's mood matches a conservative justice's own ideology, a justice is slightly less likely than the baseline to vote to grant cert (pr = .17 [.10, .24]). However, when a conservative justice is asked to hear a case from a state with liberal policy mood, the probability of a grant vote increases to .25 [.14, .36]. That is a 43% increase from a conservative to a liberal state.

These effects are even more pronounced in salient cases. The top line of the figure considers the same conservative justice when voting on a case mentioned in *US Law Week* as being particularly important. Here, a conservative justice has a .23 [.14, .32] probability to vote to grant a case from an ideologically friendly state but a .34 [.17, .52] of voting a case from a liberal state. That is a 49% increase. Liberal justices also respond, albeit slightly differently. Liberals are more likely to defer to liberal states by refusing to vote to grant the case (pr = .04 [.01, .07]) but are slightly more likely to grant from conservative states (pr = .21 [.08, .34]). In these salient cases, that is a fourfold increase from moving from a liberal to a conservative state. For context, that effect size is only slightly less than the effect of the presence of strong conflict on a justice's vote.

Our controls perform largely as expected. The canonical factors that tend to explain agenda setting do so here as well. Consistent with previous studies, we find that justices are more likely to target lower court decisions with which they disagree ideologically. We also discover that justices are more likely to review cases involving states that have a track record of losing in the last 5 years. And, they are slightly less likely to hear cases involving wealthier states. Finally, justices are unsurprisingly affected by the ideological direction of the lower court decision. Conservative justices are more likely to grant liberal decisions; liberals are more likely to grant conservative lower court decisions. Here, again we note that the effect of state policy mood plays a role in justices' decisions *above and beyond* the effect of the ideology of a particular decision. In other words, our results are evidence that justices are responding to the ideological characteristics of the parties, not just the cases.

Figure 3 contextualizes our results and explores how the effects play out state-by-state (in 1993). It represents the predicted change of each justice voting to grant review, relative to their baseline, given the actual values of our independent variables in those states. The left panels of the figure represent the predicted probability of a grant vote when a liberal justice (here, we use Justice Blackmun's 1993 ideology score) is faced with a conservative lower court decision. The top left panel shows the states Justice Blackmun was more likely to review. The bottom left panel shows the states Justice Blackmun was less likely to review. The panels of the figure on the right represent the predicted probability of a grant vote when a conservative justice (here, we use Justice Rehnquist's 1993 ideology score) is faced with a liberal lower court decision. The top right panel shows the states Justice Rehnquist was more likely to review. The bottom right panel shows the states Justice Rehnquist was less likely to review. Notice that conservatives and liberals differ in the cases they vote to review.

Compare, for instance, the effects in Wisconsin. In 1993, Wisconsin was a moderately conservative state. As a result, Justice Blackmun had a .23

Figure 3. Percent change from the baseline probability that Justice Blackmun (top panels) and Justice Rehnquist (bottom panels) vote to grant review in 1993 to an ideologically incongruent decision.

Note. Left panels indicate states where Stevens or Thomas were more likely to grant a case and the right panels are states where Stevens or Thomas were less likely to vote to grant. In all panels, darker shading indicates larger deviations from the justices' baseline probability.

probability of granting review (about a 17% increase over the baseline). Our model predicts that a hypothetical Rehnquist would have had the opposite response to Wisconsin's policy mood, with a nearly identical 17% decrease probability of voting to grant. Similar effects can be seen in Utah, Montana, Alabama, and Arizona. What this tells us, of course, is that none of the justices appeared to defer to the states as we would expect a federalist to do. Recall, again, that a pure federalist would be just as likely to defer to Wisconsin or Montana or California. But that is not what we observe. Not at all. So for all the clamor over the Court's federalism decisions, it seems

that what motivated justices more than federalism was policy. Federalism was just a shibboleth.

Conclusion

Our results paint a picture of Supreme Court justices who are active and involved. The justices that emerge from our data are eager to supervise potentially problematic states. These justices are less like the ones envisioned by Alexander Hamilton in Federalist No. 78—part of the weakest branch—and more like the ones feared by the Anti-Federalist Robert Yates, who claimed

> the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favor it [and against the states]; and that they will do it, appears probable. (Brutus, 1788)

The literature argues justices have policy goals and seek to ensure that the cases they hear maximize those policy goals. This means that in addition to granting review to cases to reverse errant and ideologically distant lower courts, they might grant review to supervise parties that have significant policymaking powers. The states clearly fall into this category. And the results suggest that liberal justices are more likely to oversee conservative states, while conservatives are more likely to check in on liberal states.

The skeptical reader might be inclined to ask, so what? Why should we care that justices seek to audit ideologically distant states? To this question, we have three responses.

First, these results offer a more pronounced view of justices than is provided by the existing literature. Scholarship has shown that justices are strategic and forward thinking at the agenda stage, but has not examined how justices target parties. That they do suggests justices are even more aggressive than commonly believed. And, because we strive always to update dominant models and improve our theories, enhancing those models would seem to be important for scholarly understanding.

Second, the results suggest that other actors might be influential at the agenda stage. We already knew that the policy preferences of lower court judges influenced justices' agenda votes. We now know that the policies of states influence their decisions. We suspect that other actors at the agenda stage also have characteristics that might influence justices. Perhaps the identity of certain attorneys influences justices. Perhaps the identity of certain amici influences the justices. Perhaps the views of other important parties influence justices' votes at the agenda stage. Our results suggest they might.

Third, these results could be interpreted to suggest that modern federalism, despite claims to the contrary, is dead (or dying). It is commonly believed, for example, that Chief Justice Rehnquist and Justice O'Connor sought to rein in federal power, seeking a devolution revolution. Starting with Rehnquist's opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and continuing in *Lopez*, supra, *Printz*, supra, and other cases, the narrative has been that the Rehnquist Court aimed to reinvigorate state authority. Our results, however, challenge those claims. Conservative justices cued on factors that exposed their distrust of particular states. To put it in the context of a similar study, just as Justice Frankfurter believed in judicial restraint when it suited him (Spaeth, 1964), modern justices would thus appear to believe in federalism primarily when it suits them ideologically.

In short, these results go beyond the findings themselves. They show that the kind of justices we have been putting on the Court do not truly respect federalism. They show that justices go out of their ways to exert their power and potentially limit their opposition. Put simply, they show that justices are far more aggressive than we thought.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Supplementary Material

Online appendix is available on the American Politics Research website at http://apr.sagepub.com/supplemental.

Notes

1. Legal factors also lead justices to review cases (Black & Owens, 2009; Perry, 1991; Stern et al., 2002). For example, the Court is supposed to resolve lower court conflict.
2. Some studies, though, do examine the success of Solicitors General across presidential administrations (see, for example, Bailey, Kamoie, & Maltzman, 2005; Segal, 1988, 1990).
3. Data from the Supreme Court Database 2016 Release 1. Data include orally argued opinions of the court, orally argued per curiams, and orally argued judgments of the Court. Original jurisdiction cases excluded. See http://supremecourtdatabase.org/

4. We examined petitions from the Court's discuss list because these are petitions that have a non-zero probability of being granted. We excluded capital petitions because during the time period of our study, they were treated differently than 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 & Armstrong, 1979).
5. In our sample, 53 cases involve cases where a state squared off against another state. Our main findings are consistent when we exclude them from the analysis. See Online Appendix Table 2.
6. We coded less than the 5,616 votes one might expect (624 × 9) because of justices' recusals and vacancies in some cases.
7. Our results remain largely consistent if we treat all non-final votes, Grant Vacate and Remands (GVR's), and summary dispositions as missing values rather than treating them as votes not to grant. See Online Appendix Table 3.
8. Note that each of the measures of our independent variables of interest are contemporaneous measures, or we use the measure corresponding to the year the Court decided to grant review. But we note that our results are largely robust to a year lagged measure. See Online Appendix Table 7. The one exception to this is the results for the interaction between state public mood and ideology unconditioned by salience. This effect drops out of significance in the lagged measure. We expect this, however, as state mood is often variable from year to year and we would expect justices to respond to public opinion in a state as it is, not as it was.
9. Because of space limitations, we exclude Alaska and Hawaii from the maps. We included them in our models, however.
10. Recent scholarship (e.g., Black & Owens, 2009) tells us justices' ideological considerations are complicated—that justices weigh opposition to the lower court opinion against the likely outcome on the merits. As such, a more appropriate control for ideology might compare the lower court status quo to the expected outcome on the merits. Yet nearly half of our cases were appealed from state supreme courts, where no comparable preference estimates exist. Without such scaled data, we could not estimate the lower court status quo in these cases. We did, however, refit our models on the subsample of cases appealed from the circuit courts, using the method employed by Black and Owens (2009). Our results remain largely the same. See the online appendix.
11. We calculated these data using the Supreme Court Database.
12. We also obtained these data from the State Politics and the Judiciary Dataset.
13. We also fit these models using state fixed effects and retrieve nearly identical results.
14. For the most part, our results hold if we include either robust unclustered standard errors or classical standard errors or if we instead include fixed effects for each justice, or each state. See the online appendix.
15. We also fit these models using state fixed effects and retrieve nearly identical results. See Online Appendix Table 6.

16. A table of the confidence intervals around the differences in these values can be found in the online appendix.
17. The baseline hypothetical case we set for all results below is a unanimous lower court opinion which produced weak, but not strong, conflict among lower courts and came to the Court on certiorari rather than appeal. The lower court did not exercise judicial review, the Solicitor General advocated neither a grant nor a denial, the case was not legally salient, one amicus brief was filed, and the state in the case was the respondent. These represent the modal values of our controls. The IVs of interest are set at their means. The liberal justice we describe below had a Martin–Quinn score of −4 and the conservative justice was set at a Martin–Quinn score of 3.
18. This baseline probability is approximately pr = .09 for liberal justices and about pr = .20 for conservative justices. For the sake of clarity, in Figure 2, we set the baseline to the overall mean judicial ideology.
19. However, we note that these differences are not statistically significant.

References

Bailey, M. A., Kamoie, B., & Maltzman, F. (2005). Signals from the tenth justice: The political role of the solicitor general in Supreme Court decision making. *American Journal of Political Science*, *49*, 72-85.

Baum, L. (2006). *Judges and their audiences: A perspective on judicial behavior*. Princeton, NJ: Princeton University Press.

Bawn, K. (1995). Political control versus expertise: Congressional choices about administrative procedures. *American Political Science Review*, *89*, 62-73.

Bawn, K. (1997). Choosing strategies to control the bureaucracy: Statutory constraints, oversight, and the committee system. *Journal of Law, Economics, and Organization*, *13*, 101-126.

Benesh, S. C., Brenner, S., & Spaeth, H. J. (2002). Aggressive grants by affirm-minded justices. *American Politics Research*, *30*, 219-234.

Black, R. C., & Owens, R. J. (2009). Agenda-setting in the Supreme Court: The collision of policy and jurisprudence. *Journal of Politics*, *71*, 1062-1075.

Black, R. C., & Owens, R. J. (2011). Solicitor general influence and agenda setting on the U.S. Supreme Court. *Political Research Quarterly*, *64*, 765-778.

Black, R. C., & Owens, R. J. (2012a). Consider the source (and the message): Supreme Court justices and strategic audits of lower court decisions. *Political Research Quarterly*, *65*, 385-395.

Black, R. C., & Owens, R. J. (2012b). Looking back to move forward: Quantifying policy predictions in political decision making. *American Journal of Political Science*, *56*, 802-816.

Boucher, R. L., Jr., & Segal, J. A. (1995). Supreme Court justices as strategic decision makers: Aggressive grants and defensive denials on the Vinson court. *Journal of Politics*, *57*, 824-837.

Brace, P., & Boyea, B. D. (2008). State public opinion, the death penalty, and the practice of electing judges. *American Journal of Political Science*, *52*, 360-372.

Brace, P., Sims-Butler, K., Arceneaux, K., & Johnson, M. (2002). Public opinion in the American states: New perspectives using national survey data. *American Journal of Political Science*, *46*, 173-189.

Brutus. (1788). *Anti-federalist papers: Brutus 15*. Retrieved from http://www.constitution.org/afp/brutus15.htm

Calabresi, S. (2001). Federalism and the Rehnquist court: A normative defense. *Annals of the American Academy of Political and Social Science*, *574*, 24-36.

Caldeira, G. A., & Wright, J. R. (1988). Organized interests and agenda setting in the U.S. Supreme Court. *American Political Science Review*, *82*, 1109-1127.

Caldeira, G. A., Wright, J. R., & Zorn, C. J. (1999). Sophisticated voting and gatekeeping in the Supreme Court. *Journal of Law, Economics, & Organization*, *15*, 549-572.

Cameron, C. M., Segal, J. A., & Songer, D. (2000). Strategic auditing in a political hierarchy: An informational model of the Supreme Court's certiorari decisions. *American Political Science Review*, *94*, 101-116.

Chemerinsky, E. (2001). The federalism revolution. *New Mexico Law Review*, *31*, 7-30.

Coan, A. (2012). Judicial capacity and the substance of constitutional law. *Yale Law Journal*, *122*, 422-458.

Colker, R., & Brudney, J. J. (2001). Dissing Congress. *Michigan Law Review*, *100*, 80-144.

Enns, P. K., & Koch, J. (2013). Public opinion in the U.S. states: 1956 to 2010. *State Politics & Policy Quarterly*, *13*, 349-372.

Epstein, D., & O'Halloran, S. (1994). Administrative procedures, information, and agency discretion. *American Journal of Political Science*, *38*, 697-722.

Epstein, L., & Knight, J. (1998). *The choices justices make*. Washington: DC: CQ Press.

Epstein, L., Segal, J. A., & Spaeth, H. J. (2007, February). *Digital archive of the papers of Harry A. Blackmun*. Retrieved from http://epstein.wustl.edu/blackmun.php

Erikson, R. S., Wright, G. C., & McIver, J. P. (1993). *Statehouse democracy: Public opinion and policy in the American states*. Cambridge, UK: Cambridge University Press.

Gleason, S. A., & Provost, C. (2015). Representing the states before the U.S. Supreme Court: State amicus brief participation, the policy-making environment, and the fourth amendment. *Publius*. Retrieved from http://publius.oxfordjournals.org/content/early/2015/12/25/publius.pjv042.short?rss=1

Haire, S., Lindquist, S. A., & Songer, D. (2003). Appellate court supervision in the federal judiciary: A hierarchical perspective. *Law & Society Review*, *37*, 143-168.

Hammond, T. H., Bonneau, C. W., & Sheehan, R. S. (2005). *Strategic behavior and policy choice on the U.S. Supreme Court*. Stanford, CA: Stanford University Press.

Huber, J. D., & Shipan, C. R. (2002). *Deliberate discretion: The institutional foundations of bureaucratic autonom*y. Cambridge, UK: Cambridge University Press.

Huber, J. D., Shipan, C. R., & Pfahler, M. (2001). Legislatures and statutory control of bureaucracy. *American Journal of Political Science*, *45*, 330-345.

Lax, J. R. (2003). Certiorari and compliance in the judicial hierarchy: Discretion, reputation and the rule of four. *Journal of Theoretical Politics*, *15*, 61-86.

Lewis, D. E. (2003). *Presidents and the politics of agency design: Political insulation in the United States government bureaucracy, 1946-1997*. Stanford, CA: Stanford University Press.

Lewis, D. E. (2008). *The politics of presidential appointments: Political control and bureaucratic performance*. Princeton, NJ: Princeton University Press.

Lindquist, S. A., Haire, S. B., & Songer, D. R. (2007). Supreme Court auditing of the US courts of appeals: An organizational perspective. *Journal of Public Administration Research and Theory*, *17*, 607-624.

Maltzman, F., Spriggs, J. F., II, & Wahlbeck, P. J. (2000). *Crafting law on the Supreme Court: The collegial game*. New York, NY: Cambridge University Press.

Martin, A. D., & Quinn, K. M. (2002, Spring). Dynamic ideal point estimation via Markov chain Monte Carlo for the U.S. Supreme Court, 1953–1999. *Political Analysis*, *10*, 134-153.

McCubbins, M., Noll, R., & Weingast, B. (1987). Administrative procedures as instruments of political control. *Journal of Law, Economics, and Organization*, *3*, 243-277.

McGuire, K. T., & Caldeira, G. A. (1993). Lawyers, organized interests, and the law of obscenity: Agenda setting in the Supreme Court. *American Political Science Review*, *87*, 717-726.

Moe, T. M. (1985). Control and feedback in economic regulation: The case of the NLRB. *American Political Science Review*, *79*, 1094-1116.

O'Brien, D. M. (1997). The Rehnquist court's shrinking plenary docket. *Judicature*, *81*(2), 58-65.

Owens, R. J., & Wohlfarth, P. C. (2014). State solicitors general, appellate expertise, and state success before the U.S. Supreme Court. *Law & Society Review*, *48*, 657-685.

Pacelle, R. (2003). *Between law and politics: The solicitor general and the structuring of race, gender, and reproductive rights litigation*. Texas A&M University Press.

Palmer, J. (1982). An econometric analysis of the U.S. Supreme Court's certiorari decisions. *Public Choice*, *39*, 387-398.

Perry, H., Jr. (1991). *Deciding to decide: Agenda setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.

Segal, J. A. (1988). Amicus curiae briefs by the solicitor general during the warren and burger courts: A research note. *Western Political Quarterly*, *41*, 135-144.

Segal, J. A. (1990). Supreme Court support for the solicitor general: The effect of presidential appointments. *Western Political Quarterly*, *43*, 137-152.

Segal, J. A., & Spaeth, H. J. (2002). *The Supreme Court and the attitudinal model revisited*. New York, NY: Cambridge University Press.

Shipan, C. R. (2004). Regulatory regimes, agency actions, and the conditional nature of congressional influence. *American Political Science Review*, *98*, 467-480.

Soss, J., Schram, S. F., Vartanian, T. P., & O'Brien, E. (2001). Setting the terms of relief: Explaining state policy choices in the devolution revolution. *American Journal of Political Science*, *45*, 378-395.

Spaeth, H. J. (1964). The judicial restraint of Mr. Justice Frankfurter—Myth or reality. *Midwest Journal of Political Science*, *8*, 22-38.

Stern, R. L., Gressman, E., Shapiro, S. M., & Geller, K. S. (2002). *Supreme Court practice* (8th ed.). Washington, DC: The Bureau of National Affairs.

Stimson, J. A. (1999). *Public opinion in America: Moods, cycles, and swings* (2nd ed.). Boulder, CO: Westview Press.

Wahlbeck, P. J., Spriggs, J. F., & Maltzman, F. (2009). *The burger court opinion writing database*. Retrieved from http://supremecourtopinions.wustl.edu/

Weingast, B. R., & Moran, M. J. (1983). Bureaucratic discretion or congressional control: Regulatory policymaking by the FTC. *Journal of Political Economy*, *91*, 765-800.

Wood, B. D., & Waterman, R. W. (1994). *Bureaucratic dynamics: The role of bureaucracy in a democracy*. Boulder, CO: Westview Press.

Woodward, B., & Armstrong, S. (1979). *The Brethren: Inside the Supreme Court*. New York, NY: Simon & Schuster.

Author Biographies

Amanda Clare Bryan is an assistant professor in the Department of Political Science at Loyola University Chicago. Her research focuses on the U.S. Supreme Court and judicial decision-making.

Ryan J. Owens is a professor of political science at the University of Wisconsin-Madison and a faculty affiliate at the UW law school. His research focuses on law and courts.