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Revisiting the Influence of Law Clerks on the U.S. Supreme Court's Agenda-Setting Process

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REVISITING THE INFLUENCE OF LAW CLERKS ON THE U.S. SUPREME COURT'S AGENDA-SETTING PROCESS*

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Do law clerks influence U.S. Supreme Court Justices' decisions in the Court's agenda-setting stage? For those Justices responding to their own law clerks' cert recommendations, we expect a high degree of agreement between Justice and clerk. For non-employing Justices, however, we anticipate that the likelihood of agreement between clerk and Justice will vary greatly based on the interplay among the ideological compatibility between a Justice and the clerk, the underlying certworthiness of the petition for review, and the clerk's final recommendation. Relying on a newly collected dataset of petitions making the Court's discuss list over the 1986 through 1993 Terms, we find that Justices are more likely to follow a pool memo's recommendation when it is consistent with the underlying cues present in the pool memo. In addition, our results indicate that Justices are significantly more likely to follow grant recommendations when the recommendation is provided by a clerk from an ideologically proximate chambers as opposed to one that is distant.

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These findings provide important information on the efficiency and effectiveness of the Court's practice of pooling certiorari petitions among chambers and also suggest that political advisors, at the Supreme Court and in other institutions, are equipped to influence political elite decision making.

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I. INTRODUCTION

Do law clerks influence U.S. Supreme Court Justices' decisions? This question is of unquestionable import. In a 2012 study published in *American Politics Research*, Black and Boyd examined this potential influence of law clerks on U.S. Supreme Court Justices' decision making in the Court's agenda-setting stage.¹ While their findings were strong—indicating that law clerks serving in the Court's certiorari (cert) pool have conditional influence on Justice cert voting—the analysis was based on limited data in terms of the number of observations and Court Terms analyzed.²

Here, we return to this question with a much more expansive set of data, an exercise that permits us to examine the robustness of these earlier findings. Consistent with this earlier work, we argue that the

1. Ryan C. Black & Christina L. Boyd, *The Role of Law Clerks in the U.S. Supreme Court's Agenda-Setting Process*, 40 AM. POL. RES. 147 (2012).

2. *See id.* at 156, 164.

influence of law clerks on Justices varies. For those Justices responding to their own law clerks' cert recommendations, we predict and find a strong relationship and a high degree of agreement between Justice and clerk. However, for non-employing Justices, we expect and find that the likelihood of agreement between clerk and Justice will vary greatly based on the interplay among three factors: (1) the ideological compatibility between a Justice and the law clerk, (2) the underlying certworthiness of the petition seeking review, and (3) the clerk's final recommendation to grant or deny review in a petition.

Relying on a newly collected dataset of all paid, non-death penalty petitions making the Court's discuss list over the course of eight Terms (1986–1993) and drawn from the papers of Justice Harry A. Blackmun,³ the findings of our analysis are strong and robust. By way of preview, we find that nearly 75% of all Justices' agenda-setting votes in our data match the recommendation made by the cert pool memo author. This influence is not uniform, but rather conditioned by two important factors: (1) Justices are significantly more likely to follow a pool memo's recommendation when that recommendation is consistent with the underlying cues present in the pool memo; and (2) Justices are significantly more likely to follow grant recommendations when the recommendation is provided by a clerk from an ideologically proximate chambers as opposed to one that is distant.

As we contend in this Article's closing pages, these findings are informative on the effectiveness and efficiency of the Court's practice of pooling certiorari petitions among the chambers. More generally, the results, which we argue are generalizable across a variety of political institutions, also suggest advisors can and do systematically influence the decisions made by political elites. Our efforts proceed in several steps. We begin by describing the advising role provided by clerks to their Justices. We then turn to outlining our theories for the conditions under which Justices should be influenced by law clerks—both their own (Part III) and those of other Justices (Part IV). Part V takes these general expectations and formulates them into specific empirically testable hypotheses. Part VI describes our data, measures, and statistical results. Finally, Part VII concludes with a discussion of the findings, some

3. LEE EPSTEIN, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE DIGITAL ARCHIVE OF THE PAPERS OF JUSTICE HARRY A. BLACKMUN* (2007), <http://epstein.wustl.edu/blackmun.php>, archived at <http://perma.cc/S5MQ-TPA9>.

potential limitations, and what our results mean more generally for the Supreme Court as an institution.

II. LAW CLERKS AS ADVISORS

A. *Advisors in Politics*

Since the 1920s, as the job of U.S. political elites has become more complex, the number of individuals serving in advisory roles across the branches has increased dramatically. In 1919, each legislator in the U.S. Congress was authorized only two staff members, while current rules allow for over twenty staffers per legislator, plus access to numerous committee aides.⁴ Through 1918, U.S. Supreme Court Justices had congressional authorization to hire one stenographic clerk;⁵ today, the total staff size for an Associate Justice has more than tripled, including the addition of three more clerks.⁶ The President's staff, which numbers near 2,000 today, was closer to 200 in the 1920s.⁷ If these numbers (and their increase) are any indication, advisors are anything but trivial members of federal politics.

The accounts of advisor influence and the roles that advisors assume while serving in these national political institutions also seem to support this conclusion. In Congress, advisors participate in policy development, conduct research, draft legislation, and communicate and negotiate on behalf of their member.⁸ In the White House, advisors develop policy expertise and act as information filters for the chief executive when it comes to their area of specialization.⁹ At the Supreme Court, the key advisor role to Justices is played by law clerks, who serve at the pleasure of their Justice and frequently take on a variety of tasks.¹⁰ For each of

4. ORGANIZATION OF THE CONGRESS, H.R. REP. NO. 103-413, S. REP. NO. 103-215, at 63 (1993).

5. TODD C. PEPPERS, COURTIER OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 83 (2006).

6. *Id.* at 186.

7. LYN RAGSDALE, VITAL STATISTICS ON THE PRESIDENCY: WASHINGTON TO CLINTON 257 tbl.6-1 (1996).

8. HARRISON W. FOX, JR. & SUSAN WEBB HAMMOND, CONGRESSIONAL STAFFS: THE INVISIBLE FORCE IN AMERICAN LAWMAKING 2 (1977).

9. See BRADLEY H. PATTERSON JR., THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND 3 (2000).

10. PEPPERS, *supra* note 5, at 14; ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 3-4 (2006).

these institutions, advisor numbers, knowledge of their responsibilities, and anecdotes from advisors themselves give us ample reason to believe that advisors play an important and influential role in our political system. However, the extent of this influence and the conditions under which it is operational generally remain a mystery.¹¹

B. Law Clerks as Advisors at Certiorari

Supreme Court Justices' law clerks, just like other advisors, serve in a variety of capacities. Although there is substantial variation in how Justices use their clerks, these advisors often conduct supplemental research, draft pre-oral argument bench memoranda that summarize the issues at stake in a case, and serve as the first—and perhaps only—line of review for certiorari petitions.¹² This lattermost duty is our focus.

Cert is “the process by which the [Supreme] Court [discretionarily] sets its agenda.”¹³ It begins with the losing party in the lower court arguing, via a written brief, why his case is worthy of further review.¹⁴

11. PEPPERS, *supra* note 5, at 2. Much of this inattention in the existing literature to systematic methods and generalizable results can be blamed not on a lack of recognition of the role advisors play but rather on a lack of available data that can be used to assess influence. The advising of legislators and presidents, for example, is often conducted through informal and undocumented conversations where debate and decision making can take place. Although these advisors author written position papers, which might then end up in archival materials, the existence of this level of detail on decisions is rare and varies widely across institutional setting. See DANIEL E. PONDER, *GOOD ADVICE: INFORMATION & POLICY MAKING IN THE WHITE HOUSE* 9 (2000); see also DAVID WHITEMAN, *COMMUNICATION IN CONGRESS: MEMBERS, STAFF, AND THE SEARCH FOR INFORMATION* 28 (1995). That these generally unrecorded conversations are most likely to take place between a decision maker and her inner circle of advisors—the group most likely to exert influence—only compounds the difficulty of documenting meaningful influence. In other cases, scholars turn to interviews with advisors and their principals. In documenting the professional nature of congressional staffers, Barbara S. Romzek and Jennifer A. Utter conducted in-depth interviews of forty current and former staffers. Barbara S. Romzek & Jennifer A. Utter, *Congressional Legislative Staff: Political Professionals or Clerk?*, 41 AM. J. POL. SCI. 1251, 1276 app. (1997). Similar approaches have also been used for both the study of the President, PATTERSON, *supra* note 9, at 8, and the Supreme Court, PEPPERS, *supra* note 5; WARD & WEIDEN, *supra* note 10. These detailed narratives often provide extensive insight into the complex roles advisors play, but fail to provide generalizable and systematic accounts of the influence of political advisors on the decision making of their political principals.

12. See PEPPERS, *supra* note 5, at 14 for a thorough review of clerk duties.

13. WARD & WEIDEN, *supra* note 10, at 21. We only provide a brief description of the review process and how clerks are involved in it. Much of this and all other procedural aspects of the Court's business are explained in far greater detail in ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, *SUPREME COURT PRACTICE* (8th ed. 2002).

14. STERN ET AL., *supra* note 13, at 288.

The cert petition and any accompanying materials are distributed to the Justices' individual chambers for their review.¹⁵ In the past, the review process was a task each chambers engaged in individually, with these duties falling primarily upon a Justice's clerks.¹⁶ However, as the number of petitions, particularly *in forma pauperis* (IFP) petitions (filed by indigent litigants), coming to the Court steadily rose through the 1960s, many Justices began to worry about the amount of time their clerks spent focused on only one activity,¹⁷ and with good reason: Evidence indicates that during this era, many law clerks reviewed more than eleven cert petitions per week, amounting to upwards of two-thirds of their working time.¹⁸

This situation led to the development of the Court's cert pool in 1972.¹⁹ The pool is a process whereby participating Justices combine (pool) their clerks' labor in the review of cert petitions so as to divide the workload of summarizing the content and merit of each petition coming to the Court.²⁰ The pool's creation had an appreciable effect on clerk time. As Ward and Weiden indicate, following the cert pool's inception, the typical amount of workload a clerk spent on cert was reduced to four to five petitions per week,²¹ thereby accounting for about one-third of his or her time.²²

With the cert pool in place, each new cert petition is randomly assigned to one of the pool clerks, and that clerk is then responsible for

15. *Id.*

16. WARD & WEIDEN, *supra* note 10, at 45.

17. *Id.* at 38–39, 138–42.

18. *Id.* at 137–42.

19. *Id.* at 45.

20. The decision to participate in the cert pool is one made by each individual Justice. *See id.* at 147. At the time of the pool's creation in 1972, Justices William J. Brennan, William O. Douglas, Thurgood Marshall, and Potter Stewart did not participate. *Id.* at 119. Since then, only Justice John Paul Stevens, *id.* at 147, and Justice Samuel Alito have opted out of the pool, Todd C. Peppers & Artemus Ward, *Introduction to IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES* 1, 7 (Todd C. Peppers & Artemus Ward eds., 2012).

21. WARD & WEIDEN, *supra* note 10, at 142.

22. This one-third time figure comes from the following evidence: "I would estimate that cert petitions took up roughly a third of our work time. My guess is that this is more time than the average cert pool clerk spent on petitions, but only slightly more." *Id.* at 142 (quoting Sean Donahue, *Behind the Pillars of Justice: Remarks on Law Clerks*, 3 LONG TERM VIEW 77, 79 (1995)) (internal quotation marks omitted).

producing a pool memorandum (pool memo) for that petition.²³ Written in a standardized way, each memo contains a summary of the case, the facts and proceedings below, and the parties' arguments (including any briefs filed *amicus curiae*); the clerk's discussion of the petition's worthiness for review; and a recommendation regarding cert.²⁴ The pool memo is then distributed to all Justices in the cert pool.²⁵ Although the treatment of this memo varies by chambers, most Justices have their clerks engage in some level of markup.²⁶ In Justice Blackmun's chambers, for example, one of his clerks would review the pool memo and then provide his or her own recommendation as to whether the petition should be granted cert, along with anywhere from a sentence to several pages of commentary.²⁷ Following this markup process, cert voting takes place at the Court's weekly agenda-setting conference.²⁸

A number of compelling arguments make the cert stage a prime candidate for assessing clerk influence. Perhaps chief among them is the fact that the clerks themselves suggest that cert is where they have the largest influence.²⁹ In Ward and Weiden's survey of former clerks, fully 38% indicated that the cert decision was the most likely occasion where a clerk could change his Justice's mind.³⁰ By way of contrast, the same survey revealed that only 4% of clerks believed that the ultimate outcome of a case was the most likely area for influence.³¹ Additionally, the large volume of petitions for review, the fact that clerks make specific recommendations on cert, and the high degree of principal oversight in other activities on the Court (such as the opinion-writing process) suggest a comparatively high potential for clerk influence at the cert stage. Ward and Weiden argue:

23. H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 42 (1991).

24. *Id.*

25. *Id.*

26. PEPPERS, *supra* note 5, at 210; PERRY, *supra* note 23, at 60.

27. For many petitions this was as simple as noting agreement with the reasoning and conclusion of the pool clerk. In others, however, the Blackmun clerk would write a paragraph or more, at times simply adding to the pool memo writer's logic while at others arguing for a wholly different substantive outcome (e.g., grant instead of deny).

28. PERRY, *supra* note 23, at 43–44.

29. WARD & WEIDEN, *supra* note 10, at 240.

30. *Id.* at 145 fig.3.

31. *Id.*

Because clerks make formal recommendations on cert memos, it is often thought that clerks have influence over cert decisions. Indeed, not only do clerks make formal recommendations on their cert memos, i.e., “GRANT” or “DENY,” but they also often try to persuade in the body of the memo with political as well as legal analyses. For example, when asked whether he often attempted to convince his justice of his position on a case or issue, a Douglas clerk from the 1960s said that he did not, “except in cert memos.” Indeed, one way of viewing the cert memo, and the mark-up memo in the case of pool memos, is that the clerk is attempting to persuade the justices to either take the case or not.³²

Finally, unlike the other tasks that clerks may work on for their Justices, we know that clerks serving in the cert pool have a role in the cert process for every case that comes before the Court—regardless of which Justice they work for.³³ This consistency in job assignment makes cert, and more generally, clerks, an ideal arena for examining advisor influence in political decision making.

III. POLITICAL ELITES AS PRINCIPALS, ADVISORS AS AGENTS

To most, political advisor influence, even though it may not be modeled, is assumed to exist.³⁴ Given the enormous amount of responsibilities that major political actors face, it is no wonder that they turn to advisors to gather information, develop expertise, and, in certain contexts, act on their behalves. This assumption of advisor influence, then, is both reasonable and consistent with the delegation aspect of principal–agency theory.³⁵ As Kowert tells us, “It may be lonely at the top, but hardly ever so lonely that important decisions in government and business are made by only one person.”³⁶ From a variety of anecdotes, we know that advisors play an important role in making highly important decisions across a variety of political institutions. White House advisors craft future national foreign policy, congressional

32. *Id.* at 144.

33. PERRY, *supra* note 23, at 42.

34. See WHITEMAN, *supra* note 11, at 35; see also JEAN A. GARRISON, GAMES ADVISORS PLAY: FOREIGN POLICY IN THE NIXON AND CARTER ADMINISTRATIONS, at xviii–xix (1999).

35. See Gary J. Miller, *The Political Evolution of Principal–Agent Models*, 8 ANN. REV. POL. SCI. 203, 220–21 (2005).

36. PAUL A. KOWERT, GROUPTHINK OR DEADLOCK: WHEN DO LEADERS LEARN FROM THEIR ADVISORS?, at 1 (2002).

aides strike bargains over the text of a pending bill, and Supreme Court clerks write initial drafts of controversial opinions.

While political principals are ultimately responsible for the decisions that they make, they are unable to make those decisions alone. Simply put, political actors “are most troubled by insufficient time and information.”³⁷ Enter the political advisor, whose existence and substantial duties can be explained by sheer necessity. By acting as the silent agent to presidents, legislators, and judges, advisors can specialize, gain expertise, and provide information to their principals that will enable multi-dimensional decision making that would not otherwise be possible. Within this scenario, political principals can be likened to managers of an enterprise.³⁸

Of course, principal–agency theory demands that agents be properly incentivized in order to be effective and not shirk.³⁹ In the case of advisors, both short-term and long-term reputation and career considerations present a sizable incentive structure that helps prevent shirking.⁴⁰ In the short term, advisors may have vast discretion in doing their jobs, but “such grants of discretion can always be recalled on a moment’s notice, even retroactively.”⁴¹ Longer term, many of these advisors have career goals that will keep them active in political- and policy-related activities.⁴²

With an effective principal–agent relationship in place, politicians serving as enterprise managers can then delegate substantial activities to their staffers, something that is necessary for modern-day political success. Because actors in the Executive, Legislative, and Judicial Branches are not equipped to manage every minute detail of their position or to personally acquire the information necessary to make the most of the administrative and policy-making decisions required of

37. H. Owen Porter, *Legislative Information Needs and Staff Resources in the American States*, in *LEGISLATIVE STAFFING: A COMPARATIVE PERSPECTIVE* 39, 40 (James J. Heaphey & Alan P. Balutis eds., 1975).

38. Robert H. Salisbury & Kenneth A. Shepsle, *Congressional Staff Turnover and the Ties-That-Bind*, 75 *AM. POL. SCI. REV.* 381, 382 (1981).

39. Bengt Holmström, *Moral Hazard and Observability*, 10 *BELL J. ECON.* 74 (1979); Miller, *supra* note 35, at 204; Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 *BELL J. ECON.* 55 (1979).

40. See Romzek & Utter, *supra* note 11, at 1260, 1263.

41. *Id.* at 1260.

42. *Id.*

them, political principals delegate a variety of tasks to advisors,⁴³ some of which are routine and others that approach policy making.⁴⁴ Advisors are frequently considered area experts by their bosses, a structure that, when served by incentivized agents in a well-designed system, provides an effective method of controlling the “chaotic informational environment”⁴⁵ through filtering and delivering information to principals. The same system also increases the possibilities for advisors to serve in critical and important roles in politics. Thus, the very design of this advisory system explains not only the existence of a sizable contingent of advisors and staff surrounding modern political decision makers but also the presence of vast *potential* for advisors to influence governmental policy.

In the context of law clerks as advisors to Justices, in hiring a law clerk to work for her, a Justice is entrusting the clerk to work on her behalf and provide assistance as she works to pursue her goals. More generally, this includes a Justice’s desire “to see [her] policy preferences etched into law.”⁴⁶ What is more, from a theoretical perspective, we have several reasons to believe that a Justice is equipped to ensure dutiful and loyal work among her own law clerks. These reasons include the Justice’s control over the selection of law clerks, her ability to audit law clerk decisions and activities, and her ability to incentivize loyalty through influence on post-clerkship employment opportunities.

Turning first to a Justice’s selection of her law clerks, each Justice has complete discretion with regards to the process used to select clerks and the outcome of that process—i.e., who ultimately gets selected.⁴⁷ This creates the ability for a Justice, alone and through her existing staff of advisors, to develop a detailed understanding of the applicants, their

43. See, e.g., Andrew Rudalevige, *The Structure of Leadership: Presidents, Hierarchies, and Information Flow*, 35 PRESIDENTIAL STUD. Q. 333, 338 (2005).

44. *Id.* at 338, 344. We are not the first to suggest using a principal–agency approach to understanding law clerks. Sally J. Kenney has deployed such a perspective in her work on clerks at the Court and on *référéndaires*, the law clerk counterpart in the European Court of Justice. Sally J. Kenney, *Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référéndaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court*, 33 COMP. POL. STUD. 593 (2000); Sally J. Kenney, *Puppeteers or Agents? What Lazarus’s Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 LAW & SOC. INQUIRY 185 (2000) (reviewing EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998)).

45. Rudalevige, *supra* note 43, at 335.

46. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9–10 (1998).

47. WARD & WEIDEN, *supra* note 10, at 108.

personalities and talents, and to select only those individuals who she can trust will pursue her agenda and policy goals.⁴⁸ Information such as law school attended, grades and course work, letters of recommendation, group membership, writing samples, and lower court clerkships can be critical for the reliability of the results of this selection process.⁴⁹

Upon hiring a law clerk, a Justice can monitor her work by auditing.⁵⁰ Whether the clerk reviews cert petitions, writes bench memoranda, or authors early drafts of opinions, the employing Justice still has access to the raw materials from which the clerk drew.⁵¹ Beyond this, incentives for clerks to impress their employing Justice are high. Faithful, reliable clerks are likely to receive strong post-clerkship employment support.⁵² Supreme Court clerkships are tremendous accomplishments for attorneys, carrying with them great potential for hiring bonuses, high salaries, prestige, and opportunities.⁵³ Being held in low regard by one's former Justice would surely decrease these post-clerkship opportunities and benefits.

These tools of selection and control give us good reason to believe that the clerk–Justice employment relationship is a strong one that fits well within the principal–agency theoretical framework. Because of the strength of this relationship, we expect that there will be great similarity between what a Justice would have done herself and what her clerk does as her agent. And due to this, in the context of cert, we expect that Justices will closely follow the recommendations of their own clerks.

IV. SIGNALING THEORY:

LAW CLERK INFLUENCE IN NON-AGENCY RELATIONSHIPS

A Supreme Court clerk's interactions, work, and potential for influence are generally limited to her employing Justice. However, the existence of the cert pool facilitates unique interactions between clerks and non-employing Justices because a law clerk's pool memo and

48. *See id.* at 107.

49. *Id.* at 55–56; Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869, 870–71 (2001); Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 55 (2008).

50. Peppers & Ward, *supra* note 20, at 9.

51. *See id.*

52. *See* WARD & WEIDEN, *supra* note 10, at 1.

53. *Id.* at 1, 55.

recommendation are distributed to and relied upon by chambers *other* than that of her own Justice.⁵⁴ While all pool Justices receive the same memo, only the Justice who originally hired the law clerk has the ability to use the direct supervision tools described above. For example, Justice O'Connor had no influence in selecting or overseeing the clerks hired by Justice Thomas. As a result, we must look beyond principal–agency theory to what is known as signaling theory⁵⁵ to offer predictions on how non-employing Justices will respond to cert pool recommendations.⁵⁶ Signaling theory permits the exploration of a communication between a sender and a receiver in which the sender holds an informational advantage over the receiver. Under the theory, as the interests of the sender and receiver move further apart, the value of the communication (i.e., the signal) decreases.⁵⁷

In our context, the signaling model depends on the communication of information through the pool memo from a sender (here, the pool clerk) to the receiver (here, each Justice serving in the pool). As with the agent in principal–agency theory, the clerk in signaling theory has a significant informational advantage over the receiving Justices. During the cert pool process, the pool clerk reads the complete record of a case, including the litigants' briefs and any lower court opinions, all of which inform the content of his resulting pool memos and the signal that is sent with it.⁵⁸ Since the interests and loyalty of the signal-sending pool clerk and the signal-receiving pool Justice do not always align, the reliability of the communication through this signaling process is not always of high value.

As such, after the Justices in the pool receive the cert recommendation, they must account for the potential that the pool

54. PERRY, *supra* note 23, at 42.

55. Vincent P. Crawford & Joel Sobel, *Strategic Information Transmission*, 50 *ECONOMETRICA* 1431, 1432–33 (1982).

56. In recent years, signaling theory has been used to understand other Supreme Court-related relationships, including the interactions between Justices and the Solicitor General, Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 *AM. J. POL. SCI.* 72 (2005), and the Supreme Court's overall decision to grant or deny cert, Ryan C. Black & Ryan J. Owens, *Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions*, 65 *POL. RES. Q.* 385 (2012); Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 *AM. POL. SCI. REV.* 101 (2000).

57. Crawford & Sobel, *supra* note 55, at 1431–33.

58. STERN ET AL., *supra* note 13, at 39.

memo's recommendation made by the law clerk might be wrong or incomplete. Such signaling "errors" might be related to the clerk's skill at interpreting the private information or could be deliberate efforts to influence the receiver. Because examining the record directly himself to check the quality and accuracy of the pool recommendation in every case would be prohibitively time-consuming, a Justice must turn to informational shortcuts to accomplish this assessment.

In this process, we believe that Justices rely on a handful of readily available sources in making this determination: (1) the presence of critical informational cues about the underlying quality of a cert petition; (2) the direction of the clerk's pool recommendation (grant, deny); and (3) the compatibility of the political preferences between a receiving Justice and the pool clerk. In addition to the information available to a Justice to assess pool recommendation reliability, we also expect that his need to rely on the recommendations of the cert pool will vary based on the length of his tenure on the Court.

Key elements of a case being petitioned to the Court for cert can serve as important informational cues that influence Justices' cert voting.⁵⁹ This critical information includes things such as whether the petition involves a circuit conflict or an important national matter, whether there was a dissenting opinion in the lower court, or whether there is an IFP petitioner in the case.⁶⁰ Petitions with many positive cues should be better cert candidates for Justices (i.e., more certworthy) than those with fewer positive cues or more negative cues.⁶¹

These informational cues are likely to operate in connection with the pool clerk's grant/deny recommendation for each petition. Simply put, we expect that Justices will be more likely to follow clerk recommendations when they align with the signal sent through the petition's level of certworthiness. If a petition is considered certworthy and the clerk recommends granting it, then this recommendation should be more likely to be followed than if the law clerk recommends denying the same high quality petition. The opposite (higher likelihood of following deny recommendations for non-certworthy petitions) should hold as well. This means, for example, that a Justice would be more likely to follow a grant recommendation for the petition with conflict

59. Joseph Tanenhaus, Marvin Schick, Matthew Muraskin & Daniel Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 111, 118 (Glendon Schubert ed., 1963).

60. *Id.* at 115–17.

61. *Id.* at 118.

and a deny recommendation for the petition submitted by an indigent.

As we argue above, individual law clerks should behave according to the preferences of their employing Justices. This ideologically driven behavior will be consistent with the preferences of some outside chambers, but it is likely to be far from the preferences of others. Indeed, when the ideological distance between a Justice and the chambers of the pool clerk's Justice is high, the quality of the cert pool signal will be doubted, and the receiving Justice should be less likely to follow that recommendation. Our theory thus predicts that Justice Scalia would, all else equal, reject a recommendation from one of Justice Ginsburg's law clerks while accepting a recommendation from one of Justice Thomas's law clerks.

To further complicate matters, we expect that, because Justices are forward looking and policy conscious in the cert votes,⁶² the above-noted importance of ideological distance and the relationship between a petition's certworthiness and the type of recommendation that a pool clerk makes will themselves be interrelated. When faced with a petition that (1) is of high quality (i.e., is certworthy) and (2) has received a grant recommendation from the pool clerk, a Justice should be more likely to follow that recommendation when the policy preferences of the pool clerk are similar to the voting Justice's own preferences. Applying this expectation once again to sitting Justices in our data, even if the petition is of high quality and the pool clerk recommends granting review, Justice Scalia would still potentially discount a recommendation coming from a pool clerk hailing from Justice Marshall's ideologically distant chambers.

Beyond these relationships, we also expect that a Justice's propensity to follow a clerk's recommendation will be driven, in part, by his level of experience and familiarity with the Court. Consistent with previous research on the Court indicating that a Justice's behavior varies across his Supreme Court tenure,⁶³ this cert-related expectation recognizes that newly appointed Justices need time to become

62. Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1063 (2009); Gregory A. Caldeira, John R. Wright & Christopher J. W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 550 (1999).

63. Timothy M. Hagle, "Freshman Effects" for Supreme Court Justices, 37 AM. J. POL. SCI. 1142 (1993); Mark S. Hurwitz & Joseph V. Stefko, *Acclimation and Attitudes: "Newcomer" Justices and Precedent Conformance on the Supreme Court*, 57 POL. RES. Q. 121 (2004).

accustomed to the Court's unique workload, norms, culture, and responsibilities. In the context of cert, relatively new Justices are likely to lean more heavily on cert pool recommendations than their senior colleagues in deciding how to vote in the Court's agenda-setting stage.

V. HYPOTHESES

The above detailed theories give rise to the following four hypotheses⁶⁴:

- *Hypothesis 1*: Pool clerk recommendations to deny non-certworthy petitions should be more likely to be followed than grant recommendations of similarly non-certworthy petitions.
- *Hypothesis 2*: Pool clerk recommendations to grant certworthy petitions should be more likely to be followed than deny recommendations of similarly certworthy petitions.
- *Hypothesis 3*: Pool clerk recommendations to grant certworthy petitions should be more likely to be followed by Justices ideologically similar to the recommending pool clerk.
- *Hypothesis 4*: The less time a Justice has served on the Court, the more likely he should be to follow a pool clerk's cert recommendation.

VI. DATA AND MEASUREMENT

To further probe the nature of clerk influence at cert in this replication project, we analyzed a subset of the petitions considered by the Court. We started by examining the conference discuss lists for the Court's 1986–1993 Terms, which we obtained from the archival papers of Justice Blackmun at the Library of Congress in Washington, D.C. The discuss list identifies what petitions received a recorded vote at the agenda-setting stage. Although the Chief Justice is responsible for circulating the first draft of the discuss list, any Justice can ask to have a petition added to it.⁶⁵ Petitions not making the discuss list are denied

64. These hypotheses align closely with hypotheses 1a–1c and 2 in the 2012 paper that we are replicating. Black & Boyd, *supra* note 1, at 155–56. As we discuss in further detail below, we do not have the data necessary in this project to model the procedural complexity hypothesis from the 2012 paper. *See infra* note 79.

65. Ryan C. Black & Christina L. Boyd, *Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process*, 94 SOC. SCI. Q. 1124, 1126 (2013).

without a formal vote.⁶⁶

Discuss lists in hand, we then made several data-winnowing steps. First, we removed all petitions seeking review of a death penalty sentence.⁶⁷ Second, we included only paid petitions.⁶⁸ Third, we included only petitions coming from a federal court of appeals or federal district court.⁶⁹ All told, the data used for our analysis consist of 9,531 Justice votes cast across 1,081 petitions. By way of comparison, the original Black and Boyd 2012 study examined 305 petitions containing just over 2,000 Justice votes.⁷⁰

Our dependent variable is whether there is agreement between the law clerk's pool memo recommendation on cert and the final cert vote cast by a Justice serving in the cert pool. A dichotomous measure, this variable is coded as 1 when a law clerk recommends grant and the voting Justice votes to grant or when a law clerk recommends deny and the voting Justice votes to deny.⁷¹ In other scenarios (e.g., clerk

66. *Id.* The process by which petitions are selected for the discuss list is not, of course, random. *See id.* Rather it is the Court's first chance to winnow the pool of cases to a more manageable number by eliminating those that are clearly without merit. *See id.* One might be concerned that, by selecting only petitions that have already cleared this bar, our analysis will have some degree of a selection bias. While there is undoubtedly some bias, we believe it actually causes us to understate the true nature of law clerk influence.

67. During most of the Terms analyzed, the Court had a distinct cert review process for capital cases which automatically added them to the discuss list. *See* EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* 119–22 (Penguin Books 2005) (1998). When the Court voted on whether to grant cert in these petitions, it was the standing policy of Justices Marshall and Brennan to vote to grant the petition, vacate the death penalty sentence, and remand the case for further proceedings. LAZARUS, *supra*, at 159; *see also* BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 205–08 (1979).

68. This is consistent with the vast majority of agenda-setting studies, which argue that unpaid (i.e., *in forma pauperis*) petitions are of substantially less merit than their paid counterparts. *See, e.g.,* Black & Owens, *supra* note 62, at 1065 n.4; Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1116 (1988). *But see* Ryan C. Black & Christina L. Boyd, *U.S. Supreme Court Agenda Setting and the Role of Litigant Status*, 28 J.L. ECON. & ORG. 286, 288 n.2 (2012).

69. The data we use here were collected as part of a larger project on the policy influences on agenda setting. This separate project requires that we place lower court judges and Supreme Court Justices in the same ideological space. The Judicial Common Space allows us to compare preferences of Justices and lower court judges. Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 305–06 (2007). At present, however, no analogous procedure exists for state court judges. This data loss is not, however, especially worrisome since nearly three-fourths of all petitions come from the lower federal courts.

70. Black & Boyd, *supra* note 1, at 156.

71. We follow Harold J. Spaeth and code a Justice's vote as "grant" when she actually

recommends granting review and a Justice votes to deny), this variable is coded as 0. Obtained from Epstein, Segal, and Spaeth,⁷² these clerk recommendations and Justice votes were coded from the pool memos and Justice Blackmun's docket sheets, respectively, which existing research has shown to be a reliable and valid indicator of the Justices' agenda-setting behavior.⁷³

To test our four hypotheses, we need independent variables to capture the direction of the clerk's recommendation, a petition's certworthiness, the ideological distance between the recommending clerk and the voting Justice, and the length of the voting Justice's tenure on the Court. To isolate whether the impact of a clerk's recommendation only matters in, for example, petitions of high certworthiness, we further interact the first three of these variables together (i.e., direction, certworthiness, and ideological distance). We describe each of these measures in turn.

Clerk Recommendation takes on a value of 1 when the pool memo recommends grant and 0 when the memo recommends deny. The pool clerk recommended denying in approximately 70% of our petitions and granting in the remaining 30%.⁷⁴

To operationalize **Certworthiness**, we follow the practice from our 2012 piece and develop a summary measure that captures the meaningful informational cues found by scores of scholars of the Court's cert process over the years.⁷⁵ To do this, we first estimate a logistic

voted to grant and also when she voted to "Join-3," something that becomes a grant vote if there are three other grant votes. HAROLD J. SPAETH, EXPANDED BURGER COURT JUDICIAL DATABASE (1969-1985), at v (2008), available at http://artsandsciences.sc.edu/poli/juri/burger_codebook.pdf, archived at <http://perma.cc/BDX8-HYPQ>. Our results remain the same if we recode Join-3 votes as missing data.

72. EPSTEIN ET AL., *supra* note 3.

73. Ryan C. Black & Ryan J. Owens, *Analyzing the Reliability of Supreme Court Justices' Agenda-Setting Records*, 30 JUST. SYS. J. 254 (2009).

74. Note that we "coarsen" the specific language of a pool clerk's recommendation to make this value dichotomous. That is, although when making a recommendation the most common language is to simply say "Deny" (or "Grant"), the pool clerk will, on occasion, hedge her recommendation by saying "Close, but deny" or "Weak grant." We pool the close/weak recommendations with their "strong" counterparts.

75. Tanenhaus, et al., *supra* note 59, at 118; see also Jennifer Barnes Bowie & Donald R. Songer, *Assessing the Applicability of Strategic Theory to Explain Decision Making on the Courts of Appeals*, 62 POL. RES. Q. 393, 393 (2009); Caldeira et al., *supra* note 62, at 570; Caldeira & Wright, *supra* note 68, at 1109, 1116; S. Sidney Ulmer, William Hintze & Louise Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 LAW & SOC'Y REV. 637, 642 (1972).

regression model at the *petition* level that includes variables that tap into legal conflict, the United States' position, lower court decision characteristics, and petition characteristics.⁷⁶ We then calculate predicted probabilities for each of these petitions and use those values in our variable. The variable has an observed range of 0.07 through 1.00, with a mean of 0.17 and a standard deviation of 0.29.

Ideological Distance is coded as the absolute value of the difference between a voting Justice's Judicial Common Space score⁷⁷ and the score of the pool writer's parent Justice for the Term.⁷⁸ Thus, when measuring the distance between a Justice and his own clerk, this variable takes on a value of 0.

Justice Tenure is measured as the number of years that a Justice had been on the bench before casting her agenda-setting vote in the case at hand.⁷⁹

Finally, we also include Justice fixed effects. These consist of a single dichotomous variable that takes on a value of 1 for each of the Justices in our data. Fixed effects allow us to determine, for example, if Justice Thomas was simply more likely, even after controlling for all other variables in our model, to follow recommendations from the pool memo than say Justice Ginsburg.⁸⁰

A. Methods and Results

Our dependent variable—whether we observe agreement between the pool clerk's recommendation and a Justice's final agenda-setting

76. The results from this logistic regression are reported in the Appendix, *infra*.

77. See Epstein et al., *supra* note 69, at 305–06.

78. This represents a minor departure from the original 2012 *American Politics Research* paper, where we use a Justice's Martin-Quinn score. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). See *supra* note 69 for additional discussion about why we are using Judicial Common Space scores in this present project. In any event, the bivariate correlation between the two measures is above 0.95 ($p < 0.001$), which means the two measures are nearly identical.

79. Due to data limitations, this study omits one variable and its related hypothesis that was present in the 2012 study. The omitted variable, **Procedural Complexity**, was “operationalize[d] as the proportion of pages in a cert pool memo that were devoted to discussing the facts of the case and proceedings of the lower court(s).” Black & Boyd, *supra* note 1, at 157. The hypothesis related to this variable was designed to capture complex underlying cases that would likely lead to Justices being increasingly likely to turn to a case's underlying material themselves rather than relying on a clerk's recommendation. *Id.* In the 2012 study, Black and Boyd found no statistical support for this expectation. *Id.* at 164.

80. The original 2012 study did not, due to a limited number of observations, include these controls. See Black & Boyd, *supra* note 1, at 156–57.

vote—is dichotomous, so we estimate a logistic regression model. To allay potential concerns about a lack of independence across our observations, we calculate and assess statistical significance using robust standard errors. Because our model includes multiple interaction terms, the normal table of parameter estimates is essentially useless in informing us about the relationships among our variables.⁸¹ Thus, we move directly to using stochastic simulations to illustrate our results.⁸²

We begin with Figure 1, which shows the results for Hypothesis 1 and Hypothesis 2. Hypothesis 1 argued that Justices should be more likely to follow recommendations to deny as opposed to grant when the petition is of low certworthiness.⁸³ Similarly, Hypothesis 2 argued that Justices should be more likely to follow recommendations of grant as opposed to deny when the petition has a high level of facial certworthiness.⁸⁴ We find strong support for both of these hypotheses.

Figure 1 is divided into two panels. The left panel corresponds to a petition with a low level of certworthiness, which we define as being the tenth percentile value in our sample data or roughly a 10% baseline chance of being granted review. Within the plot, the square point denotes the estimated probability that a Justice follows the pool clerk's recommendation when that recommendation is to deny the petition. The circle point shows that analogous probability if the law clerk were to recommend granting review in the petition. Consistent with our expectation, we find that a Justice is more than twice as likely to follow a law clerk's recommendation to deny than she is to follow a recommendation to grant. The predicted probability of agreement for a low certworthy petition accompanied by a deny recommendation is 0.86, compared to a probability of only 0.37 when that same petition is accompanied by a grant recommendation.

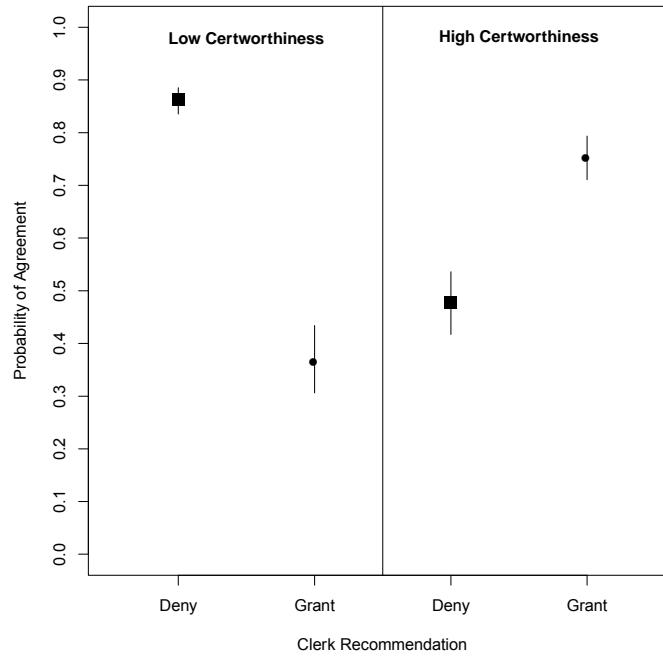
81. See generally Chunrong Ai & Edward C. Norton, *Interaction Terms in Logit and Probit Models*, 80 ECON. LETTERS 123 (2003); William D. Berry, Jacqueline H.R. DeMeritt & Justin Esarey, *Testing for Interaction in Binary Logit and Probit Models: Is a Product Term Essential?*, 54 AM. J. POL. SCI. 248 (2010); Thomas Brambor, William Roberts Clark & Matt Golder, *Understanding Interaction Models: Improving Empirical Analyses*, 14 POL. ANALYSIS 63 (2006); Tsung-han Tsai & Jeff Gill, *Interactions in Generalized Linear Models: Theoretical Issues and an Application to Personal Vote-Earning Attributes*, 2 SOC. SCI. 91 (2013).

82. See *infra* Appendix for a table of parameter estimates that underlie these simulations.

83. See *supra* Part V.

84. See *supra* Part V.

Figure 1
Effect of Certworthiness and Clerk
Recommendation on Likelihood of Agreement



Note: Low and high certworthiness correspond to petitions with a 0.10 and a 0.80 probability of being granted review, which are the tenth and ninetieth percentile values in our data, respectively. The square mark shows the point estimate and the vertical whisker denotes the 95% simulation interval (two-tailed). All other variables were held at their mean or median values, as appropriate.

The right panel increases the level of certworthiness for the petition being reviewed. In particular, we now use the ninetieth percentile value in our data, which corresponds to roughly a 0.84 probability of seeing the Court grant review in the petition. The square point again denotes the likelihood of agreement when the clerk recommends denying the petition and the circle point shows the likelihood of agreement when the clerk recommends granting it. In such a petition, we estimate a 0.48 probability of agreement if a clerk were to recommend denying it compared with a 0.75 probability of agreement if the clerk were to suggest granting the petition—a relative change of more than 55%.

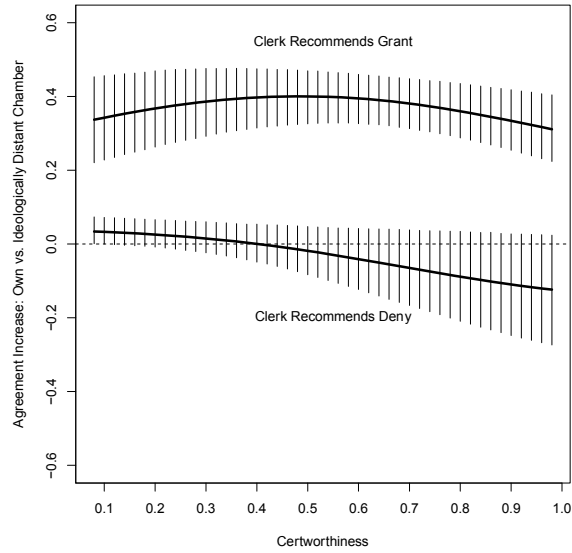
Both of these empirical results are consistent with our expectations. Although law clerks have an informational advantage when it comes to knowing the quality of a petition, the cert pool format compels them to disclose a substantial portion of that information, which the Justices are able to observe. Thus, recommendations that are consistent with the underlying cues in a petition are more likely to be followed than those that seem incongruous with the petition's quality.

We next consider our third hypothesis. Here, we argued that when considering a pool clerk recommendation to grant review, a Justice would be more likely to follow that recommendation when it came from a pool clerk whose chambers was ideologically proximate to (as opposed to distant from) the Justice.⁸⁵ More concretely, Justice Thomas should view a grant recommendation from one of Justice Scalia's law clerks more favorably than the same recommendation from one of Justice Ginsburg's clerks.

Figure 2 shows the results we obtain for this hypothesis. Along the x-axis we show the certworthiness of a petition, which ranges from very low on the far left (i.e., 0.10) to very high on the far right (i.e., 1.0). The y-axis shows what we might think of as the "home chambers advantage." This is the *difference* in the probability of a Justice following a clerk's recommendation when the clerk is from her own chambers (and ideological distance is equal to zero) versus when the clerk is from a chambers that is ideologically distant (we use the distance between Justice Thomas and Justice Blackmun). Positive values, therefore, indicate that a Justice is more likely to follow her own clerk's recommendation as opposed to the recommendation from a more distant chambers.

85. See *supra* Part V.

Figure 2
Effect of Ideological Agreement and Clerk Recommendation on Likelihood of Agreement



Note: The solid horizontal lines show the point estimate and the vertical whiskers denote the 95% simulation interval (two-tailed). All other variables were held at their mean or median values, as appropriate.

Within the plot itself we show two lines. The top line denotes the home chambers advantage when the clerk recommends granting review. The bottom line, by contrast, shows the difference when the clerk recommends denying the petition. Both of these lines are accompanied by a series of vertical line segments, which express our uncertainty around the point estimate. When these segments cross the dashed horizontal line located at zero, then we can say that no significant home chambers advantage exists. Conversely, if the lines do not cross that dashed zero line, then we can be confident a systematic effect exists.

Starting with the top line, which corresponds to a recommendation of grant, we see a consistent and substantial home chambers advantage across all values of petition certworthiness. Take, for example, a petition with a coin-flip likelihood of being granted review. Under the circumstance, we estimate that a grant recommendation coming from a Justice's own clerk will have a 40% higher chance of being followed than if that same recommendation were to come from an ideologically distant chambers.⁸⁶ Importantly, we find that this difference persists even in instances when a petition is either very unlikely to be granted review (i.e., low certworthiness) or very likely to be granted review (i.e., high certworthiness). Indeed, the effect size never becomes smaller than a 0.31 agreement advantage afforded to a Justice's own clerk.

Although we find a substantial and persistent effect for grant recommendations, as the bottom line of the figure indicates, we do not find such an effect for deny recommendations. A Justice is slightly more likely to follow her own clerk's deny recommendation when a petition is of very low certworthiness (a probability difference of about 0.04). This small effect quickly becomes statistically insignificant, however, as we move up to higher levels of certworthiness. Indeed, the point estimate for very high values of certworthiness actually becomes negative, which would suggest that a Justice is more likely to follow an ideologically distant clerk's recommendation over her own clerk's.⁸⁷

86. The specific agreement probabilities are 0.72 (own clerk) versus 0.32 (ideologically distant clerk).

87. We are unable to push this point too far, however, given the large width of our confidence intervals. The difference is still statistically insignificant at the 0.10 level but would be statistically significant at the 0.20 level (all two-tailed tests), which has been used by some as the threshold for accepting the null hypothesis. See Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC'Y REV. 349, 364 tbl.3 (2005).

Finally, although we fail to find support for our judicial tenure hypothesis,⁸⁸ we do recover some significant differences for our Justice fixed effects. That is, even after controlling for the factors in our model, we find that some variation in whether a Justice follows a law clerk's recommendation can be attributed to the specific identity of the Justice him or herself.⁸⁹ Figure 3 illustrates the magnitude of these Justice-level differences. Along the x-axis we show the likelihood of a Justice following a law clerk's recommendation in an average cert petition, which we operationalize as one with a 0.42 probability of being granted review where the clerk recommends denial. Ideological distance is held at its mean value. The y-axis shows each of the thirteen Justices in our data. The square points denote the likelihood a Justice follows the clerk's recommendation and the horizontal whiskers express our (often considerable) uncertainty around the point estimates.

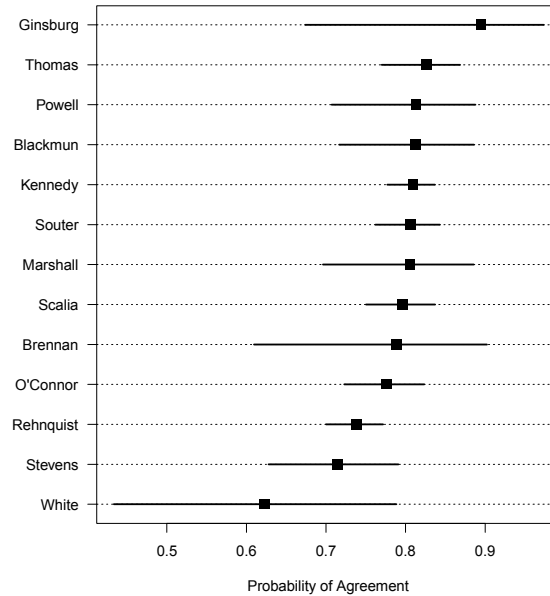
Upon initial examination, it appears as though Justice Ginsburg is the most likely to follow recommendations from the pool memo. As the width of the horizontal whisker indicates, however, there is a substantial amount of uncertainty around that estimate. This stems from the fact that we have only twenty-one observations for Justice Ginsburg in our data. Although she ended up following the pool writer's recommendation in eighteen of those observations (about 86%), we can only say that the rate at which she followed clerk recommendations is significantly larger than the rate of her predecessor, Justice White, who followed around 63% of cert pool recommendations.⁹⁰

88. See *supra* Part V; *infra* Appendix Table 2.

89. We made this determination by comparing the Bayesian Information Criterion (BIC) values for a simple model that did not include Justice fixed effects versus the more complicated model that did include them. The BIC for the more complicated model was 9,875 compared to a BIC of 9,891 for the simple model. This difference (of 16) provides "very strong" evidence to prefer the fixed effects model over the pooled one. See J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 113 (2d ed. 2006).

90. See the caption, *supra* Figure 3, for a complete listing of all other significant differences.

Figure 3
Effect of Justice Identity on Likelihood of Agreement



Note: The square mark shows the point estimate and the horizontal whisker denotes the 95% simulation interval (two-tailed). The petition characteristics were held constant at 0.42 certworthiness, deny recommendation, and an average amount of ideological distance. The 22 significant Justice differences (out of 78 possible, $p < 0.05$, two-tailed test) are: Blackmun > Stevens, Blackmun > White, Brennan > White, Ginsburg > White, Kennedy > Rehnquist, Kennedy > Stevens, Kennedy > White, Marshall > Stevens, Marshall > White, O'Connor > Stevens, O'Connor > White, Powell > Stevens, Powell > White, Scalia > Rehnquist, Souter > Rehnquist, Thomas > Rehnquist, Scalia > Stevens, Scalia > White, Souter > Stevens, Souter > White, Thomas > Stevens, Thomas > White.

Readers familiar with the cert pool might be curious to see the presence of three Justices in Figure 3. In particular, we have estimates for the probability that Justices Brennan, Marshall, and Stevens would follow a pool clerk's recommendation. Such estimates might be puzzling given that none of these Justices participated in the cert pool during their time on the Court.⁹¹ Why, then, do we include them in our analysis? Although non-participating Justices do not receive their own copies of the cert pool memos,⁹² it is likely that their law clerks are, through the law clerk network,⁹³ aware of what the pool memo has recommended in most petitions—especially those that are on the discuss list and are thus viable candidates for receiving a cert grant. Indeed, Perry, in his seminal book on agenda setting, is told by his informants that non-pool clerks would “go swimming” in cert pool memos to look for guidance in making recommendations for their own, non-pool Justice.⁹⁴

From our perspective, then, the question of whether the cert pool influenced a non-pool Justice is both empirical and one that, to the best of our knowledge, no published research has examined. If the extent of “pool swimming” by non-pool clerks was limited, then we should expect to find non-pool Justices as being among the least likely to follow a pool clerk's recommendation. If, by contrast, it was more widespread, then non-pool Justices should be statistically similar to the pool Justices. Our results suggest the answer is somewhere between these two extremes. Justice Stevens, for example, has the second lowest probability of following a clerk's recommendation.⁹⁵ His other non-pool colleagues, Justices Brennan and Marshall, fall more towards the middle of the pack.⁹⁶ As we note in the caption to Figure 3, although we can conclude that a significant difference exists between Justices Marshall and Stevens, we cannot conclude that such a difference exists between either Justices Brennan and Marshall or Justices Stevens and Brennan.

91. PERRY, *supra* note 23, at 42.

92. See WARD & WEIDEN, *supra* note 10, at 45.

93. *Id.* at 164–65.

94. PERRY, *supra* note 23, at 54 (quoting Interview with C2, Unidentified Law Clerk).

95. See *infra* Appendix Table 2.

96. See *infra* Appendix Table 2.

VII. DISCUSSION

A. *Placing the Results in Context*

Previous research on the Supreme Court's agenda-setting process, though not ignoring law clerks, has often failed to systematically incorporate their role into models of judicial behavior. As we have argued in the past, this omission provides an incomplete picture of the Court's discretionary decision making in this important stage.⁹⁷ Black and Boyd began the task of tackling this research in their 2012 study, finding evidence that a pool "clerk's cert recommendation interacts with the quality of the [cert] petition and the comparative ideology of the voting Justice" to explain when Justices will agree with the pool clerk.⁹⁸ While their evidence was strong, the results were based on a relatively limited time frame (only four Terms) and a small sample of data (just over 300 petitions). Our primary goal in this Article was to replicate and extend their study to see if the results held after examining a larger number of Court Terms and bigger set of petitions. Importantly, the type of replication and extension exercise conducted here is encouraged in social science research.⁹⁹ Indeed, renowned political science methodologist Gary King urges the replication of "existing studies to understand, evaluate, and especially build on" the previous work.¹⁰⁰

Our results largely confirm those found by Black and Boyd in their 2012 paper. To summarize, we find a substantial level of agreement between what law clerks recommend in the pool memos and how Justices ultimately vote. Indeed, roughly 75% of the more than 9,500 votes in our data follow the recommendation made by the law clerk. The influence of law clerks on Justices is neither constant nor random, however. Rather, our analysis suggests that Justices compare the law clerk's recommendation with their own prior belief about a petition's certworthiness.¹⁰¹ Recommendations that are consistent with those beliefs are substantially more likely to be followed than those that challenge them. Additionally, in the event that a pool clerk recommends granting review in a petition—an event that occurs about 31% of the time in our data—a voting Justice also considers the

97. Black & Boyd, *supra* note 1, at 164.

98. *Id.*

99. See Gary King, *Replication, Replication*, 28 PS: POL. SCI. & POL. 444 (1995).

100. *Id.* at 444.

101. See *infra* Appendix Table 2.

ideology of the clerk's supervising Justice. When a Justice is ideologically proximate to a clerk's employing Justice, we find that the voting Justice is more than twice as likely to follow that recommendation than when the Justice is ideologically distant. Taken together with the findings from our original study, these results provide strong evidence of the conditional influence that law clerks can have in the Court's agenda-setting process. These clerks are not just spending a lot of time reviewing cert petitions, something that we estimated above to be approximately one-third of their work load,¹⁰² but they are wielding potential influence on their own employing Justices and other Justices while doing so.

B. Normative Implications for the Cert Pool

Our present findings, coupled with those previously obtained by Black and Boyd, provide what may be very important normative implications of the existence of the institutionalized cert pool. Recall that, from its inception in 1972, the cert pool implored law clerks to author "objective" memos.¹⁰³ While our research confirms the standardization of the memos' formatting, it paints a very different picture regarding the content of the memos, particularly with regard to the conclusions drawn. As we summarize above, grant recommendations are treated differently when coming from a clerk who hails from an ideological ally as opposed to a foe. This may not be surprising, especially given what we know about the strength of the principal-agent relationship between a Justice and his hired clerk.

It does, however, call into question whether the cert pool was, just over a decade after its inception, serving its intended goals. To the extent bias exists in the recommendations, a pool Justice needs to devote additional effort to detect and correct for that bias before she can cast her agenda-setting vote. If this work is being delegated to a Justice's law clerk, which seems very likely, then we must ask, how much of an efficiency gain is there over simply having one's own law clerks do an independent review? Interestingly, our results suggest that the answer to this question will depend upon the ideological composition of the Court and, in particular, a Justice's location on the Court. If a Justice is one of the more extreme members of the Court, then grant recommendations from either proximate or distant chambers are

102. See *supra* notes 22 and accompanying text.

103. WARD & WEIDEN, *supra* note 10, at 118.

informative—you follow those from allies and do the opposite of those coming from ideologically distant chambers. Paradoxically, however, a Justice in the middle stands to gain far less from either end of the spectrum and, as a result, would likely need to invest more of her clerk's time to determine what the most appropriate vote would be. This newly revealed nuance thus opens the door for more empirical and normative scholarship assessing the value and efficiency of the cert pool for all participating members of the Court.

C. *Generalizing About Advisors Beyond the Supreme Court*

As we have already argued, the activities of law clerks during the U.S. Supreme Court's agenda-setting process provide an excellent setting for systematically and empirically testing for advisor influence.¹⁰⁴ Although we recognize that Supreme Court law clerks are not precisely analogous to advisors in the Executive and Legislative Branches of the federal government, we believe that in many ways, the similarities between these staffers outweigh the differences, particularly when examining the existence and conditionality of their influence. These similarities range across the education and experience of the people that fill the jobs, the motivations that drive the employees, and the tasks that they are asked to perform while serving in their staff positions.¹⁰⁵

Law clerks are regarded as being among the brightest and most talented young legal minds.¹⁰⁶ Modern clerks typically come from the top of their class at an elite law school and often have experience clerking for a federal trial or appellate judge.¹⁰⁷ Similar language has also been used to describe congressional advisors.¹⁰⁸ White House staffers, particularly those that serve close to the President, tend to be more experienced (and older) than congressional and court advisors, but the positions held by all three groups are highly coveted and can lead to uncountable future opportunities—both inside and outside of Washington.¹⁰⁹

In addition to similar backgrounds, key advisors to presidents, legislators, and Justices tend to be selected with many of the same

104. See Black & Boyd, *supra* note 1; see also *supra* Part II.B.

105. See *supra* Part III.

106. See WARD & WEIDEN, *supra* note 10, at 1.

107. *Id.* at 55.

108. See, e.g., MICHAEL J. MALBIN, *UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT* 20 (1979).

109. See *id.* at 21–23.

characteristics in mind. Presidents generally choose only those who have demonstrated personal loyalty and trustworthiness to them and their partisan ideals to serve in close advisory positions.¹¹⁰ Although the criteria for choosing lower level White House staffers is less careful and precise, no one can serve the President without some demonstrated dedication to the office.¹¹¹ Members of Congress, particularly in modern times with large staffs and a relatively high level of turnover, tend to have less of a hands-on role in the selection process of their staff.¹¹² Nonetheless, the content of “their personal staffs are entirely subject to their discretion,”¹¹³ and partisan dedication matters greatly for choosing these employees.¹¹⁴ As one anonymous member was quoted in Whiteman as saying of his staff, “I rely on their judgment, and I have to think that their judgment is attuned to my philosophy.”¹¹⁵ At the Supreme Court, the nine Justices choose new clerks each year. Although educational cues provide a bar for employment, other factors, including previous clerkship experience and ideological similarity or acquiescence, seem to be operational with at least some Justices.¹¹⁶

In each institution, although advisors tackle critical tasks and arguably exert vast influence, they nearly uniformly do so out of sight. Their employers were the ones elected or appointed to their positions, and, as such, are the ones that serve in the public spotlight. Patterson, for example, notes that when it comes to presidential power “it is the men and women on the president’s personal staff who first channel that power, shape it, focus it—and, on the president’s instructions, help him wield it. . . . [Most of them] are nearly unknown—largely because it is usually in the president’s interest to keep them out of sight.”¹¹⁷

The same is said to be true for the other branches, with the anonymity of the job actually acting to foster a spirit of cooperation and

110. GARRISON, *supra* note 34, at 137.

111. Rudalevige, *supra* note 43, at 341.

112. See Salisbury & Shepsle, *supra* note 38, at 393–94.

113. David L. Leal & Fredrick M. Hess, *Who Chooses Experience? Examining the Use of Veteran Staff by House Freshman*, 36 *POLITY* 651, 655 (2004).

114. Romzek & Utter, *supra* note 11, at 1267.

115. WHITEMAN, *supra* note 11, at 35–36 (internal quotation marks omitted).

116. WARD & WEIDEN, *supra* note 10, at 76, 102–03; Ditslear & Baum, *supra* note 49, at 870–71.

117. PATTERSON, *supra* note 9, at 1.

to reduce (but not eliminate entirely) incentives for shirking or self-promotion.¹¹⁸

We, of course, are not the first to argue that the role of law clerks is similar to that of other federal political advisors. Fox and Hammond argue that “[t]he job of congressional aide, whether on a personal or committee staff, is a peculiarly personal one—based on mutual trust, confidence, and loyalty to a member. Analogous jobs in the Federal government are the White House staff, personal assistants to Presidential appointees, and clerks of judges.”¹¹⁹ Although it is important to remember that our attempts to systematically test advisor influence focus only on one stage at one political institution, we also think that these efforts are nonetheless meritorious and provide insight into the broader topic of advisor influence in politics. Although law clerks, legislative advisors, and presidential staffers are different in many ways, their similarities are salient enough to allow us to draw preliminary conclusions about the presence of advisor influence and the conditional nature of that influence across political branches based on our findings regarding clerk influence at the U.S. Supreme Court. Although future efforts are needed to generalize these findings across the other branches of government, we have little reason to doubt that advisor influence is any weaker for legislators and presidents—though it might be more difficult to measure and document. As such, if taken seriously and studied rigorously, the question of advisor influence over political principals could lead to a more complete understanding of the factors that affect political decision making.

118. See Christine DeGregario, Research Note, *Staff Utilization in the U.S. Congress: Committee Chairs and Senior Aides*, 28 *POLITY* 261, 266 (1995); Romzek & Utter, *supra* note 11, at 1268.

119. FOX & HAMMOND, *supra* note 8, at 3.

APPENDIX

Appendix Table 1**Logistic Regression Parameter Estimates of Petition Certworthiness**

Variable	Variable Coding	Coefficient (Standard Error)
Conflict Alleged	Did petitioner allege existence of legal conflict? (0 = no, 1 = yes)	0.16 (0.20)
Conflict Present	Did pool memo determine that alleged legal conflict existed? (0 = no, 1 = yes)	2.65* (0.20)
U.S. Seeks Review	Was U.S. petitioner in case or did it submit an amicus brief seeking review? (0 = no, 1 = yes)	1.89* (0.26)
U.S. Opposes Review	Was U.S. respondent in case or did it submit an amicus brief opposing review (0 = no, 1 = yes)	-0.18 (0.21)
Dissent in Lower Court	Did one or more lower court judges dissent from majority opinion in court immediately below Supreme Court? (0 = no, 1 = yes)	0.69* (0.20)
Constitutional Petition	Did petitioner assert a violation of his or her constitutional rights? (0 = no, 1 = yes)	-0.08 (0.21)
Judicial Review Exercised	Did court immediately below Supreme Court exercise judicial review by invalidating a law as being unconstitutional? (0 = no, 1 = yes)	1.34* (0.31)
Legal Salience	Did opinion of court immediately below the Supreme Court receive media coverage in the legal periodical U.S. Law Week? (0 = no, 1 = yes)	0.35* (0.19)

Civil Liberties Petition	Did petition involve a civil liberties issue? ¹²⁰ (0 = no, 1 = yes)	-0.17 (0.17)
Total Amicus Curiae Briefs	How many amicus briefs were filed either supporting or opposing the petition?	0.36* (0.09)
Constant		-2.08* (0.21)
Observations		1100
Pseudo-R2		0.31

Note: The cell entries in the right column are maximum likelihood coefficients. Standard errors, which appear in parentheses below each coefficient, are robust standard errors.

120. See Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 74 (2000).

Appendix Table 2
Logistic Regression Parameter
Estimates of Clerk–Justice Voting Agreement

Variable	Coefficient (Standard Error)
Clerk Recommendation	-2.40 (0.18)
Certworthiness	-2.93* (0.20)
Ideological Distance	-0.32* (0.15)
Certworthy x Ideological Distance	0.81* (0.37)
Certworthy x Clerk Recommendation	5.22* (0.33)
Clerk Recommendation x Ideological Distance	-1.15* (0.35)
Certworthy x Recommendation x Distance	-0.90 (0.60)
Justice Tenure	-0.004 (0.014)
Justice Fixed Effects	
Justice Blackmun	2.50* (0.29)
Justice Brennan	2.35* (0.45)
Justice Ginsburg	3.19* (0.73)
Justice Kennedy	2.47* (0.11)
Justice Marshall	2.46* (0.32)

Justice O'Connor	2.28* (0.15)
Justice Powell	2.50* (0.29)
Justice Rehnquist	2.06* (0.11)
Justice Scalia	2.39* (0.14)
Justice Souter	2.46* (0.15)
Justice Stevens	1.95* (0.21)
Justice Thomas	2.59* (0.19)
Justice White	1.53* (0.39)
Observations	9531
Pseudo-R2	0.11

Note: The cell entries in the right column are maximum likelihood coefficients. Standard errors, which appear in parentheses below each coefficient, are robust standard errors. Because our model contains numerous interactive terms, this table should not be used to assess either the statistical significance or substantive magnitude of any variable except Justice Tenure, which is not statistically significant. See Figures 1 and 2 and the accompany text above for interpretation of these results. Complete Justice Fixed Effects were estimated by suppressing the constant term, which means there is no baseline justice category. See Figure 3 and accompanying text above for discussion of the substance of these results.