Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence

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For decades, scholars have searched for data to show that Supreme Court justices are influenced not only by policy goals but also by legal considerations. Analyzing justices' agenda-setting decisions, we show that while justices are largely motivated by policy concerns, jurisprudential considerations can prevail over their policy goals. When policy goals and legal considerations collide, policy gives way. If legal considerations and policy goals align toward the same end, law liberates justices to pursue policy. In short, we find that at the intersection of law and politics, law is both a constraint on and an opportunity for justices.

> [P]olitical scientists who have done so much to put the "political" in "political jurisprudence" need to emphasize that it is still "jurisprudence."
>
> —C. Herman Pritchett (1969, 42)

Does law influence the choices Supreme Court justices make? It has become axiomatic among judicial politics scholars that justices are motivated primarily by their policy goals. Some scholars even claim that policy alone motivates justices, leaving no room for law as an independent influence. "[There is] virtually no evidence for concluding that the justices' decisions are based on legal factors" (Segal and Spaeth 2002, 311). In part, these claims are understandable. Legal ambiguity pervades much of what the Court does, giving the appearance that law is irrelevant. That previous studies have largely been unable to detect evidence of legal influence does not, however, mean that it fails to exist. Indeed, there are strong theoretical reasons to believe that law influences the choices justices make. For example, the Court's decisions are framed by precedent and legal doctrine while lawyers' briefs are composed of the same (Gillman 2001). At private conferences, away from public consumption, justices discuss with one another how precedent governs cases (Knight and Epstein 1996). Moreover, as Baum tells us, "All lawyers [and future justices] undergo law-school training that emphasizes the value of legally oriented judging" (1997, 62). Furthermore, since the Court lacks the power to enforce its own decisions, justices must be loathe to trespass on legal norms that require adherence to certain patterns of behavior. Violating them could impugn the Court's legitimacy and provoke damaging repercussions (Epstein and Knight 1998; Lindquist and Klein 2006; Mondak 1994).

The question of whether law influences justices is not simply a narrow one of interest solely to judicial scholars. Rather, it is an issue of importance to those who study institutions and the interactions among them. If the Court as a legal institution is different from other policymaking institutions, scholars must be careful when making cross-institutional comparisons (Bailey 2007) since other bodies operate under different norms. Relatedly, the manner in which justices pursue their policy goals in the face of legal influences can inform research on how political actors balance competing interests (Baum 1997). At stake in this analysis, then, are some of the most pressing questions in institutional scholarship.

We argue, as Pritchett did, that law is likely to matter and that it is our duty to explicate "the unique limiting conditions under which judicial policy making proceeds" (Pritchett 1969, 42). We undertake this task in the context of the Court's agenda-setting process, with results that suggest a strong role for both legal and policy considerations in this aspect of the Court's decision making. Using data collected from the personal papers of Justice Harry A. Blackmun (Epstein, Segal, and Spaeth 2007), we analyze justices' agenda-setting votes in 358 randomly selected appeals

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and petitions for certiorari during the Court's 1986–1993 terms. We examine the predictions of a policy-based agenda-setting model and analyze how legal factors influence those predictions. We make two unique contributions. First, after empirically testing a theoretical model recently proposed by Hammond, Bonneau, and Sheehan (2005), we find that justices are more likely to grant review to a case if they are ideologically closer to the predicted policy outcome on the merits than they are to the status quo and, conversely, less likely to grant review when they favor the status quo over the Court's expected policy decision on the merits. This finding builds on Caldeira, Wright, and Zorn (1999), who discovered empirical evidence of forward-looking agenda-setting behavior, but did not examine the role of a status quo. Second, we find that legal considerations strongly influence justices' agenda-setting behavior. When legal and policy goals diverge, legal considerations limit justices' abilities to maximize their policy goals. When legal and policy goals converge, legal factors make it easier for justices to seek policy. In other words, law is both a constraint on and an opportunity for justices.

To explain how policy outcomes and jurisprudential influences affect Supreme Court agenda setting, we begin by providing a brief sketch of the Court's agenda setting process. We then analyze justices' agenda behavior in two parts. First, we examine predictions of policy-based agenda setting. Second, we analyze how legal considerations alter those predictions. By engaging the analysis in two parts, we overcome the observational equivalence problem noted by Segal and Spaeth, who argue: "The problem with systematically assessing the influence of [law] is that in many cases Supreme Court decision making would look exactly the same whether justices adhered to [the law] or not" (1996, 974).

The Decision to Grant Review

The agenda-setting process begins when a party in a lower court loses, wants the Supreme Court to review her case, and files a petition for a writ of certiorari ("cert") or an appeal with the United States Supreme Court.[1] Before the Court decides whether to grant or deny review to it, the petition must first make the "discuss list." This list is created and circulated by the Chief Justice, who initially identifies the petitions he thinks deserve formal consideration by the Court. Each associate justice can add petitions to the discuss list that they think merit the Court's attention. A petition that does not make the discuss list is summarily denied. Voting for discuss list petitions takes place at private conferences roughly once every two weeks. If four or more justices vote to hear the case, it proceeds to the merits stage, where it receives full treatment. Absent a dissent from the denial of cert, the only immediate public result reported is whether the petition is granted or denied.

A long tradition of scholarship has provided important information about the conditions under which justices vote to grant review. Perry (1991) and Provine (1980) argue that agenda setting is largely a function of legal considerations, while Krol and Brenner (1990), Brenner (1997), and Ulmer (1972) argue that agenda setting can be explained by a justice's desire to reverse lower court decisions. Some of the first agenda-setting studies analyzed whether "cue theory" explained cert votes (Tanenhaus, Schick, and Rosen 1963). The theory held that justices look for certain cues that signal petitions worthy of review, filtering them from frivolous petitions. Later scholars expanded on cue theory to include additional factors. Songer (1979), for example, argued that justices also use policy cues to decide which cases to review. Caldeira and Wright (1988) showed that when more groups file amicus curiae briefs either supporting or opposing review, the Court perceives the case to be more important. Since justices desire to make policy in important and far-reaching cases, they are more likely to hear cases with increased amicus participation.

Recent scholars have analyzed whether justices *strategically* pursue their policy goals when casting agenda votes. Palmer (1982), for example, finds that justices are both reverse-minded and strategic. Many of these studies, however, find that strategic agenda setting is "situational" (Baum 1997, 80). Affirm-minded justices strategically anticipate the Court's likely merits ruling (Benesh, Brenner, and Spaeth 2002; Boucher and Segal 1995; Brenner 1979). These affirm-minded justices must be more strategic than reverse-minded justices, the argument goes, because they have more to lose if they miscalculate (Benesh, Brenner, and Spaeth 2002). Thus, scholarship has found evidence that justices strategically engage in aggressive grants but that they do not act strategically by casting defensive denials.

Of the studies that emphasize strategic agenda setting, Caldeira, Wright, and Zorn (1999) is perhaps

[1]For more details see Perry (1991) or Stern et al. (2002).

the most sophisticated. Caldeira, Wright, and Zorn (1999) argue that there should be no difference between aggressive grants and defensive denials when justices pursue their policy goals. Policy maximization simply means that justices will be more likely to vote to grant as they increasingly favor the merits outcome and will be more likely to vote to deny as they increasingly disapprove of that policy. Their results support their theory—as the Court becomes more liberal (conservative), conservative (liberal) justices become less likely to vote to grant review. On the other hand, the more ideologically proximate a justice is with the majority, the more likely she is to grant review.

Policy-Based Agenda Setting

While the studies discussed above inform our understanding of Supreme Court agenda setting, they all have one critical limitation—they fail to model and to empirically test how the status quo policy affects justices' votes.[2] In recent scholarship, Hammond, Bonneau, and Sheehan (2005) provide a clear theory for how policy-seeking justices should vote at the agenda-setting stage.[3] If justices care about shaping legal policy—and we have every reason to believe that they do (Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Martin and Quinn 2002; Segal and Spaeth 2002)—they should pay attention not just to where the Court will set policy, but how that policy will change the benefits they currently enjoy.

Indeed, there is strong anecdotal evidence to suggest that justices compare future policy to the status quo when rendering decisions. Perry's seminal text on agenda setting is replete with quotes from justices suggesting that they vote to deny review to cases where they expect the Court might negatively alter policy. For example:

> I might think the Nebraska Supreme Court made a horrible decision, but I wouldn't want to take the case, for if we take the case and affirm it, then it would become a precedent. (Perry 1991, 200).

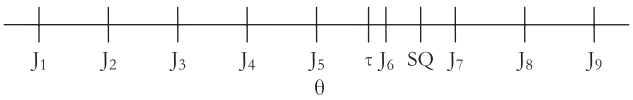

FIGURE 1 Spatial model of a justice's agenda setting decision. J_i = Justice$_i$'s ideal point. θ = Expected policy location of merits decision. SQ = Status quo. τ = Midpoint between SQ and θ.

We take Hammond, Bonneau, and Sheehan (2005) and Caldeira, Wright, and Zorn (1999) as our departure points. We empirically test how the role of a legal status quo influences justices' agenda-setting votes. We proceed with the following model, derived from Hammond, Bonneau, and Sheehan (2005). The model presents a unidimensional policy space from liberal (left) to conservative (right). J_i represents Justice i's ideal point, the point he prefers to all others. SQ is the law the Court is being asked to review and alter. θ is the expected policy that will arise if the Court hears the case on the merits. Finally, τ is the cutpoint between SQ and θ (i.e., $\tau = \frac{SQ+\theta}{2}$).

Under this configuration, a purely policy-based explanation of agenda setting predicts that all $J_i < \tau$ (i.e., J_1-J_5) would vote to hear the case since the expected policy decision on the merits (θ) is better for them than is the status quo (SQ). The remaining justices, $J_i \geq \tau$ (i.e., J_6-J_9), prefer the status quo to the expected policy outcome and, as a result, would vote to deny review to the case. If, like previous efforts, we examined only justices' ideological distance from θ, the model suggests that J_4 and J_6 would be equally likely to vote to grant review, since $|J_4 - \theta| = |J_6 - \theta|$. We can see, however, that a decision at θ would make J_4 better off by shifting policy closer to him but would make J_6 worse off by shifting policy away from her. Thus, J_4 should be more likely—not equally likely—to vote to hear the case than J_6. All this is to say that a policy-motivated justice's vote is a function of which outcome is closer to her—the expected policy location of the merits decision or the status quo policy. Accordingly, we expect that a policy-motivated justice will vote to grant review to a case when the ideological distance between the justice and the expected policy from the merits decision is smaller

[2]While a few studies incorporate some sense of a status quo—such as those analyzing aggressive grants (Benesh, Brenner, and Spaeth 2002; Boucher and Segal 1995; Brenner 1979)—they do not theoretically model and empirically test how, specifically, the status quo affects justices' votes. That is, they are unable to model whether a justice is ideologically closer to the status quo than to the expected merits outcome and how that dynamic affects their decision. As such, knowledge of how the status quo location influences agenda setting remains unclear.

[3]Research in other institutional settings, such as studies on the appointment process (Hammond and Hill 1993; Nokken and Sala 2000) and studies on political control over independent agencies (Ferejohn and Shipan 1990) note the importance of the status quo.

than the ideological distance between that justice and the legal status quo. When the opposite is true and the status quo is closer, the justice will vote to deny review.

Data and Methods

To test this policy-based model, we randomly sampled 358 paid nondeath penalty petitions coming out of a federal court of appeals that made the Supreme Court's discuss list during the 1986–93 terms.[4] Our dependent variable is each justice's dichotomous cert vote, which we code as 1 for grant and 0 for deny (N=3024).[5] Our source for the justice votes are the docket sheets of Justice Harry A. Blackmun, which we obtain from Epstein, Segal, and Spaeth (2007).

Our main independent variable of interest in this model is *Merits Outcome Closer*, which we code as 1 if the voting justice is ideologically closer to the predicted policy location of the merits decision than to the status quo policy; 0 otherwise. Coding *Merits Outcome Closer* requires an estimate of the voting justice's ideology (J_i), the predicted merits outcome (θ), and the status quo (SQ). To determine these quantities we relied on the Judicial Common Space (JCS; Epstein et al. 2007). The JCS places Supreme Court justices (as measured by Martin and Quinn 2002) on the same ideological scale as federal circuit court judges, with scores ranging from negative (liberal) to positive (conservative).

We measure θ, the predicted policy location of the Court's merits decision, as the JCS score of the median justice of the Court for the term in question, which we obtain from Martin and Quinn (2002). Making this determination was no easy task. Scholars have offered a host of competing interpretations for where they think the Court sets policy. The model we employ here, the "Bench Median model" (Hammond, Bonneau, and Sheehan 2005; Bonneau et al. 2007) reflects the median voter theorem and argues that after a free competition among the justices over draft opinions, the median's position wins out. The equilibrium result is that no matter who drafts the majority opinion, its policy reflects the preferences of the median justice. Given the theoretical appeal of the median voter theorem, as well as the recent empirical support for the Bench Median model at the merits stage (Bonneau et al. 2007), we are comfortable measuring the predicted policy of the Court's merits decision this way. Accordingly, we measure the predicted policy location of the Court's merits decision as the median justice's ideal point.[6]

To measure the location of the status quo, we analyze the JCS scores of the judges who sat on the federal circuit panel (i.e., the lower court) that heard the case. In the typical unanimous three-judge panel decision, the status quo is the JCS score of the median judge of the majority coalition. In cases with a dissent or a special concurrence, where only two circuit judges constituted the winning coalition, we coded the status quo as the midpoint between those two judges in the majority. If the lower court decision was en banc, we coded the status quo as the median judge in the en banc majority. Finally, when district court judges sat by designation on the circuit panel, we followed Giles, Hettinger, and Peppers (2001) and coded the district court judge's ideal point consistent with norms of senatorial courtesy.

To account for the fact that nonpolicy considerations can influence justices' votes—a concept we analyze more fully in the second part of this paper—we include a number of variables that are derived from over 40 years of research on Supreme Court agenda setting (see, e.g., Brenner 1979; Caldeira and Wright 1988; Caldeira, Wright, and Zorn 1999; Songer 1979; Tanenhaus, Schick, and Rosen 1963; Ulmer, Hintz, and Kirklosky 1972). A description of these variables, along with our expectations of

[4]We sample petitions from the Court's discuss list because these are petitions that have a nonzero probability of being granted, since at least one justice deemed it worthy of some discussion. We examine only petitions from federal courts of appeals because there are no measures that map state supreme court justices on the same ideological scale as U.S. Supreme Court justices. We exclude capital petitions 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 and Armstrong 1979).

[5]The online supplement provides details on several coding decisions made in creating the dependent variable.

[6]While Bonneau et al. (2007) found slightly stronger results for a second model that turns on the preferences of the opinion writer, such a model is unworkable at the agenda-setting stage because nearly all the justices lack *a priori* knowledge of who will assign and write the Court's opinion (Hammond, Bonneau, and Sheehan 2005, 224).

Additionally, as a robustness check, we recoded the predicted policy location of the Court's merits decision using over a dozen alternative specifications. Our results remained unchanged. What is more, of all the alternative coding schemes we used to predict the Court's policy outcome, the median justice approach had the smallest value of the Bayesian Information Criteria (Long and Freese 2006). The online supplement provides a complete description of the alternative measurements we tested.

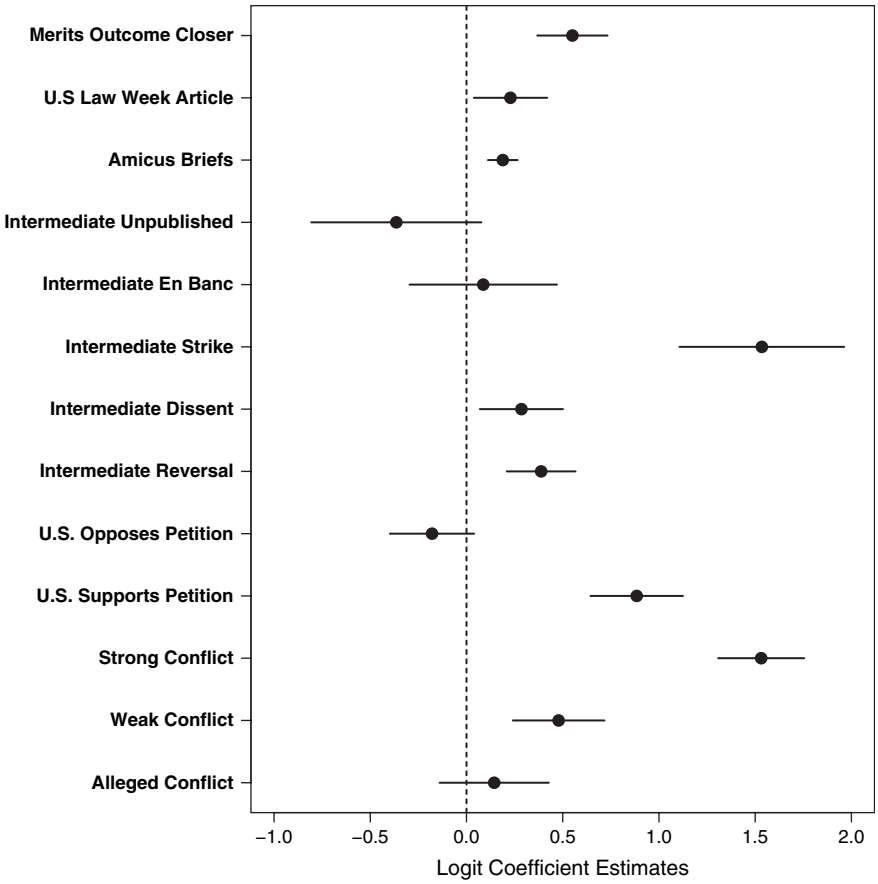

FIGURE 2 Parameter estimates for logistic regression of dichotomous justice agenda-setting votes (N = 3024). The solid circles are the parameter estimates and the horizontal lines represent the 95 percent confidence intervals for those estimates based on asymptotic standard errors (see note 7). The parameter estimate for the constant term, not displayed, is −2.53 [−2.82, −2.23].

their effect on the dependent variable, is available in the appendix.

Results

Because a justice's vote to grant or deny review is dichotomous, we estimate a logistic regression model. We provide a visual depiction of the parameter estimates and their 95% confidence intervals in Figure 2.[7] Traditional in-sample diagnostics show that the model performs well. It correctly predicts roughly 75% of justices' votes, with a 19% reduction in error over guessing the modal category (that a justice votes to deny).

Turning to *Merits Outcome Closer*, we find that justices are significantly more likely to grant review when they are ideologically closer to the predicted policy of the merits decision than when they are closer to the status quo—a result that is consistent with and expands on the findings of Caldeira, Wright, and Zorn (1999). We provide a graphical depiction of this finding in Figure 3. Holding all other variables at their median values, a justice will vote to grant review with a probability of 0.08 [0.06, 0.11] when he is closer to the status quo than to the predicted merits policy. When a justice is ideologically closer to the predicted merits outcome, however, the probability of a grant vote jumps to 0.14 [0.11, 0.17], an increase of roughly 75%. Relative to our other covariates, the substantive affect of *Merits Outcome Closer* is larger

[7]The confidence intervals in the figure are calculated using asymptotic standard errors. We follow Zorn (2006) and also estimate the model with robust, justice-clustered, and petition-clustered errors, which serve to relax the assumption of independence across observations. Some control variables fall out of significance in these models, but *Merits Outcome Closer* remains significant throughout all specifications. Tables with alternative standard errors are available in the online supplement.

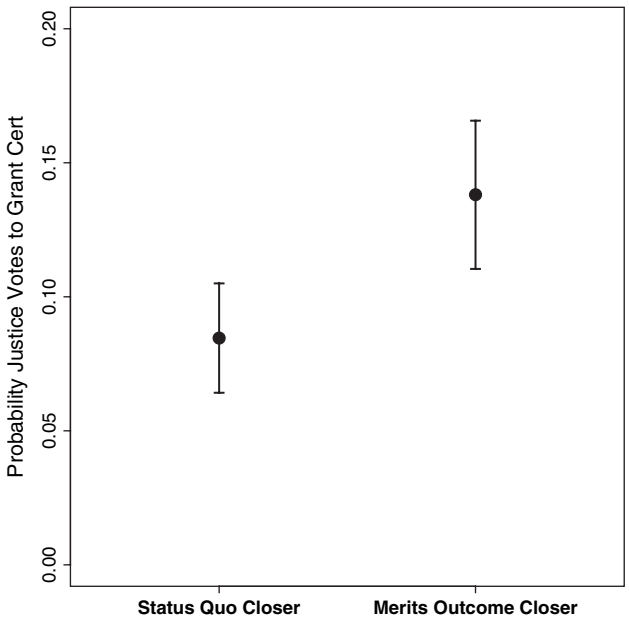

FIGURE 3 Predicted probability a justice votes to grant review conditional on whether he is closer to the status quo (left dot) or the predicted merits outcome (right dot). All other variables are held at their median values. The vertical lines represent the 95 percent confidence interval for the predicted value.

than the presence of weak conflict among the federal courts but smaller than the support of the United States in granting review.[8]

The significance of *Merits Outcome Closer* provides strong support for the theory that justices are policy-driven agenda setters who analyze both the Court's expected policy decision and the status quo. When they prefer the expected policy outcome of the merits decision to the status quo, justices are more likely to vote to hear a case. We contend, however, that a policy-based approach to explaining agenda setting is incomplete. That is, the predictions from our simple policy model help explain justices' votes, but justices frequently vote contrary to such policy-based predictions. In what follows, we analyze what causes these nonpolicy-based votes. We suggest that legal factors lead to such votes. In that respect, we test Baum's assertion that "goals of legal accuracy and clarity might help to explain deviations from ideologically consistent voting" (1997, 71). Ultimately, we find that law can serve as a constraint on policy-seeking justices, as well as an opportunity for them.

[8]If we measure *Merits Outcome Closer* as the (continuous) ideological distance between the justice and the cutpoint τ, the coefficient remains statistically significant in the expected direction.

Jurisprudential Agenda Setting

In this section, we analyze how legal factors influence justices' votes. Of course, this begs the question, why would legal factors matter? Beyond the simple answer that justices are trained in the law and taught to approach decisions legalistically, they are subject to strong legal norms (Knight and Epstein 1996). Moreover, justices rely on other institutions and actors to execute the Court's decisions. These actors are likely only to execute decisions that satisfy notions of normatively appropriate behavior—decisions that trespass such boundaries are likely to be met with noncompliance. Justices who wish to create efficacious policy must—on the whole—comply with predominant community beliefs (Lindquist and Klein 2006, 135).

Of course, law need not always be a constraint on justices. Its influence is likely to depend upon the extent to which law and policy point toward the same or different ends. On the one hand, justices may wish to pursue their policy goals but find themselves constrained by legal considerations. Legal factors may lead justices to shed their policy goals in the broader aim of protecting the legitimacy of the law and the Court (Mondak 1994). On the other hand, if a justice's policy goals accord with what legal norms countenance, the law liberates justices to pursue their policy goals. Indeed, rather than constraining justices, the law may actually place the justice in an enhanced position to achieve policy. In short, we argue that law is likely to matter and can serve as either a constraint or a collaborator.

To that end, we turned to Perry (1991) as our theoretical starting point to determine what legal factors might influence justices' agenda votes. Perry (1991, 278) argues that a handful of legal considerations are relevant at the agenda-setting stage. Legal conflict and legal importance are the two testable features he mentions. Of course, other works also provide valuable information on the Court's agenda-setting process. Key among these is Stern et al. (2002), which argues that judicial review exercised in the lower court is an important legal factor driving the Court's agenda. We address each of these factors.

One of the Supreme Court's most important duties is to resolve legal conflict, which occurs when two or more lower courts diverge over the interpretation or application of the law. If conflict exists, the Court is expected to clarify it. Support for the

importance of legal conflict can be found both in the Court's own rules (see Supreme Court Rule 10) as well as statements made by the justices, some of whom have even suggested that the presence of conflict can swamp their policy considerations.

> I would say that [cert votes] are sometimes tentative votes on the merits. Now I would say that there are certain cases that I would vote for, for example, if there was a clear split in circuits, *I would vote for cert. without even looking at the merits.* But there are other cases I would have more of a notion of what the merits were. (Perry 1991, 269; emphasis supplied).

Beyond its facial validity, previous scholarship buttresses our main point. As Lindquist and Klein argue, "[E]ven a cursory examination" of the Court's docket shows that policy implications alone do not explain Supreme Court agenda setting. " . . . justices [may] choose to hear [cases] not because they care so much about the policies involved but in order to clarify federal law . . . " (2006, 139). If legal clarity is an influential legal factor, we expect it to affect policy-seeking justices in the following way:

> *Legal Conflict H1: The presence of legal conflict will increase the likelihood that a justice who prefers the status quo to the merits outcome will nevertheless vote to grant review and, therefore, cast a nonpolicy-based vote.*

The justice's statement above in Perry's study suggests that if conflict is present, s/he would vote for cert without even looking to the merits. We can imagine, however, that policy-motivated justices take advantage of the Court's legal obligation to clarify law in order to achieve their personal policy goals. That is, policy-seeking justices might use the presence of legal conflict as "cover" to grant review to the case so that they can alter the status quo policy. Under these conditions, when policy goals and legal goals point toward the same outcome, justices are in an enhanced position to achieve policy. This gives rise to the following hypothesis:

> *Legal Conflict H2: The presence of legal conflict will increase the likelihood that a justice who prefers the merits outcome to the status quo will vote to grant review.*

Judicial review exercised in the intermediate court offers a second instance where legal considerations may influence justices. When a lower federal court strikes down a federal law as unconstitutional, legal norms compel the Supreme Court to grant review to the case (Stern et al. 2002, 244). Justices themselves have made this point:

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

Due to their legal goals of clarifying law and diminishing its uncertainty, justices who otherwise would have denied review on policy grounds should nevertheless be more likely to grant review to the case in order to maintain the Court's institutional legitimacy and importance as final constitutional arbiter.

Yet, much like the presence of legal conflict, some justices might take advantage of judicial review in the lower court to further their policy goals. That is, justices who prefer the predicted policy of the merits decision to the status quo should be even more likely to vote to hear the case when the lower court struck down a federal law. Thus, we suggest the following hypotheses:

> *Judicial Review H1: The exercise of judicial review in the intermediate Court will increase the likelihood that a justice who prefers the status quo to the merits outcome will nevertheless vote to grant review and, therefore, cast a nonpolicy-based vote.*

> *Judicial Review H2: The exercise of judicial review in the intermediate Court will increase the likelihood that a justice who prefers the merits outcome to the status quo will vote to grant review.*

Finally, Perry (1991) tells us that justices believe themselves obligated to grant review to cases that are legally important. There are some cases the resolution of which are demanded by the public. Perry's analysis consists of numerous quotes from justices who tell us that the importance of an issue or a case can force the Court to hear it:

> Sometimes the people just demand that the Supreme Court resolve an issue whether we really ought to or not. That does affect us sometimes. We just feel that the Supreme Court has to decide. (1991, 259).

Important cases simply have more at stake than others. For example, the distributional consequences arising from *Grutter v. Bollinger* (2003) in which the Court upheld race-based admissions policies in higher education arguably were broader than, say, a Native American gaming dispute. In these legally important cases, then, we might expect justices to be more likely to grant review, regardless of their policy goals. Those who would deny the petition on policy grounds should instead vote to grant review, while those who would grant review on policy grounds should become more likely to do so. Thus, we expect:

> *Legal Importance H1: A petition that raises a legally important issue will increase the likelihood that a justice who prefers the status quo to the merits outcome will nevertheless vote to grant review and, therefore, cast a nonpolicy-based vote.*

Legal Importance H2: A petition that raises a legally important issue will increase the likelihood that a justice who prefers the merits outcome to the status quo will vote to grant review.

Of course, it could be that the law does not influence justices at all (Segal and Spaeth 2002). Rather, justices who cast deviant (i.e., nonpolicy based) agenda-setting votes may simply have committed voting errors. We control for this possibility in the following ways. First, we control for the possibility that the freshman effect causes nonpolicy based votes. Some scholars have argued that new justices face a steep learning curve during which time their calculations are imprecise and their policy preferences still unstable (Hagle 1993). During this learning period, justices may be more likely to make errors. If this is the case, freshman justices might be more likely to cast nonpolicy-based votes than their more senior colleagues. Second, we control for petition complexity. The likelihood of miscalculating may be higher in complex cases than in less complex ones, as the policy issues are more muddled. Third, we control for the fact that the merits outcome might be uncertain and thus cause voting errors. As the identity of the median becomes more difficult to assess, justices may be more likely to commit voting errors. Finally, we control for the distance between the status quo and the likely outcome. As the distance between these two points shrinks, it might become increasingly difficult for a policy-minded justice to distinguish between the two and, as a result, that justice may be more likely to cast a nonpolicy-based vote.

Data and Methods

Our dependent variable is whether a justice casts a policy-minded vote, which we define as a vote consistent with the predictions of our above spatial model. Because our hypotheses suggest that the influence of legal considerations is conditional, we delineate two types of policy-minded votes: Policy-Deny votes and Policy-Grant votes. *Policy-Deny* equals 1 where the policy model predicted that a justice would vote to Deny review and the justice in fact voted to Deny; 0 otherwise. *Policy-Grant* equals 1 where the policy model predicted that a justice would vote to Grant review and the justice in fact voted to Grant; 0 otherwise. By analyzing how the presence of these legal factors affects justices' policy votes, we can assess the independent influence of law in a way that overcomes observational equivalence.

To operationalize our legal conflict hypotheses we include two variables: *Weak Conflict* and *Strong Conflict*. Both of these variables are derived from the law clerks' discussions in pool memos. *Weak Conflict* is coded as 1 if the petitioner alleges legal conflict and the law clerk suggests that the conflict is minor and tolerable. This occurs most often when the conflict includes few circuits (i.e., is a shallow split). *Strong Conflict* is coded as 1 when the pool memo writer notes the existence of conflict that is neither minor nor tolerable.[9]

We tap into the judicial review hypotheses by including *Intermediate Strike*, which takes on a value of 1 if the intermediate reviewing court struck down a federal statute as unconstitutional; 0 otherwise. To operationalize our next concept, legal importance, we rely on three different measures. Our first measure comes from the intermediate court's opinion type. We code *Intermediate Unpublished* as 1 if the intermediate court's opinion was unpublished. Courts of appeals judges are allowed to dispose of easy or mundane cases through a brief opinion (usually no more than a few sentences) which they declare to be unpublished. Supreme Court Justices are hesitant to review such decisions because of their nonprecedential nature. Indeed, in *Calderon v. United States* (no. 91-6685) the pool memo writer argued that the Court should not grant review to the petition because the case was not legally important, as the lower court decision was unpublished: "I recommend denial [the lower court's] decision is unpublished and therefore no 'rule' was created by the case."

Our second measure of legal importance comes from the pages of the *U.S. Law Week*, a legal periodical that seeks to "[alert] the legal profession to the most important cases and why they are important" (LexisNexis Source Information). We expect that legally

[9]Because coding the level of conflict required some judgment on the part of the coders, we conducted an intercoder reliability study for these variables. We note that all three measures are reliable by common standards. The complete results are reported in the online supplement.

An additional potential criticism of this coding technique is that the clerks might skew the intensity of the conflict in order to influence whether the Court grants review to the case. A number of factors mitigate against this concern. First, our interest is not whether conflict *in fact* exists, but whether the justices *believe* it exists. Since the pool memos are what the justices analyze when deciding whether to grant review, they serve as the best indicators of perceived conflict. As to potential claims of bias among the clerks, there are strong group norms that counsel against such behavior. What is more, clerks know that their colleagues will review and mark up the pool memo for their justices so any attempt to pad the memo is likely to be discovered and rendered ineffective (Lazarus 2005; Peppers 2006; Ward and Weiden 2006). Moreover, our sample stretches across seven terms with numerous different memo writers. The bias threat from a single clerk or a handful of clerks is not great enough to warrant serious concern.

important cases will generate summaries in U.S. Law Week while legally mundane cases will not. We code *U.S. Law Week Article* as 1 if there was a story written about the circuit court opinion; 0 otherwise.

Our third measure of legal importance turns on the number of amicus curiae briefs filed in a case. Participating in Supreme Court decision making is an expensive undertaking. For organized interests to involve themselves in the process, the results of the Court's decision must be important. In other words, that organized interests would bear participation costs even before the Court agrees to hear the case suggests that the legal implications are broad and important. Thus, we suggest that as the number of groups filing amicus briefs increases, the perceived legal importance of the case should also increase.[10] Accordingly, we coded *Amicus Briefs* as the total number of amicus curiae briefs filed both in support of and in opposition to the petition.

We measured our control variables in the following way. *Freshman Justice* follows the literature standard and is a dummy variable taking on the value of 1 when the voting justice served less than two full terms when the petition received its final grant or deny vote; 0 otherwise (Maltzman, Spriggs, and Wahlbeck 2000). *Procedural Complexity* is the proportion of the pool memo (in pages) that was devoted to discussing the petition's procedural history in the lower courts.[11] *Median Justice Uncertainty* is the probability—as provided by Martin and Quinn—that the justice identified as the median justice is in fact the median (Martin and Quinn 2002). *Outcome-Status Quo Difference* measures the absolute value of the distance between the status quo and the expected merits outcome.

Results

Both of our dependent variables, *Policy-Deny* and *Policy-Grant*, are dichotomous, so we estimate two logistic regression models. The parameter estimates for these models are displayed graphically in Figure 4.[12] Viewed together, these results provide strong support for nearly all of our legal variables.

First, we examine the role of legal conflict, which we portray visually in Figure 5. We find that when the legal norm of conflict resolution collides with justices' policy goals, policy gives way. The probability that a justice casts a policy-based deny vote decreases from 0.89 [0.86, 0.92] in the absence of legal conflict to 0.83 [0.79, 0.88] in the presence of weak conflict. In the presence of strong legal conflict, the probability the justice casts a policy-based deny vote plummets to 0.61 [0.55, 0.67]. Simply put, justices who otherwise would have cast policy-based deny votes because they prefer the status quo to the expected outcome on the merits instead are increasingly compelled by the presence of conflict and norms of legal clarity to grant review.

We also find that this legal norm can serve as an opportunity for policy-motivated justices. When legal motivations and policy motivations combine toward the same end, justices can more vociferously pursue their policy goals. We hypothesized that the presence of legal conflict would increase the likelihood that a justice who prefers the merits outcome to the status quo would vote to grant review. Our findings support this claim. The probability of a policy-based grant vote more than triples from 0.17 [0.14, 0.19] to 0.56 [0.52, 0.61] when strong conflict is present. Our *Weak Conflict* variable shows similar patterns though the magnitude of the difference is smaller.

Judicial review in the lower court also proved to be a strong legal influence. We hypothesized that justices would be more likely to vote to hear a case,

[10]Our assertion that amicus briefs can proxy for legal importance follows from Baum, who argued that the number of amicus briefs filed at the cert stage "is consistent with an interest in good policy, legal accuracy, or legal clarity: justices who give priority to any of those criteria would look for consequential cases" (1997, 78). A recent study by Collins (2008) found that amicus briefs were poor proxies for political salience. Collins used a host of correlation measures to determine that amici activity was uncorrelated with political salience at the merits stage. Rather, amici participation was tied to legal factors. We thank an anonymous reviewer for pointing out this evolving distinction to us.

[11]One potential concern with this coding scheme is that various clerks may write differently, with some clerks emphasizing unique aspects of a case's procedural background. We are unfazed by this concern. Each pool memo in the time period we studied followed the same format. It began with a Summary, moved to the Facts and Decisions Below, Petitioners' Contentions, Respondents' Contentions, a Discussion, and a Recommendation. That the clerks follow a standard procedure when writing the memo suggests that there should not be a large variance in how they personally approach the write-up of this portion of it. Moreover, for clerk bias to undermine our findings, the bias would have to be nonrandom and consistent; given the few memos written by each clerk, the potential for such bias is minimal. Nevertheless, we analyzed whether our results differed by coding the length of the discussion section as well as the length of the sections devoted to the parties' contentions. Our results remained unchanged.

[12]We also reestimated these models with robust, justice-clustered, and petition-clustered errors and achieved nearly identical results. Full tables of standard errors are available in the online supplement.

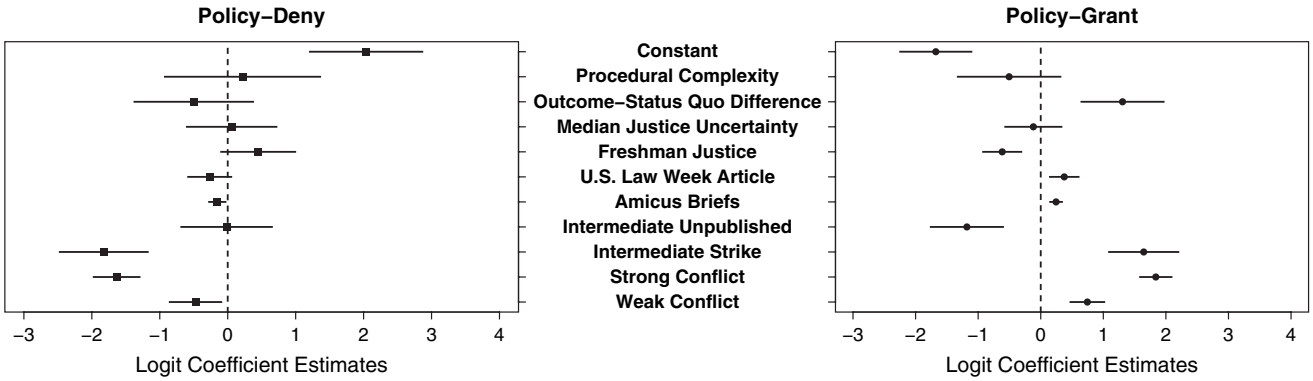

FIGURE 4 Parameter estimates for logistic regression of Policy-Deny votes (left panel, N = 1138) and forward Policy-Grant votes (right panel, N = 1886). The solid points are the parameter estimates and the horizontal lines represent the 95 percent confidence intervals for those estimates based on asymptotic standard errors (see note 12).

regardless of their policy goals, when the Court below struck down a federal law. We did so because there are powerful norms on the Court to uphold federal legislation whenever possible. Our findings show that this dynamic strongly predicts their votes. A justice's predicted probability of casting a policy-deny vote drops from 0.89 [0.86, 0.92] to 0.56 [0.41, 0.72] when the intermediate court has struck down a federal law.

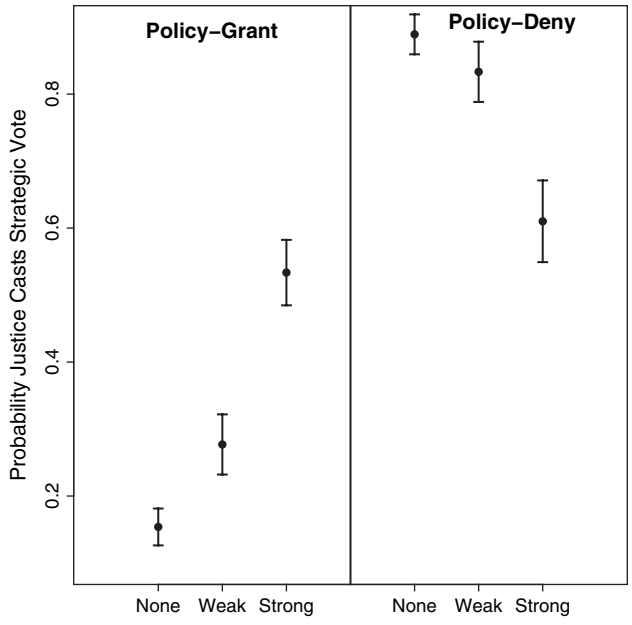

FIGURE 5 Predicted probabilities that a justice casts a Policy-Grant (left panel) or Policy-Deny (right panel) vote, conditional on the extent of legal conflict present in a petition. All other variables are held at their median values. The vertical lines are 95 percent confidence intervals for the predicted values.

Of course, we also find—as we did with the legal conflict variables—that judicial review below can liberate justices to pursue their policy goals. We argued that justices who would vote to hear a case on policy grounds would be even more likely to grant review when the lower court struck down a federal law. The data support this argument. A justice's probability of voting to grant when he prefers the merits outcome to the status quo increases from 0.15 [0.13, 0.18] in the absence of lower court judicial review to 0.49 [0.35, 0.62] if a law was struck down by the intermediate court.

Our first legal importance variable, *Intermediate Unpublished*, performs partly as expected. Justices are less likely to cast policy-based grant votes in unpublished cases than in published ones. The predicted probability of a Policy-Grant drops from 0.15 [0.13, 0.18] in a petition with a published intermediate court decision to only 0.05 [0.02, 0.08] in a petition featuring an unpublished opinion. We do not find, however, that justices are any more or less likely to cast a Policy-Deny vote in unpublished petitions than they are in published ones.

Our second legal importance variable, *U.S. Law Week Article,* performs partially as expected. We find that justices who could be expected to vote to Grant review become even more likely to do so. With no article present a justice casts a Policy-Grant vote with a 0.15 [0.13, 0.18] probability; however, when an article is present, that probability increases to 0.21 [0.17, 0.25]. While the sign on the variable in the Policy-Deny model is in the predicted direction, its

p-value is not at the conventional 95% level of statistical significance ($p = 0.10$).

Our third legal importance variable, *Amicus Briefs*, performs entirely as expected. Increased amici activity decreases the likelihood of casting a Policy-Deny vote. A justice has a 0.89 [0.86, 0.92] probability of casting a Policy-Deny vote with zero amicus briefs present and a 0.87 [0.84, 0.91] probability when one brief is present, a difference that, while slight, is statistically significant at the 95% percent level. In the context of policy-minded grants, justices who could be expected to Grant on policy grounds are even more likely to Grant when amicus curiae briefs are present. Moving from zero amicus briefs to one amicus brief changes the probability of a Policy-Grant from 0.15 [0.13, 0.18] to 0.19 [0.16, 0.22].

Lastly, we examine our control variables. We argued that nonpolicy-based votes might be the result of strategic error. Of course, that we find support for our legal hypotheses even while controlling for these additional factors endorses our legal findings. *Procedural Complexity* fails to achieve statistical significance, as does *Median Justice Uncertainty*. *Outcome-Status Quo Difference* is not statistically significant in the Policy-Deny model but it is in the Policy-Grant model. As the relative distance between the status quo and the likely merits outcome decreases and the two become less distinguishable, a justice is more likely to make a strategic error and vote to deny when the spatial model suggests he should vote to grant.[13] *Freshman Justice*, too, is statistically significant in the Policy-Grant model. Holding all else equal, a freshman justice has only a 0.09 [0.06, 0.12] probability of casting a policy-based grant vote. His more senior counterpart, by contrast, who has a better grasp of his colleagues' preferences and the ideological context casts a strategic grant vote with a 0.15 [0.13, 0.18] probability—a change of over 65%. In the context of policy-based deny votes, however, we fail to find statistical support for a freshman effect.[14]

[13]When the variable takes on its minimum value and the status quo and merits outcome are nearly indistinguishable, a justice casts a forward-looking grant vote with a 0.12 [0.09, 0.15] probability. When the distance is at its largest, however, making the distinction between the two points obvious, the probability more than doubles to 0.26 [0.19, 0.33].

[14]We also controlled for the Chief Justice's voting behavior. Deviations in his behavior that appear to be legally driven may, in fact, be driven by his ultimate ability to control the content of the majority opinion by exercising his opinion assignment prerogative. If opinion assignment causes the deviations in policy-based voting we observe, this variable should be statistically significant. The variable fails to achieve significance.

Discussion

We began this article with a simple but important question—does law influence the choices justices make? Our findings submit that while policy goals are quite substantial to justices, law and legal norms also influence their behavior. We are thus reminded of Perry's concluding remarks:

> [W]hen in the jurisprudential mode, the justice makes his decision based on legalistic, jurisprudential types of considerations such as whether or not there is a split in the federal circuit courts of appeal. In the outcome mode, while the justice does not ignore jurisprudential concerns, they do not dominate his decision process. Rather it is dominated by strategic considerations related to the outcome of the case on the merits. (1991, 271)

Our empirical analysis supports precisely what Perry (1991) and Hammond, Bonneau, and Sheehan (2005) theorized in their important works. Justices grant review when they believe that the policy outcome of the merits decision will be better ideologically for them than is the status quo. Conversely, they deny review when they prefer the status quo policy. Policy maximization—the outcome mode—is a strong predictor of Supreme Court agenda setting. This finding provides an important addition to Caldeira, Wright, and Zorn (1999) and suggests the value of empirically testing theoretical models of judicial behavior (Bonneau et al. 2007).

At the same time, however, we find that legal considerations are crucial to the agenda-setting process. When certain legal factors are present, justices opt into jurisprudential mode. Those who otherwise would have denied review to the case on policy grounds instead sacrifice their policy goals, grant review, and follow the Court's legal norms. The law constrains them from acting on policy goals alone. These findings, of course, highlight the importance of legal norms on the Supreme Court, showing that the legitimacy of the Court and appropriate behavior by judicial actors is something to take seriously. Yet, the law does not only constrain. When legal considerations and policy maximization predict the same behavior, justices become freer to pursue their policy goals. That is, justices who would grant review on policy grounds become even more likely to do so, as they take shelter under cover of the law. In sum, we find that law matters and that it is both a constraint on and an opportunity for Supreme Court justices (Hansford and Spriggs 2006).

While our results cannot speak loudly to the influence of law at later stages of the decision-making

process, they whisper in our ears—why would the law influence justices during one stage of the process but not another? Indeed, in many ways the agenda-setting stage provides the most rigorous test for examining the role of law and legal norms on the Court. Justices have nearly total discretion to decide which cases the Court will hear, meaning they have freedom to pursue their raw policy goals with minimal constraints. That legal norms can thrive in such an environment is testament to their power. Moreover, the agenda-setting process is shrouded in secrecy. The fact that legal concerns are relevant at all in such a private forum suggests, of course, that law matters (Knight and Epstein 1996). Future scholarship should build on these findings to test empirically the interaction of law and policy, seeking out new ways of thinking about legal influence and policy considerations in an effort to elucidate the Supreme Court's role among policy making institutions, and to put the "jurisprudence" back into "political jurisprudence."

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Appendix

TABLE A1 Variable names and measurements.

Variable Name	Exp. Sign	Measurement
Merits Outcome Closer	+	Is the justice ideologically closer to the likely merits outcome than s/he is to the location of the status quo? 0 = no, 1 = yes.
U.S. Law Week Article	+	Was the intermediate court's opinion summarized in an article published by the legal periodical *U.S. Law Week*? 0 = no, 1 = yes.
Amicus Briefs	+	The number of briefs filed both supporting and opposing the granting of cert by friends of the court (amici curiae).
Intermediate En Banc	+	Was the decision of the intermediate court made en banc (i.e., generally when the full circuit hears and votes on the case)? 0 = no, 1 = yes.
Intermediate Unpublished	−	Was the opinion of the lower court published in the relevant federal or state reporter? 0 = published, 1 = unpublished.
Intermediate Strike	+	Did the intermediate court's opinion strike down as unconstitutional a federal statute? 0 = no, 1 = yes.
Intermediate Dissent	+	Did a judge in the court immediate below the Supreme Court write a dissenting opinion in the case? 0 = no, 1 = yes.
Intermediate Reversal	+	Did the court immediately below the Supreme Court reverse the decision of the court below it (usually a trial court)? 0 = no, 1 = yes.
U.S. Opposes Petition	−	Is the U.S. the respondent to a petition or has it filed a brief in opposition to the granting of reviewing as amicus curiae? 0 = no, 1 = yes.
U.S. Supports Petition	+	Does U.S. ask for review either as petitioner or through participation as amicus curiae? 0 = no, 1 = yes.
Strong Conflict	+	Does clerk note conflict alleged by petitioner is real? 0 = no, 1 = yes.
Weak Conflict	+	Does clerk note conflict alleged by petitioner exists, but discounts it as shallow or otherwise not requiring the Court's immediate attention? 0 = no, 1 = yes.

TABLE A1 (Continued)

Variable Name	Exp. Sign	Measurement
Alleged Conflict	+	Does petitioner allege conflict between decision below and Supreme Court or Court of Appeals precedent? 0 = no, 1 = yes.
Freshman Justice	+	Did the voting justice serve less than two full terms when the petition received its final grant or deny vote? 0 = no, 1 = yes.
Procedural Complexity	+	The proportion of the memo (in pages) that was devoted to discussing the petition's procedural history in the lower courts.
Median Justice Uncertainty	−	The probability that the justice identified by Martin and Quinn as the median justice is in fact the median.
Outcome-Status Quo Difference	+	The absolute value of the distance between the status quo and likely merits outcome.

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