Abstract

I exploit cases in which the Supreme Court resolves conflicts between lower courts to study how lower court ideology and lower courts’ decisions affect the choices of which cases to review, which to reverse upon review, and what doctrine to establish. In these instances, the Supreme Court discusses how it would have ruled on cases it did not take; as a result, the data clearly reveal how the Supreme Court chooses which cases to review and what information is gained upon review. The results deepen the understanding of how the Supreme Court resolves legal ambiguity, and also speak to the dynamics of ideology and legal development in the judicial hierarchy.
In contemporary American politics, the U.S. Supreme Court is a national policymaker. But unlike legislatures, the Court can only affect policy by deciding a case or controversy. This raises the question of how the particularities of a case affect the Supreme Court’s decision—and how, in turn, the Supreme Court selects which cases will best allow it to develop doctrine. How does the Supreme Court choose which cases to review, which controversies will offer the best opportunities for doctrinal development?

Inevitably, many cases implicate the same legal question; some cases may be more likely to be reviewed than others. The choice of which case is reviewed may have implications for doctrinal outcomes, and certainly has implications for strategic litigants pursuing an appeal. But we do not yet know the empirical realities surrounding which types of cases are systematically better vehicles, or which case out of a choice set the Supreme Court choose to review. In this paper, I present exploratory empirical analyses of these questions.

I use a combination of existing and original data to create choice sets of cases the Supreme Court could review. By constructing these sets of cases, I am able to analyze the Supreme Court’s cert decision contextually to better understand the characteristics of good vehicles inductively. I show that the Supreme Court is far more likely to review decisions with which it ultimately disagrees. This effect is not driven by litigant strategy—litigants are no more likely to petition for certiorari in cases that ultimately prevail compared to those that do not. This is also not driven by ideological divergence between the Supreme Court and the lower court in question. Instead, I present evidence that the Supreme Court’s primary cue is contextual. The Supreme Court cues off the number of circuits that agree with the stated position in a given case—the Court is more than twice as likely to choose a case from the smaller side of a conflict. The results strongly suggest that the balance of decisions is a far more important factor in predicting certiorari than previously acknowledged, and suggest that theoretical claims about the Supreme Court’s certiorari choices should focus on
hierarchical relationships as being non-dyadic.

1 Certiorari

Many of the factors that predict Supreme Court review are well-known—non-unanimous decisions, cases in which the solicitor general files an amicus brief, and decisions that are prima facie suspicious are more likely to be reviewed, for example (Tanenhaus et al. 1963, Perry 1991, Caldeira, Wright and Zorn 1999, Hall 2009, Caldeira and Wright 1988, Bailey, Kamoie and Malztman 2005). All of these empirical phenomena are by construction dyadic, asking only about one case, about the relationship between any one lower court and the Supreme Court. But the Supreme Court’s relationship to the Courts of Appeals is not dyadic—it relates to the Courts of Appeals collectively. The Supreme Court’s review decisions are contextual. 37% of Supreme Court decisions reference multiple lower courts on the issue being decided in the instant case (Summers and Newman 2011); most Supreme Court decisions reference more than one lower court decision on some relevant point of law (George and Berger 2005).

In other words, most of the Supreme Court’s docket is selected not because the particular case is relevant but because it implicates a broader question of law or has bearing for other cases. One implication of this is that the Court typically has a choice of cases for resolving one particular legal question. On the whole, this reality has not been acknowledged in empirical studies of judicial politics. The nature of inference surrounding the decision to grant cert assumes that the probability any given case is reviewed is independent of the probability any other case is reviewed; when in fact choosing to review one case on a particular question significantly affects the likelihood other cases on the same question are reviewed. This become stark when considering lower court conflicts. It is well-known that the Supreme Court is much more likely to review cases that implicate conflict in the lower courts (Tanenhaus et al. 1963).
But, by definition, lower court conflict requires a minimum of two potential decisions to review. This is not an abstract notion—as I will show below, in 66% of conflicts, there is a petition for cert in more than one case. We do not know, however, which of these petitions are most likely to be granted or how the Supreme Court chooses which case will best allow it to resolve the question at hand.

This contextual selection is important for case outcomes. Beyond the legal aphorism that “hard cases make bad law,” there is extensive theoretical work suggesting not all cases are alike—that the doctrine resulting from a decision will vary based on which of many cases the Supreme Court chooses to hear. Carrubba et al. (2012) present a formal model in which the facts of a case (combined with the ideology of the justices) perfectly determines the doctrine espoused in the Court’s majority opinion. Theories both within judicial politics and within legal scholarship suggest that some cases are better “vehicles” for lawmaking. But to date there has been no systematic analysis of which kinds of cases are good vehicles.

Instead, we have a sense for which cases are most likely to be reviewed that is driven by a notion of supervision and constraint. Contemporary empirical studies of discretionary review build off “cue theory” (Tanenhaus et al., 1963). The notion is that the decision of whether to grant cert is an exercise in uncertainty. The Supreme Court therefore “cues” off indicators that a case is likely to be controversial, contrary to its preferences, or decided using unclear doctrine (Ulmer, Hintze and Kirklosky, 1972), because these are the types of cases it wants to review. Among these indicators, dissent (Tanenhaus et al., 1963, Perry, 1991, Caldeira, Wright and Zorn, 1999, Beim, Hirsch and Kastellec, 2012), the ideological composition of a panel (Hall, 2009) and its interaction with the decision the panel makes (Cameron, Segal and Songer, 2000, Hammond, Bonneau and Sheehan, 2005), amicus participation (Caldeira and Wright, 1988), and the involvement of the solicitor general (Bailey, Kamoie and Malztman, 2013).
stand out as particularly relevant. All are seen as indications that a case is more likely to be reversed—long seen as a motivator for review (though see [Klein and Hume 2003]). Cameron, Segal and Songer (2000) explores the strategic response of lower court judges who know their decisions will be reviewed, and the resulting strategic interaction between the Supreme Court and the Courts of Appeals. The justices may also be influenced by public opinion (Bryan 2014), the “legal status quo” (Hammond, Bonneau and Sheehan 2005; Benesh 2002), or concerns about the separation of powers and other institutions’ responses (Epstein, Segal and Victor 2002).

More than any of these, the best predictor of certiorari is lower court conflict. Consistent with Rule 10, the Supreme Court is far more likely to review cases that implicate a conflict in the lower courts (Tanenhaus et al. 1963; Ulmer 1984; Caldeira and Wright 1988; Caldeira, Wright and Zorn 1999; Perry 1991). They are particularly more likely to review “strong” or deep conflicts as opposed to shallow ones (Black and Owens 2009). This is so broadly known—and Gressman et al. (2007) (page 242) advise petitioners of this reality—that allegation of conflict is extremely common. Much of a clerk’s task is distinguishing genuine from alleged conflict; the Court is far more likely to review cases of true conflict (Estreicher and Sexton 1984). But it is not entirely clear whether and to what extent this interacts with ideological factors—when true, deep conflict exists, does the Supreme Court still choose strategically? Black and Owens (2009) and Epstein, Martin and Segal (2012) evaluate how the probability of cert is affected by the interaction between ideological and non-ideological factors, finding that ideology only plays a role in cases where non-ideological factors—including lower court conflict—suggest the probability of a cert grant is moderate (not too high or too low). Here, I exploit these cases—where the Supreme Court is very likely to grant cert—to understand what makes any given case a good vehicle for doctrinal development.
2 Data

When the Supreme Court wishes to resolve some doctrinal questions, there are many potential cases it can take to do so. Identifying those potential cases poses a difficult task, both for the researcher and for the Supreme Court. In an attempt to create a set of cases the Supreme Court could have chosen in order to resolve a given legal question, I focus on the resolution of lower court conflicts and select Courts of Appeals cases that were explicitly in doctrinal conflict with one another. In these instances, it is possible to explicitly identify a set of cases which all allow the Supreme Court to resolve the same doctrinal question. I identified these sets of cases by relying on the Supreme Court’s description of the conflict once it had been resolved. When the Supreme Court referenced a lower court’s description of the conflict, I adopted it as well. The Supreme Court’s descriptions list the cases involved; in most instances, the Court will explicitly state whether it ultimately agrees or disagrees with the position taken in each lower court case.

Focusing only on cases that are in conflict with one another restricts the generalizability of the findings. Most importantly, this means I ignore the kinds of cross-conflict questions discussed above (such as constitutional versus statutory issues). Instead, I focus only on differences within vehicles for addressing legal questions. Furthermore, litigant strategy outside of these issues might be quite different. Second, a circuit’s decision is represented by the opinion the Supreme Court cited—but that same circuit may have relied on that same doctrine in many other cases. With respect to the ideological composition of the panel, the presence of a dissent or concurrence, and the date of the decision, this could be

\footnote{This method is growing in popularity for estimating the Supreme Court’s “true” rate of reversal. \cite{Wasby2005}, \cite{CummingsAft2012}, \cite{SummersNewman2011} all show the Supreme Court agrees with more cases than it seems by showing they often agree with decisions they did not review. \cite{GrantHendricksonLynch2012} use the same method to study the effect of political ideology on cert grants between 1986 and 1994.}
idiosyncratic. Third, the creation of the list of circuits involved is delegated to the Supreme Court, so completeness is assumed rather than guaranteed. The Supreme Court may not discuss all cases involved in a conflict, both because it may not be aware of all of them and for more dire strategic reasons. See Bruhl (2014) for a discussion of the complexities surrounding this method. At the same time, however, studying conflicts in this way poses unique opportunities—in particular, we are able to understand litigant strategy much more thoroughly than we otherwise might.

After removing cases with missing data, the resulting database includes 2,500 lower court decisions clustered into 550 conflicts that were ultimately resolved between 1985 and 2007. To this data I added the judges on the panel (whenever the decision was made by a three-judge panel); their votes (that is, whether they dissented, concurred with, authored, or joined the majority opinion); whether a litigant petitioned for cert and, if so, whether cert was granted. I also merged the data to the Spaeth Supreme Court Database (Spaeth 2011), from which I know the subject matter of the conflict.

About 47% of the lower court cases exhibited petitions for certiorari; by comparison, there are petitions for cert in about 10% of cases overall (including in forma pauperis petitions) (Thompson and Wachtell 2009). There are an average of 4.5 lower court cases per conflict, 2.1 of which the Supreme Court disagrees with. In 64% of the conflicts in the data, there was a cert petition in more than one lower court case. Figure 1 shows a histogram of the number of cert petitions within a conflict. The data clearly reveals that even when the Supreme Court is resolving a conflict between lower courts, it has a choice of which case to review.

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2For some years of the data, the lower court cases involved and the Supreme Court’s treatment thereof, were taken from Lindquist and Klein (2006) and Summers and Newman (2011).
Figure 1: Number of *certiorari* petitions within a conflict. In most instances, the Supreme Court has a choice between multiple cases to resolve a conflict.

3 Analysis

3.1 Selection: Petitioning for *cert*

The Supreme Court cannot choose from all cases decided in the Courts of Appeals, and not all cases that petition for *cert* are viable candidates. Substantively, this means that strategic litigants may have a large effect on the Court’s docket. Methodologically, it implies that studies of the Supreme Court’s decision-making may be biased [Kastellec and Lax (2008)] and creates complexities for studying the decision to grant *certiorari*. These concerns are comparable to issues generated by neglecting to study settled cases [Priest and Klein (1984)]. But overcoming this methodological concern is difficult. One possibility is to study all cases that were decided in the lower courts. For example, [Harvey and Friedman (2006)] study all Congressional bills instead of focusing only on those the Supreme Court decided to review, to more accurately estimate how often the Supreme Court strikes down legislation. But not
all congressional bills are viable candidates for judicial review, and the enormity of generic cases can swamp inferences. This is generically true with respect to lower court decisions as well.

Another possibility is to focus only on the pool of cases that petitioned for review. Estreicher and Sexton (1984) evaluate every case that petitioned for certiorari in the year 1982 in order to evaluate how often the Supreme Court denied cert in a case where it could or should have granted it. McGuire and Caldeira (1993) undertake a similar exercise studying obscenity cases from 1955 to 1987. But there is strikingly little work exploring the determinants of cert petitions, and if smart litigants foresee the Supreme Court’s behavior, this pool itself will be heavily biased. McGuire et al. (2009) show that the same strategic factors affect the likelihood of petitioning for certiorari and the likelihood of a cert grant. Songer, Cameron and Segal (1995) shows that litigants in search-and-seizure cases are more likely to petition for cert in the decisions that seem contrary to Supreme Court doctrine. Zorn (2002) investigates the decisions of the Department of Justice and the Solicitor General to appeal; he finds that intercircuit conflict makes it much more likely that one will petition for review. Methodologically, the approach is analogous to Giles, Walker and Zorn (2006), who analyze multiple decision points in the decision to grant en banc review.

As an empirical matter, this is exacerbated by the varying likelihood with which a litigant petitions for cert. The average number of petitions-per-conflict is 2.2. The bulk of the variation occurs within, not across, conflicts: the variance in the likelihood of review within a conflict is about .26; across conflicts, it is .07.

Therefore, since the Supreme Court may only choose to grant cert when a litigant has petitioned for it, I begin with an analysis predicting when litigants choose to petition for certiorari, where the dependent variable equals 1 if there was a petition for certiorari in a
case, 0 otherwise. The data here includes all cases that were referenced by the Supreme Court as having been in conflict.

Model 1 includes an indicator of whether, upon review, the Supreme Court *ultimately affirmed* the doctrinal position articulated in that case, or did not. This is based on reading the Supreme Court’s description of the conflict and its description of its own decision. Strategic litigants may know the Supreme Court is more likely to grant cert when there is a conflict; to account for the possibility they become more likely to petition for cert under these same conditions I include an indicator for whether a conflict exists at time $t$. (Recall that in this sample of cases a conflict eventually exists in all instances—this is an indicator solely of whether that conflict had already arisen or had yet to arise.) Because litigants may cue off the behavior of lower court judges, or may know the Supreme Court will, I also include an indicator for whether the lower court’s decision included a Dissent.

The results of Model 1, presented in Table 1, suggest litigants do not strategize over expected outcomes in their petitions for review—they are no more likely to petition for certiorari in cases that are ultimately reversed than in those ultimately affirmed. In the raw data, among cases whose doctrinal position was ultimately supported, the rate of cert petition is 46%; among those whose doctrinal position is ultimately not supported, the rate of cert petition is 49%. This is interesting in light of the literature on strategic litigation. Priest and Klein (1984) suggest that only those cases that are borderline should petition for review, and this finding is consistent with that claim. However, Priest and Klein (1984) is not focused on litigation at the Supreme Court level, and it stands to reason that litigation there might be different—petitioners know a cert grant that goes against their favor can be quite damaging. The result is therefore inconsistent with the notion that litigants will only petition for certiorari when they are sure they will win.

But litigants are aware of the benefit of lower-court conflict in having their petition
granted, and so are much more likely to petition once a conflict has arisen. This is indicated by the positive coefficient on *conflict has arisen*. Again returning to the raw data, the probability of a *cert* petition is 55% once a conflict exists and 37% absent such a conflict. It is noteworthy both that litigants are more likely to petition once a conflict exists and that the baseline probability of a petition, even *absent* intercircuit conflict, is relatively high.

To better understand this effect, Model 2 includes these same predictors but adds two additional, time-varying predictors and ideological variables. *Length of Percolation* counts the number of decisions made at or before time $t$, indicating how long a conflict has existed in the lower courts (as a function of number of circuits involved, *not* number of years). *Number in Agreement* counts the number of circuits that agree with the decision in case $i$ before time $t$. Because the Supreme Court was relatively conservative during this period, I control for the lower court’s ideology using a straightforward measure: the party of the president who appointed judges. For three-judge panels, I use the composition of the panel; for circuits, I use the proportion of Democratic appointees serving on the circuit.

Model 2’s results clearly show that litigants are more likely to petition for *cert* the fewer circuits agreed with the decision they received. Lindquist and Klein (2006) show this predicts the side the Supreme Court will ultimately agree with, which suggests litigants could be petitioning strategically on the basis of this indicator. And indeed, including this indicator completely absorbs the effect of the Supreme Court’s ultimate decision—the effect of *ultimately reversed* is now statistically indistinguishable from zero. Litigants are also somewhat more likely to petition for *cert* the longer an issue has been percolating in the courts. Including these two control variables significantly diminishes the effect of the existence of a conflict; given how long an issue has been percolating in the courts, litigants are no more likely to petition for *cert* after conflict has arisen than before. Furthermore, the positive and statistically significant coefficient on dissent indicates that litigants are more
likely to petition for *cert* in non-unanimous cases. This finding mirrors one in [Giles, Walker and Zorn (2006)](https://www.jstor.org/stable/4160644), and I return to it below.

Strategic litigants may base their decision to petition or not on the ideological divergence across tiers of the judicial hierarchy. Since liberal and conservative judges may be expected to make different decisions, litigants may be more likely to petition for *cert* the further apart are the courts in question. To account for this possibility Models 3 and 4 include measures of the ideological distance between the Supreme Court and the Courts of Appeals. This is measured by the difference in their Judicial Common Space Scores [Epstein et al. (2007)](https://www.rand.org/content/dam/rand/pubs/working_papers/2007/WP563.pdf), which are based on the ideologies of judges and justices’ appointing presidents and home-state Senators. The results indicate that neither is predictive of the likelihood of a petition for *cert*. Litigants are no more likely to petition for *cert* in decisions made by ideologically distant panels, or by ideologically distant circuits.

### 3.2 Granting Cert

Among the 1,267 cases in which there was a *cert* petition, the Supreme Court ultimately agreed with 52%. Among those the Supreme Court *reviewed*, however, it agreed with just 42%. Models 5 through 8 in Table 2 predict the Supreme Court’s review decision among these cases, with variables that mirror those in Table 1. The dependent variable equals 1 if *cert* was granted, and 0 if *cert* was denied.

Looking first at Model 5, we see that although litigants do not seem to petition strategically with respect to expected outcomes, the Supreme Court does target those cases which it ultimately reverses—the coefficient on *ultimately affirmed* is large and statistically significant. (Were the decision to review *independent* of team size, this coefficient would be statistically indistinguishable from zero.) This is consistent with the common knowledge that the Supreme Court is more likely to reverse than to affirm. The result is also consistent with [Wasby (2005)](https://www.rand.org/content/dam/rand/pubs/working_papers/2005/WP563.pdf) and [Summers and Newman (2011)](https://www.rand.org/content/dam/rand/pubs/working_papers/2011/WP7257.pdf)—both find that the Supreme Court
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Standard errors in parentheses
* indicates significance at $p < 0.05$

Table 1: Regressions models of petitions for cert

is more likely to agree with lower court cases it cites but does not review.

The other variables illuminate this further. As shown in Model 6, including a measure of the number of circuits that support a side absorbs part of this effect. This is because the Supreme Court is much more likely to grant review the fewer circuits agree with the position taken by the circuit in question. In other words, the Supreme Court cues off the available cases before deciding which to select—its cert decision is contextual. This effect can be powerfully seen in the raw data as well. For cases that are alone in their position, the probability of a grant is 57%. For cases with at least one other circuit on their side, the probability of a grant is 15%. This is not purely a function of litigant strategy: the rates
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Standard errors in parentheses
* indicates significance at $p < 0.05$

Table 2: Regressions models of granting cert

conditional on a cert petition are 79% and 36%, respectively. Cert was granted to the larger team in just 32% of cases.

A number of secondary results are also noteworthy. The coefficient on Dissent is positive and statistically significant. That is, the presence of a dissent increases the probability both of a petition for cert and the grant of cert. This result contrasts with Giles, Walker and Zorn (2006), who find that dissent increases the probability of a petition for en banc review but not the likelihood of a grant.

Furthermore, the ideological composition of the panel and the circuit each play no meaningful role in the probability that cert is granted, as shown in Models 7 and 8. This result is particularly noteworthy given the repeated findings that the Supreme Court is more likely

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3Litigants are also somewhat strategic, however; the probability of a cert petition among solo cases is 72% and among cases with companion circuits it is 42%.
to review courts ideologically distant from it (Cameron, Segal and Songer 2000, Hall 2009). Grant, Hendrickson and Lynch (2012) consider how the ideological distance between teams affects the likelihood that the Supreme Court grants certiorari.

Thus, the Supreme Court’s decision to grant cert is strategic even beyond strategic litigant behavior. The Court is much more likely to grant cert in cases which it will ultimately reverse, which it identifies by evaluating decisions in concert and by cueing off the circuit from which the case arises.

In fact, the court intentionally chooses these such cases. As an example, consider a set of cases the Court faced during the 1986 term. In that year, the Court was presented with petitions for cert in three cases dealing with business partnerships and tax deductions of financial losses—docket numbers 86-1151, 86-1152, and 86-1672. When the Court is deciding whether or not to grant a cert petition, clerks will write “pool memos” suggesting whether or not to grant cert. In the pool memos deciding whether to grant cert to any of these three cases, the clerks wrote that the issue was important and warranted review. But the clerks writing for the cert pool argued that one of these cases was a noticeably better vehicle than the others—even though all three would require and allow the Court to answer the exact same question. In the memo discussing 86-1151, the clerk argued the Court should grant in Bollinger since that decision is most likely to be incorrect. To that clerk, the opportunity to change the outcome of the litigation presented a valuable opportunity. Notably, the clerk also mentioned that “the correct resolution of the question presented here is a closer call” than suggested—in other words, the Court was not searching for the most difficult or borderline case, but rather for the case most likely to have been decided incorrectly.

This anecdote, combined with the empirical analysis above, suggests the Court does not wish to take cases because they are difficult, nor because they are decided by a panel likely to have issued a non-compliant decision. (The sixth circuit, which the Court chose to review,
was ideologically closest to the Supreme Court. The panel that made the decision, composted of two Republican appointee and one Democratic appointee, was the most conservative, during a time when the Supreme Court was largely conservative.) Instead, the Court searches for the case most likely to be reversed—even when the Court is explicitly seeking to resolve a conflict and clarify doctrine.

4 Discussion and Conclusion

The Supreme Court’s relationship with a lower court does not exist in a vacuum. It is influenced by the behavior of litigants and other lower courts, who can strategize and whose decisions can affect the Supreme Court’s decision to review or reverse any given ruling. The results here suggest that litigant strategy plays a large role in the certiorari process, meaningfully changing the pool of cases from which the Supreme Court can select. But, even among those cases that petition for review, the Supreme Court’s decision is non-random—it is driven contextually, but the balance of cases it sees. Most importantly, the Supreme Court is far more likely to take cases the fewer circuits agree with its position. This effect is not driven entirely by litigant strategy, and seems consistent with an attempt by the justices to predict which side of the conflict they will disagree with.

Taken together, the preliminary results here suggest that understanding the judicial hierarchy requires an account of these external forces. They suggest that future theoretical research on the judicial hierarchy and on interactions between the Supreme Court and lower courts should acknowledge actors outside that dyad. While some theories can offer explanations for such a pattern, few offer explicit, testable hypotheses that pertain to contextual decisions to grant cert.

Restricting attention to conflicts the Supreme Court resolved has a number of benefits. One of them is an entrance to understanding litigant strategy—because the Supreme Court
has mentioned all these cases, we are able to understand how the Supreme Court would have treated a case had it come to them, thereby better illuminating litigants’ anticipation of reversal upon review. But, in these cases, strategic non-petitions might be less successful—since a litigant knows a petition may arise from another circuit, he may petition even though he knows he will be reversed, simply so that he might participate in the argument.
References


