Appendix

Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court

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Defining and Measuring the Legal Status Quo

For our two models, the status quo represents the current state of the law that some justices may be trying to change and that other justices may be trying to maintain in the face of this challenge. The current state of the law may be complex and will obviously vary from case to case, but the key issue is always what has been considered legal in the country. For example:

- Some prior decision by the Court might constitute a clear and unequivocal precedent for the Court and for the rest of the country, and an appeals court might have upheld this precedent, but an appellant is now challenging the precedent. The legal status quo here would simply be the old precedent. An example of this is that the status quo for *Brown v. Board of Education* (1954) was *Plessy v. Ferguson* (1896).
- The Court may have articulated a precedent, but an appellate court may have rejected it. An example involves the Court's decision to reaffirm *Miranda v. Arizona* (1966) in *Dickerson v. U.S.* (2000). Although the Court had consistently required that suspects be given their Miranda rights prior to interrogation, the 4th Circuit ruled in *Dickerson* that a 1968 law was constitutional when it stated that failure to be read one's rights did not necessarily mean a statement was involuntary. The Court's decision in *Dickerson* overturned the 4th Circuit's ruling and restored the status quo

ante.

- A prior decision by the Court might constitute a precedent for the Court, but several appellate courts might have interpreted the precedent differently, so that the law currently in effect in these circuits would now be different from what the precedent specified. With a different legal condition holding in each of the circuits where the original precedent was successfully challenged, and with the original precedent still holding in the circuits where the precedent was not successfully challenged, the legal status quo here can be seen as a kind of "composite" – e.g., an "average" – of these different legal conditions. An example of this is the status quo addressed by the Court in the University of Michigan's affirmative action programs (*Grutter v. Bollinger* 2003 and *Gratz v. Bollinger* 2003). The Court's decision here resolved the conflicts that existed among a number of circuits.[1]
- For a case that interprets a statute or agency regulation that has never been considered by the Supreme Court, the state of the law would be some appellate court's decision regarding the meaning of the statute or regulation in question. For example, the Equal Employment Opportunity Commission's (EEOC) had maintained a regulation declaring that it was permissible for an employer to require that a worker's disability

[1]See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996); *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001); *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000), cert. denied, 532 U.S. 1051 (2001); and the lower Court opinions in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002); and *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

on the job not pose a "direct threat" to his health. The 9th Circuit ruled that this EEOC interpretation of the Americans with Disabilities Act (ADA) did not provide workers with the broad protections to which they were statutorily entitled by the ADA. In *Chevron v. Echazabal* (2002) the Supreme Court overturned this 9th Circuit ruling and restored the law to what the EEOC had tried to establish via its regulation.

This list illustrates some of the variables that can affect the current legal state of affairs on a case. What is critical is that if the Court does not produce a majority opinion, the current state of the law relevant to the case will remain in effect.

As explained in the main paper, we constructed our measure of the status quo by relying upon a combination of the lower court decision and the justices' certiorari votes. In particular, we located the status quo as the midpoint between the justice who was most likely to agree with the lower court but who supports cert and the justice who is closest to this justice, who voted to deny cert, and who is closest to the lower court ruling. This is clearly an imperfect measure of the status quo, but we can find no superior or more plausible one. Because this measure is imperfect, the probability that we will find support for either the agenda control model or the bench median model will be diminished. The fact that we do find substantial support for both models gives us more faith in the measure and the results that we derive.

Our faith in the measure is further enhanced by what we perceive as its face validity. The measure appears to have a fair amount of face validity. For example, in the *University of California Regents v. Bakke* (1978), we located the status quo between the justice who was most likely to vote in a liberal direction on a civil liberties case and who voted to grant cert (Stevens) and the justice nearest to him (Marshall). Since Marshall

voted liberally on civil liberty cases 75.7% of the time and Stevens 66.7%, we placed the status quo at 71.2. Our placement of the pre-Bakke SQ on the left hand side of the ideological spectrum makes sense since prior to Bakke "reverse discrimination" programs were widespread throughout the nation. As a result, "a number of organizations, including some civil rights groups, asked the Supreme Court...not to take the California case" (Olesner 1977). In contrast, "a brief filed on behalf of two organizations, the Committee on Academic Nondiscrimination and Integrity, and the Mid-America Legal Foundation...urged the Court to take the case in order to decide the issue, saying that 'reverse discrimination' in student admissions is rampant throughout the United States" (Olesner 1977). In the end, Justice Powell wrote the opinion that moved the law to the right. The opinion held that even though it was constitutional to use race as one of many factors in university admissions, a fixed number of slots could not be set aside for minorities.

In *Garcia v. San Antonio Metro Transit Authority* (1985), the Court overturned a conservative lower court. In particular, lower courts had ruled that because of the Supreme Court's *National League of Cities v. Usery* (1976) interpretation of the tenth amendment, the Fair Labor Standards Act did not apply to the San Antonio Transit Authority. In *Garcia,* the precedent established by *National League* was overturned. The legal status quo in *Garcia* was defined by *National Legal* and the subsequent decisions that were based upon it. The decision to grant certorari in this case was 9-0. Because of this and because the lower court had ruled in a conservative direction, we placed the SQ as the midpoint between the most conservative justice to support the granting of cert (Rehnquist, .38) and the end point of the scale (0 for a conservative lower court). Thus,

we located the SQ at .19. Given that the majority opinion in *National League of Cities* was written by Rehnquist our use of Rehnquist's own ideology as a vehicle for identifying the SQ seems appropriate.

In *Ake v. Oklahoma* (1985), the justices voted 7-2 to grant certorari. The principle issue before the bench was whether the state of Oklahoma had a constitutional obligation to assist Glen Burton Ake's defense in his murder trial by paying for his defense to secure a psychiatric evaluation. Prior to *Ake*, a number of states did not provide psychiatric assistance to those defending indigent clients (Greenhouse 1984). Given that the Oklahoma courts had stated that the defense was not entitled to a psychiatric evaluation, we located the legal status quo as the midpoint between the most conservative justice who voted to grant cert (Powell at .32) and the most liberal justice who voted to deny cert (Burger at .30). The result is we have located the SQ on the right hand of the ideological spectrum. Given that Ake's appeal was being handled by the American Civil Liberties Union and the fact that Marshall's majority opinion overturned the Oklahoma decision upholding Ake's conviction and required the state to make a psychiatrist available, our placement of the SQ on the conservative side of the spectrum seems appropriate.

Appendix References

Ake v. Oklahoma. 1985. 470 U.S. 68.

Brown v. Board of Education. 1954. 347 U.S. 483.

Chevron v. Echazabal. 2002. 536 U.S. 73.

Dickerson v. U.S. 2000. 530 U.S. 428.

Garcia v. San Antonio Metro Transit Authority. 1985. 469 U.S. 528.

Gratz v. Bollinger. 2003. 539 U.S. 244.

Greenhouse, Linda. 1984. "Justices to Rule on the Right to State Aid in Insanity Plea." *New York Times.* March 20. Page B8.

Grutter v. Bollinger. 2003. 539 U.S. 306.

Miranda v. Arizona. 1966. 384 U.S. 436.

National League of Cities v. Usery. 1976. 426 U.S. 833.

Oelsner, Lesley. 1977. "Court to Weigh College Admission that Gives Minorities Preference." *New York Times.* February 23. Page A12.

Plessy v. Ferguson. 1896. 163 U.S. 537.

University of California Regents v. Bakke. 1978. 438 U.S. 265.

Table 5—Martin/Quinn Version

Random Effects Logit Estimates of the Probability of Joining the Majority Coalition

	Agenda Control	Bench Median
Agenda Control Variables		
AUTHOR ACCEPTABILITY	0.93 **** (.047)	——
AUTHOR ACCEPTABILITY X FRESHMAN	.324** (.182)	——
AUTHOR ACCEPTABILITY X COMPLEXITY	.059 (.047)	——
AUTHOR ACCEPTABILITY X SALIENCE	-.104 (.040)	——
AUTHOR ACCEPTABILITY X CJ	-.082 (.138)	——
Median Control Variables		
MEDIAN ACCEPTABILITY	——	.948**** (.047)
MEDIAN ACCEPTABILITY X FRESHMAN	——	-.828**** (.191)
MEDIAN ACCEPTABILITY X COMPLEXITY	——	-.065* (.046)
MEDIAN ACCEPTABILITY X SALIENCE	——	.060* (.040)
MEDIAN ACCEPTABILITY X CJ	——	-.463*** (.155)
Control Variables		
FRESHMAN	.116 (.123)	.891**** (.158)
COMPLEXITY	-.340**** (.040)	-.256**** (.046)
SALIENCE	-.062*** (.033)	-.105**** (.038)
CJ	.644**** (.095)	.907**** (.131)
CONSTANT	1.013**** (.039)	.811**** (.044)
Observations	18,419	18,419
Chi-SQ	631.66****	609.09****
ln (σ_v)	.006 (.075)	-.081 (.077)
σ_v	1.003 (.038)	.960 (.037)
ρ	.234 (.013)	.219 (.013)
Likelihood ratio test of ρ=0	564.61****	512.51****
BIC'	-1148.961	-1079.709

<.05, *<.01, ****<.001 (two-tailed). The observations were grouped by case.
The difference of 69.2524 in the BIC' provides support for the agenda control model over the bench median model.