THE DISCUSS LIST: AGENDA BUILDING IN THE SUPREME COURT

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Each term 4,000 or more cases arrive at the doorstep of the Clerk of the Supreme Court of the United States. The Court narrows the field of decision from all possible choices to a smaller set of the most plausible ones; in a typical term, the Conference places 20 to 30 percent (around 500) of the cases filed on its "discuss list," only 150 or so of which will be selected for plenary review. Here we investigate the composition, sources, and implications of the Court's discuss list. What criteria do the justices use in creating the list of cases for discussion in conference? Do these criteria differ from those ultimately applied in the decision to grant or deny a writ of certiorari? What, if any, implications does the operation of the discuss list hold for the composition of the agenda and the outcome of decisions on the merits in the Supreme Court?

We test two chief sets of hypotheses: (1) the justices weigh the various formal and informal criteria differently across the two stages of agenda building, and (2) despite differences in weighting, the justices rely on briefs amicus curiae as well as ideological predispositions to help them both to identify logical candidates for discussion and to decide whether to grant certiorari. We explain the variation in the weighting of the criteria as being largely due to the cost and accuracy of information and the different risk of errors during the two phases of choice.

I. INTRODUCTION

In the Supreme Court of the United States, as in virtually any appellate court, some cases receive more attention than do others. It is true, of course, that anyone with sufficient resources can, in the proverbial phrase, take a case "all the way to the Supreme Court." Indeed, several thousand cases do arrive each term at the doorstep of the Clerk of the Supreme Court. Of this docket of

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4,000 or so cases, the Supreme Court grants a hearing to fewer than 150 disputes each term. But the filing of a petition for certiorari or a jurisdictional statement on appeal with the Supreme Court does not guarantee a detailed evaluation from the justices. The Supreme Court, like other well-established organizations, has to narrow the full field of decision from all possible choices to a smaller set of the most plausible ones; in a typical term, the Conference places only 20 to 30 percent of the cases filed on its "discuss list." It is from this smaller set that the Supreme Court binds cases over for full treatment.

Typically, scholars divide the decisionmaking on the Supreme Court into two separate stages: "gatekeeping"—decisions on whether to grant or deny a hearing—and "resolving the merits"—deciding the substance of a case. The Supreme Court, it is said, denies "access" to those whose cases do not receive a hearing. That characterization is fine as far as it goes. But, in our view, it makes more sense to conceptualize "access" to the Supreme Court as a continuous variable. In some instances, the Court grants a writ of certiorari and goes on to decide the case on the merits with full opinion. In others, the Supreme Court grants certiorari and issues a summary reversal or affirmance. Of course, in the lion's share of the cases, the Supreme Court simply denies the petition for a writ of certiorari.

One might well conclude that, on the face of the matter, the Court has denied "access" to all litigants in cases in the category of denials. These litigants, after all, have failed to persuade the Court to make a decision on the merits, and so the decision below stands. But even within the list of denials, cases receive varying degrees of scrutiny from the Court. The justices discuss only a small portion of the cases denied a writ of certiorari. Thus, some cases fail to reach the plenary stage but nevertheless do make it to the stage in which the justices actually discuss candidates for decision. To gain "access" to the discuss list, then, is no small feat. It signifies that at least one justice regards the case as important and a plausible legal vehicle, although for some reason fewer than four see it as appropriate for a full hearing. For litigants who seek a decision on the merits in the Supreme Court, the first battle is to gain access to the discuss list. Furthermore, the discuss list reveals, as does the plenary docket, the kinds of matters the members of the Supreme Court regard as important enough for detailed attention. It is evidence of a politically consequential allocation of resources. And, yet, past research has revealed little about this crucial stage of decision—about either its determinants or consequences.

Here we examine the composition, sources, and implications of the Supreme Court's discuss list. How, if at all, do the cases on the discuss list differ from those on the dead list? What criteria do the justices use in creating the list of cases for discussion in Confer-

ence? Or, conversely, what considerations go into a decision to put a case aside without a full ventilation of views? Do these criteria differ from those applied in the decision to grant or deny a writ of certiorari? In other words, do we need discrete models for the two stages of case selection in the Supreme Court? Finally, what, if any, implications, does the actual operation of the discuss list hold for the composition of the agenda and the outcome of decisions on the merits in the Supreme Court?

We offer two chief sets of hypotheses. First, based on our theoretical orientation and our understanding of the Supreme Court's informational needs, we hypothesize that the justices weigh the various formal and informal criteria somewhat differently across the two stages of agenda building. In our view, the weighting of the criteria depends, in large part, on the nature and severity of the risks of errors during the two phases of choice. In the initial phase, the justices use a wider and less reliable set of indicators; in the final stage of screening, the justices use a smaller number of more dependable measures. Nevertheless, the selection of cases for discussion in Conference is every bit as much of a political process as is the decision to grant or deny a hearing. Second, in the same vein as our earlier work, we hypothesize that the justices rely on briefs amicus curiae as well as on ideological predispositions to help them identify logical candidates for discussion, just as they do in making the decision whether or not to grant certiorari (Caldeira and Wright, 1988: 1111–14). Our research here and elsewhere strongly indicates the impact of briefs amicus curiae and ideology, as well as other formal and informal criteria.

II. DEVELOPMENT OF THE DISCUSS LIST

Since the mid-1920s, the history of the Supreme Court's mandatory jurisdiction in both law and practice has been a tale of retrenchment rather than expansion. Before 1925, the Supreme Court had to decide almost all of the cases that came its way; its jurisdiction was almost entirely "obligatory." After extensive lobbying efforts by Chief Justice Taft and others on the Court, Congress enacted the so-called Judges' Bill, or the Judiciary Act of 1925 (see Stevens, 1983; Mason, 1964). It delegated to the Supreme Court the power to refuse to decide on the merits most of the cases on its docket. Thereafter, its docket was almost entirely "discretionary" in nature. Although litigants could in theory bring a case to the Supreme Court, few would receive either a full hearing or a decision on the merits. During the hearings on the Judges' Bill, the justices made a special point of the rational and comprehensive manner in which the Court screened cases and arrived at the plenary docket: the Clerk distributed the record and briefs for each case to all the justices, each of the brethren prepared a memorandum, the members of the Conference discussed each of the peti-

tions, and the Court bound the matter over for decision on the merits if four or more justices thought it worthy (Stevens, 1983). The justices promised to give full consideration to all candidates for plenary review.

Until the 1930s, so far as we can tell, the justices prepared for and the Conference discussed, however briefly, each case on the docket. Sometime during the 1930s—the precise year is not clear—the Supreme Court began to work with two lists of cases—a practice apparently established at the behest of Chief Justice Charles Evans Hughes.[1] There was then and continues to be widespread agreement among the justices that most cases, more than half, coming up on a writ of certiorari have little or no merit (Brennan, 1973; Stewart, 1982; Stevens, 1983; Rehnquist, 1987; White, 1982).[2] The first list, a "dead list," received no attention during the Conference. Chief Justice Hughes would circulate among the justices a second list he regarded as sufficiently meritorious for discussion in the Conference. Prior to the next Conference, any one of the justices could remove a case from what eventually became known as the "dead list" and require discussion among the justices.[3] This summary treatment of many cases fit neatly with Chief Justice Hughes's well-know reputation for efficiency and austerity (McElwain, 1949; Danelski and Tulchin, 1973: 343; Pusey, 1952).[4] It is not clear whether the cases on the docket during Hughes's tenure were any less meritorious than those in Taft's time, or whether

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[1] Signs of dead listing appear in the papers of Mr. Justice Stone as early as 1931. Here is a typical exchange: "My Dear Justice Stone: I enclose a list of petitions for certiorari to be presented to the Conference (week of October 7) simply by number and title. If you desire one of the cases on the list to be stated to the Conference, kindly let me know" (Charles Evans Hughes to Harlan F. Stone, 30 September 1935, Papers of Harlan F. Stone, Library of Congress).

[2] Why the movement from full to selective consideration of the Court's caseload? The pressures of workload? The result of adjustment by trial and error? We have no authoritative answer, but it is an issue worthy of further research.

[3] In the Conference, the justices take up for discussion writs of appeal, writs of certiorari, and cases *in forma pauperis* on the "discuss list," and then those argued previously on the merits.

[4] Much later, Justice Black made claims in a public interview apparently in conflict with what we know about the Court's mode of doing business. He said:

> I don't think it can be fairly said that we give no consideration to all who apply. I think we do. You can't decide the case, you can't write long opinions, but when we meet, we take up the cases that are on our docket that have been brought up since we adjourned. Frequently I'll mark at the top "Denied—not of sufficient importance." "No dispute among the circuits," or something else. And I'll go in and vote to deny it. Well, I've considered it to that extent. And every judge does that same thing in conference. (Quoted in O'Brien, 1986: 210)

In truth, Black's description of the process had ceased to describe the actual operation of the Supreme Court since the tenure of Chief Justice Hughes.

Hughes had simply decided to focus the energies of the Court more than had his predecessors.[5]

The process of retrenchment has continued. Mr. Justice Stevens has commented: "In the 1975 Term, when I joined the Court, I found that other procedural changes had occurred. The 'dead list' had been replaced by a 'discuss list'; now the chief justice circulates a list of cases he deems worthy of discussion and each of the other members of the Court may add cases to it" (Stevens, 1983: 13).[6] In a sense, nothing has changed since the tenure of Chief Justice Hughes. But, as Justice Stevens remarks, "there is a symbolic difference. In 1925, every case was discussed unless it was on the dead list; today, no case is discussed unless it is placed on a special list" (*ibid.*).[7] Similarly, no longer does each justice personally read the briefs and record of each case. Some justices participate in the so-called pool of law clerks, a practice initiated during the early Burger Court at the request of Mr. Justice Powell (see Wilkinson, 1974: 17–18, 19–20, 57). Each of the participating chambers contributes a law clerk to the pool. In the pool, one law clerk prepares a memorandum for each case based on an evaluation of the record and briefs. The "cert. pool's" memorandum then circulates among the participating chambers. If the practice of the chambers of Mr. Justice Rehnquist is at all characteristic, then the law clerks within each chamber in this arrangement "mark up" the pool's memorandum and make a recommendation to the jus-

[5] Danelski (1960: 4) says of Hughes: "Hughes disposed of about 60 percent of the petitions for certiorari via the special list, and rarely did a Justice challenge his list. Challenges were also relatively rare during Stone's Chief Justiceship" (less than ten times in five years).

That the chief justice may derive a strategic advantage from his role as creator of the "discuss list" strikes us as plausible and intuitively appealing. But on the basis of interviews at the Court, Perry (1987: 110) comments, "the chief justice is only first among equals. The discuss list is indeed important, but the role of the chief justice in authorizing the list seems to be mostly administrative." The discuss list, in Perry's view (*ibid.*, p. 115), "serves primarily an administrative function." The strategic possibilities of the discuss list seem so obvious and rich that we remain skeptical of Perry's conclusions from personal interviews. Whether the chief justice or the associates manipulate the discuss list for strategic reasons deserves systematic testing.

Our study of the papers of Justice Brennan and Chief Justice Warren reveals that the associate justices have challenged the chief justice on a significant number of occasions in a term—certainly more often than in the tenures of Taft, Hughes, and Stone. During the 1982 term, for which we have collected systematic data, the associate justices—not Chief Justice Burger— placed well over half the cases onto the discuss list.

[6] Justice Stevens is correct in noting the change in terminology. Nevertheless, in their docketbooks and apparently in conversation, the justices continue to refer to the "dead list" as well as the "discuss list."

[7] Provine (1980: 28) states: "Miscellaneous Docket cases soon became so numerous on the special list ['dead list'] that it became more efficient to list only cases the Court might desire to vote for. The change from special-listing most Miscellaneous Docket petitions to listing only those the Court might discuss occurred in 1950 . . . . In recent terms, this practice has been expanded to cover all cases." We have not discovered a precise year for the change in terminology for the Appellate Docket.

tice on whether to vote to grant (see Rehnquist, 1987; Perry, 1987; O'Brien, 1986). During the last term of the Burger Court, the chief justice and Justices O'Connor, Rehnquist, White, Blackmun, and Powell took part in the pool.[8] Some justices continue to rely—as justices have done since at least the 1940s—on their own law clerks to prepare memoranda on each case suited to their individual needs and tastes. Clerks for Justice Stevens screen all of the cases filed and prepare a memorandum for only those cases they believe consequential enough for him to review. Only Mr. Justice Brennan persists in personally evaluating petitions for certiorari, and even he leans on law clerks for memoranda during the latter part of the Summer Break (Brennan, 1973: 479).[9]

These days, the chief justice circulates two lists to the chambers of the justices prior to "noon on the Wednesday before the Friday conference" (O'Brien, 1986: 185–86; cf. Alsup, 1974). Initially, the office of the chief justice, but actually the Conference Secretary, sends around to each chamber a "Conference List"; it includes all of the matters, including petitions for certiorari, jurisdictional statements, motions, and cases submitted, awaiting a disposition from the Court. The second list—the "Discuss List"—includes jurisdictional statements and petitions for certiorari that the chief justice or at least one associate justice thinks worthy of discussion. After an initial list for discussion from the office of the chief justice goes out to the members of the Court, each justice, including the chief justice, adds cases. Normally, the justices discuss between forty and fifty cases in each Conference. The third list—the "dead list"—contains the cases no one regards as important enough or appropriate for discussion in the Conference. It is simply the residual, and it never actually circulates among the justices.[10] By law, the Court must decide appeals on the merits, so all

[8] In his recent book, Chief Justice Rehnquist notes that Mr. Justice Scalia of the current Court participates in the pool (1987: 263). According to Ms. Toni House, Public Information Officer for the Supreme Court, Mr. Justice Kennedy immediately decided to take part in the pool.

[9] Justice Brennan (1973: 472–73), unlike the others currently on the Court, does not see the screening function as a burden: "For my own part, I find that I don't need a great amount of time to perform the screening function—certainly not an amount of time that compromises my ability to attend to decisions of argued cases. In a substantial percentage of the cases I find that I need to read only the 'Questions Presented' to decided how I will dispose of the case. This is certainly true in at least two types of cases—those presenting clearly frivolous questions and those that must be held for disposition of pending cases." Mr. Justice Frankfurter, who certainly had strong feelings about the importance of full deliberation on the merits, treated the screening of "pets. for cert." as an essential part of the job. Oftentimes, he scanned a week's worth of petitions in one evening just before bed. Mr. Justice Douglas took a similar view.

[10] We base our description of the formation of the discuss list on conversations with personnel at the Supreme Court; analysis of the discuss lists and conference lists in the papers of Justice William J. Brennan, Jr., and Chief Justice Earl Warren in the Library of Congress; and personal correspondence with Justice Brennan (2 June 1989).

jurisdictional statements go on to the discuss list for at least a brief discussion (see also Stern *et al.*, 1986: 258).[11] Each term, approximately 70 percent of the "paid" cases filed go directly on to the Supreme Court's dead list and never reach the Conference.[12]

What purpose does the discuss list serve on the Supreme Court? Members of the Court describe it as a neutral, administrative measure, a result of the widespread agreement on the frivolousness of 60 to 70 percent of the caseload (see Perry, 1987: 110–11). None of the justices—not even that apostle of access, William O. Douglas—has argued that more than 30 percent of the cases filed deserves serious attention. With the frivolous cases out of the path, the Conference can concentrate on the important legal issues in the remaining subset. The discuss list simplifies the Court's work. It might also function as a device to keep a persistent minority relatively satisfied with the Court's operation. Theoretically, of course, a single justice may shift any case from the dead to the discuss list.[13] Although a justice in the minority normally cannot hope to win on the merits, he or she may nonetheless prevail on the Conference to justify a decision not to consider the matter. Others see the members of the Court as making the same sorts of judgments about which cases to discuss as they do on which to grant or deny certiorari (e.g., Provine, 1980: 81). Does it contain a conflict? Does the case raise an important issue? Discussion of cases in Conference, then, represents a repetition of the initial phase but with a smaller group of cases from which to chose.

We see a substantial element of truth in all these views of the roles of the discuss list in the Court. Undoubtedly, the discuss list, in varying degrees, serves administrative goals, releases tensions among the justices, and represents at least some of the same political/legal judgments as the decision to grant or deny. Yet, our theoretical framework leads us to an emphasis somewhat different

[11] There is, however, an exception to this rule: "All appeals, save those considered to be improvident, are routinely placed on the discuss list" (Stern *et al.*, 1986: 6). Since President Reagan in summer 1988 signed a bill to abolish the obligatory jurisdiction of the Court on writs of appeal except on matters heard in three-judge district courts, scholars will no longer have to make this distinction except in a handful of cases.

[12] Actually, there seems to be some confusion in the literature about the percentage. Students of the subject have not specified whether they include in their calculations cases *in forma pauperis* (cases in which the petitioner is unable to pay a filing fee). The Court places all but a handful of the unpaid cases on the dead list—about half of the total of cases filed each term. If scholars have included unpaid cases, then a much smaller percentage of the paid cases (cases in which the petitioner pays for filing) should have gone on to the dead list. We have no answer to this question, since we have excluded cases *in forma pauperis*.

[13] Some justices may wish to hedge their bets a little. In a Memorandum to the Chief Justice, Mr. Justice Black wrote: "I am of the opinion that certiorari should be granted in the following cases and shall ask that this be noted, but do not wish to have any of them taken off the Special List unless I am joined by one of my Brethren" (Hugo L. Black to Earl Warren, 25 September 1962; Papers of Earl Warren, Library of Congress).

from previous research. In our view, the informational needs of the justices and the costs of errors differ at the two stages of agenda building. And, of course, the quality and reliability of the indicators before the justices vary tremendously (see Spence, 1974; Feldman and March, 1981; Perry, 1987). On certain indicators (e.g., the participation of the United States as a petitioner) the justices can place a high degree of reliance; on others (e.g., allegations of conflict) the justices will cast a jaundiced eye. Even on the more technical criteria, such as the existence of an intercircuit conflict, lawyers and judges will often disagree. In the first stage, faced with thousands of cases, the Conference can put just about any outside sign of distinction about a lawsuit to good use. The Court need not worry much about mistakes at this stage; it can still rid itself with relative ease of "noncertworthy" cases. Even inexpensive, perhaps untrustworthy, information helps to discriminate among the profusion of cases. Thus, for example, a dissent in a lower court, especially from a familiar and respected judge, might draw the attention of clerks and justices who would otherwise give a case short shrift.

In the second stage, after selecting a much smaller group of cases, the Court requires much more reliable information about the qualities of and differences among cases. Mistaken choices here exact high costs in time and public embarrassment for the justices.[14] Qualities of, or indicators in, a case communicate, in varying degrees of effectiveness, information about it as a vehicle for the Court. In our view, the costliness of information goes a long way in shaping the reliability of the various indicators as predictors of the cert- or discuss-worthiness of cases.[15] Thus, for example, the filing of petition for certiorari costs the solicitor general in time, opportunities foregone, and reputation. It is, consequently, a costly and reliable indicator. Filing of amicus curiae briefs is also costly in time, money, opportunities foregone, and so forth. Accordingly, in the second phase, we anticipate particular reliance on the United States as a petitioner, the existence of conflict, outcome in the lower court, and briefs amicus curiae—all relatively reliable or costly pieces of information—and less on other facets of a case. In section V, we shall set forth in a more formal and detailed manner our expectations about particular variables in our models.

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[14] Baker (1984: 612) puts it this way: "The cert. process is devoted more to finding the flaws in apparently certworthy cases than to uncovering cases hidden by weak advocacy. It is easy to see why. If the Court makes a mistake in granting review, it will live with that mistake for months before finally dismissing cert as improvidently granted or deciding the case on grounds wholly unrelated to the original reason for granting review. . . . Every time the cases comes up for discussion the Justices and clerks who recommended the grant are embarrassed anew."

[15] For more on our notions about the role of the costliness of information in the selection of cases, see Caldeira and Wright (1988: 1112–13).

Quite apart from the question of informational needs at the two stages, the strategic situation in the initial winnowing permits—indeed, invites—wide sway for the policy orientations of the justices. If, as we assume (see sec. III and Caldeira and Wright, 1988: 1111–14), the justices pursue policy goals, then they should do so here as well. In fact, because of the ambiguities about the qualities of cases prior to the stage of discussion, the formal criteria in Rule 17[16] might not constrain members of the Court as much in the exercise of policy judgments as later in the process.

In our view, the formation of the discuss list is, first and foremost, a political process, driven by the ideological stakes so often at issue in the great matters brought before the justices. It is the initial skirmish in the battle for public policy; and the content of the discuss list holds enormous implications for the eventual shape of decisions on the merits.

III. A THEORETICAL FRAMEWORK

We have theorized that the justices of the Supreme Court possess ideological preferences for particular public policies, that they pursue these goals, and that they do so by choosing to decide cases with the largest possible impact on legal, political, social, and economic policy (Caldeira and Wright, 1988: 1111–14; Murphy, 1964). Not for a moment, though, do we imagine the justices as ideological machines, mindlessly registering preferences. The Court as an institution imposes formidable constraints. Thus, the justices maximize their ideological preferences within a framework of legal rules, societal expectations, professional values, and institutional norms. And, regardless of the constraints, if the justices hope to pursue their policy objectives in an efficient manner, they should allocate time to the cases that hold the greater opportunity for shaping future public policy, in light of the resources needed to hear and decide the cases. In gist: the justices should decide important cases in a direction consistent with their ideological preferences (see Baum, 1977; Linzer, 1979: 1303 n.539).

We predict that the justices will discuss and review the cases they desire to reverse on ideological grounds and those they believe will make the greatest impact. Most, although not all, of the time the ideological stakes of a case are transparent, and one need go no further than the petition and brief in opposition to ascertain them. One need not be a subtle political analyst to make such a

[16] Rule 17 of the Supreme Court sets out with deceptive authoritativeness the formal, legal criteria for the acceptance of a case on a writ of certiorari: conflict among the courts of appeals on an issue, the presence of an important legal issue the Supreme Court has not yet decided, disagreement between the lower court and a precedent of the Supreme Court, and a serious departure from the "accepted and usual course of judicial proceedings" (Stern *et al.*, 1986: 193–253). In the most recent version of the Supreme Court's Rules, Rule 17 has become Rule 10. Nonetheless, because Rule 17 governed the Court during the 1982 term, we continue to refer to it under the old system of numbering.

determination; and certainly a justice, even a law clerk, will readily do so on most occasions. The significance of a case may be a great deal more troublesome to assess. Most petitioners and appellants will, as a matter of course, trumpet the importance of their cases. So we ask: How do the justices discover the practical significance of cases filed in the Supreme Court?

For theoretical purposes, we assume that the "importance" of a case is proportional to the demand for adjudication among the potentially affected parties, and that the extent of participation by amici indicates the actual demand for adjudication of the issue in the Supreme Court.[17] We argue, then, that the participation of organized interests as amici curiae provides the justices with information, or signals, otherwise not readily available, about the legal, social, political, and economic ramifications of cases on the Court's docket; and the justices make inferences about the impact of their choices based on observation of the extent of activity by amici curiae (on signaling, see Jervis, 1970; Feldman and March, 1981; Spence, 1974; Perry, 1987).[18] Potential amici may choose to file a brief either in support of or against a petition for certiorari or jurisdictional statement. In our theoretical framework, both should have the effect of increasing the probability of discussion and of a grant.[19] For, after all, both types of briefs suggest the importance

[17] On the rise of the brief amicus curiae as a form of participation, see O'Connor and Epstein, 1981–82; Bradley and Gardner, 1985; and Krislov, 1963. For a recent discussion, see Rosenthal, 1988.

[18] By our focus here on briefs amicus curiae, we do not in any way intend to denigrate the role and influence of direct representation—or "sponsorship"—by organizations in the selection of the Supreme Court's plenary docket. Indeed, there is growing evidence of the importance of sponsorship and the status of parties; see Lawrence, 1987; Epstein, 1985; and Caldeira and Wright, 1989a.

[19] Is the relationship between the filing of a brief amicus curiae and the decision to grant certiorari or to discuss a spurious one? Do organized interests, as some critics have argued, screen cases on the same bases as the clerks and the justices on the Supreme Court? Others have made much the same argument about the effects of the United States as a petitioner. It is a plausible contention and one to which we have given much thought; but the evidence we have collected does not support the critics' case.

First, we have conducted a detailed survey of the behavior, motivations, and tactics of organized interests (Caldeira and Wright, 1989b), and our results suggest criteria other than those noted in Rule 17 or shown to be significant in our previous research on the selection of cases within the Court (Caldeira and Wright, 1988). For example, organized interests will often file a brief amicus curiae in response to demands of members. Since organized interests possess finite resources, they will and do take the Court's criteria into account; but it is simply not true to say that they mimic the Court's process of selection. We could make much the same point with further analysis of the data we present here.

Second, in the case of the United States as a petitioner, we think the critics have a much better argument. The solicitor general does, indeed, attempt to anticipate the response of the Supreme Court. So, like all smart litigants, the solicitor general picks cases with eyes carefully fixed on Rule 17. Nevertheless, the solicitor general, like all lawyers at the bar, has a client, and will sometimes put forth cases for reasons other than those set out in Rule 17 (see Caplan, 1987; Schnapper, 1988; Uelmen, 1986). And even the solicitor general

of a case (Shapiro, 1984). Why would an organized interest file a costly amicus brief in opposition if the case did not matter or raise an important issue?[20]

In sum, we anticipate the potency of briefs amicus curiae and the ideological outcome in the lower court as forces in the decisionmaking of the justices on petitions for certiorari. These are not, however, the only considerations at play in the calculus of the Court. In section IV, we take up some of these criteria as we make a brief journey through some of the earlier literature. The discussion in the next section serves as well to identify the variables we specify in our statistical analyses.

IV. PREVIOUS SCHOLARSHIP ON SUPREME COURT AGENDA SETTING

A. The Discuss List

To our knowledge, only two scholars have analyzed the discuss list systematically and empirically. Even the better textbooks on the Supreme Court rarely contain more than a few sentences or paragraphs of description on the discuss list or venture any speculation about the implications of or calculations involved in this device (see, e.g., O'Brien, 1986: 185–86). Thus, we do not have a great deal of literature on which to base our analysis. Ulmer and associates (1972: 639), in their study of cue theory based on Harold H. Burton's docketbooks, use only those cases placed on the discuss list in the 1955 term of the Court. Within the set of cases discussed in Conference, the justices showed a marked tendency to grant certiorari in cases in which the United States was a party and petitioner. Ulmer and associates "reject two of the three cues suggested by earlier work" (*ibid.*, p. 642)—that is, civil liberties as an issue and dissension in the lower court.

More recently, Provine (1980), again with Justice Burton's docketbooks, examined the discuss list and its properties in greater detail, and, unlike Ulmer and associates, focused on differences between the dead and discuss lists. According to Provine, "the technical quality of a case, its procedural posture, the apparent rightness of the petitioner's claims, and the subject matter of the petition—all seem to be relevant criteria in this preliminary elimination process" (*ibid.*, p. 29). Over three terms of the Court—1947, 1952, 1955—Provine found that the justices tended to "special list some subject matters oftener than others" (*ibid.*, p. 30). In all three terms, the Court dead listed many more contract, common

is not invincible; from term to term, the Court refuses to hear from 20 to 35 percent of the cases in which he petitions for certiorari. Unfortunately, we have no systematic analysis of the criteria the solicitor general uses in screening the government's cases.

[20] See Caldeira and Wright, 1988, 1989b, for discussions of the actual costs and procedures involved in the filing of a brief amicus curiae as well as data on organizations' perceptions of the costs and benefit of such participation.

law, and federal criminal and tax cases than one should have anticipated on the basis of chance alone. By the same token, the Court in these same terms evinced a much lower propensity to place issues of civil liberty on the special list (*ibid.*).

Later in the analysis, Provine reports: "cases involving dissension in the lower courts and civil liberties are well represented on the special list, even though they are special-listed considerably less often than cueless cases" (*ibid.*, p. 80). She goes on to argue that the justices do not rely on a set of cues to separate cases into those worthy of careful review and those of a frivolous nature (*ibid.*, p. 82). Instead, the "justices do indeed seem to act upon certain shared ideas about the proper work of the Supreme Court, ideas that correspond with the responsibilities of the court of last resort in complex legal systems" (*ibid.*, p. 103). In our view, Provine's contentions seem inconsistent with the evidence presented in her own tables; these suggest significant connections between various so-called cues and the Court's propensity or tendency to place cases on the dead list. Nevertheless, at one point, Provine (*ibid.*, p. 81) allows that "the facts which control special listing and those which control voting after discuss may be similar."

B. The Decision to Grant or Deny Certiorari

There is, of course, a substantial literature on how the Supreme Court decides to grant or deny petitions for writs of certiorari. It is a source of ideas and propositions about the determinants of the Supreme Court's behavior in shaping the discuss list.

The empirical evidence vividly demonstrates how often the justices reject cases seemingly within the criteria of Rule 17 and accept cases on their face inconsistent with the letter of the rule. Based on data from the *Journal of Proceedings* in the *United States Reports*, Tanenhaus *et al.* (1963) report the significant influence of the presence of the United States as a petitioning party, dissension in the courts below, and a civil liberties issue on the chances a case would go on to the plenary agenda of the Supreme Court. Several investigators (e.g., Ulmer *et al.*, 1972) have demonstrated the crucial part the solicitor general of the United States performs in the Court's screening activities. Over the years, the office of the solicitor general has a earned a reputation for picking cases with considerable care and concern for the rules and procedures of the Supreme Court (Caplan, 1987; see Segal, 1988; Ulmer and Willison, 1985).

Others have argued for the importance of the outcome in the lower court as a determinant of the Court's screening decision. The ideological consequence of a grant or denial, according to Songer (1979), strongly affects the probability that the Court will

bind a case over for full treatment (see also Armstrong and Johnson, 1982).

Rule 17 of the Supreme Court and the public statements of the justices strongly underline the crucial role of "conflicts" between and among courts and the "importance" of a case as forces motivating the Court to grant a petition for certiorari or note probable jurisdiction on a jurisdictional statement (see Stern *et al.*, 1986: 188–253). Until recently, however, political scientists have not taken the impact of either conflicts or "importance" on the Court's decisionmaking into account. This lacuna derives in no small measure from the difficulty of identifying either conflicts or importance with any certainty—a problem for the Supreme Court and the bar, no less than for social scientists (Estreicher and Sexton, 1986; Perry, 1987).

But Ulmer (1983, 1984) has shown with admirable clarity the striking effect of conflicts on agenda setting. He reports (1984) a remarkable connection between genuine, as opposed to alleged, conflicts among courts (e.g., intercircuit conflicts) and the probability of the Court's binding a case over for full treatment. Caldeira and Wright (1988) report that amicus curiae briefs increase the likelihood of a grant—as much as does the presence of the United States and conflict, the two most potent of the other independent variables. A brief amicus curiae serves as a good indicator of the legal, social, and political importance of a case. We found, in addition, a significant connection between the decision to grant certiorari and the allegation of conflicts, a reversal between the two lower courts, and the presence of amicus briefs in opposition. The statistical evidence adduced there strongly supports the theoretical arguments we put forth in section III.

V. STATISTICAL ANALYSIS

The data for this article come from a larger project on the influence of organized interests on the Supreme Court (see Caldeira and Wright, 1988, 1989a, 1989b, 1990). Our sample includes all paid cases in which the Supreme Court granted or denied a petition for writ of certiorari or noted probable jurisdiction on a writ of appeal during the 1982 term ($N=2,060$). Effectively, we have a number of cases with docket numbers from 1981 as well as a much larger number with 1982 docket numbers. Of these 2,060, 1,906 came up on certiorari, and the rest were appeals. Here we confine our attention to the petitions for writs of certiorari. We have two dependent variables—whether the Conference discussed a case, and whether the Court granted certiorari—both of them dichotomous. In this sample of cases, the Supreme Court granted a petition for certiorari in 145, or 8 percent, of the instances. For the purposes of statistical analysis, we exclude all cases on which we lack one or more values of the independent variables. That gives us a sample

of 1,771, of which the Court granted certiorari in 141 cases. The Court designated 459, or 24 percent of the paid cases on certiorari for discussion in the Conference (on a base of 1,906), or 26 percent if we use the cases for which we have complete data as the base (1,771).[21] Of the cases the justices actually discussed in the Conference, about 30 percent of the petitions for a writ of certiorari were granted. Recall that we are speaking of the paid cases, so the proportion of cases *in forma pauperis* on the discuss list would no doubt run much, much lower. To be sure, we cannot claim that we have a sample representative of all terms of the Court; but we have no reason to believe that it differs in any important respect from recent terms (see Hellman, 1983a, 1983b, 1985).

We have collected the bulk of the information from three sources. From the docket books of Mr. Justice William J. Brennan, Jr., we have taken an enumeration of the cases placed on the discuss list. Thus, for each case in our sample, we note whether or not the members of the Court discussed it in Conference. From *Records and Briefs of the Supreme Court* we collected for each case information on dissent in the lower court, disagreement between the lower courts, nature of the issues, ideological outcome below, whether the United States was a petitioning party, the presence of amicus curiae briefs in support of or against certiorari, and, of course, whether the justices granted or denied the petition. And from the New York University Law School's Project on the Supreme Court (1984a, 1984b; see also Estreicher and Sexton, 1986, for an analysis of that study; cf. Feeney, 1975), we ascertained whether (1) the attorney or attorneys for the petitioner had alleged conflicts on legal doctrine or interpretation between or among lower courts or between the lower court and the Supreme Court, and (2) in the opinion of the editors and advisers of *New York University Law Review*, a real or square conflict between courts had occurred (see Caldeira and Wright, 1988, for a discussion of real or square conflict between courts). We have created two variables—whether the petitioner claimed one or more conflicts, and whether one or more "real" conflicts occurred in a case. Of the petitions for a writ of certiorari, about 6 percent contained real conflict, and about 60 percent set forth an alleged conflict.

For each case in our sample, we have coded the ideological direction of the decision in the lower court immediately below based on our reading of the summaries in *United States Law Week* and *Records and Briefs*. We categorized the lower court's decision in each as liberal, conservative, or indeterminable or irrelevant. For the most part, we followed conventional procedures for such classifications, much in the fashion of Goldman, Spaeth, and others. For some 92 percent of our sample, we were able to make a clear as-

[21] In some 8 percent of the cases in our sample, we could make no classification of the ideological direction of the lower court's decision.

sessment of the ideological direction of the lower court's decision; of these cases, about 60 percent were decided in a conservative direction.[22]

The Appendix presents our operationalizations of the independent variables we have identified in our reading of previous research and derived from our theoretical framework. In our examination of selecting cases for the discuss list, the first phase, we hypothesize a significant relationship between each of the variables and the choice of cases for the discuss list. All but one of the signs should run in a positive direction. In one case, ideological direction of the decision in the lower court, we expect a liberal outcome to increase the probability of discussion, so the sign should be negative. This prediction follows naturally from the ideological balance among the justices in October Term 1982 and the demonstrated tendency of the Court to take cases to reverse them.

For the second phase of case selection—selecting cases for certiorari from among those on the discuss list—we expect a different pattern. We hypothesize a strong relationship between the presence of the United States as a petitioner and of briefs amicus curiae in support, actual conflicts, and ideological direction of the decision in the lower court—each relatively reliable and costly indicators—and the decision to grant certiorari among cases on the discuss list. However, in this stage of selection, in contrast to the first, we expect no significant relationship between disagreement among lower courts, alleged conflicts, issue area, and dissent in the lower court—each "noisy," inexpensive, and relatively unreliable indicators. Because of the need for reliability, the focus in the second phase is on costly but more reliable indicators. Issue area, of course, tells us nothing about the certworthiness of a case; it picks up the Court's priorities at a particular time. Dissent in the lower court might draw attention to a case, especially if a visible judge does the writing, but the Court must look to the content of the judicial opinion for indicia such as conflicts among the circuits in order to justify certiorari. Similarly, a reversal between the trial

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[22] Several scholars have suggested the presence of a respondent's brief in opposition as a predictor of certiorari. If a respondent forgoes a response, so the argument run, it indicates the lack of a credible petition for certiorari (Prettyman, 1975). In fact, Stern *et al.* (1986: 392) suggest:

> A respondent may also choose to waive the right to oppose a petition which seems clearly without merit. This will save time and money, without any substantial risk if he feels certain that certiorari will be denied. . . . In recent years, in order to expedite the filing of responses in the more meritorious cases, the Solicitor General has waived the right to file opposition briefs in many cases he deems to be frivolous or insubstantial. States often do the same thing, especially in criminal cases.

The Court seems to request a response routinely prior to discussing a case in Conference; we encountered no cases discussed without a response. Perforce a case granted certiorari will have drawn a response, even if the Court itself has requested it.

court and appellate court below begs a second look. That might well trigger discussion. It does not in itself inform the justices of how well the case fits the Court's formal and informal criteria. In more than 60 percent of the petitions, counsel allege a conflict among circuits, far more often than the evidence of conflict actually indicated. This might catch the attention of the Court in the first stage. Yet, for a grant of certiorari on this ground in the second phase, the justices must discern a real conflict after study. Briefs amicus curiae in opposition to certiorari should, according to our argument in section III, increase the probability of discussion. Here, again, any sign of more than minimal public concern will raise the salience of a case. In the decision to grant or deny, however, briefs amicus curiae in opposition should make no difference.

Briefs amicus curiae in support of certiorari, like petitions from the United States, send a costly message to the Court about the importance of a case. Organized interests, for example, the United States, appear repeatedly in the Court and develop reputations. No organization has the financial resources to file an amicus brief in each and every case. So reputation and limited resources constrain the filing of briefs in favor of certiorari. A brief amicus curiae in the first stage draws attention. In the second stage, a brief amicus curiae continues to carry information; the arguments and evidence in favor of the importance and other facets of certworthiness should increase the probability of certiorari.

We assume justices are motivated by concern for policy, so we expect a significant effect from ideological outcome in the second as well as the first stage of screening. Even within the set of cases on the discuss list, most of them quite plausible candidates for certiorari, the Court will have an opportunity to choose among them in order to maximize the policy agendas of members. The Court, as Rule 17 states and as the justices reiterate from time to time, places a high priority on the resolution of conflicts among lower courts. Thus the presence of a real conflict should not only occasion interest in the initial phase in the Conference but also raise the probability of certiorari among the cases on the discuss list.

We begin with some simple descriptive data about the properties of the Supreme Court's two lists of cases at the agenda-building stage. Undoubtedly, some characteristics increase the appeal of a case to the members of the Court. In screening cases, the justices and their clerks look for qualities such as conflict, the solicitor general as a petitioner, and the like. This we know from the statements and the papers of the justices. The question is: Which qualities of a case increase the probability of the Conference's choosing it for discussion? How much difference do these qualities make? The first column in Table 1 arrays our data on the relationship between the decision to discuss and the presence of a number of characteristics. The number in the first column represents the percentage of cases with a particular quality making the

discuss list; directly below is the percentage in the absence of the characteristic. For example, of the cases in which the United States petitioned ($n=49$), 92 percent proceeded to the discuss list; of the cases without the United States as a petitioning party, only 24 percent succeeded. It is, in effect, the probability of the Conference's placing a case on the discuss list, given the presence of a characteristic.[23]

The data confirm our hypotheses about the importance of ideology and briefs amicus curiae in the makeup of the discuss list. Overall, the presence of the United States as a petitioner, actual conflict, and briefs amicus curiae are the most potent forces in predicting the shape of the discuss list. The presence of any one of these characteristics made a case a better-than-average candidate for discussion; issue area, in the bivariate relationship, appears to be the sole exception. More than 90 percent of the cases the solicitor general put forward ultimately figured in the debate in Conference. Similarly, of the cases in which the petitioner raised an actual conflict, the Conference selected more than 80 percent for deliberation. Two-thirds of the cases with one brief amicus curiae went on to the discuss list; and two, three, or four briefs increased the edge. When there was contention in a case, whether exhibited by dissent within or reversal between the lower courts, the Conference was more likely to discuss a petition for certiorari; about half of the cases with some sort of dissensus appeared on the discuss list. Perhaps more important, in light of our theoretical framework, a case decided by a lower court in a liberal direction had an extremely high probability of going beyond the initial hurdle, much higher than that of the average case. A case decided below in a conservative direction had an extremely low probability—.14—much lower than the average within the sample. The tendency to bring forward cases of a liberal stripe for discussion strikes us as further evidence of the political nature of agenda setting on the Supreme Court.

In the second column of Table 1 we examine the connection between the presence of particular characteristics and the decision to grant or deny certiorari for the cases on the discuss list. For example, of the cases in which the U.S. petitioned and the Court discussed ($N = 45$), 87 percent were granted certiorari. Broadly, the pattern of the Court's propensities evinced at the previous stage persists. Within the subset of cases brought forth for deliberation, the Conference granted certiorari in an extremely high proportion of the cases in which the United States petitioned, conflict between or among courts was present, and organized interests filed amicus curiae briefs. In particular, ideology continued to help explain the continued ideological slant of the Conference's selections:

[23] For comparative purposes, we present—but do not discuss—in the third column the probability of certiorari in the entire sample.

Table 1. Qualities of Cases on Discuss List and Certiorari

	Proportion Discussed (1)	Proportion Granted Cert. | on Discuss List (2)	Proportion Granted Certiorari (3)
Total	.26 (1,771)	.31 (459)	.08 (1,771)
United States as petitioner			
Yes	.92 (49)	.87 (45)	.80 (49)
No	.24 (1,722)	.24 (414)	.06 1,722)
Disagreement among lower courts			
Yes	.47 (445)	.36 (207)	.17 (445)
No	.19 (1,326)	.26 (252)	.05 (1,326)
Alleged conflicts			
Yes	.30 (1,219)	.33 (368)	.10 (1,214)
No	.16 (552)	.19 (91)	.03 (552)
Actual conflicts			
Yes	.83 (106)	.83 (88)	.69 (106)
No	.22 (1,665)	.18 (371)	.04 (1,665)
Issue area/civil liberties			
Yes	.27 (910)	.28 (248)	.08 (910)
No	.25 (861)	.33 (211)	.08 (861)
Liberal outcome/lower court			
Yes	.45 (682)	.36 (304)	.16 (682)
No	.14 (1,089)	.19 (155)	.03 (1,089)
One amicus curiae brief in support			
Yes	.66 (70)	.46 (46)	.30 (70)
No	.24 (1,701)	.29 (413)	.07 (1,701)
Two or three amicus curiae briefs in support			
Yes	.73 (26)	.63 (19)	.46 (26)
No	.25 (1,745)	.29 (440)	.07 (1,745)
Four or more amicus curiae briefs in support			
Yes	.90 (19)	.71 (17)	.63 (19)
No	.25 (1,752)	.29 (442)	.70 (1,752)
One or more amicus curiae briefs in opposition			
Yes	.69 (35)	.50 (24)	.34 (35)
No	.25 (1,736)	.29 (435)	.70 (1,736)
Dissent in lower court			
Yes	.52 (207)	.39 (107)	.20 (207)
No	.23 (1,564)	.28 (352)	.06 (1,564)
	N = 1,771	N = 459	N = 1,771

the justices chose more than one third of the cases decided liberally in the court below and less than 20 percent of the conservative cases. Ultimately, very few of the cases the members of the liberal minority might wish to take and correct (i.e., those decided in a conservative direction in the lower court) went forward to a decision on the merits. Decisions within the Conference simply exacerbated the pronounced biases we noted earlier. Nevertheless, consistent with our hypotheses about the differential needs for information at the two stages of selection, the Court seems to weigh certain of the qualities less heavily in the decision to grant within the discuss list than it does in the earlier stage. Thus, the impact of several of the variables—notably, disagreement among the lower courts, dissent in the lower court, and issue area—on the probability of a grant of certiorari declines in the second stage. These qualities exert a significantly greater pull at the earlier stage.

Thus far, we have presented descriptive information about the properties of the discuss list. We turn now to multivariate analyses of the determinants of the discuss list and of the decision on certiorari in order to discover whether variables that appeared influential in Table 1 prove spurious. We test whether the theoretical model developed for the selection of cases from the entire docket of paid cases (Caldeira and Wright, 1988) applies as well to the decision on which cases to discuss and, of this list, which to decide. To estimate the influence of the independent variables on our two dependent variables, both of which are dichotomous, we utilize logit analysis (see Maddala, 1983).

Table 2 presents the estimated logit coefficients for our models of the discuss list, the decision on certiorari of those on the discuss list, and, for comparative purposes, the same equation for the decision to grant or deny within the full sample.[24] We restrict our interpretation of the results to the first two columns. The statistics for all the equations are impressive. A large proportion of the coefficients for both equations reaches statistical significance, and none runs in an unanticipated direction. In both instances, the model predicts more than 80 percent of the cases correctly, although it does slightly better for the decision on certiorari within the discuss list. For both models, we encounter a greater tendency to make false predictions in a positive rather than a negative direction. That is, we predict that more cases will make the discuss list and the plenary docket than actually do. Without further informa-

[24] The coefficients and *t*-ratios we report here in the third column differ somewhat from those we set out in our earlier work (Caldeira and Wright, 1988: 1118). First, for reasons of convenience and access, here we use logit instead of probit analysis. Results from the two analytic techniques do not differ in any appreciable way. Second, we have included an additional variable, dissent in the lower court, in our analyses. Nonetheless, the results presented here do not differ in any material respect from those in the prior article.

Table 2. Logit Coefficients for Certiorari Models

	Discuss?		Grant | Discussed?		Grant?	
Variables	MLE[a]	*t*-ratio	MLE	*t*-ratio	MLE	*t*-ratio
Intercept	−3.09	−17.20	−3.39	−6.78	−5.70	−12.70
United States as petitioner	2.88	5.09	3.02	5.80	3.90	8.48
Disagreement among lower courts	0.64	4.44	0.14	0.48	0.40	1.54
Alleged conflicts	0.51	3.40	0.49	1.23	0.91	2.52
Actual conflicts	2.03	6.79	3.11	8.52	3.53	11.39
Issue area	0.66	4.71	−0.17	−0.55	0.11	0.40
Ideological direction of lower court	−1.40	−10.00	−1.03	−3.03	−1.49	−5.14
One amicus curiae brief in support	1.49	4.97	0.92	2.22	1.64	4.19
Two or three amicus curiae briefs in support	1.60	3.16	2.17	3.80	2.63	5.06
More than three amicus curiae briefs in support	3.31	4.01	2.50	3.80	3.56	5.59
One or more amicus curiae briefs in opposition	1.18	2.58	0.29	0.49	0.79	1.44
Dissent in lower court	0.85	4.59	0.28	0.85	0.67	2.16
Percentage correct	82.0%		85.4%		95.0%	
False negative	16.4%		12.2%		3.6%	
False positive	26.4%		21.0%		25.0%	
N	1,771		459		1,771	
	discuss 459		deny 320		deny 1,630	
	no discuss 1,312		grant 141		grant 141	

[a] Maximum likelihood estimate.

tion from the Conference, we can only speculate on the sources of these false positives. It is conceivable that these cases contain many signposts of importance (e.g., square conflict, reversal, etc.) but bear some fatal defect in procedural stance or perhaps an unfortunate pattern of facts (see Provine, 1980: 29). Thus, even if on its face a case seems like a perfect vehicle for certiorari, some unanticipated factor may derail it before the phases of discussion or the decision to grant or deny. For the discuss list, the proportion predicted correctly, 82 percent, represents a substantial improvement in capacity over the null model (the percentage of cases not discussed in Conference).[25] Similarly, for the decision on certio-

[25] The Court refuses to discuss about 74 percent of the paid cases. Thus,

rari within the discuss list, our model performs considerably better than does a prediction based on no more than knowledge of the proportion of cases in which the Court granted a petition for certiorari (85.4 percent versus 69.8 percent correct).

In interpreting the results in Table 2, we have found it useful to think of our variables in two sets: (1) some affect both the decision to discuss and the decision to select among the cases discussed for certiorari (e.g., United States as a petitioner), and (2) some influence only the decision to discuss and thereby affect the probability of certiorari, but have no further effect in helping the justices choose among discussed cases (e.g., disagreement among lower courts). What differentiates these sets of variables? The cost and reliability of the first set, we submit, permits it to carry a heavy weight at both stages; the second, less costly and less reliable set of indicators provides assistance in an environment of low information but little or none in the richer informational environment of the much smaller set of cases on the discuss list.

Overall, for both equations, the statistical results confirm our theoretical model of agenda formation in the Supreme Court: as we anticipated, the sets of considerations at play in the first two phases differ significantly; and ideology and briefs amicus curiae carry a great deal of weight at both stages of the sifting process. For the Conference, the decision on certiorari is not simply a replay of the decision to place a case on the discuss list. These results fit nicely with our view of the informational needs of the Court at the various junctures of case selection. In the initial sifting, the Court can be relatively generous; it runs little risk. Cases mistakenly brought forward can go back on the shelf in the secrecy of Conference, and the bar and public are never the wiser. It can, therefore, take into account a much wider variety of considerations in forming the discuss list than later on; and that is precisely what the justices do. In the equation for the discuss list, all the coefficients are significant—each, independently, makes a difference in the sifting process. Apparently, the justices do not engage in direct bargaining or negotiation on the list prior to the Conference (see Perry, 1987). Thus, the makeup of the discuss list is the summation of a series of individual calculations largely free of collective interaction. It is therefore not at all surprising to encounter such a large number of considerations at work in the initial sifting for discussion. Once the Court has made public the decision to grant certiorari, the stakes increase considerably. To be sure, in several cases each term, the Court "dismisses a writ of certiorari as improvidently granted," but it is an embarrassing step to take and wastes the time and effort of the parties. Not nearly as

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on the basis of the null model, we could predict 74 percent of the cases correctly without knowing anything about them. To gauge the predictive capacity of our model, then, we need to compare it against the null model.

many of the coefficients reach statistical significance in the equation for the decision to grant certiorari as in the one for discussion. This is due, in part, to the reduced size of the sample in the second stage; but even if we take into account the shrinking number of cases, the pattern persists. Obviously, the Supreme Court sharpens the focus on a smaller, more determinative set of criteria at the last stage of agenda formation.

Of the criteria utilized in the formation of the discuss list, which, based on a simulation of probabilities from the coefficients in Table 2, played the most consequential role? Each independent variable reaches statistical significance, indicating the broad sweep of the Conference at this stage of decision. The United States as a petitioner and the presence of more than three briefs amicus curiae in favor of certiorari yielded large and statistically secure coefficients. And the increasing magnitude of the effects for multiple amicus briefs in support strikes us as especially impressive. The more amicus briefs in favor of a petition, the higher the probability of discussion, although the effect tails off at some point. As we anticipated, one or more amicus curiae briefs in opposition had an effect quite the opposite of what the organized interests undoubtedly intended; it increased the probability of discussion (see Ennis, 1984, for comments consistent with this result).

Ideological direction of the lower court's decision exerted a greater impact than did most of the qualities of cases. "A grant of certiorari by the Supreme Court to review a decision of a lower court suggests that the case at issue is a genuinely doubtful one. [T]he most common reason members of our Court vote to grant certiorari is that they doubt the correctness of the decision of the lower court" (Rehnquist, 1987: 1027). This is as true of the discuss list as of the decision on certiorari. In October Term 1982, a moderate-conservative coalition often controlled a majority in the Supreme Court. Liberals could hope for the consistent support of only Brennan, Marshall, and Stevens. The federal courts, however, were filled with President Carter's appointees, most of them at odds with the majority on the Supreme Court. And, of course, quite a few state supreme courts had shown a willingness to go far beyond the Supreme Court in support of traditionally liberal values. The result we see here, bias in favor of discussing and ultimately granting cases decided in a liberal direction below, makes good sense given the ideological tension between the Supreme Court and the lower courts. And it comports well with our theoretical framework.

Conflict between courts, as Rule 17 would have us believe, is one of the chief determinants of whether or not the Conference discusses a case. Mr. Justice White has in numerous dissents to denials of certiorari criticized his colleagues for failing to hear conflicts, and many commentators have debated about whether the Court has adequately performed the role of resolving inconsisten-

cies in the federal system (e.g., Estreicher and Sexton, 1986). The Court may not hear as many conflicts as some would prefer, but the results here leave little doubt about how high a priority the justices assign to this criterion.[26]

Several of the qualities exerted a much lesser, though still significant, effect on discussion. Disagreement between courts, claims of conflict, presence of civil liberties as an issue, and dissent in the lower court—all pulled less weight in the model. These variables, of course, represent less reliable indicators of the plausibility of a case. Accordingly, the more reliable the indicator of a case's quality, the more important it was in the decision to discuss. In keeping with previous research (Provine, 1980: 28), issue area does discriminate between the dead- and discuss-listed cases. The Conference's marked tendency to discuss more cases involving civil liberties and rights than those on economic questions comports well with the Supreme Court's conception of itself in the modern era. In a sense, issue area simply indicates the Court's collective priorities in a particular term. Of course, priorities shift over time, as personnel changes and the Court decreases the uncertainty of issues once high on its agenda.

How do these same criteria figure in the decisional calculus of the Conference on petitions for certiorari within the cases discussed? The pattern here is clearer than for the discuss list. Thus, once the Conference has narrowed the field, the justices react to some of the classic criteria specified in Rule 17: importance of the issue, as revealed by the participation of the solicitor general and amici curiae, and conflicts among appellate courts. In this second phase of selection, the presence of the solicitor general as a petitioner, real conflicts, and briefs amicus curiae proved potent predictors of the decision to grant or deny. Real conflict and the presence of the solicitor general bulked especially large; none of the other variables comes close in magnitude. To a lesser extent, but still quite significant, the ideological direction of the lower court's decision motivated the Supreme Court's choices. Given the political bias built into the discuss list, the persistent influence of ideological outcome on the decision on certiorari provides eloquent testimony to the importance of policy preferences in the Court.

Here, as for the discuss list, the filing of several amicus briefs increases the probability of a grant above and beyond what we would anticipate from one brief alone. The presence of several briefs amicus curiae communicates the breadth of interest in a particular case; it lessens the chance of making a mistake about the importance of an issue. This result, for both stages, runs contrary to the pronouncement of an experienced advocate: "A second or third amicus brief has little impact, especially if the additional

[26] Indeed, some criticize the Court of late for relying too heavily on intercircuit conflicts in the decision on certiorari. See Geller and Englert (1990).

amici simply repeat points made by other parties. Encourage the amici to work together on a single brief" (Baker, 1984: 626). But second, third, and even more briefs do make a difference.

After the formation of the discuss list, half of the qualities of cases fall by the wayside. Our theoretical argument about the differential needs for information at the two stages makes clear why this is so. Some of the criteria, such as real conflict, continue to communicate information even on a closer examination. Others, such as allegations of conflict, call attention to a case but do not help much as the members of the Court begin to focus in some detail on the issues. A dissent in the lower court or a disagreement between courts calls for a closer examination, perhaps a discussion, by the Court; this pair helps to eliminate the implausible cases but not to establish which ones to grant. Issue area, as we have remarked, represents the Court's priorities in the first stage; but the Conference does not continue to discriminate among cases on the basis of the type of claim made. We have already spotlighted the anomalous status of the brief amicus curiae in opposition to certiorari; it simply makes no sense for an organized interest to file one. It signals the importance of a case. Within the Conference, of course, the justices study the cases with some care, so amicus curiae in opposition will no longer serve a signaling function. At this stage, its effectiveness rises or falls on the strength of the arguments offered. The coefficient for allegation of conflict is about the same size for both stages; but in the decision to grant or deny among the cases actually discussed, it is statistically insecure. Claims of conflict among appellate courts fail to reach significance for very much the same reasons as do amicus curiae's briefs in opposition. The Conference, having selected the discuss list, then has the time to do the homework in order to decide which cases actually raise conflicts; absent a real conflict, mere allegations can no longer attract attention from the justices.

VI. CONCLUDING REMARKS

Everyone now agrees on the importance of agenda building in politics and the need for scholars to learn more about its dynamics, determinants, and consequences. Decisions about the content of an agenda allocate three of the most essential resources in politics: time, energy, and attention. The Court, like other policymaking institutions, makes tough choices about which matters to give full treatment and which to avoid. Within the secrecy of the Conference, the justices and law clerks construct three separate agendas—the dead list, the discuss list, and the plenary docket—each with distinctive characteristics and implications. These choices reveal political priorities inside the Supreme Court. Until now, few scholars have attempted to come to grips with either the formation of the discuss list or its role in the selection of cases for decision on

the merits. To correct that situation, we have investigated the properties as well as the determinants of the discuss list and of decision on certiorari in that smaller subset of cases.

The results conform well to our chief hypotheses about the informational needs of the justices at the two stages of decision. The Court takes into account a smaller, more reliable set of indicia about cases once it has moved from the formation of the discuss list to the decision on certiorari; for error brings much heavier costs as the justices winnow cases in successive stages. To a great degree, relative risk at the different phases of decision dictates the choices of indicators on which to rely. To be sure, the Court uses several of the criteria to screen cases at both stages; but our data suggest that it is a mistake to see the winnowing in Conference as a simple replay of the initial cut.

Similarly, the statistical evidence set out here provides strong support for our hypotheses about the role and impact of briefs amicus curiae in the selection of cases for both the discuss list and the plenary docket. Consider a pair of hypothetical cases based on the coefficient in Table 2. If all of the qualities—except the United States as a petitioner, amicus briefs, and real conflict—are present in a case, it has a .39 probability of making the discuss list. The addition of an amicus curiae brief increases the probability of discussion to .74. Similarly, on the decision on a writ of certiorari—absent the United States as a petitioner, an amicus brief, and actual conflict—the addition of an amicus brief more than doubles its chances. The message seems clear: organized interests as amici curiae perform an especially central role in both stages of decision

We have argued that the formation of the discuss list, no less than that of the list of cases to be decided on the merits, is a political process shaped by the pull and tug of political ideology within the Court. It is not a simple matter of the justices arriving at an appropriate set of cases based on general agreement on "lawyerly" principles. This is, as Justice Jackson once said, "power politics." In filing amicus curiae briefs, organized interests help the Supreme Court to discriminate on the dimensions of importance and ideology among the multitude of cases in an environment of extreme uncertainty.

Quite apart from the evidence in favor of our theoretical framework, we are impressed with the responsiveness to external conditions (e.g., briefs amicus curiae, United States as a petitioner) exhibited by the Court, especially in the initial winnowing of cases. Internal forces, alone, cannot explain the decisional process. We hope to explore this point at greater length in the future.

The results we have reported here represent an initial step toward a greater understanding the discuss list. Yet, many puzzling issues remain. We have highlighted the ideological basis of the two stages of agenda building, but a more detailed accounting of this phenomenon should pay dividends. Does the discuss list exert

a differential impact on the various types of parties, amici, and sponsors before the Court? Which organized interests do best in attracting the Supreme Court's attention? We presume that the benefits and burdens of the Conference's decisions will fall unevenly across groups and classes of litigants, as do most legal outcomes (see Galanter, 1974; see also Caldeira and Wright, 1989a). Does the chief justice use the initial Conference List distributed for additions to the associate justices as a means of stacking the discuss list with cases to suit his ideological predilections? Do the associate justices often challenge the chief justice's Conference List? In what sorts of situations do the justices choose to add cases for discussion? From our brief look at the composition of issues on the dead and discuss lists, we know of the differences between cases involving civil liberties and those on economic questions. Even clearer distinctions in the composition of the two lists might well emerge in a more detailed breakdown of the issues the Supreme Court faces.

APPENDIX

We have said a fair amount in the text about the variables in our model. Lest there be undue confusion, we offer a more detailed description of procedures. In operationalizing our independent variables, we have coded them as follows:

UNITED STATES AS A PETITIONER:
- 1 = If the Solicitor General of the United States is the petitioning party
- 0 = otherwise

DISAGREEMENT BETWEEN THE LOWER COURTS:
- 1 = if the appellate court immediately below reversed the lower court's decision
- 0 = otherwise

ALLEGED CONFLICTS:
- 1 = if the petitioning attorney claimed a conflict in one or more of the following situations, including conflict between two or more state supreme courts, conflict between two or more federal circuit courts, conflict between a state court and a federal court, and conflict with a precedent of the Supreme Court
- 0 = otherwise

REAL CONFLICT:
- 1 = if real or square conflicts occurred in one or more of the situations mentioned for alleged conflicts
- 0 = otherwise

ISSUE AREA:
- 1 = if the case raised a question of civil rights or liberties
- 0 = otherwise

IDEOLOGICAL DIRECTION OF THE LOWER COURT:
- 1 = if the decision of the court immediately below was in the conservative direction
- 0 = if liberal

ONE AMICUS CURIAE BRIEF IN SUPPORT:
- 1 = if one brief amicus curiae was filed in favor of certiorari
- 0 = if more than one brief or no briefs were filed

TWO OR THREE AMICUS CURIAE BRIEFS IN SUPPORT:
- 1 = if two or three amicus curiae briefs were filed in support of certiorari
- 0 = otherwise

MORE THAN THREE AMICUS CURIAE BRIEFS IN SUPPORT:
- 1 = if four or more amicus curiae briefs were filed in support of certiorari
- 0 = otherwise

ONE OR MORE AMICUS CURIAE BRIEFS IN OPPOSITION:
- 1 = if one of more amicus curiae briefs were filed in opposition to certiorari
- 0 = otherwise

DISSENT IN LOWER COURT:
- 1 = if a judge in the court immediately below filed a dissent
- 0 = otherwise

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