Review Essay

Case Selection and Decisionmaking in the U.S. Supreme Court

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H. W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press, 1991. ix+316 pp. $39.95.

Among scholars who study the courts, one enduring issue has been the forces that determine judicial decisions. Not surprisingly, different conceptions of these forces have prevailed in different scholarly communities.

Political scientists who study judicial decisionmaking have given most of their attention to the U.S. Supreme Court. While their perspectives vary a good deal, the predominant view is that the Court's decisions on the merits[1] result chiefly and most directly from its members' preferences for some public policies over others. But this view always has attracted critics, who argue that it gives too little weight to the impact of law on Supreme Court decisions.

Deciding to Decide, the recent study of Supreme Court case selection by H. W. Perry, Jr., contributes to our thinking about the Court in several ways. One of its contributions is to offer a new and forceful challenge to the position that policy goals are the primary determinants of Supreme Court decisions, a challenge that focuses on case selection[2] but that Perry links to de-

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[1] Decisions on the merits are those that resolve cases by reconsidering directly the appropriate outcome for the parties; these can be contrasted with decisions whether to accept cases for decisions on the merits.

[2] The Supreme Court holds extraordinary power to select cases. The Court's jurisdiction has been divided between a mandatory segment and a discretionary segment, with a series of statutes gradually increasing the size of the discretionary segment. Mandatory cases are designated as appeals, while discretionary cases come to the Court

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cisions on the merits as well. Whether they agree or disagree with Perry's conclusions, readers are likely to rethink their perspectives on judicial decisionmaking.

The book highlighted for me an important fact about research on decisionmaking in the Court: When political scientists study decisions on the merits, they emphasize the dominance of policy goals over legal considerations, but when they study the Court's selection of cases, they depict a much closer balance between these two kinds of goals. This difference in the portrayal of the two stages of decision raises a question: Have scholars collectively misunderstood one of those stages, or do differences between the two stages call forth different mixes of goals?

My essay focuses on this question. I begin by discussing scholars' views on legal and policy goals in judicial decisionmaking, then turn to Perry's book and its relationship to that issue. The final section examines possible reasons why scholars offer different explanations for decisions on the merits and for decisions whether to hear cases.[3]

Legal and Policy Goals in Decisionmaking

At the outset, I should clarify the distinction that I make between legal and policy goals. The choices of Supreme Court justices, like those of other public officials, might be motivated by a wide array of goals. Both legal and policy goals pertain primarily to the substance of the Court's decisions.[4] In Walter Murphy's formulation (1964:4), a policy-oriented justice "is aware of the impact which judicial decisions can have on public

chiefly as petitions for writs of certiorari. During the period on which Perry focused, appeals were a small but significant part of the Court's work; a 1988 statute eliminated nearly all categories of appeals. The court's jurisdiction and its development prior to the 1988 statute are discussed in Stern et al. 1986:40–193; the effects of that statute are described in Boskey & Gressman 1988.

The Court's almost complete discretion to accept or reject cases today makes it fundamentally different from nearly all intermediate appellate courts, whose jurisdiction is primarily mandatory. Most state supreme courts have discretionary jurisdiction over a large share of the cases brought to them, but for the most part the mandatory segment of their jurisdiction is considerably larger than that of the Supreme Court. However, the Supreme Court and other appellate courts have used various mechanisms to give some mandatory cases less than full consideration while meeting their legal mandate to decide these cases on the merits.

[3] Two limitations in the scope of the essay should be noted. First, the essay focuses specifically on decisionmaking by the U.S. Supreme Court rather than by courts in general, because Perry's book and the issues it raises concern the Supreme Court most directly. Second, like Perry's book, the essay deals primarily with issues and arguments within the political science community, which is the primary source of systematic research on Supreme Court case selection (but see Estreicher & Sexton 1986).

[4] Other goals, such as limiting workload and maximizing personal popularity, also may influence the behavior of Supreme Court justices; thus the dichotomy of legal and policy goals is not comprehensive. Useful in thinking about the array of possible goals for justices are studies of trial judges' incentives (Caldeira 1977; Sarat 1977) and the debate over legislators' goals (see Parker 1992).

policy, realizes the leeway for discretion which his office permits, and is willing to take advantage of this power and leeway to further particular policy aims." Legal goals are more difficult to define, but a legally oriented justice is concerned with achieving what might be called the internal goals of the legal system: clear, consistent, and accurate interpretation of the law.[5] In decisions on the merits, the policy-oriented justice wants to advance desirable public policy; the legally oriented justice wants to interpret the law accurately.

As I have noted, the predominant view among political scientists is that Supreme Court decisions on the merits are determined primarily, perhaps overwhelmingly, by policy goals.[6] David Rohde and Harold Spaeth (1976) articulate this position very well (see also Segal & Spaeth 1993). As they see it, Supreme Court justices gain unusual freedom through a combination of three conditions: lack of accountability to the electorate, lack of ambition for other positions, and the absence of higher courts. In turn, this freedom allows the justices to follow their own inclinations, and their primary goals are "*policy goals*. Each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences" (p. 72; emphasis in original).

Political scientists differ in the weight they give to policy goals, ranging from those who see them as the overwhelming determinants of Supreme Court decisions to those who argue that both legal and policy goals are critical to decisions (see George & Epstein 1992). The latter view is reflected in a recent body of work that interprets the role of case-related facts in decisions as evidence for the importance of legal considerations (Segal 1984; George & Epstein 1992). But most scholars who study Supreme Court decisionmaking agree on the primacy of policy goals.

The evidence for this primacy is significant but not neces-

[5] These goals have policy implications of their own, and in this sense what I am calling legal goals might be considered a particular species of policy goals. But the kinds of policy goals that a legally oriented justice may seek to advance, such as limiting the role of the judiciary and increasing the certainty with which people can predict the legal implications of their actions, are diffuse ones. Of course, legal goals also can serve as a supporting rationale for actions motivated primarily by policy goals.

[6] I should emphasize that my concern here and throughout this essay is not with the importance of legal and policy goals to justices but rather with their impact on the Supreme Court's choices. The two do not necessarily coincide. For instance, even if justices gave the highest priority to legal goals, the context in which they make decisions might cause policy goals to have a greater impact on those decisions. This point will be discussed later.

I should note that when I refer to goals as determinants of decisions, this is simply an alternative formulation to one that treats such factors as justices' backgrounds or the Court's political environment as determinants. In a goal-based formulation, such factors come into play as they affect justices' goals and the means justices use to advance those goals.

sarily conclusive. Studies have found a structured pattern to justices' voting behavior that seems most reasonably interpreted as a reflection of their preferences (Goldman & Jahnige 1985:137). Other scholars have shown a strong relationship between the policy positions justices take in cases and external evidence of their preferences (Danelski 1966; Segal & Cover 1989). But these methods are more effective in demonstrating the significance of preferences as a source of differences among the justices than in establishing the relative importance of policy and legal goals in shaping decisions.

Students of judicial decisionmaking have also taken considerable interest in the Court's selection of cases to hear (Brenner & Krol 1989; Caldeira & Wright 1988; Palmer 1982; Provine 1980; Schubert 1959; Tanenhaus et al. 1963; Ulmer, 1972, 1984).[7] At this stage of decision, there is less clarity and consistency in scholars' collective views about the relative importance of legal and policy goals.

A common starting point for this literature is Rule 10 of the Supreme Court, which describes some criteria the Court may use in choosing whether to accept cases. Not surprisingly, the rule says nothing about advancing the policy preferences of individual justices. Rather, it emphasizes legal goals: certainty and consistency in the law. Among the criteria listed are the presence of important legal questions, doctrinal conflict between lower courts or between a lower court and the Supreme Court, and departure "from the accepted and usual course of judicial proceedings" in the lower courts.

Students of case selection have expressed considerable skepticism about Rule 10 as a full explanation for the Court's certiorari decisions, and much of their work is an effort to demonstrate the importance of policy goals in case selection (Brenner & Krol 1989; Schubert 1959; Songer 1979; Ulmer 1972). Yet by no means do most political scientists who study case selection dismiss legal goals as meaningless. Those who argue for the importance of policy goals typically seek only to establish their importance rather than to read legal goals out of the process. And these scholars often point to the impact of legal considerations (Caldeira & Wright 1988; Provine 1980; Tanenhaus et al. 1963; Ulmer 1984). In her book on the case selection process, Marie Provine concludes (1980:6) that "the justices' perceptions of a judge's role and of the Supreme Court's role in our judicial system significantly limit the range

[7] Also relevant are two other bodies of literature, one dealing with the composition and development of the Court's agenda as a whole (Caldeira 1981; Casper & Posner 1976; Hellman 1978; Likens 1979; Pacelle 1991), the other with the process by which litigants and especially interest groups bring cases to the Court (Barker 1967; Cortner 1968; Epstein 1985, 1991; Kobylka 1991; O'Connor & Epstein 1984; Sorauf, 1976).

of case-selection behavior that the justices might otherwise exhibit." In the most extensive statistical analyses of case selection, Gregory Caldeira and John Wright (1988, 1990) show that the Court's choices of cases are influenced not only by policy-related factors such as the ideological direction of the lower court decision but also—and quite powerfully—by the existence of doctrinal conflict between lower courts.

The Book

H. W. Perry's *Deciding to Decide* examines the considerations that influence the Court's acceptance and rejection of cases. Perry's methods of analysis distinguish his book from previous studies. The usual method has been statistical analysis of the relationship between the Court's certiorari decisions and specific case characteristics such as issue content and the identity of the party petitioning for a hearing.[8] Perry's primary method, in contrast, was to interview Supreme Court justices and their law clerks about case-selection decisions. Altogether, Perry interviewed 5 justices and 64 former clerks, along with 1 other Court employee, 7 court of appeals judges, 4 U.S. solicitors general, and 4 other attorneys in the solicitor general's office.[9] His extensive use of interview material stands out among studies of the Supreme Court, and it demonstrates the practicality and value of this approach.

After an introductory chapter, the book undertakes a series of inquiries into aspects of case selection in the Court, dealing with both how the Court goes about choosing cases and why it chooses the cases it does. Chapter 2 discusses the Court's jurisdiction and case-selection procedures, laying out and elaborating on the formal rules. This chapter is particularly useful for scholars who are unfamiliar with case selection.

Chapters 3 and 4 examine the process by which the Court considers and disposes of petitions for hearings. In chapter 3 Perry uses his interviews to describe the process in considerable detail. Among the topics he illuminates are the roles of law clerks in screening of petitions and the creation of the "discuss list" of petitions to be considered collectively in conference. Chapter 4 examines "special situations," such as the treatment

[8] Unlike the case with decisions on the merits, individual votes on granting or denying hearings generally are not made public, except where justices choose to indicate their dissents from denials of certiorari. Perry (pp. 179–91) and Ulmer and Nicholls (1978) analyzed those public dissents. Data on individual votes can be obtained from the justices' papers for some periods; among others, Brenner and Krol (1989), Provine (1980), Palmer (1982), and Ulmer (1972, 1975) have used these data to analyze voting behavior in case selection.

[9] Perry focuses on the 1976–80 terms; nearly all his interviews with law clerks are with people who served during that period. For the most part, however, he generalizes to the case selection process at other times—including the present (see p. 20).

of capital punishment cases and dismissals of cases after certiorari is granted. The material in these chapters provides a great deal of concrete information on what this part of the Court's work is like. Perry notes, for instance, that most law clerks dislike working on petitions for hearing; he quotes one clerk who said, "You sit there and listen woefully" as the cart with the certiorari petitions "rumbles down the hall" (p. 41).

Chapter 6, "Bargaining, Negotiation, and Accommodation," focuses on the extent of interaction and collaboration among justices in case selection. Perry concludes that justices have little contact with each other about petitions for hearing prior to their consideration in conference, and he offers an explanation for this lack of contact. A long section explores dissents from denials of certiorari, both those that are issued publicly and those that serve as "tools of negotiation" during consideration of petitions.

Chapter 7 examines strategic behavior in case selection, primarily consideration of potential outcomes on the merits. Perry argues that such behavior is common but that justices generally engage in it as individuals rather than in collaboration with colleagues. He describes "defensive denials," in which justices vote against hearing a case because they expect that the Court would decide the case contrary to their views. "I might think the Nebraska Supreme Court made a horrible decision," one justice told Perry, "but I wouldn't want to take the case, for if we take the case and affirm it, then it would become a precedent" (p. 200). Perry also considers what he calls "aggressive grants," which are the affirmative counterpart of defensive denials.

Perry touches on explanations for the Court's case-selection decisions throughout the book; in three chapters he focuses directly on explanation. Chapter 5 discusses "cue theory," used by some scholars to analyze case selection. Perry sees some value in cue theory, but he argues for a more complex conception of "indices and signals," traits of cases that incline some or all justices to accept them. Chapter 8, "Certworthiness," continues this inquiry by looking more closely and comprehensively at case characteristics that work in favor of granting or denying certiorari. This chapter discusses a wide array of considerations that justices take into account, ranging from whether an issue is tractable to the future availability of other cases raising the same question.

In chapter 9, Perry pulls together the various perspectives on case selection that he offered in previous chapters, summarizing his conception of the selection process in a decision model. This model rests on an argument that justices and their clerks do not weigh several considerations simultaneously in choosing whether to accept a case, as other scholars have ar-

gued or implied; rather, they go through a series of steps in which considerations are weighed one at a time.

This is striking enough. Perhaps more provocative is Perry's view that the decision process takes two forms or modes, each with its own series of steps.[10] As he sees it, justices (actually, the law clerks) begin by screening out frivolous petitions. In examining the remaining petitions,

> if a justice cares strongly about the outcome of a case on the merits . . . he will enter the outcome mode to decide whether or not to take the case. If, however, the justice does not feel particularly strongly about the outcome of a case on the merits, he enters the jurisprudential mode with all its attendant steps. . . . [W]hen in the jurisprudential mode, the justice makes his decision based on legalistic, jurisprudential types of considerations such as whether or not there is a split in the federal circuit courts of appeals. In the outcome mode, while the justice does not ignore jurisprudential concerns, they do not dominate his decision process. Rather, it is dominated by strategic considerations related to the outcome of the case on the merits. (P. 274)

Perry does not estimate the relative frequency of the jurisprudential and outcome modes in case selection, but he indicates that the former predominates (pp. 276, 279–80). He depicts this conclusion as a challenge to other political scientists' views about case selection. As he sees it, scholars generally have emphasized outcome-oriented considerations; in contrast, he emphasizes jurisprudential considerations (pp. 12–15).

In arguing that the jurisprudential mode predominates and that the outcome mode is relatively rare, Perry gives unusual emphasis to legal goals.[11] But I think he overstates somewhat the distinctiveness of his own views; much of what he says about the factors that influence case selection is basically compatible with the predominant view among political scientists (see Caldeira 1992:82). For one thing, he agrees with other scholars that considerations related to the justices' preferences are important, and he provides considerable evidence for the impact of these considerations. One example is the practice of defensive denials. Perry shows the practice is so common that this term is widely used within the Court itself (pp. 198–207).

[10] Richard Pacelle, who analyzed change in the composition of the Court's agenda rather than the case-selection process, described a dichotomous agenda that is somewhat parallel to Perry's dichotomous selection process: the Court's "exigent agenda" consists of cases heard to settle important questions and resolve intercourt conflicts, while the "volitional agenda" consists of cases "that fulfill the policy designs or goals of its members" (Pacelle 1991:28). Estreicher and Sexton (1986:52–70) offer a trichotomy of the Court's agenda that is prescriptive and quite different from the Perry and Pacelle dichotomies.

[11] I am largely equating Perry's two modes of decision with the legal-policy dichotomy; Perry himself offers some support for that equation but some caution as well (pp. 16, 274).

And, as I discussed earlier, other scholars also have concluded that legal goals are important to the Court's selection of cases.

For me, then, differences between Perry and other students of case selection are less noteworthy than the widespread agreement that legal goals are prominent in this stage of decision. And this viewpoint stands in sharp contrast with most depictions of decisions on the merits by political scientists, in which policy goals have primacy and legal goals exert only limited impact. It is this difference between the two stages of decision that I want to explore.

Comparing the Two Stages of Decision

The difference between depictions of decisionmaking in case selection and on the merits might stem from either of two sources. One possibility is that the difference reflects scholarly misperceptions; in reality, the relative weight of legal and policy goals might be similar in the two stages. Alternatively, these depictions might be accurate, in that legal goals have greater impact in case selection than in decisions on the merits.

Similar Weights of Goals at the Two Stages

Legal Goals in Decisions on the Merits

While Perry focuses primarily on case selection, his argument about the importance of legal goals has implications for Supreme Court decisionmaking in general.[12] In one intriguing passage, he refers to the two modes of decision he has identified.

> There is also reason to believe that the jurisprudential/outcome distinction is useful beyond case selection. Though this cannot be the forum, I am prepared to argue that it gets us much further in understanding attitudes and behavior on the Court generally than do our usual categories and ways of understanding justices. (P. 284)

Might it be, as Perry seems to suggest in this passage, that justices employ two alternative modes of decision at the merits stage? It is easy to imagine how such a situation could exist. Certainly, justices care a good deal more about some cases that they decide on the merits than they do about others. And there is some evidence that, where they care less, they are more amenable to persuasion by colleagues or advocates. For instance, it appears that the quality of lawyers' advocacy has a greater ef-

[12] In focusing on a possible dichotomy in decision modes at the merits stage, I pass by the broader and longstanding argument that legal goals play a larger role in *all* decisions on the merits than most political scientists think. It would be impossible to do justice to that argument in a brief discussion, although I will touch on aspects of it in this section.

fect in cases that are less important to justices (Frank 1958:98). Other aspects of decisionmaking might also vary with the level of justices' interest in the outcome.

But is there a sharp difference between the primary criteria for decision in two types of cases? That question could be examined directly with evidence about the decision process from interviews and justices' papers. It might also be explored by comparing characteristics of decisions such as the frequency of dissent in cases that would seem to elicit high interest from justices and those that would seem of less interest, such as conflict cases involving relatively narrow and technical matters. My suspicion is that, even if there are two distinct modes of decision in the case-selection stage, the distinction does not carry over to decisions on the merits. One way to think about this issue is in terms of fields of law. As Perry documents for tax and patent cases (pp. 229–30), there are some areas of law in which most justices have little interest. In such areas, the Court may accept cases almost solely for jurisprudential reasons. During the 1974–83 terms, a period that includes the time on which Perry focused, there were several fields in which nearly all the Court's decisions occurred in cases involving intercircuit conflicts. Among them were federal tax liability, bankruptcy, and admiralty and maritime law (Hellman 1985:1016).

Once a case in one of these fields is accepted, however, justices may take a strong interest in its outcome, because such a case often implicates broad policy dimensions that are important to members of the Court. While justices may accept patent cases with extreme reluctance, for instance, the Court's patent decisions often feature sharp disagreements between liberals and conservatives that are based on differing attitudes toward the anticompetitive connotations of patents.[13] As this example suggests, there is less reason to expect fundamental differences between the Court's approach to different kinds of cases at the merits stage than at the selection stage.

Policy Goals in Case Selection

Perhaps it is not that legal goals are more prominent in decisions on the merits than most scholars think; rather, policy goals might be even more significant in case selection than much of the existing research indicates. The distinction between tactical and strategic policy considerations helps in understanding this possibility.

At the merits stage, tactical behavior consists of efforts to obtain decisions in individual cases that accord as closely as

[13] The Court's four most recent decisions on standards of patentability, the central issue in patent law, were by votes of 6–3 (*Parker v. Flook* 1978), 5–4 (*Diamond v. Chakrabarty* 1980), 5–4 (*Diamond v. Diehr* 1981), and 4–4 (*Diamond v. Bradley* 1981).

possible with the justice's policy preferences. Strategic behavior can be directed at such results as winning the support of colleagues over the long run, avoiding conflict with Congress, and achieving effective implementation of decisions in the lower courts. Scholars have emphasized the tactical element of policy-oriented behavior in merits decisions, yet strategic behavior is also common (Murphy 1964).

Considerations ranging from highly tactical to highly strategic influence case selection as well. Most purely tactical is voting to accept cases because of disagreement with lower court decisions. Voting for cases because of an expectation that the justice's position will prevail on the merits, the heart of Perry's outcome mode, is somewhat more strategic. And justices may take broader strategic considerations into account by assessing how a decision in a specific case would affect policy in the Court and elsewhere in the future.[14]

Understandably, Perry treats conflict between lower courts and the importance of legal issues as jurisprudential considerations. They *look* legal, and their inclusion in the legalistic Rule 10 seems to confirm that label. Yet a purely policy-oriented justice with a strategic perspective might also be concerned with these factors. This is particularly true of the importance of the issue in a case (Caldeira 1992:82). The weight that a policy-oriented justice with strategic concerns would give to this consideration is emphasized by Caldeira and Wright (1988:1111): "Theoretically, we propose that justices of the U.S. Supreme Court are motivated by ideological preferences for public policy and that they pursue their policy goals by deciding cases with maximum potential impact on political, social, or economic policy."

Similarly, a justice who seeks to achieve policy goals is likely to give attention to intercourt conflict. Questions on which serious conflicts have arisen often involve important issues of public policy, and by definition these are issues on which there is no consensual position. And it is primarily the conflicts with the greatest impact that the Court agrees to resolve.

Although the mix of considerations in case selection may reflect justices' policy goals to a greater extent than would appear at first glance, this point should not be overstated. In particular, if legal goals were not important to the justices, it is quite unlikely that they would accept so many cases involving conflicts between lower courts. Policy goals do not seem as dominant in the Court's choices of cases to hear as they do in decisions on the merits.

[14] Perry touches on these broader considerations, suggesting that justices in the outcome mode are concerned with more than simply whether they can win a case on the merits (p. 282).

Differing Weights of Goals in the Two Stages

If the relative weight of legal and policy goals does differ between these two stages of decision, this difference requires explanation. Several possible explanations could be suggested.

Capacity

One possibility concerns the capacity of justices to utilize policy considerations. Even in decisions on the merits, justices may find it difficult to predict how alternative decisions ultimately would affect their policy goals. The level of difficulty is considerably greater when the question is whether to decide a case at all.

The difficulty of applying policy goals to individual cases is aggravated by time constraints. The Court now faces more than 5,000 petitions for hearing each term, and it simply may be impossible to make complex calculations concerning policy consequences in so many cases. As a result, the justices might deemphasize policy considerations in favor of legal considerations that are more straightforward and thus easier to utilize.[15]

This difficulty should not be overstated. Law clerks extend justices' capacities in this respect; while clerks cannot be perfect surrogates for justices, they understand their justices' policy concerns and take those concerns into account when they analyze and comment on petitions. Further, a high proportion of petitions—probably a substantial majority—clearly have little or no value for advancing a justice's policy goals. The clerks and justices can concentrate their time and effort on the petitions that might have such value.[16]

Context

Undoubtedly, Supreme Court justices are concerned about advancing legal goals, which are integral to the expectations held by most of the Court's audience and by the justices themselves. But the actual impact of those goals may depend on the context in which the Court acts, and case selection and decisions on the merits come in quite different contexts.

In decisions on the merits, the goal of interpreting the law accurately may have relatively little impact because justices usually choose among multiple alternatives that are highly defensible in legal terms. This condition frees, perhaps forces, the jus-

[15] Another capacity problem clearly has an impact on case selection: the effective ceiling the Court has set on the number of cases it decides on the merits. This ceiling could be expected to reduce the number of cases that the Court accepts on the basis of either legal or policy goals.

[16] I am suggesting here that justices who applied policy goals to every petition for hearing would concentrate their efforts on a minority of petitions; this differs from Perry's argument that justices apply policy goals to only a minority of petitions.

tices to make choices on the basis of other considerations. Judgments about good policy are likely to take primacy among them (Rohde and Spaeth 1976; Segal & Spaeth 1993:69–72).

In case selection, conflict between legal and policy goals is not so easily resolved. For any justice some cases are useful primarily for one or the other. Justices might wish that they could accept only cases that serve their policy goals well, but the results would be intolerable: an accumulation of legal uncertainty that would cause concrete harm to a good many people and institutions and that would lead to growing criticism of the Court itself. Indeed, as much emphasis as the Court gives to resolving lower court conflicts (Estreicher & Sexton 1986:76–103), it has been chided for failing to resolve even more.[17] Therefore, the justices devote a large share of the Court's institutional agenda to cases that are more relevant to legal goals than to their policy goals. To this degree, the Court's agenda setting is constrained by justices' perceptions of its institutional role (see Pacelle 1991).

Differing Samples of Cases

I have suggested that legal goals have limited impact on decisions at the merits stage because cases usually present alternatives that are highly plausible in legal terms. This situation is not inevitable; rather, it results primarily from the Court's selection of cases: the selection process ensures that the great majority of cases heard on the merits feature a high level of legal ambiguity.[18]

This effect does not depend on the mix of legal and policy considerations in case selection, because either set of criteria results in the selection chiefly of ambiguous cases. If a case is chosen to resolve a legal uncertainty, the existence of that uncertainty generally means that the application of relevant legal rules to the issue in the case is highly arguable. This is especially true of issues on which lower courts have reached conflicting judgments.

The same is true of cases chosen to advance justices' policy goals. The Court might accept a case for this purpose even when the application of legal rules to the case is quite clear. But such cases are unlikely to seem interesting or worth a portion of the small agenda on the merits. Indeed, the likelihood that a

[17] On concern about whether the Court fails to resolve enough conflicts, see Feeney 1975 and Hellman 1991.

[18] Because the cases decided in court are a nonrandom sample of all cases that litigants could have brought, some legal scholars have pointed out that analysis of decided cases may produce a misleading picture of the factors influencing decisions by judges and juries (Baxter 1980; Danzon & Lillard 1983; Eisenberg 1990; Eisenberg & Johnson 1991; Eisenberg & Schwab 1989; Priest 1977, 1980). The selection of cases by a court itself, of course, can have the same effect; this effect and its implications, however, have not been recognized fully (but see Handberg 1991).

case will serve the policy goals of four or more justices tends to increase with the legal ambiguity involved in the case.[19] This tendency can be illustrated with the practice of accepting cases largely to reverse lower court decisions with which justices disagree, seemingly quite common;[20] the greater the legal ambiguity, the more likely that four or more justices will disagree with a lower court decision.

The presence of this ambiguity in the set of cases that the Court hears makes them fundamentally different from the larger set that the Court *could* hear. The set of petitions that come to the Court includes a good many cases in which there is very little ambiguity, in that virtually any justice or potential justice would agree with the lower court judgment.[21] If such cases were decided on the merits in the same proportion as they appear among petitions for hearing, the Court's decisions on the merits would look more "legal" and less policy-oriented than they actually do. Far more decisions would be unanimous, and many—perhaps most—opinions would resolve cases in routine fashion through the application of well-established rules. Under this circumstance, a scholar who applied Perry's dichotomy to decisions on the merits might conclude that most of the time the Court operated in the jurisprudential mode.

It is at this point that the difference between the importance of particular goals to justices and their importance in determining decisions becomes critical. I think it clear from their behav-

[19] Legal ambiguity does not mean that the outcome on the merits is uncertain. In fact, the legal ambiguity in cases the Court hears makes justices' past votes and opinions particularly good guides to their policy positions and thus good predictors of their votes and opinions in a future decision.

[20] See Rehnquist 1984:1027. It is noteworthy that the Supreme Court's reversal rate on the merits in a term typically is well above 50%; for cases in which certiorari was granted and which then were decided on the merits in the 1990 term, 68% of the lower court decisions were reversed or vacated (Harvard Law Review 1991:423). In courts without discretionary jurisdiction, the reversal rate is far lower; in the 1991 fiscal year, the federal courts of appeals reversed 11% of the decisions they reviewed (Administrative Office of the United States Courts 1992:177). If the Supreme Court accepted cases randomly, its reversal rate might well be in the same range. If the Court accepted cases with ambiguous issues without concern for the correctness of the lower court decision, the rate would approximate 50%.

[21] The evidence for this proposition is largely indirect. Justices often say that high proportions of petitions are weak (Perry, pp. 35–36); for the most part, however, they are referring to the unimportance of the issues rather than the merits of cases. But some of these statements do allude to the merits (*In re McDonald* 1989:188). It appears that the preponderance of petitions come in cases in which all the lower court judges agreed (see Tanenhaus et al. 1963:124), suggesting a frequent lack of legal ambiguity, and my own reading of petitions has led me to conclude that a great many petitioners have very weak cases on the merits.

The posited existence of so many unambiguous cases runs counter to the hypothesis that cases actually reaching any court for decision tend to be close ones (Priest 1980; Priest & Klein 1984). The low costs of filing paupers' petitions help to explain filings that are weak on the merits, but justices' statements indicate that hopeless paid cases also are filed with some frequency—primarily because of high material and symbolic stakes in such cases (see Mann 1983). On factors that work against the close-case hypothesis at the trial level, see Gross & Syverud 1991.

ior in case selection that the justices take legal goals seriously. I doubt that they then discard these goals in deciding cases on the merits. However, the high level of legal ambiguity in most cases heard on the merits reduces the effective weight of legal goals in decisions.[22]

In this way, the case-selection process in itself produces a difference in the relative weights of legal and policy goals at the two stages of decision. The more carefully the Court chooses cases to hear, whatever the mix of legal and policy considerations, the more its decisions on the merits appear to be—and in fact are—shaped by policy goals. The frequent depiction of policy considerations as dominant in decisions on the merits reflects the Court's success in making meaningful choices from the petitions for hearing that it receives.

Conclusions

By emphasizing the role of jurisprudential considerations in the case-selection process, H. W. Perry highlights a difference in the ways that scholars have portrayed the two stages of decision in the Supreme Court. I have suggested several ways of understanding this difference. In combination, they help to explain why political scientists give considerable weight to legal goals in case selection and little weight to those goals in decisions on the merits. I think that a difference between the two stages in the relative importance of legal and policy goals does exist. This difference stems chiefly from the differing contexts of decisions at the two stages and especially from characteristics of the cases that the Court selects.

Some legal scholars dismiss political science depictions of Supreme Court decisionmaking on the ground that they do not accord with what those scholars know about judges' motives. A depiction that gives little weight to judges' concern for making good law seems wildly unrealistic. But this dismissal, I think, does not take into account the distinction between the importance judges accord to particular goals and the importance of those goals in shaping decisions.[23] Even if Supreme Court justices give a high priority to legal goals, as most undoubtedly do, the impact of those goals in decisions on the merits is reduced by the Court's selection of cases: that selection process

[22] This is not to say that justices never face a conflict between their policy preferences and what they see as the best interpretation of the law. By their own testimony, for instance, at least three justices have voted to uphold the death penalty despite their personal opposition to it (*Furman v. Georgia* 1972:405; De Benedictis 1990:69; Reynolds 1984).

[23] Some depictions of decisionmaking in political science (and among legal scholars as well) begin with the proposition that justices actually give low priority to legal goals, and the disagreement between these depictions and the views of most legal scholars is quite real rather than simply a matter of how the question is framed.

largely eliminates cases in which the law leads clearly to a particular decision.

Because of its focus on one issue, this essay has not done full justice to the very substantial achievement represented by *Deciding to Decide*. But the inquiry I have undertaken suggests the value of the book in raising fundamental questions about decisionmaking in the Supreme Court. Perry is imaginative in his formulations and bold in his assertions; as a result, his book offers new ways of thinking about the Court. This, like his enhancement of what we know about case selection in itself, is a valuable contribution.

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