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Case Selection in the Georgia and Illinois Supreme Courts*

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What prompts a state supreme court to grant or deny a request for appeal? This article addresses this topic by applying three contending theories of case selection to data from the Georgia and Illinois Supreme Courts. Cue theory was the least useful in explaining case selection behavior of courts, although some objective cues, especially dissension in lower court and the government as litigant, helped to distinguish petitions granted from those denied. Similarly, no direct relationship was found between votes on case selection and votes on the merits in Georgia, which demonstrates that case selection decisions are not merely covert decisions on the merits. The most significant finding was that judicial role, justices' attitudes toward appellate review, was the most important concept to be associated with case selection. Further work needs to explore the relationship among the error-correction/policy-making functions of appellate courts, the judicial philosophy of activism-restraint, and case selection.

Introduction

With caseloads growing at the rate of nine percent per year for the past decade (Marvell and Kuykendall, 1980),[1] appellate courts are subject to increasing pressures to limit access. Discretionary jurisdiction, the power to accept some cases for full review and to reject others summarily, is one important way appellate courts limit access. Screening of petitions for certiorari, granting some and denying most, is not only a way to control case pressure, but also a way of setting agendas. Unless supreme courts grant petitions for appeal in direct proportion

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1. In an update, Marvell (1982-83) found that filings rose almost 30 percent between 1978 and 1982.

to the number of appeals filed, case selection criteria have important policy consequences by providing some issues or types of litigants either easier or more difficult access to appellate courts.

Because opinions are seldom published to provide reasons why petitions for certiorari are granted or denied, justices are less accountable for case selection decisions than for decisions on the merits. According to the National Conference of the Council on the Role of Courts (1982:7):

> ... the courts can and do definitely determine — subject to valid legislation — which types of disputes they themselves may lawfully hear and bindingly decide. The power to decide who shall decide is a paramount power, and its holder deserves to be held to special scrutiny.

Despite the importance of the case selection decision, "To date, little has been known about the factors which prompt a state supreme court to accept a case for review" (Stookey and Bowen, 1978:755). Nearly all theories of case selection that now exist have been based upon the response of the U.S. Supreme Court to petitions for certiorari. These theories must be tested in other contexts if propositions applicable to all appellate courts and those unique to the U.S. Supreme Court are to be distinguished. Indeed, present evidence indicates that conclusions drawn from studies of the U.S. Supreme Court are not generalizable to state supreme courts.[2] With state courts as units of analysis, it is possible to observe case-selection behavior in state supreme courts which have different numbers of justices and in jurisdictions with and without intermediate appellate courts. This article is an addition to that small, but growing, body of research on case selection in state supreme courts. Although data from two state courts of last resort are not sufficient to test alternative theories of case selection completely, they can shed some light on present theories of case selection.

Georgia and Illinois Supreme Courts

The Illinois and Georgia Supreme Courts were chosen for analysis because both courts are the same size (seven justices); both are in states which have an intermediate appellate court (and whose intermediate appellate courts publish opinions); both have discretionary jurisdiction; and both hear cases *en banc*, rather than in panels. Dis-

2. Fair (1967) found different scales to explain decisions on the merits on the Pennsylvania Supreme Court than those found to explain decision making on the U.S. Supreme Court. Hall's (1985) findings in Louisiana also support this conclusion.

cretionary jurisdiction is a prerequsiite to agenda setting. Intermediate appellate courts contribute to the ability of supreme courts to choose the cases they hear by providing litigants with one opportunity to appeal a decision of the trial courts. In addition, case selection votes for individual justices were available in Georgia — providing a rare opportunity to compare votes of individual justices with the final court decisions. In Georgia and Illinois, as in most states, four justices (a majority) decide whether or not to accept a request to appeal (Mosk, 1975; Leiman, 1975; Roper *et al.*, 1985).

Obviously, the size of the mandatory docket influences the number of discretionary petitions that can be granted and the ability of a court to set its agenda. In Illinois, the Supreme Court essentially sets its own agenda by selecting most (92% to 94%) of the cases it hears. In Georgia, only between a quarter and a third of the appellate filings are applications for certiorari, and another six to eleven percent are discretionary appeals from trial courts.

The *proportion* of certiorari petitions granted, however, appears to be less influenced by the amount of discretionary jurisdiction. During the 1978-1981 period examined in this study, the Illinois Supreme Court granted between 11 and 17 percent of its petitions for leave to appeal while the Georgia Supreme Court granted between 13 and 23 percent of its applications for certiorari.

The number of unanimous decisions on applications for certiorari may indicate the amount of agreement on the proper subjects for the court's agenda. In Georgia, 42 percent of the petitions were decided unanimously — a moderate consensus on the cases appropriate for supreme court action.[3]

Contending Perspectives on Case Selection

Researchers of appellate court behavior have posited several theoretical explanations for appellate court case selection behavior. These different perspectives emphasize characteristics of the individual cases, policy preferences of the judges, or judicial role in attempts to explain which cases are selected for review and which are not.

Cue Theory uses "objective" case characteristics to explain case selection behavior of courts. Because the supreme court is attempting to provide guidance to lower courts, a comparatively large number of

3. By comparison, nearly a third of the cases granted review during the period of time Justice Burton was on the U.S. Supreme Court were unanimous (Provine, 1980). It was not possible to calculate the percentage of petitions decided unanimously in Illinois because individual justices' votes on case selection were not available.

cases should be accepted for review. The decisions on the merits should be completely independent of case selection decisions.

Policy Theory assumes that reactions to case characteristics will be subjective, hence the focus of analysis changes from the court as a whole to individual justices. If this theory is accurate, not only will justices react differently to the same cues, but they may disagree on what constitutes a cue. For policy-oriented justices, case selection decisions are tied to decisions on the merits as well as to decisions of lower courts. If the lower court decision is in accord with their policy preferences, there is no point in hearing it again. Therefore, comparatively fewer cases should be accepted for review, and cases that are decided on the merits should be reversed more often.

Role Theory shares with policy theory the expectation that justices will vary in their reactions to case characteristics and with cue theory the expectation that the case selection decision will be independent of the decision on the merits. Both the number of cases heard and the number of cases reversed on the merits should be less than expected under the assumptions of cue theory, but more than expected under the assumptions of policy theory.

Cue Theory

According to Tanenhaus and his colleagues (1963:121), " ... the justices of the [U.S.] Supreme Court employ cues as a means of separating those petitions worthy of scrutiny from those that may be discarded without further study." Cue theory uses "objective" case characteristics, such as type of case, status of litigants, and dissension in lower court, to explain case selection behavior of courts. Certiorari was more likely to be granted when one or more of the cues were present than when all were absent.

Tanenhaus used regression analysis to measure the multiple effects of cues in case selection. Discriminant analysis, which attempts to find a linear combination of variables that best "discriminates" or separates cases into groups, is a more appropriate technique to study simultaneously the effects of several characteristics on the probability of certiorari being granted.[4] This technique was applied to the Georgia

4. Variables were introduced into the discriminant equation in a stepwise fashion so that characteristics important to the granting or denying of discretionary petitions would be highlighted and redundant variables eliminated. "Rao's V," a generalized measure of the overall separation between groups, was the criterion used to select the most influential cues (Klecka, 1981). Standardized discriminant coefficients show the relative importance of each case characteristic. Canonical correlations are measures of association that summarize the relationship between characteristics and certiorari decisions. A canonical correlation of 0 indicates no relationship at all, while the maximum of 1.0 represents a perfect linear relationship.

and Illinois Supreme Courts to determine the extent to which objective cues in individual cases could be identified that served to explain case selection decisions. Discriminant analysis revealed that the explanatory power of these cues was not especially high in the two courts examined. Taken together, the cues explained roughly 14 percent of the variance in Illinois selection decisions and 6 percent in Georgia. The percentage of cases correctly classified by the cues were 86 percent and 84 percent respectively.

Subject Matter Cues. With respect to type of case, Tanenhaus *et al.* and Provine (1980:80) both found civil liberties issues to be a cue. Provine also identified labor disputes, criminal cases, and cases raising issues of federalism as cues. The subject matter cues used in this research did not contribute much to the explanation of case selection behavior. (This finding casts some doubt on Teger and Kosinski's (1980) assertion that cues are surrogates for salient issues.) Despite the fact that criminal cases made up 43 percent of the discretionary filings in Illinois and 38 percent of the discretionary cases in Georgia, only sexual assault cases in Illinois emerged as a significant cue to case selection. (Only three percent of the sexual assault petitions were granted.) On the civil side, only government action cases were identified as subject matter cue in Georgia, whereas all civil case categories: torts, miscellaneous civil, government action, labor/workers' compensation, domestic relations, and contract cases were cues in Illinois.[5] Civil liberties cases, an important subject-matter cue on the U.S. Supreme Court, rarely occurred in these data sets.

Litigant Status. Tanenhaus *et al.* (1963), Provine (1980), and Ulmer (1981) all found that petitions involving the federal government as litigant, particularly as plaintiff, were especially likely to be granted by the U.S. Supreme Court. Indeed, Ulmer *et al.* (1972) found the presence of the federal government as a petitioning party was the only cue related to the decision to grant certiorari. The analogous case characteristic at the state level would be the state government as

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Another way to evaluate the usefulness of case characteristics in combination is to use the discriminant equation to predict (postdict) whether or not each petition would be granted or denied and then compare the predicted results to the actual case selection decision. To the extent that predictions are in error, e.g., classified as granted when they were in fact denied or vice versa, the characteristics selected are poor discriminators. If a large proportion of petitions are correctly classified, however, it would be encouraging, but not overwhelming evidence that the characteristics are good discriminators.

5. The percentage of case types actually granted certiorari were torts, 18 percent; miscellaneous civil, 17 percent; government action, 29 percent; labor/workers' compensation, 37 percent; domestic relations, 18 percent; contract, 9 percent.

Table 1.

Case Characteristics That Influence Granting of Petitions for Review by Supreme Courts

Intermediate Appellate Court	Standardized Discriminate Function		
Illinois:			
Dissent on intermediate appellate court	.89		
Criminal defendant as appellant	.69		
Tort cases	.49		
Miscellaneous civil	.49		
Government action cases	.48	Wilk's Lambda	= .86
State as appellant	.46		
Labor/Workers' Compensation cases	.46	Canonical	
Domestic relations	.26	Correlation	= .37
Individual as appellant	.26		
Contract cases	.21	Percent Classified	
Local government agency as appellant	.18	Correctly	= 86%
Reversal by intermediate appellate court	−.18		
Company as appellant	.16		
Sexual assault cases	−.14		
Georgia:			
		Wilk's Lambda	= .94
The State as appellee	−.56		
Reversal by intermediate appellate court	.50	Canonical	
Dissent on intermediate appellate court	.37	Correlation	= .25
State or local government agency as appellant	.24		
Government action case	−.18	Percent Classified	
		Correctly	= 84%

appellant. More research is required to determine if state attorney generals' offices perform a petition screening function equivalent to the one performed by the U.S. Solicitor General's office.

It may be that the frequency of litigation, rather than the status of the litigant, explains the importance of this cue. To the extent that criteria for case selection are ambiguous, experienced litigants will have the advantage of knowing how to place their arguments in the context of current court concerns. Galanter (1974) distinguished "one shotters" from "repeat players." Corporations, unions, or government agencies as appellants operationally are defined here as "repeat players," whereas individuals or employees are defined as "one shotters."

Petitions involving state or local government agencies as appellants or appellees were indeed significant cues in both states. The State as appellee was the strongest case characteristic in Georgia and criminal defendants as appellant was significant in Illinois. (This finding runs counter to Ulmer's (1985) finding and lends some support to the contention that "repeat players" have an advantage in state supreme courts.) These two characteristics are highly related. In the 357 Illinois petitions where a criminal defendant was the appellant, the State was the respondent, and in 450 Georgia petitions where the State was the appellee, a criminal defendant was the appellant. The acceptance rate for these petitions during the period was low in both states — eleven percent in Illinois and six percent in Georgia. The individual and companies as appellants were also cues in Illinois.

Dissension. Tanenhaus listed "dissension" among judges of the lower court or between two or more courts or agencies as another cue used by the U.S. Supreme Court. This is not surprising since some state supreme courts review *all* cases where there are dissenting votes in the intermediate appellate court (Roper *et al.*, 1985). Ulmer (1984) defined the cue as presence of conflict. Dissension can be operationally defined in two ways: dissension among judges — as presence of dissenting opinions in the intermediate appellate court — and dissension among courts, as indicated by reversals of trial court decisions by intermediate appellate courts.[6]

Dissent on the intermediate appellate court and reversal of the trial court by the intermediate appellate court were significant cues in both states. Although the vast majority of intermediate appellate court decisions in both states were unanimous, cases in which there was disagreement among the justices were much more likely to be heard than cases which were decided unanimously.[7] Intermediate appellate courts affirmed most appeals, but those that the intermediate appellate court reversed were more likely to be granted review by courts of last resort.

6. In states where the intermediate appellate court sits in panels or in different geographical jurisdictions, dissension can occur between panels of the intermediate appellate courts or between different divisions of the court. This type of dissension among peers is not addressed in this article.

7. This finding comports with the finding of Wold and Calderia (1980:340), in California, who noted ". . . a dissenting opinion in a lower court's decision often acts as a trigger activating review by the supreme court." This finding is also consistent with an empirical study undertaken by the *Stanford Law Review* (1951) in 1949, which found that disagreement with the District Court of Appeal, not novelty of the question presented, was the most significant factor associated with the Supreme Court's decision to grant a hearing.

Table 2.

Petitions for Review Granted by Intermediate Appellate Court Disposition and Vote

Intermediate Appellate Court		Total Number of Petitions	Number of Petitions Granted	Percent of Petitions Granted
Illinois:				
Vote	Disposition			
Unanimous	Affirmed	490	24	5
Unanimous	Reversed	303	67	22
Nonunanimous	Affirmed	50	18	36
Nonunanimous	Reversed	58	31	53
		901	140	16
Georgia				
Vote	Disposition			
Unanimous	Affirmed	978	100	10
Unanimous	Reversed	428	104	24
Nonunanimous	Affirmed	37	13	35
Nonunanimous	Reversed	34	11	32
		1,477	228	15

Table 2 shows that intermediate appellate court vote is a more important guide to supreme court case selection than intermediate appellate court disposition.[8] Appeals with dissent by appellate court justices — whether the appellate court affirmed, modified, or reversed the trial court — were more likely to be granted than decisions on which there were total agreement in the intermediate appellate court. In Illinois, the petitions most likely to be accepted were those in which the appellate court reversed the trial court and at least one appellate court justice dissented (thus, the two characteristics reinforced each other). Petitions on which the appellate court vote was unanimous to affirm the trial court, though constituting over half of all petitions for leave to appeal, were least likely to be granted. In Georgia, nonunanimity in the intermediate appellate court was the dominant cue.

8. Because there were so few separate concurrences, because concurrence is agreement on the outcome but not on the reasoning, and because the percent of petitions allowed was more similar to unanimous votes than to dissents, the separate concurrence category was combined with the unanimous category in Table 2. Similarly, the modified category contained comparatively few petitions. Because modified cases are essentially cases affirmed in part and reversed in part, they were combined with reversals on the grounds that a reversal does not have to overturn all points of a decision.

Nevertheless, for cases in which the intermediate appellate court vote was unanimous, certiorari petitions were granted more than twice as often for cases reversed by the intermediate appellate court than cases affirmed by the intermediate appellate court.

In conclusion it would appear that sets of cues help distinguish petitions granted from those denied, but their explanatory power is not great. Dissension and litigant status, especially involvement of the state government, were the two most powerful cues. Dissent on an intermediate appellate court or reversal of a trial court decision by an intermediate appellate court were cues for both the Illinois and Georgia Supreme Courts.

The Policy Theory of Case Selection

Policy theory assumes that subjective considerations, including predispositions of the justices, color the perceptions of objective case characteristics. Accordingly, case selection decisions are not independent but rather are influenced by the same policy goals that influence justices' decisions on the merits.[9] Guided by their attitudes toward substantive issues raised, justices will be more likely to vote to accept cases through which they can advance desirable policies. From this perspective, a decision to grant or deny access can become a covert way of making a decision on the merits of the case. If this is true, there should be a congruence between decisions on the merits and case selection decisions.

The policy model of case selection, then, requires taking into consideration both objective case characteristics and the direction of the lower court's decision as well. A policy-oriented justice seeking to expand the rights of injured workers might vote to grant certiorari only if a worker lost in the lower court. If the worker won the case at the lower level, nothing could be gained by a rehearing.

Evidence to support policy theory is based primarily on studies of the U.S. Supreme Court. His examination of Federal Employer Liability Act certiorari petitions in the 1938-1949 terms of the Supreme Court convinced Schubert (1964) that attitudes of justices determine whether or not cases are granted full review. Roper and Netols (1982) found that the Burger court granted certiorari more frequently than the Warren court when the Court of Appeals found in favor of the

9. The following studies have examined the relationship between decisions on the merits and case selection decisions and concluded that the two decisions are related: Baum (1976, 1977, 1979); Dudley (1986); Ulmer (1972, 1983); Schubert (1962, 1964). Others who have not used voting data have also concluded that the two stages of decision are not as independent as official statements of review criteria indicate, e.g., Gibbs (1955).

defendant. Sidney Ulmer (1973) found propensity to review prisoner claims corresponded to support for prisoners on the plenary decision, and that knowledge of a justice's case selection vote enhanced the ability to predict that vote on the merits for eight of the eleven justices in the sample (Ulmer, 1972). Baum (1977) also found the case selection vote related to a vote to reverse on the merits in the California Supreme Court.

The data collected in this research do not support a pure "policy" perspective on case selection decisions. Policy theory posits a direct relationship between (1) dissent rates on case selection and dissents on the merits, (2) voting blocs on certiorari and on the merits, and (3) votes to grant certiorari and votes to reverse on the merits.

The correlation between dissent rates on case selection and dissent rates on the merits is not statistically significant in Georgia. Table 3 shows that justices' votes on certiorari do not predict justices' votes on the merits. (The exception to this rule was Justice I who dissented most on certiorari and even more on the merits). Indeed, the median dissent rate on case selection was higher (9.5%) than the dissent rate on the merits (7%).[10]

During the period of the study, there were three personnel changes on the Georgia and consequently three "natural courts."[11] Table 4 compares the voting coalitions on the merits with voting coalitions on case selection for each of the three natural courts. In Court I, certiorari blocs and blocs on the merits were similar, except for the shift by Justice G. In Court II, there were two voting blocs on case selection and three blocs on the merits, but again the coalitions were similar except for Justice G. In Court III, the coalitions on case selection were very different than the voting coalitions on the merits.

From a policy perspective, a justice who agrees with the decision of an intermediate appellate court can simply vote to deny the petition for certiorari. Table 5 shows percentage of votes to reverse for each Georgia justice, subdivided by the vote on the certiorari decision.

The table indicates that *all* Georgia Supreme Court Justices were more likely to reverse than affirm petitions they voted to grant.

10. This comports with Dudley's (1986) finding of a higher level of disagreement in case selection decisions than on decisions on the merits on the California Supreme Court. More dissension on case selection decisions may be the result of a lack of discussion. Based on interviews with U.S. Supreme Court Justices, Perry (1986) concluded that there is little bargaining, or even communication, over certiorari. Justice I had comparatively high rates of dissent on both decisions. He could be the "outsider" on his court, except he never dissented alone (Ducat and Flango, 1985). In 9 of his 17 dissents on the merits, he wrote the dissenting opinion and had others join him — the hallmark of an alternate leader.

11. Although only seven justices occupy the bench at one time, this sample is composed of case selection votes of ten justices. Names are deleted to preserve anonymity.

Table 3.

Dissent Rates on Case Selection and Decisions on the Merits

	Case Selection			Decisions on Merits		
Justice	Majority	Dissent	Dissent Rate	Majority	Dissent	Dissent Rate
I	539	83	13%	59	17	22%
C	1302	159	11%	217	10	4%
F	1326	129	9%	213	13	6%
E	784	71	8%	139	2	1%
B	1369	97	7%	217	10	4%
D	341	26	7%	49	0	0%
A	782	41	5%	137	2	1%
G	1002	45	4%	174	3	2%
H	1054	31	3%	160	8	5%
J	604	18	3%	82	1	1%

Table 4.

Case Selection Blocs and Blocs on the Merits

	Court I		Court II		Court III	
	Case Selection	Merits	Case Selection	Merits	Case Selection	Merits
Bloc 1	A-G-D	A-*	A-B-C-G-H	A-C	C-I	F-G
Bloc 2	E-F	E-F-G		B-H	B-F-H	B-C
Bloc 3	B-C	B-C	E-F	E-F-G	G-J	H-I-J

*Justice D had no dissents on the merits.

Provine (1980:108) explained the fact that all U.S. Supreme Court justices are more " ... likely to vote to reverse a case they voted to review than one they did not vote to review" in terms of role theory:

> A justice's failure to vote for reversal in every case he voted to review can be interpreted to mean that he believed the subject to be too important to pass over, or that he found a conflict among lower-court interpretations, or that he encountered some other issue of court administration unrelated to the merits of the particular dispute. Likewise, a justice's vote to reverse in cases he voted against reviewing can be attributed to his view that the case was wrongly decided below, but not important enough to rate a vote for review.

Table 5.
Case Selection Votes and Votes to Reverse in Georgia

Georgia Justice	Percentage of Votes to Reverse: When Justice Voted to Grant	When Justice Voted to Deny	Difference
Justice J	80	33*	47
Justice F	71	39	33
Justice C	68	53	13
Justice B	66	57	9
Justice E	65	33*	32
Justice G	63	73	−10
Justice D	63	80*	−17
Justice A	62	67	−5

*Percentage based on fewer than 10 votes.

Brenner and Arrington (1983:491) contend that justices may vote to grant certiorari even if they agree with the decision below:

> Why do the justices vote to grant certiorari when the law is certain? They might be willing to grant cert even when the law is clear because they want to reverse the error of the court below. They would be less likely to grant cert to affirm a correctly decided lower court decision. When the law is unclear, however, some justices might vote for cert even if they believed that the court below has decided the case correctly, for the granting of the cert would give them the opportunity to expound upon their view as to what the law ought to be.

Nevertheless, the fact that all justices had the tendency to reverse casts doubt upon a direct connection between the case selection decision and the decision on the merits. It is especially surprising that the percentage of votes to reverse for Justices G, D, and A were even higher for cases in which they initially voted to deny certiorari. (These three formed a certiorari bloc on natural court I, but Justice G did not remain in the bloc on the merits.)

The Role Theory of Case Selection

The dimension of activism-restraint, developed exclusively from research of decision on the merits, may be useful in explaining case

selection decisions.[12] In a sense, each request to appeal contains the implicit question, "Should the courts interject themselves into this particular dispute?" Some justices may be more willing to accept petitions for certiorari than others based upon their perception of the role courts ought to play in society. Activist justices can base case selection decisions on policy considerations without experiencing role conflict. A restraintist judge is more likely to experience role conflict, especially if he desires a particular case outcome, but also believes that courts should not decide certain kinds of disputes.

Conventional wisdom usually equates judicial restraint with political conservatism because a narrow interpretation of cases appropriate to court review may restrict the accessibility of courts to "have nots," even though policy issues *per se* have not been considered. Because the concept of judicial activism-restraint is broad, and may be multidimensional, the narrower operational concept of review-proneness will be employed here. On the U.S. Supreme Court, Provine (1979) found that Black and Douglas differed from Burton and Frankfurter " ... less in the types of cases they voted to hear than in the numbers they felt competent to decide on the merits." Black and Douglas believed that the Court should decide cases quickly and without much ado. To review-prone justices, colleagues who reluctantly vote for review are not sensitive enough to the plight of petitioners. Justices who want to supervise the activities of lower courts and do justice by correcting lower court errors, should vote to review the maximum number of lower court cases possible so that consistency in law will be assured. It was once believed that this error correction function was the sole purpose of appeals (Leflar, 1976).

On the other hand, policy-oriented colleagues consider review-prone justices insensitive to the workload imposed on the court. Besides, they argue, one landmark case can change policy and influence many more petitioners than acceptance of many petitions that make piecemeal changes affecting few individual petitioners. By accepting too many petitions for review, justices have less time for reflection and less time to write opinions, consequently opinions may become more formalistic,

12. Flango and Ducat (1977) defined the key differences between activism-restraint as (1) the scope of the questions to be decided; (2) the decision of a case on the merits versus decision on narrower, procedural grounds; (3) the amount of deference to be accorded to the legislature; (4) the willingness of judges to formulate new policies before the "political" branches have had a chance to act; and (5) the degree of deference to be accorded to the primary fact finder; and empirically discovered these dimensions in the California Supreme Court. See also Grossman (1962) and Spaeth (1964; 1986) who also attempted to measure judicial restraint empirically; Forte (1972) who discusses the concept from several perspectives; Abraham (1975:354-376) who lists 16 maxims of self-restraint; and Lamb (1982) who questions the utility of the concept.

rely more mechanically on precedent, and provide less guidance to lower courts.[13] This more deliberate emphasis on case selection stresses the agenda setting task of courts. In these courts, which stress the policy-making function of appellate courts, decisions *not* to grant petitions have policy implications as well. Certiorari could even be used to avoid difficult issues (Harper and Rosenthal, 1950).

Review-proneness may be operationally defined initially as the proportion of times justices voted to grant certiorari. Table 6 shows there was diversity among Georgia's justices in the percentage of votes to grant certiorari. Justice J voted to grant certiorari for one case in eight, while Justice E. voted for one petition in four. Other things being equal, one would suspect that Justice E's philosophy of case selection would favor error correction and Justice J is either less review prone or is carefully choosing cases to make a policy statement.

Most courts claim that they receive a large number of frivolous appeals, and therefore deny most petitions for review. Writs may be denied for want of sufficient assignment of error in the petition or for failure to comply with the rules. A denial of certiorari by the Georgia Supreme Court does not imply approval of the decision of the intermediate appellate court. In *Adair v. Traco Division* (1941) the Court noted:

> Petitions are frequently denied without determining whether the decision of the Court of Appeals was correct, or probably correct. Under our interpretations of the Constitution and laws, the decisions of that court were intended to be final, except in a narrow class of cases.

Review-prone justices would be expected to dissent from certiorari petitions denied, but not (or rarely) from certiorari petitions granted. Policy-oriented justices would be expected to dissent from certiorari petitions granted, but not from petitions denied.

Table 6 also shows that overall percentage vote to grant certiorari as a measure of review proneness corresponds with percentage dissents from certiorari denied as an indicator of review proneness. Comparing the two measures reveals that Justices E, C, F and I, are most review prone, and Justices H, G, B, and A are the least review prone. Justice D dissented equally from certiorari petitions granted and denied, but never from decisions on the merits. Justice J may be following a policy-

13. See Kagen *et al.* (1978). Justices of the Rhode Island Supreme Court, which handles approximately 200 cases per year, complained that they were not able to give each case the time it deserved, to write the kind of opinions they wanted, or to keep up with legal periodicals and important decisions (Beiser, 1973).

Table 6.
Review Proneness on the Georgia Supreme Court

	Total Certiorari Votes (N)	Vote to Grant Certiorari (%)	Total Certiorari Dissents (N)	Dissents from Certiorari Denied (N)	Dissents from Certiorari Denied (%)
Justice E	855	26	71	63	89
Justice C	1461	22	159	124	78
Justice D	367	22	26	13	50
Justice F	1455	20	129	95	74
Justice I	622	19	83	64	77
Justice A	823	17	41	16	39
Justice G	1047	15	45	9	20
Justice H	1085	14	31	18	58
Justice B	1466	12	97	25	26
Justice J	622	12	18	13	72

making strategy because he votes to grant certiorari less often than his colleagues, but also frequently dissents from certiorari denials.

Role theory would lead us to expect variation among justices in their perceptions of which case characteristics are relevant to case selection. In Gibson's (1983:15) words "...judges with different attitudes will rely upon different cues and/or rely upon similar cues in different ways." Data obtained in this research on the behavior of individual judges on the Georgia Supreme Court permit one test of this assertion. Table 7 sets out the results of a discriminant analysis — analogous to that performed on the entire courts in Table 1 — for the case selection decisions of each Georgia Supreme Court Justice.[14] These data support the contention that different judges rely upon different case characteristics in reaching case selection decisions, but case characteristics were no more successful in explaining the variance in the case selection votes of individual justices as it was in explaining the vote of the court as a whole. Taking case selection votes of justices for all cases in which they participated yielded a canonical correlation ranging from .12 to .43, which means case characteristics explained between 1 and 18

14. The number and types of case characteristics justices relied upon also varied by natural court. Space does not permit a full display of the results for all three natural courts, but a brief summary may be illustrative. Case selection votes in court I yielded canonical correlations which ranged between .34 and .47, which means case characterstics accounted for between 12 percent and 22 percent of the variance. At the other extreme, the canonical correlations for court III ranged between .14 and .37 explaining (between 2% and 13% of the variance). These findings show the varying effect of judicial perceptions of case characteristics on case selection decisions and dramatize the effects of court composition on case selection.

Table 7.
Case Characteristics and Justices' Votes on Applications for Certiorari

Georgia Justice	Standardized Discriminant Function	Wilk's Lambda	Canonical Correlation	Number of Cases
Justice E				
Criminal defendant as appellant	−.61	.85	.38	855
Reversal by intermediate appellate court	.54			
Dissent in intermediate appellate court	.23			
Individual as appellant	−.20			
Employee as appellee	.19			
State or local government agency as appellant	.18			
Homicide cases	.16			
Justice C				
Reversal by intermediate appellate court	.68	.93	.26	1461
State or local government agency as appellee	−.56			
Justice D				
Reversal by intermediate appellate court	.54	.82	.43	367
Miscellaneous civil cases	.40			
State or local government agency as appellee	−.37			
Association as appellee	.35			
Homicide cases	.28			
Employee as appellant	.26			
Domestic relations cases	.25			
Justice F				
State or local government agency as appellee	.83	.87	.35	1455
Reversal by intermediate appellate court	−.47			
Company/Corporation as appellee	.32			
Individual as appellant	.30			
Dissent in intermediate appellate court	−.27			
State or local government agency as appellee	.14			
Justice I				
Reversal by intermediate appellate court	1.00	.99	.12	622

Table 7. (Continued)
Case Characteristics and Justices' Votes on Applications for Certiorari

Georgia Justice	Standardized Discriminant Function	Wilk's Lambda	Canonical Correlation	Number of Cases
Justice A				
State or local government agency as appellee	.71	.92	.28	823
Reversal by intermediate appellate court	−.48			
Company/Corporation as appellant	.28			
Homicide cases	.27			
Government action cases	.24			
Dissent on intermediate appellate court	−.21			
Justice G				
State or local government agency as appellee	.70	.93	.26	1047
Reversals by intermediate appellate court	−.37			
Dissent on intermediate appellate court	−.29			
Government action cases	.25			
Employee as appellant	−.25			
Justice H				
Dissent on intermediate appellate court	.51	.96	.20	1085
Individual as appellee	.50			
Company/Corporation as appellant	.37			
Criminal defendant as appellee	.30			
Reversal by intermediate appellate court	.26			
Justice B				
Criminal defendant as appellant	.72	.95	.22	1466
Reversal by intermediate appellate court	−.44			
State or local government agency as appellant	−.25			
State or local government agency as appellee	.24			
Justice J				
Criminal defendant as appellee	.72	.95	.23	622
Individual as appellee	.47			
Company/Corporation as appellant	.34			
Reversal by intermediate appellate court	.32			

percent of the variance. Justices varied in the number and types of case characteristics they used as cues. Only one characteristic, reversal by intermediate appellate court, was important to Justice I, while Justices E and D relied on seven characteristics each.

Review-prone justices were expected to be more sensitive to the outcome of cases at the intermediate appellate court level than their less review-prone colleagues so they could better correct errors of the lower court. Indeed, one of Georgia's justices, in a personal interview, stated that dissent, especially on a matter of law on the intermediate appellate court, most likely would lead to the granting of certiorari, but that justices "were not concerned at all" about reversals of trial court decisions by the intermediate appellate court. Intermediate appellate court reversal, however, was a significant cue for all justices, not just the review prone.

In sum, Georgia Supreme Court Justices did differ in the extent to which they were prone to grant certiorari, their perception of cues, and in the number of cases they felt appropriate to review.

Conclusions and Implications

This article began by asking which factors determine whether a case is selected for full hearing on the merits. Three theories — cue theory, policy theory, and role theory — were tested in full on the Georgia Supreme Court and in part using data from the Illinois Supreme Court. The basic findings are as follows:

1. Cue theory attempts to use objective case characteristics, such as type of issue, status of litigant, and level of dissension, to predict the case selection behavior of courts. In the final analysis, the case selection process is just too complicated to be explained by a small number of case characteristics and a theory that does not take into account the importance of judicial perceptions of cues. Type of case, a surrogate for issues raised, was not a useful predictor of case selection. Perhaps, more detailed case types would yield better results, but a more likely explanation is that it is not necessary to decide *all* cases raising similar issues to make policy. A sample of cases may be sufficient. Dissent on the intermediate appellate court, reversal of trial court decisions by an intermediate appellate court, and government as litigant were cues that did have some value in distinguishing which cases would be granted full review and which would not. Methodological tools must be sharpened to increase prediction of case selection decisions. Discriminant analysis works best when the expected vote split is 50-50.

Because 90 percent of all petitions for review are denied, a naive prediction that *all* petitions will be denied, will be correct 90 percent of the time. Statistical techniques will have to be much sharper to improve on that prediction.

An attempt was made to adapt cue theory by using it to predict case selection behavior of justices rather than courts as a whole. Cue theory was used to illuminate the case characteristics important to individual Georgia justices. Even this modification did not improve the usefulness of cue theory, but did add some insight on the case characteristics important to individual justices and illustrate how court composition affects case selection decisions.

2. Policy theory, in its rejection of the objectivity of cue theory, is too simplistic for the opposite reason — it weights only subjective considerations. Supreme court justices in Illinois and Georgia do not appear to use case selection as a means of making covert decisions on the merits of the case. Comparing dissent rates on both case selection and on the merits failed to support a policy theory of case selection, but certiorari voting blocs on two of the three natural courts were similar to coalitions on the merits. The relationship between decisions to grant certiorari and to reverse on the merits was strong for *all* justices, not just the policy-oriented, and so the policy theory was an inadequate explanation for case selection.

3. Role theory, which Goldman and Jahnige (1971:189) called "potentially the most comprehensive" explanation of decision making on the merits, has not been applied systematically to case selection. Because it shares features of cue theory and policy theory, role theory provides the best potential for explaining case selection behavior. Georgia Supreme Court Justices differed in the extent to which they were prone to grant certiorari and in their perceptions of the importance of various case characteristics.

Role theory should be extended to cover case selection decisions as well as decisions on the merits. A view of appellate courts as error-correctors implies review proneness, just as a view of appellate courts as policy makers implies stringent case screening. The results of this study suggest that role theory could be fruitfully applied to future studies of case selection processes in state supreme courts. Future studies could clarify the following questions: Is the error-correction policy-making concept related to the more established concept of activism-restraint? Are activists, with their willingness to interject courts into a variety of disputes, more review prone than restraintists? Or,

would activists, with their emphasis on changing the policy directions of a court, restrict petitions granted to those where they have the best opportunity to win on the merits? Does the concept of activism-restraint, developed exclusively from decisions on the merits, apply to case selection decisions at all?

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