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Case Selection in the United States Supreme Court

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CASE SELECTION IN THE UNITED STATES SUPREME COURT. By *Doris Marie Provine*. Chicago: University of Chicago Press. 1980. Pp. 214. $18.

The Supreme Court can decide with full opinion between one hundred and two hundred cases per year out of approximately four thousand requests that it receives (p. 9). Since review is almost totally discretionary,[1] the selection process is extremely important. What factors distinguish the petitions granted review from the mass of those filed? The Court publishes no record of individual votes and no explanation for denials of review; consequently, the standards applied in case selection remain a mystery. Writers interested in selection standards have had to rely on the published record of grants and denials of certiorari and published case reports. Doris Provine's study is unusual, however, because she examines the only actual data on case selection available from inside the Court. Through a careful analysis of the docket books and personal papers of Justice Harold H. Burton, which meticulously record the inner workings of the Court from 1945 to 1957, she is able to provide a complex and intimate view of the selection process.[2]

In the first part of the book, Provine traces the development of discretionary review and argues that the court has consistently sought to increase control over its docket and to "maximize its institutional independence" by minimizing its obligatory jurisdiction (p. 43). The Judiciary Act of 1925 sharply limited the number of cases that could be appealed as of right to the Court.[3] And the vagueness of Supreme Court Rule 17, the Court's only statement of its certiorari criteria, insulates the Court from challenges of inconsistent application.

Secrecy and broad discretion in the case selection process have enhanced the Court's image as the protector of even the most unsophisticated petitioner (p. 44). Provine shows that this image is but a myth. In 1978 0.2% of the *in forma pauperis* petitions were granted review, compared to 7.8% of paid cases (pp. 44-45). Provine also argues that the lack of explicit standards, the large volume of cases,

1. According to Provine's figures, cases within the Court's appellate jurisdiction account for less than 10% of the total docket. P. 10.

2. Justice Burton's papers were unavailable until 1965. P. 5. The only other author using Burton's records extensively is Sidney Ulmer. Unlike Provine, Ulmer has found a strong correlation between disagreement on the merits of the decision below and voting for review. P. 6.

3. *See* ch. 229, 43 Stat. 936 (current version codified at 28 U.S.C. §§ 1253, 1254, 1257 (1976)).

and the intricacies of the Court's procedures unfairly advantage experienced litigants, particularly the Solicitor General.[4] Experienced litigants learn the formal but unpublished prerequisites of review, while the volume of cases makes it unlikely that poorly written petitions will receive the attention needed to determine their merit.[5] Provine decries what she sees as the resulting unequal access to the Court.

Despite the problem of unequal access, Provine believes that discretionary review "is part of the foundation of the [Court's] institutional strength" (p. 72), because it enables the Court to side-step untimely issues. By waiting for the best cases for decision, the Court maintains its public image (p. 72). Until recently, the Court was united in the effort to maintain control over case selection. But, Provine suggests, a split among the justices on the issue of docket control became evident during the debate in the mid-1970s over whether to reduce the Court's workload by creating a National Court of Appeals.[6] Justices favoring judicial restraint seemed to view the current system of case selection of as a tool of the more activist members, and hence supported the National Court of Appeals proposal. But Provine points out that broad discretion can also reflect restraint. She argues that the most serious problem created by current procedures, and one not considered by either side, is unequal access (p. 73). While Provine endorses Court-controlled case selection because it furthers institutional independence, she believes that secrecy in case selection is unnecessary to achieve such independence and that it promotes unequal access. Since case selection is such an important aspect of the Court's work, she argues, the public should be given information about the process (p. 177).

In the remainder of the book, Provine examines previous scholarship on case selection in light of the Burton data.[7] Provine says that

4. From 1947 to 1957 the United States petitioned the Court for review 554 times and had a success rate of 66%. The United States was respondent in 2,670 cases, 15% of which were granted review. P. 87.

5. *See also* Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966).

6. The National Court of Appeals would have been inferior to the Supreme Court, but superior to the circuit courts of appeals, and would have screened cases for the Supreme Court. *See* Hufstedler, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545 (1974).

7. Other work on case selection includes Brenner, *The New Certiorari Game*, 41 J. POL. 649 (1979); Earp, *Sovereign Immunity in the Supreme Court: Using the Certiorari Process to Avoid Decision Making*, 16 VA. J. INTL. L. 903 (1976); Hanus, *Denial of Certiorari and Supreme Court Policy Making*, 17 AM. U.L. REV. 41 (1967); Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term — An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950). Prof. Harper and three Yale students co-authored similar articles under similar titles for the three succeeding terms at 100 U. PA. L. REV. 354 (1951); 101 U. PA. L. REV. 439 (1953); and 102 U. PA. L. REV. 427 (1954).

previous studies have tended to extremes, some assuming a purely political, outcome-oriented process, and others assuming a purely legalistic, rule-oriented process. Provine finds both extremes unsatisfactory descriptions of the actual decision making that takes place in case selection.

Joseph Tanenhaus,[8] who theorized that petitions containing one or more "cues" would receive closer attention, found a positive correlation between the grant of review and three such cues: (1) cases in which the United States was the petitioner; (2) cases involving disagreement between the trial and appellate courts; and (3) cases involving civil liberties petitions. Provine's examination of the "special lists" used by the Court for much the same period studied by Tanenhaus leads her to conclude that the one theory does not adequately explain the selection process. Chief Justice Hughes introduced the practice of special listing those cases he thought should not be reviewed. Any justice could delete cases from the list at any time, but those remaining on the list after conference were automatically denied review. Provine's analysis shows that many factors other than Tanenhaus's cues played a role in special listing decisions. She identifies five classes of cases more likely to be reviewed during the Burton period: (1) those in which the United States was a party; (2) civil rights or civil liberties cases; (3) labor disputes; (4) cases involving issues of federalism; and (5) criminal cases (p. 83).[9]

Provine also rejects Glendon Schubert's game theory analysis[10] of case selection because its underlying assumption — that justices vote in case selection primarily to further their views on the merits — cannot be supported by her data. The Burton data indicate that four factors influence the voting behavior of individual justices in case selection: (1) the Justice's perception of the role of a judge; (2) his perception of the role of the Supreme Court; (3) his views on the merits of the case; and (4) the circumstances of the particular case. Provine found that justices who tend to vote for review do so in a variety of cases, while those who favor judicial restraint tend to vote against review "across the board" (p. 130). Thus the justices' individual convictions about the merits do not influence voting behavior as much as some writers have assumed. Provine therefore

8. Tanenhaus, Schick, Muraskin & Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION MAKING 111 (G. Schubert ed. 1963).

9. Provine also finds that the identity of the petitioning party was an important factor within each of the categories. P. 84.

10. G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959); Schubert, *Policy Without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284 (1962).

concludes that the justices' perceptions of the proper role of the Court were the most important factors in case selection during the Burton period.

Case Selection in the United States Supreme Court is an interesting and valuable book. It provides a convincing theory of case-selection decisions that does not ignore the complexity of the process, complexity that makes it difficult to draw conclusions about the underlying standards applied. Provine recognizes that since the personalities of the justices affect these standards, her conclusions are somewhat limited to the Burton period. Although the analysis of the Burton data cannot necessarily be applied to the current Court, it is useful because it disproves previous assumptions about case selection, and provides intimate glimpses into the usually secret workings of the Court.[11]

11. Provine quotes part of one memo to Justice Burton:

> Petitioner is a big Cadillac dealer who got caught buying the local Alderman; he has been fighting conviction for four years; his case has no merit and his brief is replete with overstatements, innuendo, speculation, and almost untruth. It would be a crime to touch this case.

P. 22 (footnote omitted).