

The Supreme Court

Setting the Docket:
Managing and Court's Agenda

Supreme Court Decision Making

- Why does the Supreme Court face and agenda setting problem?
- How does the Court manage the “docket”?
- What issues are likely to be heard by the Court?

Two Routes to Review by the SC

- As a result of an amendment to the *Judiciary Act in 1925*, only a few types of cases now qualify for (a more or less) automatic review by the SC.
 - e.g., when a lower court has declared a federal law unconstitutional.
 - Such cases constitute only about 10% of the SC case load (~10 cases a year).
- In other cases, the losing party may petition the SC for a *writ of certiorari*, by explaining why the SC should review the case:
 - If the petition is granted, the SC will issue the writ to the lower court, ordering it to send up the case for review.

The Writ of Certiorari (cont.)

- The SC uses the “rule of four” (4/9 rule) in deciding whether grant “cert.”
 - The SC court is especially likely to grant cert
 - if the case raises important and/or unresolved legal issues, or
 - if the lower court(s) ruled in a way that appears to be contrary to precedent and prior SC decisions.
 - Justices who vote to grant cert are somewhat likely to support the appellant and reverse the lower court decision, but there is no guarantee they will so decide.

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Setting the Agenda and Managing the Docket

- How and why does the Supreme Court select the cases they do?
 - Supreme Court receives requests to grant cert to over 8,000 cases a year.
 - Decides around 90 small and major cases
- Factors influencing selection
 - Practical
 - Does the case have standing? Does it pass test of mootness?
 - Strategic
 - Do facts allow a clean decision that will guide lower courts?
 - Will ruling result in a 5 vote decision that is consistent with the Justice’s ruling?

Outside Influences on Setting the Docket

- Amicus Curiae briefs
 - Friends of the court briefs
 - Argue that a petition should be heard
- Influential friends of the Court
 - The Solicitor General
 - Outlines federal government's agenda and requests
 - Prestigious/powerful interests
 - Controversial issues

The Process

- Cert pool memo
 - "markup" process
- Consideration at conference
 - discuss list and dead list
 - discussion and conference vote
- Denial of certiorari is NOT a decision on the merits of the case

Getting on the Discuss List

	Proportion discussed	Proportion granted of those discussed	Overall proportion granted
TOTAL	.26	.31	.08
U.S. as Petitioner	.92	.87	.80
Disagreement among low courts	.47	.36	.17
Alleged conflicts	.30	.33	.17
Actual conflicts	.83	.83	.69
Civil liberties cases	.27	.28	.08
Liberal outcome in lower court	.45	.36	.16
One amicus brief in support of certiorari	.66	.46	.30
Two or three amicus briefs in support of cert	.73	.63	.46
Four or more amicus briefs in support of cert	.90	.71	.63
One or more amicus briefs in opposition	.69	.50	.34
Dissent in lower court	.52	.39	.20

Cue Analysis

Solicitor General as Petitioner	Actual conflicts in circuits	2 or more amicus briefs supporting	% granted
no	no	no	1%
no	no	yes	35%
no	yes	no	33%
no	yes	yes	88%
yes	no	no	37%
yes	no	yes	96%
yes	yes	no	97%
yes	yes	yes	[no cases]

NO cue: 1% ONE cue 33-37% TWO cues: 88-97%

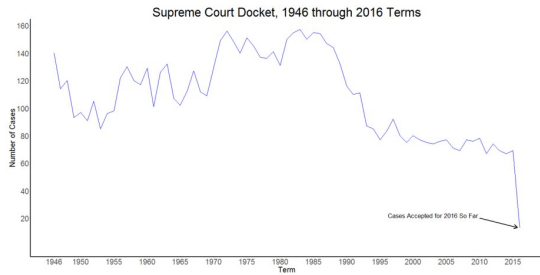
Strategy of Making Doctrine

- Supreme Court hopes to limit case load by instructing lower court behavior
- Establishes judicial doctrine
 - Easier to Avoid overturning
 - Guides lower court latitude
- *Procedural Doctrine*
 - How courts should proceed
- *Substantive Doctrine*
 - Who should prevail in types of cases

The Importance of Precedent

- *Stare Decisis*
 - Let the decision stand
- Court traditionally refers to precedent when forming decisions
 - Ex: *Griswold v Connecticut*
 - Privacy is established as a constitutionally protected right
- Some legal philosophies move away from precedent
 - Ex: Clarence Thomas and original intent

Shrinking Dockets



Why the Decrease?

- **Strategic:** Justice want to place cases on docket when they can predict outcome.
 - When Court has a stable winning coalition, it takes on more cases.
 - When Court lacks a stable coalition it takes fewer cases.
- **Political:** Court hears fewer cases when ideologically out of alignment with Congress and/or President.
- **Institutional:** Supreme Court Selections Act (1998) gives Court more discretion in taking cases, and mandates fewer cases.

Key Takeaways

- Court has to be strategic in managing the number of cases it places on the docket.
- Court is legally, politically and ideologically strategic in case selection.
