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**Agenda Setting on the Supreme Court of the United States in 1960, 1977,
and 1992**

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Abstract

This dissertation adds to Supreme Court of the United States agenda-setting research by exploring the following overarching research question: How does the Supreme Court of the United States decide which cases it will review? In addition, this study addresses three gaps in the agenda-setting research by considering types of petitions for writ of certiorari that are often ignored by other studies, analyzing the Court's case-selection process as a two-step process, and studying the Court's agenda-setting trends over time. To explore these gaps in the research, an original dataset was created by collecting data on a random sample of petitions for writ of certiorari to the Court during its 1960, 1977, and 1992 terms. Selection models were then used to analyze the data and a low-cost, low-value and high-cost, high-value cue theory framework was applied to the results of the models to determine the factors that influence the likelihood a petition for writ of certiorari is discussed by and selected for review during the Court's case-selection process. The results of this study show that different factors significantly influence the Court's case-selection process across the terms studied and have varying impact during one or both stages of the case-selection process (which include the selection of petitions for the Court's discuss list and the selection of petitions from the discuss list for review). This study has implications for future scholarly work on the Supreme Court's agenda-setting process as it highlights the importance of considering all types of certiorari petitions, the two-step nature of the case-selection process, and changing agenda-setting patterns over time. The findings in this dissertation may also assist potential litigants who hope to have their cases considered by the Supreme Court.

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Chapter 1: Introduction

I. Introduction.

This dissertation sets forth the following primary research question: How does the Supreme Court of the United States decide which cases it will review? In order to address this question, this dissertation applies a low-cost, low-value and high-cost, high-value cue theory framework to the Court's case-selection process to identify factors that significantly influence the likelihood a petition is discussed by and selected for review by the Court during its case-selection process. This dissertation also poses smaller research questions intended to explore gaps in the existing agenda-setting research.

For instance, this dissertation considers some factors that may influence the Court's agenda-setting process that have often been ignored by previous studies. These studies have typically ignored these factors because data or statistical analysis limitations have led to these studies excluding certain types of petitions for writ of certiorari. In other words, previous studies have excluded certain types of petitions for writ of certiorari. However, this dissertation analyzes several of these types of petitions that have been ignored by other studies. Considering these petitions allows this dissertation to consider additional factors that may influence the Court during the case-selection process and thus provide a more complete explanation of the Court's agenda-setting process.

In addition, this dissertation considers both stages of the Court's case-selection process, which include the Court's selection of petitions for the discuss list and then the Court's selection of petitions for review. Past studies often ignore the first stage of the case-selection process and focus on only the second stage, even though the first stage is crucial to the Court's case-selection process because petitions are selected for review

only after they have first been selected for the discuss list. Studying both stages of the case-selection process will help to shed light on the differences between the stages and identify the important factors that influence decisions at each stage.

Finally, this dissertation also takes a historical approach by studying Supreme Court agenda-setting over time through analyses of data from multiple terms during which the Court was under the leadership of different chief justices. Previous agenda-setting studies generally study data from only one term, or, if multiple terms are considered, terms during which the Court was under the leadership of only one chief justice. Considering agenda-setting over a period of time helps to address this gap in the research and determine whether Court agenda-setting trends change over time.

II. “Agenda-Setting” and “Case Selection” on the Supreme Court.

It is helpful to first define how the terms “agenda-setting” and “case selection” are used in this dissertation. Studies that focus on the manner in which certain issues come before the Supreme Court have referred to the process as “agenda-setting” or “case selection.” However, these terms are often undefined in studies (Black and Boyd 2012a; Black and Boyd 2012b; Owens 2010; Caldeira and Wright 1988) and are sometimes conflated or used interchangeably (Black and Boyd 2013; Black and Boyd 2012a; Caldeira and Wright 1988). Because scholars typically do not define these terms or conflate them, it is important to define these terms for the purpose of this dissertation.

First, this dissertation borrows the definition of “agenda-setting” from Pacelle (1991), who defines agenda-setting as the wide variety of issues that citizens, interest groups, and other government actors bring to the Court’s attention (p. 3). Second, “case selection” is defined here as the Court’s process of choosing from these issues those it

will consider by selecting cases for review.¹ In other words, through the case-selection process, the Court is able to select the cases that involve issues the members of the Court desire to review. The case-selection process consists of two stages, which include the selection of petitions for the discuss list and then the selection of petitions for review.

As explained in Chapter 2, four processes occur before the Supreme Court hands down a decision in a particular case. First, a party must petition the Court for review of its case. Second, one of the justices must choose to add the petition to the discuss list, which includes the list of petitions the Court discusses in conference. Third, the petition must be selected for review by the Court. Fourth, the Court makes a decision on the merits of the case.

As defined here, “agenda-setting” broadly refers to the manner in which certain issues are considered by the Court and thus includes the first three processes discussed above. Case selection, however, refers to the second and third processes described above, and therefore the case-selection process is a part of the broader agenda-setting process. The case-selection process, which includes the creation of the discuss list and the selection of petitions for review, provides a pathway through which the Court is able to shape its agenda (Baum 2013).

In other words, the case-selection process is the part of the agenda-setting process that allows the members of the Court exert some control over the issues the Court will hear.² As the two steps of case-selection are the steps of the agenda-setting process in

¹ Pacelle (1991) and Caldeira and Wright (1990) refer to the case-selection process as “agenda building.” However, “case selection” is the term used in this study to describe the Court’s process because through this process it selects the petitions it will review. The term “case selection” has also been used by other scholars to describe the Court’s two-step process (Black and Boyd 2013; Caldeira and Wright 1988).

² There is some indication, however, that the Court may have some indirect influence on the first process, or the decision by a party to petition the Court for review of its case. For instance, Baird (2004) finds that after the Court signals that its policy preferences regarding a particular issue have changed the number of

which the Court has the most control, the two steps of the case-selection process are studied here. Therefore, this dissertation often specifically refers to the case-selection process instead of the more general agenda-setting process, although, as defined here, case selection is a component of the Court's agenda-setting process.

III. Agenda-Setting on the Supreme Court of the United States.

The Supreme Court has been able to exert some control over its agenda through the case-selection process since 1925, when Congress gave the Court the ability to choose the cases that do not fall within the Court's original jurisdiction that it will review.³ Cases that do not fall within the Court's original jurisdiction now come to the Court through the certiorari process, or the process during which potential litigants petition the Court for writ of certiorari. The Court may choose whether to grant writ of certiorari and review a petitioner's case or deny writ of certiorari and not review a petitioner's case. Before 1925, the Court operated similarly to other federal courts, which must hear cases brought by parties with proper standing and thus do not have the same ability to choose the cases they will review.

As briefly discussed in Section II above, the Court does not have complete control over its agenda-setting process as it may choose cases for review from only those cases first properly brought by parties to the Court. However, agenda-setting research has shown that through its case-selection process the Court does choose to review certain

cases involving that issue increases, indicating that the Court signals to potential litigants the issues it would like to review. Hurwitz (2006) also finds that the justices send signals regarding their agenda preferences and that litigants litigating in appeals courts respond to these signals. This suggests that the Court may have some level of control, however indirect and minimal, over the first stage of the agenda-setting process.

³ The Judiciary Act of 1925, which is discussed in Chapter 2, gave the Court this ability. The Court does not have the same ability to choose which cases it will review from cases that fall within its mandatory jurisdiction.

issues by selecting cases that involve those issues (Black and Boyd 2013; Caldeira and Wright 1988). Consequently, the Court does have some control over its agenda and chooses to review cases involving some policy issues more than others⁴ (Pacelle 1991; Provine 1980). Therefore, put broadly, this dissertation seeks to add to agenda-setting research by identifying the factors that influence the Court's two-step case-selection process. The specific hypotheses and research questions addressed by this dissertation are discussed below.

IV. This Dissertation and Supreme Court Agenda-Setting Research.

Agenda-setting research has attempted to explain influences on the Supreme Court's agenda-setting process and the reasons the Court chooses to grant certiorari to certain petitions. A brief summary of this research, the theoretical framework utilized by this dissertation based on this research, as well as the manner in which this dissertation attempts to address gaps in the existing research is provided below, although these topics are discussed more thoroughly in Chapter 2.

A. Current Agenda-Setting Research.

Early agenda-setting studies developed and applied cue theory to explain the Court's agenda-setting process. Cue theory posits that the members of the Court will look for certain factors that act as informational cues as they review petitions for writ of certiorari in order to more easily obtain information about the petitions that will aid them in making case-selection decisions.

Agenda-setting studies have also applied general theories of judicial-decision making, which are typically used to explain the justices' decisions on the merits of cases,

⁴ The Court's agenda-setting process, as well as scholarly research on the topic, is described more fully in Chapter 2.

to the explain the Court's case-selection process. These theories include the legal model, the attitudinal model, and the strategic model.

The legal model assumes that the members of the Court are influenced by legal factors such as the law, precedent, and legal doctrines when making decisions. Conversely, the attitudinal model theorizes that the members of the Court make decisions based not on legal factors but on their personal policy preferences, ideological attitudes, and values (Segal, Spaeth, and Benesh 2005; Segal and Spaeth 2002). The strategic model posits that the members of the Court act strategically to achieve policy outcomes that are as close as possible to their own personal policy preferences, which means that they sometimes make decisions that are not a reflection of their personal policy preferences.

In addition to applying the various above-described decision-making theories to the case-selection process, some agenda-setting studies consider individual justice voting behavior, while others study the collective decision-making behavior of the Court. The latter is often used when the creation of the discuss list is analyzed due to data limitations that restrict the ability to study the behavior of individual justices during both stages of the case-selection process. In other words, a lack of data on individual justices' decisions during the case-selection process limits the ability to study individual justice voting behavior.

B. The Theoretical Framework Applied in this Dissertation.

Section IV(B) of Chapter 2 discusses some limitations of applying the general theories of judicial decision-making, which include the legal, attitudinal, and strategic models, to the Court's agenda-setting process. For instance, the models have been

criticized as being too “one-dimensional” and unable to sufficiently explain Supreme Court decision-making alone (Cross and Nelson 2001, p. 1491). Additionally, these models usually consider individual justice voting behavior, and data availability limits the ability to study individual justice behavior in research that focuses on both stages of the case-selection process. Therefore, due to these issues, this dissertation applies cue theory to explain the Court’s case-selection process.

Specifically, this dissertation applies a low-cost, low-value and high-cost, high-value cue theory framework, which has been used in previous agenda-setting research (Black and Boyd 2013). This cue theory framework theorizes that the influence of a cue on the Court during the stages of the case-selection process is related to the relative cost, or time commitment, it takes to determine the presence of the cue and the value, or quality of information, the cue provides⁵ (Black and Boyd 2013). A more detailed explanation of the low-cost, low-value and high-cost, high-value cue theory framework, and the manner in which it is applied in this dissertation, is provided in Section V of Chapter 3.

In addition, because limited data availability does not permit the study of individual justice behavior when both stages of the case-selection process are studied, this dissertation studies the collective decision-making behavior of the Court as a whole.

C. Gaps in the Agenda-Setting Research Addressed by this Dissertation.

There are gaps in the Supreme Court agenda-setting research that I attempt to address in this dissertation, which are discussed more comprehensively in Chapter 2. First, as explained briefly in Section I above, agenda-setting studies often exclude certain

⁵ Section V of Chapter 3 explains that the level of influence of a cue, as well as the stage of the case-selection process it impacts, is related to its relative cost and value.

types of cert petitions from analyses due to potential issues these types of petitions may cause with respect to statistical analyses. However, excluding these types of petitions from study may cause selection bias and thus result in an incomplete explanation of the factors that influence the stages of the Court's case-selection process. These often-excluded petitions include state supreme court petitions and *in forma pauperis*, or IFP, petitions. To address this gap in the research, I include these petitions in the dataset analyzed in this dissertation.

Perhaps most importantly, studies also often exclude from data petitions that were not selected for the Court's discuss list. The exclusion of this type of petition creates a second gap in the research, because it prevents these studies from being able to analyze the first stage of the Court's two-step case-selection process, or the selection of petitions for the discuss list. Therefore, the data used in this dissertation includes petitions that were not selected for the discuss list, which allows this dissertation to consider the first stage of the case-selection process and explore the factors that influence the Court during this stage.

Finally, many agenda-setting studies do not study the Court's agenda-setting process over time, which makes it difficult to determine the manner in which agenda-setting trends have changed over time. This third gap in the research limits the usefulness of applying these studies' findings regarding previous Court terms to the case-selection process of the current Roberts Court, as agenda-setting trends of past Courts may not explain those of the current Court. To address this gap in the research, data from multiple terms under the leadership of different chief justices are studied in this dissertation.

V. Hypotheses and Research Questions.

As stated above, this dissertation sets forth the following overarching research question: How does the Supreme Court of the United States decide which cases it will review? In order to address this broad question, this dissertation also addresses the three gaps in the agenda-setting research described above and considers the following smaller research questions, which are also discussed in Chapter 3.

1. Does the inclusion in this study of types of cert petitions that have been excluded from study by other scholars, such as IFP petitions and petitions originating in state supreme courts, provide a more complete explanation of agenda-setting on the Supreme Court?
2. Do different factors act as cues to inform and influence the Court during the creation of the discuss list and the selection of petitions for review?
3. Have Supreme Court agenda-setting trends changed from 1960 to 1992, the span of years between the terms included in this study? If so, how have trends changed?

To answer the overarching research question, this dissertation also addresses the following hypotheses, which are discussed more comprehensively in Chapter 3.

Hypothesis 1: Because the time-commitment costs and informational values associated with factors that act as cues varies, there are some cues that inform and influence the Court during one stage of the case-selection process that do not inform and influence the Court during the other stage of the case-selection process. Similarly, because of cost and value considerations, some of the cues that do inform and influence the Court during both stages of the case-selection process

have a greater level of influence on one of the two stages of the case-selection process than on the other stage of the process.

Hypothesis 2: Because of historical, political, and internal factors, some of the factors that inform and significantly influence the Court during its two-step case-selection process differ between the 1960, 1977, and 1992 terms. Similarly, also due to historical, political, and internal factors, the factors that do inform and significantly influence the Court across multiple terms have a different degree of influence on the Court during each of these terms.

Chapter 4 provides a summary of the findings related to the research questions listed above and whether the predictions set forth in the hypotheses were met.

VI. Outline of this Dissertation.

The remainder of this dissertation attempts to address the overarching research question by determining the factors that influence the Supreme Court's decision-making during the agenda-setting process. First, Chapter 2 summarizes current agenda-setting literature, describing the case-selection process as well as the different theories that have been applied to the Court's agenda-setting process. An explanation regarding the use in this dissertation of the low-cost, low-value and high-cost, high-value cue theory framework and the focus on the case-selection decisions the Court makes as an institution compared to decisions made by individual justices is also in this chapter. Additionally, Chapter 2 describes the gaps in the agenda-setting research that are briefly summarized above and the manner in which this dissertation addresses these gaps.

Chapter 3 sets forth the research questions and hypotheses addressed in this dissertation, which are briefly described above. This chapter also describes the data that

is used in this dissertation, which includes data on a random sample of cert petitions from the 1960 Warren Court, 1977 Burger Court, and 1992 Rehnquist Court terms. Chapter 3 also thoroughly explains how the low-cost, low-value and high-cost, high-value cue theory framework is applied. In addition, Chapter 3 describes the dependent and independent variables included in this study and the reasons they are included, as well as the manner in which the dependent and independent variables are measured.

Chapter 4 explains the selection models used in this dissertation to analyze the data from the 1960, 1977, and 1992 Court terms, as well as the results of these models with respect to each independent variable included in this study. Chapter 4 also includes an analysis of the results of these models and a discussion regarding the manner in which the research questions and hypotheses in Chapter 3 are addressed.

Finally, Chapter 5 examines the ways in which the analyses in Chapter 4 addressed the overarching research question posed by this dissertation. Chapter 5 also discusses the implications of this study for future Supreme Court agenda-setting research, as well how the findings of this study may inform potential litigants who are considering dedicating resources to petition the Court to review their cases.

Chapter 2: Review of Supreme Court of the United States Agenda-Setting Studies

I. Introduction.

This dissertation addresses the following overarching research question: How does the Supreme Court of the United States decide which cases it will review? To begin to answer this question, this Chapter 2 reviews relevant Supreme Court agenda-setting studies and determines the appropriate theoretical framework to apply in this dissertation. Specifically, I find that utilizing a low-cost, low-value, and high-cost, high-value cue theory framework, which theorizes that the Court uses informational signals to help simplify decision-making during the two case-selection stages, and that focusing on the case-selection decisions made by the Court as an institution compared to the decisions of individual justices, provides the best framework for addressing my research questions and the analyses in my statistical models. I also discuss three gaps in the Supreme Court agenda-setting research and the manner in which this dissertation attempts to address those gaps.

A. Agenda-Setting and the Supreme Court.

Before 1925, the Supreme Court of the United States had to render decisions on all cases properly brought before the Court. As the Supreme Court's caseload began to grow in the early twentieth century, some justices expressed concerns to Congress that the Court's workload was becoming unmanageable. Congress addressed these concerns with the Judiciary Act of 1925, which gave the Supreme Court justices the ability to choose the cases the Court reviews. By choosing cases for review, the justices are able to control the types of policy issues the Court will address. This process gives the Supreme Court much more discretion over its agenda than lower federal courts have over their

agendas, as lower courts must still render a decision on all cases brought to them by parties subject to their jurisdictions and with proper standing.

The Judiciary Act of 1925 stipulates that the Court has an obligation to make a decision on the merits of all cases that fall under its original jurisdiction, but allows the Court to have discretion over cases within its appellate jurisdiction.⁶ Since the passage of the Act, parties who want the Supreme Court to review a decision by a United States Court of Appeals Circuit or a state supreme court must file a petition for writ of certiorari with the Supreme Court.⁷ If a party, called a “petitioner,” is granted a writ of certiorari, the Supreme Court requests that the lower court involved in the case send all records of the case to the Court for review. The case is also placed on the Court’s docket for a decision on the merits. If a writ of certiorari is denied, the party petitioning the Court will be informed that their petition for writ of certiorari was denied, with no additional explanation, and the lower court ruling on the case will stand.⁸

⁶ According to Article III of the United States Constitution, the Supreme Court has original jurisdiction over cases in which a state is a party, or cases in which ambassadors, public ministers, or consuls are involved (Neubauer and Meinhold 2012, p. 415). In cases in which the Court has original jurisdiction, the case does not originate in a lower court; it is first heard in the Supreme Court of the United States. The Supreme Court receives only two or three of these cases per year (Barbour and Wright 2012). The Court has discretionary jurisdiction over cases that fall under its appellate jurisdiction, which are cases that are brought properly to the Court from lower appeals courts. The Court’s appellate jurisdiction can be changed by Congress.

⁷ If Congress has mandated review, the litigant files what is called a “writ of appeal” instead of a writ of certiorari. As explained further in footnote 8, the Court gained the ability in 1988 to deny writ of appeals, and it uses the same procedures for a writ of appeal as a writ of certiorari (Segal, Spaeth, and Benesh 2005, p. 276).

⁸ After the Judiciary Act of 1925, the Supreme Court still had mandatory jurisdiction over some cases, such as writs of appeals, and therefore did not have discretion over whether to hear these cases. However, in 1988, Congress eliminated most of the Court’s mandatory jurisdiction, giving the Court even more discretion over the cases it would review. The majority of petitions reaching the Court are writs of certiorari, and so the 1988 law did not have as strong of an impact on the Court’s discretion as the 1925 Act. Most agenda-setting studies, like this one, focus on writs of certiorari, and the Court has had discretion over whether to grant writs of certiorari since 1925. These other studies that have analyzed writs of certiorari from terms of the Court before 1988 and after 1988 have not placed an emphasis on the changes brought about in the 1988 law (Black and Boyd 2013; Owens 2010).

Scholars have established that the Supreme Court of the United States can redirect and change its agenda. For example, McGuire (2004) and Perry and Abraham (1999) illustrate that the Court's institutionalization and perceived legitimacy among Americans gives the Court the ability to redirect its agenda and focus on new policy issues. Because the Supreme Court exerts unique control over its agenda compared to lower courts, scholars have done extensive research on the Court's case-selection process and the factors that influence the justices' decisions to grant or deny certiorari to petitions. These scholars have been able to demonstrate that the Supreme Court allocates more time to cases that involve certain issues than others (Pacelle 1991; Provine 1980). This suggests that either the Court is selective about the types of cases it wants to address, or that cases involving certain policy issues are not sent to the Court in great numbers. Nevertheless, the selection of cases involving certain issues has allowed the Court to change national policy in areas such as civil rights and capital punishment. Legal and political science scholars have shown a great interest in agenda-setting on the Court because the Court hands down decisions that greatly impact public policy.

What factors influence the Court's creation of its agenda? The literature on the Supreme Court's agenda-setting process is expansive, and several models of judicial decision-making have been applied to the study of the Court's agenda-setting process. Agenda-setting studies have consistently shown that certain factors, such as the policy issue presented in a case, can influence the Court's likelihood of accepting a case for review. Previous studies have explored the manner in which several models of judicial decision-making, including the legal model, the attitudinal model, and the strategic

model, as well as cue theory and historical institutionalism, help to explain agenda-setting on the Supreme Court.

This literature, however, leaves three important gaps in our understanding of Supreme Court agenda-setting. Most importantly, scholars have excluded several types of petitions for writ of certiorari from the analyses in their studies, such as IFP petitions, petitions from state supreme courts, and petitions that are not selected for the Court's discuss list. These petitions may constitute a significant portion of the total petitions sent to the Court during a given term. Additionally, ignoring the petitions not placed on the discuss list creates a second gap in the research, as it disregards the creation of the discuss list, which is the first step in the agenda-setting process. Third, most agenda-setting studies do not consider the Court's agenda-setting over time, and instead focus on agenda-setting during only one Court term or multiple terms under the leadership of only one chief justice. A discussion of these gaps in the research is in Section V below.

B. "Agenda-Setting" and "Case Selection" on the Supreme Court.

Section II of Chapter 1 explains that Supreme Court research of the manner in which certain issues come before the Court has referred to this process as "agenda-setting" or "case selection." These studies have frequently not defined these terms or have used them interchangeably (Black and Boyd 2013; Black and Boyd 2012a; Black and Boyd 2012b; Owens 2010; Caldeira and Wright 1988).

For clarity purposes, "agenda-setting" is defined here as the wide variety of issues that citizens, interest groups, and other government actors bring to the Court's attention (Pacelle 1991, p.3). "Case selection" is defined as the Court's process of choosing from these issues those it will consider by selecting cases for review. Through the process of

case selection, the Court selects the cases that involve issues the members of the Court choose to review. The case-selection process consists of two stages, which are the selection of petitions for the discuss list and the selection of petitions for review. Section II below explains that case selection is a part of the broader agenda-setting process.

II. The Agenda-Setting Process on the Supreme Court of the United States.

The Supreme Court has a considerable amount of discretion in choosing the cases it will review. The Court's ability to choose cases, however, is guided by several rules and procedures, some of which have been put in place by the Court. There are four processes that occur before the Court hands down a decision on a particular case. First, a party must choose to petition the Supreme Court for review of its case after a lower federal court or state court of last resort has rendered a decision that is not in the party's favor. Second, one of the justices on the Court must choose to add the party's petition to the Court's discuss list, which is the list the justices create when choosing the petitions they will discuss as a group in conference. Third, the justices decide the petitions they will select from the discuss list for review. Finally, in the fourth process, the Supreme Court makes a decision on the merits of the case.⁹

The agenda-setting process, as defined in Section I(B), includes the first, second, and third processes described above, because they are the processes through which a wide variety of issues are eventually brought before the Court by citizens, interest groups, and other government actors. Because the Supreme Court is passive and must wait for

⁹ It is interesting to note that only the fourth process requires a majority vote by the justices. In the second stage, only one justice has to decide to place a petition on the discuss list for it to appear on the list. In the third stage, the votes of only four justices are needed for a petition to be granted review.

litigants to bring cases to the Court, it is arguable that the Court has little control over this initial process.¹⁰

This dissertation focuses on the second and third processes, the construction of the discuss list and the selection of petitions for review, which together form the case-selection process and help to shape the Court's agenda (Baum 2013). During the case-selection process, "the Court selects from those cases the few—currently about 1 in 100—that it will fully consider and decide" (Baum 2013, p. 69). After the passage of the Judiciary Act of 1925, the Supreme Court developed procedures to guide these two stages of the case-selection process. Because the Court has direct control over only the case-selection process, most agenda-setting studies focus on this process.¹¹

In 1960, the Court received about 2,300 hundred petitions for certiorari, and granted cert to a little over 100 of these cases. Currently, about 7,000 to 8,000 petitions for certiorari are filed in the Supreme Court each year. Of these petitions, only about 80 will be granted cert and given full consideration by the Court (SCOTUSblog 2021).¹² Therefore, from the 1960s to the 2020s, the Court has moved from deciding about 5% to about 1% of the total number of cert petitions, which demonstrates the growing power of the justices to choose only a few cases the Court will decide from thousands of petitions.

¹⁰ However, as discussed in footnote 11 below, Baird (2004) suggests that the Court may have some indirect and minimal influence over this process by signaling to parties through opinions that it would like to review cases involving certain issues. There is also evidence that parties are responsive to the Court's signals (Baird 2004).

¹¹ Almost all Supreme Court agenda-setting studies associate agenda-setting on the Court with the case-selection process. Baird (2004) and Mak, Sidman, and Sommer (2013) investigate ways in which the Court may have some sort of a relationship with potential litigants that might result in certain cases being brought to the Court. The Court's influence over litigants is extremely limited, however, and the justices' control over their agenda mostly lies within their ability to select the cases the Court will review.

¹² When a case is given full consideration, the Court requests the parties involved submit new briefs, then the Court holds oral arguments and renders a decision on the merits with a written opinion (Baum 2013, p. 87). A few cases each term will receive summary consideration, which means the Court makes a decision on existing briefs without an oral argument or new information from the parties (Baum 2013, p. 87).

In addition to not being selected for review, most cert petitions are not even read directly by a justice. Reviewing each of the thousands of cert petitions the Court receives per term would be a tedious task for an individual justice, so the justices' law clerks are charged with the job of briefing all cert petitions. The law clerks summarize the history of each case in the lower court from which it originated, describe the main contentions of both parties, and make recommendations that the petition be granted or denied cert.

Originally, each justice had his own clerks write briefs for every cert petition. Beginning with the Burger Court in the 1970s, as the number of cert petitions continued to increase, the Court developed the "cert pool," which is still in use today. The clerks of the justices who choose to participate in the cert pool meet with other justices' clerks, where they divide and assign cert petitions so that each clerk is responsible for writing memos for her assigned petitions.¹³ The justices who participate in the pool receive memos written by the other justices' clerks. The few justices who have not chosen to participate in the cert pool continue have their own law clerks brief every cert petition.

In the 1930s, Chief Justice Hughes devised an additional practice aimed at reducing the time justices spent evaluating cert petitions (Provine 1980, p. 28). Petitions that at first glance did not appear to warrant a decision on the merits were placed on a "dead list" or "special list" by Chief Justice Hughes and his law clerks. The dead list was then circulated to the other justices. Any justice could remove a petition from the dead list, but petitions that remained on the final dead list were immediately denied cert and

¹³ Not all justices participate in the cert pool. Justices Marshall, Stevens, Brennan, and Stewart all chose not to participate in the pool. Except for Justice Brennan, who briefed some petitions on his own, these justices' law clerks were responsible for briefing all petitions to the Court for their respective justices (Perry 1991a; Caldeira and Wright 1990).

were not discussed in conference by the Court.¹⁴ Petitions that were not placed on the dead list were discussed in conference by all justices, and a vote was taken with respect to these petitions to grant or deny cert.

There were changes made to this procedure during the Burger Court in the 1970s that are still in effect today. Instead of creating and circulating a dead list containing the petitions not to be discussed in conference, the chief justice now creates a “discuss list” of petitions to be discussed in conference. The list is circulated, and each justice may add petitions to the discuss list but cannot remove petitions from the discuss list. Petitions not placed on the discuss list are summarily denied.

Once a discuss list (or dead list, for the Hughes, Stone, Vinson, and Warren Courts) has been formulated and circulated among all of the justices, they meet to have a formal conference. During conference, each petition on the discuss list is introduced by the justice who placed the petition on the list (usually the chief justice). The justices are then able to express their views on each petition based on seniority, and then the justices vote to grant or deny cert (Baum 2013; Segal, Spaeth, and Benesh 2005). The Court uses the “Rule of Four” when voting to grant or deny cert. Under the Rule of Four, four or more justices must vote to grant cert for a petition to be granted certiorari and reviewed on the merits. If a petition receives less than four votes, it is almost always denied certiorari.

There are a few exceptions to the Rule of Four. One exception occurs when fewer than eight justices are voting to grant cert. In this case, only three votes are needed to

¹⁴ According to Provine (1980), Justice Burton’s papers reveal that Chief Justice Hughes said that only about six changes were made to the dead list during his tenure as chief justice. This illustrates the high level of influence the chief justice had in formulating the list of petitions that would not be discussed in conference.

grant certiorari to a petition (Segal, Spaeth, and Benesh 2005). Another exception is a “Join-3 Vote.” Join-3 Votes are considered by most scholars to be a variation of four justices voting to grant cert, but a few scholars believe that these votes are different than standard grant votes and thus merit special attention.¹⁵ In a Join-3 Vote, a fourth justice will decide to vote in favor of granting cert to a petition only after three other justices have already voted to grant cert. At times a justice may also request that a denied petition be relisted and discussed again in a later conference, so that justice has more time to review the petition (Baum 2013).

As the number of petitions for writ of certiorari grows each year, the Court has developed the case-selection procedures described above to simplify the case-selection process. In addition to these case-selection procedures, there are legal rules that guide and restrict the Supreme Court during the agenda-setting process.

III. Legal Criteria for Case Selection.

There are several legal rules and criteria that guide the justices during case selection. For example, the method in which cases are sent to the Court serves as an initial constraint on the Court’s ability to shape its agenda. Unlike most government institutions in the United States, the Court is a passive and reactive institution. This means that the justices must wait for cases involving certain issues to be properly brought before the Court by litigants before the justices are able to render a decision on a specific issue.

¹⁵ O’Brien (1997) and Black and Owens (2009b) treat Join-3 votes differently than other votes to grant cert in their studies, and Black and Owens (2009b) find some evidence that individual justices may be more uncertain and may consider different factors when making a decision to Join-3 versus a decision to initially grant cert. Although Join-3 votes are worth mentioning as an important part of the case-selection process, my study is not focused on individual justice decision-making during case selection, and thus Join-3 votes are treated like all other votes to grant cert.

Even though the justices must wait for issues to be brought before the Court, there is some evidence that the justices signal to potential litigants that the Court is willing to hear cases in a specific policy area (Hurwitz 2006; Baird 2004).¹⁶ Baird (2004) found that about five years after the Court signals through an opinion that its policy preferences regarding a particular issue have changed, the quantity and quality of cases brought to the Court that involve that issue significantly increases (p. 763). Baird (2004) illustrates that litigants can actually help to set the Supreme Court's agenda by responding to signals that the policy preferences of justices have changed. However, although there is some evidence that the Court at times has successfully signaled to litigants, Baird (2004) shows it could take several years following a signal by the Court that it is willing to review cases involving a particular issue for such cases to reach the Court.

The Supreme Court is also constrained in the cases it can review by legal "doctrines of access," including justiciability, jurisdiction, standing, ripeness, and mootness (Neubauer and Meinhold 2012; Perry 1991b). A case is justiciable if it can be properly decided by a court, meaning there is a question of law to which a court can offer a solution. There must be a legal controversy between parties because federal courts are constitutionally prohibited from forming advisory opinions, or opinions where a court hands down a formal decision about a question of law in the absence of an actual controversy (Neubauer and Meinhold 2012, p. 420).

¹⁶ Hurwitz (2006) finds that the justices send signals to the judicial, legal, and political communities regarding their agenda interests and that the Supreme Court has some influence on appeals court litigants, who respond to Supreme Court agenda priorities by appealing cases that reflect the Court's apparent agenda preferences (p. 335-337). However, Hurwitz (2006) finds that the federal courts exist in an endogenous system, and thus federal appeals courts have some influence on the Court's agenda as the dockets of these courts help to compose the agenda of the Supreme Court.

A court has jurisdiction when it has the authority to settle a controversy between parties. Courts can have geographical, personal, subject matter, and hierarchical jurisdiction (Neubauer and Meinhold 2012). The Supreme Court's subject matter jurisdiction may be changed by Congress, and it is limited both geographically to the states and territories of the United States and to questions involving federal law or diversity jurisdiction.¹⁷ The Supreme Court is the highest court in the United States, and its decisions are the final word on constitutional interpretations of federal law.

The Court is restricted in its ability to review a case if a party does not have standing, or if a case is moot or not ripe for adjudication. Parties have standing when they have a right to be a part of a lawsuit, meaning they must present an actual dispute, have suffered direct legal injury as a result of the dispute, and have a stake in the outcome of the resolution of the dispute (Neubauer and Meinhold 2012). A case is ripe if it is ready for adjudication. For example, a case cannot be argued on the basis of possible future events that may cause harm, but only on actual events that have already caused harm. Finally, an issue is moot if the issue becomes resolved in some way before being reviewed by a court. If parties do not have standing, or a case is not ripe or is moot, the Supreme Court is restricted in its abilities to grant cert and review the case.¹⁸

The Supreme Court has an official set of rules that guide its decision-making process, which is updated every few years. "Rule 10" in the rules is the only official

¹⁷ Federal courts have diversity jurisdiction when the amount in dispute exceeds \$75,000 and no plaintiff shares a state of citizenship with any defendant (Yeazell 2012). If a federal court has diversity jurisdiction, it does not need to establish federal-question jurisdiction, or jurisdiction based on whether a question of federal law is addressed in the case (Yeazell 2012).

¹⁸ These "doctrines of legal access" pose a limit on the justices' discretion when taking cases, in theory. However, in practice these doctrines are flexible. I expand more on this subject later in this chapter.

guideline that outlines the criteria necessary to grant certiorari to a petition. In the “Rules of the Supreme Court of the United States,”¹⁹ Rule 10 states:

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

To summarize, Rule 10 stipulates that the Supreme Court will consider granting cert when petitioners demonstrate that a federal court of appeals or state supreme court

¹⁹ The *Rules of the Supreme Court of the United States* are published by the Supreme Court and were last updated in 2019.

decided a federal issue in a way that directly conflicts with the decision of another court of appeals, state supreme court, and/or the Supreme Court.²⁰ Rule 10 also states, however, that the rule is “neither controlling nor fully measuring the Court’s discretion.” Not only does this suggest that the Court will not always grant cert when a conflict is present, but also indicates that the Court may consider factors other than those mentioned in Rule 10 when using its discretion to grant cert to petitions.

During the agenda-setting process, the Supreme Court is guided by case-selection procedures and legal rules and criteria. Legal scholars point to these rules and guidelines as the main influences on the justices’ decisions to grant or deny cert. The political science literature on this subject is mixed, however, with most scholars suggesting that these factors have only a very limited influence on the justices during case selection.²¹ By the Court’s own admission in Rule 10, the rules do not completely control nor explain the Court’s discretion when it selects petitions for review.

IV. Supreme Court of the United States Agenda-Setting Studies.

Scholars have extensively studied Supreme Court of the United States agenda-setting. The sections below summarize agenda-setting studies, including early agenda-setting studies and cue theory, the application of general theories of judicial decision-making to agenda-setting, and studies of the collective decision-making behaviors of the Court. Based on these studies, the theoretical framework that is applied in this

²⁰ When there is a conflict over the interpretation or application of federal law between two or more United States Courts of Appeals, the conflict is often labelled by the Court, its law clerks, and other legal practitioners as a “circuit split” (Hansford 2010-2011).

²¹ A discussion of the legal model, which posits that the justices make decisions based primarily on legal factors, is in Section IV(B)(1) below.

dissertation to explain decision-making during the Court's case-selection process is also identified and summarized below.

A. Early Agenda-Setting Studies and the Development and Application of Cue Theory.

As described above, the Court receives thousands of petitions for writ of certiorari per term and it has developed strategies to manage its time during the case-selection process, including the creation of the law clerk cert pool and the discuss list. Some early agenda-setting studies developed "cue theory," which describes another method that may be used by the justices to manage the Court's large number of cert petitions. Cue theory posits that the members of the Court will look for certain factors that act as cues as they sort through petitions for writ of certiorari in order to obtain information from these cues about the petitions that will assist them in making case-selection decisions. Tanenhaus et al. (1963) find that three cues signal to justices that a case is worthy of review: (1) dissent in a lower court decision, (2) involvement of civil liberties issues, and, most importantly, (3) the involvement of the federal government as a party in the case (p. 127).

Studies following Tanenhaus et al. (1963) lend support to the theory that certain cues signal to justices that a petition is cert-worthy. Ulmer (1972) and Baum (1977) find evidence that "error-correction," or a desire for a justice to reverse a lower court decision, is the most important signal to justices to grant cert. Songer (1979) finds strong support for the role of policy cues, and concludes that policy considerations, the parties involved in a case, and the potential for "error-correction" must also be components of "cue theory." While these older studies did not have the advantage of using modern quantitative analysis techniques, later studies have built upon and confirmed their findings (Mak, Sidman, and Sommer 2013; Black and Boyd 2012a; Black and Owens

2009a; Caldeira and Wright 1988; Armstrong and Johnson 1982; Provine 1980; Brenner 1979).

For instance, Brenner (1979), Palmer (1982), Armstrong and Johnson (1982), and Krol and Brenner (1990) find support for Ulmer's (1972) findings that error-correction is an important factor in a justice's decision to grant cert. Brenner (1979) and Palmer (1982) go further and find a link between a justice's decision to grant cert and his or her final decision on the merits, further supporting the proposition that a desire for error-correction positively influences a decision to grant cert. Additionally, Provine (1980) places more emphasis on personal policy preferences as a cue to justices than earlier studies and her study finds that the justices are interested in some policy issues more than others, which can lead to some policy issues being ignored by the Court. Provine (1980) and Perry (1991a) conclude that the justices are mostly motivated by legal cues when voting to grant cert.

Most of these early agenda-setting studies focus on individual justices' voting behaviors during case selection. These early studies find that several "cues" influence the justices when voting to grant or deny cert, such as involvement of certain policy issues, error-correction, dissent in a lower court decision, the involvement of the federal government as a party, and individual policy preferences (Songer, 1979; Baum, 1977; Ulmer 1972; Tanenhaus et al. 1963).

More recent studies still consider these factors when analyzing agenda-setting on the Supreme Court (Caldeira and Lempert 2020; Black and Boyd 2013).²² For example,

²² Caldeira and Lempert (2020) refer to factors that are low-cost, low-value factors in their study, but they do not consistently apply the framework throughout their analysis.

while studying the collective decision-making behavior of the Court,²³ Black and Boyd (2013) apply a low-cost, low-value and high-cost, high-value cue theory framework to the Court's case-selection process. This framework categorizes factors that act as informational cues to the Court based on the cues' relative cost and value.

For instance, if it requires little time to determine a cue's presence but the cue also provides a small amount of information about a petition to the Court, the cue is a low-cost, low-value cue. Conversely, if a considerable amount of time is needed to determine the presence of a cue but the cue provides a depth of information about a petition, the cue is a high-cost, high-value cue. Black and Boyd (2013) find that low-cost, low-value cues are more important to the Court during the creation of the discuss list, when the Court is faced with a large number of petitions to consider, and that high-cost, high-value cues are more important during the selection of petitions for review, when the discuss list has narrowed down the number of petitions the Court must consider.

While cue theory has been shown to explain decisions during the Court's case-selection process, Provine (1980) suggests that cue theory might at times prove to be insufficient in explaining Court's decisions to grant cert. Provine (1980) finds in her thorough analysis of Justice Burton's papers and certiorari briefs that a significant number of petitions denied certiorari feature one or more of the cues identified by Tanenhaus et. al (1963) and other scholars. While cues seem to signal to justices that a case is cert-worthy, Provine's (1980) findings indicate that the presence of cues does not always lead to cert being granted, suggesting that while cues may inform the case-selection process and indicate to the Court that a petition is worth a closer look, the

²³ This is compared to studying individual justice behavior during case selection, the approach most studies have taken.

presence of cues does not guarantee review. Nevertheless, subsequent agenda-setting studies have demonstrated that cue theory continues to be a valuable tool when evaluating the Court's agenda-setting process (Caldeira and Wright 1990; Black and Boyd 2013).

B. Application of Theories of Judicial Decision-Making to the Agenda-Setting Process.

How does the Court reach its final decision on the merits? Much of the literature on Court decision-making examines the Court's final decision on the merits, the fourth and final process of the Court's decision-making procedure. A large number of studies have been devoted to analyzing the Court's process of deciding cases on the merits, which occurs only after a cert petition has successfully advanced through the first three decision-making processes. When the Court makes a decision on the merits of a case, the justices apply the law to the specific facts of the case and render a final decision.

In addition to studying the fourth decision-making process, the Court's decision on the merits, these judicial decision-making studies have also provided frameworks for studying the justices' decision-making processes during the two agenda-setting stages of case selection. In other words, the same models that apply to the Court's process for rendering decisions on the merits of a case have also been applied to the Court's processes for determining whether a case will even be reviewed by the Court. The following three theories of judicial decision-making, which are typically applied to the Court's decisions on the merits, are summarized below: (1) the legal model, (2) the attitudinal model, and (3) the strategic model.

The legal model of judicial decision-making assumes that Supreme Court justices are influenced by the law, precedent, legal doctrines, "doctrines of access," and formal

and informal procedures when rendering decisions. More specifically, the legal model assumes the justices review the facts of a case, determine legislative and/or Framers' intent when creating a law, and apply the "plain meaning" of the law when making a decision on the merits (Segal, Spaeth, and Benesh 2005).

Conversely, the attitudinal model is described by Segal and Spaeth (2002) as a model of judicial decision-making that "holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices" (p. 86). Put simply, according to this model, if a justice is liberal, she will consider the facts of a case and render a liberal decision, and if she is conservative, she will render a conservative decision. The attitudinal model originated with Schubert, Rohde, and Spaeth due to a need for a theory of judicial decision-making that did not rely on legal factors (Segal and Spaeth 2002).

Finally, the strategic model of judicial decision-making asserts that each justice acts strategically to achieve a policy outcome that is as close as possible to her personal policy preferences (Maltzman, Spriggs, and Wahlbeck 2000; Epstein and Knight 1998). Because the justices are strategic actors, they consider constraints on meeting their policy goals, such as the position of other justices on a policy issue. Contrary to the assumptions of the attitudinal model, the strategic model finds that these constraints may cause justices to make decisions that are not a reflection of their personal policy preferences. (Maltzman, Spriggs, and Wahlbeck 2000).

For example, under the strategic model, a justice may be constrained when she is drafting an opinion because her need to persuade other justices to join her opinion may result in a sacrifice of some of her policy goals. Also, justices are not the only actors who

act strategically to influence the decision-making processes. There is some evidence that litigants act strategically when petitioning the Court for certiorari by writing and framing a petition to appeal to specific members on the Court (Wedeking 2010).

The legal, attitudinal, and strategic models have also been applied to the Court's agenda-setting process. In the following three sections, I explain how the legal, attitudinal, and strategic models have been used to explain case selection on the Court and some potential issues with applying each of the models to the case-selection process.

1. Agenda-Setting and the Legal Model.

The legal model of judicial decision-making has been applied to Supreme Court agenda-setting and theorizes that the justices make case-selection decisions based on the legal factors discussed above. However, the evidence that these legal factors influence the case-selection process is mixed. Provine (1980) finds in her study of the Vinson Court that the justices seem to be influenced by questions of jurisdiction, justiciability, standing, and mootness, and petitions exhibiting issues with any of these doctrines were more likely to be immediately denied certiorari. However, other scholars point to evidence that these doctrines are somewhat flexible, and open to interpretation by the justices (Segal and Spaeth 1993; Newbauer and Meinhold 2012). For example, Segal and Spaeth (1993) suggest that the justices' personal policy preferences lead them to be more flexible about justiciable considerations.

There have also been questions about the ability of another legal guideline, Rule 10, to provide strict procedures for the justices to follow when selecting cases. For example, Provine (1980) believes that Rule 10 is not comprehensive and avoids addressing many factors that have been found to influence case selection. In addition,

Rule 10 does not require the justices to explain why they have decided to review a case, so usually no explanation is given as to why cert was granted or the manner in which a petition has met the criteria in Rule 10. Provine (1980) finds that this leads to difficulties in using Rule 10 to explain the Court's decisions to grant or deny cert to petitions.

Despite these issues with the legal model as a predictive model of judicial behavior, there are findings that suggest that legal factors at least partially explain judicial decision-making during case selection. Many studies find that the Supreme Court's power lies primarily in its legitimacy as a protector of constitutional law, because it lacks the spending and enforcement powers given to the other branches of government. Because the Court must maintain its legitimacy in order to have its decisions implemented, Court decisions must appear to follow legal standards and be impartial (Zink, Spriggs, and Scott 2009; Lindquist and Klein 2006; Epstein and Knight 1998).

According to Richards and Kritzer (2002), legal factors can have a strong influence on judicial decisions when they are used by the justices to create an "institutional construct" (p. 305). These "jurisprudential regimes" can consist of a set of "key precedents" in a policy area that cause the justices to evaluate cases using the same standards, regardless of their different policy goals (Richards and Kritzer 2002, p. 308). For example, Richards and Kritzer (2002) find that key precedents guide justices' decisions in Establishment Clause cases more than personal policy preferences.²⁴

There is also evidence that legal factors, along with the justice's personal policy preferences, influence decision-making. For instance, Bailey and Maltzman (2008) find evidence that justices are influenced by three legal doctrines: precedent, the idea that the

²⁴ Establishment Clause cases address issues concerning the clause in the First Amendment of the United States Constitution that states, "Congress shall make no law respecting an establishment of religion...".

legislature should be the branch to change policy, and a strict interpretation of the First Amendment of the Constitution. However, Bailey and Maltzman (2008) also find that these legal doctrines influence some justices more than others, and that policy preferences play a role in decision-making. McAtee and McGuire (2007) find that the justices can be influenced by the legal arguments made by experienced lawyers, especially in cases that are not salient to the justices, suggesting the importance of legal factors is related to the importance to the justices of the issues in a case. Black and Owens (2009a) focus on the influence of both legal factors and personal policy preferences on the justices' behaviors during the case-selection process. Black and Owens (2009a) find that legal factors and personal policy preferences are both important to the justices when voting to grant or deny cert to petitions.

Some scholars who study Supreme Court decision-making have questioned the usefulness of the legal model in explaining the outcomes of Supreme Court cases. For instance, justices often come to different conclusions about a case even though they are presented with the same law and precedent, which suggests justices interpret legal considerations such as legislative intent or precedent differently (Neubauer and Meinhold 2012; Segal, Spaeth, and Benesh 2005). Segal and Spaeth (2002) go as far as to conclude that there is no indication that legal factors have any influence on judicial decision-making (p. 311).

Therefore, there is a general consensus among scholars of the Supreme Court that the legal model does not provide a framework for fully explaining the outcomes of Court decisions or the case-selection process. However, several studies, including those discussed above, do provide evidence that legal factors have some level of influence on

decisions the justices make, suggesting that some legal factors should be considered in a study of Supreme Court agenda-setting.

2. Agenda-Setting and the Attitudinal Model.

While most of the scholarship on the attitudinal model focuses on the justices' final decisions on the merits, Segal, Spaeth, and Benesh (2005) apply the attitudinal model to the case-selection process. They find that several factors influence a justice's desire to reverse a lower court decision, including the presence of conflict between lower courts in similar cases, the facts of the case, the subject matter or policy area involved, the parties involved in the case, and the ideology of lower court where the case originated (Segal, Spaeth, and Benesh 2005).

Segal, Spaeth, and Benesh (2005) conclude that the most important factor that influences the justices during the case-selection process, however, is justices' personal policy goals, which supports the attitudinal model's assertion that the justices are primarily motivated by their personal policy preferences. In other words, the attitudinal model assumes that because the justices are given considerable discretion when selecting cases, their case-selection choices will be a reflection of their personal policy preferences (Segal, Spaeth, and Benesh 2005).

There is a consensus among Supreme Court scholars that the justices' decisions on the merits and during case selection are motivated by personal policy preferences (Black and Owens 2009a; Segal, Spaeth, and Benesh 2005; Epstein and Knight 1998; McGuire and Caldeira 1993; Segal and Spaeth 1993; Caldeira and Wright 1988), but some scholars find that personal policy preferences are not always the primary motivation behind the justices' behaviors. Bailey and Maltzman (2008) find the attitudinal model

“too restrictive” because it does not consider constraints created by the environment in which the justices exist (p. 382). Other studies find that while personal policy preferences are important during case selection, other considerations such as legal factors, the Court’s perceived legitimacy, and the ideological position of other justices can be just as influential (Zink, Spriggs, and Scott 2009; Black and Owens 2009a; Lindquist and Klein 2006; Boucher and Segal 1995).

3. Agenda-Setting and the Strategic Model.

While there is a wide variety of literature on the strategic behavior of justices during the process of rendering a decision on the merits, fewer studies have attempted to determine if and when the justices act strategically during the case-selection process. Caldeira, Wright, and Zorn (1999) claim that “opportunities for strategic manipulation of the Court’s plenary agenda are plentiful: the Court follows a sequenced, binary voting procedure for decisions on certiorari and the merits; the sifting of cases occurs out of sight, with no need to justify those decisions; cases are fungible; and decisions to grant plenary review usually presage the outcome on the merits” (p. 550). Although these institutional procedures make strategic voting during case selection likely, Caldeira, Wright, and Zorn (1999) find that there is a lack of consensus among scholars about the extent the justices act strategically during this process.

For example, Perry (1991a) interviews justices and their clerks and does not find much evidence that the justices act strategically on a regular basis when voting to grant or deny cert. Perry (1991a) finds that on the rare occasion the justices do act strategically, strategic behavior depends on each specific situation and the justices’ individual views of their roles on the Court. Both Perry (1991a) and Provine (1980) find that legal factors

influence justices during the case-selection process more than strategic considerations, although Palmer (1982) finds evidence that justices are sometimes influenced during this process by their perceived likelihood of winning or losing a case on the merits.

There are other scholars, however, who find that the justices often behave strategically during case selection to achieve their own personal policy goals. Brenner and Krol (1989) identify three strategies justices might use: (1) an error-correcting strategy, which assumes that there is a relationship between voting to grant cert and voting to reverse on the merits, (2) a prediction strategy, which assumes that there is a relationship between voting to grant cert and being a part of the majority on the final decision on the merits, and (3) a majority strategy, which assumes that justices will vote to grant cert more often if they are a part of the ideological majority on the Court (p. 828-830). While evidence regarding prediction strategy is mixed, their findings lend some support to the idea that justices use all three strategies during case selection, and at times use two or more of the strategies simultaneously (Brenner and Krol 1989; Krol and Brenner 1990).

Boucher and Segal (1995) also find evidence that justices act strategically by considering the possible behavior of other justices. For example, justices are more likely to vote to grant cert to reverse a lower court decision on the merits than affirm, although there is variation among justices (Boucher and Segal, 1995). A justice's decision to grant cert to reverse or affirm a lower court decision is called an "aggressive grant" (Benesh, Brenner, and Spaeth 2002; Boucher and Segal 2005). Benesh, Brenner, and Spaeth (2002) find additional evidence that "affirm-minded" justices, or justices who wish to affirm a lower court decision, are more likely to grant cert. Caldeira, Wright, and Zorn

(1999) and Black and Owens (2009a) demonstrate that justices are more likely to grant cert to a case when they hope the decision on the merits will change policy in a way that better aligns with their policy preferences. Moreover, Bryan and Owens (2017) conclude that justices act strategically to maximize their policy goals by granting cert to petitions involving states with ideologies different from their own at higher rates, so that they may “supervise potentially problematic states.” (p. 450).

Overall, studies that focus on strategic behavior generally support the conclusion that if justices act strategically during the case-selection process, they usually do so in a way to further personal policy preferences and not necessarily to achieve group goals, or goals that all justices may have together (Epstein and Knight 1998; Boucher and Segal 1995; Perry 1991a; Brenner and Krol 1989).²⁵ These findings indicate that the justices do not work to achieve goals as a unified body, but instead are focused on strategically achieving their own individual interests.

4. Additional Issues with the Application of Judicial Decision-Making Theories to the Agenda-Setting Process.

As summarized above, the legal, attitudinal, and strategic models have strengths and shortcomings in explaining the Court’s decision-making processes, including the case-selection process. However, scholars point to additional issues regarding the use of the models to explain the Court’s decision-making.

For instance, Cross and Nelson (2001) argue that all three models are too simplistic. Cross and Nelson (2001) view the legal model as “naïve” because it is

²⁵ Moffet et al. (2016) examine variation in the size of the Court’s caseload, and they find that the justices act strategically when setting the docket and that this influences the number of cases the Court hears per term. However, Moffet et al. (2016) focus primarily on the size of the Court’s docket, not the factors that impact which petitions the Court decides to review.

unrealistic to posit that the justices are never influenced by factors external to the legal system such as their background experiences (p. 1443). Similarly, Cross and Nelson (2001) believe that the attitudinal model naively finds that justices are motivated by only their internal policy preferences instead of other factors. And finally, Cross and Nelson (2001) critique the strategic model for failing to take into account the impact of external preferences, such as the positions of other justices, when making decisions.

Although Cross and Nelson (2001) expect to find support for the strategic model compared to the other models through their analysis of justices' decisions on the merits, they instead find that justices' decisions reflect a blend of all three models (p. 1491). Specifically, they find that while each of these models, if applied in isolation from the other models, are "one-dimensional" and "overly-simple," they each are important in explaining Supreme Court decision-making (Cross and Nelson 2001, p. 1491). Cross and Nelson (2001) conclude that a combination of all three models best explains Court decision-making, because the justices are "...driven by a complex mix of factors – legal, ideological, and strategic" (p. 1491).

While Cross and Nelson (2001) study the behavior of justices during decisions on the merits, their findings apply to case selection because other studies have shown that the legal, attitudinal, and strategic models also apply to decision-making during the Court's case-selection process. Because justices make crucial decisions during the case-selection process, as they do when they make decisions on the merits, a blend of the three models also likely better explains justices' decisions during case selection than any one of the "one-dimensional" models does on its own, suggesting there are issues with using any of the models alone to explain case selection.

C. Agenda-Setting and the Collective Decision-Making of the Court.

Agenda-setting studies analyze the case-selection process by looking at either (1) individual-justice voting behavior or (2) the collective decision-making behavior of the Court. For example, studies that investigate individual justices' voting behaviors may analyze each individual justice's voting choice to grant or deny cert to petitions to determine the factors that influence specific justices during the case-selection process. Conversely, studies that investigate the collective voting behavior of the Court study the choices of the Court as a unit to either grant or deny cert to petitions in order to determine the factors that influence the Court's decision-making choices during case selection. In other words, these studies do not consider the choices of individual justices.

Because several scholars conclude that Supreme Court justices act to achieve their individual personal policy goals, many agenda-setting studies focus on individual justice behavior, and not on the collective behavior of the Court (Bryan and Owens 2017; Segal, Spaeth and Benesh 2005; Epstein and Knight 1998; McGuire and Caldeira 1993; Segal and Spaeth 1993; Caldeira and Wright 1988). However, for the reasons explained below, like several other studies I study the collective behavior of the Court rather than the case-selection choices of individual justices. Nevertheless, the studies that focus on individual justice behavior, including several of the studies reviewed above, remain essential to understanding the Court's case-selection process because they provide information about the factors that influence the justices during the process.

Scholars who study how institutional factors influence the Supreme Court's decisions over time analyze the collective behavior of the Court instead of individual justice behavior. Many of these scholars believe that institutions, including formal and

informal structures such as “constitutions, statutes, judicial doctrines, or shared conceptions of equality or liberty,” shape Supreme Court decisions (Clayton and Gillman 1999, p. 15). McGuire (2004) agrees that these institutional factors influence the Court’s decision-making as well as the political power of Court decisions over time. According to McGuire (2004), institutionalism is the “development of a regularized system of policy making” (p. 129). McGuire (2004) looks at institutional growth of the Court over time, and finds it is the institutionalization of the Court, not the changing goals and ideological considerations of individual justices, that is the primary factor leading to the increased political power of the Court over time (p. 141).

Perry and Abraham (1999) also find that the Court’s institutional growth has allowed it to experience increased political power over time.²⁶ An example they provide is the increasing ability of the Court to make decisions that are at odds with the public and other branches of government, such as decisions overturning New Deal legislation, without facing damages to its perceived legitimacy as an institution (Perry and Abraham 1999).

McGuire (2004), Perry and Abraham (1999), and Clayton and Gillman (1999) focus on institutional factors and the influence these factors have on the Court’s collective decision-making, political power, and legitimacy as a legal and political institution. There are other studies that study the Court’s collective behavior but that investigate specifically how historical changes, or changes to the institution over time, have influenced the agenda-setting process. For example, Keck (2004) follows the

²⁶ Perry and Abraham (1999) use an analysis of symbols and images in the media to demonstrate that the media and public at the time saw the Court as a legitimate legal institution with the right to question the constitutionality of New Deal policies. Perry and Abraham (1999) conclude from their analysis that the Court’s institutional growth over time led to the Court’s legitimacy being more resilient.

Court's transformation from promoting laissez-faire economic policies to then backing New Deal policies and becoming involved in civil rights and civil liberties cases. Keck (2004) examines the cases the Court accepted for review during this transformation and demonstrates that the Court was able to move towards a new policy direction, civil rights and liberties, when involvement in economic issues was no longer an option.

Pacelle's (1991) study of the manner in which the Supreme Court's agenda has changed since 1925 is the broadest study of agenda-setting of the Supreme Court over time.²⁷ Pacelle (1991) differentiates between "agenda-setting," which he defines as the wide variety of issues that citizens, interest groups, and other government actors bring to the Court's attention, and "agenda-building," or the Court's process of choosing among these issues (p. 3). Pacelle (1991) focuses his analysis on changes in the Court's agenda-building process from the Hughes Court through the Rehnquist Court. In addition to analyzing how institutional structures, external factors, and policy entrepreneurs may have influenced changes in the Court's agenda, Pacelle (1991) investigates how historical factors, such as the Great Depression, a partisan realignment, war, changes in leadership, and economic cycles may have also influenced the Court. Pacelle (1991) demonstrates that landmark cases and other internal and external factors led to an agenda shift from economic issues to civil rights and civil liberties issues.

Some studies focus on the Court as a cohesive unit and study the collective decision-making behavior of the Court primarily because data restrictions make it difficult to focus on individual justice behavior. For example, with respect to justices' votes to grant or deny cert, individual justices' votes cannot always be considered

²⁷ The year 1925 was the year the Judiciary Act of 1925 was enacted by Congress, which gave the Court the ability to select cases for review.

because records of preliminary individual votes to grant cert are not always available (Owens 2010).²⁸ In other words, information about individual justices' votes during the second stage of case-selection with respect to some petitions is not obtainable, so scholars studying individual justice behavior have excluded these petitions from consideration.

With respect to the first stage of the case-selection process, individual justice voting behavior cannot be considered when petitions not placed on the discuss list are included in data. As explained by Owens (2010), in a sense all justices vote to deny cert to those petitions not on the discuss list by not placing them on the list.²⁹ Therefore, it is difficult to draw useful conclusions regarding individual justice behavior when these petitions are included in data (Owens 2010).

To avoid the selection bias of these studies, Caldeira and Wright (1988) and Black and Boyd (2013) include these previously excluded cert petitions and consider the collective behavior of the Court as a whole. More specifically, Caldeira and Wright (1988) use a dataset of all paid cases (petitions where litigants pay the Court's filing fee) that were granted and denied cert in their study of the Court's 1982 term, even if the cases did not make the discuss list. Caldeira and Wright's (1988) main finding is that the presence of amicus curiae briefs increases the likelihood a petition will be accepted for review by the Court. They also find evidence that factors that influence individual justice behavior, such as personal policy preferences and legal considerations, also impact the likelihood that the Court will grant cert to a petition (Caldeira and Wright 1988).

²⁸ Specifically, individual justice behavior cannot be considered if these petitions are not removed from data, because records of the manner in which individual justices voted to grant cert is often not available (Owens 2010).

²⁹ Remember, only one justice needs to add a petition to the discuss list for that petition to be discussed.

Black and Boyd (2013) also consider the Court's collective behavior when they use a random sample of paid non-capital petitions³⁰ to the Rehnquist Court to determine the factors that influence both stages of case selection, which include the selection of petitions for the discuss list and the selection of petitions for review. Black and Boyd (2013) find that several factors significantly influence both processes, such as presence of conflict between lower courts, solicitor general support of review, a large number of amicus briefs in support of a petition, dissent in a lower court opinion, and whether the lower court opinion is published (Black and Boyd 2013).

D. The Theoretical Framework Applied in this Dissertation.

As summarized above, there are different approaches to studying the Supreme Court's agenda-setting process. A review of these approaches demonstrates that a low-cost, low-value and high-cost, high-value cue theory framework is the most appropriate framework to apply in this dissertation to explain the Court's case-selection process. Additionally, because this dissertation is like other studies that take a historical approach, and data on individual justice voting behavior at a both stages of the Court's case-selection process is often not available, the Court's collective decision-making behavior is considered here rather than individual justice voting behavior.

First, as stated above, early agenda-setting studies focus on "cue theory," which finds that justices will use "cues" present in petitions to save time when identifying the petitions that are cert-worthy (Tanenhaus et al. 1963). Several subsequent studies provide support for the idea that certain cues signal to the justices that a petition is worthy of review (Provine 1980; Brenner 1979; Songer 1979; Baum 1977; Ulmer 1972).

³⁰ Capital petitions are also called death penalty petitions, as they concern petitioners who have been sentenced to the death penalty.

Additionally, Black and Boyd (2013) applied the low-cost, low-value and high-cost, high-value cue theory framework to their study of the two steps of the Court's case-selection process, which indicates that the cue theory framework may be appropriately applied here. A more thorough explanation of the low-cost, low-value and high-cost, high-value cue theory framework and the manner in which it is applied in this dissertation, as well as how factors are categorized as different types of cues, is in Section V of Chapter 3.

The sections above also explain how general theories of judicial decision-making have been applied to explain the justices' decision-making during the agenda-setting process. These theories include the legal, attitudinal, and strategic models. To review, the legal model assumes justices on the Court are influenced by legal factors, such as the law and precedent. Under the legal model, the justices' case-selection decisions are guided primarily by these legal factors. This model is not applied in this study as it does not sufficiently explain judicial decision-making during case selection because it seems clear that the justices' decisions are influenced by considerations in addition to legal factors (Segal, Spaeth, and Benesh 2005).

Unlike the legal model, the attitudinal model assumes that justices are motivated purely by personal policy preferences, and therefore a decision to grant or deny cert will be a reflection of a justice's desire to influence policy (Segal, Spaeth, and Benesh 2005; Segal and Spaeth 2002; Segal and Spaeth 1993). However, this approach has also been criticized as not sufficiently explaining the Court's decision-making process. While most agenda-setting studies find that personal policy preferences are indeed important during the case-selection process, many studies point to additional factors that play an equally

important role (Black and Owens 2009a; Bailey and Maltzman 2008; Epstein and Knight 1998; Boucher and Segal 1995; Caldeira and Wright 1988). Therefore, the attitudinal model is not used in this dissertation.

The strategic model assumes there are internal and external constraints on the justices' decision-making, which has led to arguments that the justices act strategically when voting to grant or deny cert to petitions. The strategic model of judicial decision-making asserts that the justices consider obstacles to achieving their policy goals, and act strategically to achieve the best possible policy outcomes (Maltzman, Spriggs, and Wahlbeck 2000; Epstein and Knight 1998). The findings of agenda-setting studies that focus on the strategic model are mixed regarding the extent justices act strategically during the case-selection process, and thus it is not the most appropriate model to apply in this dissertation.

Furthermore, the legal, attitudinal, and strategic models have been shown to provide an incomplete picture of judicial decision-making when applied in isolation from the other models (Cross and Nelson 2001). Cross and Nelson (2001) conclude that a combination of all three models best explains Court decision-making, because the justices are influenced by legal, ideological, and strategic considerations (p. 1491), lending further support to my conclusion that none of the models are best suited to be used here.

Moreover, for the reasons summarized below, this study analyzes the collective decision-making behavior of the Court compared to decision-making behaviors of individual justices. Conversely, the legal, attitudinal, and strategic models are usually applied in studies that consider individual justice voting behavior, and therefore would be difficult to apply in a study that considers the Court's collective behavior. Thus, this and

the other above-described shortcomings associated with these models demonstrates that they are not as useful to apply to the study of the Court's case-selection process as cue theory, which has been applied in research focusing on the Court's collective decision-making behavior.³¹

Finally, while many agenda-setting studies focus on individual justice behavior, it is not appropriate here for the following reasons. First, this dissertation seeks to analyze changing agenda trends over time, and as described above, studies that focus on changes to the Court's agenda over time have analyzed the collective decision-making of the Court as an institution compared to individual justice behavior. Second, limited information on individual justices' voting choices during both stages of the case-selection process makes considering individual justice voting behavior impossible without excluding data, which creates selection bias.³² Thus, for these reasons it is appropriate for this study to analyze the collective decision-making behavior of the Court.

V. Gaps in the Supreme Court Agenda-Setting Research.

Although the scholarship on Supreme Court agenda-setting is extensive, there are three significant gaps in the research that I attempt to address in this dissertation. The first gap I address is the exclusion of several types of petitions for writ of certiorari from data analyses. For several different reasons, many studies do not include several types of cert petitions in their data, such as *in forma pauperis* or IFP petitions, capital petitions,

³¹ For example, Black and Boyd (2013) consider the collective decision-making behavior of the Court in their study that applies cue theory to the case-selection process.

³² As reviewed above, scholars study the collective case-selection behavior of the Court to avoid the selection bias experienced by studies that focus on individual justices' voting behaviors (Black and Boyd 2013; Caldeira and Wright 1988).

petitions from state supreme courts, and petitions that were not first placed on the Court's discuss list.

By excluding these petitions, previous studies may be missing relevant information regarding the Court's agenda-setting process. For example, in 1992, a term studied in this dissertation, 90% of the total cert petitions for that term were not placed on the Court's discuss list and 67% of the total petitions were IFP petitions. Moreover, about a third of the petitions from my random sample of the 1992 term were petitions from state supreme courts. Due to the large number of these petitions, scholars that exclude these types of petitions subject their studies to selection bias by ignoring a large amount of data, and therefore their studies may have misleading conclusions regarding the Court's agenda-setting process.

Second, the exclusion of petitions that were not placed on the Court's discuss list creates an additional gap in the research. As I will further explain below, the selection of petitions for the discuss list and selection of petitions for review are two distinct steps. When scholars exclude from their studies petitions that were not placed on the discuss list, they neglect to examine one of the Court's two case-selection stages.

A third gap in the research stems from a lack of study that investigates how the Court's agenda-setting process has changed over time. Most research focuses on agenda-setting during one Court term or multiple Court terms under the leadership of one chief justice. For example, a study may analyze agenda-setting during a term or terms of only the Rehnquist Court. Without considering the manner in which the Court's agenda-setting process changes over time, scholars are unable to draw solid comparisons between the agenda-setting process of the Court under one chief justice and the agenda-setting process

of the Court under a different chief justice. This gap in the research also makes it difficult to determine the usefulness of applying agenda-setting research on past Court terms to explain the agenda-setting process of the current Roberts Court, as it is not entirely clear how agenda-setting trends may vary for different Courts.

A. Inclusion of All Types of Petitions for Writ of Certiorari to the Supreme Court.

The first gap in the research is previous studies' exclusions of several types of cert petitions from data analyses. These cert petitions include IFP petitions, petitions originating in state supreme courts, and petitions that were not selected for the Court's discuss list.

1. Inclusion of *In Forma Pauperis* Petitions.

In forma pauperis, or IFP petitions, are petitions filed by individuals who do not have the financial means to pay the Supreme Court's filing fee. IFP petitions arrive at the Court in greater numbers than paid petitions (petitions for which litigants are able to pay the Court's filing fee) and are sometimes hand-written and illegible because the petitioners often cannot afford counsel or printing costs (Lazarus 2005). Beginning with how these petitions are numbered and organized when they reach the Court, IFP petitions are treated differently from paid petitions throughout the case-selection process. During the Warren Court, only Chief Justice Warren received copies of IFP petitions, and his clerks summarized these petitions for the other justices (Tanenhaus et al. 1963). When the cert pool was created during the Burger Court, the chief justice's law clerks were no longer solely responsible for IFP petitions because they were divided among all justices' clerks to brief along with the paid petitions (O'Brien 1993).

Before the 1970s, paid and IFP petitions were separated before they were given docket numbers. Paid petitions were listed on conference lists receiving docket numbers beginning with “1,” and IFP petitions were numbered on a “Miscellaneous” list, also beginning with “1.” Therefore, there could be two petitions from the same term with the same docket number, but one would be on the regular conference list, while the other would be on the miscellaneous, or IFP list. When the chief justice went through the process of “deadlisting,” only the petitions to be discussed in Court remained on the conference and miscellaneous lists. Separating the two types of petitions on different lists immediately signaled to the members of the Court which petitioners had IFP status.

Beginning in the 1970s, when the Court began using a discuss list instead of a dead list or special list to sort the petitions that would be discussed in conference, IFP petitions continued to be organized differently than paid petitions. Instead of having a separate “miscellaneous” list for IFP petitions, the Court began numbering paid petitions from 1-4999 and numbering IFP petitions beginning with the docket number 5001. Although IFP petitions are no longer on lists titled “miscellaneous,” members of the Court can still immediately recognize these petitions because of their assigned docket numbers.

The justices have docketsheets that they use in conference when discussing the petitions they will grant or deny cert. Each justice receives a docketsheet that correlates to each cert petition. The docketsheet for a petition lists the docket number, the name of the case, and includes an area for notes and the name of each justice, so that a justice can record how each justice voted to grant cert. Each paid petition corresponds to one docketsheet. Docketsheets for IFP petitions, however, are often split into fourths, with

each petition receiving only a portion of a page. The IFP docketsheets leave much less room for notes than the docketsheets for paid petitions.³³ This practice suggests that the justices expect to give less attention to IFP petitions than to paid petitions.

Studies have also supported the notion that the justices treat IFP petitions differently, and usually less seriously, than paid petitions. Epstein et al. (1996), Gressmann (2007), and Wachtell and Thompson (2009) find that the justices often consider IFP petitions frivolous and select them for review at a much lower rate than paid petitions. For these reasons, and because the inclusion of IFP petitions can lead to issues with data analyses, most scholars exclude IFP petitions from their studies (Caldeira and Lempert 2020; Black and Owens 2010; Owens 2010; Black and Owens 2009a; Lazarus 2005; Caldeira and Wright 1990; Caldeira and Wright 1988).

Although it is clear that the Court differentiates between IFP and paid petitions, there is evidence that these petitions should not be ignored. Lazarus (2005) states that while the Court does treat IFP petitions differently, not all are frivolous, and some have even become landmark cases. For example, *Gideon v. Wainwright*, a landmark case that established a right to counsel in criminal cases, began as a handwritten IFP petition (Lazarus 2005). Watson (2006) examines paid and IFP petitions from several of the Court's terms and finds that IFP petitions are not "categorically frivolous and unimportant," and that these petitions should receive "further consideration in the literature on the Supreme Court's agenda setting" (p. 47). IFP petitions can raise important issues that catch the Court's attention, and therefore should not be excluded from agenda-setting studies.

³³ An example of an IFP docketsheet is in Appendix C.

During a given term, there are more IFP petitions to the Court than paid petitions (Lazarus 2005). In 1992, a term included in this study, 2,061 of the 6,300 petitions sent to the Court were paid petitions, while 4,239 petitions were IFP petitions. If IFP petitions were removed from my data, I would be excluding roughly two-thirds of the petitions sent to the Court during that term. While scholars have demonstrated that these petitions are accepted by the Court at a smaller rate than paid petitions, there has not been much study on how these petitions are treated throughout the case-selection process.

To provide an example, studies show that fewer IFP petitions may be granted cert than paid petitions, but there is a lack of evidence that IFP petitions are statistically significantly less likely to be placed on the discuss list or granted cert than paid petitions. In order to fully investigate the factors that influence the Court's case-selection process, IFP petitions should be considered, as excluding them from data removes a large number of cert petitions, creates selection bias, and may skew results. Therefore, the data in this study includes IFP petitions, other than capital petitions.³⁴

2. Inclusion of Petitions Originating in State Supreme Courts.

Another subset of petitions that have been excluded from previous agenda-setting studies are petitions originating in a state's court of last resort, which is also referred to as

³⁴ Almost all agenda-setting studies have excluded capital petitions, or death penalty petitions, from their analyses. Capital petitions are almost exclusively IFP petitions. During the time periods from which there is data available for agenda-setting studies (the Vinson, Warren, Burger, and Rehnquist Courts), all capital petitions were automatically added to the Court's discuss list. Including these petitions does not help to explain the influences on the Court during the process of selecting petitions for the discuss list, because all capital petitions were placed on the discuss list without regard to the issues or the other characteristics of these petitions. Considering capital petitions also does little to help explain individual justice voting during the process of granting or denying cert. For example, it was the personal policy of both Justices Marshall and Brennan to vote to grant cert to all capital petitions (Lazarus 2005). Because a petition's status as a capital petition, or death penalty petition, perfectly predicts that the petition will be placed on the discuss list, these petitions were excluded from the data and analysis in this study.

the state's supreme court.³⁵ Many studies exclude these petitions because there is no ideological measure for state supreme court judges that is comparable to ideological measures of Supreme Court justices, while there are comparable ideological measures for federal courts of appeals judges (Black and Owens 2011; Owens 2010; Black and Owens 2009a). In other words, it would be difficult to consider lower court ideology as a variable when including state supreme court petitions, so several scholars have eliminated these petitions from their data.

Most studies that include state supreme court petitions do not consider variables that measure Supreme Court ideology and lower court ideology (Black and Boyd 2013; Black and Boyd 2012a; Black and Boyd 2012b; Caldeira and Wright 1990; Caldeira and Wright 1988). The few studies that do consider the ideology of the Supreme Court do not include a variable for lower court ideology (Caldeira, Wright, and Zorn 1999; Provine 1980), which illustrates the limitations in measuring an ideological variable if state supreme court cases are included in a study.

However, a large number of petitions to the Supreme Court originate in state supreme courts. For example, in my random sample of 1992 cert petitions to the Court, 34% of the petitions originated in state supreme courts. Eliminating these petitions creates a selection bias, because it is possible that the cases addressed in state supreme courts differ significantly from cases in federal courts. I include petitions from state supreme courts in my study in order to avoid selection bias and because there is a possibility that these cases will illustrate an important factor influencing the Court's case-selection process.

³⁵ Some states do not refer to the highest court, or court of last resort, in that state as the "supreme court." For instance, Maine calls its highest court the Maine Supreme Judicial Court.

3. Inclusion of Petitions Not Placed on the Court's Discuss List.

Many agenda-setting studies have not included in their analyses petitions that were not placed on the Court's discuss list. In other words, these studies consider only the petitions that were placed on the Court's discuss list. This causes selection bias by excluding a very large number of petitions from consideration, as a large majority of petitions are not discussed by the Court.³⁶ Additionally, it creates an additional gap in the research, because excluding these petitions makes it difficult to study and draw conclusions regarding the first stage of the Court's case-selection process, which is the creation of the discuss list. Thus, the need to include these petitions is discussed in further detail below.

B. Examining Case Selection as a Two-Step Process.

Case selection on the Supreme Court has two distinct stages: (1) the selection of petitions for the discuss list and (2) the selection of petitions from the discuss list for review by the Court. While most agenda-setting studies at least mention the discuss list, most focus their analyses on only the selection of petitions for review (Bryan and Owens 2017; Black and Boyd 2012a; Black and Boyd 2012b; Owens 2010; Wachtell and Thompson 2009; Black and Owens 2009a; Caldeira and Wright 1988). In the early 1990s, roughly 10% of petitions were placed on the Court's discuss list. Therefore, studies that consider only petitions that were placed on the discuss list draw conclusions about the agenda-setting process while excluding a very large number of petitions from consideration.

³⁶ As referenced above, 90% of the total cert petitions for the 1992 term were not placed on the Court's discuss list.

It is worth mentioning that some studies that consider only the second stage of case selection, the selection of petitions for review, have been even more selective about the petitions included in their analyses. In addition to excluding those petitions that were not placed on the discuss list, these studies also exclude petitions that were placed on the discuss list but that were not ultimately granted certiorari. Put differently, these studies draw conclusions regarding the case-selection process by examining only the petitions that were granted certiorari and reviewed by the Court.

For instance, Brenner (1979), Palmer (1982), Brenner and Krol (1989), Krol and Brenner (1990), and Boucher and Segal (1995) consider only petitions that were granted certiorari and given full consideration on the merits. These scholars attempt to determine if a justice's vote to grant or deny cert is correlated with her final decision on the merits, so petitions denied certiorari are not beneficial to their analyses.³⁷

Brenner (1997) justifies ignoring the petitions denied cert by simply asserting that Supreme Court justices deny certiorari to petitions for the same reasons they grant certiorari to petitions, without analyzing denied petitions to determine if his assertion is valid.³⁸ However, I argue that it is difficult to come to this conclusion without examining the denied petitions. The Court currently only accepts about 1% of petitions for review, so the denied petitions must be studied in order to draw concrete conclusions as to the reasons these petitions are denied by the Court.

³⁷ Of course, this is because the Court does not render a decision on the merits with respect to petitions denied certiorari.

³⁸ Brenner (1997) attempts to make a connection between a decision to grant cert and a desire for the justices to correct errors made in lower courts. To do this, Brenner (1997) considers only those cases granted cert, so that he can use information from accepted cases to show when the Court was correcting errors made in lower courts.

Many relatively recent studies appear to agree as they have begun to include in their analyses some petitions that were ultimately denied certiorari by the Court. For example, Black and Owens (2009a), Owens (2010), Black and Boyd (2012a), Black and Boyd (2012b), and Bryan and Owens (2017) include petitions that were denied cert, but only if these petitions were placed on the Court's discuss list, ignoring petitions denied and not placed on the discuss list.³⁹

Black and Owens (2009a) look at the factors that influenced individual justice voting and conclude that both personal policy preferences and legal factors are important to justices when voting to grant or deny cert. Owens (2010) fails to find conclusive evidence that separation of powers factors, such as legislative and executive preferences, affects justices during case selection. Black and Boyd (2012a) find that law clerks have an influence on whether a petition is granted or denied certiorari by the Court. In addition, Black and Boyd (2012b) find that litigant status influences the likelihood a petition is granted certiorari.⁴⁰ Finally, Bryan and Owens (2017) find that a justice is more likely to grant review to a petition that involves a state as a party when that state is ideologically distant from the justice.

While these studies at least consider some petitions denied certiorari, their practice of including only the denied petitions that were first added to the Court's discuss

³⁹ Black and Owens (2009a) randomly sample 358 paid non-capital petitions that were placed on the Court's discuss list during the 1986-1993 terms (p. 1065). Black and Boyd (2012a) and Black and Boyd (2012b) use a similar dataset, but they expand their sample size to 1,025 paid non-capital petitions from 1986, 1987, 1991, and 1992. Owens (2010) also uses a sample of paid non-capital petitions from the Court's discuss list, but he limits his sample of 542 to petitions in which the Court was asked to review a federal statute from 1953-1993. Bryan and Owens (2017) use a sample of 624 paid non-capital petitions that made the discuss list from 1986-1993. Although each of these studies uses different sample sizes, they all restrict their samples to petitions that made the discuss list.

⁴⁰ Litigant status refers to the advantages some litigants have over other litigants in terms of resources, strategy, and experience. Black and Boyd (2012b) derive this idea from Galanter's (1974) work on the "haves" coming out ahead over the "have-nots."

list still ignores a large number of petitions denied during the creation of the discuss list, an essential part of the case-selection process. Owens (2010) admits that this practice leads to selection bias, because selection of petitions for the discuss list is not random. Owens (2010) also explains, however, that if petitions not on the discuss list were included in his study, it would be difficult to investigate individual justice voting as these petitions are unanimously denied by the Court (p. 419). Similar to Owens (2010), Black and Owens (2009a), Black and Boyd (2012a), and Black and Boyd (2012b) focus on individual justice behavior during case selection, which subjects them to some selection bias by restricting the types of petitions that can be included in their data.

There have been a small number of studies that have overcome this selection bias by considering all denied petitions, even if the petitions did not make the Court's discuss list. Tanenhaus et. al (1963) and Songer (1979) include a sample of all petitions from select terms, but unlike more recent studies, these studies did not gather data from the justices' docketsheets or cert petition memos, which greatly limits the variables they were able to consider.⁴¹

Provine (1980) uses Justice Burton's papers to analyze all petitions to the Court from select terms in the 1940s and 1950s in one of the first studies that illustrates the importance of the justices' personal policy preferences on case selection. Because her study is limited to Justice Burton's tenure on the Court (1945-1958), Provine's (1980) work is restricted to terms from the early part of the twentieth century. Also, her study was completed in the 1970s and lacks the statistical precision of more recent studies.

⁴¹ There are examples law clerk certiorari memoranda and docketsheets in Appendix C. A more detailed description of docketsheets and cert memos is in Chapter 3. Docketsheets are also described below in the discussion of *in forma pauperis* petitions.

While Provine's (1980) work is widely cited in agenda-setting studies and is highly valuable because she considers all types of cert petitions, there is a need for more current study that extends upon her work.

Caldeira and Lempert (2020) investigate the factors that influence the chief justice during the creation of the discuss list across the 1939, 1968, and 1982 terms of the Court. Specifically, Caldeira and Lempert (2020) analyze whether some factors have varying degrees of influence on Chief Justices Hughes, Warren, and Burger throughout the creation of the discuss list during these terms,⁴² and they discover that some factors do have differing degrees of impact on these chief justices' formations of the discuss list over terms.⁴³ However, Caldeira and Lempert (2020) do not consider the second step of the case-selection process, or the selection of petitions for review.

Thus, while Caldeira and Lempert's study is rare among Supreme Court agenda-setting studies in that it examines the creation of the discuss list, it does not analyze the case-selection process as a two-step process. Additionally, Calderia and Lempert's (2020) analysis is subject to some selection bias, as they consider petitions from only the October terms of 1939, 1968, and 1982, and they do not include in their dataset IFP petitions or petitions that were placed on the discuss list by justices other than the chief justice.⁴⁴

⁴² Section II above explains the manner in which the chief justice creates the initial version of the discuss list before it is circulated to the other justices so that they may add petitions to the list.

⁴³ For example, Caldeira and Lempert (2020) find that both alleged conflict and civil liberties issues in a petition have a greater effect on the selection of petitions for the discuss list by Chief Justice Warren than Chief Justices Hughes and Burger.

⁴⁴ Caldeira and Lempert (2020) explain that the number of petitions added to the discuss list after it is first formulated by the chief justice is small, however, and their research question is focused on the factors that impact the chief justice's creation of the discuss list.

Caldeira and Wright (1990) and Black and Boyd (2013) focus on the discuss list and the selection of petitions for review as two separate agenda-setting processes. Caldeira and Wright (1990) thoroughly examine the “two stages of decision,” and their “data suggest that it is a mistake to see the winnowing in Conference as a simple replay of the initial cut” (p. 831). Caldeira and Wright (1990) point to evidence that each step of the agenda-setting process is distinct and find further support for the conclusions in their earlier 1988 study regarding the importance of amicus curiae briefs to the agenda-setting process.⁴⁵ If amici participate in a case, it is more likely that a petition will be placed on the Court’s discuss list and selected for review (Caldeira and Wright 1990, p. 831).

Black and Boyd (2013) also provide evidence that the two steps of case selection are unique and separate processes. As described above in Section IV(A), they build on Tanenhaus et al.’s (1963) cue theory, which suggests that certain cues signal to the Court that a petition is cert-worthy. Black and Boyd (2013) find support for their hypothesis that informational cues are even more important at the discuss list stage, because the justices are operating in a “low-information, high-time pressure environment” when formulating the discuss list (p. 1126). For example, they find that the Court mostly uses cues that require less time and effort to identify petitions at the discuss list stage, but the Court will spend more time collecting information during the selection of petitions for review (Black and Boyd 2013, p. 1143).

Caldeira and Wright (1990) and Black and Boyd (2013) both demonstrate the importance of considering the two stages of the case-selection process. First, at the discuss list stage decisions are made by the Court to deny the majority of cert petitions,

⁴⁵ Caldeira and Wright (1988) also consider petitions that did not make the Court’s discuss list, as their data include all paid cases from the Court’s 1982 term.

which is a highly secretive and selective process (Caldeira and Wright 1990), so this stage should not be ignored. As stated above, only about 10% of petitions are placed on the discuss list and discussed by the members of the Court.⁴⁶ In addition, Black and Boyd (2013) provide evidence that the Court uses different types of cues when selecting petitions for the discuss list versus selecting petitions for review, providing support for the notion that these stages are distinct.⁴⁷

Caldeira and Wright (1990) and Black and Boyd (2013) begin to address a significant gap in the literature by considering both stages of case selection on the Supreme Court.⁴⁸ Because of their findings, in this dissertation I also treat the two steps of case selection as two distinct processes and avoid selection bias by including in my data petitions that were not placed on the Court's discuss list.

C. Study of Agenda-Setting on the Supreme Court Over Time.

As described above, one of the reasons scholars study the collective behavior of the Court compared to individual justice behavior is to analyze the Court's agenda-setting process over time, however, few studies actually investigate changes to the Court's agenda-setting process over time. Keck (2004) provides evidence that certain events facilitated the Court's agenda change from laissez-faire economics to civil rights cases; however, he does not indicate whether members of the Court had other issue-area options

⁴⁶ This percentage is from data collected by Black and Owens (2009a) from the early 1990s. There are no public records of the discuss list and conferences, and the most recent available data come from Justice Blackmun's personal papers from the early 1990s.

⁴⁷ Again, according to their findings, "low-cost" cues, or cues that do not require much time and effort to identify, are more useful to the Court when selecting petitions for the discuss list, while "high-value" cues, which require more time and effort to identify, are used during the process of selecting petitions for review (Black and Boyd 2013).

⁴⁸ Both studies, however, still exclude some subsets of petitions from their data that are included in this dissertation, such as IFP petitions (Caldeira and Wright 1990), which subjects these studies to selection bias.

to choose from when moving the focus of the Court's agenda to civil rights. Without analyzing the petitions that the Court did not accept for review, it is difficult to determine whether the Court was significantly more likely to select civil rights petitions over petitions involving other issues, or if perhaps the majority of petitions coming to the Court during that time were civil rights petitions, which left the Court little choice.

Pacelle (1991) demonstrates that landmark cases and other internal and external factors led to an agenda shift from economic issues to civil rights and civil liberties, but similar to Keck (2004), he does not examine whether the Court had a choice between focusing on civil rights instead of cases in other policy areas. For example, Pacelle (1991) finds in his analyses that foreign affairs and separation of powers cases took up less than 2% of the Court's agenda space over the time period he studied, which he concludes could be a sign that these cases required more institutional resources than civil rights cases (p. 134). However, Pacelle (1991) does not test this hypothesis by looking at the issues addressed in petitions that were not accepted for review by the Court. An analysis of the petitions that were both granted and denied cert might help to provide more conclusive evidence regarding changes in the Court's agenda.

Moreover, other than Caldeira and Lempert's (2020) study, the agenda-setting scholarship described above in Section V(B) above does not analyze the Court's agenda-setting over time. For example, Caldeira and Wright (1988), Caldeira and Wright (1990), and Calderia, Wright, and Zorn (1999) use a dataset created by Caldeira and Wright (1988) of all paid petitions for certiorari to the Court in the 1982 term. While their studies certainly shed light on the Court's case-selection process, confining their studies to one

Court term limits the application of their findings to the Court's agenda-setting process during other time periods.

Black and Owens (2009a) use data from the 1986 to 1993 Supreme Court terms in their 2009 study and in a subsequent study (Black and Owens 2012), while Bryan and Owens (2017) also analyze data from the 1986-1993 terms. Black and Boyd (2012a) use data from the 1986, 1987, 1991, and 1992 terms that they also use and expand on in later studies (Black and Boyd 2012b; Black and Boyd 2013). Therefore, all of these studies are limited to terms of the Rehnquist Court. Black and Boyd (2013), the only recent study that exams the discuss list and the selection of petitions for review, note how the Court's case-selection process has changed over the 20th century. However, although they draw this conclusion, they consider data from only four terms of the Rehnquist Court (Black and Boyd 2013).

Caldeira and Lempert (2020), however, do analyze the selection of petitions for the discuss list over time by investigating the factors that influence the creation of the discuss list by Chief Justices Hughes, Warren, and Burger during the 1939, 1968, and 1982 terms of the Court, respectively. Nevertheless, Caldeira and Lempert (2020) still leave a significant gap in the agenda-setting research. Although Calderia and Lempert (2020) study the formation of the discuss list over time, they do not consider both steps of the case-selection process as their analyses focuses only on the discuss list and not the selection of petitions for review. Additionally, as described above, Caldeira and Lempert's (2020) study is subject to some selection bias as they do not include in their dataset IFP petitions or petitions added to the discuss list by justices other than the chief justice.

Scholars have documented the importance of studying political institutions such as the Supreme Court over time. North (1990) finds that economic change cannot be understood without looking at the history and evolution of institutions. North (1990) believes that “tracing the incremental evolution of institutions” is the only way to fully understand how and why these institutions make public policy. North (1990) finds that this is because institutions are “path dependent,” and states that “path dependence means that history matters. We cannot understand today’s choices ... without tracing the incremental evolution of institutions” (p. 100). Scholars in political science find that applying North’s concepts is important in studying political institutions and the policy choices that these institutions make (Pierson 2004). The Court is a political institution, and if historical changes in the Court are not examined it is difficult to understand the current policy choices the Court makes.

Most studies that thoroughly study the Supreme Court over time focus on the history of the Court’s decision-making and political development. McCloskey (1960) studies the Supreme Court since its inception and sees the development of the Supreme Court as linear, with the Court gaining political power over time. According to McCloskey (1960), the Court has been able to gain political power over time with key decisions, although he finds that some events, such as the Court’s resistance to the New Deal, hurt the Court’s progress.

Conversely, Valelly (2004) finds that the Court’s development has not been entirely linear. Valelly (2004) compares the Court’s involvement in civil rights in the mid-twentieth century to the Court’s involvement in interpreting the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution after the Civil War. According

to Vally (2004), the post-Civil War Court was able to have a major impact on policy, similar to the impact the Court had on civil rights in the 1960s. Skowronek (1982) also finds evidence that the Court was influential in the late 1800s. The Court played a key role in restricting the behavior of the federal government by providing guidelines through cases as to what actions were permitted according to the Constitution (Skowronek 1982, p. 24).

In short, these studies demonstrate that the level of political power and influence of the Supreme Court has changed throughout its history. McCloskey (1960) finds the development of the Court to be more linear, although he describes times where actions by the Court have actually caused the Court to regress and lose power. Vally (2004) and Skowronek (1982) also find that the Court's ability to influence policy has changed over time, but their findings indicate that the Court's political power may be more cyclical. Overall, these scholars show that certain historical influences have impacted the Court's power, legitimacy, and influence.

These studies demonstrate the importance of considering Supreme Court processes over time. Therefore, this study seeks to begin to evaluate the manner in which the Supreme Court's agenda-setting process has changed over time. Consequently, in this dissertation I analyze data from three terms of the Court under the leadership of three different chief justices. Specifically, my dataset includes data on the 1960 Warren Court, the 1977 Burger Court, and the 1992 Rehnquist Court.

Unlike McCloskey (1960), Vally (2004), and Skowronek (1982), this study does not consider the manner in which the changing power and influence of the Supreme Court throughout its history impacts its agenda-setting process. Put differently,

investigating the factors that influence the two stages of the case-selection process during only the three Court terms studied limits my ability to draw conclusions regarding the possible institutional impact that changes to the agenda-setting process might have had on the Court. However, studying these three terms will allow me to draw some conclusions about Court agenda-setting trends during each term, and how these trends might have changed over the time span included in my study.

Additionally, this dissertation might shed some light on the usefulness of the many agenda-setting studies that use data from only the Rehnquist Court to draw general conclusions about agenda-setting on the Court. These studies analyze data from the Rehnquist Court because data from this Court is the most recent data on the case-selection process that is available. To collect the most reliable information on petitions that are denied cert, scholars must use justices' personal papers.⁴⁹ The latest justice to donate his papers for scholarly use was Justice Blackmun, who retired from the Rehnquist Court in 1994. Due to this data limitation, 1993 is the most recent term of the Court that scholars can study if they must rely on a justice's papers to collect data on petitions denied certiorari.

While I am also limited by this data availability restriction, in addition to Rehnquist Court data I consider data collected from justices' papers during the Warren and Burger Courts, so I might find evidence that suggests that the Court during different decades was influenced by different factors during the case-selection process. If I find that there are changes in agenda-setting trends across the Courts studied here, there may

⁴⁹ Because there is no official record of the Court's case-selection process, most of the information about the petitions denied certiorari must be collected from justices' personal papers, if available. (Black and Owens 2009c).

be reason to believe that there have been changes to the process since the early 1990s. Therefore, the current Roberts Court's case-selection process may differ from the Rehnquist Court's process, suggesting that existing agenda-setting studies may have limited usefulness when applied to explain agenda-setting on the Roberts Court.

VI. Conclusion.

The Supreme Court of the United States has some influence over its agenda. The Court is a passive institution, which means it must wait for cases involving certain issues to be properly brought before the Court through the certiorari process. However, once cert petitions are brought to the Court, the justices face few restrictions in choosing cases for review. Because Supreme Court decisions can have a great impact on public policy, numerous studies focus on the manner in which the Court selects the cases it will review.

A review of the agenda-setting literature indicates that the most appropriate model to apply in this dissertation to explain the Court's case-selection process is a low-cost, low-value and high-cost, high-value cue theory framework. Tanenhaus et al.'s (1963) cue theory has been applied in several agenda-setting studies, and there is evidence that the Court responds to certain factors in petitions that act as cues during both stages of the case-selection process (Black and Boyd 2013; Caldeira and Wright 1990). Because I identified issues with applying Supreme Court decision-making theories to the Court's case-selection process, as described above, those theories are not applied in this dissertation.

Additionally, I examine the collective decision-making behavior of the Court during case selection rather than individual justices' behaviors. Considering the collective decision-making behavior of the Court is appropriate in this dissertation because it is

consistent with the practices of previous studies that evaluate Court agenda-setting changes over time and because a lack of data on the manner in which individual justices vote during the case-selection process makes it impossible to consider individual justice voting behavior without excluding large amounts of data.

This study also seeks to address three gaps in the literature that are identified above. First, previous studies exclude large subsets of petitions from their data, including IFP petitions and petitions from state supreme courts. To avoid the selection bias created by the exclusion of these petitions, I include both types of petitions in my analyses.

Second, most agenda-setting studies also exclude from their data petitions that do not make the Court's discuss list. This creates another gap in the research as it makes it difficult for these studies to analyze the two distinct stages of the Court's case-selection process: (1) the formulation of the discuss list and (2) the selection of petitions from the discuss list for review. The few studies that analyze the two stages of the case-selection process demonstrate that these two stages are treated differently by the Court, and thus should be viewed as two separate processes (Black and Boyd 2013; Caldeira and Wright 1990). Therefore, to address this gap, this dissertation considers both steps of the case-selection process and analyzes petitions that did not make the Court's discuss list.

Third, few agenda-setting studies have analyzed the Court's agenda-setting process over time, with most using data from the Rehnquist Court. I attempt to close this gap in the research by including in my analysis petitions from three different Court terms under three different chief justices to determine whether Court agenda-setting trends have changed over time. Changes to the process over time may indicate that the current

Court's agenda-setting process differs from the process of the Courts included in this study.

In the next chapter, I discuss the methods I used to collect the data necessary to address my research questions and the gaps in the research.

Chapter 3: Data and Measurement

I. Introduction.

This chapter sets forth the research questions and hypotheses, explains the data collection methods utilized, and discusses the dependent and independent variables considered in this dissertation. In Section II of this Chapter 3, I discuss the research questions and hypotheses that are addressed in this dissertation. My data collection methodology is discussed in Section III, while Section IV explains the dependent variables used. Section V discusses the manner in which the low-cost, low-value and high-cost, high-value cue theory framework is applied in this dissertation and the independent variables considered in this study. Section V also makes predictions regarding the influence of these factors on both the Court's creation of the discuss list and its selection of petitions for review during the 1960, 1977, and 1992 terms. Other independent variables, which I do not expect to significantly influence the discuss list or the selection of petitions of review, are discussed in Section VI.

II. Research Questions and Hypotheses.

As discussed in Chapter 2, there are three gaps in the existing Supreme Court agenda-setting literature that this dissertation attempts to address, including the exclusion of certain types of cert petitions from analyses, the failure to consider the first step of the Court's two-step case-selection process, and the lack of study of the Court's agenda-setting process over time. To begin to explore these gaps, I formulate several research questions and hypotheses.

A. Research Questions.

I pose the following overarching research question in this dissertation: How does the Supreme Court of the United States decide which cases it will review?

To answer this question, I also pose three smaller questions related to the gaps in the research that have been not been fully addressed in previous studies:

1. Does the inclusion in this study of types of cert petitions that have been excluded from study by other scholars, such as IFP petitions and petitions originating in state supreme courts, provide a more complete explanation of agenda-setting on the Supreme Court?
2. Do different factors act as cues to inform and influence the Court during the creation of the discuss list and the selection of petitions for review?
3. Have Supreme Court agenda-setting trends changed from 1960 to 1992, the span of years between the terms included in this study? If so, how have trends changed?

B. Hypotheses and Predictions.

1. Hypotheses.

To address the research questions presented above, I pose the following hypotheses:

a. Hypothesis 1.

Hypothesis 1: Because the time-commitment costs and informational values associated with factors that act as cues varies, there are some cues that inform and influence the Court during one stage of the case-selection process that do not inform and influence the Court during the other stage of the case-selection process. Similarly,

because of cost and value considerations, some of the cues that do inform and influence the Court during both stages of the case-selection process have a greater level of influence on one of the two stages of the case-selection process than on the other stage of the process.

The Supreme Court currently receives about 7,000 to 8,000 petitions for writ of certiorari each term, and of these petitions only about 80 are granted certiorari and given full consideration by the Court (SCOTUSblog, 2021). During the first stage of the case-selection process, the Court significantly narrows the large pool of petitions by creating the discuss list, and then the justices are able to dedicate more time to the second stage of the process, which is the selection of petitions for review (Black and Boyd 2013).

Black and Boyd (2013) find that some factors act as informational cues that significantly influence the Court during one stage of the agenda-setting process but do not influence the Court during the other stage of the process. This is because, as briefly described above, the Court is able to allocate more time to the process of selecting petitions for review than to the process of selecting petitions for the discuss list (Black and Boyd 2013). With respect to cues that significantly influence both stages of the case-selection process, Black and Boyd (2013) find that these cues have a greater impact on one stage of the process than the other stage.

Based on these findings, I hypothesize that some of the factors that act as cues to the Court that play significant role during one stage of the case-selection process will not play either a significant role or as significant of a role during the other stage of the process. Additionally, based on this hypothesis, I make predictions below regarding

specific cues and the influence I expect each of these cues to have on the Court's case-selection decisions during each stage of its case-selection process.

b. Hypothesis 2.

Hypothesis 2: Because of historical, political, and internal factors, some of the factors that inform and significantly influence the Court during its two-step case-selection process differ between the 1960, 1977, and 1992 terms. Similarly, also due to historical, political, and internal factors, the factors that do inform and significantly influence the Court across multiple terms have a different degree of influence on the Court during each of these terms.

As reviewed in Section V(C) of Chapter 2, some studies demonstrate that over time historical, political, and internal factors have led the Court to shift the focus of its agenda to different issues, resulting in Supreme Court agenda-setting trends changing over time (Keck 2004; Pacelle 1991). Findings that the Court's agenda has changed over time at least suggests that some factors important to the Court during the case-selection process have also likely changed over time. For instance, when the Court begins to focus its agenda on different issues, the justices may look to different factors that act as cues for information about cert petitions. In the discussion in Section V below of the independent variables used in this study, I make predictions regarding specific factors that act as cues and their different degrees of influence on the stages of the Court's case-selection process during the different terms studied.

2. Predictions Regarding Individual Cues.

To explore Hypotheses 1 and 2, I make several predictions regarding the influence of specific factors that act as informational cues on the Supreme Court's

creation of the discuss list and its selection of petitions for review during the Court's 1960, 1977, and 1992 terms. These predictions are discussed below in Section V.

III. Data Collection.

This dissertation includes data on petitions for writ of certiorari to the Supreme Court of the United States from the Court's 1960, 1977, and 1992 terms. Analyzing petitions from these terms allows this dissertation to explore the research questions and hypotheses posed above. As described in more detail in Chapter 2, cert petitions are a valuable source of information for studying the Court's agenda-setting process because petitions are assigned their own identifying docket numbers and they represent each of the lower court decisions that a litigant is petitioning the Court to review. Therefore, cert petitions provide a broad amount of information regarding the cases the Court has an opportunity to review.⁵⁰

Due to the large number of cert petitions sent to the Court each term, agenda-setting scholars draw random samples of cert petitions from various Court terms to analyze, with most scholars drawing samples of petitions from Rehnquist Court terms in the 1980s and 1990s. These studies have typically excluded from their random samples the following petitions: *in forma pauperis* or IFP petitions, petitions from state courts of last resort, and/or petitions that were both denied cert and were not placed on the discuss list.⁵¹ Because these petitions generally represent over 50% of cert petitions in a given term, studies' exclusions of these petitions results in selection bias that makes it difficult

⁵⁰ As explained in Section II in Chapter 2, the first process of the Court's agenda-setting process involves a party petitioning the Supreme Court to review its case.

⁵¹ In other words, these petitions were denied cert during the first stage of the case-selection process because they were not placed on the discuss list.

to draw concrete conclusions regarding the factors that influence the Court's agenda-setting process.

To close the gaps in the research, I created an original dataset that includes a random sample of petitions from one term from each of the Warren, Burger, and Rehnquist Courts. These terms are the 1960, 1977, and 1992 terms. My data also includes IFP petitions,⁵² petitions from state courts of last resort, and petitions not placed on the Court's discuss list.

A. Data Sources.

The first step in creating my original dataset was determining the best sources to use to collect the most reliable data on cert petitions. As described in Chapter 2, the Court's case-selection process is very private, and the justices are not required to keep records of cert petitions or provide reasons to the public explaining the reasons they chose grant or deny certiorari. The Court generally renders a decision on petitions granted certiorari, so it is relatively easy to gather information on petitions granted cert. However, the only official record of certiorari petitions not granted cert from each term of the Court is a list of their names in bound volumes of the *United States Reports*.

For example, the volume of the *United States Reports* from the 1992 term contains a list of all petitions that were sent to the Court during that term. The only information about the denied petitions in the *United States Reports* is parties' names and the petitions' docket numbers. Because there are no other official records of these petitions, relying on sources external to the Court to gain additional information about the petitions denied cert would prove difficult, if not impossible.

⁵² My dataset includes IFP petitions other than capital, or death penalty, petitions. The reason these petitions were ultimately excluded from my dataset is explained more fully below.

The lack of official records has led Supreme Court agenda-setting scholars to turn to the personal papers of former justices as a source for collecting information about denied petitions (Caldeira and Lempert 2020; Black and Boyd 2013; Black and Boyd 2012a; Black and Boyd 2012b; Owens 2010; Black and Owens 2009a; Black and Owens 2009c; Caldeira, Wright, and Zorn 1999; Caldeira and Wright 1990; Caldeira and Wright 1988; Palmer 1982; Provine 1980). Several Supreme Court justices have chosen to donate upon their deaths or retirements their personal papers to either the Library of Congress or a university library. These collections of papers usually include documents from throughout the justices' legal careers, including time spent as judges on lower federal or state courts. The portion of papers from the justices' tenures on the Supreme Court usually includes documents such as personal notes on cases, the law clerks' cert petition memoranda, copies of written correspondence between the justices, docketsheets, and conference lists.

To collect information about cert petitions, scholars have used the justices' conference lists, docketsheets, and certiorari memoranda.⁵³ Conference lists contain a list of the names of all cert petitions to the Court along with their corresponding docket numbers. During the terms studied here, each justice would receive a copy of the conference lists, and most justices marked the petitions on the lists that were selected for the discuss list (or the dead list during the Warren Court term). Conference lists are useful for scholars who want to determine which petitions were placed on the Court's discuss list during a given term.

⁵³ Examples of conference lists, docketsheets, and cert memos are in Appendix C.

Docketsheets are also used for recording certiorari votes. Each docket sheet has the name and docket number of a cert petition at the top of the page, a space for notes, and an area to note how each justice voted to grant or deny cert with respect to the petition. A docket sheet is printed for each cert petition to the Court, but a vote to grant or deny cert is recorded on the docket sheets of only the petitions that are placed on the discuss list. Therefore, scholars usually use the docket sheets to determine how individual justices voted to grant or deny cert (Black and Owens 2009a), but they are not as useful for analyzing the selection of petitions for the discuss list.

Certiorari memoranda, or cert memos, are written by law clerks and are used to brief each cert petition for the justices.⁵⁴ Cert memos are a useful source for gathering information about petitions. The law clerk authoring a memo begins by listing the petition's docket number, the full names of the parties involved, the page of the conference list the petition is listed on, and the lower federal appeals court or state supreme court in which the case was last decided. The body of each memo begins with a short summary of the petition. Depending on the law clerk and the case discussed in the cert petition, the summary may very briefly state the facts of the case or can more thoroughly summarize the issues addressed by the parties to the case. The summary is then followed by a more detailed synopsis of the facts of the case, which typically includes a review of the events that led to the controversy between the parties. The facts section also includes the decision reached by the trial court on the case.

⁵⁴ Before the 1970s, each justice's own law clerks wrote cert memos for each petition. Beginning with the Burger Court in the 1970s, most justices' law clerks now participate in the cert pool and divide up the petitions among their clerks for briefing. The law clerks for Justices Brennan, Marshall, and Alito have not participated in the cert pool (Miller 2014).

In the second section of the memo, the law clerk authoring the memo summarizes questions addressed by the appeals court or state supreme court immediately below the Supreme Court and the appeals court's final decision on the case.

The third section of the cert memo lists the "contentions" of the petitioner, or the party that has filed the petition for writ of certiorari. If any amicus curiae briefs have been filed in favor of the petitioner, the law clerk summarizes them after discussing the petitioner's arguments.⁵⁵ If there are no amicus briefs in favor of the petitioner, the law clerk then summarizes the respondent's arguments in the fourth section of the memo. Although most respond, some respondents do not give the Court a written reply to a cert petition that explains their positions. In this case, the law clerk writes "there is no response" at the end of the brief.⁵⁶ Any amicus curiae briefs in favor of the respondent are summarized after the overview of the respondent's views.

At the end of each memo, in a "discussion section," the law clerk gives her own synopsis of the petition. First, the law clerk discusses whether the petition has characteristics that make it "cert-worthy." For example, the authoring law clerk notes if the lower court ruling features any "splits" or "conflicts," which means the court's ruling conflicts with previous Supreme Court rulings or with rulings of other appeals courts on the same subject matter. If there are no conflicts, the law clerk might still deem a petition cert-worthy if it addresses a subject that is highly controversial, or if it presents an issue

⁵⁵ An amicus curiae, or "friend of the court," brief is a brief filed by a third party. The third party has no right to appear in a case, but the Court may give permission to a third party to submit an amicus brief that might introduce a new argument or evidence on behalf of one of the parties participating in the case.

⁵⁶ In some cases, if the respondent has filed no response to a petition for writ of certiorari, the Court may call for a response or "CFR" the respondent. In a cert memo, a law clerk often encourages the justices to call for a response from the respondent if the respondent's position is unclear or if the law clerk thinks the petition may be cert-worthy.

that the Court has not yet addressed. At the end of the discussion, the clerk gives a recommendation to the Court to grant or deny certiorari.

After consulting the literature and advice of several scholars, I determined that the best source for obtaining the information needed for my original dataset was the personal papers of select justices, which are located in the Library of Congress in Washington, D.C. The Library contains papers of justices from all three terms included in my study. Although the justices' papers are not official records, as explained above, the conference lists, docketsheets, and cert memos offer the most reliable source for collecting data on cert petitions. Furthermore, Black and Owens (2010) compared the records of multiple justices from the same term and found the records to be consistent. Their findings demonstrate that the justices' papers are a dependable source for information on cert petitions (Black and Owens 2009c).

There is some variation, however, in the content of justices' papers. For example, some justices' papers contain different types of documents than others. Justice Blackmun, who served on both the Burger and Rehnquist Courts, was a very diligent record keeper. His papers contain conference lists, cert memos, and docketsheets for every term he served on the Court. Only a very small percentage of these documents are missing from his collection. However, while Chief Justice Warren and Justice Douglas kept copies of their cert memos, they did not record cert votes on their docketsheets, which were mostly blank. Justice Brennan did keep detailed records of cert votes on his docketsheets and recorded the petitions that were not discussed in conference, so his records are useful for determining the petitions placed on the discuss list. However, he did not keep copies of his cert memos with his papers. Because of the variation in the types of documents

retained by different justices, I use the papers of several justices to complete my original dataset.

B. Data Collection.

I selected the 1960, 1972, and 1992 terms for the reasons discuss in Section III(C) below. For all three terms, I created a list of all petitions, and coded the petitions that were discussed in conference by the Court. In other words, I made a list of all petitions to the Court for each term that identified those petitions that made the discuss list as it is important to identify these petitions because the selection of petitions for the discuss list is the first step of the Court's case-selection process.

After creating the list of petitions for each term, I used Stata to draw a random sample of petitions from each term. My random sample from each term included 190 petitions that were discussed by the Court and 150 petitions that were not discussed.⁵⁷ I then took pictures of the cert memos in the Library of Congress that corresponded to each petition included in my samples of the 1977 and 1960 terms, so that I could code information about each cert petition.⁵⁸ In the following section, I describe the reasons I choose the 1960, 1977, and 1992 terms, and provide more detail on the manner in which I collected data for my random samples of petitions from each term.

⁵⁷ As discussed in footnote 62, a small percentage of cert memos that corresponded with petition numbers in my random sample were missing from the justices' papers. When a cert memo was missing, I choose another memo for a petition that was like the one that was missing. For example, if the petition missing was on the discuss list but not granted review, I choose a memo written for another petition that was on the discuss list and not granted review. Also, I drew a larger number of petitions that made the discuss list than cases that did not make the discuss list because during each term included in my study, capital (death penalty) petitions were automatically placed on the discuss list. For reasons explained below, capital petitions were excluded from my data, so a larger number of cases that made the discuss list was needed so that I was not at risk of my discuss list sample being much smaller than my non-discuss list sample after capital petitions were removed.

⁵⁸ I did not need to do this for the 1992 term because the pictures of the cert memos for this term are on the Blackmun Archive online.

C. The Selection of the 1960, 1972, and 1992 Terms.

I selected the 1960, 1972, and 1992 Court terms for my dataset for several reasons. First, a goal of this dissertation is to study the Court's agenda-setting process over time in order to determine whether the Supreme Court's case-selection process has changed during the time following the passage of the Judiciary Act of 1925. Some of the changes to the Court's case-selection process during this time are already known. For example, when Warren Burger became chief justice in 1969, the Court began to use a discuss list instead of a dead or special list, and it also began to utilize the cert pool of law clerks to brief cert petitions. However, while some agenda-setting studies study case selection on the Court before these changes were implemented in 1969, these studies do not attempt to determine if the factors that influenced case selection were also different before and after 1969 (Owens 2010; Provine 1980).

I also chose the 1960, 1977, and 1992 terms so that my dataset included data from one term from each of the Rehnquist (1986-2005), Burger (1969-1986), and Warren Courts (1953-1969). The Supreme Court at different times in the history of the United States is generally categorized and labeled by scholars and journalists according to chief justice (Neubauer and Meinhold 2012). For example, the Court under the leadership of Chief Justice Earl Warren is referred to as the Warren Court. There are several reasons why the Court is usually categorized in this way.

First, although the chief justice's vote carries the same weight as the other justices' votes, the chief justice plays an important leadership role and thus he has some

influence over the other members of the Court. An example of this is the frequency in which the chief justice assigns a justice to author the majority opinion of a decision on a case selected for review. When the chief justice is in the majority, he has the duty of assigning the opinion because the most senior justice in the majority of a decision is charged with the task of assigning the opinion to herself or to another justice.⁵⁹ Maltzman and Wahlbeck (1996) find that between 1953 and 1990, the chief justice was in the majority and charged with this task about 80% of the time. There is even some evidence that Chief Justice Burger would change his position and join the majority so that he could control the assignment of the author of an opinion (Woodward and Armstrong 1979).

An additional example of the chief justice's leadership and influence is his role during the case-selection process. The chief justice formulates the initial discuss list and begins the discussion of the list in conference. Although other justices can add petitions to the discuss list, the chief justice contributes the majority of the petitions to the list because it originates with him (Provine 1980).

Another reason for categorizing the Court by chief justice is that it allows scholars to assign certain ideological characteristics to each Court. For example, the Warren Court is usually characterized as a Court that made liberal decisions in civil rights and civil liberties cases. The Burger Court, which followed the Warren Court, is viewed as a more conservative Court than the Warren Court. For example, when given the opportunity, the Burger Court would make minor conservative adjustments to Warren Court precedent in cases that involved civil rights and civil liberties issues, especially if the cases addressed

⁵⁹ The justice with the most seniority on the Supreme Court is the chief justice. The other justices rank in seniority according to the length of time they have served on the Court, with the justice with the longest tenure having the highest seniority.

criminal procedure (Neubauer and Meinhold 2012). Segal and Spaeth (1989) find that decisions supporting civil rights and civil liberties declined by about 45% from the last years of the Warren Court to the last years of the Burger Court. Additionally, Baum (2013) finds that it was President Nixon's appointment of Burger and three additional justices that led to this ideological change on during the Burger Court. Finally, the Rehnquist Court is regarded among scholars as even more conservative than the Burger Court. Justice Rehnquist's elevation to chief justice in 1986 by President Reagan led the Court in an even more conservative direction than the Burger Court (Baum 2013).

Because the chief justice plays such an influential role and different Courts have different characteristics, I choose a term from approximately the middle of the tenures of Chief Justices Warren, Burger, and Rehnquist. Ideally, I would have chosen a term from the Roberts Court (2005-present) so that I could study the case-selection process of the current Court. Unfortunately, no justice on the Roberts Court has contributed her papers to the Library of Congress, making it impossible to collect the data on the Roberts Court needed for this study. Until a Roberts Court justice decides to donate her papers, the Rehnquist Court is the most recent Court I can include in my study.

For consistency purposes, I also considered membership change when I selected the 1960, 1977, and 1992 terms. Supreme Court terms begin on the first day of October. Petitions for writ of certiorari that arrive to the Court on or after October 1st receive a docket number beginning with the current year. For example, the first petition for writ of certiorari in October 1992 was given the docket number 92-1.⁶⁰ Until October 1, 1993,

⁶⁰ Petitions for the 1977 and 1992 term were numbered this way. During the Warren Court, petitions were not numbered beginning with the year, and so the first petition in 1960 was just numbered "1." However, the Library of Congress has numbered cert memos from petitions granted cert beginning with the term year for organizational purposes.

all cert petitions arriving at the Court were given a docket number beginning with 92. Therefore, a decision to grant or deny cert for most 1992 petitions took place in 1993. If a 1992 petition was granted cert, it would not have been argued until the 1993 or 1994 terms. Because it could take up to two years for a petition to be discussed and/or granted cert, I selected terms in which there was no membership change during that term and during the two years following that term.

An additional factor I considered when selecting terms was the availability of sources for data collection. Data from the 1992 term was more easily available than data from the other terms included in my study. I used the papers of Justice Blackmun, who served on the Court from 1970 until 1994, to collect data from the 1992 term. Several other scholars have used Justice Blackmun's papers because they are well organized and complete (Black and Boyd 2013; Black and Boyd 2012a; Owens 2010; Black and Owens 2009a; Black and Owens 2009c; Caldeira and Wright 1990; Caldeira and Wright 1988).

Blackmun's papers include his conference lists, docketsheets, and cert memos. In addition to being reliable (Black and Owens 2009c), Blackmun's cert memos for the years he was on the Rehnquist Court (1986-1994) are also available in Epstein, Segal, and Spaeth's (2007) online Blackmun Archive. At the time I created my dataset the Archive did not contain conference lists for these years, but Ryan Black and Ryan Owens were willing to share their list of petitions that were on the discuss list for the 1992 term.⁶¹ Using Black and Owens's (2009a) data and the law clerks' memos from the Blackmun Archive, I was able to draw a random sample from the 1992 term, identify the petitions on the discuss list for that term, and collect the other data I needed.

⁶¹ Black and Owens (2009a) used Blackmun's docketsheets to create a list of petitions that were on the discuss list.

Collecting data for the 1977 and 1960 terms proved a bit more challenging. Blackmun served on the Court during 1977, and so I again used his papers to collect data because of the reliability of Blackmun's records.⁶² The 1977 term was not available online on the Blackmun Archive when I collected my data, so I traveled to the Library of Congress to directly collect data from Blackmun's papers.

I was able to identify the petitions added to the discuss list for the 1977 term by using Justice Blackmun's papers. During all terms included in my study, every justice received a copy of the conference lists for a given term. The conference lists contain the names and docket numbers for every petition for writ of certiorari. Blackmun methodically circled in red the names and docket numbers of each of the petitions placed on the discuss list, so I was able to note which petitions were on the discuss list during the 1977 term.⁶³

After drawing a random sample of petitions from the 1977 term, I searched through Blackmun's cert memos and took pictures of the pages of each cert memo that correlated to each petition in my sample so that I could collect data from the memos for my dataset.⁶⁴

⁶² After I determined the petitions that were on the discuss list and pulled a random sample of petitions from 1977, I began to take pictures of all cert memos in my sample so that I could collect data on the petitions at a later time. I noticed that more of Blackmun's cert memos were missing from 1977 than from 1992. I consulted the librarians in the Library of Congress and scholars who have worked with his papers and they all seemed to conclude that Blackmun's record-keeping methods improved during his tenure on the Court. Although there are more documents missing from 1977 than 1992, the number of missing documents is still relatively small. Only 1% of petitions that corresponded with docket numbers in my sample were missing for the 1992 term, and about 4% were missing for the 1977 term.

⁶³ In addition to circling in red the petitions placed on the discuss list, Justice Blackmun also recorded in conference on his docketsheets how each justice voted to grant or deny cert to each petition. Only the petitions that were placed on the discuss list have a vote recorded on their corresponding docketsheet. When my random sample was created, I double checked my petitions on the discuss list with their docketsheets, to make sure that votes had been recorded and that Blackmun's conference lists were accurate. There are examples of conference lists and docketsheets in Appendix C.

⁶⁴ I did not need to do this for the petitions in my 1992 sample, as pictures of these petitions are online on the Blackmun Archive.

I also collected data from the 1960 term from justices' papers in the Library of Congress. Justice Blackmun was not yet on the Court in 1960, so I had to determine which justices' papers are the best source of complete and reliable records on cert petitions. Most scholars have collected data only from terms during the Rehnquist Court so that they can use Justice Blackmun's papers, but Owens (2010) studies terms from the Warren Court and uses the papers of Chief Justice Warren, Justice Brennan, and Justice Douglas.

Because I wanted to choose a term from the middle of the Warren Court, I initially choose the 1961 term. However, when I was comparing the records of Warren, Brennan, and Douglas for this term, I noticed some inconsistencies between their records.⁶⁵ Due to these inconsistencies, I compared the Warren, Brennan, and Douglas papers from the 1960 term, and all of their docketsheets and cert memos were consistent for this term. I also randomly selected 25 docket numbers, and then reviewed Justice Warren's and Justice Douglas's collection of cert memos related to these docket numbers to determine if most of the cert memos were present for the 1960 term. From my sample, it appeared as if most of Justice Warren's cert memos were present, and so I felt confident in choosing the 1960 term, instead of the 1961 term, for my study.

I used Justice Brennan's papers to determine the petitions that were placed on the discuss list in 1960. On his conference lists, Justice Brennan wrote "SL" next to the petitions that were placed on the special list, or dead list.⁶⁶ These petitions were

⁶⁵ Justice Brennan and Justice Douglas had docketsheets that were numbered from 1-1062 for the 1961 term, while Justice Warren's docketsheets and cert memos were numbered from 1-1028 for this term. Of the three justices, Warren's docketsheets were the most complete and I relied on them to collect the most data, so I needed to make sure I found a term during which the records of all three justices were consistent and reliable.

⁶⁶ During the Warren Court, the Court used a special list or dead list for the petitions that were not discussed in conference by the Court. The petitions not placed on the dead list were discussed in

immediately denied cert and were not discussed in conference by the justices, while the remaining petitions were discussed in conference. Therefore, I was able to use Brennan's conference lists to determine which petitions were discussed by the justices in conference as a collegial body. Like Justice Blackmun, Justice Brennan recorded the cert votes of the justices on his docketsheets, meaning that votes were only recorded on the docketsheets of petitions discussed in conference. Thus, also similar to my use of Blackman's papers, I used Brennan's docketsheets to confirm the accuracy of my list of petitions that were discussed in 1960.

While Brennan kept meticulous conference sheets and docketsheets, he did not save cert memos. Chief Justice Warren and Justice Douglas kept copies of cert memos, but after reviewing some of their memos, Warren's seemed more complete and easier to read.⁶⁷ Therefore, I primarily used Warren's cert memos to collect data for the 1960 petitions in my random sample. If a cert memo was missing from Warren's collection, however, I searched Douglas's papers for a cert memo on the petition and if it was available I used Douglas's memo to collect data.

To summarize, I choose the 1960, 1977, and 1992 terms for several reasons. The terms were close to the middle of the Warren, Burger, and Rehnquist Courts, there were no membership changes on the Court during or immediately after these terms, and there were reliable sources available for data collection for these terms. In the following

conference. Beginning with the Burger Court in the 1970s, the Court started using a discuss list to identify the cases to be discussed in conference instead of a dead list to identify those not discussed.

⁶⁷ The Court did not yet use the law clerk cert pool during the 1960 term, and so Douglas's and Warren's cert memos were written by their own clerks, and differed from each other in organization and style, with the exception of IFP briefs. The IFP memos were written only by the chief justice's law clerks at that time. Conversely, Justice Blackmun's cert memos from 1977 and 1992 were written from law clerks in the cert pool, and all justices participating in the pool all received copies of the same cert memos.

sections, I describe the variables I considered in this dissertation, which were all coded using the data collected from the justices' papers.

IV. Dependent Variables.

My unit of analysis is individual cert petition, because I want to determine whether different factors influence the collective decision-making of the Supreme Court to place a petition on the discuss list and to grant review. To analyze both stages of case selection, I created two dependent variables: (1) whether a petition is added to the discuss list and (2) whether the petition, if placed on the discuss list, is subsequently reviewed by the Court.

My first dependent variable is placement of the petition on the discuss list, or "discuss list." For the 1977 and 1992 terms, petitions were placed on the discuss list by the chief justice, and after the list was circulated, other justices could add to this list. If Justice Blackmun's papers indicated that a petition was placed on the discuss list during these terms, "discuss list" was given a value of 1. If the petition was not on the discuss list, "discuss list" was given a value of 0. During the 1960 term, petitions that were not discussed were placed on the special list or dead list. These petitions were given a value of 0 for "discuss list," while petitions that were not placed on the special list were given a value of 1. As stated above, I drew a random sample of 190 petitions from the discuss list from each Court term included in my study.

To determine the petitions from each term that were granted review, I consulted the Supreme Court Database. The Supreme Court Database (2021) is a dataset of all of the cases decided by the Court from 1946 to 2017. The Supreme Court hands down

several types of decisions, and the Supreme Court Database (2021) considers different types of decisions to be cases decided by the Court.

The first type of decision is an opinion of the Court. This is the type of decision made when a case receives full consideration by the Court, meaning that the Court receives new briefs from each party, holds oral argument, and hands down a full written opinion on its decision on the merits (Baum 2013, p. 87). Another type of decision rendered by the Court is a per curiam decision. This is a written decision that is not signed by a justice. The Supreme Court Database (2021) includes cases with per curiam decisions in the database only if there was a written summary or opinion. The Supreme Court Database (2021) also notes whether there was an oral argument preceding the per curiam decision.

The other types of decisions included in the Database are decrees, judgments of the Court, and cases that resulted in equally divided votes. According to the Supreme Court Database (2021), decrees are rare and usually involve the justices choosing a special master who writes a report that the Court uses to issue the decree. The labeling of a decision as a decree appears to be the only characteristic that differentiates it from other types of decisions (Supreme Court Database 2021).⁶⁸ A judgment of the Court is a decision handed down when less than a majority of justices agree with the opinion written by the justice chosen to author the majority opinion (Supreme Court Database 2021). Additionally, cases can result in an equally divided vote when one of the nine justices is not participating in a case. When a case results in an equal vote, the Court

⁶⁸ For instance, a decree does not appear to have a different or less final effect on the litigants than other decisions on the merits.

hands down a judgment affirming the decision of the lower court in that case (Supreme Court Database, 2021).

The Supreme Court Database (2021) suggests that if scholars are concerned with studying the behavior of justices who authored opinions that they only consider formal, signed opinions. I do not investigate individual justice behavior, so I considered unsigned Supreme Court opinions as opinions that were granted cert and reviewed by the Court. Thus, if a petition in my sample is listed in the Supreme Court Database, it was coded 1 for my “grant” dependent variable. If a petition was not in the Database, it was coded as 0.⁶⁹ Cases in the Database are organized by the new docket number that they received when granted review, which correlates with the year in which they were decided, and not the original docket number they were given as cert petitions. Fortunately, the Supreme Court Database also includes the original cert docket number assigned to each case, which made it easier to match the petitions in my sample with the data in the Database.

Because the number of cases granted cert in each random sample I created is small, I added all of the petitions that were granted cert during each term to my dataset.⁷⁰ It is important to note that these petitions were not the petitions heard by the Court in a given year; the added grant petitions were petitions submitted to the Court during a particular term, such as 1992, and that were eventually granted cert and reviewed by the Court. For example, some petitions from 1992 were granted cert in 1993, while others not until 1994 or 1995.

⁶⁹ The Blackmun Archive also indicates whether a petition was granted cert. I compared the list of cases I obtained from the Supreme Court Database with the petitions that had a “G” for grant next to them in the Archive to confirm that my findings were consistent and accurate.

⁷⁰ For example, in my 1992 sample of 340 petitions, 57 were reviewed by the Court. In my 1977 sample, only 31 were reviewed by the Court, and in 1960, only 66 were reviewed.

It is also interesting to observe the differences in the number of cert petitions from each term that were eventually heard by the Court. For example, 103 petitions from the 1992 term were eventually granted review, while 173 from the 1977 term and 231 from the 1960 term were granted review.⁷¹ Tables 3.1, 3.2, and 3.3 list the summary statistics for the “discuss list” and “grant” dependent variables for each Court term. Tables 3.1, 3.2, and 3.3 are in Appendix A.

V. Independent Variables.

This section describes the independent variables that are included in my analyses. The manner in which these variables are categorized according to the low-cost, low-value and high-cost, high-value cue theory framework that is applied in this dissertation is also explained below.

A. The Application of Cue Theory.

As set forth in Section IV(D) of Chapter 2, this dissertation builds on cue theory studies by applying the low-cost, low-value and high-cost, high-value cue theory framework to determine if certain factors act as informational cues that signal to the Court that a petition is worthy of the discuss list or a grant of certiorari. This study also attempts to determine if there is evidence that the cues that provide important signals to the Court during these processes differ during different terms of the Court over time. Because the Court currently receives about 7,000 to 8,000 petitions for writ of certiorari

⁷¹ There are two possible explanations for the large number of petitions granted review in 1960 compared to the smaller number from 1977 and the even smaller number from 1992. First, the Court’s plenary docket began to steadily shrink during the Burger and Rehnquist Courts (Corday and Corday 2001), meaning the Court gradually began reviewing less cases. Second, during the Warren Court, petitions that were relisted for the next term were given new docket numbers that corresponded with that term. For example, a 1959 petition that was relisted for 1960 was given a 1960 number. This probably caused the number of granted petitions from 1960 in my dataset to be larger than it should, because some petitions likely started as 1959 petitions. However, I could not always determine if a petition was relisted and therefore included all petitions that were given a 1960 docket number.

each term and selects about only 80 for review, the justices likely rely on informational shortcuts as they sort through the large number of petitions to determine if a petition might be worth a discussion or a grant. Informational cues are a valuable resource to the justices because they provide these shortcuts during both the creation of the discuss list and the selection of cases for review (Black and Boyd 2013).

Black and Boyd (2013) also utilize cue theory in their study of the Court's discuss list. Similar to this dissertation, Black and Boyd (2013) hypothesize that different factors affect the Court's process of selecting petitions for the discuss list and its process of selecting cases for review. To test their hypothesis, Black and Boyd (2013) place into different categories the cues that have been found to influence the Court's decision to grant cert.

First, Black and Boyd (2013) identify two characteristics of cues that are important to determine: (1) the cost, in terms of time, that is necessary for the Court to determine if a particular cue is present in a petition and (2) the depth of information a cue provides (p. 1127). Black and Boyd (2013) then hypothesize that the Court will give "primary consideration" to the cues that are low cost, in terms of time commitment, during the process of selecting petitions for the discuss list (p. 1127), because during this process the justices have little information about the petitions but must choose from thousands of petitions those petitions that are worth a second thought (p. 1126). Put another way, the utilization by the justices of low-cost, low-value informational cues does not require a large time commitment, but these cues typically provide the justices with a low level of information about cert petitions (Black and Boyd 2013).

Black and Boyd (2013) next theorize that the Court will give more consideration to high-cost cues, or cues involving a greater time commitment, during the selection of petitions for review because at this stage the pool of potential petitions has been condensed by the creation of the discuss list and thus the justices have more time to invest into determining whether a high-cost cue is present (p. 1127). High-cost, high-value cues generally provide the justices with more information about petitions than low-cost, low-value cues, and are therefore more useful as a signal to the justices than low-cost, low-value cues.

The results of Black and Boyd's (2013) study support their hypothesis by indicating that low-cost, low-value cues are more important to the Court during the creation of the discuss list, while high-cost, high-value cues that provide more information are more important during the selection of petitions for review. To build upon Black and Boyd's (2013) findings, this study also categorizes cues according to their time-commitment costs and the level of information they provide to the Court. In the following sections, the independent variables considered in this dissertation are categorized according to cue type and are described in greater detail.

B. Low-Cost, Low-Value Informational Cues.

Low-cost, low-value informational cues provide the Court with information that takes relatively little time to access but do not provide the Court with a great depth of information about cert petitions. However, even though these cues provide limited information about a petition, they can still act as a signal to the justices that a petition is worth another look or even a grant of cert (Black and Boyd 2013). Like Black and Boyd (2013), I hypothesize that factors that act as low-cost, low-value cues have a greater

impact on the justices during the creation of the discuss list because during this stage, the justices are assessing a large number of petitions and are merely deciding which petitions are worth a second look compared to a grant of cert.

This study considers five independent variables that are low-cost, low-value cues: (1) lower dissenting opinion, (2) constitutional claim, (3) alleged conflict, (4) IFP status, and (5) Ninth Circuit. The summary statistics for these variables, and all other variables included in this study, are reported in Tables 3.1, 3.2, and 3.3. Table 3.1 contains the summary statistics for the 1960 Warren Court sample, Table 3.2 contains the summary statistics for the 1977 Burger Court sample, and Table 3.3 contains the summary statistics for the 1992 Rehnquist Court sample.

1. Lower Dissenting Opinion.

The first low-cost, low-value cue considered in this dissertation is whether with respect to a cert petition there was a dissenting opinion filed by a member or members of the court immediately below the Supreme Court. For all terms included in this study, law clerks noted in cert memos whether there was a dissenting opinion in the lower court that reviewed a case before it reached the Supreme Court as a cert petition. Similar to the measurement of this variable in previous studies, here “lower dissenting opinion” takes on a value of 1 if a law clerk’s memo notes the presence of a dissenting opinion in the court below, and 0 if it does not (Black and Boyd 2013; Black and Boyd 2012a; Black and Boyd 2012b; Owens 2010; Caldeira and Wright 1990).

The presence of a dissenting lower court opinion signals to the Court that a petition is worth a closer look because it suggests either possible conflict on the lower court or a problematic outcome (Caldeira and Wright 1988, p. 1115). Therefore, previous

agenda-setting studies find that the presence of a lower dissenting opinion positively influences the justices to select a petition when creating the discuss list (Black and Boyd 2013; Caldeira and Wright 1990) and when selecting cases for review (Black and Boyd 2013; Tanenhaus et al. 1963). Tables 3.1, 3.2, and 3.3 show that the percentage of petitions with a lower court dissenting opinion does not vary greatly across the Court terms included in this study.⁷²

Black and Boyd (2013) and Caldeira and Lempert (2020) characterize the presence of a lower dissenting opinion as a low-cost cue because it is relatively easy for the justices to determine the existence of a dissenting opinion by quickly scanning law clerks' briefs. The cue is also categorized as having low informational value, because cert memos usually simply state whether there was a dissenting opinion and do not provide sufficient information for the justices to determine whether a disagreement between lower court judges was merely superficial or over an issue of great interest to the Court (Caldeira and Lempert 2020; Black and Boyd 2013).

Similar to previous studies (Black and Boyd 2013; Caldeira and Wright 1988), for all terms included in this study I expect a lower dissenting opinion to positively influence the Court's decisions to choose a petition for the discuss list and for review for all terms.⁷³ Also, because "lower dissenting opinion" is a low-cost, low-value cue, I expect

⁷² According to Table 3.3, the percentage of petitions with lower court dissenting opinions from my 1992 sample was about 17%, while Tables 3.1 and 3.2 demonstrate that the number of petitions from my samples with dissenting opinions was about 17% in 1977 and about 15% in 1960. Because "lower dissenting opinion" is a dummy variable with the values of 0 and 1, the mean for this variable and all other dummy variables included in this study can be simply translated into the percent of observations with the value of 1, or in this case, the percentage of petitions with a lower dissenting opinion.

⁷³ Dissenting opinions were present in lower court opinions and recorded by the law clerks in their cert memos for all terms included in this study. Nothing in the literature suggests that dissenting opinions were a more important signal to the justices during case selection for one term compared to the others. Caldeira and Lempert (2020) find that the impact of lower dissenting opinion on the chief justices' formations of the

this cue to have a stronger effect on the creation of the discuss list than the selection of petitions for review.

2. Constitutional Claim.

The second low-cost, low-value cue considered in this dissertation is “constitutional claim.” “Constitutional claim” measures whether a petitioner made an allegation that her constitutional rights were violated. In my dataset, a petition is coded as featuring a constitutional claim if a law clerk noted in a cert memo that the petitioner made a constitutional claim or claimed she was adversely affected by a violation of any provision of the United States Constitution.

For example, constitutional claims include alleged violations of amendments in the Bill of Rights, or other amendments or provisions of the Constitution, including provisions such as the Interstate Commerce Clause. Here, like Black and Boyd (2013) and Black and Boyd (2012b), petitions containing a constitutional claim are coded 1, and petitions not containing a constitutional claim are coded 0. It is important to emphasize that “constitutional claim” measures whether a petitioner merely alleged a constitutional violation in her petition, not whether the justices or their law clerks actually confirmed a constitutional violation. According to Table 3.2, 39% of petitions in my 1977 sample featured a constitutional claim. Table 3.1 and Table 3.3 show that the number of petitions with a constitutional claim was 27% in 1960 and 24% in 1992.

The Supreme Court of the United States has the final word on the interpretation of provisions in the United States Constitution, and many previous agenda-setting studies find that an allegation of a constitutional violation positively influences the Court to grant

discuss list during the 1939, 1968, and 1982 terms is steady across terms. Thus, there is no indication that the importance of this factor during case-selection has changed over time.

certiorari (Black and Boyd 2013). Additionally, Black and Boyd (2013) find that the presence of a constitutional claim has a statistically significant positive effect on the Court's decision to place a petition on the discuss list, but they did not find that constitutional claims had any significant influence on the Court's decision to grant certiorari (p. 1133).⁷⁴

Therefore, like "lower dissenting opinion," this cue is a low-cost, low-value cue, because it is easy for the justices to identify by quickly scanning a law clerk's brief. "Constitutional claim" also provides limited information to the Court because it tells justices only whether a petitioner is alleging a violation, not whether there was a constitutional violation.

Because prior studies provide evidence that this cue is significant during both case-selection processes, I expect this cue to positively affect both stages of case selection during all three terms studied. Additionally, due to the low value of this cue and previous studies' mixed results regarding its effect on the selection of cases for review, I also expect this cue to have a greater influence on the Court's creation of the discuss list than the selection of petitions for review. Finally, I do not expect constitutional claim to be more important during one Court term studied here than other terms, because similar to "lower dissenting opinion," nothing in the literature suggests that constitutional claims were more important to the Court during one time period compared to another.

3. Alleged Conflict.

The third low-cost, low-value cue is "alleged conflict." "Alleged conflict" measures whether a petitioner claimed that two or more federal courts of appeals or state

⁷⁴ This finding supports Black and Boyd's (2013) hypothesis that low-cost informational cues are more important during the creation of the Court's discuss list than the process of selecting cases for review.

supreme courts have interpreted and applied the law to the same issue in different, conflicting ways. As Black and Boyd (2013) recognize, addressing legal conflict is one of the few criteria for selecting cases set forth in Rule 10 (Rules of the Supreme Court of the United States 2019). Because of Rule 10, and the Court's role of resolving legal conflicts between appeals courts (Roehner and Roehner 1953), attorneys are likely to allege conflicts between lower courts in order to increase the chances that their clients' petitions are chosen by the Court for review (Smith 1999-2000, p. 406).

If a petition alleges a legal conflict between United States Courts of Appeals or state supreme courts, "alleged conflict" takes on a value of 1, and if no conflict is alleged, it takes on a value of 0. According to Table 3.3, about 56% of petitions in the 1992 sample alleged conflict, compared to only 31% of petitions from 1977 in Table 3.2 and about 17% of petitions from 1960 in Table 3.1.

Unlike other low-cost, low-value cues, which are easy to ascertain by looking at the front page of a cert memo, law clerks usually place their discussions regarding an alleged conflict in their analyses of a petitioner's contention, making identification of this variable a bit more time consuming for the justices to determine than other low-cost cues. However, alleged conflict still costs justices a relatively short amount of time to determine compared to high-cost cues, because they are able to find if a petitioner alleged a conflict by scanning law clerks' memos. Alleged conflict is also a low-value cue, because justices learn from the cue only whether a petitioner is alleging a conflict, not whether a conflict actually exists.

Caldeira and Wright (1988) find that allegations of conflict in cert petitions positively affect the Court's decisions to grant cert, and Caldeira and Lempert (2020) find

that alleged conflict positively impacts the creation of the discuss list. Therefore, I predict alleged conflict will positively impact the Court's decisions to discuss and grant cert, but because the cue is low cost and provides limited information, for all three terms I expect its impact to be stronger during the creation of the discuss list than during the selection of petitions for review.

Additionally, Caldeira and Lempert (2020) find that alleged conflict has a greater impact on the creation of the discuss list by Chief Justice Warren compared to the creation of the discuss list by Chief Justice Burger. Moreover, attorneys over time have become aware of the Court's interest in conflict and may allege that a petition features conflict, even where conflict may not exist, merely to gain the Court's attention (Black and Boyd 2013; Smith 1999-2000; Roehner and Roehner 1953).⁷⁵ Therefore, because I predict that alleged conflict becomes less useful to the justices over time as attorneys use the cue to solicit the Court's attention, I expect alleged conflict to have the greatest level of influence on the Court during the 1960 Warren Court term, and the least impact on the Court during the 1992 Rehnquist Court term.

4. IFP Status.

The fourth low-cost, low-value cue is "IFP status." IFP status measures whether a petition is an IFP, or *in forma pauperis*, petition. IFP petitions are unpaid petitions, meaning they are filed by individuals without the financial means to pay the Court's filing fee. Scholars have provided some evidence that a smaller percentage of IFP petitions are granted certiorari than paid petitions (Wachtell and Thompson 2009;

⁷⁵ This might be one reason the percentage of petitions with allegations of conflict is much higher in my 1992 sample than the other terms; attorneys have become aware that this cue can catch the Court's attention.

Gressman 2007). Scholars have often justified excluding IFP petitions from their data analyses because of these findings and the potential issues with statistical models that may arise if they are included (Smith 1999-2000; Caldeira and Wright 1988).

For all three terms included in this study, the number of IFP petitions sent to the Court was greater than the number of paid petitions.⁷⁶ If like previous agenda-setting studies I removed IFP petitions from the list of total petitions before generating my random samples from each term, I would have subjected my study to selection bias because my dataset would not include a type of petition that makes up over half of the total cert petitions that are sent to the Court. According to Tables 3.1, 3.2, and 3.3, in 1992 41% of the petitions in my sample were IFP petitions, compared to 29% in 1977 and 32% in 1960.

A petition's status as an IFP petition is a low-cost cue because, as Chapter 2 explains, IFP petitions are numbered differently than paid petitions and therefore a petition's docket number enables members of the Court to immediately recognize if a petition is an IFP petition.⁷⁷ IFP status is also considered a low-value cue, because aside from informing a justice that a petition is an IFP petition, this cue does not provide the justice with additional information about the petition.⁷⁸ "IFP status" is given a value of 1 if a petition is an IFP petition and 0 if a petition is a paid petition. Due to previous

⁷⁶ During the 1960 term, the Court received 1,037 paid petitions and 1,207 IFP petitions. In the 1977 term, the Court received 1,765 paid petitions and 1,974 IFP petitions. And in 1992, the Court received 2,061 paid petitions and 4,239 IFP petitions.

⁷⁷ An example of a law clerk cert memo on an IFP petition and an IFP docket sheet are in Appendix C.

⁷⁸ During the 1960 term of the Warren Court, justices did not yet participate in the cert pool. Each of the justices' law clerks drafted for their justice cert memoranda on every paid petition. However, Chief Justice Warren's clerks wrote memoranda on all of the IFP petitions for each term. During the Warren Court, IFP status would also inform justices that cert memoranda were written by a clerk other than their own. This cue is still considered low value during the 1960 term, because even though a Warren Court justice gained slightly more information from this cue (that a memoranda was not drafted by one of his clerks), he still obtained relatively little information about the substance of a petition from this cue.

studies' findings that IFP petitions are less likely to be granted review than paid petitions, I expect IFP status to have a negative effect on the selection of petitions for the discuss list and for review for all terms. Additionally, because IFP status is a low-cost, low-value cue, I expect this cue to have an even stronger negative effect on the selection of petitions for the discuss list than on the selection of petitions for review.

5. Ninth Circuit.

The fifth and final low-cost, low-value cue considered in my analysis is “Ninth Circuit.” “Ninth Circuit” refers to the United States Court of Appeals for the Ninth Circuit, and this variable measures whether the Ninth Circuit was the appeals court to review a case before it came before the Supreme Court by writ of certiorari. There is some evidence that the ideology of the court immediately below the Supreme Court can act as a signal to the justices during case selection, suggesting the justices are more interested in reviewing petitions from courts with judges whose ideologies differ from their own (Lane and Black 2017; Black and Owens 2012; Scott 2006a; Segal, Spaeth, and Benesh 2005).⁷⁹

Moreover, in the second half of the twentieth century, the Supreme Court reversed Ninth Circuit decisions more often than it reversed decisions of other courts of appeals (Scott 2006a; Scott 2006b).⁸⁰ In a study focused on determining the reasons the Supreme Court reverses a high rate of Ninth Circuit decisions, Scott (2006a) analyzes courts of appeals cases from 1980-2002 and finds that there is a positive, significant relationship

⁷⁹Because I study the collective voting behavior of the Court, and not individual justice voting behavior, it is impossible for me to consider the ideology of the individual justices voting to grant or deny cert compared to the ideology of lower court judges. Moreover, including a measure for lower court ideology is further complicated in my study because I include state petitions, and there is not a comparable measure for state supreme court ideology I could use.

⁸⁰ Scott (2006a) finds that the Ninth Circuit from 1953-2002 was reversed on an average of 10.78 times per term, a rate greater than any other appeals court (p. 341).

between a federal court of appeal's ideological distance from the Court and the Court's likelihood of reversing that court's decisions (p. 350). Therefore, Scott (2006a) concludes that ideological distance provides at least a partial explanation for the Court's high number of Ninth Circuit reversals, however, he suggests that there may be other factors that contribute to the reversals.⁸¹

Because of these findings, I expect "Ninth Circuit," which signals that a liberal appeals court rendered the last decision in a case,⁸² to have a significant, positive effect on the creation of the discuss list and on the selection of petitions for review during the 1992 Rehnquist Court and 1977 Burger Court terms, as these Courts are both considered ideologically conservative Courts.⁸³ Conversely, I expect "Ninth Circuit" to have no significant effect during the 1960 Warren Court term, because the Warren Court is considered a liberal Court.⁸⁴

Additionally, previous research also indicates that the Rehnquist Court in particular is more likely to accept cases from the Ninth Circuit Court of Appeals than from other appeals courts (Winston, Yan, and Karpilow 2016; Farris 1997). For example,

⁸¹ Scott (2006a) does not find a significant relationship between the large size of a federal court of appeals and its number of reversals, and therefore he concludes that the large size of the Ninth Circuit does not contribute to the high number of Court reversals of its decisions (p. 350). Scott (2006a) finds that the ideologically heterogeneity of an appeals court increases the likelihood the court is reversed, and concludes that the Ninth Circuit, which is not heterogeneous according to his categorization of courts of appeals, is less likely to be reversed based on this factor (p. 350). However, Scott (2006a) finds that the Ninth Circuit's procedural practice of utilizing a limited en banc review, or an en banc review in which only a subset of Ninth Circuit judges, and not the entire Circuit, participate, has a statistically significant relationship with the Ninth's Circuit's high number of reversals.

⁸² The Ninth Circuit has long been perceived as an ideologically liberal court by politicians, legal commentators, the media, and even federal judges (Wermiel 2006, p. 355; Calvert & Richards 2003, p. 291-292).

⁸³ The Burger and Rehnquist Courts have been considered by scholars as substantially more conservative than the Warren Court (Smith and Hensley 1993, p. 83).

⁸⁴ Walker and Epstein (1993) describe the Warren Court as causing "what can only be described as a constitutional revolution, generated by a group of justices who were perhaps the most liberal in American History" (p. 19).

Lindquist, Haire, and Songer (2007) include in their dataset federal courts of appeals cases from 1982-2001, the majority of which are years during the Rehnquist Court, and their findings suggest that even after controlling for the Ninth's Circuit's ideological composition and its history of Supreme Court reversals, during the time period studied the Ninth Circuit is reviewed at a higher rate than all other federal courts of appeals (p. 621).⁸⁵ Therefore, I expect "Ninth Circuit" to have an even greater impact on the creation of the discuss list and the selection of cases for review during the Rehnquist Court than the Burger Court.

"Ninth Circuit" is given a value of 1 if a petition originated in that circuit, and of 0 if it did not.⁸⁶ Tables 3.1, 3.2, and 3.3 contain the summary statistics for "Ninth Circuit" for each of the three terms included in this study. "Ninth Circuit" is a low-cost cue because law clerks write the name of the lower federal appeals or state court in which each cert petition originated at the top of each cert memoranda, and thus the justices can easily determine whether the Ninth Circuit rendered a decision in a particular case. The cue is low value because the only information the justices obtain from the petition is whether the Ninth Circuit was the appeals court involved in the case. Therefore, similar to other low-cost, low-value cues, I expect "Ninth Circuit" to have a greater influence on the creation of the discuss list than on the selection of petitions for review, at least with respect to the Burger and Rehnquist Courts.

⁸⁵ The Rehnquist Court spanned from 1986 to 2005. Lindquist, Haire, and Songer (2007) found that when they made comparisons across courts of appeals, the Ninth Circuit was a "clear outlier," because the number of cases from the Ninth Circuit heard by the Rehnquist Court was high throughout the years included in their study (p. 615).

⁸⁶ State petitions, even those from states within the Ninth Circuit, were also given a value of 0, because I expect the cue of a petition with "Ninth Circuit" written on it to act as a cue to the Court.

C. High-Cost, High-Value Informational Cues.

High-cost, high-value cues are different from low-cost, low-value cues in that they require the justices to invest more time in determining their presence but also enable the justices to gain a greater depth of knowledge about cert petitions. Similar to Black and Boyd (2013), I predict these cues will have a greater influence on the Court's selection of petitions for review than on the creation of the discuss list, because at the stage of selecting petitions for review, the pool of petitions to consider has been made smaller due to the creation of the discuss list and thus the justices are able to invest more time in identifying cues. I consider two high-cost, high-value cues in this dissertation: (1) civil liberties and (2) actual conflict.

1. Civil Liberties.

In the first Court agenda-setting study utilizing cue theory, Tanenhaus et al. (1963) find that justices look to the issue area presented in a petition for cues that a petition should be granted cert. Specifically, their findings suggest that the presence of civil liberties issues increases the likelihood that a petition is granted review (Tanenhaus et al. 1963). This finding may not have surprised Tanenhaus et al., because they analyze cases from the Court's 1947-1957 terms, a time when civil rights issues began to become more prevalent in the United States and the Court's agenda was shifting from economic issues to civil rights issues (Pacelle 1991).

Most of the later studies that focus on the Burger and Rehnquist Courts, however, indicate that civil liberties issues do not significantly influence a petition's chances of being granted cert (Black, Boyd, and Bryan 2014; Black and Boyd 2012a; Caldeira and Wright 1988). However, Black and Boyd (2013), unlike most other agenda-setting

studies of the Rehnquist Court, include in their data analysis petitions that were not placed on the Court's discuss list. Black and Boyd (2013) find that while the presence of a civil liberties issue in a petition does not significantly influence the likelihood the petition is placed on the discuss list, it has a positive, significant influence on the likelihood the petition is selected for review.⁸⁷

"Civil liberties" is considered a high-cost, high-value cue for several reasons. First, determining whether a petition involves a civil liberties issue requires a bigger time commitment than the time required to determine low-cost cues. For example, it is rare that a law clerk will begin a brief by writing, "The issue in this petition is civil liberties," or, "This petition addresses a federalism issue." Often a law clerk begins a cert memo with a small introduction of the petition, which might include a brief description of the issues addressed, but a more time-intensive reading of the facts and the petitioner's contentions is usually required to conclusively determine the main issue, or issues, being set forth in the petition.

"Civil liberties" is also a high-value cue because of the depth of information it can provide to the justices. For instance, the justices may gain information about whether any civil liberties sub-issues are involved, which include segregation, voting rights, and immigration rights. Also, because it is likely that the justices must thoroughly read through at least part of a law clerk's cert memo to gain a complete understanding of the issues involved in a petition, the justices will likely learn information in addition to whether the petition involves a civil liberties issue.

⁸⁷ Black and Boyd's (2013) inclusion in their analysis of petitions that did not make the discuss list reduces the risk of the selection bias experienced by other studies and may be the reason Black and Boyd's (2013) results regarding the influence of civil liberties issues on the case-selection process differs from the results of other studies.

Because this cue is high-cost and high-value, and because Black and Boyd (2013) find this cue to influence only the selection of petitions for review but not the discuss list, I expect “civil liberties” to positively influence the selection of petitions for review but have no significant effect on the creation of the discuss list for all terms included in my study. Also, because scholars find mixed results regarding the influence of civil liberties issues on the case-selection process during the Burger and Rehnquist Courts, and because it is well-known that the Warren Court was heavily involved in civil liberties issues, I also expect civil liberties to have a stronger influence on the selection of petitions for review during the 1960 Warren Court term than during the 1977 Burger Court and 1992 Rehnquist Court terms.⁸⁸

“Civil liberties” is given a value of 1 if a law clerk identifies in his brief a civil liberties issue as the main issue in a petition, and a value of 0 if a civil liberties issue is not identified as the main issue in a petition. The Supreme Court Database (2021) codes all cases in the Database (which includes the cases that have been reviewed by the Court) according to the main issue presented in the case. I used the Database’s coding guidelines and coded each petition according to the fourteen issue areas used in the Supreme Court Database (2021).

The Database suggests that the fourteen issue areas it identifies can be consolidated into a smaller number of issue areas. Therefore, after coding each petition in my dataset according to the fourteen issue areas used by the Database, I collapsed issue

⁸⁸ Caldeira and Lempert (2020) also provide some support for this prediction because they find that civil liberties issues have a greater effect on the creation of the discuss list by Chief Justice Warren compared to Chief Justice Burger. However, they do not indicate whether the influence of civil liberties on the creation of the discuss list is statistically significant for the Warren and Burger Court terms in their model. Also, unlike Caldeira and Lempert (2020), Black and Boyd (2013) consider both stages of the Court’s case-selection process and find that civil liberties does not significantly influence the creation of the discuss list.

areas into five categories.⁸⁹ I collapsed the issues to make my analyses more manageable because some issue areas in the terms included in my study had less than five observations. I then created a dummy variable for civil liberties. “Civil liberties” includes the subcategories of First Amendment, due process, and privacy issues. According to Tables 3.1, 3.2, and 3.3, 15% of the petitions in the 1960 sample feature civil liberties issues, 23% of the petitions in the 1977 sample contain civil liberties issues, and 20% of the petitions from my 1992 sample contain civil liberties issues.

2. Actual Conflict.

The second high-cost, high-value cue included in this study is “actual conflict.” As stated above, petitioners’ attorneys might allege conflict between opinions issued by lower courts, even if actual conflicting opinions do not exist, because there is some indication that attorneys believe that the Court is more likely to grant cert to petitions featuring conflict (Caldeira and Wright 1988, p. 1120).

Stern et al. (2002) find that actual conflict is present when an issue has been decided by lower courts, at least some of these courts have decided the issue differently, and disagreement on the issue is not acceptable to the Supreme Court (p. 434). Additionally, scholars find that actual conflict between federal courts of appeals or state supreme court decisions positively influences the Court’s decision to grant cert (Black and Boyd 2012b; Caldeira and Wright 1988; Ulmer 1983), and there is also evidence that actual conflict positively influences the Court to place a petition on the discuss list (Caldeira and Lempert 2020; Black and Boyd 2013). This cue likely impacts the case-

⁸⁹ The five issue area categories are criminal procedure, civil liberties (which includes First Amendment, due process, and privacy issues), economic activity (which includes unions and private action), federal government (which includes federalism, interstate relations, and federal taxation), and judicial power.

selection process because, as the ultimate court of last resort, the members of the Court believe it is the Court's duty to resolve disagreements and correct misapplications of the law.

Like Black and Owens (2009a) and Estreicher and Sexton (1986), I define actual conflict as a disagreement between two or more federal appeals or state courts of last resort over the interpretation or application of law. I also use information from law clerks' cert memoranda to determine whether an actual conflict exists with respect to a cert petition.⁹⁰ Petitions that exhibit actual conflict are coded as "1," while petitions without actual conflict are coded as "0." It is interesting to note that, according to Tables 3.1, 3.2, and 3.3, the percentage of the petitions in my samples that exhibit actual conflict increases from 1960 to 1992.

Based on the research discussed above, I expect the presence of actual conflict to positively influence both the creation of the discuss list and the selection of petitions for review in all three terms studied. However, for all terms studied here I expect the presence of "actual conflict" to have a greater influence on the selection of petitions for review than on the selection of petitions for the discuss list, because actual conflict is a factor that acts as a high-cost, high-value cue. Nothing in the research indicates that the

⁹⁰ Black and Owens (2009a) create two categories for actual conflict: "weak conflict" and "strong conflict." Black and Owens (2009a) consider a petition to feature "weak conflict" if the law clerk authoring the cert petition thinks the cases in conflict are distinguishable from each other or finds the conflict minor and tolerable (p. 1069). Black and Owens (2009a) consider a petition to exhibit "strong conflict" if the authoring law clerk finds the interpretations or applications of a law that are alleged to be in conflict in lower court cases are not distinguishable from each other, or that the conflict is not minor and tolerable (p. 1069). In a more recent study, Black and Boyd (2012b) apply cue theory and measure whether actual conflict exists with respect to cert petitions without differentiating between weak and strong conflict. Like Black and Boyd (2012b), in this study I also chose to measure whether a petition exhibited actual conflict, without differentiating between weak and strong conflict. During the process of collecting data, I found that law clerks did not always indicate whether a conflict was minor or tolerable, which made it difficult to accurately and consistently code conflict as "weak" or "strong." Thus, a petition was coded as featuring actual conflict if the law clerk authoring the cert memo on the petition confirmed the existence of actual conflict, regardless of the strength of the conflict.

degree of impact of actual conflict on the case-selection process varies across Courts over time, so I do not expect to see differences across Courts with respect to actual conflict.⁹¹

Actual conflict is a high-cost, high-value cue because similar to determining whether civil liberties are implicated in a petition, the justices must invest a considerable amount time in determining whether a petition exhibits an actual conflict between lower courts, as the justices must, at the very least, read the authoring law clerk's analysis and determine if the law clerk found that conflict exists. In other words, like "civil liberties," actual conflict is a high-cost, high-value cue, because the justices must allocate time to reading through materials to determine the presence of this cue in a petition, and they are therefore likely to acquire more substantive information about the petition than they would while determining the presence of factors that act as low-cost, low-value cues.

D. Factors that Operate as Both Low-Cost, Low-Value and High-Cost, High-Value Cues.

Some variables included in this study function as both low-cost, low-value and high-cost, high-value cues. Because these cues operate as both types of cues, I expect these cues to have a similar effect on the creation of the discuss list and the selection of petitions for review. The following cues fit into this category: (1) law clerk recommendation, (2) the United States government's support of or opposition to a grant, and (3) amicus curiae briefs.

1. Law Clerk Recommendation.

The first cue that fits into both categories is "law clerk recommendation." After analyzing a cert petition in a cert memo, a law clerk summarizes her findings and

⁹¹ Caldeira and Lempert (2020) find a decreasing effect over time of the impact of actual conflict on Chief Justices Hughes, Warren, and Burger's formations of the discuss list, but the differences across terms is not statistically significant.

recommends to the justices the next step she believes is the most appropriate for the Court to take in the case-selection process. A law clerk might suggest that the Court “grant” or “deny” certiorari to a petition, but there are several other recommendations a clerk may make to the Court. For example, a law clerk might recommend “hold,” “call for response,” “call for the views of the solicitor general,” or “relist.”⁹² In order to measure the impact of a law clerk’s suggestion to grant cert, in this study “law clerk recommendation” is given the value of 1 if the authoring law clerk in her cert memo suggests a grant of certiorari, and 0 if the law clerk makes a suggestion other than “grant,” such as denial, hold, relist, call for response, or call for the views of the solicitor general.⁹³

Studies find that the law clerks’ recommendations significantly influence the Court’s decisions during case selection. For example, Stras (2007) finds in his study of the Court’s 1991 and 1992 terms that when voting to grant or deny cert, the Court acted in a way contrary to the recommendations given by clerks in law clerk cert pool only 0.86% of the time (p. 981).⁹⁴ On the other hand, Black, Boyd, and Bryan (2014) find that

⁹² “Hold” typically means the law clerk making the recommendation thinks the Court should hold off on making a decision regarding cert until a similar case that is on the Court’s docket has been resolved. “Call for response” or “CFR” suggests to the justices that they should call for a response from the respondent party for clarification on an issue before making a decision to grant or deny cert. “Call for the Views of the Solicitor General” is self-explanatory; the law clerk making the recommendation believes the Solicitor General’s views on a matter will be important in determining whether the petition should be reviewed by the court and/or possibly shed light on an issue. “Relist” recommends the Court relist the petition for reconsideration at a further date.

⁹³ Black and Boyd (2013) excluded all petitions that did not recommend either “grant” or “deny” from their study, because they felt these petitions did not “fit within [their] framework treating discuss list formation and final review outcomes as dichotomous events” (p. 1130). This study, unlike Black and Boyd’s (2013) and most other agenda-setting studies, seeks to avoid the selection bias that occurs when categories of cert petitions are excluded from a study’s data because their inclusion makes the successful performance of data analyses more difficult. By coding petitions based on whether they give a recommendation of grant or a recommendation other than grant, the law clerk recommendation variable remains dichotomous and will reveal the impact of law clerks’ suggestions to grant cert on the Court’s case-selection decisions.

⁹⁴ Each cert petition is assigned to only one law clerk who completes a memorandum on the cert petition. Each justice participating in the cert pool receives the same memo from the law clerk who reviewed the cert petition. It may also be worth mentioning that Blake, Hacker, and Hopwood (2015) find that law clerks

the Court follows the law clerks' recommendations only about 75% of the time when choosing whether to grant cert. However, they include data from more terms in their dataset than Stras (2007), and they also find there are circumstances under which the justices' willingness to accept a law clerk's recommendation to grant or deny cert varies.⁹⁵ For example, Black, Boyd, and Bryan (2014) find that justices will consider the ideology of a clerk's supervising justice and will also compare a clerk's recommendation against their own views.⁹⁶

According to Tables 3.2 and 3.3, law clerks suggested a grant in only 19% and 21% of the petitions in my samples from the 1977 and 1992 terms, respectively, while Table 3.1 shows law clerks suggested a grant in about 44% of petitions in my sample from the 1960 term. The higher number of petitions in which a law clerk recommended a grant of cert in 1960 is likely the result of two factors. First, the proportion of cases granted cert from the 1960 sample is higher than the other samples, and since studies have shown a suggestion of grant is likely to lead to a grant, it makes sense that the proportion of grant suggestions is also higher in 1960. Moreover, in 1960, law clerks

are less likely to recommend grant to cert petitions that arrive in the summer months. Blake, Hacker, and Hopwood (2015) conclude that this is because law clerks begin their terms in the summer, and they are more cautious about granting cert when they are new to the Court.

⁹⁵ Black, Boyd, and Bryan (2014) consider individual justice voting behavior in their study and find that when a law clerk from the cert pool makes a recommendation such as a grant, justices whose ideology is similar to the ideology of the justice for whom the clerks works are more likely to follow that recommendation than justices whose ideologies contrast with the clerk's justice. This dissertation, unlike Black, Boyd, and Bryan (2014), considers the discuss list as a stage of decision-making and therefore cannot similarly measure the impact of law clerks' recommendations on individual justices.

⁹⁶ Black, Boyd, and Bryan (2014) use a dataset of petitions from 1986-1993, which are all Rehnquist Court terms. During the Rehnquist and Burger Courts, justices participated in the cert pool and all justices in the pool received the same cert memos, which could be assigned to a law clerk that they were not supervising. However, during the Warren Court, each of the justices' clerks drafted cert memoranda for each petition. Because justices were reviewing memoranda written by only their own clerks, they likely received different recommendations. This may have some impact on the results from my 1960 data, but due to the limited availability of data, using cert memos from Warren Court justices is consistent with the practices of other scholars, such as Owens (2010), and is the best source of data available.

wrote cert memoranda for only the justices for whom they worked, and the clerks did not participate in a cert pool. It is possible that the 1960 law clerks were more likely to suggest a petition be granted because their memoranda were viewed by only their supervising justice.

“Law clerk recommendation” is both a low-cost, low-value cue and a high-cost, high-value cue for several reasons. First, “law clerk recommendation” can be considered a low-cost cue because law clerks generally type a simple phrase stating their recommendation, such as “grant,” on a line by itself below the conclusion of their memoranda.⁹⁷ Justices who quickly skim or review a memo may glance at the end of the memo and learn the authoring clerk’s recommendation. Viewed this way, however, “law clerk recommendation” also functions as a low-value cue. If a justice observes only a law clerk’s recommendation, and he does not read and synthesize the law clerk’s reasoning for her recommendation, the justice gains only a minimal amount of information about a petition. Because “law clerk recommendation” can operate as a low-cost, low-value cue, I predict the presence of this cue will positively affect the Court’s decision to place a petition on the discuss list during all three Court terms.

“Law clerk recommendation” can also operate as a high-cost, high-value cue. Similar to actual conflict, a justice likely needs additional time, and possibly supplemental materials, to read a cert memorandum, understand the reasoning behind a law clerk’s recommendation, and compare her own reasoning with that of the authoring law clerk. Based on previous findings that law clerks’ recommendations influence the

⁹⁷ Examples of law clerk certiorari memoranda are in Appendix C. Appendix C includes a law clerk cert memo for a paid petition from my dataset that was discussed and granted certiorari by the court and a cert memo for a capital IFP petition from my dataset that was discussed but denied certiorari.

selection of petitions for review, and Black and Boyd's (2013) findings that high-cost, high-value cues are more influential during the final stage of the case-selection process because they provide the justices with substantial information, I expect a law clerk's recommendation to grant cert to also have a significant, positive influence on the selection of petitions for review during all three terms included in this study.

Additionally, as explained above, during the Burger and Rehnquist Courts most law clerks drafted cert memos that were read by all justices participating in the law clerk cert pool. Conversely, during the Warren Court, law clerks drafted memoranda on cert petitions for only the justices for whom they worked. Due to these differences, I also predict that the impact of a law clerk's recommendation to grant cert is stronger during both stages of the case-selection process during the Warren Court than the Burger or Rehnquist Courts because law clerks wrote cert memos for only the justices who employed them and with whom they had a close working relationship.

2. United States Supports Grant and United States Opposes Grant.

A second cue that operates as both low-cost, low-value and high-cost, high-value is broken into two variables: "U.S. supports grant" and "U.S. opposes grant." These variables measure whether the United States government supports or opposes granting cert to a petition. Studies have shown that the Court is more likely to grant review to petitions that are brought by the United States government (Provine 1980; Tanenhaus et. al 1963). Additionally, Provine (1980) finds some evidence that petitions in which the United States is a respondent, and therefore is not the moving party, are also granted at a slightly higher rate than petitions in which the United States is not a party.

Additionally, the solicitor general (or “SG”) plays an important role with respect to Supreme Court proceedings because she represents the interests of the United States government in the Supreme Court, decides whether the United States will appeal a case, and determines whether the United States will file an amicus curiae brief in a case in which it is not a party (Perry 1991a). Moreover, with respect to the case-selection process, the SG can provide to the Court the opinion of the United States government regarding whether a petition in which the United States is not a party should be granted or denied cert in two ways: (1) the SG may submit a third-party amicus brief or (2) the SG may respond to the Court if it requests the SG’s recommendation.⁹⁸ Black and Owens (2011) show that when the SG uses either of these methods to recommend that the Court grant or deny cert to a petition, the justices’ decision-making process is significantly influenced by the SG’s recommendation.

Moreover, Black and Boyd (2013) find that the Court is significantly more likely to place a petition on the discuss list when the United States, acting through the SG, either supports or opposes review. Black and Boyd (2013) conclude that these findings demonstrate “the utter lack of probability” that a petition that is either supported or opposed by the United States is denied certiorari without being placed on the discuss list (p. 1136). Similarly, Caldeira and Lempert (2020) find that the United States government as a petitioner has a great effect on the likelihood a petition is added to the discuss list.

⁹⁸ Additionally, the SG has a high success rate when representing the United States in cases orally argued before the Court (Epstein et al. 2007; Segal 1990). The SG’s success rate and the willingness of the Court to grant cert to petitions in which the United States government is a party suggests the SG, as the representative of the United States government, has a special relationship with the Court compared to other litigants (Provine 1980).

However, Black and Boyd's (2013) results show that while the Court is also more likely to grant cert when the United States government supports review, the Court is not significantly more likely to grant or deny cert when the United States opposes review.

"U.S. supports grant" and "U.S. opposes grant" both function as low-cost cues because the Court can easily determine whether the United States is a party to a case, as the petitioner or respondent, by quickly looking at a case caption, or the names of the parties listed at the top of a cert petition. However, when both variables operate as low-cost cues they also operate as low-value cues, because simply observing that the United States is a party in a petition does not provide the Court with information other than a suggestion that the federal government is either in favor of or opposed to the Court granting review of the petition, depending on whether the government is the petitioner or respondent.

Overall, while this cue can be low-cost and low-value, the SG has a special relationship with the Court (Provine 1980), and there is evidence both the SG's support of and opposition to the review of a petitions signals to the Court that a petition is worth being placed on the discuss list for an additional look (Black and Boyd 2013). Given these factors, for all terms included in this study I expect both "U.S. supports grant" and "U.S. opposes grant" to have a positive, significant impact on the Court's decisions to select petitions for the discuss list.

"U.S. supports grant" and "U.S. opposes grant" can also operate as high-cost, high-value cues. For example, if a justice first determines that the United States is not a party in a particular petition, he must invest additional time in learning whether the SG has participated as amici or if the SG has responded to a request for her views. Moreover,

if the SG has participated as amici or sent her views to the Court, the justice must spend even more time reading the SG's amici brief or summary of her views in order to uncover the SG's analysis and reasoning behind her views on an issue. By taking these steps, however, the justice will likely uncover valuable information about the SG's views and the overall issues present in the petition.

Black and Boyd (2013) and Schoenherr and Black (2019) find that the United States government's opposition to a petition does not significantly impact the selection of petitions for review, but also find that the United States government's support of a petition does have a strong, significant impact on whether a petition is granted of review. Taking their findings into consideration, I expect "U.S. supports grant," but not "U.S. opposes grant," to have a positive and significant impact the selection of petitions for review. In other words, I do not expect "U.S. opposes grant" to have an impact on the selection of petitions for review.

I also expect "U.S. supports grant" to more strongly impact the selection of petitions for review during the 1977 Burger and 1992 Rehnquist Court terms than the 1960 Warren Court term, because in the 1960s the SG did not yet submit amicus curiae briefs (Provine 1980) and therefore during this term both "U.S. supports grant" and "U.S. opposes grant" would likely not have operated as high-cost, high-value cues as frequently.

I coded "U.S. supports grant" and "U.S. opposes grant" according to the guidelines used by Black and Owens (2009a) and Schoenherr and Black (2019). "U.S. supports grant" is coded as 1 if the United States government is a petitioner or if the SG recommends cert be granted in either an amicus curiae brief or in a response to a request

for her views from the Court.⁹⁹ “U.S. supports grant” is coded 0 if the United States is not a petitioner or the SG has not recommended a grant of cert. Similarly, “U.S. opposes grant” is coded 1 if the U.S. is a respondent (unless the SG recommends cert be granted) or if the SG opposes grant as amicus or in response to a request from the Court for her views.¹⁰⁰ “U.S. opposes grant” is given a value of 0 if the U.S. is not a respondent or does not oppose granting cert.

3. Amicus Curiae Briefs.

The third cue that functions as both a low-cost, low-value and high-cost, high-value cue is the number of amicus curiae briefs filed in support of or opposition to a petition prior to the creation of the discuss list and the Court’s decision to grant or deny certiorari to the petition. Amicus curiae, or “friend of the court,” briefs are briefs that third parties, mostly interest groups, submit to the Court. The briefs are usually in the form of written briefs, and they explain a third party’s views regarding how a case should be decided (Carp, Stidham, and Manning 2011, p. 411).

Amicus briefs can support the petitioner or the respondent, but sometimes amicus briefs support neither party and instead explain to the Court the third party’s own opinion on how a case should be decided (Carp, Stidham, and Manning 2011, p. 200). Filing an amicus brief is costly, and most groups pay thousands of dollars to complete and submit

⁹⁹ Black and Boyd (2013) used the SG’s amicus briefs to determine whether the SG granted or opposed cert. However, Provine (1980) finds that it was not until the early 1960s that the SG would submit briefs as an amicus. This finding corresponds with my own findings. In my sample of petitions from the 1960 term, the SG did not participate as amicus with respect to any petition.

¹⁰⁰ In some rare instances, the SG supports granting cert in cases where the United States is a respondent and has therefore won its case in the lower appeals court. The SG might do this if there is a conflict between two lower courts on particular issue, and the SG believes the Court should address and resolve this conflict.

an amicus brief (Caldeira and Wright 1988).¹⁰¹ Due to the expenses associated with amicus briefs, groups are likely to put serious effort into the formulation and completion of amicus briefs, and therefore the briefs act as a reliable cue to the Court about the importance of a particular case (Caldeira and Wright 1988, p. 1112).

Caldeira and Wright (1988) find that the presence of amicus curiae briefs both in support of and opposition to a petition significantly increases the likelihood a petition is reviewed (p. 1119). Because of these findings, I measure my “amicus curiae” variable similarly to Black and Owens (2009a) and Black and Boyd (2012a), and code the variable according to the total number of amici that filed a brief in support of or opposition to a petition.¹⁰² For example, in my study the amicus curiae variable is given a value of “5” for a particular petition if there are a total number of five amicus briefs associated with that petition, even if some briefs are in support of the petitioner and some are in opposition to the petitioner. Amicus briefs are mentioned and usually summarized in the law clerks’ cert memos (Black and Boyd 2012a), and therefore I used the cert memos to determine the number of amicus briefs that were filed in support of or

¹⁰¹ Caldeira and Wright (1988) determine that amicus briefs are expensive and taken seriously by the groups that submit them by consulting several large law firms and interest groups that often participated as amicus curiae. The briefs are expensive to complete because involve considerable resources and research. (Songer and Sheehan 1993; Box-Steffensmeier, Christenson, and Hitt 2013).

¹⁰² Caldeira and Wright (1988) use separate variables to measure the effects of amicus briefs in support of a petition and amicus briefs in opposition to a petition, but they do find that amicus briefs in opposition to a petition actually increases the likelihood the petition is reviewed. It should be noted, however, that Caldeira and Wright (1998) did not find a significant relationship between amicus briefs in opposition to a petition and the likelihood the petition is reviewed. Nevertheless, considering Caldeira and Wright’s (1988) earlier findings and subsequent scholars’ practices of including a variable that measures the number of amicus briefs both in opposition to and in support of a petition, the amicus curiae briefs variable is measured similarly here. In addition to Caldeira and Wright’s (1988) findings, scholars have also considered the total number of amicus briefs due to data availability. For example, Black and Boyd (2012b) find that the low number of amicus briefs filed in opposition of review can cause issues with statistical analyses, and therefore found that creating a separate variable to measure briefs in opposition was not practical for their study (p. 295). Similarly, the number of amicus briefs opposing petitions is low in my study. For example, only two petitions in my 1992 sample feature opposing amicus briefs. The low number of opposing amicus briefs is an additional reason that I did not create a separate variable measuring the number of amicus briefs opposing petitions.

opposition to each petition in my sample before the creation of the discuss list and the Court's decision to grant or deny cert.

Amicus curiae briefs function as low-cost cues when the justices simply glance at a law clerk's cert memo to obtain information regarding the number of amicus briefs involved in a petition. Because briefs are expensive, amicus briefs are relatively uncommon and therefore the mere presence of an amicus brief acts as a positive cue to the Court during the case-selection process (Black and Boyd 2012b, p. 290). When used in this manner by the Court, this cue also functions as a low-value cue, because the justices can determine only whether amicus briefs are present and they do not learn additional information that could be obtained by reviewing the content or analyses in the briefs (Black and Boyd 2012b). Studies like Caldeira and Wright's (1990) indicate, however, that the presence of an amicus brief increases the probability of a petition being placed on the Court's discuss list.¹⁰³

Given these findings, and taking into consideration the fact that amicus briefs were used during all terms included in my study, I expect amicus briefs to act a positive cue to the Court during the creation of the discuss list during all three terms, with no variation across terms.¹⁰⁴ Additionally, given the ability of an amicus brief to act as a positive cue to the Court during the creation of the discuss list, I also predict that the as

¹⁰³ Caldeira and Wright (1990) find that, in a petition in which the United States is not the petitioner and actual conflict does not exist, the presence of an amicus curiae brief increases the probability of the petition being placed on the discuss list from .39 to .74 (p. 831).

¹⁰⁴ Calderia and Lempert (2020) conclude that amicus curiae briefs have a greater influence on the creation of the discuss list by Chief Justice Hughes compared to Chief Justice Burger. However, I do not expect to see variation with respect to the impact of amicus briefs on the creation of the discuss list over time based on Calderia and Lempert's (2020) findings as my analyses differs from theirs. First, my study does not include data from Chief Justice Hughes's tenure. Second, Caldeira and Lempert (2020) code their amicus brief variable differently, by creating a dummy variable where "0" is no amicus briefs and "1" is one or more amicus briefs.

the number of amicus briefs associated with a petition increases, the amicus briefs will have an even greater, positive impact on a petition's probability of being placed on the discuss list.

Amicus curiae briefs also act as high-cost, high-value cues. Amicus briefs may provide information to the Court about the issues present in a petition that is in addition to the information provided in the petitioner's or respondent's briefs (Collins 2004). For example, an amicus brief can present legal arguments that the petitioner or respondent have not set forth in their briefs (Black and Boyd 2012b). However, to gather the information in amicus briefs, the justices must devote a considerable amount of time to reading and synthesizing the briefs. Caldeira and Wright (1990) find that the presence of an amicus brief also greatly increases the probability that a petition will be granted certiorari by the Court.¹⁰⁵

Because of these findings, and due to the operation of amicus curiae briefs as high-cost, high-value cues, for all terms in my study I expect the presence of amicus briefs to operate as a positive cue to the Court when it is selecting petitions for review. Specifically, because of the ability of an amicus brief to act as a positive cue to the Court during the process of selecting petitions for review, I expect that as the number of amicus briefs associated with a petition increases, the probability the petition is selected for review also increases.

Amicus curiae briefs were submitted to the Court during all of the terms analyzed in this study, and nothing in the research suggests that I should expect any differences

¹⁰⁵ Caldeira and Wright (1990) find that, in a petition in which the United States is not the petitioner and actual conflict does not exist, the presence of an amicus curiae brief "more than doubles" the petition's likelihood of being granted certiorari (p. 831).

with respect to the effect of amicus briefs on the case-selection process over time.

Therefore, I do not predict any variation in the degree of impact of amicus briefs on the case-selection process over Court terms.

VI. Other Independent Variables.

I consider in my analyses additional independent variables in order to control for potential influential factors. Based on previous studies, I do not expect these variables to act as cues that significantly influence the Court's creation of the discuss list or its selection of petitions for review.

A. Petitions from State Supreme Courts.

First, I include a measure for whether a petition originated in a state's supreme court, or a state court of last resort,¹⁰⁶ and not in a federal appeals court. As stated in Section V(A)(2) in Chapter 2, many studies remove petitions originating in state supreme courts from their analyses because of the difficulties these petitions pose for scholars who wish to include measures for court ideology at all levels. (Black and Owens 2011; Owens 2010; Black and Owens 2009a). However, removing state petitions from analyses creates selection bias and makes it difficult to conclusively determine whether the Court's treatment of state petitions differs from its treatment of federal petitions. In order to avoid the selection bias of past studies, state petitions are included in my data. The variable "state petition" is given a value of 1 if a petition originated in a state supreme court, and 0 if it originated in federal court.

¹⁰⁶ Some states, such as New York, Maryland, and the District of Columbia, do not refer to their court of last resort as the "supreme court." Petitions from the District of Columbia and from United States territories, such as Puerto Rico, were included in my data. Here, these petitions are considered petitions from state supreme courts. Litigants who lose in state supreme courts may petition the Supreme Court of the United States for writ of certiorari if their cases involve a question that falls within the Court's jurisdiction.

The justices can easily determine whether a petition is from a state supreme court because law clerks write the name of the court in which a petition originated at the top of each cert memo. There is nothing in the agenda-setting literature that suggests that the Court treats petitions from state supreme courts differently than petitions from federal courts during either the creation of the discuss list or the selection of petitions for review. However, this may be because state petitions have often been excluded from agenda-setting studies and therefore the impact of a petition's origination in state court on the agenda-setting process has not yet been studied. Because there are no findings to indicate that a petition's origination in a state supreme court acts a cue to the Court, I do not expect state petitions to have a significant positive or negative effect on either stage of the case-selection process. However, I included a state petition variable because there have been few studies that consider the impact of these petitions on the case-selection process.

B. Capital Petitions.

An additional factor considered in my study is whether a petition is a capital petition, or a petition that requests that the Court review an individual's criminal conviction that resulted in a death penalty sentence. Law clerks note at the top of their memoranda "Capital Case" if a petition is a capital petition, which immediately signals to the members of the Court that a petition falls within this category.

Previous studies have removed capital petitions from their data because during the Warren, Burger, and Rehnquist Courts capital petitions were automatically added to the discuss list as a matter of Court policy (Black and Boyd 2013; Black and Boyd 2012a; Black and Boyd 2012b; Black and Owens 2009a). Because all capital petitions were

automatically added to the discuss list, the inclusion of these petitions in my study may skew my results, as there is no variation with respect to the Court's treatment of capital petitions during the discuss list stage. In addition to data issues, the inclusion of these petitions would not reveal much about the factors that influence the Court during its selection of petitions to the discuss list and for review, because it was the Court's policy to select all capital petitions for the discuss list and it was the policy of at least some of the justices to also select all capital petitions for review (Black and Boyd 2012a; Black and Boyd 2012b; Black and Owens 2009a; Lazarus 2005; Woodward and Armstrong 1979).¹⁰⁷

To avoid these potential data issues, I coded capital petitions in my dataset as 1 and all other petitions as 0. Coding the petitions in this manner enabled me to identify the capital petitions and remove them from my dataset in order to avoid the issues discussed above, which would result from the inclusion of these petitions in my study as capital petition status perfectly predicts a petition's selection for the discuss list.¹⁰⁸

VII. Conclusion.

This Chapter 3 sets forth research questions and hypotheses to address my overarching research question and the three gaps in the Supreme Court agenda-setting research that are identified and discussed in Chapter 2. This chapter also describes the data sources and collection methods utilized in this dissertation, as well as the dependent

¹⁰⁷ During the Warren, Burger, and Rehnquist Courts, capital petitions were automatically added to the discuss list, and during the tenures of Justice Brennan and Justice Marshall, both Brennan and Marshall would vote to grant certiorari to all capital petitions, vacate the death penalty, and remand (Black and Owens 2009a; Woodward and Armstrong 1979).

¹⁰⁸ It is interesting to observe, however, that only 5% of petitions in my 1960 sample and 3% of petitions in my 1977 sample were capital petitions, while 21% of petitions in my 1992 sample were capital petitions. One possible reason for this disparity is that Supreme Court essentially held the death penalty to be unconstitutional in 1972 in *Furman v. Georgia*, and then later decided that the death penalty was constitutional under certain circumstances in 1976 in *Gregg v. Georgia*.

and independent variables considered, in order to complete the analyses needed to address the research questions and hypotheses.

In particular, Chapter 3 explains the manner in which the low-cost, low-value and high-cost, high-value cue theory framework is applied in this dissertation, including how the independent variables are categorized according to this framework and the predictions made regarding each variable. Specifically, independent variables are categorized as low-cost and low-value, high-cost and high-value, or both low-cost, low-value and high-cost, high-value cues. Predictions are made regarding the influence of these variables on the two stages of the Court's case-selection process due to the categories to which they belong and on findings in previous studies. Furthermore, based on studies that focus on changes to the Court's agenda-setting process over time, I also make predictions regarding the varying level of impact of the independent variables on the case-selection process during the different Court terms studied in this dissertation.

Chapter 4 describes the statistical models I utilize to test my predictions and explains the results of my statistical analyses.

Chapter 4: Models and Analysis

I. Introduction.

Chapter 3 details the manner in which I collected data and measured each of my dependent and independent variables. Chapter 3 also explains the application of the low-cost, low-value and high-cost, high-value cue theory framework in this dissertation and sets forth research questions, hypotheses, and predictions regarding each of the independent variables considered in this study.

In order to address my research questions and test my hypotheses and predictions, I completed statistical analyses on the original dataset created from data collected from each of the three Court terms studied in this dissertation. This Chapter 4 discusses these statistical analyses, specifically the manner in which I use three selection models to model the data from each Court term. In this chapter, I also discuss the results of my three selection models and whether my findings support my hypotheses and my predictions.

II. Heckman Selection Probit Models.

Three Heckman selection probit models were used in this dissertation. Each selection model examines data collected from one of the three Supreme Court terms included in this study, so that there is a separate model for the Court's 1960 term, 1977 term, and 1992 term. Each of the three selection models includes all of the dependent and independent variables that are discussed in Chapter 3. The model estimates are in Tables 4.1, 4.2, and 4.3 in Appendix A.

The Heckman selection probit model is an appropriate model to use to model the data in this study, because the Court's selection of petitions for the discuss list creates a

non-random sample of petitions from which the Court selects petitions for review. This creates sample selection bias, which results from using non-randomly selected samples to estimate behavioral relationships (Heckman 1979, p. 153). The Heckman selection probit model mitigates the methodological issues caused by sample selection bias by treating sample selection bias as a specified error and providing an estimation that eliminates the specified error for censored samples (Heckman 1979).

The Heckman probit selection model involves the estimation of two models, or equations, for each of the dependent variables used in this study. First, the “selection equation” is estimated on the entire dataset (Vance and Ritter 2014). In this study, the dependent variable in the selection equation is “discuss list,” or whether a petition is added to the discuss list by the Court. Second, the “outcome equation” is estimated on the non-censored observations in the data, or the petitions in the dataset that were added to the discuss list (Vance and Ritter 2014). The dependent variable in the outcome equation is “grant,” or whether a petition that was added to the discuss list is granted review by the Supreme Court.

Heckman selection models are subject to methodological and diagnostic issues if exclusionary restrictions are not estimated (Vance and Ritter 2014; Bushway, Johnson, and Slocum 2007; Stolzenberg and Relles 1990; Berk 1983). An exclusionary restriction is a variable that has an influence on the selection equation but that does not have a direct influence on the outcome equation (Garip 2012; Bushway, Johnson, and Slocum 2007). Empirical or theoretical justification should demonstrate that an exclusion restriction may be legitimately excluded from the outcome equation (Garip 2012; Bushway, Johnson, and Slocum 2007).

Here, there is empirical support for excluding the independent variable “U.S. opposes grant” from the outcome equation because this variable influences the selection equation but does not influence the outcome equation. While Black and Boyd (2013) find that while the United States government’s opposition to a petition positively and significantly impacts the likelihood that a petition is placed on the discuss list, Black and Boyd (2013) and Schoenherr and Black (2019) find that the United States government’s opposition has no significant positive or negative effect on whether the petition is ultimately granted review. Therefore, to avoid the methodological and diagnostic issues associated with the absence of an exclusionary restriction, “U.S. opposes grant” is excluded from the outcome equation in all three Heckman probit selection models in Tables 4.1, 4.2, and 4.3.

Appendix B provides a more detailed description of the Heckman selection probit model in general and also provides a further explanation as to the reasons Heckman selection probit models are used in this dissertation.

III. Analyses and Results.

As stated above, I use three Heckman selection probit models of the independent variables discussed in Chapter 3 on the Court’s creation of the discuss list and the Court’s selection of petitions for review. The tables that include the results of these models are in Appendix A. Table 4.1 is the model that includes data from the 1960 term of the Warren Court, Table 4.2 is the model that includes data from the 1977 term of the Burger Court, and Table 4.3 is the model that includes data from the 1992 term of the Rehnquist Court.¹⁰⁹ The results of each model and whether the results support my predictions

¹⁰⁹ A separate model was used for each Court term included in this study so that comparisons could be made between different Court terms.

regarding the independent variables' influence on the Court's case-selection process are discussed below.

A. Low-Cost, Low-Value Informational Cues.

Factors that act as low-cost, low-value informational cues provide the Court with information on cert petitions that requires relatively little time to gather, but these cues do not provide the Court with a great depth of knowledge about cert petitions. As explained in Chapter 3, I predict that in general, low-cost, low-value cues will have a greater impact on the Court's decisions to place petitions on the discuss list than on the Court's decisions to grant review. The results of my models and my predictions regarding the influence of the following five independent variables, which are low-cost, low-value cues, are discussed below: (1) lower dissenting opinion, (2) constitutional claim, (3) alleged conflict, (4) IFP status, and (5) Ninth Circuit.

1. Lower Dissenting Opinion.

I predict in Chapter 3 that with respect to all three Court terms studied the existence of a dissenting opinion filed in a lower federal or state court in the matter that is the subject of a petition acts as a cue that positively influences both the Court's decision to place a petition on the discuss list and its decision to grant review. As a low-cost, low-value cue, I also predict that this cue has a stronger effect on the creation of the discuss list than on the selection of petitions for review. Tables 4.1, 4.2, and 4.3 show the influence of "lower dissenting opinion" on the creation of the discuss list and on decisions to grant review during the Warren Court's 1960 term, the Burger Court's 1977 term, and the Rehnquist Court's 1992 term, respectively.

According to Tables 4.1, 4.2, and 4.3, my predictions regarding the lower dissenting opinion cue are only partially supported. For example, Table 4.1 illustrates that the lower dissenting opinion variable is not statistically significant in either the selection model, the model with the dependent variable “discuss list,” or the outcome model, the model with the dependent variable “grant.” Therefore, during the 1960 Warren Court term, the existence of a dissenting opinion related to a petition filed in a lower federal or state court does not significantly increase or decrease the likelihood that the petition is added to the discuss list or granted review by the Court.

Table 4.2 demonstrates that in the selection model, the lower dissenting opinion variable is statistically significant at $p < .01$, which indicates that consistent with my prediction, during the 1977 term of the Burger Court there is a positive relationship between the existence of a lower dissenting opinion and the decision of the Court to place a petition on the discuss list. In other words, the existence of a lower dissenting opinion significantly increases the likelihood that a petition will be placed on the discuss list during this term. However, contrary to my prediction, in Table 4.2 lower dissenting opinion is not statistically significant in the outcome model, which indicates that the presence of a lower dissenting opinion does not significantly increase the likelihood that the 1977 Burger Court grants certiorari to a petition.

Similar to Table 4.2 and consistent with my predictions, Table 4.3 shows that in the selection model, the lower dissenting opinion variable is positive and statistically significant at $p < .01$. This indicates that during the 1992 term of the Rehnquist Court, the presence of a lower dissenting opinion significantly increases the likelihood that a petition is placed on the discuss list. Also similar to Table 4.2, the lower dissenting

opinion variable in the outcome model in Table 4.3 is positive but not statistically significant. This means that contrary to my prediction, during the 1992 term of the Rehnquist Court the presence of a lower dissenting opinion does not increase the likelihood that a petition is granted review.

Overall, my prediction that the existence of a lower dissenting opinion positively influences both the Court's decision to place a petition on the discuss list and its decision grant review during the 1960, 1977, and 1992 terms is not entirely met, although the findings suggest that a lower dissenting opinion increases the likelihood a petition is discussed by the Court at least during some terms. The variable lower dissenting opinion was not significant in the outcome models in Tables 4.1, 4.2, and 4.3, suggesting that a lower dissenting opinion does not significantly influence the Court's decisions to grant review. However, while Table 4.1 shows that the Warren Court during the 1960 term is also not more likely to place a petition with a lower dissenting opinion on the discuss list, Tables 4.2 and 4.3 indicate that during the 1977 Burger Court and the 1992 Rehnquist Court a lower dissenting opinion significantly increases the likelihood that a petition is placed on the discuss list, which suggests that it acts as a cue to the Court that a petition is worthy of a discussion by the Court.¹¹⁰

Additionally, my models provide some support for my prediction that a lower dissenting opinion has a stronger effect on the creation of the discuss list than the selection of petitions for review. As stated above, Tables 4.2 and 4.3 suggest that the existence of a lower dissenting opinion is a cue to the Court that increases the likelihood

¹¹⁰ This finding with respect to the 1992 term differs from that of Black and Owens (2013), who use data from four years of the Rehnquist Court and find that a lower dissenting opinion is significant during both stages of the case-selection process and increases the likelihood a petition is both discussed and granted review.

that the Burger and Rehnquist Courts place a petition on the discuss list, but a lower dissenting opinion has no significant effect on the likelihood that the Burger or Rehnquist Courts select a petition for review.

2. Constitutional Claim.

In Chapter 3, I predict that an allegation by a petitioner that her constitutional rights were violated positively influences both the Court's decision to place a petition on the discuss list and its decision to grant review. However, as explained in Chapter 3, this cue provides low informational value to the Court, and previous studies find mixed results regarding its impact on the Court's selection of petitions for review. Therefore, I also predict this cue to have a greater effect on the Court's creation of the discuss list than on the selection of petitions for review.

The results of my models in Tables 4.1, 4.2, and 4.3 provide only partial support for my prediction that a constitutional claim positively influences both stages of the Court's case-selection process during all terms studied. For example, in Table 4.1, the variable constitutional claim is positive and significantly significant at $p < .01$ in both the selection and outcome equations, indicating that during the 1960 term of the Warren Court, a constitutional claim increases the likelihood that a petition both makes the discuss list and is granted review by the Court.

However, in Table 4.2 the constitutional claim variable is positive and statistically significant at $p < .01$ in the selection model, but it is not statistically significant in the outcome model. These results demonstrate that during the 1977 term of the Burger Court, a constitutional claim significantly increases the likelihood that a petition is on the discuss list, but it does not significantly increase or decrease likelihood it is granted

review. Furthermore, the constitutional claim variable is not significant in the selection model or the outcome model in Table 4.3, indicating that during the 1992 term of the Rehnquist Court a constitutional claim does not significantly impact the likelihood that a petition is discussed or granted review.

The results of the models in Tables 4.1, 4.2, and 4.3 also provide only partial support for my prediction that a constitutional claim is a cue that has a greater effect on the Court's creation of the discuss list than on the selection of petitions for review. As stated above, the results in Table 4.3 indicate that a petition with a constitutional claim is not more or less likely to be discussed or granted review by the Rehnquist Court.

However, consistent with my predictions, Table 4.2 suggests that during the Burger Court a constitutional claim has a greater impact on the creation of the discuss list than on the selection of petitions for review, as the existence of a constitutional claim significantly increases the likelihood that a petition is discussed but does not significantly increase or decrease the likelihood that it is granted review. Table 4.1 also provides some support for my predictions by indicating that a constitutional claim has a greater influence during the discuss list stage than the decision to grant review during the Warren Court, because the coefficient for the constitutional claim variable is larger in the selection model than in the outcome model.¹¹¹

3. Alleged Conflict.

In Chapter 3, I explain that I expect alleged conflict to positively influence both stages of the case-selection process during all three terms studied, but as a low-cost, low-value cue, I also expect alleged conflict to have a greater impact on the Court during the

¹¹¹ As summarized above, Table 4.1 suggests that a constitutional claim has a significant influence on both stages of the case-selection process during the Warren Court.

creation of the discuss list than during the selection of petitions for review. Additionally, I predict alleged conflict to have the greatest influence during the 1960 Warren Court term and the least influence on the 1992 Rehnquist Court term, because there is some indication that alleged conflict as a cue may have become less useful to the Court over time as attorneys have begun to utilize the cue, even in the absence of an actual conflict, in order to attract the Court's attention.

The predictions that alleged conflict positively influences the Court during both stages of the case-selection process, and that its influence on the Court is greater during the creation of the discuss list, are not supported by the models in Tables 4.1, 4.2, and 4.3. The variable alleged conflict is not statistically significant in the selection or outcome models in all three tables, indicating that during all terms studied here, alleged conflict in a petition does not significantly increase or decrease the likelihood a petition is selected for the discuss list or for review. These findings suggest that alleged conflict as a cue does not signal to the Court that a petition is worthy of discussion or review. Furthermore, the results regarding alleged conflict in Tables 4.1, 4.2, and 4.3 do not allow me to conclude that alleged conflict has a greater impact on the case-selection process during the 1960 term than in the 1992 term.

4. IFP Status.

In Chapter 3, I predict that, for all three terms included in this study, a petition's status as an IFP petition has a negative effect on the likelihood that the petition will be both placed on the Court's discuss list and ultimately selected for review. Similar to my predictions regarding other factors that act as low-cost, low-value cues, I also predict that

the influence of IFP status is stronger during the creation of the discuss list than during the selection of petitions for review.

Tables 4.1, 4.2, and 4.3 lend some partial support to my predictions that a petition's status as an IFP petition negatively influences the likelihood that the petition will be placed on the discuss list and subsequently selected for review by the Court during all terms studied, and that the influence of IFP status is stronger during the creation of the discuss list. However, the models demonstrate that there are differences regarding the influence of IFP status across the terms included in this study.

For instance, Table 4.1 supports my prediction that IFP status influences both case-selection stages by illustrating that the variable IFP status is negative and significant at $p < .01$ in the selection and outcome models. This indicates that during the 1960 term of the Warren Court, a petition's status as an IFP petition significantly decreases both the likelihood that the petition will be discussed and the likelihood that it will be selected for review by the Court. However, the IFP status variable in Table 4.2 is negative and significant only in the selection model at $p < .01$, indicating that during the 1977 term of the Burger Court, IFP status significantly decreases the likelihood that a petition is placed on the discuss list, but IFP status does not significantly decrease or increase the likelihood that a petition is granted review. Moreover, according to Table 4.3, the IFP status variable is not significant in the selection model or the outcome model, indicating that during the 1992 Rehnquist Court term, IFP status does not have a significant influence on the likelihood that a petition is placed on the discuss list or granted review by the Court.

Additionally, Tables 4.1 and 4.2 lend some support to my hypotheses that IFP status, at least when it is influential as a cue, has a greater effect on the Court's creation of the discuss list than on its selection of petitions for review. In Table 4.1, the IFP status variable is significant in both models, but the coefficient for IFP status is larger in the selection model than in the outcome model, which indicates that IFP status has a greater influence on the Warren Court during the discuss list stage. Additionally, in Table 4.2, the IFP status variable is significant in the selection model and not the outcome model, which demonstrates that it has a greater influence on the Burger Court during the discuss list stage.

5. Ninth Circuit.

I predict in Chapter 3 that a petition that originates in the United States Court of Appeals for the Ninth Circuit is more likely to be both placed on the discuss list and granted review compared to petitions from other appeals courts during the Rehnquist and Burger Court terms because both Courts are considered to be ideologically conservative. I also predict that the effect of "Ninth Circuit" is greater on the discuss list than on the selection of petitions for review, as it operates as a low-cost, low-value cue. Additionally, due to findings in previous studies, I expect "Ninth Circuit" to have an even greater impact during the Rehnquist Court term than the Burger Court term. However, I expect "Ninth Circuit" to have no significant influence during either stage of the case-selection process during the Warren Court because it is considered an ideologically liberal Court.

The models in Tables 4.1, 4.2, and 4.3 do not offer support for my predictions. In Tables 4.2 and 4.3, the Ninth Circuit dummy variable is not statistically significant, indicating that the 1977 Burger Court and 1992 Rehnquist Court are not more likely to

discuss or grant review to a petition that originated in the Ninth Circuit compared to petitions from other appeals courts. Because of my findings, I also cannot conclude that origination in the Ninth Circuit has a greater influence on the Rehnquist Court than on the Burger Court. Contrary to my predictions, and unlike some findings of previous studies, these results suggest that “Ninth Circuit” does not act as a cue that significantly influences conservative Courts to discuss or review a petition.

Surprisingly, according to Table 4.1, the Ninth Circuit dummy variable is positive and statistically significant in the selection model, which demonstrates that during the 1960 term of the Warren Court, petitions originating in the Ninth Circuit Court of Appeals are more likely to be discussed by the Court than petitions originating in other appeals courts. However, the Ninth Circuit variable is not significant in the outcome equation, indicating that a petitions’ origination in the Ninth Circuit does not significantly impact the likelihood that it is reviewed by the Warren Court.

B. High-Cost, High-Value Informational Cues.

As explained in Chapter 3, factors that operate as high-cost, high-value cues require a greater time commitment to determine, but provide a greater depth of knowledge about petitions, than low-cost, low-value cues. In general, because of their time costs and high informational value, I predict that high-cost, high-value cues will have a greater impact on the selection of petitions for review than the creation of the discuss list. The results of the models in Tables 4.1, 4.2, and 4.3 with respect to my predictions regarding the following two high-cost, high-value cues are discussed below: (1) civil liberties and (2) actual conflict.

1. Civil Liberties.

Based on previous studies and the status of “civil liberties” as a high-cost, high-value cue, I predict in Chapter 3 that for all Court terms included in my study the involvement of civil liberties issues positively influences the selection of petitions for review but has no significant effect on the creation of the discuss list. I also expect civil liberties to have a greater impact on process of selecting petitions for review during the Warren Court than during the Burger and Rehnquist Courts.

The models in Tables 4.1, 4.2, and 4.3 do not support my predictions. For instance, according to Table 4.1, the civil liberties dummy variable is positive and marginally significant at $p < .10$ in the selection model, and it is not significant in the outcome model. This indicates that during the 1960 Warren Court term, petitions involving civil liberties issues are significantly more likely to be placed on the discuss list, but not granted review, than petitions that do not involve civil liberties issues. Similarly, Table 4.2 illustrates that the civil liberties dummy variable is positive and statistically significant in the selection model at $p < .01$, but it is not significant in the outcome model. Therefore, Table 4.2 demonstrates that the 1977 Burger Court is also significantly more likely to discuss a petition involving civil liberties issues than a petition that does not involve such issues, but it is not more likely to grant cert to a petition featuring civil liberties issues.

According to Table 4.3, the civil liberties dummy variable is not statistically significant in the selection or the outcome model. While Table 4.3 partially supports my prediction, at least with respect to the Rehnquist Court, that a civil liberties petition is not significantly more likely to be discussed than other petitions, it does not support my

prediction that a civil liberties petition is significantly more likely to be granted cert than petitions involving other issues.

My prediction that the civil liberties cue has a greater influence on the Warren Court than on the Burger and Rehnquist Courts is also only partially supported by my results. For instance, Tables 4.1 and 4.3 suggest that civil liberties as a cue has a greater influence on the discuss list stage for the Warren Court than for the Rehnquist Court, because the civil liberties variable is significant the selection model in Table 4.1 but not in the selection model in Table 4.3.

However, opposite my prediction, the results suggest that civil liberties has a greater influence on the discuss list stage during the Burger Court than during the Warren Court. To determine the substantive effects of civil liberties on the likelihood that a petition is selected for review during the Warren and Burger Courts, I calculated the maximum marginal effects on the predicted probability that a petition is selected for review by these Courts. The maximum marginal effect shows the marginal effect that would occur if the values of the other independent variables make it a knife-edge case (with an initial probability of selection of 0.5).

In other words, here the maximum marginal effect shows the absolute largest effect possible of civil liberties on the likelihood that a petition is discussed by the Court. For a probit coefficient, the maximum marginal effect is calculated by multiplying the coefficient by 0.4. Realistically, for most observations, given the values of other variables, the effect is likely to be smaller than the maximum marginal effect, but the maximum marginal effect is useful for making comparisons as to the size of the influence a factor that acts as a cue has on the Court during case selection.

The maximum marginal effect is calculated for a petition that, based on its characteristics, has the same probability of being discussed or not discussed by the Court. During the 1960 term of the Warren Court, the maximum marginal effect of civil liberties issues is that the expected probability that such a petition is selected for the discuss list increases .173, or 17.3 percentage points. During the 1977 term of the Burger Court, the maximum marginal effect of civil liberties issues is that the expected probability a petition is selected for the discuss list increases .272, or 27.2 percentage points. Therefore, the results suggest that contrary to my prediction, the influence of civil liberties as a cue during the discuss list stage is stronger on the Burger Court than the Warren Court.

2. Actual Conflict.

My prediction regarding actual conflict between two or more federal appeals or state courts of last resort is that the presence of actual conflict in a petition positively influences both stages of the Court's case-selection process. Similar to my predictions regarding civil liberties, as a high-cost, high-value cue, I also expect actual conflict to have a greater effect on the Court's selection of petitions for review than on the creation of the discuss list.

My analysis does not provide support for my predictions. For example, according to Table 4.1, the actual conflict variable is not statistically significant in either the selection or the outcome models. This illustrates that during the 1960 Warren Court term, petitions featuring actual conflict between federal and state appeals courts are not more likely to be discussed or selected for review than petitions that do not involve actual conflict.

Similar to civil liberties, the results regarding the Burger and Rehnquist Courts are the opposite of what was predicted. For instance, the actual conflict variable in the outcome equations in Tables 4.2 and 4.3 are not statistically significant, indicating that during the Burger and Rehnquist Courts a petition involving actual conflict is not significantly more likely to be granted review than a petition that does not involve conflict. However, the actual conflict variable is significant and positive at $p < .01$ in the selection models in both Tables 4.2 and 4.3, indicating that a petition involving actual conflict is significantly more likely to be placed on the discuss list during the 1977 Burger Court and 1992 Rehnquist Court terms.

C. Variables that Operate as Both Low-Cost, Low-Value and High-Cost, High-Value Cues.

Some of the variables considered in my analysis operate as both low-cost, low-value and high-cost, high-value cues. Because these variables may function as both types of cues, I expect these cues to have a similar effect on the creation of the discuss list and the selection of petitions for review. The results of the models with respect to the following cues are discussed below: (1) law clerk recommendation, (2) the United States government's support of or opposition to a grant, and (3) amicus curiae briefs.

1. Law Clerk Recommendation.

For reasons explained in Chapter 3, I predict that the suggestion of a law clerk to grant certiorari significantly and positively influences both the placement of a petition on the discuss list and the Court's decision to grant review. Additionally, I predict that the influence of a law clerk's recommendation to grant cert is stronger during both stages of the case-selection process during the Warren Court compared to the Burger and Rehnquist Courts.

The models in Tables 4.1, 4.2, and 4.3 support my prediction that a law clerk's suggestion to grant cert significantly and positively influences both stages of the case-selection process. In Tables 4.1, 4.2, and 4.3, the law clerk recommendation variable is positive and statistically significant at $p < .01$ in the outcome model, indicating that for the terms of the Warren, Burger, and Rehnquist Courts studied here, a law clerk's recommendation that a petition be granted review significantly increases the likelihood that such petition is granted review.

Additionally, in Tables 4.1 and 4.2 the law clerk recommendation variable is positive and statistically significant at $p < .01$, illustrating that during the Warren and Burger Court terms, a law clerk's suggestion of grant also significantly increases the likelihood that a petition is placed on the discuss list. However, according to Table 4.3, the coefficient for the law clerk recommendation variable is blank. This means that all petitions in my 1992 data in which a law clerk recommended that the Court grant certiorari were added to the Court's discuss list. Therefore, there was no variance in the variable to explain and Stata did not report a significant coefficient.¹¹² Nevertheless, the fact that all petitions in which a law clerk recommended cert in the 1992 data were added to the discuss list indicates that a law clerk's recommendation is also very influential on the Rehnquist Court during the discuss list stage.

There is also some support for my prediction that the influence of a law clerk's recommendation is stronger during the Warren Court's case-selection process than that of

¹¹² For the law clerk recommendation variable in Table 4.3, Stata reported a coefficient of 6.188 and a p-value of .992. In a probit model of the independent variables on the discuss list dependent variable, Stata dropped observations and the law clerk recommendation variable because it perfectly predicted that a petition was added to the discuss list. Although Stata did not drop the variable in the Heckman probit model, the coefficient and p-value it reported were not meaningful.

the Burger or Rehnquist Courts. I calculated the maximum marginal effects on the predicted probability that a petition that, based on its characteristics, has an equal likelihood of either being granted review or denied review.

For the 1960 Warren Court model, the maximum marginal effect of a law clerk's recommendation is that the expected probability that such a petition is selected for review increases .694, or 69.4 percentage points. For the 1977 Burger Court model, the maximum marginal effect of a law clerk's recommendation is that the expected probability the petition is selected for review increases .194, or 19.4 percentage points. For the 1992 Rehnquist Court model, the maximum marginal effect of a law clerk's recommendation is that the expected probability the petition is selected for review increases .450, or 45 percentage points. The results therefore indicate that the influence of a law clerk's recommendation on the likelihood a petition is selected for review is greater during the Warren Court than the Rehnquist Court, and much greater during the Warren Court than the Burger Court.

Additionally, although I am unable to calculate the maximum marginal effect of a law clerk's recommendation on the discuss list for the Rehnquist Court model in Table 4.3, the maximum marginal effect on the predicted probability that a petition that has an equal likelihood of being added or not added to the discuss list is an increase in the expected probability that the petition will be selected for the discuss list of .720, or 72 percentage points, for the Warren Court and .436, or 43.6 percentage points, for the Burger Court. Thus, the results also suggest that a law clerk's recommendation has a greater influence on the discuss list stage during the Warren Court. Overall, the models support my predictions that a law clerk's recommendation of grant significantly

influences both stages of the case-selection process for all Courts studied, and it has an even greater influence on the Warren Court than on the Burger and Rehnquist Courts.

2. United States Supports Grant and United States Opposes Grant.

The second cue considered in this study that functions as a low-cost, low-value and high-cost, high-value cue is broken into two variables: “U.S. supports grant” and “U.S. opposes grant.” As discussed in Chapter 3, the United States government supports a petition if the United States government is a petitioner or if the solicitor general (or “SG”) recommends cert be granted in either an amicus curiae brief or in a response to a request from the Court for her views regarding a petition. The United States government opposes grant if the United States government is a respondent (unless the SG recommends cert be granted) or if the SG opposes grant as amici or in response to a request from the Court for her views.

Chapter 3 explains that Black and Boyd (2013) find that a petition is significantly more likely to be placed on the discuss list if the United States government supports or opposes grant. However, while Black and Boyd (2013) and Schoenherr and Black (2019) find that a petition is also significantly more likely to be granted cert if it is supported by the United States government, Black and Boyd’s (2013) and Schoenherr and Black’s (2019) results show that the United States government’s opposition to the Court granting review does not significantly influence whether a petition is granted cert. Therefore, due to Black and Boyd’s (2013) and Schoenherr and Black’s (2019) findings, and the importance of excluding a valid exclusion restriction from the outcome model,¹¹³ I did not consider “U.S. opposes grant” as a variable in the outcome model.

¹¹³ The importance of excluding a legitimate exclusion restriction from the outcome model in a Heckman probit selection model is explained above in Section II and described in more detail in Appendix B.

I predict in Chapter 3 that the United States government's support of and opposition to the Court granting cert to a petition are cues to the Court that have a significant, positive impact on whether a petition is discussed by the Court during all Court terms considered in this study. I also predict that the United States government's support of a petition will have a significant, positive impact on whether a petition is granted cert by the Court during all terms. Additionally, I predict that the United States government's support of grant will have a greater impact on the selection of petitions for review during the 1977 Burger and 1992 Rehnquist Court terms than the 1960 Warren Court term, because in the 1960s the SG did not yet submit amicus curiae briefs (Provine 1980) and therefore during the Warren Court both "U.S. supports grant" and "U.S. opposes grant" likely did not operate as high-cost, high-value cues as often.

The models in Tables 4.1, 4.2, and 4.3 offer only limited, mixed support for my predictions. For example, the U.S. supports grant variable in the outcome model in Table 4.1 is positive and statistically significant at $p < .01$, demonstrating that as predicted, during the 1960 term of the Warren Court a petition supported by the United States government is significantly more likely to be granted review than a petition not supported by the government. The coefficient for the U.S. supports grant variable in the selection model in Table 4.1 is blank; however, the results suggest that it also positively influences the Warren Court to add a petition to the discuss list.¹¹⁴ All petitions in the 1960 dataset in which the United States government supported a grant were added to the discuss list,

¹¹⁴ Stata reported a very high coefficient and a p-value of 1.0 for the U.S. supports grant variable in the selection model because all observations in my dataset for which the United States government supported a grant of certiorari were added to the discuss list.

which indicates the importance of the United States government's support as a cue to the Warren Court during the discuss list stage.

Conversely, although in Table 4.1 the U.S. opposes grant variable is also positive, it is not statistically significant, which indicates that unlike predicted, the United States government's opposition to a petition does not significantly increase the likelihood the petition is discussed by the 1960 Warren Court. Overall, the results show that the United States government's support has a significant, positive influence on the Warren Court during both stages of the case-selection process, but that the United States government's opposition has no significant influence on the discuss list stage.

Unlike in Table 4.1, in Table 4.2, the U.S. supports grant variable in the outcome model is positive but not statistically significant, indicating that during the 1977 Burger Court a petition supported by the United States government is not significantly more likely to be granted review. However, according to the selection model in Table 4.2, the U.S. supports grant variable is positive and statistically significant at $p < .01$, indicating that the United States government's support of granting cert to a petition significantly increases the likelihood that the Burger Court places a petition on the discuss list. Contrary to my predictions and Black and Boyd's (2013) findings, however, the U.S. opposes grant variable is statistically significant but negative in the selection model, indicating that a petition is significantly less likely to be placed on the discuss list if opposed by the United States government.

Furthermore, according to Table 4.3, the U.S. supports grant variable in the outcome model is positive and marginally statistically significant at $p < .10$, indicating that a petition supported by the United States government is more likely to be granted review

by the Rehnquist Court than a petition that lacks support. However, in the selection model in Table 4.3, neither the U.S. supports review variable nor the U.S. opposes review variable are statistically significant, which suggests that the U.S.'s support of or opposition to granting cert does not act as a cue that significantly influences whether a petition is placed on the discuss list by a member of the Rehnquist Court.

Finally, the models in Tables 4.1, 4.2, and 4.3 do not lend support to my prediction that the United States government's support of grant has a stronger impact on the selection of petitions for review during the 1977 Burger and 1992 Rehnquist Court terms than the 1960 Warren Court term, because the models indicate the opposite is true. First, the U.S. supports grant variable is significant in the outcome model in Table 4.1 but not in the outcome model in Table 4.2, indicating that it has a significant influence on the selection of petitions for review during the Warren Court but not the Burger Court.

The U.S. supports grant variable is statistically significant in the outcome model in Table 4.3, however, so to make comparisons between the Warren and Rehnquist Courts, I calculated the maximum marginal effects of the predicted probability that a petition is granted certiorari. The maximum marginal effect of the United States government's support is an increase of 62.4 percentage points in the expected probability that a petition, which has an equal likelihood of being granted or denied review, is actually granted cert by the Warren Court. The maximum marginal effect of the United States government's support is an increase of only 30.4 percentage points in the expected probability that a petition, which has an equal likelihood of being granted or denied review, is actually granted cert by the Rehnquist Court.

Overall, these findings suggest that the impact of the United States government's support of the Court's decision to grant cert is greater during the Warren Court than during the Burger or Rehnquist Courts, which is the opposite of what I predicted.

3. Amicus Curiae Briefs.

The third and final cue considered here that operates as both a low-cost, low-value and high-cost, high-value cue is the number of amicus curiae briefs filed in support of or opposition to a petition. Similar to other cues in its category, I predict in Chapter 3 that for all three terms, amicus briefs act a positive cue to the Court during the creation of the discuss list and during the selection of petitions for review, and that as the number of amicus briefs in support of and in opposition to a petition increases, the likelihood that a petition is discussed and ultimately granted review by the Court also increases. I also predict that there is not variation across terms with respect to the effect of amicus briefs on both stages of the case-selection process.

The models in Tables 4.1, 4.2, and 4.3 offer strong support for my predictions regarding the influence of amicus curiae briefs as a cue to members of the Court during both stages of the Court's case-selection process. The coefficient for the amicus curiae variable in the selection model in Table 4.1 is blank because in my 1960 dataset, all petitions that had at least one amicus brief filed in support or opposition were discussed by the Court and therefore there was no variance in the variable to explain. However, these results still demonstrate the strong, positive influence of amicus briefs during the Warren Court's creation of the discuss list. Additionally, the amicus curiae brief variable is positive and statistically significant at $p < .05$ in the selection model in Table 4.2, and it is also positive and marginally significant at $p < .08$ in the selection model in Table 4.3.

These results indicate that as the number of amicus briefs filed in support of or opposition to a petition increases, the Burger and Rehnquist Courts are significantly more likely to add the petition to the discuss list.

Moreover, the amicus brief variable is positive and statistically significant at $p < .05$ in the outcome models in Tables 4.1, 4.2, and 4.3. These findings demonstrate that as the number of amicus briefs in support of or in opposition to a petition increases, the likelihood that the petition is granted review by the 1960 Warren Court, the 1972 Burger Court, and the 1992 Rehnquist Court significantly increases.

IV. Other Independent Variables.

Chapter 3 explains that I consider additional factors that have been identified by previous agenda-setting research but that I do not expect to have a significant influence on either stage of the Court's case-selection process. The following variables are discussed below: (1) petitions from state supreme courts and (2) capital petitions.

A. Petitions from State Supreme Courts.

I predict in Chapter 3 that a petition's origination in a state supreme court does not act as a cue to the Court that positively or negatively influences the members of the Court during either step of the case-selection process. My prediction is based on previous research that often excludes state petitions from data or finds that a petition's status as a state supreme court petition does not have a significant impact on the Court's case-selection process.

The results of my models indicate that my predictions regarding the impact of state supreme court petitions were not entirely met. Although the results in Table 4.3 meet my predictions, as the state petition variable is not significant in either the selection

or the outcome models, indicating that during the 1992 Rehnquist term a state petition is not more or less likely to make the discuss list or be granted for review than a non-state petition, the results in Tables 4.1 and 4.2 are different.

For instance, in Table 4.1, state petition is positive and marginally statistically significant at $p < .10$ in the selection model, but state petition, while positive, is not significant in the outcome model. These findings suggest that during the 1960 Warren Court, a state supreme court petition is significantly more likely to be discussed by the Court, but it is not significantly more likely to be granted review, than a federal petition. Conversely, in Table 4.2 the state petition variable is marginally positive and significant in the outcome model, but it is not significant in the selection model, although it is positive. These results suggest that during the 1977 Burger Court, a state supreme court petition is not significantly more likely to be discussed by the Court than a non-state petition, but it is significantly more likely to be granted review.

The models in Tables 4.1 and 4.2 suggest that during the Warren Court, a petition's origination in state supreme court acted as a cue to the Court during the creation of the discuss list that made it significantly more likely that state supreme court petitions would be placed on the discuss list than non-state or federal petitions, while during the Burger Court, a petition's origination in state court acted as a cue to the Court during the selection of petitions for review that made it significantly more likely that state supreme court petitions would be granted review than non-state or federal petitions. Table 4.3 suggests that a petition's origination in state supreme court had no significant effect on either stage of the case-selection process during the Rehnquist Court.

The results in Tables 4.1, 4.2, and 4.3 are inconsistent, and previous research either finds that state petitions have no significant effect on the Court's case-selection process or excludes state petitions from data analyses altogether. Therefore, it is difficult to draw solid conclusions regarding the state petition variable results in the models. One reason that my results, which suggest that state petitions have a positive, significant influence on some Courts during at least one stage of the case-selection process, might differ from previous research is that unlike most other studies, I included in my data petitions that were not discussed by the Court.¹¹⁵ As described in Chapters 2 and 3, petitions that are not discussed by the Court make up a large portion of petitions during each term studied and excluding these petitions could result in selection bias and skewed results.

Overall, the results in Tables 4.1, 4.2, and 4.3 regarding the influence of state petitions suggest that further research is needed to determine the reasons why a petition's origination in a state court does not appear to significantly influence case-selection during the Rehnquist Court, but it does appear to significantly influence different stages of the case-selection processes during the Warren and Burger Courts.

B. Capital Petitions.

An additional factor that I control for in my study is whether a petition is a capital petition, or death penalty petition. Previous studies remove capital petitions from their data analyses because capital petitions were automatically discussed by the Warren,

¹¹⁵ Caldeira and Wright (1988) and Black and Boyd (2013) include petitions that did not make the discuss list in their data analyses, but neither study measures the impact of a petition's origination in state court on the Court's creation of the discuss list or its selection of petitions for review. It would be interesting to see results regarding the impact of state petitions in these studies' data analyses, because Caldeira and Wright (1988) analyze Burger Court petitions and Black and Boyd (2013) analyze Rehnquist Court petitions.

Burger, and Rehnquist Courts as a matter of policy, and thus their inclusion could skew results (Black and Boyd 2013; Black and Boyd 2012a; Black and Boyd 2012b; Black and Owens 2009a). Therefore, I identified and removed capital petitions from my dataset to avoid skewing my results.

I was particularly concerned over the possible effect of including capital petitions on my results regarding petitions with IFP status. According to Watson (2006), a large majority of criminal petitions are also IFP petitions. As reviewed above, agenda-setting research has shown that IFP petitions in general are less likely to be selected by the Court for the discuss list and for review. However, if a large majority of capital petitions, which are mostly also criminal petitions, are automatically added to the discuss list, their inclusion in the data could skew results regarding the impact of IFP petitions.

Additionally, I explained in Chapter 3 that I do not expect the inclusion of capital petitions to provide useful information regarding cues that impact the members of the Court during the case-selection process, particularly the creation of the discuss list, because capital petitions were automatically added to discuss list as a matter of policy during all terms analyzed in this study. Therefore, it was appropriate to remove capital petitions from my dataset.

V. Discussion of Research Questions, Hypotheses, and Predictions.

In Chapter 3, I posed three research questions in order to address my overarching research question and the three gaps that I identified in the Supreme Court agenda-setting research. I also set forth two hypotheses to explore my research questions and made related predictions regarding the manner in which I expect factors that act as cues to the Court to influence the Court's case-selection process based on the low-cost, low-value

and high-cost, high-value cue theory framework. For ease of discussion, I first examine in Subsection A below the manner in which the results of my analyses support or do not support my hypotheses and related predictions. In Subsection B, I discuss the extent of which my research questions were addressed by the results of my analyses.

A. Hypotheses and Predictions.

In the sections above, I provide a detailed discussion on the results of my models with respect to my predictions regarding the influence of factors that act as cues to the Court during its two-step case-selection process. Below, I repeat the hypotheses set forth in Chapter 3 and discuss the extent to which my hypotheses, and the predictions used to address my hypotheses, are supported by the analyses in this Chapter 4.

1. Hypothesis 1.

Hypothesis 1: Because the time-commitment costs and informational values associated with factors that act as cues vary, there are some cues that inform and influence the Court during one stage of the case-selection process that do not inform and influence the Court during the other stage of the case-selection process. Similarly, because of cost and value considerations, some of the cues that do inform and influence the Court during both stages of the case-selection process have a greater level of influence on one of the two stages of the case-selection process than on the other stage of the process.

This dissertation provides some support for Hypothesis 1. For example, the results of my analyses demonstrate that there are some cues that inform and influence the Court during one stage of the case-selection process that do not inform and influence the Court during the other stage of the process. The results also indicate that some of the cues that

do inform and influence the Court during both stages of the case-selection process have a stronger effect on one stage of the process than on the other stage. However, unlike I hypothesized, these differences do not always appear to exist because of the time costs and informational values associated with the different cues, and therefore my findings do not always fit within the low-cost, low-value and high-cost, high-value cue theory framework.

a. Predictions regarding low-cost, low-value cues.

For instance, the results of my analyses indicate that as broadly predicted, some low-cost, low-value cues significantly influence the Court during the creation of the discuss list but have either a lesser or non-existent influence on the Court's selection of petitions for review, at least during some of the Court terms studied. First, the results in Tables 4.2 and 4.3 indicate that a dissenting opinion filed by a lower court significantly increases the likelihood that a petition will be discussed by the Burger and Rehnquist Courts, but it does not increase the likelihood that it will be granted review by these Courts. These findings indicate that a lower dissenting opinion has a greater influence on the Court during the discuss list stage than on the selection of petitions for review.

Additionally, the results in Tables 4.1 and 4.2 indicate that during the Warren and Burger Courts, the presence of a constitutional claim, a low-cost, low-value cue, significantly increases the likelihood that a petition is chosen for the discuss list. Tables 4.1 and 4.2 also indicate that the impact of constitutional claim as a cue is greater during the discuss list stage. For instance, while Table 4.1 suggests that a constitutional claim also significantly increases the likelihood that the Warren Court grants certiorari to a petition, as discussed above in Section III(A)(2), the results indicate that this factor has a

greater impact on the likelihood that a petition will be discussed by the Warren Court than on the likelihood that it will be granted review by the Warren Court. Also, Table 4.2 demonstrates that during the Burger Court, a constitutional claim has a greater influence on the discuss list stage because it has no significant influence on whether a petition is selected for review.

Moreover, Tables 4.1 and 4.2 provide support for the prediction that IFP status, another low-cost, low-value cue, significantly decreases the likelihood that the Warren and Burger Courts will add a petition to the discuss list. The results also indicate that IFP status has a greater influence on the discuss list stage than on the selection of petitions for review. For instance, Table 4.1 demonstrates that while the Warren Court is also significantly less likely to review an IFP petition than a paid petition, the impact of IFP status on the discuss list stage during the Warren Court is greater than its impact on the decision to grant cert. Table 4.2 indicates that IFP status has no significant influence on whether a petition is granted certiorari by the Burger Court.

Furthermore, Table 4.1 illustrates that the origination of a petition from the Ninth Circuit Court of Appeals, another cue to the Court that involves minimal time commitment and provides little informational value, significantly increases the likelihood that the Warren Court discusses the petition but does not increase the likelihood that the Warren Court grants certiorari. These findings suggest that the factor's influence is significant only with respect to the creation of the discuss list, at least during some terms.

Contrary to my predictions, however, the results in Tables 4.1, 4.2, and 4.3 indicate that alleged conflict, the final low-cost, low-value cue discussed here, does not significantly increase the likelihood that a petition is discussed or reviewed by the

Warren, Burger, or Rehnquist Courts and does not have a significant, greater effect on the discuss list stage than on the selection of petitions for review. This finding is in contrast to the conclusions drawn by Caldeira and Wright (1988), who find that allegations of conflict increase the likelihood a petition is ultimately granted cert. However, Caldeira and Wright (1988) analyze petitions from one term of the Burger Court, which may explain their different findings. Additionally, my findings may provide support for some scholars' predictions that the Court has become aware that attorneys may allege conflict, even where it is weak or does not exist, to gain the Court's attention, and therefore the cue alleged conflict is not meaningful to the Court (Black and Boyd 2013; Smith 1999-2000; Roehner and Roehner 1953).

b. Predictions regarding high-cost, high-value cues.

The results of my models also show that the high-cost, high-value cues studied here have different degrees of influence on the two stages of the case-selection process. However, my results do not support my predictions that high-cost, high-value cues have a significant influence on the selection of petitions for review and a lesser or non-existent influence on the selection of petitions for the discuss list.

For example, Tables 4.1 and 4.2 demonstrate that contrary to my predictions, the involvement of civil liberties issues does not significantly influence the Warren and Burger Courts during the process of selecting petitions for review, but it does significantly increase the likelihood that the Warren and Burger Courts select a petition for the discuss list. Therefore, the models suggest that for the Warren and Burger Courts, the influence of civil liberties issues is significant during the discuss list stage and insignificant during the selection of petitions for review.

Similarly, Tables 4.2 and 4.3 illustrate that unlike my predictions, the existence of actual conflict does not significantly influence the Warren, Burger, or Rehnquist Courts during the process of selecting petitions for review. However, the results of the models indicate that actual conflict significantly increases the likelihood that a petition is placed on the discuss list by the Burger and Rehnquist Courts, suggesting that actual conflict has a greater influence on the discuss list stage of the Court's case-selection process.

The results in Tables 4.2 and 4.3 with respect to actual conflict support the conclusion of Black and Boyd (2013) that actual conflict positively and significantly influences the Court to place a petition on the discuss list. However, unlike previous studies that find that the presence of actual conflict also positively influences the Court's decisions to grant cert (Black and Boyd 2013; Black and Boyd 2012b; Caldeira and Wright 1988; Ulmer 1983), the findings here indicate that actual conflict does not significantly influence the Court's decision to grant cert.

The findings in this study may differ due in part to differences in the data analyzed. For example, most of the previous studies that find that actual conflict significantly and positively influences the Court's selection of petitions for review analyze more limited data, such as data from terms of only the Rehnquist Court (Black and Boyd 2013; Black and Boyd 2012b)¹¹⁶ or the Burger Court (Caldeira and Wright 1988), data that includes only paid petitions and not IFP petitions (Calderia and Wright 1988, p. 1116; Ulmer 1983, p. 475),¹¹⁷ or data that includes only those petitions ultimately granted cert (Ulmer 1983). The findings here may differ because the data used

¹¹⁶ Black and Boyd (2012b) and Black and Boyd (2013) use data from the 1986, 1987, 1991, and 1992 terms.

¹¹⁷ Ulmer's (1983) data includes all paid cases from the 1961-1976 terms that were granted certiorari and Caldeira and Wright (1988) use data on all paid cases from the 1982 term.

in this study is more expansive as it includes data from terms of the Court under the leadership of different chief justices, does not exclude IFP petitions, and includes petitions that did not make the discuss list.

c. Predictions regarding cues that function as both low-cost, low-value and high-cost, high-value cues.

Finally, my analysis lends some support to the prediction that cues that operate as both low-cost, low-value and high-cost, high-value cues generally have a similar degree of influence on the Court during both stages of the case-selection process, but as with the other types of cues discussed here, my results are mixed. First, my results in Tables 4.1, 4.2, and 4.3 show that a law clerk's recommendation to grant certiorari significantly increases the likelihood that the Warren, Burger, and Rehnquist Courts place a petition on the discuss list and grant review.¹¹⁸ The results in Tables 4.1, 4.2, and 4.3 with respect to law clerks' recommendations lend support to my predictions and to previous studies that find that law clerks play an important and significant role during both stages of the Court's case-selection process (Black, Boyd, and Bryan 2014; Stras 2007).

Additionally, my analysis supports my prediction that the total number of amicus briefs in support of or in opposition to a petition acts as a cue that influences the Court during both stages of the case-selection process. For instance, the findings in Table 4.1 suggest that the presence of amicus briefs in support of or opposition to a petition positively influences the likelihood that the Warren Court selects the petition for the

¹¹⁸ As explained in Section III(C)(1), Stata did not report a meaningful coefficient or a meaningful p-value for the law clerk recommendation variable in the selection model in Table 4.3 because every petition in my 1992 data in which a law clerk recommended granting cert was placed on the discuss list. However, these results demonstrate the important influence of law clerks' recommendations on the discuss list stage for the Rehnquist Court.

discuss list.¹¹⁹ Tables 4.2 and 4.3 indicate that as the total number of amicus briefs associated with a petition increases, the likelihood that Burger and Rehnquist Courts place the petition on the discuss list also significantly increases.

Furthermore, Tables 4.1, 4.2, and 4.3 indicate that as the total number of amicus briefs associated with a petition increases, the likelihood that the Warren, Burger, and Rehnquist Courts grant certiorari to the petition also significantly increases. The results in Tables 4.1, 4.2, and 4.3 provide support for Caldeira and Wright's (1988) conclusions that the total number of amicus briefs positively influences both stages of the case-selection process.

However, my models in Tables 4.1, 4.2, and 4.3 offer only limited, mixed support for my predictions regarding another low-cost, low-value and a high-cost, high-value cue, which is whether the United States government supports or the United States government opposes a grant of cert by the Court. As predicted, the U.S. supports grant cue has a positive, significant influence on the Warren and Rehnquist Courts' process of granting certiorari to petitions. Additionally, as predicted, the U.S. supports grant cue also has a positive influence on the discuss list stage during the 1960 Warren and 1977 Burger Courts.¹²⁰

Nevertheless, my results do not support my prediction that the United States government's opposition to review increases the likelihood a petition is discussed, because my results indicate that the opposite is true—the government's opposition

¹¹⁹ Section III(C)(3) also explains that Stata did not report a meaningful coefficient or p-value for the amicus curiae brief variable in the selection model in Table 4.1 because every observation in my 1960 dataset for which an amicus brief was filed was selected for the discuss list. Therefore, my results still provide support for my prediction that amicus briefs have an important, positive influence on the creation of the discuss list during the Warren Court.

¹²⁰ The U.S. supports grant variable was not significant in the selection model in Table 4.3.

actually significantly decreases the likelihood that a petition is discussed by the Burger Court. These results conflict with Black and Boyd's (2013) findings that both the United States government's support of and opposition to a petition act as significant cues to the Court that a petition should be on the discuss list. My results may differ from Black and Boyd's (2013) results because their data included four Rehnquist Court terms and did not include data from the Warren or Burger Courts. The conflicting findings suggest that more research is needed regarding the United States government's support of and opposition to granting cert and its influence on both stages of the case-selection process.

Overall, while my results regarding the United States government's support of and opposition to a petition do not fully support my predictions and are so mixed that it is difficult to draw useful conclusions regarding the impact of this cue on the different case-selection stages, my results do offer some support for my broad hypothesis that low-cost, low-value and high-cost, high-value cues significantly influence both stages of the Court's case-selection process.

d. Predictions regarding other independent variables.

As discussed in Section IV above, I include other independent variables in my study that have been identified and sometimes excluded from consideration by other agenda-setting scholars. Due to conclusions drawn in previous research, I do not predict these variables to have a significant influence on either stage of the Court's case-selection process during any term of the Court studied in this dissertation.¹²¹

¹²¹ As explained in Section IV(B), unlike state petitions I did not include capital petitions in my study because I did not expect the inclusion of these petitions to provide useful information as capital petitions were always discussed by the Court during the three terms studied here.

For instance, I considered petitions that originated in a state supreme court compared to a federal appeals court by including the variable state petition in my study. Contrary to my predictions, state petition has a significant impact on one stage of the case-selection process during the Warren and Burger Courts, although state petition has no significant influence on either stage of the case-selection process during the Rehnquist Court. During the Warren Court, a state petition is significantly more likely to be placed on the discuss list than a petition originating in a federal appeals court, but a state supreme court petition is not significantly more likely to be granted cert. Conversely, during the Burger Court, a state petition is not significantly more likely to be placed on the discuss list than a petition originating in a federal appeals court, but a state court petition is significantly more likely to be granted cert.

My study indicates that the Court at times is significantly more likely to discuss or to grant cert to a petition if it originates in a state supreme court. However, my results also suggest that the impact of state petition is significant during different stages of the case-selection process for different Courts.

One possible reason for my findings that the Warren Court is significantly more likely to discuss a petition if it originates in a state supreme court may be because the Warren Court handed down a large number of cases invalidating state laws, especially in the area of criminal procedure (Thomas 2005). Therefore, it is possible that during the Warren Court, a petition's status as a state petition acted as a cue to the Court that a petition deserved closer examination.

Similarly, the Burger Court may be significantly more likely to review a petition that originates in state supreme court because the Burger Court reversed many Warrens

Court cases (Thomas 2005; Smith and Hensley 1993), and thus a petition's status as originating in a state supreme court may have also acted as a cue to the Burger Court that the petition was worthy of review, as it may have offered the Burger Court an opportunity to reevaluate a Warren Court precedent.

However, it is not clear why state petition status would be significant during the Warren Court's creation of the discuss list, but significant during the Burger Court's selection of petitions for review. Future study should more fully investigate the reasons a state petition may be more likely to be discussed or selected for review by the Court during different terms, including the varying impact of a state petition on different stages of the case-selection process observed in this study.

e. Conclusions on Hypothesis 1.

In conclusion, the results in Tables 4.1, 4.2, and 4.3 offer some support for Hypothesis 1, because my findings indicate that some cues that significantly influence one stage of the case-selection process have less or no influence on the other stage of the case-selection process. While the associated costs and values of the cues provide some explanation as to the reasons these cues influence different stages of the case-selection process, the low-cost, low-value and high-cost, high-value cue theory framework applied here does not provide a complete explanation and thus suggests that the framework alone will not allow agenda-setting scholars or those in the legal field to fully predict the cues that influence the Court during the case-selection process.

For example, the discussion above demonstrates that while there is evidence that most low-cost, low-value cues studied here do have a greater influence on the creation of the discuss list than the selection of petitions for review, at least during some of the

Court's terms, this is not the case for every low-cost, low-value cue. Additionally, my analysis suggests that the high-cost, high-value cues in this study have a greater influence on the creation of the discuss list than on the selection of petitions for review, which is the opposite of what was predicted here and found in other research (Black and Boyd 2013). Furthermore, while this analysis shows that some cues that operate as low-cost, low-value and high-cost, high-value cues influence both stages of the case-selection process, there is an indication that these cues could have a greater influence on one stage of the process than on the other stage of the process.¹²²

2. Hypothesis 2.

Hypothesis 2: Because of historical, political, and internal factors, some of the factors that inform and significantly influence the Court during its two-step case-selection process differ between the 1960, 1977, and 1992 terms. Similarly, also due to historical, political, and internal factors, the factors that do inform and significantly influence the Court across multiple terms have a different degree of influence on the Court during each of these terms.

Although my predictions regarding the influence of individual factors that act as cues during different terms are not always met, the results of my analyses provide some support for my hypothesis that some of the cues that inform and influence the Court's case-selection process differ between the 1960, 1977, and 1992 terms, during which the Court was under the leadership of Chief Justices Warren, Burger, and Rehnquist, respectively. This analysis also suggests that some of the factors that act as cues during

¹²² For example, Section V(A)(2)(d) explains the varying impact of the United States government's support of granting cert to a petition on different stages of the case-selection process during different Courts.

the case-selection process throughout multiple terms have a greater influence during some of the Court's terms than others.

a. The importance of some cues has increased over time.

First, the models suggest that the importance to the Court of some cues during the case-selection process may have increased over time. Tables 4.1, 4.2, and 4.3 show that a lower dissenting opinion significantly increases the likelihood that a petition is discussed by the Burger and Rehnquist Courts, but it does not significantly increase the likelihood that a petition is discussed by the Warren Court. This suggests that over time, a lower dissenting opinion may have become more meaningful as cue that influences the Court's creation of the discuss list. These findings conflict with Caldeira and Lempert's (2020) findings, which indicate that the impact of lower dissenting opinion on the discuss list is steady across the Hughes, Warren, and Burger Courts; however, Caldeira and Lempert (2020) do not include Rehnquist Court data in their analysis, nor do they consider both stages of case selection. Additional research might help reconcile this conflict with their study and determine the reasons dissenting opinions may have become more influential during the Court's first step of its case-selection process.

Tables 4.1, 4.2, and 4.3 indicate that the importance of actual conflict between two or more federal appeals or state courts of last resort as a cue to the Court during the case-selection process may have increased over time. Table 4.1 suggests petitions involving actual conflict are not more likely to be discussed or granted cert by the Warren Court than petitions that do not involve actual conflict.¹²³ However, Tables 4.2 and 4.3

¹²³ This finding is interesting because as stated in Chapter 3, legal conflict is one of the few official criteria for selecting cases that is set forth in the Supreme Court's official rules, and a variation of the rule was present in the version of the rules applicable to the 1960 Warren Court (*Revised Rules of the Supreme*

indicate that petitions that feature actual conflict are significantly more likely to be selected for the discuss list, although not for review, by the Burger and Rehnquist Courts.

To interpret the substantive effects of actual conflict on the likelihood that a petition is selected for review during the Burger and Rehnquist Courts, I calculated the maximum marginal effects on the predicted probability that a petition is discussed. For the Burger Court model, the maximum marginal effect of actual conflict is that the expected probability that a petition, which has an equal likelihood of being selected or not selected for the discuss list, is actually selected for the discuss list increases .525, or 52.5 percentage points. For the Rehnquist Court model, the maximum marginal effect of actual conflict is that the expected probability that a petition, which has an equal likelihood of being selected or not selected for the discuss list, is placed on the discuss list increases .504, or 50.4 percentage points.

The maximum marginal effect of actual conflict on the expected likelihood a petition is discussed is similar but slightly higher for the Burger Court model than the Rehnquist Court model. Still, the results here suggest that the importance of actual conflict became more important as a cue to the Burger and Rehnquist Courts than the Warren Court. Studies that find that actual conflict significantly influences the Court's case-selection process focus on the Burger Court (Caldeira and Wright 1988) and the Rehnquist Court (Black and Boyd 2013), and therefore additional research is needed to determine the reasons actual conflict may not act as a cue that significantly influences the Warren Court during either step of the case-selection process.

Court of the United States 1954). Therefore, the Court's rules do not indicate that actual conflict is less important to the Warren Court than the Burger or Rehnquist Courts.

The results also suggest that the number of amicus curiae briefs in support of and opposition to a petition may be more important to the Rehnquist Court than the Burger Court during both stages of the case-selection process. In order to determine the substantive effects of the number of amicus briefs on the likelihood that a petition is selected for the discuss list during the Burger and Rehnquist Courts, I calculated the maximum marginal effects on the predicted probability that a petition is selected for the discuss list during these Court terms.¹²⁴

During the 1977 Burger Court, the maximum marginal effect of an increase of one amicus brief in support of or in opposition to a petition that, based on its characteristics has an equal probability of being discussed or not discussed by Court, is an increase of .350, or 35 percentage points, in the expected probability that the petition is selected for the discuss list. For the 1992 Rehnquist Court, the maximum marginal effect of an increase of one amicus brief in support of or in opposition to that petition is an increase of .405, or 40.5 percentage points, in the expected probability that the petition is selected for the discuss list, which indicates that amicus briefs have a greater influence during the Rehnquist Court than the Burger Court.¹²⁵

Additionally, for all three terms, I calculated the maximum marginal effect of an increase of one amicus curiae brief on the likelihood that a petition, which has the same

¹²⁴ As explained in Section III(C)(3), Stata did not produce a meaningful coefficient or p-value for the amicus curiae variable in the selection model in Table 4.1 because in the 1960 data, every observation with an amicus brief associated with it was discussed by the Court. Therefore, I cannot calculate the maximum marginal effect with respect to the amicus curiae variable in the selection model in Table 4.1, and I am not able to make meaningful comparisons across all three Courts regarding the influence of amicus briefs on the discuss list stage.

¹²⁵ This finding somewhat contradicts Caldeira and Lempert's (2020) conclusions that the impact of amicus briefs on the creation of the discuss list has decreased over time. However, Caldeira and Lempert (2020) do not consider both stages of the case-selection process and analyze data from the Hughes, Warren, and Burger Courts, and not from the Rehnquist Court, which may explain their different findings.

probability of being discussed or not being discussed, is selected for review. The maximum marginal effect of an increase of one amicus brief in support of or opposition to such a petition is that the expected probability that it is granted certiorari by the 1960 Warren Court increases .514, or 51.4 percentage points. The maximum marginal effect of an increase of one amicus brief is smaller during the 1977 Burger Court, as it increases the expected probability a petition is granted certiorari by only .097, or 9.7 percentage points. However, the maximum marginal effect of an increase of one amicus brief in support of or in opposition to a petition is the largest during the 1992 Rehnquist Court, because it increases the expected probability that a petition is granted certiorari by .522, or 52.2 percentage points.

Overall, the models provide some indication that the number of amicus briefs associated with a petition may have a greater influence on the entire two-step case-selection process during the Rehnquist Court than during the Warren or Burger Courts. Kearney and Merrill (2000) find that the number of amicus briefs submitted to the Court increased throughout the twentieth century, which may help to explain the increasing influence of amici observed here.

b. The importance of some cues has decreased over time.

Second, the models also suggest that the importance of some cues to the Court's case-selection process may have decreased over time. For instance, Tables 4.1 and 4.2 indicate that a constitutional claim significantly increases the likelihood that the Warren and Burger Courts select a petition for the discuss list, but Table 4.3 shows that a constitutional claim does not have a significant influence on the Rehnquist Court's creation of the discuss list. Also, Tables 4.1, 4.2, and 4.3 demonstrate that a petition with

a constitutional claim is significantly more likely to be granted certiorari by the Warren Court but is not significantly more or less likely to be granted review by the Burger or Rehnquist Courts.

In other words, Tables 4.1, 4.2, and 4.3 suggest that the importance of a constitutional claim as a cue to the Court that a petition should be placed on the discuss list and granted review has decreased over time, as a constitutional claim increases the likelihood a petition is both discussed and granted review during the Warren Court's 1960 term, but does not increase the likelihood a petition is either discussed or granted review during the Rehnquist Court's 1992 term.

The research regarding the usefulness of another factor, actual conflict, as a cue to the Court may provide an explanation for these findings. For example, there is some indication that over time, attorneys have become aware of the Court's interest in conflict between federal and state appeals courts and therefore may allege in a petition that a matter features conflict, even when conflict may not exist, merely to gain the Court's attention (Black and Boyd 2013; Smith 1999-2000; Roehner and Roehner 1953). It might be possible that similarly, attorneys have also become aware that a constitutional claim acts as a cue to the Court that a petition should be discussed or reviewed, and they have therefore begun to allege a constitutional claim even when such a claim is weak or non-existent. If this is the case, the reasons the constitutional claim variable is not significant in either stage in Table 4.3 may be because it has become less useful to the Court over time.

The results of my models also suggest that the importance of IFP status as a cue during the case-selection process has decreased over time as well. For instance, my

models in Tables 4.1 and 4.2 indicate that a petition's status as an IFP petition significantly decreases the likelihood that the Warren and Burger Courts discuss the petition and the likelihood that the Warren Court ultimately reviews the petition. However, Table 4.3 suggests that IFP status does not have a significant relationship with the Rehnquist Court's creation of the discuss list or its selection of petitions for review.

As reviewed in Chapter 3, studies have provided evidence that IFP petitions are accepted for review by the Court at a smaller rate than non-IFP, or paid, petitions (Wachtell and Thompson 2009; Gressman 2007), and some agenda-setting scholars have even justified excluding these petitions from their analyses for this reason (Watson 2006; Segal and Spaeth 1993; Tanenhaus et al. 1963). However, the findings here indicate that more recently,¹²⁶ IFP petitions are not significantly less likely than paid petitions to be discussed or granted certiorari by the Court, because the models show that while IFP petitions are significantly less likely to be discussed and granted review by the Warren Court, IFP petitions are not significantly less likely to be discussed or ultimately granted review by the Rehnquist Court. Therefore, these findings lend some support to Watson's (2006) study, which finds that IFP petitions are not mostly frivolous and thus should not be ignored in agenda-setting studies.

Additionally, the results of the models suggest that a petition's origination in the United States Court of Appeals for the Ninth Circuit significantly influences the Warren Court's case-selection process, but not the case-selection processes of the Burger or Rehnquist Courts. For instance, Table 4.1 demonstrates that a petition from the Ninth

¹²⁶ Due to data availability, the most recent Court that can be studied in this dissertation is the Rehnquist Court. Chapter 3 describes the data sources necessary to complete this study and the reasons that the most recent data available is from the Rehnquist Court in the 1990s.

Circuit is statistically more likely to be discussed by the Warren Court than a petition from a different federal appeals court. However, Tables 4.2 and 4.3 indicate that a petition from the Ninth Circuit is not significantly more or less likely to be discussed by the Burger or Rehnquist Courts.

The findings here regarding petitions from the Ninth Circuit are contrary to my prediction that a petition from the liberal Ninth Circuit acts as a cue that significantly influences the case-selection processes of the more conservative Burger and Rehnquist Courts but has no influence on the more liberal Warren Court. This prediction was based on research that suggests that the justices are more interested in reviewing petitions from courts with judges whose ideologies differ from their own (Lane and Black 2017; Black and Owens 2012; Scott 2006a; Segal, Spaeth, and Benesh 2005) and that ideological differences provide at least a partial explanation for the Court's high number of Ninth Circuit reversals (Scott 2006a).

However, Scott (2006a) suggests that there may be other factors that contribute to the high number of Ninth Circuit reversals, which indicates that more research is needed to investigate his predictions as well as to determine the reasons that origination in the Ninth Circuit acts as a cue that significantly increases the likelihood that the Warren Court discusses a petition, but does not act as a cue that significantly increases or decreases the likelihood that the Burger or Rehnquist Courts discuss a petition.

Furthermore, my models suggest that civil liberties issues are less important as a cue to the Court that a petition is worth being discussed for the Rehnquist Court than for the Burger and Warren Courts. For example, Tables 4.1 and 4.2 indicate that the involvement of civil liberties issues significantly increases the likelihood that a petition is

discussed, although not the likelihood that it is ultimately reviewed, by the Warren and Burger Courts. As explained in Section III(B)(1), civil liberties has a stronger influence on the creation of the discuss list during the Burger Court than it does during the Warren Court. However, Table 4.3 demonstrates that the involvement of civil liberties issues does not significantly influence the likelihood that a petition is discussed or reviewed by the Rehnquist Court.

These findings are contrary to my prediction that civil liberties issues have a stronger influence on the Warren Court than both the Burger and Rehnquist Courts, as they suggest civil liberties had a stronger impact on the Burger Court than the Warren Court. Smith and Hensley (1993) explain that the Warren Court was focused on handing down cases that expanded civil rights and liberties, while the Burger Court was focused on handing down cases that reversed the direction of earlier Warren Court civil rights and civil liberties cases (p. 83). Smith and Hensley's (1993) findings may provide a possible explanation as to the reasons my models indicate that civil liberties issues significantly increase the likelihood that both the Warren Court and the Burger Court discuss a petition.

Tables 4.1, 4.2, and 4.3 also indicate that the weight of the influence of law clerks' recommendations to grant cert on both stages of the Court's case-selection process has decreased over time. Specifically, while the models demonstrate that a law clerk's recommendation to grant certiorari significantly increases the likelihood that a petition is discussed and granted certiorari during the Warren, Burger, and Rehnquist Courts, the maximum marginal effects calculated in Section III(C)(1) suggest that the degree of influence of a law clerk's recommendation is greater during both stages of the

case-selection process during the Warren Court than during the Burger and Rehnquist Courts.¹²⁷

As explained in Chapter 3, I predict that a law clerk's recommendation to grant cert has a greater influence on the Warren Court than on the Burger or Rehnquist Courts because law clerks during the Warren Court era did not yet participate in the cert pool and drafted cert memos only for the justice for whom they worked and had a working relationship. The findings here support my prediction and previous research that suggests that the creation of the cert pool may have resulted in a law clerk's recommendation becoming less important as a cue during both stages of the case-selection process.

For instance, Black and Boyd's (2012a) study of agenda-setting on the Rehnquist Court concludes that the cert pool's usefulness as a "factual and efficiency-based service" for the Court is limited because the likelihood of a justice agreeing with a law clerk's recommendation is "inversely related to the ideological distance between the two" (p. 165). However, even though there is evidence that the influence of a law clerk's recommendation has decreased because of the use of the cert pool, Black and Boyd's (2012a) findings and the results here indicate that a law clerk's recommendation remains a significant cue to the Court during both the selection of petitions for the discuss list and the selection of petitions for review and that law clerks continue to have an important role during the Court's case-selection process.

¹²⁷ As discussed in Section III(C)(1), Stata did not calculate a meaningful coefficient or p-value for the law clerk recommendation variable in the selection model in Table 4.3. This outcome resulted because all observations in my 1992 data for which there was a law clerk recommendation of grant were selected for the discuss list.

c. Some cues have no influence on the Court over time.

The models in Tables 4.1, 4.2, and 4.3 demonstrate that alleged conflict in a petition does not have a significant relationship with the selection of petitions for the discuss list or the selection of petitions for review. Additionally, the models show that the degree of influence alleged conflict has on the Court during both stages of the case-selection process does not significantly vary across terms.

Specifically, my results do not support my prediction that alleged conflict has a positive, significant impact on both stages of the case-selection process, but a stronger influence on the discuss list stage, during all Court terms studied, or my prediction that it has the greatest degree of influence on the Warren Court and the least degree of influence on the Rehnquist Court. Instead, Tables 4.1, 4.2, and 4.3 indicate that alleged conflict does not significantly increase or decrease the likelihood that a petition will be selected for the discuss list or for review by the Warren, Burger, or Rehnquist Courts. As stated above, these findings could be the result of the Court's awareness that some litigants allege conflict in order to gain the Court's attention even if actual conflict does not exist, which likely limits the usefulness of alleged conflict as a cue (Black and Boyd 2013; Smith 1999-2000; Roehner and Roehner 1953).

d. Some cues have varying levels of influence on the Court over time.

The models in Tables 4.1, 4.2, and 4.3 indicate that some factors that act as cues have varying levels of influence on both stages of the Court's case-selection process across terms. The findings regarding these factors do not show any patterns in the factors' fluctuating levels of influence, and therefore the results of the analyses here do not allow

meaningful conclusions to be drawn regarding the impact of these cues over time on the Court's case-selection process.

For example, according to Tables 4.1 and 4.3, the United States government's support of a petition appears to act as a cue to the Warren and Rehnquist Courts that significantly increases the likelihood that these Courts grant cert to such a petition. However, while the United States government's support of a petition also increases the likelihood that it is discussed by the Warren Court, it does not significantly increase or decrease the likelihood that the petition is discussed by the Rehnquist Court.¹²⁸ Moreover, Table 4.2 suggests that the United States government's support of petition acts as a cue that significantly increases the likelihood that a petition is placed on the discuss list by the Burger Court, but it does not significantly increase or decrease the likelihood that the Burger Court grants cert to a petition.

Furthermore, contrary to my predictions, the United States government's opposition to a grant of cert significantly decreases the likelihood that a petition is placed on the discuss list by the Burger Court and has no significant impact on the selection of petitions for review by the Burger Court. The United States government's opposition to a petition does not significantly increase or decrease the likelihood that a petition is discussed or selected for review by the Warren or Rehnquist Courts.

In addition, my prediction that the United States government's support of a petition has a greater degree of impact on the selection of petitions for review during the

¹²⁸ The coefficient for the U.S. supports grant variable in the selection model in Table 4.1 is blank because all petitions in the 1960 Warren Court sample for which the United States government supported a grant of certiorari were placed on the Court's discuss list. Therefore, the model does not show a significant relationship between the U.S. supports grant variable and selection for the discuss list, but the data still suggests the importance of the United States government's support of a petition and its selection for the discuss list during the Warren Court.

Burger and Rehnquist Courts compared to the Warren Court is not met. In fact, the models suggest that the opposite is true by indicating that the United States government's support of a petition has a greater impact on the Warren Court's process of granting cert to petitions than that of the Burger and Rehnquist Courts.

Additional research may be needed to uncover whether other factors might interact with the influence of the United States government's support of or opposition to a grant of cert, such as the Court's relationships with different SGs, to determine the reasons the degree of influence of these cues on both stages of the Court's case-selection process appears to fluctuate over time.

Petitions from state supreme courts also had varying levels of influence across Courts. During the Warren Court, a state petition is significantly more likely to be discussed but not significantly more or less likely to be granted review, while during the Burger Court, a state petition is significantly more likely to be granted review but not significantly more or less likely to be discussed. Additionally, petitions from state supreme courts have no significant influence on either stage of the case-selection process during the Rehnquist Court. As explained in the discussion of this variable with respect to Hypothesis 1, additional research may help to explain the variation of the impact of this variable across Courts.

e. Conclusions on Hypothesis 2.

Although results are mixed, Tables 4.1, 4.2, and 4.3 offer some support for Hypothesis 2 by demonstrating that some of the factors that act as cues that significantly influence the Court's two-step case-selection process during the 1960, 1977, and 1992 terms vary across terms. In other words, some factors that impact the case-selection

process during some terms have no impact during other terms. Additionally, with respect to those cues that significantly influence the Court's case-selection process during all terms studied, some cues have a greater degree of influence during some terms than during other terms.

For example, Tables 4.1, 4.2, and 4.3 show that the importance of some cues has increased over time. Lower dissenting opinion and actual conflict significantly influenced the Court's creation of the discuss list during the Burger and Rehnquist Courts but had no significant influence on the discuss list during the Warren Court. Similarly, my results show that the number of amicus briefs associated with a petition has a greater impact on both stages of the case-selection process during the Rehnquist Court than during the Burger and Warren Courts.

Tables 4.1, 4.2, and 4.3 also suggest that the influence of some factors on the Court's case-selection process has decreased over time. For example, while the models show a constitutional claim, IFP status, and a civil liberties claim all significantly influence the likelihood a petition is discussed by the Burger and Warren Courts, the cues have no significant impact on whether a petition is discussed by the Rehnquist Court. Additionally, my results suggest origination in the Ninth Circuit significantly increases the likelihood a petition is discussed by the Warren Court, but it has no significant effect on whether a petition is discussed by the Burger or Rehnquist Courts. Similarly, the models show that while a law clerk's recommendation to grant cert is significant during both stages of the Court's case-selection process for all terms, the degree of influence of a law clerk's recommendation to grant cert has decreased over time.

Finally, alleged conflict has no significant relationship with a petition's placement on the discuss list or selection for review by the Court during any of the terms studied. Moreover, the significance during both stages of the case-selection process of the United States government's support of or opposition to a petition and a petition's origination in a state supreme court varies widely across terms.

B. Research Questions.

In Section II(A) of Chapter 3, I pose three research questions that help me to address the three gaps I identify in the agenda-setting research and to answer the overarching research question I set forth this dissertation: How does the Supreme Court of the United States decide which cases it will review?¹²⁹ The analyses of my models and the discussion of my hypotheses above begin to address these smaller research questions, which are discussed below.

1. Does the inclusion in this study of types of cert petitions that have been excluded from study by other scholars, such as IFP petitions and petitions originating in state supreme courts, provide a more complete explanation of agenda-setting on the Supreme Court?

One of the goals of this dissertation is to include in agenda-setting data and analyses petitions with certain characteristics that have been excluded from study by other scholars, including IFP petitions and petitions that originate in state supreme courts. The inclusion in this study of IFP and state petitions provides some insight into the Court's treatment of these petitions during its agenda-setting process.

First, as discussed in Section III(A)(4) above, my analysis indicates that, similar to the findings of previous studies that include a measure for whether a petition is an IFP

¹²⁹ My conclusions regarding the overarching research question are discussed more thoroughly in Section II of Chapter 5.

petition, an IFP petition is significantly less likely to be placed on the Court's discuss list than a paid petition, at least during the Warren and Burger Courts. Additionally, an IFP petition is significantly less likely to be granted review by the Warren Court. However, my results indicate that IFP status does not always impact the likelihood a petition is discussed or selected for review, as the findings here show it has no significant impact on either stage of case selection during the Rehnquist Court.

Overall, my findings demonstrate that IFP status can significantly influence both stages of the Court's case-selection process, however, this influence may vary across Court terms. Therefore, given the fluctuating impact of IFP status, IFP petitions should not be ignored by other Supreme Court agenda-setting studies. Additional study regarding the impact of IFP petitions may help to uncover the reasons the significance of IFP status varies across terms.

In addition, as analyzed in Section IV(A) above, unlike previous studies that conclude that a petition's status as a state supreme court petition has no significant impact on the Court's decisions during the case-selection process, I find that state petitions can significantly impact the case-selection process. For example, during the Warren Court, a state petition is significantly more likely to be discussed by the Court than a non-state petition, although it is not significantly more likely to be granted review. Conversely, during the Burger Court, a state petition is not significantly more likely to be discussed by the Court, but it is significantly more likely to be granted review. However, during the Rehnquist Court, a state petition is not significantly more or less likely to be discussed or granted review.

While based on these results it is difficult to draw conclusions regarding the reasons a petition's origination in a state supreme court has a varying impact on the case-selection processes of each of the Court terms studied, the results do indicate that a petition's origination in a state supreme court can significantly influence the stages of the case-selection process of the Supreme Court. These findings demonstrate that state petitions should not be removed from future agenda-setting studies, and their impact on the Court's case-selection process should be more thoroughly studied.

2. Do different factors act as cues to inform and influence the Court during the creation of the discuss list and the selection of petitions for review?

The results of the analyses in this dissertation demonstrate that the factors that act as cues to inform and influence the Court's creation of the discuss list differ in some ways from the cues that inform and influence the Court's decisions to grant review to petitions. For instance, Section V(A)(1) above describes the manner in which my findings show that some cues that significantly influence one stage of the case-selection process do not significantly influence (or have a lesser degree of influence on) the other stage of the process.

Section V(A)(1) also explains that the differing effects of some of the cues on the stages of the case-selection process can be partially explained by the relative cost and value associated with each of the cues. There is some evidence that, as predicted, many low-cost, low-value cues such as lower dissenting opinion, constitutional claim, IFP status, and Ninth Circuit do have a greater effect on the selection of petitions for the discuss list than the selection of petitions for review. Also, this study shows that some cues that operate as both low-cost, low-value and high-cost, high-value cues, such as law

clerk recommendation and amicus curiae briefs, affect both stages of the case-selection process.

However, while the low-cost, low-value and high-cost, high-value cue theory framework is useful in that it does help to explain the importance of some factors that act as cues to the Court during the two stages of its case-selection process, it does not predict the importance of all cues on the process. For instance, not all low-cost, low-value cues have a greater effect on the discuss list (such as alleged conflict), and none of the high-cost, high-value cues studied here has a greater effect on the selection of petitions for review than the discuss list.

Instead, there appear to be factors at play in addition to the relative costs and values associated with cues that impact their importance to the Court during the case-selection process. Because this study also finds that the degree of influence a particular cue may have on one of the stages of the case-selection process sometimes changes depending on the Court being studied, additional research will help to explain the varying impact of different factors on the Court's stages of the case-selection process, such as the composition of the Court's members or political or societal factors.

3. Have Supreme Court agenda-setting trends changed from 1960 to 1992, the span of years between the terms included in this study? If so, how have trends changed?

Because the Court's 1960, 1977, and 1992 terms are studied in this dissertation, this dissertation provides some insight into the manner in which agenda-setting trends changed from 1960 to 1992. Section V(A)(2) above discusses how different cues inform and influence the Court's case-selection process between the 1960, 1977, and 1992 terms. For instance, constitutional claim has a positive, significant relationship with the

selection of a petition for review by the Warren Court, but a constitutional claim does not have a significant relationship with the selection of a petition for review by the Burger and Rehnquist Courts.

Additionally, Section V(A)(2) above explains that while some cues significantly influence the case-selection process during all terms studied, the effects of these cues may vary across Court terms. In other words, the manner in which these cues affect the case-selection process has increased, decreased, or fluctuated widely across terms. For instance, a law clerk's recommendation to grant cert has a positive, significant relationship on both the selection of a petition for the discuss list and for review during all terms studied, but it has a greater effect on the Warren Court than on the Burger and Rehnquist Courts.

Overall, the analyses and results in this Chapter 4 demonstrate that the factors that inform and affect both stages of the Court's case-selection process changed from 1960 to 1992, which suggests that the Court's agenda-setting trends change over time.

VI. Conclusion.

In this Chapter 4 of my dissertation, I discuss the statistical analyses I performed on the data collected on the Court's 1960, 1977, and 1992 terms. I also describe the results of my statistical models provided in Tables 4.1, 4.2, and 4.3, examine the results of the statistical analyses, and explain the manner in which the results of my models address the hypotheses, predictions, and research questions set forth in Chapter 3.

As explained above, my analyses show that some types of cert petitions that are not considered by some agenda-setting studies, including IFP petitions and state petitions,

can have a significant relationship with both stages of the Court's case-selection process and thus should be considered by Court agenda-setting studies.

My findings also indicate that some cues that significantly influence one stage of the Court's case-selection process have a lesser or non-existent influence on the other stage of the case-selection process. My results show that this variation can be partially explained by applying the low-cost, low-value and high-cost, high-value cue theory framework. However, this dissertation also demonstrates that the low-cost, low-value and high-cost, high-value cue theory framework does not provide a complete explanation as to the degree of influence of all cues on Court's case-selection process, and additional explanations regarding the influence of factors on case selection should be explored.

Finally, my analyses show that the factors that influence the Court's case-selection process changed from 1960 to 1992. These findings suggest that agenda-setting trends on the Court do change over time. Additional study on the reasons this variation over time exists, such as whether it is attributable to the Court's make-up or other political or societal factors, will help scholars and legal practitioners to more conclusively identify the factors that influence the Court's case-selection process.

Chapter 5 summarizes and provides a conclusion for this dissertation.

Chapter 5: Conclusion

I. Introduction

This dissertation seeks to answer the overarching research question: How does the Supreme Court of the United States decide which cases it will review? In order to address this question, this dissertation investigates several factors that have been shown to influence both stages of the Court's two-step case-selection process¹³⁰ and agenda-setting trends over time.

Chapter 4 discusses hypotheses and research questions that help to address the overarching research question posed in this dissertation. Through the analysis in Chapter 4, this dissertation identifies factors that influence each stage of the case-selection process across different Court terms.

Section II below summarizes the factors identified in Chapter 4 as a significantly influencing the Court during one or both stages of its case-selection process, which supports and contributes to existing scholarly and legal Supreme Court agenda-setting research. Section III explains some of the additional implications this dissertation has for scholarly agenda-setting research, including the importance of considering all types of petitions for writ of certiorari, both stages of the Court's case-selection process, and agenda-setting trends over time. Finally, Section IV summarizes some of the implications of this dissertation's findings for potential litigants who are considering petitioning the Court for writ of certiorari.

¹³⁰ As a reminder, the two steps of the Supreme Court's case-selection process include the selection of petitions for the discuss list and the selection of petitions from the discuss list for review. See Section II of Chapter 2 for a more thorough description of the two-step case-selection process.

II. The Factors that Influence Decision-Making During Each Stage of the Agenda-Setting Process.

In order to address the overarching research question posed by this dissertation and determine the factors that influence both stages of the Supreme Court's case-selection process, this dissertation applies a low-cost, low-value and high-cost, high-value cue theory framework that has been utilized in previous agenda-setting research (Black and Boyd 2013). By applying this framework, this dissertation identifies factors that significantly influence the Court's decision-making during its agenda-setting process, at least during the terms studied. Specifically, the analyses in this dissertation identify factors that significantly influence the Court during (1) both stages of the case-selection process, (2) only the creation of the discuss-list, and (3) only the selection of petitions for review. This dissertation also identifies factors that do not significantly influence either stage of the case-selection process. All of these factors are discussed below.

The identification of these factors contributes to scholarly research on agenda-setting studies by adding support to previous studies that recognize the same factors as significant influences on the Court's case-selection process, by identifying additional factors that influence the Court's case-selection process that should be considered by future studies, and by pinpointing the factors that have a greater influence on one stage of the case-selection process than on the other stage. Additionally, these findings may benefit a potential litigant who is considering petitioning the Court for writ of certiorari by providing the potential litigant with factors the members of the Court may look for during the case-selection process.

A. The factors that influence both stages of the case-selection process.

This study identifies several factors that act as cues that significantly influence both stages of the Supreme Court's case-selection process. However, it is important to note that as explained in Chapter 4, the level of influence of some factors on the case-selection process varies by Court term, which shows that the factors do not always significantly influence both stages of the case-selection process for all Court terms. Nevertheless, if the results from the models in Tables 4.1, 4.2, and 4.3 are considered together, they point to several factors that influence both stages of the case-selection process.

For example, the models in Tables 4.1, 4.2, and 4.3 indicate that at least for some terms a petition is significantly more likely to be both added to the discuss list and granted review if the petition includes a constitutional claim (or a claim that the petitioner's constitutional rights were violated), if the petition is supported by the United States government (the United States government is petitioning the Court for review or the solicitor general recommends that the Court grant cert), or if the petition is a state petition, meaning it originated in a state supreme court instead of a federal court of appeals. Additionally, a petition's IFP status significantly influences the likelihood of the petition being selected for the discuss list and for review by the Court, as my results show that for some terms an IFP petition is significantly less likely to be placed on the discuss list and selected for review than a paid petition.

Tables 4.1, 4.2, and 4.3 show that two factors positively and significantly influence the case-selection process over all terms studied here. First, a petition is significantly more likely to be discussed and granted cert by the Court if the law clerk

authoring the cert memo with respect to the petition recommends that the Court grant cert. Furthermore, my results support the work of other scholars who find that amicus curiae briefs act as a cue to the Court during the case-selection process (Black and Boyd 2012b; Caldeira and Wright 1988), as I find that as the number of amicus briefs filed in support of or opposition to a petition increases, the likelihood that petition is selected for the discuss list or granted review also significantly increases.

B. The factors that influence the creation of the discuss list.

The analyses in Chapter 4 indicates that some factors have a significant influence on the creation of the discuss list, at least during some terms studied, but do not significantly influence the Court's selection of the petitions it will review. These factors appear to act as cues to signal to the Court whether a petition is worth a second look and a discussion by the Court, but do not signal to the Court whether a petition should be selected for review.

For instance, a petition is significantly more likely to be placed on the discuss list if it involves a dissenting opinion filed by a member of the court immediately below the Court, a civil liberties issue, or when there is an actual, real conflict between opinions by lower courts on an issue, but these factors do not appear to significantly influence the likelihood a petition is selected for review by the Court. Conversely, a petition is significantly less likely to be placed on the discuss list if it is opposed by the United States government, which means the United States is a respondent or the solicitor general opposes the Court granting cert to the petition. Finally, there is some indication, at least during the Warren Court, that petitions from the United States Court of Appeals for the

Ninth Circuit are significantly more likely to be placed on the discuss list compared to petitions from other United States Courts of Appeals.

C. The factors that influence the selection of petitions for review.

When considering the results of the models in Tables 4.1, 4.2, and 4.3 together, there is not a cue that significantly influences the Court during the selection of petitions for review that does not also influence the Court during the creation of the discuss list. In other words, all factors I find to have a significant relationship with the Court's selection of petitions for review during one or more of the terms studied also had a significant relationship with the Court's selection of petitions for the discuss list during one or more of the terms studied. These findings demonstrate to scholars and to potential litigants the importance of the factors discussed in Section II(A) above, as these factors have been shown to influence the Court during both stages of its case-selection process.

D. The factors that do not influence the case-selection process.

This study finds that alleged conflict, or a claim in petition that a conflict exists between lower court opinions on an issue, does not significantly impact the Court's selection of petitions for the discuss list or the selection of petitions for review. This finding has implications for Supreme Court agenda-setting research as it contradicts Caldeira and Wright's (1988) findings in their study of the Court's 1982 term. However, the conflicting results regarding alleged conflict could be because the Court has become aware that attorneys will allege a conflict in a cert petition, even where it does not exist, to gain the Court's attention (Black and Boyd 2013). Thus, the mere allegation of conflict in a petition without confirmation by a law clerk in her memo that the conflict actually

exists may not significantly impact the Court's decision to select a petition for the discuss list or for review.

III. Additional implications for future agenda-setting studies.

In addition to identifying factors that influence the two stages of the Court's case-selection process, the findings in this dissertation have other implications for the future of Supreme Court of the United States agenda-setting research. These implications are discussed below.

A. The importance of considering both stages of the case-selection process.

A central topic in this dissertation is that agenda-setting on the Supreme Court includes a two-step process for selecting the cases the Court will review. Thus, this dissertation continuously expresses how important it is for agenda-setting studies that analyze the Court's case-selection process to consider both stages of the two-step process, as some studies consider only the selection of petitions for review and just a limited number of studies also consider the creation of the discuss list (Black and Boyd 2013; Caldeira and Wright 1990; Provine 1980). Both stages are essential to the Court's process of selecting cases, because the petitions that are selected for review during any given term are chosen only from the list of petitions that were first selected for the discuss list.

The analyses in Chapter 4 provide support for the assertion that agenda-setting studies must consider both stages of the two-step case-selection process, as it is clear that the stages are distinct. Section II of this Chapter 5 summarizes the factors that influence the two stages of the Court's case-selection process. Studies that ignore the first stage of the case-selection process might fail to capture the impact of some of the factors that

influence the Court's agenda-setting process, as some factors influence only the creation of the discuss list.

Chapter 4 also demonstrates that even those factors that influence both the creation of the discuss list and the selection of petitions for review may have a greater influence on one stage of the case-selection process than on the other stage of the process. For instance, Section III(A)(4) of Chapter 4 explains that IFP status has a greater influence on the discuss list stage than on the selection of petitions for review. Therefore, studies that focus only on the Court's selection of petitions for review while ignoring the first step of case selection may not fully realize the degree of impact of factors such as IFP status on the Court's agenda-setting process.

B. The usefulness of cue theory to explain the agenda-setting process.

This dissertation applies a low-cost, low-value, and high-cost, high-value cue theory framework to determine if certain factors provide informational cues to the Court during its case-selection process that signal that a petition is worthy of the discuss list or of review. However, my findings suggest that this cue theory framework does not provide a complete explanation of case-selection on the Court, and thus alone is not sufficient in entirely explaining the case-selection portion of the Court's agenda-setting process.

Section IV(A) of Chapter 2 explains that cue theory posits that the members of the Court will look for certain factors that act as cues in petitions in order to obtain information that aids the justices in making decisions during the case-selection process. In other words, these cues provide informational shortcuts to the Court to help it more quickly determine whether a petition should be added to the discuss list or granted certiorari and reviewed by the Court. Scholars have utilized cue theory in order to explain

the Court's agenda-setting process (Black and Boyd 2013; Caldeira and Wright 1990; Songer 1979; Baum 1977; Ulmer 1972; Tanenhaus et al. 1963). Recent use of cue theory applies a low-cost, low-value and high-cost, high-value framework to the Court's case-selection process (Black and Boyd 2013).

Therefore, applying this framework, cue theory involves categorizing factors that operate as (1) low-cost, low-value, (2) high-cost, high-value, (3) and low-cost, low-value and high-cost, high-value informational cues. In summary, low-cost, low-value cues are low cost in that they require a relatively low amount of time to determine, however, they are low value as they also provide a low level of information to the Court. Conversely, high-cost, high-value cues are high cost in that determining the existence of these cues with respect to cert petitions requires a greater time commitment, but these cues are high value because they provide a greater amount of information about petitions. Finally, some factors operate as both low-cost, low-value and high-cost, high-value informational cues. Section V of Chapter 3 provides a detailed explanation of the factors studied here that fall into each category.

Hypothesis 1 of this dissertation posited that because the time-commitment costs and the informational value associated with cues varies, some cues inform and influence the Court during one stage of the case-selection process that do not inform and influence the Court during the other stage of the process. Because of the cost and value considerations, I also hypothesized that some of the cues that do inform and influence the Court during both stages of the case-selection process have a greater level of influence on

one of the two stages of the case-selection process than on the other stage of the process.¹³¹

My predictions in Chapter 3 explored this hypothesis, expecting (1) low-cost, low-value cues to have a greater influence on the discuss list stage because the Court has a greater number of petitions to sort through at this stage, (2) high-cost, high-value cues to have a greater influence on the selection of petitions for review, because the Court has fewer petitions to consider at this stage and more is at stake when selecting the few cases it will review, and (3) cues that operate as both low-cost, low-value and high-cost, high-value to have an impact on both stages of the case-selection process.

Yet, as explained in Section V(A)(1) of Chapter 4, my analyses offer only partial support for Hypothesis 1, indicating that the application of the low-cost, low-value and high-cost, high-value cue theory framework to the Court's agenda-setting process does not provide a complete explanation for the Court's case-selection decisions. The models in Tables 4.1, 4.2, and 4.3 demonstrate that while most factors identified as low-cost, low-value cues do have a greater influence on the creation of the discuss list than the selection of petitions for review, this is not true for every low-cost, low-value cue.¹³²

Moreover, the models show that the high-cost, high-value cues considered here also have greater influence on the creation of the discuss list than the selection of petitions for review.¹³³ This is opposite of what was predicted and found in other research (Black and Boyd 2013), as under the cue theory framework, high-cost, high-value cues

¹³¹ For example, it is possible that a low-cost, low-value cue influences both stages of the case-selection process; however, based on the low-cost, low-value and high-cost, high-value cue theory framework, this cue likely has a greater influence on the creation of the discuss list than the selection of petitions for review.

¹³² These findings are explained more thoroughly in Section V(A)(1)(a) of Chapter 4.

¹³³ Section V(A)(1)(b) of Chapter 4 explains the results in Tables 4.1, 4.2, and 4.3 with respect to high-cost, high-value cues.

have a greater influence on the Court's decisions to grant review as they involve a greater time commitment. Furthermore, while the analyses in Chapter 4 show that some cues that operate as low-cost, low-value and high-cost, high-value cues influence both stages of the case-selection process, there is an indication that these cues have a greater impact on one stage of the process.¹³⁴

Provine (1980) opines that cue theory is at least at times insufficient in explaining the case-selection process, as her study shows that the presence of cues in a petition does not always lead to the petition being granted certiorari by the Court. Instead, Provine (1980) states that cues may inform the Court during the case-selection process and indicate to the Court that a petition is worth a second look, suggesting that there are factors in addition to those that operate as cues that influence the case-selection process. Therefore, while cue theory may be a tool that helps to explain the case-selection process, this study and Provine's (1980) work indicate that it does not fully explain the case-selection process and thus it would be helpful for subsequent research to determine if another Supreme Court decision-making framework may work together with cue theory to more completely explain the Court's agenda-setting process.¹³⁵

Additionally, it may be possible that the low-cost, low-value and high-cost, high-value cue theory framework specifically, compared to cue theory in general, does not sufficiently explain the Court's agenda-setting process, as some early cue theory studies did not categorize cues as low-cost, low-value or high-cost, high-value. For example, the

¹³⁴ Section V(A)(1)(c) of Chapter 4 describes these findings regarding cues that operate as both low-cost, low-value and high-cost, high-value cues.

¹³⁵ Section IV of Chapter 2 discusses different theories of Supreme Court agenda-setting studies, including cue theory and judicial decision-making theories that have been applied by scholars to the Court's agenda-setting process.

Court may not consider the time commitment required with respect to a high-cost, high-value cue when considering whether a petition should be added to the discuss list, as this study indicates that high-cost, high-value cues are more significant with respect to the creation of the discuss list.

Moreover, as the Court's agenda-setting process is private, it is possible that some of the factors studied here are not correctly categorized within the low-cost, low-value and high-cost, high-value cue theory framework. For instance, it may be possible for future research to determine whether the Court has other ways to gather information regarding some of the cues categorized here as high-cost, high-value cues, which might indicate these cues actually operate as both low-cost, low-value and high-cost, high-value cues. This would help to explain why the high-cost, high-value cues studied here have a greater influence on the creation of the discuss list compared to the selection of petitions for review.

C. The importance of considering agenda-setting trends over time.

Section V(C) in Chapter 2 explains that the existing agenda-setting literature does not adequately examine the Court's agenda-setting process over time. This dissertation attempts to begin to fill the gap in this research by positing in Hypothesis 2 that some of the factors that act as cues to inform and influence the Court during its two-step case-selection process differ between the 1960, 1977, and 1992 terms. Hypothesis 2 also posits that with respect to the factors that do influence the Court across terms, the degree of influence of some of these factors on the Court's case-selection process varies across these terms.

The analyses in Chapter 4 provide some support for Hypothesis 2, indicating that Court agenda-setting trends change over time. Section V(A)(2) of Chapter 4 summarizes this dissertation's findings regarding the different factors that impact the case-selection process during the terms studied. These findings have implications for using agenda-setting research to explain agenda-setting on the Roberts Court, because they suggest that due to variations in agenda-setting trends over time, existing research may not fully explain the agenda-setting process of the current Court.

For instance, the analyses in Chapter 4 that demonstrate that the factors that influence the Court's case-selection process vary over time may also suggest that Court agenda-setting studies, including this dissertation, may have a limited ability to explain agenda-setting on the current Court. As explained in Chapter 2, the Court's case-selection process is private and the information available on the process comes mostly from personal papers of retired or deceased justices. The most recent papers available are the papers of Justice Blackmun, who retired from the Court in 1994. Therefore, the most recent case-selection data that can be studied by agenda-setting studies are the from terms during Justice Blackmun's tenure.

Because the findings of this dissertation show that the factors that influence case selection vary across the Warren, Burger, and Rehnquist Courts, it is possible that there is variation in the factors that significantly influence the case-selection process of the Roberts Court. Without data on the case-selection process of the Roberts Court, the conclusions of this and similar studies may have limited application to the current Court's case-selection process.

In addition to considering the variation over time of the factors that significantly influence both stages of the Court's case-selection process, future agenda-setting research could continue to explore some of the reasons for such variation. For example, studies have shown that in petitions for writ of certiorari attorneys are likely to allege conflict between lower courts because they believe these allegations increase the likelihood the petitions will be chosen by the Court for review (Smith 1999-2000, p. 406). However, the results of the analyses in Chapter 4 suggest that the Court may be aware of attempts to allege conflict to gain its attention during the case-selection process.

For instance, alleged conflict, the variable that measures whether a petition alleges conflict exists, is not significant in any of the models. However, actual conflict, the variable that measures whether conflict between lower courts really exists, is significant in the Burger and Rehnquist Court models in Tables 4.2 and 4.3 for the discuss-list stage of the case-selection process. This at least suggests the Court has realized over time the importance of determining the presence of actual conflict compared to the allegations by petitioners of such conflict.

Moreover, it appears that the factors that impact the case-selection process during a given Court term may be at least partly influenced by the issues that are salient in the United States at the time. For example, it is well known that the civil rights movement grew in the 1960s (Ware 2013). Furthermore, previous studies have indicated that as civil rights issues began to become more popular in the United States, civil rights issues, which may include constitutional and civil liberties claims, also began to become more prevalent on the Court's agenda (Caldeira and Lempert 2020; Black, Boyd, and Bryan 2014; Black and Boyd 2012a; Pacelle 1991; Caldeira and Wright 1988).

The results of this study provide support for the notion that civil rights issues were more important to the Warren Court, during a time when these issues were more salient in the United States, than to the Rehnquist Court. Specifically, Tables 4.1 and 4.3 suggest that the presence of a constitutional or civil liberties claim in a petition for writ of certiorari is less important to the case-selection process of the Rehnquist Court compared to the Warren Court. For example, the constitutional claim variable is significant and positive in the selection and outcome models in Table 4.1, and the civil liberties variable is significant and positive in the selection model of Table 4.1. However, these variables are not statistically significant in either model in Table 4.3, indicating that these factors do not significantly increase the likelihood a petition is discussed or reviewed by the Rehnquist Court.

These findings suggest that the salience of civil rights, including constitutional and civil liberties issues, to the nation in the 1960s at least corresponds to the significant level of influence these factors have on the Warren Court's case-selection process. Additional research may help to solidify the conclusion that the saliency of issues affects the factors that impact the Court's case-selection process, and whether there is causal relationship between issue salience and agenda-setting trends.

D. The importance of considering IFP petitions and petitions from state supreme courts.

Section V(A) of Chapter 2 explains that one of the gaps in the agenda-setting research addressed in this dissertation is the failure of some previous research to consider certain types of cert petitions, including IFP petitions and state petitions. IFP or *in forma pauperis* petitions are unpaid petitions, or petitions filed by individuals who have shown they are unable to pay the Court's required filing fee. State petitions are petitions that

originate in a state's supreme court or court of last resort instead of a federal appeals court. This dissertation's findings show that both of these types of petitions should be considered by agenda-setting studies.

As explained in Chapters 2 and 3, some scholars have justified not including IFP petitions in their studies on the basis that IFP petitions are granted certiorari at a lower rate than paid petitions and may also cause issues with statistical analyses (Smith 1999-2000; Caldeira and Wright 1988). Research has indicated that IFP petitions are granted certiorari at a lower rate than paid petitions, and the models in Chapter 4 show that IFP status significantly decreases the likelihood a petition is selected for the discuss list and for review by the Court during some terms.

However, although this dissertation provides some support for conclusions that IFP status decreases the likelihood of a petition being placed on the discuss list or selected for review, this dissertation shows that IFP petitions should not be excluded from analyses in Supreme Court agenda-setting studies. First, as explained in Section III(A)(4) in Chapter 4, my findings regarding IFP status are not consistent as IFP status does not sign significantly decrease the likelihood petitions are selected for the discuss list or for review for all terms.

Additionally, IFP petitions should be included in agenda-setting studies because they are selected for the discuss list and for review by the Court, even if at a lower rate than paid petitions. IFP petitions often contain other cues, such as constitutional or civil liberties claims, and thus excluding these petitions from consideration likely skews results. Moreover, Chapter 4 of this dissertation shows that it is possible to include IFP petitions in a dataset and perform statistical analyses.

Chapters 2 and 3 also explain that state petitions are sometimes excluded from agenda-setting studies because including these petitions makes it difficult to include measures for ideology for both the Supreme Court and for lower courts (Black and Owens 2011; Owens 2010; Black and Owens 2009a). However, similar to IFP petitions, state petitions also often include other factors that act as cues, such as actual conflict or constitutional claims. Thus, the removal of state petitions from datasets creates selection bias that likely skews results regarding the factors that impact the Court's case-selection process.

Furthermore, the results in Chapter 4 show that during the Warren Court and the Burger Court, state petitions are significantly more likely to be selected for the discuss list and granted certiorari, respectively. As explained in Chapter 4, one reason for this finding may be because the Warren Court frequently invalidated state laws, and the Burger Court often reversed Warren Court decisions invalidating such laws.

Future study could confirm the reasons a petition's status as a state petition significantly impacts the case-selection process of the Warren and Burger Courts and could also investigate the reasons a state supreme court petition might significantly influence the creation of the discuss list during the Warren Court and the selection of petitions for review during the Burger Court. Overall, the results of this study suggest that a state petition may act as a signal to the Court during the case-selection process. Therefore, these petitions should be considered by future agenda-setting research so that the reasons a state petition might be more likely to be discussed or granted certiorari than a petition from a federal appeals court may be more conclusively determined.

E. Considering the court of appeals from which a petition originates.

Previous studies have indicated that the lower court from which a petition originates can influence the Court's decision-making during the case-selection process, especially when the lower court's ideological makeup compared to that of the Supreme Court is considered (Lane and Black 2017; Black and Owens 2012; Scott 2006a; Segal, Spaeth, and Benesh 2005). There is also some evidence that ideological differences between the United States Court of Appeals for the Ninth Circuit and the Supreme Court is one reason that during the second half of the twentieth century the Supreme Court reversed the Ninth Circuit more than it reversed the other United States Courts of Appeals, although there are likely reasons in addition to ideology that contribute to the Court's high rate of Ninth Circuit reversals (Scott 2006a; Scott 2006b). Studies also showed that the Rehnquist Court reviewed Ninth Circuit petitions at a higher rate than petitions from other circuits (Linqiest, Haire, and Songer 2007). Based on these studies, I predict in Chapter 3 that a petition's origination in the Ninth Circuit acts as a factor that positively and significantly influences conservative Courts during the case-selection process.

However, the results of the models in Tables 4.1, 4.2, and 4.3 show that the conservative Rehnquist and Burger Courts are not significantly more likely to discuss or grant review to a petition originating in the Ninth Circuit compared to a petition originating in another circuit. This may indicate that a petition's origination in the Ninth Circuit, which is generally viewed as an ideologically liberal court, is not a factor that significantly influences the more ideologically conservative Rehnquist and Burger Courts to discuss or grant review to the petition. Conversely, the results in Chapter 4 show that

the Warren Court, which is considered more liberal than both the Rehnquist and Burger Courts, is significantly more likely to select a petition that originates in the Ninth Circuit for the discuss list compared to a petition originating in another circuit.

Future agenda-setting research should continue to consider the manner in which the appeals court from which a petition originates is a factor that influences the Court during both stages of its case-selection process. Including a measure for the originating appeals court, including but not limited to the Ninth Circuit, will help scholars to determine whether the Court is significantly more likely to discuss or grant review to petitions from some appeals courts more than others, and the reasons that the Court may be more likely to discuss or review a petition from one appeals court compared to others. Moreover, it may help to explain and build upon this dissertation's findings that the more conservative Burger and Rehnquist Courts are not significantly more likely to discuss or grant review to petitions from the more liberal Ninth Circuit, suggesting that ideological differences may not always be what signals the Court during the case-selection process when it considers the appeals court from which a petition originates.

F. The role of law clerks in the agenda-setting process.

As explained in Chapter 3, previous research demonstrates the importance of law clerks' recommendations in cert memos to grant or deny certiorari on the Court's decisions to grant or deny cert (Black, Boyd, and Bryan 2014; Stras 2007). The results of the models in Tables 4.1, 4.2, and 4.3 provide support for this research by demonstrating that the Court is significantly more likely to both add a petition to the discuss list and to

ultimately select the petition for review if the law clerk authoring the cert memo on the petition recommends that the Court grant certiorari.¹³⁶

Chapter 3 also explains that the existing agenda-setting research that studies law clerks' recommendations considers data from more recent Court terms during which most justices on the Court participate in the cert pool. Through the cert pool, the participating justices' clerks divide the duties of drafting cert memos for the cert petitions. Therefore, justices participating in the cert pool review cert memos drafted by their own law clerks and by law clerks who work for other justices.

Because prior research also indicates that the justices will consider the ideology of a clerk's supervising justice when reviewing the clerk's cert memo on a petition (Black, Boyd, and Bryan 2014) and because the cert pool did not yet exist during the Warren Court, I predict in Chapter 3 that law clerks' recommendations have a greater influence on the Warren Court, during which the justices reviewed cert memos drafted by only their respective clerks. The results in Table 4.1, which are more thoroughly explained in Section III(C)(1) in Chapter 4, provide support for the notion that law clerks' recommendations have a greater impact on both stages of the Court's case-selection process during the Warren Court than during the Burger and Rehnquist Courts, the latter of which utilized the cert pool.

These findings at least suggest that law clerks' recommendations may have a greater influence on the justices when the justices are reviewing cert memos authored

¹³⁶ The results from the models in Tables 4.1, 4.2, and 4.3 show that the Court during all terms studied is more likely to add a petition to the discuss list and to grant certiorari to a petition if the authoring law clerk recommends a "grant" compared to a denial, hold, relist, call for a response, or call for the views of the solicitor general. Section V(D)(1) in Chapter 3 explains that the law clerk recommendation variable was coded "1" for a recommendation of "grant" and "0" for the other recommendations.

only by their respective clerks and thus the justices need not consider the ideology of the authoring clerks' justices. They may also indicate that the degree of influence of law clerks' recommendations on the stages of the case-selection process is somewhat diminished when the cert pool is used, as the impact of the recommendations is greater on the case-selection process of the Warren Court. Further research may help to pinpoint the reasons law clerks' recommendations have a greater impact on the Warren Court.

Similarly, agenda-setting research that considers individual-justice voting behavior during the case-selection process, instead of considering the collective voting behavior of the Court like this study,¹³⁷ might also investigate the influence of law clerks' recommendations on the justices who choose to not participate in the cert pool compared to the justices who choose to participate in the cert pool.¹³⁸ This will help to determine the degree that the influence of law clerks' recommendations on justices' decisions during both stages of the case-selection process differs when justices participate in the cert pool compared to when justices choose not to participate in the cert pool.

G. The role of amicus curiae briefs in the agenda-setting process.

This dissertation also provides strong support for previous research that shows the important role of amicus curiae briefs during the case-selection process. For instance, prior research demonstrates that amicus briefs both in support of and in opposition to a petition act as a reliable cue to the Court as to the significance of the issues presented in that petition and increase the likelihood the petition is granted certiorari (Caldeira and

¹³⁷ Agenda-setting studies that analyze individual-justice voting behavior compared to the Court's collective decision-making behavior are discussed in Section IV(C) of Chapter 2.

¹³⁸ Not all justices choose to participate in the cert pool. For instance, Justices Marshall, Stevens, Brennan, and Stewart all chose not to participate in the pool. (Perry 1991a; Caldeira and Wright 1990). Because we do not have access to a justice's personal papers that are more recent than Justice Blackmun's papers, it is not clear whether any of the justices on the Roberts Court have chosen not to participate in the cert pool.

Wright 1988). The results described in Section III(C)(3) of Chapter 4 strongly supports this research by showing for all Court terms studied that as the number of amicus curiae briefs in support of and in opposition to a petition increases, the likelihood that the petition is added to the discuss list and ultimately selected for review by the Court significantly increases.¹³⁹

Given these findings, Supreme Court agenda-setting research should continue to consider the role of amicus curiae briefs on both stages of the Court's case-selection process, as this dissertation and previous studies demonstrate the importance of amicus curiae briefs to a petition's likelihood of being added to the discuss list and being selected for review. A third party's involvement as amicus, which generally entails the third party spending substantial money and resources to produce an amicus brief,¹⁴⁰ appears to signal to the Court that a petition should be given additional consideration. This is the case whether the brief is in support of the petition, in opposition to the petition, or explains the third party's own views on the issues.

Additionally, because prior research has shown that the number of amicus briefs filed both in support of and in opposition to a petition significantly increases the likelihood a petition is reviewed by the Court (Caldeira and Wright 1988), this dissertation includes a measure for the total number of all amicus briefs, regardless of whether they supported or opposed their respective petitions. Other studies also include a

¹³⁹ Section V(D)(3) in Chapter 3 provides a more thorough explanation of the role of amicus briefs on the Court's case-selection process. Section III(C)(3) in Chapter 4 also explains that the coefficient for the amicus curiae variable in the selection model in Table 4.1 is blank because in the 1960 Warren Court dataset, all petitions that had at least one amicus brief filed in support or opposition were discussed by the Court and therefore there was no variance in the variable to explain. This shows the importance of amicus briefs to the Warren Court's decisions to add petitions to the discuss list.

¹⁴⁰ Amicus curiae briefs are expensive as the briefs require considerable resources and research to complete. (Songer and Sheehan 1993; Box-Steffensmeier, Christenson, and Hitt 2013).

variable that measures all amicus briefs related to a petition, regardless of the briefs' positions (Calderia and Lempert 2020; Black and Boyd 2012a; Black and Owens 2009a).

However, although contrary to findings in this dissertation regarding the influence of opposing amicus briefs, Caldeira and Wright (1998) do not find support in a later study for their earlier finding that the number of amicus curiae briefs in opposition to a petition increases the likelihood that the petition is reviewed. Based on these mixed results, Black and Boyd (2012b) include a variable in their study that measures only the number of amicus briefs in support of petitions, and they find a positive relationship between the number of amicus briefs in support of a petition and the likelihood it is selected for review. However, Black and Boyd (2012b) do not consider the number of amicus briefs in opposition to petitions.¹⁴¹ Future studies on the impact of amicus curiae briefs on the Court's case-selection process may choose to separately measure the number of amicus briefs in support of and in opposition to petitions in order to reconcile the apparent conflict between Caldeira and Wright's 1988 and 1998 studies regarding the influence of opposing amicus briefs on the Court's decision to grant review to a petition.

H. The influence of the United States government on the agenda-setting process.

Some Supreme Court agenda-setting studies investigate the role of the United States government in both stages of the Court's case-selection process. These studies find that the Court is more likely to place a petition on the discuss list if the United States government either supports or opposes review of that petition (Black and Boyd 2013).

Previous studies also find that a petition is more likely to be granted review if it is

¹⁴¹ Although Black and Boyd (2012b) consider other factors, they do find a significant relationship between the number of amicus briefs in support of a petition and the likelihood the petition is granted review. Black and Boyd (2012b) do not consider the selection of petitions for the discuss list stage of the case-selection process in their analysis.

supported by the United States government (Black and Boyd 2013; Provine 1980; Tanenhaus et. al 1963). Results regarding the impact of the United States government's opposition to a petition on the likelihood it is granted review are mixed, however, and Black and Boyd's (2013) more recent study, which considers both stages of the case-selection process, concludes that the United States government's opposition has no significant impact on the likelihood a petition is granted review.

Based on previous studies, I predict in Chapter 3 that both the United States government's support of and opposition to a petition increases the likelihood a petition is added to the discuss list, that the United States government's support of a petition increases the likelihood a petition is granted certiorari, and that the United States government's opposition to a petition has no significant impact on whether a petition is granted or denied certiorari.¹⁴²

Section III(C)(2) of Chapter 4 explains that the results of my models regarding the U.S. supports grant and U.S. opposes grant variables are mixed, as the results are not the same across all models and provide only partial support for my predictions.¹⁴³ Because

¹⁴² Section V(D)(2) of Chapter 3 describes how the "U.S. supports grant" and "U.S. opposes grant" variables are measured. Additionally, Section IV of Appendix B explains that the U.S. opposes grant variable was excluded from the outcome models in Tables 4.1, 4.2, and 4.3, and the reasons the variable was excluded, which includes evidence that this variable has no significant impact on the Court's decisions to grant review to petitions.

¹⁴³ For example, Table 4.1 shows that the United States government's support of a petition positively influences the likelihood it is both discussed and reviewed by the Warren Court, but the United States government's opposition to a petition does not have a significant impact on whether a petition is discussed by the Warren Court. However, both variables are significant in the selection model of Table 4.2 for the 1977 Burger Court term, demonstrating they significantly impact the creation of the discuss list, but the United States government's support of a petition makes it more likely it will be discussed by the Burger Court while the government's opposition makes it less likely it will be discussed by the Burger Court. The U.S. supports grant variable is not statistically significant in the outcome model in Table 4.2, which shows that the United States government's support does not significantly increase or decrease the likelihood that a petition is granted review by the Burger Court. Neither variable is significant in the selection model in Table 4.3, indicating neither the United States government's support of or opposition to a petition impacts the Rehnquist Court's creation of the discuss list, but the U.S. supports grant variable is positive and significant in the outcome model in Table 4.3, which indicates that a petition with the United States government's support is significantly more likely to be granted review by the Rehnquist Court.

my models provide only some support for Black and Boyd's (2013) conclusions regarding the influence of the United States government's support of or opposition to a petition on both stages of case selection, additional research in this area would help to narrow down the degree of impact of the United States government's support of and opposition to a petition on case selection.

For instance, Caldeira and Lempert (2020) opine that their findings regarding the varying effect of the United States government as a petitioner on the creation of the discuss list by Chief Justices Hughes, Warren, and Burger is likely due to factors such as the standing of SG and the ideologies of the chief justice compared to that of the SG. Additional study could help to determine if these factors influence the fluctuating effect across terms found here of the United States government's support of a petition on the case-selection process.

Moreover, the conclusions of Caldeira and Lempert (2020) regarding the impact of the standing and ideology of the SG, as well as the results in Tables 4.1, 4.2, and 4.3, suggest that it may be beneficial for future research to separately measure the influence of the SG on the case-selection process. For example, the U.S. supports grant variable in this study measures whether (1) the United States government is a petitioner or (2) the SG recommends cert be granted in an amicus brief or in a response to a request for her views from the Court. Section V(D)(2) of Chapter 3 predicts that the influence of the United States government's support of a petition has a greater influence on the selection of petitions for review during the Burger and Rehnquist Courts compared to that of the Warren Court, as the SG did not yet submit amicus curiae briefs to the Court in the 1960s.

However, the models in Tables 4.1, 4.2, and 4.3 suggest that the impact of the United States government's support of a petition being granted cert is greater during the Warren Court than during the Burger or Rehnquist Courts, even though the SG did not submit amicus briefs during the Warren Court. Therefore, it may be helpful if subsequent research separately measures whether the United States government is a petitioner and whether the SG recommends granting cert as amicus or in response to a call from the Court for her views to determine if these may be factors that independently influence the Court's case-selection process. Separately measuring whether the United States government is a petitioner or whether the SG recommends cert be granted may also help to more accurately identify the SG's impact on both stages of the case-selection process.

One possible reason for the results in Tables 4.1, 4.2, and 4.3 that indicate that the impact of the United States government's support of a petition is greater during the Warren Court than the Burger or Rehnquist Courts could be that like alleged conflict, the United States government's support of a petition (including support by the SG), or the government's general involvement in the case that is the subject of a petition, has become less useful as a cue to the Court as it could be increasingly used over time to attract the Court's attention during the case-selection process.

This is likely not the case, however, as studies indicate that involvement by the SG during the Court's case-selection process has not grown, much less increased in order to influence case selection. Cordray and Cordray (2010) study the role of the SG in the Court's case-selection process and find that the SGs during the Rehnquist Court and early Roberts Court have continued to limit their involvement as *amicus curiae* to petitions that

“directly and substantially affect the federal government’s institutional interests.” (p. 1323).

Moreover, the SG’s involvement as amicus during the case-selection process has actually decreased over time. Cordray and Cordray (2010) find that number of cases in which the SG participates as amicus curiae during the case-selection process has decreased steadily since the Burger Court, and that this reduced involvement by the SG occurred independently of the Court’s shrinking docket over the same time period. Since 1980, the SG has instead expanded participation as amicus curiae during the merits stage, increasing SG involvement in the Court’s cases from about 60% in 1980 to about 75% by 2010 (Solimine 2013; Cordray and Cordray 2010).

It is possible, therefore, that the seemingly greater impact of the United States government’s support of a petition during the Warren Court than the Burger or Rehnquist Courts could be because of the SG’s decreasing role during the case-selection process. Additional research is needed to determine if this is the case, and separately measuring the impact of the United States government as a party and the SG’s participation, as suggested above, will be beneficial to future study.

I. The implications for the study of agenda-setting within the context of American democracy.

As a Supreme Court agenda-setting study, this dissertation does not consider the manner in which the Supreme Court through case law impacts democracy or democratic institutions in the United States, nor does it seek to determine whether the Supreme Court’s selection of petitions for review appears to be impacted by majority views.¹⁴⁴

¹⁴⁴ There may be several ways in which the relationship between the American public’s opinion and the Supreme Court’s agenda-setting process might be studied. For instance, future study could investigate whether during a specific term the petitions the Supreme Court selects for the discuss list and for review

However, the results of this dissertation have some implications for the study of the Court's agenda-setting process within the context of American democracy, however attenuated.

The Supreme Court has often been considered the least democratic of the three branches of the United States federal government, because Supreme Court justices are appointed rather than elected, they are appointed to lifetime terms, and they are removable from their positions only through a very rarely used impeachment process.¹⁴⁵ Therefore, the members of the Court arguably do not have political responsibility to the American public and are relatively insulated from public opinion.

The results of this dissertation suggest that in addition to being the least democratic branch, access to the Court by most citizens of the United States is limited. For instance, parties with greater resources, such as time, education, and money, are probably more likely to have cert petitions discussed and reviewed by the Court because they may have greater knowledge about the Court's case-selection process and the ability to hire attorneys who have experience in drafting petitions featuring cues that attract the Court.

In addition, as explained in Section III(G), a party who solicits an amicus brief at the time its cert petition is submitted to the Court is more likely to have the petition selected for the discuss list and for review. Due to the cost of amicus briefs, however,

reflect the types of issues that are important to the majority of the American public during that time, if an appropriate measure for the issues important to the American public during specific time periods is identified. A study that attempts to determine whether the Supreme Court's decisions in cases it selects for review actually reflect majority views is more appropriate for a study focused on Supreme Court decision-making compared to a study focused on Supreme Court agenda-setting.

¹⁴⁵ The use of the impeachment process is so rare that only one Supreme Court justice, Justice Samuel Chase, has ever been impeached. The Senate acquitted Justice Chase after he was impeached by the United States House of Representatives in 1805.

such a party would likely have financial resources greater than the average person because an amicus brief is expensive to produce and would be a risky expenditure to undertake in a case prior to it being selected for review. This indicates that those parties who have greater resources also have greater access to the Supreme Court. Future study could continue to explore the implications of the Court's case-selection process on individuals' access to the Court.

IV. Additional implications for litigants petitioning the Supreme Court.

This dissertation may also aid potential litigants who hope to catch the Court's attention during both stages of the case-selection process so that their petitions are granted writ of certiorari, as there is evidence that petitioners do consider the factors the Court looks for during the case-selection process (Black and Boyd 2013; Smith 1999-2000; Caldeira and Wright 1988; Roehner and Roehner 1953). The identification of the factors that influence the Court's case-selection process that are summarized in Section II of this Chapter 5 outline for litigants the characteristics the Court may look for in petitions when it creates the discuss list and selects petitions for review.

However, this dissertation's ability to aid potential litigants who wish to have their petitions discussed and granted review by the Court may be somewhat limited. First, litigants have varying degrees of control over whether some of the factors identified above are present in petitions. In addition, this study and Provine (1980) demonstrate that the presence of these factors does not always predict that a petition is added to the discuss list or granted review. Furthermore, this dissertation demonstrates that some of the factors that influence the Court's case-selection process have changed over time, and thus some

of the factors that significantly influence the current Roberts Court may be different than those identified here, as data from the Roberts Court is not yet available for study.

Nevertheless, this dissertation still identifies factors that do impact the Court's case-selection process, even if the impact of some of these factors varies over time, and thus the implications of this dissertation for potential litigants who wish to have their cases reviewed by the Court are discussed below.

A. Potential litigants should be aware of both stages of the case-selection process.

This dissertation shows the importance of considering both stages of the Supreme Court's case-selection process. Litigants who consider petitioning the Court for review of their cases should be aware of both stages of the Court's case-selection process, as a petition must first be selected for the discuss list before it is selected by the Court for review. Additionally, as discussed in Section II above, some of the factors that significantly influence the creation of the discuss list differ from the factors that significantly influence the selection of petitions for review. Therefore, a potential litigant who is not aware of the creation of the discuss list as a distinct first step in the case-selection process may overlook highlighting factors in a cert petition that have an influence on only the Court's creation of the discuss list.

B. The implications of cue theory for potential litigants.

Section III(B) above explains how this dissertation applies the low-cost, low-value and high-cost, high-value cue theory framework to the Court's two-stage case-selection process. The results of the models in Tables 4.1, 4.2, and 4.3 indicate that some factors work as cues that provide information to the members of the Court about a cert petition during the case-selection process, and also influence the likelihood that petitions

are discussed by or selected for review by the Court. Therefore, a litigant who is contemplating petitioning the Court for writ of certiorari may benefit from considering these factors, as the presence of one or more of these factors may impact the likelihood the litigant's petition is discussed by the Court and selected for review.

Section II identifies and summarizes the factors that significantly influence the likelihood a petition is either selected for the discuss list, selected for review, or selected during both stages of the Court's case-selection process. Potential litigants may want to consider whether their cases feature one or more of these factors before allocating and spending resources on petitioning the Court for review.¹⁴⁶

Moreover, a potential litigant should confirm that one or more of these factors is actually present with respect to her case, as merely alleging the existence of these factors in a cert petition is not likely to be sufficient to increase the possibility that a petition is selected for review. As an example, this study has discussed how there is some evidence that attorneys sometimes allege a conflict between lower courts in order to increase the likelihood their clients' petitions are selected for review, even if the conflict between lower courts is non-existent (Black and Boyd 2013; Smith 1999-2000; Roehner and Roehner 1953). However, this dissertation shows that a mere allegation of conflict does not significantly impact the likelihood a petition is discussed by or selected for review by the Court; instead, only actual conflict is shown to have a significant impact on the Court's case-selection process.¹⁴⁷

¹⁴⁶ Or, with respect to a factor that decreases the likelihood a petition is selected for review, litigants may want to confirm that their cases do not feature such a factor.

¹⁴⁷ Specifically, the results in Chapter 4 show that the presence of actual conflict in a petition significantly increases the likelihood it is discussed by the Burger and Rehnquist Courts.

Furthermore, while this dissertation shows that there are factors that influence the likelihood a petition is selected for review, and thus appear to work as informational cues to the Court during the case-selection process, I conclude that the application of the low-cost, low-value and high-cost, high-value cue theory framework does not provide a complete explanation of the Court's case-selection process. Consequently, the presence of these cues in petitions may not always result in the petitions being discussed or selected for review by the Court. Therefore, while litigants who are considering petitioning the Court should be aware that the factors do play a role in the case-selection process and that the presence of these factors with respect to their petitions will likely increase the probability their petitions are discussed and selected for review, these factors do not guarantee a petition will be discussed and selected for review.

C. The implications for potential litigants of changing agenda-setting trends over time.

This dissertation also demonstrates that Supreme Court agenda-setting trends change over time, which has implications for potential litigants, especially those who choose to consider the findings of this and other agenda-setting studies before dedicating resources to petition the current Court for writ of certiorari. For instance, while Section IV(B) above discusses the manner in which it may be beneficial for potential litigants to consider the factors that act as cues to the Court during the case-selection process, this study shows that at least some of the factors that significantly impact the Court during case selection vary across the Warren, Burger, and Rehnquist Courts. This suggests that agenda-setting trends might have changed with respect to the current Roberts Court, which may limit the usefulness of this study for potential litigants who wish to apply its findings regarding past Courts to the Roberts Court.

To provide an example, Table 4.1 indicates that a constitutional claim significantly increases the likelihood a petition is discussed and selected for review by the Warren Court. Conversely, a constitutional claim does not significantly increase the likelihood a petition is discussed or selected for review by the Rehnquist Court. This suggests that this factor has become less important to the Court's case-selection process over time, and, if this trend has continued, that a petition that features a constitutional claim is not significantly more likely to be discussed or reviewed by the Roberts Court. However, because sufficient data on the case-selection process of the current Roberts Court is not available, we can only speculate based on agenda-setting trends identified here as to the importance of these factors to the current Court.

Furthermore, some factors such as amicus curiae briefs and law clerks' recommendations to grant certiorari significantly influence both stages of the case-selection process of all Court terms studied here. While a lack of data on case selection during the Roberts Court makes it impossible to determine whether these factors have the same influence with respect to the Roberts Court, the findings here suggest that they have had a steady impact on the Court's case-selection process over time thus likely still have a significant relationship with the likelihood a petition is discussed by and selected for review by the Roberts Court.

In summary, findings that agenda-setting trends have changed over time shows that the usefulness of this and other agenda-setting studies for potential litigants, especially those who choose to use agenda-setting research to determine the likelihood their petitions may be discussed and reviewed by the Roberts Court, may be limited. However, given that sufficient data on the current Court's case-selection process is not

available, potential litigants should still consider the factors that are shown here to significantly influence the Court's case-selection process, especially those factors that are significant across terms such as amicus curiae briefs and law clerk recommendations.

D. The impact of IFP status on the likelihood a petition is selected for review.

As explained in Section III(D) above, IFP petitions are unpaid petitions, which means they are petitions filed by litigants who demonstrate they are unable to pay the Court's required filing fee. Members of the Court can easily determine the IFP status of a petition, as IFP petitions are numbered differently than paid petitions and thus have recognizable docket numbers.¹⁴⁸ Previous research shows that a smaller number of IFP petitions are granted certiorari than paid petitions, suggesting that litigants who file IFP petitions may be less likely to have their petitions reviewed by the Court than litigants who file paid petitions (Wachtell and Thompson 2009; Gressman 2007).

While Tables 4.1, 4.2, and 4.3 indicate that IFP petitions may be less likely to be discussed or granted certiorari than paid petitions, these results are mixed.¹⁴⁹ For instance, the models show that IFP status significantly decreases the likelihood that the Warren Court both discusses and reviews a petition, but that IFP status does not significantly decrease or increase the likelihood the Rehnquist Court discusses or reviews a petition. In other words, IFP status has a negative, significant influence on the Warren

¹⁴⁸ This is at least the case for the Warren, Burger, and Rehnquist Courts, as docket numbers from these Courts are available for study.

¹⁴⁹ Section III(A)(4) of Chapter 4 explains that the Warren Court is significantly less likely to both discuss and grant review to an IFP petition, while the Burger Court is only significantly less likely to discuss an IFP petition. In other words, IFP status does not have a significant influence on the likelihood an IFP petition is selected for review by the Burger Court. Moreover, the Rehnquist Court is not significantly more or less likely to discuss or review an IFP petition, suggesting the impact of IFP status is greater on the Warren Court than the Rehnquist Court.

Court's case-selection process, but it has no significant impact on the Rehnquist Court's case-selection process.

These findings may suggest that the importance of IFP status to the Court's decision-making during both stages of its case-selection process may have decreased over time, although additional research is needed to confirm this conclusion. At the very least, these findings indicate that potential litigants who file IFP petitions may not be significantly less likely to have their petitions discussed or reviewed by the current Court, as findings with respect to the impact of IFP status on case-selection are mixed and agenda-setting trends regarding IFP petitions may have changed over time.

In addition, even if IFP petitions are less likely to be discussed or granted review, as shown in Tables 3.1, 3.2, and 3.3, some IFP petitions are discussed and reviewed by the Court. Thus, it may help potential litigants (or their counsel) who have no choice but to file IFP petitions because of financial constraints to be aware of other factors that may act as cues to the Court that their petitions merit discussion and review by the Court.¹⁵⁰

E. The impact of the court in which a petition originates on the likelihood a petition is reviewed.

This study provides some indication that the identity of the court in which a petition originates may influence the likelihood it is discussed and ultimately selected for review. While potential litigants in a dispute have some ability to choose the courts in which to file their claims, jurisdiction, venue, and forum selection clauses provide some limitations on litigants' freedoms to file claims in the courts they choose. Thus,

¹⁵⁰ It is worth noting that although petitioners filing IFP petitions do not have the financial means to pay the Court's filing fee, a majority of IFP petitions are drafted by attorneys (Lane 2003). Both federal law and Supreme Court Rule 39.7 both provide for the appointment of counsel to litigants who are unable to afford counsel (28 U.S.C. Section 1915(e)); Rules of the Supreme Court of the United States (2019).

jurisdiction, venue, and forum selection may have an indirect impact on the likelihood that a petition involving a civil matter is selected for review by the Court, as they limit the courts in which litigants may bring their claims.

Courts in the United States must have jurisdiction to review a case brought by litigants¹⁵¹ (Yeazell 2012). Jurisdiction includes personal jurisdiction, or authority over the parties to a case, and subject matter jurisdiction, or authority over the matter that is in dispute (Yeazell 2012). The Federal Rules of Civil Procedure permit waiver of personal jurisdiction, and thus parties may subject themselves to the jurisdiction of a court that otherwise would not have personal jurisdiction over the parties.¹⁵² However, under the rules subject matter jurisdiction may not be waived and thus a case must be heard by a court with authority over the subject matter involved in the case.

In general, cases must be brought in a proper venue, which refers to the location of the court in which a case is heard. With respect to federal courts, federal law under 28 U.S.C. Section 1391 determines whether a case is brought in a proper venue, although cases may be heard in an improper venue as the Federal Rules of Civil Procedure also allow parties to waive improper venue.¹⁵³

¹⁵¹ Article III of the United States Constitution provides for the jurisdiction of federal courts (except for those courts that are Article I courts) (Yeazell 2012). Under the Constitution, Congress has some control over the jurisdiction of federal courts (Yeazell 2012). Article III of the United States Constitution provides for federal courts to have jurisdiction over cases that arise under the Constitution or laws or treaties of the United States, that involve ambassadors, consuls, and other public ministers, admiralty and maritime claims, or the United States as a party, or that arise between two or more states, between a state and a citizen of another state, between citizens of the same state claiming lands under grants of different states, or between a state or its citizens and foreign states, citizens, or subjects.

¹⁵² Federal Rule of Civil Procedure 12(h) provides that personal jurisdiction may be waived. Under the rule, waiver of personal jurisdiction may be intentional by a party, but a party may also unintentionally waive personal jurisdiction by, for example, failing to raise lack of personal jurisdiction in a motion in a timely manner as required under the Federal Rules of Civil Procedure.

¹⁵³ Federal Rule of Civil Procedure 12(h) provides for the waiver of improper venue, whether such waiver is intentional or unintentional by the parties.

Forum selection clauses are contractual provisions in which the parties to a contract agree to litigate disputes that arise under the contract in a specific location or court. A forum selection clause may provide a court that otherwise might not have personal jurisdiction over one or both parties with personal jurisdiction over the parties. A forum selection clause may also establish a venue for settling a potential dispute by selecting a specific location or court in which disputes arising under the contract will be heard.¹⁵⁴

The analysis in Chapter 4 suggests that the court in which a petition originates may have some influence on the likelihood that the petition is added to the discuss list and granted certiorari by the Court. However, it may not be practical for a potential litigant to identify a specific court in a forum selection clause, or to select a specific court in which to file a claim, based on potentially increasing the likelihood her case will be selected for review by the Court.

First, as described above, a litigant's ability to choose a court in which to file her claims is limited by jurisdiction, venue rules, and sometimes a forum selection clause. Second, very few litigants in the United States appeal cases to the Supreme Court, so litigants have other considerations to weigh when choosing courts in which to file their claims. Nevertheless, the findings here may provide parties who are already involved in litigation another factor to consider if they are contemplating petitioning the Supreme Court for writ of certiorari.

¹⁵⁴ For example, a forum selection clause may state that disputes must be heard in the courts of a specific state, or it may specify a specific court in which disputes must be heard, such as the United States District Court for the Eastern District of Missouri. While the Supreme Court held in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas* that forum selection clauses that select a venue may be enforceable, there are some limitations on clauses that select a venue that could render them unenforceable (Dodson 2017).

For example, as described above and explained in Section IV(A) of Chapter 4, Tables 4.1, 4.2, and 4.3 show that during some Court terms a petition originating in a state supreme court is significantly more likely to be placed on the Court's discuss list or granted review than a petition originating in a federal appeals court. More importantly to litigants with claims in state courts, the models also show that for all terms a petition originating in a state supreme court is not significantly less likely to be selected for review than a petition originating in a federal appeals court. Thus, these results inform parties who are considering petitioning the Court and who litigated in state court, whether due to jurisdiction, venue, or forum selection limitations, that they are not less likely to have cert petitions discussed or reviewed by the Court than petitioners whose cases were litigated in federal courts.

Additionally, the models in Tables 4.1, 4.2, and 4.3 provide some evidence that the Court may be more likely to discuss petitions from one United States Court of Appeals circuit compared to petitions from the other circuits, as they show that the Warren Court is significantly more likely to discuss petitions originating in the Ninth Circuit compared to other circuits.¹⁵⁵ These findings indicate that litigants with petitions originating in one United States Court of Appeals circuit may be more likely to have their petitions reviewed than litigants with petitions from other circuits.

However, because this study included a variable that measures only whether a petition is from the Ninth Circuit compared to all other circuits, additional research in this area is needed. As an example, future research could analyze whether petitions from

¹⁵⁵ The analyses in Chapter 4 show that the Warren Court is significantly more likely to discuss a petition originating in the Ninth Circuit than petitions originating in other circuits, although origination in the Ninth Circuit does not have a significant impact on either stage of the case-selection process during the Burger and Rehnquist Courts.

other United States Courts of Appeals are significantly more likely to be discussed or granted review by the Warren, Burger, or Rehnquist Courts. Overall, additional exploration on the influence of the identity of the court in which a petition originates on the Court's case-selection process is needed to provide more useful information to litigants who are considering petitioning the Court for writ of certiorari.

F. The influence of law clerks on the likelihood a petition is reviewed.

Section III(F) above explains that the results in Tables 4.1, 4.2, and 4.3 provide strong support for the notion that law clerks' recommendations in cert memos to grant certiorari significantly influence both stages of the Court's case-selection process. Specifically, during all terms studied, a petition is significantly more likely to be discussed and granted review by the Court if the law clerk authoring the cert memo on the petition recommends that the Court grant certiorari.

At first glance, these findings may appear to be of limited use to a potential litigant because a petitioner has no direct control over whether the law clerk drafting a cert memo on his petition recommends that the Court grant review. However, it is important for potential litigants to be aware of the strong influence of law clerks' recommendations on the Court's decision-making during the case-selection process, because a petitioner does have control over the manner in which he drafts the petition for certiorari that will be reviewed by the law clerk authoring the cert memo on his petition.

Section III(A) of Chapter 3 discusses the role of cert memos in the case-selection process. In short, each cert petition is assigned to a law clerk who drafts a cert memo summarizing the petition for the Court. Cert memos provide a variety of information to the Court about a petition, including a synopsis of the petition, in which the authoring law

clerk identifies the reasons she thinks the petition has or does not have characteristics that make it cert worthy. In this section of the cert memo, the law clerk may identify whether some of the factors that this study shows influences the Court's case-selection process are present with respect to the petition, such as constitutional or civil liberties claims made by the petitioner, any alleged or actual conflicts between lower courts on an issue, or whether there was a dissenting opinion filed by a member of the lower court from which the petition originated.¹⁵⁶

A petitioner with knowledge of the role cert memos play in the Court's case-selection process may be able draft her cert petition in a manner that gains the attention of the law clerk assigned to draft a cert memo on her petition. For example, a potential litigant may raise any constitutional or civil liberties issues present in her petition or highlight any conflicting opinions between lower courts on a matter at issue in her case. Identifying characteristics law clerks appear to look for when reviewing cert memos may increase the likelihood that a law clerk recommends the Court grant cert.

However, while it may be helpful for potential litigants to draft their cert petitions in a manner that gains a reviewing law clerk's attention, highlighting the characteristics listed above does not guarantee an authoring law clerk will recommend the Court grant cert. Additionally, the content of cert memos indicates that law clerks do thorough, independent research with respect to cert petitions, so a petitioner's claim that some of these characteristics are present when they are not is not likely to increase his chances

¹⁵⁶ This study provides some support that these factors significantly influence the Court's decision-making during the case-selection process. However, whether these factors influence a law clerk's decision to recommend cert be granted is a related but separate question. As these factors are important to the Court during case selection, at least some of the time, law clerks' practice of mentioning in cert memos whether these factors are present suggests law clerks know their importance to members of the Court and that law clerks may consider them when they make their recommendations. However, further research is needed to conclude that these factors significantly impact law clerks' recommendations regarding granting cert.

that a law clerk recommends cert be granted to his petition. Law clerks, for example, note when a petitioner alleges a conflict exists between lower courts, but confirm for the Court whether the allegations have merit and the conflict actually exists.

G. The influence of amicus curiae briefs on the likelihood a petition is reviewed.

Section III(G) above also discusses the important role of amicus curiae briefs during both stages of the Court's case-selection process. In summary, this study provides strong support for research that shows that as the number of amicus briefs filed both in support of and opposition to a petition increases, the likelihood the petition is added to the Court's discuss list and granted review by the Court significantly increases.

There is evidence that litigants are aware of the positive impact of amicus briefs on Supreme Court decision-making, at least with respect to the Court's decision on the merits of a case granted review, as litigants often solicit and even manage amicus briefs¹⁵⁷ (Simard 2008, p. 708; Harrington 2005). The results of this dissertation may help to inform potential litigants that in addition to impacting the Court's decision on the outcome of a case, amicus curiae briefs, whether in support of or in opposition to a petition, increase the likelihood a petition is discussed and ultimately granted review by the Court.

Therefore, litigants may also choose to solicit amicus curiae briefs in support of their petitions when their petitions are submitted to the Court in order to increase the chances their petitions are selected for review. The findings in this study regarding the impact of amicus briefs on the case-selection process is likely more useful to litigants

¹⁵⁷ Litigants may solicit private parties to participate as amici, and there is even some evidence of parties attempting to obtain an amicus curiae brief from the SG (Simard 2008). For example, Kenneth Starr paid legal fees of \$750 an hour to attempt to solicit an amicus curiae brief from the SG to prevent the SG from supporting the opposing side in a dispute (Mauvo 2006).

with considerable resources, however, as it is often costly to solicit and complete amicus curiae briefs. In other words, many litigants may not have the resources that are needed to solicit amicus briefs solely for the purpose of increasing the likelihood their petitions are selected for review.

H. The influence of the participation of the United States government on likelihood a petition is reviewed.

A potential litigant who is contemplating whether to spend resources to petition the Court for writ of certiorari may benefit from considering possible involvement by the United States government in his case. Although the results of this study are mixed regarding the role of the United States government on the likelihood a petition is discussed or selected for review, during at least one term studied the United States government's support of or opposition to a petition has a significant relationship with the likelihood the petition is discussed or reviewed by the Court.¹⁵⁸

Specifically, considering the results of the models in Tables 4.1, 4.2, and 4.3 together, the United States government's support of a petition may make it more likely that a petition is granted review. The variable measuring United States government support of a petition considers whether the United States is a petitioner or the SG recommends cert be granted in an amicus brief or in a response to a request for her views from the Court. These findings may have limited use for potential litigants, as litigants who are considering petitioning the Court for review will not face the United States government as a petitioner and may not have an indication as to whether the SG will participate in their cases by submitting an amicus brief. There are some attorneys,

¹⁵⁸ Footnote 143 above summarizes the findings regarding the U.S. support variable and the U.S. opposition variable.

however, who believe that under some circumstances a petitioner may increase the likelihood the SG becomes involved in a petition.

Similar to alleged and actual conflict, attorneys are aware of the potential importance of obtaining the SG's involvement in a petition to the likelihood the petition is selected for review. Millett (2009) provides advice to attorneys petitioning the Court for review of their clients' cases, suggesting that parties should draft cert petitions with the intent of not only receiving a grant of certiorari, but also with a goal of prompting the Court to request the SG's views in the matter.¹⁵⁹

Drafting a certiorari petition so that it encourages the Court to call for the views of the SG will likely be successful only under certain circumstances. Millett (2009) explains that the Court is more likely to call for the SG's views in petitions that involve "distinctive governmental functions," governmental interests or operations, or other viewpoints that will prompt the Court to call for the SG's views (p. 223). The SG rarely files unsolicited amicus briefs at the case-selection stage, therefore the SG generally becomes involved in a cert petition when the Court thinks the SG's views on an issue would be helpful and it thus requests the SG's opinion (Millett 2009).¹⁶⁰

The results in the models also indicate that the Court may be less likely to discuss a petition if the United States government opposes review, which was measured by considering whether the United States government is a respondent (unless the SG

¹⁵⁹ Millett (2009) advises that if a petition presents the type of question that could support an order by the court that calls for the views of the SG (or CVSG), the petition should explain the federal government's expertise with any statutory scheme at issue, the federal government's role in administering a statute, or the likely impact of a decision on governmental interests or operations (p. 217). Millett (2009) also offers suggestions to parties if the Court has issued a CVSG with respect to their petition, including methods for contacting the SG's office and meeting with the SG.

¹⁶⁰ Millett (2009) explains that the SG rarely submits unsolicited amicus briefs during case selection because the SG's office has very selective criteria it applies before it participates as amicus curiae with respect to a petition.

recommends cert be granted) or the SG opposes grant as amicus or in response to a request from the Court for her views. Thus, because the results of this study indicate that a petition that is opposed by the United States government may be less likely to be discussed by the Court, litigants who are contemplating petitioning the Court for review with respect to cases in which the United States government is the respondent may want to consider whether they want to spend resources on a cert petition as a petition must first be selected for the discuss list before it is granted review.¹⁶¹

I. The implications on litigants' abilities to access the Court.

As described in Section III(I) above, the results of this dissertation indicate that the potential litigants with greater resources, such as time, education, and money, likely have an increased ability to access the Court. For instance, potential litigants who are educated on the Court's case-selection process and who are financially able to retain attorneys experienced in drafting cert petitions that highlight cues that attract the Court most likely have a greater chance of their petitions being discussed and reviewed by the Court.

A litigant who solicits an amicus brief also significantly increases the likelihood his petition is selected by the Court for the discuss list and for review. As Sections III(G) and IV(G) explain, however, high costs prevent most potential litigants from being able

¹⁶¹ It is important to note that Caldeira and Wright (1988) found support that the United States government's opposition to a petition significantly increases, instead of decreases, the likelihood it is selected for review. However, while Caldeira and Wright (1988) include petitions that did not make the Court's discuss list, they consider only whether a petition was ultimately selected for review while not separately considering the discuss list stage, which could be a reason their results differ from the results here. Nevertheless, additional research in this area would help to solidify findings regarding the relationship between the United States government's support of and opposition to a petition and the likelihood it is discussed and granted review. It is also important to again mention that the U.S. opposition variable was not included in the outcome models in Tables 4.1, 4.2, and 4.3, as Black and Boyd (2013), who consider both stages of the discuss list in their study, state that the United States government's opposition to a petition has no influence on the selection of petitions for review.

solicit an amicus brief, especially at the case-selection stage during which there is a high likelihood that a petition is not reviewed or even discussed by the Court.

Therefore, while the results of this dissertation may aid potential litigants who hope to increase the chances their cases are heard by the Court, these results may be more useful to litigants who have more resources and thus have greater access to the Court.

V. Conclusion.

This dissertation attempts to add to the Supreme Court of the United States agenda-setting research by exploring the following overarching research question: How does the Supreme Court of the United States decide which cases it will review? To explore this overarching research question, this dissertation poses hypotheses and research questions aimed at addressing three gaps in the Supreme Court agenda-setting research.

The analyses of these hypotheses and research questions allows this dissertation to demonstrate the importance of considering all types of petitions for writ of certiorari in a study on the Court's case-selection process, analyzing the Court's case-selection process as a two-step process, and studying the Court's agenda-setting trends over time. This dissertation is also able to identify the factors that significantly influence the Court during one or both stages of its case-selection process across different Court terms. Moreover, the findings here have implications for the future scholarly study of the Supreme Court's agenda-setting process and may also assist potential litigants who hope to have their cases considered by the Supreme Court.

Appendix A: Tables

Table 3.1. Summary Statistics for Dependent and Independent Variables, 1960 Warren Court Term

Sources: The Supreme Court Database (2021), The Papers of Chief Justice Warren and Justice Douglas

Variable	Range	Mean	Std. Dev.
Grant	[0,1]	0.671	0.471
Discuss	[0,1]	0.688	0.464
Lower Dissenting Opinion	[0,1]	0.146	0.353
Constitutional Claim	[0,1]	0.268	0.443
Alleged Conflict	[0,1]	0.173	0.378
IFP Status	[0,1]	0.324	0.469
Ninth Circuit	[0,1]	0.044	0.205
Civil Liberties	[0,1]	0.148	0.355
Actual Conflict	[0,1]	0.139	0.347
Law Clerk Recommendation	[0,1]	0.445	0.497
U.S. Supports Grant	[0,1]	0.110	0.313
U.S. Opposes Grant	[0,1]	0.310	0.463
Amicus Curiae	[0,4]	0.150	0.542
State Petition	[0,1]	0.358	0.480

N = 481

Table 3.2. Summary Statistics for Dependent and Independent Variables, 1977 Burger Court Term

Sources: The Supreme Court Database (2021), The Papers of Justice Blackmun

Variable	Range	Mean	Std. Dev.
Grant	[0,1]	0.546	0.499
Discuss	[0,1]	0.682	0.466
Lower Dissenting Opinion	[0,1]	0.173	0.379
Constitutional Claim	[0,1]	0.390	0.488
Alleged Conflict	[0,1]	0.310	0.463
IFP Status	[0,1]	0.290	0.454
Ninth Circuit	[0,1]	0.089	0.285
Civil Liberties	[0,1]	0.229	0.421
Actual Conflict	[0,1]	0.214	0.411
Law Clerk	[0,1]	0.186	0.390
Recommendation	[0,1]	0.117	0.322
U.S. Supports Grant	[0,1]	0.249	0.433
U.S. Opposes Grant	[0,1]	0.247	0.959
Amicus Curiae	[0,8]	0.247	0.959
State Petition	[0,1]	0.340	0.474

N = 462

Table 3.3. Summary Statistics for Dependent and Independent Variables, 1992 Rehnquist Court Term

Sources: The Supreme Court Database (2021), Black and Owens (2009a), Epstein, Segal, and Spaeth (2007), “The Digital Archive of the Papers of Justice Harry A. Blackmun”

Variable	Range	Mean	Std. Dev.
Grant	[0,1]	0.528	0.501
Discuss	[0,1]	0.540	0.499
Lower Dissenting Opinion	[0,1]	0.175	0.380
Constitutional Claim	[0,1]	0.239	0.427
Alleged Conflict	[0,1]	0.561	0.497
IFP Status	[0,1]	0.411	0.493
Ninth Circuit	[0,1]	0.160	0.367
Civil Liberties	[0,1]	0.202	0.402
Weak Conflict	[0,1]	0.380	0.486
Law Clerk	[0,1]	0.206	0.405
Recommendation	[0,1]	0.206	0.405
U.S. Supports Grant	[0,1]	0.098	0.298
U.S. Opposes Grant	[0,1]	0.334	0.472
Amicus Curiae	[0,16]	0.245	1.107
State Petition	[0,1]	0.202	0.402

N = 326

Table 4.1. Heckman Selection Model of Placement on the Discuss List (Selection Model) and Selection for Review (Outcome Model), 1960 Warren Court Term

Sources: The Supreme Court Database (2021), The Papers of Chief Justice Warren and Justice Douglas

Variable	Coefficient	Standard Error
Outcome Model: Is the petition selected for review?		
Lower Dissenting Opinion	0.265	0.225
Constitutional Claim	0.603***	0.180
Alleged Conflict	0.175	0.328
IFP Status	-0.682***	0.185
Ninth Circuit	0.475	0.441
Civil Liberties	0.163	0.233
Actual Conflict	0.116	0.369
Law Clerk Recommendation	1.736***	0.165
U.S. Supports Grant	1.561***	0.396
Amicus Curiae	1.285**	0.536
State Petition	-0.100	0.183
Constant	-1.149	0.159
Selection Model: Is the petition selected for the discuss list?		
Lower Dissenting Opinion	0.243	0.302
Constitutional Claim	1.098***	0.220
Alleged Conflict	0.285	0.372
IFP Status	-1.154***	0.178
Ninth Circuit	1.637***	0.467
Civil Liberties	0.432*	0.246
Actual Conflict	0.342	0.463
Law Clerk Recommendation	1.799***	0.230
U.S. Supports Grant	^	^
U.S. Opposes Grant	0.279	0.196
Amicus Curiae	^	^
State Petition	0.396*	0.208
Constant	-0.297	0.166

N: 481

Rho Chi2: 4.29**

*Significant at $p < .10$

**Significant at $p < .05$

***Significant at $p < .01$

^ In the Heckman selection model, Stata reported this coefficient and an insignificant p-value for this variable. In a probit model of the independent variables on the discuss list dependent variable, Stata dropped observations and this variable because it perfectly predicted that a petition was added to the discuss list. Even though Stata did not drop the variable in the Heckman probit model, the coefficient and p-value it reported were not meaningful, so no coefficient was reported here.

Table 4.2. Heckman Selection Model of Placement on the Discuss List (Selection Model) and Selection for Review (Outcome Model), 1977 Burger Court Term

Sources: The Supreme Court Database (2021), The Papers of Justice Blackmun

Variable	Coefficient	Standard Error
Outcome Model: Is the petition selected for review?		
Lower Dissenting Opinion	-0.090	0.185
Constitutional Claim	0.013	0.179
Alleged Conflict	-0.001	0.241
IFP Status	-0.043	0.227
Ninth Circuit	0.049	0.262
Civil Liberties	-0.205	0.171
Actual Conflict	0.010	0.280
Law Clerk Recommendation	0.485***	0.188
U.S. Supports Grant	0.250	0.235
Amicus Curiae	0.243**	0.102
State Petition	0.299*	0.181
Constant	0.090	0.251
Selection Model: Is the petition selected for the discuss list?		
Lower Dissenting Opinion	0.799***	0.254
Constitutional Claim	0.498***	0.164
Alleged Conflict	-0.263	0.228
IFP Status	-0.798***	0.161
Ninth Circuit	0.261	0.267
Civil Liberties	0.681***	0.215
Actual Conflict	1.313***	0.289
Law Clerk Recommendation	1.089***	0.401
U.S. Supports Grant	1.291***	0.432
U.S. Opposes Grant	-0.398*	0.188
Amicus Curiae	0.875*	0.446
State Petition	0.204	0.187
Constant	-0.027	0.179

N: 462

Rho Chi2: 5.40**

*Significant at $p < .10$

**Significant at $p < .05$

***Significant at $p < .01$

^ In the Heckman selection model, Stata reported this coefficient and an insignificant p-value for this variable. In a probit model of the independent variables on the discuss list dependent variable, Stata dropped observations and this variable because it perfectly predicted that a petition was added to the discuss list. Even though Stata did not drop the variable in the Heckman probit model, the coefficient and p-value it reported were not meaningful, so no coefficient was reported here.

Table 4.3. Heckman Selection Model of Placement on the Discuss List (Selection Model) and Selection for Review (Outcome Model), 1992 Rehnquist Court Term

Sources: The Supreme Court Database (2021), Black and Owens (2009a), Epstein, Segal, and Spaeth (2007), “The Digital Archive of the Papers of Justice Harry A. Blackmun”

Variable	Coefficient	Standard Error
Outcome Model: Is the petition selected for review?		
Lower Dissenting Opinion	0.070	0.353
Constitutional Claim	-0.063	0.257
Alleged Conflict	0.144	0.337
IFP Status	-0.410	0.257
Ninth Circuit	-0.068	0.344
Civil Liberties	-0.024	0.275
Actual Conflict	0.640	0.548
Law Clerk Recommendation	1.125	0.409
U.S. Supports Grant	0.761***	0.450
Amicus Curiae	1.304*	0.438
State Petition	-0.009***	0.286
Constant	-1.219	0.817
Selection Model: Is the petition selected for the discuss list?		
Lower Dissenting Opinion	0.820***	0.295
Constitutional Claim	-0.038	0.208
Alleged Conflict	0.012	0.218
IFP Status	-0.228	0.263
Ninth Circuit	-0.227	0.273
Civil Liberties	-0.012	0.246
Actual Conflict	1.260***	0.259
Law Clerk Recommendation	^	^
U.S. Supports Grant	0.942	0.821
U.S. Opposes Grant	-0.143	0.284
Amicus Curiae	1.013**	0.587
State Petition	-0.127	0.239
Constant	-0.484	0.208

N: 326

Rho Chi2: 0.529

*Significant at $p < .10$

**Significant at $p < .05$

***Significant at $p < .01$

^ In the Heckman selection model, Stata reported this coefficient and an insignificant p-value for this variable. In a probit model of the independent variables on the discuss list dependent variable, Stata dropped observations and this variable because it perfectly predicted that a petition was added to the discuss list. Even though Stata did not drop the variable in the Heckman probit model, the coefficient and p-value it reported were not meaningful, so no coefficient was reported here.

Appendix B: Heckman Selection Models

I. Introduction.

In this dissertation, I use three Heckman selection probit models. The results of these models are in Tables 4.1, 4.2, and 4.3 in Appendix A. Section II below explains the reasons that the Heckman selection probit model was the most appropriate model to use to analyze my data. Section III provides additional information about Heckman selection probit models, while Section IV discusses the identification and use of exclusionary restrictions in my Heckman probit selection models.

II. Choosing the Appropriate Model.

My study includes two binary dependent variables: (1) whether a petition is added to the Supreme Court's discuss list and (2) whether the petition, if placed on the discuss list, is subsequently reviewed by the Supreme Court.¹⁶² Ordinary least squares regression, or OLS regression, is not the most appropriate model to use with data that includes two binary dependent variables. Additionally, if I used probit or logistic regression models, which are often used to analyze data with two binary dependent variables, my models would be at risk for sample selection bias because the Supreme Court's decisions whether to grant certiorari to petitions are not independent of its earlier decisions to select petitions for the discuss list. Therefore, the selection of petitions for the discuss list creates a non-random sample of petitions from which the Court selects petitions for review.

Heckman (1979) discusses the manner in which sample selection bias can result from using non-randomly selected samples to estimate behavioral relationships (p. 153).

¹⁶² These dependent variables are discussed in more detail in Chapter 3.

Sample selection bias may result from “self-selection bias,” or selection by the individuals who are being studied (Heckman 1979, p. 153).¹⁶³ Sample selection bias may also result from decisions that are made by scholars during an analysis or study, such as the data collection procedures utilized by scholars (Heckman 1979; Berk 1982; Bushway, Johnson, and Slocum 2007).

The Supreme Court’s two-step case-selection process provides an example of self-selection bias. As described above, the Court’s process of first selecting petitions for the discuss list before subsequently selecting petitions for review from only those petitions on the discuss list creates a non-random sample of petitions from which the Court selections petitions for review. Sample selection bias creates methodological issues with potentially serious consequences for substantive inferences and conclusions, because both the external and internal validity of a study are at risk when a portion of data is systematically excluded due to sample selection bias (Garip 2012, p. 948-949; Winship and Mare 1992; Beck 1983). For example, if a logistic or probit regression model is used to estimate a model with the data used in this dissertation, the coefficients may be biased because, due to sample selection bias, values of the dependent variable that measures whether the Court grants review to a petition are underrepresented (Winship and Mare 1992, p. 328).

As discussed more thoroughly in Chapter 2, Black and Boyd (2013) study the cues that influence the Rehnquist Court’s decisions to place petitions on the discuss list and to grant certiorari to petitions. Black and Boyd (2013) find that the use of two independent models in their study is inappropriate, as the Court’s decisions regarding the

¹⁶³ Berk (1983) states that this type of selection bias may occur due to some “processes inherent in the phenomena under study” (p. 309).

discuss list and granting review are correlated (p. 1132, FN 5). Therefore, Black and Boyd (2013) utilize a model that considers the sample selection bias resulting from the Supreme Court's two-step case-selection process.

Similar to Black and Boyd (2013), the correlation of the two steps of the Court's case-selection process creates sample selection bias in my data.¹⁶⁴ Political science studies have commonly used the Heckman sample selection model to address the issue of sample selection bias in datasets (Vance and Ritter 2014).¹⁶⁵ Heckman selection probit models have been utilized in studies where both dependent variables considered in the model are binary (Garip 2012). Therefore, because my data includes two binary dependent variables and features sample selection bias, Heckman selection probit models are used in this dissertation.¹⁶⁶

¹⁶⁴ The size and significance of the correlation term in a selection model, rho, helps to determine whether sample selection bias exists in a model (Garip 2012, p. 649). Rho is a correlation coefficient that measures the dependence of the two models considered in a selection model (Stata 2019). If Rho is zero, the two models are not dependent and may be analyzed as separate models (Stata 2019). Tables 4.1 and 4.2 demonstrate that for my 1960 and 1977 models, the rho coefficient is not zero and thus selection bias exists in those models. Therefore, the use of a model that considers selection bias is appropriate for these models. Table 4.3 indicates that rho is not statistically different than zero, and thus a selection model is not needed for my 1992 model. However, as Black and Boyd (2013) state, the selection of petitions for review is not independent of the selection of petitions for the discuss list, and thus theoretically a selection model is needed. Therefore, I use a Heckman selection model for all three models in Tables 4.1, 4.2, and 4.3.

¹⁶⁵ Vance and Ritter (2014) and Bushway, Johnson, and Slocum (2007) do offer some criticism over the broad use of the Heckman selection model in political science and criminology, respectively, suggesting that there are other selection models that may be more appropriately used with regard to data with certain characteristics. One major concern set forth by Bushway, Johnson, and Slocum (2007) is that many studies do not use Heckman models with exclusion restrictions, which can inflate standard errors because of collinearity between the correction term and included regressors (p. 153). This concern is not applicable to my study, because my models include exclusion restrictions, as explained more fully in Section IV.

¹⁶⁶ Black and Boyd (2013) use a Sartori estimator and not a Heckman estimator in their study. Unlike a Sartori estimator, a Heckman probit model should include an exclusionary restriction, or a variable that is included in the outcome equation but excluded from the selection equation (Vance and Ritter 2014; Black and Boyd 2013; Garip 2012). Black and Boyd (2013) conclude that a Sartori estimator was more appropriate than a Heckman estimator, because they argue that the overlap between the creation of the discuss list and the selection of petitions for review makes it unlikely that there is a variable that is related to the creation of the discuss list that is "wholly unrelated" to the selection of petitions for review (p. 1132 FN 6). However, other scholars have found that researchers must make theoretical justifications that an exclusionary restriction influences the selection equation but does not directly affect the outcome equation, and not necessarily demonstrate that the variable is "wholly unrelated" to the outcome equation (Garip 2012; Bushway, Johnson, and Slocum 2007). Therefore, because this study provides such theoretical

III. Heckman Probit Selection Models.

To mitigate the methodological issues caused by sample selection bias, Heckman (1979) treats sample selection bias as a specification error and provides an estimation method that eliminates the specification error for censored samples.¹⁶⁷ The Heckman estimator estimates a selection model, calculates the expected error, and uses the estimated error as a regressor in the second equation (Winship and Mare 1992, p. 340; Heckman 1979).

The Heckman probit selection model involves two steps in which two models are estimated. In the first step, a model is estimated on the entire dataset to capture the determinates of censoring (Vance and Ritter 2014, p. 528). This model is referred to as the “selection equation” (Vance and Ritter 2014). In this study, the dependent variable in the selection equation measures whether a petition is added to the Court’s discuss list. In the second step, a model is estimated on the non-censored observations in the data (Vance and Ritter 2014). This model is referred to as the “outcome equation” (Vance and Ritter 2014). In this study, the dependent variable in the outcome equation is “grant,” or whether a petition is granted review by the Supreme Court. This model is estimated only on observations, or petitions, in the data that were first added to the discuss list. I used Stata 14 to estimate the three Heckman probit selection models that are reported in Tables 4.1, 4.2, and 4.3.

justification, as explained in Section IV, the utilization of Heckman probit selection models in this dissertation is appropriate.

¹⁶⁷ This study uses a censored sample because the dependent variable in the outcome model considers only petitions that made the discuss list instead of all petitions.

IV. Exclusionary Restrictions.

An exclusionary restriction is a variable that has an influence on the selection equation, but that does not have a direct influence on the outcome equation (Garip 2012; Bushway, Johnson, and Slocum 2007).¹⁶⁸ A Heckman model does not require exclusionary restrictions to be estimated, but a valid exclusionary restriction allows the model to be identified beyond functional form and reduces multicollinearity among predictors and the Mill's ratio in the outcome equation (Vance and Ritter 2014; Bushway, Johnson, and Slocum 2007; Berk 1983). Additionally, Heckman models can inflate standard errors due to collinearity between the correction term and other included variables (Stolzenberg and Relles 1990). However, this issue can be mitigated by the inclusion of a valid exclusionary restriction (Bushway, Johnson, and Slocum 2007).

Whether a variable may be properly included in the selection equation but excluded from the outcome equation is made not based on technical reasoning, but on substantive reasoning (Garip 2012; Bushway, Johnson, and Slocum 2007). Empirical or theoretical justification should demonstrate that an identified exclusion restriction may be legitimately excluded from the outcome equation (Garip 2012; Bushway, Johnson, and Slocum 2007).

The exclusion restriction identified in this dissertation is the independent variable “U.S. opposes grant,” which measures whether the United States government opposes a grant of certiorari to a petition.¹⁶⁹ There is empirical support for excluding this variable

¹⁶⁸ Exclusionary restrictions are sometimes referred to as “instruments” or “instrumental variables” (Bushway, Johnson, and Slocum 2007; Berk 1983).

¹⁶⁹ As explained in Chapter 3, I coded “U.S. supports grant” and “U.S. opposes grant” according to the guidelines used by Black and Owens (2009). “U.S. supports grant” is coded as 1 if the United States government is a petitioner or if the SG recommends cert be granted in either an amicus curiae brief or in a response to a request for her views from the Court. “U.S. supports grant” is coded 0 if the United States is not a petitioner or the SG has not recommended a grant of cert. Similarly, “U.S. opposes grant” is coded 1

from the outcome equation. Black and Boyd's (2013) model demonstrates that both the solicitor general's support of and opposition to the Court's review of a petition positively, significantly impacts the placement of the petition on the Court's discuss list. However, while Black and Boyd's (2013) model shows that the solicitor general's support of a petition also positively and significantly impacts likelihood that a petition is granted review by the Court, Black and Boyd's (2013) model does not offer support that the solicitor general's opposition to review of a petition by the Court has a significant positive or negative effect on whether the petition is ultimately granted review. Additionally, Schoenherr and Black (2019) support these findings with their study that shows that the United States government's opposition to a petition does not significantly impact the selection of petitions for review.

Therefore, because there is support for excluding the variable U.S. opposes grant, as Black and Boyd's (2013) and Schoenherr and Black's (2019) studies show that as a cue to the Court, it significantly impacts the Court's decisions to place petitions on the discuss list but not its decisions to grant review, U.S. opposes grant is excluded from the outcome models as an exclusion restriction. The use of U.S. opposes grant as an exclusion restriction in my model will likely reduce multicollinearity among predictors and the Mill's ratio in the outcome equation (Vance and Ritter 2014; Bushway, Johnson, and Slocum 2007; Berk 1983), and thus lessen the inflation of standard errors caused by collinearity between the correction term and other included variables (Stolzenberg and Relles 1990).

if the U.S. is a respondent (unless the SG recommends cert be granted) or if the SG opposes grant as amici or in response to a request from the Court for her views.

Appendix C: Example Docketsheets, Law Clerk Memoranda, Conference List

Exhibit 1: Docketsheet

Court - Sup. Ct. of Appa. of Va. Voted on _____, 19__
 Argued _____, 19__ Assigned _____, 19__
 Submitted _____, 19__ Announced _____, 19__

No. 7

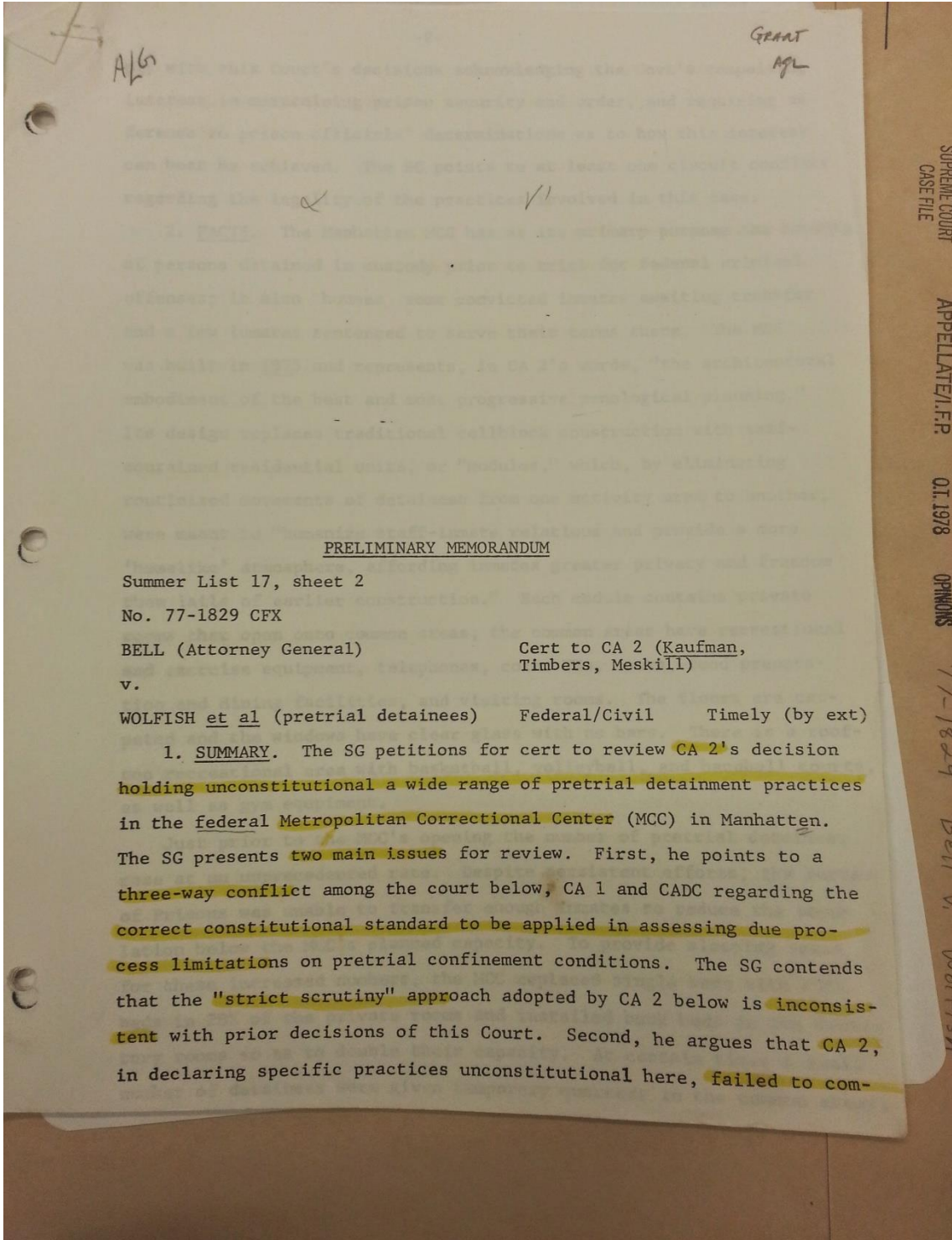
BRUCE BOYNTON, Petitioner
 vs.
 VIRGINIA

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	CERT.		JURISDICTIONAL STATEMENT				MERITS		QUESTION		ABSENT	NOT VOTING
	G	D	N	POST	DIS	AVF	REV	AVF	NO	YES		
Stewart, J.		✓							✓			
Whittaker, J.		✓							✓			
Brennan, J.	✓						✓					
Harlan, J.		✓					✓					
Clark, J.		✓					✓		✓			
Douglas, J.	✓						✓					
Frankfurter, J.		✓					✓					
Black, J.	✓						✓		✓			
Warren, Ch. J.	✓						✓		✓			

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Exhibit 2: Law Clerk Memorandum



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PRELIMINARY MEMORANDUM

Summer List 17, sheet 2

No. 77-1829 CFX

BELL (Attorney General)

Cert to CA 2 (Kaufman,
Timbers, Meskill)

v.

WOLFISH et al (pretrial detainees) Federal/Civil Timely (by ext)

1. SUMMARY. The SG petitions for cert to review CA 2's decision holding unconstitutional a wide range of pretrial detainment practices in the federal Metropolitan Correctional Center (MCC) in Manhattan. The SG presents two main issues for review. First, he points to a three-way conflict among the court below, CA 1 and CADC regarding the correct constitutional standard to be applied in assessing due process limitations on pretrial confinement conditions. The SG contends that the "strict scrutiny" approach adopted by CA 2 below is inconsistent with prior decisions of this Court. Second, he argues that CA 2, in declaring specific practices unconstitutional here, failed to com-

ply with this Court's decisions acknowledging the Govt's compelling interest in maintaining prison security and order, and requiring deference to prison officials' determinations as to how this interest can best be achieved. The SG points to at least one circuit conflict regarding the legality of the practices involved in this case.

2. FACTS. The Manhattan MCC has as its primary purpose the housing of persons detained in custody prior to trial for federal criminal offenses; it also houses some convicted inmates awaiting transfer and a few inmates sentenced to serve their terms there. The MCC was built in 1975 and represents, in CA 2's words, "the architectural embodiment of the best and most progressive penological planning." Its design replaces traditional cellblock construction with self-contained residential units, or "modules," which, by eliminating routinized movements of detainees from one activity area to another, were meant to "humanize staff-inmate relations and provide a more 'homelike' atmosphere, affording inmates greater privacy and freedom than jails of earlier construction." Each module contains private rooms that open onto common areas; the common areas have recreational and exercise equipment, telephones, color TVs, books, food preparation and dining facilities, and visiting rooms. The floors are carpeted and the windows have clear glass with no bars. There is a rooftop recreational area with basketball, volleyball, and handball courts, as well as gym equipment.

Just prior to the MCC's opening the number of pretrial detainees rose at an unprecedented rate. Despite persistent efforts, the Bureau of Prisons was unable to transfer enough inmates to reduce the population below the MCC's planned capacity. To provide sleeping space for these increased numbers, the MCC replaced single beds with bunk beds in 20% of the private rooms and installed bunk beds in the dormitory rooms so as to double their capacity. At certain times a small number of detainees were given temporary quarters in the common areas;

these persons were moved to private rooms as soon as possible.

Four months after the MCC opened resp filed a pro se habeas petn in federal court, challenging the alleged overcrowding and a vast array of other practices as violative of his constitutional rights. The suit was declared a class action on behalf of all persons confined, both pretrial detainees and sentenced prisoners. In a pair of preliminary injunctions, one opinion rendered on summary judgment, and a 125-page opinion rendered after trial, SDNY (Frankel, J) enjoined no fewer than 20 MCC administrative practices on constitutional and statutory grounds.

3. OPINION BELOW AND CONTENTIONS. CA 2 began by narrowing the issues before it. First, it reversed the DC's order insofar as it was premised on a finding that the Attorney General had breached his statutory duty to provide "suitable" care for inmates in his custody. The AG's actions in this respect, CA 2 held, were "committed to agency discretion by law" and hence judicially unreviewable. Second, CA 2 remanded the DC's findings of unconstitutional deprivations insofar as they related to sentenced inmates. The court noted that the DC had applied the same heightened level of scrutiny to restrictions on convicted persons as to restrictions on pretrial detainees, and held that a lower level of scrutiny under the 8th Amendment was properly applicable to the former. Third, CA 2 held that the DC's injunctions against certain MCC practices intruded too far into the minutiae of prison administration. Judge Frankel, for example, had (1) abolished the MCC's policy requiring visitors to request a bathroom key from a correctional officer; (2) ordered the MCC to take commissary requests every other day rather than twice a week; (3) ordered the MCC to install 23 telephones so that inmates could make long-distance calls; (4) ordered that inmates be permitted to possess typewriters for personal use; (5) found the prison attire "garish, ill-fitting, degrading and

humiliating to wear" and ordered the MCC to "permit pretrial detainees to wear their own clothes unless they volunteer to wear correctional uniforms."

Although CA 2 detected some dissonances in Judge Frankel's treatment, however, it affirmed his opinion in the main. Specifically, it approved (a) the heightened level of constitutional scrutiny that he had applied to restrictions on pretrial detainees and (b) his application of those standards to the practices concerned.

(a) Constitutional Standards. CA 2 held squarely that "strict scrutiny" applied. Because an individual is presumed innocent until proven guilty, pretrial detainees must be accorded as far as possible the same rights as unincarcerated individuals. Accordingly, it is not enough that the conditions of their confinement "merely comport with contemporary standards of decency prescribed by" the 8th Amendment. Rather, the "indisuptable rudiments of due process" dictate that pretrial detainees "be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.'" Under this standard of "compelling necessity," deprivation of detainees' rights cannot be justified by "the cries of fiscal necessity," "administrative convenience," or "the cold comfort that conditions in other jails are worse."

The SG contends that CA 2, by proscribing all restrictions on pretrial detainees that are not justified by a "compelling necessity," and by eliminating fiscal and administrative constraints as possible justifications, has enunciated a constitutional standard more stringent than that adopted either by CA 1 or CADC in their recent pretrial detainment opinions. In Feeley v. Sampson, 570 F2d 364 (1978) (Campbell, Markey (CCPA); Coffin, dissenting), CA 1 promulgated a "reasonable relationship" test. Judge Campbell there wrote:

While detainees are not convicts, the same practical reasons that counsel judicial restraint in second-guessing correctional officials dictates restraint in second-guessing the authorities who run jails....We believe that the proper standard by which to review the actions of those lawfully entrusted with the custody of detainees is that normally employed in reviewing administrative actions: whether the actions of jail authorities are arbitrary or capricious; whether they are lacking in a reasonable relationship to the limited purpose of the confinement; and whether they are otherwise not in accordance with law.

Id. at 371. The majority expressly rejected the "strict scrutiny" approach taken by the DC, under which "a state carries the burden of justifying every restriction imposed on an inmate on the basis of 'compelling interest', and must further demonstrate that each measure taken is the 'least restrictive alternative'." Id. at 370. Rather, said the majority, due process requires only that the conditions of confinement bear "a reasonable relation to the state's purpose in confining a detainee," id. at 369; that the state play "its limited custodial role in a reasonable, and hence a humane, manner," id. at 370; and that the detainee "be treated in a manner rationally related to the limited purpose for which he is imprisoned." Id. Judge Coffin dissented, believing that a higher standard of review was appropriate.

In Campbell v. McGruder, ^{590 F2d 521} No. 77-1350 (CADC 30 March 1978) (Bazon, Leventhal; MacKinnon, dissenting), CADC enunciated a standard intermediate between CA 2's "compelling necessity" and CA 1's "reasonable relationship" tests. Judge Bazon stated that pretrial detainees possess a "liberty interest...rooted in the presumption of innocence." Slip op at 13. Accordingly,

each restriction of the jail regimen must be carefully examined to determine if it is justified by substantial necessities of jail administration. To evaluate these necessities we will look to the needs of the state to produce the detainee for trial, to maintain the security of the jail, or generally to sustain the institution of pre-

trial detention at a feasible cost.

Id. at 17 (emphasis added). The majority specifically acknowledged the Govt's interest in being able "to manage the institution of pre-trial detention in an administratively feasible manner." Id. at 12. The majority held, however, that under certain circumstances this "balancing approach" must yield to a higher level of scrutiny. "[C]onditions of confinement that are likely to impair a detainee's mental or physical health," id. at 18, or which may impede a defendant's preparation or presentation of his defense at trial, "are constitutionally suspect and can be justified only by the most compelling necessity." Id. at 19. Judge MacKinnon dissented, rejecting the majority's reliance on the presumption of innocence, diss op at 32-33, and contending that greater deference to the judgments of prison authorities was required, id. at 36-37.

The decisions of CA 1, CADC, and CA 2 enunciate three distinct due process standards: a "reasonable relationship" test, a "substantial necessity" test allowing administrative and fiscal concerns as justifications, and a "compelling necessity" test allowing no administrative or fiscal justifications to be asserted. The SG notes that CA 4 has "adopted a standard that parallels the Second Circuit test." Petn at 21 n.16, citing Patterson v. Morrisette, 564 F2d 1109 (1977). Judge Coffin in Feeley noted that CAs 3 & 7 have adopted "rational relationship" tests similar to CA 1's. See 570 F2d at 378. The DC Circuit's intermediate test seems to stand alone, although the SG suggests rather optimistically that its test and CA 1's "lev[y] essentially similar requirements." Petn at 19.

After pointing out the circuit conflict, the SG argues that the due process standard adopted by CA 2 lacks substantial support in this Court's decisions. The SG initially questions the reasoning of both CA 2 and CADC that the "presumption of innocence" dictates a

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heightened level of scrutiny for confinement conditions imposed on pretrial detainees. As CA 3 recently has noted, the "presumption of innocence" is not a source of substantive rights; it serves rather

[to] allocate[] the burden of proof. It is a principle of evidence,...acting as the foundation for the procedural due process requirement of proof beyond a reasonable doubt.... If the "presumption of innocence" is read literally to apply to all pretrial procedures, it is impossible to justify bail or pretrial detention, both of which are restraints imposed upon an accused despite the presumption.

Hampton v. Holmesburg Prison Officials, 546 F2d 1077, 1080 n.1 (1976).

Following the reasoning of CA 3, the SG stresses that pretrial confinement--notwithstanding that it is itself a fundamental deprivation of liberty--is implicitly authorized by the 8th Amendment and is justified by the governmental interest in controlling crime. The prisoner, moreover, is afforded a hearing prior to commitment. Once detention is ordered, therefore, the conditions of the detainee's confinement, unless they trench on specific constitutional guarantees, such as 1st Amendment freedoms, impinge directly only on detainees' "understandable desire to live comfortably during detention." This Court has never elevated "the individual's interest in economic comfort to the level of a fundamental constitutional interest." This Court, moreover, has consistently held that the conditions of confinement are shaped importantly by considerations of prison order and security--considerations which are "peculiarly within the province and professional expertise of corrections officials" to whose judgment courts "should ordinarily defer." Jones v. North Carolina Prisoners' Labor Union, 433 US 119, 128 (1977), quoting Pell v. Procunier, 417 US 817, 827 (1974). The SG concludes that under this Court's decisions the proper standard of review is as follows:

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[I]n reviewing practices of detention for pretrial detainees under the Due Process Clause, unless a practice abridges a specific, fundamental right guaranteed by other provisions of the Constitution, the practice should be upheld if it is reasonably related to the objective of confinement and the inherent needs of the institution for security, order and safety. Furthermore, in determining whether living conditions during confinement are decent and reasonable, consideration should be given to cost, administrative feasibility, and available practical alternatives.

Resp seems to concede that the constitutional standards announced by CAs DC, 1 & 2 are mutually inconsistent. Whereas the SG says that CADC's test is "essentially similar" to CA 1's, however, resp thinks it "articulates the same substantive principle" as CA 2's. Resp contends in any event that this case is "an inappropriate vehicle for meaningful resolution" of the differences among the circuits, since the practices held illegal below would be invalidated regardless of which standard of review were applied. Resp agrees with the SG that this Court's cases compel deference to the opinions of correctional officials; resp contends, however, that the record and decisions below indicate that great "attention, consideration, and deference" were accorded the views of prison officials here.

(b) Application of the standard to the practices involved.

CA 2 upheld the DC's injunction against approximately a dozen MCC administrative practices. Although the Govt professes to disagree "with virtually all" of CA 2's determinations, the SG has decided, "in order to avoid unduly complicating this Court's task should it elect to grant review in this case," not to seek review of them all. In some cases, the adverse impact of CA 2's ruling will be minimal; in others, the Bureau is rethinking its position anyway. The SG presents five issues for review:

- (1) Overcrowding. CA 2 held that the overcrowded conditions violated detainees' constitutional rights of privacy. Placement of bunk beds in private rooms ("double-celling") afforded inmates

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"virtually no space for minimal privacy or in which to avoid the other's presence." Double-celling, moreover, put more pressure on the common-area facilities, creating pressure "to eat in the cell, with its single chair, open toilet, and unsolicited companion." Because the Govt made "no showing of compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling," CA 2 held the practice unconstitutional. CA 2 also held that the temporary quartering of detainees in the common areas, where "the lights burn[ed] all night," gave inmates "no means of securing any degree of privacy." Since the MCC had "offered no explanation for this completely inadequate housing except administrative convenience," CA 2 declared it unconstitutional as well.

The SG replies that the double-celling was confined to 20% of the rooms; notes that the rooms were 75 feet square, significantly larger than those in previous cases finding overcrowding; and observes that detainees in the MCC in any event are confined to their rooms for only 7-8 hours per day, during which time "they are presumably asleep." Testimony at trial, moreover, indicated that double-bunking would have no "significant detrimental effects on the physical or psychological health of the inmates." Even assuming that a significant abridgment of personal privacy did occur, CA 2 erred in evaluating it under a "compelling necessity" test that accorded no weight at all to the fiscal and administrative constraints the MCC was operating under. The level of care did not fall below the minimum threshold of decency and humane treatment (citing Feeley). Finally, the SG argues that CA 2 has gone far beyond even its own precedents: a previous case, cited by CA 2 as support here, involved double-celling in rooms 48 feet square amid decidedly more archaic and unpleasant surroundings. Resp relies on the analysis of CA 2 and asserts that the SG's

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position in this case is "ironic," given that the Govt "has been prominent in its criticism of [double-celling] in state and local facilities."

(2) The "publisher-only" rule. The MCC enforced a Bureau of Prisons' rule, applicable to all its facilities, under which inmates can receive books only if mailed directly from the publisher or a book club. Federal corrections experts testified at trial that this rule was adopted to avert substantial security risks occasioned by inmates' receipt of books from other sources: books and magazines are easily used to smuggle drugs or money into jail; detection of these items in books is difficult; and an adequate inspection for such items often unavoidably destroys the books anyway. CA 2 held that the publisher-only rule "severely and impermissibly restricts the reading material available to inmates" and thus was "inconsistent with both the first amendment and due process." CA 2 dismissed the availability of the prison library by finding it "inconceivable that the first amendment rights of an incarcerated individual do not extend beyond a few, selected titles." CA 2 dismissed a decision of CA 10 upholding the publisher-only rule, Woods v. Daggett, 541 F2d 237 (1976), on the grounds that that case involved Leavenworth, where security justifications were more compelling.

The SG urges that the publisher-only rule is a reasonable accommodation between inmates' interests and prison security concerns. Other avenues to reading materials remain open, viz., books mailed from publishers and book clubs and books in the prison library. The SG says that CA 2 erred in ignoring the unanimous testimony of corrections officials that an item-by-item inspection of all arriving books would be unmanageable. The SG, finally, points to the circuit conflict with Daggett.

Resp contends that the publisher-only rule effectively leaves in-

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mates no options: books cost money, publishers' names are hard to get, and the prison library is laughable. Resp asserts that the Justice Dept, in a June 1978 draft of Federal Standards for Correction, has taken the position that inmates "may receive publications from any source, subject to search and inspection, except where there is clear and convincing evidence to justify limitations."

(3) Packages. The MCC prohibited inmates from receiving packages containing items of personal property. Corrections officials testified that this rule was necessary to avoid fighting, stealing, and extortion among inmates, and also to limit the introduction of contraband. The DC dismissed these concerns as "dire predictions" and ordered the MCC to promulgate regulations permitting receipt of at least some items. CA 2 agreed, noting that the DC "did no more than instruct the MCC to devise reasonable regulations" and that its action thus was "not inconsistent with the tenet that prison officials should retain as much control as possible over their institutions." Neither the DC nor CA 2 said what constitutional provision was violated by the no-packages rule.

The SG contends that CA 2's holding gives no deference to the security concerns voiced by expert witnesses at trial. There was no suggestion in the record that these concerns were disingenuous or exaggerated, and under these circumstances the regulation should have been upheld unless the corrections officials had been "conclusively shown to be wrong." Jones v North Carolina Prisoners' Labor Union, 433 US at 128. Resp contends that the regulation was arbitrary and capricious since inmates could purchase items of personal property at the commissary anyway--which presumably should give rise to the same "security" problems--and since there were other ways of policing introduction of contraband.

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(4) Room searches. The MCC required inmates to leave their rooms during routine inspections for contraband. Trial testimony indicated that the rule was necessary to avoid friction between inmates and prison officials and to thwart attempts to conceal contraband. CA 2 held that this requirement was unconstitutional. The searches were "far from neat" and often caused tension among inmates who "suspected the officers of thievery." CA 2 saw

no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege to grant him and reassures the detainee's already diminished sense of control over self, that he still has some small private domain, while at the same time not interfering with the institution's security concern and the removal of possible contraband.

The SG contends that "[t]here is no authority for the proposition that persons--either inside or outside of jail--have a privacy interest that requires that lawful searches of their premises be conducted in their presence." The SG points out that CA 2's finding of "no reason whatsoever" not to permit detainees to observe the search was inconsistent with the evidence at trial. The SG contends, finally, that CA 2 has ignored this Court's injunction that prison officials, "not courts, [make] the difficult judgments concerning institutional operations in situations such as this." Jones, supra, 433 US at 128.

Resp replies that, given the circumstances under which the inspections were made, the search would be "unreasonable" absent detainee observation. The officers rummaged through possessions willy-nilly and their actions constituted, in CA 2's words, a "regime of tyranny." Resp contends that prohibiting detainees from being present is an overbroad means of thwarting attempts to conceal contraband.

(5) Body Searches. The MCC, unlike many prisons, permits inmates to have "contact visits" with guests, i.e., interviews

trative justifications are eliminated, bail itself ...

without a glass or wire screen intervening between the interlocutors. Because contact visits "present a unique opportunity for passing contraband, including weapons and drugs, into the Jail," Feeley, supra, 570 F2d at 373, the MCC requires inmates after contact visits to strip naked and expose their armpits and the soles of their feet. In addition, they are required to submit their anal and genital areas to visual inspection. The DC left the basic strip search undisturbed, but found that the anal and genital inspections "plunged the inmate into a deep level of degradation and submission." He enjoined such visual inspections absent probable cause to believe that an inmate is hiding contraband. CA 2 agreed. It noted that the MCC had proved "only one instance in the several years of [the practice's] existence when contraband was found during a body cavity inspection," and held that the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility." CA 2 found that the procedure "shocks one's conscience," citing Rochin v. California.

The SG notes that body cavity searches have been upheld by CA 10 and by DCs in five other circuits. He contends that CA 2 erred in finding such searches of "little actual utility;" this observation "wholly ignores the substantial deterrent effect that such searches inevitably have on efforts to pass contraband to inmates during contact visits." The MCC's search policy, says the SG, is a necessary concomitant to its relatively liberal policies in allowing contact visits, policies the MCC is reluctant to restrict. The SG contends, finally, that CA 2 has again improperly substituted its judgment for that of prison officials.

Resp contends that body searches are unnecessary, since the Govt's

security interests can be achieved by far less restrictive means. Passing of contraband during contact visits is virtually impossible, since inmates and visitors are constantly monitored by officials through visiting-room windows, inmates wear one-piece jumpsuits which make surreptitious concealment of contraband impracticable, and inmates are not permitted to use the visiting-area rest room where passage of contraband might occur. Concealment of objects in the anal area also produces an "unusual gait" which invites suspicion. Resp notes, finally, that the Justice Dept's 1978 draft Standards propose to allow body cavity searches only when contact visits are "not constantly monitored." As noted above, contact visits at the MCC are so monitored.

5. DISCUSSION. The issues the SG presents for review defy easy answers no less than they defeat terse statement. Although cases involving the rights of pretrial detainees have flooded the lower courts in recent years, this Court has never dealt with these questions comprehensively--a fact that lower courts have both noted and bemoaned. Although this Court's pronouncements on the rights of convicted prisoners have figured largely in those courts' considerations, those pronouncements--involving persons with considerably diminished "liberty" interests--have been as often distinguished as followed.

Given the frequency with which pretrial detainment questions arise, the circuit conflict as to the proper constitutional standard of review is bound to cause confusion among the district courts. The SG is correct, I believe, in saying that the three-way conflict is both substantial and real. The "compelling necessity" test adopted by CA 2 below, moreover, seems problematic on a practical no less than on a theoretical level: it is hard to imagine any restriction that could pass constitutional muster thereunder. Once fiscal and adminis-

trative justifications are eliminated, bail itself may stand condemned. House arrest could do the job, albeit more expensively, as well.

This case, additionally, presents questions of pretrial detainment in a peculiarly unadulterated guise. This case does not involve ramshackle jailhouses in remote county seats, equipped with the Dickensian amenities of an archaic age. It involves a modern federal facility built three years ago, designed and equipped with the best that contemporary architecture and penology can devise. If the Govt has not succeeded here, one is tempted to despair of success at all.

Finally, despite the large number of pretrial detainment cases that have been decided in the past three years, this is apparently the first case in which the SG has sought cert. It is hard not to suspect that he has been "sandbagging," waiting for the right case to come along. In my judgment, CA 2 in this case has cooperated handsomely.

Grant.

There is a response.

9/1/78

Lauber

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This is an important case and I think the decision below was wrong. I apologize for the length of the memo.

Grant. AgL

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Exhibit 3: IFP Docketsheet

MISCELLANEOUS DOCKET

No. 17 Miscellaneous
Superior Ct., Pa.

JOSEPH RIEHL, Petitioner

v.

ERWIN C. GACKENBACK, WARDEN,
NORTHAMPTON COUNTY PRISON

6/5/51
Cert. & IFP

	GRANT	REFUSE	RULE
Minton, J.			10/8/51 Denied.
Clark, J.			
Burton, J.			
Jackson, J.			
Douglas, J.			
Frankfurter, J.			
Reed, J.			
Black, J.			
Vinson, Ch. J.			

No. 18 Miscellaneous
Sup. Ct., Mo.

BERNIE BEASON, Petitioner

v.

STATE OF MISSOURI

6/6/51
Cert. & IFP

	GRANT	REFUSE	RULE
Minton, J.			10/8/51 Denied.
Clark, J.			
Burton, J.			
Jackson, J.			
Douglas, J.			
Frankfurter, J.			
Reed, J.			
Black, J.			
Vinson, Ch. J.			

No. 19 Miscellaneous
Sup. Ct., N. J.

FRANK SEVERA, Petitioner

v.

STATE OF NEW JERSEY

6/6/51
Cert. & IFP

10/7/51 - Motion for H. C.

	GRANT	REFUSE	RULE
Minton, J.			10/8/51 Cert. & motion denied.
Clark, J.			11/3/51 Pet. for rehearing.
Burton, J.			11/5/51 Denied.
Jackson, J.			
Douglas, J.			
Frankfurter, J.			
Reed, J.			
Black, J.			
Vinson, Ch. J.			

No. 20 Miscellaneous
Ct. of App., Md.

HARRY EYER, Petitioner

v.

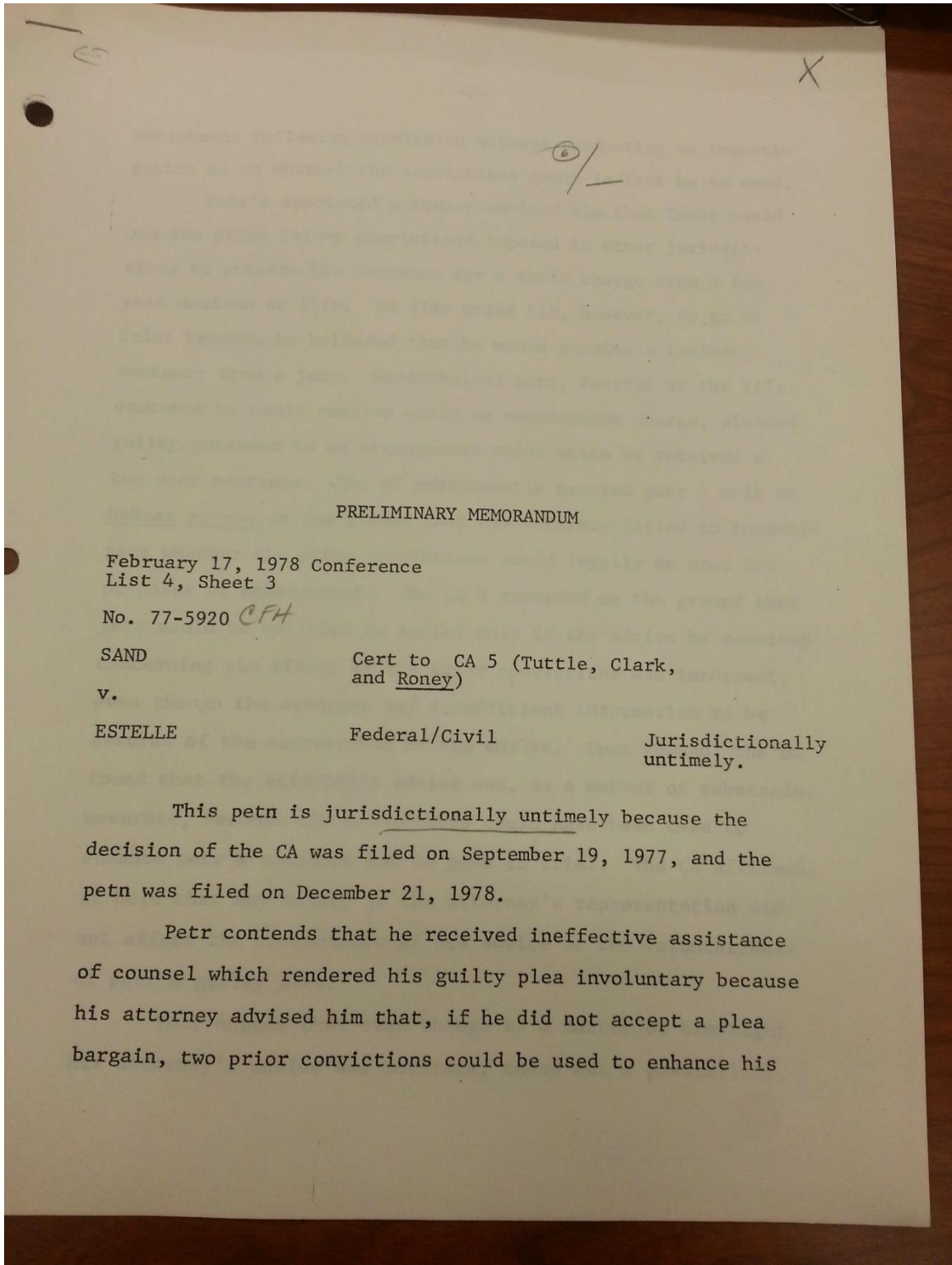
EDWIN T. SWENSON, WARDEN OF THE
MARYLAND PENITENTIARY

6/7/51
Cert. & IFP

	GRANT	REFUSE	RULE
Minton, J.			10/8/51 Denied.
Clark, J.			
Burton, J.			
Jackson, J.			
Douglas, J.			
Frankfurter, J.			
Reed, J.			
Black, J.			
Vinson, Ch. J.			

U. S. GOVERNMENT PRINTING OFFICE 16-52708-3

Exhibit 4: IFP Law Clerk Memorandum



PRELIMINARY MEMORANDUM

February 17, 1978 Conference
List 4, Sheet 3

No. 77-5920 *CFH*

SAND

Cert to CA 5 (Tuttle, Clark,
and Roney)

v.

ESTELLE

Federal/Civil

Jurisdictionally
untimely.

This petn is jurisdictionally untimely because the decision of the CA was filed on September 19, 1977, and the petn was filed on December 21, 1978.

Petr contends that he received ineffective assistance of counsel which rendered his guilty plea involuntary because his attorney advised him that, if he did not accept a plea bargain, two prior convictions could be used to enhance his

punishment following conviction without conducting an investigation as to whether the convictions could in fact be so used.

Petr's appointed attorney advised him that Texas could use two prior felony convictions imposed in other jurisdictions to enhance his sentence for a theft charge from a ten year maximum to life. He also urged him, however, to go to trial because he believed that he would receive a lenient sentence from a jury. Nevertheless petr, fearful of the life sentence he could receive under an enhancement charge, pleaded guilty pursuant to an arrangement under which he received a ten year sentence. The DC subsequently granted petr a writ of habeas corpus on the ground that his attorney failed to investigate whether the prior convictions could legally be used for purposes of enhancement. The CA 5 reversed on the ground that petr would be entitled to relief only if the advice he received concerning the effect of his prior convictions was incorrect, even though the attorney had insufficient information to be assured of the correctness of the advice. Upon remand, the DC found that the attorney's advice was, as a matter of substance, accurate, because the convictions could have been used to enhance petr's sentence had he gone to trial. The CA affirmed. It held that any defect in the attorney's representation did not affect the correctness of his advice or the voluntariness of petr's guilty plea.

Petr argues that even though as a matter of hindsight his attorney's advice was accurate, there was a possibility,

of which his attorney should have informed him, that the State would have failed to establish the adequacy of the prior convictions for enhancement purposes.

Deny.

There is no response.

1/23/78

Glekel

Ops in petn.

jp

1/27/78 L.O.T. Deny.
XZ

Exhibit 5: Conference List

(List 1, Sheet 34)

PETITIONS FOR CERTIORARI Cont'd.

R 77-25 CFX	FLAGG BROTHERS, INC. V. BROOKS
77-37 CFX	LEFKOWITZ V. BROOKS
77-42 CFX	AMERICAN WAREHOUSEMEN'S ASSN V. BROOKS
77-27 CFY	LANDMESSER V. UNITED STATES
77-28 CFX	IOWA BEEF PROCESSORS, INC. V. VALLEY VIEW CATTLE CO.
77-29 CFX	NEMSER V. COMM'R. INTERNAL REVENUE
77-31 COX	KING V. UNITED STATES
77-33 CFY	TURNER V. UNITED STATES
77-35 CFX	KIRSCHENBLATT V. SECURITIES AND EXCHANGE COMM'N.
77-36 CFX	SABINE TOWING AND TRANSPORTATION CO., INC. V. ZAPATA UGLAND DRILLING, INC.
77-40 CSX	TONTI V. TONTI
77-41 CSX	CITY OF CLEVELAND V. CLEVELAND ELEC. ILLUMINATING CO.
9 X 77-46 CSX	CORY V. FASKEN DC (x out 6)
77-48 CSX	WALLES V. BECHTEL CORP.
77-49 CFY	HOLM V. UNITED STATES
77-50 CSX	ORDER OF AHEPA V. TRAVEL CONSULTANTS, INC. Rule 2 9/29
77-51 CFY	FUIMAN V. UNITED STATES
77-55 CFY	ALLEN V. UNITED STATES
77-58 CFX	CHLEBORAD V. CHARTER 8
77-60 CFX	NATL. R.R. PASSENGER CORP. V. BLANCHETT
77-63 CSX	COOPER V. STATE TAX COMM'N OF UTAH
77-66 CSY	CUGLIATA V. MAINE
77-68 CSX	PARKING REALTY CO. V. SHERLINE

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