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ISSUE FLUIDITY ON THE U.S. SUPREME COURT

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In making decisions on the merits, the members of the U.S. Supreme Court are often willing to provide authoritative answers to questions that have not been asked and to disregard issues that the parties have presented. What accounts for these forms of issue fluidity? Analyzing data from the 1988 term of the Court, we find that issue transformation is quite common, occurring in roughly half of the cases on the plenary agenda. We propose models of both issue discovery and issue suppression that, while successful in explaining how the justices select issues, suggest that these two forms of fluidity result from largely different influences.

Scholarly interest in the Supreme Court's agenda has generated considerable insight into the process by which cases are chosen for decisions on the merits. Still, despite our knowledge of how the members of the Court select cases for full consideration, we know precious little about how the justices determine which specific issues to resolve in a case once review is granted. Naturally, the substantive questions that the Court addresses on the merits are apt to be controlled largely by those that are presented by the litigants, but the members of the Court are relatively unconstrained; the justices may use a case as a vehicle for resolving issues not formally presented, or they may elect to ignore issues that were fully briefed and argued. There is no doubt that such issue fluidity is present in a good many cases (see, e.g., Ulmer 1979, 1982). Yet no one has attempted to provide a systematic analysis of this potentially significant variation in judicial choice. To what extent does such issue fluidity occur on the Supreme Court, and what factors account for it?

We shall examine several competing hypotheses regarding the likely causes of issue fluidity on the Supreme Court. With data from the 1988 term of the Court, we examine two different forms of fluidity. Specifically, we model the discovery and suppression of issues for decisions on the merits. Aside from uncovering a fair amount of issue fluidity, our results indicate that a variety of legal and extralegal factors invite and constrain both types of decisions. In each case, our basic design is to explore the difference between the issues that the Supreme Court is *asked* to decide and those that it ultimately *chooses* to decide.

TRANSFORMING THE JUDICIAL AGENDA

Most studies of the Supreme Court's agenda setting focus on the process by which the justices accept and reject appeals and petitions for certiorari (e.g., Caldeira and Wright 1988; Perry 1991; Ulmer 1984). In sifting out all but the most significant cases, the justices obviously narrow the range of issues to which they will devote their scarce attention and resources. That process by itself, however, does not necessarily presage the precise issues to which the Court will speak when it renders an opinion. In other words, each of the cases that the justices agree to decide on the merits will contain issues on which the Court may (or may not) eventually rule. Conversely, a question not formally addressed by the parties may nonetheless be resolved within the context of a specific case. In short, the plenary agenda—which consists of cases—and the issue action agenda—which consists of issues—are not interchangeable, so "the question(s) to which the Court will respond in any given case cannot be known with certainty until the Court's opinion in the case is announced" (Ulmer 1982, 322). Consequently, the process of developing an agenda, as others have rightly noted, must be regarded as a continuous process, one that extends even to decisions on the merits (see, e.g., Caldeira and Wright 1990).

The ability of judges to transform the issues in the cases they decide is, of course, made possible by the malleability inherent in questions of law. In the flow of litigation, for instance, the questions resolved at the trial level are often not those that are addressed on appeal (Marvell 1978; Richardson and Vines 1970). It is therefore scarcely surprising that, as cases make their way through the courts, seemingly narrow, commonplace issues often metamorphose into broader, more consequential concerns. To be sure, lawyers and litigants have a hand in this process, molding the presentation of issues in the hopes of maximizing their likelihood of success. Quite apart from such contributions to the evolution of issues, however, appellate judges—and justices of the Supreme Court in particular—are in large measure free to manipulate the substance of the legal questions before them.

One of the best illustrations of the Supreme Court's facility for modifying the issues with which it contends is evidenced in the transformation of the Court's agenda. Since the 1930s, regularized patterns of change have manifested themselves as the justices have gradually shifted their attention away from economic questions and toward developing doctrines

in the area of civil liberties. Indeed, the ebb and flow of the Court's policy priorities can be understood, to a considerable extent, as a function of the changing preferences of the justices themselves (Pacelle 1991). This vacillation in the issue alternatives to which the Court has devoted its energies is visible not only at a broad level of aggregation but within more parochial areas of the Court's docket as well (Caldeira 1981).

Quite clearly, then, there is fluidity on the Court's agenda; it exists at the macro level, both between and within policy domains. What is more, we know a good deal about the various forces that have produced these transformations in the Court's docket. Interestingly enough, however, at the micro level (i.e., at the level of individual cases) our knowledge of issue change is not nearly as well developed. To the extent that the subject of fluidity in judicial choice has been addressed in individual cases, the focus has been on the degree to which there is fluctuation in the votes—as opposed to the issues—before an opinion is announced (Howard 1968). To put it another way, we know how the justices change as a function of the issues in a case, not how the issues in a case change as a function of the justices.

Still, some scholarly signposts do mark the direction for such research. The most significant work on issue transformation of this sort has been largely theoretical. Ulmer (1979) formally introduced the concept and contemplated a number of important variations. In its two most general forms, issue fluidity occurs as either *issue discovery* or *issue suppression*.[1] The former occurs "in any case in which the Court grants full review and then proceeds to discover and decide an issue not raised by the [parties]," while the latter exists "in any case in which review is granted but in which the Court then suppresses and does not decide an issue posed by the [parties]" (Ulmer 1982, 322).

The Court's jurisprudence is replete with both varieties, and each can be readily illustrated. To that end, two prominent cases from the law of search and seizure, *Mapp* v. *Ohio* (1961) and *Schneckloth* v. *Bustamonte* (1973), are often cited as examples of issue fluidity. *Mapp* is perhaps the best known instance of issue discovery. Aside from its obvious constitutional importance, the case is noteworthy in that the application of the exclusionary rule to the states was not an issue formally presented by the litigants. Although originally argued primarily on the question of the constitutionality of a state obscenity statute, the Court's opinion ultimately dealt with the Fourth Amendment, not the First. Here, the justices were apparently persuaded to reach the search-and-seizure issue by the arguments raised in an amicus brief filed by the American Civil Liberties Union (Cortner 1981). Conversely, in *Schneckloth*, the justices ruled that an individual could voluntarily consent to a search, whether or not the person searched was aware of the right to refuse. At the same time, however, a majority of the justices also chose not to address another issue that was clearly raised in the case, namely, whether state prisoners could seek federal habeas corpus review of Fourth Amendment claims (Ulmer 1982, 328–29).

Such decisions—many more of which are easily found—are suggestive of a more general set of behaviors on the high bench. Thus they invite students of the Court to examine more closely this aspect of judicial decision making: How often does issue fluidity occur? Why do the justices bury some issues and unearth others? These questions are especially worthy of attention because they touch directly upon the nature of the judicial role: To what degree are members of the Supreme Court, driven by ideology, willing either to expand or contract issues—to deviate from the questions presented to them by litigants—as a means of promoting their policy preferences? As far as we know, no one has undertaken to answer these questions for a general cross section of the Court's docket.

MEASURING ISSUE FLUIDITY

We hypothesize that legal and extralegal factors affect how the justices select the questions on which to rule in a case, including their decision to enlarge and diminish the range of issues. Accordingly, we begin our analysis by underscoring the importance of distinguishing issues from cases. As much as one might tend to think in terms of the Supreme Court resolving cases, cases simply provide the framework in which issues are addressed. Although this applies with particular force in the Supreme Court, it is no less true of appellate courts more generally. "Issues are the most important information attorneys give an appellate court. . . . Appellate courts create law by deciding issues, not cases," observes one scholar. "Issues determine what legal rules, facts of the case, and social facts may influence the court" (Marvell 1978, 119).

For their part, the justices see the Supreme Court as a forum for resolving significant issues of federal law, not as a court for deciding individual—and often interchangeable—cases: "To say that cases are fungible is not to suggest that an individual case is of no importance, or that differences between cases do not matter. . . . Nevertheless, it is the issue, not the case that is primary" (Perry 1991, 221). Ultimately, the role of the high court, as Chief Justice Vinson suggested, is "to resolve conflicts of opinion on federal questions that have arisen among lower courts, [and] to pass upon questions of wide import" (quoted in Perry 1991, 36; see also Stern, Gressman, and Shapiro 1986, 221–24). Even from a more mechanical perspective, the Court's Rule 10, which provides the only formal guidance on the Court's agenda setting, speaks of the justices deciding "questions," not "cases." It is true, of course, that cases become the currency in which specific issues are exchanged in the world of judges and lawyers, but the cases themselves do little more than provide a kind of legal architecture for the principles of law that they represent.

Being aware of the very real difference between

cases and issues is critical to understanding issue fluidity. Many studies of the Court's decision making are justifiably occupied with explaining who wins and loses. From a legal standpoint, however, the outcome of a case is not nearly as significant as the legal basis that undergirds it. So the choice of issues—as opposed to the choice of outcomes—is a matter of much gravity, especially since the justices have considerably more flexibility in justifying their decisions than they do in disposing of them. In most cases, determining which party prevailed is not terribly difficult. Divining *why* from the opinion may be quite another matter: Did the Court discover new issues, suppress existing ones, or simply answer the questions presented?

The justices have continually suggested that they are loathe to manipulate the issues in a case. Rule 21, providing that "only the questions set forth in the petition or fairly included therein will be considered by the Court,"[2] is fairly straightforward in expressing the reluctance of the Court to stray from the record in a case. Moreover, it is not difficult to discern why the members of the Court would hesitate to discover issues not originally raised by the parties. As Justice O'Connor argues, "Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the issue" *Yee* v. *Escondido* (1992, 172).[3] Notwithstanding these caveats, the justices are still willing, from time to time, to widen the scope of a case: "Although we do not ordinarily consider questions not specifically passed upon by the lower court, . . . this rule is not inflexible" *Capital Cities Cable* v. *Crisp* (1984, 691). Issue discovery, then, looms inevitably because, "in determining whether to consider issues not raised in a petition, the Court not only has broad discretionary power, but . . . can exercise its discretion so as to permit it to decide the issue it wants to decide" (Stern, Gressman, and Shapiro 1986, 365).[4]

Of course, in the name of judicial restraint, the Supreme Court is occasionally willing to avoid deciding questions that may have been presented on the merits. Justice Brandeis's well-known Ashwander Rules outline a number of circumstances in which the members of the Court may cull the questions in a case: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided" *Ashwander* v. *Tennessee Valley Authority* (1936, 348).

Naturally, the views on the advisability of issue fluidity are likely to vary from justice to justice and from case to case (see, e.g., Rathjen and Spaeth 1979). Still, the larger lesson that emanates from the Court is that, all things being equal, the justices would prefer to stay closer to the issues presented, rather than deviate significantly from them. To what extent, however, does their avowed aversion to transforming issues belie the actual incidence of issue fluidity?

To answer this question, we collected data on all orally argued cases decided by full opinion during the Supreme Court's 1988 term ($N = 160$). It is certainly true that an analysis of a single term provides but a limited perspective on the Supreme Court. Notwithstanding this limitation, there is no compelling basis to believe that any one term differs radically from the next. Any term is likely reasonably to reflect more general patterns of behavior that endure over time. In each case, we measured issue fluidity by comparing the questions presented by the parties in their briefs against the issues outlined in the syllabus of each case in the *U.S. Reports*.[5] Following Ulmer's (1982) lead, we coded issue discovery as present in any case in which a majority opinion ruled on one or more issues that were clearly not discussed in the "Questions Presented" section of the briefs on the merits of either the petitioner or the respondent. Likewise, we regarded issue suppression as occurring in any case in which a majority did not rule on a substantive question that had obviously been raised in the parties' briefs.[6] Our coding rules (presented more extensively in the Appendix) dictated that we proceed conservatively, judging fluidity as present only where reasonably obvious from a fair reading of the briefs and the syllabus. By our estimates, fluidity in some form was present in just over half of the sample. Ulmer's (1982) analysis suggests that issue suppression would be the more common form of fluidity, and this is in fact what we find. Specifically, issue discovery was present in a relatively small number of cases (some 11%), while the suppression of issues was considerably more common, occurring in 46% of all cases. Happily, these figures compare quite favorably with the rates at which one state supreme court decided issues not raised and ignored insubstantial ones (Marvell 1978, 119–28). Thus, since our data permit some cautious optimism regarding the adequacy of our measures, we proceed to developing some theoretical perspectives on the decision to discover and to suppress issues at the merits.

We begin by assuming that the justices are ideologically motivated, seeking to maximize their policy objectives (Segal and Spaeth 1993) and that the members of the Court, consequently, may either expand or contract issues to that end. At the same time, however, we suspect that a variety of intervening factors will mediate the impact of the justices' attitudes and exercise significant independent effects on the frequency of issue fluidity. What specific forces would be at work in shaping these decisions?[7]

At the institutional level, we believe several characteristics are fairly conspicuous. A leading candidate among them is the manner in which the high court takes jurisdiction. Cases that arise on appeal afford the justices considerably less flexibility than do those that fall under the Court's certiorari jurisdiction. While scholars have noted that as a practical matter, appeals are generally treated as a discretionary seg-

ment of the docket (e.g., Perry 1991, 104–6), they are nonetheless cases that the Court is obligated, by law, to decide on the merits. One of the implications of having this well-defined appellate jurisdiction is that it gives the Court very limited discretion, relative to other cases. The lesson is obvious enough: from a jurisdictional perspective, issues brought on appeal simply must be decided. For that reason, the Court should be less prone to either discover new issues or suppress existing ones for cases arising in this fashion. In contrast, those cases brought via the writ of certiorari should be much more open to both forms of issue transformation.[8]

Still, the justices do reserve to themselves the ability to structure the manner in which cases are decided on the merits. One of the more common ways in which this is accomplished is by consolidating multiple cases that raise more or less comparable issues (Stern, Gressman, and Shapiro 1986, 345). The effect of this practice is to increase efficiency. Cases are merged because the Court is interested in deciding, in the context of a single opinion, an issue or group of issues common to all of them. These shared issues, however, are likely to be but a subset of the larger total number of questions raised in the cases. With a spate of ancillary issues, the justices would probably have little need to discover additional ones. Furthermore, focusing attention upon the primary issues that are shared by the cases should come at the expense of those that are unique to but a single case. Consolidated cases, therefore, should have a higher incidence of issue suppression.

Quite apart from the probable consequences of streamlining the plenary caseload, the number of questions raised in a case is apt to affect how many are answered. For a case with a large number of questions emanating from the record, the justices need not look elsewhere for additional ones. Conversely, in deciding a case raising only a single issue, the Court may find it expeditious to develop another. Thus we expect that the greater the number of questions presented in a case, the lesser the likelihood of the justices engaging in issue discovery. Furthermore, as the number of issues increases, so too should the probability of issue suppression. There is little doubt that parties are far from stingy when presenting issues. A litigant may argue that a case presents a host of important questions, but some—even most—could be profitably ignored. As one former clerk emphatically stated, "it would be a minor miracle if a single case really presented more than one" (Baker 1984, 613). As a general rule, complex decisions produce simple solutions (March and Simon 1958). By logical extension, the more questions presented for resolution in a case, the more likely the justices are to simplify their decision making by jettisoning one or more of them.

These disputes, in virtually every instance, come to the justices after having first been heard in the lower appellate courts. These courts vary widely in their institutional reputations (see, e.g., Caldeira 1983), and members of the Court give careful attention not only to the disposition of the case by the lower court but to the identity of the lower court itself. The justices usually give greater deference, for instance, to those members of the bench whose judgments they most respect (Perry 1991, 125). One way to highlight the degrees of deference to lower courts is in the context of federalism. In the minds of some of the justices, decisions originating from the state courts need to be viewed with a critical eye, while cases in the lower federal courts, in contrast, can be considered as more reliably adjudicated. Reflecting his distrust of the involvement of state policymakers in matters of national concern, for instance, Justice Holmes remarked, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states" (1920, 295–96). Generally speaking, the federal bench can boast a much higher caliber of operation than the state judiciaries. Federal judges are chosen more selectively, are more able, are better paid, and receive superior administrative support (Neuborne 1977). Not surprisingly, the high court is reluctant to disturb the decisions made within the circuits (Howard 1981). It strikes us as plausible therefore to suspect that the justices consider the review of federal appeals to require neither the suppression of extraneous issues nor the supplement of additional ones; that is, cases channeled to the justices through the federal courts—where questions of national consequence are considered on a regular basis—should be less subject to change at the hands of the Supreme Court.

Another institutional consideration likely to affect the transformation of issues is the timing of a case in relation to the Court's overall calendar. The Court does not, so far as we know, consciously structure its timetable with an eye toward manipulating the issues on its plenary agenda. Nevertheless, the point in the term at which a case receives formal treatment on the merits could well have implications for the outcome. Although the justices dispense with a tremendous number of petitions at the outset of the term, setting an agenda is an ongoing process, one that continues throughout the session. By convention and formal rules, the procedures for litigating a case in the Supreme Court are highly regularized. So in most instances, the justices, with the help of the clerk of the Court, follow more or less established schedules that govern how and when briefs are filed, arguments are held, and so on. The only step in this process in which the justices have measurable latitude is at the end—deciding when to announce publicly their decision.

Ordinarily, the Court issues decisions in all cases argued during the term by the end of the session in late spring. In effect, then, the justices have considerably more time to develop opinions in the cases argued earlier in the term than they have for those argued later. We predict that the likelihood of issue fluidity varies in direct proportion to the amount of time the justices have available to decide a case: "It is

easy in October, when the work of the Court is really just starting up for the term, to imagine that there is an infinite amount of time in which to explore every nuance of a question. . . . But, as I learned long ago, . . .there is not an infinite amount of time. . . . I feel very strongly that I want to keep as current as I possibly can with my work on the Court, in order not to build up that sort of backlog of unfinished work that hangs over one as an incubus throughout the remainder of the term" (Rehnquist 1987, 298–99). Hence, the more time the Court has available to mold and shape its ruling, the more ably it will locate the ductile qualities of a case and draw out new issues. With less time, the justices face the prospect of having to restrict the majority opinion to all but the more central concerns.

In addition to the vagaries of the Supreme Court's calendar, the amount of time that the justices take to render a decision probably bears upon the choice of issues. Some cases present knotty legal dilemmas with which the justices are liable to wrestle for some time, while other, less problematic cases permit prompt settlement. If the members of the Court can quickly coalesce around a proposed resolution of the questions presented, the opinions can be drafted and issued with relative dispatch, whereas deciding whether to deviate from the questions presented in a case takes time. To be sure, there may well be a variety of confounding factors that determine when an opinion is handed down; still, our hypothesis is that the less time the members of the Court need to make a decision, the more likely they are to eschew manipulating the issues and deal only with the legal questions immediately at hand.

One direct gauge of the impact of institutional alliances is the vote in a case. It is often asserted that majorities are maintained by selecting the marginal justice to write the opinion, but there is little empirical support for this contention (Brenner and Spaeth 1988). That by itself, however, does not mean that the opinion writer gives no consideration to the views of individual justices. It has long been recognized that the members of the Supreme Court are sensitive to the sentiments of their brethren when drafting opinions (Murphy 1964), a fact we think should be reflected in the Court's choice of issues. Because opinions tend to be assigned to the more moderate members of the majority, we assert that the breadth of a decision varies with the number of votes supporting it: the smaller the majority, the more limited the scope of the Court's opinion.[9] What this means in terms of our models is that smaller majorities should make issue suppression much more likely to occur and issue discovery much less common.

Whatever the impact of the views of the individual justice, the Supreme Court as an institution still reviews cases from the lower courts with an eye toward reversing those judgments with which it disagrees (Armstrong and Johnson 1982; Baum 1977). Predictably, the high court reverses far more often than it affirms. Bear in mind, however, that righting the lower courts who stray from the fold need not trigger wholesale rejection of their opinions. When reversing, the Court may single out the egregious issue and disregard the others. We think, therefore, that the reversal of decisions made by lower courts should correspond with the suppression of issues.

Affirmances are another matter. Why would the Supreme Court grant review to a case simply to put its imprimatur on the lower court? After all, apart from the obvious concerns over conflict, the importance of the issue, and the like, there really is no need to affirm. Obviously, the easiest, most efficient way to "affirm" is to do nothing, that is, to deny the petition for certiorari. A plausible hypothesis is that the justices are willing to devote their scarce resources to a decision with which they agree because they see it as an attractive vehicle, an opportunity to broaden and extend the law within a general policy area that has already been conveniently crafted to their liking by the court below. Necessarily, such favorable circumstances should smooth the way to transcending the claims over which the litigants contend, allowing the justices to probe additional questions.

Beyond these institutional constraints, the substance of a case probably determines its potential for fluidity. One obvious consideration is whether the justices are called upon to adjudge constitutional questions. Charles Evans Hughes' oft-quoted aphorism is particularly relevant to the subject of issue fluidity. Because "the Constitution is what the judges say it is," the Supreme Court has ample leeway to treble or soften the constitutional aspects of a case. The innate plasticity of such issues is evident in their transformation in the flow of litigation (Lamb 1976), and given that the members of the Court are regularly called to inject meaning into the text, one has every reason to expect a strong relationship between the presence of constitutional cases and the incidence of both types of fluidity in the Supreme Court.

Just as the Constitution is more elastic than federal statutes, so too are some issues more flexible than others (see Levi 1949, 3). Civil liberties issues, for example, strike us as naturally more pliant than economic ones. The logic behind this assumption is that the cases in the former category tend to involve questions that are, on average, presented at a higher level of abstraction than those of the latter. Disputes over equality, fundamental freedoms, and individual rights invoke broad legal principles and thus seem fairly to invite mutation and reconceptualization. In contrast, cases dealing with government regulation of economic activity (patent or antitrust controversies, questions of labor law, and disputes over transportation and utilities regulation, to name but a few) can be enormously complex and therefore not readily given to manipulation of any kind.

Another conceivable explanation for fluidity aside from the nature of the issues before the Court is the authority upon which the justices rely when disposing of those issues. Among the basic tenets of judicial restraint is the belief that courts should defer to popular decision makers; only sparingly should judges exercise judicial review. Likewise, judges

should invariably seek statutory grounds for their opinions, not constitutional rationales (see, e.g., Lamb 1982). Necessarily, then, to the extent that the justices adhere to these maxims, one should expect to see a direct correspondence between the basis of the Court's opinion and the transformation of issues. A court willing to supplant someone else's judgment for its own should be just as open to substituting its own preferred issues in place of those presented. So the probability that the Supreme Court will deviate from the questions in a case—to enter territory that has not been covered or to ignore territory that has—should increase when the Supreme Court exercises judicial review. By implication, the Court should also be less amenable to modifying a case when it grounds its decision in federal law.

In addition, we recognize that the factors that motivate issue fluidity may not be strictly internal to the Court and the content of its caseload. Certain litigants or organized interests might well color the Court's perceptions. Clearly the most influential litigant in the Supreme Court is the United States. In view of his considerable credibility and talents, the solicitor general enjoys great institutional clout (Caplan 1987; Salokar 1992; Segal and Reedy 1988). In the cases in which the solicitor general is involved, therefore, the justices can anticipate a full and fair treatment of the issues. This, in turn, should obviate the need to address questions not covered in the merits briefs or to slight those issues that have been fully presented.

Interests groups, too, are likely candidates for shaping the high court's judgment (Epstein and Kobylka 1992; Lawrence 1990). Groups pursue their policies in the Court through a variety of mechanisms, the most common of which is the filing of amicus curiae briefs (Schlozman and Tierney 1986). Unfortunately, one of the most important questions—whether or not the independent arguments of interest groups as amici curiae are actually embraced by the Court in its opinions—is also one of the most difficult to answer, given that amicus briefs often only duplicate the reasoning of the litigants (see Epstein 1993, 694–99). We make no pretense of resolving that question here. Instead, we simply assert that the presence of amicus briefs increases the chances of the justices seeing a case from a perspective other than that of the parties. In the absence of amici, the information about a case is filtered through two sources, the petitioner and the respondent. This circumstance substantially improves the odds of the Court resolving the case on precisely the grounds on which it was presented. Briefs amicus curiae, even those that replicate the parties, serve as a reminder that the issues should not be viewed solely through the eyes of the litigants. On the other hand, where amici, independent of the parties, actually make novel arguments that advocate deciding a case on broader or narrower grounds, the Court may find them attractive and adopt them.

It is instructive to bear in mind that amici urge the suppression of issues, as well their expansion. Since amicus briefs, in their intended form, are supposed to present information not contained in the parties' briefs, intuition might suggest that amici would lead the Court to discover new issues, not abandon existing ones. Yet amici can—and often do—urge the Court to limit the questions in a case:

> It frequently happens that a party wants a particular argument to be made but is not in a position to make that argument itself. . . . For example, governmental entities often feel compelled, for political reasons, to argue for very broad rulings: eliminate the exclusionary rule entirely, absolute immunity for all governmental employees, etc. But courts, including the Supreme Court, are institutionally conservative and usually prefer to decide cases on narrower grounds if possible. An amicus can suggest those narrower grounds: qualify the exclusionary rule rather than eliminate it, distinguish a prior case rather than overrule it, or dismiss certiorari as improvidently granted, among others. (Ennis 1984, 606–7)

In short, we suspect that amicus briefs are conducive to fluidity of either form. Moreover, even if amici often replicate the parties, we think that their presence still prompts the Court to look outside the parties' briefs for answers to important questions.

Of course, this is not a comprehensive survey of the potential sources of issue fluidity. Nevertheless, within our theoretical framework, we believe that we have covered a wide range of appropriate and promising predictors. We next subject this theoretical orientation to empirical scrutiny.

ANALYSIS

As we have noted, issue fluidity occurs in the Supreme Court in numbers sufficient to merit closer investigation. Why then does the Supreme Court so often explore uncharted questions or disregard existing ones? Our examination takes the form of two explanatory models; one estimates the likelihood of issue discovery, the other, issue suppression. In each model, the dependent variable assumes a value of 1 for the cases in which fluidity did occur and 0 for those in which the Court did not deviate from the questions presented. With our set of explanatory measures (the coding is presented in the Appendix), we estimated the probability of fluidity using probit analysis (Aldrich and Nelson 1984). The results for these models are presented in Table 1.

Both equations offer generally striking performances; they demonstrate overall statistical significance and impressive fits, as measured by the pseudo-R-squared. The model of issue suppression does enjoy greater success. It reduces error by some 73%, while the equation for issue discovery represents a more modest 11% improvement over the null model. Nevertheless, each provides corroborative support for a good many of our expectations. There are a number of forces clearly at work. What particular effects manifest themselves?

One factor whose impact is common to both models is the jurisdiction under which a case is brought to

TABLE 1

Probit Models of Issue Fluidity on the U.S. Supreme Court

VARIABLE	ISSUE DISCOVERY	ISSUE SUPPRESSION
Constant	−3.57**	.07
	(1.47)	(1.48)
Writ of appeal	−1.48*	−1.55**
	(.77)	(.55)
Consolidated case	−.06	.73*
	(.37)	(.42)
Number of questions presented	.04	1.52***
	(.10)	(.26)
Case from federal appellate court	.43	−1.19**
	(.43)	(.45)
Days remaining to decide the case	.0031	−.0054*
	(.0026)	(.0028)
Days taken to decide the case	−.0034	−.0003
	(.0043)	(.0045)
Vote of the majority	.29*	.08
	(.13)	(.13)
Supreme Court reverses lower court	−.89**	.18
	(.36)	(.37)
Constitutional case	1.29**	−.36
	(.54)	(.56)
Civil liberties issue	.76*	−.32
	(.45)	(.41)
Economic issue	−.52	−1.90**
	(.68)	(.71)
Judicial review	.80	−.60
	(.73)	(.74)
Federal statutory interpretation	.83	−.55
	(.52)	(.56)
Solicitor general	−.60	−.22
	(.44)	(.43)
Number of amicus briefs	.037*	.084*
	(.019)	(.049)
Pseudo-R^2	.49	.89
−2LLR	28.61*	138.07***
Cases with fluidity	18	73
Cases with no fluidity	142	87

Note: Numbers in parentheses are standard errors. $N = 160$.
*$p < .05$.
**$p < .01$.
***$p < .001$.

the Court. Federal law specifies the kinds of appeals that the justices are bound to hear, and despite their frequent dismissals by the justices, this mandatory jurisdiction still translates into less decisional wiggle room. Accordingly, when a case arises via the writ of appeal, the members of the Court are clearly more likely to face it foursquare, without limiting or expanding the basic questions. Not only does the Court feel obligated to hear appeals, it also thinks it necessary to decide the questions they present.

At least one form of fluidity appears to spring from the concentration of both cases and issues. Although the expansion of issues occurs largely independent of such factors, consolidated cases and those raising a variety of substantive issues are likely to be reduced. Of course, condensing cases into a single opinion and pruning away secondary concerns may be advantageous from the perspective of the justices, but from the litigants' standpoint, there is a very reasonable chance that some of the questions important to them will ultimately not be addressed in the Court's ruling. Far more critical, however, is the number of questions the justices are asked to resolve. Indeed, cases that raise numerous issues are especially vulnerable to suppression. The magnitude of this connection is readily illustrated in probabilistic terms: with two questions presented in a case, the chances of the Court ignoring one of them is fairly strong (.34); the probability of issue suppression jumps to .86, however, when a case raises three questions.[10] These estimates comport quite well with the Court's general tendencies; opinions usually address but one or two primary questions. To be sure, there are occasional constitutional kaleidoscopes, such as *Buckley* v. *Valeo* (1976), but they are obviously the exception. When the high court is asked to decide myriad issues on the merits, it separates the wheat from the chaff no less than at the agenda stage.

If the process of deciding which issues truly merit the Court's close attention is made more burdensome by the parties' demanding answers to large numbers of questions, at least some of their work is lightened by the federal appellate bench. Although the rate of issue discovery does not appear to be sensitive to the identity of the lower court, when it comes to suppressing questions, the justices show considerable respect for the issues as framed within the circuits. So whatever opinions the justices may have on an issue, if it was decided by a federal court of appeals, it will probably not be abandoned. When cases are brought to the Supreme Court from other tribunals—courts unaccustomed to dealing with potentially certworthy cases as a matter of course—the justices frequently find it necessary to overlook issues in order to resolve the most important ones.

Time constraints, too, factor into the Court's decision making in different ways. On the one hand, given more time, the justices evince no greater alacrity for expanding the range of questions in a case. The Court is inclined to tease new issues from a case if time permits, but this propensity is rather slight. On the other hand, as the end of the term approaches and the Court strives to clear its plenary agenda, the justices are significantly more willing to overlook one or more issues in an opinion in the name of expediency. In short, there is good reason to believe that the justices' calendar (in particular, the crunch at the end of term) has genuine consequences for the Court's policy outputs. Beyond the time limitations imposed by the term, we find that the number of days the justices need to agree on an opinion has no effect in either equation.

Why do the justices unearth new issues? The results indicate that part of their decision can be attributed to the size of the majority. In marginal cases, all things being equal, moderation is more likely to prevail in the opinion; that is, the justice writing for the Court is not apt to stray from the questions presented. As agreement among the justices increases, however, so does the willingness of the majority to extend the ruling further and resolve other questions as well. We also hypothesized that issue discovery would occur more often when the justices affirmed the lower court, and this is precisely what we find. Thus, among the factors that might prompt the justices to reverse lower courts, the desire to modify issues is not among them. Those cases where the justices affirm the lower court, however, have a significantly higher likelihood of issue discovery. A plausible explanation is that the justices are motivated to affirm, at least in part, by the desire to enter new territory and amplify issues toward which they are already favorably disposed. Given that the Rehnquist Court has affirmed considerably more cases than its predecessors, we think this relationship is especially noteworthy (see Segal and Spaeth 1993, 199–202). In fact, far from simply placing its stamp of approval on the policies of the lower courts, the Court, it would seem, has carefully chosen the fertile ground in which to allow legal issues to bloom. Not only do these results provide some clues to understanding the high affirmance rate of the Rehnquist Court, but they also suggest that in recent years, the policymaking of the Court may have been far more extensive and magnified than one might presume.

Whether there is a metamorphosis of issues in a case also depends upon its subject matter. As expected, constitutional questions revealed their natural elasticity. The breadth of the Constitution's language undoubtedly affords great freedom in recasting legal questions, a fact that the justices seem keen to exploit, at least in the case of discovering new issues. In addition, the Court is quite sensitive to the general issue area of a case. One interesting difference between our two models is that cases involving civil liberties are much more tractable than others (i.e., they raise the probability of issue discovery), while economic issues are decidedly intractable (i.e., they lower the probability of issue suppression). The justices, therefore, have a marked tendency to increase the amplitude of a civil liberties decision before an opinion is announced. In cases involving individual rights and freedoms, the Court is more than willing to flesh out new issues. Economic cases are not given to such expansion, but they are rarely disregarded; if the justices are asked to address a number of economic questions in a case, there is every likelihood that they will answer them all.

There is, of course, much more to the judicial role than can be captured by the measures we employ. The correlates of activism and restrain that we do bring to bear, however, provide virtually no explanatory power in either equation. Declarations of unconstitutionality and the construction of federal statutes have little bearing upon the rate of issue fluidity. If the justices were genuinely concerned with following the dictates of judicial restraint, the reluctance to judge the validity of the actions of executives and legislatures should decrease the frequency with which the Court departs from the issues in a case. Also, when the authority of the Court's decision rests on statutory grounds, one would again anticipate there being less fluidity. We find no support for the assertion that the judicial role enters into the calculus. None of this will be news to adherents of the attitudinal model.

Even if their policy preferences do shape the contours of issue fluidity, the justices still take their cues to a certain extent from the Court's institutional players. The coefficients for the presence of the solicitor general, while not significant, are instructive nonetheless. The solicitor general is the Court's most reliable litigant; and scholars have shown, over and over again, that the justices consistently look to the federal government for faithful representation of the issues at stake in a case, as well as of their relative importance. So it is not at all surprising that as a party, the solicitor general reduces the incidence of fluidity in either form. Organized interests have an apparently prominent role, too. The greater their presence in the form of briefs amicus curiae, the more willing the justices are to search for new issues or abandon existing ones. It is possible that in formulating their opinions, the justices seize upon alternative grounds suggested by amici. After all, "a good idea is a good idea, whether it is contained in an amicus brief or in the brief of a party" (Ennis 1984, 603). Our evidence on this point, however, is only circumstantial.[11] Still, our data do provide fairly persuasive evidence that amici have a hand—in what precise way, we cannot be sure—in reframing the issues before the Court.

Overall, our assessment of these two models does lead us to one important conclusion. It would seem that these two forms of issue fluidity respond to decidedly different influences. With only a couple of exceptions, the reasons why the Supreme Court resolves issues not presented in a case are not the same as those that determine whether issues are cast aside. Issue discovery is more or less a matter of discretion. For example, the justices are more anxious to augment a case with additional questions when they affirm the lower court and when more members support the outcome. Constitutional questions and civil liberties issues likewise provide a more expandable canvas. By comparison, the Court's decision to ignore issues is largely a function of institutional constraints: a less experienced lower court failed to focus attention on the important issues and made it necessary; the case presented too many questions; or there was not enough time remaining in the term to fully develop the opinion. Issue discovery is largely a proactive behavior, while issue suppression is clearly more reactive in nature. In this respect, then, the pattern is quite clear: the Supreme Court discovers

issues because it wants to and suppresses issues because it has to.

CONCLUSION

Our purpose here has been to estimate the extent of, and reasons for, issue fluidity on the Supreme Court for decisions on the merits. We have argued that the justices have considerable leeway in manipulating the issues before them, and our data suggest that they frequently take advantage of that latitude. In roughly half of the full-opinion cases, there is a divergence between the questions presented by the parties and the questions ultimately decided by the justices. Issue fluidity, it turns out, occurs quite often. In a significant minority of cases, the members of the Court provide authoritative answers to questions that have not been asked. More commonly, they disregard issues that the parties have presented. The causes of such transformations are largely as we hypothesized. The justices search for cases that permit them to expand their preferences through new issues, while institutional forces often conspire to leave existing issues behind. Such expansion and restriction of questions is not at all inconsequential, because "via the manipulation of issues, the Supreme Court is exercising a role in the American political system for which it is generally not held accountable" (Ulmer 1979, 73). Issue fluidity, therefore, is a topic worthy of more attention.

However convenient it may be to think of the justices as selecting cases, it is in some sense more appropriate to conceive of the agenda process as involving the selection of issues. Viewed in those terms, the suppression of issues actually reflects fairly refined decisions by the members of the Court. That is, it is not simply a matter of placing cases on the plenary agenda; indeed, the justices have fairly discriminating palates, choosing from among the questions presented in those cases. Similarly, the considerable discretion that the justices exercise in building their agenda can be seen with even greater clarity through the lens of issue discovery. Granted, this expansion of issues occurs in a limited number of cases, but given the fungibility of the Court's jurisdictional agenda (see Perry 1991), it is noteworthy that it occurs as often as it does. In sum, our empirical analysis of the transformation of issues leads us to believe that the process of setting an agenda in the Supreme Court is much more complex and continuous than previous research has established. Far from ending with the selection of cases for plenary review, agenda setting is in fact intertwined with the making of substantive decisions.[12] Quite simply, it involves a good deal more than accepting some cases and rejecting others.

The evidence reported here, we think, brings issue fluidity into greater relief, but it does, of course, leave many questions unanswered. For instance, at the broadest level, our results do not speak to the exercise of fluidity at different time periods: Did the Warren and Burger Courts transform case-specific issues in substantially different ways? In light of the profound changes over time in the Court's allocation of agenda space (Pacelle 1991), this is an interesting consideration. To that end, we expect to undertake in the near future a similar analysis of the Warren Court. Another relevant concern is the filtering of issues that takes place at the stage of case selection. Why, in the granting of petitions for review, do the justices sometimes limit review to specific issues or request that the parties present alternative ones (see Ulmer 1982, 331–33)? Furthermore, we can easily imagine models that take account of various other explanatory factors on which we currently lack data. Such specifications could include the impact of circuit conflicts—which might well lead to issue suppression—and the role of landmark decisions—which could well serve as the stage for the expansion of issues (see Ulmer 1982).

Moreover, as revealing as these results may be, they still do not convey a deeper sense of the substantive decisions embodied in issue fluidity. That is, although our models delineate the circumstances under which issue fluidity occurs, they do not untangle the more perplexing question of *which* issues are expanded or contracted: Do the justices broaden an issue because it is narrowly framed? Similarly, will they abandon a question simply because of its boilerplate quality? Obviously, these are relevant considerations, clearly worthy of close attention in future research. In light of the lack of systematic inquiry into this area, however, we think that demonstrating *whether* issue fluidity occurs is itself an important undertaking.

Our analysis does offer some insight into a significant feature of judicial decision making, a set of decisions that the Supreme Court apparently makes with some frequency. As a consequence, we think that our theoretical notions of agenda building in the Court should take issue fluidity into greater account. That the Court's plenary docket is so fluid suggests quite clearly that the setting of an agenda does not end with the granting of certiorari. It is a highly complex and continuous process in which the justices pick and choose issues long after cases are granted review. Understanding how the Supreme Court selects its issues, therefore, is at least as important as knowing how it selects its cases.

APPENDIX

Issue fluidity reflects the extent to which the U.S. Supreme Court, in making decisions on the merits, provides authoritative answers to legal questions that have not been asked (i.e., issue discovery) or disregards legal issues that the parties have presented (i.e., issue suppression). Although perhaps easily grasped in the abstract, measuring the presence or absence of issue fluidity requires some specific coding rules.

Rule 1. Identify the legal questions raised in a case by consulting the "Questions Presented" of both the petitioner's and the respondent's briefs on the merits. Where the respondent fails to state the questions in its brief, we assume (consistent with the Rules of the

Court) that the party agrees with the petitioner's portrayal of the case. If both parties present essentially comparable questions but one brief treats them summarily while the other expands the general issues into more specific subquestions, we count them in their more expanded form.

Since docket numbers are the unit of analysis, where two or more distinct cases are consolidated (i.e., where cases with separate docket numbers are decided with a single opinion), match the individual petitioners with their respective respondents. In other words, determine questions within docket numbers, not case citation. For instance, if two consolidated cases involve the identical respondent (e.g., a particular state), while the petitioners are two distinct parties, identify the questions separately for each case. Thus the number of questions can differ between docket numbers even though they are part of the same case citation. Where multiple parties represent the same side in a case but individually file briefs, consult each set of briefs to determine the number of unique questions.

Rule 2. Identify the questions addressed in the Supreme Court's opinion. We examine the syllabus for each case in the *U.S. Reports*, identifying the Court's specific holding(s) by asking, "To what issue(s), as a matter of law, did the Supreme Court speak, either directly or indirectly?" Thus questions are addressed only in the context of full majority opinions (or sections of an opinion to which a majority of justices subscribe). Although it is certainly true that a minority of justices may discuss a specific legal issue (in a section of what is otherwise a majority opinion, in a concurrence, or even in a dissent), their statements, however specific, do not have binding precedential value.

Rule 3. Identify the presence or absence of issue discovery. In making this judgment, we ask, "Did a majority opinion provide an authoritative ruling on one or more questions not presented in the merits brief of either the petitioner or the respondent?" In other words, do we know more than we would expect to know based upon the questions presented? This can assume one of two forms: (1) the justices may rule on an issue completely unique to a case (i.e., answer a question not presented), or (2) the justices may specifically answer a question presented at a level of generalization greater than is necessary to cover that question (see Ulmer 1979, 70–73; idem 1982, 321–24). Either of these must be true as a matter of law; that is, a judgment of the Court, though it may speak to other questions, is not sufficient. (Note again, we assess whether a majority of justices addressed additional issues, or expanded existing ones, by consulting the case's syllabus. We adopt this approach because the syllabus underscores the central elements of the Court's decisions, as well as the voting alignments supporting them. These summaries are also generally unadorned by distracting dicta, which might otherwise lead one to inflate the incidence of issue expansion.) If both or either appears in a case, then we code issue discovery as having taken place (1), 0 otherwise.

By way of illustration, issue discovery occurred in the case of *Lorance* v. *AT&T* (1989), a case in which a collective bargaining agreement—one that produced changes in a plantwide seniority system—had an adverse effect on certain female employees. Here, the central question posed on the merits was whether "administrative charges filed by female workers under Title VII of the Civil Rights Act of 1964 [are] timely when filed within 300 days of their demotion to lower-paying jobs caused by the operation of a discriminatory seniority system that was designed to advantage males workers over females workers" (*U.S. Supreme Court Records and Briefs* 1988–89, No. 87-1428, Brief for the Petitioner, p. i.). Before answering this question, however, the Court first held that under Title VII of the Civil Rights Act of 1964, "the operation of a seniority system having a disparate impact on men and women is not unlawful unless discriminatory intent is proved" (ibid. p. 900). The Court then went on to hold, in answer to the question presented, that the limitations period for filing charges began when the seniority system was imposed. Whether the Court had to address the issue of establishing discriminatory intent in order to resolve the question presented is, of course, debatable. More importantly, it is also beside the point. As a matter of law, we know the answer to a legal question not presented by the litigants.

Rule 4. Identify the presence or absence of issue suppression. In making this judgment, we ask, "Did a majority opinion fail to provide an authoritative ruling on one or more questions presented in the merits brief of either the petitioner or the respondent?" In other words, do we know less than we would expect to know based upon the questions presented? It is important to note that the Court need not answer all questions specifically and directly. In many instances, the justices may, by answering one question directly, answer a related question by implication (see Stern, Gressman, and Shapiro 1986, 361). What is determinative is whether, upon consulting the questions presented in the merits briefs, one could turn to the Supreme Court's opinion for authoritative answers to each one. If one cannot, then we consider issue suppression to have taken place (coded 1) or not (coded 0).

By our lights, these coding rules lead us to classify issue suppression as having occurred in the case of *Webster* v. *Reproductive Health Services* (1989). This dispute arose over a number of regulations, imposed by the state of Missouri, that generally restricted access to abortion services. Among the seven questions presented for review by the state in its brief on the merits was the following: "Are legislative findings in the preamble to a state abortion bill that 'the life of each human being begins at conception' and that 'unborn children have protectable interest in life, health and well-being' facially unconstitutional?" (*U.S. Supreme Court Records and Briefs*, 1988–89, No. 88-605, Brief for the Appellants, p. i.). By our coding scheme, this question was not answered as a matter of law in a majority opinion of the Court. More precisely, reasoning that "it would be time enough for federal courts to address the meaning of the preamble should it be applied in some concrete way to restrict the activities of such health care professionals," the Court concluded, "This Court *need not pass on the constitutionality of the Missouri statute's preamble*" (p. 490, emphasis added). So although the Court's opinion actually spoke to the issue raised by the state, the Court—quite explicitly, in fact—refused to answer the question presented. In other words, based on the opinion of the Court, we do not know, as a matter of law, the answer to the question presented by the litigants.

We regard these as reasonably reliable coding rules for our dependent variables. Moreover, we have the empirical support of a reliability check, having recruited a graduate student (one previously unfamiliar with our analysis) to code, consistent with these decision rules, both forms of issue fluidity for a random sample of some 20% of the cases. The agreement between coders was very high for both issue discovery (97%) and issue suppression (94%). To make a more formal judgment about the replicability of our measures, we calculated kappa. This statistic of intercoder reliability is especially appropriate for categorical data—even those variables with skewed distributions—and has the added virtue of correcting for chance agreement between coders. With an upper positive bound of 1.0, our measures of kappa for issue discovery and issue suppression, .88 and .87 respectively, are very substantial, suggesting "almost perfect agreement" (Elder, Pavalko, and Clipp 1993, 42–43). Accordingly, we are confident that our measures of issue fluidity are quite reliable.

Below we also report the coding of the variables we utilize in our models of issue discovery and issue suppression:

Writ of appeal
: 1 if the case was brought under appellate jurisdiction, 0 if under the certiorari jurisdiction;

Consolidated case
: 1 if the Supreme Court consolidated the case with one or more additional cases and reported them in a single opinion, 0 otherwise;

Number of questions presented
: the number of unique questions presented in the parties' briefs on the merits;

Case from federal appellate court
: 1 if the court whose decision the Supreme Court reviewed was a federal court of appeals, 0 otherwise;

Days remaining to decide the case
: the number of calendar days from the date the case was argued to the last day of the term;

Days taken to decide the case
the number of calendar days from the date the case was argued to the date the opinion was announced;
Vote of the majority
the number of justices voting in the majority;
Supreme Court reverses lower court
1 if the petitioning party prevailed on the merits, 0 otherwise;
Constitutional case
1 if the Supreme Court considered a provision of the U.S. Constitution, 0 otherwise;
Civil liberties issue
1 if the case involved a civil liberties issue—i.e., criminal procedure, civil rights, the First Amendment, due process and privacy—0 otherwise;
Economic issue
1 if the case involved an economic issue—i.e., unions and general economic and commercial activity—0 otherwise;
Judicial review
1 if the Supreme Court declared unconstitutional a federal, state, or local act, 0 otherwise;
Federal statutory interpretation
1 if interpretation of a federal statute or regulation was the basis for a part of the Supreme Court's decision, 0 otherwise;
Solicitor general
1 if the federal government was a party to the case, 0 otherwise;
Amicus briefs
the number of amicus briefs filed in the case on the merits.

Notes

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1. Ulmer (1982) presents a host of different incarnations of issue fluidity. He discusses, for instance, complex combinations of both issue suppression and issue discovery, as well as the fluidity that occurs between the stage of case selection and decisions on the merits. Although we do not deny the importance of these variations, we choose to focus our attention on the two most basic forms.

2. See the *Rules of the Supreme Court of the United States*, reproduced in Stern, Gressman, and Shapiro 1986, 884.

3. This line of reasoning is particularly appealing, given the fungibility of the Court's docket and the justices' expressed need for percolation in the lower courts (see Perry 1991, 220–21, 230–34).

4. In its rules, the Court also makes explicit its right to "consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide" (Stern, Gressman, and Shapiro 1986, 896).

5. Using docket numbers as the unit of analysis, we identified these cases in the *United States Supreme Court Judicial Database*. Of course, a more revealing portrait of issue fluidity—one that would permit assessment of which issues were being manipulated and with what substantive effects—could be painted if we were to treat issues (as opposed to cases) as the unit of analysis. The substantial statistical obstacle to this approach, however, is that it would come at the cost correlated errors. (For example, if issues were the unit of analysis, then the error term in predicting whether the Court, say, suppressed an issue in a case would be directly related to the errors for every other issue within that same case.) Necessarily, the data in our sample are at the case level; some 156 cases were decided with signed opinions and 4 contained full opinions that were written per curiam. Data on the questions presented by the parties were taken from *U.S. Supreme Court Records and Briefs* 1988–89.

6. We did, however, depart from Ulmer's conception of fluidity in one important respect by not restricting our analysis to the questions raised by the petitioning party. In the abstract, our different approaches should not matter, given that the justices identify the issues (usually implicitly but sometimes explicitly) when granting a petition for certiorari or noting probable jurisdiction. All things being equal, at the stage of case selection neither party should be making arguments on the merits of an issue. Instead, one party stresses the importance of the issue(s) and the need to reexamine the decision of the lower court, while another party gainsays the significance of the issue(s) and highlights the correctness of the lower court.

Once a case has been slated for a decision on the merits, however, the debate shifts to the substance of the questions involved. Again, the petitioner's brief "should also include points raised by the respondent or appellee as matters of defense, so that the Questions Presented will contain all the issues upon which the Court is called to pass" (Stern, Gressman, and Shapiro 1986, 553–54); but we are not willing to assume that the two parties necessarily agree on the questions. Parties can and do act strategically on the merits, minimizing or enlarging, as the case may be, issues originally presented at the agenda stage (Baker 1984; Springer 1984). In any given case, therefore, there is some likelihood that the two parties will present objectively different questions in their briefs on the merits. In fact, we have such cases in our data set. We think that it is important to consider the issues as presented by both parties. If, for example, the justices elected to decide an issue that was presented by the respondent but absent from the petitioner's brief, the Court would be, under Ulmer's rule, "discovering" an issue that was clearly contained in a merits brief. Our rule is, we think, more in keeping with the spirit of issue fluidity. It is not, in our judgment, a major concern, given that in most cases the parties do not disagree as to the questions presented.

7. The reader should note that in many instances we draw our hypotheses directly from Ulmer's conceptual survey of the likely causes of issue fluidity (see 1982, 335–41). Much of his discussion was appropriately speculative and, by his admission, subject to dispute. We do, in fact, occasionally propose counterhypotheses.

8. For a more recent sample of the Court's docket, this issue would not loom as large, given that Congress in 1988 all but eliminated the range of cases that could be brought on appeal. In the 1988 term, however, a significant minority of cases—24%—were appealed to the Court and decided with oral argument and full opinion.

9. Also, as a very important technical matter, if a majority of the justices cannot agree to a single opinion, then the Court's decision has no precedential value (Segal and Spaeth 1993, 276). This form of issue suppression—where a plurality of justices announces the judgment of the Court—is what Ulmer (1982) refers to as the "disappearing question."

10. These probabilities are calculated by constraining all of the remaining predictors to their mean values (see Aldrich and Nelson 1984).

11. Moreover, another limitation is that we examine only one avenue of interest group activity. Given our knowledge about the credibility of repeat players more generally, it is entirely possible that when interest groups directly sponsor litigation, the incidence of issue fluidity is reduced.

12. Naturally, this implies that issue fluidity is part of a sequence of decisions, a step that occurs later in the process, not earlier. Although we cannot say with certainty when issue fluidity takes place, we believe that logic is on our side. First, we know that in the earliest stages of case selection (i.e., formation of the discuss list) the justices are apt to rely upon very general indicators of a case's importance. In contrast, in making the subsequent decisions to grant or deny review, the Court renders more sophisticated judgments (Caldeira and Wright 1990). So the even more complex question of which issues to suppress or broaden would not likely arise until the Court began rendering decisions on the merits. Second, if decisions about which issues to address were actually made earlier, the justices would more commonly restrict their grant of certiorari to certain questions within a given case. It is true, of course, that the justices do suppress issues when they

grant review (see Ulmer 1982). Any examination of the Court's regular list of orders, however, would demonstrate that this happens only rarely. Finally, some of our significant predictors (e.g., the number of days remaining in the term or the number of amicus briefs) are either wholly unconnected to the process of case selection or not present until the time that the Court actually makes decisions on the merits.

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