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The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law

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The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law

BENJAMIN JOHNSON

The Supreme Court is unique among federal courts in that it chooses—using the writ of certiorari—which cases it will decide. Justice Brennan once noted that this discretionary power is “second to none in importance.” This article examines the institutional politics behind this certiorari process. Specifically, it uses an original dataset of Justices’ agenda-setting votes from 1986 to 1993 to show how Justices use the rules that govern certiorari to pursue ideological goals. In addition, and in contrast to existing qualitative accounts, the data suggest some Justices queue off of the Chief Justice’s vote giving the Chief’s vote outsized influence. After analyzing the effects of politics at certiorari, the article considers possible reforms that might lessen or at least channel the effects of Justices’ policy preferences. To that end, the article offers a range of proposals to reform the certiorari process to promote transparency, to improve efficiency, and to enhance the Court’s legitimacy.

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BENJAMIN JOHNSON *

INTRODUCTION

A common attack against courts is that they are “political.”¹ One need look no further than newly-inaugurated President Trump’s assertion that an injunction against his executive order on immigration² was “so political.”³ The President went on to say that he does not “ever want to call a court biased, . . . but courts seem to be so political.”⁴ Politics at the Supreme Court are no less divisive, but they are potentially more consequential, since they may undermine the Court’s legitimacy⁵ and judicial review powers.⁶ Increasingly, Senate confirmation battles focus less on nominees’

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¹ Sometimes this is offered not as an indictment but as an observation. See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 34 (2005) (introducing his main thesis “which is that to the extent the Court is a constitutional court, it is a political body”).

² Exec. Order No. 13769, 82 Fed. Reg. 8, 977 (Jan. 27, 2017).

³ Donald J. Trump, U.S. President, Speech to the Major Cities Chiefs Police Association (Feb. 8, 2017), in THE HILL (Feb. 8, 2017, 3:40 PM), <http://thehill.com/blogs/pundits-blog/the-administration/318525-transcript-of-president-donald-trumps-speech-to-the> [https://perma.cc/3D3E-RJH9].

⁴ *Id.*

⁵ See Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) (noting the widespread agreement that the Court’s public legitimacy is rooted in its reputation as being “impartial, trustworthy, and above . . . politics”). Compare *id.* at 193 (suggesting the Court’s public legitimacy may be less dependent on apolitical procedures), with Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1648 (2000) (arguing the Court’s conceptual legitimacy is “dependent on its conformity with law”).

⁶ See Hartnett, *supra* note 5, at 1718 (arguing that the Supreme Court is no longer a “passive” or “neutral” institution because of its ability to decide which cases to hear (quoting RICHARD L. PACELLE, JR., *THE TRANSFORMATION OF THE SUPREME COURT’S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION* 15 (1991) and DORIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* 2 (1980))).

qualifications than on their perceived politics.⁷ Legal scholars bemoan the influence of politics at the Court,⁸ and Justices air similar concerns.⁹

Among the most opaque,¹⁰ consequential, and *political* decisions the Court makes in any case is the first one: whether or not to take the case at all.¹¹ Justice Brennan called the power to make this decision “second to none in importance,”¹² while one scholar has gone far enough to suggest that “the Supreme Court’s power to set its agenda may be more important than what the Court decides on the merits.”¹³ And yet scholars are divided on the question of whether or not the Justices actually use this power to advance a political agenda, with answers ranging from always,¹⁴ to sometimes,¹⁵ to

⁷ See Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1189 (1988) (hypothesizing that when the public begins to become frustrated with Supreme Court decisions, they use the confirmation process to find candidates that share their values and “will read the Constitution not according to some eccentric or extremist philosophy, but rather in the way that . . . the People demand”); Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296, 296 (2006) (arguing that Senate confirmation hearings are conducted to ensure the nominee shares the Senators’ values); Jonathan P. Kastellec et al., *Polarizing the Electoral Connection: Partisan Representation in Supreme Court Confirmation Politics*, 77 J. POL. 787, 788 (2015) (evaluating whose opinion matters in “how senators cast votes on Supreme Court nominees”).

⁸ E.g., ERWIN CHEREMINSKY, *THE CASE AGAINST THE SUPREME COURT* 6 (2014) (expressing his “disappointment” with the Court’s decisions over the years, especially regarding their “[failure] to protect people’s rights”); ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* (2012) (referencing in Preface the well-known criticism that the Justices act as “politicians in robes” and introducing the argument that because the “Supreme Court does not function as a true court,” it “prevents the American people and our elected leaders from resolving [various] issues democratically”); see also Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY 601, 606 (noting that many scholars have concluded “that judicial decisions simply reflect the political preferences of a majority of the Justices on the Court at any given time”).

⁹ See, e.g., *Bush v. Gore*, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting) (disparaging the majority by ending his dissent claiming that while the Nation would never know who truly won the election, clearly the Nation has lost their “confidence in the judge as an impartial guardian of the rule of law”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (criticizing the majority’s decision as “an act of will, not legal judgment”).

¹⁰ See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 790 (1984) (calling the process “hopelessly indeterminate and unilluminating”).

¹¹ See *id.* at 710 (providing an overview of the different factions that criticize the cases the Supreme Court hears and chooses not to hear).

¹² William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477 (1973). Similarly, Justice Marshall said that even the decision *not* to decide a case is “among the most important things done by the Supreme Court.” Thurgood Marshall, U.S. Supreme Court Justice, Remarks at the Second Circuit Judicial Conference (Sept. 8, 1978), in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 177 (Mark V. Tushnet ed., 2001).

¹³ Hartnett, *supra* note 5, at 1737.

¹⁴ See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 293 (2005) (“[C]entral to positive scholarship is the notion that the Justices are strategic in using their almost unlimited control over their docket to manage their agenda along ideological terms.”).

¹⁵ See H.W. PERRY, JR., *DECIDING TO DECIDE* 274–82 (1991) (suggesting Justices care about case outcomes on certain issues and utilizes certain decision modes depending on how strongly they care about the outcome of the case); S. Sidney Ulmer, *The Decision to Grant Certiorari as an Indicator to*

almost never.¹⁶ For all the concern generated by political decision making at the Court, scholars have struggled to quantify the extent to which politics influences the Court's decisions, pin down where politics enters the process,¹⁷ or define it in a way that can be measured. This Article proposes a more rigorous inquiry based on the following definitions. Justices are *strategic* in that they consider the likely outcome on the merits as they decide how to vote at certiorari. They may be *ideological* in two senses. First, they may have policy preferences that are more liberal or conservative. Second, they may have judicial philosophies that tend to lead to liberal or conservative outcomes. Justices make *political* decisions at certiorari when they vote strategically and ideologically—in the first sense—to advance a policy agenda.¹⁸

Political decision making that affects the agenda is related to, but distinct from, ideological decisions on the merits or justifications and guidance in an opinion. Motivated reasoning¹⁹ may apply in each circumstance, but they are not equivalent. Rather, ideological politics at the agenda-setting stage is something like evidence of premeditation. Justices choose to take these cases so they can use them as vehicles for ideological advancement later.

This Article explores how politics infects the Court's "shadow docket,"²⁰ the largest part of which is the set of decisions about petitions for certiorari. Certiorari is a tool that the Court uses to take questions that it wants to decide and dodge those it wants to avoid.²¹ This Article presents an empirical examination of how ideology can and does influence the cert process and the Court's agenda for the term. The results matter because the Court's docket shapes the course of law, and as that docket shrinks, every slot appropriated by Justices' political votes is a slot unavailable for the Court's more apolitical agenda.

Decision "On the Merits," 4 POLITY 429, 441 (1972) (noting a close correlation between agenda-setting votes and votes on the merits).

¹⁶ DORIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* 125–30 (1980); see also David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417, 1430 (2006) (opposing the notion that "Justices are motivated solely by their own policy preferences").

¹⁷ See, e.g., Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 188 (1968) (suggesting there are politics everywhere).

¹⁸ Accordingly, the rest of the Article uses the terms ideological and political interchangeably.

¹⁹ See Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7 (2011) (describing motivated reasoning as "the tendency of people to unconsciously process information—including empirical data, oral and written arguments, and even their own brute sensory perceptions—to promote goals or interests extrinsic to the decisionmaking task at hand").

²⁰ William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 4 (2015) (noting that many "criticize the Court's merits cases for being political, unprincipled, or opaque. But those criticisms may be targeted at the wrong part of the Court's docket").

²¹ LISA KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW* 4 (2001)

The Court is very selective about the cases it takes. Since it grants so few petitions, it tries to reserve spots on the docket for only important cases.²² But exactly what makes a case sufficiently important is not always clear. The Court offers only limited guidance to those who would seek the writ, and in practice, the Justices do not rigorously adhere to any standards regarding the “certworthiness” of petitions.²³ The absence of clear standards “exacerbates the ever-present tendency of the Justices to conceive of the case selection process in political terms.”²⁴ That is, whether a Justice finds a petition to be worthy of certiorari is a function of how important the substance of the case is and whether or not the case is likely to advance the Justice’s ideological interests.

Accordingly, any careful, empirical study of agenda-setting at the Court must account for both a case’s intrinsic certworthiness and ideological effects that push in favor of or against granting the writ. This Article develops tools to do just that.²⁵ The only data needed to undertake the study is a set of cert votes. Fortunately, Justice Blackmun saved all of his papers from his time on the Court.²⁶ Helpfully, Lee Epstein, Jeffrey Segal, and Harold Spaeth scanned several years of docket sheets and internal memoranda into PDF form and posted the data on the web at the Blackmun Archive.²⁷ For this project, the PDF records were hand-coded into useable computer data.²⁸ With this rich dataset, there is more than enough data to pursue a rigorous empirical analysis of the cert process.

By carefully analyzing the Justices’ votes at the agenda-setting stage during the early years of the Rehnquist Court, this Article provides empirical support for two distinct claims. First, the Rule of Four,²⁹ which governs the cert process, empowers liberal and conservative coalitions to push cases onto the docket for ideological reasons. For conservatives, the opportunity is to push the law ever more to the right. For the liberals, the hope is to fill up the docket with less important cases so the conservatives have fewer

²² See PERRY, *supra* note 15, at 34–36 (discussing the absence of a definition of what makes a case certworthy and suggesting that the definition is “a case that [they] consider to be important enough to be certworthy”).

²³ *Id.* at 34–35 (suggesting that the “ambiguity of Rule 10 is not some unfortunate oversight by the Justices” but instead that “[t]hey have intentionally enunciated murky criteria”).

²⁴ Estreicher & Sexton, *supra* note 10, at 791.

²⁵ The model presented builds on other models of voting at the Court or in legislatures. See, e.g., Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 137 (2002) (using the Justices’ votes to reverse or affirm at disposition); Joshua Clinton et al., *The Statistical Analysis of Rollcall Data*, 98 AM. POL. SCI. REV. 355, 356 (2004) (using congressional votes).

²⁶ Harold Hongju Koh, *Unveiling Justice Blackmun*, 72 BROOK. L. REV. 9, 10–11 (2006).

²⁷ DIGITAL ARCHIVE OF THE PAPERS OF HARRY A. BLACKMUN (Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth eds., Washington University in St. Louis 2007), [epstein.wustl.edu/blackmun.php?p=3](https://perma.cc/U88C-SZUM) [<https://perma.cc/U88C-SZUM>].

²⁸ *Id.*

²⁹ PERRY, *supra* note 15, at 43–44.

opportunities to work mischief or to convince a moderate Justice to vote with them to collect a rare win.

Second, the empirical analysis highlights the role and influence of the Chief Justice, who seems to have a large, and previously unnoticed, effect on the composition of the Court's docket. The Chief Justice's vote has a statistically significant effect on the voting behavior of five of the other Justices even after accounting for ideology. This result is quite surprising as it contradicts the qualitative evidence on the subject.³⁰ Further, while there is a growing awareness that the Chief Justice possesses largely unexamined—and possibly unjustifiable—formal powers to shape the judiciary,³¹ the Chief Justice's influence over the docket is unexplored.³² The customary privilege of voting first³³ appears to give him an outsized impact on the Court's agenda. Since Justices vote ideologically, the Court's docket may come to reflect the Chief's idiosyncratic political views instead of heaving to the more neutral principles espoused in the Court's rules.³⁴

This Article is also helpful to better understand the stakes of current fights over the Court. The politics *over* the Court should take seriously the politics *at* the Court in every stage of the Court's process. The core empirical findings about the power of ideology and the Chief Justice strongly suggest that personnel is policy, or in the case of the Court, personnel is law. Both parties and aligned interest groups engaged in a pitched battle over the last open seat on the Court, and there is every chance that one or more seats could come open in the next few years. As the Senate and nation evaluate potential Justices for the next seat, this Article makes clear that it is at least as important to know how the nominee would take cases as it is to determine how that person would dispose of cases. The implications extend beyond the Court as well; most state supreme courts also control their agenda,³⁵ and these findings suggest politics may be at work across the states.

Finally, this Article offers tentative suggestions to amend the cert process.³⁶ Previous works address concerns that sometimes the Court takes cases it should not and other times it passes on cases it should take. Discerning exactly which cases the Court “should” or “should not” take is beyond the scope of the present Article. Those who believe the Justices

³⁰ See *id.* at 85–91 (referencing the Discuss List as an administrative process that is not strategically manipulated by the Chief Justice).

³¹ See Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1575–76 (2006) (explaining the reality of the impact that the Chief Justice can have on American law).

³² *Id.* at 1577–78.

³³ See PERRY, *supra* note 15, at 44 (specifying that when votes are required, they are done in order of seniority from most senior to most junior Justice).

³⁴ SUP. CT. R. 10.

³⁵ *E.g.*, CAL. GOV'T CODE § 1067 (1872); TEX. GOV'T CODE § 22.001 (1987).

³⁶ See *infra* Part IV (speaking of the problems that threaten the court's legitimacy and the solutions proposed to rechannel the political power).

should just be umpires would presumably say the Court should take cases without regard to ideology and not seek to re-make the law.³⁷ In general though, ideology may be a relevant or even necessary consideration under different theories; however, it is harder to identify a theory that would award the Chief Justice so much sway over the docket.

This Article proposes a range of specific changes to address the Chief's power and to harness the Justices' willingness to reason ideologically at certiorari.³⁸ First, Congress or the Court could clarify the rules that govern certiorari so that there are clearer rules. Second, the Court on its own initiative or pursuant to a congressional regulation of the Court's appellate jurisdiction could take steps to promote transparency in the process. Specifically, the Court could release the records of the certiorari votes within a reasonable timeframe. Third, the Court could change the voting procedures by amending the Rule of Four³⁹ or altering the order in which Justices vote in conference. Finally, Congress could create an external review body to help the Court select cases.

The Article is organized as follows. Part I offers three examples of the certiorari process at work. The different strategies and concerns displayed in those examples are then considered alongside other possibilities in Part II. That Part explains how Justices can—and sometimes do—take advantage of the certiorari process to advance a policy agenda. Part III introduces the empirical model and results, leaving policy recommendations for Part IV.

I. THREE EXAMPLES

Before turning to the formal and statistical analysis, it is worth considering three examples from the Blackmun Archive.⁴⁰ Justices decide how to vote on certiorari based in part on the intrinsic importance of the issue or case presented and in part on the likely policy effects that would result if the Court granted cert and decided the case. The three examples presented here are consistent with different types of voting behavior that follow from that assertion. First, some issues are so important that the Court simply must take and decide the case regardless of the ideological effects. Second, sometimes Justices want to try to keep cases—even important

³⁷ Cf. Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U.L. REV. 683, 685 (2016) (“At its core, in our separation of powers system, to be an umpire as a judge means to follow the law and not to make or re-make the law.”). On the tensions with the umpire analogy in the context of the Court, see Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 701–02 (2007). Similarly, Aaron Zelinsky has a thoughtful and historically minded criticism of the judge-as-umpire metaphor. See Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 113–14 (2010) (introducing the “judge-umpire” analogy by explaining its history, intent, and inaccuracy).

³⁸ See *infra* Part IV (proposing to channel or relocate political power within certiorari).

³⁹ Congress could also require such a change as a “Regulation[.]” of the appellate jurisdiction.

⁴⁰ DIGITAL ARCHIVE, *supra* note 27.

cases—off of the docket because they are concerned the Court will make a decision that will move the law in a “bad” direction.⁴¹ Finally, sometimes Justices are aggressive and take cases that do not seem important in order to advance an ideological agenda.

Take first, *Mistretta v. United States*.⁴² The facts of *Mistretta* are straightforward. John Mistretta sold cocaine to an undercover agent for the DEA, and he was convicted for selling a controlled substance.⁴³ He appealed his sentence, which was set according to the newly enacted federal sentencing guidelines promulgated by the Federal Sentencing Commission.⁴⁴ His appeal asserted that the new guidelines were unconstitutional.⁴⁵ A memorandum circulated to the Court noted that district courts across the country were divided on whether the new guidelines were constitutional or not, and noted that no matter how the Court resolved the matter, “a large number of defendants will have to be resentenced.”⁴⁶ That large number was growing on a daily basis, and so it was important that the Court act quickly.

Given the obvious importance of the case, the memorandum recommended granting cert.⁴⁷ All nine Justices agreed, and the Court granted certiorari unanimously.⁴⁸ Justice Scalia voted to grant cert even though he ended up dissenting in the case.⁴⁹ Given the 8-1 outcome, it is almost certain he knew that he would be on the losing side, but plainly he recognized it would be irresponsible for the Court to wait to decide this question.⁵⁰

While *Mistretta* was so obviously important that ideological concerns were rendered secondary, some cases are not so overwhelmingly important that ideological considerations vanish entirely. When issues or cases appear that carry significance, sometimes Justices worry that the Court—if it takes the case—will decide the case in a way that will displease the Justices. Such

⁴¹ See *infra* text accompanying notes 46–47.

⁴² 488 U.S. 361 (1989).

⁴³ *Id.* at 370; Preliminary Memorandum for No. 87-1904 at 2–5 (June 2, 1988) (on file with Washington University in St. Louis), <http://epstein.wustl.edu/research/blackmunMemos/1988/GM-1988-pdf/87-1904.pdf> [<https://perma.cc/XGV8-XJKJ>].

⁴⁴ The Commission was established under the Sentencing Reform Act of 1984, 28 U.S.C. §§ 991-998.

⁴⁵ *Mistretta*, 488 U.S. at 370–371.

⁴⁶ Preliminary Memorandum for No. 87-1904, *supra* note 43, at 1–2, 11.

⁴⁷ *Id.* at 11.

⁴⁸ Docket Sheet, *Mistretta v. United States*, 488 U.S. 361 (1989) (No. 87-1904), <http://epstein.wustl.edu/research/blackmunDockets/1988/Paid/docket-87-1904.pdf> [<https://perma.cc/GTQ4-ETVB>].

⁴⁹ *Mistretta*, 488 U.S. at 413–27 (Scalia, J., dissenting).

⁵⁰ See Preliminary Memorandum for No. 87-1904, *supra* note 43, at 10–11 (Explaining that the district courts have examined this issue and decided it over fifty times, and little would be gained from waiting for a court of appeals to decide the issue. It explains further that the district courts have not been able to reach a uniform result, so courts of appeals would likely have the same difficulty.); see also *Mistretta*, 488 U.S. at 361.

Justices may then try to play defense. One possible example of this is *Murray v. Giarratano*, where the Court held states do not have to provide counsel in postconviction collateral proceedings in capital cases.⁵¹ The memorandum summarizing the certiorari petition circulated to the Court suggested the lower court decision requiring states to provide counsel conflicted with the Court's recent decision in *Pennsylvania v. Finley*.⁵² It also noted the Fourth Circuit issued its opinion en banc, so it would have a great deal of precedential force, and it would require Virginia to develop and fund a system to provide attorneys for offenders. The memorandum colorfully stated that "respondent's arguments for why cert should not be granted border on the absurd."⁵³ Unsurprisingly, the memorandum recommended granting cert.⁵⁴

Justice Blackmun's own clerk wrote, in a two-page memorandum appended to the memorandum, that she agreed that the petition "requires a grant of cert."⁵⁵ She stated that "the only rationale for denial would be a patently defensive one."⁵⁶ This "defensive denial" strategy is one through which a Justice votes to deny a case because of the risk of making unfavorable law.⁵⁷ Justice Blackmun voted to deny certiorari, as did Justices Brennan, Marshall, and Stevens.⁵⁸

Just as the certiorari process allows some Justices to play defense, at times it also allows them to play offense. Consider *Employment Division v. Smith*,⁵⁹ which worked a sea change in Free Exercise jurisprudence.⁶⁰ The facts of the case were rather straightforward. Alfred Smith was a member of the Native American Church, and as a part of a religious ceremony, he ingested "a small quantity of peyote for sacramental purposes."⁶¹ This single use constituted a violation of his employer's—a drug treatment center—

⁵¹ 492 U.S. 1 (1989).

⁵² Preliminary Memorandum for No. 88-411, 4-5, 9 (Oct. 28, 1988) (on file with Washington University in St. Louis), <http://epstein.wustl.edu/research/blackmunMemos/1988/GM-1988-pdf/88-411.pdf> [<https://perma.cc/H5JV-37BG>]; see also *Pennsylvania v. Finley*, 481 U.S. 551 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further.").

⁵³ Preliminary Memorandum for No. 88-411, *supra* note 52, at 11.

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at app. p.1. Her final recommendation was to "Grant (reluctantly)" *Id.* app. p.2.

⁵⁶ *Id.* at app. p.1.

⁵⁷ PERRY, *supra* note 15, at 198-207.

⁵⁸ See Docket No. 88-411 (Aug. 31, 1988) (on file with Washington University in St. Louis), <http://epstein.wustl.edu/research/blackmunDockets/1988/Paid/docket-88-411.pdf> [<https://perma.cc/H5JV-37BG>].

⁵⁹ 494 U.S. 872 (1990).

⁶⁰ See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("The Smith decision is undoubtedly the most important development in the law of religious freedom in decades.").

⁶¹ *Emp't Div., Dep't of Hum. Res. of Oregon v. Smith*, 485 U.S. 660, 663 (1988).

employment policies, as well as of the laws of Oregon.⁶² The center fired Smith, who then applied for unemployment compensation from the State of Oregon.⁶³ The Employment Division denied the application because Smith had been fired for “misconduct.”⁶⁴ The Supreme Court of Oregon overturned this decision based on First Amendment Free Exercise concerns, and the State appealed to the U.S. Supreme Court.

Much of the story is well known and set out plainly in the Court’s opinion. What is less well known is that the Court very nearly did not hear this case. The case got the bare-minimum level of support necessary to make it onto the docket, with Justice Blackmun casting the pivotal fourth vote in favor of hearing the case.⁶⁵ If Blackmun, who ended up in the minority,⁶⁶ had simply withheld his vote, the Court would not have granted certiorari.

Thanks to Justice Blackmun, the Court granted cert and remanded the case to Oregon for further consideration. Specifically, the Court wanted to know whether Oregon recognized a religious-use exception to the state’s criminal code for the consumption of peyote.⁶⁷ In subsequent proceedings, the Oregon court held that there was no state religious-use exception to the relevant statute.⁶⁸ Still, the Oregon court maintained that the First Amendment of the U.S. Constitution prohibited the state from denying benefits to Smith for taking peyote as a part of a religious practice. The state again appealed to the U.S. Supreme Court, leading to perhaps the most important and controversial Free Exercise case of the last several decades.⁶⁹

But before the Court could write a landmark opinion, it must first take the case, and this was not a foregone conclusion. One of Justice O’Connor’s clerks authored a memo to the Court⁷⁰ recommending it *deny* certiorari. According to the memo, *Smith* was not the “best vehicle” to answer the question presented, there was no clear circuit split, and “the impact and

⁶² See *id.* at 662–63, 672 (stating that the possession of peyote amounts to a felony under Oregon law).

⁶³ *Id.* at 663.

⁶⁴ *Id.*

⁶⁵ Cert. Voting Docket Sheet No. 86–496, (Dec. 2, 1986), <http://epstein.wustl.edu/research/blackmunDockets/1987/Paid/docket-86-946.pdf> [<https://perma.cc/XX8L-GHF4>].

⁶⁶ *Smith*, 485 U.S. at 674 (1988) (Blackmun, J., joining the Brennan dissent).

⁶⁷ *Id.* at 673–74.

⁶⁸ *Smith v. Emp’t Div.*, 763 P.2d 146, 147–48 (Or. 1988), *rev’d sub nom.*, *Emp’t Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

⁶⁹ See Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 956 (2003) (“*Smith* is one of the Rehnquist Court’s most controversial holdings, and the Justices are still sharply divided on the issue.”); McConnell, *supra* note 60, at 1110–11 (noting that the Court held religious beliefs do not excuse an individual from complying with other laws that a state is free to regulate).

⁷⁰ Drafting the memo was a part of the clerk’s job since Justice O’Connor was a part of the cert pool. The cert pool and cert pool memos are more fully described in Part III, *infra*. See also Preliminary Memorandum for No. 88–1213, at 12, (Mar. 17, 1989), <http://epstein.wustl.edu/research/blackmunMemos/1989/GM-1989-pdf/88-1213.pdf> [<https://perma.cc/3CWW-SUHR>].

precedential value of a holding by this Court . . . would be limited.”⁷¹ The memo’s author has certainly been proven wrong about the impact of the precedent,⁷² but most likely, the clerk could not anticipate such a sweeping decision.⁷³ Justice Blackmun’s clerk was a bit more cynical and suggested a faction of the Court was more interested in making law than deciding a case. In an internal memorandum, one of Justice Blackmun’s clerks noted that the majority from *Smith I* “thought it would get to decide whether religious use of peyote is protected by the [F]ree Exercise Clause against state criminal prosecution.”⁷⁴

The *Smith II* Court seemed to be focused on getting to answer a particular question to make a particular change in the law. *Smith II* was certworthy because of the law the majority could make—the law it *knew* it could make—if the Court granted cert.⁷⁵ That politics was at play is easy to see from the voting patterns at cert. *Smith* provided the same facts and the same question both times it came to the Court. The first time, Justice Blackmun thought the question was worth resolving, but Justices O’Connor and Stevens did not.⁷⁶ When the case came back, Justice Blackmun saw that the Court was likely to go in a direction he would not support, so in the second case, he voted to deny cert.⁷⁷ But Justices O’Connor and Stevens also had new opinions about the possibilities of *Smith*.⁷⁸ Though the Court had no new facts and only a marginally clearer picture of the possibly relevant state law, those two Justices changed their minds and voted to grant cert so they could answer the question.

Smith shows how precarious the cert process can be. An enormous result hinged on the cert vote of a Justice who would come to dissent in the case. It also shows how politics is at play at cert, as Justices changed their minds on how certworthy *Smith* was between *Smith I* and *Smith II*, even though neither the facts nor the question changed. The only difference was that the Justices had a different idea of how *Smith II* would come out given their

⁷¹ *Id.* at 12.

⁷² In response to the Court’s decision, Congress passed the Religious Freedom Restoration Act. *See* 42 U.S.C. §§ 2000bb(a)-1 to -4 (noting that the government, through any law, cannot burden the First Amendment freedom of religion).

⁷³ Indeed, Justice O’Connor, for whom the clerk worked, concurred only in the judgment and wrote a blistering concurring opinion that claimed that the majority’s holding “dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation’s fundamental commitment to individual religious liberty.” *Emp’t Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 891 (1990) (O’Connor, J., concurring).

⁷⁴ Preliminary Memorandum for No. 88–1213, *supra* note 70, at 12.

⁷⁵ One of Justice Blackmun’s clerks made this point in an internal memo. The clerk said it was clear that the majority in *Smith I* “thought it would get to decide whether religious use of peyote is protected by the Free Exercise Clause.” *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

deliberations in the first hearing. *Smith II* shows how the Court can grab a case that is not that significant on its own and make law from ideology. The Court did this even though it could have reached the same outcome without working such a large change in Free Exercise jurisprudence.⁷⁹

II. POLITICS AND THE RULE OF FOUR

The Rule of Four is perhaps the most famous minority-voting rule in politics. When the Justices requested and received control over their docket from Congress in 1925, there was a real concern that the Court would take too few cases.⁸⁰ In particular, Congress did not want the Court to focus too narrowly on certain types of cases, leaving broad swaths of the legal landscape unsupervised.⁸¹ The Justices responded that the Court already had an institutional remedy for that problem in The Rule of Four.⁸² Under the rule, it takes only four of the nine Justices to commit the Court to review a case.⁸³ The Rule provides ideological opportunities for individual Justices, minority coalitions, the Court median, and the Court as an institution. It also helps keep lower courts in line and expands the types of cases the Court hears.⁸⁴ This Part describes the current certiorari process and the strategic opportunities the Rule of Four presents.

A. *A Brief Overview of the Process*

The Supreme Court has nearly complete control of its docket through the certiorari process. However, the Court has not always had such power over its docket. Until the Judges' Bill in 1925, the Court was required to decide all cases within its jurisdiction.⁸⁵ The Judges' Bill curtailed the Court's mandatory jurisdiction, though it was still technically supposed to hear certain types of cases: for example, where a lower court struck down a federal statute.⁸⁶ The Court quickly began to treat this mandatory jurisdiction similarly to its discretionary docket and limited review to only those cases

⁷⁹ *Smith*, 494 U.S. at 891 (1990) (O'Connor, J., concurring).

⁸⁰ John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 15–16 (1983).

⁸¹ See Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four—Or is it Five?*, 36 SUFFOLK U. L. REV. 1, 12 (2002) (describing Justices' testimony intended to allay concerns that increased discretion would result in arbitrary dismissals).

⁸² *Id.*

⁸³ E.g., Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 975 (1957).

⁸⁴ See Stevens, *supra* note 80, at 20 (noting that “the Rule of Four must inevitably enlarge the size of the Court’s argument docket,” given that it allows cases to be heard even when a majority of Justices deem the case “unworthy of review”).

⁸⁵ See Felix Frankfurter, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 1 (1928) (“To enable the Court to cope with the growth in its business and to conserve its energies for issues appropriate to the Supreme Bench, Congress by the Act of February 13, 1925, acceded to the Court’s desire for drastic limitations upon its jurisdiction.” (footnote omitted)).

⁸⁶ Mark Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 U. CIN. L. REV. 347, 347 (1977).

with a “substantial federal question.”⁸⁷ Congress continued to whittle away at the mandatory parts of the Court’s jurisdiction, culminating in 1988 with the removal of nearly all of the remaining mandatory jurisdiction.⁸⁸ As a result, nearly all parties seeking Supreme Court review of a lower court decision must seek certiorari.

The cert process begins when one or more parties in a lower court files a petition for a writ of certiorari after a final decision is made by the lower court.⁸⁹ The Court receives thousands of petitions every year. In the October 2015 term, the Court disposed of over 6,500 cert petitions,⁹⁰ but that number has often exceeded 8,000.⁹¹ Of this number, the Court will grant cert to only about 1 percent of the petitions.⁹²

Given the sheer volume of petitions, the Court has developed a procedure for streamlining the cert process.⁹³ Most Justices belong to the “cert pool.”⁹⁴ Chambers belonging to the pool divide up the work of reading and summarizing the petitions between the clerks that work for the participating Justices. When a petition arrives at the Court, the case is assigned to one of the clerks in the pool. The responsible clerk reviews the petition and writes a memo to be distributed to the chambers participating in

⁸⁷ PERRY, *supra* note 15, at 29.

⁸⁸ Act of June 27, 1988, Pub. L. No. 100–352, § 1, 102 Stat. 662. Most of the remaining mandatory docket involves cases under the Voting Rights Act or the Bipartisan Campaign Reform Act. *See, e.g.*, *Bethune-Hill v. Va. Bd. of Elections*, 137 S. Ct. 788, 794, 797 (2017) (noting probable jurisdiction for an alleged Voting Rights Act violation); *Cooper v. Harris*, 137 S. Ct. 1455, 1464, 1466 (2017) (noting probable jurisdiction for an alleged Voting Rights Act violation); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442, 1444 (2014) (noting probable jurisdiction for an alleged Bipartisan Campaign Reform Act violation).

⁸⁹ 28 U.S.C. § 1254(1) (2012) (establishing the statutory basis for the Court’s certiorari jurisdiction).

⁹⁰ *The Supreme Court, 2015 Term — The Statistics*, 130 HARV. L. REV. 507, 514 tbl.II(A) (2016) [hereinafter *2015 Statistics*].

⁹¹ *See* EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 312 (9th ed. 2007) (“[T]he Justices consider and dispose of over eight thousand certiorari petitions each term”); *The Supreme Court, 2009 Term — The Statistics*, 124 HARV. L. REV. 411, 418 tbl.II(A) (2010) (noting that during the 2009 term, the Court disposed of 8,087 petitions).

⁹² The bulk of the petitions are filed in forma pauperis, and the Court granted only 12 of the nearly 5,000 such petitions in the 2015 term, or 0.2 percent. The Court is more open to taking cases off of its paid docket, granting 69 of 1565 paid petitions, or 4.4 percent. *2015 Statistics, supra* note 90, at 514 tbl.II(B).

⁹³ F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 703–04 (2009) (noting the process seeks “to avoid unnecessary redundancy” by dividing the work up across chambers).

⁹⁴ *See* Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 FLA. ST. U. L. REV. 101, 110 (2009) (describing the history and function of the cert pool); Adam Liptak, *Gorsuch, in Sign of Independence, is Out of Supreme Court’s Clerical Pool*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/2017/05/01/us/politics/gorsuch-supreme-court-labor-pool-clerks.html> (reporting that currently, Justices Alito and Gorsuch are the only members of the Court who are not members of the pool).

the pool.⁹⁵ The memo describes the facts of the case, the procedural posture, the arguments presented by all parties, and concludes with the author's recommendation of whether to grant or deny the petition.⁹⁶ The memos are often the only information about the petitions the Justices will have.⁹⁷ Even the most certworthy petitions get scant review at the preliminary stage.⁹⁸

Once the memo is circulated, the next step is the creation of the "Discuss List."⁹⁹ The Chief Justice circulates a list of cases to be discussed at the following conference. Any Justice may add a case to the list. If no Justice adds a particular case, cert is automatically denied.¹⁰⁰ At the conference, the Justices vote on whether or not to take the case. Justices may vote to grant, deny, or to Join-3.¹⁰¹ Cases that get four grants or three grants and at least one Join-3 get certiorari.¹⁰² Thus, the Join-3 vote is a sort of weak grant¹⁰³ that functions as a grant in only certain circumstances. If three other Justices vote to grant, then the Join-3 is effectively a vote to grant. If only two vote to grant, then the Join-3 functions as a vote to deny. Interestingly, there is a strong norm against discussing petitions before the conference, so Justices do not build cert coalitions prior to conference.¹⁰⁴

⁹⁵ See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 233 (2001) (explaining that the clerks divide up who should write each memo and then the memos are "circulated to the chambers whose clerks comprise the pool").

⁹⁶ See David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 973 (2007) (book review) (explaining the standardized format that law clerks use to draft memoranda). Generally, the Court's disposition on petitions for certiorari reflects the pool memos' suggestions. During the October Terms in 1984, 1985, 1991, and 1992, the Court agreed with the pool memo on approximately 90 percent of petitions. *Id.* at 991.

⁹⁷ See REHNQUIST, *supra* note 95, at 233–34 (2001) (noting that in the vast majority of cases, he would only review the pool memo and his clerks' annotations to it); David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 801 (1997) (noting a similar admission from Justice Stevens).

⁹⁸ Henry Hart estimated that a Justice spends less than twenty minutes in total on the nonfrivolous petitions. Henry M. Hart, Jr., *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 88 (1959). Chief Justice Hughes said that petitions received about three-and-a-half minutes of discussion at conference. Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 14 (1949).

⁹⁹ See PERRY, *supra* note 15, at 85–89 (discussing the evolution, history, and mechanics of the Chief Justice's "Discuss List").

¹⁰⁰ GRESSMAN ET AL., *supra* note 91, at 15 ("The cases that do not make the discuss list . . . are automatically denied review without discussion or vote.").

¹⁰¹ PERRY, *supra* note 15, at 48–49.

¹⁰² *Id.* at 43–44, 49.

¹⁰³ One Justice called it a "timid vote to grant" and another said he used it for cases he "would vote to grant, but that [he] wouldn't put on the discuss list." *Id.* at 167–68; see also Ryan C. Black & Ryan J. Owens, *Join-3 Votes and Supreme Court Agenda Setting* 3 (June 8, 2009) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568389 [<https://perma.cc/T2HL-4ZD4>] (suggesting the Join-3 reflects collegiality concerns generally and addresses a Justice's uncertainty in a particular case).

¹⁰⁴ PERRY, *supra* note 15, at 147–49, 163.

The guidelines for what makes a petition certworthy at the initial stage are charitably described as imprecise,¹⁰⁵ but such as they are, they are located in Rule 10 of the Supreme Court's Rules.¹⁰⁶ The Rule emphasizes several factors that are of special concern to the Court: resolving circuit splits, clarifying federal law, deciding important questions, and rebuking lower courts that misstate the Court's precedent.¹⁰⁷ It also specifically says that the Court is not generally interested in righting wrongs in particular cases.¹⁰⁸ If the law is clear, the Court is not interested in taking the case. As Chief Justice Vinson put it:

The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. . . . The function of the Supreme Court is . . . to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United

¹⁰⁵ One commentator calls them "tautological[]." PERRY, *supra* note 15, at 34.

¹⁰⁶ This is Rule 10 in its entirety:

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.

SUP. CT. R. 10.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* There appears to be a bit of a fuzzy line between the Court's stated desire to not be a court of error correction and its concern to police lower courts that diverge from its precedents. The latter would seem to be an error, and yet the Court expresses an interest in correcting it. The relevant distinction seems to be between law and fact. The Court is unlikely to review a decision that misapplies Supreme Court precedent to facts, but will review when a court misstates law.

States, and to exercise supervisory power over lower federal courts.¹⁰⁹

Given the importance of the process and the interesting mix of discretion and institutional rules, scholars have not been idle in studying the cert process. There is wide agreement that splits, whether between lower courts or between a lower court and the Supreme Court's precedents, draw the Court's attention.¹¹⁰ Scholars also tend to agree that the Justices are sophisticated voters at the cert stage.¹¹¹ There is a rather robust finding that Justices tend to vote to grant cert in cases where they reverse.¹¹² Interestingly, previous work has not found such votes to be ideologically motivated, though there is evidence that in cases where a Justice wants to see a lower court affirmed, cert votes are focused on the likely outcome of cases.¹¹³ And scholars have amassed qualitative and quantitative evidence that Justices withhold their votes for cert when they worry the Court will reach an unfavorable outcome if the Justices grant cert.¹¹⁴ Despite these findings, scholars still dispute whether the Court really is outcome motivated at the cert stage.¹¹⁵ The remainder of this Part describes possible strategies Justices could—if motivated by outcomes—pursue at certiorari.

¹⁰⁹ PERRY, *supra* note 15, at 36 (quoting Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi). Most formal models focus mainly on the supervisory power. See, e.g., Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 101 (2000) (studying how the certiorari decisions enforce the Court's "doctrinal preferences . . . within the judicial hierarchy"); Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four*, 15 J. THEORETICAL POL. 61, 61–62 (2003) (developing a "formal model of the judicial hierarchy" to better understand how certiorari allows the Court to "compel compliance" and determine "which battles to fight with the lower courts").

¹¹⁰ Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1120 (1988); Stras, *supra* note 96, at 981–83; see also S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 906–11 (1984) (providing statistical data analyzing the Court's conflicts); S. Sidney Ulmer, *Conflict with Supreme Court Precedent and the Granting of Plenary Review*, 45 J. POL. 474, 474–77 (1983) (using statistical data to show the Court's attention to circuit splits).

¹¹¹ Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 561–71 (1999); Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387, 393–96 (1982).

¹¹² JAN PALMER, THE VINSON COURT ERA: THE SUPREME COURT'S CONFERENCE VOTES 59–62 (1990); PROVINE, *supra* note 16, at 107–10.

¹¹³ See Sara C. Benesh, Saul Brenner, & Harold Spaeth, *Aggressive Grants by Affirm-Minded Justices*, 30 AM. POL. RES. 219, 221 (2002) (collecting studies to this effect).

¹¹⁴ See PERRY, *supra* note 15, at 198–207 (describing the existence of defensive denials in judging); Mark V. Tushnet, *Defensive Denials*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 256 (Kermit L. Hall ed., 2005); *infra* Part II.B.

¹¹⁵ Compare Friedman, *supra* note 14, with PROVINE, *supra* note 16, at 125–30, 172; see also Stras, *supra* note 16, at 1430 (opposing the notion that "Justices are motivated solely by their own policy preferences").

B. *Defensive Denials*

The most obvious feature of the Rule of Four is that it makes certiorari contingent on the agreement of a defined number of Justices.¹¹⁶ Absent ideology, the Justices would simply vote for cases they think are intrinsically important and against those they think less so. But once Justices factor in ideological concerns, they must weigh the ideological costs and benefits against the importance of the case. If a Justice wants to take a case, then voting to take the case is a meaningful step in that direction. Similarly, voting to deny the petition makes it more likely the case will not be heard. Stated this way, there is an obvious strategy: vote for what you like and against what you dislike. But this intersects awkwardly with the Court's presumed obligation to take certain important cases.

When ideological considerations cause a Justice to vote to deny certiorari in a case that is important enough that she would otherwise vote to grant, the Justice casts what is called a "defensive denial."¹¹⁷ The *Giarratano* case mentioned in the introduction is one example.¹¹⁸ Another seemingly clear instance of this strategy is *Florida v. Riley*.¹¹⁹

In *Riley*, the Court had to decide whether surveilling residential property from a helicopter 400 feet above the ground constitutes a search under the Fourth Amendment.¹²⁰ The Court had previously ruled in *California v. Ciraolo* that there was no reasonable expectation of privacy from "naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet."¹²¹ The cert pool memo¹²² recommended a grant because there was a split on the issue, and the increasing use of police helicopters seemed to make resolution of this question worth the Court's time.¹²³

¹¹⁶ Leiman, *supra* note 83.

¹¹⁷ See Udi Sommer, *Beyond Defensive Denials: Evidence from the Blackmun Files of a Broader Scope of Strategic Certiorari*, 31 JUST. SYS. J. 316, 319 (2010) (defining a "defensive denial" as occurring when a Justice votes to deny certiorari despite disagreeing with the lower court's decision, as they will likely lose on the merits). The defensive denial has been studied at length in the political science literature. See generally Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995) (studying "the extent to which Justices consider the relative likelihood of winning on the merits when deciding to grant or deny review," and thereby, the prevalence of defensive denials); Caldeira et al., *supra* note 111 (studying the extent to which Justices acted on certiorari petitions with the future decision on the merits in mind).

¹¹⁸ *Murray v. Giarratano*, 492 U.S. 1 (1989); see *supra* pp. 590.

¹¹⁹ 488 U.S. 445 (1989).

¹²⁰ *Id.* at 447–48.

¹²¹ 476 U.S. 207, 213–14 (1986).

¹²² The author was a clerk for Justice White.

¹²³ Preliminary Memorandum for No. 87-764-CSY at 7, (Jan. 25, 1988), <http://epstein.wustl.edu/research/blackmunMemos/1988/GM-1988-pdf/87-764.pdf> [<https://perma.cc/TJ5K-3SQN>].

Justice Blackmun's clerk recognized that the split was sufficient so that "cert would not be unwarranted."¹²⁴ But she also noted that Blackmun had been in the dissent in *Ciraolo*, and presumed that the Justice "was not eager to further curtail individuals' privacy interest in being free from aerial surveillance."¹²⁵ Given his policy preferences—and correctly predicting the likely outcome in the case—she "recommend[ed] defensive denial."¹²⁶ Blackmun took her advice and voted to deny the petition.

Despite Blackmun's strategic vote, the Court took *Riley* anyway. In what will be a recurring theme throughout this Part, strategic voting can improve the chances of a favorable outcome, but it does not guarantee such an outcome. Blackmun's vote made it less likely the Court would take *Riley*, but the Court took the case anyway.

C. *Aggressive Grants*

In contrast to defensive denials, aggressive grants occur when a Justice sees enough positive ideological potential in a case that the vote shifts from deny to grant. In such an instance, the Justice can hope her cert vote pushes a favorable—if not obviously certworthy—case onto the docket where the Court is likely to make a decision more to that Justice's liking. Once again, there is a conflict between the aggressive grant and the desire to focus on "important" cases. Where the defensive denial aims to prevent the Court from taking a case it "should," the aggressive grant attempts to get the Court to take a case it "should not." The previously described *Employment Division v. Smith*¹²⁷ appears to be one example of an aggressive grant. Recall that in the pool memo, Justice O'Connor's clerk recommended denying the petition, but O'Connor and the other conservatives took the case anyway.

The aggressive grant is particularly appealing when there is only a limited downside if the case turns out unfavorably. One possible example of this phenomenon is *South Carolina v. Gathers*.¹²⁸ In 1987, the Supreme Court held in *Booth v. Maryland* that victim impact statements presented during the sentencing phase of a capital case violate the Eighth Amendment.¹²⁹ The Court reasoned that information about a murder victim that is "irrelevant to the [defendant's] decision to kill," but could undermine "reasoned decisionmaking" by playing on jurors' emotions violated the Constitution.¹³⁰ Justice Powell authored the opinion for a five-member

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 494 U.S. 872 (1990).

¹²⁸ 490 U.S. 805 (1989).

¹²⁹ 482 U.S. 496, 509 (1987).

¹³⁰ *Id.* at 505, 509.

majority.¹³¹ Justice White wrote a dissent signed by all dissenting Justices and also signed Justice Scalia's dissenting opinion.¹³² Two years later, Justice Powell had retired and been replaced by Justice Kennedy, who had expressed a desire to overturn *Booth*.¹³³ In *Gathers*, the conservatives took their chance.

Gathers seemed like an unlikely candidate for cert. The case lacked many of the features associated with a successful cert petition. There was no split in the lower courts. There was no dissenting opinion below. The law was clear. Internally, the recommendation from the clerk assigned to summarize the petition for the Court recommended the Court deny the petition "[u]nless the Court wishe[d] to reconsider *Booth*."¹³⁴ In a private memo to Justice Blackmun, one of his clerks agreed the case was not certworthy, but did say that if the conservatives wanted to overturn *Booth*, "this case for them is as good as any."¹³⁵ When the Court met in conference to decide whether to grant cert and take the case, four conservatives (Rehnquist, O'Connor, Scalia, and Kennedy), and only the four conservatives, voted to take the case.¹³⁶

In *Gathers*, essentially none of the Rule 10 factors were in play. What was possible was that the replacement of Powell with Kennedy had opened the door for the conservatives to establish their preferred reading of the law. This situation was somewhat ideal from their perspective, as even if they lost, the law would only remain the same. This was essentially a no-lose proposition, even if they were not guaranteed a win. As it turned out, they did not win. Though their cert strategy worked, and they got the case they wanted onto the docket, the Court upheld *Booth* with Justice White voting to leave *Booth* untouched.¹³⁷

D. *Minority-Enhancing Strategies*

The Rule of Four is obviously a minority-voting rule (at least when there are nine Justices on the Court). It stands to reason that the rule should benefit minority coalitions. While this seems plausible, there has been little effort to explain exactly what benefits the Rule provides to these coalitions. After all, this only puts the case on the docket. Once taken, the majority will dispose

¹³¹ *Id.* at 497.

¹³² *Id.* at 515 (White, J., dissenting); *id.* at 519 (Scalia, J., dissenting).

¹³³ Preliminary Memorandum for No. 88-305-CSY 7 (Sept. 27, 1988), <http://epstein.wustl.edu/research/blackmunMemos/1988/GM-1988-pdf/88-305.pdf> [<https://perma.cc/5E7A-QSV6>] (citing *Mills v. Maryland*, 486 U.S. 367, 397) (Rehnquist, C.J., dissenting)).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Cert. Docket Sheet *South Carolina v. Gathers*, No. 88-305, <http://epstein.wustl.edu/research/blackmunDockets/1988/Paid/docket-88-305.pdf> [<https://perma.cc/JV27-L992>].

¹³⁷ *South Carolina v. Gathers*, 490 U.S. 805, 812 (1989) (White, J., concurring) ("Unless *Booth v. Maryland* is to be overruled, the judgment below must be affirmed. Hence, I join JUSTICE BRENNAN's opinion for the Court." (citations omitted)).

of the case; so, it is a bit unclear what the actual benefit is. Put differently, the minority cannot decide a case, write an opinion, or set any policy on its own, which raises the question: what, if any, benefit is there to a minority coalition from having the power to force a case onto the docket?

The Rule of Four provides different opportunities to minority coalitions depending on prevailing conditions. The unifying feature of all of the advantages is that the Rule of Four lets the minority force the Court to take a case the majority wants to avoid. There are times where a minority coalition can put the majority in a tight place politically. At other moments, the minority might be able to take a case where they can peel off a member of the usual majority coalition and actually win. The Rule of Four also allows a minority of the usual winning coalition to push cases onto the docket to promote an ideological agenda. Finally, and perhaps most intriguingly, the Rule of Four might allow a minority coalition to clutter up the docket and limit the ability of the majority to work mischief.

1. *Political Hardball*

Suppose conservatives make up a 5-4 majority on the Court. A lower court decides a case on a hot political topic, and the Court majority does not want to take the case because it will be forced to reach an unpopular outcome or compromise on a matter of principle. If it is up to the majority, the Court will deny certiorari and leave the matter alone. But the liberal minority can force the Court to take the case anyway. Now, the conservatives must face the choice they wished to avoid. They must now either give the progressive Justices the policy they want or face the wrath of Congress.

A possible example of this phenomenon comes from *Ledbetter v. Goodyear Tire & Rubber*.¹³⁸ The issue in that case involved the statute of limitations for certain claims under Title VII.¹³⁹ Specifically, Ledbetter sued Goodyear for sexual discrimination, arguing that her negative performance reviews were the result of sexual discrimination.¹⁴⁰ A jury agreed with her, but Goodyear appealed the outcome on the basis of the statute of limitations.¹⁴¹ Goodyear argued that Ledbetter could not recover for damages incurred prior to the 180-day window preceding Ledbetter's EEOC claim, and since any improper discriminatory payment decision happened long before that, the statute of limitations had lapsed before the EEOC complaint was filed.¹⁴² Ledbetter argued that each paycheck that was less than that received by a man was a separate act of discrimination.¹⁴³ There

¹³⁸ 550 U.S. 618 (2007).

¹³⁹ *Id.* at 623.

¹⁴⁰ *Id.* at 622.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See id.* ("Ledbetter introduced evidence that during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her

was a circuit split on this issue, and the Court granted certiorari on June 26, 2006, and set argument for that November.¹⁴⁴

The politics of the issue were tricky. Ledbetter was a decidedly sympathetic plaintiff. *Ledbetter* presented a challenge to the conservative majority on the Court, as ruling against Ledbetter would be unpopular with the public and with the new Congress that had just flipped to the Democrats. Further, if it ruled against her, the Court could elevate this as an issue in the upcoming 2008 presidential election, which could harm the Republicans' chances to retain the White House.

There is little reason to believe the conservative majority should want to take this case at this moment. Their preferred outcome would risk popular and legislative backlash, and insofar as the Justices are concerned with presidential elections,¹⁴⁵ it threatened the conservatives' preferred party. This suggests that if they could have, they would have preferred to deny certiorari and resolve the underlying circuit split at a later time. But under the Rule of Four, the liberal bloc had the votes to force the case onto the docket.

For the liberal bloc, *Ledbetter* was a win-win. If the conservatives wilted under the political pressure, the result was an expansive reading of Title VII. If the conservatives stuck to their principles, the result was political pressure against the conservative majority, a possible legislative response that would overturn the decision, and an increased chance the Democrats win the following presidential election.

As it turns out, the conservatives ruled against Ledbetter in a decision that was widely covered and was turned into "a cause celebre"¹⁴⁶ by "Democrats and legal groups on the left."¹⁴⁷ The case became an issue in the 2008 elections, and Ledbetter herself spoke at the DNC and was featured in campaign commercials for then-Senator Obama.¹⁴⁸ After Obama took office,

pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment. Toward the end of her time with Goodyear, she was being paid significantly less than any of her male colleagues.")

¹⁴⁴ *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 548 U.S. 903 (2006) (granting certiorari).

¹⁴⁵ See Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html> [<https://perma.cc/6QBA-6XZ8>] ("I can't imagine what this place would be—I can't imagine what the country would be—with Donald Trump as our president," she said. "For the country, it could be four years. For the court, it could be—I don't even want to contemplate that.") (quoting Justice Ruth Bader Ginsburg).

¹⁴⁶ Robert Barnes, *Exhibit A in Painting Court as Too Far Right*, WASH. POST (Sept. 5, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/04/AR2007090401900.html> [<https://perma.cc/UY64-YZAK>].

¹⁴⁷ *Id.*

¹⁴⁸ Mary Jo Shafer, *Jacksonville's Ledbetter Featured in Obama Ad*, ANNISTON STAR, Sept. 28, 2008.

the Democrats passed the Lilly Ledbetter Fair Pay Act of 2009,¹⁴⁹ which amended Title VII to effectively reverse the Supreme Court's decision.¹⁵⁰

Given this largely foreseeable sequence of events, one would imagine the conservative majority would have preferred to take a pass on *Ledbetter*. While we cannot know for sure, since the cert votes have not been made publicly available, it would not be surprising if the four more liberal members of the Court pushed the case onto the docket. *Ledbetter* points to a set of circumstances where the Rule of Four lets the minority coalition play political hardball and put the majority between a rock and a hard place.

2. *Forcing the Reluctant Median*

For the past several decades at least, legal scholars and political scientists have generally thought of the Court as breaking down along a left-right continuum.¹⁵¹ While this often gets reduced, especially in the popular press, to the assertion that there are two blocs that usually vote in lockstep, there is also the recurring theme of the “swing” Justice. Since the retirement of Justice O'Connor, most observers think that Justice Kennedy is the pivotal member of the Court,¹⁵² who in many, if not most, cases votes with the conservative faction.¹⁵³

Imagine for a moment that this swing Justice is something of a free agent, un beholden to a liberal or a conservative bloc. If the other Justices have a clear sense of what the swing Justice will decide to do in a particular case, they can alter their cert votes accordingly by voting to grant in cases where the median agrees with the swing Justice's own preferred outcome. In contrast, if the majority rule governed at cert, the swing Justice would be able to set the agenda and decide the case as the pivotal voter in both rounds. The median would not only be able to dictate the answers at disposition; she would also be able to pick her own questions. That would be a tremendous power for a single Justice.

¹⁴⁹ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5.

¹⁵⁰ *See id.* (“Congress finds the following: (1) The Supreme Court in [*Ledbetter*] significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decisions undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.”).

¹⁵¹ *See, e.g.,* Kenneth W. Moffett, *Four Predictions about President Trump's Supreme Court*, WASH. POST (Nov. 23, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/23/four-predictions-about-president-trumps-supreme-court/> [<https://perma.cc/92RP-E3BZ>] (analyzing potential Trump Supreme Court picks on a liberal-conservative scale).

¹⁵² *See, e.g.,* Ariane de Vogue, *Travel Ban, Religious Liberty Cases Could Keep Swing Vote Kennedy Around*, CNN (June 26, 2017), <http://www.cnn.com/2017/06/26/politics/anthony-kennedy-supreme-court-monday/index.html> [<https://perma.cc/JYL6-M349>] (describing Justice Kennedy as a “swing vote” on the Court).

¹⁵³ Douglas M. Parker, *Justice Kennedy: The Swing Voter & His Critics*, 11 GREEN BAG 2D 317, 318 (2008).

The Rule of Four lets the competing factions have a say in this scenario. For the liberal Justices who are usually in the minority, they can wait for cases that will bring the swing Justice on board. The conservatives may feel they can take more risks if the swing Justice is usually with them and take cases that could move the law to the right, even if the pivotal Justice is not particularly interested in that case or issue.

Moreover, there are areas of the law where the traditional left-right distinction breaks down.¹⁵⁴ If there are dimensions on which Justices who are often in the minority can cobble together a majority by peeling off one or two Justices from the usual majority coalition, that provides another opportunity for the Rule of Four to make a difference and gives Justices who normally find themselves in dissent a pathway to victory.

Importantly, the minority can do this without the initial support of the defecting Justice. That Justice may not wish to take a case that will split the usual majority for collegiality reasons; she may not think the area of law is particularly important, etcetera. Still, the minority can use the Rule of Four to push the case onto the docket and collect the defector's vote at disposition to secure the win.

3. *Stuffing the Docket*

It is well known that the Court takes fewer cases these days than it did in earlier eras. The Court has decided no more than seventy-seven cases during any term in the Roberts era, and it has decided less than eighty cases in every year since 2000, when it issued eighty-one opinions.¹⁵⁵ Under Roberts, the Court decides on average just over seventy opinions a year. While the Court could always take more cases—indeed, the Court took 111 cases in 1992 and over 150 cases through much of the 1970s and 1980s—in practice it does not seem willing to go much beyond eighty cases a year.¹⁵⁶ Given this empirical regularity, the Rule of Four creates an opportunity for minority coalitions to crowd the docket. If there are only about seventy to eighty slots available in a given term, every case placed on the docket by the minority takes up a slot that otherwise might be filled by ideological opponents in the majority. Several types of cases might be candidates for a minority coalition interested in using this strategy to limit its overall losses.

First, it may want to take cases that the Court will decide unanimously. By definition, the minority coalition would be a part of the “winning” coalition in a unanimous decision. If the minority bloc can substitute a

¹⁵⁴ The obvious example is formalism in criminal cases. *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296, 297 (2004) (in which Justice Scalia, a conservative, wrote for a 5–4 majority joined by liberal Justices Stevens, Souter, and Ginsburg as well as conservative Justice Thomas).

¹⁵⁵ SUPREME COURT DATABASE, <http://scdb.wustl.edu> [<https://perma.cc/7XXG-3JUJ>] (last visited Feb. 11, 2018). The numbers include signed opinions, per curiam opinions, or judgments following oral arguments.

¹⁵⁶ *Id.*

unanimous case for one it would lose narrowly, it will almost certainly be better off on the ideology dimension. Second, the minority may be able to take a case they care little about but is of particular interest to a possible swing Justice. For instance, even if Justices Stevens, Souter, and Ginsburg did not care deeply about whether judge-found facts were inappropriate to use as the basis for a sentencing enhancement,¹⁵⁷ if Justice Scalia did care about advancing his formalist agenda in this area, these other three Justices could join with him to grant cert and be on the winning side. This provides an additional reason to pick cases where the minority coalition could pick off a member of the usual majority. Even if this case is of little importance to the minority coalition, taking this case may take up a slot that would otherwise go to a case they would lose.

One may object that the argument as presented relies on the Court taking only a fixed number of cases. As the Court could always take more cases, this seems to be a questionable assumption. However, as an initial matter, there is an empirical reality that the Court does not take more than eighty cases a year. The finite docket may not be an actual constraint, but the Court seems to treat it as though it were. But more importantly, this ability to stuff the docket does not rely on the Court only taking a limited number of cases.

As the docket increases, the cost of deciding cases—for example, the time reading briefs, hearing arguments, writing opinions, etcetera—increases, and there is value in stuffing the docket. Put differently, if the 81st case is costlier to decide than the 80th, and the 82nd is costlier than the 81st, and so forth, then there are times the minority bloc would prefer to stuff the docket. The reason is the traditional comparison of marginal costs and benefits. If the 79th case is less costly than the 80th, then there is a set of cases that are sufficiently important and would provide the majority with a sufficiently large ideological payoff that they would want to take the case as the 79th, but the importance and ideology are not large enough to pay the higher cost if it were to be the 80th case. Accordingly, cases that are somewhat important and give a small to medium ideological gain to the majority bloc—and presumably a corresponding loss to the minority bloc—might be passed over if the docket is already sufficiently large. Very important cases or cases where the majority could achieve a significant policy victory might still find their way onto the docket despite the docket-stuffing strategy because the payoff is high enough to justify paying the higher cost for taking another case on an already-crowded docket. But at the margin, the minority bloc can block some losses by stuffing the docket even if the Court is unconstrained in how many cases it takes.

Finally, and perhaps most surprisingly, it is possible that the minority bloc would even be willing to *lose* cases they find unimportant to pursue this

¹⁵⁷ See *Blakely*, 542 U.S. at 301 (“This case requires us to apply the rule we expressed [in a previous case]: ‘Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.’”).

blocking strategy. Suppose a Justice does not care much about tax law and taking an additional case can keep some cases the Justice does care about, and will lose, off of the docket. In that instance, it seems clear the Justice would be happy to lose on the tax issue. Even if it is an area of the law the Justice does care about, if the law is already bad from her perspective, then taking another case in this area that will leave the law in the same or a similarly bad place may be a small price to pay to keep a case off of the docket where the majority coalition could actually move the law enough to cause the minority Justice real pain.

This raises an interesting question: what prevents the minority bloc from taking the first eighty meaningless cases that come along to keep the Court majority from doing mischief? The answer is simply that if the minority was so blatant, the majority could change the Rule of Four.¹⁵⁸ The Court did something similar regarding the practice of “holding” cases. The Court will occasionally hold a case pending the outcome of a related case. It used to be the Court would hold a case when three Justices requested it. Death penalty opponents on the Court used this rule to hold death penalty appeals that the Court would otherwise reject, thus delaying the execution. As a result, the majority eventually changed the rule to require four votes to hold a case.¹⁵⁹ This suggests that if a minority coalition presses this advantage too far, it could lose it entirely.

E. *Majority Benefits*

These possibilities generate real benefits for Justices in the minority, but they raise the question of why a majority allows the Rule of Four to continue. If the minority is regularly inconveniencing the majority, the majority should simply eliminate the Rule of Four; the Rule is customary not statutory.¹⁶⁰ So scholars must account for the continuation of the rule as a part of the cert process.

¹⁵⁸ See *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting) (“The ‘rule of four’ is not a command of Congress. It is . . . fair enough [as a] rule of thumb on the assumption that four Justices find such importance on an individualized screening of the cases sought to be reviewed. The reason for deference to a minority view no longer holds when a class of litigation is given a special and privileged position.”).

¹⁵⁹ See Mark Tushnet, “*The King of France with Forty Thousand Men*”: *Felker v Turpin and the Supreme Court’s Deliberative Processes*, 1996 SUP. CT. REV. 163, 181 (1996) (“[A] month before Marshall himself retired, the justices voted to require four votes to hold cases. . . . For Marshall, however, it was purchased at the cost of the decent consideration that people sentenced to death ought to receive from the nation’s highest court.”).

¹⁶⁰ See, e.g., *Ferguson*, 352 U.S. at 529 (Frankfurter, J., dissenting) (“The ‘rule of four’ is not a command of Congress. It is . . . fair enough [as a] rule of thumb on the assumption that four Justices find such importance on an individualized screening of the cases sought to be reviewed. The reason for deference to a minority view no longer holds when a class of litigation is given a special and privileged position.”).

A few possibilities present themselves immediately. First, the Court may worry that eliminating the Rule of Four would draw a Congressional response. Congress may respond by mandating the Rule of Four, or worse (from the Court's perspective), reducing the discretion the Court has over its own docket.¹⁶¹ Second, it may be that Justices recognize that their careers are likely to be long, and there may come a day when they will be in the minority. If a majority of Justices expect the Rule to be beneficial to them over time, they may want to keep it as insurance.

Also, Justices may be concerned about overlooking important cases. Justices have different preferences regarding areas of law and believe that the Court should be more or less active in different areas. The Rehnquist Court had a healthy contingent of Justices from the western United States¹⁶² and these Justices were attuned to cases involving water rights.¹⁶³ The Rule of Four made it easier for this western bloc to force the Court to take important water cases the majority would have missed because other Justices were less attuned to questions involving water rights. So, one way the Rule of Four benefits the majority is by making it easier for a larger variety of cases—reflecting different substantive interests of Justices—to make the docket.

Jeff Lax provides a third and more intriguing justification.¹⁶⁴ He argues that the Rule is actually median enhancing.¹⁶⁵ That is, the median Justice agrees to the Rule of Four because it credibly binds her to take certain cases. Suppose a lower court does not follow Supreme Court precedent exactly.¹⁶⁶ Instead, it deviates slightly, but not enough so that the Court median wants to take the time and spend the resources to correct the error. Though the Court median does not want to take the case, if forced to take it, she will enforce her preferred rule and overturn the lower court.

Now view this framework from the perspective of the lower court. If the Court followed a majority rule at the cert stage, the lower court would be free to deviate from the Court's preference because the median does not

¹⁶¹ Possible Congressional actions related to the certiorari process are addressed in Part IV.B, *infra*.

¹⁶² Though born in Wisconsin, Rehnquist was educated in California and practiced law in Arizona for 16 years. *William H. Rehnquist*, OYEZ, https://www.oyez.org/justices/william_h_rehnquist [<https://perma.cc/796W-RWXM>] (last visited Jan. 13, 2018). O'Connor was born in Texas, educated in California, and was a state senator and judge in Arizona. *Current Members*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/NZ2R-QTL4>] (last visited Jan. 13, 2018). Justice Kennedy was born and raised in California and served on the Ninth Circuit before being elevated to the Court. *Id.*

¹⁶³ See, e.g., Docket Sheet at 1, *Wyoming v. United States*, 492 U.S. 406 (1989) (No. 88-309), <http://epstein.wustl.edu/research/blackmunMemos/1988/GM-1988-pdf/88-309.pdf> [<https://perma.cc/L8J9-UAZW>] (concerning water rights).

¹⁶⁴ See Lax, *supra* note 109, at 68 ("I show that this rule increases the power of the median Justice by increasing lower court compliance with her/his preferred legal doctrine. Ironically, it strengthens the median Justice by reducing her/his pivotal power.").

¹⁶⁵ *Id.*

¹⁶⁶ The Court's precedent is presumed to be at the median's ideal point.

think it is worth the effort. But the median Justice is not pivotal under the Rule of Four. The Justice just to the right of the median patrols deviations by liberal circuits, and Justices to the left of the median are on the lookout for conservative attempts to violate precedent. This dramatically reduces the range in which lower courts can cheat if they are so inclined. If lower courts deviate now, either the Justice to the left or to the right of the median will blow the whistle, and the lower court will get overturned on appeal. This keeps lower courts in line, as they recognize a higher probability that any cheating will be caught and overturned.

If we think that the Court median is generally able to decide cases at her ideal policy, what she really wants from the lower courts is that they follow that policy. By turning over the agenda-setting power to the Justices on either side of her, she is able to get compliance from the lower courts. By handing over power at the agenda-setting stage, the median Justice gets to keep lower courts in line. Under this logic, the median benefits tremendously from the Rule of Four, and so she would not support its demise.

This account is elegant and has the virtue of being about the only theoretical attempt to answer the intriguing question of why the Court majority continues to follow the Rule of Four. Nonetheless, there are a couple of empirical inconsistencies with the theory. First of all, the Justices are generally clear that they do not view themselves as engaged in error correction. If the lower court “deviates” because the Court has been unclear, then the Justices will likely take the case to clarify the law, not to simply correct an error. If the law is clear and the lower courts still cheat, then the Court either ignores it, because the law is clear and the Court’s job is done, or it may simply reverse summarily.

Another point to keep in mind is that in the early Rehnquist Court, Byron White was both the Court median and the most frequent advocate for taking more cases. For instance, in the several terms when Justice Kennedy was the junior Justice, Justice White voted to grant cert 486 times.¹⁶⁷ Chief Justice Rehnquist came in second with 284 votes in favor of cert.¹⁶⁸ One implication of Lax’s model is that *ceteris paribus* the median should be less likely to grant cert, but Justice White defies that prediction. Of course, all else is not likely equal. Justice White thought the Court should be deciding more cases, and he voted accordingly. But it appears Justice White did not need the Rule of Four to help him monitor cases.

F. *The Anti-Filibuster*

The preceding Section suggests that the Rule of Four gets the Court involved in cases of great importance even when the majority does not want to end up there. There is an interesting comparison here with the filibuster

¹⁶⁷ Epstein, *supra* note 7.

¹⁶⁸ *Id.*

rule in the Senate. The supermajority requirement in the Senate empowers the minority to keep certain proposals from coming up for consideration. It also has the effect of empowering the Senate as an institution. Without the filibuster, the Senate would likely devolve into a purely majoritarian institution like the House. Policy negotiations would only need to satisfy the median to clear a majority. But with the filibuster in place, much if not most of the important legislative work hinges on getting through the Senate filibuster. This moderates policy, but it also enhances the Senate's standing.

Just as the Senate filibuster raises that chamber's profile, the Rule of Four promotes the Court. By keeping the Court engaged in a broader range of cases and by increasing the odds that the Court will find itself deciding matters of great public concern, the Rule keeps the Court at the front and center of public life. Of course, once in the game, the Justices have to play, and that is where questions about the relationship between ideological and jurisprudential preferences come to the fore.

III. AN EMPIRICAL EXAMINATION OF POLITICS IN THE CERTIORARI PROCESS

Certiorari is the narrow gateway to review, so naturally practitioners and academics have long been interested in what it takes to get the Court to take a case.¹⁶⁹ Scholars have also been attuned to the substantive importance of certiorari as an institution.¹⁷⁰ The ability to control the docket gives the Court the power to direct its “mere[] judgment” if it does not fully provide Force or Will.¹⁷¹ By choosing what issues it will place on its docket, it directly affects the political agenda for the nation.¹⁷² Equally important, by choosing

¹⁶⁹ *E.g.*, Caldeira & Wright, *supra* note 110, at 1109; Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 102–04 (1997); PERRY, *supra* note 15, at 135–39; David C. Thompson and Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON. L. REV. 237, 239 (2009).

¹⁷⁰ *E.g.*, Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366 (2006) (suggesting that “the reduced merits docket has exacerbated the shortcomings within the Rehnquist Court’s grant process of certiorari review, and has had a negative impact on its jurisprudence” and that “the ‘cert. pool’—the first level of review for any petition for certiorari—has become too powerful”); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 397 (2004) (“Given the many levels on which the Court’s case-selection decisions impact its work, its role, and its image, decisionmaking at the threshold stage may be second to none in importance.” (internal quotation marks omitted)).

¹⁷¹ THE FEDERALIST NO. 78, at 227 (Alexander Hamilton). *But see* Hartnett, *supra* note 5, at 1718 (arguing that while Hamilton’s assertion is still widely quoted, it is “hardly an accurate description of a court that has the power to set its own agenda. . . . The ability to set one’s own agenda is at the heart of exercising will”).

¹⁷² *See* Warren E. Burger & Earl Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group’s Composition and Proposal*, 59 A.B.A. J. 721, 728 (1973) (noting that denials of certiorari can have a large impact on legal developments); *see also* Margaret Meriwether

which questions to avoid, the Court can sidestep landmines that might threaten its standing.¹⁷³

Unfortunately, it is quite difficult to study certiorari using traditional tools of legal scholarship. The Court gives scholars little to work with when it comes to the cert process, and since the writ is discretionary, there is no legal right to cert to be understood, much less vindicated.¹⁷⁴ The standard legal tools of careful explication of reasoned and public opinions are almost entirely unavailable to us because the Court does not explain its cert decisions. What guidance they do provide is largely provided in Rule 10, which offers a list of considerations that is “neither controlling nor fully measur[es] the Court’s discretion.”¹⁷⁵ The remaining information we have from traditional legal sources comes largely from occasional dissents from denials of cert.¹⁷⁶

Answers to substantive questions must therefore come from sources other than the U.S. Reports or Statutes at Large. Qualitatively, the Justices have occasionally spoken individually about the cert process.¹⁷⁷ H.W. Perry has a justifiably famous book based on interviews with Justices and clerks about the cert process.¹⁷⁸ Quantitatively inclined scholars have undertaken large-scale data collection efforts to piece together the information available to the Justices at the cert stage, looking for clues as to what drives the decision.¹⁷⁹

The aim of this Section is to study the cert process quantitatively to understand the Court more broadly. Cert is not so much the subject of inquiry as it is the lens through which one may examine the Court. Put differently, by viewing the cert process as a political process embedded in a judicial institution, we can learn a lot about the Court.

This study requires a model of voting at the cert stage that assumes Justices participate in the agenda-setting round with a good understanding

Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 313 (2009) (arguing that the cases that the Supreme Court grants cert on have the ability to influence the public’s view on important issues).

¹⁷³ KLOPPENBERG, *supra* note 21; Marshall, *supra* note 12; Hartnett, *supra* note 5, at 1648 (“[T]he legitimacy of judicial action is widely thought to be dependent on its conformity with law, yet there is (virtually) no law governing the Supreme Court’s exercise of power to set its own agenda, and the Court has steadfastly refused to establish any.”); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 L. & SOC’Y REV. 621, 622 (1991).

¹⁷⁴ See Hartnett, *supra* note 5, at 1648 (nothing that the Supreme Court has discretion to grant certiorari).

¹⁷⁵ SUP. CT. R. 10.

¹⁷⁶ E.g., Singleton v. Comm’r, 439 U.S. 940, 940–42 (1978) (Blackmun, J., dissenting from denial of certiorari); *id.* at 942 (Stevens, J., responding to Blackmun).

¹⁷⁷ See *id.* at 942–51 (providing Justice Stevens’s interpretation on granting of certiorari).

¹⁷⁸ PERRY, *supra* note 15.

¹⁷⁹ See, e.g., Caldeira & Wright, *supra* note 110, at 1109–10 (discussing an “empirical” study “on the impact of amicus curiae participation” on the Court’s decisions “to grant writs of certiorari”).

of both the current law and the likely consequences of taking the case. Thus, the model *assumes* Justices are strategic in the sense that they are able to look down the game tree and make educated guesses as to how the case will turn out.¹⁸⁰ In comparison, the model *allows* Justices to be ideological; that is, they may act on ideological preferences. This Section uses the model to address three important questions about the Court. First, it quantifies how much of what the Justices do—at least at the cert stage—is about ideology and how much is about the commonly recognized Rule 10 factors. Second, it provides evidence that stable ideological minorities are able to wield disproportionate influence at the cert stage. Finally, it suggests a previously overlooked power of the Chief Justice at the agenda-setting stage. But first, to motivate this empirical exploration, the Section begins with a brief description of the research model.

A. *A Brief Description of the Model and Estimation Strategy*

Studying the cert votes allows a greater understanding of the Court. This Section presents two novel findings that result from a relatively simple model. The model used is closely related to the models used to understand Justices' votes at disposition. Perhaps the most well known of these models is that of Professors Martin and Quinn,¹⁸¹ which is widely used in the law and social-science literatures.¹⁸² They look at how Justices vote when deciding to reverse or affirm a decision on the merits and use that information to derive “ideal points” for each Justice.

As certiorari is a different process, the standard model must be adapted to take the contours of the cert process seriously.¹⁸³ The model presented here accounts for Join-3 votes, different Justices' preferences regarding taking cases, and different Justices' comfort with using the Join-3 as a tool.

¹⁸⁰ See, e.g., Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1, 29 (2008) (“[T]here is a significant merits-oriented component in the Justices' decisionmaking on certiorari.”).

¹⁸¹ Martin & Quinn, *supra* note 25, at 135.

¹⁸² E.g., Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1279 (2005); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1353–54 (2009); Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801, 820–21 (2009); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1746 (2010).

¹⁸³ From a technical perspective, my model makes only minor adjustments to standard models in the literature. While these models appear at first glance to be so-much statistical wizardry, they are well-known in the literature and quite valuable to scholars. See, e.g., Joshua B. Fischman, *Do the Justices Vote Like Policy Makers? Evidence from Scaling the Supreme Court with Interest Groups*, 44 J. LEGAL STUD. S269, S274 (2015); Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 104 (2010); see also Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CAL. L. REV. 813, 833–34 (2010) (noting that by using data on merits votes, Professors Andrew D. Martin, Kevin M. Quinn, and Lee Epstein were able to calculate the probability that each Justice was the median member of the Court).

It also accounts for the Court's stated preference for bringing clarity to the law. Cases where the Court can bring clarity to the law will reduce the variance in lower court outcomes, and Justices derive utility from reducing this variance.

There are several benefits to using cert votes as opposed to the Justices' decisions on the merits. First, there are many more votes at the agenda-setting stage than at the merits stage. There are usually two to three times as many cases with recorded cert votes as there are cases decided on the merits. Second, because the Justices choose which cases they take but do not get to choose which petitions are filed, there is less concern that results are biased by their selectivity. These advantages lead to ideal point estimates that are far more stable than those recovered from merits votes. The model also returns other interesting quantities including measures of Justices' individual preferences for taking lots of cases, the expected ideological shift in the law from taking the case, and even a rough measure of case importance. The model may also easily be adapted to take into account different covariates of interest, for example, whether the petition is a civil case, comes from a federal court, is a capital case, etcetera.

The model is more fully presented in the accompanying technical appendix. But, in brief, the assumption is that Justices and policies can be placed in a single left-right dimension. A liberal policy is to the left of a conservative policy, and a liberal, like Justice Brennan, is to the left of a conservative, like Chief Justice Rehnquist.¹⁸⁴ Justices have an idea of where the current law is on this line, and they have an idea of where the law will end up if the Court takes the case.¹⁸⁵ The ideological calculation the Justices make depends in part on whether the new policy would be closer to them than the old one.¹⁸⁶

The model assumes that Justices would like to vote to grant cert for important cases, cases that clarify the law, and cases that move the law in their preferred ideological direction.¹⁸⁷ Cases that are not important, will not do much to improve doctrinal clarity, or will move the law away from a Justice's preferred rule should not receive a vote for cert. In addition, as Justices implicitly compare the reasons for and against voting to grant cert,

¹⁸⁴ Ho and Quinn argue that while this spatial framework is helpful to motivate the model, it is not strictly necessary to justify the statistical enterprise. See Ho & Quinn, *supra* note 186, at 819 (noting that "measurement models can be illuminating even if the spatial theory is questionable").

¹⁸⁵ See *infra* Technical Appendix. Strictly speaking, all that is required is that Justices share a common belief about the distribution of the rules that lower courts currently apply and the distribution lower courts will apply if the Court takes the case. By framing the model in terms of the distribution of possible policies instead of the single policy, it is possible to treat the variance of the likely applications as a measure of the law's clarity. When there is a circuit split and the law is unclear, there is a high variance in the current application. If the Court could decide the case in such a way that this variance would be reduced, this would create a reason for every Justice to take the case.

¹⁸⁶ *Id.*

¹⁸⁷ See PERRY, *supra* note 15, at 217, 253–54.

Justices must also consider how many cases they would like to take overall, with some Justices preferring to take more cases than others.¹⁸⁸ Accordingly, different Justices will need the positive factors to outweigh the reasons to deny cert by more than other Justices. Once the benefits reach that Justice-specific critical level, the Justice will at least vote Join-3. If the reasons to grant are strong enough, that Join-3 will turn into a full vote to grant.¹⁸⁹ In this way, the model follows Perry's guidance that the Join-3 is a timid grant.¹⁹⁰

This model has three types of variables. The first type of variables are case-specific, including information drawn from the memos, a term to capture¹⁹¹ general case importance,¹⁹² and the (possibly negative) distance between where the law is and where they expect it to be if they grant cert.¹⁹³ If the distance is positive, then the law is expected to move to the right (become more conservative than the current doctrine).¹⁹⁴ Likewise, if the distance is negative, this signals the law is expected to move to the left. If the distance is close to zero, then the Court does not expect doctrine to become much more conservative or liberal, as it will not move far at all.

The second type of variables are Justice specific. The first of these is each Justice's ideal point. This is directly analogous to ideal points measured by Martin and Quinn.¹⁹⁵ These ideal points are often viewed as a measure of the conservatism or liberalism of a Justice's jurisprudence or ideology.¹⁹⁶ Second, a Justice-specific parameter sets the individual Justice's floor for

¹⁸⁸ Kenneth W. Moffett, Forrest Maltzman, Karen Miranda & Charles R. Shipan, *Strategic Behavior and Variation in the Supreme Court's Caseload over Time*, 37 JUST. SYS. J. 20, 20 (2016).

¹⁸⁹ See PERRY, *supra* note 15, at 168.

¹⁹⁰ *Id.* at 167–68.

¹⁹¹ The case importance term measures the commonly recognized level of importance. Rather than assuming that all circuit splits, for example, create a fixed level of importance, the model has the flexibility to recover the common level of importance recognized by all Justices for a given case. Justices can think some splits are more important than others, that some recommendations from the SG are more urgent, etc. The case importance term backs out the level of importance common to all Justices regardless of the factors.

¹⁹² It is important to distinguish between a case that is important ex-ante and a case that becomes important ex-post. Take the earlier Free Exercise example of *Smith*. See discussion *supra* Part I. When it appeared, the case was not intrinsically important. It subsequently became a very important precedent because of the law the Court made. At cert, case importance is about the ex-ante importance, which is independent of the legacy the case may create.

¹⁹³ See *infra* Technical Appendix. This is actually the expected value of a draw from the distribution of policies that will follow either denying or granting cert. The variance of these distributions captures the clarity or lack thereof in the law and is captured in the case importance term.

¹⁹⁴ Ho & Quinn, *supra* note 186, at 827.

¹⁹⁵ Martin & Quinn, *supra* note 184, at 135.

¹⁹⁶ Ho & Quinn, *supra* note 186, at 836–37. Ho and Quinn appropriately point out that the best understanding of this parameter is “a descriptive summary of the single dimension that best characterizes differences in” the Justices’ votes. *Id.* The measures correspond to the familiar left-right spectrum, but this does not necessarily imply that “the scale accords with a coherent political philosophy or pure policy preferences untethered from law.” *Id.*

voting Join-3.¹⁹⁷ If a Justice requires a greater “payoff” to take a case, then she will vote to take fewer cases than other Justices, holding all else equal. The final Justice-specific parameter is the threshold at which the Justice moves from Join-3 to a full grant.

The last terms are specific to individual Justices in a specific case.¹⁹⁸ The first of these is a random shock. I assume that these shocks are normally distributed with a mean of zero, so that in expectation, the shock should not change any Justice’s vote in any case. The second such term is each Justice’s net return from taking the case. This net return is calculated by combining the Justice-specific terms with the case-specific terms and adding the random shock.¹⁹⁹ If this return is higher than the Justice’s grant threshold (the third Justice-specific term), she votes to grant. If this return is between the two threshold values for the Justice, she casts a Join-3. If it is less than the Join-3 threshold (the second Justice-specific value), she votes to deny.

The estimation procedure is relatively straightforward. It starts by randomly filling in values for each of the case- and Justice-specific parameters.²⁰⁰ The next step is to look at the actual vote and use that information to draw the error term. Since there is a Justice-specific constant, the assumption is that a Justice would vote to deny cert if her net return is less than zero. The computer draws a random error term subject to the constraint that, when included with the Justice- and case-specific terms, results in negative net utility. It then uses the new error term and the case-specific parameters to estimate new values for the Justice-specific parameters. Having done that, it uses the net utility and just-found Justice-specific terms to estimate case-specific terms. The program moves in a loop, holding the two terms constant and using them to find the third. The loop cycles thousands of times and stores these values. At the end of the run, the average values are computed, and those are the numbers given in the following analysis.

B. *The Effect of Ideology on the Docket*

While political scientists generally use such models to measure ideology, a substantively more important question is whether that ideology affects the Court’s docket. Fortunately, the cert model provides tools to begin answering this question. The gap parameter provides an estimate for the expected change in policy along an ideological dimension.²⁰¹ Using these

¹⁹⁷ See *infra* Technical Appendix.

¹⁹⁸ *Id.* at Model 1.

¹⁹⁹ *Id.* at 65.

²⁰⁰ *Id.* at 59.

²⁰¹ One of the things to keep in mind about these models is that the distances are not well identified. But they do give a relative notion of distance, and the direction is identified once Rehnquist is fixed on the right and Brennan on the left. What this means is that if the estimated model returns a +2 for one case

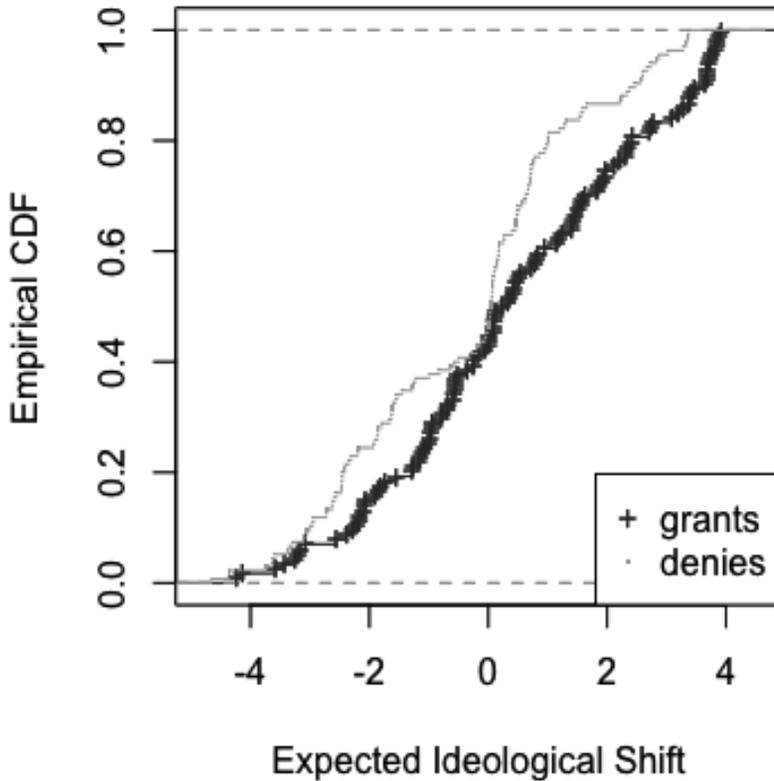
estimates, it is straightforward to compare the cases in which the Court granted cert with those in which it denied the writ. If the docket is not influenced by ideology, then the gap parameters—which measure the expected change in the law if the Court grants cert—should look similar. Thinking in terms of probability distributions, we would anticipate that the ideological distribution of granted cases should match the ideological distribution of denied cases. And yet when those two distributions are compared in Figure 1, they do not match.²⁰²

Figure 1 shows the empirical cumulative distribution function (CDF) of the gap parameters for the subset of cases where the Court granted cert and the subset where the Court denied certiorari. The plus-signs represent expected shifts of cases the Court granted. Notice that for cases further to the left, for example, those less than -0.5 or so, the plus-signs are well to the right of the simple dots, which represent the cases the clerks recommended granting. That indicates that the Court took relatively few cases expected to move the law to the left. In the middle of the graph—near zero—the plus-signs catch up quickly. That indicates that the Court took a lot of cases where importance, not ideology, was the most important factor. Finally, looking further to the right of the figure, the plus-signs are again to the right of the dots. That signals that the conservatives were able to take relatively more ideologically conservative cases. In sum, the conservatives on the Court were generally effective at putting cases on the docket that would maximize a conservative shift in the law.

and a -1 for another, we can say that the first case is expected to move the law in a conservative direction and that change should be larger than the expected liberal change in the law for the second case.

²⁰² See *infra* Figure 3. A Kolmogorov-Smirnov test returns a p-value of 0.0025. Thus, we can confidently reject the hypothesis that the distributions are the same.

Figure 1: Set of Granted Cases Are Ideologically Different than Denied Cases



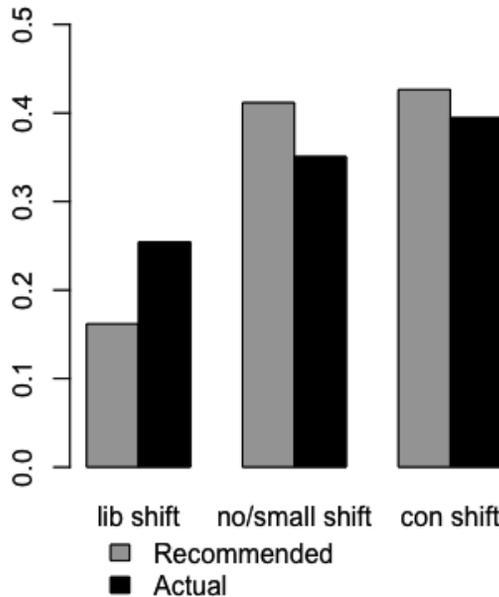
But the story is a bit more complex than this. The comparison between the granted and denied cases clearly demonstrates that the cases that make the docket are expected to end up with more conservative outcomes than the ones that do not make it through certiorari. But another interesting comparison is between the cases that make the docket and the cases that “should” make the docket based only on importance. This is a tougher test to run because it requires generating a set of cases that the Court “should” take. Fortunately, the cert pool memos are available to serve as a worthy proxy.

Recall that the clerks who write the memos are instructed to provide a recommendation as to whether the Court should grant the petition. Further, the memo and recommendation are supposed to be free of clerks’ own ideological biases. Of course, this is not to say that clerks never fudge on the

recommendation to promote or protect ideological considerations. It is only to say that the institutional pressures are against such behavior. Further, there is no reason to think that conservative or liberal clerks are any more or less likely to shade the truth. Accordingly, it seems reasonable to use the set of cases where clerks recommended granting cert as a proxy for the distribution of cases important enough to grant cert.

Figure 2 below shows the ideological distribution of the cases where the clerks recommended a grant in gray and the ideological distribution of cases the Court actually granted in black.²⁰³ The bars represent the proportion of total recommendations and actual grants that would move the law significantly to the left, the right, or not much at all.²⁰⁴ If the clerks' recommendations are representative of the breakdown of the "important" cases, it appears that the liberal bloc is getting more cases onto the docket than it "should."

Figure 2: Liberal Minority Gets Extra Cases



²⁰³ The data is drawn from the 1988 term.

²⁰⁴ Gap parameters less than -1 are considered liberal moves, parameters greater than 1 are conservative moves, and parameters that suggest policy would move less than one unit in either direction were classified as no/small shift.

These two different comparisons lead to the following conclusions about the effect of ideology on the cert process. First, conservatives know that they are likely to win on the merits, and they prefer to take and win important cases. Doing so means trying to keep less important cases or those where there will not be a sufficiently large conservative shift in the law off of the docket. Second, they are usually successful at this, but in a nontrivial number of cases, the liberal minority is able to identify cases they—but not the conservative majority—want to put on the docket. They do not get as many of these cases as they would like, but they get more than they “should” compared to the clerk recommendations. In short, conservatives are able to use certiorari to identify important cases that will let them move the law to the right, but liberals are able to use the Rule of Four to add additional cases of their choosing.

These empirical observations align with some of the strategies suggested above. Liberal coalitions on the conservative Rehnquist Court were able to use the Rule of Four to push additional cases onto the docket, consistent with the various minority-enhancing strategies above. Similarly, the evidence suggests that the set of cases the Court actually grants are likely to yield more conservative outcomes than the cases it rejects. This suggests the conservative majority targeted cases to promote their policy preferences.

C. *The Chief Justice Really Matters*

Another aspect available through the cert votes is a chance to examine the importance of the Chief Justice. The Chief has several tools that empower him to shape the law. The foremost is the power to assign opinions.²⁰⁵ But the Chief has two particular opportunities to affect the development of law through the case selection process. The first tool is the Discuss List. The Chief is responsible for circulating the first draft of the list, and so he is able to ensure that his preferred cases are considered.²⁰⁶ However, this particular first-mover advantage is not all that strong on its own as any Justice can add a case to the Discuss List.²⁰⁷ The Chief cannot prevent a case from being discussed, and he has no more power than any other Justice to add a case.

The second possible advantage the Chief has is another first-mover advantage: the privilege of voting first.²⁰⁸ Since Justices have little time to analyze each petition,²⁰⁹ they may not have very fixed opinions on the

²⁰⁵ Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the US Supreme Court*, 23 J.L. ECON. & ORG. 276, 276 (2007).

²⁰⁶ PERRY, *supra* note 15, at 85.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 86.

²⁰⁹ See Hart, *supra* note 98, at 88 (discussing the limited time that a Justice has to analyze petitions); McElwain, *supra* note 98, at 14 (same).

importance of a case.²¹⁰ In such a situation, the institutional practice of voting sequentially instead of simultaneously presents an opportunity for Justices to learn about the case based on the votes of others. Justices vote in order of seniority, so in the data, Chief Justice Rehnquist usually voted first.²¹¹ As such, other Justices could take cues from his vote. Of course, if a Justice did not share the Chief's views on what made a case certworthy, or believed the Chief's vote was a poor signal of quality in general, she may have thought the signal was uninformative and ignored it.

The challenge in looking for the first-mover advantage is distinguishing between signaling and shared ideology. If conservatives would like to have taken a case, then Rehnquist should have voted to take the case, as should the other conservatives. Their votes should have been correlated simply because they shared a common ideology.

One can separate out the effect of ideology by controlling for it through treating Rehnquist's votes as data. Begin by coding a Rehnquist vote in favor of cert (including a Join-3) as 1 and a vote to deny a petition as -1. Then, include that variable as data in the cert model and estimate as before. The estimation procedure will return a different coefficient for each Justice, which measures the effect of the Chief's vote. This measures the effect associated with Rehnquist's vote while still controlling for ideology.²¹² To capture the effect of the Chief's vote, I first count how many votes the full model—including the Chief's vote—correctly predicts. I then subtract the effect of the Chief's vote from the underlying net utility and predict the votes again. The difference in the number of correct predictions is the predicted effect of the Chief's vote.²¹³

The data show the correlation from Rehnquist's vote affects roughly 7 percent of other Justices' cert votes. As Figure 5 shows, the effect is positive and significant for five of the eight Justices. For Justices O'Connor and Kennedy, the effect is quite substantial; the effect associated with Rehnquist's votes was large enough to change 16 percent of their votes.

²¹⁰ *But see* PERRY, *supra* note 15, at 86 (explaining that Justices may put a case on the discussion list without having a strong opinion about it).

²¹¹ The exceptions are in cases added to the list by another Justice, in which that Justice would lead off the discussion. *Id.*

²¹² I coded votes to grant and Join-3 as 1, votes to decline as 0, and dropped all cases where Rehnquist did not vote. It is important to note that the causal effect is not strictly identified here, as I cannot randomize the Chief Justice. Still, the correlation is consistent with a model of other Justices learning from the Chief's vote.

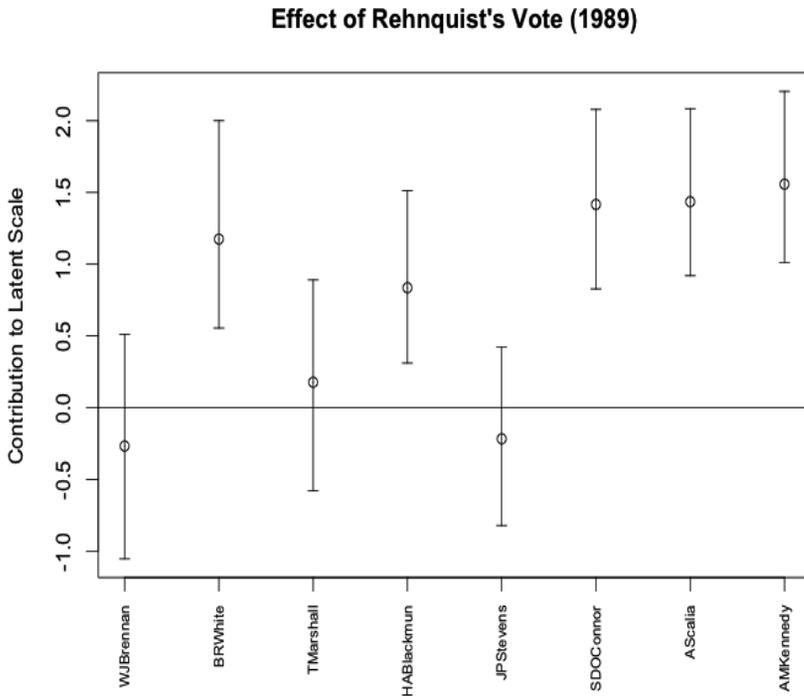
²¹³ This is a conservative measure of the effect. The test is based on the counterfactual scenario where the Chief does not vote, rather than where the Chief voted in the opposite direction. For instance, suppose for a given Justice that the coefficient on the Chief Justice's vote was 2. Then, if Rehnquist voted to grant cert, that other Justice would add 2 to the underlying net utility, and would be more likely to vote for cert. If he does not observe the Chief's vote, then the additional two units go away. But if Rehnquist had voted to deny, instead of adding 2 to the underlying measure of utility, one would subtract 2. This would be a swing of four units, not two. If one were to run the test switching Rehnquist's votes from grant to deny and from deny to grant, then the effects would be even larger.

Rehnquist's vote pushed O'Connor and Kennedy to change their votes for about forty-five petitions in 1989 alone.

Justice Blackmun was also more likely to vote for cert if Rehnquist did. While Blackmun was not as far to the left as Justices Brennan or Marshall, he was hardly a regular member of the conservative majority on the Court.²¹⁴ Blackmun's greater likelihood to follow the Chief at cert indicates that Rehnquist's vote is signaling something to Blackmun about the certworthiness of the case.

²¹⁴ See Christopher E. Smith & Thomas R. Hensley, *Assessing the Conservatism of the Rehnquist Court*, 77 JUDICATURE 83, 86, 88 (1993) (describing Blackmun's transformation from a "consistently conservative" Justice into "one of the most liberal Justices on the Rehnquist court").

Figure 3: Effects of Rehnquist's Vote on Five of the Other Eight Justices



It is important to note that since Rehnquist's votes were not random, these estimates are not strictly causal. While the sequence of votes makes it impossible for O'Connor's vote to have influenced Rehnquist's vote, it is still possible that some unmodeled and nonideological third factor explains the correlation between these votes. Still, given the large literature on sequential voting and first-mover effects,²¹⁵ the results are consistent with theories that would suggest the Chief has a strong influence on the docket by moving first. This is strong—but still only suggestive—evidence that the Chief has significant influence over the Court's docket. This effect deserves further study, especially because the Chief also votes first at disposition.²¹⁶ If the first-mover advantage remains when the Court decides the case, or

²¹⁵ See, e.g., Marco Ottaviani & Peter Sørensen, *Information Aggregation in Debate: Who Should Speak First?*, 81 J. PUB. ECON. 393, 395–96 (2001) (examining the importance of the sequence in which heterogeneous experts convey information); Jan Potters, Martin Sefton & Lise Vesterlund, *After You—Endogenous Sequencing in Voluntary Contribution Games*, 89 J. PUB. ECON. 1399, 1400 (2005) (studying the effects of the sequence of contributions and level of information on donors' contributions to a public good).

²¹⁶ Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court*, 39 L. & SOC'Y REV. 349, 350 (2005).

when the assigned Justice circulates the draft opinion, then sequencing effects would have a powerful effect on law.

For the purposes of this Article, it is enough to show that there is a high likelihood that the Chief influences the docket. As we have seen previously, Chief Justice Rehnquist's own votes were highly affected by ideology.²¹⁷ If the Chief's first-mover advantage is real, then Rehnquist's ideology has an outsized influence on the Court, which may help explain why the Court took cases that pushed the law in Rehnquist's preferred direction. Giving this sort of power to the Chief seems normatively problematic, so the Article proposes a change to the voting procedures that would reduce this monopoly power.²¹⁸

These results challenge the qualitative conclusions provided by Perry.²¹⁹ To be sure, Perry's initial thought was that the sequence would affect votes, but he was repeatedly assured that it did not.²²⁰ There are several possible explanations for the discrepancy between Perry's initial hypothesis and the results presented here on the one hand and the accounts provided by the Justices to Perry on the other. First, as Perry recounts, there was not a great deal of respect for Chief Justice Burger on the Court.²²¹ It is possible that Chief Justice Burger did not influence the votes of other Justices and those Justices were correct in their self-assessments. The results presented here come from the Rehnquist Court, and Rehnquist may have commanded greater respect and wielded greater influence than Burger. Second, the largest effects are concentrated among the newest Justices.²²² It may be that the effect dissipates over time. If so, the Chief may occasionally be able to influence the votes of other Justices, but the effect is small enough that the other Justices do not recount it in interviews.

IV. POLITICS IN CERTIORARI: PROBLEMS AND SOLUTIONS

So far, this Article has established the empirical reality of politics at play in the cert process and worked through the possible strategies available to the Justices under the Rule of Four. Essentially, it is now empirically clear that the Justices *are* playing at politics and theoretically clear *how* they play. At which point, there are two distinct questions remaining. First, what are the potential consequences of politicizing the Court's discretionary jurisdiction and second, what if anything could be done about it?

²¹⁷ See *supra* Figure 2.

²¹⁸ See *infra* Part IV.B.3 (suggesting elimination of the tradition of voting in order of seniority).

²¹⁹ See PERRY, *supra* note 15, at 86–87 (“[T]he ability to formulate and lead the discussion would make little difference on cert. . . . Except in relatively rare instances, the Justices do not rely on one another’s judgment at the cert. stage.”).

²²⁰ *Id.* at 87, 91.

²²¹ *Id.* at 86.

²²² See *supra* p. 621.

A. Threats to the Court's Legitimacy

As the Court becomes perceived as a policy-making body with political preferences,²²³ its legitimacy is increasingly called into question.²²⁴ Work in political psychology shows that citizens have a strong negative response to Court decisions portrayed as politically motivated, compared to decisions described as following legal guidelines.²²⁵ Similarly, respondents had a lower view of the Court's legitimacy when exposed to articles describing Chief Justice Roberts' decision in *National Federation of Independent Business v. Sebelius*²²⁶ as a political decision to strategically flip his vote.²²⁷

As shown above, the Court's certiorari decisions have led to a situation where the merits docket is far more ideologically fraught than the certiorari docket. By focusing its attention on these more polarizing cases, the Court feeds the perception that its decisions are almost entirely ideological. If the Court were deciding 350 cases a term that were more representative of the certiorari docket, it is likely their decisions would appear far less ideological. Instead, the Court has reduced its workload and concentrated on the most divisive cases. This both undermines public support in the Court and means that the Justices are leaving large fields of doctrine largely untended.

Threats to legitimacy exist outside of politics as well. At the conceptual level, the politicization of the cert process further erodes the foundations of judicial review. Consider Chief Justice Marshall's opinion in *Marbury*. Marshall asserted that the Court had the power of judicial review because "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."²²⁸ Judicial review hinges on the Court's obligation—"of necessity" and "must decide"—to decide the question.²²⁹

Marshall was even more clear in *Cohens v. Virginia*:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it

²²³ See, e.g., Carrington & Cramton, *infra* note 277, at 590 (citing Posner, *supra* note 1, at 35–39, 60).

²²⁴ See, e.g., CHEMERINSKY, *supra* note 8, at 4–5 (arguing that the Court sided with the government and did not protect the plaintiff); SEGALL, *supra* note 8, at xvi–xvii (summarizing three major problems with the Supreme Court).

²²⁵ Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCHOL. 597, 597 (2006).

²²⁶ 567 U.S. 519, 529 (2012).

²²⁷ Dino Christenson & David Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 403–04 (2015).

²²⁸ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

²²⁹ *Id.* at 177.

is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.²³⁰

On this traditional account, the Court's power of judicial review is incidental to its power to decide cases.²³¹ Put differently, the Court's substantive power flows from its procedural obligations to decide cases. And yet, the Court today has no such obligation. As Professor Hartnett has noted: "A court that can simply refuse to hear a case can no longer credibly say that it had to decide it."²³²

When the Court gained control over its docket, it promised to avoid this problem by taking cases "according to recognized principles."²³³ For instance, it promised Congress that it would take any case involving a circuit split "as a matter of course,"²³⁴ as well as any "constitutional question of any real merit or doubt."²³⁵ The Court also promised that the lower courts could certify questions to the Supreme Court, thereby "plac[ing] the question of review also in the discretion of the Circuit Court of Appeals."²³⁶ In essence, Congress initially gave the Court discretion on the promise that the Court would follow "recognized principles" that would involve the Court in essentially every nonfrivolous case.²³⁷

While it soon became clear the Court was applying a stricter standard of importance than mere nonfrivolousness, commenters remained convinced that the Court avoided danger by having "defined standards for the exercise

²³⁰ 19 U.S. 264, 404 (1821).

²³¹ See Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 147 (1999) ("Under *Marbury*, it is the court's obligation to decide a case by issuing a judgment that gives rise to the power of judicial review."); see also Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 352 (1994) (explaining Marshall's argument for judicial review); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) (explaining that the courts must decide litigation in their jurisdiction, and when they do, that becomes the supreme law of the land).

²³² Hartnett, *supra* note 5, at 1717.

²³³ *Id.* at 1705 (quoting Justice Van Devanter's testimony in Senate testimony from 1924).

²³⁴ *Id.* at 1665 (quoting Justice Taft in the Hearing Before the House Comm. on the Judiciary, 67th Cong. 30 (1922)).

²³⁵ *Id.* at 1715 (citing 66 Cong. Rec. 2922 (1925)).

²³⁶ *Id.* at 1691.

²³⁷ For a compelling argument that current certiorari practice is an impermissible delegation of Congressional power to the Court, see Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 3–6 (2011).

of its discretion.”²³⁸ Herbert Wechsler urged that “[o]nly the maintenance and the improvement of such standards and, of course, their faithful application can . . . protect the Court against the danger of the imputation of bias”²³⁹

Neutral principles seemed to offer a way to hold off the challenge to the Court’s judicial review power. By adhering to these objective standards, the Court would be obligated to decide cases that meet objective criteria. With obligation still in play, the judicial review power is maintained. Even so, it is a bit unsettling that these criteria were established by the Court. Accordingly, Wechsler urged Congress to play a more active role and to be more specific about what types of cases the Court should take.²⁴⁰ This would further remove politics and discretion from the Court and safeguard judicial review within the confines of obligation.

Instead, Congress has moved in the other direction, removing almost all mandatory jurisdiction and leaving the docket almost entirely to the discretion of the Court even as the Court has refused to clarify its own standards. The result is “a plenary docket reflecting the particular agenda of shifting coalitions of four or more justices”²⁴¹ instead of a docket composed of cases that meet objective criteria.

The absence of such criteria leaves the Court unprotected “against the danger of the imputation of bias.”²⁴² What is more, as seen in Part II, bias is clearly present. What is more disturbing is that the particular bias Wechsler was concerned about when discussing the Court’s agenda setting was bias for or against certain kinds of claims. He cites a law review note that showed the Court was taking an unjustifiable number of claims under FELA.²⁴³ The present Article shows that the Court is directly biased for or against different ideological outcomes. At cert, politics operates at a much more ideological level than Wechsler imagined.

In sum, the lack of clear standards for managing the discretionary docket opens up the Court to attack. In the absence of standards, the Justices often pursue ideological aims through the cert process. This is particularly problematic because it leads the Court to take cases it should not and to not take cases it should, which violates the constitutional covenant that empowers the Court to state what the law is. This problem is exacerbated because the Court now focuses on the questions that let Justices implement their political views. As such, it is not clear that the current Court is making

²³⁸ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959).

²³⁹ *Id.* at 10.

²⁴⁰ *Id.*

²⁴¹ Estreicher & Sexton, *supra* note 10, at 791.

²⁴² Wechsler, *supra* note 241, at 10.

²⁴³ Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 HARV. L. REV. 1441, 1441 (1956).

legitimate use of the judicial power, and it is substituting Will, if not exactly Force, for Judgment.²⁴⁴

B. *Proposals to Channel or Relocate Political Power in Certiorari*

Supposing ideological decision making and large agenda-setting power by the Chief are problematic, what can be done about these features of the current process? At the outset, it must be admitted any change is unlikely. The current process represents the decades-long and successful attempt by the Court to control and reduce its docket. It is unlikely to sit passively in the face of attempts to temper this control. To the extent Congress has shown interest in making use of its Article III powers, it usually works in the direction of removing cases from the Court's jurisdiction rather than imposing pressure to increase transparency and neutrality in the cert process.²⁴⁵ Insofar as the Justices have no incentive to change things and Congress has no interest in forcing the issue, the success of any particular proposal is doubtful. Still, reforms could take one of two paths. First, the Court or Congress could pursue strategies to reform the substance of certiorari rules. In the alternative, they could reform the process through which the Court takes cases.

1. *Clarify the Rules*

A common refrain in the effort to improve certiorari is the request for greater clarity. Scholars have again and again called on Congress or the Court to promulgate improved standards that would provide clear guidance for applicants. Such clarification should provide several benefits. First, by being more explicit about the standards, the Court should face fewer frivolous petitions, as parties in some cases would be able to read the rules and realize the Court will not take their respective cases. Second, by following clearer statements, the certiorari process would appear a more legitimate use of judicial discretion. Clear rules would seem to make certiorari both more efficient and more legitimate.

To succeed, the standards must be sufficiently clear and the Court committed enough to them that the new regime would significantly reduce the Court's discretion over the docket. If the Court is still willing and able to go beyond the standards, parties will still take their chances with a cert petition—lowering the efficiency gains—and the Court would still be perceived as exercising unbounded—instead of judicial—discretion, limiting any legitimating upside.

²⁴⁴ See THE FEDERALIST NO. 78 (Alexander Hamilton) (“[The judiciary] may truly be said to have neither force nor will, but merely judgement.”).

²⁴⁵ See Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 931 (2013) (explaining that in the past, Congress expanded the Court's discretion to facilitate the Court's ability to settle political disputes).

The challenge is to create and maintain such standards. To see the difficulty in writing down such standards, consider the proposal by Samuel Estreicher and John E. Sexton. They would divide cases into those the Court should take (the Priority Docket), those the Court could take if it wanted (the Discretionary Docket), and those the Court should not take (Improvident Grants).²⁴⁶ The first of these categories would include cases where there are “intolerable” splits in lower courts, blatant conflicts with Supreme Court precedent, profound threats to federalism or the separation of powers, interstate disputes, and those where either state courts strike a federal action as unconstitutional or where the federal court strikes a state action. The second set covers those cases where there is: reason to be suspicious of the lower court when reviewing a federal question, a pressing case involving vertical federalism disputes, interference with Executive authority, need for the Court’s extraordinary powers of supervision, a national emergency, an opportunity to advance the development of federal law, an appeal from a court of exclusive jurisdiction, or a need to apply clear precedent in cases where the effects could cause dramatic effects or “dislocation[s].”²⁴⁷ Even with these standards, there is clearly much room left for discretion. Whether a split is truly “intolerable,” for example, will always be a judgment call. Similarly, whether a federalism case is profound, pressing, or mundane is hard to define with any certainty. These—or any comparable set—of standards can hardly decide all cases clearly. That said, they would provide a marked improvement from the current guidelines; to recognize that benefits would be limited is not to say they would not be meaningful.

This leads to the second problem with calls to improve the standards: the Court may think trading away its vast discretion is too high a cost. As it stands, the Court takes the cases it wants with very little risk of pushback, largely because few people pay serious attention to certiorari decisions. Promulgating new guidelines would draw unwelcome attention to the cert stage. The Justices may feel pressure to take a case they would rather skip simply because it conforms to the standard. Similarly, the Justices may want to take a case that falls outside of newly announced parameters. Either way, the Court would lose some control over its docket.

In return for this loss of control, it may get fewer petitions to work through, which would save it some time and may boost the Court’s legitimacy. However, as the Court has continued to reduce its caseload, the time constraints bite less. What is more, if the new guidelines resulted in piling additional cases onto the docket, the Justices would only be adding more work to their schedule, not reducing their burdens. Further, drawing attention to the docket might invite scrutiny and criticism rather than

²⁴⁶ Estreicher & Sexton, *supra* note 10, at 706.

²⁴⁷ *Id.* at 737.

applause. For the Justices, clarifying the rules of certiorari appears to come at too high a cost.

2. *Increased Transparency*

There have been occasional calls for the Court to explain its certiorari decisions.²⁴⁸ The benefits of this proposal are, again, improved efficiency—as the bar learns what is or is not certworthy—and enhanced legitimacy. The mechanism is the same as before: clarity. One of the problems with clarified rules or standards is that it is very hard to write down standards that are not over- or underinclusive. This is a familiar problem to legal systems in general. The common-law system addresses this problem by developing case law. If the Court explained its decisions, it would develop a case law for certiorari that lawyers could learn from as they do in any other body of law. Further, the development of certiorari case law would signal that the Court's decision is judicial in nature. The opinions would show how the Court grapples with its standards, and lawyers would be able to make arguments that address the Court's real concerns.

And yet one might be reasonably concerned that written orders denying certiorari that were more than cursory could work mischief. The Court would have to be very careful to avoid opining on the issues or facts presented in the underlying litigation in a way that would affect future cases on the merits. But it would be very hard for the Court to issue useful opinions without engaging with the facts and issues of the instant case. The Court would likely either say too much about the issues—possibly unintentionally creating a strange type of precedent—or too little, which would mean that the opinions would not provide enough information to future litigants.

Of course, such a concern would likely never arise in practice because, given the thousands of petitions the Court reviews each term, the requirement to explain the reasons why individual cases were rejected would overwhelm the Court.²⁴⁹ Almost certainly, the Court would fall back on summary opinions. The model here would be the traditional mandatory jurisdiction where appeals that appeared to satisfy the formal jurisdictional

²⁴⁸ Frank D. Moore, *Right of Review by Certiorari to the Supreme Court*, 17 GEO. L.J. 307, 308 (1929); see also Shapiro, *supra* note 94, at 125 (raising the concerns with the Court's limited explanations on denials of cert).

²⁴⁹ See *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 942 (1978) (Stevens, J., respecting denial of certiorari) (“Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.” (quoting *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari))); John M. Harlan, *Manning the Dikes*, 13 REC. ASS'N B. CITY N.Y. 541, 556 (1958) (explaining that requiring the Court to give its reasons for denial of cert would unduly burden the Court and would undermine the purposes Congress gave it with its control over the appellate docket).

requirements were dismissed “for lack of a substantive federal question.”²⁵⁰ Requiring a written opinion would invite similarly cursory and unhelpful opinions, substantially eliminating any hope for a viable case law of certiorari.

Another proposal to increase transparency is to release the Justices’ certiorari votes.²⁵¹ From the perspective of a party petitioning the Court, it would be useful to know which Justices have supported or opposed certiorari in similar cases. Just as litigants target pivotal Justices on the merits, it would be helpful to know which Justices will make or break a certiorari decision. From the perspective of policy, releasing the votes would increase legitimacy by promoting transparency and accountability. While per curiam decisions are not uncommon, judicial decisions at all levels are signed. By putting their names to their decisions, Justices publicly take responsibility for their decisions. Since certiorari is an especially political decision—as it is largely unconstrained by law, involves prioritizing competing policy interests, and the Court issues no written opinions—accountability is especially important.

This is a sensible suggestion with only manageable drawbacks. There are real concerns that releasing the votes too quickly could adversely influence ongoing litigation or add fuel to any fires lit in response to an unpopular decision. Accordingly, the Court could release the certiorari votes within a reasonable window of time—say, three years—after the end of the underlying litigation. This window allows the Court to benefit from increased transparency regarding cases that are still relevant without the risk of tipping the Court’s hand in any litigation that is still ongoing in the lower courts. Still, the Court is likely to push back against this proposal since it would be “inconsistent with the long-standing and desirable custom of not announcing the Conference vote on petitions for certiorari.”²⁵²

3. *Changes to Voting Procedures*

As detailed above, there are two particular voting procedures during certiorari that are important. First, the Rule of Four sets the threshold that separates the petitions that are dismissed from those that are granted. There have occasionally been suggestions that the Court change the voting rule. Justice Stevens, for instance, suggested turning the Rule of Four into a Rule of Five,²⁵³ thereby applying the same majority rule at the certiorari stage and at disposition. Enlarging the size of the minimal certiorari coalition would presumably help the Court avoid taking cases that it should not. In general, if one assumes that the more important the case the more likely each Justice is to vote for certiorari, then petitions that garner four votes should, in

²⁵⁰ Harlan, *supra* note 252, at 546.

²⁵¹ PROVINE, *supra* note 16, at 177.

²⁵² *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 561 (1957) (Harlan, J., dissenting).

²⁵³ O’Brien, *supra* note 97, at 786–88.

expectation, be the least important cases and, presumably, the ones most likely to turn out to be a waste of the Court's time. With a minority-voting rule, it is easier for marginally important cases to sneak onto the docket, either because a few Justices misread the importance of the case, or because a minority is stuffing the docket. Either way, requiring an additional vote to grant certiorari would presumably filter out those cases the Court should not take.

But moving to a majority rule is not an unalloyed good. Moving to a majority rule at the agenda-setting stage would limit a minority coalition's ability to mitigate the ideological impact of the majority. Moving to a majority rule makes it possible for the ideological majority to hold out for only those cases that provide large ideological payoffs. The run-of-the-mill cases where the Court is unanimous but the results do not promote the majority's ideological ends will have a hard time getting the Court's attention. If these are cases that are important for law on the ground, forgoing them in favor of ideological wins would likely lead to bad public policy.

Moving to a majority rule would also make it easier for lower courts to deviate from Court precedent. Recall that under Lax's model, the Rule of Four²⁵⁴ allows the four liberal Justices²⁵⁵ to monitor conservative lower courts and punish deviations. Similarly, the four more conservative members police liberal lower courts. The median would tolerate some deviations because taking cases is costly, but the more extreme members are willing to pay these costs. The Rule of Four creates a credible threat of overturning lower courts which stray from the median's preferred policy.

Further, increasing the size of the minimum cert coalition will reduce the Court's caseload even more.²⁵⁶ Along these same lines, it would dramatically increase the power of the median Justice. Moving to a Rule of Five would not make the Court less political; it would just mean the Court largely represents the politics of the median Justice. If Lax's model is correct,²⁵⁷ lower courts could take advantage of this by deviating from Court precedent in ways that would not draw the median's attention.

Finally, increasing the size of the necessary coalition would almost certainly reduce the size of the docket further while increasing the share of divisive 5-4 cases. The Court is already taking an incredibly small—and shrinking—number of cases.²⁵⁸ This has drawn the ire of many observers,

²⁵⁴ See *supra* Part IV (explaining the Lax model and the Rule of Four).

²⁵⁵ Under the model, the four liberals are the four Justices to the left of the Court median. The four conservatives are the four to the right of the median. This is not to say that all members of those coalitions are liberal or conservative in the colloquial sense.

²⁵⁶ GRESSMAN ET AL., *supra* note 91, at 327.

²⁵⁷ See *supra* Part IV (explaining the Lax model and the Rule of Four).

²⁵⁸ See Analysis, THE SUPREME COURT DATABASE, WASH. U.L., <http://scdb.wustl.edu/analysis.php> [<https://perma.cc/2WSC-R2QL>] (last visited Mar. 16, 2018) (showing that the Court took between 150

and, over time, threatens the ability of the Court to play an active role in the full scope of American law. Further, if the majority is holding out for big ideological wins, we should expect them to pick cases that will split the Court. Since the minority would no longer be able to add cases where the Court is unanimous, a larger fraction of the cases would be divisive.

The Court could change the rule in the other direction and move to a Rule of Three. This is not without precedent. In his testimony before the Senate regarding the Judges' Bill of 1925, Justice Van Devanter noted that cert was sometimes granted if only three Justices were in favor.²⁵⁹ The Court already grants cert with only three votes to grant if a fourth offers a Join-3, and until the retirement of Justice Brennan, three Justices were sufficient to force the Court to postpone decisions on certiorari pending the outcome of another case.²⁶⁰

Moving to a Rule of Three would almost certainly increase the size of the docket. If the Rule of Four became a Rule of Three, assuming no changes to voting behavior,²⁶¹ the Court would have taken another 148 cases during the first eight years of the Rehnquist Court.²⁶² That works out to be 18.5 additional cases a year.²⁶³ However, it is not entirely obvious if this would resolve the problem of a politicized Court. In many ways, this path would counter politics with more politics. The more extreme members of the usual majority would be able to press the Court to take more cases that may shift the law in their preferred direction. For the defensive-minded members of the minority, on the other hand, a Rule of Three would make it easier to stuff the docket full of unanimous cases or to better police deviations by lower courts.

If the greater threat to the Court's legitimacy is public perception of a politicized court due to a surfeit of 5-4 cases, then a Rule of Three could help. A Rule of Three makes these splits relatively less likely. Most of the cases the defensive-minded minority coalition puts on the docket would yield unanimity, which by the same logic should increase public confidence in the Court. When an aggressive three-member coalition overreaches, it is also more likely to lead to a 5-4 outcome than cases that already have four votes. In the latter case, if the cert coalition gains one defector or if it merely

and 190 cases per year between 1971 and 1988, and between 69 and 92 cases per year between 1988 and 2016).

²⁵⁹ *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearings on H.R. 8206 Before the House Comm. on the Judiciary*, 68th Cong., 2d Sess. 8 (1924).

²⁶⁰ The Court changed the rule to frustrate the efforts of Justices who used the hold in death penalty cases to delay executions. See Tushnet, *supra* note 159, at 181 (explaining the history behind the change).

²⁶¹ This is an overly strong assumption. Justices are strategic individuals, and their individual thresholds would adjust if the rule changed. The results here are simply ballpark figures to provide a rough estimate of the effects.

²⁶² See *infra* Technical Appendix (counting the number of cases where three Justices supported cert.)

²⁶³ See *infra* Technical Appendix (dividing the number of cases by the eight years in the sample).

keeps itself together, the result is a 5-4 case. In contrast, if three Justices could grant cert, 5-4 cases at disposition only happen if one or two Justices join the cert-granting minority. If the minority merely holds together, the result is 5-4. This suggests that cases that reach the docket with minimal support are less likely to lead to 5-4 outcomes under a Rule of Three than under the Rule of Four.

The second voting rule that could change is the tradition of voting in order of seniority, which appears to give the Chief Justice a first-mover advantage and gives him a great deal of influence in the cert process.²⁶⁴ This finding relates to other recent work that notes that the Chief's influence is often underestimated and may be unjustified.²⁶⁵ The particular advantage the Chief has in agenda setting is that he votes first. Other Justices seem to queue off of his vote, and as such, the Chief's vote carries more weight than others. One way to dilute this advantage would be to have the Justices vote simultaneously. The problem with this procedure is that for it to be truly effective, the Justices could not discuss the decision amongst themselves. Discussions in conference are structured according to seniority, so the Chief Justice speaks first.²⁶⁶ Even if the actual vote were simultaneous, the Chief would retain a first-mover advantage by speaking first. Since the Court is a deliberative body, it seems too high a price to pay to force it to not deliberate.

So long as the Justices vote sequentially, there will be an opportunity for Justices to take cues from the first speaker. If simultaneous voting is off the table, then cue taking will always be a concern. But steps could be taken to minimize this danger by restructuring the discussion and voting process. Social scientists are fond of a random recognition rule.²⁶⁷ If the Chief randomly called on a Justice to begin (and then continue) conversation about a petition, the first-mover advantage would be dispersed among the different Justices. This would not cancel the advantage, though it would mean the advantage would not be concentrated in the hands of the Chief. It would also have the salutary benefit of inducing Justices to come prepared to discuss every petition. As it stands, a Justice that is not up to speed on a case can glean information from the Chief's comments and free ride. If there were a chance the Justice would have to begin the conversation, there would be

²⁶⁴ See discussion in Part ILE.; see also Benjamin Johnson & Keith E. Whittington, *Why Does the Supreme Court Uphold so Many Laws?*, U. ILL. L. REV. (forthcoming May 2017) (manuscript at 38–39), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970868 [<https://perma.cc/3APB-6T25>] (showing that the composition of the Court's judicial review docket is dramatically affected by successive Chiefs, and specifically showing the Roberts Court has drastically reduced the size of its judicial review docket and dramatically altered its composition).

²⁶⁵ Resnik & Dilg, *supra* note 31, at 1575–76.

²⁶⁶ PERRY, *supra* note 15, at 43.

²⁶⁷ E.g., David P. Baron & John A. Ferejohn, *Bargaining and Agenda Formation in Legislatures*, 77 AM. ECON. REV. 303 (1987); David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 83 AM. POL. SCI. REV. 1181 (1989).

additional incentive to carefully study the petition and come to an independent conclusion before the conference. If the Justices were to do this, they would likely form stronger prior beliefs about the petitions, and this would limit the first-mover advantage.

Unfortunately, it is difficult to imagine Chief Justice Roberts managing conferences with the aid of a randomization machine. Still, the Court already has institutional structures that could be adapted to dilute the Chief's first-mover advantage. Justices are assigned managerial responsibilities over different circuits.²⁶⁸ The Court could easily restructure discussion of cert petitions so that the Justice that oversees the circuit where a case originates begins the conversation. This would not end the first-speaker advantage, but it would end the Chief's monopoly on that advantage.²⁶⁹

4. *Creating External Bodies to Review Petitions*

From time to time, scholars have suggested creating an external body to help manage the Court's agenda-setting process. For example, Estreicher and Sexton suggested a "second look mechanism."²⁷⁰ Their concern was to eliminate the cases from the docket that the Court should not take.²⁷¹ Under their proposal, the Court would vote first in conference, and any case receiving four votes would be submitted to "an independent staff of the caliber of the Justices' clerks, headed by a leading senior member of the Supreme Court bar."²⁷² Once vetted by that commission, the case would be returned to the Court with the report of the commission, and the Justices would vote a second time.²⁷³

Paul Carrington and Roger Cramton argue for a commission of thirteen Article III judges empowered to "select[] . . . cases . . . that the Court would be obliged to decide."²⁷⁴ Their recommendation would require the Court to take the cases referred by the commission. Sanford Levinson suggests broadening the membership of this commission to include state judges and public representatives.²⁷⁵ His view that the Court would be well served by input from a broader range of views is well taken.

However, as Kathryn Watts had suggested, employing non-Article III judges on such a commission would raise constitutional concerns about

²⁶⁸ 28 U.S.C. § 42 (2012).

²⁶⁹ The Court could randomize which Justice leads off discussion on each case. But this seems to create implementation problems that the Court would most likely find not worth the effort to undertake.

²⁷⁰ Estreicher & Sexton, *supra* note 10, at 802–03.

²⁷¹ *Id.* at 791.

²⁷² *Id.* at 802.

²⁷³ *Id.* at 803.

²⁷⁴ Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 632 (2009).

²⁷⁵ Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 111 (2010), <http://www.yalelawjournal.org/forum/assessing-the-supreme-courts-current-caseload-a-question-of-law-or-politics> [<https://perma.cc/YVD3-FSHS>].

delegating government powers to nongovernmental actors or might violate the “oneness” principle of Article III.²⁷⁶ Further, a blunt legal requirement that the Justices decide the cases selected by this commission prevents Justices from weighing in, and denies the process the benefit of their perspectives and their concerns for the Court as an institution.

If Carrington and Crampton’s proposal were amended to provide recommendations instead of mandates, there would be fewer issues with adding state judges, retired Justices, or others. The recommendations themselves could then inform the Court’s internal deliberation on certiorari. The commission’s work would save the Court time, as the cert pool would largely become redundant. Further, by turning the cert process over to professionals, the work should be done more efficiently and with less concern that the recommendations reflect the idiosyncratic preferences of a clerk two years removed from law school.²⁷⁷

The commission’s review of individual petitions would be made a matter of public record. These reports would provide members of the Supreme Court bar a wealth of information about what makes a case certworthy. It may also have a beneficial effect of making frivolous appeals less likely, as lawyers may be less inclined to recommend a costly certiorari petition to a client when it is likely that the staff report will subsequently tell the client that her attorney was wasting her money. Most importantly, releasing these recommendations and reports promotes greater transparency. Thus, the commission could achieve the benefits sought by reformers who have called on the Court to clarify rules or explain cert decisions.

A public commission would add a great deal of transparency to the process while reducing the amount of time Justices and clerks must spend on reviewing cert petitions. This should increase the capacity of the Court to take additional cases and increase the chances that the cases they do take will not merely reflect the Justices’ ideological preferences. This transparency would go a long way to reduce the danger of appearing biased in taking cases.

CONCLUSION

The cert process is a hugely important but poorly understood part of the Supreme Court as an institution. Currently, the Justices use this process to advance their own ideological agendas. Over two-thirds of the Justices’ votes are attributable to ideology.²⁷⁸ However, Justices vary greatly in how ideological they are. Further, there is strong, if only suggestive, evidence

²⁷⁶ Watts, *supra* note 240, at 21 n.112.

²⁷⁷ *Id.* at 631–32.

²⁷⁸ See *supra* Part II.D (discussing the impact of individual Justices’ ideology on the docket).

that this could reflect a previously unrecognized power of the Chief Justice to affect the docket.²⁷⁹

The politicization of the cert process undermines the Court's legitimacy and particularly its power of judicial review. Accordingly, the Article proposes a novel solution to the problem: a First Look Commission that would make recommendations to the Court as to which cases to take and help Congress better use its Article III power over the Court's jurisdiction.

²⁷⁹ See *supra* Part II.E (discussing the power of the Chief Justice to shape the law).

TECHNICAL APPENDIX

The model I propose is a generalization of the traditional rollcall voting framework. Justices are $i \in \{1, 2, \dots, I\}$ and cases are $j \in \{1, 2, \dots, J\}$. First, let $z_{i,j}$ be Justice i 's vote at cert in case j . Let ω_j be a vector of case-specific covariates and β_i be a vector of Justice-specific coefficients. Justices vary in how much they dislike taking cases in two ways. First, taking any case imposes a cost of α_i on Justice i . Second, Justices have differing thresholds, λ_i , for moving from a Join-3 to a full grant. Finally, let κ_j be the common payoff from case j across all Justices.

The substantive interpretations of these values are that more negative values of α_i imply Justices prefer to take fewer cases, higher values of λ_i are associated with a Justice being more liberal with using Join-3 votes as a tool, and κ_j is the intrinsic certworthiness of a case recognized by all Justices. Including the product of Justice-specific coefficients and case-specific covariates, $\beta_i \omega_j$ allows Justices to have idiosyncratic differences in their views of what makes a case certworthy. For instance, κ_j will capture the average certworthiness of a death penalty case, but the interaction term $\omega_j^\top \beta_i$ will allow Justice Marshall to place greater weight on death penalty cases than some other Justices.

Payoffs from ideology are modeled as follows. Judicial decision-making from the cert stage through the dispositional stage is a two-stage game. In the first round, the Court collectively decides to grant or deny certiorari. If the Justices grant cert, the Court decides the case in stage two. The important assumption is that Justices share a common view of what is likely to happen at the second stage.

Suppose the lower courts are split on an issue, and the rule applied in a given case is a random draw from a commonly known distribution $f_{cert}(\xi_j)$ with finite mean and variance μ_j^{lc} and σ_j^{2lc} , respectively. Further, assume that Justices share a common belief that, if they Court takes the case, the majority will issue a new rule ψ_j that lower courts will subsequently apply by drawing policies from some known distribution $g_{cert}(\psi_j)$ with mean and variance μ_j^{sc} and σ_j^{2sc} .

Making the standard assumption that Justices face quadratic losses, suppose the expected ideological payoff to Justice i if the Court takes case j is

$$\begin{aligned}
E[V_{i,j}^{grant}] &= \int_{\Psi} -\frac{1}{2}(\psi_j - \theta_i)^2 g_{cert}(\psi_j) d\psi_j \\
&= -\frac{1}{2} \int_{\Psi} (\psi_j^2 + \theta_i^2 - 2\psi_j\theta_j) g_{cert}(\psi_j) d\psi_j \\
&= -\frac{1}{2}\theta_i^2 - 2\theta_i \int_{\Psi} \psi_j g_{cert}(\psi_j) d\psi_j + \int_{\Psi} \psi_j^2 g_{cert}(\psi_j) d\psi_j \\
&= -\frac{1}{2}(\theta_i^2 - 2\theta_i\mu_j^{SC} + K_j^{SC}) \\
&= -\frac{1}{2}(\theta_i^2 + K_j^{SC}) - \theta_i\mu_j^{SC}
\end{aligned}$$

where $K_j^{SC} = \int_{\Psi} \psi_j^2 g_{cert}(\psi_j) d\psi_j = \sigma_j^{2SC} + \mu_j^{2SC}$.

Since by definition the majority policy prevails at the second stage, the decision Justices face at cert is between the expected payoff just recovered and the value of the current state of affairs. The expected utility from maintaining the current state of the law is

$$\begin{aligned}
E[V_{i,j}^{deny}] &= \int_{\Xi} -\frac{1}{2}(\xi_j - \theta_i)^2 f_{cert}(\xi_j) d\xi_j \\
&= -\frac{1}{2}(\theta_i^2 + K_j^{lc}) - \theta_i\mu_j^{lc}
\end{aligned}$$

where $K_j^{lc} = \int_{\Xi} \xi_j^2 f_{cert}(\xi_j) d\xi_j = \sigma_j^{2lc} + \mu_j^{2lc}$.

I can now apply the standard random utility framework and write down an individual Justice's utility functions as

$$\begin{aligned}
U_{i,j}^{grant} &= E[V_{i,j}^{grant}] + \alpha_i + \kappa_j + \omega_j^T \beta_i - \epsilon_{i,j}^{grant} \\
U_{i,j}^{deny} &= E[V_{i,j}^{deny}] - \epsilon_{i,j}^{deny}
\end{aligned}$$

I now operationalize this model similar to Clinton et al. (2004).²⁸⁰

²⁸⁰ See Clinton et al., *supra* note 25 (using congressional votes for statistical analysis of rollcall data).

$$\begin{aligned}
z_{i,j}^* &= U_{i,j}^{grant} - U_{i,j}^{deny} \\
&= \frac{1}{2}(K_j^{lc} - K_j^{SC}) + \kappa_j + \alpha_i + \omega_j^\top \beta_i + \theta_i(\mu_j^{lc} - \mu_j^{SC}) + \epsilon_{i,j}^{cert} \\
&= \Lambda_j + \alpha_i + \omega_j^\top \beta_i + \theta_i(\mu_j^{lc} - \mu_j^{SC}) + \epsilon_{i,j}^{cert} \\
&= \Lambda_j + \alpha_i + \omega_j^\top \tilde{\beta}_i - \theta_i G_j + \epsilon_{i,j}^{cert}
\end{aligned}$$

where $\Lambda_j = \frac{1}{2}(K_j^{lc} - K_j^{SC}) + \kappa_j = (\mu_j^{2lc} - \mu_j^{2SC}) + (\sigma_j^{2lc} - \sigma_j^{2SC}) + \kappa_j$, $G_j = \mu_j^{SC} - \mu_j^{lc}$, and $\epsilon_{i,j}^{cert} \sim \mathcal{N}(0,1)$ is a policy shock where $\epsilon_{i,j}^{cert} = \epsilon_{i,j}^{deny} - \epsilon_{i,j}^{grant}$.

The following model simply says that when the latent variable $z_{i,j}^*$, which represents the expected net payoff from taking a case, is negative, the Justice will vote to deny. If the payoff is sufficiently high enough, the Justice will vote to grant. If the latent variable is between zero and the floor for a grant, the Justice will vote to Join-3.

Model 1

$$z_{i,j}^{cert} = \begin{cases} 0(\text{Deny}), & \text{if } z_{i,j}^* < 0 \\ 1(\text{Join3}), & \text{if } 0 \leq z_{i,j}^* < \lambda_i \\ 2(\text{Grant}), & \text{if } z_{i,j}^* \geq \lambda_i \end{cases}$$

Notice the substantive impact of the Λ_j term in equation for $z_{i,j}^*$ above. First, when κ_j is large and a case is intrinsically more certworthy, the Justice is more likely to vote to take the case. When the lower courts are generally confused about the law, they have a higher variance, which increases K_j^{lc} and through that Λ_j . This makes every Justice more likely to vote to take a case. Similarly, when Justices are confident they can predict the outcome of the case, they are more willing, *ceteris paribus*, to take the case, because the variance σ_j^{2SC} is smaller. This difference in variance nicely represents the Court's concern with circuit splits and its desire to take cases where it can bring clarity.

For the analysis in the Article, the relevant term is $G_j = \mu_j^{SC} - \mu_j^{lc}$, which is the signed distance between the mean of the two distributions, ψ_j and ξ_j . If $G_j > 0$, then the expected policy that results from taking the case is to the right of the current law.

I estimate Model 1 in a standard Bayesian framework using a Gibbs sampler. After a burn-in of 1,000 runs, I collect 200 draws from the relevant posteriors by running the sampler 2,000 additional times and thinning every ten. At each iteration, I save the value of all components of $z_{i,j}^*$.

I generate results in Part I.C by looking first at the sum of the ideological parameters, $\omega_{j,ideo}^1 \beta_{i,ideo} - \theta_i G_j$, where the ideological variables are Blackmun's clerks' recommendations, the product of the Justices' ideal points, and the case-specific gap parameter. If that sum is negative, then the purely ideological Justice votes to deny. If it is positive, the purely ideological Justice votes in favor of cert. Note that for this analysis, a Join-3 is treated as a vote to grant. Similarly, if the nonideological components are negative, a Justice that does not care about ideology votes to deny, but if they are positive, the Justice who does not care about ideology would vote to grant. If both components are greater (less) than zero, then the Justice's vote is overdetermined. If the ideology part correctly predicts the vote and the nonideological part does not, then ideology is necessary to predict the vote. If ideology alone gets it wrong but the non-ideological factors get it right, then case importance is necessary to predict the vote. If a case is overdetermined, then both ideological and importance factors are sufficient to predict the vote.

For Part I.D, I run the model on all cases and subset the results into two groups: memo recommends grant; recommends deny. The figure shows the average value of G_j for each of the 200 draws from the sampler for the two subsets.

For Part I.E, the analysis is the same but with different subsets. The first chart shows the average G_j value for cases actually granted and denied. Later figures show the average values for granted and denied subsets of cases the clerks recommended granting and denying, respectively.

For Part I.F, Chief Justice Rehnquist's votes enter the model as data. If Rehnquist voted to deny, then the variable takes on a value of -1. If he voted to Join-3 or to Grant, the variable takes on a value of 1. I then re-run model 1, but this time instead of Rehnquist's votes being a dependent variable, they are part of the data, ω_j . The model returns results based on the votes of the other eight Justices. The figure shows the coefficient on the Rehnquist-vote variable for the other Justices. To calculate how many votes changed consistent with Rehnquist's vote, I predict every Justice's vote in every case using the full model and again after subtracting off the product of the Justice's Rehnquist-vote coefficient and the value of Rehnquist's vote (± 1). I compare the proportion of correctly predicted votes from each set of predictions and report the results.

