

# THE PHILOSOPHY OF CERTIORARI: JURISPRUDENTIAL CONSIDERATIONS IN SUPREME COURT CASE SELECTION

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Over the past century, the Supreme Court has gained virtually complete control over its own agenda. Once a relatively passive institution which heard all appeals that Congress authorized, the Court is now a virtually autonomous decisionmaker with respect to the nature and extent of its own workload.<sup>1</sup> No longer is it true, as Chief Justice Marshall declared in a bygone era, that the Court has “no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given,” or that the Court “must take jurisdiction if it should.”<sup>2</sup> On the contrary, the Court’s muscular authority over case selection in the modern era now gives it the unchallenged prerogative in almost every instance to choose whether to resolve or to bypass important controversies that are brought before it in particular cases.<sup>3</sup> And this is so despite the Court’s protestation—after twice intervening in the sprawling contest over the 2000 Presidential election—that “when contending parties invoke the process of the courts, . . . it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.”<sup>4</sup>

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1. See *infra* Part I.A (discussing evolution of Supreme Court’s control over its docket).

2. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

3. The few elements of mandatory jurisdiction that remain add “very little to the Court’s workload.” Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 97 (1988); see also Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 752 (2001) [hereinafter *Plenary Docket*] (specifying areas where litigants retain a right of appeal to the Supreme Court).

4. *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam). Cf. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1717 (2000) (“A court that can simply refuse to hear a case can no longer credibly say that it had to decide it.”).

The Justices actively sought this dramatic increase in the Supreme Court's autonomy, arguing that the "business of the Supreme Court should be to consider and decide for the benefit of the public and for the benefit of uniformity of decision only questions of importance," making discretionary jurisdiction "essential to our playing the part we ought to play in the administration of justice in the country."<sup>5</sup> Justices have since emphasized that "[t]he power to decide cases presupposes the power to determine what cases will be decided"<sup>6</sup> and also "the more subtle power to decide when, how, and under what circumstances an issue should or should not be accepted for review."<sup>7</sup> And with this power in hand, the Justices have recognized that not only deciding to decide, but also "[d]eciding not to decide is . . . among the most important things done by the Supreme Court."<sup>8</sup> Indeed, "the Supreme Court's power to set its agenda may be more important than what the Court decides on the merits."<sup>9</sup>

The importance of this work is all the more striking in view of the unusual manner in which it is performed. In sharp contrast to traditional judicial decisionmaking, the Justices typically make decisions about whether to grant certiorari according to vague guidelines that afford them maximum discretion, based on very little collegial deliberation, with virtually no public disclosure or explanation of their actions and subject to no precedential constraints.<sup>10</sup>

The secrecy of the Court's deliberations and actions at the threshold stage makes analysis of the nature of the Court's agenda-setting work difficult, since the Court typically does not publish its certiorari votes and

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5. 66 CONG. REC. 2,920 (1925) (statement of Chief Justice William Taft in letter to Senator Copeland seeking support for the Judges' Bill (Dec. 9, 1924)).

6. Arthur J. Goldberg, *The Case Against a National Court of Appeals*, WASH. POST, Jan. 6, 1973, at A14; see also William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 484 (1973) [hereinafter *Another Dissent*] (quoting and endorsing this statement).

7. Brennan, *Another Dissent*, *supra* note 6, at 484 (quoting Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 256 (1973)).

8. Thurgood Marshall, *Remarks at the Second Circuit Judicial Conference* (Sept. 8, 1978), in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, AND REMINISCENCES 177 (Mark V. Tushnet ed., 2001).

9. Hartnett, *supra* note 4, at 1737 (documenting the Court's growing assertiveness in managing its own docket); see also JOHN R. SCHMIDHAUSER, *THE SUPREME COURT* 128 (1960) (this "ability to control, to a great extent, both the volume and substance of the litigation which comes before it" is "the most striking attribute of the modern Supreme Court"); Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387, 387 (1982) ("Much of the Court's power rests on its ability to select some issues for adjudication while avoiding others."); *infra* Part I.A (discussing the importance of the certiorari process).

10. See *infra* Part I.B (discussing the Court's processes in considering and ruling on petitions for certiorari).

rarely explains them in any detail.<sup>11</sup> Nonetheless, a number of political scientists have mined the docket books of retired Justices in order to develop a better grasp of this critical function. Their analysis of the data has done much to clarify the extent to which the criteria articulated in the Court's rule on certiorari (such as the presence of a conflict among the lower courts) and strategic considerations about the likelihood of prevailing on the merits actually motivate the Justices' decisionmaking.<sup>12</sup>

In this Article, we offer a fuller jurisprudential analysis of the gatekeeping choices that the Justices make as they set the direction in which the Court will proceed. Using more recent data that we gathered from the docket books of Justices Brennan and Marshall, we show that rule-based and strategic factors, while undeniably important, cannot adequately account for the Justices' voting behavior at the certiorari stage. Although the Justices consider the very same cases and materials, in light of the same criteria set out in the Court's rule, they come to quite different conclusions about which cases merit plenary review. Even Justices closely aligned in decisions on the merits often have dramatically different voting records on certiorari.<sup>13</sup>

We suggest that other, more jurisprudential considerations also affect the individual Justices' judgments about the quantity and content of the Court's proper workload. In particular, we contend that a Justice's views about what role the Supreme Court should play in the judicial system and American life—including his or her views on the nature of precedent, the importance of uniformity in federal law, and the Court's appropriate role in effectuating social change—play a central role in shaping his or her decisions about case selection.<sup>14</sup>

## I. THE IMPORTANCE AND UNIQUENESS OF THE CERTIORARI PROCESS

### A. *The Importance of the Certiorari Process*

Beginning in the decades after the Civil War, the Justices of the Supreme Court began a fierce struggle to gain more direct control of their

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11. See *supra* note 10.

12. See SUP. CT. R. 10; see also *infra* Part II (discussing the political science literature on the influence of rule-based criteria and strategic concerns in certiorari voting).

13. In the 1990 Term, for example, Justice White voted to grant certiorari in 229 cases, Justice Stevens in 111 cases, Justice Kennedy in 104 cases, and Justice Scalia in 91 cases. See *infra* notes 130–39 and accompanying text (discussing differences in the Justices' voting records).

14. See *infra* Part III (discussing how different approaches to the task of judicial decisionmaking can affect certiorari voting).

own docket. The immediate and most obvious impetus for this struggle was the Court's staggering caseload, which had become increasingly burdensome as the array of legal issues multiplied with the growing scale and complexity of federal law in American life.<sup>15</sup> The reasons for the Court's insistence on reform of its jurisdictional statutes, however, ultimately went well beyond the initial issues of administration.

The Court's efforts evolved through four periods. First, the Court importuned Congress for help in the waning decades of the nineteenth century, as the Court found itself unable to cope with its workload and fell more than three years behind in processing cases.<sup>16</sup> Congress responded with several pieces of legislation, most notably the Evarts Act, which created the intermediate courts of appeals and for the first time explicitly conferred on the Supreme Court some authority—through an order denying a writ of certiorari—simply to turn away cases that were not judged to warrant full consideration and resolution on their merits.<sup>17</sup>

When these various legislative changes did not suffice to eliminate the problem, the Court embarked on a lengthy period of negotiation with Congress that culminated in the Judiciary Act of 1925.<sup>18</sup> The key feature of this legislation—known as the Judges' Bill because of the Justices' tireless advocacy for its passage<sup>19</sup>—was its sweeping embrace of the idea that the Supreme Court should be vested with broad discretion to decline to review the vast majority of the cases that litigants bring to it.<sup>20</sup> The obverse of this development was a clear retreat by Congress: in ceding such broad authority to the Court, Congress surrendered much of its own ability to dictate which cases the Supreme Court would decide.<sup>21</sup> The full scope of Congress' concession was initially masked, however, by the fact that the Act still contained many constraints on the Court's discretionary control over its docket: in certain cases, litigants retained an automatic

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15. See Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 190–93 (2004) (describing the growth in the Court's docket following the Civil War).

16. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 86 (1927) (describing the Court's staggering caseload); see also *id.* at 60–69 (same); Eugene Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 748 n.23 (1964) [hereinafter *About Certiorari*] (same).

17. See Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

18. See Judiciary Act of 1925, 43 Stat. 936.

19. See, e.g., Hartnett, *supra* note 4, at 1660–1704 (describing Chief Justice Taft's strenuous efforts to bring about the Judiciary Act of 1925).

20. See Gressman, *About Certiorari*, *supra* note 16, at 744 (explaining how the 1925 Act succeeded in its design “to enable the Court to maintain a flexible but firm control over the volume and nature of its work”).

21. See FRANKFURTER & LANDIS, *supra* note 16, at 119 (“The history of latter-day judiciary acts is largely the story of restricting the right of appeal to the Supreme Court.”).

right of appeal—notably in those cases thought to create the strongest frictions in our system of federalism, such as where a state court rejected a claim of right asserted under federal law or where a federal court invalidated state legislation.<sup>22</sup> Other provisions of the Act, such as its procedure for a lower court to certify a case to the Supreme Court, also imposed limitations upon the Court’s power to set its own agenda.<sup>23</sup>

The Act succeeded in easing the Court’s unmanageable workload. Between the 1926 and 1928 Terms the number of plenary decisions fell by more than one-third, and it has never returned to the levels seen prior to the Act.<sup>24</sup> Along with this reduction in its caseload came the new burden of screening and evaluating an ever-growing number of petitions for review,<sup>25</sup> but the Justices were generally satisfied with this exchange. Indeed, they soon worked off their backlog and instituted a practice of deciding all argued cases by the end of each term.<sup>26</sup>

Nonetheless, the Supreme Court still chafed at the restrictions on its discretion. Over the next several decades, the Court gradually interpreted and implemented the Act so as to erode virtually all of the intended constraints on its authority to select its own cases. In addition to eviscerating the certification process,<sup>27</sup> the Court circumvented the mandatory provisions for appellate jurisdiction by deciding many cases on

22. See *id.* at 277–78; Hartnett, *supra* note 4, at 1697–1700 (describing the legislative negotiations over these provisions).

23. See James W. Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 3 (1949) (“Congress determines what courts may use certification and when, but within these limits the certifying court determines on what matters the reviewing court must pass. In other words the jurisdiction of the latter court is obligatory at the option of the certifying court.”). See generally ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 449–57 (7th ed. 1993) [hereinafter STERN & GRESSMAN] (describing the certification process).

24. The 1925 legislation reduced the number of the Court’s signed opinions from 199 in the 1926 Term to 129 in the 1928 Term. See LEE EPSTEIN ET AL., *SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 84 tbl. 2-7 (3d ed. 2003) [hereinafter SUPREME COURT COMPENDIUM].

25. See, e.g., FEDERAL JUDICIAL CENTER, *REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT*, 57 F.R.D. 573, 590–95 (1972) [hereinafter FREUND REPORT] (documenting the large increase in petitions filed and urging the establishment of a new tribunal to assist the Supreme Court with its screening function and certain other work); FRANKFURTER & LANDIS, *supra* note 16, at 286–89 (finding that the “great volume” of petitions raises “[n]ew perplexities”).

26. See GREGORY HANKIN & CHARLOTTE A. HANKIN, *PROGRESS OF THE LAW IN THE SUPREME COURT: 1930–1931*, at 35 (1931). In the 1929 Term, under Chief Justice Taft, this feat was accomplished by restoring a number of argued cases to the docket for reargument during the next term; in the 1930 Term, under Chief Justice Hughes, “every case argued was disposed of” without putting any over for reargument. *Id.* at 35; see also STERN & GRESSMAN, *supra* note 23, at 3 n.10 (discussing this practice); Gressman, *About Certiorari*, *supra* note 16, at 749 n.29 (same).

27. See STERN & GRESSMAN, *supra* note 23, at 450 (describing the Court’s success in eliminating use of certification, largely through overt hostility to the procedure); Hartnett, *supra* note 4, at 1710–12 (same).

appeal in a summary fashion that was largely indistinguishable from the Court's disposition of petitions for certiorari.<sup>28</sup> In 1988, Congress finally capitulated to the Justices' efforts to eliminate almost all remaining vestiges of the Court's mandatory appellate jurisdiction by conferring nearly blanket authority on the Court to determine its own docket and to choose the specific cases that it wished to hear and decide on the merits.<sup>29</sup>

As this account suggests, more is at stake here than the Court's ability to keep up with its workload.<sup>30</sup> Instead, the Justices have insistently sought increased control over the Supreme Court's docket because they have understood that their ability to fulfill their role involves not only *deciding* those cases that *do* come before them but also deciding *which* cases *should* come before them at any given point in time.<sup>31</sup> As Justice Brennan emphasized, "the screening function is inextricably linked to the fulfillment of the Court's essential duties and is vital to the effective performance of the Court's unique mission 'to define the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal system.'"<sup>32</sup> Indeed, some Justices have contended that the power to decide

28. See FREUND REPORT, *supra* note 25, at 595–96 ("The discretionary-mandatory distinction between certiorari and appeal has been largely eroded. The concept that all appeals are argued while most certiorari cases are disposed of summarily has not been true for many years."); Cordray & Cordray, *Plenary Docket*, *supra* note 3, at 751–58 (showing that the Court treated appeals and petitions for certiorari in similar fashion).

29. See Review of Cases by the Supreme Court, Pub. L. No. 100–352, 102 Stat. 662 (1988). Congress thus buried once and for all the concerns raised most forcefully by Senator Walsh during debate on the Judges' Bill: he "[f]ound it difficult to yield to the idea that the Supreme Court of the United States ought to have the right in every case to say whether their jurisdiction shall be appealed to or not." 66 CONG. REC. 2,756 (1925).

30. See, e.g., Thomas J. Walsh, *The Overburdened Supreme Court*, 1922 VA. BAR ASSN. REP. 216, 225 ("The House Committee on the Judiciary was told by the Chief Justice that the bill [that would become the Judiciary Act of 1925] is the work of the justices of the Supreme Court. If so, it exemplifies that truism, half legal and half political, that a good court always seeks to extend its jurisdiction, and that other maxim, wholly political, so often asserted by Jefferson that the appetite for power grows as it is gratified.")

31. See DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 177 (1980) (agreeing that case selection "is an important aspect of the Supreme Court's . . . power" and noting that if this were "not true, the work of justices from Taft to the present to protect and extend the Court's authority to select cases without interference would be incomprehensible"); Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 721–22 (1993) (reviewing H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991)) (discussing "how significant the decision to decide is" and suggesting that constitutional scholars should "be as interested in the processes by which the Justices decide not to engage in articulated decisionmaking as those by which they do").

32. Brennan, *Another Dissent*, *supra* note 6, at 482 (quoting FREUND REPORT, *supra* note 25, at 1); see also *id.* at 484 ("The screening function is an indispensable and inseparable part of this entire process, and it cannot be curtailed without grave risk of impairing the very core of the extraordinary function of the Supreme Court.")

which cases to hear and not to hear is a necessary corollary to the power to decide cases at all.<sup>33</sup>

The connection between the Court's agenda-setting function and its more prominent responsibility to decide cases is reflected in the consequences that each decision to grant or deny review has for the Court's agenda. At stake in the aggregate is the overall size of the Court's docket and thus its capacity to decide cases well while processing its caseload in a timely and effective manner.<sup>34</sup> Also at stake are the contours of the Court's agenda—what kinds of issues will be addressed while others go unheard.<sup>35</sup> The shape of the Court's agenda in turn produces a broad range of effects.

At a more concrete level, the choice of a particular case, with its peculiar set of facts, among the many that are generally available to resolve an issue can influence the scope and content of the Court's opinion on the merits—and possibly the outcome.<sup>36</sup> Indeed, even delaying adjudication of an issue may affect its ultimate disposition, perhaps by

33. Justice Goldberg, for example, urged that “[t]he power to decide cases presupposes the power to determine what cases will be decided.” Goldberg, *supra* note 6, at A14; *see also* Brennan, *Another Dissent*, *supra* note 6, at 484 (quoting and endorsing this statement). Paul Freund replied to Justice Goldberg's statement by saying “[w]hence comes this asserted principle? Not, surely, from the constitution . . . .” Paul A. Freund, *Why We Need the National Court of Appeals*, 59 A.B.A. J. 247, 251 (1973). More recently, Hartnett added: “Indeed, at the time of the Judges' Bill in 1925, the Court's control over its docket was viewed as a ‘new dispensation’ from Congress.” Hartnett, *supra* note 4, at 1736.

34. *See* PROVINCE, *supra* note 31, at 120 (concluding that many Justices during the Burton era felt constrained in voting to grant review by the Court's limited capacity); *see also* William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 64 JUDICATURE 411 (1981) [hereinafter *Court's Workload*] (suggesting that the Court can cope with no more than 150 cases per term); Byron R. White, *Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections*, 51 ANTITRUST L.J. 275, 277 (1982) [hereinafter *Challenges for the Court*] (same).

35. *See, e.g.*, Brennan, *Another Dissent*, *supra* note 6, at 480 (arguing that the Court's case selection process “provides a forum in which the particular interests or sensitivities of individual Justices may be expressed”); Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 1048 (1985) [hereinafter *Case Selection*] (opining that up to half of the plenary docket is shaped by the particular interests and inclinations of the Justices then sitting on the Court). The decision *not* to decide is also important. *See* Fowler V. Harper & Arnold Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427, 457 (1954) (“the work which the Supreme Court does *not* do is as important as the work which it *does*”); Fowler V. Harper & George C. Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439 (1953) (discussing the Court's denial of review in many important cases); Fowler V. Harper & Edwin D. Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354 (1951) (same); Fowler V. Harper & Alan S. Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950) (same).

36. *See, e.g.*, W.H. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 265 (1991) (describing the importance to the Justices of finding a “good vehicle” to develop a doctrine in the preferred direction, and their recognition that a case with “bad” facts might cause one to “lose on the merits; or even if one won, [to] take doctrine in a way that was undesirable”).

putting it off to a later Court with different personnel or by causing the issue to be considered within a changed political climate or an evolved legal landscape.<sup>37</sup>

At a more general level, the decisions that the Justices make about which cases to hear (and not to hear) play a part in determining the magnitude of the Court's profile in American life.<sup>38</sup> In this connection, it has been suggested that perhaps "the most significant impact of Supreme Court decisions is to increase the political salience of the issues decided—regardless of which way the Court decides the issues."<sup>39</sup> In addition, the "choice of issues for decision largely determines the image that the American people have of their Supreme Court."<sup>40</sup>

The Justices' case selection decisions also help to define the role that the Court plays within the judicial system and American life. Through their decisions on which cases to hear, the Justices set the Court's priorities. The Court's agenda might, for example, be weighted in favor of achieving the maximum degree of national uniformity in the application of federal law by emphasizing cases presenting conflicts in the lower courts.<sup>41</sup> Alternatively, its docket might be focused on particular social issues to enable the Court to serve as an aggressive force for societal change.<sup>42</sup> Further, the types of cases that the Justices choose can affect the

37. See, e.g., DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* 408 (1998) (quoting Justice White as saying, "'it's perfectly obvious from time to time that a case is being decided in a way quite different than it would have been decided if his predecessor were still sitting there'"); PROVINCE, *supra* note 31, at 70 (describing Chief Justice Warren's concern that "'[d]enials can and do have a significant impact on the ordering of constitutional and legal priorities. Many potential and important developments in the law have been frustrated, at least temporarily, by a denial of certiorari.'").

38. See, e.g., PERRY, *supra* note 36, at 253–60 (discussing the Court's willingness to take some cases of great societal importance, and its efforts to duck others); Mark Tushnet, *The Warren Court as History: An Interpretation*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 1, 5 (Mark Tushnet ed., 1993) (describing how the Court denied certiorari on "entirely specious grounds" in *Naim v. Naim*, 350 U.S. 985 (1956), to avoid hearing a challenge to Virginia's ban on interracial marriage in the tension-filled aftermath of *Brown v. Board of Education*).

39. Hartnett, *supra* note 4, at 1738. The Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), for example, has ignited a debate over gay rights and same-sex marriage.

40. Brennan, *Another Dissent*, *supra* note 6, at 483.

41. Justice White, for example, strongly advocated the need for national uniformity:

[W]here cases present issues over which the federal and state courts have divided, this Court has a special obligation to intercede and provide some definitive resolution of the issues. . . . [M]y point is that this Court is only fulfilling this role with respect to some of the cases brought here on review, and not others—and the method by which it distinguishes between the two is elusive, to say the least.

*Metheny v. Hamby*, 488 U.S. 913, 915 (1988) (White, J., dissenting from denial of certiorari). See generally *infra* Part III.B.2 (discussing this view of the Court's proper role).

42. Justice Brennan's conception of the Court's role, for example, "involved nothing less than active judicial involvement in shaping a way of life for the American people." See DAVID E. MARION,



manner in which they supervise and guide the lower courts. There is a spectrum of views about how this supervisory function is most effectively performed, ranging from a preference for issuing decisions with broad rules of general applicability to a preference for use of incremental, step-by-step decisions in the common law tradition.<sup>43</sup> Ultimately the guidance given—whether in broad or narrow form—is in the majority’s opinion on the merits. But the Court’s decisions about which cases to place on its plenary docket may affect its ability to pursue its preferred approach. Thus, for example, if the Court prefers to use a more incremental approach to create a body of decisions to guide the lower courts, it must have clusters of cases in discrete areas available for plenary review and decision.

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.”<sup>44</sup> At a minimum, it makes a crucial contribution to the lasting body of national law that the Supreme Court eventually compiles.

### *B. The Peculiarly “Unjudicial” Nature of Certiorari Decisionmaking*

Viewed in this light, it is perhaps surprising to find that at least some Justices regard the Court’s certiorari work as much less important than its job of deciding cases on the merits. Justice Stevens has candidly endorsed this view and, moreover, suggested that his colleagues do as well: “When I compare the quality of their collective efforts at managing the certiorari docket with the high quality of their work on argued cases, I readily conclude that they also must be treating the processing of certiorari petitions as a form of second-class work.”<sup>45</sup> Justice Harlan also bluntly observed that because “the Court exists to adjudicate cases, and certiorari is but an ancillary process designed to promote the appropriate discharge

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THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN, JR.: THE LAW AND POLITICS OF “LIBERTARIAN DIGNITY” 161–62 (1997). *See generally infra* Part III.B.3 (discussing this view of the proper role of the Court).

43. Justice Scalia, for example, is a staunch advocate of guiding the lower courts through provision of broad rules. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–86 (1989). Justice White, in contrast, was “an incrementalist, deciding issues a case at a time.” HUTCHINSON, *supra* note 37, at 359. *See generally infra* Part III.B.1 (discussing these views on the function of precedent).

44. Brennan, *Another Dissent*, *supra* note 6, at 477.

45. John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 179 (1982) [hereinafter *Judicial Restraint*]. *Cf.* White, *Challenges for the Court*, *supra* note 34, at 282 (“[F]or myself, I give a good deal of attention to the certiorari docket and find it an important part of the overall appellate process at the Supreme Court level.”).

of that duty,” the process of “certiorari would be self-defeating if its demands upon the Court’s time were allowed to impinge upon the adjudicatory process.”<sup>46</sup> Our focus here, however, is not on assessing the quality of the Court’s gatekeeping efforts. Rather we focus on understanding and exploring the wide gulf that exists between the freewheeling procedures employed in carrying out the certiorari responsibility and the more careful and traditional “judicial” processes that guide the Court’s plenary decisionmaking.<sup>47</sup>

Insight into the Court’s decisionmaking at the certiorari stage requires an understanding of the certiorari process itself. The most striking feature of the process is that it lacks most of the trappings of traditional judicial decisionmaking—collegial deliberation, constraining criteria, majority rule, and public accountability. Indeed, the unique system that the Justices use in deciding which cases to grant for full consideration on the merits provides the Justices with virtually unfettered discretion in shaping the content of the Court’s docket.

Each week, hundreds of petitions are circulated to the individual chambers where the Justices and their law clerks review them.<sup>48</sup> At this stage, the Justices act almost entirely on their own in deciding which cases are worthy of review.<sup>49</sup> This isolation is driven in part by tradition and in part by necessity; as a practical matter, the sheer volume of petitions virtually eliminates the possibility of oral argument or any more collegial deliberation.<sup>50</sup> Following this initial review, most petitions are readily

46. John M. Harlan, *Manning the Dikes*, 13 REC. A.B. CITY N.Y. 541, 559 (1958); see also Stevens, *Judicial Restraint*, *supra* note 45, at 179 (reviewing certiorari petitions “is less important work than studying and actually deciding the merits of cases that have already been accepted for review and writing opinions explaining those decisions”).

47. See, e.g., PROVINCE, *supra* note 31, at 175 (noting the disparity between decisionmaking at the certiorari and merits stages); Hartnett, *supra* note 4, at 1720 (same).

48. Everyone but Justice Stevens participates in the “cert pool,” such that their law clerks share the task of preparing memoranda summarizing the petitions for review. See Barbara Palmer, *The “Bermuda Triangle?” The Cert Pool and Its Influence Over the Supreme Court’s Agenda*, 18 CONST. COMM. 105, 106 n.4, 119 (2001). Although some would disagree, we have argued elsewhere that the pooling of law clerks has little systematic impact on certiorari decisionmaking by individual Justices. See Cordray & Cordray, *Plenary Docket*, *supra* note 3, at 790–93; see also Palmer, *supra*, at 106–20 (using statistical evidence to show that the cert pool has remarkably little influence on certiorari voting). Also, the mere fact that a clerk’s summary memorandum is circulated to numerous Justices does not constitute the kind of collegial deliberation among the Justices that we have in mind, which clearly does occur at oral argument and in their private conferences in merits cases.

49. See, e.g., PERRY, *supra* note 36, at 147–49 (quoting Justices saying that there is virtually no interchamber discussion on certiorari petitions prior to conference); Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOC’Y REV. 807, 827 (1990) [hereinafter *Discuss List*] (noting that “the makeup of the discuss list is the summation of a series of individual calculations largely free of collective interaction”).

50. Of certiorari petitions, Justice White once said, “Their flow, like the Mississippi, is

found to be unworthy, and the Court simply denies them unless a Justice circulates a request to put a case on the “discuss” list prior to conference.<sup>51</sup>

Those cases placed on the discuss list do receive some form of collective consideration and then a vote in conference.<sup>52</sup> Because of the crush of work, though, this discussion is almost invariably brief—even perfunctory—providing “little opportunity for leadership” before individual votes are cast.<sup>53</sup> In addition, there is no opportunity for the collegial deliberation in a more public setting that often occurs among the Justices at the oral argument of cases heard on the merits.<sup>54</sup> The certiorari process is thus “relatively atomistic with decisions being made within chambers and the outcome on cert. being primarily the sum of nine individual decision processes.”<sup>55</sup> Put differently, “the extent to which the

unceasing.” Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. ST. B.J. 346, 349 (1982) [hereinafter *Work of the Court*].

51. See, e.g., PERRY, *supra* note 36, at 85–91 (describing the “discuss” list and the “dead” list); Caldeira & Wright, *Discuss List*, *supra* note 49, at 809–13 (same); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 13 (1983) [hereinafter *Life Span*] (same); White, *Work of the Court*, *supra* note 50, at 349 (same).

52. The Justices usually conference on Wednesday and Friday during argument weeks. See White, *Work of the Court*, *supra* note 50, at 383. At the Wednesday conference, they generally decide the cases argued on Monday, and at the Friday conference, they generally deal with the weekly certiorari list and decide the cases argued on Tuesday and Wednesday. See *id.* The Justices also hold a certiorari conference at the end of each recess. See DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 198–207* (6th ed. 2003); White, *Work of the Court*, *supra* note 50, at 383. As of 1990, there were normally forty to fifty cases discussed at each conference. See Caldeira & Wright, *Discuss List*, *supra* note 49, at 812.

53. See PERRY, *supra* note 36, at 91. The demands of reviewing the thousands of petitions for certiorari filed each year are intense. Even in a more sedate era, Chief Justice Hughes is reported to have concluded that the Court could devote no more than three and one half minutes to each petition that was actually discussed at conference. See Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 14 (1949). And in his now-dated time-study analysis, Professor Hart estimated that each Justice is able to spend a total of about 20 minutes *altogether* on each nonfrivolous petition, including all the time that is necessary to read and become familiar with the case materials. See Henry M. Hart, Jr., *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 87–88 (1959).

54. See, e.g., Walsh, *supra* note 30, at 229 (“[I]t is impossible to resist the conclusion that in the vast majority of cases [the petitions for certiorari] can have nothing more than the most cursory and superficial examination, [especially as] pre-conceived notions erroneously entertained are often dissipated with ease in oral argument against which counsel who must rely on a printed brief would have no warning. . . . I am convinced that to be required to submit to the Supreme Court on a written or printed statement of the facts and briefs whether a cause should be reviewed in that court is a denial of justice in a multitude of cases.”).

55. PERRY, *supra* note 36, at 163. Perry notes, however, that the Justices do on occasion seek to influence one another through threatening to dissent from denial of certiorari, which can act as a spur to accommodation, and they also sometimes indicate their willingness to acquiesce to the will of others through use of the Join-3 vote, which will serve as the fourth vote to grant. See *id.* at 166–92; see also John Paul Stevens, “Cheers!” *A Tribute to Justice Byron R. White*, 1994 B.Y.U. L. REV. 209, 217–18 (1994) (noting the effectiveness of Justice White’s use of dissents from denial of certiorari to persuade other Justices to change their votes to “grant”).

nine Justices operate as ‘nine little law firms’ is maximized here.”<sup>56</sup>

In making these highly individualized decisions, the Justices operate under virtually no formal constraints. The Court’s own Rule 10 sets out the considerations governing review on certiorari. The rule instructs that among “the character of the reasons the Court considers” in deciding whether to grant or deny certiorari are whether a lower court of last resort (i.e., a federal court of appeals or a state court of last resort): (1) “has entered a decision in conflict with” another such court on “an important federal question”; (2) “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”; (3) “has decided an important question of federal law that has not been, but should be, settled by this Court”; or (4) “has decided an important federal question in a way that conflicts with relevant decisions of this Court.”<sup>57</sup>

These criteria, laden as they are with malleable terms such as “important,” “usual,” “should,” and “conflict” do not serve to exert much meaningful restraint on the decisionmaking process.<sup>58</sup> Even so, the Court

56. Cordray & Cordray, *Plenary Docket*, *supra* note 3, at 783 (quoting BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 6 (1996) (attributing this formulation to “a number of” Justices)).

57. See SUP. CT. R. 10(a)–(c). The full text of the rule states:

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.

*Id.*

58. See S. Sidney Ulmer, *The Decision to Grant Certiorari as Indicator to Decision “On the Merits,”* 4 POLITY 429, 434 (1972) [hereinafter *Grant as Indicator*] (noting that, in light of the elasticity of the rule’s terms, “the Rule itself will not explain how the Court makes its decisions on certiorari applications”). The squishiness of the rule has generated complaint from practitioners, academics, and even some Justices, on the ground that its criteria afford inadequate guidance for litigants to make a meaningful assessment of those cases in which they are likely to succeed in petitioning for certiorari. See *id.* This vagueness encourages litigants to submit petitions for certiorari

takes further steps to forestall any constraint by noting that review “is not a matter of right, but of judicial discretion,” and cautioning that the criteria articulated in Rule 10 are “neither controlling nor fully measuring [of] the Court’s discretion.”<sup>59</sup>

Another unique feature of the certiorari process is the time-honored “Rule of Four,” which was already settled practice at the time of the wholesale expansion of certiorari in the Judiciary Act of 1925.<sup>60</sup> According to this unwritten custom, the Court will accept a case for plenary review whenever at least four of the nine Justices vote to do so.<sup>61</sup> The value of this unusual plurality decisionmaking procedure is that it “gives each member of the Court a stronger voice in determining the makeup of the Court’s docket. It increases the likelihood that an unpopular litigant, or an unpopular issue, will be heard in the country’s court of last resort.”<sup>62</sup> But it does permit some cases to make their way onto the docket

in cases which lack any serious merit. See Caldeira & Wright, *Discuss List*, *supra* note 49, at 813 (estimating that the Justices find 60–70% of petitions for certiorari frivolous). Moreover, the generality of the criteria fosters an appearance of inconsistency, as the Court’s pattern of grants and denials sends litigants mixed and confusing signals. See PERRY, *supra* note 36, at 221 (“[T]he criteria given by the justices are vague, nonbinding, and not very helpful; and, despite their grumbling about attorneys petitioning frivolous cases, justices do not want lawyers or anyone else to know precisely what it is that makes a case certworthy.”).

59. See SUP. CT. R. 10; see also PERRY, *supra* note 36, at 221 (“Fundamentally, the definition of ‘certworthy’ is tautological; a case is certworthy because four justices say it is certworthy.”); Levinson, *supra* note 31, at 736 (“[I]t seems difficult indeed to read the Court’s own Rule 10 as anything other than an invitation to balancing, to the making of ‘political choice(s)’ about what is ‘important’ enough.”); Walsh, *supra* note 30, at 234 (“The rules which guide or should guide the Supreme Court in passing on applications for writs of certiorari have never been very clearly defined or, perhaps it is more accurate to say, so far as any rule has been laid down, it is so general in character . . . as to tolerate the exercise of an unrestrained discretion.”).

60. See Act of Feb. 13, 1925, ch. 229, 43 Stat. 936; Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1069–70 (1988) (describing the origins of the Rule of Four).

61. See, e.g., Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 976, 981–82 & n.37 (1957) (describing the history of the Rule of Four); 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, 784–86 (1997) (same). In using this rule, the Justices count each “Join-3” vote the same as a vote to grant, and thus will accept a case for review even where fewer than three “grant” votes are cast if the combination of “grant” votes and “Join-3” votes adds up to at least four. See Cordray & Cordray, *Plenary Docket*, *supra* note 3, at 779–81 (analyzing “Join-3” votes). In addition, some of the Justices themselves have acknowledged that they will occasionally yield where “two or three justices strongly desired to hear a case.” PROVINE, *supra* note 31, at 33; see also PERRY, *supra* note 36, at 169.

62. Stevens, *Life Span*, *supra* note 51, at 21. Justice White argued that, in convincing Congress to make the Court’s docket largely discretionary in 1925, the Justices had assured Congress that the Court would continue to use the Rule of Four to ensure that “all cases deserving review at the Supreme Court level would be identified and granted review.” White, *Challenges for the Court*, *supra* note 34, at 277; see also White, *Work of the Court*, *supra* note 50, at 349 (same).

even though the collective judgment of the majority is that the case is not worthy of review.<sup>63</sup>

The unconstrained nature of the Court's case selection criteria is facilitated by the intense privacy and secrecy of the Court's approach to disposing of petitions: no record of the Court's vote is ever published (regardless of whether the case is granted or denied),<sup>64</sup> and typically no opinion or explanation is ever rendered for the Court's action.<sup>65</sup> The relatively rare breaches of this unspoken norm over the years are the exceptions that prove the rule: in his waning years, Justice Douglas insisted on publishing all of his own grant votes; and in particular categories of cases, some Justices have revealed their grant votes—for example, Justices Brennan and Marshall regularly dissented from denial of certiorari in death-penalty cases.<sup>66</sup> In general, the result of this private decisionmaking process is to divorce the case selection process from precedential constraints, thus minimizing any obligation of consistency from case to case.<sup>67</sup>

There are two main justifications for this secrecy. The first is limited resources: the crush of work in processing thousands of petitions each term simply does not permit of any more elaborate procedures. In explaining why the Court does not provide the reasons for its case selection decisions, Justice Rehnquist was explicit: "because there are

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63. Stevens, *Life Span*, *supra* note 51, at 19; *see also* Revesz & Karlan, *supra* note 60, at 1105–07 (noting that the Rule of Four enables a minority to bring issues before the Court repeatedly, in an effort to expose weaknesses in the majority's rule and to signal to outside actors that the precedent is precarious).

64. *See, e.g.*, Hartnett, *supra* note 4, at 1723–25 (discussing the effects of secrecy). Justice Douglas urged his colleagues to publish the votes cast on certiorari, at least in cases not accepted for argument, *see* WILLIAM O. DOUGLAS, *THE COURT YEARS 1937–1975*, at 39 (1980) [hereinafter *COURT YEARS*], and stated that Justice Black agreed, *see* WILLIAM O. DOUGLAS, *GO EAST YOUNG MAN* 452 (1974), but there is no indication that the other Justices ever seriously entertained the notion.

65. The only exception to the rule is that occasionally the background section of the Court's opinion on the merits will briefly indicate why the Court accepted the case for review, but even this is usually unilluminating, referring for example to the "importance" of the issue without more. *See* Ulmer, *Grant as Indicator*, *supra* note 58, at 432 (describing a study which demonstrated the rarity with which the Court explained its reasons for granting or denying a case).

66. *See, e.g.*, *Vickers v. Arizona*, 497 U.S. 1033 (1990) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari); *Swindler v. Lockhart*, 495 U.S. 911 (1990) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari); William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, in *THURGOOD MARSHALL* 21 (Roger Goldman & David Gallen eds., 1992) [hereinafter *Tribute to Marshall*] (noting that Justice Marshall had "filed more than 150 dissents from 'denial of certiorari' in capital cases"). Interestingly, even given Justice Douglas' strongly held views on this issue, and the intensity of the position taken by Justices Brennan and Marshall on the death penalty, they never went beyond publishing their own votes to breach the norm of confidentiality by divulging the votes of their colleagues.

67. *See* Harlan, *supra* note 46, at 556–57 (noting the lack of precedential constraint); Hartnett, *supra* note 4, at 1723 (same).

approximately 4,000 [petitions for review], as opposed to 150 decisions on the merits, there is simply not the time available to formulate statements of reasons why review is denied or appeals are affirmed or dismissed without argument.”<sup>68</sup> And the volume of certiorari filings has expanded significantly since commentators first described “the seeds of competition between the task of deciding cases and the necessity of disposing of petitions for certiorari” in the wake of the Judiciary Act of 1925.<sup>69</sup>

The other main justification is greater flexibility: the Court wants and believes that it needs the ability to wait for the “right” case,<sup>70</sup> to allow an appropriate amount of “percolation” of issues in the lower courts,<sup>71</sup> and to control the size of its docket.<sup>72</sup> This rationale is more telling because it is an explicit acknowledgment that the Court prefers to minimize the judicial character of its certiorari decisionmaking in order to achieve other administrative objectives—including its ability to achieve specific goals through the case selection process itself.<sup>73</sup> In other words, the Court seems to recognize not only that it would be burdensome to justify its certiorari decisions to the public, but perhaps also that it would be somewhat

68. William H. Rehnquist, *Sunshine in the Third Branch*, 16 WASHBURN L.J. 559, 561 (1977) [hereinafter *Sunshine*]; see also Harlan, *supra* note 46, at 556, 559 (observing that “the great volume of petitions” precludes “the giving of reasons for denial in individual cases,” and that “certiorari would be self-defeating if its demands upon the Court’s time were permitted to impinge upon the adjudicatory process” in cases heard on the merits).

69. Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 11 (1928). In the 1927 Term, when they penned these words, the Court had a total of 587 petitions for certiorari on its docket; when Justice Harlan spoke, the Court had 1,657 petitions on its docket; in the 2001 Term, the Court had 9,195 petitions on its docket. See SUPREME COURT COMPENDIUM, *supra* note 24, at 68–69 tbl. 2-5, 71 tbl. 2-6.

70. See, e.g., Revesz & Karlan, *supra* note 60, at 1119 (“[E]ven once the Court decides that a certain issue is certworthy, it is under no obligation to take the first case that presents it. . . . The Court’s institutional interest, rather than the interest of the parties, is the determining factor.”).

71. See, e.g., *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”); *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) (stating that the Court need not “act to eradicate disuniformity as soon as it appears” and praising the benefits of percolation); Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 689–91 (1990) (discussing pros and cons of percolation); *infra* notes 229–32 and accompanying text (discussing percolation).

72. See, e.g., Brennan, *Court’s Workload*, *supra* note 34, at 411 (noting that a docket of 150 cases “taxes [the Court’s] endurance to the limits”); Stevens, *Judicial Restraint*, *supra* note 45, at 180 (arguing that Court grants too many cases).

73. See Harlan, *supra* note 46, at 557 (“Flexibility is of the essence of certiorari, and it is by no means unknown for the Court to grant the writ to consider an issue which at an earlier time it had refused to review.”); cf. Lewis F. Powell, Jr., *What Really Goes on at the Supreme Court*, 66 A.B.A. J. 721, 722 (1980) (arguing that secrecy in conference is necessary to ensure a candid exchange of ideas free of public pressures); Rehnquist, *Sunshine*, *supra* note 68, at 563–67 (same).

difficult to justify them or at least that it would be undesirable to have to do so.<sup>74</sup>

But the price of the streamlined procedures and uninhibited flexibility is the absence of accountability.<sup>75</sup> Indeed, the odd result of the Court's administration of the certiorari process is to make the votes cast on certiorari seem almost legislative or prerogative in character.<sup>76</sup> Although presumably the Justices faithfully strive to apply the general substantive criteria set forth in Rule 10, each Justice maintains enormous latitude to vote to grant or deny a particular case for "any reason the Court sees fit."<sup>77</sup> Moreover, the decision that a Justice makes in any given case at the certiorari stage imposes no precedential constraint on his or her judgment about even the very same issue if (or, more likely, when) it arises in another case.<sup>78</sup>

Despite the lack of formal constraints and accountability, the Justices share some understanding of what they are trying to accomplish at this threshold stage and hence what kinds of issues are important enough to warrant full review. As Provine concluded from her study of the Vinson Court, the Justices' shared "conception of their role . . . prevents them

74. See, e.g., *Brown v. Allen*, 344 U.S. 443, 542 (1953) (Jackson, J., concurring) ("I agree that, as stare decisis, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case."); PERRY, *supra* note 36, at 221 (noting that "despite their grumbling about attorneys petitioning frivolous cases, justices do not want lawyers or anyone else to know precisely what it is that makes a case certworthy"); Harlan, *supra* note 46, at 557 ("It must be admitted that the Court's practice of not giving reasons for denials of certiorari in particular cases is at the expense of some guidance to the Bar . . . . Nevertheless, it is clear that such a criticism must yield to the force of the considerations [favoring secrecy.]").

75. See Tom Staunton, *How to Decide: Case Selection and Judicial Review*, 1992/1993 ANN. SURV. AM. L. 347, 354–62, 362–73 (arguing that secrecy of certiorari decisions is not justified, that it leads to unprincipled decisionmaking, and that that undermines the Court's effectiveness as constitutional interpreter); Ulmer, *Grant as Indicator*, *supra* note 58, at 432–33 ("Secret decision making without explanation is, of course, sufficiently frustrating to attorneys and students of the Court to cause widespread complaint. But in addition, the historical use of prerogative writs by English kings for political purposes contributes to the suspicion with which such practices are viewed in a democratic political system.") (footnotes omitted).

76. Cf. *Dalton v. Specter*, 511 U.S. 462, 479 (1994) (Souter, J., concurring) (describing the "unfettered discretion" that Congress granted the President to close military bases for "a good reason, a bad reason, or no reason"); Cass R. Sunstein, *Yet Still Partial to It*, 103 YALE L.J. 1627, 1641 (1994) (similarly describing the scope of the President's power to veto bills).

77. STERN & GRESSMAN, *supra* note 23, at 166; see also Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 255 (1973) ("[I]nformed arbitrariness is at the very heart of the certiorari jurisdiction. The justices are supposed to be motivated to grant or deny review solely by their individual subjective notions of what is important or appropriate for review by the Court.")

78. Justice Harlan explicitly approved this capacity for inconsistency, observing that it was a beneficial effect of the Court's secrecy in disposing of petitions for certiorari. See Harlan, *supra* note 46, at 557; see also Hartnett, *supra* note 4, at 1723 ("The lack of constraining text might not be important if there were a body of constraining case law. But there is none.")



from using their votes simply to achieve policy preferences.”<sup>79</sup> Yet even Provine is dubious about the Justices’ degree of self-restraint: “self-imposed limits of role conceptions, it is important to note, are essentially the only limits upon judicial discretion in case selection. Case selection approximates and even exceeds plenary decision making in the scope it provides for the exercise of unfettered judicial judgment.”<sup>80</sup>

The contrast between the processes that the Court has devised for case selection and for plenary decisionmaking is thus quite stark. At the threshold stage, decisions are made atomistically, with little collegial deliberation, and are based on a very brief review of the documentation submitted in support of and opposition to a petition for certiorari. At the merits stage, decisions are made after extensive study and consideration and are based on a more explicit and intensive presentation of views and collective exchange that occurs both in public—at oral argument—and in the Justices’ private conference. At the threshold stage, decisions can be, and often are, made with a mere plurality vote; whereas a precedential decision at the merits stage requires majority support. At the threshold stage, decisions are made based on criteria that are designed to preserve immense discretion; at the merits stage, there are elaborate procedural and interpretive norms that often influence and channel the Justices’ decisionmaking.<sup>81</sup> Finally, at the threshold stage votes typically are kept secret—meaning not only that the Court’s certiorari decisions are largely unexplained, but also that the Justices’ individual decisions lack accountability in the particular case and from one case to the next. At the merits stage, the Justices publish both their individual votes and the reasons for the Court’s holding; indeed, any Justice may issue a written account explaining his or her vote. Moreover, at the merits stage the accepted principle of *stare decisis* exerts further pressure on each Justice to justify his or her position in light of the Court’s prior precedents, which

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79. PROVINE, *supra* note 31, at 174.

80. *Id.* at 175.

81. Despite the differences described above between the decisionmaking process on certiorari and the merits, some critics would assert that the Court’s rulings on the merits are no more systematic than those on certiorari. *See, e.g.*, Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673, 706–10 (2000) (contending that the Justices have “postmodern” tendencies, where “postmodern” means “anything goes”); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 825 (1983) (arguing that “there are no determinate continuities derivable from history or legal principle. Rather, judges must choose which conceptions to rely on”). But many disagree. *See, e.g.*, Richard H. Fallon, Jr., *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 10–24 (1997) (discussing four conceptions of the rule of law).

are understood, from an institutional standpoint, to merit great respect in the process of deciding subsequent cases.<sup>82</sup>

This striking disparity between the Court's decisionmaking process at the certiorari stage and its more familiar process at the merits stage reinforces one Justice's comment that "[i]t is really hard to know what makes up this broth of the cert. process."<sup>83</sup> In the next section, we examine what is known about the kinds of considerations that influence the Supreme Court's decisionmaking on certiorari.

## II. RULE-BASED AND STRATEGIC FACTORS AFFECTING CERTIORARI DECISIONS

There have been a number of useful attempts to identify and prioritize the key determinants in the Court's case selection process. Scholars and researchers, primarily from the social sciences, have used various modes of analysis to illuminate the extent to which the Justices' case selection decisions may be motivated by two distinct concerns: (1) fidelity to the explicit rule-based criteria set out in Rule 10 and sensible proxies for those criteria; and (2) ideological or strategic concern about the result on the merits in each case. This second category includes concerns about whether the case was rightly or wrongly decided by the court below and whether it is likely to be rightly or wrongly decided by the Supreme Court if plenary review were to be granted.<sup>84</sup> Before identifying and analyzing other

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82. See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1350 n.123 (1995) (noting that the certiorari process is more political than deciding cases on the merits because unlike case decisions, "justices rarely publish their reasons for granting or denying certiorari petitions," and therefore do not "feel bound by prior votes on certiorari petitions").

83. PERRY, *supra* note 36, at 216 (quoting an unnamed Justice).

84. There is a continuing debate over how the Court employs these determinants in its decisionmaking process. Early on, Joseph Tanenhaus proposed that the Justices used specific "cues"—in particular, federal government as petitioner, dissension below, and the presence of a civil liberties issue—to separate certiorari petitions requiring serious attention from the great mass of frivolous petitions. Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISIONMAKING 111, 118–30 (Glendon Schubert ed., 1963). A number of scholars have since cautioned against overreliance on cue theory. See, e.g., PROVINE, *supra* note 31, at 77–83 (arguing that the actual voting records of the Burton period Justices do not support cue theory, but recognizing that the Tanenhaus "cues" represent case characteristics associated with the grant of review); Stuart H. Teger & Douglas Kosinski, *The Cue Theory of Supreme Court Certiorari Jurisdiction: A Reconsideration*, 42 J. POL. 834, 845 (1980) ("Cue theory ends up saying that the Justices tend to accept cases that they think are important."). Perry has suggested that the Justices use a different decision model, taking each case through a series of steps or gates that are keyed to various determinants (such as importance and conflict), all of which must be passed in order for a case to be granted. See PERRY, *supra* note 36, at 271–84. Moreover, he suggests that the Justices employ two different modes, one focused on standard jurisprudential considerations and the other focused on

criteria that we contend are also important to the Justices in case selection, we first consider what can be learned from the statistical evidence available on these points.

#### A. Rule-Based Determinants in the Certiorari Process

The key criteria set out in Rule 10, which lists the reasons that the Court considers in deciding whether to grant or deny a petition for certiorari, are whether the lower court decision creates a conflict and whether the case presents an important federal question.<sup>85</sup> Researchers have studied both criteria in an effort to gauge their significance in the decisionmaking process.

Not surprisingly, researchers have found that the existence of an actual conflict between the lower courts or between the lower court and a Supreme Court precedent is a potent determinant.<sup>86</sup> There is strong evidence that the presence of genuine conflict between the circuit courts of appeals, between state supreme courts, between federal courts and state courts, or between the lower court and Supreme Court precedent dramatically increases the probability that the Court will grant a case.<sup>87</sup> Indeed, even *allegations* of a conflict between lower court decisions, where actual conflict is absent, increase the likelihood that the Court will grant certiorari.<sup>88</sup>

In determining whether the case presents an important federal question, the second key criterion in Rule 10, the Court looks to a variety of indicators. Among these, a consistent standout is the presence of the United States as a petitioner in the case.<sup>89</sup> When the Solicitor General

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strategic concerns about the ultimate outcome, depending on how much they care about the issue. *See id.*

85. *See* SUP. CT. R. 10; *see also supra* notes 57–59 and accompanying text (discussing the provisions of Rule 10).

86. *See* 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) [hereinafter *Organized Interests*] (describing the importance of this variable); S. Sidney Ulmer, *Conflict with Supreme Court Precedents and the Granting of Plenary Review*, 45 J. POL. 474, 474–77 (1983) (finding that the Court is more likely to grant review in cases where the ruling conflicted with Supreme Court precedent); S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 906–11 (1984) [hereinafter *Conflict as Predictive Variable*] (demonstrating a significant relationship between the grant of certiorari and the presence of genuine intercourt conflict or conflict with Supreme Court precedent).

87. *See* Caldeira & Wright, *Organized Interests*, *supra* note 86, at 1120 (“Whenever actual conflict was present, the likelihood that certiorari was granted jumped dramatically.”).

88. *See id.* at 1120.

89. *See, e.g.,* Caldeira & Wright, *Discuss List*, *supra* note 49, at 829 (finding that the presence of the United States as petitioner is a key determinant in the decisional calculus); Caldeira & Wright,

seeks review on behalf of the United States, the Court is far more likely to grant certiorari. Indeed, the Court consistently grants over fifty percent of the Solicitor General's petitions for certiorari, whereas it grants only about three percent of paid petitions filed by other parties.<sup>90</sup> The Solicitor General's success is attributable in part to the rigorous screening that he performs to cull out cases appropriate for review, as well as the general expertise and quality of the lawyers in his office.<sup>91</sup> But perhaps most significantly, the key "importance" criterion for review is almost necessarily met when the federal government seeks review asserting that the government is directly and substantially affected by a lower court decision or that decisional conflicts are requiring it to operate differently in various parts of the country.<sup>92</sup>

Amicus curiae briefs filed in support of (or even in opposition to) the petition for certiorari also serve to flag importance. In an innovative study, Gregory Caldeira and John Wright hypothesized that, because it is expensive to prepare amicus briefs, the Court can and does use amicus activity as an indicator of the importance or practical significance of a case.<sup>93</sup> Specifically, they proposed that "amicus curiae participation by organized interests provides information, or signals—otherwise largely unavailable—about the political, social, and economic significance of cases on the paid docket and that justices make inferences about the potential impact of their decisions by observing the extent of amicus activity."<sup>94</sup>

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*Organized Interests*, *supra* note 86, at 1115, 1121 (same); Tanenhaus et al., *supra* note 84, at 122–23. Cf. Ulmer, *Conflict as Predictive Variable*, *supra* note 86, at 908–11 (finding the United States as petitioner to be the most important variable in the Burger era, but presence of genuine conflict to be the most important in the Warren and Vinson eras).

90. See STERN & GRESSMAN, *supra* note 23, at 164 & n.6; see also REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 25 (1992) (between 1959 and 1989, the Solicitor General was successful in obtaining plenary review 69.78% of the time, whereas private litigants were successful only 4.9% of the time).

91. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 142 (1996) (describing the Solicitor General's office as "superbly staffed"); SALOKAR, *supra* note 90, at 33–34 (the Solicitor General's office contains "some of the best attorneys in our nation"); STERN & GRESSMAN, *supra* note 23, at 164 (Solicitor General's success "is due both to the fact that government cases are likely to be of more general public importance and to the strictness with which the office screens the cases lost by the government below before deciding to petition for certiorari" by "apply[ing] the Supreme Court's own certiorari standards"). See generally LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987) (discussing the role and importance of the Solicitor General in the work performed by the Supreme Court).

92. See SUP. CT. R. 10 (stating Court's criteria for granting certiorari).

93. Caldeira & Wright, *Organized Interests*, *supra* note 86, at 1111–12. The authors determined that the cost of preparing an amicus brief ranged from \$15,000 to \$20,000 in 1988. See *id.* at 1112.

94. *Id.*

The results of the authors' statistical analysis of the petitions for certiorari filed in the 1982 Term bore out this proposition.<sup>95</sup> Caldeira and Wright found that when a case involves an actual conflict or when the United States is the petitioner, the filing of just one amicus brief in support of the petition increases the likelihood that the Court will grant certiorari by forty to fifty percent, and the filing of two or three amicus briefs increases the likelihood even more.<sup>96</sup> Tellingly, they also found that amicus briefs filed in opposition to certiorari increased the likelihood of a grant, presumably because these too signal the importance of the issue.<sup>97</sup>

Researchers have also suggested that a case is more likely to be granted if the court immediately below reversed the lower court, or if a judge dissented from the decision.<sup>98</sup> There has also been some attempt to correlate the likelihood of a grant with substantive areas—for example, it has been suggested that the Court is more inclined to grant cases involving civil liberties than economic issues—but recent analysis raises questions about the extent to which the Court may favor certain issue areas over others.<sup>99</sup> In any event, these factors appears to exert far less influence on the Court's decision to grant certiorari than the three major determinants of genuine conflict, the United States as petitioner, and the presence of amicus briefs.<sup>100</sup>

95. *See id.* at 1119.

96. *See id.* at 1119, 1122. *Cf.* Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717, 719, 722–24 (1993) (arguing that the participation of a professional obscenity litigator in petitions raising obscenity issues signals importance, and thus increases the likelihood of review).

97. *See Caldeira & Wright, Organized Interests, supra* note 86, at 1119.

98. *See id.* at 1115.

99. *See* PROVINE, *supra* note 31, at 111 (finding that, in the 1947–1957 Terms, most “justices voted more often for government cases involving civil rights and civil liberties than for any other type of government cases”); Virginia Armstrong & Charles A. Johnson, *Certiorari Decision Making by the Warren and Burger Courts: Is Cue Theory Time Bound?*, 15 POLITY 141, 145–47 (1982) (arguing that the presence of a civil liberties issue serves as a “cue” for the Court to grant certiorari); Tanenhaus et al., *supra* note 84, at 124–25 (same). *But see* Caldeira & Wright, *Discuss List, supra* note 49, at 830 (showing that issue area helps a case move from the “dead list” to the “discuss list,” but “the Conference does not continue to discriminate among cases on the basis of the type of claim made”); Caldeira & Wright, *Organized Interests, supra* note 86, at 1118 (“The Court, it appears, is little inclined to hear one particular type of case over another—all else being equal. This finding, of course, runs counter to the conventional wisdom.”) (footnote omitted).

100. *See* Caldeira & Wright, *Discuss List, supra* note 49, at 828–30. In this article, Caldeira and Wright distinguish between the two stages of agenda building: the “discuss list” stage, which is the initial winnowing down of the mass of petitions filed to those worthy of discussion in Conference, and the decision stage, when the Court makes a final decision on which cases from the discuss list to grant. Caldeira and Wright show that the Justices use a broader array of factors to create the discuss list, because there is little at stake for the Court at that point, since the cases they choose not to grant “can go back on the shelf in the secrecy of Conference, and the bar and public are never the wiser.” *Id.* at 827. Thus, at this stage the Court uses all of the factors noted in the text and each is independently

*B. Ideological and Strategic Considerations on Certiorari*

Researchers have also identified other, more political, influences on the Court's decisionmaking at the certiorari stage. In considering the extent and impact of these influences, it is useful to distinguish between the various ways in which a Justice could give play to ideological preferences in his or her certiorari votes.

First, Justices might vote to grant or deny certiorari not merely because of the national importance of the issue or the existence of conflicting decisions in the lower courts, but also based on their own ideological predilections. Thus, a Justice would be more likely to vote to grant a case where he or she was uncomfortable with the ideological result below and would be inclined to vote to reverse on the merits. Second, Justices might vote to grant or deny certiorari in a somewhat more sophisticated manner that takes into account the likely positions of their colleagues, with a view to the ultimate outcome on the merits. Engaging in this kind of strategic voting, a Justice might vote to deny certiorari even if he or she disagreed with the result below if the Justice believed that the unappealing result would likely be affirmed in any decision on the merits. And third, in pursuing these objectives, it is also possible that the Justices might not act as independent decisionmakers guided exclusively by their own ideological inclinations or predictions, but could consciously form explicit coalitions that would work as power blocs in setting the Court's plenary agenda.<sup>101</sup>

Numerous scholars have contended that the Justices' agenda-setting decisions are motivated, at least in part, by their own ideological inclinations; in other words, a Justice is more likely to vote to grant a case when the result reached by the court below is out of step with his or her

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significant in the sifting process. *Id.* When the Court reaches the decision stage, however, the stakes are considerably higher, and the Court focuses in on the more reliable factors—the United States as petitioner, real conflict, amicus briefs, and to a lesser extent, the ideological direction of the lower court's decision (which is addressed more fully below). *Id.* at 829. And with the greater scrutiny, the less dependable factors, such as allegations of conflict, disagreement in the courts below, and dissent in the lower court, tend to drop away. *Id.* at 830.

101. In an intriguing new study, Lee Epstein, Jeffrey Segal, and Jennifer Victor investigated whether the Justices engage in yet another form of politically-based behavior, taking into account the broader political landscape in deciding which cases to grant. See Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395, 399 (2002). Based on data from the 1946–1992 Terms which showed that the Court granted a higher proportion of constitutional, as opposed to statutory, cases when its decisions were at risk of congressional override, the authors ultimately concluded that the Justices do consider Congress' likely actions. See *id.* at 395, 406–11.

own ideological preferences.<sup>102</sup> Indeed, Chief Justice Rehnquist seems to have recognized as much: “There is an ideological division on the [C]ourt, and each of us have some cases we would like to see granted, and on the contrary some of the other members . . . would not like to see them granted.”<sup>103</sup> The extent to which the Justices’ decisionmaking is driven by ideology is unclear, however. Studies have demonstrated a statistically significant relationship between a Justice’s vote to grant a case and his or her vote to reverse on the merits.<sup>104</sup> But there is not a clear delineation in the political science literature between cases in which a Justice’s inclination for error correction is rooted in ideology and those in which this inclination is based on non-ideological legal considerations.<sup>105</sup>

Further, a growing body of scholarship indicates that the Justices do engage in strategic voting at the certiorari stage. One form of strategic, or sophisticated, voting occurs when a voter does not vote for his or her

102. See, e.g., Armstrong & Johnson, *supra* note 99, at 149 (finding that in civil liberties and economic cases, the conservative Burger Court “consistently accepted more petitions involving liberal lower court decisions than those involving conservative lower court decisions”); Caldeira & Wright, *Organized Interests*, *supra* note 86, at 1120 (finding a “clear tendency” by the Burger Court to select cases decided liberally below); Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 759, 769 (2001) (finding that the predominantly conservative Court from 1981–1987 was 5.5 times more likely to grant a case raising an Equal Protection issue if the decision below was liberal); Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari*, 41 J. POL. 1185, 1187 (1979) (“Since justices appear to recognize the policy significance of their certiorari decisions, it would be reasonable to expect them to take the policy consequences of their actions into account when deciding whether or not to grant certiorari.”).

103. *Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations for 1982: Hearings on Salaries and Expenses of the Supreme Court of the United States Before a Subcomm. of the House Comm. on Appropriations*, 97th Cong. 21 (1981) (testimony of Justice Rehnquist).

104. See JAN PALMER, *THE VINSON COURT ERA: THE SUPREME COURT’S CONFERENCE VOTES* 59–62 (1990) (finding a statistically significant relationship between voting to grant certiorari and ultimately voting to reverse for all Justices during the Vinson era); PROVINE, *supra* note 31, at 107–10 (finding that all Justices during the Burton period were more likely to vote to reverse a case that they voted to review); Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828, 833 (1989) (finding that, over seven terms of the Vinson, Warren, and Burger Courts, Justices who voted to reverse on the merits had a grant rate of 77.7%, whereas Justices who voted to affirm had a grant rate of 59.1%); Ulmer, *Grant as Indicator*, *supra* note 58, at 440 (finding a statistically significant relationship between the vote to grant and the vote to reverse, and the vote to deny and the vote to affirm, for eight of the eleven Justices on the Court from the 1947 to 1956 Terms).

105. See Lawrence Baum, *Case Selection and Decisionmaking in the U.S. Supreme Court*, 27 LAW & SOC’Y REV. 443, 454–56 (1993) (arguing that at the Supreme Court level, where the result is often not dictated by precedent, a preference for error correction likely has a strong ideological component); John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the U.S. Supreme Court: A Reevaluation*, 43 W. POL. Q. 335, 335 n.1 (1990) (same). However, in many cases granted plenary review—especially in areas such as tax, bankruptcy, or patent law—it seems likely that purely legal considerations will predominate in a Justice’s decisional calculus.

preferred alternative at an early stage of a voting process in hopes of bringing about a more desirable outcome at a later stage.<sup>106</sup> The Supreme Court's two-stage voting process (deciding to grant certiorari and then deciding the case on the merits) is ripe for strategic manipulation since the decisionmaking at the first (certiorari) stage occurs in the secrecy of the Justices' private conference, with no justification provided publicly, and the Justices have sufficient familiarity with the preferences of their colleagues to predict with some confidence how they will cast their votes at the later (merits) stage.<sup>107</sup> Yet the conditions for manipulation are not ideal because the Justices' concerns for the rule of law and for compliance with established norms of proper judicial behavior may constrain their willingness to exploit the potential for power-based voting at the case selection stage.<sup>108</sup>

In 1959, Glendon Schubert initiated the debate over the existence and extent of strategic voting in certiorari decisions.<sup>109</sup> Using game theory and votes on the merits in Federal Employers' Liability Act cases during the 1942–1948 Terms, Schubert speculated that four liberal Justices were engaging in bloc voting on certiorari to shape the law in that area.<sup>110</sup> This proposition was eye-catching because it not only raised the possibility that the Justices acted strategically in their decisionmaking, but also that they deliberately formed power alliances to attain their goals.

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106. See Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 550 (1999). On the other hand, voters are considered to be "sincere" if they do not look ahead to anticipate future outcomes, but rather vote only for their favorite alternative at every stage of the voting process. *Id.* at 550–51.

107. See *id.* at 550 (noting that certiorari decisions are secret, no justifications are given, the cases are fungible, and the decision to grant often presages the outcome); PROVINE, *supra* note 31, at 126 ("The justices work together daily, often for years, so a colleague's reaction could often be anticipated.").

108. See PROVINE, *supra* note 31, at 6 ("[T]he justices' perceptions of a judge's role and of the Supreme Court's role in our judicial system significantly limit the range of case-selection behavior that the justices might otherwise exhibit."); *id.* at 172 (similar); Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 120 (1992) [hereinafter *Rules and Standards*] ("Most judges hold deeply internalized role constraints and believe that judgment is not politics.").

109. See Glendon Schubert, *The Certiorari Game*, in QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 210–67 (Glendon Schubert ed., 1959).

110. See *id.* at 229–40. In particular, Schubert predicted that the bloc would always vote to grant certiorari where the district court decision favored the railroad worker, but the court of appeals reversed the decision; at the merits stage, the Supreme Court held in favor of the worker 92% of the time in these cases. See *id.* at 231–33, 237. Schubert also examined the 1949–1962 Terms, but the size of the bloc fluctuated from three to five during this period. See *id.* at 240–50; see also Glendon Schubert, *Policy Without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284, 292–320 (1962) (discussing further the Court's certiorari behavior in FELA cases in the 1949–1959 Terms).



When the docket books of Justice Burton became available to the public, researchers were able to test Schubert's hypothesis against the actual votes cast by the Justices at the certiorari stage. After examining the voting patterns on the Vinson Court, Marie Provine found that the votes of putative bloc members did not conform to the power-oriented pattern that Schubert had predicted.<sup>111</sup> She concluded that, despite the ease and effectiveness with which power-bloc voting could be accomplished, "a shared conception of the proper role of a judge prevents the justices from exploiting the possibilities for power-oriented voting in case selection."<sup>112</sup> This conclusion is strongly supported in the work of H.W. Perry, who conducted extensive interviews of five Justices and sixty-four former law clerks.<sup>113</sup> Perry found that at the certiorari stage the Justices' decisionmaking is highly independent, with only rare attempts at persuasion or accommodation and with no vote trading at all.<sup>114</sup>

But the absence of evidence of bloc voting at that juncture in the Court's history does not eliminate the possibility that it occurred at other times. Moreover, it does not preclude the possibility that Justices engage individually in strategic voting. Despite the intuitive appeal of this possibility, some scholars have contended that the Justices do not cast their votes on certiorari with a view to how the Court is likely to decide the case on the merits.<sup>115</sup> Using certiorari data from Justice Burton's papers, for example, Provine argued that the Justices were not result-oriented in their case selection decisions, at least as a general matter.<sup>116</sup> Rather, she contended that case selection decisions were primarily driven by a Justice's own evaluation of the merits of the case and his or her "beliefs about the proper work and workload of the Supreme Court."<sup>117</sup>

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111. See PROVINE, *supra* note 31, at 158–72. In particular, she found that within Schubert's pool of worker-brought cases: (1) in five cases denied certiorari, the vote of a bloc member prevented review; (2) in five cases granted certiorari, the case won review because of non-bloc members' votes, and despite a bloc member's vote to deny; and (3) the overall voting pattern did not tend to clump around four votes and zero votes, which one would expect under Schubert's hypothesis. *See id.* at 168–69.

112. *Id.* at 172.

113. See PERRY, *supra* note 36, at 9.

114. *See id.* at 146–66; *see also id.* at 214 ("Agenda coalitions are not formed and nourished explicitly, but coalitions are sometimes assumed based on anticipated reactions.").

115. *See, e.g.,* PROVINE, *supra* note 31, at 125–30, 172 (arguing that the Burton-era Justices did not consider the likely result on the merits in case selection); Krol & Brenner, *supra* note 105, at 340–42 (doubting whether the Vinson Court in general considered likely outcome in case selection, but recognizing that individual Justices may have done so).

116. See PROVINE, *supra* note 31, at 127–30. Provine reserved the possibility that "some justices calculate outcomes in cases that are particularly important to them." *Id.* at 129.

117. *See id.* at 128–30. Provine attributed the close correlation between many Justices' votes to review and their wins on the merits to their tendency to be in the majority in general. *See id.*

The weight of the evidence, however, now favors the view that the Justices do act strategically in their decisionmaking at the certiorari stage.<sup>118</sup> In a recent study, Gregory Caldeira, John Wright, and Christopher Zorn provided strong empirical evidence that strategic voting not only occurs but is routine and has a substantial impact on the content of the Court's plenary docket.<sup>119</sup> Using data from the 1982 Term, they had two key findings: (1) there was a substantial correlation between a Justice's own ideological position and his or her vote on certiorari; and (2) there was strong evidence that the Justices consider the likely result on the merits in deciding how to vote.<sup>120</sup> Further, they estimated that the strategic use of "defensive denials"—that is, a vote to deny certiorari to fend off an undesirable result on the merits, despite the Justice's own preference to grant the case—accounted for at least eighteen omissions from the Court's plenary docket in the 1982 Term.<sup>121</sup>

Although they might take issue with claims about the extent of its use, several Justices have acknowledged the existence of the defensive denial. In Perry's interviews with five Justices, all of them recognized, with varying degrees of approval, that Justices use this strategic device.<sup>122</sup> Indeed, one Justice responded to Perry's inquiry about defensive denials by saying: "Certainly, it's a standard of the way we behave, and it's a perfectly honorable standard. I think anyone who suggests that this is an objective institution is just wrong; the notion that we are objective is just fallacious."<sup>123</sup> The clerks likewise agreed that they and at least some of the

118. See Epstein et al., *supra* note 101, at 405 (although the debate over whether the Justices vote strategically will continue, "the evidence, especially that offered by the most recent (and sophisticated) studies, tips the scales substantially in favor of the strategic camp"). *But cf.* 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, 826 (1995) (noting that "the current literature on strategic certiorari voting is a hodgepodge at best").

119. See Caldeira et al., *supra* note 106, at 553–71. The authors used all of the petitions for certiorari in the 1982 Term (not merely those granted), and employed a relatively objective measure of the ideological preferences of the individual Justices and the Court as a whole. See *id.* at 559–61. In particular, the authors measured the Justices' individual preferences based on their votes on the merits in similar, but different, cases in the past. See *id.* They then used this data to gauge how the Court as a whole would likely decide a case on the merits. See *id.* at 559–60.

120. See *id.* at 561–66.

121. See *id.* at 566–70.

122. See PERRY, *supra* note 36, at 198–202.

123. See *id.* at 201 (Perry preserved the Justices' anonymity); see also DOUGLAS, COURT YEARS, *supra* note 64, at 94 (explaining that he did not supply the crucial fourth vote to grant in a certain case because it was clear that a majority would have voted to affirm "and it seemed to me at that particular point in history unwise to put the Court's seal of approval on that doctrine. . . . Such a judgment is often made at Conference, and everyone who has been on the Court has succumbed to that influence"). *Time* magazine quoted an unnamed Justice on the Burger Court as stating:

"If I suspected a good decision by a lower court would be affirmed, making its application

Justices took such strategic considerations into account, though not all realized that their own Justice did too.<sup>124</sup>

Through his interviews, Perry also identified several other strategic tools that the Justices use. These include employing “aggressive grants,” where the Justices reach out to take cases for strategic reasons; looking for cases that are “good vehicles” because they have a fact situation that might pull in a swing Justice or allow the Justice to move doctrine in a desired direction; and sending signals in merits opinions to encourage litigants to bring certain types of cases.<sup>125</sup>

In the end, the question seems to be less whether the Justices engage in strategic voting than how extensively they do so. Based on his interviews, Perry argued that “strategic considerations tended to be the exception rather than the rule for all of the justices, though some justices were clearly strategic more often than others.”<sup>126</sup> But the Justices’ sense of their own voting behavior is not always dependable,<sup>127</sup> and the social science data suggests that these kinds of strategic concerns may have a more pervasive influence in the Court’s decisionmaking.<sup>128</sup>

nationwide, I’d probably vote to grant.” . . . “[A] decision may seem outrageously wrong to me, but if I thought the Court would affirm it, then I’d vote to deny. I’d much prefer bad law to remain the law of the Eighth Circuit or the State of Michigan than to have it become the law of the land.”

*The Supreme Court: Deciding Whether to Decide*, TIME, Dec. 11, 1972, at 77.

124. See PERRY, *supra* note 36, at 202–07.

125. See *id.* at 207–15, 281–82. In questioning Justices and clerks about aggressive grants, all of the respondents agreed that the behavior occurred but was unlikely to be successful due to the heavy presumption against granting cases. See *id.* at 207–09. Perry opined that “the relative ease of defensive denials compared to the difficulty of aggressive grants . . . suggests that it will be far easier to maintain the status quo than it will be to change, particularly on a closely divided court.” *Id.* at 210; *cf.* Boucher & Segal, *supra* note 118, at 830–32, 836 (finding strong evidence of aggressive grants, but no evidence of defensive denials, during the 1946–1952 Terms).

126. See PERRY, *supra* note 36, at 276.

127. Experience shows that “the Justices do not always have an accurate picture of the Court’s practices.” Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 404 (1996) [hereinafter *Shrunken Docket*]; see also Cordray & Cordray, *Plenary Docket*, *supra* note 3, at 751–58 & n.108 (showing that the Justices “greatly overestimated” the effect on their plenary docket of eliminating the Court’s remaining mandatory appellate jurisdiction).

128. See Caldeira et al., *supra* note 106, at 561–71 (contending that strategic voting is routine and substantially impacts the Court’s docket); see also Boucher & Segal, *supra* note 118 at 830–32, 836 (finding “strong evidence that many justices strategically consider probable outcomes when they wish to affirm”; designating the Vinson Court Justices “semistrategic”); Saul Brenner, *The New Certiorari Game*, 41 J. POL. 649, 651–55 (1979) (arguing that Justices who wish to affirm the decision below have less to gain and more to lose, so more carefully calculate the chances of winning on the merits than reverse-minded Justices); Palmer, *supra* note 9, at 393–96 (finding a positive relationship between voting to grant certiorari and voting with the majority on the merits in a study of 512 cases from the 1947–1956 Terms).

### III. THE INFLUENCE OF THE INDIVIDUAL JUSTICES' VIEWS ON THE PROPER ROLE OF THE SUPREME COURT

The set of rule-based and strategic factors discussed above does much to explain the Court's agenda-setting decisions. But given how much is at stake for the Court in building its docket—the size of its caseload, the Court's profile and image in American society, selection of a case mix that will enable it to supervise and guide the lower courts most effectively, and setting the Court's priorities<sup>129</sup>—one would expect the Justices to take an even broader array of considerations into account in their decisionmaking.

Moreover, the rule-based and strategic factors fail to account for important phenomena. Although the Justices consider the very same materials, and apply the same guidelines articulated in Rule 10, they reach dramatically different conclusions about which cases merit plenary review. In the 1982 Term, for example, Justices White and Rehnquist examined the thousands of applications and each voted to grant review in over 230 cases.<sup>130</sup> Yet in the same term, based on the same sample of cases, Justice Powell and Chief Justice Burger each voted to grant review in more than 100 fewer cases.<sup>131</sup> In the 1990 Term, to take another example, Justice White again voted to grant review in more than 200 cases, whereas Justices Scalia, Kennedy, and Stevens voted to grant review only half as often.<sup>132</sup> Earlier studies of the Vinson Court show that the same kinds of disparities have persisted for decades, even with different personnel and different universes of legal issues.<sup>133</sup>

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129. See *supra* notes 34–43 and accompanying text (discussing these byproducts of the Court's agenda-setting decisions).

130. Then-Justice Rehnquist cast grant votes in 242 cases, Justice White in 234 cases. We count as grant votes all votes to grant certiorari, to “Join 3,” and to note probable jurisdiction in cases on appeal. See generally Cordray & Cordray, *Plenary Docket*, *supra* note 3, at 776–90 (discussing compilation of data on grant rates). Our data stems from three sources. First, we compiled our own data on the 1982–1990 Terms from the conference records available in the official papers of Justices Brennan and Marshall. Second, Professor Gregory A. Caldeira of the Department of Political Science at The Ohio State University generously shared with us the data he developed from the 1968, 1982, and 1990 Terms. Third, the U.S. Supreme Court Judicial Database, compiled by Professor Harold J. Spaeth in the Department of Political Science at Michigan State University, includes conference votes gleaned from the private papers of retired Justices over several decades. We are indebted to Professor Spaeth and Professor Reginald S. Sheehan, Director of the Program for Law and Judicial Politics at Michigan State University, for giving us access to the computerized database. This aggregated information on the Justices' conference votes will be cited simply as “Judicial Database” and is on file with the authors.

131. Justice Powell voted to grant in 141 cases, Chief Justice Burger in 131 cases. See *Judicial Database*, *supra* note 130.

132. Justice White cast 229 grant votes, Justice Stevens 111, Justice Kennedy 104, Justice Scalia 91. See *Judicial Database*, *supra* note 130.

133. See, e.g., PALMER, *supra* note 104, at 56–57 (finding that during the Vinson Court's first

Equally paradoxical is the fact that even though some Justices routinely win on the merits, they vote infrequently to grant review.<sup>134</sup> Justice Kennedy, for example, dissented in only fourteen cases during the 1990 Term.<sup>135</sup> Yet he voted to grant only 101 cases that Term, the second fewest on the Court, and considerably fewer than Justice O'Connor, who was the only Justice to dissent less often on the merits.<sup>136</sup> By contrast, Justice Blackmun was one of the more frequent dissenters during the 1990 Term and yet he voted to grant 142 cases that Term, more than anyone except Justice White.<sup>137</sup> Similarly paradoxical examples from an earlier period include Justice Jackson, who voted infrequently to grant review on the Vinson Court and yet regularly was part of the controlling swing bloc that made up the prevailing side on the merits,<sup>138</sup> and Justices Douglas and Black, who voted the most frequently to grant review on the Vinson Court yet were not part of its controlling swing bloc and instead were frequent dissenters on the merits.<sup>139</sup>

To understand these various phenomena, analysis of the agenda-setting function requires greater emphasis on each Justice's distinctive views and voting record, as opposed to focusing on the Court's aggregate decisionmaking.<sup>140</sup> Further, analysis should include factors that go beyond

three terms, Justice Murphy voted to grant certiorari in more cases than Justice Jackson and Chief Justice Vinson combined; after Justice Murphy died, Justices Black and Douglas voted to grant certiorari in approximately three times as many cases as Justice Minton did).

134. See, e.g., PERRY, *supra* note 36, at 281 ("Much of the political science literature suggests a justice's decision process stops here—'If I can win, grant.' A potential win on the merits is not enough to vote to grant, however.").

135. See *The Supreme Court, 1990 Term—The Statistics*, 105 HARV. L. REV. 419, 419 (1991). In its annual recap of the Supreme Court Terms, the *Harvard Law Review* compiles various statistics on the cases decided on the merits. All of these recaps will be cited hereinafter as "*Supreme Court Statistics*," and they will be cited to a particular volume where appropriate.

136. See *id.*; see also Judicial Database, *supra* note 130. Justice Souter's raw totals from the 1990 Term were actually lower, but he did not vote on certiorari in about one-quarter of the cases, which were considered after the summer recess at the outset of the term. When his numbers are extrapolated over a full term they do not affect the results described above.

137. See Judicial Database, *supra* note 130; *Supreme Court Statistics*, *supra* note 135, 105 HARV. L. REV. at 419.

138. See PALMER, *supra* note 104, at 56–57 (showing that on the Vinson Court, Justice Jackson ranked at or near the bottom in voting to grant review); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963*, at 103–13 (1965) [hereinafter *JUDICIAL MIND*] (placing Justice Jackson as one of the "moderate conservatives" whose votes were most often decisive in merits cases on the Vinson Court).

139. See PALMER, *supra* note 104, at 56–57 (showing that on the Vinson Court, Justices Douglas and Black ranked at the top in voting to grant review); SCHUBERT, *JUDICIAL MIND*, *supra* note 138, at 103–13 (placing Justices Black and Douglas as "liberals" who often ended up dissenting in merits cases on the Vinson Court).

140. See Boucher & Segal, *supra* note 118, at 827 ("[W]e view strategic voting as an individual-level phenomenon that should, if at all possible, be studied at the individual level. Aggregating the

the rule-based and strategic considerations discussed above. As the Justices apply the key criterion of Rule 10—that the case present an “important question” that is either unsettled or is the source of a conflict in the lower courts—each Justice’s sense of what is “important” is shaped by his or her philosophy about the Court’s proper role in the judicial system and in society.<sup>141</sup> These jurisprudential considerations thus exert a subtle but important influence on a Justice’s views about the appropriate number and mix of cases on the Court’s merits docket.<sup>142</sup>

*A. The Complex and Uniquely Impressionistic Nature of Decisionmaking on Certiorari*

Because decisionmaking at the certiorari stage is completely unfettered, the voting behavior of each Justice is constrained only by his or her own individual sense of what kinds of cases merit the Court’s attention. Over the years, Justices across the ideological spectrum have acknowledged the uniquely impressionistic nature of the task. Chief Justice Rehnquist, for example, commented that “[w]hether or not to vote to grant certiorari strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment.”<sup>143</sup> Justice Brennan noted the “inherently subjective nature of the screening process,”<sup>144</sup> and explained that “the special ‘feel’ one develops after a few years on the Court enables one to recognize the cases that are candidates for [Supreme Court] review.”<sup>145</sup> Justice Douglas stated that “the job here [deciding whether to grant plenary review] is so highly personal, depending on the judgment, discretion, and experience and point of view of each of the nine of us.”<sup>146</sup> Justice Harlan likewise stated that “[f]requently the question

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justices’ votes . . . might result in failure to reject the null hypothesis because opposing strategies by different types of justices cancel each other out.”)

141. SUP. CT. R. 10. See *supra* note 57 (setting out full text of Rule 10). Even prior to passage of the Judiciary Act of 1925, with its wholesale expansion of the certiorari process, Senator Walsh had noted that “[i]mportance’ is a highly elastic term.” Walsh, *supra* note 30, at 236.

142. See Boucher & Segal, *supra* note 118, at 836 (“[J]ustices facing exactly similar institutional environments engage in decidedly different strategies. Presumably, scholars will have to move beyond neoinstitutional analyses to explain these individual-level differences.”); Levinson, *supra* note 31, at 738 (noting that a particular Justice may have “a different sense of judicial duty, which involves interpreting Rule 10 by reference to a different set of value judgments” than other Justices).

143. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 265 (1987).

144. Brennan, *Another Dissent*, *supra* note 6, at 481.

145. *Id.* at 478. Chief Justice Warren also commented on the important “feel” a Justice develops, made up of his or her “‘concerns and interests and philosophies,’” as well as “‘other intangible actors and trends within the Supreme Court.’” Brennan, *Court’s Workload*, *supra* note 34, at 414–15 (quoting Chief Justice Warren).

146. DOUGLAS, *COURT YEARS*, *supra* note 64, at 175–76.

whether a case is ‘certworthy’ is more a matter of ‘feel’ than of precisely ascertainable rules.”<sup>147</sup>

Interestingly, this “feel” for which cases are most appropriate for plenary review seems to remain fairly stable for each Justice over time. Studies of the conference votes from both the Vinson and the Warren Courts have demonstrated that the Justices “tend to be consistent in the strength of their propensity to grant review” and so the “rank order of the justices thus remained fairly constant over the entire period,” especially in periods of a “natural” Court that was not subject to personnel changes.<sup>148</sup> As we discuss more fully below, there are exceptions to this pattern in more recent terms, but general consistency in voting behavior remains the norm.<sup>149</sup> This consistency is likely attributable to the lack of collegial deliberation at the certiorari stage, as the isolated nature of the decisionmaking process prevents the kind of peer influence that might cause an individual Justice’s approach to case selection to evolve.<sup>150</sup> The consistency also suggests that each Justice has an innate formula, which apparently remains remarkably steady in the face of the varying procession of legal issues that arise from one year to the next.

But more fundamentally, what elements combine to create this “feel”? As we have seen, this “feel” is significantly influenced by rule-based and strategic considerations.<sup>151</sup> These considerations, however, do not appear to account fully for the voting patterns of the individual Justices in the

147. Harlan, *supra* note 46, at 549; *see also* Brennan, *Another Dissent*, *supra* note 6, at 479 (subscribing “completely” to this observation). Perry also quotes one Justice as saying, “Some cases are ones you can just smell as grants,” PERRY, *supra* note 36, at 216, and another as saying, “there are plenty of strategic considerations, but I think those are really made in the individual chambers.” *Id.* at 201.

148. PROVINCE, *supra* note 31, at 114–15; *see also id.* at 104–72 (discussing differences among individual Justices); PALMER, *supra* note 104, at 50–96 (discussing differences among individual Justices who served on the Vinson Court).

149. *See infra* Parts III.B.2 & III.C (discussing possible explanations for changes in certain Justices’ voting behavior on certiorari on the Burger and Rehnquist Courts). In the late years of the Burger Court, for example, the typical groupings (from highest to lowest grant rates) were: Justices White and Rehnquist; Justices Blackmun and O’Connor; Chief Justice Burger and Justices Brennan and Powell; Justices Marshall and Stevens. *See* Judicial Database, *supra* note 130. In the early years of the Rehnquist Court, the typical groupings were: Justice White; Justice Blackmun and Chief Justice Rehnquist; Justices O’Connor and Brennan; Justices Marshall and Stevens; Justices Kennedy and Scalia. *See id.*

150. *See, e.g.*, PERRY, *supra* note 36, at 163 (describing the certiorari process as “relatively atomistic with decisions being made within chambers and the outcome on cert. being primarily the sum of nine individual decision processes.”). *See generally supra* notes 49–56 and accompanying text (discussing the isolated nature of decisionmaking at the certiorari stage).

151. *See supra* notes 84–128 and accompanying text (discussing the relative importance of the Court’s announced criteria for decisionmaking on certiorari and the influence of ideological and strategic concerns).

case selection process.<sup>152</sup> Indeed, even as the Justices strive to implement the guidelines of Rule 10, their central notions of what constitutes an “important question” or a “conflict” worthy of resolution are inevitably colored by their own views on a complex web of other factors.<sup>153</sup> In other words, the “feel” or sense that each Justice develops is molded by subtle elements in his or her outlook on a variety of matters.

On the more practical side, for some Justices (and perhaps for all Justices to some degree), is the effect of administrative concerns. The capacity of the Court’s docket—that is, how many cases it is manageable for the Court to resolve in a given term—can become an important constraint on their willingness to vote to grant a case.<sup>154</sup> For example, during the Burger Court, which routinely decided approximately 150 cases per term, Justice Brennan argued that the Court could not do more, stating: “There is a limit to human endurance, and with the ever increasing complexity of many of the cases that the Court is reviewing in this modern day, the number 150 taxes that endurance to its limits.”<sup>155</sup> During this same period of heavy dockets, Justice Stevens was a vocal proponent of the view that the Justices should exercise more restraint in granting cases, observing that he was “persuaded that since the enactment of the Judges’ Bill in 1925, any mismanagement of the Court’s docket has been in the

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152. See PROVINE, *supra* note 31, at 124–25 (“The voting patterns in both unanimous and nonunanimous cases during the Burton period indicate, however, that the justices selected cases with something more than the result they desired on the merits in mind. More particularly, these voting patterns seem to reflect judicial sensitivity to the role of the Supreme Court on the merits.”); Brennan, *Another Dissent*, *supra* note 6, at 479 (noting that “for the more statistically oriented, the subjective nature of the decision whether a particular case is of sufficient ‘importance’ to merit plenary consideration is amply demonstrated by the voting pattern of the Justices in the screening process,” where many cases are granted with only four or five votes).

153. The criteria of “conflict” also presents room for disagreement, as it may be unclear whether the decision below is in square conflict with other decisions. See Levinson, *supra* note 31, at 735 (opining that the existence of a conflict is often indeterminate); Stevens, *Judicial Restraint*, *supra* note 45, at 182 (noting his “view that the number of unresolved conflicts is exaggerated”). The variation in the Justices’ views on the importance of resolving true conflicts is discussed below. See *infra* Part III.B.2.

154. See PROVINE, *supra* note 31, at 120 (concluding that the bulk of Justices during the Burton-era “failed to vote often for review less because they were satisfied with lower-court results than because they felt constrained by the limited capacity of the Court for judicial decision making”); see also HUTCHINSON, *supra* note 37, at 201 (describing Chief Justice Vinson’s strategy to “reduce the Court’s conspicuous fractiousness,” which was to “cut down the caseload to more manageable proportions” and “to minimize dissent”).

155. Brennan, *Court’s Workload*, *supra* note 34, at 411; cf. PROVINE, *supra* note 31, at 117 (describing the unusually high grant rates of Justices Black and Douglas, and opining that their “willingness . . . to involve the Court in this number of on-the-merits decisions indicates that they placed little value on time-consuming methods of decision making. These men thus exhibited in their case-selection behavior their own willingness to reach decisions quickly and to justify them without ado.”).



direction of taking too many, rather than too few, cases.”<sup>156</sup> At the same time, however, Justice White consistently opined that the Court was wrongly abdicating one of its core duties by failing to grant review in many cases to protect the uniformity of federal law.<sup>157</sup>

This sort of practical consideration is likely to exert a direct effect on the composition of the Court’s docket. For purposes of this discussion, however, we focus on more theoretical elements in decisionmaking at the certiorari stage, which might be called “jurisprudential” concerns.<sup>158</sup> These factors encompass each Justice’s views on the role that the Court should play within the judicial system itself and within the national government, and hence the numbers and types of cases that are best suited to fulfilling that dual role.<sup>159</sup> Because decisions about case selection are so subjective, a Justice’s “feel” for when an issue is sufficiently “important” to merit plenary review is necessarily informed by his or her conception of the essential nature of the Supreme Court’s responsibility to supervise and

156. Stevens, *Life Span*, *supra* note 51, at 16 (questioning whether the Justices should eliminate the “Rule of Four” to reduce their docket); *see also* Stevens, *Judicial Restraint*, *supra* note 45, at 180 (arguing that “both in deciding when to review novel questions and in deciding what questions need review, the Court often exhibits an unfortunate lack of judicial restraint,” and giving examples of how the Court sometimes grants cases too soon, and sometimes grants cases that are too limited in geographical scope or where no conflict actually exists).

157. *See, e.g.*, *Beaulieu v. United States*, 497 U.S. 1038, 1038–40 (1990) (White, J., dissenting from denial of certiorari) (advocating that the Court grant more cases involving circuit conflicts); *Metheny v. Hamby*, 488 U.S. 913, 913–16 (1988) (White, J., dissenting from denial of certiorari) (same). Justice White, however, also felt that 150 cases per term was the Court’s maximum. *See* White, *Challenges for the Court*, *supra* note 34, at 277 (opining that “[a]s a rule of thumb, the Court should not be expected to produce more than 150 opinions per term in argued cases, including per curiam opinions in such cases”).

158. Our use of this term should be distinguished from Perry’s description of what he calls “a series of fundamentally jurisprudential considerations” in his process model for decisions on certiorari in individual cases. *See* PERRY, *supra* note 36, at 279. What he refers to under that rubric is a series of “winnowing steps” that each Justice considers in deciding whether to vote to grant or deny each case, including decisions about whether a conflict exists, whether a strong reason exists to resolve the issue now, whether the issue is important, and whether the case is a good vehicle for resolving the issue. *See id.* at 272–79. By contrast, our presentation here of “jurisprudential concerns” is intended to flesh out various considerations that tend to inform each Justice’s outlook on the elusive but decisive “importance” factor itself.

159. *See* PROVINE, *supra* note 31, at 6 (contending that “subjective considerations lie at the heart of case selection” and “the justices’ perceptions of a judge’s role and of the Supreme Court’s role in our judicial system significantly limit the range of case-selection behavior that the justices might otherwise exhibit.”); *id.* at 7 (“When the justices disagree in case selection . . . they reflect differences in how they weigh the fundamental responsibilities of the Court against the circumstances of actual cases, as well as differences in how they view the merits of the claims. . . .”); Levinson, *supra* note 31, at 738 (noting that Justice Scalia’s varied voting behavior in cases that Justice White identified as presenting conflicts could suggest that either “Justice Scalia has a different sense of judicial duty, which involves interpreting Rule 10 by reference to a different set of value judgments than that articulated (and displayed) by Justice White, or that he differs on the criteria that make a conflict ‘certworthy’”).

guide the lower courts and to shape the law.<sup>160</sup> Recognizing the potency of these ingredients, Justice Frankfurter observed: “As is true of so many matters that come before us, one’s view of the appropriate treatment of these cases derives from one’s attitude toward the true functions of the Court and the best way to discharge them.”<sup>161</sup> Indeed, the importance of these kinds of influences on the Justices’ aggregate decisionmaking prompted Justice White to observe that “[e]very time a new justice arrives on the Court, the Court’s a different instrument.”<sup>162</sup>

Upon reflection, it seems clear that the Justices’ individual views about the proper jurisprudential role of the Court must have a substantial effect on their case selection process.<sup>163</sup> Nonetheless, both the shape of those views and the extent to which they influence the Justices’ decisionmaking are tantalizingly elusive. Equally troubling is the fact that these matters seem to be difficult if not impossible to quantify through empirical analysis. In the next section, we discuss some of the different potential conceptions of the Court’s role and, using data from the Justices’ voting records on certiorari, consider how those conceptions may influence the case selection decisions of particular Justices. Our purpose is not to canvass all of the myriad views on the Court’s proper role but rather to show how differing views on these matters can affect the Justices’ decisionmaking at the certiorari stage.

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160. SUP. CT. R. 10; *see also* Brennan, *Another Dissent*, *supra* note 6, at 481 (noting that “a question that is ‘substantial’ for me may be wholly ‘insubstantial’ to some, perhaps all the rest, of my colleagues”); Hellman, *Case Selection*, *supra* note 35, at 1048–49 (suggesting that “[h]alf or more of [the Court’s] cases will receive plenary consideration in response to exigent needs of the legal system—needs that would draw a similar response from almost any group of Justices. But the remainder of the plenary docket is shaped in large part by the interests and predilections of the Justices now sitting.”).

161. PROVINE, *supra* note 31, at 174 (quoting a memorandum from Felix Frankfurter to Chief Justice Warren, Jan. 26, 1956, at 1).

162. HUTCHINSON, *supra* note 37, at 408 (quoting Justice White); *see also* Byron R. White, *Some Current Debates*, 73 JUDICATURE 155, 156 (1989) (“I soon observed at first hand what Court watchers had always known—what a difference the arrival of a new justice usually makes. . . . There have been 11 new justices since my arrival, and each had his or her immediate impact.”).

163. *See, e.g.*, Hellman, *Shrunken Docket*, *supra* note 127, at 429–35 (suggesting that the Justices’ “views of the Court’s role” have a substantial effect on the case selection process).

*B. The Significance of Jurisprudential Approach for Decisionmaking on Certiorari*

*1. Views on How Precedent Guides and Superintends the Lower Courts*

There is extensive discussion in the legal literature about the different approaches that the Justices take in resolving cases on the merits. The discussion centers on the competing claims of a “rule-articulating” approach, a “standard-setting” approach, and an “incrementalist” approach.<sup>164</sup>

Under a rule-articulating approach, the Court sets out broad and clear rules that not only control the outcome in the particular case on its specific set of facts, but are also consciously intended to govern many other situations where the facts are somewhat different but the same principles are nonetheless operative.<sup>165</sup> Advocates of this approach contend, in essence, that the Court should generate opinions that cast a substantial precedential shadow covering a meaningful amount of legal terrain. The chief virtues of this approach are that rules enhance fairness by requiring decisionmakers to act consistently, and they increase the predictability of results.<sup>166</sup>

Under a standard-setting approach, the Court applies the background principle or policy to the fact situation, taking into account all relevant

164. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) (describing different approaches used in judicial decisionmaking); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (advocating incremental judicial decisionmaking); Pierre J. Schlag, *Rules and Standards*, 33 *UCLA L. REV.* 379, 381–90 (describing and deconstructing the rules versus standards dialectic); Sullivan, *Rules and Standards*, *supra* note 108, at 57–69 (describing the debate over “rules” and “standards”).

165. See, e.g., Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 *B.U. L. REV.* 781, 783–92 (1989) (describing different conceptions of the rule of law); Schlag, *supra* note 164, at 381–83 (noting that the “paradigm example of a rule has a hard empirical trigger and a hard determinate response”); Sullivan, *Rules and Standards*, *supra* note 108, at 58 (defining a legal directive as rule-like “when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts,” and noting that it “captures the background principle or policy in a form that from then on operates independently”).

166. See, e.g., Larry Alexander, “*With Me, It’s All Er Nuthin’*”: *Formalism in Law and Morality*, 66 *U. CHI. L. REV.* 530, 534–36 (1999) (arguing that “authoritative settlements” solve problems of coordination, expertise, and efficiency); Scalia, *supra* note 43, at 1178–80 (arguing that the rule-articulating approach enhances consistency, uniformity, and predictability, while also imposing judicial restraint and arming judges against popular disapproval); Schlag, *supra* note 164, at 400 (describing the advantages typically associated with rules as certainty, uniformity, stability, and security); Sullivan, *Rules and Standards*, *supra* note 108, at 62–66 (describing four arguments for rules: fairness as formal equality, certainty and predictability, liberty, and democracy).

factors.<sup>167</sup> This approach is epitomized by reliance on the “balancing test,” through which the Court identifies multiple factors as the relevant criteria for decisionmaking in a particular area, and then instructs the lower courts to apply a prescribed formula that leaves them with discretion to weigh those factors in deciding future cases.<sup>168</sup> The primary advantages of a standard-setting approach are that standards promote fairness by enabling decisionmakers to consider all factors relevant to the individual case, and standards are sufficiently flexible to permit decisionmakers to adapt to changing circumstances.<sup>169</sup>

Under an incrementalist approach, the Court seeks only to resolve the dispute before it, allowing the law to develop “not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time.”<sup>170</sup> The core of this approach is the notion that judges do not pronounce the law in their role as authors (either by articulating broader rules or by formulating balancing tests), but rather they shape the law by resolving disputes and ultimately creating a pattern of judgments through deciding a sufficient number of discrete cases in an area.<sup>171</sup> This approach is the antipode to the rule-articulating approach but is akin to the standard-setting approach in that both focus closely on the facts of the particular case before the Court. The incrementalist approach,

167. See, e.g., Schlag, *supra* note 164, at 381–83 (noting that a standard “has a soft evaluative trigger and a soft modulated response”); Sullivan, *Rules and Standards*, *supra* note 108, at 58–59 (defining a legal directive as standard-like “when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation,” and noting that it allows “the decisionmaker to take into account all relevant factors or the totality of the circumstances”).

168. See, e.g., Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court’s Balancing Test*, 76 HARV. L. REV. 755, 757–78 (1963) (describing and discussing use of balancing tests in constitutional adjudication); Paul Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 3–60 (1987) (describing and criticizing the balancing test approach); Sullivan, *Rules and Standards*, *supra* note 108, at 59–60 (noting that “balancing” is a version of “standards,” because “it explicitly considers all relevant factors with an eye to the underlying purposes or background principles or policies at stake”).

169. See, e.g., Schlag, *supra* note 164, at 400 (describing the advantages typically associated with standards as flexibility, individualization, open-endedness, and dynamism); Sullivan, *Rules and Standards*, *supra* note 108, at 66–69 (describing four arguments for standards: fairness as substantive justice, utility, equality, and deliberation).

170. Scalia, *supra* note 43, at 1177; see also CARDOZO, *supra* note 164, at 25 (“This work of modification is gradual. It goes on inch by inch. . . [with] the pressure of the moving glacier.”).

171. See, e.g., SUNSTEIN, *supra* note 164, at 4 (describing “decisional minimalism,” which involves “saying no more than necessary to justify an outcome, and leaving as much as possible undecided”). Sunstein’s advocacy of judicial minimalism is part of an extensive discussion of the merits, justification, and scope of common-law methods of adjudication in Supreme Court decisionmaking. See, e.g., Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

however, differs from a standard-setting approach in one key aspect: a Justice employing a standard-setting approach seeks to lay down a formula that identifies the most relevant factors to guide further judicial decisionmaking in the area, whereas a Justice employing an incrementalist approach consciously seeks to decide cases as narrowly as possible, without providing much of a road map for deciding future cases.<sup>172</sup> To return to the earlier illustration, incrementalist opinions cast pinpoint shadows; they are intended, individually, to cover very little of the legal terrain. The main benefits of an incrementalist approach are that it reduces the risk and cost of errors in judicial decisionmaking and leaves maximum room for further deliberation and action by the other political branches.<sup>173</sup>

Our purpose is not to join the debate on the relative merits of these approaches, but rather to suggest that a Justice's view of the proper mode of decisionmaking can influence his or her decisions about case selection. These approaches, and the Justices' preferences for them, fall along a continuum,<sup>174</sup> and none of the Justices is perfectly consistent in his or her approach.<sup>175</sup> But particularly at the poles, each Justice's sense of how the Supreme Court most effectively creates precedent to guide and supervise the lower courts can provide important context for his or her decisions about which cases merit plenary review.

Justice Scalia, for example, has championed the rule-articulating approach.<sup>176</sup> He has argued strongly that, wherever it is possible to do so, opinions should be written expansively to explain the rules of general

172. See, e.g., CARDOZO, *supra* note 164, at 32 (“A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.”) (quoting *Quinn v. Leatham*, 1901 A.C. 495, 506 (Lord Halsbury)).

173. See, e.g., SUNSTEIN, *supra* note 164, at 4 (noting that minimalism “is likely to reduce the burdens of judicial decision,” making it easier to reach a majority position); Peters, *supra* note 171, at 1458 (“Minimalism is necessary to preserve the representative accountability, and thus the democratic legitimacy, of adjudication, and to maintain the gradualism and particularism that gives the Court its natural advantage in decisionmaking about individual rights.”).

174. See generally Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J. L. & PUB. POL’Y 823, 828–32 (1991) (arguing that rules and standards are endpoints on a continuum, rather than distinct categories); Sullivan, *Rules and Standards*, *supra* note 108, at 57 (noting that the classification of “rules” and “standards” serve to “signify where they fall on the continuum of discretion”).

175. See Sullivan, *Rules and Standards*, *supra* note 108, at 113 n.567 (noting that “[n]o Justice is entirely consistent,” and providing examples of cases in which Justices have deviated from their usual approach).

176. See Scalia, *supra* note 43, at 1176–86 (advocating a “law of rules” approach); Sullivan, *Rules and Standards*, *supra* note 108, at 83 (“Justice Scalia, more than any other current Justice, favors operative rules and condemns operative standards”).

application that control the result in the particular case because “the establishment of broadly applicable general principles is an essential component of the judicial process.”<sup>177</sup> Justice Scalia has justified this view, in part, based on a functional understanding of how the Supreme Court should fulfill its supervisory role at the apex of the judicial system. He has noted, in particular, that a “common-law, discretion-conferring approach is ill suited . . . to a legal system in which the supreme court can review only an insignificant proportion of the decided cases.”<sup>178</sup> It is difficult to be “gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another” when the Court “will revisit the area in question with great infrequency.”<sup>179</sup>

We focus here on the effect that these views would tend to have on Justice Scalia’s approach to the case selection process. All other things being equal, it would seem that he would be disinclined, on average, to vote to grant certiorari as often as a Justice with a narrower view of precedent. Justice Scalia has candidly stated that little is to be gained from granting certain kinds of cases, or cases in certain areas of the law, where the Court has already developed the governing rules to the maximum degree of productiveness, and he cites as examples of such unhelpful cases those raising issues under the Commerce Clause and disputes about whether a given search or seizure was reasonable.<sup>180</sup> In these and other cases where the Court either decides outcomes based explicitly on the unique circumstances or employs balancing tests involving an evaluation of multiple factors to arrive at results, Justice Scalia contends that it unproductively “begins to resemble a finder of fact more than a determiner of law.”<sup>181</sup>

Moreover, Justice Scalia has also expressed his disagreement with the notion that the Court should continue to revisit a particular issue as a

177. Scalia, *supra* note 43, at 1185. By contrast, Justice Cardozo was more pessimistic about the rule-articulating approach:

We like to picture to ourselves the field of the law as accurately mapped and plotted. We draw our little lines, and they are hardly down before we blur them. . . . We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees.

CARDOZO, *supra* note 164, at 161; *see also id.* at 166 (“I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found . . . the real heaven was always beyond.”).

178. Scalia, *supra* note 43, at 1178.

179. *Id.*

180. *See id.* at 1185–86.

181. *Id.* at 1182.

means of “gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another until (by process of elimination, as it were) the truly *operative* facts become apparent.”<sup>182</sup> At bottom, the main consequences of his jurisprudential approach on the merits appear to be twofold: altering the mix of cases to favor areas that are more susceptible to articulation of clear legal rules, and necessitating fewer total precedents since the Court can effectively guide the lower courts with a more selective group of opinions that provide general rules with broad applicability.

And, in fact, the information available about Justice Scalia’s voting record is consistent with this expectation. In his first four full terms after joining the Court, he voted to grant review in fewer cases than any other Justice—averaging almost ten fewer grant votes per term than Justice Stevens, who was next in rank.<sup>183</sup> One would not predict this stingy record based on Justice Scalia’s votes on the merits during those same terms, since he was regularly winning at that stage; indeed, only Justices White and Kennedy dissented from the majority’s ultimate disposition in substantially fewer cases than Justice Scalia, who dissented in relatively few cases, with about the same frequency as Justice O’Connor and Chief Justice Rehnquist.<sup>184</sup> Therefore, it was not that Justice Scalia was voting “strategically” based on a calculation that he would not prevail on the merits. Instead, his different approach to the case selection process seems to derive from his distinct conception of the appropriate mode of decisionmaking and hence his views on how many precedents are required to fulfill the Court’s central responsibilities.

Sanford Levinson has suggested that Justice Scalia’s voting behavior on certiorari is out of step with his “unrelenting [advocacy] for the notion of the judge as positivistic enforcer of formalistic rules.”<sup>185</sup> Noting that Justice Scalia did not vote to grant many of the cases presenting conflicts among the circuits that Justice White and others felt strongly about, Levinson questions how Justice Scalia can “fit his own behavior within the

182. *Id.* at 1179 (emphasis in original). He thus rejects Justice Cardozo’s preference for “growth from precedent to precedent. The implications of a decision may in the beginning be equivocal. New cases by commentary and exposition extract the essence. At last there emerges a rule or principle which becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured.” CARDOZO, *supra* note 164, at 48.

183. *See* Judicial Database, *supra* note 130.

184. From the 1987 Term to the 1990 Term, Justice Scalia cast a total of 90 dissenting votes, as compared to 85 for Justice O’Connor and 89 for Chief Justice Rehnquist. *See Supreme Court Statistics*, *supra* note 135. Among the Justices who sat on the Court for that entire period, Justice Kennedy was the lowest at 55, while Justice Marshall was the highest at 202. *Id.*

185. Levinson, *supra* note 31, at 738.

commitment to rules that he has so insistently proclaimed.”<sup>186</sup> Viewed through a merits prism, Justice Scalia’s willingness to bypass many cases involving conflicts—which Rule 10 states is one of the principal bases for granting certiorari—does appear paradoxical.<sup>187</sup>

But Justice Scalia undoubtedly sees case selection through a different prism, where the job at the certiorari stage is simply to identify those cases most appropriate for plenary review. Given that Rule 10 itself is so emphatically discretion-conferring,<sup>188</sup> it seems consistent, and even natural, for Justice Scalia to use that discretion to promote the selection of those cases through which he judges that his merits-stage approach can be advanced. In other words, it seems that Justice Scalia sees the task of case selection as distinct from the task of deciding cases on the merits because the goals at each stage are so fundamentally different.<sup>189</sup> Whereas equal treatment and predictability are essential values at the merits stage, the key focus at the certiorari stage is to build a docket that will best enable the Court to carry out its crucial supervisory responsibilities at the head of the judicial system. This leads Justice Scalia to be willing to “tolerate a fair degree of diversity” in lower court decisions in order to reserve space on the Court’s docket for cases in which it can best accomplish the more compelling work of crafting and issuing opinions that lay down clear rules of broad applicability.<sup>190</sup>

We believe there is widespread agreement among the Justices that the goals at the certiorari stage are fundamentally different from those at the merits stage and that they are achieved not through a rigid application of the criteria set forth in Rule 10, but rather through according the Justices broad latitude to select the universe of cases that will best enable the Court

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186. *Id.* at 739. Levinson relies on several cases in which Justice White, joined by various other Justices, dissented from denial of certiorari based on the importance of resolving conflicts. *See id.* at 737–38.

187. *See* SUP. CT. R. 10.

188. *See id.*; *see supra* notes 57–59 and accompanying text (discussing the malleability of Rule 10).

189. Other Justices have noted this important distinction. *See, e.g.,* Harlan, *supra* note 46, at 559 (“For after all the Court exists to adjudicate cases, and certiorari is but an ancillary process designed to promote the appropriate discharge of that duty.”); *see also* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 132 (1962) (“It follows that the techniques and allied devices for staying the Court’s hand, as is avowedly true at least of certiorari, cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled.”); Revesz & Karlan, *supra* note 60, at 1101 (“Votes at the certiorari phase have traditionally been portrayed as quite different from votes on the merits.”).

190. Scalia, *supra* note 43, at 1186. In this respect, Justice Scalia would seem to be a direct descendent of Justice Jackson, who compiled a miserly voting record on certiorari even though he made up part of the swing center bloc that typically controlled the majority decision on the merits in cases decided by the Vinson Court. *See supra* note 138 (discussing Justice Jackson).



to discharge its essential responsibilities in guiding and directing decisionmaking by lower courts, lawyers, officials in other branches of government, and citizens.<sup>191</sup> The point of divergence occurs over different conceptions of how those responsibilities are most effectively discharged.

At the opposite pole from the rule-articulating approach, Justice White epitomized the incrementalist approach. “The function of a judge, as White often reiterated, is to decide cases, not to write essays or to expound theories.”<sup>192</sup> In implementing this view, he “remained an incrementalist, deciding issues a case at a time, and he perfected an opinion style that was intentionally opaque and self-effacing.”<sup>193</sup> Although Justice White was respectful of the principle of *stare decisis*, he tended to regard the decision reached in each case as the specific judgment rendered on a particular set of facts.<sup>194</sup> When the constellation of facts differed in a later case, he was not reluctant to conclude that statements and observations made in the *opinion* from the earlier case would not control the Court’s judgment, exemplifying Justice Cardozo’s observation that “[j]udges differ greatly in their reverence for the illustrations and comments and side-remarks of their predecessors, to make no mention of their own.”<sup>195</sup> “For White, the

191. Indeed, the criteria in Rule 10 may be mere symptoms reflecting what actually happens in the case selection process rather than rigid determinants the Court deems itself bound to follow. See Levinson, *supra* note 31, at 736 (“it seems difficult indeed to read the Court’s own Rule 10 as anything other than an invitation to balancing, to the making of ‘political choice(s)’ about what is ‘important’ enough”); PERRY, *supra* note 36, at 221 (“the criteria given by the justices are vague, nonbinding, and not very helpful”); Teger & Kosinski, *supra* note 84, at 845 (arguing that cue theory merely says the Justices grant cases they view as important, even if “the notion of ‘important’ seems too slippery a guide”).

192. HUTCHINSON, *supra* note 37, at 355; see also Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1287 (2003) (“Justice White remained true to the answer he gave at his confirmation hearings, when he was asked to define the constitutional role of the Supreme Court. He replied, simply and disarmingly: ‘To decide cases.’”); William H. Rehnquist, *A Tribute to Justice Byron R. White*, 103 YALE L.J. 1, 1 (1993) (noting with approval portrayals of White “as ‘non-doctrinaire’—a jurist without ideology or social agenda who decides each case narrowly and on its own merits”).

193. HUTCHINSON, *supra* note 37, at 359; see also Robert Henry, *The Players and the Play*, in THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION 21 (Bernard Schwartz ed., 1998) [hereinafter COUNTER-REVOLUTION] (Justice White’s opinions were “among the most terse on the Court”).

194. See Dennis J. Hutchinson, *Two Cheers for Judicial Restraint: Justice White and the Role of the Supreme Court*, 74 U. COLO. L. REV. 1409, 1416–17 (2003) [hereinafter *White and Role of Court*] (contending that “[r]espect for precedent was a hallmark of White’s jurisprudence,” but also that White “never felt boxed into a precedential corner when he concluded that experience dictated re-auditing the doctrinal books”).

195. CARDOZO, *supra* note 164, at 29. As Charles Fried stated in his tribute to Justice White:

My guess is that he came closer than most Justices to trying to make sense out of each case, one at a time. Doctrinal consistency just did not weigh very heavily with him if it led to a conclusion that did not make sense. With no other Justice would you get so little mileage from quoting his own words back to him.

focus on the discrete case imposed a discipline that deterred loose or expansive exercise of the judicial power.”<sup>196</sup>

Another general adherent of the incrementalist approach, though less uniformly, is Chief Justice Rehnquist, who narrowly interprets precedents and places primary emphasis on their specific holdings rather than the broader language contained in the Court’s opinions.<sup>197</sup> This preference for narrow decisionmaking is reflected in his readiness to dispatch contrary precedents with little elaboration when he sees them as not controlling the circumstances of the case at hand.<sup>198</sup> It also shows up in his apparent embrace of “a premise more associated with the civil law than the common law tradition, to wit that only a consistent line of cases . . . rather than a single case, has any strong precedential force.”<sup>199</sup>

Charles Fried, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 20, 22–23 (1993); see also William E. Nelson, *Justice Byron R. White: His Legacy for the Twenty-First Century*, 74 U. COLO. L. REV. 1291, 1298 (2003) (“Nor did the Justice feel bound either by the Court’s precedents or by his own votes in earlier cases. . . . I remember his comment one day in chambers that ‘everything is up for grabs’ once the Court grants certiorari on an issue.”).

196. Hutchinson, *White and Role of Court*, *supra* note 194, at 1414; see also *id.* (“By focusing exclusively on the particulars of each case, Justice White avoided deciding issues not presented by the record, hypothetical developments uninformed by future litigation, and rights or responsibilities of those not appropriately represented in litigation under review.”).

197. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 599–601 (1993) (Rehnquist, J., dissenting) (joining the Court’s key holding on the admissibility of scientific evidence, but dissenting from the majority’s provision of “general observations,” stating “I think the Court would be far better advised in this case to decide only the questions presented, and to leave the further development of this important area of the law to future cases.”); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 269 (1986) (Rehnquist, J., dissenting) (criticizing the Court’s “even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before, and has no intention of starting now.”); Mary Anne Case, *The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1462 (2000) (opining that much of Justice Rehnquist’s jurisprudence “is common law constitutional interpretation of a far more primitive sort, ‘encompassing case-by-case method that emphasizes analogy, context, and “situation sense”’); Henry, *supra* note 193, at 24 (describing Justice Rehnquist’s “terse and concise opinions”); Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 IND. L. REV. 535, 572 (1996) (discussing “Rehnquist’s reluctance to formulate tests or to draw lines”). *But see* SUNSTEIN, *supra* note 164, at xiii (arguing that sometimes Justice Rehnquist prefers bright line rules); *id.* at 77–102 (criticizing Justice Rehnquist’s opinion in the right-to-die case as nonminimalist).

198. See, e.g., *Neder v. United States*, 527 U.S. 1, 10 (1999) (Rehnquist, J.) (applicability of harmless error analysis “is consistent with the holding (if not the entire reasoning) of . . . the case upon which Neder principally relies”); *Nichols v. United States*, 511 U.S. 738, 746–48 (1994) (Rehnquist, J.) (stating that “[w]e adhere to that holding today” from a prior case but then proceeding to “overrule” that very same case); *Martin v. Wilks*, 490 U.S. 755, 767 (1989) (Rehnquist, J.) (dismissing contrary precedent involving “proceedings challenging the merger of giant railroads” as inapplicable to “ordinary civil actions”).

199. Case, *supra* note 197, at 1462; see *id.* at 1463 (describing Justice Rehnquist as employing “common law reasoning with a vengeance—only a precedent on all fours as to the facts, not a

This less sweeping approach to judging also has ramifications for case selection. All other things being equal, it would seem that these Justices would be inclined, on average, to vote to grant certiorari in a different mix of cases and more frequently than those with a more robust view of precedent. In order for the incrementalist approach to be effective, the Court must take a sufficient number of cases in each distinct area to be able to create the body of judgments that are necessary to guide the lower courts.<sup>200</sup> The Court might thus need several decisions to supply the guidance that Justice Scalia would prefer to provide through declaration of a broad, general rule in a single case.<sup>201</sup> But under the incrementalist approach, the Court does not need to formulate a rule that will produce acceptable results in a broad run of cases; rather the Court focuses on resolving only the dispute at hand, which eases the burdens of deciding each case.<sup>202</sup> The main consequence of this jurisprudential approach on the merits is thus to require more precedents in each area but with each precedent expected to carry a lighter load in terms of illuminating the law.

Justice White's voting record on certiorari is consistent with this hypothesis. On both the Burger and the Rehnquist Courts, he invariably cast the most votes each term to grant review on the merits.<sup>203</sup> Moreover, in cases that were granted on a bare four votes during that period, Justice White provided the essential fourth vote for review more often than any

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developed rule of decision, is seen as binding"); *see also* Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67, 75–85 (2001) (criticizing Justice Rehnquist's willingness to overrule precedent on the basis that the previous decision was erroneous); Earl M. Maltz, *No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis*, 25 RUTGERS L.J. 669, 669 (1994) (discussing and defending Justice Rehnquist's "general lack of respect for stare decisis").

200. *Cf.* Scalia, *supra* note 43, at 1178 (noting that under the incrementalist approach, the Court must "gradually [close] in on a fully articulated rule of law by deciding one discrete fact situation after another," and questioning whether the Supreme Court with its limited docket is in a position to do so).

201. We assume that, regardless of their preferred approach to decisionmaking, the Justices all have a sense that they need to provide some minimum amount of precedent "to assure that the views of the Supreme Court in various areas of the law shall, over the long run, prevail." William H. Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U. L.J. 1, 4 (1984) [hereinafter *Plea for Help*]. Of course, a further wrinkle would be introduced if different Justices were to have different senses of the appropriate amount of precedential guidance that should be provided to the lower courts.

202. *See, e.g.*, SUNSTEIN, *supra* note 164, at 4 (noting that a court engaging in decisional minimalism, as opposed to declaring broad rules, does not generate the "risks that come from intervening in complex systems, where a single-shot intervention can have a range of unanticipated bad consequences").

203. In the 1988–1990 Terms, Justice White averaged about 205 grant votes per term, whereas his colleagues averaged about 110. *See* Judicial Database, *supra* note 130. During the last four terms of the Burger Court, Justice White averaged 225 grant votes per term, which again was the highest average on the Court. *See id.*

other Justice.<sup>204</sup> As an Associate Justice, Justice Rehnquist was comparable to Justice White in his frequency of voting to grant review, and both were far more active in this respect than their colleagues.<sup>205</sup> After his elevation to Chief Justice in 1986, Justice Rehnquist's voting behavior on certiorari changed markedly, an exception to the general rule of consistency which we discuss further below.<sup>206</sup> But his voting pattern as an Associate Justice is in line with what might be expected from a Justice who favors a narrow view of Supreme Court precedents: voting to grant large numbers of cases in order to produce enough of a pattern of judgments to provide satisfactory guidance to the lower courts.

The Justices who incline more generally to a “standard-setting” or “balancing” approach present yet another perspective on case selection. One would expect that adherents to this view of precedent, all else being equal, would not tend to be extreme in their decisions on certiorari—neither seeking to confine the Court to a smaller number of opinions written with an eye to settling broad principles nor demanding a large number of judgments to create the pattern necessary to set a direction for the lower courts.<sup>207</sup> In recent decades, Justice Powell has been the most devoted proponent of a balancing approach in many areas of the law<sup>208</sup> and, to a lesser extent, Justice O'Connor has as well.<sup>209</sup> With respect to

204. *See id.*

205. During the last four terms of the Burger Court, Justice Rehnquist averaged about 190 grant votes per term; aside from Justice White, he was the only other Justice who averaged much more than about 150 such votes per term. *See id.*

206. *See infra* Parts III.B & III.C (discussing possible explanations for changes in certain Justices' voting behavior on certiorari on the Burger and Rehnquist Courts).

207. Sullivan convincingly demonstrates that the preference for rules versus standards does not correspond systematically with the political left or right; instead, it depends on who has the upper hand. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 306–08 (1992) [hereinafter *Categorization and Balancing*]; Sullivan, *Rules and Standards*, *supra* note 108, at 96–101; *cf.* SUNSTEIN, *supra* note 164, at 261 (arguing that there is no “simple connection between one’s stand on minimalism and any particular set of substantive convictions,” whether “liberal” or “conservative”). Sullivan predicts, however, that “standards will tend to correlate more systematically with moderation than rules,” because only rules can be used to achieve extreme ends. *Id.* at 99. The Justices who currently favor standards do tend to be moderates; the expected correlation between a preference for standards and moderation in certiorari voting may reflect this ideological moderation as well.

208. In his analysis of Justice Powell's jurisprudence, for example, Paul Kahn stated:

For Powell, the goal of constitutional adjudication was to find the center, to strike the balance between competing interests. The model of the judicial ‘balance’ appeared over and over again in Powell's opinions. He pursued a balancing approach to issues of federalism, free speech, free press, equal protection, separation of powers, criminal procedure, and criminal punishment.

Kahn, *supra* note 168, at 3.

209. *See, e.g.*, Board of County Comm'rs v. Umbehr, 518 U.S. 668, 679–79 (1996) (defending a balancing test to govern free-speech claims in government employment over the bright-line rule

both, the expected moderation is found in the voting data. During the last four terms of the Burger Court, Justice O'Connor ranked fourth in the number of grant votes per term, lagging far behind Justices White and Rehnquist but running well ahead of Justice Stevens at the low end.<sup>210</sup> Justice Powell likewise came in near the middle, though he voted to grant somewhat fewer cases than Justice O'Connor.<sup>211</sup> During the first five terms of the Rehnquist Court, after Justice Powell's retirement, Justice O'Connor remained at exactly the same ordinal—comfortably in the middle of the Court.<sup>212</sup>

These disparities in voting behavior again indicate that the Justices bring very different perspectives to their common task of evaluating the criteria for case selection set out in Rule 10. Furthermore, viewed from a purely “strategic” standpoint, some of these voting patterns are strongly counterintuitive. During the last four terms of the Burger Court, for example, Justice Rehnquist cast over twice as many dissenting votes on the merits as Justice Powell did and considerably more than Justice O'Connor did.<sup>213</sup> Yet, as previously noted, Justice Rehnquist voted to grant certiorari in far more cases than Justices Powell and O'Connor. Conversely, Justice Powell was in the majority in more cases over this period than any other Justice, yet he was not at all aggressive about

proposed in Justice Scalia's dissent because “such a nuanced approach . . . recognizes the variety of interests that may arise”); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring) (“To me, the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply [a] test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling.”); James L. Oakes, *Introduction to Sandra Day O'Connor, Keynote Address-Conference on Compelling Government Interests*, 55 ALB. L. REV. 535, 537 (1992) (noting that Justice O'Connor “often avoids adopting bright-line rules and opts instead for what has been termed contextual or individualized decisionmaking”); Sandra Day O'Connor, *Keynote Address—Conference on Compelling Government Interests*, 55 ALB. L. REV. 535, 543–44 (1992) (noting that “courts frequently employ balancing tests as a way of overcoming the problems associated with using historical, bright-line approaches to resolve constitutional ambiguity,” but recognizing and discussing problems inherent in a balancing approach); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 604–12 (1986) (describing Justice O'Connor's rejection of bright-line rules and preference for “contextual” decisionmaking).

210. In the 1982–1985 Terms, Justice O'Connor voted to grant approximately 150 cases per term. At the polar extremes, Justice White voted to grant about 225 cases per term and Justice Stevens voted to grant only about 122 cases per term during the same period. See *Judicial Database*, *supra* note 130.

211. In the 1982–1985 Terms, Justice Powell voted to grant approximately 127 cases per term, which ranked him seventh in the number of grant votes per term. This number does not include figures from the 1984 Term, during which Justice Powell was ill and did not vote on certiorari in many cases. See *id.*

212. See *id.*

213. In the 1982–1985 Terms, Justice Rehnquist cast 133 dissenting votes in merits cases, Justice Powell cast 60, and Justice O'Connor cast 88. See *Supreme Court Statistics*, *supra* note 135.

“maximizing” his victories by seeking to have the Court review more cases.<sup>214</sup> The same was true of Justice O’Connor after the transition to the Rehnquist Court where she quickly settled into virtually the same role: regularly in the majority on the merits, but moderate in voting to grant certiorari.<sup>215</sup>

In the end, we do not wish to suggest that the jurisprudential hypotheses we have posited in this section are determinative of Justices’ voting behavior on certiorari. As discussed further below, the blend of influences that affect each Justice’s decisionmaking is far more complex than these artificially-tidy pigeonholes might indicate.<sup>216</sup> Yet among the considerations constituting the subjective “feel” for the importance of an issue that each Justice brings to bear on case selection is undoubtedly his or her own understanding of what the Court is trying to accomplish when it decides cases on the merits. Indeed, it seems likely that the Justices formulate their differing perspectives on the proper mode of judicial decisionmaking prior to their arrival at the Court,<sup>217</sup> and this factor thus tends to be one of the more invariable components of their overall approach to case selection.<sup>218</sup>

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214. In the 1982–1985 Terms, Justice Powell dissented only 60 times in merits cases, less than any other Justice (even after correcting for his illness during the 1984 Term), see *Supreme Court Statistics*, *supra* note 135, yet only Justices Stevens and Marshall voted to grant review less often than he did. See Judicial Database, *supra* note 130.

215. In the 1989–1990 Terms, Justice O’Connor tied with Justice White for the fewest dissenting votes cast in merits cases (34 over both terms), one fewer than Justice Kennedy. See *Supreme Court Statistics*, *supra* note 135. Her grant rate over this same period, once again, was fourth behind Justice White, Justice Blackmun, and Chief Justice Rehnquist. See Judicial Database, *supra* note 130. Justice Kennedy ranked eighth over that same period, exceeding only Justice Scalia. See *id.*

216. Justices Black and Stevens, for example, both have voting records at the certiorari stage that do not correlate closely with their preferred mode of decisionmaking. Justice Black favored the rule-articulating approach, see Sullivan, *Rules and Standards*, *supra* note 108, at 26, yet he cast a relatively large number of grant votes each term. See Judicial Database, *supra* note 130. As we discuss below, his penchant for voting to grant is probably due to other overriding factors such as his own immense capacity for work and his extreme distrust of lower court judges. See *infra* notes 286–87 and accompanying text. Justice Stevens is viewed as favoring the standard-setting approach, see Sullivan, *Rules and Standards*, *supra* note 108, at 88, yet he votes to grant in relatively few cases. See Judicial Database, *supra* note 130. Other factors seem to account for this, including his intense concerns about the size of the docket, see *supra* notes 154–56 and accompanying text, and his unusually great tolerance of disuniformity among the lower courts, see *infra* notes 231–33 and accompanying text.

217. See Sullivan, *Rules and Standards*, *supra* note 108, at 123 (suggesting that we “have a general orientation toward the form of rules or standards that is shaped by jurisprudential considerations—by our attitudes toward history, knowledge, and power; by our judgments about whether decisionmakers are to be trusted in their reasoning,” but cautioning that “particular choices between rules and standards take place in specific political contexts”).

218. See PALMER, *supra* note 104, at 50–96 (describing the general consistency of certiorari voting behavior over time among Justices on the Vinson Court); PROVINE, *supra* note 31, at 114–15 (same); *supra* notes 148–50 and accompanying text (discussing the same phenomenon).

## 2. *Views on the Importance of Ensuring Uniformity by Resolving Conflicts*

Another consideration for each Justice is the degree to which he or she is willing to tolerate disagreements among the lower courts. As discussed above, the manner in which each Justice understands and intends the Court to use its precedents to resolve disagreements among the lower courts is one variable that affects case selection; how urgently each Justice feels the need to *intervene* to resolve conflicts is a related but distinct variable. If, for example, a Justice believes that every conflict presents an “important federal question,” then regardless of his or her views about how precedents should be fashioned this priority will motivate that Justice to vote to grant cases more aggressively than a Justice less concerned about national uniformity.

All of the Justices no doubt agree, on some level, that resolving conflicts among the lower courts is an essential task of the Supreme Court,<sup>219</sup> and Rule 10 expressly recognizes that certiorari may be granted where a circuit court or a state court of last resort “has entered a decision in conflict with” another such court on “an important federal question.”<sup>220</sup> But there appears to be a surprisingly large variance in the importance that individual Justices attach to achieving uniformity in the application of federal law.

Justice White, of course, was at the far end of the spectrum; he fiercely advocated that a principal task of the Court is “to provide some degree of coherence and uniformity in federal law throughout the land.”<sup>221</sup> Indeed,

219. For example, Justice O’Connor has stated:

[O]ne of the Supreme Court’s most important functions—and perhaps *the* most important function—is to oversee the systemwide elaboration of federal law, with an eye toward creating and preserving uniformity of interpretation. It is precisely because of the importance of this unifying function that the jurisdiction of the Supreme Court of the United States has been made ever more discretionary over the years. Today, this function is uppermost in the minds of the Justices in exercising the discretion to take cases for review. I breach no confidence in saying that the most commonly enunciated reason for granting review in a case is the need to resolve conflicts among other courts over the interpretation of federal law.

Sandra Day O’Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 5 (1984–85); see also PERRY, *supra* note 36, at 246 (“The overwhelming majority of my informants, indeed almost all, listed [circuit conflicts] as the first and most important thing that they looked for in a petition.”).

220. SUP. CT. R. 10; see *supra* note 57 (setting out full text of Rule 10).

221. White, *Work of the Court*, *supra* note 50, at 349; see also Ginsburg, *supra* note 192, at 1285 (“Byron White was an ‘activist’ Justice only in his unswerving view that the Court ought not let circuit splits linger, that it should say what the federal law is sooner rather than later.”); Philip J. Weiser, *Justice White and Judicial Review*, 74 U. COLO. L. REV. 1305, 1312 (2003) (“More so than any of his contemporaries, Justice White remained acutely conscious of instances where the Supreme Court needed to step in to resolve circuit conflicts or clear up areas of legal doctrine that confused lower

departing from the general practice of maintaining the secrecy of certiorari votes, he frequently published dissents from denial of certiorari criticizing the Court for failing in its “*special obligation* to intercede and provide some definitive resolution of the issues.”<sup>222</sup> As an Associate Justice, Justice Rehnquist also was a staunch advocate of the need for national uniformity:

But surely it is hard to dispute that, in a country with a national government such as ours, Congress should not be held to have laid down one rule in North Carolina and another rule in North Dakota simply because the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Eighth Circuit disagree with one another on the meaning of a federal statute.<sup>223</sup>

This special emphasis on resolving conflicts is founded on several points. First, the strong policy in favor of uniformity is reflected in the Constitution itself, which vests the “one supreme Court” with the judicial power to uphold and interpret federal law as “the supreme Law of the Land.”<sup>224</sup> Second, some view the Judges’ Bill of 1925, which gave the Justices the authority to exercise control over most of their plenary docket, as designed to help achieve uniformity;<sup>225</sup> indeed, some believe that the legislation was based on an explicit commitment that the Justices made to

courts and practicing attorneys.”).

222. *Metheny v. Hamby*, 488 U.S. 913, 915 (1988) (White, J., dissenting from denial of certiorari) (emphasis added) (noting that the Court’s failure to grant cases involving conflicts “is the principal reason why I have dissented from so many of the Court’s decisions to deny certiorari in the past: almost 200 times in the past three Terms”); see also *Taylor v. United States*, 504 U.S. 991, 991–92 (1992) (“One of the Court’s duties is to do its best to see that the federal law is not being applied differently in the various circuits around the country. The Court is surely not doing its best when it denies certiorari in this case, which presents an issue on which the Courts of Appeals are recurringly at odds.”); *Beaulieu v. United States*, 497 U.S. 1038, 1040 (1990) (Justice White, dissenting from denial of certiorari) (“[I]t is plain enough to me that quite a number of the cases involving conflicts have been denied review but could have been granted without presenting any danger of not being current in our docket.”).

223. William H. Rehnquist, *The Changing Role of the Supreme Court*, 1 FLA. ST. U. L. REV. 1, 11–12 (1986) [hereinafter *Changing Role*]; see also Rehnquist, *Plea for Help*, *supra* note 201, at 2–6 (arguing that the decisionmaking capacity of the Supreme Court is too low to ensure uniformity and to superintend the lower courts).

224. See U.S. CONST. art. III & art. VI; Thomas E. Baker, *Constitutional Law and the Federal Courts: Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472, 1482–83 (1989) (reviewing SAMUEL ESTREICHER & JOHN E. SEXTON, *REDEFINING THE SUPREME COURT’S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (1986)) (noting that “[u]niformity in matters of a federal law has been the overriding policy since the drafting of the Supremacy Clause and the creation of a role for one Supreme Court”).

225. See Baker, *supra* note 224, at 1483 (noting that “the Judges’ Bill of 1925 was deemed a measure to allow the Court to achieve greater uniformity”).



Congress to protect the uniformity of federal law in return for Congress' ceding the Court so much control over case selection.<sup>226</sup> Third, conflicts create undesirable incentives for litigants to engage in forum shopping and for repeat players to continue litigating issues that they have lost in some jurisdictions in the hope of attaining a better outcome elsewhere.<sup>227</sup> And finally, it is widely regarded as unfair and unseemly for litigants to receive different treatment based merely on the geographic accident of where their cases were filed.<sup>228</sup>

Nonetheless, many of the Justices have indicated a far greater tolerance for conflicts, especially in their endorsement of the concept of "percolation," whereby the Court consciously allows conflicts to persist until the lower courts have offered more extensive guidance about the differing views on the legal issue presented.<sup>229</sup> Then-Justice Rehnquist scoffed at the notion that percolation was valuable:

And to go further and suggest that it is actually desirable to allow important questions of federal law to "percolate" in the lower courts for a few years before the Supreme Court takes them on seems to

226. See Hartnett, *supra* note 4, at 1663–65 (describing Chief Justice Taft's representation to the House Judiciary Committee, which was considering the Judges' Bill, that "[w]henver a petition for certiorari presents a question on which one circuit court of appeals differs from another, then we let the case come into our court as a matter of course."). Perry quotes an unidentified Justice as stating, "Justice B [presumably Justice White] is strong on conflicts . . . I think his views are based partly on his understanding of the Court's commitment to Congress at the time of the Judiciary Act of 1925, but I disagree with his understanding." PERRY, *supra* note 36, at 248. Perry describes the speaker, likely Justice Stevens, as "probably the justice at the opposite extreme." *Id.* at 247.

227. Baker, *supra* note 224, at 1483, 1485–86 (noting these negative incentives and describing an issue that concerned the postal service which the government litigated in 20 district courts and 8 courts of appeals before the Supreme Court resolved it); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 727 (1984) (finding most troubling those conflicts that give rise to forum shopping or planning problems).

228. Justice White urged that:

"[D]enying review of decisions that conflict with other decisions of Courts of Appeals . . . results in the federal law being enforced differently in different parts of the country. What is a crime, an unfair labor practice or an unreasonable search and seizure in one place is not a crime, unfair practice or illegal search in another jurisdiction. Or citizens in one circuit do not pay the same taxes that those in other circuits must pay."

*Intercircuit Panel of the United States Act: Hearings on S.704 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 99th Cong. 147–48 (1985) (statement of A. Leo Levin quoting Justice Byron White); see also PERRY, *supra* note 36, at 247 (quoting an unidentified Justice as stating, "[i]t is intolerable to have a certain law for the people in the Second Circuit and something else for people in the Eighth"; Perry describes this Justice as being "fairly close" to "Justice B's" position that virtually all conflicts should be taken); Rehnquist, *Changing Role*, *supra* note 223, at 11–12 (arguing that litigants should not be subjected to different interpretations merely because the circuit courts disagree).

229. See Estreicher & Sexton, *supra* note 227, at 716 (defining percolation as "the independent evaluation of a legal issue by different lower courts before the Supreme Court ends the process with a nationally binding rule").

me a very strange suggestion; at best it is making a virtue of necessity.<sup>230</sup>

But other Justices have strongly defended its use. Justice Stevens, for example, has noted:

Although one of the Court's roles is to ensure the uniformity of federal law, we do not think that the Court must act to eradicate disuniformity as soon as it appears. . . . Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to eradicate disuniformity when further percolation or experimentation is desirable.<sup>231</sup>

Justice Ginsburg, too, has lauded the benefits of percolation: “We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”<sup>232</sup>

230. Rehnquist, *Changing Role*, *supra* note 223, at 11; *see also* Baker, *supra* note 224, at 1487 (discussing the drawbacks of percolation); Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 882–92 (1993) (arguing that percolation does not lead to better statutory decisions).

231. *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) (quoting *Estreicher & Sexton*, *supra* note 227, at 716); *see also* *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) (“In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.”); Dorf, *supra* note 171, at 65–67 (defending the benefits of percolation); *cf.* CARDOZO, *supra* note 164, at 145 (“In each system, hardship must at times result from postponement of the rule of action till a time when action is complete. It is one of the consequences of the limitations of the human intellect and of the denial to legislators and judges of infinite prevision.”).

232. *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). Justice O’Connor has also favorably described “our practice of letting issues ‘percolate’ in the 50 States in the interests of federalism.” *Johnson v. Texas*, 509 U.S. 350, 379 (1993) (O’Connor, J., dissenting). But she has commented that “[b]ecause one of the most important functions of the Supreme Court is to ensure uniformity in federal law, when such conflicts become *too* sharp the Court must step in to prevent unfairness to the public or an adverse impact on the administration of the law.” SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW* 211 (2003) (emphasis added). *But see* Baker, *supra* note 224, at 1486 (arguing that the circuit courts, unlike the states, are not appropriate laboratories for experiment).

Embracing the concept of percolation demonstrates a willingness to tolerate disuniformity for a time—the period needed for multiple lower courts to address an issue and flesh out the relevant considerations—but not necessarily forever. Some Justices, however, have less concern about the existence of conflicts in general. Justice Stevens is of this view: “I would like to suggest, first, that the existence of differing rules of law in different sections of our great country is not always an intolerable evil and, second, that there are decisionmakers other than judges who could perform the task of resolving conflicts on questions of statutory construction.”<sup>233</sup>

The implications for case selection are straightforward. All else being equal, the higher the priority a Justice places on resolving conflicts, the more frequently he or she is likely to vote to grant review. Given the ever-rising tide of petitions for certiorari, and the inevitable disagreements among the lower courts, there are more conflicts each term than the Court can possibly resolve.<sup>234</sup> A strong commitment to upholding the principle of national uniformity would thus incline a Justice to vote to grant cases presenting conflicts and also to resolve as many conflicts as possible.<sup>235</sup>

The voting data seems to bear out this prediction. Justice Stevens, who not only sees percolation as beneficial, but also has a higher tolerance for allowing conflicts to exist, has a relatively low grant rate. In the last four terms of the Burger Court, for example, he voted to grant review less often than any other Justice.<sup>236</sup> In the first five terms of the Rehnquist Court, he remained in the lower end of the spectrum, outdone in his parsimony only by the extremely low totals compiled by Justices Scalia and Kennedy.<sup>237</sup> In

233. Stevens, *Judicial Restraint*, *supra* note 45, at 182–83. Michael Sturley argues that, in determining whether to grant a case involving a conflict, the “Court should consider not simply the importance of the question, but also the need to have the Supreme Court’s answer to it.” Michael F. Sturley, *Observations on the Supreme Court’s Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251, 1275 (1989). Using two maritime laws as examples, he suggests that the Court need not intervene in conflicts involving the Longshore and Harbor Workers’ Compensation Act because it governs personal injury matters, which tend to implicate only one legal system, but should resolve conflicts arising under the Carriage of Goods by Sea Act because it governs interjurisdictional commercial matters. *See id.* at 1258–74.

234. *See* Cordray & Cordray, *Plenary Docket*, *supra* note 3, at 772–73 (discussing the large number of decisional conflicts available for review each year).

235. *See* *Beaulieu v. United States*, 497 U.S. 1038, 1040 (1990) (White, J., dissenting from denial of certiorari) (“It is surely arguable that we should not grant more cases in one Term than we can decide in one Term. Being current in our docket is a major consideration . . . . But I suggest that we should do what we can[.]”).

236. *See* Judicial Database, *supra* note 130. In the 1982–1985 Terms, Justice Stevens averaged 122 grant votes per term. The Court’s median was Justice Brennan’s 152 grant votes per term. *See id.*

237. In the 1986–1990 Terms, Justice Stevens averaged 104 grant votes per term; leaving out their first partial terms on the Court (because they did not vote on certiorari with respect to the cases considered after the summer recess and before the term commenced), Justice Scalia averaged 96 cases

contrast, Justice White, who advocated tirelessly for the resolution of conflicts, made that a priority in his case selection decisions by regularly voting to grant review in cases involving conflicts.<sup>238</sup> Moreover, he usually had the highest grant rate throughout both periods and, by the time he retired, he was regularly voting to grant over fifty percent more cases than any other Justice.<sup>239</sup>

Chief Justice Rehnquist is an interesting case. As discussed above, while an Associate Justice, he championed the need for uniformity and deprecated percolation. Indeed, as recently as the mid-1980s, when the Court was still hearing approximately 150 cases per term, he found the tiny percentage of cases that the Court was able to review “intolerable,” stating that it was “simply not enough to assure that the views of the Supreme Court in various areas of the law shall, over the long run, prevail.”<sup>240</sup> In addition, his voting behavior on certiorari was consistent with these views. In the 1982 and 1983 Terms, he outpaced even Justice White to lead the Court in voting to grant cases.<sup>241</sup> In the 1984 and 1985 Terms, however, the number of cases in which he supported review began to decline, and this slide continued after he was appointed as Chief Justice in 1986.<sup>242</sup> A change in his views about how important it is to resolve conflicts may account for this abrupt shift in his approach—since he has not reiterated his criticism of percolation or disuniformity in recent years, instead stating that he “no longer votes to take a case just because it is

per term and Justice Kennedy averaged 99 cases per term. *See id.*

238. *See Metheny v. Hamby*, 488 U.S. 913, 915 (1988) (White, J., dissenting from denial of certiorari) (noting that the Court’s failure to grant cases involving conflicts “is the principal reason why I have dissented from so many of the Court’s decisions to deny certiorari in the past: almost 200 times in the past three Terms”).

239. *See* Judicial Database, *supra* note 130. In the 1988–1990 Terms, Justice White averaged 205 grant votes per term; Chief Justice Rehnquist and Justice Blackmun were virtually tied in the next rank at an average of 128 grant votes per term. *See id.*

240. Rehnquist, *Plea for Help*, *supra* note 201, at 4; *see also* Rehnquist, *Changing Role*, *supra* note 223, at 10 (arguing that granting review in less than five percent of the cases is “simply not a large enough number of cases to enable us to address the numerous important statutory and constitutional questions which are daily being decided” by the lower courts). Moreover, he argued that the Court should not cut back from 150 cases per term in light of the load carried by the lower courts: “Unless other judges get some much needed relief, I do not believe the members of the Supreme Court should claim this luxury.” Rehnquist, *Plea for Help*, *supra* note 201, at 6.

241. In the 1982 and 1983 Terms, Justice Rehnquist voted to grant review in 242 and 168 cases, respectively; Justice White did so in 234 and 159 cases. *See* Judicial Database, *supra* note 130.

242. In the 1984 and 1985 Terms, Justice Rehnquist voted to grant review in 184 and 177 cases, respectively; Justice White did so in 236 and 272 cases. *See* Judicial Database, *supra* note 130. After Justice Rehnquist became the Chief, the gap between them continued to grow so that by the 1988–1990 Terms, Chief Justice Rehnquist voted to grant review in an average of only 125 cases by comparison to Justice White’s average of 205 cases. *See id.*

‘interesting.’”<sup>243</sup> His ascent to the Chief Justiceship, with its distinct responsibilities, likely also played a prominent role in altering his behavior on certiorari.<sup>244</sup>

Again, we are not suggesting that a Justice’s views on the need to resolve conflicts among the lower courts is determinative of his or her voting behavior on certiorari. But it is an important factor in the mix of considerations that make up each Justice’s approach to case selection.

### 3. *Special Interest in Certain Legal Issues and in Effectuating Social Change*

Another element in the “feel” that individual Justices have for which cases are sufficiently important to deserve plenary review is their special concern for, or particular interest in, certain areas of the law. These particular interests range from constitutional matters, such as capital cases and abortion, to statutory matters, such as water rights and securities law.<sup>245</sup> It is, of course, not surprising that the Justices would have their own personal interests both from their experiences prior to joining the Court and from their service on it.<sup>246</sup> But the Justices themselves have acknowledged that these idiosyncratic interests affect their behavior on certiorari.<sup>247</sup> Justice Brennan, for example, observed that an essential feature of the certiorari process is that it “provides a forum in which the particular interests or sensitivities of individual justices may be expressed.”<sup>248</sup>

243. Joan Biskupic, *The Shrinking Docket; Attorneys Try to Make an Issue Out of the Dramatic Decline in High Court Rulings*, WASH. POST, Mar. 18, 1996, at A15.

244. See O’Brien, *supra* note 61, at 807 (noting that Chief Justice Rehnquist publishes far fewer dissents from denial of certiorari than he did as an Associate Justice); cf. Laura Krugman Ray, *Judging the Justices: A Supreme Court Performance Review*, 76 TEMP. L. REV. 209, 213 (2003) (noting that “since becoming Chief Justice, he has sharply reduced his separate opinions”).

245. See PERRY, *supra* note 36, at 262–63 (describing various interest areas for different Justices, including capital cases, abortion, schools, criminal procedure, free speech, water rights, tax cases, Indian cases, oil and gas, securities, administrative law, and national security issues).

246. See *id.* at 263 (quoting an unidentified Justice saying, “We all have our own ideas of what is important that we bring to the Court with us.”); *id.* (“One frequent observation was that once a justice wrote a seminal opinion in an area, he usually became very interested when cases were petitioned in that area.”).

247. At least four of the five Justices that Perry interviewed agreed that the Justices “have areas of special interest that affect their cert. behavior.” *Id.* at 261 (quoting one of those Justices as saying, “[W]e all inherit from our past experiences certain things that we are interested in. And personnel has a great deal to do with the agenda.”).

248. Brennan, *Court’s Workload*, *supra* note 34, at 414 (Justice Brennan also noted that “a single justice may set a case for discussion at conference, and in many instances that justice succeeds in persuading three or more of his colleagues that the case is worthy of plenary review”).

That their individual predilections influence the Justices' perception of which cases are "important," and thus their decisions on certiorari, further demonstrates the complexity and subjectiveness of the case selection process.<sup>249</sup> Moreover, in areas where a Justice has a strong personal interest, strategic considerations play an unusually heavy role. In other words, the more a Justice cares about a particular subject area or doctrine, the more he or she will care about the outcome on the merits, and the more that variable will predominate in his or her certiorari decisions in cases raising such issues. Indeed, Perry argued that in areas where they have a special interest, Justices employ a different and far more strategic decisional calculus:

The justice usually knows how he wants doctrine to develop in the area, and he therefore acts strategically at the cert. decision. That is, a case is seen as certworthy if it is one where the justice thinks he will win on the merits, and if it allows him to move doctrine in the way he wishes.<sup>250</sup>

While particular interest in specific areas affects the decision processes of all Justices in varying degrees, some Justices take matters even further by consciously pressing to shape the direction of American law and society by means of the Court's agenda. Based on their conception of the essential responsibilities of the Supreme Court, these Justices have sought to have the Court play a significant role in directing the course of social change.<sup>251</sup>

249. Perry, for example, noted:

Prediction of cert. is so difficult in part because of these idiosyncratic interests in particular areas that lead some justices and not others to see certain issues as important. . . . In sum, everyone says that a case must present an important issue for it to be certworthy, but determinations of importance are sometimes related to an individual justice's interest in an area, making the notion of importance even more subjective.

PERRY, *supra* note 36, at 264–65; *see also* Hellman, *Case Selection*, *supra* note 35, at 1048–49 ("Half or more of [the Court's] cases will receive plenary consideration in response to exigent needs of the legal system—needs that would draw a similar response from almost any group of Justices. But the remainder of the plenary docket is shaped in large part by the interests and predilections of the Justices now sitting.").

250. *Id.* at 264–65; *see also id.* at 279–82 (positing a separate decision model for cases in which a Justice cares intensely about the outcome on the merits, where the first consideration is likelihood of winning on the merits and the second is whether the case is a "good vehicle" for taking the doctrine in the right direction).

251. *See* Nelson, *supra* note 195, at 1297–98 (contrasting "those who use power, as did several justices of the Warren Court, to try to control the course of history so that those who live after them will lead better lives" with "constitutional conservative[s] who saw no major role for the Court in directing the course of the nation's social change"); *cf.* PERRY, *supra* note 36, at 208–09 (the Justices he interviewed all agreed that "aggressive grants" or "'strategic reaching,' that is, trying to get a case

The paradigmatic example of a Justice with this approach is Justice Brennan.<sup>252</sup> He believed that the “federal courts have been delegated a special responsibility for the definition and enforcement of the guarantees of the Bill of Rights and the Fourteenth Amendment”<sup>253</sup> and that these vital guarantees “are ineffectual when the will and power to enforce them is lacking.”<sup>254</sup> By the 1961 Term,<sup>255</sup> Justice Brennan was thus “taking an active leadership role in trying to find cases that would promote his reforms.”<sup>256</sup> And he was very successful: “In the years between 1961 and 1969, the Supreme Court interpreted the Fourteenth Amendment to nationalize civil rights, making the great guarantees of life, liberty, and property binding on all governments throughout the nation. In so doing, the Court fundamentally reshaped the law of this land.”<sup>257</sup> As the Court’s

that would allow a certain doctrinal outcome” occurred, yet aggressive grants remain difficult to achieve because of the heavy presumption against granting cases).

252. See MARION, *supra* note 42, at 161 (“Whether construed in light of the interpretation that Brennan gave to the judicial oath or the nature of the project to which he was committed, his task involved nothing less than active judicial involvement in shaping a way of life for the American people.”).

253. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 552 (1986) [hereinafter *Bill of Rights*]; see also William J. Brennan, Jr., *Some Observations on the Role of the Supreme Court*, 92 CASE & COMMENT 11, 16 (1987) (“Judicial review is vital and indispensable for the protection of the individual’s liberty in our kind of democratic society—a society imbued with a desire to make the individual free from governmental oppression, to guarantee the individual’s liberty under the law, his liberty from the lawmaker.”).

254. William J. Brennan, Jr., *Why Have a Bill of Rights?*, 26 VAL. U. L. REV. 1, 10 (1991) (decriing the negligible role that the Court played in protecting civil liberties during its first century and a half). Bernard Schwartz explained:

Brennan believed that the Bill of Rights provisions protecting personal liberties imposed more active obligations on the judges. . . . Brennan rejected judicial restraint because he believed that it thwarted effective performance of the Court’s constitutional role. Judicial abnegation, in the Brennan view, meant all too often judicial abdication of the duty to enforce constitutional guarantees.

Bernard Schwartz, *How Justice Brennan Changed America*, in REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE 31, 33 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

255. President Eisenhower appointed Justice Brennan to the Supreme Court in 1956, but he was firmly allied with the Court’s liberal wing by 1959. See KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM BRENNAN JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 160–64 (1993).

256. *Id.* at 164. Eisler provided an example in which Justice Brennan urged Chief Justice Warren to take a particular case to try to extend to the states the doctrine of *Jencks v. United States*, 353 U.S. 657, which required the prosecution to turn over witness statements to the defense:

“I suppose there would be a vehement protest,” Brennan wrote, “and the probabilities are we would lose out on the merits. The latter probability may be good reason to pass up this opportunity, but I do think we’ll wait a long time before we get a question as sharply presented.” Warren persuaded Brennan to pass up the case. But other opportunities would soon come along. The chief and the “deputy chief” vowed to watch for them. Then, they believed, they would make history.

*Id.* at 165.

257. Brennan, *Bill of Rights*, *supra* note 253, at 540. In particular, the Court extended nine of the

prevailing ideology became more conservative with the shift from Chief Justice Warren to Chief Justice Burger in 1969, Justice Brennan continued to push the Court's agenda,<sup>258</sup> though he moved to social issues on which he was more likely to win.<sup>259</sup> He was consistently joined in these efforts by Justice Marshall, who had developed similar views on the Court's appropriate role from his many years of crusading as a lawyer for school desegregation.<sup>260</sup>

While Justices Brennan and Marshall promoted a liberal agenda, this broader conception of the role of the Court—as an instrument of social change—is not viewpoint specific. A conservative Justice might also hold a similarly broad conception of the Court's role and thus seek to build an agenda that would enable it to steer the course of social change in a conservative direction. When Chief Justice Burger joined the Court in 1969, for example, he actively sought to undo the “adventurous egalitarianism” of the Warren Court and reinforce the forces of social order by strengthening the position of law enforcement.<sup>261</sup> He was soon

provisions of the Bill of Rights to the states during this period. *See id.* at 541–45 (describing the cases); *see also* O'BRIEN, *supra* note 52, at 229 (discussing the “dramatic shift in the 1960s when the Warren Court built an agenda for constitutional revolution and accelerated legal-policy changes”).

258. Describing Justice Brennan's role, Eisler stated:

Egged on by Brennan, the [Burger] Court tackled social issues such as abortion, job discrimination, and capital punishment. Ultimately it came to respond to equal employment and affirmative action. On virtually every issue, well into the 1980s, Brennan, and not the chief justice, whether it be Burger or later Rehnquist, defined the direction and ideology of the Court.

EISLER, *supra* note 255, at 14; *see also* Schwartz, *supra* note 254, at 31 (contending that Justice Brennan served “as the catalyst for some of the most significant decisions during his tenure” on the Warren and Burger Courts).

259. Eisler suggested that Justice Brennan moved away from criminal justice issues. *See* EISLER, *supra* note 255, at 260 (“Surveying the Court in 1975, Brennan knew that he had done all he could in the area of criminal rights. . . . Turning away from his interest in the rights of criminal defendants, Brennan began concentrating on protecting the rights of blacks, minorities, and women.”). Yet Justice Brennan continued to vote to grant a disproportionately high number of cases from the “in forma pauperis” list, which tend primarily to raise issues of criminal law and procedure. *See infra* notes 272–79 and accompanying text (discussing and analyzing the data on Justice Brennan's voting behavior).

260. *See, e.g.,* Brennan, *Tribute to Marshall*, *supra* note 66, at 14 (observing that Justice Marshall's “was a voice with an unwavering message: that the Constitution's protections must not be denied to anyone and that the Court must give its constitutional doctrine the scope and sensitivity needed to assure that result”); Thurgood Marshall, *Law and the Quest for Equality*, 1967 WASH. U. L.Q. 1, 7 (“[T]he quest for equality by litigation in the courts, up to the Supreme Court, and by the favorable decisions obtained is, I think, testimony to support my themes: that law cannot only respond to social change but can initiate it, and that lawyers, through their everyday work in the courts, may become social reformers.”).

261. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 252 (1994); *see also* EISLER, *supra* note 255, at 260 (observing that “Burger and Rehnquist had made no secret of their desire to turn the Warren Court decisions upside down”); James B. O'Hara, *Introduction to THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION* 3 (Bernard Schwartz ed., 1998) (explaining that “Burger



joined by Justice Rehnquist, who candidly stated that he and the Chief Justice sought “a halt to . . . the sweeping rules made in the days of the Warren Court.”<sup>262</sup> Although Chief Justice Burger’s quest was ultimately less successful than expected,<sup>263</sup> his efforts to shape the Court’s agenda to achieve this broader goal had distinct implications for decisionmaking at the case selection stage.<sup>264</sup>

Other Justices, in contrast, believe that the Court should maintain a lower profile and not consciously seek to be an engine of social change. Justice White, for example, “saw no major role for the Court in directing the course of the nation’s social change”<sup>265</sup> and “when asked what was his greatest case, declined to identify any particular case, observing that he did not perceive that it was his job to decide great cases but simply to decide cases.”<sup>266</sup> Many other Justices have shared this traditional preference, viewing the Court’s proper role as responsive rather than proactive.<sup>267</sup> In dissent, Justice Harlan criticized the Court’s decision in the “one man, one vote” case as “a current mistaken view of the Constitution and the constitutional function of this Court.” He continued:

This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional “principle,” and that this

was a known critic of the Warren jurisprudence” and when he “came to the Supreme Court, it was widely supposed that he came with a specific agenda: to roll back the energetic activism of the recent past”).

262. BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM* 400 (1990). Justice Douglas later claimed that Chief Justice Burger actually “announced in Conference . . . the precedents we should overrule. *Miranda*, *Gideon*, . . . *Reynolds v. Sims* and many others were on the list.” DOUGLAS, *COURT YEARS*, *supra* note 64, at 231.

263. *See, e.g.*, Bernard Schwartz, *The Burger Court in Action*, in *COUNTER-REVOLUTION*, *supra* note 193, at 263 (Burger was “never able to secure the rollback in Warren Court jurisprudence that headed his agenda”); Vincent Blasi, *The Rootless Activism of the Burger Court*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T* 199 (Vincent Blasi ed., 1983) (“The much anticipated—by some with hope, by others with dread—reversals and undercuttings of activist Warren Court precedents have not materialized.”).

264. *Cf.* PERRY, *supra* note 36, at 210 (suggesting that the “failure of the counterrevolution may have something to do with the bias in the cert. process against change, particularly when there is a divided Court”).

265. Nelson, *supra* note 195, at 1298.

266. Henry, *supra* note 193, at 14. In contrast, Justice Brennan responded that identifying his favorite opinion “would be almost as impossible as picking a favorite child. I will, however, say that high on the list of the Court’s accomplishments during my tenure were a panoply of opinions protecting and promoting individual rights and human dignity.” William J. Brennan, *My Life on the Court*, in *COUNTER-REVOLUTION*, *supra* note 193, at 9 [hereinafter *My Life*].

267. Justice Stewart once defined himself as neither a “conservative” nor a “liberal,” but “I am a lawyer . . . I have some difficulty understanding what those terms mean even in the field of political life. . . . And I find it impossible to know what they mean when they are carried over to judicial work.” Brennan, *My Life*, *supra* note 266, at 21.

Court should “take the lead” in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.<sup>268</sup>

These different conceptions of the Court’s proper role in American society have ramifications for the Justices’ decisions on case selection, particularly with regard to the composition of their votes.<sup>269</sup> A Justice who prefers that the Court maintain a more reactive posture will presumably not reach out aggressively for cases that will effectuate social change. Moreover, such a Justice may actively avoid cases that raise socially divisive issues or questions that, in the Justice’s view, properly belong to the other branches of government.

In contrast, a Justice who holds a broad conception of the Court’s role and actively seeks to drive certain doctrines in a particular direction will likely skew his or her votes in favor of cases that can advance those doctrines—as long as the Justice believes that he or she will prevail on the merits.<sup>270</sup> Indeed, if such a Justice is pessimistic about prevailing on the

268. *Reynolds v. Sims*, 377 U.S. 533, 624–25 (1964) (Harlan, J., dissenting). In addition, Perry noted that some

justices are known to be less ideological, less result-oriented, and more “judge-like.” . . . Some admire these justices for their lack of an agenda and their less ideological, less result-oriented approach. Other criticize them for not having a consistent ideology or vision of the constitutional order—something that should differentiate a justice from a judge. The merits of that debate aside, the point is that the presence of “judge-like” justices, whatever their ideological leanings, makes strategic manipulation at cert. more difficult . . . [because] the primary factor governing their cert. behavior is usually certworthiness in some jurisprudential sense rather than a strategy for outcome on the merits and some ultimate doctrinal stance.

PERRY, *supra* note 36, at 211. It bears emphasis that Perry uses the term “jurisprudential” to denote more legalistic considerations such as whether an alleged circuit split is genuine, rather than the kinds of considerations being discussed here. *See id.* at 274.

269. In her analysis of the Burton-era Justices, Provine found a “striking” parallel “between restraint in voting for review and restraint on the merits.” PROVINE, *supra* note 31, at 122–23. Ultimately, she concluded that “a justice’s view of the degree of restraint appropriate to the Supreme Court is primarily responsible for the frequency with which he votes for review.” *Id.* at 124. Based on more recent data, this correlation seems less reliable. As we discuss below, Justices Brennan and Marshall were “activist” Justices, yet as the climate on the Court grew less favorable to them, their grant rates declined until they were among the lowest on the Court. Justice White would hardly be viewed as an “activist” judge in this sense, yet he was extremely aggressive in supporting review, whereas Justice Stevens is stingy in voting to grant review even though he is viewed as one of the more “liberal” Justices. *See* Judicial Database, *supra* note 130.

270. Indeed, this orientation can affect Justices’ conduct in other ways. For example, it is reported that when Attorney General Robert Kennedy took soundings from Chief Justice Warren about the possibility of naming Judge William H. Hastie as the first African-American to the Supreme Court in 1962, Warren “was violently opposed” stating that Hastie “is not a liberal, and he’ll be opposed to all the measures that we are interested in, and he just would be completely unsatisfactory.” HUTCHINSON,

merits then he or she might well engage in a “defensive denial” to avoid a decision that would potentially undermine the preferred direction of judicial doctrine. Overall, the effect on case selection will be mainly in the composition of the Justice’s grant votes, which again would disproportionately emphasize cases in the favored issue areas. But given the close interrelation between pressing an agenda and strategic concerns about winning on the merits, there also may be implications for the quantity of cases in which the Justice votes to grant. All other things being equal, when such a Justice is confident of routinely winning he or she would likely vote to grant cases more aggressively; conversely, when the Justice regularly expects to lose he or she would likely vote to grant fewer cases, perhaps as a general matter but at least in those areas of greatest interest and concern.<sup>271</sup>

With regard to quantity, the voting data on Justices Brennan and Marshall is consistent with this expectation. During the 1960s, when they were confident of delivering a majority vote in most important cases,<sup>272</sup> their grant rates were relatively high.<sup>273</sup> Yet by the last few terms before they retired, fraught with concern that the Court was “involved in a new curtailment of the Fourteenth Amendment’s scope,”<sup>274</sup> their grant rates had dropped dramatically.<sup>275</sup> And though their overall totals remained at or

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*supra* note 37, at 314.

271. There is likely to be some direct relationship between a Justice’s views on whether the Court should operate as an engine of social change and his or her preference for “rules” or “standards.” A Justice who approves that broader role for the Court will likely be attracted to rules, because rules are stronger and more dependable when that Justice is succeeding in moving the Court in the desired direction. *See Sullivan, Categorization and Balancing, supra* note 207, at 316–17 (noting that Justice Brennan chose a rules approach for this reason). But as political shifts occur and the Justice begins to lose on the merits, he or she may incline toward standards as a “second-best” option that may help to limit losses. *Id.* at 317; *see also Sullivan, Rules and Standards, supra* note 108, at 99 (describing Justice Marshall’s push for balancing when it became clear that the Burger Court would not recognize new suspect classes or fundamental rights for purposes of strict scrutiny analysis of due process or equal protection claims).

272. *See EISLER, supra* note 255, at 179 (noting that when Justice Goldberg was appointed in 1962, “Black and Brennan had already formulated the outline for what they wanted to achieve . . . . Now, with the full endorsement and support of the chief justice, and with Goldberg’s fifth vote a certainty, they set about to accomplish their aims.”).

273. In the later years of the Warren Court, Justice Brennan was consistently in the top tier and trailed only Justice Douglas in numbers of votes cast for review, averaging about 200 votes for review in the 1965–1968 Terms; Justice Marshall cast 171 votes for review in the 1968 Term, his first full term on the Court, which was more than every Justice other than Douglas, Brennan, and Warren. *See Judicial Database, supra* note 130.

274. Brennan, *Bill of Rights, supra* note 253, at 546.

275. By the 1980s, Justice Brennan’s grant rate had dropped to an average of about 125 votes to review per term, causing him to move from the top tier to the lower middle tier among the Justices. Likewise, Justice Marshall’s grant rate had dropped to an average of about 115 votes to review per term, causing him to drop down to the high end of the lower tier among the Justices. *See Judicial*

near the Court's declining median in voting to grant review, this fact masked a shift in the composition of their grant votes. From the "paid" list of ordinary cases, they were casting far fewer grant votes than the median and were rivaling Justice Stevens' figures at the low end of the spectrum; however, from the list of "in forma pauperis" cases filed by indigents and prisoners, which consisted mainly of criminal procedural issues and alleged civil rights violations, they supported review far more often than any of the other Justices.<sup>276</sup>

This continued emphasis on criminal justice and civil rights issues at first seems somewhat surprising given the strong conservative trend of the Court. But the Court's results in such cases were far from uniform, leaving open the possibility that Justices Brennan and Marshall could win if they found sufficiently compelling cases.<sup>277</sup> Moreover, their interest in criminal justice and civil rights issues remained intense, especially in capital cases.<sup>278</sup> Indeed, in capital cases, they cared deeply not only about shaping the doctrine, but also about voiding death sentences in individual cases.<sup>279</sup>

In sum, Justices who have a special interest in certain kinds of issues, especially the kinds of issues that involve the Court in shaping the direction of broader social change, are likely to be much more sensitive to strategic considerations in those areas. This broader conception of the Court's role will lead some Justices actively to seek out cases and support

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Database, *supra* note 130.

276. In the 1986–1989 Terms, Justice Brennan averaged only 115 grant votes per term and Justice Marshall only 106. *See* Judicial Database, *supra* note 130. During those same terms, they averaged 35 and 34 grant votes, respectively, from the "IFP" list, which dropped their grant votes in paid cases well below even the very low totals amassed by Justices Scalia and Kennedy. *See id.* The other Justices voted far more infrequently to grant review in "IFP" cases, with the median being Justice Blackmun, averaging 18 such grant votes per term. *See id.* By contrast, in the 1960s Justice Brennan was voting to grant review in about the same number of "IFP" cases, but was supporting plenary review in more than twice as many of the paid cases also. *See id.*

277. *See, e.g.,* *Ford v. Wainwright*, 477 U.S. 399, 401–18 (1986) (holding that execution of insane prisoners violates the Eighth Amendment); *Ake v. Oklahoma*, 470 U.S. 68, 70–87 (1985) (holding that an indigent defendant is entitled to have a psychiatrist when presenting an insanity defense in a capital murder case).

278. *See* EISLER, *supra* note 255, at 245 (noting that after the death penalty was reinstated, "[f]or the remainder of his years on the bench, Brennan would vote to overturn every death sentence that came before the Court"); Brennan, *Tribute to Marshall*, *supra* note 66, at 20 (stating that, even when the Court again began permitting use of the death penalty four years after *Furman v. Georgia*, Justice Marshall "never became complacent in his opposition"); *id.* (describing how Justice Marshall "challenged the majority view on its own terms by arguing that there were insufficient safeguards to ensure the 'reliability' of capital sentencing—safeguards that several other justices found constitutionally necessary") (emphasis in original).

279. *See* Brennan, *Tribute to Marshall*, *supra* note 66, at 21 (noting that Justice Marshall had "filed more than 150 dissents from 'denial of certiorari' in capital cases. These dissents called his colleagues' attention to particular problems, often involving procedural unfairness, in the imposition of individual death sentences that he thought warranted review.").

review in their favored areas, at least where they believe that they can win on the merits. If those same Justices come to believe that they are unlikely to prevail on the merits, however, then they will discourage the Court from taking those same kinds of cases to avoid surrendering any of the progress they have attained. The result is that their voting behavior is likely to be more volatile even as they exert a more concentrated influence over the composition of the Court's plenary docket.

*C. Further Consideration of the Factors Affecting Decisionmaking on Certiorari*

This account of jurisprudential concerns is intended to shed light on additional perspectives that may affect the Justices' approach to case selection beyond the rule-based and strategic considerations that political scientists have discussed and analyzed. Our central point is that each Justice's particular conception of what role the Supreme Court should play in the judicial system and in American life inevitably informs his or her views about what makes an issue "important" enough to address and resolve on the merits.

These perspectives somehow blend together with rule-based and strategic considerations to form the contours of each Justice's voting behavior on certiorari. Take, for example, Justice White. His unusually high grant rates are consistent with his strong adherence to the view that virtually every conflict is "important" in its own right and with his preference for moving incrementally in the common law tradition.<sup>280</sup> With the Court needing to puzzle through each discrete disuniformity from one case to the next, it would be imperative that the Court keep its docket full in order to perform its essential functions. At the same time, since he did not seem to be exercising any broader substantive agenda, there was little impetus to steer him away from pressing the Court to shape a very busy but relatively neutral docket.<sup>281</sup>

Even here, however, Justice White's record was not as straightforward as it appears; the data reveals that he was one of the three Justices (along with Justices Brennan and Marshall) whose voting behavior on certiorari shifted significantly when the Court changed direction in the 1970s. Unlike Justices Douglas and Stewart, whose voting behavior remained

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280. See *supra* notes 192–96, 221–22 and accompanying text (discussing Justice White's views on the role of precedent and the need for uniformity).

281. See *supra* notes 265–66 and accompanying text (discussing Justice White's views on the proper scope of the Court's social agenda).

relatively consistent even through the various upheavals in Court personnel that occurred under the Nixon Administration,<sup>282</sup> the altered landscape did have an effect on Justice White. On the Warren Court, where he was often in disagreement with the Court's general direction, Justice White had one of the lowest grant rates on the Court.<sup>283</sup> After a few years on the Burger Court, however, he became a leading advocate for reviewing more cases and he remained so for the duration of his tenure.<sup>284</sup> This surprising shift suggests that perhaps Justice White had more of a substantive agenda than even he may have realized.

This unexpected quirk in Justice White's voting pattern helps to demonstrate the complexity and multidimensional character of the decisionmaking process at the certiorari stage. Indeed, our discussion of three "jurisprudential" variables—views on the nature of precedent, the importance of uniformity in federal law, and the Court's proper role in shaping the law and effectuating social change—represents only a sampling of the kinds of influences that can affect the Justices' decisional calculus. External influences, such as the enactment of new legislation, realignment among the lower courts, economic developments, and changes in the public's social and political interests, also can exert unpredictable influences on the Justices' views about which issues are sufficiently "important" to justify the Court's granting of plenary review at any given point in time.<sup>285</sup> So do more idiosyncratic factors, such as

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282. Justice Douglas remained the leader throughout both periods in voting to grant plenary review; by contrast, Justice Stewart was at the low end of the Court during both periods. *See* Judicial Database, *supra* note 130. Chief Justice Rehnquist has praised Justice Stewart as "the one least influenced by considerations extraneous to the strictly legal aspects of a case—he was, that is, the quintessential judge." REHNQUIST, *supra* note 143, at 256.

283. On the Warren Court, Justice White was never higher than sixth in the number of votes cast for review, averaging about 154 per term. *See* Judicial Database, *supra* note 130.

284. In the 1980s, Justice White's grant rate was at the very top of the Court; he averaged about 210 votes for review per term. *See id.*

285. The environmental protection laws are an example of "new" legislation, which produced 23 decisions between 1974 and 1984; an example of an economic development is the energy crisis in the late 1970s, which led to more cases involving energy issues; an example of a change in social and political life is the rise of the women's movement, which caused sex discrimination issues to arise frequently for the Burger Court. *See* Hellman, *Case Selection*, *supra* note 35, at 991–1010; *see also* Brennan, *Court's Workload*, *supra* note 34, at 415 (emphasizing the importance to case selection of not "isolating the Court from many nuances and trends of legal change throughout the land"); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768–69 (noting that the Justices are aware of and to some extent influenced by "currents of public opinion"); Revesz & Karlan, *supra* note 60, at 1104–05 (noting that a Justice might prefer to deny review in a case raising a politically sensitive issue than to have to take a position on the merits).

Justice Black's special concern about the competence of lower court judges,<sup>286</sup> and the Justices' own personal capacity for work.<sup>287</sup>

The complexity of decisionmaking at the certiorari stage is exacerbated by the varying weights that the different factors may carry with regard to each individual case, which makes quantification of the importance of each factor virtually impossible. Justice Douglas captured this fact in his vivid description of the certiorari process: "The electronics industry—resourceful as it is—will never produce a machine to handle these problems. They require at times the economist's understanding, the poet's insight, the executive's experience, the political scientist's understanding, the historian's perspective."<sup>288</sup> Nonetheless, it is worthwhile to explore the various considerations that may underlie the Justices' case selection decisions so as to facilitate a better understanding of that critical function by those who observe the Court, those who participate before it as litigants, and those who serve on it.<sup>289</sup> Although, ultimately, it is hard to imagine that the case selection process could or should be confined by purely objective factors,<sup>290</sup> a greater appreciation of the considerations that can and do shape the Justices' certiorari decisions may prove to be valuable in allowing a more conscious consideration of the appropriate content of the key "importance" criterion.<sup>291</sup>

286. See *PROVINE*, *supra* note 31, at 116 (noting that Justice Black was very "review-prone," and quoting him on the need for the Court to watch lower court judges: "'Some of them puff up like kings, and we're the only thing standing between them and their victims.'") (quoting HUGO BLACK, JR., *MY FATHER: A REMEMBRANCE* 187 (1975)).

287. Justices White, Black, and Douglas, for example, all had a great capacity for work and unusually high grant rates. See, e.g., *HUTCHINSON*, *supra* note 37, at 356 (noting that "most of [Justice] White's opinions are . . . impatient to finish the job"); *PROVINE*, *supra* note 31, at 117 ("The willingness of Black and Douglas to involve the Court in this number of on-the-merits decisions indicates that they placed little value on time-consuming methods of decision making. These men thus exhibited in their case-selection behavior their own willingness to reach decisions quickly and to justify them without ado."); Ginsburg, *supra* note 192, at 1285 (opining that Justice White's "readiness to take more cases reflects his extraordinary capacity to tackle hard jobs and get them done").

288. William O. Douglas, *The Supreme Court and Its Caseload*, 45 *CORNELL L.Q.* 401, 413–14 (1960).

289. See, e.g., Levinson, *supra* note 31, at 722 ("Those of us who profess some special interest in understanding 'the processes of constitutional decisionmaking' should, presumably, be as interested in the processes by which the Justices decide not to engage in articulated decisionmaking as those by which they do.>").

290. See Baker, *supra* note 224, at 1493–97 (arguing that the Court is remarkably successful in selecting the important cases from the mass of certiorari petitions, and that the more objective criteria that Estreicher and Sexton proposed would not "send clearer signals to the bar" or "constrain the Justices in the exercise of their discretion"); Estreicher & Sexton, *supra* note 227, at 710–39 (proposing more objective criteria for case selection).

291. See William H. Rehnquist, *Whither the Courts*, 60 *A.B.A. J.* 787, 789 (1974) ("I think there would be consensus among the members of the Court that the problem is not seeking out important cases to fill out the number to an even 150, but instead it is one of choosing among several hundred

## CONCLUSION

The Supreme Court's extensive control over case selection enables the Justices to set their own agenda. Although an essential tool in managing the size of the docket, this power gives the Court more than mere administrative competence: it confers the ability to choose which issues the Court will decide, in what context, and at what time. Indeed, these decisions about what to decide, and what not to decide, can raise or depress the salience of issues throughout American politics and society. Despite the critical importance of this agenda-setting function, the certiorari process lacks the hallmarks of judicial decisionmaking on the merits because decisions are made without collegial deliberation, well-defined rules, precedential constraint, or public accountability. In consequence, as Justice Jackson acknowledged, "neither those outside of the Court, nor on many occasions those inside of it, know just what reasons led six Justices to withhold consent to a certiorari."<sup>292</sup>

In order to discern how the Court builds its agenda it is essential to forge a better understanding of what leads each Justice to decide that certain cases are "important" enough to warrant plenary review. Political scientists have identified influential factors in the Justices' decisions at the certiorari stage, including certain rule-based criteria and strategic considerations about whether he or she can prevail on the merits. We have suggested, however, that this analysis remains incomplete and that other more jurisprudential concerns also play a considerable role in each Justice's voting behavior. In particular, a Justice's views about what the Court does and should accomplish when it decides a case on the merits—including views on the nature of precedent, the importance of uniformity in federal law, and the Court's proper role in effectuating social change—help to shape the contours of individual decisions about case selection as part of this complex dynamic.

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cases, all of which have arguably strong claims.").

292. *Brown v. Allen*, 344 U.S. 443, 542 (1953) (Jackson, J., concurring).