

Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits

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In this Article the authors examine how the Supreme Court exercises its virtually unfettered control over case selection. With its certiorari power, the Court sets its direction and influences the country's social agenda, yet relatively little is known about how the Justices choose cases because of the intense secrecy that envelops this aspect of their work. Using data from the private papers of retired Justices, the authors analyze whether, and to what extent, the Justices cast their votes to grant or deny cases based on whether they expect to win on the merits. More specifically, the authors analyze whether Justices who are ideologically aligned on the merits also tend to vote together at the case selection stage and, similarly, whether Justices who are ideologically opposed on the merits also tend to cast opposing votes at the case selection stage. In addition, the authors look more closely at the Justices' voting behavior from the certiorari stage through the merits stage in two special sets of cases—those granted unanimously and those granted by a minority—to see whether the Justices' votes on certiorari are merely a precursor to their votes on the merits. The authors find that although there is a substantial strategic element in the Justices' case selection decisions, jurisprudential and institutional considerations play a significant role as well.

I. INTRODUCTION

One of the most critical aspects of the Supreme Court's work is also its least understood—the granting of certiorari. With its decisions about which cases to take up for full review on the merits, the Court shapes not only its

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own legal agenda, but also the country's agenda on socially controversial and politically sensitive issues. Indeed, even the Court's decisions *not* to take up particular issues are significant, as delay may allow for the personnel on the Court to change, for the political climate in which the case is heard to shift, or for the relevant case law to evolve—any of which can decisively influence the ultimate resolution of those issues.

Decisionmaking at the certiorari stage may thus be “second to none in importance,”¹ yet relatively little is known about how the Justices actually decide which cases to grant for full consideration on the merits. The certiorari process is conducted in secret; the Court merely announces whether each petition for certiorari was granted or denied without revealing votes or reasons. Moreover, the Justices exercise virtually unfettered discretion to decide whether or not to grant review.

With the twin benefits of secrecy and complete discretion, each individual Justice is free to cast his or her vote on any basis, including one that is purely strategic. Indeed, a Justice's vote on certiorari could serve merely as a preliminary vote on the merits. If the Justice is dissatisfied with the result below and thinks that he or she can win on the merits, then the Justice votes to grant the case, otherwise to deny it. Despite this possibility, we have previously argued that the Justices' decisions on certiorari are based on a complex and multidimensional set of considerations that also include administrative, rule-based, and jurisprudential factors.² While there is little doubt that a broad array of factors plays a role in the case selection process, it remains unclear how great their role is in relation to the impact of merits-oriented factors.

In this Article, we consider whether, and to what degree, a Justice's decisionmaking at the certiorari stage is influenced by his or her view of the merits of the cases under consideration. Using information on the Justices' certiorari votes that we gathered from the private papers of Justices Blackmun, Brennan, and Marshall, we compare the Justices' voting behavior at the case selection stage in cases granted to their voting behavior at the merits stage. We find that Justices who are ideologically aligned on the merits tend to vote together on certiorari much more consistently than those Justices who are ideologically opposed on the merits, suggesting that there is a significant merits-oriented component to the Justices' certiorari formulas.

¹ William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477 (1973).

² See generally Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389 (2004) [hereinafter Cordray & Cordray, *Philosophy of Certiorari*] (discussing the certiorari process and the factors that influence decisionmaking at the certiorari stage).

However, we also find that the rate of agreement between almost all Justices is significantly lower on certiorari than it is on the merits, and that this decrease is most pronounced for Justices who are ideologically aligned. These results indicate that other factors also play an important role in the Justices' decisionmaking on certiorari.

In addition, we look more closely at the Justices' voting behavior from the certiorari stage through the merits stage in two special sets of cases—those granted unanimously and those granted by a minority (that is, with the minimum four votes required). In both sets of cases, we find that the Justices' agreement at the certiorari stage does not merely presage their agreement about the merits. Indeed, in our sample, more than one-quarter of the cases granted unanimously resulted in a five to four decision on the merits, indicating that many of the Justices voted to grant these cases based on their sense of the Court's institutional responsibilities, rather than because they were likely to win. Similarly, in more than one-third of the cases granted with only four votes the Court reached a unanimous decision on the merits, suggesting that many of the Justices who voted to deny these cases did so not for ideological or strategic reasons, but rather because of concerns about the quality or importance of the cases.

We begin with an overview of certiorari, discussing the Court's processes and the factors that influence the Justices' decisionmaking. We then embark on an analysis of the Justices' voting behavior using original data that we compiled on voting alignments at the certiorari stage. This analysis helps us to shed new light on the vexing issue of whether and to what extent the Justices' votes on certiorari are more than just preliminary votes on the merits. At the end of the Article, we provide several appendices with specifics about the Justices' voting alignments on certiorari and on the merits.

II. THE SUPREME COURT'S CASE SELECTION PROCESS

The Court's decisionmaking process at the certiorari stage is fundamentally different from traditional judicial decisionmaking. In stark contrast to traditional judicial processes, case selection decisions are made without constraining criteria, majority rule, public accountability, or collegial deliberation. Indeed, the Justices' process for deciding which cases to grant for full consideration on the merits provides the Justices with virtually unfettered discretion.³

The Court's own Rule 10 sets out the considerations that the Court takes into account in determining whether to grant or deny certiorari as follows:

³ See generally *id.* at 400–06 (discussing the lack of constraint on decisionmaking at the certiorari stage).

whether a lower 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 . . . 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.”⁴ This rule, however, pointedly exerts no restraint on the Justices’ decisionmaking, emphasizing that review “is not a matter of right, but of judicial discretion,” and that the criteria noted are “neither controlling nor fully measuring [of] the Court’s discretion.”⁵

This discretion is further enhanced by the secrecy with which the Court acts on petitions; no record of the Court’s vote is ever published, and typically no explanation of the Court’s decision is ever provided.⁶ As a

⁴ 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.

⁵ See SUP. CT. R. 10. See also H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 221 (1991) (“Fundamentally, the definition of ‘certworthy’ is tautological; a case is certworthy because four justices say it is certworthy.”); Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 736 (1993) (reviewing PERRY, *supra*) (“[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 . . .”).

⁶ 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 then substantive

result, the case selection process is freed from precedential constraints, relieving the Justices of any obligation of consistency from case to case.⁷

In addition, the Justices engage in almost no collective deliberation about which cases they will grant. The initial review of the approximately 7,000 petitions that are filed each term is done individually by each Justice, with the help of his or her law clerks.⁸ Some commentators have suggested that the “cert pool,”⁹ which an increasing number of Justices have joined over the years, tends to homogenize the Court’s consideration of petitions for review and thereby create an artificial uniformity of voting behavior.¹⁰ But there is

reasons are rarely given. *See* S. Sidney Ulmer, *The Decision to Grant Certiorari as Indicator to Decision “On the Merits,”* 4 POLITY 429, 432 (1972) (describing a study which demonstrated the rarity with which the Court explained its reasons for granting or denying a case). *See generally* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1723–25 (2000) (discussing the effects of secrecy).

⁷ *See* John M. Harlan, *Manning the Dikes*, 13 REC. ASS’N B. CITY N.Y. 541, 556–57 (1958) (noting the lack of precedential constraint); Hartnett, *supra* note 6, at 1723 (same). This secrecy is justified on two grounds. The first is that processing thousands of petitions each term does not permit the use of more elaborate procedures. *See* William H. Rehnquist, *Sunshine in the Third Branch*, 16 WASHBURN L.J. 559, 561 (1977) (explaining that “because there are 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”). The second is that the Court wants the flexibility to wait for the “right” case, to allow “percolation” of the issue in the lower courts, and to control the size of its docket. *See, e.g.,* Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1119 (1988) (“[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. . . .”); Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 689–91 (1990) (discussing the pros and cons of percolation).

⁸ *See, e.g.,* PERRY, *supra* note 5, 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 Caldeira & Wright, *Discuss List*] (noting that “the makeup of the discuss list is the summation of a series of individual calculations largely free of collective interaction”).

⁹ Through the “cert pool,” a group of Justices allow their law clerks to share the task of preparing memoranda summarizing the petitions for review. *See* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 790–91 (2001) [hereinafter Cordray & Cordray, *Plenary Docket*] (describing the operation and growth of the cert pool).

¹⁰ *See, e.g.,* BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 257–58 (1996) (noting criticisms of the cert pool); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1376–77 (2006) (decrying the use of the cert pool and its perceived effect

strong evidence that the pooling of law clerks has little systematic impact on certiorari decisionmaking by individual Justices.¹¹

Unless at least one Justice places a case on the “discuss” list, the petition is simply denied.¹² Cases that make it onto the discuss list do receive some collective consideration before they are voted on in conference,¹³ but because of the intense demands of the Justices’ schedules, this discussion tends to be quite perfunctory.¹⁴ In consequence, the certiorari process is “relatively atomistic with decisions being made within chambers and the outcome on cert. being primarily the sum of nine individual decision processes.”¹⁵

on the Justices); David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 968–97 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) and ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006)) (using data from cert pool memos to suggest that, with eight Justices now participating in the cert pool, the law clerks’ recommendations have greater influence).

¹¹ See Cordray & Cordray, *Plenary Docket*, *supra* note 9, at 790–93 (arguing that the cert pool does not affect the Justices’ decisionmaking on certiorari); Barbara Palmer, *The “Bermuda Triangle?”: The Cert Pool and Its Influence Over the Supreme Court’s Agenda*, 18 CONST. COMMENT. 105, 106–20 (2001) (using statistical evidence to show that the cert pool has remarkably little influence on certiorari voting). Also, circulation of a clerk’s summary memorandum to the Justices does not constitute collegial deliberation among the Justices.

¹² See, e.g., John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 13 (1983) (describing the “discuss” list and the “dead” list); Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. ST. B. J. 346, 349 (1982) (same); see also PERRY, *supra* note 5, at 85–91 (same); Caldeira & Wright, *Discuss List*, *supra* note 8, at 809–13 (same).

¹³ The Justices usually conference on Wednesday and Friday during argument weeks and at the end of each recess. See White, *supra* note 12, at 383; DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 198–207* (6th ed. 2003). As of 1990, there were normally forty to fifty cases discussed at each conference. See Caldeira & Wright, *Discuss List*, *supra* note 8, at 812.

¹⁴ See PERRY, *supra* note 5, at 149. The Justices must review thousands of petitions for certiorari each year. Chief Justice Hughes felt that the Court could allot no more than 3½ 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). Professor Hart estimated that each Justice can spend only about 20 minutes *in total* on each nonfrivolous petition, including all the time needed 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, 88 (1959).

¹⁵ PERRY, *supra* note 5, at 163. Put differently, “the extent to which the nine Justices operate as ‘nine little law firms’ is maximized here.” Cordray & Cordray, *Plenary Docket*, *supra* note 9, at 783 (quoting BERNARD SCHWARTZ, *DECISION: HOW THE*

III. FACTORS INFLUENCING CASE SELECTION DECISIONS

Because decisionmaking at the certiorari stage is both atomistic and unfettered, the voting behavior of each Justice is constrained only by his or her own sense of what kinds of cases merit the Court's attention.¹⁶ Justice Harlan neatly explained the Justices' own widely-shared view: "[f]requently the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules."¹⁷ But although it is just a "feel," it seems to remain fairly stable over time for each Justice, at least with regard to the relative quantity of cases he or she votes to grant.¹⁸ This consistency suggests that each Justice has his or her own internal but durable formula for determining which cases the Court should hear.

The precise content of these highly individualized formulas is ultimately unknowable (even by the Justices themselves), but statistical research has demonstrated that certain discrete factors do play a significant role in the Justices' decisionmaking. Some of these factors derive from the substantive considerations articulated in the Court's Rule 10, whereas others appear to be more jurisprudential or administrative in nature, and still others are best described as fundamentally ideological or strategic.

SUPREME COURT DECIDES CASES 6 (1996) (attributing this formulation to "a number of" Justices)).

¹⁶ ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 166 (7th ed. 1993) (observing that a case may be granted or denied for "any reason that the Court sees fit"); 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.").

¹⁷ Harlan, *supra* note 7, at 549. See also Brennan, *supra* note 1, at 479 (subscribing "completely" to this observation); WILLIAM O. DOUGLAS, *THE COURT YEARS 1937-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 175-76* (1980) ("[T]he job here [deciding whether to grant plenary review] is so highly personal, depending upon the judgment, discretion, and experience and point of view of each of the nine of us . . ."); WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 265 (1987) ("Whether 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.").

¹⁸ DORIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* 114-15 (1980) (noting that conference votes from both the Vinson and the Warren Courts show that the Justices tend "to be consistent in the strength of their propensity to vote for review" and so the "rank order of the justices thus remained fairly constant over the entire period," especially in periods of a "natural" Court where there were no personnel changes). Although there are a few exceptions to this pattern in the Burger and Rehnquist Courts, overall there continues to be a marked consistency in voting behavior. See Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 2, at 419, 440-41, 447-48 (discussing the overall consistency and explaining the aberrations).

A. Rule-Based and Jurisprudential Factors

Several important factors flow from Rule 10 itself, which focuses on whether the lower court decision creates a conflict and whether the case presents an important federal question.¹⁹ In particular, the existence of a genuine conflict between the lower courts or between the lower court and a Supreme Court precedent dramatically increases the probability that the Court will grant a case.²⁰ Similarly, when the United States is a petitioner, the Court is far more likely to grant the case.²¹ The Court consistently grants over 50% of the Solicitor General's petitions for certiorari, whereas it grants only about 3% of paid petitions filed by other parties.²² This is largely because the key "importance" criterion for review is almost necessarily met when the federal government seeks review, asserting that it is substantially affected by a lower court decision or that decisional conflicts require it to operate differently across the country.²³ In addition, amicus curiae briefs

¹⁹ See SUP. CT. R. 10; see also *supra* notes 4 and 5 and accompanying text (discussing the provisions of Rule 10).

²⁰ 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 Caldeira & Wright, *Organized Interests*] ("Whenever actual conflict was present, the likelihood that certiorari was granted jumped dramatically."); Stras, *supra* note 10, at 981–83 (noting that in the 2003–2005 Terms, approximately 70% of cases granted involved a conflict among the lower courts); S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 906–11 (1984) (demonstrating a significant relationship between the grant of certiorari and the presence of genuine intercourt conflict or conflict with Supreme Court precedent); S. Sidney Ulmer, *Conflict with Supreme Court Precedent 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).

²¹ See, e.g., Caldeira & Wright, *Discuss List*, *supra* note 8, at 829 (finding that the presence of the United States as petitioner is a key determinant in the decisional calculus); Caldeira & Wright, *Organized Interests*, *supra* note 20, at 1115, 1121 (same); Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISIONMAKING 111, 122–23 (Glendon Schubert ed., 1963) (same).

²² See STERN ET AL., *supra* note 16, at 164 n.6; see also REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 25 (1992) (finding that, 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% of the time).

²³ The Solicitor General's success is also 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. See, e.g., STERN ET AL., *supra* note 16, at 164 (noting that the 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");

filed in support of (or even in opposition to) the petition for certiorari significantly increase the likelihood that the Court will grant review, presumably because they signal the Justices that the case has broader social, political, or economic significance.²⁴

Other, more jurisprudential considerations also play an important part in each Justice's decisionmaking, because the central notion of what constitutes an "important question" is inevitably colored by the Justice's own views on an intricate web of other factors. Indeed, even a criterion that appears to be objective—the existence of a conflict between the lower courts—carries only as much weight in the overall mix as each Justice chooses to assign it. While 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,²⁵ there is a wide variance in the importance that individual Justices attach to achieving uniformity in the application of federal law and thus in their inclination to

RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 142 (1996) (describing the Solicitor General's office as "superbly staffed").

²⁴ See Caldeira & Wright, *Organized Interests*, *supra* note 20, at 1111–12. Based on data from the 1982 Term, the authors showed 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 40 to 50%, and the filing of two or three amicus briefs increases the likelihood even more. *See id.* at 1119, 1122. Amicus briefs help to flag importance because they are expensive to prepare (\$15,000 to \$20,000 in 1988). *See id.* at 1112.

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. *See id.* at 1115; Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review*, 14 SUP. CT. ECON. REV. 1, 2–21 (2006) (analyzing how lower court dissenting judges communicate information to Supreme Court Justices to promote certain cases for review). The Justices may also be more inclined to grant cases in particular subject areas, such as civil liberties, but the research in this area to date is inconclusive. Compare *PROVINE*, *supra* note 18, at 111 (finding that, in the 1947–1957 Terms, the Justices were more inclined to vote for cases involving civil rights and civil liberties) with Caldeira & Wright, *Organized Interests*, *supra* note 20, 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."). In any event, these factors are far less influential than the three major determinants of genuine conflict, the United States as petitioner, and the presence of amicus briefs. *See Caldeira & Wright, Discuss List*, *supra* note 8, at 828–30.

²⁵ See, e.g., Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 5 (1984–85) ("[T]he 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."); PERRY, *supra* note 5, 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.").

vote to grant cases on that basis.²⁶

Another more jurisprudential element in the “feel” that individual Justices have for which cases deserve plenary review is the extent to which they believe that the Court should serve as a force for social change. Some Justices feel that the Court should actively promote a social agenda,²⁷ while others believe that the Court should not seek to be an engine of societal change.²⁸ These different conceptions of the Court’s proper role in American society have ramifications for the Court’s decisions on case selection, as they will help to determine how aggressively (or reluctantly) each Justice reaches out for the types of cases that will effectuate social change.²⁹

A myriad of other factors also influence a Justice’s case selection decisions, such as his or her views on how the Court can best supervise and

²⁶ Justice White, for example, fiercely advocated that a principal task of the Court is “to provide some degree of coherence and uniformity in federal law throughout the land.” White, *supra* note 12, at 349. And he regularly pressed the Court to grant more cases involving circuit conflicts. *See, e.g.*, *Beaulieu v. United States*, 497 U.S. 1038, 1038 (1990) (White, J., dissenting from denial of certiorari). Justice Stevens, in contrast, has a much greater tolerance for conflicts: “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.” John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982). *See generally* Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 2, at 435–41 (discussing this variable in more detail).

²⁷ Justice Brennan is the paradigm example of a Justice with this view. *See, e.g.*, DAVID E. MARION, *THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN, JR.: THE LAW AND POLITICS OF “LIBERTARIAN DIGNITY”* 161–62 (1997) (“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.”); KIM ISAAC EISLER, *A JUSTICE FOR ALL: WILLIAM BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA* 164 (1993) (observing that Justice Brennan took “an active leadership role in trying to find cases that would promote his reforms”).

²⁸ *See* William E. Nelson, *Justice Byron R. White: His Legacy for the Twenty-First Century*, 74 U. COLO. L. REV. 1291, 1297–98 (2003) (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”); *see also* *Reynolds v. Sims*, 377 U.S. 533, 624–25 (1964) (Harlan, J., dissenting) (“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.”).

²⁹ *See generally* Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 2, at 441–49 (discussing this variable in more detail).

guide the lower courts through precedent;³⁰ a special concern for, or a particular interest in, certain areas of the law;³¹ his or her views about the optimal size of the docket;³² and his or her own personal capacity for work.³³

Many of these factors—especially the rule-based factors which focus on the presence of a conflict, the United States as petitioner, and amicus briefs—undoubtedly play a significant role as the Justices cull through the petitions, separating the frivolous from the nonfrivolous cases.³⁴ But within the smaller subset of nonfrivolous petitions, it is unclear how strongly these rule-based, jurisprudential, and administrative factors affect the Justices' decisionmaking. Once a Justice has narrowed the list of candidates for review to several hundred clearly meritorious petitions, how does he or she decide among them? Is it with an eye to shaping an agenda for the Court based on jurisprudential considerations, or is it with an eye to whether he or she will likely win the cases on the merits? To gain a better sense of this, we now look at the existing research on the influence of ideological and strategic factors.

³⁰ See *id.* at 441–49 (discussing how a Justice's view of the proper mode of decisionmaking can influence his or her decisions about case selection).

³¹ See PERRY, *supra* note 5, 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). Justices sometimes develop these interests through their experiences prior to joining the Court, as well as in their service on it. 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.”).

³² See PROVINE, *supra* note 18, 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”); William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231 (1981) (“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.”).

³³ Justices White, Black, and Douglas, for example, all had a great capacity for work and unusually high grant rates. See, e.g., Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003) (opining that Justice White's “readiness to take more cases reflects his extraordinary capacity to tackle hard jobs and get them done”); PROVINE, *supra* note 18, 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.”).

³⁴ See *infra* note 52 and accompanying text (discussing Justices' estimates that approximately 70% of petitions for review are obviously frivolous).

B. Merits-Oriented Concerns

Researchers, primarily from the political science field, have used a variety of approaches to investigate the issue of how motivated the Justices are by their own ideological inclinations and their desire to win at the merits stage. These studies have focused on whether the Justices' case selection decisions are driven by the following: (1) their ideological preferences, so that they tend to vote to grant cases in which they wish to reverse the result below; and (2) their strategic calculations as to whether they can ultimately win the cases on the merits.

Numerous studies have demonstrated that a Justice is more likely to vote to grant a case when he or she disagrees with the result below.³⁵ This data suggests that ideology does motivate the Justices, because in many areas the Justices' ideological preferences undoubtedly influence their views of whether a case was decided rightly or wrongly.³⁶ Chief Justice Rehnquist recognized this fact, stating: "There is an ideological division on the Court, and each of us has some cases we would like to see granted, and on the contrary some of the other members would not like to see them granted."³⁷

The extent to which ideology influences the Justices' decisionmaking is unclear, however. While studies have demonstrated a statistically significant relationship between a Justice's vote to grant a case and his or her vote to

³⁵ See Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision-Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995) (finding "overwhelming evidence that justices are reversal minded in their certiorari votes"); see also Virginia Armstrong & Charles A. Johnson, *Certiorari Decision Making by the Warren and Burger Courts: Is Cue Theory Time Bound?*, 15 POLITY 141, 149 (1982) (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 20, 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).

³⁶ 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).

³⁷ *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 H. Comm. on Appropriations*, 97th Cong. 21 (1981) (testimony of Justice Rehnquist).

reverse on the merits,³⁸ there is no distinction made between cases in which a Justice's inclination to reverse is based on ideology and those in which this inclination is based on purely legal considerations.³⁹

Researchers have also considered whether the Justices engage in a strategic voting calculation at the certiorari stage, taking into account not only whether a case deserves plenary review, but also the likely outcome on the merits.⁴⁰ This type of voting is more sophisticated because, to achieve his or her goal, the actor takes into account the probable actions of other relevant actors, and thus does not necessarily vote in accord with his or her sincere preferences.⁴¹

³⁸ 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); PROVIN, *supra* note 18, 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, *supra* note 6, 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).

³⁹ While there is likely a strong ideological aspect in some areas, in many cases granted (such as tax, bankruptcy, or patent law), it seems much more likely that purely legal considerations will predominate in a Justice's decisional calculus. See Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 542 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998)) (noting that the Court regularly grants "cases that lack ideological or political import" and suggesting that this demonstrates "the power of legal concerns").

⁴⁰ See Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 561–71 (1999) (contending that strategic voting is routine and substantially impacts the Court's docket); see also 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); Boucher & Segal, *supra* note 35, at 830–32, 836 (same; designating the Vinson Court Justices "semistrategic"); Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387, 393–96 (1982) (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).

⁴¹ See Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783, 798–800 (2003) (explaining the difference between the attitudinal model, under which actors behave in accordance with their sincere policy preferences, and the strategic model, under which goal-oriented actors take into account the likely actions of other relevant actors). Under the strategic model, the researcher may specify any type of goal that the actors hold. See *id.* at 798. However, "[v]irtually every existing strategic account

At the Supreme Court's case selection stage, strategic voting is quite feasible because the Justices have sufficient familiarity with their colleagues' inclinations to enable them to predict how they would vote on the merits.⁴² Strategic voting can take a variety of forms, but the most common are the "defensive denial," where a Justice votes against his or her own preference to grant a case rather than risk an undesirable outcome on the merits, and the "aggressive grant," where a Justice reaches out to grant a case to affirm and thereby broaden the effect of a desirable result below.⁴³

Debate about whether the Justices engage in strategic voting continues, but there is mounting evidence that they do.⁴⁴ Not only have Justices acknowledged using such devices,⁴⁵ but empirical research strongly indicates that the Justices do act strategically to at least some extent.⁴⁶

of judicial decisions posits that Justices pursue policy, that is, their goal is to see public policy—the ultimate state of the law—reflect their preferences," *id.*, and we do as well.

⁴² See PROVINE, *supra* note 18, at 126 (pointing out that the "justices work together daily, often for years, so a colleague's reaction could often be anticipated"); see also Caldeira et al., *supra* note 40, at 550 (noting that conditions are favorable for sophisticated voting because certiorari decisions are secret, no justifications are given, the cases are fungible, and the decision to grant often presages the outcome).

⁴³ See, e.g., EPSTEIN & KNIGHT, *supra* note 39, at 80 (describing aggressive grants and defensive denials); PERRY, *supra* note 5, at 198–212 (same); Caldeira et al., *supra* note 40, at 558 (defining these terms and giving examples). Yet another strategic behavior is when a Justice seeks a "good vehicle"—a case with a good set of facts—in order to enhance his or her chances of driving doctrine in a particular way or convincing a swing Justice to join. See PERRY, *supra* note 5, at 281–82 (discussing the importance Justices attach to finding a good vehicle).

⁴⁴ See, e.g., Caldeira et al., *supra* note 40, at 553–71 (providing strong empirical evidence that strategic voting occurs regularly and substantially affects the composition of the Court's plenary docket); Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395, 405 (2002) (opining that, 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.* PROVINE, *supra* note 18, 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 36, 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).

⁴⁵ See PERRY, *supra* note 5, at 198–202 (describing how each of the five Justices he interviewed acknowledged—with varying degrees of approval—use of the defensive denial); Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 2, at nn.122–24 and accompanying text (discussing various Justices' own observations on use of the defensive denial).

⁴⁶ In a widely-respected study of the Court's 1982 Term, the authors found that there is a substantial relationship between a Justice's own ideological position and his or her decisions on certiorari, and that the Justices consider the likely outcome on the merits in

Still, it remains unclear how pervasively such ideological and strategic factors may affect the Justices' decisionmaking. Not surprisingly, there is a spectrum of opinions on the issue. Some contend that the Justices rarely take into account such considerations,⁴⁷ others contend that the Justices do so only in cases that they feel passionately about,⁴⁸ and still others contend that the Justices do so routinely.⁴⁹

To get a clearer picture of the extent to which merits-oriented considerations influence the Justices at the case selection stage, we compared their voting behavior on certiorari to that of other Justices with whom they are ideologically aligned and with whom they are ideologically opposed. In addition, we looked more carefully at cases that the Court granted unanimously to assess whether the Justices' agreement in such cases is reflective of their agreement about the merits, or whether it is lodged in more institutional and jurisprudential concerns about the Court's responsibility to

making those decisions. *See* Caldeira et al., *supra* note 40, at 553–71. In the study, the authors used all of the petitions for certiorari in the 1982 Term (not merely those granted) and measured the Justices' individual preferences based on their votes on the merits in similar cases in the past. 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. Their results were “also robust: [holding] despite controls for the effect of case quality, direction of the lower court decision, and interjustice influence at the certiorari stage.” *Id.* at 566. Further, they determined that this strategic behavior had a substantial effect on the content of the Court's docket; they estimated that the strategic use of “defensive denials” resulted in at least eighteen omissions from the Court's plenary docket in the 1982 Term. *See id.* at 566–70.

⁴⁷ PROVINE, *supra* note 18, at 125–30, 172 (contending that the Burton-era Justices did not act strategically in case selection); Krol & Brenner, *supra* note 36, at 340–42 (doubting whether the Vinson Court in general acted strategically in case selection, but recognizing that individual Justices may have done so); David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417, 1430 (2006) (rejecting the notion that “most Justices are motivated solely by their own policy preferences”).

⁴⁸ *See* PERRY, *supra* note 5, at 274–82. Perry contended that in most cases the Justices follow a “jurisprudential mode” of decisionmaking, where in essence they take each nonfrivolous petition through a series of gates, considering whether there is a conflict in the circuits, how important the issue is, how urgent resolution of the issue is, and whether the particular case is a good vehicle substantively and procedurally. *See id.* at 277–79. In those cases where a Justice cares deeply about a particular issue, though, he or she employs the “outcome decision mode,” where “the first thing that the justice does is try to make an assessment of whether or not he will win on the merits. If he thinks he will not, he will vote to deny the case.” *Id.* at 280. If, on the other hand, “the justice thinks he will win on the merits, and if [the case] allows him to move doctrine in the way he wishes,” then the Justice will vote to grant. *Id.* at 265.

⁴⁹ *See* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 293 (2005) (“[C]entral to positive scholarship is the notion that the Justices are strategic in using their almost unlimited control over their docket to manage their agenda along ideological terms.”).

review certain kinds of cases. We also looked closely at cases granted with only four votes to determine whether the Justices' disagreement in such cases seems to be based on their disagreement about the merits, or whether it reflects a division over the need for the Court to afford the case plenary review.

IV. VOTING ALIGNMENTS AT THE CASE SELECTION STAGE

As the Justices undertake their initial cut to determine which petitions are potentially meritorious, the most basic legal criteria—such as whether the case presents a federal question, whether the judgment below is final, and whether there are independent state grounds for the decision below—undoubtedly predominate in their decisionmaking.⁵⁰ And in many cases, straightforward rule-based considerations—such as whether the case presents a conflict among the lower courts or whether it has sparked any interest from third-party groups filing as amici—yield a clear assessment that the petition does not justify full briefing and argument.⁵¹ Indeed, the Justices themselves have commented that approximately 70% of the petitions filed are obviously frivolous and easily rejected.⁵² But each term, the initial culling process still leaves well over a thousand cases that could generously be viewed as potentially meritorious, and surely several hundred petitions that are “certworthy” in the sense that they are excellent candidates for plenary review.

What remains unclear is how significantly the Justices' decisionmaking in this subset of nonfrivolous petitions is influenced by merits-based factors, namely ideological and strategic considerations about whether victory can be achieved in a particular case and how a decision in that case will drive the further evolution of legal doctrine. Merits-oriented factors obviously cannot fully account for the differences in the Justices' voting records on certiorari.

⁵⁰ See Brennan, *supra* note 1, at 478 (providing examples of petitions for review that are “clearly frivolous”); PERRY, *supra* note 5, at 222–26 (giving examples of frivolous certiorari petitions described to him in interviews with Justices and clerks).

⁵¹ See *supra* note 4 and accompanying text (setting out Rule 10); see also PERRY, *supra* note 5, at 277–79 (suggesting that, at least in cases where they do not care strongly about the outcome, the Justices make their decisions based on a series of legal considerations such as whether a conflict exists).

⁵² See Brennan, *supra* note 1, at 479 (noting that “the Court is unanimously of the view in 70% of all docketed cases, that the questions sought to be reviewed do not even merit conference discussion”); White, *supra* note 12, at 349 (“Chief Justice Taft told Congress in 1925 that about 60% of the cases filed were obviously without merit and should not have been filed at all. It is not much different today. About 70% of the cases filed do not make the discuss list and are unanimously denied. Most of these cases take very little time.”).

Even a simple look at the quantity of votes cast on certiorari shows that more is at work than just maximizing victory and minimizing defeat.⁵³ Justice White, for example, voted with Chief Justice Burger and Justice Powell approximately 80% of the time on the merits, and yet he cast dramatically more votes to grant certiorari than they did.⁵⁴ To take another striking illustration, even during a period in which he stood consistently as a key swing vote on the merits, Justice Kennedy typically voted less frequently to grant new cases than almost any other Justice.⁵⁵ By contrast, Justice Blackmun was one of the most frequent dissenters towards the end of his tenure, and yet he consistently ranked among the top three Justices with respect to number of votes to grant cases.⁵⁶ But how significant are merits-oriented considerations in the Justices' case selection formulas?

For a new perspective on the extent to which the Justices' certiorari decisions in nonfrivolous cases are driven by their view of the merits, we compared their voting patterns at the two decision stages. In particular, we looked at whether Justices who are ideologically aligned on the merits also tend to vote together at the certiorari stage, and whether Justices who are ideologically opposed on the merits also tend to disagree at the certiorari

⁵³ See Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 2, at 416–18.

⁵⁴ Over the terms that the Justices overlapped in our survey, Justice White voted with Chief Justice Burger 84% of the time and with Justice Powell 78% of the time in cases on the merits. These figures come from the *Harvard Law Review's* annual recap of the Supreme Court terms. These statistics are found in the first issue of each volume of the *Harvard Law Review*; Volumes 98–108 include the statistics for the 1983–1993 Terms, respectively, and will be cited hereinafter as “*Supreme Court Statistics*.” On certiorari, Justice White voted to grant an average of 223 cases per term during this period, whereas Chief Justice Burger voted to grant an average of 138 cases per term and Justice Powell voted to grant an average of 118 cases per term.

⁵⁵ During each of the 1991–1993 Terms, Justice Kennedy dissented on the merits fewer times than any other Justice. See *Supreme Court Statistics*, *supra* note 54. Yet in each of those terms, he had either the second or third *lowest* number of votes to grant certiorari.

⁵⁶ During each of the 1991–1993 Terms, Justice Blackmun was either the most or second-most frequent dissenter on the merits. See *Supreme Court Statistics*, *supra* note 54. Yet in each of those terms, he had either the second or third *highest* number of votes to grant certiorari. Similar examples from the Vinson Court include Justice Jackson, who generally won on the merits but voted infrequently to grant review, and Justices Douglas and Black, who frequently lost on the merits but ranked at the top in votes to grant review. See PALMER, *supra* note 38, at 56–57 (showing that on the Vinson Court, Justice Jackson ranked at or near the bottom in voting to grant review, while Justices Douglas and Black were at the top); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963*, at 103–13 (1965) (placing Justice Jackson as one of the “moderate conservatives” whose votes were most often decisive in merits cases; placing Justices Black and Douglas as “liberals” who often ended up dissenting in merits cases).

stage. We also took a closer look at two special sets of cases: those that are granted unanimously and those that are granted by a minority (that is, with only four votes). Specifically, we analyze whether the vote on certiorari is mirrored on the merits, or whether the Justices are voting in these cases based on institutional and jurisprudential concerns.

To gauge the ideological compatibility of the Justices, we relied on the *Harvard Law Review's* annual statistical recaps, which provide data on voting alignments in merits cases for each pair of Justices. That data shows the frequency of agreement between each pair of Justices in cases decided on the merits, and thus provides a useful measure of the extent to which the Justices are ideologically in (or out of) sync with each other.⁵⁷

Because the Justices' votes on certiorari are never published, they are not included in the statistical recaps, but information on these votes is available in the papers of retired Justices. We gathered data on the Justices' case selection votes for the 1983 through the 1993 Terms from the docket books of Justices Blackmun, Brennan, and Marshall.⁵⁸ With this data, we compiled the voting alignment information for each pair of Justices at the certiorari stage, similar to that which the *Harvard Law Review* has regularly compiled at the merits stage. The results for each pair of Justices both on certiorari and on the merits are set out in Appendix A.

To make the comparison more meaningful, we limited our universe of voting data to those petitions granted for plenary review on the merits. Because so many petitions are frivolous, and because all of the Justices simply vote to deny them, each pair of Justices is actually in agreement well over 90% of the time.⁵⁹ Restricting the data to cases granted eliminated the

⁵⁷ The *Harvard Law Review* treats two Justices as having voted together "whenever they join in the same opinion, as indicated either by the reporter or by the explicit statement of a Justice in the body of his own opinion." *The Supreme Court, 1967 Term—The Statistics*, 82 HARV. L. REV. 93, 307 n.f (1968). It calculates the percentage of agreement by dividing the number of times that one Justice voted with another in opinions of the Court, opinions announcing the judgment of the Court, concurrences, and dissents by the number of cases in which both Justices participated. *See id.*; *see also id.* at 301–02 (describing more fully how it calculates the statistics).

⁵⁸ We treated all "Join-3" votes as votes to grant because they function as such. *See generally* Cordray & Cordray, *Plenary Docket*, *supra* note 9, at 780–81 (discussing Join-3 votes). A Join-3 vote is a vote to grant review if, but only if, at least three other Justices vote in favor of review. *See* 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, 788–99 (1997) (describing the rise and subsequent decline of the Join-3 vote).

⁵⁹ In 1983, 4222 new cases were filed; that number has steadily risen, reaching 6897 in 1993. *See* LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS* 62 tbl.2-2 (4th ed. 2007) [hereinafter EPSTEIN ET AL., *COMPENDIUM*]. During that same time period, no Justice voted to grant more than 275 cases in a term, and the great majority voted to grant fewer than 150.

many frivolous cases and the superficial impression of overwhelming agreement that they produce. Moreover, limiting the universe in this way made the comparison between agreement on certiorari and agreement on the merits much more direct.⁶⁰ In other words, using the subset of cases granted at the certiorari stage allows a much tighter comparison of the Justices' voting behavior at the two decision points—case selection and then the merits.⁶¹

A. *Alignments at the Certiorari and Merits Stages*

When the Justices take distinct looks at the same set of cases at these two different points in their decisionmaking process, how closely related are their voting alignments? To what extent is the decision on certiorari a precursor of the decision on the merits? If a vote on certiorari is merely a preliminary vote

⁶⁰ The comparison is not perfect for several reasons. First, we are comparing the Justices' voting behavior in the term during which they cast the votes, whether on certiorari or on the merits. Many of the cases granted in one term are not decided on the merits until the following term (or even later), so the cases voted on at the certiorari stage are not identical to the cases voted on at the merits stage in any given term. However, we have averaged the voting alignments data over the terms that each pair of Justices sat together, so the comparison is nonetheless quite good. Second, when a Justice retires or joins the Court, he or she will have cast some votes at one decision point but not the other. Third, we included all cases that were granted in our certiorari data set; these do not line up perfectly with cases ultimately decided on the merits because some were later dismissed (usually because the parties settled or the Court determined that the writ of certiorari was improvidently granted).

⁶¹ The other alternative would be to use the data from a larger subset of the nonfrivolous petitions filed. One way to do this would be to include all cases that received at least one vote to grant. We opted against this approach because it too readily allows the views of one idiosyncratic Justice to create a false sense of agreement among the other eight Justices. Justice White, for example, voted to grant approximately 100 more cases per term than any other Justice. Including all of those cases would significantly, but somewhat misleadingly, increase the rate of agreement among the eight other Justices. We recognize, however, that use of only cases granted poses problems as well. *See* Caldeira et al., *supra* note 40, at 552 (discussing downside of limiting data set to cases granted). First, it does not capture certain kinds of strategic behavior, such as successful defensive denials. Second, it fails to identify certain kinds of nonstrategic behavior. Justice White, for example, voted to grant an unusually large number of cases presenting conflicts among the lower courts. *See, e.g.,* 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.”). And Justices Brennan and Marshall voted to grant all death penalty cases. *See, e.g.,* EPSTEIN & KNIGHT, *supra* note 39, at 60 n.c (1998) (discussing why Justices Brennan and Marshall issued dissents from denial in all capital cases that the Court refused to hear).

on the merits, then one would expect to find that the voting alignments among the Justices are basically the same at these two decision points. But the manner and extent to which the voting alignments diverge should shed light on the relative strength of the factors that are not merits-oriented—the rule-based and jurisprudential factors—in the Justices’ decisionmaking at the certiorari stage.

1. *Ordinal Rankings*

The ordinal rankings of the pairings of Justices in the two sets of data—alignment on merits votes and alignment on certiorari votes—confirm that merits-oriented voting at the certiorari stage is a very real phenomenon.⁶² Over the eleven terms surveyed, with relatively few exceptions, Justices who voted together most frequently on the merits also tended to vote together most frequently on certiorari. Of the seventy-six pairings, for example, Justices Brennan and Marshall voted together most frequently on the merits and on certiorari. Justices Scalia and Thomas likewise ranked near the top of both lists, as did Chief Justice Rehnquist and Justice O’Connor.⁶³ The same correlation also tended to hold with those pairings of Justices who voted together least often on the merits. Chief Justice Rehnquist and Justice Marshall, for example, were in the bottom nine pairings on both lists, as were Justices Brennan and Scalia.⁶⁴ Indeed, as a general matter most Justices from one end of the spectrum on merits voting were also grouped toward the same end of the spectrum on certiorari voting.⁶⁵

There were, however, some notable exceptions. Justice Blackmun, for example, voted regularly with Justices Brennan and Marshall on the merits, but did so far less frequently on certiorari.⁶⁶ And the same was true for

⁶² See Appendix B (setting out the pairings of Justices ranked ordinally by their agreement rate on the merits, averaged over the eleven terms, along with their agreement rate on certiorari and ordinal ranking on certiorari).

⁶³ Justices Scalia and Thomas were fifth in agreement rate at the merits stage and eighth at the certiorari stage; Chief Justice Rehnquist and Justice O’Connor were ninth in agreement rate at the merits stage and fourth at the certiorari stage. *Id.*

⁶⁴ Chief Justice Rehnquist and Justice Marshall were seventy-third in agreement rate at the merits stage and seventy-first at the certiorari stage; Justices Brennan and Scalia were seventy-second in agreement rate at the merits stage and sixty-eighth at the certiorari stage. *Id.*

⁶⁵ Twenty-three pairs of Justices had a merits agreement rate of over 75%; all but five of them had an ordinal ranking on certiorari between one and twenty-six. *See id.* Twenty pairs of Justices had a merits agreement rate of 55% or lower; all but four of them had a certiorari ordinal ranking between fifty-one and seventy-six (i.e., in the bottom twenty-five). *See id.*

⁶⁶ In rankings, Justices Blackmun and Brennan were sixteenth on the merits and

Justice Blackmun in the other direction as well; he voted infrequently with Justice Thomas and Chief Justice Rehnquist on the merits, but did so much more regularly on certiorari.⁶⁷ In fact, Justice Blackmun voted more frequently on certiorari with Justice Thomas and Chief Justice Rehnquist than he did with Justices Brennan and Marshall. Similar aberrations occurred with several other pairs of Justices as well,⁶⁸ and reflect, at least in part, the individuality of decisionmaking at the certiorari stage. They also indicate that merits-oriented concerns are not the only consideration at the certiorari stage, even in the narrow subset of cases that are by definition “certworthy.”

Nevertheless, the correlation between the ordinal rankings of Justices at the certiorari and merits stages was surprisingly close. At the certiorari stage, there are many factors that could cause even closely allied Justices to stray, including different subject area interests, different strategic assessments of the likely outcome on the merits, and different emphases on the importance of the various rule-based and jurisprudential considerations. In addition, the Justices make their decisions in relative isolation, without the benefit of much, if any, collegial deliberation about the cases. Despite all of this, the ordinal rankings for agreement on certiorari largely carry over to the merits, strongly indicating that ideological and strategic concerns about the outcome on the merits play a significant role in the case selection decisions of most Justices.

2. Overall Rates of Agreement

While merits-oriented concerns are a significant factor, the overall rates of agreement between Justices tend to show that decisions made at the certiorari stage are more than just preliminary votes on the merits. In general, the rate of agreement among the pairs of Justices was lower at the certiorari stage than it was on the merits. Indeed, the rate of agreement was lower on certiorari for sixty-two of the seventy-six pairs of Justices, and the difference

fiftieth on certiorari; Justices Blackmun and Marshall were eighteenth on the merits and forty-eighth on certiorari. *Id.*

⁶⁷ In rankings, Justices Blackmun and Thomas were seventy-fifth on the merits and forty-fifth on certiorari; Justice Blackmun and Chief Justice Rehnquist were fifty-seventh on the merits and thirty-eighth on certiorari. *Id.*

⁶⁸ Justice Powell, for example, when paired with Chief Justice Burger, ranked as ordinal six in voting on the merits, but the same pairing sank to ordinal forty-two in voting on certiorari. *See* Appendix B. The same was true for Justices Powell and Scalia, who were twenty-fifth on the merits and fifty-seventh on certiorari. *Id.* Other aberrations include Chief Justice Burger and Justice White, who were seventh on the merits and forty-seventh on certiorari, and Justices Thomas and Stevens, who were dead last on the merits (seventy-sixth) but forty-ninth on certiorari. *Id.*

was statistically significant for all but one of those pairs.⁶⁹ Moreover, the average rate of agreement for all pairs of Justices over the eleven terms surveyed was 8% lower at the certiorari stage than at the merits stage.⁷⁰

Particularly among Justices who were closely aligned on the merits, the consensus was systematically less uniform on certiorari. Chief Justice Burger and Justice Rehnquist, for example, were aligned on the merits in almost 90% of the cases, but were aligned on certiorari in under 70% of the cases.⁷¹ At the other end of the ideological spectrum, Justices Brennan and Marshall were aligned on the merits in 95% of the cases, but agreed on certiorari in only 80% of the cases.⁷²

⁶⁹ In the social sciences, a comparison is considered to be statistically significant if there is only a 5% chance that the difference in means observed could have occurred by chance alone; if the “t-statistic” is above 1.96, then the difference is statistically significant at the .05 level. *See* EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 448–53 (6th ed. 1992) (discussing statistical significance); THOMAS H. WONNACOTT & RONALD J. WONNACOTT, *INTRODUCTORY STATISTICS* 291–96 (5th ed. 1990) (same).

In our sample of seventy-six pairs, sixty-two had agreement rates that were lower on certiorari than on the merits, and the difference was statistically significant for sixty-one of those pairs. *See* Appendix C (showing the level of statistical significance for each pairing). Fourteen pairs had agreement rates that were higher on certiorari than on the merits, and the difference was statistically significant for twelve of those pairs. *See id.* Overall, therefore, 80.3% of the comparisons were statistically significant and in the expected direction. *Id.* While the comparisons indicate a strong degree of statistical significance, making it unlikely that the differences were caused by chance alone, we caution that the comparisons were not exact. We compared the Justices’ voting behavior in the term during which they cast the votes, whether on certiorari or the merits. However, many cases granted are not decided until the following term, so the cases voted on are not identical in any given term. *See supra* note 60 (discussing this phenomenon). Second, we did not consider the entire population of cases considered for certiorari, but rather limited our analysis to cases granted for plenary review on the merits. *See supra* notes 59–61 and accompanying text (explaining the reasons for limiting the data in this way). While we believe that this limitation makes the comparison more useful, we recognize that the certiorari agreement rates would be much higher if we included all cases considered on certiorari.

⁷⁰ The average rate of agreement at the merits stage was 66.1%; at the certiorari stage it was 58.1%. *See* Appendix B.

⁷¹ Chief Justice Burger and Justice Rehnquist were aligned on the merits in 89.5% of the cases, but were aligned on certiorari only in 67.8% of the cases. *Id.* Similar results were obtained for other conservative pairs: Chief Justice Burger and Justice O’Connor (87.6% to 66.1%), Chief Justice Burger and Justice Powell (84.9% to 58.1%), and Justices Powell and O’Connor (85.3% to 63.9%). *Id.* Occasionally the gap was narrower, as between Chief Justice Rehnquist and Justice O’Connor (82.4% to 72.0%), Justices Scalia and Thomas (84.9% to 70.2%), Chief Justice Rehnquist and Justice Scalia (78.4% to 66.3%), and Chief Justice Rehnquist and Justice Kennedy (80.8% to 67.9%). *Id.*

⁷² Justice Brennan and Justice Marshall were aligned on the merits in 95.0% of the cases, but were aligned on certiorari in 80.7% of the cases. *Id.* Similar results were

Nonetheless, occasional pairs of Justices agreed more frequently on certiorari than they did on the merits. Interestingly, all of the fourteen pairs for whom this was true included Justice Ginsburg (for whom we have data only from her first term on the Court), Justice Blackmun (whose certiorari behavior was idiosyncratic in a variety of ways), Justice Scalia, or Justice Thomas.⁷³ Moreover, the agreement rate on certiorari was generally only slightly higher for these pairs of Justices. Only the two pairs with the widest disparities on the merits—Justice Thomas and Justice Stevens, and Justice Thomas and Justice Blackmun—had a substantially higher rate of agreement on certiorari than they did on the merits.⁷⁴

Again, however, the great majority of Justices had a lower agreement rate at the certiorari stage than they did on the merits. This result suggests that voting on certiorari is somewhat more complicated for the Justices than voting on the merits, and involves a greater array of competing considerations. It may well reflect that the Justices are putting rule-based, jurisprudential, and administrative considerations ahead of merits-oriented considerations in some cases. But it could also be partly a symptom of the relative isolation in which the Justices make their case selection decisions. This isolation may make it more difficult for the Justices to calculate the strategic implications of voting for or against certain cases, even if those considerations continue to drive many of their decisions. It is also possible that at least some of the Justices were voting to grant or deny certain cases for reasons that are not directly ideological or strategic—such as interest (or lack of interest) in a particular subject area—but that are not necessarily inconsistent with a merits-oriented approach to case selection.

3. *Ideologically Aligned and Ideologically Opposed Pairs*

Two patterns stand out in the voting alignments data; the ordinal rankings of the Justices remain fairly constant on both the merits and on certiorari, but the Justices' agreement rates tend to be lower on certiorari than they are on the merits. These patterns suggest that merits-oriented concerns play a substantial role in the Justices' case selection decisions, but that other factors affect their decisionmaking as well. To better understand what these other factors are, we compared the voting behavior of ideologically aligned

obtained for other liberal pairs: Justices Brennan and Blackmun (77.2% to 54.7%), and Justices Marshall and Blackmun (76.8% to 56.4%). *Id.*

⁷³ *See id.* With respect to Justice Blackmun's voting behavior, see *supra* notes 56 and 66–67 and accompanying text.

⁷⁴ The merits agreement rate for Justices Thomas and Blackmun was 44.4%, whereas their certiorari agreement rate was 57.5%. *See* Appendix B. The merits agreement rate for Justices Thomas and Stevens was 42.3%, whereas their certiorari agreement rate was 56.2%. *Id.*

Justices to that of ideologically opposed Justices.

We found that the decline in agreement rates from the merits to certiorari was markedly larger for Justices who were closely aligned at the merits stage than it was for those who were frequently opposed on the merits. Of the eleven pairings of Justices with an agreement rate on the merits of 80% or more, all had a lower rate of agreement on certiorari than on the merits.⁷⁵ Moreover, the drop was pronounced; the agreement rate for all of the pairs fell by more than 10% from the merits to certiorari, and for six of the eleven it sank by more than 20%.⁷⁶ Expanding the closely aligned group to include all pairings with a merits agreement rate of over 75% yielded similar results, but the decline in the certiorari agreement rate was less dramatic. All but one of these twenty-three pairs agreed more often in voting on the merits than they did on certiorari;⁷⁷ the agreement rate for seventeen of these pairs fell more than 10% from the merits to certiorari; and the agreement rate for eight of them sank more than 20%.⁷⁸

At the other end of the spectrum, however, the record was much more mixed. For example, of the twenty pairings of Justices with an agreement rate on the merits of 55% or less, thirteen of them agreed more often in voting on the merits, but seven of them agreed more often in voting on certiorari.⁷⁹ Even for those pairs who agreed more often on the merits, the drop in agreement rate from merits to certiorari was much more modest than it was for the closely-aligned group; the agreement rate for only four pairs of ideologically opposed Justices fell by more than 10%, and none dropped by as much as 20%.⁸⁰

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *See id.* The lone exception was Justices Souter and Ginsburg. Their merits agreement rate was 77.0%, whereas their certiorari agreement rate was 79.3%. *Id.* As noted earlier, our data on Justice Ginsburg was limited to her first term, which may explain this aberration. *See supra* Part IV.A.2.

⁷⁸ *See* Appendix B.

⁷⁹ *See id.* The seven pairs of Justices who voted together more often on certiorari than on the merits were Chief Justice Rehnquist and Justice Blackmun, Justices Thomas and Ginsburg, Justices Blackmun and Scalia, Justices Stevens and Scalia, Justices Marshall and Scalia, Justices Blackmun and Thomas, and Justices Stevens and Thomas. *See id.*

⁸⁰ Three of the pairs included Justice Brennan. In his pairing with Chief Justice Burger, the agreement rate on the merits was 53.9%, and on certiorari it was 36.3%; with Justice Kennedy the agreement rate on the merits was 53.7%, and on certiorari it was 41.1%; with Justice O'Connor the agreement rate on the merits was 53.2%, and on certiorari it was 41.9%. *Id.* The fourth pair was Chief Justice Rehnquist and Justice Stevens, who had an agreement rate on the merits of 53.0% and on certiorari of 41.0%. *Id.*

The data thus shows that the Justices generally agree less frequently on certiorari than they do on the merits, but the decline in their agreement rates is markedly larger for Justices who are ideologically aligned on the merits than it is for Justices who are ideologically opposed on the merits.⁸¹ These results present something of a puzzle, on which we offer some thoughts.

The fact that both ideologically aligned and opposed Justices tended to agree less often on certiorari than on the merits suggests that there is a more complex constellation of factors involved at the certiorari stage, and this complexity fosters greater disagreement, regardless of whether the Justices tend to agree or disagree on the merits. The array of pertinent factors on certiorari includes not only merits-oriented concerns, but also subjective judgments about the size of the docket, the existence of a conflict in the lower courts, the breadth and importance of the issue, the Court's institutional responsibility to hear certain types of cases, and so forth.⁸² The Justices' greater level of disagreement on certiorari indicates that these other considerations carry weight in their decisionmaking, and that they exert a kind of randomizing influence on the Justices' voting behavior.

But how to explain the much more pronounced decline in the agreement rates among ideologically aligned Justices? One possibility is that the decline in agreement rates on certiorari is due (in whole or in part) to the atomistic nature of the Justices' certiorari process.⁸³ The relative isolation in which the Justices make their case selection decisions may make it more difficult even for Justices who are voting with a view to the merits to agree with their like-minded counterparts. Because the Justices make their case selection decisions with little, if any, collective deliberation, the process itself tends to impede Justices from signaling one another or voting together (as opposed to the merits stage, where they participate together in oral argument and deliberate in a more collegial way).

Another possible explanation is that jurisprudential, rule-based, and administrative factors are trumping merits-oriented concerns to some degree, and this effect is more obvious among the ideologically aligned Justices. One would expect that, if ideological and strategic considerations were

⁸¹ Among pairs of Justices who agreed on the merits more than 80% of the time, the certiorari agreement rate dropped by an average of 18.4%. *See id.* Among pairs of Justices who agreed on the merits more than 75% of the time, the certiorari agreement rate dropped by an average of 14.5%. *See id.* Among pairs of Justices who agreed on the merits less than 55% of the time, the certiorari agreement rate dropped by an average of 2.9% (this figure includes the seven pairs who had higher agreement rates on certiorari than on the merits). *See id.*

⁸² *See supra* Part III.A. (discussing rule-based, administrative, and jurisprudential considerations).

⁸³ *See supra* notes 8–15 and accompanying text (discussing the lack of collegial deliberation in the certiorari process).

eliminated, the effect would be to moderate the range of disagreement among the Justices and cause their agreement rates to bunch closer together. In other words, Justices who were ideologically aligned on the merits would be aligned to a lesser degree on certiorari, and Justices who were ideologically opposed on the merits would agree more often on certiorari. The greater unpredictability on certiorari (stemming from the broad array of factors and the relative isolation in which the Justices make their decisions), however, would tend to depress the agreement rates of all Justices, whether ideologically aligned or opposed. If both of these effects are operating, then in combination they would tend to cause the agreement rates of ideologically aligned Justices to fall markedly on certiorari. But the effects would tend to counteract each other with respect to ideologically opposed Justices, leading their agreement rates to drop less dramatically or even, in some cases, to rise.

On an intuitive level, this explanation makes some sense. Each term, a certain percentage of the cases are granted unanimously.⁸⁴ To the extent that the Justices are voting to grant these cases because they believe that the Court has an institutional responsibility to hear them (regardless of what the ultimate outcome might be), then the certiorari agreement rate between ideologically opposed Justices will rise (because of factors unrelated to the merits) but the certiorari agreement rate between ideologically aligned Justices will not (because they would likely have voted together in such cases anyway). Thus, if Justices are voting for unanimous grants for institutional reasons, and not merely because they all want to reverse the lower court, then the disparity between the agreement rates of ideologically opposed Justices on certiorari and the merits should be more muted than the disparity between ideologically aligned Justices. This analysis depends, of course, on the nature of cases which are granted unanimously. We now turn to a closer examination of such cases.

B. Cases Granted Unanimously and by a Minority Vote

Yet another way to approach the question of how significantly merits-oriented considerations influence the Justices' decisionmaking on certiorari is to analyze the Justices' voting behavior in cases granted at the two extremes—that is, those granted unanimously and those granted by a bare minority of four votes.⁸⁵ The existence of unanimous grants in cases that are divisive on the merits, and the existence of minority grants in cases where

⁸⁴ See *infra* note 86 (giving the specific numbers for each term in our five-term sample).

⁸⁵ Although cases in these two categories are not different in kind from cases granted with five, six, seven, or eight votes, they are especially revealing because they are at the two poles.

there is full agreement on the merits, are strong evidence that rule-based and jurisprudential factors act as a moderating influence on ideological and strategic impulses at the case selection stage.

In our sample, the Court generally granted approximately 15–25% of the cases with a unanimous vote.⁸⁶ When a case is granted unanimously, there are two possibilities. One is that, at the certiorari stage, the Justices were in agreement about the merits and thus all voted to grant the case because they (presumably) wanted to reverse the result on the merits and eliminate a faulty or otherwise undesirable precedent. This possibility is consistent with a merits-oriented view of decisionmaking on certiorari. If it is correct, then one would expect to find that unanimous grants typically lead to unanimous decisions on the merits.

The second possibility is that the case was granted unanimously because the Justices agreed that the Court, as a matter of institutional responsibility, needed to take the case. Under this view, the Justices' jurisprudential concerns override their merits-oriented concerns. If this possibility is correct, then one would likely find that some cases granted unanimously result in deeply divided decisions on the merits.

Similar possibilities exist at the other end of the spectrum. In our sample, the Court granted about 25–35% of the cases with only the bare four votes required.⁸⁷ One possibility is that, at the certiorari stage, the Justices were deeply divided about the merits, and this division is reflected in their case selection votes. If this possibility, which is consistent with a merits-oriented view of decisionmaking on certiorari, is correct, then one would expect to find that minority grants typically lead to closely divided decisions on the merits. The second possibility is that the case received only a minimum number of votes to grant because the Justices disagreed not about the merits, but rather about whether the case was important enough to deserve plenary review. Under this scenario, the Justices who voted to deny review would have done so for rule-based, jurisprudential, or administrative reasons rather than for ideological or strategic reasons. If this possibility is correct, then one

⁸⁶ There was one marked exception to this in our sample of five terms (1993, 1992, 1991, 1988, and 1984). In 1984, only 6% of the cases were granted by a unanimous vote. *See* Appendix D (setting out the data on cases granted unanimously and by minority). The specific numbers for each term are: 1993: 23 of 84 (27%); 1992: 23 of 85 (27%); 1991: 18 of 105 (17%); 1988: 16 of 119 (13%); 1984: 9 of 146 (6%). *Id.* We included in our data set only cases in which the Court heard oral argument and issued a decision on the merits.

⁸⁷ The Justices use the “Rule of Four” on certiorari, such that four votes suffice to grant review. *See* Revesz & Karlan, *supra* note 7, at 1068–73 (describing the origins of the Rule of Four). The specific number of minority grants for each of the sample terms are as follows: 1993: 21 of 84 (25%); 1992: 20 of 85 (24%); 1991: 32 of 105 (31%); 1988: 32 of 119 (27%); 1984: 52 of 146 (36%). *See* Appendix D.

should find that a number of minority grants ultimately result in unanimous decisions on the merits.

To gain a better sense of the nature of unanimous grants and minority grants with respect to these issues, we segregated those cases for five terms: 1984, 1988, 1991, 1992, and 1993. We then tracked the outcome on the merits in each of those cases.⁸⁸

In cases granted unanimously, we found that in over 25% of the decisions on the merits the Court was divided five to four, a considerably higher percentage than the Court had in the full set of cases granted.⁸⁹ In these cases, almost half of the Justices were apparently voting to grant even though they knew that they were likely to lose on the merits. It is possible that some of these Justices simply miscalculated which way the Court would decide, but given their familiarity with each other, it is highly unlikely that all four of the losing Justices erred in this way in such a significant number of cases.⁹⁰ This voting behavior indicates that the Justices have a strong sense of the Court's institutional responsibility to hear certain cases, and that this sense can and frequently does trump merits-oriented considerations.⁹¹

In cases granted by a minority of Justices, the results were even more striking. The Court's decisions on the merits were unanimous in over one-third of the cases that were granted with only four votes.⁹² In these cases,

⁸⁸ In selecting the five terms sampled, we chose the three most recent terms plus two terms from the 1980s. We opted for 1988 and 1984 because the Court's personnel was stable both in those terms and the terms immediately succeeding them. When analyzing the outcome on the merits, we included in the majority any Justice who concurred in the opinion or in the judgment. We treated any Justice who dissented, whether in whole or in part, as being in the dissent.

⁸⁹ The average based on the total number of cases granted unanimously and then decided 5-4 on the merits in each of the five terms surveyed was 26% (when averaging the per-term averages it was 25%). See Appendix D. The numbers for each term were: 1993: 8 of 23; 1992: 2 of 23; 1991: 5 of 18; 1988: 7 of 16; 1984: 1 of 9. *Id.* Several cases in our sample were granted unanimously by an 8-0 vote. The average based on *all* cases granted and then decided by a one-vote margin in the five terms surveyed was 18.3%. See EPSTEIN ET AL., COMPENDIUM, *supra* note 59, at 223-24 tbl.3-4.

⁹⁰ The rate of affirmances in these cases was consistent with the norm. In the five terms surveyed, the overall rate of affirmances was 43.1%, see EPSTEIN ET AL., COMPENDIUM, *supra* note 59, at 228-29 tbl.3-6, and in this subset of cases it was 43.5%, see Appendix D.

⁹¹ Whether these cases also tend to be the high-profile, politically sensitive cases that dominate the American public's image of the Supreme Court is an interesting question that we plan to pursue in another article.

⁹² The average based on the total number of cases granted by a minority and then decided unanimously in each of the sample terms was 38% (the average of the per-term averages was 39%). See Appendix D. The numbers for each term were: 1993: 5 of 21; 1992: 12 of 20; 1991: 13 of 32; 1988: 10 of 32; 1984: 20 of 52 (in 1984, one or more

over half of the Justices were apparently voting to deny even though they could reasonably expect to win on the merits. Again, it is possible that some of these Justices simply misjudged how the Court would decide, but that possibility alone cannot account for the Justices' voting behavior in such a significant number of cases.⁹³ Rather, it seems that the Justices who opposed review in these cases did so for reasons unrelated to the merits, such as rule-based, jurisprudential, and administrative concerns about the quality of the cases and the size of the docket.⁹⁴

V. CONCLUSION

With the ability to select its own cases, the Supreme Court quietly exercises great power: “[a]genda setting accounts for the direction of constitutional law, just as the opinions themselves account for its substance.”⁹⁵ How the Justices perform this critical task remains something of a mystery, given the secrecy that envelops their decisions over whether to grant or deny review in the thousands of cases that come before them each term.

A persistent question about the Justices' use of the certiorari power is whether (and to what extent) they exercise it ideologically and strategically, with a view to securing their preferred outcome on the merits. By comparing the Justices' voting alignments on certiorari to their voting alignments on the merits in granted cases, we saw strong evidence that there is a significant merits-oriented component in the Justices' decisionmaking on certiorari. However, the substantial divergence between the Justices' voting patterns on certiorari and their voting patterns on the merits refutes the notion that a Justice's vote on certiorari is nothing more than a preliminary vote on the

Justices did not participate in the decision on the merits in nine of the cases decided unanimously—usually Justice Powell, who had health problems). *Id.* The average based on *all* cases granted and then decided unanimously in the five terms surveyed was 42.7%. *See* EPSTEIN ET AL., COMPENDIUM, *supra* note 59, at 210 tbl.3-1.

⁹³ Of interest, in our sample the number of cases granted with a minority of votes diminished over time, while the number of cases granted unanimously grew. *See* Appendix D. In 1984, the Court granted fifty-two cases with four votes and only nine cases unanimously. *Id.* In 1993, in contrast, the Court granted twenty-one cases with four votes and twenty-three unanimously (despite taking just over half as many cases as it did in 1984). *Id.* Changes in personnel almost certainly account for this substantial shift in the Justices' voting behavior.

⁹⁴ The rate of affirmances in these cases was lower than the norm, but only slightly. In the five terms that we surveyed, the overall rate of affirmances was 43.1%, *see* EPSTEIN ET AL., COMPENDIUM, *supra* note 59, at 228–29 tbl.3-6, but in this subset of cases it was 41.7%. *See* Appendix D.

⁹⁵ Friedman, *supra* note 49, at 294.

merits. This conclusion is underscored by the Justices' voting behavior in cases that are granted unanimously and those granted with only four votes. In both sets of cases, the vote on certiorari was not, as a general matter, a mere precursor to the vote on the merits. Rather, in cases granted unanimously the Court was often deeply divided on the merits, indicating that many of the Justices cast their vote to grant the case not on the basis of merits-oriented considerations, but on the basis of jurisprudential concerns. Similarly, the Court resolved many of the cases granted with only four votes by a unanimous decision on the merits, suggesting that the Justices who voted to deny the case did so for rule-based or administrative reasons having to do with the importance of the case, rather than for outcome-oriented reasons. While it is not possible to quantify with precision the impact of these different considerations in the certiorari process, this new data on the Justices' voting alignments at the certiorari and merits stages provides a fresh perspective on the issue.

Appendix A

October Term 1993 Rate of Agreement in Votes on Certiorari and the Merits^a									
	Rehnquist	Blackmun	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Rehnquist									
Cert	X	66.3	51.1	68.5	75.0	77.2	65.2	76.1	53.3
Merits		55.3	49.4	76.7	73.6	73.6	64.4	67.8	66.7
Blackmun									
Cert	66.3	X	67.4	60.9	56.5	65.2	75.0	64.1	71.7
Merits	55.3		77.6	52.4	48.2	55.3	81.2	40.0	68.2
Stevens									
Cert	51.1	67.4	X	65.2	52.2	52.2	72.8	57.6	69.6
Merits	49.4	77.6		58.1	48.3	58.6	77.0	40.2	75.9
O'Connor									
Cert	68.5	60.9	65.2	X	67.4	73.9	68.5	64.1	65.2
Merits	76.7	52.4	58.1		69.8	68.6	65.1	62.8	69.8
Scalia									
Cert	75.0	56.5	52.2	67.4	X	78.3	68.5	77.2	65.2
Merits	73.6	48.2	48.3	69.8		75.9	57.5	82.8	62.1
Kennedy									
Cert	77.2	65.2	52.2	73.9	78.3	X	64.1	72.8	58.7
Merits	73.6	55.3	58.6	68.6	75.9		67.8	72.4	64.4
Souter									
Cert	65.2	75.0	72.8	68.5	68.5	64.1	X	60.9	79.3
Merits	64.4	81.2	77.0	65.1	57.5	67.8		46.0	77.0
Thomas									
Cert	76.1	64.1	57.6	64.1	77.2	72.8	60.9	X	57.6
Merits	67.8	40.0	40.2	62.8	82.8	72.4	46.0		52.9
Ginsburg									
Cert	53.3	71.7	69.6	65.2	65.2	58.7	79.3	57.6	X
Merits	66.7	68.2	75.9	69.8	62.1	64.4	77.0	52.9	

^a Merits agreement rate is from *The Supreme Court, 1993 Term—The Statistics*, 108 HARV. L. REV. 372, 373 (1994).

October Term 1992 Rate of Agreement in Votes on Certiorari and the Merits^b									
	Rehnquist	White	Blackmun	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas
Rehnquist									
Cert	X	72.7	56.4	49.5	73.7	63.6	62.6	64.6	68.7
Merits		78.9	54.4	50.0	76.3	78.1	85.1	70.2	82.5
White									
Cert	72.7	X	71.7	66.7	80.8	52.5	53.5	69.7	69.7
Merits	78.9		64.0	57.9	67.5	67.5	74.6	72.8	68.4
Blackmun									
Cert	56.4	71.7	X	72.7	72.7	54.5	57.6	61.6	55.6
Merits	54.4	64.0		73.7	61.4	47.4	59.6	62.3	50.9
Stevens									
Cert	49.5	66.7	72.7	X	56.4	55.6	64.6	60.6	64.6
Merits	50.0	57.9	73.7		54.4	47.4	55.3	57.9	45.6
O'Connor									
Cert	73.7	80.8	72.7	56.4	X	51.5	58.6	70.7	58.6
Merits	76.3	67.5	61.4	54.4		69.3	72.8	70.2	73.7
Scalia									
Cert	63.6	52.5	54.5	55.6	51.5	X	72.7	64.6	70.7
Merits	78.1	67.5	47.4	47.4	69.3		81.6	73.7	86.0
Kennedy									
Cert	62.6	53.5	57.6	64.6	58.6	72.7	X	69.7	73.7
Merits	85.1	74.6	59.6	55.3	72.8	81.6		74.6	83.3
Souter									
Cert	64.6	69.7	61.6	60.6	70.7	64.6	69.7	X	65.7
Merits	70.2	72.8	62.3	57.9	70.2	73.7	74.6		67.5
Thomas									
Cert	68.7	69.7	55.6	64.6	58.6	70.7	73.7	65.7	X
Merits	82.5	68.4	50.9	45.6	73.7	86.0	83.3	67.5	

^b Merits agreement rate is from *The Supreme Court, 1992 Term—The Statistics*, 107 HARV. L. REV. 372, 373 (1993).

October Term 1991 Rate of Agreement in Votes on Certiorari and the Merits^c									
	Rehnquist	White	Blackmun	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas
Rehnquist									
Cert	X	61.8	56.4	37.3	64.5	70.0	62.7	56.4	60.0
Merits		71.9	48.2	42.1	63.2	70.2	66.7	68.1	80.0
White									
Cert	61.8	X	74.5	59.1	71.8	51.8	55.5	54.5	70.9
Merits	71.9		57.9	58.8	64.0	60.5	67.5	69.9	67.1
Blackmun									
Cert	56.4	74.5	X	68.2	68.2	48.2	55.5	63.6	52.7
Merits	48.2	57.9		73.7	60.5	31.6	54.4	56.6	42.4
Stevens									
Cert	37.3	59.1	68.2	X	56.4	43.6	56.4	59.1	46.4
Merits	42.1	58.8	73.7		59.6	35.1	51.8	58.4	41.2
O'Connor									
Cert	64.5	71.8	68.2	56.4	X	50.9	60.0	57.3	62.7
Merits	63.2	64.0	60.5	59.6		53.5	63.2	67.3	60.0
Scalia									
Cert	70.0	51.8	48.2	43.6	50.9	X	67.3	62.7	62.7
Merits	70.2	60.5	31.6	35.1	53.5		62.3	61.1	85.9
Kennedy									
Cert	62.7	55.5	55.5	56.4	60.0	67.3	X	68.2	59.1
Merits	66.7	67.5	54.4	51.8	63.2	62.3		74.3	60.0
Souter									
Cert	56.4	54.5	63.6	59.1	57.3	62.7	68.2	X	56.4
Merits	68.1	69.9	56.6	58.4	67.3	61.1	74.3		66.7
Thomas									
Cert	60.0	70.9	52.7	46.4	62.7	62.7	59.1	56.4	X
Merits	80.0	67.1	42.4	41.2	60.0	85.9	60.0	66.7	

^c Merits agreement rate is from *The Supreme Court, 1991 Term—The Statistics*, 106 HARV. L. REV. 378, 379 (1992).

October Term 1990 Rate of Agreement in Votes on Certiorari and the Merits^d									
	Rehnquist	White	Marshall	Blackmun	Stevens	O'Connor	Scalia	Kennedy	Souter
Rehnquist									
Cert	X	68.2	44.2	65.1	35.7	71.3	65.1	72.1	64.3
Merits		79.2	48.3	52.5	49.2	80.0	73.1	82.1	81.5
White									
Cert	68.2	X	65.1	70.5	48.8	70.5	56.6	63.6	52.7
Merits	79.2		60.0	64.2	59.2	71.7	62.2	70.1	77.8
Marshall									
Cert	44.2	65.1	X	69.8	60.5	52.7	49.6	51.9	48.8
Merits	48.3	60.0		81.7	78.3	53.3	44.5	51.3	54.6
Blackmun									
Cert	65.1	70.5	69.8	X	53.5	65.9	55.0	58.9	51.2
Merits	52.5	64.2	81.7		72.5	60.0	49.6	54.7	59.3
Stevens									
Cert	35.7	48.8	60.5	53.5	X	48.8	47.3	45.0	49.6
Merits	49.2	59.2	78.3	72.5		54.2	41.2	52.1	55.6
O'Connor									
Cert	71.3	70.5	52.7	65.9	48.8	X	59.7	66.7	57.7
Merits	80.0	71.7	53.3	60.0	54.2		68.9	84.6	88.9
Scalia									
Cert	65.1	56.6	49.6	55.0	47.3	59.7	X	77.5	60.5
Merits	73.1	62.2	44.5	49.6	41.2	68.9		72.4	71.0
Kennedy									
Cert	72.1	63.6	51.9	58.9	45.0	66.7	77.5	X	61.2
Merits	82.1	70.1	51.3	54.7	52.1	84.6	72.4		83.8
Souter									
Cert	64.3	52.7	48.8	51.2	49.6	57.7	60.5	61.2	X
Merits	81.5	77.8	54.6	59.3	55.6	88.9	71.0	83.8	

^d Merits agreement rate is from *The Supreme Court, 1990 Term—The Statistics*, 105 HARV. L. REV. 419, 420 (1991).

October Term 1989 Rate of Agreement in Votes on Certiorari and the Merits^e									
	Rehnquist	Brennan	White	Marshall	Blackmun	Stevens	O'Connor	Scalia	Kennedy
Rehnquist Cert	X	42.5	70.8	45.8	63.3	31.7	64.2	65.8	73.3
Merits		38.1	82.0	37.4	54.7	48.2	81.9	81.3	82.6
Brennan Cert	42.5	X	46.7	83.3	49.2	55.8	41.7	48.3	39.2
Merits	38.1		46.0	94.2	73.4	65.5	42.0	38.1	44.2
White Cert	70.8	46.7	X	48.3	69.2	45.8	68.3	60.0	65.8
Merits	82.0	46.0		46.0	61.9	53.2	74.6	70.5	73.9
Marshall Cert	45.8	83.3	48.3	X	50.8	59.2	43.3	45.0	44.2
Merits	37.4	94.2	46.0		69.8	64.0	39.1	37.4	41.3
Blackmun Cert	63.3	49.2	69.2	50.8	X	51.7	62.5	55.8	60.0
Merits	54.7	73.4	61.9	69.8		61.2	56.5	49.6	55.8
Stevens Cert	31.7	55.8	45.8	59.2	51.7	X	54.2	52.5	43.3
Merits	48.2	65.5	53.2	64.0	61.2		47.1	45.3	46.4
O'Connor Cert	64.2	41.7	68.3	43.3	62.5	54.2	X	68.3	67.5
Merits	81.9	42.0	74.6	39.1	56.5	47.1		79.7	83.2
Scalia Cert	65.8	48.3	60.0	45.0	55.8	52.5	68.3	X	70.8
Merits	81.3	38.1	70.5	37.4	49.6	45.3	79.7		84.1
Kennedy Cert	73.3	39.2	65.8	44.2	60.0	43.3	67.5	70.8	X
Merits	82.6	44.2	73.9	41.3	55.8	46.4	83.2	84.1	

^e Merits agreement rate is from *The Supreme Court, 1989 Term—The Statistics*, 104 HARV. L. REV. 359, 360 (1990).

October Term 1988 Rate of Agreement in Votes on Certiorari and the Merits^f									
	Rehnquist	Brennan	White	Marshall	Blackmun	Stevens	O'Connor	Scalia	Kennedy
Rehnquist Cert	X	43.6	78.9	48.1	57.9	41.4	80.5	72.2	77.4
Merits		50.7	88.0	49.6	54.9	63.6	93.4	82.3	92.1
Brennan Cert	43.6	X	43.6	80.5	58.6	60.2	43.6	41.4	43.6
Merits	50.7		53.9	93.6	78.0	72.7	53.7	53.6	54.0
White Cert	78.9	43.6	X	51.1	62.4	48.9	72.9	70.7	71.4
Merits	88.0	53.9		50.7	58.0	61.7	81.2	78.2	85.8
Marshall Cert	48.1	80.5	51.1	X	57.1	61.7	51.1	47.4	49.6
Merits	49.6	93.6	50.7		76.1	73.6	49.6	50.4	50.7
Blackmun Cert	57.9	58.6	62.4	57.1	X	60.9	57.9	57.1	56.4
Merits	54.9	78.0	58.0	76.1		73.8	56.8	53.5	56.7
Stevens Cert	41.4	60.2	48.9	61.7	60.9	X	42.9	51.1	44.4
Merits	63.6	72.7	61.7	73.6	73.8		63.5	59.3	63.3
O'Connor Cert	80.5	43.6	72.9	51.1	57.9	42.9	X	66.2	74.4
Merits	93.4	53.7	81.2	49.6	56.8	63.5		75.9	89.7
Scalia Cert	72.2	41.4	70.7	47.4	57.1	51.1	66.2	X	79.7
Merits	82.3	53.6	78.2	50.4	53.5	59.3	75.9		85.0
Kennedy Cert	77.4	43.6	71.4	49.6	56.4	44.4	74.4	79.7	X
Merits	92.1	54.0	85.8	50.7	56.7	63.3	89.7	85.0	

^f Merits agreement rate is from *The Supreme Court, 1988 Term—The Statistics*, 103 HARV. L. REV. 394, 395 (1989).

October Term 1987 Rate of Agreement in Votes on Certiorari and the Merits^g									
	Rehnquist	Brennan	White	Marshall	Blackmun	Stevens	O'Connor	Scalia	Kennedy
Rehnquist Cert	X	44.5	67.7	52.3	52.3	40.0	71.6	60.0	49.7
Merits		60.9	81.3	57.6	68.3	71.2	81.9	82.6	83.1
Brennan Cert	44.5	X	51.0	80.6	56.1	60.6	41.9	47.1	40.6
Merits	60.9		64.7	94.2	79.9	74.1	57.2	56.5	63.1
White Cert	67.7	51.0	X	51.0	63.9	43.9	71.6	58.7	40.6
Merits	81.3	64.7		62.1	67.9	74.3	76.3	72.5	82.8
Marshall Cert	52.3	80.6	51.0	X	57.4	58.1	44.5	47.1	43.2
Merits	57.6	94.2	62.1		77.9	74.3	54.7	52.2	61.5
Blackmun Cert	52.3	56.1	63.9	57.4	X	63.2	58.7	57.4	43.2
Merits	68.3	79.9	67.9	77.9		72.9	61.9	60.9	67.2
Stevens Cert	40.0	60.6	43.9	58.1	63.2	X	43.9	46.5	51.6
Merits	71.2	74.1	74.3	74.3	72.9		66.9	63.8	67.7
O'Connor Cert	71.6	41.9	71.6	44.5	58.7	43.9	X	65.2	52.3
Merits	81.9	57.2	76.3	54.7	61.9	66.9		78.1	82.5
Scalia Cert	60.0	47.1	58.7	47.1	57.4	46.5	65.2	X	58.7
Merits	82.6	56.5	72.5	52.2	60.9	63.8	78.1		83.1
Kennedy Cert	49.7	40.6	40.6	43.2	43.2	51.6	52.3	58.7	X
Merits	83.1	63.1	82.8	61.5	67.2	67.7	82.5	83.1	

^g Merits agreement rate is from *The Supreme Court, 1987 Term—The Statistics*, 102 HARV. L. REV. 350, 351 (1988).

October Term 1986 Rate of Agreement in Votes on Certiorari and the Merits^h									
	Rehnquist	Brennan	White	Marshall	Blackmun	Powell	Stevens	O'Connor	Scalia
Rehnquist Cert	X	43.6	76.9	40.4	55.1	68.6	39.1	76.3	58.3
Merits		40.8	84.8	39.5	53.7	86.1	47.7	86.1	85.8
Brennan Cert	43.6	X	50.0	80.1	57.7	49.4	59.6	42.9	45.5
Merits	40.8		47.0	98.0	78.5	56.3	67.5	45.0	41.9
White Cert	76.9	50.0	X	44.2	55.1	69.9	44.2	73.6	55.8
Merits	84.8	47.0		45.7	61.5	77.3	58.0	72.7	78.2
Marshall Cert	40.4	80.1	44.2	X	57.1	37.2	59.0	44.9	43.6
Merits	39.5	98.0	45.7		79.9	55.0	68.2	43.0	40.5
Blackmun Cert	55.1	57.7	55.1	57.1	X	53.2	64.7	57.1	48.1
Merits	53.7	78.5	61.5	79.9		68.9	70.9	57.7	52.4
Powell Cert	68.6	49.4	69.9	37.2	53.2	X	47.4	66.7	50.0
Merits	86.1	56.3	77.3	55.0	68.9		56.7	83.3	73.5
Stevens Cert	39.1	59.6	44.2	59.0	64.7	47.4	X	44.9	43.6
Merits	47.7	67.5	58.0	68.2	70.9	56.7		52.0	51.0
O'Connor Cert	76.3	42.9	73.6	44.9	57.1	66.7	44.9	X	60.3
Merits	86.1	45.0	72.7	43.0	57.7	83.3	52.0		74.1
Scalia Cert	58.3	45.5	55.8	43.6	48.1	50.0	43.6	60.3	X
Merits	85.8	41.9	78.2	40.5	52.4	73.5	51.0	74.1	

^h Merits agreement rate is from *The Supreme Court, 1986 Term—The Statistics*, 101 HARV. L. REV. 362, 363 (1987).

October Term 1985 Rate of Agreement in Votes on Certiorari and the Meritsⁱ									
	Burger	Brennan	White	Marshall	Blackmun	Powell	Rehnquist	Stevens	O'Connor
Burger Cert	X	36.6	62.9	45.1	53.7	68.6	77.7	39.4	75.4
Merits		46.5	78.5	40.8	50.0	84.5	91.7	48.4	82.2
Brennan Cert	36.6	X	52.0	82.3	61.1	53.1	39.4	65.1	41.7
Merits	46.5		54.8	91.0	80.3	55.8	43.9	67.9	56.8
White Cert	62.9	52.0	X	51.4	65.7	61.1	71.7	46.9	73.7
Merits	78.5	54.8		48.1	54.8	73.7	77.6	56.7	79.5
Marshall Cert	45.1	82.3	51.4	X	58.3	54.9	40.0	64.6	40.0
Merits	40.8	91.0	48.1		82.1	51.6	39.4	67.1	54.2
Blackmun Cert	53.7	61.1	65.7	58.3	X	64.6	55.4	58.3	61.1
Merits	50.0	80.3	54.8	82.1		58.4	46.8	64.1	59.6
Powell Cert	68.6	53.1	61.1	54.9	64.6	X	63.4	49.1	71.4
Merits	84.5	55.8	73.7	51.6	58.4		87.7	56.1	87.1
Rehnquist Cert	77.7	39.4	71.7	40.0	55.4	63.4	X	37.7	77.1
Merits	91.7	43.9	77.6	39.4	46.8	87.7		49.7	84.5
Stevens Cert	39.4	65.1	46.9	64.6	58.3	49.1	37.7	X	44.6
Merits	48.4	67.9	56.7	67.1	64.1	56.1	49.7		58.1
O'Connor Cert	75.4	41.7	73.7	40.0	61.1	71.4	77.1	44.6	X
Merits	82.2	56.8	79.5	54.2	59.6	87.1	84.5	58.1	

ⁱ Merits agreement rate is from *The Supreme Court, 1985 Term—The Statistics*, 100 HARV. L. REV. 304, 305 (1986).

October Term 1984 Rate of Agreement in Votes on Certiorari and the Merits^j									
	Burger	Brennan	White	Marshall	Blackmun	Powell	Rehnquist	Stevens	O'Connor
Burger Cert	X	34.3	56.0	40.0	50.3	50.9	62.9	46.3	62.3
Merits		55.3	85.9	51.7	72.5	80.8	89.3	60.1	88.6
Brennan Cert	34.3	X	44.0	77.1	46.3	41.1	30.3	62.9	38.9
Merits	55.3		61.3	100.0	79.2	65.7	52.0	69.1	61.3
White Cert	56.0	44.0	X	45.1	61.1	53.7	62.3	49.1	65.1
Merits	85.9	61.3		57.9	77.0	79.8	81.8	63.5	82.4
Marshall Cert	40.0	77.1	45.1	X	46.3	44.6	29.1	64.0	42.3
Merits	51.7	100.0	57.9		75.0	62.7	47.6	65.3	59.3
Blackmun Cert	50.3	46.3	61.1	46.3	X	58.3	57.7	47.4	55.4
Merits	72.5	79.2	77.0	75.0		79.6	70.3	66.7	80.4
Powell Cert	50.9	41.1	53.7	44.6	58.3	X	56.0	46.7	56.1
Merits	80.8	65.7	79.8	62.7	79.6		76.2	63.1	85.7
Rehnquist Cert	62.9	30.3	62.3	29.1	57.7	56.0	X	44.6	68.6
Merits	89.3	52.0	81.8	47.6	70.3	76.2		60.1	90.5
Stevens Cert	46.3	62.9	49.1	64.0	47.4	46.7	44.6	X	49.7
Merits	60.1	69.1	63.5	65.3	66.7	63.1	60.1		63.3
O'Connor Cert	62.3	38.9	65.1	42.3	55.4	56.1	68.6	49.7	X
Merits	88.6	61.3	82.4	59.3	80.4	85.7	90.5	63.3	

^j Merits agreement rate is from *The Supreme Court, 1984 Term—The Statistics*, 99 HARV. L. REV. 322, 323 (1985).

October Term 1983 Rate of Agreement in Votes on Certiorari and the Merits^k									
	Burger	Brennan	White	Marshall	Blackmun	Powell	Rehnquist	Stevens	O'Connor
Burger Cert	X	38.0	51.1	42.3	46.0	54.7	62.8	52.6	60.6
Merits		60.0	87.5	55.8	77.8	89.4	87.5	55.9	91.9
Brennan Cert	38.0	X	54.7	81.0	54.0	55.5	40.1	57.7	42.3
Merits	60.0		62.3	94.2	70.9	58.5	49.7	75.0	56.6
White Cert	51.1	54.7	X	51.8	65.7	71.5	66.4	47.4	67.2
Merits	87.5	62.3		61.2	77.8	81.0	81.1	61.0	84.5
Marshall Cert	42.3	81.0	51.8	X	54.0	52.6	38.7	63.5	38.0
Merits	55.8	94.2	61.2		71.7	58.8	45.5	67.5	51.3
Blackmun Cert	46.0	54.0	65.7	54.0	X	66.4	62.8	51.1	59.1
Merits	77.8	70.9	77.8	71.7		78.3	68.9	66.3	75.2
Powell Cert	54.7	55.5	71.5	52.6	66.4	X	64.2	54.0	62.0
Merits	89.4	58.5	81.0	58.8	78.3		82.4	55.6	84.9
Rehnquist Cert	62.8	40.1	66.4	38.7	62.8	64.2	X	43.1	75.9
Merits	87.5	49.7	81.1	45.5	68.9	82.4		51.6	91.9
Stevens Cert	52.6	57.7	47.4	63.5	51.1	54.0	43.1	X	45.3
Merits	55.9	75.0	61.0	67.5	66.3	55.6	51.6		58.5
O'Connor Cert	60.6	42.3	67.2	38.0	59.1	62.0	75.9	45.3	X
Merits	91.9	56.6	84.5	51.3	75.2	84.9	91.9	58.5	

^k Merits agreement rate is from *The Supreme Court, 1983 Term—The Statistics*, 98 HARV. L. REV. 307, 308 (1984).

Appendix B

Average Rate of Agreement in Votes on the Merits* and Certiorari				
Pairing	Merits Average	Ordinal Ranking	Cert Average	Ordinal Ranking
Brennan + Marshall	95.0%	1	80.7%	1
Burger + Rehnquist	89.5%	2	67.8%	14
Burger + O'Connor	87.6%	3	66.1%	16
Powell + O'Connor	85.3%	4	63.9%	24
Scalia + Thomas	84.9%	5	70.2%	8
Burger + Powell	84.9%	6	58.1%	42
Burger + White	84.0%	7	56.7%	47
Rehnquist + Powell	83.1%	8	63.1%	26
Rehnquist + O'Connor	82.4%	9	72.0%	4
Rehnquist + Kennedy	80.8%	10	67.9%	13
Rehnquist + White	80.7%	11	69.7%	9
Rehnquist + Scalia	78.4%	12	66.3%	15
White + Powell	78.0%	13	64.1%	23
O'Connor + Kennedy	77.8%	14	64.8%	21
Scalia + Kennedy	77.8%	15	72.1%	3
Brennan + Blackmun	77.2%	16	54.7%	50
Souter + Ginsburg	77.0%	17	79.3%	2
Marshall + Blackmun	76.8%	18	56.4%	48
Rehnquist + Thomas	76.8%	18	68.3%	12

* Merits agreement rates are from the *Harvard Law Review's* statistical recaps of the Supreme Court terms, which can be found in the first issue of each of Volumes 98–108.

Average Rate of Agreement in Votes on the Merits* and Certiorari				
Pairing	Merits Average	Ordinal Ranking	Cert Average	Ordinal Ranking
Stevens + Ginsburg	75.9%	20	69.6%	10
White + Kennedy	75.8%	21	58.4%	41
White + O'Connor	75.4%	22	71.6%	6
Kennedy + Souter	75.1%	23	65.8%	18
White + Souter	73.5%	24	59.0%	39
Powell + Scalia	73.5%	25	50.0%	57
O'Connor + Souter	72.9%	26	63.5%	25
Kennedy + Thomas	71.9%	27	68.5%	11
Powell + Blackmun	71.3%	28	60.6%	34
O'Connor + Scalia	71.2%	29	61.2%	32
Rehnquist + Souter	71.1%	30	62.6%	28
Blackmun + Stevens	70.3%	31	59.7%	37
Brennan + Stevens	70.3%	32	60.3%	36
White + Scalia	69.9%	33	58.0%	43
O'Connor + Ginsburg	69.8%	34	65.2%	19
Marshall + Stevens	69.8%	35	61.3%	31
Blackmun + Ginsburg	68.2%	36	71.7%	5
White + Thomas	67.8%	37	70.3%	7
Burger + Blackmun	66.8%	38	50.0%	58
Rehnquist + Ginsburg	66.7%	39	53.3%	52

* Merits agreement rates are from the *Harvard Law Review's* statistical recaps of the Supreme Court terms, which can be found in the first issue of each of Volumes 98–108.

Average Rate of Agreement in Votes on the Merits* and Certiorari				
Pairing	Merits Average	Ordinal Ranking	Cert Average	Ordinal Ranking
Scalia + Souter	65.8%	40	64.1%	22
O'Connor + Thomas	65.5%	41	61.8%	30
Blackmun + Souter	64.9%	42	62.9%	27
White + Blackmun	64.5%	43	66.0%	17
Kennedy + Ginsburg	64.4%	44	58.7%	40
Stevens + Souter	62.2%	45	60.5%	35
Scalia + Ginsburg	62.1%	46	65.2%	20
Blackmun + O'Connor	60.5%	47	61.9%	29
White + Stevens	60.4%	48	50.1%	56
Souter + Thomas	60.1%	49	61.0%	33
Powell + Brennan	59.1%	50	49.8%	59
Powell + Stevens	57.9%	51	49.5%	60
Stevens + O'Connor	57.8%	52	50.3%	55
Blackmun + Kennedy	57.7%	53	56.7%	46
Powell + Marshall	57.0%	54	47.3%	64
Stevens + Kennedy	56.5%	55	51.1%	53
Brennan + White	55.7%	56	48.9%	62
Rehnquist + Blackmun	55.0%	57	59.4%	38
Burger + Stevens	54.8%	58	46.1%	67
Marshall + Souter	54.6%	59	48.8%	63

* Merits agreement rates are from the *Harvard Law Review's* statistical recaps of the Supreme Court terms, which can be found in the first issue of each of Volumes 98–108.

Average Rate of Agreement in Votes on the Merits* and Certiorari				
Pairing	Merits Average	Ordinal Ranking	Cert Average	Ordinal Ranking
Marshall + White	54.0%	60	51.0%	54
Burger + Brennan	53.9%	61	36.3%	76
Brennan + Kennedy	53.7%	62	41.1%	73
Brennan + O'Connor	53.2%	63	41.9%	72
Rehnquist + Stevens	53.0%	64	41.0%	74
Thomas + Ginsburg	52.9%	65	57.6%	44
Marshall + Kennedy	51.2%	66	47.2%	65
Marshall + O'Connor	50.6%	67	44.6%	69
Burger + Marshall	49.4%	68	42.5%	70
Blackmun + Scalia	49.2%	69	54.1%	51
Stevens + Scalia	48.9%	70	49.1%	61
Rehnquist + Brennan	48.0%	71	40.6%	75
Brennan + Scalia	47.5%	72	45.6%	68
Rehnquist + Marshall	45.6%	73	42.3%	71
Marshall + Scalia	45.0%	74	46.5%	66
Blackmun + Thomas	44.4%	75	57.5%	45
Stevens + Thomas	42.3%	76	56.2%	49

* Merits agreement rates are from the *Harvard Law Review's* statistical recaps of the Supreme Court terms, which can be found in the first issue of each of Volumes 98–108.

Appendix C

Significance of Change in Rate of Agreement in Votes on the Merits and Certiorari*				
Pairing	Merits Average	Cert Average	P-Value	T-Statistic
Brennan + Marshall	95.0%	80.7%	<.01	31.65
Burger + Rehnquist	89.5%	67.8%	<.01	38.92
Burger + O'Connor	87.6%	66.1%	<.01	37.44
Powell + O'Connor	85.3%	63.9%	<.01	35.79
Scalia + Thomas	84.9%	70.2%	<.01	25.14
Burger + Powell	84.9%	58.1%	<.01	43.97
Burger + White	84.0%	56.7%	<.01	44.24
Rehnquist + Powell	83.1%	63.1%	<.01	32.78
Rehnquist + O'Connor	82.4%	72.0%	<.01	17.62
Rehnquist + Kennedy	80.8%	67.9%	<.01	20.94
Rehnquist + White	80.7%	69.7%	<.01	18.18
Rehnquist + Scalia	78.4%	66.3%	<.01	19.33
White + Powell	78.0%	64.1%	<.01	21.94
O'Connor + Kennedy	77.8%	64.8%	<.01	20.39
Scalia + Kennedy	77.8%	72.1%	<.01	9.26
Brennan + Blackmun	77.2%	54.7%	<.01	34.61
Souter + Ginsburg	77.0%	79.3%	<.01	-3.94
Marshall + Blackmun	76.8%	56.4%	<.01	31.33
Rehnquist + Thomas	76.8%	68.3%	<.01	13.49

* A p-value at <.05 indicates that the difference is statistically significant at the 5% level, meaning that there is less than a 5% chance that the difference was due to chance alone. All but three of the results met this standard (the three results that were not significant are in bold). A p-value at <.01 indicates that there is less than a 1% chance that the difference was due to chance alone.

Significance of Change in Rate of Agreement in Votes on the Merits and Certiorari*				
Pairing	Merits Average	Cert Average	P-Value	T-Statistic
Stevens + Ginsburg	75.9%	69.6%	<.01	10.01
White + Kennedy	75.8%	58.4%	<.01	26.64
White + O'Connor	75.4%	71.6%	<.01	6.09
Kennedy + Souter	75.1%	65.8%	<.01	14.46
White + Souter	73.5%	59.0%	<.01	21.97
Powell + Scalia	73.5%	50.0%	<.01	35.24
O'Connor + Souter	72.9%	63.5%	<.01	14.33
Kennedy + Thomas	71.9%	68.5%	<.01	5.25
Powell + Blackmun	71.3%	60.6%	<.01	16.05
O'Connor + Scalia	71.2%	61.2%	<.01	14.99
Rehnquist + Souter	71.1%	62.6%	<.01	12.84
Blackmun + Stevens	70.3%	59.7%	<.01	15.79
Brennan + Stevens	70.3%	60.3%	<.01	14.92
White + Scalia	69.9%	58.0%	<.01	17.65
O'Connor + Ginsburg	69.8%	65.2%	<.01	6.88
Marshall + Stevens	69.8%	61.3%	<.01	12.70
Blackmun + Ginsburg	68.2%	71.7%	<.01	-5.41
White + Thomas	67.8%	70.3%	<.01	-3.82
Burger + Blackmun	66.8%	50.0%	<.01	24.46
Rehnquist + Ginsburg	66.7%	53.3%	<.01	9.44

* A p-value at <.05 indicates that the difference is statistically significant at the 5% level, meaning that there is less than a 5% chance that the difference was due to chance alone. All but three of the results met this standard (the three results that were not significant are in bold). A p-value at <.01 indicates that there is less than a 1% chance that the difference was due to chance alone.

Significance of Change in Rate of Agreement in Votes on the Merits and Certiorari*				
Pairing	Merits Average	Cert Average	P-Value	T-Statistic
Scalia + Souter	65.8%	64.1%	<.05	2.53
O'Connor + Thomas	65.5%	61.8%	<.01	5.45
Blackmun + Souter	64.9%	62.9%	<.01	2.94
White + Blackmun	64.5%	66.0%	<.05	-2.23
Kennedy + Ginsburg	64.4%	58.7%	<.01	8.29
Stevens + Souter	62.2%	60.5%	<.05	2.47
Scalia + Ginsburg	62.1%	65.2%	<.01	-4.55
Blackmun + O'Connor	60.5%	61.9%	<.05	-2.03
White + Stevens	60.4%	50.1%	<.01	14.74
Souter + Thomas	60.1%	61.0%	n.s.	-1.29
Powell + Brennan	59.1%	49.8%	<.01	13.23
Powell + Stevens	57.9%	49.5%	<.01	11.95
Stevens + O'Connor	57.8%	50.3%	<.01	10.68
Blackmun + Kennedy	57.7%	56.7%	n.s.	1.43
Powell + Marshall	57.0%	47.3%	<.01	13.75
Stevens + Kennedy	56.5%	51.1%	<.01	7.65
Brennan + White	55.7%	48.9%	<.01	9.65
Rehnquist + Blackmun	55.0%	59.4%	<.01	-6.29
Burger + Stevens	54.8%	46.1%	<.01	12.36

* A p-value at <.05 indicates that the difference is statistically significant at the 5% level, meaning that there is less than a 5% chance that the difference was due to chance alone. All but three of the results met this standard (the three results that were not significant are in bold). A p-value at <.01 indicates that there is less than a 1% chance that the difference was due to chance alone.

Significance of Change in Rate of Agreement in Votes on the Merits and Certiorari*				
Pairing	Merits Average	Cert Average	P-Value	T-Statistic
Marshall + Souter	54.6%	48.8%	<.01	8.18
Marshall + White	54.0%	51.0%	<.01	4.25
Burger + Brennan	53.9%	36.3%	<.01	25.45
Brennan + Kennedy	53.7%	41.1%	<.01	18.04
Brennan + O'Connor	53.2%	41.9%	<.01	16.10
Rehnquist + Stevens	53.0%	41.0%	<.01	17.15
Thomas + Ginsburg	52.9%	57.6%	<.01	-6.69
Marshall + Kennedy	51.2%	47.2%	<.01	5.66
Marshall + O'Connor	50.6%	44.6%	<.01	8.51
Burger + Marshall	49.4%	42.5%	<.01	9.82
Blackmun + Scalia	49.2%	54.1%	<.01	-6.94
Stevens + Scalia	48.9%	49.1%	n.s.	-0.28
Rehnquist + Brennan	48.0%	40.6%	<.01	10.56
Brennan + Scalia	47.5%	45.6%	<.01	2.69
Rehnquist + Marshall	45.6%	42.3%	<.01	4.70
Marshall + Scalia	45.0%	46.5%	<.05	-2.13
Blackmun + Thomas	44.4%	57.5%	<.01	-18.62
Stevens + Thomas	42.3%	56.2%	<.01	-19.79

* A p-value at <.05 indicates that the difference is statistically significant at the 5% level, meaning that there is less than a 5% chance that the difference was due to chance alone. All but three of the results met this standard (the three results that were not significant are in bold). A p-value at <.01 indicates that there is less than a 1% chance that the difference was due to chance alone.

Appendix D

Cases Granted Unanimously and By Minority*

Cases Granted Unanimously				
Term	Total Granted**	Total Granted Unanimously	Decided on Merits 5-4	Affirmed
1993	84	23	8	2
1992	85	23	2	1
1991	105	18	5	2
1988	119	16	7	5
1984	146	9	1	0
Average		16.5% of total cases granted were granted unanimously	25.8% of cases granted unanimously were decided 5-4	43.5% of unanimous grants that were decided 5-4 were affirmed

* In selecting the five terms sampled, we chose the three most recent terms plus two terms from the 1980s. We opted for 1988 and 1984 because the Court's personnel was stable both in those terms and the terms immediately succeeding them.

** The total number of cases granted includes cases with signed opinions and orally argued per curiams. The number reflects the term in which the cases were granted.

Cases Granted By Minority*				
Term	Total Granted**	Total Granted with 4 Votes	Decided on Merits Unanimously	Affirmed
1993	84	21	5	3
1992	85	20	12	5
1991	105	32	13	4
1988	119	32	10	2
1984	146	52	20	11
Average		29.1% of total cases granted were granted by a minority	38.2% of cases granted by a minority were decided unanimously	41.7% of minority grants that were decided unanimously were affirmed

* In selecting the five terms sampled, we chose the three most recent terms plus two terms from the 1980s. We opted for 1988 and 1984 because the Court's personnel was stable both in those terms and the terms immediately succeeding them.

** The total number of cases granted includes cases with signed opinions and orally argued per curiams. The number reflects the term in which the cases were granted.