

CASE SELECTION AND REVIEW AT THE SUPREME COURT

STATEMENT FOR THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES JUNE 25, 2021

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Thank you for inviting me to address the Presidential Commission on the Supreme Court of the United States on the topic of case selection and review. This is a broad and complex subject, encompassing the Supreme Court's processes for deciding what to hear, when to hear it, and what procedures to employ in making its decisions. I will focus on the Court's exercise of its power to grant discretionary review through certiorari, considering its strengths, its arguable weaknesses, and proposals for reform.

I will begin by describing a typology of cases in which the Court grants review—(1) publicly important cases; (2) legally important cases; (3) cases implicating lower-court conflicts; and (4) error-correction cases. Next, I will offer impressions about the Court's performance in selecting cases to hear in these four categories. Finally, I will comment on some suggestions to address perceived deficiencies in the Court's case-selection process. While the process may not be perfect, none of the more ambitious proposals—such as creating a “certiorari division” composed of court of appeals judges to select cases for review, or restoring categories of mandatory jurisdiction—has sufficient benefit

to outweigh the costs. And if procedural reforms were imposed legislatively, at least some of them would raise separation-of-powers concerns and threaten the Court's historic independence.

I. The Court's Certiorari Jurisdiction: Types of Cases the Court Hears

The Supreme Court's jurisdiction is largely controlled by Congress. Under Article III of the Constitution, the Court has original jurisdiction over a small class of cases—those “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.” U.S. Const. art III, § 2, cl. 2. All other authority must be conferred by statute: Article III provides that in non-original cases that fall within the judicial power, the Court “shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” *Id.* Since 1988, when Congress did away with the bulk of cases within the Court's mandatory appellate jurisdiction,¹ the Court has enjoyed virtually plenary discretion to set its own agenda by determining whether to grant or deny certiorari. With the exception of small remaining categories of mandatory jurisdiction—notably for cases involving redistricting and other cases required to be heard by a three-judge district court—the Court's docket is composed of cases of its choosing.

¹ See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988). The arc of the Court's jurisdiction is traced in, among other sources, Carolyn Shapiro, *Docket Control, Mandatory Jurisdiction, and the Supreme Court's Failure in Rucho v. Common Cause*, 2020 Wis. L. Rev. 301, 303-306 (2020) (describing the Court's efforts to win congressional support to reduce its mandatory appellate jurisdiction and expand its discretionary jurisdiction).

The guidance in Supreme Court Rule 10 (“Considerations Governing Review on Writ of Certiorari”) is relatively sparse and expressly indeterminate.² Rule 10 emphasizes that a grant of certiorari requires “compelling reasons,” that a primary consideration is the need to resolve “conflicts” on “important” federal issues, and that case-specific error correction is “rarely” a basis for review.³ But how the Court applies those criteria is not obvious. The Court does not offer explanations for denying certiorari or publicly reveal its votes, although Justices occasionally issue opinions concurring in or dissenting from denials of certiorari. The windows into the Court’s processes are thus limited. Only approximately 1% of the certiorari petitions filed with the Court make it on to the Court’s

² Rule 10 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.

³ *Id.*

docket.⁴ And the Court hears and resolves only about 70 cases a term. What motivates four (or more) Justices to grant review, and why, is left to their own private judgment.

Nevertheless, the Rule 10 standards, the occasional concurrences or dissents at the certiorari stage, and most importantly, the types of cases that the Court votes to grant suggest that four types of cases tend to find a place on the Court's docket:

- (1) **Publicly important cases.** These are the high-profile cases that generate national news and garner intense interest from the public. They may raise profound social, cultural, or political issues that grab headlines and have broad ramifications in society. These are often constitutional cases. But they also may involve interpretation of sweeping statutory provisions such as the Affordable Care Act, Title VII, or the Voting Rights Act.
- (2) **Legally important issues.** This category embraces legal issues that may be of great importance to specific fields of law, the conduct of litigation, or discrete industries, groups, or governments, but that tend to draw less public attention. They may involve technical areas of law, such as patent, copyright, securities, or ERISA, or may

⁴ See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. Penn. L. Rev. 1, 3 n.3 (2011). The rate is higher for paid petitions than in forma pauperis petitions, but it is low for both. *Id.*

implicate questions of law about law: civil or criminal procedure or jurisdictional questions, for instance.

- (3) **Conflicts.** These arguably compose the majority of the Court's workload. Ensuring uniformity in the interpretation of federal law is a critical part of the Court's function and perhaps the least controversial component of the certiorari docket—except to those who would like to see more grants to resolve conflicts.
- (4) **Error correction.** This category covers both factual and legal errors. While members of the Court say from time to time that “we are not a court of error correction,”⁵ the summary-reversal docket is largely just that. This class subsumes cases in which the Court ensures adherence to its own precedents and supervises the administration of justice in the federal courts. Generally, the Court resolves error-correction cases through summary reversals rather than plenary grants of review.

Of course, the Court's docket can be characterized in many different ways, aside from this typology. Cases could be classified as constitutional or statutory; state or federal; governmental or private; civil or criminal; and on and on. Even taking the categories sketched above, many cases fall into two or even three of these categories. Nevertheless, these categories offer one way of asking what the Court may be doing right or arguably wrong in granting certiorari.

⁵ *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (statement of Alito, J., respecting the denial of certiorari).

And how that question is answered may help in evaluating different reform proposals that respond to different asserted critiques of the way the Court assembles its docket each term.

A complete analysis of whether the Court exercises its discretion wisely could not proceed without a theory of the Court's role in our legal system. Should the Court enter into large social or political debates and provide legal solutions to sweeping societal problems? Should it monitor emerging trends and problems that are troubling the lower courts and provide guidance? Or should it primarily or exclusively seek to resolve discrete legal issues framed by the parties in concrete cases and ensure the consistency and supremacy of the Constitution and federal law as a matter of supervisory authority over decisions of other courts? The Article III limitation of the judicial power to "cases and controversies" at least requires concrete adversarial disputes amenable to a judicial remedy, on issues generally if not invariably framed by the parties.⁶ But beyond that, descriptions of the Court's proper role involve answering deeper questions about constitutional theory and the nature of judicial review. Addressing those issues and the various theories of constitutional interpretation that may inform them is well beyond the scope of this discussion of the Court's certiorari jurisdiction.

⁶ See, e.g., *California v. Texas*, 2021 WL 2459255, at *6-*7 (June 17, 2021) (explaining importance of Article III standing requirements as "not simply technical" but as means of ensuring that "unelected judge[s] [do not enjoy] a general authority to conduct oversight of decisions of the elected branches of Government"; and declining to consider a "novel alternative theory of standing" not argued below or presented at the certiorari stage).

II. The Court's Performance in Selecting Cases

Working through those categories, it seems to me that the Court does a reasonably good job of identifying and granting review to resolve high-profile, publicly important cases (the first category). It also does an effective job of granting review to resolve conflicts among the lower courts (the third category). It arguably does a less effective job in identifying important issues of federal law in discrete and potentially obscure areas that have not generated a conflict, but where guidance is needed (the second category). And the Court's sporadic exercise of the power of error correction (the fourth category) seems difficult to understand in many instances.

The reasons for this disparity in performance may be traced at least in part to the Court's internal processes. And that may, in turn, shed light on the merits of various reform proposals.

First, the Court is well equipped to identify the larger, high-profile issues it adds to its docket. Those issues practically leap off the page: paradigmatic examples include abortion, religion, healthcare, certain due process and equal protection rights, and election law. These are also frequently the areas in which guideposts for decision are most contested and the Court's decisions generate the most controversy. But without delving into the merits of the Court's decisions when it takes up these big-ticket issues, the Court has a sound grasp on deciding *what and when to decide*. This necessarily embraces at least two

considerations: what questions should be answered by the Nation's highest Court, and when that answer should be provided.

As to the selection of issues, so long as we have a system in which the Constitution is law and the Supreme Court has the *Marbury v. Madison* role of saying what the law is,⁷ the Court will inevitably settle seismic issues that roil the lower courts and require a national answer. Alexis de Tocqueville's "famous observation, written in the 1830's, that 'scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question'"⁸ may be somewhat overstated.⁹ But it rings true for a large swath of issues.

As to timing, the question is more delicate. A critical task when the Court resolves these major issues is to preserve the Court's legitimacy in the minds of the public. Many issues land on the Court's doorstep because constitutional issues cannot finally be resolved elsewhere. Respect for the rule of law requires that the Court's decisions be accepted (if not always agreed with). But the Court may defer resolving an issue until it perceives that its answer will meet with public acceptance. A notable example is the Court's celebrated and landmark decision striking down bans on interracial marriage in *Loving v. Virginia*.¹⁰ The Court had many opportunities to address the issue in earlier years, but it deferred granting review because of concerns that the timing was wrong: The

⁷ 5 U.S. (1 Cranch) 137, 177-178 (1803)

⁸ *Sierra Club v. Morton*, 405 U.S. 727, 740 n.16 (1972) (quoting 1 Alexis de Tocqueville, *Democracy in America* 280 (1945)).

⁹ See Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 Const. Comm. 485 (2004).

¹⁰ 388 U.S. 1 (1967).

Nation was grappling with the fallout of desegregation under *Brown v. Board of Education*,¹¹ and members of the Court apparently believed that the public was not ready for the invalidation of interracial marriage bans.¹² If part of the Court's job is not only to resolve the most fundamental issues of constitutional law but also to preserve its institutional capital in the eyes of the public, then prudence in identifying issues and deciding when to address them is essential. While the Court may not always get the timing right, there is no reason to think that any governmental body or any other process would do a better job of identifying fundamental issues and assessing when to decide them than the Justices themselves.

Second, the Court performs well when deciding whether to resolve purported conflicts in case law. Justices have expressed varied views about how central a role conflict resolution should play in exercising certiorari jurisdiction. Justice White famously voted to grant review in far more cases raising purported conflicts than his colleagues.¹³ But the Court still grants many cases simply to resolve conflicts and turns away many more because of the absence of

¹¹ 347 U.S. 483 (1954).

¹² See Peter Wallenstein, *Race, Marriage, and the Law of Freedom*, 70 Chi.-Kent L. Rev. 371, 415-418 (1994). Some civil rights litigators themselves held back challenges to anti-miscegenation laws while pressing forward on rights of political equality and challenging education, housing, and employment discrimination. See Dorothy E. Roberts, *Loving v. Virginia as a Civil Rights Decision*, 59 N.Y.U. Sch. L. Rev. 175, 183-187 (2014-2015) ("Civil rights advocates feared that pressing to overturn interracial marriage bans would jeopardize the gains made in desegregating public education.").

¹³ See Carl W. Tobias, *Justice Byron White and the Importance of Process*, 30 Hastings Const. L. Q. 297, 303-304 (2004) (noting that Justice White issued "hundreds of statements dissenting" from the denial of certiorari because of his view that the Court had a "special obligation to intercede and provide some definitive resolution" of issues on which federal and state courts were in conflict) (quoting *Metheny v. Hamby*, 488 U.S. 913, 915 (1988) (White, J., dissenting from the denial of certiorari)).

a deep split. Arguably, the Court could relax its standards somewhat and grant review of more cases that involve conflicts, even when the depth and prospective importance of the split is unclear. Doing so would advance one of the undisputed roles of the Court and preserve a bedrock assumption of the rule of law: like cases should be treated alike and the happenstance of geography should not justify different outcomes. Looking at the federal system alone, a one-to-one circuit split between the Ninth Circuit (with more than 60 million people) and the Fifth Circuit (with more than 32 million) affects more than 28% of the Nation's population. Yet a petitioner relying on such a split may struggle to overcome a brief in opposition suggesting that the split is shallow and the issue should be allowed to percolate. Not always, but often enough, that objection prevails. The Court, of course, has limited resources, and it benefits from waiting for the insights of other courts and seeing how an issue plays out in varied fact patterns. But the Court could probably take a few more cases to resolve splits without sacrificing its understanding of the arguments or taxing its resources. Still, at least when it comes to assessing whether a split is real or illusory, the Court's processes work quite well.

Third, where the Court may experience shortcomings is in identifying issues of surpassing importance to the administration of justice that have not resulted in a split. Those issues may involve specialized areas of law in which the Justices are not themselves expert. And they may be less glamorous. Yet on occasion, these issues have compelling importance in commercial litigation,

criminal law, or judicial procedure. Despite this, a petition based solely on an assertion that the decision is wrong on the law and that it affects important (if discrete) interests faces an uphill battle. Some of those cases make it on to the Court's docket. But most experienced Supreme Court practitioners will acknowledge that these are long shots.

This may be a problem for several reasons. Lower courts may coalesce on a rule of law based on precedent in other circuits, without necessarily turning over all the rocks. That is not necessarily a bad thing. Consistency and uniformity in federal law is a virtue. Particularly when a body of precedent has evolved, other courts may be reluctant to create a split. But in some instances, uniform decisions may be wrong, and the costs of waiting for a split to arise are great. National industry actors may have to conform their conduct to a problematic decision and forgo challenges elsewhere—or press on with litigation while living with uncertainty about whether a split will ever emerge that would justify Supreme Court intervention. If the Court could identify those cases and grant review earlier, it could reduce those costs by providing regulated parties with a clear path forward.

Finally, the Court's error-correction role may be one of its least transparent areas, where its rationales for rare interventions can only be inferred. The Court has frequently issued factbound summary reversals of holdings denying qualified immunity to police officers or granting habeas corpus

relief to state prisoners.¹⁴ Some Justices have objected to what they have perceived as a pattern of summary reversals that freely overturns the denial of qualified immunity while rarely rejecting rulings that incorrectly afford it.¹⁵ If such patterns exist, they raise questions about the evenhandedness of the Court's rare decisions to fish a case out of the sea of petitions and engage in pure error correction. Perhaps the Court singles out these cases because of a perception that a court of appeals is defying the Court's precedents or abusing the standards that it has announced. But the infrequency of these summary reversals and any one-sided use of that lightning bolt from the Court can contribute to legitimacy concerns about potential arbitrary or unfair use of certiorari jurisdiction.¹⁶ Those concerns may be amplified for summary reversals because the Court bypasses merits briefing and a public hearing and resolves often-intricate factual questions solely on the certiorari papers without oral argument.

¹⁴ See Richard C. Chen, *Summary Dispositions as Precedent*, 61 Wm. & Mary. L. Rev. 691, 707 (2020) (of 88 summary reversals from 2005 through 2018, 41 were in federal habeas cases and 11 were in qualified immunity cases, with "asymmetrical" results: 34 of the 41 habeas cases "were reversed in favor of the state," and 9 of the 11 qualified immunity cases were reversed in favor of the official).

¹⁵ See *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting from per curiam decision granting qualified immunity); *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., joined by Ginsburg, J., dissenting from the denial of certiorari on a petition challenging the grant of qualified immunity). Some decisions, however, run counter to any perceived trend. See *Taylor v. Rojas*, 141 S. Ct. 52, 53 (2020) (per curiam) (summarily reversing grant of qualified immunity to officials for alleged confinement of a detainee for six days in "shockingly unsanitary cells").

¹⁶ See Chen, *supra*, 61 Wm. & Mary. L. Rev. at 71 (arguing that the lack of "stated criteria" or any "constraint" on the Court's summary reversals can undermine rule-of-law values and the "public's perception that [the Court] is making decisions based on legal—rather than political—grounds"); *id.* at 712 (arguing that the Court "regularly intervene[s] in unremarkable cases, and its interventions are not random, but follow a clear pattern").

An explanation for the shortcomings in the latter two categories, if they are valid concerns, may stem from the Court's internal processes for evaluating certiorari petitions. Reviewing the vast volume of certiorari petitions would be impossible for any Justice. And the Justices understandably give priority to the difficult and important task of writing majority opinions, concurrences, and dissents in argued cases. This work commands the lion's share of the Justices' attention because their decisions make national law and require careful crafting and deliberative decisionmaking. Of course the Justices themselves make the decision whether to grant review, and they deeply immerse themselves in the certiorari papers to make that decision.¹⁷ But it falls to the clerks in the first instance to search for the needle in the certiorari-petition haystack through the pool-memo process.¹⁸ Seven of the nine Justices cooperate by delegating the review of certiorari petitions to their clerks, who divide them up among the chambers to produce memos for the pool. Two Justices—Justice Alito and Justice Gorsuch—are outside the pool. The clerks thus are the gateway for a petition to reach the Court. In reviewing petitions, the clerks can readily spot hot issues. They are attuned to their own Justice's priorities and well aware of special interests of other members of the Court. Blogs and websites devoted to the Court also highlight major cases. And as for circuit conflicts, clerks can do a

¹⁷ Beginning in 2013, the Court also instituted a general practice of relisting cases for consideration at a second conference before granting certiorari. See Stephen M. Shapiro, et al., *SUPREME COURT PRACTICE*, Chap. 5.2, at 5-9 (11th Ed. 2019). This affords the Justices and the clerks the chance to take a second look at a case to weed out potential vehicle issues. Some cases are relisted multiple times before the Court grants review. *Id.*

¹⁸ See *id.*, Chap. 5.2, at 5-6 to 5.7; Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 *Wm. & Mary L. Rev.* 1219, 1226-1227 (2012).

crackerjack job of zeroing in on splits. They have a well-honed ability to read cases and dissect their facts and rationales. If a certiorari petition overstates the claim of a split, it is unlikely to escape their notice. And a flimsy distinction of other cases is unlikely to slip through. So in processing high-profile petitions and circuit splits, the systemic collaboration of the Court and the clerks is likely to work—with just enough checks on the pool writer from clerks of other chambers to prevent the memos from skewing the analysis because of subtle agendas or oversights.

The pool process may operate less successfully, however, when no split is alleged or born out, but the petition claims to raise an important but unsettled legal issue or, conversely, a serious factual or case-specific error (what Rule 10 calls “erroneous factual findings or the misapplication of a properly stated rule of law”). A clerk may face a conundrum when confronted with a petition that does not allege (or establish) a bona fide circuit split, but that asserts that the case was wrongly decided and surpassingly important to, say, the health care sector or broker-dealers or the admissibility of DNA evidence. The decision may look wrong or at least debatable. But assessing its importance in the absence of a conflict is more challenging. The clerks are almost invariably recent law school graduates with limited legal experience beyond one or more judicial clerkships. A decision to recommend a grant based on a claim of importance alone is possible, but it takes a lot of confidence. Given the Court’s track record

of denying that type of case, a clerk would have to go out on a limb with a high risk of it breaking. The process is thus stacked against such a petition.¹⁹

Yet a conflict is not always necessary for an issue to be important enough for the Court to address. (Nor is a conflict sufficient to establish that a case is important; many splits are not.) For example, the Court almost invariably will grant a petition for a writ of certiorari when a federal statute has been invalidated as unconstitutional, and the Solicitor General seeks review. But it is less likely to grant when a case involves a multifactor test that makes it difficult to pin down divergent results—even if courts and litigants would benefit from guidance on how to apply the test. I am not suggesting that the Court radically expand its docket or that it dispense with conflicts as a key certiorari factor. But occasionally, the Court might intervene if it could be confident that the issue is truly important despite the absence of a conflict. The challenge is sorting out which issues might qualify for that treatment. Amicus briefs can shed light on the wider importance of an issue and place it in broader context, particularly if filed by well-known organizations and counsel with a track record of insight and credibility. But clerks and the Justices themselves have little way to check the accuracy of those assertions, which are now a regular feature of certiorari practice. A raft of amicus briefs by the usual suspects is not necessarily helpful to the Court.

¹⁹ Owens & Simon, *supra*, 53 Wm. & Mary L. Rev. at 1235 (describing “tremendous pressures on the law clerks in the cert pool to recommend that the Court deny review to a petition; clerks fear mistakenly recommending the Court grant review on cases that could make themselves, the Justice for whom they clerk, or the Court look foolish”).

A potential remedy would be for the Court to call more often for the views of the Solicitor General (CVSG), as it does multiple times each term. The Solicitor General's Office has access to the information, resources, and expertise of the government, and it is attuned to the standards and practices of the Court. When the Solicitor General is invited to express the views of the United States on a petition, her Office invariably conducts an extensive process, including meeting with the parties and the interested components of the government, to get to the bottom of the case. The government's resulting amicus brief can provide the Court with a fresh and independent perspective on both the case's importance and its suitability for review. The CVSG brief may identify legal issues that the parties have missed, uncover jurisdictional flaws, or discuss collateral legal or legislative developments that inform whether review is warranted. If the Court were interested in expanding its understanding of legal issues that have not generated a split but that may justify certiorari, greater use of the CVSG process might be the way to proceed.

The remedy for any imbalanced use of the summary-reversal docket for error-correction cases is harder to imagine. Identifying factbound decisions that are not only wrong, but that justify use of the Court's scarce resources, takes a lot of work. And writing a pool memo recommending that the Court act on them takes persuasive advocacy. Filtering those cases through a diverse set of clerks, with different potential priorities, will almost inevitably produce uneven results. But is not easy to envision the solution to this problem (again, assuming it is

one). Short of imagining algorithms and machine learning that would surpass human judgment in reviewing certiorari petitions, individual clerks will have to make case-by-case front-line judgments. They may well respond to priorities of their Justices in identifying summary-reversal candidates. And the Justices may individually have a feel for when a case is suitable for resolution on a summary basis, but they do not seem have consensus on that issue. No procedural remedy can address that. And it is not obvious whether any internal changes in the Court would improve the process. The Justices are undoubtedly well aware of criticisms, but are unlikely to impose rigid criteria on a process that is designed to be used rarely.

III. Proposals for Reform

Many critiques of the Court's case-selection process begin from the premise that the Court has the capacity to hear more cases and should use it. It is undeniable that the Court's docket has contracted notably since the mid-twentieth century, with a particularly steep drop following the elimination of most mandatory appellate jurisdiction.²⁰ Whether this is a good or bad thing is a subject for endless debate.²¹ I do not think that the Court has any special need to decide more cases for the sake of volume alone. Over time, the Court does well at reaching the areas of federal law where guidance is needed. The

²⁰ See, e.g., Owens & Simon, *supra*, 53 Wm. & Mary L. Rev. at 1228-1229; *but see id.* at 1244-1245 (canvassing evidence that the repeal of most mandatory jurisdiction does not account for the reduced case load).

²¹ For a view that it is a virtue, see J. Harvie Wilkinson, *Yale Symposium on Supreme Court Case Selection Process: If It Ain't Broke . . .*, 119 Yale L. J. Online 67 (2009).

case for a broader docket faces multiple counterarguments—including that a higher case load could result in less detailed attention to each case. I see no compelling reason to displace the Justices’ judgment about the number of cases to decide. But other potential reforms have been proposed that have rationales apart from driving up the Court’s output.

Certification. As suggested above, the Court might do well to grant review in additional low-profile cases that are legally important but have not yet generated a conflict. As discussed, the Court could potentially identify those cases by improving the flow of information about a case’s significance from sources outside the parties, who have obvious reasons to oversell or undersell a case’s significance. One technique could be to revive the Court’s use of the certification process.

The Court has review authority “[b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired”; upon certification, the Court has discretion to “give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.”²² If courts of appeals were judicious in invoking this procedure, it might be helpful. The wider significance of a legal question might be apparent to appellate courts, but harder to spot through the petition process. Yet the Court has dismissed all of the recent certifications filed by the courts of

²² 28 U.S.C. § 1254(2).

appeals—such that the leading treatise on Supreme Court practice describes certification as “virtually, but not quite, a dead letter.”²³

From my experience as Deputy Solicitor General, I saw firsthand the Court’s aversion to certified questions. In *United States v. Penaranda*,²⁴ the en banc Second Circuit certified three questions about the constitutionality of the federal sentencing guidelines with an extensive statement, resembling a petition. The certifications were filed on July 12, 2004. Within days, the Supreme Court Clerk’s office informally asked the Solicitor General’s office whether the government planned to file a petition for certiorari seeking review of the same issue. Nine days later, the government filed the certiorari petitions later consolidated and decided as *United States v. Booker*.²⁵ Implicit in the Clerk’s request was the Court’s preference for a petition from a party rather than a certification from a court. And the Court had good reason for that preference in this instance: The Solicitor General’s office had a nationwide perspective on which cases would best present the issues. It selected cases free of procedural obstacles. And it drafted questions to present both the constitutional and remedial issues that the Court ultimately resolved in *Booker*, which the Second Circuit had not. The Court’s reasons for preferring that the government seek certiorari were unstated; perhaps the Court simply did not wish to encourage the courts of appeals to shift their hardest problems to it. But the Second Circuit’s plea for guidance and expedited briefing “to minimize, to the extent

²³ Shapiro, et al., *supra*, at Chap. 9.1, at 9-3.

²⁴ 375 F.3d 238 (2d Cir. 2004) (en banc).

²⁵ 543 U.S. 220 (2005).

possible, what we see as an impending crisis in the administration of criminal justice in the federal courts”²⁶ may well have provided the Court with an important spur to urgent action. When it granted certiorari on August 2, 2004, the Court expedited briefing and held argument on the first day of the new term.²⁷

It seems unlikely that the Court will breathe new life into court of appeals certifications, for several reasons. The Court regards the composition of its docket as its own special prerogative.²⁸ It also frequently rewrites the questions presented in a petition or adds questions of its own, which it may feel less free to do with a certification by a court of appeals.²⁹ And review of certified questions that a court of appeals has not decided is at odds with the Supreme Court’s frequent statement that it is a “court of review, not of first view.”³⁰ Still, court of appeals’ certification could be a valuable additional source of information for the Court in deciding which below-the-radar issues are worthy of review.

²⁶ 75 F.3d at 248.

²⁷ *United States v. Booker*, 542 U.S. 956 (2004) (mem.).

²⁸ This was highlighted by Chief Justice Rehnquist’s exchange with counsel for the government in a case in which the government had petitioned for certiorari:

COUNSEL FOR THE UNITED STATES: We brought the case here because the Ninth Circuit decision conflicts with the view of every other court of appeals that has considered what sort of a jurisdictional proof satisfies the requirements of RICO.

CHIEF JUSTICE REHNQUIST: I think it’s we rather than you who brought the case here.

COUNSEL FOR THE UNITED STATES: Well, I stand corrected, Mr. Chief Justice.

United States v. Robertson, No. 94-251, 1995 WL 115550, at *4 (Feb. 27, 1995).

²⁹ See, e.g., *New York State Rifle & Pistol Ass’n v. Corlett*, 2021 WL 1602643 (Apr. 26, 2021) (No. 20-843) (granting certiorari limited to a question formulated by the Court); *Citizens United v. Federal Election Commission*, 587 U.S. 932 (2009) (mem.) (restoring case to the calendar for re-argument and specifying a question for supplemental briefing); see also *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1582-1583 (2020) (addendum listing cases from 2015-2020 in which the Court ordered supplemental briefing on Court-specified questions or appointed an amicus).

³⁰ See, e.g., *Brownback v. King*, 141 S. Ct. 740, 748 n.4 (2021) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

Intermediate court of appeals. Other reform proposals focus on separating the Court’s case-selection function from its deciding function. One proposal would create a separate tribunal of court of appeals judges who would make the certiorari decisions for the Court.³¹ The theory behind such a tribunal would be to remove the agenda-setting role of the Court—the power to decide what to hear, when to hear it, and how to frame the questions presented—which can be used to shape ultimate decisions to achieve specific legal objectives. This proposal has multiple drawbacks and little to recommend it. The creation of such a tribunal would prompt political and possibly partisan jockeying over selection of the judges who would then set the Court’s agenda. And those judges, no matter how selected, could not be expected to act as Platonic guardians, nor would they be seen as such.

Beyond simply producing a new realm for controversy, there is no reason to think that the court of appeals judges would have the time, panoramic vision, or collective experience to do a better job than the Justices even at the technical side of the task. The Court has a data base of pool memos written by their clerks, a fine-tuned attention to vehicle defects, and experience with how grants of certiorari translate into decisions at the merits stage. The Justices can thus look down the line to assess whether a particular case is likely to yield a useful opinion on the merits. How broadly or narrowly to write, how much or how little to say, whether to make a big move or take an incremental step are all questions

³¹ See Wilkinson, *supra*, 119 Yale L. J. Online at 72-73 (describing and discarding this as a “bad idea”).

that the Court must face.³² Deciding which cases to hear is inseparable from deciding how and when to develop the law. Separating those functions may thus dilute the usefulness of the decisions the Court ultimately issues.

Restoration of mandatory jurisdiction. Another proposal that occasionally surfaces is to restore some of the Court’s mandatory jurisdiction, requiring it (for example) to resolve “more routine criminal appeals.”³³ A potential virtue of such an approach would be to expose the Court to the daily work of the courts of appeals. This could enhance the Justices’ understanding of the day-to-day issues that preoccupy the appellate courts. It could also provide perspective on the challenges those courts face (for example, interpreting ambiguous Supreme Court opinions). Although those experiences might enhance the art of judging, they would come at the expense of what the “one Supreme Court” prescribed by Article III uniquely does: settle vital questions of national law.

Mandatory jurisdiction is now quite limited. In a handful of specific areas, the Court still receives mandatory direct appeals from district courts, but it is questionable whether they are a sound use of its resources. Mandatory

³² See, e.g., *Mahanoy Area School District v. B.L.*, 2021 WL 2557069, at *5 (June 23, 2021) (rejecting a strict on-campus/off-campus line for school officials to regulate student speech, but expressing uncertainty over the scope of authority school officials should have to address off-campus speech and declining to “set forth a broad, highly general First Amendment rule”). Clearly, the Court would retain discretion to frame its decisions as it saw fit even if another tribunal had certified the case to the Court as a form of mandatory jurisdiction. But allowing the Court to consider its options at the certiorari stage may reduce the possibility of a disconnect between the questions granted and the opinion later announced.

³³ Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 Yale L. J. Forum 840-841 (2021).

direct appeals may signal urgency and the need for an authoritative decision. But the Court can grant certiorari before judgment in a rare case that warrants leapfrogging the appellate process.³⁴ Restoring mandatory jurisdiction to address large categories of cases seems like an inexact and overbroad response to a highly particular and circumstance-dependent concern.

Amendment of the Supreme Court’s rules. Another possibility would be to amend the Court’s rules to provide more concrete guidance on when certiorari will be granted. To the extent any such amendment would be advisable, it should come from the Court, not Congress. Both separation-of-powers concerns and respect for the Court’s historic independence suggest that the legislature should refrain from intervening in the Court’s case-selection process. But even if the task were left to the Court, it is difficult to identify a set of specific standards that would be useful. The certiorari standards that the Court actually applies are sufficiently broad and flexible that it is difficult to say that there is “law to apply.”³⁵ Perhaps the Court could borrow from criteria covered in now-repealed mandatory jurisdiction statutes.³⁶ But attempting to give those standards more specificity than the factors in Rule 10 would not likely provide much benefit to the Court, the litigants, or the public.

³⁴ See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (granting certiorari before judgment to consider the constitutionality of the federal sentencing guidelines).

³⁵ Cf. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (discussing principle under the Administrative Procedure Act that judicial review is precluded when a statute is drawn so broadly that there is “no law to apply” and the decision is instead committed to the agency’s discretion).

³⁶ For instance, before its repeal in 1988, 28 U.S.C. § 1257 provided for appellate jurisdiction from decisions “by the highest court of a State . . . where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.”

Transparency proposals. Finally, some have thought that the Court’s certiorari process is opaque without sufficient justification. A possible solution would to require disclosure of a Justice’s vote to grant or deny a petition. This would not entail a requirement to issue an explanatory opinion. That type of requirement would face insuperable practical obstacles given the scale of the task. The Court denies review to thousands of petitions a year, and it would be impossible to require anything other than the most perfunctory statement. An explanation along the lines of “See Rule 10” would help no one. Nor would a requirement to disclose the votes cast entail disclosure of the Court’s internal deliberations. Those discussions are unquestionably appropriately shielded. Confidentiality is essential to promote candor, free debate, and quality of decisionmaking—considerations that justify presidential- and deliberative-process privileges in the Executive Branch.³⁷ But “this rationale does not apply . . . to documents that embody a final decision because once a decision has been made, the deliberations are done.”³⁸ A Justice’s vote to grant or deny certiorari is akin to the final decision on the only action before the Court. It represents an exercise of official power conferred by statute. That could suggest that there is a public interest in understanding how the Justices voted—that this is not a private act but the wielding of governmental power.

³⁷ See *United States v. Nixon*, 418 U.S. 683, 708 (1974) (describing qualified privilege for presidential communications); *United States Fish and Wildlife Service v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021) (describing deliberative process privilege).

³⁸ *Id.*

While disclosure of the votes for or against certiorari would illuminate how a Justice stood on whether to grant review in that particular case, it is questionable whether that information would be sufficiently illuminating to justify the costs of automatic disclosure. Petitions that do not make the “discuss” list at conference are regularly denied without comment.³⁹ Given the enormous volume of these petitions, it is likely no Justice deeply engaged in the arguments in most of those cases. In other cases, four votes to grant may quickly emerge thus eliminating the need for other Justices to make a formal decision one way or another. Another potential objection is that the certiorari vote without explanation would be unilluminating or even misleading.⁴⁰ A Justice could vote to deny because of concerns about the case as a vehicle, jurisdictional concerns, complicated facts, unrepresentative claims, lack of importance to the outcome, harmless error—the list may not be infinite, but it is long. Without an accompanying explanation of reasons—which few would advocate as a routine measure—the disclosure of votes would provide limited benefit. And a vote to grant a petition the Court denied might be similarly unilluminating, suggesting only that, for unexpressed reasons, a Justice believed that the issue merited the Court’s attention.⁴¹

³⁹ Shapiro, *supra*, Chap. 5.2, at 5-10-5-11.

⁴⁰ See Nancy S. Marder, *The Supreme Court’s Transparency: Myth or Reality*, 32 Ga. St. L. Rev. 849, 872-873 (2016).

⁴¹ A potential argument that the Justices should reveal their votes because they “hold their Offices [only] during good Behavior.” U.S. Const. art. III, § 1, and disclosure would be a check on abuses of power seems extraordinary weak. Absent any reason to believe that Justices are exercising their power in an invidious or unconstitutional manner, there is no justification for treating them as suspect. And they are far from elected or even appointed executive officials who are accountable to the public for their decisions. They are afforded life tenure precisely to give them independence.

Finally, any Justice who wishes can file a statement respecting the denial of certiorari or a dissent. Justices may file such statements to make clear that they would encourage pursuit of the issue, just not in that case or in its particular procedural posture. And dissents from the denial of certiorari can send an even stronger message. Given this option of informing the public about the Court's inner workings at the certiorari stage, the benefits of routinely requiring the disclosure of certiorari votes would appear to be outweighed by its costs. At any rate, the Court has consistently made the judgment not to routinely disclose certiorari votes, and the case for displacing that conclusion has not been made.