
CERTIORARI TRANSPARENCY

Alexandra L. Klein*

Michael L. Smith**

Amid increasing controversy over the Supreme Court's amassing of power, rejection of precedent, reliance on the shadow docket, and Justices' undisclosed acceptance of lavish gifts, legal scholars, commentators, and politicians have called for bold and far-reaching reforms to the Court, including term limits for Justices, stripping the Court of jurisdiction in certain cases, and adding Justices to the Court. This Article proposes a more subtle reform to the Court's proceedings: the Court should make its certiorari determinations, in which it decides which cases to take up and review, public. Currently, the Court exercises near-complete discretion over the cases it decides to take up. Its reasons for granting certiorari are entirely unknown. Justices' votes on these determinations, and memoranda on whether to grant or deny certiorari, are almost never public until a Justice's papers are made accessible to the public, usually after their retirement or death. We propose that Justices' certiorari votes and the Court's certiorari memos for all cases should become part of the public record and become available after the Court denies certiorari or issues a decision and opinion in the case.

The potential benefits of such a simple reform are myriad. Publicizing Justices' votes on certiorari determinations puts these decisions in the public eye—subjecting Justices to critiques for inconsistency and poor judgment where relevant. Publicizing the Court's certiorari memos may reveal what the Court (or certain Justices) prioritize in determining whether a case is cert-worthy—revealing information about institutional priorities and providing valuable information to advocates who wish their dispute to be one of the increasingly minuscule number of cases on the Court's merits docket each year. More fundamentally, increased transparency in the Court's case selection process provides much needed insight into the Court's motivations and exercise of discretion in shaping its docket—information that may bolster other reform proposals. Certiorari transparency opens the Court's extensive discretion in case selection to public scrutiny and critique. It is likely to appeal to those on both the right and left, and

* Associate Professor of Law, Washington & Lee University School of Law. Our thanks to Maureen Edobor, Brandon Hasbrouck, Alexi Pfeffer-Gillett, Alan Trammell, and Mark Drumbl for helpful suggestions, comments, and discussions. Jas Oommen provided invaluable research assistance.

** Associate Professor of Law, University of Oklahoma College of Law.

unlike other reforms (like adding Justices or jurisdiction-stripping), it is not tied to any political party or policy outcomes. Additionally, the Court itself may implement this proposal, making it more feasible than alternatives that would require the passage of legislation or constitutional amendments.

If an independent judiciary ensures respect for the law, the judiciary should also demonstrate that respect. The way the Court wields the judicial power can be a force for greater transparency and accountability, rather than exercises of power for power's sake that ultimately undermine the legitimacy of the judicial branch. Much of the criticism of the Court arises from the way it has conducted its business. Greater transparency in the certiorari process may lead to greater public understanding of the Court and promote civic engagement with its work.

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I. INTRODUCTION

“[N]either those outside of the Court, nor on many occasions those inside of it, know just what reasons led six Justices to withhold consent to a certiorari.”¹

In the 2024 Year End Report on the Federal Judiciary, Chief Justice John Roberts identified “four areas of illegitimate activity” that threatened judicial independence: “(1) violence, (2) intimidation, (3) disinformation, and (4) threats to defy lawfully entered judgments.”² With regard to disinformation, the Chief Justice complained that “distortion of the factual or legal basis for a ruling can

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

2. 2024 YEAR END REPORT ON THE FEDERAL JUDICIARY 5 (2024) [hereinafter 2024 YEAR END REPORT].

undermine confidence in the court system.”³ Renewing arguments made in the 2019 Year End Report, the Chief Justice asserted that “a renewed emphasis on civic education” was “the best antidote for combating the epidemic of misinformation” and lauded efforts from “the bench, bar, and academy” to “writ[e] and speak[] about the distinct role of courts in American government and explain[] what they do and don’t do.”⁴ Informed public discussion of the courts is, the Report emphasizes, important to inform the public and protect democracy.⁵

The Court has received significant criticism over the last several years for its decisions that have reinforced its own power and overruled longstanding precedent.⁶ The Court’s increasing use of the “shadow docket” to decide important issues without argument via unsigned per curiam decisions—or no written decision at all—has led to congressional hearings and public criticism.⁷ Individual Justices have accepted lavish gifts from wealthy benefactors in the form of property purchases, resort retreats, and travel on private planes.⁸ Justices did not report these gifts until journalists published detailed exposés.⁹ The Court attempted to correct course by promulgating and adopting a code of ethics—but that code does not include an enforcement mechanism.¹⁰ These events have driven calls for Supreme Court reform by legal scholars, commentators, and politicians, including President Biden.¹¹ Suggestions for reform have been bold and far-reaching, and include term limits for Justices, jurisdiction stripping, and expanding the

3. *Id.* at 7. The Court, however, may want to take this up with itself first. See Sheldon Whitehouse, *Knights-Errant: The Roberts Court and Erroneous Fact-Finding*, 84 OHIO ST. L.J. 837, 855 (2023) (arguing that the Court engages in improper and erroneous fact-finding to support its rulings).

4. 2024 YEAR END REPORT, *supra* note 2, at 7.

5. *Id.* at 4.

6. See *infra* notes 94–98 and accompanying text.

7. JOANNA R. LAMPE, CONG. RSCH. SERV., THE “SHADOW DOCKET”: THE SUPREME COURT’S NON-MERITS ORDERS 2–6 (2021), <https://www.congress.gov/crs-product/LSB10637> [<https://perma.cc/8P6S-ZN8G>].

8. See *infra* notes 114–17 and accompanying text.

9. See Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Justice Clarence Thomas Acknowledges He Should Have Disclosed Free Trips From Billionaire Donor*, PROPUBLICA (June 7, 2024, at 13:32 CT), <https://www.propublica.org/article/clarence-thomas-gift-disclosures-harlan-crow> [<https://perma.cc/5LES-X4QG>].

10. See *infra* notes 118–19 and accompanying text.

11. LAMPE, *supra* note 7; Joe Biden, *Joe Biden: My Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WASH. POST (July 29, 2024), <https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement/> [<https://perma.cc/V93Y-26HV>].

Court.¹² These reform proposals have recognized the secretive nature of the Court's practices.¹³

In this Article, we offer another, more subtle reform to the Court's practices: the Court should make its certiorari determinations more transparent. Currently, the Court exercises near-complete discretion over the cases it decides to take up and the questions it decides to hear in each of those cases.¹⁴ Its reasons for granting certiorari are rarely known, although the Court sometimes offers some generalized explanation why it granted certiorari in a case in the opinion.¹⁵ Justices' votes on certiorari and memoranda addressing whether to grant or deny certiorari are almost never made public until a Justice's papers become accessible to the public, usually years after the Justice's retirement or death.¹⁶ Greater information about the workings of the Court could contribute to the informed public discussion about the role of the Court from the bench, bar, and academy that the Chief Justice desires. If the Court thinks of itself as a component of a robust democratic project, then the Court should govern itself accordingly.¹⁷

We are not the first to call for transparency in the certiorari process. Legal scholars have urged that certiorari votes be made public, citing increased transparency and accountability that would result.¹⁸ These calls for reform appear in

12. See, e.g., Kermit Roosevelt III, *I Spent 7 Months Studying Supreme Court Reform. We Need to Pack the Court Now*, TIME (Dec. 10, 2021, at 07:00 ET), <https://time.com/6127193/supreme-court-reform-expansion/> [<https://perma.cc/R9Y2-U5YC>]; Diane P. Wood, *Why Term Limits for Supreme Court Justices Make Sense*, BRENNAN CTR. JUST. (Aug. 19, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/why-term-limits-supreme-court-justices-make-sense> [<https://perma.cc/3YGK-JJBQ>]; Press Release, Sen. Ron Wyden, Wyden Introduces Sweeping Court Reforms to Restore Public Trust as Supreme Court Faces Legitimacy Crisis (Sep. 26, 2024), <https://www.wyden.senate.gov/news/press-releases/wyden-introduces-sweeping-court-reforms-to-restore-public-trust-as-supreme-court-faces-legitimacy-crisis> [<https://perma.cc/7JRE-TF2A>]; Ryan Doerfler & Elie Mystal, *The Supreme Court Is Broken. How Do We Fix It? Strip Its Power*, THE NATION (June 6, 2022), <https://www.thenation.com/article/society/how-to-fix-supreme-court/> [<https://perma.cc/GH2C-WRAL>].

13. See Press Release, *supra* note 12; Joan Biskupic, *Behind the Scenes at the Secretive Supreme Court*, CNN (May 5, 2022, at 07:54 ET), <https://www.cnn.com/2022/05/05/politics/behind-the-scenes-supreme-court> [<https://perma.cc/NV2Z-7W9J>].

14. See *infra* Section II.A.

15. See Tejas N. Narechania, *Certiorari in the Roberts Court*, 67 ST. LOUIS U. L.J. 587, 595 (2023) (“[T]hough the Supreme Court’s Rule does little to elaborate on which important questions will merit review, the Supreme Court’s opinions sometimes do more.”).

16. See Susan deMaine & Benjamin J. Keele, *Should Supreme Court Justices Fear Access to Their Papers? An Empirical Study of the Use of Three Archival Collections*, in THE ROLE OF CITATION IN THE LAW: A YALE LAW SCHOOL SYMPOSIUM 505, 507 (Michael Chiorazzi, ed., 2022).

17. See Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 802–03 (2024).

18. See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 59 (2011); Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 990 (2022); Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787, 829–30 (2016); Louis J. Virelli III, *Freedom of the Press and Supreme Court Ethics*, 55 U. PAC. L. REV. 209, 223–24 (2024).

law reviews and in public outlets.¹⁹ Beyond legal academics, high profile members of the judiciary have hinted at certiorari transparency reform as well.²⁰

We agree with those who have previously called for increased transparency in the certiorari process and build upon their proposals. Prior calls for transparency tend to focus on the transparency of certiorari votes alone, without in-depth consideration of other aspects of the case-selection process.²¹ Our proposal is more far-reaching. We call not only for Justices' certiorari votes to be made public, but also the memoranda on each certiorari petition the Court prepares in making these determinations and chambers cover memoranda. To our knowledge, we are unaware of commentators who have proposed such wide-ranging disclosures of certiorari deliberations.²² In addition to the enhanced transparency measures, we go beyond what are often simple, straightforward calls for vote disclosures and explore in detail the implications this change would have.²³ We survey the benefits this increased transparency may have on the Court's discretion, power, and candor.²⁴ And we contemplate and respond to objections that such a shift might lead to entrenchment, decreased legitimacy, or the needless expenditure of scarce resources.²⁵

In Part II, we briefly summarize the process of certiorari, with an emphasis on the Court's control over its docket. We then discuss events that have contributed to negative perceptions of the Supreme Court that have highlighted the need for reform.²⁶ Part III sets out our proposal in detail. Part IV addresses the arguments in favor of adopting this reform: (1) increased transparency and information regarding the Court's operations; (2) potential constraint of the Court's docket control operations; and (3) impressing the importance of the certiorari stage upon the Justices themselves. In Part V, we set forth and address the

19. See Eric J. Segall, *Op-Ed: Let's Lift the Supreme Court's Veil of Secrecy*, L.A. TIMES (Oct. 7, 2014, at 17:04 PT), <https://www.latimes.com/opinion/op-ed/la-oe-1008-segall-scotus-anonymous-certiorari-20141007-story.html> [<https://perma.cc/9VEY-MYLY>] ("But there is no reason the votes of the justices could not be provided, especially because it is likely that most denials are unanimous, and the vote could be recorded as such."); Steven Lubet, *Which Supreme Court Justice Threw Trump the Immunity Lifeline?*, HILL (Mar. 11, 2024, at 11:30 ET), <https://thehill.com/opinion/judiciary/4522668-which-supreme-court-justices-threw-trump-the-immunity-lifeline/> [<https://perma.cc/DWM7-CY87>] ("The secrecy of certiorari votes has gone on for so long that it probably seems normal, but it is otherwise an anomaly in a democratic society."); see *supra* note 18 and accompanying text (listing scholarship advocating for greater transparency in the certiorari process).

20. See Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable: Part II*, 19 GREEN BAG 2D 257, 266 (2016) (proposing reform of "the Court's refusal to disclose the vote (not the voters) in cases in which certiorari is denied").

21. See Segall, *supra* note 19.

22. *Cf. id.* ("I am not suggesting that the court provide reasons why it doesn't hear a case. Many of the petitions are obviously not important enough to justify the court's attention, and requiring the justices to have to agree on reasons for more than 7,000 denials annually would not be worth the effort."); Artemus Ward and David Weiden suggested releasing pool memos could provide greater insights into the activities of the Supreme Court clerks. See ARTEMUS WARD & DAVID WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 274 (2006).

23. See discussion *infra* Part III.

24. See discussion *infra* Part IV.

25. See discussion *infra* Part V.

26. See discussion *infra* Section II.B.

arguments against certiorari transparency: (1) entrenchment; (2) decreased legitimacy; and (3) the resource costs.

One advantage of our proposal is that the Court can independently implement these practices. We acknowledge that the Court may be unlikely to act, but it is still worth spelling out the reform and its implications for candor and transparency. At present, Congress is unlikely to undertake most mainstream versions of Supreme Court reform because of the election of President Trump.²⁷ Conservatives may appreciate the Court's current trajectory and liberals undoubtedly recognize that reform efforts are implausible given the current composition of Congress.²⁸ Our proposal is uniquely feasible in this political landscape. Certiorari transparency has the benefit of being entirely neutral, with no specific advantage accorded to either liberal or conservative actors.²⁹ Instead, the reforms we propose offer the judiciary the opportunity to provide greater public insights into its work.

The Chief Justice claims that an independent judiciary is critical to ensuring that “the people *and* their government respect the law.”³⁰ That task requires that the independent judiciary also demonstrate respect for the law. The judiciary has the power to say what the law is.³¹ The way the judiciary wields that power can be a force for greater transparency and accountability from the judicial branch. Judicial acts that are bare exercises of that power for its own sake can also undermine the legitimacy of the judicial branch. A crisis of judicial legitimacy is unlikely to be solely motivated by external factors. Much of the public criticism of the Court is a response to the way the Court has conducted its business.³² We believe that greater transparency in the certiorari process may lead to greater public awareness and understanding of the work of the Court and support civic engagement.

II. BACKGROUND

During a 2024 interview with *New York Times* Opinion columnist David French, Justice Neil Gorsuch claimed, while addressing the Court's voting patterns:

We decide the 60, 70 hardest cases in the country every year where lower courts have disagreed. That's the only point to get a case to the Supreme Court. We just want federal law—largely our job is to make sure it's uniform throughout the country, and if the circuit courts are in agreement,

27. For details on mainstream reform proposals like court packing and term limits, see *infra* Section II.B.

28. See *infra* notes 131–35 and accompanying text.

29. See Josh Blackman, *Bilateral Judicial Reform*, 1 TEX. A&M J.L. & CIV. GOVERNANCE 59, 64–65 (2024).

30. 2024 YEAR END REPORT, *supra* note 2, at 3.

31. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

32. See Stephen I. Vladeck, *Fixing the Supreme Court Through Its Docket*, B.U. L. REV. (forthcoming 2025) (manuscript at 34) (“[M]ore of what the Court is doing, and more of what the public sees the Court as doing, involves behavior that portrays the Court at its most controversial.”).

there's very little reason for us to take a case, unless it's of extraordinary importance. So most of the work we do is when lower court judges disagree about the law. Magically, I think in this country there are only about 60 or 70 cases. You could argue a little bit more, a little bit less, but there aren't thousands of them. They're very few in number.³³

Gorsuch's claim about the low number of cert-worthy cases runs into trouble when one considers the Court's actual practice. Every year, the Court receives thousands of petitions for writs of certiorari, and it routinely turns down cases where lower state and federal courts disagree about significant constitutional questions.³⁴ The Court decides which cases—and which issues—it wants to hear.³⁵ It has near-unlimited control over its docket.³⁶ It has power to reshape the way that courts address constitutional questions, and it can choose to do so even when lower courts agree on how the law should be applied.³⁷ The process of certiorari requires conscious decision-making by the Court about which cases and issues it will choose to hear and which it will not.³⁸ Thus, to claim that the Court is mostly taking cases to make sure the law is uniform is somewhat disingenuous. Indeed, the Court's more recent decisions, many of which have reshaped modern constitutional and administrative law, have created perceptions that the Court is pursuing a specific agenda.³⁹

In Section A, we summarize the process of certiorari and what is known about how the Court decides which cases it will hear each term. In Section B, we address some of the critiques of the Court and calls for reform.

33. David French, *Neil Gorsuch Has a Few Thoughts About America Today*, N.Y. TIMES (Aug. 4, 2024), <https://www.nytimes.com/2024/08/04/opinion/neil-gorsuch-supreme-court.html> [<https://perma.cc/866A-R239>].

34. For example, lower state and federal courts disagree over two significant criminal procedure issues: (1) whether *Carpenter v. United States*, 585 U.S. 296 (2018), which recognized an expectation of privacy in the totality of a person's movements should limit the use of pole camera surveillance; and (2) when requiring a person to enter a password may be a compelled act of production with the potential to violate the Fifth Amendment. See Matthew Tokson, *Telephone Pole Cameras Under Fourth Amendment Law*, 83 OHIO ST. L.J. 977, 979 (2022); Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 TEX. L. REV. 767, 769 (2019). The Court has consistently denied certiorari on these issues despite a lack of uniformity among federal and state courts on how to resolve these important constitutional questions. See, e.g., Dana Khabbaz, *Unmanned Stakeouts: Pole-Camera Surveillance and Privacy After the Tuggle Cert Denial*, 132 YALE L.J.F. 105, 105 (2022) (discussing and critiquing the Supreme Court's denial of certiorari in *Tuggle v. United States*, 142 S. Ct. 1107 (2022), a pole-camera surveillance case); Bill Wichert, *Justices Won't Touch 5th Amendment Exception in NJ Case*, LAW360 (May 17, 2021, at 18:16 ET), <https://www.law360.com/articles/1385313/justices-won-t-touch-5th-amendment-exception-in-nj-case> [<https://perma.cc/Y7XB-BL98>] (reporting on the Court's denial of certiorari in *Andrews v. New Jersey*, which raised the issue of password disclosure and the right against self-incrimination).

35. See Vladeck, *supra* note 32 (manuscript at 2).

36. *Id.*

37. See Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 WAKE FOREST L. REV. 1021, 1024 (2022).

38. See *infra* notes 54–81 and accompanying text.

39. See Vladeck, *supra* note 32 (manuscript at 3).

A. *The Certiorari Process*

We have not written a survey of the history of certiorari because other scholars have done that work.⁴⁰ Instead, we briefly summarize the Supreme Court's process for addressing the petitions for writs of certiorari it receives. Understanding this process helps illuminate some of the critiques we describe in Section B.

The Court owes its control over its docket to Chief Justice William Howard Taft, who lobbied Congress for that authority during the early Twentieth Century.⁴¹ In 1988, Congress gave the Supreme Court even more discretion over its docket—it only has to perform mandatory review of one class of cases.⁴² The effect of these alterations to the Court's appellate jurisdiction means that the Court has near-complete control over the cases it decides to hear, the cases it decides not to hear, and even which questions it wants to decide in any given case.⁴³ Indeed, the Court can *add* questions, a practice that sometimes signals what one or more justices think the Court should actually be doing, especially when the Court adds a question addressing justiciability.⁴⁴

Until 1972, individual Justices reviewed each petition for certiorari through their own chamber processes.⁴⁵ The number of cases the Court was asked to decide grew substantially during the 1960s and 1970s.⁴⁶ Beginning in 1972, the Justices adopted the “cert pool” in an attempt to streamline their clerks' workload.⁴⁷ Each chamber that participates is assigned a certain number of petitions,

40. See STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* 27–60 (2023); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1649–56 (2000); Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 812–14 (2022); Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1229–44 (1979); Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1, 1–16 (2008); Vladeck, *supra* note 32 (manuscript at 6–18).

41. See VLADECK, *supra* note 40, at 45–46; Sternberg, *supra* note 40, at 1–2.

42. See VLADECK, *supra* note 40, at 57.

43. See *id.* at 42–46; Sternberg, *supra* note 40, at 8–13; Johnson, *supra* note 40, at 795. Chief Justice Taft apparently assured Congress that giving the Justices discretion was appropriate because, as they had to review the whole case upon granting certiorari, they should have more control over which cases to hear and decide. VLADECK, *supra* note 40, at 47–48. Professor Vladeck notes that Taft “quickly retreated” from this claim and began picking questions to decide, an action less consistent with “a belated change of heart” than “a deliberate bait and switch.” *Id.* at 48.

44. See Johnson, *supra* note 40, at 860–63; Vladeck, *supra* note 32 (manuscript at 14); *Glossip v. Oklahoma*, 144 S. Ct. 691, 692 (2024) (granting certiorari and directing the parties to brief an additional question regarding whether the Oklahoma Court of Criminal Appeals' judgment “is an adequate and independent state-law ground for judgment”); Amy Howe, *Justices Take Up Bid to Overturn Oklahoma Death Sentence*, SCOTUSBLOG (Jan. 22, 2024), <https://www.scotusblog.com/2024/01/justices-take-up-bid-to-overturn-oklahoma-death-sentence/> [<https://perma.cc/B4DJ-2367>].

45. Barbara Palmer, *The “Bermuda Triangle?” The Cert Pool and Its Influence Over the Supreme Court's Agenda*, 18 CONST. COMMENT. 105, 107 (2001); ANTHONY LEWIS, *GIDEON'S TRUMPET: HOW ONE MAN, A POOR PRISONER, TOOK HIS CASE TO THE SUPREME COURT—AND CHANGED THE LAW OF THE UNITED STATES* 33 (Random House 2d ed., 1964); WARD & WEIDEN, *supra* note 22, at 114–18.

46. See Palmer, *supra* note 45; 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, 779–80 (1997).

47. See Palmer, *supra* note 45; WILLIAM H. REHNQUIST, *THE SUPREME COURT* 263–64 (1987).

and law clerks review the petitions and related material, such as amicus briefs, and draft a memo for each case that summarizes the case, arguments, and reasons for why the Court should grant or deny certiorari.⁴⁸ These memos are circulated among the chambers that participate in the cert pool for clerks' and Justices' review.⁴⁹ Clerks review pool memos and make recommendations in cover memos to their individual justices.⁵⁰ Not every Justice participates in the cert pool. Justice John Paul Stevens never joined, nor did Justices Douglas, Stewart, Brennan, and Marshall.⁵¹ Current Justices Samuel Alito and Neil Gorsuch also do not participate.⁵² Their clerks must slog through all the petitions for certiorari and generate memos for every single case.⁵³

Until the 1930s, the Court considered all petitions for certiorari in conference, until Chief Justice Charles Evan Hughes began circulating a list of cases that he thought were unworthy of discussion.⁵⁴ This list became known as the "dead list."⁵⁵ This process continues to this day.⁵⁶ The Chief Justice circulates a "discuss list" of cases that he wishes to discuss at conference and Associate Justices can add cases to the list.⁵⁷ If a case is not added to the "discuss list," it goes on the "dead list," and cert is denied without a vote.⁵⁸ This process, as Professors Ryan Owens and David Simon explain, creates a presumption that cases are not "worthy of cert unless otherwise directed."⁵⁹ Given the size of the Court's docket, this is not unexpected, but it may be disheartening for advocates and their clients.⁶⁰

Petitions on the "discuss list" are discussed at the Court's conferences.⁶¹ Discussions at conferences are highly confidential, although occasionally memos or notes from conferences may appear in Justices' papers once they are

48. See Palmer, *supra* note 45, at 107–08; David Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 953 (2007).

49. See Palmer, *supra* note 45, at 108.

50. WARD & WEIDEN, *supra* note 22, at 125–26.

51. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1227 n.18 (2012); Joan Biskupic, *Ketanji Brown Jackson's First Few Months at the Fractured Supreme Court*, CNN (Sep. 30, 2022, at 10:37 ET), <https://www.cnn.com/2022/09/30/politics/kevanji-brown-jackson-supreme-court/index.html> [https://perma.cc/S9P2-MYPW]. See REHNQUIST, *supra* note 47, at 264.

52. See WARD & WEIDEN, *supra* note 22, at 119; Tony Mauro, *Unlike Gorsuch, Kavanaugh Jumps into SCOTUS Cert Pool*, LAW.COM (Oct. 11, 2018, at 14:07 ET), <https://www.law.com/nationallawjournal/2018/10/11/unlike-gorsuch-kavanaugh-jumps-into-scotus-cert-pool/> [https://perma.cc/4ZU3-FVR3].

53. See ALBERT CAMUS, *THE MYTH OF SISYPHUS* 123 (1942) ("One must imagine Sisyphus happy.").

54. WARD & WEIDEN, *supra* note 22, at 113.

55. *Id.*

56. *Id.* at 3.

57. See Owens & Simon, *supra* note 51, at 1227; REHNQUIST, *supra* note 47, at 265; WARD & WEIDEN, *supra* note 22, at 126.

58. Owens & Simon, *supra* note 51, at 1227; REHNQUIST, *supra* note 47, at 265 ("The petitions for certiorari that are not discussed at conference are denied without any recorded vote.").

59. See Owens & Simon, *supra* note 51, at 1227 n.22.

60. See REHNQUIST, *supra* note 47, at 266–67 (asserting that "dead listed" cases "deserve[]" to be there because "no one of the nine justices thought the case was worth discussing at conference" and to bring it up would "be a totally sterile exercise").

61. *Id.* at 265.

accessible to the public.⁶² Justices then vote whether to grant or deny certiorari, relist the petition, or seek the views of the Solicitor General.⁶³ Justices should recuse themselves from these decisions and other court proceedings if “the Justice’s impartiality might reasonably be questioned.”⁶⁴ If four Justices vote to grant certiorari, then the case is added to the Court’s merits docket.⁶⁵

Some petitions may be relisted for discussion at later conferences multiple times before certiorari is granted or denied.⁶⁶ Petitions may be relisted for a variety of reasons.⁶⁷ For example, the Court may have a pending case on its merits docket that would resolve some of the questions in the petition, or the issue is one of importance, but the Justices are weighing whether the case is the right vehicle for the issue.⁶⁸ Tracking the relists can offer some information into the kinds of issues the Court considers important, but it does not, by itself, provide much information into the internal dynamics of conference or illustrate why the Court has chosen to relist a particular petition.⁶⁹

If certiorari is granted or denied, the Court publishes that information in its Orders.⁷⁰ Occasionally a Justice may write a statement on the denial of certiorari, usually indicating whether they would have granted certiorari and why, which may offer some hints to lower courts and litigants about the importance of a particular legal argument or issue.⁷¹ These statements are usually the sole insight contemporaneous with a certiorari denial into why at least some members of the Court think a case should or should not be heard.⁷²

The Supreme Court receives thousands of petitions for writs of certiorari each year.⁷³ It agrees to hear only a small number of those cases.⁷⁴ That number

62. See, e.g., *McCleskey v. Kemp*, Sup. Ct. Case Files Collection, Box 132, Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law, Virginia.

63. Owens & Simon, *supra* note 51, at 1227.

64. See CODE OF CONDUCT FOR THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, Canon 3(B)(2) (2023).

65. *Id.*; SUP. CT. R. 16; REHNQUIST, *supra* note 47, at 264.

66. REHNQUIST, *supra* note 47, at 263–65.

67. Chief Justice Rehnquist observed that even if there were a significant number of cases on the “discuss list,” the Court might not discuss them all at a particular conference. *Id.* at 265.

68. *Id.*

69. SCOTUSblog, for example, tracks petitions that are of special interest, have been relisted, or in which the Court has sought the views of the Solicitor General and discusses the significance of those petitions in various blog posts. See *Petitions We’re Watching for the Next Conference*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/petitions-were-watching/> [<https://perma.cc/Q28D-5Y4W>] (last visited Jan. 2, 2026).

70. See SUP. CT. R. 16.

71. See, e.g., *Singleton v. Comm’n*, 439 U.S. 940, 942–43 (1978); (Blackmun, J., dissenting from denial of certiorari); *Glass v. Louisiana*, 471 U.S. 1080, 1080–81 (1985) (Brennan, J., dissenting from denial of certiorari); *Coal. Life v. City of Carbondale*, 145 S. Ct. 537, 538 (2025) (Thomas, J., dissenting from denial of certiorari).

72. That is, unless a journalist finds a member of the Supreme Court who is willing to talk. See generally BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979); David Garrow, *The Supreme Court and The Brethren*, 18 CONST. COMMENT. 303, 303 (2001).

73. *The Supreme Court at Work*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/courtat-work.aspx> [<https://perma.cc/A53T-TE58>] (last visited Jan. 2, 2026) (estimating approximately 5,000 to 7,000 cases per term).

74. VLADECK, *supra* note 40, at 63; WOODWARD & ARMSTRONG, *supra* note 72, at xvi, 2–3.

has declined significantly over time.⁷⁵ Because the Court takes so few cases, everything it takes is usually important.⁷⁶ As Professor Steven Vladeck reveals, the Court's docket has changed in recent years both in size and content: the Court is taking more high profile cases that impact its public legitimacy because it can.⁷⁷ The low volume of cases, coupled with the Court's ability to decide exactly what it wants to consider gives the Court considerable power.

Why does the Court grant or deny certiorari in any particular case? The answer is unclear. Supreme Court Rule 10 identifies some considerations, such as conflicts among the lower courts, the need to exercise the Court's supervisory power based on an extreme departure from usual proceedings, or a decision by a lower court that "has decided an important question of federal law that has not been, but should be, settled by this Court."⁷⁸ Rule 10 emphasizes that these considerations "although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers."⁷⁹ Chief Justice William Rehnquist wrote that "[w]hether or not to grant certiorari strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment."⁸⁰ He observed that circuit splits, inconsistencies, and "incorrect application of Supreme Court precedent or of general importance beyond its effect on these particular litigants" tended to be cases that increased the likelihood of granting certiorari.⁸¹

It is true that the Court must prioritize—it cannot possibly hope to dispose of every case before it on the merits, and some cases may not need review.⁸² But the current iteration of the Roberts Court is also increasingly willing to revisit *stare decisis* and take action that has significant political results, while simultaneously insisting that such activity is not political.⁸³ The Court's control over its docket allows the Court to set its own agenda, which in turn allows the Court to decide how it wishes to shape the law and public policy of the United States, for better or worse.⁸⁴ It is, therefore, somewhat disingenuous to insist that the Court is only saying what the law is, "call[ing] balls and strikes," or only ensuring that

75. VLADECK, *supra* note 40, at 57; Stras, *supra* note 48, at 964–67; O'Brien, *supra* note 46; Owens & Simon, *supra* note 51, at 1223–24.

76. *See* SUP. CT. R. 10.

77. Vladeck, *supra* note 32 (manuscript at 28, 32).

78. *See* SUP. CT. R. 10.

79. *Id.*

80. REHNQUIST, *supra* note 47, at 265.

81. *Id.*

82. *Id.* at 266–67.

83. *See* Narechania, *supra* note 15, at 604 (concluding, based on an analysis of the Court's cases, that the Roberts Court has a "historically unique proclivity to grant review in cases to consider whether to overrule precedent").

84. Segall, *supra* note 18, at 824–25; Margaret Merriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. REV. Q. 389, 390 (2004); Hartnett, *supra* note 40, at 1737; Vladeck, *supra* note 32 (manuscript at 32) ("A Court with more time on its hands, and with more of an ability to decide which cases to hear and to not hear, is necessarily better situated for pursuing long-term substantive goals than one that is limited to simply reacting to each case as it comes in.").

federal law is “uniform throughout the country.”⁸⁵ Professor Eric Segall writes that the Court’s “virtually unfettered discretion to decide which cases it will hear suggests that the process for those decisions should be open and transparent.”⁸⁶ No discretion, he explains, means that it would not be necessary to understand the Court’s decisions about certiorari—it would be like any other court, taking each case as it was assigned.⁸⁷ But the Supreme Court does not do that. It gets to decide any issue it wants if it is at least plausibly suggested by something in the record.⁸⁸ Understanding why the Court decided to take a particular case and why it decided to address a particular question or add a question may shed light on the Court’s actions and motivations at a time when the Court has been receiving serious criticism.⁸⁹

B. Court Reform: The Modern Context

Criticism of the Supreme Court and calls for its reform are not a modern innovation.⁹⁰ Professor Joshua Braver surveys attempts—successful and unsuccessful—to alter the Court’s size dating back to the early 1800s, through Reconstruction, and through President Roosevelt’s court-packing plan in the 1930s.⁹¹ Professor Barry Friedman surveys historical calls for reform, deriving requirements that must be present for successful reform to occur—including focused critiques of the Court coupled with targeted reforms and political support for Court reform.⁹² Federal legislation has had a profound impact on the federal

85. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States: Hearings Before the S. Comm. On the Judiciary*, 109th Cong. 55–56 (2005) (statement of Judge John G. Roberts, Jr.); French, *supra* note 33.

86. Segall, *supra* note 18, at 828.

87. *Id.* That is not to say that litigants do not engage in judge-shopping to obtain favorable rulings. The Northern District of Texas has been fertile ground for certain litigants who are guaranteed to receive a specific judge if they file in Amarillo. See Matthew Choi, *With an Eye on Amarillo Courthouse, U.S. Senators Push to Stop Federal Judge Shopping*, TEX. TRIB. (Apr. 11, 2024, at 17:00 CT), <https://www.texastribune.org/2024/04/11/judge-shopping-texas-amarillo-kasmaryk-senate/> [https://perma.cc/34RK-P739]. The Chief Judge of the Northern District of Texas has refused to alter its assignment processes. See Craig Anderson, *Texas Judges Reject US Courts’ Anti-Judge Shopping Guidelines*, DAILY J. (Apr. 2, 2024), <https://www.dailyjournal.com/articles/377882-texas-judges-reject-us-courts-anti-judge-shopping-guidelines> [https://perma.cc/2WXD-FARJ]. At least one Fifth Circuit judge has argued that responsiveness to “forum shaming” is the same as becoming “forum selling.” Jacqueline Thomsen, *Fifth Circuit’s Ho Cites ‘Political Attacks’ on Judge Shopping*, BLOOMBERG L. (Apr. 16, 2024, at 10:25 ET), <https://news.bloomberglaw.com/us-law-week/fifth-circuits-ho-cites-political-attacks-on-judge-shopping> [https://perma.cc/42Q3-BBLA].

88. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 352–53 (2022) (Roberts, C.J., concurring in the judgment) (pointing out the Court’s unnecessary decision to overrule *Roe* and observing that “[t]here is no rule that parties can confine this Court to disposing of their case on a particular ground—let alone when review was sought and granted on a different one”); *Mapp v. Ohio*, 367 U.S. 643, 672–73 (1961) (Harlan, J., dissenting) (complaining that the Court re-examined *Wolf v. Colorado*, 338 U.S. 25 (1949), when it was asked to address a First Amendment issue involving the criminalization of the “knowing possession or control of obscene material”).

89. See Vladeck, *supra* note 32 (manuscript at 1).

90. See Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C.L. REV. 2747, 2773 (2020); Barry Friedman, *What It Takes to Curb the Court*, 2023 WIS. L. REV. 513, 519–20 (2023).

91. See Braver, *supra* note 90.

92. See Friedman, *supra* note 90.

court system—including through the creation of lower courts and the resizing of the Supreme Court.⁹³

Court reform is a topic of modern discussion as well. The Court’s conservative supermajority has recently overturned longstanding precedents like *Roe v. Wade*,⁹⁴ *Lemon v. Kurtzman*,⁹⁵ and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁹⁶ The Court’s willingness to exert its power in an increasingly aggressive manner has prompted scholars like Professor Mark Lemley to declare an “era of the imperial Supreme Court.”⁹⁷ Well-funded organizations are getting into the game as well, with the Brennan Center announcing its receipt of a \$30 million donation for efforts related to Supreme Court reform.⁹⁸

Despite significant attention to issues of Court reform in academic and political commentary, political institutions have been reluctant to respond.⁹⁹ In April 2021, President Biden issued an executive order resulting in the formation of the Presidential Commission on the Supreme Court of the United States.¹⁰⁰ The Commission’s members consisted of a who’s who of high-profile legal academics and appellate practitioners.¹⁰¹ The Commission issued its report in December 2021.¹⁰² The report surveyed a variety of mainstream reform proposals, including adding Justices to the Court, imposing term limits on Justices, and stripping the Court of jurisdiction over certain legal issues.¹⁰³ But the report did not advocate or discourage any of these reforms, instead providing a list of “pros and cons of major reform proposals and potential routes to implementation” without any accompanying recommendations.¹⁰⁴

93. See Michael C. Blumm, Kate Flanagan & Annamarie White, *Right-Sizing the Supreme Court: A History of Congressional Changes*, 72 CASE W. RES. L. REV. 9, 16–40 (2021).

94. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 302 (2022) (overruling *Roe v. Wade* and *Planned Parenthood v. Casey* and ruling that “[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion”).

95. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) (proclaiming that the Court has abandoned “*Lemon* and its endorsement test offshoot”).

96. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024) (overruling *Chevron* and proclaiming that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority”).

97. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022).

98. Michael Waldman, *New Energy for Supreme Court Reform*, BRENNAN CTR FOR J. (July 23, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/new-energy-supreme-court-reform> [<https://perma.cc/GF27-WR9K>].

99. See Lemley, *supra* note 97, at 115–18.

100. See *Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE, <https://www.whitehouse.gov/pscotus/> [<https://perma.cc/5GPX-LFVP>] (last visited Jan. 2, 2026).

101. See *Commissioners*, WHITE HOUSE, <https://www.whitehouse.gov/pscotus/commissioners/> [<https://perma.cc/D6ZU-HLC6>] (last visited Jan. 2, 2026).

102. See DRAFT FINAL REPORT, PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES (Dec. 2021), <https://www.courthousenews.com/wp-content/uploads/2021/12/SCOTUS-Report-commission.pdf> [<https://perma.cc/5Q4N-L39N>].

103. See *id.*

104. David E. Landau & Rosalind Dixon, *Restorative Constitutionalism*, 81 WASH. & LEE L. REV. 455, 499 (2024).

Reactions to the report ranged from neutral to negative.¹⁰⁵ The Project on Government Oversight described the report as “milquetoast” and little more than “a book report.”¹⁰⁶ Heritage Foundation Senior Legal Fellow Thomas Jipping argued that the Commission had been designed to avoid “tak[ing] a position on anything,” but that it still gave the appearance of addressing calls for reform.¹⁰⁷ Some commissioners spoke up in defense of the report and the drafting process. Professor Olatunde Johnson stated that while the report “[did] not include specific recommendations . . . ‘it [did] a very valuable job of really sorting through some of the design challenges and constitutional challenges and what solutions to those might be.’”¹⁰⁸ One of the commissioners, Professor Will Baude, critiqued the Commission’s functioning and structure, noting, among other issues, that the “size of the commission, the distribution of different views across different leadership roles, the lack of in-person meetings and hallway conversations, and other operational constraints” led to the “squander[ing of] the overflowing amounts of intellectual ability and political judgment that filled the commission.”¹⁰⁹

The Commission’s report was met by years of silence from the Biden administration.¹¹⁰ During that time, the Court continued to consolidate power in a series of aggressive opinions overturning precedent, eliminating the right to abortion, and curtailing deference to administrative agencies.¹¹¹ In the wake of the Court’s 2022 ruling overturning *Roe v. Wade* and eliminating the right to abortion, several commission members popped out of the woodwork to say “I told you so,” even though the report itself had eschewed endorsing any particular proposals.¹¹² As pressure mounted into 2023, Biden continued to resist

105. *Id.* at 538.

106. *Biden’s Supreme Court Commission Releases Milquetoast Report*, PROJECT ON GOV’T OVERSIGHT (Dec. 7, 2021), <https://www.pogo.org/post/bidens-supreme-court-commission-releases-milquetoast-report> [<https://perma.cc/WKJ9-ZL4U>].

107. Thomas Jipping, *Biden’s Supreme Court Commission Does What He Intended: Nothing*, HERITAGE FOUND. (Dec. 7, 2021), <https://www.heritage.org/courts/commentary/bidens-supreme-court-commission-does-what-he-intended-nothing> [<https://perma.cc/34V3-C44Y>].

108. *Faculty Offer Insiders’ Account of Presidential Commission on the Supreme Court*, COLUM. L. SCH. (Feb. 7, 2022), <https://www.law.columbia.edu/news/archive/faculty-offer-insiders-account-presidential-commission-supreme-court> [<https://perma.cc/2L9F-FNZY>].

109. See William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631, 2650–51 (2022).

110. See Holly Otterbein & Zach Montellaro, *Biden Still Won’t Nuke the Court. But He Is Upping His Criticism of It*, POLITICO (June 30, 2023, at 16:40 ET), <https://www.politico.com/news/2023/06/30/biden-supreme-court-reform-00104484> [<https://perma.cc/ZMW2-MDPK>] (noting the Biden Administration’s lack of interest in and attention to the report, though highlighting a statement by the White House Press Secretary that Biden had at least read the report).

111. See *supra* notes 94–96 and accompanying text.

112. Eugene Daniels, *Biden’s Court Commission Appointees: We Told You So on Expanding the Court*, POLITICO (June 7, 2022, at 04:30 ET), <https://www.politico.com/news/2022/07/07/joe-biden-supreme-court-commission-00044401> [<https://perma.cc/9D6Z-JJWZ>].

“endorsing any of the broad array of reforms—including court expansion, term limits, and mandatory retirements” that the Democratic base urged.¹¹³

During that time, reports on ethically questionable activities by Supreme Court Justices began to circulate. *ProPublica* issued a series of reports on Justice Thomas’s close relationship with billionaire Harlan Crow, including the largesse Crow bestowed upon Thomas in the form of vacations, private jet flights, house payments, and other benefits.¹¹⁴ Further reports followed questionable gifts and activities by Justice Alito (private vacations and flights; flying politically charged flags),¹¹⁵ and Justice Sotomayor (pressuring institutions into making book purchases).¹¹⁶ This prompted further calls for Court reform—particularly for reforms that would bind the Court to ethical rules.¹¹⁷

In November 2023, the Court adopted “its first-ever ethics code,” which contained rules relating to financial transactions and recusal requirements.¹¹⁸ Reactions from reform advocates were generally negative, highlighting the code’s

113. Tyler Pager, *Biden Faces Renewed Pressure to Embrace Supreme Court Overhaul*, WASH. POST (July 4, 2023), <https://www.washingtonpost.com/politics/2023/07/04/biden-pressure-supreme-court-overhaul/> [<https://perma.cc/YT9M-D63H>].

114. See Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, at 05:00 ET), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow> [<https://perma.cc/SYH7-LLTW>] (reporting on multiple, undisclosed luxury vacations and private jet flights that Crow gifted to Justice Thomas); Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn’t Disclose the Deal*, PROPUBLICA (Apr. 13, 2023, at 14:20 ET), <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus> [<https://perma.cc/WWU5-4C4F>] (reporting on Harlan Crow’s undisclosed purchase of residential property owned by Justice Thomas); Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition.*, PROPUBLICA (May 4, 2023, at 06:00 ET), <https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus> [<https://perma.cc/L6BB-EHGH>] (reporting on Crow’s payment of tuition fees for Justice Thomas’s grand-nephew of whom Justice Thomas and his wife had legal custody).

115. Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, at 23:49 ET), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court> [<https://perma.cc/69S4-DB2R>]; Jodi Kantor, Aric Toler & Julie Tate, *Another Provocative Flag Was Flown at Another Alito Home*, N.Y. TIMES (May 22, 2024), <https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html> [<https://perma.cc/Y83X-WDM4>].

116. See Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor’s Staff Prodded Colleges and Libraries to Buy Her Books*, ASSOCIATED PRESS (July 11, 2023, at 04:14 CT), <https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02> [<https://perma.cc/PZ47-YVU7>].

117. See John Kruzell, *Democratic-Backed US Supreme Court Ethics Bill Passed by Senate Panel*, REUTERS (July 20, 2023, at 12:28 CT), <https://www.reuters.com/world/us/senate-panel-set-vote-us-supreme-court-ethics-reform-2023-07-20/> [<https://perma.cc/W8EK-YSQ8>] (reporting on the Senate Judiciary Committee’s party-line approval of “a bill that would mandate a binding ethics code for the Supreme Court”); Kedric Payne, *Supreme Court Has a Lot to Learn About Ethics from Other Branches*, BLOOMBERG (May 10, 2023, at 03:00 CT), <https://news.bloomberglaw.com/us-law-week/supreme-court-has-a-lot-to-learn-about-ethics-from-other-branches> [<https://perma.cc/C75V-HTB8>] (arguing that the “Supreme Court is severely lacking in ethical rules and procedures compared to the other branches of our federal government”).

118. Annie Gersh & Nina Totenberg, *The Supreme Court Adopts First-Ever Code of Ethics*, NPR (Nov. 13, 2023, at 16:56 ET), <https://www.npr.org/2023/11/13/1212708142/supreme-court-ethics-code> [<https://perma.cc/4UL3-N2S3>].

limited content and lack of an enforcement mechanism.¹¹⁹ Critics raised the code's requirement that judges "remain independent and avoid political statements or opinions on matters that could come before them" when Justice Alito's wife flew an upside-down American flag at their house during a dispute with a neighbor.¹²⁰ Despite calls for Alito's recusal in pending cases related to the January 6, 2021 insurrection, Chief Justice Roberts refused to meet with the Senate Judiciary Committee to address the ethics code, and reiterated that it remained up to individual Justices to decide whether to recuse.¹²¹

Two months after the Alito flag incident—and several years after issuing his order for the Commission on the Supreme Court—President Biden finally spoke out on Court reform.¹²² In an op-ed in the *Washington Post*, Biden called for two reforms to the institution, urging eighteen-year term limits for Justices and a binding code of conduct that would govern the Court.¹²³ Biden finally mentioned his years-old Commission, though his reference was brief and vague, thanking them for their work and stating that their "insightful analysis . . . informed some of these proposals."¹²⁴ Reactions to Biden's proposals among Democrats were mixed, with some concerned over their practicality, and others expressing hope that some of the proposals might have an impact.¹²⁵

Supreme Court reform was a part of the discussion as 2024 went on.¹²⁶ Then-Senate Majority Leader Chuck Schumer promised action on judicial reform if the Democrats were to prevail in the 2024 presidential and congressional elections.¹²⁷ Polling in the wake of Biden's proposals suggested bipartisan support for some of Biden's proposals—particularly the requirement that Justices

119. See Michael Waldman, *New Supreme Court Ethics Code Is Designed to Fail*, BRENNAN CTR. JUST. (Nov. 14, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail> [<https://perma.cc/B4ZU-KK6W>] ("There is no mechanism to enforce the code—no arbiter to enforce, apply, or even interpret these rules."); Abbie VanSickle & Adam Liptak, *Supreme Court Adopts Ethics Code After Reports of Undisclosed Gifts and Travel*, N.Y. TIMES (Nov. 13, 2023), <https://www.nytimes.com/2023/11/13/us/politics/supreme-court-ethics-code.html> [<https://perma.cc/84PA-DE3Z>] (quoting Daniel Epps's acknowledgment that the code reflected the Court's awareness of a need to respond to criticism, but that "in terms of the content, it doesn't seem to move the ball much").

120. Jodi Kantor, *At Justice Alito's House, a 'Stop the Steal' Symbol on Display*, N.Y. TIMES (May 16, 2024), <https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html> [<https://perma.cc/N6A8-ZPVA>].

121. Jacob Fischler, *U.S. Supreme Court Chief Declines to Discuss Alito Flag Uproar, Ethics with Senate Dems*, OHIO CAP. J. (June 3, 2024, at 04:20 CT), <https://ohiocapitaljournal.com/briefs/u-s-supreme-court-chief-declines-to-discuss-alito-flag-uproar-ethics-with-senate-dems/> [<https://perma.cc/5DNB-LJGH>].

122. See Biden, *supra* note 11.

123. *Id.*

124. *Id.*

125. See Ankush Khardori, *Democrats May Have a Real Chance to Reform the Supreme Court*, POLITICO (July 29, 2024, at 15:47 ET), <https://www.politico.com/news/magazine/2024/07/29/biden-supreme-court-reform-00171667> [<https://perma.cc/DNF5-JERR>].

126. See, e.g., David French, *Supreme Court Reform Is in the Air*, N.Y. TIMES (Oct. 10, 2024), <https://www.nytimes.com/2024/10/10/opinion/harris-supreme-court.html> [<https://perma.cc/W7TR-NU72>] (acknowledging and fretting about Supreme Court reform proposals).

127. See Sahil Kapur, *Schumer Vows Supreme Court Reform Will Be 'A Very Big Priority' if Democrats Win Election*, NBC NEWS (Aug. 1, 2024, at 15:15 CT), <https://www.nbcnews.com/politics/2024-election/schumer-vows-supreme-court-reforms-democrats-win-2024-elections-rcna164719> [<https://perma.cc/EH4X-RCYC>].

submit to a binding set of ethical rules.¹²⁸ In September 2024, Senator Ron Wyden introduced a bill to reform the Court by adding six Justices over twelve years, and requiring that two-thirds of Justices sign on to opinions overturning federal legislation.¹²⁹ As the 2024 presidential election drew near, Vice President Kamala Harris “suggested that she could be open to reforming the United States Supreme Court,” though she did not provide specifics.¹³⁰

Trump’s victory in the 2024 election has altered the landscape of Supreme Court reform.¹³¹ With Republicans in charge of all branches of government, Democrats are unlikely to continue calling for reforms that would benefit those in charge of the legislative and executive branches—such as jurisdiction stripping and adding Justices to the Court.¹³² A few voices from the left continue to call for Court reform, particularly the imposition of binding ethical rules on Justices.¹³³ Conservative outlets welcome the appointment of additional conservative judges and Justices through standard channels.¹³⁴ The public’s impression of the Court is at an all-time low, with just 50% of Americans expressing favorable opinions of the Court, although those perceptions, unsurprisingly, vary greatly based on political affiliation.¹³⁵ While public opinion is not the best metric for evaluating whether a branch of government is functioning properly, widespread public perceptions that the Court is operating consistently with a specific political ideology may undermine the Court’s legitimacy.

III. CERTIORARI REFORM PROPOSAL

The Supreme Court desperately needs reform. As Ben Parker said, “[w]ith great power comes great responsibility.”¹³⁶ The Court has outsized power for a government entity that was once described as the “least dangerous” branch.¹³⁷

128. See Sarah Fortinsky, *Majority of Republicans Support Supreme Court Reforms in Biden’s Proposal: Poll*, HILL (Aug. 12, 2024, at 13:47 ET), <https://thehill.com/regulation/court-battles/4824095-republicans-support-supreme-court-reforms/> [https://perma.cc/6KWN-BR3R].

129. Justin Jouvenal & Tobi Raji, *Sweeping Bill to Overhaul Supreme Court Would Add Six Justices*, WASH. POST (Sep. 26, 2024, at 16:16 CT), <https://www.washingtonpost.com/politics/2024/09/26/supreme-court-reform-15-justices-wyden/> [https://perma.cc/LT2T-X5VF].

130. See *Harris Teases Court Reform But Offers Few Details in Pennsylvania Town Hall*, AL JAZEERA (Oct. 24, 2024), <https://www.aljazeera.com/news/2024/10/24/harris-teases-court-reform-but-offers-few-details-in-pennsylvania-town-hall> [https://perma.cc/4UH3-JX4N].

131. See Rebecca Buckwalter-Poza, *The Future of Judicial Reform*, MS. (Nov. 22, 2024), <https://msmagazine.com/2024/11/22/trump-supreme-court-reform-biden-judges/> [https://perma.cc/PW39-ZSZ9].

132. *Id.*

133. See, e.g., *id.* (highlighting ethical reforms as a potential avenue to pursue in the wake of the 2024 election).

134. See, e.g., Jorge Gomez, *Election Results Could Impact the Supreme Court and Federal Courts for Generations*, FIRST LIBERTY (Nov. 8, 2024), <https://firstliberty.org/news/supreme-court-could-be-changed-for-generations/> [https://perma.cc/G2FY-VM5P] (anticipating that Trump might appoint numerous lower court judges, and possibly replace Justices Thomas and Alito).

135. See Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sep. 3, 2025), <https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/> [https://perma.cc/6AFH-6T2C].

136. SPIDER-MAN, DVD (Columbia Pictures 2002).

137. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Its recent rulings have tended to consolidate the Court's power at the expense of federal and state actors.¹³⁸ This power is at an imbalance with its transparency and accountability.¹³⁹

We propose that the Court should make the certiorari process more transparent. We are not the first to make this suggestion—others have proposed this solution, or at least elements of the proposal we offer.¹⁴⁰ Artemus Ward and David Weiden briefly suggested in *Sorcerer's Apprentices: 100 Years of Law Clerks at the Supreme Court* that one way to limit the influence of law clerks would be through “increased disclosure of the Court's internal operations and, at the same time, of the role that clerks play.”¹⁴¹ They argue that, given the secrecy surrounding certiorari, “[r]eleasing the pool memo, at the very least, could help ensure that pool writers are providing the kind of objective analysis that they are supposed to provide.”¹⁴²

Professor Eric Segall argues that “[t]he most troubling aspect of the process through which the Court decides which cases to hear is that the Justices do not identify which of them voted to hear a case.”¹⁴³ He recognizes that providing the details of every cert petition might be difficult, but argues that the Court should disclose the certiorari vote counts for the cases they grant.¹⁴⁴ Professor Segall asserts that knowing the vote counts would permit the public to better evaluate the quality of Justices' work and “better hold these public officials accountable for their important governmental decisions.”¹⁴⁵ Although a Justice's vote may be misinterpreted “as a strong indicator of that Justice's views on the merits of that case,” Professor Segall suggests that, although “not ideal,” the Court could simply publish the vote count after they decide the case.¹⁴⁶ He also advocates for greater transparency about the role of law clerks in the certiorari process because there is virtually no contemporary information about how Justices use, defer to, or ignore cert pool memos.¹⁴⁷

We propose that the Court should make the “dead lists,” “discuss lists,” vote counts for certiorari, and all certiorari memos—both pool memos and individual chambers memos—public, both prospectively and retroactively. The Court should identify which Justices voted to deny or grant certiorari. Most of

138. Lemley, *supra* note 97 (“The Court has taken significant, simultaneous steps to restrict the power of Congress, the administrative state, the states, and the lower federal courts. . . . The common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court.”).

139. Segall, *supra* note 18, at 787–88; VLADECK, *supra* note 40, at 264 (“The rise of the shadow docket is not just about the Supreme Court amassing power through unsigned and unexplained rulings; it is about the Supreme Court as an institution, and the justices as individuals, conducting ever more of the Court's business in the literal and metaphorical darkness—in ways that are knowingly, if not intentionally, in tension with what ought to be unobjectionable principles of transparency.”).

140. See WARD & WEIDEN, *supra* note 22, at 247.

141. *Id.*

142. *Id.*

143. Segall, *supra* note 18, at 828.

144. *Id.*

145. *Id.* at 829.

146. *Id.* at 830.

147. *Id.* at 830–31.

this information is either never public or not accessible until a Justice's papers are available to the public, usually after the Justice's retirement and death—sometimes decades later.¹⁴⁸ Occasionally Justices may indicate their votes by signaling public dissent from denials of certiorari, but this is not as common.¹⁴⁹ The disclosures we propose are of significant scholarly and public interest. Because the Court has the unfettered discretion to determine its docket, the public should know *how* the Court sets its agenda and makes decisions.¹⁵⁰

We recognize that this task is challenging, given the volume of petitions the Court receives every year. But we think it is manageable. The Court currently indicates when petitions for certiorari are received, distributed for a specific conference, relisted, and denied.¹⁵¹ The Court could easily indicate which petitions landed on the “dead list” each time they publish a list of orders without going to the trouble of listing vote counts because they do not actually vote on those petitions. The Court could publish the pool and chambers memos for petitions on the dead list once they have denied certiorari.

If the Court denies certiorari for a petition on the discuss list, then the Court could publish the vote count and the relevant memos. We propose that if the Court grants certiorari, it should delay the publication of the memos and vote count until it releases the decision.¹⁵² If the Court had to provide vote counts before the case is argued, that might telegraph the decision in the case, although litigants and observers can sometimes make predictions based on the tenor of oral arguments.¹⁵³ While some of this material may be duplicative with the actual decision, understanding the reason why the Court took a specific case—and which Justices wanted to hear it—will provide a more detailed picture of the process by which the Court makes decisions.

We also propose extending this reform to emergency applications. As Professor Stephen Vladeck observes, the Court has granted certiorari before judgment more frequently than is typical in recent years in high-profile cases.¹⁵⁴ This information may be useful to draw comparisons with potential justiciability issues in denials of certiorari—the Court may reject cases for mootness or ripeness, but that seems inconsistent with the Court's increasing engagement with its emergency applications. As with our proposal for certiorari determinations on merits cases, memos addressing emergency applications and vote counts should

148. See *infra* notes 220–24 and accompanying text (discussing access to Justices' papers).

149. Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 *YALE L.J.F.* 551, 552 (2014).

150. Segall, *supra* note 18, at 830 (“The Justices perform an immensely important public duty that affects all Americans when they decide which cases to hear. Why should they cast this vote in secrecy with no accountability?”).

151. See *FAQs: Announcements of Orders and Opinions*, SCOTUSBLOG, <https://www.scotusblog.com/faqs-announcements-of-orders-and-opinions/> [<https://perma.cc/XN3X-MKA9>] (last visited Jan. 2, 2026).

152. We agree with Professor Segall that, while it is not ideal, it is probably the best solution.

153. See, e.g., Mary Ziegler, *The End of Roe Is Coming, and It Is Coming Soon*, *N.Y. TIMES* (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/opinion/supreme-court-abortion-mississippi-law.html> [<https://perma.cc/KB5M-SFQJ>] (predicting, after oral arguments, that the Court was ready to overturn *Roe v. Wade*).

154. Vladeck, *supra* note 32 (manuscript at 27–28).

not be disclosed until the Court either issues a decision on the merits or the case is concluded in a lower court.

The Court should also publish any materials related to its decision to add questions or grant certiorari on a specific issue. Cert memos will likely have useful information on these points. There is no publicly available information about the process the Court uses to decide which questions in a petition should be heard or how the Court decides to add a question, although it is possible to make educated guesses, and the Supreme Court's opinion in a case may indicate why the Court thought it was necessary.¹⁵⁵ This information is important because the Court's decisions about which questions to hear may have a significant impact on other cases and further proceedings below. We believe the Court should explain those decisions to the public. If a case is important enough to justify Supreme Court review, then the public should understand why and how the Court picks and chooses among the issues in those cases and why the Court adds questions. The Court could publish this information when it decides the case.

Although the Justices' votes would be identified, we do not advocate for identifying the authors of the pool or chambers certiorari memos in the published memos. We recommend identifying if memos originate from the pool or the chambers of a specific Justice.¹⁵⁶ Identifying the authors of memos has some substantial advantages. It would provide valuable information about the role clerks play at the Supreme Court—a topic that has been widely discussed in academic literature.¹⁵⁷ Anonymity in the memos is inconsistent with the pressing need for transparency at the Court.¹⁵⁸ Learning the authors of various clerk memos is also valuable because Supreme Court clerks may go on to become federal judges or even Supreme Court Justices and the contents of certain memos have been quite revealing.¹⁵⁹ Identifying the authors of memos may also prove—or disprove claims about the Court's institutional legitimacy.

155. See Narechania, *supra* note 15, at 590–91.

156. Pool memos could identify which chambers were assigned the case in the pool. If internal chambers mark-ups are published, which we propose they should be, those could be anonymized for publication.

157. See, e.g., TODD C. PEPPERS, COURTIER OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 207–09 (2006); WARD & WEIDEN, *supra* note 22, at 6; IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 1 (Todd C. Peppers & Artemus Ward eds., 2012); Todd C. Peppers, *Thoughts on Law Clerk Diversity and Influence*, 137 HARV. L. REV. F. 109, 130 (2023); Lawrence Baum & Corey Ditslear, *Supreme Court Clerkships and “Feeder” Judges*, 31 JUST. SYS. J. 26, 27 (2010); Ryan C. Black, Christina L. Boyd & Amanda C. Bryan, *Revisiting the Influence of Law Clerks on the U.S. Supreme Court’s Agenda-Setting Process*, 98 MARQ. L. REV. 75, 103 (2014); Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 53 (2008); William E. Nelson, Harvey Rishikof, I. Scott Messinger & Michael Jo, *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1753 (2009); Tracey E. George, G. Mitau Gulati & Albert H. Yoon, *Some Are More Equal Than Others: U.S. Supreme Court Clerkships*, 123 COLUM. L. REV. F. 146, 181 (2023); Adam Bonica, Adam Chilton, Jacob Goldin, Kyle Rozema & Maya Sen, *Legal Rasputins? Law Clerk Influence on Voting at the US Supreme Court*, 35 J.L., ECON. & ORG. 1, 1 (2019).

158. See Segall, *supra* note 18, at 831–32.

159. For example, a memo William Rehnquist wrote as a law clerk for Justice Robert Jackson arguing that *Plessy v. Ferguson* should be affirmed played a significant role in his initial confirmation to the Court and later as Chief Justice. See Memorandum from William H. Rehnquist to Justice Robert H. Jackson, A Random Thought on the Segregation Cases (Dec. 1952), <https://www.govinfo.gov/content/pkg/GPO-CHRG-REHNQUIST/pdf/>

On the other hand, we think our proposal is more feasible if the memos are unsigned. Judges, and Justices, are protective of their clerks.¹⁶⁰ And clerks have been subjected to public harassment. For example, after the *Dobbs* draft leaked, at least two law clerks for liberal justices were accused of being the leakers without any evidence and doxed.¹⁶¹ If law clerks were identified, they might become targets of harassment. Anonymous memos might also promote greater transparency because they are more likely to be candid—a clerk would not have to worry as much about their earlier assessments of legal issues becoming a problem in hiring, confirmations, or legal careers.¹⁶² Keeping clerks anonymous may reduce gamesmanship (or at least keep it at the usual levels) from litigants who might capitalize on transparency to be more persuasive. Finally, keeping memos anonymous makes them institutional materials, rather than the product of individuals, an area of concern at a Court that has, unfortunately, developed a celebrity culture surrounding the justices.¹⁶³ Things could get much worse if law clerks were to become part of that culture.¹⁶⁴ For these reasons, we think that identification of memos should be limited to the chambers from which they originated regardless of whether a Justice participates in the cert pool.

One objection to this proposal is the potential impact on the relationship of trust and confidentiality that law clerks and judges share. Work in any judicial chambers is generally kept in confidence between judges and clerks and judges depend on clerks' candor and advice.¹⁶⁵ Indeed, some jurists and commentators

GPO-CHRG-REHNQUIST-4-16-6.pdf [<https://perma.cc/2QZG-7LCL>]; Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631, 632–33 (2012); DAVID M. O'BRIEN, JUSTICE ROBERT H. JACKSON'S UNPUBLISHED OPINION IN *BROWN V. BOARD: CONFLICT, COMPROMISE, AND CONSTITUTIONAL INTERPRETATION* 67–77 (2017) (discussing the impact of the "WHR memo" on Chief Justice William Rehnquist's confirmations to the Supreme Court and as Chief Justice of the United States).

160. See *infra* notes 165–66 and accompanying text.

161. See Steve Vladeck, *The Supreme Court Leaks Are Transparent Political Plays*, MSNBC (May 15, 2022, at 04:30 CT), <https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-leaks-go-beyond-overturning-roe-n1295414> [<https://perma.cc/6ZJV-GT6M>]; Will Sommer, *MAGA Pundits Target Random Supreme Court Clerks After Roe Leak*, DAILY BEAST (May 4, 2022, at 18:14 ET), <https://www.thedailybeast.com/maga-pundits-target-random-supreme-court-clerks-after-roe-leak> [<https://perma.cc/9ASP-MGYN>].

162. Pool memos may be less candid overall than internal chambers memos, however. See WARD & WEIDEN, *supra* note 22, at 130–31. For that reason, we think it would be beneficial to publish internal chambers mark-ups and memos.

163. See Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 185–87 (2020); Chad M. Oldfather, *The Inconspicuous DHS: The Supreme Court, Celebrity Culture, and Justice David H. Souter*, 90 MISS. L.J. 183, 213–14, 224–25 (2020).

164. See Sherry, *supra* note 163, at 187–88 (discussing the relationship between judicial celebrity culture and court dysfunction).

165. See Charles W. Sorenson, Jr., *Are Law Clerks Fair Game? Invading Judicial Confidentiality*, 43 VALPARAISO U. L. REV. 1, 24–25 (2008) (discussing the relationship between judge and clerks); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153–54 (1990) (describing the role clerks play in chambers). The secretive atmosphere in judicial chambers, however, may be conducive to harassment and make it difficult for clerks to report inappropriate conduct and seek assistance in redressing misconduct. See Aliza Shatzman, *Untouchable Judges? What I've Learned About Harassment in the Judiciary and What We Can Do to Stop It*, 29 UCLA J. GENDER & L. 161, 187–97 (2022); Heidi Bond, *Judge Kozinski Had a Way of Summoning His Clerks*, COURTNEYMILAN.COM, <https://www.courtneymilan.com/metoo/kozinski.html> [<https://perma.cc/56TX-V2CH>] (last visited Jan. 2, 2026); Ina Jaffe, *Federal Appeals Judge Alex Kozinski Accused of Sexual Harassment*, NPR

believe that law clerks are the equivalent of their judge's lawyers: they represent the judge and thus communications are privileged.¹⁶⁶ Publishing certiorari memos—either from the pool, specific chambers, or mark-ups, are likely to implicate the relationship between Justices and clerks and potentially reduce the candor and thoroughness of the advice clerks provide.

We do not think this concern is sufficient to justify rejecting our proposal. Because memos would be confidential until certiorari is denied or the case is decided, the Justices would still be able to rely on their clerks for confidential, candid advice. Cert pool memos arguably present less of a concern because they are intended for many members of the Court.¹⁶⁷ Chambers mark-ups and chambers-specific memos may raise greater concerns about candor, but the publication timing we recommend should reduce those concerns—many of the issues that appear in those memos are likely to be addressed or discussed in a published opinion and probably appear in the briefing parties and amici submit to the Court. Even if one were to subscribe to the view that the memos are privileged information, publication of certiorari memos could operate as a limited waiver of that privilege. Justices already provide access to these materials after their retirements or deaths,¹⁶⁸ thus what we propose is simply moving up the timeline of public access. Justices would still benefit from their clerks' advice as they draft and develop opinions and those materials would remain confidential until a Justice chose to make their papers public. Although memos might become less candid based on the eventual knowledge that they would be published, it would be possible to spot the shift from detailed and sophisticated memoranda before the adoption of certiorari transparency to more simplistic memoranda after the reform, which would further highlight the Court's hostility for transparency, potentially fueling momentum for further reforms.

Our proposal is consistent with recent attempts to require the Court to be more transparent about the way it makes decisions in other settings. A group of Senators proposed the Shadow Docket Sunlight Act of 2024 that would require the Court's decisions "granting, denying, or vacating" injunctive relief or stays of injunctive relief to include a "written explanation of reasons supporting such order" and statements of how each Justice voted.¹⁶⁹ The Act was proposed in response to concerns about the Supreme Court's increasing use of the "shadow docket"—unsigned procedural orders that may grant or deny stays or injunctive relief.¹⁷⁰ The Act does not, however, apply to "petitions for certiorari that do not

(Dec. 8, 2017, at 20:41 ET), <https://www.npr.org/sections/thetwo-way/2017/12/08/569559223/federal-appeals-judge-alex-kozinski-accused-of-sexual-harassment> [<https://perma.cc/D2DL-B25U>].

166. See Sorenson, *supra* note 165, at 39–46 (summarizing arguments that law clerks operate as lawyers for their judges and are therefore subject to attorney-client privilege).

167. See Palmer, *supra* note 45, at 107–08 (describing the function of cert pool memos).

168. See *infra* notes 220–24 and accompanying text (discussing access to Justices' papers).

169. Shadow Docket Sunlight Act of 2024, S. 4388, 118th Cong. (2024), <https://www.documentcloud.org/documents/24679624-shadow-docket-sunlight-act> [<https://perma.cc/CKZ3-BSEN>].

170. See VLADECK, *supra* note 40, at 11–12; William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015); *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 10 (2021) (statement of Stephen I. Vladeck,

grant, deny, or vacate injunctive relief or grant, deny, or vacate a stay of such relief.”¹⁷¹ We believe this is an unfortunate oversight. Although the Court’s use of the shadow docket has expanded, its decisions about certiorari are core components of the Court’s merits docket and have a significant impact upon the public and the development of law. The Act was referred to the Senate Committee on the Judiciary in May 2023.¹⁷² Nothing more occurred before the end of the congressional term, and no new similar bill has been proposed in the 119th Congress.¹⁷³ Given the results of the 2024 Presidential election, it is unlikely that a similar act will progress through Congress.

IV. BENEFITS OF CERTIORARI TRANSPARENCY

In this Part, we discuss arguments in favor of our proposal. We identify three main benefits. First, publishing this information increases transparency about the Court’s operations. Second, increased scrutiny of how the Court controls its docket may restrain the Court’s worst impulses. Third, publication of this information may impress the importance of the certiorari process onto the Justices themselves.

A. *Transparency: Information about the Court’s Functions and Dynamics*

Publishing certiorari memos and vote counts might make an extremely secretive process more transparent. The Supreme Court is a co-equal branch of the U.S. government.¹⁷⁴ The Executive Branch, Congress, and federal agencies are required to make information about their operations publicly accessible, with some exceptions.¹⁷⁵ The Supreme Court has no such obligation, although the Justices are required to provide annual financial disclosures that are made publicly available.¹⁷⁶ To put it simply, we do not know *how* and *why* the Court chooses to hear any given case. There are some sources of information: petitions, briefs, statements in opinions, and individual Justices’ statements regarding the denial of certiorari or a stay, but these provide a largely incomplete picture of the

Charles Alan Wright Chair in Fed. Cts., Univ. Tex. Sch. L.), <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf> [<https://perma.cc/U32G-9LSU>].

171. See *S. 4388 - Shadow Docket Sunlight Act of 2024*, CONGRESS.GOV, <https://www.congress.gov/bills/118th-congress/senate-bill/4388/text> [<https://perma.cc/F3QP-E6RX>] (last visited Jan. 2, 2026).

172. See *id.*

173. See *id.* (reflecting that the last action on the bill was that it was “[r]ead twice and referred to the Committee on the Judiciary”).

174. See *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997).

175. See *Government in the Sunshine Act*, 5 U.S.C. § 552b; *Freedom of Information Act*, 5 U.S.C. § 552; 44 U.S.C. § 2118 (requiring records be submitted from Congress).

176. See 5 U.S.C. § 13103(f)(11) (requiring “judicial officer[s]” to file financial disclosures); *id.* § 13101(10) (defining “judicial officer[s]” to include the Chief Justice of the United States and the Associate Justices of the Supreme Court); see also WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10949, FINANCIAL DISCLOSURE AND THE SUPREME COURT 3–5 (2023) (discussing mandatory judicial officer financial reports).

Court's decision-making.¹⁷⁷ Further, these statements are not contemporaneous; rather they have been polished for presentation as part of an opinion and therefore may not be as candid about the internal decision-making process.¹⁷⁸

Certiorari memoranda and vote counts may reveal where the Justices stand on various issues. This matters not just for litigants, but for the public. The Court has been plagued by ethical scandals that have led to public speculation about whether the Justices are, in fact, operating independently.¹⁷⁹ Increasing transparency about votes to grant or deny certiorari, as well as the considerations that go into those decisions, might prove that the Justices really are independent—or substantiate ethics concerns. This in turn may provide useful information for legislators considering whether to take up Supreme Court reform and how to shape such reforms.¹⁸⁰ It might also shed light on decisions about recusals. The Court's current code of ethics does not require a Justice offer any explanation about why she recuses herself from a particular case, although some Justices have chosen to provide short written explanations.¹⁸¹

From a litigant's perspective, identifying which cases only receive three votes—and how individual Justices are voting—may identify areas in which the Court is considering taking up issues. Tracking the petitions the Court relists can supply some information on this point, but without memoranda or votes identifying judicial concerns, relist watching is at most informed speculation.¹⁸² This information can be useful to parties with cases before the Court as to whether it is likely the Court will address those issues in the future.

This information may be beneficial to actors other than litigants. Cert vote information may signal to the U.S. public where the Court is likely to wreak havoc in the future. That information may even incentivize federal and state legislators and members of the public to exercise *their* democratic prerogatives.¹⁸³

177. See VLADECK, *supra* note 40, at 73–74 (explaining that denials of certiorari lead to “enormous practical impact,” but do not signal the court's rationale to lower courts, leading to confusion about the rationale for the denial of certiorari).

178. See Narechania, *supra* note 18, at 939–41 (describing the Court's practice of sometimes explaining why it granted certiorari in the text of an opinion).

179. See *supra* notes 114–17, 128–35 and accompanying text.

180. Thus far, Chief Justice Roberts has declined to meet with members of Congress to address judicial ethics questions. See *Chief Justice Roberts Declines a Meeting with Senate Democrats*, NPR (May 30, 2024, at 15:10 ET), <https://www.npr.org/2024/05/30/g-s1-1870/chief-justice-roberts-declines-a-meeting-with-senate-democrats> [<https://perma.cc/A2PU-SUC7>].

181. *Fulks v. Watson*, 143 S. Ct. 2694 (2023) (order denying certiorari) (“Justice Kagan took not part in the consideration or decision of this petition.”). See 28 U.S.C. § 455(b)(3) and Code of Conduct for U.S. Judges, Canon 3C(1)(e) (prior government employment).

182. See, e.g., John Elwood, *Sacred Sites, Religious Tax Exemptions, and Whether to Reconsider Feres*, SCOTUSBLOG (Dec. 12, 2024), <https://www.scotusblog.com/2024/12/sacred-sites-religious-tax-exemptions-and-whether-to-reconsider-feres/> [<https://perma.cc/UQK9-G36Q>]; John Elwood, *Relist Watch: In a Slew of New Cases, the Justices Take in Closer Look*, SCOTUSBLOG (Jan. 16, 2025), <https://www.scotusblog.com/2025/01/in-a-slew-of-new-cases-the-justices-take-in-closer-look/> [<https://perma.cc/E8P6-CANS>].

183. One example of popular reforms in response to the Court's decisions is the rise in state constitutional protections for reproductive autonomy and abortion. See Elissa Nadworny & Ryland Barton, *Most States That Considered Abortion Rights Amendments Approved Them*, NPR (Nov. 6, 2024, at 07:06 ET), <https://www.npr.org/2024/11/06/g-s1-32962/abortion-rights-amendments-2024-election> [<https://perma.cc/PN2F-NP22>].

Awareness of the Court's patterns and interests could allow courts and litigants greater information about uniformity and consistency when litigating in appellate circuits where splits arise. This may encourage increased uniformity and consistency among circuits and district courts. Awareness of the Court's assessments of various circuit splits may encourage circuits and district courts to decide cases with an eye towards limiting circuit splits or offering more persuasive justifications for retaining a minority position. And for those federal appellate judges who disagree with a panel's outcome, information on where the Court might be more or less likely to contemplate granting certiorari may be valuable in deciding whether it is worth authoring a separate or dissenting opinion.¹⁸⁴

Cert memos and vote counts are likely to provide insight into Justices' decisions, highlight their priorities, and permit observers to derive patterns in their behavior. While some of the petitions the Court receives need not be addressed by the Supreme Court, every term the Court denies petitions of national significance in favor of others. Understanding *why* the Court does something is just as important as understanding *what* the Court is doing. Consider the October 2024 term. At the time of writing, the Court had granted certiorari on a range of issues that may have profound consequences: "ghost guns,"¹⁸⁵ the Clean Water Act,¹⁸⁶ state bans on transgender individuals' medical care,¹⁸⁷ the First Amendment,¹⁸⁸ and the ability to bring suit under 42 U.S.C. § 1983.¹⁸⁹ The Court did not have to hear any of those cases. It denied certiorari on other equally important issues like state restrictions on firearms,¹⁹⁰ the applicability of *Batson*,¹⁹¹ and

Additional information about cert voting patterns may give advance notice to those pursuing state-level legislation and constitutional amendments on where to focus their efforts.

184. See Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 120, 125–29 (2011) (describing the costs and benefits of dissenting in federal appellate cases, including the time and effort costs of dissent, and benefits, including signaling that a case is worthy of the Supreme Court's attention).

185. *VanDerStok v. Garland*, 86 F.4th 179, 185 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 1390 (2024).

186. *City & Cnty. of S.F. v. Env't Prot. Agency*, 75 F.4th 1074, 1078 (9th Cir. 2023), *cert. granted*, 144 S. Ct. 2578 (2024).

187. *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 466 (6th Cir. 2023), *cert. granted sub nom.*, *United States v. Skrmetti*, 144 S. Ct. 2679 (2024).

188. *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 266 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024).

189. *Johnson v. Washington*, 387 So. 3d 138, 140 (Ala. 2023), *cert. granted sub nom.*, *Williams v. Washington*, 144 S. Ct. 679 (2024).

190. *Harrel v. Raoul*, 144 S. Ct. 2491, 2491 (2024) (denying certiorari in six cases challenging state prohibitions on the ownership of assault weapons). Justice Thomas wrote to indicate that, while the "interlocutory posture" of the cases made them a poor vehicle, he "hope[d] we will consider the important issues presented by these petitions after the cases reach final judgment." *Id.* at 2492.

191. *King v. Emmons*, 144 S. Ct. 2501, 2501 (2024). Justice Jackson dissented from the denial of certiorari, pointing out that the Eleventh Circuit had erred in its application of AEDPA, tolerating discriminatory juror strikes. *See id.* at 2505–06 (Jackson, J., dissenting from denial of certiorari).

prosecutorial immunity.¹⁹² These decisions were made based on an unreviewable and virtually unknown decision-making process.¹⁹³

The Court may, in its exercise of discretion, also add questions for argument or only grant certiorari on some of the questions presented in a petition.¹⁹⁴ The Justices do not have to explain why they have chosen to add a question or only hear certain questions.¹⁹⁵ In the October 2024 term, the Court agreed to hear *Glossip v. Oklahoma*, a capital case with a lengthy history.¹⁹⁶ Glossip's petition for a writ of certiorari presented three merits questions, which focused on claims arising from the suppression of evidence, a prosecutor's obligation to correct a witness's false testimony, and the due process implications of the Oklahoma Attorney General's decision to confess error and support Glossip's request for a new trial.¹⁹⁷ The Court added a question when it granted certiorari: "Whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment."¹⁹⁸ The Court did not explain why it added this question.¹⁹⁹ In 2015, the Court sent a letter to advocates days before oral arguments in *Foster v. Chatman*, demanding they address a new jurisdictional question—and spent substantial time on that issue during argument, rather than the serious *Batson* issues at the heart of the case.²⁰⁰ The procedural posture and history of the case permit informed speculation about the Court's likely reasons for adding questions.²⁰¹ But doing so permits the Court to change the nature of a case before it.²⁰² While jurisdiction is an issue that a court can always raise

192. *Price v. Montgomery Cnty., Ky.*, 144 S. Ct. 2499, 2499 (2024). Justice Sotomayor issued a statement hinting that she was willing to revisit prosecutorial immunity in the future if courts were willing to tolerate prosecutors allegedly advising witnesses to destroy evidence. *Id.* at 2500–01 (statement of Sotomayor, J., respecting the denial of certiorari).

193. *See supra* Section II.A.

194. *Johnson, supra* note 40, at 795.

195. *See id.* at 795–97.

196. *Glossip v. Oklahoma*, 144 S. Ct. 691 (2024) (granting certiorari).

197. Brief for Petitioner at i, *Glossip v. Oklahoma*, 604 U.S. 226 (2024) (No. 22-7466), 2024 WL 1860352.

198. *Glossip*, 144 S. Ct. at 691–92.

199. *See id.*

200. *See* Letter from Clerk of Court, *Foster v. Chatman*, 578 U.S. 578 (2016) (No. 14-8349), <https://www.supremecourt.gov/docketfiles/14-8349.htm> [<https://perma.cc/CF5W-ESBK>] (directing counsel to "expect questions at oral argument whether certiorari in this case should be directed to the Supreme Court of Georgia or the Superior Court of Butts County, Georgia, and what significance, if any, that determination may have on the Court's resolution of the case"); *Foster v. Chatman*, 578 U.S. 488, 496–97 (2016); ROBERT L. TSAI, DEMAND THE IMPOSSIBLE: ONE LAWYER'S PURSUIT OF EQUAL JUSTICE FOR ALL 120–29 (2024) (discussing the *Foster v. Chatman* oral arguments).

201. *See* Lyle Denniston, *Argument Analysis: To Decide, or Not—That Is the Question*, SCOTUSBLOG (Nov. 2, 2015), <https://www.scotusblog.com/2015/11/argument-analysis-to-decide-or-not-that-is-the-question> [<https://perma.cc/8BFK-BTHT>] ("If there was an ideological division among the Justices suggested by their questions and comments, the more liberal Justices were working to try to salvage the case for a ruling on the merits, and the more conservative Justices were more inclined to let the lower courts have at least the first chance to resolve the procedural glitches—if they were willing to do so upon request.")

202. *See* Heather Elliott, *Does the Supreme Court Ignore Standing Problems to Reach the Merits? Evidence (or Lack Thereof) from the Roberts Court*, 23 WM. & MARY BILL RTS. J. 189, 193–95 (2014); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L.

sua sponte,²⁰³ the Supreme Court can manipulate jurisdictional issues to narrow the field of inquiry—or to avoid merits issues.²⁰⁴ Understanding the nature of Justices’ procedural concerns may assist lower courts and advocates with these problems. Increased transparency may also reduce Justices’ ability to manipulate their dockets through altering the questions presented—or at least identifying the justifications for those alterations.²⁰⁵ It may also permit a more searching inquiry into instances in which the Court decides a question it did not grant certiorari on.

While decisions about certiorari do not address the merits of a case, they leave lower courts’ merits decisions in place and may reflect the Justices’ preferred outcomes.²⁰⁶ Gay rights cases offer one example. Chief Justice Burger, for example, added cases to the “[d]iscuss” list when the Court was being asked to reverse a lower-court decision in favor of gay rights—but challengers seeking to overturn lower-court decisions unfavorable to gay rights ended up on the “dead” list.²⁰⁷ Justice Rehnquist also “consistently voted to deny certiorari whenever civil rights advocates sought review of judicial defeats for gay rights.”²⁰⁸ The Court did not grant cert in gay-rights cases for an extended period of time, arguably stalling progress and signaling to lower courts that these issues were not as important.²⁰⁹ But votes to deny cert in gay-rights cases, as Professor Christopher Leslie explains, might also have been protective because more liberal justices feared what the Court might do if they *did* hear a case.²¹⁰ Other certiorari decisions allow the Court to manipulate legal issues: Professor Matthew Fletcher contends that the Court hears Indian law cases not to address Indian law issues, but to address other constitutional questions “embedded in a run-of-the-mill

REV. 633, 640–42 (2006); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1786–87 (1999).

203. *Wilkins v. United States*, 598 U.S. 152, 157 (2023).

204. *See* Pierce, *supra* note 202, at 1742–43; Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 105 & n.1 (2014) (describing academic critiques of the Supreme Court’s standing doctrine); *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14–15 (2024) (Alito, J., dissenting from denial of certiorari) (“I am concerned that some federal courts are succumbing to the temptation to use the doctrine of Article III standing as a way of avoiding some particularly contentious constitutional questions.”). *But see* *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 431–33 (2013) (Breyer, J., dissenting) (critiquing the majority opinion written by Justice Alito for improperly denying standing to some of the plaintiffs).

205. Professor Richard Fallon observes that the Court’s discretion over certiorari may disincentivize standing manipulation, but if four justices vote to hear a case, the other five may “dismiss for absence of standing—even if doing so requires a strategic manipulation of otherwise applicable doctrine.” Fallon, *supra* note 204, at 125–26.

206. Christopher R. Leslie, *The Importance of Lawrence in the Context of the Supreme Court’s Historical Treatment of Gay Litigants*, 11 WIDENER L. REV. 189, 191–92 (2005).

207. *See id.* at 209 (citing JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE* 149 (2001)).

208. *Id.* at 214.

209. *Id.* at 209–10.

210. *Id.* at 209. For example, Justices Brennan, Marshall, and Stevens voted to deny certiorari in *California v. Ciraolo*, 476 U.S. 207 (1986), presumably because they believed that the California Court of Appeals had correctly decided that intentionally flying a plane over a person’s backyard to observe what was behind a privacy fence was a search. *See California v. Ciraolo*, Supreme Ct. Case Files Collection, Box 125, Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia; *Ciraolo*, 476 U.S. at 210.

Indian law certiorari petition.”²¹¹ He argues that the Court evades congressional authority and Indian legal history to reach preferred results.²¹²

Justices’ papers can be rich sources of information about the Justices’ priorities, preferences, and patterns.²¹³ Justice Stevens’s papers revealed that Justices O’Connor and Kennedy prevented the “independent state legislature” theory from gaining ground during the *Bush v. Gore* deliberations.²¹⁴ Professor Travis Crum reviewed Justice Stevens’s papers and discovered that a draft dissent from denial of certiorari by Justice Scalia may have persuaded Justice Ginsburg to vote in favor of granting certiorari in *Rice v. Cayetano*, a voting rights case from Hawaii.²¹⁵ Justice Lewis Powell’s papers offer candid discussion about whether *Batson* was even the right vehicle to grant certiorari on the question of race-based preemptory strikes, cautioning that “the Court cannot expect particularly able advocacy of the State’s position, judging from the resp to the petn [sic].”²¹⁶

These matters are of scholarly and public interest. Publicizing certiorari votes may reveal information confirming or revealing strategies that blocs of Justices employ with regard to politically salient cases. Those who consider the Court’s agenda-setting behaviors and docket management frequently discuss the strategic considerations behind certiorari determinations and develop theories for how Justices vote the way they do.²¹⁷ This literature, however, remains either outdated or speculative, because there is limited information on certiorari voting patterns.²¹⁸ While certiorari votes and chambers memos might be consistent with

211. Matthew L. M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579, 580 (2008).

212. *Id.* at 611 (discussing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)).

213. *See, e.g.,* deMaine & Keele, *supra* note 213, at 507 (“These examples show how access to the justices’ working papers enlightens us as to their views, the inner workings of the Supreme Court, and the development of the law.”).

214. Debra Cassens Weiss, *Rehnquist Dropped Push for “Independent State Legislature” Theory in Bush v. Gore, Stevens’ Papers Show*, ABA J. (May 3, 2023, at 12:42 CT), <https://www.abajournal.com/news/article/rehnquist-dropped-push-for-independent-state-legislature-theory-in-bush-v-gore-stevens-papers-show> [<https://perma.cc/9ETX-BAB8>]; Joan Biskupic, *New Documents Show How Sandra Day O’Connor Helped George W. Bush Win the 2000 Election*, CNN (May 3, 2023, at 12:01 ET), <https://www.cnn.com/2023/05/02/politics/bush-gore-oconnor-supreme-court-2000/index.html> [<https://perma.cc/5WYU-6ZXP>].

215. Guy Charles, *(Updated) Travis Crum Guest Post: Justice Scalia’s Draft Dissent from Denial of Certiorari in Rice v. Cayetano*, ELECTION L. BLOG (May 23, 2023, at 09:33 CT), <https://electionlawblog.org/?p=136398> [<https://perma.cc/V3SY-WBK4>].

216. Supplement to Preliminary Memorandum from Lewis F. Powell Jr. *Batson v. Kentucky*, Sup. Ct. Case Files Collection, Box 128, Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia. (Mar. 27, 1985).

217. *See, e.g.,* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 272–77 (1991) (modeling the Court’s decision process for taking cases); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 82 (2013) (describing the “defensive denial” practice in which Justices “are less likely to vote to grant certiorari when they think they’ll wind up on the losing side of the case if certiorari is granted even if they would like to reverse the decision below”); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 350, 434 (2002) (describing strategic considerations involving Justices’ certiorari votes in light of how their colleagues are likely to decide the case on the merits).

218. *See, e.g.,* Benjamin Johnson, *The Supreme Court’s Political Docket: How Ideology and the Chief Justice Control the Court’s Agenda and Shape Law*, 50 CONN. L. REV. 581, 603 (theorizing that the four liberal Justices on the Court were behind the grant of certiorari in *Ledbetter v. Goodyear Tire & Rubber*, 550 U.S. 618

ideological positions and public assumptions about the Justices, there may also be cases and topics that are inconsistent with those trends. The reform we propose is arguably increasingly salient in light of recent challenges to judicial authority by the executive branch.²¹⁹ Transparency in decision-making—including judicial candor about decisions—may bolster the legitimacy of the Court and the judiciary. There may be categories of cases in which certiorari votes might come as a surprise. Greater judicial candor may have the effect of strengthening public perceptions of the Court as a neutral judicial body, improving public support and respect for the judiciary.

Justices' papers may also be incomplete—after all, each Justice decides which materials should be collected, stored, and donated.²²⁰ Justices' papers may not be available for a long period of time after their retirements or deaths.²²¹ Justice Stevens's papers will only become available in batches.²²² Chief Justice Burger's papers will not be accessible to researchers until 2033.²²³ Justice Souter's papers will not be available until 2075.²²⁴ Although useful for future scholars, this practice does not provide contemporaneous opportunities to evaluate the Court's practices. It also limits scholars' ability to engage with contemporary trends in the Court's decision-making and agenda-setting. While scholars can, and do, make meaningful contributions in this area without access to the

(2007), but acknowledging that “we cannot know for sure, since the cert votes have not been made publicly available”); Glendon Schubert, *Policy Without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284, 285 (1962) (noting that one cannot know whether Justice Douglas was the only Justice who dissented to the Court's denial of certiorari in *Murphy v. Butler*, 362 U.S. 929 (1960), as “custom permits, but does not require, the identification of dissenting votes in jurisdictional decisions of the Court”).

219. See Hugo Lowell, *Trump Officials Create Uncertainty to Evade Court Orders Rather Than Comply*, GUARDIAN (Apr. 18, 2025, at 10:00 ET), <https://www.theguardian.com/us-news/2025/apr/18/trump-immigration-court-orders> [<https://perma.cc/2D75-54GJ>]; Nicholas Riccardi, *Trump's Clash with the Courts Raises Prospect of Showdown Over Separation of Powers*, ASSOCIATED PRESS (May 18, 2025, at 06:45 CT), <https://apnews.com/article/trump-courts-rule-law-justice-contempt-congress-d588119540b8338e7b32e41fc8039dd0> [<https://perma.cc/YR56-EA4V>]; Andrew Stanton, *Amy Coney Barrett Confronts Trump Admin Lawyer on Respecting Court Rulings*, NEWSWEEK (May 16, 2025, at 11:16 ET), <https://www.newsweek.com/amy-coney-barrett-confronts-d-john-sauer-rulings-supreme-court-2072962> [<https://perma.cc/5MVU-T5XR>]; Erwin Chemerinsky, *A Terrible Idea*, JUST SEC. (May 19, 2025), <https://www.justsecurity.org/113529/terrible-idea-contempt-court/> [<https://perma.cc/C2XE-74A7>].

220. See Stephen Wermiel, *SCOTUS for Law Students: Supreme Court Mysteries and the Justices' Papers (Corrected)*, SCOTUSBLOG (July 2, 2019, at 13:19 CT), <https://www.scotusblog.com/2018/07/scotus-for-law-students-supreme-court-mysteries-and-the-justices-papers/> [<https://perma.cc/55P3-MNMC>].

221. See *id.* (discussing the status of Justices' papers); Mark Walsh, *Justice Stevens' Papers Let Researchers Peek into Supreme Court's Inner Workings*, ABA J. (May 18, 2023, at 11:04 CT), <https://www.abajournal.com/web/article/library-of-congress-opens-more-of-justice-stevens-papers> [<https://perma.cc/2L7R-84A6>] (noting that the papers of Justices Sandra Day O'Connor and Ruth Bader Ginsburg are not yet available).

222. Walsh, *supra* note 221 (describing the gradual process of public access to Justice Stevens's papers, which will be released in batches culminating in 2030).

223. Chief Justice Warren Burger's papers are not accessible to researchers until either “10 years after the last Justice who served with Warren E. Burger on the Supreme Court has passed away, or 2026, whichever comes later.” *Warren E. Burger Collection*, WM. & MARY SPECIAL COLLECTIONS RSCH. CTR., <https://libraries.wm.edu/src/collections/warren-e-burger-collection> [<https://perma.cc/V7F6-YJBP>] (last visited Jan. 2, 2026).

224. Josh Blackman, *Justice Souter's Papers Will Be Available in the Year 2075*, REASON MAG. (May 9, 2025, at 11:04 CT), <https://reason.com/volokh/2025/05/09/justice-souters-papers-will-be-available-in-the-year-2075/> [<https://perma.cc/ZKN8-MZKM>].

Court's internal information on the certiorari process,²²⁵ having those documents would give scholars and the public greater insights into the judicial process.

The lack of transparency in the certiorari process leads to academic work-arounds—for example, Professor Tejas Narechania has attempted to derive a “doctrine of certiorari” based on instances where the Court gives a reason for granting certiorari in its ultimate opinion in the case.²²⁶ While these efforts may illuminate aspects of the process, they are ultimately incomplete.²²⁷ Professor Narechania's data, for instance, is limited only to the minority of cases in which the Court granted certiorari, and is then further limited to cases with opinions indicating the reasons the Court granted certiorari.²²⁸ Furthermore, the Court's reasoning is indirect and backward looking, as the reasoning is derived only from the finished product of a later opinion rather than the immediate deliberations over the granting of certiorari in the first place.²²⁹ Making certiorari votes public would add substantial up-to-date data to supplement existing scholarship and strategizing over Justices' voting patterns and strategies.

The Court has been resistant to other transparency reforms in the past. For years, the Court refused to permit live audio or video of oral arguments.²³⁰ Comedian John Oliver responded to the Court's recalcitrance to televising arguments by recreating Supreme Court oral arguments featuring dogs as stand-ins for the Justices.²³¹ The Court only released audio of arguments on the same day they were held in a handful of cases of national significance like *NFIB v. Sebelius* and *Obergefell v. Hodges*.²³² The COVID-19 pandemic forced the Court to adapt; for the first time, the Court permitted audio of its oral arguments (held over the phone) to be aired live.²³³ When the Court stopped holding telephonic arguments, it continued live-streaming the audio of oral arguments and releasing audio files the same day arguments took place.²³⁴ The Court does not live-stream

225. Narechania, *supra* note 18, at 984–89.

226. *Id.* at 984–90.

227. *Id.* at 984 (“But the understanding that comes from such a synthesis is incomplete.”).

228. *See id.* at 942–43 (explaining the scope of the dataset).

229. *See id.* at 950–51 (discussing the limitations of the dataset).

230. *See* David Hawkins, *New High Court Term, Same No-TV and Tape-Delay Rules*, ROLL CALL (Sep. 27, 2018, at 05:03 CT), <https://rollcall.com/2017/09/27/new-high-court-term-same-no-tv-and-tape-delay-rules/> [<https://perma.cc/CGH8-ADQ2>] (discussing the Court's resistance to televising oral arguments and real-time audio of oral arguments).

231. *See* LastWeekTonight, *Supreme Court Dogs: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Oct. 20, 2014), <https://www.youtube.com/watch?v=fJ9prhPV2PI> [<https://perma.cc/SB5Q-M952>].

232. Hawkins, *supra* note 230 (“After importuning by the press and ‘good government’ groups, the justices have allowed later-the-same-day release of the tapes only two dozen times—for such obvious history-in-the-making moments as the cases, most recently, that upheld the 2010 health care law and found a constitutional right to same-sex marriage.”).

233. *See* Ariane de Vogue, ‘Oyez! Oyez! Oyez!’ *The Supreme Court Is Live on the Air*, CNN (May 4, 2020, at 15:40 ET), <https://www.cnn.com/2020/05/04/politics/supreme-court-live-audio-historic-trademark/index.html> [<https://perma.cc/2WUV-FUA3/>].

234. Amy Howe, *Live Audio of Oral Arguments Will Continue as Court Partially Reopens to Public*, SCOTUSBLOG (Sep. 28, 2022), <https://www.scotusblog.com/2022/09/live-audio-of-oral-arguments-will-continue-as-court-partially-reopens-to-public/> [<https://perma.cc/P2XL-BPMK>]; *Argument Audio*, S. CT., https://www.supremecourt.gov/oral_arguments/argument_audio/2024 [<https://perma.cc/K3VL-E938>] (last visited Jan. 2, 2026).

opinion announcements, but it does post the opinions to the Court's website as they are announced.²³⁵ Although public polling has indicated support for televising arguments, and other courts, including state supreme courts, routinely livestream video of arguments, the Court has resisted.²³⁶ These modest concessions have increased transparency at the Court by making their proceedings more accessible to the public and the sky has not fallen.

B. Restraint

Increased transparency may also curb the Court's worst impulses. Professor Mark Lemley argues that the Court has "begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself."²³⁷ He explains that the Court is "consolidating its power, systematically undercutting any branch of government, federal or state, that might threaten that power, while at the same time undercutting individual rights."²³⁸ This, he suggests, arises not from the Court's interest in taking away *other* entities' power—but from the Court's "desire to do what the Court wants and to prune back what it views as obstacles to that goal."²³⁹ We agree with Professor Lemley: "This is not a good development."²⁴⁰

The Court occupies a peculiar place in American democracy. It can check the legislative and executive branches and restrain states.²⁴¹ There are reasons for the Court to have that kind of power. The Court can clarify conflicting interpretations of federal law,²⁴² ensure fair legal processes,²⁴³ protect and nurture democratic institutions,²⁴⁴ and reinforce constitutional protections.²⁴⁵ Ensuring

235. See *Media and Public Access*, FIX THE CT., <https://fixthecourt.com/fix/media-and-public-access/> [<https://perma.cc/78UY-XADT>] (last visited Jan. 2, 2026) ("Audio recordings of opinion announcements are still not livestreamed, with the audio only becoming available at the start of the subsequent term."); *Opinions*, S. CT., <https://www.supremecourt.gov/opinions/opinions.aspx> [<https://perma.cc/NJZA-SKPJ>] (last visited Jan. 2, 2026) ("Opinions are posted on the website upon release in slip opinion format.")

236. Hawkings, *supra* note 230 (discussing state supreme courts and federal court audio and video practices); *Americans Want the Supreme Court to Function Remotely, And That Includes Hearing Arguments*, FIX THE CT. (Apr. 8, 2020), <https://fixthecourt.com/2020/04/americans-want-supreme-court-function-remotely-includes-hearing-arguments/> [<https://perma.cc/L2VF-X9BP>].

237. Lemley, *supra* note 97.

238. *Id.* at 113.

239. *Id.* at 114.

240. *Id.*

241. See *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803); *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958); *United States v. Nixon*, 418 U.S. 683, 706–07 (1974); *but see Trump v. United States*, 603 U.S. 593 (2024).

242. See SUP. CT. R. 10(a).

243. See generally A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968) (discussing how the Warren Court used its supervisory power over the criminal justice system to expand procedural protections and enforce fairness in state and federal prosecutions).

244. See Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 4 (2012) ("The animating impulse behind many of the Warren Court's major decisions was a commitment to civic inclusion and democratic decisionmaking.")

245. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–91 (1977); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1693 (2008).

that other institutions act in compliance with statutory and constitutional protections is an important role that the judicial branch can play in a healthy democratic society.²⁴⁶ The other institutions are supposed to be able to restrain the judicial branch—and they do not.²⁴⁷ This is not entirely the Court’s fault—the legislative and executive branches have their own share of institutional dysfunction that has stymied their ability to provide meaningful oversight of the judiciary.²⁴⁸ But the power the Court has amassed has allowed it to weaken the other branches and the democratic processes and functions that support those branches.²⁴⁹ If Congress were to enact some of the proposed Supreme Court reforms, the Court would be the ultimate adjudicator of whether those reforms were constitutional and therefore permissible. Legislation can only restrain the Court if it chooses to be restrained.

One reason the Court has this power is because of the level of control it has over its docket.²⁵⁰ Because the Court can decide the cases and questions it wants to hear out of thousands of cases each year, it has significant influence over federal and state political processes.²⁵¹ Federal and state entities are aware of this and can take action intended to give the Court opportunities to overrule precedent, particularly if they are tracking the trajectory of judicial decisions.²⁵² And what the Court does with constitutional questions can never be undone without a constitutional amendment—even when its decisions may rest on a questionable foundation.²⁵³

Docket control is not unique to the Supreme Court. State supreme courts also exercise docket control through discretionary review, although state law may also require automatic review of certain types of cases.²⁵⁴ We do not claim

246. See Fallon, *supra* note 245, at 1700.

247. See *supra* notes 100–09, & 180 (discussing the Commission to consider Supreme Court reform); see also *supra* note 166 and accompanying text (noting the Chief Justice’s refusal to meet with legislators about the Court’s ethics issues).

248. See, e.g., Rachel Reed, ‘Too Little Too Late’, HARV. L. TODAY (Aug. 1, 2024), <https://hls.harvard.edu/today/bidens-proposed-court-reforms-may-be-too-little-and-too-late-says-doerfler/> [<https://perma.cc/QB2C-TA9L>].

249. See Murray & Shaw, *supra* note 17, at 777–85 (describing the Supreme Court’s decisions that weakened democratic and electoral processes); Karlan, *supra* note 244, at 13 (“[T]he Court’s decisions convey a broad message about the democratic process itself that may undermine public confidence in the democratic process going forward.”).

250. See Wayne A. Logan, *The “Alito Hypothesis” in an Era of Emboldened One-Party State Rule*, 18 HARV. L. & POL’Y REV. 395, 408–09 (2024).

251. Winston Bowman, *The Supreme Court’s Rule of Four*, FED. JUD. CTR., <https://www.fjc.gov/history/spotlight-judicial-history/rule-four> [<https://perma.cc/2DC6-3Y5F>] (last visited Jan. 2, 2026).

252. See Logan, *supra* note 250, at 407–08.

253. For example, if the Court decides a punishment violates the Eighth Amendment, such decisions cannot be undone without a constitutional amendment. See *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (quoting *Gregg v. Georgia*, 428 U.S. 153, 176 (1976)).

254. See, e.g., ARIZ. CONST. art. VI, § 5 (describing the jurisdiction of the Supreme Court of Arizona); VA. CONST. art. VI, § 1 (setting out the jurisdiction of the Supreme Court of Virginia); MD. CODE ANN., CTS. & JUD. PROC. § 12-203 (providing that the Maryland Supreme Court can hear a case if it finds that review is “desirable and in the public interest”); CAL. RULE OF COURT 8.500(b) (identifying grounds for Supreme Court review); FLA. R. APP. P. 9.030(a)–(b) (identifying mandatory and discretionary jurisdiction for the Supreme Court of Florida); IDAHO APP. R. 118(b) (authorizing discretionary review of final decisions of the Court of Appeals); ILL. SUP. CT.

that state supreme courts are models of transparency. A recent report by the ACLU's State Supreme Court Initiative observed that state supreme courts are not publishing case names and docket numbers, and questions presented promptly, and do not routinely provide free public access to dockets, filings, and briefs.²⁵⁵ State courts should address these deficiencies.²⁵⁶ But state supreme courts are more politically accountable than the Supreme Court, for better or for worse.²⁵⁷ First, state supreme court judges and justices may be elected.²⁵⁸ Some are appointed, but even in those jurisdictions, there are mechanisms that tie judicial selection to democratic processes.²⁵⁹ Virginia's Supreme Court justices are elected by both houses of the General Assembly.²⁶⁰ In Maryland, the governor appoints supreme court justices who are confirmed by the Maryland Senate and must stand for retention elections at ten-year intervals.²⁶¹ States may also have a mandatory retirement age for members of the judiciary, or term limits for state supreme court justices, permitting more frequent turnover that may better reflect changing community preferences and demographics.²⁶² State constitutions are also easier to amend than the U.S. Constitution.²⁶³ Finally, decisions of state supreme courts, although significant, do not by themselves have the same national impact as a decision issued by the Supreme Court of the United States.²⁶⁴ The flexibility of state systems creates a more politically responsive judiciary, for better or for worse.²⁶⁵ Thus, while state supreme court docket control gives state

R. 315(a) (identifying non-controlling criteria for Supreme Court review); TEX. R. APP. P. 56.1(a) (listing relevant factors the Supreme Court of Texas considers when deciding whether to grant a petition for review).

255. *Scorecard for State Supreme Court Transparency*, ACLU (Dec. 9, 2024), <https://www.aclu.org/publications/scorecard-for-state-supreme-court-transparency> [<https://perma.cc/SC5N-QTHA>].

256. This lack of transparency may be one contributor to federal law's primacy. State courts are, however, increasingly taking on constitutional adjudication under state constitutions. Most lawyers will practice in state court while applying state law and state constitutional law is all too frequently overlooked, including in law school curricula. See Ellie Margolis & Leonore F. Carpenter, *What Law Schools Teach When They Don't Teach About State Constitutions*, 55 N.M. L. REV. 391, 391–93 (2025).

257. *See Judicial Selection: An Interactive Map*, BRENNAN CTR. JUST. (Aug. 20, 2024), <https://www.brennancenter.org/judicial-selection-map> [<https://perma.cc/UPA3-2QVG>] (illustrating the range of judicial selection processes).

258. *See id.*

259. *See id.*

260. VA. CONST. art VI, § 7.

261. MD. CONST. art. IV, § 5A.

262. Michael Milov-Cordoba, *Life Tenure Is a Rarity on State Supreme Courts*, BRENNAN CTR. JUST. (Oct. 2, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/life-tenure-rarity-state-supreme-courts> [<https://perma.cc/J4F3-BEXM>].

263. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1670–71 (2014).

264. *See* Robyn Painter & Kate Mayer, *Which Court Is Binding? Binding vs. Persuasive Cases*, WRITING CTR. GEO. U. L. CTR. (2017), <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf> [<https://perma.cc/535U-T56J>].

265. We are not suggesting that elected judges are inherently better. Indeed, in states that suffer from partisan gerrymandering and electoral capture, state supreme courts may not be representative or politically accountable. State legislatures may also engage in retaliatory action against state supreme court justices. *See* Michael Wines, *Judges Say Throw Out the Map. Lawmakers Say Throw Out the Judges*, N.Y. TIMES (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/us/pennsylvania-gerrymandering-courts.html> [<https://perma.cc/6HMY-2WG5>] (describing state legislative attempts to retaliate against state judges).

supreme courts significant power, there are greater restraints on state supreme courts.²⁶⁶ The Supreme Court of the United States has few comparable controls.²⁶⁷

Other courts are subject to restraint through judicial norms.²⁶⁸ U.S. Courts of Appeals are less able to manipulate their docket insofar as they must decide all the cases that come to them.²⁶⁹ That does not mean that dockets of lower courts are less manipulable.²⁷⁰ A federal district court that is willing to issue nationwide injunctions or appears sympathetic to certain types of plaintiffs may be inviting forum- and judge-shopping.²⁷¹ The Fifth Circuit has, in recent years, been hearing a number of high-profile cases of national significance because litigants have been persistently filing cases in the Northern District of Texas, which has a number of single-judge divisions that all but guarantee plaintiffs the judge of their choice.²⁷² Forum- and judge-shopping are not unusual problems and can be addressed through statutory and rule reforms.²⁷³ Appellate courts, including the Supreme Court, can also deal with those issues.²⁷⁴ Our point is that the norms of the judicial process can restrain other courts in the development of their dockets.²⁷⁵ Even the most ardent forum-shoppers may be defeated when their desired

266. LAURA DEAL & JOANNA R. LAMPE, CONG. RSCH. SERV., FEDERAL AND STATE COURTS: STRUCTURE AND INTERACTION 12–15 (Aug. 2, 2023), <https://www.congress.gov/crs-product/R47641> [<https://perma.cc/QS3Q-YZZT>] (comparing the restraints on both federal and state judiciaries).

267. See Shaheen Nouri, *Life Tenure and the Dynamic of Judicial Independence in the Federal System*, 5 STETSON J. ADVOC. & L. 155, 159 (2018) (discussing life tenure of federal judges).

268. See, e.g., Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 409 (2007) (“When judges decide cases, the body of applicable legal rules—statutes, regulations, and prior precedents—constitute the relevant constraints on their decisionmaking.”).

269. Segall, *supra* note 18, at 827–28.

270. We express no opinion in this Article as to whether greater transparency norms would be desirable in lower federal courts, particularly the U.S. Courts of Appeals. Such reforms may be a good idea, given the significant power of federal courts.

271. See Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 980 (2020).

272. See *supra* note 87 and accompanying text (discussing forum- and judge-shopping); Eleanor Klibanoff, *Federal Judge at Center of FDA Abortion Drug Case Has History with Conservative Causes*, TEX. TRIB. (Mar. 15, 2023, at 10:00 CT), <https://www.texastribune.org/2023/03/15/federal-judge-amarillo-abortion-fda/> [<https://perma.cc/M29D-5W7S>]; Ian Millhiser, *How an Obscure Christian Right Activist Became One of the Most Powerful Men in America*, VOX (Dec. 17, 2022, at 06:00 CT), <https://www.vox.com/policy-and-politics/2022/12/17/23512766/supreme-court-matthew-kacsmatyk-judge-trump-abortion-immigration-birth-control> [<https://perma.cc/JTQ7-BWLD>]; Jacqueline Thomsen, *Fifth Circuit Risks Losing Big Cases Amid Judge Shopping Worries*, BLOOMBERG L. (Apr. 5, 2024, at 03:45 CT), <https://news.bloomberglaw.com/us-law-week/fifth-circuit-risks-losing-big-cases-amid-judge-shopping-worries> [<https://perma.cc/F99M-UCTW0>].

273. See Mattathias Schwartz, *New Federal Judiciary Rule Will Limit ‘Forum Shopping’ by Plaintiffs*, N.Y. TIMES (Mar. 12, 2024), <https://www.nytimes.com/2024/03/12/us/judge-selection-forum-shopping.html> [<https://perma.cc/YWX7-F6LN>].

274. See *id.*

275. This of course, would require robust enforcement of, and commitment to, those norms. See Jacqueline Thomsen, *US Judge Shopping Curb Thwarted as Texas Court Resists (3)*, BLOOMBERG L. (Apr. 1, 2024, at 15:56 CT), <https://news.bloomberglaw.com/us-law-week/texas-court-eyed-for-judge-shopping-wont-alter-case-assignments> [<https://perma.cc/GW8T-YAA7>].

court lacks jurisdiction.²⁷⁶ Decisions that may run contrary to appropriate jurisdiction and venue rules are subject to review by other courts. The Supreme Court, however, gets to decide whether it—or any other federal court—has jurisdiction and can manipulate that process.²⁷⁷

Further, federal and state judges are subject to mandatory ethical restraints that include the prospect of judicial discipline for judges who violate those rules.²⁷⁸ Although the Supreme Court has a code of ethics—adopted after reporting from news outlets revealed serious concerns about the Justices’ conduct—it is not enforceable.²⁷⁹ The Court’s Code of Conduct is therefore aspirational, rather than a meaningful check on the Court or a substantive limit on whether Justices should recuse themselves from hearing a particular case.²⁸⁰ The norms of the judiciary do not restrain the Court unless it chooses to be restrained.

The official response to flags flown outside of Justice Alito’s homes exemplifies the disparity in the force of ethical restraints. In May 2024, the *New York Times* reported on multiple instances in which flags were flown outside of Justice Alito’s homes and how these flags may have signaled political preferences.²⁸¹ Responding to calls that he recuse himself from cases related to the January 6, 2021 insurrection at the Capitol, Justice Alito refused to recuse and stated that his wife had flown the flags.²⁸² Justice Alito faced no official consequences or ethical sanctions, and went on to participate in those cases.²⁸³

276. Oklahoma, for example, sought to compel the United States to transfer a prisoner being held in Louisiana for execution by filing suit in the Northern District of Texas, where there was clearly no jurisdiction. *See* *Oklahoma v. Tellez*, No. 7:22-cv-00108-O, 2022 WL 17069132, at *2–3 (N.D. Tex. Nov. 17, 2022).

277. The U.S. Constitution gives Congress the authority to alter the Supreme Court’s appellate jurisdiction. *See* U.S. CONST. art. III, § 2. The Supreme Court can, however, address the constitutionality of alterations to its jurisdiction. For a discussion of the wisdom of jurisdiction-stripping, see Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077 (2023).

278. *See* Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 204 (2007); Charles Gardner Geyh, *Judicial Ethics and Discipline in the States*, STATE CT. REP. (Dec. 14, 2023), <https://statecourtreport.org/our-work/analysis-opinion/judicial-ethics-and-discipline-states> [<https://perma.cc/KH2R-HAKA>]. We do not believe that the presence of judicial ethics codes is a panacea—there may be abuses of those codes or a failure to enforce them. *See id.* Legislative checks are important, although those processes carry their own attendant risks of abuse. *See supra* notes 265–66 and accompanying text.

279. *See Chapter Three: Judicial Ethics*, 137 HARV. L. REV. 1677, 1689 (2024); *see also supra* notes 118–19 and accompanying text (discussing the adoption of the Supreme Court’s Code of Ethics); Joshua Kaplan, Justin Elliott, Brett Murphy & Alex Mierjeski, *The Supreme Court Has Adopted a Conduct Code, but Who Will Enforce It?*, PROPUBLICA (Nov. 13, 2023, at 16:47 ET), <https://www.propublica.org/article/supreme-court-adopts-ethics-code-scotus-thomas-alito-crow> [<https://perma.cc/J52X-NJLN>].

280. *See Chapter Three: Judicial Ethics, supra* note 279, at 1688–89.

281. *See id.* (reporting on an upside-down American flag flown at the Alitos’ house, and the flag’s association with people who claim the 2020 election was stolen); Kantor et al., *supra* note 120 (reporting on an “Appeal to Heaven” flag flown at the Alitos’ vacation house, which was one of several “carried by rioters at the Capitol on Jan. 6, 2021”).

282. *See, e.g.,* Ann E. Marimow & Justin Jouvenal, *Justice Alito Tells Congress He Will Not Recuse from Jan. 6-Related Cases*, WASH. POST (May 29, 2024), <https://www.washingtonpost.com/politics/2024/05/29/supreme-court-alito-recuse-flag-jan-6/> [<https://perma.cc/8ED8-VGXF>].

283. *See* *Fischer v. United States*, 603 U.S. 480, 482 (2024); *Trump v. United States*, 603 U.S. 593, 600 (2024).

In the meantime, a federal district court judge, Michael Ponsor, wrote an op-ed in the *New York Times* critiquing the decision to fly the flag and Justice Alito's response.²⁸⁴ Unlike Justice Alito, Judge Ponsor was disciplined for his remarks.²⁸⁵ The Fourth Circuit's Chief Judge, Albert Diaz, issued a ruling finding that Judge Ponsor had violated multiple canons of judicial conduct, including canons related to public confidence in the integrity of the judiciary, and prohibitions on comments on the merits of pending matters.²⁸⁶ As a result, Judge Ponsor wrote a letter of apology.²⁸⁷ The rules of judicial ethics had an effect—but only with respect to Judge Ponsor, who dared to call out what was, at the very least, ethically questionable activity by Justice Alito.

Certiorari memoranda may provide insights into the way the Court considers which cases and issues are worth addressing. Indeed, some cases the Court has heard recently are unusual procedural vehicles for addressing a particular problem.²⁸⁸ Scholars and commentators can offer theories about why the Court took a particular case—or ignored a particular set of facts.²⁸⁹ What the Court decides to hear, when it decides to hear it, and how it decides cases permits it to manipulate the development of law in the United States.²⁹⁰ The Court can grant certiorari in a series of cases, gradually modifying and adjusting the law, or declining to apply disfavored precedent until it can eliminate extant precedent that a majority of Justices believe to be erroneous.²⁹¹ When the Court overruled *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel* in June 2024, the Court emphasized that it had not used *Chevron* in administrative law cases since 2016 before announcing that the doctrine was dead.²⁹² This pattern appears elsewhere in Supreme Court precedent.²⁹³ Information about votes and memoranda would shed some light on this practice and could, in theory, require the Court to work harder to justify its reasons for taking cases and deciding them the way it does.

284. Michael Ponsor, *A Federal Judge Wonders: How Could Alito Have Been So Foolish?*, N.Y. TIMES (May 24, 2024), <https://www.nytimes.com/2024/05/24/opinion/alito-flag-supreme-court.html> [https://perma.cc/S354-X6KM].

285. See *In the Matter of a Judicial Complaint Under 28 U.S.C. § 351, No. 04-24-09904 1, 1* (4th Cir. Dec. 10, 2024).

286. See *id.* at 5.

287. See *id.* at 6; see also Nate Raymond, *Judge's Criticism of US Supreme Court's Alito over Flags Is Deemed Improper*, REUTERS (Dec. 17, 2024, at 17:52 CT), <https://www.reuters.com/legal/government/judges-criticism-us-supreme-courts-alito-over-flags-is-deemed-improper-2024-12-17/> [https://perma.cc/B3EX-B952].

288. See, e.g., Meghan J. Ryan, *The Misery Message of Grants Pass*, 22 OHIO ST. J. CRIM. L. 181–82 (2024) (discussing the procedural issues with *Grants Pass* and suggesting that the Court granted certiorari to “do subcutaneous work on the bones of the Eighth Amendment”).

289. See, e.g., Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 2 (2010) (describing stealth overruling).

290. See *Trump v. CASA, Inc.*, 606 U.S. 831, 880 (2025) (Sotomayor, J., dissenting) (“The gamesmanship in this request is apparent and the Government makes no attempt to hide it. Yet, shamefully, this Court plays along. A majority of this Court decides that these applications, of all cases, provide the appropriate occasion to resolve the question of universal injunctions and end the centuries-old practice once and for all.”).

291. See Friedman, *supra* note 289, at 11–12.

292. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 405–06 (2024).

293. See Friedman, *supra* note 289, at 16–25 (describing the Court's stealth overruling of *Miranda v. Arizona*).

Certiorari transparency would not go so far as to undo the Court's discretion over its docket. But it would illuminate the Court's practices and subject it to scrutiny from the public and the other political branches.

C. *The Importance of Certiorari*

Another possible benefit of increased transparency at the certiorari stage would be to impress the importance of this stage upon the Justices themselves. In his interview with *The New York Times*, Justice Gorsuch asserted that there are “only” sixty or seventy cases important enough for the Court to agree to hear that make their way up to the Court each year.²⁹⁴ We disagree. While the overall number of petitions for certiorari has declined,²⁹⁵ the Court is still, as Professor Vladeck demonstrates, granting certiorari less frequently in *in forma pauperis* than in paid cases.²⁹⁶ This strikes us as less of a situation in which sixty or seventy cases are “magically” the most important and one in which the Court is exercising docket control. The Court does not have to grant certiorari in any particular case. And because the Court grants certiorari in a small (and dwindling) number of cases each year,²⁹⁷ the true nature of the work it undertakes is especially significant.

Denial of certiorari is effectively the end of the line for most cases.²⁹⁸ The decision from a state supreme court or a U.S. Court of Appeals is as far as most litigants will be able to appeal their case.²⁹⁹ When the Court denies certiorari, then whatever the judgment below is will stand, even if it is incorrect.³⁰⁰ Given the volume of cases and the absence of public scrutiny, it may be too easy for the Court to sort through petitions in an assembly-line manner akin to the way that state courts handle low-level criminal offenses.³⁰¹ These parallels are readily apparent when considering the indigent-defense crisis and the Court's handling of indigent petitioners.³⁰² There were 4,223 cases filed with the Supreme Court during the October 2023 term.³⁰³ Of that number, 2,847, or approximately 67%, were filed in the *in forma pauperis* docket.³⁰⁴ The Court is less likely to grant certiorari in *in forma pauperis* cases.³⁰⁵ Professor Robert Yablon suggests that

294. French, *supra* note 33.

295. Vladeck, *supra* note 32 (manuscript at 20).

296. *Id.* (manuscript at 22–23).

297. *Id.* (manuscript at 20).

298. See Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 612 (1984).

299. See Yablon, *supra* note 149, at 555.

300. See Baker, *supra* note 298, at 612–13.

301. See Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon's Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299, 2315–16 (2017) (describing and critiquing the “assembly-line justice” approach to cases in misdemeanor courts).

302. See Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1312–15 (2013) (discussing the indigent defense crisis).

303. 2024 YEAR END REPORT, *supra* note 2, at 10.

304. *Id.*

305. See Yablon, *supra* note 149 (“[I]n most years, they account for less than twenty percent of the Court's grants of certiorari.”). Professor Vladeck's research illustrates that this trend is continuing—paid filings make up significantly more of the Court's docket in recent years. Vladeck, *supra* note 32 (manuscript at 21–22).

this may be due to “the failure of most *in forma pauperis* petitions to present the sort of legal issue that would even arguably warrant Supreme Court review.”³⁰⁶ But he cautions that “the widespread deficiencies of *in forma pauperis* petitions mean that they are also the petitions in which serious issues can most easily escape notice.”³⁰⁷

The way the Court handles cases now supports this analysis: relying on the “dead list” allows the Court to dispose of most cert petitions based primarily on a cert pool or chambers memo.³⁰⁸ There are cases that the Court does not need to address, in which lower courts correctly applied existing law and appropriately resolved the case. A denial of certiorari does not mean that a case or legal argument lacks merit.³⁰⁹ It can, however, be used to persuade the Court to continue to deny certiorari on that specific issue.³¹⁰

Professor Yablon points out that Justice Sotomayor appears to take the certiorari stage seriously: many of her statements on the denial of certiorari are for cases that are part of the Court’s *in forma pauperis* docket.³¹¹ He observes that many of the cases she chooses to write statements about are criminal cases with serious risks of injustice or that involve unethical or improper conduct by courts or government actors.³¹² Professor Yablon suggests that if the Court were to reshape its docket more consistently with Justice Sotomayor’s interests, it would counter the Court’s habit of granting certiorari to summarily vacate lower court determinations that are favorable to criminal defendants and habeas petitioners.³¹³ Those decisions, he notes, send a message to lower courts about how to handle those sorts of cases—something that has become increasingly common in the way lower courts have handled issues arising from state execution litigation.³¹⁴

Supreme Court statements about denials of certiorari provide insight into the dynamics of the Court, invite litigants to raise issues with the Court, and may signal the Justices’ approval or disapproval of the way legal issues have been addressed. They lack precedential value but may prove useful for future litigants to signal that a case presents an important issue that at least *some* members of the Court thought mattered, for better or for worse.³¹⁵ Our proposal, if adopted,

306. Yablon, *supra* note 149, at 555.

307. *Id.* While a number of the petitions in this docket may be filed by “skilled federal public defenders,” Professor Yablon notes that many *in forma pauperis* petitions may be *pro se*, handwritten, and even “counseled petitions” are sometimes inconsistent with the “norms of Supreme Court advocacy.” *Id.*

308. *See supra* notes 62–67 and accompanying text.

309. *See Baker, supra* note 298, at 612.

310. *See* Brief for the United States in Opposition at 6, *Hay v. United States* (No. 24-72), *cert. denied* 2024 WL 4874676 (“This Court has recently and repeatedly denied petitions for writs of certiorari in cases presenting similar contentions about pole cameras. . . . It should follow the same course here.”).

311. Yablon, *supra* note 149, at 554–55.

312. *See id.* at 555–60 (summarizing Justice Sotomayor’s statements regarding denial of certiorari).

313. *See id.* at 562–63.

314. *See id.*; Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 674 (2022).

315. For example, Justice Thomas (joined by Justice Gorsuch) dissented from the denial of certiorari in *Peruta v. California*, which involved a Second Amendment challenge to California’s restrictions on the public carrying of firearms. 582 U.S. 943, 943 (2017) (Thomas, J., dissenting). Thomas argued that “[t]he most natural reading” of the Second Amendment’s right to bear arms “encompasses public carry,” stating that he found “it

may encourage the Court to engage more seriously with certiorari process. If the Court knows that its reason for not hearing a case will be public, that may encourage the Court to think more carefully about its reasons for denying cases and provide more careful scrutiny and explanation of its reason for rejecting cases in which the issues are not as flawlessly presented. Similarly, this information could be beneficial to advocates, who may be able to adapt their practices to better reflect the Court's needs at the certiorari stage.

This reform may address concerns that the Court is, in fact, a purely political entity and not a court at all. Professor Eric Segall has argued that the Supreme Court is not a court because it “simply does not take text, history, and prior case law seriously enough to justify the label ‘court,’ and it has consistently reversed itself on major issues for no other reason than the people on the Court changed.”³¹⁶ He writes, “the Supreme Court is a policy making institution influencing and often resolving important moral questions without any check other than their own sense of what the American people and the elected branches will accept.”³¹⁷ The Court is in the position where it can act like a court—but only when it wants to. Its purported interest in deference, for example, permits the Court to evade addressing serious flaws in legal procedure that it could, in fact, remedy.³¹⁸ The Court can develop a mania for justiciability doctrines and procedure when it does not want to reach a substantive issue—but then crash through procedural hurdles to reach an issue that it wants to.³¹⁹

Requiring greater transparency about the certiorari process is not a guaranteed remedy for these issues. But it is a step in the right direction. Transparency from the Court about the certiorari stage may push the Court to work a bit harder to justify its decision to grant or deny certiorari, especially when it comes to cases with odd procedural postures or complex factual backgrounds. The Court can—and has—manipulated justiciability doctrines and facts in the final opinion.³²⁰ Certiorari memoranda and votes may make it easier to determine just how much manipulation has happened and demonstrate how the Court can stop being a Court when it wants to.

extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen.” *Id.* at 946. Beyond indicating Justices Thomas's and Gorsuch's desire to take a Second Amendment case, the dissent previewed Thomas's reasoning in *New York State Rifle & Pistol Association, Inc. v. Bruen*—the 2022 case in which the Court took up the issue and (in an opinion authored by Thomas) concluded that the Second Amendment protected a right to carry firearms. *See* 597 U.S. 1, 32–33 (2022) (“This definition of ‘bear’ naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table. Although individuals often ‘keep’ firearms in their home, at the ready for self-defense, most do not ‘bear’ (*i.e.*, carry) them in the home beyond moments of actual confrontation.”).

316. Eric J. Segall, *Foreword II: To Reform the Court, We Have to Recognize It Isn't One*, 2023 WIS. L. REV. 461, 469 (2023).

317. *Id.* at 473.

318. *See* Eric Berger, *Gross Error*, 91 WASH. L. REV. 929, 932–33 (2016) (summarizing the Supreme Court's “highly questionable” deference in *Glossip v. Gross*).

319. *See supra* notes 196–205 and accompanying text.

320. *See* Whitehouse, *supra* note 3, at 842 (arguing that the Court engages in improper and erroneous fact-finding to support its rulings); Richard M. Re, *Legal Realignment*, 92 U. CHI. L. REV. 1965 (2025) (describing the Court's shifting approach to standing, stare decisis, and deference as its political makeup changes over time).

And should the Court take certiorari transparency seriously, perhaps it will act a bit more like a court. Opening the process of certiorari to greater public view would hopefully raise the stakes for the Justices: their work, and the work of their clerks, would be under greater scrutiny, potentially increasing the informed public and academic commentary that the Chief Justice thinks would facilitate civic education.³²¹ Such transparency may be critical in coming litigation over executive branch policies.³²² It may also balance the signals that lower courts receive from shadow docket and summary determinations: the Court is, in fact, watching what they do. And in turn, everyone else can watch what the Court does.

V. OBJECTIONS AND RESPONSES

While there are benefits to making the certiorari process transparent, we acknowledge that the proposal is not without its potential drawbacks. This Part addresses several likely concerns with certiorari transparency. In some cases, we demonstrate that the concerns are misplaced. In others, we suggest that problems with certiorari transparency are not flaws with the proposal itself as much as they are illustrations of deeper defects in how the Court does business.

A. *Decreased Legitimacy and Objectivity*

One potential objection to making Justices' votes on certiorari petitions publicly available is that it may telegraph how they may decide particular cases—leading advocates to “tailor their merits arguments to certain Justices based on a ‘tea leaf’ reading of the certiorari votes.”³²³ This objection is of little concern, however, if votes are not disclosed until some point after the court issues the decisions—which is what we propose here.³²⁴ Justices' statements on denials of certiorari and separate opinions already serve this function, thus our proposal is unlikely to further alter the balance.³²⁵

321. See 2024 YEAR END REPORT, *supra* note 2, at 4 (“[P]ublic engagement with the work of the courts results in a better-informed polity and a more robust democracy.”).

322. See, e.g., Adam Liptak, *On the Supreme Court's Emergency Docket, Sharp Partisan Divides*, N.Y. TIMES (Sep. 14, 2025), <https://www.nytimes.com/2025/09/14/us/politics/supreme-court-emergency-docket-partisan.html> [<https://perma.cc/FXN4-3PZP>] (discussing the different treatment the Court has accorded when responding to emergency applications by the Biden and Trump administrations).

323. See Watts, *supra* note 18.

324. *Id.* (recognizing that concerns over Justices' indicating their positions may be addressed “by waiting to disclose certiorari votes on granted petitions until the case is decided on the merits”).

325. See, e.g., Adam Liptak, *Clarence Thomas Renews Call for Reconsideration of Landmark Libel Ruling*, N.Y. TIMES (Oct. 10, 2023), <https://www.nytimes.com/2023/10/10/us/clarence-thomas-libel-supreme-court.html> [<https://perma.cc/DV2T-2HNY>] (reporting on Justice Thomas's call for the Court to reconsider *New York Times v. Sullivan* in his separate opinions on certiorari determinations); Robert Barnes, *Thomas Dissents from Supreme Court Decision Not to Review California Gun Law*, WASH. POST (Feb. 20, 2018), https://www.washingtonpost.com/politics/courts_law/thomas-dissents-from-supreme-court-decision-not-to-review-california-gun-law/2018/02/20/342c378e-164d-11e8-92c9-376b4fe57ff7_story.html [<https://perma.cc/48P4-7NWJ>] (reporting on Justice Thomas's call for the Court to take up more Second Amendment cases in his separate opinions on certiorari determinations).

But this may not be enough for those concerned with the Court's legitimacy. Votes on certiorari petitions, once available, may be read as indicators of where Justices stand on particular issues and may, in turn, compromise the expectation that Justices remain impartial. Professor Barry McDonald critiques Justices' issuances of opinions related to orders—such as concurrences, dissents, and separate opinions issued in instances where the Court denies certiorari—arguing that these separate opinions reflect a pre-judging of issues on which the Justices are to remain impartial.³²⁶ In instances where Justices issue opinions dissenting from denials of certiorari in which the Justices “criticize[] or call[] for an overruling of its own precedent or the rethinking of doctrinal areas in accordance with particular methods of constitutional interpretation,” Professor McDonald argues that these opinions compromise the Justices' appearance of impartiality:

The Justice is not even pretending to be an umpire merely [“]call[ing] balls and strikes[”] as Chief Justice John Roberts described the proper role of Justices during his confirmation hearings. In essence, the Justice is assuming the role of an advocate rather than a neutral judge. Compounding this problem is the fact that the changes being advocated for are almost always being driven by a Justice's political ideology.³²⁷

While Professor McDonald focuses on existing practices in which Justices issue opinions in connection with certiorari determinations,³²⁸ it is easy to see how this response may apply to our proposal of publicizing certiorari votes and memoranda. Even if this information is released after the Court reaches its merits determinations, these votes and memos may reveal the Justices' leanings on particular issues. This, in turn, may cause the Court to lose its appearance of impartiality and legitimacy—as it will support those who argue that Justices are inclined to vote in certain ways on matters that have not made their way onto the Court's merits docket.³²⁹

Two decades ago, Professor Charles Fried leveled a similar critique against dissenting opinions from denial of certiorari, calling them “a troubling practice.”³³⁰ Professor Fried, like Professor McDonald, argues that these opinions “seem[] quite close to a purely extrajudicial statement of how that Justice would

326. McDonald, *supra* note 37, at 1086–90.

327. *Id.* at 1088.

328. *Id.* at 1086–90.

329. See *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016) (“Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”); Melinda A. Marbes, *Reforming Recusal Rules: Reassessing the Presumption of Judicial Impartiality in Light of the Realities of Judging and Changing the Substance of Disqualification Standards to Eliminate Cognitive Errors*, 7 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 238, 255 (2017) (“[I]mpartiality is a key component of how people assess the procedural fairness and, in turn, the legitimacy of the judiciary.”); see also Melissa E. Lowenstein, Note, *The Impartiality Paradox*, 21 YALE L. & POL'Y REV. 501, 515 (2003) (describing founding-era perceptions that the “judiciary's power lay solely in its integrity and legitimacy—characteristics a Court can maintain only through an appearance of neutrality and impartiality”); James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 L. & SOC. REV. 899, 900 (2008) (acknowledging that many believe that impartiality is “a supposed bedrock of judicial legitimacy”).

330. Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1238 (2004).

vote if the case did come before him.”³³¹ Professor Fried goes even further than Professor McDonald’s critique of opinions at the certiorari stage—making the same argument against opinions concurring and dissenting from a determination that certiorari was improvidently granted, as well as dissenting opinions in cases in which a majority of the Court determines a dispute to be non-justiciable.³³²

What of the response that it is better to know which way the Justices are, in fact, leaning? One might take the position that if Justices are inclined in a particular direction, it may be better for litigants, legal actors, and the general public to know which way Justices may go in future cases. Professor McDonald is unconvinced, arguing that even if a majority of the Court is inclined to vote in a particular direction, “it is better that this position be manifested pursuant to the resolution of disputes in well-reasoned opinions than the public see a majority of Justices as following an ideologically driven agenda to change our fundamental law.”³³³ These “[a]pppearances of dispassion and impartiality matter to public confidence in the integrity of the Court just as much as the actual exercise of those traits likewise matter.”³³⁴

Elsewhere, Professor Jason Iuliano describes the Court’s claimed adherence to legal formalism as a “noble lie,” told to bolster popular perceptions of impartiality required for judicial legitimacy.³³⁵ Perpetuating this lie, the thinking goes, shields judges from criticism that they have abused their discretion or decided cases on bases other than the law alone.³³⁶ Without this lie, the Court risks losing the public’s support and, potentially, losing what power it has to compel the results of its rulings.³³⁷

Professor Iuliano ultimately argues that perpetuating falsehoods about the Court’s functions is a misguided strategy which, if believed, undermines the consent of the governed and, if not believed, may result in even more damage to the Court’s legitimacy than judicial candor.³³⁸ We share in this sentiment and conclude that greater transparency is desirable for the sake of enhanced legitimacy and oversight, contrary to scholars like Professors McDonald and Fried who urge against increased disclosures out of a concern for losing the appearance of impartiality.³³⁹

Our conclusion is primarily motivated by our previously stated views of the benefits of transparency.³⁴⁰ Moreover, the uniformity of certiorari voting and memoranda may pose less of a concern over the separate opinions that Professors McDonald and Fried critique, as the practice of taking the additional step of

331. *Id.* at 1238–39.

332. *See id.*

333. McDonald, *supra* note 37, at 1090.

334. *Id.*

335. Jason Iuliano, *The Supreme Court’s Noble Lie*, 51 U.C. DAVIS L. REV. 911, 960–64 (2018).

336. *Id.* at 960–61.

337. *Id.* at 961–62.

338. *Id.* at 965–72.

339. *See* McDonald, *supra* note 37, at 1090–91.

340. *See supra* Section IV.A.

authoring those opinions and their similarity to opinions on the merits seem to motivate concerns over compromised impartiality.

More fundamentally, though: say we were concerned that Justices' votes or statements made in connection with certiorari determinations revealed that the Justices held pre-conceived notions on issues and disputes not yet before the Court. The problem here does not seem to lie with whatever mechanism or procedure reveals Justices' inclinations or biases. Rather, the problem is with the inclinations or biases themselves. Those who urge decreased transparency out of a concern that additional disclosures or candor will compromise the Court's perceived impartiality are papering over the bigger problem: the lack of impartiality itself. If Justices are, in fact, inappropriately predisposed to opine in a certain manner—to a point where shedding light on the process will reveal that underlying partiality—it seems strange to take issue with the shedding of light that does nothing more than reveal this underlying true problem.

This is not to say that we are making the case that publicizing certiorari votes and memos will lead to the discovery of judicial bias and prejudice. Perhaps Justices today refrain from pre-judging the cases that come before them—unaffected by lucrative personal relationships,³⁴¹ privileged backgrounds,³⁴² and the elite circles in which they run.³⁴³ Maybe the Justices today are doing better at maintaining impartiality than their historical counterparts.³⁴⁴ It's hard to know either way the more the Court's activities are kept under wraps.

341. See Kaplan et al., *Clarence Thomas and the Billionaire*, *supra* note 114 (reporting on Justice Thomas's relationship with billionaire Harlan Crow, including repeated instances of luxury travel on yachts and private jets); Elliott et al., *supra* note 115 (reporting on Justice Alito's luxury fishing vacation with Paul Singer, who had flown Alito "to Alaska on a private jet"); *but see* Samuel A. Alito Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, at 18:25 ET), <https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda> [<https://perma.cc/CY6U-Q9A7>] (disputing ProPublica's reporting prior to its publication by arguing, among other things, that the lodge in which he stayed "was a comfortable but rustic facility" and that "I cannot recall whether the group at the lodge, about 20 people, was served wine, but if there was wine it was certainly not wine that costs \$1,000").

342. See Emily Birnbaum & Bill Allison, *How Rich Is the US Supreme Court?*, BLOOMBERG (Apr. 20, 2023, at 10:51 CT), <https://www.bloomberg.com/news/articles/2023-04-20/what-s-supreme-court-justices-s-net-worth-24-68-million?embedded-checkout=true> [<https://perma.cc/DA2Q-8SPQ>] (noting that the net worth of the Supreme Court Justices is at least \$24 million, and potentially closer to \$68 million, though disclosure requirements do not permit much clarification on which is closer to the correct number); Jessica Gresko, *Supreme Court Shouldn't Be Covered in Ivy, 2 Lawmakers Say*, ASSOCIATED PRESS (Feb. 1, 2022, at 12:50 CT), <https://apnews.com/article/stephen-breyer-joe-biden-us-supreme-court-law-schools-lindsey-graham-f7c3968b6a956ab36b8523d490fe9f4e> [<https://perma.cc/2TQB-29KG>] ("Eight of the nine members of the current court went to law school at either Harvard or Yale.").

343. *But see* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1566–67 (2010) (arguing that Justices are influenced by the opinions of elite audiences rather than the general public); Associated Press, *Thomas Says Critics Are Pushing a "Nastiness" and Calls Washington a "Hideous Place"*, POLITICO (May 10, 2024, at 21:24 ET), <https://www.politico.com/news/2024/05/10/clarence-thomas-critics-00157460> [<https://perma.cc/2MJG-KQEZ>] (reporting on a speech by Justice Thomas to a judicial conference in which Thomas complained about "the nastiness and the lies" that he and his wife had purportedly faced in the preceding few years, as well as how those in Washington "pride themselves on being awful").

344. See, e.g., Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 621–28 (1987) (detailing historical examples of Supreme Court Justices taking on political roles, being appointed on conditions of certain votes, participating in cases involving former clients, and leaking internal court discussions).

Publicizing certiorari votes and memoranda will shed additional light on the Court's functions—whether they are above-board or not.

B. Reluctance to Change and Judicial Brands

Another critique of increasing the transparency of the certiorari process is that it may end up entrenching Justices' behavior to the extent that their certiorari determinations align with their personal jurisprudence and political brands.³⁴⁵ Professor Suzanna Sherry critiques the celebritization of individual Justices, arguing that this has contributed to the Court's loss of public confidence and Justices "allowing ideology to trump the rule of law."³⁴⁶ In a 2010 article, Professors Craig Lerner and Nelson Lund described the perks of judicial celebrity status:

They are feted by the ethnic groups that identify with them. They deliver speeches, not only to legal audiences, but also to various other groups of admirers. Recently, they have taken to delivering lectures abroad, and some even promote their books on television.³⁴⁷

These trends persist—with both conservative and liberal Justices benefiting from celebrity status. Justice Sotomayor was hailed as "current queen of the best-seller list and suddenly the nation's most high-profile Hispanic figure" following her appointment to the Court and release of her memoir.³⁴⁸ Justice Alito's overruling of *Roe v. Wade* brought him "a boisterous standing ovation" at the Federalist Society's annual gala in 2022.³⁴⁹ In other years, Justices Gorsuch, Barrett, and Kavanaugh have also appeared as keynote speakers at the "glittering annual gala dinner."³⁵⁰ Former Justices Scalia and Ginsburg enjoyed celebrity status as well,³⁵¹ with the latter hailed as a "pop culture icon."³⁵² Justice Jackson recently appeared on Broadway.³⁵³

345. See Sherry, *supra* note 163, at 182.

346. *Id.*

347. Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1267 (2010).

348. Jodi Kantor, *On Book-Tour Circuit, Sotomayor Sees a New Niche for a Justice*, N.Y. TIMES (Feb. 3, 2013), <https://www.nytimes.com/2013/02/04/us/politics/book-tour-rock-star-sotomayor-sees-an-even-higher-calling.html> [<https://perma.cc/J8UQ-3PSC>].

349. Lawrence Hurley, *Abortion Ruling Author Alito Gets Standing Ovation at Conservative Legal Gala*, NBC NEWS (Nov. 10, 2022, at 22:21 CT), <https://www.nbcnews.com/politics/supreme-court/abortion-ruling-author-alito-gets-standing-ovation-conservative-legal-rcna56696> [<https://perma.cc/SU6S-WXKH>].

350. Adam Liptak, *A Surprise at the Federalist Society Gala: Justice Breyer, a Retired Liberal*, N.Y. TIMES (Nov. 15, 2024), <https://www.nytimes.com/2024/11/15/us/breyer-gorsuch-federalist-society.html> [<https://perma.cc/UD5F-PSXX>].

351. See Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2D 157, 166 (2016) ("When it comes to flash, Justices Scalia and Ginsburg appear to act more as Celebrity Justices than Justice Breyer, despite the latter's greater frequency.")

352. Tyler Aquilina, *The Notorious R.B.G.: How Ruth Bader Ginsburg Became an Unlikely Pop Culture Icon*, ENT. WKLY. (Sep. 19, 2020, at 15:01 CT), <https://ew.com/celebrity/ruth-bader-ginsburg-pop-culture-icon-notorious-rbg/> [<https://perma.cc/98XA-WXSP>].

353. Vladimir Duthiers & Analisa Novak, *Backstage with Supreme Court Justice Ketanji Brown Jackson as She Made Her Broadway Debut*, CBS NEWS (Dec. 16, 2024, at 14:19 CT), <https://www.cbsnews.com/news/backstage-justice-ketanji-brown-jackson-broadway-debut-juliet/> [<https://perma.cc/2MF3-D36V>].

Publicizing certiorari determinations may entrench Justices who seek out particular “brands” in pursuit of furthering their celebrity images. Professor Louis Virelli argues in favor of making certiorari votes public, arguing that doing so “will reveal potentially self-serving or otherwise ethically questionable votes and will allow tracking of a [J]ustice’s consistency in deciding to hear cases over time.”³⁵⁴ Justices’ awareness of this transparency, however, may be a downside should certain Justices seek to conform their certiorari determinations with their public image. If certiorari votes and memoranda remain undisclosed, Justices may be able to freely change their minds on the cert-worthiness of particular cases or issues as time goes on and their opinions or knowledge on certain subjects evolves.³⁵⁵ But if their certiorari votes become public, a desire for consistency—something that commentators like Virelli seem to prioritize in advocating for this transparency—may prevent this change from occurring.³⁵⁶

This consideration becomes even more apparent when one adds the notion of personal precedent to the mix. Professor Richard Re defines “personal precedent” as “a judge’s presumptive adherence to her own previously expressed legal views, as paradigmatically expressed in a separate opinion.”³⁵⁷ Professor Re argues that judges and Justices “have strong reasons to attend to personal precedent, regardless of what formal legal rules dictate.”³⁵⁸ Judicial brands and celebrity status play a role; Professor Re acknowledges the “second-tier celebrat[y]” status of modern Justices and argues that Justices’ consistent adherence to their “distinctive opinions” may help maintain their “fandom and a long-term jurisprudential legacy.”³⁵⁹

Certiorari determinations are, for the most part, free from the demands of consistency, personal precedent, and judicial celebrity that Justices face. This is possible through the secrecy of the certiorari process. Should certiorari votes and memoranda be made public, Justices may face novel pressures to conform their certiorari determinations to align with their personal precedent and judicial branding on display in their published opinions and public appearances. This may lead to further entrenchment of Justices behind their own brands and prevent the evolution of their views. Compromise and collaboration may be reduced at the certiorari stage.³⁶⁰ Should Justices conform their certiorari determinations to fit with their distinctive brands, the facts of the pending cases themselves may fall by the wayside.

To be sure, one can respond to concerns over Justices’ entrenchment in certiorari voting patterns by emphasizing the non-precedential nature of certiorari votes. Unlike opinions on merits cases, certiorari votes and opinions issued in concurrence or dissent from certiorari determinations lack the binding force

354. Virelli, *supra* note 18, at 224.

355. *See id.*

356. *See id.* (expressing the possibility of determining whether Justices are consistent in their certiorari determinations).

357. Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 828 (2023).

358. *Id.* at 829.

359. *Id.* at 830–31.

360. *See* Sherry, *supra* note 163, at 190.

of a decision on the merits.³⁶¹ The Court may emphasize this in its policies or other opinions to foreclose courts below and other actors from reading too much into its certiorari votes and memoranda.

But this solution has its limits. To start, prior Justices' treatment of opinions issued with respect to certiorari determinations is less than consistent. Take, for example, Justice Stevens' approach to separate opinions. In *Singleton v. C.R.*, Justice Stevens issued an opinion with respect to the Court's denial of certiorari in response to a dissent from the denial from three other Justices.³⁶² Justice Stevens critiqued the practice of dissenting from certiorari denials, arguing that beneficial effects of these dissents were limited.³⁶³ Years later, in *Barber v. Tennessee*, Justice Stevens issued an opinion respecting the denial for a petition for a writ of certiorari in which he acknowledged "the settled proposition that this Court's denial of certiorari does not constitute a ruling on the merits," yet noted the merit in the petitioner's challenge due to a "plainly impermissible" jury instruction in the trial court.³⁶⁴

Justice Stevens' emphasis in *Barber* on the limited implications of the Court's determination and critique of the proceedings below are in tension with his earlier refusal to dissent from certiorari denials.³⁶⁵ To further confuse things, Justice Stevens cited his own separate opinion in the *Singleton* case as authority for the statement that the Court's certiorari denials are not rulings on the merits—suggesting both a lack of authority in certiorari denials while citing his own separate opinion in a certiorari denial as an apparent authority for that very statement.³⁶⁶ Justice Stevens did so again in *Knight v. Florida*, citing his separate opinion in *Barber* in support of his statement that "the denial of these petitions for certiorari does not constitute a ruling on the merits."³⁶⁷ These repeated instances of citing separate opinions respecting certiorari denials suggest that at least some Justices think that the opinions have some force, and lend support to Professor Re's account of personal precedent.³⁶⁸

Beyond Justices' own reliance on separate opinions on certiorari determinations, lower courts may read into certiorari determinations to derive the Court's views on the merits of undecided cases.³⁶⁹ As far back as 1979, Professor Peter Linzer noted that despite the Court's repeated proclamations that its certiorari denials didn't involve determinations on the merits of the cases, "a remarkable number of federal and state court opinions . . . nonetheless contend[ed] that,

361. See Louis J. Virelli III, *Transparency and Policymaking at the Supreme Court*, 32 GA. ST. U. L. REV. 903, 914 (2016).

362. See *Singleton v. C.I.R.*, 439 U.S. 940, 942–46 (1978) (Stevens, J., respecting denial of petition for writ of certiorari).

363. *Id.* at 945–46.

364. *Barber v. Tennessee*, 513 U.S. 1184, 1184 (1995) (Stevens, J., respecting denial petition for writ of certiorari).

365. See *id.*

366. See *id.*

367. *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Stevens, J. respecting denial of petition for writ of certiorari).

368. See *Singleton*, 439 U.S. at 942–46; *Barber*, 513 U.S. at 1184; Re, *supra* note 357.

369. Peter Linzer, *supra* note 40, at 1277–78.

because of some special circumstance, a certiorari denial in a particular case indicated the Court's view on the merits."³⁷⁰ Making certiorari votes and memoranda public may give even more ammunition to lower courts that are determined to read the tea leaves of the Court's certiorari determinations despite the Court's repeated admonitions against doing so.

The Justices' treatment of lower courts in their decisions granting emergency stay applications illustrates this risk. In *National Institutes of Health v. American Public Health Association*, the Court granted a stay of a district court decision that blocked the government from ending research grants.³⁷¹ The Court cited its single-paragraph decision in a previous emergency application as authority.³⁷² The Chief Justice wrote separately to explain why the prior application was distinguishable.³⁷³ Justice Gorsuch also wrote separately and, joined by Justice Kavanaugh, criticized the lower court for its purported defiance, suggesting that decisions about interim relief, even before certiorari, were "precedent that commands respect in lower courts."³⁷⁴ The Court's emergency docket rulings, however, "have not been models of clarity," as one district court judge observed.³⁷⁵ The Court's "super-aggressive exercise of its hierarchical position at the apex of the judicial branch of government" suggests that it may even prefer lower courts to treat certiorari determinations as binding should these determinations become public.³⁷⁶

A stronger, more fundamental response to concerns over entrenchment and inflexibility may be to acknowledge and accept these consequences. Justices may become less flexible in making and reasoning through certiorari determinations—and *this is precisely the point* of the reform. Under the status quo, Justices have near-absolute authority over the cases they hear, giving them unchecked agenda-setting power.³⁷⁷ Increasing the transparency of the certiorari process sheds light on these otherwise opaque determinations, bringing some level of constraint.³⁷⁸ Justices no longer being able to change their position on a whim is precisely one constraint this reform is aimed to accomplish.

All of this leads to an even deeper question of whether the force of objections arising from over-adherence to personal precedent and judicial brands is

370. *Id.*

371. *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2659 (2025).

372. *Id.* (citing *Dep't of Ed. v. California*, 604 U.S. 650 (2025)).

373. *Id.* at 2662–63 (Roberts, C.J., concurring in part and dissenting in part).

374. *Id.* at 2663 (Gorsuch, J., concurring in part and dissenting in part).

375. *President & Fellows of Harvard Coll., v. U.S. Dep't of Health & Hum. Svcs.*, Nos. 25-cv-11048-ADB & 25-cv-10910-ADB, 2025 WL 2528380, at *12 n.9 (D. Mass. Sep. 3, 2025).

376. William N. Eskridge Jr., *Trump 2.0 Removal Cases & the New Shadow Docket*, U. CHI. L. REV. ONLINE (2025), <https://lawreview.uchicago.edu/online-archive/trump-20-removal-cases-new-shadow-docket> [https://perma.cc/92T7-WQ59]; see also Jan Wolfe & Nate Raymond, *Judges Vexed by Supreme Court's 'Shadow Docket' Rulings in Trump Cases*, REUTERS (Sep. 10, 2025, at 10:42 ET), <https://www.reuters.com/legal/government/judges-vexed-by-supreme-court-shadow-docket-rulings-trump-cases-2025-09-10/> [https://perma.cc/3GX X-4TH2].

377. Narechania, *supra* note 15, at 589–90; Vladeck, *supra* note 32 (manuscript at 32).

378. See David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 409 (2015) (recognizing the relationship between transparency and constraint in the context of courts' formulation of clear doctrinal rules).

truly attributable to reforming the certiorari process. Our position is that certiorari reform itself is not the issue—instead, the more fundamental problem of judicial celebrity and pursuit of praise is to blame. Indeed, to the extent that making certiorari determinations gives rise to further judicial entrenchment and branding, this revelation may be helpful to the extent it further illuminates the scope of the problem.

C. *Resource Constraints*

A discussion of the Supreme Court's discretionary docket practices is not complete without acknowledging the resource demands reforms may carry, as well as limitations on the Court's resources. With thousands of petitions for certiorari before the Court each year, the Court takes up only a tiny fraction of cases for hearings and opinions on the merits.³⁷⁹ Resource constraints limit the number of cases the Court can take.³⁸⁰ A historical perspective suggests that removing the Court's discretion to reduce its caseload would lead to disastrous backlogs—as this was often the case before Congress's Judiciary Act of 1925 gave the Court the “broad discretion to decline to review the vast majority of the cases that litigants bring to it.”³⁸¹ On the other hand, Professor Stephen Vladeck argues that reducing the Court's discretion by adding new categories of mandatory jurisdiction could “*improve* the Court's relationship with the other institutions of government.”³⁸²

Although docket reform may reduce the Court's opportunities for mischief in some areas, we do not propose removing or altering the Court's power to grant or deny certiorari, and rather propose only that the Court be more transparent in its exercising of this power. Even so, this may give rise to concerns of the rigor needed to produce public-facing documents detailing the reasons for or against granting certiorari. The costs and time associated with preparing public certiorari memoranda may be too substantial for the Court, given the sheer number of determinations to be made.³⁸³

Professor Tom Staunton suggests that a separate court be created to make certiorari determinations—arguing that doing so would make the certiorari

379. Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 U. PA. L. REV. 1129, 1139–40 (2022) (noting that while “[t]he Justices have almost unbounded discretion in deciding *which* sixty to eighty cases to hear annually out of the thousands of petitions they receive,” the Court “simply does not have the resources to hear every case that generates a petition”).

380. Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422, 427–28 (2012) (arguing that the need to maintain “minimum professional standards of judging . . . probably caps the capacity of the Supreme Court at somewhere between one hundred fifty and two hundred full-dress decisions per [term]”); see also Steve Y. Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430, 450 (1991) (“The massive number of petitions for certiorari, combined with the Supreme Court's limited resources, eliminates the likelihood that many, or even a substantial minority of, important and controversial administrative law cases will be adjudicated in any given year.”).

381. Cordray & Cordray, *supra* note 84, at 392.

382. See Vladeck, *supra* note 32 (manuscript at 39).

383. See McDonald, *supra* note 37, at 1036–39 (tracking trends in the number of cert petitions before the Court and noting a substantial increase from the mid-1900s to 2000, with a “level[ing] off” of petitions to 6,400 to 6,500 in the mid-2010s).

process more rigorous and transparent.³⁸⁴ Professor Staunton argues that a separate body is needed for a “robust certiorari review process” that involves “detailed written opinions” regarding certiorari determinations.³⁸⁵ An entirely separate court is needed for these determinations, however, because producing a written opinion for each certiorari decision is beyond the institutional capacity of the Supreme Court alone:

The greatest problem with keeping the new, robust certiorari review process with the Supreme Court itself is the scarcity of the Court’s resources. The Court is presently able to give full plenary review to only 100 to 150 cases annually. Absent an increase in the number of justices, any increase in certiorari responsibilities would have a negative impact on the Court’s plenary review function. Solving the problem of improper discretion is critical to the Court’s legitimate participation and preeminence in the judicial review process. However, any solution that impairs the Court’s ability to decide cases on the merits would be a Pyrrhic victory indeed.³⁸⁶

This proposal is worth noting, but it may be more dramatic than necessary. Creating an additional court—particularly one with an agenda-setting power so significant that it might affect the makeup of the cases the Supreme Court ends up deciding on the merits—is a dramatic proposal that would add significant structural constraints to the Court.³⁸⁷ While we favor this added constraint on the Court, the complexity and feasibility of such a reform render it questionable. Certiorari transparency, by contrast, is simpler—requiring no new institutions or personnel.

Indeed, it is unclear how concerns over resource constraints are at all relevant to our proposal. Certiorari transparency does not require any additional work beyond the publicizing of votes the Justices already issue, and memoranda that their clerks already produce.³⁸⁸ The work has already been done. All our reform proposes is making this information publicly available, a relatively simple and inexpensive undertaking.³⁸⁹

To the extent that objections over resource constraints have any force, it derives from an assumption that more work would need to go into certiorari determinations and memoranda if they are to be made public. This assumption, however, reveals the need for certiorari transparency. If the Court’s current certiorari determination processes are not worthy for the public eye due to insufficient reasoning, insufficient support, or general sloppiness, these are problems that must be addressed. Certiorari determinations may be numerous, but they are important—whether it is to the public at large in cases that implicate generally applicable laws and constitutional provisions, or even just to the parties to each dispute. Given the infrequency of granting certiorari, the Court owes the parties

384. Tom Staunton, *How to Decide: Case Selection and Judicial Review*, 1992/1993 ANN. SURVEY AM. L. 347, 381–82 (1994).

385. *Id.* at 380–82.

386. *Id.* at 382.

387. *See, e.g., id.* at 383–84.

388. *See supra* Section II.A.

389. *See Virelli, supra* note 18, at 224.

and the public a fair and reasoned determination of which cases it will hear. What better test for this effort than requiring that these determinations and the reasoning behind them be good enough for the public eye?

We acknowledge concerns over resource constraints. Indeed, it is awareness of institutional limitations that precludes us from advocating for written opinions on certiorari determinations and to instead argue only for a disclosure of votes and certiorari memoranda. But certiorari transparency, which merely makes public the work the Court already does, ought to add no substantial costs or burdens to the Court's functioning. If our proposal does indeed lead to substantial additional costs and effort, this is not a problem with our proposal but rather an indicator that the work the Court is presently doing at the certiorari stage is insufficient.

VI. CONCLUSION

The Court enjoys near-limitless power to control its docket.³⁹⁰ Using this power, the Court has heard fewer cases over the years³⁹¹ and selected cases that have enabled it to disrupt the law and increasingly assert its power over other branches of government.³⁹² The Court does much of this work out of public view.

Making the certiorari process transparent may not seem as dramatic a change in the Court's power and makeup as reform advocates normally suggest.³⁹³ But as we have demonstrated here, transparency at the case selection stage may have effects on the Court, those who do business before it, and lower courts who operate in the shadow of the possibility of Supreme Court review.³⁹⁴ Increased transparency may subject the Court to increased scrutiny, causing it to rein in some of its more dramatic tendencies.³⁹⁵ And the Court may devote increased effort and attention to the question of certiorari, knowing that its work at this stage of the case may now be parsed through by the broader public.³⁹⁶ Certiorari transparency will not fix every problem with the Court. But it is a step toward demystifying the Court's activities and giving the public more insight into how and why the Court does what it does.

390. Narechania, *supra* note 15, at 589–90.

391. See McDonald, *supra* note 37, at 1036–39 (tracking trends in the number of cert petitions before the Court and noting a substantial increase from the mid-1900s to 2000, with a “level[ing] off” of petitions to 6,400 to 6,500 in the mid-2010s).

392. See Lemley, *supra* note 97; Vladeck, *supra* note 32 (manuscript at 3).

393. See discussion *supra* Part IV.

394. See discussion *supra* Sections V.A–C.

395. See discussion *supra* Section IV.B.

396. See discussion *supra* Part III.