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QUESTIONING CERTIORARI: SOME REFLECTIONS SEVENTY-FIVE YEARS AFTER THE JUDGES' BILL

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We tend to take for granted that the United States Supreme Court has the discretionary power, through its use of the writ of certiorari, to select the cases it wishes to decide. The Court, however, has not always possessed this discretion. Professor Hartnett traces the history of certiorari in the Court, paying particular attention to the unprecedented efforts of Chief Justice William Howard Taft to promote the landmark Judges' Bill of 1925 and the uncritical deference to the Court shown by Congress in enacting it. After describing ways in which the Court asserted even broader discretion than Congress provided, Professor Hartnett questions whether certiorari is consistent with the traditional conceptions of judicial review, the nature of judicial power, and the rule of law. While questioning certiorari, he emphasizes its importance not only in encouraging Supreme Court justices to think of themselves as final arbiters of controversial questions but also in shaping substantive constitutional law.

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IV. GIVE 'EM AN INCH . . .

"It is clear that Congress in passing the judiciary Act of 1925 relied heavily on judicial explanation of the need for the power and the manner in which it would be used."[365] Apart from Senator Walsh, Congress did not critically evaluate the justices' arguments-indeed, it cooperated in the charade that the idea for the bill originated outside the Court and did not press for details upon learning that the facade of unanimity was only a facade. Yet seventy-five years of experience under the Judges' Bill demonstrates the continuing truth of Walsh's critique: "it exemplifies that truism, half legal and half political, that a good court always seeks to extend its jurisdiction, and that other maxim, wholly political, so often asserted by Jefferson, that the appetite for power grows as it is gratified."[366]

In advocating their bill, the justices frequently argued that they needed the discretionary power to refuse to decide cases in order to avoid

365. Leiman, supra note 120, at 985; see also James F. Blumstein, The Supreme Court's Jurisdiction-Reform Proposals, Discretionary Review, and Writ Dismissals, 26 Vand. L. Rev. 895, 904 (1973) (noting that "Congress accepted uncritically the statute presented" by the Court); Letter from Willis Van Devanter to William H. Taft (Dec. 14, 1926), Taft Papers, supra note 78, at Reel 287 (noting that the judiciary Act of 1925 "was passed largely because of our representations and the faith that was had in us"). In an accompanying handwritten note, Van Devanter suggested that perhaps Taft should not seek additional legislation because "we recently have been asking as much as we could expect and therefore should be content for the present," and noted "some real danger" that seeking additional legislation might lead to the loss of "some of the ground we have gained." Id.

366. 62 Cong. Rec. 8547 (1922) (speech delivered by Sen. Walsh); see also Murphy, supra note 6, at 18-19 (listing as one of the "instruments of judicial power" the Court's "control over its own jurisdiction").

frivolous appeals. But they never adequately explained why the power of summary affirmance was not sufficient for this purpose. Surely the frivolity of a legal argument can be seen as easily from a brief on the merits, or a brief in support of a motion to dismiss or affirm, as it can from a petition for certiorari. To the extent that the Court was concerned about hearing oral argument in frivolous cases, a much less radical solution was possible: Read the briefs before deciding whether to hear oral argument.

Of course, the Justices also pointed to "unimportant" cases clogging the docket. But while Taft originally spoke of giving the Court arbitrary discretion and letting it decide what was important, Van Devanter took a different tack. He told the Congress that the Court did not exercise choice or will, but instead decided petitions for certiorari "according to recognized principles."[367] But although the justices assured Congress that certiorari is always granted when there is a conflict between courts of appeals and would always be granted when there was an arguable constitutional claim, they never explained what the supposedly recognized principles were. Instead, Van Devanter changed the subject and provided detail about the care with which petitions are considered. But careful consideration is no substitute for governing principles to apply. Effectively, then, the Court had achieved absolute and arbitrary discretion over the bulk of its docket.

With this achievement under its belt, the Court (as Walsh's maxim predicted) sought to extend that discretion by (among other things) claiming the power to issue limited writs of certiorari, by subjecting ostensibly mandatory appeals to discretionary review, and by practically eliminating the certification power of courts of appeals.[368]

A. *Limited Grants of Certiorari*

Soon after the Judges' Bill became law, the Court claimed the authority to issue limited grants of certiorari, that is, to decide to decide only a particular issue in a case, ignoring other issues.[369] It asserted this power even though certiorari under the Evarts Act brought up the whole case,[370] and even though one of Taft's arguments for the Judges' Bill was

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367. 1924 Senate Hearings, supra note 167, at 32.

368. Concededly, I cannot prove a close, direct, causal link between the Judges' Bill and these subsequent developments. Perhaps the Court, even without any legislation at all, would have devised ways to increase its discretionary control over its jurisdiction. At the very least, however, the Judges' Bill gave a new baseline from which to expand such discretionary control. Moreover, by making discretionary jurisdiction the order of the day, I believe that the Judges' Bill accustomed the Court to such discretion and encouraged its expansion.

369. See Maryland Cas. Co. v. Jones, 278 U.S. 596, 596 (1928); Olmstead v. United States, 277 U.S. 438, 455 (1928).

370. See Frankfurter & Landis, Business, supra note 5, at 290 (noting that while the statute limited scope of review in mandatory cases from courts of appeals, like state court judgments, to federal questions, as to certiorari to circuit courts, the "old scope of review remains and the Court will have to deal with all the questions presented by the record"); cf.

that there was a "greater need" for discretion as to cases from the circuit courts of appeals than from state courts, because in the former the "power of review extends to the whole case and every question presented in it" rather than only to the federal questions.[371]

Indeed, in the famous *Olmstead* case in 1928 involving the admissibility of wiretap evidence, Chief Justice Taft's opinion for the Court asserted the authority to limit review to constitutional questions, thereby ignoring possible nonconstitutional grounds of decision.[372] Taft even chided justices Brandeis, Holmes, and Stone for addressing nonconstitutional grounds for their conclusion that the evidence was inadmissible.[373] Taft offered no answer to Stone's objection that, under the law enacted by Congress, "this Court determines a case here on certiorari `with the same power and authority, and with like effect, as if the cause had been brought [here] by unrestricted writ of error or appeal.'"[374] Nor did Taft explain why it was appropriate to decide whether the constitution permitted the admission of the evidence without first deciding whether the law of evidence permitted its admission.

This practice of limited grants of certiorari has become so uncritically accepted that, under current Supreme Court rules, no writ of certiorari brings before the Court all questions presented by the record, as such writs did under the judiciary Act of 1891. Instead, "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court."[375] At first glance, this might seem like nothing more than an

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Felix Frankfurter & James Landis, The Supreme Court Under the Judiciary Act of 1925, 42 Harv. L. Rev. 1, 7 n.17 (1928) [hereinafter Frankfurter & Landis, Judiciary Act] (arguing that the scope of review of circuit court cases should be confined to federal questions in certiorari cases, as well as appeals where it is a federal question that prompts the grant of certiorari).

371. 66 Cong. Rec. 2921 (1925) (reproducing letter from Taft to Copeland (Dec. 31, 1924)).

372. See *Olmstead,* 277 U.S. at 455 (noting that certiorari was "granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence of private telephone conversations . . . intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments").

373. See id. at 466 (noting that "some of our number" chose to depart from the order granting certiorari and proceeding to address the nonconstitutional issue only after disposing of the constitutional question). Interestingly, Justice Brandeis was not referring to the government's violation of the Fourth Amendment when he penned his oft-quoted comment that "[o]ur government is the potent, the omnipresent teacher. . . . If the government becomes a lawbreaker, it breeds contempt for the law . . . ." Id. at 485. Instead, he was referring to the violation of state criminal law by the federal agents and arguing that a federal court should not permit a prosecution to continue where the government, to prove its case, must "lay bare the crimes committed by its officers on its behalf." Id. at 480.

374. Id.at 488 (Stone, J., dissenting) (alteration in original) (citation omitted). In Stone's view, "the effect of the order granting certiorari was to limit the argument to a single question," but not to "restrain[ ] the Court from a consideration of any question which we find to be presented by the record." Id.

375. Sup. Ct. R. 14(1) (a).

ordinary rule of waiver (issues not raised are waived), but it is not. As the Court has explained, this rule not only serves the respondent's interest in not having to respond to issues not raised by her adversary, but also serves the Court's interest in "forc[ing] the parties to focus on the questions the Court has viewed as particularly important."[376] The Court has made clear that it is rarely interested in having litigants present questions about whether lower courts misapplied properly stated law,[377] and the leading treatise urges counsel not to phrase their questions presented in terms of error correction .[378] If, however, a litigant presents such a question (or any other question that the Court does not want to address) along with a question that the Court is interested in hearing, the Court may well limit the grant of certiorari to the question in which it is interested.[379] While we tend today to think of only this latter situation as a limited grant of certiorari, in truth, under current Supreme Court practice, all writs of certiorari are limited writs: None brings forth all properly preserved claims of error within the Supreme Court's jurisdiction.

Put slightly differently, the Supreme Court does not so much grant certiorari to particular cases, but rather to particular questions. Especially in light of its expressed lack of interest in simple error correction,[380] the result can well be the affirmance of judgments that, while correct as to the controversial issue on which certiorari is granted, are nevertheless erroneous because based on a simpler error that the Supreme Court declines to consider.[381]

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376. Yee v. City of Escondido, 503 U.S. 519, 536 (1992).

377. See Sup. Ct. R. 10.

378. See Stern & Gressman, supra note 3, at 341 (explaining that counsel should avoid general claims of error and instead raise questions "beyond the perceived erroneousness of the particular ruling below," and that the question presented should not begin "did the court below err," because the Court "is not a tribunal of errors and appeals; it is concerned more with whether it should address the substance of a nationally important question, not with whether the lower court erred in resolving that question"). On the other hand, Stern and Gressman also note that sometimes the Court does grant certiorari to correct error, and urge counsel to include "an argument briefly attacking or defending the correctness of the decision below." Id. at 194-95.

379. See id. At 244 (observing that "the Court will frequently limit its granting of a petition for certiorari to particular questions presented"). Note that as early as 1954, the Court itself used the adverb "frequently" when it stated that the certiorari petition fixes the issues, "unless we limit the grant, as frequently we do to avoid settled, frivolous, or state law questions." Irvine v. California, 347 U.S. 128, 129-30 (1954); see also Stern & Gressman, supra note 3, at 337 (suggesting that "if the case contains an issue that is considered not certworthy in and of itself, but on which petitioner believes there is a good argument on the merits, it may be included," but warning that "to add too many noncertworthy issues may induce the Court either to deny the petition or to limit the grant to the certworthy issues, as it may do anyway").

380. See, e.g., Judicial Conference of the Second Judicial Circuit of the United States, 160 F.R.D. 287, 375 (1994) (comments by justice Clarence Thomas) ("[W]e try not to engage in simple error correction.").

381. For a defense of limited grants of certiorari, see Scott H. Bice, The Limited Grant of Certiorari and the justification of judicial Review, 1975 Wis. L. Rev. 343. Bice

B. The Expansion of Discretion from Certiorari to Ostensibly Mandatory Appeals

The same year that the Court decided the *Olmstead* case and claimed the power to issue limited writs of certiorari, it also laid the groundwork for extending its discretion to cases within its mandatory jurisdiction cases where Taft dared not propose certiorari for fear of congressional opposition. It promulgated a new rule, Rule *12,* requiring the filing of a jurisdictional statement within thirty days of docketing an appea1.[382] In the *1929* Term, this rule was used to dismiss some thirty-six appeals.[383]

Significantly, although Rule *12* did not say so, it was used "to cover matters not merely of jurisdiction in the conventional sense, that is, the appellate authority of the Court."[384] Instead, counsel were obliged to demonstrate that the federal question involved was substantial and (at least) "persuade the Court that the record presents an issue that is not frivolous and is not settled by prior decisions."[385] Frankfurter and Landis predicted:

> Plainly, the criterion of substantiality is neither rigid nor narrow. The play of discretion is inevitable, and wherever discretion is operative in the work of the Court the pressure of its docket is bound to sway its exercise. To the extent that there are reasonable differences of opinion as to the solidity of a question presented for decision or the conclusiveness of prior rulings, the administration of Rule *12* operates to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing *certiorari.*[386]

Their prediction was accurate, and as early as *1945,* a deputy clerk of the Supreme Court wrote that "[j]urisdictional statements and petitions for certiorari now stand on practically the same footing."[387] Eventually it

candidly notes that his argument relies on a view of the Supreme Court as an "essential policymaking institution." Id. at 379.

382. See Sup. Ct. R. 12, 275 U.S. 603-04 (1928).

383. See Felix Frankfurter &James M. Landis, The Business of the Supreme Court at October Term, 1929, 44 Harv. L. Rev. 1, 12 (1930) [hereinafter Frankfurter & Landis, 1929 Term]. That same year, the Court construed the word "appeal" in a special jurisdictional statute to mean certiorari. See Colgate v. United States, 280 U.S. 43, 44-45 (1929). Frankfurter and Landis point to this case as an example of the Court using a "policy of restricting its own jurisdiction" as a "guide in construing legislation governing its jurisdiction." Frankfurter & Landis, 1929 Term, supra, at 37-38.

384. Frankfurter & Landis, 1929 Term, supra note 383, at 12.

385. Id. The promulgation of this rule illustrates that the Court did not need broadened certiorari jurisdiction in order to quickly dispose of frivolous appeals. Cf. Commission on Structural Alternatives, supra note 239, at 70 ("Up until three decades ago this right to appeal [to courts of appeals under 28 U.S.C. § 1291] was assumed to include an opportunity to file briefs, to present oral argument to the court, and to receive from the court a written opinion explaining the decision.").

386. Frankfurter & Landis, 1929 Term, supra note 383, at 12, 14.

387. Harold B. Wiley, Jurisdictional Statements on Appeals to U.S. Supreme Court, 31 A.B.A. J. 239, 239 (1945).

became commonplace to conclude that "[t]he discretionary-mandatory distinction between certiorari and appeal has been largely eroded"[388] and that "[t]he jurisdiction that is obligatory in form is discretionary in fact."[389] This, of course, further increased judicial power.[390]

Some commentators were critical of such lawlessness,[391] and egregious cases attracted some attention.[392] But some justices practically admitted as much in print. For example, after his retirement from the Court, Justice Clark stated that "at least during the eighteen Terms in which" he sat, "appeals from state court decisions received treatment similar to that accorded petitions for certiorari."[393] And Congress, rather

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388. Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 595-96 (1972) [hereinafter Freund Report].

389. Casper & Posner, supra note 364, at 1.

390. See id.

391. See Herbert Wechsler, The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review, 34 Wash. & Lee L. Rev. 1043, 1061 (1977) [hereinafter Wechsler, Appellate jurisdiction] ("If that was so ... the Court simply disregarded its statutory duty to decide appealed cases on the merits."); id. ("It is simply inadmissible that the highest court of law should be lawless in relation to its own jurisdiction."); cf., e.g., Simpson, supra note 120, at 315-16 (" [I] t is frequently argued that eliminating the appeal/certiorari distinction would conform theory to practice because the Court has assimilated essentially all of the certiorari criteria into the standards for the disposition of appeals.").

392. See, e.g., Naim v. Naim, 350 U.S. 891, 891 (1955) (dismissing appeal from conviction for violation of Virginia anti-miscegenation statute), recall of mandate denied, 350 U.S. 985 (1956). See also, e.g., Lucas A. Powe, Jr., The Warren Court and American Politics 72 (2000) (describing *Naim's* ground for dismissal as "absurd" and "fictitious" and asking, "[I]f the Court does not feel it necessary to follow the rules when they pinch, why should others feel any more bound when different legal rules adversely affect them?"); Del Dickson, State Court Defiance and the Limits of Supreme Court Authority: *Williams v. Georgia* Revisited, 103 Yale L J. 1423, 1476 & n.317 (1994) (quoting a Nov. 4, 1955 memorandum from justice Frankfurter arguing that the Court should refuse to decide *Naim* lest it risk *Brown* and the Court's prestige); David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 578 n.215 (1985) (noting that "it is difficult to see any" "discernible ground for dismissal of the appeal" in *Naim);* Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 34 (1959) [hereinafter Wechsler, Neutral Principles] (describing dismissal in *Naim* as "wholly without basis in the law").

393. Hogge v. Johnson, 526 F.2d 833, 836 (4th Cir. 1975), cert. denied, 428 U.S. 913 (1976) (Clark, J., concurring); cf. William J. Brennan, Jr., The National Court of Appeals: Another Dissent, 40 U. Chi. L. Rev. 473, 474 (1973) (stating that the Court is "regularly constrained to grant review" in cases from three judge district courts "not so much because the question presented is especially important or because the District Court may well have erred, but rather because we are reluctant to deprive the losing litigant of any opportunity for appellate review"-without so much as mentioning that the Court was "constrained" by an Act of Congress). Congress obliged the Court here as well, largely eliminating three-judge district courts with their attendant mandatory Supreme Court review. See Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119; cf. 15 U.S.C. § 29(b) (1994) (providing for direct appeal to the Supreme Court in government civil antitrust cases if the district judge "enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice," but permitting the Supreme Court to deny the appeal and remand the case to the court of appeals). The

than objecting to the Court's non-compliance with the statute, instead amended the statute to conform to the Court's practice .[394]

C. The Practical Elimination of Certification

In the hearings on the Judges' Bill, it was repeatedly noted that the Supreme Court would not alone control its jurisdiction, but that the courts of appeals, by use of certification, would share in that control. Yet just as the Court increased its power to set its own agenda by tending to treat appeals more like petitions for certiorari, so too it largely deprived the lower courts of their promised role in controlling the Supreme Court's docket. This process also began soon after the Judges' Bill was enacted.

Frankfurter and Landis acknowledged in *1930* that "[p]etitions for *certiorari* the Court can deny, but questions certified must be answered."[395] Yet they already detected the Court's "hostility" to the certification process.[396] That hostility continued, leading the courts of appeals to be quite reluctant to issue certificates.[397] In the decade from *1927* to *1936,* courts of appeals issued seventy-two certificates, while in the decade

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permissive remand provision was added in 1974 in response to complaints by the Supreme Court. See Act of Dec. 21, 1974, Pub. L. No. 95-528, § 5, 88 Stat. 1706, 1709; Tidewater Oil Co. v. United States, 409 U.S. 151, 169-70 (1972) (complaining about the burden of mandatory direct appellate review of government civil antitrust cases but "despite all of these criticisms" finding "no basis for disregarding what we are bound to recognize as the plain and unaltered intent of Congress"). For the Court's most recent exercise of the permissive remand provision, see Microsoft Corp. v. United States, Nos. 00-139 & 00-261, 2000 WL 1052937, at *1 (Sept. 26, 2000). Although this statute is generally known as the Expediting Act, the Court acknowledged in *Tidewater* that "mere speed in the disposition of Government civil antitrust cases was not Congress' only concern ... [but that] Congress was also intent upon facilitating review by this Court of a class of antitrust cases deemed particularly important." *Tidewater,* 409 U.S. at 155-56 (internal quotation and citations omitted); cf. *Microsoft,* 2000 WL 1052957, at *1 (Breyer, J. dissenting) (noting that the case "significantly affects an important sector of the economy").

394. See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (eliminating virtually all of the Supreme Court's mandatory jurisdiction).

395. Frankfurter & Landis, 1929 Term, supra note 383, at 35; see also Moore & Vestal, supra note 9, at 3 ("Congress determines what courts may use certification and when, but within these limits the certifying court determines on what matters the reviewing court must pass. In other words the jurisdiction of the latter court is obligatory at the option of the certifying court.").

396. Frankfurter & Landis, 1929 Term, supra note 383, at 36 (discussing Wheeler Lumber Co. v. United States, 281 U.S. 572 (1930), where the Court originally held that the certificate in that case was an unconstitutional attempt to expand the Court's original jurisdiction, but withdrew that opinion). Moore and Vestal agree that the infrequent use of certification is due in part to "the Supreme Court's hostility," Moore & Vestal, supra note 9, at 10, but nevertheless assert without citation that serious consideration of eliminating certification in the 1948 revision of the judicial code ended when a committee composed of Chief Justice Stone and Justices Douglas and Frankfurter opposed the change. See id. at 7-8.

397. See Moore & Vestal, supra note 9, at 22 & n.86 (noting that an "indication by the Court that certification is not favored will greatly limit its use," and that "[w]henever the

from 1937 to 1946, that number dropped to twenty.[398] Writing in 1949, Moore and Vestal explained that one reason for the Court's hostility was that the Court "apparently felt that a broad use of certification would frustrate the Court's proper functioning as a policy-determining body by greatly restricting the time available for the discretionary side of its docket."[399] They concluded that "[j]udiciously and modestly used, certification now seems acceptable to the Court."[400] While Moore and Vestal's explanation is persuasive, their endorsement of its propriety is doubtful,[401] and their confidence misplaced.

In 1957, the Court went so far as to conclude that certification should not be used to handle conflicts between different three judge panels of the same court of appeals, noting that it "is primarily the task of a Court of Appeals to reconcile its internal difficulties," such as by sitting en banc.[402] Ironically, the Supreme Court chastised the court of appeals,

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Supreme Court has dismissed a certificate from a lower court, that court has usually refrained from certifying for a number of years").

398. See Moore & Vestal, supra note 9, at 25-26 n.99. One was Korematsu v. United States, 319 U.S. 432, 436 (1943) (holding, in response to certified question, that the court of appeals had jurisdiction to review a district court decision that suspended the imposition
of sentence and placed Korematsu on probation). After the court of appeals rendered its judgment, the Supreme Court granted certiorari and issued its infamous decision upholding the exclusion of Japanese-Americans during World War II. See Korematsu v. U.S., 323 U.S. 214 (1944).

399. Moore & Vestal, supra note 9, at 23; see also Stern & Gressman, supra note 3, at 450 (noting that "if the courts of appeals were free to request instructions from the Supreme Court on any doubtful question, the effect might be to vest in them a substantial part of the discretion to determine what cases the Supreme Court should hear" and thereby "frustrate the Court's discretionary power to limit its review to cases it deems worthy"). Moore and Vestal list two other reasons. First, they claim that the pre-1891 experience of pro forma certificates of division in the circuit courts "cast a cloud of suspicion over the technique." Moore & Vestal, supra note 9, at 23. Second, they contend that the Court "hesitates to use a method wherein a legal ruling is pronounced without a clear indication that the facts of the case require such a declaration." Id.

400. Moore & Vestal, supra note 9, at 25.

401. Rather than condemn or question the Court's hostility to a valid Act of Congress, Moore and Vestal instead suggest that some statutory change is desirable to the end that it is clearly stated and frankly recognized that certification does not invoke the Supreme Court's obligatory jurisdiction, but is only in effect a petition for certiorari by the certifying court asking appellate aid on the certified questions, and that, as in the case of petitions for certiorari by the litigants, the grant or denial of appellate review should rest in the Supreme Court's sound discretion.
Id. at 43.

402. Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). *Wisniewski* did not expressly mention the en banc process, but referred to it by citing an opinion devoted to the exploration of that process. See id. at 902 (citing Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247 (1953)); see also Textile Mills Sec. Corp. v. Comm'r of Internal Revenue, 314 U.S. 326, 335 (1941) (approving the use of an en banc procedure – even though prior to the judicial Code of 1948 there was no explicit statutory authorization for such en banc sitting, and the governing statute seemed to limit the courts of appeals to three judge panels).

observing that it "is also the task of a Court of Appeals to decide all properly presented cases coming before it.[403] In the period from 1946 until 1985, the Court accepted only four certificates. [404] At this point, certification is practically a dead letter [405] and I suspect there are few lawyers (and perhaps few circuit judges) who even know it remains an option.

D. Other Expansions of Discretionary Control over jurisdiction

The Court has acted to maximize its power to set its own agenda in other ways as well. For example, it has riddled the statutory requirement that it review only final state court judgments with exceptions so large it can drive any case it wants through them,[406] a development unlikely to be produced by a court without discretion to decline to hear cases. It has declined to hear cases within its original jurisdiction,[407] once going to the embarrassing extreme of refusing to hear a case between states where its jurisdiction was exclusive.[408] Sometimes, it even grants certiorari and then rewrites the question presented.[4O9]

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403. Wisniewski, 353 U.S. at 902 (noting an exception "in the rare instances, as for example the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and expedition of judicial business").

404. See Stern & Gressman, supra note 3, at 450. My research has not located any since *1985.*

405. See Freund Report, supra note 388, at 603 (describing certification as "virtually obsolete" and noting that the only case since 1957 in which the Court accepted a certificate was a "highly exceptional case" in which the court of appeals was sitting as a court of original jurisdiction and divided equally); Stern & Gressman, supra note 3, at *450* (describing certification as "virtually, but not quite, a dead letter"); see also In re Slagle, 504 U.S. 952 (1992) (dismissing a certificate with a citation to *Wisniewski).* In *1981,* the Court answered a certified question in Iran Nat'l Airlines Corp. v. Marschalk Co., *453 U.S. 919 (1981),* but did so simply by citing its contemporaneous decision in Dames & Moore v. Regan, 453 U.S. 654 (1981).

406. See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 477-85 (1975) (elaborating four categories of cases which are considered "final" even though further proceedings in state court are envisioned); Hart & Wechsler, supra note 58, at 639 (asking if there is "a discernible limit" to one of the four categories).

407. See Simpson, supra note 120, at 315-16 ("Both appellate and original jurisdiction have become subject to discretionary control; in the latter context, the Court has declined to hear cases which fall squarely within its original jurisdiction."). It was some fourteen years after the Judges' Bill that the Court first squarely asserted the power to simply decline to hear a case within its original jurisdiction. See Massachusetts v. Missouri, 308 U.S. 1, 15-20 (1939); Hart & Wechsler, supra note 58, at 329 & n. l.

408. See Louisiana v. Mississippi, 488 U.S. 990, 990 (1988). The Court had to backtrack once it was confronted with a decision in the case by a lower federal court that (it had to admit) lacked jurisdiction. See Mississippi v. Louisiana, 506 U.S. 73, 77-79 (1992) (concluding that the district court lacked jurisdiction); Louisiana v. Mississippi, 510 U.S. 941, 941 (1993) (granting leave to file the bill of complaint); cf. California v. West Virginia, 454 U.S. 1027, 1027 (1981) (denying leave to file a bill of complaint arising out of an alleged breach of contract covering athletic contests between two state universities).

409. See, e.g., Jones v. United States, 523 U.S. 1058, 1058 (1998) (amending prior order granting certiorari and limiting writ to two questions set forth by the Court); Calderon v. Thompson, 521 U.S. 1140, 1141 (1997) (amending prior order granting

In short:

> At every turn, the Court has acted to maximize its institutional independence from Congress, litigants, and other courts. The earliest indication of the Court's interest in providing itself the widest possible scope for setting its own agenda was the energetic campaign of the Taft period justices for the 1925 Judiciary Act. Subsequently, the Court has whittled away at the small remaining portion of its jurisdiction that was intended to be obligatory. The Court has now worked itself into the position that it is no longer expected to decide any case as a matter of course.[410]

V. QUESTIONING CERTIORARI

Although the Supreme Court has achieved the ability to select what cases (and what issues in cases) it wants to decide, there remain important questions to be asked: How can this power be reconciled with the classic justification for judicial review? How can a court with such power claim to be exercising judgment rather than will, and is such a power consistent with the rule of law? Can this power be justified as a form of administrative rather than judicial power?

A. Judicial Review

As Alexander Bickel recognized almost four decades ago, there is a deep tension between certiorari and the classic justification for judicial

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certiorari and limiting writ to single question set forth by the Court); Phillips v. Washington Legal Found., 521 U.S. 1140, 1141 (1997) (same); Lewis v. United States, 520 U.S. 1226, 1226 (1997) (same); Miller v. Albright, 520 U.S. 1208 (1997) (same). As the Court described its action in the opinion on the merits in Jones, "We granted certiorari and framed as the question presented: [description of question]." Jones v. United States, 120 S. Ct. 1904, 1908 (2000) (citation omitted). It is possible that this practice simply brings to the surface what had been happening without notice to the public or the parties anyway. See, e.g., Barbara Palmer, Issue Fluidity and Agenda Setting on the Warren Court, 52 Pol. Res. Q. 39, 44 (1999) (claiming that in a sample of 200 cases, issues presented were not decided in 59%, issues were decided that were not presented in 27%, and that in 72% of the cases in which issues were decided that were not presented, some issues were presented but not decided, a process that Palmer characterizes as issue "substitution"); cf. Lee Epstein &Jack Knight, The Choices Justices Make 161 (1998) (contending that without a norm against the decision of issues not presented, "the Court would no longer resemble a legal body in the way that scholars, attorneys, and jurists – not to mention Article III of the U.S. Constitution – contemplate" and that "regular deviations from this norm would undermine the Court's legitimacy").

410. Provine, supra note 11, at 43-44; see also Shapiro, supra note 392, at 562-66 (detailing "at least five respects" in which the Supreme Court's appellate jurisdiction can be described as "containing significant elements of discretion"); cf. William A. Fletcher, The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions, 78 Cal. L. Rev. 263, 276-78 (1990) (suggesting that standing and mootness doctrines were used to avoid mandatory appeals from state courts and to avoid collision with the rule of four).

review.[411] Pursuant to that classic justification, judicial review is the by-product of a court's obligation to decide a case.[412] In *Marbury v. Madison,* Chief Justice Marshall did more than simply assert that it is "province and duty of the judicial department to say what the law is" – in the next two sentences he immediately explained *why*: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." [413]

Because a court lacks the luxury of simply avoiding decision, it must sometimes choose between following a statute and following the Constitution. This justification of judicial review, then, is the point of Marshall's famous passage from *Cohens v. Virginia:*

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is,

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411. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 127 (1962) (pointing to Sen. Walsh's opposition to the Judges' Bill and noting both "the difficulty of reconciling the discretionary certiorari jurisdiction with *Marbury v. Madison* and *Cohens v. Virginia"* and that "[m]isgivings about the certiorari jurisdiction, grounded in the strict-constructionist position, are nothing new").

412. See, e.g., Christopher L. Eisgruber, The Most Competent Branches: A Response to Professor Paulsen, 83 Geo. L.J. 347, 349 (1994) ("The business of the federal judiciary is deciding cases, not saying what the law is."); Edward A. Hartnett, A Matter of judgment, Not a Matter of Opinion, 74 N.Y.U. L. Rev. 123, 147 (1999) ("Under *Marbury,* it is the court's obligation to decide a case by issuing a judgment that gives rise to the power of judicial review."); Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 Iowa L. Rev. 1267, 1273 (1996) ("The power to interpret the laws is an incident to this case- or controversy-deciding function; courts must interpret because they must decide."). As Herbert Wechsler famously explained:

> Federal Courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.

Herbert Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1006 (1965). For Bickel's view that "[ilf, as Marshall argued, the judiciary's power to construe and enforce the Constitution ... is to be deduced from the obligation of the courts to decide cases conformably to law, which may sometimes be the Constitution, then it must follow that the power may be exercised only in a case," see Bickel, supra note 411, at 114, and for his view that the ideas of "case and controversy" are "not so much limitations of the power of judicial review as necessary supports for Marshall's argument in establishing it," see id. at 115.

413. Marbury v. Madison, 5 &.S. (1 Cranch) 137, 177 (1803).

> to exercise our best judgment, and conscientiously to perform our duty.[414]

Alexis de Tocqueville and Abraham Lincoln both made the same point. Tocqueville observed, "But the American judge is dragged in spite of himself onto the political field. He only pronounces on the law because he has to judge a case, and he cannot refuse to decide the case."[415] Lincoln, despite his refusal to accept the authoritativeness of the Supreme Court's interpretation of the Constitution in the *Dred Scott* opinion, noted that he was not making "any assault upon the court, or the judges. It is a duty, from which they may not shrink, to decide cases properly brought before them . . . ."[416]

The Supreme Court's certiorari practice, however, completely undercuts this rationale.[417]

Strikingly, in advocating the Judges' Bill, the justices never attempted to explain its application in cases presenting even arguable constitutional questions. Instead, (as far as their statements to Congress revealed) the only use envisioned in constitutional cases was as a way of quickly dealing with claims that were either frivolous or plainly governed by precedent-that is, in cases where the lower court was obviously correct and summary affirmance would be appropriate. Taft expressed confidence that in no case "would a constitutional question of any real merit or doubt escape our review by the method of certiorari," explaining that the restrictions were merely "to keep out constitutional questions that have really no weight or have been fully decided in previous cases and that have only been projected into the case for the purpose of securing delay or a reconsideration of questions the decision of which has already become settled law."[418] In this way, the justices never had to deal with reconciling certiorari and judicial review. Indeed, perhaps the tension between certiorari and the classic justification for judicial review helps to explain why it was not until 1953 that the Court would definitively hold.

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414. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); see also Maxwell L. Stearns, Standing Back from the Forest: Justiciabililty and Social Choice, 83 Cal. L. Rev. 1309, 1358 n.148 (1995) (noting that while "legislatures have the power of institutional inertia, that is, they can decline to decide proposed issues ... [the] courts do not, that is, they cannot generally decline to decide cases properly before them"); cf. Maxwell L. Stearns, Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making 65 & n.* (2000) (arguing that, from a social choice perspective, this remains true for certiorari in the limited sense that the court must grant or deny the petition).

415. Alexis de Tocqueville, Democracy in America 103 (J.P. Mayer ed., 1969).

416. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 The Collected Works of Abraham Lincoln 249, 268 (Roy P. Basler ed., 1953).

417. "Without the assumption that courts must decide cases within their jurisdiction, Marshall's argument [in *Marbury*] would collapse; a court could avoid the dilemma described by Marshall simply by declining to decide the case at all." Steven D. Smith, Courts, Creativity, and the Duty to Decide a Case, 1985 U. Ill. L. Rev. 573, 580.

418. 66 Cong. Rec. 2922 (1925) (reproducing letter from Taft to Sen. Copeland (Jan. 16, 1925)).

that a denial of certiorari was not a ruling on the merits of a constitutional challenge.[419]

Alexander Bickel did not attempt a reconciliation either, but instead used certiorari as a lever to argue against the classic conception of judicial review. In contrast to the classic conception, Bickel instead justified judicial review by idolizing the Supreme Court as the institutional representative of "decency and reason," and by asserting that its "constitutional function" is "defin[ing] values and proclaim[ing] principles. [420] Some v ariant of this view is commonplace (either explicitly or implicitly) among constitutional scholars today, but as John Harrison has correctly observed, "[t]he power to interpret the Constitution ... comes from the case-deciding power. To suggest that the power to interpret is primary and the case deciding power secondary, is to misinterpret the Constitution and to confuse cause and effect."[421] Such a view unhinges the Supreme Court from other courts-all of which exercise the power of judicial review, both within the classic model and in fact.[422] While there is an enormous literature responding to Bickel's "counter-majoritarian difficulty" and "passive virtues," I am not aware of any work that takes up his challenge to reconcile certiorari with the classic conception of judicial review.[423]

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419. See Brown v. Allen, 344 U.S. 443, 497 (1953) (opinion for Court by Frankfurter, J.) (holding that "in habeas corpus cases, as in others, denial of certiorari cannot be interpreted as an `expression of opinion on the merits'" (quoting Sunal v. Large, 332 U.S. 174, 181 (1946))). Compare Liebman, supra note 277, at 2083 ("The only revolution *Brown* worked ... was one that seems so obvious today that we can hardly imagine anyone having thought the law different-its holding that a denial of certiorari was not a ruling on the merits."), with Schechtman v. Foster, 172 F.2d 339, 342-43 (2d Cir. 1949) (Learned Hand, CJ.) (giving *conclusive* effect in an habeas proceeding to a prior denial of certiorari). But see O'Sullivan v. Boerckel, 119 S. Ct. 1728 (1999) (holding, at least unless a state court clearly indicates otherwise, that a habeas petitioner seek *state* supreme court discretionary review in order to comply with the exhaustion requirement).

Ironically, in discussing habeas petitions before district courts (but not certiorari petitions before the Supreme Court), Justice Frankfurter stated, "Discretion without a criterion for its exercise is authorization of arbitrariness." *Brown,* 344 U.S. at 496.

420. Bickel, supra note 411, at 68, 133.

421. John Harrison, The Role of the Legislative and Executive Branches in Interpreting the Constitution, 73 Cornell L. Rev. 371, 373 (1988); see also John Harrison, The Constitutional Origins and Implications of Judicial Review, 84 Va. L. Rev. 333, 361 (1998) (stating that "courts must know what the law is in order to decide cases"). As Justice Brennan once noted, speaking on behalf of a unanimous Court, "[t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them." United States v. Raines, 362 U.S. 17, 20 (1960).

422. See, e.g., Bickel, supra note 411, at 173 (distinguishing the Supreme Court from other courts by claiming that the "Supreme Court in constitutional cases sits to render an additional, principled judgment on what has already been authoritatively ordered," and "to revise a pre-existing order that is otherwise viable and was itself arrived at by more normal processes").

423. See, e.g., Gerald Gunther, The Subtle Vices of the "Passive Virtues"–A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 25 (1964)

A court that can simply refuse to hear a case can no longer credibly say that it had to decide it. If asked, "Why did you exercise the awesome power to declare an Act of Congress unconstitutional?" the justices of the Supreme Court can no longer say, "Because we had to." Instead, they must say, "Because we chose to."[424] It is true that lower courts can continue to answer, "Because we had to." Perhaps oddly, then, certiorari calls into question the exercise of judicial review by the Supreme Court, but not by lower courts.[425]

This difficulty is particularly acute when we consider limited grants of certiorari, bearing in mind that, under current practice, all grants of certiorari are limited. The Supreme Court not only chooses which cases to decide, but also chooses which questions to answer. Its justices can no longer say they had to decide the case; even within a case, they cannot even say they had to decide any particular question. To the contrary, they can grant certiorari as to a particular question in a case, ignoring the presence of other legal errors, even if this means that the Court affirms a judgment that is, by hypothesis, erroneous.

(asserting that "[t]here is legitimate discretion not to review, as in the certiorari jurisdiction," but not attempting to reconcile that discretion with judicial review); Martin H. Redish, The Passive Virtues, The Counter-Majoritarian Principle, and the 'JudicialPolitical" Model of Constitutional Adjudication, 22 Conn. L. Rev. 647, 656, 662-63 (1990) (criticizing Bickel's "passive virtues," but pointing to certiorari as evidence that providing a particular individual with a remedy is at best "incidental" to the role of the judiciary as "enforcer of the counter-majoritarian Constitution"); Cass R. Sunstein, The Supreme Court, 1995 Term-Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 33-55 (1996) (building upon Bickel by advocating decisional minimalism, and treating the denial of certiorari as an example of minimalism, but failing to address Bickel's point regarding certiorari and judicial review); cf. Clinton v. Jones, 520 U.S. 681, 690 (1997) (stating, without elaboration, that the principle of constitutional avoidance "comes into play after the court has acquired jurisdiction of a case" and "does not dictate a discretionary denial of every certiorari petition raising a novel constitutional question").

424. Professor Redish has made a similar point in criticizing the political question doctrine: "For if the Court declines to exercise review in one instance on the basis of wholly pragmatic fears and discretionary judgment, it will have a more difficult time justifying its decision not to abstain in another politically sensitive matter." See Martin Redish, The Federal Courts in the Political Order: Judicial jurisdiction and American Political Theory 129 (1991). Moreover, in the same context, Redish argues that "[w]hatever the risks to the Court's stature that might result from a disregard of its decision by the political branches, then, the risks to its legitimacy are at least as great from the Court's refusal to review allegedly unconstitutional governmental action." Id. He does not, however, aim this critique at certiorari. See Redish, supra note 423, at 663 (criticizing Bickel's "passive virtue" view of standing while noting that "[u]nder its discretionary certiorari power ... the Supreme Court can easily avoid the dangers [he] feared simply by denying application for the writ").

425. Seizing on this seeming peculiarity, some might say that it is the judiciary *as a whole* that can rely on the classic *Marbury* model, and that certiorari only involves a determination regarding which court will exercise judicial review. Under this view, certiorari is administration rather than adjudication. For a discussion of this view of certiorari, see infra Part W.C.

B. Law or Will?

The inability of the Supreme Court to credibly claim that it has to decide a case highlights another profound tension between certiorari and classic conceptions of judicial power, a tension that extends beyond cases involving constitutional adjudication.[426] The judiciary, as Hamilton explained, is the least dangerous branch because it possesses only judgment, not force or Will.[427] But although this description continues to be widely repeated, it is hardly an accurate description of a court that has the power to set its own agenda. While the judiciary still lacks its own military force, the Judges' Bill gave the Supreme Court an important tool with which to exercise will: The ability to set one's own agenda is at the heart of exercising will.[428]

Political scientists are quite blunt about the impact of the Judges' Bill. "In short, because of its broad discretion to set its own agenda, the Court is no longer the passive institution `with neither force nor will but merely judgment' described by Hamilton . . . ."[429] "The Court also sets its own substantive agenda for policy-making."[430] Indeed, "[m]uch of the Court's power rests on its ability to select some issues for adjudication while avoiding others."[431] Its ability to set its own agenda permitted it to "shed the long-standing image of a neutral arbiter and an interpreter of policy" and emerge "as an active participant in making policy."[432]

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426. Not all Supreme Court cases, of course, involve constitutional questions, although in recent years approximately one-half do. See Seth F. Kreimer, Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s, 5 Wm. & Mary Bill Rts. J. 427, 434 (1997).

427. See The Federalist No. 78, at 227 (Alexander Hamilton) (R.P. Fairfield ed., 1981).

428. Indeed, as public choice scholarship emphasizes, the power to set the agenda for a group decision is an enormous power. See, e.g., Daniel A. Farber & Philip P. Frickey, Law and Public Choice 40 (1991) (describing ability of agenda setters to control group decisions); cf. Evan H. Caminker, Sincere and Strategic Voting Norms on Multimember Courts, 97 Mich. L. Rev. 2297, 2355 n.163 (1999) (noting the "injunction that courts, unlike legislatures, should not set their own agenda"); id. at 2357 ("Unlike legislatures, [courts] do not set their own agenda as to when they issue rules governing what substantive issues.").

429. Provine, supra note 11, at 2.

430. O'Brien, supra note 8, at 247.

431. Jan Palmer, An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions, 39 Pub. Choice 387, 387 (1982); see also Provine, supra note 11, at 177 ("Case selection, in short, is an important aspect of the Supreme Court's institutional power."). For example, when the Court decided to overrule Betts v. Brady, 316 U.S. 455 (1942), it endeavored to select a case that would lend its decision maximum force and palatability, ultimately using Gideon v. Wainwright, 372 U.S. 335 (1963), rather than Carnley v. Cochran, 369 U.S. 506 (1962) (granting relief under *Betts* to a petitioner convicted under Florida's Child Molester Act of incestuous sexual intercourse with his thirteen-year-old daughter). See Powe, supra note 392, at 381-83; Provine, supra note 11, at 65. For a narrative account of *Gideon,* see generally Anthony Lewis, Gideon's Trumpet (1964) (detailing story of case).

432. Pacelle, supra note 11, at 15.

> The power to decide what to decide ... enables the Court to set its own agenda.... Unlike any other court ... the Supreme Court, as its caseload changed and grew, got the power to pick which issues it would decide. The Court now functions like a roving commission, or legislative body, in responding to social forces.[433]

As Provine puts it:

> The Supreme Court's nearly unfettered discretion to set its own agenda ... is part of the foundation of its institutional strength. Court-controlled case selection permits the Court to sidestep or postpone politically damaging disputes. It helps the Court respond to changing litigation patterns, and it enhances the Court's image as an available forum.[434]

Perry writes:

> [M]y assumption, of course, is that the Court does in fact set its own agenda and that the only question is how. The `textbook' argument, however, asserts that the Court is a passive institution that can set its agenda in only the most limited sense. While it is true that a legitimate case or controversy must exist and be appealed, this requirement is not really much of a constraint if the Court does not want it to be. Virtually any issue the Court might wish to resolve is offered to it.... Moreover, if a case does not arise naturally, the justices often invite cases via their written opinions and by various other means.[435]

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433. O'Brien, supra note 8, at 191. See also id. at 248 ("The current Court's power to pick the cases it wants from a very large docket enables it to assume the role of a super legislature."); cf. Felix Frankfurter &James M. Landis, The Business of the Supreme Court at October Term, 1928, 43 Harv. L. Rev. 33, 56 (1929) [hereinafter Frankfurter & Landis, 1928 Term] ("The Court's essential role is to mediate between conflicting public policies in American life, as revealed by the complicated details presented from time to time for adjudication."); Frankfurter & Landis, 1929 Term, supra note 383, at 18. (noting that "Necessarily, the Court is too aloof from adequate contact with the stuff of common law cases to make it an apt tribunal for such causes," and that "[Its] role is that of high judicial statesmanship in the adjustment of controversies of a public nature to which our complicated federal society gives rise.").

434. Provine, supra note 11, at 72.

435. Perry, supra note 11, at 11. For this reason, the Court's negative power to deny certiorari effectively operates as affirmative agenda control. But cf. O'Brien, supra note 8, at 191 ("Like other courts, the Court must await issues brought by lawsuits."); Caminker, supra note 428, at 2357 n.168 (contending that the Supreme Court "lacks affirmative agenda control because it cannot create a vehicle for deciding a particular issue; it must await one"). A legislature that required all bills to be based on a citizen petition would hardly be constrained in setting its agenda: It is difficult to imagine any potential bill (with the possible exception of a bill that benefited no one except legislators) that some citizen would not be willing to seek in a petition, at least in response to a legislator's invitation.

Perry acknowledges, however, that courts take seriously legal doctrine in general, and jurisdictional doctrine in particular, and criticizes political scientists for myopically missing this point. See Perry, supra note 11, at 39-40. Similarly, Provine emphasizes that "the justices' perceptions of a judge's role and of the Supreme Court's role in our judicial system significantly limit the range of case-selection behavior that the justices might otherwise exhibit." Provine, supra note 11, at 6; cf., e.g., Glendon Schubert, Policy

Of course, many political scientists make similar assumptions about judicial decisions on the merits, seeming to take for granted that the 'Justices of the Supreme Court are policy entrepreneurs, who seek to fulfill their policy goals through [not only] their case selection policies [but also] their decisions on the merits of the issues."[436] Some legal scholars seem to share this view,[437] and few are so naive as to completely reject the point.[43]s Nevertheless, many legal scholars tend to believe that the rule of law is not chimerical and that it requires judges to be meaningfully constrained through (some variant or combination of) the original understanding of a controlling text, the existence of rules to guide decisionmaking, the obligation to elaborate reasons for decision, and basic requirements of substantive justice.[439]

In the land of certiorari, however, law provides precious little constraint on judicial action.[440] While Justice Van Devanter assured Congress in the hearings regarding the Judges' Bill that petitions were determined by recognized principles, he changed the subject rather than

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Without Law: An Extension of the Certiorari Game, 14 Stan. L. Rev. 284, 294-95 (1962) (treating certiorari as a game in which justices select cases in order to maximize their policy goals).

436. Pacelle, supra note 11, at 31; see also, e.g., Jerome J. Hanus, Denial of Certiorari and Supreme Court Policy-Making, 17 Am. U. L. Rev. 41, 52 (1967) (suggesting that the Court's pattern of denying petitions raising double jeopardy issues was "a means for protecting itself from too much criticism at any one time concerning its work in the area of criminal law"); cf. Howard Gillman & Cornell Clayton, Introduction, in The Supreme Court in American Politics: New Institutionalist Interpretations 4, 4 (Howard Gillman & Cornell Clayton eds., 1999) (explaining a more recent school of political scientists who reject the assumption "that judicial behavior is motivated primarily by the justices' policy preferences [but instead seek] to understand legal and judicial institutions as independent variables that both constitute and constrain judicial attitudes and motivations").

437. See, e.g., Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 825 (1983) (arguing that only a shared political culture constrains judges).

438. See, e.g., Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 423-26 (1985) (acknowledging that judges sometimes ignore clear language, but arguing that the failure of rules to always constrain judges does not mean that rules have no constraining effect, any more than the failure of stop signs to always constrain drivers means that stop signs have no constraining effect).

439. See, e.g., Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 10-24 (1997) (describing historicist, formalist, legal process, and substantive ideal type conceptions of the rule of law). It is, of course, hard to know for sure how many legal scholars believe that the law imposes meaningful constraints on judges. The difficulty is compounded because those who do not nevertheless use the tools trumpeted by those who do, but do so "ironically, knowing that the tools cannot perform as promised," and the irony may not always be so obvious. Stephen M. Feldman, The Supreme Court in a Postmodern World: A Flying Elephant, 84 Minn. L. Rev. 673, 677 (2000); see also id. at 704 (describing "the arched eyebrow of postmodern irony").

440. See Provine, supra note 11, at 175 ("Case selection approximates and even exceeds plenary decision making in the scope it provides for the exercise of unfettered judicial judgment."); cf. Thomas E. Baker, Siskel and Ebert at the Supreme Court, 87 Mich. L. Rev. 1472, 1494 (1989) (book review) ("I believe that the case selection process is, and should be, as much a political process as decisions on the merits.").

elaborate what those principles were.[441] Shortly after the passage of the Judges' Bill, the Court promulgated a new rule regarding certiorari, a legal text that might be thought to set forth those controlling principles. That rule begins:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered . . . .[442]

Although this rule has changed a bit over time, particularly in light of the *Erie* decision,[443] the basic thrust remains the same and the opening provision is nearly identical.[444] It is not only that the "rule" at best sets forth a broad set of standards, but, as it forthrightly proclaims, those standards are not "controlling" at all.

In short, except for specifying certain types of conflicts,[445] the Court has "essentially defined certworthiness tautologically; that is, that which

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441. See Gibbs, supra note 181, at 138 n.41.

442. The remainder of the rule provides:

> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
>
> (b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.
>
> (c) Where the Court of Appeals of the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court.

See Taft, jurisdiction, supra note 310, at 3 n.4 (quoting the rule).

443. Compare Revised Rules of the Supreme Court (1932), 268 U.S. 624 (providing that a circuit court decision on an important question of general law may trigger certiorari), with Revised Rules of the Supreme Court (1939), 306 U.S. 718 (deleting the clause related to "general law"), and Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that there "is no federal general common law").

444. The rule reads:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers ....

Sup. Ct. R. 10.

445. Conflict between circuits is probably the single most important factor in granting certiorari, see Perry, supra note 11, at 251, although, as the rule itself recognizes, the Court

makes a case important enough to be certworthy is a case that we consider to be important enough to be certworthy."[446] Although people might well be able to agree that a case presents an important issue of federal law without agreeing on how that issue should be resolved,[447] it is "difficult indeed to read the Court's own Rule 10 as anything other than an invitation ... to the making of `political choice (s)' about what is 'important' enough to demand the overt, highly visible intervention of the United States Supreme Court."[448] Certiorari, then, is difficult to reconcile with the formalist conception of the rule of law.[449]

Such an unconstraining rule imposes some costs on the Court, particularly by encouraging large numbers of petitions. Yet if the Court wanted to reduce the number of petitions filed, it could.

> The most effective method of reducing the number of cases filed with the Court that is wholly within the Court's power to effectuate would be the formulation and publication of detailed guidelines regarding the criteria for granting and denying re

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does not consider itself obligated to grant certiorari whenever a petition reveals such a conflict. See Stern & Gressman, supra note 3, at 167 ("A well-established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by the Supreme Court or some lower court whose judgment is final in the absence of Supreme Court review."); Sanford Levinson, Strategy, Jurisprudence, and Certiorari, 79 Va. L. Rev. 717, 737 (1993) (reviewing H.W. Perry, Deciding to Decide: Agenda Setting in the United States Supreme Court (1991)) (noting justice White's frequent dissents from denial of certiorari and suggesting that other justices "accept Justice White's perception that a conflict exists, but disagree with him that the Court has any strong duty to resolve all but the most `important' conflicts"); see also judicial Conference of the Second Judicial Circuit of the United States, 160 F.R.D. 287, 375 (1994) (comments by Justice Clarence Thomas) ("If you think that a petition should be granted, often you say there is a clean split. If you think it shouldn't be granted, you say you think there is tension. (Laughter)."); cf. 1924 Senate Hearings, supra note 167, at 29-30 (testimony by Justice Van Devanter that conflict, without more, leads to a grant of certiorari as a matter of course).

446. Perry, supra note 11, at 34; see also Provine, supra note 11, at 42 ("Those interested in decision criteria can only guess at why the court chooses most of the cases it does for decision on the merits.").

447. See Levinson, supra note 445, at 725 (noting Perry's argument that a determination that an issue is important is "independent of any views as to what should be the proper outcome"). Thus I do not mean to suggest that most votes on certiorari are based on strategic calculations about the likelihood of winning on the merits if the Court grants review. As Levinson has noted, Perry's book makes it "impossible for anyone to proffer a model of strategic, instrumentally result-oriented decisionmaking as the dominant explanation of certiorari grants." Id. at 726.

448. Id. at 736; see also Blumstein, supra note 365, at 907 (noting that Judges' Bill "transformed a very substantial portion of the Court's work into outright political decisionmaking").

449. See Fallon, supra note 439, at 28-30 (describing formalist ideal-typical conception of the rule of law as one in which decisionmaking "should, to the extent possible, be cast in the form of rules"); see also Levinson, supra note 445, at 736 (wondering how Justice Scalia can implement his emphasis on rules in deciding whether to grant certiorari).

> view. There are no criteria at present, other than the fatuous generalities recited in the Court's rules and opinions.[450]

But from Taft on down, the justices have steadfastly refused to promulgate rules that might constrain their discretion.[451] "One can be assured that the ambiguity of Rule 10 is not some unfortunate oversight by the justices. They have intentionally enunciated murky criteria."[452]

The lack of a constraining text might not be important if there were a body of constraining case law. But there is none. Indeed, in a sustained defense of judicial discretion in matters of jurisdiction, David Shapiro emphasizes that what he defends is not an ad hoc exercise of will (or even Bickelian "prudence"), but instead "principled discretion."[453] Such principled discretion requires "that criteria drawn from the relevant statutory or constitutional grant of jurisdiction or from the tradition within which the grant arose guide the choices to be made in the course of defining and exercising that jurisdiction."[454] Moreover, it requires that these criteria be "capable of being articulated and openly applied by the courts, evaluated by critics of the courts' work, and reviewed by the legislative branch."[455]

Shapiro argues that such principled discretion is compatible with "the power of judicial review upheld in *Marbury"* because it "carries with it an obligation of reasoned and articulated decision, and ... can therefore exist within a regime of law."[456] Significantly, Shapiro never links these requirements with certiorari, which, he notes, is an example of "virtually absolute" discretion.[457]

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450. Casper & Posner, supra note 364, at 116.

451. See Letter from William H. Taft to Willis Van Devanter (Feb. 4, 1922), Taft Papers, supra note 78, at Reel 238 (specifically rejecting any suggestion that "the Court ought to define the rules which shall govern it in the issue of the writs of certiorari").

452. Perry, supra note 11, at 34; see also Provine, supra note 11, at 43 ("Because the Court has long had the means available to reduce the influx of cases, the logical conclusion is that the Court intentionally subjects itself to the widest possible range of petitions."); Richard L. Revesz & Pamela S. Karlan, Nonmajority Rules and the Supreme Court, 136 U. Pa. L. Rev. 1067, 1080 (1988) ("The discretion of an individual justice in voting on petitions for certiorari is narrowed neither by statute nor by Court rule .... And, the Court has done nothing to cabin significantly the discretion accorded it.").

453. Shapiro, supra note 392, at 578; cf., e.g., Redish, supra note 423, at 47-74 (arguing against the legitimacy of judicial discretion in matters of jurisdiction and particularly criticizing abstention doctrines).

454. Shapiro, supra note 392, at 578.

455. Id.; see also id. at 589 (stating that reasoned discretion in matters of jurisdiction calls for "articulated reasoning," "careful elaboration of . . . decisions," and "continued oversight by the legislative branch").

456. Id. at 579.

457. Id. at 575-76; see also id. at 578 n.215 (criticizing Bickel's argument that Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), should have been dismissed on ripeness grounds in order to avoid legitimating censorship, observing that "[e]ven though the legitimation argument might be a basis for denying certiorari, its relationship to the ripeness argument is too remote to support an exercise of reasoned discretion on that ground"); cf. Redish, supra note 423, at 98 (criticizing Bickel's "passive virtue" view of

Although commentators early on called for the Court to explain briefly its reasons for denying certiorari,[458] the Court has not obliged. While this refusal to explain "gives the justices greater flexibility in agenda setting,"[459] it makes certiorari difficult to reconcile with the legal process conception of the rule of law .[460] Indeed, Alexander Bickel

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standing while noting that "[u]nder its discretionary certiorari power . . . the Supreme Court can easily avoid the dangers he feared, simply by denying the application for the writ").

458. See Frank D. Moore, Right of Review by Certiorari to the Supreme Court, 17 Geo. LJ. 307, 308 (1929).

459. O'Brien, supra note 8, at 242; see also Stearns, supra note 414, at 1350 n.123 (noting that "the certiorari process is, not surprisingly, more political than is the process of deciding the merits of particular cases because, unlike case decisions, justices rarely publish their reasons for granting or denying certiorari petitions, and therefore do not feel bound by prior votes on certiorari petitions"); cf. Anastasoff v. United States, No. 993917EM, 2000 '"TL 1182813, at *1 (8th Cir. Aug. 22, 2000) (holding that the duty to follow precedent is inherent in the judicial power and that a court rule that frees a court from this obligation violates Article III). But see Michael Stokes Paulsen, Abrogating Stare Decisis by Statutes May Congress Remove the Precedential Effect of *Roe* and *Casey?,* 109 Yale LJ. 1535, 1537-38 (2000) (arguing that Congress has the power to alter the law of stare decisis and free courts from being bound by precedent).

460. See Fallon, supra note 439, at 30-33 (describing legal process ideal-typical conception of the rule of law as "maintain[ing] that a reasoned connection between recognized legal norms and sources of authority and the outcome in particular cases often will satisfy the requirements of the Rule of Law, even if the result is not determined by a clear rule or an original historical understanding"). Fallon points to certiorari as a "seemingly settled understanding[ ]" to illustrate his claim that "reasoned elaboration of the grounds for decision" is not always "necessary to the Rule of Law." Id. at 32. Reasoned elaboration is certainly not required by the rule of law where rule of law concerns are met by the existence of a clear rule. See id. at 52 (suggesting that the legal process conception of the rule of law is most significant "in the absence of reasonably clear, controlling, preexisting rules, or an authoritative original understanding"). The difficulty with certiorari, in terms of the rule of law, is that it rests on *neither* clear rules *nor* reasoned elaboration. (Fallon also suggests that certiorari is akin to jury trial in that "procedural formalities ... seem designed to ensure reasoned, deliberative decisionmaking" in both id. at 51 n.246. The requirement of unanimity or near-unanimity may well promote reasoned, deliberative decisionmaking, but modern certiorari practice hardly seems to encourage or involve deliberation.) And although certiorari is "seemingly settled," the whole point of this Article, of course, is precisely to attempt to "unsettle" those views.

Cass Sunstein is, in important respects, an intellectual descendent of Bickel. See Sunstein, supra note 423, at 8 n.8 (noting obvious connections between Sunstein's argument for decisional minimalism and Bickel's approach, while noting some differences as well). Sunstein describes denials of certiorari as "reasonless" and "entirely rule-free and untheorized, id. at 22, and simultaneously applauds justice Breyer's concurring opinion in BMW v. Gore, 517 U.S. 559, 586 (1996), for treating "unconstrained discretion" as a "violation of the rule of law," id. at 81-82. He does not, however, turn the latter against the former.

Nor does the historicist ideal type serve to reconcile certiorari with the rule of law. See Fallon, supra note 439, at 11-14 (describing the historicist ideal type as "rule by norms laid down by legitimate lawmaking authorities prior to their application to particular cases"). With the exception of the rule of four, the Supreme Court no longer follows the approaches to certiorari described in the hearings on the Judges' Bill. See Stevens, supra note 16, at 13-14. Finally, it is hard to see how certiorari might be justified by the

pointed to certiorari as the clearest example of techniques that "cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled." [461]

It has also been suggested that if "all petitions [were] channeled through experienced Supreme Court lawyers, the inadequacies of [the rule] would be less apparent. Assuming the Court is fairly consistent in its choices, much of what the rule lacks in specificity would be compensated for by the experience of the Supreme Court bar."[462] But the Court has not acted to impose any meaningful limits on membership in its bar: Essentially anyone admitted to the bar of any state for three years (and who pays a modest fee) is admitted.[463] The reason is simple:

> [T]he Court profits by having a large pool of cases from which to make its selections. Were the bar sufficiently organized and capable of limiting itself to the presentation of the few hundred cases each term which are given serious consideration by the Court, the justices themselves would soon lose the essence of the discretionary power they now possess.[464]

Perhaps the most graphic illustration of how certiorari frequently operates in the area of will and not law is the common practice of defensive denials. In a defensive denial, a justice votes to deny certiorari-not due to the unimportance of the issue involved-but due to disapproval of the

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substantive ideal type of the rule of law, for it is hard to see anything in certiorari practice that resembles "a morally authoritative guide to human conduct." Fallon, supra note 439, at 21 (describing the substantive ideal type). These difficulties may help to explain, however, the persistence of the rule of four.

461. Bickel, supra note 411, at 132 (noting that this is "avowedly true at least of certiorari"); see Stern & Gressman, supra note 3, at 166 ("Certiorari is a discretionary jurisdiction, one that can be invoked or withheld for any reason that the Court sees fit."). The most that even Gerald Gunther's scathing critique of Bickel's passive virtues could muster in this regard was that certiorari is "not ... wholly without standards." Gunther, supra note 423, at 13; cf. Wechsler, Appellate jurisdiction, supra note 391, at 10 (noting that the Court has by rule defined neutral standards for the exercise of its certiorari discretion but calling not only for the maintenance, improvement, and faithful application of these standards, but also for the amendment of the governing statutes "to play a larger part in the delineation of the causes that make rightful call upon the time and energy of the Supreme Court").

462. Provine, supra note 11, at 42; see also Freund Report, supra note 388, at 608-09 (recommending further study of the possibility of creating a specialized Supreme Court bar).

463. See Sup. Ct. R. 5. There is not even a requirement of familiarity with the Supreme Court's Rules. Cf. 3d Cir. R. 46.1 (a) (requiring familiarity with Federal Rules of Civil Procedure, Criminal Procedure, Appellate Procedure, as well as the Local Appellate Rules and Internal Operating Procedures).

464. Gressman, Much Ado, supra note 9, at 765.

result the Court is expected to reach on the merits.[465] Remarkably, "[m]ost justices view defensive denials as an acceptable strategy."[466]

C. Certiorari as Administrative Power

One possible response that defenders of current certiorari practice might make is that the only issue being decided on a certiorari petition is which court will have the last word in a case. On this view, the judiciary as a whole must decide the case and, in so doing, exercise judgment in accordance with the rule of law rather than will. So understood, the Supreme Court's power to choose which cases to decide and which to leave for final adjudication by other courts is better viewed as a species of administrative power rather than adjudicative power.[467] The Judges' Bill does share kinship with the Rules Enabling Act, and was born in an era of considerable faith in the notion of neutral expertise in general and neutral expertise regarding the establishment of judicial procedure in particular.[468]

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465. See Perry, supra note 11, at 198-207 (describing defensive denials and reporting that all five current Justices interviewed "admitted that defensive denials occur"); see also William O. Douglas, The Court Years: 1939-1975, at 94-95 (1980) (noting that decisions to defensively vote to deny certiorari are "often made at Conference, and everyone who has been on the Court has succumbed to that influence," yet noting that they can be unwise if the future Court is even less hospitable); Provine, supra note 11, at 126 (discussing defensive denials).

466. Perry, supra note 11, at 207; see also id. at 198-207 (documenting strategic use of defensive denials by various justices).

467. See, e.g., Bice, supra note 381, at 392 (attempting to reconcile limited grants of certiorari with judicial review by limiting the *Marbury* model to trial courts and viewing the "essential function of appellate courts" as reviewing "the work of trial courts to correct error and to provide uniformity of decision"); Hartnett, supra note 412, at 141 n.112 (noting that certiorari practice "resembles administration or management more than adjudication"); Wechsler, Neutral Principles, supra note 392, at 9 (noting that "[t]he system rests upon the power that the Constitution vests in Congress to make exceptions to and regulate the Court's appellate jurisdiction" and that "it is addressed not to the measure of judicial duty in adjudication of a case but rather to the right to a determination by the highest as distinguished from the lower courts"). As early as 1930, Frankfurter and Landis noted that the Judges' Bill "widened the area of administrative discretion and enlarged the part inevitably played by individuals." Frankfurter & Landis, 1929 Term, supra note 383, at 1.

468. See, e.g., Ross, supra note 73, at 106-07 (noting that "[e]fforts toward judicial 'education' and the introduction of scientific expertise into the judicial process were quintessentially progressive. They reflected the progressives' faith that humanity was capable of improving itself through rational and scientific means . . . .").

Professor James Pfander's recent argument that the Constitution requires that the Supreme Court have the power to act as hierarchical supervisor of the inferior federal courts, see Pfander, supra note 19, at 1436, appears to project the assumptions of the progressive era into the constitution. But see Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789, at 5-6, 72, 78-79 (1990) (demonstrating the nonhierarchical nature of judiciaries at the founding).

While a full response to Pfander's interesting argument is beyond the scope of this Article, I note two additional difficulties with it. First, Pfander relies heavily on the history of the prerogative writs of mandamus, prohibition, and habeas corpus, but does not

This approach is best represented by two former Supreme Court clerks, Samuel Estreicher and John Sexton, who conducted a detailed legal study of the workings of the certiorari process and advocated treating
the Supreme Court as the "manager of a system of courts."[469] They urged viewing the Court as a "wise manager" that should "delegate[ ] responsibilities to subordinates and, absent an indication that something is awry, accord[ ] their decisions a presumption of validity."[470] They acknowl

adequately explain how such prerogatives of the King and the King's judges became attached, as a matter of constitutional compulsion, to a republican judiciary of limited jurisdiction. See generally, de Smith, supra note 23, passim (discussing the evolution of prerogative writs in England); Jenks, supra note 23, passim (tracing the history of the prerogative writs in England). The Constitution explicitly protects the one prerogative writ that guards individual liberty. See U.S. Const. art. 1, § 9, cl. 2 ("The [p]rivilege of the [w]rit of [h]abeas [c]orpus shall not be suspended . . . ."). It does not, however, explicitly protect other prerogative writs nor assign their control to either the executive or the judiciary. Instead, it gives to Congress both the power to make regulations and exceptions to the Supreme Court's appellate jurisdiction, see U.S. Const. art. 111, § 2, cl. 2; cf. Wechsler, Neutral Principles, supra note 392, at 10 (noting proposals in the 1940s to amend the Constitution to shift the regulations and exceptions power from Congress to the Court), and the power to make all laws necessary and proper to carry into effect the judicial power. See U.S. Const. art. 1, § 8, cl. 18; see, e.g., Dickerson v. United States, 120 S. Ct. 2326, 2332 (2000) (noting that Supreme Court's supervisory power over inferior federal courts is subject to ultimate congressional authority). Second, even if Pfander is correct that this history supports the idea of a constitutionally-protected supervisory power, it is difficult to see how the history of these writs requires any broader power than a power to ensure that inferior courts do not ignore their jurisdictional limitations and obligations. Significantly, Pfander does not rely on the history of the prerogative writ of certiorari, for he acknowledges that "Congress refrained from conferring any freestanding powers to issue writs of certiorari . . . in the judiciary Act of 1789" and voices no constitutional objection. Pfander, supra note 19, at 1510. And nothing in the legislative history of the 1891, 1914, 1916, or 1925 Acts suggests that anyone at any of these times thought that Congress was constitutionally required to confer such a power or to give the Supreme Court discretion to control its docket.

469. Samuel Estreicher &John Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681, 717 (1984) [hereinafter Estreicher & Sexton, Managerial Theory]. (As a student at New York University School of Law, I served as a research assistant to Professor Sexton in connection with this Article.) A revised version of this Article was published in a book designed to be "more accessible to the non-lawyer." Estreicher & Sexton, Redefining, supra note 11, at 4. Estreicher and Sexton believe that this transformation to a managerial role "was arguably codified" by the Judges' Bill. Estreicher & Sexton, Managerial Theory, supra, at 717 n.142; cf. David E. Engdahl, What's In a Name? The Constitutionality of Multiple "Supreme" Courts, 66 Ind. L J. 457, 503-04 (1991) (noting that "the Supreme Court's hierarchical primacy in a pyramided judicial structure"-a design different from the one "with which our federal history began" and "by no means what the text of the Constitution requires"-has enabled the Court to "accrete enormous political power in its hands").

470. Estreicher & Sexton, Managerial Theory, supra note 469, at 718; see also Levinson, supra note 445, at 731 & n.75 (suggesting that what Perry calls legal and jurisprudential may illuminate the bureaucratic nature of the court and that the Supreme Court, "at least at the level of decisions on certiorari, is better conceived as a bureaucratic organization ... than as anything that might plausibly be described as a truly deliberative body"); cf. Stearns, supra note 414, at 1352 (contending that the Supreme Court's certiorari jurisdiction permits the Court to avoid path manipulation by litigants).

edged that the Court's rule governing certiorari is "hopelessly indeterminate and unilluminating,"[471] and suggested detailed alternative criteria[472] that could supplant "the ever-present tendency of the justices to conceive of the case selection process in political terms."[473] Making the analogy to administrative law quite explicit, they even suggested that the Court might emulate "the Administrative Procedure Act's rulemaking procedures [by] disseminat[ing its criteria] throughout the legal community."[474]

There is a fundamental difficulty with viewing certiorari as administrative power: The Supreme Court has certiorari jurisdiction over both the state courts and the inferior federal courts. Yet, it is difficult to see any basis for the Supreme Court to claim administrative power over state courts. As the Court explained earlier this year, "This Court has supervisory authority over the federal courts," but it "is beyond dispute that we do not hold a supervisory power over the courts of the several States."[475] Put slightly differently, when administering its certiorari jurisdiction over inferior federal courts, the Supreme Court could be understood to be allocating cases among the members of the federal judiciary who together exercise the judicial power of the United States, in a way roughly analogous to the way the judicial panel on multidistrict litigation allocates cases for pretrial proceedings to various district courts and judges ,[476] or even more roughly, the way a multimember court that does not always sit en banc allocates cases among its judges.[477] When the Supreme Court administers certiorari jurisdiction over state courts, however, it is determining whether the judicial power of the United States shall be called into play at all.

Even as limited to inferior federal courts (or assuming that the objections to the Supreme Court exercising administrative authority over state courts were overcome), there remains another significant difficulty with viewing certiorari as administrative power: Faith in such apolitical management by experts has been deeply shaken, not only in administrative law generally, but in procedural law in particular.[478] Debates over the

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471. Estreicher & Sexton, Managerial Theory, supra note 469, at 790. .

472. See id. at 720-37.

473. Id. at 791.

474 Id. at 800.

475. Dickerson v. United States, 120 S. Ct. 2326, 2332-33 (2000).

476. See 28 U.S.C. § 1407 (1999).

477. See, e.g., D.N J. Local Civ. R. 40.1 (describing the allocation and assignment of cases among district judges). Even here, there are powerful reasons to have rules governing the allocation rather than leaving it to the exercise of unfettered discretion. See J. Robert Brown, Jr. & Allison Herren Lee, Neutral Assignment of judges at the Court of Appeals, 78 Tex. L. Rev. 1037, 1066-1069 (2000).

478. See Post, Achievements, supra note 73, at 61 ("As a good child of the Progressive era, Taft seemingly regarded judicial reform as purely technical and apolitical."); id. at 68 (noting that "[i]n our own fallen world of post-Progressive disillusion," "Chief justices after Taft can no longer share his naive Progressive faith in the neutrality of disinterested administration"). See generally Richard B. Stewart, The Reformation of American

Federal Rules of Civil Procedure reflect this loss of faith, with the rulemaking process seen less and less as something to be left in the hands of neutral experts in the `just, speedy, and inexpensive" decision of cases, but rather an arena for battle over the substantive results of cases.[479] It is hardly surprising in this environment that the Supreme Court has not heeded Estreicher and Sexton's call for clearer and more detailed standards governing certiorari: Not only would any such standards tend to reduce the Court's agenda-setting power, but also the debate over the content of those standards would itself likely be highly political. In any event, it has become far more difficult to justify judicial control over the judicial agenda on the basis of such neutral administrative expertise.

There is a final reason the Court might be reluctant to heed Estreicher and Sexton's advice-a reason that Estreicher and Sexton themselves note:

Administrative Law, 88 Harv. L. Rev. 1669, 1669 (1975) (arguing that "American administrative law is undergoing a fundamental transformation that calls into question its appropriate role in our legal system"); Peter L. Strauss, From Expertise to Politics: The Transformation of American Rulemaking, 31 Wake Forest L. Rev. 745, 766 (1996) (noting that the last seven years have "been characterized by continued growth in political control mechanisms over rulemaking and debate over the virtues of judicial review"). The move in administrative law from reliance on expertise to reliance on a participatory process may be mildly reflected in the Supreme Court's amicus practice. See, e.g., South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 171 (1999) (refusing to consider respondent's request to abandon negative commerce clause jurisprudence, proferred as an alternative grounds for affirming state court judgment, because "the State did not make clear it intended to make this argument until it filed its brief on the merits" and explaining that the Court "would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari . . . thereby assuring adequate preparation time for those likely affected and wishing to participate"); see also Gregory A. Caldeira & John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 1109, 1122 (1988) (relying on data regarding amicus briefs to argue that the Court "is quite responsive to the demands and preferences of organized interests when choosing its plenary docket");Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. Pa. L. Rev. 743, 761-65 (2000) (noting that the first Supreme Court rule regarding amicus briefs was in 1939, that in the 1940s and 1950s they were discouraged, but that beginning in the late 1950s and early 1960s the Court began to move toward its current "open door" policy of accepting virtually all amicus briefs).

479. See, e.g., Robert G. Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy, 87 Geo. LJ. 887, 889 (1999) (noting that "court rulemaking has moved toward a legislative model and away from the traditional model based on reasoned deliberation and expertise. Because procedure has substantive effects and involves controversial value choices, critics argue, rulemaking is `political`.....); Stephen B. Burbank, The Costs of Complexity, 85 Mich. L. Rev. 1463, 1473 (1987) (reviewing Richard L. Marcus & Edward F. Sherman, Complex Litigation: Cases and Materials on Advanced Civil Procedure (1985)) (arguing that "the perception that procedural rules are not neutral makes it important to try to identify the impact of procedural rules and to be candid in describing [both] that impact . . . . [and] the purposes of procedural rules" and that "consideration should be given to the political legitimacy of the process by which they are formulated or applied and of the actors who are formulating or applying them"). The quotation in the text is from Fed. R. Civ. P. 1.

> One possible criticism is that our managerial conception of the Court's responsibilities is fundamentally at odds with the view that courts are obligatory decision makers who do not "manage" dockets but render justice in all cases properly before them, so that open avowal of the Court's managerial discretion is likely to exacerbate doubts about the legitimacy of its judicial review function.[480]

Estreicher and Sexton reject this criticism and think it "misguided," noting that the Supreme Court "ceased long ago to be a court of mandatory jurisdiction."[481] Their observation is true, but it simply sidesteps the conceptual tension between certiorari practice and judicial review.

In their book, Estreicher and Sexton added a section aptly called "Recasting the *Marbury v. Madison* Model."[482] There, while purporting to reconcile their managerial approach with the *Marbury v. Madison* model, they instead criticized "the claimed linkage between the *Marbmy v. Madison* model and the insistence on [the] universal availability" of the Supreme Court.[483] They are correct to sever any asserted "connection between legitimacy and universal availability. [484] *Marbury* did not assert the universal availability of the Supreme Court; indeed, its holding was precisely to the contrary.[48, *Marbury* did, however, rest the legitimacy of judicial review on a court's obligation to decide a case properly before it. Estreicher and Sexton fail to wrestle with that genuine *Marbury v. Madison* model, contenting themselves with shredding the papier mache model they recasted.[486] The Supreme Court, in contrast, apparently prefers to leave the classic *Marbury* model in place despite its tension with certiorari practice.

VI. THE IMPORTANCE OF CERTIORARI

In questioning certiorari, I do not doubt its importance. Indeed, the power to select cases–like other doctrinal devices that reduce the impact of particular decisions, such as non-retroactivity and qualified immunity–makes it easier for the Supreme Court to change its interpretation of the Constitution. [487] The power to refuse to hear cases enables the

480. Estreicher & Sexton, Managerial Theory, supra note 469, at 740; see also Post, Achievements, supra note 73, at 68 (noting that "executive administration" of the judiciary "contains important elements that are essentially political, and that therefore stand in tension with American ideals of judicial nonpartisanship and with the American institution of judicial review").

481. Estreicher & Sexton, Managerial Theory, supra note 469, at 740.

482. Estreicher & Sexton, Redefining, supra note 11, at 129-30.

483. Id. at 130.

484. Id.

485. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-180 (1803) (holding that the Supreme Court lacked jurisdiction).

486. See Baker, supra note 440, at 1474 ("Their straw person is the age-old myth that wronged litigants may take their cases `all the way to the Supreme Court.'").

487. See Harper v. Virginia Dep't. of Taxation, 509 U.S. 86, 105 (1993) (Scalia, J., concurring) (arguing that "[plrospective decisionmaking is the handmaid of judicial

Court to bide its time and "to escape, at least temporarily, from the logical implications of an initial unpopular on-the-merits decision."[488] It also enables the Court to intervene selectively, without committing itself to policing a new area it brings under its supervision. As a result, then, the procedural license given by certiorari has had a profound role in shaping our substantive constitutional law. 489

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activism" and was promoted as a method of judicial lawmaking); Powe, supra note 392, at 426-27 (observing that non retroactivity doctrine was produced by an odd coalition of justices who favored it because "it freed them to do good" plus justices who sought "to minimize the damage" caused by decisions they thought wrong, and labeling the latter "unwitting facilitators" of the former); John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale LJ. 87, 98 (1999) (noting that "doctrines that deny full individual remediation reduce the cost of innovation, thereby advancing the growth and development of constitutional law").

In commenting on an earlier draft of this Article, John Jeffries suggested that repeated denials of certiorari can also be used by the Supreme Court to suggest to the lower courts that it is no longer interested in vigorously policing compliance with existing precedent, thereby encouraging them to experiment with departures from that precedent. He points to the repeated denials of certiorari in the 1970s in cases involving the more or less open flouting of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), a pair of cases that were ultimately overruled in Illinois v. Gates, 462 U.S. 213, 238 (1983).

488. Provine, supra note 11, at 66. This function stands in marked contrast to Taft's statement in Congress:

> We are confident that in neither case would a constitutional question of any real merit or doubt escape our review by the method of certiorari. The restrictions are put on merely to keep out constitutional questions that have really no weight or have been fully decided in previous cases and that have only been projected into the case for the purpose of securing delay or a reconsideration of questions the decision of which has already become settled law.

66 Gong. Rec. 2922 (1925) (reproducing letter from Taft to Copeland of Jan. 16, 1925).

Of course, at any given point in time, the Supreme Court might lack a plan for its agenda, in which case it might "confine its case selection to those petitions demonstrating clear lower court conflict that had spread to a number of circuits," thus reducing the Court's "policymaking capacity." Pacelle, supra note 11, at 202-03 (suggesting that this may be at work in the Rehnquist Court); cf. John C. Jeffries, Jr. & Daryl L. Levinson, The Non-Retrogression Principle in Constitutional Law, 86 Cal. L. Rev. 1211, 1249 (1998) (suggesting that the Rehnquist Court "is habituated to the exercise of power but has no clear agenda" and therefore "invalidates laws for internal inconsistency and legislative sloppiness, for reasons that border on the trivial, . . . and ... for reasons that the Court is unwilling or unable to give").

489. The discretion provided by the Judges' Bill of 1925 also played a role in the battle over Roosevelt's Court-packing plan. In proposing his plan in February of 1937, President Roosevelt claimed that "the personnel of the Federal judiciary is insufficient to meet the business before them," producing delay and expense. Message From the President of the United States Transmitting a Recommendation to Reorganize the Judicial Branch of the Federal Government, reprinted as Appendix A to S. Rep. 75-711, at 25 (1937). Chief Justice Hughes's famous responsive letter stated at the outset that the "Supreme Court is fully abreast of its work," that "[t]here is no congestion of cases upon our calendar," and that the Court has "been able for several terms to adjourn after disposing of all the cases which are ready to be heard." Letter from Charles Evans Hughes to Burton K. Wheeler, Mar. 21, 1937, reprinted as Appendix C to S. Rep. No. 75-711, at 38. This state of affairs was made possible by the Judges' Bill. The Senate Report rejecting

Consider, for example, the incorporation doctrine. The Supreme Court launched the idea that some of the protections of the Bill of Rights were "incorporated" in the Fourteenth Amendment's due process clause in 1925, four months after the Judges' Bill.[490] Perhaps that was purely coincidental. Perhaps the First Amendment right to freedom of speech would have been applied to the states regardless of whether Congress gave the Court discretionary control over the bulk of its docket.[491]

But would the Supreme Court have incorporated the Fourth, Fifth, Sixth, and Eighth Amendments if it were obliged to review every state judgment that upheld a criminal conviction or sentence over a defendant's objection based on one of these Amendments? And if it did, is it remotely possible that it would have spun out such elaborate doctrinal requirements if it were required to apply and enforce them in every such case? Reflect for a moment on what that would have required (and would still require) from the Court: deciding every losing claim that evidence should have been excluded because obtained in violation of the Fourth Amendment,[492] every losing *Miranda*[49]s claim, every losing *Massiah*[494] claim, every losing *Strickland*[495] claim, every losing *Lockett*[496] claim-and much, much more.[497]

Roosevelt's plan relied in part on the letter from Hughes, S. Rep. No. 75-711, at 6, although just how important a role the letter played is debatable. See Richard D. Friedman, Chief Justice Hughes's Letter on Court-Packing, 1997J. Sup. Ct. Hist. 76, 83 (suggesting that a "myth grew up" that the letter was of crucial importance).

490. Compare the Feb. 13, 1925 passage of the Judges' Bill with the Jun. 8, 1925 announcement of the decision in Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming First Amendment right of free speech incorporated in due process).

491. See Michael J. Klarman, Rethinking the History of American Freedom, 42 Wm. & Mary L. Rev. 271 (2000) (reviewing Eric Foner, The Story of American Freedom (1998)) (attributing the popularity of freedom of speech in the 1930s to its connection with the labor movement).

492. See Mapp v. Ohio, 367 U.S. 643, 660 (1961) (applying exclusionary rule to the states). This would include, for example, every losing challenge to the sufficiency of a warrant, see, e.g., Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (establishing totality of circumstances test for validity of warrant) and every losing challenge to a stop and frisk, see, e.g., Terry v. Ohio, 392 U.S. 1, 16-20 (1968) (frisk acceptable when stop is justified and frisk "reasonably related to circumstances").

493. See Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (requiring police to give warnings to those in custody prior to interrogation).

494. See Massiah v. United States, 377 U.S. 201, 206 (1964) (forbidding use of postindictment statement elicited by government agents in the absence of counsel).

495. See Strickland v. Washington, 466 U.S. 668, 687-691 (1984) (setting forth standards for claims of ineffective assistance of counsel).

496. See Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (forbidding exclusion of virtually any evidence regarding the offense or defendant's character proferred as mitigating by the defendant regarding death penalty).

497. See, e.g., Batson v. Kentucky, 476 U.S. 79, 93-98 (1986) (forbidding race-based peremptory challenges by prosecutors); Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring disclosure of material exculpatory information). It is likewise inconceivable that the Court would have decided that due process requires a court to determine whether record evidence is sufficient to support a finding of guilt beyond a reasonable doubt, see

Scholars have noted that the Supreme Court used habeas to enlist the lower federal courts in enforcing the criminal procedure revolution on the states.[498] Scholars have also noted that the shift to broader federal habeas can be traced to, and justified by, the elimination of the right to Supreme Court review of state court judgments denying federal defenses.[499] It seems to me, however, that there is a current of causation running in the other direction as well: The Supreme Court's power to refuse to review state court judgments denying federal claims enabled the Court to intervene selectively and move the law in its preferred direction without subjecting itself to an onslaught of cases that it was required to decide.[500]

More generally, the Court's unbridled discretion to control its own docket, choosing not only which cases to decide, but also which "questions presented" to decide, appears to have contributed to a mindset that thinks of the Supreme Court more as sitting to resolve controversial questions than to decide cases. Cases tend to be thought of as "vehicles" for

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Jackson v. Virginia, 443 U.S. 307, 321 (1979) (sufficiency of evidence "cognizable in federal habeas corpus proceeding"), if it were the Court that had to review every state criminal case in which a defendant asserted that the state courts wrongly rejected his sufficiency argument. Cf. Hellman, supra note 13, at 435 n.83 (asking if the court would "be so enamored" of multifactor balancing tests and open-ended standards "if the justices themselves had to apply tests of that kind in numerous cases").

The doctrine of selective incorporation was also aided by the certiorari process in that the provisions of the Bill of Rights that the Court did not like "could be left out without the Court's ever having to justify their exclusion." Powe, supra note 392, at 415.

498. As Barry Friedman has explained:

> If the Supreme Court intended to invigorate the concept of due process, and if the Court's review capabilities were limited, the way to obtain a new set of views and gradually expand the body of criminal constitutional law was to draft habeas courts as `foot soldiers' in the due process revolution.

Barry Friedman, Pas *de Deux:* The Supreme Court and the Habeas Courts, 66 S. Cal. L. Rev. 2467, 2484 (1993); see also Powe, supra note 392, at 420 (noting the "dramatic changes in habeas corpus wrought by the Warren Court as the means of implementing its sweeping overhaul of police practices and criminal procedure") ; Barry Friedman, A Tale of Two Habeas, 73 Minn. L. Rev. 247, 273-77 (1988) (arguing that the Court "drafted habeas into service to provide the federal review of state criminal cases the Court could not supply").

499. See Liebman, supra note 277, at 2075-81 (arguing that the increased scope of habeas was a response to the decreased availability of as-of-right review of state court judgments in the Supreme Court); id at 2092 ("The moment Supreme Court review as of right was not meaningfully available ... following the Court's unofficial, then Congress' official, certiorarification of the Court's appellate docket, the Court reinvigorated habeas corpus review.").

500. I do not mean to suggest that such institutional capacity was a sufficient condition for the criminal procedure revolution. See, e.g., Powe, supra note 392, at 446 (linking the criminal procedure revolution to the War on Poverty); Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 62-66 (1996) (arguing that the Warren Court's dramatic changes in criminal procedure were a product of changing attitudes about race, poverty, and fascist methods of criminal prosecution.)

deciding controversial questions,[501] and some distinguished commentators suggest that the role of the Supreme Court is to authoritatively pronounce the law, with the limitation of the judicial power to "cases and controversies" simply a way to limit the occasions for those pronouncements.[502]

Perhaps surprisingly, one of the clearest judicial statements that the Supreme Court should be concerned with deciding controversial issues rather than live cases comes from Chief Justice Rehnquist. In *Honig v. Doe,* he argued that the Supreme Court should simply exempt itself from the mootness doctrine once it has granted certiorari.[503] The majority of the Court has never explicitly adopted Rehnquist's view, but it has come pretty close. For example, in its most recent nude dancing case, it concluded that the case was not moot even though the dancing establishment bringing the challenge to a local ordinance had been closed, its building had been sold to a real estate developer, and its seventy-two-year-old owner no longer had an interest in or intention to own or operate a nude dancing business.[504] Significantly, the Court relied in part on the

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501. See, e.g., Judicial Conference of the Second Judicial Circuit of the United States, 160 F.R.D. 287, 375 (1994) (comments by Justice Clarence Thomas) ("what we try to do is to pick those [cases] that are the best vehicles to decide a recurring, important issue"); Estreicher & Sexton, Managerial Theory, supra note 469, at 734 (describing a category of cases "presenting vehicles for advances in the development of federal law"); see also Jon A. Soderberg, The "Constitutional" Assault on the Virginia Military Institute, 53 Wash. & Lee L. Rev. 429, 454 (1996) (describing government's certiorari petition as asking the Court to "use the VMI case as a vehicle for declaring that actions that discriminate on the basis of sex should be subject to . . . strict ... scrutiny"); cf. Colorado v. Nunez, 465 U.S. 324, 328 (1984) (Stevens, J., concurring) ("[O]nce we agree that we lack jurisdiction, this case no more provides a vehicle for deciding the question . . . than if the petition for a writ of certiorari had never been filed.").

502. See, e.g., Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359,1376-1381 (1997) (defending judicial supremacy in constitutional interpretation based on view that role of Supreme Court is to settle authoritatively what is to be done); cf. Frederick Schauer, Giving Reasons, 47 Stan L. Rev. 633, 655 (1995) (describing ban on advisory opinions as a good strategic way to cabin the courts and prevent overreaching).

503. 484 U.S. 305, 329-330 (1988) (Rehnquist, CJ.; concurring). In arguing that the mootness doctrine is not constitutional in nature, Rehnquist relied on the "capable of repetition, yet evading review" exception, id. at 330-31, an exception that, unless confined to situations in which the repetition involves the same complaining party, reflects the same underlying view that the Supreme Court sits to resolve controversial issues rather than decide cases. See Gene R. Nichol, Jr., Moot Cases, Chief Justice Rehnquist, and the Supreme Court, 22 Conn. L. Rev. 703, 715 (1990) (arguing that Rehnquist's proposal is no different than existing mootness exceptions that already show "far more interest in the existence of an unresolved legal issue than in an actual lingering dispute between the litigants" and endorsing the proposal because it would ensure that "the rigors of the case or controversy requirement do not unnecessarily thwart the Court's performance as `ultimate arbiter' of the Constitution," citing the Court's extravagant assertion of judicial supremacy, Cooper v. Aaron, 358 U.S. 1, 17-18 (1958)).

504. See City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1390 (2000).

respondent's failure to raise the mootness issue before certiorari had been granted.[505]

What is not surprising is that those who believe that the Supreme Court should be the nation's moral leader and view the Court as "a primary instrument of constitutional amendment"[506] applaud its agenda-setting power. This applause was perhaps most audible in the reaction to the 1972 Freund Commission Report calling for a National Court of Appeals.[507] For example, in a remark more in keeping with Taft's original description of his goal than with Van Devanter's more politic argument to the Senate, Eugene Gressman claimed that "informed arbitrariness is at the very heart of the certiorari jurisdiction. The justices are supposed to be motivated to grant or deny review solely by their individual subjective notions of what is important or appropriate for review by the Court."[508] Under the Freund proposal, former Chief Justice Warren asserted, "Inevitably the capacity of the Supreme Court to maintain the Constitution as a living document ... would be jeopardized."[509]

As Warren saw it, the purpose of the Judges' Bill was "to permit the Court not only to achieve control of its docket but also to establish our

505. Id. at 1390; see also Peter W. Low & John C. Jeffries, Jr., Federal Courts and the Law of Federal-State Relations 27 (4th ed. Supp. 2000) (suggesting that Court in Pap's adopted Rehnquist's view in *Honig* without acknowledgment).

506. Frank R. Strong, The Time Has Come To Talk of Major Curtailment in the Supreme Court's jurisdiction, 48 N.C. L. Rev. 1, 14 (1969); see id. at 15 (noting a "growing acceptance of constitutional amendment by judicial interpretation"). Strong advocated that the Supreme Court be "reconstituted as the nations's constitutional court of last resort," with a new court to handle what he dubbed "ordinary judicial review." Id. at 31; cf. O'Brien, supra note 8, at 247-48 (noting that in the late 19th century less than 4% of its cases involved constitutional law, while by the late 20th century, nearly half did).

507. See Freund Report, supra note 388, at 590-95. For a description and evaluation of the Freund proposal, as well as other proposals that were made in its wake (such as Comm'n. on Revision of the Fed. Court Appellate Sys., Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195 (1975) (commonly known as the Hruska Report)), see Estreicher & Sexton, Managerial Theory, supra note 469, at 689-704. For present purposes, the details of the various proposals are of less concern than the vision of the Court held by the critics of those proposals.

508. Eugene Gressman, The National Court of Appeals: A Dissent, 59 A.B.A. J. 253, 255 (1973). Moreover, placing case selection "in the hands of lower court judges would tend to elevate and perpetuate their more conventional views of the law, thereby precluding much of the innovative and developmental aspects of Supreme Court litigation." Id. at 257. In 1964, Professor Gressman described the prior decade as the Court coming to "full flower as arbiter of constitutional and legal problems of national import." Gressman, Much Ado, supra note 9, at 744.

509. Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal, 59 A.B.A. J. 721, 727 (1973) (statement of justice Warren) [hereinafter Warren Attacks, Burger Defends]. Turning concerns about judicial propriety on their head, Warren criticized the Freund proposal, precisely because (unlike the Judges' Bill of 1925), it had not been prepared by the members of the Court. See id. at 726 (praising the Judges' Bill because it "emerged only after a long and careful study .... by a committee composed of Chief Justice Taft and Justices Van Devanter, McReynolds, and Sutherland" and criticizing the Freund commission as "seven well-meaning lawyers and law professors").

national priorities in constitutional and legal matters."[510] "Those standards cannot be captured in any rule or guideline that would be meaningful to an outside group of judges," because what matters are "the concerns and interests and philosophies of the Supreme Court justices."[511] The requisite "broad overlook and an innovative approach to the law and the Constitution . . . are acquired only by those who serve on the Supreme Court."[512] Rotating lower court judges (as proposed by the Freund Commission) would tend "to deny review of those decisions that fall into the traditional molds and that seem correctly decided in terms of precedent and settled law."[513] This would cut off the Supreme Court from cases in which "no one could anticipate that the justices would perceive in those cases the chance to advance the meaning and the application of some aspect of the Bill of Rights."[514]

Remarkably, some asserted that "only the Court itself can properly determine which cases it should hear ... to carry out its unique function."[515] As former Justice Goldberg put it, "The power to decide cases presupposes the power to determine what cases will be decided."[516] Paul Freund accurately replied, "Whence comes this asserted principle? Not, surely, from the constitution .... "[517] Indeed, at the time of the Judges' Bill in 1925, the Court's control over its docket was viewed as a "new dispensation" from Congress.[518]

While it is understandable that those who treat justices of the Supreme Court as the nation's moral leaders would endorse judicial review

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510. Id. at 728. See also Eugene Gressman, The Constitution v. The Freund Report, 41 Geo. Wash. L. Rev. 951, 959 (1973) (arguing that deciding petitions for certiorari "involve[s] the establishment of national priorities in constitutional and legal matters").

511. Warren Attacks, Burger Defends, supra note 509, at 728.

512 Id. at 728.

513 Id. at 728-29.

514. Id. at 729; cf. Hogge v. Johnson, 526 F.2d 833, 836 (4th Cir. 1975), cert. denied, 428 U.S. 913 (1976) (Clark, J., concurring) (noting that an "unquestioning application" of the rule that summary affirmances by the Supreme Court are binding "can lead to nothing but mischief and place an unnecessary restraining hand on the progress of federal constitutional adjudication").

515. Pusey, supra note 17, at 76. In his view, the Judges' Bill and the statute creating the judicial Conference "go a long way ... toward elevating the courts to their rightful place as a separate and quasi-independent branch of the government." Id.

516. Warren Attacks, Burger Defends, supra note 509, at 730 (quoting Arthur Goldberg, The Case Against a National Court of Appeals, Wash. Post, Jan. 6, 1973, at A-14). Justice Brennan noted his agreement with this statement by justice Goldberg. See
Brennan, supra note 393, at 484; cf. Leiman, supra note 120, at 978 ("An appellate court normally decides all cases which are properly brought before it; the judges do not make their own rules defining what they will and will not hear.").

517. Paul A. Freund, Why We Need the National Court of Appeals, 59 A.B.A. J. 247, 251 (1973); cf. Warren Attacks, Burger Defends, supra note 509, at 722 (statement of justice Burger) (defending absences of sitting judges from Freund Commission and noting
"I need not rely on that old cliche that `War is too important to be left to generals' to suggest that a searching and objective examination of the work of the Supreme Court need not necessarily include judges").

518. Frankfurter and Landis, Judiciary Act, supra note 370, at 1.

coupled with broad agenda-setting power, it is past time to frankly acknowledge that such views are nothing more than a call for mixed government, with one branch – the judiciary – representing the interests and views of the "better" class of society.[519]

CONCLUSION

Justice Brennan once stated that choosing cases is "second to none in importance. 11520 Indeed, the Supreme Court's power to set its agenda may be *more* important than what the Court decides on the merits. Recent scholarship has called into serious doubt the notion that the Supreme Court has been or can be the counter-majoritarian hero of some lawyers' dreams, suggesting instead that the Court lacks both the power and the inclination to deviate very far from prevailing elite opinion.[521] Yet, when one considers the impact of cases such as Prigg v. *Pennsylvania,*[522] *Dred Scott v. Sandford,*[523] *Brown v. Board of Education,*[524] Mi

519. John Hart Ely, The Apparent Inevitability of Mixed Government, 16 Const. Comment. 283, 290-91 (1999) (arguing that the "educated elite" should not be able to veto "the collective judgment of its ... fellow citizens"); see Michael J. Klarman, What's So Great About Constitutionalism?, 93 Nw. U. L. Rev. 145, 188-92 (1998) (presenting, despite its title, not so much an argument against constitutionalism but an argument against judicial review based on its bias in favor of the elite); see also, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (declining to overrule *Roe v. Wade* in part because "the thoughtful part of the Nation" might not accept it).

520. Brennan, supra note 393, at 477; see also Tidewater Oil Co. v. United States, 409 U.S. 151, 175 (1972) (Douglas, J., dissenting) ("The review or sifting of these petitions is in many respects the most important and, I think, the most interesting of all our functions."); Judicial Conference of the Second Judicial Circuit of the United States, 160 F.R.D. 287, 374 (1994) (comments of justice Clarence Thomas) ("I find [deciding certiorari petitions] to be a most important part of our work.").

521. See, e.g., Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 336-43 (1991) (showing that U.S. courts rarely produce significant social reform and at best only reinforce social reforms that originate in other government branches); see also Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7 (1994) (arguing that the decision in *Brown v. Board ofEducation* did not directly instigate social change; instead, it precipitated Southern white resistance, and the portrayal of this resistance on television roused Northern whites to demand change); cf. Powe, supra note 392, at 216 (suggesting that the members of the Warren Court were "men with power happily exercising it to promote the values of what were, at least during the 1960s, the dominant national elites"); Resnik, supra note 229, at 995 ("For those enamored with `The Federal Courts' because they assume that inherent in the charter of life-tenured judges is a commitment to guarding rights, it may well be time to leave behind that romance.").

522. 41 U.S. (16 Pet.) 539 (1842) (holding unconstitutional a state law against the use of self-help in recovering those claimed to be fugitive slaves).

523. 60 U.S. (19 How.) 393 (1857) (holding that free blacks whose ancestors were slaves are not citizens of the United States under the Constitution, and stating that a black slave who is taken to free territory does not become free, but remains the property of his owner).

524. 347 U.S. 483 (1954) (finding racial segregation in public schools unconstitutional).

randa v. Arizona,[525] *Furman v. Georgia,*[526] *Roe v. Wade,* 527 *Bowers v. Hardwick,*[528] and *Cruzan v. Missouri,*[529] it may be that the most significant impact of Supreme Court decisions is to increase the political salience of the issues decided-regardless of which way the Court decides the issues.[530]

For seventy-five of our more than two hundred years under the Constitution, we have had a Supreme Court with a far-ranging power to set its own agenda and thereby shape the nation's political agenda. On the seventy-fifth anniversary of the Judges' Bill of 1925, it is appropriate to reflect upon and question this important feature of our legal and political landscape.

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525. 384 U.S. 436 (1966) (ruling that a person taken into custody by the police must be informed of various rights).

526. 408 U.S. 238 (1972) (ruling that in some cases the imposition of the death penalty may constitute cruel and unusual punishment).

527. 410 U.S. 113, 153 (1973) (holding that the right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

528. 478 U.S. 186 (1986) (upholding the constitutionality of a Georgia statute that criminalizes sodomy); see also Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (holding that the Boy Scouts have a constitutional right to exclude an avowed homosexual and gay rights activist); Kate Zernike, Scouts' Successful Ban on Gays is Followed by Loss in Support, N.Y. Times, Aug. 29, 2000, at A1 (describing erosion of corporate and governmental support of the Boy Scouts since the *Dale* decision).

529. 497 U.S. 261 (1990) (finding that there is no constitutionally-protected fundamental right to die).

530. See, e.g., Rosenberg, supra note 521, at 341 ("While I have found no evidence that court decisions mobilize supporters of significant social reform, the data suggest that they may mobilize opponents."); Klarman, supra note 491, at 286-87 (noting that "[1]andmark Court decisions often seem to mobilize political opposition as effectively as they advance the cause of freedom that the Court has identified for constitutional protection"); Carol S. Steiker &Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 438 (1995) ("It is deeply ironic that the impulse to abolish and reform the death penalty has produced a body of law that contributes substantially to the stabilization and perpetuation of capital punishment as a social practice."); see also Michael McCann, How the Supreme Court Matters in American Politics: New Institutionalist Perspectives, *in* The Supreme Court in American Politics, supra note 436, at 63, 71 (noting that Court action "can at once elevate the salience of that issue in the public agenda, privilege some parties who have perceived interests in the issue, create new opportunities for such parties to mobilize around causes, and provide symbolic resources for those mobilization efforts in various venues"); id. at 71-73 (noting that Court rulings may facilitate or catalyze waves of public mobilization quite contrary to what the justices intend or expect); Sunstein, supra note 423, at 33 (noting that the Court "may not produce social reform even when it seeks to do so [but] may instead activate forces of opposition and demobilize the political actors that it favors"). I certainly do not mean to suggest that the Supreme Court controls the nation's agenda, but even if its intervention serves to mobilize political opposition, it plays a role in shaping that agenda. Cf. Rosenberg, supra note 521, at 111-16 (arguing that there is little evidence that *Brown* induced increased press coverage of civil rights issues); id. at 229-34 (finding no increase in press coverage of abortion after *Roe);* Levinson, supra note 445, at 721 & n.25 (reading Rosenberg as calling into doubt not only the ability of the Supreme Court to effect its desired social changes, but also its ability to "set an agenda for the nation").