CERTIORARI IN IMPORTANT CASES

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The Supreme Court has wide discretion to choose the cases it will decide. But how does the Court exercise this discretion? The Supreme Court's rules explain that it may hear any case "important" enough for it to decide. Unsurprisingly, commentators have criticized this standard as "hopelessly indeterminate" and "intentionally vague."

The Court, however, has said more about how it decides whether to grant review. We need simply to look to its merits opinions. These decisions sometimes offer a brief, informative description of the decision to grant review. These oft-overlooked statements may, in aggregate, be suggestive of trends in the Court's agenda-setting discretion.

This Article presents a text and data analysis of thousands of Supreme Court opinions describing the reason for granting review, collectively illuminating which cases are important enough to merit certiorari. This view into certiorari helps reveal which cases earn the Court's attention and how the Court's priorities change over time. This analysis finds, for example, that the Court's docket shifts in response to large events (e.g., depressions and wars) and to significant political developments (e.g., landmark legislation). And, perhaps more concerning, individual appointments also shape the Court's docket. The Court should thus better explain its decisions to grant review in the mode of a common law of certiorari. Doing so can improve the interbranch dialogue over judicial reform, offer better information to litigants, and instill greater confidence in our Supreme Court.

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INTRODUCTION

The Supreme Court has nearly unrestrained discretion to set its own agenda.[1] It could, if it wanted, grant review in only bankruptcy, patent, and tax cases.[2] Or it could focus on only Second Amendment challenges. Or it could choose to be a criminal court, summarily rejecting every petition for a writ of certiorari in a civil case.

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1. See, e.g., 28 U.S.C. § 1254(1) (2018) (explaining, simply, that federal cases "may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree"); id. § 1257(a) (providing a similar explanation for state cases presenting federal questions); see also Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 197 (1962) (describing the Court's unparalleled power over "whether, when, and how much to adjudicate").

2. But cf. Act of Mar. 3, 1891, Pub. L. No. 51-517, § 6, 26 Stat. 826, 828 (modifying the Court's mandatory appellate jurisdiction to exclude revenue and bankruptcy cases, among others, making such cases reviewable only by writ of certiorari).

In practice, the Court's approach to docket selection is not so extreme. It is widely understood that the dominant standard for certiorari is conflict. The Supreme Court is most likely to grant review where there is a split in authority among, say, the federal courts of appeals.[3] This is because of a longstanding view that federal law should be uniform—that, for example, a federal statute should apply the same way in Kansas City, Kansas, as it does in Kansas City, Missouri.[4] Commentators dating to the nation's founding have described the Court's primary function as "to unite and assimilate the principles of national justice and the rules of national decisions."[5] And many Justices, past and present, have also echoed this dominant rationale for review, often suggesting that the Court is duty-bound to establish a uniform federal law.[6] Indeed, some Justices have traced this obligation to a tacit trade between the Court and Congress, suggesting that the Court implicitly promised to ensure geographic uniformity in federal law in exchange for greater docket discretion.[7]

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3. Sup. Ct. R. 10(a)–(b); see also H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 246 (1991) ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits."); Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1631–32 (2008) ("[T]he presence of a conflict remains by far the most important criteria in the Court's case selection . . . .").

4. See, e.g., Nichols v. United States, 578 U.S. 104, 108 (2016) (describing a circuit split that gave rise to one outcome for a defendant living in "the Kansas City area—on the Missouri side" and a different outcome for a defendant on the Kansas side). For an argument that such splits play an outsized role in the Court's docket-setting procedures, see Frost, supra note 3, at 1631–32.

5. The Federalist No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Boag v. MacDougall, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) ("The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights [and] uniformity of [judgments].'" (quoting Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949))); Perry, supra note 3, at 246; Frost, supra note 3, at 1631–32.

6. See, e.g., City of San Francisco v. Sheehan, 575 U.S. 600, 610 (2015) ("[C]ertiorari jurisdiction exists to clarify the law . . . ."); Bullock v. BankChampaign, N.A., 569 U.S. 267, 273, 276 (2013); Thompson v. Keohane, 516 U.S. 99, 106 (1995); Key v. Doyle, 434 U.S. 59, 67–68 (1977); Tidewater Oil Co. v. United States, 409 U.S. 151, 170 (1972); Hanna v. Plumer, 380 U.S. 460, 463 (1965); Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923); Lau Ow Bew v. United States, 144 U.S. 47, 58 (1892); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (Story, J.) (noting that the Supreme Court's appellate jurisdiction highlights "the importance, and even necessity of *uniformity* of decisions throughout the whole United States," finding that disuniformity "would be truly deplorable"); see also Kansas v. Marsh, 548 U.S. 163, 183 (2006) (Scalia, J., concurring).

7. See Perry, supra note 3, at 248; Margaret Meriwether Cordray & Richard Cordray, The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection, 82 Wash. U. L.Q. 389, 436–37 (2004) ("[S]ome believe that the legislation was based on an explicit commitment that the Justices made to Congress to protect the uniformity of federal law in return for Congress' ceding the Court so much control over case selection.") [hereinafter Cordray & Cordray, Philosophy of Certiorari]; but see Perry, supra note 3, at 248 (quoting a Justice as disagreeing with this understanding of the 1925 Judges' Bill).

But this account of the Court's docket is underspecified. The Supreme Court's docket encompasses more than just those cases presenting conflicts among state and federal appeals courts. In other cases, the Court considers (for example) whether to overturn its precedents, how to address new circumstances, or when to correct errors. In short, the Court grants certiorari in cases it deems sufficiently "important"—important for *whatever* reason—to merit review.[8] Here, the Court's discretion is at its apex: It is under no duty (real or imagined) to hear these cases to ensure uniformity. Instead, the Court grants review in these cases for its *own* reasons—it is free to decide which precedents to revisit, which new circumstances to confront, and which errors to correct.

To the extent scholars and commentators have noted the Court's grants in such cases of importance—i.e., cases not implicating the Court's longstanding interest in uniformity—they have largely derided it as a standardless exercise of judicial power (or, worse, political power masquerading as judicial power).[9] Some such scholars have suggested that the Court's standard for granting certiorari is not only hopelessly vague, but that it is intentionally so.[10]

But, again, that's not quite right. The Court's decisions to grant review are not wholly standardless. Rather, scholars, practitioners, and commentators have sought these canons in the wrong places, and so they have remained largely obscured. Scholars have understandably looked primarily to the Supreme Court's Rule 10 for guidance on the considerations governing "[r]eview on a writ of certiorari,"[11] especially given the view that

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8. See Sup. Ct. R. 10(c) (noting that the Court may grant certiorari in cases where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court").

9. See, e.g., Ryan C. Black & Ryan J. Owens, Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence, 71 J. Pol. 1062, 1073 (2009) ("Justices have nearly total discretion to decide which cases the Court will hear, meaning they have freedom to pursue their raw policy goals . . . .").

10. See, e.g., The Oxford Companion to the Supreme Court of the United States 154 (Kermit L. Hall ed., 2d ed. 2005) [hereinafter Oxford Companion] ("The justices have been intentionally vague as to what makes a case 'certworthy.'"); Pamela K. Bookman, The Arbitration–Litigation Paradox, 72 Vand. L. Rev. 1119, 1191 (2019) (suggesting that the Court's standards for granting review are "intentionally cryptic"); Samuel Estreicher & John E. Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681, 790 (1984) (contending that the Court's standards for granting review are "hopelessly indeterminate"); Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643, 1723 (2000) (contending that the Court's standards for granting review are "intentionally . . . murky" (quoting Perry, supra note 3, at 34)); cf. Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, Supreme Court Practice § 4.2 (11th ed. 2019) ("Any attempt to restate the[] criteria [in Supreme Court Rule 10] with greater precision is somewhat temeritous . . . .").

11. Sup. Ct. R. 10. Other important sources of information regarding the Court's exercise of its certiorari jurisdiction include, most notably, Shapiro et al., supra note 10, § 4, and many of the sources cited therein.

there is a "shroud of intense secrecy surrounding the Court," one that encompasses "the significant discretion Justices exercise over which cases they hear," both in general and as to the certiorari process specifically.[12] In truth, however, the Court's merits opinions offer some (frequently overlooked) suggestions regarding the reasons for granting review. We can thus turn to opinion text to perhaps better understand which sorts of cases present an "important question of federal law that has not been, but should be, settled by th[e] [Supreme] Court."[13]

Consider, for example, the Court's seemingly odd decision to grant review in *Allen v. Cooper*, which asked whether North Carolina could be held liable for copyright damages, state sovereign immunity notwithstanding.[14] The Court's decision to grant review seems unusual because it agreed to review a case that presented no circuit split and that faithfully applied the Court's precedents.[15] Indeed, the Court's decision to grant review in *Allen*

12. See Carolyn Shapiro, The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court, 37 Fla. St. U. L. Rev. 101, 103 (2009); see also Kathryn A. Watts, Constraining Certiorari Using Administrative Law Principles, 160 U. Pa. L. Rev. 1, 17 (2011) ("[T]he only real insight the Court gives the public about the factors that motivate its certiorari decisions can be found in Supreme Court Rule 10.").

13. Sup. Ct. R. 10(c); see also Watts, supra note 12, at 17 (conceding that "sometimes the Court will include a cursory explanation of its decision to grant certiorari when the Court ultimately issues its opinion on the merits in the case").

14. 140 S. Ct. 994 (2020). Specifically, a videographer who filmed the salvage of Blackbeard's famed ship, *Queen Anne's Revenge*, sought to sue the state for violating his copyright in that footage. Id. at 999. In short, the case asked whether North Carolina could be forced to pay damages for pirating a film about pirates. Cf. Transcript of Oral Argument at 55–56, Halo Elecs., Inc., v. Pulse Elecs., Inc., 579 U.S. 93 (2016) (No. 14-1513), 2016 WL 1028388 (statement of Roberts, C.J.) (loosely characterizing some patent infringement disputes as about "pirates" and some as about "trolls").

15. Specifically, the case implicated the Copyright Remedy Clarification Act (CRCA). *Allen*, 140 S. Ct. at 999. The CRCA was enacted in the 1990s as one part of a package of reforms attempting to hold states liable for intellectual property infringement. See Pub. L. No. 101-553, 104 Stat. 2749 (1990) (codified as amended at 17 U.S.C. § 511 (2018)). That legislative attempt ultimately failed: In 1999, the Supreme Court reviewed the constitutionality of the CRCA's two companions—the Trademark Remedy Clarification Act (TRCA) and the Patent and Plant Variety Protection Remedy Clarification Act (PPVPRCA)—and concluded that Congress could not have constitutionally abrogated the states' sovereign immunity under its Article I intellectual property and commerce powers nor under the Fourteenth Amendment. See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672, 675 (1999) (reviewing the TRCA); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636, 647 (1999) (reviewing the PPVPRCA) (collectively, "the "*Florida Prepaid* cases"); Tejas N. Narechania, Note, An Offensive Weapon?: An Empirical Analysis of the "Sword" of State Sovereign Immunity in State-Owned Patents, 110 Colum. L. Rev. 1574 (2010) (reviewing the history of these statutes and the *Florida Prepaid* cases). Since then, every court of appeals to have considered the CRCA, including in the case on review, concluded that that statute is likewise unconstitutional. See, e.g., Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297, 1301, 1314–15 (11th Cir. 2011); Chavez v. Arte Publico Press, 204 F.3d 601, 604 (5th Cir. 2000). And the Court's opinion explains that the outcome, affirming the Fourth Circuit's decision, was practically commanded by precedent. *Allen*, 140 S. Ct. at 1001 ("The slate on

appeared to puzzle some notable commentators.[16] So why did the Supreme Court grant Frederick Allen's petition for certiorari?

The Court's opinion in *Allen* suggests the reason. There, the Court wrote that it granted review "[b]ecause the Court of Appeals held a federal statute invalid" (namely, a federal statute purporting to abrogate the state's immunity).[17] Where might a petitioner find this standard for granting review? The Supreme Court Rules—the rules established by the Court itself to govern Supreme Court practice and procedure—do not explicitly note a statute's unconstitutionality as among the considerations governing review on certiorari.[18] But other cases do. In *Iancu v. Brunetti*, decided the year before, the Court explained that "when a lower court has invalidated a federal statute," its "usual" course is to grant review.[19] *Allen* and *Brunetti* follow in a line of cases setting out this standard for granting review.[20]

Such cases thus offer one example of the Court's approach to certiorari in cases presenting potentially important—but splitless—questions. At one basic level, these cases suggest that the Court is likely to review cases

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which we write today is anything but clean. *Florida Prepaid*, along with other precedent, forecloses each of [petitioner]'s arguments.").

16. See, e.g., Samuel V. Eichner, Will SCOTUS Salvage the Copyright Remedies Clarification Act in *Allen v. Cooper*?, Finnegan: Incontestable® Blog (Oct. 22, 2019), https://www.finnegan.com/en/insights/blogs/incontestable/will-scotus-salvage-the-copyright-remedies-clarification-act-in-allen-v-cooper.html [https://perma.cc/DM38-4YR5] (noting, before the case was decided, how narrow the question "before the Court in *Allen v. Cooper*" was). I was among those who thought it unlikely that the Court would agree to hear this case. See Steven Seidenberg, US Perspectives: In US, No Remedies for Growing IP Infringements, IP Watch (Mar. 4, 2019), https://www.ip-watch.org/2019/03/04/us-no-remedies-growing-ip-infringements/ [https://perma.cc/USA9-ECWD] (quoting my skepticism); see also Mark Lemley (@marklemley), Twitter (Mar. 23, 2020), https:// twitter.com/marklemley/status/1242133956612546561?s=20 [https://perma.cc/5Q49-NJHN] (humorously paraphrasing the Court's opinion in the case as "we decided this issue 20 years ago, and we're not sure why we took this case").

17. *Allen*, 140 S. Ct. at 1000.

18. See Sup. Ct. R. 10. These Rules are authorized by the Rules Enabling Act. 28 U.S.C. § 2071(a) (2018) ("The Supreme Court . . . may from time to time prescribe rules for the conduct of their business."). But the Supreme Court had issued such rules long before Congress passed that Act. Historical Rules of the Supreme Court, Sup. Ct. of the U.S., https://www.supremecourt.gov/ctrules/scannedrules.aspx [https://perma.cc/2N46-8H78] (noting rules dating back to 1803). These rules cover a wide range of matters. Compare Sup. Ct. R. 10, 11, 18.1 (setting out important standards of procedure), with Sup. Ct. R. 33 (prescribing the minutiae of permitted margins and materials for filings).

19. 139 S. Ct. 2294, 2298 (2019) ("As usual when a lower court has invalidated a federal statute, we granted certiorari."). *Brunetti* regards a First Amendment challenge to a provision of the Lanham Act barring the registration of "immoral or scandalous" trademarks. See id.; see also 15 U.S.C. § 1052 (2018).

20. See, e.g., United States v. Kebodeaux, 570 U.S. 387, 391 (2013) (suggesting that review is warranted when a "[c]ourt of [a]ppeals [holds] a federal statute unconstitutional," and citing a line of cases in support of that view). But see infra note 33 and accompanying text (noting cases where the Court has declined to review a decision holding a federal statute invalid).

holding a federal statute unconstitutional—such cases, that is, are sufficiently "important" to merit review.[21] This is so even when the statute's fate seems a fait accompli, and even where there appears little for the Court to add over the judgment on review.[22] Moreover, these cases are only one example of a more generalizable certiorari-related phenomenon that is notable for at least three reasons.

First, as described, the Court's opinions sometimes articulate a standard for certiorari that is not clearly set out anywhere else. Supreme Court Rule 10 offers some scant guidance regarding the considerations governing "[r]eview on a writ of certiorari,"[23] setting out what many observers already know: One, the Court is comparatively likely to grant review in cases presenting conflict; and two, it will also grant review in other "important" cases.[24] In short, the Court grants review to resolve splits and to address important questions.[25] The Court's opinions can thus offer a clear(er) articulation of its certiorari canons, notwithstanding critiques decrying Rule 10's standard for review as too vague.[26]

Indeed, the understanding of the certiorari standard derived from *Allen* and *Brunetti* helps to explain the Court's behavior in other cases. It surprised some commentators when, for example, the Court denied certiorari in *Regents of the University of Minnesota v. LSI Corp.*, a case asking whether state entities enjoy immunity from certain proceedings at the

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21. See Sup. Ct. R. 10(c); see also Michael R. Dreeben, Partner, O'Melveny & Myers LLP, Case Selection and Review at the Supreme Court: Statement for the Presidential Commission on the Supreme Court of the United States 15 (June 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Dreeben-Statement-for-the-Presidential-Commission-on-the-Supreme-Court-6.25.2021.pdf [https://perma.cc/9NF6-855Z]; Marcia Coyle, Supreme Court Brief: SCOTUS Advocates Dish on Barrett, Biz Docket and Vote Dynamics (June 23, 2021) (on file with the *Columbia Law Review*) (quoting Kannon Shanmugam as stating that when "statutes are found unconstitutional," that gives rise to "automatic cert[iorari] grants"). But see infra note 33.

22. See *Allen*, 140 S. Ct. at 1007 (concluding that "*Florida Prepaid* all but prewrote our decision today").

23. Sup. Ct. R. 10.

24. Cf. Richard L. Pacelle, Jr., The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration 28 (1991) (describing the Court's agenda as "bifurcated" into a "volitional agenda" (analogous to the important-questions docket) and an "exigent agenda" (analogous to the circuit splits docket)).

25. Of course, cases presenting conflicts are not unimportant; indeed, many of these cases present critical questions that are worthy of the Court's attention. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (granting certiorari both "to consider an important constitutional question . . . and to resolve a conflict"). Analogously, it is true that some cases on the important-questions docket may, in fact, seem trivial. See Tejas N. Narechania, Certiorari, Universality, and a Patent Puzzle, 116 Mich. L. Rev. 1345, 1382–84 (2018) [hereinafter Narechania, A Patent Puzzle]; cf. Dreeben, supra note 21, at 7, 10 (describing the Supreme Court's "shortcomings . . . in identifying issues of surpassing importance to the administration of justice that have not resulted in a split" beyond the context of major constitutional questions, such as "abortion, religion, healthcare, certain due process and equal protection rights, and election law").

26. See supra note 10.

Patent Office.[27] *Allen* and *LSI Corp.* raised related questions at the crossroads of intellectual property and sovereign immunity. But the Court's emphasis on cases finding federal statutes unconstitutional helps to explain the Court's decisions to review the former but not the latter, as the U.S. Court of Appeals for the Federal Circuit upheld the statutory scheme in *LSI Corp.*[28] Observers comparing these two cases—both about state sovereign immunity and intellectual property—might find the differential treatment inexplicable. But if the Court's certiorari decisions are understood as motivated by a belief that only the Supreme Court ought to hold federal statutes unconstitutional—a belief held for whatever reason, such as comity among the branches or distrust for the appeals courts—rather than an interest in questions regarding state immunity and intellectual property, then the Court's decisions seem more coherent.[29] Such coherence comes only through an analysis of the descriptions of the certiorari grants contained in the Court's opinions.

Second, by setting out its certiorari standard in its opinions, the Court has both retained and exercised significant flexibility in shaping the contours of its important-questions docket over time. *Allen*, *Brunetti*, and other such cases not only offer a clear statement regarding one aspect of the Court's current certiorari standard, they may also suggest an evolution in the Supreme Court's docket-setting practice. To the extent these cases suggest that the Court will routinely review judgments striking down an act of Congress, such a rule may seem at odds with the congressionally prescribed scope of certiorari jurisdiction. Congress had once required the Court to review a variety of cases holding statutes unconstitutional.[30] But

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27. 926 F.3d 1327 (Fed. Cir. 2019); see also, e.g., Kevin E. Noonan, State of Minnesota Petitions for Certiorari in *Regents of University of Minnesota v. LSI Corp.*, Patent Docs (Sept. 15, 2019), https://www.patentdocs.org/2019/09/state-of-minnesota-petitions-for-certiorari-in-regents-of-university-of-minnesota-v-lsi-corp.html [https://perma.cc/C3VD-ZYL2] (suggesting that *LSI Corp.* is "[i]n many ways . . . a quintessential Supreme Court case" and that "failure to grant *cert* would be an uncharacteristic and surprising action").

28. See *LSI Corp.*, 926 F.3d at 1330.

29. Notably, the Court's present asymmetric approach—reviewing difficult questions of unconstitutionality, while pretermitting review for similarly difficult questions of constitutionality—may seem inconsistent with past practice. See, e.g., Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 573 (1935) (explaining that though "[t]he federal court for western Kentucky and the . . . Sixth Circuit [had] held [a statutory amendment to the bankruptcy laws] valid" and that "it ha[d] been sustained elsewhere," the Court agreed to review the case "[i]n view of the novelty and importance" of the question presented (citations omitted)). Moreover, this asymmetry in the Court's approach to certiorari may give rise to asymmetric incentives at the courts of appeals. I consider this feature of the Court's approach to certiorari, among others, in a forthcoming project. See Tejas N. Narechania, Managing Up—Certiorari from the Lower Courts (Mar. 31, 2022) (unpublished manuscript) (on file with author).

30. See, e.g., 28 U.S.C. § 2282 (1970) (repealed 1976) (requiring that a three-judge district court hear any case seeking to enjoin federal law on grounds of unconstitutionality); see also id. § 1253 (2018) (giving the Supreme Court direct appellate jurisdiction over the decisions of three-judge district courts); Id. § 1254(2) (1982) (amended 1988) (giving the

in 1976 and again in 1988, Congress moved such cases into the Court's discretionary docket, suggesting that the Court need not always review such cases.[31] Indeed, legislative history suggests that Congress found automatic, mandatory review to both denigrate lower courts and prevent the Supreme Court from addressing more pressing matters.[32] But *Allen* and *Brunetti*, among other cases, hint that what might have been discretionary—what Congress preferred to be discretionary—is, in fact, to some degree automatic. Hence, the Court can deploy its discretion to shift the contours of its docket over time, even in ways that seem in tension with Congress's preferences.

Third, though these cases offer a comparatively clear and relatively new rule for certiorari, we know little about that rule's scope and foundation. Why has the Court claimed (incorrectly) to grant review automatically in practically any case holding a federal statute invalid (notwithstanding Congress's possibly contrary preference)? And what sets *Allen* and *Brunetti* apart from those other decisions holding a statute invalid and yet evading Supreme Court review?[33] Neither case says. But while

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Supreme Court appellate jurisdiction over federal court decisions finding a state statute unconstitutional); Id. § 1257 (1982) (amended 1988) (giving the Supreme Court appellate jurisdiction over state court decisions finding a statute, federal or state, unconstitutional).

31. See Act of June 27, 1988 (Supreme Court Case Selections Act of 1988), Pub. L. No. 100-352, 102 Stat. 662 (1988); Pub. L. No. 94-381, 90 Stat. 1119 (codified in part at 28 U.S.C. § 2284 (1976)); see also H.R. Rep. No. 100-660, at 1 (1988) (explaining that the "bill substantially eliminates the mandatory or obligatory jurisdiction of the Supreme Court" including in various cases holding federal and state statutes unconstitutional); Opposition to Petition for a Writ of Certiorari at 13, Holder v. Humanitarian L. Project, 557 U.S. 966 (2009) (mem.) (No. 08-1498), 2009 WL 1970188 ("[T]his Court does not automatically review decisions invalidating federal statutes."); Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, Epitaph for Mandatory Jurisdiction, ABA J., Dec. 1, 1988, at 66, 66 ("The Supreme Court's mandatory jurisdiction is all but gone.").

32. See, e.g., H.R. Rep. No. 100-660, at 7 ("Perpetuation of a mandated system of appellate review represents an unfortunate and erroneous view of the sensitivity of State courts to constitutional issues. To the extent that issues of paramount Federal importance are raised by State court decisions the Supreme Court is capable of picking these cases through . . . certiorari . . . ."); State of the Judiciary and Access to Justice: Hearings on State of the Judiciary and Access to Justice Before the Subcomm. on Cts., C.L., and the Admin. of Just. of the H. Comm. on the Judiciary, 95th Cong. 536 (1977) (supplemental materials submitted by Robert H. Bork) ("Mandatory Supreme Court review . . . implies that we cannot rely on state courts to reach the proper result in such cases. This residue of implicit distrust has no place in our federal system." (quoting Comm. on Revision of the Fed. Jud. Sys., DOJ, The Needs of the Federal Courts 13 (1977))); Three-Judge Court and Six-Person Civil Jury: Hearing on S. 271 and H.R. 8285 Before the Subcomm. on Cts., C.L., and the Admin. of Just. of the H. Comm. on the Judiciary, 93rd Cong. 7 (1973) (statement of J. Skelly Wright, J.) ("The burden placed on the Supreme Court of disposing of these appeals . . . is formidable and has been growing. The time of the Supreme Court is extremely limited, and the direct appeal procedure preempts time which the Court might more profitably utilize on more compelling questions where a conflict . . . has developed.").

33. See, e.g., 2 U.S.C. § 441a(a)(1)(C), 441a(a)(3), invalidated by SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686 (D.C. Cir. 2010) (en banc), cert. denied, 562 U.S. 1003 (2010); Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998), invalidated

Allen and *Brunetti* alone do not elaborate on the rationale for this apparent shift in the Court's certiorari practice, it is worth trying to bring greater coherence to the Court's certiorari decisions through a more comprehensive analysis of the Court's briefly stated reasons for granting review.

In short, an analysis of the Court's opinions, describing its decision to grant review, may bring some coherence to our understanding of the institution's certiorari discretion—that is, it may help identify the patterns and trends that define the Court's docket.[34] But we should be clear that such coherence need not embed any reasoning—that is, it need not explain these patterns and changes over time. We may learn, for example, that the Court prefers to review judgments holding statutes unconstitutional, but we do not learn why.

How can we conduct such an analysis? Though *Brunetti* sets out a standard for certiorari that seems to inform the grant of review in *Allen*, neither cites the other, neither cites any other authority, and neither engages with changes in the scope of the Court's congressionally delineated certiorari jurisdiction.[35] In short, the Court's description of the standard for granting review eschews the most important content of traditional doctrinal development—for example, precedents, citations, and analysis—in favor of terse, citationless text.[36] The Court's standard for certiorari in important cases thus seems to resist traditional doctrinal evaluation.

We can analyze the Court's opinion text, briefly describing the reasons for granting review, as data.[37] Indeed, the Court's description of a

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by ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), aff'd sub nom. ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008), cert. denied, 555 U.S. 1137 (2009); see also Binderup v. Att'y Gen., 836 F.3d 336, 339 (3d Cir. 2016) (holding 18 U.S.C. § 922(g)(1) unconstitutional as applied), cert. denied sub nom. Sessions v. Binderup, 137 S. Ct. 2323 (2017); W. Va. CWP Fund v. Stacy, 671 F.3d 378, 391 (4th Cir. 2011) (concluding that various statutory provisions were repealed by implication), cert. denied 568 U.S. 816 (2012). Some readers might disagree with *Stacy*'s inclusion here, contending that decisions holding that statutes have been repealed by implication are meaningfully different from decisions holding statutes unconstitutional. That may be so. But, as suggested above and elaborated below, the Court's present approach means that we do not know what the Court means to include and exclude when it says that certiorari is warranted in cases "invalidat[ing] a federal statute." See Iancu v. Brunetti, 139 S. Ct. 2294, 2298 (2019). Do repeals by implication count? As-applied challenges? This uncertainty has important but unknown implications for certiorari practice, as well as for potential efforts to amend the scope of the Court's docket-setting discretion. See infra note 257 and accompanying text.

34. Cf. supra text accompanying note 29.

35. See Allen v. Cooper, 140 S. Ct. 994, 1000 (2020); *Brunetti*, 139 S. Ct. at 2298.

36. One exception seems to be *United States v. Kebodeaux*, which cites two cases for the proposition that review is warranted when a "[c]ourt of [a]ppeals [holds] a federal statute unconstitutional." 570 U.S. 387, 391 (2013) (citing United States v. Morrison, 529 U.S. 598 (2000); United States v. Edge Broad. Co., 509 U.S. 418 (1993)). Such exceptions, to the extent there are others, seem exceedingly rare.

37. See Michael A. Livermore, Allen B. Riddell & Daniel N. Rockmore, The Supreme Court and the Judicial Genre, 59 Ariz. L. Rev. 837, 871 (2017). See generally Law as Data:

case's procedural history nearly always notes the grant of certiorari, often (as in the examples above) including a brief description of the decision to grant review, thus giving rise to an opportunity to examine how the Court exercises its docket-setting discretion.[38] This Article undertakes such an analysis, drawing on the growing computational legal studies literature—which includes notable pieces examining the opinions of the Supreme Court—to examine how the Court exercises this discretion. Michael Livermore, Allen Riddell, and Daniel Rockmore, for example, have examined both federal appeals courts and Supreme Court opinions to discern the extent to which the Court's docket (and its merits opinions) are distinct from the dockets and decisions of the federal courts of appeals.[39] In their study, they find "significant and meaningful" differences between the case topics selected for Supreme Court review vis-à-vis the topics at issue in the courts of appeals' dockets, and they also find a "growing stylistic distinctiveness" in the Court's opinions themselves.[40] Their work, moreover, "identif[ies] the topics that are correlated, either positively or negatively, with certiorari."[41] In this project, I focus on those cases where the Court's discretion is at its apex—namely, those cases that do not present a split but are decided solely because the Court deemed them important enough to decide—in order to better understand the Court's important-questions docket in particular, and, by extension, the Court's own priorities. To do so, I have built and analyzed a dataset of thousands of Supreme Court opinions in such important-questions cases specifically.

This descriptive analysis suggests several contributions to the literatures on certiorari, the Supreme Court, and data-driven analyses of legal materials. For one, the collective focus on Supreme Court Rule 10's (unhelpful) text has obscured the importance of the Court's own opinions in assessing its certiorari—and, indeed, its greater institutional—priorities.[42]

Computation, Text, & the Future of Legal Analysis (Michael A. Livermore & Daniel N. Rockmore eds., 2019) [hereinafter Law as Data] (exploring the field of computational legal analysis, which uses legal texts as data).

38. See infra Figure 1 (noting that the Court's opinions are coded as having offered a reason for the grant in a majority of its opinions); infra note 103 and accompanying text (noting that nearly 90% of the opinions analyzed here include at least one paragraph containing the term "certiorari").

39. See Livermore et al., supra note 37, at 841–43.

40. Id. at 842, 881; see also Keith Carlson, Daniel N. Rockmore, Allen Riddell, Jon Ashley & Michael A. Livermore, Style and Substance on the US Supreme Court, *in* Law as Data, supra note 37, at 83 (examining trends in judicial writing style and typifying genres of judicial opinions).

41. Livermore et al., supra note 37, at 843.

42. See, e.g., Doris Marie Provine, Case Selection in the United States Supreme Court 2 (1980) ("Case selection . . . provides a good indication of the decision-making priorities of the Supreme Court . . . ."); Cordray & Cordray, Philosophy of Certiorari, supra note 7, at 421–22 ("[A] Justice's 'feel' for when an issue is sufficiently 'important' to merit plenary review is necessarily informed by his or her conception of the essential nature of the Supreme Court's responsibilit[ies] . . . ."); Margaret Meriwether Cordray & Richard Cordray, Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme

We might, that is, learn a lot about the Supreme Court and its docket by simply looking to the Court's own descriptions of its decisionmaking criteria. The Roberts Court, for example, seems to favor granting review in cases that invite the Court to overrule precedent (i.e., that include the terms *overrule** and *precedent**).[43] Moreover, this broad-based, data-driven approach also offers insight into the Court's priorities at various moments in time. In short, this analysis not only helps us learn about certiorari; it helps us learn how priorities have changed over time. The term *overrule**, for example, seems not only important to the Roberts Court, it also appears *more* important to the Roberts Court than any other Court (since Taft).[44] And the text-analysis approach employed here might also offer some general methodological insights for analyzing other terms that resist traditional doctrinal evaluation—a matter of growing importance to scholars and practitioners.[45]

This Article proceeds in three parts. The first describes this data-driven approach to understanding the Court's docket-setting priorities. Specifically, it begins with a brief description of the Court's discretion to shape its docket, emphasizing the Court's practices that have informed this project's research design. It then describes this specific design.

The second Part presents the results of this analysis, focusing on two primary measures for terms appearing in the Court's descriptions of its certiorari grants—an "Importance Score," and changes in such scores over time ("Delta," or Δ). The interpretation of these results identifies three

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Court, 57 U. Kan. L. Rev. 313, 313, 318 (2009) [hereinafter Cordray & Cordray, Setting the Social Agenda] (explaining that a decision to grant or deny a petition is one expression of the Court's "subjective notions of what is important or appropriate for review" (internal quotation marks omitted) (quoting Eugene Gressman, The National Court of Appeals: A Dissent, 59 ABA J. 253, 255 (1973))); see also Black & Owens, supra note 9, at 1073 ("Justices have nearly total discretion to decide which cases the Court will hear, meaning they have freedom to pursue their raw policy goals . . . .").

43. See infra Table 2; infra Table 3; infra Appendix Figure 4; infra note 150 (listing all the cases represented by *overrule** during the Roberts Court).

Here and throughout the article's main text, I use an italicized font (like *this*) to refer to terms that appear in the results of the data analysis described and presented below. Moreover, as I explain below, I use an asterisk (*) to denote terms that encompass multiple related terms. Here, for example, *overrule** encompasses both overrule and overruled. This nomenclature is roughly derived from some computational contexts, where asterisks are used as wildcard characters. But, as I elaborate below, such asterisks are not strictly used as wildcard characters here. See infra note 107 and accompanying text.

44. See infra Table 2.

45. See, e.g., Frank Fagan, Natural Language Processing for Lawyers and Judges, 119 Mich. L. Rev. 1399, 1407–08 (2021) (reviewing Law as Data, supra note 37); cf. Transcript of Oral Argument at 8–10, ZF Auto. US, Inc. v. Luxshare, Ltd., No. 21-401 (Mar. 23, 2022) (noting the reactions of multiple Justices to the petitioner's reliance upon a "Corpus Linguistic study"); Wilson v. Safelite Grp., Inc., 930 F.3d 429, 440–42 (6th Cir. 2019) (Thapar, J., concurring) ("[C]orpus linguistics is a powerful tool . . . .").

factors driving many of the shifts in the Court's priorities over time, complicating the received wisdom that it is "temeritous"[46] to attempt to clarify the Court's "vague"[47] certiorari standard. One, large exogenous events, such as wars or depressions, can have important effects on the Court's docket. Such effects are, upon reflection, expected: Eras of sustained economic hardship, for example, give rise to bankruptcy cases that require final resolution.[48] Two, significant political developments, such as landmark legislation, can also drive the Court's docket.[49] Statutes aimed squarely at the Supreme Court or the judiciary can obviously have such an effect: When, for example, Congress moved vast categories of cases implicating the constitutionality of federal statutes out of the Court's mandatory docket, questions of constitutional interpretation occupied an even more significant part of the Court's discretionary docket.[50] And other notable actions by the political branches—passage, say, of major reforms to the patent statutes—can raise "important question[s] of federal law that ha[ve] not been, but should be, settled by th[e] Court."[51] Three, the Court's important-questions docket seems to have become more volatile in recent years, with new confirmations to the Court seeming to have an especially important effect on changes to the Court's docket.[52] This outcome is especially noteworthy: It may seem controversial that the Court's interpretation and application of a longstanding rule of procedure—Supreme Court Rule 10—shifts more now, and especially when a new Justice is confirmed to the Court (as compared to other times).

In view of this noteworthy outcome, the third Part considers possible reforms to the Court's certiorari practice and, more specifically, argues that the Court requires a more robust doctrine of certiorari. The Court needs to better explain its approach to certiorari so that the public and the political branches can better assess it. This Article is not, to be sure, the first to advocate for greater transparency in the Court's certiorari practices.[53] But as Congress and the executive branch consider reforms to the judiciary—and to the Supreme Court in particular—to temper its seeming political character,[54] it is ever more important for the Court to engage in this interbranch dialogue over the appropriate scope of the

46. Shapiro et al., supra note 10, § 4.2.

47. Oxford Companion, supra note 10, at 154.

48. See, e.g., infra Figure 5.

49. See infra section II.B.2.

50. See, e.g., infra Figure 7.

51. Sup. Ct. R. 10(c); see infra notes 142, 176–177 and accompanying text.

52. See, e.g., infra Figure 8; infra Table 5.

53. See, e.g., Watts, supra note 12, at 42–61; see also William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1, 5–6, 16–18 (2015) [hereinafter Baude, Shadow Docket].

54. See, e.g., Presidential Commission on SCOTUS: June 30, 2021, The White House, https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021/ [https://perma.cc/7YSU-2XQE] (last visited Feb. 19, 2022).

Court's docket. Doing so may help both to protect the Court's legitimacy and to ensure that any reforms to the Court's docket—for example, limiting the Court's jurisdiction or expanding its mandatory docket—respond to a more accurate and complete account of the Court's docket-setting canons.

I. UNDERSTANDING CERTIORARI IN IMPORTANT CASES

A. *Certiorari and Important Cases*

The modern Supreme Court has significant power to set its own agenda. This was not always so. For its first century, the Supreme Court had to decide every case properly before it.[55] In the Judiciary Act of 1891, however, Congress granted the Supreme Court greater discretion over its docket, making the courts of appeals' decisions final in certain categories of cases (e.g., revenue cases, patent cases, and cases arising under diversity jurisdiction), with further review available only at the Supreme Court's discretion (i.e., by writ of certiorari).[56] The Judges' Bill of 1925 further expanded the Court's control over its docket, making the courts of appeals' decisions final in most cases (except, again, where the Supreme Court decided to issue a writ of certiorari).[57] And finally, in 1988, after a series of intervening incremental changes, Congress "freed the Court from virtually all . . . cases [it was] at least technically obliged to decide on the merits," granting it near total control over the shape of its docket.[58]

The Supreme Court's "exercise of this discretion is a matter of great practical consequence and scholarly interest."[59] The decision to take a case often both reflects contemporary concerns, and, significantly, helps to "shape[] the nation's political, social, and economic agenda."[60] Indeed, former Justices have explained that case selection "is second to none in

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55. See Stern et al., supra note 31, at 66.

56. Act of Mar. 3, 1891, Pub. L. No. 51-517, § 6, 26 Stat. 826, 828.

57. See Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936, 936–37.

58. See Stern et al., supra note 31, at 66 (describing the Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662). One notable exception is the Supreme Court's continued mandatory jurisdiction over direct appeals from three-judge district courts. 28 U.S.C. § 1253 (2018). Such courts are now used primarily to address certain questions of electoral redistricting. See Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119 (codified in part at 28 U.S.C. § 2284 (1976)); see also Shapiro et al., supra note 10, § 2.10; Michael E. Solimine & James L. Walker, The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954–76, 72 Case W. Res. L. Rev. (forthcoming 2022) (manuscript at 3), https://ssrn.com/abstract=3882148 [https://perma.cc/K4DV-SGKK] ("Congress in 1976 restricted the jurisdiction of [three-judge district courts] to reapportionment cases."). Congress has since occasionally enacted other three-judge courts for special purposes, see Shapiro et al., supra note 10, § 2.10(a), and there are a few other "rarely used" vestiges of the three-judge district court sprinkled throughout the U.S. Code, see id. § 2.10(c)–(e).

59. Narechania, A Patent Puzzle, supra note 25, at 1357.

60. Id.

importance," as the "choice of issues for decision largely determines the image that the American people have of their Supreme Court."[61] The Court's docket is certainly shaped—at least in part—by the debates of the moment.[62] And the Court's decisions—which, among other things, drive news coverage and commentary—play an important role in shaping political discourse.[63]

Moreover, the Court's power over its docket helps to reveal institutional values. Each decision to grant review helps to reveal the Court's "subjective notions of what is important or appropriate for review,"[64] or, at the very least, such decisions help to reveal the priorities of at least four Justices (because granting review requires only four votes).[65]

The Court's decisions to grant review in cases presenting, say, circuit splits reflect a longstanding view, shared by both Congress and the Court, that national uniformity is an important value.[66] Indeed, the Judges' Bill of 1925 may have been premised on a tacit trade: Some Justices have understood Congress's decision to grant the Court discretion over its docket as in exchange for an implicit promise to ensure uniformity in federal law.[67] The Court has largely kept its end of this bargain: Supreme Court Rule 10 confirms the significance of conflict to the decision whether to grant review; individual Justices have repeatedly stated that the Court's principal responsibility is to ensure uniformity in federal law; and several

61. William J. Brennan, Jr., The National Court of Appeals: Another Dissent, 40 U. Chi. L. Rev. 473, 477, 483 (1973).

62. See, e.g., St. Louis, Kan. City, & Colo. R.R. v. Wabash R.R., 217 U.S. 247, 251 (1910) (granting review in a case where the question presented seemed to the Court "of constantly enlarging importance" given the growing industrialization across many cities like St. Louis).

63. See, e.g., N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1528 (2020) (Alito, J., dissenting) (suggesting that the Court's "grant of review . . . led to an epiphany of sorts," giving rise to policy and political changes); see also Katerina Linos & Kimberly Twist, The Supreme Court, the Media, and Public Opinion: Comparing Experimental Observational Methods, 45 J. Legal Stud. 223, 224 (2016) ("Court rulings can change national public opinion, even on controversial issues that have been extensively debated beforehand and on which Americans have relatively firm views."). But see Frederick Schauer, Foreword: The Court's Agenda—And the Nation's, 120 Harv. L. Rev. 4, 41 (2006) ("But when we look at the world as ordinary Americans see it, we begin to understand that even when the Supreme Court is at its most influential and most visible, the American people quite often have other things on their minds.").

64. Cordray & Cordray, Setting the Social Agenda, supra note 42, at 313, 318.

65. See, e.g., Rogers v. Mo. Pac. R.R., 352 U.S. 521, 527–29 (1957) (Frankfurter, J., dissenting) (describing the "rule of four").

66. See, e.g., The Federalist No. 82, supra note 5, at 494; Deborah Beim & Kelly Rader, Legal Uniformity in American Courts, 16 J. Empirical Legal Stud. 448, 450 (2019) ("Part of the reason the Supreme Court resolves intercircuit splits is a preference for legal uniformity and a commitment to unifying doctrine across the country.").

67. See supra note 7 and accompanying text.

notable studies of the Court have confirmed the importance of uniformity and circuit splits to certiorari jurisdiction.[68]

Though conflict may be the single most significant input to the Court's decision whether to grant review, it is hardly complete. The broadly described standards for granting review set out in Rule 10 primarily regard conflict.[69] But one standard, set out in Rule 10(c), leaves open the possibility for the Court to grant review, conflict or not, in any case presenting an "important question of federal law that has not been, but should be, settled by th[e] Court."[70] These important-questions cases account for about one-third to one-half of the Court's entire docket.[71]

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68. See, e.g., Kansas v. Marsh, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility under current practice . . . is to ensure the integrity and uniformity of federal law."); Perry, supra note 3, at 246; Stephen G. Breyer, Reflections on the Role of Appellate Courts: A View From the Supreme Court, 8 J. App. Prac. & Proc. 91, 92 (2006) (explaining that "the Supreme Court is charged with providing a uniform rule of federal law in areas that require one"); see also Narechania, A Patent Puzzle, supra note 25, at 1360–61, 1360 n.76 (collecting similar sources). But see Beim & Rader, supra note 66, at 449 (finding that the Supreme Court only resolves about one-third of circuit splits); Kenneth W. Starr, The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft, 90 Minn. L. Rev. 1363, 1372 (2006) (suggesting that the Court lets too many circuit splits fester).

69. See Sup. Ct. R. 10.

70. For example, compare Sup. Ct. R. 10(a)–(b) with Sup. Ct. R. 10(c). Or, for an example of the Court drawing a distinction between conflict cases and important-questions cases, see Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923) (describing certiorari jurisdiction as "given for two purposes, first to secure uniformity of decision between those courts . . . and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court . . . .").

71. See infra Figure 1; infra Appendix Figure 1. Determining the precise number is a bit tricky, since many of the Court's cases do not offer any reason for the certiorari grant. But assuming that those decisions in which a reason is given are roughly representative of the larger set, then about 45% of the Court's cases are decided to resolve a split of some sort, while 55% are decided for some other reason. See infra Appendix Figure 1; see also infra note 289 (finding a similar ratio among cases that include only an *importan** term and those that include a *conflict** term). But this rough calculation is likely to overstate the cases decided for reasons of importance (and understate the cases decided for reasons of conflict). As Figure 1, infra, indicates, the Taft Court offered reasons in comparatively few cases. Moreover, the Taft Court rarely noted the existence of a conflict, though it likely granted cases for reasons of conflict far more frequently than indicated—especially if one believes that the 1925 Judges' Bill rested on an implicit trade between the branches. See supra note 7 and accompanying text. Other studies are roughly consistent with this Article's overall findings (which encompass all Terms from 1925 to 2018), with some differences suggesting that the conflict criterion has become more dominant in recent years.

> Professor David Stras reviewed petitions for certiorari, lower court opinions, and Supreme Court opinions for all the cases decided in the 2004, 2005, and 2006 terms and discovered that approximately seventy percent of the cases resolved by the Court during those years involved a split among the lower courts. Professor [Arthur D.] Hellman conducted similar research for the 1983-1985 terms and the 1993-1995 terms, but limited his study to conflicts between federal courts of appeals. From 1983-1985, forty-five percent of the Court's cases concerned a conflict,

So what exactly makes a case "important" enough to merit review? Various observers—scholars and practitioners, among others—have complained that we simply do not know, criticizing this important-questions standard as "murky," "hopelessly indeterminate," "intentionally vague," or "intentionally cryptic."[72] Indeed, the leading treatise on Supreme Court practice explains that "[t]here is no formula" that can explain when the Court will grant review for reasons of importance, noting that "[i]mportance is a relative factor, dependent upon the type of issue involved, the way in which it was decided below, the status of the law on the matter, the correctness of the decision below, and the nature and number of persons who may be affected by the case."[73]

Standing alone, "important question" is doubtlessly ambiguous.[74] But that need not imply that we do not know, or cannot learn, how the Court selects cases to review under this important-questions standard.

As noted in the Introduction, the Court sometimes sets out the basis for its initial decision to grant review in its final opinion on the merits. Indeed, the Court has been doing so since Chief Justice William Howard Taft helped negotiate Congress's passage of the 1925 Judges' Bill.[75] In one case during the Taft Court, for example, the Court explained that because "the constitutionality of the statute [at issue] was questionable, and that the question of its validity was one of general importance," it "granted the petition for a writ of certiorari."[76] During Charles Evans Hughes's tenure as Chief Justice, the Court similarly explained in one case that it "granted

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> and from 1993-1995, that percentage increased to sixty-nine percent. Professor Stras reviewed cases from the 2003-2005 terms using criteria identical to Professor Hellman's and found that approximately sixty percent of the cases involved a conflict between the courts of appeals.

Frost, supra note 3, at 1632–33 (citing Arthur D. Hellman, The Shrunken Docket of the Rehnquist Court, 1996 Sup. Ct. Rev. 403, 415–16; David R. Stras, The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process, 85 Tex. L. Rev. 947, 981, 983 (2007)); cf. S. Sidney Ulmer, The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable, 78 Am. Pol. Sci. Rev. 901, 910 (1984) (analyzing strength of the conflict criterion).

72. See supra note 10.

73. Shapiro et al., supra note 10, § 4.11.

74. Cf. Branzburg v. Hayes, 408 U.S. 665, 702 n.39 (1972) (suggesting that a test based on the importance of certain evidence is too vaguely defined).

75. See, e.g., Landmark Legislation: The Judges' Bill, Fed. Jud. Ctr., https://www.fjc.gov/history/legislation/landmark-legislation-judges-bill-0 [https://perma.cc/SVL5-3QCC] (last visited Nov. 3, 2021) (describing Chief Justice Taft's role in drafting and advocating for the Judges' Bill).

76. Richardson Mach. Co. v. Scott, 276 U.S. 128, 132 (1928) (regarding the constitutionality of an Oklahoma state statute). For another example of the Taft Court explaining why it granted certiorari, see Indep. Wireless Tel. Co. v. Radio Corp. of Am., 270 U.S. 84, 86 (1926) ("Our writ of certiorari was granted solely because of the importance [of] the question to patent practice . . . .").

certiorari" "in view of the importance of the question with respect to proceedings instituted under . . . the Bankruptcy Act."[77] During the Stone Court, in cases "involv[ing] the rights of individuals charged with crime and not connected with the armed forces to have their guilt or innocence determined in courts [of] law . . . rather than by military tribunals," the Court "granted certiorari" in view of the importance of the "established procedural safeguards" that attend to normal judicial proceedings.[78] During the Vinson Court, too: "We brought the cases here on certiorari, the problem raised being one of importance in the administration of the Veterans' Preference Act."[79] The Warren Court: "We granted certiorari to consider the admissibility of Whitley's post-conspiracy confession."[80] The Burger Court granted review "to consider a seemingly important question affecting the jurisdiction of the federal courts."[81] Rehnquist: "We granted certiorari especially to determine the standard of review governing appeals from a district court's decision to depart from the sentencing ranges in the Guidelines."[82] And, as described above, the Roberts Court has offered similar statements, too.[83]

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77. Adair v. Bank of Am. Nat'l Tr. & Sav. Ass'n, 303 U.S. 350, 351 (1938). For another example of the Hughes Court explaining why it granted certiorari, see Bruno v. United States, 308 U.S. 287, 291 (1939) ("[T]he Circuit Court of Appeals for the Second Circuit dealt with an important question in the administration of federal criminal justice in such a way as to lead us to grant certiorari." (citation omitted)).

78. Duncan v. Kahanamoku, 327 U.S. 304, 307 (1946). For another Stone Court example, see St. Pierre v. United States, 319 U.S. 41, 42 (1943) ("We granted certiorari on a petition which raised important questions with respect to petitioner's constitutional immunity from self-incrimination." (citation omitted)).

79. Mitchell v. Cohen, 333 U.S. 411, 416 (1948). For another Vinson Court example, see Nat'l Lab. Rels. Bd. v. Crompton-Highland Mills, Inc., 337 U.S. 217, 220 (1949) ("Because of the importance of the issue in the administration of the labor relations statutes, we granted certiorari.").

80. Delli Paoli v. United States, 352 U.S. 232, 234 (1957). Another Warren Court example can be found in Salem v. U.S. Lines Co., 370 U.S. 31, 32 (1962) ("Since the question whether supporting expert testimony is needed is important in litigation of this type, we granted certiorari.").

81. Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 252 (1972). For further Burger Court examples, see Comm'r of Internal Revenue v. Lincoln Sav. & Loan Ass'n, 403 U.S. 345, 346–47 (1971) ("Because of the importance of the issue for the savings and loan industry and for the Government, we granted certiorari."); cf. Gravel v. United States, 408 U.S. 606, 630–31 (1971) (Brennan, J., dissenting) (noting that the government "sought certiorari on the question whether the Speech or Debate Clause bars a grand jury from questioning congressional aides about privileged actions of Senators or Representatives").

82. Koon v. United States, 518 U.S. 81, 91 (1996). Another Rehnquist example: Town of Newton v. Rumery, 480 U.S. 386, 392 (1987) ("Because the case raises a question important to the administration of criminal justice, we granted the town's petition for a writ of certiorari.").

83. See supra Introduction (describing similar statements in Allen v. Cooper, 140 S. Ct. 994, 1000 (2020), and Iancu v. Brunetti, 139 S. Ct. 2294, 2298 (2019)).

Of course, the Court's practice of offering such explanations has not been perfectly consistent. In 1932, then-Professor Felix Frankfurter complained that the Court's certiorari decisions were largely "baffl[ing]."[84] But three years later, Frankfurter lauded the Court's growing "practice of explaining, in the ultimate opinion on the merits, the reasons which had moved [the Court] to grant" review.[85] Indeed, he adopted the practice himself when confirmed to the bench in 1939.[86] Since then, the Court has tended to describe, at least in minimal terms, the reason for the grant in a majority of its cases.[87]

In short, though the Supreme Court's Rules do little to elaborate on which important questions will merit review, the Court has since the earliest days of its certiorari jurisdiction offered some relevant suggestions in its merits decisions. And to the extent that the Court's exercise of its certiorari-stage discretion signals its institutional values, these statements help illuminate the sorts of questions the Court and its members consider sufficiently important to merit its limited time and resources.[88]

B. *A Method for Understanding Certiorari in Important Cases*

The Court's opinions, describing the basis for its review, therefore offer an opportunity to study that institution's preferences—preferences that have further effects nationwide, helping to set the nation's agenda and to shape discourse around major questions of law and policy. But if those opinions do not constitute a coherent body of certiorari doctrine, how might legal scholars study them? By treating the Court's opinions as data.[89] In short, one can use computational tools to analyze the pages of

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84. See Felix Frankfurter & James M. Landis, The Business of the Supreme Court at October Term, 1931, 46 Harv. L. Rev. 226, 240 (1932) (complaining that "one is at times baffled to know what considerations moved the Court in selecting a particular case for review").

85. Felix Frankfurter & Henry M. Hart, Jr., The Business of the Supreme Court at October Term, 1934, 49 Harv. L. Rev. 68, 83 (1935).

86. See, e.g., Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 592 (1940) (explaining that "[s]ince [the court of appeal's] decision ran counter to several *per curiam* dispositions of [the Supreme] Court, we granted *certiorari* to give the matter full reconsideration" (footnote omitted)); see also infra note 96.

87. See infra Figure 1.

88. See Starr, supra note 68, at 1385 ("The Court's docket is a scarce, indeed precious[,] national resource.").

89. Many legal scholars are employing similar or related approaches to study and understand a range of terms in a range of contexts. See, e.g., Livermore et al., supra note 37, at 890 (using text analysis methods and finding that "the Court appears to use its certiorari power to select cases that are non-representative of the work of the appellate courts"); Jennifer L. Mascott, Who Are "Officers of the United States"?, 70 Stan. L. Rev. 443, 495 (2018) (using text analysis approaches to study the meaning of "officer" in the Founding era); James Hicks, Informative Patents? Predicting Invalidity Decisions With the Text of Claims 5 (May 6, 2021) (unpublished manuscript), https://www.law.virginia.edu/system/files/informative_patents_owcal_Hicks%20Noon%20Panel%202.pdf [https://perma.cc/E8LQ-FAGG] (training "a statistical model to distinguish between valid and

the U.S. Reports—and, in particular, the paragraphs describing the Court's reason for granting review—to better understand how the Court exercises its wide discretion to decide which cases merit review. This Article describes, in detail, an approach for doing so in the Methods Appendix. It also offers a brief summary of this approach in the following sections, beginning with its data sources and subsequently turning to its methods for analysis.

1. *Dataset.* — The dataset begins on October 5, 1925, the first day of the first complete Term, October Term 1925, following the enactment of the 1925 Judges' Bill.[90] This Article relies on The Supreme Court Database (developed and maintained at the Washington University in St. Louis School of Law) to identify every case arising under the Court's certiorari jurisdiction since October 5, 1925.[91] Moreover, The Supreme Court Database also helpfully codes (in very general terms) the reason for certiorari, if any, given in the Court's opinion.[92] Though the Database's documentation lists thirteen distinct code values, many overlap (for present purposes), and so the dataset sets aside those cases coded as granted to resolve any form of confusion or conflict among the federal and state trial and appellate courts, retaining only those cases coded as granted "to resolve [an] important or significant question," granted "to resolve [the] question presented," granted for some other reason, as well as those cases coded as granted for no specified reason (but later limited to only those cases whose terms are suggestive of a place on the Court's important-questions docket).[93] In short, those cases reviewed in service of the Court's longstanding and congressionally confirmed institutional duty to ensure uniformity are set apart from those cases that the Court seems to have granted entirely of its own discretion.[94]

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invalid patents based on the prevalence of specific words in their claims"). See generally Stephen C. Mouritsen, The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning, 2010 B.Y.U. L. Rev. 1915, 1919, 1951–70 (proposing "a corpus-based approach to resolving questions of lexical ambiguity").

90. See Act of Sept. 6, 1916, Pub. L. No. 64-258, sec. 1, § 230, 39 Stat. 726, 726 (codified as amended at 28 U.S.C. § 2 (2018)) (providing that the "Supreme Court shall hold . . . one term annually, commencing on the first Monday in October"); Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.

91. The Supreme Court Database, The Sup. Ct. Database, Wash. Univ. Sch. of L., http://scdb.wustl.edu/ [https://perma.cc/8HTJ-VM8C] (last visited Feb. 19, 2022).

92. See Harold Spaeth, Lee Epstein, Ted Ruger, Sara C. Benesh, Jeffrey Segal & Andrew D. Martin, Supreme Court Database Code Book, at A7 (Sept. 30, 2021), http://scdb.wustl.edu/_brickFiles/2021_01/SCDB_2021_01_codebook.pdf [https://perma.cc/5XZ9-ZBRY] [hereinafter Spaeth et al., Code Book].

93. More detail on how each of the thirteen coded values is treated may be found in the Methods Appendix.

94. The Court exercises some discretion in choosing which conflicts to address, too. The Court might conclude in some cases that some splits are too insignificant to merit review, or that the legal question at issue is unlikely to recur with any notable frequency; in other cases, the Court might recognize a growing problem but wait for other courts of appeals to weigh in; and in still others, the Court might find that a split is important enough

This gave rise to a list of 7,169 cases through October Term 2018: 4,319 total cases granted for no apparent reason (under the Database's coding methodology), and 2,850 cases granted for any other reason (other than conflict or confusion).[95]

Notably, these two categories of cases—those with some explanation, and those with none—are not evenly distributed over time. Rather, the trend, driven primarily during Chief Justice Hughes's tenure, seems to be in favor of some, if limited, reason-giving (with some apparent retrenchment since then).[96] The Taft Court, for example, declined to explain the

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to merit immediate intervention. Cf. Beim & Rader, supra note 66, at 449 (finding that the Supreme Court only resolves about one-third of circuit splits, namely those that the Court finds to be "harmful and important"). But including those cases granted in order to resolve a split in this study would risk confounding the Court's interest in uniformity with whatever other value might make a particular split important enough to merit review. And so these cases are set aside for present purposes. Of course, there may be something to be said for comparing the splits granted against those denied. But conducting such a study is a harder task, one that is saved for another day. It is harder to evaluate the Court's reasons for denying a petition—reasons which may include a belief that a split does not merit review, skepticism that there is even a split at all, or some procedural defect, among other considerations—not least because the Court's certiorari denials are only sparingly explained. See infra note 128 and accompanying text.

95. See infra Methods Appendix, section A. Some cases, however, might have been granted for more than one reason (including reasons of conflict); other cases, coded as having been granted for no apparent reason, might have been granted for reasons of conflict. The Methods Appendix describes the approach for addressing this complication. See id.

96. See infra Appendix Figure 2. Appendix Figure 2 modifies Figure 1 by examining each "natural court" during the Hughes Court. The "natural court" is a construct consisting of each unique set of Justices—typically nine, though occasionally fewer when the Court hears and decides cases at less than full strength. See Spaeth et al., supra note 92, at 31; see also David M. O'Brien, Charting the Rehnquist Court's Course: How the Center Folds, Holds, and Shifts, 40 N.Y.L. Sch. L. Rev. 981, 981 n.5 (1996) (defining "natural courts" as "periods in which the Court's personnel remain stable"). Appendix Figure 2 suggests that with each successive appointment to the Hughes Court, the Court tended to increase the frequency with which it gave some reason for its review. So there may be some reason to think that Chief Justice Hughes aimed to institute this practice. In a speech to the American Law Institute, for example, Chief Justice Hughes expressed dismay over some "extraordinary misconceptions" regarding the Court's certiorari processes and standards, and went on to say that any "mystery about this part of [the Court's] work . . . should be dispelled." Charles Evans Hughes, Chief Justice, Address of the Chief Justice, *in* 11 A.L.I. Proc. 313, 314 (1934). Indeed, Chief Justice Hughes's speech went on to address some of these common misconceptions. And later, in their annual review of the Supreme Court's Term, Felix Frankfurter and Henry Hart noted the Court's new "helpful practice of explaining, in the ultimate opinion on the merits, the reasons which had moved [the Court] to the grant the writ [of certiorari]." See Frankfurter & Hart, supra note 85, at 83. And, as noted above, this comment came only a few years after Felix Frankfurter and James Landis decried the then-prevailing certiorari practice. See Frankfurter & Landis, supra note 84, at 240.

After he was confirmed to the Supreme Court, Justice Frankfurter held true to his word, as about ninety percent of majority opinions coded in The Supreme Court Database as having been authored by Justice Frankfurter are not coded as having described no reason for the grant of review. See Harold Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, The Modern Database: 2020 Release 01 (Sept. 21,

reason for its review in over two-thirds of cases.[97] Over the span of the Hughes Court, however, that practice had inverted, with about three-quarters of decisions in Hughes's last years offering some reason for review.[98] Subsequent Courts tended to explicitly explain the reason for review in between one-half and two-thirds of its cases, as Figure 1 demonstrates:

2020), http://scdb.wustl.edu/data.php?s=2 (on file with the *Columbia Law Review*) [hereinafter Spaeth et al., Database Version 2020] (indicating that, of the 262 decisions coded as having been authored by Justice Frankfurter, thirty-four, or just under thirteen percent, are coded as having offered no reason for the grant of review); Spaeth et al., Code Book, supra note 92, at A7 (explaining how cases are coded). Moreover, Justice Frankfurter frequently wrote separately to elaborate on his view of certiorari jurisdiction. See, e.g., Dick v. N.Y. Life Ins., 359 U.S. 437, 461 (1959) (Frankfurter, J., dissenting); Rogers v. Mo. Pac. R.R., 352 U.S. 521, 524 (1957) (Frankfurter, J., dissenting); Wilkerson v. McCarthy, 336 U.S. 53, 66–67 (1949) (Frankfurter, J., concurring).

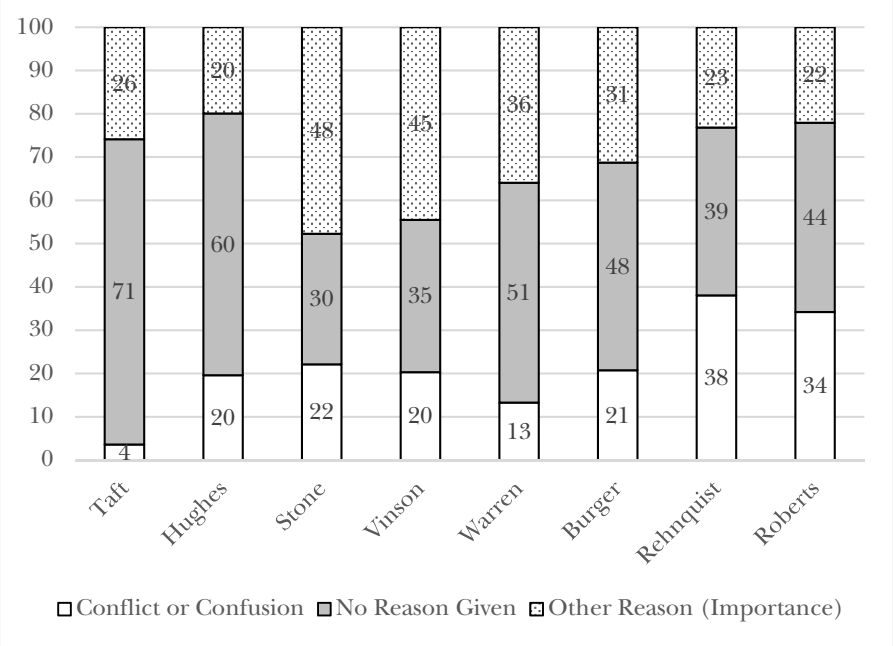
Justice John Paul Stevens seems to have largely followed in the path set out by Justice Frankfurter in both merits decisions and certiorari-stage decisions. See, e.g., Kansas v. Marsh, 548 U.S. 163, 199 (2006) (Stevens, J., dissenting) (writing "to explain why the grant of certiorari in this case was a misuse of our discretion"); Evans v. Stephens, 544 U.S. 942, 942 (2005) (Stevens, J., respecting denial of certiorari); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 525 U.S. 943, 943 (1998) (Stevens, J., respecting denial of certiorari); California v. Carney, 471 U.S. 386, 396–97 (1985) (Stevens, J., dissenting) (calling the Court's decision to take the case an "improvident exercise of discretionary jurisdiction"); New Jersey v. T.L.O., 468 U.S. 1214, 1215 (1984) (Stevens, J., dissenting) (suggesting that the Court should have "dismiss[ed] the writ of certiorari as improvidently granted"); Smith v. North Carolina, 459 U.S. 1056, 1056 (1982) (Stevens, J., respecting denial of certiorari); see also Lackey v. Texas, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari) ("Though the importance and novelty of the question presented by this certiorari petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue . . . ."). Indeed, more than three-quarters of decisions coded as having been authored by Justice Stevens are not coded as having described no reason for the grant of review. See Spaeth et al., Database Version 2020, supra (noting that, of the 397 decisions coded as having been authored by Justice Stevens, ninty-seven are coded as having offered no reason for the grant of review).

And so it is notable that Justice Stevens also wrote that "the practice of dissenting from denials of certiorari [is] counterproductive." Watt v. Alaska, 451 U.S. 259, 273–74 (1981) (Stevens, J., concurring); see also Singleton v. Comm'r, 439 U.S. 940, 942–44 (1978) (Stevens, J., respecting denial of certiorari) ("One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary.").

97. See infra Figure 1.

98. See infra Appendix Figure 2 (showing the Hughes Court's increasing tendency, with each successive appointment, to explain the reason for granting review).

FIGURE 1. REASON FOR CERTIORARI (IN PERCENT) BY CHIEF JUSTICE, 1925–2018 TERMS



Next, the full texts of the opinions in those cases were obtained in one of three ways: from the Caselaw Access Project; from CourtListener; and, for a handful of cases, manually.[99]

Finally, I sharpened focus in those opinions to those sections discussing the Court's reason for granting certiorari—statements like those highlighted above—by selecting for discrete paragraphs that contain the term "certiorari."[100] Here, the research design takes advantage of a relative conservatism in the style of Supreme Court opinions. As noted, many of the Court's opinions since the Taft Court follow a roughly similar cadence: Near the beginning of each opinion, the Court often includes a summary of the case's procedural history that frequently—though, as noted, not always—concludes with the Court's decision to grant certiorari. This "helpful practice of explaining, in the ultimate opinion on the merits, the reasons which had moved it to grant the writ" clarifies "the canons which

99. See infra Methods Appendix, section A (describing these data sources in more detail).

100. The Methods Appendix offers more detail on how relevant text is extracted. See id. The limit employed here—limiting analysis to paragraphs containing the word "certiorari"—is akin to a method employed in other text analyses. See infra notes 285, 289, 291.

guide the Court's exercise of [its docket-setting] discretion."[101] Indeed, even cases coded in The Supreme Court Database as having offered no

101. See Frankfurter & Hart, supra note 85, at 82–83. As noted above, Justice Frankfurter seems to have stood by his view that the decisions to grant review merit explanation, and that the Court's merits opinions offer a convenient and expeditious way to do so. See supra note 96 (explaining that Justice Frankfurter explained the reason for review in the vast majority of opinions he authored).

Some readers may be skeptical that these paragraphs merit the attention that Frankfurter gave them in the 1930s, see supra notes 84–85, 96, and that they are given here. Such readers may contend that these paragraphs are barely given a second thought in the Justices' own processes of drafting, reviewing, and revising their opinions, and thus are hardly scrutinized by the Court as a whole. I respectfully disagree. For one, the Supreme Court Bar and the judiciary generally take the Supreme Court at its word, and parse its opinions—dicta and all—carefully. See, e.g., In re Pre-Filled Propane Tank Antitrust Litig., 860 F.3d 1059, 1064 (8th Cir. 2017) ("Appellate courts should afford deference and respect to Supreme Court dicta . . . ."); Richard J. Lazarus, The (Non)Finality of Supreme Court Opinions, 128 Harv. L. Rev. 540, 561 (2014) ("The number of people who read Supreme Court opinions carefully and the varied expertise of those readers are enormous. Every word, every fact, every characterization of the facts, and *every discussion of background legal doctrine is subject to close scrutiny*." (emphasis added)). This is no less true for a unanimous opinion issued shortly after oral argument than it is for a highly contested opinion that takes nearly the entire Term to finalize. In short, scholars, lawyers, and courts are likely to take the Supreme Court at its word in other contexts of judicial procedure, and there is little reason to treat the Court's elaboration of the canons governing certiorari any differently. Indeed, some judges and practitioners have already taken the Court at its word in certiorari grant contexts specifically, citing these paragraphs in support of their pleas for Supreme Court review. See, e.g., Allapattah Servs., Inc. v. Exxon Corp., 362 F.3d 739, 753–55 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc) (citing several such paragraphs). For petitioners, this is true across both successful and unsuccessful petitions. Compare Petition for a Writ of Certiorari at 2, Trump v. Vance, 140 S. Ct. 659 (2019) (No. 19-635), 2019 WL 6115077 (noting in a successful petition that the "Supreme Court has stressed the 'importance' of questions concerning presidential immunity" and "granted certiorari to decide these questions even in 'one-of-a-kind cases' in which there was no 'conflict among the Courts of Appeals'" (quoting Clinton v. Jones, 520 U.S. 681, 689 (1997))), with Reply Brief for Petitioners at 11, Lieu v. Fed. Election Comm'n, 141 S. Ct. 814 (2020) (No. 19-1398), 2020 WL 6275379 (citing Allen v. Cooper, 140 S. Ct. 994, 1000 (2020)) (referring to the Supreme Court's precedent of granting certiorari when a court of appeals holds a federal statute invalid). For more examples, see Petition for Writ of Certiorari at 23–24, Cusano v. Klein, 549 U.S. 816 (2006) (No. 05-1492), 2006 WL 1440820 (noting in an unsuccessful petition that the "Court has granted certiorari in cases of importance to the administration of bankruptcy law or other significant federal statutes, even in the apparent absence of any split," and citing several cases from the 1940s in support of that proposition); Petition for a Writ of Certiorari at 16 n.50, Co-Steel Raritan v. N.J. Bd. of Pub. Utils., 534 U.S. 813 (No. 00-1393), 2001 WL 34124906 (denying certiorari).

Moreover, the Court likely understands this and therefore may closely consider how to characterize the decision to grant review. It seems very likely that, at the very least, Justice Frankfurter did (and probably Justice Stevens, too). Moreover, cases of disagreement, where a dissent (or concurrence) and the majority haggle over the appropriate framing of the question presented, offer further evidence of the Court's close review. See, e.g., Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Marshall, J., dissenting); *Watt*, 451 U.S. at 276 (Stevens, J., dissenting); *Dick*, 359 U.S. at 447 (Frankfurter, J., dissenting). Other examples may be found in the public papers of other Supreme Court Justices. For example, Justice Lewis Powell's papers in Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), suggest a concern by Justice Antonin Scalia on the proper framing and scope of the issues presented to the

explicit rationale for the certiorari grant sometimes include a paragraph noting the Court's decision to grant the certiorari petition. And those paragraphs might be understood to imply *some* foundation for the Court's review, by gesturing at either the case's subject matter or some other notable feature, even if not expressly describing the motive(s) for granting review.[102]

The decision to focus on paragraphs containing the term "certiorari" is not without trade-offs. One, not all opinions include such paragraphs, though about ninety percent of these opinions do.[103] Two, some decisions contain multiple paragraphs containing the term certiorari—sometimes, for example, a dissent or concurrence may grumble about the majority's failure to address the issue at which the certiorari grant was directed.[104] In short, this approach is both overinclusive (in that it includes paragraphs that mention the term *certiorari*, even if they do not bear directly on the majority's understanding of the reason for granting review) and underinclusive (in that it excludes opinions that do not contain the term *certiorari*, even if the decision describes certain features of the case that also pertained to the Court's decision to grant review). But such overinclusivity may yet yield important insights about the Court's approach to certiorari at any given time; a dissent's discussion of a decision to review, for example, may provide some insight into the Court's general approach to its docket discretion.[105] And this underinclusivity helps to avoid confounding

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Court. See Memorandum from Justice Antonin Scalia to the Conference (Dec. 4, 1986), *in* Lewis F. Powell, Jr., Supreme Court Case Files: *California Coastal Comm'n v. Granite Rock Co.*, at 53 (on file with the Lewis F. Powell Jr. Archives, Washington and Lee University School of Law). This concern was eventually raised in Justice Scalia's opinion dissenting from the Court's decision. *Cal. Coastal Comm'n*, 480 U.S. at 607 (Scalia, J., dissenting).

102. *Board of Governors of the Federal Reserve System v. Agnew* is one example of a case coded as having offered no reason for the grant of review, but which includes terms suggestive of its place on the Court's important-questions docket. See 329 U.S. 441, 443 (1947) ("This case, here on certiorari to the Court of Appeals of the District of Columbia, presents important problems under § 30 and § 32 of the Banking Act of 1933."); see also Alexander v. Holmes Cnty. Bd. of Educ. 396 U.S. 19, 20 (1969) (per curiam) ("This case comes to the Court on a petition for certiorari . . . . The question presented is one of paramount importance, involving as it does the denial of fundamental rights to many thousands of school children, who are presently attending Mississippi schools under segregated conditions . . . .").

103. Most of the 874 cases that did not include the term "certiorari" and were therefore ultimately excluded from the final dataset were coded in The Supreme Court Database as providing no reason for the grant. Only 125 of the excluded cases were coded as offering some nonconflict-related reason for review. See infra note 273 (describing these cases in more detail).

104. See, e.g., McWilliams v. Dunn, 137 S. Ct. 1790, 1807 (2017) (Alito, J., dissenting) ("The Court refuses to decide the legal question on which we granted review and instead decides the question on which review was denied."); *Siegert*, 500 U.S. at 236 (Marshall, J., dissenting) ("The majority today decides a question on which we did not grant certiorari.").

105. See, e.g., *Siegert*, 500 U.S. at 238 (Marshall, J., dissenting) (describing the question decided as regarding "the extent of a government employee's constitutional liberty interest in reputation").

the certiorari-centered analysis with content that is far afield from the Court's decision to grant review (when, for example, the Court grants review to decide a question of criminal law but then decides the case on unrelated grounds of mootness).[106] Hence, as described in greater detail in the Methods Appendix, I ultimately concluded that the benefits of limiting focus to any paragraph containing the term "certiorari" were likely to outweigh the costs of this approach. This collection of paragraphs constitutes the dataset—the corpus—for further analysis.

2. *Analysis.* — Analysis of this corpus begins, of course, with the research question: How has the Supreme Court decided to grant certiorari in nonconflict cases of importance? In order to discern what's been sufficiently important to merit review, this study relied on an index of 136 salient terms, named, creatively, a Term Index.[107]

Each term in the Term Index (i.e., each Index Term) was then scored according to two metrics: frequency (i.e., in how many cases did the term appear?) and proximity (i.e., how close was the term to the focus for analysis—opinion statements indicating the questions important enough to merit certiorari?). These two metrics, taken together, form the basis for each Index Term's Importance Score.[108]

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106. Cf. United States v. Microsoft Corp., 138 S. Ct. 1186, 1187–88 (2018) (explaining that the Court granted certiorari to decide a narrow question regarding disclosure of electronic communications stored abroad under 18 U.S.C. § 2703, but finding that there was no longer any "live dispute . . . between the parties"). *Microsoft* offers a sort of counterexample: There, the Court's opinion does contain a certiorari paragraph describing the reason for review, but then goes on to note that the case has since become moot. The Court might, instead, have declined to describe the decision to grant review, simply noted the case's status as moot, and dismissed it. A research design that looked beyond certiorari paragraphs would likely have mistakenly attributed the case's discussion of mootness to the decision to grant review. But a research design that is limited to certiorari paragraphs may avoid making that mistake (but, perhaps, at the cost of missing other pertinent certiorari signals in other cases).

107. The Methods Appendix describes the Term Index in greater detail. In short, it is derived from the most common words in the corpus (while excluding those words that do not seem to advance our understanding of the Court's certiorari process). And, as explained in the Methods Appendix, asterisked Index Terms represent multiple words (etymologically similar words, or close synonyms). For example, *counsel** encompasses *attorney*, *attorneys*, and *counsel*. See infra notes 275–278 and accompanying text; see also Appendix Table 1.

108. This study relies on the Term Index and these metrics rather than The Supreme Court Database's own codes for a case's issue and issue area. This is for two reasons. First, as noted above, the Court sometimes grants review to resolve one question, but ends up deciding the case on grounds far afield from the original grant. See supra note 106; see also Bert I. Huang, The Supreme Court's Two Minds, 122 Colum. L. Rev. Forum 90, 102–03 (2022) (describing certiorari "off-ramps"). Moreover, this approach offers one possible way to mediate the conflict between a case's specific legal context and its public policy context. See Carolyn Shapiro, Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court, 60 Hastings L.J. 477, 480 (2009) (describing this conflict in the context of Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357 (2009), and criticizing The Supreme Court Database for emphasizing a case's "public policy context" at the expense of careful legal analysis). Specifically, it does so by relying on the Court's own descriptions of the case and possible motives for granting review.

My emphasis on these two metrics is informed by both domain-specific knowledge and general principles of computational text analysis. Co-word analysis, which this study employs, relies primarily on both frequency and proximity metrics to understand the relationships among phrases and themes in a body of texts.[109] Other data science methods likewise consider frequency and proximity metrics in text analysis.[110] And these general data science insights are reinforced by those that lawyers and scholars might intuit from reading a number of the Court's opinions: A series of statements, across a number of opinions, explaining that the Court has "granted certiorari to decide an important question of [tax *or* patent *or* bankruptcy *or* constitutional] law" suggests that frequency matters.[111] And that an Index Term appears near the word "important" or "certiorari" suggests that tax law (or constitutional law) is important to the decision to grant review (whereas terms appearing further away from words like "certiorari" in these paragraphs may more likely describe some other feature of the case's claims and procedural history).[112]

Specifically, a term's frequency measure is a scaled representation of how often that term appears in a given time period, with zero representing the most frequent term and one representing the least frequent. Consider this (fictitious) example: Imagine that, during the Taft Court, the term

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109. See infra note 281 and accompanying text. For other examples of co-word analysis in the legal literature, see, e.g., Heidi M. Berven & Peter David Blanck, The Economics of the Americans With Disabilities Act Part II—Patents and Innovations in Assistive Technology, 12 Notre Dame J.L. Ethics & Pub. Pol'y 9, 46 & n.285 (1998); Diego Corrales-Garay, Marta Ortiz-de-Urbina-Criado & Eva-María Mora-Valentín, Knowledge Areas, Themes and Future Research on Open Data: A Co-Word Analysis, 36 Gov't Info. Q. 77, 77–87 (2019).

110. See infra notes 280–281.

111. Here, elaboration is due on the meaning of an "important question of basket-weaving law" (for example) and a "question important to basket-weaving law." It may be that a given question is important to the development of basket-weaving doctrine, but that there is still some uncertainty as to whether that question is important enough to garner the Court's attention. In such cases, this study assumes that questions important to basket-weaving law are only important enough to merit certiorari if basket-weaving law is itself sufficiently important (under the Court's own approach to importance). And, conversely, if basket-weaving law is important, then questions important to basket-weaving law are likely to merit review. Hence, when the Court grants review to decide an "important question of basket-weaving law," it implies that basket-weaving law is itself important. For a nonfictitious example, consider Nat'l Lab. Rels. Bd. v. Crompton-Highland Mills, Inc., which explains that the Court granted review "[b]ecause of the importance of the issue in the administration of the labor relations statutes, we granted certiorari." 337 U.S. 217, 220 (1949). This implies that the labor relations statutes are themselves important (since issues important to those statutes merit review).

112. See, e.g., Bowman v. Monsanto, Co., 569 U.S. 278, 283 (2013) ("We granted certiorari to consider the important question of patent law raised in this case . . . ."); Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 418 (1968) ("We granted certiorari because this case presents important questions under the bankruptcy laws." (citation omitted)). Likewise, terms that appear only far away from words like "important" or "certiorari" would seem less important to the Court's decision to grant review.

*murder** (least frequent) appears in the relevant paragraph(s) of only one case; the term *constitution** (most frequent) appears in the relevant paragraph(s) of 101 cases; and the term *patent* appears in the relevant paragraph(s) of 11 cases. In this example, the scaled frequency score would be 1.00 for *murder**, 0.00 for *constitution**, and 0.90 for *patent*.[113]

Similarly, a term's proximity measure is a scaled representation of how close that term is to certain key phrases (i.e., Focal Terms), such as *important questions* or *we granted certiorari* (collectively, *certiorari**, *question**, and *importan**) within the certiorari paragraph.[114] Consider, for example, this sentence: We granted certiorari because this case presents important questions under the bankruptcy laws.[115] In this example, the distance between the term *bankruptcy* and *important questions*, after excluding filtered stop words such as *the*, is 2 (and is 1 for *under*).[116] And so, after evaluating all the cases in a given time period, we can calculate *bankruptcy**'s average distance from these Focal Terms and assign it a scaled score as in the frequency context, where again, zero represents the most proximate, or closest, term, and one represents the least proximate.

3. *Limitations.* — The method described above has some limitations. For one, this approach offers a perspective on the Court's important-questions docket that is largely internal to the Court and that is largely quantitative. The approach described is internal in that it looks at the Court's own stated approach to its important-questions docket, rather than to signals generated from beyond the Court (such as the content of petitions, effects on law and policy, or outside observers' views of the Court).[117] This approach is used because this Article is primarily interested in understanding the principles that guide the Court's own exercise of its docket-setting discretion (and how those principles have evolved over time). By adopting an internal and quantitative approach, I do not mean to suggest that external or qualitative approaches are less useful. It is true, for example, that the Court can significantly affect public policy by granting certiorari in an area of law that it visits only rarely,[118] or that close

113. See infra notes 284–285 and accompanying text (describing the formula for calculating these scaled scores).

114. See infra note 282 (listing these Focal Terms).

115. This sentence is adapted from Protective Committee for Independent Stockholders, 390 U.S. at 418, but slightly modified for illustrative purposes.

116. See infra note 284 and accompanying text (further explaining how proximity is measured); infra Appendix Table 2 (listing excluded stop words).

117. My previous work has used an external approach, examining petitions for writs of certiorari to try to discern which petitions seem to attract the Court's attention. See Narechania, A Patent Puzzle, supra note 25; see also Livermore et al., supra note 37, at 874 (noting other analyses based on external signals).

118. One example is the Second Amendment. See N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1527–28 (2020) (Alito, J., dissenting) (noting that "until this case, we denied all . . . requests" to review lower court decisions construing the scope of the Second Amendment, but that the Court's action in this one case "led to an epiphany of sorts" that sparked changes in the governing laws).

observers of the Court may be able to discern the Court's priorities from the content of the petitions it chooses to grant.[119] The approach described here may not capture these external signals, as it is aimed at identifying other factors that shape the Court's discretionary docket. Hence, both methods can advance our understanding of the Court and its public role, and it is worth acknowledging that the method employed here has a particular focus.

This method also has further limitations within its own approach. For one, there is an element of subjective selection in the construction of the Terms Index, one which is unavoidable no matter the approach employed.[120] I have tried to mitigate the effects of my particular approach by verifying my inferences with law school research assistants.[121] Moreover, changes in the scope of the Court's discretionary jurisdiction over time limit the ability to attribute shifts in the Court's docket to changes in the Court's priorities: In such cases, it is difficult, if not impossible, to disentangle changes caused by the new scope of the Court's certiorari jurisdiction from changes caused by shifting judicial preferences.[122] And it must be emphasized that these results are descriptive and not necessarily predictive. Indeed, the wide docket discretion that the Court enjoys necessarily means that it could shift practices radically in the future.

More notably, this analysis focuses on the Court's selectively reasoned decisions to grant review to the substantial exclusion of the Court's almost-entirely unreasoned decisions to deny review, except in the comparatively rare opinions concurring in or dissenting from the Court's denial of the writ of certiorari, what the Court calls "Opinions Relating to Orders" (ORTOs).[123] Moreover, this sample of the Court's priorities is shaped by

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119. See Narechania, A Patent Puzzle, supra note 25, at 1348 (hypothesizing one rationale for the Court's increased attention to patent cases based on a study of certiorari petitions); see also Christa J. Laser, Certiorari in Patent Cases, 48 AIPLA Q.J. 569, 602–03 (2020) (collecting qualitative evidence supporting that hypothesis).

120. See, e.g., Justin Grimmer & Brandon M. Stewart, Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts, 21 Pol. Analysis 267, 270 (2013) ("Automated content analysis methods . . . will not . . . eliminate the need for careful thought by researchers nor remove the necessity of reading texts."). Even the different choice to use automated tools to construct a Terms Index, rather than the manual approach used here, would reflect some subjective selection—both the subjective judgment that automated tools are better than manual selection informed by domain expertise, as well as whatever (possibly unknowable) subjective biases may inform the underlying automated process.

121. See infra note 277 and accompanying text (describing the construction of the Terms Index).

122. See infra note 183.

123. See Opinions Relating to Orders—2021, Sup. Ct. of the U.S., https://www.supremecourt.gov/opinions/relatingtoorders [https://perma.cc/Q5H7-FRFY] (last visited Mar. 19, 2022) ("Opinions may be written by Justices to comment on the summary disposition of cases by orders, *e.g.*, if a Justice wants to dissent from the denial of certiorari or concur in that denial."); Barry P. McDonald, SCOTUS's Shadiest Shadow Docket, 56

available petitions, excluding those cases and controversies where no petition for certiorari was filed. This latter limit does not present a significant problem. Though the Court is formally constrained by the petitions that are presented to it, the Court has both a wide range of petitions from which to select (far more than it could reasonably choose) and a variety of mechanisms by which to signal its interest in receiving a particular petition (such as through issuing ORTOs[124]). In short, I am not concerned that the Court will be unable to grant review in a case presenting an issue that it thinks merits a place on its important-questions docket.[125] The possibility that the Court only selectively explains its motives for granting review does, however, pose an inherent limitation on this study, one that would attend to any study relying on judicial texts to discern judicial motives.[126] Moreover, absence of reasoned opinions in most decisions to deny review limits the ability to analyze why, for example, some matters are excluded from or deemphasized in the Court's important-questions docket. We cannot compare grants to denials. This is an unavoidable consequence of the Court's current practice of declining to explain certiorari-stage decisions independent of merits-stage decisions.[127] This limit—which would affect any such study of the Court's docket-setting priorities—may suggest one further reason to urge the Court to better explain its certiorari-stage decisions.[128]

Wake Forest L. Rev. (forthcoming 2022) (manuscript at 1024), https://ssrn.com/abstract=3832106 [https://perma.cc/8SPD-TTH2].

124. See infra note 224; see also McDonald, supra note 123, at 1100 (describing some problems with this practice including failure to recognize difficulties surrounding judicial impartiality and the impact of individual Justices advising lower courts that "they got the law wrong").

125. But cf. Frederick Schauer, Is It Important to Be Important?: Evaluating the Supreme Court's Case Selection Process, 119 Yale L.J. Online 77, 77 (2009) (explaining that the Court's preferences might be shaped by a skewed perception of the universe of disputes).

126. The Court's selectivity manifests in at least two ways. First, the descriptions offered by the Court may, in some cases, offer only an incomplete or misleading description of the decision to grant review. Such a criticism, however, might be levied against any decision, both at the certiorari stage and on the merits. Second, the Court may offer descriptions only in certain cases while choosing to omit them in others. This practice has analogues in the practices of other courts, including, for example, the decision whether to publish a decision, whether to make that decision precedential, or whether to hide a decision altogether. See, e.g., Bert I. Huang & Tejas N. Narechania, Judicial Priorities, 163 U. Pa. L. Rev. 1719, 1721–22 (2015); Merritt E. McAlister, Missing Decisions, 169 U. Pa. L. Rev. 1101, 1103–05 (2021) ("Depending on the year, as many as forty percent of merits terminations from the federal appellate courts are missing from commercial databases.").

127. Watts, supra note 12, at 16–17 ("When a certiorari petition is either granted or denied, the Court does not routinely disclose the Justices' votes, nor does the Court explain its reasons for granting or denying certiorari.").

128. See id. (arguing for more transparency in the Court's certiorari decisions); see also Baude, Shadow Docket, supra note 53, at 5–6, 16–18 (offering a similar argument); infra Part III (arguing in favor of greater transparency and reasoning in certiorari decisionmaking).

* * *

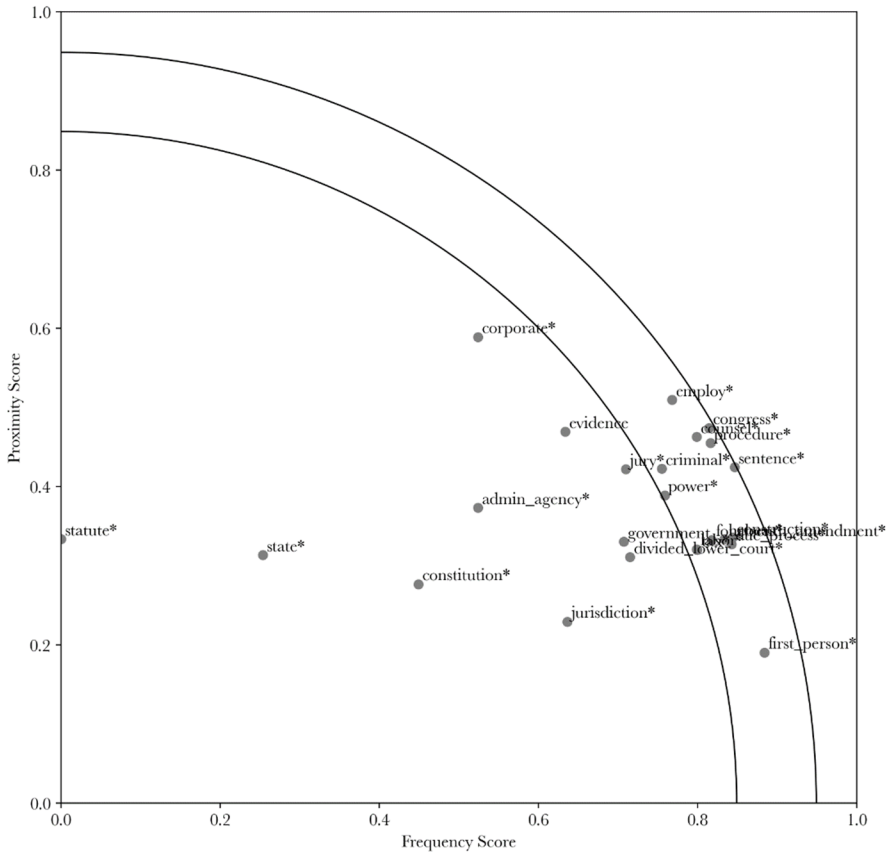
Though the Supreme Court does not independently explain its certiorari-stage decisions, it does, as noted, often explain its decisions to grant review inside its merits decisions. And while these explanations seem to resist traditional doctrinal evaluation, they can be analyzed using text analysis and language processing techniques. This Article has developed and employed a method based in co-word analysis that generates a two-dimensional score (frequency, proximity) for each in a list of salient terms that may help to describe the Court's decision to grant review where its docket-setting discretion is greatest. This text analysis can help us better understand the priorities that inform the Court's approach to its important-questions docket.

II. CERTIORARI GRANTS IN IMPORTANT CASES

A. *Results*

1. *Importance Scores.* — So how has the Supreme Court exercised its discretion to select the cases important enough to merit its resolution? This Article cannot say definitively. It can only make inferences based on frequency and proximity and limited by the accuracy of the various filters applied to the indices. But acknowledging those limits, here is a brief summary of what may have been important to the Supreme Court since 1925.

FIGURE 2. TERMS PLOTTED BY IMPORTANCE SCORE, 1925–2018



I plotted each Index Term, based on its overall two-dimensional score, on a two-dimensional plane, along with the median distance from the origin minus one (outer arc) and two (inner arc) median absolute deviation(s) (over all terms across all times).[129] Appendix Figure 3 contains this complete plot, and Figure 2, above, sharpens focus on the twenty-three most significant terms, namely, those that lie inside the two arcs.[130]

These terms can also be ranked by their distance from the origin, which represents the term *certiorari**. This converts the two-dimensional score into a one-dimensional score, one that weighs both factors equally.[131] As suggested above and described in the Methods Appendix, terms closer

129. See infra Appendix Figure 3.

130. See Wolfgang Alschner, Sense and Similarity: Automating Legal Text Comparison *in* Computational Legal Studies: The Promise and Challenge of Data-Driven Research 9, 14 (Ryan Whalen ed., 2020) (noting the importance of "intra-corpus benchmarking").

131. See infra note 289 and accompanying text.

to the origin point (0, 0)—that is, those with smaller distances from the *certiorari** term—are more suggestive of the Court's priorities.[132]

TABLE 1. TERMS RANKED BY IMPORTANCE SCORE, 1925–2018

Term	Distance from Origin (DFO)
*statute**	0.334
*state**	0.406
*constitution**	0.530
*admin_agency**	0.646
*jurisdiction**	0.678
*corporate**	0.774
*divided_lower_court**	0.781
government	0.783
evidence	0.791
*jury**	0.828
*power**	0.854
*labor**	0.861
*tax**	0.862
*criminal**	0.867
*fourteenth_amendment**	0.884
*habeas**	0.899
*first_person**	0.904
*due_process**	0.905
*construction**	0.909
*employ**	0.922
*counsel**	0.925
*procedure**	0.938
*congress**	0.944
*death_sentence**	0.948
*sentence**	0.948

Table 1 thus presents a list of only those terms inside the arcs described in Figure 2, sorted by their distance from the origin. Hence, this is a list of only significant terms. Given the important-questions standard unearthed and described in the Introduction, it may seem unsurprising

132. See infra note 289 and accompanying text; see also Matthew Jennejohn, Samuel Nelson & D. Carolina Núñez, Hidden Bias in Empirical Textualism, 109 Geo. L.J. 767, 793 (2021) ("Words that are more closely associated with one another in the text will have vectors with a shorter Euclidean distance between them.").

that constitutional questions, questions of statutory interpretation, and, together, questions about a statute's constitutionality rank near the top of the Court's priorities.[133] Moreover, the Court's attention to questions of *jurisdiction** and *procedure** resonates with other studies of the Court's docket.[134] Those terms, standing alone, do not say which statutes, constitutional provisions, and procedural or jurisdictional rules most caught the Court's attention. And while other terms, such as *due_process**, *fourteenth_amendment**, *habeas**, *labor**, or *tax** might be understood to offer some hints, a more complete understanding requires a closer look at the cases underlying these results.[135] And so it is worth emphasizing that the approach here does not rely solely on the results generated by this method, but also on a complementary analysis of the Court's underlying opinions.

Some other results are somewhat more surprising or noteworthy. For one, the term *divided_lower_court** suggests that many of the Court's decisions to grant review occur in the wake of some disagreement among members of a single court of appeals—e.g., a single dissent, or a dissent from the denial of a petition for rehearing en banc—the absence of any resultant disuniformity notwithstanding. This perhaps validates a strategy, discussed by many appellate judges, for attracting the Court's attention.[136]

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133. See supra notes 17–22 and accompanying text; see also Shapiro et al., supra note 10, § 4.12 (noting that cases raising questions regarding the constitutionality of federal statutes often merit review).

134. See Shapiro et al., supra note 10, § 4.15; see also Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160 (2010) ("We granted . . . certiorari, and formulated the question presented to ask whether § 411(a) restricts the subject-matter jurisdiction of the federal courts over copyright infringement actions.").

135. See Grimmer & Stewart, supra note 120, at 270; Ronald N. Kostoff, Henry J. Eberhart & Darrell Ray Toothman, Database Tomography for Information Retrieval, 23 J. Info. Sci. 301, 305 (1997) ("Because numbers are limited in their ability to portray the conceptual relationships among themes and sub-themes, the qualitative analyses of the extracted data have been at least as important as the quantitative analyses."). Hence, one cannot jump to conclusions based solely on the terms in this list, even as the method employed tries to account for various concerns. For instance, *corporate** will capture cases raising questions of corporate law, but may also capture cases involving a corporate party (without respect to the nature of the question at issue). The method accounts for such concerns (which may extend to like terms such as *admin_agency**) through the proximity dimension of the measure employed: In cases where the corporate status of the parties is not germane to the question presented, one generally would not expect the *corporate** term to appear near the Court's description of the question presented, and so it is de-emphasized along that axis. Compare Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (granting "certiorari to determine the extent to which the *per se* rule against price-fixing applies to an important and increasingly popular form of business organization, the joint venture," suggesting that a business law question is central to the grant of certiorari), with P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp., 485 U.S. 495, 499 (1988) (noting the "importance of the issue presented" and granting certiorari where "several oil companies[] brought actions" that alleged challenged "orders were unconstitutional on pre-emption grounds," suggesting that constitutional preemption questions were more central to the Court's certiorari grant).

136. See, e.g., Michael Boudin, Friendly, J., Dissenting, 61 Duke L.J. 881, 896 (2012) ("The common aims of dissenters are familiar: to force changes in the majority opinion

It also bears noticing that the Court seems to have dedicated some significant focus, over time, to questions of procedure and to questions of criminal sentencing (especially capital sentencing), among other case categories.

This list encompasses a sample of the Court's cases spanning nearly a century, but federal law and the content of the Court's docket has changed quite a bit since 1925. *Erie*, for example, was decided in 1938, effectively sweeping entire bodies of law out of the Court's docket.[137] Moreover, the

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and . . . to encourage en banc reconsideration or certiorari . . . ."); Bernice B. Donald, The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality and Dissent in Multi-Member Courts, 47 U. Mem. L. Rev. 1123, 1130 tbl.1 (2017); Kermit V. Lipez, Some Reflections on Dissenting, 57 Me. L. Rev. 313, 322 (2005); see also Doe v. Fairfax Cnty. Sch. Bd., 10 F.4th 406, 407–08 (4th Cir. 2021) (Wynn, J., concurring in the denial for rehearing en banc) (describing and criticizing the practice, at the en banc stage, of "submit[ting] advisory opinions to the Supreme Court" that read, "'inappropriately, like petitions for writs of certiorari'" (quoting Marsha S. Berzon, Introduction, 41 Golden Gate U. L. Rev. 287, 293 (2011))); Antonin Scalia, The Dissenting Opinion, 1994 J. Sup. Ct. Hist. 33, 37 ("[A] dissent is also a warning flag to the Supreme Court[,] . . . evidence that the legal issue is a difficult one worthy of the Court's attention."); Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. Chi. L. Rev. 1371, 1400 (1995); Diane P. Wood, When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court, 100 Calif. L. Rev. 1445, 1457 (2012); supra note 123; cf. Eva M. Guzman & Ed Duffy, The (Multiple) Paths of Dissent: Roles of Dissenting Judges in the Judicial Process, 97 Judicature 105, 107 (2013); Leroy Rountree Hassell, Sr., Appellate Dissent: A Worthwhile Endeavor or an Exercise in Futility?, 47 How. L.J. 383, 388 (2004); Francis P. O'Connor, The Art of Collegiality: Creating Consensus and Coping With Dissent, 83 Mass. L. Rev. 93, 95–96 (1998) ("The Massachusetts [Supreme Judicial Court] looks to the published opinions of the Massachusetts Appeals Court and especially to the reasoning not only of that court but also of dissenting opinions."). But cf. Joseph v. United States, 574 U.S. 1038, 1040 (2014) (Kagan, J., respecting denial of certiorari) (suggesting that intracircuit division is usually not enough to warrant certiorari). Together, these sources might imply that, for a lower court judge looking to induce further review of a case question, it may be more effective to write a separate opinion describing why circuit precedent is incorrect than to try to create an intracircuit split. But cf. Tracey E. George & Michael E. Solimine, Supreme Court Monitoring of the United States Courts of Appeals En Banc, 9 Sup. Ct. Econ. Rev. 171, 194–95 (2001) (finding that, for certiorari petitions arising out of federal en banc appellate decisions, the presence of "[a] dissenting judge" is "not statistically significant").

One hypothesis for this result may be that a dissent is likely to foreshadow some future intercircuit conflict, and the Court's review resolves the question even before any disuniformity can take hold. See, e.g., Marin K. Levy & Tejas N. Narechania, Interbranch Information Sharing: Examining the Statutory Opinion Transmission Project, 108 Calif. L. Rev. 917, 939 (2020) ("[S]uch separate writings may foreshadow a future split. One judge's dissenting opinion may become the majority view in another circuit." (citation omitted)).

137. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). In *Erie*, the Court famously declared that when the federal courts hear state law causes of action (e.g., state law torts or contract claims) under their diversity jurisdiction, such cases should be decided by reference to state law principles (rather than under principles of federal common law). Such cases, then, ceased to raise federal questions requiring the Supreme Court's attention. But see Diane P. Wood, Back to the Basics of *Erie*, 18 Lewis & Clark L. Rev. 673, 674 (2014) (describing the "exceptions to exceptions to exceptions" in the "unwieldy '*Erie* doctrine'").

Court decided many more cases in those early years of certiorari jurisdiction than it does now,[138] giving those early years a relative advantage vis-à-vis more recent decades (given this research design emphasizing frequency). Hence, and given these important changes over time, it may be instructive to look at smaller time horizons. It is common to define and compare different eras of the Court by the tenure of each Chief Justice.[139]

TABLE 2. TERMS RANKED BY IMPORTANCE SCORE BY CHIEF JUSTICE TENURE

Taft (1925–1930)	**DFO**	**Hughes (1930–1941)**	**DFO**	**Stone (1941–1946)**	**DFO**	**Vinson (1946–1953)**	**DFO**
statute*	0.072	statute*	0.145	statute*	0.091	statute*	0.186
corporate*	0.151	tax*	0.487	corporate*	0.577	state*	0.597
state*	0.580	state*	0.504	state*	0.608	admin_ agency*	0.606
jurisdiction*	0.601	admin_ agency*	0.510	admin_ agency*	0.635	divided_ lower_court*	0.660
tax*	0.603	corporate*	0.603	evidence	0.724	government	0.709
admin_ agency*	0.612	jurisdiction*	0.644	divided_ lower_court*	0.727	constitution*	0.735
government	0.685	constitution*	0.658	jurisdiction*	0.729	evidence	0.753
constitution*	0.703	bankruptcy*	0.777	tax*	0.737	jurisdiction*	0.781
property*	0.767	evidence	0.788	constitution*	0.771	jury*	0.796
judicial_code	0.800	power*	0.802	employ*	0.781	power*	0.813
power*	0.802	government	0.804	labor*	0.788	criminal*	0.841
evidence	0.816	property*	0.809	government	0.808	habeas*	0.843
damages	0.833	employ*	0.814	power*	0.812	employ*	0.850
bank	0.833	labor*	0.836	property*	0.819	procedure*	0.851
railroad*	0.868	congress*	0.853	contract*	0.836	corporate*	0.855
construction*	0.868	income	0.864	jury*	0.838	tax*	0.864
death_ sentence*	0.868	jury*	0.872	commerce*	0.840	due_ process*	0.885
income	0.877	construction*	0.877	judicial_ code	0.849	counsel*	0.889
jury*	0.882	divided_ lower_court*	0.893	counsel*	0.862	fourteenth_ amendment*	0.892
commerce*	0.882	contract*	0.909	construction*	0.865	construction*	0.902

138. See, e.g., Starr, supra note 68, at 1368 tbl. (highlighting the decline in the Court's discretionary docket).

139. See Spaeth et al., Code Book, supra note 92, at 31 ("[M]ost judicial research is chronologically organized by the term of the Court or by chief justice . . . ."); see also Lee Epstein, William M. Landes & Richard A. Posner, When It Comes to Business, the Right and Left Sides of the Court Agree, 54 Wash. U. J.L. & Pol. 33, 38 (2017) (framing their study as revolving around "the five Chief Justice eras in the Business Litigant Dataset"); Tonja Jacobi & Matthew Sag, Taking Laughter Seriously at the Supreme Court, 72 Vand. L. Rev. 1423, 1459 (2019).

Taft (1925–1930)	DFO	Hughes (1930–1941)	DFO	Stone (1941–1946)	DFO	Vinson (1946–1953)	DFO
contract*	0.885	equity*	0.917	criminal*	0.871	labor*	0.914
insurance	0.887	trust	0.924	damages	0.888	rules	0.928
bankruptcy*	0.901			railroad*	0.895	contract*	0.930
congress*	0.902			bankruptcy*	0.908	death_ sentence*	0.942
collector	0.917			injunction*	0.911	property*	0.943
trust	0.927			overrule*	0.915	bankruptcy*	0.945
equity*	0.927			securities*	0.916		
counsel*	0.929			death_ sentence*	0.916		
				fair	0.920		
				regulation*	0.922		
				congress*	0.929		
				fourteenth_ amendment*	0.929		
				due_process*	0.930		

Warren (1953–1969)	DFO	Burger (1969–1986)	DFO	Rehnquist (1986–2005)	DFO	Roberts (2005–___)	DFO
statute*	0.201	state*	0.323	state*	0.130	state*	0.094
state*	0.368	statute*	0.356	statute*	0.156	statute*	0.200
constitution*	0.487	constitution*	0.360	constitution*	0.212	admin_ agency*	0.486
evidence	0.609	admin_ agency*	0.552	corporate*	0.574	constitution*	0.505
jurisdiction*	0.625	jurisdiction*	0.649	admin_ agency*	0.582	corporate*	0.564
corporate*	0.640	corporate*	0.678	jurisdiction*	0.645	jurisdiction*	0.662
admin_ agency*	0.642	government	0.723	evidence	0.670	government	0.664
jury*	0.668	criminal*	0.759	jury*	0.674	criminal*	0.684
divided_ lower_court*	0.715	evidence	0.775	government	0.690	first_person*	0.687
labor*	0.742	fourteenth_ amendment*	0.791	divided_ lower_court*	0.737	habeas*	0.704
power*	0.781	divided_ lower_court*	0.798	sentence*	0.740	jury*	0.726
government	0.788	first_person*	0.804	criminal*	0.759	evidence	0.738
fourteenth_ amendment*	0.793	employ*	0.819	death_ sentence*	0.766	sentence*	0.745
criminal*	0.798	labor*	0.831	first_person*	0.769	counsel*	0.751
counsel*	0.802	jury*	0.839	power*	0.770	divided_ lower_court*	0.754

Warren (1953–1969)	**DFO**	**Burger (1969–1986)**	**DFO**	**Rehnquist (1986–2005)**	**DFO**	**Roberts (2005–___)**	**DFO**
due_ process*	0.826	construction*	0.878	procedure*	0.780	procedure*	0.788
construction*	0.843	damages	0.881	congress*	0.781	prison*	0.788
employ*	0.846	procedure*	0.883	habeas*	0.782	death_ sentence*	0.808
congress*	0.858	power*	0.885	due_ process*	0.794	rules	0.809
habeas*	0.863	congress*	0.887	employ*	0.798	precedent*	0.811
prison*	0.867			counsel*	0.820	congress*	0.851
tax*	0.874			officer*	0.822	officer*	0.856
officer*	0.878			first_ amendment	0.824	due_process*	0.863
sentence*	0.889			fourteenth_ amendment*	0.830	interpretation	0.866
procedure*	0.898			regulation*	0.833	regulation*	0.872
death_ sentence*	0.901			rules	0.859	power*	0.874
contract*	0.909			interpretation	0.872	overrule*	0.883
interpretation	0.922			precedent*	0.878		
rules	0.922			damages	0.884		
				construction*	0.892		
				fair	0.897		
				property*	0.902		
				tax*	0.903		

Table 2 presents ranked lists of significant terms during the tenure of each Chief Justice since 1925—i.e., the Taft Court, the Hughes Court, the Stone Court, the Vinson Court, the Warren Court, the Burger Court, the Rehnquist Court, and the Roberts Court. Here, though the wide range of terms over time suggests that no single formula can explain the Court's important-questions docket, some hints about the factors that shape the Court's docket begin to emerge. For one, bankruptcy cases (*bankruptcy**) suddenly rank just below constitutional cases (*constitution**) during the Hughes Court, which encompasses much of the Great Depression.[140] Likewise, labor and employment cases (*labor**, *employ**) appear as a new focus for the Hughes Court, which coincides with the enactment of the National Labor Relations Act.

140. Charles Evans Hughes served as Chief Justice from 1930 to 1941. The Great Depression is typically marked as beginning in 1929 and reaching its apex around 1933, with high rates of unemployment persisting for years thereafter. See Americans React to the Great Depression, Libr. of Cong., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/americans-react-to-great-depression/ [https://perma.cc/F5V7-B2ZW] (last visited Feb. 2, 2022).

2. *Change in Importance Scores.* — The emergence of such new priorities for the Hughes Court suggests one further measure of the Court's important-questions docket. In addition to ranking terms by their "importance" (measured by a term's distance from the origin in a two-dimensional plot), terms may be ranked by their change in importance: How, for example, do terms change from one Court to the next? Table 3 offers information about these shifts in the Court's priorities, highlighting the most significant Deltas toward and away from the origin.

TABLE 3. TERMS RANKED BY CHANGE IN IMPORTANCE SCORE BY CHIEF JUSTICE TENURE

Hughes (1930–1941)	**Δ**	**Stone (1941–1946)**	**Δ**	**Vinson (1946–1953)**	**Δ**	**Warren (1953–1969)**	**Δ**
standing	-0.429	force	-0.428	solicitor_general	-0.418	confession	-0.472
employ*	-0.204	levied	-0.230	government	-0.099	fraud	-0.286
procedure*	-0.174	settlement	-0.201	habeas*	-0.097	officer*	-0.271
labor*	-0.139	citizenship	-0.195	procedure*	-0.096	constitution*	-0.248
regulation*	-0.124	diversity	-0.194	divided_lower_court*	-0.067	state*	-0.229
bankruptcy*	-0.124	divided_lower_court*	-0.166			corporate*	-0.215
tax*	-0.115	water	-0.148			frankfurter	-0.196
divided_lower_court*	-0.107	fair	-0.127			executive*	-0.181
admin_agency*	-0.102			arrest*	0.126	congress*	-0.179
				tax*	0.126	labor*	-0.172
				labor*	0.126	jurisdiction*	-0.156
		trust	0.073	overrule*	0.135	equity*	-0.148
bank	0.122	congress*	0.076	fraud	0.151	evidence	-0.144
judicial_code	0.136	bank	0.080	securities*	0.152		
settlement	0.150	jurisdiction*	0.085	executive*	0.199	. . .	
levied	0.234	collector	0.097	equity*	0.209		
force	0.405	state*	0.104	officer*	0.214	school*	0.153
corporate*	0.452	income	0.113	corporate*	0.278	vessel	0.181
		constitution*	0.114	confession	0.428	speech*	0.185
		admin_agency*	0.125			collector	0.220
		bankruptcy*	0.131			prejudice	0.253
		tax*	0.250			murder	0.325
		solicitor_general	0.414			military*	0.392
						precedent*	0.401

Burger (1969–1986)	**Δ**	**Rehnquist (1986–2005)**	**Δ**	**Roberts (2005–___)**	**Δ**
military*	-0.386	market	-0.393	river	-0.429
precedent*	-0.382	fine	-0.324	robbery	-0.230
school*	-0.282	fair	-0.309	prison*	-0.122
prejudice	-0.252	fraud	-0.287	amici	-0.117
speech*	-0.203	douglas	-0.282	patent	-0.113
murder	-0.182	five_years	-0.275	admin_agency*	-0.096
first_person*	-0.176	history	-0.261	overrule*	-0.096
standing	-0.136	settlement	-0.260	first_person*	-0.082
constitution*	-0.127	discharge*	-0.249	habeas*	-0.079
first_amendment	-0.091	frankfurter	-0.246		
admin_agency*	-0.090	accused	-0.241		
		sentence*	-0.237		
		equal_ protection	-0.233	fourteenth_ amendment*	0.085
		racial	-0.222	power*	0.105
jury*	0.171	witness*	-0.219	employ*	0.130
vessel	0.193	murder	-0.208	aggravating	0.143
history	0.193	transportation	-0.206	constitution*	0.293
river	0.205	statute*	-0.200	grand_jury	0.434
transportation	0.205	state*	-0.193		
prison*	0.207				
five_years	0.234				
settlement	0.238				
accused	0.241	damages	0.003		
fair	0.244	discrimination	0.006		
witness*	0.246	military*	0.009		
frankfurter	0.274	solicitor_general	0.009		
douglas	0.283	insurance	0.011		
discharge*	0.284	title_vii	0.011		
fraud	0.313	construction*	0.014		
fine	0.334	indian	0.016		
market	0.352	amici	0.022		
		bank	0.025		
		confession	0.028		
		admin_agency*	0.030		
		bankruptcy*	0.030		
		securities*	0.032		
		privilege	0.039		
		fourteenth_ amendment*	0.039		
		patent	0.041		
		harlan	0.043		

Burger (1969–1986)	Δ	Rehnquist (1986–2005)	Δ	Roberts (2005–___)	Δ
		school*	0.043		
		labor*	0.075		
		robbery	0.081		
		river	0.168		

Table 3 presents lists of significant terms, ranked by their change in position over the previous Court.[141] During the Roberts Court, for example, the term *patent* moved closer to the origin—that is, its distance from the origin decreased (or was negative)—suggesting that patent cases have increased in importance.[142] The term *amici* has also grown significantly during Chief Justice Roberts's tenure so far, perhaps reflecting the "amicus machine" that now surrounds the Court.[143] So too for the term *overrule**, a result explored in more detail below.[144]

These results interact with those found in previous analyses of the Court's certiorari process. In their study of all Supreme Court opinions from 1951 to 2007, Michael Livermore, Allen Riddell, and Daniel Rockmore find that discrimination-related cases are less likely to earn the Supreme Court's attention (comparing probabilities from 1979 to 1995).[145] Table 3 confirms this finding. Under the Rehnquist Court, the term *discrimination* seems to decrease substantially in importance, as evinced by its move away from the origin.[146] Related terms, such as *title_vii*, also experienced similar effects. Moreover, the findings presented here, which focus on important-questions cases in particular, suggest that the de-emphasis of discrimination-related cases is due, at least in part, to the

141. As explained in the Methods Appendix, infra, the terms highlighted for inclusion evince a change in position that is greater than one standard deviation (in either a positive or negative direction) from the mean of all the changes across all terms from one Court to the next. See infra note 292 and accompanying text.

142. See, e.g., Medtronic, Inc. v. Mirowski Fam. Ventures, LLC, 571 U.S. 191 (2014); Bowman v. Monsanto Co., 569 U.S. 278 (2013); see also Narechania, A Patent Puzzle, supra note 25, at 1392–93; infra note 176–177 and accompanying text.

143. See Allison Orr Larsen & Neal Devins, The Amicus Machine, 102 Va. L. Rev. 1901, 1936–40 (2016) (describing the relatively new impact of certiorari-stage amicus briefs); cf. Gregory A. Caldeira & John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 1109, 1119 (1988) (noting the impact of amicus briefs on certiorari-stage decision prior to the Roberts Court); but cf. George & Solimine, supra note 136, at 194–95 (finding that, for certiorari petitions arising out of federal en banc appellate decisions, "the presence of an amicus brief" is "not statistically significant").

144. See infra note 150 and accompanying text.

145. See Livermore et al., supra note 37, at 875–76.

146. Table 3 likewise confirms the finding that the Rehnquist Court seems to have de-emphasized insurance-related cases. Compare id. at 876 (finding that insurance cases are increasingly underrepresented on the Court's docket as compared to the courts of appeals' dockets from 1979 to 1995), with supra Table 3 (finding that the term *insurance* decreases substantially in importance to the Court's important-questions docket during the Rehnquist Court).

Court's own decisions to deemphasize these cases. It is due to the way the Court decides to wield its docket-setting discretion and, importantly, is not solely attributable to a decrease in the number of circuit splits over discrimination-related questions. In short, this change seems to be a product of a judicial view, held during the Rehnquist Court, that such cases are less worthy of the Court's scarce attention than other cases.

Other findings might seem, at first blush, to be in tension with previous studies. Livermore, Riddell, and Rockmore's study finds, for example, that sentencing-related cases become less important over time. But Table 3 finds the term *sentence** to increase substantially in importance during the Rehnquist Court—a result considered in greater detail in the following section.[147]

Tables 2 and 3, taken together, are also suggestive of greater shifts in the Court's docket over time. During the Taft and Hughes Courts, for example, tax cases (*tax**) occupy a place of significance. But during the Stone and Vinson Courts, *tax** moves substantially away from the origin, suggesting that tax cases receded from their prior place of prominence in the Court's important-questions docket.

147. See infra notes 172–173 and accompanying text. As noted there, there are two complementary explanations for the Rehnquist Court's apparent interest in sentencing-related cases, both of which turn on the Sentencing Guidelines. First, recall that the analysis here focuses only on the important-questions docket. Hence, one possible explanation is simply that sentencing-related questions grew in importance to this slice of the Court's docket in particular, while falling in importance the Court's docket overall. And indeed, the Guidelines might explain that result: The Rehnquist Court granted review to decide important Guidelines-related questions (e.g., the constitutionality of the Guidelines, or the standard of review applied to Guidelines-based determinations, see infra note 173), but the Guidelines' uniform, nationwide sentencing standards may also have reduced the number of conflicts in other sentencing matters requiring the Court's attention. Cf. Dorszynski v. United States, 418 U.S. 424, 425 (1974) (granting review to resolve a split regarding the sentencing procedures for minor offenders). To clarify, *Dorszynski* is not from the dataset analyzed here. Second, the Livermore, Riddell, and Rockmore study compares Supreme Court selection against the universe of federal appellate decisions. Livermore et al., supra note 37, at 874. The Sentencing Guidelines may have vastly increased the number of sentencing-related appeals in the appellate courts. See, e.g., Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 987 (1995); Cynthia J. Thomas, Report on the Federal Sentencing Guidelines and Their Impact, 28 Rev. Juridica U. Interamericana P.R. 283, 293–94 (1994). As a result, the number of sentencing-related cases granted by the Court is likely a smaller proportion of the total number of such federal appellate cases, even as these cases occupied a larger proportion of the Court's important-questions docket.

FIGURE 3. TAX* PLOTTED BY IMPORTANCE SCORE BY CHIEF JUSTICE

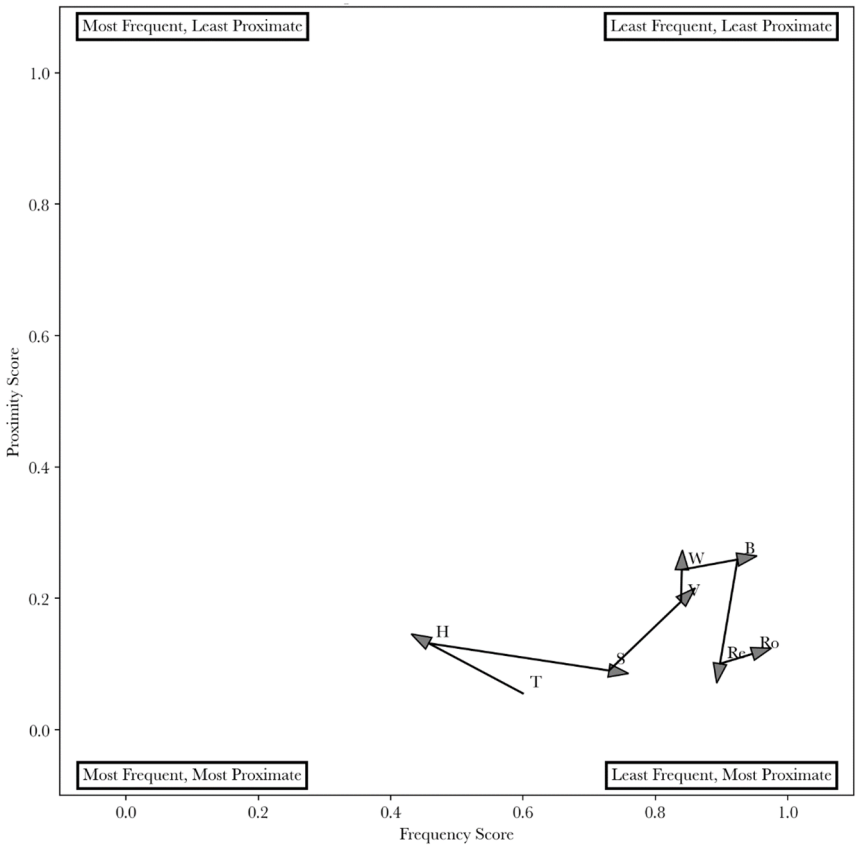
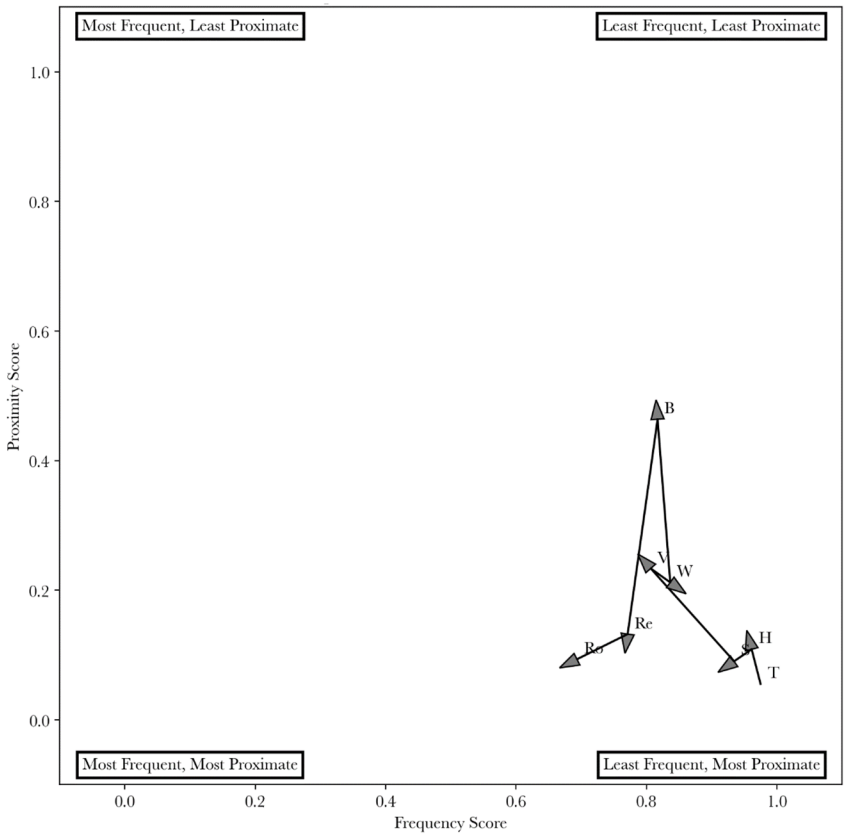


Figure 3 (above) shows *tax**'s progression over time, beginning with the Taft Court (denoted by T), to the Hughes Court (denoted by H), and sharp move away from the origin in the Stone Court (S) and in the Vinson Court (V), followed by Warren (W), Burger (B), Rehnquist (Re) and Roberts (Ro).

By contrast, Figure 4 (below) highlights *habeas**'s shift toward the origin—that is, its increasing significance to the Court's important-questions docket.

FIGURE 4. HABEAS* PLOTTED BY IMPORTANCE SCORE BY CHIEF JUSTICE



Understood together, Tables 2 and 3, along with the measures on which they are based, offer a new look at the Court's certiorari priorities over time. In some instances, these measures are indicative of larger shifts in the Court's priorities: its waxing interest in habeas matters, or its waning interest in tax cases.[148] Moreover, as noted above, Table 2 suggests that the Hughes Court seemed to place special significance on bankruptcy cases (*bankruptcy**) in the wake of the Great Depression, as well as on labor and employment cases (*labor**, *employ**) after the enactment of the National Labor Relations Act and the Fair Labor Standards Act (among other provisions). Table 3 further suggests that the Hughes Court's emphasis on these cases presents a significant shift from the priorities of the Taft Court.

Significantly, the Roberts Court appears especially interested in cases that ask the Court to consider whether to overrule precedent (no matter

148. On the latter, several Justices confirmed after the Stone and Vinson Courts have described tax cases as uniquely undesirable. See Robert A. Green, Justice Blackmun's Federal Tax Jurisprudence, 26 Hastings Const. L.Q. 109, 109 n.1 (1998) (collecting sources).

whether the Court does, on the merits, ultimately decide to upturn settled law). These cases are especially notable because they can arise only on the important-questions docket, as the appeals courts cannot split over whether to overturn the Court's existing precedents.[149] Both *overrule** and *precedent** are significantly important during the Roberts Court, with *overrule** significantly increasing in importance during Chief Justice Roberts's tenure (so far).[150] These findings contest the conventional (but perhaps

149. But cf. Amy Coney Barrett, Precedent and Jurisprudential Disagreement, 91 Tex. L. Rev. 1711, 1731–32 (2013) (suggesting that conflicts among lower courts may help to "put[] a challenge to precedent on the Court's agenda").

150. See, e.g., Kisor v. Wilkie, 139 S. Ct. 2400, 2409 (2019) ("We then granted certiorari to decide whether to overrule *Auer* and (its predecessor) *Seminole Rock*."); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1491 (2019) ("The sole question presented is whether *Nevada v. Hall* should be overruled."); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2462 (2018) ("Janus then sought review in this Court, asking us to overrule *Abood* . . . . We granted certiorari to consider this important question."); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018) ("The South Dakota Supreme Court affirmed. It stated: 'However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled [and] remains the controlling precedent on the issue . . . .' This Court granted certiorari." (alteration in original) (citation omitted)); Franchise Tax Bd. v. Hyatt, 578 U.S. 171, 175 (2016) ("We agreed to decide two questions. First, whether to overrule *Hall*."); Kimble v. Marvel Ent., LLC, 576 U.S. 446, 451 (2015) ("We granted certiorari to decide whether, as some courts and commentators have suggested, we should overrule *Brulotte*." (citation omitted)); Alleyne v. United States, 570 U.S. 99, 103 (2013) ("In *Harris v. United States*, this Court held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. We granted certiorari to consider whether that decision should be overruled." (citation omitted)); Pearson v. Callahan, 555 U.S. 223, 223 (2009) ("[I]n granting certiorari, we directed the parties to address the question whether *Saucier* should be overruled."); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 33 (2006) ("[The Federal Circuit] concluded that the 'fundamental error' in petitioners' [argument] was its disregard of 'the duty of a court of appeals to follow the precedents of the Supreme Court until the Court itself chooses to expressly overrule them.' We granted certiorari . . . ." (citation omitted)); see also McCullen v. Coakley, 573 U.S. 464, 504 (2014) (Scalia, J., concurring) ("[W]e granted a second question for review in this case (though one would not know that from the Court's opinion, which fails to mention it): whether *Hill* should be cut back or cast aside."); Daimler AG v. Bauman, 571 U.S. 117, 159–60 (2014) (Sotomayor, J., concurring) ("The Court rules against respondents today on a ground . . . that this Court did not grant certiorari to decide, and that . . . is unmoored from decades of precedent.").

Appendix Figure 4 shows a marked move for these terms towards the origin during the Rehnquist Court and then further during the Roberts Court, echoing the suggestion, made by others, that, "[b]eginning with the Rehnquist court, justices have become more willing to reject precedents they think were badly reasoned, simply wrong, or inconsistent with their own senses of the constitutional framers' intentions." David Schultz, The Supreme Court Has Overturned Precedent Dozens of Times in the Past 60 Years, Including When It Struck Down Legal Segregation, Conversation (Sept. 20, 2021), https://theconversation.com/the-supreme-court-has-overturned-precedent-dozens-of-times-in-the-past-60-years-including-when-it-struck-down-legal-segregation-168052 [https://perma.cc/7WPZ-32BG]; cf. Robert S. Peck, Requesting Reconsideration of Precedent, App. Advoc. Blog (Aug. 15, 2021), https://lawprofessors.typepad.com/appellate_advocacy/2021/08/requesting-reconsideration-of-precedent.html [https://perma.cc/BKD9-54EK] ("The unusual spate of requested nullifications of existing precedent plainly reflects a calculation that the Supreme Court's new majority is less tied to stare decisis than their predecessors."). But see Schultz, supra

flawed) wisdom that the Roberts Court is the "stare decisis court."[151] While these previous studies conclude that the Roberts Court overrules precedent fewer times per Term than the Warren, Burger, and Rehnquist Courts, the analysis here suggests that the Roberts Court dedicates more of its docket-setting discretion to cases seeking to upturn settled law than previous Courts.[152] Moreover, the Roberts Court's interest in reevaluating precedent seems to have accelerated in the time since some of these earlier studies (which themselves may have helped to form the conventional wisdom).[153]

B. *Interpretations*

This section moves beyond presenting bare results in charts and graphs, in order to make greater sense of the data amassed from this analysis of thousands of opinions arising out of the Court's important-questions docket. No single factor can account for the Court's docket-

("Under Chief Justices Earl Warren, Warren Burger, William Rehnquist and now John Roberts, the court overturned constitutional precedent 32, 32, 30 and 15 times, respectively. That is well under 1% of decisions handled during each period in the court's history."). Of course, several of the cases noted above regard statutory, not constitutional, precedents.

Moreover, except as otherwise noted, the cases cited here, throughout this section, and throughout the next are all drawn exclusively from this study's results. They are therefore among the cases that satisfy the various standards that form the study sample. In some cases, it is possible to identify further such examples from beyond the bounds of the dataset (which extends through the Court's 2018 Term). See, e.g., Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) (noting that the Court granted review to decide whether to overrule Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990)); see also Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Kavanaugh, J., concurring) (agreeing with the majority that "the time has come to overrule *Apodaca*"); id. at 1425 (Alito, J., dissenting) (accusing the majority of "[l]owering the bar for overruling our precedents"); cf. Gamble v. United States, 139 S. Ct. 1960, 1964 (2019) (falling within the dataset's scope, but not appearing in these results because it uses the more unique term "overturn" rather than "overrule").

151. See Jonathan H. Adler, The Stare Decisis Court?, Volokh Conspiracy (July 8, 2018), https://reason.com/volokh/2018/07/08/the-stare-decisis-court/ [https://perma.cc/5K3C-72BD] (arguing that "[t]he Roberts Court has overturned precedents at a lower rate than its predecessors" but considering whether this will change); see also William Baude, Precedent and Discretion, 2019 Sup. Ct. Rev. 313, 316 & n.27 (collecting sources) [hereinafter Baude, Precedent and Discretion].

152. See, e.g., Adler, supra note 151 (evaluating relative rates of overruling precedent on a per Term basis).

153. For example, Baude, Precedent and Discretion, supra note 151, at 316 n.27, cites the 2017 edition of a Government Printing Office publication setting out a list of Supreme Court decisions overruled. That edition notes only nine such Roberts Court decisions (extending through the 2015 Term). See U.S. Gov't Publ'g Off., Supreme Court Decisions Overruled by Subsequent Decision, https://www.govinfo.gov/content/pkg/GPO-CONAN-2017/pdf/GPO-CONAN-2017-13.pdf [https://perma.cc/AP88-Y6TZ] (last visited Feb. 24, 2022). But a more recent government publication identifies eighteen such decisions, including three from the 2017 Term, four from the 2018 Term, and another from the 2019 Term. See Table of Supreme Court Decisions Overruled by Subsequent Decisions, Const. Annotated, https://constitution.congress.gov/resources/decisions-overruled (on file with the *Columbia Law Review*) (last visited Feb. 24, 2022).

setting discretion; if there were a secret rule governing certiorari, it surely would have been uncovered by now. Instead, the following sections highlight three factors drawn from the results presented above, which taken together can help to explain a substantial segment of these results.

First, many of these results seem to correlate with events exogenous to the judiciary (and the judiciary's place in the government). Events like the Great Depression and military campaigns, for example, have shaped the Court's docket.

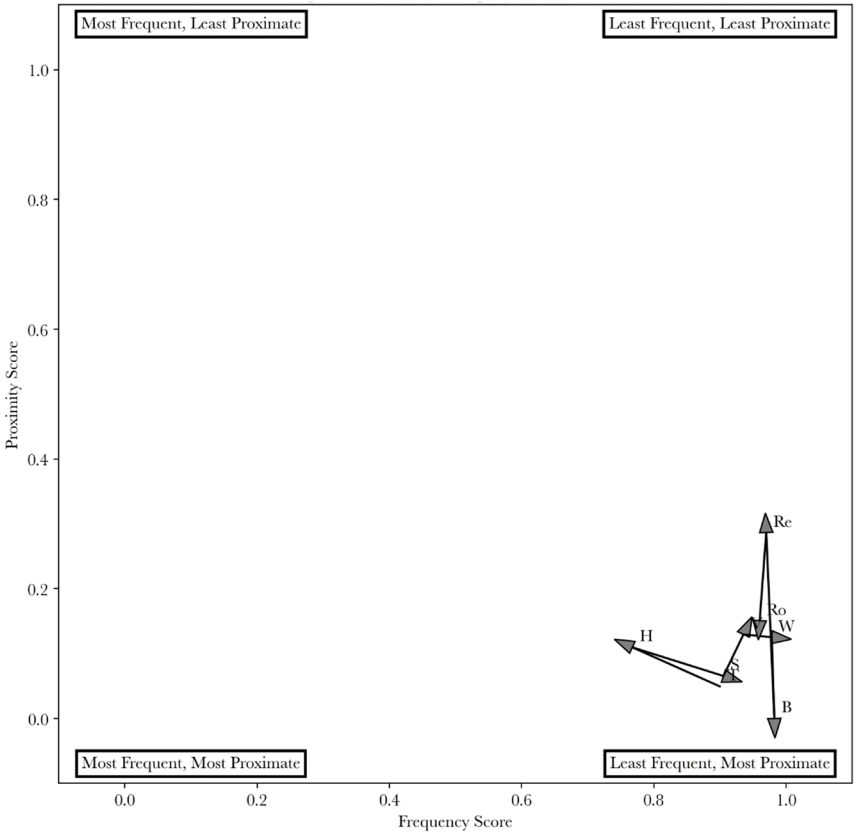
Second, the Court's docket is also in dialogue with developments in the political branches. The Court is sometimes, for example, moved to grant review in a case involving some new landmark legislation, even absent a split over the meaning of some statutory provision. But it is also true that not every significant political development is reflected in the Court's important-questions docket. Nevertheless, these first two factors, taken together, suggest that the Court's institutional priorities move with the priorities of society and the branches of government most responsive to it.

But third, some of these changes are made entirely at the Court's discretion in cases that cannot be easily explained by splits, exogenous events, or political developments. What might explain these shifts? One compelling possibility is that such shifts are the result of the Court's discretion—discretion that is shaped by new appointments to the Court. Caution is warranted: The Court's important-questions docket is a bit like the weather—ever-changing and responsive to a number of known and unknown variables—and so this Article should not be understood to overstate its claim.[154] But it does appear that, as the Court has gained greater discretion in recent years, its important-questions docket has become more unpredictable, with significant shifts in the Court's docket coinciding with changes in the Court's personnel. In short, it is possible, perhaps even likely, that the Justices' *individual* views and preferences are shaping the Court's *institutional* priorities.

1. *Exogenous Events.* — First, certain exogenous events seem to have had an effect on the Court's docket. There are at least a few such examples. For one, the Great Depression seems to have shaped the Hughes Court's attention to bankruptcy cases. The term *bankruptcy** rockets toward the origin—that is, increases in importance—during Chief Justice Hughes's tenure (1930 to 1941), particularly along the frequency dimension, and then recedes back almost as quickly thereafter.

154. Cf. Lee Epstein, Comments During Panel I: Laying the Empirical Groundwork: What Has Changed, and Why?, at the Yale Law School Supreme Court Advocacy Clinic and the Yale Journal Online Conference: "Important Questions of Federal Law": Assessing the Supreme Court's Case Selection Process (Sept. 18, 2009), https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/supreme-court-advocacy-clinic/conferences [https://perma.cc/ML6S-DGLL].

FIGURE 5. BANKRUPTCY* PLOTTED BY IMPORTANCE SCORE BY CHIEF JUSTICE



Moreover, a closer look at the dozens of cases decided during the Hughes Court containing *bankruptcy** alongside *certiorari** helps to confirm the hypothesis that the Great Depression helped to shape the docket. One case, for example, regards a debt incurred only weeks before "Black Tuesday," resulting in a bankruptcy claim that had made its way to the Supreme Court only a few years later.[155] Another case notes that the federal government's efforts to revalue the dollar in the wake of the depression led to one debtor's bankruptcy, and considered whether those debts were to be paid on the dollar's pre-revaluation terms or under its then-current terms.[156] Stated simply, it seems that there were a lot of bankruptcies during this time, and those proceedings raised difficult questions about bankruptcy practice—for example, priority among claims, or asset

155. See Marine Nat'l Exch. Bank v. Kalt-Zimmers Mfg. Co., 293 U.S. 357, 361 (1934).

156. Holyoke Water Power Co. v. Am. Writing Paper Co., 300 U.S. 324, 333–34 (1937).

valuation—that required some final resolution.[157] Notably, the Hughes Court agreed to review these cases not out of some interest or obligation in national uniformity but rather because the Court considered the questions presented in these cases sufficiently important—perhaps in view of these new and changed circumstances—to merit Supreme Court resolution.[158]

We can also find other examples of external influences on the Court's docket in Table 3. For example, during the combined tenures of Chief Justice Harlan F. Stone (1941 to 1946) and Chief Justice Frederick M. Vinson (1946 to 1953), the Court decided nearly thirty cases containing the term *military**.[159] Predictably, these cases presented questions arising out of the Second World War and regarded matters such as the federal government's wartime powers,[160] tort claims brought by servicemembers,[161] and the scope and meaning of various statutes governing servicemembers' benefits.[162] By the time of the Warren Court, however, such questions no longer occupied such a prominent place on the Court's docket. Yet, during the Burger Court, which encompassed some domestic turmoil regarding the Vietnam War,[163] such cases increased significantly in importance

157. See, e.g., id. at 333 ("The controversy is one as to the number of dollars in present currency that will discharge a covenant for rent in leases antedating the reduction of the gold content of the dollar . . . ."); United States v. Knott, 298 U.S. 544, 546–47 (1936) (explaining that the court granted certiorari due to the "importance" of the question of whether the United States had priority for its claim to Florida state government debt over the claims of Florida creditors); see also Adair v. Bank of Am. Nat'l Tr. & Sav. Ass'n, 303 U.S. 350, 351 (1938) (granting certiorari to review a Ninth Circuit decision requiring the petitioner to pay the respondent the "gross proceeds of the grape crop harvested on the debtor's land after the debtor had filed his petition under section 75 of the Bankruptcy Act" without any deductions).

158. See Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 573 (1935) (explaining that although the lower courts in this case held a bankruptcy law amendment constitutional, and despite the fact that "it ha[d] been sustained elsewhere," the Court would review the case "[i]n view of the novelty and importance" of the question presented).

159. See supra Table 3.

160. See Korematsu v. United States, 323 U.S. 214, 215–16 (1944).

161. See United States v. Standard Oil Co., 332 U.S. 301, 306 n.7 (1947).

162. See Mitchell v. Cohen, 333 U.S. 411, 412 (1948).

163. To be sure, the United States' involvement in the Vietnam War began during the last few years of the Warren Court. But the latency in the appeals process—from trial, to appeals court, and to the Supreme Court—meant that many of these cases did not come to the Court until the start of the Burger Court. Fein v. Selective Serv. Sys. Local Bd. No. 7, 405 U.S. 365, (1972), is one example: There, the trial complaint was filed during the Warren Court, but the case didn't come to the Supreme Court until after Chief Justice Burger's confirmation. Id. at 366–67.

It is worth noting, moreover, that changes to the Court's docket that may seem to be a function of shifts in judicial personnel, see infra section II.B.3, should not reflect any latency, since new Justices are more readily able to immediately implement their new priorities. See infra notes 185–188 and accompanying text (noting Justice Warren's immediate effect on the term *confession* in the first "natural court" after his confirmation).

once again, presenting questions relating to the selective service and protest speech among servicemembers and in military institutions.[164] And so we might speculate that future studies like this one will uncover effects related to newer major exogenous events—including, perhaps, the COVID-19 pandemic.[165]

2. *Political Developments.* — Such exogenous-events cases also begin to highlight another corner of the Court's important-questions docket. As noted, some of these *military** cases directly implicate war-powers-related questions.[166] But others are about congressional postwar programs, or statutes governing conscription into military service.[167] In short, many of these cases are about new and significant statutory programs, and so the Court's important-questions docket might be understood as in dialogue with the political branches over the scope of questions important enough to society to merit the Court's attention.

The Hughes Court offers another set of examples. The Great Depression, for example, spurred broad interest in economic inequality and labor rights and led Congress to enact such statutes as the National Labor Relations Act and the Fair Labor Standards Act.[168] And so it is not at all surprising that labor and employment cases (represented by the *labor** and *employ** terms) rose to prominence during the Hughes Court.[169] And, again, the Hughes Court's interest in these cases was driven by more than the mere presence of circuits splits over the interpretation of these statutes. Rather, the Hughes Court decided to spend its scarce spare attention on these cases over any others raising potentially important and meritorious challenges (and not implicating a national interest in uniformity).[170]

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164. See, e.g., Greer v. Spock, 424 U.S. 828, 833–34 (1976); *Fein*, 405 U.S. at 366–67.

165. Westlaw suggests that at least eight cases so far contain the terms *covid* or *pandemic* in the same paragraph as *certiorari*: Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022); Dr.A v. Hochul, 142 S. Ct. 552 (2021); Does 1-3 v. Mills, 142 S. Ct. 17 (2021); Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021); Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289 (2021); Barnes v. Ahlman, 140 S. Ct. 2620 (2020); Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020); RNC v. DNC, 140 S. Ct. 1205 (2020) (per curiam). To clarify, these cases are not drawn from this dataset, see supra note 150, as they lay outside its scope. See infra note 270 (explaining that the dataset runs through the Court's 2018 Term).

166. See, e.g., United States v. Caltex (Philippines), Inc., 344 U.S. 149, 149–50 (1952); Korematsu v. United States, 323 U.S. 214, 215–16 (1944).

167. See, e.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 539–40 (1950); *Mitchell*, 333 U.S. at 412.

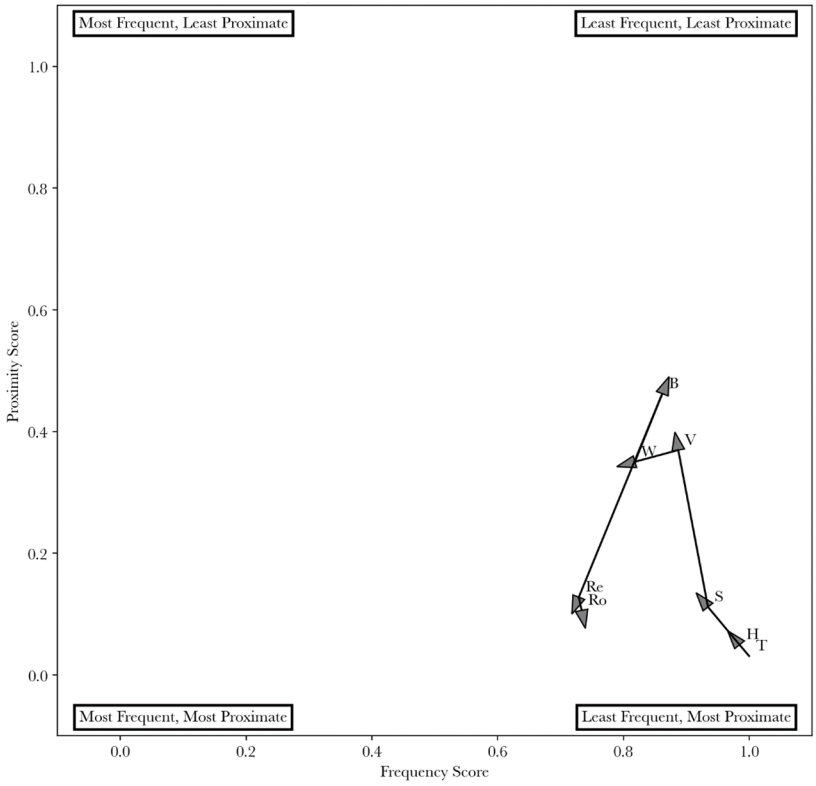
168. See Jonathon Fox Harris, Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future, 13 N.Y. City L. Rev. 107, 107 (2009) ("The National Labor Relations Act . . . and the Fair Labor Standards Act . . . were passed in the same era . . . and both were intended to help the economy and workers recover from the devastation of the Great Depression.").

169. See supra Table 2; supra Table 3.

170. See, e.g., Nat'l Lab. Rels. Bd. v. Fainblatt, 306 U.S. 601, 604 (1939) (granting review to decide a question of "public importance"); Nat'l Lab. Rels. Bd. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 296 (1939) (granting review on the same grounds); Nat'l

Other such examples abound.[171] The Rehnquist Court's sudden interest in sentencing cases (*sentence**) might be explained by Congress's enactment of the Sentencing Guidelines only a few years before then-Associate Justice Rehnquist's lateral promotion to Chief Justice.[172]

FIGURE 6. SENTENCE* PLOTTED BY IMPORTANCE SCORE BY CHIEF JUSTICE



Lab. Rels. Bd. v. Pa. Greyhound Lines, 303 U.S. 261, 264 (1938) (granting review on similar grounds).

171. In addition to the examples described here, see Shapiro et al., supra note 10, § 4.13 (noting that many of the Court's cases "involve the construction and application of acts of Congress" and that some involve conflicts, but in others, "the importance of the issue is the major basis for securing review").

172. See G. Edward White, The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy, 154 U. Pa. L. Rev. 1463, 1463 & n.1 (2006) (describing and challenging the conventional view that a Chief Justice is a "first among equals": "[T]he Chief Justice . . . is but one of eight judges, each of whom has the same powers . . . . His judgment has no more weight, and his vote no more importance, than those of . . . his brethren. He presides, and a good deal of extra labor is thrown upon him. That's all." (internal quotation marks omitted) (quoting Letter from Salmon P. Chase to John D. Van Buren (Mar. 25, 1868))).

Indeed, a closer look at these sentencing cases suggests that several implicate important Guidelines-related questions.[173] Similarly, the Rehnquist Court's interest in habeas cases *(habeas*)* may be linked, at least in part, to Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which instituted major habeas reforms.[174] Interestingly, the bulk of *habeas**'s move toward the origin during the Rehnquist Court is along the proximity (vertical) dimension rather than the frequency dimension.[175] This may suggest that the Court heard only a few additional cases arising out of such collateral challenges, but that this feature of the case's procedural posture was more central to the importance of the question presented (e.g., the fact of the collateral posture of the case raised important questions about the scope or meaning of AEDPA). And even as scholars have offered a range of explanations for the Roberts Court's interest in patent cases,[176] it seems likely that one partial explanation lies in Congress's enactment of the America Invents Act—a landmark patent reform statute—and the interpretative questions that have arisen from this new statutory text.[177]

This effect appears to extend not only to public programs but also to reforms aimed directly at the Court itself.[178] In 1976, for example, Congress eliminated the Court's mandatory jurisdiction over "the large class of suits challenging the constitutionality of state or federal statutes," moving such cases to the Court's discretionary docket.[179] And the Court's important-questions docket responded to encompass many more questions of constitutionality. The Burger Court agreed to hear many more constitutional cases absent a split, as suggested by *constitution**'s significant shift toward the origin, especially along the frequency (horizontal) dimension. And in 1988, during the Rehnquist Court, when Congress "freed the Court from virtually all . . . cases [it was] at least technically obliged to decide on

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173. See, e.g., United States v. Booker, 543 U.S. 220, 229 (2005) (granting review to resolve the important questions of "whether [the] *Apprendi* line of cases applies to the Sentencing Guidelines, and if so, what portions of the Guidelines remain in effect"); Koon v. United States, 518 U.S. 81, 91 (1996) ("We granted certiorari to determine the standard of review governing appeals from a district court's decision to depart from the sentencing ranges in the Guidelines.").

174. See, e.g., Brown v. Payton, 544 U.S. 133, 135–36 (2005); Price v. Vincent, 538 U.S. 634, 636 (2003).

175. See supra Figure 4.

176. See, e.g., Paul R. Gugliuzza, The Supreme Court Bar at the Bar of Patents, 95 Notre Dame L. Rev. 1233, 1234–36 (2020) (summarizing several hypotheses); Laser, supra note 119, at 598–609 (qualitatively examining several of these hypotheses).

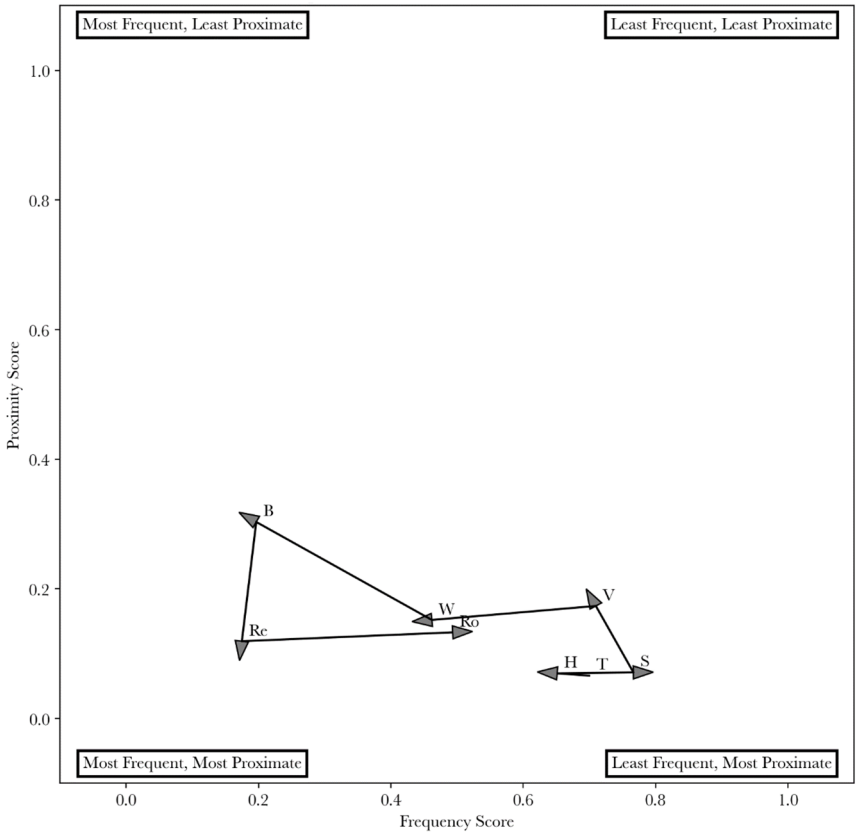
177. See, e.g., Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc., 139 S. Ct. 628, 630 (2019); SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1353–54 (2018).

178. There are further examples beyond those described above the line. During the Stone Court, for example, both *diversity* and *citizenship* move closer to origin, in part because of questions raised by a 1940 amendment to the federal judiciary's diversity jurisdiction. See De Castro v. Bd. of Comm'rs, 322 U.S. 451, 452 (1944); see also 28 U.S.C. § 1332 (2018) (historical and revision notes).

179. See Stern et al., supra note 31, at 66.

the merits,"[180] constitutional questions became even more central to the Court's important-questions docket.

FIGURE 7. CONSTITUTION* PLOTTED BY IMPORTANCE SCORE BY CHIEF JUSTICE



Some of the cases represented here may be merely displaced—that is, they may have only moved from the Court's mandatory docket to its important-questions docket. But, importantly, not *all* such cases moved to the Court's discretionary docket. From the years immediately preceding this change to the Court's certiorari jurisdiction to the years immediately following it, the overall size of the Court's docket decreased substantially—by almost one-fifth.[181] And other similar statutes, such as those moving

180. Id.

181. In particular, the Court issued a final disposition in an average of 346 cases during the 1973, 1974, and 1975 Terms, as compared to an average of 280 cases during the 1977, 1978, and 1979 Terms. Similarly, the Court issued a final disposition in an average of 272 cases during the 1985, 1986, and 1987 Terms, as compared to an average of 222 cases during the 1989, 1990, and 1991 Terms. See Federal Judicial Caseloads, 1789-2016: Supreme Court

classes of antitrust cases from the Court's mandatory docket to its certiorari docket, do not correlate with any notable increase in the frequency with which the Court agreed to hear antitrust cases in its important-questions docket.[182] In all, the Court does seem to exercise discretion in selecting among the cases that are newly moved to its discretionary docket.

Moreover, Table 3 suggests that the volume of changes—the number of Index Terms that increased or decreased significantly in importance—during the Rehnquist Court (and the Burger Court) was quite substantial. So it is worth considering which sorts of cases the Court continued to prioritize and the process by which the Court prioritized certain cases over others.[183]

3. *Discretion and Personnel.* — Beyond those sets of important-questions cases that may be linked to major exogenous events, or to substantial political developments, there are a number of other notable results: *confession* during the Warren Court and *overrule** and *precedent** during the Roberts Court, to name only two. Such results are not so easily connected to some outside explanation (as in the examples of *bankruptcy** or *habeas**, described above). Instead, the wide range of these results seems

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Caseloads, 1880-2015, tbl. Supreme Court of the United States Case Dispositions, 1970-2015, Fed. Jud. Ctr., https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015 [https://perma.cc/3FD4-99LD] (last visited Mar. 19, 2022) (summing cases disposed by full opinion, by per curiam opinion, and those decided without oral argument).

182. Compare, e.g., Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974), and Stern et al., supra note 31, at 66 (noting that the Antitrust Procedures and Penalties Act "narrowed, almost to the point of extinction, direct appeals to the Supreme Court in antitrust cases"), with Appendix Figure 7 (demonstrating *antitrust*'s substantial distance from the origin across various Courts and, in particular, its relatively static infrequency).

A word about Appendix Figure 7: As Appendix Table 1 notes, the term *antitrust* is not in the Term Index because it appears infrequently in the dataset. Hence, in order to generate Appendix Figure 7, a special result set was run, which added *antitrust* to the Term Index to generate this particular comparison. Appendix Figure 7 suggests that the Court heard antitrust cases on its important-questions docket quite infrequently both before and after the Antitrust Procedures and Penalties Act; but after that Act, antitrust questions became significantly more central to the question presented, perhaps further suggesting that the Court granted review in antitrust cases only selectively and to address important antitrust questions. See Broad. Music, Inc. v. Columbia Broad, Sys., Inc., 441 U.S. 1, 7 (1979) ("We granted certiorari because of the importance of the issues to the antitrust and copyright laws.").

183. That is not to say that this analysis can compare the importance of a given constitutional provision for certiorari purposes across, say, the Burger and Warren Courts. Because the scope of the Court's discretionary jurisdiction over such matters changes over these periods, it cannot do so. See supra text accompanying note 122. Stated otherwise, this Article cannot say that (to take a fictitious example) *due_process** becomes more important during the Burger Court vis-à-vis the Warren Court because it is impossible to know how many *due_process** cases the Warren Court might have voluntarily elected to hear out of those that in fact arose in its mandatory docket. This limit most obviously implicates the *first_amendment* (and related) terms in the Burger column, and the *equal_protection* term in the Rehnquist column, of Table 3, though it may of course affect others, too.

to reflect the Court's growing discretion to set its own agenda. The exercise of this discretion seems, at least in some instances, to reflect the specific (and perhaps idiosyncratic) preferences of the Court's membership at that time—preferences that can vary as the Court's personnel shifts.[184]

Consider cases about the admissibility of criminal confessions during the Warren Court.[185] The Warren Court's sudden attention to these cases represents the largest Delta, in any direction, across all the results in Table 3. A more fine-grained analysis, one that examines Deltas across each change in the Court's personnel (rather than aggregating those changes across the tenure of each Chief Justice), suggests that it was Chief Justice Earl Warren's appointment itself that drove the Court's interest in these cases. This result is consistent with hypotheses that the Court's interest in such cases was motived by Warren's own prior career in law enforcement.[186] Table 4, below, suggests that the most significant shift toward such confession-related cases happened during Natural Court 1401—the Court that represents Chief Justice Warren's appointment to the seat previously held by Chief Justice Vinson. A "natural court" is a construct representing each unique combination of Justices: 1401, for example, represents the set of {Chief Justice Earl Warren, Justice Hugo Black, Justice Felix Frankfurter, Justice Sherman Minton, Justice William Douglas, Justice Thomas Clark, Justice Stanley Reed, Justice Harold Burton, Justice Robert Jackson}. 1402 represents the set of Justices following Justice Harlan's appointment to the seat previously held by Justice Jackson, i.e., {Chief Justice Warren, Justice

184. See infra note 213 and accompanying text; see also Zalman Rothschild, Free Exercise Partisanship, 107 Cornell L. Rev. (forthcoming 2022) (manuscript at 44), https://ssrn.com/abstract=3707248 [https://perma.cc/MX3E-V845].

185. See, e.g., Johnson v. Massachusetts, 390 U.S. 511, 511–12 (1968) (granting certiorari to consider the "substantial questions" surrounding an allegedly voluntary confession); Miranda v. Arizona, 384 U.S. 436, 439, 441–42 (1966) (granting certiorari to "further explore" issues related to "applying the privilege against self-incrimination to in-custody interrogation" and "to give concrete constitutional guidelines" regarding the same); Blackburn v. Alabama, 361 U.S. 199, 276–77 (1960) (expressing "grave doubt" that seven-year prison sentence was justifiable if confession was improperly admitted); Payne v. Arkansas, 356 U.S. 560, 561 (1958) (granting certiorari because petitioner's coerced-confession and jury-tampering claims presented "substantial" constitutional questions); Thomas v. Arizona, 356 U.S. 390, 392–93 (1958) (granting certiorari in a case involving a potentially coerced murder confession "because of the seriousness of petitioner's allegations under the Due Process Clause"); Leyra v. Denno, 347 U.S. 556, 557–58 (1954) (granting certiorari to determine if confessions to a state-employed psychiatrist were coerced); Adams v. Maryland, 347 U.S. 179, 180 (1954) (granting certiorari to consider the admissibility of congressional testimony as confessional evidence).

186. See Yale Kamisar, How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice, 3 Ohio St. J. Crim. L. 11, 11–13 (2005) (concluding that Warren's "extensive background" of "twenty-two years in law enforcement," including, for example, his experience "rel[ying] on confessions in many homicide cases . . . [and] interrogat[ing] homicide suspects," gave him a unique perspective into law enforcement practices that "affected his work as Chief Justice of the United States").

Black, Justice Frankfurter, Justice Minton, Justice Douglas, Justice Clark, Justice Reed, Justice Burton, Justice Harlan}.[187]

TABLE 4. TERMS RANKED BY CHANGE IN IMPORTANCE SCORE BY NATURAL COURT (WARREN COURT)

1401	Δ	1402	Δ	1403	Δ	1404	Δ
confession	-0.479	prison*	-0.301	government	-0.525	prejudice	-0.413
security	-0.465	congress*	-0.194	witness*	-0.488	procedure*	-0.316
fair	-0.323	damages	-0.170	officer*	-0.414	sentence*	-0.285
labor*	-0.273	sentence*	-0.162	rules	-0.355	criminal*	-0.169
witness*	-0.207	commerce*	-0.145			death_sentence*	-0.152
evidence	-0.203					fourteenth_ amendment*	-0.151

1405	Δ	1406	Δ	1407	Δ	1408	Δ
evidence	-0.465	moot	-0.435	corporate*	-0.340	commerce*	-0.483
jurisdiction*	-0.460	regulation*	-0.339	divided_ lower_court*	-0.276	state*	-0.465
jury*	-0.447	vessel	-0.239	school*	-0.258	interstate	-0.456
counsel*	-0.426	injunction*	-0.202	constitution*	-0.208	rules	-0.450
government	-0.421	rate*	-0.175	immunity	-0.191	first_ person*	-0.265
constitution*	-0.403	discrimination	-0.150	jury*	-0.191		
		corporate*	-0.137	insurance	-0.179		
		divided_ lower_court*	-0.130	interpretation	-0.151		

1409	Δ	1410	Δ	1411	Δ
constitution*	-0.286	precedent*	-0.372	jury*	-0.398
first_person*	-0.240	property*	-0.154	first_person*	-0.224
harlan	-0.227	prison*	-0.140	rules	-0.217
counsel*	-0.199	search	-0.112	jurisdiction*	-0.147
international*	-0.192	seize*	-0.103	fifth_amendment	-0.135
proof*	-0.183	federal_courts	-0.096	tax*	-0.114
arrest*	-0.181	vessel	-0.083		
warrant	-0.156				
jury*	-0.153				
vessel	-0.142				
officer*	-0.135				
citizenship	-0.126				
sentence*	-0.119				

187. The complete set of changes, for each natural court from 1401 to 1411, may be found at Spaeth et al., Database Version 2020, supra note 96.

Hence, one might think that the sizeable shift to confession-related cases—occurring not only during the Warren Court generally, but also during Natural Court 1401 in particular—may be attributed at least in part to Chief Justice Warren's appointment. (After 1401, in subsequent natural courts, such cases may remain important, but they do not become substantially *more* important.)[188] In short, the meteoric rise of confession-related cases on the Court's docket during the Warren Court, and in Natural Court 1401 in particular,[189] reflects the Justices' wide discretion to shape a docket of their own choosing. Indeed, individual judicial preferences (or preferences attributable to some subset of Justices) seem to shape the Court's important-questions docket.

This hypothesis—that the judicial personnel comprising the Court shape the contours of the important-questions docket—might be tested by comparing shifts in the docket at different times. In particular, the changes in the years in which the Court welcomes a new member can be compared to those in which the Court's composition stays stable. If the Court's important-questions docket changes more when its personnel shifts, then the changes in the docket (i.e., changes in the Court's revealed priorities) might be attributed to these changes in the Court's personnel.[190]

188. Indeed, during Natural Court 1406, *confession* moves away from the origin, as compared to Natural Court 1405.

189. See supra note 163.

190. Again, caution is warranted: It is possible that, for example, such shifts in the docket are not attributable to shifts in personnel, but rather result from some confounding factor. Perhaps the Court's exercise of its docket-setting discretion may respond to the additional public and congressional scrutiny that attends to the modern confirmation process. It's possible that changes to the Court's docket are not due to the change in personnel, but rather to the *process* of changing personnel, and this Article should not be understood as definitively ascribing causation to one theory or the other. But this alternate hypothesis raises the further question of why the Court modifies its behavior in times of close scrutiny. Moreover, Figure 8 suggests that there have been increases in docket volatility across all recent years (though such results seem more substantial in years of personnel change). See infra Figure 8; infra Table 5.

FIGURE 8. IMPORTANT-QUESTIONS DOCKET VOLATILITY, TERM OVER TERM

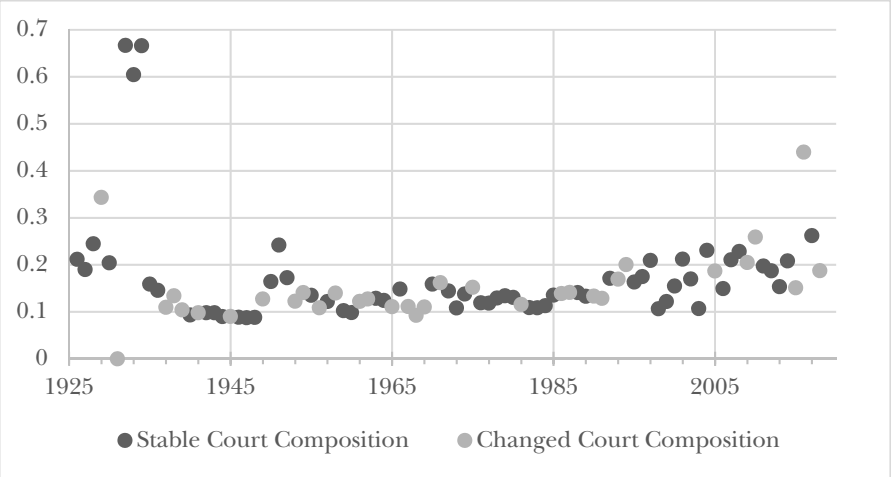

Figure 8 offers that comparison. In particular, each plotted value represents the average change, Supreme Court Term over Supreme Court Term, across all the Index Terms common to the compared subsequent Terms (e.g., October Term 2018 over October Term 2017).[191] In short, this measure offers a sense of the important-questions docket's volatility year over year.

Figure 8 suggests two notable results.[192] First, the Court's docket remains relatively stable during its first sixty years or so of certiorari jurisdiction, setting aside one period of intense volatility immediately after Congress's passage of the 1925 Judges' Bill,[193] and another short period of volatility in the early 1950s (encompassing the Court's decisions to hear

191. More specifically, it represents the average of the *absolute values* of the Delta values for common Index Terms across compared Terms. This is because an Index Term that suddenly rises in importance is just as suggestive of volatility as an Index Term that suddenly decreases in importance. See infra Methods Appendix.

192. Besides the two results described above the line here, one other potentially interesting finding is that the instantiation of the "cert pool" in 1973 seems to have had little effect on the overall stability of the important questions docket. See Adam Liptak, Gorsuch, in Sign of Independence, Is Out of Supreme Court's Clerical Pool, N.Y. Times (May 1, 2017), https://www.nytimes.com/2017/05/01/us/politics/gorsuch-supreme-court-labor-pool-clerks.html (on file with the *Columbia Law Review*) (describing the cert pool as a "labor pool at the Supreme Court in which justices share their law clerks in an effort to streamline decisions about which cases to hear"). It is notable that the Court's shift from a practice of individual evaluations of petitions for certiorari to a system of shared evaluations did not lead to dramatic shifts in the Court's important-questions docket (suggesting, perhaps, a shared understanding at the time among the Justices and their clerks on certiorari's importance standard). See supra Figure 8.

193. Cf. Benjamin B. Johnson, The Origins of Supreme Court Question Selection, 122 Colum. L. Rev. 793, 838–39 (2022) (describing a short-lived disagreement among the Justices over the permissible scope of certiorari review under the Judges' Bill of 1925).

and rehear *Brown v. Board of Education*[194]). This stability persists even across the Terms encompassing the New Deal cases,[195] and even in years when the Court's composition changes.[196] But beginning in the late 1980s and early 1990s, shortly after Congress dramatically reduced the scope of the Court's mandatory appellate docket via the Supreme Court Case Selections Act of 1988,[197] the Court's discretionary important-questions docket appears more volatile (that is, it appears to evince much more heteroskedasticity). Indeed, as noted, the list of significant changes to the Court's docket during the Rehnquist Court is much longer than during any other era. Many of these changes reflect common understandings of the Rehnquist Court's specific priorities, too: Though *state** consistently ranks near the top of the lists of important Index Terms across Chief Justices, the Rehnquist Court seemed to place an extra special emphasis on that term, perhaps reflecting the Rehnquist Court's federalism revolution.[198] One further example might be found in the term *settlement*, which moves significantly toward the origin during the Rehnquist Court and, in particular, after the appointments of Justices Scalia, Kennedy, and Thomas. Across a range of cases—*Marino v. Ortiz*,[199] *Estate of Cowart v. Nicklos Drilling Co.*,[200] *Boca Grande Club, Inc. v. Florida Power & Light Co.*,[201]

194. 347 U.S. 483 (1954). *Brown* was first argued in 1952 and then reargued in 1953. Id. at 483.

195. See, e.g., Nat'l Lab. Rels. Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22 (1937) (addressing a suit that arose under the National Labor Relations Act of 1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521 (1935) (dealing with a code promulgated under the National Industrial Recovery Act).

196. See Justices 1789 to Present, Sup. Ct. of the U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/885G-WMZ9] (last visited Feb. 20, 2022); supra Figure 8.

197. See supra note 58 and accompanying text.

198. See supra Table 2; infra Appendix Figure 5. Table 3 suggests that *state** moved significantly toward to origin in the Rehnquist Court (over the Burger Court), and Appendix Figure 5 suggests that during the Rehnquist Court, *state** moved toward the origin on the proximity dimension, perhaps suggesting that state matters become more central to the question presented. But see supra note 183 (describing one important limit to this comparative analysis). This important limit notwithstanding, the results seen here are consistent with other analyses of the Rehnquist Court. See, e.g., Erwin Chemerinsky, The Federalism Revolution, 31 N.M. L. Rev. 7, 7 (2001) ("[W]hen constitutional historians look back at the Rehnquist Court, they will say that the greatest changes in constitutional law were with regard to federalism."); Thomas W. Merrill, The Making of the Second Rehnquist Court: A Preliminary Analysis, 47 St. Louis U. L.J. 569, 570, 618 (2003) ("[T]he dominant theme of the [post-1994] Rehnquist Court has been constitutional federalism . . . .").

199. 484 U.S. 301, 303 (1988) (holding that nonintervening nonparties may not appeal a consent decree approving a settlement).

200. 505 U.S. 469, 475 (1992) (concluding, in the context of the Longshore and Harbor Workers' Compensation Act, that workers may obtain federal benefits in addition to a settlement obtained from a third party only if the employer approved in writing the third-party settlement).

201. 511 U.S. 222, 222 (1994) (concluding that, for tort claims arising under federal general maritime law, "actions for contribution against settling defendants are neither necessary nor permitted").

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,[202] and *Matsushita Elec. Indus. Co. v. Epstein*[203]—the Court advances a set of legal rules that seem to prioritize finality values in the settlements of legal disputes. And, as noted above, the findings here confirm those of other studies finding that *discrimination* cases seem to wane in importance during the Rehnquist years.[204] It may seem puzzling, then, that *equal_protection** seems to become more important during the Rehnquist Court. But a closer examination of the underlying cases suggests that they were granted to clarify, and seemingly narrow, the scope of *Batson*, which was decided in Burger's last year as Chief Justice.[205] (Indeed, this example reinforces the need to look beyond the quantitative results and to the underlying cases.[206])

Moreover, this volatility spikes in years that mark a change to the Court's composition. For example, the 1993 and 1994 Terms—when Justice Ruth Bader Ginsburg and Justice Stephen G. Breyer, respectively, were confirmed to the Court—account for two of the three most volatile Terms for the Court's important-questions docket in the preceding forty Terms (i.e., from 1954 through 1994), with the third coming in the 1992 Term.[207] In these years, terms that moved significantly toward the origin include *procedure*;[208] and, perhaps notably, Justice Ginsburg was a highly regarded civil procedure professor in a prior career.[209] Similarly, the Terms of Justice Elena Kagan's appointment and Justice Neil M. Gorsuch's appointment also represent two of the three years of greatest volatility

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202. 513 U.S. 18, 29 (1994) (concluding that, where settlement moots a case on appeal, an appellant ordinarily forfeits the opportunity to seek vacatur of the decision below).

203. 516 U.S. 367, 369 (1996) (holding that a state court settlement of class action litigation is final for federal full faith and credit purposes).

204. See supra notes 145–146 and accompanying text.

205. See Batson v. Kentucky, 476 U.S. 79, 84–89 (1986) (holding that the Constitution's Equal Protection Clause bars states from discriminating on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial). For examples of Rehnquist Court *equal_protection** cases clarifying or cabining *Batson*, see Campbell v. Louisiana, 523 U.S. 392, 396 (1998) (granting certiorari to address whether petitioner had standing to raise a *Batson*-type claim); Ford v. Georgia, 498 U.S. 411, 418 (1991) (granting certiorari to determine whether state procedure would bar a *Batson* claim); Holland v. Illinois, 493 U.S. 474, 487 n.3 (1990) (declining "to convert *Batson* from an unexplained departure to an unexplained rule"); Buchanan v. Kentucky, 483 U.S. 402, 404–15 (1987) (granting petition alleging equal protection violation for unselected jurors opposed to death penalty).

206. See supra note 135.

207. See supra Figure 8. Moreover, the lowest "Changed Court Composition" value during this era comes during a period in which the Court had only eight members: after Justice Antonin G. Scalia's death, but before Justice Neil M. Gorsuch's confirmation. See supra Figure 8.

208. See supra Table 2 and accompanying text. For an example of a case from the 1994 Term that dealt with procedure, see U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 23 (1994).

209. See John Q. Barrett, Ruth Bader Ginsburg: Litigating Against Gender Discrimination. . . and Remembering One Such New York Case, 16 Jud. Notice 50, 53 (2021).

since the 1930s (with the third immediately following Justice Gorsuch's confirmation).[210]

A closer look at the natural courts that begin with each such appointment can further boost the hypothesis that appointments shape the exercise of the Court's docket-setting discretion. Natural Court 1704—which begins with Justice Kagan's confirmation to the bench from her prior position as Solicitor General—sees the term *solicitor general* move significantly toward the origin.[211] Importantly, the presence of this term need not suggest that the Office of the Solicitor General increased its influence, nor even that Justice Kagan herself was partial to the Office's certiorari-stage presentations. Rather, it may simply suggest that Justice Kagan's (then-new) presence on the Court made the Court generally more mindful of the Solicitor General, and perhaps even more critical of their maneuvering in some cases.[212] After 1988—which, recall, is when the Court gained near-total control over its docket—the Court's important-questions docket has seemed to change substantially whenever the Court's personnel changes.[213]

TABLE 5. AVERAGE DOCKET VOLATILITY

Average Across	1925 through 1988	1989 through 2018
Stable Composition Terms	0.174	0.178
Changed Composition Terms	0.126	0.206

210. Cf. Brandon L. Bartels, The Sources and Consequences of Polarization in the U.S. Supreme Court, *in* American Gridlock: The Sources, Character, and Impact of Political Polarization 171, 198 (James A. Thurber & Antoine Yoshinaka eds., 2015) (predicting this result, with respect to Justice Gorsuch's confirmation, as a "blockbuster scenario" affecting the "volitional agenda," i.e., the important-questions docket, see supra note 24).

211. See, e.g., United States v. Kebodeaux, 570 U.S 387, 391 (2013) ("The Solicitor General sought certiorari. And, in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional, we granted the petition."). It is notable that the Court highlights that the Solicitor General sought review. It could have instead simply said—as it has in other contexts—that it granted review because a federal court of appeals held a federal statute unconstitutional. See supra notes 17–20 and accompanying text (discussing *Allen* and *Brunetti*).

212. Cf. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 575–76 (2015) (Alito, J., dissenting); Michael A. Bailey, Brian Kamoie & Forrest Maltzman, Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making, 49 Am. J. Pol. Sci. 72, 83 (2005) ("Viewing the solicitor general solely as an apolitical legal expert is inconsistent with our results. The solicitor general's influence should be seen in political terms.").

213. See David R. Stras, The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation, 27 Const. Comment. 151, 153–58 (2010) (finding other evidence to suggest that changes in the Court's membership led to changes in the Court's discretionary docket over a similar time period).

One possible interpretation of these findings is that, as the Court has gained greater discretion to set its own docket, its exercise of that discretion has become more fluid. Moreover, changes in the Court's composition seem to yield even more substantial changes to the shape of the important-questions docket. Stated similarly, the Court has—and has exercised—wide discretion to shape its own docket, and *who* is on the Court may matter to *how* the Court exercises that docket-setting discretion.

III. TOWARD A DOCTRINE OF CERTIORARI

The Supreme Court now has virtually unfettered discretion to choose the cases it will decide. Though the Court dedicates much of its attention to ensuring uniformity in federal law (by agreeing to review cases presenting conflicts among, say, the federal courts of appeals), a substantial portion—between one-third and one-half—of the Court's attention is dedicated to questions of particular importance.[214] Though this importance-based standard has been widely criticized for its indeterminacy,[215] a close analysis of the Court's descriptions of its decisions to grant review sheds new light on the Court's exercise of its docket-setting discretion. But this new light does not illuminate all the shadows cast on the Court's important-questions docket. Even as we might begin to see which cases are more likely to earn the Court's attention—bankruptcy or labor cases in the Hughes Court, confession-related cases in the Warren Court, or cases seeking to overrule precedent in the Roberts Court[216]—we lack an accounting from the Court of why these cases merit its attention, and how these emphases have changed over time. The Supreme Court should resolve this difference between the *what* and the *why* of the Court's important-questions docket with a more complete doctrine of certiorari.

A. *Coherence Without Reasoning*

As noted above, a close reading of the Court's opinions, describing its decisions to grant review, can help bring some coherence to the Court's certiorari discretion. Such coherence, however, is no substitute for reason-giving. Consider, again, the example set out in the Introduction. Cases like *Allen* and *Brunetti* teach that the Court is likely to review judgments that hold statutes unconstitutional, thus helping to explain the Court's behavior in other cases, like *LSI Corp.*[217] But the understanding that comes from such a synthesis is incomplete. Congress moved such cases out of the Court's mandatory docket and into its discretionary docket, both out of respect for the lower courts and to allow the Court to focus on more pressing matters. So why does the Court treat review in such cases as practically

214. See supra Figure 1; infra Appendix Figure 1; supra note 71 and accompanying text.

215. See supra note 10.

216. See supra Table 2.

217. See supra notes 17–29 and accompanying text.

automatic, even though Congress preferred a more discretionary approach? Moreover, given the Court's claims that its "usual" course is to grant review in cases holding a federal statute unconstitutional,[218] what explains the Court's decisions to deny review in several such cases?[219] And what explains the difference between the standard the Court claims to apply to cases implicating federal statutes and the standard for cases implicating state statutes?[220] The Court does not say, and so we do not know.

Just as a close reading of cases like *Allen* and *Brunetti* (among others in this line) helps to make the Court's discrete certiorari decisions more coherent, a more systematic examination of the Court's opinions can help achieve greater coherence. Techniques such as those employed in this project can help us to identify patterns and trends in the Court's important-questions docket. But, as in the *Allen* and *Brunetti* examples, this new understanding still seems incomplete, missing a critical substrate of judicial reasoning.

We find that the Court's docket seems shaped (at least in part) by the social, political, and legal debates of the moment. For example, both the Great Depression and the laws enacted in its wake affected the Court's exercise of its docket-setting discretion.[221] And some preliminary indications might suggest that the COVID-19 pandemic (and responses to it) are similarly helping to set the Court's agenda.[222] Hence, the Court's docket is sometimes (rightly, in my view) responsive to the public's evolving concerns. We also uncover some aspects of the Court's important-questions docket best explained by changes internal to the Court. Consider, for example, the Warren Court's acute, sudden interest in cases regarding criminal confessions. Chief Justice Warren's confirmation may have empowered him to immediately act on his (apparent) personal interest in such cases, thus dramatically reshaping the important-questions docket.[223] Likewise, the Roberts Court's accelerating interest in revisiting precedent may be, at least in part, a function of its changing composition. In all, the contours of the Court's discretionary agenda seem more volatile in recent years: Figure 8 and Table 5 suggest that these case-selection decisions are now more fluid and may be shaped by the particular preferences of the Court's members, preferences that change as the Court's composition changes. Indeed, these findings seem corroborated by the Court's growing

218. Iancu v. Brunetti, 139 S. Ct. 2294, 2298 (2019).

219. See supra note 33 (listing examples).

220. See County of Maricopa v. Lopez-Valenzuela, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from denial of certiorari) (noting that "Congress eliminated . . . mandatory" review of federal appellate decisions invalidating state statutes under the Federal Constitution in 1988 "and gave this Court discretion to review such cases . . . . In exercising that discretion, we should show at least as much respect for state laws as we show for federal laws").

221. See supra sections II.B.1–.2.

222. See supra note 165.

223. See supra notes 185–188; see also supra note 163.

practice of issuing separate statements that call for particular cases and questions.[224] If these calls are deployed strategically and are subsequently answered by petitioners, they allow individual Justices to move the Court's docket in the direction of their own (perhaps idiosyncratic or even ideological) preferences.

But while these patterns help to illuminate the types of cases that may attract the Court's attention and the mechanisms that may cause the Court's priorities to shift over time, questions remain. The Hughes Court shifted focus to bankruptcy cases in the wake of the Great Depression—but which bankruptcy cases, and why those cases? The Roberts Court emphasizes cases asking it to revisit precedent—but is the Court merely seeking to jettison disfavored policy outcomes,[225] or is it applying a new stare decisis standard?[226] (If the latter, is it applying that standard consistently?) Again, the Court does not say, and so we do not know.[227]

Yet these decisions may be profoundly important. While still a professor, Justice Amy Coney Barrett described the certiorari standard as one important restraint on the Court's power to revisit precedent: "One way in which the Court maintains stability in the case law is by not granting certiorari to revisit well-settled questions."[228] But if the Court's standard for granting review in these cases has changed, then, perhaps, so too will stability in the case law.

At first blush, this seems most troublesome when applied to the trends that seem attributable to changes in the Court's personnel—the Warren Court's emphasis on confession-related cases, for example. We do not ordinarily expect or desire the interpretation and application of procedural

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224. See McDonald, supra note 123, at 1024, 1062–72. Tables 2–3, supra, and Appendix Figure 6, infra, note that *first_person** terms, such as *I_would* and *my_view*, are significant during the Burger, Rehnquist, and Roberts Courts, and that they increase significantly in significance during the Burger and Roberts Courts. Such terms are sometimes found in separate opinions suggesting particular challenges. See, e.g., Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in part) ("I would end the failed *Saucier* experiment now.").

225. See, e.g., Warren S. Grimes, Judicial Activism in the First Decade of the Roberts Court: Six Activism Measures Applied, 48 Sw. L. Rev. 37, 73 (2019) (contending that the Roberts Court engages in "selective activism . . . [by] overruling . . . past precedent[s]" to which it seems ideologically opposed); cf. Sheldon Whitehouse, Opinion, Judicial Activism, Nat'l L.J. (Nov. 1, 2010) (on file with the *Columbia Law Review*) (describing and criticizing a theory of precedent, attributed to Chief Justice Roberts, that allows the Court to more easily upturn "hotly contested" precedents (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010))).

226. See, e.g., Gamble v. United States, 139 S. Ct. 1960, 1980–89 (2019) (Thomas, J., concurring).

227. Cf. Baude, Precedent and Discretion, supra note 151, at 313 (positing that the Court's "real problem is not that [it] overrules too much, but that it overrules without a theory that explains *why* it overrules" (emphasis added)).

228. Barrett, supra note 149, at 1731; see id. at 1733 (describing the "certiorari process" as "provid[ing] the justices with a way of avoiding the question whether a troublesome precedent should be overruled").

rules (including Supreme Court Rule 10) to vary on the identity of judicial personnel.[229] But we also understand that not all judges are the same: Judges and Justices use a range of legal methods—all legitimate (i.e., deemed acceptable by the legal community), though perhaps approved of to varying degrees by the public—to reach a range of outcomes.[230] And varying those methods might give rise to varying outcomes, including as applied to the decision whether to grant review.

And so perhaps what is most troubling about the Court's important-questions docket is not its apparent volatility or that the changes in the Court's governing standards may be attributed to the Court's changing membership—such changes might, as noted, be explained by shifts in the legal methods or standards governing the decisions to grant review—but rather our inability to scrutinize the legal methods that inform the Court's approach to its important-questions docket and the concomitant effects of this opacity on the Court's public standing. Though we can bring some coherence to the Court's important-questions docket—we can begin to identify the patterns and trends that define its scope—we lack meaningful rationales for these patterns and trends. And this deficit of reasoning in certiorari contexts is consequential.

First, the Court's legitimacy is derived, at least in part, from a tradition of reason-giving.[231] It is, after all, only its judgment that confers power on the judiciary.[232] This is because public reasoning tends to bind the Judiciary in future decisions, thereby generating trust in the Court's decisions, as reason-giving constrains the Court's ability to act ideologically.[233] But opacity in certiorari decisionmaking may undermine the Court's legitimacy (and the power derived from such legitimacy), by contributing to—or, at minimum, failing to rebut—a view that the Court acts politically, rather than legally.[234] Indeed, the Court's "shadow docket," which has lately

229. Cf. Mass. Const. art. XXX (explaining that the government is "a government of laws and not of [persons]"). Notably, John Adams authored Massachusetts' constitution. See Mass. Ct. Sys., John Adams & the Massachusetts Constitution, Mass.gov, https://www.mass.gov/guides/john-adams-the-massachusetts-constitution [https://perma.cc/AC6J-VYBK] (last visited Feb. 21, 2022).

230. See Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court 35–36 (2018); see also Stephen Breyer, The Authority of the Court and the Peril of Politics 51 (2021) (suggesting that "jurisprudential differences, not political ones, account for most, perhaps almost all, of judicial disagreement").

231. See, e.g., Micah Schwartzman, Judicial Sincerity, 94 Va. L. Rev. 987, 1004–05, 1004 n.51 (2008) (describing the link between reason-giving and legitimacy and collecting sources); see also Ruth Bader Ginsburg, The Obligation to Reason Why, 37 U. Fla. L. Rev. 205, 221 (1985) ("A judgment expressing no reasons presents the appearance of arbitrariness.").

232. Cf. The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (The Courts "may truly be said to have neither FORCE nor WILL but merely judgment . . . .").

233. See Kent Greenawalt, Statutory and Common Law Interpretation 199 (2013).

234. Cf. Richard L. Hasen, Polarization and the Judiciary, 22 Ann. Rev. Pol. Sci. 261, 267 (2019) ("[N]o one doubts that the Supreme Court is growing more polarized in its

centered the Court's decisions on applications for stays, but which may also encompass decisions on petitions for certiorari,[235] has been subject to similar transparency-based criticisms.[236]

Second, reason-giving offers a degree of predictability to future parties.[237] And so this failure of certiorari-stage transparency undermines certiorari-stage predictability, perhaps leading some litigants to overinvest resources in costly (elite) counsel[238] and in generating amicus support (while causing other putative petitioners to underinvest in their case, perhaps by declining to seek further review at all). Moreover, this unpredictability compounds in the context of the Court's emergency docket, where

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decision making."); Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 Harv. L. Rev. 123, 157 (2019) (arguing that effecting doctrinal changes through the shadow docket "risks the perception" that the Court is ruling in a certain way "depending upon the identity . . . of the sitting President, or perhaps, . . . the political or ideological valence of the particular . . . policy at issue"); Greg Stohr, Supreme Court Approval Drops as New Term Brings Divisive Issues, Bloomberg (Sept. 22, 2021), https://www.bloomberg.com/news/articles/2021-09-22/supreme-court-approval-drops-as-new-term-brings-divisive-issues (on file with the *Columbia Law Review*) (citing "a new poll . . . showing declining confidence in the court and growing concern that it is driven by politics").

235. Compare Baude, Shadow Docket, supra note 53, at 5–6 (describing "orders . . . granting or denying certiorari" as part of the "shadow docket"), with The Presidential Comm'n on the Sup. Ct. of the U.S., "Case Selection and Review at the Supreme Court" 1 n.1 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf [https://perma.cc/U7S8-7MQD] (written testimony of Samuel L. Bray, Professor of Law, Notre Dame L. Sch.) (excluding "the mere grant or denial of a petition for a writ of certiorari" from its understanding of the "shadow docket").

236. See Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting from denial of injunctive relief) ("Today's ruling illustrates just how far the Court's 'shadow-docket' decisions may depart from the usual principles of appellate process. . . . [T]he majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend."); see also Vladeck, supra note 234, at 156–58; Deepak Gupta, Founding Principal, Gupta Wessler PLLC, "Access to Justice and Transparency in the Operation of the Supreme Court," Remarks Before the Presidential Commission on the Supreme Court of the United States 3 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Gupta-SCOTUS-Commission-Testimony-Final.pdf [https://perma.cc/XQ7X-KRGK] ("[T]he secrecy of the Court's certiorari process, and the unpredictability and lack of clear reason-giving endemic to its 'shadow docket', threaten public access to and trust in the Court's work."); cf. Melvin A. Eisenberg, The Principles of Legal Reasoning in the Common Law, *in* Common Law Theory 81, 82 (Douglas E. Edlin, ed. 2007) (arguing that it is "socially desirable for judges to make law" and that the judicial lawmaking function is impaired when "the methods of legal reasoning utilized by courts are not easily replicable").

237. Greenawalt, supra note 233, at 198–99.

238. Relatedly, the opacity of the Court's certiorari canons may contribute to concentration in the Supreme Court Bar, as only a subset of select lawyers—often former Supreme Court clerks—may know what's needed to get the Court's attention, thereby skewing the content of the Court's docket. See Richard J. Lazarus, Docket Capture at the High Court, 119 Yale L.J. Online 89, 94–95 (2009).

emergency relief may depend on whether the Court is likely to grant review[239]—but where the probability of certiorari remains the function of a largely unknown equation.

And third, reason-giving gives the public and the political branches an opportunity to review the Court's decisional principles, enabling them to respond democratically to its decisions and shift policy accordingly. The Court's failures to fully explain the exercise of its docket-setting discretion diminish the interbranch dialogue over the appropriate scope of the Court's certiorari jurisdiction.[240]

Of course, the Court (or defenders of the status quo) might respond that opacity in certiorari-stage decisionmaking is necessary to the Court's legitimacy, as it preserves the Court's discretion to, say, dodge politically sensitive cases and thereby preserve its scarce institutional capital.[241] But even if these passive virtues once served such an important function, they seem to be of increasingly questionable value. Close observers of the Court seem increasingly aware of the institution's attempts to dodge these cases.[242] And, in related contexts, it is the Court's very unwillingness to describe the reasons for its decisions that has tended to undermine its status as an apolitical institution.[243]

B. *Reasoning and a Doctrine of Certiorari*

We might thus prefer that the Court offer even more certiorari-stage transparency in the form of certiorari *doctrine*, rather than mere certiorari *text*. We must move from coherence to understanding. A traditional doctrinal approach would require the Court to interpret and apply Supreme Court Rule 10 like other rules of procedure, giving its docket-setting canons more doctrinal content consistent with common law norms of reason-giving: transparency; predictability; bindingness (to a degree) in future

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239. See Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (explaining that decisions whether to grant extraordinary relief hinge, in part, on an assessment of the merits, and that an assessment of the merits includes a consideration of whether the Court is likely to grant review at all).

240. See Erin F. Delaney, Analyzing Avoidance: Judicial Strategy in Comparative Perspective, 66 Duke L.J. 1, 18–19, 58–64 (2016) (agreeing that the lack of reason-giving diminishes "dialogic benefits," but suggesting that those benefits may be outweighed by the Court's ability to serve its "countermajoritarian aspiration"); cf. Tony Mauro, Supreme Court Brief—From Ken Geller, A Different Take on the Supreme Court's 'Shadow Docket' Controversy, Nat'l L.J. (Sept. 23, 2021) (on file with the *Columbia Law Review*) (quoting Ken Geller as saying that the Court should be clearer in its shadow docket decisions "both for transparency purposes and for other purposes [such as the] development of the law").

241. See, e.g., Alexander M. Bickel, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 75 (1961).

242. See Huang, supra note 108, at 92, 97–98; cf. Rogers v. Grewal, 140 S. Ct. 1865, 1865 (2020) (Thomas, J., dissenting from denial of certiorari) (accusing the Court of "look[ing] the other way" when faced with potentially controversial Second Amendment cases).

243. See supra note 236 and accompanying text.

deliberations (yet flexibility to evolve as needed, as with other common law doctrines); and susceptibility to political scrutiny.[244]

This Article is far from the first to call for greater certiorari-stage transparency. Kathryn Watts, for example, has argued in favor of certiorari-stage vote disclosures.[245] And while she is skeptical that the Court could (or would) comply with a reason-giving requirement across all the thousands of certiorari petitions received annually,[246] the suggestion here is more modest. I mean only to build on the Court's existing practice of offering a concise reason for granting review by suggesting that the Court further institutionalize this existing practice, and that it link it more expressly to established modes of legal reasoning.[247]

The Court should build a more robust doctrine of certiorari by offering more detailed explanations for the reasons of its review, and it should explain how the decision to grant review in one case reflects (or differs from) its decisions in other cases. Such a common law system of precedential and analogical reasoning, in dialogue with the political branches is, well, common in our system, familiar to first-year law students. Common law procedural doctrines are thus already familiar, and a certiorari-specific doctrine would not require any drastic changes to the Court's existing practices. The Court already writes opinions in its merits cases, and those

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244. See, e.g., Vladeck, supra note 234, at 157 (2019) (suggesting that if the Court has developed a new standard for certain shadow docket matters, then "it would behoove all involved . . . for the Court to say so"); Will Baude, Death and the Shadow Docket, The Volokh Conspiracy (Apr. 12, 2019), https://reason.com/volokh/2019/04/12/death-and-the-shadow-docket/ [https://perma.cc/W5CJ-L8KK] (suggesting that the Court undertake any number of processes to improve transparency into the decisionmaking process attending to the Court's death penalty cases).

Implementing this suggestion will, of course, be complicated in some cases. Perhaps the Justices who voted to grant review do not mirror the Justices in the majority on the merits, or perhaps the Justices who voted to grant review did so for widely varying reasons. In such cases, it may be difficult or implausible to offer a complete legal explanation for why a given case was important enough to merit review. Of course, the Court has various mechanisms for addressing intramajority disagreement, including through concurring opinions, or by having members of the majority decline to join various parts or footnotes of an opinion. The Court could employ similar strategies in this context, too.

245. Watts, supra note 12, at 55–61; see also Baude, Shadow Docket, supra note 53, at 16–18; cf. Stephen I. Vladeck, The Supreme Court Needs to Show Its Work, Atlantic (Mar. 10, 2021), https://www.theatlantic.com/ideas/archive/2021/03/supreme-court-needs-show-its-work/618238/ (on file with the *Columbia Law Review*) ("[T]he growth of unseen, unsigned, and unexplained decisions can only be a bad thing.").

246. See Watts, supra note 12, at 47.

247. See, e.g., United States v. Kebodeaux, 570 U.S. 387, 391 (2013) (citing United States v. Morrison, 529 U.S. 598, 605 (2000), and United States v. Edge Broad. Co., 509 U.S. 418, 425 (1993), for the proposition that review is warranted when a "Court of Appeals [holds] a federal statute unconstitutional"). *Kebodeaux* appears to be the rare example of the Court following this practice. But it also suggests that doing so is not implausible or impracticable. See Frankfurter & Hart, supra note 85, at 83 (explaining that this "needed elucidation" can come by the "less time-consuming means" of more fully explaining the reasons for review in merits opinions).

opinions already contain, in many instances, a description of the Court's decision to grant review. I am simply asking the Court to say *more* about those decisions to grant review. The development of such a common law doctrine of certiorari thus draws on the tradition first lauded and later followed by Justice Frankfurter, among others.

Indeed, such a common law of certiorari is likely to help address each of the defects noted above. For one, clear rationales for its decisions to grant review will offer scholars, practitioners, and other observers better insights into the Court's docket-setting processes and perhaps inspire confidence that the Court's certiorari decisions are more legal than political—particularly if they tend to show that the Court's certiorari rules are evenly applied (or bind the Court to apply them more consistently).[248] Common law procedural doctrine has, after all, served as a vessel for a range of legally legitimate modes of reasoning (even if reasonable minds may disagree over the better rule).[249] But if the Court finds that it cannot offer consistent explanations for its certiorari decisions, or if its reasoning in such decisions shifts dramatically over time, then that should give the Court, and the public, cause for concern.[250]

Moreover, a more openly reasoned doctrine of certiorari should improve predictability for litigants who are considering whether to undertake the costly process of filing a petition for certiorari. And such a doctrine of certiorari might aid the Court in its own docket-selection processes, as clearer certiorari standards might cause more litigants, whose cases obviously do not raise certworthy questions, to drop out, allowing the Court to focus on more meritorious petitions. It is true that other mechanisms already serve this prefiltering role.[251] ORTOs, for example, offer public signals about the cases and questions that have piqued the interest of the

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248. But compare Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1940 (2021) (Gorsuch, J., concurring) (noting that the Court granted review to address a specific question, but "[r]ather than resolve that question, . . . the Court rests its decision on other grounds," and going on to conclude that "[t]hat is a good thing"), with Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1926 (2021) (Gorsuch, J., concurring) (noting that Court granted review to address a specific question, lamenting the Court's decision to "to sidestep th[at] question," and concluding that the Court's approach causes some "problems [to] emerge").

249. See Fallon, supra note 230, at 35–36 (discussing the legal legitimacy of Supreme Court decisions); see also Schwartzman, supra note 231, at 1002 (describing the importance of judicial reason-giving to both winning and losing parties).

250. Tara Leigh Grove, The Supreme Court's Legitimacy Dilemma, 132 Harv. L. Rev. 2240, 2259 (2019) (reviewing Fallon, supra note 230, and describing the importance of whether a mode of reasoning draws from "legal sources . . . deemed to be acceptable by the legal community").

251. In addition to ORTOs, addressed supra note 123, some have suggested both that the Court pays special attention to the counsel of record on a petition of certiorari—using that metric as a signal or proxy for a case's certworthiness—and that, by relying on this proxy, the Court has helped to create a concentrated, elite, and nondiverse Supreme Court Bar. More openly reasoned certiorari decisions may help to also address such concerns, to the extent they are accurate, by making the Court's certiorari canons known to any lawyer

Justices.[252] But such statements have been criticized for allowing individual Justices to nudge the Court's docket in the direction of their own individual preferences.[253] By contrast, statements in majority opinions, which speak for the Court as an institution, send a more compelling signal. Indeed, such statements account for at least five votes—and only four are needed to grant review.[254]

And finally, a common law of certiorari might help bring the Court's docket selection decisions into conversation with the political branches. Hence, to be clear, nothing written here should be understood to suggest that internal reforms to the Court's own certiorari practice are alone sufficient. The political branches have, and should continue to, evaluate the propriety of the Court's certiorari docket and impose external constraints on the Court's discretionary jurisdiction as appropriate. It is not inconsistent with the Court's institutional legitimacy for Congress or the President to consider and advance proposals to amend the Court's docket-setting discretion. Rather, democratic control over the Court's docket is legitimating, as the Constitution itself suggests.[255] As noted above, Congress has, on multiple occasions, modified and amended the Court's jurisdiction to address public needs and to account for judicial resources.[256] And the White House and Congress are presently considering a range of proposals for reforming the Supreme Court, including possibilities for the Court's docket-setting discretion.[257] Congress may, for example, find the volatility highlighted in Figure 8 and Table 5 to be untenable,[258] and return a number of cases to the Court's mandatory appellate docket

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who cares to study them, perhaps creating more opportunities for such lawyers (outside the Supreme Court Bar) to argue before the Court.

252. See supra note 123.

253. See McDonald, supra note 123, at 1024, 1062–72; see also supra note 224 and accompanying text.

254. See supra note 65.

255. See U.S. Const. art. III, § 2 (subjecting the Court's appellate jurisdiction to "such Regulations as the Congress shall make").

256. See supra notes 57–58 and accompanying text; see also supra notes 30–31 and accompanying text.

257. See Daniel Epps & Ganesh Sitaraman, The Future of Supreme Court Reform, 134 Harv. L. Rev. Forum 398, 408 (2021) ("We note also that members of Congress seem interested in reforms that might change how the Court deals with its 'shadow docket.'"). See generally The Presidential Comm'n on the Sup. Ct. of the U.S., Final Report (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/WVX3-E69F] (providing an account of the public debate for and against Supreme Court reform and an assessment of specific reform proposals).

258. Cf. Glen Staszewski, Precedent and Disagreement, 116 Mich. L. Rev. 1019, 1020–21 (2018) ("[T]he fundamental purposes of presumptive deference to precedent are to facilitate reasoned deliberation within the judiciary and to shift responsibility for changing entrenched features of the law to more deliberative or broadly representative institutions of government."). This pluralistic deliberative democratic theory of precedent might apply not only to the Court's substantive rulings, but also to its decisions regarding the appropriate contours of certiorari jurisdiction.

to invite greater stability.[259] Or it may attempt to exclude certain cases from the Court's jurisdiction altogether. But if Congress decides to change these governing standards, it would be better served if it knew whether it is changing some governing legal rule, or whether it is legislating to limit the power of an institution that is predisposed to certain policy outcomes, or something else entirely. Indeed, Congress might make a different choice with better information, as the sort of reform it implements will vary over whether it is changing a legal standard or a political institution.[260] No matter the path that Congress chooses, the interbranch dialogue among the branches on the role of the Supreme Court and Judiciary will benefit from a more robust common law of certiorari. And so we need the Court—and the Court needs—to better explain how it populates its important-questions docket, and why that docket changes over time.

The Court's current practice of offering a brief statement describing its decision to grant review offers one step towards transparency in certiorari. It helps to explain, as Justice Frankfurter noted, "the reasons which had moved [the Court] to grant the writ."[261] But these statements are not enough. We must be able to better understand the Court's motives for doing so and to evaluate and amend, as needed, the institution in response to that information. Absent this understanding, the Court's exercise of its docket-setting discretion is subject to critiques (warranted or not) that it is acting politically, not legally—that it is, say, calling for certain cases to drive outcomes rather than to resolve important questions and set out general decisional principles. The Court can help to allay concerns about its docket-setting processes by developing and applying an approach to docket selection in a medium that both the legal profession and the political branches are accustomed to interpreting. Such a shift in the Court's certiorari practice may help to improve its standing among both

259. There are reasons to suspect that growing the Court's mandatory doctrine would yield other salutary benefits, including that the Court might be more constrained in its ability to craft special rules for cases with particular facts, while trying to duck the consequences of applying those rules to other circumstances. Compare Bush v. Gore, 531 U.S. 98, 109 (2000) (explaining that the Court's opinion "is limited to the present circumstances"), and Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2376 (2018) (suggesting that the Court's opinion is limited to its specific context, and not affecting "the legality of health and safety warnings long considered permissible"), with J. Harvie Wilkinson III, If It Ain't Broke . . . , 119 Yale L.J. Online 67, 69 & n.8 (2010) (citing sources contending "that the Court should hear more cases because the discipline and time required to do so would discourage . . . judicial activism," but ultimately disagreeing with their conclusion); see also The Presidential Comm'n on the Sup. Ct. of the U.S., supra note 235, at 4 (written testimony of Samuel L. Bray, Professor of Law, Notre Dame L. Sch.) ("[T]he Commission might well consider proposing an expansion of direct appeals to the Court.").

260. The Court's present failure to fully articulate the canons informing its approach to docket selection means that this interbranch process may only partially engage the factors that shape the Court's important-questions docket. But this is a failing of the Court's own doing, and the Court's opacity should not be rewarded with diminished scrutiny.

261. Frankfurter & Hart, supra note 85, at 83.

the legal community and the greater public,[262] offer greater predictability to its certiorari-stage decisions, and bring the Court's canons for shaping its docket into a more complete dialogue with the political branches.

CONCLUSION

The modern Supreme Court has nearly unlimited discretion to set its own docket. In doing so, the Court both reflects and shapes national discourse, and so understanding how the Court exercises this discretion is critical to understanding the Court and its priorities over time. Though critics have derided the Court's certiorari standard as hopelessly inscrutable,[263] the Court's standard for granting review can be better understood through a close analysis of its merits opinions, including by means of computational text analysis.

This view into the Court's agenda is revealing. Terms like *bankruptcy** and *military**, and the cases they represent, suggest that the Court's docket shifts in the wake of large exogenous events (such as depressions and wars). Similarly, terms like *labor**, *employ**, and *habeas** suggest that major political developments, such as landmark legislation, are reflected in the Court's caseload—sometimes in lasting ways.[264] But other changes, such as the Roberts Court's emphasis on terms like *overrule** and *precedent**, are less easily explained. Some evidence suggests that, in recent years, individual appointments have shaped the contours of the Court's docket. Put simply, who is on the Court has mattered to how the Court has exercised its docket-setting discretion—including how frequently to revisit precedent and which precedents to revisit. But this development gives rise to suspicions, warranted or not, that the Court is acting as a legislature of nine, free to set its own agenda, rather than as a common law court bound by longstanding traditions and legal standards.[265] And so it should offer the legal rationales for its certiorari decisions—in the mode of a more traditional common law—both to better improve the interbranch dialogue over judicial (and Supreme Court) reform and perhaps even to instill greater confidence in our Supreme Court.

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262. See Stohr, supra note 234; cf. Grove, supra note 250, at 2259 (explaining that "legal legitimacy has a sociological component"). This Article suggests that sociological legitimacy also seems to have a legal component—that perhaps the public's acceptance of the Court's decisions depends on those decisions being made in legally legitimate ways.

263. See supra note 10.

264. Pacelle, supra note 24, at 29 ("Once an issue has been on the volitional agenda, its life may be extended long after the Court's interest in the issue has waned.").

265. Cf. Huang, supra note 108, at 92–94 (describing both the "appeals" and the "curatorial" aspects of the Court's docket-setting discretion).

APPENDIX OF TABLES AND FIGURES

APPENDIX TABLE 1. ORIGINAL TERMS AND INDEX TERMS

Original Term	**Index Term**
a_divided_panel	divided_lower_court*
accused	accused
act	statute*
act_stat	statute*
administrative	admin_agency*
admiralty	admiralty
agency	admin_agency*
aggravating	aggravating
alito	alito
amici	amici
an_injunction	injunction*
and_fourteenth_amendments	fourteenth_amendment*
arrest	arrest*
arrested	arrest*
attorney	counsel*
attorney_general	attorney_general
attorneys	counsel*
bank	bank
bankruptcy	bankruptcy*
bankruptcy_act	bankruptcy*
business	corporate*
by_a_divided	divided_lower_court*
capital	death_sentence*
carrier	carrier
citizenship	citizenship
civil_rights	civil_rights
class	class
clearly_established	clearly_established
code	statute*
collateral	collateral
collector	collector
commerce	commerce*
commission	admin_agency*
commissioner	admin_agency*
companies	corporate*
company	corporate*
confession	confession
conflict	conflict*
conflict_with	conflict*
congress	congress*
congressional	congress*
constitution	constitution*

Original Term	**Index Term**
constitutional	constitution*
constitutional_question	constitution*
constitutional_questions	constitution*
constitutional_rights	constitution*
constitutionality	constitution*
constitutionally	constitution*
construction	construction*
construed	construction*
contract	contract*
contracts	contract*
corp	corporate*
corporation	corporate*
corporations	corporate*
counsel	counsel*
crime	criminal*
criminal	criminal*
cruel	eighth_amendment*
damages	damages
death	death_sentence*
death_penalty	death_sentence*
death_sentence	death_sentence*
deducted	tax*
deduction	tax*
deductions	tax*
department	admin_agency*
discharge	discharge*
discharged	discharge*
discrimination	discrimination
dissented	divided_lower_court*
dissenting_from_denial	first_person*
diversity	diversity
divided	divided_lower_court*
douglas	douglas
due_process	due_process*
due_process_clause	due_process*
education	school*
eighth_amendment	eighth_amendment*
election	election
employee	employ*
employees	employ*
employer	employ*
employment	employ*
en_banc	divided_lower_court*
equal_protection	equal_protection
equitable	equity*

Original Term	Index Term
equity	equity*
evidence	evidence
execution	death_sentence*
executive	executive*
fair	fair
federal_constitution	constitution*
federal_constitutional	constitution*
federal_courts	federal_courts
federal_employers_liability_act	employ*
federal_habeas	habeas*
federal_habeas_corpus	habeas*
fifth_amendment	fifth_amendment
fine	fine
first_amendment	first_amendment
five_years	five_years
force	force
foreign	international*
fourteenth_amendment	fourteenth_amendment*
fourth_amendment	fourth_amendment
frankfurter	frankfurter
fraud	fraud
gas	oil*
government	government
grand_jury	grand_jury
habeas	habeas*
habeas_corpus	habeas*
habeas_relief	habeas*
harlan	harlan
health	health
helvering	tax*
history	history
i_believe	first_person*
i_would	first_person*
immunity	immunity
imprisonment	prison*
inc	corporate*
income	income
income_tax	tax*
indian	indian
ineffective	ineffective
injunction	injunction*
injunctive_relief	injunction*
insurance	insurance
internal_revenue	tax*
international	international*

Original Term	**Index Term**
interpretation	interpretation
interstate	interstate
interstate_commerce	commerce*
its_discretion	its_discretion
judicial_code	judicial_code
judicial_review	judicial_review
jurisdiction	jurisdiction*
jurisdiction_over	jurisdiction*
jurisdictional	jurisdiction*
jury	jury*
jury_trial	jury*
labor	labor*
labor_board	labor*
land	property*
lands	property*
language	language
legislative	legislative
levied	levied
llc	corporate*
local	local
market	market
military	military*
moot	moot
murder	murder
my_view	first_person*
national_labor_relations_act	labor*
national_labor_relations_board	labor*
negligence	negligence
officer	officer*
officers	officer*
oil	oil*
one_judge_dissenting	divided_lower_court*
overrule	overrule*
overruled	overrule*
patent	patent
police	officer*
political	political
postconviction	habeas*
power	power*
powers	power*
precedent	precedent*
precedents	precedent*
prejudice	prejudice
president	executive*
press	press

Original Term	Index Term
prison	prison*
prisoner	prison*
privilege	privilege
probable_cause	probable_cause
procedural	procedure*
procedure	procedure*
procedures	procedure*
proof	proof*
property	property*
prove	proof*
punishment	punishment
racial	racial
railroad	railroad*
railway	railroad*
rates	rate*
receiver	bankruptcy*
redrup	speech*
regulation	regulation*
regulations	regulation*
rehearing	divided_lower_court*
rehearing_en_banc	divided_lower_court*
remedies	remedy*
remedy	remedy*
resources	resources
restraining	restraining
retroactive	habeas*
revenue_act	tax*
river	river
robbery	robbery
rules	rules
scalia	scalia
school	school*
search	search
secretary	admin_agency*
securities	securities*
security	security
seized	seize*
seizure	seize*
sentence	sentence*
sentences	sentence*
sentencing	sentence*
settlement	settlement
sixth_amendment	sixth_amendment
solicitor_general	solicitor_general
sotomayor	sotomayor

Original Term	**Index Term**
speech	speech*
standing	standing
state	state*
state_law	state*
states	state*
statute	statute*
statutes	statute*
statutory	statute*
stock	securities*
suppress	suppress
tax	tax*
taxable	tax*
taxes	tax*
taxpayer	tax*
thomas	thomas
title_vii	title_vii
transportation	transportation
trust	trust
unconstitutional	constitution*
union	labor*
united_states_constitution	constitution*
vessel	vessel
vote	vote
wages	employ*
war	military*
warrant	warrant
water	water
witness	witness*
witnesses	witness*
workers	employ*

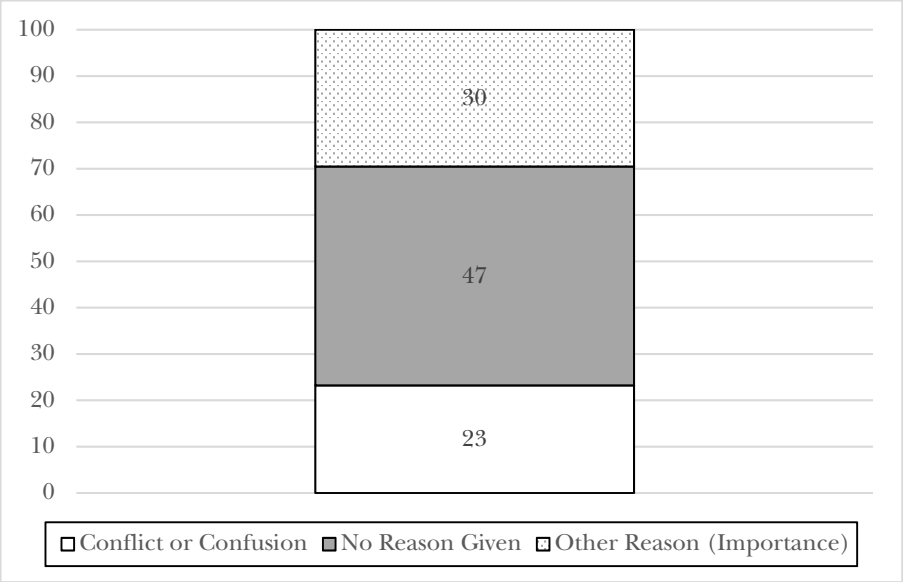
APPENDIX TABLE 2. STOP WORDS

i	a	same
me	an	so
my	the	than
myself	and	too
we	but	very
our	if	s
ours	or	t
ourselves	because	can
you	as	will
you're	until	just

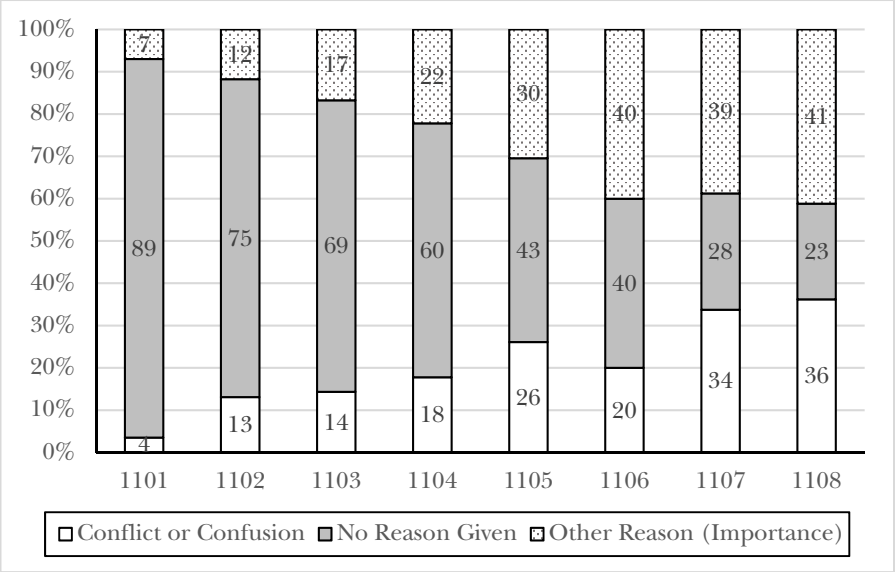
you've	while	don
you'll	of	don't
you'd	at	should
your	by	should've
yours	for	now
yourself	with	d
yourselves	about	ll
he	against	m
him	between	o
his	into	re
himself	through	ve
she	during	y
she's	before	ain
her	after	aren
hers	above	aren't
herself	below	couldn
it	to	couldn't
it's	from	didn
its	up	didn't
itself	down	doesn
they	in	doesn't
them	out	hadn
their	on	hadn't
theirs	off	hasn
themselves	over	hasn't
what	again	haven
which	further	haven't
who	then	isn
whom	once	isn't
this	here	ma
that	there	mightn
that'll	when	mightn't
these	where	mustn
those	why	mustn't
am	how	needn
is	all	needn't
are	any	shan
was	both	shan't
were	each	shouldn
be	few	shouldn't
been	more	wasn
being	most	wasn't

have	other	weren
has	some	weren't
had	such	won
having	no	won't
do	nor	wouldn
does	not	wouldn't
did	only	
doing	own	

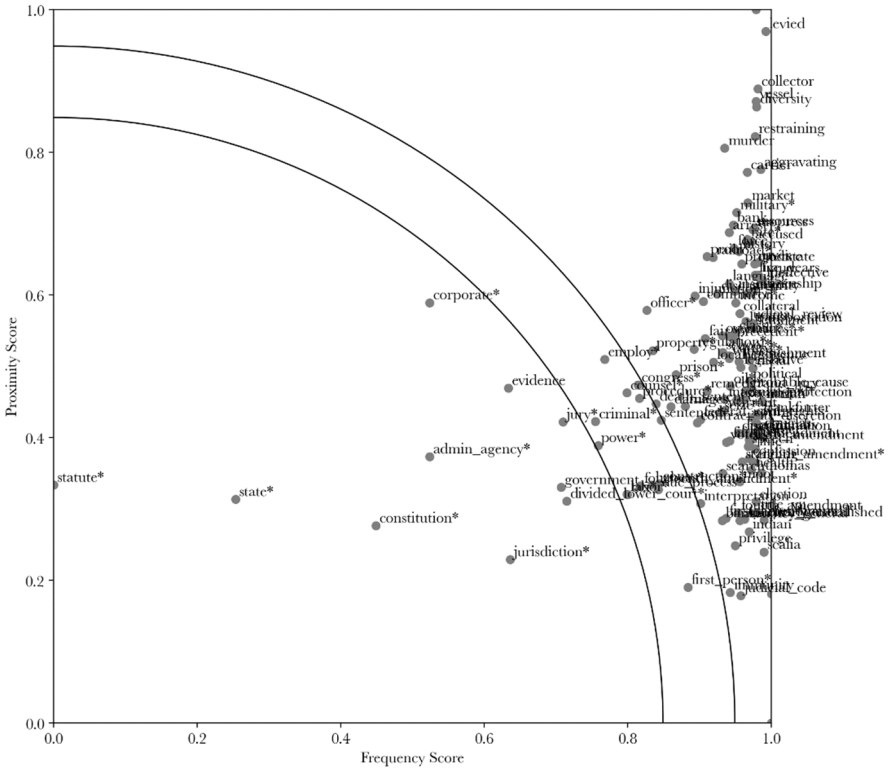
APPENDIX FIGURE 1. REASON FOR CERTIORARI (IN PERCENT) IN TOTAL, 1925–2018 TERMS



APPENDIX FIGURE 2. REASON FOR CERTIORARI (IN PERCENT) BY NATURAL COURT (HUGHES COURT)

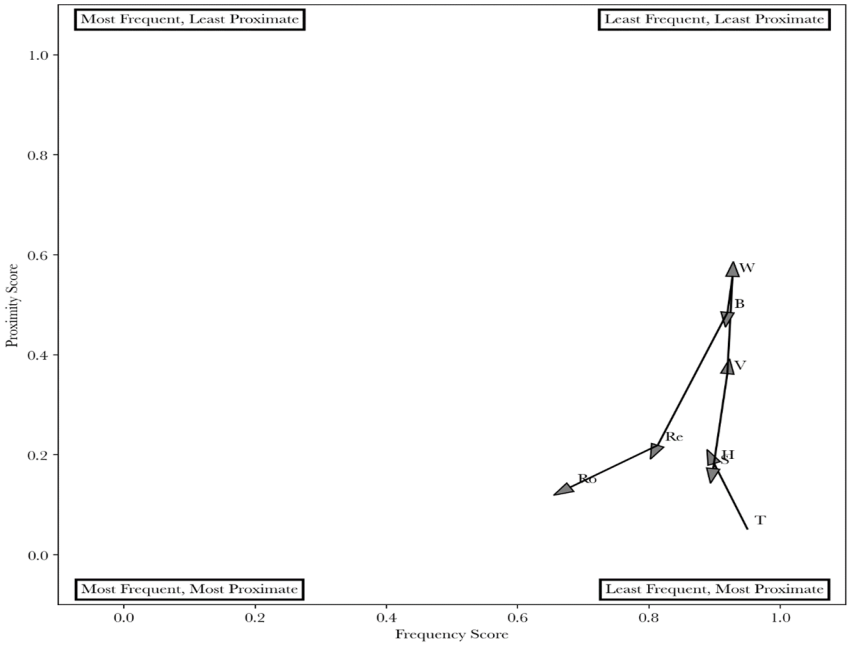


APPENDIX FIGURE 3. TERMS PLOTTED BY IMPORTANCE SCORE, 1925–2018[266]

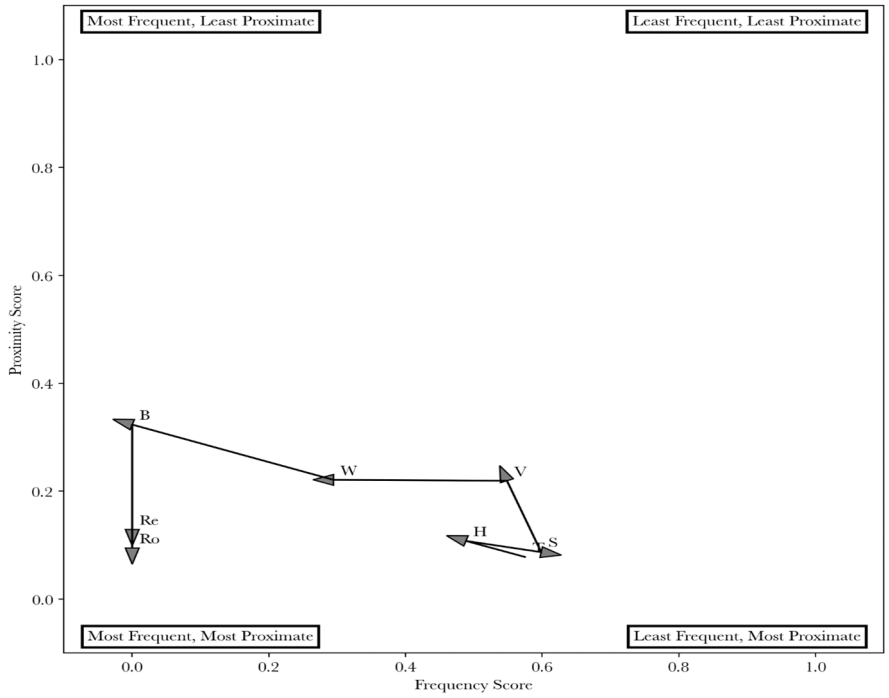


266. Appendix Figure 3 shows the overall distribution of all Index Terms (across all times), including those beyond the arcs. See supra note 129 and accompanying text.

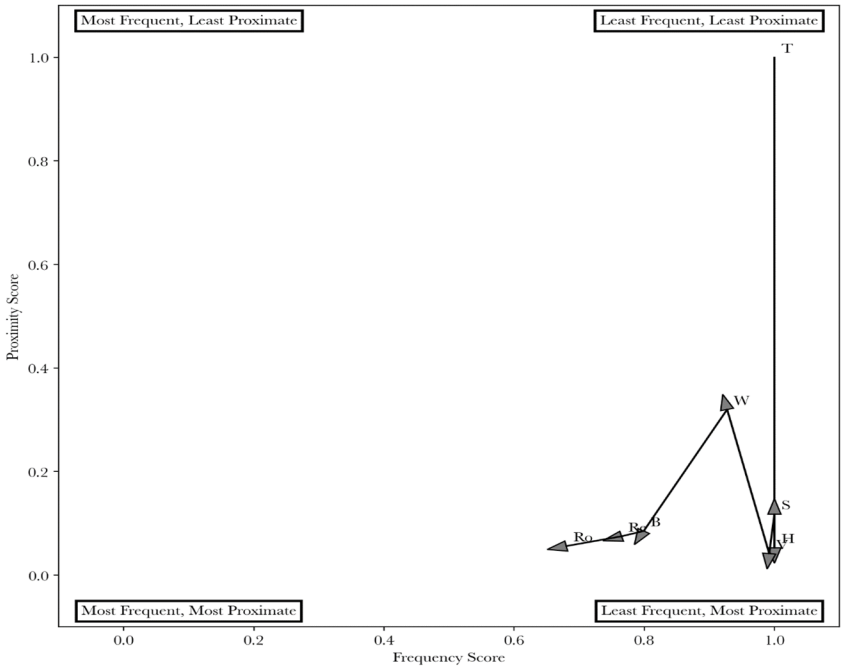
APPENDIX FIGURE 4. {OVERRULE*, PRECEDENT*} PLOTTED BY IMPORTANCE SCORE BY CHIEF JUSTICE



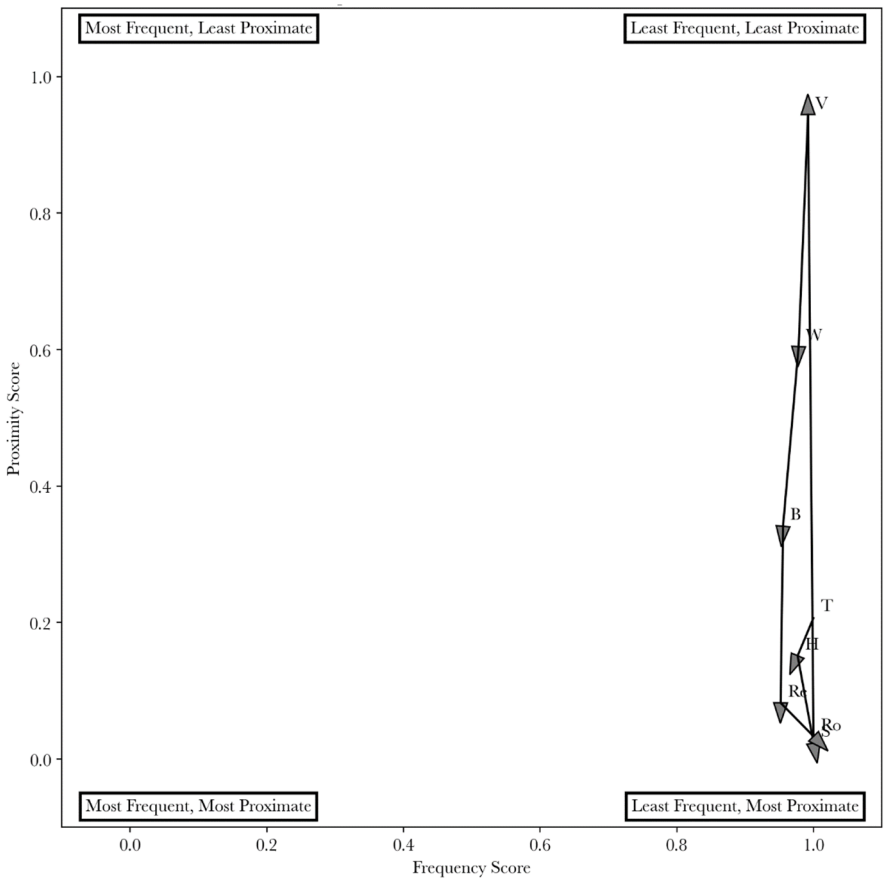
APPENDIX FIGURE 5. STATE* PLOTTED BY IMPORTANCE SCORE BY CHIEF JUSTICE



APPENDIX FIGURE 6. FIRST_PERSON* PLOTTED BY IMPORTANCE SCORE BY CHIEF JUSTICE



APPENDIX FIGURE 7. ANTITRUST PLOTTED BY IMPORTANCE SCORE BY CHIEF JUSTICE



METHODS APPENDIX

This Methods Appendix supplements the Article by providing a more detailed account of the underlying datasets and the empirical and computational methods used to derive the results presented above.

A. *Constructing the Dataset*

The dataset is built primarily on three sources: The Supreme Court Database (Washington University in St. Louis School of Law); the Caselaw Access Project (Harvard Law School); and CourtListener (Free Law Project, a nonprofit organization).

The Supreme Court Database codes "the reason, if any, that the Court gives for granting the petition for certiorari,"[267] with possible values ranging from 1 to 13, where 1 indicates that the case did not arise under the Court's certiorari jurisdiction, and any value from 2 through 9 indicates that the Court granted review to resolve some conflict or confusion among the lower courts (including putative conflicts). As described above, this study's focus is on cases arising under the Court's certiorari jurisdiction, and specifically, cases arising under the Court's certiorari jurisdiction that do not implicate lower court conflicts. The analysis has thus been limited to those cases coded as 10, 11, or 13 (i.e., cases granted to resolve the question presented, or granted to resolve an important or significant question, or granted for any other reason), as well as those cases coded as 12 (i.e., cases granted for no specified reason).[268] There are a total of 7,169 cases coded as 10, 11, 12, or 13 beginning in October Term 1925 (the Term in which the Judges' Bill of 1925 took effect) through October Term 2018.[269]

Though The Supreme Court Database contains many important useful details about each Supreme Court opinion, it does not contain the full text of those opinions. Hence, I obtained the full opinion text of these 7,169 opinions from the Caselaw Access Project in HTML (6,857 opinions), from CourtListener in plain text (305 opinions), or manually in plain text (7 opinions).[270]

After cleaning and processing these text files,[271] I extracted from each opinion any paragraph containing the term *certiorari*.[272] 6,295 opinions contained at least one such paragraph (out of 7,169, or roughly 88%), and those paragraphs formed the basic corpus for further study.[273] In addition,

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267. Spaeth et al., Code Book, supra note 92, at 26.

268. Id. at A7.

269. See supra note 90.

270. Specifically, the Caselaw Access Project offered access to all opinions through the Court's 2011 Term, as well as a limited number of opinions from the 2012 Term, and one opinion from the 2013 Term. CourtListener provided the full text of the remaining opinions from the 2012 and 2013 Terms, all opinions from the 2015, 2016, and 2017 Terms, and most of the opinions from the 2014 and 2018 Terms. The relevant text of the remaining seven cases (four from the 2014 Term and three from the 2018 Term) was retrieved manually. Those seven cases are PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051 (2019); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Gundy v. United States, 139 S. Ct. 2116 (2019); Glebe v. Frost, 574 U.S. 21 (2014); Carroll v. Carman, 574 U.S. 13 (2014); Johnson v. City of Shelby, 574 U.S. 10 (2014); and Lopez v. Smith, 574 U.S. 1 (2014).

271. Among other things, the text was edited to remove star page notation, to correct terms that were hyphenated across lines, to concatenate block quotes into single paragraphs, and to convert text to lowercase for consistency.

272. Paragraphs from files in HTML format were extracted using the Beautiful Soup package. Paragraphs from files in plain text were extracted using Python's native string manipulation functions. Note that this extraction occurs before generating bigrams and trigrams, see infra note 276, and so searches for *certiorari* here encompass all *certiorari** terms.

273. Out of the 874 cases that did not include the term certiorari, 749 were coded in The Supreme Court Database as providing no reason for the grant, whereas only 125 cases

a research assistant spot checked a random sample of 2% of the cases, to ensure both that the code correctly captured an entire paragraph containing the term "certiorari" (and only those paragraphs), and that the code did not overlook any such paragraphs. The final spot check returned no errors.[274]

Supreme Court Database Code Value	Supreme Court Database Citations	Full Text Available	Certiorari Paragraph Found
10, 11, or 13:	2850	2850	2725
12:	4319	4319	3570
Total:	7169	7169	6295

B. *Constructing the Term Index*

Next, this corpus was used to construct a dictionary of relevant terms,[275] beginning with a list of the 1,555 terms or phrases that appeared in over one percent of the decisions (limited to only the relevant paragraphs) in which *certiorari* appeared (i.e., terms that appeared in sixty-three or more cases).[276] Moreover, in order to avoid losing terms that were unusually concentrated in one period of time, I also included the additional 126 terms that appeared in more than three percent of cases for any given Court (defined by the tenure of a Chief Justice), Presidential Administration, or Decade. Because many of these 1,681 terms would be clearly unhelpful as Index Terms—like *court* or *we granted certiorari*—this list was filtered to only those terms that I thought likely to be helpful in assessing the reasons for a case's importance. My inferences were verified with two law school research assistants (one of whom is female, and one of

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of the excluded cases were coded as offering some nonconflict-related reason for review. Moreover, nearly half of these cases come from the Taft and Hughes Courts—117 and 296, respectively—when certiorari-stage reason-giving was rare or in its earliest stages. By contrast, these cases account for a comparatively small percentage of more recent time periods: 4.5% of Roberts Court cases, 2.8% of Rehnquist Court cases, and 5.2% of Burger Court cases.

274. Admittedly, spot checking was an iterative process. Some early rounds of spot checking revealed some data cleaning errors that were subsequently addressed, see supra note 271 (describing some data cleaning tasks), leading to a new round of results and spot checks. A new random sample was drawn for each round of spot checks.

275. See David E. Pozen, Eric L. Talley & Julian Nyarko, A Computational Analysis of Constitutional Polarization, 105 Cornell L. Rev. 1, 22 (2019) (using the term "dictionary" to analogously refer to a "designated lexicon").

276. This list of terms and phrases was generated by processing paragraph text with a tokenizer, to convert the sentences into words, and with a phraser (twice), to capture bigrams and trigrams (i.e., common two- and three-word phrases, such as "fourteenth amendment" or "we granted certiorari"). The list of terms and phrases excludes common stop words, reproduced at Appendix Table 2. Cf. Livermore et al., supra note 37, at 867 (including stop words but noting that some other topic-model applications exclude stop words).

whom is a person of color).[277] This gave rise to a list of 252 terms. These 252 terms were then consolidated: Some sets of terms containing shared roots and close synonyms (e.g., *attorney*, *attorneys*, and *counsel*) were consolidated under a single entry (*counsel**); while other terms (such as *patent*) were not consolidated.[278] An asterisked term thus stands in for a collection of related terms (e.g., *counsel** for *attorney*, *attorneys*, and *counsel*); any term without an asterisk represents only itself. This consolidation was a manual process that did not apply any standard stemming or lemmatizing techniques.[279] (Most legal audiences know, for example, that "execute" and "executive" can mean very different things. So too with "damage" and "damages," or with "federal" and "federalism.") This process gave rise to a final list of 136 unique terms—the Terms Index. Cognizant that this manual approach can raise replicability and transparency concerns, the list of 252 retained terms and their place in the final Terms Index is reproduced at Appendix Table 1.

C. *Measuring Importance (Importance Scores)*

Finally, the tables of ranked terms and topics introduced in the Article's main text derive from each term's score along dimensions of both frequency and proximity.[280] In order to discern the Court's approach to certiorari in important-questions cases, I generated a two-dimensional score for each term, as in other studies employing co-word analysis or database tomography methods.[281]

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277. Specifically, this list was processed in two stages. First, I removed all the terms that I thought to be obviously unhelpful in assessing the reason for a case's importance. Second, from that filtered list, I retained only those terms that seemed likely helpful in assessing the reasons for a case's importance. I had my research assistants follow the same procedure. I reviewed every term where there was some disagreement among the three of us and made a final determination. I experimented with analyses conducted on the entire set of terms, or with larger subsets (i.e., the list of the words retained after the first pass described above), but such term lists proved to be too large to be scrutable.

278. As noted above, the asterisk is used here to loosely represent a wildcard character (as in a regular expression or other search query) and does not represent significance.

279. Some words, of course, presented challenges. Should *capital* be grouped with death-penalty-related terms, or with corporate- and securities-related terms? Is *discharge* used more frequently in the context of debt or firearms? In such cases, I used my best judgment, verified my inferences with research assistants, see supra note 277, and checked the results against the final case set.

280. In addition to the sources cited infra note 281, see, e.g., Peter D. Turney & Patrick Pantel, From Frequency to Meaning: Vector Space Models of Semantics, 37 J. Artificial Intel. Rsch. 141, 141–48, 153 (2010) (proposing that units of text with similar vectors in a text frequency matrix will tend to have similar meanings); Tomas Mikolov, Kai Chen, Greg Corrado & Jeffrey Dean, Efficient Estimation of Word Representations in Vector Space 3 (Sept. 7, 2013) (unpublished manuscript), https://arxiv.org/pdf/1301.3781v3.pdf [https://perma.cc/33WT-5L6D] ("This follows previous observations that the frequency of words works well for obtaining classes in neutral net language models.").

281. See, e.g., Kostoff et al., supra note 135, at 301 (describing database tomography as an "information extraction and analysis system which operates on textual databases" whose

One dimension represents proximity: On average, how close is each Index Term (i.e., each term in the Terms Index) to any Focal Term (i.e., those terms in a study paragraph that serve as a locus for discerning the Court's approach to deciding which questions are important enough to merit certiorari)? *Question**, *certiorari**, and *importan** terms became Focal Terms.[282] During the Roberts Court, for example, *habeas** appeared (on average) 12.4 terms away from any of *question**, *certiorari**, and *importan**. Moreover, during the Roberts Court, one of the most proximate terms was *equal_protection* (which appeared next to a Focal Term), and the least proximate term was *grand_jury* (which appeared 121 terms away from the closest Focal Term).[283] Each term was assigned a linearly scaled score, between zero and one. Hence, in this example, *equal_protection* was assigned a score of zero, *grand_jury* was assigned a score of one, and *habeas** was assigned a score of 0.095.[284]

"two main algorithmic components are multiword phrase frequency analysis and phrase proximity analysis"); id. at 302 ("Co-word analysis utilizes the proximity of words and their frequency of co-occurrence in some domain (sentence, paragraph, paper, etc) to estimate the strength of their relationship."); see also Berven et al., supra note 109, at 46 & n.285; Corrales-Garay et al., supra note 109; Neal Coulter, Ira Monarch & Suresh Konda, Software Engineering as Seen Through Its Research Literature: A Study in Co-Word Analysis, 49 J. Am. Soc'y Info. Sci. 1206 (1998) (using co-word analysis to evaluate the software engineering literature); Qin He, Knowledge Discovery Through Co-Word Analysis, 48 Library Trends 133, 145–46 (1999); Ronald N. Kostoff, Darrell Ray Toothman, Henry J. Eberhart & James A. Humenik, Text Mining Using Database Tomography and Bibliometrics: A Review, 68 Tech. Forecasting & Soc. Change 223 (2001) (describing and employing database tomography). As these sources all suggest, co-word analysis and database tomography generally use frequency (or co-occurrence) and proximity metrics to evaluate the relationships between textual themes (such as terms indicative of a decision to grant review and terms indicative of a given field of laws). Cf. Gery W. Ryan & H. Russell Bernard, Techniques to Identify Themes, 15 Field Methods 85, 89, 97–99 (2003) (identifying frequency and proximity as among the metrics that help to define relationships among and within textual themes).

282. *Importan** includes the following set of terms: *an_important*, *an_important_question*, *importan*, *importanc*, *importance*, *importanee*, *important*, *important_question*, *important_questions*, *importante*, *importantly*, and *public_importance*. *Question** encompasses the following set of terms: *an_important_question*, *constitutional_question*, *constitutional_questions*, *federalquestion*, *important_question*, *important_questions*, *question*, *question_presented*, *question_whether*, *questioned*, *questioner*, *questioning*, *questions*, *questions_presented*, *questions_raised*, *questionupon*, *two_questions*. *Certiorari** encompasses the following set of terms: *also_on_certiorari*, *bycertiorari*, *certiorari*, *certiorari_to_consider*, *certiorari_to_decide*, *certiorari_to_determine*, *certioraris*, *certioraristage*, *certiorariwas*, *certiorariwhich*, *court_granted_certiorari*, *crosscertiorari*, *discretionarycertiorari*, *forcertiorari*, *grant_certiorari*, *granted_certiorari*, *grantedcertiorari*, *here_on_certiorari*, *petition_for_certiorari*, *petitioned_for_certiorari*, *petitions_for_certiorari*, *postcertiorari*, *we_granted_certiorari*.

283. In some cases, both the Index Term and a Focal Term may appear multiple times, giving rise to several possible proximity measures for such cases. In these instances, this Article uses the lowest value (i.e., the closest available proximity). Such an approach helps, for example, to protect constructions such as "granted certiorari to decide this important bankruptcy question" from being affected by other references to bankruptcy proceedings described as procedural history in the study paragraphs.

284. In essence, this calculation asks what percent of the way is 12.4 (the average proximity of *habeas**) from 1 (the minimum proximity value across all terms) to 121 (the maximum proximity value across all terms). This can be solved by computing (12.4—1) /

The second dimension represents frequency: In how many decisions (again, limited to only the relevant paragraphs) does the Index Term appear? To continue with the same example, the term *habeas** appeared in twenty-four cases during the Roberts Court. Moreover, during the Roberts Court, the most frequent such term was *state** (which appeared in seventy-seven cases), and one of the least frequent terms was *grand_jury* (which appeared in one case). Again, each term was assigned a scaled score, between zero and one. Hence, in this example, *state** was assigned a score of zero, *grand_jury* was assigned a score of one, and *habeas** was assigned a score of 0.697.[285]

One complication bears mentioning. First, as noted, the dataset encompasses cases coded as having been granted for some nonconflict reason (i.e., coded as 10, 11, or 13 in The Supreme Court Database), as well as cases that were granted for no noted reason (i.e., coded as 12 in The Supreme Court Database). But some cases might have been granted for multiple reasons, including reasons of conflict. Moreover, cases that were granted for no noted reason might, in fact, have been granted for reasons related to conflict among the lower courts. Hence, to sharpen focus on important-questions cases when computing Importance Scores, cases where *conflict** appears in the same paragraph as *certiorari** are filtered out.[286] And, among the cases that give no rationale for the grant of review,

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(121—1), or 0.095. In more general terms, the equation is (Term Proximity Value—Minimum Proximity Value) / (Maximum Proximity Value—Minimum Proximity Value).

One edge case merits explanation: *constitution** is an Index Term, *question** is a Focal Term, and *constitutional_question* is one of the original terms in the corpus that is encompassed by both asterisked terms. In this example, *constitution** is measured to be zero terms away from any Focal Term, namely, this *question** term.

285. Similar to the calculation for the proximity score, this calculation asks what percent of the way is 24 (the frequency of *habeas**) from 77 (the maximum frequency value across all terms) to 1 (the minimum frequency value across all terms). This can be solved by computing 1—[(24—1) / (77—1)], or 0.697. In more general terms, the equation is 1—[(Term Frequency Value—Minimum Frequency Value) / (Maximum Frequency Value—Minimum Frequency Value)].

Of course, this is not the only method that would help interpret importance with frequency measures. Another commonly used metric is tf-idf, or term-frequency inverse-document-frequency. Tf-idf is not employed here because the primary aim is to measure *co-occurrence* with the focal terms in a set of documents that are already filtered to include a focal term (i.e., *certiorari**). Put slightly differently, using an inverse-document-frequency measure in this pre-filtered document set risks downweighing a term whose measure of co-occurrence should actually be quite strong. Cf. Laura K. Nelson, Computational Grounded Theory: A Methodological Framework, 49 Socio. Methods & Rsch. 3, 34 (2020) (explaining that "researchers using computer-assisted text analysis techniques should understand the range of methods available and choose ones that are best suited to the research question and available data").

286. *Conflict** includes *conflict, conflict_with, conflicted, conflicting,* and *conflicts*. There were 166 cases coded as 10, 11, or 13 that included a *conflict** term. There were 108 cases coded as 12 that included a *conflict** term.

only cases that include an *importan** term are included.[287] Hence, Importance Scores are based on 2,698 cases (while the Term Index draws from the larger set of all certiorari paragraphs, as described above).[288]

Supreme Court Database Code Value	Certiorari Paragraph Found	Any Focal Term Found	Remaining After *conflict** Filtered
10, 11, or 13:	2725	2725	2559

Supreme Court Database Code Value	Certiorari Paragraph Found	*importan** Found	Remaining After *conflict** Filtered
12:	3570	168	139

In sum, each Index Term is assigned a two-dimensional score in the form of (Frequency Scaled Score, Proximity Scaled Score). And to compare terms over time, a single Importance Score for each Index Term is calculated by plotting and measuring that Term's distance to the origin (i.e., distance from (0, 0)—that is, most frequent *and* most proximate).[289]

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287. For two examples of a case coded as 12 but including *importan**, suggestive of its place on the Court's important-questions docket, see Alexander v. Holmes Cnty. Bd. of Educ., 396 U.S. 19, 20 (1969) ("This case comes to the Court on a petition for certiorari . . . . The question presented is one of paramount importance, involving as it does the denial of fundamental rights to many thousands of school children, who are presently attending Mississippi schools under segregated conditions . . . ."); Bd. of Governors of the Fed. Rsrv. Sys. v. Agnew, 329 U.S. 441, 443 (1947) ("This case, here on certiorari to the Court of Appeals of the District of Columbia, presents important problems under § 30 and § 32 of the Banking Act of 1933."). There were 168 cases coded as 12 that included an *importan** term, 108 cases coded as 12 that included a *conflict** term, and twenty-nine cases coded 12 that included both an *importan** and a *conflict** term.

288. The cases that are dropped because they are coded as having been granted for no noted reason, i.e., coded as 12, and because this Article is not able to determine with sufficient confidence whether they were granted for conflict-related reasons or importance-related reasons, are mostly evenly distributed across the tenures of the Chief Justices, with slightly fewer cases dropped from the Hughes Court and slightly more from the Roberts Court.

289. By definition, *certiorari** would have a score of (0, 0), since it appears in each case in which *certiorari** appears, and because it is most immediately proximate to itself.

This co-word approach to term rankings was not the first approach attempted. The first approach—using Word2Vec to detect terms that might stand in for *importan**—generated results rather randomly, ranking highly terms that were especially rare but that may have perfectly modeled the standard sentence structures highlighted above. In short, Word2Vec's analysis seemed to prize some measures over other metrics (namely, proximity and frequency) that seemed on reflection more substantial. (It is difficult to say what particular measures Word2Vec preferred, given the opaque nature of the neural networks constructed by it.) And so another preliminary iteration of this approach used ranked lists—rather than

The charts and tables presented in the Article's main text are largely limited to those Index Terms whose Importance Score is less than the median of all Importance Scores minus one median absolute deviation.[290]

D. *Measuring Change in Importance (Deltas)*

Change in importance for a given Index Term from, say, the Rehnquist Court to the Roberts Court is measured straightforwardly by computing the difference (Delta, or Δ) between Importance Scores for the two time periods.[291] Where an Index Term does not appear in one of the time periods under comparison, it is treated as if it were minimally important (i.e., assigned a position of (1, 1)). The charts and tables presented in the Article's main text are limited to those Index Terms whose Deltas are greater than the mean of all Importance Scores plus one stand-

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scaled values—for proximity and frequency. But ranked lists both understated vast differences between, say, the second- and third-place terms in frequency and overstated minor differences among proximity values. This Article resolved these concerns by settling on an approach using scaled values across two dimensions, as described above.

Moreover, there are multiple ways to convert this two-dimensional score into a one-dimensional metric simplifying comparisons. The Euclidean distance (or, more specifically in this context, the distance-from-the-origin approach) used here may seem to be the "more natural" of the available options. See Shlomo Argamon, Interpreting Burrows's Delta: Geometric and Probabilistic Foundations, 23 Literary & Linguistic Computing 131, 134 (2008); see also Alschner, supra note 130, at 13–14 (noting that distance measures are a common way of assessing similarity and describing a few such measures, including Euclidean distance measures); Jennejohn et al., supra note 132, at 793. Other options include cosine distance, which is a measure of the angle of the vector formed by the two-dimensional score, and Manhattan distance, which offers an alternate way to measure the distance between two points (in this context, essentially the sum of the two measures). See Stefan Evert, Thomas Proisl, Fotis Jannidis, Isabella Reger, Steffen Pielström, Christof Schöch & Thorsten Vitt, Understanding and Explaining Delta Measures for Authorship Attribution, 32 Digit. Scholarship Humans. ii4, ii14 (2017) (describing these measures and concluding that the cosine measure is best for purposes of ascribing authorship to text). Since my research question focuses on the relationship between terms and certiorari (which, as noted above, is represented by the origin) rather than the relationship among measures (namely, frequency and proximity), I used a commonly accepted measure for reporting the distance from the origin that would also help to measure changes over time.

290. Appendix Figure 3, supra, is an exception, as it displays all terms.

291. Another approach that was considered (and abandoned) was the alternative of measuring the linear distance between the plotted points for the Index Term in each time period—i.e., of measuring the distance between, say, (1, 0) and (0, 1) for a (hypothetical) Index Term that was most frequent but least proximate in one time period and least frequent but most proximate in the next. Under this alternative, it would be difficult to distinguish increases in importance from decreases in importance. Moreover, in this extreme hypothetical, that alternate approach would give rise to the highest possible change—but this result is inconsistent with the assumption, embedded in this design, that frequency and proximity are equally significant to an Index Term's importance. In short, if frequency and proximity are equally significant, then there should be no difference between (1, 0) and (0, 1). Using the difference between Importance Scores is consistent with that conceptual approach.

ard deviation (indicating a move away from the origin, or a drop in importance), or are less than the mean of all Importance Scores minus one standard deviation (indicating a move toward the origin, or an increase in importance).[292]

E. *Measuring Change in Change (Volatility)*

Measuring change in change, as in Figure 8, is somewhat more complex. This analysis begins with the absolute value of the Delta for each Index Term that is common across the compared time periods (i.e., Supreme Court Terms), excluding terms that do not appear in both time periods. The approach here deviates from the approach taken above (where missing terms are assigned a score), because the studied time periods are much shorter, and so any inference about the meaning of an absent Index Term is much more tenuous. Stated simply, it's quite possible that the Court will go one whole term without hearing any bankruptcy or patent cases, and so it's not appropriate to infer that such cases are unimportant because they disappear for one year. By contrast, if the Court declines to hear such a case during Chief Justice Rehnquist's entire tenure (to take a nearly fictitious example[293]) such an inference is far more reasonable. Overall change in change is represented by the average across all such measures for a given time period. This value offers a sense of overall volatility: Did priorities shift wildly, with previously less important terms moving up significantly and previously important terms falling? Or did terms stay roughly in place?

In Figure 8, Index Terms are compared Supreme Court Term over Supreme Court Term (year over year), using The Supreme Court Database's "Term of Court" field. In order to identify "Stable Court Composition" Terms and "New Court Composition" Terms, I used The Supreme Court Database's list of starting dates for each natural court. If a new natural court started during a given Term or during the summer immediately preceding that Term (i.e., after July 1), then that Term was noted as one with a new composition. The July 1 start date accounts for the recess before the start of a new Term: New Justices seated during, say, the summer of 1994 are formally confirmed during the 1993 Term, but their effect on the Court's docket is unlikely to be felt until the 1994 Term. Hence, this approach seems likely to be marginally more accurate—though an analogous approach using October 1 as the cutoff date yields substantially similar results.[294]

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292. See supra note 141 and accompanying text.

293. Only two cases from the Rehnquist Court in the dataset contain the term *patent*. See Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 85–102 (1993); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 804–15 (1988).

294. See Act of Sept. 6, 1916, Pub. L. No. 64-258, 39 Stat. 726 (codified as amended at 28 U.S.C. § 2 (2018)) (providing that the "Supreme Court shall hold . . . one term annually, commencing on the first Monday in October").

F. *Selecting Terms for Study*

Finally, a word on how various Index Terms were selected for extended discussion in the Article's main text. This is an admittedly subjective exercise, one that is susceptible to unavoidable critiques of cherry-picking and prior-confirming. This Article focuses on those terms that appeared in either the main text tables for Importance Scores and Deltas—i.e., to terms that were significant for some period, or that significantly increased or decreased in importance from one period to the next. Moreover, this Article emphasizes, to the extent feasible, terms that are in both tables. That is, if an Index Term was both significantly important during the Roberts Court and experienced a significant change (e.g., increase) in importance from the Rehnquist Court to the Roberts Court (or if an Index Term was both significantly important during the Rehnquist Court and experienced a significant decrease in importance from the Rehnquist Court to the Roberts Court), then such a term is more likely to be emphasized in the narrative descriptions above. For example, *overrule** is both significant to the Roberts Court, and increased in significance during that Court (compared to the Rehnquist Court); moreover, *precedent** is also significant to the Roberts Court. And both terms are discussed together because of their related character.