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# The Ideological Divide: Conflict and the Supreme Court's Certiorari Decision

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# THE IDEOLOGICAL DIVIDE: CONFLICT AND THE SUPREME COURT'S CERTIORARI DECISION

EMILY GRANT\*  
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## ABSTRACT

This Article bridges a gap in existing literature by evaluating, from an empirical perspective, the impact of conflict among the lower courts on the Supreme Court's decision to grant or deny a petition for a writ of certiorari. Specifically, this Article looks at the political ideology of the lower courts involved in a split of authority on federal law and compares those positions to the political ideology of the Supreme Court itself. This Article concludes that the ideological content of lower court opinions in a conflict case impacts the Supreme Court's certiorari decisions in a statistically significant way, and thus sheds new light on the role lower court conflict plays in whether the Supreme Court's exercise of its discretion to grant cert.

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## I. INTRODUCTION

Scholars have long argued that ideological and political considerations affect judicial behavior—that judges decide cases based, at least in part, on their own personal ideological and partisan preferences rather than solely on application of legal principles.<sup>1</sup> Considerably less attention has been paid to the existence of an ideological basis for how the justices of the United States Supreme Court decide which cases to decide. The question of *how* the Court decides to decide is of tremendous importance, given that it only chooses approximately 1% of the cases presented. The conventional wisdom is that the Court’s decisions on petitions for writs of certiorari are made based on a number of variables including, relevant to this Article, circuit splits. But prior research on circuit splits and their effect on the Court’s cert decisions has focused predominately on the mere existence of a split of authority, rather than on the ideological or partisan divide that the split represents. This Article bridges a gap in existing literature by evaluating, from an empirical perspective, the impact of political ideology on the Supreme Court’s decision to grant cert in cases involving splits of authority among the circuits and concludes that political ideology impacts that decision to a greater extent than previously recognized.

During its 2011 term, the Supreme Court considered approximately 8,000 petitions for a writ of certiorari.<sup>2</sup> As the primary (and nearly exclusive) method by which the Supreme Court selects the cases it will decide, the writ of certiorari reflects the discretionary nature of the Court’s appellate jurisdiction.<sup>3</sup> The Court is not required to hear all cases in which a petition for a writ of certiorari is filed; instead, it chooses at its discretion whether to grant or deny the petition. In recent

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<sup>1</sup> Sanford Levinson, *Assessing the Supreme Court’s Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. 99, 102-03 (2010) (“Many hard-core political scientists are satisfied to describe judges as nothing more than politicians in robes who do nothing more than maximize their policy preferences.”).

<sup>2</sup> Official data are not yet publicly available. This approximation is based on the number of petitions considered by the Court in the prior two terms. *The Statistics*, 124 HARV. L. REV. 411, 413 (2010) (during its 2009 term, the Court considered 8,131 petitions for a writ of certiorari); *The Statistics*, 125 HARV. L. REV. 362, 369 (2011) [hereinafter *Statistics 2011*] (during its 2010 term, the Court considered 7,868 petitions for a writ of certiorari).

<sup>3</sup> SUP. CT. R. 10 (“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.”).

terms, the Court has granted certiorari and issued a full decision on the merits in less than one-hundred cases per term.<sup>4</sup>

Among these approximately 8,000 certiorari petitions were numerous petitions claiming a conflict in the interpretation of federal law.<sup>5</sup> The term “conflict” signals that at least two courts have adopted differing legal rules to be applied to the same or similar facts.<sup>6</sup> Conflict has long been considered one of the primary reasons for granting certiorari because conflict “offends the principle that, under one national law, people who are similarly situated should be treated similarly.”<sup>7</sup> Historically, the Court was able to resolve almost all of the conflicts presented to it.<sup>8</sup> But, as the Court’s caseload has increased over time, its ability to resolve all conflicts has diminished.<sup>9</sup> Given this workload constraint, how does the Court determine which conflicts to address and which to ignore?

We approach this research question from a policy-based perspective, adopting the view that ideological and political considerations affect judicial behavior—that judges “decide to decide”<sup>10</sup> cases based, at least in part, on their own personal ideological and policy preferences rather than solely on the application of legal principles.<sup>11</sup> We argue that the Court is more likely to grant certiorari in conflict cases that reflect a difference of opinion among the lower courts over policy choices. While existing research has pointed to the importance of policy considerations in the

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<sup>4</sup> See *Statistics 2011*, *supra* note 2, at 370 (showing that during its 2010 term, the Court issued full, written opinions in eighty cases); see also Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES, Sept. 28, 2009, at A18.

<sup>5</sup> In his study of the certiorari process, one scholar found that a conflict was claimed in approximately 50% of the certiorari petitions filed with the Court. S. Sidney Ulmer, *The Supreme Court’s Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 905 (1984).

<sup>6</sup> Perhaps the most common occurrence of conflict is reflected by the term “circuit split”—a conflict between two or more federal courts of appeals. However, conflict also may come in several other forms: (i) conflict between one or more lower federal courts and Supreme Court precedent; (ii) conflict between one or more federal courts and one or more state courts (usually state supreme courts); (iii) conflict between one or more state courts and Supreme Court precedent; and (iv) conflict between two or more state courts (usually state supreme courts). For reasons discussed below, this paper focuses on conflict between two or more federal courts of appeals.

<sup>7</sup> Michael S. Shenberg, *Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney’s Study of Conflicts in Federal Law*, 59 N.Y.U. L. REV. 1007, 1020-21 (1984). But see Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008).

<sup>8</sup> Robert L. Stern, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465, 465 (1953).

<sup>9</sup> Thomas E. Baker & Douglas D. MacFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1404-07 (1987).

<sup>10</sup> See generally H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991).

<sup>11</sup> See *supra* note 1 and accompanying text.

Court's certiorari behavior,<sup>12</sup> it has not considered how these policy considerations play a role in conflict cases. In studying the role conflict plays in the Court's certiorari decision, the focus has been on the mere existence of the conflict, rather than on the ideological divide the conflict may represent.

Answering our research question is important for a number of reasons, not the least of which is the implications it raises for the Court's role in our legal and political system. It has long been argued that one of the main functions of the Court is unify the interpretation of federal law.<sup>13</sup> But, when the Court fails to address conflict, the law remains unclear<sup>14</sup> and a better understanding of the Court's reasons for doing so enables scholars, practitioners, and the public at large to understand the role the Court sees for itself. If, for example, the Court's certiorari decisions in conflict cases reflect a concern over policy, it may suggest that the Court views itself more as a national policy maker than as a supervisor policing non-uniformity in the lower courts.

What might a "policy conflict" look like? Consider *National Federation of Independent Business v. Sebelius*,<sup>15</sup> in which the Court resolved a well-publicized split among the federal courts of appeals<sup>16</sup> on the constitutionality of the individual health insurance mandate contained in the Patient Protection and Affordable Care Act.<sup>17</sup> News reports on the decisions from the various federal court judges addressing the law highlighted the perceived ideology of these judges in reaching their decisions. Newspapers were quick to identify judges appointed by Democratic presidents who upheld the law and judges appointed by Republican presidents who overturned the law,<sup>18</sup> implying, if not suggesting outright, that the political ideology

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<sup>12</sup> 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 (2009).

<sup>13</sup> Ulmer, *supra* note 5, at 902 n.3.

<sup>14</sup> Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1223 (2012).

<sup>15</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

<sup>16</sup> Compare *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) (upholding mandate), and *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (upholding mandate), with *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (overturning mandate).

<sup>17</sup> Patient Protection and Affordable Care Act, 124 Stat. 119 (2010).

<sup>18</sup> Reporting on the early federal trial court decisions, *The New York Times* noted:

The ruling by Judge Vinson, a senior judge who was appointed by President Ronald Reagan, solidified the divide in the health litigation among judges named by Republicans and those named by Democrats. In December, Judge Henry E. Hudson of Federal District Court in Richmond, Va., who was appointed by President George W. Bush, became the first to invalidate the insurance mandate. Two other federal judges named by President Bill Clinton, a Democrat, have upheld the law.

Kevin Sack, *Federal Judge Rules that Health Law Violates Constitution*, N.Y. TIMES, Jan. 31, 2011, at A1. News reports on the later decisions reached by the U.S. Court of Appeals continued the trend—reporting, for example, on the fact that the Eleventh Circuit had overturned the law in an opinion written by a judge appointed by George H.W. Bush. Michael Cooper, *Health Law is Dealt Blow by a Court on Mandate*, N.Y. TIMES, Aug. 12, 2011, at A11.

of the judge, or at least of the president who appointed him or her, explained the particular judge's decision. This framing of the conflicting opinions in the federal courts by the media highlights the ideological divide that we view as representing a "policy conflict."

This Article offers an initial exploration of the role of policy conflicts in the Supreme Court's certiorari decision. We do so by comparing the policy implications raised by cases involving conflicts among the United States Courts of Appeals in which the Supreme Court has either granted or denied certiorari. Part II begins the discussion by describing the relationship between conflict and the petition for writ of certiorari. Part III reviews prior research on certiorari behavior, focusing primarily on the role of conflict and policy preferences. From this review, Part IV suggests a different approach to the study of the role of conflict in the Court's certiorari behavior, and using data collected from lower court cases, tests the theory that the ideological divide that the conflict represents affects the Court's decision to hear a particular case. Part V concludes by summarizing the results of this first look, acknowledging the limitations of this approach, and suggesting further research to test the theory.

## II. BACKGROUND

The process by which appellate cases make their way to the Supreme Court has evolved dramatically over time. While Article III, Section 1 of the United States Constitution vests the judicial power of the United States in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,"<sup>19</sup> it is Article III, Section 2 that is the genesis of this evolution—an evolution that has seen the Court move from mandatory appellate jurisdiction to discretionary appellate jurisdiction.

### A. *The Writ of Certiorari and the Development of Discretion*

Article III, Section 2 defines the judicial power—delineating the cases and controversies over which the federal courts have jurisdiction. In addition, section 2 broadly outlines the Supreme Court's original and appellate jurisdiction with respect to these cases and controversies and grants to Congress the authority to regulate, and make exceptions to, the Court's appellate jurisdiction.<sup>20</sup> Congress first exercised its Article III powers in the Judiciary Act of 1789, which created thirteen district courts<sup>21</sup> and three circuit courts,<sup>22</sup> and defined a six-member Supreme Court.<sup>23</sup> The

<sup>19</sup> U.S. CONST. art. III, § 1.

<sup>20</sup> U.S. CONST. art. III, § 2. "[A]cts of Congress specifying the Court's [appellate] jurisdiction have long been understood as exercises of this power, implicitly excepting all cases not specified." Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1649 (2000).

<sup>21</sup> Judiciary Act of 1789, ch. 10, § 2, 1 Stat. 73 (1789).

<sup>22</sup> *Id.* at § 4.

<sup>23</sup> *Id.* at § 1; see also Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System*, FED. JUDICIAL CTR. 4-7 (2005), [http://www.fjc.gov/public/pdf.nsf/lookup/creat3ed.pdf/\\$File/creat3ed.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/creat3ed.pdf/$File/creat3ed.pdf). The Court was expanded to seven members in 1807, then to nine in 1837, and to ten in 1863, before finally settling at nine with the Circuit Judge Act of 1869. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 34, 48, 72 (1928).

Act conferred upon the Supreme Court original (and, in some cases, exclusive) jurisdiction over certain matters,<sup>24</sup> as well as appellate jurisdiction over specified cases from both the federal and the state courts.<sup>25</sup> Appeals to the Supreme Court were as of right; the Court had no power to accept or decline any particular case that came before it.<sup>26</sup> And although the 1789 Act gave the Court the power to issue writs of certiorari,<sup>27</sup> that power was not a mechanism to assert jurisdiction and “did not provide the Supreme Court with discretionary control over its jurisdiction.”<sup>28</sup>

Congress’s first grant of discretionary docket control to the Court came over one-hundred years later with the passage of the Evarts Act of 1891.<sup>29</sup> Enacted largely to reduce the Supreme Court’s swelling case load,<sup>30</sup> the act created nine new circuit courts of appeal and transferred much of the Court’s appellate jurisdiction to these new courts.<sup>31</sup> The Court maintained mandatory appellate jurisdiction over many of the cases decided by these courts, but was given discretionary appellate jurisdiction over cases otherwise deemed final in these Courts. This discretionary jurisdiction was to be exercised through the use of a writ of certiorari.<sup>32</sup>

<sup>24</sup> Judiciary Act of 1789, ch. 10, § 13, 1 Stat. 73 (1789).

<sup>25</sup> *Id.*; see also FRANKFURTER & LANDIS, *supra* note 23, at 13.

<sup>26</sup> See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 9 (2011); see also Hartnett, *supra* note 20, at 1649 (“[T]he Supreme Court had no power to pick and choose which cases to decide.”).

<sup>27</sup> Judiciary Act of 1789, ch. 10, § 14, 1 Stat. 73 (1789); see also Hartnett, *supra* note 20, at 1650; Watts, *supra* note 26, at 9.

<sup>28</sup> Hartnett, *supra* note 20, at 1650; see also Watts, *supra* note 26, at 7 (“At its inception, the Court’s jurisdiction was not discretionary. Rather, the Court initially stood as a court of obligatory jurisdiction that felt it had ‘no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.’” (quoting *Cohens v. Virginia* 19 U.S. 264, 404 (1821))).

<sup>29</sup> Judiciary Act of 1891, ch. 517, 26 Stat. 826 (1891).

<sup>30</sup> See FRANKFURTER & LANDIS, *supra* note 23, at 98-112; see also Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 611 (2003); Watts, *supra* note 26, at 10-11; Hartnett, *supra* note 20, at 1650 (“[T]he number of cases that the Court was obligated to decide grew dramatically after the Civil War . . . By 1888, the Court was more than three years behind in its work . . .”).

<sup>31</sup> Judiciary Act of 1891, ch. 517, § 2, 26 Stat. 826 (1891).

<sup>32</sup> [T]he Act provided:

[T]hat in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, *by certiorari or otherwise*, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1233 (1979) (quoting Judiciary Act of 1891, ch. 517, § 6, 26 Stat. 826 (1891)). This discretionary grant of jurisdiction was driven by Congress’s concern about divergent views of law emerging from the newly created circuit courts of appeal. Hartnett, *supra* note 20, at 1651-56. See discussion *infra* notes 38-60 and accompanying text.

Congress's largest expansion of the Supreme Court's power to dictate its own appellate docket came in the Judges' Bill of 1925.<sup>33</sup> Promoted by the justices themselves as a way to manage the Court's growing workload, the bill eliminated numerous categories of cases for which Supreme Court review was mandatory and instead made these cases reviewable via a writ of certiorari.<sup>34</sup> With the passage of the Judges' Bill, the Court effectively "achieved absolute and arbitrary discretion over the bulk of its docket."<sup>35</sup> Over the next sixty years, Congress granted more and more discretionary jurisdiction to the Court until legislation enacted in 1988 eliminated all but a handful of cases from the Court's mandatory jurisdiction.<sup>36</sup>

### B. *The Tie Between Certiorari and Conflict*

With the creation of the nine original circuit courts by the Evarts Act of 1891,<sup>37</sup> came the ability of those courts to be divided on issues and the need to resolve such conflicts.<sup>38</sup> It was this concern that formed the basis of Congress' initial grant of

<sup>33</sup> Judiciary Act of 1925, ch. 229, 43 Stat. 936 (1925). The 1925 Act followed smaller expansions of the Court's discretionary jurisdiction that occurred in 1914 and 1916. See Hartnett, *supra* note 20, at 1657-58.

<sup>34</sup> See Watts, *supra* note 26, at 13. Prior to this Act, the Court was required by law to review cases involving "suits by the United States, suits based on federal statutes or treaties, postal law cases, private antitrust suits, Civil Rights Act damage actions, and commerce law suits not covered by the direct review provisions." Linzer, *supra* note 32, at 1240. For an interesting discussion of the politics behind the passage of the Judges' Bill, see Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1 (2003) and Hartnett, *supra* note 20, at 1660-1704.

<sup>35</sup> Hartnett, *supra* note 20, at 1705.

<sup>36</sup> Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Epitaph for Mandatory Jurisdiction*, APPELLATE.NET (Dec. 1988), <http://www.appellate.net/articles/epitaph.asp>.

<sup>37</sup> Judiciary Act of 1891, ch. 10, § 2, 26 Stat. 826 (1891).

<sup>38</sup> At one time or another, [for example],

Courts of appeals have held that 1) under federal law, a bank robber who perpetrates a kidnapping while robbing a national bank commits one offense (U.S. v. Faleafine, [492 F.2d 18 (9th Cir. 1974)]) and commits two offenses (Clark v. U.S., [381 F.2d 230 (10th Cir. 1960)]); 2) under the Internal Revenue Code, the legal expenses of a corporate liquidation are deductible as an ordinary and necessary business expense (U.S. v. Mountain States Mixed Feed Co., [365 F.2d 244 (10th Cir. 1966)]) and not deductible (Lanrao Inc. v. U.S., [422 F.2d 481 (6th Cir. 1970)]); and 3) conviction for making a threat against the President of the United States requires proof that the defendant intended to carry out the threat (U.S. v. Patillo, [431 F.2d 293 (4th Cir. 1970)]) and does not require such proof (Watts v. U.S., [402 F.2d 676 (D.C. Cir. 1968)]).

As long as they are allowed to stand, such conflicts mean, *inter alia*, that the robber of a national bank is in less jeopardy in one circuit than in another; that the United States Tax Court, whose decisions are appealable to the Courts of Appeals, would have to grant a deduction in one circuit but not in another; and that it is safer to threaten the President in one circuit than in another. When it is recognized that such conflicts are multiplied many times across the circuits and that they can exist for many years, the complexity of the problem is easily appreciated.



discretionary jurisdiction to the Court. Conflicts among the new circuit courts of appeals were not desired and Congress sought a mechanism to resolve these potential conflicts. The primary method of resolution of these conflicts was certification by the circuit courts of appeals.<sup>39</sup> The secondary method of resolution was a petition for a writ of certiorari from the Court, ostensibly to be used in instances in which the circuit courts of appeals failed to certify. Defending this dual approach, Senator William M. Evarts, the Chair of the Senate Judiciary Committee at the time the Evarts Act was passed, argued, “there should be something besides a mere judgment within [the circuit courts of appeals] as to what ought to be reviewed in the interest of jurisprudence and uniformity of decision” and that certiorari would serve as “another guard against the occurring diversity of judgments” by the circuit courts of appeals.<sup>40</sup>

As the Court’s certiorari jurisdiction grew, the focus on conflict remained. As they testified before the relevant congressional committees on the bill that would eventually become the Judges Act of 1925, the justices repeatedly emphasized the importance of conflict in their certiorari decisions—even implying that the presence of conflict would lead to a grant of the certiorari petition. Testifying to the House Judiciary Committee in 1922, for example, Chief Justice Taft noted “[w]henever a petition for certiorari presents a question on which one circuit court of appeals differs from another, then we let the case come into our court as a matter of course.”<sup>41</sup>

After the enactment of the Judges’ Bill this emphasis found its way into the Court’s certiorari practice. Supreme Court Rule 35(5), adopted in 1925, stated that

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Ulmer, *supra* note 5, at 902 (footnote omitted).

<sup>39</sup> As passed in the House, the bill (H.R. 9014) *required* the circuit courts of appeals to certify to the Court any “question that had been decided differently in another circuit court.” Hartnett, *supra* note 20, at 1651; *see also* Linzer, *supra* note 32, at 1234. The requirement for certification was removed in the Senate substitute that eventually became the Evarts Act of 1891. Hartnett, *supra* note 20, at 1652; Linzer, *supra* note 32, at 1234-35. Thus, as enacted, the bill merely authorized the circuit courts of appeals, at their discretion, to certify questions to the Court. Linzer, *supra* note 32, at 1233.

<sup>40</sup> Linzer, *supra* note 32, at 1235. “[C]ertiorari was envisioned as a sort of fallback provision should the circuit courts of appeals, prove, on occasion, to be surprisingly careless in deciding cases or issuing certificates.” Hartnett, *supra* note 20, at 1656.

<sup>41</sup> Hartnett, *supra* note 20, at 1665 (quoting Chief Justice Taft). Echoing Taft’s statement in more detail in his testimony to the Senate Judiciary Committee in 1924, Justice Van Devanter explained:

The inquiry is, first, whether or not the case is one in which a petition for certiorari will lie at all; next, whether the questions presented in the case are of wide or public importance or concern only the parties to the particular case; next, *whether there is any conflict between the decision that is complained of and decisions on the same question in other circuit courts of appeal or in the Supreme Court*; and next, if any of the questions determined by the circuit court of appeals be questions of State law, whether or not there is a conflict between the decision of that court thereon and the decisions of the court of last resort in the State on the same questions. *Whenever we find such a conflict that, without more, leads to the granting of the petition, if the case be one in which a petition for certiorari will lie.*

*Id.* at 1677 (quoting Justice Van Devanter) (emphasis added).

the Court would consider conflicts among the circuit courts of appeals in determining whether to exercise its newly granted discretionary jurisdiction.<sup>42</sup> Importantly, and in seeming contrast to the earlier congressional testimony, the new rules emphasized the discretionary nature of the writ—even when such a conflict was present.<sup>43</sup> Since that time, conflict among the courts of appeals has been a stated consideration of the Court in deciding whether to exercise its discretionary jurisdiction. Supreme Court Rule 10, the modern day successor to Rule 35(5), provides:

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

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.<sup>44</sup>

### C. Conflict, the Uniformity of Federal Law, and the Certiorari Decision

Although the tie between the Court's discretionary jurisdiction and conflict first occurred in 1891, uniformity of federal law<sup>45</sup> has been a priority since the ratification of the Constitution.<sup>46</sup> “A significant purpose of Article III . . . to permit the Supreme

<sup>42</sup> SUP. CT. R. 35(5), 266 U.S. 645 (1925) (repealed 1939).

<sup>43</sup> Rule 35(5) provided that “review on writ of certiorari is not a matter of right, but of sound judicial discretion,” and that “while neither controlling nor fully measuring the [C]ourt’s discretion,” the Court would consider conflict among the circuit courts of appeals in making its certiorari decision. *Id.*

<sup>44</sup> SUP. CT. R. 10.

<sup>45</sup> In contrast, conflict in the interpretation of state law is a natural (and often celebrated) by-product of our federal system of government.

<sup>46</sup> Algero, *supra* note 30, at 618.

Court to unify federal law by reviewing state court decisions of federal questions.<sup>47</sup> The uniform interpretation of federal law was, in part, the basis for the Court's holding in *Martin v. Hunter's Lessee*<sup>48</sup> that the Court has the power to review and overturn a state supreme court's interpretation of federal law. The Court stressed "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution."<sup>49</sup>

The historical concern for uniformity has been viewed as a way to promote similar treatment of similarly situated litigants and as way to promote efficiency in the legal system. Conflict "offends the principle that, under one national law, people who are similarly situated should be treated similarly."<sup>50</sup> Yet, one of the key components of our common law system is to apply the same legal rule to the same or similar facts. If federal law means one thing in Pennsylvania and a different thing in Kansas, the potential for disparate and potentially unfair treatment arises. Moreover, a "large number of unresolved conflicts impedes the smooth and consistent functioning of our justice system."<sup>51</sup> The uncertainty and incoherence of a non-uniform federal law, however, invited relitigation of previously decided issues, "weakens the theory of one national law," and "attract[s] strategic and inefficient litigation."<sup>52</sup>

Given the connection between conflict and the development of the Court's discretionary jurisdiction and the desire for uniform federal law, it stands to reason that the Supreme Court would be more likely to grant certiorari to those cases presenting a conflict. Available data supports this view. During the 1983-1985 terms of the Court, approximately 45% of the cases heard from the courts of appeals involved a conflict.<sup>53</sup> That percentage increased to almost 69% during the 1993-1995 terms,<sup>54</sup> and then dropped to approximately 60% during the 2003-2005 terms.<sup>55</sup> In addition, both qualitative<sup>56</sup> and quantitative<sup>57</sup> research on the Court's certiorari

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<sup>47</sup> RICHARD H. FALLON, JR. ET AL., *HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 509 (5th ed. 2003).

<sup>48</sup> *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). The United States Supreme Court reversed a ruling of the Virginia Supreme Court regarding a land ownership dispute. The Virginia Supreme Court refused to adhere to the United States Supreme Court's ruling. In response, the United States Supreme Court affirmed its power to review state supreme court cases.

<sup>49</sup> *Id.* at 347-48.

<sup>50</sup> Shenberg, *supra* note 7, at 1020-21. *But see* Frost, *supra* note 7, at 1567.

<sup>51</sup> Baker & MacFarland, *supra* note 9, at 1407.

<sup>52</sup> *Id.*

<sup>53</sup> Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 416 (1996).

<sup>54</sup> *Id.*

<sup>55</sup> David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 983 (2007).

<sup>56</sup> PERRY, *supra* note 10.

behavior highlight the important role of conflict. Perhaps, then, it is no surprise to note that “[a]mong the orthodox justifications for Supreme Court review, the most firmly established is the intercircuit conflict.”<sup>58</sup>

This information, however, does not paint a complete picture. The data highlights the number of conflict cases the Court resolved, but does not provide information on the number of conflict cases the Court left unresolved. In fact, over the past forty years, it is these unresolved conflicts that have been of most concern to scholars.<sup>59</sup> Existing research confirms the important role of conflict, but does not clearly explain why the Court grants certiorari in some conflict cases, but denies certiorari in others. In fact, “departures from the uniformity of law principle have become more frequent, as has the Supreme Court’s failure to correct or eliminate such conflicts.”<sup>60</sup>

Clearly, the existence of conflict positively impacts the Supreme Court’s decision to grant certiorari. But, it remains uncertain how the Court chooses which conflicts to resolve and which to ignore.

### III. STUDYING CERTIORARI BEHAVIOR FROM AN EMPIRICAL PERSPECTIVE

Thus far, we have made clear the extraordinary discretion the Court possesses with respect to the certiorari process and the key role conflict plays in that process. How the Court exercises its discretion is a question that has fascinated scholars since 1925. While the theoretical emphasis has varied between legal<sup>61</sup> and extra-legal<sup>62</sup>

<sup>57</sup> Ulmer, *supra* note 5; Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988); Black & Owens, *supra* note 12, at 1062.

<sup>58</sup> Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 1014 (1985).

<sup>59</sup> Early treatises on Supreme Court jurisdiction suggested that, in the presence of conflict, the Court granted certiorari as a matter of course. Stern, *supra* note 8, at 465. As the Supreme Court’s caseload increased over time, however, the Court’s ability to resolve [grant certiorari to] all cases presenting conflict dwindled. Baker & MacFarland, *supra* note 9, at 1407. By the mid-1970s, two different national commissions had recommended the formation of a National Court of Appeals with the authority to resolve intercircuit conflicts. For a summary of these proposals, as well as other historical proposals designed to promote the uniformity of federal law, see Algero, *supra* note 30, at 623-34. Writing in 1984, then Associate Justice William H. Rehnquist opined that:

[t]he Court cannot review a sufficiently significant portion of the decisions of any federal court of appeals to maintain the supervisory authority that it maintained over the federal courts fifty years ago; it simply is not able or willing, given the other constraints upon its time, to review all the decisions that result in a conflict in the applicability of federal law.

William H. Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U. L.J. 1, 4-5 (1984).

<sup>60</sup> Ulmer, *supra* note 5, at 911.

<sup>61</sup> The legal model asserts that, “in one form or another, [judicial behavior is] substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent.” JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 48 (2002).

explanations of judicial behavior, two general answers to this question have been offered—one focusing on cues readily available to the Court, the other focusing on ideological disagreement between the Court and the lower court that issued the decision being considered for review.

*A. The Development of Cue Theory*

Early studies attempted to trace, without much success, the Court's application of its own rules for exercising its discretion.<sup>63</sup> Although the rules claimed to highlight the factors the Court would consider in making its certiorari decision, there were "[d]isturbing instances . . . in which the Court's action in granting *certiorari* appears irreconcilable either with its own professed grounds or with any general canons which can independently be formulated."<sup>64</sup> Indeed, it appeared that the Court's own rules provided "no standard whatsoever" to its certiorari decisions.<sup>65</sup> Convinced that the Court's rules (including those focusing on conflict) offered little explanation for its behavior, scholars began to test other explanations of the Court's certiorari decision.

Cue theory, developed in 1963 by political scientist Joseph Tanenhaus and his colleagues, was one of the first attempts to generate a more complete picture of the Court's certiorari behavior.<sup>66</sup> Given the assumption that justices can give each certiorari petition no more than an initial cursory review, justices need a quick and efficient method to help them separate frivolous from non-frivolous certiorari petitions.<sup>67</sup> The non-frivolous petitions would not necessarily be granted review, but they would be set aside for more "careful study."<sup>68</sup> Thus, under cue theory, certiorari petitions contain "readily identifiable cues" to enable a justice to perform the initial cursory review; petitions devoid of cues could be ignored and denied review, while petitions containing cues could be set aside for further review.<sup>69</sup> Relevant cues

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<sup>62</sup> Extra-legal models of judicial behavior emphasize the role of ideological attitudes (i.e. preferences over policy) and values. Judicial behavior "can be explained primarily as expressions of their personal policy preferences, with little or no role for law, legal reasoning, or legal doctrine." Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79, 81 (2010).

<sup>63</sup> See, e.g., Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 275-76 (1934) (evaluating certiorari grants and denials from the 1933 term, and advocating that the Court issue opinions explaining its certiorari decisions to "render[] the grounds of its action discoverable and predictable" and "[to] make familiar the canons which guide the Court"); Fowler V. Harper & Arnold Leibowitz, *What the Supreme Court did not do During the 1952 Term*, 102 U. PA. L. REV. 427 (1954).

<sup>64</sup> Frankfurter & Hart, *supra* note 63, at 276.

<sup>65</sup> Harper & Leibowitz, *supra* note 63, at 456.

<sup>66</sup> Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION MAKING 111 (Glendon A. Schubert ed., 1963).

<sup>67</sup> Stuart H. Teger & Douglas Kosinski, *The Cue Theory of Supreme Court Certiorari Jurisdiction: A Reconsideration*, 42 J. POL. 834, 835 (1980).

<sup>68</sup> Tanenhaus et al., *supra* note 66, at 118.

included the parties to the case (specifically the federal government as a party), dissension in the case under review (specifically among the judges of the lower court or between two or more courts or administrative agencies in the same case), and the issue raised by the case (specifically civil liberties or economic issues).<sup>70</sup> Data analysis found support for the influence of all of these cues except for economic issues.<sup>71</sup>

As originally envisioned, the purpose of cue theory was to move beyond a study of the legal rules the Court purported to use in its certiorari process.<sup>72</sup> Later scholars disagreed with this approach and began to reincorporate the Court's rules into their analysis of the Court's certiorari behavior, arguing that factors like conflict were too important to ignore. The first systematic effort to this end was undertaken by political scientist S. Sidney Ulmer in the early 1980s.<sup>73</sup> Ulmer examined a sample of certiorari petitions during the 1947-1976 terms of the Court (encompassing all or part of the Vinson, Warren, and Burger Courts) and coded these petitions for the presence of traditional cues identified by cue theory, as well as the presence of conflict. To determine whether conflict was present, Ulmer identified the cases in his sample in which a conflict was claimed to exist and independently evaluated the cases cited therein in order to determine whether the claimed conflict was genuine.<sup>74</sup> Statistical analysis confirmed that "conflict is far and away the most significant predictor of certiorari decisions" for two of the three Courts evaluated.<sup>75</sup> Ultimately, Ulmer concluded that "[t]he Court is significantly responsive to the legal-systemic

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<sup>69</sup> *Id.* But see Teger & Kosinski, *supra*, note 67 at 845 (questioning the validity of the cue theory, noting that it "ends up saying [merely] that the Justices tend to accept cases that they think are important"); S. Sidney Ulmer, *The Decision to Deny or Grant Certiorari: Further Consideration of Cue Theory*, 6 LAW & SOC'Y REV. 637, 642 (1972) (noting that "our analysis led us to reject two of the three cues suggested by earlier work" and suggesting that "[a] search for and the testing of additional cues now seems in order").

<sup>70</sup> Tanenhaus et al., *supra*, note 66 at 122-27; see also PERRY, *supra*, note 10, at 114-16.

<sup>71</sup> Tanenhaus et al., *supra*, note 66, at 122-27. And even economic issues "didn't do too badly" as a cue. Teger & Kosinski, *supra* note 67, at 837; see also Virginia C. Armstrong & Charles A. Johnson, *Certiorari Decisions by the Warren & Burger Courts: Is Cue Theory Time Bound?*, 15 POLITY 141 (1982) (applying cue theory to the Warren Court and the Burger Court).

<sup>72</sup> Tanenhaus et al., *supra* note 66, at 114-16.

<sup>73</sup> S. Sidney Ulmer, *Conflict with Supreme Court Precedent and the Granting of Plenary Review*, 45 J. POL. 474, 474-75 (1983); accord Ulmer, *supra* note 5, at 903 ("I wish to know not just how many conflict cases are granted or denied certiorari, but whether such decisions are associated with the presence and absence of the conflict condition.").

<sup>74</sup> See Ulmer, *supra* note 5, at 904-05.

<sup>75</sup> Ulmer's results varied significantly across the three Courts he studied. For the Vinson and Warren Courts, the presence of conflict explained from four to eight times as much of the variance in the decision to grant or deny certiorari as did cues such as federal government as a party or the presence of either a civil liberties or economic issue. For the Burger Court, however, the presence of the federal government as a party explained as much (in all cases of conflict) or more (in cases of intercircuit conflict only) of the variance in the certiorari decision as did the presence of conflict. *Id.* at 908-10.

variable—conflict—and less governed by case issue variables than one might have thought.”<sup>76</sup>

More recent research is consistent with this conclusion, finding that “[w]henver actual conflict was present, the likelihood that certiorari was granted jumped dramatically.”<sup>77</sup> Thus, in a study of the Court’s 1982 term certiorari behavior, the presence of a conflict<sup>78</sup> had a statistically significant effect on the Court’s cert decision, increasing the chances of a cert grant by 33%.<sup>79</sup> Interviews with Supreme Court justices and former clerks have suggested that conflict among the federal courts of appeals is perhaps the “single most important” factor in a justice’s certiorari decision.<sup>80</sup>

### B. A Focus on Ideology

Despite the relative success of cue theory in explaining the Court’s certiorari behavior, dissatisfaction with its ability to accurately predict the Court’s appellate docket remained.<sup>81</sup> While some of this dissatisfaction was due to the fact that cue theory did not actually predict which cases would be granted certiorari,<sup>82</sup> much of it was due to cue theory’s failure to consider other potentially significant influences on judicial behavior. Among most important of these considerations was impact of ideology.

At its simplest level, a role for ideology can be found in what scholars have labeled error-correction strategy. “[P]olicy motivated judges . . . vote to grant certiorari whenever a lower court decision depart[s] significantly from their preferred doctrinal position.”<sup>83</sup> Justices following this strategy will examine petitions to determine if the lower court issued a decision in contrast with the justice’s personal policy preferences.<sup>84</sup> Thus, a conservative justice will be more likely to vote to grant certiorari to cases decided liberally below; a liberal justice will

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<sup>76</sup> *Id.* at 910.

<sup>77</sup> Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1120 (1988).

<sup>78</sup> For this study, the researchers broadly defined conflict to mean conflict between state supreme courts, between federal courts of appeals, between a lower court and Supreme Court precedent, or between a state court and a federal court. Caldeira & Wright, *supra* note 77, at 1117.

<sup>79</sup> *Id.* at 1121.

<sup>80</sup> PERRY, *supra* note 10.

<sup>81</sup> Caldeira & Wright, *supra* note 77, at 1115.

<sup>82</sup> The initial tests of cue theory focused only on behavior of the Court in its decision to grant or deny certiorari. Tanenhaus et al., *supra* note 66, 119-20. But this is only an indirect test of the theory. A direct test of cue theory would require observation of an individual justice’s initial review of certiorari (i.e. the separation of frivolous from non-frivolous petitions). Short of that, the indirect test of cue theory suggests that cases devoid of cues will not be granted certiorari; cases containing cues may or may not be granted certiorari. Teger & Kosinski, *supra* note 67, at 836.

<sup>83</sup> Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari*, 41 J. POL. 1185, 1187 (1979).

<sup>84</sup> *Id.* at 1188.

be more likely to vote to grant certiorari to cases decided conservatively below.<sup>85</sup> In that way, the “ideological direction of the lower court decision may be an error or policy ‘cue’ and the Supreme Court may use the occasion to counter a decision of which is disapproves ideologically.”<sup>86</sup>

The underlying concern behind an error-correction strategy is the existing status quo policy reflected in the lower court’s opinion. Because of the time and resources that must be devoted to those cases in which certiorari is granted, justices are more concerned with reversing “incorrect” decisions below, than with affirming “correct” decision below. In granting certiorari to those cases decided “incorrectly” below, the justice is given the opportunity to vote to reverse the lower court decision, thereby issuing a decision in congruence with his or her policy preferences. In denying certiorari to those cases decided “correctly” below (thereby letting stand the lower court decision), the justice’s preferred policy position is reflected in the lower court opinion.

This simple hypothesis has been tested in a variety of ways—with the focus being on both individual justice behavior and aggregate Court behavior. Two themes emerge from this research—consistent support for the error-correction hypothesis and increasing sophistication in testing it. Many initial studies examined the effect of policy at the aggregate level, with scholars studying periods or terms of the Court in which it could be labeled “conservative” or “liberal.” The policy cue was deemed to be present when a liberal court, granted certiorari to a case decided conservatively below, and vice versa.<sup>87</sup> More recent studies have focused on individual justice behavior and on a comparison of the status quo policy established by the lower court decision and the likely policy that would be established by a decision from the Court. Data supports the conclusion that justices whose preferred ideological position is closer to the likely outcome from the Court are thus more likely to vote to grant certiorari, believing that the Court’s final decision will more closely resemble their personal policy preferences than the existing state of the law.<sup>88</sup>

#### IV. A NEW APPROACH TO CONFLICT

As the discussion above highlights, conflict and ideology have become necessary components in the analysis of the Court’s certiorari behavior. To this point, however, they have been treated as competing explanations.<sup>89</sup> Conflict has been viewed as representing the effect of law on certiorari behavior; ideology has been viewed as representing the effect of policy preferences on certiorari behavior.<sup>90</sup> More generally, the ability of conflict to explain certiorari behavior has been used to

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<sup>85</sup> *Id.* at 1188-89. The 1982 Supreme Court, for example, had a “decided, but certainly not extreme, conservative ideological orientation.” Caldeira & Wright, *supra* note 77, at 1120. One study concluded that “[o]ther things being equal, the [1982] Court [was] significantly more likely to hear cases that were decided liberally in the court immediately below.” *Id.*

<sup>86</sup> Armstrong & Johnson, *supra* note 71, at 147.

<sup>87</sup> Songer, *supra* note 83, at 1185.

<sup>88</sup> Black & Owens, *supra* note 12, at 1062.

<sup>89</sup> *But see id.* at 1070 (arguing that the presence of conflict can both empower and constrain justices seeking to effectuate policy goals).

<sup>90</sup> *Id.*



validate legal models of judicial behavior while the ability of ideology to explain certiorari behavior has been used to validate extra-legal models of judicial behavior.

That this law-based approach to conflict has been taken is not surprising. Both the Court's own rules and the legal system's concern for uniformity point to the importance of conflict. In taking this legal view of conflict, the focus of much of this work has been on whether the conflict is real and genuine or merely alleged.<sup>91</sup> Once a conflict is determined to be real, each conflict is treated exactly the same as any other conflict. Such an approach allows the presence of a correlation between conflict and certiorari grants to substitute itself for a full understanding of the mechanism, the *reason*, by which conflict influences certiorari behavior. This approach adopts the view that the explanation for this correlation must be the adjudication of law and fails to consider any other potential alternatives. Yet, potential alternatives exist.

As the cases involving the Patient Protection and Affordable Care Act make clear,<sup>92</sup> the correlation between conflict and certiorari grants may indicate that conflict can be about the resolution of competing views over policy. A conflict among the lower courts may in fact be a cue to the Court that the lower courts disagree about the underlying policy aspects of their decisions.<sup>93</sup> And perhaps the political ideology of the opposing views in the conflict, as compared to the ideology of the Court itself, affects the Supreme Court's decision to hear a particular case.

Take, for example, the competing policy positions presented to the Court in *Harris v. Forklift Systems, Inc.*<sup>94</sup> *Harris* raised competing views over the proper standard for determining when a hostile or abusive work environment constituted a violation of Title VII of the Civil Rights Act of 1964.<sup>95</sup> The Court of Appeals for the Sixth Circuit, along with the Courts of Appeals for the Eleventh and Federal Circuits, required an employee to show a serious effect on his or her psychological well-being or suffer injury in order to bring a hostile work environment claim.<sup>96</sup> This side of the conflict represents a "conservative" position, in the sense that the standard adopted made it harder for the employee's claim against the employer to be successful. In contrast, the Court of Appeals for the Ninth Circuit rejected the Sixth Circuit requirement and mandated that an employee need only show that a reasonable person of the same gender as the employee would consider the conduct to be "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."<sup>97</sup> The Ninth Circuit, thus, took a "liberal" approach to this issue, because its standard made it easier for the employee's claim

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<sup>91</sup> Caldeira & Wright, *supra* note 77, at 1116-17; Ulmer, *supra* note 5, at 904-06.

<sup>92</sup> See *supra* notes 2-6 and accompanying text.

<sup>93</sup> See, e.g., Frost, *supra* note 7, at 1591 ("When presented with ambiguous federal law, judges in the Fourth Circuit will often adopt the more politically conservative reading and the judges in the First and Ninth Circuits the more liberal one.").

<sup>94</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

<sup>95</sup> *Id.* at 18-19.

<sup>96</sup> See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986); *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989); *Downes v. Fed. Aviation Admin.*, 775 F.2d 288, 292 (Fed. Cir. 1985).

<sup>97</sup> *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

against the employer to be successful. In short, *Harris* provides a clear example of two competing ideological “sides” in conflict.

Clearly, not all conflict is about policy.<sup>98</sup> Similarly, however, not all conflict is about law. When it comes to conflict, policy and law are not completely separate (the traditional view) or completely overlapping explanations. Rather, they partially overlap. Unless scholars understand how this overlap affects Court behavior, inferences about the effects of both policy and law on certiorari behavior may be incorrect.

#### A. Hypotheses: Political Ideology in Cases Presenting Conflict

Perhaps, given the role ideology plays in the certiorari process in general, conflict also provide an opportunity for justices to act on their individual ideological preferences in evaluating certiorari petitions. Do all conflict cases raise such clear partisan implications? Of course not. But, we argue, certainly others do.

Two simple hypotheses serve as the starting point to test this argument. Both hypotheses rely on assigning an ideological value to the Supreme Court as a whole and to both “sides” of a conflict,<sup>99</sup> and then comparing the relative political position of those three entities.

The first hypothesis focuses on the ideological distance between the two competing “sides” of the conflict—specifically, how far apart, politically, are the two sides of the conflict represented in a cert petition. If the Court is concerned about the policy implications of the conflicts that it reviews, we would expect it to review those conflicts where the opposing policy positions are widely divergent—in other words, where the two sides of the conflict are far apart on the spectrum of ideological positions. Thus, we hypothesize that as the distance between the political positions of the two sides of the conflict increases, the Court will be more likely to grant certiorari.

The second hypothesis focuses on the distance between the Court and “side” of the conflict that is furthest from it. If the Court is concerned about the policy implications of the conflicts that it reviews, we would expect it to review those conflicts in which one of the sides represents an outcome that is far from the Court’s preferred policy. In other words, if one side of the conflict is ideologically very far from the Court’s preferred policy position, then we would expect the Court to grant certiorari to bring the overall state of law closer to its own ideological preferences. Thus, we hypothesize that as the distance between the Court and the side that is furthest from it increases, the Court will be more likely to grant certiorari.

#### B. Empirical Testing

To test these hypotheses, we reviewed cases that came before the Supreme Court during the 1986–1994 terms. We chose these years specifically because of the availability of cert pool memoranda,<sup>100</sup> which were recently released to the public in

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<sup>98</sup> See, e.g., Tanenhaus et al., *supra* note 66, at 118 (discussing “trivial” conflicts).

<sup>99</sup> See discussion *infra* Part IV.C.2.

<sup>100</sup> The “cert pool” is an aggregation of the justices’ clerks charged with reviewing petitions for a writ of certiorari. Justice Samuel A. Alito, Jr. opted out of the cert pool process, as did Justice John Paul Stevens before him. Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The ‘Cert. Pool’*, N.Y. TIMES, Sept. 25, 2008, at A21. When a petition for a writ of certiorari is filed with the Court, it is randomly assigned to one of these clerks for

the Digital Archive of the Papers of Justice Harry A. Blackmun.<sup>101</sup> Our basic approach is as follows: we identified cases that presented to the Court a certiorari petition that alleged a conflict and we assigned an ideological “score” to each side of the conflict and to the Supreme Court itself. Using statistical analysis, then, we were then able to compare these ideological scores to test each of our hypotheses.

### 1. Data

Our data consist of cases in which a petition for a writ of certiorari was filed with the Court and which present a conflict among the federal courts of appeals.<sup>102</sup> For conflict cases in which the Court granted certiorari, our data consist of a random sample of ninety-four cases, out of a possible 296 cases, initially brought to the Court during the 1986–1994 terms in which the Court indicated in its opinion that it had granted certiorari in order to resolve a conflict.<sup>103</sup> From the Supreme Court opinions in these granted cases, we identified each of the courts of appeals cases that the Court cited in its reasons from granting certiorari as being in conflict, and we noted which “side” of the conflict each court of appeals case represented. In *Harris*, for example, the Court’s opinion explicitly states:

We granted certiorari . . . to resolve a conflict among the Circuits on whether conduct, to be actionable as “abusive work environment” harassment . . . must “seriously affect [an employee’s] psychological well-being” or lead the plaintiff to “suffe[r] injury.” Compare *Rabidue* (requiring serious effect on psychological well-being); *Vance v. Southern Bell Telephone & Telegraph Co.*, 863 F.2d 1503, 1510 ([11th Cir.] 1989) (same); and *Downes v. FAA*, 775 F.2d 288, 292 (Fed. Cir. 1985) (same), with *Ellison v. Brady*, 924 F.2d 872, 877-878 ([9th Cir.] 1991) (rejecting such a requirement).<sup>104</sup>

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review. The clerk writes a memorandum offering a recommended course of action for the Court and then circulates that memorandum to the chambers of the justices participating in the cert pool. Watts, *supra* note 26, at 15; see also Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 520 (2003); WILLIAM H. REHNQUIST, THE SUPREME COURT 232-33 (Knopf ed., 2001); Owens & Simon, *supra* note 14, at 1226-27 (detailing the cert pool further).

<sup>101</sup> Lee Epstein et al., *Digital Archive of the Papers of Harry A. Blackmun* (Oct. 14, 2010), <http://epstein.usc.edu/blackmun.php>; see also Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 934 (2009).

<sup>102</sup> We ignored cases presenting conflicts with state courts because we lack the necessary information on state court judge ideology to conduct our analysis.

<sup>103</sup> We recognize the limitation in relying only on whether the Court states that it granted cert to resolve a conflict. This approach potentially undercounts the number of conflicts actually resolved by the Court. In future research, we plan to use the cert pool memoranda provided in the archives of Justice Blackmun’s papers to more completely identify this population since the cert pool memorandum typically indicates if a conflict is present.

<sup>104</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993).

From this language, we identified one side of the conflict as consisting of the Sixth Circuit (the *Rabidue* case), the Eleventh Circuit, and the Federal Circuit. The Ninth Circuit represents the other side of the conflict.

For conflict cases in which the Court denied certiorari, our data consist of a sample of thirty-nine cases, out of a possible 295 cases, initially brought to the Court during the 1986–1993 terms in which Justice White indicated his dissent from the denial of certiorari.<sup>105</sup> For these denied cases, we reviewed the cert pool memorandum to identify which courts of appeals the memo cited as being in conflict and which side of the conflict those cases represent.

We then collected information from the lower court opinions, including information on the identity and votes of the judges involved and the lower court's disposition of the case. In some instances this process resulted in coding, or gathering data from, two lower court opinions (i.e. the Court or cert pool memo merely noted that lower court opinion A conflicts with lower court opinion B); in some instances this resulted in the coding of thirteen lower court opinions (i.e. the Court or the cert pool memo cited opinions from each of the thirteen courts of appeals reflecting the conflict).<sup>106</sup> In total, for the certiorari granted cases, we coded information from 374 courts of appeals cases, an average of 3.98 lower court cases for each Supreme Court opinion; for the certiorari denied cases, we coded information from 165 courts of appeals cases, an average of 4.23 lower court cases for each cert pool memorandum.

## 2. Ideology Score

To examine conflict as an ideological variable, we need some measure of where a particular “side” from a given case sits in policy space relative to the other “side.” If we can think of lower court cases as presenting, as *Harris* demonstrates,<sup>107</sup> competing “sides” of a policy debate, then we can begin to identify where the rule of law adopted by each of these lower courts is located by examining the side of the conflict on which each court sits.

As noted above, in reviewing Supreme Court opinions and cert pool memoranda, we recorded which side of the conflict the Court or the cert pool memo indicated each lower court opinion represented. Such a statement from the Court and the cert pool memo is typical in conflict cases. In granted cases, the final opinion from the Court not only provides citations to the lower court opinions in conflict, but also clearly identifies which lower courts it thinks are in agreement or disagreement with one another.<sup>108</sup> In denied cases, a careful reading of the cert pool memorandum delineates which lower courts the clerk thinks are in agreement or disagreement with each other.

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<sup>105</sup> We adopt this approach because of Justice White's focus, throughout his tenure on the Court, on conflicts among the courts of appeals. See Owens & Simon, *supra* note 14, at 1269–70. Thus, of all the justices, Justice White was most often prone to issue dissents from the denial of certiorari due to his view that a conflict existed which the Court was refusing to resolve. See Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 705 (1995).

<sup>106</sup> We ignored any citations to state supreme court cases.

<sup>107</sup> See *supra* notes 91–94 and accompanying text.

<sup>108</sup> See, e.g., *infra* note 109 and accompanying text (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)).

To develop a measure of the ideological position of each side, we assumed a one-dimensional liberal-conservative (left-right) spectrum. Obviously, we cannot simply assign each lower court opinion a location on this left-right dimension. Instead, our measure of the location on the spectrum was derived from the Judicial Common Space (JCS)<sup>109</sup> methodology. The JCS places justices of the Supreme Court<sup>110</sup> and judges of the courts of appeals<sup>111</sup> on the same one-dimensional, liberal-conservative scale.<sup>112</sup> The scores range from -1 (liberal) to 1 (conservative),<sup>113</sup> and “[t]he result is a score that can be compared directly across institutions and over time.”<sup>114</sup> Thus, “[e]mpirical legal scholars have employed these scores across the board.”<sup>115</sup>

For the lower court opinions, we assigned to each opinion an ideology score equal to the JCS score of the judge who authored the opinion. Although courts of appeals cases typically are decided in three-judge panels, we use the authoring judge’s JCS score for a couple of reasons. First, this judge typically retains the most control over the content of the lower court’s opinion. Moreover, viewed from the Supreme Court’s perspective, it is the identity of the authoring judge that most quickly and efficiently provides a cue for the justices reviewing the lower decision.<sup>116</sup>

In situations where the Supreme Court or cert pool memo cited only one lower court case as representing a particular side of a conflict, the location on the ideological spectrum of that side is represented by the JCS score of the judge who authored the cited lower court opinion. In situations where the Supreme Court or cert pool memo cited more than one lower court case as representing a particular

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<sup>109</sup> See generally Lee Epstein et al, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007) (introducing the Judicial Common Space measurement scale).

<sup>110</sup> Supreme Court justices are assigned a JCS score based on “a vote-based measure of Supreme Court ideology developed by [political scientists Andrew D. Martin and Kevin M. Quinn in 2002].” *Id.* at 306; see also *id.* at 307 (“These ‘Martin-Quinn’ scores, which are available for all justices in all terms from 1937 to 2003 . . . are derived from voting patterns on the Supreme Court.”).

<sup>111</sup> JCS scores for courts of appeals judges are based on the notion of “senatorial courtesy.”

If a judge is appointed from a state where the President and at least one home-state Senator are of the same party, the nominee is assigned the . . . score of the home-state Senator (or the average of the home-state Senators if both members of the delegation are from the President’s party). If neither home-state Senator is of the President’s party, the nominee receives the . . . score of the appointing President.

*Id.* at 306.

<sup>112</sup> Similar common space scores are also available for presidents and members of Congress. Owens & Simon, *supra* note 14, at 1273.

<sup>113</sup> Epstein et al., *supra* note 109, at 309-10.

<sup>114</sup> Owens & Simon, *supra* note 14, at 1274.

<sup>115</sup> *Id.*

<sup>116</sup> Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court’s Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 109-10 (2000).

side of a conflict, the location of that side is represented by the mean JCS score of all of the judges authoring the cited lower court opinions.

For the Supreme Court's ideological position, we use the JCS score of the median justice on the Court in the prior term. Thus, taken together, we have measures of the Court median and the two "sides" of the conflict for 133 conflicts cases that were brought to the Court on a petition for a writ of certiorari. And all of these measures—the scores for the Court and the sides of the conflict—are on the same JCS scale, enabling direct comparison among them.

Figure 1: Ideological Position of Circuits and Supreme Court, Conflict Cases.

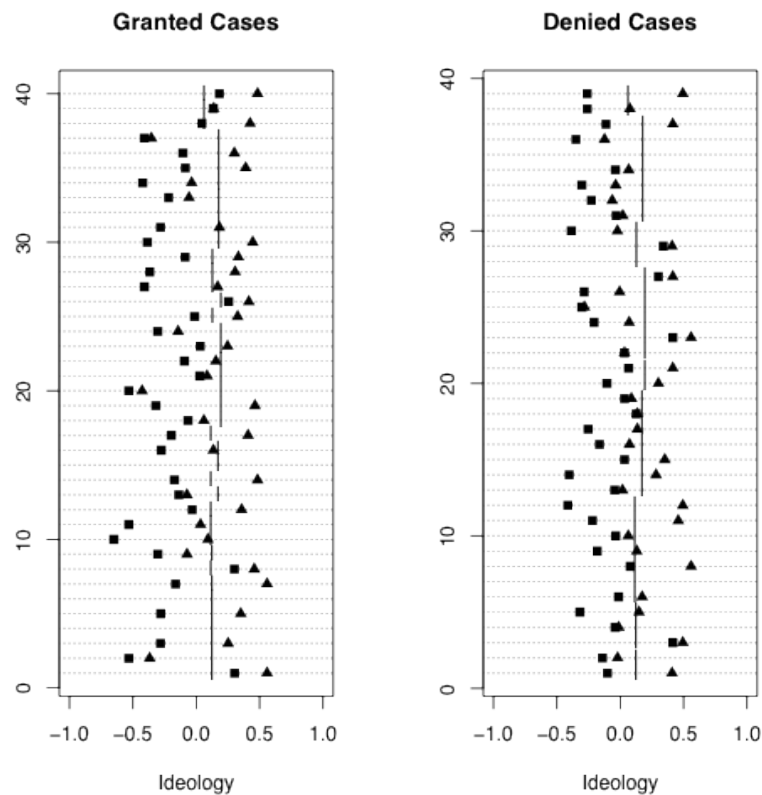


Figure 1 displays these measures for the first forty of the ninety-four conflict cases in which certiorari was granted and all of the thirty-nine conflict cases for which certiorari was denied. The vertical line on each dotted horizontal line represents the Supreme Court's LCS score, its ideological position on a -1 to 1 scale, based on the median justice of the prior term. The squares mark the JCS score of the more liberal side of the circuit split, and the triangle denotes the JCS score of the more conservative side, both calculated as an average of the JCS scores of the authoring judges of opinion on that side of the split.

*C. Analysis and Discussion of Hypothesis One*

Recall that our first hypothesis focused on how far apart, ideologically, the two sides of a conflict were. We suggested that if the Court were concerned about conflict from a policy standpoint, it would be more likely to grant certiorari as the distance between the policy positions of the two sides of the conflict increased. Figure 2 shows the results of our tests for this first hypothesis.

Figure 2: Ideological Distance Between Circuit Split Sides.

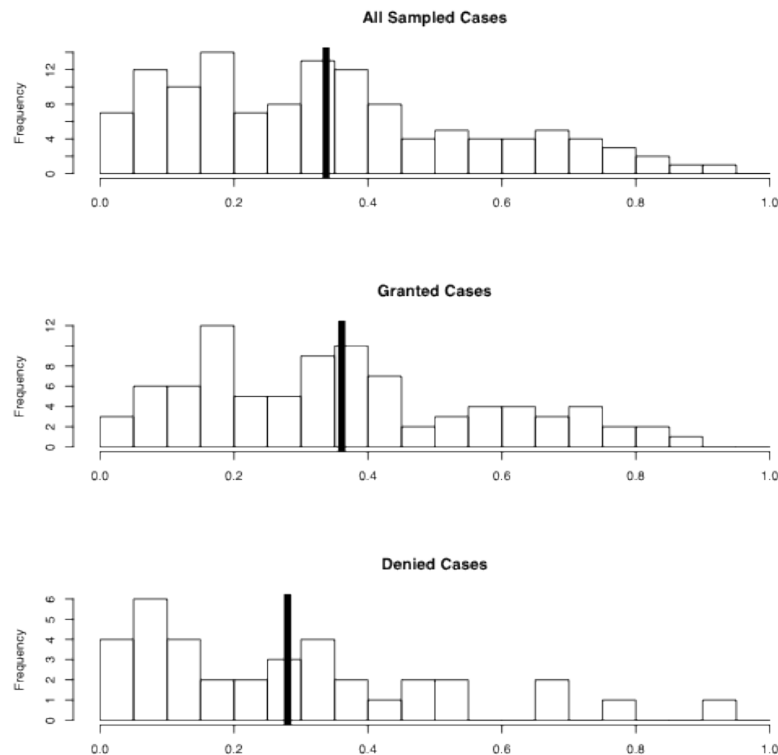


Figure 2 includes three separate histograms, each indicating the number of certiorari petitions the court received based on the ideological distance between the sides of the circuit split. The horizontal axis of each histogram is the distance between the ideological score of the two sides of the conflict, and the vertical axis is a count of how many petitions included a conflict with that divide.

The top histogram shows the distribution between the two sides to the conflict for all of the cases in our data set. The middle histogram shows the same distribution for the cases where the Court granted certiorari. And the bottom histogram shows the distribution between the sides of the conflict in cases where the Court denied certiorari. The thick vertical line represents the mean distance between sides of the conflict for each category.

There is a marked difference between the shapes of the distributions for the granted and denied conflicts, which supports our hypothesis. As the distance between the sides of the conflict increases (approaches 1), the Court is more likely to

grant certiorari. The bottom histogram of denied petitions shows far fewer cases with a wider split than the granted cases. Conversely, the denied petitions include far more cases with a narrow split—a smaller ideological difference between the two sides of the conflict. Moreover, the mean distance between the sides of the granted conflicts (0.361) is greater than the mean distance (0.280) between the sides of the denied conflicts, a difference that is statistically significant.<sup>117</sup>

#### D. Analysis and Discussion of Hypothesis Two

Our second hypothesis focused on the position of the Court relative to the sides of the conflict. Specifically, we suggested that if the Court were concerned about conflict from a policy standpoint, it would be more likely to grant certiorari as the distance between the Court and one side of the conflict increased. Figure 3 shows the results of our tests for this second hypothesis.

Figure 3: Maximum Distance Between Circuit Split Side and Supreme Court.

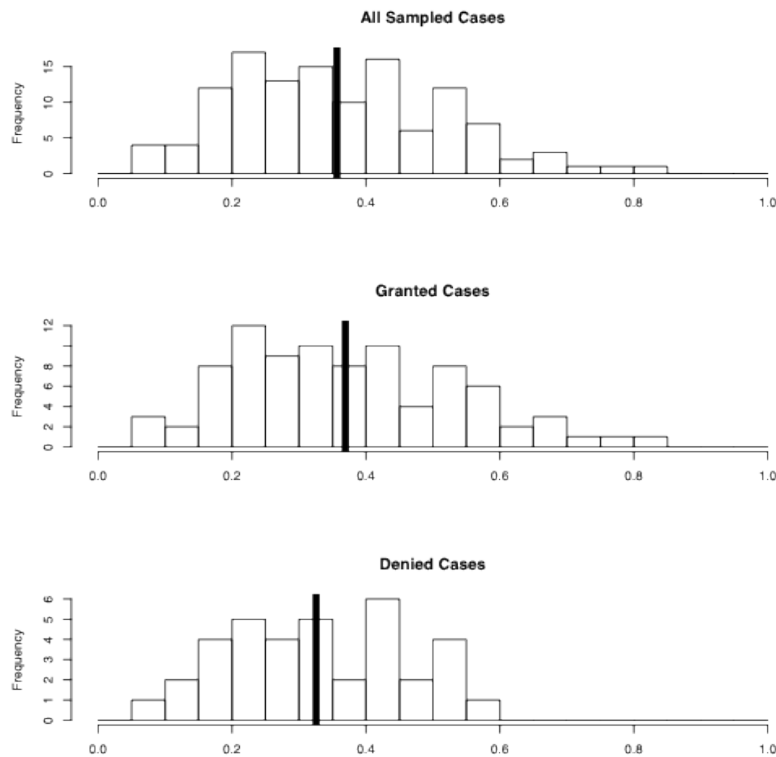


Figure 3 includes three separate histograms, each showing the number of cert petitions the Court received based on the distance between the Court and the side of

<sup>117</sup> A simple one-tailed t-test indicates that this difference is statistically significant at the 0.05 level ( $p=0.039$ ).



the conflict that is farthest from it. The horizontal axis of each histogram is the distance between the ideological score of the Court and the side of the conflict that is farthest from it, and the vertical axis is a count of how many petitions included a distance of that magnitude.

The top histogram shows the distribution between the Court and the “side” of the conflict that is the farthest from it for all the conflicts in our data. The middle and bottom histograms show that the distribution of this distance for granted and denied cases. And again, the thick vertical line is the mean distance for each category of petitions.

Once again, there is a difference between the shapes of the distributions for the granted and denied conflicts, but the difference is less dramatic. Granted conflicts appear to more often reflect a greater distance between the Court and the far side of the conflict; granted conflicts include far more petitions where the distance approaches 1. Moreover, the mean distance between the Court and the far side of the conflict in granted conflicts (0.369) is greater than the mean distance (0.326) between the Court and the far side of the conflict in denied conflicts. The difference between these two means is markedly smaller than in the analysis for the first hypothesis, and this difference fails to achieve statistically significant.<sup>118</sup>

#### *E. Discussion of Empirical Analyses*

The analysis presented in this study sheds new light on the role lower court conflict plays in influencing the Supreme Court’s certiorari decisions. Conflict has long been recognized as being important in the certiorari process, but the above analysis shows that it is more important to Court decision-making than has been previously recognized. This study provides evidence that the ideological content of lower court conflict provides informational clues to justices that influence their decisions to grant certiorari, which is particularly important as the Court works its way through the thousands of certiorari petitions it receives each year. The data show that the ideologies of lower court justices can influence Supreme Court certiorari decision.

Consistent with hypothesis one, when the justices on the two sides of a circuit split have distinct ideological differences, cases are more likely to be heard by the Court. The differences in lower court ideologies are significantly higher in the cases granted cert than in the cases denied cert. This phenomenon indicates that the Court is using what it knows about the ideologies of lower court justices to help it identify cases where the conflict in the law is the greatest and where resolution by the Supreme Court is the most needed. Cases that show stark ideological difference between the sides of a split are likely to represent areas of the law where current law is the most unsettled and where the greatest policy difference between circuits are likely to lie. The ideological content of conflict cases provides the Supreme Court with a useful informational tool that allows justices to identify the conflict cases that most need the Court’s attention.

Hypothesis two argues that the ideological content of conflict cases provides the Supreme Court with a way to identify cases where the lower courts are issuing rulings that are the farthest away from the Supreme Court’s ideological preferences. This allows the Court to identify and then correct “errors” made by lower courts.

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<sup>118</sup> A simple one-tailed t-test indicates that this difference is not statistically significant at the 0.05 level ( $p=0.067$ ).

The empirical evidence provides only the weakest of support for this hypothesis. While cases where the ideological differences between the Supreme Court and at least one side of a conflict are highest are slightly more likely to be granted certiorari, the effect is small. The Court may occasionally consider its policy preferences relative to those of lower court preferences when accepting cases for review, but the Court does not appear to be doing so consistently. These results, taken together, indicate that the Court is using the ideological information about lower court justices to help identify the conflict cases most in need of resolution, but is not consistently using this information to further its own policy preferences.

#### V. CONCLUSION

In this Article, we argued in favor of an examination of the long-held assumption in the literature on the Court's certiorari behavior that conflict in the lower courts is a purely legal concept and nothing else. Clearly, case examples exist that demonstrate the need for this examination. In some cases, like *Harris* and the recent case involving the Patient Protection and Affordable Care Act, conflict appears to be about more than just a dispute over the proper legal rule to be applied to a given set of facts. Our results, though limited in nature by the number of cases from which we collected data, indicate some support for our hypotheses.

Future research and statistical analysis can only enhance this conversation. Does, for example, the depth or strength of the conflict in terms of the number of courts of appeals having issued the decision affect the likelihood of the Court's grant of certiorari? We hope to continue to explore this and other questions with additional data collection and continued research and analysis.

