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Kevin H. Smith

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CERTIORARI AND THE SUPREME COURT AGENDA: AN EMPIRICAL ANALYSIS

KEVIN H. SMITH*

That the United States Supreme Court profoundly affects the judicial system, the broader political system, and society as a whole is universally acknowledged. Legal scholars, lawyers, and political scientists who study the Supreme Court focus their attention almost exclusively on the written opinions published by the Court after cases have been fully briefed and orally argued.¹ Their emphasis is understandable. The Court's many roles are most visible in published opinions. Further, in published opinions, the Court makes policy through its exercise of discretion² in the formulation, selection, interpretation, application, and policy justification³ of

* Associate Professor of Law, Cecil C. Humphreys School of Law, The University of Memphis. B.A. 1977, Drake University; M.A. 1981, The University of Iowa; J.D. 1983, The University of Iowa; Ph.D. 1994, The University of Iowa. This article is drawn from Kevin H. Smith, *Supreme Court Agenda-Setting for Equal Protection Cases: An Empirical Analysis* (1994) (unpublished Ph.D. dissertation, the University of Iowa) (on file with the University of Iowa Library), parts of which previously were reported and amplified in Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381 (1999).

1. I shall refer to such a case as one involving a "written decision," a "written opinion," or a "published opinion" with or without the addition of "after plenary review."

2. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279 (1957) ("A policy decision might be defined as an effective choice among alternatives about which there is, at least initially, some uncertainty.")

Occasionally, an acknowledgment of judicial policymaking finds its way into a published opinion. Consider Justice White's statement:

"Policy" is defined as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and us[ually] determine present and future decisions." . . . In resolving disputes, although judges do not operate with unconstrained discretion, they do choose "from among alternatives" and elaborate their choices in order "to guide and . . . determine present and future decisions."

Gregory v. Ashcroft, 501 U.S. 452, 482 (1991) (White, J., concurring in part, dissenting in part, and concurring in the judgment) (second alteration in original) (citation omitted).

Even those who acknowledge the existence of judicial policymaking are quick to point out its limits. Justice White, for example, went on to offer this quotation from Justice Cardozo:

Each [common-law judge] indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law . . . [W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made.

Id. (alterations in original) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-15 (1921)).

3. A case of first impression presents the clearest example of judicial policymaking. In such a case, the Court must either (1) select a rule from among the alternatives presented to it by the parties or from among the alternatives existing in the persuasive authorities of lower courts and the scholarly literature,

"authoritative rules . . . which . . . influence the operation of government and [the] shape [of] society as a whole."⁴ And, written opinions also expose the political⁵ nature of the deliberative process when conservative, moderate, and liberal Justices routinely align themselves with their ideological counterparts.⁶ In comparison, the Court's ability to establish its roles, to make policy, and to act politically by exercising its "gatekeeping" or "agenda-setting" function — its essentially complete discretion to decide which of the many cases properly placed before it using a petition for a writ of certiorari⁷ will be decided on the legal merits — is ignored.

or (2) select a rule from among alternatives generated by members of the Court itself. Further, even if the case is not one of first impression, discretion may be required in selecting (1) from among the alternative constitutional provisions, statutes, regulations, or lines of case authority that might plausibly supply the rule of law that will be dispositive of the case; (2) from among the credible alternative interpretations of the authority that is selected by the Court; (3) from among the alternative plausible interpretations of the facts as shown in the record; or (4) from among the alternative plausible applications of the authority thus selected and interpreted to fit the specific facts of the case.

4. LAWRENCE BAUM, *THE SUPREME COURT* 3 (4th ed. 1992).

5. The deliberative process is political to the extent that it involves goal-directed behavior in which a Justice seeks — explicitly or implicitly, consciously or preconsciously — to attain specific ends that coincide with his or her ideological position. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (discussing and providing evidence for an "Attitudinal Model" of Supreme Court decision making on the merits).

6. For a specific example of ideological alignment, see *Bush v. Gore*, 531 U.S. 98 (2000). For general data suggesting the existence of that ideological alignment, see the end-of-the-term statistics published each year by the *Harvard Law Review*. The table concerning voting alignment provides the overall percentage of agreement and disagreement between each Justice with respect to decisions on the merits decided during a particular Term. For an example of such a chart, see *The Supreme Court 1995 Term, Table I(B), Voting Alignments*, 110 HARV. L. REV. 368 (1996). Viewed collectively, the tables provide compelling evidence of stable, long-term patterns of voting that reasonably may be interpreted to have an ideological basis.

7. A petition for a writ of certiorari is a mechanism for seeking appellate review. The petitioner requests that the Supreme Court issue a writ of certiorari to a lower court. If the Court denies the petition, the decision of the lower court stands. If the Court grants the petition and issues a writ of certiorari, the lower court must send the record to the Supreme Court for review. The Supreme Court usually acts after plenary review, but may act summarily. The decision of the lower court may be affirmed, reversed, or vacated. The Supreme Court possesses complete discretion regarding whether a petition will be granted. For an excellent discussion of petitions for certiorari, see ROBERT STERN ET AL., *SUPREME COURT PRACTICE* (7th ed. 1993).

Chief Justice Rehnquist provided the following summary of the Court's internal certiorari process:

Shortly before each conference at which the Court will consider petitions for certiorari, the chief justice sends out a list of the petitions he wishes to have discussed. After the chief's "discuss list" has come around, each of the associate justices may ask to have additional cases put on this list. If at a particular conference there are one hundred petitions for certiorari on the conference list, the number discussed at conference will range from fifteen to thirty. The petitions for certiorari that are not discussed at conference are [automatically] denied without any recorded vote.

WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 265 (1987). For a similar description of the process, see John Paul Stevens, *The Life-Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 13 (1983). A petition on the "discuss list" will be granted upon the votes of four or more Justices. This requirement is referred to as the "Rule of Four." The Rule of Four's purposes, implementation, and exceptions are examined by STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 206-08 (3d ed. 1988); and Peter Linzer, *The Meaning of Certiorari Denials*,

Each term, petitioners file well over 5000 cases with the Court.⁸ From these many cases, the Supreme Court selects approximately 100,⁹ or fewer than three out of every 100 cases filed,¹⁰ for a written decision after plenary review. The Court's

79 COLUM. L. REV. 1227, 1249 (1979). See generally STERN ET AL., *supra*, at 224-33 (discussing aspects of the certiorari process, including the operation of the "discuss list" and the Rule of Four).

8. After the Clerk of the Supreme Court accepts and files a case for appellate review, the case is placed on the Court's appellate docket. The number of cases filed on the appellate docket each Term has grown over the past several decades. Approximately 5300 cases were placed on the appellate docket during the 1981 Term, the initial Term studied in this article. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 75-76* (2d ed. 1996). Since the 1981 Term, between approximately 5000 and approximately 9000 cases have been placed on the appellate docket each Term. See *id.* (providing by Term the number of cases on the appellate docket from 1970 through 1995). For the number of cases filed on the appellate docket in recent Terms, see *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 70 U.S.L.W. 3060 (July 17, 2001) [hereinafter 2000 Term Statistical Recap]; *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 69 U.S.L.W. 3134 (Aug. 15, 2000) [hereinafter 1999 Term Statistical Recap]; *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 68 U.S.L.W. 3069 (July 20, 1999) [hereinafter 1998 Term Statistical Recap]; *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 67 U.S.L.W. 3168 (Sept. 8, 1998) [hereinafter 1997 Term Statistical Recap].

9. The number of cases disposed of by a written opinion after plenary review has declined dramatically in recent Terms. During the 1981 Term through the 1987 Term, the period examined in this article, the Court disposed of, on average, 173 cases per Term, through signed opinions and per curiam opinions after oral argument. See EPSTEIN ET AL., *supra* note 8, at 84-85. In contrast, during recent Terms, the Court has disposed of fewer than 100 cases each Term using signed opinions and per curiam opinions after oral argument. See 2000 Term Statistical Recap, *supra* note 8, at 3060; 1999 Term Statistical Recap, *supra* note 8, at 3134; 1998 Term Statistical Recap, *supra* note 8, at 3069; 1997 Term Statistical Recap, *supra* note 8, at 3168.

Scholars have put forth a variety of theories to explain the decline. See, e.g., David O. Stewart, *Quiet Times: The Supreme Court Is Reducing Its Workload — But Why?*, A.B.A. J., Oct. 1994, at 40, 43 (speculating that (1) "after 12 years of Republican appointments to the lower federal courts, the justices — most of them Republican appointees — are generally satisfied with the decisions coming out of the lower courts and see little need for intervention;" (2) "those seeking social change now are less likely to bring their complaints to the Supreme Court, preferring to turn to Congress or state legislatures, or state courts;" and (3) "the justices have chosen to decide fewer cases to reduce the role of the judiciary in the nation's political life"); Alexander Wohl, *The Dry Docket*, A.B.A. J., Jan. 1991, at 44, 45 (examining some of the same theories discussed by Stewart, but also including a comment by Justice Stevens that "probably . . . 20 or 25 cases" have been eliminated due to restrictions in the Court's mandatory jurisdiction); see also Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996) (analyzing the composition of the plenary docket during the 1993 through 1995 Terms and comparing it with the docket a decade earlier, before the drastic decline in the number of cases on the plenary docket); David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779 (1997) (a broad-ranging look at the Court's agenda-setting behavior).

10. See EPSTEIN ET AL., *supra* note 8, at 82-83 (providing the percentage of cases granted review each Term for the 1970 Term through the 1995 Term); see also 2000 Term Statistical Recap, *supra* note 8, at 3060; 1999 Term Statistical Recap, *supra* note 8, at 3134; 1998 Term Statistical Recap, *supra* note 8, at 3069; 1997 Term Statistical Recap, *supra* note 8, at 3168.

This article examines the 1981 Term through the 1987 Term. During that time, the Court granted an average of 6.2% of paid petitions and 0.59% of in forma pauperis petitions each Term. See EPSTEIN ET AL., *supra* note 8, at 82-83. For a brief discussion of the difference between paid petitions and in forma pauperis petitions, see *infra* notes 29-31 and accompanying text.

decisions during this agenda-setting process have significant consequences.¹¹

First, as the Court decides which cases it will hear on the merits, the Court establishes the roles it will play within the legal and political systems, as well as within society as a whole. For example, the decision whether to hear a case may reflect the Court's (1) reluctance to act as an arbiter in disputes involving the allocation of power between the branches of the federal government,¹² (2) willingness to make policy concerning civil rights and privacy rights rather than deferring to Congress or to the state legislatures,¹³ (3) willingness to take an active role in "overseeing lower courts' interpretation and application of legal rules,"¹⁴ and (4) willingness to become involved in national electoral politics.¹⁵

Second, the sum of the Court's certiorari decisions determines the range of issues on which the Court will make policy by issuing written opinions. In turn, these written decisions establish rules of constitutional law and interpretations of treaties, statutes, and administrative regulations that have an impact on every aspect of the legal, social, economic, and political systems. In addition, a single written decision may "set the agenda, or a large part of it, for political, social, and legal institutions for years to come. A seminal opinion sometimes opens the floodgates for future litigation, legislation, and social reform."¹⁶ And, at a minimum, a Supreme Court opinion may bring attention to, and stimulate discussion concerning, an issue.¹⁷

Third, the agenda-setting process determines which individuals, business entities, governmental units, and economic, political, religious, ethnic, social, and other groups will have access to the Court's policy-making process. "The Court can either sample quite evenly from the array of cases brought to it, or it can establish criteria which will provide easier access to adjudication for some groups in our society than for others."¹⁸ The agenda-setting process thus may reflect both the Supreme Court's

11. Indeed, it has been observed that "[d]eciding which cases shall be heard and which shall not is the publicly unseen essence of the dispensation of justice." BERNARD SCHWARTZ, *INSIDE THE WARREN COURT: 1953-1969*, at 31 (1983).

12. It is, of course, impossible to *know* why the Court declines to hear a case. The Court has indicated its reluctance to decide certain types of issues on the merits. See, e.g., Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215 (1985) (discussing the Supreme Court's use of the political question doctrine to avoid becoming embroiled in issues regarding the foreign affairs authority given by the Constitution to the executive branch and to the legislative branch). It seems reasonable to assume the Court often might simply deny a petition for certiorari in such cases rather than accept the case and then sidestep the issue, as through the use of the political question doctrine.

13. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (declaring unconstitutional Texas criminal abortion laws that prohibited abortions at any point in a pregnancy except to save the mother's life); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (declaring unconstitutional a state statute that permitted the establishment of separate school systems for African American and white students).

14. WASBY, *supra* note 7, at 31.

15. *Bush v. Gore*, 531 U.S. 98 (2000).

16. H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 6 (1991).

17. See S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901 (1984).

18. DONIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* 2 (1980).

"priorities" and the impact of individual litigants, business entities, governmental units, and of various groups.¹⁹

Fourth, the agenda-setting process determines whether particular individuals, business entities, governmental units, and economic, political, religious, ethnic, social, and other groups will have access to the *national government's* policy-making process. If the petitioner unsuccessfully has sought redress from Congress or the executive branch, a denial of review by the Court may result in a total lack of access to decision makers within the national government.²⁰ On the other hand, the Court may "provid[e] an important correction for [the] inequalities in the political system noted by critics of pluralist democratic theory"²¹ if it provides a hearing to petitioners who were denied access to the other branches of the national government.²²

The wide-ranging and important consequences of the Court's agenda-setting process make it an appropriate phenomenon for study. Unless we embrace the assumption that the agenda-setting process is arbitrary or random,²³ an analysis of the process must begin with the assumption that the Court's agenda-setting decisions are made using a relatively stable set of factors, that is, that the Court tends to select — and to avoid selecting — cases that possess certain attributes.²⁴ From this perspective, the central research questions become: What are the determinants of the Court's agenda?²⁵ What do these determinants suggest about the Court's role

19. *Id.*

20. See Ulmer, *supra* note 17, at 901 (denial of certiorari may prevent the petitioner from gaining relief where the petitioner has "already sought and failed to get relief from the political branches of government").

21. Mark Kessler, *Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting*, 24 L. & SOC'Y REV. 121, 123 (1990). Kessler also notes that through decisions such as *Gideon v. Wainwright*, 372 U.S. 335 (1963), "law and the courts may play an important role in protecting and furthering the interests of those without effective access to political institutions." *Id.* at 121 (footnote omitted).

22. The Court's exercise of discretion in the agenda-setting process will have additional effects. First, the decision to grant or to deny review to particular kinds of cases may affect the Court's popularity, prestige, and credibility. The Court's popularity, prestige, and credibility influence whether the Court's decisions will be followed. See, e.g., PROVINE, *supra* note 18, at 2-3. Second, whether the Court reviews a case is of personal significance to the litigants because such review may be the last opportunity to correct a lower court's legal error. Finally, the Court's decision to grant plenary review may give the petitioner great emotional satisfaction by providing the petitioner with the opportunity to take her case "all the way to the Supreme Court."

23. See, e.g., Ulmer, *supra* note 17, at 901.

24. If the Court uses a relatively stable set of factors to decide whether to grant petitions, analysis of certiorari decisions should identify attributes — such as the presence of an allegation of a conflict between circuit courts of appeal — that are so strongly associated with the decision to grant review that the associations are not likely to be the result of random chance. (The association is "statistically significant.") On the other hand, if decisions whether to grant a petition are based on ever-shifting or randomly selected factors, there likely would be no associations between particular attributes and the Court's decision whether to grant a petition.

A relatively stable set of factors does not require that every attribute be used in each decision. Nor must the presence (or absence) of a particular attribute invariably lead to a decision to grant (or to deny) a petition.

25. The language of this question is based on ROGER W. COBB & CHARLES D. ELDER, *Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting*, 24 L. & SOC'Y REV. 121, 123 (1990).
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in the judicial system, the political system, and society in general? Five specific and connected research questions²⁶ follow: First, what case attributes, if any, does the Court suggest play a role in its certiorari decision-making process? Second, what case attributes, if any, do relevant constitutional and statutory provisions, the scholarly literature, and the nature of the certiorari process suggest play a role in the Supreme Court's certiorari decision-making process? Third, do the attributes of the *petitions* for which the Court grants certiorari differ in any material respects from the attributes of the *petitions* for which the Court denies certiorari, and, if so, in what respects? Fourth, do the attributes of the *cases* in which the Court grants certiorari differ in any material respects from the attributes of the *cases* in which the Court denies certiorari, and, if so, in what respects? Fifth, if differences do exist between the attributes of petitions and cases in which the Court grants certiorari and the attributes of petitions and cases in which the Court denies certiorari, do the respective attributes suggest that the Court selects cases based on the factors actually articulated by the Supreme Court, or do unarticulated factors play a role as well?

This article examines the determinants of the Supreme Court's agenda using a data set of 318 cases randomly drawn from those paid petitions for statutory certiorari raising an equal protection argument in which the Court made a decision whether to grant review during its 1981 through 1987 Terms. This article examines only petitions for statutory certiorari. Statutory certiorari is the only method of reviewing a lower court decision that gives the Supreme Court the unbridled discretion in case selection required for agenda setting²⁷ and that occurs in numbers significant enough to warrant study.²⁸ The article considers only "paid"²⁹ petitions

PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING (1972), and I hereby acknowledge my debt to them.

26. See Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381, 386 (1999) (setting out similar questions in the context of exploring the Supreme Court's almost complete denial of paid, pro se petitions for certiorari).

27. In order for the Court to set its agenda, it must possess the discretion to choose which cases it will hear on the merits. The Supreme Court has complete discretion in the decision whether to grant a petition for certiorari. See SUP. CT. R. 10.

28. The other methods by which a case could have been placed before the Supreme Court for review are appeal, certification, and common law writ of certiorari. For in-depth treatment of the constitutional provisions, statutes, and Supreme Court Rules pertaining to these methods of review, as well as discussions of their relative insignificance, see 22 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE (3d ed. 1997); 23 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE (3d ed. 1997); STERN ET AL., *supra* note 7; and CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 769-816 (5th ed. 1994).

29. During the period studied, as now, in conformance with 28 U.S.C. § 1911, Supreme Court Rule 38(a) provided that a fee would be charged by the Clerk of the Court for docketing a case involving a petition for a writ of certiorari. Rule 38 currently requires a \$300 filing fee; the fee is not increased if the Court allows an oral argument. SUP. CT. R. 38(a). During the period studied, as now, in the case of a petitioner allowed to proceed in forma pauperis, the Court waives the filing fee. See generally 23 MOORE ET AL., *supra* note 28, at chs. 538 & 539 (examining filing fees and procedures for obtaining in forma pauperis status); STERN ET AL., *supra* note 7, at 301.

Petitions for certiorari are placed on the appellate docket. A separate numbering system is used to differentiate between cases in which the petitioner paid the filing fee ("paid cases") and cases in which

for certiorari because the Justices appear to consider them to be more important than *in forma pauperis* petitions³⁰ and because they are granted at a much higher rate than *in forma pauperis* petitions, thus making statistical analysis easier.³¹

In order to minimize any impact that might result from a shift in the Court's collective ideology, I examined a period during which at least a plurality of the Court could be classified as "conservative."³² Because the jurisdictional rules concerning appellate review in effect during the 1981 Term were drastically altered by Congress beginning with the 1988 Term,³³ I examine only the Court's gate-keeping activity through the end of the 1987 Term. By confining my investigation to this period, I provide both a picture of the Court's activity during the 1981 through 1987 terms and a reference point for comparison with the Court's activity beginning with the 1988 Term.³⁴ I am aware of no a priori reason to believe that

the fee is waived ("in forma pauperis cases"). "The pauperis cases are filed most often by federal and state prisoners challenging their convictions, decisions on habeas corpus proceedings or prison conditions." Stewart, *supra* note 9, at 40.

The number of paid cases being filed has been relatively consistent over the past two decades, fluctuating between 2935 during the 1981 Term and 2151 during the 1994 Term. See EPSTEIN ET AL., *supra* note 8, at 79-80; 2000 Term Statistical Recap, *supra* note 8, at 3060; 1999 Term Statistical Recap, *supra* note 8, at 3134; 1998 Term Statistical Recap, *supra* note 8, at 3069; 1997 Term Statistical Recap, *supra* note 8, at 3168. The increase in the overall number of cases filed with the Court mainly has been the result of in forma pauperis petitions. See EPSTEIN ET AL., *supra* note 8, at 79-80; 2000 Term Statistical Recap, *supra* note 8, at 3060; 1999 Term Statistical Recap, *supra* note 8, at 3134; 1998 Term Statistical Recap, *supra* note 8, at 3069; 1997 Term Statistical Recap, *supra* note 8, at 3168.

30. See, e.g., BAUM, *supra* note 4, at 99.

31. During the period examined in this article, the Court granted an average of 6.2% of paid cases and an average of 0.59% of in forma pauperis petitions each Term. See EPSTEIN ET AL., *supra* note 8, at 82-83. Given the relative grant rates, I would have needed to include in the data set ten times as many in forma pauperis petitions as paid petitions to yield the same number of grants. Because it took approximately one hour to examine each case, this would have required an additional 2700 hours (or approximately 335 additional eight-hour days) of data collection.

32. This statement is based on my interpretation of the analysis of the Justices' ideological predispositions conducted by Professor Timothy Mark Hagle of the University of Iowa and adapted from HAROLD J. SPAETH, SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION 133-35 (1979). The Court enjoyed stable membership during the 1981 through the 1986 Terms. For the purpose of my dissertation, I classified Chief Justice Burger and Justices Blackmun, Powell, O'Connor, and Rehnquist as "conservatives." I classified Justices Stevens and White as "independents." Justices Brennan and Marshall are classified as "liberals." Beginning with the 1986 Term, then-Justice Rehnquist became Chief Justice with the retirement of Chief Justice Burger and Justice Scalia was appointed to the Court to fill the vacancy. A conservative, Justice Scalia's presence did not alter the overall division among conservatives, independents, and liberals. I recognize that Justice Blackmun might be considered to have become an "independent" during the period studied. See E-mail from Timothy Hagle, Professor, University of Iowa College of Law, to Kevin H. Smith, Associate Professor, Cecil C. Humphrey School of Law (Jan. 9, 2002) (on file with author). Even in such a case, the conservative Justices outnumber the liberal Justices throughout the period I studied, so the Court could be classified as "conservative" in the sense that the plurality block was conservative.

33. The changes in the jurisdictional rules that were made prior to the 1988 Term are discussed *infra* at Part I.A.

34. I am in the process of gathering data concerning all paid petitions for certiorari that the Court decided during the 1994 Term. Because of the large number of these petitions (over 2000) and the large amount of data that I am collecting concerning each petition (over 50 variables), this is a time-consuming

the change in the jurisdictional rules will alter the results reported in this article. Because previous studies suggested that influences on the Court's decisions to grant full review vary depending on the substantive issues involved, I confine my investigation to cases that raise an equal protection issue.

The remainder of this article is divided into two parts and a conclusion. Part I surveys sources that assert that certain attributes are associated with the Court's decision whether to grant a petition for a writ of certiorari. The survey resulted in a list of attributes, and I examined the 318 cases in the data set to determine whether the asserted attributes were present or absent in each case.

Part II sets forth the results of my empirical analysis. Part II.A reports the results of a statistical analysis in which each attribute is examined individually for possible association with the decision whether to grant plenary review. Part II.B summarizes the results of multivariate analysis of the attributes and discusses the seven attributes that have the greatest impact on the decision whether to grant plenary review. In the conclusion, I discuss the legal and political ramifications of the empirical analysis.

I. Attributes Associated with the Supreme Court's Grant of Certiorari

A variety of sources purport to enumerate the attributes that are positively associated with the Supreme Court's decision to grant a petition for a writ of certiorari. Cataloguing these attributes is the first step in building a view of the Court's agenda-setting process.

A. Jurisdictional Authorities and Supreme Court Rule 10

The Supreme Court's authority to review lower court decisions by granting a petition for a writ of certiorari is limited by the scope of the federal judicial power as set forth in the Constitution.³⁵ The Court may review a case only if it involves a federal matter; a case may not be reviewed if it raises only an issue of state or local law. Within the scope of the federal judicial power, Congress establishes the

enterprise.

35. Article III, Section 2 establishes the scope of the federal judicial power:

Section 2.[1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2

Court's specific appellate jurisdiction by enacting jurisdictional statutes.³⁶

The Judges' Bill of 1925 decreased the scope of the Court's extensive obligatory appellate jurisdiction and increased the scope of the Court's discretionary certiorari jurisdiction.³⁷ The Supreme Court Case Selection Act (the Act), which took effect on September 25, 1988, all but abolished the Court's obligatory appellate jurisdiction.³⁸ Prior to the Act, during the period studied in this article, "20 to 25 percent of the cases argued before the Supreme Court" resulted from the Court's obligatory appellate jurisdiction.³⁹ The Act resulted in the petition for a writ of certiorari becoming essentially the only method of placing a case before the Court for appellate review.⁴⁰

Both prior to and after the Supreme Court Case Selection Act, no constitutional provision or jurisdictional statute enumerated "any factors [other than those directly related to jurisdiction] which the Supreme Court must, or should, consider when deciding which cases to review"⁴¹ via the mechanism of a petition for a writ of certiorari. In 1925, coinciding with the expansion of its certiorari jurisdiction, the Supreme Court promulgated a rule that provided a nonexhaustive list of the factors the Court asserted that it considers in making the decision whether to grant a petition for a writ of certiorari.⁴² Supreme Court Rule 10 currently states:

A 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

36. *Id.* art. III, § 2, cl. 2 (providing that in all cases not falling within the Court's original jurisdiction, "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make").

37. See Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (1925) (amending the Judicial Code, and, inter alia, defining the jurisdiction of the Supreme Court); see also Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 655 n.252 (1987) ("Discretionary review in the Supreme Court was not introduced until the Evarts Act of 1891 . . . and did not become commonplace until after the Judges' Bill of 1925. . . . Before those statutes, cases reached the Supreme Court as of right, so those litigants who wished it and could afford it were assured review. This situation contrasts sharply with modern practice."). For a general discussion of certiorari and obligatory appellate jurisdiction, past and present, see the sources cited *supra* note 28.

38. See Supreme Court Case Selection Act, Pub. L. No. 100-352, 102 Stat. 662 (1988) (codified as amended at 28 U.S.C. §§ 1254, 1257-1258, 2104 (1994)) [hereinafter the Act]. For insightful discussions of the Act, see Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1989), and the commentaries provided by David D. Siegel at 28 U.S.C.A. §§ 1252, 1254 (West 1993). After the Act, the right to appeal to the Supreme Court is very limited. For extensive treatments of appeals, both prior to and after the Supreme Court Case Selection Act, see MOORE ET AL., *supra* note 28, §§ 403.01[2][d], 404; STERN ET AL., *supra* note 7, at 39-161, 385-405; WRIGHT, *supra* note 28, at 769-805.

39. See PERRY, *supra* note 16, at 25.

40. After the Act, only a small number of appeals have come before the Court. For example, Stern reports that for the entire 1991 Term, the Court "summarily affirmed five appeals, vacated or dismissed seven appeals, and accepted four for oral argument." See STERN ET AL., *supra* note 7, at 211.

41. See Smith, *supra* note 26, at 397.

42. See generally 23 MOORE ET AL., *supra* note 28, § 510.01-45, 510 app. 01-105 (containing a thorough discussion of the history, purposes, and operation of Rule 10, its predecessors, and its various incarnations).

compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of 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.⁴³

On the one hand, Rule 10 can be viewed as providing only minimal insight into the certiorari process. Rule 10 itself indicates that it "neither control[s] nor fully measur[es] the Court's discretion."⁴⁴ The Court thus concedes that other factors may influence the agenda-setting process. In addition, Rule 10 contains no objective criteria for interpreting terms such as "compelling reasons," "important," and "conflict." Only the Justices can know what these terms mean and can assess whether a given case meets these standards.⁴⁵

43. SUP. CT. R. 10. Rule 10's predecessor, Rule 17, was in effect during the time period examined in this article. Rule 17 was renumbered in 1990, and its wording was revised on several occasions. Rule 17 and Rule 10 are identical in substance, with the exception that, beginning in 1995, Rule 10 included the statement that "[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. CT. R. 10.

44. SUP. CT. R. 10.

45. For example, although an attorney or a researcher may possess a strong opinion concerning whether "conflict" is present or an issue is "important," only the Court's assessment is relevant. Attributes such as these are not susceptible to the same level of objective, empirical determination as are attributes such as whether the petitioner is a natural person.

Baker and McFarland note the conundrum facing the Court with respect to Rule 10:

A second idea for reducing the Supreme Court's intake is for the Court to issue definitive guidelines for when a petition will be granted, thereby reducing, so the argument goes, both the time required to review petitions and the number of petitions submitted. The Rules of the Supreme Court, enacted shortly after the Judges' Bill of 1925, mention only "special and important reasons," "important question[s] of federal law," and conflicts cases, providing little guidance for prospective certiorari petitioners. The reason why the Court has not issued definitive guidelines should be readily apparent: either they would be so general as to be of no assistance or they would be so specific that the justices could

On the other hand, the attributes stated in Rule 10 may guide the Court's behavior. The attributes enumerated in Rule 10 are in harmony with the reasons for granting certiorari that the Court states in its written opinions.⁴⁶ In addition, the Court has little reason to inaccurately state the reasons for granting certiorari. It is reasonable to assume the Court wants to limit its workload and will seek to accurately signal to attorneys what types of cases will be reviewed so that they can make informed recommendations to their clients regarding whether to file a petition for a writ of certiorari.

The Constitution requires that cases heard by the Supreme Court contain a federal issue. Any petition for certiorari that does not raise a federal issue should be denied. The Court possesses complete discretion whether to grant petitions for certiorari; neither the Constitution nor relevant jurisdictional statutes set forth any factors the Court must consider. Rule 10 suggests that the Court is more likely to grant a petition for certiorari that involves a conflict between lower courts, a conflict between a lower court and a decision of the Supreme Court, or an important, but undecided, legal issue. The relevance of the Rule 10 criteria will be strengthened

not agree on them.

Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1412-13 (1987) (footnotes omitted) (alteration in original).

46. As I have elsewhere noted,

The Court's formal statements of the reasons for granting certiorari include: (1) maintaining uniformity by resolving circuit conflict. *See, e.g., United States v. Hyde*, 520 U.S. 670, 673 (1997) ("The Courts of Appeals for the Fourth and Seventh Circuits have reached the opposite conclusion on this issue. We granted certiorari to resolve the conflict . . .") (citations omitted). (2) maintaining uniformity by resolving conflict between state courts. *See, e.g., National Private Truck Council, Inc. v. Oklahoma Tax Comm'n.*, 515 U.S. 582, 585-86 (1995) ("We granted certiorari to resolve a conflict among the state courts as to whether, in tax cases, state courts must provide relief under § 1983 when adequate remedies exist under state law.") (footnote omitted). (3) maintaining supremacy within the federal court system by ensuring compliance with Supreme Court precedents. *See, e.g., Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982) ("Because [the Court of Appeals'] ruling appeared to be in conflict with our precedents, we granted certiorari.") (footnote omitted). (4) maintaining supremacy by ensuring compliance by state courts with Supreme Court precedents. *See, e.g., Barker v. Kansas*, 503 U.S. 594, 597 (1992) ("We granted certiorari because the holding below [in the Supreme Court of Kansas] is arguably inconsistent with our decision in *Davis* and conflicts with decisions of other state courts of last resort.") (citation and footnote omitted). (5) resolving important federal law questions. *See, e.g., Freytag v. Commissioner*, 501 U.S. 868, 873 (1991) ("We granted certiorari to resolve . . . the important questions the litigation raises about the Constitution's structural separation of powers.") (citation omitted). (6) for a combination of reasons, see for example, *Lane v. Pena*, 518 U.S. 187, 191 (1996) ("We granted certiorari to resolve . . . the disagreement in the Courts of Appeals on the important question whether Congress has waived the Federal Government's immunity against monetary damages awards for violations of § 504(a) of the Rehabilitation Act.") (citations omitted).

Smith, *supra* note 26, at 398-99 n.69 (alterations in original). Also, Stern provides a comprehensive enumeration and an enlightening discussion of statements by the Court in opinions on the merits regarding the Court's rationale for granting certiorari in particular cases, and I acknowledge my debt to the discussion. *See STERN ET AL., supra* note 7, §§ 4.1-4.29, at 162-221.

if a statistical analysis indicates that the probability the Court will grant a petition increases if an attribute discussed in Rule 10 is present.⁴⁷

Informal statements by past and present Supreme Court Justices provide another source of information concerning the determinants of the Court's agenda. These statements suggest that ideological factors influence the Justices' decisions whether to grant a petition for a writ of certiorari.

B. The Supreme Court Corrects Ideological Errors, Not Simply Legal Errors, in Individual Cases

Popular mythology⁴⁸ characterizes the Supreme Court as a "non-political, governmental institution in which the Justices impartially apply 'the law' in order to reach the 'correct' [legal] result in each case the Court hears."⁴⁹ An unsuccessful

47. The Court's statements in Rule 10 and in its opinions on the merits regarding the attributes that influence certiorari behavior guarantees neither that those attributes actually are used by the Court nor that those attributes are the only attributes used by the Court. Only an empirical analysis of Court behavior permits an informed assessment of the attributes that actually influence the Court's certiorari behavior and their relative impact.

48. Legal myths should be distinguished from lies and legal fictions:

Myths are beliefs not in consonance with reality, but not known as such; they are believed to be true. They are to be distinguished from lies, which are falsehoods knowingly used for improper purposes, and [legal] fictions, which in law are suppositions known to be in variance with fact but nonetheless accepted because they are believed to help attain beneficial ends. Myths, lies, and [legal] fictions, in other words, are all forms of statements or beliefs that are erroneous or false; the distinction between them is that the latter two are known to be false, but still are used, while myths are both false and not known as such.

ARTHUR SELWYN MILLER, *THE SUPREME COURT MYTH AND REALITY* 14 (1978).

The popular myth structure that surrounds the Supreme Court serves a valuable function to the extent it creates respect for, and promotes compliance with, the Court's decisions. See SHELDON GOLDMAN & THOMAS P. JAHNIGE, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* 108-18 (3d ed. 1985) (discussing support for the judiciary, especially the Supreme Court, and observing that support of the Supreme Court varies over time); MILLER, *supra*, at 15-41 (discussing public trust in the judiciary).

Miller correctly notes that the popular legal mythology is not believed by all. He refers to "[l]aw professors (and some political scientists)" as "the Pharisees" who "grind out heavily footnoted critiques of what the high priests [who are, of course, the Supreme Court Justices] have said." MILLER, *supra*, at 15; see also SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 2 (1986) (noting that "even some serious students of the Court have failed to adjust their conception of its role to fit [the] modern reality" of how the Court actually functions).

49. See Smith, *supra* note 26, at 387. The popular myth structure that surrounds Supreme Court decision making on the merits of a case is known as "mechanical jurisprudence." See, e.g., MILLER, *supra* note 48, at 31. It is also known as the "slot machine theory of judicial interpretation," or the "cult of the robe." See, e.g., WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 13 (1964); DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 32 (1976); SPAETH, *supra* note 32, at 3-4. According to the myth, Justices are impartial and objective decision makers whose legal decisions on the merits of a case involve only "rigorously logical deductions from 'the law.'" MURPHY, *supra*, at 17. According to the myth, the Justices are "unaffected by their political or philosophical beliefs; they simply 'discover' and apply the law without seeking to attain any personal policy goals or without being influenced, even subconsciously, by any philosophical or political belief systems." Smith, *supra* note 26, at 388 n.23. The Justices do not exercise discretion and, therefore, do not "make law." See SPAETH,

litigant, so the myth asserts, may have the Supreme Court reexamine her case so that any legal error committed by a lower court will be reversed and a correct legal decision will be achieved.⁵⁰

supra note 32, at 3 (providing statements by judges that "judges merely 'find' or 'discover' what the law is and . . . they never, ever make law").

The popular myth of Justices who merely discover and apply the law without being influenced by their personal beliefs has been vigorously attacked by proponents of legal realism, critical legal studies, feminist jurisprudence, and critical race theory. The popular myth's assumption that law can be objectively discovered and applied also has been criticized by these schools of thought. *See, e.g.,* SPAETH, *supra* note 32, at 176-93 (summarizing criticisms of the popular myth structure); SEGAL & SPAETH, *supra* note 5, at 33-73 (examining alternative models of judicial decision making).

Not surprisingly, the Justices attempt to reinforce the popular mythology through their statements in cases and in public. An example of the former is as follows:

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

Osborne v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824). An example of the latter is Justice Potter Stewart's description of his decision-making style: "For me there is only one possible way to judge cases and that is to judge each case on its facts of record, under the law and the United States Constitution, conscientiously, independently, and with complete personal detachment." *See* Paul Gewirtz, Essay, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1036 n.46 (1996) (quoting *Nomination of Potter Stewart to be Associate Justice of the Supreme Court of the United States: Hearing Held Before the Committee on the Judiciary*, in THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975, at 142 (Roy Mersky & J. Myron Jacobstein eds., Supp. 1977)).

50. *See, e.g.,* ESTREICHER & SEXTON, *supra* note 48, at 1 (discussing "the myth of the Supreme Court as the ultimate error-corrector"). Estreicher and Sexton state:

The popular view of the Supreme Court of the United States is exactly what its name implies. It is the High Court of Justice, the ultimate guarantor of the rule of law, ever ready to correct the errors of subordinate courts and ensure a just result in each case. The image of the innocent death-row inmate saved from execution by an eleventh-hour order from the Court is a powerful one — but simply an aspect of the generally held view that the Justices are there for any litigant willing to take his case "all the way to the Supreme Court."

Id. Public opinion surveys suggest the general public believes that all legal errors made by a lower court may be corrected by the Supreme Court. *See, e.g.,* Public Opinion Online, June 11, 1991, LEXIS, News Library, Public Opinion Location Library (accession number 0154199). In a 1977 survey, 1931 participants were asked: "Here is a list of statements about the courts. Please tell me whether you think each statement is correct or incorrect. . . . Every decision made by a state court can be reviewed and reversed by the U.S. (United States) Supreme Court." *Id.* Seventy-two percent of the respondents — incorrectly — believed the statement to be accurate, while only 12% of the respondents — correctly — believed the statement to be inaccurate. *Id.* Sixteen percent were "uncertain." *Id.* A 1983 survey of 983 participants yielded substantially the same results with the following question: "True or false: Every decision made by a state court can be reviewed and reversed by the U.S. Supreme Court." Public Opinion Online, April 8, 1989, LEXIS, News Library, Public Opinion Location Library (accession number 0108125). Seventy-seven percent of the respondents — incorrectly — believed the statement to be accurate, while only 11% of the respondents — correctly — believed the statement to be inaccurate.

The popular myth is incorrect.⁵¹ A petitioner has no legal right to have the Court review her case if the alleged error involves only state or local law⁵² or if a petition for a writ of certiorari is the only available method for placing the case before the Court. In addition, the Court has indicated that certain types of legal errors, "such as an erroneous factual finding or the misapplication of a properly stated rule of law," are unlikely to result in a petition for a writ of certiorari being granted.⁵³ Finally, the number of cases docketed with the Supreme Court⁵⁴ make it impossible for the Court to review each case closely enough to detect, much less to correct, each individual legal error — even if it were disposed to do so.⁵⁵

The Court undoubtedly does correct errors in some cases. Substantial uncertainty exists, however, regarding both "the nature of the errors which the Justices believe they are correcting"⁵⁶ and the nature of the errors which the Court actually is correcting. Political scientists have identified two possible models of Supreme Court error correction. The "legal error" model, the model on which popular mythology is based, embraces the "viewpoint that law is determinate and that a legal error occurs when there has been an 'objective' or 'actual' mistake in the creation, selection, interpretation, or application of 'the law' [in] the litigant's specific case."⁵⁷

Id. Twelve percent of respondents fell into the "Don't know/no answer" category. *Id.*

51. The popular myth of the Supreme Court as a corrector of legal errors in individual cases may be dangerous. A myth that significantly varies from reality may erode the respect for and the confidence in the Supreme Court, which are required to ensure compliance with its decisions. See ESTREICHER & SEXTON, *supra* note 48, at 6 ("The vision of the Court as error-corrector, though vaguely comforting, breeds frustration among those who do not gain a hearing despite their perception that error requiring review has occurred in their cases.").

52. An allegation that a state supreme court erred in its interpretation of a state statute — without more — is an example of a matter involving only state law.

53. See SUP. CT. R. 10 (stating that "[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").

54. See *supra* notes 8-10 and accompanying text concerning the Court's caseload.

55. Estreicher and Sexton state the matter as follows:

Myth often captures Truth, but the myth of the Supreme Court as the ultimate error-corrector is fundamentally misleading — at least as applied to the Court of the 1980s. Today's Court sits at the top of a multilayered, regionally diverse judicial system that decides more cases in a week than the Court could decide in a decade. Given such numbers, it is impossible for the Court to intervene in any way in more than an inappreciable fraction of the cases brought to American courts.

ESTREICHER & SEXTON, *supra* note 48, at 1.

56. See Smith, *supra* note 26, at 388 n.26.

57. See *id.* at 389; see also, e.g., SEGAL & SPAETH, *supra* note 5, at 32 (setting forth a "legal model" of decision making in which the Justices' determination of error is based on "the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, precedent, and a balancing of societal interests").

Situations exist in which no legal error reasonably can be said to exist. For example, the Court frequently acts by deciding unsettled federal questions, questions that present cases of first impression for the Court. The lower court's decision is not an error in the sense that it is at odds with the Supreme Court. The lower court's decision can be "wrong" or "erroneous" only after the Supreme Court decides what the law is and how it is to be interpreted. The same is true when the Court is asked to resolve a circuit split. At the time the lower court decision was made, it was not wrong. The lower court simply

The "ideological error" model stands as an alternative and is based on the assumptions "that law frequently is indeterminate; that the law's indeterminacy gives rise to the opportunity for the exercise of judicial discretion; that Justices are policy-motivated and seek to promote their individual policy goals; and that Justices utilize the opportunity for discretion to correct ideological errors committed by lower courts."⁵⁸ From the perspective of an individual Justice, a decision is ideologically incorrect when it "is not in harmony with the Justice's underlying political, social, economic, religious, or philosophical belief structure."⁵⁹ From the perspective of "the Court," an ideological error occurs in two situations: (1) when there is a conservative Supreme Court and a liberal decision below, or (2) when there is a liberal Court and a conservative decision below. The Supreme Court is considered to be liberal (or conservative) when five or more Justices customarily vote for liberal (or conservative) results.

The Justices profess that the Court rarely operates⁶⁰ in accordance with the popular myth of individual legal error correction by granting a petition for the sole purpose of correcting a legal error made by a lower court in the particular case.⁶¹ Nonetheless, the Justices are reluctant to acknowledge that the Court may operate to correct ideological errors.⁶² Supreme Court Rule 10⁶³ and the language contained in most written opinions in which the Court states the reason it granted certiorari in the particular case⁶⁴ suggest that the Court does not act to promote the

applied the law of that circuit.

58. See Smith, *supra* note 26, at 389 (citing Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828, 828 (1989) (discussing error-correcting strategy)).

59. *Id.*

60. Stern indicates that the Court sometimes will grant certiorari in order to correct a "gross miscarriage of justice or a subtle erosion of a statutory or legal principle." STERN ET AL., *supra* note 7, at 193-95 (footnotes omitted). However, Stern also indicates that the "great majority" of these cases involve in forma pauperis petitioners in capital cases. See *id.* at 194 n.55.

61. See, e.g., *id.* at 193-95 (providing quotations in which Justices state their belief that the Court's main function is not legal error correction). For example, Justice Rehnquist is quoted as saying: "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Id.* at 193 (quoting Justice Rehnquist in *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974)). And, Justice Harlan is quoted as saying: "The fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari, nor, for that matter, is the fact a case may have been rightly decided in itself enough to preclude certiorari." *Id.* at 193 (quoting Justice Harlan, *Manning the Dikes*, 13 RECORD OF N.Y.C. BAR ASS'N 541, 551 (1958)).

62. See, e.g., S. Sidney Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision "On the Merits,"* 4 POLITY 429, 437 (1972) (noting that Justices Taft, Frankfurter, and Warren affirmed that "after full review, Supreme Court cases are decided on the legally relevant issues presented — that is, 'on the merits'"); LAWRENCE BAUM, *THE SUPREME COURT* 144 (7th ed. 2001) (quoting Chief Justice Rehnquist's statement during nomination hearings for his initial appointment to the Supreme Court that, "My fundamental commitment, if I am confirmed, will be to totally disregard my own personal belief.").

63. SUP. CT. R. 10(a) (setting forth a nonexhaustive list of factors that the Court purports to consider when deciding whether to grant a petition for certiorari). For the language of Rule 10, see *supra* text accompanying note 43.

64. See STERN ET AL., *supra* note 7, at 165 ("The Court tries to provide guidance as to the standards it applies in passing upon petitions for certiorari in two ways: first, by incorporating standards in the
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Justices' personal ideologies. Abundant anecdotal⁶⁵ and empirical⁶⁶ evidence suggests, however, that individual Justices and the Court as a whole frequently do engage in ideological error correction.

Court's rules; and second, by stating in some, but by no means all, opinions why certiorari was granted in the particular case." For examples of such statements, see *supra* note 46.

65. See, e.g., PERRY, *supra* note 16, at 276 (providing numerous quotations from Justices and former Supreme Court clerks that suggest an ideological component in certiorari decision making); BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* (1979) (describing, inter alia, how Chief Justice Warren asked his clerks to scan petitions for certiorari for a right-to-counsel case that would permit the Court to expand the right to counsel for indigents).

66. If ideological error correction is occurring, statistical analysis of the Court's behavior should result in three findings. First, the existence of an "error" (an ideologically incorrect decision by the court below) should be associated with an increased probability that a petition for certiorari will be granted. Second, among the cases in which certiorari has been granted, the Court should reverse the lower court's (ideologically incorrect) decision more frequently than the Court votes to affirm the lower court's (ideologically correct) decision. Third, Justices who voted to grant certiorari in a particular case should be more likely to vote to reverse the lower court's decision than to vote to affirm the lower court's decision. See, e.g., SEGAL & SPAETH, *supra* note 5, at 191, 194-95; see also Brenner & Krol, *supra* note 58, at 828 (stating that if a court is engaged in ideological error correction, statistical analysis should show "a direct, positive relationship between voting to grant certiorari and voting to reverse [— thus, correcting the ideological error —] at the final vote on the merits").

Many empirical studies have concluded that the existence of an ideological error is associated with an increased probability that the Court will grant a petition for certiorari or that a Justice's vote to grant review is associated with a later vote to reverse on the merits. See, e.g., Virginia C. Armstrong & Charles A. Johnson, *Certiorari Decisions by the Warren & Burger Courts: Is Cue Theory Time Bound?*, 15 POLITY 141, 147-50 (1982); Lawrence Baum, *Judicial Demand — Screening and Decisions on the Merits: A Second Look*, 7 AM. POL. Q. 109, 114 (1979); Lawrence Baum, *Policy Goals in Judicial Gatekeeping: A Proximity Model of Discretionary Jurisdiction*, 21 AM. J. POL. SCI. 13, 23-29 (1977) (finding that California Supreme Court justices voted to grant certiorari in criminal cases when decisions of the lower court departed significantly — in either a liberal or conservative direction — from their individually preferred policy positions); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1112 (1988) [hereinafter Caldeira & Wright, *Organized Interests*]; Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 L. & SOC'Y REV. 807, 815 (1990); Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387, 396 (1982) (finding a positive relationship between a Justice's vote to grant review and a subsequent vote to reverse on the merits); Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari*, 41 J. POL. 1185, 1187 (1979); Ulmer, *supra* note 62, at 446 (finding a positive, although weak, relationship between a Justice's vote to grant certiorari and his subsequent vote to reverse the decision on the merits).

These studies examined the impact of multiple factors on the decision whether to grant a petition for certiorari, and found that factors other than the ideological correctness of a lower court decision were also associated with the Court's certiorari decision. For a discussion of these factors, see the review of empirical literature, *infra*. In addition, these studies acknowledged the possibility that factors other than ideological error correction might play a role in cases in which the Court voted to grant certiorari and then voted to reverse on the merits. See, e.g., BAUM, *supra* note 4, at 129-43 (asserting that mass public opinion and Congress are among the factors that influence the Court's decisions on the merits); D. Marie Provine, *Deciding What to Decide: How the Supreme Court Sets Its Agenda*, 64 JUDICATURE 320 (1981).

Stern asserts that "[t]he fact that there are many more reversals than affirmances following the grant of certiorari further indicates that the Court is more likely to grant certiorari when it believes the decision below may be erroneous." STERN, ET AL, *supra* note 7, at 224-33 (footnote omitted). Indeed, the data indicate that the Court routinely reverses or vacates twice as many cases as it affirms. *Id.*

The popular myth of individual legal error correction suggests that the Court frequently considers the existence of a legal error as a factor in its certiorari decision making. However, the jurisdictional requirement that the Court review only cases involving a federal question and the Court's crushing caseload ensure that the Court could review only a small fraction of the petitions seeking the correction of individual legal error, even if it were disposed to do so. Further, the Court's statement in Rule 10 suggests that the Court does not perceive its function as correcting legal errors in individual cases; rather, the Court has indicated that it is intended to, and functions to, determine important issues of federal law, ensure compliance with Supreme Court precedents, ensure federal supremacy, and resolve conflicts between lower courts concerning federal questions.

C. Attributes Suggested by Political Science Literature

Political scientists have examined whether the Court involves itself in ideological error correction, and they have concluded that it does.⁶⁷ Thus, the ideological direction (liberal or conservative) of a lower court decision may be an attribute that is associated with the decision whether to grant a petition for a writ of certiorari. Might nonideological attributes also affect the Court's decision whether to grant a petition for a writ of certiorari?

Political scientists have statistically analyzed the relationship between a variety of attributes and the Court's decision whether to grant a petition for a writ of certiorari. Positive associations⁶⁸ at statistically significant levels⁶⁹ repeatedly have been found between the Court's decision whether to grant a petition for certiorari and (1) lower court conflict, alleged and actual;⁷⁰ (2) noncompliance, alleged and actual, with Supreme Court precedent;⁷¹ and (3) attributes that signal the importance of a case. These attributes include the existence of conflict;⁷² the existence of dissension, that is, disagreement between the courts below the Supreme Court or

67. See *supra* note 66.

68. An association between variables exists if they have a tendency to change together. An association is positive if the presence of an attribute (for example, the presence of an allegation of a conflict between lower courts) is associated with the granting of petitions for certiorari. An association is negative if the presence of an attribute (for example, a pro se petitioner) is associated with the denial of petitions for certiorari. For a more developed, yet still accessible, explanation of variables and the association between them, see Smith, *supra* note 26.

69. For an accessible explanation of statistical significance, see Smith, *supra* note 26, at 401 n.77.

70. See, e.g., Caldeira & Wright, *Organized Interests*, *supra* note 66, at 1114 (conflict included "dissension in the courts below").

71. See *id.* (stating conflict was operationalized to include "conflicts between [a] lower court and Supreme Court precedent" and data analysis led to a conclusion that both "actual" and petitioner-alleged conflict increased the probability of certiorari being granted); see also S. Sidney Ulmer, *Conflict with Supreme Court Precedent and the Granting of Plenary Review*, 45 J. POL. 474, 475 (1983) (contending conflict with Supreme Court precedent was operationalized to involve the situation when one or more dissenters in the court immediately below the Supreme Court alleged that the majority's decision conflicted with Supreme Court precedent).

72. See PERRY, *supra* note 16, at 249 ("[Conflict] is a proxy for or is indicative of other important criteria. It indicates that an issue is of sufficient importance that it has arisen in different places, and the disposition is not obvious.").

within the court immediately below the Supreme Court;⁷³ the identity of the petitioner,⁷⁴ especially whether the United States or the Solicitor General acts as petitioner;⁷⁵ the status of the petitioner;⁷⁶ the number of amicus curiae briefs⁷⁷

73. See Caldeira & Wright, *Organized Interests*, *supra* note 66, at 1115 (suggesting that either the existence of one or more dissenting opinions in the court immediately below the Supreme Court or the situation in which the court immediately below the Supreme Court reverses the decision of the court immediately below it may "signal ferment in the lower courts and suggest a problematic outcome, one perhaps worthy of a closer look"). Perry suggests that unanimity within the court immediately below the Supreme Court might suggest to the Justices that "[i]f those three could agree on an opinion, there is little reason to think that the Supreme Court would come out differently." PERRY, *supra* note 16, at 125.

74. Comparatively little research has been conducted concerning the comparative success rates for different types of petitioners. However, the existing research concludes that state governments, local governments, and corporations are more likely to have their petitions granted than are individuals. See, e.g., PERRY, *supra* note 16, at 136-37 (sampling 1213 randomly selected petitions and observing the following petitioner grant rates: United States — 100%; states, counties, and cities — 12.4%; corporations and other business associations — 14.3%; organized groups — 10.2%; and individuals (including those asserting a class action) — 2.9%). One may speculate that the varied grant rates result from differences in the expertise of counsel (which may, in turn, be related to differences in financial resources) and from the potentially greater impact of issues raised by larger entities. Support for this speculation comes from statistical analysis that concludes that petitions filed by individuals are more likely to contain a request for legal error correction in the particular case and to contain a frivolous legal issue, and are less likely to contain attributes, such as an allegation of a conflict between federal courts of appeal, which are positively associated with the grant of a petition. See *infra* Part II; see also Smith, *supra* note 26.

75. Petitions filed by the Solicitor General enjoy a special status because the Justices believe they have gone through a rigorous screening process. See PERRY, *supra* note 16, at 93. Not only are they normally placed on the "discuss list," *id.*, but they also are granted at a much higher rate than petitions filed by other litigants. See, e.g., BAUM, *supra* note 4, at 108 (noting that for the period encompassing the 1984 Term through the 1989 Term, the Court granted 76% of the petitions filed by the federal government, which the Solicitor General usually filed, while the Court granted only 2.5% of cases in which the federal government neither filed the petition nor supported it by filing an amicus brief); PERRY, *supra* note 16, at 136-37 (finding that in a sample of 1213 randomly selected petitions, the Court always granted petitions filed by the federal government); Armstrong & Johnson, *supra* note 66, at 145 (finding that the Court granted 47.8% of petitions containing the federal government).

76. See S. Sidney Ulmer, *Selecting Cases for Supreme Court Review: An Underdog Model*, 72 AM. POL. SCI. REV. 902 (1978) [hereinafter Ulmer, *An Underdog Model*]. Ulmer examined the impact of litigant status on the decision whether to grant a petition for review. Ulmer divided petitioners into higher-status "upperdogs" and lower-status "underdogs." Upperdogs include governments (federal, state, and local and their agents) and business corporations; underdogs include labor unions, employees, minority group members, individuals, aliens, and criminals. *Id.* at 903. Using docket books in which Justices recorded their votes on whether to grant certiorari, Ulmer observed that liberal Justices tended to support granting petitions filed by underdogs and that conservative Justices tended to support granting petitions filed by upperdogs. See *id.* But see S. Sidney Ulmer, *Selecting Cases for Supreme Court Review: Litigant Status in the Warren and Burger Courts*, in COURTS, LAW, AND JUDICIAL PROCESSES 284, 294-95 (S. Sidney Ulmer ed., 1981) [hereinafter Ulmer, *Litigant Status*] (concluding that in both the liberal Warren Court era and in the conservative Burger Court era, the Court granted the petitions filed by upperdogs at a higher rate than petitions filed by underdogs).

Ulmer asserts that litigant status has an impact on the Court's actions because the Court seeks to avoid "undue system stress" by "inadequately responding to the demands/needs of high status system members. For it is precisely such 'elites' who can cause serious erosion in support for the Court." Ulmer, *Litigant Status*, at 286-87. Alternative explanations for the impact of litigant status are more compelling. First, high litigant status is associated with greater financial resources, greater expertise in dealing with the

arguing whether a petition ought to be granted,⁷⁸ and the filing of briefs-in-opposition and reply briefs.⁷⁹

Existing empirical research supports the conclusion that the Court's certiorari decision-making process relies on the factors set forth in Rule 10 and in the Court's formal statements. Much of the existing research suffers from methodological flaws, however, including analyzing only one or a few attributes at one time; using bivariate instead of multivariate analysis; or not controlling for the subject matter of the case or for the ideological position of the Court.

II. Results of Statistical Analysis

Having catalogued the attributes of petitions that the Court and others assert are used to make the decisions whether to grant certiorari, it must be determined whether the attributes are, in fact, so used.⁸⁰ A statistically significant association

Supreme Court (for example, the Solicitor General appears frequently before the Court), and the potentially greater impact of issues raised by these generally larger, more powerful entities. Second, petitions filed by individuals are more likely to contain a request for legal error correction in the particular case and to contain a frivolous legal issue and are less likely to contain attributes, such as an allegation of a conflict between federal courts of appeal, which are positively associated with the grant of a petition. See Smith, *supra* note 26; *infra* Part II.

77. In addition to the pleadings filed by the petitioner and respondent, nonparties are permitted, with certain restrictions, to file *amicus curiae* briefs. The Court views the role of *amicus* briefs as follows: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." SUP. CT. R. 37.1. Where parties to the litigation give written consent or the Court approves, *amicus curiae* briefs may be filed to either support or oppose the granting of certiorari. SUP. CT. R. 37.2. Consent is not needed when the brief is sponsored by the governmental entities at all levels when proceeding through their appropriate legal representatives, such as the Solicitor General or a state attorney general. The applicable Supreme Court Rule reads as follows:

No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

SUP. CT. R. 37.4.

78. See Caldeira & Wright, *Organized Interests*, *supra* note 66, at 1112 (suggesting "that the potential significance of a case is proportional to the demand for adjudication among affected parties and that the amount of *amicus curiae* participation reflects the demand for adjudication"). Professors Caldeira and Wright also note that "*amicus curiae* participation by organized interests provides information, or signals — otherwise largely unavailable — about the political, social, and economic significance of cases on the Supreme Court's paid docket and that Justices make inferences about the potential impact of their decisions by observing the extent of *amicus* activity." *Id.* The importance of an issue may also be inferred from the willingness of a friend of the court to incur the significant expense (estimated to be between \$15,000 and \$20,000) of filing an *amicus* brief on the question of whether the Court should grant the petition for certiorari. See *id.*

79. The expense of preparing a brief-in-opposition might serve as a signal to the Court that the party considers the matter to be of importance. See *id.* at 1112 (discussing this argument in the context of *amicus* briefs).

80. I do not mean to imply that the Court deceives the public, I simply mean that the Court may
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between an attribute's presence and the Court's decision to grant certiorari constitutes good evidence that the attribute is considered in the decision-making process. In Part II, I report the results of my statistical analysis.

The results are based on an analysis of a data set of 318 cases randomly drawn from those paid petitions for statutory certiorari raising an equal protection argument in which the Court made a decision whether to grant review during its 1981 through 1987 Terms.⁸¹ The event I examine — the dependent variable — is the Court's decision whether to grant certiorari, followed by a full briefing, an oral argument, and a written decision on the merits. The dependent variable is dichotomous, that is, it is measured in a binary (1/0) manner; either the Court granted certiorari and wrote an opinion on the merits after oral argument or the Court did not.⁸² The Supreme Court granted certiorari and published a written decision on the merits after full briefing and an oral argument in 17, or 5.35%, of the 318 cases used in this analysis.⁸³

A. Results Concerning Individual Attributes

A careful review of the association between individual attributes and the decision whether to grant a petition for certiorari enlarges our view of the Supreme Court's agenda-setting practices. In order to focus on the attributes themselves, this article summarizes the results of the statistical results in the text, relegating the specific statistics to footnotes.

believe it uses these attributes when, in fact, it does not.

81. For an explanation of why I examined these cases, see *supra* notes 27-34 and accompanying text.

82. The Court relatively frequently grants certiorari and then vacates the decision below. The grant is made in conjunction with an order remanding the case to a lower court for disposition in light of another case which the Court did decide on the merits, usually during the same Term. I did not operationalize the dependent variable to include this situation. The Court may have selected another case for plenary treatment because the Court determined that the case accorded full review possessed some attribute or attributes that the case to be vacated did not. I will postpone to another day a research project to assess the similarities and differences between cases granted plenary review and those in which the Court granted certiorari, but then vacated and remanded.

83. During the period I studied, the average grant rate for the paid docket was 6.3%. EPSTEIN ET AL., *supra* note 8, at 70-71. The 5.35% grant rate for my sample is approximately one percentage point lower than the paid-docket-wide average. I only can speculate why the grant rate for equal protection cases was lower than the average rate for the entire paid-petition docket. I believe that the Fourteenth Amendment's phrase "equal protection" and the Fifth Amendment's phrase "due process" (which contains an unwritten equal protection component) sometimes were used by petitioners as a "catch-all" when they had no other basis for their legal claim. In other words, "I was denied equal protection" was, in the minds of the petitioners, the equivalent of "I was treated unfairly" or "I did not get the result I wanted." This may have been particularly true for pro se petitioners, who undoubtedly lacked a full understanding of the deceptively simple phrase "equal protection," and who equated a request for equal protection with a generalized cry for "justice." Further, an equal protection argument was, at least facially, a more generally appropriate vehicle for raising a spurious federal question (which I will discuss in the next section of this part) than more tightly focused constitutional provisions such as the Free Exercise Clause.

I suspect that a comparison of a sample of equal protection cases to a sample of cases in a more tightly focused area, such as the Free Exercise Clause, would reveal that the former contained a much higher percentage of "unworthy" petitions and a correspondingly lower grant rate.

1. Conflict

Supreme Court Rule 10 indicates that a conflict between courts may serve as the basis for the Court granting a petition for certiorari.⁸⁴ Rule 10 suggests, therefore, that the allegation of a "conflict"⁸⁵ will be positively associated with a decision to grant a petition. Indeed, all the petitions which the Court granted contained an allegation of conflict.⁸⁶

The political science literature and the Justices, in their comments in articles, speeches, and interviews, focus on resolving two forms of conflict: conflict with Supreme Court precedent and conflict between federal circuits.⁸⁷ In fact, all the petitions granted by the Court contained an allegation of one or both of these forms of conflict. The statistical analysis suggests that the Supreme Court is more likely to grant certiorari if the petition for a writ of certiorari contains an allegation of a conflict with Supreme Court precedent⁸⁸ or contains an allegation of a conflict between two or more federal circuit courts of appeals⁸⁹ than if such a claim of conflict is absent.

84. See, SUP. CT. R. 10; see also *supra* text accompanying note 43.

85. A petition was deemed to have alleged the existence of a particular type of conflict if such an allegation was made either in a question presented or in one of the petition's point headings. The existence of conflict is in the eyes of beholders, the Justices of the Supreme Court; therefore, I made no attempt to measure the presence of actual conflict.

86. Conflict of some type was alleged in 143, or 45%, of the 318 cases examined. The Court granted review in seventeen, or 11.9%, of the 143 cases in which conflict was alleged. Using the chi-square statistic to present an inferential test of association, the association between the allegation of conflict and the decision whether to grant a petition for certiorari is significant at $p < .00000$.

The existence of an association between the granting of certiorari and the various attributes was tested using the chi-square inferential test of association. See generally WILLIAM R. ARNEY, UNDERSTANDING STATISTICS IN THE SOCIAL SCIENCES (1990); WILLIAM HAYS, STATISTICS FOR THE SOCIAL SCIENCES (2d ed. 1973); FRANK J. KOHOUT, STATISTICS FOR SOCIAL SCIENTISTS: A COORDINATED LEARNING SYSTEM (1974). The chi-square test permits one to reject a null hypothesis that there is no association between two variables, but it does not indicate the strength of association. For a discussion of testing for association and the statistical significance of such tests, see Smith, *supra* note 26. In this article, "[t]he null hypothesis will be rejected if p is less than or equal to .05, meaning that the probability of the observed distribution being drawn from a population in which there is no association between the variables is less than or equal to five in one hundred." *Id.* at n.87. For a detailed explanation of these statistical concepts, see most introductory statistics textbooks.

87. See *supra* notes 47, 71, 72 and accompanying text.

88. Conflict with Supreme Court precedent was alleged in 101, or 31.8%, of the 318 cases. When conflict with Supreme Court precedent was alleged, the Court granted review in sixteen, or 15.8%, of the 101 cases. When conflict with Supreme Court precedent was not alleged, the Court granted certiorari in only one, or 0.5%, of the remaining 217 cases. Using the chi-square statistic to present an inferential test of association, the association between the allegation of a conflict with Supreme Court precedent and the granting of certiorari is significant at $p < .00000$.

89. Conflict between two or more federal courts of appeals was alleged in seventy-two, or 22.6%, of the 318 cases examined. When conflict between circuits was alleged, the Court granted certiorari in eight, or 11.1%, of the seventy-two cases. When conflict among federal courts of appeals was not alleged, the Court granted certiorari in nine, or 3.7%, of the remaining 246 cases. An inferential test of association, the chi-square statistic, indicates the association between the allegation of circuit conflict and the decision to grant certiorari is significant at $p = .01$.

Rule 10's reference to conflict may result in some petitioners alleging the existence of a conflict in the hope of increasing the probability that the Court will grant their petition. The Justices must recognize this strategy. An allegation of a conflict by a more impartial observer, by a dissenting judge in the court below, for example, may carry more weight than an allegation of conflict in the petition. The data indicate just that. The Supreme Court was more likely to grant certiorari if a judge in a dissenting opinion in the court immediately below the Supreme Court alleged a conflict with Supreme Court precedent than if such an allegation was absent.⁹⁰ Too few cases involved an allegation of circuit conflict by a lower court judge to permit an evaluation of the impact of such an allegation.⁹¹

2. Importance of the Underlying Issue

Supreme Court Rule 10 states that the Court will consider whether "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 [the Supreme] Court."⁹² Rule 10 also states that the Court will resolve issues involving conflicts with respect to "important" issues.⁹³ Rule 10 does not provide a test for determining whether an issue is "important." Rule 10's ambiguity promotes judicial flexibility and may result from the Justices' recognition both that an issue's importance may fluctuate over time and that totally new issues may arise and become important.

A knowledge of what constituted an "important" legal issue during just the time period covered by this article will increase understanding of the agenda-setting process. In this section, I report the analysis of several attributes that might be surrogates for "importance."⁹⁴

90. Conflict with Supreme Court precedent was alleged by a judge in a dissenting opinion in the court immediately below the Supreme Court in twenty-two, or 6.9%, of the 318 cases. When conflict with Supreme Court precedent was alleged, the Court granted review in six, or 27.3%, of the twenty-two cases. On the other hand, when conflict with Supreme Court precedent was not alleged, the Court granted certiorari in eleven, or 3.7%, of the remaining 296 cases. This relationship is significant at $p < .00000$.

91. A judge in a dissenting opinion in the court immediately below the Supreme Court alleged a conflict between two or more federal circuit courts of appeals in only one, or 0.3%, of the 318 cases examined, and certiorari was not granted in the case. The small number of cases in which a judge alleged a conflict between two or more federal courts of appeals is not surprising. The lower court judge's role is not to resolve circuit splits, so the existence of such splits would be either irrelevant (as in a case in which the court was applying precedent for that jurisdiction) or of minor importance (as in a case of first impression in the jurisdiction, in which case the existence of conflict might be noted, but not with the same urgency as if the court were being called upon to resolve the conflict).

92. SUP. CT. R. 10(c) (emphasis added).

93. See SUP. CT. R. 10; text accompanying *supra* note 43.

94. I immediately concede the circular nature of the argument that is implicit in my reporting of these results. The argument's essence is as follows: The Court asserts that it grants petitions for a writ of certiorari in order to decide important issues. A rational Justice might consider an important issue to be one [that, for example, raises an issue that would receive heightened scrutiny]. We would expect to see a positive association between the higher level of scrutiny and the granting of petitions for certiorari. And, indeed, such an association exists at a statistically significant level. Therefore, the Court must consider issues that would receive heightened scrutiny to be more important than other issues.

a) Importance as Indicated by Heightened Scrutiny

Through its decisions outlining the level of scrutiny to be applied to different categories of equal protection cases, the Court has suggested the importance it attaches to certain types of equal protection issues.⁹⁵ The equal protection guarantee protects persons from certain government actions that fail to treat similarly situated individuals in a similar manner. While a government may create classifications that divide people into groups, the classifications may neither be based on impermissible criteria nor be unreasonable or arbitrary. During the time period I studied, the Court used three legal tests to determine the constitutionality of a particular classificatory scheme (or of an action which had the effect of creating a classificatory scheme).

The Court subjected a classification based on a suspect criterion (race, ethnicity, or national origin) or which impinged upon a fundamental constitutional right (such as the regulation of the content of speech under the First Amendment) to the "strict scrutiny" test.⁹⁶ The Court declared this classification unconstitutional unless the government demonstrated both that there was a "compelling" need for such a classification and that there was no less restrictive or burdensome means of achieving the government's interest. The government had the burden of proof and very rarely met this burden.

The Court subjected classifications based on gender or illegitimacy to the "intermediate scrutiny" test and declared the classification unconstitutional unless the government demonstrated that the classification was "substantially related" to an "important governmental objective." Here, too, the government bore the burden of proof.

A classification that furthered a governmental purpose, but did not fall within the previous two categories (which included most governmental action that furthered the general social welfare, economic matters, and the regulation of business) was subject to the "rational basis" test. The Court upheld such a classification as long as it furthered a legitimate governmental purpose and the method used was rationally related to achieving the governmental end. The Court normally deferred

This argument assumes the conclusion. Therefore, the argument and the statistical results which accompany it should be considered to provide a piece of evidence for, but not to make the full case for, the importance of the issues discussed.

95. The discussion of equal protection doctrine during the period studied in this article is based on JOHN NOWAK ET AL., *CONSTITUTIONAL LAW* (2d ed. 1983) and LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1988). In addition, I would like to express my thanks to Professor Eugene Shapiro of the Cecil C. Humphreys School of Law, The University of Memphis, for his review of, and comments concerning, this section.

96. For cases involving a state action in which a classification was drawn on the basis of alienage (noncitizenship), the Court applied a strict scrutiny standard. This was subject to an exception for classifications that involved the exercise of political functions (elective and important nonelective executive, legislative, and judicial positions), in which the Court applied a more deferential standard. Because of the federal government's broad authority over immigration and naturalization, the standard for review of federal action was, in general, deferential.

to the judgment of the other branch or level of government, and overturned very few purely social welfare classifications.

Equal protection cases appear well suited for testing the Court's assessment of the importance of general categories of legal issues. The more stringent the test that would be applied to a particular classificatory scheme, the more important the Court must perceive protection of the underlying right from government interference. It is reasonable to expect, therefore, that all other factors being equal, the Court would deem more important and review at a higher rate those cases involving legal facts that trigger heightened scrutiny than cases involving facts that trigger rational basis scrutiny.⁹⁷ Indeed, the data indicate that the Supreme Court was more likely to grant certiorari if the equal protection issue concerned a classification or right that would trigger heightened (strict or intermediate) scrutiny⁹⁸ than if the issue did not.⁹⁹

b) Importance as Suggested by the Subject Matter of the Case

The political science literature suggests that the Court considers some "issue areas" to be more important than others.¹⁰⁰ It is plausible that, all other things being equal, issue areas that implicate the power of the federal government might be deemed to be most important because they likely will have an impact on a large number of people and because they likely involve functions or activities that are critical for the federal government's continued vitality. Two specific issue areas come immediately to mind: issues involving federalism and issues involving "core" governmental powers.

Federalism issues involve conflicts between the federal government and the state and local governments. In the nonjudicial arena, the most common federalism issues are the closely related issues of preemption and supremacy. Preemption issues concern whether, in enacting a legislative scheme, Congress intended to fill the entire subject area, thus precluding concurrent, but nonconflicting, state action in the

97. Of course, only the Court is in the position to know if it is a case worthy of heightened scrutiny. Therefore, in coding to obtain information to test this hypothesis, I coded the allegation of the classification or the denial of the right. I did not attempt to determine its actual existence.

98. I examined the level of scrutiny that a case likely would receive if the Court granted certiorari and decided the case on its merits. A case was deemed to be "important" if the case involved an allegation, which *if true*, would have led to heightened scrutiny (strict or intermediate scrutiny) under equal protection doctrine, for example, the allegation of a classification based on race, national origin, ethnicity, alienage, gender, or illegitimacy. The case also was considered important if the petition contained an allegation that the government's action impinged on a fundamental constitutional right, such as the freedoms of speech (content-based restrictions) or religion, or implicated the right of privacy.

99. A case was deemed to be "important" in sixty-two, or 19.5%, of the 318 cases examined. The Court granted certiorari in nine, or 14.5%, of these sixty-two cases. By contrast, certiorari was granted in eight, or only 3.1%, of the remaining 256 cases. The chi-square test of association is significant at $p = .0004$.

100. Because all the cases I examined raised an equal protection issue, the constitutional/economic dichotomy is not an appropriate test of importance. And, because economic issues generally are tested with the deferential rational basis test, the analysis of levels of scrutiny indirectly tested for the impact of an economic issue within the equal protection area.

area.¹⁰¹ Supremacy issues concern whether two laws, one federal and one state or local, directly conflict, in which case the latter must yield to the former.¹⁰² The data indicate that the Supreme Court was more likely to grant a petition for certiorari if one or more of the legal issues involved an allegation of a federalism issue than if the petition did not involve such an issue.¹⁰³

The Court has suggested that it will grant review in cases involving essential government functions.¹⁰⁴ Thomas Cronin has argued that core or essential governmental functions are those that reside in the departments that make up the inner cabinet (State, Defense, Treasury, and Justice Departments), that is, those departments established immediately after the nation's founding because their activities were deemed essential to the nation's operation.¹⁰⁵ And, the data indicate the Supreme Court was more likely to grant review if one or more of the questions presented implicated a governmental function involving foreign relations (including matters involving Indian nations), immigration, defense, or federal taxation than if the question did not implicate any of these powers.¹⁰⁶

c) Importance as Measured by Current Social Issues: Gender-Based and Race-Related Issues

The literature suggests that the Supreme Court grants certiorari to settle legal issues involving the great social issues of the day. The 1980s witnessed a struggle concerning the legal rights of women and minorities, with abortion, sexual harassment, and equality of job opportunities and pay being sources of significant debate. The data indicate that the Supreme Court was more likely to grant review

101. Suppose, for example, that Congress passed a consumer protection law that provides a certain set of rights and remedies for consumers. A state then passed a law that provides for rights and remedies in areas not specifically covered by the federal statute. Businesses might object to the state's action on the ground that Congress preempted the subject, that is, provided the entire universe of rights and remedies.

102. Suppose, for example, that Congress passed a statute providing that the maximum interest rate that may be charged on credit purchases is 12%. Suppose further, that a state passed a law identical in every respect except that it allowed a 13% rate to be charged. There is a direct conflict, and the state law must yield to the federal statute.

103. A federalism issue was alleged in eleven, or 3.5%, of the 318 cases examined. The Court granted certiorari in two, or 18.2%, of the eleven cases. By contrast, when a federalism issue was absent, the Court granted certiorari in eleven, or only 4.9%, of the remaining 307 cases. The chi-square test of association is marginally significant at $p = .054$.

When collecting data about cases, I did not differentiate between cases involving a preemption issue and cases involving a supremacy issue. Therefore, I cannot provide a breakdown of the "federalism" cases.

104. See *Donaldson v. United States*, 400 U.S. 517, 522 (1971); *United States v. Zacks*, 375 U.S. 59, 61 (1963) (indicating that the Court granted certiorari because of the importance of the administration of the tax laws).

105. THOMAS CRONIN, *THE STATE OF THE PRESIDENCY* (1980).

106. A core governmental function was implicated in nineteen, or 6%, of the 318 cases examined. The Court granted certiorari in four, or 21.1%, of the nineteen cases. By contrast, when a core governmental function was not involved, the Court granted certiorari in thirteen, or only 4.3%, of the remaining 299 cases. The chi-square test of association is significant at $p = .002$.

if one or more of the legal issues involved a claim of gender discrimination or involved a privacy issue, such as abortion, than if such an issue of social concern was absent.¹⁰⁷ On the other hand, the data do not suggest that the Supreme Court was more likely to grant review if one or more of the legal issues involved a claim of racial discrimination than if such a claim were absent.¹⁰⁸

d) Importance as Measured by the Opinion of Others Concerning the Case's Importance

The data suggest that the Court considered "important" issues to have included issues involving preemption or supremacy, core government functions, gender discrimination, or privacy issues, such as abortion. These issue areas are rather broad; however, the Court certainly considered some cases within these broad categories to be more important than other cases. How did the Court decide which cases were the most certworthy? Perhaps the Court viewed the following actions as providing insight into the importance that the litigants and other interested parties attach to the case: (1) whether a brief-in-opposition, a reply brief, or an amicus brief had been filed, (2) whether the court immediately below the Supreme Court published a written opinion, and (3) whether the petitioner proceeded pro se.

(1) Briefs: Opposition, Reply, and Amicus

In addition to the petitioner's brief in support of the petition for certiorari, three types of briefs may be filed: the respondent may file a brief-in-opposition; the petitioning party may then file a reply brief; and an interested nonparty may be

107. Twelve, or 3.8%, of the 318 cases examined involved a claim of gender discrimination or involved a privacy issue such as abortion. The Court granted review in three, or 25%, of the twelve cases. By contrast, the Court granted review in fourteen, or 4.6%, of the 306 cases in which no claim of gender discrimination was made. The chi-square test of association is statistically significant at $p = .002$.

108. A claim of racial discrimination was present in twenty-nine, or 9.1%, of the 318 cases examined. The Court granted review in two, or 6.9%, of the twenty-nine cases. By contrast, the Court granted review in fifteen, or 5.2%, of the cases in which no claim of racial discrimination was made. The chi-square test of association indicates the association is not statistically significant ($p = .7$).

There are several possible explanations for the low grant rate for race-related claims. First, if the courts below are believed, the vast majority of the petitions were without merit; there was no legal or factual basis to the claims, and the petitions did not present any new or novel legal questions for the Court to decide. In other words, most of the cases presented to the Court neither provided a good vehicle for making policy nor provided a factual basis for the Court to correct an injustice.

Second, the results may have been influenced by the way I classified cases as involving a claim of racial discrimination. I included only claims of racial discrimination against the petitioner. However, in two cases in which the Court granted certiorari, parents of African American children attending public school districts undergoing desegregation filed class action suits seeking to force the IRS to deny tax-exempt status to discriminatory private schools. Because these cases primarily involved the Tax Code and tax regulations, I classified these cases as involving a core governmental function. I did not reclassify these cases. At the time I originally coded these as tax cases, and when I reviewed them after my initial data analysis, I judged the principal issue in each to be the federal government's ability to use the Tax Code to provide (dis)incentives. However, the reader should interpret the results of the analysis of federalism issues in light of this discussion.

permitted to file an *amicus curiae* brief. Professors Caldeira and Wright have argued that only if the "preparation and filing of a brief *amicus curiae* is costly [can it serve] as a reliable signal about the importance of a case."¹⁰⁹ They report that, at the time of their study, law firms usually charged between \$15,000 and \$20,000 to prepare an *amicus* brief.¹¹⁰

Additionally, perhaps the cost of hiring a law firm to prepare a brief-in-opposition or a reply brief signals the importance that the litigants attach to the case. All other things being equal, perhaps the filing of an additional brief results in the Court being more disposed to grant certiorari. I am not aware of any data concerning the cost of a brief-in-opposition or a reply brief. However, a comparison of ten randomly selected *amici* briefs and ten randomly selected briefs-in-opposition suggests they are of approximately equal length and complexity. The reply briefs tend to be rather short and focused, and do not tend to involve significant legal research; they likely are not terribly expensive by standards of legal research.

The data suggest a weak but discernible impact from the filing of briefs-in-opposition¹¹¹ and reply briefs,¹¹² with the Supreme Court being more likely to grant certiorari in cases in which one or more such briefs was filed than in cases in which they were not. The weak impact of briefs-in-opposition may stem from the fact that litigants file them in almost 70% of cases. The more routinely briefs-in-opposition are filed, the less effective they become at signaling the importance of a particular case. Litigants file reply briefs much less frequently than briefs-in-opposition; litigants filed them in only 19% of the cases I sampled. The weak impact of the filing of a reply brief on the Court's likelihood to grant certiorari may result from their relative inexpensiveness.

The expense of filing an *amicus* brief, coupled with the relative infrequency with which interested parties file *amicus* briefs,¹¹³ may result in the Justices viewing the

109. Caldeira & Wright, *Organized Interests*, *supra* note 66, at 1112; *see also, e.g.*, PERRY, *supra* note 16, at 137 (documenting the increase in the acceptance rate when an *amicus* brief is filed on behalf of the petitioner); *infra* notes 122-23 and accompanying text (setting forth the hypothesis that cases in which *pro se* petitions are filed are negatively associated with briefs-in-opposition and reply briefs).

110. Caldeira & Wright, *Organized Interests*, *supra* note 66, at 1112.

111. Although the data demonstrate a positive association between the filing of a brief-in-opposition and the decision to grant a petition for a writ of certiorari, the relationship is not statistically significant, with $p = .09$. An opposition brief was filed in 221, or 69.5%, of the 318 cases examined. The Court granted review in fifteen, or 4.7%, of the 221 cases. By contrast, when an opposition brief was not filed, the Court granted certiorari in two, or 2.1%, of the remaining ninety-seven cases. The data suggests the counterintuitive conclusion that the filing of a brief-in-opposition (which argues that the Court should not grant the petition for certiorari) actually may increase the probability that the petition is granted. The fact that a brief-in-opposition is filed may signal that the respondent felt the case was sufficiently important that the Court might be willing to grant certiorari, a result the respondent sought to avoid. The presence of the brief-in-opposition flows from the importance of the case.

112. Although the data demonstrate a positive association between the filing of a reply brief and the decision to grant a petition for a writ of certiorari, the relationship is not statistically significant, with $p = .26$. A reply brief was filed in sixty, or 18.9%, of the 318 cases examined. The Court granted review in five, or 8.3%, of the sixty cases. By contrast, when a reply brief was not filed, the Court granted certiorari in twelve, or 4.7%, of the remaining 258 cases.

113. An *amicus* brief was filed in twenty, or 6.3%, of the 318 cases examined. *See also* PERRY,

presence of an amicus brief as a signal that third parties view the case as important. Indeed, the Supreme Court was more likely to grant certiorari when at least one amicus brief was filed than when no amicus curiae brief was filed.¹¹⁴ In every instance in which the Court granted review, the interested parties filed the briefs in favor¹¹⁵ of Supreme Court review.¹¹⁶

(2) *Published Decision in the Court Immediately Below*

The Justices may view the presence or absence of a published decision in the court immediately below the Supreme Court¹¹⁷ as an indication of the lower court's evaluation of the case's importance. Given the frequency with which lower courts publish decisions, the mere publication of an opinion would not signal that the lower court considered the case to be important. The lower court's decision *not* to publish an opinion, however, easily could indicate that the lower court viewed the case as unimportant and therefore chose not to expend the time and energy to write and publish an opinion.

The lack of a published opinion presents startling results when used to identify which cases the Court did not accept for review. The association between the lack of a published opinion below and the decision to grant certiorari is in the expected negative direction.¹¹⁸ In fact, the Court denied review in all but one of the cases in which the lower court did not publish a written opinion.¹¹⁹

supra note 16, at 136 (amicus briefs were filed in 2.9% of the cases examined); Caldeira & Wright, *supra* note 66, at 1116 (amicus briefs were filed in 7.8% of the cases examined).

114. An amicus brief was filed in twenty, or 6.9%, of the 318 cases. The Court granted certiorari in three, or 15%, of the twenty cases. When no amicus brief was filed, the Court granted review in fourteen, or 4.7%, of the remaining 298 cases. The association is in the positive direction, and as expected, it is statistically significant at $p = .05$.

115. An amicus brief arguing against review was filed in five, or 1.6%, of the 318 cases examined, and the Court did not grant review in any of these cases. The number of cases in which an amicus brief opposing review was filed is too small to offer an accurate view of the impact of briefs. If the expense and effort involved in filing an amicus brief serves to indicate a case's importance, it should not matter if the brief favors or opposes review. This situation is analogous to the impact of briefs-in-opposition. The differential impact of amicus briefs supporting and opposing review warrants further investigation. See, e.g., Caldeira & Wright, *Organized Interests*, *supra* note 66.

116. An amicus brief favoring review was filed in sixteen, or 5%, of the 318 cases examined. When an amicus brief favoring review was filed, the Court granted review in three, or 18.75%, of the sixteen cases. On the other hand, when an amicus brief favoring review was not filed, the Court granted certiorari in fourteen, or 4.6%, of the remaining 302 cases. This relationship is in the positive direction, as expected, and it is statistically significant at $p = .01$.

117. In 110, or 34.6%, of the 318 cases examined, the court immediately below the Supreme Court did not issue a written opinion on the merits.

118. When the court immediately below the Supreme Court did not publish a written opinion, the Court granted certiorari in one, or 0.9%, of the 110 cases. On the other hand, when an opinion was written and published by the court immediately below the Supreme Court, the Court granted certiorari in sixteen, or 7.7%, of the 208 remaining cases. The low number of grants when the court immediately below the Supreme Court did not publish a written opinion does not permit an accurate assessment of the statistical significance of the association between the lack of a written opinion and whether a petition for a writ of certiorari is denied.

119. I had expected that petitions in cases in which the court immediately below the Supreme Court

(3) *Pro Se Petitioner*

The petitioner proceeded pro se in approximately 20% of the cases sampled.¹²⁰ Status as a pro se petitioner might negatively influence the grant rate. First, the Court might assume that because the petitioner did not hire an attorney, the petitioner viewed the case as unimportant.¹²¹ If the petitioner viewed the case as unimportant, the Justices might view the case as uncerworthy. Second, the pro se petitioner might file a petition involving a nonfederal issue, a petition seeking review of a factual finding, or a petition seeking review of a case-specific legal error, all matters that will not likely result in a grant of certiorari.

The data indicate that the Supreme Court was less likely to grant a petition filed by a pro se petitioner than a petition filed by a person with retained counsel.¹²² Indeed, the Court denied the petition in every case in which a petitioner proceeded pro se regardless of whether the petitioner was an attorney or a nonattorney.¹²³

did not publish an opinion would be denied at a rate somewhat higher than the overall 94.65% denial rate. However, the 99.1% denial rate greatly exceeded my expectation. At the conclusion of my statistical analysis of the data, after I had assessed which attributes were associated with an increased or decreased grant rate, I examined the association between the publication of an opinion by the lower court and these other attributes. Table 1 presents the results of the examination.

Table 1 suggests why the lack of a published opinion by the court immediately below the Supreme Court is associated with the denial of a petition for a writ of certiorari. First, the table indicates a statistically significant association between petitions in cases in which no written opinion was published by the court immediately below the Supreme Court and a lower incidence of three of the six case attributes associated with the grant of certiorari: an allegation in the petition that there was a conflict between the decision below and Supreme Court precedent (CONSUPAL); a liberal decision below (DIRBELOW); and a state government as a petitioner (STGOVPET). In addition, Table 1 indicates a statistically significant association between petitions with no published opinion immediately below and the presence of other case attributes associated with the denial of certiorari: one or more frivolous issues (FRIVOLOUS) and the filing of the petition pro se (PROSE). Given these associations, the lack of a published opinion is likely to be associated with the denial of a petition for certiorari.

120. The petitioner proceeded pro se in seventy-two, or 22.6%, of the 318 cases examined. In fifty-seven, or 17.9%, of the 318 cases examined, the petitioner was a nonattorney proceeding pro se, a "true" pro se petitioner. In fifteen, or 4.7%, of the 318 cases examined, the petitioner was an attorney proceeding pro se.

121. Of course, it could simply mean, as many pro se petitioners rather apologetically indicated at the beginning of their petition, that the petitioner lacked the funds to hire an attorney.

122. In all seventy-two cases in which the petitioner proceeded pro se, the Supreme Court did not grant certiorari. On the other hand, in the 246 cases in which the petitioner did not proceed pro se, the Supreme Court granted certiorari in seventeen, or 6.9%, of the cases. Using the chi-square statistic to conduct an inferential test of association, the association between the petitioner proceeding pro se and the decision whether to grant certiorari is significant at $p = .02$. Again using the chi-square statistic, the association between nonattorneys proceeding pro se and the decision whether to grant certiorari is significant at $p = .048$.

123. I had expected that pro se petitions would be denied at a rate somewhat higher than the overall 94.65% denial rate. I was not prepared for a 100% denial rate, and I searched for explanations for the elevated denial rate. As I discuss in Smith, *supra* note 26, pro se petitions have a reduced likelihood of containing attributes that are positively associated with the grant of certiorari and have an increased likelihood of containing attributes that are positively associated with the denial of certiorari.

e) Importance as Measured by the Existence of a Frivolous Legal Issue

Some Justices have suggested that frivolous cases make up a significant percentage, at least 50%, of the cases filed with the Court.¹²⁴ "Frivolous" is a term of art that signals that the case clearly is not certworthy.¹²⁵ Unfortunately, these same Justices have not been as forthcoming in explaining exactly what attributes of those petitions they considered frivolous.

Several Justices and Supreme Court clerks privately have suggested the attributes of a case that might cause it to be classified as frivolous,¹²⁶ and Professor Hellman has commented on the association between a "spurious federal question" and the decision to deny a petition for certiorari.¹²⁷ I tested the following characteristics as attributes of a frivolous legal issue: (1) the presence of a spurious federal question,¹²⁸ (2) the presence of a patently absurd question,¹²⁹ (3) a request that

124. See PERRY, *supra* note 16, at 222-26.

125. *Id.*

126. *Id.* (discussing examples of frivolous cases and their respective attributes and discussing categories of frivolous cases including absurd cases, fact-specific cases, and insufficient evidence cases).

127. Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 965-67 (1985). Professor Hellman's analysis of spurious federal questions had a profound impact on my operationalization of this variable, and I acknowledge my debt to him.

128. A case was deemed to be frivolous if one or more questions presented raised a "spurious federal question." The Constitution and federal jurisdictional statutes require a federal question to be present in all cases in the federal court system. A federal question includes a question that invokes equal protection under the Constitution. Cases that originated in a state court system frequently involved only questions of state law. If a petitioner exhausted his or her remedies in state court, he or she might want to have the matter reviewed by the Supreme Court. In order to do so, the petitioner would have to concoct a federal question or the petition certainly would be denied. Petitioners would attempt to raise a federal question by posing a question presented that read something like the following two examples: "Did the state court, by denying me the relief that I sought, deny me equal protection of the laws?" or "Did the state court, by denying me the relief I sought but giving in some other case the relief I sought to a different and similarly situated litigant, deny me equal protection of the laws?" These examples present spurious federal questions because the questions presented in the state courts did not raise an equal protection issue and because the question presented was concocted in the attempt to attain federal jurisdiction for the purpose of obtaining review by the Supreme Court.

Some cases that originated in the federal court system also raised a spurious federal question. In these cases, the issue raised below usually involved a federal statutory claim involving merely the interpretation and application of the statute. After losing below, the petitioner would add a claim that she had been denied equal protection to the claim made below; the claim would be phrased in the same "I was robbed!" manner as set forth in the previous paragraph. Because jurisdictional concerns did not require the addition of the equal protection claim, my conjecture is that the petitioner included the constitutional question because she or her counsel believed it would make the case more certworthy.

I classified cases cautiously, using a presumption that an equal protection issue was *not* a spurious federal question. I classified a case as raising a spurious federal question only if the equal protection issue had not been raised in the lower court and only if the question presented could not be read — in the petitioner's favor — as raising an equal protection challenge to the rule established by the court below in the petitioner's case. As I have explained elsewhere.

For example, if the court below had created a rule that women were entitled to more favorable insurance rates than men, a male petitioner might have had a valid equal protection claim. I did not code this situation as a spurious federal question. In practice, I did not have to exercise an appreciable amount of judgment about how to code such

the Supreme Court review a lower court's factual determination,¹³⁰ and (4) a request that the Supreme Court review the sufficiency of the evidence upon which a judgment in the lower court was based.¹³¹

Of the 318 cases examined, 104, or 32.7%, contained one or more of the "frivolous" case attributes.¹³² The Court did not grant review in any of the cases containing a frivolous issue; therefore, based on the available data, the presence of a frivolous issue permits 100% accuracy in predicting certiorari denials. Further, the relationship is negative, the expected direction, with the presence of a frivolous issue being associated with the denial of certiorari.

3. *The Existence of Dissension*

Rule 10 implies that cases that contain an unsettled question of law will be granted review at a higher rate than cases that involve well-settled law.¹³³ Rule 10 does not specify when a question of law is "unsettled," although the context in which Rule 10 uses the term "settled" suggests that the term means something other than "conflict." A legal question may be deemed to be unsettled if there was disagreement within or between the lower courts which heard the particular case that is the subject of the petition. This state of affairs is known as "dissension."¹³⁴

cases. The petitioners made it quite clear when they were objecting to a new rule which had been created by the court below.

Smith, *supra* note 26, at 420 n.133. Of the 318 cases, ninety-two, or 28.9%, contained at least one spurious federal question. All petitions raising a spurious federal question were denied.

129. I considered a case to be frivolous if a question presented in the petition raised a patently absurd issue. Perry indicated that "there are cases that might be called absurd." PERRY, *supra* note 16, at 222. He quotes a clerk's example of "a case about traffic tickets in the Supreme Court." *Id.* I classified traffic ticket cases as frivolous. Of the 318 cases, twelve, or 3.8%, contained an absurd issue. All the petitions raising an absurd issue were denied.

130. I considered a case to be frivolous if a question presented in the petition requested the Court to review the lower court's factual determination. There is a clear division of responsibility in most court proceedings. The judge determines the law and the jury (or a judge as trier of fact) determines the facts. Appellate courts are notoriously reluctant to second-guess the trier of fact. Only the trier of fact has heard all the evidence and has been able to evaluate the credibility of witnesses through direct observation of their demeanor during testimony. Only if there is a patently gross error will an appellate court review the factual determination of the trier of fact. Any other rule would undermine the jury system and would dramatically increase the workload of the appellate courts. Perry provided the following quotation from a Justice as an example of a fact-specific case: "Factual issues. For example, whether or not the light was green. That doesn't have any business being in the Supreme Court." *Id.* at 223; *see also* SUP. CT. R. 10 (noting that petitions seeking review of factual determinations are unlikely to be granted). Of the 318 cases, four, or 1.3%, contained a request that the Court review a factual determination of the lower court. All the petitions were denied.

131. I considered a case to be frivolous if a question presented in the petition requested the Court to review the sufficiency of the evidence upon which a judgment in a lower court was based. Of the 318 cases, thirty, or 9.4%, contained a request that the Court review the sufficiency of the evidence. All the petitions were denied.

132. This association is significant at $p = .003$.

133. *See* SUP. CT. R. 10 ("[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.").

134. The operationalization of dissension is based on Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION MAKING 111-32 (Glendon Schubert ed.,

Dissension occurs when there is a disagreement within the court that heard a case (horizontal dissension) or between courts that heard a case (vertical dissension).¹³⁵

Horizontal dissension appears either as a dissenting opinion¹³⁶ or a concurring opinion.¹³⁷ Because the Supreme Court has limited docket space, it seems reasonable to assume that profound disagreement below — that is, a dissenting opinion — would be most likely to prompt Supreme Court review. A dissenting opinion indicates that although the court below decided the case, disagreement existed among the Justices concerning the proper resolution of the legal issue. The Justices may believe that the presence of such disagreement signals that neutral, learned legal minds may continue to disagree if the Justices do not resolve the issue. The data indicate that the Supreme Court was more likely to grant certiorari when at least one judge issued a dissenting opinion in the court immediately below the Supreme Court than when no judge issued a dissenting opinion.¹³⁸

Vertical dissension occurs when a court reverses or vacates a lower court's decision. Vertical dissension indicates that although the court immediately below the Supreme Court resolved the legal issue, there was disagreement among the courts below concerning what the resolution should be. As with horizontal dissension, the Justices may believe that the presence of dissension signals that neutral, learned legal minds may continue to disagree and they therefore need to resolve the issue. Here again, the data indicate that the Supreme Court was more likely to grant certiorari when the court immediately below the Supreme Court reversed or vacated the decision of a lower court¹³⁹ than when it did not.¹⁴⁰

1963).

135. A search of law reviews in electronic databases indicates that the terms "horizontal dissension" and "vertical dissension" do not appear in the literature. As I sought to describe dissension, I drew an analogy from "horizontal federalism" and "vertical federalism," as well as other horizontal and vertical governmental relationships. See Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1100 (1996) ("In the United States, regulatory power is divided 'vertically' between the states and the federal government and 'horizontally' among the several states."); Stewart G. Pollack, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985) (defining horizontal federalism as "federalism in which states look to each other for guidance"). I first used these terms in Smith, *supra* note 26, at 409-13.

136. A dissenting opinion disagrees with both the outcome of a case and the creation, selection, interpretation, and/or application of the law that is used to arrive at the outcome. See BLACK'S LAW DICTIONARY 486 (7th ed. 1999) (explaining that a dissent is "the explicit disagreement of one or more judges of a court with the decision passed by the majority upon a case before them").

137. In a concurring opinion, the judge agrees with the majority's outcome, but disagrees with some facet of the manner in which the majority reached its decision. See *id.* at 286 ("A separate opinion delivered by one or more judges which agrees with the decision of the majority of the court but offering [its] own reasons for reaching that decision.").

138. One or more dissenting opinions occurred in fifty-three, or 16.7%, of the 318 cases, with the Court granting review in nine, or 17%, of the fifty-three cases. By contrast, when there was no dissenting opinion filed in the court below, certiorari was granted in eight, or only 3%, of the cases. This relationship is significant at $p = .00004$.

139. Vertical dissension is not present if the court immediately below the Supreme Court either affirmed or declined to review the decision of the court below it. An affirmance obviously signaled agreement with the court below. Assuming that a court wanting to review a case can find some plausible ground on which to do so, I also included as an agreement situations in which the appellate court

4. Ideological Orientation of the Case

Stepping away from Rule 10 in the search for relevant factors in the certiorari decision-making process, the political science literature suggests that Justices may accept a case for review based on whether the case contains an ideological error, that is, whether the lower court decided the case in a manner inconsistent¹⁴¹ with the Justices' ideological predispositions. Accepting such a case might permit the Court to reverse the error.

During the period under study, the Court issued predominantly conservative opinions.¹⁴² Therefore, a case would be in ideological error if it had a liberal outcome. And, indeed, the conservative Supreme Court was more likely to grant certiorari when the decision below was a liberal decision than when the decision was either conservative or ideologically neutral.¹⁴³

declined to review the lower court's decision.

140. The court immediately below the Supreme Court reversed or vacated the decision of the court below it in seventy-three, or 23%, of the 318 cases. The Court granted review in ten, or 13.7%, of the seventy-three cases. By contrast, when there was agreement between the two courts immediately below the Supreme Court, the Court granted certiorari in seven, or only 2.9%, of the 245 remaining cases. The association between this form of vertical dissension and the decision whether to grant certiorari is significant at $p = .0003$.

141. An ideologically neutral case would not be considered an "error."

142. In classifying opinions as liberal or conservative in the dissertation upon which this article is based, I used the standard contained in a former version of a code book for the U.S. Supreme Court Judicial Database, which is compiled by Professor Harold Spaeth of Michigan State University. The classificatory scheme is complex, and a full discussion far exceeds the scope of this article. As an example, the following is an edited portion of the code book section:

In the context of criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys:

Liberal = pro-person accused or convicted of crime; pro-civil liberties or civil rights claimant; pro-indigent; pro-Indian; pro-affirmative action; pro-female in abortion; pro-underdog (minority, alien, poor, etc.); anti-government in the context of due process

Conservative = reverse of above

For a current version of the code book, see Sarah C. Benson & Harold J. Spaeth, Program for Law and Judicial Politics: Department of Political Science: Michigan State University (Feb. 2001), at <http://www.ssc.msu.edu/~pls/plip/rehnflpcodebk.pdf> (last visited Jan. 29, 2002).

143. I was able to obtain a clear ideological direction in 278, or 87.4%, of the 318 cases. Of the 278 cases, eighty-nine, or 32%, were liberal. Of the liberal cases below, eleven, or 12.4%, were accepted for review. By contrast, when the decision below was conservative, six, or only 3.2%, of the cases were accepted for review. The association between a conservative decision below and the decision whether to grant certiorari is significant at $p = .003$.

In forty cases, I could not discern any ideological direction in the decision below. In order to avoid the loss of 20% of the cases, I decided to perform another test. The "error correction" strategy posits that the Court will take and reverse a disproportionately high percentage of ideologically objectionable cases. Ideologically neutral cases — those without a clear ideological direction — should neither be ideologically objectionable to the Justices nor a good vehicle for maximizing policy preferences. Liberal decisions occurred in eighty-nine, or 28%, of the 318 cases. Of the liberal cases below, eleven, or 12.4%, were accepted for review. By contrast, when the decision below was conservative or ideologically neutral, six, or 2.6%, of the cases were accepted for review. The relationship is significant at $p = .0005$.

5. *Petitioner Identity and Status*

The political science literature suggests that both petitioner identity and petitioner status are associated with the Court's decision whether to grant a petition for certiorari. Neither of these factors is mentioned by Rule 10, by the Court in its statement of the reason for granting certiorari that appears in most cases decided on the merits, or by Justices in public statements, books, or law review articles. I will discuss each attribute in turn.

a) *Petitioner Identity*

Beginning with Tanenhaus,¹⁴⁴ legal scholars have viewed the petitioner's identity as a potentially significant factor, although the theoretical relevance of petitioner identity has not always been clearly stated. There are several reasons why petitioner identity might be associated with the Court's decision whether to grant a petitioner for certiorari. First, the combination of resources and experience possessed by corporations and governmental entities might give them an edge over individual petitioners in presenting their claims. Second, the screening process that cases go through before a state government files a petition should serve to screen out the more frivolous petitions. Third, the Justices may believe that, all other things being equal, petitions filed by corporations and governmental entities are more likely to involve "important" legal issues, including issues that will have an impact on a large number of people. Finally, Justices may have an ideological predisposition to feel sympathy toward particular types of parties; for example, conservative Justices might be more disposed to grant petitions filed by corporations, while liberal Justices might be more disposed to grant petitions filed by individuals.¹⁴⁵

The results of my study indicate that the petitioner's¹⁴⁶ identity was associated with the decision to grant certiorari. Identity¹⁴⁷ as a state¹⁴⁸ government¹⁴⁹ or a

144. See Tanenhaus et al., *supra* note 134.

145. I will postpone until the multivariate analysis any analysis of my own concerning the possible relationship between petitioner identity and the decision whether to grant certiorari. Multivariate analysis will isolate the impact, if any, of petitioner identity after controlling for other possible influences on the Court's decision.

146. I also examined respondent identity. No association between any respondent identity and the granting of certiorari was statistically significant. This result is not surprising. Any class of respondents would have a wide variety of cases filed against it. Some of the cases would have merit, but many would not. And the respondent could not control or select the cases filed against it. Therefore, there is nothing in particular that the respondent's identity alone could tell the Justices about the nature or importance of the case.

147. There were no cases in which the United States was a petitioner. Under the jurisdictional rules in effect during the period I studied, in any case in which the United States was a losing party on a constitutional issue, the United States would have appealed rather than proceeded by petition for certiorari. Thus, situations in which the federal government lost an equal protection issue would have been channeled into appeals.

148. A state government was the petitioner in eight, or 2.5%, of the 318 cases examined. The Court granted certiorari in three, or 37.5%, of the eight cases in which the state government was a petitioner. By contrast, when a state government was not a petitioner, review was granted in fourteen, or only 4.5%, of the remaining 310 cases. The relationship is statistically significant at $p = .00004$.

149. After examining state and local governments individually, I collapsed both levels of

business enterprise¹⁵⁰ was positively associated with the grant rate, while identity as an individual was negatively associated with the grant rate.¹⁵¹

b) Petitioner Status

Closely linked to a petitioner's identity is the "status" a petitioner holds.¹⁵² The political science literature suggests a relationship between petitioner status and the grant rate, although it does not resolve the question of why petitioner status is relevant to the Court's decisions. The literature does not clearly explain whether status is a mere surrogate for the characteristics (such as resources and expertise) attributable to petitioner identity or whether status taps into an ideological or other dimension.

Ulmer asserts that each petitioner possesses a status level. He created a higher-status "upperdog"/lower-status "underdog" dichotomy:¹⁵³ Governments (federal,

government into a single variable. A governmental entity was the petitioner in twenty-five, or 7.9%, of the 318 cases. The Court granted review in four, or 16%, of the twenty-five cases. By contrast, when a governmental entity was not a petitioner, the Court granted certiorari in thirteen, or 4.4%, of the remaining 293 cases. The relationship between the status as a government entity and the granting of certiorari is in the expected direction, and it is statistically significant at $p = .01$. The data suggest that status as a governmental entity is positively associated with the granting of review.

This analysis must be read with caution, however. First, because there were no cases in which the United States was a petitioner, these results may not be extrapolated to the federal government. Second, three of the four grants involving a governmental petitioner occurred when a state government was a petitioner. Given this fact and the ratio of grants to denials in each category, a better understanding of the process, and a more statistically significant empirical description of the relationship, would result from using as the explanatory case attribute only the state government as a petitioner.

150. A business enterprise was defined to include any type of business entity other than a sole proprietorship. A business enterprise was the petitioner in sixty-two, or 19.5%, of the 318 cases examined. The Court granted certiorari in seven, or 11.3%, of the sixty-two cases. By contrast, the Court granted review in ten, or only 3.9%, of the 256 cases in which there was a nonbusiness petitioner. The association between petitioner identity as a business enterprise and the granting of certiorari is significant at $p = .02$.

The impact of identity as a business enterprise may stem from what is associated with that identity. Business petitioners tended not to raise frivolous issues (only 17.7% of the time versus 36.3% for nonbusiness petitioners); did not proceed pro se (0% of the time versus 28.1% for nonbusiness petitioners); and had more published opinions below (75.8% of the time versus 62.9% of the time for nonbusiness petitioners).

151. Individuals petitioned the Court in 222, or 69.8%, of the 318 cases examined. The Court granted review in six, or 2.7%, of the 222 cases. By contrast, the Court granted review in eleven, or 11.5%, of the ninety-six cases in which the petitioner was not an individual. The association between petitioner identity as an individual and the granting of certiorari is statistically significant at $p = .001$. The negative direction of the association between identity as a individual petitioner and the granting of certiorari may stem from what is associated with the individual petitioners. As compared with other petitioners, individual petitioners more frequently raised frivolous issues (39.6% of the time versus 16.7% for nonindividual petitioners); more frequently proceeded pro se (31.5% of the time versus 2.1% for non-individual petitioners); and less frequently had published opinions below (40.5% of the time versus 20.8% of the time for nonindividual petitioners).

152. See *infra* notes 153-54 and accompanying text for an explanation of "status" as used in this study.

153. See Ulmer, *An Underdog Model*, *supra* note 76, at 903 (explaining the upperdog/underdog dichotomy).

state, and local), government agents, and business associations (corporations, partnerships, and the like) are deemed to have high status and are referred to as "upperdogs." Labor unions, employees, minority group members, aliens, and criminals are deemed to have low status and are referred to as "underdogs."¹⁵⁴ Using this dichotomy, the data indicate that the Supreme Court was more likely to grant certiorari when the petitioner¹⁵⁵ was an upperdog than when the petitioner was an underdog.¹⁵⁶

Ulmer did not consider that whatever resources and expertise an upperdog petitioner possesses may be canceled by an equally powerful upperdog respondent. In other words, whatever ideologically driven sympathy (or antipathy) a court may have for a petitioner might be offset by a respondent of the same type. Therefore, the parties' relative status may be more relevant than the petitioner's status alone. And, indeed, the data indicate that the Supreme Court was more likely to grant certiorari in cases in which the petitioner held a higher status than the respondent than in cases in which the petitioner held an identical or lower status¹⁵⁷ than the respondent.¹⁵⁸

6. Summary

The data indicate a positive association at statistically significant levels between each of the following attributes and the Court's decision to grant a petition for certiorari: petitioner allegation of a conflict between circuits; petitioner allegation of conflict with Supreme Court precedent; the allegation of conflict with Supreme Court precedent by a dissenting judge in the court below the Supreme Court; an issue implicating federalism, a core governmental function, gender discrimination, or a privacy issue; a liberal decision below; a dissenting opinion in the court immediately below the Supreme Court or a reversal or vacation of a lower court's

154. *Id.* (explaining that upperdogs have greater status and power than underdogs).

155. Respondent status is not associated with the granting of certiorari at a statistically significant level. The respondent had high status, was an "upperdog," in 256, or 80.5%, of the 318 cases. This is not unexpected because governmental entities and corporations are likely to generate, and be the defendants and respondents in, a significant amount of litigation. The Court granted review in fourteen, or 5.5%, of these cases. By contrast, when the respondent was an underdog, certiorari was granted in three, or 4.8%, of cases. The relationship was not statistically significant at $p = .84$.

156. The petitioner had high status, was an "upperdog," in ninety-three, or 29.2%, of the 318 cases. The Court granted review in eleven, or 11.8%, of the ninety-three cases. By contrast, when the petitioner was an underdog, certiorari was granted in only six, or 2.7%, of the 225 remaining cases. The relationship between high status and the granting of certiorari was positive, was in the expected direction, and was statistically significant at $p = .0001$.

157. Using Ulmer's classification, a petitioner had a status higher than the respondent's status when the petitioner was an upperdog and the respondent was an underdog. The petitioner did not have a higher status if both parties were upperdogs, if both parties were underdogs, or if the petitioner was an underdog and the respondent was an upperdog.

158. The petitioner had higher status in twenty-three, or 7.2%, of the 318 cases. The Court granted review in four, or 17.4%, of the twenty-three cases. By contrast, when the petitioner did not have a higher status, the Court granted certiorari in thirteen, or 4.4%, of the 295 remaining cases. The relationship between the parties' relative status and the granting of certiorari was positive, was in the expected direction, and was statistically significant at $p = .008$.

decision by the court immediately below the Supreme Court; the filing of an opposition brief, an amici brief in favor of review, or a reply brief; a petitioner's allegation that, if true, would have triggered heightened equal protection scrutiny; petitioner status as an upperdog or petitioner status higher than that of the respondent; and the petitioner's identity as a state government or a business association. Three case attributes were negatively associated with the grant rate at statistically significant levels; that is, the presence of one of the attributes was associated with the denial of a petition for a writ of certiorari. These attributes include a pro se petitioner, the lack of a written and published opinion by the court immediately below the Supreme Court, and the presence of a frivolous legal issue. In the next section, I report the findings of my multiple logistic regression estimation.

B. Multiple Logistic Regression Model

My additional statistical analysis employed logistic regression, a multivariate statistical technique that assesses the independent impact of specified attributes in terms of the odds that certiorari will be granted. Multivariate analysis is appropriate where, as here, there are a number of attributes of potential theoretical relevance and their impact must be controlled and individually assessed. The "logistic" form of regression is appropriate where, as here, the dependent variable (the phenomenon to be evaluated, here, the decision whether to grant certiorari and issue a written opinion after plenary review) is dichotomous (loosely speaking, existing in a 0/1, deny/grant format).¹⁵⁹ Logistic "regression" is ideally suited to "find[ing] the best fitting and most parsimonious, yet [theoretically] reasonable model to describe the relationship between [a dichotomous dependent variable] and a set of independent (predictor or explanatory) variables."¹⁶⁰

Multiple logistic regression offers the same advantages as ordinary least-squares multiple regression.¹⁶¹ First, it permits the researcher to assess the impact of a

159. For a general discussion of logistic regression and its appropriate application, see DAVID HOSMER, JR. & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* (1989). The existence of a dichotomous dependent variable means that the ordinary least-squares regression assumptions of homogeneous variance and an expected value of the error term of zero are violated. See generally JOHN H. ALDRICH & FORREST D. NELSON, *LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS* (1984); MICHAEL LEWIS-BECK, *APPLIED REGRESSION: AN INTRODUCTION* (1980). When these assumptions are violated, ordinary least-squares regression is an inappropriate modeling technique because the parameter estimates are biased and the predicted dependent variable may vary outside the range of zero to one, which constitutes the boundaries of a dichotomous dependent variable.

160. HOSMER & LEMESHOW, *supra* note 159, at 1.

161. In ordinary least-squares multiple regression, the estimated coefficient represents the average change in the value of the dependent variable that accompanies a one-unit change in the covariate that is being estimated. In multiple logistic regression, the coefficient generated is based on a logistic transformation involving the natural log of the odds ratio of successes to failures. The estimated coefficient represents the log odds associated with a one-unit change in the covariate being estimated. To convert the log odds to true odds, "e" is raised to a power equal to the estimated coefficient.

Consider the dependent variable, DEPEND, and a fictitious covariate, CONFLICT. Assume further an estimated coefficient of 1.5. The change in the log odds associated with the presence of conflict would be 1.5. To calculate the true odds, one raises "e" to the power of 1.5. This results in true odds

particular covariate after controlling for the impact of the other covariates included in the model. Second, multiple logistic regression permits the researcher to test an overall goodness of fit. Both a likelihood ratio test and a model chi-square can be calculated to test the null hypothesis that all the coefficients for the covariates in the model are equal to zero.¹⁶² And third, multiple logistic regression permits the researcher to test the statistical significance of individual coefficients. Both the Wald statistic¹⁶³ and the ratio of the estimated coefficient over its standard error¹⁶⁴ may be used to test for individual coefficient significance.

The first multiple logistic regression model I estimated contained all the case attributes that had demonstrated a statistically significant association with the decision to grant a petition for certiorari. The results are presented in Table 2. I included all the attributes because all were theoretically relevant and no reasoned basis existed for excluding particular attributes.

The overall model is statistically significant¹⁶⁵ and produces a reduction in predictive error, both in the aggregate¹⁶⁶ and within specific categories.¹⁶⁷

of 4.48. This means that the presence of conflict makes it 4.48 times as likely that certiorari will be granted, all other things being equal.

162. HOSMER & LEMESHOW, *supra* note 159, at 30-34.

163. The Wald statistic is the square of the ratio of the estimated coefficient over its standard error, and it is distributed approximately as a chi-square with one degree of freedom. *Id.*

164. The ratio of the estimated coefficient over its standard error is distributed approximately as a standard normal distribution. STANTON A. GLANTZ & BRYAN K. SLINKER, *PRIMER OF APPLIED REGRESSION AND ANALYSIS OF VARIANCE* 525 (1990).

165. The overall significance of the model is tested using the likelihood ratio test. GLANTZ & SLINKER, *supra* note 164, at 523-27; HOSMER & LEMESHOW, *supra* note 159, at 30-34. The log likelihood ratio statistic is 74.38. The probability of a chi-squared value of 74.38 distributed with nineteen degrees of freedom occurring by chance is less than one in 1000. Thus, the null hypotheses may be rejected, and it is permissible to conclude that at least one, and perhaps all, of the covariates are nonzero.

166. The model estimated fits the data relatively well. The model results in a reduction of error in predicting the disposition of both grants and denials in the 317 cases examined. (One case — a denial — was dropped due to a missing value.) Overall, the error in prediction is reduced by 34.33%. The overall reduction in error statistic reports the improvement in prediction that the model provides over merely "guessing the outcome in the modal category." It is calculated as follows:

$$ROE(\%) = 100 \times \frac{\% \text{ correctly classified} - \% \text{ modal category}}{100\% - \% \text{ modal category}}$$

where *ROE* stands for Reduction of Error.

Timothy M. Hagle & Glenn E. Mitchell II, *Goodness-of-Fit Measures for Probit and Logit*, 36 AM. J. POL. SCI. 762, 781 n.13 (1992). The "% correctly classified" is the percentage of the observed cases that are correctly classified by the model. The "% modal category" is the percentage of the dichotomous dependent variable observations that fall into the modal category. *Id.*

167. A more interesting and revealing assessment of the reduction in predictive error can be made by examining the within-category reduction of error. The reduction of error within the denial categories is 75.19% (from sixteen erroneous classifications as denials to four), and error is reduced in the grant category by 56.49% (from sixteen erroneous classifications as denial to seven). It is a given that for the 317 cases used in the estimation, there were 300 denials and seventeen grants. In the absence of any

Nonetheless, the model requires refinement.

A quick perusal of Table 2 yields several interrelated observations. First, and most important, only three of the attributes are statistically significant at $p < .05$: petitioner allegation of conflict with Supreme Court precedent (CONSUPAL), federalism issue (FEDERAL), and gender-related issue (GENDER). Even with a more liberal test of significance ($p < .25$), only another four case attributes are statistically significant: dissenting judge's allegation of conflict with Supreme Court precedent (CONSUSOP), liberal decision below (DIRBELOW), dissenting opinion below (DISSOPIN), and state government as a petitioner (STGOVPET). This suggests that the model contains more attributes than is required to explain the Court's certiorari decision making.

The goal "of any model-building technique used in statistics is to find the best fitting and most parsimonious, yet [theoretically] reasonable model to describe the relationship between" the dependent variable and the attributes being tested.¹⁶⁸ To that end, I estimated a more parsimonious, yet still theoretically justifiable, model using the case attributes that survived both bivariate and multivariate screening.¹⁶⁹ The results are reported in Table 3. The overall model is statistically significant¹⁷⁰ and produces a reduction in predictive error, both in the

association between a case attribute and the decision whether to grant certiorari, we should expect to see the cases randomly distributed. The use of the estimated model improves the number of predicted denials by thirteen (a drop from sixteen incorrect predictions to four incorrect predictions). This is a 75.19% reduction in the predicted error over the random distribution within the category. The use of the estimated model reduces error in the grant category by 56.49% (from sixteen erroneous classifications as denial to seven).

168. HOSMER & LEMESHOW, *supra* note 159, at 1.

169. I employed a manual backward, then forward step-wise process. Using the results of the first model estimation as a starting point, I pared the model down through a manual step-wise process, which included the following: I presumptively excluded all covariates that were not significant at $p < .75$. And, at each step of the process of paring down the model, I excluded covariates that were not significant at that level. I examined the impact of exclusion on the magnitude and statistical significance levels of the remaining estimated coefficients on overall and within-category reduction of error, and overall fit of the model. All other things being equal, I sought — within theoretically justifiable constraints — to maximize the magnitude and significance of the estimated coefficients, the reduction of error, and the overall significance of the model. Where two or more covariates arguably measured the same case attribute or were highly correlated as indicated by the program output, I estimated the model with alternative specifications that encompassed the covariates with the alleged collinearity problem. In addition, I estimated the model using the analogous covariates that were rejected at the univariate analysis stage. Finally, I also estimated the model using many of the covariates that were rejected by bivariate analysis. I did so in order to ensure that there was no covariate that would show a statistically significant impact in a multivariate model. However, and this is an important qualifier, I did not include any covariate that was not broadly theoretically relevant.

170. I tested the overall significance of the model using the likelihood ratio test. The log likelihood ratio statistic is 64.25. The probability of a chi-squared value of 64.25 distributed with six degrees of freedom occurring by chance is less than one in 1000. Thus, the null hypotheses may be rejected, and it is permissible to conclude that at least one, and perhaps all, of the covariates are nonzero.

Each of the parameter estimates is in the correct direction, and five of the covariates are statistically significant at $p < .025$. The remaining covariate, STGOVPET, is significant at $p = .1003$. Although STGOVPET does not meet the traditional .05 test, given the small numbers observed in the sample and the bivariate and multivariate screening to get to the final model estimated, I retain STGOVPET in the

aggregate¹⁷¹ and within specific categories.¹⁷²

The heart of Table 3 is the right-hand column, which indicates the true odds by which the presence of particular attributes increased the grant rate, all other factors being held constant. For ease of presentation, I have set out that information immediately below.

| <i>Variable Name</i> | <i>Description</i> | <i>Odds</i> |
|----------------------|--|-------------|
| CONSUPAL | allegation of conflict with Supreme Court precedent | 52 |
| FEDERAL | presence of a federalism issue | 10.7 |
| GENDER | presence of a gender-related issue | 43.7 |
| DISSOPIN | presence of dissenting opinion in case immediately below Supreme Court | 11.1 |
| DIRBELOW | ideologically "incorrect," that is, liberal, decision below | 5.5 |
| STGOVPET | state government as petitioner | 7 |

For example, all other things being equal, certiorari was fifty-two times more likely to be granted if the petitioner made an allegation of conflict with Supreme Court precedent than if the petitioner did not make such an allegation.

III. Conclusion

Where does this leave us? Which petitions — and petitioners — for certiorari make the cut? The statistical analysis provides convincing evidence that cases with the following attributes are unlikely to be reviewed: (1) cases that raise a "frivolous" question; (2) cases in which the court immediately below the Supreme Court did not publish a written opinion on the merits; and (3) cases involving a pro se petitioner. The data indicate that these three case attributes, when taken together, permitted 57.5% of the cases to be eliminated with only one misclassification. To the best of my knowledge, no other author has demonstrated a statistically significant association between the decision to deny a petition and attributes such as these.

The policy implications of these statistical findings need to be explored. That the Court fails to grant certiorari to review questions that are "frivolous" should be of no particular concern. All should agree that the Court must allocate its most precious resource — time — to those petitions that present the most compelling issues.

model.

171. The model estimated fits the data relatively well. And, again, the model results in a reduction of error in predicting the disposition of the cases. The model reduces error in prediction by 17.94%.

172. The within-category reduction in error is even more significant. The use of the estimated model improves the number of predicted denials by eleven (a drop from sixteen incorrect predictions to five incorrect predictions). This is a 68.97% reduction in the predicted error over the random distribution within the category. The use of the estimated model improves the number of predicted grants by seven (an increase from one to eight). This is a 44.06% reduction in the predicted error over the random distribution within the category.

More troubling, however, is the treatment of petitions filed by a pro se petitioner. If a petitioner's mere status as a pro se petitioner constitutes an almost insuperable obstacle to review, this raises serious concerns about the availability of Supreme Court review to individuals who cannot afford counsel in civil actions. Elsewhere, I have demonstrated that, as compared to non-pro se petitions, pro se petitions are much more likely to contain frivolous issues and are much less likely to contain attributes (such as the allegation of a conflict with Supreme Court precedent) that are associated with the granting of certiorari.¹⁷³ Based on this analysis, I concluded that "the denial of petitions filed by individuals proceeding pro se does not constitute discrimination against the poor; rather, it constitutes a responsible and efficient deployment of scarce judicial resources to promote the Court's fundamental purposes."¹⁷⁴

The denial of review in cases in which the Court below did not issue a written and published opinion also might be troubling. The lower court's decision not to publish an opinion might result from the lower court's assessment that the case was not important enough to expend the time and energy to write and publish an opinion. If it is assumed that the lower court judges are making accurate and honest assessments, then subsequent denial of petitions for certiorari should not be of particular concern. However, if the lack of a written opinion is, indeed, a case attribute that causes the elimination of petitions, then might lower court judges use that knowledge to manipulate the process? Might judges seek to manipulate the probabilities of review by failing to write opinions in cases that they do not want the Supreme Court to review? Manipulation of the process would be cause for concern. Analysis of the cases in which the lower court did not write an opinion demonstrates that, as compared to cases in which the lower court did write an opinion, the cases without a written lower court opinion are much more likely to contain frivolous issues and are much less likely to contain attributes (such as the allegation of a conflict with Supreme Court precedent) that are associated with the granting of certiorari. Based on this analysis, it seems unlikely that the lower court judges are attempting to manipulate the process. And, after all, the Supreme Court still independently reviews the case. No evidence exists that the Supreme Court denies petitions solely because the lower court did not issue a written opinion.

The statistical analysis of individual attributes identified over a dozen attributes that were positively associated, at statistically significant levels, with the decision to grant certiorari. Many of these attributes overlap, directly or indirectly, with the Court's statements in Rule 10. The following attributes reflect Rule 10's reference to granting certiorari to resolve conflict: petitioner allegation of a conflict between circuits, and petitioner allegation of conflict with Supreme Court precedent. The positive impact of the allegation of conflict with the Supreme Court precedent by a dissenting judge in the court below the Supreme Court also relates to Rule 10's reference to conflict. A number of the attributes also appeared to be related to Rule

173. See Smith, *supra* note 26 (providing an empirical examination of the treatment of pro se petitions in the same data set).

174. *Id.* at 424.

10's reference to the Court's desire to review "important" issues. Substantive areas to which the Court seemed to attach importance included those implicating federalism, a core governmental function, gender discrimination, or a privacy issue. The Court also appeared to attach particular importance to petitions containing allegations that, if true, would have triggered heightened equal protection scrutiny. The evaluation of a particular case's importance by parties and certain nonparties also seemed relevant, as indicated by the positive association between the granting of review and the filing of an opposition brief or an amici brief in favor of review. Finally, in addition to granting certiorari to resolve circuit splits, two attributes were related to the Court's stated objective of reviewing cases involving issues that need to be "settled": a dissenting opinion in the court immediately below the Supreme Court, and the situation in which the court immediately below the Supreme Court reversed or vacated a lower court's decision. Overall, the data appear to confirm that Rule 10 does reflect the Court's behavior, with the Court functioning to resolve conflicts concerning, or to settle issues involving, important issues.

Several attributes suggest the Court may also function to correct ideological errors. The data demonstrate that the Court was more likely to grant certiorari when the petitioner was an upperdog or when the petitioner had higher status than the respondent. This may reflect a pro-business bias on the part of the conservative Court. Potentially of more concern is the Court's tendency to grant certiorari when the court below issued a "liberal" decision. If the conservative Court is acting in an ideological manner, this would be both outside the guidance given by Rule 10 and outside the expectation that the Court act in a nonpolitical manner.

Examining individual attributes provides only a partial picture of the Court's behavior. Suppose, for example, that liberal decisions below were disproportionately "rich" in allegations of conflict and important issues. The Court might grant petitions because of the conflicts alleged and the important issues involved, but it might appear that the Court acted based on the ideological direction of the decision below. Multivariate analysis is required to tease out the statistical association between attributes while controlling for the presence of other attributes. Thus, for example, multiple logistic regression permitted an assessment of the association between the decision to grant certiorari and the ideological direction of the decision below, thus controlling for the presence of other attributes. The multivariate analysis determined that only six attributes were associated with the certiorari decision at a statistically significant level: allegation of a conflict with Supreme Court precedent; the presence of a federalism issue; the presence of a gender-related issue; the presence of a dissenting opinion in the court immediately below the Supreme Court; a state government as petitioner; and an ideologically incorrect (i.e., "liberal") decision in the court below.¹⁷⁵ The particular case attributes found to be associated

175. The fact that only these attributes were associated at statistically significant levels with the decision to grant a petition does not mean that the other attributes had no impact on the Court. Given the sample size, the grant rate, and the incidence of the covariate, there were simply not enough cases to permit some of the relationships to become apparent. For example, there were only twenty cases in which an amicus brief was filed, and an amicus brief against a grant was filed in only five cases.

with certiorari decision making also warrant discussion.

Once again, most of the attributes overlap with the Court's statements in Rule 10. The desire to resolve conflict appears to be the Court's number-one concern, with the petitioner's allegation of conflict with Supreme Court precedent resulting in a fifty-two-fold increase in the likelihood that the Court will grant a petition. The list fails to represent an allegation of circuit conflict; however, this does not mean that resolution of circuit conflict is unimportant to the Court. Rather, it suggests that so many petitions allege a circuit conflict, a circuit conflict — without more — does not result in a petition being granted. The Court appears perfectly willing to tolerate circuit conflicts regarding many issues. On the other hand, the large impact of an allegation of conflict with Supreme Court precedent suggests that the Court takes seriously the need to uphold its authority and ensure that there is no conflict with its opinions.

A number of the attributes also appeared to be related to Rule 10's reference to reviewing important issues. Substantive areas to which the Court seemed to attach importance included those implicating gender discrimination (increased the probability of a grant almost forty-four-fold) and federalism (increased the probability of a grant almost eleven-fold).

Related to the Court's stated objective of reviewing cases involving issues that need to be settled, the presence of a dissenting opinion in the court immediately below the Supreme Court increased the probability of a grant eleven-fold. On the other hand, an ideologically incorrect (i.e., "liberal") decision below was 5.5 times more likely to be granted, suggesting that the Court engages in ideological error correction. This result provides objective, statistical evidence of an ideological component to judicial decision making.

Finally, the impact of the identity of state government as petitioner was not surprising. Given the channeling effect of appeals pertaining to constitutional law issues, state governments would logically be the most powerful governmental unit remaining in the certiorari pool. In addition, given the resources available to them and the incentives to avoid bringing frivolous petitions due to their "repeat player" status, state government would be logically accorded favorable treatment similar to that normally given to the federal government.

Overall, the Court appears to act in accordance with its statement in Rule 10. The data clearly indicate, however, that the Court may act to correct ideological errors committed by lower courts. The latter role adds a significant political aspect to the Court's behavior. And, it may go far in explaining the Court's behavior during the 2000 presidential election.¹⁷⁶

Perhaps, if there had been more cases observed, a relationship in one direction or another would have become apparent.

176. See *Bush v. Gore*, 531 U.S. 98 (2000).

Key to Tables 1-3

| | |
|-----------|---|
| CONCIRAL | allegation in the petition of a conflict between federal circuits |
| CONSUPAL | allegation in the petition of a conflict between the decision below and Supreme Court precedent |
| CONSUIPOP | allegation by dissenting judge below of a conflict with Supreme Court precedent |
| CORE | case involved core governmental functions |
| CORPET | business entity as petitioner |
| DIRBELOW | ideologically "incorrect," that is, liberal decision below |
| DIRFAKE | liberal decision below |
| DISREVAC | whether the court immediately below the Supreme Court either reversed or vacated the decision of the court immediately below it |
| DISSOPIN | presence of dissenting opinion in case immediately below the Supreme Court |
| FEDERAL | presence of federalism issue |
| FRIVOLOUS | one or more frivolous issues |
| GENDER | presence of a gender-related issue |
| INDIVPET | individual as petitioner |
| NOPUB | no published opinion in the court immediately below the Supreme Court |
| OPPFIELD | brief-in-opposition filed |
| PETSTAT | high petitioner status on Ulmer's upperdog/underdog dichotomy |
| PROAMIC | amicus brief in favor of granting certiorari filed |
| PROSE | petition filed pro se |
| REPLYFLD | reply brief filed |
| SCRUTFCT | case contained legal facts that would trigger strict or intermediate scrutiny |
| STATHIGH | whether petitioner had higher status on Ulmer's dichotomy than did the respondent |
| STGOVPET | state government as petitioner |

Table 1. Attribute of NOPUB Petitions-Percentage Displaying

| Attribute | Published | No Published |
|-----------|-----------|--------------|
| CONSUPAL | 36.5 | 22.7* |
| STGOVPET | 3.8 | 0.0* |
| DIRBELOW | 34.6 | 15.5** |
| FRIVOLOUS | 27.4 | 42.7** |
| PROSE | 15.9 | 39.5*** |

*p <.05

**p <.01

***p <.001

Table 2. Logistic Regression Estimation of Court Votes

| Covariate | Estimated Coefficient | Standard Error | Wald Statistic | B e |
|-----------|-----------------------|----------------|----------------|----------|
| CONCIRAL | .0196 | .7961 | .0006 | 1.0198 |
| CONSUPAL | 4.2809 | 1.4306 | 8.9540*** | 72.3043 |
| CONSUPOP | 2.4187 | 1.3277 | 3.3188* | 11.2317 |
| CORE | .8171 | 1.1973 | .4657 | 2.2640 |
| CORPPET | 1.4166 | 1.4761 | .9210 | 4.1230 |
| DIRBELOW | 1.7909 | 1.0116 | 3.1344* | 5.9948 |
| DISSOPIN | 1.3094 | 1.0596 | 1.5271* | 3.7040 |
| DISREVAC | .5667 | .7746 | .5353 | 1.7625 |
| FEDERAL | 3.6863 | 1.8663 | 3.9013** | 39.8982 |
| INDIVPET | 5.2829 | 53.6658 | .0097 | 196.9425 |
| NOPUB | .0611 | 1.3942 | .0019 | 1.0630 |
| OPPFLED | -.7348 | 1.8451 | .1586 | .4796 |
| PETSTAT | 5.4380 | 53.6497 | .0103 | 229.9744 |
| PROAMIC | -.7532 | 1.3865 | .2951 | .4709 |
| REPLYFLD | .9437 | .8358 | 1.2751 | 2.5696 |
| SCRUTFCT | .4886 | .8423 | .3365 | 1.6300 |
| STATHIGH | .3998 | 1.2907 | .0960 | .4916 |
| STGOVPET | 2.7174 | 1.6544 | 2.6979* | 5.1403 |
| GENDER | 4.2059 | 1.7474 | 5.7931*** | 67.0800 |
| CONSTANT | -14.8498 | 53.6982 | .0765 | |

*p<.25

**p<.05

***p<.01

Table 3. Logistic Regression Estimation of Court Votes-Model II

| Covariate | Estimated Coefficient | Standard Error | Wald Statistic | B e |
|-----------|-----------------------|----------------|----------------|---------|
| CONSUPAL | 3.9528 | 1.1627 | 11.5580*** | 52.0815 |
| DISSOPIN | 2.4116 | .7122 | 11.4654*** | 11.1513 |
| DIRBELOW | 1.6977 | .6884 | 6.0808* | 5.4612 |
| FEDERAL | 2.3702 | 1.0373 | 5.2212* | 10.6996 |
| GENDER | 3.7778 | 1.3069 | 8.3558** | 43.7207 |
| STGOVPET | 1.9494 | 1.1863 | 2.7002 | 7.0242 |
| CONSTANT | -7.9656 | 1.4861 | 28.7312 | .0003 |

*p<.05 ** p<.01 ***p<.001

