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GAMING CERTIORARI

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Just how “supreme” is the Supreme Court? By most accounts, the Supreme Court sits atop of the nation’s judicial hierarchy and—at least among judges—has the last word on what the law means. Yet this conventional wisdom overlooks something important: the Supreme Court’s ability to “say what the law is” is limited both by the cases presented to it and the manner of their presentation. This means that the

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Supreme Court's supremacy in a sense depends on how lower courts tee cases up for the Justices, which in turns means that lower court judges—acting strategically—can influence which cases the Supreme Court decides. By understanding how the certiorari process works, lower court judges can reverse engineer their decisions to make certiorari more or less attractive for the Justices. It is more difficult, for example, for the Justices to review decisions with cursory analysis, fact-bound rationales, or alternative holdings, and these or similar techniques are often available to a lower court seeking to avoid the Supreme Court's attention.

This Article focuses on lower court decisions that have been designed to evade or attract Supreme Court review. First, we offer a game theory model of the certiorari process to demonstrate how lower courts can manipulate certiorari. Second, using that model, we examine the emergence and operation of the Supreme Court's so-called "shadow docket," which—via summary reversal—allows the Supreme Court to reverse a lower court's decision without expending the costs ordinarily associated with certiorari, and so can be understood as a tool to prevent some forms of lower court manipulation. Third, we explore the doctrinal and normative implications of gaming certiorari, with particular focus on the externalities that it creates. Finally, we offer a menu of admittedly imperfect options to address efforts to game certiorari. Ultimately, the purpose of this Article is not to solve the problem of gaming certiorari, but instead to present a more nuanced understanding of the judiciary as a whole.

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INTRODUCTION

The United States Supreme Court sits atop the judicial hierarchy: it is the ultimate arbiter of what the law means. But that doesn't mean the Supreme Court always gets the law "right" in any absolute sense. As Justice Robert Jackson famously put it, "We are not final because we are infallible, but we are infallible only because we are final."¹ And because of that supremacy—the power to give the final answer—it may seem natural that lower court judges (ordinarily) decide cases as the Supreme Court wants them to decide cases.²

¹ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

² By "lower court judges," we directly refer to judges on federal courts of appeal and state supreme courts, that is, the courts that the Supreme Court ordinarily reviews. We also indirectly refer to judges on federal district courts and state intermediate and trial courts, although we do not discuss these categories of judges at length because generally the Supreme Court does not directly

Reality is more complicated. The Supreme Court is supreme vis-à-vis lower courts in the sense that it can exercise appellate jurisdiction over their decisions.³ Appellate jurisdiction, however, does not extend to all cases.⁴ And even when appellate jurisdiction does exist, the Supreme Court's power to exercise that jurisdiction—at least in the real world—is not entirely within the Justices' control. Today, the Supreme Court fills its docket almost entirely through writs of certiorari. The lower courts decide hundreds of thousands of cases per year, “approximately 7,000 [to] 8,000” of which lead to certiorari petitions.⁵ The Supreme Court then sorts through that immense stack and grants “cert” for less than one hundred cases per term.⁶ In selecting cases, the Justices look for “certworthy” petitions that present questions with enough importance to the legal system as a whole to justify use of the Supreme Court's scarce time.⁷ Or more colorfully, when deciding whether hear a case, “[t]he game . . . [must be] worth the candle.”⁸

The Supreme Court's pickiness makes sense; there are simply too many petitions for the Justices to hear all of them. This inherent capacity limitation thus creates opportunities for lower courts to “game” certiorari—that is, to deliberately make a case appear more or less certworthy than the Supreme Court would perceive it to be if the Justices had complete information. By sending “false” signals (in the sense that the signals do not convey information that the Justices would like to know), the lower courts can

review their decisions. By using the term “lower court judge,” we do not mean to denigrate anyone, suggest a lack of legal ability, or claim that when the Supreme Court reverses a decision it means it was right and the other court was wrong. Instead, we are simply reflecting the conventional view that the Supreme Court is on top of the judicial hierarchy.

³ See 28 U.S.C. §§ 1254, 1257 (describing the types of cases reviewable by the Supreme Court); U.S. CONST. art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact . . .”); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816) (holding that the Supreme Court's appellate jurisdiction also “extend[s] to cases pending in the state courts”).

⁴ The Supreme Court's jurisdiction, for example, only applies to “[f]inal judgments or decrees rendered by the highest court of a State,” and only for federal questions. 28 U.S.C. § 1257. See also *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635 (1874) (jurisdiction is limited to federal questions).

⁵ PUB. INFO. OFF., SUP. CT. OF THE U.S., A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 15 (rev. 2021) [hereinafter REPORTER'S GUIDE], <https://www.supremecourt.gov/publicinfo/reportersguide.pdf> [<https://perma.cc/K9CD-6KGT>].

⁶ *Id.*

⁷ *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 619-20 (2015) (Scalia, J., concurring in part and dissenting in part); see also *id.* at 619 (explaining that a “certworthy” petition is one that presents “compelling reasons” for Supreme Court review, including those that present “conflicting decisions on issues of law,” while generally excluding those that merely present “error consist[ing] of erroneous factual findings or the misapplication of a properly stated rule of law” (quoting SUP. CT. R. 10)).

⁸ *Marshall v. Lonberger*, 459 U.S. 422, 447 (1983) (Brennan, J., dissenting).

influence, at least somewhat, the Supreme Court's exercise of jurisdiction and thus reduce the Supreme Court's realistic supremacy over legal disputes.

Lower courts may seek to game certiorari for many reasons.⁹ Most obviously, a judge may be tempted to evade review where the Supreme Court majority is likely to hold a different opinion on an issue that is important to the lower court judge. In such cases, judges may be tempted to “cert-proof” opinions that they believe the Supreme Court's majority will dislike, taking advantage of the Justices' capacity limitations by reverse engineering opinions so that the Supreme Court will consider them “bad vehicles” for certiorari review.¹⁰ By contrast, lower court judges who tend to align with the Supreme Court's majority may seek to push cases to the Justices by making them especially attractive vehicles, thus providing the Supreme Court with an opportunity to shift the law in a direction that the lower court judges favor. And even in cases without ideological overtones or obvious differences of opinion between the lower court and the Supreme Court, judges who simply do not like to be reversed—perhaps because they consider it embarrassing—may seek to “bury” difficult issues to avoid review. Regardless of the reason, the power of lower courts to game certiorari complicates the reality of Supreme Court's supremacy.

Here, we focus on how lower courts can deliberately evade or attract Supreme Court review by increasing or decreasing the Supreme Court's “transaction costs.”¹¹ Using the Supreme Court's 2019 decision in *Kisor v. Wilkie* as our archetype,¹² we first construct a game theory model of the

⁹ To be clear, many lower court judges presumably do not seek to manipulate certiorari. Yet it is possible, at the margins, to imagine judges seeking to influence which cases the Supreme Court decides to hear.

¹⁰ See, e.g., Linda Greenhouse, *Linda Greenhouse on the Roberts Project*, HARV. C.R.–C.L. L. REV. (Oct. 10, 2013), <https://harvardcrcl.org/linda-greenhouse-on-the-roberts-project> [<https://perma.cc/B4VR-Y9EV>] (explaining that “the Oklahoma Supreme Court tried to ‘cert proof’” an abortion case “by giving an extremely short opinion” (discussing *Okla. Coal. for Reprod. Just. v. Cline*, 292 P.3d 27 (Okla. 2012))); Susannah W. Pollvogt, *Forgetting Romer*, STAN. L. REV. ONLINE (2013), <https://www.stanfordlawreview.org/online/forgetting-romer> [<https://perma.cc/D24S-MEJS>] (suggesting that the U.S. Court of Appeals for the Ninth Circuit tried to “cert-proof” *Hollingsworth v. Perry*, 558 U.S. 183 (2010), by relying on state-law grounds and narrow analysis). We discuss specific cert-proofing techniques below. See *infra* notes 43–53 and accompanying text.

¹¹ By “transaction costs,” we mean the full panoply of costs Supreme Court Justices necessarily expend in issuing a merits decision. Some of these costs are more obvious than others, and we discuss the range of inputs to judicial transaction cost functions in more detail below. But for preliminary purposes, we note that judicial transaction cost functions include not only traditional components like search costs, information costs, and error costs, but also less intuitive components like the opportunity costs associated with deciding the case in question instead of other cases on the certiorari docket. See discussion *infra* Section II.D.

¹² 139 S. Ct. 2400, 2418 (2019) (narrowing, but not overruling, the deference required under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), to an agency's interpretation of its own rules). As explained below, we picked *Kisor* not because it is an example of a lower court evading or attracting certiorari, but instead because it well demonstrates how the Supreme Court decides cases, which,

Supreme Court's certiorari and opinion assignment processes to demonstrate why gaming works as a theoretical matter. Importantly, our model does more than just formalize common intuitions.¹³ Rather, it demonstrates the power of lower courts to essentially “trade off” substantive and procedural values to reach, from their perspectives, outcomes that the Supreme Court has no realistic way to reverse—or that, from the other direction, are handed to the Supreme Court on a silver platter. In this way, the lower courts may have a great deal of ability to control the Supreme Court's exercise of discretionary jurisdiction.

With our model in place, we then turn to one aspect of the Supreme Court's so-called “shadow docket”¹⁴: summary reversals. In recent years, commentators have focused on how the Supreme Court can (and does) use less formal orders to reverse or alter lower court decisions.¹⁵ Rather than grant certiorari, consider merits and amicus briefing, hear oral argument, and take time to issue an opinion that fully explains the reasoning behind the Court's decision, the Court sometimes acts more summarily, including deciding cases based on the certiorari briefing alone.¹⁶ These decisions have become controversial.¹⁷ Although we do not address all aspects of the shadow docket in this Article, our model offers a new perspective on this aspect of it. Because use of the shadow docket can be less costly from the Supreme Court's perspective, in that the Justices can act without using one of their oral argument slots, the Justices may perceive the shadow docket as a “lower-cost” tool to discourage lower courts from using the Supreme Court's inherent capacity limitations against it. Of course, this is not to say that summary

by backwards induction, can be used to create a model of certiorari that lower courts can in turn “game.” See *infra* Part II.

¹³ See, e.g., Adam Liptak, *Courts Write Decisions That Elude Long View*, N.Y. TIMES (Feb. 2, 2015), <https://www.nytimes.com/2015/02/03/us/justice-clarence-thomas-court-decisions-that-set-no-precedent.html> [<https://perma.cc/29XB-W7E7>] (speculating that lower courts may try to evade Supreme Court review).

¹⁴ See Steven I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019) (defining the “shadow docket” as “the significant volume of orders and summary decisions that the Court issues without full briefing and oral argument” (citing William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3-5 (2015))). As explained below, the appropriateness of the term “shadow docket” is disputed. See *infra* note 178. We use the term here because it is common in the literature but do not weigh in on whether the label is appropriate. Our analysis, moreover, directly addresses only one aspect of the shadow docket: summary reversals.

¹⁵ See, e.g., Mark Walsh, *The Supreme Court's 'Shadow Docket' Is Drawing Increasing Scrutiny*, A.B.A. J. (Aug. 20, 2020, 9:20 AM), <https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny> [<https://perma.cc/7U9H-89HF>] (“The U.S. Supreme Court's ‘shadow docket’ is coming in from the dark.”).

¹⁶ *Id.*

¹⁷ See, e.g., Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 705-06 (2020) (suggesting that “error correction” of “fact-bound” cases is the “most controversial” type of summary reversal).

reversal is necessarily worthwhile; the practice has downsides, too.¹⁸ But transaction costs may help explain in part why summary reversal has become so attractive to modern Justices.

We next address the implications of our model. In many ways, the United States' approach to law takes the Supreme Court's supremacy as a given—indeed, that supremacy is found in Article III of the Constitution and is embedded in statutory law.¹⁹ Yet that common view is in tension with the realization that the Justices' ability to “say what the law is”²⁰ may be contingent on a variety of factors, including but not limited to lower courts' ability to manipulate certiorari. The possibility that certiorari can be gamed thus poses a challenge to the conventional view of supremacy itself: in some cases, the Supreme Court may have no realistic ability to control how law is interpreted and applied. This raises difficult doctrinal questions about the uniformity of federal law and the Supreme Court's future. It also raises difficult normative questions about the proper relationship between lower courts and the Supreme Court. How should we understand lower court attempts to game certiorari?²¹ And if gaming certiorari is sometimes justified—itsself debatable—how do we address the externalities that doing so imposes on litigants, third parties, and the judiciary as a whole? We contend that the ability to game certiorari may be a problem in need of at least a partial solution. But unfortunately, there is no perfect solution because the tools that a lower court might use to game certiorari themselves have significant benefits. Ultimately, therefore, our goal is not to solve the problem but instead to present a more nuanced understanding of the judiciary as a whole.

¹⁸ See, e.g., Baude, *supra* note 14, at 56 (“[D]ecisions [from the shadow docket] seem to deviate from [the Court's] otherwise high standards of transparency and legal craft.”).

¹⁹ See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); 28 U.S.C. § 1254(1) (“Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari . . . before or after rendition of judgment or decree . . .”); 28 U.S.C. § 2254(d) (“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted . . . unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . .”).

²⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *Cooper v. Aaron*, 358 U.S. 1, 4, 17 (1958) (stressing the “basic constitutional proposition[]” and “settled doctrine” that officials must “obey federal court orders resting on th[e] Court's considered interpretation of the United States Constitution”).

²¹ Compare Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785 (2007) (defending some evasiveness), with Immanuel Kant, *On a Supposed Right to Tell Lies from Benevolent Motives*, in KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 361, 362-63 (Thomas Kingsmill Abbott trans., London, N.Y. & Bombay, Longmans, Green & Co., 5th ed. 1898) (rejecting even “benevolent” lies).

* * *

Part I of this Article sets the stage by discussing how certiorari works and exploring the limited and largely anecdotal existing literature on how lower courts can game certiorari. Part II constructs a graphical model of how certiorari can be gamed using a hypothetical version of *Kisor*. We build this model from the ground up, first exploring the Supreme Court's certiorari and opinion assignment dynamics, and then reverse engineering that process to demonstrate how those dynamics can be manipulated by strategic lower courts. Because Supreme Court decisions—even those involving a single “issue” or “question presented”—often involve multiple relevant dimensions, we present both a traditional single-dimensional analysis and a more realistic two-dimensional analysis. In Part III, we apply our model to one aspect of the Supreme Court's shadow docket: summary reversal. In Part IV, we explore the implications of gaming certiorari, and finally, in Part V, we identify potential reforms.

I. THE BASICS OF CERTIORARI

The U.S. legal system is simultaneously hierarchical and disordered. In some ways, the Supreme Court is the ultimate arbiter of federal law. But in other ways, the complexity of U.S. society and the sheer number of legal disputes the system must resolve make it functionally impossible for the Supreme Court to reign supreme over all aspects of all suits. Accordingly, the Supreme Court has evolved over time into a body that uses the discretionary certiorari process to shape the broad contours of federal law. This means that every grant of certiorari is costly to the Justices, and those costs provide the raw material for lower courts to game certiorari. Once we understand judicial “transaction costs” (i.e., the full range of costs actors must incur to engage in decisionmaking in a deliberative context),²² we can see both how gaming is possible and how it might work. Here, we introduce these concepts to set the stage for how they can be gamed.

A. *The Supreme Court's Constitutional and Statutory Powers*

The Supreme Court is the court of last resort for litigants contesting issues of federal law. But in practice, the Supreme Court does far more than

²² Cf. Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 84-88 (2010) [hereinafter Stancil, *Close Enough for Government Work*] (discussing transaction costs in a legislative context); Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L. REV. 1251, 1308-16 (2013) [hereinafter Stancil, *Congressional Silence*] (same).

declare the ultimate winners and losers in discrete disputes. The Justices' decisions provide final interpretations of the law for countless parties who will never appear before them. The Supreme Court thus must deploy its finite resources for a population of over 330 million people.²³

The Supreme Court most think of today—a body with discretionary jurisdiction to hear cases that the Justices identify as sufficiently important—arrived only with the passage of the Judiciary Act of 1925.²⁴ Over the last century, Congress has removed nearly all of the Supreme Court's historical areas of mandatory jurisdiction.²⁵ Today, virtually all of the Supreme Court's docket consists of cases accepted by way of certiorari or other mechanisms that are now treated as discretionary.²⁶ The Supreme Court has also firmly established its primacy as the final arbiter of federal law. The Supreme Court can review both the decisions of federal courts of appeal²⁷ and, as a rule, any outcome-determinative federal questions addressed by state supreme courts.²⁸

Given the hierarchical nature of the United States legal system, some characterize the lower courts—either descriptively or normatively—as the

²³ *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock> [<https://perma.cc/LQQ4-TS6A>].

²⁴ Judiciary Act of 1925, ch. 229, sec. 237, 43 Stat. 936, 937; cf. EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, *SUPREME COURT PRACTICE* 235-36 (9th ed. 2007) [hereinafter STERN & GRESSMAN] (describing the reduction in the Court's obligatory jurisdiction and corresponding increase in its power to exercise discretionary review resulting from passage of the 1925 Judiciary Act).

²⁵ See, e.g., Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 28 U.S.C.) (removing the Supreme Court's mandatory jurisdiction over certain appeals from state courts).

²⁶ See, e.g., Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483 (2010) (discussing how the path to Supreme Court review in § 2 of 28 U.S.C. § 1254 has fallen into desuetude); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1712 (2000) (explaining that few even know that this "option" exists).

²⁷ See 28 U.S.C. § 1254 (empowering the Supreme Court to review circuit court decisions).

²⁸ See 28 U.S.C. § 1257 (granting the Supreme Court authority to review decisions by State Supreme courts raising questions of federal law); see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816) ("[I]t is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction."); U.S. CONST. art. VI (obligating state judges to follow federal law). A state law decision that does not depend on federal law is not reviewable, even if the state supreme court discussed federal law. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983) ("[W]e have long recognized that 'where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.'" (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935))).

Supreme Court's "agents" on issues of federal law.²⁹ On this understanding, the Supreme Court's decision to reverse or affirm a lower court's decision stands as a repudiation or ratification of its agent's action.³⁰ Moreover, an agency view of the judiciary means lower courts are obligated not merely to enforce the Supreme Court's holdings in individual cases, but also to effectuate more generally the methods of decision embodied in Supreme Court decisions.³¹ As the late Justice Antonin Scalia explained, "[W]hen the Supreme Court . . . decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts"³²

B. *The Cert Process*

For such an important topic, the Supreme Court's case selection process is surprisingly understudied and decidedly undertheorized.³³ The basics, however, are straightforward. For a lower court case to be decided by the Supreme Court, the Supreme Court must have jurisdiction over the dispute and at least four Justices must vote in favor of granting certiorari.³⁴

²⁹ See, e.g., Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 674-75 (1994) (outlining a principal-agent theory of the federal court system).

³⁰ See *id.*

³¹ There are both practical and philosophical problems with any strong-form agency theory of the lower courts. It is difficult to escape the conclusion, however, that lower courts have at least some characteristics of agents in an agent-principal relationship with the Supreme Court. If nothing else, the Supreme Court can and will reverse lower courts, which implies that the Supreme Court sees *itself* as the principal in an agent-principal relationship.

³² Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

³³ That said, there is some scholarship on certiorari, albeit on different aspects than those addressed here. See, e.g., Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705 (2018) (challenging the notion that the Court's absolute discretion to select its docket is beneficial and suggesting that it hears a portion of cases selected at random); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 961-62 (2016) (noting several dissents from denials of certiorari that address a trend of lower courts narrowing Supreme Court precedent); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1 (2011) (applying administrative law principles to the topic of certiorari reform); Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1, 2 (2008) (examining the degree to which "a Justice's decisionmaking at the certiorari stage is influenced by his or her view of the merits of the cases under consideration"); Hartnett, *supra* note 26, at 1643 (tracing the history of certiorari and "question[ing] whether certiorari is consistent with the traditional conceptions of judicial review, the nature of judicial power, and the rule of law"); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100-02 (1987) (discussing the impact of capacity restraints on the Court's docket); Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1228-29 (1979) (examining the meaning and importance of certiorari denials).

³⁴ See, e.g., *New York v. Uplinger*, 467 U.S. 246, 249-50 (1984) (Stevens, J., concurring) (discussing the "Rule of Four").

But understanding the mechanics of the certiorari vote is of little help without a corresponding understanding of the inputs the Justices consider when deciding *how* to vote. We divide this second class of inputs into two discrete categories: (1) inputs relating to the general “certworthiness” of a particular lower court decision, and (2) inputs relating to the strategic implications of granting certiorari in a particular case.

1. General Certworthiness

The Justices have almost unbounded discretion in deciding *which* sixty to eighty cases to hear annually out of the thousands of petitions they receive.³⁵ Court rules provide guidance to aid the process.³⁶ Supreme Court Rule 10 states that certiorari is only granted upon showing of “compelling reasons.”³⁷ In practice, a compelling reason is more likely to be found when one of the following occurs:

- there are conflicting rulings between federal courts of appeal or a federal court of appeal and a state’s court of last resort;
- a state’s court of last resort or federal court of appeal has decided an important issue that has yet to be decided by the Supreme Court, or has decided the issue in a way that conflicts with Supreme Court precedent; or
- a lower court has so egregiously ignored judicial norms that the Supreme Court’s supervisory authority is necessary.³⁸

The Justices’ perceptions of the importance of the issues raised in a petition seem to be particularly critical; indeed, the Supreme Court has largely rejected error correction in favor of “confin[ing] itself to resolving only those relatively few critically important federal questions that emerge from the lower judiciary.”³⁹ And “the recurring refusal of the Court over

³⁵ See STERN & GRESSMAN, *supra* note 24, at 244-45 (describing factors the Justices consider when deciding whether to take a case); JOHN G. ROBERTS, JR., U.S. SUP. CT., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY, at appendix (2021) [hereinafter 2021 YEAR-END REPORT], <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf> [<https://perma.cc/5E4S-KHUE>] (providing data on the number of cases filed and heard annually in the Supreme Court).

³⁶ See generally SUP. CT. R. 10 (listing factors the Court should consider when deciding whether to grant certiorari). See also STERN & GRESSMAN, *supra* note 24, at 238-41 (contending Rule 10 is vague and allows the Court wide discretion).

³⁷ SUP. CT. R. 10.

³⁸ See, e.g., STERN & GRESSMAN, *supra* note 24, at 238-41 (describing how “perceived ‘error’ in the lower court’s resolution of an important issue” can be grounds for Supreme Court review).

³⁹ *Id.* at 60.

strong dissents to review” some circuit splits “indicates [] that importance to a high degree may sometimes be necessary even where there is a conflict.”⁴⁰

The pressures of the modern litigation environment undoubtedly drive the Justices further in the direction of hearing only important cases. The Supreme Court simply does not have the resources to hear every case that generates a petition.⁴¹ Given the demands on its time, it is perhaps inevitable that the Supreme Court has developed both positive and negative heuristics to help sort petitions.⁴² We focus here on the negative heuristics because they are especially vulnerable to manipulation. All else equal, a petition for certiorari review is *less likely* to be granted if one or more of the following criteria are satisfied:

- the petition is based on frivolous claims;⁴³
- there are “[t]hreshold” jurisdictional concerns or the fear that “[i]ntervening circumstances [may] have arisen since the lower court’s decision that may moot the case”;⁴⁴
- the lower court opinion is “fact-bound”;⁴⁵

⁴⁰ *Id.* at 244-45; *see also id.* at 245 (explaining that the Court’s refusal to hear cases where a split exists may also be explained by a preference “to await further litigation that might produce a consensus or a satisfactory majority view among the lower courts” or perhaps “other unrevealed factors”).

⁴¹ *Cf.* Kenneth W. Starr, *The Supreme Court and the Future of the Federal Judiciary*, 32 ARIZ. L. REV. 211, 214 (1990) (“Justice Stewart, it is said, increasingly relied upon clerks to produce the initial drafts of opinions in virtually all the cases. Things had just become too busy to do it the old fashioned way.”).

⁴² Positive heuristics suggesting *higher* potential certworthiness include the presence of a dissent. *See* Alex Kozinski & James Burnham, *I Say Dissent, You Say Concurral*, 121 YALE L.J. ONLINE 601, 603 (2012) (“Among the recognized legitimate reasons for dissenting . . . [is] to encourage a higher court to reverse . . .”).

⁴³ Former Supreme Court law clerks identified frivolousness “most frequently and consistently” as a reason for denial. H.W. PERRY, JR., DECIDING TO DECIDE 222-23 (1991).

⁴⁴ *How to Get Your Case to the Supreme Court—Or, in the Alternative, How to Keep It from Getting There*, AM. BAR. ASS’N (Nov. 1, 2013) [hereinafter *How to Get Your Case to the Supreme Court*], https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2013_14/2013-fall-get-your-case-to-supreme-court-or-not [<https://perma.cc/MR4J-WGJY>]; *see also id.* (listing “vehicle problems” that could make the Court less likely to grant certiorari).

⁴⁵ Supreme Court Rule 10 states that erroneous factual findings or simple misapplication of the law will rarely warrant the grant of certiorari. SUP. CT. R. 10. In fact, labeling a case as “fact-specific” has been equated with giving that case a “kiss of death” given how rarely “fact-bound” cases ultimately find their way to the merits stage. PERRY, JR., *supra* note 43, at 223-24, 245. The late Justice Harlan stated that

even where a ‘true’ conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals, or where the impact of the conflict is narrowly confined and is not apt to have continuing future consequences, as where a statute which has given rise to conflicting interpretations has been repealed or amended. The nub of all these qualifications is that a conflict of decisions may be safely relied on as a ground for certiorari only in instances

- there are “[g]aps in the appellate record that may make the facts unclear”;⁴⁶
- the lower court opinion is unpublished;⁴⁷
- the decision below is not final;⁴⁸
- the lower court opinion offers alternative grounds;⁴⁹
- the lower court holds that a claim has been waived or, for whatever reason, the lower court did not decide the issue;⁵⁰
- the conflict in the lower courts is based on a decision that has been discredited or no longer has authority;⁵¹ or
- the conflict is not well presented.⁵²

The above list is far from exhaustive; there are other reasons why a lower court opinion might be deemed “uncertworthy.”⁵³ But they illustrate the point: because of capacity constraints, not every case will be reviewed, even

where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone.

STERN & GRESSMAN, *supra* note 24, at 243.

⁴⁶ *How to Get Your Case to the Supreme Court*, *supra* note 44.

⁴⁷ See, e.g., *Plumley v. Austin*, 574 U.S. 1127, 1131-32 (2015) (Thomas, J., dissenting from denial of certiorari). An unpublished decision is an opinion that cannot be cited as precedent in future cases. Federal appellate courts can issue such decisions, but this form of decision should be limited to unimportant cases without broader applicability. See Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 72-76 (2016) (describing the history of unpublished opinions).

⁴⁸ See, e.g., *Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., commenting on denial of petition for writ of certiorari) (“We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.”); see also STERN & GRESSMAN, *supra* note 24, at 249 (“It is often most efficient for the Supreme Court to await a final judgment and a petition for certiorari that presents all issues at a single time rather than reviewing issues on a piecemeal basis.”).

⁴⁹ See, e.g., *Supreme Court Criteria*, GOLDSTEIN & RUSSELL, P.C., <http://www.goldsteinrussell.com/pro-bono/supreme-court-criteria> [<https://perma.cc/9AFD-EQ3M>] (“The Court is likely to deny review if the lower court also ruled against the party on an alternative ground . . .”); *How to Get Your Case to the Supreme Court*, *supra* note 44 (explaining that certiorari is less likely where there are “alternative holdings, such that even if the petitioner is right about the question presented, it will still lose in light of the alternative holding”); cf. STERN & GRESSMAN, *supra* note 24, at 248 (“While this Court decides questions of public importance, it decides them in the context of meaningful litigation.”).

⁵⁰ See *How to Get Your Case to the Supreme Court*, *supra* note 44 (explaining that certiorari is less likely where the petitioner did not “raise certain questions below, or the lower court[] fail[ed] to pass on those questions”); see also, e.g., *Clingman v. Beaver*, 544 U.S. 581, 598 (2005) (“We ordinarily do not consider claims neither raised nor decided below . . .” (citing *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004))).

⁵¹ See STERN & GRESSMAN, *supra* note 24, at 247-48 (explaining that a conflict with discredited decisions generally does not support granting certiorari).

⁵² See *id.* at 248-49 (stating that courts will dismiss cases if they do not adequately bring into question the disputed legal issue); see also *Rogers v. United States*, 522 U.S. 252 (1998) (dismissing as improvidently granted after concluding that the lower court’s conflict was not at issue in the case presented).

⁵³ See generally PERRY, JR., *supra* note 43, at 234-45 (listing reasons why a court may not grant certiorari).

though the Supreme Court's statutory authority often is essentially limitless for questions of federal law.

2. Strategic Inputs

The determination that a petition presents a generally certworthy issue is a necessary condition for any Justice's vote in favor of certiorari. But it may not always be a sufficient condition. It is reported that individual Justices sometimes also think strategically when deciding whether to vote in favor of certiorari.⁵⁴ As explained by an unnamed Justice, "If I suspected a good decision by the lower court would be affirmed, making its application nationwide, I'd probably vote to grant," but even if the "decision may seem outrageously wrong to me but if I thought the Court would affirm it, then I'd vote to deny. I'd much prefer bad law to remain the law of the Eighth Circuit of the State of Michigan than to have it become the law of the land . . ."⁵⁵ Or as Justice Stephen Breyer put it, "Can I promise you that I've never thought of what the outcome eventually will be? No, I can't promise you that."⁵⁶ The number of circuit splits that remain unresolved suggests that other Justices sometimes share this strategic view.⁵⁷

When such considerations apply, an individual Justice will only vote in favor of certiorari if she believes the case in question is genuinely certworthy *and* that the outcome of an eventual merits decision will ultimately move the overall rule in the direction she prefers relative to the pre-certiorari rule. A Justice has less incentive to vote in favor of certiorari if the result of merits consideration will make national law *worse* from her perspective. Our model incorporates both facets of the Justices' decisionmaking calculus when evaluating certiorari petitions.

⁵⁴ See John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828, 833 (1989) (examining possible "strategies" in certiorari voting).

⁵⁵ *Id.* at 829 (quoting *The Law: The Supreme Court: Deciding Whether to Decide*, TIME (Dec. 11, 1972), <https://content.time.com/time/subscriber/printout/0,8816,878113,00.html> [<https://perma.cc/ZPF3-RKRU>]).

⁵⁶ Joan Biskupic, *The Secret Supreme Court: Late Nights, Courtesy Votes and the Unwritten 6-Vote Rule*, CNN (Oct. 17, 2021, 1:08 PM), <https://www.cnn.com/2021/10/17/politics/supreme-court-conference-rules-breyer/index.html> [<https://perma.cc/UXU5-4354>].

⁵⁷ See STERN & GRESSMAN, *supra* note 24, at 244-45 ("[T]he recurring refusal of the Court over strong dissents to review what appear to be important questions as to which the lower courts are in conflict indicates (1) that importance to a high degree may sometimes be necessary even where there is a conflict; (2) that the Justices may prefer to await further litigation that might produce a consensus or a satisfactory majority view among the lower courts; or (3) that other unrevealed factors may be treated as decisive by many of the Justices in these situations.").

C. *The Intuition Behind Gaming Certiorari*

At root, a lower court's ability to protect a decision from review is driven by the fact that the Supreme Court has limited resources to devote to a largely unlimited potential docket. If the Supreme Court grants certiorari for an unimportant, uncertain, or overly complicated case, it loses the opportunity to devote the time and resources required by that case to more important, clearer, or easier-to-understand cases.

Some of the considerations relevant to a case's overall certworthiness are inherent to the legal issues raised by that case. If the lower court must in fact reach an issue that members of the Supreme Court would consider important, that lower court cannot somehow make that issue *less* important, at least not at an intrinsic level.⁵⁸ But lower courts can exercise at least partial control over both the presence and magnitude of many of the considerations that might affect the Supreme Court's interest in hearing a case. Using this knowledge, a lower court judge can, in theory, "reverse engineer" an effectively unreviewable case by sending false signals suggesting the case lacks certworthiness using available discretionary tools.⁵⁹ If a lower court judge wants to "hide" a case from the Supreme Court, it can issue a decision that

- identifies potential jurisdictional concerns;
- is deliberately fact-intensive;
- leaves gaps in the record (perhaps even omitting steps in the court's analysis) or highlights factual uncertainties;
- is unpublished;
- remands for additional proceedings;
- offers alternative grounds for decision;
- finds waiver or otherwise sidesteps the certworthy questions; or
- distinguishes, rather than contradicts, the law of other courts (thus avoiding any direct conflict).

We label *all* factors—both inherent and discretionary—that make it more difficult for Supreme Court Justices to evaluate whether to grant certiorari as "transaction costs."⁶⁰ This is consistent with Ronald Coase's observation that agreement is "often extremely costly, sufficiently costly at any rate to prevent

⁵⁸ As we note below, most but not all gaming techniques involve attempts to *hide* the importance of the vulnerable issue on which the lower court issues its ruling. But they do not change the *inherent* importance of that issue to the Justices.

⁵⁹ As our model demonstrates, "gaming" is not solely a matter of the lower court deploying the right cost-increasing techniques to evade review. The lower court's best strategy for avoiding certiorari will often involve a combination of techniques and strategic placement of the policy in question.

⁶⁰ See Stancil, *Congressional Silence*, *supra* note 22, at 1308-09 (stating that political players face response costs if they are to respond to an "undesirable judicial interpretation" and that those costs will "differ from player to player").

many transactions that would be carried out in a world in which the pricing system worked without cost.”⁶¹ This is as true for the “transaction” of judicial decisionmaking as it is in other contexts.⁶²

Once transaction costs are identified, the potential for gaming certiorari becomes intuitive. By falsely suggesting that a case is not certworthy, a lower court judge can increase the Supreme Court’s transaction costs,⁶³ thus decreasing the probability that the Justices will grant certiorari. The Justices cannot review all cases, and when the costs of deciding whether to review a particular case increase, the likelihood that the Justices will select that case decreases relative to the other cases on their docket.

D. Previous Analysis of Gaming Certiorari

Commentators have hypothesized that evading Supreme Court review is possible⁶⁴ and have even speculated that certain decisions were designed to be cert-proof.⁶⁵ Unfortunately, intentional strategic behavior of this sort is difficult to identify and admissions of guilt by lower courts are hard to find. Indeed, at least as a rule, such behavior only works if two conditions are satisfied: (1) the lower court’s intent must be kept secret, and (2) the Supreme Court must continue to accept the technique the lower court deploys as generally establishing genuine “uncertworthiness.” A lower court that tells the Supreme Court that it is gaming the Justices’ certiorari calculus would not likely succeed. And if a particular technique acquires a reputation for being used regularly to evade review, the Supreme Court will no longer place significant value on the signal that technique sends.⁶⁶ Scholars thus struggle

⁶¹ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON 1, 15 (1960).

⁶² See generally Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON & ORG. 306, 308 (1999); Douglass C. North, *A Transaction Cost Theory of Politics*, 2 J. THEORETICAL POL. 355, 362 (1990).

⁶³ As we discuss below, the Supreme Court here is a “they,” not an “it,” because individual Justices will often face *different* transaction costs. See generally Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992) (explaining this concept in the context of Congress, where the House and the Senate, and the actors within them, have different preferences).

⁶⁴ See, e.g., Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1216 (2003) (“There is even some speculation that, because the Supreme Court is less likely to grant certiorari to an appeal from an unpublished opinion, appellate judges may decide controversial cases via unpublished opinions simply to insulate those decisions from Supreme Court review.”).

⁶⁵ See, e.g., Greenhouse, *supra* note 10 (noting an example by the Oklahoma Supreme Court, which tried—though ultimately failed—to make a case “cert proof” by issuing “an extremely short opinion”).

⁶⁶ In fact, it may cut the other way: if a particular technique is used too frequently to game certiorari, the Supreme Court may start to pay special attention to its use—for example, in the case of unpublished opinions. See *infra* notes 81–91 and accompanying text.

to identify clear examples of evasion. That said, the literature does contain some discussion of the subject, and the extant discussion at least suggests that it occurs.

1. Admissions

The best evidence of lower court gaming is judicial admissions of guilt. These are hard to find, especially in print, but a few such admissions do exist. The late Patricia Wald, former Chief Judge of the D.C. Circuit, acknowledged that judges sometimes agree to “sweep troublesome issues under the rug,” though she quickly added, “[M]ost [such issues] will not stay put for long.”⁶⁷ She also confessed that she has “even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.”⁶⁸ Wald’s admission finds support in the late Judge Stephen Reinhardt’s statement that the Supreme Court “can’t catch em all.”⁶⁹ Reinhardt’s statement, of course, was not especially savvy if his goal was to avoid the Justices’ attention.⁷⁰ But it does suggest that lower court judges do not always see themselves as the Supreme Court’s agents and that they design decisions with hopes of avoiding reversal.

Another prominent jurist, the late Judge Richard Arnold of the Eighth Circuit Court of Appeals, also suggested that some gaming may occur. As he explained, if a panel cannot distinguish precedent “but nevertheless, for some extraneous reason, wish[es] to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser,” though he added, “I don’t say that judges are actually doing this—only that the temptation exists.”⁷¹ He went on to say that if a judge wants to reach a particular outcome “but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion

⁶⁷ Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995).

⁶⁸ *Id.*

⁶⁹ Baude, *supra* note 14, at 47 (citing Matt Rees, *The Judge the Supreme Court Loves to Overturn*, WASH. EXAM’R: WKLY. STANDARD (May 5, 1997, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/the-judge-the-supreme-court-loves-to-overturn> [<https://perma.cc/J9UE-HF5Q>]); see also Linda Greenhouse, *Dissenting Against the Supreme Court’s Rightward Shift*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html> [<https://perma.cc/E5P3-9LTF>].

⁷⁰ See Baude, *supra* note 14, at 47 (explaining that Reinhardt is “the subject of special scrutiny from the Court—and understandably, given that quote”); see also M. Todd Henderson, *Justifying Jones*, 77 U. CHI. L. REV. 1027, 1029 n.15 (2010) (“Reinhardt’s reversal rate is about 4 out of every 100 opinions, and, conditional on certiorari being granted, prevails at the Court only 16 percent of the time.”).

⁷¹ Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 223 (1999).

and sweeping the difficulties under the rug.”⁷² Although Arnold did not say that an effort to evade scrutiny “has ever occurred in any particular case,” he openly worried that “a system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings.”⁷³

Other judges disagree that such gaming occurs. Jennifer Barnes Bowie and Donald Songer, for example, interviewed more than two dozen appellate judges and reported those “judges to be nearly unanimous in their view that neither they nor their colleagues act strategically to avoid review.”⁷⁴ “Nearly,” though, is an interesting word in that sentence; it means that at least one judge believed that strategic decisionmaking did occur and was willing to say so to outsiders.

2. Accusations

Outside observers have also accused judges of attempting to cert-proof their decisions. Aaron-Andrew Bruhl, for example, examined how state courts may attempt to avoid Supreme Court review of their arbitration decisions.⁷⁵ By Bruhl’s account, as the Supreme Court began “shut[ting] off various means of resisting arbitration” under the Federal Arbitration Act, state courts that opposed arbitration began “manipulat[ing]” state unconscionability law, as unconscionability remained a valid reason to deny arbitration.⁷⁶ A willingness to “manipulate” the law to avoid certiorari is consistent with the notion that gaming certiorari sometimes happens.

Consistent with Chief Judge Wald’s admission, moreover, Richard Revesz has argued that D.C. Circuit judges, in the context of environmental law, “employ a strategically ideological approach to judging” whereby they “attempt to estimate the probability” of “reversal by the en banc D.C. Circuit, the Supreme Court, or Congress.”⁷⁷ His analysis thus supports the notion that gaming certiorari is possible. Relatedly, Max Schanzenbach and Emerson Tiller have argued that sentencing courts can and do protect decisions that

⁷² *Id.* Presumably, this is the same rug Judge Wald’s hypothetical lower court judge was using.

⁷³ *Id.*

⁷⁴ Jennifer Barnes Bowie & Donald R. Songer, *Assessing the Applicability of Strategic Theory to Explain Decision Making on the Courts of Appeals*, 62 POL. RSCH. Q. 393, 394 (2009).

⁷⁵ Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008).

⁷⁶ *Id.* at 1488.

⁷⁷ Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1766-67 (1997). We do not discuss en banc review specifically in this Article; however, the “panel v. en banc rehearing” analysis is in many ways identical to the “lower court v. Supreme Court” analysis we do perform. The transaction cost functions in the en banc review context differ substantially for reasons beyond the scope of this Article, but the game theoretical analysis is essentially the same.

conflict with appellate court preferences by relying on factual rather than legal grounds.⁷⁸

Andrew Hoffman has observed that the Federal Circuit—home to the nation’s patent cases—has increasingly decided cases through summary affirmances that sometimes simply say “affirmed” without any discussion.⁷⁹ At the same time, the Supreme Court has turned its attention on the Federal Circuit and begun disagreeing with it on major patent issues. According to Hoffman, these trends may be related. After all, “[b]y issuing a summary affirmance, the court potentially shields the case from future Supreme Court review. While this hypothesis likely does not fully explain the court’s practice, it is a plausible factor in light of the recent relationship between the Federal Circuit and the Supreme Court.”⁸⁰

Notably, members of the Supreme Court itself have expressed similar suspicions. The late Justice John Paul Stevens stated in an interview that he “tend[ed] to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.”⁸¹ And Justice Harry Blackmun once warned that lower courts should not be able to use unpublished decisions as “a convenient means to prevent review.”⁸²

More recently, Justice Clarence Thomas came close to openly accusing a court of gaming certiorari. In February 2015, both the *New York Times* and the *ABA Journal* asked essentially the same question: “Are some opinions unpublished to avoid review?”⁸³ The occasion for their question was Thomas’s dissent from denial of certiorari in *Plumley v. Austin*.⁸⁴ *Plumley* involved a habeas claim by an inmate, Timothy Austin, whose original sentence was increased by the trial court after he challenged the original sentence. Austin claimed that he was entitled to a “presumption of judicial vindictiveness” under *North Carolina v. Pearce*,⁸⁵ a 1969 Supreme Court case that created such a presumption when a judge “imposes a more severe sentence upon a

⁷⁸ See Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24, 24 (2007) (predicting that Judges can “more freely” use fact-oriented adjustments to alter sentencing).

⁷⁹ See Andrew Hoffman, Comment, *The Federal Circuit’s Summary Affirmance Habit*, 2018 BYU L. REV. 419, 442-50 (citing cases in which the Federal Circuit issued a summary affirmance).

⁸⁰ *Id.* at 442 (footnote omitted).

⁸¹ Jeffrey Cole & Elaine E. Bucklo, *A Life Well Lived: An Interview with Justice John Paul Stevens*, LITIGATION, Spring 2006, at 8, 67.

⁸² *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting).

⁸³ See Liptak, *supra* note 13; Debra Cassens Weiss, *Are Some Opinions Unpublished to Avoid Review? Thomas Dissent Highlights the Issue*, A.B.A. J. (Feb. 4, 2015, 6:15 AM), http://www.abajournal.com/news/article/are_some_opinions_unpublished_to_avoid_review_thomas_dissent_highlights_the [https://perma.cc/KRH8-3QBP].

⁸⁴ 574 U.S. 1127 (2015) (Thomas, J., dissenting from denial of certiorari).

⁸⁵ 395 U.S. 711, 725-26 (1969).

defendant after a new trial.”⁸⁶ After unsuccessfully exhausting his state law remedies, Austin applied for a writ of habeas corpus in federal court and the district court denied the application.⁸⁷ The Fourth Circuit, however, granted a certificate of appealability and reversed, holding that the inmate was entitled to the presumption of vindictiveness.⁸⁸ To do so, the Fourth Circuit issued a detailed thirty-nine-page opinion, which it issued as an unpublished decision despite a panel member’s dissent.⁸⁹

Joined by Justice Scalia, Justice Thomas contended that the case involved a significant split of authority and noted that later Supreme Court opinions had generally restricted the *Pearce* presumption. From Thomas’s perspective, these factors weighed in favor of certiorari. But Thomas reserved his true rhetorical scorn for the panel’s decision to issue its decision in unpublished form:

True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit. But that in itself is yet another disturbing aspect of the Fourth Circuit’s decision, and yet another reason to grant review. The Court of Appeals had full briefing and argument on Austin’s claim of judicial vindictiveness. It analyzed the claim in a 39-page opinion written over a dissent. By any standard—and certainly by the Fourth Circuit’s own—this decision should have been published. The Fourth Circuit’s Local Rule 36(a) provides that opinions will be published only if they satisfy one or more of five standards of publication. The opinion in this case met at least three of them: It “establishe[d] . . . a rule of law within th[at] Circuit,” “involve[d] a legal issue of continuing public interest,” and “create[d] a conflict with a decision in another circuit.” It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit.⁹⁰

Justice Thomas stopped short of accusing the Fourth Circuit of issuing *Plumley* as an unpublished opinion to evade Supreme Court review. Yet his citation to the Fourth Circuit publication rule and his suggestion that the Fourth Circuit issued the opinion in the form that it did “to avoid creating binding law” together seem to imply that evasion was the goal. In their separate articles on the case, both Adam Liptak and Debra Cassens Weiss noted the concern that unpublished opinions might be used to stymie review.⁹¹

⁸⁶ *Plumley*, 574 U.S. at 1127 (Thomas, J., dissenting from denial of certiorari) (citing *Pearce*, 395 U.S. at 725-26).

⁸⁷ *Id.* at 1129.

⁸⁸ *Id.* at 1130.

⁸⁹ *Id.* at 1132.

⁹⁰ *Id.* at 1131-32 (citations omitted).

⁹¹ Liptak, *supra* note 13; Cassens Weiss, *supra* note 83.

II. OUR MODEL

Scholars have explored how the Supreme Court can leverage Congress's transaction costs to prevent legislative nullification of the Justices' preferences.⁹² Yet there are others who also don't like being told no: lower court judges.⁹³ The Supreme Court receives thousands of cert petitions each year.⁹⁴ If the facts are too complicated, if there are alternative holdings, or if the decision is unpublished, the Justices are less likely to grant review. Yet those considerations are not entirely endogenous to the lower court's decision. A lower court can *make* its decision more or less certworthy.

Few have tried to understand the institutional design features of certiorari, and fewer still have explored the ways in which those design features affect judicial incentives at both levels of the system.⁹⁵ And yet, such an analysis is necessary if we wish to understand the dynamics and the implications of how certiorari can be gamed. Accordingly, here, we present a dynamic theory of the judicial hierarchy with a focus on efforts to shield decisions from certiorari. Using the Supreme Court's decision on judicial deference in *Kisor v. Wilkie*⁹⁶ as an archetype, we explain how certiorari works, and then how certiorari can be gamed. Proceeding first without weighing transaction costs,⁹⁷ we begin by presenting one- and two-dimensional graphical representations of how the Supreme Court decides cases and, thus,

⁹² See, e.g., Stancil, *Close Enough for Government Work*, *supra* note 22, at 84–88 (reviewing these transaction costs and how they are leveraged).

⁹³ See Andrew S. Watson, *Some Psychological Aspects of the Trial Judge's Decision-Making*, 39 MERCER L. REV. 937, 949 (1988) (“The inevitable narcissistic desire not to be reversed will influence greatly the judge’s writing process.”).

⁹⁴ 2021 YEAR-END REPORT, *supra* note 35, at appendix.

⁹⁵ Much of the literature on this subject comes from experts in the social sciences rather than the legal academy. See, e.g., Chad Westerland, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Scott Comparato, *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891 (2010) (modeling circuit court treatment of Supreme Court precedents); Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the US Supreme Court*, 23 J.L. ECON. & ORG. 276 (2007) (modeling the dynamics of opinion assignment); Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000) (modeling the granting of cert); Songer et al., *supra* note 29 (modeling how the Supreme Court monitors circuit court compliance with its precedents). Although such discourse from social science experts can be useful, it may not always accurately reflect the nuances of legal institutions or judicial decisionmaking. Cf. Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2487 (2014) (book review) (explaining that a “purely ideological model” of the sort that political scientists often use to study political behavior “does not fare well” in the judicial context). We join the conversation as experienced legal practitioners, offering a game theory analysis that is informed not only by expertise in the social sciences, but also by first-hand knowledge about the dynamics and nuances of our legal system.

⁹⁶ 139 S. Ct. 2400 (2019).

⁹⁷ See *supra* text accompanying notes 60–62.

how Justices presumably sometimes choose whether to grant certiorari. Each dimension in our model represents a range for a given policy preference. We use the horizontal dimension (x-axis) to show the Justices' preferred degrees of agency deference and the vertical dimension (y-axis) to show their respective commitments to stare decisis.

In the absence of transaction costs, a lower court seeking to avoid review has few, if any, options. But the story changes when transaction costs enter the model. We show not only that transaction costs inherent in the Justices' consideration of a particular issue might give a lower court some leeway to diverge from the Supreme Court's preferred outcome, but also that the lower court's ability to *create* dynamic transaction costs in many cases may expand their ability to limit review.

A. *The Fundamentals of Our Model*

We conceptualize Supreme Court decisionmaking as a two-stage game encompassing (1) the certiorari phase and (2) an opinion assignment phase that ultimately produces the Supreme Court's opinion. We use a graphical pivotal politics approach to depict the model. We do so first using a single-dimension analysis in which the Justices are modeled as having preferences along only one axis—that is, portraying only one policy issue. We then expand our analysis to two dimensions because real-world cases often involve more than one relevant policy dimension.⁹⁸ As such, the various points on the relevant spectrums represent specific *preferences* relevant to the game. As is typical in such analyses, we make traditional simplifying assumptions; however, we do not believe that these assumptions should affect the insights the model generates to any important degree.⁹⁹

For expository purposes, our model initially depicts only the preferences of the Justices, respectively, and the location of the inherited policy P_i . This

⁹⁸ For a thorough introduction to pivotal politics modeling, see KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 20-28 (1998).

⁹⁹ For instance, we model the process as a single-iteration game in which all players possess perfect and complete information about each other's preferences and the state of the world. We also assume that the players have "uni-peaked preferences" such that each player's utility can be measured as the negative of the distance between the outcome or preference under consideration and the player's own ideal point. See, e.g., Stancil, *Congressional Silence*, *supra* note 22, at 1268. That is, the farther the distance between a player's preference and the true outcome, the lower that player's utility. Similarly, in the two-dimensional analysis, we assume that the players' preferences are linear, proportional, and Cartesian such that each player's utility is again measured as the negative of the distance between the outcome or preference being studied and that player's ideal point. We further assume that cases under consideration will be decided by a minimum winning coalition of five Justices unless a sixth Justice can obtain a better result for herself, in that case by joining and influencing the majority. Of course, these assumptions may not always hold, but that should not undermine the model's fundamental insight, even if it does complicate the analysis.

preliminary version of the model presents each Justice's ultimate preference as an "ideal point" in the relevant space. By contrast, the inherited policy reflects the aggregated *national* rule that will continue to prevail if the Supreme Court chooses not to grant certiorari.¹⁰⁰ We begin our analysis in both the one-dimensional and two-dimensional contexts by positing a world without transaction costs to demonstrate how the game would unfold if the Justices did not face scarcity-induced restraints (such as the need to prioritize or the time necessary to figure out a complex record or negotiate with each other). Our analysis then incorporates these transaction costs *and* an additional player in the game: a lower court whose own preference diverges substantially from those of a majority of the Justices.¹⁰¹

B. Framing the Analysis Through the Lens of *Kisor v. Wilkie*

In 2019, a divided Supreme Court considered whether to retain *Auer* deference, which generally requires courts to defer to an agency's interpretations of its own ambiguous regulations.¹⁰² In *Kisor*, a five-Justice majority consisting of Chief Justice John Roberts and the four "liberal" Justices¹⁰³ then on the Court (Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan) upheld a weakened version of *Auer* deference¹⁰⁴ over a spirited dissection of the doctrine authored by Justice Neil Gorsuch on behalf of four "conservative" Justices¹⁰⁵ (himself and Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh), who would have overruled *Auer* completely.¹⁰⁶ Justice Kagan's opinion, however, garnered the Chief Justice's support only in part; he joined her as to the judgment, and he

¹⁰⁰ The inherited policy *P*_{*i*} is necessarily an aggregated estimation of national policy that incorporates the weighted average of regional differences in the lower courts.

¹⁰¹ Except where relevant, our model treats lower court panels as sharing a single ideal point. In reality, determining how a lower court panel reaches a decision can itself be complicated. *See* Nielson & Walker, *supra* note 47, at 89-90 (reviewing factors that influence lower court decisionmaking).

¹⁰² *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *see also* *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (addressing the standard for interpretive deference).

¹⁰³ Here, we are using the terms "liberal" and "conservative" colloquially to reflect how they are often characterized. Such crude labels, of course, often confuse more than clarify. Rather than recreating the wheel, however, we accept these labels here for ease of exposition.

¹⁰⁴ *See Kisor*, 139 S. Ct. at 2408-24; *id.* at 2418 (articulating a new "deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear").

¹⁰⁵ Throughout this Article, we use the term "conservatives" to refer only to Justices Thomas, Alito, Gorsuch, and Kavanaugh (and not Chief Justice Roberts) based on their positions in this case. *See infra* note 106.

¹⁰⁶ *See id.* at 2425-49 (Gorsuch, J., concurring in the judgment); *id.* at 2447 (contending that the Court's "remodell[ing]" of *Auer* is "convoluted"). The Court's decision to remand the case prevented the conservative Justices from dissenting. However, the four conservatives would have disposed of *Auer* deference entirely. *See id.* at 2425 ("It should have been easy for the Court to say goodbye to *Auer v. Robbins*.").

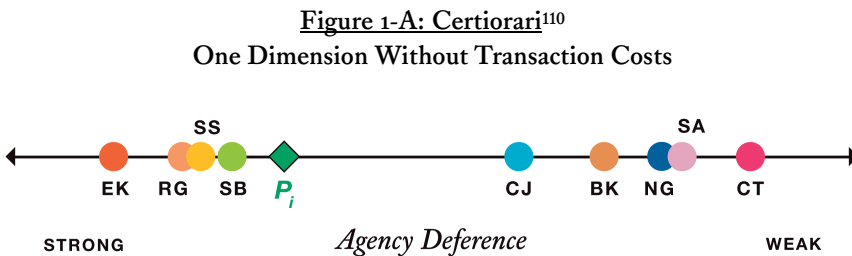
also joined the portions of her opinion that (1) established new safeguards limiting the scope of *Auer* and (2) based the outcome of the case at least in part upon the importance of stare decisis.¹⁰⁷ The Chief Justice pointedly did not join the portion of Justice Kagan’s opinion in which she extolled the virtues of judicial deference more generally.¹⁰⁸

Kisor thus presents a near-perfect lens through which to view the certiorari and opinion assignment game. Some commentators may see *Kisor* as a one-dimensional case whose outcome can be assessed simply by reference to a traditional one-dimensional “liberal to conservative” continuum.¹⁰⁹ And indeed, we begin our own analysis with a one-dimensional frame. But we ultimately find that a single-dimensional analysis leaves much to be desired. By deploying educated (but admittedly hypothetical) assumptions regarding the Justices’ preferences in *two* dimensions rather than one, the more sophisticated version of our model does a better job of explaining the outcome of that case.

C. Modeling the Supreme Court Without Transaction Costs

1. A One-Dimensional Decision Without Transaction Costs

We begin our analysis by providing a hypothetical one-dimensional mapping of the Justices’ preferences for the ideal amount of deference in *Kisor*. Figure 1-A depicts that mapping as the Court considers whether to grant certiorari.



¹⁰⁷ *Id.* at 2424-25 (Roberts, C.J., concurring in part).

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., Adam Liptak, *Supreme Court Limits Agency Power, but Conservatives Say Majority Didn't Go Far Enough*, N.Y. TIMES, June 27, 2019, at A20 (“The Supreme Court [in *Kisor*] . . . cut back on the power of administrative agencies, a central goal of the conservative legal movement. But it refused to overrule two key precedents, to the frustration of four conservative justices.”).

¹¹⁰ We generally use the label “Certiorari” to identify Figures relating to the first stage of the game, and “Opinion Assignment” to reflect the second stage of the game. However, there is no need to separate the two in this specific “single dimension, no transaction costs” context because the Chief Justice is the median voter in that game and thus it collapses into a single stage. See *infra* note 116 and accompanying text.

In this one-dimensional context, each Justice's hypothetical ideal point is denoted in terms of their optimal level of deference to agency interpretations.¹¹¹ Point P_i represents the level of agency deference inherent to the existing policy. In Figure 1-A, we posit that the Supreme Court's current median preference—represented in this case¹¹² by the ideal point labeled “ CJ ” for Chief Justice¹¹³—lies well to the right of the existing inherited policy P_i , while the four conservative Justices on this issue lie even farther to the right (of both P_i and CJ), and the four liberal Justices' preferences lie to the left of P_i .¹¹⁴ Importantly, each Justice's (hypothetical) utility is defined as the negative of the linear distance between that Justice's own ideal point and the alternative outcome under consideration. In plain English, the farther a Justice's ideal point is from the outcome being studied, the less she likes it.

The certiorari phase of the game depends upon whether there exists a coalition of at least four Justices (the minimum necessary to grant certiorari) who can infer from the combination of judicial preferences and the inherited policy that they will be better off with a new majority decision on the merits. Depicted graphically, this means that there must be a group of five or more Justices to one side of the inherited policy. Thus, in a one-dimensional world without transaction costs, a petition for certiorari involving the issue represented by Figure 1-A will meet the four-vote threshold for the Supreme Court to grant certiorari because a majority of five Justices (namely, the conservative bloc plus the Chief Justice) can improve the outcome relative to their own preferences.¹¹⁵ Note that if anyone other than the Chief Justice represented the median preference, factors such as the opinion-assignment rules might become relevant as well—even without adding transaction costs

¹¹¹ How they decide that optimal level, including what interpretative tools they use, is beyond our model's scope. These ideal points are hypothetical but are based on what appears to be at least a *relatively* realistic assessment of their preferences. We do not strenuously defend the respective placement of each individual Justice's ideal point. For the sake of internal consistency, and to demonstrate the importance of multi-dimensional analysis, we use the same scale and the same deference preferences for each Justice in both the one-dimensional and two-dimensional analyses.

¹¹² To be clear, the Chief Justice is not the median Justice by virtue of his position as Chief. Rather, he is the median Justice in *this* particular case because his preferred level of agency deference happens to fall at the Court's median.

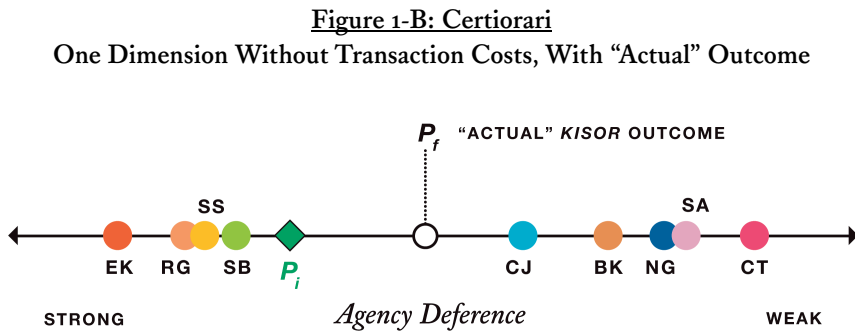
¹¹³ Throughout this Article we use the initials CJ to identify the Chief Justice's ideal points but use the relevant associate Justices' initials to identify their ideal points. We use “ CJ ” for the Chief Justice rather than his initials to remind the reader that the Chief Justice possesses opinion assignment authority when he joins the majority—a power with significant implications for the outcome of the certiorari and opinion-assignment game we model.

¹¹⁴ As discussed *supra* note 111, the ideal points we have selected are hypothetical. Our model does not depend on their precise accuracy; rather, they are estimations that serve as a vehicle to demonstrate application of our model.

¹¹⁵ Notably, under these conditions, certiorari would be granted in *every* case unless at least one Justice's ideal point was located precisely at P_i .

into the mix. But in the *Kisor* model depicted in Figure 1-A, the fact that the Chief Justice is also the swing Justice dictates the outcome of the case. Without transaction costs, the outcome of *Kisor* should fall at the median for the Supreme Court; that is, the outcome will fall at point *CJ*.¹¹⁶ Notably, this would also be the outcome in the absence of the rules allowing the Chief Justice to assign opinions when he is in the majority for a case.¹¹⁷

In Figure 1-B, we include our estimate of the “actual” outcome of *Kisor*, at least with respect to the deference dimension that many commentators have appeared to treat as the only relevant issue in the case.¹¹⁸



The apparent disconnect between the actual outcome of *Kisor* and the prediction of this simplified version of the model raises two questions: First, what explains the gap between the predicted outcome, $CJ=P_f$, and the actual outcome in which P_f affords stronger agency deference than the Chief Justice

¹¹⁶ This is the outcome regardless of who writes the opinion. Without transaction costs, a median voter model yields outcome at the median preference in the absence of additional agenda setting rules. Cf. DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 23-24 (Iain McLean, Alistair McMillan & Burt L. Monroe eds., rev. 2d ed. 1998) (assessing this logic in the legislative committee context). By contrast, if the Chief Justice and Justice Kavanaugh were to switch places in Figure 1-A, the outcome would be different because the Chief Justice would use his agenda-setting power (i.e., his opinion assignment authority) to his advantage.

¹¹⁷ See Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1731-32 (2006) (explaining that the Chief Justice assigns who drafts majority opinions when he is in the majority, otherwise the senior-most Justice makes the assignment).

¹¹⁸ The “actual” outcome of *Kisor* we model is taken from Figure 3 below, which depicts a two-dimensional analysis of the *Kisor* game with inherent transaction costs incorporated. This outcome, however, also accords closely with our understanding of the actual *Kisor* opinion relative to both Chief Justice Roberts’ preferences and the likely true preferences of the liberal coalition he joined to produce that result. Indeed, Roberts’ vote in *Kisor* seems out of step with some of his past hostile statements about deference. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (“[T]he danger posed by the growing power of the administrative state cannot be dismissed.”). It is also unlikely that the liberal bloc would have imposed significant checks on *Auer* deference if doing so was not necessary to obtain Roberts’ vote. See Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 6 (“Justice Kagan led the four liberal Justices in a defensive effort, seeking to deter or at least mitigate the conservative assault.”).

would prefer? And second, if the Chief Justice could have obtained what he regarded as a better result by either retaining the opinion for himself or creating a coalition with the conservative Justices in the real case, why didn't he?

We contend that the gap is best explained by two facts. First, we argue that many—and perhaps even most—cases presented to the Supreme Court for potential review involve more than one relevant dimension of decision. In the case of *Kisor* itself, a two-dimensional approach incorporating judicial preferences as to *both* appropriate deference levels *and* the relevant Justices' preferences regarding stare decisis comes far closer to explaining the actual result than does a one-dimensional analysis. Second, we argue that judicial transaction costs—whether inherent to the case under consideration or artificially inflated by a lower court seeking to evade Supreme Court review—also play an important role in both the certiorari and the opinion-assignment stages of the game.¹¹⁹ We incorporate each feature in turn below.

2. A Two-Dimensional Decision Without Transaction Costs

Although it may be tempting to adopt a “liberal to conservative” ideological continuum as a tool to predict judicial outcomes, in reality a large percentage of litigated cases involve more than one potentially competing dimension, even when the Supreme Court is deciding whether to grant certiorari as to a single *issue* articulated in the form of a single “question presented.” For example, a case focused solely on interpreting a statute may involve a single appellate *issue*, but nonetheless involve more than one competing *preference dimension*. One competing dimension may, for example, consist of each Justice's preference (however reached) about liability. But that same case may also involve potentially competing preferences about the relative importance of legal clarity.¹²⁰ And two Justices with similar preferences along one dimension may nonetheless diverge along the second dimension.

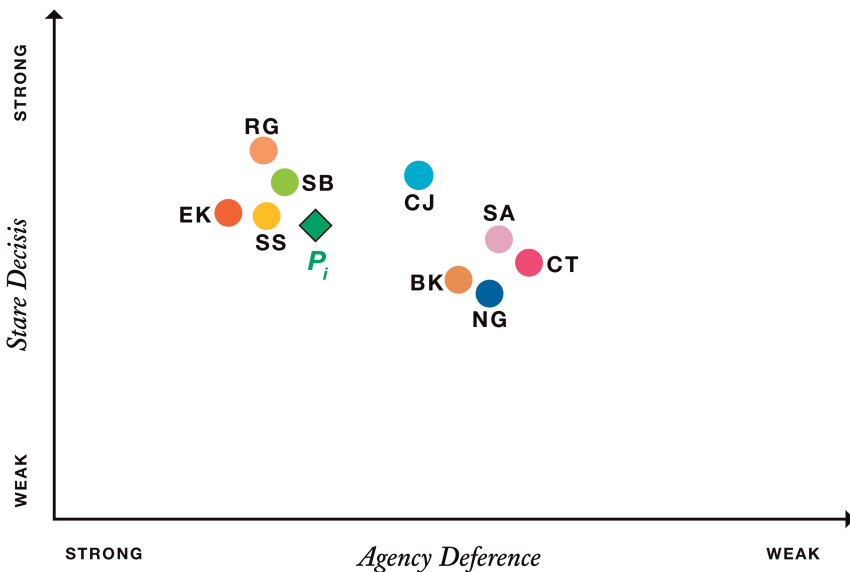
¹¹⁹ It would be possible to demonstrate certain interesting dynamics of the overall game with further one-dimensional analysis. For example, a one-dimensional “liberal to conservative” preference distribution matching the conventional wisdom about the Court once Justice Barrett replaced Justice Ginsburg yields a potentially interesting outcome. In that situation, the Chief Justice would face some incentive to join a conservative majority in a 6–3 decision, using his assignment power to limit the extent to which the five more conservative Justices move the policy.

¹²⁰ Compare, e.g., *Borden v. United States*, 141 S. Ct. 1817, 1836 (2021) (Thomas, J., concurring in judgement) (“I reluctantly conclude that I must accept *Johnson* in this case because to do otherwise would create further confusion and division . . .”), *with id.* at 1839 n.3 (Kavanaugh, J., dissenting) (“[O]nly four Justices conclude that the phrase ‘against the person of another’ addresses *mens rea* and excludes reckless offenses. Yet despite all of that, *Borden* prevails, and reckless offenses are now excluded from ACCA's scope.”). Cf. David S. Cohen, *A Tale of Two Vote Switches*, 100 TEX. L. REV. ONLINE 39, 40 (2021) (explaining how Justices sometimes “wr[i]te (or sign[]) onto an opinion that would logically produce one vote on the outcome in the case, but then ultimately conclude[] by voting for a different outcome”).

In fact, many cases might involve three or more competing dimensions. Thankfully, though, the most important dynamics of multi-dimensional analysis of Supreme Court decisionmaking can be demonstrated by expanding our dimensional frame from one to two because that move is all it takes to demonstrate the players' ability to leverage their counterparts' preferences in one dimension against those in another. Accordingly, for simplicity's sake, our analysis next tracks the Supreme Court's decisionmaking process in *Kisor* through a two-dimensional world with no transaction costs. We frame the case in terms of the two preference dimensions that appear in the opinions themselves: deference and stare decisis.

It is not possible to identify each Justice's true ideal point with precision, of course, in one dimension or two. *Kisor* nonetheless continues to provide an excellent canvas for exploring Supreme Court voting dynamics in a multi-dimensional context because both the deference and stare decisis dimensions show up explicitly in the opinions. Allowing for a certain amount of license in estimating each Justice's ideal point, we map the *Kisor* Court's hypothetical preferences and the aggregate national policy inherited following *Auer*¹²¹ (P_i) as follows:

Figure 2-A: Certiorari
Two Dimensions Without Transaction Costs



¹²¹ See *supra* note 100 (explaining the meaning of “national policy”); see *supra* note 102 and accompanying text (discussing the outcome in *Auer*).

In Figure 2-A, we identify the inherited policy P_i as lying in between the liberal cluster of Justices' preferences and the conservative cluster of Justices' preferences, but significantly closer to the liberal group.¹²² The position of the inherited policy indicates strong deference to agency interpretation and also indicates relatively strong commitment to stare decisis.¹²³ Importantly, each Justice's preferred level of deference is identical to their one-dimensional preference as analyzed above; the additional "scatter" apparent in Figure 2-A is entirely vertical—a function of hypothesized differences in the Justices' preferences as to the stare decisis dimension in this context.

The conservative Justices are tightly clustered well to the right of the inherited policy.¹²⁴ In other words, our model depicts the conservative Justices' (Thomas, Alito, Kavanaugh, and Gorsuch) relatively strong preference for less deference and relatively modest commitment to stare decisis in this context.¹²⁵ By contrast, we posit (with some plausibility) that

¹²² As we explain *supra* note 111, the ideal points we identify for each Justice are largely hypothetical. However, "hypothetical" is not the same as "random." Rather, we have inferred the likely general position of each Justice's ideal point based upon information from *Kisor* itself and other sources. See *infra* note 124. But far more importantly, although the specific results of each modeled game will of course depend upon the locations of the various ideal points, the broad implications of the model do not.

¹²³ Notably, Chief Justice Roberts has shown a greater commitment to stare decisis than some of the Justices, although he is still willing to overrule cases. See, e.g., Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. & PUB. POL'Y 733, 737-38 (2020) ("In two decisions handed down as the October 2018 term drew to a close, the Chief Justice was willing to pay that price; in two others at the end of that term and a third during the Court's most recent term, he declined." (footnote omitted)); see also Jonathan H. Adler, *The Stare Decisis Court?*, THE VOLOKH CONSPIRACY (July 8, 2018, 10:05 AM), <https://reason.com/volokh/2018/07/08/the-stare-decisis-court> [<https://perma.cc/D2SY-TVCT>] ("[T]here is reason to believe Chief Justice Roberts is reluctant to overturn prior precedent (given his general orientation toward preserving the status quo and avoiding disruption) . . .").

¹²⁴ Justices Thomas and Alito, for example, expressed dissatisfaction with *Auer* deference before *Kisor* was decided, and Justices Gorsuch and Kavanaugh expressed hostility generally to deference before they were elevated to the Supreme Court. See, e.g., Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 104 (2018) ("In 2015, Justices Scalia, Thomas, and Alito all questioned the wisdom and constitutionality of judicial deference to agency interpretations of their own regulations. . . . Some circuit judges have subsequently expressed concerns about these deference doctrines. . . ."). Mostly for illustration purposes, we have chosen to characterize each Justice as having a slightly different ideal point than even his or her closest compatriots; for instance, it is likely that Justice Thomas has a weaker attachment to stare decisis than some of the other Justices, but for ease of illustration, we modeled his ideal point as we did here. As we will see when we introduce transaction costs into the analysis, relatively small differences in ideal points between generally aligned Justices may often wash out of the analysis such that it is better to characterize certain blocs of Justices as sharing a single ideal point. It also makes the modeling easier.

¹²⁵ Justice Gorsuch expressed this position in his dissenting opinion in *Kisor*. See *Kisor v. Wilkie*, 139 S. Ct. 2400, at 2425 (2019) (Gorsuch, J., dissenting) ("It should have been easy for the Court to say goodbye to *Auer v. Robbins*."); *id.* at 2443-44 ("There are serious questions about whether *stare decisis* should apply here at all.").

the liberal Justices would all prefer slightly *more* deference than even *Auer* provides; moreover, those Justices prefer a relatively strong form of stare decisis as well, at least in this context.¹²⁶ Of course, the most interesting player in the *Kisor* drama is Chief Justice Roberts. Here, we have a reasoned sense of his preferences. Specifically, it is clear from Roberts' opinion concurring in part that he would generally prefer *less* deference to agency interpretation than *Auer* previously required.¹²⁷ At the same time, Roberts also endorsed a preference for relatively strong stare decisis—so much so that he joined Justice Kagan's majority on this basis.¹²⁸

In our one-dimensional zero-response-costs analysis, the certiorari question is simple: is there a group of five Justices to one side of the inherited policy? If so (as there was in *Kisor*), a grant was guaranteed because there are numerous outcomes that would move policy closer to all five of those Justices' respective ideal points. This is what economists call a "Pareto improvement" for the requisite five-member majority.¹²⁹

Although the underlying analysis is the same in the multidimensional context, visual representation of the concept is more complex. The introduction of a second dimension also implies a set of tradeoffs that were not present in the one-dimensional context. Under the assumptions of our model, the two-dimensional representation of potential Pareto improvements for each Justice

¹²⁶ The four liberal Justices in the *Kisor* majority all dissented in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), which limited *Auer*. As to stare decisis, such a commitment is plausible considering the importance the liberal Justices place on preserving certain older precedents. That said, none of the Justices treats stare decisis as an absolute.

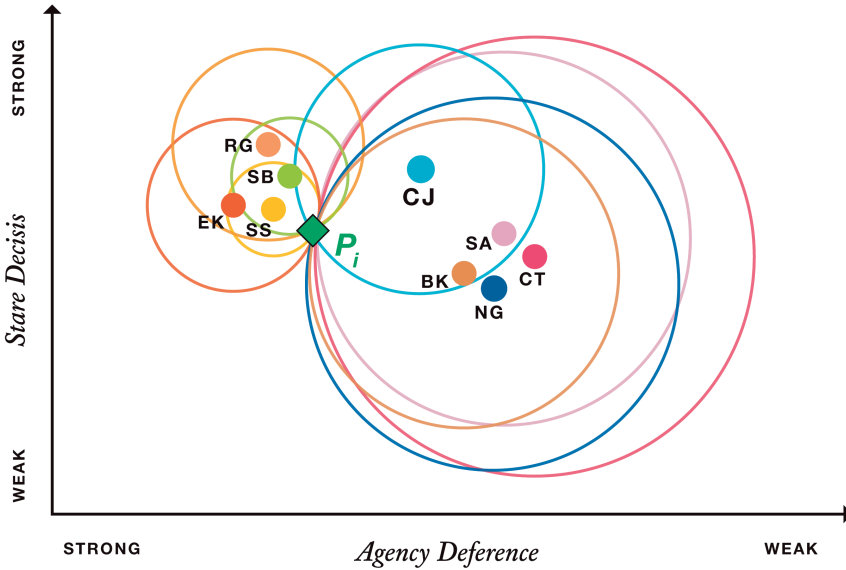
¹²⁷ See *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part) ("[C]ases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation.").

¹²⁸ See *id.* at 2424 ("For the reasons the Court discusses in Part III–B, I agree that overruling those precedents is not warranted."). The Chief Justice's commitment to stare decisis is not particularly surprising. Indeed, every Chief Justice has at least some incentive to prefer stronger stare decisis because over the long haul, their opinion assignment authority will tend to produce more outcomes they prefer (and would thus prefer to endure).

¹²⁹ "Pareto superiority" refers to outcomes that improve utility for at least one actor while making all other actors no worse off than before. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, at 14 (5th ed. 1998) (describing concept). A "Pareto improvement zone" is thus the area of decisions that are superior. Even in the one-dimensional context, Pareto analysis and our utility assumptions impose some limits on the extent to which policy can move. Recall that the one-dimensional model predicts a *Kisor* outcome precisely at the Chief Justice's ideal point because, without transaction costs, he could (and would) credibly threaten to switch sides if either faction offered him anything other than exactly what he wanted. See *supra* Figure 1-A. But there is another limit on the potential outcome that, while not in play in *Kisor* itself, might be relevant in other one-dimensional mappings. Specifically, any outcome farther to the right of the Chief Justice's ideal point than the inherited policy is to its left is a nonstarter from the Chief Justice's perspective. Under the assumptions of the model, the Chief Justice would prefer the inherited policy to such an outcome.

involves circles instead of lines.¹³⁰ Figure 2-B depicts the Justices' individual improvement zones for our hypothetical *Kisor* preference map.

Figure 2-B: Certiorari
Two Dimensions Without Transaction Costs,
With Individual Improvement Zones



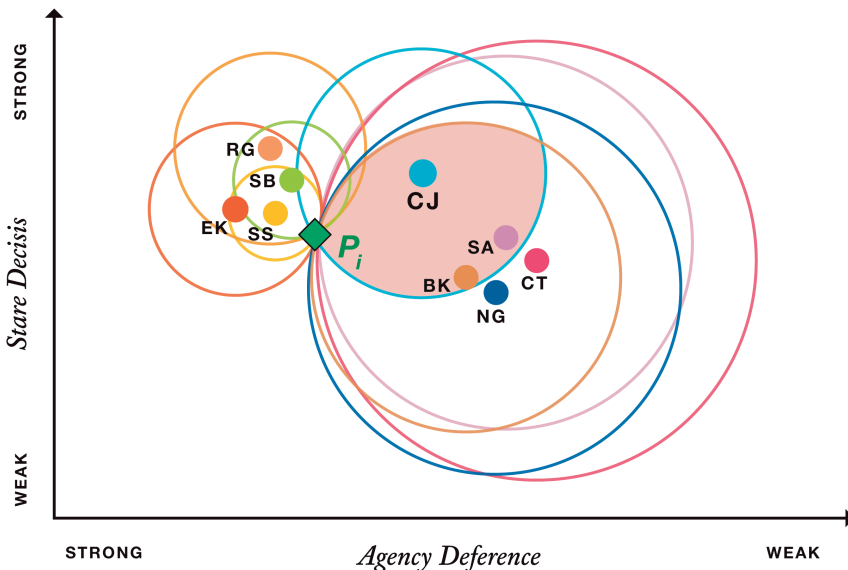
There is now a circle associated with each Justice (marked by the same color as used to designate the Justice), centered on that Justice's ideal point and passing through the inherited policy P_i . From any given Justice's perspective, any final policy outcome *on* their circle represents an outcome *equivalent* in utility terms to the inherited policy P_i . Any outcome *outside* a Justice's circle represents *lower* utility from that Justice's perspective, and any outcome *inside* their circle represents an *improvement* from that same Justice's utility perspective. Thus, each circle represents an "individual improvement zone" relative to the inherited policy.

As explained above, to determine the result of the certiorari phase of the game, we first need to determine whether there are any potential Pareto

¹³⁰ The use of circles rather than some other shape is a function of our assumptions that the Justices weight each dimension equally, and that their utility is measured as the simple Cartesian distance between ideal points and outcomes. Though neither of these assumptions is particularly realistic, both simplify the model such that its insights become easier to uncover. The validity of those insights does not change when we relax those assumptions, although the math admittedly becomes more difficult.

improvements available to a minimum winning coalition of five Justices.¹³¹ Taking a potential winning coalition consisting of the conservative Justices and the Chief Justice first, Figure 2-C depicts the policy space in which such an improvement would be possible.

Figure 2-C: Certiorari
Two Dimensions Without Transaction Costs, With Individual Improvement Zones and Mutual Improvement Zone (Chief Justice Plus Conservatives)



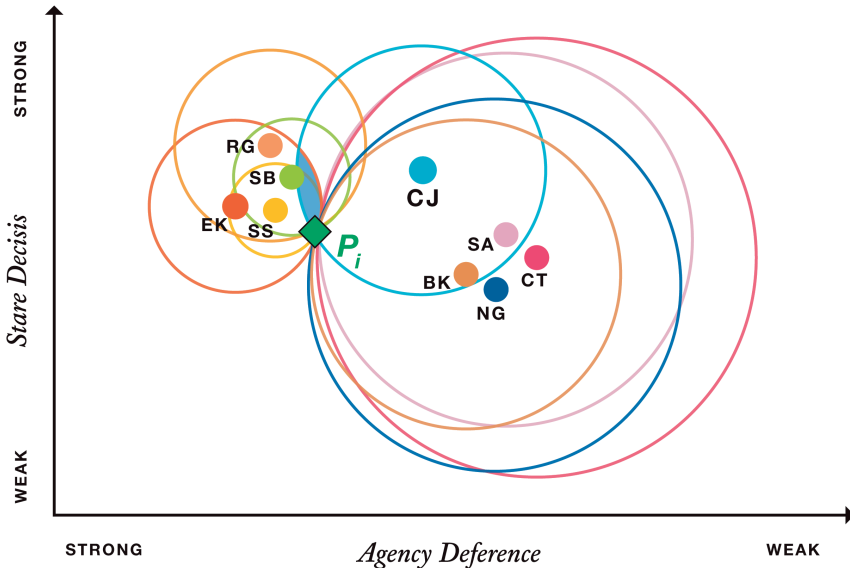
In Figure 2-C, the shaded red area represents the Pareto improvement zone associated with the Chief Justice and the four conservative Justices. Any outcome inside the borders of that region represents an improvement over *Auer* for those five Justices. We note three characteristics of this region. First, it is relatively large, which means that there is substantial space in which a coalition consisting of the conservatives and the Chief Justice could reach a

¹³¹ For a nine-member court, the number of possible combinations of five-Justice minimum winning combinations is 126. To determine the number of possible combinations of size r out of n total participants, use the formula: $\frac{n!}{r!(n-r)!}$ where n is the total number of Justices (9) and r is the size of the relevant combination (5). For a five-member majority of a nine-member court, the formula yields $\frac{9!}{5!4!} = \frac{9 \times 8 \times 7 \times 6}{4 \times 3 \times 2} = \frac{3024}{24} = 126$. But the preference distributions that were likely operative in *Kisor* functionally reduced the number of genuinely viable coalitions down to just two.

mutually superior outcome.¹³² Second, potential improvements available to this group of Justices are mostly—but not entirely—a function of the potential to decrease the level of deference to agency interpretations. Finally, the region contains the Chief Justice’s own ideal point, which may give the Chief Justice significant power to obtain his *ideal* outcome rather than just a *better* outcome than the inherited policy.

Figure 2-D performs the same analysis for the “liberal bloc and Chief Justice” coalition.

Figure 2-D: Certiorari
Two Dimensions Without Transaction Costs, With Individual Improvement Zones and Mutual Improvement Zone (Chief Justice Plus Liberals)



Note that there is a small region in which the Chief Justice and the liberals on the Court could obtain an outcome better for each of them than the inherited policy. This region is much smaller than the corresponding mutual Pareto improvement zone available to the “conservatives and Chief Justice” coalition. Moreover, virtually all the mutual improvements available to the

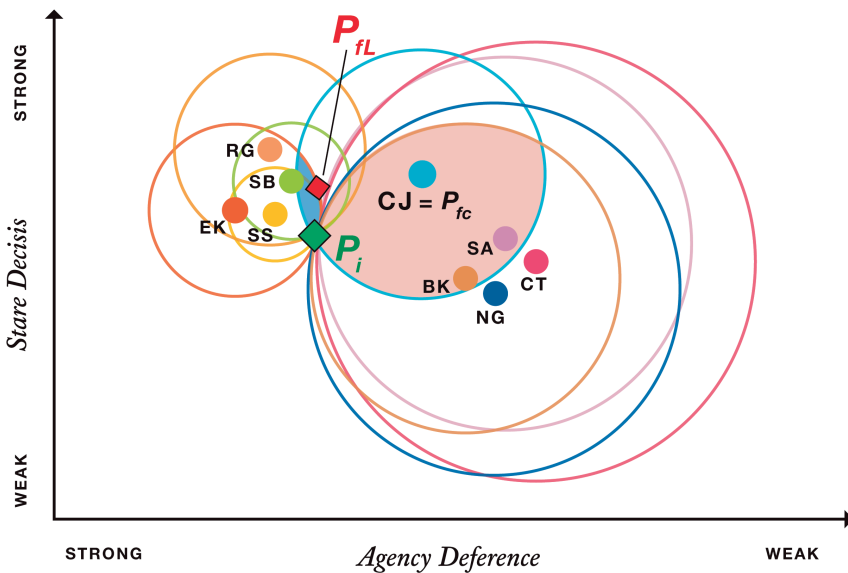
¹³² Notably, real-world evidence suggests that Justices do, in fact, accept outcomes that are not their preferred outcomes but that are considered better than the alternative. See ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 31 (1957) (providing a specific example of Justice Brandeis not dissenting because “the opinion [was written] so closely to the facts of [the] case[] that [he was] inclined to think it will do less harm to let it pass unnoticed by dissent”).

“liberals and Chief Justice” bloc would come in the form of a stronger commitment to stare decisis. Anything other than a *de minimis* decrease in deference eliminates the Pareto improvement entirely.

Building upon the previous Figures, Figure 2-E demonstrates the outcome not only of the certiorari phase, but also of the opinion assignment phase of a two-dimensional *Kisor* game with no transaction costs.

Figure 2-E: Certiorari and Opinion Assignment

Two Dimensions Without Transaction Costs, With Outcome at $P_{fc} = CJ$



This Figure includes the Pareto improvement zones for both coalitions and suggests that the four conservative Justices and the Chief Justice will all vote to grant certiorari. Each of them knows ahead of time that doing so will improve their position relative to the inherited policy. But unlike in the one-dimensional context, the actual certiorari calculus for the conservative bloc involves a certain amount of complexity.

The addition of a second dimension means that a coalition consisting of the liberals and the Chief Justice could also realize a Pareto improvement over *Auer* if they were to vote together.¹³³ The conservatives in this context thus

¹³³ This is because a Justice may be willing to sacrifice in one dimension to gain in another. As discussed *supra* note 130, our model measures each Justice’s utility as the simple Cartesian distance between ideal points and outcomes. For example, we predict that Justice Ginsburg would be willing

vote for certiorari not because theirs is the *only* Pareto-superior coalition, but because it is the *better* Pareto-superior coalition from the Chief Justice's perspective. Recall that the Chief Justice's ideal point falls within the Pareto improvement zone associated with a "conservatives plus Chief Justice" coalition. By contrast, the best *Pareto-superior* point the liberals can offer the Chief Justice lies at P_{JL} , the closest point to CJ on the border of the liberals' Pareto improvement zone.

As a result, even though Figure 2-E cannot predict the opinion writer,¹³⁴ it can predict the ultimate outcome: in a two-dimensional world with zero transaction costs, the final policy will again fall precisely at the Chief Justice's ideal point.

D. Modeling the Supreme Court with Transaction Costs

1. Understanding Transaction Costs

Of course, as explained above, real-world Supreme Court Justices face a host of transaction costs, some of which are inherent to the specific *substance* of each petition for certiorari, and others of which are a function of the *form* of the lower court decision on which each petition is based.¹³⁵ These transaction costs can have a significant effect on the Supreme Court's actions at both the certiorari and the opinion assignment stages of the game.¹³⁶ We divide the Justices' transaction costs into four sometimes overlapping categories: opportunity costs, error costs, bargaining costs, and information/search costs, and we address each in turn.

to sacrifice some agency deference to gain more adherence to stare decisis, depicted in Figure 2-E by tracing Justice Ginsburg's circle from point P_i counterclockwise.

¹³⁴ See *infra* subsection II.D.3 (discussing opinion assignment dynamics).

¹³⁵ We note that there is a distinction between the individual *components* of a Justice's transaction cost function and whether or to what extent each of those components represents a *dynamic* or *inherent* transaction cost. It is therefore possible for the opportunity cost component of a Justice's individual transaction cost function as to a particular cert petition to have both inherent and dynamic components. That is, there are some aspects of a Justice's opportunity costs that "are what they are" by virtue of the nature and substance of a case, and there are other aspects of that component that a lower court can raise or lower by way of specific decisions it makes as it writes. The same is true for bargaining costs, error costs, etc.

¹³⁶ Real-world evidence indicates that transaction costs matter. See, e.g., Greg Goelzhauser, *Graveyard Dissents on the Burger Court*, 40 J. SUP. CT. HIST. 188, 192 (2015) (quoting a letter from then-Justice William Rehnquist to Justice Thurgood Marshall, which reads: "If this were November rather than June, I would prepare a masterfully crafted dissenting opinion exposing the fallacies of your pre-emption discussion. Since it is June, however, I join.").

a. *Opportunity Costs*

Opportunity costs are likely the most important single component of the Supreme Court's certiorari-related transaction costs.¹³⁷ The Justices build most of their docket by comparing the petitions they review to one another and to some ill-defined minimum standard of certworthiness. Defined as "the loss of potential gain from other alternatives when one alternative is chosen,"¹³⁸ "opportunity cost" formalizes a broadly shared human intuition: at least part of the net value of any given decision depends upon what we must give up to make that decision. Opportunity costs are of particular concern in highly selective environments in which resources are limited—for example, in the discretionary review environment facing a Supreme Court that typically grants certiorari on less than two percent of the petitions it reviews.¹³⁹

In fact, many of the criteria used to identify certworthy cases (or to reject unworthy cases) are facets of the Supreme Court's opportunity cost calculus. Imagine, for example, two separate cases in which an equal "distance" separates the preference expressed in an inherited policy and that of a particular Justice's own ideal point. Now imagine that one of those cases concerns a frequently arising, publicly salient question about the First Amendment, while the other is about, say, the "processing facilities" provision of the Robinson-Patman Act.¹⁴⁰ If the Court grants certiorari on the Robinson-Patman Act case, it devotes one of its valuable slots to (from the perspective of most Justices) a lower priority issue. Thus, the Supreme Court's commitment to reviewing only cases of high importance reflects an opportunity cost mindset.

¹³⁷ See, for example, David R. Henderson, *Opportunity Cost*, ECONLIB: ENCYCLOPEDIA, <http://www.econlib.org/library/Enc/OpportunityCost.html> [<https://perma.cc/ZRK5-VCAC>], for a discussion demonstrating that opportunity costs are, in fact, transaction costs. The *Econlib* definition describes a scenario in which a student at a state college pays only \$4,000 in annual tuition and the state subsidizes that tuition to the tune of \$8,000. *Id.* Although it might be tempting to suggest that the student only pays 1/3 of her education costs, this is not true unless she is foregoing no other economic opportunities to attend college. If she has foregone \$20,000 in income for each year of schooling, then the total cost of the "transaction" of attending school is \$32,000—the \$4,000 she pays in tuition, the \$8,000 paid by the state, and the \$20,000 in foregone income—and she pays seventy-five percent of her total education cost. *Id.* Because the Supreme Court's docket slots are so limited, any decision to grant certiorari as to one case necessarily implies denying certiorari on others; each Justice's opportunity cost function for a given petition thus necessarily incorporates the value she would assign to other petitions not granted as a result of granting certiorari in the case at hand.

¹³⁸ *Opportunity Cost*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

¹³⁹ REPORTER'S GUIDE, *supra* note 5, at 15.

¹⁴⁰ 15 U.S.C. § 13(d).

b. *Error Costs*

Error costs are also an inevitable component of a Justice's transaction cost function. In general, and all else equal, the Justices would prefer to select cases that present the lowest risk of them making a mistake. This again suggests that the Supreme Court will perceive fact-bound, unpublished, and summary affirmance cases as higher-cost relative to its preferred published, "clean," and fully reasoned lower court opinions. The Justices might be concerned that a highly fact-bound case is more likely to result in a mistake of law than a "good vehicle." And an unpublished opinion might signal (whether accurately or inaccurately) that the lower court did not fully address the issues and engage in sufficiently thorough legal reasoning, since an unpublished opinion is precedentially weaker than a published opinion. The summary affirmance presents a similar problem because the Supreme Court will have to delve into a potentially complex trial court or administrative agency record in detail to decide the case.

Error costs also potentially create a principal-agent problem within the Supreme Court itself. Law clerks play an important role in screening certiorari petitions. Clerks making certiorari recommendations may disproportionately worry about their reputation; indeed, many speculate that fear of recommending a "bad vehicle" (i.e., a case that does not cleanly present the question) may lead clerks to aggressively urge the Justices to reject petitions.¹⁴¹ Thus, all else equal, as the risk of a Supreme Court mistake increases, so too do the transaction costs.

c. *Bargaining Costs*

Bargaining costs are in many ways the most intuitive component of any actor's response-cost function; in fact, when one considers the concept of transaction costs in the abstract, bargaining costs are likely the first type of costs that come to mind. All else equal, the value of a transaction to the parties increases as the time and effort expended to reach agreement decreases. The same is true at the Supreme Court, and the Justices' preference for "clean," clearly presented legal issues is at least in part attributable to the fact that

¹⁴¹ The American Bar Association notes:

When you work on your petitions and [briefings], you should keep in mind that the justices' clerks never want to recommend cert in a case that raises serious vehicle problems. The single most embarrassing thing that can happen to one of these young lawyers, during their year on the Court, is to recommend that the Court grant cert in a case only to have a vehicle problem prevent the Court from reaching the merits. So when you are the respondent, you will want to tell the Court that the petition raises all sorts of vehicle problems that will rear their ugly heads if the Court grants review.

How to Get Your Case to the Supreme Court, *supra* note 44.

cleaner cases make for less costly bargaining among the Justices.¹⁴² As with opportunity costs and error costs, the triumvirate of unpublished opinions, fact-bound opinions, and summary affirmances will, all else equal, increase the Supreme Court's bargaining costs because it will take time and effort to ensure that everyone is on the same page. Those types of cases will tend to obscure issues relative to the Supreme Court's paradigm certworthy case, making it more difficult—and thus more costly—to reach agreement.

d. *Search/Information Costs*

It is also costly for the Justices to obtain the information they need to make informed decisions. A Justice facing many of the techniques to evade review we identify will find it relatively more costly to understand the lower court case than if the vehicle was clean. In fact, messy cases may in certain circumstances be costly enough to dissuade even otherwise relatively interested Justices from granting review. The more the Supreme Court must investigate the facts or law of a case, the greater the expected benefits of the decision must be to justify that effort.

2. Categorizing Costs

a. *Baseline Transaction Costs*

When considering the types of transaction costs we identified above, it is important to note that each Justice comes to each case with a baseline transaction cost function. That is, we start from the proposition that each case carries with it inherent baseline costs for each Justice that reflect the case's immutable characteristics.¹⁴³ In our model, each Justice's baseline transaction

¹⁴² For an example of how this phenomenon almost derailed a Supreme Court merits decision, see ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS, AND PROBLEMS IN COMPETITION POLICY* 336-37 (3d ed. 2017), which uses Justice Marshall papers to illuminate Justices' deliberation regarding whether to "DIG"—dismiss as improvidently granted—the certiorari grant in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), because the case was arguably too "factbound" to serve as a clean vehicle. To be sure, it is possible that Justices do not always want "clean" cases. It may be easier to reach a compromise when the facts or law is murky, for example. It is sufficient that as a general matter, the Supreme Court prefers petitions without potential vehicle issues.

¹⁴³ In reality, of course, different lower court judges would inevitably generate different baseline transaction costs for the same case; lower court judges are not fungible. Even without acting strategically, differences in individual judges' writing styles and interests could yield different baseline Supreme Court Justice transaction cost functions as to the same case. However, these differences are irrelevant to our model because we are exploring only a single-iteration game. In that context, it is sufficient to compare the "Platonic ideal" baseline transaction costs associated with a non-strategic opinion from the specific lower court in question to the increased transaction costs associated with a strategically written "cert-proofed" opinion *from the same court*. Additionally, a

costs are often dominated by the opportunity cost component of that Justice's cost function. This is because the issues fairly presented by a given petition for certiorari will differ in their importance to different Justices—one Justice may think that a petition in a Free Exercise case is incredibly important, thus having very *low* opportunity costs relative to the rest of the docket, while another may see the same case as relatively unimportant, thus presenting *high* opportunity costs.

Although individual Justices' opportunity costs likely constitute the majority of their respective baseline transaction costs, other components of the transaction cost function may come into play as well. For example, a particular petition and the issues it raises may involve inherently higher (or lower) bargaining costs than other petitions, whether because of the complexity of the legal environment or for some other reason. Relatedly, a given petition may also involve an inherently higher or lower error risk than its fellows on the docket.¹⁴⁴ The important takeaway here is that the nine baseline transaction cost functions of the Justices in a given case serve as the starting point for our analysis of strategic behavior by the lower courts.

b. *Dynamic Transaction Costs*

We label the other category of transaction costs relevant to our analysis “dynamic transaction costs” because each Justice's baseline transaction costs can be increased¹⁴⁵ by way of lower court action. As a threshold matter, it is important to distinguish between “dynamic transaction costs” as a *concept* and the intentional and strategic *use* of such costs to affect the Supreme Court's certiorari calculus. Conceptually, the dynamic transaction costs associated with a case are simply any transaction costs that are not inherent to the case itself but are rather a function of how the lower court decision presents the case to the Supreme Court.

lower court–specific “playing it straight” baseline is the only baseline that enables us to invert the model to account for lower court attempts to *increase* the likelihood of a certiorari grant.

¹⁴⁴ Cf. Greg Reilly, *How Can the Supreme Court Not “Understand” Patent Law?*, 16 CHI.-KENT J. INTELL. PROP. 292, 302-03 (2017) (acknowledging that “the Supreme Court justices and their clerks, for the most part, lack scientific or technical backgrounds and are neophytes when it comes to the technology in patent cases” but arguing that this criticism is “overly broad” because most of the time the Justices through effort can master enough of the technology to resolve the case).

¹⁴⁵ Our analysis focuses primarily upon lower court attempts to *increase* the Justices' transaction costs, thereby *reducing* the likelihood of a cert grant. However, it is also possible that lower courts could attempt to “game certiorari” in the opposite direction by deliberately writing their opinions in ways intended to *lower* the Justices' transaction costs, thus *increasing* the likelihood of a grant relative to each lower court's “playing it straight” baseline. Our model implicitly contemplates this possibility as well, although we do not offer specific illustrations of a lower court's “cert-pumping” attempt.

Thus, the tools we have already identified—including unpublished opinions, fact-bound opinions, summary affirmances, and alternative grounds holdings¹⁴⁶—all inherently impact dynamic transaction costs because the lower court’s decision to deploy one or more of these techniques *changes* the Supreme Court Justices’ transaction costs.¹⁴⁷ But the mere use of one of these tools does not (and cannot) by itself denote a strategic attempt by the lower court to evade review. Indeed, sometimes lower courts use their decision to issue an unpublished opinion as a good-faith signal to the Supreme Court that the issues in the case are not worth the Justices’ time. Therefore, the existence of dynamic transaction costs is not in itself a bad thing. But dynamic transaction costs are susceptible to strategic manipulation.

Cert-proofing as we define it involves a lower court’s deliberate decision to increase dynamic transaction costs for the purpose of reducing the chances of Supreme Court review. The court does so by deploying one or more of the techniques we discuss above.¹⁴⁸ As with the Justices’ baseline costs, the added dynamic costs do not accrue equally to each Justice. For example, a deliberate lower court decision to “unpublish” an opinion in hopes of avoiding Supreme Court review will likely increase all Justices’ transaction costs to some degree, but it may add more to some Justices’ *dynamic* transaction costs than it does others.¹⁴⁹

3. Incorporating Baseline Transaction Costs

Both types of transaction costs identified above are relevant to our analysis; we consider inherent baseline transaction costs first. In functional terms, each Justice’s baseline transaction costs effectively expand that Justice’s ideal point such that she now regards any outcome within the expanded zone as equivalent to her ideal point, assuming she does not have to incur the transaction costs associated with deciding the case. The dashed circles in Figure 3-A incorporate the baseline component of each Justice’s transaction cost function into our hypothetical analysis of *Kisor*.¹⁵⁰

¹⁴⁶ See *supra* Sections I.C, I.D.

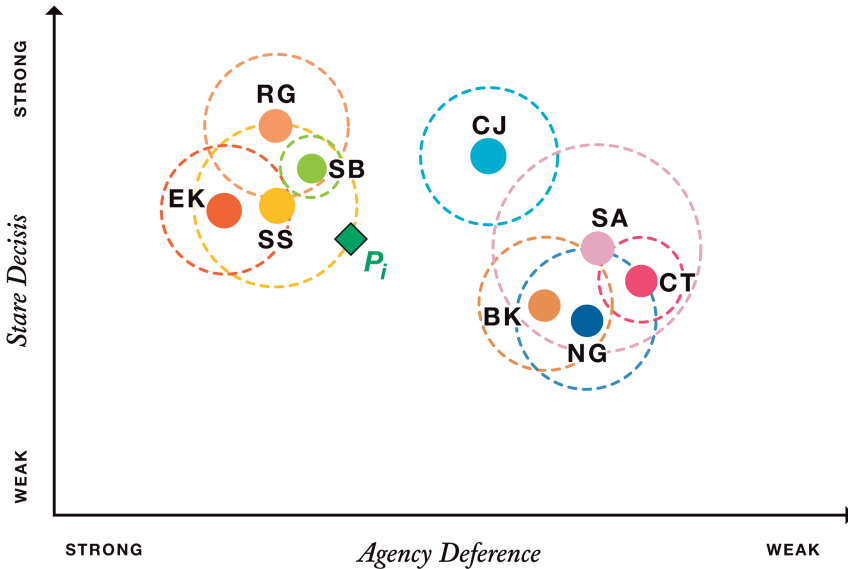
¹⁴⁷ For example, a heavily fact-bound lower court opinion may increase the error costs and search/information costs in a Justice’s transaction cost formula.

¹⁴⁸ *Supra* Sections I.C, I.D.

¹⁴⁹ It is possible (at least in theory) that a lower court’s use of a cert-proofing technique might *lower* some Justices’ dynamic transaction costs if those Justices perceive the use of that technique to be an attempt by the lower court to avoid review. This might thereby signal the case’s importance rather than its unimportance, thus decreasing the opportunity cost of reviewing such a case relative to other candidates for certiorari.

¹⁵⁰ Recall that the real lower court opinion that generated *Kisor* involved no obvious attempt to avoid certiorari for the case. Accordingly, although it is admittedly an oversimplification of the real-world dynamics, we treat *Kisor* as involving *only* baseline transaction costs for the Justices.

Figure 3-A: Certiorari
Two Dimensions with Individual Baseline Transaction Costs



They key feature of Figure 3-A is that it includes baseline transaction costs. To understand the implications of this addition, consider the Chief Justice's ideal point and baseline transaction cost function. The incorporation of these baseline costs means that the Chief Justice regards any outcome on or inside his dashed circle as functionally equivalent to an outcome at his ideal point. The same is true for the remaining Justices with their respective dashed circles.

A critical feature of our analysis is that we model baseline transaction costs as varying from Justice to Justice for a given petition. This is primarily because different Justices will see the same petition as involving different opportunity costs; that is, different Justices are likely to regard the same petition as being of differing levels of importance relative to the remainder of the Supreme Court's potential docket. For example, in Figure 3-A, our hypothetical Justice Alito (ideal point SA) has the greatest baseline transaction costs, and Justice Breyer (ideal point SB) has the lowest baseline transaction costs among the Justices.¹⁵¹

¹⁵¹ We emphasize that these are purely hypothetical and for illustrative purposes only; devising a method to estimate the unique baseline transaction costs associated with any Justice exceeds the scope of this Article. But if these did represent reality, it would mean that Justice Alito tends to think the issues at stake in *Kisor* are less important (and involve a higher opportunity cost relative to the rest of the docket) than his colleagues think they are, and that Justice Breyer thinks the *Kisor* issues are *more* important than his colleagues think they are.

Given the baseline transaction costs we hypothesize in Figure 3-A, the certiorari vote would still ultimately yield a grant in this case. That said, graphical depiction of this phenomenon is possible within the model, but such a depiction is visually complicated.¹⁵² To understand why baseline transaction costs alone would not defeat certiorari, begin by focusing solely on the Chief Justice and his conservative colleagues, all of whom face relatively small baseline transaction costs. In fact, none of those Justices' baseline transaction cost functions are large enough to include the inherited policy, P_i . This means that each of those Justices would expect their individual net gains from deciding the case on the merits to exceed their baseline transaction costs.

The intuition is as follows: so long as there exist at least four Justices (1) who anticipate an improvement from the inherited policy if certiorari is granted, and (2) for whom P_i lies outside their baseline transaction cost functions, there will exist a baseline-transaction-cost-adjusted Pareto improvement zone leading to a certiorari grant.

Of course, it is also possible that baseline transaction costs alone will be sufficient to prevent a certiorari grant even when a Pareto improvement over the existing inherited policy exists for five or more Justices.¹⁵³ In at least some cases, certain Justices will not be in favor of granting cert based solely on weighing their baseline transaction costs against the potential benefits of a decision on the merits. If a Justice's baseline costs are high enough *and* her ideal point is close enough to the inherited policy—in other words, if granting cert comes at a high cost, but the outcome will yield minimal, if any, gain for that Justice—cert-proofing is not necessary. That Justice will not vote in favor of granting cert regardless. Thus, if our hypothetical version of *Kisor* instead involved sufficiently high *baseline* transaction costs such that the inherited policy P_i laid inside two or more of the *baseline* transaction cost boundaries associated with the Chief Justice and his conservative colleagues, certiorari would not have been granted.

By itself, incorporation of baseline transaction costs has implications for the outcome of our hypothetical *Kisor*. Recall that in the absence of

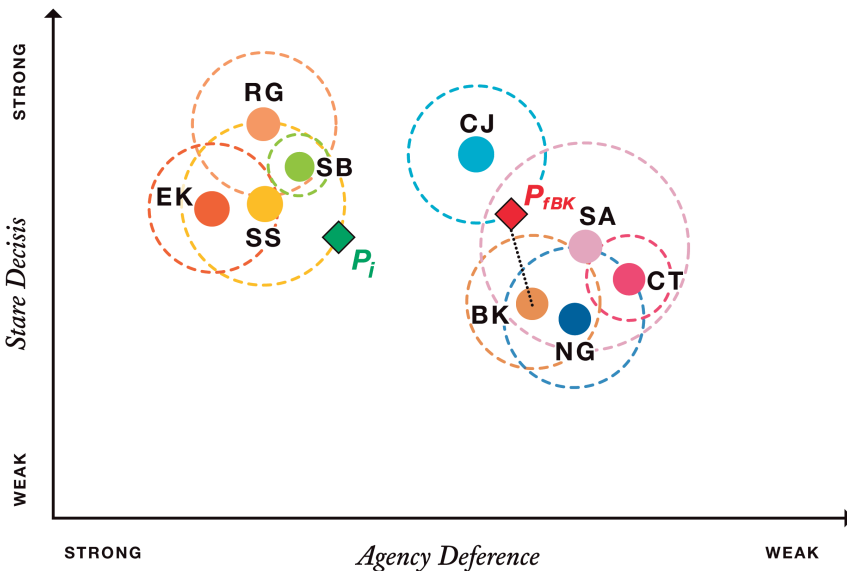
¹⁵² To depict this graphically one would first need to identify the point closest to P_i on each Justice's baseline transaction cost boundary. Because each Justice treats any point on or within that boundary as equivalent to her ideal point, we could then use those new points to identify potential baseline-transaction-cost-adjusted Pareto improvement zones for various potential coalitions of Justices. However, as we demonstrate in Section II.E below, the analysis ultimately boils down to determining whether the inherited policy P_i falls within enough of the relevant Justices' relevant transaction cost boundaries to reduce the number of Justices who would vote to grant certiorari below the requisite four.

¹⁵³ We depict this situation graphically in Figure 4, *infra*, in the context of dynamic transaction costs. This Figure is applicable to the present discussion, however, because the certiorari phase depends only on whether the absolute *quantum* of transaction costs facing the various Justices eliminates the incentive to grant certiorari, not on the *mix* of baseline and dynamic costs involved.

transaction costs, the model predicts both that the Supreme Court will grant certiorari and that the outcome will lie at the Chief Justice's ideal point CJ .¹⁵⁴ Figure 3-A suggests a potentially different result, depending on the Justice assigned to write the opinion by the Chief Justice.

If the Chief Justice retains the opinion for himself, he will of course still fix policy at point CJ . But if the Chief Justice assigns the opinion to another member of the five-Justice majority, the writing Justice will set policy at the point closest to her ideal point on the Chief Justice's transaction cost circle. Figure 3-B illustrates this, working on the assumption that Justice Kavanaugh receives the assignment.

Figure 3-B: Certiorari and Opinion Assignment
Two Dimensions with Baseline Transaction Costs;
Hypothetical Justice Kavanaugh Writes at P_{fBK}



If Justice Kavanaugh writes an opinion that fixes policy *inside* the Chief Justice's baseline transaction cost function, he is ceding ground unnecessarily; the incorporation of the Chief Justice's baseline transaction costs means that he will treat all outcomes within or *on* that boundary as equivalent to his ideal point. By contrast, if Kavanaugh attempts to fix policy *outside* the Chief Justice's baseline transaction cost function, the Chief Justice will instead

¹⁵⁴ See *supra* Figure 2-E and accompanying text.

assign the opinion to himself or another more compliant Justice.¹⁵⁵ The best Kavanaugh could do in that scenario is to fix policy at point P_{fBK} in Figure 3-B—the location closest to his own ideal point on the Chief Justice’s baseline transaction cost boundary.

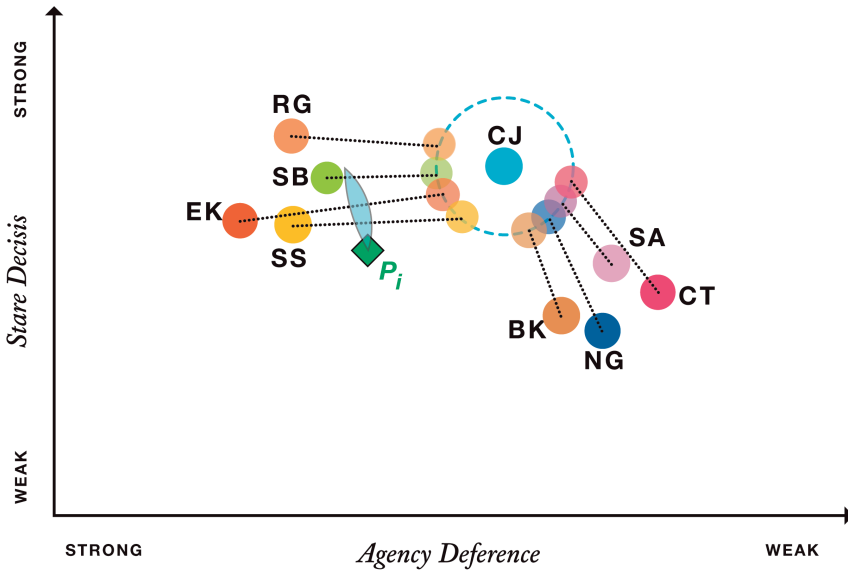
Of course, this is *not* what happened in *Kisor* itself, and careful consideration of the model depicted in Figure 3-B may partially explain why. Given the hypothetical preference distributions we posit, the Chief Justice is obviously the swing Justice in this case because his preferences lie between the northwestern liberal bloc’s preferences and the southeastern conservative bloc’s preferences. But once baseline transaction costs appear, the Chief Justice can only obtain an outcome precisely at his ideal point by retaining the opinion for himself. Full consideration of why the Chief Justice might opt instead to assign the opinion to another Justice lies outside the scope of our analysis, but once the Chief Justice makes that decision—for whatever reason—he effectively faces eight outcomes that will be functionally identical from his perspective, given the assumptions of the model. That is, assigning the opinion to *any* of the eight Associate Justices will result in an opinion on the Chief Justice’s baseline transaction cost boundary and closest to the writing Justice’s own ideal point.

With the Chief Justice’s baseline transaction costs factored in, the final policy equilibrium will be in one of three general locations. First, if the Chief Justice assigns the opinion to himself, the final policy outcome will lie at his own ideal point CJ , regardless of the coalition partners he chooses. But if the Chief Justice chooses to assign the opinion to another writer (something that is a possibility given his relatively high inherent transaction costs), the final equilibrium will lie in one of the two clusters seen on the Chief Justice’s response cost circle in Figure 3-C.

¹⁵⁵ Cf. David W. Rohde, *Policy Goals and Opinion Coalitions in the Supreme Court*, 16 MIDWEST J. POL. SCI. 208, 214 (1972) (explaining the dynamics of Supreme Court decisionmaking and noting that following assignment of the majority opinion, the writer “will be shaped by his own preferences, but he is not a free agent. If he is to attain a winning coalition, he must gain the assent of at least four other justices in the opinion. The opinion writer is thus forced to bargain with the other justices.”).

Figure 3-C: Opinion Assignment (Post-Certiorari)

Two Dimensions; Only Chief Justice's Baseline Transaction Costs Relevant



Unfortunately, the assumptions of the model preclude any additional certainty as to the precise location of the outcome. This is because the model is built in only two dimensions when, in reality, there are undoubtedly additional dimensions, including a desire to show that even the Supreme Court's controversial decisions do not always break down along traditional lines,¹⁵⁶ and because we assume that every Justice weighs both dimensions equally. As a result, once the Chief Justice makes the decision to assign the opinion to another Justice, we can predict that the outcome will be somewhere on (but not inside) the Chief Justice's own response cost circle, but precisely *where* on that circle depends both upon the coalition he chooses to form and, to a lesser extent, upon the specific Justice he assigns to write the opinion.

¹⁵⁶ Chief Justice Roberts may be especially mindful of accusations of ideological-driven decisions. See Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, AP NEWS (Nov. 21, 2018), <https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-immigration-c4b34f9639e141069c08cfie3deb6b84> [<https://perma.cc/XM2U-83JM>] (“We do not have Obama judges or Trump judges, Bush judges or Clinton judges.” (quoting Roberts)). He also is on record as preferring a docket that tends toward unanimity. See Mark Sherman, *Roberts Touts Unanimity on Supreme Court*, WASH. POST (Nov. 17, 2006, 5:56 PM), <https://www.washingtonpost.com/wp-dyn/content/article/2006/11/17/AR2006111700999.html> [<https://perma.cc/8YNQ-YS8C>] (describing an interview in which Roberts “offer[ed] his view that the Supreme Court produces stronger decisions by being cautious rather than bold” because a cautious approach “can get the most justices to sign onto it”).

If the Chief Justice opts to side with the liberal Justices (as he did in the real *Kisor* case), the final policy will fall somewhere between points *RG* and *SS* on the Chief Justice's response cost circle.¹⁵⁷ Any liberal Justice to whom the Chief Justice assigns the opinion will know that she can deviate from the Chief Justice's own ideal point without his changing his vote or refusing to go along with the ultimate result, so long as she does not place the final policy outcome *outside* his response cost circle. Accordingly, if a liberal Justice is assigned to write the *Kisor* opinion, she will place the final policy outcome at the point on that circle closest to her own ideal point. By contrast, if the Chief Justice votes with the conservatives, the opinion will lie somewhere between points *BK* and *CT* on that same circle.¹⁵⁸

Importantly, any outcome on the Chief Justice's response cost circle represents a stable equilibrium. That is, there is no Pareto improvement available to any other coalition of five Justices. The Chief Justice will be unwilling to disturb any outcome in or outside his own response cost circle. Accordingly, the Justices in the losing bloc will know that they will not be able to change the Chief Justice's mind by offering him a "better" outcome. From the Chief Justice's response-cost-adjusted perspective, there is no "better" outcome than an outcome on or inside his response cost circle, in that he will be unwilling to incur any additional costs just to get the result slightly closer to his own ideal point.

¹⁵⁷ The light blue shaded area in Figure 3-C represents the Pareto improvement zone available to a coalition of the Chief Justice plus the four liberal Justices. (See *supra* Figure 2-E and accompanying text for its derivation. Recall that the Pareto improvement zone for any coalition of Justices exists at the intersection of those Justices' nominal indifference zones, independent of their respective transaction cost functions.) We include the shaded region in Figure 3-C to highlight the power of the "Chief Swing Justice"—that is, the power of the swing Justice when he also holds the opinion assignment power of the Chief Justice. Although the actual winning coalition in *Kisor* consisted of the Chief Justice and the liberal Justices, the outcome falls outside that coalition's Pareto improvement zone relative to the inherited policy *P*. That is, none of the liberal Justices' final points (on the Chief Justice's response cost circle) represents a more ideal outcome from their perspective. Rather, their final points reflect the "least bad" outcome. This is because the Chief Justice's status as swing Justice combined with his ability to assign the opinion to the Justice of his choice when he is in the majority make the threat of a far worse outcome (from the liberals' perspective) highly credible. For example, if Justice Kagan attempts to pull the opinion back toward the blue zone, the fact that this outcome would represent a Pareto improvement over the inherited policy for all members of the liberal coalition is irrelevant: the Chief Justice can either assign the opinion to a different member of the liberal bloc, or he can obtain an even *better* personal outcome by switching to vote with the conservative bloc instead. Thus, when casting the swing vote, the Chief Justice wields significant power over where the final policy outcome falls.

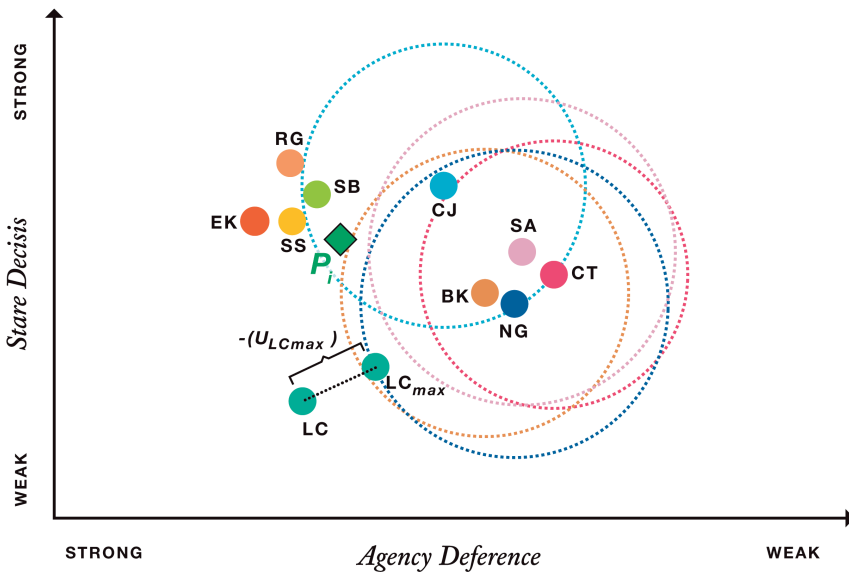
¹⁵⁸ Although our two-dimensional model does not predict the actual outcome in *Kisor* with certainty, the outcome falls within one of the three potential outcomes the model does predict. It is likely that one or more additional dimensions not captured in our two-dimensional representation led the Chief Justice to select Justice Kagan and the liberals as his winning coalition partners.

E. Modeling the Supreme Court to Defeat Certiorari

Once this model is understood, it becomes apparent that lower courts sometimes may be able to add dynamic transaction costs to cases by virtue of the decisions they make and the techniques they deploy. We might also think of these as “cert-proofing-induced costs,” because the lower courts can deliberately add these costs to the Court’s certiorari calculus to evade review. To be sure, the mere presence of these costs does not always mean that the lower court was deliberately using that technique to game certiorari. In fact, as we noted above, these gambits would largely lose their potency as evasive techniques if they reliably signaled an attempt to avoid review.¹⁵⁹ But sometimes they can be used to evade certiorari nonetheless.

Figure 4 depicts a final preference mapping for the original *Kisor* case, this time incorporating large *total* transaction costs (baseline plus dynamic) for the Chief Justice and the conservative Justices. Although the specific technique adopted by our hypothetical lower court is irrelevant, assume that the new cost functions represented below are the product of deliberate evasion.

Figure 4: Certiorari and Opinion Assignment
 Two Dimensions with Dynamic Transaction Costs,
 with Lower Court Ideal Points



¹⁵⁹ See *supra* Section I.D.

Like the preceding Figures, Figure 4 depicts an inherited policy at point P_i , which is the *national* policy facing both the Justices and the relevant lower court. Now, we also introduce the lower court as a full player in the game, depicting its ideal point at LC . Thus, our hypothetical lower court here prefers about the same level of deference as the inherited policy P_i , but it prefers much weaker stare decisis (as an independent principle) than any Justice. This is perhaps because it wants greater flexibility to distinguish precedent in other cases and thus does not want the Supreme Court to adopt a strict standard of stare decisis.

The dashed-line circles in Figure 4 are substantially larger than their baseline response cost analogues in Figure 3-A. Although these increased costs *may* be the result of deliberate attempts to defeat review, they do not *have* to be. They exist because of the characteristics of the lower court opinion, regardless of *why* the opinion has those characteristics.

With this background in place, we can understand how a lower court's effort to game certiorari would work in a case like *Kisor*. Obviously, we do not claim that it "worked" in *Kisor*; indeed, there is no evidence that it was even tried,¹⁶⁰ and, regardless, the Supreme Court granted certiorari. But if a *hypothetical* lower court wanted to avoid Supreme Court review in a case like *Kisor*, Figure 4 illustrates how it could do so.

The lower court cannot place policy at its own ideal point LC without prompting a grant of certiorari and the ultimate placement of the new nationwide policy on or inside the Chief Justice's response cost circle. Point LC lies outside of all five of the relevant Justices' transaction-cost-adjusted indifference zones, and any one of them would be willing to incur the costs to defeat the cert-proofing techniques deployed by the lower court if it locates its policy at its own ideal point.¹⁶¹ However, the addition of dynamic transaction costs will allow the lower court to do far better than it would in a no-response-cost world, without prompting certiorari.

Figure 4 also contains the position LC_{max} , the policy location representing the lower court's best possible cert-proof outcome. At LC_{max} , only three hypothetical Justices—Justice Thomas, Justice Alito, and the Chief Justice—

¹⁶⁰ In *Kisor* itself, the Federal Circuit wrote a lengthy published opinion that fully analyzed the relevant issues and expressly presented the issue of whether deference matters. *Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017) *vacated sub nom.* *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

¹⁶¹ We omit the liberal Justices' expanded transaction cost functions both for graphical clarity and because they are irrelevant to the lower court's calculus. In simplest terms, the lower court need not concern itself with the liberal Justices' transaction costs because the *outcome* of any cert grant will still be driven entirely by the interaction of the Chief Justice's transaction costs and the transaction costs facing the conservative Justices. Stated another way, the liberal bloc knows that if they grant cert, the conservative bloc will set the policy at an even less favorable position (from the liberals' perspective) than LC_{max} , so the liberals will not do so. See *supra* note 157 for further explanation.

would vote in favor of certiorari.¹⁶² LC_{max} lies within Justice Kavanaugh's expanded transaction cost boundary and on Justice Gorsuch's boundary; because they are indifferent between any point on or within their respective boundaries and their own ideal points, they will not vote to grant, thus defeating certiorari. At that location the lower court maximizes its own utility because LC_{max} is the cert-proof point closest to its own ideal point LC . Accordingly, assuming the lower court has done all it can to successfully increase dynamic transaction costs, point LC_{max} represents the lower court's best cert-proof play.¹⁶³

This is the essence of the model. Once dynamic transaction costs are included, evading certiorari can be possible—so long as it is done carefully. It sometimes can be done solely by the form of the decision used, which increases the Supreme Court's dynamic transaction costs. It can also sometimes be done solely by evaluating the Justices' substantive transaction costs and picking a point that cannot command five votes for certiorari. Or, perhaps most likely, it can be done by doing some of *both*—by picking a point that is not the lower court's ideal point but is closer to the lower court's ideal point because of the extra costs the lower court imposed on the Supreme Court by the form of its decision. The inverse, of course, is also true.

F. *Limitations of the Model*

Any attempt to model a complicated system will likely fall short of fully describing reality.¹⁶⁴ No model can fully explain or predict behavior, and economic models are by no means immune from this criticism. We discuss four potential critiques below.

¹⁶² The Supreme Court's general rule for certiorari is to grant on the affirmative vote of four Justices. However, there is also a tradition on the Court that sometimes if three Justices would vote for certiorari, a fourth Justice will vote in favor of certiorari as a courtesy. See Kenneth W. Starr, *The Supreme Court and the Federal Judicial System*, 42 CASE W. RES. L. REV. 1209, 1213 (1992) (explaining the tradition but noting that it may "have fallen by the wayside"). Our model reflects the formal four-vote requirement. To adjust the model to reflect the fourth-vote courtesy tradition, LC_{max} would need to shift northeast to Justice Alito's transaction cost boundary in order to represent the lower court's best possible cert-proof outcome. In this position, only two Justices would vote to grant cert (the Chief Justice and Justice Thomas), defeating cert even with a fourth-vote courtesy.

¹⁶³ To be sure, our model assumes perfect and complete information. Otherwise, the lower court judge cannot be certain where the optimal point is and may guess wrong. This is another reason why cert-proofing may not work in a particular case. That said, lower court judges—who monitor the Supreme Court closely and sometimes may even interact with the Justices personally—may have a fair bit of insight into the Court's preferences. Accordingly, even if the assumption of perfect knowledge is relaxed, there is still reason to think that cert-proofing may be possible.

¹⁶⁴ See Daniel J. Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633, 645 (2017) ("Like any model, it inevitably oversimplifies. But such oversimplification is a necessary aspect of the modeling enterprise—and perhaps not an entirely unfortunate one.")

1. Do Judges Really Behave This Way?

The most obvious criticism of our model is that it fails to capture the reality that many, perhaps most, lower court judges attempt to be faithful to their understanding of existing law and the views of the Supreme Court. This is undoubtedly true; it is also largely irrelevant. We do not purport to offer a “unified field theory” of certiorari. Rather, we offer an analysis of the game theoretical dynamics inherent in the certiorari process to illustrate what is possible in some cases.

As explained above, there is reason to believe that transaction costs are sometimes manipulated to game certiorari. As the judiciary becomes more polarized, moreover, it is reasonable to predict more such behavior. We have no way to measure how often it occurs. And for what it is worth, it may not happen often; not only do judges want to get the law right, but appellate judges work in teams and have a lot to do. But it is *possible*.

2. If Judges Do Behave This Way, Isn't This Model Obvious?

From the opposite direction, someone might say, “Of course judges do this—and your model doesn't advance the ball much beyond what is intuitive.” We disagree. Many “intuitive” concepts are not true,¹⁶⁵ so demonstrating why this intuition may be accurate is itself valuable. Beyond that, though, the implications of this model go well beyond intuition. For instance, the fact that a strategic lower court can essentially trade substance for procedure to optimize total utility is not intuitive. Nor is it intuitive that such a strategic court can evaluate what the Supreme Court is likely to do in a world without dynamic transaction costs when picking how many such costs to impose. Gaming review, after all, requires reverse engineering what the Supreme Court will do, and then adjusting the equation accordingly. That means that there is no one path; it will depend on the Justices' individual preferences *combined* with the Justices' individual static transaction costs and dynamic transaction costs.

The result is a bespoke menu of tools, as lower court judges have both greater substantive and procedural flexibility for areas in which the Justices do not have a strong grasp, but less substantive flexibility for areas in which a coalition of Justices has a pre-developed and easily implemented preference. And the precise ratio of substantive to procedural tools depends on the lower court's preference relative to status quo.

¹⁶⁵ See, e.g., Mark Greer, *When Intuition Misfires*, AM. PSYCH. ASS'N (Mar. 2005), <https://www.apa.org/monitor/mar05/misfires> [<https://perma.cc/P8MQ-TARR>] (explaining how intuitive decisionmaking can lead people astray).

3. What About Circuit Splits and Counsel?

One of the more powerful potential criticisms of the model is that it largely fails to account for what most regard as the single most important criterion in Supreme Court case selection: the circuit split. After all, if the Supreme Court grants review where a split exists, and does not grant certiorari without one, then there may not be much for a lower court to do.

This criticism is not without force, yet it does not defeat the model. Serious circuit splits are a signal of importance, so they will tend to make their way to the front of the Supreme Court's queue. But that queue remains discretionary, so our model does not, in fact, ignore circuit splits. At the same time, circuit splits are not an *automatic* trigger for certiorari, so focusing on importance rather than circuit splits may be a better measure. Circuit splits might also be relevant to the dynamic portion of the Justices' transaction costs. Specifically, a lower court looking to avoid review might take steps to obscure the existence of a circuit split in a variety of ways to increase the Justices' transaction costs. It may also adopt an alternative ground for its decision, making the circuit split not outcome determinative, or remand for additional proceedings and thus avoid a final judgment. A lower court looking to attract review may do the opposite.

Of course, the lower court's ability to do such things can be mitigated by certiorari counsel in some cases—there is a reason why some clients are willing to spend great sums on appellate lawyers.¹⁶⁶ But it remains the case that *at the margins*, a determined lower court may be able to trick the Justices. Furthermore, as explained below, the mere fact that efforts to evade certiorari may lead litigants to pay more for appellate counsel than they otherwise would is itself a reason to be wary.¹⁶⁷ In other words, the fact that a pricy team of specialized lawyers can sometimes defeat a lower court's effort to game certiorari may not suggest that gamesmanship is a false worry but instead might illustrate why we should be concerned.

4. Don't Existing Tools Already Prevent Gaming?

Finally, isn't it possible that the temptation to game certiorari is real, but that safeguards already exist to prevent it? Federal circuit courts, for example, generally hear cases in panels of three judges, "at least a majority of whom

¹⁶⁶ Cf. Mike Scarcella, *Paul, Weiss Inked \$700K Contract with Oklahoma to Undo Tribal Rights Ruling*, REUTERS, Aug. 16, 2021 (explaining that Kannon Shanmugam, one of the nation's top Supreme Court specialists, "normally bills at \$1,824 an hour").

¹⁶⁷ See *infra* Section IV.B.

shall be judges of that court.”¹⁶⁸ The existence of multi-judge panels could defeat any risk that lower courts would use the Supreme Court’s transaction costs to change the likelihood of certiorari because conspiracies of one are easier to coordinate and errors are less likely in a multi-member panel. The reality, however, is more nuanced.

Because the lower federal court must itself reach a majority position,¹⁶⁹ it is true that any attempt to game certiorari must obtain the approval of at least two judges on each panel. If the judges on a panel share roughly the same ideological position, this safeguard might fail.¹⁷⁰

At the same time, a three-judge panel may exacerbate the Supreme Court’s response cost problem. Consider a judge who is interested in cert-proofing her opinion. She may wish to obtain partial “cover” by writing a unanimous opinion that will be less likely to attract Supreme Court attention. If there is a potential dissenter, the judge might persuade her colleague to join the majority opinion by offering to issue the decision in an unpublished form.¹⁷¹ Thus, the internal dynamics of the three-judge panel can make things worse from the perspective of the Supreme Court reviewing that petition for certiorari—for it is hard to imagine anything less exciting than a unanimous, unpublished opinion. The judge might also draft the opinion herself in a particularly fact-bound way. Before her fact-bound opinion causes Supreme Court eyes to glaze over at the certiorari stage, it will likely have the same effect on her panel colleagues, who may even congratulate her for taking such a close and thorough look at the issues.

Nor is en banc review a silver bullet. We might expect that the threat of such review would reduce a panel’s temptation to game certiorari. But en banc rehearing is subject to precisely the same response cost problem that the Supreme Court faces at the certiorari stage. Like the certiorari determination, rehearing en banc is effectively a discretionary decision, to be undertaken only when “necessary to secure or maintain uniformity of the court’s decisions” or when “the proceeding involves a question of exceptional importance.”¹⁷² The data support this conclusion: although the comparison is

¹⁶⁸ 28 U.S.C. § 46(b). The Federal Circuit is authorized to sit in larger panels if its rules so designate, but it currently sits in three-member panels as well. *See* 28 U.S.C. § 46(c) (outlining panel parameters). Certiorari petitions from the state court system have also usually passed through a multi-judge tribunal or tribunals—including a state supreme court—on their way to the U.S. Supreme Court. *See* 28 U.S.C. § 1257 (authorizing review of only “[f]inal judgments or decrees rendered by the highest court of a State”).

¹⁶⁹ 28 U.S.C. § 46(d).

¹⁷⁰ *See* Nielson & Walker, *supra* note 47, at 63-64 (describing this dynamic).

¹⁷¹ *See, e.g.*, Wald, *supra* note 67, at 1374 (“I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.”).

¹⁷² FED. R. APP. P. 35(a).

not apples-to-apples, the circuit courts decide “less than 1 percent” of their appeals sitting en banc.¹⁷³

III. GAMING CERTIORARI AND THE SHADOW DOCKET

The prospect that lower courts can leverage the Supreme Court’s transaction costs to make cases more or less attractive for certiorari is noteworthy in its own right. But it may also help shed light on an increasingly important aspect the Supreme Court’s operations: the shadow docket. Not every case follows the familiar pattern of beginning with cert grant, followed by merits briefing and oral argument, and concluding with a signed opinion. Instead, the Court sometimes decides cases on the certiorari briefing alone. This use of the shadow docket—colloquially known as summary reversals or “sumrevs”¹⁷⁴—and the possibility that certiorari can be gamed may be related, at least sometimes.¹⁷⁵ Indeed, because summary reversal is less “costly” from the Justices’ perspective than the ordinary certiorari process, it may be a tool to discourage efforts to evade review. This does not mean that use of the tool is always justified. But it does help explain why this aspect of the shadow docket may be quite attractive to the Justices.

A. *The Basics of the Summary Reversal*

The Supreme Court often uses its certiorari authority as the first step in the decisionmaking process. After certiorari is granted, the parties brief their

¹⁷³ Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* 2001, 2004 (2014) (citing Michael E. Solimine, *Ideology and En Banc Review*, 67 *N.C. L. REV.* 29, 29-30 (1988)).

¹⁷⁴ See, e.g., *Cole v. Carson*, 935 F.3d 444, 473 (5th Cir. 2019) (en banc) (Ho, J., dissenting) (explaining what a “SUMREV[.]” means).

¹⁷⁵ To be clear, the shadow docket includes other types of decisions, such as whether to stay a lower court order. See, e.g., *Vladek*, *supra* note 14, at 128-31 (discussing the role of emergency relief, including stays, within the shadow docket). The insights from this Article may also be relevant to some of those decisions. Our focus here, however, is on summary reversal, as well as a certain type of grant-vacate-and-remand (“GVR”) order—that is, “orders in which the Court grants, vacates, and remands a petition for reconsideration in light of new precedent.” Baude, *supra* note 14, at 30 n.69. We focus on GVRs—if they should be called GVRs, see, for example, *Webster v. Cooper*, 558 U.S. 1039, 1042 (2009) (Scalia, J., dissenting) (“We should at least give it a new and honest name—not GVR, but perhaps SRMEOPR: Summary Remand for a More Extensive Opinion than Petitioner Requested.”)—in which the lower court issued its decision *after* the Supreme Court’s supposedly intervening decision. See, e.g., *Kaushal v. Indiana*, 138 S. Ct. 2567 (2018). As Justice Scalia explained,

This practice has created a new mode of disposition, a sort of ersatz summary reversal. We do not say that the judgment below was wrong, but since we suspect that it *may* be wrong and do not want to waste *our* time figuring it out, we instruct the Court of Appeals to do the job again, with a particular issue prominently in mind.

Webster, 558 U.S. at 1041 (Scalia, J., dissenting).

positions, amici file briefs, the Justices hear oral argument, and then the Supreme Court issues its decision, almost always in a signed opinion. When lawyers discuss how the Supreme Court decides cases, this familiar decisionmaking process is typically what is meant.¹⁷⁶

Sometimes, however, certiorari is both the first and last step of the process.¹⁷⁷ Summary reversal—which constitutes only part of the shadow docket¹⁷⁸—allows the Supreme Court to decide cases quickly through per curiam decisions,¹⁷⁹ so long as six Justices agree.¹⁸⁰ These decisions have long been criticized on the ground that they “do not always live up to the high standards of procedural regularity set by [the Court’s] merits cases.”¹⁸¹ Indeed, “[t]he *Harvard Law Review*’s annual *Foreword* criticized them in 1958, as did the third edition of Stern and Gressman, published in 1962.”¹⁸² The fear is that without at least further briefing (if not an oral presentation), the Supreme Court may misunderstand the case, or at least give the appearance of not understanding the case.¹⁸³ Nonetheless, summary reversal is now an established part of the Supreme Court’s toolkit, and no current Justice rejects it as per se inappropriate.¹⁸⁴

Summary reversal is also common. As others have noted, many of these decisions are directed at lower court opinions that grant habeas relief, refuse

¹⁷⁶ See Baude, *supra* note 14, at 5-6 (describing the process for merits cases, which attract the “vast majority” of Supreme Court scholarship).

¹⁷⁷ See Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 591 (2016) (explaining how the Supreme Court may “grant certiorari and decide the merits of the case simultaneously, in one fell swoop”).

¹⁷⁸ See Baude, *supra* note 14, at 3-4 (noting that stays and injunctions are also often resolved without briefing). These other aspects of the shadow docket may be understood as falling within the Supreme Court’s “emergency docket.” See Ashley Rowland, *Justice Samuel Alito Defends Supreme Court’s Use of Emergency Docket*, NOTRE DAME NEWS (Oct. 1, 2021), <https://news.nd.edu/news/justice-samuel-alito-defends-supreme-courts-use-of-emergency-docket> [<https://perma.cc/3B8E-ECTG>] (describing the use of the emergency docket as a “method for fast-tracking urgent cases”). Justice Alito has protested that “[t]he catchy and sinister term ‘shadow docket’ has been used to portray the court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways,” which “feeds unprecedented efforts to intimidate the court or damage it as an independent institution.” *Id.* Here, we use the term “shadow docket” because it is regularly used in the literature, but we do not address the normative implications of the term. Further, summary reversals—which have been a longstanding feature of the Supreme Court’s toolkit—are not part of the “emergency docket.”

¹⁷⁹ See Hartnett, *supra* note 177, at 609 (explaining this use of per curiam opinions).

¹⁸⁰ See, e.g., Biskupic, *supra* note 56 (“[T]he court requires six votes when it seeks to reverse a lower court decision without hearing oral arguments.”).

¹⁸¹ Baude, *supra* note 14, at 4-5.

¹⁸² Hartnett, *supra* note 177, at 592 (footnote omitted).

¹⁸³ See *id.* (describing the criticism of such summary decisions).

¹⁸⁴ See Baude, *supra* note 14, at 27 (“[T]he current edition of [Stern & Gressman] now concedes that ‘there appears to be agreement that summary disposition is appropriate to correct clearly erroneous decisions of lower courts.’” (quoting STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* 352 (10th ed. 2013))).

to enforce arbitration agreements, or that hold that a government official is not entitled to qualified immunity.¹⁸⁵ This pattern, unsurprisingly, makes summary reversal controversial, as some argue that the Justices turn a blind eye on some errors but not others.¹⁸⁶ Recently, however, the Supreme Court vacated a decision that, in the majority's view, wrongly awarded qualified immunity.¹⁸⁷ And some summary reversals do not seem to fit any pattern at all.¹⁸⁸

Relevant here, commentators have observed that “[m]any of the Court’s summary reversals appear to be designed to ensure that lower courts follow Supreme Court precedents.”¹⁸⁹ Indeed, the Justices seem most likely to summarily reverse if they believe that “there is an unusual epidemic of lower-court judges willfully refusing to apply the Supreme Court’s interpretations of the law.”¹⁹⁰ Summary reversal thus may prevent “resistance by the lower court to the Supreme Court’s doctrine.”¹⁹¹

B. *A Transaction Costs Explanation?*

The debate over the shadow docket is ongoing. Here, we observe that the risk of certiorari being gamed provides some support for summary reversal. To the extent that lower court judges may be attempting to leverage transaction costs to evade certiorari, the Supreme Court may look for less costly mechanisms to reassert its supremacy. As demonstrated in Figures 5-A and 5-B, as the Supreme Court’s transaction costs decrease, it necessarily becomes more difficult for lower courts to select outcomes that diverge from the Justices’ preferences.

¹⁸⁵ See Baude, *supra* note 14, at 43-45 (summarizing research findings on the type of summary reversals most commonly issued by the Court); Hartnett, *supra* note 177, at 594-96 (noting the areas of law where the Court granted three or more summary reversals).

¹⁸⁶ See Baude, *supra* note 14, at 54 (“It has been observed that ‘the current Court’s disdain for error correction is selective’ and seems to work largely to the detriment of ‘criminal defendants and habeas petitioners.’” (citing Robert M. Yablon, *Justice Sotomayor and the Supreme Court’s Certiorari Process*, 123 YALE L.J.F. 551, 562 (2014))).

¹⁸⁷ See *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam) (reversing a Circuit Court’s decision to grant officers qualified immunity where no reasonable correctional officer could have concluded that it would be constitutionally permissible to house an inmate in “shockingly unsanitary cells”).

¹⁸⁸ See Baude, *supra* note 14, at 50 (explaining that the answer “may simply be that sometimes a court has done something wrong in an unusual way that defies generalization”).

¹⁸⁹ Baude, *supra* note 14, at 43; see also *id.* at 36 (“And implicit . . . is an assertion—true, or not—that there is an epidemic of pro-habeas willfulness in habeas cases, but not of pro-officer willfulness in civil rights suits.”).

¹⁹⁰ *Id.*

¹⁹¹ Hartnett, *supra* note 177, at 597; see also *id.* at 601 (“Within the resistance category, about half of the cases share another feature: what the lower courts seem to be resisting is the centralization of judicial lawmaking (particularly regarding the Constitution) in the Supreme Court of the United States [by, for example, relying on circuit precedent rather than Supreme Court precedent].”).

Figure 5-A: Supreme Court's Potential Response Without Summary Reversal

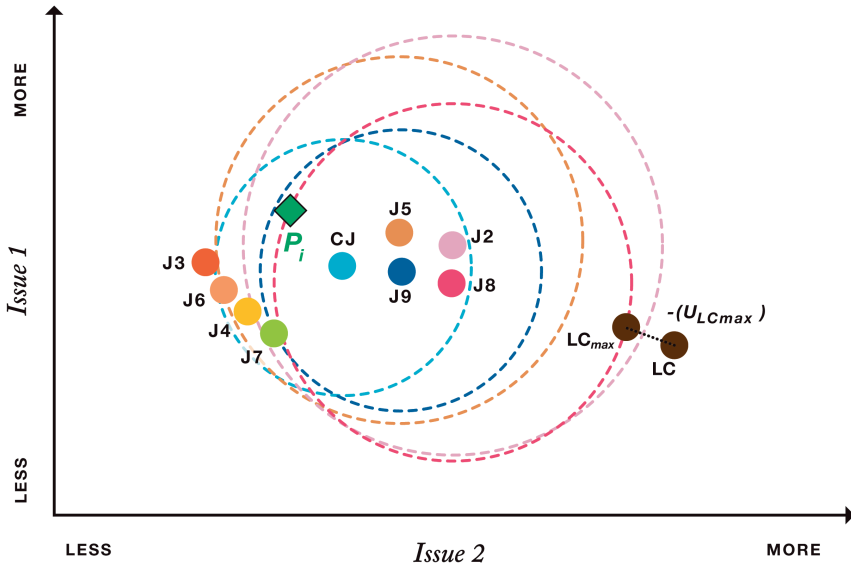
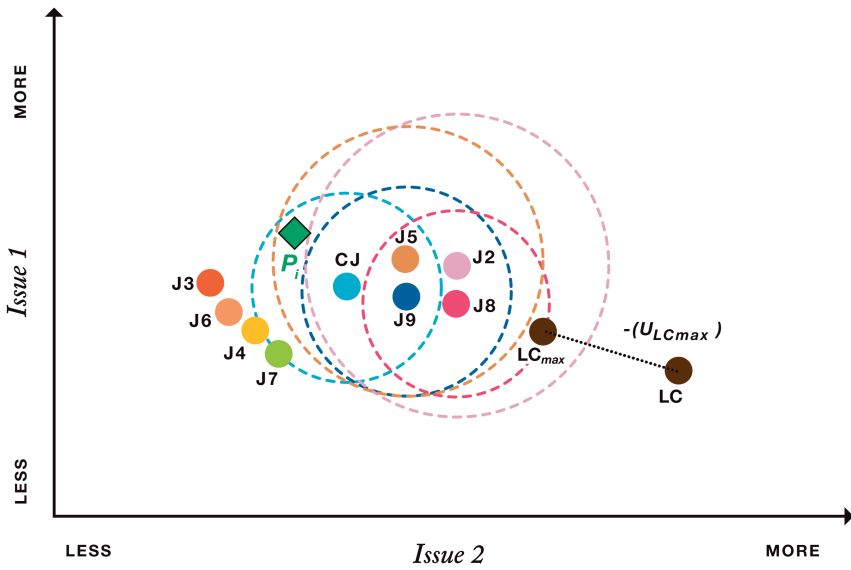


Figure 5-B: Supreme Court's Potential Response With Summary Reversal



In other words, when the Supreme Court's transaction costs decrease, the lower court's ability to game certiorari also decreases. Furthermore, if a Justice is merely concerned that a lower court *might* be trying to game certiorari, she may expend extra effort on the petition to protect the certiorari process. After investing that sunk cost, however, she may be reluctant to not correct what she now confidently believes is error, even if she concludes that the lower court was not trying to game certiorari. And once a Justice has invested the resources to reach a firm conclusion that error occurred, the other Justices may be willing to entertain a draft opinion. In other words, if the only way that the Supreme Court can prevent lower courts from leveraging transaction costs is to incur those costs from time to time, then it may not want to throw that work away in those cases for which it believes that error, in fact, occurred.¹⁹²

Against that backdrop, it is worth considering the nature of some of the lower court decisions summarily reversed by the Supreme Court. Consider, for example, *Wilkins v. Gaddy*.¹⁹³ There, in an unpublished decision with essentially no analysis, a panel of the Fourth Circuit affirmed dismissal of a prisoner's claims for excessive physical force.¹⁹⁴ The Supreme Court reversed, apparently unanimously, holding that "[t]he Fourth Circuit's strained reading of [Supreme Court precedent] is not defensible."¹⁹⁵ We have no reason to think that the Fourth Circuit was trying to "slip one by" the Supreme Court and certainly do not accuse the court of such behavior. But it is not implausible to suppose that the Supreme Court—which observed that the Fourth Circuit affirmed "[i]n a summary disposition" based solely on "the reasons stated by the district court"¹⁹⁶—was concerned by that prospect, and thus invested the time to figure out what happened. After doing so, and being

¹⁹² Apart from entailing lower transaction costs, there may be another reason why summary reversal is attractive to the Supreme Court: it may be especially embarrassing for lower court judges. Most summary reversals are unanimous (or, at least appear unanimous to the outside world, because no dissent is noted). That prospect may have dynamic effects; because lower court judges know that summary reversal is possible, they may be less tempted to game certiorari or engage in other sorts of behavior that the Justices want to discourage. On this account, the Supreme Court's occasional use of summary reversal is helpful so that the threat is credible, thus making *other* lower court decisions better. Whether this is an appropriate use of summary reversal is debatable. *See, e.g.*, Chen, *supra* note 17, at 718 ("At the same time that summary reversals are failing to dissuade one group of judges, a different set is likely to be overdeterred by the threat of being summarily reversed. Notably, lower-court judges have begun to acknowledge this threat as an explicit consideration.").

¹⁹³ 308 F. App'x 696 (4th Cir. 2009) (unpublished), *cert. granted, rev'd per curiam*, 559 U.S. 34 (2010).

¹⁹⁴ *See id.* at 697 ("Jamey Lamont Wilkins appeals the district court's orders denying relief on his 42 U.S.C. § 1983 (2000) complaint and his Fed.R.Civ.P. 59(e) motion. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court.").

¹⁹⁵ 559 U.S. at 39.

¹⁹⁶ *Id.* at 36 (quoting 308 F. App'x at 697).

convinced that error had occurred, the Justices may have been reluctant to deny certiorari, especially because other Fourth Circuit precedent on the subject was out of step with the Supreme Court precedent. Other summary reversals may also fit this pattern.¹⁹⁷

Similarly, in *Sexton v. Beaudreaux*, a Ninth Circuit panel reversed the denial of federal habeas relief in a murder case over a dissent, yet did so in a relatively short, unpublished decision that focused primarily on the case's facts and purported to follow governing law.¹⁹⁸ The Supreme Court summarily reversed, with only Justice Breyer noting a dissent (though he did not write an opinion). The Supreme Court stressed that “[t]he Ninth Circuit’s opinion was not just wrong. It also committed fundamental errors that this Court has repeatedly admonished courts to avoid.”¹⁹⁹ That the opinion was unpublished, even though the panel held oral argument and one of the judges on the panel dissented, could have suggested to the Justices that the opinion was unpublished to reduce its importance.

C. Summary Reversal’s Pluses and Minuses

We don’t take a position here on whether summary reversal is on net good or bad. To the extent (if any) that summary reversal results in lower quality opinions, that is obviously bad. To the extent that summary reversal results in legitimacy concerns about how the Supreme Court issues opinions—on the idea that such opinions are *perceived* to be of lower quality, even if not true, or that the tool is asymmetrically used—it is harder to assess whether this aspect of the shadow docket is worthwhile. Our analysis, however, demonstrates that the issue is complicated, and that summary reversal may sometimes reflect the Justices’ reasonable fear that lower courts may be deliberately leveraging transaction costs.

¹⁹⁷ See, e.g., *Emmons v. City of Escondido*, 716 F. App’x 724 (9th Cir. 2018) (unpublished), *cert. granted, vacated per curiam*, 139 S. Ct. 500 (2019); *State v. Grady*, 762 S.E.2d 460 (N.C. 2014) (mem.), *cert. granted, vacated per curiam*, 575 U.S. 306 (2015); *Jackson v. Felkner*, 389 F. App’x 640 (9th Cir. 2010) (unpublished), *cert. granted, rev’d per curiam*, 562 U.S. 594 (2011); *Wilkins*, 308 F. App’x. 696, *cert. granted, rev’d per curiam*, 559 U.S. 34. Again, we do not accuse any of these judges of hiding the ball. Our point is only that to evaluate whether the courts were hiding the ball, the Justices had to expend effort.

¹⁹⁸ *Beaudreaux v. Soto*, 734 F. App’x 387 (9th Cir. 2017) (unpublished), *cert. granted, rev’d per curiam sub nom. Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018).

¹⁹⁹ *Sexton*, 138 S. Ct. at 2560. Once more, we do not accuse the panel of trying to hide anything—indeed, this would be a very difficult decision to hide. But by issuing an unpublished decision focused on the specific facts of the case, the case became marginally less certworthy, as the respondent’s counsel stressed. See Brief for Respondent in Opposition to Petition for Writ of Certiorari at 19, *Sexton*, 138 S. Ct. 2555 (No. 17-1106) (noting the decision was “unpublished” and “the Circuit’s decision will have few ramifications, if any, on other cases, due to the highly unusual facts and fact-bound conclusions presented in this case”).

In short, to the extent that lower courts can game certiorari, the Supreme Court faces an optimization problem. The Justices need to balance the Court's legitimacy (which potentially can be harmed by summary reversal's lack of procedural robustness), the legitimacy of the judiciary overall (which potentially can be harmed if lower courts may be designing opinions to evade review), and their own limited capacity (which may limit the number of cases the Justices can hear through the ordinary process²⁰⁰). Although imperfect, summary reversal could be the best of bad options. Again, we do not say that conclusion is correct, but our point, more modestly, is to broaden the discussion by considering transaction costs.

D. *An Alternative?*

Finally, this discussion prompts an additional thought: might there be a better way to use the shadow docket to combat lower court efforts to game certiorari? Perhaps, though this path can itself be controversial.²⁰¹

In particular, the Supreme Court could increase its use of a type of grant-vacate-and-remand ("GVR") order. When the Supreme Court announces a new decision, it often GVRs petitions in which the lower court acted without the benefit of the Court's analysis.²⁰²

200 No doubt, some readers will argue that the Supreme Court is nowhere near its capacity when it comes to hearing cases through its ordinary process. After all, the Justices hear oral argument today in roughly half as many cases as they heard in past decades. Meg Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket*, 72 SMU L. REV. F. 8, 8 (2019). The Supreme Court's capacity is another empirical question that merits further study. The total number of cases, for example, may be a poor metric if the types of cases heard today are more complicated or the quality of opinions is higher. There is also reason to believe that the Supreme Court may have exceeded its capacity in the past. See, e.g., John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 16 (1983) ("I think it is clear that the Court now takes far too many cases. Indeed, I am persuaded that since the enactment of the Judges' Bill in 1925, any mismanagement of the Court's docket has been in the direction of taking too many, rather than too few, cases."). From another direction, some may argue that the Supreme Court's capacity should be increased, for example by adding new Justices. Yet even putting aside potential legitimacy objections, see, for example, STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* 21 (2021) (describing potential issues with expanding the Supreme Court), adding more Justices may not increase the Supreme Court's capacity if it makes it harder for the institution to function. After all, there is always a point at which marginal returns become diminishing. Here, however, we do not address such questions, which are far outside this Article's scope.

201 See, e.g., Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 NOTRE DAME L. REV. 171, 174-75 (2020) (noting that some remands "attract criticism," including where the Supreme Court remands because of a "suspicion that an injustice has occurred—but the Court asks the lower court to take another look rather than sorting out what happened itself").

202 See Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711, 712 (2009) ("The GVR is most commonly used when the ruling below might be affected by one of the Court's recently rendered decisions, which was issued after the lower court ruled.").

In issuing a GVR, the Court does not determine that the intervening event necessarily changes the outcome in the case, just that it might. Thus, the purpose of the GVR device is to give the lower court the initial opportunity to consider the possible impact of intervening developments and, if necessary, to revise its decision accordingly.²⁰³

On occasion, however, the Justices remand a case that the lower court decided *after* the supposedly intervening decision—sometimes well after.²⁰⁴ Indeed, sometimes the supposedly “intervening” decision was actually briefed in the lower court.²⁰⁵ In this way, the Supreme Court can essentially order the lower court to perform a do-over. As Justice Scalia explained,

This practice has created a new mode of disposition, a sort of ersatz summary reversal. We do not say that the judgment below was wrong, but since we suspect that it *may* be wrong and do not want to waste *our* time figuring it out, we instruct the Court of Appeals to do the job again, with a particular issue prominently in mind.²⁰⁶

According to Justice Scalia, such orders are “monster[ous]”²⁰⁷ because, among other failings, they “accord inadequate respect to the work of our colleagues below.”²⁰⁸ Following Scalia’s lead, Justices Thomas, Alito, and Gorsuch continue to reject this type of GVR.²⁰⁹ Alito has even stated that such GVRs are “[ir]responsible,” and that the Supreme Court lacks “authority” to “treat[]” a lower court like how “an imperious senior partner in a law firm might treat an associate” who “simply orders the [lower court] to redo its work” but “[w]ithout pointing out any errors in the [lower court’s] analysis.”²¹⁰ According to Alito, “[i]f the majority wishes to review [a lower court’s] decision, it should grant the petition for a writ of certiorari, issue a briefing schedule, and hear argument. If the majority is not willing to spend

²⁰³ *Id.* (citation omitted).

²⁰⁴ *See, e.g., Webster v. Cooper*, 558 U.S. 1039, 1041 (2009) (Scalia, J., dissenting) (explaining that sometimes “the Court has GVR’d on the basis of a case decided long before the Court of Appeals ruled” and providing examples).

²⁰⁵ *See, e.g., Kaushal v. Indiana*, 138 S. Ct. 2567, 2567 (2018) (Alito, J., dissenting) (“[Our decision in *Jae Lee v. United States*, 137 S. Ct. 1958 (2017)] was handed down on June 23, 2017—almost a month before the Indiana Court of Appeals issued its decision in this case. Moreover, petitioner admits that he cited and advanced arguments based on *Lee* in both his petition for rehearing before the Indiana Court of Appeals and his petition for transfer to the Indiana Supreme Court.”).

²⁰⁶ *Webster*, 558 U.S. at 1041 (Scalia, J., dissenting).

²⁰⁷ *Id.* at 1042.

²⁰⁸ *Lawrence v. Chater*, 516 U.S. 163, 187 (1996) (Scalia, J., dissenting).

²⁰⁹ *See, e.g., White v. Kentucky*, 139 S. Ct. 532, 532 (2019) (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.) (noting that they would deny the petition). Notably, Justice Kavanaugh did not join the dissenting opinion.

²¹⁰ *Flowers v. Mississippi*, 136 S. Ct. 2157, 2159 (2016) (Alito, J., dissenting).

the time that full review would require, it should deny the petition.”²¹¹ In other words, Alito appears to view the Supreme Court’s transaction costs as a check against too much meddling in lower court decisionmaking.

We do not address here whether such GVRs comport with the Supreme Court’s statutory authority. Instead, we simply observe that ordering lower courts to redo analysis—perhaps even without needing to identify an intervening change in law—could prevent efforts to evade review. For example, if a lower court issued a cursory opinion, the Supreme Court could order the court to issue a better one, with more complete analysis.²¹² It is true that such a power could be seen as disrespectful to the lower courts, but to the extent that efforts to game certiorari impose costs on third parties (as explained in Part IV), such a tool may be worthwhile.

IV. THE IMPLICATIONS OF GAMING CERTIORARI

A lower court’s ability to game certiorari raises important doctrinal questions about the Supreme Court’s role in the U.S. legal system. The conventional view is that the Supreme Court is, well, *supreme*. In fact, however, the Supreme Court’s ability to control how federal law is interpreted and applied may sometimes be limited, even for “cases or controversies” squarely within Article III.²¹³ The prospect that certiorari can be manipulated also prompts normative questions. Is this how judges *should* behave? We argue that even if one accepts for the sake of argument that it can be morally right for a lower court judge to mislead the Supreme Court, the externalities that such conduct imposes on third parties complicate arguments in favor of gaming certiorari.

A. Doctrinal Implications

The Supreme Court has announced that lower courts have a duty to interpret and enforce federal law as the Supreme Court believes it should be interpreted and enforced.²¹⁴ Because the Supreme Court has the authority to

²¹¹ *Id.*

²¹² *Cf.* Greenhouse, *supra* note 10 (explaining how the Supreme Court certified questions to the Oklahoma Supreme Court when that court issued a decision with little analysis).

²¹³ *See* U.S. CONST. art. III, § 2 (extending the judicial power to “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made” and over controversies between states).

²¹⁴ *See* Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21 (2012) (per curiam) (“It is this Court’s responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.” (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994))).

say “what the law is,”²¹⁵ the theory goes, “the laws, the treaties, and the constitution of the United States [are not] different in different states,” thus avoiding all the “public mischiefs” that such disuniformity would create.²¹⁶ The Justices may not always be right, but at least they create uniform law.²¹⁷ Notably, Congress sometimes legislates with that understanding of the judicial hierarchy in mind.²¹⁸

But is that understanding of “supremacy” accurate? The notion that lower courts act as faithful agents—or at least that they will be reversed when they don’t—is hard to reconcile with the ability of lower courts to manipulate review.²¹⁹ True, sometimes lower courts follow the Supreme Court’s lead even when they disagree with it. And sometimes the Supreme Court does step in to prevent a lower court judge from evading precedent. But even if our model only sometimes reflects reality, the Supreme Court’s supremacy may be weaker than the conventional wisdom supposes. At a certain level of abstraction, there is supremacy, but in the real world, a judge may have discretion to disagree with the Justices.²²⁰

If that is true, then the Supreme Court’s effective supremacy may be limited. Yet a foundational principle of many legal doctrines is that federal law is uniform. This uniformity flows from the theory that the national government is sovereign, at least with respect to the powers assigned to it by the Constitution.²²¹ Because the United States is one nation,²²² it seems to follow that the laws the national legislature enacts generally should be the same throughout the nation. And the Supreme

215 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

216 *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).

217 *Cf. Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

218 *See, e.g.*, 28 U.S.C. § 2254(d)(1) (focusing on Supreme Court precedent in determining what constitutes “an unreasonable application of[] clearly established Federal law”).

219 Whether lower court judges should be treated as agents is debatable. *See, e.g.*, Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 442 (2007) (questioning whether “lower federal courts in fact have a duty to follow the preferences of the Supreme Court”).

220 Indeed, *most* disagreements between lower courts and the Supreme Court presumably go unresolved and perhaps even unnoticed. Many lower court decisions do not prompt a certiorari petition. And the Court chooses not to review many cases that are presented, even when the lower court has taken a position contrary to the likely outcome at the Court and has done nothing to hide its disagreement.

221 *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”).

222 *See Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43 (1868) (“The people of these United States constitute one nation.”).

Court, with its power to resolve federal legal issues from anywhere in the nation, ensures that uniformity.²²³

But what to do with the prospect that the Supreme Court's supremacy is limited by its inherent resource constraints, and that lower court judges can (and perhaps sometimes do) leverage those constraints to reach outcomes that the Supreme Court cannot realistically control? Supremacy itself is challenged. Granted, it may be possible to reduce the disuniformity by preventing some lower court manipulation (indeed, in Part V, we offer a menu of options to do just that). But such reforms will only reduce the threat, not eliminate it. And the mere fact that such reforms may be necessary challenges the conventional view.

Further, as the nation increases in size and complexity, even more supremacy may be lost. Recall, the less knowledge the Justices have about an issue, the greater their transaction costs when determining whether to address the issue—and as transaction costs increase, so does a lower court's autonomy. This is true even without deliberate efforts to leverage those transaction costs. But it is especially true when strategic behavior is also incorporated into the analysis. Thus, our model leads us to predict that the Supreme Court's ability to ensure uniform interpretation of federal law will decrease over time, all else being equal. To be sure, it may be possible to reduce that effect by increasing the Supreme Court's capacity. But eventually such efforts to increase capacity will have diminishing returns. Thus, transaction costs may pose fundamental questions about the Supreme Court's long-term place in the legal system.

B. Normative Implications

Gaming certiorari also raises normative issues. To be sure, when (and whether) it is appropriate for lower court judges to manipulate Supreme Court review is related to the doctrinal discussion above. But it also raises separate concerns. Gaming the Supreme Court's transaction costs to prevent review often requires at least some degree of deceit.

People will disagree about whether it is appropriate for a lower court to deliberately send false signals.²²⁴ If one believes that the Supreme Court is especially likely to get questions "wrong," then that person may conclude that efforts to game certiorari are warranted. The opposite is also true; if the Supreme Court is especially likely to get questions "right," evasion might be perceived as worse than it otherwise would be. Others will undoubtedly

²²³ See, e.g., *James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law.").

²²⁴ See generally *Butler*, *supra* note 21.

conclude that it is never right to send false signals because doing so is either wrong in and of itself (which, as a moral idea, strikes us as compelling) or because the accuracy benefits do not outweigh the systemic costs that manipulation causes.

Whatever one thinks about these issues, the reality is that efforts to evade review harm others. Such efforts, for example, impose costs on the parties to the litigation. If nothing else, it becomes harder and more expensive to petition for certiorari or to oppose it. The certiorari process can be expensive, and to the extent that the lower court increases the expense, that cost comes out of someone else's pocket. Other costs, moreover, may be even more significant. For example, if an appellate court remands a case to avoid a final decision that might trigger an unwanted certiorari petition, the parties must continue litigating. Likewise, if a court resolves an appeal in an unpublished decision without analysis (making the decision a bad vehicle for the Justices), the parties to the litigation never learn why they won or lost.²²⁵ To the extent that the judicial process should be concerned with the parties' sense of fair treatment,²²⁶ this sort of behavior is problematic. Perhaps even more problematic, a judge fearing reversal could change the law for future litigants at the expense of the parties before the court—for example, by issuing dicta that could instead have been a certworthy holding.²²⁷

Evading certiorari also imposes costs on third parties uninvolved in the underlying litigation. Unpublished decisions are appropriate for cases that do not raise novel questions of law because the public can understand the law from earlier decisions. But when a court “buries” resolution of a novel issue in an unpublished decision, the public is deprived of legal clarity, which in turn may prompt additional litigation.²²⁸ Or perhaps sometimes the opposite is true. An unpublished decision may have real-world effects because parties

²²⁵ This is not just a conceptual harm. The inability to understand why one has won or lost litigation prevents parties from modifying their behavior appropriately in the future.

²²⁶ Cf. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) (explaining that procedural fairness increases the public's acceptance of legal institutions); see also Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (“[P]rocedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms.”).

²²⁷ Granted, one could say that but for cert-proofing, the aggrieved party would have lost anyway because the Supreme Court would have granted review and reversed the lower court's opinion in favor of that party. Thus, the argument would go, the party whose case provides a launching pad for favorable dicta has not really lost anything. But if, for instance, cert-proofing merely reduces the odds of certiorari review from, say, twenty percent to five percent, a party that loses a case it otherwise would have won but for cert-proofing would have reason to be upset.

²²⁸ See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (explaining that parties often do not need to go to court because they make decisions against the backdrop of cases already decided).

will anticipate a court following the decision even if it is not formally required to do so, yet those effects may not trigger Supreme Court review. Either way, deciding to issue an unpublished opinion for a novel issue of law may have significant consequences for the public.

Similar logic applies if the court does not explain its analysis; it may prompt additional litigation that would otherwise not have existed. Counterintuitively, moreover, creating certainty where it should not exist also imposes costs. One way for a court to decrease the odds of certiorari is by adding an alternative holding. Alternative holdings (arguably) are not themselves problematic.²²⁹ But if a court strains to add one to mitigate “cert risk,” the court’s deviation from its ordinary standard for determining when an alternative holding is appropriate—for instance, whether the issue was adequately briefed—may result in legal error.

Gaming certiorari also imposes costs on the judiciary as a whole. The tools that enable manipulation are valuable to the judiciary’s overall operation. There often are good reasons not to prepare published decisions (e.g., the public does not need additional precedent that merely applies settled law to run-of-the-mill facts and judicial resources can be directed to cases for which legal clarity does not yet exist) or to issue decisions with cursory analysis (e.g., such decisions can be prepared more quickly, providing the parties an answer with less delay).²³⁰ That is why these tools exist. But the value of these tools depends on their good faith use. If other jurists do not trust that an unpublished decision should be unpublished, they can no longer rely on that signal to conclude that a case is unimportant. That leads to more work, not less, as multiple judges will expend the effort to evaluate a case to determine whether, in fact, it should have been unpublished.

There is at least one more concern with evasion: it is not limited to cases for which a lower court thinks its interpretation is correct. It also can be used where a court, viewing the question objectively, would agree that its decision is wrong, but chooses to side with one party for inappropriate reasons, such as bias or self-interest. Likewise, evasion may occur in a case with a question that the judge objectively believes merits certiorari, but that the judge does not want to be associated with. If a judge, for example, believes that being reversed is embarrassing, he may attempt to avoid review of an entirely non-ideological decision so that—in “hot potato” fashion—another judge will

²²⁹ Alternative holdings are sometimes criticized. See, e.g., Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1258 n.23 (2006) (“Courts often give less careful attention to propositions uttered in support of unnecessary alternative holdings.”).

²³⁰ See, e.g., Nielson & Walker, *supra* note 47, at 74 (“[I]magine a lawsuit where the law is clear and it is impossible to imagine how the case’s resolution could be relevant to any other parties in any other cases. In a case like that, it makes little sense to require busy judges to go through the trouble of preparing a full opinion of the sort that fills law school casebooks.” (footnote omitted)).

author the decision that the Supreme Court reviews. That sort of evasion is hard to defend by any standard.

Finally, it is also important to consider the normative implications of efforts to attract certiorari. This can be done by deliberately decreasing the Court's transaction costs (for example, by clearly creating a circuit split). This sort of behavior does not undermine the Supreme Court's ability to establish uniform law. But it can still be problematic if it requires a court to depart from its ordinary process. For example, if a case can be resolved on narrow grounds that do not require much time, but also could be resolved on broader grounds that may attract certiorari but would require more judicial resources, it may be problematic to divert resources from other cases to that case.²³¹ Even more problematic, a lower court may hope to attract certiorari by mischaracterizing the record, misconstruing the parties' arguments, or ignoring forfeiture. It is hard to defend such behavior.

V. POSSIBLE REFORMS

Efforts to game certiorari can be problematic. Merely identifying a problem, however, does not mean there is a good solution. Reform is difficult because the tools that lower courts can use to increase the Supreme Court's transaction costs are often valuable. Accordingly, many potential responses to our model involve some version of the "baby with the bathwater" problem—transaction costs introduce problems but are also a necessary and useful feature of the system we have. There is no easy path to reform and the ultimate answer may require changes in judicial norms rather than formal rules.

A. *Change the Rules*

The most straightforward way to reduce the gaming of certiorari is to eliminate the tools that courts use to do it. The Federal Rules of Appellate Procedure, for example, do not restrict courts from issuing unpublished opinions.²³² Using its rulemaking authority, the Supreme Court could change the rules. This sort of reform runs directly into the "baby with the bathwater" problem, however. That tools can be abused does not mean they should be eliminated. Instead, the question is how to strike the optimal balance.²³³

²³¹ The normative implications may turn on how much extra capacity the lower court has. If the court can resolve the broader issue without delaying other cases or lessening the quality of its work in those cases—either of which would harm the litigants in those other cases—then it is more appropriate.

²³² Cf. FED. R. APP. P. 32.1 (prohibiting courts from restricting citation to unpublished opinions).

²³³ See Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 676 (2015) ("An administrative regime will tolerate a predictable level of abuse of power as part of an optimal package solution—as the inevitable byproduct of attaining other ends that are desirable overall.").

Thus, if the Supreme Court were to change the rules, nuanced reforms would likely be best, such as requiring greater analysis in summary dispositions and limiting the circumstances in which unpublished decisions are permissible. Yet those would be hard rules to enforce.

B. Case Selection Reform

The Supreme Court could also change how it selects cases for review. For example, it could change the four-vote requirement for certiorari, which is a creature of the Justices' own practice. Indeed, in theory, it could be a one-vote requirement.²³⁴ In a world where any Justice could grant certiorari, we generally should not expect different outcomes in argued cases. But lower courts would not be able to evade certiorari as easily. The flipside, however, is that the Supreme Court may end up as a less congenial body with far too many cases. By the same token, if the concern is that lower courts are trying too hard to attract certiorari, the Supreme Court could require more than four votes for certiorari, though that may result in greater disuniformity of federal law.

The Supreme Court could also attempt to lower transaction costs by increasing its expertise. Law clerks tend to be relatively young lawyers.²³⁵ If more experienced lawyers review petitions, they may be better able to prevent manipulation. The Justices can also borrow expertise from the lower courts. Dissenting opinions serve many functions, including "whistleblowing."²³⁶ If a panel is trying to "bury" a case, a dissenting judge can say so. This already happens, of course, but the Justices have levers to encourage more of such behavior, including public praise for accurate signals.²³⁷ This path, however, is a costly one for the lower court, as it can harm collegiality and possibly over deter reasonable judgment calls. Hence, for collegiality purposes, some

²³⁴ It could also be a lottery. See Epps & Ortman, *supra* note 33, at 741 (arguing that the Supreme Court should be required to hear some random cases in order to, among other things, better understand what other judges are doing and prevent "docket-capture" that occurs because "an experienced advocate can help identify conflict or disagreement that a case implicates and frame the petition in a particularly favorable way").

²³⁵ See *id.* at 715 ("Clerks, inexperienced young lawyers who are usually only a year or two out of law school, 'seek objectively verifiable criteria like circuit splits and are unlikely to recommend a grant based on a belief, for example, that the lower court was simply wrong.'" (quoting Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 FLA. ST. U. L. REV. 101, 128 (2009))). Notably, over time, the legal experience of law clerks has increased. See Gregg Costa, *Clerking to Excess? The Case Against Second (and Third and Fourth) Clerkships*, JUDICATURE Fall/Winter 2018, at 22.

²³⁶ See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

²³⁷ By parity of reasoning, the Supreme Court should not praise inaccurate attempts to attract certiorari. To the contrary, the Justices should shame those who engage in false efforts to "cry wolf," just as they should do so for those who falsely say "nothing to see here."

judges have outright rejected the view that judges should dissent from denials of rehearing en banc.²³⁸

C. *Increasing the Costs of Gaming Certiorari*

The Supreme Court could also punish a judge whom the Justices believe is sending false signals. That is not so easy to do, however, and for good reason.²³⁹ There are many reasons to worry about a world where the Supreme Court could formally punish other judges over judgment calls. Stigma, however, can be a powerful device to prevent bad behavior.²⁴⁰ Judges presumably do not want to be called out in a Supreme Court decision.²⁴¹ The Justices could also punish judges by refusing to hire their clerks, even more so than already presumably happens now. Such reform, however, would also be costly. The Supreme Court would inevitably make mistakes in imposing such informal sanctions. And efforts by lower court judges to avoid being wrongly accused would also waste resources. Thus, if reform entails imposing costs on strategic behavior, the standard of proof would likely need to be high, which could defeat the purpose of increasing costs because judges almost always will have some plausible deniability.

D. *A Better Understanding of Supremacy?*

Finally, another solution may be to update our understanding of supremacy. The Supreme Court is free to choose *not* to use its certiorari powers for certain categories of cases where the risk to uniformity is not great, for instance in true fact-bound cases. Doing so would allow lower court judges to express their own views more freely, while also encouraging them to expend more resources to try to resolve the case correctly (rather than trying to hide the decision), which is potentially a good thing. But uniformity also matters. Issues of broad applicability should be reviewable by the Supreme Court, and once the Court has decided such issues, lower courts should follow that precedent. Thus, there must be a balance; federal judges should be able to exercise their independent judgment, but not all the time. Striking this balance therefore requires both the Supreme Court and the lower courts to

²³⁸ See, e.g., *United States v. Shaygan*, 676 F.3d 1237, 1238 (11th Cir. 2012) (Pryor, J., concurring in denial of rehearing en banc) (collecting authorities criticizing the practice).

²³⁹ See David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute"*, 83 WASH. U. L.Q. 1397, 1405 (2005) (explaining reasons for life tenure).

²⁴⁰ See Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 461-64 (2006) (discussing the power of social pressures to preserve collective norms).

²⁴¹ See Toby J. Heytens, *Reassignment*, 66 STAN. L. REV. 1, 41 (2014) (“[T]he Justices have . . . means of disciplining appellate judges—including high-profile tongue-lashings via summary reversal . . .”).

give up something. Yet social norms may not be stable, and without a shared commitment to good faith uses of power, perhaps any reform will fail, just “as a Whale goes through a Net.”²⁴²

CONCLUSION

Many accounts of the Supreme Court assume a seamless process in which the Justices identify certworthy issues and then resolve them. Reality is more complicated. Because of transaction costs, virtually every characteristic of a certworthy case can be gamed to send a false signal. Here, we have demonstrated why gaming certiorari works in theory. We have also offered evidence that it may sometimes happen in the real world. The time, therefore, has come to think hard about such behavior. Unfortunately, there are no easy answers. True supremacy requires infinite resources, yet even the Supreme Court of the United States exists in a world of scarcity.

²⁴² Letter from John Adams to the Massachusetts Militia (Oct. 11, 1798), <https://founders.archives.gov/documents/Adams/99-02-02-3102> [<https://perma.cc/AVH8-LCZX>].

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