STILL QUESTIONING CERTIORARI

*Edward A. Hartnett**

Twenty-five years ago, I wrote an article reflecting on the seventy-fifth anniversary of the Judges' Bill, entitled Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill. *Here, I reflect on the past twenty-five years and suggest that the information presented in that article remains true and the questions posed remain (at least largely) unanswered. For those reasons, I continue to question certiorari.*

I. Recap of Reflections on the Seventy-Fifth Anniversary of the Judges' Bill

Twenty-five years ago, I wrote an article reflecting on the seventy-fifth anniversary of the Judges' Bill, entitled *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill.*[1] I thank the *Notre Dame Law Review* for providing me with this opportunity to reflect on that article and on the twenty-five years since then. I'm not sure whether I should be proud or chagrined, but I think that the article has held up better over the past twenty-five years than I have.

The article presented a detailed history of how the modern Supreme Court was born in 1925. It traced the origin of the Supreme Court's discretionary certiorari jurisdiction to a fallback provision included in the 1891 Statute creating the circuit courts of appeals.[2] The decisions of those newly created circuit courts of appeals were made final in many cases, subject to their ability to certify questions to the Supreme Court and, if they proved, on occasion, to be surprisingly careless in deciding cases or certifying questions, to the power of the

---

© 2025 Edward A. Hartnett. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* Richard J. Hughes Professor for Constitutional and Public Law and Service, Seton Hall University School of Law. Thanks to the staff of the *Notre Dame Law Review* for putting this symposium together, and thanks to the other contributors to the symposium for their insights.

1 Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000).

2 *See id.* at 1649–57.

Supreme Court to grant certiorari.[3] It noted the expansion of certiorari in 1914, when Congress gave the Supreme Court, for the first time, the power to review state court judgments upholding (rather than rejecting) federal claims and defenses.[4] It explored the uncertainties Congress created in 1916 when it, for the first time, gave the Supreme Court the power to decline to review some ill-defined set of cases where a state court rejected a federal claim or defense—and the Supreme Court's interpretation of that ambiguous statute to expand its discretion.[5]

Much of that article provided a detailed account of the efforts of Chief Justice William Howard Taft to secure what he called "absolute and arbitrary discretion with respect to all business but constitutional business."[6] Chief Justice Taft spoke of that goal before becoming Chief Justice, and he launched those efforts as soon as the Court gathered for his first term as Chief in 1921.[7] It took more than three years, but Chief Justice Taft succeeded.[8] And his achievement was not limited to cases that presented no constitutional questions.[9]

He and other members of the Court drafted the Bill and testified before Congress in support of the Bill.[10] Chief Justice Taft lobbied the American Bar Association, members of Congress, and President Calvin Coolidge.[11] Chief Justice Taft not only persuaded President Coolidge to say something favorable in his first State of the Union address in December of 1923, but he also drafted that part of President Coolidge's address.[12]

Chief Justice Taft paid close attention to the presidential election in 1924, in which the incumbent President Coolidge was running against both Democrat John W. Davis and Progressive Republican Robert La Follette.[13] While La Follette favored judicial reforms such as ten-year terms for federal judges and the power of Congress to re-enact statutes that the Supreme Court had invalidated, President Coolidge defended the Supreme Court.[14] Chief Justice Taft wrote to President

---

3 *See id.* at 1650–51, 1656.

4 *See id.* at 1657.

5 *See id.* at 1658–59.

6 *Id.* at 1661 (quoting William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 18 (1916)); *see generally id.* at 1660–1704.

7 *See id.* at 1661.

8 *See id.* at 1703–04.

9 *See id.* at 1718 & n.426.

10 *See id.* at 1662–63.

11 *See id.* at 1673–75.

12 *See id.* at 1674.

13 *See id.* at 1681–82.

14 *See id.*

Coolidge, praising his defense of the Supreme Court.[15] Chief Justice Taft observed that this defense "was helping Coolidge with Catholic and other ethnic voters" who were pleased with some recent and anticipated Supreme Court decisions about private education.[16] Chief Justice Taft even wrote to a newspaper editor urging him to mention these cases in an effort to convince Lutherans and Catholics not to trust legislators.[17] Not surprisingly, Chief Justice Taft was happy when President Coolidge won in November of 1924, and he hoped that "Republicans would 'have the courage' to 'drop from the party roll in the Senate everyone who did not support Coolidge.'"[18]

The lame duck session of Congress that ran from December 1, 1924, through March 3, 1925, saw the enactment of the Judges' Bill.[19] The House Judiciary Committee conducted hearings in December, at which Justices Van Devanter, McReynolds, and Sutherland, as well as Chief Justice Taft, testified.[20] Justice Brandeis had grave doubts about the Bill, but he suppressed his dissent, and he allowed Chief Justice Taft to say that the Court approves the Bill.[21]

The Justices told Congress about "the consideration that each member of the Court gives to each petition," with Justice Van Devanter noting that they discuss any disagreement and always grant the petition if four, and sometimes if three, think it should be granted.[22] Justice Van Devanter stated in hearings before the House Judiciary Committee that the Court certainly intended to exercise its discretion the same way,[23] and Chief Justice Taft stated that the Court, in asking for more discretionary power, did not intend to relax its close scrutiny of cases on certiorari.[24] But he no longer wanted to confine this discretion to nonconstitutional cases, explaining that lawyers can create a fog by citing the Fifth and Fourteenth Amendments, and that the Court should be empowered to refuse to hear the case if there is no real substance

---

15 *Id.* at 1682.

16 *Id.*

17 *Id.*

18 *Id.* at 1683 n.222 (quoting Letter from William H. Taft, C.J., Sup. Ct., to Robert A. Taft (Nov. 9, 1924) (on file with the Library of Congress, the William H. Taft Papers: Series 3, General Correspondence and Related Material, 1877–1941; 1924 Oct. 4–Nov. 14, image 1046–48)); *see id.* at 1683.

19 *See id.* at 1644.

20 *See id.* at 1684–91.

21 *Id.* at 1684.

22 *Id.* at 1685.

23 *See id.* at 1686.

24 *See id.* at 1690.

to the constitutional claim.[25] The House passed the bill on a voice vote with very little discussion.[26]

Things were a bit bumpier in the Senate. The major concern involved constitutional cases.[27] Chief Justice Taft reiterated that the Court discusses and votes on every case, and that the Court was confident that no constitutional question of any real merit or doubt would escape certiorari review.[28] He explained that extending certiorari to constitutional cases was designed to keep out constitutional questions that have really no weight or that have already been fully decided in previous cases.[29] Chief Justice Taft worked out a compromise and mollified the opposition with a slight concession that provided for some appeals as of right from courts of appeals.[30]

The House, again by voice vote, accepted the Senate's amendment, and President Coolidge signed the Judges' Bill into law with less than three weeks left before the 68th Congress expired,[31] with the full Congress not to meet again until ten months later.[32]

In addition to recounting this history, my article from twenty-five years ago argued that the Court built upon the Congressional grant of discretion to expand its discretion even further.[33] While certiorari under the 1891 Evarts Act brought up the whole case for review, the Court asserted the power after the Judges' Bill to limit the grant of certiorari to particular issues in a case.[34] The Court also subjected cases within its mandatory appellate jurisdiction to discretionary review.[35] But "Congress, rather than objecting to the Court's noncompliance with the statute, instead amended the statute" in 1988 to conform to the Court's practice and eliminate almost all appeals as of right.[36] The Court also practically eliminated the certification power of the courts of appeals; Congress has been silent in response.[37]

The article also raised questions about certiorari: How can certiorari be reconciled with the classic justification for judicial review, which

25 *See id.* at 1690–91.

26 *See id.* at 1695.

27 *See id.* at 1699.

28 *See id.* at 1698–99.

29 *See id.* at 1699.

30 *See id.* at 1699–1700.

31 *See id.* at 1697 n.321, 1703–04.

32 *See Dates of Sessions of the Congress*, U.S. SENATE, https://www.senate.gov/legislative/DatesofSessionsofCongress.htm [https://perma.cc/WYS4-C7EU] (last visited Jan. 24, 2026).

33 *See* Harnett, *supra* note 1, at 1705.

34 *See id.* at 1705–06.

35 *See id.* at 1708.

36 *Id.* at 1709–10; *see id.* at 1710 n.394.

37 *See id.* at 1710–12.

treats the power to declare a law unconstitutional as a byproduct of a court's obligation to decide a case?[38] How can a court with discretionary certiorari power claim to be exercising judgment rather than will, since setting one's own agenda is at the heart of exercising will?[39] Is certiorari consistent with the rule of law?[40] Can it be justified as a form of administrative power rather the judicial power?[41]

Although the article questioned certiorari, it also emphasized its importance.[42] It "contributed to a mindset that thinks of the Supreme Court more as sitting to resolve controversial questions than to decide cases."[43] It enabled the Court to move the law in its preferred direction without having to immediately confront the implications of its decisions.[44] It also empowered the Court to increase the role of federal law and the federal judiciary, without having to itself hear the deluge of cases relying on newly-created federal claims and defenses.[45] That is, it made it possible for the Court to interpret the constitution in ways that would have been unthinkable if it lacked the discretion to avoid the onslaught of cases it created. Finally, the article suggested that since it is frequently unclear whether a Supreme Court decision will spawn a backlash powerful enough that the loser in court winds up winning in the longer term, the power to raise the salience of an issue by granting certiorari may be even more important than the power to decide the case on the merits.[46]

II. Reflections on Reflections

So how has *Questioning Certiorari* held up over twenty-five years?

A. *History*

I believe that the history of the birth of certiorari and the adoption of the Judges' Bill has stood up well. Others, such as Robert Post, have added to and elaborated on that historical account.[47] But I'm not aware of any real challenge to it.[48]

---

38 *See id.* at 1713–17.

39 *See id.* at 1718–26.

40 *See id.* at 1724 & n.460.

41 *See id.* at 1726–30.

42 *See id.* at 1730.

43 *Id.* at 1733.

44 *See id.* at 1730–31.

45 *See id.* at 1733–34.

46 *See id.* at 1737–38.

47 *See* 10 Robert C. Post, The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States 476–501 (Maeva Marcus ed., 2024).

48 In their contribution to this symposium Daniel Epps and Marin Levy suggest that Chief Justice Taft's efforts were not completely unprecedented, pointing to prior

Similarly, I think it remains undisputed that of the many promises and commitments that the Justices made to convince Congress to expand the Court's discretion, only one continues to be honored: the rule of four. The Court does not discuss every petition for certiorari. To the contrary, every petition is automatically denied unless a Justice places it on the "discuss list."[49] More significantly, the Court does not grant certiorari whenever the petition presents a colorable constitutional argument.[50]

---

communication between Justices and elected officials. *See* Daniel Epps & Marin K. Levy, *Judicial Reform from the Inside Out*, 100 NOTRE DAME L. REV. 2191, 2195–2206 (2026). But regardless of whether the differences between Chief Justice Taft's efforts and those of his predecessors are better described as differences in kind or in degree, they are at least the latter.

49 STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE ch. 5, § 5.2(7) (11th ed. 2019) (ebook) (describing the changes in processing from that described to Congress, including the use of law clerks rather than the justices themselves to prepare memos, the creation of the cert pool to create those memos rather than having each chambers prepare memos on each petition, and the use of the "discuss list"). The "discuss list" includes cases in which the cert pool memo recommends a grant and any case that the Chief Justice thinks significant. *Id.* "Any Justice may add any case to the list before the conference. But cases that do not appear on the list by the day before the conference are automatically denied without even being mentioned at the conference." *Id.* "The Court has suggested that only 3% or so of all petitions are included on the discuss list." WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 333 (8th ed. 2025) ("Roughly 97 percent of [certiorari petitions] may be and are denied at a preliminary stage, without joint discussion among the Justices, as lacking any reasonable prospect of certiorari review." (quoting SUP. CT. OF THE U.S., STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT 11 (2023))).

50 This practice is nearly ubiquitous but perhaps can be most readily seen from opinions issued when certiorari is denied. Here is a sampling from 2024. *See, e.g.*, Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm., 145 S. Ct. 15, 18 (2024) (mem.) (Alito, J., joined by Thomas, J., dissenting from denial of certiorari) ("We have now twice refused to correct a glaring constitutional error . . . ."); *id.* at 15 (Gorsuch, J., respecting denial of certiorari) (noting that he shares Justice Alito's concerns but that certain developments "greatly diminish the need for our review"); Baker v. City of McKinney, 145 S. Ct. 11, 12 (2024) (mem.) (Sotomayor, J., joined by Gorsuch, J., respecting denial of certiorari) ("The Court's denial of certiorari expresses no view on the merits of the decision below. I write separately to emphasize that petitioner raises a serious question: whether the Takings Clause permits the government to destroy private property without paying just compensation, as long as the government had no choice but to do so."); McCrory v. Alabama, 144 S. Ct. 2483, 2489 (2024) (mem.) (Sotomayor, J., respecting denial of certiorari) ("I vote to deny this petition because the constitutional question McCrory raises has not yet percolated sufficiently in the lower courts to merit this Court's review."); Bassett v. Arizona, 144 S. Ct. 2494, 2495 (2024) (mem.) (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting from denial of certiorari) (arguing for summary reversal because the sentence imposed violated the Eighth Amendment); Sandoval v. Texas, 144 S. Ct. 1166, 1166 (2024) (mem.) (Jackson, J., joined by Sotomayor, J., dissenting from denial of certiorari) ("The [decision below] raises a significant and certworthy question about whether criminal defendants have a due

B. Expanding Discretion

As for the ways in which the Supreme Court expanded its discretion in the wake of the Judges' Bill—by using limited grants of certiorari, subjecting cases within its mandatory appellate jurisdiction to discretionary review, practically eliminating the certification power of the courts of appeals, and refusing to permit the filing of complaints within its original (even exclusive) jurisdiction—things are a tad more complex.

The Court continues to grant limited writs of certiorari. This is obviously true when a petition presents multiple questions, and the Court grants the petition limited to one of those questions.[51] But it is also true when the Court simply grants the petition as presented; all grants of certiorari are limited grants. That's because the Court limits its consideration of a case on certiorari to the question presented and those that are "fairly included" in that question.[52] It does not take up an entire case when it grants certiorari, the way it did before the Judges' Bill.[53] As a result, the Court can *affirm* a judgment that is wrong, reviewing and agreeing with the decision below on the difficult and controversial issue on which it granted certiorari, but ignoring an error on a simple and uncontroversial issue which it declined to hear.

The Court also continues to rewrite the question presented by the parties, and to add its own questions.[54]

Since 2000, the Court's practice has become even more *issue* focused and less *case* focused. The ordinary rule in an appellate court is

---

process right to be present in such circumstances. In my view, the answer is yes, and this Court should have granted the petition for certiorari to furnish that important holding.").

51 *See, e.g.*, Docket, Dep't of Educ. v. Career Colls. & Schs. of Tex. (No. 24-413) (U.S. Jan. 10, 2025) ("Petition GRANTED limited to Question 1 presented by the petition.").

52 SUP. CT. R. 14.1(a).

53 For a recent account and critique of the Court's practice of limiting review on certiorari to particular questions, see Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022).

54 *See, e.g.*, Warner Chappell Music, Inc. v. Nealy, 144 S. Ct. 478, 478 (2023) (mem.) ("Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit granted limited to the following question: Whether, under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil actions, 17 U.S.C. § 507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit."); 303 Creative LLC v. Elenis, 142 S. Ct. 1106, 1106 (2022) (mem.) ("Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted limited to the following question: Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."); Seila L. LLC v. CFPB, 140 S. Ct. 427, 427–28 (2019) (mem.) ("In addition to the question presented by the petition, the parties are directed to brief and argue the following question: If the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. § 5491(c)(3) be severed from the Dodd-Frank Act?").

that a party who won in the lower court can defend that judgment on appeal on any ground properly raised below.[55] But the Supreme Court no longer follows that general rule. Instead, it refuses to consider arguments that support a judgment, even when properly preserved in the lower courts, if those arguments were not presented in opposing certiorari by the party that won in the lower courts.[56] As a result, the Court can *reverse* a judgment that is right, reviewing and disagreeing with the decision below on the difficult and controversial issue on which it granted certiorari, but ignoring an alternative ground for affirmance that was preserved in the lower court.

With regard to appeals as of right, the Court no longer dismisses such appeals within its mandatory appellate jurisdiction "for want of a substantial federal question" the way it used to.[57] That is likely the result of Congress eliminating virtually all appeals as of right.[58] In the few remaining mandatory appeals, the Court does appear to take seriously its obligation to decide the merits—although that does not preclude the Court from deciding such appeals summarily, without argument or opinion.[59] The Court does, however, continue to confront pre-1998 decisions in which it dismissed an appeal "for want of a substantial question"[60] but now concludes that the argument raised in that appeal is not just substantial but correct. This has happened with

55 *See* Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979) ("As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below . . . ." (first citing United States v. Am. Ry. Express Co., 265 U.S. 425, 435–36 (1924); and then citing Dandridge v. Williams, 397 U.S. 471, 475 & n.6 (1970))).

56 *See, e.g.*, L.A. Cnty. Flood Control Dist. v. Nat Res. Def. Council, 568 U.S. 78, 84 (2013); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 16–17 (2011).

57 *See* BAUDE ET AL., *supra* note 49, at 329 ("The Court initially limited jurisdictional dismissals for want of a substantial federal question to inherently frivolous federal claims or federal claims foreclosed by prior decisions. But in the 1930s, it began to dismiss nonfrivolous claims based on their relative importance and other non-merits discretionary factors that were similar to those that governed petitions for certiorari.").

58 The most recent case that I have located in which the Court dismissed an appeal for want of a substantial federal question was in 1990. Lively Expl. Co. v. Valero Transmission Co., 493 U.S. 1065 (1990) (mem.). The underlying state court decision was rendered on May 18, 1988. Lively Expl. Co. v. Valero Transmission Co., 751 S.W.2d 649 (Tex. App. 1988). The 1988 Act was approved on June 27, 1988, and took effect ninety days later, but did not "affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." Act of June 27, 1988, Pub. L. No. 100-352, § 7, 102 Stat. 662, 664 (codified at 28 U.S.C. § 1254 (2018)).

59 *See, e.g.*, Castañon v. United States, 142 S. Ct. 56 (2021) (mem.).

60 *See* BAUDE ET AL., *supra* note 49, at 329.

regard to gun control,[61] same-sex marriage,[62] and racial classifications designed to promote integration.[63]

The Supreme Court had rendered the certification procedure nearly a dead letter by 2000, and it has not revived it.[64] In 2004, when the Court of Appeals for the Second Circuit went en banc (something it rarely does[65]) and certified questions regarding the application of the *Apprendi* line of cases to the federal Sentencing Guidelines, it noted that it had been twenty-three years since the last time it had invoked the certification procedure.[66] The Supreme Court, however, waited for certiorari petitions on the issue, granted them, decided those cases, and then dismissed the certified questions.[67] That's why law students learn about *Booker*, but not about *Penaranda*. In 2009, Justices Stevens and Scalia objected to the Court's dismissal of a question certified by the en banc Court of Appeals for the Fifth Circuit.[68] In 2024, a court

---

61 *See* District of Columbia v. Heller, 554 U.S. 570, 675 n.36 (2008) (Stevens, J., dissenting) ("In *Burton v. Sills*, 394 U.S. 812 (1969) *(per curiam)*, the Court dismissed for want of a substantial federal question an appeal from a decision of the New Jersey Supreme Court upholding, against a Second Amendment challenge, New Jersey's gun-control law.").

62 *See* Obergefell v. Hodges, 576 U.S. 644, 665 (2015) (noting that *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), *overruled by Obergefell*, 576 U.S. 644, held that "the exclusion of same-sex couples from marriage did not present a substantial federal question").

63 *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 802 (2007) (Stevens, J., dissenting) (noting that in *School Committee of Boston v. Board of Education*, 389 U.S. 572 (1968) (mem.), the appeal was "dismissed for want of a substantial federal question" and thereby "constitutes a precedent that the Court overrules today"). As Stern and Gressman's Supreme Court Practice notes, "[T]he earlier and vast precedential jurisprudence arising out of pre-1988 summary dispositions of appeals, from both state and federal courts, remains in effect. Perhaps the passage of time will cause those enigmatic precedents to fade. But their continuing existence can haunt both lower courts and the bar." SHAPIRO ET AL., *supra* note 49, at ch. 4, § 4.29. Chief Justice Roberts once wished for a birthday gift: the elimination of the very few remaining appeals as of right.

64 *See* Hartnett, *supra* note 1, at 1710–12. 28 U.S.C. § 1254(2) provides for Supreme Court review of cases in the courts of appeals by

> certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1254(2) (2018).

65 *See generally* Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, 256 N.Y. L.J., no. 38, (2016).

66 *See* United States v. Penaranda, 375 F.3d 238, 242, 247 (2d Cir. 2004) (en banc).

67 *See* United States v. Penaranda, 543 U.S. 1117 (2005) (mem.) (dismissing certified questions); United States v. Fanfan, 542 U.S. 956 (2004) (granting certiorari before judgment in the court of appeals); United States v. Booker, 543 U.S. 220 (2005) (deciding merits).

68 United States v. Seale, 558 U.S. 985, 985 (2009) (mem.) (Stevens, J., respecting dismissal of certified question). They noted, "The Court has accepted only a handful of certified cases since the 1940's and none since 1981; it is a newsworthy event these days

of appeals denied a motion to certify, stating, "We won't cause a newsworthy event and stir up the bloggers and podcasters by asking the Court to accept a certified question from a court of appeals for only the fifth time in 78 years," and observing that the Court has not accepted a certified question in the last forty-three years.[69]

With certification unavailable, lower court judges have at least two other techniques available to induce the Supreme Court to take up a case. One is to write an opinion that implicitly or explicitly calls for the Supreme Court to do so; notably, this can be done by a single judge in dissent.[70] Some judges have been critical of their colleagues for writing opinions, particularly dissents from denial of rehearing en banc,

when a lower court even tries for certification." *Id.* at 986. For an argument in the wake of *Seale* calling for a revitalization of certification, see Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310 (2010); see also Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 492 (2010) ("The lower courts . . . are well-placed to know which issues merit the Court's consideration, and a policy that provides for a give-and-take relationship between the Supreme Court and the other federal courts benefits the development of the law. Or at least it would work that way if Congress's statute was obeyed. Lamentably, certification jurisdiction is dead at the hands of the Supreme Court and, after *Seale*, it is not coming back.").

69 *In re Bowe*, No. 24-11704, 2024 WL 4038107, at *3 (11th Cir. June 27, 2024), *vacated by* Bowe v. United States, 146 S. Ct. 447 (2026). The Supreme Court held that 28 U.S.C. § 2244(b)(3)(E)—which provides, "The grant or denial of an authorization by a court of appeals to file a second or successive [habeas corpus] application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari"—does not apply to motions by federal prisoners under 28 U.S.C. § 2255. *Bowe*, 146 S. Ct. at 455-62. Cf. Felker v. Turpin, 518 U.S. 651, 658 (1996) (upholding the constitutionality of this provision in the context of a habeas application by a state prisoner while noting that it "does not deprive this Court of jurisdiction to entertain original habeas petitions"). Four justices dissented from the holding that certiorari was available and argued, "Rather than ignore § 2244's express constraint on our certiorari jurisdiction, . . . we might have simply signaled to the courts of appeals our willingness to accept certification in this or a similar case." *Bowe*, 146 S. Ct. at 470 (Gorsuch, J., dissenting). Recognizing the possibility of Bowe filing an original habeas petition in the Supreme Court, the court of appeals explained that "[w]hile '[t]he standard for [the Supreme] Court's consideration of an original habeas petition is a demanding one,' it is no more demanding than the standard for considering a question certified by a federal appellate court, as the last four decades of non-use of that procedure demonstrates." *In re* Bowe, 2024 WL 4038107, at *3 (second and third alterations in original) (quoting *In re* Bowe, 144 S Ct. 1170, 1171 (2024) (Sotomayor, J., respecting denial of petition for writ of habeas corpus)); *cf. In re* Bowe, 144 S. Ct. at 1171 (Sotomayor, J., respecting denial of petition for writ of habeas corpus) (noting a circuit split, inviting invocation of the Court's original habeas jurisdiction in a future case, and that the government "suggests that a court of appeals seeking clarity could certify the question to this Court").

70 *See generally* Michael Boudin, *Friendly, J., Dissenting*, 61 DUKE L.J. 881 (2012) (observing that the "common aims of dissenters" include encouraging certiorari, *id.* at 896).

that read like petitions for writs of certiorari.[71] Dissents from denials of rehearing en banc increased substantially in 1971, and then again in 2003.[72]

The other technique, which does require a majority, is to render a decision that pushes the law so strongly in a particular direction that the Supreme Court will find it difficult to simply let it stand. For example, the United States Court of Appeals for the Fifth Circuit held that the federal statute criminalizing the possession of firearms by someone subject to a domestic violence restraining order was unconstitutional under the Second Amendment.[73] I do not mean to suggest that the judges who reached that decision did so only to provoke the Supreme Court to take the case and did not believe they were reaching the proper result under then-existing precedent. But it did have that function.[74]

The Supreme Court continues to treat its original jurisdiction as discretionary, even in cases between states, where its jurisdiction is exclusive.[75] But at least in that area, there is some faint hope for change. In *Texas v. California*, Justice Alito, joined by Justice Thomas, dissented from the denial of the motion for leave to file the complaint.[76] He observed that "the Court has never provided a convincing justification for the practice," and that, "[l]ike many a questionable habit, the practice developed incrementally."[77] Two Justices out of nine is hardly ground for much hope. But Justice Thomas has acknowledged that he used to accept the precedents allowing such discretion but has since

---

71 Marsha S. Berzon, *Introduction*, 41 GOLDEN GATE U. L. REV. 287, 294 (2011); *see* Defs. of Wildlife v. EPA, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurring in order denying petition for rehearing en banc) ("A practice has developed in this court of writing dissents from denial of rehearing en banc consideration as a matter of routine. Those dissents sometimes read more like petitions for writ of certiorari than judicial opinions of any stripe."); Doe v. Fairfax Cnty. Sch. Bd., 10 F.4th 406, 406–07 (4th Cir. 2021) (Wynn, J., concurring in denial of rehearing en banc) (criticizing the practice of dissents from denial of rehearing en banc that address the merits and read like petitions for writs of certiorari); Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 719 (1987) ("One relatively recent phenomenon deserves note: the elaborate statements by dissenting members when en banc is denied. These statements have been described, probably accurately, as thinly disguised invitations to certiorari.").

72 Jeremy D. Horowitz, *Not Taking "No" for an Answer: An Empirical Assessment of Dissents from Denial of Rehearing En Banc*, 102 GEO. L.J. 59, 69–70, 70 fig. 1 (2013).

73 United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024).

74 *See id.*, *cert. granted*, 143 S. Ct. 2688 (2023) (mem.); *see also* All. for Hippocratic Med. v. FDA, 78 F.4th 210, 222–23 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1540 (2024); Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616 (5th Cir. 2022), *rev'd*, 144 S. Ct. 1474 (2024).

75 *See* 28 U.S.C. § 1251(a) (2018).

76 Texas v. California, 141 S. Ct. 1469 (2021) (mem.) (Alito, J., joined by Thomas, J., dissenting from denial of motion for leave to file complaint).

77 *Id.* at 1470.

come to question those decisions.[78] That provides some glimmer of hope that others might similarly see the light. As Justice Frankfurter famously put it, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[79]

C. Questions About Certiorari

1. Judicial Review and Rule of Law

I believe that my questions about whether certiorari can be reconciled with the classic justification for judicial review, and whether a court with discretionary certiorari power can claim to be exercising judgment rather than will, remain unanswered.[80] Consider the two cases from this past term that Will Baude describes as the Supreme Court's version of Trump derangement syndrome[81]: *Trump v. Anderson*, holding that a state could not disqualify a federal candidate from the ballot for insurrection,[82] and *Trump v. United States*, holding that the President's official acts are presumptively immune from criminal prosecution.[83]

In the first case, the Court could have denied certiorari, leaving the Colorado Supreme Court decision in place, and letting each state

78 *See* Arizona v. California, 140 S. Ct. 684, 685 (2020) (mem.) (Thomas, J., dissenting from denial of motion for leave to file complaint).

79 Henslee v. Union Planters Nat'l Bank & Tr. Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting); *see also* Spencer v. Kemna, 523 U.S. 1, 21–22 (1998) (Ginsburg, J., concurring) (invoking this quotation in explaining her changing her mind about a position she took in a previous case); Ring v. Arizona, 536 U.S. 584, 614 (2002) (Breyer, J., concurring in judgment) (same).

80 *Cf.* Johnson, *supra* note 53, at 863 (suggesting that "the Court still has the obligation to decide all of the cases," but "could simply be shirking its duty—worse, strategically shirking to maximize its power" and therefore "operates out of obligation and so retains the power of judicial review on the standard account" on those occasions when it chooses to grant certiorari).

81 *See* Will Baude, *The Supreme Court's Trump Exceptionalism*, REASON: THE VOLOKH CONSPIRACY (July 5, 2024, 8:45 AM), https://reason.com/volokh/2024/07/05/the-supreme-courts-trump-exceptionalism/ [https://perma.cc/6B3W-QFXC]; *see also* William Baude, *A Principled Supreme Court, Unnerved by Trump*, N.Y. TIMES (July 5, 2024), https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html [https://perma.cc/79PM-86RE]; *see also generally* William Baude & Michael Stokes Paulsen, Commentary, *Sweeping Section Three Under the Rug: A Comment on* Trump v. Anderson, 138 Harv. L. Rev. 676 (2025).

82 *See* Trump v. Anderson, 144 S. Ct. 662, 667 (2024) (per curiam).

83 *See* Trump v. United States, 144 S. Ct. 2312, 2347 (2024).

decide the eligibility question itself.[84] Colorado predictably voted for Harris in November,[85] with President Trump on the ballot.

In the second, the Court could have denied certiorari, letting the prosecution go forward and, if there were a conviction and affirmance, deal with any immunity issue on the basis of a full record. Alternatively, if it thought that the nature of any presidential immunity should be determined by the Supreme Court in advance of trial, it could have granted the petition for certiorari before judgment.[86]

Whatever one thinks about the Court's handling of these cases, no law required the Court to act as it did; it was a matter of choice.[87]

One scholar has taken some issue with the critique of certiorari as standardless. Tejas Narechania contends that those of us who have focused on the lack of constraining criteria in the Supreme Court Rules have overlooked that the Court sometimes explains its decision to grant certiorari in its ultimate opinion on the merits.[88] He used computational text analysis to calculate how often a particular word or phrase appeared in paragraphs in merits opinions explaining the

---

84 *See* Akhil Reed Amar, *The Supreme Court Should Get Out of the Insurrection Business*, N.Y. TIMES (Feb. 7, 2024), https://www.nytimes.com/2024/02/07/opinion/supreme-court-trump-section-3.html [https://perma.cc/W4BV-H2SG] ("What happens in Denver stays in Denver, unless other states choose to follow suit. In 1860, Lincoln was not on the ballot in every state; ditto for Ralph Nader in 2000. Welcome to the Electoral College."). One complication would have been if other States considered themselves bound by Colorado's law of issue preclusion and prevented Trump for relitigating the question of his disqualification. *See* 28 U.S.C. § 1738 (2018) ("[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."). If that occurred, a Supreme Court holding that Article II and the Twelfth Amendment (or even something akin to the mishmash of reasons given in *Anderson*) limit § 1738 would have been a much narrower holding. The point is simply that no law obliged the Supreme Court to grant certiorari in *Anderson*.

85 *See 2024 Electoral College Results*, NAT'L ARCHIVES, (Jan. 13, 2025) https://www.archives.gov/electoral-college/2024 [https://perma.cc/LNA4-QQTM].

86 *See* United States v. Trump, 144 S. Ct. 539, 539 (2023) (mem.) ("Petition for writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit denied.").

87 *See* Karen M. Tani, *The Supreme Court 2023 Term—Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 17 (2024) ("Chief Justice Roberts's famous umpire metaphor . . . registers differently when one recognizes that the Court also has some ability to field the players, assign the batting order, and dictate which pitches can be thrown.").

88 *See* Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 926–27 (2022) [hereinafter Narechania, *Important Cases*] ("The Court's decisions to grant review are not wholly standardless. Rather, scholars, practitioners, and commentators have sought these canons in the wrong places . . . . In truth, however, the Court's merits opinions offer some (frequently overlooked) suggestions regarding the reasons for granting review."); *see also* Tejas N. Narechania, *Certiorari in the Roberts Court*, 67 ST. LOUIS U. L.J. 587, 609 (2023) [hereinafter Narechania, *Roberts Court*] (updating the analysis).

reason certiorari was granted and how close that word or phrase was to "statements indicating the questions important enough to merit certiorari."[89] This analysis revealed that the ten most important words or phrases from 1925 to 2018 were: statute, state, constitution, admin_agency, jurisdiction, corporate, divided_lower_court, government, evidence, and jury.[90] Segmenting the analysis by time, he concluded that exogenous events (such as the Great Depression and wars), landmark legislation, and the views and preferences of individual Justices have shaped the Court's docket.[91]

But as Narechania acknowledges, while this analysis can identify broad categories of cases that attract the Court's attention, it does not tell us which cases in those categories are selected and why.[92] In the end, then, like so many before, he calls for more constraining standards governing certiorari: it should create a "common law doctrine of certiorari" by "offering more detailed explanations for the reasons of its review, and it should explain how the decision to grant review in one case reflects (or differs from) its decisions in other cases."[93] That is, rather than calling for the Court to amend the text of Supreme Court Rule 10 to more clearly specify the criteria for certiorari, he calls for a common law reason-giving regarding the interpretation and application of Rule 10.[94] But there is little reason to expect the Court to heed this call to align certiorari with rule of law principles any more than it has similar prior calls. It has what Chief Justice and President Taft called "absolute and arbitrary discretion" (relabeled but unexplained by Justice Van Devanter as "judicial discretion") and has shown no inclination to give that up.[95]

2. Administrative Rather Than Judicial Power

Twenty-five years ago, I suggested that perhaps certiorari might be justified as a form of administrative power rather than judicial power, noting its "kinship with the Rules Enabling Act" and its birth in an era with considerable faith in neutral expertise, particularly regarding judicial procedure.[96] From that perspective, certiorari allocates cases

89 Narechania, *Important Cases*, *supra* note 88, at 948; *see id.* at 948–49.
90 *See id.* at 955 tbl.1.
91 *See id.* at 969.
92 *See id.* at 986.
93 *Id.* at 990–91.
94 *See id.* at 989–90.
95 Taft, *supra* note 6, at 18; Hartnett, *supra* note 1, at 1678.
96 Harnett, *supra* note 1, at 1726,1726–30.

among courts, in a way similar to the way that local case assignment rules or the Judicial Panel on Multidistrict Litigation (MDL) works.[97]

Since then, Kathryn A. Watts has explored subjecting certiorari to the principles of administrative law, including "the nondelegation doctrine, political oversight, public participation, judicial review, and reason-giving requirements."[98] Finding certiorari practice lacking, she suggests serious consideration by both Congress and the Court of "vote-disclosure requirements and increased public participation . . . as promising means of increasing transparency, deliberation, and accountability in the certiorari process."[99] Confidentiality regarding votes on certiorari—except to the extent that Justices choose to reveal their own by filing opinions regarding the denial of certiorari—remains in place.[100] At least one reason why Justices might resist revealing votes is to avoid disclosing obvious defensive denials.[101] The Court has, however, made it somewhat easier for the public to participate: it does make petitions available on its website, and, effective January 2023, permits amicus briefs to be filed without filing a motion or obtaining consent from the parties.[102]

Even if further steps were taken to apply principles of administrative law to certiorari, would that be enough to justify viewing certiorari as an exercise of administrative power rather than judicial power? Twenty-five years ago, I noted three major problems with that justification. First, the Supreme Court has certiorari jurisdiction, but no supervisory power over state courts.[103] Second, faith in neutral expertise, including regarding procedure, has been shaken.[104] Third, viewing certiorari as administrative power does not resolve the tension between certiorari and judicial review.[105]

---

97 *See id.* at 1728.

98 Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 7 (2011); *see id.* at 6–7, 25–42.

99 *Id.* at 68.

100 *See id.* at 16–17.

101 The concern that revealing votes on certiorari in a case in which certiorari has been granted might influence the briefing and argument on the merits could be met by not revealing votes in such cases until the case has been decided.

102 *See* SUP. CT. R. 37. In her contribution to this symposium from the perspective of administrative law, Professor Emily Bremer argues that the Judiciary Act of 1925 shifted the Supreme Court from adjudication to rulemaking and increased the expectation and volume of reason-giving by the Court. *See generally* Emily S. Bremer, *Making Our Ministry of Justice*, 100 NOTRE DAME L. REV. 255 (2026). But while the Court does write longer opinions than it used to, it does not provide reasons when it grants or denies certiorari. Watts, *supra* note 98, at 16–17.

103 Harnett, *supra* note 1, at 1728.

104 *See id.* at 1728–29.

105 *See id.* at 1729–30.

Those concerns could benefit, perhaps, from further reflection twenty-five years on.

It is true that the Supreme Court lacks supervisory power over state courts.[106] But a lack of supervisory power may not mean that administrative power is necessarily lacking as well. Given the Madisonian Compromise, the Supreme Court was plainly envisioned as exercising appellate review over state court judgments.[107] And Congress, which is given the power to make exceptions to the Supreme Court's appellate jurisdiction, can be understood to have delegated that power to the Supreme Court.[108] If the exceptions power is not judicial power in the hands of Congress—and it plainly is not—then perhaps a delegation of that exceptions power to the Supreme Court is not an exercise of judicial power either.

Other delegations of power to parts of the judicial branch involve something other than judicial power. Consider the United States Sentencing Commission, which is "established as an independent commission in the judicial branch," and does not exercise judicial power.[109] Or the power of the Judicial Conference not only to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" but also to "make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary," and "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business."[110] These nonjudicial powers are vested in bodies other than courts, but the power of the Supreme Court under the Rules Enabling Act to promulgate rules of practice and procedure for the lower federal courts is ultimately vested in the Court itself.[111]

So, perhaps the absence of supervisory power over state courts is not fatal to viewing certiorari as administrative power, a delegation of power that Congress could exercise directly itself.[112] In any event,

106 Dickerson v. United States, 530 U.S. 428, 438 (2000); *see also* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 342 n.78 (2006) ("[T]he fact that the Court's supervisory authority does not extend to state courts is good evidence that the Court has not thought carefully about its occasional assertions that the supervisory power derives from the appellate review statutes.").

107 *See* BAUDE ET AL., *supra* note 49, at 7–9.

108 *See* U.S. CONST. art. III, § 2, cl. 2.

109 28 U.S.C. § 991 (2018); *accord* Mistretta v. United States, 488 U.S. 361, 384–85 (1989).

110 28 U.S.C. § 331 (2018).

111 *See* 28 U.S.C. § 2072 (2018).

112 *See* Watts, *supra* note 98, at 22 ("Congress routinely hands over broad policymaking powers to agencies—power that Congress could have chosen to exercise itself."). In a

certiorari to state courts is of reduced practical importance because the Supreme Court hears so few cases from state courts these days. For example, in each Term since the 2020 Term, the Court has decided five or fewer cases by full opinion from the state courts.[113]

For decades, expertise, plus political responsiveness, have been key justifications for administrative power.[114] The Court in *Chevron* explained that perhaps Congress "consciously desired the Administrator" of the EPA to strike the balance between conflicting policies, "thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so," or perhaps Congress "was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency."[115] But it didn't matter:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving

---

recent article, Professor Dinis Cheian argues that the delegation involved in certiorari is unconstitutional because it violates the nondelegation doctrine. Dinis Cheian, *"Absolute and Arbitrary": How the Supreme Court's Certiorari Power Violates the Nondelegation Doctrine*, 50 BYU L. Rev. 963, 1012–29 (2025) (arguing that the delegation lacks an intelligible principle and also fails the exclusivity and importance strands of the nondelegation doctrine). Perhaps the nondelegation doctrine will make a comeback in the Supreme Court after having had only one good year, in 1935. *See* Cass R. Sunstein, *Foreword: The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1207 (2018) ("In all of American history, it has had just one good year."). Even so, it is very unlikely that the Supreme Court will turn a revived nondelegation doctrine against its own power. But the nondelegation argument is one more good reason to continue to question certiorari, and it underscores the power of Congress to act.

113 *See The Supreme Court, 2020 Term—The Statistics,* 135 HARV. L. REV. 491, 500 tbl.II(e) (2021); *The Supreme Court, 2021 Term—The Statistics*, 136 Harv. L. Rev. 500, 510 tbl.II(e) (2022); *The Supreme Court, 2022 Term—The Statistics*, 137 HARV. L. REV. 490, 500 tbl.II(e) (2023); *The Supreme Court, 2023 Term—The Statistics*, 138 HARV. L. REV. 446, 456 tbl.II(e) (2024); *The Supreme Court, 2024 Term—The Statistics*, 139 HARV. L. REV. 430, 440 tbl.II(e) (2025).

114 *See* Watts, *supra* note 98, at 22; *id.* at 35 ("[M]any have come to see the legitimacy of the administrative state as hinging on the notion that agencies are politically accountable because of their relationship with Congress and the President.").

115 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

> the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[116]

Faith in expertise has fallen still further in the past twenty-five years, particularly in the wake of the COVID-19 pandemic. Last year's overruling of *Chevron* in *Loper Bright* can be seen as a product of declining faith in expertise and resistance to the idea that the law can change with each change in administration.[117] The dissent, by contrast, defended those ideas in arguing for adherence to *Chevron*:

> Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority.[118]

In the interest of full disclosure, I should confess that my perspective on expertise, particularly expertise regarding judicial procedure, is likely influenced by my experience inside the federal rulemaking process, experience that I did not have twenty-five years ago. For the past several years, I have been the Reporter for the Advisory Committee on the Federal Rules of Appellate Procedure. In that role, I participate not only in the meetings of that Advisory Committee but also in the meetings of the Committee on Rules of Practice and Procedure (commonly known as the Standing Committee), the Committee that considers all of the Federal Rules (Appellate, Bankruptcy, Civil,

---

116 *Id.* at 865–66.

117 *Loper Bright*, 144 S. Ct. at 2273; *id.* at 2286 (Gorsuch, J., concurring) (noting that under *Chevron*, "legal demands can change with every election even though the laws do not").

118 *Id.* at 2294 (Kagan, J., dissenting). On the other hand, *Loper Bright* could be understood as the judiciary insisting on its own expertise, that of interpreting the law. As the Court put it, "Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do." *Id.* at 2266 (majority opinion). Judicial expertise in interpreting the law is of no help if certiorari is defended as administrative power rather than judicial power.

Criminal, and Evidence). While the judges, practicing lawyers, and academics involved in this process have their own backgrounds and perspectives, I have seen them work carefully and diligently trying to get it right, seeking, in the words of the statute governing the Judicial Conference, "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[119]

Yet even if these difficulties with viewing certiorari as administrative power are overcome, there remains the difficulty of reconciling certiorari, even as administrative power, with the classic *Marbury* justification for judicial review. Even if one or more lower courts can rely on the classic *Marbury* justification, the Supreme Court cannot, because it has chosen to decide the case.

When a district court is allocating its cases among its judges, or a court of appeals is allocating cases among three-judge panels of its judges, or even deciding that all of them should decide the case en banc, the starting point is that the court has to decide the case, and the question is which member or members of the court will do so. When a court transfers a case, it sends the case to another court; it does not take cases from other courts.[120] And when the Judicial Panel on Multidistrict Litigation decides to consolidate cases, it sends the case to a particular court for pretrial purposes; it does not take the case itself.[121] Indeed, the Supreme Court has construed the MDL statute to prohibit the court that receives the case from the MDL Panel from transferring the case to itself for trial.[122] But the Supreme Court, when granting certiorari, is choosing to take the case from another court to itself for decision.

---

119 28 U.S.C. § 331 (2018); *see also* 28 U.S.C. § 2073(b) (2018) ("The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice."). In 2026, I became the Reporter to the Standing Committee.

120 *See* 28 U.S.C. §§ 1404, 1406 (2018); *see also In re* Joint E. & S. Dists. Asbestos Litig., 769 F. Supp. 85, 88 (E. & S.D.N.Y. 1991) (Weinstein, J.) (sitting by designation as a Southern District Judge in order to transfer cases from the Southern District to the Eastern District of New York and noting that he pretermitted an objection that he could not do so while physically in the Eastern District by walking across the Brooklyn Bridge and "continuing the hearing on the motion [to transfer] in a courtroom in the Southern District of New York").

121 *See* 28 U.S.C. § 1407 (2018).

122 *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998). *Lexecon* therefore had no need to decide whether § 1404 itself precludes self-transfer, but noted that "the statute explicitly provides for transfer only 'to any other district.'" *Id.* at 41 n.4 (quoting 28 U.S.C. § 1404(a) (2018)).

D. The Importance of Certiorari

1. Questions Rather Than Cases

Certiorari continues to contribute to a mindset that thinks of the Supreme Court more as sitting to resolve controversial questions than to decide cases. The late Henry Monaghan has put the point powerfully: relying on its "agenda selection freedom," the Supreme Court "seeks as much freedom as possible over what is to be finally and authoritatively decided."[123] While it "continues to piously disclaim any general, freestanding superintendence role over other organs of government," if "another court has passed on an issue of federal constitutional law regulating the conduct of public officials," then "the Court believes that it should be able to review that ruling, and it fashions doctrine towards that end."[124] As a result:

> The Court has in significant measure embraced the premises of the law declaration model. While still formally disclaiming any general superintendence over the conduct of other organs of government, the Court seeks to ensure and expand its hierarchical superiority in our judicial system. Current doctrinal developments reflect a powerful drive to ensure that (a) the Court can have the final say when any other court, state or federal, rules on the constitutionality of government conduct; and (b) the Court possess wide-ranging agenda-setting freedom to determine what issues are to be (or not to be) decided, irrespective of the wishes of the litigants.[125]

The Supreme Court's self-perception can perhaps best be illustrated by what it unselfconsciously takes for granted. In *State v. Cruz*, the Arizona Supreme Court denied post-conviction relief under Arizona Rule of Criminal Procedure 32.1(g), holding that the decision of the Supreme Court of the United States in *Lynch v. Arizona* was "not a significant change in the law" within the meaning of Rule 32.1(g).[126] Cruz sought certiorari, presenting the question whether *Lynch* "must be applied to cases pending on collateral review."[127] Scholars of habeas corpus supported the petition, arguing that "[w]hen states provide a process for collateral review, they must enforce all settled federal constitutional rules as of the date a conviction became final."[128] They

123 Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 679 (2012).

124 *Id.*

125 *Id.* at 668–69.

126 State v. Cruz, 487 P.3d 991, 992 (Ariz. 2021) (citing Lynch v. Arizona, 578 U.S. 613 (2016)), *vacated*, 143 S. Ct. 650 (2023).

127 Petition for a Writ of Certiorari at i, *Cruz*, 143 S. Ct. 650 (No. 21-846).

128 Brief of Amici Curiae Habeas Scholars in Support of Petitioner at 6, *Cruz*, 143 S. Ct. 650 (No. 21-846).

relied on cases including *Montgomery* and *Teague*.[129] Among other reasons to deny certiorari, Arizona objected to the Court's jurisdiction, arguing that the state court judgment relied on "an independent and adequate state law ground."[130]

The Court granted certiorari, but not on the question presented by the petition (a petition submitted by former Acting Solicitor General Neal Katyal).[131] Instead, it granted certiorari limited to the following question that it formulated: "Whether the Arizona Supreme Court's holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment."[132]

Pause for a moment on the oddity of that question as the sole question to be addressed. Sure, if an appellate court has doubts about its jurisdiction, it might make sense to direct the parties to brief the issue (if they haven't already done so) or inform counsel that the court expected them to be prepared to discuss the issue of jurisdiction at oral argument. And on rare occasions, the Supreme Court has ordered oral argument on the question whether to grant certiorari, particularly "where there are severe jurisdictional problems in a case involving otherwise important issues."[133]

But if the *only* question to be decided by the appellate court is whether it has jurisdiction, what is it supposed to do once it decides that question in favor of its jurisdiction?

In a 5-4 decision, the Supreme Court concluded that the Arizona Supreme Court's judgment did not rely on an adequate and independent state ground.[134] It relied on its "rule, reserved for the rarest of situations, that 'an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question.'"[135] Having concluded that the state court decision was not supported by an independent and adequate state ground, the Supreme Court was free to exercise its jurisdiction and decide the merits. But having granted certiorari only on the question of its jurisdiction, instead it said this: "Accordingly, the judgment of the Supreme Court of Arizona is

129 *Id.* at 4 (first citing Montgomery v. Louisiana, 577 U.S. 190, 204–05 (2016); then citing *id.* at 219 (Scalia, J., dissenting); and then citing Teague v. Lane, 489 U.S. 288, 307 (1989)).

130 Brief in Opposition at 1, *Cruz*, 143 S. Ct. 650 (No. 21-846).

131 *See* Petition for a Writ of Certiorari, *supra* note 127, at i, 33.

132 Cruz v. Arizona, 142 S. Ct. 1412 (2022) (mem.) (granting the petition for certiorari).

133 SHAPIRO ET AL., *supra* note 49, at ch. 5, § 5.2(9).

134 *See Cruz*, 143 S. Ct. at 655.

135 *Id.* at 658 (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)).

vacated, and the case is remanded for further proceedings not inconsistent with this opinion."[136]

The four dissenters argued that "the Arizona Supreme Court did not contradict its own settled law. Instead, it confronted a new question and gave an answer reasonably consistent with its precedent."[137] But the dissent did not say a word about the oddity of the Court deciding that it had jurisdiction and then simply sending the case back to state court.

> Given that the adequate and independent state ground doctrine is aimed at determining whether the Supreme Court has *jurisdiction* to review an underlying federal question on appeal, it is curious that the Court declined to review the petitioner's underlying due process claim on the merits and instead sent the case back to the state courts.[138]

Imagine a court of appeals doing the same thing: hearing argument on the question of whether it had appellate jurisdiction (perhaps as to whether the district court decision was a final judgment), deciding that it did, and remanding the case to the district court with nothing further.[139]

Evidently, all of the Justices—including the dissenters—simply took for granted that once it told the Arizona Supreme Court that it *had* jurisdiction to review the Arizona Supreme Court judgment, it need not actually *exercise* that jurisdiction and review the Arizona Supreme Court judgment. Instead, they all seem to have assumed that the Arizona Supreme Court would do what was expected and either change its interpretation of state law or review the federal question notwithstanding state law.[140]

---

136 *Id.* at 662.

137 *Id.* at 663 (Barrett, J., dissenting).

138 BAUDE ET AL., *supra* note 49, at 704–05.

139 *Cf.* 28 U.S.C. § 1291 (2018).

140 *Cf.* BAUDE ET AL., *supra* note 49, at 705 (asking whether the Arizona courts are "obligated either to change their interpretation of state law or review the federal question"). Perhaps the Court has adopted Dan Meltzer's suggestion that the "inadequate state ground doctrine" be viewed as a matter "of federal common law binding on the states." Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1184 (1986). But that seems unlikely, both because the Court said nothing like that and because it is hardly receptive to expansive views of federal common law. *See, e.g.*, Turkiye Halk Bankasi A.S. v. United States, 143 S. Ct. 940, 955 (2023) ("But since Erie R. Co. v. Tompkins, federal courts have largely disclaimed the power to develop federal common law outside of a few reserved areas." (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938))) (Gorsuch, J., concurring); Egbert v. Boule, 142 S. Ct. 1793, 1802 (2022) ("Now long past 'the heady days in which this Court assumed common-law powers to create causes of action,' we have come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'") (first quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring), and then quoting Hernandez v. Mesa, 140

2. Moving the Law Without Confronting the Implications or Bearing the Caseload

There are at least three significant examples of this phenomenon over the last twenty-five years, involving gay rights, gun rights, and Guantanamo.

The first victory for gay rights in the Supreme Court was nearly thirty years ago. *Romer v. Evans* involved a state constitutional amendment that prohibited state and local governments from making "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" a basis for a claim of discrimination; the Supreme Court held that this state constitutional amendment violated the Equal Protection Clause of the Fourteenth Amendment.[141] The dissent relied in part on *Bowers v. Hardwick*,[142] which had upheld the constitutionality of law criminalizing homosexual sodomy.[143] The majority pointedly did not even cite *Bowers*, leading the dissent to "strongly suspect" that the Court had concluded that "the perceived social harm of homosexuality" is not a "legitimate concern of government."[144] But the Court waited until 2003, seven years later, to address whether the dissent was correct and that *Bowers* was no longer good law.[145] In the meantime, the Supreme Court could stand above the fray and watch as lower courts and academics wrestled with a world in which both *Bowers* and *Romer* stood as precedents[146]—and wait for the gay rights movement to achieve greater political, social, and legal acceptance.

And in deciding *Lawrence* and overruling *Bowers*, the Court could state that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek

---

S. Ct. 735, 741 (2020)); *see also* Edward A. Hartnett, *Legislative Calibration of Constitutional Remedies*, 128 PENN ST. L. REV. 165, 180 (2023).

141 Romer v. Evans, 517 U.S. 620, 624 (1996) (quoting COLO. CONST. art. II, § 30b, *invalidated by Romer*, 517 U.S. 620); *see id.* at 623.

142 *See id.* at 640 (Scalia, J., dissenting) (citing Bowers v. Hardwick, 48 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)); *id.* at 641 ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.").

143 *See Bowers*, 48 U.S. at 196.

144 *Romer*, 517 U.S. at 651 (Scalia, J., dissenting) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993)).

145 *See Lawrence*, 539 U.S. at 578.

146 *See, e.g.*, Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 297–301 (6th Cir. 1997); Richenberg v. Perry, 97 F.3d 256, 261–62 (8th Cir. 1996); Shahar v. Bowers, 114 F.3d 1097, 1099 (11th Cir. 1997) (en banc); Williams v. Pryor, 240 F.3d 944, 949–55 (11th Cir. 2001). *See generally, e.g.*, Thomas C. Grey, Bowers v. Hardwick *Diminished*, 68 U. COLO. L. REV. 373 (1997); Janet E. Halley, Romer *v.* Hardwick, 68 U. COLO. L. REV. 429 (1997).

to enter,"[147] prompting the dissent to say, "Do not believe it. . . . This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."[148]

The Court could then wait another ten years before holding that the federal Defense of Marriage Act is unconstitutional,[149] while observing that its opinion and holding are confined to marriages that are lawful under state law—thereby punting the question of the constitutionality of state laws that limit marriage to opposite-sex couples.[150] The wait was short after that: it was only two years, and after widespread adoption of same-sex marriage across the country in one way or another, before the Court held that "same-sex couples may exercise the fundamental right to marry in all States."[151]

The first victory for gun rights in the Supreme Court was seventeen years ago. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm for self-defense in the home.[152] This was followed in short order two years later by *McDonald v. City of Chicago*, holding that the Fourteenth Amendment incorporates the Second Amendment, making the right to bear arms a limitation on state power as well as on federal power.[153]

But then the Court stayed away from the issue for a dozen years, apart from a unanimous summary reversal of a Massachusetts decision that viewed stun guns as unprotected by the Second Amendment because they did not exist in 1789 and are not readily adaptable to military use.[154] Justice Thomas repeatedly complained that the Court's

---

147 *Lawrence*, 539 U.S. at 578.

148 *Id.* at 604–05 (Scalia, J., dissenting) (quoting *id.* at 578 (majority opinion)).

149 *See* United States v. Windsor, 570 U.S. 744, 774 (2013).

150 *See id.* at 775. The dissent observed:

> It takes real cheek for today's majority to assure us . . . that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it.

Id. at 798 (Scalia, J., dissenting).

151 Obergefell v. Hodges, 576 U.S. 664, 681 (2015). Once the Court denied certiorari to review several decisions invalidating bans on same-sex marriage and denied stays of injunctions barring enforcement of such state laws, so that numerous marriages occurred because of those injunctions, the writing was on the wall. *See* Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 323–25 (2016).

152 *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

153 *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

154 *See* Caetano v. Massachusetts, 577 U.S. 411, 411–12 (2016) (per curiam). The Court granted certiorari in a gun rights case in 2019 but determined that the case was moot after

denials of certiorari reflected its disfavor of the right to bear arms and left lower courts on their own.[155] As late as 2020, Justice Thomas, joined by Justice Kavanaugh, dissented from the denial of certiorari in a gun rights case, noting that it had "been more than a decade since" *McDonald* and *Heller* and that "lower courts have struggled to determine the proper approach for analyzing Second Amendment challenges."[156] After Justice Barrett replaced Justice Ginsburg, the Court granted certiorari and held that the right to bear arms includes the right to bear arms in public for self-defense.[157]

In both the areas of gay rights and gun rights, certiorari empowered the Court to move the law when it thought the time was right. And especially in the case of gun rights, it permitted the Court to establish newly enforceable rights without having to hear the thousands of resulting cases. As with incorporation generally, it is hard to imagine the Supreme Court incorporating the Second Amendment if that meant (as it did before Congress gave the Court the power to decline to review state court judgments denying federal rights and defenses) that the Court would have to hear every case in which a state court rejected a claim or defense based on the Second Amendment.

As a final example, consider the Guantanamo cases. In a series of three increasingly aggressive decisions, the Court insisted that the writ of habeas corpus reaches Guantanamo. *Rasul* interpreted longstanding statutes to reach that result,[158] *Hamdan* held that a statute enacted in response to *Rasul* did not apply to pending cases,[159] and *Boumediene* held that a statute enacted in response to *Hamdan* was unconstitutional.[160] But having established that point, it has stood aside, refusing to hear case after case where the Court of Appeals for the D.C. Circuit denied relief. Writing in 2011, Steve Vladeck observed that "with one equivocal exception, the Supreme Court has denied certiorari in every

---

a legislative change. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525, 1526 (2020) (per curiam).

155 *See, e.g.*, Silvester v. Becerra, 138 S. Ct. 945, 950 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari) ("As I have previously explained, the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights." (citations omitted)); Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari).

156 Rogers v. Grewal, 140 S. Ct. 1865, 1866 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari); *see also, e.g.*, State v. Roundtree, 952 N.W.2d 765, 792 (Wis. 2021) (Hagedorn, J., dissenting) (describing the Supreme Court's second amendment jurisprudence as "sparse" and not "offer[ing] much assistance in this case").

157 *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022).

158 *See* Rasul v. Bush, 542 U.S. 466, 483–85 (2004).

159 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 582–84, 584 n.15 (2006).

160 *See* Boumediene v. Bush, 553 U.S. 723, 735, 792 (2008).

post-*Boumediene* Guantánamo case it has thus far been asked to hear."[161] That pattern continues.[162]

One need not go as far as Judges Silberman and Randolph to see that the Court largely announced that habeas applies in Guantanamo and left it to the D.C. Circuit to figure out the rest.[163] That is possible only because of certiorari.[164]

161 Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1454 (2011) (noting that the exception was Kiyemba v. Obama, 559 U.S. 131 (2010) (per curiam), where the Court granted certiorari and then remanded prior to argument for consideration of changed factual circumstances, *see id.* at 1454 n.24). After that consideration, the Court denied certiorari. Kiyemba v. Obama, 563 U.S. 954 (2011) (mem.).

162 *See, e.g.*, Al-Alwi v. Trump, 139 S. Ct. 1893, 1893 (2019) (mem.); *id.* at 1984 (Breyer, J., respecting denial of certiorari) ("I would, in an appropriate case, grant certiorari to address whether, in light of the duration and other aspects of the relevant conflict, Congress has authorized and the Constitution permits continued detention."). The Court did decide that a detainee at Guantanamo could not obtain certain discovery from former CIA contractors to use in litigation in Poland. *See* United States v. Zubaydah, 142 S. Ct. 959, 963–64 (2022).

163 *See* Esmail v. Obama, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) ("Of course, if it turns out that regardless of our decisions the executive branch does not release winning petitioners because no other country will accept them and they will not be released into the United States, then the whole process leads to virtual advisory opinions. It becomes a charade prompted by the Supreme Court's defiant—if only theoretical—assertion of judicial supremacy, sustained by posturing on the part of the Justice Department, and providing litigation exercise for the detainee bar." (first citing Kiyemba v. Obama, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam); then citing Kiyemba v. Obama, 561 F.3d 509, 516 (D.C. Cir. 2009); and then citing *Boumediene*, 553 U.S. 723)); *id.* (noting that the Supreme Court is unlikely to take a case because doing so "might obligate it to assume direct responsibility for the consequences of *Boumediene*" (citing *Boumediene*, 553 U.S. 723)); *see also* A. Raymond Randolph, *The Guantánamo Mess*, *in* CONFRONTING TERROR: 9/11 AND THE FUTURE OF AMERICAN NATIONAL SECURITY 241, 241–42 (Dean Reuter & John Yoo eds., 2011).

164 At the symposium, Professor Tara Grove wondered whether *Brown v. Board of Education*, 347 U.S. 483 (1954), would have been possible absent certiorari, implicitly invoking the *Brown* litmus test for constitutional theory. Tara Leigh Grove, *Foreword: Certiorari—Necessary, but Legitimate?*, 100 Notre Dame L. Rev. 1995 (2025). "As has often been remarked, *Brown* has become a litmus test for theories of constitutional interpretation, as any theory worth its salt must accommodate the decision." Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 357–58; *see also* Richard A. Posner, *Bork and Beethoven*, 42 STAN L. REV. 1365, 1374 (1990) ("No constitutional theory that implies that *Brown v. Board of Education* . . . was decided incorrectly will receive a fair hearing nowadays . . . ."). *Brown* itself, as well as the companion cases from South Carolina and Virginia, were before the Supreme Court on appeal. *See Brown*, 347 U.S. at 486 n.1. The companion case from Delaware was before the Court on certiorari, but the Black student plaintiffs had won in the Delaware courts. *See id.*

E. Disappointment

While I think that *Questioning Certiorari* has held up well over twenty-five years, I do have one significant disappointment. I had hoped, evidently vainly, that reminding readers that the Supreme Court has discretion over its docket only because Congress chose to give it that discretion might reshape the debates over so-called jurisdiction stripping. Professor Grove has explained that the statutes giving the Supreme Court discretionary certiorari jurisdiction are exercises of congressional power to make exceptions to the Supreme Court's appellate jurisdiction.[165] But lawyers, judges, elected officials, law students, and too many law professors keeping using the term "jurisdiction stripping."[166]

We should stop. The term assumes the current jurisdiction as a baseline and a change in that baseline is problematic. And it connotes something deliberately designed to degrade someone from the dignity to which they are entitled.

The Supreme Court in 1891 and 1925 was not proudly insisting on its dignity and objecting to Congress "stripping" it of jurisdiction. It was begging Congress for relief. And if Congress put the Court at the baseline set by Article III—with mandatory jurisdiction (either original or appellate) in every case listed in Article III[167]—the Court would immediately be at the doors of Congress begging for relief. "Please make some exceptions to our appellate jurisdiction!"

---

165 *See* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929 (2013).

166 The search "jurisdiction stripping" in the Westlaw Law Reviews and Journals database returns 1,640 law review articles since 2000, WESTLAW, https://westlaw.com [https://perma.cc/F69V-VSKY] (last visited June 19, 2026) (select "Secondary Sources"; then select "Law Reviews & Journals"; then search "jurisdiction stripping"; and then filter for results after December 31, 1999), plus 458 in the Legal Newspaper and Newsletters database for that same period, *id.* (select "Secondary Sources"; then select "Legal Newspapers & Newsletters"; then search "jurisdiction stripping"; and then filter for results after December 31, 1999).

167 *See* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313–14 (1810).

> It is contended that the words of the constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by congress; and that if the court had been created without any express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever.
>
> The force of this argument is perceived and admitted. Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it.

Id. at 313. Bear in mind that Article III gives the Supreme Court appellate jurisdiction "both as to Law and Fact." U.S. CONST. art. III, § 2.

III. STILL QUESTIONING CERTIORARI

Then why still *questioning* certiorari? Why not *against* certiorari?[168]

It's not because I can't imagine any alternative. Congress could certainly do what it did between 1789 and 1891 and establish which categories of cases the Supreme Court is obliged to hear on appeal and which cases it could not hear. And once one conceptualizes the Court's certiorari power as a delegation to it of Congress's power to make exceptions to its appellate jurisdiction,[169] even more radical changes can be imagined.[170]

What Congress can delegate, it can do directly itself. So imagine Congress doing what the Court does in choosing its cases. The Judiciary Committee of each house could receive petitions from losing litigants and (perhaps after hearing from the winning parties as well) periodically draft bills providing for Supreme Court appellate jurisdiction over designated judgments. Competing bills passed by each house could be reconciled, and the result sent to the President

168 *Cf.* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Suzanna Sherry, *Against Diversity*, 17 CONST. COMMENT. 1 (2000).

169 *See* Watts, *supra* note 100, at 22 ("[B]oth certiorari and administrative law involve Congress delegating broad discretion to other governmental actors, largely for functional reasons relating to expertise and flexibility.").

170 Professor Grove suggests that certiorari is necessary. *See* Tara Leigh Grove, *Foreword: Certiorari—Necessary, but Legitimate?*, 100 NOTRE DAME L. REV. 1995, 1998 (2026). It may be "necessary" in the *McCulloch v. Maryland* sense of being useful or convenient. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819); *see also* Samuel L. Bray, "*Necessary and Proper" and "Cruel and Unusual*": *Hendiadys in the Constitution*, 102 VA. L. REV. 687 (2016). And it may be necessary for the Supreme Court that we know. Without the Judges' Bill, I doubt that Hart's notion of the Supreme Court's essential role would have developed and suspect that Wechsler's notion that the Supreme Court's role, like the role of other courts, is to decide cases within its jurisdiction would seem obvious. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396 (1953); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965). But Congress made the Supreme Court that we have what it is, and Congress could have made it—and still could make it—rather different. If, as Professor Grove suggests, the Supreme Court we have is legitimate because Congress created it that way, then it is even more important to stop the worried talked about jurisdiction-stripping. As Professor Grove acknowledges, this approach is consonant with the thinking of Dean Charles Black, who (like Wechsler) endorsed broad Congressional power to restrict jurisdiction, viewing that power as "the rock on which rests the legitimacy of the judicial work in a democracy." Grove, *supra* at 2017–2018 n.123 (quoting Charles L. Black, 32 WASH. & LEE L. REV. 841, 846 (1975)). Certiorari is not necessary in a stronger sense, such as Jefferson's. *See* Steven Gow Calabresi, Elise Kostial & Gary Lawson, *What* McCulloch v. Maryland *Got Wrong: The Original Meaning of "Necessary" Is Not "Useful," "Convenient," or "Rational,"* 75 BAYLOR L. REV. 1, 5 (2023).

for signature or veto. The resulting list would constitute the Court's appellate caseload.[171]

The difficulty, one that a small-d democrat like me is loath to admit, is whether our contemporary Congress is up to the task—not just the radical task of picking particular cases, but the more traditional task of picking categories of cases.

I fear that James Bradley Thayer might have been right. Expansive judicial power leads legislatures to grow accustomed to distrust and then act in ways to justify that distrust, "as if honor and fair dealing and common honesty were not relevant to their inquiries."[172] Further,

> The people . . . become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives.[173]

In short, "a common and easy resort" to judicial review "dwarf[s] the political capacity of the people, and . . . deaden[s] its sense of moral responsibility."[174]

Perhaps there is a way to restore our politics first and then reduce the power of judges. Or perhaps the tough love of drastically shifting power from judges to legislatures is the best or only way to restore our politics. But at this juncture, I'm not ready to prescribe such tough love.

But I would like to think that our contemporary Congress is up to the task of tempering the Court's certiorari power with a renewed certification power in the courts of appeals. The past twenty-five years gives us no reason to expect the impetus to come from the Court. And

171 Congress could phrase such laws as stating that the Supreme Court shall have no appellate jurisdiction except as provided, but it need not; the Court has long interpreted acts of Congress that are phrased as grants of appellate jurisdiction as negating all jurisdiction not provided for. *See, e.g.*, *Durousseau*, 10 U.S. (6 Cranch) at 314 ("When the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.").

172 JAMES BRADLEY THAYER, JOHN MARSHALL 104 (1901); *see id.* at 103–04.

173 *Id.* at 104.

174 *Id.* at 107.

presumably it would do little good for Congress to reenact 28 U.S.C. § 1254(2) and say, "This time we really mean it."[175]

A new certification statute that, like certification of district court orders under 28 U.S.C. § 1292,[176] is tied to review of a specific decision, rather than a request for desired instructions, might help. Back when the Supreme Court took its obligations under the certification statute more seriously, it nonetheless "repeatedly held that it w[ould] not answer questions of objectionable generality."[177] Instead, it interpreted the statute to require that the certificate present "distinct propositions of law."[178] The Freund Committee criticized certificates because they "bring to the Court abstract questions of law, divorced from a complete factual setting in which they may be more carefully explored."[179] Similar problems are sometimes found under the current practice of federal courts certifying state law questions to state courts.[180]

---

175 *See* Narechania, *Roberts Court*, *supra* note 88, at 609 n.85 (2023) (suggesting "that Congress reiterate and clarify that the Court's jurisdiction in [certified] cases is mandatory, and that Congress direct the Courts of Appeals to certify cases presenting substantial circuit splits to the Supreme Court").

176 28 U.S.C. § 1292(b) (2018) (providing for court of appeals jurisdiction over appeals from orders not otherwise appealable if the district judge states in writing in that order that it "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation"). Section 1292(b) then gives the court of appeals discretion to permit an appeal from that order. *Id.*. Providing similar discretion to the Supreme Court in a new certification statute would be unnecessary (because certiorari is already available), and it would undermine the purpose of restoring to the courts of appeals some control of the Supreme Court's appellate jurisdiction.

177 White v. Johnson, 282 U.S. 367, 371 (1931) (first citing United States v. Worley, 281 U.S. 339, 340 (1930); then citing United States v. John Barth Co., 276 U.S. 606 (1928) (mem.); then citing United States v. Mayer, 235 U.S. 55 (1914); and then citing United States v. Northway, 120 U.S. 327 (1887)); *see also* Johnson, *supra* note 53, at 799 (explaining that certiorari calls for the review of cases, while certification calls for the review of questions).

178 *Mayer*, 235 U.S. at 66 ("It is a familiar rule that this court can not be required through a certificate under § 239 to pass upon questions of fact, or mixed questions of law and fact; or to accept a transfer of the whole case; or to answer questions of objectionable generality—which instead of presenting distinct propositions of law cover unstated matters 'lurking in the record'—or questions that are hypothetical and speculative." (citations omitted)).

179 FED. JUD. CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 35–36 (1972).

180 *See* Rachel Koehn Breland, *Avoiding Rejection: Studying When and Why State Courts Decline Certified Questions*, 92 FORDHAM L. REV. 1429, 1472 (2024) (noting that one reason "often offered for declining certification was a lack of factual or legal context needed to resolve the certified questions"); *see generally* M. Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law*, 41 WAYNE L. REV. 273 (1994); Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677 (1995).

Such a statute might give the losing party in the court of appeals a right to appeal a judgment to the Supreme Court if a majority of the full court of appeals certifies that the decision reached by the court of appeals conflicts with the decision of another court of appeals and that the judgment would be different if the case arose in another circuit.[181]

In suggesting that the Supreme Court be obligated to decide more mundane cases selected by others, I'm reminded of a passage from a sermon by C.S. Lewis in which he explained to students at Oxford the importance of mundane activities. After an extended discussion of religion, philosophy, war, life, and death, he noted the "almost cosmic discrepancy" between these "high issues" and the immediate tasks faced by students such as learning chemical formulae.[182]

> But there is a similar shock awaiting us in every vocation—a young priest finds himself involved in choir treats and a young [British military officer] in accounting for pots of jam. It is well that it should be so. It weeds out the vain, windy people and keeps in those who are both humble and tough.[183]

181 *See* Tyler, *supra* note 68, at 1326–27 (suggesting that the Supreme Court might be more receptive if the revival came from circuit judges than from Congress and that the Court "might choose to prioritize questions certified by a court of appeals that has gone so far as to declare that its judgment would have been different had it felt itself bound by the law of another circuit," *id.* at 1327). Such a certification statute would easily supply an intelligible principle for courts of appeals to apply.

182 C.S. LEWIS, *Learning in War-Time*, *in* THE WEIGHT OF GLORY AND OTHER ADDRESSES 43, 51 (1949).

183 *Id.* For a more radical proposal to have the Supreme Court hear mundane cases, see Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705 (2018).