

Con Law I

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Certiorari Materials

NOTE: Please drop the “Nixon Tapes Materials” from the syllabus, and add the TSP Cert Petition, available on Turtle Talk.

Supreme Court Rule 10. Considerations Governing Review on Writ of Certiorari

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

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

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

B. The Mechanics of Modern Certiorari Decisionmaking

The process by which the United States Supreme Court decides to accept a petition for certiorari has long been a virtual mystery,¹ except perhaps to those who have participated in the process.² What is known is that the Court grants cert in only a handful of cases – often less than 100 a year – out of over several thousand petitions filed each Term.³ When a party to litigation receives an adverse judgment from a federal Court of Appeal or the highest court of a state judiciary, if the party wishes to seek Supreme Court review, it must file a petition for certiorari with the Court – a “cert petition.” Opposing parties may file an opposition – a “cert opposition” or “cert opp.” Even amici may file briefs at this time.⁴ Each of the Supreme Court Justices hires clerks – usually recent law graduates with some experience in lower federal courts – who review all the cert petitions, cert oppositions, and amicus briefs first. The clerks prepare short memoranda, formally known as a “preliminary memorandum,” in which they summarize the facts, procedural history, and the claims of the parties. Then they offer a short discussion section in which they offer candid commentary on the relative merits of the petitions and make a recommendation either to grant or deny the petition. In some instances, especially in cases in which the federal government might have an interest or special expertise (federal Indian law being a prime example), they recommend that the Court call for the views of United States, represented by the Solicitor General – or a CVSG.⁵ Each of these decisions is preceded by a preliminary memorandum from a law clerk.

¹ Cf. Stras, *supra* note **Error! Bookmark not defined.**, at 947 (referencing “the shroud of secrecy surrounding the Court”); Ulmer, *supra* note **Error! Bookmark not defined.**, at 432-33 (critiquing the Court’s “[s]ecret decision making”).

² Cf. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. __, __ (2008) (arguing that the Supreme Court bar, often former clerks, dominates advocacy before the Court).

³ E.g., Harvard Law Review, *supra* note **Error! Bookmark not defined.**, at 523 (reporting that the Court considered over 8374 certiorari petitions and granted 95 during the 2006 Term).

⁴ See Caldeira & Wright, *supra* note **Error! Bookmark not defined.**, at 816 (asserting that amicus briefs at the certiorari stage are critical to providing hints to the Court about the importance of a case).

⁵ Professor Stras helpfully listed the various miscellaneous actions that a cert pool memo could recommend: “The most common variations ... included CVSG (call for the views of the Solicitor General), Summary Reverse,

Eight of the nine current Justices (Justice Stevens excluded) participate in what is known as the “cert pool,” whereby the law clerks of the eight Justices are assigned a docket number and asked to write a preliminary memorandum about the petition.⁶ During the period in question in this study – the 1986 through the 1993 Terms – however, only Chief Justice Rehnquist and Justices White, Blackmun, O’Connor, Scalia, Kennedy, Souter, and Thomas participated in the pool. Justices Brennan, Marshall, and, as noted above, Stevens, did not participate, although they each received copies of each cert pool memo.⁷

The cert pool memos are the Court’s first take on whether a case is “certworthy,” an internal term of art that can be best defined by referring to Supreme Court Rule 10, which governs the exercise of judicial discretion the Court is allowed when making decisions on cert petitions. Rule 10 indicates that the Court will review petitions for numerous factors, including: (1) whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;”⁸ (2) whether “a United States court of appeals ... has decided an important federal question in a way that conflicts with a decision by a state court of last resort;”⁹ (3) whether “a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;”¹⁰ (4) whether “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;”¹¹ (5) whether “a state court or a United States court of appeals has decided an

Summary Affirm, CFR (call for a response), CFRecord (call for the record), Hold, and GVR (grant, vacate, and remand).” Stras, *supra* note **Error! Bookmark not defined.**, at 978 n. 188.

In Indian law cases, a CVSG is a common cert pool recommendation because of the special experience – and the special relationship – that the federal government has with Indians and Indian tribes. A CFR is also common because the Court does not require a party opposing a cert petition to file a cert opposition brief. Both a CVSG and a CFR are strategically useful to a clerk as a means of garnering more information about a complex Indian law case. Holds and GVRs are often related to the likelihood that the Court will decide another case that may decide the outcome of a later case. Then, the clerk will recommend a Hold if a cert petition should wait for the Court to decide a case already on the Court’s calendar. Once the Court decides that case, the clerk will then recommend a GVR, asking the lower court to reconsider the same case given the new precedent. Summary reversals, summary affirmances, and CFRecords are very rare in the sample studied here.

⁶ See Stras, *supra* note **Error! Bookmark not defined.**, at 953.

⁷ See *id.* at 953.

⁸ SUP. CT. RULE 10(a).

⁹ *Id.*

¹⁰ *Id.*

¹¹ SUP. CT. RULE 10(b).

important question of federal law that has not been, but should be, settled by this Court;”¹² or (6) whether “a state court or a United States court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court.”¹³ Running throughout the rule is the requirement that the question presented must be “important.” Rule 10 also states that “[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”¹⁴

Primarily, the Court looks for cases in which the lower courts are split or lower court decisions that conflict with the Court’s own precedents.¹⁵ In the rare circumstance where a lower court has made a decision that appears to be an exceptional departure from normal “proceedings,” the Court may be inclined to exercise its supervisory power. But the Court avoids petitions asking it to review the lower court’s findings of fact, which are entitled to deference, or application of a settled legal standard to specific facts. In the parlance of the cert pool memo, cases in which there is no split in authority are “splitless.” Cases in which a party is seeking cert asking the Court to review a lower court’s application of specific facts to a settled legal principle are “factbound.” It is clear from reading the cert pool memos contained in Justice Blackmun’s archives that the vast majority of Indian law-related cert petitions are “factbound” or “splitless” – and often both.

The cert pool memos feature recommendations from the clerks on whether to grant or deny a petition, or in other cases to seek the views of the Solicitor General or hold a case. These recommendations often are hedged, however, by a note that a case is a “close call.” Moreover, not even the clerks know for certain when the Court will find a case “important” enough to justify the granting of a cert petition. There may be clear splits between circuits that the Court might find to be not important enough to resolve. In other instances, the clerks note that a split is weak or illusory, which could mean that there may appear to be a split in authority, but one of the lower court cases forming the split might have been resolved by alternative means. Or the language in one of the lower court cases forming the split is dicta or the kind of dispute creating the split is unlikely to recur. In short, however, most cases that are important enough are placed on the so-called “discuss list.”

¹² SUP. CT. RULE 10(c).

¹³ *Id.*

¹⁴ SUP. CT. RULE 10.

¹⁵ *See* REHNQUIST, *supra* note **Error! Bookmark not defined.**, at 265.

On the relatively rare occasion when a cert pool memo recommends anything other than a straight denial, the Court often will discuss the case to some extent. Justice Blackmun appears to have taken the time to annotate his docket sheet when the Court voted in conference on whether to grant or deny a cert petition.

Edward A. Hartnett, *Questioning Certiorari*, 100 COLUM. L. REV. 1643, 1713-38 (2000)

V. Questioning Certiorari

Although the Supreme Court has achieved the ability to select what cases (and what issues in cases) it wants to decide, there remain important questions to be asked: How can this power be reconciled with the classic justification for judicial review? How can a court with such power claim to be exercising judgment rather than will, and is such a power consistent with the rule of law? Can this power be justified as a form of administrative rather than judicial power?

A. Judicial Review

As Alexander Bickel recognized almost four decades ago, there is a deep tension between certiorari and the classic justification for judicial review. Pursuant to that classic justification, judicial review is the byproduct of a court's obligation to decide a case. In *Marbury v. Madison*, Chief Justice Marshall did more than simply assert that it is "province and duty of the judicial department to say what the law is"--in the next two sentences he immediately explained why: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

Because a court lacks the luxury of simply avoiding decision, it must sometimes choose between following a statute and following the Constitution. This justification of judicial review, then, is the point of Marshall's famous passage from *Cohens v. Virginia*:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid;

but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

Alexis de Tocqueville and Abraham Lincoln both made the same point. Tocqueville observed, “But the American judge is dragged in spite of himself onto the political field. He only pronounces on the law because he has to judge a case, and he cannot refuse to decide the case.” Lincoln, despite his refusal to accept the authoritative nature of the Supreme Court's interpretation of the Constitution in the Dred Scott opinion, noted that he was not making “any assault upon the court, or the judges. It is a duty, from which they may not shrink, to decide cases properly brought before them”

The Supreme Court's certiorari practice, however, completely undercuts this rationale.

Strikingly, in advocating the Judges' Bill, the Justices never attempted to explain its application in cases presenting even arguable constitutional questions. Instead, (as far as their statements to Congress revealed) the only use envisioned in constitutional cases was as a way of quickly dealing with claims that were either frivolous or plainly governed by precedent--that is, in cases where the lower court was obviously correct and summary affirmance would be appropriate. Taft expressed confidence that in no case “would a constitutional question of any real merit or doubt escape our review by the method of certiorari,” explaining that the restrictions were merely “to keep out constitutional questions that have really no weight or have been fully decided in previous cases and that have only been projected into the case for the purpose of securing delay or a reconsideration of questions the decision of which has already become settled law.” In this way, the Justices never had to deal with reconciling certiorari and judicial review. Indeed, perhaps the tension between certiorari and the classic justification for judicial review helps to explain why it was not until 1953 that the Court would definitively hold that a denial of certiorari was not a ruling on the merits of a constitutional challenge.

Alexander Bickel did not attempt a reconciliation either, but instead used certiorari as a lever to argue against the classic conception of judicial review. In contrast to the classic conception, Bickel instead justified judicial review by idolizing the Supreme Court as the institutional representative of “decency and reason,” and by asserting that its “constitutional function” is “defin[ing] values and proclaim[ing] principles.” Some variant of this view is commonplace (either explicitly or implicitly) among constitutional scholars today, but as John Harrison has correctly observed, “[t]he power to interpret the Constitution . . . comes from the

case-deciding power. To suggest that the power to interpret is primary and the case deciding power secondary, is to misinterpret the Constitution and to confuse cause and effect.” Such a view unhinges the Supreme Court from other courts--all of which exercise the power of judicial review, both within the classic model and in fact. While there is an enormous literature responding to Bickel's “counter-majoritarian difficulty” and “passive virtues,” I am not aware of any work that takes up his challenge to reconcile certiorari with the classic conception of judicial review.

A court that can simply refuse to hear a case can no longer credibly say that it had to decide it. If asked, “Why did you exercise the awesome power to declare an Act of Congress unconstitutional?” the Justices of the Supreme Court can no longer say, “Because we had to.” Instead, they must say, “Because we chose to.” It is true that lower courts can continue to answer, “Because we had to.” Perhaps oddly, then, certiorari calls into question the exercise of judicial review by the Supreme Court, but not by lower courts.

This difficulty is particularly acute when we consider limited grants of certiorari, bearing in mind that, under current practice, all grants of certiorari are limited. The Supreme Court not only chooses which cases to decide, but also chooses which questions to answer. Its Justices can no longer say they had to decide the case; even within a case, they cannot even say they had to decide any particular question. To the contrary, they can grant certiorari as to a particular question in a case, ignoring the presence of other legal errors, even if this means that the Court affirms a judgment that is, by hypothesis, erroneous.

B. Law or Will?

The inability of the Supreme Court to credibly claim that it has to decide a case highlights another profound tension between certiorari and classic conceptions of judicial power, a tension that extends beyond cases involving constitutional adjudication. The judiciary, as Hamilton explained, is the least dangerous branch because it possesses only judgment, not force or will. But although this description continues to be widely repeated, it is hardly an accurate description of a court that has the power to set its own agenda. While the judiciary still lacks its own military force, the Judges' Bill gave the Supreme Court an important tool with which to exercise will: The ability to set one's own agenda is at the heart of exercising will.

Political scientists are quite blunt about the impact of the Judges' Bill. "In short, because of its broad discretion to set its own agenda, the Court is no longer the passive institution 'with neither force nor will but merely judgment' described by Hamilton" "The Court also sets its own substantive agenda for policy-making." Indeed, "[m]uch of the Court's power rests on its ability to select some issues for adjudication while avoiding others." Its ability to set its own agenda permitted it to "shed the long-standing image of a neutral arbiter and an interpreter of policy" and emerge "as an active participant in making policy."

The power to decide what to decide . . . enables the Court to set its own agenda. . . . Unlike any other court . . . the Supreme Court, as its caseload changed and grew, got the power to pick which issues it would decide. The Court now functions like a roving commission, or legislative body, in responding to social forces.

As Provine puts it:

The Supreme Court's nearly unfettered discretion to set its own agenda . . . is part of the foundation of its institutional strength. Court-controlled case selection permits the Court to sidestep or postpone politically damaging disputes. It helps the Court respond to changing litigation patterns, and it enhances the Court's image as an available forum.

Perry writes:

[M]y assumption, of course, is that the Court does in fact set its own agenda and that the only question is how. The 'textbook' argument, however, asserts that the Court is a passive institution that can set its agenda in only the most limited sense. While it is true that a legitimate case or controversy must exist and be appealed, this requirement is not really much of a constraint if the Court does not want it to be. Virtually any issue the Court might wish to resolve is offered to it. . . . Moreover, if a case does not arise naturally, the justices often invite cases via their written opinions and by various other means.

Of course, many political scientists make similar assumptions about judicial decisions on the merits, seeming to take for granted that the "justices of the Supreme Court are policy entrepreneurs, who seek to fulfill their policy goals through [not only] their case selection policies [but also] their decisions on the merits of the issues." Some legal scholars seem to share this view, and few are so naive as to completely reject the point. Nevertheless, many legal

scholars tend to believe that the rule of law is not chimerical and that it requires judges to be meaningfully constrained through (some variant or combination of) the original understanding of a controlling text, the existence of rules to guide decisionmaking, the obligation to elaborate reasons for decision, and basic requirements of substantive justice.

In the land of certiorari, however, law provides precious little constraint on judicial action. While Justice Van Devanter assured Congress in the hearings regarding the Judges' Bill that petitions were determined by recognized principles, he changed the subject rather than elaborate what those principles were. Shortly after the passage of the Judges' Bill, the Court promulgated a new rule regarding certiorari, a legal text that might be thought to set forth those controlling principles. That rule begins:

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered

Although this rule has changed a bit over time, particularly in light of the Erie decision, the basic thrust remains the same and the opening provision is nearly identical. It is not only that the “rule” at best sets forth a broad set of standards, but, as it forthrightly proclaims, those standards are not “controlling” at all.

In short, except for specifying certain types of conflicts, the Court has “essentially defined certworthiness tautologically; that is, that which makes a case important enough to be certworthy is a case that we consider to be important enough to be certworthy.” Although people might well be able to agree that a case presents an important issue of federal law without agreeing on how that issue should be resolved, it is “difficult indeed to read the Court's own Rule 10 as anything other than an invitation . . . to the making of ‘political choice(s)’ about what is ‘important’ enough to demand the overt, highly visible intervention of the United States Supreme Court.” Certiorari, then, is difficult to reconcile with the formalist conception of the rule of law.

Such an unconstraining rule imposes some costs on the Court, particularly by encouraging large numbers of petitions. Yet if the Court wanted to reduce the number of petitions filed, it could.

The most effective method of reducing the number of cases filed with the Court that is wholly within the Court's power to effectuate would be the formulation and publication of

detailed guidelines regarding the criteria for granting and denying review. There are no criteria at present, other than the fatuous generalities recited in the Court's rules and opinions.

But from Taft on down, the Justices have steadfastly refused to promulgate rules that might constrain their discretion. “One can be assured that the ambiguity of Rule 10 is not some unfortunate oversight by the justices. They have intentionally enunciated murky criteria.”

The lack of a constraining text might not be important if there were a body of constraining case law. But there is none. Indeed, in a sustained defense of judicial discretion in matters of jurisdiction, David Shapiro emphasizes that what he defends is not an ad hoc exercise of will (or even Bickelian “prudence”), but instead “principled discretion.” Such principled discretion requires “that criteria drawn from the relevant statutory or constitutional grant of jurisdiction or from the tradition within which the grant arose guide the choices to be made in the course of defining and exercising that jurisdiction.” Moreover, it requires that these criteria be “capable of being articulated and openly applied by the courts, evaluated by critics of the courts' work, and reviewed by the legislative branch.”

Shapiro argues that such principled discretion is compatible with “the power of judicial review upheld in *Marbury*” because it “carries with it an obligation of reasoned and articulated decision, and . . . can therefore exist within a regime of law.” Significantly, Shapiro never links these requirements with certiorari, which, he notes, is an example of “virtually absolute” discretion.

Although commentators early on called for the Court to explain briefly its reasons for denying certiorari, the Court has not obliged. While this refusal to explain “gives the justices greater flexibility in agenda setting,” it makes certiorari difficult to reconcile with the legal process conception of the rule of law. Indeed, Alexander Bickel pointed to certiorari as the clearest example of techniques that “cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled.”

It has also been suggested that if “all petitions [were] channeled through experienced Supreme Court lawyers, the inadequacies of [the rule] would be less apparent. Assuming the Court is fairly consistent in its choices, much of what the rule lacks in specificity would be compensated for by the experience of the Supreme Court bar.” But the Court has not acted to impose any meaningful limits on membership in its bar: Essentially anyone admitted to the bar of any state for three years (and who pays a modest fee) is admitted. The reason is simple:

[T]he Court profits by having a large pool of cases from which to make its selections. Were the bar sufficiently organized and capable of limiting itself to the presentation of the few hundred cases each term which are given serious consideration by the Court, the Justices themselves would soon lose the essence of the discretionary power they now possess.

Perhaps the most graphic illustration of how certiorari frequently operates in the area of will and not law is the common practice of defensive denials. In a defensive denial, a Justice votes to deny certiorari--not due to the unimportance of the issue involved--but due to disapproval of the result the Court is expected to reach on the merits. Remarkably, “[m]ost justices view defensive denials as an acceptable strategy.”

C. Certiorari as Administrative Power

One possible response that defenders of current certiorari practice might make is that the only issue being decided on a certiorari petition is which court will have the last word in a case. On this view, the judiciary as a whole must decide the case and, in so doing, exercise judgment in accordance with the rule of law rather than will. So understood, the Supreme Court's power to choose which cases to decide and which to leave for final adjudication by other courts is better viewed as a species of administrative power rather than adjudicative power. The Judges' Bill does share kinship with the Rules Enabling Act, and was born in an era of considerable faith in the notion of neutral expertise in general and neutral expertise regarding the establishment of judicial procedure in particular.

This approach is best represented by two former Supreme Court clerks, Samuel Estreicher and John Sexton, who conducted a detailed legal study of the workings of the certiorari process and advocated treating the Supreme Court as the “manager of a system of courts.” They urged viewing the Court as a “wise manager” that should “delegate[] responsibilities to subordinates and, absent an indication that something is awry, accord[] their decisions a presumption of validity.” They acknowledged that the Court's rule governing certiorari is “hopelessly indeterminate and unilluminating,” and suggested detailed alternative criteria that could supplant “the ever-present tendency of the Justices to conceive of the case selection process in political terms.” Making the analogy to administrative law quite explicit,

they even suggested that the Court might emulate “the Administrative Procedure Act’s rulemaking procedures [[by] disseminat[ing its criteria] throughout the legal community.”

There is a fundamental difficulty with viewing certiorari as administrative power: The Supreme Court has certiorari jurisdiction over both the state courts and the inferior federal courts. Yet, it is difficult to see any basis for the Supreme Court to claim administrative power over state courts. As the Court explained earlier this year, “This Court has supervisory authority over the federal courts,” but it “is beyond dispute that we do not hold a supervisory power over the courts of the several States.” Put slightly differently, when administering its certiorari jurisdiction over inferior federal courts, the Supreme Court could be understood to be allocating cases among the members of the federal judiciary who together exercise the judicial power of the United States, in a way roughly analogous to the way the judicial panel on multidistrict litigation allocates cases for pretrial proceedings to various district courts and judges, or even more roughly, the way a multimember court that does not always sit en banc allocates cases among its judges. When the Supreme Court administers certiorari jurisdiction over state courts, however, it is determining whether the judicial power of the United States shall be called into play at all.

Even as limited to inferior federal courts (or assuming that the objections to the Supreme Court exercising administrative authority over state courts were overcome), there remains another significant difficulty with viewing certiorari as administrative power: Faith in such apolitical management by experts has been deeply shaken, not only in administrative law generally, but in procedural law in particular. Debates over the Federal Rules of Civil Procedure reflect this loss of faith, with the rulemaking process seen less and less as something to be left in the hands of neutral experts in the “just, speedy, and inexpensive” decision of cases, but rather an arena for battle over the substantive results of cases. It is hardly surprising in this environment that the Supreme Court has not heeded Estreicher and Sexton’s call for clearer and more detailed standards governing certiorari: Not only would any such standards tend to reduce the Court’s agenda-setting power, but also the debate over the content of those standards would itself likely be highly political. In any event, it has become far more difficult to justify judicial control over the judicial agenda on the basis of such neutral administrative expertise.

There is a final reason the Court might be reluctant to heed Estreicher and Sexton’s advice--a reason that Estreicher and Sexton themselves note:

One possible criticism is that our managerial conception of the Court's responsibilities is fundamentally at odds with the view that courts are obligatory decision makers who do not "manage" dockets but render justice in all cases properly before them, so that open avowal of the Court's managerial discretion is likely to exacerbate doubts about the legitimacy of its judicial review function.

Estreicher and Sexton reject this criticism and think it "misguided," noting that the Supreme Court "ceased long ago to be a court of mandatory jurisdiction." Their observation is true, but it simply sidesteps the conceptual tension between certiorari practice and judicial review.

In their book, Estreicher and Sexton added a section aptly called "Recasting the Marbury v. Madison Model." There, while purporting to reconcile their managerial approach with the Marbury v. Madison model, they instead criticized "the claimed linkage between the Marbury v. Madison model and the insistence on [the] universal availability" of the Supreme Court. They are correct to sever any asserted "connection between legitimacy and universal availability." Marbury did not assert the universal availability of the Supreme Court; indeed, its holding was precisely to the contrary. Marbury did, however, rest the legitimacy of judicial review on a court's obligation to decide a case properly before it. Estreicher and Sexton fail to wrestle with that genuine Marbury v. Madison model, contenting themselves with shredding the papier mache model they recasted. The Supreme Court, in contrast, apparently prefers to leave the classic Marbury model in place despite its tension with certiorari practice.

VI. The Importance of Certiorari

In questioning certiorari, I do not doubt its importance. Indeed, the power to select cases--like other doctrinal devices that reduce the impact of particular decisions, such as non-retroactivity and qualified immunity--makes it easier for the Supreme Court to change its interpretation of the Constitution. The power to refuse to hear cases enables the Court to bide its time and "to escape, at least temporarily, from the logical implications of an initial unpopular on-the-merits decision." It also enables the Court to intervene selectively, without committing itself to policing a new area it brings under its supervision. As a result, then, the procedural license given by certiorari has had a profound role in shaping our substantive constitutional law.

Consider, for example, the incorporation doctrine. The Supreme Court launched the idea that some of the protections of the Bill of Rights were “incorporated” in the Fourteenth Amendment's due process clause in 1925, four months after the Judges' Bill. Perhaps that was purely coincidental. Perhaps the First Amendment right to freedom of speech would have been applied to the states regardless of whether Congress gave the Court discretionary control over the bulk of its docket.

But would the Supreme Court have incorporated the Fourth, Fifth, Sixth, and Eighth Amendments if it were obliged to review every state judgment that upheld a criminal conviction or sentence over a defendant's objection based on one of these Amendments? And if it did, is it remotely possible that it would have spun out such elaborate doctrinal requirements if it were required to apply and enforce them in every such case? Reflect for a moment on what that would have required (and would still require) from the Court: deciding every losing claim that evidence should have been excluded because obtained in violation of the Fourth Amendment, every losing Miranda claim, every losing Massiah claim, every losing Strickland claim, every losing Lockett claim--and much, much more.

Scholars have noted that the Supreme Court used habeas to enlist the lower federal courts in enforcing the criminal procedure revolution on the states. Scholars have also noted that the shift to broader federal habeas can be traced to, and justified by, the elimination of the right to Supreme Court review of state court judgments denying federal defenses. It seems to me, however, that there is a current of causation running in the other direction as well: The Supreme Court's power to refuse to review state court judgments denying federal claims enabled the Court to intervene selectively and move the law in its preferred direction without subjecting itself to an onslaught of cases that it was required to decide.

More generally, the Court's unbridled discretion to control its own docket, choosing not only which cases to decide, but also which “questions presented” to decide, appears to have contributed to a mindset that thinks of the Supreme Court more as sitting to resolve controversial questions than to decide cases. Cases tend to be thought of as “vehicles” for deciding controversial questions, and some distinguished commentators suggest that the role of the Supreme Court is to authoritatively pronounce the law, with the limitation of the judicial power to “cases and controversies” simply a way to limit the occasions for those pronouncements.

Perhaps surprisingly, one of the clearest judicial statements that the Supreme Court should be concerned with deciding controversial issues rather than live cases comes from Chief Justice Rehnquist. In *Honig v. Doe*, he argued that the Supreme Court should simply exempt itself from the mootness doctrine once it has granted certiorari. The majority of the Court has never explicitly adopted Rehnquist's view, but it has come pretty close. For example, in its most recent nude dancing case, it concluded that the case was not moot even though the dancing establishment bringing the challenge to a local ordinance had been closed, its building had been sold to a real estate developer, and its seventy-two-year-old owner no longer had an interest in or intention to own or operate a nude dancing business. Significantly, the Court relied in part on the respondent's failure to raise the mootness issue before certiorari had been granted.

What is not surprising is that those who believe that the Supreme Court should be the nation's moral leader and view the Court as “a primary instrument of constitutional amendment” applaud its agenda-setting power. This applause was perhaps most audible in the reaction to the 1972 Freund Commission Report calling for a National Court of Appeals. For example, in a remark more in keeping with Taft's original description of his goal than with Van Devanter's more politic argument to the Senate, Eugene Gressman claimed that “informed arbitrariness is at the very heart of the certiorari jurisdiction. The justices are supposed to be motivated to grant or deny review solely by their individual subjective notions of what is important or appropriate for review by the Court.” Under the Freund proposal, former Chief Justice Warren asserted, “Inevitably the capacity of the Supreme Court to maintain the Constitution as a living document . . . would be jeopardized.”

As Warren saw it, the purpose of the Judges' Bill was “to permit the Court not only to achieve control of its docket but also to establish our national priorities in constitutional and legal matters.” “Those standards cannot be captured in any rule or guideline that would be meaningful to an outside group of judges,” because what matters are “the concerns and interests and philosophies of the Supreme Court justices.” The requisite “broad overlook and an innovative approach to the law and the Constitution . . . are acquired only by those who serve on the Supreme Court.” Rotating lower court judges (as proposed by the Freund Commission) would tend “to deny review of those decisions that fall into the traditional molds and that seem correctly decided in terms of precedent and settled law.” This would cut off the Supreme Court

from cases in which “no one could anticipate that the justices would perceive in those cases the chance to advance the meaning and the application of some aspect of the Bill of Rights.”

Remarkably, some asserted that “only the Court itself can properly determine which cases it should hear . . . to carry out its unique function.” As former Justice Goldberg put it, “The power to decide cases presupposes the power to determine what cases will be decided.” Paul Freund accurately replied, “Whence comes this asserted principle? Not, surely, from the constitution” Indeed, at the time of the Judges' Bill in 1925, the Court's control over its docket was viewed as a “new dispensation” from Congress.

While it is understandable that those who treat Justices of the Supreme Court as the nation's moral leaders would endorse judicial review coupled with broad agenda-setting power, it is past time to frankly acknowledge that such views are nothing more than a call for mixed government, with one branch-- the judiciary--representing the interests and views of the “better” class of society.