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Constraining Certiorari Using Administrative Law Principles

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CONSTRAINING CERTIORARI USING ADMINISTRATIVE LAW PRINCIPLES

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The U.S. Supreme Court—thanks to various statutes passed by Congress beginning in 1891 and culminating in 1988—currently enjoys nearly unfettered discretion to set its docket using the writ of certiorari. Over the past few decades, concerns have mounted that the Court has been taking the wrong mix of cases, hearing too few cases, and relying too heavily on law clerks in the certiorari process. Scholars, in turn, have proposed fairly sweeping reforms, such as the creation of a certiorari division to handle certiorari petitions. This Ar-

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ticle argues that before the Court's discretion to set its own agenda is taken away, another area of the law—one that already has thought long and hard about how to constrain delegated discretion—should be consulted: administrative law. Although certiorari and administrative law certainly differ, both involve congressional delegations of discretion to a less accountable body and therefore both raise concerns of accountability, transparency, and reasoned decisionmaking. Accordingly, in considering certiorari reform, it makes sense to borrow from some of administrative law's well-developed lessons about how delegated discretion can be controlled. Specifically, after consulting the nondelegation doctrine, reason-giving requirements, public participation mechanisms, and oversight principles found in administrative law, this Article concludes that vote-disclosure requirements and increased public participation stand as promising ways of checking the Court's currently unconstrained discretion.

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INTRODUCTION

The U.S. Supreme Court today enjoys nearly unfettered discretion to choose which cases to hear via the discretionary writ of certiorari.¹ Various statutes enacted by Congress from 1891 to 1988 almost entirely eliminated the Court’s obligatory jurisdiction and delegated to the Court the task of setting its agenda. Thanks to these changes, the Court no longer operates in a world where the Court, in the words of Chief Justice John Marshall, had “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”² Rather, the Court today enjoys broad discretion to decide which cases warrant the Court’s time, routinely granting certiorari in only about one percent of all petitions received each term.³

¹ Cf. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1645 (2000) (“[W]e have grown accustomed to the idea that the Supreme Court sets its own agenda, and tend to take it for granted.” (footnote omitted)).

² *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

³ See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 321 (9th ed. 2007) (“During the nine terms from 1992 to 2002, the Court granted 1.19 percent of the certiorari petitions filed.”); see also *The Supreme Court, 2008 Term—The Statistics*, 123 HARV. L. REV. 382, 389 (2009) (noting that the Court granted review in 87 cases on the Court’s appellate docket out of 7868 total petitions, leading to a 1.1% grant rate); *The Supreme Court, 2007 Term—The Statistics*, 122 HARV. L. REV. 516, 523 (2008) (noting that the Court granted review in 95 cases on the Court’s appellate docket out of 8374 total petitions, also leading to a 1.1% grant rate). If only paid petitions are considered, the grant rate goes up, whereas if only in forma pauperis petitions are considered, the grant rate goes down. See, e.g., *The Supreme Court, 2008 Term—The Statistics, supra*, at 389 (noting that 4.7% of paid petitions were granted, compared to only 0.1% of in forma pauperis petitions).

In choosing which cases will win a prized slot on the docket, the Court operates outside of the public eye and under a cloak of secrecy. The Court, for example, generally does not explain why a particular case will or will not be heard.⁴ Nor does the Court routinely disclose individual Justices' votes on certiorari petitions.⁵ In addition, the Court makes its certiorari decisions free of any constraining legislative criteria that might differentiate those cases that merit certiorari from those that do not.⁶

In light of the sweeping discretion that the Court enjoys and the importance of the Court's docket-setting powers,⁷ it is not at all surprising that certiorari has been criticized. For example, Sanford Levinson recently commented that "there are overtones—given the extent of discretion enjoyed by the Court—of southern sheriffs during the 1960s in having the authority to allow (or disallow) parades or demonstrations based on broad, unhelpful 'standards' and, ultimately, on what occasionally seems to be whim."⁸ Edward Hartnett has questioned whether the Court's broad discretion to set its own agenda can be squared with "classic conceptions of judicial review, judicial power, and the rule of law."⁹ In addition, two scholars of the Court have noted that "[t]he most striking feature of the [certiorari] process is that it lacks most of the trappings of traditional judicial decisionmak-

⁴ See *infra* notes 88-91 and accompanying text.

⁵ See *infra* notes 88-91 and accompanying text.

⁶ See *infra* subsections III.A.1-2.

⁷ See, e.g., William J. Brennan, Jr., *The National Court of Appeals*, 40 U. CHI. L. REV. 473, 482 (1973) ("[T]he screening function is inextricably linked to the fulfillment of the Court's essential duties and is vital to the effective performance of the Court's unique mission 'to define [and vindicate] the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union.'" (quoting FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), reprinted in 57 F.R.D. 573, 578 (1972) [hereinafter FREUND REPORT])); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 397 (2004) [hereinafter Cordray & Cordray, *Philosophy of Certiorari*] ("Given the many levels on which the Court's case-selection decisions impact its work, its role, and its image, decisionmaking at the threshold stage may be second to none in importance." (internal quotation marks omitted)); Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1, 1 (2008) [hereinafter Cordray & Cordray, *Strategy in Supreme Court Case Selection*] (noting that certiorari is "[o]ne of the most critical aspects of the Supreme Court's work").

⁸ Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 101 (2010), <http://yalelawjournal.org/2010/02/01/levinson.html>.

⁹ Hartnett, *supra* note 1, at 1647.

ing—collegial deliberation, constraining criteria, majority rule, and public accountability.”¹⁰

What is surprising, however, is that scholars who have criticized certiorari and considered possible means of reform generally have focused on forcing the Court to hear certain kinds of cases or to hear more cases,¹¹ or alternatively on taking discretion away from the Court and giving it to some other body like a certiorari division.¹² Accordingly, scholars generally have not focused on the source of the Court’s discretion (namely, delegations from Congress) and how that delegated discretion might be cabined or checked. In particular, scholars have failed to look to the lessons of another area of the law that has already thought long and hard about how to control delegated discretion: administrative law.¹³ That is what this Article aims to do. Although administrative law might at first blush appear to be an unconventional place to look for ideas about how to reform certiorari,¹⁴ this

¹⁰ Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 7, at 398.

¹¹ See, e.g., Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1310 (2010) (noting that complaints about the Court’s certiorari practices “tend to reduce to two general assertions: first, the Court is taking too few cases; and second, the Court is not taking the ‘right’ cases”); Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 89 (2009), <http://yalelawjournal.org/2010/01/24/lazarus.html> (arguing that “the Court’s plenary docket is increasingly captured by an elite group of expert Supreme Court advocates” and suggesting that “[i]t is, accordingly, not the number of cases on the plenary docket but rather their content that is the real problem”); see also *infra* notes 101-02 and accompanying text (identifying criticisms of the Court’s shrinking docket).

¹² See Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 591 (2009) (proposing “to assign veteran circuit judges to replace some of the young law clerks and to empower those judges to independently designate a substantial, fixed number of cases that the Justices would be obliged to decide each year”). In the 1970s, proposals were made to create a national court of appeals to take over portions of the Court’s certiorari cases. See FREUND REPORT, *supra* note 7, at 590 (“We recommend creation of a National Court of Appeals which would screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between circuits.”).

¹³ For a discussion of the few examples of scholarship that briefly reference or discuss administrative law principles when thinking about the Court’s certiorari jurisdiction, see *infra* note 98.

¹⁴ In contrast to the general lack of scholarship connecting administrative law principles and certiorari, a few scholars have connected administrative law principles and judicial decisionmaking on the merits. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLES AND POLITICS IN CONSTITUTIONAL LAW* 40-42 (2009) (drawing on administrative law principles in arguing that courts must engage in reasoned decisionmaking on the merits); Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 1002 (2009) (arguing

Article argues that both certiorari and administrative law involve the same underlying concerns of accountability and reasoned decision-making that arise when Congress—a deliberative and democratically accountable branch—delegates broad discretion to a less accountable body.

The aim here is not to argue that the nondelegation doctrine, which limits Congress's ability to delegate lawmaking power, strictly governs in the certiorari context—although there are persuasive arguments that the doctrine might apply to certiorari that warrant further exploration.¹⁵ Rather, the contention is that, even if the nondelegation doctrine does not control certiorari as a constitutional matter, the same principles that underlie the doctrine—that important policy decisions should be made in a transparent, accountable, and principled manner—represent sound policy that the Court and Congress should take into account in considering reforms to certiorari.

This Article proceeds in four parts. Part I provides an overview of certiorari. Part II argues that administrative law's lessons warrant consideration in the certiorari context because both certiorari and administrative law involve broad congressional delegations of policy-making discretion to a less accountable body and hence both raise similar concerns about accountability, transparency, and reasoned decisionmaking.

Part III looks at well-developed principles and mechanisms that operate in the administrative law world to constrain discretion—

that federal courts should subject judicial opinions on the merits to a notice-and-comment system).

¹⁵ Arguments that the nondelegation doctrine should apply to certiorari might not start with Article I, Section 1 of the U.S. Constitution, which serves as the font of the traditional nondelegation doctrine. See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."). Rather, one might start with Article III, Section 2 of the U.S. Constitution, which provides that the Supreme Court shall have appellate jurisdiction over specified cases "with such Exceptions, and under such Regulations *as the Congress shall make.*" *Id.* art. III, § 2 (emphasis added). In light of this text, the Framers seem to have quite expressly chosen to give *Congress* rather than the Court the power to make "exceptions" to the Court's jurisdiction and to promulgate "regulations" governing the Court's appellate jurisdiction. Hence, it might be argued that Congress—by delegating docket-setting powers to the Court without providing a constraining standard—has violated nondelegation principles. Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 127 (1962) (noting that "Congress has granted the jurisdiction" but that "[i]t is the Supreme Court that makes the exceptions, and it does so by the case, not by the category; and that is what happens, even though the exceptions are the cases that are heard rather than those that are dismissed"). This Article, however, does not resolve this constitutional question.

namely, the nondelegation doctrine, political oversight, public participation, judicial review, and reason-giving requirements. Part III concludes that the Court's discretion in the certiorari context is not checked by similar principles. When Congress gave the Court the power to pick its cases, for example, Congress did not include any guiding statutory principle, such as a directive that the Court grant certiorari where doing so would serve the "public interest," as the nondelegation doctrine would require in the administrative context.¹⁶ Nor are the Court's certiorari decisions constrained by any of the other mechanisms that play a constraining role in administrative law, such as reason-giving requirements, judicial review, or meaningful political oversight.

Finally, Part IV borrows from administrative law's lessons and considers three possible means of certiorari reform aimed at increasing accountability, transparency, and participation: (1) legislating more meaningful standards to provide an intelligible principle to guide certiorari; (2) providing reasons for certiorari denials or, at a minimum, disclosing Justices' votes on certiorari petitions; and (3) increasing the opportunity for public participation in the certiorari process. Part IV concludes that a vote-disclosure requirement and increased opportunities for public participation, which could be achieved through greater use of invited and uninvited amicus curiae briefs as well as a revival of certification, offer the most promising means of constraining the Court's discretion and enabling greater transparency, deliberation, and monitoring in the certiorari process.

I. A BRIEF HISTORY OF CERTIORARI

At its inception, the Court's jurisdiction was not discretionary. Rather, the Court initially stood as a court of obligatory jurisdiction that felt it had "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."¹⁷ It was only through the passage of various laws beginning in 1891 that Congress, responding primarily to functional concerns about the Court's workload, transformed the Court from a court with "an entirely mandatory docket" to a court with an "overwhelmingly discretionary one."¹⁸ This Part describes that transformation.

¹⁶ See *infra* notes 134-40 and accompanying text.

¹⁷ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

¹⁸ Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 2 (2003); see also RICHARD H. FAL-

A. *The Court's Beginnings as a Court of Mandatory Jurisdiction*

Article III, Section 1 of the Constitution provides for “one supreme Court” and empowers Congress to create inferior federal courts.¹⁹ Article III, Section 2 then defines the judicial power, explaining that the Court shall have “original Jurisdiction” in all cases “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”²⁰ Article III, Section 2 further provides that the Court shall have “appellate Jurisdiction” in all other “Cases” and “Controversies” mentioned in Article III, “with such Exceptions, and under such Regulations *as the Congress shall make.*”²¹ Hence, as the leading Supreme Court treatise has put it, the constitutional description of appellate jurisdiction makes clear that “it is Congress, not the Constitution or the Supreme Court, that defines the precise metes and bounds of the Court’s appellate jurisdiction over the specified ‘cases and controversies.’”²²

When Congress enacted the Judiciary Act of 1789, it created two types of inferior federal courts: thirteen district courts, as well as three multidistrict circuit courts that consisted of two Supreme Court Justices and a district judge from within the circuit.²³ Both the district and the circuit courts generally operated as trial courts in the first instance, with the circuit courts enjoying only a very “limited appellate jurisdiction over the district courts.”²⁴

LON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 30 (6th ed. 2009) (noting that the “principle of discretionary review” was introduced by the Evarts Act (citing Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (codified as amended at 28 U.S.C. § 1257 (2006)))).

¹⁹ U.S. CONST. art. III, § 1.

²⁰ *Id.* § 2.

²¹ *Id.* (emphasis added).

²² GRESSMAN ET AL., *supra* note 3, at 72-73; *see also* DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 9-10 (1980) (“Under the Constitution, Congress has the responsibility to determine the appellate jurisdiction of the United States Supreme Court.”).

²³ *See* Judiciary Act of 1789, ch. 20, §§ 2-4, 1 Stat. 73, 73-75 (creating the thirteen district courts and the Eastern, Middle, and Southern circuits); *see also* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 11 (Transaction Publishers 2007) (1928) (describing the Judiciary Act of 1789).

²⁴ Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1230 (1979); *see also* Judiciary Act of 1789, §§ 21-22, 1 Stat. at 83-84 (providing appellate jurisdiction to the circuit courts in limited circumstances); FRANKFURTER & LANDIS, *supra* note 23, at 12-13 (noting that the volume of appellate business does not appear to have been very considerable).

Congress initially gave the Supreme Court appellate jurisdiction over certain classes of cases coming up from the lower federal courts²⁵ and the state courts.²⁶ These appeals were appeals as of right—meaning that the Court was obligated to hear the appeal when the case fell within the Court’s congressionally defined appellate jurisdiction.²⁷ The Court “had no power to pick and choose which cases to decide.”²⁸

The Judiciary Act of 1789 did empower the federal courts to issue various common law writs, including the writ of certiorari,²⁹ which has its roots as an English prerogative writ.³⁰ However, the Judiciary Act did not authorize the Court to use the writ as a means of enabling discretionary jurisdiction.³¹ Rather, the Judiciary Act enabled the Court to use the writ of certiorari as “an auxiliary process only, to supply imperfections in the record of a case already before it.”³² Accordingly, during the first one hundred years of its existence, “the Court was ob-

²⁵ See Judiciary Act of 1789, § 13, 1 Stat. at 80-81 (providing for “appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specifically provided for”); *id.* § 22, 1 Stat. at 84-85 (delineating the Court’s appellate jurisdiction over the district courts).

²⁶ See *id.* § 25, 1 Stat. at 85-87 (limiting the Court’s appellate jurisdiction over state court cases to those involving state constitutions in which the validity of those laws is questioned as being “repugnant” to federal laws); see also Linzer, *supra* note 24, at 1231 (“[A] litigant had a right to Supreme Court review of most federal noncriminal litigation and of a more limited number of state court decisions.”).

²⁷ See Hartnett, *supra* note 1, at 1649 (noting that “the Supreme Court was required to decide those cases within its congressionally-defined jurisdiction”).

²⁸ *Id.*

²⁹ See Judiciary Act of 1789, § 14, 1 Stat. at 81-82 (enabling federal courts to issue all writs “necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law”).

³⁰ See generally Frank J. Goodnow, *The Writ of Certiorari*, 6 POL. SCI. Q. 493, 493 (1891) (describing how the writ of certiorari, like most of the English writs, “was originally a prerogative writ”); Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y. L.F. 478, 504 (1963) (noting that the early writ of certiorari “was technical nomenclature denoting that certain records or documents were certified and transmitted at the request of the Crown” and explaining that “[i]n the late Tudor period, certiorari still retained its narrow, mechanical function and was widely used in criminal proceedings, to bring up records on appeal and to secure certification of official acts”).

³¹ See Hartnett, *supra* note 1, at 1650 (“Such certiorari did not provide the Supreme Court with discretionary control over its jurisdiction.”).

³² *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 380 (1893); see also *United States v. Dickinson*, 213 U.S. 92, 102 (1909) (explaining that the writ was used more frequently in England than in the United States); *In re Chetwood*, 165 U.S. 443, 461-62 (1897) (recognizing the limitations in *American Construction*, but also noting that the writ may be used “to correct excesses of jurisdiction and in furtherance of justice”); Hartnett, *supra* note 1, at 1650 (describing the history of the writ).

liged to decide every case that properly came before it, whether by way of an appeal or a writ of error.”³³

B. *From Obligatory to Discretionary Jurisdiction*

As the country grew in scale and complexity in the wake of the Civil War,³⁴ the Court’s docket grew “dramatically,”³⁵ increasing from 253 cases pending in 1850 to 1,816 cases pending at the beginning of the 1890 October Term.³⁶ Although the Court was obligated to hear this expanding docket of cases, the reality was that it simply could not keep up with its mushrooming docket, leading to a “growing backlog of delayed cases.”³⁷ By 1890, the Court’s docket was so congested that “it took three and a half years between the time a case was first docketed in the Supreme Court and the time it was orally argued before the justices.”³⁸

Congress initially responded to the Court’s workload problems through various “piecemeal and dilatory” solutions,³⁹ such as by reducing the Justices’ circuit-riding duties⁴⁰ and restricting the Court’s appellate jurisdiction.⁴¹ However, in 1891, Congress took a stronger step: it created nine intermediate federal appellate courts via the Evarts Act.⁴² It was in the Evarts Act that Congress first introduced the statutory writ of certiorari as a mechanism to enable discretionary re-

³³ GRESSMAN ET AL., *supra* note 3, at 74; *see also* Buchman, *supra* note 18, at 2.

³⁴ *See* FRANKFURTER & LANDIS, *supra* note 23, at 56-59 (describing how the post-Civil War period “brought with it an accelerated industrial development” and other political, social and economic forces that led to an increase in the business of the federal courts).

³⁵ Hartnett, *supra* note 1, at 1650; *see also* FALLON ET AL., *supra* note 18, at 28 (“Growth in the Supreme Court’s caseload resulted both from an increased population and from congressional additions to the Court’s jurisdiction, including civil rights, habeas corpus, and patent and copyright cases.” (footnotes omitted)).

³⁶ FRANKFURTER & LANDIS, *supra* note 23, at 60.

³⁷ Hartnett, *supra* note 1, at 1650.

³⁸ WILLIAM H. REHNQUIST, *THE SUPREME COURT* 236 (2001).

³⁹ PROVINE, *supra* note 22, at 10.

⁴⁰ *See* Act of Apr. 10, 1869, ch. 22, §§ 2-4, 16 Stat. 44, 44-45 (laying out the responsibilities of a circuit judge); *see also* FRANKFURTER & LANDIS, *supra* note 23, at 30 (noting that the 1869 Act “drastically curtailed circuit riding”).

⁴¹ *See* Act of Feb. 16, 1875, ch. 77, § 3, 18 Stat. 315, 316 (raising the jurisdictional amount in controversy to \$5000).

⁴² The Evarts Act is also known as the Circuit Court of Appeals Act. *See* Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826, 826 (creating a court of appeals in each circuit and requiring the appointment of three circuit judges to each court).

view and docket control⁴³—planting the early seeds for what was later to become the Court’s almost entirely discretionary docket.⁴⁴

In the Evarts Act, Congress generally continued the longstanding notion of appeals as of right and obligatory jurisdiction.⁴⁵ For example, cases from the district courts or existing circuit courts that involved the construction or application of the U.S. Constitution were still appealable as of right, as were cases involving the conviction of a “capital or otherwise infamous crime.”⁴⁶ Congress, however, also made circuit court of appeals decisions “final” in certain limited classes of cases, such as in diversity litigation and in suits under the revenue and patent laws.⁴⁷ Congress enabled Supreme Court review of these limited classes of “final” decisions only if: (1) the court of appeals certified any questions or propositions of law from the case to the Court; or (2) the Supreme Court granted a writ of certiorari to bring the judgment before it for review.⁴⁸ In this way, Congress “began to invest the Court with a bit of discretion in deciding which cases should be given plenary consideration.”⁴⁹

As Hartnett has described, “certiorari was envisioned as a sort of fallback provision should the circuit courts of appeals prove, on occasion, to be surprisingly careless in deciding cases or issuing certificates.”⁵⁰ The Court’s early use of certiorari confirms this vision of a

⁴³ See *id.* § 6, 26 Stat. at 828 (allowing the Supreme Court, by certiorari, to review any cases final in the courts of appeals).

⁴⁴ See FALLON ET AL., *supra* note 18, at 30 (noting that it was through the innovation of the Evarts Act that “the then revolutionary, but now familiar, principle of discretionary review of federal judgments on writ of certiorari” was born); REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 310, at 589 (Richard F. Wolfson & Philip B. Kurland eds., Matthew Bender & Co. 1951) (1936) (“The use of certiorari as an ordinary appellate process had its inception in section 6 of the Circuit Court of Appeals Act of March 3, 1891.” (citing ch. 517, 26 Stat. 826, 828)); see also LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 264 (1986) (“The discretionary jurisdiction of some appellate courts over most types of cases is linked to the creation of appellate systems with two levels.”).

⁴⁵ See Act of Mar. 3, 1891, §§ 5–6, 26 Stat. at 827–28; FALLON ET AL., *supra* note 18, at 30 (“[T]he Act continued to permit Supreme Court review as of right in important classes of cases, subject in general to a jurisdictional amount requirement of \$1,000.”).

⁴⁶ Act of Mar. 3, 1891, § 5, 26 Stat. at 827–28.

⁴⁷ See *id.* § 6, 26 Stat. at 828 (making decisions “final” in some criminal and admiralty cases as well).

⁴⁸ *Id.*; see also Hartnett, *supra* note 1, at 1650–51 (drawing from legislative history to conclude that the use of certiorari seemed to be “distinctly secondary”).

⁴⁹ GRESSMAN ET AL., *supra* note 3, at 75.

⁵⁰ Hartnett, *supra* note 1, at 1656; see also Linzer, *supra* note 24, at 1234–36 (describing how Congress intended certiorari to be used sparingly as a “safety valve”).

very circumscribed role for certiorari: just two years after the enactment of the Evarts Act, certiorari had been granted only two times.⁵¹

However, as time went by and the Court's docket continued to grow, Congress included certiorari in additional jurisdictional acts. Notably, for example, in 1914, Congress responded to concerns about the state courts invalidating federal legislation by enabling the Court to use the discretionary writ of certiorari to review state court judgments upholding federal rights.⁵² In expanding the Court's jurisdiction to cover cases upholding a federal right, Congress chose to use the discretionary writ of certiorari rather than a mandatory writ to "protect[] the already over-loaded Court from further obligatory jurisdiction."⁵³

In 1916, Congress passed the Webb Act, which again further empowered the Court to use certiorari.⁵⁴ The Act required that only certiorari be used to review certain state court judgments, including judgments denying and upholding certain federal rights, and it thereby eliminated the Court's mandatory jurisdiction over certain cases that had been obligatory since 1789.⁵⁵ As various scholars have noted, the precise reason that Congress chose to expand certiorari in this way and to leave "a major area of undisputed national importance" to the Court's discretion is a bit unclear.⁵⁶ Indeed, the important certiorari innovation found in "the Act went through Congress without serious consideration, certainly without debate."⁵⁷ Perhaps this was because Congress was focused on the Act's main aim of saving the Court from voluminous employers' liability litigation,⁵⁸ or perhaps it was because

⁵¹ See *Cunard S.S. Co. v. Fabre*, 13 S. Ct. 1045, 1045 (1892) (granting certiorari without further opinion); *Lau Ow Bew's Case*, 141 U.S. 583, 589 (1891) (granting certiorari but advising that "this branch of our jurisdiction should be exercised sparingly and with great caution"); see also *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 383-84 (1893) (noting that *Lau Ow Bew's Case* and *Cunard Steamship* were the only two cases in which the Court had granted certiorari).

⁵² Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; see also FALLON ET AL., *supra* note 18, at 30 (attributing the expansion to Congress's "hostility to state court decisions invalidating legislation under the Due Process Clause"); Linzer, *supra* note 24, at 1237-38 (explaining that Congress was seeking "a safety valve for anomalous cases").

⁵³ FRANKFURTER & LANDIS, *supra* note 23, at 196.

⁵⁴ Act of Sept. 6, 1916, Pub. L. No. 64-258, § 2, 39 Stat. 726, 726-27.

⁵⁵ See *id.*; see also Linzer, *supra* note 24, at 1239-40 (explaining that after the 1916 Webb Act, there was no longer an automatic right to review of federal claims in the Supreme Court unless "a treaty, statute or 'authority'" was involved).

⁵⁶ Linzer, *supra* note 24, at 1239-40; cf. FRANKFURTER & LANDIS, *supra* note 23, at 213; Hartnett, *supra* note 1, at 1658.

⁵⁷ FRANKFURTER & LANDIS, *supra* note 23, at 213 (noting that Congress passed the legislation "as though it were a perfunctory measure").

⁵⁸ *Id.*

the measure was authored by Justice James Clark McReynolds, who was familiar with members of the House and Senate Judiciary Committees due to his prior service as Attorney General.⁵⁹ Regardless, the Act played an important role in certiorari's transformation.

Next came the most significant congressional expansion of certiorari: the passage of the Judges' Bill of 1925 (also called the Judiciary Act).⁶⁰ The bill—called the Judges' Bill because the Justices themselves drafted the legislation and Chief Justice William Howard Taft lobbied for the bill⁶¹—withdrew “all but a few categories of cases” from the Court's mandatory docket and effectively “gave to the Court power to control its docket.”⁶² In lobbying for the bill, the Justices argued that their workload had become unmanageable and that they were forced to spend their time deciding cases that failed to raise important issues.⁶³ In this sense, both the Justices lobbying for the bill and the legislators who passed the bill seemed to understand that the need to delegate agenda-setting discretion to the Court flowed from functional concerns about the Court's capacities and workload.

Even the dramatic expansion of certiorari brought about by the Judges' Bill, however, did not ultimately prove sufficient to deal with the Court's workload issues.⁶⁴ The Court's docket continued to grow, fueled by the growth of the economy and the administrative state and also by the Court's recognition of new constitutional rights.⁶⁵ Various proposals for alleviating the Court's unmanageable workload began to surface, including a well-known study published in 1972 called the

⁵⁹ *Id.* at 213-14.

⁶⁰ Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.

⁶¹ Linzer, *supra* note 24, at 1240-41.

⁶² *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 459 (1959) (Frankfurter, J., dissenting).

⁶³ See, e.g., *Procedure in Federal Courts: Hearing on S. 2060 Before a Subcomm. of the S. Comm. on the Judiciary*, 68th Cong. 45 (1924) (statement of Justice James C. McReynolds) (“It will not be possible to keep up with the docket unless some way is found to relieve the court of relatively unimportant things.”); *id.* at 26-27 (statement of Justice Willis Van Devanter) (noting that many cases are unnecessarily heard by the Court due to its obligatory jurisdiction).

⁶⁴ See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 50-51 (2009) (identifying reasons for the growth of the Supreme Court's docket in the latter half of the twentieth century).

⁶⁵ See Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1402 (1987) (“The pattern has been clear: as the nation's population and economy have grown and as legal assistance has become more widely available, the number of cases filed in federal courts, the number of federal judges, and the Supreme Court's docket have grown concurrently.”); Grove, *supra* note 64, at 50-51 (noting that “the expanding federal administrative state and . . . changes in the Court's own doctrine” were partly responsible for the increasing volume).

Freund Report, which recommended the “creation of a National Court of Appeals which would screen all petitions for review [then] filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between circuits.”⁶⁶ The Freund Report did not succeed, but in 1988 Congress passed legislation⁶⁷ that eliminated “virtually all of the Court’s mandatory jurisdiction.”⁶⁸ As a result, today only a very small number of cases fall within the Court’s mandatory appellate jurisdiction.⁶⁹ These cases arise out of statutes in which Congress has called for mandatory review of the decisions of three-judge district court panels, such as decisions in voting rights cases.⁷⁰ Otherwise, the Court today enjoys unfettered discretion to set its appellate docket.⁷¹

C. *Current Certiorari Practices*

In recent years, the Court has received around 8000 or 9000 certiorari petitions per year,⁷² but the Court has granted only about one percent of all petitions.⁷³ This extreme selectivity means that, in many

⁶⁶ FREUND REPORT, *supra* note 7, at 590.

⁶⁷ Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662.

⁶⁸ See GRESSMAN ET AL., *supra* note 3, at 75-76 & n.11 (explaining which statutory provisions providing mandatory jurisdiction were repealed by the 1988 legislation).

⁶⁹ *Id.* at 75-76.

⁷⁰ See 42 U.S.C. § 1973c(a) (2006) (providing that claims of unconstitutional voter disenfranchisement are to be raised to a three-judge district court panel and appealed directly to the Supreme Court); see also 28 U.S.C. § 1253 (2006) (permitting appeal to the Supreme Court for an order granting or denying an interlocutory or permanent injunction in a civil action before a three-judge district court panel).

⁷¹ See Buchman, *supra* note 18, at 2 (asserting that the Court has shifted from an entirely mandatory to an “overwhelmingly discretionary” docket); see also FALLON ET AL., *supra* note 18, at 30 (noting that since the Judges’ Bill of 1925, “the principle of review at the Court’s discretion has become ever more dominant until, today, mandatory appellate jurisdiction has entirely disappeared in cases originating in state courts and has virtually disappeared in federal cases”).

⁷² See GRESSMAN ET AL., *supra* note 3, at 312 (noting that “the Justices consider and dispose of over eight thousand certiorari petitions each term”); see also, e.g., *The Supreme Court, 2009 Term—The Statistics*, 124 HARV. L. REV. 411, 418 (2010) (showing 9296 total cases on the Court’s paid and in forma pauperis appellate docket during the 2009 Term).

⁷³ See GRESSMAN ET AL., *supra* note 3, at 321 (“During the nine terms from 1992 to 2002, the Court granted 1.19 percent of the certiorari petitions filed.”); *The Supreme Court, 2009 Term—The Statistics*, *supra* note 72, at 418 (noting that the Court granted review in 77 out of 8131 total cases, or 0.9%, on its appellate docket in 2009).

ways, the process of “deciding to decide”⁷⁴ is just as important as the Court’s decisions on the merits of cases, if not even more important.⁷⁵

The Court’s process for reviewing certiorari petitions is fairly simple. Currently, all of the Justices except Justice Alito⁷⁶ participate in what is called the “cert pool,” whereby the Justices aggregate their law clerks and assign one law clerk from the group to each certiorari petition.⁷⁷ Once a petition for certiorari is filed and circulated to the Justices’ chambers, the pool clerk assigned to that petition will review the petition and write a memo, recommending that the Court either grant or deny the petition or take some other action.⁷⁸

After the pool memo is circulated within the Court, the Justices who participate in the pool review the memo, and occasionally the certiorari papers, before deciding whether a particular certiorari petition should be placed on the “discuss list.”⁷⁹ The discuss list serves as

⁷⁴ This phrase is taken from *Deciding to Decide*, H.W. Perry’s famous book. H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991).

⁷⁵ See, e.g., Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 314-15 (2009) (arguing that the Court’s certiorari decisions set the national political and cultural agenda and determine the Court’s “institutional and moral authority”); see also sources cited *supra* note 7.

⁷⁶ Adam Liptak, *A Second Justice Opt[s] Out of a Longtime Custom: The ‘Cert. Pool,’* N.Y. TIMES, Sept. 26, 2008, at A21 (noting that Justice Alito, like Justice Stevens before him, has opted out of the “cert. pool” and comparing the advantages and disadvantages of participation).

⁷⁷ See Carrington & Cramton, *supra* note 12, at 631 (explaining the history and functions of the cert pool and describing how law clerks writing memos for the pool “strive objectively to discern the reasons why petitions should be denied”).

⁷⁸ See Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 FLA. ST. U. L. REV. 101, 110 (2009) (describing the creation of the cert pool in 1972 and its functions); see also REHNQUIST, *supra* note 38, at 233 (2001) (describing law clerks’ memo-writing duties and Justice Rehnquist’s reliance on those memos); Andrew F. Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 703-04 (2009) (“The [cert] pool thus seeks both to avoid unnecessary redundancy—each Justice and his clerks independently summarizing the facts and legal issues of a case—by dividing that work among the various clerks, and to preserve the important redundancy of each Justice independently voting whether to grant review.”). Other actions that might be recommended by a pool clerk include calling for the views of the Solicitor General or requesting a response from the respondent. See David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 991 (2007) (book review) (cataloguing cert pool recommendations in certain years from 1984 through 1992, which include actions other than simply granting or denying certiorari).

⁷⁹ Cf. REHNQUIST, *supra* note 38, at 233-34 (noting that with a “large majority of the petitions,” he reviewed only cert pool memos, which would have been annotated by one of his own law clerks).

an internal court document—it is not circulated to the public or the parties—that lists those certiorari petitions that have been selected for discussion at conference by at least one Justice.⁸⁰ Any one Justice has the power to place a certiorari petition on the discuss list simply by asking.⁸¹ Certiorari petitions not placed on the list are automatically denied without conference discussion, whereas those certiorari petitions that are placed on the discuss list are discussed and voted on.⁸² Justice Ginsburg has estimated that eighty-five percent of petitions are denied without discussion, meaning that only about fifteen percent are placed on the discuss list.⁸³

If a certiorari petition *does* make the discuss list, then the Justices discuss and vote on the petition at conference.⁸⁴ These private conferences are held behind closed doors with only the Justices in attendance; no law clerks or aides may attend.⁸⁵ Under the “Rule of Four,” a certiorari petition will be granted if at least four Justices vote to grant at conference.⁸⁶ If there are fewer than four votes, certiorari is denied.⁸⁷

When a certiorari petition is either granted or denied, the Court does not routinely disclose the Justices’ votes, nor does the Court ex-

⁸⁰ See generally Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOC’Y REV. 807, 808 (1990) (examining the “composition, sources, and implications” of the discuss list); see also GRESSMAN ET AL., *supra* note 3, at 320 (noting that “the [discuss] list is never made public” and that “it is futile to inquire whether a particular case did or did not make the discuss list”); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 13 (1983) (noting the historical evolution from the use of a “dead list,” on which only those petitions that would be automatically denied were listed, to a “discuss list”).

⁸¹ See GRESSMAN ET AL., *supra* note 3, at 319.

⁸² See *id.* (“[C]ases that do not appear on the list by the day before the conference are automatically denied without even being mentioned at conference.”); see also BAUM, *supra* note 44, at 264 (“Petitions for certiorari that fail to reach [the discuss] list are denied without collective consideration.”).

⁸³ Ruth Bader Ginsburg, Thomas Jefferson Lecture: Workways of the Supreme Court (Feb. 6, 2003), in 25 T. JEFFERSON L. REV. 517, 519-20 (2003); see also REHNQUIST, *supra* note 38, at 234 (remarking that if “there are one hundred petitions for certiorari on the conference list, the number discussed at conference will range from fifteen to thirty”).

⁸⁴ GRESSMAN ET AL., *supra* note 3, at 322-23.

⁸⁵ *Id.*; see also REHNQUIST, *supra* note 38, at 224 (“The conference[] . . . [is] attended only by the justices themselves; they are not open to the public or to other Court personnel.”).

⁸⁶ See generally Stevens, *supra* note 80, at 10 (discussing the origins of the so-called “Rule of Four”).

⁸⁷ *Id.*; see also GRESSMAN ET AL., *supra* note 3, at 324 (“Four votes are still required for a grant of certiorari.”).

plain its reasons for granting or denying certiorari. Occasionally, Justices who disagree with the Court's disposition of a certiorari petition will publish an opinion dissenting from the denial of certiorari,⁸⁸ or will ask that their votes be noted in the Court's order respecting certiorari.⁸⁹ In addition, sometimes the Court will include a cursory explanation of its decision to grant certiorari when the Court ultimately issues its opinion on the merits in the case.⁹⁰ But in most cases, no explanation "is ever rendered for the Court's action," and "no record of the Court's vote is ever published (regardless of whether the case is granted or denied)."⁹¹ Hence, as Carolyn Shapiro has noted, the Court exercises its discretion via a process that operates very much like a "black box" that is "shroud[ed] in intense secrecy."⁹²

Indeed, the only real insight the Court gives the public about the factors that motivate its certiorari decisions can be found in Supreme Court Rule 10.⁹³ However, Rule 10 merely provides a list of considerations that the Court might, in its discretion, take into account when deciding whether to grant certiorari. Specifically, Rule 10 stresses that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion," and that the writ will be granted "only for compelling reasons."⁹⁴ Rule 10 does list the importance of the question presented

⁸⁸ See, e.g., *Alderman v. United States*, 131 S. Ct. 700, 702 (2011) (Thomas, J., dissenting from denial of certiorari) ("It is difficult to imagine a better case for certiorari."); *Nurre v. Whitehead*, 130 S. Ct. 1937, 1940 (2010) (Alito, J., dissenting from denial of certiorari) ("A decision with such potentially broad and troubling implications merits our review."); see also *Singleton v. Comm'r*, 439 U.S. 940, 944-46 (1978) (Stevens, J., respecting the denial of certiorari) (discussing the increase in the practice of dissenting from denials of certiorari and whether these dissents serve any purpose); Linzer, *supra* note 24, at 1256-59 (describing the growth in the 1970s of the practice of writing dissents from certiorari denials); Adam Liptak, *Sotomayor Guides Court's Liberal Wing*, N.Y. TIMES, Dec. 28, 2010 at A10 (noting that just months into the 2010 Term, Justice Sotomayor had exercised her discretion to write three dissents from certiorari denials).

⁸⁹ See Linzer, *supra* note 24, at 1262 (explaining that some Justices will include a "bare notation[]" of dissent stating simply that "Mr. Justice Q would grant certiorari"); see also GRESSMAN ET AL., *supra* note 3, at 331 (noting that dissents from denials "take forms ranging from a simple notation of a dissent to an elaborate dissenting opinion").

⁹⁰ See, e.g., *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2639 (2010) (justifying the Court's decision to grant certiorari in order to resolve a "conflict"); *Wyeth v. Levine*, 129 S. Ct. 1187, 1193 (2009) (granting certiorari because of the importance of the preemption issue at stake and because the relevant agency had changed its opinion); *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) ("The obvious importance of the case prompted our grant of certiorari.").

⁹¹ Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 7, at 402.

⁹² Shapiro, *supra* note 78, at 103.

⁹³ SUP. CT. R. 10.

⁹⁴ *Id.*

and the presence of a conflict in the lower courts as factors that the Court might consider, but notes that these factors do not “control[] nor fully measur[e] the Court’s discretion.”⁹⁵ Rule 10, accordingly, does nothing to diminish the near absolute discretion that Congress has given the Court.⁹⁶

II. THE RELEVANCE OF THE ADMINISTRATIVE LAW ANALOGY TO CERTIORARI REFORM

The Court’s unfettered discretion to set its docket via certiorari has not gone unnoticed. To the contrary, various scholars and Court watchers have criticized certiorari and proposed reforms. However, these proposals for reform have focused primarily on forcing the Court to hear certain kinds of cases or to hear more cases, or alternatively on taking certiorari discretion away from the Court and giving it to some other body, as will be described in this Part. Largely missing from the dialogue has been much serious discussion about the source of the Court’s discretion (namely, various delegations from Congress) and how the broad discretion Congress has given to the Court might be constrained while leaving it with the Court.⁹⁷ In particular, scholars have failed to look to another area of the law that already has thought long and hard about how to constrain delegated discretion: administrative law.⁹⁸ Because administrative law is concerned with

⁹⁵ *Id.*

⁹⁶ For a further discussion of Rule 10, see *infra* subsection III.A.3.

⁹⁷ One notable exception should be mentioned: Hartnett has written a detailed article on certiorari that does focus on the source of the Court’s discretion, describing in detail Congress’s various legislative acts granting discretion to the Court. See Hartnett, *supra* note 1, at 1650-57, 1713-30 (tracing the development of certiorari and also raising questions about certiorari practice). However, Hartnett did not propose specific means of cabining the Court’s discretion. His aim was to suggest that certiorari be questioned, not to propose specific solutions. *Id.* at 1647.

⁹⁸ I am aware of only three works that briefly discuss administrative law principles in connection with certiorari. The most relevant is a recent essay by Richard Lazarus that argues that the Court’s plenary docket “is increasingly captured by an elite group of expert Supreme Court advocates, dominated by those in the private bar,” and suggests that the problem of docket capture might be solved by analogy to “the kinds of structural reforms that have been made in administrative agencies to reduce the risk of agency capture.” Lazarus, *supra* note 11, at 89, 96. The other two works are less on point, raising administrative law only in a fairly general sense. One of these works is a piece by Samuel Estreicher and John Sexton, which suggests that when the Court makes certiorari decisions, the Court operates in an administrative fashion by managing our judicial system. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities*, 59 N.Y.U. L. REV. 681, 812 (1984). Estreicher and Sexton make one very direct analogy to administrative law, suggesting that perhaps the Court could take a cue from administrative law principles and disseminate its certiorari

controlling delegations to agencies and preventing arbitrary agency decisionmaking,⁹⁹ it stands as an untapped resource for suggesting potential certiorari reforms.

A. Criticisms of Certiorari and Proposals for Reform

Complaints about certiorari are commonplace today.¹⁰⁰ Many critics have focused on the Court's shrinking docket, arguing that the Court should be hearing many more cases than it does.¹⁰¹ As Kenneth Starr has pointed out, "the Supreme Court's docket has shrunk from 146 signed opinions during Chief Justice Rehnquist's first year occupying the Court's center seat to just 74 signed opinions during his final year."¹⁰²

In addition, some critics have focused on the type of cases the Court accepts, arguing that the Court is taking the wrong mix of cases. Senator Arlen Specter, for example, has complained that the Court is not taking enough "high-profile major constitutional cases,"¹⁰³ while Starr has asserted that the Court should take more cases that are less "headline-grabbing" in nature.¹⁰⁴ Some have argued that the Court is

standards for public comment. *Id.* at 800. I am aware of only one other work that mentions administrative law principles in the certiorari context: Hartnett's piece on the Judges' Bill briefly summarizes Estreicher and Sexton's work and notes that they seem to view certiorari as an exercise of managerial or administrative power. *See* Hartnett, *supra* note 1, at 1726-30.

⁹⁹ *See* 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.1, at 1231 (4th ed. 2002) ("Much of administrative law is a response to the existence of broad discretionary power in government officials."); *see also id.* at 1227-28 (noting that "[m]any administrative law doctrines are a response" to the well-known problem that "conferring too much discretion on an individual or institution creates the potential for harm attributable to abuse of discretion").

¹⁰⁰ *See, e.g.,* Tyler, *supra* note 11, at 1313-17 (noting several frequent complaints about the Supreme Court's current certiorari practices). *But see* J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L.J. ONLINE 67, 68-72 (2010), <http://yalelawjournal.org/2010/01/07/wilkinson.html> (defending the status quo in the certiorari context).

¹⁰¹ *See* Margaret Cordray & Richard Cordray, *Numbers That Don't Befit the Court*, WASH. POST, July 11, 2006, at A17 ("During the term just concluded, the court issued a grand total of 71 plenary decisions (in cases with full argument)—its lowest output since the Civil War."); Philip Allen Lacovara, *The Incredible Shrinking Court*, AM. LAW., Dec. 2003, at 53, 53 (noting that "[i]f their productivity were measured by private sector standards, the Supremes might receive pink slips"); Adam Liptak, *Justices Opt for Fewer Cases, and Professors and Lawyers Ponder Why*, N.Y. TIMES, Sept. 29, 2009, at A18 (discussing possible reasons for the Court's shrinking docket).

¹⁰² Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006).

¹⁰³ Arlen Specter, *The Chamber of Secrets*, NAT'L L.J., Aug. 3, 2009, at 38.

¹⁰⁴ Starr, *supra* note 102, at 1366.

not taking enough cases implicating circuit splits or disagreement in the courts below,¹⁰⁵ or that the Court is not granting enough cases in areas of the law that are governed by standards rather than rules.¹⁰⁶ In addition, Richard Lazarus has argued that the Court has been granting too many certiorari petitions filed by expert Supreme Court litigators who represent “the more powerful economic interests.”¹⁰⁷

A few critics also seem concerned with the process the Court uses to make its certiorari decisions. It is here that the cert pool and the role of law clerks have come under attack. Starr, for example, has argued that the cert pool has become “too powerful,” giving clerks “an unjustifiable influence over which cases the Supreme Court reviews.”¹⁰⁸ Others have speculated that the Court’s shrinking docket may—at least in part—be due to law clerks’ reluctance to stick out their necks and recommend grants in pool memos.¹⁰⁹

In order to address some of the perceived problems with the Court’s current certiorari practices, numerous proposals for reform have been floated in the past few years alone. For example, Starr recently suggested one idea for reform: the Court should “put its shoulder to the wheel and work harder” by hearing more cases.¹¹⁰ In addition, Paul Carrington and Roger Cramton recently proposed the creation of a Certiorari Division that would consist of thirteen Article III judges who would be tasked with “selecting perhaps as many as 120 cases a term that the Court would be obliged to decide.”¹¹¹ Subse-

¹⁰⁵ See, e.g., *id.* at 1365 (asserting that “the Supreme Court by and large does not even pretend to maintain the uniformity of federal law”).

¹⁰⁶ See, e.g., Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 287-90 (2006) (decrying the Court for failing to distinguish between rules and standards in certiorari decisions).

¹⁰⁷ Lazarus, *supra* note 11, at 89.

¹⁰⁸ Starr, *supra* note 102, at 1366, 1376-77; see also Carrington & Cramton, *supra* note 12, at 632 (proposing to replace the cert pool “with a panel of experienced federal judges”); Shapiro, *supra* note 106, at 286 (arguing that “[t]he Court’s reliance on the cert pool . . . increases the likelihood that chaotic areas of the law may be given short shrift, due to the law clerks’ and Justices’ unfamiliarity with more mundane areas of the law”).

¹⁰⁹ See Stras, *supra* note 78, at 968-72 (describing different views on the relationship between the cert pool and the decline of the Court’s plenary docket and concluding that the cert pool might be contributing to the decline).

¹¹⁰ Starr, *supra* note 102, at 1383, 1385.

¹¹¹ Carrington & Cramton, *supra* note 12, at 632. This proposal was converted into draft legislation, garnered the signatures of nineteen proponents, predominantly law professors, and in 2009 was submitted to the House and Senate Judiciary Committees. See *Four Proposals for a Judiciary Act*, PAUL DEWITT CARRINGTON (Feb. 9, 2009),

quently, Sanford Levinson, using the Carrington and Cramton proposal as a point of departure, suggested that the Certiorari Division might consist not only of federal judges, but also of state judges and public representatives.¹¹²

B. *Administrative Law as an Untapped Resource for Reform*

Despite all of the ink that scholars and Court watchers have spilled criticizing the Court's certiorari discretion and proposing reforms, scholars studying certiorari generally have failed to look to administrative law, an area whose central goal is constraining delegated discretion.

Perhaps the failure to look to the lessons of administrative law when considering certiorari reform is understandable. After all, at first blush, administrative law and the Supreme Court's certiorari practice might not appear to share much in common. The Court's certiorari power involves questions about which cases the U.S. Supreme Court will hear, whereas administrative law involves questions surrounding agency action and inaction, such as decisions made by the Environmental Protection Agency (EPA) about whether and how to regulate emissions that lead to global warming.¹¹³ In addition, certiorari decisions are made by nine Justices who enjoy lifetime tenure and salary protections, whereas administrative law concerns itself with decisions made by officials who are much more accountable. Furthermore, although Congress could use the powers vested in it by Ar-

<http://paulcarrington.com/Four%20Proposals%20for%20a%20Judiciary%20Act.htm> (laying out this and three other suggested reforms).

¹¹² See Levinson, *supra* note 8, at 111 (suggesting that, on the subject of public representatives, “[i]f there really is a point to the Supreme Court’s doing anything beyond providing uniform ‘solutions’ to conflicts below, then ordinary citizens should be able to offer their own valuable perspectives as to when intervention is needed (and when it is just fine to leave well enough alone)”). Although Levinson does not explore potential constitutional hurdles that might stand in the way of his proposal, a few immediately come to mind. For example, if the certiorari power is an exercise of legislative power, then Levinson’s proposal to delegate the certiorari process to nongovernmental actors might raise serious constitutional issues. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-12 (1936) (holding unconstitutional the delegation of the power to set maximum hour and minimum wage provisions to coal industry executives); 1 PIERCE, *supra* note 99, § 2.6, at 93 (describing how the “Court continues to impose meaningful limits on congressional delegation of regulatory power to private parties”). Alternatively, if the certiorari power is an exercise of judicial power, then Levinson’s proposal might violate the so-called “oneness” principle found in Article III. See U.S. CONST. art. III, § 1 (vesting the judicial power in “one supreme Court” and in such lower federal courts as Congress shall create (emphasis added)).

¹¹³ See *Massachusetts v. EPA*, 549 U.S. 497, 514 (2007) (reviewing the EPA’s refusal to regulate greenhouse gas emissions).

title III, Section 2 of the Constitution to regulate which cases the Court hears,¹¹⁴ Congress cannot decide the merits of constitutional cases facing the Court, whereas Congress could decide the merits of policy matters that it chooses to delegate to agencies.

Despite these differences, administrative law and certiorari share much more in common than might immediately be apparent. Specifically, both certiorari and administrative law involve Congress delegating broad discretion to other governmental actors, largely for functional reasons relating to expertise and flexibility. These delegations of policymaking power, in turn, raise concerns that principles of accountability, transparency, and rationality might be subverted.

Beginning with the world of administrative law, Congress routinely hands over broad policymaking powers to agencies—power that Congress could have chosen to exercise itself. For example, Congress has given the EPA the authority to regulate new motor vehicle emissions that lead to global warming.¹¹⁵ Similarly, Congress recently gave the FDA the power to regulate tobacco products.¹¹⁶ These sorts of delegations to agencies arise largely for functional reasons relating to agency expertise, specialization, and flexibility.¹¹⁷ Congress, in other words, chooses to transfer large portions of quasi-legislative power to various federal agencies largely because “Congress lacks the capacity—the expertise, the resources, the time, the foresight, the flexibility—to address every detail that might prove to be relevant to any given legislative scheme.”¹¹⁸

¹¹⁴ See U.S. CONST. art. III, § 2 (providing that “the supreme Court shall have appellate Jurisdiction” over certain types of cases “with such Exceptions, and under such Regulations as the Congress shall make” (emphasis added)).

¹¹⁵ See *Massachusetts*, 549 U.S. at 533-34 (holding that the Clean Air Act empowers the EPA to regulate new motor vehicle greenhouse gas emissions and concluding that the agency’s reasons for denying a rulemaking petition were arbitrary and capricious).

¹¹⁶ See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3, 123 Stat. 1776, 1781 (2009) (codified at 21 U.S.C. § 387 note (2006 & Supp. 2010)).

¹¹⁷ See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 440-41 (1987) (suggesting that the increase in grants of authority to regulatory agencies during the New Deal was motivated in part by a conception of administrative agencies “as politically insulated, self-starting, and technically sophisticated”); Alexander Dill, Comment, *Scope of Review of Rulemaking After Chadha: A Case for the Delegation Doctrine?*, 33 EMORY L.J. 953, 953 (1984) (“Congress has routinely granted broad discretionary authority to agencies in order to accord them the flexibility necessary in highly technical areas of regulation such as nuclear energy and environmental health, as well as in areas of economic regulation such as banking and corporate securities . . .”).

¹¹⁸ Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 412 (2008).

Despite the compelling practical reasons for Congress to delegate to agencies, these delegations have not been without controversy. In particular, many administrative law scholars have argued that Congress's decisions to legislate only in very broad strokes and to leave the details of policymaking up to agencies threaten principles of accountability, transparency, and rationality. For example, Martin Redish has argued that delegations of policymaking powers to agencies undermine accountability "by removing basic social policy choices from those who are most representative of and accountable to the electorate."¹¹⁹

Although today we routinely allow broad delegations of power to administrative agencies, concerns about accountability, transparency, and rationality have not gone completely unheeded. To the contrary, administrative law's primary purpose has been to develop various legal structures and mechanisms—such as political oversight, judicial review, public participation, and reason-giving requirements—that help to legitimate and control agency action.¹²⁰

Now compare Congress's delegations in the administrative world with Congress's delegation to the Court in the certiorari context. Given that Article III expressly empowers *Congress* to make exceptions to and regulations governing the Court's appellate jurisdiction,¹²¹ Congress could have chosen to precisely delineate the cases that the Court must hear (as it did for the first 100-plus years of the Court's existence).¹²² Nonetheless, rather than defining which cases the Court

¹¹⁹ MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 142 (1995); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131-34 (1980) (discussing the incentives for, and problems raised by, risk-averse legislators passing off substantive and contentious policy decisions onto "executive-branch bureaucrat[s]" and "independent regulatory commission[s]"). See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 99-152, 155-77 (1993) (criticizing Congress's delegation to administrative agencies and suggesting a revival of the nondelegation doctrine).

¹²⁰ See generally KEITH WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW* 31 (2008) ("Americans have relied on administrative law to ensure that agencies perform [their] functions with due regard for the rule of law, a proper respect for individual rights, and a sense of fidelity to our deepest constitutional commitments.").

¹²¹ See U.S. CONST. art. III, § 2 (providing that "the supreme Court shall have appellate Jurisdiction" over certain types of cases "with such Exceptions, and under such Regulations as the Congress shall make" (emphasis added)).

¹²² Cf. James F. Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 907 (1973) ("The kinds of jurisdictional decisions that Congress normally makes for the federal judiciary as a whole it delegated to the Justices through passage of the 1925 Act."); Daniel J. Meador, *Reining in the Superlegislature: A Response to Professors Carrington and Cramton*, 94 CORNELL L. REV. 657, 660 (2009) ("Eighteenth- and nineteenth-century jurists would have found

would hear, Congress chose to delegate policymaking power to the Court, giving the Court the discretion to decide which cases are important enough to warrant review. The Court is free to decide, for example, that fact-bound cases involving mere error correction or cases involving the misapplication of a properly stated rule of law do not warrant review.¹²³ Although today we are well accustomed to the notion that the Court enjoys such broad discretion (just as we are by now well accustomed to the notion that agencies can and do wield significant policymaking powers), the Court's wide discretion in this area (just like agencies' broad discretion to set policy) exists as a result of legislative delegation.¹²⁴

Much like in the administrative law world, Congress's willingness to give the Court broad discretion can be explained largely by functional concerns relating to expertise and flexibility. Congressional testimony given by Solicitor General Beck in 1922 prior to the passage of the Judges' Bill, for example, helps to highlight the themes of expertise and flexibility that motivated the transfer of power from Congress to the Court. According to the Solicitor General, "[s]omebody must determine" which are "the cases of public importance," and "[t]he court can do that far better than can any hard and fast law describing what cases shall be heard and what cases shall not be heard."¹²⁵ Similarly, in advocating for the passage of the Judges' Bill, Chief Justice Taft drew on notions of expertise: "His essential message to Congress was 'trust us.'"¹²⁶ Presumably, these notions of expertise and flexibility were not entirely unfamiliar to Congress when it was considering the

the concept [of discretionary appellate jurisdiction] novel and inconsistent with the role of a court, especially in a separation-of-powers regime.").

¹²³ See SUP. CT. R. 10 ("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.").

¹²⁴ Some have implied otherwise, suggesting that the Court's power to set its own docket is an inherent judicial function. For example, Justice Arthur Goldberg once stated that "[t]he power to decide cases presupposes the power to determine what cases will be decided." *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721, 730 (1973) (statement of Chief Justice Earl Warren) (quoting Justice Goldberg); see also Brennan, *supra* note 7, at 484 (agreeing with Justice Goldberg). However, as Meador has aptly explained, a claim that the Court's discretion to set its own agenda is "inherent in and inseparable from the Justices' jurisdiction to decide cases on their merits" confuses "the familiar with the necessary." Meador, *supra* note 122, at 661.

¹²⁵ *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 26 (1922) (statement of James M. Beck, Solicitor General).

¹²⁶ Starr, *supra* note 102, at 1364.

Judges' Bill, given that the bill was enacted in 1925—roughly around the same time that Congress was delegating increasingly broad powers to agencies and was creating significant new agencies, such as the Federal Trade Commission in 1914.¹²⁷

As with delegations to agencies in the administrative world, Congress's decision to delegate policymaking power to the Court has generated concern that principles of accountability, transparency, and rationality are being evaded. For example, two scholars have noted that certiorari is "striking," because unlike judicial evaluation of cases on the merits, certiorari lacks "collegial deliberation, constraining criteria, majority rule, and public accountability."¹²⁸ Similarly, Harnett has argued that "[t]he ability to set one's own agenda is at the heart of exercising will" and that certiorari is difficult to reconcile with "rule of law" principles.¹²⁹ Hence, Congress's delegation to the Court in the certiorari context raises many of the same concerns as do Congress's delegations to agencies.

III. CHECKS ON CERTIORARI VS. CHECKS ON ADMINISTRATIVE AGENCIES

Even though congressional delegation of docket control to the Court raises many of the same concerns as does congressional delegation of discretion to administrative agencies, administrative law's lessons have not been carried over and applied in the certiorari context. Certiorari does not appear to comport with the so-called nondelegation doctrine. Nor is the Court's discretion constrained by other softer administrative law mechanisms, including political oversight, public participation, judicial review, and reason-giving requirements. This

¹²⁷ Cf. WERHAN, *supra* note 120, at 13-18 (describing the birth of the modern administrative state during the Progressive Era and noting that Progressives believed in expert-driven decisionmaking by specialists); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 504-20 (2002) (describing the creation of new agencies and the delegation of power to agencies in the Progressive and New Deal eras). Increased delegation to the Court via the Judges' Bill also occurred less than a decade prior to the passage of the Rules Enabling Act of 1934, which gave the Supreme Court the power to prescribe general rules for the district courts. *See* Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)). *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (providing a detailed overview of the Rules Enabling Act).

¹²⁸ Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 7, at 398.

¹²⁹ Harnett, *supra* note 1, at 1718, 1722.

leaves the Court's broad discretion—unlike agencies' delegated policymaking discretion—unchecked and unconstrained.

A. *The Nondelegation Doctrine*

When Congress delegates legislative-like power to administrative agencies, the so-called “nondelegation doctrine” operates as a check to constrain these delegations. The nondelegation doctrine is based on Article I, Section 1 of the Constitution, which provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”¹³⁰ For close to 200 years, “the Court has interpreted that provision to prohibit Congress from delegating its legislative power and has equated legislative power with policymaking.”¹³¹ Our constitutional commitment to representative democracy provides a major reason for reading the Constitution this way: by ensuring that the most democratic branch conducts our lawmaking, principles of political accountability are protected.¹³²

Despite generally reading the Constitution to prohibit delegations of legislative authority, the Court has never erected a very rigid line between permissible and impermissible delegations. The inquiry currently used by the Court, which was first articulated in 1928 in *J.W. Hampton, Jr. & Co. v. United States*, focuses on the presence of an intelligible principle.¹³³ When Congress sets forth an intelligible principle, then the entity exercising the delegated power is deemed to be acting

¹³⁰ U.S. CONST. art. I, § 1.

¹³¹ RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 7 (2008). However, in recent years, some scholars and judges have questioned this view. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 489 (2001) (Stevens, J., joined by Souter, J., concurring in part and concurring in the judgment) (noting that the text of Article I's Vesting Clause “do[es] not purport to limit the authority of [Congress] to delegate authority to others”); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109-14, 2165-66 (2004) (arguing for an exclusive delegation doctrine under which Congress has the exclusive power to decide when and whether to delegate lawmaking powers).

¹³² See WERHAN, *supra* note 120, at 44-45 (noting that it “would subvert the political accountability hardwired into the legislative process for Congress to farm out its lawmaking authority to institutions that are less democratic, and therefore less accountable, in their decisionmaking”). But see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-96 (1985) (arguing that in light of the existence of presidential elections, “it may make sense to imagine the delegation of political authority to administrators as a device for improving the responsiveness of government to the desires of the electorate”).

¹³³ See 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [regulate] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

in the mere execution of a congressional act and not in a legislative capacity.¹³⁴

Although the Court generally has taken an extremely lenient view of the intelligible principle requirement,¹³⁵ the nondelegation doctrine is not completely dead.¹³⁶ Litigants continue to mount nondelegation challenges,¹³⁷ and some judges continue to bite.¹³⁸ In addition, courts sometimes adopt narrow constructions of statutes in order to “corral[] what might otherwise be a constitutionally excessive delegation of power.”¹³⁹ Hence, even in its weakened form, the nondelegation doctrine persists, acting in some ways like the “Energizer Bunny of constitutional law,” as Gary Lawson has put it.¹⁴⁰

¹³⁴ *Id.* at 410-11.

¹³⁵ The Court has upheld many vague delegations of power, such as delegations to regulate in the “public interest.” *See* *NBC v. United States*, 319 U.S. 190, 225-26 (1943) (upholding Congress’s delegation to the FCC to regulate broadcasting licensing “as public interest, convenience, or necessity” warrant); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 576-77 (1939) (upholding Congress’s delegation to the Secretary of Agriculture to regulate milk prices in the “public interest”). Indeed, the Supreme Court has found the requisite intelligible principle lacking in only two cases, both involving delegations found in the National Industrial Recovery Act of 1933 (NIRA). *See* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (ruling that section 3 of the NIRA was an unconstitutional delegation of legislative power to the President); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 414-19 (1935) (ruling that section 9(c) of the NIRA was an unconstitutional delegation of legislative power).

¹³⁶ *See* *Lemos*, *supra* note 118, at 419 (arguing that it would be a “mistake” to declare the nondelegation doctrine dead).

¹³⁷ *See, e.g.*, *Petition for a Writ of Certiorari at i*, 11-24, *Defenders of Wildlife v. Chertoff*, 554 U.S. 918 (2008) (No. 07-1180), 2008 WL 727967 (arguing that section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is an unconstitutional delegation of legislative power); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002) (noting a “series of attempts by lawyers and judges in the past decade” to keep the nondelegation doctrine alive).

¹³⁸ *See, e.g.*, *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 33-40 (D.C. Cir. 2008) (Brown, J., dissenting) (arguing that a statute giving the Secretary of the Interior the power to acquire lands “in his discretion” violated the nondelegation doctrine); *Am. Trucking Ass’ns v. EPA*, 175 F.3d 1027, 1034-40 (D.C. Cir. 1999) (holding that the EPA had relied on a construction of its authority-granting statute that violated the nondelegation doctrine), *aff’d in part, rev’d in part sub nom.* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001); *South Dakota v. U.S. Dep’t of the Interior*, 69 F.3d 878, 882, 885 (8th Cir. 1995) (holding that delegation to the Secretary of the Interior to acquire lands “in his discretion” violated the nondelegation doctrine), *vacated and remanded*, 519 U.S. 919 (1996).

¹³⁹ *Lemos*, *supra* note 118, at 455; *see also* *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 659-62 (1980) (plurality opinion) (requiring the Occupational Safety and Health Administration to make a finding of significant risk in promulgating its safety regulations).

¹⁴⁰ Lawson, *supra* note 137, at 330.

In contrast to the longstanding role that the nondelegation doctrine has played in administrative law, the nondelegation doctrine has been largely absent when it comes to delegations of lawmaking power to *the courts*. As Margaret Lemos has thoroughly described, the voluminous scholarship on the nondelegation doctrine thus far has focused primarily on delegations of lawmaking power to administrative agencies and generally has failed to consider whether the doctrine can or should be used to constrain delegations to courts.¹⁴¹ This has been the case even though Congress routinely delegates lawmaking power to the courts.¹⁴² Lemos, accordingly, has persuasively called for more conversation about delegations to courts, suggesting that these delegations should not necessarily be immune from nondelegation challenges.¹⁴³

If one were to apply nondelegation-esque principles to Congress's delegation of docket-setting power to the Court, then an "intelligible principle" would need to be identified. In searching for an intelligible principle, three possible sources seem worthy of consideration: (1) statutory text defining the Court's certiorari jurisdiction; (2) legislative history surrounding Congress's decisions to give the Court a discretionary docket; and (3) the Court's own published rules. Unfortunately, however, even if these sources were all appropriate places to search for an intelligible principle, they fail to supply a guiding principle sufficient for even today's weakened version of the nondelegation doctrine.

1. Statutory Text

Various statutes define the Court's certiorari jurisdiction. For example, 28 U.S.C. § 1254 speaks to the Court's power to review decisions from the federal courts of appeals, providing that the Court "may" review cases in the courts of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case,

¹⁴¹ See Lemos, *supra* note 118, at 421 ("[N]otwithstanding the robust and ever-growing body of law and commentary on the boundaries of permissible delegations to agencies, we lack any account of the constitutional status of delegations of lawmaking authority to courts.").

¹⁴² See *id.* at 428-34 (discussing congressional delegations to the courts and pointing to the Sherman Act as an example of "a clear-cut and self-conscious delegation of lawmaking power to courts").

¹⁴³ See *id.* at 475-76 ("Nondelegation law and theory ignore courts at their peril Delegation to courts raise the same constitutional concerns as delegations to agencies.").

before or after rendition of judgment or decree.”¹⁴⁴ Nothing in this statutory text, however, helps to define when the Court *should* exercise its discretion to grant a petition for a writ of certiorari that otherwise falls within § 1254’s grant of jurisdiction. Similarly, 28 U.S.C. § 1257, which speaks to the Court’s ability to review final judgments from the states, provides only that review “may” be had via certiorari

where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.¹⁴⁵

Just like § 1254, nothing in § 1257 sets forth a principle to guide when the Court might refuse to hear a case that otherwise falls within the jurisdiction created by § 1257.¹⁴⁶ Hence, the statutory text appears to give the Court unconstrained discretion to refuse to hear a case that otherwise falls within the Court’s statutorily defined jurisdiction for any reason or for no reason at all.

2. Legislative History

In searching for an intelligible principle with which to constrain delegations, the courts have sometimes looked not only to statutory text but also to legislative history.¹⁴⁷ In the certiorari context, however, the relevant legislative history—like the statutory text—fails to provide any meaningful criteria that could be read to guide the Court’s discretion.

As Hartnett has described in an article detailing the emergence of the certiorari process, the legislative history leading up to and surrounding the landmark Judges’ Bill of 1925 contains little clarification

¹⁴⁴ 28 U.S.C. § 1254 (2006).

¹⁴⁵ *Id.* § 1257.

¹⁴⁶ To fit within the Court’s jurisdiction, of course, the statute makes clear that the judgment below must be “final” and that the judgment must have been rendered by the “highest court of a State in which a decision could be had.” *Id.* However, once these and other statutory requirements are met, the statute says nothing about when the Court may exercise its discretion to decline to hear a case.

¹⁴⁷ *See, e.g.,* *Mistretta v. United States*, 488 U.S. 361, 375-76 nn.9-10 (1989) (looking to legislative history for elaboration on the purposes of various statutory factors); *Indus. Union Dep’t. v. Am. Petroleum Inst.*, 448 U.S. 607, 676 (1980) (Rehnquist, J., concurring) (“One of the primary sources looked to by this Court in adding gloss to an otherwise broad grant of legislative authority is the legislative history of the statute in question.”).

about what specific standards, if any, were to guide the Court's discretion.¹⁴⁸ In fact, in advocating in 1914 for expanded certiorari jurisdiction, William Howard Taft (later to become Chief Justice and the central proponent of the Judges' Bill) spoke initially of the need to give the Court "*absolute and arbitrary* discretion with respect to all business but constitutional business."¹⁴⁹

When Taft subsequently appeared before the House Judiciary Committee in 1922 (then as Chief Justice) with proposed legislation designed to expand certiorari,¹⁵⁰ Taft described the "proper basis for determining the class of cases which should be reviewed" in a slightly more reserved fashion, stating:

The Supreme Court's function is for the purpose of expounding and stabilizing principles of law *for the benefit of the people of the country*, passing upon constitutional questions and other important questions of law *for the public benefit*. It is to preserve uniformity of decision among the intermediate courts of appeal.¹⁵¹

In addition, Taft explained that "[t]he question is whether the questions as presented are sufficiently important, considering the function that the Supreme Court has to play—to justify and require the court to let the case into the court for a full hearing on the merits."¹⁵² This rather vague description of the principles that would guide the Court in granting certiorari was about as specific as Taft got.

The additional legislative history surrounding the passage of the Judges' Act of 1925 does not supply any more precise standards. At most, the legislative history provides repeated promises from the Justices about how certiorari was to be used to review cases of "public im-

¹⁴⁸ See Hartnett, *supra* note 1, at 1660-704 (detailing at length the history of certiorari, including the Judges' Bill of 1925).

¹⁴⁹ William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 18 (1916) (emphasis added).

¹⁵⁰ For a discussion of Taft's role in lobbying the Court for passage of the Judges' Bill, see Buchman, *supra* note 18, at 3. Buchman states that "Taft's campaign can be explained best by the interaction of two factors: a lobbying campaign designed to emphasize the belief that the bill implicated merely technical matters, and congruence between the policy preferences of a congressional majority and the Court." *Id.*; see also Hartnett, *supra* note 1, at 1660-704 (discussing Taft's prominent role in the lobbying process).

¹⁵¹ *Jurisdiction of the Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 2 (1922) [hereinafter *Hearing on H.R. 10479*] (statement of Chief Justice William H. Taft) (emphasis added).

¹⁵² *Id.*

portance,”¹⁵³ cases that needed to be decided to serve the “public benefit,”¹⁵⁴ and cases that create a conflict in the courts.¹⁵⁵ In addition, the Justices promised to grant review when the circuit courts “certified” the questions arising in the case.¹⁵⁶

These sorts of vague promises made primarily by members of the Court itself, however, seem insufficient to provide a congressionally imposed “intelligible principle.”¹⁵⁷ In hindsight, it seems quite clear that these vague statements made by the Justices have not in fact offered any kind of meaningful constraint on the Court’s discretion.¹⁵⁸ For example, contrary to what the Justices promised, it is not unheard of for the Court today to deny certiorari petitions even when a circuit conflict is presented.¹⁵⁹ Similarly, despite the Justices’ reassurances

¹⁵³ See, e.g., *Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before a Subcomm. of the S. Comm. on the Judiciary*, 68th Cong. 21 (1924) (reporting that “[i]f this bill becomes law, every case now reviewable in the Supreme Court will still be subject to review there, if the court finds that it presents any question which should, in the public interest, engage its attention”); *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing on H.R. 8206 Before the H. Comm. on the Judiciary*, 68th Cong. 7 (1924) [hereinafter *Hearing on H.R. 8206*] (statement of Justice Willis Van Devanter) (suggesting that the Court would grant cases that presented questions “of public importance or of wide general interest”); *id.* at 22 (statement of Justice James C. McReynolds) (emphasizing that the Court should not decide a case unless it is “of particular importance” or it “involves[s] something more than the mere rights of the litigants”).

¹⁵⁴ *Hearing on H.R. 10479*, *supra* note 151, at 2 (statement of Chief Justice William H. Taft).

¹⁵⁵ See *id.* (“Whenever a petition for certiorari presents a question on which one circuit court of appeals differs from another, then we let the case come into our court as a matter of course.”).

¹⁵⁶ See *id.*, at 3; see also *Hearing on H.R. 8206*, *supra* note 153, at 8 (statement of Justice Willis Van Devanter) (indicating that the Court would grant cases that needed to be decided “in the interest of uniformity”).

¹⁵⁷ Even if the legislative history could be said to supply some kind of a guiding principle, there is also the question of whether legislative history alone can supply the requisite intelligible principle or whether the principle must be tethered to some ambiguous statutory text. See, e.g., *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 38 (D.C. Cir. 2008) (Brown, J., dissenting) (“[E]ven in a nondelegation challenge, a court must find meaning for an ambiguous phrase in some relevant text.”).

¹⁵⁸ Cf. Stevens, *supra* note 80, at 14 (rejecting the notion that “representations made to Congress when the 1925 Judges’ Bill was enacted created some sort of estoppel that would make it dishonorable for the Court to change the Rule of Four”).

¹⁵⁹ See, e.g., *Hiersche v. United States*, 503 U.S. 923, 925 (1992) (Stevens, J., respecting the denial of certiorari) (defending the Court’s denial of certiorari and arguing that “[s]ome conflicts are tolerable”); *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting) (noting he had dissented from the denial of certiorari forty-eight times that term because “there were conflicts among Courts of Appeals sufficiently crystallized to warrant certiorari” and that he had dissented seven other times where there were “differences on the same federal issue between Courts of Appeals and state courts”).

that the Court would decide issues certified by the lower courts, the Court has essentially killed the practice of certification, effectively rendering it “a dead letter.”¹⁶⁰

3. Supreme Court Rule 10

The Supreme Court’s own rules provide a final place to look for some kind of intelligible principle that could guide the Court’s discretion. Specifically, Rule 10 might be thought to serve as a legal text setting forth a constraining principle. However, even a quick reading of Rule 10 demonstrates that this is not the case:

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.¹⁶¹

As the text of the rule itself admits, Rule 10 does not set forth binding factors.¹⁶² Rather, the rule merely sets forth some relevant,

¹⁶⁰ Hartnett, *supra* note 1, at 1712; *see also* Aaron Nielson, *The Death of the Supreme Court’s Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 487 (2010) (noting that the last time the Court even mentioned certification was more than twelve years earlier in 1996 (citing *Felker v. Turpin*, 518 U.S. 651, 667 (1996))); Tyler, *supra* note 11, at 1319 (proposing that the Court resume using the process of certification).

¹⁶¹ SUP. CT. R. 10 (emphasis added).

¹⁶² *See* Hartnett, *supra* note 1, at 1721 (explaining that Rule 10 fails to provide controlling standards).

nonbinding considerations.¹⁶³ Some of these considerations might well operate in practice as the functional equivalent of jurisdiction-defining rules. For example, Rule 10 makes clear that a petition for certiorari will rarely be granted “when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law,”¹⁶⁴ and the Court has been quite unyielding in refusing to take cases that are splitless or involve fact-bound error correction.¹⁶⁵ Yet given that the rule expressly reserves the Court’s discretion, it seems difficult to say that Rule 10 sets forth a constraining principle.

Furthermore, even if Rule 10 could be read as a constraining principle, it still does not supply the kind of intelligible principle that would be required if the traditional nondelegation doctrine were applied. This is because the relevant question in nondelegation challenges is whether *Congress* has set down via “*legislative act* an intelligible principle to which the person or body authorized to [act] is directed to conform.”¹⁶⁶ As Justice Scalia explained in *Whitman v. American Trucking Ass’ns*, an agency cannot “cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”¹⁶⁷ In the certiorari context, there is no such limiting principle set forth *by Congress*. Hence, Congress’s delegation to the Court is not constrained by the kind of guiding principle—not even a vague, open-ended standard—that exists in a congressional delegation to an administrative agency.

B. Softer Mechanisms for Control

The fact that current certiorari practices would fail any strict application of the nondelegation doctrine might not be all that troub-

¹⁶³ See SUP. CT. R. 10 (noting that the considerations listed are neither binding nor exclusive); see also BICKEL, *supra* note 15, at 126 (“The Court’s own rule on the subject says that it neither controls nor fully measures the Court’s discretion, and, broad as it is, the rule does not in fact do so.”).

¹⁶⁴ SUP. CT. R. 10.

¹⁶⁵ See Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 980 (2009) (“The Court will agree to decide few ‘splitless’ or ‘factbound’ cases unless there are extraordinary circumstances, such as unusual importance to the question or an atypical lower court error.”).

¹⁶⁶ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (alteration in original) (emphasis added) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); see also *id.* at 473 (“The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory.”).

¹⁶⁷ *Id.* at 472.

ling, given that courts have largely abandoned direct enforcement of the intelligible principle requirement, even in the administrative law context.¹⁶⁸ But in the administrative law world, substantial delegations of significant policymaking power to agencies have been allowed in large part because a variety of more informal mechanisms for constraint—including political oversight, judicial review, public participation, and reason-giving requirements—operate to check administrative discretion and to facilitate accountability and transparency. In the certiorari context, these more informal mechanisms for constraint are absent.

1. Political Accountability and Oversight

Political accountability and oversight are two of the most significant checks on agency discretion.¹⁶⁹ Although agency heads are not directly accountable to the people,¹⁷⁰ the heads of both independent and executive agencies are subject to varying degrees of political control from the President, Congress, or both.¹⁷¹ Congress, for example, creates agencies and controls their budgets.¹⁷² In addition, Congress can influence agency policymaking via oversight hearings, as well as through more informal communications.¹⁷³ Similarly, the President plays a “unique role . . . in overseeing agency action.”¹⁷⁴ The President, for example, has the power to appoint and remove certain agency officials (although independent agency heads are insulated from the

¹⁶⁸ See Lemos, *supra* note 118, at 418-19 (noting that the Supreme Court has not directly enforced the nondelegation doctrine in decades).

¹⁶⁹ See 3 PIERCE, *supra* note 99, § 17.4, at 1246.

¹⁷⁰ See Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 568 (1987) (“We vote for presidents, not secretaries or administrators.”).

¹⁷¹ See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 35-37 (2009); see also *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (“[I]ndependent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2384 (2001) (“Presidential administration . . . advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion.”).

¹⁷² See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84 (2006) (“One way in which Congress has supervised agencies . . . is through the appropriations process. The power of the purse is among Congress’s most potent weapons in its effort to control the execution of the laws.”).

¹⁷³ See *id.* at 121-35.

¹⁷⁴ Watts, *supra* note 171, at 35.

President's at-will removal powers).¹⁷⁵ The President can also pressure or steer agency decisionmakers via informal mechanisms, like jawboning, as well as more formal mechanisms, such as executive orders.¹⁷⁶

Indeed, in recent years, many 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.¹⁷⁷ The Supreme Court, for example, famously explained the legitimacy of judicial deference to agencies in 1984 in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, by relying on the notion that agencies are accountable to the "Chief Executive," who is "directly accountable to the people."¹⁷⁸ Similarly, in arguing in favor of the permissibility of broad delegations of legislative power to administrative agencies, some scholars have relied upon the democratic accountability of agencies, with prominent scholars like Jerry Mashaw emphasizing that delegations to agencies may actually be a "device for improving the responsiveness of government to the desires of the general electorate."¹⁷⁹

In contrast to the heads of agencies, the Justices of the Supreme Court are insulated from direct political oversight and control.¹⁸⁰ Although the Justices are chosen by the President with the advice and consent of the Senate, they enjoy salary protections and life tenure

¹⁷⁵ See U.S. CONST. art. II, § 2, cl. 2 (enumerating the President's appointment powers and constraints thereon); *Morrison v. Olson*, 487 U.S. 654, 670-71 (1988) (discussing the President's appointment and removal powers and noting that principal officers may only be selected by the President with the advice and consent of the Senate, but that inferior officers may be appointed by "the President alone, by the heads of departments, or by the Judiciary," in Congress's discretion); see also Watts, *supra* note 171, at 57-62 (explaining that while the President does not enjoy removal power over independent agency heads, he can use other means to control independent agencies, such as informal contacts and pressure).

¹⁷⁶ See generally Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1261 (2006) (describing how Reagan "tapped the Office of Management and Budget (OMB) to review agency rulemaking and help streamline the administrative state"); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 944-47 (1980) (discussing the various modes of interaction between the Carter Administration and federal agencies).

¹⁷⁷ See generally Watts, *supra* note 171, at 35-39 (describing the rise of the political-control model of agency decisionmaking).

¹⁷⁸ 467 U.S. 837, 865 (1984).

¹⁷⁹ JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 152 (1997).

¹⁸⁰ See Lemos, *supra* note 118, at 449-50 (noting that courts are not subject to the same political controls as agencies).

subject only to impeachment.¹⁸¹ Congress does have some ability to exert indirect control over the Court by using the Exceptions Clause to limit the Court's jurisdiction,¹⁸² acting under its Spending Clause powers to cut back on the Court's budget,¹⁸³ or exercising its general lawmaking powers to overturn a statutory construction rendered by the Court.¹⁸⁴ In addition, because the Court enjoys neither the power of the purse nor the sword, the Court depends on the coordinate branches and the American public to enforce and follow its judgments.¹⁸⁵ Otherwise, however, the members of the Court—unlike the heads of agencies—are insulated from direct political oversight.

2. Public Participation

Public participation is yet another way in which administrative discretion—at least in the rulemaking realm—is subject to significant external checks. When promulgating rules via informal notice-and-comment rulemaking, for example, agencies generally must provide public notice of the proposed rulemaking, allow the public to submit comments responding to the proposed rulemaking, and respond in a

¹⁸¹ See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

¹⁸² See *id.* § 2 (giving Congress the power to make exceptions to the Supreme Court's appellate jurisdiction). For literature discussing the longstanding debate about the extent of Congress's powers to strip the Court of jurisdiction to hear particular kinds of cases (such as cases involving abortion or school prayer), see generally Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960), and Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

¹⁸³ See U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”). See generally Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131, 132-35 (1991) (discussing Congress's control over the Court's budget as a mechanism to signal its satisfaction or dissatisfaction with the Court's decision-making).

¹⁸⁴ See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991) (providing an empirical analysis showing that Congress overrides the Supreme Court's decisions interpreting statutes on average ten times per Congress).

¹⁸⁵ Cf. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 369-72 (2009) (arguing that the Court listens closely to and is in dialogue with the public and political actors).

reasoned way to all significant public comments.¹⁸⁶ Interested members of the modern tech-savvy public have to go no further than their computers to easily locate proposed rules and file comments electronically.¹⁸⁷ In addition, interested members of the public can petition agencies to engage in rulemaking, thereby playing a role in setting agency agendas.¹⁸⁸ Hence, rulemaking proceedings conducted by agencies are quite accessible to the public.

Unlike notice-and-comment rulemaking proceedings that have the benefit of public participation, the Court's certiorari decisions are made behind closed doors and cannot easily be monitored by Congress, the President, or the public.¹⁸⁹ In making certiorari decisions, the Court generally relies only upon the opinion below, the written submissions of the parties to the case, and any briefs filed at the certiorari stage by amici curiae who have the means to hire an attorney and pay the costs of drafting and printing a formal brief.¹⁹⁰ Accordingly, opportunities for general public input on specific certiorari petitions do not exist.

The public did not have an opportunity to comment on or participate in the rulemaking process for Supreme Court Rule 10, which defines the factors that the Court may take into account when granting or denying certiorari.¹⁹¹ A federal statute granting the federal courts general powers to promulgate "rules for the conduct of their business" does call for courts to give the public notice and an opportunity for comment on proposed rules, but that statute explicitly exempts the Supreme Court from these requirements.¹⁹² The Supreme Court, accordingly, is not required to offer an opportunity for public comment

¹⁸⁶ See generally 1 PIERCE, *supra* note 99, at §§ 7.3–7.4 (discussing notice and comment requirements).

¹⁸⁷ See REGULATIONS.GOV, <http://www.regulations.gov> (last visited Oct. 15, 2011) (enabling members of the public to search for proposed rules, submit and read comments, and locate final rules).

¹⁸⁸ See 5 U.S.C. § 553(e) (2006) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

¹⁸⁹ See generally 3 PIERCE, *supra* note 99, § 17.4, at 1247-48 (noting that various procedural requirements, such as the requirement that agencies obtain the views of interested parties, help to shape the exercise of agency discretion).

¹⁹⁰ See *infra* text accompanying notes 304-05 (arguing for greater public participation as amici curiae).

¹⁹¹ See SUP. CT. R. 10 (listing considerations important to the Court in deciding whether to grant certiorari).

¹⁹² See 28 U.S.C. § 2071(b) (2006) ("Any rule prescribed by a court, *other than the Supreme Court*, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment." (emphasis added)).

in its rulemaking process and did not elect to do so until 1995¹⁹³ — long after the basic language currently found in Rule 10 had already been codified.¹⁹⁴

3. Judicial Review

Another method of oversight applicable to agency discretion but not the Court's certiorari discretion is judicial review.¹⁹⁵ Courts play an important role in reviewing many kinds of agency actions to ensure that the actions are not arbitrary and do not contravene statutory, regulatory, or constitutional principles. A prominent example of this can be seen in the Supreme Court's recent decision in *Massachusetts v. EPA*, in which the Court took the EPA to task for supplying improper reasons in denying a petition asking the EPA to regulate emissions that lead to global warming.¹⁹⁶

Although there is a presumption of judicial review in the administrative law world,¹⁹⁷ not all agency action is judicially reviewable. Indeed, some agency decisions involving questions of resource allocation, such as nonenforcement decisions or refusals to reconsider, are presumptively exempted from judicial review.¹⁹⁸ However, even when *judi-*

¹⁹³ See GRESSMAN ET AL., *supra* note 3, at ix (“Starting with the revision in 1995, the Court added a new element to its rule-making process: making proposed rule changes available for public comment before finalizing them.”).

¹⁹⁴ Although Rule 10 has changed slightly through the years, the basic language found in the current rule can be traced back to a Court rule adopted just months after the passage of the Judges' Bill of 1925. See William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 3 (1925) (“The Court has thought it wise to indicate the lines along which its discretion will be exercised in granting certioraris, in Par. 5 of Rule 35 of the new Rules adopted by the Court in June last, to square with the new Act.”); see also Hartnett, *supra* note 1, at 1721 (“Although this rule has changed a bit over time . . . the basic thrust remains the same and the opening provision is nearly identical.”).

¹⁹⁵ See 3 PIERCE, *supra* note 99, § 17.2, at 1233 (“At least part of the solution to the problem of agency discretion must lie in judicial review of agency actions.”).

¹⁹⁶ 549 U.S. 497, 532-35 (2007).

¹⁹⁷ See 5 U.S.C. §§ 701(a), 704 (2006) (providing for judicial review and enumerating the two instances in which the presumption favoring judicial review is rebuttable: when the “action is committed to agency discretion by law” or the “statutes preclude judicial review”); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (noting that both case law and the Administrative Procedure Act support the presumption of judicial review of agency action).

¹⁹⁸ See *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 280 (1987) (holding an agency denial of a request for reconsideration to be unreviewable); *Heckler v. Chaney*, 470 U.S. 821, 828-31 (1985) (holding that agency nonenforcement decisions are presumptively nonreviewable). See generally Eric Biber, *The Importance of Resource Allocation*

cial review is not available (for example, in the nonenforcement context), *political* review nonetheless operates to check agency decisions.¹⁹⁹

In the certiorari context, judicial review of the Court's certiorari decisions by some other judicial body does not occur because the Court is the highest court in our country.²⁰⁰ Nor are the Court's certiorari decisions subject to any kind of meaningful review by Congress, the President, or members of the public, given that the Court does not explain its certiorari decisions and generally does not disclose individual Justices' votes on certiorari petitions. Hence, unlike agency decisions that generally are subject to judicial or political review, or both, neither judicial nor political review operates to constrain the Court's certiorari decisions.

4. Reason Giving

Finally, certiorari is unconstrained by another procedural mechanism that plays a prominent role in administrative law: a "reason-giving" requirement. In administrative law, reason-giving requirements appear in various places. Section 555(e) of the Administrative Procedure Act (APA), for example, requires federal agencies to provide a "brief statement of the grounds for denial" when denying written petitions or applications.²⁰¹ Accordingly, when agencies deny petitions asking them to engage in rulemaking or to initiate enforcement actions, the agency must give reasons for the denial.²⁰² Similarly, when an agency engaged in informal adjudication denies a written application or a petition made in connection with an agency proceeding, the agency must provide a "brief statement of the grounds for denial."²⁰³

in Administrative Law, 60 ADMIN. L. REV. 1, 10-13 (2008) (discussing confusion in the law concerning judicial review of agency inaction and resource allocation issues).

¹⁹⁹ Cf. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1658-60, 1714-17 (2004) (recognizing that under the current state of the law, agency decisions not to act are subject to political rather than judicial control, but arguing that the law should be altered to allow room for courts to provide a check against arbitrary agency inaction).

²⁰⁰ The Court itself could reconsider a certiorari decision, but such reconsideration rarely occurs. See SUP. CT. R. 44.2 (allowing for petitions for rehearing of orders denying certiorari); GRESSMAN ET AL., *supra* note 3, at 520 (noting that the majority of petitions for rehearing are filed "without any basis").

²⁰¹ 5 U.S.C. § 555(e) (2006).

²⁰² *Id.*; see also Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 765 (1990) (noting that section 555(e) of the APA requires an agency to furnish a written explanation when it denies either a rulemaking petition or a petition for enforcement action).

²⁰³ 1 PIERCE, *supra* note 99, § 8.5, at 546 (quoting 5 U.S.C. § 555(e)).

Section 706(2)(A) of the APA is the source of another reason-giving requirement. Section 706(2)(A), which subjects agency action to so-called “arbitrary and capricious review” by the federal courts,²⁰⁴ has been read to require agencies to provide adequate reasons for their decisions.²⁰⁵ In the 1983 case *Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, the Court explained this obligation as follows: “[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”²⁰⁶ Taking their cue from *State Farm*, agencies today routinely provide lengthy explanations for any actions that will be subjected to arbitrariness review under § 706(2)(A). For example, agencies generally accompany their newly announced rules with detailed discussions of the relevant statute, any underlying data, explanations of the agency’s methods of reasoning, and responses to public comments received by the agency.²⁰⁷

These reason-giving requirements mainly exist to ensure that agencies do not act in an arbitrary manner.²⁰⁸ In fact, the permissibility of Congress’s decision to delegate broad legislative and adjudicatory discretion to agencies has, in many ways, hinged on the existence of the reason-giving requirement. This requirement enables the courts, the political branches, and the public to examine the reasons supporting agency exercise of delegated discretion and to guard against arbitrariness.²⁰⁹

In contrast to the reason-giving requirement that agencies generally face,²¹⁰ Congress has left the Court free to make certiorari deci-

²⁰⁴ 5 U.S.C. § 706(2)(A).

²⁰⁵ See Watts, *supra* note 171, at 14 (discussing the reason-giving requirement imposed by arbitrary and capricious review).

²⁰⁶ 463 U.S. 29, 43 (1983) (citations and internal quotation marks omitted).

²⁰⁷ See 1 PIERCE, *supra* note 99, § 7.4, at 441–50; Watts, *supra* note 171, at 14.

²⁰⁸ Cf. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 496 (2003) (describing how failing to demonstrate reasoned decisionmaking can be indicative of arbitrary action).

²⁰⁹ See, e.g., Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 423–25 (arguing that the heightened reason-giving requirement articulated in *State Farm* flows from separation of powers principles and responds to the broad delegations of legislative authority given to agencies); cf. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989) (noting that “the permissibility of delegating regulatory power” has hinged on the courts’ ability to review agency exercises of delegated power).

²¹⁰ Not all agency action is subject to a *judicially enforceable* reason-giving requirement. Nonenforcement decisions, for example, are not subjected to any judicially en-

sions without providing any reasons. Nor has the Court chosen to limit itself by imposing a reason-giving requirement on certiorari decisions.²¹¹ In most cases, no explanation is given. This differentiates the Court's certiorari process from agency actions that are subject to reason-giving requirements, like denials of rulemaking petitions or denials of petitions seeking enforcement actions.

It also distinguishes the Court's certiorari powers from other areas in which the federal courts sometimes decline to exercise jurisdiction. As David Shapiro has described, historically the federal courts have enjoyed the power to decline some jurisdiction given to them based on "principled" exercises of discretion.²¹² Shapiro explains that these decisions generally involve the application of identifiable criteria that are "capable of being articulated and openly applied by the courts, evaluated by critics of the courts' work, and reviewed by the legislative branch."²¹³ For example, various justiciability doctrines with prudential aspects like standing, ripeness, and the political-question doctrine enable the courts to make choices about which cases to hear.²¹⁴ Similarly, courts sometimes invoke abstention doctrines rooted in notions

forced reason-giving requirement by virtue of the fact that there is "no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 828-32 (1984). Such decisions are nonetheless still subject to other checks, such as political oversight, and perhaps to constitutional checks like the nondelegation doctrine. See Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L. J. 941, 989 (2000) (noting that decisions that are committed entirely to an agency's discretion "would seem a prime target for nondelegation challenges"). In addition, the APA helps facilitate political oversight of some nonenforcement decisions by requiring agencies to furnish written explanations when petitions for enforcement are denied. 5 U.S.C. § 555(e) (2006); see also Levin, *supra* note 202, at 765-66 (fleshing out the requirements of § 555(e)).

²¹¹ Cf. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634, 637 (1995) (noting that when the Court makes certiorari decisions, "the conclusion stands alone, unsupported by reasons, justifications, or explanations"); see also *supra* notes 88-90 and accompanying text.

²¹² David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 578 (1985).

²¹³ *Id.*; see also *id.* at 589 (arguing that courts should enjoy some discretion in matters relating to federal jurisdiction but that "the process is one that calls not only for the continued involvement and articulated reasoning of trial and appellate courts, and for careful elaboration of their decisions, but also for continued oversight by the legislative branch").

²¹⁴ See *id.* at 552-55 ("[A] variety of cases reveal that the concepts falling under the heading of justiciability have a constitutional core, and that each concept has a penumbra within which the Court sees itself as having discretion whether to exercise jurisdiction."); see also BICKEL, *supra* note 15, at 125 (noting the doctrines of standing and ripeness as examples of "available devices of 'not doing'").

of comity and federalism to avoid deciding cases that fall within the jurisdiction conferred upon them by Congress.²¹⁵

However, unlike judicial decisions that provide explanations as to why a court declines to grant prudential standing in a given case or why it decides to abstain from hearing a case due to federalism concerns, contemporary exercise of certiorari does not fit within the type of “principled discretion” described by Shapiro. Certiorari does not involve the application of identifiable criteria that are “capable of being articulated and openly applied by the courts, evaluated by critics of the courts’ work, and reviewed by the legislative branch.”²¹⁶ Rather, as a result of Congress’s vague delegation to the Court, the Court’s discretion to “grant or deny review of cases within [its certiorari] jurisdiction is limited only by any guidelines that the Court chooses to impose on itself.”²¹⁷

IV. CHECKING THE COURT’S DISCRETION: SOME POSSIBLE SOLUTIONS BASED ON ADMINISTRATIVE LAW PRINCIPLES

In thinking about how the Court’s discretion might be reformed to help legitimate and constrain the Court’s certiorari process, various lessons drawn from administrative law are worthy of serious consideration. First, analogizing to the nondelegation doctrine, this Part considers whether Congress should attempt to legislate an “intelligible principle” to guide the Court’s discretion. Second, this Part examines whether the reason-giving requirement found in administrative law suggests the need to mandate greater disclosure in the certiorari process, either through a traditional reason-giving requirement or some other type of vote-disclosure requirement. Third, this Part analyzes whether the Court—inspired by public-participation mechanisms used by administrative agencies—should become more willing to solicit views on the cert-worthiness of cases from knowledgeable outsiders. Ultimately, this Part concludes that although it might be advisable for Congress to set forth an “intelligible principle” to guide certiorari decisions in order to ward off any possible nondelegation-esque con-

²¹⁵ See Shapiro, *supra* note 212, at 550-52. Certain abstention doctrines have been criticized as inconsistent with separation of powers. See, e.g., Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984) (arguing that judge-made abstention doctrines used in the federalism context “could be characterized as a judicial usurpation of legislative authority, in violation of the principle of separation of powers”).

²¹⁶ Shapiro, *supra* note 212, at 578.

²¹⁷ *Id.* at 562.

cerns, a vote-disclosure requirement and increased opportunities for public participation offer the most promising and feasible means to improve accountability and to increase monitoring opportunities.

A. *Legislating More Specific Standards*

The most obvious way to provide a check on the Court's certiorari discretion would be for Congress to pass legislation that more specifically delineates the standards to be used in certiorari decisions.²¹⁸ In other words, inspired by the nondelegation doctrine, Congress could pass legislation setting forth an "intelligible principle" to guide the Court's discretion and to force the Court to consider specific factors when making certiorari decisions.²¹⁹

As Congress has often done in the administrative context, it would be fairly simple for Congress to add a vague legislative standard—like "in the public interest" or "based on the public importance"—to the statutes that currently govern the Court's certiorari jurisdiction. A statute in Maryland, for instance, provides that the state's highest court should grant certiorari if the court determines that review is "desirable and in the public interest."²²⁰ Similarly, in 1975, Canada's parliament gave Canada's Supreme Court wide discretion to hear any case that the Court determines should be decided by "reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question."²²¹

²¹⁸ Alternatively, a constitutional amendment might enumerate factors to guide the Court's power of discretionary review. *See, e.g.*, GA. CONST. art. VI, § 6, para. 5 ("The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance."); OHIO CONST. art. IV, § 2(B)(2)(e) ("In cases of public or great general interest, the Supreme Court may direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify, or reverse the judgment of the court of appeals."). However, a constitutional amendment not only seems highly unlikely, but also might well be undesirable because it would take valuable flexibility away from Congress.

²¹⁹ An additional benefit of having Congress legislate more specific certiorari standards would be that litigants could be sanctioned for filing frivolous certiorari petitions. Estreicher and Sexton have suggested that the Supreme Court adopt a rule analogous to Rule 11 of the Federal Rules of Civil Procedure. Estreicher & Sexton, *supra* note 98, at 801-02. This might discourage the filing of frivolous petitions, allowing the Court to focus more closely on meritorious petitions.

²²⁰ MD. CODE ANN., CTS. & JUD. PROC. § 12-203 (LexisNexis 2006).

²²¹ *See* ROY B. FLEMMING, TOURNAMENT OF APPEALS: GRANTING JUDICIAL REVIEW IN CANADA 5 (2004) (noting that "[t]he 1975 reform gave Canada's Supreme Court wide latitude, declaring that the decision to grant leave to appeal rested on the Court's determination of the 'public importance' of issues raised by an application") (quoting Supreme Court Act, R.S.C. 1985, c. S-26, s. 40(1) (Can.)).

The addition of an elastic standard along these lines would likely be enough to provide the intelligible principle required by today's weakened nondelegation doctrine.²²² Indeed, adding such a standard might well be advisable to avoid any potential nondelegation concerns. In terms of constraining effects, however, such a "public importance" standard might at most preclude a Justice who agrees that a case raises issues of great public importance from voting to deny the case for purely political or strategic reasons. This standard might also preclude the Court from taking into account the quality of the lawyering when deciding whether to grant certiorari. For the most part, however, it would seem that the addition of such a vague standard would do little to truly constrain the Court.²²³

The next question, accordingly, becomes whether it would be desirable for Congress to legislate more specific, detailed certiorari standards that would have a greater constraining effect.²²⁴ In the past, some have argued that Congress should try to more carefully delineate the kinds of cases that warrant certiorari review. Herbert Wechsler, for example, argued in 1961 that "much would be gained if the governing statutes could be revised to play a larger part in the delineation of the causes that make rightful call upon the time and energy of the Supreme Court."²²⁵ The fact that Congress has not done so—

²²² See, e.g., *NBC v. United States*, 319 U.S. 190, 225-26 (1943) (holding that a congressional delegation to the Federal Communications Commission to regulate broadcasting licensing for "public interest, convenience or necessity" was not unconstitutionally vague); *United States v. Rock Royal Coop.*, 307 U.S. 533, 574-77 (1939) (upholding a delegation to the Secretary of Agriculture to regulate milk prices in the "public interest").

²²³ Cf. *State v. Tyson*, 544 S.E.2d 444, 446 (Ga. 2001) (noting that a Georgia constitutional provision giving the Georgia Supreme Court the power to review by certiorari cases in the Court of Appeals which are of "gravity or great public importance" places "no limit" on the court's certiorari jurisdiction).

²²⁴ Various state statutes might provide clues about how this could be done. For example, a New Mexico statute provides that its supreme court has jurisdiction to review via certiorari decisions of the court of appeals that (1) conflict with a decision of the supreme court; (2) conflict with a decision of the court of appeals; (3) involve a "significant question of law under the constitution of New Mexico or the United States"; or (4) involve an issue of "substantial public interest that should be determined by the supreme court." N.M. STAT. ANN. § 34-5-14 B (1996). The Supreme Court in New Mexico appears to pay attention to these four statutory factors—it has indicated that there are "four grounds" on which the court may grant certiorari. *Paule v. Santa Fe Cnty. Bd. of Cnty. Comm'rs*, 117 P.3d 240, 246 (2005); see also N.M. R. APP. P. 12-502(C)(2) (requiring petitioners to state the basis for granting certiorari, including whether any of the four statutory factors are present).

²²⁵ HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 15 (1961). Estreicher and Sexton have made a related but different suggestion, arguing that *the*

despite mounting criticism of the certiorari process—seems to highlight a fairly widely held assumption: certiorari decisions are driven by a variety of factors, including the importance of the questions, the presence of a conflict in the lower courts, the need for further percolation of the issues, and the need for clarification of the law.²²⁶ Hence, some level of flexibility seems desirable in certiorari decisions.²²⁷ Just as it has proven undesirable for Congress to speak with great specificity in many areas of the law that benefit from administrative flexibility,²²⁸ it would seem undesirable and perhaps quite difficult for Congress to specify precisely the Court’s jurisdiction in a way that would preclude the Court from exercising some judgment about which cases should be heard. After all, as Alexander Bickel and Doris Provine have described, the Court’s power *not* to hear cases is “part of the foundation of its institutional strength,” enabling the Court to “sidestep or postpone politically damaging disputes” or to “respond to changing litigation patterns.”²²⁹

Consistent with this notion that flexibility is valuable in the agenda-setting process, most states have chosen to leave their highest courts

Court itself should “develop more specific criteria for selecting cases for review” because “[t]he lack of meaningful criteria contributes to overgranting and overpetitioning, because litigants can never be certain whether their cases merit review.” Estreicher & Sexton, *supra* note 98, at 800.

²²⁶ See GRESSMAN ET AL., *supra* note 3, at 233-310 (describing numerous factors that motivate the Court’s exercise of jurisdiction); Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, The Lower Federal Courts, and the Nature of the “Judicial Power,”* 80 B.U. L. REV. 967, 979-80 (2000) (noting that the Court sometimes takes the need for percolation into account when deciding whether to grant certiorari). *But see* REHNQUIST, *supra* note 38, at 235 (suggesting that “there are really only two or three factors involved in the certiorari decision—conflict with other courts, general importance, and perception that the decision is wrong in light of Supreme Court precedent”).

²²⁷ See, e.g., *Hearing on H.R. 8206*, *supra* note 153, at 21 (statement of Justice James C. McReynolds) (“It is almost impossible to define [the Court’s certiorari jurisdiction] with sufficient accuracy and certainty, and there ought to be some flexibility, and that flexibility is gained by means of the application for certiorari.”); *Hearing on H.R. 10479*, *supra* note 151, at 3 (statement of Chief Justice William H. Taft) (rejecting the idea that the Court’s jurisdiction be limited via careful congressional delineation because “it is a very difficult thing to include all the important cases, and it is a very difficult thing to exclude the unimportant cases”); Meador, *supra* note 122, at 660 (“Any [congressional] effort to define by statute the types of cases to which the Court would be required to devote its limited resources would likely be either over-inclusive or under-inclusive.”).

²²⁸ See *The Supreme Court, 2009 Term—Leading Cases*, 124 HARV. L. REV. 360, 368 (2010) (“Legislatures often pass laws in broad terms to allow flexibility for future developments or to defer details to specialized executive agencies.”).

²²⁹ PROVINE, *supra* note 22, at 72; see also BICKEL, *supra* note 15, at 111-98 (describing “passive virtues” whereby courts might choose not to hear certain cases).

with docket-setting discretion.²³⁰ In Kansas, for example, a statute lists various non-binding factors that the court should consider, such as the “general importance of the question presented” and the “existence of a conflict.”²³¹ Similarly, in Minnesota, a statute delineates factors that its court “should” take into account when deciding whether to grant a petition for further review, including the importance of the question and whether a statute has been held unconstitutional,²³² but these factors are merely “intended to be instructive” and are “neither mandatory nor exclusive.”²³³ Hawaii presents a similar situation.²³⁴ This highlights the need to look to other more indirect forms of constraint in the certiorari context, just as other more indirect forms of constraint have been instrumental in controlling delegated discretion in the administrative law arena.

B. Mandating Disclosure to Enable Greater Transparency and Monitoring

An alternative means of reining in the Court’s discretion and enabling greater oversight and transparency would be for Congress to mandate—or for the Court to voluntarily impose upon itself—some kind of disclosure requirements. Two possible disclosure requirements are considered here: (1) requiring the Court to explain the reasons behind certiorari decisions; and (2) requiring disclosure of the Justices’ certiorari votes. Ultimately, this Section concludes that although a full-blown reason-giving requirement is unlikely to succeed, vote-disclosure requirements seem more feasible.

²³⁰ See Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida’s System With Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 23 (1993) (noting that the “majority of state appellate court systems consist of two tiers: a court of last resort, usually called the supreme court, and an intermediate appellate court, usually called the courts of appeals” and explaining that “[o]ne of the hallmarks of a two-tier appellate court system is discretionary supreme court review”). One notable outlier is Florida. In Florida, the state constitution sets forth specific criteria for discretionary review in a fairly restrictive manner. See *id.* at 48 (noting that “Florida’s system runs counter to prevailing practice, in that the supreme court’s constitutional categories are not guidelines, but are jurisdictional limitations”).

²³¹ KAN. STAT. ANN. § 20-3018(b) (2010).

²³² MINN. STAT. § 480A.10 (2010).

²³³ MINN. R. CIV. APP. P. 117 comment (1983). See generally Peter S. Popovich & Erin Leigh Miller, *Obtaining Review in the Minnesota Supreme Court*, 14 HAMLIN L. REV. 117, 131-32 (1990) (noting that in spite of the enumerated factors, “the granting of review is entirely discretionary”).

²³⁴ See HAW. REV. STAT. § 602-59 (2010) (noting that the “acceptance or rejection of [a petition for review] shall be discretionary upon the supreme court”); *State v. Bolosan*, 890 P.2d 673, 676 n.5 (Haw. 1995) (noting that the legislative history makes clear that the court’s review is discretionary).

1. Imposing a Reason-Giving Requirement

Reason-giving requirements used in administrative law suggest one potential way of constraining certiorari. Imposing a similar requirement on the Court's certiorari decisions would likely help ensure greater transparency, facilitate monitoring,²³⁵ and promote greater consistency.²³⁶

Without analogizing to administrative law, a few scholars—including one writing shortly after the passage of the Judges' Bill—have considered the possibility of requiring the Court to explain its certiorari decisions.²³⁷ This kind of reform, however, would likely face numerous legal and practical hurdles.

First, it might not be feasible for the Court to explain all of its certiorari decisions. Various Justices have indicated that it would be plainly impractical for the Court to do so. For example, in 1950 when the Court acted on approximately 1500 certiorari petitions per term, Justice Frankfurter explained that “it would not be feasible to give reasons, however brief, for refusing to take” cases because the “time that would be required” would be “prohibitive.”²³⁸ Similarly, writing in 1977 when the Court heard about 150 out of 4000 cases per term, then-Justice Rehnquist suggested that “there simply is not the time available to formulate statements of reasons why review is denied.”²³⁹ Today, concerns about the time-intensive nature of explaining certiorari decisions would likely be even more acute given that the Court now receives approximately 8000 or 9000 petitions per term.²⁴⁰

While it might seem that issuing a brief order stating that a certain certiorari petition was denied because it is “splitless and factbound” or because it alleges the “misapplication of a properly stated rule of law”

²³⁵ Cf. Shapiro, *supra* note 78, at 125 (“[M]ore transparency about cert decisions would encourage both public and internal discussion to focus more on the cert criteria themselves . . .”).

²³⁶ Cf. Schauer, *supra* note 211, at 641 (stating that “to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself” (emphasis omitted)).

²³⁷ See Frank D. Moore, *Right of Review by Certiorari to the Supreme Court*, 17 GEO. L.J. 307, 308 (1929) (suggesting that “the court should assign briefly its reasons for its denial”); see also Shapiro, *supra* note 78, at 125 (stating that the Court “publicly shar[ing] more information about the reasons it does or does not grant cert in particular cases” would result in greater transparency).

²³⁸ *Maryland v. Balt. Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting the denial of certiorari).

²³⁹ William H. Rehnquist, *Sunshine in the Third Branch*, 16 WASHBURN L.J. 559, 561 (1977).

²⁴⁰ See *supra* note 72 and accompanying text.

would not take that much time, this may not be true. For the most part, the Justices act on their own—without the benefit of collegial discussion—when deciding which cases merit discussion as a group, and even those certiorari petitions that are deemed worthy of group discussion receive fairly perfunctory discussion at conference.²⁴¹ Given that certiorari decisions tend to be made individually, it seems likely that different Justices might have different reasons for granting or denying certain petitions.²⁴² Accordingly, it might be quite difficult for the Court to quickly formulate any kind of unified certiorari explanations.²⁴³

Second, it might be argued that reason-giving requirements are most applicable to decisions that are driven by legal or technocratic factors and less applicable to highly discretionary decisions driven by strategic or political concerns.²⁴⁴ This argument might appear to find some support in the notion that certain agency actions—namely, those that are “committed to agency discretion by law,” such as non-enforcement decisions—are not subject to judicial review under the APA and hence are not subject to a judicially enforced reason-giving requirement.²⁴⁵ Essentially, the argument is that if actions committed entirely to agency discretion (and not constrained by legal principles) are not subject to a reason-giving requirement, then the Supreme Court’s highly discretionary certiorari decisions should not be either.

This argument against a reason-giving requirement in the certiorari context, however, is not fatal. First, when a petition seeking a rulemaking proceeding or a petition seeking the initiation of an enforcement action is filed with an agency and is denied, the agency

²⁴¹ See Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 7, at 398-99 (describing how the Justices act individually, without collective discussion, during the certiorari process).

²⁴² See *Balt. Radio Show*, 338 U.S. at 918 (Frankfurter, J., respecting the denial of certiorari) (“[D]ifferent reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable.”).

²⁴³ See GRESSMAN ET AL., *supra* note 3, at 328 (noting that “since there are so many petitions denied each term and since there are so many differing, individual reasons that can underlie a denial in a particular case,” spelling out the reasons for certiorari decisions has become “impracticable”).

²⁴⁴ Cf. Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472, 1494 (1989) (“I believe that the case selection process is, and should be, as much a political process as decisions on the merits.”); Hartnett, *supra* note 1, at 1718-26 (suggesting that certiorari decisions “frequently operate[] in the area of will and not law”).

²⁴⁵ See 5 U.S.C. § 701(a) (2006) (rendering agency action “committed to agency discretion by law” nonreviewable); see also *Heckler v. Chaney*, 470 U.S. 821, 828-32 (1985) (holding that nonenforcement decisions are generally not judicially reviewable because they are committed to agency discretion).

must provide a brief explanation for the denial.²⁴⁶ Thus, not all agency action committed to agency discretion is exempted from the reason-giving requirement.²⁴⁷ Second, the main reason that some agency action committed to agency discretion is exempted from judicial review (and hence by implication from a judicially enforced reason-giving requirement) is *not* that it would be undesirable for agencies to explain the reasoning behind their discretionary actions. Rather, agency action committed entirely to agency discretion is exempted from judicial review because there would be “no law” for the courts to apply in reviewing entirely discretionary decisions,²⁴⁸ and such decisions are left to politically accountable actors.²⁴⁹

In the certiorari context, judicial review of the Court’s certiorari decisions is never conducted by any other judicial body, and so there would be no need for the Court to explain its certiorari decisions solely in legalistic terms capable of judicial review—other than perhaps the Court’s own desire to publicly disprove the notion that certiorari “frequently operates in the area of will and not law.”²⁵⁰ Furthermore, unlike in the administrative law world, where the availability of *political* review can help to compensate for the unavailability of *judicial* review in some circumstances (as in the nonenforcement setting), the Court’s certiorari decisions are shielded not only from judicial review but also from political review.

Finally, if a reason-giving requirement were to be imposed, there is still the question of who would impose it. It seems highly unlikely that the Justices would agree to voluntarily adopt such a requirement, especially in light of statements made by various Justices, such as Chief Justice Rehnquist and Justice Frankfurter, suggesting that the Justices believe that the Court simply does not have the time to explain its certiorari decisions.²⁵¹

²⁴⁶ See *supra* note 210 and accompanying text.

²⁴⁷ See *supra* note 210 and accompanying text.

²⁴⁸ See S. REP. NO. 79-752, at 26 (1945) (suggesting that this exception to the APA was meant to apply where “statutes are drawn in such broad terms that in a given case there is no law to apply”).

²⁴⁹ Cf. Bressman, *supra* note 199, at 1659 (“Consistent with the accountability theory, an agency’s failure to act should be subject to the scrutiny of politically accountable officials.”).

²⁵⁰ Hartnett, *supra* note 1, at 1725.

²⁵¹ See *supra* notes 238-39 and accompanying text; see also *Singleton v. Comm’r*, 439 U.S. 940, 942-43 (1978) (Stevens, J., respecting the denial of certiorari) (approving of Justice Frankfurter’s view that “[p]ractical considerations preclude” the Court from explaining its decisions (quoting *Maryland v. Balt. Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting the denial of certiorari))).

So any reason-giving requirement would likely have to come from Congress. Yet congressional attempts to impose a reason-giving requirement on the Court would almost certainly elicit constitutional objections on separation of powers grounds. Support for a separation of powers argument might appear to exist in *Houston v. Williams*, an 1859 opinion written by Justice Stephen Field when he was on the California Supreme Court.²⁵² In *Houston*, Justice Field held that a California statute, which required the state appellate courts to give reasons for their decisions in writing, violated California's constitution by improperly encroaching on the judiciary's independence.²⁵³ Specifically, Justice Field wrote:

If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?

The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence. In its own sphere of duties, this Court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions.²⁵⁴

Part of what seemed to bother Justice Field about the statute's imposition of an across-the-board reason-giving requirement is that it would needlessly take up the court's time and resources. "It is not every case," Justice Field wrote, "which will justify the expenditure of time necessary to write an opinion."²⁵⁵

Other state courts, including the Supreme Court of Arkansas²⁵⁶ and the Supreme Court of Indiana,²⁵⁷ have embraced Justice Field's reasoning in *Houston*. In addition, *Houston* was recently cited by Judge

²⁵² 13 Cal. 24 (1859).

²⁵³ *Id.* at 25. For an analysis of what happened post-*Houston* and the history surrounding a constitutional amendment that requires reasons for judicial opinions, see *People v. Kelly*, 146 P.3d 547, 550-53 (Cal. 2006). See also CAL. CONST. art. VI, § 14 ("Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.").

²⁵⁴ *Houston*, 13 Cal. at 25.

²⁵⁵ *Id.* at 26.

²⁵⁶ See *Vaughan v. Harp*, 4 S.W. 751, 752-53 (Ark. 1887) (concluding that the legislature has no authority to require the court to give written reasons for its decisions).

²⁵⁷ See *In re Griffiths*, 20 N.E. 513, 513-14 (Ind. 1889) (holding unconstitutional a statutory provision requiring the Indiana Supreme Court to make a syllabus of each opinion).

Alex Kozinski in a statement to a congressional subcommittee cautioning Congress against intervening to address the issue of unpublished judicial decisions.²⁵⁸ Hence, it seems that if Congress were to impose a reason-giving requirement on the Court, those inclined to oppose the requirement might well look to the separation of powers arguments raised in *Houston*.²⁵⁹

However, any arguments along these lines might well be overcome simply by relying upon Article III, Section 2 of the U.S. Constitution, which provides that the Court shall have appellate jurisdiction over specified cases “with such Exceptions, and *under such Regulations as the Congress shall make.*”²⁶⁰ In light of the Constitution’s grant of power to Congress to make exceptions and to promulgate regulations governing the Court’s jurisdiction, it might be permissible for Congress to delegate to the Court the power to decide which cases it will hear subject to the caveat that the Court must explain its decisions to decline to exercise jurisdiction. In other words, it might be possible—consistent with separation of powers principles—to say that Congress’s decision to delegate its own legislative-like powers to the Court can have certain strings attached, such as the requirement that the Court explain itself in carrying out a role that Congress could have per-

²⁵⁸ *Unpublished Judicial Decisions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. 16 (2002) (statement of Judge Alex Kozinski).

²⁵⁹ *Cf.* *United States v. Lopez*, 514 U.S. 549, 614 (1995) (Souter, J., dissenting) (suggesting that “an Act of Congress mandating long opinions from this Court” would be “patently unconstitutional”).

²⁶⁰ U.S. CONST. art. III, § 2 (emphasis added). Interestingly, some state constitutions explicitly give the states’ highest courts—not the state legislatures—the power to promulgate rules defining the courts’ appellate jurisdiction. For example, the Illinois Constitution, adopted in 1970, gives its supreme court the power to provide by *court rule* for appeals other than appeals as of right specified in the federal or state constitution. ILL. CONST. art. 6, § 4(b)–(c). Similarly, the Kentucky Constitution declares that in all but certain specified types of cases, “the Supreme Court shall exercise appellate jurisdiction as provided by its rules.” KY. CONST. § 110(2)(b); *see also* IND. CONST. art. 7, § 4 (“The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death shall be taken directly to the Supreme Court.”); MICH. CONST. art. 6, § 4 (“The supreme court shall have . . . appellate jurisdiction as provided by rules of the supreme court.”); VT. CONST. ch. II, § 30 (“The Supreme Court shall exercise appellate jurisdiction in all cases, criminal and civil, under such terms and conditions as it shall specify in rules not inconsistent with law.”).

formed itself. After all, this is similar to what Congress routinely does when it hands legislative powers to administrative agencies.²⁶¹

In any event, this constitutional question might well be mere academic sport because of a serious practical hurdle that would likely get in the way of any congressionally imposed reason-giving requirement: the Court might choose to thumb its nose at Congress by providing only very vague and general explanations in response to any such statute. The nub of the problem is *quis custodiet ipsos custodes*: who would guard the guardians? The experiences of two states—Michigan and Maryland—corroborate this concern.

A provision of the Michigan constitution mandates that the state's supreme court provide "reasons for each denial of leave to appeal."²⁶² This constitutional provision came about as a result of a 1961–1962 constitutional convention through which Michigan created an intermediate appellate court and modified the state supreme court's appellate jurisdiction, making it almost completely discretionary.²⁶³ As Maurice Kelman has detailed, "[p]revious Michigan constitutions directed the supreme court to issue explanatory opinions for all decisions," but to the extent that the court enjoyed some discretionary jurisdiction prior to 1963, the court was not constitutionally required to offer a public explanation for the discretionary decision to deny review.²⁶⁴ Thus, when significant expansion of the state supreme court's discretionary jurisdiction was contemplated at the 1961–1962 constitutional convention, three delegates offered the Donnelly Amendment, which proposed requiring the court to give "reasons for each denial of leave to appeal."²⁶⁵ The delegate who proposed the amendment stated during the convention that she envisioned that this would simply require the court to provide a very short, concise statement of why

²⁶¹ See 5 U.S.C. § 555(e) (2006) (requiring that notices of agency denial of applications be accompanied by "a brief statement of the grounds of denial"); *id.* § 706(2)(A) (giving courts the power to review an agency decision for arbitrariness or capriciousness).

²⁶² See MICH. CONST. art. VI, § 6 ("Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal.").

²⁶³ See Maurice Kelman, *Case Selection by the Michigan Supreme Court: The Numerology of Choice*, 1992 DETROIT C. L. REV. 1, 7 (describing the Convention's actions to "create[] an intermediate appellate court" and modify "the existing constitutional reference to the supreme court's appellate jurisdiction" (internal quotation marks omitted)).

²⁶⁴ *Id.* at 8-9.

²⁶⁵ *Id.* at 9 (emphasis omitted) (quoting MICH. CONST. art. 6, § 6).

leave was denied, for example, because the case raises “merely a question of fact.”²⁶⁶

Proponents of the Donnelly Amendment made various arguments in support of the proposed provision.²⁶⁷ For example, one delegate argued that if the court considers a petition, “it must have arrived at a rational basis for its decision to deny appeal, and if it has a rational basis there is no reason why it ought not say so in writing to the parties who are appealing.”²⁶⁸ Others suggested that published reasons for denial would help provide guidance to litigants and attorneys about which cases warrant appeal.²⁶⁹ Various points were raised in response, including that requiring explanations would create an “insuperable work load” for the court.²⁷⁰

One delegate even quite presciently raised the possibility that no one would be able to enforce the constitutional requirement against the court:

MR. TUBBS: [Assuming] that the answer given by the court would be something like this, “Appeal denied. Reasons, none.” Would that satisfy this amendment?

. . . .

MISS DONNELLY: Mr. Tubbs, I suggest that you as a member of the bar are not serious in saying this.

MR. TUBBS: Let me ask you another question. . . . Now, this next opinion says “Appeal denied. Reasons, we do not like the brief filed for the appellant.”

MISS DONNELLY: I like to use my first reasoning again. I don’t believe they will do that, and I don’t think you do, either.

MR. TUBBS: Third question: suppose the supreme court issues an opinion “Appeal denied. No reasons.” Who and what will enforce the constitution?

CHAIRMAN VANDUSEN: Does the lady care to answer, Miss Donnelly?

²⁶⁶ STATE OF MICHIGAN CONSTITUTIONAL CONVENTION 1961 OFFICIAL RECORD 1296 (Austin C. Knapp ed., 1962) (statement of Del. Donnelly).

²⁶⁷ See Kelman, *supra* note 263, at 9-10 (summarizing arguments made in favor of the amendment).

²⁶⁸ STATE OF MICHIGAN CONSTITUTIONAL CONVENTION 1961 OFFICIAL RECORD, *supra* note 266, at 1297 (statement of Del. Norris).

²⁶⁹ *Id.* at 1295 (statement of Del. Donnelly); *id.* at 1297 (statement of Del. Ford).

²⁷⁰ *Id.* at 1302 (statement of Del. Prettie); see also Kelman, *supra* note 263, at 10 (summarizing other arguments made by critics of the amendment, including that a statement of reasons for denial would blur the line between the merits of a case and discretionary decisions about whether to exercise jurisdiction).

MISS DONNELLY: I think you know the answer, Mr. Tubbs. Nothing will. But if the supreme court will so violate that part of the constitution, then we have a very, very serious problem in this state.²⁷¹

Just as Delegate Tubbs' questions predicted,²⁷² the Donnelly Amendment—after going into effect²⁷³—failed to yield meaningful explanations. In fact, in Michigan, “[a]ll that is filed in the clerk’s office and sent to the litigants is a standard form order filled in with the title and docket number of the case” and accompanied by boilerplate language stating that the court is “not persuaded that the question(s) presented should be reviewed.”²⁷⁴ Hence, as Kelman has pointed out in an article criticizing the Michigan court, the court is effectively ignoring the requirement set forth in the state’s constitution.²⁷⁵

Maryland’s experience with a reason-giving requirement is quite similar. A Maryland state statute provides that its highest court (the Maryland Court of Appeals), which can grant review when the court determines it is “desirable and in the public interest,” shall provide the “reasons for the denial of the writ . . . in writing.”²⁷⁶ As in Michigan, the requirement has not resulted in illuminating explanations of certiorari denials. Rather, the Court of Appeals will generally issue nothing more than formulaic language to the effect that the petition is “denied as there has been no showing that review by certiorari is desirable and in the public interest.”²⁷⁷

²⁷¹ STATE OF MICHIGAN CONSTITUTIONAL CONVENTION 1961 OFFICIAL RECORD, *supra* note 266, at 1304 (statements of Del. Tubbs and Del. Donnelly).

²⁷² See Kelman, *supra* note 263, at 12 (“The palm for prescience goes to Mr. Tubbs, not Ms. Donnelly.”).

²⁷³ MICH. CONST. art VI, § 6.

²⁷⁴ Kelman, *supra* note 263, at 12; see also, e.g., *Morrill v. St. Joseph Cnty. Road Comm.*, 699 N.W.2d 698, 698 (Mich. 2005) (denying application for leave to appeal “because we are not persuaded that the questions presented should be reviewed by this court”). This is the case despite the existence of a court rule suggesting that reasons will be given. See MICH. CT. R. 7.321 (“The reasons for denying leave to appeal, required by Const 1963, art 6, § 6 and filed in the clerk’s office, are not to be published, and are not to be regarded as precedent.”).

²⁷⁵ Kelman, *supra* note 263, at 12-13 (stating that the process “is utterly uninformative and a far cry from the statement of reasons the Constitutional Convention directed the court to give”).

²⁷⁶ MD. CODE ANN., CTS. & JUD. PROC. § 12-203 (LexisNexis 2006).

²⁷⁷ E.g., *Johnson v. Baker*, 562 A.2d 151 (Md. 1989); *Smith v. Graymar Co.*, 468 A.2d 624 (Md. 1983); *Taylor v. Benjamin*, 468 A.2d 624 (Md. 1983); *Moats v. Estate of Pumphrey*, 366 A.2d 1047 (Md. 1976); see also William L. Reynolds, II, *The Court of Appeals of Maryland: Roles, Work and Performance*, 37 MD. L. REV. 1, 15 (1977) (noting that the standard wording of an order denying certiorari simply provides in an unrevealing manner that “there has been no showing that review by certiorari is desirable and in the public interest”); cf. William J. Murphy & John J. Connolly, *Petitions for Certiorari—*

Perhaps it could be argued that the U.S. Supreme Court would be less able than Maryland and Michigan state courts to effectively ignore a reason-giving requirement because the Court stands at the pinnacle of our nation's legal system and faces intense public scrutiny through a variety of avenues, including legal blogs that might keep the Court honest.²⁷⁸ However, further evidence suggesting that a congressionally mandated reason-giving requirement might face serious hurdles can be found by looking at the Court's reactions to past congressional attempts to mandate that the Court hear certain cases. Prior to the 1988 Act,²⁷⁹ which eliminated most of the Court's mandatory jurisdiction, the Court disposed of many mandatory appeals summarily without full briefing and oral argument and without issuing a full opinion.²⁸⁰ The Court effectively thwarted Congress's intent by taking summary action before argument, such as summary affirmances and summary dismissals.²⁸¹

In short, with no means of enforcing a reason-giving requirement against the Court, the success of any such requirement would likely depend on the receptiveness of the Court. Given that it seems quite unlikely that the Court would look kindly upon a congressional mandate or would voluntarily impose such a requirement on itself, other mechanisms for constraining the Court's certiorari jurisdiction warrant consideration.

2. Requiring Disclosure of Certiorari Votes

Rather than importing administrative law's reason-giving requirement wholesale into the certiorari context, one less intrusive and much more promising means of forcing an alternative kind of disclosure might simply be to require publication of the Court's votes on certiorari petitions.²⁸² This could be a backdoor way of obtaining rea-

View From the Bar, in APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL 351 (Paul Mark Sandler & Andrew D. Levy eds., 3d ed. 2007) (noting that the judges on the Court of Appeals "rarely publish specific reasons why certiorari was either granted or denied in particular cases").

²⁷⁸ See, e.g., SCOTUSBLOG, <http://www.scotusblog.com> (last visited Oct. 15, 2011) (covering the Supreme Court, often with multiple posts per day).

²⁷⁹ See *supra* note 67 and accompanying text.

²⁸⁰ See GRESSMAN ET AL., *supra* note 3, at 364 (noting that "[i]n the 1981 and 1982 Terms, for example, 85 percent and 92 percent of the appeals from state courts, and 45 percent and 40 percent of the appeals from federal courts" were summarily dismissed).

²⁸¹ *Id.*

²⁸² The possibility of calling for vote disclosure was mentioned by Doris Provine in 1980. See PROVINE, *supra* note 22, at 177 ("Interested persons should have access to

sons for some of the Court's certiorari decisions since the Justices—knowing that their certiorari votes would be made public and fearing that their votes could be misread as a reflection on the merits of the case—might be more inclined to choose on their own initiative to explain their certiorari votes in certain cases.²⁸³ For example, a Justice might opt to write an explanation of a vote to deny a petition by noting that jurisdictional defects in the petition precluded a vote to grant but that the substantive issues raised in the petition warrant review in a future case, thereby signaling to the outside world that the Justice is interested in the merits of the issue raised.

A vote-disclosure requirement also might be a way of encouraging the Justices to rely less on their law clerks for petition screening and to pay more careful attention to certiorari petitions.²⁸⁴ After all, the Justices' own names would be publicly attached to certiorari decisions at the time the decisions are made rather than (as is the case under our current system) years or decades after the fact when a retired colleagues' papers are made public. In addition, publication of the discuss list might help to cut down on frivolous filings. An attorney might be reluctant to recommend that a client spend money on a certiorari petition if the attorney knew that the client would ultimately learn that no Justice on the Court voted to grant certiorari.

Perhaps even more importantly, a vote-disclosure requirement could be used to facilitate public oversight and political monitoring, just as transparency in administrative decisionmaking facilitates political control and oversight. Specifically, Congress could use vote-disclosure information to consider whether (and how) to revise the Court's jurisdictional statutes.²⁸⁵ In addition, both the President and

voting data that will enable them to piece together the considerations the Court takes into account in deciding cases.”).

²⁸³ See *id.* (“Publication of votes might indeed encourage some justices to write opinions justifying their case-selection votes, but this is an insufficient argument against any disclosure at any time.”); cf. Steve Albert, *The Ninth Circuit's Secret Ballot: Some Judges Want to Reconsider the Private Nature of Votes for En Banc Review*, RECORDER (S.F.), Mar. 3, 1995, at 1 (noting that some judges in the Ninth Circuit worry that if en banc votes were publicly revealed, “their votes could be misread as reflecting their judgments on the merits of a case”).

²⁸⁴ Cf. Shapiro, *supra* note 78, at 116-29 (discussing concerns about the role that clerks play in the certiorari process).

²⁸⁵ Congress could receive assistance in analyzing the “real-time” voting data from scholars who already mine the papers of retired Justices to try to piece together clues about how the Court has handled certiorari petitions in the past. See, e.g., Cordray & Cordray, *Strategy in Supreme Court Case Selection*, *supra* note 7, at 29 (“By comparing the Justices' voting alignments on certiorari to their voting alignments on the merits in granted cases, we saw strong evidence that there is a significant merits-oriented com-

the Senate could use the information to put the spotlight on certiorari in the confirmation process and to take nominees' views on certiorari into account when nominating and confirming Justices.²⁸⁶

Two possible means of requiring vote disclosure are considered here: (a) requiring disclosure of those certiorari petitions that fail to make the Court's discuss list; and (b) requiring disclosure of the Justices' votes on all other certiorari petitions. Whether imposed by Congress or by the Court itself, these kinds of vote-disclosure requirements offer a promising mechanism to increase transparency and improve public monitoring of the Court.

a. *Votes on Petitions That Fail to Make the Discuss List*

Requiring public disclosure of those certiorari petitions that are automatically denied without discussion would be an easy way to shed some light on the certiorari process and enable greater monitoring. Unlike a reason-giving requirement, such disclosure would not impose a time-consuming burden on the Justices. Since the Court already internally tracks which cases make the discuss list and which do not, it

ponent in the Justices' decisionmaking on certiorari."); Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 766 (2001) (finding that over half of the cases eliminated through the certiorari process either raised a "frivolous" question, did not have an opinion on the merits from the court immediately below the Supreme Court, or involved a pro se petitioner); Nancy C. Staudt, *Agenda Setting in Supreme Court Tax Cases: Lessons from the Blackmun Papers*, 52 BUFF. L. REV. 889, 892 (2004) (investigating Justice Blackmun's papers to determine "the factors that explain the Supreme Court's decision to grant certiorari to federal tax controversies").

²⁸⁶ In recent confirmation proceedings, certiorari has surfaced but generally has played only a bit part. For example, Justice Sonia Sotomayor was asked whether she would join the cert pool and whether she would have granted certiorari in a particular case that the Court denied. See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 438, 440 (2009). In addition, Justice Elena Kagan was asked whether she would grant certiorari in specific cases, and she was asked what factors would motivate her certiorari grants. See *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 78, 248-50 (2010). Justice Kagan was also asked about a certiorari memo she wrote as a law clerk to Justice Marshall in which she cautioned the Justice against granting in the case because "the Court might create some very bad law on abortion and/or prisoners' rights." *Id.* at 107. Chief Justice John Roberts was asked how he would decide "which cases will make the cut and will be heard by the Supreme Court" and what would guide his "complete discretion to choose which cases to hear." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 336 (2005). Justice Alito was asked whether he would join the cert pool. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 394-95 (2006).

would be quite simple for the Court to release a list of certiorari petitions that were denied without receiving conference discussion. If the Court were to disclose all cases that fail to make the discuss list, it would, by negative inference, also disclose those cases that *did* make the discuss list.

Certainly, the mere disclosure of those petitions that fail to make the discuss list would not enable the outside world to learn *why* certain cases did or did not warrant discussion, but such disclosure would reveal—in a minimally intrusive manner—which petitions yielded discussion and which did not, as well as precisely how many petitions fail to yield any conference discussion in a given year. Accordingly, Court watchers and Congress alike would gain valuable information about how the Court is exercising its discretion.

Such a disclosure requirement would not be unheard of in the judicial realm, but rather finds an analog in various federal courts of appeals' en banc procedures.²⁸⁷ Much like petitions for certiorari filed with the U.S. Supreme Court, petitions for rehearing en banc filed with the courts of appeals are often denied, and rarely even result in a judge requesting a vote on the petition.²⁸⁸ Notably, three different circuit courts have chosen to adopt rules or internal procedures that provide that orders denying petitions for rehearing en banc shall note when no member of the circuit court requests a poll on the petition. In the Fourth Circuit, for example, if no judge requests a poll on a petition for rehearing en banc, then “the panel’s order on a petition for rehearing will bear the notation that no member of the Court requested a poll.”²⁸⁹ Similarly, in the Fifth Circuit, when no judge makes a request for a poll, “the panel’s order denying the petition for rehearing en banc must show no poll was requested.”²⁹⁰ In the Eleventh

²⁸⁷ Petitions for rehearing en banc filed in the courts of appeals are similar to petitions for certiorari filed with the U.S. Supreme Court in that both are discretionary instead of mandatory. However, they are also quite different in that a court of appeals that decides to hear a case en banc has already heard the case, whereas a petition for certiorari requests the Supreme Court to review the case for the first time. And further, when the Supreme Court is faced with a petition for certiorari on appeal from a state court, the Supreme Court is deciding whether any federal judges shall exercise the federal judicial power in the case at all.

²⁸⁸ See, e.g., Pierre H. Bergeron, *En Banc Practice in the Sixth Circuit*, 68 TENN. L. REV. 771, 780 (2001) (discussing the statistical improbability of obtaining en banc review in the Sixth Circuit).

²⁸⁹ 4TH CIR. R. 35(b).

²⁹⁰ U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, RULES AND INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 34-36 (2011), available at <http://www.ca5.uscourts.gov/clerk/docs/5thCir-IOP.pdf>.

Circuit, if no poll is requested, then “the panel must enter an order denying the petition for rehearing en banc showing no poll was requested by any judge of the court in regular active service.”²⁹¹ Hence, these three circuits’ en banc rules establish some judicial receptiveness to the notion of vote disclosure and suggest a model that could be very useful in thinking about how to mandate disclosure of the Court’s discuss list.

b. *Votes on All Petitions or All Denied Petitions*

Alternatively, the Court could be required to disclose the Justices’ votes on more than just the subset of petitions that fail to make the discuss list. This could be done by either requiring the Justices to disclose their votes on *all denied petitions* (not just those petitions that are automatically denied because they fail to make the discuss list), or by requiring the Justices to disclose their votes on *all petitions* regardless of whether the petition is granted or denied. A major advantage of vote disclosure on all petitions is that it would be easier for those external to the Court, including Congress, to monitor the Court’s certiorari decisions and to piece together possible voting patterns. One possible disadvantage, however, of disclosing votes on all petitions might be that if certiorari votes were disclosed at the time certiorari was granted, then litigants in granted cases might try to tailor their merits arguments to certain Justices based on a “tea leaf” reading of the certiorari votes.²⁹² This problem could be avoided, however, by waiting to disclose certiorari votes on granted petitions until the case is decided on the merits.²⁹³ Alternatively, a vote-disclosure requirement could be limited to denied petitions.

At the en banc level, the Fourth Circuit’s local rules provide a useful example of requiring vote disclosure for all denials. In the Fourth Circuit, not only will an order on a petition for rehearing that fails to yield a request for a poll “bear the notation that no member of the

²⁹¹ U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, ELEVENTH CIRCUIT RULES AND INTERNAL OPERATING PROCEDURES No. 5, at 147 (2011), available at <http://www.ca11.uscourts.gov/documents/pdfs/BlueAUG11.pdf>.

²⁹² Another potential disadvantage of requiring the Justices to disclose their votes on petitions that make the discuss list is that such a requirement might disincentivize the Justices from putting certiorari petitions on the discuss list in the first place. This could militate in favor of only requiring disclosure of those cases that fail to make the discuss list.

²⁹³ See FALLON ET AL., *supra* note 18, at 1482 n.18 (questioning whether, if Provine’s suggestion of vote disclosure were adopted, disclosure of votes on a grant of certiorari should “be deferred until the case has been disposed of”).

Court requested a poll,”²⁹⁴ but also if a poll *is* requested on a petition and rehearing en banc is denied, then “the order will reflect the vote of each participating judge.”²⁹⁵

Some other useful examples can be found at the state level. In Arizona, for example, Rule 23(h) of Arizona’s Rules of Civil Appellate Procedure provides: “If the Supreme Court denied review, its order shall specify those justices of the Supreme Court, if any, who voted to grant review.”²⁹⁶ This rule, accordingly, embraces the notion of vote disclosure in cases where review is denied.²⁹⁷ Similarly, in California, a court rule also calls for vote disclosure on petitions for review, but unlike the rule in Arizona, it focuses on disclosure of votes in cases where review is granted. Specifically, this rule provides: “An order granting review must be signed by at least four justices; an order denying review may be signed by the Chief Justice alone.”²⁹⁸ Thus, if one wants to learn which members of the California Supreme Court voted to grant review in a particular granted case, one need only look to the court’s

²⁹⁴ 4TH CIR. R. 35(b).

²⁹⁵ *Id.* This differs from the en banc rules of some other circuits that allow (but do not require) judges to disclose their en banc votes in certain circumstances. See U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 57 (2011), available at <http://www.cadc.uscourts.gov/internet/home.nsf/content/Court+Rules+and+Operating+Procedures> (follow “Handbook of Practice and Internal Procedures” hyperlink) (“An order granting rehearing en banc does not indicate the names of the judges who voted against rehearing, but an order denying rehearing en banc does indicate the names of the judges who voted to grant rehearing en banc, if they wish.” (emphasis omitted)); U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ch. 9.5.8, at 13 (2002), available at <http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf> (“If there is a dissent from the denial of rehearing and no dissenting opinion is filed, a notation will be added to the dispositive order, at the affirmative request of the dissenting judge, that ‘Judge ___ would grant rehearing by the court en banc.’ Any active judge may file an opinion sur denial of the petition and direct its publication.”). The Fourth Circuit rule also stands in sharp contrast to the Ninth Circuit’s procedures, which expressly provide that orders denying or granting en banc consideration will not specify the vote tally. See 9TH CIR. R. 35-1 to 35-3 advisory committee note 2.

²⁹⁶ ARIZ. R. CIV. APP. P. 23(h).

²⁹⁷ See, e.g., *State v. Johnson*, No. CR-09-0256-PR, 2010 Ariz. LEXIS 8 (Ariz. Feb. 4, 2010) (denying petition for review and noting that “Chief Justice Berch and Justice Bales voted to grant review on issue 2”), *denying review to* 207 P.3d 804 (Ariz. Ct. App. 2009); *State v. Gum*, No. CR-07-0176-PR, 2007 Ariz. LEXIS 114 (Ariz. Sept. 25, 2007) (denying review but noting that “Justice Hurwitz voted to grant review”), *denying review to* 153 P.3d 418 (Ariz. Ct. App. 2007); *Performance Funding, L.L.C. v. Ariz. Pipe Trade Trust Funds*, No. CV-02-0240-PR, 2002 Ariz. LEXIS 215 (Ariz. Dec. 4, 2002) (denying review but noting that “Chief Justice Jones voted to grant review”), *denying review to* 49 P.3d 293 (Ariz. Ct. App. 2002).

²⁹⁸ CAL. R. CT. 8.512(d)(1).

minutes,²⁹⁹ which indicate which justices voted to grant the petition.³⁰⁰ The justices in California are also free to note their votes in cases that are denied review, but court rules do not mandate vote disclosure in the case of denials as opposed to grants.³⁰¹

The fact that some federal and state courts have chosen to promulgate court rules imposing vote-disclosure requirements suggests that it might not be all that unrealistic to believe that the U.S. Supreme Court would be willing to do so as well. Alternatively, a vote-disclosure requirement could come from Congress. Congressional action along these lines might raise separation of powers questions similar to those that would be raised if Congress considered imposing a traditional reason-giving requirement on the Court. However, as discussed above, any such separation of powers concerns might be surmountable in light of Article III's textual grant of power to Congress to make regulations governing the Court's jurisdiction.³⁰² Furthermore, any concerns that might flow from separation of powers principles would seem to be less significant in the vote-disclosure context than in the traditional reason-giving context. Unlike a full-blown reason-giving requirement, vote disclosure would not require significant time or resources and hence could not as easily be said to unduly interfere with the Court's ability to carry out its judicial functions.³⁰³ Nonetheless, even if Congress could impose a vote-disclosure requirement on the Court without violating separation of powers principles, it would seem preferable to have the Court voluntarily impose the requirement on itself in order to maximize judicial compliance with the requirement.

²⁹⁹ See Lawrence Baum, *Decisions to Grant and Deny Hearings in the California Supreme Court: Patterns in Court and Individual Behavior*, 16 SANTA CLARA L. REV. 713, 716 (1976).

³⁰⁰ California makes the court's meeting minutes available online. *Minutes: Supreme Court and Courts of Appeal*, CAL. CTS., <http://www.courtinfo.ca.gov/cgibin/minutes.cgi> (select "Supreme Court" from the dropdown menu) (last visited Oct. 15, 2011).

³⁰¹ SUPREME COURT OF CAL., THE SUPREME COURT OF CALIFORNIA pt. IV.I (2007), available at http://www.courts.ca.gov/documents/2007_Supreme_Court_Booklet.pdf ("In any case in which the petition, application, or motion is denied, a justice may request that his or her vote be recorded in the court minutes.").

³⁰² See *supra* notes 252-61 and accompanying text.

³⁰³ See *Houston v. Williams*, 13 Cal. 24, 26 (1859) (striking down a reason-giving requirement in part because the requirement would needlessly take up the court's time and resources).

C. *Enabling Greater Public Participation*

One final means of reforming the Court's certiorari discretion would seek to enable greater public participation in the certiorari process by analogizing to public participation mechanisms that exist in the administrative law world. The goal certainly would not be to move the certiorari process to a full-blown notice-and-comment rule-making model, which is cumbersome and can take years to complete.³⁰⁴ Rather, the goal would be to increase the opportunity for participation by knowledgeable outsiders through greater invited and uninvited amicus curiae participation and through greater use of "certification," which allows the lower federal courts to certify questions of law to the Court for resolution.³⁰⁵

Currently, the primary sources that the Court looks to when making certiorari decisions are the written briefs filed by the petitioner seeking certiorari, any brief in opposition filed by the respondent, and the opinions below.³⁰⁶ Certiorari decisions are thus based primarily on information presented to the Court in the parties' briefs through a fairly closed judicial process. This highlights how Congress has removed important questions about what kinds of cases the Court should hear from the usual legislative arena where public participation and open deliberation can easily occur. It also highlights how the Court must make certiorari decisions based on limited information regarding the importance of the case. Enabling greater participation by knowledgeable outsiders in the certiorari process could help to open up the process to greater public awareness and deliberation.

Moreover, encouraging greater public participation could help reduce the risk of "capture" of the Court by the expert Supreme Court bar.³⁰⁷ As Richard Lazarus has demonstrated, expert Supreme Court

³⁰⁴ See Julia Kobick, *Negotiated Rulemaking: The Next Step in Regulatory Innovation at the Food and Drug Administration?*, 65 FOOD & DRUG L.J. 425, 431 (2010) (noting that notice-and-comment rulemaking can take several years to complete).

³⁰⁵ See 28 U.S.C. § 1254 (2006) (giving the Court jurisdiction to review cases in the court of appeals via certification).

³⁰⁶ Respondents do not always provide the Court with a written brief opposing certiorari. See GRESSMAN ET AL., *supra* note 3, at 508 (noting that respondents can choose to "waive the right to oppose a petition").

³⁰⁷ See Lazarus, *supra* note 11, at 90 (describing the increasing influence of the Supreme Court bar); see also Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1562-64 (2008) (highlighting the influence of the Supreme Court bar and urging reform from both the bar and the Court); Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175, 203 (2007)

advocates were responsible for 53.8% of the petitions granted plenary review during the 2007 Term—a number that has steadily increased from only 5.8% of plenary grants in the 1980 Term.³⁰⁸ These statistics, according to Lazarus, raise “the very real possibility that the Court’s plenary docket is increasingly captured by an elite group of expert Supreme Court advocates, dominated by those in the private bar” who “know best how to influence the decisionmaking of the Justices at the jurisdictional stage.”³⁰⁹

1. Invited Amici Briefs

One potential way of increasing the opportunity for broader public participation at the certiorari stage involves encouraging “the Justices to be more willing at the jurisdictional stage to seek input from those outside the Court who are knowledgeable about the issues raised by a pending petition.”³¹⁰ It is well established that the Court can reach out and invite the views of those who are not involved in the case at the certiorari stage,³¹¹ but to date the Court has used this power almost exclusively to invite the views of the Solicitor General (“SG”) through what is known as a “CVSG”—an order that “calls for the views of the Solicitor General.”³¹² There is room, then, for the Court to reach out to others at the certiorari stage.

For example, the Court might invite the views of states at the certiorari stage, or might invite the views of advocacy organizations with expertise relating to the issues raised by the petition, such as the ACLU or the AFL-CIO. Since the SG’s office generally presents the views of the executive branch, the Court might also invite the views of members of the legislative branch in certain cases. Unlike the executive branch, which is headed unilaterally by the President, Congress—with

(“[C]ertain experienced practitioners enjoy disproportionate success in crossing the Court’s [certiorari] threshold.”).

³⁰⁸ Lazarus, *supra* note 11, at 90.

³⁰⁹ *Id.* at 89.

³¹⁰ *Id.* at 96.

³¹¹ See GRESSMAN ET AL., *supra* note 3, at 516-17 (noting that the Court typically reaches out for the opinion of the United States or a state). See generally David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 242 (2009) (discussing the Court’s ability to invite the views of those outside the Court at the certiorari stage).

³¹² See GRESSMAN ET AL., *supra* note 3, at 516-17 & n.178; cf. John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 525 (2010) (noting that CVSGs have been used by the Court at the certiorari stage to invite the Solicitor General’s views for about a half century now).

its many members—might well face institutional difficulties if trying to formulate a unified, institutional response to an invitation.³¹³ However, groups of Congressmen or subcommittees might be able to come together to bring a legislative perspective to the table, even if it fell short of representing the views of the legislative branch as a whole.

In terms of invitations to nongovernmental amici, the Justices might hesitate because of concerns about imposing a financial burden on the invited amici. However, these concerns could be significantly reduced if the Court allowed invited amici to forego printing their briefs in booklet format and instead allowed them to file on standard-sized paper, which the Court already allows in forma pauperis filers to do.³¹⁴ Alternatively, the Court could cover the printing costs of invited amici.

2. Uninvited Amici Briefs

Besides relying solely upon additional invited amicus briefs to increase public participation in the certiorari process, another means of enabling greater input would be to encourage the increased filing of uninvited amicus briefs by interested organizations. Court rules allow interested organizations or individuals to file amicus curiae briefs either supporting or opposing certiorari if the brief is accompanied by the written consent of all parties, or if the Court grants leave to file.³¹⁵ Although certiorari-stage amicus briefs are on the rise,³¹⁶ most certiorari petitions today are unaccompanied by amicus briefs.³¹⁷ Thus, the increased filing of amicus briefs by interested and knowledgeable organizations might well serve as a useful means of boosting broader public participation and deliberation in the certiorari process and

³¹³ Cf., e.g., *INS v. Chadha*, 462 U.S. 919, 929 n.4 (1983) (noting that briefs were filed by the Senate and the House of Representatives in the case but that “[n]ine Members of the House of Representatives disagree with the position taken in the briefs” and hence “filed a brief *amici curiae*”).

³¹⁴ See SUP. CT. R. 39.3 (providing an exception to Rule 33.2, which allows in forma pauperis filers to file on 8-1/2 by 11-inch paper, except when expressly provided). Electronic filing might also be an option to consider.

³¹⁵ SUP. CT. R. 37.2(a); see also SUP. CT. R. 37.1 (“An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.”).

³¹⁶ See Tony Mauro & Marcia Coyle, *To Get on the Argument Docket, It Helps to Have Friends*, NAT’L L.J. (July 28, 2010), <http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202463990959&slreturn=1>.

³¹⁷ See *id.* (noting that the Court still generally makes certiorari decisions based only on filings from the petitioner and the respondent).

bringing more diverse views to the table,³¹⁸ as well as signaling public interest in certain cases.³¹⁹

In thinking about roadblocks that might stand in the way of the increased use of uninvited amicus briefs, one significant issue surfaces: when certiorari petitions are filed, they are not made readily accessible to the public. The Court does not post pending certiorari petitions on the Court's website. Those who are interested in monitoring certiorari petitions generally must visit the Supreme Court in Washington, D.C.; use a subscription service like Westlaw, which now includes a certiorari petition database; or closely monitor legal blogs, such as SCOTUSblog's "Petitions to Watch" list.³²⁰ Hence, if uninvited amicus briefs are to come from more than just the usual suspects at the certiorari stage, then the Court might need to consider publicly disseminating pending certiorari petitions free of charge on its website. Although this might sound like a difficult task, the creation of websites like Regulations.gov, which was designed to increase transparency in the administrative law world,³²¹ suggests that posting all pending certiorari petitions would be logistically feasible and that it might fit within the government's current focus on transparency.³²² Such a move might also fit nicely with recent steps the Court has taken to make itself more publicly accessible, such as its decision in 2010 to publicly release audio transcripts from oral arguments the same week as the argument via the Court's website.³²³

³¹⁸ See, e.g., Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 377-84 (2010) (studying the role that citizen petitions and litigation play in driving the environmental regulatory agenda and concluding that public participation might help improve the performance of environmental agencies by collecting diffuse information about environmental conditions).

³¹⁹ Cf. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 783 (2000) ("Political scientists have long perceived an analogy between interest groups lobbying legislatures and interest groups seeking to influence judicial decisions through the filing of amicus briefs.").

³²⁰ See, e.g., Christa Culver, *Petitions to Watch: Conference of September 26, 2011*, SCOTUSBLOG (Sept. 2, 2011, 7:14 PM), <http://www.scotusblog.com/2011/09/petitions-to-watch-conference-of-september-26-2011-2/>.

³²¹ See REGULATIONS.GOV, *supra* note 187 (providing an online forum for citizens to search, view, and comment on federal regulations).

³²² See Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685, 4685 (Jan. 21, 2009) (explaining President Obama's goal of governmental transparency within executive departments and agencies).

³²³ See Press Release, Supreme Court of the United States (Sept. 28, 2010), available at http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_09-28-10.html ("Beginning with October Term 2010, the audio recordings of all

Alternatively, the Court might seek to increase amicus participation at the certiorari stage by publicly releasing the Court's discuss list a certain number of weeks prior to voting on the petitions to enable interested amici to file briefs addressing whether certiorari should be granted. This is somewhat analogous to the practice of some administrative agencies issuing advanced notices of proposed rulemaking or soliciting dialogue from the public prior to engaging in rulemaking or deciding petitions seeking rulemaking.³²⁴

Of course, even if the Court did make certiorari-stage filings more readily accessible or disseminate its discuss list in advance to enable public response, additional hurdles still might stand in the way of turning uninvited amicus briefs into a successful tool for meaningful public participation. For example, the Court might not listen to the uninvited amici. This concern seems quite plausible given that—unlike in the administrative law context where the threat of judicial review motivates agencies to respond in a reasoned manner to all significant comments—there would be no judicial enforcement mechanism to force the Court to take the amici views into account. Nonetheless, since the Court lacks the power to enforce its own judgments and is in some ways beholden to public opinion,³²⁵ the Court might well have an incentive to listen closely to meaningful comments filed by amici about the importance of petitions,³²⁶ particularly in today's interconnected world in which legal blogs increasingly keep tabs on the Court and enable public discussion of the Court's actions.³²⁷

In addition, questions might arise concerning whether any uninvited amici would predominantly represent certain interest groups rather than diverse public views. Similar concerns have arisen in traditional notice-and-comment rulemaking proceedings. Although several scholars have concluded that interest groups dominate the adminis-

oral arguments heard by the Supreme Court of the United States will be available free to the public on the Court's Web site, www.supremecourt.gov, at the end of each argument week.”).

³²⁴ See generally Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1465-70 (2002) (discussing agency efforts to obtain public input prior to rule proposals).

³²⁵ See *supra* note 185 and accompanying text.

³²⁶ See Abramowicz & Colby, *supra* note 14, at 970 (arguing in the context of a proposal to inject notice-and-comment procedures into judicial decisionmaking on the merits that “notice and comment might provide genuine constraint benefits even without an enforcement mechanism” because “reputation may be a more powerful motivator of judges than of administrative agency officials”).

³²⁷ See, e.g., SCOTUSBLOG, *supra* note 278.

trative rulemaking process,³²⁸ others have found broad public participation in rulemakings.³²⁹ Furthermore, a recent study concluded that in the environmental context, public participation might help to improve the performance of environmental agencies and their agenda-setting decisions by collecting diffuse information about environmental conditions.³³⁰ Hence, in the certiorari context, there is reason to hope that increased uninvited amici participation would represent diverse public views rather than just the views of certain special interests.

3. Certification

A final way of broadening participation by knowledgeable outsiders in the Court's certiorari process would be to reinvigorate "certification." Congress has enabled certification by empowering the Court to hear cases from the courts of appeals via "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."³³¹ Despite the Justices' promises to rely upon certification when lobbying for the Judges' Bill of 1925,³³² certification has "all but disappeared in recent decades."³³³ Indeed, as Justice Stevens recently noted, "The Court has accepted only a handful of certified cases since the 1940s and none since 1981; it is a newsworthy event these days when a lower court even tries for certification."³³⁴

Amanda Tyler recently gave certification some much-needed attention, and her call for greater use of certification makes sense when thinking about different mechanisms that might be used in the certiorari context to boost participation.³³⁵ If certification were used with greater regularity by the courts of appeals, it would enable more dialogue between the Court and courts of appeals judges who are well

³²⁸ See Biber & Brosi, *supra* note 318, at 328 n.27 (noting that most scholars conclude that interest groups dominate the rulemaking process).

³²⁹ See, e.g., Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 460 (2005) (finding that comments from the lay public compose the vast majority of total comments on some regulations).

³³⁰ See Biber & Brosi, *supra* note 318, at 377-84.

³³¹ 28 U.S.C. § 1254 (2006).

³³² See Hartnett, *supra* note 1, at 1710 ("In the hearings on the Judges' Bill, it was repeatedly noted that the Supreme Court would not alone control its jurisdiction, but that the courts of appeals, by use of certification, would share in that control.").

³³³ *United States v. Seale*, 130 S. Ct. 12, 13 (2009) (Stevens, J., respecting the denial of the certified question).

³³⁴ *Id.*; see also Nielson, *supra* note 160, at 486-88 (detailing the decline of the Court's exercise of its certified question jurisdiction).

³³⁵ See Tyler, *supra* note 11, at 1326-28 (advocating a return to the use of certification).

situated to know what areas of the law need clarification. Certification, accordingly, stands as an underutilized tool that could be used with increasing frequency to achieve greater participation by knowledgeable outsiders during the certiorari process.

CONCLUSION

Concerned by the mix and number of cases the Court has been taking, scholars studying the Court have been quick to propose some fairly sweeping changes to certiorari. Some of these reforms would take discretion away from the nine Justices on the Court and transfer certiorari decisions to some other body or division. The recent Carrington and Cramton proposal, which calls for the creation of an entirely new certiorari division consisting of federal judges, is just one such example.³³⁶

This Article suggests that before the certiorari power is taken away from the Court and placed elsewhere, some basic principles and doctrines found in administrative law should be consulted. After all, the problem of confining discretion is not unique to judges, but rather is an issue that administrative law has thought long and hard about. Although certiorari involves a delegation to the Court rather than to an agency, the underlying concerns about accountability and reasoned decisionmaking remain the same. In both contexts, congressional delegations of broad discretionary power raise concerns about a deliberative and democratically accountable branch transferring power to a less accountable body.

When some of administrative law's lessons about how to constrain delegated discretion are considered in the certiorari context, several means of reforming certiorari—while leaving the Court with substantial discretion and flexibility—emerge. Specifically, vote-disclosure requirements and increased public participation surface as promising means of increasing transparency, deliberation, and accountability in the certiorari process. These potential reforms deserve serious consideration from Congress and the Court.

³³⁶ Carrington & Cramton, *supra* note 12, at 591; *see also* Levinson, *supra* note 8, at 110-11 (examining the idea of creating a "certiorari court").