NONMAJORITY RULES AND THE SUPREME COURT

RICHARD L. REVESZ† AND PAMELA S. KARLAN††

It is no secret that the Supreme Court has become a deeply divided institution. Its divisions are reflected, for example, in sharp disagreements over such issues as the constitutionality of the death penalty, the contours of the right to an abortion, and the scope of states' immunity from suit under the eleventh amendment. They are reflected in the growing polarization of the Court's voting lineups. And they are further reflected in the rising numbers of separate writings, as Justices choose to express their individual views at the expense of uniting behind a single opinion.

Less widely observed, but no less prevalent, are heated disagreements over the Court's internal operating rules—the rules the Court uses in deciding whether, and how, to decide particular cases. The Court traditionally has been reluctant to make public its inner workings. But the last few Terms have yielded a surprising number of opinions concerning these internal operating rules. The Justices' positions on these rules often are as bitterly divided as their positions on various substantive issues.

In part, of course, these disagreements can be the result of substantive conflicts. Indeed, a Justice might adopt a position on an operating rule because of its potential effect on the outcome of a particular case. But conflicts over internal operating rules can also reflect a broader struggle over the nature of the Court as an institution and over its responsibilities to the litigants before it and to the legal system as a whole.

† Assistant Professor of Law, New York University.

†† Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc.

We are grateful to Vicki Been, Rochelle Dreyfuss, Samuel Estreicher, Lewis Kornhauser, Larry Kramer, Saul Levmore, Lewis Liman, Eben Moglen, Daniel Ortiz, William Nelson, David Shapiro, and Napoleon B. Williams, Jr., for their extensive comments on earlier drafts. In addition, we appreciate the suggestions of various members of the law faculties at New York University, the University of Chicago, and the University of Virginia, and the research assistance of Robert Davis. We profited from the generous financial support of the Filomen D'Agostino and Max E. Greenberg Research Fund of the New York University School of Law.

We served as law clerks to Justice Marshall (1984 Term) and Justice Blackmun (1985 Term), respectively. Of course, our clerkships provided us with the opportunity to observe the Court's operation from a privileged vantage point. But we take seriously the obligation to respect the confidentiality of the Court's operation. Thus, our Article is based exclusively on information available in the public record.

This Article examines disputes over two important internal procedures: the "Rule of Four," which governs the Court's selection for plenary review of cases on its discretionary docket; and the "hold" rule, or "Rule of Three," which postpones decisions on petitions for certiorari or jurisdictional statements pending disposition of a case already given plenary review. While the existence of the Rule of Four has been known publicly at least since 1925 and the Justices have frequently debated its scope, the hold rule was not explicitly discussed by the Court until the 1985 Term, and it was not until the 1986 Term that the Court indicated that that rule was in fact a Rule of Three.

Both the Rule of Four and the hold rule are nonmajority rules: they can be invoked by fewer than half the Justices. At the same time, however, they set in motion a process whose outcome—a decision on the merits—is ultimately decided by majority vote. This Article looks at what happens when a minority's invocation of these rules conflicts with the contrary desire of a majority of the Court. The reasons for examining these conflicts are, first, to see whether a coherent view of the rules' boundaries emerges and, second, to determine the purpose, if any, of their nonmajority nature. This Article suggests how different visions of the role of the Court lead to different resolutions of the conflicts between the majority and a minority, and to different explanations as to why a majority vote is not required.

Two important conclusions emerge from this inquiry. First, the Court's operating rules have a significant impact on the Court's substantive decisions and on the behavior of various actors in our legal system. They affect, for example, the stability of precedent, the scope of retroactivity of substantive decisions, and the incentives faced by litigants. Second, the Justices' views on the scope of these rules exhibit a remarkable degree of inconsistency and incoherence. Their disregard for these essential attributes of adjudication, albeit in a procedural context, raises serious questions about their respect for substantive legal doctrines.

I. THE RULE OF FOUR

The Rule of Four is the mechanism that the Supreme Court uses to determine to which of the approximately four thousand cases on its discretionary docket it will give full consideration on the merits.¹

¹ It is surprising, particularly given the overwhelming support by the Justices for the abolition of the Court's mandatory jurisdiction, *see* S. ESTREICHER & J. SEXTON, *REDEFINING THE SUPREME COURT'S ROLE* 117 (1986), that the Court's official statistical sheet does not indicate how many cases invoke its discretionary jurisdiction and

Broadly speaking, the Court will schedule full briefing and oral argument whenever four Justices agree that a case deserves plenary consideration.²

Part I first discusses the genesis of the Rule of Four, the incompleteness with which it is specified, and the lack of exclusive criteria to govern the Court's exercise of its certiorari jurisdiction. Next, it identifies three areas in which the Rule potentially collides with majority rules governing other aspects of the Court's business and shows the deep divisions that have emerged as the Court has attempted to deal with these conflicts. Finally, it examines the shortcomings of the traditional view of why grants of certiorari are governed by a nonmajority rule, puts forth alternative views that have more explanatory power, and shows how different resolutions of the conflicts between the Rule of Four and the Court's majority rules can undermine the goals served by the nonmajority character of the Rule of Four.

A. *Genesis of the Rule*

The Rule of Four first received public attention during the congressional hearings that preceded the passage of the Judiciary Act of 1925,³ which converted a large part of the Court's mandatory jurisdic-

how many invoke its mandatory jurisdiction. That sheet indicates, however, that the total number of filings in the 1986, 1985, and 1984 Terms was 5123, 5158, and 5006, respectively. *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 56 U.S.L.W. 3102 (1987). It has been estimated that approximately twenty-five percent of these cases are mandatory appeals. See Coleman, *The Supreme Court of the United States: Managing Its Caseload to Achieve Its Constitutional Purposes*, 52 FORDHAM L. REV. 1, 17 (1983).

² Under its discretionary jurisdiction, the Court reviews, primarily, "[c]ases in the courts of appeals . . . [either] before or after rendition of judgment or decree," 28 U.S.C. § 1254(1) (1982), and "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" that are challenged on federal grounds, 28 U.S.C. § 1257(3) (1982). See also 28 U.S.C. § 1258(3) (1982) (Supreme Court of Puerto Rico); 28 U.S.C. § 1259 (Supp. III 1985) (Court of Military Appeals).

In addition, the Court has mandatory appellate jurisdiction, principally over cases in which the courts of appeals strike down a state statute on federal grounds, 28 U.S.C. § 1254(2) (1982), and over final judgments or decrees of state courts that strike down a federal statute or treaty or that reject a federal constitutional challenge to a state statute, 28 U.S.C. §§ 1257(1)-(2) (1982). See also 28 U.S.C. §§ 1258(1)-(2) (1982) (Supreme Court of Puerto Rico).

This Article focuses primarily on the Court's discretionary jurisdiction. But some of its conclusions are also relevant to the Court's mandatory jurisdiction. See *infra* note 173.

³ Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (current version codified at 28 U.S.C. §§ 1251-1294 (1982 & Supp. III 1985)). The Act is known as the Judges' Bill because it was drafted by a committee of Supreme Court Justices. Justice Van Devanter played the central role in this endeavor. See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 259-60 (1928).

tion into discretionary jurisdiction.⁴ Even before 1925, the Court had enjoyed some discretionary jurisdiction, and the manner in which it had made decisions on which cases to review became a focus of the hearings.⁵ In seeking to reassure Congress that giving the Court greater control over its docket would not result in the arbitrary denial of review, Justice Van Devanter recounted during the hearings the Court's then-existing practice with respect to its more limited discretionary docket: "We always grant the petition when as many as four think that it should be granted, and sometimes when as many as three think that way."⁶ Justice Van Devanter further explained that

if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case the petition [sic] should be granted.⁷

Similarly, in 1937, during the controversy over President Roosevelt's proposal to pack the Supreme Court, Chief Justice Hughes stated: "A vote by a majority [to grant certiorari] is not required . . . [E]ven if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other Justices will acquiesce in their view, but the petition is always granted if four so vote."⁸

⁴ *Procedure in Federal Courts: Hearings on S. 2060 and S. 2061 Before a Subcomm. of the Senate Comm. on the Judiciary*, 68th Cong., 1st Sess. 26-27 (1924) (statement of Justice Van Devanter) (detailing the effects of the bill) [hereinafter *Senate Hearings*]; see, e.g., F. FRANKFURTER & J. LANDIS, *supra* note 3, at 260-73 (main purpose of the Act was to reduce litigation before the Supreme Court); Frankfurter & Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 10-11 (1928) (empirical data showing the large percentage increase in discretionary jurisdiction relative to mandatory appeals following the passage of the Act); Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711, 1726-27 (1978) (data showing that the great percentage of all cases on the Court's docket are based on certiorari); Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10 (1983) (asserting that the Act copes with the "utterly impossible" task of deciding every case before the Court on the merits).

⁵ Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 976 (1957) (discussing what "Congress thought to be the practice of the Court" with respect to its discretionary jurisdiction prior to 1925).

⁶ *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearings on H.R. 8206 Before the House Comm. on the Judiciary*, 68th Cong., 2d Sess. 8 (1924) [hereinafter *1924 House Hearings*].

⁷ *Senate Hearings*, *supra* note 4, at 29.

⁸ *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong., 1st Sess., pt. 3, 490 (1937) (letter of Chief Justice Hughes read by Senator Wheeler); see Leiman, *supra* note 5, at 981-82.

Since 1937, it has become fairly clear that the rule is in fact a Rule of Four.⁹ The fact that three Justices often dissent publicly from denials of certiorari shows that the strong opinions of a small minority now are insufficient to trigger plenary consideration.¹⁰

While there is no doubt that, under the Rule of Four, four Justices have the power to commit the Court to do *something*, the Judiciary Act and its legislative history do not specify what this something

⁹ It may be, however, that in certain cases a Justice who was originally inclined to deny will vote to grant as a result of the strong views of three of his colleagues. See S. ESTREICHER & J. SEXTON, *supra* note 1, at 107 (discussing vote to "join three"). But it is clear that in many cases the strong views of three Justices are not enough. See *infra* note 10.

Justice Douglas's papers reveal that in 1969, when the Court was operating with only eight Justices as a result of the resignation of Justice Abe Fortas, it held cases in which three Justices had voted to grant certiorari pending a possible fourth vote by Justice Fortas's replacement. But it did not grant certiorari based only on three votes. See THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 139 & n.1 (M. Urofsky ed. 1987). It is not clear whether three out of seven votes are sufficient to grant certiorari. See C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 4004, at 516 & n.37 (1977).

¹⁰ This phenomenon has been relatively frequent in recent years. See, e.g., Mitchell v. Kemp, 107 S. Ct. 3249 (1987); Norvell v. Miller, 106 S. Ct. 995 (1986); Michigan v. Little, 474 U.S. 1024 (1985); Busby v. Louisiana, 474 U.S. 873 (1985); Young v. Lehman, 471 U.S. 1061 (1985); Gould v. Adams, 469 U.S. 1122 (1985); Bushey v. New York State Civil Serv. Comm'n, 469 U.S. 1117 (1985). But it is by no means purely a recent phenomenon. See, e.g., Howard v. Texas, 386 U.S. 928 (1967); Bertman v. J.A. Kirsch Co., 377 U.S. 995 (1964).

Moreover, not every Justice who votes in conference to grant certiorari dissents on the public record in every case in which certiorari is denied. See R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE § 5.6, at 267 (6th ed. 1986). Even fewer do more than summarily note their vote. Writing a dissent from denial of certiorari can be time consuming. Thus, one is likely to see written dissents from denial in only three kinds of cases: 1) cases in which the minority seeks to focus attention on the outrageousness of the majority's denial of certiorari, see, e.g., *Busby*, 474 U.S. at 873 (Marshall, J., dissenting) ("Once again this Court has declined to correct an error of constitutional magnitude with a defendant's life in the balance."); 2) cases in which the minority hopes to encourage future litigants to continue pressing the issue upon the Court, see, e.g., *McCray v. New York*, 461 U.S. 961, 970 (1983) (Marshall, J., dissenting) ("[I]t is time to reexamine whether the rule announced in [*Swain v. Alabama*, 380 U.S. 202 (1965)] can be reconciled with the Sixth Amendment right of every defendant."); or 3) cases in which, at the time the dissent was drafted and circulated, the minority hoped to pick up a fourth vote for certiorari.

Conversely, it is possible that four Justices will dissent from the denial of certiorari. In a series of obscenity cases in 1974 and 1975, "four Justices who believe[d] certiorari should issue . . . waive[d] the right to insist on decision, in recognition of the Court's clear five to four division on the merits." C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 9, § 4004, at 513 n.28 (collecting cases).

actually is.¹¹ Thus, it is not surprising that the Court has found it difficult to define the Rule's scope.¹²

Moreover, the criteria that the Court is expected to apply in deciding whether to grant certiorari are similarly opaque. Neither the Judiciary Act of 1925 nor any other statutory enactment define such criteria. The fullest explanation in the legislative history is contained in testimony by Chief Justice Taft on behalf of a predecessor bill:

The 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. . . .

. . . No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. 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 appeals.¹³

This explanation does little more than establish that it is the interest of the Court, rather than the interest of the litigants, that should govern the decision whether to grant certiorari. It does not purport to set forth specific, exclusive criteria to guide that decision.

Such criteria are also lacking in Supreme Court Rule 17, the "official" statement of the reasons for a grant, which provides:

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

¹¹ The relevant statutes prescribe only the jurisdictional prerequisites to certiorari. See 28 U.S.C. §§ 1254, 1257-1259 (1982 & Supp. III 1985). The hearings on the Judiciary Act do not explain what should happen following the grant of certiorari. See *Senate Hearings*, *supra* note 4.

¹² See *infra* notes 16-132 and accompanying text.

¹³ *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearings on H.R. 10479 Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess. 2 (1922) (testimony of Chief Justice Taft) [hereinafter *1922 House Hearings*].

Justice Van Devanter stated even more cryptically in 1924 that "the Supreme Court should not be required to review the case unless there be in it come [sic] question or matter of such importance as would cause that court in the exercise of a sound discretion to take the case." *Senate Hearings*, *supra* note 4, at 28.

Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.¹⁴

In light of the fact that Rule 17, by its own terms, is not "controlling" or a "ful[l] measur[e]" of the Court's discretion, and of the inevitable slipperiness of such concepts as "conflict" among the circuits and "important" questions of law, Rule 17 provides only the most general guidance to the Court.¹⁵

B. *Limits of the Rule*

As discussed above, while the Rule of Four means that the Court will grant certiorari whenever four Justices vote to do so, the governing statute, its legislative history, and the Court's own rules and practices all fail to define what obligations the grant of certiorari imposes on the Court as a whole and on the various Justices.¹⁶ The Court's published opinions reveal three important cleavages on these issues. First, does the grant of certiorari place on the five Justices who voted to deny certiorari an affirmative duty to *preserve* the Court's jurisdiction?¹⁷ Sec-

¹⁴ SUP. CT. R. 17.

¹⁵ See S. ESTREICHER & J. SEXTON, *supra* note 1, at 42-43, 106-09; D. PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 3 (1980) (characterizing as "obscure" the standards that the Court applies in deciding whether to take a case on the merits).

¹⁶ See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1625 (2d ed. 1973).

¹⁷ For example, if four Justices vote to grant certiorari in order to decide whether

ond, are there circumstances in which the five Justices who voted to deny certiorari can take affirmative steps to *prevent* the Court from deciding a case on the merits?¹⁸ Finally, does the grant of certiorari in a case impose on individual Justices a duty to *decide* that case?

The first two questions focus on what actions the Court will take in the face of a grant of certiorari. They arise only when certiorari has been granted despite the fact that a majority of the Justices voted to deny. If, instead, it is a majority of the Court that wishes to decide an issue on the merits, these questions as to the scope of the Rule will not arise, since there will be no conflict between the Justices voting to grant certiorari and the majority of the Court. The third question, which focuses not on the actions of the Court but on those of an individual Justice, arises whenever certiorari is granted on a less than unanimous vote.

1. The Duty to Preserve Jurisdiction

The fullest recent exploration of the Rule of Four and the duties it imposes on Justices who have voted to deny certiorari occurred three Terms ago in a capital case, *Darden v. Wainwright*.¹⁹ Darden was scheduled to be executed on September 4, 1985.²⁰ He asked the Court for a stay of execution pending the filing and disposition of his petition for certiorari. On the afternoon of September 3, 1985, the Court denied the application, by a vote of five to four.²¹ As is often the case with

a petitioner received due process in a deportation hearing and the petitioner will be deported immediately if the order of deportation is not stayed, must the Justices who did not vote to grant certiorari nonetheless vote to stay the deportation pending briefing, argument, and decision?

¹⁸ The Court frequently dismisses a writ of certiorari as "improvidently granted." See generally R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 5.15, at 288-89 (discussing the practice). Dismissal on this ground is colloquially referred to as a "DIG."

If the answer to this second question is that the Court can DIG a case even when the original four Justices who voted to grant continue to want to decide the case, a negative answer to the first question should follow a fortiori. If Justices can act to prevent the Court from hearing a case in which certiorari has been granted, certainly they can allow the Court to lose jurisdiction through inaction. See *infra* notes 123-24 and accompanying text.

¹⁹ 473 U.S. 927 (1985).

²⁰ *Id.* at 927.

²¹ Chief Justice Burger concurred in the denial, explaining that the Court had "had three prior opportunities to review the issues" raised in the stay application and that those issues had been "thoroughly considered and resolved by federal and state courts . . ." *Id.* at 927-28 (Burger, C.J., concurring).

Justices Brennan and Marshall dissented, filing their "form" dissent, see *infra* note 28, that "the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments . . ." *Id.* at 928 (Brennan & Marshall, JJ., dissenting). Even though a petition for certiorari had not yet been dock-

votes on stays, the Court did not explain the reasons for its decision.²²

Later that day, Darden asked the Court to consider the papers that he had filed in support of his application for a stay as a petition for certiorari.²³ Four Justices voted to grant certiorari;²⁴ the petition was therefore granted.

The Court, however, had already denied Darden's request for a stay of execution. Because a grant of certiorari does not of its own force operate as a stay,²⁵ the grant of certiorari would have become essentially an empty exercise unless the Court reversed its earlier decision: Darden would have been executed shortly after midnight and the Court would then have had to dismiss his claims as moot.²⁶

Ultimately, the Court, again by a vote of five to four, granted a stay.²⁷ Justice Powell was the one Justice who voted to grant the stay despite having voted to deny the petition for certiorari and the earlier

eted, they indicated that they would grant such a petition and vacate the death sentence. *Id.* (Brennan & Marshall, JJ., dissenting). Justices Blackmun and Stevens also dissented. Because the Court had not yet reviewed the denial of Darden's first federal habeas corpus petition, they believed that a stay should have been granted to permit the Court to "consider whether to grant certiorari in the normal course of business." *Id.* (Blackmun & Stevens, JJ., dissenting).

Thus, the lineup of the vote was as follows. For the stay: Justices Brennan, Marshall, Blackmun, and Stevens; against the stay: Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor.

²² For example, in one recent period, from October 9 to October 19, 1987, the Court denied stays in four cases and did not give reasons in any of those cases. *Rosenthal v. State Bar*, 108 S. Ct. 254 (1987); *Lorenzini v. New Jersey*, 108 S. Ct. 254 (1987); *Daugherty v. Florida*, 108 S. Ct. 221 (1987); *Bell v. Lynaugh*, 108 S. Ct. 221 (1987).

²³ *Darden*, 473 U.S. at 928.

²⁴ The Court virtually never reveals the number of votes in support of a petition that has been granted. In this case, however, Justice Powell's separate opinion concurring in the grant of a stay of execution provided this information. *Id.* at 928 (Powell, J., concurring).

²⁵ See R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 17.10, at 674.

In *Autry v. Estelle*, 464 U.S. 1 (1983) (per curiam), the Court denied a stay of execution in a capital case pending the filing of a petition for certiorari. Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor joined the per curiam opinion, which stated that "[h]ad applicant convinced four Members of the Court that certiorari would be granted on any of his claims, a stay would issue." *Id.* at 2. Nonetheless, when later faced with a case in which certiorari was *in fact* granted—*Darden*—four of these five Justices were unwilling to vote to issue a stay. See *infra* note 27.

²⁶ See, e.g., *Straight v. Wainwright*, 106 S. Ct. 2267 (1986) (dismissing petition for certiorari as moot after petitioner was executed).

²⁷ Four Justices indicated that they would not have granted a stay of execution: Chief Justice Burger, who dissented both from the grant of certiorari and from the grant of a stay, *Darden*, 473 U.S. at 929, and Justices White, Rehnquist, and O'Connor, who indicated summarily that they would have denied a stay, *id.* at 928. Thus, although Justice Powell was the only Justice to state on the record that he had voted to stay the execution, it follows necessarily from the published votes that Justices Brennan, Marshall, Blackmun, and Stevens also voted for a stay.

stay application.²⁸

Darden raises an important question about the nature of the obligation to preserve the Court's jurisdiction. Four Justices—Chief Justice Burger and Justices White, Rehnquist, and O'Connor—implicitly took the position that Justices who have voted to deny certiorari are under no obligation to preserve the Court's jurisdiction over a case simply because four of their colleagues have voted to hear it.²⁹ They did not explain the basis for this position or say when, if ever, Justices would be under such an obligation.

Justice Powell took a quite different position. He explained that he had voted to stay the execution, despite finding "no merit whatever in any of the claims advanced in the petition for certiorari,"³⁰ because of "the unusual situation in which four Justices have voted to grant certiorari . . . and in view of the fact that this is a capital case with petitioner's life at stake, and further in view of the fact that the Justices

²⁸ By piecing together the various public statements made by the Justices with regard to the two stay applications and the petition for certiorari, it is possible to discern the actual lineup on the vote for certiorari. Justices Brennan and Marshall had earlier voted to grant *Darden's* petition, even before it reached the Court. *Darden*, 473 U.S. at 928. Moreover, since *Gregg v. Georgia*, 428 U.S. 153 (1976), in which they announced their view that the eighth and fourteenth amendments prohibit the death penalty, *id.* at 227 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting), they have consistently voted to grant certiorari in every capital case. See Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82, 111 n.39 (1986). Thus, it is clear that they voted to grant certiorari in *Darden*.

Chief Justice Burger and Justice Powell voted to deny *Darden's* certiorari petition, which they each stated publicly to be meritless. *Darden*, 473 U.S. at 929 (Burger, C.J., dissenting); *id.* at 928 (Powell, J., concurring).

We are left, then, with two groups of Justices who are "silent" on the vote to grant—Justices White, Rehnquist, and O'Connor, who twice voted to deny the stay, and Justices Blackmun and Stevens, who twice voted to grant it. See *supra* notes 21, 27.

While it might have made sense, in order to give full effect to the Rule of Four, for Justices Blackmun and Stevens to vote to stay the execution even if they had voted to deny the petition (as Justice Powell did), it would not have made sense for Justices White, Rehnquist, and O'Connor to vote to grant a petition and then refuse to take a step—staying the execution—necessary to make the grant meaningful. See *supra* text accompanying note 26 (denial of stay would have been followed by dismissal of writ of certiorari as moot). Thus, we can assume with considerable confidence that Justices White, Rehnquist, and O'Connor did *not* vote to grant, leaving Justices Blackmun and Stevens as the other two who did.

The lineup on the vote to grant would therefore be the following. To grant: Justices Brennan, Marshall, Blackmun, and Stevens; to deny: Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor.

²⁹ See *supra* note 27. When the Supreme Court denies a stay in this posture, it is unlikely that the grant of certiorari would lead a state court or a lower federal court to grant such a stay.

³⁰ *Darden*, 473 U.S. at 928 (Powell, J., concurring).

are scattered geographically and unable to meet for a Conference³¹

Justice Powell's opinion points to two distinct considerations. To the extent that it rests on the fact that the Court has granted certiorari (and it is somewhat revealing of the conflict between the Rule of Four and the majority that instead of writing that "the Court" has granted certiorari, Justice Powell writes that "four Justices" have voted to do so),³² it sets out a categorical rule.³³ However, to the extent that it rests on the two additional factors—that Darden's life was at stake and that the Justices had voted by telephone rather than in conference—Justice Powell's opinion evokes reliance on the standard by which Justices determine whether to issue stays in their individual capacities—albeit in a somewhat modified manner.

That standard embodies a four-part test:

First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. . . . Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. . . . And fourth, in a close case it may be appropriate to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.³⁴

In *Darden*, the first prong of the test was, of course, met: by the time Justice Powell switched his vote, there was an absolute certainty that four Justices would vote to grant. The first fact to which Justice Powell referred—that Darden's life was at stake—clearly goes to, and satisfies, the third prong of the test: it is hard to imagine a harm more irrepara-

³¹ *Id.* at 928-29 (Powell, J., concurring).

³² *Cf.* Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 628 n.111 (1983) (noting irony in the Court's emphasis that the opinion in *Cooper v. Aaron*, 358 U.S. 1 (1958), is "by" all nine Justices rather than "by" the Court).

³³ But if Justice Powell intended to set out a categorical rule, his comment is somewhat perplexing. It is simply not an "unusual situation" for four Justices to vote to grant certiorari. *See* Stevens, *supra* note 4, at 17 (over 23% of petitions in 1979 Term, over 30% in 1980 Term, about 29% in 1981 Term were granted by only four votes).

³⁴ *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, Circuit Justice); *see* R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 17.19, at 690 n.83 (citing cases applying the principles of Justice Brennan's test); *see also* Comment, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. REV. 1020, 1031 (1985) (discussing Justice Brennan's test).

ble than death.

The real question, then, is whether, given the grant of certiorari, the second prong—a “fair prospect” of reversal on the merits—drops out of the equation. Clearly, in Justice Powell’s formulation, it cannot retain its full force: Justice Powell himself believed Darden’s claims had “no merit”;³⁵ he knew that Chief Justice Burger felt similarly;³⁶ and he knew that Justices White, Rehnquist, and O’Connor were willing to let Darden die without first resolving his claims even when faced with the Court’s decision to grant certiorari.³⁷ Thus, it was hard to say that Darden had a “fair prospect” of convincing the Court that the judgment of the court below was erroneous.³⁸ If the “fair prospect” prong had been strictly applied, then Justice Powell should have voted to deny the stay. But Justice Powell’s reference to the fact that certiorari had been granted hastily and without a conference suggests, at least implicitly, that the “fair prospect” prong played at least some role in his decision. Indeed, the geographic dispersal of the Justices made it unusually difficult to gauge the reason why the four Justices had voted to grant,³⁹ thereby also making it more difficult to determine Darden’s prospect for success on the merits.

No conclusions can be drawn from the result in *Darden* itself regarding the views of Justices Brennan, Marshall, Blackmun, and Stevens, who voted both for certiorari and for the stay.⁴⁰ They may well have voted for a stay only because they had voted for certiorari and therefore wanted to hear the case. Unlike Justice Powell, they did not face the question whether a Justice who has voted to deny certiorari nonetheless has the duty to vote to stay a lower court’s judgment so that the Court has the opportunity to reach the merits of a granted case.

In a case closely related to *Darden* decided in the 1985 Term,

³⁵ *Darden*, 473 U.S. at 928 (Powell, J., concurring). This is an even stronger position than Justices often have on cases where they have voted to deny certiorari. A Justice may often be convinced that a lower court’s decision is wrong without believing that the issue is of sufficient importance to justify a place on the Court’s plenary docket. See *infra* notes 140-45 and accompanying text.

³⁶ *Darden*, 473 U.S. at 929 (Burger, C.J., dissenting) (“I conclude that no issues are presented that merit plenary review by this Court.”).

³⁷ See *supra* note 28.

³⁸ On the merits, *Darden* lost five to four, with Justice Powell writing the opinion for the Court. *Darden v. Wainwright*, 106 S. Ct. 2464 (1986). Justices Brennan, Marshall, Blackmun, and Stevens dissented. *Id.* at 2476.

³⁹ See *Schlesinger v. Holtzman*, 414 U.S. 1321, 1323-24 (1973) (Douglas, J., dissenting) (stating, with regard to an order staying an injunction of bombing in Cambodia: “Seriatim telephone calls cannot, with all respect, be a lawful substitute. A Conference brings us all together . . . [T]he telephonic disposition of this grave and crucial constitutional issue is not permissible.”).

⁴⁰ See *supra* notes 27-28.

however, three of these four Justices did take an explicit position on this issue.⁴¹ In an opinion joined by Justices Marshall and Blackmun, Justice Brennan stated:

[W]hen four vote to grant certiorari in a capital case, but there is not a fifth vote to stay the scheduled execution, one of the five Justices who does not believe the case certworthy will nonetheless vote to stay; this is so that the "Rule of Four" will not be rendered meaningless by an execution that occurs before the Court considers the case on the merits.⁴²

Even though this opinion was written in the context of a capital case, its rationale might well apply more broadly to cases in which the denial of a stay would lead to mootness, thereby making it impossible for the Court to consider the merits of a case in which it had granted certiorari.⁴³

In summary, in recent Terms, four Justices—Justices Brennan, Marshall, Blackmun, and Powell—took the position that at least in some cases the grant of certiorari on the basis of four votes compels measures to protect the Court's jurisdiction; four Justices—Chief Justice Burger and Justices White, Rehnquist, and O'Connor—took the position that at least in some cases it does not; and Justice Stevens did not address the issue. With the retirements of Chief Justice Burger and Justice Powell, six of the sitting Justices have cast recorded votes, and those votes are split three to three.

A second important issue raised by *Darden* concerns whether it is ever appropriate for Justices disagreeing with the grant of certiorari to assess the reasons that led their colleagues to vote to grant. If such an inquiry is appropriate, it could have implications for the determination

⁴¹ *Straight v. Wainwright*, 106 S. Ct. 2004, 2006 (1986) (Brennan, J., dissenting). This case, in which the Court denied a stay of execution despite the vote of four Justices to "hold," is discussed at greater length in Part II. See *infra* notes 179-99 and accompanying text.

⁴² *Straight*, 106 S. Ct. at 2006 (Brennan, J., dissenting).

⁴³ Whenever a petition must be dismissed as moot, the actions of the Justices who voted to grant certiorari are "rendered meaningless." *Id.*

A curious element of Justice Brennan's position is that he suggests that only *one* of five Justices who voted to deny need switch his vote to grant a stay. The principle articulated by Justice Brennan, however, does not seem to depend on what these Justices think of the merits of the petition for certiorari or on the propriety of the votes of their colleagues. Rather, it is stated as a blanket rule, which is triggered whenever four Justices vote to grant certiorari. Thus, all five Justices who vote to deny should be in the same position with respect to an obligation to protect the Court's jurisdiction; if such an obligation attaches to one, it should attach to all. While Justice Brennan suggests that under his position a capital case that received only four votes for certiorari should be stayed on a five-to-four vote, in fact his rationale supports a nine-to-zero vote.

of when five Justices voting to deny can dismiss a petition that four have granted or, as in *Darden*, refuse to take measures to protect the Court's jurisdiction.

On this point, only one Justice reached the issue at the time certiorari and the stay were granted. In his dissent from the grant of certiorari, Chief Justice Burger stated explicitly that the petition presented no issues that "merit plenary review."⁴⁴ He suggested that it was an "abuse of discretion" for four Justices to accept for review a petition that, according to him, was "meritless."⁴⁵ Chief Justice Burger's opinion suggested that his vote to deny the stay rested on his assessment of the justifiability of his four colleagues' votes to grant certiorari.

In light of the nature of the Court's discretionary jurisdiction, it is far from self-evident what "abuse of discretion" means. As the Court has recognized in the area of administrative law, a decisionmaker's action cannot constitute an abuse of discretion where there is "no law to apply."⁴⁶ The discretion of an individual Justice in voting on petitions for certiorari is narrowed neither by statute nor by Court rule. The relevant statutes prescribe only the jurisdictional prerequisites to certiorari.⁴⁷ They say nothing about how the Court should pick, from the many cases that meet those prerequisites, the few that it considers especially worthy of review on the merits. And, the Court has done nothing to cabin significantly the discretion accorded it.⁴⁸ Thus, even if a Justice determines that a petition does not present a compelling case for review under any of the listed factors, it is difficult to see how he could conclude that the votes of four colleagues to grant certiorari constituted an abuse of discretion.

Another problem with Chief Justice Burger's position that a vote

⁴⁴ *Darden*, 473 U.S. at 929 (Burger, C.J., dissenting).

⁴⁵ *Id.*

⁴⁶ *Heckler v. Chaney*, 470 U.S. 821, 830-31 (1985). The Administrative Procedure Act ("APA") provides that judicial review is not available where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1982). In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Court determined that the exception for "'action committed to agency discretion' . . . is a very narrow exception. The legislative history of the [APA] indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case *there is no law to apply*.'" *Id.* at 410 (emphasis added) (citation omitted).

In administrative law, the "no law to apply" standard comes into play "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830. But where such standards exist, it is proper to review an agency's exercise of its discretion for "abuse of discretion." See, e.g., *id.*; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41 (1983).

⁴⁷ See 28 U.S.C. §§ 1254, 1257-1259 (1982 & Supp. III 1985).

⁴⁸ See *supra* notes 11-15 and accompanying text.

to grant certiorari can constitute an "abuse of discretion" is that the Court has never adopted a requirement that the Justices explain—either publicly or to their colleagues—the reasons underlying their votes on certiorari petitions.⁴⁹ As indicated above, the Chief Justice's conclusion that his four colleagues had erred in granting certiorari was premised exclusively on his view that, on the merits, the claims should be rejected by the Court.⁵⁰ Nothing in the public record suggests, however, that the Justices who voted to grant certiorari did so exclusively because they believed that the lower court's judgment was wrong.⁵¹

Thus, even if the factors listed in Rule 17 were the exclusive factors to guide the Court's decisions on certiorari, it may be that, consistent with Rule 17, the granting Justices determined that a decision on the merits would have, for example, "the purpose of expounding and stabilizing principles of law for the benefit of the people of the country."⁵² Unless each Justice is required to explain the basis for his decision to grant certiorari, it is impossible for other Justices to determine whether the votes to grant were an abuse of discretion.⁵³

⁴⁹ See R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 5.5, at 264. In *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950), Justice Frankfurter, discussing the reasons why the Court does not require Justices to explain denials of petitions for certiorari, stated:

[I]t has been suggested from time to time that the Court indicate its reasons for denial. Practical considerations preclude. In order that the Court may be enabled to discharge its indispensable duties, Congress has placed the control of the Court's business, in effect, within the Court's discretion. . . . If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive, apart from the fact . . . that different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable.

Id. at 918.

⁵⁰ He made this point even more clearly in a concurrence in the Court's rejection of Darden's substantive claims, in which he stated: "I voted to deny the petition in this extraordinary case because the meritless claims raised did not require plenary review. Full briefing and oral argument have not changed my views." *Darden v. Wainwright*, 106 S. Ct. 2464, 2475 (1986) (Burger, C.J., concurring).

⁵¹ This is not to say that the Justices are wholly uninformed as to why their colleagues might have voted to grant certiorari. As Justice Stevens has indicated, "law clerks prepare so-called 'pool memos' that are used by several justices in evaluating certiorari petitions." Stevens, *supra* note 4, at 13-14; see D. O'BRIEN, STORM CENTER 183 (1986) ("[I]n 1972, at the suggestion of [Justice] Powell, the 'cert. pool' was established. Six of the Justices now share their collective law clerks' memos . . ."). Presumably, as to Justices in this pool, the reasons for their votes to grant certiorari will often be those given in the "pool memos."

⁵² 1922 *House Hearings*, *supra* note 13, at 2 (statement of Chief Justice Taft).

⁵³ It is possible, of course, that a Justice will explain his vote in conference. But he certainly is not required to do so. See *infra* notes 116-19 and accompanying text.

2. The Ability to Prevent a Decision

Several times each Term, the Court declines to decide cases on which it has granted certiorari, on the grounds that the grant had been "improvident."⁵⁴ Such a dismissal, like the decision to give plenary consideration in the first place, rests wholly within the Court's discretion.⁵⁵

The most common explanation for such dismissals (or "DIG's")⁵⁶ is that it is either impossible or inappropriate for the Court to issue a decision on the merits. Briefing, oral argument, or further research by the Court may reveal that the case does not squarely present the issue on which certiorari was granted.⁵⁷ Or, changed circumstances may diminish the importance of the issue involved.⁵⁸

Because the Court has the ability to DIG, a grant of certiorari is not irrevocable. Thus, whatever a grant of certiorari entails, it does not entail a categorical obligation that the Court decide a case on the merits—that is, determine whether the judgment below should be affirmed or reversed.⁵⁹ Even if a grant of certiorari were unanimous, the Court would retain the ability to divest itself of jurisdiction.

The question therefore arises as to the relationship between the vote to grant certiorari and the vote to DIG. If the Court were to vote to grant unanimously, and then were to vote to DIG unanimously, there would be no problem. But if four Justices continue to want to hear and decide a case on the merits, then the power of the majority to DIG comes into conflict with the power of the minority under the Rule of Four.⁶⁰

⁵⁴ In the first six months of 1987, for example, the Court dismissed six cases. See *California v. Rooney*, 107 S. Ct. 2852 (1987); *Van Drasek v. Webb*, 107 S. Ct. 2171 (1987); *Lynnaugh v. Petty*, 107 S. Ct. 1596 (1987); *Missouri v. Blair*, 107 S. Ct. 1596 (1987); *United States v. Merchant*, 107 S. Ct. 1596 (1987); *City of Springfield v. Kibbe*, 107 S. Ct. 1114 (1987).

⁵⁵ See R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 5.15, at 288-93.

⁵⁶ See *supra* note 18.

⁵⁷ See *infra* notes 92-95 and accompanying text.

⁵⁸ See *infra* notes 82-89 and accompanying text. If the changed circumstances render the case moot or otherwise deprive the Court of jurisdiction, the writ of certiorari will be dismissed on those grounds, rather than on the ground that certiorari was improvidently granted. See R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 18.5, at 722-24 (discussing cases).

⁵⁹ A DIG, which could be viewed as an abstention on that question, is not a decision on the merits. The legal effect of a DIG is equivalent to that of a denial of certiorari, that is, it has no precedential effect. See R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 5.7, at 269-70. But cf. Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1302-05 (1979) (suggesting that denials of certiorari can, in some cases, be indicative of the Court's views on the merits).

⁶⁰ Because the power to grant certiorari clearly is not irrevocable, nor should it be, if six Justices want to DIG (and therefore only three want to hear a case), the conflict, while no doubt real, does not implicate the Rule of Four.

On a number of occasions, four Justices have dissented from a DIG. This Section examines three instances in which the Court addressed explicitly the conflict between the power to DIG and the Rule of Four: a series of cases decided in 1957 in which the Court considered the sufficiency of the evidence supporting employees' tort claims under the Federal Employers' Liability Act ("FELA") ending with *Ferguson v. Moore-McCormack Lines*,⁶¹ *Triangle Improvement Council v. Ritchie*,⁶² and *New York v. Uplinger*.⁶³

In the FELA cases, the Court addressed the merits. Justice Frankfurter dissented, arguing that, as a matter of sound judicial policy, the Court should refuse to hear employer liability cases that involved only sufficiency of the evidence determinations. He therefore voted to dismiss certiorari as improvidently granted.⁶⁴

In his dissent, Justice Frankfurter took issue with the proposition that "the 'integrity of the certiorari process' as expressed in the 'rule of four' . . . requires all the Justices to vote on the merits of a case when four Justices have voted to grant certiorari and no new factor emerges after argument and deliberation."⁶⁵ He maintained that the initial decision to grant certiorari "must necessarily be based on a limited appreciation of the issues in a case, resting as it so largely does on the partisan claims in briefs of counsel."⁶⁶ After hearing oral argument and deliberating on a case, a Justice may well conclude that it would be inadvisable for the Court to address the merits.⁶⁷ Under this rationale, five Justices could dismiss certiorari, following oral argument, even if their four colleagues still wanted to decide the case on the merits. The Rule of Four, then, is one in which a minority of Justices can bind the majority in the presence of the incomplete information available when the certiorari petition is considered, perhaps even because of the incompleteness of the information, but cannot do so once the Justices have given further consideration to the case.

Anticipating the criticism that dismissing a writ of certiorari in a case that four Justices still wanted to decide would turn the Rule of Four into a Rule of Five, at least in the postargument period, Justice

⁶¹ 352 U.S. 521 (1957). The other cases in this series were: *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957); *Webb v. Illinois Cent. R.R.*, 352 U.S. 512 (1957); *Herdman v. Pennsylvania R.R.*, 352 U.S. 518 (1957).

⁶² 402 U.S. 497 (1971) (per curiam).

⁶³ 467 U.S. 246 (1984) (per curiam).

⁶⁴ *Ferguson*, 352 U.S. at 524 (Frankfurter, J., dissenting).

⁶⁵ *Id.* at 527 (Frankfurter, J., dissenting).

⁶⁶ *Id.*

⁶⁷ *See id.* at 528 (Frankfurter, J., dissenting).

Frankfurter stated:

No Justice is likely to vote to dismiss a writ of certiorari as improvidently granted after argument has been heard In the usual instance, a doubting Justice respects the judgment of his brethren that the case does concern issues important enough for the Court's consideration and adjudication. But a different situation is presented when a class of cases is systematically taken for review. Then a Justice who believes . . . that an increasing amount of the Court's time is unduly drained by adjudication of these cases cannot forego his duty to voice his dissent to the Court's action.⁶⁸

Thus, there would be a presumption in favor of a decision on the merits.

In summary, Justice Frankfurter provides two independent explanations for why his interpretation of the Rule of Four does not turn it into a Rule of Five. First, the Rule of Four loses force only after the Court has been briefed on the merits and heard oral argument. Second, once four Justices have voted to grant certiorari, their decision gains a claim to deference; five Justices cannot disturb it merely because, in the first instance, they would have reached the contrary conclusion.

In a concurring opinion joined in pertinent part by six other Justices, Justice Harlan, who agreed with Justice Frankfurter that the FELA cases should not be reviewed, nonetheless took issue with Justice Frankfurter's position on the nature of the Rule of Four.⁶⁹ He argued that

due adherence to [this] rule requires that once certiorari has been granted a case should be disposed of on the premise that it is properly here, in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted. . . .

I do not think that, in the absence of the considerations mentioned, voting to dismiss a writ after it has been granted can be justified on the basis of an inherent right of dissent. In the case of a petition for certiorari that right, it seems to me—again without the presence of intervening factors—is exhausted once the petition has been granted and the cause set for argument.⁷⁰

⁶⁸ *Id.* at 528-29 (Frankfurter, J., dissenting).

⁶⁹ *See id.* at 559 (Harlan, J., concurring and dissenting).

⁷⁰ *Id.* at 559-60 (Harlan, J., concurring and dissenting); *see also* Leiman, *supra* note 5, at 975-77 (discussing the two views of the Rule).

Justice Harlan challenged Justice Frankfurter's assertion that five Justices have the right to dismiss, after oral argument, a petition that four had granted.⁷¹ He argued that "permitting the . . . writ to be thus undone would undermine the whole philosophy of the 'rule of four,' which is that any case warranting consideration in the opinion of such a substantial minority of the Court will be taken *and disposed of*."⁷²

He thus articulated a blanket rule compelling a decision in the absence of "intervening factors."⁷³ Justice Harlan's reference to this exception, however, contains an important ambiguity: who is to decide the relevance of those factors—the five who had voted to deny or at least one of the four who had voted to grant?⁷⁴

The Court addressed this question in 1971, in *Triangle Improvement Council v. Ritchie*. The plaintiffs in that case had challenged the condemnation of their houses, which stood in the path of a planned interstate highway. They claimed that the state road commission had failed to comply with the requirement of the Federal-Aid Highway Act of 1968 concerning the duty "to provide for the 'prompt and equitable relocation and reestablishment of persons' displaced by federal highway programs,"⁷⁵ and thus that the Secretary of Transportation could not approve the proposed project. The district court, relying on the then-

⁷¹ This case generated some amusing correspondence between Justices Frankfurter and Harlan. In response to the circulation of a draft of Justice Harlan's opinion, Justice Frankfurter sent him a handwritten note stating: "Will you take me up on my offer of a bet that the rest of you—including Black, J., yourself & Douglas, J.—have at one time or another disregarded 'the integrity of the certiorari process'?" Letter from Justice Frankfurter to Justice Harlan (undated) (on file with the *University of Pennsylvania Law Review*).

Justice Harlan agreed, calling this "a good sporting proposition" and stating, as one of the terms of the bet, that "[t]he bet will be a lunch at that nice fish place." Justice Harlan also added: "The actions of Brothers Black and Douglas are to be excluded from the bet because (a) even though junior, I am not bound by their actions and (b) I already know of instances where they have 'violated' the 'integrity' rule." Letter from Justice Harlan to Justice Frankfurter (Feb. 21, 1957) (on file with the *University of Pennsylvania Law Review*). We have not been able to determine who won the bet.

We are grateful for the assistance of the curators of the John Marshall Harlan Papers at the Princeton University Library.

⁷² *Ferguson*, 352 U.S. at 560 (Harlan J., concurring and dissenting) (emphasis added); see Leiman, *supra* note 5, at 975-76. Referring to Justice Harlan's criticism of Justice Frankfurter, which was joined by six of his colleagues, one commentator stated: "The language may have been legal, but the intent was obviously lethal. Clearly the Brothers had committed fratricide on one of their number." Berman, *The Case of Justice Frankfurter*, 2 N.J. St. B.J. 149, 169 (1958).

⁷³ *Ferguson*, 352 U.S. at 562 (Harlan, J., concurring and dissenting).

⁷⁴ It is also possible, of course, that the five Justices who vote to DIG will be different from the five who initially voted to deny certiorari. But, for the purposes of this discussion, it is assumed that they are the same.

⁷⁵ *Triangle Improvement Council v. Ritchie*, 429 F.2d 423, 424 (4th Cir. 1970) (Sobeloff, J., dissenting) (quoting 23 U.S.C. § 501 (repealed 1971)).

existing interpretation of the Federal-Aid Highway Act, ruled that these requirements were inapplicable to the Triangle project because the project had been authorized prior to the passage of the Act.⁷⁶

Subsequent to the district court's decision, the Secretary of Transportation issued new guidelines, which applied the Act's requirements to all projects, even those authorized before the Act's passage.⁷⁷ Nonetheless, the court of appeals affirmed the district court's opinion in a one-sentence per curiam, and denied rehearing and rehearing en banc.⁷⁸

The Supreme Court granted certiorari, with only four Justices voting to grant,⁷⁹ on the question whether either the Act or administrative regulations applied to projects begun prior to the Act's effective date. After briefing and oral argument, however, certiorari was dismissed as improvidently granted.⁸⁰ The five Justices who had originally voted to deny now voted to DIG; the four Justices who had originally voted to grant now dissented.⁸¹

Four of the five Justices who voted to DIG remained silent as to the reasons for their decision. But Justice Harlan, in an opinion concurring in the dismissal, provided four justifications for his vote.⁸² First, the Federal-Aid Highway Act had been repealed since the grant of certiorari, and thus interpreting its scope was no longer an important issue.⁸³ Second, the Act had been replaced by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.⁸⁴ The 1970 Act was closely modeled on the substantive provisions of the 1968 Act, and this factor "alter[ed] drastically the potential impact of any decision [the Court] might reach in this case."⁸⁵ Justice Harlan believed it unwise to interpret those provisions without first affording the lower courts a chance to consider the impact on a wide range of affected agencies.⁸⁶ Third, by the time of oral argument, less than ten

⁷⁶ See *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20, 28-29 (S.D.W. Va. 1969).

⁷⁷ See *Triangle Improvement Council*, 429 F.2d at 425-26 (Sobeloff, J., dissenting).

⁷⁸ *Id.* at 423 (per curiam).

⁷⁹ Although the Court rarely reveals the actual votes at the certiorari stage in a granted case, see *supra* note 24, Justice Douglas makes this statement in his dissent from the DIG. *Triangle Improvement Council*, 402 U.S. at 508 (Douglas, J., dissenting).

⁸⁰ See *id.* at 497 (per curiam).

⁸¹ See *id.* at 508 (Douglas, J., dissenting).

⁸² See *id.* at 497 (Harlan, J., concurring).

⁸³ See *id.*

⁸⁴ See *id.* at 498-99 (Harlan, J., concurring).

⁸⁵ *Id.* at 499 (Harlan, J., concurring).

⁸⁶ See *id.* at 500-01 (Harlan, J., concurring).

residents of the Triangle remained to be relocated; that only these persons would be affected by the decision, in Justice Harlan's view, "renders this case . . . a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import."⁸⁷ Finally, petitioners had significantly broadened their claims in their brief on the merits to challenge not simply the failure to produce a formal relocation plan but also to claim that in fact given individuals had not been properly relocated. Since this issue had not been determined by the trial and appeals courts, Justice Harlan believed it inappropriate for the Supreme Court to reach it.⁸⁸

In a dissent joined by Justices Black, Brennan, and Marshall, Justice Douglas claimed that the integrity of the Rule of Four had been impaired by the Court's dismissal of certiorari over the continuing votes of four Justices to hear the case:

This petition should not be dismissed as improvidently granted. Our "rule of four" allows any four Justices to vote to grant certiorari and set the case for consideration on the merits. The four who now dissent were the only ones to vote to grant the petition. The rule should not be changed to a "rule of five" by actions of the five Justices who originally opposed certiorari. It is improper for them to dismiss the case after oral argument unless one of the four who voted to grant moves so to do, which has not occurred here. . . . [I]t is the duty of the five opposing certiorari to persuade others at Conference, but, failing that, to vote on the merits of the case.⁸⁹

⁸⁷ *Id.* at 499 (Harlan, J., concurring).

⁸⁸ *Id.* at 501-02 (Harlan, J., concurring). Justice Harlan's argument was a prudential one. Certainly, the Supreme Court had jurisdiction to decide the case. *See supra* note 58. It was Justice Harlan's view, however, that for the Court to address the merits would be an improper exercise of its discretion to determine which cases within its certiorari jurisdiction merit its limited decisional resources.

⁸⁹ *Id.* at 508 (Douglas, J., dissenting). Justice Douglas had originally articulated this position in *United States v. Shannon*, 342 U.S. 288 (1952):

The suggestion that the writ be dismissed as improvidently granted raises a recurring problem in the administration of the business of the Court. A Justice who has voted to deny the writ of certiorari is in no position after argument to vote to dismiss the writ as improvidently granted. Only those who have voted to grant the writ have that privilege.

Id. at 298 (Douglas, J., dissenting). One year after *Triangle Improvement Council*, however, Justice Douglas took quite a different approach: "We should 'dismiss as improvidently granted' only in exceptional circumstances and where all nine members of the Court agree. In all other cases the merits of the controversy should be decided." *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228, 232 (1972) (Douglas, J., dissenting) (the remaining eight Justices joined a per curiam opinion dismissing certiorari).

The dissenters in *Triangle Improvement Council* treated the Rule of Four as having continuing force even after briefing and oral argument: as long as four Justices wish to reach the merits, the Court as a whole must follow suit. In short, the dissenters argued, the majority must persuade one of the Justices who voted to grant certiorari that changed circumstances render proceeding to a decision on the merits inappropriate.

In 1984, the Court returned once again to the question of who can properly find "changed circumstances" justifying dismissal. In *New York v. Uplinger*, the New York Court of Appeals had struck down a state statute prohibiting loitering for the purpose of soliciting others to engage in various sexual activities.⁹⁰ The Supreme Court granted a petition filed by the District Attorney of Erie County challenging the state court's analysis of the federal constitutional question.⁹¹ Ultimately, after briefing and oral argument, the Court dismissed the writ as improvidently granted.⁹² In a brief per curiam opinion joined by Justices Brennan, Marshall, Blackmun, Powell, and Stevens, the Court stated that it was "uncertain as to the precise federal constitutional issue the [state] court decided,"⁹³ noted that the state court's analysis in *Uplinger* rested substantially on an earlier decision whose correctness the petitioner in *Uplinger* had declined to challenge,⁹⁴ and treated the postgrant filing of an amicus brief by the Attorney General of New York attacking the statute's constitutionality as a changed circumstance detracting from the desirability of review.⁹⁵

The four Justices who dissented from the per curiam stated simply that "the New York statute was invalidated on federal constitutional grounds, and the merits of that decision are properly before us and should be addressed. Dismissing this case as improvidently granted is not the proper course."⁹⁶

⁹⁰ 467 U.S. at 247.

⁹¹ See *id.* at 247 n.1.

⁹² See *id.* at 249.

⁹³ *Id.* at 248.

⁹⁴ See *id.* at 249.

⁹⁵ See *id.* at 247-48 n.1 ("The . . . conflict in the positions taken by petitioner and the New York State Attorney General, a circumstance which 'was not . . . fully apprehended at the time certiorari was granted,' provides a strong additional reason for our conclusion that the grant of certiorari was improvident." (citation omitted)).

⁹⁶ *Id.* at 252 (White, J., joined by Burger, C.J., and Rehnquist & O'Connor, JJ., dissenting).

Triangle Improvement Council and *Uplinger* are not the only cases in which certiorari was dismissed over four dissenting votes. See, e.g., *City of Springfield v. Kibbe*, 107 S. Ct. 1114 (1987); *Piccirillo v. New York*, 400 U.S. 520 (1971); *Miller v. California*, 392 U.S. 616 (1968); *NAACP v. Overstreet*, 384 U.S. 118 (1966); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959); *Ellis v. Dixon*, 349 U.S. 458

In an opinion concurring in the dismissal of certiorari, Justice Stevens provided an expansive view of the power of five Justices to trump the Rule of Four.⁹⁷ Unlike Justice Harlan in *Triangle Improvement Council*, who had noted the "changed posture" of the particular case before him,⁹⁸ Justice Stevens claimed that "there is *always* an important intervening development that may be decisive,"⁹⁹ namely, the closer scrutiny given to cases after the grant of certiorari. While he recognized a presumption that the grant of certiorari will lead to a decision on the merits, even when "the majority may remain convinced that the case does not present a question of general significance warranting this Court's review,"¹⁰⁰ Justice Stevens identified a "jurisprudential" institutional consideration for removing the power to force a decision from a group of only four Justices and vesting it instead in the majority:

The decision to decide a constitutional question may be the most momentous decision that can be made in a case. Fundamental principles of constitutional adjudication counsel against premature consideration of constitutional questions and demand that such questions be presented in a context conducive to the most searching analysis possible. . . . If a majority is convinced after studying the case that its posture, record or presentation of issues makes it an unwise vehicle for exercising the "gravest and most delicate" function that this Court is called upon to perform, the Rule of Four should not reach so far as to compel the majority to decide the case.¹⁰¹

Justice Stevens thus asserts that five Justices have the authority to dismiss certiorari if they believe that it would be inappropriate to decide the case, regardless of the views of the minority.

Justice Stevens's view of the Rule of Four distinguishes between "the power to require that a case be briefed, argued, and considered at a postargument conference," which the Rule of Four vests in four Justices,¹⁰² and "the power to command that [a case's] merits be decided by the Court," which remains with the majority.¹⁰³ For him, the "force [of

(1955); *Hammerstein v. Superior Court*, 341 U.S. 491 (1951).

⁹⁷ *Uplinger*, 467 U.S. at 249 (Stevens, J., concurring).

⁹⁸ *Triangle Improvement Council*, 402 U.S. at 502 (Harlan, J., concurring).

⁹⁹ *Uplinger*, 467 U.S. at 250 (Stevens, J., concurring) (emphasis added).

¹⁰⁰ *Id.* at 251 (Stevens, J., concurring).

¹⁰¹ *Id.* (citation omitted).

¹⁰² *Id.* at 250 (Stevens, J., concurring).

¹⁰³ *Id.*

the Rule of Four] is largely spent once the case has been heard.”¹⁰⁴ Through a somewhat similar route, Justice Stevens thus arrives at the same conclusion that Justice Frankfurter had reached in the *FELA* cases.¹⁰⁵

From Justice Stevens’s perspective, briefing and argument should change the number of Justices able to force the Court to continue considering the case from four Justices (who can grant certiorari despite the opposition of their five colleagues) to five Justices (who must want to address the merits for the Court actually to render such a decision). Also, briefing and argument should change the reasons that can legitimately be asserted to prevent a decision. At the certiorari stage, a Justice can properly argue that while the legal system would benefit from the Court’s guidance on the issue, it would not benefit sufficiently to justify the Court’s expenditure of its limited decisional resources. But by the time a case has been briefed and argued, many of the resources necessary to decide the case have already been expended.¹⁰⁶ Thus, the proper question at that stage is whether the benefits from a decision justify the expenditure of the costs necessary to produce such a decision.¹⁰⁷ In many cases, therefore, Justices who opposed the grant of certiorari should favor a decision on the merits once a case has been briefed and argued.

Moreover, the Court’s perception of the benefits from a decision on the merits may be quite different after oral argument than it was at the certiorari stage. It is the benefits estimated after oral argument that should enter the calculus to determine whether a case should be decided on the merits. Thus, when a case is dismissed after oral argument, it may sometimes be a misnomer to say that certiorari was “improvidently granted.” Indeed, decisions to grant certiorari that, *ex ante*, seemed desirable may turn out, *ex post*, to have been mistakes.

In summary, under Justice Stevens’s approach, the certiorari process has two steps. At the first step, four Justices can make the initial determination whether the benefits from a decision on the merits justify

¹⁰⁴ *Id.* at 251 (Stevens, J., concurring).

¹⁰⁵ See *supra* notes 65-68 and accompanying text.

¹⁰⁶ See *Uplinger*, 467 U.S. at 250-51 (Stevens, J., concurring) (“[O]nce a case has been briefed, argued, and studied in chambers, sound principles of judicial economy normally outweigh most reasons advanced for dismissing a case.”).

¹⁰⁷ *Id.* at 251 (Stevens, J., concurring). Justice Stevens apparently posits an example in which five Justices become convinced after argument that there would be no benefit, but rather a detriment, from a decision on the merits. For example, an issue may be presented in a manner that is poorly suited for meaningful consideration. But Justice Stevens’s argument should also compel dismissal where there would be a benefit from a decision, but where that benefit would be insufficient to warrant the expenditure of the costs necessary to produce such a decision.

the expenditure of the decisional costs involved in scheduling, briefing, and oral argument. But at the second step, after oral argument, it is up to five Justices to reevaluate the benefits of a decision on the merits and establish whether the Court should expend the remaining costs necessary to produce such a decision.

There is a certain paradox in the general approach taken by Justice Harlan's opinion in *Triangle Improvement Council* and by the per curiam opinion in *Uplinger*: if four Justices still want to hear a case and render a decision on the merits, then it is difficult to assert that there has been a "changed circumstance" since the vote to grant. Even if the petition in *Triangle Improvement Council* had been filed after the repeal of the Federal-Aid Highway Act, had involved only the rights of ten individuals, and had raised broader questions not actually decided by the lower courts,¹⁰⁸ four Justices could have voted to grant the petition. Similarly, in *Uplinger*, even if the Attorney General of New York had filed a brief in opposition to the petition for certiorari, the federal issue had been murky, and the petitioner had made clear at the petition stage the relationship between his claims and the earlier decision,¹⁰⁹ four Justices might have thought the case worthy of certiorari. Neither *Triangle Improvement Council* nor *Uplinger* explains why such circumstances are relevant to the decision to dismiss certiorari merely because they became apparent after, rather than before, the vote to grant. In an important sense, then, the converse of Justice Stevens's assertion that "there is always an important intervening development that may be decisive" is also true: to the extent that four Justices wish to decide a case, there has been no change in circumstances that is relevant to whether the Court has an obligation to rule on the merits.

Moreover, if five Justices believe that particular factors make the grant of certiorari undesirable, there may be stronger reasons for them to vote to dismiss if those factors are present at the time of the Court's vote on the petition than if they appear later. If a dismissal immediately follows the grant of certiorari, neither the parties nor the Court will have invested any resources in the consideration of the merits of the case. In contrast, if it occurs at a later time, they will have done so.¹¹⁰

¹⁰⁸ See *supra* notes 82-88 and accompanying text.

¹⁰⁹ See *supra* notes 93-95 and accompanying text.

¹¹⁰ *Triangle Improvement Council*, 402 U.S. at 508 (Douglas, J., dissenting) ("It would save time and money if the five would dismiss as improvidently granted immediately after certiorari is granted rather than waiting for briefs and oral argument."); *Ferguson*, 352 U.S. at 560 (Harlan, J., concurring and dissenting) ("It would be preferable to have the vote of annulment come into play the moment after the petition for certiorari has been granted, since then at least the litigants would be spared useless

This is not to say that the Court's exercise of its certiorari jurisdiction should be guided by the interests of the parties before it—a factor that Chief Justice Taft expressly disavowed in his 1922 testimony.¹¹¹ But from the Court's viewpoint, the expenditure of resources may be relevant. Indeed, as indicated above, once some resources have been expended in a case, the calculus changes to whether the benefits from a decision justify the costs that have yet to be expended, rather than whether such benefits justify the total costs calculated from the time certiorari was granted.¹¹²

Justice Harlan himself had recognized in the FELA cases that if dismissal "were proper, it would be preferable to have the vote of annulment come into play the moment after the petition for certiorari has been granted," rather than later.¹¹³ Yet, ironically, his analysis of the relevance of changed circumstances in *Triangle Improvement Council*¹¹⁴ leads to precisely the opposite conclusion—that five Justices can dismiss a petition after the passage of some time for reasons that would not have been legitimate if invoked immediately following the grant.

Thus, the middle position advocated by Justice Harlan in *Triangle Improvement Council* and by the per curiam opinion in *Uplinger* lacks any claim to intellectual legitimacy. It is surprising, then, that the two other competing positions—the strong argument against dismissal articulated by Justice Douglas in *Triangle Improvement Council*, and the strong argument for dismissal articulated by Justice Frankfurter in the FELA cases and by Justice Stevens in *Uplinger*—have been rejected by a majority of the Court.

The discussion of the three cases also reveals the inconsistencies in the Court's approach to the question of when five Justices can dismiss a petition for certiorari that four have granted. Justice Harlan's position in *Triangle Improvement Council*, which was apparently accepted by a majority of the Court, and that of the per curiam in *Uplinger*, are directly at odds with Justice Harlan's own approach in the FELA cases, which also received majority support. Indeed, if five Justices who voted to deny can rely on changed circumstances since the Court's grant

effort in briefing and preparing for the argument of their cases.").

¹¹¹ See *supra* note 13 and accompanying text.

¹¹² See *supra* notes 106-07 and accompanying text. It is true, of course, that despite the expenditure of such resources, the Court may be precluded from issuing a decision by the parties' agreement to settle the case. When a pending case is settled, the Court dismisses the petition under Rule 53. See SUP. CT. R. 53.

¹¹³ *Ferguson*, 352 U.S. at 560 (Harlan, J., concurring and dissenting).

¹¹⁴ *Triangle Improvement Council*, 402 U.S. at 501 (Harlan, J., concurring) ("[E]vents subsequent to the granting of the writ have . . . robbed it of all national significance.").

as the basis for dismissal, then five Justices who disagree with the grant of certiorari should be able to dismiss immediately following that grant. Changed circumstances should be cognizable only if they convince at least one Justice who originally voted to grant certiorari that his earlier decision is no longer appropriate, leaving fewer than four Justices in favor of a decision on the merits.¹¹⁵

In addition, the primacy accorded the analysis of changed circumstances in Justice Harlan's opinion in *Triangle Improvement Council* and in the per curiam opinion in *Uplinger*, like Chief Justice Burger's analysis of the abuse of discretion question in his dissent in *Darden*,¹¹⁶ is inconsistent with the Court's failure to require each Justice to explain his vote to grant certiorari.¹¹⁷ Indeed, it is indefensible to maintain that a change in circumstances may be invoked to dismiss certiorari if those circumstances were irrelevant to the initial decision to grant certiorari.¹¹⁸ But if the Justices who voted to deny certiorari can legitimately assess, at a later time, whether changed circumstances weaken the reasons why certiorari was granted, they will have to know the basis for their colleagues' vote to grant. Justices, however, are under no obligation to make such reasons public, and, in fact, at least four Justices have maintained that such an obligation would be undesirable.¹¹⁹

¹¹⁵ See *supra* note 89 and accompanying text (discussing Justice Douglas's position).

Such an approach would be consistent with the Court's own rule concerning rehearings of cases decided on the merits: "A petition for rehearing . . . will not be granted except at the instance of a Justice who concurred in the judgment or decision and with the concurrence of a majority of the Court." SUP. CT. R. 51.1.

¹¹⁶ See *supra* notes 44-45 and accompanying text.

¹¹⁷ See *supra* notes 49-53 and accompanying text.

¹¹⁸ For example, if the age of a criminal defendant is irrelevant to the issues raised in the challenge to his conviction, surely certiorari cannot be dismissed merely because the defendant is a few months older than he was when certiorari was granted.

¹¹⁹ In *Darden v. Wainwright*, 106 S. Ct. 2464 (1986), Justice Blackmun criticized Chief Justice Burger for having filed a dissent from the grant of certiorari. *Id.* at 2484 n.9 (Blackmun, J., joined by Brennan, Marshall & Stevens, JJ., dissenting). He argued that the Chief Justice, in his dissent, "irrevocably had committed himself to rejecting [Darden's] claims before he had received the benefit of the full briefing, oral argument, access to the record, and discussion of the issues by other Members of the Court that followed [the] grant of certiorari." *Id.*; see also *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 n.1 (1959) (Brennan, J., mem.) (discussed *infra* note 173).

Similarly, a public explanation of a vote to grant certiorari could involve a pre-judgment of the petitioner's arguments—for example, when a Justice states that his vote is motivated by a desire to overrule one of the court's precedents. See *infra* notes 148-50 and accompanying text.

The problem of prejudgment could be avoided, of course, if the Justices' reasons for granting certiorari were not made public. But this option would also present serious drawbacks. First, forcing a Justice to articulate reasons for voting to grant certiorari, even reasons that are not made public, is a substantial imposition on his time. See *supra* note 49. Second, not making the reasons public would have the effect of creating a body of secret law, a feature that is quite alien to our system of adjudication.

Finally, it is noteworthy that the inconsistency and incoherence exhibited by the Court are not solely the product of a change in personnel,¹²⁰ as, over the years, individual Justices have taken inconsistent and incoherent positions on these issues.¹²¹ The case of Justice Harlan has already been discussed.¹²² In addition, Justices Brennan and Mar-

¹²⁰ Moreover, inconsistency and incoherence are not a product of the aggregation of the Justices' preferences. See Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 813-32 (1982). Relying on Kenneth Arrow's famous theorem on collective choice, see K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963), Professor (now Judge) Easterbrook posits a decisional model in which the Justices make comparisons among pairs of different legal rules. For example, suppose that there are three plausible formulations of the rule governing dismissals of certiorari petitions in cases in which four Justices want the Court to issue a decision on the merits: under rule A, a petition can be dismissed only immediately following the grant; under rule B, a petition can be dismissed only if there are external "intervening circumstances"; and under rule C, a petition can be dismissed only after oral argument. The Justices are asked to rank the three rules, that is, to vote on whether they prefer A to B, B to C, and C to A. Easterbrook argues that, "[f]irst, decisions produced by voting will tend to be unstable even when the same voters participate in all decisions; second, the sequence in which issues are decided frequently controls the outcome of the process; third, any voting system can be manipulated by people who do not honestly state their positions." Easterbrook, *supra*, at 814-15.

Easterbrook's decisional model does not accurately portray the mechanism by which the Justices select legal rules. Justices are not asked to consider competing rules pairwise, and to provide a full ranking of all plausible rules. Instead, they are simply asked to select, from among such rules, the single rule that they deem most desirable. See Kornhauser & Sager, *supra* note 28, at 109 n.37. This process does not lead to the problems identified by Easterbrook. *Id.* at 109.

In addition, Easterbrook's model is not a desirable model of adjudication. As Professors Kornhauser and Sager point out, "although courts might adopt a mechanism that did produce a complete ranking of alternatives, it seems silly to do so when such a choice has no apparent benefits and plunges one into the antinomies of Arrow's theorem." *Id.* at 109 n.37.

In any event, however, the problem that we focus on is a more basic one: that individual Justices act in an inconsistent and incoherent manner. Consistency and coherence on the part of individual Justices are necessary conditions for consistency and coherence on the part of the Court. On the question of whether such conditions are also sufficient, compare Kornhauser & Sager, *supra* note 28, at 111 (consistency by individual Justices a sufficient condition for consistency by the Court, but coherence by individual Justices not a sufficient condition for coherence by the Court) with Easterbrook, *supra*, at 815-21 (Court can act inconsistently even though individual Justices act consistently). For definitions of consistency and coherence, see *infra* note 121.

¹²¹ "[C]onsistency is simply the state of non-contradiction, and two legal rules are inconsistent if and only if they are contradictory." Kornhauser & Sager, *supra* note 28, at 103. In contrast:

Coherence is a quality of conceptual unity. Coherence does not require that a system's premises be correct, but it does demand that they form or reflect a unitary vision of that portion of the world modeled by the system. . . . Coherence thus brings some order and structure to what might otherwise be a jumble of consistent propositions.

Id. at 105.

¹²² It might be argued that Justice Harlan's approach is somehow internally coherent: in the FELA cases, he stated that, absent "intervening factors," the Rule of Four is violated if five Justices can DIG a petition that four have granted, see *supra*

shall, who, by joining Justice Douglas's dissent in *Triangle Improvement Council*, thereby accepted the view that changed circumstances are cognizable when acknowledged by at least one of the four Justices who voted to grant the petition, took precisely the opposite position in joining the per curiam opinion in *Uplinger*.

Further, the position of Justices Brennan, Marshall, Blackmun, and Powell, who joined the per curiam opinion in *Uplinger*, cannot be harmonized with their approach in *Darden*. Explaining *Darden*, these Justices argued that the grant of certiorari imposes on the nongrantee Justices the obligation to take affirmative measures to protect the Court's jurisdiction. It follows, a fortiori, that the nongrantee Justices may not take affirmative measures to deprive the Court of such jurisdiction.¹²³ Yet that is precisely what Justices Brennan, Marshall, Blackmun, and Powell did when they voted to DIG in *Uplinger*.

3. The Duty of an Individual Justice to Address the Merits

This last question goes not to whether the Court can dismiss certiorari, but rather to the obligations imposed on an individual Justice in light of the Court's decision not to do so. In the FELA cases, Justice Frankfurter took the position that even if certiorari is not dismissed, a Justice who disagrees with that decision is under no obligation to address the merits of the case himself.¹²⁴ Justice Frankfurter stated:

The right of a Justice to dissent from an action of the Court is historic. Of course self-restraint should guide the expression of dissent. But dissent is essential to an effective judiciary in a democratic society, and especially for a tribunal exercising the powers of this Court. Not four, not eight,

notes 69-73 and accompanying text; thus, in *Triangle Improvement Council*, he merely applied the "intervening factors" exception to conclude that five Justices could DIG a petition that four continued to want to decide, see *supra* notes 82-88 and accompanying text. But as indicated above, Justice Harlan never explains the relevance of changed circumstances for purposes of a DIG when four Justices continue to believe that a decision on the merits is desirable. See *supra* note 74 and accompanying text. This failure to explain why five Justices who originally voted against granting certiorari can later invoke changed circumstances to DIG a petition is inconsistent with his defense in the FELA cases of the general principle that four Justices can compel the majority to dispose of a case. See Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 930-31 (1973) (discussing Justice Harlan's positions in the FELA cases and in *Triangle Improvement Council*).

¹²³ See *supra* notes 29-43 and accompanying text.

¹²⁴ *Ferguson*, 352 U.S. at 526 & n.3 (Frankfurter, J., dissenting).

Justices can require another to decide a case that he regards as not properly before the Court.¹²⁵

It is important to underscore that Justice Frankfurter had no quarrel with the Court's jurisdiction to hear the FELA cases; he in no way suggested that the Court did not have the power to decide the merits. His quarrel was with the Court's decision to single out for plenary review these petitions from among all petitions properly invoking the Court's jurisdiction. He maintained that the Court's prudential decision to grant certiorari should not trump his prudential decision not to address the merits of the cases.¹²⁶

A similar issue has arisen in recent years. In a number of cases in which the Court has granted a petition for certiorari and summarily reversed the lower court's decision, Justice Marshall has dissented, without addressing the merits, on the ground that it is improper for the Court to issue opinions in cases it does not consider sufficiently important to accord plenary consideration.¹²⁷

¹²⁵ *Id.* at 528 (Frankfurter, J., dissenting).

¹²⁶ Two days before the decision in the FELA cases, Justice Frankfurter wrote to Justice Harlan about a hypothetical case in which eight Justices concluded that the Court had jurisdiction to decide a case and Justice Frankfurter concluded that it did not. He asked: "What is my duty? Must I bow to the rule of eight and say that since eight have ruled the case should be dealt with on the merits I must so deal with it, or am I free to adhere to my jurisdictional view?" Letter from Justice Frankfurter to Justice Harlan (Feb. 23, 1957) (on file with the *University of Pennsylvania Law Review*).

Justice Harlan replied that he did not think that "dismissal for lack of jurisdiction is a good analogy to denial of cert." Letter from Justice Harlan to Justice Frankfurter (Feb. 25, 1957) (on file with the *University of Pennsylvania Law Review*). Justice Harlan thus distinguished between cases in which one Justice believes that the Court has no power to issue a decision on the merits, and cases in which that Justice accepts that the Court has such power but believes that the exercise of this power would be unwise.

¹²⁷ For example, during the 1985 Term, Justice Marshall published a "form" dissent in many such cases: "Justice Marshall dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits." See, e.g., *Acosta v. Louisiana Dep't of Health & Human Resources*, 106 S. Ct. 2876, 2878 (1986) (Marshall, J., dissenting); *Dennison Mfg. Co. v. Panduit Corp.*, 106 S. Ct. 1578, 1579 (1986) (Marshall, J., dissenting); *City of Los Angeles v. Heller*, 106 S. Ct. 1571, 1573 (1986) (Marshall, J., dissenting); *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985) (Marshall, J., dissenting); *Pennsylvania v. Goldhammer*, 474 U.S. 28, 31 (1985) (Marshall, J., dissenting); *Lanier v. South Carolina*, 474 U.S. 25, 26-27 (1985) (Marshall, J., dissenting); *Delaware v. Fensterer*, 474 U.S. 15, 23 (1985) (Marshall, J., dissenting); *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12-13 (1985) (Marshall, J., dissenting); *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 8 (1985) (Marshall, J., dissenting). Until that Term, boilerplate of this sort had been confined primarily to the death penalty area, in which Justices Brennan and Marshall state in practically every case that they regard the death penalty as cruel and unusual punishment prohibited by the eighth and fourteenth amendments. See Kornhauser & Sager, *supra* note 28, at 111

The question whether a Justice who has been unsuccessful in advocating denial or dismissal of certiorari has the right to refuse to address a case's merits has important implications for the stability of the Court's decisions. For example, an opinion that fails to command the support of a majority of the Justices participating in a case—including those who under the guise of a vote to dismiss the writ are actually abstaining on the merits—is not labeled an "opinion of the Court" and has no precedential value. Such an opinion does, of course, dispose of the case before the Court, but it does not articulate a rule binding on the lower courts or one to which the Supreme Court must accord *stare decisis* effect.¹²⁸ If Justices who disagree with the Court's decision to review a case express this disagreement by abstaining on the merits, it becomes less likely that the prevailing opinion will enjoy majority support.

n.39.

Justice Marshall has explained that it is unfair to reverse summarily a case on the basis only of a certiorari petition and a response. *Montana v. Hall*, 107 S. Ct. 1825, 1828 (1987) (Marshall, J., dissenting). Under the Court's rules, petitions and responses should be addressed to whether the case merits the attention of the Court. *See* SUP. CT. R. 17.1, 22.1. Justice Marshall elaborated: "We do *not* indicate that the parties should address the merits of the lower court's decision beyond what is necessary to demonstrate whether the case is important enough to receive plenary review. . . . [B]ut if [parties] fail to cover the merits of the lower court's decision *in full*, they risk summary disposition without having been heard." *Hall*, 107 S. Ct. at 1828-29 (Marshall, J., dissenting). Other Justices have also complained about the Court's use of summary dispositions. *See id.* at 1828 n.2 (citing cases).

Summary dispositions are not a new phenomenon and have been the subject of powerful criticism. *See Brown, The Supreme Court, 1957 Term—Foreword: Process of Law*, 72 HARV. L. REV. 77 (1958).

¹²⁸ In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), a plurality of four Justices concluded that the Bankruptcy Act of 1978 was unconstitutional because it "has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct." *Id.* at 87 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., plurality). Two Justices concurred on the narrower ground that it was improper to vest jurisdiction over state common law actions in non-Article III courts. *See id.* at 90-91 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment).

Chief Justice Burger emphasized that the latter theory, because it was the narrowest theory to which a majority of the Justices subscribed, was the holding of the Court. *Id.* at 92 (Burger, C.J., dissenting). He added that "notwithstanding the plurality opinion, the Court does *not* hold today that Congress' broad grant of jurisdiction to the new bankruptcy courts is generally inconsistent with Art. III of the Constitution." *Id.*; *see Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (Stewart, Powell & Stevens, JJ., plurality))). For academic discussions, see Davis & Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59; Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980).

For example, consider a federal criminal case in which four Justices join an opinion affirming the judgment of the lower court, four Justices dissent on the merits, and the remaining Justice asserts that the case does not warrant the Court's attention and therefore does not address the merits at all.¹²⁹ This "abstaining" Justice will provide a fifth and decisive vote for letting stand the judgment of the court of appeals but will also be responsible for leaving the substantive issue unresolved, with four Justices on each side.¹³⁰ The issue that induced the Court to grant certiorari in this hypothetical case may well be an important one, over which the courts of appeals are deeply split. At least four (and perhaps even eight) Justices may consider it desirable for the Court to resolve the circuit split. But the conduct of the "abstaining" Justice would frustrate that attempt.¹³¹ Consequently, the

¹²⁹ In *Connecticut v. Johnson*, 460 U.S. 73 (1983), the Court granted certiorari to decide whether a jury instruction in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979), could constitute harmless error. *Johnson*, 460 U.S. at 74-75. Four Justices joined an opinion stating that such an error could not be considered harmless, except perhaps in rare circumstances. *Id.* at 87-88 (Blackmun, J., joined by Brennan, White & Marshall, JJ., plurality). Another group of four Justices joined an opinion disagreeing with this conclusion. *See id.* at 90 (Powell, J., joined by Burger, C.J., and Rehnquist & O'Connor, JJ., dissenting). The ninth Justice, Justice Stevens, did not address the merits, voting instead to dismiss certiorari. *Id.* at 89 (Stevens, J., concurring in the judgment) (Justice Stevens did not state explicitly whether he would dismiss as improvidently granted or for want of jurisdiction.). He added: "Because a fifth vote is necessary to authorize the entry of a Court judgment, however, I join the disposition which will allow the judgment of the Connecticut Supreme Court to stand." *Id.* at 89-90 (Stevens, J., concurring in the judgment). The question that the Court had granted certiorari to decide therefore remained unresolved. *See Francis v. Franklin*, 471 U.S. 307, 325 (1985).

¹³⁰ *See Johnson*, 460 U.S. at 89-90 (Stevens, J., concurring in the judgment). This situation is akin to one in which a case is affirmed "by an equally divided Court." Such affirmances permit the judgment below to stand but have no precedential value. *See, e.g., Neil v. Biggers*, 409 U.S. 188, 192 (1972) ("[A]n affirmance by an equally divided Court [is not] entitled to precedential weight."); R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 5.4, at 264. We assume that if the Justice had addressed the merits, he would have sided with one of the two groups.

When confronted with such a situation, Justice Frankfurter set aside his refusal to address the merits of a FELA case:

In accordance with the view that I expressed in *Rogers* . . . and in which I have since persisted, the appropriate disposition would be dismissal of the writ of certiorari as improvidently granted. If these views were enforced . . . [in] this case, affirmance by an equally divided Court would result. Thereby this case would be cast into the limbo of unexplained adjudications, and the lower courts, as well as the profession, would be deprived of knowing the circumstances of this litigation and the basis of our disposition of it. Since I have registered my conviction on what I believe to be the proper disposition of the case, it is not undue compromise with principle [to express an opinion of the merits]."

Inman v. Baltimore & O.R.R., 361 U.S. 138, 141 (1959) (Frankfurter, J., mem.).

¹³¹ This problem is also present when a majority of the Justices cannot unite behind a single legal theory.

conflict will remain unresolved and the Court will have squandered a portion of its limited resources on the case. Thus, the force of the Rule of Four is weakened when a Justice declines to address the merits of a case that is decided by the Court.¹³²

C. *The Reasons for a Nonmajority Rule*

The lack of statutory or regulatory direction does not make it proper for each Justice to approach questions about the scope of the Rule of Four anew in each case, resolving the issues in whatever way promotes the results that he wants to reach on the merits of a particular case. Certainly, the Court should not determine whether the Rule of Four requires that Justices who voted to deny certiorari take measures to protect the Court's jurisdiction simply on the basis of its views on capital punishment, the context in which this issue arises most frequently. It is not likely a mere coincidence, however, that the votes on the scope of the Rule of Four in *Darden* were highly correlated both with the votes on the merits of that case and with the Justices' general approaches to capital punishment.¹³³ Similarly, Justice Frankfurter's views on certiorari may have been influenced by a desire not to address the merits of the FELA cases.¹³⁴ It would be easier to believe that the Court has dealt responsibly with the ambiguities surrounding the Rule of Four if there were more examples, like Justice Harlan's opinion in the FELA cases,¹³⁵ in which a Justice's interpretation of the Rule of Four undermined his position on the merits.

Particularly in light of Justice Stevens's assertion that the Rule of Four should perhaps give way to a Rule of Five as a means of reducing the number of cases in the Court's argument docket,¹³⁶ careful consid-

¹³² For summary reversals, however, it is unlikely that a Justice's refusal to address the merits would have this effect. Typically the Court summarily reverses in criminal cases in which there are at least five votes to reinstate a criminal conviction and in which the thoughts of at least five Justices coalesce around a single opinion. See *Florida v. Meyers*, 466 U.S. 380, 383 (1984) (Stevens, J., dissenting).

Also, at the time that the Court decides to summarily reverse, it may well not have expended any resources beyond those normally expended in the consideration of the certiorari petition.

¹³³ *Darden*, 473 U.S. at 927-29. Chief Justice Burger and Justices White, Rehnquist, and O'Connor voted both to deny the stay and to uphold the conviction. Justices Brennan, Marshall, Blackmun, and Stevens voted both to grant the stay and to reverse the conviction. See *supra* notes 21, 27-28.

¹³⁴ See *supra* notes 64-68 and accompanying text.

¹³⁵ See *Ferguson*, 352 U.S. at 559 (Harlan, J., concurring and dissenting).

¹³⁶ Stevens, *supra* note 4, at 15-17. According to Justice Stevens, in the 1980 and 1981 Terms, about 30% of the cases granted certiorari were granted with only four affirmative votes. *Id.* at 17. He asserts that under a Rule of Five, the number of cases scheduled for argument would fall to a more "acceptable" level, *id.*, implying that most

eration is needed as to whether there is any special utility in a nonmajority rule. Only by analyzing this issue can any conclusions be reached regarding how conflicts between the four and the five should be resolved.

The most common justification for the Rule of Four centers on the exchange of views regarding cases accorded plenary review. As Justice Brennan explained this position:

A minority of the Justices has the power to grant a petition for certiorari over the objection of five Justices. The reason for this "antimajoritarianism" is evident: in the context of a preliminary five to four vote to deny, five give the four an opportunity to change at least one mind.¹³⁷

This explanation muddies the distinction between a Justice's position on the certworthiness of a case and his position, should the case be accorded plenary consideration, on the merits.¹³⁸ If Justice Brennan means only that four Justices will convince a fifth Justice that the case is certworthy, then the analysis is tautological: the use of a Rule of Four obviates the need to convince anyone to change his mind as to whether certiorari should be granted. The only way of eliminating the tautology (assuming, again, that Justice Brennan is referring to chang-

of the petitions in the 1980 and 1981 Terms receiving only four votes would have been denied. Justice Stevens also argues that it was not particularly important for the Court to decide these cases. *Id.* at 17-19. For an attempt to test this assertion, see Perry & Carmichael, *Have Four Vote Certiorari Cases Been Unimportant? Qualitative and Quantitative Tests of Justice Stevens' Argument*, 16 CUMB. L. REV. 419, 437-46 (1986) (noting, based on a statistical analysis of a limited sample, that "significant" cases received five or more votes to grant certiorari).

It is far from clear, however, that a Rule of Five would significantly reduce the number of cases in which certiorari is granted. In recent years, the Court has heard argument during seven months, two weeks each month, and the first three days of each week except when one of these days was a holiday. For each day, the Court has scheduled oral argument in four cases. Thus, there are approximately 160 argument slots. Not surprisingly, each year the Justices have selected for argument approximately 160 cases (counting cases in both the discretionary and mandatory dockets). It may be that the Justices view their collective role as involving the identification of the 160 cases most worthy of review. Under such a scenario, the move from a Rule of Four to a Rule of Five might not affect the number of granted cases.

Similarly, reducing below four the number of Justices needed to grant a case might not greatly increase the number of cases in which certiorari is granted. Under such a rule, each Justice might exhibit more restraint in deciding whether to vote to grant certiorari.

¹³⁷ *Straight v. Wainwright*, 106 S. Ct. 2004, 2006 (1986) (Brennan, J., dissenting).

¹³⁸ The distinction would probably be muddled even further under a Rule of Five. With the same voting rule applying at the case selection stage and at the merits stage, a decision to grant certiorari might be viewed as a preliminary decision to reverse the lower court's judgment.

ing a fifth vote on certworthiness) is to embrace a view of the continued force of the Rule of Four far more restrictive than even Justice Stevens's position in *Uplinger*: that unless a fifth Justice can be convinced after briefing and argument that a case is important enough to be decided, the Court should dismiss certiorari.¹³⁹

It is far more likely that Justice Brennan is referring to the opportunity to change a fifth mind on the merits of the case. If so, then Justice Brennan must also be embracing a view of the vote to grant certiorari as a tentative vote on the merits to reverse the judgment below. This view may well be valid in death-penalty cases, in which he and Justice Marshall always vote to grant certiorari, but it certainly does not govern all decisions on petitions for certiorari. Votes at the certiorari phase have traditionally been portrayed as quite different from votes on the merits.¹⁴⁰ When a Justice votes to grant certiorari, he is saying, in effect, that the Court's limited resources would be well invested in deciding the merits of that case; he is not necessarily saying, at the same time, that the judgment of the lower court should be reversed. Indeed, Justice Marshall makes just this point in his criticism of the Court's use of summary dispositions: the incentives for litigants at the certiorari phase are such that many litigants do not even address the substantive merits of the issues on which review is sought.¹⁴¹ Similarly, when a Justice votes to deny certiorari, he is reaching the opposite conclusion on the wisdom of plenary consideration but is not saying thereby that the lower court's judgment was correct. It must sometimes be the case that Justices who have voted to grant certiorari will differ on how they expect to vote on the merits and that Justices who have voted to deny certiorari similarly will be divided.

To explain the shortcomings of this traditional explanation, consider various categories of cases in which the Court grants certiorari. The first category contains cases in which the rule of law is clear but a lower court has misapplied the rule. Second, there may be cases in which there is a conflict among the courts of appeals and the conflict has sufficiently serious implications that the articulation of a uniform rule by the Court is warranted. Finally, a case may involve a clear rule of law that four Justices would like to overrule.

In the first category, Justice Brennan's hypothesis—that a vote to grant is connected with a Justice's view on the merits—is particularly

¹³⁹ See *supra* notes 97-107 and accompanying text.

¹⁴⁰ See *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-18 (1950) (Frankfurter, J.) (discussing factors other than the merits of a case that affect the vote for or against certiorari).

¹⁴¹ See *supra* note 127.

likely to be true. A Justice is more likely to vote to correct a lower court's error when he is convinced *both* that the lower court misapplied the rule *and* that the rule is substantively correct.¹⁴² The hard questions with regard to cases in the first category are whether the Court should cede a place on its crowded docket to "error correction," and, if it should, whether it should use a nonmajority rule to decide which cases to take. The oft-repeated phrase that the Court does not engage in error correction but instead spends its time in the loftier occupation of articulating national norms¹⁴³ is, of course, little more than a cliché. From a managerial standpoint, it is important that the Court occasionally step in and correct deviant decisions below.¹⁴⁴ To give up this role would be to abdicate an important part of its power to the lower courts, which would find it easier to develop bodies of case law at odds with those of the Supreme Court. But it is also important that the Court exercise its error correction functions wisely,¹⁴⁵ and different Justices may have different views of the propriety of granting certiorari in a particular case, even if they are in agreement on the merits. Thus, while the traditional explanation for the Rule of Four is perhaps accurate with respect to error correction cases—the four will have a chance to convince a fifth that the lower courts erred—it is with regard to such cases that the justification for a nonmajority rule is least powerful. If the Court can engage in error correction in only a small percentage of the cases in which lower courts have erred, then it should presumably take those cases which are most likely to be erroneous, in other words, those cases where, at the outset, a majority of the Court is inclined to believe the lower court should be reversed. It is precisely with regard to these cases that a majority (or even a supermajority) grant rule would make most sense.

¹⁴² A Justice is less likely to vote to grant when he favors the result below, even if he recognizes that this result is inconsistent with the Court's doctrine. For example, suppose that the lower courts rejected a public employee's procedural due process challenge to his termination because they erroneously relied on the since-rejected "bitter with the sweet" approach of *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) (Rehnquist, J., joined by Burger, C.J., and Stewart, J., plurality). See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("bitter with the sweet" approach misconceives the Constitutional guarantee). It is unlikely that Chief Justice Rehnquist, who in *Loudermill* reiterated his approval of the "bitter with the sweet" approach, see *id.* at 563 (Rehnquist, J., dissenting), would vote to grant certiorari.

¹⁴³ See, e.g., R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 4.17, at 221; Harlan, *Manning the Dikes: Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States*, 13 REC. A.B. CITY N.Y. 541, 551 (1958).

¹⁴⁴ See S. ESTREICHER & J. SEXTON, *supra* note 1, at 64.

¹⁴⁵ For a comprehensive analysis of the Court's practice, see Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795 (1983) (discussing the 1977-1979 Terms).

In the second category—cases involving conflicts among the lower courts—there need not be a significant correlation between votes at the certiorari stage and subsequent votes on the merits. With regard to conflicts, the question at the certiorari-granting stage is whether it is necessary to have a uniform governing rule, not whether this rule should have any particular content. That a Justice concludes that a conflict is present, or that the persistence of the conflict is counterproductive, should have little to do with his views as to which of the competing approaches taken by the lower courts should be adopted. Since votes to grant certiorari do not therefore imply that *any* Justices have made up their minds on the underlying issue, there are no minds to be changed.

This does not necessarily imply that in this category a Justice's vote to grant will be wholly divorced from his views on the merits. Even in relatively uncontroversial cases, the Justices are not dispassionate managers sitting atop the judicial hierarchy. On most issues, each will have a certain outlook and each will be attempting to use his votes—both at the certiorari stage and on the merits—to maximize the impact of his views.¹⁴⁶ The likelihood that a Justice will vote to grant may be directly related to his assessment of the likelihood that his preferred position will obtain a majority.¹⁴⁷ The less likely that outcome, the more likely it is that he will tolerate disuniformity.

Despite effects such as these, however, one may assume that in this second category a Justice's expected vote on the merits plays a relatively small role—though not an inconsequential one—in the decision whether to grant certiorari. For the first two categories, then, Justice Brennan's explanation for a nonmajority rule does not seem persuasive.

¹⁴⁶ A Justice's choice as to *which* case should be the vehicle for deciding a conflict can be significantly influenced by his tentative assessment of the merits. A Justice may well pick among the available cases the one he believes a lower court has rendered the most persuasive opinion in support of his position. Or, he may vote to grant in the case presenting the fact pattern most likely to lead to adoption of his preferred rule. Or he may vote to grant in the case in which the party he favors is represented by the best counsel. See D. PROVIN, *supra* note 15, at 65.

Conversely, a Justice may engage in "defensive denials," that is, he may vote to deny certiorari, even though he favors resolving a conflict, because the petitioner seeking review presents a peculiarly unattractive fact pattern or is represented by peculiarly incompetent counsel. The strategic considerations surrounding defensive denials are beyond the scope of this Article. For a discussion of the practice, see *id.* at 34 ("A decision may seem outrageously wrong to me, but if I thought the Court would affirm it, then I'd vote to deny. I'd much prefer bad law to remain the law of the 8th Circuit or the State of Michigan than to have it become the law of the land.") (quoting anonymous Justice)).

¹⁴⁷ See Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision "On the Merits"*, 4 POL'Y 429, 440-41 (1972) (empirical study based on Justice Burton's papers showing statistical correlation between the Justices' votes on certiorari and on the merits).

The third category, however, presents quite different considerations, which argue for a nonmajority rule, but for more complex and subtle reasons than that the exchange of views at conference may result in changing a Justice's mind. In this last category, a Justice votes to grant certiorari because he views the case as a vehicle to overrule existing precedent. A Justice prepared to overrule will be far more likely to vote to grant certiorari than one who is satisfied with the existing precedent. For the latter, there is little reason to grant because, even if he prevailed on the merits, he would be no better off than if certiorari had been denied.¹⁴⁸ But for the former, a vote to grant is a necessary prerequisite to the adoption of his views by the Court.

In cases in this third category, the Rule of Four does indeed, as Justice Brennan maintains, "give the four an opportunity to change at least one mind."¹⁴⁹ Thus, the Rule of Four has an educative function: briefing and oral argument may lead Justices to reconsider their initial positions. Absent the impetus for serious thought provided by the grant of certiorari, the remaining Justices would continue to subscribe to the views embodied in the Court's prior precedent.¹⁵⁰

But there are less obvious ways in which the Rule of Four might lead to the overruling of precedent. Despite the popular image, Justices are not entirely isolated from external pressures and oblivious to what their peers on the Court and in the outside world think about their rulings. This is not to say, of course, that a Justice is captive to any particular constituency, but rather that he may, in certain cases, be influenced by how he expects his ruling to be received by his colleagues and by the public.¹⁵¹ There may be cases in which a Justice, in the absence of any outside influence, would favor reaffirming a prior precedent but where such influence would lead him to vote to overrule if he were compelled to take a position on the merits.

For such a Justice, the optimal course is to vote to deny certiorari. The practical effect of this vote is to close off the reexamination of the issue. At the same time, however, a vote to deny is far less visible than

¹⁴⁸ There may be instances in which reaffirming existing precedent may have some value. This Article, however, does not focus on this phenomenon.

¹⁴⁹ *Straight v. Wainwright*, 106 S. Ct. 2004, 2006 (1986) (Brennan, J., dissenting).

¹⁵⁰ See S. ESTREICHER & J. SEXTON, *supra* note 1, at 124.

¹⁵¹ Cf. F. DUNNE, MR. DOOLEY'S OPINIONS: THE SUPREME COURT'S DECISION 26 (1906), reprinted in E. GERHART, QUOTE IT!: MEMORABLE LEGAL QUOTATIONS 188 (1969) ("[N]o matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns."); D. PROVINE, *supra* note 15, at 59-62 (according to Justice Clark, the probable impact of a decision in *Naim v. Naim*, an interracial marriage case, was an important consideration in the Court's decision not to note jurisdiction).

a vote on the merits to reaffirm the precedent and therefore less likely to engender negative reactions.

In contrast, if certiorari is granted, the Justice may be affected by the potential negative response to his adherence to precedent and therefore vote to overrule. Thus, in a situation in which only four Justices are comfortable with the prospect of taking a public position against the precedent, but where additional Justices would take one if they were forced to take a position at all, having a nonmajority rule may well affect the outcome.

In addition, the Rule of Four has important effects, both on the Court itself and on other actors in the legal system, even where it does not lead immediately to the overruling of precedent. First, by allowing a minority to bring before the Court again and again issues on which the outcome is foreordained, it allows such a minority to expose weaknesses in the underpinning of the majority's position and thereby to create a propitious climate for overruling that position in the future. For example, it seems likely that the Court's frequent reexamination of *National League of Cities v. Usery*¹⁵² ultimately led to its overruling in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁵³ When the rule was applied to different factual contexts it proved simply unworkable.¹⁵⁴ Similarly, the repeated granting of cases challenging the vitality of the construction of the eleventh amendment provided by *Hans v. Louisiana*¹⁵⁵ may presage its demise.

Continued five-to-four splits on the merits on issues of great public importance also serve as a signal to actors outside of the Court that the stability of the precedent is precarious by underscoring that there is a group of four Justices committed to overruling it. Moreover, such splits indicate that the replacement of one of the five Justices in the majority

¹⁵² 426 U.S. 833 (1976). In *National League of Cities*, the Court held that the tenth amendment prohibited Congress from "displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852. This principle was reexamined in *EEOC v. Wyoming*, 460 U.S. 226, 236-42 (1983); *FERC v. Mississippi*, 456 U.S. 742, 758-71 (1982); *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 683-86 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286-93 (1981).

¹⁵³ 469 U.S. 528 (1985).

¹⁵⁴ *See id.* at 538-39.

¹⁵⁵ 134 U.S. 1 (1890). Four Justices have repeatedly taken the position that the *Hans* doctrine—that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state," *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (quoting *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 280 (1973))—should be overruled. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 248 (1985) (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2958 (1987) (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting) (following *Atascadero*).

could well lead to an overruling. These signals can affect the way other actors in the legal system respond to the Court's rulings.¹⁵⁶

To lower courts, they are an invitation to make distinctions that might otherwise not be made, in the hope of either convincing a fifth Justice of the force of the distinction or of perhaps being reviewed at a time at which the composition of the Court has changed. In cases in which the precedent under attack is one striking down statutory enactments on constitutional grounds, continued reexamination of this precedent is a message to legislatures that, with minor tinkering, similar statutes might be upheld.¹⁵⁷ Frequent reexaminations of precedent also provide litigants who wish to challenge such precedent with means to impose higher costs on those defending it, who will be more likely to have to litigate their cases up to the level of the Supreme Court. At the margin, these increased costs will discourage litigation aimed at asserting a right protected by a prior ruling of the Court.¹⁵⁸

The abortion cases are a paradigmatic use of this facet of the power the Rule of Four accords a minority. Again and again, the Court has rejected challenges to *Roe v. Wade*,¹⁵⁹ most recently by a five-to-four vote.¹⁶⁰ In the meantime, the repeated consideration of the issue has kept it in the public eye and has prompted state legislatures to try to probe the edges of what the Constitution permits.¹⁶¹ It also fueled

¹⁵⁶ Under a Rule of Five, a four-Justice dissent from denial of certiorari would not have the same effect because it would be far less visible than a four-Justice dissent on the merits.

¹⁵⁷ See *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2173-74 (1986) (discussing Pennsylvania's past attempts to restrict abortions and successful challenges to those statutes); *id.* at 2178-84 (discussing the infirmities of the statute under examination).

¹⁵⁸ For the purposes of this discussion, it is not necessary to determine whether these effects are good or bad. This Article is simply trying to show that different interpretations of the scope of the Rule of Four have different substantive results.

The desirability of these external effects, however, is debatable. As a result of such effects, a minority of four Justices can have an impact on the resolution of actual controversies. At the same time, the legal system will exhibit incoherence, as some transactions will be governed by the majority's interpretation of the law, whereas others will be governed by the minority's interpretation. See R. DWORKIN, *LAW'S EMPIRE* 227-28 (1986) (arguing that such a system lacks integrity, which requires "consistency of principle").

¹⁵⁹ 410 U.S. 113 (1973).

¹⁶⁰ See, e.g., *Thornburgh*, 106 S. Ct. at 2169 (5-4 decision); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (6-3 decision); see also *Hartigan v. Zbaraz*, 108 S. Ct. 479 (1987) (affirmance by equally divided Court).

¹⁶¹ For example, after the Court struck down Pennsylvania's abortion statute in *Thornburgh*, see *supra* note 157, the Pennsylvania legislature passed a substantially similar bill. Convinced of its unconstitutionality in light of *Thornburgh*, Governor Robert Casey, an opponent of abortion, vetoed the bill. But, in his veto message, he "provided guidelines for 'joining with the clear majority of the legislature who voted for this bill' to forge new legislation . . ." *Casey Vetoes the Abortion Bill*, Phila. In-

the strong opposition to the nomination of Judge Robert Bork,¹⁶² who denounced *Roe v. Wade* in vehement terms,¹⁶³ to replace Justice Powell.¹⁶⁴

All of the three external effects identified point in the same direction. They weaken the force that the Court's precedent will have on the legal system by encouraging actors to take positions inconsistent with that precedent and by potentially rewarding such actors for their efforts either through an overruling or through a decision by other actors to let stand an inconsistent result. Therefore, they reinforce the direct effects that the Rule of Four has on the Court itself.

With this background in mind, it is possible to assess the effects of different interpretations of the Rule of Four. To the extent that five Justices can dismiss, before oral argument, a petition that four have granted, they will be able to neutralize the Rule's effects both on the Court itself and on other actors in the legal system. A similar result will attach if the Court does not take measures to protect its jurisdiction when this jurisdiction is in peril. If a case is not heard despite the granting of certiorari, the four Justices who voted to grant will not get the opportunity to convince a fifth, Justices who might be influenced by outside pressures will not have to face those pressures, and the weaknesses in the precedent will not be exposed. With respect to outside actors, the mere grant and later dismissal of certiorari may be a signal of a strong cleavage within the Court, but it will be a far weaker signal than four votes on the merits in favor of the overruling of precedent.

If the dismissal occurs after oral argument, the Rule of Four may, in certain instances, have fulfilled its educative function. It is entirely possible that reviewing briefs on the merits, hearing oral argument, and deliberating in conference will prompt a Justice to reconsider his initial position. This, of course, is the justification for the distinction made by Justice Stevens between dismissal before oral argument and dismissal

quirer, Dec. 18, 1987, at A1, col. 5.

¹⁶² See *Bork Fight Gives Abortion Rights Convention Something to Shout About*, N.Y. Times, July 13, 1987, at A12, col. 1.

¹⁶³ See, e.g., *The Human Life Bill: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 315 (1982) (statement of Judge Robert H. Bork) ("I am convinced . . . that *Roe v. Wade* is an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority.").

¹⁶⁴ Because Justice Powell had voted with the five-Justice majority in *Thornburgh*, his replacement could lead to the demise of *Roe v. Wade*. After the rejection of Judge Bork by a 58-42 vote in the Senate, President Reagan nominated Judge Anthony Kennedy, who had not expressed definitive views on the abortion question. As a result, Judge Kennedy did not face the sustained opposition of the pro-choice groups, which, at least in part, had led to the defeat of the Bork nomination. Judge Kennedy faced little opposition in the Senate and took Justice Powell's seat in February 1988.

after argument.¹⁶⁵ But if a Justice approaches cases without a clear sense that he will have to vote on the merits, he will be less likely to give to the merits of the case the same careful consideration that he would give to them if he labored under the clear expectation that a decision on the merits would follow. It seems likely, therefore, that an increased possibility that dismissal will follow oral argument, even if such dismissal does not actually occur, will dilute the Rule of Four's role in educating the Justices.

Similarly, oral argument may increase the visibility of the Court's dismissal, thereby sending a more powerful message throughout the legal system than a dismissal preceding argument. But, in general, the internal and external effects of the Rule of Four will be weaker if dismissal occurs after argument than if it does not occur at all.

Finally, if the grant of certiorari does not oblige a Justice to address the merits, he will have a lesser incentive to give serious thought to the merits of the case. Moreover, by not voting, he will be able to avoid external influences that may have affected the substance of his vote.¹⁶⁶ In this sense, the nonmajority quality of the Rule of Four is central to its distinctive function, both within and outside the Court, for it serves as both a spur and a check on the tendencies of the majority.

This discussion suggests a connection between the Rule of Four and the doctrine of stare decisis.¹⁶⁷ Both are nonmajority rules in that they interfere with the desires of a current majority: the Rule of Four because it trumps the desires of five Justices to deny certiorari, stare decisis because it creates a presumption against reconsideration of an established doctrine.

But these rules point in different directions. As discussed above, the Rule of Four creates conditions that make the reconsideration of precedent more likely. In contrast, the doctrine of stare decisis has the opposite effect. Justice Stevens has pointed out that

the question whether a case should be overruled is not simply answered by demonstrating that the case was erroneously decided and that the Court has the power to correct its past mistakes. The doctrine of *stare decisis* requires a separate examination. Among the questions to be considered are the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining

¹⁶⁵ See *supra* notes 100-07 and accompanying text.

¹⁶⁶ In certain cases, a Justice may be influenced by how he expects his ruling to be received. See *supra* note 151 and accompanying text.

¹⁶⁷ Cf. Stevens, *supra* note 4, at 14 (suggesting that the Rule of Four itself may be entitled to presumptive protection provided by the doctrine of stare decisis).

public confidence in the stability of our basic rules of law.¹⁶⁸

As a result of stare decisis, there will be cases in which five Justices would subscribe to a particular holding if they were writing on a blank slate but in which they will fail to do so if that holding is inconsistent with precedent.¹⁶⁹ The inquiry surrounding the possible overruling of precedent has two components: whether a different rule is, in some sense, preferable, and whether it is sufficiently more desirable to trump stare decisis. The first condition is necessary to an overruling but is not, by itself, sufficient.

Stare decisis also has indirect effects that serve to protect precedent. By creating an additional hurdle that the Court must traverse in order to overrule precedent, it decreases the likelihood that other actors in the legal system will take positions inconsistent with that precedent.

In summary, to Justices who care primarily about the scope of the majority's power, the Rule of Four and the doctrine of stare decisis work hand-in-hand in that both constrain the ability of the majority to dictate the outcome. In contrast, to Justices who care primarily about the stability of precedent, they work at cross purposes because the Rule of Four weakens precedent while stare decisis reinforces it. Thus, whether Justices who subscribe to an expansive interpretation of the Rule of Four would accord strong force to the doctrine of stare decisis should depend on whether they consider the former goal more important than the latter.

II. THE RULE TO HOLD

Individuals who practice regularly before the Supreme Court know that the Court sometimes defers consideration of a petition for certiorari until after it decides a case in which it has already granted certiorari and which raises a similar issue.¹⁷⁰ In 1959, Justice Clark

¹⁶⁸ *Id.* at 9.

¹⁶⁹ *See, e.g.,* *Patsy v. Board of Regents*, 457 U.S. 496 (1982). In *Patsy*, the Court upheld precedent that a plaintiff in a § 1983 action is not required to exhaust state administrative remedies before filing his complaint. In a concurrence joined by Justice Rehnquist, Justice O'Connor indicated that the rule of stare decisis determined her vote: "[C]onsiderations of sound policy suggest that a § 1983 plaintiff should be required to exhaust adequate state administrative remedies before filing his complaint. . . . However, . . . this Court has already ruled that . . . exhaustion . . . is not required in § 1983 actions. . . . Reluctantly, I concur." *Id.* at 516-17 (O'Connor, J., concurring).

¹⁷⁰ *See* R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 4.16, at 221 (stating that when a petition presents a question that is identical or similar to an issue already pending before the Court in another case in which certiorari has been granted, the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make sum-

mentioned that the petition in *Ohio ex rel. Eaton v. Price*¹⁷¹ had been held "awaiting the decision" in *Frank v. Maryland*¹⁷² in arguing why Eaton's claims were foreclosed by *Frank*.¹⁷³ Supreme Court observers

mary disposition of that case in accordance with its decision); *id.* § 5.9, at 274 ("On occasion a petition for certiorari may be held, without the Court taking any action, until some event takes place which will aid or control the determination of the matter.").

¹⁷¹ 360 U.S. 246 (1959).

¹⁷² 359 U.S. 360 (1959).

¹⁷³ 360 U.S. at 249 (Clark, J., mem.). *Eaton* is interesting for another reason. The case involved an appeal from an Ohio Supreme Court decision striking down a state statute providing access for housing inspectors. Only eight Justices participated in the decision to note probable jurisdiction. Four Justices—Frankfurter, Clark, Harlan, and Whittaker—voted against a full hearing. In response to the public announcement of their disagreement with the decision to note probable jurisdiction, Justice Brennan, who had voted to note probable jurisdiction, explained that the Court employed a Rule of Four with respect to whether cases on the appeal docket should be afforded full briefing and oral argument similar to its Rule of Four with respect to the granting of certiorari. *Id.* at 247 (Brennan, J., mem.). This practice is surprising because the dismissal of an appeal, unlike the denial of certiorari, is a disposition on the merits. *See, e.g., Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (votes to dismiss for want of a substantial federal question, "it hardly needs comment, are votes on the merits of a case." (citation omitted)); D. PROVIN, *supra* note 15, at 15-16 (stating that the difference in effect between the denial of certiorari and the dismissal of an appeal exists "because litigants have a statutory right to a Supreme Court disposition in appeals cases").

Moreover, never before, to Justice Brennan's knowledge, had Justices who either would have summarily affirmed the judgment below or dismissed the appeal publicly announced their disagreement with the order setting an appellate case for argument:

The reasons for such forbearance are obvious. Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case, and public expression of views on the merits of a case by a Justice before argument and decision may well be misunderstood; the usual practice in judicial adjudication in this country, where hearings are held, is that judgments follow, and not precede them. Public respect for the judiciary might well suffer if any basis were given for an assumption, however wrong in fact, that this were not so.

Eaton, 360 U.S. at 247-48 (Brennan, J., mem.). Moreover, Justice Brennan argued, the more detailed consideration and debate attendant on full consideration could alter a Justice's views, and a Justice should not be held to his previously cast votes in conference. *See id.* at 248 (Brennan, J., mem.).

Like so many other disputes over the Court's operating rules, the conflict in *Eaton* cannot really be understood without reference to the issues raised by the case. The four Justices who voted against noting probable jurisdiction explained that for them Eaton's claims were entirely foreclosed by the decision in *Frank*, decided just a few weeks previously, and that the Court should therefore summarily affirm the decision of the Ohio Supreme Court. In a statement resembling Chief Justice Burger's dissent from the grant of certiorari in *Darden v. Wainwright*, 473 U.S. 927 (1985), *see supra* notes 44-45 and accompanying text, the four wrote that "we are of the opinion that it would manifest disrespect by the Court for its own process to indicate its willingness to create an opportunity to overrule a case decided only a fortnight ago . . ." 360 U.S. at 248-49 (Frankfurter, J., mem.). *Frank* had been decided by a five-to-four vote. Justice Stewart, one of the Justices in the *Frank* majority, had recused himself in *Eaton* because his father had been on the lower court. *See Eaton*, 360 U.S. at 249 (Clark, J.,

have been able to infer decisions to "hold" from several facts: the unusually long time that it takes the Court to dispose of a petition raising an issue similar to one that has recently received plenary consideration;¹⁷⁴ the disposition en masse of batches of petitions raising issues just decided by the Court; and the fact that many such petitions are granted, vacated, and remanded for reconsideration in light of a case that has recently been decided.¹⁷⁵

A decision to "hold" a case, however, unlike a decision to grant certiorari, is never published in the *United States Reports* or otherwise released to the public. Furthermore, until *Straight v. Wainwright*,¹⁷⁶ the Court had never explicitly discussed the contours of its "hold" policy or the basis for such a policy. In *Straight*, the Court indicated that the votes of four Justices were sufficient to "hold" a case but did not reveal how many votes were necessary.¹⁷⁷ Only during this past Term, in yet another death-penalty case, did the Court reveal that "[t]hree votes suffice to hold a case"¹⁷⁸

This Article next examines the Court's discussion of the hold rule in *Straight* and assesses the extent to which the Court has developed a consistent view of why cases are held. Two themes emerge from this discussion: that holding petitions avoids revealing the Court's internal processes with regard to granted cases and that holding promotes equity among litigants—a value that might be called "judicial equal protec-

mem.).

Thus, *Eaton* illustrates the themes discussed in Part I of this Article, and is one of the few cases that overtly suggests that the Rule of Four provides an opportunity for a minority to attack precedent.

¹⁷⁴ See, e.g., *Keney v. New York*, 388 U.S. 440 (1967) (petition for certiorari held for almost two years while other obscenity cases decided).

¹⁷⁵ Perhaps the most significant example of this phenomenon occurred in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), which invalidated all the then-imposed death sentences in the United States. On June 29, the same day the Court announced *Furman*, it vacated the death sentences in over 100 cases. See *Stewart v. Massachusetts*, 408 U.S. 845 (1972) (per curiam); 408 U.S. 933-940 (1972) (listing cases).

Cases in which the Court grants, vacates, and remands (colloquially known as "GVR"s) are relatively frequent. See Hellman, "Granted, Vacated, and Remanded"—*Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389, 390 (1984) (Court GVRed 69 cases in the 1982 Term). Explaining its GVR practice in *Henry v. City of Rock Hill*, 376 U.S. 776 (1964) (per curiam), the Court stated that a case will be remanded for reconsideration in light of a recent decision when the Justices are "not certain that the case [is] free from all obstacles to reversal on [the] intervening precedent." *Id.* at 776. The Court further stated that a GVR does "not amount to a final determination on the merits." *Id.* at 777. It does, however, "indicate that we [find the intervening case] sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Id.*

¹⁷⁶ 106 S. Ct. 2004 (1986).

¹⁷⁷ *Id.* at 2006-07 (Brennan, J., dissenting).

¹⁷⁸ *Watson v. Butler*, 108 S. Ct. 6, 7 (1987) (Brennan, J., dissenting).

tion." After discussing the analytic force of these two themes, this Article returns again to its central question: how does the hold rule in general, and its nonmajority nature in particular, serve the Court's institutional concerns?

A. *Straight v. Wainwright*

Several months after the oral argument in *Darden v. Wainwright*,¹⁷⁹ Ronald Straight, another Florida death row inmate scheduled for imminent execution, filed a petition for federal habeas corpus claiming that, at the time of his trial, Florida's capital sentencing procedure was constitutionally defective. Straight asserted that this claim was also presented in *Darden* and asked the Court to stay his execution pending the decision in that case. He also petitioned for certiorari.

By a five-to-four vote, the Court denied Straight's application for a stay.¹⁸⁰ Justice Powell filed an opinion concurring in the denial of the stay, which was joined by Chief Justice Burger and Justices Rehnquist and O'Connor.¹⁸¹ Justice Brennan dissented in an opinion joined by Justices Marshall and Blackmun.¹⁸² Both the concurrence and the dissent addressed the question of the Court's obligation to stay an execution where the petition for certiorari presents an issue on which certiorari has already been granted and on which decision is pending.¹⁸³

Justice Brennan's dissent indicated that "[f]our Justices have voted to 'hold' Straight's petition because they believe that it presents an issue sufficiently similar to *Darden* to warrant delaying disposition of Straight's case until a decision is reached in that case."¹⁸⁴ If the Court had actually granted certiorari in *Straight*, the posture of the case would have been identical to that of *Darden* and the central question on the stay application would have been, as it was in *Darden*, whether the fact that four Justices had voted for certiorari triggers a duty for the remaining Justices to vote for a stay in order to preserve the Court's jurisdiction. Here, however, the vote of the four Justices was not for certiorari, but rather to postpone consideration of the petition until after the decision on the merits of *Darden*'s claims. The question before the Court was then whether this difference was relevant for the pur-

¹⁷⁹ 106 S. Ct. 2464 (1986).

¹⁸⁰ *Straight v. Wainwright*, 106 S. Ct. 2004 (1986).

¹⁸¹ See *id.* at 2004 (Powell, J., concurring). Justice White voted to deny the stay but did not join Justice Powell's opinion.

¹⁸² See *id.* at 2006 (Brennan, J., dissenting). Justice Stevens voted to grant the stay but did not join Justice Brennan's dissent. See *id.* at 2007 (Stevens, J.).

¹⁸³ See Amsterdam, *In Favor of Mortis: The Supreme Court and Capital Punishment*, 14 HUMAN RIGHTS, Winter 1987, at 14, 56.

¹⁸⁴ *Straight*, 106 S. Ct. at 2006 (Brennan, J., dissenting).

pose of determining whether the execution should be stayed.

Justice Brennan viewed *Darden* and *Straight* as similar cases in all relevant respects. He argued that, for purposes of staying an execution, a vote to hold should be treated no differently than a vote to grant certiorari:

A "hold" is analogous to a decision to grant a petition for certiorari. The Court's "hold" policy represents the conviction that like cases must be treated alike. Like the Rule of Four, it grants to a minority of the Court the power to prevent the majority from denying a petition for certiorari when the minority is persuaded that the issues or questions presented in the case to be held are similar to a case that the Court is to decide. The principle is apparent: whether an individual obtains relief should not turn on the fortuity of whether his papers were the first, the second or the tenth to reach the Court. What counts is the merits. A vote to "hold" is a statement by a number of Justices that the disposition of the granted case may have an effect on the merits of the case which is to be held. The fact that a majority of the Justices disagree with the decision to "hold" does not warrant subversion of the "hold" rule any more than does disagreement by five with the decision to grant a petition for certiorari justify departure from the Rule of Four.¹⁸⁵

Apparently referring to the Court's disposition of the stay application in *Darden* earlier that Term, he added: "It is unthinkable to me that the practice that four votes to grant certiorari trigger an 'automatic' fifth vote to stay an execution should not apply to a 'hold' when a man's life is in the balance."¹⁸⁶ For the dissenters, then, the requirement that held cases be treated identically to granted cases arises from the ancient common law principle that "like cases be treated alike."¹⁸⁷ Generalizing from the particular context of *Straight*, if the Court has granted certiorari in one case to resolve a particular issue, and, before it has reached a decision on the merits of that case, the same issue is presented in a second certiorari petition, the latter petition must be held pending the adjudication of the first case to enable both petitioners to

¹⁸⁵ *Id.* at 2006-07 (Brennan, J., dissenting).

¹⁸⁶ *Id.* at 2007 (Brennan, J., dissenting).

¹⁸⁷ One commentator states that the principle rests on the teachings of Aristotle who "repeatedly defined justice in terms of equality" and stated in *Magna Moralia I* that, "The just, then, in relation to one's neighbor is, speaking generally, the equal; . . . since, then, the just is equal, the proportionally equal will be just." Coons, *Consistency*, 75 CALIF. L. REV. 59, 59 n.1 (1987).

be treated alike. Otherwise, the treatment of the two petitioners will depend on the "fortuity" of who filed first: the petitioner in one case will benefit from the rule, but the petitioner in the other will not.¹⁸⁸

Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, strongly disagreed with the claim that because the Court issues stays when four Justices have voted to grant certiorari, it must also do so when three (or four) have voted to hold. This conclusion rested on two arguments.

First, Justice Powell stated that a vote to grant certiorari reflects a decision that the case raises an issue worthy of plenary consideration and creates the possibility that the petitioner will obtain a favorable outcome. Thus, the petitioner in a granted case has been found, in a sense, to "merit" the Court's consideration. In contrast, according to Justice Powell, a decision to hold may not reflect any such opinion regarding the "merit" of the petitioner's claims: "the Court often 'holds' cases for reasons that have nothing to do with the merits of the cases being held, as when we wish not to 'tip our hand' in advance of an opinion's announcement."¹⁸⁹

The Court takes a preliminary vote soon after oral argument, and the Chief Justice, or the senior Associate Justice if the Chief Justice is not in the majority, assigns the opinion.¹⁹⁰ Barring a switch in the votes, the outcome of the case—although not the details of the opinion—is known to the Justices well before the opinion becomes public.

Suppose, for example, that at time 1, the Court grants certiorari in Case 1, which raises issue A. At time 2, after the Court has taken a preliminary vote on Case 1, but before the opinion in Case 1 has been released, it faces a petition for certiorari in Case 2, which also raises issue A. Justice Powell maintains that, if at time 2 the Court were to deny certiorari in Case 2, it would send the signal that issue A had been preliminarily decided in a way that would leave unaffected the judgment in Case 2. The Court would therefore "tip its hand" on the

¹⁸⁸ See *United States v. Johnson*, 457 U.S. 537, 556 n.16 (1982) (noting the "[p]otential for unequal treatment" in granting plenary consideration only to one of numerous cases presenting the same question).

Most discussions of this issue concern whether all similarly situated petitioners will "benefit" from the Court's grant. Of course, if the result in the first case is unfavorable to the first petitioner, then no "benefit" will be created. In such a case, clearly the second petitioner will be no worse off than if his case had simply been denied. But, in some circumstances, he will be better off: if the reason the first petitioner loses is unrelated to the merit of the common claims in the two petitions, holding may make it possible for the second petition ultimately to be granted.

¹⁸⁹ *Straight*, 106 S. Ct. at 2005 n.2 (Powell, J., concurring).

¹⁹⁰ See R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 1.2, at 6. See generally Rehnquist, *Sunshine in the Third Branch*, 16 WASHBURN L.J. 559 (1977) (anecdotal discussion of the Court's current practices).

outcome of Case 1.

But this "tipping" rationale has force only to the degree that the Court usually applies the "new" rule to all cases in which the petition for certiorari has not yet been disposed of at the time of a grant in a case raising the same issue.¹⁹¹ If the Court operated under a contrary rule—for example, that once it grants a petition on a particular issue it will automatically deny certiorari on any additional petitions raising that issue—then the denial of certiorari in subsequent cases would give no signal as to the impending result.¹⁹² It is only if subsequent cases *should be affected* by prior grants that a decision not to hold a petition indicates anything with regard to the outcome of the granted case. Thus, Justice Powell's explanation of the function of holds necessarily implies that the grant of certiorari to decide an issue triggers an obligation for the Court to treat as "alike" subsequent cases raising that same issue.

Moreover, the tipping rationale does not provide a complete explanation for the Court's hold policy. The period between when a case is granted and the decision is reached after briefing, argument, and conference will usually involve several months. During this period, the tipping rationale provides no basis for holding at all, since until the Court has reached at least a tentative outcome there is no "hand" to be tipped. Nonetheless, it seems fairly clear that the Court often holds petitions filed long before any decision has been reached in the granted case.¹⁹³

¹⁹¹ Not all these petitions will necessarily have been filed *after* the granted case. Some may have been filed at roughly the same time and thus considered at the same conference. Others may have been filed before the granted case but, for various reasons such as extensions of time for the respondents, may not be decided prior to the grant. And still others may have been held for previous cases.

For example, several of the cases GVRed in light of *Furman v. Georgia*, 408 U.S. 238 (1972), dated back to the 1968 October Term. See *supra* note 175.

¹⁹² Moreover, to the extent that the Court is using a tipping rationale for holding cases, it clearly matters whether the second petition is being considered before or after the Court has in fact decided the first case. If the Court has not yet decided the first case—perhaps neither full briefing nor oral argument has yet occurred—then denial of a second petition could not "tip" the Court's hand because there is no hand yet to tip. Petitions filed prior to oral argument in the similar case could thus be denied without creating any suggestion of the way in which the granted case would be decided. But such a rule could lead to costly strategic behavior on the part of litigants. For example, petitioners might seek extensions of time within which to file their petitions, placing a burden on the Circuit Justice to whom the application is sent. See generally R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 10, § 6.5, at 316-18 (discussing applications for extension of time). Moreover, the Justices themselves might engage in wasteful strategic behavior, such as asking that petitions be "relisted" (that is, put over for reconsideration) at a later conference.

¹⁹³ For example, the petition in *M.C.C. of Fla., Inc. v. United States*, which ultimately was GVRed in light of *Tull v. United States*, 107 S. Ct. 1831 (1987), see 107 S.

In the particular context of *Straight*, Justice Powell's discussion of the tipping rationale is unpersuasive for another reason as well. Suppose that the four Justices who had voted to hold *Straight* had done so solely to avoid revealing the result in *Darden*. The decision not to issue a stay would nonetheless provide a tip-off as to how *Darden* would be decided: *if* the preliminary vote in *Darden* had been favorable to Straight's claims and *if* the Court normally applies a new rule to petitioners in pending cases, then it would surely be perverse to deny Straight a stay and let him be executed. Thus, denying a stay makes sense only if the decision in *Darden*, regardless of which way the Court decided the case, would make no difference to Straight's prospects. But then, however, no tipping would be at stake, since nothing about the outcome in *Darden* could be inferred from the denial of the stay. Thus, the different results in *Straight* and *Darden* on the applications for stay cannot be explained solely by reference to the hold rule's tipping rationale.

Justice Powell's second reason for treating held cases differently from granted cases is no more persuasive. Turning to the merits of Straight's particular claims, Justice Powell stated: "In this case, my vote to deny Straight's petition for certiorari—and therefore not to hold the petition for *Darden*[—]reflects my view that *no matter how Darden* is resolved, the judgment [in *Straight*] will be unaffected."¹⁹⁴ This rationale fully and properly explains why Justice Powell voted against holding the petition in *Straight*. That, however, was not the issue to which his opinion was supposed to be addressed. Instead, the question before the Court was whether the five Justices who voted against holding nevertheless had an independent duty to protect the Court's jurisdiction once their colleagues invoked the hold rule.

As indicated in Part I of this Article, Justice Powell had explicitly noted in *Darden* that such an obligation attaches, at least in certain circumstances, to a Justice who has voted to deny certiorari in the face of a vote by four of his colleagues to grant. And Justice Powell did not abandon this position in *Straight*, as, apparently referring to *Darden*, he noted that "the Court has ordinarily stayed executions when four members have voted to *grant* certiorari"¹⁹⁵ Under the rationale

Ct. 1968 (1987), was filed on January 30, 1986, see 54 U.S.L.W. 3533 (1986), nearly a year before *Tull* was argued, on January 21, 1987, see 55 U.S.L.W. 3523 (1987).

The time that elapses between a grant of certiorari and oral argument can often be eight or more months, since the Court usually fills up its oral argument calendar for each Term by mid-January. Thus, there will be a long period during which, although the Court has granted certiorari, it has taken absolutely no action on the granted case.

¹⁹⁴ *Straight*, 106 S. Ct. at 2005 n.2 (Powell, J., concurring) (citation omitted).

¹⁹⁵ *Id.*

in *Darden*, it is irrelevant that Justice Powell believed that holding the petition was unwarranted. What *is* relevant, instead, is that a sufficient number of Justices had voted to hold.¹⁹⁶

One can hypothesize that a reason why the hold rule and the Rule of Four might impose different obligations on the Justices who disagree with the invocation of the rule is that the inquiry as to whether the decision in one case might affect the judgment in another is a more objective one than the inquiry as to whether the grant of certiorari is appropriate.¹⁹⁷ Thus, it may be more understandable in the case of the hold rule to permit Justices who disagree with the invocation of the rule to give effect to their disagreement by refusing to protect the Court's jurisdiction. Similarly, the goal served by the certiorari rule (that the Court consider cases in which its intervention would benefit the legal system) might be deemed more compelling than the goal served by the hold rule (that certain cases be treated alike).¹⁹⁸

But Justice Powell did not even speculate whether either of these reasons, or any other, justify the different obligations on the majority imposed by the Rule of Four and the hold rule. Absent such a justification, there is incoherence between the approach of the prevailing plurality in *Straight* (that the Court is not obligated to preserve its jurisdiction in held cases) and the same plurality's explanation of the result in *Darden* (that the Court is obligated to preserve its jurisdiction in granted cases).¹⁹⁹

¹⁹⁶ Thus, Justice Powell's position in *Straight* resembled Chief Justice Burger's position in *Darden*, see *supra* notes 44-45 and accompanying text. That approach permits Justices who have voted against further consideration of a case to assess whether the reasons their colleagues have used for granting or holding are justified.

¹⁹⁷ In *Straight* itself, for example, the Justices who voted to deny *Straight*'s application did so, not on the ground that *Straight*'s claim lacked merit, but on the ground that, because *Straight* had previously litigated his claim, his present petition constituted an abuse of the writ. See *Straight*, 106 S. Ct. at 2005 (Powell, J., concurring).

¹⁹⁸ If the grant of certiorari is vitiated, then the Court loses an opportunity to issue a decision on the question presented. But if the hold is vitiated, the Court remains able to address the question presented in the granted case.

¹⁹⁹ Two recent capital cases confirm the Court's belief that a hold does not obligate it to preserve its jurisdiction. *Streetman v. Lynaugh*, 108 S. Ct. 588 (1988); *Watson v. Butler*, 108 S. Ct. 6 (1987). Even though these two cases had been held, the Court denied the respective stays on four-to-four votes (one seat was vacant as a result of the retirement of Justice Powell). Commenting on the Court's failure to grant the stay in *Streetman*, Justice Brennan stated, not without a tinge of bitterness:

Had *Streetman* been convicted of bank robbery, this case would be of no moment. The Court would simply hold *Streetman*'s case until *Franklin* was decided, and then take appropriate action. But death is different. Due to the unique nature of the death penalty, the relief that we could give any other type of habeas corpus petitioner is unavailable to *Streetman*. His case will be moot long before we can resolve *Franklin*—he will be dead. . . . Death is certainly different, but I had never believed it to be different

B. *Judicial Equal Protection*

Perhaps more important than the differences between the four concurring and three dissenting Justices in *Straight* is the general agreement of all seven on the obligation of the Court, following the grant of certiorari in one case, to hold certiorari petitions raising the same issue that are filed prior to the announcement of a decision on the merits. As discussed in the preceding Section, this proposition is accepted implicitly in Justice Powell's discussion of the tipping rationale and explicitly in Justice Brennan's dissent.

Through holds, petitioners in subsequent cases presenting the same issue can benefit from the Court's ruling.²⁰⁰ This concern with what might be termed "judicial equal protection," that is, the obligation of courts to "treat like cases alike,"²⁰¹ is central to the notion of common law adjudication.²⁰² At first glance, however, it fits uncomfortably with the discretionary nature of the Court's certiorari jurisdiction.

It is beyond dispute that no obligation to treat like cases alike attaches before the grant of certiorari on a particular issue. One day, the Court can deny certiorari in a case in which a given issue was decided by the lower courts in a way favorable to plaintiffs; the next day, it can deny certiorari in another case in which the same issue was decided in favor of defendants.²⁰³ This power is the essence of a system of discretionary grants; it is precisely in this way that such a system differs from a system of error correction.²⁰⁴ It might be said that in this example the Court has treated like cases alike: the two cases are "alike" in that they both fail to present an issue that prompts the Court to exercise its discretionary jurisdiction. But they are treated alike only with respect to the Court's interest in deciding the issue; from the perspective of the litigants, the cases will have been treated differently.

Similarly, it is perfectly consistent with the Court's exercise of its discretionary jurisdiction to deny certiorari in a case raising a particu-

in this way.

108 S. Ct. at 590 (Brennan, J., dissenting).

²⁰⁰ For a general discussion of this question, see Hellman, *supra* note 175.

²⁰¹ See, e.g., *South v. South Carolina*, 474 U.S. 888, 890 (1985) (Blackmun, J., dissenting) (arguing that the petition for certiorari should be GVR'd in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and adding that "[t]his Court's refusal to treat like cases alike can only add to the unconstitutionally arbitrary nature of the death penalty").

²⁰² See *supra* note 187 (discussing the doctrine).

²⁰³ See, e.g., *United States v. Kras*, 409 U.S. 434, 460-61 (1973) (Marshall, J., dissenting) ("Reliance on denial of certiorari for *any* proposition impairs the vitality of the discretion we exercise in controlling the cases we hear.").

²⁰⁴ See Hellman, *supra* note 145, at 799-800.

lar issue and, a short time later, to grant certiorari in another case raising the same issue and decided the same way by the lower courts. If, for example, a conflict in the circuits developed in the interim, the issue's claim on the Supreme Court's decisional resources will have become more compelling and this difference may justify the decision to deny certiorari in one case and to grant in the other. But even once the Court decides that a certain issue is certworthy, it is under no obligation to take the first case that presents it. For example, the first case may present questions as to the standing of one of the parties, the ripeness of the issue for review, or possible mootness, all of which the Court will have to face before it can reach the issue it wishes to decide, whereas the second case may present the issue cleanly. The Court's institutional interest, rather than the interest of the parties, is the determining factor in its decision to deny certiorari in the first case but to grant in the second. That this decision is legitimate indicates that the Court is under no obligation to treat the first case in the way that it plans to treat the second. Stated differently, the Court need not treat "alike" these two like cases.

Again, one can say that the cases are not "like" cases from the perspective of the Court. In the first example, the case arising after the split in the circuits presents a stronger claim on the Court's time. In the second example, the second case permits the Court to decide the issue with more ease. Thus, the Court's institutional interest in deploying its resources wisely is a cognizable factor in determining the "likeness" of cases.

But if this factor is cognizable to differentiate the case in which certiorari was granted from an earlier case that is similar from the perspective of the litigants, it should also be cognizable to differentiate the case in which certiorari is granted from a similar, later case. Thus, if, after the Court grants certiorari, it receives a second, similar petition, one can say that the second case is not like the first case in the fundamental respect that, following the grant, the Court may have no interest in giving further consideration to the issue involved.

To say that the Court's institutional interest determines what are "like" cases, therefore, does not help explain why a grant of certiorari triggers the obligation to hold subsequent cases raising that issue. Thus, defining the "likeness" of cases from the Court's perspective does not advance the inquiry.

Returning to defining likeness of cases from the perspective of the litigants, the hold rule can be stated as providing that the duty of the Court to "treat like cases alike" attaches only after the grant of certiorari to decide a particular issue. If the Court is faced with three cases

that are identical from the perspective of the litigants—Case 1, Case 2, and Case 3—and if it denies certiorari in Case 1, but later grants certiorari in Case 2, then it must hold the petition in Case 3. The petitioner in the third case will get the benefit of the ruling in the second, whereas the petitioner in the first will not.

The question of why the obligation on the Supreme Court to “treat like cases alike” arises at the time of the grant of certiorari to decide a particular issue does not have an obvious answer. Clearly it could not arise before, for if the Court had to engage in error correction to ensure that all “like” cases throughout the legal system are treated “alike,” it would lose most of the flexibility provided by the discretionary nature of its jurisdiction and would face an unmanageable number of cases under any reasonable conception of the Court’s decisional capacity.

At the other end of the spectrum, it is quite clear that, following the Supreme Court’s holding on the merits of a particular issue, lower courts must apply that rule to cases in which the underlying activity occurs after the Supreme Court’s decision. The categories that are less clear involve cases that are pending somewhere in the judicial system at the time the Supreme Court announces the new rule. Table I sets out the relevant categories.

TABLE I

Stage of
"Controlling" Case

Stage of "Controlled" Case	certiorari granted	preliminary vote taken	opinion announced
certiorari petition considered	A	B	C
decision of lower court	D	E	F
underlying activity	G	H	J

The horizontal axis reflects the status of the case whose merits the Supreme Court has decided to address. This case will be referred to as the "controlling" case, since this analysis is concerned with its potential to control the outcome of other cases. The relevant time periods on this axis are the grant of certiorari, the preliminary vote of the Justices immediately following oral argument, and the announcement of the opinion.

The vertical axis reflects the status of another case that raises an issue potentially affected by the outcome of the controlling case. This latter case will be referred to as the "controlled" case. The relevant time periods on this axis are the occurrence of the underlying activity, the decision of the lower court, and the consideration of the petition for certiorari by the Supreme Court.

The boxes of the matrix reflect the relationship between controlling and controlled cases. To place a "controlling case, controlled case" pair in a particular box, one must first identify the latest stage that the controlling case has traversed. Next, one must determine the earliest stage that the controlled case has not yet traversed. Thus, for example,

all pairs in which certiorari has been granted in the controlling case but where a preliminary vote has not yet been taken in that case fall in the left-hand column of Table I. Such pairs will fall in box G if the underlying activity in the controlled case has not yet taken place, in box D if the underlying activity in that case has already taken place but if the lower court has not yet decided the case, and in box A if the lower court has decided the controlled case but the Supreme Court has not yet considered the certiorari petition.²⁰⁵

The question for each of the boxes is whether the rule announced by the Supreme Court in the controlling case will apply to the controlled case. Notwithstanding recent suggestions by Attorney General Meese,²⁰⁶ any serious view of judicial equal protection dictates that activities that occur after the Supreme Court has announced a rule of law be governed by that rule, unless and until the Supreme Court itself decides otherwise. The outcome of cases in Box J is therefore straightforward: the new rule, whatever its contours, will apply to the controlled case. So, for example, any evidence seized in violation of the fourth amendment by state officers after the Supreme Court held the exclusionary rule applicable to the states²⁰⁷ was necessarily suppressed. In short, Box J represents the vast bulk of all cases; indeed, in such cases, it is a misnomer to refer to the Supreme Court's decision as a "new" rule, since it represents the existing law at the time the underlying activity takes place.

Judicial equal protection and the hierarchical structure of the judiciary similarly require that lower courts apply to cases coming before them the rule announced by the Court in the controlling case. In other words, cases in Box F are governed by the new rule. But the rules announced by the Court always have two distinct components—one substantive, the other temporal. The substantive component concerns the specific legal principle decided in the controlling case, for example, that evidence obtained in violation of the fourth amendment cannot be introduced in the prosecution's case in chief.²⁰⁸ The temporal component concerns the universe of cases to which the substantive component

²⁰⁵ This model assumes that each case is adjudicated by only one lower court. But this analysis does not depend on such assumption. More lower courts would simply add more rows to Table I.

²⁰⁶ See Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987) ("[A] constitutional decision by the Supreme Court . . . binds the parties in a case and also the executive branch for whatever enforcement is necessary. But such a decision does not establish a supreme law of the land that is binding on all persons and government henceforth and forevermore.").

²⁰⁷ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

²⁰⁸ See *id.*

will apply, for example, that cases on direct appeal at the time the new rule was announced shall be governed by the new rule,²⁰⁹ or that the new rule shall not apply to collateral review of final state court convictions.²¹⁰ In other words, the temporal component of a decision is what determines the extent to which the substantive rule is to be given retroactive application.²¹¹

Although it is beyond the scope of this Article to discuss in depth the Court's jurisprudence of retroactivity,²¹² that debate sheds significant light on the issues underlying the Court's use of holds. In particular, the debate over retroactivity has focused on the scope of the Court's duty to treat all litigants equally by giving them all, or at least a substantial class of them, the benefit of a new rule regardless of whether their case is the vehicle for announcing that rule, the very issue before the Court in *Straight*. For this reason, a brief summary of that body of law is necessary before considering the remaining boxes in Table I; this inquiry is confined to the domain of criminal law, in which the issue has received the most attention.

The nature of the Court's recent concern with retroactivity can be traced to a 1965 case, *Linkletter v. Walker*,²¹³ which determined the applicability of *Mapp v. Ohio*'s²¹⁴ extension of the exclusionary rule to state-court proceedings. *Linkletter* held that the exclusionary rule announced in *Mapp* would not apply to cases in which the defendant's

²⁰⁹ See, e.g., *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) (case was on direct appeal when *Mapp* was decided); *Ker v. California*, 374 U.S. 23, 25 (1963) (same); see also *Linkletter v. Walker*, 381 U.S. 618, 622 (stating that the Court's decisions "applied to cases still pending on direct review at the time [they are] rendered").

²¹⁰ See *Linkletter*, 381 U.S. at 619-20.

²¹¹ Cases in boxes G and H raise a "hold" question for lower courts: if a lower court knows that an issue is currently pending before the Supreme Court (and, obviously, the lower court will be unable to determine whether the case falls in box G or box H since the lower court will not know the Supreme Court's preliminary vote), it can either decide the case on the basis of existing law or it can defer consideration until after the Supreme Court's decision and then apply the new substantive and temporal rules.

²¹² The vast majority of the cases in which the Court has considered issues of retroactivity have involved issues of constitutional criminal procedure, such as the scope of the fourth, fifth, and sixth amendments. See Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1558-96 (1975) (discussing *Linkletter* and its progeny of criminal procedure cases from 1965-1975). Although this discussion is confined to these cases, the Court has discussed retroactivity in the civil context. See, e.g., *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 719-22 (1978) (retroactive liability under Title VII); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-109 (1971) (retroactive application of a state statute of limitations). Nothing in the Court's analysis in those cases undercuts the point that the Court's treatment of retroactivity is intimately connected to its approach to various of its operating rules.

²¹³ 381 U.S. 618 (1965).

²¹⁴ 367 U.S. 643 (1961).

conviction had become final prior to the decision in *Mapp*.²¹⁵ From *Linkletter* until last Term,²¹⁶ the Court employed a rule-specific, three-part test, which considered the purpose of the new rule, the extent to which law enforcement authorities had relied on the old rule, and the effect retroactivity would have on the administration of justice.²¹⁷ The end result of this test was that the Court's decisions regarding retroactivity ran the gamut: some rules were applied even to cases in which the claim was first raised in a petition for habeas corpus;²¹⁸ some rules were applied only to cases then pending on direct appeal;²¹⁹ and others were applied only to the actual litigants before the Court and to litigants in cases where the underlying activity (for example, the search or the lineup) occurred after the announcement of the decision.²²⁰ In some cases, then, one defendant would receive the benefit of a new rule while another defendant, subject to an identical violation of his constitutional rights, would remain in prison.²²¹

Justice Harlan, normally a strong partisan of judicial restraint, argued that, with respect to cases pending on direct appeal, it was intolerable for the Court to refuse to grant relief to all defendants: "Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of

²¹⁵ By "final," the Court meant "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the] decision in *Mapp v. Ohio*." *Linkletter*, 381 U.S. at 622 n.5.

²¹⁶ See *infra* notes 222-24 and accompanying text.

²¹⁷ See, e.g., *Stovall v. Denno*, 388 U.S. 293, 297 (1967) (discussing the three criteria); *Linkletter*, 381 U.S. at 636 (applying the three criteria).

²¹⁸ See, e.g., *Williams v. United States*, 401 U.S. 646, 653 & n.6 (1971) (giving retroactive effect to *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

²¹⁹ See *supra* note 209 and accompanying text.

²²⁰ See, e.g., *Desist v. United States*, 394 U.S. 244, 254 (1969) (holding that *Katz v. United States*, 389 U.S. 347 (1967), would be applied only to cases in which the prosecution sought to introduce the fruits of electronic surveillance conducted after December 18, 1967, the date that *Katz* was decided); *DeStefano v. Woods*, 392 U.S. 631, 633-35 (1968) (holding that the rule of *Duncan v. Louisiana*, 391 U.S. 145 (1968), requiring the states to respect the right to a jury trial was to apply only to trials begun after the *Duncan* decision); *Stovall v. Denno*, 388 U.S. 293, 296 (1967) (holding that the rule announced in *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), would "affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after [the Court's opinions in *Wade* and *Gilbert*]").

²²¹ See, e.g., *Stovall*, 388 U.S. at 303-04 (Black, J., dissenting) (pointing out that defendants already convicted and in prison because of unconstitutionally obtained evidence must remain but that others subject to the same constitutional violation can go free).

judicial review.”²²² This past Term, in *Griffith v. Kentucky*,²²³ the Court adopted Justice Harlan’s approach to the retroactivity of criminal cases on direct appeal, abandoning the prior three-part test and holding that “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.”²²⁴ In other words, all cases will now be controlled by the new rule, assuming, of course, that the case is a “direct” rather than a collateral case.

The Court’s decision in *Griffith* focused principally on the connection between the perceived vagaries of a system of discretionary grants and the obligation to “treat like cases alike”:

[S]elective application of new rules violates the principle of treating similarly situated defendants the same. . . . [T]he problem with not applying new rules to cases pending on direct review is “the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary” of a new rule.²²⁵

Griffith did not cure this problem, however, as it created an “inequity” between criminal cases still on direct review and criminal cases on habeas review.²²⁶ This “inequity” may be particularly pernicious, since the availability of habeas relief appears to induce the Court to deny certiorari in cases that, otherwise, might merit a grant.²²⁷ But, of

²²² *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring).

²²³ 107 S. Ct. 708 (1987). *Griffith* considered whether the Court’s decision the previous Term in *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), which held that the equal protection clause barred prosecutors from using peremptory challenges to strike jurors on the basis of race, should be applied retroactively. In *Allen v. Hardy*, 106 S. Ct. 2878 (1986) (per curiam), the Court had refused to apply the *Batson* rule, which overruled a portion of *Swain v. Alabama*, 380 U.S. 202 (1965), to cases pending on habeas.

²²⁴ 107 S. Ct. at 713. Since the retroactivity of *Batson* to cases on habeas had already been decided, see *supra* note 223, *Griffith* did not address the determination of retroactivity in habeas cases.

²²⁵ *Griffith*, 107 S. Ct. at 713-14 (quoting *United States v. Johnson*, 457 U.S. 537, 555 n.16 (1982)); see also *id.* at 716 (“It was solely the fortuities of the judicial process that determined the case this Court chose initially to hear on plenary review.”); *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring) (“[T]he lucky individual . . . enjoys retroactive application This hardly comports with the ideal of ‘administration of justice with an even hand.’” (quoting *Desist v. United States*, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting))).

²²⁶ Cf. *Griffith*, 107 S. Ct. at 716-17 (Powell, J., concurring) (reiterating his hope, first stated in *Hankerson*, see *supra* note 225, that the Court will apply Justice Harlan’s view that “habeas petitions generally should be judged according to the constitutional standards existing at the time of conviction”).

²²⁷ This practice is most visible in death penalty cases, in which the inequity is, of course, most troubling. For example, in *Shippy v. Estelle*, 440 U.S. 968 (1979), the Court denied certiorari based solely on the representations of the State that “as long as

course, as soon as a criminal defendant's certiorari petition on direct review is denied, the defendant loses the benefits of *Griffith's* retroactivity rule.²²⁸ Moreover, should the Court actually decide to grant certiorari in a habeas case, there would be an "inequity" between the petitioner in that case, who would presumably get the benefit of the Court's holding in her case, and other similarly situated habeas petitioners, who would not. But even though it does not establish total hori-

[petitioner] is actively pursuing his right to a writ of habeas corpus, [he] will not be executed.' " *Id.* at 968 (quoting brief of State of Texas, filed in opposition to certiorari petition); cf. *Jurek v. Estelle*, 430 U.S. 951, 951 (1977) ("Without intimating any views on the merits of the questions presented to the United States District Court for the Southern District of Texas in petitioner's pending application for a writ of habeas corpus, the petition for writ of certiorari [to the Court of Criminal Appeals of Texas] is denied.").

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court, reviewing the denial of federal habeas relief, addressed the defendant's argument that the use of psychiatrists at his sentencing hearing to predict future dangerousness was unconstitutional. *Id.* at 896-97. The defendant had raised this argument previously in his direct appeal, but the Court had denied certiorari on that occasion. *Id.* at 884-85.

Similarly, last Term, in *Stewart v. Wainwright*, 55 U.S.L.W. 3228 (Oct. 3, 1986), the Court denied a stay of execution pending the filing of a certiorari petition. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented, noting that "[a]rguably, the Court's decision is justified by the fact[] that . . . the 'fundamental miscarriage of justice' inquiry can better be performed . . . in a federal habeas corpus proceeding" *Id.* at 3229 (Stevens, J., dissenting).

It is true that in some cases, the habeas corpus proceedings may produce a record that will aid the Supreme Court's consideration of the legal issues presented. See *Pilcher v. Mississippi*, 420 U.S. 938, 938 (1975) ("Certiorari denied without prejudice to an application for writ of habeas corpus in the appropriate United States District Court for consideration of questions not adequately presented by the record before us."). But even in those cases, the Court's practice is troubling because of the difference in the applicable retroactivity rules.

²²⁸ The defendant would then be unable to benefit from the new substantive rule either in the lower courts or in the Supreme Court. Thus, for example, the defendant in *McCray v. New York*, 461 U.S. 961 (1983), petitioned for review of a New York Court of Appeals decision upholding his criminal conviction in the face of a claim that the prosecutor had used his peremptory challenges to remove all blacks from the jury. In essence, *McCray* sought to have the Court overrule *Swain v. Alabama*, 380 U.S. 202 (1965).

The Court denied certiorari, apparently with only two Justices voting to grant, but three other Justices joined an opinion that invited *McCray* to litigate his claims in a federal habeas proceeding. See *McCray*, 461 U.S. at 963 (Marshall, J., joined by Brennan, J., dissenting); *id.* at 961 (Stevens, J., joined by Blackmun & Powell, JJ.).

Ultimately, *McCray* won his federal habeas petition in the Second Circuit, *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), and the state petitioned for certiorari (albeit on a somewhat different issue than the question whether such use of challenges was permitted). In the meantime, the Supreme Court granted another petition seeking to limit the scope of *Swain*. See *Batson v. Kentucky*, 106 S. Ct. 1712 (1986). In its decision, the Court overruled *Swain*. *Id.* at 1719-24. Subsequently, the Court granted the state's petition in *McCray's* case, vacated the judgment of the Second Circuit, and remanded the case for reconsideration "in light of" *Allen v. Hardy*, 106 S. Ct. 2878 (1986), which had held that habeas petitioners are not entitled to the benefit of *Batson*. See *Abrams v. McCray*, 106 S. Ct. 3289 (1986).

zontal fairness—which could only be achieved in a system in which unlimited reexaminations of criminal convictions was permitted—the rule in *Griffith* eliminates the inequities among cases on direct appeal.

Returning to Table I, unlike Boxes D through J, which involve situations in which a lower court must decide how to act in the face of the Supreme Court's actions, Boxes A through C represent decisions that must be made by the Supreme Court itself. Box C represents those cases in which, at the time the certiorari petition is filed, the Supreme Court has a publicly announced, controlling rule, but in which that rule was not in place when those cases were adjudicated by the court immediately below the Supreme Court. The Court's response to cases in Box C depends on the age of the controlling rule and the posture of the controlled case. In a post-*Griffith* world in which rules are retroactively applied to cases pending on direct appeal but are not necessarily applied to cases on habeas review, if the rule in the controlling case was announced after the petitioner's conviction became final and the petitioner is appealing from an adverse decision by a federal or state habeas court, the Court may simply deny the petition. In contrast, if the petitioner is claiming the benefit on direct appeal of the new rule announced after the lower court's affirmance of her conviction, the Court will grant the petition, summarily vacate the decision of the lower court, and remand the case for further proceedings "in light of" the decision in the controlling case, a procedure colloquially known as "GVR."²²⁹ The practice of GVR does not aid the Court in its core function of articulating norms of national applicability, as the norm itself will already have been articulated in the controlling case. Thus, absent any concern that the Court treat "like cases alike," petitions in Box C would simply be denied.

Finally, Boxes A and B represent the two situations in which the Court must make a decision about whether to hold a case. By holding a petition, the Court makes the petitioner eligible for whatever benefit she might derive from the rule that will be announced in the controlling case. Once the controlling case is decided, and if its rationale could affect the judgment of the lower court in the controlled case, the Court would GVR the controlled case; otherwise the Court would deny the petition.

The difference between the two boxes is that in Box B the Court, although not the litigants, knows the preliminary vote in the controlling case. If the sole objective of the hold rule were to avoid tipping, then the Court would not hold cases in Box A (that is, postgrant, pre-deci-

²²⁹ See *supra* note 175.

sion-conference cases).²³⁰ It is only a concern with judicial equal protection that can explain why cases in Box A are held. But if judicial equal protection were the sole justification for holds, then, while every case in Box A would be held (since it would be as-yet unclear whether petitioners would benefit from a new rule), only some of the cases in Box B would be held, since the Court would be able to determine those cases in which a new rule might alter the outcome of the controlled case. Thus, only the tipping rationale explains why all cases in Box B are held.

The proposition that new rules articulated in criminal cases should be given retroactive application to cases pending on direct review does not compel a hold in Boxes A and B in the same way that it compels a GVR in Box C. When the Court considers a petition in a controlled case before it has announced the opinion in the controlling case, it could, consistent with its retroactivity rules, simply deny the petition. After all, at the time the controlled case petition is being addressed, the old rule is still in effect. If the Court took this approach, then when the controlling case is decided, the controlled case would no longer be pending on direct review and therefore would not be covered by the retroactivity rule. Thus, holding cases so that they are still on direct review at the time that the controlling case is decided gives a somewhat larger scope to the retroactive application of new rules.

It appears, however, that the hold rule is grounded as much on practical considerations as on a broader vision of judicial equal protection. If the Court were to GVR only those petitions that it considered for the first time after it had announced the rule in the controlling case, it would create a strong incentive for litigants to delay filing their certiorari petitions whenever the Court had granted a case raising a similar issue.²³¹ Similarly, individual Justices could delay the consideration of petitions in controlled cases if they wanted to make such petitions the beneficiaries of rules about to be announced in controlling cases. A broad hold rule, however, eliminates both problems. Thus, holding cases serves the interests both of the litigants, who can benefit from new rules even when their petitions are not the ones ultimately selected for review, and of the Court, which benefits from the elimination of potentially inefficient strategic behavior.

²³⁰ See *supra* note 193 and accompanying text.

²³¹ They can do so, for example, by filing petitions for rehearing in the lower courts or applications for extensions of time on their certiorari petition in the Supreme Court. See *supra* note 192.

C. *The Institutional Interest in Holds*

The preceding discussion has not focused on the nonmajority nature of the hold rule. That aspect of the rule cannot be traced to the Court's desire to "treat like cases alike." First, the decision to GVR, which directly determines which cases will in fact receive the benefit of the new rule, is a majority rule. If the Court were seriously concerned that every case that might conceivably be affected by the rule in the controlling case be reexamined by the lower courts, it would adopt a nonmajority rule at the GVR stage. Moreover, if, following a GVR, the lower court erroneously fails to apply the rule in the controlling case, the Supreme Court is unlikely to grant a subsequent petition for certiorari, as at that point the only reason for doing so would be to correct an error. It is odd, then, that only one of the elements of the Supreme Court's judicial equal protection policy should show a heightened concern for "treating like cases alike."

A more appropriate justification for the hold rule as a Rule of Three is that the Justices themselves benefit from holding cases pending a decision in the case on which they have granted certiorari. Because a nonmajority hold rule will result in more GVRs than a majority hold rule, it will give litigants a greater incentive to file certiorari petitions. Thus, when the Justices wish to consider an issue on the merits, they will have before them a wider array of cases from which to choose.²³²

Moreover, even though typically the Court will grant certiorari on only one case, it will benefit from having before it other cases presenting the issue in different factual contexts. Given its limited decisional capacity, the Court often feels a conflict between its role as an adjudicator of the claims of the parties before it and its role as an overseer of a vast judicial and legal system. The former role counsels for narrow holdings. The latter role, in contrast, is best promoted by more liberal use of dicta, since through such dicta the Court will be able to direct the outcomes of a greater number of cases. To the extent that the Court employs dicta as a managerial tool, the quality of its decisions will be enhanced by having before it sets of concrete facts against which to test such dicta. Viewed in this way, the hold rule plays a role not only in the decision of the controlled case, but also in that of the controlling

²³² Along similar lines, Professors Estreicher and Sexton have argued that the Justices make better case selection decisions at conferences in which they discuss a relatively large number of cases. S. ESTREICHER & J. SEXTON, *supra* note 1, at 109, 122.

case; it serves as a tool that enables the Court to reach better substantive decisions.²³³

The nonmajority character of the hold rule may also conserve the Court's resources by decreasing the resources that individual Justices invest in persuading their colleagues to hold. If a hold required more votes, the Justices who favored holding a case might spend time and energy seeking to persuade other Justices. Their efforts would often be wasted, since after a granted case is decided it is likely that a consensus will emerge as to whether it controls a held case. On the other side of the equation, there is little institutional cost to postponing consideration of certiorari petitions.

This equation may explain why it takes more votes to grant certiorari than to hold a petition. In the case of a grant, unlike the case of a hold, there are significant institutional costs, as it is certainly burdensome for the Court to evaluate briefs on the merits, hear oral argument, and render a decision.²³⁴

In summary, this Article has discussed three rationales for the hold rule. The first two, the "tipping" rationale and the "judicial equal protection" rationale, on which the opinions in *Straight* focused, each explain only a portion of the cases to which the Court applies this rule,

²³³ That many cases are pending will also lead to the filing of more amicus briefs. While many of these briefs do not provide much more than a crude barometer of sentiment about the questions before the Court, others can either supplement inadequate presentations by the parties or supply the Court with useful information.

The hold rule encourages filings in two respects. First, those parties whose cases are pending will be encouraged to file briefs, since they will be affected directly by the Court's rulings. Second, because the Court's hold/retroactivity jurisprudence makes the potential scope of each substantive rule broader, there will be an incentive for groups, such as professional and trade associations, to file amicus briefs.

²³⁴ This difference in costs points to another factor: deference to a small minority in hold decisions may contribute significantly to the Court's collegiality. One of the central features of nonmajority rules is that they lessen the likelihood of a tyranny of the majority in which the minority lacks any power over decisions. See D. MUELLER, PUBLIC CHOICE 19-67 (1979). Thus, one should expect nonmajority rules to be particularly prevalent in bodies with relatively stable memberships that make a significant number of decisions, many of them preliminary in nature. The cloture rules of the Senate (which permit a minority to control the agenda by requiring a supermajority to cut off debate) are another illustration of the phenomenon discussed in this Article. See Rule XXII of the Standing Rules of the Senate, reprinted in STANDING RULES OF THE SENATE AND CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974, AS AMENDED, S. DOC. NO. 22, 99th Cong., 2d Sess. 15-17 (1986) (requiring an affirmative vote of 3/5 of senators to close debate on a matter pending before the Senate).

Since the majority retains ultimate power to issue dispositions on the merits, providing a group of three Justices with the power to hold may be a fairly costless gesture in the direction of recognizing the feelings of a minority. Of course, annoyance by the majority with strategic behavior by the minority, which seems to pervade the consideration of capital stay applications, may vitiate the sense of collegiality engendered by minority rules.

although taken together they explain all such cases. These two rationales, however, do not justify the nonmajority nature of the hold rule. For this, one must look to a third rationale—the rule's benefits to the Court's decisional processes.

CONCLUSION

After observing several days of oral argument at the Supreme Court, a visitor from Mars would probably conclude that the Court's operating rules have been well established for decades and that all of the present Justices feel great pride at deciding cases under procedures set up by their predecessors. After all, the Martian will have noticed, day after day, that the Court's proceedings start at precisely the same time, that the Justices enter the courtroom in precisely the same order, that they sit in precisely the same seats, that when lawyers are admitted to the Supreme Court bar they are greeted by the Chief Justice with precisely the same words, that male lawyers for the Government wear precisely the same clothes, and so forth.

The image the Court conveys to casual observers is that of an institution deeply respectful of its own traditions. What is far less apparent to such observers, or for that matter to the vast majority of lawyers in this country, is that the emphasis on consistent procedures is little more than a veneer. This Article has attempted to show that beneath this largely irrelevant veneer is a great deal of chaos. The Court's cleavages and shifting positions with respect to the rules that govern the exercise of its discretionary jurisdiction are analogous to daily fights over the times when oral argument would begin or where the Justices would sit, except of course that they are far more important because they can have an impact on serious substantive issues.²³⁵

²³⁵ The Court is also deeply divided about other procedural questions. The case of summary dispositions has already been discussed. *See supra* note 127.

Similarly, the Court is split on whether it should deny motions to proceed in forma pauperis without first inquiring "whether the questions presented in the petition for certiorari or jurisdictional statement merit . . . plenary review." *See Brown v. Herald Co.*, 464 U.S. 928, 928 (1983) (Brennan, J., dissenting). In *Brown v. Herald Co.*, the Court denied such motions by a five-to-four vote. Justice Brennan, joined by Justices Marshall and Blackmun, dissented, noting that each year the Court receives approximately 1000 motions supported by affidavit for leave to proceed in forma pauperis and that the Court's practice in the past had been "not to pass" on the motion "but to proceed directly to grant or deny the petition based on the merits of the questions presented in the petition or statement." *Id.* at 929 (Brennan, J., dissenting). He concluded: "Our time certainly can be spent in more productive effort than the determination of whether a petitioner or appellant is able to pay \$200 plus the cost of printing [the cost of proceeding if in forma pauperis status is denied] and still provide himself and his dependents the necessities of life." *Id.* at 931 (Brennan, J., dissenting). In a separate dissent, Justice Stevens stated: "I see no purpose . . . in insisting that these

The Court's treatment of the two procedural rules on which this Article has focused—the Rule of Four and the hold rule—is indicative of the low premium the Justices place, more generally, both on consistency and coherence. As to particular elements of these rules, the Justices have shifted their interpretations to favor the substantive result that they wished to achieve in particular cases, and they have made no effort to harmonize such elements with the remainder of the legal landscape.

Consistency and coherence should play as important a role with respect to the two procedural rules discussed in this Article as they do with respect to substantive doctrines.²³⁶ Indeed, as Justice Van Devanter told Congress in his testimony on the Judiciary Act of 1925: "When I speak of a discretionary jurisdiction on certiorari I do not mean, of course, that the Supreme Court merely exercises a choice or will in granting or refusing the writ, but that it exercises a sound judicial discretion . . . and resolves it *according to recognized principles*."²³⁷ What is at stake, in short, is respect for legal principle. One must therefore conclude that the Court's treatment of the Rule of Four and the hold rule is symptomatic of a broad and troubling disregard for the traditional common law models of judging.²³⁸

petitioners—none of whom is represented by counsel who could advise them that their petitions stand no chance of being granted—pay a fee for the privilege of having their petitions denied." *Id.* (Stevens, J., dissenting).

This issue has also become one in which "form" dissents, containing identical boilerplate rationales, are now filed. *See supra* note 127. For example, in the period from October to December 1987, the Court denied in forma pauperis status on a four-to-four vote (one seat was vacant as a result of Justice Powell's retirement) in at least seven cases. In each of these cases, Justices Brennan, Marshall, Blackmun, and Stevens filed a joint dissent stating: "For the reasons expressed in *Brown v. Herald Co. Inc.*, we deny the petition . . . without reaching the merits of the motion to proceed *in forma pauperis*." *Shibuya v. Voss*, 108 S. Ct. 483, 483 (1987); *Bennett v. North Am. Van Lines*, 108 S. Ct. 343, 343 (1987); *Jones v. Farm Credit Admin.*, 108 S. Ct. 282, 282-83 (1987); *McCullum v. Michigan*, 108 S. Ct. 62, 62 (1987); *Brown v. City of St. Louis*, 108 S. Ct. 61, 61-62 (1987); *Maclin v. Mobile Consortium*, 108 S. Ct. 60, 60-61 (1987); *In re Conco*, 108 S. Ct. 60, 60 (1987).

These divisions illustrate the low premium that the Court places on deciding institutional issues and its reticence in invoking its rulemaking authority to establish clear procedural rules.

²³⁶

It is commonplace among lawyers that the manner in which a judicial tribunal conducts its business is an important part of its business. It is not only that procedure gives its shape to substance, though that of course is true. The very effectiveness of the tribunal, the respect and authority accorded its decisions, may be increased or diminished as its procedures are or are not thought fair.

Brown, *supra* note 127, at 77 (discussing summary dispositions in the Supreme Court).

²³⁷ *Senate Hearings, supra* note 4, at 32 (emphasis added).

²³⁸ It is true, of course, that the common law did not deal with the exercise of

Unfortunately, the Court is unlikely to address these issues in a satisfactory manner in the context of case-by-case adjudication. Its two most recent forays—*Darden v. Wainwright*²³⁹ and *Straight v. Wainwright*²⁴⁰—both involved applications for stays of executions. Because the Court's nonmajority and majority rules often come into conflict in the context of stays, it is likely that the scope of the Court's nonmajority rules will receive further consideration in death penalty cases.

Such cases are particularly ill-suited for reasoned decisionmaking regarding the procedural questions discussed in this Article. First, they involve a substantive issue on which the Court is deeply divided and on which the Justices exhibit strong emotions. Second, petitions for stays of executions must often be adjudicated the same day they are filed, making it difficult for the Court to reflect about how its vision of its role in the judicial system should affect the manner in which it handles its discretionary jurisdiction. Rather, questions as to the proper scope of the Rule of Four and the hold rule can best be resolved through the Court's rulemaking procedures, in which they can be considered divorced from the divisive influence of an unrelated issue—the constitutionality of the death penalty—and with sufficient time for productive reflection.²⁴¹ Perhaps this Article will provide, at least in small measure, an incentive for the Justices to systematically address these questions.

discretionary jurisdiction. But, as Justice Van Devanter noted, the common law method is applicable to the Supreme Court's decisions on how to manage its discretionary docket.

²³⁹ 473 U.S. 927 (1985).

²⁴⁰ 106 S. Ct. 2004 (1986).

²⁴¹ Congress could address these questions by amending the statute establishing the Supreme Court's discretionary jurisdiction. See 28 U.S.C. §§ 1254, 1257-59 (1982 & Supp. III 1985). But because it is unlikely that Congress will be as familiar with the relevant issues as the Justices, it is preferable for the Court itself to articulate the principles defining the scope of the Rule of Four and of the hold rule.