Process and Substance: A Study of *Certiorari* on the U.S. Supreme Court

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Overview

In the study of courts with discretionary dockets, judicial scholars have directed their attention primarily at *how* judges decide cases at the merit stage. The process by which the court decides *whether* to hear a case has received far less attention. A decision to review is conceptually distinct from a decision on the merits: the former asks whether a case warrants adjudication by the court, whereas the latter asks how the judges to adjudicate the case on the merits. In theory, the threshold stage is procedural, and the merit stage is substantive. In practice, however, each stage has substantive implications. In this paper, we examine the interplay between judges' votes at each stage. In the context of the U.S. Supreme Court, we examine the tension between the non-majoritarian threshold for granting a writ of *certiorari* with the majoritarian requirement at the merits stage. We also explore conditions under which justices may have an incentive to behave strategically at the *certiorari* stage, based on their beliefs on the vote outcome at the merit stage. We then build an original data set from the Blackmun papers for the period 1986 through 1993, for forensic evidence to test our theory. In this sketch, we offer a brief theoretical context for some preliminary statistical analysis for discussion. Please note that we have dropped citations and references from this sketch.

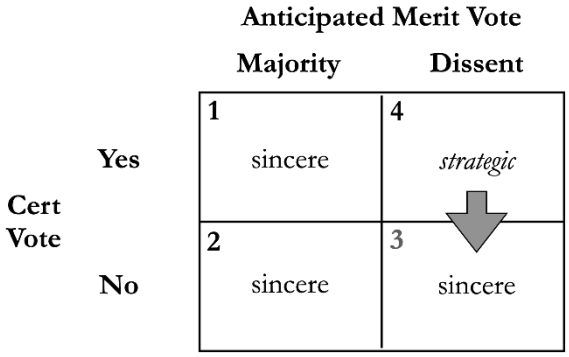
Theory

A vote on *certiorari* is conceptually distinct from a vote on the merits. At the *certiorari* stage, the justices are voting whether to grant or deny a request for the U.S. Supreme Court to hear an appeal. The formal question before the Court is procedural: is the dispute one that warrants the Court to adjudicate the matter? While followers of the Court may speculate as to how individual justices will decide a given case, a justice's vote to grant *certiorari* does not commit her to any position on the merits.

By contrast, once a case is on the Court's docket, the task before the Court is substantive: how would the Court adjudicate this matter? Most directly, the Court decides whether the appellant or respondent prevails on the merits. Given the Court's position at the apex of all federal matters, its decisions create precedent that affects not only the parties before the Court but all subsequent parties. Each decision dictates how lower courts should decide the same dispute that subsequently arises. In addition, depending on the scope of the Court's reasoning, the decision determines how lower courts decide similar disputes that vary factually then those before the Court. These two stages of voting are conceptually distinct insofar that a justice's vote to grant *certiorari* on a case does not dictate her vote on the merits.

This conception of independence rests on the strong assumption that justices vote sincerely at each stage. The existing literature on judicial behavior, however, suggests that justices are sophisticated actors. Accordingly, it is entirely plausible that justices will think strategically when casting their vote on certiorari. A strategic justice will vote based on assessment of whether their view of the merits will gain majority support at the opinion-writing stage. This is true even if the justice agrees with the lower court decision because of the greater impact of a high court decision. Figure 1 shows how strategic thinking should impact the justice's vote at the cert stage, moving the justice from a yes vote on a cert to a no vote because the justice forecasts losing (dissenting) at the merits stage.

Figure 1



The potential import of acting strategically is enhanced by the differing voting thresholds for each stage. The *certiorari* stage allows for non-majoritarian outcomes, while the merits stage demands it. The *certiorari* stage requires a minimum of four justices to vote yes. While in many instances additional justices may vote to grant *certiorari*, the four-vote threshold means that, at least in some instances, the Court grants *certeriorari* even though a majority of justices opted against hearing the case. The merits stage, by contrast, requires majority support of the justices who heard oral argument for the case.

The institutional features of the *certiorari*-merits stages generate a few testable hypotheses. First, if a justice is behaving strategically, her voting "yes" to grant *certiorari* should correlate closely with her joining the majority opinion at the merits stage. If she believes the Court should hear the case and that the majority will share her view on the merits, she has an incentive to vote sincerely. Conversely, voting "no" on *certiorari* should be less correlated with how a justice votes at the merits stage. If a justice sincerely believes the Court should deny *certiorari*, she has no incentive to strategically vote "yes"; voting sincerely does not adversely affect the Court's vote on the merits. Lastly, we anticipate that justices would be least likely to vote "yes" to grant *certiorari* only to join the dissenting opinion at the merits stage.

These hypotheses depend in large part on the justices' level of uncertainty. At the time they vote on *certiorari,* justices act under perfect but incomplete information: all justices observe the *certiorari* vote, but no justice knows – with certainty – how one another will vote at the merits stage (a justice may feel uncertain how she herself will vote). After granting *certiorari*, justices' information through the written briefs, oral argument, or at conference. While justices may predictably fall along an ideological distribution ranging from liberal to conservative, how they will vote in any one case is far less predictable.

Data

The central source of the data comes from the Digital Archive of the Papers of Harry A. Blackmun Papers at the Library of Congress. The digital archive contains docket sheets and memos for petitions of *certiorari* before the Court for the 1986 through 1993 Terms, inclusive. Blackmun recorded whether a justice voted to grant (G) or deny (D) the petition or to vote for cert if three colleagues (3) want cert granted. When analyzing the data, the article creates a binary variable that treats every vote to grant (G or 3) as one, and everything else as zero.

The full dataset merges the certiorari votes with two additional data sources. One is the Supreme Court Database, which provides detailed information for each case that the Court decides, beginning in 1954. The other source of data is comparable preference estimates, which provide ideology scores for each justice, for each year they are on the court allowing us to evaluate justices relative to one another within and across terms as well as relative to themselves across terms.

From OT 1986 through OT 1993, the Court granted 931 *certiorari* petitions. On average, six (5.98) justices voted to grant *certiorari*. Of these granted petitions, 28 percent received the minimum number of required votes and 13 percent received 9 votes. On the petitioner side, the government – federal, state, or local – was a party in 23 percent of the cases granted cert; on the respondent side, the government was a party in 27 percent of the cases. Four issue areas – criminal procedure (25%), civil rights (13%), economic activity (18%), and judicial power (15%) – exceeded 80 percent of the Court's discretionary docket.

In those 931 cases, the modal case was decided by a unanimous court (32%). (A justice is deemed to vote in the majority if she either votes directly in the majority, writes a concurrence, or joins in the judgment of the Court (*per curiam*).) A minimum-winning coalition (e.g., 5-4, 4-3, 3-2) decided 23 percent.

Preliminary Analysis

This section examines the justices' votes on *certiorari* and on the merits for all cases granted *certiorari*. Figure 2 illustrates how justices cast their votes. The interesting cells are cell 2 and 4.

Figure 2
All Cert Votes

Vote at Cert Stage	Vote at Merit Stage: Majority	Vote at Merit Stage: Dissent
Yes	1 4407 (82.5%)	4 934 (17.5%)
No	2 1868 (77.2%)	3 550 (22.8%)

Justices who voted "yes" on *certiorari* were more likely to join the majority than those who voted "no", irrespective of the number of justices voting "yes" on *certiorari (*Figure 3). The greatest differential occurred when justices cast five "yes" votes to grant *certiorari*.

Figure 3
Differential in Joining the Majority, by Number of *Certiorari* Votes

Number of Certiorari Votes	Voting with Majority Differential Between Yes/No at Cert
4	2.8%
5	8.8%***
6	8.2%***
7	7.5%***
8	0.0%

Figure 4 provides box plots for the rates at which the justices granted *certiorari* during the period 1986 through 1993. Conditioning on the Court granting *certiorari* to a petition, every justice voted more often than not to grant *certiorari*. Within these figures, however, interesting pattern emerges. The three most liberal justices during this period – Marshall (55 percent), Brennan (54 percent), and Stevens (57 percent) – were also the least likely to grant *certiorari*. Of their conservative counterparts – Scali, Thomas, and Rehnquist – only Scalia granted fewer than 70 percent of petitions. Thomas (76 percent) and Rehnquist (71 percent) voted to grant *certiorari* at rates comparable to justices (e.g., O'Connor (77 percent) or Powell (70 percent)) with preference estimates closer to the Court's median. The box plots reveal that the justices' grant rates varies across years, with the ideologically more liberal (Marshall and Brennan) justices with lower variation.

Figure 4
Justices' Granting *Certiorari*
(1986-1993)

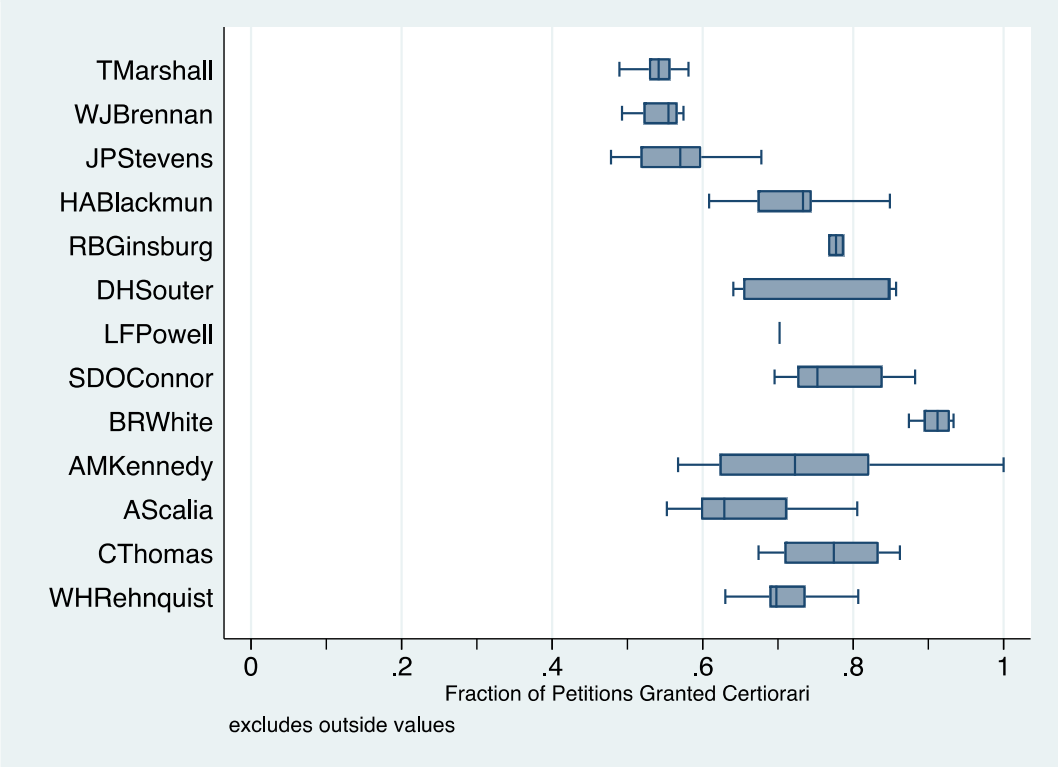
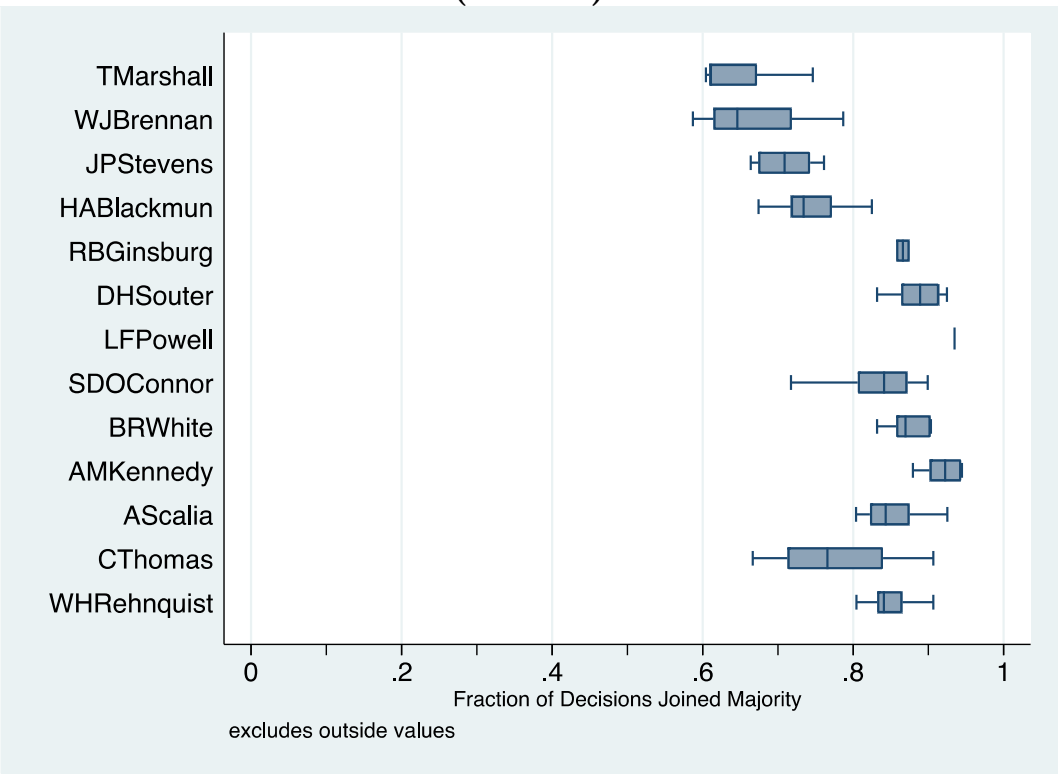


Figure 5 shows the box plots for justices joining the majority opinion rates at which justices voted to join the majority. All justices – save White – voted with the majority at rates higher than voting to grant *certiorari*. Every justice voted with the majority at least 65 percent (Marshall) of the time, with Kennedy voting with the majority 92 percent of the time. As with the granting of *certiorari*, Justices Marshall, Brennan, and Stevens were the least likely justices to join the majority. By contrast, the swing (White, O'Connor and Kennedy) and conservative justices (Rehnquist, Thomas, and Scalia) all voted with the majority at least 80 percent of the time.

Figure 5
Justices' Joining the Majority Opinion
(1986-1993)



Our project at this stage seeks to tease out a more complex and subtle story than the standard "offensive grants, defensive denials" story. To do this, we have run initial analyses of aggregate Court behavior as well as a consideration of the role of specific dynamics including:

- judicial coalitions (partners or trios);
- independent ideological effect on cert decisions;
- relationship of disposition to consensus on cert and how that reflects the justices' view of the role of the Court;
- cert votes as a proxy and cert votes/majority votes as a proxy for significance;
- Majority votes as a measure of cert votes.