

Setting the Nation’s Legal Agenda: Case Selection on the U.S. Supreme Court*

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1 Overview

Each term the Supreme Court receives over 8,000 requests for review, most of them petitions for writs of certiorari (“cert”). And, each term, the justices reject roughly 99% of these requests, meaning that they hear and decide well under 100 cases.¹ How the Supreme Court selects its agenda has, accordingly, spawned a large, decades-old social science literature.² Questions about cert also have generated more legal and journalistic commentary than we could possibly recount here.³

Analyses of agenda-setting have burgeoned and, yet—despite the immense interest,⁴ the sheer amount of attention,⁵ the awards bestowed on books examining cert in part or in full,⁶ the

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¹E.g., during the 2002-03 term, 8,255 cases arrived at the Supreme Court’s doorstep but the justices decided, with a written opinion, only 84.

²A small sample of the extant literature includes Armstrong and Johnson (1982); Baum (1979); Boucher and Segal (1995); Brenner (1979); Brenner and Krol (1989); Caldeira and Wright (1988, 1990); Caldeira, Wright and Zorn (1999); Krol and Brenner (1990); McGuire and Caldeira (1993); Palmer (1982, 2001); Perry (1991*a*); Provine (1980); Schubert (1962, 1959); Smith (1999); Songer (1979); Tanenhaus (1963); Teger and Kosinski (1980); Ulmer (1972); Ulmer, Hintze and Kirklosky (1972); Ulmer (1983, 1984).

³Again, for a small sample, see Frankfurter and Landis (1928); Lawless and Murray (1997); Estreicher and Sexton (1984); Linzer (1979); Gressman (1964); Leiman (1957); Estreicher and Sexton (1986); Berlage (1984); Hartnett (2000); Hellman (1985); Long (1984); Sturley (1989); Tiberi (1993); Baker (1984); Cordray and Cordray (2001).

⁴See, e.g., Perry (1991*b*).

⁵See notes 2 and 3.

⁶E.g., Perry (1991*a*); Epstein and Knight (1998); Segal and Spaeth (1993).

deployment of clever research strategies,⁷ and the employment of sophisticated technologies⁸—commentators do not agree on why Supreme Court justices make the agenda-setting decisions that they do.⁹ Some stress the importance of Rule 10,¹⁰ a justice-made institution governing the case-selection process that emphasizes “conflict” and legal “importance.”¹¹ Others see the cert decision as a clear example of sincere voting to further policy goals,¹² while a third set suggests it is laden with strategic calculations.¹³ A fourth group focuses on the litigants, attorneys, and amici participating in the case,¹⁴ and yet a fifth and more recent series of papers draws our attention to the larger judicial (hierarchy) and political (separation-of-powers) context in which the Court operates.¹⁵ This lack of consensus,¹⁶ we should stress, is not just a matter of emphasis; it is fundamental and it is an impediment to the development of an understanding of what virtually all judicial specialists, legal commentators, and the justices themselves regard as a crucial part of the Court’s work—the establishment of its agenda.¹⁷

⁷See, e.g., Brenner (1979).

⁸See, e.g., Caldeira and Wright (1988); Caldeira, Wright and Zorn (1999).

⁹Throughout this prospectus, we use the term “agenda-setting” as a shorthand way to describe how the branches of government go about the task of determining which of the issues on the “public” agenda (containing all the issues of concern to society) they will “schedule for active and serious consideration” and, thus, place on their “institutional” agenda (Cobb and Elder, 1983; Kingdon, 1984). So, for example, most students of the U.S. Supreme Court refer to “agenda setting” (or “deciding to decide”) as the process by which the justices determine which disputes to hear and resolve (see, e.g., Caldeira and Wright, 1988; Perry, 1991*a*). More specifically (and as we noted earlier), since the vast majority of the 8000+ cases that arrive at the Court each year come as requests for certiorari (cert), scholars typically say that deciding to decide or agenda setting involves selecting those cases to which the Court will grant cert and those to which it will deny cert. Accordingly, our focus in the proposed book is on cert petitions but we also consider appeals and other writs parties use to access the Court.

¹⁰The text of Rule 10 is available at: <http://www.supremecourtus.gov/ctrules/ctrules.html>.

¹¹See, e.g., Provine (1980); Perry (1991*a*); Ulmer (1984).

¹²See, e.g., Krol and Brenner (1990); Ulmer (1972).

¹³See, e.g., Boucher and Segal (1995); Brenner (1979); Schubert (1959); Caldeira, Wright and Zorn (1999).

¹⁴See, e.g., Armstrong and Johnson (1982); Caldeira and Wright (1988); Teger and Kosinski (1980).

¹⁵See, e.g., Cameron, Segal and Songer (2000); Segal, Cameron and Songer (1995); Epstein, Segal and Victor (2002).

¹⁶Of course, overlaps exists among these sets of explanations. So, for example, some accounts of the role of Rule 10—especially that rule’s emphasis on whether the petition raises “important” legal questions—measure “importance” on the basis of amicus curiae participation at the cert stage (see Caldeira and Wright, 1988). Along the same lines, theories centering on legal conflict (see Perry, 1991*a*) and those that emphasize monitoring (see, e.g., Cameron, Segal and Songer, 2000), while conceptually distinct, both stress the Court’s role in the American judicial hierarchy.

¹⁷To provide but one example, the current “messy” state of the literature severely handicaps our ability to generate clear-cut predictions, as the Figure below (adapted from Caldeira, Wright and Zorn, 1996) shows. Here we depict a policy-oriented justice, A, who is generally quite conservative; she votes in the liberal direction in only 10 percent of all cases decided on their merits. Suppose that Justice A must decide on the fate of two cert petitions, Nos. 1 and 2, both of which were decided in a conservative direction by the court below. But, on the legal issue presented in No. 2, the justice knows that her Court rules in a liberal direction in about 90 percent of the cases; on petition No. 1,

Why this disagreement persists is a question on which we can only speculate.¹⁸ What we can say, though, is that the time has come to revisit the entire line of inquiry. That is so for several reasons, not the least of which is that while the debate over cert is ongoing and the relevance of the subject remains high, rigorous, sophisticated, and contemporary work is hardly in abundance. Caldeira, Wright and Zorn (1999) is the most recent piece of social-science work that we have been able to identify, and it is a study of the Court’s 1982 term. Within the legal literature, we have located a handful of studies published over the last five years or so, and though informative and interesting, they are more descriptive and historical than analytical.

This void, we suspect, reflects not a lack of interest but, rather, a lack of data. Investigations into cert may lead researchers to interview key participants and analyze publicly available case materials—both fruitful sources that we plan to exploit—but they also require the development of data sets housing a wide array of information: on the individual votes cast by the justices, the extent to which conflict exists over a particular legal matter, the area of law at issue, the parties to the suit, features of the lower court’s decision, the participating amici, and so on. Setting aside the severe resource and time constraints imposed on researchers who undertake this task (see note 18), the possibilities for the study of cert in the contemporary (Rehnquist Court) era (i.e., the post-1986 years) were near zero. No justice had released docket sheets, which contain the Court’s votes on

that figure is only 20 percent.



Hypothetical positions of a justice and two petitions in left-right policy space.

What will Justice A do? On a (sincere) policy account, A would deny cert in both cases since she is of the mind that both were correctly decided by the court below even though she knows that there is a high likelihood that, if granted, the Court will reverse No. 2. Strategic justice A, however, would vote to grant cert in No. 1, while voting to deny No. 2.

Of course, we could go on and develop counterfactuals that invoke the premises of rule-driven accounts, as well as others of the policy-oriented approaches. But the general point would be the same: Given the state of the literature, we have an overabundance of plausible explanations/predictions about how justices go about setting their agendas but an underwhelming amount of agreement over their veracity and virtually no evidence, as we note in the text, pertaining to post-1986 Courts.

¹⁸Several possibilities exist but surely a primary one is that many who have studied agenda-setting decisions occasionally take shortcuts to overcome severe time and resource constraints—some of which are potentially problematic (e.g., selecting on the dependent variable by analyzing only those cases to which the Court granted cert; failing to consider all the relevant variables that may affect the cert decision; and attempting to make inferences across time or areas of the law based on non-random samples of time or cases). In other words, investigators have made the reasonable tradeoff between gleaning what they can from readily available data and expending substantial resources in pursuit of the ideal data set. But this tradeoff has come at a considerable price: an agenda-setting literature that some have characterized as “a mess” (Boucher and Segal, 1995) or that we might more scientifically say has reached inferences of unknown certainty and quality.

cert and the merits of disputes, for this time period (see also note 23);¹⁹ and no justice²⁰ had ever released preliminary or “pool” memoranda.²¹ Given that currency is rightfully the fashion of much socio-legal research—and this is especially so with regard to the Supreme Court’s ever evolving agenda-setting process²²—the lack of systematic work on the Rehnquist Court is hardly a surprise.

Which brings us to a second reason why we believe the time is ripe to revisit cert: systematic, contemporary research is now possible. With the opening of the Harry A. Blackmun papers in March 2004, investigators have available to them the richest source of contemporary information on agenda setting—perhaps the richest source ever made available. Not only does the collection contain a full reckoning of the Court’s votes on cert during the 1971 through 1993 terms²³ but it also houses two heretofore unavailable documents: preliminary (cert pool) memoranda and notes from

¹⁹We should qualify this slightly by noting that Justice Lewis Powell released his docket sheets but only for formally decided cases; he destroyed those pertaining to petitions that the Court declined to review. Thurgood Marshall’s dockets are available for the first term of the Rehnquist Court but they are spotty at best. From the 1969 term until the end of the Burger Court in 1985, only William A. Brennan’s docket sheets are complete. (He did not authorize release of any of his Rehnquist Court papers.) William O. Douglas’s too are available but only for the six Burger Court terms on which he served.

²⁰Justice Powell’s archive contains pool memoranda for cases that the Court agreed to hear and decide during certain (but not all) terms. As such they are useful for some purposes (see, e.g., Palmer, 2001; Pritchard, 2003), but not for projects that seek to explain the Court’s cert decisions.

²¹In the 1940s, Chief Justice Stone apparently circulated to the other justices his clerks’ memorandum on unpaid petitions (see Bierman, 1995). This may have paved the way, in the 1970s (and in response to their growing docket), for five justices to form what has become known as the “certiorari (cert.) pool.” Now, in 2004, all but one justice (Stevens) is a member of the pool. As Perry (1991*a*, 42) explains it,

The pool was designed to reduce the workload by eliminating duplication of effort. Rather than have each chamber review every petition, the petitions are randomly assigned for evaluation among the chambers [of the justices participating in the pool]. Each chamber then divides its [share] of the petitions randomly among the clerks in that chamber. A clerk will review the petitions assigned to [her/him] and then write a cert. pool memo for each of [her/his] petitions.

The resulting memo follows a standard form. At the top is the case’s name, docket number, the identity of the court below and the participating judges, and so on. Within the memo is a summary of the facts of the case and the decision of the lower court, the arguments of attorneys and (some or all) amici curiae, and the clerk’s analysis of the legal issues. The clerk concludes with a recommendation; e.g., to grant or deny cert., to hold the case, to call for the views of the Solicitor General (known as “CVSG”). For sample pool memoranda, along with other documents related to agenda setting on the Court, visit: <http://epstein.wustl.edu/research/Blackmun.html>.

These memos are crucial for the study of cert since they indicate, along with other information, whether the pool writer believed that conflict existed on the lower courts—an extremely important datum in light of commentators’ beliefs about the importance of Rule 10. They also indicate whether the presence of amici was important enough to be brought to the Court’s attention. This again is another datum extremely key to the understanding of the Court’s agenda setting given the apparent importance of amicus curiae participation to understanding and modeling the Court’s agenda setting (see Caldeira and Wright, 1988).

²²See, e.g., Hellman (1996); O’Brien (1997); Epstein and Knight (1998). The most obvious manifestations of this change are related to the now near-universal use of the cert pool. See note 21. For a more historical perspective, see Hartnett (2000).

²³In other words, the Blackmun papers house all the docket sheets for this time period. Two votes are relevant to this project: (1) how each justice voted on the petition requesting the Court to review the case, and, if the petition is granted (2) how each justice voted on the merits (to affirm or reverse the lower court’s decision). Both are cast in conference and are unavailable to the public except through a justice’s release of his or her papers.

conference discussions on cert.²⁴ While Blackmun did not record comments from each and every conference, he did retain the pool memos for each and every case petitioned to the Court—granted as well as denied.

2 Our Plan for Setting the Nation’s Legal Agenda

With information amassed from the Blackmun papers—along with other sources we plan to tap (see below)—our overarching goal in *SETTING THE NATION’S LEGAL AGENDA* is to provide a comprehensive, sophisticated yet accessible and colorful, treatment of agenda-setting on the U.S. Supreme Court. We do not intend to rely exclusively on descriptive analyses and stylized facts culled from interviews and judicial papers on the one hand, but neither do we intend to produce a drab technical report on the other.

To achieve these diverse ends, we have divided *SETTING THE NATION’S LEGAL AGENDA* into three parts (see Section 4). First, out of the belief that we must understand the case-selection process before we can explain it,²⁵ we provide a comprehensive account of how it has worked—and works today. Since the chapter-by-chapter outline in Section 4 provides the details, we need only note here that we plan to collect the data and other information for this Part from, among other sources, interviews with Court members and former clerks, extant published and publicly available materials, and, most especially, the justices’ private papers.

The second and chief Part of the book explores explanations for the decision over cert, and assesses those explanations against qualitative and quantitative data amassed from interviews, the collections of the justices, and published Court records. We devote six chapters to this task. Five explore the various accounts we outlined in Section 1 above; the sixth integrates and enhances them by formulating, operationalizing, and assessing a global and thoroughly-specified model of cert voting on the Court. Critical features of our design include examinations using both the Court and the individual justice as the unit of analysis, data on grants *and* denials, measurements of the preferences of each justice and the institution as a whole, full specification, and the ability to accommodate a variety of institutional changes—all with the goal of elaborating a compelling and full-interrogated theory of agenda setting (see Section 4 for more details). Our emphasis throughout is on contemporary Courts, though we make some use of historical materials (including numerical data) to detect changes over time.

In the third part of the book we develop the implications of our study. The first set pertains to the future study of agenda setting—both for U.S. courts of last resort and constitutional courts abroad. As for further analyses of American courts, we emphasize the relationship between gate-keeping decisions and those the justices reach on the merits of cases. We stress, in particular, that the enterprise of developing a comprehensive model of agenda setting, which we undertake in *SETTING THE NATION’S LEGAL AGENDA*, is important in its own right; but—to the extent that cases decided on their merits are a non-random sample of the universe of filings—it is also an essential first step for properly modeling the outcomes of cases on the merits. As for agenda setting on constitutional courts abroad, this is a topic of considerable interest to judicial specialists but it

²⁴See note 21.

²⁵In reviewing the literature in preparation for this project, we came across many misconceptions and misunderstandings about the process. More important, only a few sources are comprehensive in nature, explaining how cases get to the Court, analyzing the rules (formal and informal) that govern cert, and exploring the Court’s internal procedures—and none of these cover the Rehnquist Court.

is seriously understudied.²⁶ While we do not undertake a full-blown analysis, it seems a worthwhile and important task to consider the extent to which our results transport to other societies.

A second set of implications pertains to various policy proposals designed to revamp the agenda-setting process. Some—most notably plans to establish a court to screen some or all cert petitions—came in the 1970s in response to the Court’s rising workload.²⁷ None of these attracted sufficient support but since the 1980s commentators have shifted their focus to the Court’s internal cert procedures and offered a number of specific proposals for change.²⁸ By assessing how these may affect the Court’s work—both its preliminary and merits decisions—we hope our volume will contribute to on-going legal and policy debates.

3 Market

As we implied at the outset, a slew of commentators have written on the cert process. Most analyses, though, appear in articles and papers;²⁹ only a handful of books exist—with Perry (1991*a*), Provine (1980), and Estreicher and Sexton (1986) most prominent among them. All three have considerable strengths: they are lucid, intelligent treatments of the subject. But they have weaknesses as well; most notably, they are dated. Perry (1991) is the most recent, and it is based on interviews and other data from the 1976-1980 terms. We know of no work that encompasses the Rehnquist Court years nor one that attends to the marked theoretical and technical developments in the socio-legal field. For these reasons existing works may be less than optimal both for scholarly work and the classroom.

Because *SETTING THE NATION’S LEGAL AGENDA* will be more contemporary in its theoretical, methodological, and substantive focus, it has the potential to make a valuable contribution to the literature. At the same time, our hope is that it will be sufficiently accessible and interesting for use in upper-division undergraduate courses. This we plan to achieve by relegating much technical material to appendices and by making use instead of graphics to relay key statistical results.

Finally, again given the book’s contemporary focus, we see a market among legal academics and practitioners. The former is obvious: if the sheer amount of papers they produce is any indication,³⁰ then interest in *SETTING THE NATION’S LEGAL AGENDA* should be high. As for practicing lawyers, if the number of calls we and many of our colleagues receive asking “How can I get the Court to accept my case?” is any indication, then our volume should find an audience there as well.

²⁶For exceptions, see Epstein, Knight and Shvetsova (2002); Flemming (2004); Epp (1998); Flemming and Krutz (2002).

²⁷For a review of these proposals, see Murphy, Pritchett and Epstein (2001). See also Federal Judicial Center (1972); Commission on Revision of the Federal Court Appellate System (1975).

²⁸For example, in an internal Court memorandum (see Epstein and Knight, 1998) and public speeches (see Stevens, 1983), Justice John Paul Stevens has argued for a Rule of 5, rather than 4. For other proposals, see Hartnett (2000); Estreicher and Sexton (1986) and Section 4 below.

²⁹See the studies listed in notes 2 and 3.

³⁰For examples, see note 3.

4 Chapter Outline and Précis

Part I. An Overview of Agenda Setting on the Court

Chapter Outline

1. Historical and Contemporary Perspectives on the Business of the Supreme Court
2. Deciding to Decide
 - (a) How Cases Get to the Supreme Court
 - (b) Processes and Procedures
 - i. Litigants, Attorneys, and Amici Curiae
 - ii. Clerks: Preliminary (Pool) Memoranda, Markup
 - iii. The Chief Justice and the Discuss List
 - iv. Formal and Informal Rules Governing Case Selection
 - v. Conference Lists, Relisting, Discussion, Dissents from Denials of Cert, and Votes
 - (c) Outcomes of the Process
 - i. The Petitions
 - ii. The Court's Agenda Over Time

Part Précis

As we noted in the text, the point of these chapters is provide a comprehensive account of how the case selection process has worked—and works today. Chapter 1 supplies a brief history of the Court's workload, focusing largely on developments since the enactment of the Judges' Bill in 1925 that provided the justices with discretion over their docket. Prior to this time the Court had little more discretion than that accorded the circuit courts of appeals. We also outline current controversies, a topic to which we return in the book's final chapter.

Chapter 2 begins by specifying the various methods whereby cases reach the Supreme Court, emphasizing writs of certiorari and appeal. It then moves to a discussion of the contemporary agenda-setting process. We describe the roles of litigants, attorneys, and amici curiae, along with clerks' responsibilities for pool memoranda that evaluate and recommend whether or not the justices should review the case in question (see note 21). All petitions docketed with the Court receive this attention. We further specify the role of the chief justice in compiling the list of cases that are to be discussed in conference and the extent to which the associate justices add cases to this list.

The next sections explore rules and conference procedures relating to case selection. As to the former, we see four as particularly important: Rule 10 (see note 10); the Rule of Four (at least four members of the Court must agree to hear a case); Join 3 (a justice agrees to cast a vote to grant cert if three others want to hear the case); Join 4 (a little-known practice—relayed to us by several Rehnquist Court clerks: a justice votes to grant cert to a petition she or he would prefer to deny but goes along with the inevitable decision to grant). Following the discussion of these internal norms, we consider relisting and other breaks in the Court's

productive process (e.g., “holds” and calls for the views of the solicitor general), dissents from cert denials and noting dissent in appeals by way of a vote of probable jurisdiction. We also explore the ultimate conference votes of the justices, as well the options available to the Court in all cases that do not receive full-blown treatment (i.e., oral argument and a signed or per curiam opinion). These include appeals affirmed, dismissed, vacated, and remanded without oral argument or opinion; cert denials; and dismissals under various rules of the Court.

Although some (perhaps all!) of this material may seem dry, we hope to convey it in terms sufficiently interesting and appealing for informed readers and sufficiently clear and accessible for the uninformed. We plan to accomplish this (1) by relying on a wide array of primary and secondary source materials (see Section 2) and (2) using specific (running) case examples to highlight general points.

Part II. Explaining the Cert Decision

Chapter Outline

3. Rule 10: Conflict and Legal Importance
4. Litigants, Attorneys, and Amici Curiae
5. Policy and Ideological Considerations
6. Strategy and Tactics
7. The Larger Political and Judicial Context
8. Modeling Cert

Part Précis

In Chapters 3-7 we explore each of the predominant explanations for the Court’s decisions over its agenda with an eye toward assessing their continued viability during the Rehnquist Court era (recall that most of these explanations emanate from studies of the Vinson, Warren, and early Burger Court years). To do so, we take a mixed-methods approach, using qualitative data on the one hand and descriptive quantitative analyses on the other (we reserve more sophisticated analyses for Chapter 8). Qualitative data sources include interviews with Supreme Court clerks and justices, the preliminary (pool) memoranda, and Blackmun’s notes from conferences over cert. From these sources we have accumulated invaluable information—some of which seems to confirm conventional accounts, some of which contradicts those accounts, and some of which extends them. As an example of the latter, we now know from the pool memos that the Solicitor General occasionally requests the justices to grant cert when the United States has *won* the case in the tribunal below. This counsels consideration, in Chapter 4, of the role of the Solicitor General as an appellant *and* as an appellee, in addition to participation as an amicus curiae (the importance of which scholars already have documented). We also have learned from the pool memos and notes from conference discussion that, in economic litigation, the justices (and clerks) place some emphasis on the potential effect of a cert decision on fiscal policy and practice—a finding we incorporate into the discussion

in Chapter 7.³¹ To provide but one last example, clerks have informed us of the “Join 4” practice, which warrants exploration in Chapter 6.

Numerical sources include information we can quantify from the pool memos (e.g., a mention of conflict in the lower courts) and the docket sheets, which provide tallies of how individual justices voted in conference on cert and on the merits of cases (see notes 21 and 23). We draw our data not from all 49,805 petitions on the docket while Blackmun sat on the Rehnquist Court but rather from (1) the population of cases the Court granted review and eventually resolved on their merits, (2) a random probability sample of size 4980 (roughly 10 percent) of all petitions to the Court,³² and (3) the population of petitions involving Fourth Amendment searches and seizures.³³ Where appropriate, we also make use of similar data—already collected by Harold Spaeth and others—to flesh out comparisons between the Rehnquist Court and its predecessors on each of the topics covered in Chapters 3-7.

Our purpose in these four chapters, we ought reiterate, is to explore the plausibility of extant approaches to cert decisions offered in the political science and legal literature and not to assess concurrently and rigorously the explanations (and various extensions we have identified from the Blackmun papers). This last task we take up in Chapter 8. Here we use our findings in Chapters 3-7 to formulate, operationalize, and assess models of cert voting on the Court. We note critical features of our design in Section 2 above but one that is especially important to highlight here is our interrogation of fully-specified models of the Court’s (and justices’) agenda-setting decisions—that is, we consider systematically and simultaneously all the relevant explanations, including those of our own devising. Along these lines, we ought note the inclusion of a variable designed to assess conflict in the lower courts, which we retrieve directly from the cert pool memos, as well as the integration of legal facts into the analyses. We accomplish the latter by denoting the parties and legal issues for the population of cases granted review and for the random sample of petitions (sources (1) and (2) above); as for the search and seizure cases, we invoke the fact-pattern model developed by Segal (1984) and deployed extensively and successfully ever since.³⁴

Part III. Implications

Chapter Outline

9. Studies of Agenda Setting

³¹See also Staudt (2005), which documents the importance of this consideration in agenda-setting decisions over tax cases.

³²Given the oversampling on granted cases, we well understand the technical steps we must take to conduct the multivariate analyses that appear in Chapter 8.

³³As we note momentarily, we focus on search and seizure cases because we can make use of Segal’s (1984) time-tested fact-pattern model.

³⁴See, e.g., Segal and Spaeth (2002); Epstein et al. (2005).

- (a) American Courts
- (b) Constitutional Courts Abroad

10. Proposals for Altering the Court’s Agenda-Setting Process

Part Précis

In these closing chapters, we explore the implications of our results for future research on courts with discretion over their dockets, as well as for contemporary proposals for altering the processes and procedures governing the Court’s consideration of the petitions it receives. Since we describe our general plans in Section 2, let us here provide but one example of the sort of analysis we foresee in Chapter 10.

That example focuses on the cert pool, which, over the last decade or so, has been the subject of substantial commentary—some of it positive³⁵ but most quite negative if not downright hostile.³⁶ The complaints are many in number: some writers allege that the pool has decreased the overall grant rate; others say it has “succeeded in choking off much of the important but unglamorous business-related issues from the contemporary court’s docket;” and yet a third group claims that it endows clerks with unwarranted power and influence over the justices’ cert votes.³⁷ Proposals to remedy the “problem,” perhaps not so surprisingly, are equally as numerous and far-ranging, up to and including calls to abandon the pool altogether.

Whatever the nature of the critique and resulting proposal, our results ought help place the entire debate on firmer empirical ground. So, for example, because our dataset encompasses terms prior to the establishment of the pool in 1972, covers years when only five justices were members, and extends to the contemporary Court on which all but one justice has joined, our study should be able to speak to claims about, say, the undue influence of clerks on the cert process and thus to proposals emanating from such claims.

This is but one area of agenda setting that our results may help illuminate. Other proposals—such as requests for the development of clearer formal rules to govern the Court’s review of petitions, appeals to the justices to publish their votes on cert, and calls to discard the Rule of 4 in favor of a Rule of 5³⁸—are easy enough to summons, and also should be susceptible of assessment based on our empirical analyses.

³⁵See, e.g., Jeffries (1994); Reimann (1999); Posner (1998).

³⁶See, e.g., Lazarus (1999); Starr (1993*b*,*a*).

³⁷Chief Justice Rehnquist (1987) has refuted some of these claims but Justice Stevens, who is not a member of the pool, provided gist for the mill when he told Tony Mauro (1998): “When a clerk writes for an individual justice, he or she can be more candid . . . You stick your neck out as a clerk when you recommend to grant a case . . . The risk-averse thing to do is to recommend not to take a case. I think it accounts for the lessening of the docket.”

³⁸See, e.g., Estreicher and Sexton (1984); Hartnett (2000); see also note 28

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