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Certiorari in the Roberts Court

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CERTIORARI IN THE ROBERTS COURT

TEJAS N. NARECHANIA*

ABSTRACT

Certiorari—the process by which the Supreme Court sets its docket—is a mystery. The Supreme Court’s rules explain that it may hear any sufficiently “important” case—a standard that seems hopelessly vague. In previous work, I tried to bring some coherence to this standard by way of a text and data analysis of thousands of Supreme Court opinions.

Here, I expand that prior work to include the Supreme Court’s 2019, 2020, and 2021 Terms. This update is revealing. For one, it uncovers new certiorari priorities in the Roberts Court, such as property-rights cases. This updated study also confirms the Roberts Court’s historically unparalleled interest in using its docket discretion to select cases for the purpose of revisiting, and perhaps overruling, precedent.

I present and consider these updated results against the backdrop of Stephen I. Vladeck’s Childress Memorial Lecture (to which this symposium essay responds). The Lecture reminds us to look beyond the Supreme Court’s merits decisions to the Court’s broader context—say, its shadow docket, which includes certiorari decisions. Doing so can both yield important insights regarding the Court’s own priorities and help organize the responses of the political branches.

* Robert and Nanci Corson Assistant Professor of Law, University of California, Berkeley, School of Law. As I describe below, this Essay’s analysis draws heavily from my prior work in *Certiorari in Important Cases*, 122 COLUM. L. REV. 923 (2022). I thank Steve Vladeck, Sam Jordan, and Mikayla Lewison for the invitation to this symposium on the 2022 Childress Memorial Lecture, and I thank Morgan Hazelton, Ben Johnson, and Khushali Narechania for comments on this draft and on my symposium remarks. For excellent research assistance, I thank Mathew Cha, and I reiterate my thanks to Ilya Akdemir and Ankur Jain, whose technical assistance was critical to the analyses I reprise here.

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INTRODUCTION

By any measure, *Dobbs v. Jackson Women's Health Organization* was a momentous case.¹ In practical terms, the Supreme Court's decision stripped people living in a wide array of states of the constitutional protections set out in *Roe* and *Casey*, leaving them with fewer rights and reproductive freedoms than before.² In legal terms, the Court's decision embraces a turn towards history and originalism, revising its *stare decisis* standards to make more room for such modes of interpretation.³ In institutional terms, *Dobbs* has renewed debates, inside and outside the Court, over that institution's legitimacy,⁴ sparking further conversations about the appropriate nature and structure of judicial review.⁵ *Dobbs* galvanized voters in the 2022 midterm elections, shaping various political outcomes, including the composition of Congress.⁶

At the root of all these effects lies a seemingly narrow question of Supreme Court procedure: Certiorari. The Supreme Court controls nearly its entire docket, granting writs of certiorari only in those cases it wishes to hear. In short, the Court is essentially free to choose the cases it will decide.⁷ And so the Court

1. No. 19-1392 (U.S. June 24, 2022).

2. See, e.g., *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Jan. 6, 2023, 10:30 am), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/97MT-WRL9>].

3. E.g., *Dobbs*, slip op. at 12–13, 39–48.

4. See, e.g., Nate Raymond & Andrew Chung, *U.S. Supreme Court risks its legitimacy by looking political, Justice Kagan says*, REUTERS (Sept. 14, 2022), <https://www.reuters.com/legal/us-supreme-court-risks-its-legitimacy-by-looking-political-justice-kagan-says-2022-09-14/> [<https://perma.cc/V59F-PKQP>] (quoting dueling speeches by Chief Justice Roberts and Justice Kagan on the Supreme Court's legitimacy). For similar debates preceding *Dobbs*, see Tara Leigh Grove, *Book Review: The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2244 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)).

5. E.g., Sarah Gruzca, *Supreme Court's ruling overturning Roe v. Wade "will have huge political ramifications"*, HARV. KENNEDY SCH. (June 24, 2022), <https://www.hks.harvard.edu/faculty-research/policy-topics/politics/supreme-courts-ruling-overturning-roe-v-wade-will-have-huge> [<https://perma.cc/53HW-J7AG>] (interviewing Maya Sen on the implications of *Dobbs* for proposed reforms to the Supreme Court).

6. E.g., Blake Hounshell, *Five Takeaways From a Red Wave That Didn't Reach the Shore*, N.Y. TIMES (Nov. 10, 2022), <https://www.nytimes.com/2022/11/09/us/politics/midterm-elections-take-aways.html> [<https://perma.cc/L92S-EVQ7>] (quoting a political strategist concluding that "Dobbs transformed this election").

7. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 197 (1962) (describing the Court's unparalleled power over "whether, when, and how much to adjudicate"). The Court's power over its docket has only grown since Bickel's observation. See Act of June 27, 1988 (Supreme Court Case Selections Act of 1988), Pub. L. No. 100-352, 102 Stat. 662 (1988); An Act to Improve Judicial Machinery by Amending the Requirement for a Three-Judge Court in Certain Cases and For Other Purposes, Pub. L. No. 94-381, 90 Stat. 1119 (codified in part at 28 U.S.C. § 2284); see also H.R. REP. NO. 100-660, at 1–2 (1988) (explaining that the "bill substantially eliminates the mandatory or obligatory jurisdiction

decided *Dobbs* because it *wanted* to, not because it *had* to. Even for those who believe that the Court is obliged to—or, at the very least, ought to—grant review to resolve circuit splits, the Court’s decision to decide *Dobbs* was an exercise of absolute discretion. There was no circuit split in *Dobbs*: In the judgment under review, the Fifth Circuit held, consistent with prevailing precedent and with every other court to confront a similar question, that *Roe* and *Casey* governed restrictions on access to abortion.⁸

So why did the Court grant review in *Dobbs*? Justice Alito’s majority opinion explained that it “granted certiorari to resolve the question whether ‘all pre-viability prohibitions on elective abortions are unconstitutional,’” noting that, in view of the parties’ presentations, the Court’s choices were to either “reaffirm or overrule *Roe* and *Casey*.”⁹

Dobbs, then, belongs to both a longstanding tradition and a more recent trend: a tradition, once highlighted by then-Professor Frankfurter, of describing certiorari grants in opinion text;¹⁰ and a trend, particular to the Roberts Court, of exercising its certiorari discretion to grant review in cases that present an opportunity to overrule precedent.¹¹

The Court’s certiorari standard has long perplexed scholars and court-watchers. While much of the Court’s docket may be understood as uniformity-enforcing (i.e., resolving conflicts among state and federal appellate courts), a substantial portion of the Court’s docket is dedicated to cases of importance.¹² Specifically, Supreme Court Rule 10(c) explains that the Court may grant review in any case presenting an “important question of federal law that has not been, but should be, settled by th[e] Court.”¹³ As I have noted before, this standard has been critiqued as “murky,” “hopelessly indeterminate,” “intentionally vague,”

of the Supreme Court” including in various cases holding federal and state statutes unconstitutional).

8. See *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 274 (5th Cir. 2019) (describing *Casey* and *Roe*’s application to the Mississippi’s challenged law); see also *Dobbs*, slip op. at 32, 34 & nn.10–11 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (describing the application of *Roe* and *Casey* in the appellate courts and noting no significant circuit split worthy of the Court’s attention (but admitting that there might be one recent one-to-one split)); cf. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1731 (2013) (“One way in which the Court maintains stability in the case law is by *not* granting certiorari to revisit well-settled questions.”) (italics in original).

9. *Dobbs*, slip op. at 8.

10. Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 83 (1935).

11. See Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 934, 966–67 & n.150 (2022).

12. *Id.* at 938 & n.71 (estimating the size of this important-questions docket).

13. S. CT. R. 10(c).

and “intentionally cryptic.”¹⁴ But the Court’s practice of explaining, in its merits opinions, the reasons motivating the decision to grant review can help to clarify this standard.¹⁵ For example, a close reading of one subset of these “certiorari paragraphs”¹⁶ suggests that the Court prefers (if inconsistently) to be the final arbiter of a federal statute’s unconstitutionality, even where the legal answer seems obvious.¹⁷

In prior work, I used computational text analysis—specifically, co-word analysis—to analyze thousands of cases in order to bring greater coherence to the Court’s important-questions docket.¹⁸ I highlighted three factors that seemed to influence the Court’s important-questions docket: exogenous events (e.g., economic depressions); political developments (e.g., landmark legislation); and personnel changes (e.g., new appointments).¹⁹ These findings drew from an array of examples: the Hughes Court’s interest in bankruptcy cases in the wake of the Great Depression and in labor and employment cases following passage of the Fair Labor Standards Act (among other statutes); the Warren Court’s interest in cases about criminal confessions following Chief Justice Warren’s appointment; the Rehnquist Court’s interest in sentencing- and habeas-related cases following the promulgation of the Sentencing Guidelines and of the enactment the Antiterrorism and Effective Death Penalty Act; and the Roberts Court’s interest in patent cases considering questions arising out of the Leahy-

14. *Respectively*, Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1723 (2000) (contending that the Court’s standards for granting review are “intentionally . . . murky”) (quoting H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 34 (1991)); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 790 (1984) (contending that the Court’s standards for granting review are “hopelessly indeterminate”); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 154 (Kermit L. Hall et al. eds., 2d ed. 2005) (“The justices have been intentionally vague as to what makes a case ‘certworthy.’”); Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1191 (2019) (suggesting that the Court’s standards for granting review are “intentionally cryptic”); *see also* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 4.2 (10th ed. 2013) (“Any attempt to restate the[] criteria [set out in Supreme Court Rule 10] with greater precision is somewhat temeritous . . .”).

15. *See* Frankfurter & Hart, *supra* note 10, at 83.

16. Narechania, *supra* note 11, at 941–42, 945–46 & n.101 (describing these paragraphs).

17. *Id.* at 927–28 (describing the standard for granting review described in *Allen v. Cooper* and *Iancu v. Brunetti*, among other cases). *But see id.* at 931 & n.33 (noting some inconsistency in the Court’s application of this standard); *but cf. id.* at 985 n.220 (citing *Cnty. of Maricopa v. Lopez-Valenzuela*, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from denial of certiorari) (describing, and lamenting, a difference in the solicitude that the Court extends to federal statutes vis-à-vis state statutes)).

18. *Id.* at 941–53 (describing the method for analysis).

19. *Id.* at 969.

Smith America Invents Act and, notably, in cases asking the Court to overrule its precedents.²⁰

In this essay, prepared for a symposium on Stephen I. Vladeck's Childress Memorial Lecture, I expand on that prior work to include the Court's 2019, 2020, and 2021 Terms—Terms that encompass cases such as *Dobbs*. This expanded analysis of the Roberts Court confirms some prior findings while uncovering some new and notable results. Specifically, the analysis presented here confirms the Roberts Court's interest in using its certiorari discretion to revisit settled precedent. Indeed, by some measures, the Court's interest in considering whether to overrule precedent seems to have only grown in these most recent Terms.²¹ And this updated analysis also uncovers some new certiorari priorities, namely, property-rights cases as well as cases about the availability of a damages remedy.

This Essay proceeds in three parts.

I begin with a brief description of my research method. I emphasize that the design I employ here is the same as in my prior work, updated to encompass the Court's more recent Terms.²² Hence, my description of the methodology is abridged by necessity (given the nature of this symposium response), with more complete details available in the descriptions and appendices of that earlier project.²³

I then turn to the results of this updated analysis. Most notably, I (still) find that the Roberts Court, more than any other Court in history, uses its docket-setting discretion to select cases that allow it to revisit and overrule precedent. And I also uncover some ways in which the Roberts Court's priorities have shifted in these most recent three Terms. For example, my most recent results suggest that the Roberts Court uses its certiorari discretion to select property-rights cases (a result that is new to this latest analysis). Indeed, the Roberts Court has even granted review in at least one property-rights case with a view to upending precedent.²⁴

Finally, I consider these findings against the backdrop of this Lecture. The Lecture reminds us that our collective focus on the Court's merits opinions can

20. *Id.* at 968–84.

21. See *infra* note 56 and accompanying text (noting the new addition of *precedent** (alongside *overrule**, which is on the list here and was in my previous study, too) to the list of terms that have increased significantly in importance to the Roberts Court's certiorari decisions (as compared to the preceding Rehnquist Court)).

22. I utilize the same research design primarily so that I can build directly upon the results previously presented.

23. Narechania, *supra* note 11, at 941–53, 1008–17.

24. See *Knick v. Township of Scott*, No. 17–647, slip op. at 4 (U.S. June 21, 2019) (“We granted certiorari to reconsider the holding of *Williamson County* that property owners must seek just compensation under state law in state court before bringing a federal takings claim under § 1983.”).

obscure other important features of this ecosystem—e.g., the Court’s “shadow docket” (which includes the Court’s certiorari decisions),^{25*} or the role of Congress in setting the Court’s jurisdictional limits. Indeed, the Supreme Court’s certiorari decisions seem to offer important insights regarding the Roberts Court’s priorities in ways that might help observers and policymakers better predict and respond to the cases and questions that will draw the Court’s attention.

STUDYING THE IMPORTANT-QUESTIONS DOCKET

The Important-Questions Docket

As I have explained elsewhere, the Supreme Court has significant power to set its own agenda.²⁶ The Court’s “exercise of this discretion is a matter of great practical consequence and scholarly interest.”²⁷ Justice Brennan, for example, once elaborated on the practical importance of case selection, explaining that the decision to take a case both reflects and shapes the nation’s political, social, and economic agenda.²⁸ Scholars, too, study docket discretion because doing so may help to reveal the Court’s “subjective notions of what is important or appropriate for review.”²⁹

For example, the Court’s decisions to review and resolve conflicts among the federal and state appellate courts reflect a longstanding view—shared by

25. See, e.g., STEPHEN I. VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (forthcoming May 2023) (manuscript at 23) (*on file with author); William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 5 (2015). But see PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., *CASE SELECTION AND REVIEW AT THE SUPREME COURT* 1 n.1 (2021) (written testimony of Samuel L. Bray, Professor of Law, Notre Dame L. Sch.), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf> [<https://perma.cc/U7S8-7MQD>] (excluding “the mere grant or denial of a petition for a writ of certiorari” from its understanding of the “shadow docket”).

26. My description of the Supreme Court’s important-questions docket and my method for evaluating trends on that docket draw heavily from my prior work (given that both this Essay and that prior Article use the same method to evaluate the same target over slightly different timelines). See Narechania, *supra* note 11, at 936–53.

27. Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1357 (2018).

28. *Id.* (citing William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477, 483 (1973)).

29. Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 318 (2009) (quoting Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 255 (1973)); see also Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1073 (2009) (“Justices have nearly total discretion to decide which cases the Court will hear, meaning they have freedom to pursue their raw policy goals . . .”).

Congress and the Supreme Court—that national uniformity is an important value.³⁰ Indeed, “[s]ome Justices have understood Congress’s decision to grant the Court discretion over its docket as in exchange for an implicit promise to ensure uniformity in federal law.”³¹ And the Court does regularly grant review to resolve conflicts among federal and state appellate courts on the meaning and application of federal law.³²

But what about other cases—e.g., cases asking to revisit precedent, or patent cases—that do not implicate a conflict among authorities?³³ Such cases arise under Supreme Court Rule 10(c), which notes that the Court may grant review in any case presenting an “important question of federal law that has not been,

30. See, e.g., THE FEDERALIST NO. 82 (Alexander Hamilton) (The Supreme Court “is destined to unite and assimilate the principles of national justice and the rules of national decisions.”); Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEG. STUDS. 448, 450 (2019) (“Part of the reason the Supreme Court resolves inter-circuit splits is a preference for legal uniformity and a commitment to unifying doctrine across the country.”).

31. Narechania, *supra* note 11, at 937 (citing Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 436–37 (2004) (“[S]ome believe that the legislation was based on an explicit commitment that the Justices made to Congress to protect the uniformity of federal law in return for Congress’ ceding the Court so much control over case selection.”) (citing Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1663–65 (2000) and PERRY, *supra* note 14, at 248)).

32. See, e.g., *Little v. Reclaim Idaho*, No. 20A18 (U.S. July 30, 2020) (explaining that “the Court is reasonably likely to grant certiorari to resolve [a] split . . . on an important issue of election administration”) (Roberts, C.J., joined by Alito, Gorsuch, and Kavanaugh, JJ., concurring in the grant of stay); PERRY, *supra* note 14, at 246; Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View From the Supreme Court*, 8 J. APP. PRAC. & PROC. 91, 92 (2006) (explaining that “the Supreme Court is charged with providing a uniform rule of federal law in areas that require one”); see also Narechania, *A Patent Puzzle*, *supra* note 27, at 1360–61, 1360 n.76 (collecting similar sources). *But see* Beim & Rader, *supra* note 30, at 449 (finding that the Supreme Court only resolves about one-third of circuit splits); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1372 (2006) (suggesting that the Court lets too many circuit splits fester); *but cf.* *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 34–35 (U.S. June 24, 2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) (“This Court mostly does not even grant certiorari on one-year-old, one-to-one Circuit splits, because we know that a bit of disagreement is an inevitable part of our legal system.”).

33. These two examples—patent cases, and cases implicating requests to revisit the Supreme Court’s precedent—will almost never give rise to circuit splits. Nearly every patent case is appealed to the U.S. Court of Appeals for the Federal Circuit, and so cannot give rise to a split. See, e.g., Narechania, *supra* note 27, at 1363. And because only the Supreme Court can overrule its own precedents, the appeals courts cannot split over the applicability of the Court’s prior rulings. See, e.g., Narechania, *supra* note 11, at 966–67. *But cf.* *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 452–56 (5th Cir. 2022) (substituting its own assessment of the First Amendment’s original public meaning for the Supreme Court’s prevailing First Amendment precedents, noting that the challengers “focus[ed] their attention on Supreme Court doctrine” rather than “the original public meaning of the First Amendment”); Barrett, *supra* note 8, at 1731 (suggesting that conflicts among lower courts may help to “put[] a challenge to precedent on the Court’s agenda”).

but should be, settled by th[e] Court.”³⁴ In this part of the Court’s docket, its discretion is at its apex: The Court is free to select practically any case from among the thousands of petitions it receives, unencumbered by any notions of an institutional duty to ensure uniformity. But how, exactly, does the Court exercise this discretion, and what might those decisions tell us about the Court’s other (non-uniformity-implicating) priorities?

Though the rule’s bare text offers only scant guidance to petitioners and respondents,³⁵ the Court’s merits opinions sometimes helpfully elaborate on which cases and questions are more likely to merit the Court’s attention. In 2020, for example, the Roberts Court explained that it granted review in *McKinney v. Arizona* “[b]ecause of the importance of the case to capital sentencing.”³⁶ And it issued a writ of certiorari in *Knick v. Township of Scott* “to reconsider the holding of *Williamson County* that property owners must seek just compensation under state law in state court before bringing a federal takings claim under § 1983.”³⁷ In short, though the Supreme Court’s Rule does little to elaborate on which important questions will merit review, the Supreme Court’s opinions sometimes do more.

Summary of Methods

We may thus learn more about the Court’s institutional preferences—preferences that echo across the nation’s social, political, and economic agendas—by studying the case selection decisions described in the Court’s opinions. Where the Court describes its decision to grant review, those descriptions may contain clues as to the institution’s certiorari priorities.

Specifically, modes of computational analysis can help us better understand how the Court exercises its discretion to decide which cases merit review.³⁸ My approach, founded in methods of co-word analysis,³⁹ is detailed in prior work, and I offer a brief summary of that method here.

34. S. Ct. R. 10(c).

35. See sources cited *supra* note 14 (describing criticisms of the Rule’s standard).

36. *McKinney v. Arizona*, No. 18-1109, slip op. at 2 (U.S. Feb. 25, 2020); see *infra* Table 1 (noting the Court’s enduring attention to capital sentencing cases); see *infra* Table 2 (similar, for the Roberts Court in particular).

37. *Knick v. Township of Scott*, No. 17-647, slip op. at 4 (U.S. June 21, 2019). See *infra* notes 63–67, 71–75 and accompanying text (describing the Roberts Court’s attention to property-rights cases and to cases presenting an opportunity to overrule precedent).

38. As I note in Narechania, *supra* note 11, at 933, I employ a computational approach because no traditional, doctrinal approach is available. With rare exception, “the Court’s description of the standard for granting review eschews the most important content of traditional doctrinal development—for example, precedents, citations, and analysis—in favor of terse, citationless text.” See, e.g., *id.*; see *United States v. Kebodeaux*, 570 U.S. 387, 391 (2013) (the rare exception).

39. For examples of papers in law (and law-adjacent disciplines) using similar methods, see Hanan Khaldi & Vicente Prado-Gascó, *Bibliometric Maps and Co-Word Analysis of the Literature on International Cooperation on Migration*, 55 QUALITY & QUANTITY 1845, 1845 (2021) (using

First, this Essay's analysis begins with an update to my prior dataset that encompasses the Court's 2019, 2020, and 2021 Terms. As before, I rely on the Supreme Court Database to identify cases arising under the Court's certiorari jurisdiction and to distinguish cases on the important-questions docket from those granted in service of the Court's more traditional function of ensuring uniformity in the meaning and application of federal law.⁴⁰ This update adds 123 cases to the 7169 cases that formed the basis of the original dataset.⁴¹

I obtained the full text of the opinions in these important-questions cases from the Caselaw Access Project and Justia. And, as before, I extracted "certiorari paragraphs" (paragraphs containing the term "certiorari," which typically describe the decision to grant review) from those opinions to focus the analysis on the certiorari-stage decision.⁴²

co-word analysis to examine studies "on the topic of international cooperation on migration"); D.H.S.W. Dissanayake, Leena B. Dam, Srikanth Potharla & Sanjay J. Bhayani, *Mapping the Corporate Governance Research in BRICs Economies—A Bibliometric Analysis*, 11 J. COMM. & ACCT. RSCH. 70, 70–72 (2022) (similar, for studies on corporate governance in Brazil, Russia, India, and China); cf. Matthew Jennejohn, Samuel Nelson & D. Carolina Núñez, *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767, 793 (2021) ("Word vectors provide a quantifiable way to measure associations among words. Measuring the distance between words in the vector space tells us whether they are closely or distantly associated with one another.").

40. See Narechania, *supra* note 11, at 942. For this update I used the 2022 Release 01 version of the Supreme Court Database. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, Version 2022 Release 01. URL: <http://supremecourtdatabase.org> [<https://perma.cc/RW45-YLBN>].

41. Specifically, there are 123 cases both coded as belonging to the 2019, 2020, and 2021 Terms and for which the "certReason" field is coded as 10, 11, 12, or 13. See Narechania, *supra* note 11, at 1009.

42. See Narechania, *supra* note 11, at 945, 1009. I have previously responded to concerns that these paragraphs may not merit the attention that Felix Frankfurter gave them in the 1930s (*see* Frankfurter & Hart, *supra* note 10, at 82–83) and that I give them in this analysis (*see* Narechania, *supra* note 11, at 946 n.101). I briefly elaborate on that response here, noting that the Court's opinions in *Dobbs* offer further evidence that the Justices carefully consider the scope of the grant of review, and that the Court's merits opinions carefully describe that (sometimes contested) decision to grant review. Justice Alito's opinion for the majority, for example, notes that the Court granted review "to resolve the question whether all pre-viability prohibitions on elective abortions are unconstitutional," and further explaining that, in view of the parties' presentations, the Court must "either reaffirm or overrule *Roe* and *Casey*." *See* *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 8 (U.S. June 24, 2022) (quotations omitted). Chief Justice Roberts, however, replies that answering the question presented does "not require the Court to overturn" *Roe* and *Casey*—and, moreover, that Mississippi's arguments in favor of overruling those precedents are inconsistent with the state's certiorari-stage presentations. *Id.* at 5–6 (Roberts, C.J., concurring in the judgment) (emphasis added) ("After we granted certiorari . . . Mississippi changed course."). And the dissent similarly comments on Mississippi's shifting strategy, inferring and implying that the state's maneuvers were directly responsive to changes in the Court's composition. *See id.* at 58–59 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("In its petition for certiorari, the State had exercised a smidgen of restraint But as Mississippi grew ever more confident in its prospects, it resolved to go all in Now a new and bare majority of this Court

Finally, I analyze the terms and phrases in these certiorari paragraphs to assess which ones are most closely correlated with the Court's descriptions of its decision to grant certiorari. As before, I rely on a Term Index to select for salient terms (i.e., Index Terms). Using similar criteria as in my previous study,⁴³ I added one new term—*text*—to the Term Index.⁴⁴ Each Index Term is scored according to two metrics: frequency (a scaled representation of the number of cases in which an Index Term appears) and proximity (a scaled representation of the distance between an Index Term and certain key “Focal Terms,” such as *certiorari*).⁴⁵ These two metrics, taken together, form the basis for each Index Term's Importance Score.

Specifically, each Index Term can be assessed on its overall two-dimensional score (on, say, a two-dimensional plane). Or, that two-dimensional score may be converted to a one-dimensional score—one that weighs both factors equally—to help compare terms more directly (either against each other or over time). In particular, that one-dimensional score is a Term's distance from the origin point (i.e., (0,0), which itself can be understood to represent the term *certiorari**).⁴⁶ Here, I emphasize that a lower score indicates higher salience—that is, the shorter the distance between an Index Term and the origin, the more relevant it is. Moreover, negative changes in scores indicate a move towards the origin, and, hence, and an increase in salience.

* * *

The Supreme Court's decisions to grant certiorari, contained within its merits decisions, may offer important insights into the Court's evolving case selection standards and priorities. I have developed and employed a method, founded in co-word analysis, that generates a two-dimensional score—(frequency, proximity)—for each in a list of possibly relevant terms that may help to describe the Court's decisions to grant certiorari. In short, this analysis

. . . overrules *Roe* and *Casey*.”); see also Narechania, *supra* note 11, at 969, 976–77 (suggesting that the Roberts Court's growing interest in overruling precedent may be related to changes in the Court's personnel).

43. The only difference between the criteria used in my earlier study to generate the Term Index and the criteria used here is that I did not have research assistants independently verify my inferences on which new terms to include. The list of new terms that satisfied the numerical criteria (e.g., appearing in more than one percent of all cases in which *certiorari* appears, or more than three percent of such cases in a given Court (namely, the Roberts Court, given the nature of the narrow update here)) was sufficiently small that I felt confident in my ability to review them alone.

44. The new inclusion of *text*, newly added because it now appears in more than three percent of Roberts Court cases, might be understood to reflect the Court's turn to textualism as a dominant interpretative methodology. See *infra* notes 58–61 and accompanying text.

45. As in my earlier study, italicized terms refer to terms that appear in the results of the data analysis described and presented below. And, as before, an asterisk (*) denotes Index Terms encompassing multiple related terms. See Narechania, *supra* note 11, at 934 n.43.

46. See Narechania, *supra* note 11, at 1014 & n.289.

can help to mine the case selection insights that are buried in the opinion text of the Court’s important-questions cases.

IMPORTANT QUESTIONS IN THE ROBERTS COURT

Results

Importance Scores. I begin with a summary of the Supreme Court’s priorities, dating all the way back to 1925 (when Congress enacted the so-called Judges’ Bill, giving the Court significant discretion over its docket).

Table 1. Terms Ranked by Importance Score, 1925–2021 Terms

Term	Distance from Origin (DFO)
<i>statute*</i>	0.333
<i>state*</i>	0.397
<i>constitution*</i>	0.521
<i>admin_agency*</i>	0.642
<i>jurisdiction*</i>	0.674
<i>government</i>	0.774
<i>divided_lower_court*</i>	0.776
<i>evidence</i>	0.788
<i>corporate*</i>	0.790
<i>jury*</i>	0.826
<i>power*</i>	0.852
<i>labor*</i>	0.861
<i>tax*</i>	0.862
<i>criminal*</i>	0.880
<i>fourteenth_amendment*</i>	0.883
<i>habeas*</i>	0.896
<i>first_person*</i>	0.903
<i>due_process*</i>	0.905
<i>construction*</i>	0.909
<i>employ*</i>	0.921
<i>counsel*</i>	0.921
<i>procedure*</i>	0.935
<i>congress*</i>	0.940
<i>sentence*</i>	0.944
<i>death_sentence*</i>	0.946
<i>interpretation</i>	0.951

Table 1 presents the list of significant terms across all the Court’s relevant cases since 1925. Unsurprisingly, this list is quite similar to the findings reported in my previous work: nearly all the terms are the same as before; only a few have traded places slightly (e.g., *government* has been promoted to sixth place on this list, moving slightly closer to the origin); and only one new term—*interpretation*—has moved onto the list.⁴⁷ I consider this new addition (alongside other changes) below.⁴⁸

Given that all the new data for the updated analysis presented here pertains to the Roberts Court, it may be more interesting to examine the new results for the Roberts Court in particular. Table 2, below, presents those results (and the results are plotted visually in Appendix Figures 1 and 1A). Specifically, Table 2 ranks significant Index Terms by each’s distance from the origin (Appendix Figure 1 plots every Index Term on a two-dimensional plane according to its two-dimensional importance score, and Appendix Figure 1A is similar, limited to only the most significant Index Terms).

Table 2. Terms Ranked by Importance Score, Roberts Court

Term	Distance from Origin (DFO)
<i>state</i> *	0.093
<i>statute</i> *	0.223
<i>constitution</i> *	0.461
<i>admin_agency</i> *	0.520
<i>government</i>	0.617
<i>jurisdiction</i> *	0.650
<i>criminal</i> *	0.688
<i>habeas</i> *	0.707
<i>divided_lower_court</i> *	0.717
<i>first_person</i> *	0.724
<i>jury</i> *	0.739
<i>corporate</i> *	0.744
<i>evidence</i>	0.747
<i>sentence</i> *	0.752
<i>counsel</i> *	0.758

47. Compare *supra* Table 1, with Narechania, *supra* note 11, at 955 tbl.1. As one might expect, given the total volume of data that informs Table 1 both here and in my previous study, the term *interpretation* only barely missed the cut last time, and it squeezed onto the final list with three new years of data in this latest analysis.

48. See *infra* notes 60–61 and accompanying text.

<i>procedure*</i>	0.801
<i>precedent*</i>	0.808
<i>death_sentence*</i>	0.816
<i>rules</i>	0.818
<i>prison*</i>	0.824
<i>congress*</i>	0.843
<i>officer*</i>	0.856
<i>regulation*</i>	0.860
<i>power*</i>	0.870
<i>due process*</i>	0.875
<i>interpretation</i>	0.876
<i>federal courts</i>	0.877
<i>property*</i>	0.887
<i>overrule*</i>	0.892
<i>damages</i>	0.894

Again, these findings are rather similar to those reported in my previous analysis. For example, all 27 Index Terms highlighted in my previous study make the cut here, too.⁴⁹ And, as before, many of the terms that are salient to the Roberts Court are consistent with historical trends (e.g., the Roberts Court's focus on the constitutionality of acts of Congress, its sensitivity to questions of jurisdiction, and its attention to death penalty matters, are all consistent with the concerns of predecessor courts).⁵⁰

But some changes stand out, particularly when it comes to Index Terms that seem comparatively unique to the Roberts Court. For one, there are three Index Terms—*federal courts*, *property**, and *damages*—that are new to this updated analysis. Some of these may reflect new or emerging certiorari priorities.⁵¹ And among those Index Terms that remain on the list (i.e., that are on both this updated analysis and my prior analysis of the Roberts Court), a few have moved substantially from their previous place: *divided_lower_court** has been promoted several places, from fifteenth on the list to ninth (and a change in DFO from 0.754 to 0.717); *corporate** has moved down several places, from fifth to twelfth (and a change in DFO from 0.564 to 0.744); *precedent** has moved up from twentieth to seventeenth, and *prison** has inversely moved down, from seventeenth to twentieth.⁵²

49. Compare *supra* Table 2 with Narechania, *supra* note 11, at 958–60 tbl.2.

50. Compare *supra* Table 2 with Table 1. See also Narechania, *supra* note 11, at 955–56 & tbl.1.

51. See *infra* notes 57, 63–70 and accompanying text (examining each of these new results).

52. Compare Table 2 with Narechania, *supra* note 11, at 958–60 tbl.2.

Change in Importance Scores. Some of these shifts within the Roberts Court suggest that we might also revisit the changes in certiorari priorities in the Roberts Court over its predecessor, the Rehnquist Court. Table 3, below, reports those findings, limited to only those Terms that moved significantly towards or away from the origin.

Table 3. Terms Ranked by Change in Importance Score, Roberts Court over Rehnquist Court

Term	Δ
<i>river</i>	-0.425
<i>robbery</i>	-0.229
<i>amici</i>	-0.111
<i>patent</i>	-0.093
<i>overrule*</i>	-0.087
<i>prison*</i>	-0.085
<i>criminal*</i>	-0.078
<i>precedent*</i>	-0.077
. . .	
<i>construction*</i>	0.085
<i>fourteenth amendment*</i>	0.088
<i>power*</i>	0.101
<i>employ*</i>	0.122
<i>aggravating</i>	0.143
<i>corporate*</i>	0.171
<i>constitution*</i>	0.249
<i>grand jury</i>	0.434

Here too, some results mirror those reported in my previous analysis. The new data are consistent with my prior findings that the Roberts Court’s emphasizes, say, *patent*-related cases, or the role of *amici*, much more than the Rehnquist Court did.⁵³

But there are some notable differences, too. For one, the new results suggest that the *corporate** term is less significant to certiorari decisions in the Roberts Court than those in the Rehnquist Court, adding one further data point to the debate over whether the Roberts Court is “pro-business.”⁵⁴ Specifically, these results may (but need not necessarily) accord with a view that the Roberts

53. Compare *supra* Table 3 with Narechania, *supra* note 11, at 961–63 tbl.3.

54. See, e.g., Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court: 1920–2020*, 107 MINN. L. REV. 49, 53–60 & nn.29–38 (2022) (summarizing the debate (and collecting sources) over whether the Roberts Court is “pro-business”).

Court's certiorari priorities may not be aligned with the business community's; that is, the Court may not be agreeing to hear the cases that such companies would like it to—even if the business community has an unparalleled winning record before the Roberts Court in the cases that are granted review.⁵⁵

And where my previous study found *overrule** to be much more important to the Roberts Court's certiorari decisions than to the Rehnquist Court, these new results add *precedent**, too. Indeed, I have graphed the migration of *precedent** towards the origin, from, say, the Burger Court to the Rehnquist Court to the Roberts Court, in Appendix Figure 3. Taking Tables 2 and 3 together, both *overrule** and *precedent** are significantly important during the Roberts Court, and both terms increase significantly in importance during Chief Justice Roberts' tenure (so far).⁵⁶

Analysis

So what should we make of these results? For one, some of the updates presented in this version of the study are themselves revealing.⁵⁷ For example, while *text* is not among the lists of significant terms presented in Tables 2 and 3 above, the addition of *text* to this study's Term Index, based on the most recent three Terms of the Roberts Court, may be (but need not be) a leading indicator of future results.⁵⁸ Indeed, over one-half of the cases in which the term appears

55. Compare, e.g., *id.* at 57 (finding that the Roberts Court is “significantly more likely to favor business than . . . any Court era in the last 100 years . . . and it is the first Court in the last 100 years that rules in favor of business more often than not”) with, e.g., Sri Srinivasan & Bradley W. Joondeph, *Business, the Roberts Court, and the Solicitor General: Why the Supreme Court's Recent Business Decisions Might Not Reveal Very Much*, 49 SANTA CLARA L. REV. 1103, 1116–17 (2009) (explaining that, because the set of cases in which certiorari is granted need not be representative of the set of cases in which certiorari is sought, “it is conceivable that the pool of business cases decided by the Court over the past three years disproportionately involved lower court judgments that were generally favorable to plaintiffs,” and thus, “the Court could have decided a majority of these cases in favor of business litigants while still holding a generally pro-plaintiff, anti-business disposition”).

56. See *supra* Table 2 & Table 3; see *infra* Appendix Figure 3; see also Narechania, *supra* note 11, app. at 1005 fig.4.

57. Besides *property** and *damages*, the other new addition to the list of significant terms is, as noted, *federal courts*. Looking closely at the cases implicated by this term suggests that the focus on “federal courts” is closely related to questions of jurisdiction and judicial power. See, e.g., *Shinn v. Kayer*, No. 19-1302 at 1 (U.S. Dec. 14, 2020) (per curiam) (noting that AEDPA “restricts the power of federal courts to grant writs of habeas corpus” and explaining that the Court granted certiorari in order to comply with that statute); see also *Trump v. Vance*, No. 19-635, slip op. at 1 (U.S. July 9, 2020) (noting the power of federal courts to subpoena sitting Presidents, and explaining that the Court granted review to consider analogous questions of the power of state courts).

58. See Narechania, *supra* note 11, at 951 (emphasizing that the “results are descriptive and not necessarily predictive” not least because “the wide docket discretion that the Court enjoys necessarily means that it could shift practices radically in the future”).

in a relevant certiorari paragraph belong to the Roberts Court.⁵⁹ In particular, *text* seems likely to reflect the Court's—and the Judiciary's—turn to textualism, and may foreshadow an increasing willingness to grant certiorari to resolve certain questions of interpretation (i.e., *interpretation*⁶⁰), or, more broadly, to ensure fidelity to certain methodological approaches.⁶¹ And I have already noted how the new *corporate** results may shed light on the Roberts Court's reputation as “pro-business.”⁶²

Likewise, the inclusion of *property** to the Table 2's list of significant terms reflects the Roberts Court's focus on various property-rights cases. Some relevant cases from the updated dataset include *United States Forest Service v. Cowpasture River Preservation Association* (regarding the agency's power to grant rights-of-way in certain federal forest lands)⁶³ as well as *PennEast Pipeline Co. v. New Jersey* (regarding the delegation of the federal government's eminent domain powers over state-owned lands).⁶⁴ Other property-rights cases from the Roberts Court include *Murr v. Wisconsin*⁶⁵ and *Knick v. Township of*

59. I have also visually depicted the Roberts Court's unusual emphasis on *text*, *infra* Appendix Figure 2.

60. *See supra* note 48 and accompanying text.

61. *See, e.g.*, *Nestlé USA, Inc. v. Doe*, No. 19-416 slip op. at 1 (U.S. June 17, 2021) (Gorsuch, J., concurring) (noting that it was a “good thing” that the Court addressed a question other than the one it “granted certiorari to consider” because the “statutory text and original understanding” of the Alien Tort Statute do not support the petitioner's contention); *Rehaif v. United States*, No. 17-9560 slip op. at 8 (U.S. June 21, 2019) (Alito, J., dissenting) (bemoaning the “purportedly textualist argument that [the Court] [was] sold at the certiorari stage” as a “magic trick”); *NLRB v. SW Gen.*, No. 15-1251 slip op. at 7 (U.S. Mar. 21, 2017) (granting certiorari to review (and ultimately affirm) a decision “reason[ing] that the text of [the Federal Vacancies Reform Act] squarely supports the conclusion that the [statute] restrict[s] [] nominees [from] serving as acting officers”) (quotations omitted); *Nebraska v. Parker*, 577 U.S. 481, 487 (2016) (granting certiorari to review (and ultimately affirm) a decision “examining the text of the 1882 Act, as well as the contemporaneous and subsequent understanding of the 1882 Act's effect on the [Omaha Reservation's] boundaries”).

62. *See supra* notes 54–55 and accompanying text.

63. No. 18-1584 slip op. at 1 (U.S. June 15, 2020) (“We granted certiorari in these consolidated cases to decide whether the United States Forest Service has authority under the Mineral Leasing Act to grant rights-of-way through lands within national forests traversed by the Appalachian Trail.”) (citation omitted).

64. No. 19-1039 slip op. at 6 (U.S. June 29, 2021) (“We granted certiorari to determine whether the [Natural Gas Act] authorizes certificate holders to condemn land in which a State claims an interest.”).

65. No. 15-214 slip op. at 6 (U.S. June 23, 2017) (explaining that the Court “granted certiorari” to review a determination that certain regulations “did not effect a taking,” including, among other findings, that the state court “discounted the severity of the economic impact [of the regulations] on petitioners' property”).

*Scott*⁶⁶ (both regarding the application of the Constitution’s Takings Clause), among others.⁶⁷

So too for the addition of *damages* to Table 2, as several underlying cases reflect concerns over the availability of money damages, particularly in suits against government officials. In *Torres v. Texas Department of Public Safety*, for example, the Court considered whether Congress had constitutionally authorized suits for money damages against the states, state sovereign immunity notwithstanding, in the Uniformed Services Employment and Reemployment Rights Act.⁶⁸ Likewise, in *Tanzin v. Tanvir*, the Court considered whether the Religious Freedom Restoration Act authorized suits for money damages against government officials.⁶⁹ Both of these cases, again drawn from the updated dataset, are representative of other prior Roberts Court cases.⁷⁰

But, in my view, this Essay’s most significant finding is not new. Rather, it is that these updated results confirm the Roberts Court’s historically unique proclivity to grant review in cases to consider whether to overrule precedent (i.e., *overrule** and *precedent**). As I described above, the Court’s decision to grant review in *Dobbs* required it to either “reaffirm or overrule *Roe*.”⁷¹ Similarly, the

66. No. 17-647 slip op. at 4 (U.S. June 21, 2019) (“We granted certiorari to reconsider the holding of *Williamson County* that property owners must seek just compensation under state law in state court before bringing a federal takings claim under § 1983.”).

67. *See, e.g., Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 712 (2010).

68. No. 20-603 slip op. at 3 (U.S. June 29, 2022) (“[The Court] then granted *Torres*’ petition for certiorari to determine whether . . . [the statute’s] damages remedy against state employers is constitutional.”).

69. No. 19-71 slip op. at 2–3 (U.S. Dec. 10, 2020) (granting certiorari to review (and ultimately affirm) the Second Circuit’s decision that the statute’s “open-ended phrase ‘appropriate relief’ encompasses money damages against officials”).

70. *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 175 (2016) (“California petitioned for certiorari. We agreed to decide . . . whether the Constitution permits Nevada to award Hyatt damages against a California state agency that are greater than those that Nevada would award in a similar suit against its own state agencies.”); *Morse v. Frederick*, 551 U.S. 393, 400 (2007) (“We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages.”); *see also Connick v. Thompson*, 563 U.S. 51, 51 (2010) (granting certiorari to review whether a district attorney’s office, which failed to train its officers on *Brady*’s rule regarding the disclosure of exculpatory evidence, may be liable for damages under § 1983 for a violation of *Brady*).

71. *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 8 (U.S. June 24, 2022). Some observers may resist this conclusion, noting that the Court’s own description of its certiorari decisions faults the parties for putting it to the choice of either reaffirming or overruling *Roe*. Stated simply, according to the Court, its decision to grant review did not put overruling *Roe* on the table—the parties’ merits-stage presentations did. I respond in two ways. First, the proximity dimension of the Importance Score metric accounts for the Court’s comparatively lengthy description of the decision to grant review, including the steps, described by the Court, that led it from the question presented to the stark choice of either reaffirming or overruling *Roe*. Second, I strongly suspect that

Court noted that it granted review in *Fulton v. City of Philadelphia* “to decide whether to overrule [*Smith*].”⁷² So too in *Ramos v. Louisiana*.⁷³ These three are

every member of the Supreme Court knew that overruling *Roe* was a possibility. I cannot, of course, substantiate this hunch. But, given the wide range of media commentary that noted this possibility while the petition for a writ of certiorari was pending before the Court, it strikes me as implausible that the Justices did not at least consider the possibility of overruling *Roe* when voting on whether to grant review.

72. No. 19-123 slip op. at 13 (U.S. June 17, 2021) (quoting *id.*, slip op. at 1 (Gorsuch, J., concurring)).

73. No. 18-5924 slip op. at 17 (U.S. April 20, 2020) (Kavanaugh, J., concurring) (noting that the Court’s decision to “grant[] certiorari” gave notice that it was likely to soon “overrul[e]” one of its “constitutional precedent[s]”).

only the most recent additions to a long string cite of similar cases.⁷⁴ And the Court's 2022 Term may bring even more.⁷⁵

74. *S.D v. Wayfair*, No. 17-494 slip op. at 4 (U.S. June 21, 2018) (“The South Dakota Supreme Court affirmed. It stated: ‘However persuasive the State’s arguments on the merits of revisiting the issue, *Quill* has not been overruled [and] remains the controlling precedent on the issue’ This Court granted certiorari.”) (alteration in original); *see also* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 32–33 (2006) (The Federal Circuit concluded that:

the fundamental error in petitioners’ [argument] was its disregard of the duty of a court of appeals to follow the precedents of the Supreme Court until the Court itself chooses to expressly overrule them. We granted certiorari to undertake a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements. Our review is informed by extensive scholarly comment and a change in position by the administrative agencies charged with enforcement of the antitrust laws. (quotations and citations omitted));

Pearson v. Callahan, 555 U.S. 223, 231 (2009) (“[I]n granting certiorari, we directed the parties to address the question whether *Saucier* should be overruled”); *Alleyne v. United States*, 570 U.S. 99, 103 (2012) (“In *Harris v. United States*, this Court held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. We granted certiorari to consider whether that decision should be overruled.”); *Kimble v. Marvel Ent., LLC.*, 576 U.S. 446, 451 (2015) (“We granted certiorari to decide whether, as some courts and commentators have suggested, we should overrule *Brulotte*.”) (citations omitted); *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 175 (2016) (“We agreed to decide two questions. First, whether to overrule *Hall*”); *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, No. 16-1466 slip op. at 6 (U.S. June 27, 2018) (“Janus then sought review in this Court, asking us to overrule *Abood* We granted certiorari to consider this important question.”); *Franchise Tax Bd. of Cal. v. Hyatt*, No. 17-1299 slip op. at 3 (U.S. May 13, 2019) (“The sole question presented is whether *Nevada v. Hall* should be overruled.”); *Kisor v. Wilkie*, No. 18-15 slip op. at 3 (U.S. June 26, 2019) (“We then granted certiorari to decide whether to overrule *Auer* and (its predecessor) *Seminole Rock*.”); *McCullen v. Coakley*, 573 U.S. 464, 504 (2014) (Scalia, J., concurring) (“[W]e granted a second question for review in this case (though one would not know that from the Court’s opinion, which fails to mention it): whether *Hill* should be cut back or cast aside.”); *Daimler AG v. Bauman*, 571 U.S. 117, 159–60 (2014) (Sotomayor, J., concurring) (“The Court rules against respondents today on a ground . . . that this Court did not grant certiorari to decide, and that . . . is unmoored from decades of precedent.”).

Moreover, as noted in my earlier study and suggested by some of the cases cited above, this list may be underinclusive, overlooking cases that use more unique phrasing in describing the certiorari grant. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, No. 21-418, slip op. at 10–11 (U.S. June 27, 2022) (granting certiorari to review the Ninth Circuit’s application of a precedent that a dissent referred to as “abandoned” and “renounc[ed]” (if not expressly overruled)); *Knick v. Township of Scott*, No. 17-647 slip op. at 4 (S. Ct. June 21, 2019) (explaining that it granted certiorari to “reconsider [a] holding” (without using a *overrule** or *precedent** term)); *Gamble v. United States*, 17-646 slip op. at 3 (U.S. June 17, 2019) (using the more unique term “overturn” rather than “overrule”); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (noting that the Court granted certiorari to decide whether it “should continue” to follow the rule set out in a previous decision). To clarify, the cases in this footnote’s previous paragraph are drawn from the study results (as are the results described *supra* notes 71–73 and accompanying text) whereas the four cases identified in this paragraph are not.

75. *See, e.g.*, Transcript of Oral Argument at 5, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707 (U.S. Oct. 31, 2022) (statement of Patrick Strawbridge, Esq.) (“This Court should overrule [*Grutter*].”); Brief for Caster Respondents at 24, *Merrill v. Milligan*, No. 21-1086 (U.S.

CERTIORARI AS CONTEXT

As noted, these new results offer a more complete description of the Roberts Court's certiorari priorities, accounting for the 2019, 2020, and 2021 Terms.

But why should we care about the Court's certiorari decisions at all? Stephen I. Vladeck's Childress Memorial Lecture, to which this Essay responds, urges us to look beyond the small set of merits decisions that the Court issues each year and examine the Court's broader contexts: beyond the Supreme Court's merits docket, we should pay closer attention to the Court's shadow docket, including its certiorari decisions; beyond the Supreme Court itself, we should pay more attention to, say, Congress's powers over the Court's jurisdiction, or the Executive Branch's prosecutorial discretion, or even the trial and appeals courts' ability to shape the scope and direction of any given case.⁷⁶ I agree.

Certiorari decisions offer insight into what the Court is actually doing—e.g., the “structural shifts in the Court's docket”⁷⁷—and, as important, how we might respond. Consider, for example, a case that I have highlighted a few times already: *Knick v. Township of Scott*.⁷⁸ Close observers of the important-cases docket might have predicted that this Court, comparatively unbound by precedent and evincing a growing interest in property-rights cases, would agree to revisit and overrule its prior decision in *Williamson County*.⁷⁹ And these insights help us not only make sense of the Court's docket in previous Terms; they may also help us anticipate—and perhaps even preempt⁸⁰—the cases that may attract the Court's attention in future years. In all, a better understanding of

July 11, 2022) (characterizing the petitioner's request for relief as an “invitation to . . . overrule longstanding precedent,” namely, *Thornburg v. Gingles*, 478 U.S. 30 (1986)). *But see* Narechania, *supra* note 11, at 951 (emphasizing that the “results are descriptive and not necessarily predictive,” not least because “the wide docket discretion that the Court enjoys necessarily means that it could shift practices radically in the future”).

76. *See also* VLADECK, *supra* note 25 (manuscript at 62–63).

77. Stephen I. Vladeck, Keynote Address at the Saint Louis University Law Journal Richard J. Childress Memorial Lecture: The Business of the Supreme Court: The Evolution and Devolution of the Supreme Court's Docket (Oct. 28, 2022).

78. *Knick*, slip op. at 4.

79. Hence, other significant terms may offer some clues as to which precedents the Court is more—or less—likely to consider overruling. *Cf.* Marcia Coyle, *Death Decisions | End of Line, Again | Leaks & Ethics*, SUP. CT. BRIEF, NAT'L L.J. (Nov. 22, 2022, 5:01 PM), <https://www.law.com/supremecourtbrief/2022/11/22/death-decisions-end-of-line-again-leaks-ethics/> [https://perma.cc/8W2F-Q8HY] (“For the second time in a month, the justices passed on an opportunity to revisit the so-called Insular Cases. Advocates of overturning those widely criticized cases from the early 1920s probably realize now that the [C]ourt has little appetite for re-examining them.”).

80. *Compare, e.g.*, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 3 (U.S. June 24, 2022) (Thomas, J., concurring) (suggesting that the Court overrule its decision in *Obergefell* as “demonstrably erroneous”) (quotations omitted) *with* Respect for Marriage Act of 2022, 28 U.S.C. § 1738C (codifying aspects of the practical results of *Obergefell*).

the Court's agenda-setting priorities can help to shape the agenda of the political branches.

Such decisions thus merit our close attention for several reasons.

For one, as the Lecture emphasizes, these decisions are an important, if often overlooked, vector of the Court's work. Accounting for these decisions helps us gain a more complete view of the Court's project: We can, for example, see *Dobbs* both as the momentous decision it is and as of a piece with other trends in the Roberts Court's important-questions docket, namely its unparalleled interest in using its agenda-setting discretion to select cases to revisit (and perhaps overrule) precedent. I am careful not to imply that the limited data the Court provides in each successive decision are sufficient for all purposes. While these descriptions of the Court's certiorari decisions, viewed individually and analyzed collectively, bring some coherence to the Court's certiorari canons, they fall far short of the sort of reason-giving we are accustomed to seeing—and that we should require—from the courts. And so, as I have suggested before—and reiterate here—the Court should better elaborate a common law of certiorari, lending greater transparency, predictability, and stability to its certiorari canons.⁸¹ But setting aside the objection that the Court should do more to reason its certiorari decisions, such close reviews of the existing descriptions of the Court's certiorari decisions build on the Lecture's suggestion that we look beyond the Court's merits dockets and make the most of all the data (here, text) that the Court reveals to us.

Moreover, as noted above, the Court's case selection priorities reverberate through the nation's political, social, and economic agenda.⁸² Returning, again, to *Dobbs* as an example: the Court's decision has wrought substantial practical, legal, institutional, and political consequences.⁸³ And each of these effects is itself a consequence of the Court's own exercise of its certiorari discretion. In short, the shape of the Court's docket has substantial implications for the political branches' agenda, too: It can affect both who is in office and what those officials can—and choose to—accomplish.⁸⁴ Indeed, the Lecture encourages us

81. See Narechania, *supra* note 11, at 987–93. On the results regarding *overrule** and *precedent** in particular—i.e., the need for greater clarity that explains when the Court is (and is not) likely to grant review to revisit precedent—see William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 313 (2019) (“The real problem is not that the Court overrules too much, but that it overrules without a theory that explains why it overrules”) and Lee Epstein, William M. Landes & Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1147 (2015) (concluding that “greater consistency in [the Court’s] precedent on precedent. . . . would bring greater predictability to a doctrine that begs for it”).

82. See *supra* note 28 and accompanying text.

83. See *supra* notes 2–6 and accompanying text.

84. See Hounshell, *supra* note 6 (noting the salience of *Dobbs* to the 2022 midterm election); Strict Scrutiny, *The Uncertain Future of the Indian Child Welfare Act*, CROOKED MEDIA (Nov. 14, 2022), <https://crooked.com/podcast/the-uncertain-future-of-the-indian-child-welfare-act/>

to revive the dialogue between the branches by, again, looking past the Court's merits docket to its role within the Judiciary and as against the coordinate branches. And so, as I have said before, Congress and the Executive Branch should examine the Court's certiorari canons and consider whether to reform the Court's agenda-setting discretion.^{85*} Such democratic oversight is both intrinsically important and instrumentally (for the Court) legitimating.

CONCLUSION

The Supreme Court's certiorari decisions offer important context: How the Court chooses to allocate its time helps us to better understand the Court's priorities and can thereby help Congress and the Executive Branch prioritize their respective responses. But the Court's standard for granting review is often criticized as hopelessly vague, particularly in its important-questions docket (i.e., the portion of the Court's docket not dedicated to resolving conflicts among state and federal appellate courts).⁸⁶ Such critiques notwithstanding, the Court's certiorari standard can be better understood through a close text analysis of its merits opinions, which often describe the decision to grant review.

Such an examination of the Roberts Court's important-questions docket (so far) is revealing. While the Roberts Court mirrors historical trends in many ways,

[<https://perma.cc/J78B-NF47>] (suggesting the Court's preliminary intervention in cases like *Milligan* may have affected the composition of the House of Representatives); *Relentless Personal Attacks*, DIVIDED ARGUMENT (Nov. 14, 2022), <https://www.dividedargument.com/episodes/relentless-personal-attacks/transcript> [<https://perma.cc/K8RG-DCJM>] (same); see also Remarks by President Biden and Vice President Harris at Signing of H.R. 8404, The Respect For Marriage Act, Dec. 13, 2022, 2022 WL 17664517, at *4 (White House) (suggesting that Congress's decision to act on the Respect for Marriage Act is, at least in part, in response to Justice Thomas' concurrence in *Dobbs*, advocating for overruling *Obergefell*).

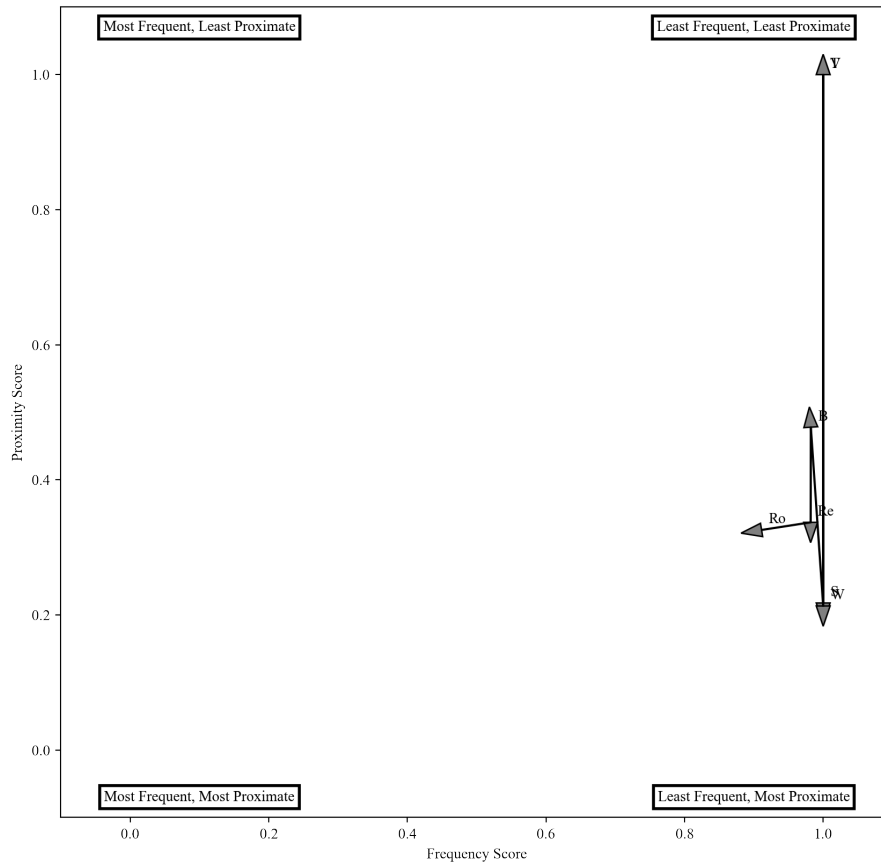
85. See Narechania, *supra* note 11, at 989, 992–93. Specifically, I have previously suggested that the political branches consider expanding the Court's mandatory docket. *Id.* at 992–93. In forthcoming work, I expand on that suggestion. See Tejas N. Narechania, *Managing Up—Certiorari and the Lower Courts* (unpublished manuscript) (*on file with author). In particular, the Court's jurisdiction over certified cases—certified from the federal appeals courts—is meant to be mandatory (though, in practice, the Court has treated its jurisdiction over such cases as discretionary). See, e.g., Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There A Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1320–21 (2010). I suggest that Congress reiterate and clarify that the Court's jurisdiction in such cases is mandatory, and that Congress direct the Courts of Appeals to certify cases presenting substantial circuit splits to the Supreme Court—especially in view of several studies' findings that the Court has tended to let circuit splits fester too long. See, e.g., Beim & Rader, *supra* note 30, at 449; Starr, *supra* note 32, at 1372. If these studies are correct, and if the 1925 Judges' Bill was premised on a tacit trade—docket discretion for a promise to ensure uniformity, see Narechania, *supra* note 11, at 925 n.7—then Congress should make sure that the Court lives up to its end of the bargain. And we may find that a Supreme Court made more busy fulfilling its longstanding and traditional function has less time to treat its docket discretion as a roving commission to, say, seek out precedents to overrule.

86. See *supra* note 14 and accompanying text.

some results are especially remarkable—including, most notably, the Roberts Court’s historically unparalleled tendency to grant review to revisit, and perhaps overrule, precedent.

The Court’s certiorari decisions are thus an important, but overlooked, vector of its work. Consistent with the Lecture’s suggestion that we look beyond the Court’s merits docket to its entire body of work as well as to its greater institutional context, we should pay more attention to the Court’s docket-selection decisions. Doing so can help us better understand the Court’s priorities and may even help revive more democratic control over the Court’s agenda.

Appendix Figure 2. *text* Plotted by Importance Score by Chief Justice



Appendix Figure 2 (above) and Appendix Figure 3 (below) show the progression of *text* and *precedent**, respectively, over time, beginning with the Taft Court (denoted by T), then to the Hughes Court (denoted by H), to the Stone Court (S), to the Vinson Court (V), followed by Warren (W), Burger (B), Rehnquist (Re) and Roberts (Ro).

Appendix Figure 3. *precedent** Plotted by Importance Score by Chief Justice

