

# Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies\*

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*Professor Brenner reviews the social science studies that have attempted to explain the behavior of the United States Supreme Court in deciding whether to grant or deny petitions for certiorari.*

¶1 Almost all the cases heard and ultimately decided by the United States Supreme Court come to the Court after it has granted a petition for a writ of certiorari. This writ is granted by the Court at its discretion.

¶2 The writ of certiorari originated with the Judiciary Act of 1891,<sup>1</sup> but it did not become a major vehicle for access to the Court until the passage of the Judiciary Act of 1925.<sup>2</sup> This statute, known as the Judge's Bill, was enacted after extensive lobbying by Chief Justice Taft and the support of the other justices on the Court. It greatly extended the Court's discretionary appellate jurisdiction by replacing most mandatory appeals with petitions for a writ of certiorari. The purpose of the change was to enable the Court to decrease its caseload. Finally, in an effort to decrease the Court's load even further, Congress enacted legislation in 1988 that eliminated all the mandatory appeals except for those from three-judge district courts.<sup>3</sup>

¶3 This article will present a brief overview of the published social science studies<sup>4</sup> that have considered how and why the decision to grant or to deny certiorari is made by the United States Supreme Court. Most of these studies have focused either on the strategies pursued by the individual justices in their certiorari voting or on the variables associated with the granting of certiorari by the Court.

## The Certiorari Process

¶4 A losing litigant has ninety days after the entry of judgment by a United States court of appeals or by a state court of last resort to file a petition for a writ of certiorari

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1. Judiciary Act of 1891, ch. 517, 26 Stat. 826 (1991).

2. Judiciary Act of 1925, ch. 229, 43 Stat. 936 (1925).

3. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

4. For the purpose of this essay, I have defined a "social science" study as one that uses systematic techniques in collecting the data. This usually involves hypothesis testing. An exception was made to include H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991) because of its importance to this field of study.

with the clerk of the United States Supreme Court. The petitioner pays the required fee and files proof that he has served a copy of his petition on all the respondents in the case. Within thirty days after receipt of the petition, the respondent may file a brief in opposition to the petition. The petitioner, in turn, may reply to the respondent's brief.<sup>5</sup> Interested third parties are routinely allowed by the Court to submit *amicus curiae* ("friend of the court") briefs in support of or in opposition to the petition. The clerk of the Supreme Court distributes the certiorari papers to the chambers of each of the nine justices.

¶15 In 1972 Justice Powell suggested that the justices participate in a certiorari pool, whereby they would pool their law clerks for the purpose of evaluating the certiorari petitions. On the present Court, eight of the nine justices (all except Justice Stevens) belong to the certiorari pool. The law clerk who is responsible for a particular certiorari petition writes a memo for all the justices in the certiorari pool, summarizing the relevant facts and issues in the case and presenting arguments as to whether certiorari ought to be granted or denied. Law clerks for the other justices "mark-up" the pool memo, indicating to their justice whether they agree with the recommendation set forth by the pool memo and presenting a reason for the position they take. Justice Steven's law clerks review all the certiorari petitions and other papers and prepare memos for those cases in which they believe that certiorari ought to be granted, in which certiorari is requested by the solicitor general's office (i.e., the office that handles the litigation for the United States government), or which are subsequently included on the Court's "Discuss List." The Chief Justice circulates a list of cases to be discussed and voted on at the Court's conference. Any justice can add any case to the Discuss List. Any case not on the final Discuss List is automatically denied certiorari. The justices meet in secret conference to decide whether to grant or to deny certiorari to the cases on the Discuss List. It takes four votes to grant certiorari.

¶16 Rule 10 of the Rules of the United States Supreme Court states that "a petition for certiorari will be granted only for compelling reasons" and then lists several situations which, "although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers."<sup>6</sup> The reasons listed by this rule are:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual court of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

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5. For more information on the normal steps taken in processing certiorari cases, see ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* xxxi-xxxii (7th ed. 1993) (containing a "Certiorari Checklist).

6. SUP. CT. R. 10.

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.<sup>7</sup>

It has been argued that these are insufficiently precise to inform the litigant or his or her attorney when certiorari is likely to be granted.<sup>8</sup>

¶17 Certiorari petitions are of two kinds: paid petitions, in which the petitioner pays the required fees, submits the appropriate number of copies, and follows the other guidelines for submission; and petitions *in forma pauperis* (i.e., in the form of a pauper), mostly submitted by federal and state prisoners, in which the fees and most of the other requirements are waived. The Court grants certiorari to only a fraction of each kind. In the 1995 term, for example, the Court granted certiorari to 92 of the 2,456 paid certiorari petitions (4 percent) and to 13 of the 5,098 *pauperis* petitions (0.3 percent).<sup>9</sup>

### The Certiorari Strategies

¶18 Supreme Court scholars have identified two strategies used by the individual justices in their reviews of certiorari voting. The first is known as the “error correction strategy.” According to this strategy, a justice who wants to reverse the decision of the lower court will vote to grant certiorari, while a justice who is happy with the lower court decision will vote to deny certiorari.

¶19 S. Sidney Ulmer compared the certiorari vote with the final vote on the merits for eleven justices who served on the Court during the 1947 through 1956 terms.<sup>10</sup> For eight of these justices, he discovered a statistically significant relationship between their vote to grant certiorari and their vote to reverse the decision of the lower court, and between their vote to deny certiorari and their vote to affirm.<sup>11</sup> The associations between these votes, however, were low. Baum was unimpressed with Ulmer’s findings and argued that they did not support the error correction strategy.<sup>12</sup> Other scholars, however, found a stronger relationship

7. *Id.*

8. See DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 40–43 (1980).

9. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 83 tbl. 2–6 (2d ed. 1996).

10. See S. Sidney Ulmer, *The Decision to Grant Certiorari as Indicator to Decision “On the Merits,”* 4 POLITY 429 (1972).

11. See *id.* at 440.

12. See Lawrence Baum, *Judicial Demand—Screening and Decisions on the Merits: A Second Look*, 7 AM. POL. Q. 109 (1979). Later, however, Baum argued that “without question, error correction is important to the justices.” LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 79 (1997).

between these two votes.<sup>13</sup> Brenner and Krol, for example, inspected seven terms in the Vinson, Warren, and Burger courts and discovered that the justices who later voted to reverse obtained a certiorari grant rate (i.e., votes to grant certiorari divided by total votes either to grant or deny certiorari) of 77.7 percent, while the justices who later voted to affirm secured a certiorari grant rate of only 59.1 percent.<sup>14</sup> In computing these statistics, Brenner and Krol only examined the cases in which certiorari was granted by the Court. When the Court denies certiorari, it is difficult to determine whether the individual justices want to reverse or affirm the decision of the lower court, because the vote to reverse or affirm does not take place.

¶10 The second strategy pursued by the individual justices is the outcome prediction strategy. In 1958 Glendon Schubert introduced “The Certiorari Game.”<sup>15</sup> He inspected Federal Employees’ Liability Act (FELA) evidentiary cases from the 1942 to 1948 terms of the Court and claimed that a bloc of four liberal justices (Black, Douglas, Murphy, and Rutledge) would always vote to grant certiorari when a U.S. Court of Appeals had reversed a district court decision favoring railroad workers, and that this bloc was successful 92 percent of the time in obtaining a decision by the Supreme Court in favor of these workers. Marie Provine, however, inspected the actual certiorari votes in Justice Harold Burton’s docket books and concluded that these four justices voted to grant certiorari in the above situation only 86 percent of the time.<sup>16</sup> In short, the bloc did not always play the game. Nevertheless, Schubert’s study is useful because it recognized that the certiorari voting could be based on the justices’ evaluation of their probability of winning at the final vote.

¶11 In 1979, I introduced “The New Certiorari Game,” arguing that justices who want to affirm the decision of the lower court are more likely to vote to grant certiorari when they win at the final vote, while no such pattern exists for justices who wish to reverse the decision of the lower court.<sup>17</sup> I offered two reasons why affirm-minded justices are likely to be outcome-oriented when they cast their certiorari votes: (1) the Court, at least in the period examined (1946–1956), was more likely to reverse the decision of the lower court than to affirm it; and (2) the justices who sought to affirm the decision of the lower court had already won in that court. Why

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13. See, e.g., S. Sidney Ulmer, *Supreme Court Justices as Strict and Not-So-Strict Constructionists: Some Implications*, 8 L. & SOC’Y REV. 13 (1972); PROVINE, *supra* note 8, at 105–13; Jan Palmer, *An Economic Analysis of the U.S. Supreme Court’s Certiorari Decisions*, 39 PUB. CHOICE 387 (1982); JAN PALMER, *THE SUPREME COURT’S CONFERENCE VOTES* (1990); John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335 (1990).

14. See Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828, 833 (1989).

15. See Glendon Schubert, *The Study of Judicial Decision Making as an Aspect of Political Behavior*, AM. POL. SCI. REV. 1007 (1958). See also Glendon Schubert, *The Certiorari Game*, in QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 210 (Glendon Schubert ed., 1959); Glendon Schubert, *Policy Without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284 (1962).

16. PROVINE, *supra* note 8, at 166, 167 t

17. See Saul Brenner, *The New Certiorari Game*, 41 J. POL. 649

risk a decision by the United States Supreme Court unless the outcome they favor is likely to win?<sup>18</sup>

¶12 Reverse-minded justices, on the other hand, are confronting decisions of the lower court they dislike. If the Court is more likely to reverse than to affirm, these justices have so much to gain and so little to lose that it is not worth the time and effort to calculate their chances of winning. Rather, it makes sense for them to gamble on the possibility that the Court will reverse.

¶13 That the affirm-minded justice will pursue the outcome prediction strategy, while the reverse-minded justice will not, was confirmed by two subsequent studies<sup>19</sup> and is consistent with the data presented in a third.<sup>20</sup> The research in these studies was also based on cases in which the Court granted certiorari.

¶14 Finally, Perry interviewed sixty-four former law clerks, five justices, and sixteen other participants in the certiorari process and identified two major modes of certiorari decision making—a jurisprudential mode and an outcome mode.<sup>21</sup> Perry concluded that while the justices care a great deal about the outcome of the case, they will not vote to grant certiorari unless the outcome they favor is likely to win at the final vote.<sup>22</sup> This occurs, according to Perry, in a minority of cases.<sup>23</sup> Note, however, that Perry’s conclusions are based on unsystematic interview data, and we do not know whether they reflect the views of the justices and, even more important, their behavior. In addition, Perry did not distinguish between reverse- and affirm-minded justices when talking about the outcome mode.

### Variables Associated with the Granting of Certiorari

¶15 In 1963 Joseph Tanenhaus and three colleagues identified three “cues” associated with the granting of certiorari by the Court during the period 1947 to 1956: (1) the United States as a petitioner; (2) disagreement among the judges in the court immediately below, or disagreement among two or more courts or agencies in a given case; (3) the presence of a civil liberties issue.<sup>24</sup> Ulmer, Hintze, and Kirklosky, however, examined the certiorari petitions discussed by the Court at conference during the 1955 term and concluded that the only variable of the three found by Tanenhaus that influenced whether certiorari was granted was the presence of the United States

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18. *See id.* at 653, 655.

19. Krol & Brenner, *supra* note 13; Robert L. Boucher & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995).

20. *See* Brenner & Krol, *supra* note 14, at 836 tbl. 2.

21. *See* PERRY, *supra* note 4, at 271–82.

22. *Id.* at 278.

23. *Id.* at 279.

24. *See* Joseph Tanenhaus et al., *The Supreme Court’s Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION MAKING 111 (Glendon Schubert ed., 1963).

as a petitioner.<sup>25</sup> Armstrong and Johnson, on the other hand, found support for Tanenhaus' three cues in their study of the 1967, 1968, 1976, and 1977 terms of the Court.<sup>26</sup>

¶16 Subsequent studies have identified other variables associated with the granting of certiorari by the Court. These include: (1) the case below was decided in a direction that differed from the ideology of a majority of the justices on the Court;<sup>27</sup> (2) there was a conflict between the decision of the lower court and Supreme Court precedent;<sup>28</sup> and (3) there was a genuine intercourt conflict.<sup>29</sup>

¶17 In 1988, Caldiera and Wright inspected the cases granted and denied certiorari during the 1982 term of the Court. They discovered nine variables, listed here in order of importance, that were associated with the granting of certiorari:

- (1) The United States as a petitioner;
- (2) There were more than three amicus briefs in support of certiorari;
- (3) There was an *actual* conflict either:
  - (A) between two or more circuit courts,
  - (B) between two or more state courts,
  - (C) between a federal court and a state court, or
  - (D) between the court immediately below and a Supreme Court precedent;
- (4) There were two or three amicus briefs in support of certiorari;
- (5) There were one or more amicus briefs in support of certiorari;
- (6) The case was decided in a liberal direction in the court immediately below;
- (7) There were one or more amicus briefs in opposition to the granting of certiorari;
- (8) The court immediately below decided the case by a split vote or the court immediately below reversed the decision of the lower court;
- (9) The petitioner *alleged* a conflict.<sup>30</sup>

¶18 What was particularly new about this methodologically sophisticated study was its identification of the importance of the amicus briefs as a variable in the granting of certiorari. Even briefs *opposing* certiorari were associated with the

25. See S. Sidney Ulmer et al., *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 L. & SOC'Y REV. 637 (1972).

26. See Virginia Armstrong & Charles A. Johnson, *Certiorari Decision Making by the Warren and Burger Courts: Is Cue Theory Time Bound?* 15 POLITY 141 (1982).

27. See Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions*, 41 J. POL. 1185 (1979).

28. See S. Sidney Ulmer, *Conflict with Supreme Court Precedents and the Granting of Plenary Review*, 45 J. POL. 474 (1983).

29. See S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901 (1984).

30. Gregory A. Caldiera & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1118 (1988).

granting of certiorari. Apparently the mere presence of the amicus briefs suggests that the issues of the case are important and therefore worthy of consideration by the Supreme Court. It should be noted that the association of “liberal” lower court decisions with the granting of certiorari is not surprising, given that Caldiera and Wright examined the behavior of the conservative Burger Court, one more likely to grant certiorari to review such decisions. Often the Burger Court would reverse these decisions in accord with the error correction strategy described earlier.<sup>31</sup> Caldiera and Wright investigated the 1982 term of the Court, in part, to take advantage of a prior empirical study<sup>32</sup> which investigated this term and which classified the certiorari petitions in terms of *actual* conflicts (number 3 above) and *alleged* conflicts (number 9 above).

¶19 Finally, in 1993 McGuire and Caldiera investigated case selection in paid obscenity cases from the period 1955–1987. They discovered that the Court was more likely to grant certiorari when there was a professional obscenity litigator handling the case for the free-speech petitioner, or when there was an amicus brief in support of the free-speech petitioner.<sup>33</sup>

### Decision-Making Techniques

¶20 Various Supreme Court scholars have investigated the techniques used by the justices or their law clerks in making the certiorari decision. Tanenhaus and his colleagues based their development of “cue theory” on several assumptions, including that “certiorari petitions are so sizable and so numerous that justices . . . can give no more than cursory attention to a large share [of them],” and that “a substantial share of . . . [the] petitions for certiorari are so frivolous as to merit no serious attention at all.” From these assumptions, they hypothesized that “some method exists for separating the certiorari petitions requiring serious attention from those that are so frivolous as to be unworthy of careful study,” and further “that a group of readily identifiable cues exists to serve this purpose.”<sup>34</sup>

¶21 A number of Supreme Court scholars have criticized this cue theory.<sup>35</sup> I do not doubt that, at times, the law clerks reject some petitions as frivolous after a cursory reading of them, but I question whether they use the cues identified by Tanenhaus<sup>36</sup> for this purpose. I also question whether the law clerks use these cues to determine which cases require serious attention, although I admit that the fact

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31. See *supra* ¶¶ 8–9.

32. *Summary of Cases Granted Certiorari During the 1982 Term*, 59 N.Y.U. L. REV. 823 (1984).

33. See Kevin T. McGuire & Gregory A. Caldiera, *Lawyers Organized Interests and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717 (1993).

34. Tanenhaus et al., *supra* note 24, at 118.

35. See, e.g., PROVINE, *supra* note 8, at 77–83; PERRY, *supra* note 4, at 114–21; Stuart H. Teger & Douglas Kosinski, *The Cue Theory of Supreme Court Jurisdiction: A Reconsideration*, 42 J. POL. 834 (1980).

36. See *supra* ¶ 15 for list of three cues identified by Tanenhaus.

that the United States government is seeking certiorari might well encourage the clerks to consider the petition more carefully.

¶122 Perry postulated another theory of Supreme Court decision making, arguing that each justice (or their clerks) would have to give favorable answers to a series of questions before he or she decides to vote to grant certiorari.<sup>37</sup> Here is one of the sequences posited by him: (1) The case is *not* frivolous; (2) the justice does *not* care strongly about the outcome of the case; (3) there is a conflict between two or more circuit courts; (4) the issue is important; (5) there is *no* need or desire for more “percolation” (or more extensive consideration) of the issue by the lower courts or by others; and (6) there is a strong reason to resolve the case or issue now.<sup>38</sup>

¶123 I doubt whether the clerks or the justices answer all six questions presented above before they decide whether certiorari ought to be granted. It may be rational for them to do so, but humans rarely take all the rational steps in making decisions.

### The Discuss List

¶124 Scholars in this field are not only interested in the variables associated with the granting of certiorari, they also care about the variables associated with a case being placed on the Discuss List. Caldiera and Wright focused on this topic for the 1982 term of the Court.<sup>39</sup> Not surprisingly, they discovered many more variables are associated with whether the case was placed on the Discuss List than with whether certiorari was granted.<sup>40</sup> In other words, the justices took less care in placing a case on the Discuss List and more when voting to grant certiorari.

### The Law Clerks

¶125 Finally, some scholars have focused on the role of the law clerks in the certiorari process. Brenner and Palmer, for example, discovered that Chief Justice Vinson voted the same way as his law clerk recommended 86 percent of the time, and that this percentage was higher than the rate with which Vinson agreed with any of the other justices on the Court.<sup>41</sup> In a second study, Brenner inspected certiorari memos authored by law clerks during three terms of the Vinson Court contained in Justice Burton’s private papers. He found that the most frequent reasons

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37. See PERRY, *supra* note 4, at 277–84.

38. *Id.* at 278.

39. See Gregory A. Caldiera & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOC’Y REV. 807 (1990).

40. *See id.* at 825.

41. See Saul Brenner & Jan Palmer, *The Law Clerks’ Recommendations and Chief Justice Vinson’s Vote on Certiorari*, 18 AM. POL. Q. 70 (1990).

for granting certiorari listed in these memos were that the decision of the lower court was in error, the issue in the case was important, or that there was a conflict in the decisions of two or more courts.<sup>42</sup> These are precisely the variables that would be expected based on the previous work identifying variables associated with the granting of certiorari by the Court.<sup>43</sup> In a final study, Brenner examined the certiorari memos written by William Rehnquist when he was a law clerk to Justice Jackson on the Vinson Court. He discovered that Rehnquist's certiorari recommendations mirrored the views of Justice Jackson.<sup>44</sup>

### Future Research

¶26 As this brief overview indicates, social scientists have covered wide ground in investigating the behavior of the Supreme Court in granting certiorari petitions. However, there is more work to be done. Future research should focus in two areas.

¶27 First, if we accept that the justices generally follow an error correction strategy and an outcome prediction strategy, we still want to know the conditions under which they are likely to follow these two strategies. Are they, for example, more likely to follow these strategies when the cases are important or when the cases are complex? Are nonfreshman justices more likely to follow these strategies? What is the relationship between the ideology of the justice and the ideology of the Court and the probability that a given justice will follow these strategies?

¶28 Second, we cannot fully understand why the justices vote the way they do at the certiorari vote unless we understand their goals. One possible goal is a desire to further their policy positions. Another is a desire to supervise the federal court system, particularly when there is intercircuit conflict. A third goal involves solving problems for the American society that are appropriate for Court resolution. And a fourth involves a concern for workload. There are a host of other goals as well.<sup>45</sup> Future research is needed that relates these goals to the justices' certiorari behavior.

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42. Saul Brenner, *Error-Correction on the U.S. Supreme Court: A View From the Clerks' Memos*, 34 Soc. Sci. J. 1 (1997).

43. See *supra* ¶¶ 15–19.

44. Saul Brenner, *The Memos of Supreme Court Law Clerk William Rehnquist: Conservative Tracts or Mirrors of the Justice's Mind?* 76 JUDICATURE 829 (1993).

45. See, e.g. Lawrence Baum, *Case Selection and Decision Making in the U.S. Supreme Court*, 27 L. & SOC'Y REV. 443; BAUM, *supra* note 12, at 78–83; Samuel Estreicher & John B. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities*, 59 N.Y.U. L. REV. 68 (1984).