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TRANSPARENCY AND POLICYMAKING AT THE SUPREME COURT

Louis J. Virelli III*

INTRODUCTION

I would like to thank the Georgia State University Law Review for including me in this symposium on transparency at the Supreme Court and for providing me the opportunity to respond to Professor Eric Segall's characteristically insightful and thought-provoking article on the topic. I share many of Professor Segall's concerns about the transparency of our public institutions, including the Court. I also agree that some of the Court's practices, particularly with regard to the Justices' papers and cameras in the courtroom, could benefit from greater transparency in light of the Court's role in our constitutional democracy.

I begin to depart from Professor Segall's position, however, when it comes to the Court's certiorari and recusal practices. This is not because I think transparency is necessarily a bad idea in either context, but rather because I think the Court's duties in each of these areas go beyond its traditional judicial role into what I will (somewhat clumsily) call policymaking responsibilities. The process of policymaking, at least as I intend to use the term, involves discretionary value judgments that are not typically seen as a core feature of judging. Judges are fundamentally expected to be neutral arbiters of legal disputes; they apply the facts of individual cases to legal rules to arrive at legal conclusions.¹ Of course, even core judicial processes involve normative questions and judgments. This is especially true with regard to the Supreme Court, which is not only

* Professor of Law, Stetson University College of Law. In addition to thanking the *Law Review* for including me in their symposium on transparency at the Supreme Court, I want to especially thank Luke Donohue and Christine Lee for their excellent work in making the symposium, and this issue, possible.

1. In fact, this assumption lies at the heart of most conversations about judicial recusal, including recusal at the Supreme Court. Professor Segall cites the prospect of someone being a judge in his or her own case as support for the need for judicial recusal and, in turn, for transparency in the recusal process. See Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787, 797–810 (2016).

our court of last resort, but also the institution that is tasked with answering some of our most divisive and complex national questions. Nevertheless, I contend that there is a difference between the Supreme Court's typical judicial role, represented in its resolution of cases through the public issuance of legally binding judgments and opinions, and the far less common, but very real, exercises of discretionary authority it is required to make as part of its broader institutional mission. Those discretionary decisions incorporate more open-ended considerations of the Court's role in our tripartite government. Such considerations include the public welfare and opinion that are neither as universally accepted in, nor as closely constrained by positive law, as traditional judging. In short, the Justices sometimes must exercise, in the words of Chief Justice John Marshall in *Marbury v. Madison*, a form of "constitutional or legal discretion" that likens them more to the political branches than the courts.²

But where does this discretionary authority come from? Since we do not normally think of judges as explicitly making policy, it makes sense to first ask whether the Court is in fact permitted to exercise discretion in its certiorari and recusal decisions, and second, whether broad discretion is justified in each of those areas. I suggest that the answer to both of these is an unqualified yes, albeit for slightly different reasons. The Justices' discretionary power over its certiorari decisions has been delegated by Congress, and as such is justified by its legislative pedigree.³ Discretion over recusal decisions is, I argue both here and elsewhere, committed exclusively to the Justices by the text, history, and structure of the Constitution—more specifically by Article III's vesting of the "judicial Power of the United States" exclusively in the courts.⁴ That is not to say that either decision is wholly unbounded. Congress could exercise its power over the Court's appellate jurisdiction to more closely control its docket, and there are constitutional limits—like the Due Process Clause—on the

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

3. 28 U.S.C. §§ 1254, 1257 (2012).

4. U.S. CONST. art. III, § 1; *See also* LOUIS J. VIRELLI III, DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION 46-94 (Forthcoming 2016).

Justices' recusal practices.⁵ These limits only highlight the fact, however, that there is a range of choices in each context that is not just left to the Court's discretion, but that is committed to its discretion as a matter of law.

So what does the fact that the Court is sometimes asked to make discretionary "policy" judgments have to do with transparency? The answer may ultimately be nothing—it is entirely possible that transparency is equally well-justified in every aspect of the Court's existence. The Court is, after all, a public institution entrusted with vast power and responsibility. It seems potentially inconsistent with the concept of democratic government to have important decisions made in relative secret, with little or no accountability. This is all true. It does not, however, account for the fact that many of our governmental institutions often make—or at least contemplate—important policy decisions in secret. Congress, our primary policymaking institution, is constitutionally required to "keep [and publish] a [j]ournal of its [p]roceedings," but only to the extent the Congress determines that the proceedings do not "require [s]ecrecy."⁶ Even a roll call vote is only constitutionally required to be reported when "one fifth of those [p]resent" desire it.⁷ Executive officials, including administrative agencies that have been delegated express policymaking authority by Congress, have long been protected from disclosing their deliberations over certain policy questions to the public, even in the face of formal requests for that information.⁸ The most common rationale given for executive secrecy is the need to protect agency deliberations in order to "encourage open, frank discussions on matters of policy" and to "protect against premature disclosure of proposed policies . . . and . . . public confusion that

5. VIRELLI, *supra* note 4, at 120–64.

6. U.S. CONST. art. I, § 5, cl. 3.

7. *Id.*

8. 5 U.S.C. § 552(b)(5) (2012). The primary legal vehicle for public disclosure of government materials, the Freedom of Information Act (FOIA), contains an exception for materials that would be considered privileged in the context of civil litigation, including the deliberative process privilege. *Id.*; *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984); *Burka v. HHS*, 87 F.3d 508, 516 (D.C. Cir. 1996) (explaining that FOIA "incorporates . . . generally recognized civil discovery protections").

might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action."⁹

The question, then, is whether the same rationales that permit secrecy in the legislative and executive branches' policymaking processes apply to the members of the judiciary when they too are tasked with making policy decisions. The Justices make such determinations when they decide whether to grant certiorari or to recuse themselves from cases properly before the Court. The remainder of this essay will explore how the discretionary nature of certiorari and recusal decisions impact the arguments for transparency in both contexts.

I. CERTIORARI

The Supreme Court currently enjoys virtually unlimited discretion over its own appellate docket.¹⁰ It exercises this discretion through its decisions to grant or deny petitions for writs of certiorari.¹¹ Congress first granted the Court the power to refuse cases on appeal at the end of the nineteenth century.¹² By that point, the Court had fallen several years behind on its existing docket. It implored Congress to provide some relief by authorizing the Justices to reject cases that it did not think merited their attention.¹³ Congress obliged, but the problem of

9. U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 5, at 13 (2014), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5.pdf> [hereinafter DOJ GUIDE].

10. The Court has less discretion over whether to exercise its original jurisdiction over cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." U.S. CONST. art. III, § 2, cl. 2. *See also* *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) (explaining that the Court's original jurisdiction should be invoked "sparingly," but that it nonetheless is "obligatory . . . in appropriate cases" (quoting *Utah v. United States*, 394 U.S. 89, 95 (1969))).

11. 28 U.S.C. § 1253 (2012). Direct appeal to the Supreme Court is available from decisions in civil cases by three-judge district courts. *Id.*

12. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 392 (2004) (noting that the "Court found itself unable to cope with its workload and fell more than three years behind in processing cases.").

13. This decision was made easier by Congress's creation of the lower federal appellate courts around the same time, thereby offering litigants a more robust opportunity to appeal federal trial court decisions without infringing on the resources of the Supreme Court or its justices. Establishment of the U.S. Circuit Courts of Appeals, 26 Stat. 826 (1891), http://www.fjc.gov/history/home.nsf/page/landmark_12_txt.html. Prior to that time, the federal appeals were still being heard by panels of judges consisting

an overloaded docket persisted.¹⁴ Congress responded with the Judiciary Act of 1925, which conferred on the Justices “broad discretion to decline to review the vast majority of the cases” presented to it.¹⁵ The 1925 Act did not, however, eliminate all forms of mandatory appellate review for the Court,¹⁶ and the Justices continued to push back against those mandatory appeals. The Court often treated mandatory appellate cases in the same summary fashion as petitions for certiorari. The result was the erosion of the “discretionary-mandatory distinction between certiorari and appeal” and a further practical expansion of the Court’s control over its docket.¹⁷ This combination of judicial pressure and practical effect led Congress to effectively remove all statutory impediments to the Court’s discretionary authority over its appellate docket in 1988.¹⁸ Since that time, the Court has exercised nearly unfettered control over its caseload, especially its appellate cases.

Congress has never required the Justices to explain their decisions or even to set standards to guide those decisions. The Justices have articulated their own set of considerations for granting certiorari, but have also made clear that those considerations are “neither controlling nor fully measuring the Court’s discretion.”¹⁹ The Court

of local federal trial court judges and Supreme Court justices “riding circuit”—travelling around the country to sit as judges in federal appeals. See Judiciary Act of 1802, 2 Stat. 156 (1802), http://www.fjc.gov/history/home.nsf/page/landmark_04_txt.html.

14. Cordray & Cordray, *supra* note 12, at 392 (explaining that Congress responded to the Court’s overtures with the Evarts Act, “which created the intermediate courts of appeals and for the first time explicitly conferred on the Supreme Court some authority—through an order denying a writ of certiorari—simply to turn away cases that were not judged to warrant full consideration and resolution on their merits”).

15. *Id.*

16. The Act still required the Court to hear appeals in a subset of cases, including cases in which a state supreme court declared a federal statute unconstitutional or denied a constitutional challenge to a state statute. The 1925 Act also required the Court to decide cases that were certified to them by federal appellate courts. See Section 240(a) of the Judiciary Act of 1925, http://www.fjc.gov/history/home.nsf/page/landmark_15_txt.html; *History of the Federal Judiciary: Landmark Judicial Legislation*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/landmark_15.html (last visited June 2, 2016).

17. Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 595–96 (1972).

18. Cordray & Cordray, *supra* note 12, at 394 (citing Review of Cases by the Supreme Court, Pub. L. No. 100-352, 102 Stat. 662 (1988)).

19. SUP. CT. R. 10.

is thus left, as a matter of law and practice, with the authority to decide for itself if a case merits review.

This fact alone, however, does not say much about whether the Justices should have to take the next step of justifying why they exercised their discretion in a particular way. It is one thing to grant a government decision maker wide latitude in reaching its conclusion. It is quite another to allow them to do so without any public explanation. The latter point requires some additional understanding of *why* judicial discretion is important in the certiorari context.

The predominant reason for granting the Court so much control over its docket was concern about its caseload. Prior to the Act of 1925, the Court was as much as three years behind in its disposition of cases. In a world where cases routinely take years just to get to the certiorari stage, it is at least fair to acknowledge that an additional three years of waiting for a decision from the Justices would be problematic for the Court's reputation and effectiveness. This is particularly important because the Court's democratic legitimacy—its ability to garner public acceptance of its decisions—depends so heavily on public perception.²⁰ Once we recognize that the size of the Court's docket is a significant factor in its ability to fulfill its constitutional responsibilities, we can see why broad discretion over which cases it hears—and whether it should explain its exercise of that discretion—is so important.

Assume that the maximum number of cases the Court can competently hear and decide in a given term is 150.²¹ Now assume that there are 200 cases in a given term that present important issues of federal law to the Court. These cases may be “circuit splits,” in which different federal circuits have reached opposite conclusions on

20. As Alexander Hamilton explained, the Court is the weakest branch of government because it possesses “neither force nor will but merely judgment.” THE FEDERALIST NO. 78 (Alexander Hamilton). It therefore depends on its ability to persuade for its authority. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865–66 (1992) (“[T]he Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”).

21. This is a conservative estimate. The Court’s current docket is roughly half that amount. *Frequently Asked Questions (FAQ)*, SUPREME COURT OF THE UNITED STATES (May 29, 2016), <http://www.supremecourt.gov/faq.aspx#faq9>.

the same matter of federal law, cases in which a lower court invalidated a federal statute on constitutional grounds, or cases that directly conflict with controlling Court precedent. By the Justices' own admission, each of these categories of cases is, at least theoretically, worthy of Supreme Court review.²² Yet for solely administrative reasons, one-fourth (50) of them must either be denied certiorari or held over for decision in another term, thereby pushing back worthy cases from the next term in a potentially endless cycle of docket congestion and delay. If there is some quantitative limit on the Court's capacity to accept cases—and under the constitutional requirement of a single, undivided Court there most certainly is²³—then the Justices will likely be forced to turn away cases that would otherwise, time and resources permitting, merit its consideration. Put another way, it is easy to imagine an environment where the Court's actual decisions to grant some cases and deny others is at best a matter of taste and at worst arbitrary. Regardless of who is responsible for the line drawing between worthy cases, a requirement that the decision makers (in this case, the Justices) try to explain such decisions in a way that provides the public with understandable and useful insight into the working of government seems like a noble, but ultimately doomed, exercise.

It of course would not be impossible for the Court to simply explain that administrative limitations forced it to make exceedingly difficult choices, but it is hard to imagine the benefit of such an explanation outweighing its potential costs. For example, we generally expect our public figures, especially our judges, to be consistent in their decision making—to treat like cases alike. But the quantitative limitations on certiorari decisions make that consistency

22. See SUP. CT. R. 10.

23. U.S. CONST. art. III, § 1. Article III explicitly requires that there be “one supreme Court.” *Id.*; The overwhelming consensus in the scholarly literature and in constitutional practice is that the Court must act as a single unitary body, rather than, for instance, in smaller panels of justices. See, e.g., Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1220–22 (2011) [hereinafter Virelli, *The (Un)Constitutionality of Supreme Court Recusal Standards*]. But see Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 99–100 (2011).

near impossible. A case that may be granted review in one year may simply not be able to be fit into the Court's schedule the next. It is easy to envision public sentiment turning against the Court when it rejects an important case due primarily to concerns about docket congestion. This is particularly true because the Court makes certiorari decisions on a case-by-case basis. Even the most rational of observers may struggle to accept the immediate loss of their own preferred case for administrative reasons in favor of one they find less worthy of review. Broader public sentiment is also more likely to be moved by immediacy concerns than by the deferred gratification of a timely and efficient justice system. As Justice Brennan explained in *Commodity Futures Trading Commission v. Schor*, there is an inherent danger in "pit[ting] an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic."²⁴ The additional tension around the Court resulting from the administrative rejection of important cases could chip away at the public's confidence in the institution in a way that is potentially delegitimizing.

Moreover, different Justices may perceive the Court's administrative capacity and the relative value of cases or legal doctrines differently. This creates two related, but ultimately distinct, problems. First, in cases where administrative concerns are not unanimous, certiorari decisions could be (rightly or not) perceived as substantive judgments about the significance of particular cases. Regardless of whether the Justices' decisions are purely administrative, the reality of administrative constraints on the Court makes it exceedingly difficult (if not impossible) to separate the substantive from the procedural. This is especially true when certiorari decisions are split among the Justices. One response to this could be that requiring every Justice to explain their decision in every vote would allow a watchful public to evaluate each Justice's certiorari decisions over time and gain valuable insight into the true motivations and criteria informing their votes. If this were true, it could provide a powerful argument in favor of transparency in the

24. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 863 (1986).

certiorari process. In reality, however, requiring the Justices to explain all of their certiorari votes just compounds an already serious problem of time and resource scarcity on the Court. The Justices' explanations could take up a tremendous amount of the Court's time and energy, resulting (ironically) in even fewer cases being eligible for review. Forcing Justices to go on the record in their certiorari decisions also creates a body of individual precedent that will, if done effectively, require Justices to make more and more nuanced arguments in future cases in order to preserve the illusion of consistency in a decision-making regime that is realistically destined to be inconsistent. The more likely result would be a glut of cursory statements about the resource and time constraints facing the Justices.²⁵

Second, requiring a Justice to explain their certiorari vote when that vote was not part of a prevailing coalition could be perceived as a conflict among the Justices over the value or importance of a particular legal issue prior to the Court actually reaching a conclusion on the topic. For example, six Justices may vote against hearing a case on administrative grounds. A dissenting Justice's explanation that they voted to hear the case because of its substantive importance could give the false impression that either the other Justices do not think the case is substantively important, that their administrative justification was a pretext, or both, when all that was really at work was a disagreement among the Justices over the best use of the Court's docket that term. Prematurely signaling a dispute on the Court over the substantive value of a given legal issue could incentivize the Justices to rely exclusively on administrative rationales for fear of raising issues that have not been fully vetted by their colleagues. The resultant chilling effect could have negative consequences for the Justices' deliberations in future cases, thereby ossifying, or at least complicating, the certiorari process without much corresponding informational benefit to outside observers.²⁶

25. See discussion *infra* note 35 and accompanying text.

26. One could argue that there is really no difference between a dispute about docket management and the substantive importance of a case because the former will depend on the latter, and this may be true in some cases. But when the institutional capacity to decide cases in a timely manner (less than 200)

Both of these difficulties with increased transparency at the certiorari stage are consistent with problems addressed in the executive policymaking context by the deliberative process privilege. Deliberative process protects against the “premature disclosure of proposed policies . . . and . . . public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action.”²⁷ Requiring Justices to explain their certiorari votes risks forcing them to prematurely divulge positions on policy issues before the entire Court has considered them. It also threatens either to provide highly misleading information about the Justices’ views on particular cases and issues or to unfairly raise suspicions about the Justices’ candor when the driving force behind a particular outcome is a genuine disagreement about the Court’s short-term administrative priorities, rather than a conflict over the substantive value of granting review.

In addition to purely administrative issues with certiorari, there are more substantive considerations that may defy explanation and thus counsel against transparency. The Court is constitutionally limited to deciding “cases” and “controversies,” such that the substantive issues raised by individual cases are not the only non-administrative considerations in a certiorari decision.²⁸ For an unreviewable body like the Supreme Court, the danger of choosing the “wrong” case to address a significant legal issue is especially salient. As Justice Oliver Wendell Holmes so aptly put it, “[g]reat cases, like hard cases, make bad law.”²⁹ Frederick Schauer similarly noted that lawmaking through individual cases “may produce inferior law whenever the concrete case is nonrepresentative of the full array of events that the ensuing rule or principle will encompass.”³⁰ This concern is magnified at the Court and, as Justice Holmes indicated over a century ago, is not lost on the Justices. Concerns about the factual or

is so far exceeded by the number of cases annually requesting review (over 7,000), there has to be room for purely procedural line drawing in order to preserve the Court’s ability to function. *See Frequently Asked Questions*, *supra* note 21.

27. DOJ GUIDE, *supra* note 9, at 13.

28. U.S. CONST. art. III, § 2.

29. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

30. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006).

procedural posture of a case may be grounds for the Court to pass on that case despite the magnitude of the legal issue it raises. Imagine a case that raises an issue of the utmost national interest but presents an unusual factual scenario or one the Justices perceive to have been decided below on an incomplete factual record. The Court could decide to accept the case and remand it for further fact finding, but could just as easily decide to deny review and wait for the issue to come up again on a more fully developed record.³¹ The same is true for potential procedural problems. Cases raising jurisdictional or justiciability issues like standing may make it too difficult for the Court to reach the real issue of interest, thus counseling the Justices to deny review in that case and wait for one that raises the relevant issue more directly.³² Highly sensitive social issues raise similar certiorari problems. There are good arguments for the Court to refrain from addressing a politically charged issue until the lower courts and the political process have had a chance to confront it. This is both to promote democratic values and for the simple reason that Supreme Court decisions are far more difficult to change than solutions from the lower courts or Congress.³³

31. Similar concerns arose in a recently argued abortion case before the Court. See Dahlia Lithwick, *The Women Take Over*, SLATE (Mar. 2, 2016, 6:20 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/03/in_oral_arguments_for_the_texas_abortion_case_the_three_female_justices.html (describing Justice Kennedy's comment during oral argument as indicating "that it might be 'proper' and 'helpful' for the court to remand this back to the lower courts for hearings" on some perceived deficiencies in the factual record).

32. There is a case to be made that this is what happened in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), a case that raised the issue of the constitutional right to marriage for same-sex couples but that was ultimately decided on standing grounds.

33. This has come up recently in the Second Amendment context. Since its landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court has denied certiorari in several Second Amendment cases, presumably to let the lower courts and the political process deal with the ramifications of *Heller* before the justices weigh in with another unreviewable ruling on the matter. Jonathan Adler, *Supreme Court Declines to Hear Second Amendment Case over Dissent of Two Justices*, WASH. POST (June 9, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/09/supreme-court-declines-to-hear-second-amendment-case-over-dissent-of-two-justices/> ("Since deciding *D.C. v. Heller* and *McDonald v. Chicago*, the Court has shown little interest in clarifying the scope of constitutionally protected gun rights."); *Protecting Strong Gun Laws: The Supreme Court Leaves Lower Court Victories Untouched*, LAW CENTER TO PREVENT GUN VIOLENCE (Aug. 26, 2015), <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/> (explaining that since 2008, "the U.S. Supreme Court has rejected more than sixty cases seeking to expand" *Heller*).

Although these may be valid reasons to deny review, they do not necessarily mean the Justices should not explain their vote against granting certiorari on those grounds. After all, if the Court is expected to explain itself in opinions deciding cases on factual or procedural grounds, it should be able to do so in the certiorari context. The difference between such explanations in merits versus certiorari decisions, however, is two-fold. First, in merits cases, the Court has presumably decided that the factual or procedural issue requires an official resolution. In that case, an explanation is important because it is part of the Court's responsibility to decide cases and set binding precedent. At the certiorari stage, the explanation does not create any future legal consequences and is thus less valuable for that reason alone.³⁴ Second, a merits decision addressing factual or procedural issues will almost always garner a majority of the Court, thereby diminishing the likelihood of confusion about the Court's message.³⁵ Certiorari votes and, by extension, any explanation thereof are individualized. The Court may not reach any form of consensus on factual or procedural concerns at the certiorari stage. The lack of legal effect and the possibility of conflicting messages trigger the same concerns about public confusion that underlie deliberative process privilege without an obvious countervailing benefit. To the extent certiorari decisions reflect the Justices' policy determinations about which cases to review, the arguments for transparency in those determinations fall short.

34. Individual Justices' certiorari decisions could create a body of precedent for that Justice. For the reasons articulated above, the possibility of individualized precedent in certiorari decisions creates its own set of challenges that also argue against transparency.

35. In the October 2013 term, a search of the Supreme Court Database revealed that the Court issued only three plurality opinions, opinions in which less than a majority of the Court signed onto the primary opinion in the case. The October 2014 term included only one. THE SUPREME COURT DATABASE, <http://supremecourtdatabase.org/index.php> (last visited June 2, 2016). This is consistent with historical data on plurality opinions. According to James F. Spriggs II and David R. Stras, "Historically, plurality decisions by the Supreme Court have been relatively rare: during the 145 Terms between 1801 and 1955, the Supreme Court issued only 45 plurality decisions." James F. Spriggs II and David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519 (2011). However, "during the 54 Terms from 1953 to 2006, the Supreme Court issued 195 plurality opinions, approximately 3.4% of the 5,711 total cases decided during the period." *Id.*

There are also serious practical problems with any legislative attempt to require transparency in the Court's certiorari process. Because the Court is unreviewable and any violations of legislative disclosure standards would be (at least directly) unenforceable, it will be difficult to ensure that the Justices reveal any more about their certiorari decisions than they would otherwise choose to, which currently appears to be almost nothing.³⁶ More likely, in the interest of inter-branch comity, the Justices would provide some summary explanation such as, "I conclude that the current case is not a good candidate for review." This level of explanation offers little if any insight into the process and makes the Court look potentially even more obstructionist than it does under the current, more secret regime. Relying on historic reasons for not divulging or explaining certiorari votes is far easier to defend than offering largely hollow explanations in response to a request by a coequal branch of government. What's more, the Justices are free to—and in fact do—explain their disagreement with the Court's decision to grant certiorari when they feel it is necessary.³⁷ This makes information about the process available in at least some circumstances without triggering the problems associated with mandatory reporting.

Taken in connection with previous arguments against the Court offering detailed explanations of its certiorari votes, legislative transparency requirements seem increasingly difficult to justify. Such requirements promise little in the way of valuable insight while increasing the likelihood of public confusion about the process and potentially casting the Court as unduly obstructionist in its refusal to fully comply with an arguably misguided congressional mandate.

Lastly, some commentators, including Professor Segall, argue that simply recording the Justices' certiorari votes in each case increases transparency in a useful way.³⁸ On one hand, a simple record of the

36. Congress could always employ its other constitutional tools, such as appropriations or investigations, to try and incentivize compliance with certiorari disclosure requirements, but each of these methods is at best indirect enforcement mechanisms. See Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1587–99 (2012).

37. See, e.g., *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), cert. denied, 135 S. Ct. 2799 (Thomas, J., dissenting).

38. See Segall *supra* note 1, at 829.

certiorari votes in each case diminishes concerns about public confusion and prematurely revealing the Court's views on policy issues because it says little about either. It is hard for observers to be confused, the argument goes, if all that is given to them is an accounting of how each Justice voted. It likewise does not prematurely reveal any Court policy regarding a particular case or legal issue because it says almost nothing about it, especially the administrative challenges surrounding certiorari.

The counter argument, however, is even more powerful. Because a list of votes cast says nothing about the multiple variables affecting that certiorari decision—such as administrative issues, factual or procedural problems, and social and cultural attitudes—it is at best unhelpful and at worst highly misleading. Taken literally, a vote count says nothing about why certiorari was granted or denied in a given case. Any more ambitious attempts to gather information from such an accounting are inherently misinformed. The result is an increased potential for public confusion with no corresponding increase in public awareness or insight.

A vote count is further unsatisfying because it incentivizes the Justices to change their approach to voting in order to preserve the status quo of secrecy in their deliberations. One obvious way in which the Justices could protect themselves against a requirement that they divulge their certiorari votes is for the Court to make those votes anonymous. Anonymous ballots would strip the vote count of most, if not all, of its informational value and would be entirely within the Court's purview, absent a legislative requirement to the contrary. To the extent Congress tried to legislatively require the Court to publish its votes, it would run into the same problems of public confusion and damage to the Court's reputation already discussed.

There is much intuitive appeal to pulling back the curtain on the Court's certiorari process. The most direct way to do that may be to have the members of the Court explain their decisions. What is missing from this view, however, is an acknowledgement of the nature of the Court's decision to hear a case. Due both to Congress's

delegation to the Court of control over its own docket and to the breadth and interrelatedness of the variables involved in the decision, the certiorari process more closely approximates a policymaking exercise by the Justices than a more traditional adjudicative one. This does not mean that increased transparency in certiorari decisions is necessarily a bad idea in all cases. It merely suggests that recasting the certiorari process in policymaking terms reveals a new perspective on transparency at the Court that implicates additional rationales for protecting policy makers from disclosure. Rationales include the importance of the deliberative process privilege, which have been previously overlooked in this context and that affect our broader understanding of certiorari and, as it turns out, recusal at the Court.

II. RECUSAL

Recusal is the process by which a judge or Justice is excluded from participating in an individual case.³⁹ Unlike the certiorari process, recusal is currently regulated directly by Congress in the form of a federal recusal statute.⁴⁰ The statute precludes federal judges, including Supreme Court Justices, from participating in a variety of cases that may present a conflict of interest that could hinder the judge's impartiality, such as having a personal financial interest in the outcome or being related to one of the parties or lawyers in the case.⁴¹ Recusal is also statutorily required "in any proceeding in which [a judge's] impartiality might reasonably be questioned."⁴² Judges and Justices decide their own recusal issues in the first instance. Those decisions are generally subject to appellate review,

39. "Recusal" is used interchangeably to include both the terms "disqualification," which traditionally refers to involuntary removal of a judge from a case, and "recusal," which has historically referred to a judge's voluntary decision to withdraw from a case. RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* 4 (2d ed. 2007).

40. 28 U.S.C. § 455 (2012).

41. *See id.*

42. *Id.* at § 455(a).

except for members of the Court, who lack any superior tribunal to hear an appeal from their recusal decisions.⁴³

Based on the clear statutory language, the decision to recuse appears a purely legal one. Judges or Justices simply apply the statutory provisions to the facts of their case. For lower court judges, this is generally true. For Supreme Court Justices, however, I have argued that the decision to recuse has constitutional implications that render it closer to a policy judgment than a traditional legal analysis.⁴⁴ To summarize, constitutional text, history, and structure suggest that a Justice's decision to recuse is part of the "judicial power" granted to the Court under Article III. Any congressional attempt to interfere with that decision by setting substantive recusal standards must be based in an independent source of congressional power under Article I, like the Necessary and Proper Clause.⁴⁵ Yet when viewed as a matter of constitutional structure, we see that legislative recusal standards for the Justices run afoul of the Court's inherent power under Article III to decide cases properly before it. To the extent a recusal statute threatens to recuse all nine Justices in a single case (an outcome that both theoretically and historically is far more likely than most realize), the statute interferes with the Court's power to decide that case and thus violates the separation of powers and, more specifically, Article III.⁴⁶

The constitutional infirmities with Supreme Court recusal standards highlight the true nature of recusal at the Court. While the Justices have many sources to draw on to inform the ethical analyses associated with recusal, they are also obligated to protect their constitutional mission by remaining available to resolve disputes, even in cases where widespread recusal may be justified. The result

43. Lower court judges are also the initial factfinders and adjudicators of their own recusal status, subject to traditional appellate review by a higher court under an abuse of discretion standard. FLAMM, *supra* note 39, 5-8, 988.

44. *See generally* VIRELLI, *supra* note 4. I have argued that similar constitutional issues with recusal arise in the lower federal courts and state supreme courts, but those arguments are beyond the scope of the present discussion of transparency at the Court. *See id.* at 165-210.

45. U.S. CONST. art. I, § 8, cl. 18.

46. *See* Virelli, *The (Un)Constitutionality of Supreme Court Recusal Standards*, *supra* note 23, at 1207-25.

is a balance between ethical and institutional concerns that may move beyond a traditional legal analysis to resemble something more akin to the policy determinations required in certiorari decisions.⁴⁷ Once we recast Supreme Court recusal as, at least in part, a matter of judicial discretion, we are able to see the full range of transparency concerns that accompany any policy decision, including recusal at the Court.

As with the certiorari process, recusal at the Court is based on a set of variables that can be difficult to balance. Any resulting explanation of that balance runs the risk of ranging between unhelpful and unduly confusing to a lay audience, and may therefore trigger the same type of protections found in the deliberative process privilege. Even if we assume—as we often do in complicated legal analyses—that Justices are capable of explaining difficult decisions in a way that the public can accept as legitimate, there are additional problems of the potential precedential effect of recusal decisions on individual Justices and other members of the Court. Certiorari is a policy-based decision that is made by the Court as a whole—individual Justices contribute to the outcome by voting, but no single Justice has the sole ability to set “precedent” for the Court by voting to hear or reject a case. Supreme Court recusal, by contrast, is and always has been an individual, unreviewable decision by a Justice of their own fitness to participate in a given case.⁴⁸ If required to explain themselves in any detail, the individualized nature of the decision would put a Justice in the unique position of potentially setting a precedent for their colleagues in future cases without any input or feedback from the rest of the Court.

47. In my previous work on recusal at the Court, I have suggested that the justices’ recusal decisions are controlled, at least at the margins, by the Due Process Clause. See VIRELLI, *supra* note 4, at 120–64. But even if we think of due process analyses as traditionally legal, there will still be a wide range of recusal issues before the Court that require balancing ethical and constitutional questions yet will not go as far as to implicate fundamental issues of due process. The important point at present is that because at least a wide range of recusal decisions are committed to the justices as a matter of constitutional law (as opposed to statutory law in the certiorari context), similar questions arise about how the nature of the Court’s activity affects the need for transparency.

48. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 612 (1947).

There are two potentially troubling consequences that arise from this reality, both of which counsel against the Justices explaining their recusal decisions. One is that it puts a single Justice in a position to set what amounts to a policy decision for the entire Court. Regardless of how persuasive (or not) the recusal-as-policy argument first seems, there is no question that Supreme Court recusal entails independent, unreviewable decisions by single Justices that necessarily incorporate a wide range of factors about which reasonable minds can differ. Requiring Justices to go on the record in defense of their recusal decisions puts undue pressure on future Justices who may have different—but equally defensible—views as to how to balance the institutional and ethical concerns that arise in a given case. Moreover, the Justices have consistently shown, in over 225 years of recusal practice, that they consider recusal an independent matter for each Justice, and as such will not do anything to unduly influence their colleagues' recusal decisions.⁴⁹ The practical effect of this position is that even if explanations were statutorily required, the most likely outcome is that the Justices would seek to avoid providing any justification that could be seen as limiting a future recusal decision. Imagine statements like “Based on my review of the relevant facts and ethical standards, it is not necessary that I recuse myself from the case at hand.” This type of explanation does not inform or educate the public about the basis for a recusal decision, and is very hard to prohibit statutorily when the decision itself is unreviewable.

A second potentially disturbing consequence is that if the Justices were inclined to explain their recusal decisions fully and candidly, the result could be increasing pressure from within the Court to be overly cautious in recusal cases. Consider two well-respected hypothetical Justices, both of whom take their ethical and institutional obligations quite seriously, and who have very different backgrounds and ideological reputations. A case arises involving an

49. See, e.g., Sherrilyn A. Ifill, *Do Appearances Matter? Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 622 (2002) (noting that “the Justices encourage and protect a fiercely independent approach to their recusal determinations”).

employment dispute at a technology company in which a conservative Justice with a reputation for favoring business interests owns a life insurance policy that invests in small part in the tech industry. Concerned that the public will construe her indirect investments as biasing her in favor of the corporation, she recuses herself and explains as much in writing. A year later, a similar case confronts the Court, but this time a Justice with a reputation for being staunchly pro-employee has the same type of indirect investment in the corporate party. She is not inclined to recuse because she does not believe (quite reasonably) that anyone would perceive her life insurance policy as biasing her against the employees in the suit. Nevertheless, due to her colleague's decision from the prior term, she feels as if failing to recuse will make her appear less ethical. She recuses herself and the Court is forced to decide the case with an even number of Justices, thus risking a tie vote and the possibility of the Court being unable to issue a binding, precedential opinion in the case, despite the fact that the recused Justice was completely capable of rendering a fair and impartial judgment in the suit.

It may be that the above example does not seem terribly disturbing. After all, an ethical "race to the top" cannot be all bad. An exercise of caution in exchange for protecting the integrity and fairness of judicial proceedings makes sense. The problem arises when the institutional pressures to conform with or exceed the ethical criteria set by other Justices overcomes the ability to balance ethical and institutional interests as required by Article III. Even if the above hypothetical came out correctly, there is no doubt that valid institutional concerns about the Court's ability to exercise its judicial power were potentially subjugated in an effort to appear as ethical as the other Justices, even when the circumstances of the two cases were meaningfully different. This is true even if both Justices feel fully competent to explain their participation without causing undue confusion. No matter how compelling the reasoning, a decision to participate in a case that is at odds with another Justice's decision to recuse in an earlier case will inevitably be met with suspicion. It is not at all unreasonable to think that Justices faced with that dilemma

would prefer to remain above even the imagined ethical fray. For this reason, the Justices have consistently and vehemently defended their independence over recusal matters, even with regard to one another.⁵⁰ Justice Anthony Kennedy made the point recently when he testified before Congress that he believes the Justices' recusal decisions "should never be discussed," even with other members of the Court, because "[t]hat's almost like lobbying."⁵¹ His answer echoed the statements of several of his colleagues, who have explained that they do not like to reveal the reasons for their recusal decisions because they do not want the other Justices to feel pressure to recuse in the same situation.⁵²

A final concern about individual Justices setting recusal precedent is the opportunity it could create for opportunistic recusal motions from parties seeking to influence the composition of the Court. Justices Antonin Scalia and Stephen Breyer testified before Congress regarding their concerns about such motions.⁵³ Written explanations for recusal decisions could incentivize parties to attempt to recuse ostensibly unsympathetic Justices from their case. This could unfairly damage the Court's public reputation and could raise significant administrative problems, as Justices will be required to spend

50. Letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy, Jan. 26, 2004, reprinted in *From the Bag: Irrecusable and Unconfirmable*, 7 GREEN BAG 2D 277, 280 (2004). Chief Justice William Rehnquist responded to a letter from Senators Patrick Leahy and Joseph Lieberman arguing that Justice Antonin Scalia should have recused himself from a case in which he had gone duck-hunting just prior to the case with a named party, Vice President Dick Cheney. The case was *Cheney v. United States District Court*, 541 U.S. 913 (2004). The case was important due to the high-profile people involved and because it marked one of the very few instances in which a Supreme Court justice voluntarily revealed their reasons behind a decision not to recuse. In his letter to the senators, Chief Justice Rehnquist reminded them "it has long been settled that each Justice must decide such a question for himself." Letter from Rehnquist to Leahy, *supra*. Perhaps most importantly, he defended Justice Scalia's decision on the grounds that there is "no precedent" for recusal in such a case, and that "any suggestion by you [Senator Leahy] or Senator Lieberman as to why a Justice should recuse himself in a pending case is ill considered." *Id.* at 280.

51. The United States House of Representatives Committee on Appropriations, *Budget Hearing-The Supreme Court of the United States*, HOUSE APPROPRIATIONS COMMITTEE (Mar. 23, 2015), <http://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394064>.

52. Steven Lubet & Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius*, 47 VAL. U.L. REV. 883, 893 (2013).

53. *Considering the Role of Judges Under the Constitution of the United States: Hearings Before the S. Comm. on the Judiciary*, 112th Cong. 28 (2011).

valuable time and energy responding to such opportunistic recusal motions.

Outside of the recusal-as-precedent context, requiring Justices to explain their recusal decisions raises further complications that must be weighed against the benefits of increased transparency generally. As an initial matter, such reforms are unenforceable against the Justices and thus incentivize Justices who do not wish to reveal their reasons to offer the same type of generalized, cursory statements that are designed to prevent their explanations from becoming precedential. Moreover, whatever benefit may be generated by the Justices disclosing the reasons for their recusal decisions, much of that benefit is lost in the absence of parallel substantive standards. If a Justice is unrestrained by Congress in deciding when to recuse herself, as I contend the Constitution requires, it is unlikely that the procedural framework in which that decision was made will do much to alter it. Published reasons for failing to recuse will not, in the absence of defined criteria for recusal, promote public confidence in the integrity of the Court because there will be no baseline against which to measure the quality of the Justices' explanations.⁵⁴

One counter argument to this point about procedural requirements being effectively hollow without corresponding substantive guidelines is that a public account of a Justice's recusal decision could be used by the remaining members of the Court as a de facto record against which to review that decision. Using recusal explanations in this way would incentivize the Justices to be as thorough in their justifications as lower court judges, and would enable their colleagues on the Court to conduct a meaningful review of their decision. There have been numerous calls for appellate-style review of the Justices' recusal decisions by the remainder of the Court, and the idea has some intuitive appeal.⁵⁵ When looked at more closely, however, internal review of a Justice's recusal decision is rife with legal and logistical problems that make it, and in turn any

54. Virelli, *The (Un)Constitutionality of Supreme Court Recusal Standards*, *supra* note 23, at 1224.

55. *See, e.g.*, The Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong., 1st Sess. § 3(a)-(b) (2011), <http://www.govtrack.us/congress/bill.xpd?bill=h112-862>; Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 *BROOK. L. REV.* 589, 644 (1987).

argument for transparency based on it, untenable. Legally, it is unlikely that some subset of the Justices could review the work of one of their own without running afoul of Article III's "one supreme Court" requirement.⁵⁶ Throughout the overwhelming majority of its history, the Supreme Court has acted as a singular unit.⁵⁷ It has not been divided into panels like the circuit courts, and, as Chief Justice John Roberts pointed out in his 2011 Year-End Report on the Federal Judiciary, it would be unprecedented to allow members of the Court to review a Justice's recusal decision.⁵⁸

As a practical matter, it is unlikely that the Justices would agree to review one another's decisions, and even if they did so it is almost certain they would arrive at summary affirmances in every case. The Court has consistently held the view that recusal is an independent inquiry for each individual Justice.⁵⁹ The Justices have supported that stance by refraining from engaging in any public exchanges about one another's recusal decisions, save for one instance in which Justice Robert Jackson publicly suggested that Justice Hugo Black should have recused himself from the case of *Jewel Ridge Coal Corporation v. United Mine Workers of America*.⁶⁰ Justice Jackson's comments not only proved damaging to his own reputation, but also drew enough negative attention to the Court that it caused concern among the Justices about its effect on the integrity of the institution.⁶¹

56. Ruth Bader Ginsburg, *An Open Discussion with Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1039 (2004).

57. Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG 2D 79, 92 (2006).

58. JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 8 (2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> ("A court normally does not sit in judgment of one of its own members' recusal decision in the course of deciding a case."). Federal judges may voluntarily submit their decisions for review by their peers on the court, but no court at any level of the federal judiciary reviews the recusal decisions of its own members. *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998). Some states such as Alaska, California, Michigan, Oklahoma, and Texas have adopted procedures whereby a judge's decision not to recuse may be reviewed by the other members of the same court. ALASKA STAT. ANN. § 22.20.020(c) (West 2012); CAL. CIV. PROC. CODE § 170.3(c)(5) (West 2012); MICH. CT. R. 2.003(D)(3)(b) (West 2012); OKLA. STAT. ANN. tit. 12, Ch. 2, App. R. 15(b) (West 2012); TEX. R. CIV. P. 18a(f)-(g) (West 2012).

59. See ROBERTS, *supra* note 58, at 7–8.

60. *Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161 (1945).

61. Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 221 ("Washington was, of course, thunderstruck by Jackson's blast. Newspaper columnists attacked both justices, although

In the seventy years since the *Jewell Ridge* incident, the Justices have spoken only rarely about their recusal practices, and in every instance have come out in support of their individual autonomy in recusal matters.⁶²

Even if the Justices were inclined to try and review one another's recusal decisions, the logistics of that review may prove too difficult. As an initial matter, the Justices and the Court as a whole are poorly equipped to develop a factual record needed for meaningful review. As Professor Stempel explained, “[t]he Court . . . lacks any formal rule, mechanism, or custom of permitting fact development in aid of a recusal motion.”⁶³ The unitary nature of the Court creates additional problems. Imagine an instance where two or more Justices faced recusal issues. How should the remaining members of the Court be allocated to review those recusal decisions? Should all eight of the remaining Justices review each recusal question, such that some Justices facing recusal themselves are voting on the fitness of their colleagues to participate in the same case? At what point does it seem too self-serving for one Justice facing recusal to be deciding on the potential participation of a colleague whom they may suspect would cast a vote different from their own? More generally, even if we assume (and there is no reason not to) that the Justices would only act in good faith, the mere appearance of any of the Justices voting to determine the composition of the Court in a specific case invites skepticism that could be damaging to the Court's reputation and, in turn, legitimacy.

Finally, requiring the Justices to provide written explanations of their recusal decisions adds additional work that could have serious administrative costs for the Court. It is not hard to envision multiple Justices being required to publish recusal decisions in nearly every case, at considerable cost in judicial time and money and at the expense of their work on merits cases. When compared to the limited

Jackson took most of the fire.”).

62. Ifill, *supra* note 49, at 622 (observing that “the Justices encourage and protect a fiercely independent approach to their recusal determinations”).

63. Stempel, *supra* note 55, at 642.

benefits of published recusal decisions, this alone is a powerful argument against increased transparency in the recusal context.

The multifaceted nature of recusal at the Court makes it more akin to executive policymaking than traditional adjudication. The result is that it forces us to reexamine the Justices' recusal practices—especially the lack of transparency in those practices—in a new light. Perhaps surprisingly, a more policy-oriented look at Supreme Court recusal offers several powerful arguments against increased transparency that may otherwise not be obvious at first glance.

CONCLUSION

Transparency is undoubtedly an important principle in a democratic government. It is not, however, necessarily a one-size-fits-all proposition. This holds true for issues of transparency at the Supreme Court. Whereas the Court's traditional adjudicative responsibilities fit comfortably within norms of transparent decision making like publishing written opinions in merits cases, some of its other, more policy-oriented roles do not. This short paper considers two areas in which the Court's activities more closely resemble policy judgments than traditional adjudication—certiorari and recusal—and uses them as examples of how the nature of the Court's activity can impact the value of transparency in that activity. It does not seek to prove that transparency is per se less valuable in certiorari and recusal decisions, but rather to highlight the highly discretionary nature of those decisions and to propose that granting such a high degree of latitude to the Court also triggers some of the protections, like the deliberative process privilege, that are more commonly associated with policymaking by administrative agencies. The result is a call for a more context-based dialogue about transparency at the Court in hopes of promoting both our democratic values and the legitimacy of one of our most important institutions.