SCOTUS'S SHADIEST SHADOW DOCKET

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Recently, scholars and the media have been paying a lot of attention to the Supreme Court's so-called "shadow docket"—its rulings on applications for interim relief that are generally made on an expedited basis without the benefit of full briefing, oral arguments, or a written opinion of the Court. But an even larger part of the Court's shadow docket consists of opinions filed by individual Justices relating to denials of petitions for writs of certiorari in the vast number of cases appealed to it each year. These opinions are called "Opinions Related to Orders" ("ORTOs") on the Court's official website, and they are grouped together with individual opinions a Justice might issue in connection with interim relief rulings.

While many have been critical of the Court's handling of interim rulings, the Justices' practice of issuing "cert denial ORTOs" has largely escaped analysis. This Article fills that gap. It traces the evolution of the practice back to two Justices who gained reputations as prominent civil and criminal rights defenders on the Warren Court—Hugo Black and William O. Douglas. It then describes how Justices of the Burger Court took up the practice in a robust way, in one Term issuing approximately 500 dissents to cert denials (including full ORTOs, summary dissents, and simple notations of dissent) despite the strong criticisms of Justices Felix Frankfurter and John Paul Stevens in opposition to the practice.

However, in the more conservative Rehnquist Court, the practice of filing cert denial ORTOs fell into relative disuse. But this Article will describe how the practice is becoming popular again on the increasingly polarized Roberts Court,

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mainly as a tool of pushing the respective ideological agendas of its conservative and liberal Justices. Indeed, what used to constitute dissenting ORTOs explaining why the Court should have reviewed a case are being replaced by ORTOs agreeing that certiorari was properly denied but nonetheless taking the opportunity to explain why the lower court got the law wrong or why the Court should correct or rethink its own precedent.

This Article contends that whatever value cert denial ORTOs might have in shedding light on a Justice's thinking or the Court's largely secretive deliberation processes, the practice suffers from at least three serious problems and should largely be abandoned. First, such ORTOs violate the modern Court's own view of the conditions necessary to exercising the Article III judicial power—the existence of a concrete case or controversy in need of judicial resolution. On this understanding, a cert denial ORTO is the epitome of a prohibited advisory opinion because it is issued in situations where the Court has expressly declined to take up a case and render a judgment.

Second, since such ORTOs routinely stake out positions on legal questions likely to come before the Court in future cases, they violate the judicial independence and impartiality norms built into Article III. They also create serious tensions with federal law requiring judges to recuse themselves in cases where their impartiality might reasonably be in question. Lastly, they violate the collective decision-making norm and custom that has governed Court action since its inception, giving Justices a vehicle for pushing their personal view of the law in situations where a supermajority of Justices may well hold the opposite view given their decision to deny certiorari in a case. This problem is only exacerbated when lower courts cite to cert denial ORTOs, as they do in a surprisingly frequent manner, as persuasive or even controlling authority when deciding legal questions before them.

TABLE OF CONTENTS

INTRODUCTION

Recently, orders of the U.S. Supreme Court that are usually issued without a written opinion explaining their basis have been garnering attention—particularly in the areas of applications for temporary stays of lower court rulings, temporary injunctions against challenged laws or orders, and expedited review of lower court rulings.[1] These rulings have generally been referred to as the Court's

1. *See, e.g.*, Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015); *see also* Mark Joseph Stern, *Congress Finally Scrutinizes One of SCOTUS's Most Disturbing Practices*, SLATE (Feb. 18, 2021), https://slate.com/news-and-politics/2021/02/supreme-court-shadow-docket-house-hearing.html; Jimmy Hoover, *Wary Lawmakers Put Justices' 'Shadow Docket' in Spotlight*, LAW 360 (Feb. 16, 2021), https://www.law360.com/articles/1355649/wary-lawmakers-put-justices-shadow-docket-in-spotlight; Mark Walsh, *The Supreme Court's 'Shadow Docket' Is Drawing Increasing Scrutiny*, ABA J. (Aug. 20, 2020), https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny; William Baude, *The Supreme Court's Secret Decisions*, N.Y. TIMES (Feb. 3, 2015), https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html.

"shadow docket," a term that distinguishes such actions from rulings on the merits of a case that are usually accompanied by a written opinion of the Court following full briefing and oral argument.[2]

But an even busier area of the Court's nonmerits docket that has largely escaped scrutiny is its orders denying certiorari that are accompanied by opinions of individual Justices dissenting from or concurring with the denials. On the Supreme Court's official website, the Court groups such individual opinions, together with opinions of individual Justices on stay or related applications, under the heading "Opinions Relating to Orders"—or what I will refer to as ORTOs.[3]

Of course, given the large number of cases each Term in which the Court denies certiorari, "cert denial ORTOs" tend to be issued by individual Justices much more frequently than ORTOs relating to stay or injunction orders.[4] And since cert denials essentially leave in place the law developed by lower courts, it can be argued that those orders indirectly shape the law to a much greater extent than orders temporarily staying a ruling or enjoining a law while the litigation process continues in a given case. Perhaps this effect is why many of the Justices on the Roberts Court have taken to filing ORTOs in connection with them.[5]

Generally speaking, cert denial ORTOs are designed to accomplish two main goals. First, a Justice might express displeasure at how the lower court interpreted and applied the law in a case; the Justice will argue for its correct application despite the fact that her fellow Justices did not view the ruling below as meriting review (i.e., being "certworthy").[6] Frequently these ORTOs will, expressly or

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2. It should be noted that sometimes such shadow docket rulings can get out of the shadow, at least to the extent of being explained by an opinion of the Court in the relatively few cases where that body might issue a per curiam opinion in connection with its summary disposition. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

3. *See Opinions Relating to Orders*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/opinions/relatingtoorders (last visited Oct. 22, 2021).

4. For example, out of twenty-five ORTOs filed in the October 2017 Term, twenty-four were cert denial ORTOs and only one was an ORTO related to an application for a stay of execution. *See Opinions Relating to Orders–2017*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/opinions/relatingtoorders/17#list (last visited Oct. 22, 2021). And in the October 2018 Term, out of forty-three ORTOs that were filed, twenty-seven were cert denial ORTOs, thirteen were ORTOs related to applications for temporary stays or injunctions, and three were ORTOs concerning both a denial of certiorari and an application for stay, which are frequently combined in capital cases. *See Opinions Relating to Orders–2018*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/opinions/relatingtoorders/18#list (last visited Oct. 22, 2021).

5. *See infra* Subparts I.E–I.F.

6. *See, e.g.*, McGee v. McFadden, 139 S. Ct. 2608, 2608–12 (2019) (Sotomayor, J., dissenting from denial of certiorari) (arguing that the petitioner

impliedly, admonish lower courts to pay heed to the Justice's analysis in the future.[7] Such ORTOs might take the form of a dissent to the denial of certiorari, in which case they often rebuke the Supreme Court itself for failing to review the case and correct the perceived error.[8] Or the Justice might even agree that the case did not merit a grant of certiorari yet still argue that the ruling below was wrong or questionable.[9] This type of ORTO typically takes the form of an opinion "respecting" the denial of certiorari or "concurring" in it.[10]

For instance, in an abortion rights case where the Court summarily reversed the U.S. Court of Appeals for the Seventh Circuit's invalidation of an Indiana law regulating the disposal of fetal remains, the Justices also denied certiorari on the question of whether the appellate court properly invalidated another Indiana law banning abortions motivated by the sex, race, or disability status of the fetus.[11] The Court explained that it wanted further consideration of that issue by additional courts of appeal before it took it up.[12] Although agreeing with this rationale for denying certiorari, Justice Clarence Thomas wrote a lengthy opinion purportedly linking abortion to eugenics and arguing that the Seventh Circuit incorrectly held that Court precedent required the invalidation of the ban.[13] He was motivated to so write, he stated, because "[g]iven the potential for abortion to become a tool of eugenic manipulation, the Court will soon need to confront the constitutionality of laws like Indiana's."[14] In other words, allow me to provide a personal preview on how I would rule in such a case in light of the fact the Court did not take up that question.

Similarly, in a recent ORTO respecting the denial of certiorari, Justice Neil Gorsuch, joined by Justices Sonia Sotomayor and Elena

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had a valid claim, the petitioner was improperly denied a certificate of appealability, and cert should be granted to reverse that improper denial).

7. *See, e.g.*, Dahne v. Richey, 139 S. Ct. 1531, 1531–32 (2019) (Alito, J., joined by Thomas & Kavanaugh, JJ., dissenting from denial of certiorari) (critiquing the Ninth Circuit for a decision that "defies both our precedents and common sense").

8. *See, e.g.*, Daniel v. United States, 139 S. Ct. 1713, 1714 (2019) (Thomas, J., dissenting from denial of certiorari) (criticizing the Supreme Court for its refusal to reconsider a damaging precedent that had "unfortunate repercussions" for military personnel).

9. *See, e.g.*, Tharpe v. Ford, 139 S. Ct. 911, 911–13 (2019) (Sotomayor, J., statement respecting the denial of certiorari) (concurring with the Supreme Court's denial of the petition but writing separately because she was "profoundly troubled by the underlying facts of this case").

10. *See, e.g.*, *id.*

11. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1781 (2019) (per curiam).

12. *Id.* at 1782.

13. *See id.* at 1782–93 (Thomas, J., concurring).

14. *Id.* at 1784 (Thomas, J., concurring).

Kagan, argued that the Vermont Supreme Court had misapplied the Fourth Amendment by sanctioning the gathering of evidence by police peering through the windows of a garage.[15] Although Justice Gorsuch thought the ruling appeared to be an isolated mistake not warranting Supreme Court review, he concluded that "the error here remains worth highlighting to ensure it does not recur."[16] In other words, do not make that mistake again, lower courts, since three Justices think you were wrong even though our other six colleagues were evidently not sufficiently troubled by the ruling to grant review.

And in another recent case, Justice Brett Kavanaugh filed an ORTO respecting the Court's denial of certiorari pretty clearly saying that the U.S. Court of Appeals for the Ninth Circuit blew it in allowing an antitrust action to go forward against the National Football League ("NFL") for giving exclusive rights to televise out-of-market games to DirecTV via its *NFL Sunday Ticket* offering.[17] According to Justice Kavanaugh, the plaintiffs lacked both standing and a valid antitrust claim against the NFL under existing law because, respectively, they did not buy anything directly from it and because the NFL operates as a joint venture.[18] However, he agreed that certiorari was properly denied because the case was in an interlocutory posture.[19] But he concluded his ORTO by observing that the defendants "have substantial arguments on the law. If the defendants do not prevail at summary judgment or at trial, they may raise those legal arguments again in a new petition for certiorari, as appropriate."[20] In other words, if the Ninth Circuit did not rectify its errors, the NFL and DirecTV could come back to the Court to obtain a reversal.

In the second major type of ORTO, a Justice might train her fire primarily at her colleagues themselves instead of at a lower court decision. These ORTOs criticize the Court for failing to correct what is perceived to be a misapplication of its decisions by the lower courts or for failing to revisit and correct precedents that the Justice views as having been incorrectly decided.[21] Or, less critically, the ORTO

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15. Bovat v. Vermont, 141 S. Ct. 22, 23 (2020) (Gorsuch, J., joined by Sotomayor & Kagan, JJ., statement respecting the denial of certiorari).

16. *Id.* at 24.

17. Nat'l Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 57 (2020) (Kavanaugh, J., statement respecting the denial of certiorari) (explaining that the Supreme Court's denial of cert "should not necessarily be viewed as agreement with the legal analysis of the Court of Appeals").

18. *Id.*

19. *Id.* at 56–57.

20. *Id.* at 57.

21. *See, e.g.*, Daniel v. United States, 139 S. Ct. 1713, 1714 (2019) (Thomas, J., dissenting from the denial of certiorari) (warning the Supreme Court that "unfortunate repercussions" will "continue to ripple through our jurisprudence" until the wrongly decided precedent is reconsidered).

will seek to make a case for a change in a doctrinal area, attempting to plant seeds for a future reevaluation of precedent.

For example, in an ORTO dissenting from the Court's denial of certiorari, Justice Thomas chided his colleagues for the Court's "decade-long failure to protect the Second Amendment" in a gun rights case from New Jersey.[22] Thomas argued that the Court has essentially been tolerating lower court disobedience in treating the right to keep and bear arms as being less than fundamental.[23]

Similarly, Justice Sotomayor recently used a cert denial ORTO to accuse her colleagues of being "complicit in state-sponsored brutality" for recent decisions requiring death row prisoners to identify less painful methods of execution to successfully challenge an existing method on Eighth Amendment grounds.[24] And in a less reproving tone, Justice Kavanaugh penned an ORTO respecting the denial of certiorari in a case that essentially argued that the Court now has a majority of Justices who are willing to revisit its nondelegation doctrine—which, in his view, permits excessive delegations of law-making power to executive branch agencies—and basically invited litigants to bring a new challenge to the doctrine.[25]

To the scant extent scholars or other commentators take note of cert denial ORTOs at all, they seem to accept the legitimacy of these writings and even appreciate the way they provide additional insights into the highly secretive Supreme Court deliberation process.[26] And in the only in-depth scholarly analysis of cert denial ORTOs to date, the author, Professor Peter Linzer, did not question the legitimacy of the practice. Rather, he argued that cert denials say more about the Justices' view of the correctness of the lower court ruling than the Court's standard line—that a denial of certiorari does not indicate anything about the Court's view of the merits of the underlying

22. Rogers v. Grewal, 140 S. Ct. 1865, 1875 (2020) (Thomas, J., joined by Kavanaugh, J., except for Part II, dissenting from denial of certiorari).

23. *Id.* at 1866–67.

24. Zagorski v. Parker, 139 S. Ct. 11, 14 (2018) (Sotomayor, J., joined by Breyer, J., dissenting from denial of certiorari). It should be noted that this cert denial ORTO was issued in a case where the Court denied an application to stay the petitioner's execution in addition to denying his petition for certiorari. Arguably such cases present stronger grounds for issuing a cert denial ORTO than the typical case where the Court merely denies cert. *See infra* Conclusion for a further discussion of this matter.

25. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (asserting twice in a short opinion that the nondelegation doctrine "may warrant further consideration in future cases"); *see also infra* notes 414–16 and accompanying text.

26. *See, e.g.*, Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L.J. F. 551 (2014); Liz Norell, Disagreement All Around: The Role of Dissents to Denials of Certiorari, Address at the Western Political Science Association Annual Meeting (Apr. 3, 2010).

decision—would admit.[27] Besides this forty-two-year-old but thoughtful article by Professor Linzer, the scholarly literature is virtually bereft of a study of cert denial ORTOs or their legitimacy. This Article seeks to fill that gap.

In it, I hope to persuade the reader that whatever value cert denial ORTOs might have in shedding light on a Justice's attitude toward a particular issue or in providing general insights into the Court's deliberation processes, the practice is fraught with problems and should largely be abandoned. More specifically, I argue that the practice suffers from at least three main defects: first, a constitutional authority and related separation of powers problem; second, judicial independence difficulties; and third, a collective decision-making dilemma.[28]

Part I of this Article traces the beginning of the practice of issuing dissents to cert denials and its subsequent evolution. I describe how it began as an outgrowth of a more activist bent on the part of two prominent Justices nominated to the Court by President Franklin D. Roosevelt during the New Deal era, Justices Hugo Black and William O. Douglas.[29] The practice came into wider usage during the liberal Warren Court, reached its peak during the increasingly centrist Burger Court, but then fell into relative disuse by the more conservative Rehnquist Court.[30] I then chronicle how, during the last decade of the Roberts Court, which has been characterized by increasing partisan polarization both inside and outside that tribunal, both sides of the conservative-liberal divide have been resurrecting the practice as a prominent tool for pressing their respective ideological agendas.[31]

Part II discusses the constitutional authority and separation of powers problems with the practice of issuing cert denial ORTOs. As the Court itself repeatedly asserts, its authority to exercise the

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27. *See* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1228 (1979).

28. For a condensed version of the arguments presented in this Article, see Barry P. McDonald, *This Is the Shadiest Part of the Supreme Court*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/opinion/supreme-court-shadow-docket.html.

29. *Supreme Court Nominations (1789-Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm (last visited Oct. 22, 2021).

30. *See infra* Subparts I.A–I.D.

31. *See infra* Subparts I.E–I.F; *see also* Adam Liptak, *Critical Moment for Roe, and the Supreme Court's Legacy*, N.Y. TIMES (Dec. 6, 2021), https://www.nytimes.com/2021/12/04/us/politics/mississippi-supreme-court-abortion-roe-v-wade.html ("[C]omplete partisan polarization at the Supreme Court, mapping onto similarly deep divisions in Congress and the electorate, is a relatively recent phenomenon. Before 2010, the political parties of the presidents who appointed Supreme Court justices did not reliably predict how the justices would vote.").

"judicial Power of the United States" means the power to "render dispositive judgments" over disputes involving live, adverse parties.[32] But cert denial ORTOs embrace exactly the opposite—issuing purely advisory opinions in connection with the Court's refusal to adjudicate legal disputes.[33] In a related vein, such ORTOs present separation of powers problems by allowing unaccountable judges to attempt to influence matters in our democracy that are designedly left to our political representatives to handle.[34]

Part III contends that the issuance of cert denial ORTOs conflicts with the norms of judicial independence built into the good behavior and salary protection provisions of Article III. Those provisions were designed to ensure that when it became necessary to resolve disputes, judges free from partiality and bias would be available to apply the facts in front of them to the law with an open and objective mind.[35] Indeed, federal statutory law *requires* Justices and judges to recuse themselves in cases where their impartiality might reasonably be questioned.[36] But in cert denial ORTOs, Justices routinely commit themselves to certain legal positions that will likely come before them in future cases, effectively prejudging those questions in a way that they themselves claim is improper when they decline to give their views on legal questions during Senate confirmation hearings.[37] Hence, not only does the practice of issuing such ORTOs appear hypocritical, it is in serious tension with both constitutional and statutory law.

A stark illustration of this problem has emerged very recently. In the cert denial dissent noted earlier where, in a challenge to a New Jersey concealed carry law, Justice Thomas criticized his colleagues for their handling of Second Amendment cases,[38] he took the opportunity to argue that the Second Amendment guarantees the

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32. *See infra* note 363 and accompanying text.

33. *See infra* notes 343–79 and accompanying text. It should be noted that some scholars have written persuasive articles criticizing the Court's modern view of the scope of the Article III judicial power and the definition of an advisory opinion as not comporting with founding era understandings of those concepts. *See infra* notes 358–60 and accompanying text. However, I ultimately conclude that the issuance of cert denial ORTOs are inconsistent with the principles underlying these concepts whether viewed from a historical or modern viewpoint. At the most basic level, I argue that the practice of issuing cert denial ORTOs is flatly inconsistent with the modern Court's own understanding of its constitutional authority. See *infra* notes 365–79 for a further discussion of these issues.

34. *See infra* notes 327–41 and accompanying text.

35. *See infra* notes 388–96 and accompanying text.

36. 28 U.S.C. § 455(b)(1), (3); *see infra* note 424 and accompanying text.

37. *See infra* notes 397–430 and accompanying text.

38. *See supra* notes 22–23 and accompanying text.

right to carry firearms "in public in some manner."[39] In other words, Thomas was staking out his position that the Second Amendment protects some form of public carry of firearms. Although Justice Kavanaugh had joined the parts of Thomas's opinion criticizing the Court for denying cert in the case, he conspicuously did not join this part of Thomas's opinion.[40] One can only speculate that perhaps Kavanaugh was not comfortable joining Thomas in opining on the very legal question the Court was refusing to decide.[41]

Just ten months later, however, perhaps due to a rightward shift in the Court's membership resulting from Justice Ginsburg's death and her replacement by Justice Barrett, the Court did grant cert to review a New York law that was virtually identical to the New Jersey law Thomas had criticized the Court for refusing to review.[42] Like the latter law, the New York law in question barred the public carry of concealed firearms without a showing of a special self-defense need to do so. Likely taking his cue from Thomas's cert denial ORTO, the lawyer for the plaintiffs in the case, former U.S. Solicitor General Paul Clement, primarily argued that the New York law infringed a general right of public carry (as opposed to a specific right to carry concealed firearms in public).[43] Clement's principal submission appeared to be that when considered together with New York's ban on the open carry of firearms in public, the State placed a total ban on public carry that violated the Second Amendment.[44]

But the general right to public carry that Clement urged the Court to adopt was precisely the right that Justice Thomas had advocated for in his New Jersey ORTO. Indeed, the petitioner's brief even cited Thomas's ORTO as persuasive authority for its argument.[45] Even more troubling, in the part of Thomas' ORTO that Justice Kavanaugh had joined, the pair expressly criticized the main lower court decision that had upheld the New York concealed carry

39. Rogers v. Grewal, 140 S. Ct. 1865, 1874 (2020) (Thomas, J., joined by Kavanaugh, J., except for Part II, dissenting from denial of certiorari).

40. *See id.*

41. While the case technically involved the constitutionality of New Jersey's regulation governing the carrying of concealed weapons in public, the first question presented in the petition for certiorari was whether there was some form of Second Amendment right to bear arms outside the home. *See* Petition for Writ of Certiorari at i, Rogers v. Grewal, 140 S. Ct. 1865 (2020) (No. 18-824).

42. *See* New York State Rife & Pistol Association Inc. v. Bruen, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/new-york-state-rifle-pistol-association-inc-v-bruen/ (last visited Dec. 27, 2021).

43. *See* Brief for Petitioners at 22–25, N.Y. State Rife & Pistol Ass'n Inc. v. Bruen, No. 20-843 (U.S. July 13, 2021).

44. *See* Reply Brief for Petitioners at 2, N.Y. State Rife & Pistol Ass'n Inc. v. Bruen, No. 20-843 (U.S. Oct. 14, 2021).

45. *See* Brief for Petitioners, *supra* note 43, at 6, 29.

law against a Second Amendment challenge.[46] How, then, can anyone reasonably contend that the impartiality of these Justices could not be reasonably questioned in the New York proceedings? One would think that they were obligated to recuse themselves from participating in the case (and especially Thomas, who had advocated for the petitioner's position in such a public manner).

Exacerbating the impartiality problem is the fact that cert denial ORTOs typically have a deeply partisan cast.[47] Republican-appointed Justices most frequently write cert denial ORTOs supporting favored causes such as freedom of speech and religion rights, Second Amendment rights, or stricter separation of powers principles—or decrying disfavored causes such as abortion or same-sex rights.[48] Justices appointed by Democratic presidents, on the other hand, most often write cert denial ORTOs criticizing the death penalty or how it was imposed in capital cases or focusing on other criminal justice issues typically favored in Democratic politics.[49]

Indeed, at least one noted scholar has pointed to cert denial ORTOs as one manifestation of a more general problem: that Justices have become celebrities in their own right playing to politically-polarized fan bases.[50] According to Professor Suzanna Sherry, this phenomenon has become a major contributor to a legitimacy crisis the Court is experiencing.[51] She argues that the public perceives the Court more as a partisan actor than an institution dedicated to evenhandedly dispensing justice in accordance with neutral principles of law.[52]

It is difficult to disagree that such a crisis exists, particularly after the acrimonious and sometimes vicious political fights that erupted over the Merrick Garland/Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett nominations.[53] After all, why would political

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46. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1867 n.1 (criticizing, among other cases, the Second Circuit's decision in Kachalsky v. County of Westchester, 701 F.3d 81, 100 (Cal. App. 2d 2012)). The Second Circuit decision upholding the New York concealed carry law that the Court is currently reviewing was a summary opinion based primarily on its earlier ruling in *Kachalsky*. *See* New York State Rifle & Pistol Ass'n, Inc. v. Beach, 818 F. App'x 99, 100 (2d Cir. 2020), *cert. granted in part sub nom.* New York State Rifle & Pistol Ass'n, Inc. v. Corlett, 141 S. Ct. 2566 (2021).

47. *See infra* notes 404–15 and accompanying text.

48. *See infra* Subpart I.F.

49. *See id.*

50. *See* Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 182, 187 (2020).

51. *Id.* at 182.

52. *See id.* at 182–84.

53. *See, e.g.*, Barry P. McDonald, *Should the Supreme Court Matter So Much?*, N.Y. TIMES (Oct. 11, 2018), https://www.nytimes.com/2018/10/11/opinion/should-supreme-court-matter.html; Joseph J. Ellis, *The Supreme Court Was Never Meant to Be*

parties battle so hard for or against a particular nominee if that person was dedicated to impartially applying neutral principles of law in an evenhanded way? Yet I will argue that celebrity treatment, to the extent it exists, is an incidental byproduct of the increased ideological partisanship that has enveloped the Court in modern times.[54] But regardless of cause or effect, one would think the Court would do everything in its power to reduce both the existence of ideological partisanship and the public perception that it exists.[55] And in light of this problem, unnecessarily issuing gratuitous and politically-charged ORTOs in connection with cert denials would not appear to be the wisest course of action.

Part IV argues that to the extent cert denial ORTOs purport to tell lower courts that they misapplied the law and should correct their ways in the future, they conflict with the collective decision-making norm that has guided the Court for most of its history.[56] Normally, the Court issues its judgments as a body, outside of narrow areas where an individual Justice is authorized to act to protect the interests of parties during the course of litigation until the entire Court can act on a dispute.[57] After all, Article III vests the judicial power "in one supreme Court," not in individual "supreme Court Justices."[58]

But cert denial ORTOs essentially amount to individual Justices giving their personal views on what the law is or should be—and in turn, appearing to use their "bully pulpits" to cajole lower courts into falling in line.[59] Perhaps not surprisingly, lower courts often appear to treat such ORTOs as controlling authority, citing them to support legal or factual propositions in the same way that they would normally cite controlling precedent.

One graphic example of this phenomenon recently erupted on the Court itself at the end of the 2020 Term. In a death penalty case, the U.S. Court of Appeals for the Eleventh Circuit had, according to a per curiam opinion joined only by the Court's conservatives, drawn "heavily on a dissent from denial of certiorari" (a cert denial ORTO penned by Justice Sotomayor at an earlier stage of the litigation) to

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Political, WALL ST. J. (Sept. 14, 2018), https://www.wsj.com/articles/stop-pretending-the-supreme-court-is-above-politics-1536852330.

54. *See infra* notes 431–33 and accompanying text.

55. Indeed, a recent *60 Minutes* report attributed increasing violence against federal judges to a public perception that judges are becoming partisans in black robes. *See* Bill Whitaker, *Federal Judges Call for Increased Security After Threats Jump 400% and One Judge's Son is Killed*, CBS NEWS (Feb. 21, 2021), https://www.cbsnews.com/news/federal-judge-threats-attack-60-minutes-2021-02-21/.

56. *See infra* Part IV.

57. *See infra* notes 446–50 and accompanying text.

46. U.S. CONST. art. III, § 1.

59. *See infra* notes 451–58 and accompanying text.

overturn an Alabama state court ruling denying an ineffective assistance of counsel claim.[60] The Eleventh Circuit had essentially adopted Sotomayor's characterization of what the state court had held in issuing its ruling.[61] Without explicitly criticizing this reliance on Sotomayor's ORTO, the Court's opinion summarily reversing the Eleventh Circuit's ruling nonetheless seemed to take pains to criticize and disagree with Sotomayor's conclusions.[62] Not surprisingly, Sotomayor filed a vigorous dissent to the summary reversal in which she essentially defended the position she had argued in her earlier cert denial ORTO.[63] One can only wonder how the Eleventh Circuit would have ruled absent Sotomayor's cert denial ORTO. But this incident provides a stark illustration of how lower courts appear to be treating individual ORTOs as controlling or highly persuasive authority.

Such reliance by lower courts is especially perverse if Professor Linzer was correct that there is some truth in the notion that a cert denial can signify the Court's view on the correctness of a lower court ruling.[64] Then, cert denial ORTOs that purport to demonstrate the error of such rulings are actually pushing a view of the law that may be the opposite of what the silent majority of Justices on the Court believe is correct. The Eleventh Circuit episode seems to confirm this troubling trend. And one can only speculate about the number of other lower court rulings that might be relying on cert denial ORTOs that do not reflect the position of a majority of Justices and go uncorrected.

I will conclude by positing that to the extent cert denial ORTOs can be justified at all, they are arguably only appropriate in cases where a Justice wishes merely to point out a legal question she believes is sufficiently important for the Court to take up *without* expressing or suggesting a position on the proper answer.[65] Justice Byron White, fairly exclusively among the Justices, frequently wrote cert denial dissents of this cast.[66] But even in those cases, while such dissents could theoretically help other Justices to better appreciate the issues at stake in a cert petition, that objective could be served equally as well by a memo circulated internally among the Justices instead of by an ORTO issued for public consumption.[67] Moreover, because the Court denied certiorari in cases where such dissents are filed, the other Justices must not have been persuaded by the dissent.

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60. Dunn v. Reeves, 141 S. Ct. 2405, 2407 (2021) (per curiam).

61. Reeves v. Comm'r, 836 F. App'x 733, 745–47 (2020).

62. *See Dunn*, 141 S. Ct. at 2410–11.

63. *See id.* at 2413–21 (Sotomayor, J., joined by Kagan, J., dissenting). Justice Breyer also dissented in a summary notation. *See id.* at 2413.

64. *See* Linzer, *supra* note 27, at 1301–02.

65. *See infra* Conclusion.

66. *See infra* note 461 and accompanying text.

67. *See infra* note 462 and accompanying text.

Hence, because Justices typically do not publish their reasons for voting one way or the other on cert petitions, such dissents could leave a misleading impression about the seriousness of the question presented or the purported split among the lower courts. In the end, then, it seems there is little to commend the practice of writing cert denial ORTOs and much supporting the position—oft expressed by Justices Felix Frankfurter and John Paul Stevens[68]—that it should be a disfavored one.

I. THE HISTORY OF ISSUING ORTOS IN CONNECTION WITH DENIALS OF PETITIONS FOR WRITS OF CERTIORARI

A. The Evolution of Certiorari Jurisdiction in the Supreme Court

Article III of the Constitution gives Congress the power to regulate the types of appeals from lower courts that the Supreme Court can hear.[69] Perhaps it is unsurprising, then, that the Court's appellate jurisdiction has changed dramatically over time—including the paths by which appeals make their way to it. In the founding era and throughout most of the nineteenth century, Congress generally gave the Court jurisdiction over various types of appeals from lower federal and state courts, and it required the Court to decide them.[70] Most of these appeals occurred via a procedural device called a "writ of error,"[71] where the Court's review was limited to alleged errors of law committed by lower courts.[72]

Because the Court was required to review and issue a decision in all of these appeals, and because of the fact that Supreme Court Justices were also required to "ride circuit" and hear cases as members of regional circuit courts,[73] by 1890, there was a backlog of some 1,800 appeals on the Court's docket.[74] In order to assist the Court with this backlog, in 1891, Congress, among other things, created intermediate federal circuit courts to handle appeals in

68. *See id.*

69. *See* U.S. CONST. art. III, §2. Although the Supreme Court does have original jurisdiction in certain categories of cases involving foreign diplomats or states as parties, that jurisdiction is seldom utilized. *See* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 557 (1994).

70. *See* Linzer, *supra* note 27, at 1231.

71. *See id.* at 1230.

72. *Id.*

73. Until 1911, federal trial courts for the most part consisted of regional circuit courts staffed by a Supreme Court Justice and a local district court judge. Hence, part of a Justice's duty was to ride circuit and sit as a judge on these circuit courts. *See* Jake Kobrick, *A Brief History of Circuit Riding*, FED. JUD. CTR., https://www.fjc.gov/history/spotlight-judicial-history/circuit-riding (last visited Oct. 22, 2021).

74. *See* Linzer, *supra* note 27, at 1232 n.36.

several categories of cases where their judgments were made "final."[75] However, to provide a safety valve where the Supreme Court could still hear appeals in such "final" cases that were deemed sufficiently important or where a conflict had emerged in the courts of appeals on a point of law, Congress provided that the Court could issue a writ of certiorari demanding the record from the lower court to facilitate its own appellate review.[76] But as Professor Linzer noted, use of certiorari as a mechanism to obtain Court review was still the exception rather than the rule.[77]

Things changed dramatically over the decade or so beginning in 1914 as Congress sought remedies for the Court's overloaded docket. That year, Congress slightly expanded the use of certiorari to allow the Court, in its discretion, to review certain state court decisions that had heretofore been outside its jurisdiction.[78] Two years later, in the Webb Act of 1916,[79] Congress made a more substantial expansion.[80] In that law, it moved a large category of federal statutory cases and an even larger swath of state court decisions, both of which had traditionally been obligatory for the Court to review, to its discretionary certiorari jurisdiction.[81] And in the Judges Bill of 1925[82] (so named because it was written by several Supreme Court Justices with the aim of further reducing the Court's caseload), Congress eliminated most other forms of the Court's obligatory

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75. *See id.* at 1232–33.

76. *See id.* at 1234–35.

77. *Id.* at 1235–36. Certiorari at common law was a discretionary writ higher courts would use to review lower court decisions by ordering the record to be sent up so the higher court could review the lower court's rulings based on that record. Unlike other forms of review (i.e., writs of error), it was discretionary and was somewhat uncommon at the Supreme Court level. After Congress began providing for discretionary review by certiorari in 1891, certiorari started to become more common. As more of the Court's docket became discretionary over the years, certiorari grew in importance until it became the primary method of review. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK THE THIRD 24, 40–42, 44 (13th Ed. 1796); Fowler v. Lindsey, 3 U.S. 411, 413 (1799); People ex rel. Loomis v. Wilkinson, 13 Ill. 660, 661–62 (1852); Felix Frankfurter, *The Business of the Supreme Court of the United States – A Study in the Federal Judicial System*, 39 HARV. L. REV. 1046, 1047–49, 1055–57 (1926); Linzer, *supra* note 27, at 1251.

78. Linzer, *supra* note 27, at 1237–38. The Court was given jurisdiction over appeals involving federal law from the highest available state court in response to a widely criticized New York Court of Appeals decision invalidating a state law under the federal Due Process Clause. *See id.*

79. Webb Act of 1916, Ch. 448, 39 Stat. 726 (1916).

80. *Id.*

81. *See* Linzer, *supra* note 27, at 1238. After complaints of the Court's docket being overloaded, cases arising under the Federal Employers' Liability Act and other railroad safety laws were moved to the Court's discretionary docket. *See id.*

82. Judge's Bill of 1925, Ch. 229, 43 Stat. 936 (1925).

jurisdiction—making most of its appellate docket discretionary through certiorari save for a few categories of cases.[83] As Linzer observed, with the passage of this bill "[c]ertiorari jurisdiction was clearly to be the dominant mode of review in the Supreme Court and was so recognized by contemporary commentators."[84]

This evolution of the Court's discretionary certiorari jurisdiction is supported by empirical data.[85] When Congress started giving the Court certiorari jurisdiction in connection with federal courts of appeal cases in the 1890s,[86] the tribunal was reviewing roughly 120 petitions per annual Term of Court by the end of the decade.[87] By the October Term 1910, that number had increased slightly to around 150 petitions a year.[88] However, by the October Term 1920, after Congress expanded certiorari jurisdiction around the middle of the 1910s, the Court was handling approximately 300 petitions each Term.[89] And by October Term 1930, after Congress had made the

83. Linzer, *supra* note 27, at 1241–42.

84. *Id.* at 1242. This has remained the case through the present. After Congress abolished most of the Court's remaining areas of mandatory jurisdiction in 1988, there are only a few categories of cases that may be appealed as of right to the Supreme Court today. *See* Ben Williams, *Why Only Some Redistricting Cases Get Three Judge Courts*, NAT'L CONF. STATE LEGISLATURES (Oct. 1, 2020), https://www.ncsl.org/bookstore/state-legislatures-magazine/why-only-some-redistricting-cases-get-three-judge-courts-magazine2020.aspx.

85. For statistics not directly provided by cited sources, this data was calculated by manually compiling results generated using the "PDF find" search function.

86. *See* Linzer, *supra* note 27, at 1232–33. Although less common prior to 1891, the Court would occasionally issue writs of certiorari to aid in the exercise of its mandatory jurisdiction pursuant to the All Writs Act. Unlike the modern writ, this version of certiorari was an order from the Court about how it was exercising its jurisdiction rather than a method of taking jurisdiction. *See, e.g.*, *Ex parte* Bollman, 8 U.S. 75, 83 (1807); Livingston v. Dorgenois, 11 U.S. 577, 583 (1813); Barton v. Petit, 11 U.S. 288, 289–90 (1813).

87. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1900), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1900_journal.pdf (recording 87 petitions of certiorari denied, 32 granted, and 1 dismissed).

88. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1910), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1910_journal.pdf (recording 134 petitions of certiorari denied, 15 granted and 2 dismissed).

89. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1920), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1920_journal.pdf (recording 237 petitions of certiorari denied, 50 granted, and 9 dismissed). It was around this period that the so-called Rule of Four, requiring four votes to grant certiorari, was adopted. The Rule did not exist at common law, and it was a practice developed by the Supreme Court for pragmatic reasons. The earliest record of its existence is Justice Willis Van Devanter's testimony before the House Judiciary Committee in 1924. Van Devanter, however, described it as a general custom, as opposed to the firm rule that it has since become. *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing on H.R. 8206 Before the H. Comm. on the Judiciary*, 68th Cong. 8 (1924)

final major expansion of certiorari jurisdiction, that number had increased to over 700 petitions.[90]

Subsequently, the growth in the Court's certiorari petitions during the twentieth century appeared to parallel the large expansion of the federal administrative state that began with the New Deal legislation of the 1930s. During October Terms 1940 and 1950, respectively, the Court acted on roughly 900[91] and 1,000[92] petitions.

(statement of Justice Van Devanter); *see also* Rogers v. Mo. Pac. R.R. Co., 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting).

90. *See* Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1930*, 45 HARV. L. REV. 271, 284 (1931) (showing that in the October 1893 Term, Court denied 565 petitions for certiorari, granted 159, and dismissed 2).

91. ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR 69 (1945), http://www.llmc.com.lib.pepperdine.edu/docDisplay5.aspx?set=98626&volume=1945&part=001# (in October Term 1940, 693 petitions for certiorari were denied and 193 were granted). It should be noted that by the 1940 Term, the Court had started granting a significant number of petitions for certiorari in the process of rendering summary "per curiam" or "by the Court" dispositions of the cases. That number was 24 in the 1940 Term according to a "PDF find" search of the official journal by the author. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES, (1940), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1940_journal.pdf (noting grants of 24 cert petitions in cases summarily disposed of). By contrast, there were only 2 such grants in the 1930 Term according to a similar search by the author. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1930), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1930_journal.pdf (noting grants of 2 cert petitions in cases summarily disposed of). Hence, in the 1940 Term, there were only 169 cert petitions granted for plenary review once the figures reported by the Administrative Office of the U.S. Courts are adjusted. This number is significant in terms of comparing it to modern cert petition grant figures, since the Court did not start reporting such figures in its official journals until the 1949 Term of Court. And when it did start reporting them, it appeared to include all cert petition grants (both cases receiving plenary review and summary dispositions) until the 1970 Term of Court when it *expressly* began limiting its reporting of cert petition grants to cases receiving plenary review. For instance, the official journal for the 1950 Term records that 106 cert petitions were granted. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1950), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1950_journal.pdf. Yet a "PDF find" search by the author on the term "granted" revealed a total of 17 cert petition grants in cases that were subject to "per curiam" summary dispositions. Hence, the number of cert petition grants for cases receiving plenary consideration in that Term was only 89. *Id.*

92. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1950), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1950_journal.pdf (495 petitions of certiorari denied or dismissed on the appellate docket and 386 denied or dismissed on the miscellaneous docket—for a total of 881 petitions denied or dismissed; 106 petitions for certiorari granted). Of the 106 grants, only 89 represented grants of cases accepted for plenary review. *Id.*

By October Terms 1960 and 1970, respectively, these numbers had mushroomed to around 1,600[93] and 2,900[94] petitions. By October Terms 1980 and 1990, respectively, these numbers again increased to about 4,000[95] and 5,300[96] petitions. And by the beginning of the twenty-first century, in October Term 2000, the Court acted on over 7,500 petitions.[97]

Since the beginning of the millennium, the number of cert petitions being filed with the Court appears to have leveled off. The Court handled roughly 7,700 petitions in October Term 2010,[98]

93. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1960), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1960_journal.pdf (628 petitions of certiorari denied or dismissed on appellate docket and 871 denied or dismissed on miscellaneous docket—for a total of 109 petitions for certiorari granted and 1,499 petitions denied or dismissed). A "PDF find" search by the author on the term "granted" revealed a total of 19 cert petition grants in cases that were subject to "per curiam" summary dispositions. Hence, the number of cert petition grants for cases receiving plenary consideration in that Term was only 90. *Id.*

94. *See Office of the Solicitor General*, *in* ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 1973, at 24, 27 (1970), https://babel.hathitrust.org/cgi/pt?id=uc1.31210022946956&view=1up&seq=36 (noting 2,793 petitions for certiorari denied or dismissed); *see also* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1970), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1970_journal.pdf (recording 104 cert petition granted in cases receiving plenary review).

95. *See The Statistics*, 95 HARV. L. REV. 339, 342 (1981) (computing that 3,967 cases were denied or dismissed and that review was granted in 262 cases). Since the Court had stopped separately reporting disposition of appeals from writs of certiorari by this time, the author estimates that less than 100 of the 3,967 cases involved dismissal of appeals from "PDF find" searches of the Court's official docket for October Term 1980. Moreover, the 262 figure also includes appeals granted. According to the Court's official docket, only 142 petitions for certiorari in cases receiving plenary review were granted that Term. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1980), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1980_journal.pdf.

96. *See The Statistics*, 105 HARV. L. REV. 419, 423 (1991) (computing that 5,171 cases were denied, dismissed, or withdrawn and that review was granted in 141 cases). It should be noted that with some minor exceptions, these figures reflect action on writs of certiorari since appeals of right as a path to Court review were mostly eliminated by Congress in 1988. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1224 (2012).

97. *See The Statistics*, 115 HARV. L. REV. 539, 546 (2001) (computing that 7,500 cases were denied, dismissed, or withdrawn and that review was granted in 99 cases).

98. *See The Statistics*, 125 HARV. L. REV. 362, 370 (2011) (computing that 7,656 cases were denied, dismissed, or withdrawn and that review was granted in 90 cases).

approximately 6,400 petitions in October Term 2015,[99] and around 6,500 petitions in the last "normal" Term prior to the COVID-19 pandemic (October Term 2018).[100] But from October Term 1930, after Congress made certiorari the dominant route for a case to reach the Court, to October Term 2018, the number of petitions dealt with on an annual basis by the Court increased roughly tenfold.

Not surprisingly given this substantial increase over the years, the number of cert petitions denied by the Court each Term has also experienced a dramatic increase. Conversely, the number of petitions actually granted in a given Term has experienced a substantial decrease relative to the total number acted on each Term. At the beginning of the twentieth century, of the roughly 120 petitions handled in October Term 1900, the Court denied around 82 and granted about 35 (yielding a rough 30 percent grant rate).[101] By the time Congress was done adding to the Court's certiorari jurisdiction, in October Term 1930, that tribunal denied roughly 565 petitions while granting some 159 (reflecting around a 22 percent grant rate).[102] By October Term 1940, the grant rate was holding fairly steady at around 20 percent—comprising some 693 denials and 169 cases granted.[103]

By the middle of the twentieth century, however, that rate began a fairly steep decline. Of the roughly 1,000 petitions received in October Term 1950, the Court denied around 881 and granted about 89 (a grant rate of roughly 9 percent).[104] By October Term 1960, denials had climbed to about 1,500 petitions, while grants remained

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99. *See The Statistics*, 130 HARV. L. REV. 507, 515 (2016) (computing that 6,277 cases were denied, dismissed, or withdrawn and that review was granted in 81 cases).

100. *See The Statistics*, 133 HARV. L. REV. 412, 420–21 (2019) (computing that 6,409 cases were denied, dismissed, or withdrawn and that review was granted in 86 cases).

101. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1900), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1900_journal.pdf.

102. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1930), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1930_journal.pdf.

103. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1940), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1940_journal.pdf. Here and for subsequent terms, I am using the number of petitions granted for plenary review since grants relating to summary dispositions had started to reach significant numbers by the 1940 Term. *See id.*

104. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1950), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1950_journal.pdf. It should be noted that even though the 881 figure reported by the Court includes cert petition dismissals as well as denials, dismissals tend to be an insignificant number. For instance, the Reference Index of the October 1950 Journal shows four cert petition dismissals for that Term. *See id.* at iv. The same observation applies whenever dismissals of cert petitions are reported together with the number of petition denials in this discussion.

at around 90 (reflecting a declining grant rate of around 6 percent).[105] This pattern continued until the early twenty-first century, when the Court's grant rate leveled off to around its current 1 percent.[106] In rounded numbers, the following Table summarizes this data:

TABLE 1. WRITS OF CERTIORARI DENIED OR GRANTED IN SELECTED YEARS

Term	Denials	Grants	Grant Rate
1970	2,800	100	3%[107]
1980	4,000	140	3%[108]
1990	5,200	140	3%[109]
2000	7,500	100	1%[110]
2010	7,700	100	1%[111]
2018	6,400	90	1%[112]

Hence, from the 1930 to 2018 Term, cert denials increased roughly eleven- to twelve-fold, cert grants declined to around 100 per Term, and the grant rate as a percentage of filed petitions decreased dramatically to its current 1 percent level.

B. The Emergence of Noting Dissents to Certiorari Denials

With this background about the certiorari process, we can now proceed to a better appraisal of the practice of issuing ORTOs in connection with cert denials. But any assessment of that practice must focus on the underlying practice of an individual Justice or group of Justices dissenting to the Court's denial of a petition for certiorari in a case. This is so because such dissents have been principally responsible for giving rise to the practice of issuing cert denial ORTOs, despite the fact that the issuance of ORTOs concurring in or making statements regarding cert denials are becoming more common today.

Although the Court regularly began denying cert petitions in the 1890s, it appears that the practice of publicly dissenting to such

105. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1960), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1960_journal.pdf.

106. *See infra* note 112 and accompanying text.

107. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1970), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1970_journal.pdf.

108. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1980), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1980_journal.pdf. It should be noted that for cert grants I am using the figure reported by the official Supreme Court Journal.

109. *See The Supreme Court 1990 Term*, 105 HARV. L. REV. 80, 423 (1991).

110. *See The Supreme Court 2000 Term*, 115 HARV. L. REV. 4, 546 (2001).

111. *See The Supreme Court 2010 Term*, 125 HARV. L. REV. 1, 369–70 (2011).

112. *See The Supreme Court 2018 Term*, 133 HARV. L. REV. 1, 420–21 (2019).

denials is mainly a creature of modern times—and of the personal jurisprudential philosophies of two Justices in particular.[113] The first published dissent to a cert denial appears to have occurred in the Court's 1938 Term in connection with a cert petition filed in the case of *Mooney v. Smith*.[114] The petitioner in *Mooney* sought review of an allegedly wrongful murder conviction in California.[115] At the end of the Court's terse, standard order denying cert, Justices Hugo Black and Stanley Reed appended the following statement: "Mr. Justice BLACK and Mr. Justice REED, dissenting."[116]

In the next Term of the Court, however, something curious happened. Justice Black, a former U.S. senator from Alabama who had joined the Court in 1937 and went on to gain a reputation as one of its most vocal civil rights defenders, indicated his disagreement with the Court's denial of certiorari in six different cases.[117] But together with another new Justice who also gained a reputation as a vocal civil rights proponent, William O. Douglas,[118] he noted his disagreement in a much different way than he and Reed had the year before. Avoiding the terminology of a "dissent" to the Court's actions, Black and Douglas refashioned their statement to read as follows: "Mr. Justice BLACK and Mr. Justice DOUGLAS are of the opinion that the petition for writ of certiorari should be granted."[119] And it was this more euphemistically phrased form of noting a dissent to a cert decision, or a close variant thereof, that became the standard way of noting such disagreements in cursory fashion—that is, noting a dissent without providing reasons for it in an ORTO or otherwise.

In his 1974 memoir, *Go East, Young Man*,[120] Justice Douglas discussed how the practice of noting cert denial dissents grew out of a philosophy shared by the two relatively new Justices that the vote of each Justice on the disposition of a case should be a matter of public record:

> When I came on the Court Hugo Black talked to me about his idea of having every vote on every case made public. In cases

113. *See infra* Subpart I.F.

114. 305 U.S. 598 (1938).

115. *See Ex parte* Mooney, 73 P.2d 554, 557 (Cal. 1937).

116. *Mooney*, 305 U.S. at 598.

117. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (1939), https://www.supremecourt.gov/pdfs/journals/scannedjournals/1939_journal.pdf.

118. *See* L.A. Powe Jr., *Douglas, William O.*, *in* AMERICAN NATIONAL BIOGRAPHY (Feb. 2000), https://www.anb.org/view/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-1100251.

119. Rinn v. Asbestos Mfg. Co., 308 U.S. 555, 555 (1939); Kowaleski v. Pa. R.R. Co., 308 U.S. 556, 556 (1939); Town of Walkerton v. New York, Chicago & St. Louis R.R. Co., 308 U.S. 556, 556 (1939); Woods v. Indem. Ins. Co. of N. Am., 308 U.S. 557, 557 (1939); Woods v. Granada Apartments, Inc., 308 U.S. 557, 557 (1939); Madden v. Mac Sim Bar Paper Co., 308 U.S. 556, 556 (1939).

120. WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS (1974).

> taken and argued, the vote of each Justice was eventually known. But in cases where appeals were dismissed out of hand or certiorari denied, no votes were recorded publicly. I thought his idea an excellent one and backed it when he proposed to the conference that it be adopted. But the requisite votes were not available then or subsequently. As a result he and I started to note our dissents from denials of certiorari and dismissal of appeal in important cases. Gradually the practice spread to a few other Justices; and finally I ended up in the sixties noting my vote in all cases where dismissals or denials were contrary to my convictions.[121]

But even using this more positive form of noting a Justice's disagreement with a cert denial, such public dissents to cert denials remained relatively rare over the course of the next two decades. Throughout the 1940s, such dissents were noted in an average of roughly seven cases per Term of Court (about 1 percent of the average of 800 some cert petitions per Term denied during that decade).[122] In the 1950s, the number of such dissents increased to approximately 22 cases per Term (or around 2 percent of the roughly 1,200 average number of denials per Term).[123] Moreover, the vast majority of such dissents during this period continued to be made by Justices Black and Douglas.[124]

It was during this period that Justices Black and Douglas and a couple of other Justices started publishing their reasons for dissenting to a cert denial, sometimes in brief statements and sometimes in more elaborate opinions that today the Court refers to as an ORTO.[125] However, such instances were even rarer than the

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121. *Id.* at 452.

122. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (Oct. 1940–49), https://www.supremecourt.gov/orders/scannedjournals.aspx (detailed tabulation on file with author).

123. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (Oct. 1950–59), https://www.supremecourt.gov/orders/scannedjournals.aspx (detailed tabulation on file with author).

124. During this period, Justice Frank Murphy also noted a number of cert denial dissents. *See, e.g.*, Waite v. Overlade, 334 U.S. 812, 812 (1948); Buice v. Patterson, 329 U.S. 739, 739 (1946); Nisonoff v. New York, 326 U.S. 745, 745 (1945).

125. Precisely when a dissenting opinion directed to a denial of certiorari qualifies for the designation of ORTO is unclear. For example, the official Supreme Court website labels certain opinions relating to cert denials as ORTOs. *Opinions Relating to Orders - 2020*, U.S. SUP. CT., https://www.supremecourt.gov/opinions/relatingtoorders (last visited Oct. 22, 2021). The website, however, fails to include more concise statements of a Justice's reasons for dissenting, which arguably also constitute opinions related to cert denials. *See, e.g.*, Molette v. United States, 139 S. Ct. 373, 373 (2018) (Sotomayor, J., dissenting from denial of certiorari) (noting denial of dissent for same reasons set out in her dissenting opinion in another case).

already infrequent practice of cursorily noting a cert denial dissent.[126] But in either form, the practice of publishing dissents to cert denials elicited strong and frequent criticism at the time by Justice Felix Frankfurter, a former Harvard law professor and one of the leading intellectuals to serve on the Court.[127]

While, as mentioned, the first cursory dissent to a cert denial appeared in the 1938 Term, the first dissent to a cert denial that provided reasons for a Justice's objection appeared in the 1945 Term case of *Scarborough v. Pennsylvania Railroad Co.*[128] There, Justices Black, Douglas, and Murphy appended a brief statement to the Court's order denying certiorari in an appeal from a lower court decision absolving a railroad from liability for an employee's death.[129]

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126. J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201, 204 (2017).

127. Justice Frankfurter was a leading intellectual at the time. *See* Lawrence S. Wrightsman & Justin R. La Mort, *Why Do Supreme Court Justices Succeed or Fail? Harry Blackman as an Example*, 70 MO. L. REV. 1261, 1266–69 (2005). Additionally, Justice Frankfurter had a generally antagonistic relationship with Justices Black and Douglas. *See* WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 30–33 (1961). Perhaps this was partially attributable to the fact that, as noted, Justices Black and Douglas became leaders of the liberal wing of the Court, while Justice Frankfurter, even though also appointed by the famous Democrat Franklin Delano Roosevelt, gradually gained notoriety for his conservative views particularly as to the necessity of judges exercising restraint in their rulings. *See Felix Frankfurter*, U-S-HISTORY.COM, https://www.u-s-history.com/pages/h4327.html#:~:text=Roosevelt%20appointed%20Frankfurter%20to%20the,Judicial%20Review%20than%20personal%20conservatism (last visited Oct. 22, 2021).

128. 326 U.S. 755 (1945) (Black, Douglas, & Murphy, JJ., dissenting from denial of certiorari). However, in a 1978 statement about writing dissenting opinions to cert denials, Justice John Paul Stevens asserted that such dissents "were almost nonexistent" around 1950 and that "there were none in 1945 or 1946, and I have been able to find only one in the 1947 Term." Singleton v. Comm'r of Internal Revenue, 439 U.S. 940, 944 n.1 (1978) (Stevens, J., opinion respecting denial of certiorari) (citing Chase Nat'l Bank v. Cheston, 332 U.S. 793, 800 (1947) (Rutledge, J., opinion respecting denial of certiorari)). It is not clear if Stevens missed the *Scarborough* dissent or just believed it did not really qualify as a true dissenting "opinion" because of its summary nature.

Moreover, there were technically four other dissenting opinions to cert denials written during the 1945 Term. *See In re* Yamashita, 326 U.S. 693, 693 (1945); *In re* Homma, 327 U.S. 759, 759–61 (1946) (Murphy, J., dissenting from denial of certiorari); *id.* at 761–63 (Rutledge, J., dissenting from denial of certiorari). But these were not ordinary cert denials, since the petitions for certiorari were combined with petitions for writs of habeas corpus and prohibition in connection with the execution of two Japanese generals after World War II. Most importantly, the Court rendered what amounted to full opinions on the merits of the disputes in upholding military commission proceedings against the generals. *Id.* at 759–61 (Murphy, J., dissenting from denial of certiorari).

129. *Scarborough*, 326 U.S. at 755 (Black, Douglas, & Murphy, JJ., dissenting from denial of certiorari).

The statement asserted that the Justices were "of the opinion that [sic] petition for certiorari should be granted because of conflict with" a decision the Court had rendered two years earlier.[130]

Two Terms later, in a case involving an appeal in a bankruptcy proceeding, Justices Frankfurter and Robert Jackson filed a short dissent to the Court's denial of certiorari (this was a bit ironic for Frankfurter because, as noted, he was to become a dogged critic of the practice).[131] The dissent essentially asserted that the Court should have invited the federal government to submit its views on the matter before denying certiorari.[132] This dissent apparently led Justice Wiley Rutledge to file a lengthy opinion explaining his reasons for concurring with the denial, arguing that such an invitation was not warranted in light of the factual record and applicable law.[133] However, seeming to evince discomfort with filing such a long opinion in connection with a certiorari denial, Rutledge commenced his opinion by apologetically observing that the "unusual circumstances in this case seem to call for explanation of [his] reasons for" his vote in the matter.[134]

Still, another two years later, in the October 1949 Term case of *State of Maryland v. Baltimore Radio Show*,[135] Justice Frankfurter filed what he termed an "opinion . . . respecting the denial of the petition for a writ of certiorari" to express his views on the significance of a certiorari denial in the case.[136] The Court had denied cert from a split decision of Maryland's highest court holding that First Amendment precedents of the U.S. Supreme Court dictated a finding that certain news outlets could not be held in contempt of court for violating an order prohibiting the publication of news about an ongoing murder trial.[137] Apparently concerned that the Court's cert denial might be viewed as an endorsement of the state court's reading of those precedents, Frankfurter went to great lengths to explain that a failure of four Justices to vote to review a case can turn on a variety of considerations having nothing to do with the perceived correctness of the decision below, and he stressed that cert denials should not be read as the Court's endorsement of such decisions.[138] In other words, Frankfurter was attempting to make clear his position that cert denials should not be viewed as taking any sort of

130. *Id.*

131. *Chase Nat'l Bank*, 332 U.S. at 800 (Frankfurter & Jackson, JJ., dissenting from denial of certiorari).

132. *Id.*

133. *Id.* at 794–800 (Rutledge, J., opinion respecting denial of certiorari).

134. *Id.* at 794.

135. 338 U.S. 912 (1950) (Frankfurter, J., opinion respecting denial of certiorari).

136. *Id.* at 912.

137. *Id.*

138. *Id.* at 917–20.

stance on the legal merits of a dispute and certainly not as an approval of the decision below by the Court.[139]

Interestingly, on the same day Justice Frankfurter issued this opinion, Justice Black noted brief dissents in a series of seven cases involving a labor dispute in which the Court denied cert. In each of the cases, he noted his dissent in the following summary fashion: "Mr. Justice BLACK thinks petitioner was denied due process of law and that the petition should be granted."[140] Perhaps it was a coincidence that Frankfurter's warnings about not reading anything into cert denials appeared on the same day as Black's dissenting statements in these other cases. On the other hand, perhaps Frankfurter was troubled that dissents like those issued by Black would create a perception that the other Justices held the opposite view on the due process issue since they did not respond to Black.

In the next Term, Justice Frankfurter again felt compelled to file an opinion emphasizing that cert denials should not be viewed as expressing any position on the correctness of the lower court opinion. In *Agoston v. Pennsylvania*,[141] Justices Black and Douglas filed a short opinion dissenting to the Court's denial of cert on the ground that the Supreme Court of Pennsylvania had ignored controlling U.S. Supreme Court precedent in its ruling below.[142] Appearing to criticize these Justices for filing their dissent, Frankfurter reiterated his negative views of cert denials and sarcastically observed that "it is not merely the laity that fails to appreciate that by denying leave for review here of a lower court decision this Court lends no support to the decision of the lower court."[143]

Despite Justice Frankfurter's thinly veiled criticism, in the next Term of Court (October Term 1951), certain Justices (mainly Justices Black and Douglas) continued to note cursory dissents to cert denials in some cases and filed dissenting opinions or statements in a few

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139. Professor Linzer calls this view the "orthodox view of certiorari denials." Linzer, *supra* note 27, at 1251. According to Professor Linzer, however, the orthodox view is somewhat of a myth. *See* Linzer, *supra* note 27, at 1255.

140. Alred v. Celanese Corp. of Am., 338 U.S. 937 (1950) (No. 395) (Black, J., dissenting from denial of certiorari); Alred v. Celanese Corp. of Am., 338 U.S. 937 (1950) (No. 397) (Black, J., dissenting from denial of certiorari); Carroll v. Celanese Corp. of Am., 338 U.S. 937 (1950) (No. 394) (Black, J., dissenting from denial of certiorari); Pedigo v. Celanese Corp. of Am., 338 U.S. 937 (1950) (No. 398) (Black, J., dissenting from denial of certiorari); Pedigo v. Celanese Corp. of Am., 338 U.S. 937 (1950) (No. 393) (Black, J., dissenting from denial of certiorari); Womack v. Celanese Corp. of Am., 338 U.S. 937 (1950) (No. 396) (Black, J., dissenting from denial of certiorari); Womack v. Celanese Corp. of Am., 338 U.S. 937 (1950) (No. 399) (Black, J., dissenting from denial of certiorari).

141. 340 U.S. 844 (1950).

142. *Id.* at 845 (Douglas, J., dissenting from denial of certiorari).

143. *Id.* at 844 (Frankfurter, J., opinion respecting denial of certiorari).

others.[144] And while Frankfurter continued to lodge protests to these practices, he also appeared to obliquely engage in them himself.[145]

At the beginning of the 1951 Term, Justice Robert Jackson filed an opinion dissenting to a cert denial on the grounds that the lower court had misapplied one of the Court's precedents.[146] Justice Frankfurter responded with the following statement: "In not joining this dissent, Mr. Justice FRANKFURTER wishes to refer to his views as to the meaning of a denial of certiorari. See [*Baltimore Radio Show*]."[147]

Yet three months later, Justice Frankfurter issued what he called an opinion "in connection with" a cert denial in a railroad bankruptcy case that read more like a dissent to the lower court opinion and the Court's failure to review it.[148] He began his opinion by citing to his *Baltimore Radio Show* opinion on the legal insignificance of cert denials, and he then proceeded to criticize the practice of publishing dissents to such actions.[149] Noting that because it would be impractical for the Justices to explain their reasons for denying cert in every case, Frankfurter complained that "a public recording of a dissent from such a denial cannot without more fairly disclose to what such dissent is directed."[150] Moreover, he argued, "[t]he ambiguous and unrevealing information afforded by noting such dissent is rendered still more dubious if dissent is not noted systematically, but only in selected cases."[151] Hence, he concluded, he had adopted an "unbroken practice" of not publishing his dissents to cert denials.[152]

But in the very next breath, Justice Frankfurter opined that it was nonetheless appropriate to occasionally "set forth some of the issues that may be involved in a case" where cert has been denied.[153] He then went on, in a lengthy opinion, to essentially complain about the way the lower court had dispossessed certain railroad creditors of their bankruptcy claims based on tenuous financial projections—a purported judicial trend he clearly found troubling.[154] While Frankfurter did not explicitly criticize the Court for denying cert in

144. *See, e.g.*, Brown v. North Carolina, 484 U.S. 970 (1987); James v. Washington, 341 U.S. 911 (1951); Hallinan v. United States, 341 U.S. 952 (1951).

145. *See* Bondholders, Inc. v. Powell, 342 U.S. 921, 921–26 (1952) (Frankfurter, J., opinion respecting denial of certiorari).

146. Koehler v. United States, 342 U.S. 852, 852–53 (1951) (Jackson, J., dissenting from denial of certiorari).

147. *Id.* at 854.

148. *See Bondholders*, 342 U.S. at 921–26 (1952) (Frankfurter, J., opinion respecting denial of certiorari).

149. *Id.* at 921.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *See id.* at 922–26.

the case, he seemed to be making his case for why it should have granted review instead.

Nonetheless, Justice Frankfurter restated his position as to the legal insignificance of cert denials two months later, when Justices Black and Douglas filed a short opinion explaining their reasons for dissenting to the Court's denial of cert in a criminal appeal.[155] Interestingly, Black stated that his custom was not to give reasons for noting that he would have granted cert in a case, but the egregious facts of that particular case caused him to feel "constrained to depart" from his usual practice.[156] And a few weeks later, in another six cases involving the bankruptcy of a railroad, Frankfurter again wrote an opinion in connection with the Court's denial of cert complaining about the selective notation of cert denial dissents.[157] At the same time, however, he again filed a lengthy opinion styled as an *indication of issues* seemingly complaining about the lower court's handling of the cases.[158] And soon thereafter, he issued another such *indication of issues* opinion relating to the Court's denial of cert in a media contempt case where he obliquely seemed to be opining on the correctness of the ruling below.[159]

In the next Term of Court (October 1952), Justices Black and Douglas continued filing cursory notations of dissents to cert denials in certain cases, with Black filing dissenting opinions in two cases taking issue with the procedural fairness of the proceedings below.[160] And Justice Frankfurter again filed memorandum opinions in two different cases, both continuing to criticize the practice of dissenting

155. Remington v. United States, 343 U.S. 907, 908 (1952) (Black, J., joined by Douglas, J., dissenting from denial of certiorari) ("As to the legal significance of a denial of the petition for writ of certiorari, Mr. Justice FRANKFURTER refers to his memoranda in State of Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 70 S. Ct. 252, 94 L.Ed. 562 [(1950)]; and Agoston v. Com[monwealth] of Pennsylvania, 340 U.S. 844, 71 S. Ct. 9, 95 L.Ed. 619 [(1950)].").

156. *Id.* ("Governmental conduct here charged is abhorrent to a fair administration of justice. It approaches the type of practices unanimously condemned by this Court as a violation of due process of law in Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L.Ed. 791. For this reason I have felt constrained to depart from my custom and give reasons for my vote to grant certiorari in this case.").

157. Chem. Bank & Tr. Co. v. Grp. of Institutional Invs., 343 U.S. 982, 982–83 (1952) (Frankfurter, J., opinion respecting denial of certiorari).

158. *See id.* at 983–87.

159. *See* Leviton v. United States, 343 U.S. 946, 946–49 (1952).

160. Du Bois v. Mossey, 344 U.S. 869 (1952) (Black, J., joined by Douglas, J., dissenting from denial of certiorari); Isserman v. Ethics Comm. of Essex Cnty. Bar Ass'n, 345 U.S. 927 (1953) (Black, J., joined by Douglas, J., dissenting from denial of certiorari).

to cert denials, but at the same time "indicating" issues about the rulings below that were arguably expressing views on their merits.[161]

This general pattern of behavior remained the same for the remainder of the decade. Justices Black and Douglas, for the most part, would note cursory dissents to cert denials in a relatively few number of cases that they thought were important for the Court to hear, and on rare occasion they would explain the reasons for their dissent in a summary form or more elaborate opinion.[162] Justice Frankfurter, on the other hand, continued noting his protests to such dissents while occasionally raising issues with the ruling below that clearly troubled him.

For instance, in a 1956 memorandum Justice Frankfurter appended to a cert denial, he appeared to be criticizing an Ohio Supreme Court decision that upheld a murder conviction despite the media circus that surrounded the trial.[163] While repeatedly stressing that the cert denial did not indicate the Court's approval of that decision, Frankfurter took another shot that seemed aimed at Justices Black and Douglas: "The rare cases in which an individual position is noted [on a cert denial] leave unillumined the functioning of the certiorari system, and do not reveal the position of all the members of the Court."[164]

And just over a year later, Justice Frankfurter, joined by the relatively new Justice John Marshall Harlan II, filed a similar memorandum indirectly criticizing a lower court ruling in a worker injury case for which the Court denied cert.[165] Frankfurter again wanted "to emphasize through concrete illustrations that a denial of certiorari does not imply approval of the decision for which review is sought or of its supporting opinion."[166] He did this, he said, to counter what he saw as a troubling trend on the part of "the bar, in briefs, and lower courts, in their opinions . . . to note such denials by way of

161. Weber v. United States, 344 U.S. 834 (1952) (Frankfurter, J., opinion respecting denial of certiorari); Rosenberg v. United States, 344 U.S. 889 (1952) (Frankfurter, J., opinion respecting denial of certiorari).

162. *See* Corona Daily Indep. v. City of Corona, California, 346 U.S. 833 (1953) (Douglas, J., joined by Black, J., dissenting from denial of certiorari); United States v. Otoe & Missouria Tribe of Indians, 350 U.S. 848 (1955) (Black, J., opinion respecting denial of certiorari); Johnson v. SEC, 352 U.S. 844 (1956) (Black, J., dissenting from denial of certiorari); Ashcraft v. United States, 361 U.S. 925 (1959) (Black, J., joined by Douglas, J., dissenting from denial of certiorari); Murphy v. Butler, 362 U.S. 929 (1960) (Douglas, J., dissenting from denial of certiorari).

163. Sheppard v. Ohio, 352 U.S. 910, 910–11 (1956) (Frankfurter, J., opinion respecting denial of certiorari).

164. *Id.* at 911.

165. Elgin, Joliet, & E. Ry. Co. v. Gibson, 355 U.S. 897, 897 (1957) (Frankfurter, J., joined by Harlan, J., opinion respecting denial of certiorari).

166. *Id.*

reinforcing the authority of cited lower court decisions."[167] In other words, lawyers practicing before the Court, as well as lower court judges, were essentially citing lower court decisions in which the Court had denied cert as being tantamount to a Supreme Court affirmance of the rulings (i.e., as authoritative Supreme Court precedents). And Frankfurter clearly believed that noting dissents to cert denials only exacerbated this problem.[168] In other words, why file a cert denial dissent criticizing a lower court ruling if the denial said nothing about the Court's view of the merits of that ruling? This was Frankfurter's last major statement on the matter of cert denial dissents before he retired from the Court at the end of its 1961 Term.[169]

All in all, the period from the late 1930s until the early 1960s saw the birth of the practices of noting dissents to cert denials and occasionally issuing opinions explaining those dissents. As described, these practices were largely the brainchild of noted liberals, Justices Black and Douglas, who were at its vanguard. However, this period also witnessed the rise of a resistance movement led by their longtime antagonist, the noted conservative Justice Frankfurter. Even from the start, then, there existed an ideological valence to the practice. But somewhat hypocritically, even Justice Frankfurter could not always resist the urge to subtly opine on the correctness of the underlying ruling the Court was declining to review.

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167. *Id.*

168. *Id.* Justice Jackson touched on this same argument in his concurrence in *Brown*. Brown v. Allen, 344 U.S. 443, 542–46 (1953) (Jackson, J., concurring) ("Perhaps the profession could accept denial as meaningless before the custom was introduced of noting dissents from them."). But *Brown*, along with its companion case *Daniels v. Allen*, settled the dispute as to the legal significance of certiorari denials. *See Brown*, 344 U.S. at 452–58; Daniels v. Allen, 344 U.S. 443, 489–97 (1953). In those cases, the U.S. Court of Appeals for the Fourth Circuit affirmed district court decisions that denied multiple petitioners's claims for habeas corpus relief, where the district courts relied on the fact that the Supreme Court had previously denied the petitioners's appeals. *See Brown*, 344 U.S. at 452–54; *Daniels*, 344 U.S. at 490 n.1. Seizing the opportunity, Justice Frankfurter in *Daniels* conclusively held "[the] denial of certiorari cannot be interpreted as an 'expression of opinion on the merits'" as the Court often knows painfully little about what is occurring in the many cases arising before the Court. *Daniels*, 344 U.S. at 496 (quoting Sunal v. Large, 332 U.S. 174, 181 (1947)). A minority of the Court, however, still believed "there is no reason why a district court should not give consideration to the record of the prior certiorari in this Court and such weight to our denial as the District Court feels the record justifies." *Brown*, 344 U.S. at 456.

169. *See* Anthony Lewis, *Justice Frankfurter Retires; Kennedy Hails 23-Year Service, Names Goldberg as Successor*, N.Y. TIMES, Aug. 30, 1962, at A1 (retirement at the end of the 1961 Term).

C. The Heyday of Certiorari Denial Dissents: 1960–1995

As if timed to coincide with Justice Frankfurter's departure and the removal of his glower on the practice of dissenting to cert denials, the period of the 1960s through the early 1990s can only be described as the heyday of individual Justices engaging in this practice. Perhaps not surprisingly, Justice Douglas led the charge, having eclipsed even his ideological soulmate Justice Black with respect to the frequency of his dissents to cert denials. As noted earlier, Justice Douglas stated in his memoirs that, beginning in the 1960s, he started noting dissents in all cases where such denials were "contrary to [his] convictions."[170]

Justice Douglas's actions drove a major increase in cert denial dissents during the next 15 years until illness forced him to retire just over one month into the Court's October 1975 Term.[171] As noted earlier, the 1950s saw dissents to cert denials expressed in an average of roughly 22 cases per Term.[172] During the 1960s, that number increased to an average of approximately 123 cases per Term—an over 500 percent increase from the prior decade.[173] By the 1970 Term, the number of cases in which cert denial dissents were made had climbed to roughly 325.[174] And in the 1973 Term, that number had increased to just short of 500 cases.[175]

To demonstrate Justice Douglas's influence on this trend, at the beginning of the 1960s, the number of cases in which cert denial dissents were made jumped from 28 in the 1959 Term[176] to 85 in the 1960 Term.[177] And of the 85, Douglas alone dissented in 54 of them

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170. *See* DOUGLAS, *supra* note 120, at 452.

171. *See* Anthony Lewis, *Douglas: Study in Contradiction*, N.Y. TIMES, Nov. 13, 1975, at 60 (Douglas's retirement).

172. *See supra* note 123 and accompanying text.

173. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-3-1960 & bef 10-4-1970) (providing 1,278 results less non-cert denial results divided by 10) (detailed tabulation on file with author).

174. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-4-1970 & bef 10-4-1971) (providing 325 results) (detailed tabulation on file with author).

175. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 09-30-1973 & bef 10-7-1974) (providing 500 results) (detailed tabulation on file with author).

176. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-4-1959 & bef 10-3-1960) (providing 29 results less one non-cert denial result) (detailed tabulation on file with author).

177. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect!

(or 65 percent) and joined other Justices in dissenting in another 16.[178] Hence, Douglas was responsible for or participated in roughly 85 percent of the 1960 Term dissents.

In the 1965 Term, out of roughly 200 cases in which cert denial dissents were made,[179] Justice Douglas was the lone dissent in 166 of them and joined other Justices dissenting in another 6 (accounting for 86 percent of such dissents).[180] And in the 1970 Term, out of some 325 cases in which cert was denied,[181] Douglas alone dissented in roughly 215 of them and jointly dissented in another 60[182] (meaning Douglas was responsible for or participated in roughly 85 percent of such dissents). In the penultimate Term before Douglas's retirement (October Term 1973), cert denial dissents were expressed in approximately 500[183] cases. In roughly 420 (or 84 percent) of these, he dissented alone, and in another 60 (an additional 12 percent), he dissented along with at least one fellow Justice.[184]

Contrast these figures with the October 1976 Term, the first full Term after Justice Douglas's retirement. As a result of his absence, the total number of cases containing cert denial dissents plummeted

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regard! statement memo!) & DA(aft 10-2-1960 & bef 10-2-1961) (providing 85 results).

178. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & "Douglas" & DA(aft 10-2-1960 & bef 10-2-1961) (providing 69 results).

179. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-3-1965 & bef 10-3-1966) (providing 197 results).

180. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s douglas /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-3-1965 & bef 10-3-1966) (providing 173 results).

181. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-4-1970 & bef 10-4-1971) (providing 325 results).

182. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari +50 denied /100 justice /s douglas /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 09-30-1970 & bef 10-01-1971) (providing 275 results).

183. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 09-30-1973 & bef 10-7-1974) (providing 500 results).

184. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & Douglas) & DA(aft 09-30-1973 & bef 10-7-1974) (providing 476 results).

to roughly 130.[185] But perhaps inspired by Justices Douglas and Black (who had retired in 1971), by this time the practice of noting or writing such dissents on occasion had become fairly widespread on the Court. Indeed, in the 1976 Term most Justices partook in it from time to time, except for Justices William Rehnquist and John Paul Stevens.[186]

But by the 1980 Term, the practice was becoming more frequent again. Some form of cert denial dissent was filed in over 250 cases.[187] By this time, Justices William Brennan and Thurgood Marshall had succeeded to the mantle previously occupied by Justices Black and Douglas as Justices who took the most expansive views of civil and criminal rights on the Court.[188] Together, they accounted for the bulk of approximately 200 cursory and summary cert denial dissents filed that Term, most of which were summary dissents noting their repeated objections to the constitutionality of the death penalty in capital cases.[189] In an interesting twist, however, the noted conservative Justice Rehnquist had jumped on the cert denial bandwagon and accounted for the highest number of nonsummary dissents in particular cases (21 of 54 such opinions filed).[190]

Justice Stevens was the only Justice during the 1980 Term who refused to participate in the practice of issuing or joining cert denial dissents. By this time, he was channeling Justice Frankfurter in noting objections to the practice. Two Terms earlier, in the case of *Singleton v. Commissioner of Internal Revenue*,[191] Justice Harry Blackmun had filed a dissenting opinion, joined by Justices Marshall and Lewis Powell, to the Court's denial of cert in a case presenting a

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185. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-3-1976 & bef 10-3-1977) (providing 131 results).

186. *See id.* (detailed tabulation on file with the author).

187. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-5-1980 & bef 10-4-1981) (providing 255 results).

188. *See, e.g.*, Michael Mello, *Adhering to Our Views: Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 591, 692–94 (1995).

189. *See* Westlaw search using the following terms: advanced: (Brennan OR Marshall) & (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-5-1980 & bef 10-4-1981) (providing 174 results) (detailed tabulation on file with the author).

190. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari +50 denied /100 justice /s grant! Dissent! Denial concur! Respect! Regard! Statement memo!) & Rehnquist) & DA(aft 09-30-1980 & bef 10-01-1981) (providing 28 results less results not consisting of nonsummary opinions authored by Rehnquist) (detailed tabulation on file with the author).

191. 439 U.S. 940 (1978) (order denying certiorari).

technical question of tax law.[192] Blackmun argued that the issue was important for the Court to decide, and he expressed his "hope" that the cert denial was not because his colleagues did not want to take on another "complicated tax case that is devoid of glamour and emotion."[193] This jab prompted Stevens to file a lengthy opinion "respecting" the denial.[194]

First, Justice Stevens quoted at length from Justice Frankfurter's opinion in *Baltimore Radio*, arguing that it should be "read again and again" to emphasize the point that a cert denial had no legal significance and could not be taken as expressing the views of the Court on the merits of the lower court decision.[195] Expressing dismay that the practice of filing dissents to cert denials had become more frequent despite the increased workload of the Court, Stevens asserted that they were "totally unnecessary."[196] He argued that such dissents were the "the purest form of dicta, since they have even less legal significance than the orders of the entire Court which . . . have no precedential significance at all."[197] He also argued that they were "potentially misleading" since they "typically appear to be more persuasive than most other opinions" due to the fact that they were rarely answered by other Justices defending the cert denial.[198] This lack of response, he added, also made it seem like the Court was acting irresponsibly or was content with the ruling below.[199]

Justice Stevens then chided Justice Blackmun for suggesting that the lack of glamour and emotion had anything to do with the cert denial in *Singleton*. In his view, cert was appropriately denied given the lack of a split in the circuits on the issue and because any eventual Court review would be aided by more lower court rulings addressing the issue.[200] He then conceded that dissenting opinions might have some value in that they might persuade other Justices to change their cert vote or add to the public's understanding of the Court's work.[201] But he concluded that the former benefit could be achieved by simply circulating a dissent internally without publishing it and that the latter benefit was illusory and came at too high a cost in any event.[202] Since such dissents by one or a minority of Justices were rarely answered, they could "give rise to misunderstanding or incorrect

192. *Id.* at 940–42 (Blackmun, J., joined by Marshall & Powell, JJ., dissenting from denial of certiorari).
193. *Id.*
194. *Id.* at 942–46 (Stevens, J., opinion respecting the denial of certiorari).
195. *Id.*
196. *Id.* at 944.
197. *Id.* at 944–45.
198. *Id.* at 945.
199. *Id.*
200. *Id.*
201. *Id.* at 945–46.
202. *Id.* at 946.

impressions about how the Court actually works."[203] And any "minimal educational value" that could be derived from such dissents was more than offset by the harm they do to the Court's confidential deliberations on individual cases.[204] Such confidentiality, Stevens argued, made "a valuable contribution to the full and frank exchange of views during the decisional process," especially regarding discretionary decisions such as whether to grant cert petitions.[205]

Apparently feeling the sting of Justice Stevens's criticisms, Justice Blackmun responded by appending a short footnote to his dissent asserting that "[t]he point Mr. Justice STEVENS would make by his separate opinion was answered effectively twenty-five years ago by Mr. Justice Jackson" in his opinion in the 1953 case of *Brown v. Allen*.[206] Surprisingly, by citing to Jackson's opinion concurring in the judgment in *Brown*, Blackmun seemed to be taking issue with the stated position of many Justices, including Frankfurter and Stevens, that a cert denial cannot be viewed as signaling the position of a majority of Justices as to the correctness of the ruling below. In his concurrence, Jackson had argued that, at the very least, lawyers and lower court judges attached some significance to cert denials—and had good reason to do so after Justices adopted the custom of noting dissents to those decisions.[207] Why else, Jackson argued, would Justices of the Court take "the trouble to signal a meaningless division of opinion about a meaningless act"?[208]

It is not clear whether Justice Blackmun and the two Justices who joined his cert denial dissent in *Singleton* truly intended to express disagreement with the Court's standard line that cert denials do not reflect any views about the merits of the underlying ruling. If they did, perhaps that view can go a long way to explain the explosion in cert denial dissents during this era. But for whatever reason, such dissents continued apace after the 1980 Term.

In the 1985 Term, for example, dissents were noted or filed in roughly 350 cases.[209] Over half of these consisted of formulaic summary dissents by Justices Brennan and Marshall objecting to the imposition of capital punishment on a petitioner.[210] But the number

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 942 n.* (Blackmun, J., joined by Marshall & Powell, JJ., dissenting from denial of certiorari) (citing Brown v. Allen, 344 U.S. 443, 542–44 (1953)).

207. *Brown*, 344 U.S. at 543 (Jackson, J., concurring).

208. *Id.*

209. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-6-1985 & bef 10-6-1986) (providing 361 results).

210. *See* Westlaw search using the following terms: advanced: (Marshall OR Brennan) & (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-6-1985 & bef 10-6-

of nonsummary dissents continued to increase, with various Justices filing them in 66 cases.[211] But now the leader in writing them was Justice White, who filed 34 opinions that mainly purported to demonstrate a split in lower court authority on an important legal question and argue that the Court should have granted cert to resolve it.[212] Following up were Brennan and Marshall, who penned 19 dissents combined, mainly complaining about how various criminal justice issues were handled below.[213]

Surprisingly, the cert denial dissent leader of the 1980 Term, Justice Rehnquist, appears to have lost his enthusiasm for writing them almost as rapidly as he appeared to pick up the practice. He wrote no dissenting opinions of his own in the 1985 Term, and he joined only a few cert denial dissents written by other conservative Justices, such as Chief Justice Warren Burger.[214] And after Rehnquist replaced Burger as Chief Justice the following Term of Court, he rarely noted, wrote, or joined cert denial dissents. Perhaps Rehnquist was eventually persuaded by Justices Frankfurter and Stevens's objections to the practice, or perhaps he just believed that his time and efforts were better directed to cases the Court actually took up for review.

But whatever the reason, in the 1990 Term of Court, Rehnquist did not participate in any of the roughly 315[215] cert denial dissents noted or written that Term.[216] Perhaps because of his leadership or influence as Chief Justice, the practice seemed to be on the decline. Of those 315 dissents, almost 200 of them were formulaic summary dissents by Justice Marshall objecting to the imposition of the death penalty[217] (his ideological soulmate Justice Brennan having retired at

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1986) (providing 259 results less results not consisting of summary opinions authored by Brennan or Marshall) (detailed tabulation on file with the author).

211. *See supra* note 209 (detailed tabulation on file with the author).

212. *See supra* note 209 (detailed tabulation on file with the author).

213. *See supra* note 209 (detailed tabulation on file with the author).

214. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari +50 denied /100 justice /s grant! Dissent! Denial concur! Respect! Regard! Statement memo!) & Rehnquist) & DA(aft 10-6-1985 & bef 10-6-1986) (providing 11 results) (detailed tabulation on file with the author).

215. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 09-30-1990 & bef 10-7-1991) (providing 323 results less non-cert denial results) (detailed tabulation on file with the author).

216. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & Rehnquist) & DA(aft 09-30-1990 & bef 10-7-1991) (providing 2 results, one not involving Chief Justice Rehnquist and one stating that he would have denied cert in connection with a summary reversal where the Court did grant cert).

217. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect!

the end of the 1989 Term).[218] And the bulk of the 21 dissenting opinions filed that Term were written either by Marshall, who continued to object primarily to the handling of criminal justice issues below,[219] or by Justice White, who complained that the Court was not fulfilling its responsibility to resolve perceived splits in the lower courts that he believed should be addressed.[220]

D. Certiorari Denial Quietude: 1995–2010

After Justices Marshall and White retired in 1991 and 1993,[221] respectively, the Justices' cert denial dissent activity virtually ceased compared to prior years.[222] In the 1995 Term, for instance, out of roughly 6,500 cert petitions denied and some 200 granted,[223] there were only three denials that elicited dissents and two that provoked statements respecting the denials (and there were no cursory or summary dissents noted).[224] Each of the three dissents were penned

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regard! statement memo!) & Marshall) & "Adhering #to my view #that the death penalty is #in all circumstances cruel #and unusual punishment prohibited #by the Eighth #and Fourteenth Amendments" & DA(aft 09-30-1990 & bef 10-7-1991) (providing 208 results) (detailed tabulation on file with the author).

218. Ruth Marcus & Al Kamen, *Liberal Justice Brennan Quits Supreme Court, Giving Bush Chance to Buttress Conservatives*, WASH. POST (July 21, 1990), https://www.washingtonpost.com/archive/politics/1990/07/21/liberal-justice-brennan-quits-supreme-courtgiving-bush-chance-to-buttress-conservatives/ade1ee4d-f7fe-4b60-ad0c-532c11ce4ce8/.

219. *See supra* note 210 (detailed tabulation on file with the author).

220. *See supra* note 212 (detailed tabulation on file with the author).

221. Andrew Rosenthal, *Marshall Retires from High Court; Blow to Liberals*, N.Y. TIMES (June 28, 1991), https://www.nytimes.com/1991/06/28/us/marshall-retires-from-high-court-blow-to-liberals.html; Ruth Marcus & Joan Biskupic, *Justice White to Retire After 31 Years*, WASH. POST (Mar. 20, 1993), https://www.washingtonpost.com/archive/politics/1993/03/20/justice-white-to-retire-after-31-years/7ef4b94a-9b0f-4fc3-b605-e1050ae8fa71/.

222. Justice Blackmun retired after the October 1993 Term. Ruth Marcus, *Justice Blackmun Announces Retirement*, WASH. POST (Apr. 7, 1994), https://www.washingtonpost.com/archive/politics/1994/04/07/justice-blackmun-announces-retirement/ba46238d-7ada-41fe-9960-8a28b0334867/. During this last Term of his tenure, he kept the number of cert denial dissents significantly higher than they otherwise would have been by writing summary opinions objecting to the death penalty. *See, e.g.*, Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor.").

223. *The Supreme Court, 1995 Term*, 110 HARV. L. REV. 367, 371–72 (1996).

224. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-1-1995 & bef 10-7-1996) (providing 28

by conservative Justices promoting known conservative causes.[225] Interestingly, one of the opinions respecting a denial was written by Justice Stevens, who seemed to have adopted Justice Frankfurter's dubious practice of voicing disapproval of cert denial dissents while occasionally filing opinions suggesting a problem with how a lower court ruled on a particular issue.[226]

This low level of cert denial dissent activity continued for most of the remainder of the decade and the first decade of the 2000s. With the exception of two Terms (October Terms 1998 and 1999), in all other Terms from 1995 until 2010, the combined number of cursory dissents, summary dissents, nonsummary dissents, and other writings respecting the denials never exceeded 8 and were frequently as low as 4.[227] And in the 1998 and 1999 Terms, the total combined dissents and writings were only 15[228] and 12,[229] respectively. In

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results less 23 non-cert denial opinions) (detailed tabulation on file with the author).

225. *See* City of Edmond v. Robinson, 517 U.S. 1201, 1203 (1996) (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting from denial of certiorari) (Establishment Clause case); Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1176 (1996) (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting from denial of certiorari) (abortion rights case); Cargill, Inc., v. United States, 516 U.S. 955, 955 (1995) (Thomas, J., dissenting from denial of certiorari) (Takings Clause case). It should be noted that Justice Stevens filed an ORTO responding to Justice Scalia's dissent in the *Janklow* case. *Janklow*, 517 U.S. at 1175. If this ORTO is counted, there were actually three in the Term respecting the denial of certiorari.

226. *See* Carpenter v. Gomez, 516 U.S. 981, 981 (1995) (Stevens, J., opinion respecting the denial of certiorari). Justice Ginsburg penned the other OTRO respecting the denial of certiorari. *See* Texas v. Hopwood, 518 U.S. 1033, 1033 (1996) (Ginsburg, J., opinion respecting the denial of certiorari).

227. For instance, in the 2000 and 2005 Terms, respectively, the number of cert denial opinions or notations was 8 and 7. *See, e.g.*, Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-1-2000& bef 10-01-2001) (providing 21 results less 13 non-cert denial notations or opinions) (detailed tabulations on file with the author); Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-2-2005 & bef 10-2-2006) (providing 23 results less 16 non-cert denial notations or opinions) (detailed tabulations on file with the author).

228. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-4-1998 & bef 10-4-1999) (providing 58 results less 43 non-cert denial notations or opinions) (detailed tabulation on file with the author).

229. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-3-1999 & bef 10-2-2000) (providing 45 results less 33 non-cert denial notations or opinions) (detailed tabulation on file with the author).

short, the period of time from the 1995 Term to the 2010 Term was one of extremely low cert denial activity relative to the prior three and a half decades.

E. Resurgence of Certiorari Denial Activity: 2010–Present

From October Term 2010 through October Term 2019, cert denial activity has both increased and started to take on a different cast than in the past. As to the volume of activity, over the 2010–2014 Terms, the number of dissents and other opinions noted or filed in connection with cert denials increased from an average of 6 cases per Term over the preceding decade to an average of roughly 11 cases per Term—with the 2014 Term ending up with 18 cases.[230] The 2015 Term through the 2019 Term reflected an even sharper rise, with the average number of cases per Term reflecting cert denial activity increasing to approximately 38 (with the 2018 and 2019 Terms reflecting 68[231] and 61,[232] respectively). Moreover, as a reflection of the total number of dissents or other opinions noted or filed each Term, these numbers are a bit understated, since many cases reflect multiple opinions being filed in connection with a particular cert denial—often with a member of the liberal or conservative bloc attacking a member of the other bloc as to their views on the propriety of the Court's action.[233]

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230. *See* JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (2015), https://www.supremecourt.gov/orders/journal/jnl14.pdf (detailed tabulation on file with the author).

231. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari) +50 denied) /100 (justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 09-30-2018 & bef 10-06-2019) (providing 74 results less 6 non-cert denial notations or opinions) (detailed tabulation on file with the author). It should be noted that seven of the opinions filed in connection with cert denials in the 2018 Term were associated with contemporaneous denials of stays of execution. *See, e.g.*, Zagorski v. Parker, 139 S. Ct. 11 (2018) (Sotomayor & Breyer, JJ., dissenting from denial of certiorari and application for stay of execution); Hamm v. Dunn, 138 S. Ct. 828 (2018) (Sotomayor & Ginsburg, JJ., dissenting from denial of certiorari and application for stay of execution). *See infra* notes 271–79 and accompanying text for a discussion of the significance of this fact.

232. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-6-2019 & bef 10-5-2020) (providing 71 results less 10 non-cert denial notations or opinions) (detailed tabulation on file with the author). In 2019, one of the 61 opinions accompanying cert denial was issued in connection with an application for stay of execution. Rhines v. Young, 140 S. Ct. 8 (2019) (Sotomayor, J., respecting the denial of certiorari).

233. *See, e.g.*, Hester v. United States, 139 S. Ct. 509, 509 (2019) (Alito, J., concurring in denial of certiorari); *id.* at 509–11 (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari); Price v. Dunn, 139 S. Ct. 1533, 1533–40 (2019) (Thomas, J., concurring in denial of certiorari) (attacking position of Justice Breyer)).

In the first five Terms of the past decade, the bulk of the cert denial activity was fairly evenly distributed between Justices Alito, Breyer, Scalia, Sotomayor, and Thomas (with Roberts, Ginsburg, and Kagan each occasionally filing an opinion or joining the opinions of other Justices).[234] Only Justice Kennedy failed to write at least one opinion during this period in connection with a cert denial, although he did note one cursory dissent and joined one opinion filed by another Justice.[235]

During the 2015–2019 Terms, however, Justices Sotomayor and Thomas emerged as the clear leaders in issuing cert denial dissents or related opinions. During this time, Sotomayor averaged a dissent or other opinion in roughly 22 cases per Term (filing 48[236] and 39[237] in the 2018 and 2019 Terms, respectively), while Thomas averaged 8 cases per Term (filing 14[238] and 10[239] in the 2018 and 2019 Terms, respectively). It should be noted, however, that both Sotomayor's and Thomas's numbers in one or more of the latter Terms were

234. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 10-3-2010 & bef 10-3-2016) (providing 114 results) (detailed tabulation on file with the author).

235. Arrigoni Enter., LLC v. Town of Durham, Connecticut, 136 S. Ct. 1409, 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); Joseph v. United States, 135 S. Ct. 705, 705 (2014) (mem.).

236. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & Sotomayor) & DA(aft 09-30-2018 & bef 10-7-2019) (providing 52 results less 4 non-cert denial notations or opinions by Sotomayor) (detailed tabulation on file with the author). Seven of Justice Sotomayor's cert denial dissents accompanied denials of applications for stay of execution in the 2018 Term. *See, e.g.*, Zagorski v. Haslam, 139 S. Ct. 20 (2018) (Sotomayor, J., dissenting from denial of certiorari and application for stay of execution); Miller v. Parker, 139 S. Ct. 626 (2018) (Sotomayor, J., dissenting from denial of certiorari and application for stay of execution).

237. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & Sotomayor) & DA(aft 10-6-2019 & bef 10-5-2020) (providing 45 results less 6 non-cert denial notations or opinions by Sotomayor) (detailed tabulation on file with the author). In the 2019 Term, Sotomayor filed one opinion respecting the denial of certiorari in connection with a denial of application for stay of execution. Rhines v. Young, 140 S. Ct. 8 (2019) (Sotomayor, J., respecting the denial of certiorari).

238. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & Thomas) & DA(aft 09-30-2018 & bef 10-7-2019) (providing 29 results less 8 non-cert denial notations or opinions by Thomas) (detailed tabulation on file with author).

239. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & Thomas) & DA(aft 09-30-2019 & bef 10-01-2020) (providing 15 results).

significantly boosted by summary cert denial opinions they filed.[240] In such cases, a Justice essentially cites to an earlier opinion and restates objections that were expressed there[241] (in the mold of Justices Brennan and Marshall with respect to their death penalty dissents[242]).

Besides the increase in volume over the past decade, the mix of the type of cert denial opinions being filed has also changed. In the past, virtually all opinions attached to cert denial orders constituted dissents to the Court's refusal to review a case—whether in cursory, summary, or lengthier form. While there were a few statements sprinkled in from time to time "respecting" the denial—as noted, mainly by cert dissent critics Justices Frankfurter and Stevens—by far the bulk of statements or opinions were of a dissenting nature.[243] Over the past few years, however, Justices are filing more and more opinions where they express agreement with the Court's decision to deny review of a case but still publish an opinion chastising the lower court or arguing for the Court to change the law in a future case. These types of opinions may take the form of a statement respecting a denial or even an outright concurrence in that action.

To illustrate this trend, in October Term 1985 (roughly the height of the post-Douglas cert dissent heyday), out of approximately 350 cert denials that were accompanied by a statement or opinion, all save one were in the nature of a dissent to the denial.[244] The one exception was an opinion respecting the denial of certiorari filed by Justice Stevens; in it, he agreed with a dissent by Justice Marshall asserting that a capital defendant had suffered a constitutional violation but argued that the claim was not ripe for review by the high court.[245]

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240. Justice Sotomayor filed 33 and 23 summary cert denial opinions in the 2018 and 2019 Terms, respectively, while Justice Thomas filed nine in the 2018 Term (not counting seven additional ones he filed in apparent response to ones filed by Justice Sotomayor in certain cases). A detailed tabulation of Justices Sotomayor's and Thomas's opinions from the 2018 and 2019 Terms is on file with the author.

241. *See, e.g.*, Williams v. United States, 141 S. Ct. 102 (2020) (Sotomayor, J., respecting denial of certiorari) ("I concur for the reasons set out in *St. Hubert v. United States*, 590 U.S. _____, 140 S. Ct. 1727, 207 L.Ed.2d 180 (2020) (Statement of Justice Sotomayor respecting the denial of certiorari).").

242. *See, e.g.*, Toney-El v. Lane, 476 U.S. 1178, 1178 (1986) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari) ("Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231, 96 S. Ct. 2909, 2950, 2973, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentence in this case.").

243. *See supra* notes 209, 215–16 and accompanying text.

244. *See supra* note 209 and accompanying text.

245. *See* Watkins v. Virginia, 475 U.S. 1099, 1099 (1986) (Stevens, J., opinion respecting denial of certiorari).

And in the 1990 Term, out of roughly 320 cert denials accompanied by some form of statement or opinion,[246] again all were dissents save for several exceptions: one "respecting" opinion filed by Justice Stevens justifying the denial in a capital case and two capital cases that generated three opinions concurring in the denial (two effectively dissenting to the denial but concurring because the case had been mooted by the petitioner's execution[247] and another essentially taking issue with the proceedings below but arguing that the claim was not yet ripe for review[248]).

During the period of cert denial quietude from roughly the 1995 Term to the 2010 Term, this trend continued where most cert denial activity—as infrequent as it was—mainly constituted dissents. Around once or twice a Term, however, Justice Stevens continued his seemingly inconsistent practice of filing an opinion respecting a denial explaining why he thought that action was appropriate even though he seemed to be taking issue with the ruling below.[249] Apart from this, there were only a handful of examples of this type of opinion filed by other Justices during this period; in them, the Justices would either make a statement respecting the denial or concur in it but, like Stevens, at the same time suggest a problem with the ruling below that might warrant the Court's review in a future case.

With the resurgence in cert denial activity over the past decade, the number of opinions respecting a denial or concurring therein has increased substantially relative to the number of dissents noted or filed. Although Justice Stevens retired just before the beginning of October Term 2010, Justice Sotomayor in particular, who joined the Court in 2009, appears to have adopted Stevens's practice of agreeing with a cert denial yet taking issue with the proceedings below. This is especially true of October Terms 2017, 2018, and 2019, where out of a total of 34 respecting or concurring cert denial opinions that were filed, Sotomayor wrote half (and even 60 percent of them if 8 respecting opinions she noted in summary form are included).[250] But

246. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 09-30-1990 & bef 10-6-1991) (providing 323 results less 3 non-cert denial notations or opinions).

247. *See* Hamilton v. Texas, 498 U.S. 908, 908–09 (1990) (Marshall, J., joined by Blackmun, J., concurring in denial of certiorari).

248. *See* Spencer v. Georgia, 500 U.S. 960, 960–61 (1991) (Kennedy, J., concurring in denial of certiorari).

249. *See supra* note 226 and accompanying text; *see also, e.g.*, Carpenter v. Gomez, 516 U.S. 981 (1995) (Stevens, J., opinion respecting denial of certiorari); Torres v. Mullin, 540 U.S. 1035 (2003) (Stevens, J., opinion respecting denial of certiorari); Thompson v. McNeil, 556 U.S. 1114 (2009) (Stevens, J., statement respecting denial of certiorari).

250. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari) +50 denied) /100 (justice /s concur! respect!) & Sotomayor) &

this practice is also on the rise among the other current Justices, who, save Justice Kagan, each filed between 3 to 8 respecting or concurring opinions over the past decade (Kagan only filed 1).[251] Indeed, in the past few Terms, not only did the total number of such opinions increase substantially to 14 per Term,[252] but they eclipsed the total number of nonsummary dissents to denials that were filed in recent years (12 for the 2018 Term and 10 for the 2019 Term).[253]

F. Current Certiorari Denial ORTO Activity

So, what does the overall mix of cert denial ORTO activity look like today? Let us look at three of the most recently completed Terms of Court for an illustration (October Terms 2017, 2018, and 2019), Terms in which that activity reached a higher volume than at any point since the 1970s and 1980s heyday of it. Out of 23 cert denial ORTOs filed in the 2017 Term,[254] 10 were filed by Justice Sotomayor.[255] All were filed in criminal cases where the Justice

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DA(aft 10-01-2017 & bef 10-05-2020) (providing 26 results) (detailed tabulation on file with author).

251. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s concur! respect!) & DA(aft 10-3-2010 & bef 10-05-2020) (providing 78 results) (detailed tabulation on file with author).

252. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s concur! respect!) & DA(aft 9-30-2018 & bef 10-05-2020) (providing 41 results less 13 non-cert denial concurring or respecting opinions) (detailed tabulation on file with author).

253. *See* Westlaw search using the following terms: advanced: (petition /s writ /s certiorari +50 denied /100 justice /s dissent!) & DA(aft 9-30-2018 & bef 10-05-2020) (providing 71 results less 49 non-cert denial dissenting opinions or ones in summary form) (detailed tabulation on file with author).

254. *See* Westlaw search using the following terms: advanced: ((petition /s writ /s certiorari) +50 denied) /100 (justice /s grant! dissent! denial concur! respect! regard! statement memo!) & DA(aft 09-30-2017 & bef 10-01-2018) (providing 27 results less seven non-cert denial ORTOs plus three additional cert denial ORTOs from cases where more than one were filed).

255. *See, e.g.*, Boyd v. Dunn, 138 S. Ct. 1286, 1286 (2018) (Sotomayor, J., dissenting from denial of certiorari); Campbell v. Ohio, 138 S. Ct. 1059, 1059 (2018) (Sotomayor, J., statement respecting denial of certiorari); Guardado v. Jones, 138 S. Ct. 1131, 1131–32 (2018) (Sotomayor, J., dissenting from denial of certiorari); Kaczmar v. Florida, 138 S. Ct. 1973, 1973 (2018) (Sotomayor, J., dissenting from denial of certiorari); Middleton v. Florida, 138 S. Ct. 829, 829 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari); Peede v. Jones, 138 S. Ct. 2360, 2360 (2018) (Sotomayor, J., joined by Ginsburg, J., opinion respecting denial of certiorari); Trevino v. Davis, 138 S. Ct. 1793, 1793–94 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari); Wessinger v. Vannoy, 138 S. Ct. 952, 952 (2018) (Sotomayor, J., dissenting from denial of certiorari); Floyd v. Alabama, 138 S. Ct. 311, 311 (2017) (Sotomayor, J., joined by Breyer, J., opinion respecting denial of certiorari); Truehill v. Florida, 138 S. Ct. 3, 3 (2017) (Sotomayor, J., joined by Ginsburg & Breyer, JJ., dissenting from denial of certiorari); Reeves v. Alabama, 138 S. Ct.

argued that the lower court committed some form of error, and all but one involved capital defendants.

In seven of these ORTOs, Justice Sotomayor dissented to the cert denials and argued that the Court should have corrected the putative errors,[256] and in three, she agreed that cert was properly denied but nonetheless criticized the lower court proceedings.[257] Several of Sotomayor's dissents had to do with her view that, in a series of capital cases, the Supreme Court of Florida had failed to properly consider an alleged capital sentencing defect in light of a recent decision of the U.S. Supreme Court. In one, she appeared to criticize the state supreme court for failing to discuss one of her earlier cert denial dissents as if it had an obligation to do so, specifically noting that it was "joined by two other Justices"[258] as though that fact heightened the obligation. In another filed two months later, she appeared to express satisfaction that the state supreme court had addressed the alleged problem more explicitly as a result of her cert denial dissents but nonetheless dissented again because the state court could not agree on a majority resolution of the issue.[259]

In three particular cases, Justice Sotomayor thought cert was properly denied. In one, she took the position that a jury selection problem was not properly raised but nonetheless asserted "that in the ordinary course, facts like these likely would warrant a court's intervention."[260] In another, she contended that a sentencing proceeding problem was again not properly raised but confidently asserted her belief that "the Ohio courts will be vigilant in

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22, 22 (2017) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from denial of certiorari).

256. *See, e.g.*, *Truehill*, 138 S. Ct. at 3 (Sotomayor, J., joined by Ginsburg & Breyer, JJ., dissenting from denial of certiorari); *Reeves*, 138 S. Ct. at 22–23 (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from denial of certiorari); *Middleton*, 138 S. Ct. at 829–30 (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari); *Kaczmar*, 138 S. Ct. at 1973 (Sotomayor, J., dissenting from denial of certiorari); *Wessinger*, 138 S. Ct. at 952–54 (Sotomayor, J., dissenting from denial of certiorari); *Guardado*, 138 S. Ct. at 1131–34 (Sotomayor, J., dissenting from denial of certiorari); *Trevino*, 138 S. Ct. at 1793–94, 1800 (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari).

257. *See, e.g.*, *Floyd*, 138 S. Ct. at 311 (Sotomayor, J., joined by Breyer, J., opinion respecting denial of certiorari); *Campbell*, 138 S. Ct. at 1059–61 (Sotomayor, J., opinion respecting denial of certiorari); *Peede*, 138 S. Ct. at 2360–61 (Sotomayor, J., joined by Ginsburg, J., opinion respecting denial of certiorari).

258. *See Guardado*, 138 S. Ct. at 1133 (Sotomayor, J., dissenting from denial of certiorari).

259. *See Kaczmar*, 138 S. Ct. at 1973 (Sotomayor, J., dissenting from denial of certiorari).

260. *Floyd*, 138 S. Ct. at 311 (Sotomayor, J., joined by Breyer, J., statement respecting denial of certiorari).

considering" the problem she had identified in the future.[261] In the last case, she asserted that federal law restricted the Court's review of an ineffective assistance of counsel claim but nonetheless complained that the lower court's ruling was "deeply concerning" because it "flatly contradicts this Court's precedent."[262]

Justice Thomas wrote the second highest number of cert denial ORTOs in the 2017 Term, issuing four dissents. In two of the dissents, Thomas trained his fire on the lower courts for upholding gun control legislation against a Second Amendment challenge[263] and striking down legislator-led prayers,[264] respectively. In both cases, he also leveled criticism at the Court itself for allowing these decisions to stand.[265] In the other two dissents, Thomas focused his criticism directly on the Court itself and its refusal to revisit precedents that, in his view, respectively, give federal administrative agencies too much deference[266] and Congress too much power under the Commerce Clause to legislate regarding Native American affairs.[267]

To round out the remaining cert denial ORTOs of the 2017 Term, Justices Breyer and Gorsuch each penned two and Justice Ginsburg penned one. Breyer wrote a dissent arguing that the death penalty violates the Eighth Amendment as it is being modernly administered and that the Court should have granted cert to consider the matter.[268] He also authored an opinion essentially arguing that the Arizona Supreme Court incorrectly upheld the State's death penalty law under high court precedents.[269] In the latter case, Breyer agreed with the cert denial decision due to an undeveloped record in the case yet essentially invited a new challenge on a more developed record.[270]

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261. *Campbell*, 138 S. Ct. at 1061 (Sotomayor, J., opinion respecting denial of certiorari).

262. *Peede*, 138 S. Ct. at 2361 (Sotomayor, J., joined by Ginsburg, J., opinion respecting denial of certiorari).

263. Silvester v. Becerra, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari).

264. Rowan Cnty. v. Lund, 138 S. Ct. 2564, 2564–66 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

265. *Silvester*, 138 S. Ct. at 945 (Thomas, J., dissenting from denial of certiorari) ("If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene."); *Lund*, 138 S. Ct. at 2564 (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) ("This Court's Establishment Clause jurisprudence is in disarray.").

266. Garco Constr., Inc. v. Speer, 138 S. Ct. 1052, 1052–53 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

267. Upstate Citizens for Equal., Inc. v. United States, 140 S. Ct. 2587, 2587–88 (2017) (Thomas, J., dissenting from denial of certiorari).

268. Jordan v. Mississippi, 138 S. Ct. 2567, 2571 (2018) (Breyer, J., dissenting from denial of certiorari).

269. Hidalgo v. Arizona, 138 S. Ct. 1054, 1057 (2018) (Breyer, J., joined by Ginsburg, Sotomayor, & Kagan, JJ., opinion respecting denial of certiorari).

270. *Id.*

Similar to one of Justice Thomas's ORTOs, both of Justice Gorsuch's ORTOs basically argued for revisiting precedents that, in his view, require too much judicial deference to federal administrative agencies in certain disputes.[271] But Gorsuch did not dissent to the cert denials, noting in one case that the issue was not cleanly presented[272] and seemingly inviting a future challenge in the other.[273] Finally, in her lone cert denial dissent, like many of the ORTOs filed by Justices Sotomayor and Breyer, Justice Ginsburg criticized the lower court ruling in a capital case that rejected a claim that Alabama's execution method violated the Eighth Amendment.[274]

Strikingly, every cert denial ORTO filed in the 2017 Term aligned with the authoring Justices' ideological predispositions. Every ORTO filed by the more liberal Justices (Ginsburg, Breyer, and Sotomayor) involved a criminal justice matter (almost always capital cases), while every ORTO issued by the more conservative Justices (Thomas and Gorsuch) either concerned the separation of powers in the administrative state, gun rights, religious freedom, or purported Commerce Clause overreaching by Congress.

In the 2018 Term, out of 26 cases in which one or more nonsummary cert denial ORTOs were filed, once again Justice Sotomayor accounted for the majority of them—penning 15. And once again, all of them except one related to criminal justice issues with most involving capital punishment. Sotomayor's ORTOs were almost evenly divided between dissents[275] and cases where she concurred in

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271. Scenic Am., Inc. v. Dep't of Transp., 138 S. Ct. 2, 2–3 (2017) (Gorsuch, J., joined by Roberts, C.J., opinion respecting denial of certiorari); E.I. Du Pont De Nemours & Co. v. Smiley, 138 S. Ct. 2563, 2563–64 (2018) (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., statement respecting denial of certiorari).

272. *Scenic Am.*, 138 S. Ct. at 3 (Gorsuch, J., joined by Roberts, C.J., & Alito, J., statement respecting denial of certiorari) ("[There are issues that,] I fear, only complicate our effort to reach the heart of the matter, for these attendant questions include 'difficult and close' jurisdictional issues that would have to be settled first.").

273. *Du Pont*, 138 S. Ct. at 2564 (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., statement respecting denial of certiorari) ("Respectfully, I believe this circuit split and these questions warrant this Court's attention. If not in this case then, hopefully, soon.").

274. Hamm v. Dunn, 138 S. Ct. 828, 828 (2018) (Ginsburg, J., joined by Sotomayor, J., dissenting from denial of certiorari).

275. *See* Zagorski v. Parker (*Zagorski I*), 139 S. Ct. 11, 11 (2018) (Sotomayor, J., joined by Breyer, J., dissenting from denial of certiorari); Brown v. United States, 139 S. Ct. 14, 14 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of certiorari); Zagorski v. Haslam (*Zagorski II*), 139 S. Ct. 20, 20–21 (2018) (Sotomayor, J., dissenting from denial of certiorari); Reynolds v. Florida, 139 S. Ct. 27, 32 (2018) (Sotomayor, J., dissenting from denial of certiorari); Miller v. Parker, 139 S. Ct. 399, 399 (2018) (Sotomayor, J., dissenting from denial of certiorari); Lance v. Sellers, 139 S. Ct. 511, 511 (2019) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from denial of certiorari); Abdur'rahman v. Parker, 139 S. Ct. 1533, 1533 (2019) (Sotomayor, J., dissenting from denial of

the denial but nonetheless expressed some sort of concern with the lower court ruling or proceedings.[276]

Half of Justice Sotomayor's dissents were directed at her conservative colleagues on the Court and their prior rulings in capital cases rejecting claims that certain execution methods were cruel and unusual.[277] She generally called for these rulings to be overturned; in one case, she called on the Court to stop the "madness."[278] In another dissent, she criticized the U.S. Court of Appeals for the Eleventh Circuit for, in her view, erring by giving "short shrift" to a claim that the government had improperly withheld exculpatory evidence—admonishing lower courts to take greater care with such appeals.[279] Representative of her ORTOs in cases where she agreed with the denial of cert, in one involving a capital case where the bailiff wore a potentially prejudicial tie, Sotomayor agreed it was not certworthy because a hearing had determined the jury had likely not seen it.[280] Nonetheless, she admonished lower courts to "intervene in future cases" by removing officials connected with such behavior.[281]

Once again, Justice Thomas held the runner-up position for issuing cert denial ORTOs during the 2018 Term. Thomas wrote two dissents and three concurrences to the denials. In one of his dissents, he chided his colleagues for causing confusion in the lower courts on an abortion-related question and accused his colleagues of abdicating their duty to fix the problem due to its "tenuous connection to a

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certiorari); McGee v. McFadden, 139 S. Ct. 2608, 2608 (2019) (Sotomayor, J., dissenting from denial of certiorari). As noted earlier, *see supra* note 231, seven of these cert denial ORTOs were connected with denials of applications for stays of execution.

276. Apodaca v. Raemisch, 139 S. Ct. 5, 5–7 (2018) (Sotomayor, J., statement respecting denial of certiorari); Townes v. Alabama, 139 S. Ct. 18, 18–20 (2018) (Sotomayor, J., statement respecting denial of certiorari); Schock v. United States, 139 S. Ct. 674, 674–75 (2019) (Sotomayor, J., statement respecting denial of certiorari); Tharpe v. Forde, 139 S. Ct. 911, 912 (2019) (Sotomayor, J., statement respecting denial of certiorari); Bowles v. Florida, 140 S. Ct. 2589, 2589 (2019) (Sotomayor, J., statement respecting denial of certiorari); Crutsinger v. Davis, 140 S. Ct. 2, 2–3 (2019) (Sotomayor, J., statement respecting denial of certiorari); Sparks v. Davis, 140 S. Ct. 6, 6 (2019) (Sotomayor, J., statement respecting denial of certiorari).

277. *See, e.g.*, *Zagorski II*, 139 S. Ct. at 21 (Sotomayor, J., dissenting from denial of certiorari); *Miller*, 139 S. Ct. at 399 (Sotomayor, J., dissenting from denial of certiorari); *Abdur'rahman*, 139 S. Ct. at 1533 (Sotomayor, J., dissenting from denial of certiorari).

278. *Miller*, 139 S. Ct. at 399 (Sotomayor, J., dissenting from denial of certiorari).

279. *McGee*, 139 S. Ct. at 2611–12 (Sotomayor, J., dissenting from denial of certiorari).

280. *Sparks*, 140 S. Ct. at 6 (Sotomayor, J., statement respecting denial of certiorari).

281. *Id.*

politically fraught issue . . . ."[282] In the other, he argued that a precedent barring military personnel from suing the United States for torts was flatly wrong and criticized his colleagues for failing to take the case up to say so.[283]

With respect to his ORTOs agreeing that cert was properly denied, in two of them, Justice Thomas nonetheless used the opportunity to criticize, and call for a reconsideration of, two major precedents—one establishing the "undue burden" standard for abortion regulation challenges[284] and the other establishing the "actual malice" standard for defamation actions against public figures (arguing that the latter standard was inconsistent with an originalist view of the First Amendment).[285] Thomas used the occasion of the third such ORTO to attack Justice Breyer for accusing the Court's conservative majority of acting arbitrarily and unfairly in an earlier dissent where the cert denial allowed an execution to proceed.[286]

Additionally, Justices Alito and Gorsuch each penned two cert denial ORTOs that Term. Alito criticized two free speech rulings by the U.S. Court of Appeals for the Ninth Circuit, one in favor of a prisoner who used abusive and disrespectful language towards prison officials[287] and the other rejecting the right of a high school football coach to pray during games.[288] The former case, Alito argued, merited cert and likely reversal,[289] while he believed the latter case had too messy of a record to warrant cert at the time.[290] Gorsuch filed two dissents to denials, one essentially accusing the lower court of condoning a Confrontation Clause violation with respect to criminal lab testing results (but largely blaming the Court for creating the confusion)[291] and the other essentially arguing that the original

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282. Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 410 (2018) (Thomas, J., joined by Alito & Gorsuch, JJ., dissenting from denial of certiorari).

283. Daniel v. United States, 139 S. Ct. 1713, 1713–14 (2019) (Thomas, J., dissenting from denial of certiorari).

284. Harris v. W. Ala. Women's Ctr., 139 S. Ct. 2606, 2607 (2019) (Thomas, J., concurring in denial of certiorari).

285. McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

286. Price v. Dunn, 139 S. Ct. 1533 (2019) (Thomas, J., joined by Alito & Gorsuch, JJ., concurring in denial of certiorari).

287. Dahne v. Richey, 139 S. Ct. 1531, 1531–32 (2019) (Alito, J., joined by Thomas & Kavanaugh, JJ., dissenting from denial of certiorari).

288. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 635–37 (2019) (Alito, J., joined by Thomas, Gorsuch, & Kavanaugh, JJ., statement respecting denial of certiorari).

289. *Dahne*, 139 S. Ct. at 1532 (Alito, J., joined by Thomas & Kavanaugh, JJ., dissenting from denial of certiorari).

290. *Kennedy*, 139 S. Ct. at 635 (Alito, J., joined by Thomas, Gorsuch, & Kavanaugh, JJ., statement respecting denial of certiorari).

291. Stuart v. Alabama, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari).

meaning of the Sixth Amendment requires jurors to find facts supporting orders of restitution and that the lower court erred in holding otherwise.[292]

Justice Breyer and then-freshman Justice Kavanaugh each filed one ORTO respecting cert denials. Breyer essentially urged that the Court take up the constitutionality of continuing to hold 9/11 detainees at Guantanamo Bay so long after that event, without explaining why he was not dissenting to the denial in that particular case.[293] Kavanaugh argued that the New Jersey Supreme Court erred under recent high court precedent in ruling that withholding historic preservation funds from churches and other religious buildings did not violate the Free Exercise Clause, but he agreed that the case was not certworthy because of an uncertain factual record and the recency of the Court's precedent.[294]

Once again, the Term's ORTOs aligned largely with the known ideological preferences of the authoring Justices. Liberal Justices Sotomayor and Breyer wrote mainly in the area of criminal rights; conservative Justices Thomas, Alito, Gorsuch and Kavanaugh were more concerned with protecting religious freedom, narrowing abortion rights, and revisiting precedent in light of originalist views of the Constitution.

Relatedly, the 2018 Term also saw the use of cert denial ORTOs to essentially wage ideological warfare over the death penalty. For instance, as noted earlier, in a series of 2017 Term cert denial dissents, Sotomayor objected to the Florida Supreme Court's application of certain United States Supreme Court precedent in capital sentencing proceedings.[295] Towards the beginning of the 2018 Term, she renewed her objections in another cert denial dissent.[296] In that case, Breyer added his own ORTO saying he would not take up Sotomayor's issue in that particular case, but he went on to renew his claims that the death penalty generally violated the Eighth

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292. Hester v. United States, 139 S. Ct. 509, 509–11 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial of certiorari) ("The Ninth Circuit itself has conceded that allowing judges, rather than juries, to decide the facts necessary to support restitution orders isn't 'well-harmonized' with this Court's Sixth Amendment decisions." (quoting United States v. Green, 722 F.3d 1146, 1151 (9th Cir. 2013))).

293. Al-Alwi v. Trump, 139 S. Ct. 1893, 1894 (2019) (Breyer, J., statement respecting denial of certiorari).

294. Morris Cnty. Bd. of Chosen Freeholders v. Freedom from Religion Found., 139 S. Ct. 909, 909–11 (2019) (Kavanaugh, J., joined by Alito & Gorsuch, JJ., statement respecting denial of certiorari).

295. Truehill v. Florida, 138 S. Ct. 3, 3–4 (2017) (Sotomayor, J., joined by Ginsburg & Breyer, JJ., dissenting from the denial of certiorari); Middleton v. Florida, 138 S. Ct. 829, 829–30 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting from the denial of certiorari).

296. Reynolds v. Florida, 139 S. Ct. 27, 32–36 (2018) (Sotomayor, J., dissenting from denial of certiorari).

Amendment.[297] That prompted Thomas to add his own ORTO attacking Breyer's arguments, asserting that he was "writ[ing] separately to alleviate Justice Breyer's concerns."[298]

Moreover, a similar dispute between Justices Breyer and Thomas replayed itself later in the Term. In another capital case in which the conservative Justices voted to vacate lower court stays late at night and let an execution proceed, Justice Breyer, joined by the three other liberal Justices, wrote a dissenting ORTO charging that the proceedings had been arbitrary and accusing the majority of acting unfairly.[299] Thomas, joined by Justices Alito and Gorsuch, responded to Breyer in a cert denial concurring ORTO filed a few weeks later, essentially accusing Breyer and the other liberal Justices of abetting "gamesmanship" by capital defendants to avoid execution.[300]

The pattern of cert denial ORTOs filed in October Term 2019 generally followed that of the preceding two Terms. Once again, Justices Sotomayor and Thomas were by far the most prolific filers, except that Thomas assumed the top spot this Term—filing one more than Sotomayor. Thomas filed 9 of the 24 ORTOs filed in the Term; 8 were dissents,[301] and 1 was a concurrence in the denial.[302] Thomas's dissents were a combination of ORTOs criticizing lower court rulings (and often the Court itself for failing to review them) and ORTOs arguing for the Court itself to reconsider precedent with which he plainly disagreed. In the former category, Thomas most notably again criticized a perceived "blatant defiance" by lower courts of the Court's gun rights rulings and the high court's "failure to protect the

297. *Id.* at 27–29 (Breyer, J., statement respecting denial of certiorari).

298. *Id.* at 29–32 (Thomas, J., concurring in denial of certiorari).

299. Dunn v. Price, 139 S. Ct. 1312, 1313–15 (2019) (Breyer, J., joined by Ginsburg, Sotomayor, & Kagan, JJ., dissenting from grant of application to vacate stay).

300. Price v. Dunn, 139 S. Ct. 1533, 1540 (2019) (Thomas, J., joined by Alito & Gorsuch, JJ., concurring in denial of certiorari).

301. *See* Baldwin v. United States, 140 S. Ct. 690 (2020) (Thomas, J., dissenting from denial of certiorari); VF Jeanswear LP v. Equal Emp. Opportunity Comm'n, 140 S. Ct. 1202 (2020) (Thomas, J., dissenting from denial of certiorari); Robinson v. Dep't of Educ., 140 S. Ct. 1440 (2020) (Thomas, J., joined by Kavanaugh, J., dissenting from denial of certiorari); Wexford Health v. Garrett, 140 S. Ct. 1611 (2020) (Thomas, J. dissenting from denial of certiorari); Jarchow v. State Bar of Wis., 140 S. Ct. 1720 (2020) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); Rogers v. Grewal, 140 S. Ct. 1865 (2020) (Thomas, J., joined by Kavanaugh, J., except for Part II, dissenting from denial of certiorari); Baxter v. Bracey, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari); Kansas v. Boettger, 140 S. Ct. 1956 (2020) (Thomas, J., dissenting from denial of certiorari).

302. Lipschultz v. Chartered Advanced Servs. (MN), LLC, 140 S. Ct. 6, 7 (2019) (Thomas, J., joined by Gorsuch, J., concurring in denial of certiorari).

Second Amendment."[303] He also took the opportunity to argue that the original meaning of the Second Amendment protects the right to carry firearms in public.[304]

In the latter category, he once again called on the Court to reconsider precedent he believes improperly empowers administrative agencies[305] and unions[306] as well as doctrines such as qualified immunity he believes the Court had no business making up.[307] In his one concurrence to the denial, Justice Thomas argued for a narrowing of federal preemption of state laws based on his originalist views of the Supremacy Clause, even though he conceded the issue had not been raised in that case.[308]

In contrast to Thomas, Justice Sotomayor filed seven ORTOs concurring in the denial[309] and only one dissenting to it.[310] Consistent with prior Terms, virtually all of her ORTOs complained about perceived lower court errors in criminal cases (often of a capital nature) and admonished lower court judges to correct the errors or consider her objections carefully in future proceedings. This was so even though in most of these cases she agreed with her colleagues that the cases were not certworthy for a variety of reasons.[311]

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303. *Rogers*, 140 S. Ct. at 1867, 1875 (Thomas, J., joined by Kavanaugh, J., as to all but Part II, dissenting from denial of certiorari).

304. *Id.* at 1868.

305. *Baldwin*, 140 S. Ct. at 690–91 (Thomas, J., dissenting from denial of certiorari).

306. *Jarchow*, 140 S. Ct. at 1720 (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

307. Baxter v. Bracey, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from denial of certiorari).

308. Lipschultz v. Charter Advanced Servs. (MN), LLC, 140 S. Ct. 6, 7–8 (Thomas, J., joined by Gorsuch, J., concurring in denial of certiorari).

309. Rhines v. Young, 140 S. Ct. 8, 8–9 (2019) (Sotomayor, J., statement respecting the denial of certiorari); Isom v. Arkansas, 140 S. Ct. 342, 343–44 (2019) (Sotomayor, J., statement respecting the denial of certiorari); Schexnayder v. Vannoy, 140 S. Ct. 354, 354–55 (2019) (Sotomayor, J., statement respecting the denial of certiorari); Cottier v. United States, 140 S. Ct. 354, 354 (2019) (Sotomayor, J., statement respecting the denial of certiorari); Reed v. Texas, 140 S. Ct. 686–90 (2020) (Sotomayor, J., statement respecting the denial of certiorari); Halprin v. Davis, 140 S. Ct. 1200, 1200–02 (2020) (Sotomayor, J., statement respecting the denial of certiorari); St. Hubert v. United States, 140 S. Ct. 1727, 1727–30 (2020) (Sotomayor, J., statement respecting the denial of certiorari). In *Rhines v. Young*, the Court simultaneously denied cert and an application for stay of execution. *See* 140 S. Ct. 8 (2019) (mem.).

310. Peithman v. United States, 140 S. Ct. 340, 340 (2019) (Sotomayor, J., dissenting from denial of certiorari).

311. *See, e.g.*, *Reed*, 140 S. Ct. at 689–90 (Sotomayor, J., statement respecting the denial of certiorari).

Conservative Justices Alito, Gorsuch, and Kavanaugh filed a total of five concurrences to denials[312] and one dissent.[313] Also consistent with prior Term patterns, two of the concurrences complained about lower or high court rulings deemed not sufficiently protective of religious freedom rights,[314] and two called for curtailing the power of the modern administrative state.[315]

In one of the religious freedom cases—in which Justice Kavanaugh did not participate because he joined the Court too late—Justice Gorsuch penned an ORTO arguing that the lower court had improperly countenanced discrimination between religious and commercial speech, but nonetheless stating he was concurring in the cert denial "[b]ecause the full Court is unable to hear this case . . . ."[316] In other words, he was basically saying "if Kavanaugh could have participated, I know my new colleague would have voted in favor of the religious plaintiff, and our new majority would then have granted cert and reversed." In one of the cases calling for curtailing the power of the modern administrative state, Kavanaugh went so far as to assert that he supported the views recently expressed by his fellow conservatives in a case calling for the narrowing of Congress's power to delegate power to administrative agencies—essentially declaring that with his appointment to the Court there were now five votes to accomplish this objective, so bring on a new challenge.[317]

In sum, once again the Justices used the cert denial ORTO process to push their favored ideological causes and overwhelmingly

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312. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari); Patterson v. Walgreen Co., 140 S. Ct. 685, 685–86 (2020) (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in the denial of certiorari); Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 789–91 (2020) (Gorsuch, J., statement respecting the denial of certiorari); Avery v. United States, 140 S. Ct. 1080, 1080–81 (2020) (Kavanaugh, J., statement respecting the denial of certiorari); Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 140 S. Ct. 1198, 1199–1200 (2020) (mem.) (Gorsuch, J., joined by Thomas, J., statement respecting the denial of certiorari).

313. Nat'l Rev., Inc. v. Mann, 140 S. Ct. 344, 344–48 (2019) (Alito, J., dissenting from denial of certiorari).

314. *Patterson*, 140 S. Ct. at 685–86 (mem.) (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in the denial of certiorari); *Archdiocese of Wash.*, 140 S. Ct. at 1199–1200 (Gorsuch, J., joined by Thomas, J., statement respecting the denial of certiorari).

315. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari); *Guedes*, 140 S. Ct. at 789–91 (Gorsuch, J., statement respecting the denial of certiorari).

316. *Archdiocese of Wash.*, 140 S. Ct. at 1199 (Gorsuch, J., joined by Thomas, J., statement respecting the denial of certiorari).

317. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari).

did so in cases where they agreed with their colleagues that the case did not warrant review by the Court.

II. HOW ORTOS RELATING TO DENIALS OF CERTIORARI ARE NOT A PROPER EXERCISE OF THE JUDICIAL POWER AND VIOLATE SEPARATION OF POWERS PRINCIPLES

Compared to the law-making and law-executing branches of the federal government, the framers of the Constitution did not spill much ink on creating and designing the judicial branch.[318] Unlike Articles I and II, which expressly lay out the legislative and executive powers that Congress and the president, respectively, possess,[319] Article III simply states that the "judicial Power of the United States" vests in "one supreme Court" and such lower federal courts as Congress might choose to create.[320] Without defining the judicial power, the Article goes on to extend it to certain types of "[c]ases" or "[c]ontroversies"—most notably, cases involving federal law or the federal or state governments as parties.[321]

Hence, precisely what the framers meant by "judicial power" and a "case" or "controversy" were not defined or self-evident. But against the English and early-American backdrop the framers—many of whom were lawyers—were writing, it seems clear they were creating an independent judiciary to impartially interpret and apply the law to adjudicate legal disputes.[322] In other words, the judiciary was intended to have a fairly limited and specialized role in the new republic, in contrast to the democratically accountable political branches that would largely be responsible for establishing and administering the new federal government.

That this was the vision for the federal judiciary is supported by important pieces of evidence from the Constitutional Convention as well as the postconvention ratification debates. James Madison and other key framers forcefully made several attempts during the

318. *See* Barry P. McDonald, *Should the Supreme Court Matter So Much?*, N.Y. TIMES (Oct. 11, 2018), https://www.nytimes.com/2018/10/11/opinion/should-supreme-court-matter.html ("Of the roughly three and a half long pieces of inscribed parchment that make up the Constitution, the first two pages are devoted to designing Congress. Most of the next full page focuses on the president. The final three-quarters of a page contains various provisions, including just five sentences establishing a 'supreme court,' any optional lower courts Congress might create and the types of cases those courts could hear.").

319. *See* U.S. CONST. art. I, § 8; *id.* art. II, § 2.

320. U.S. CONST. art. III, § 1.

321. U.S. CONST. art. III, § 2, cl. 1.

322. *See, e.g.*, Robert J. Pushaw, Jr., *The Heritage Guide to the Constitution, Judicial Vesting Clause*, HERITAGE FOUND., https://www.heritage.org/constitution/#!/articles/3/essays/102/judicial-vesting-clause (last visited Oct. 23, 2021) ("Since 1787, the central meaning of 'judicial power' has remained remarkably consistent: neutrally deciding a case by interpreting the law and applying it to the facts, then rendering a final and binding judgment.").

convention to get the delegates to include a provision creating a "council of revision" in the Constitution.[323] This council, which would have consisted of the executive and a number of Supreme Court Justices, would wield a veto power over proposed laws before they went into effect.[324] The concern driving this proposal was that since Congress would theoretically (and properly) be the most powerful branch of government in a representative democracy, an additional check was needed to ensure it would make wise laws and not improperly encroach on the designated functions of the other branches.[325] It was also argued that vesting a legislative veto in the executive alone would not be a strong enough check because the president would not be strong enough to oppose a determined legislature.[326]

However, this proposal was ultimately defeated in favor of placing a veto in the executive alone after several other prominent framers objected to having judges participate on such a council.[327] In addition to voicing general separation of powers concerns, a more specific objection expressed was that it was improper for judges to be involved in the business of politics and lawmaking.[328] For one thing, "[i]t was quite foreign from the nature of [the] office to make them judges of the policy of public measures."[329] And "[a]s Judges they are not presumed to possess any peculiar knowledge of the mere policy of public measures."[330] For another, "it will involve [judges] in parties and give a previous tincture to their opinions."[331] Relatedly, "Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation."[332] In short, these framers argued that judges should not be involved in politics and lawmaking because they enjoyed no special competence to determine public policy—matters better left to the elected

323. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Ferrand ed., 1911) [hereinafter 1 THE RECORDS]; *id.* at 97–104, 138–40; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 73–80, 298–99 (Max Ferrand ed., 1911) [hereinafter 2 THE RECORDS].

324. *See* 1 THE RECORDS, *supra* note 323, at 21.

325. *See, e.g.*, 2 THE RECORDS, *supra* note 323, at 74 (containing James Madison's assertion that "[e]xperience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex").

326. *See, e.g.*, *id.* (according to Madison's notes, George Mason argued that having judges participate on the council "would give a confidence to the Executive, which he would not otherwise have, and without which the Revisionary power would be of little avail").

327. *See, e.g.*, 1 THE RECORDS, *supra* note 323, at 140.

328. *See, e.g.*, 2 THE RECORDS, *supra* note 323, at 79–80 ("The Judges ought never to give their opinion on a law till it comes before them.").

329. 1 THE RECORDS, *supra* note 323, at 97–98 (Elbridge Gerry).

330. 2 THE RECORDS, *supra* note 323, at 73 (Nathaniel Ghorum).

331. *Id.* at 298 (Charles Pinckney).

332. 1 THE RECORDS, *supra* note 323, at 98 (Rufus King).

representatives of the people—and such involvement risked undermining the objectivity and impartiality the framers were striving for by creating independent Article III judges.

Some delegates also objected to the proposed council on the ground that judges could protect their own branch against congressional encroachments by setting "aside laws as being [against] the Constitution."[333] In other words, in early glimmerings of the notion of judicial review—that courts have the right to declare acts of the political branches unconstitutional—it was urged that judges could invalidate laws and other acts that transgressed the limits on Congress's power established by the Constitution.

This objection to the council, however, was met with some skepticism. Certain delegates claimed that judges could only refuse to give effect to laws that clearly and obviously transgressed the limits of Congress's power set out in the Constitution.[334] Other delegates flatly rejected the idea that judges could invalidate laws duly enacted by Congress.[335] It is likely that this skepticism about judicial review reflected the idea that it was improper in a democracy for unelected judges to invalidate laws passed by the people's representatives for purportedly being inconsistent with the Constitution. These misgivings about the ex post review of laws by judges, however, were not sufficient to overcome other objections to including judges in a council that would perform ex ante review. But this debate highlighted the framers' view of the judiciary as performing a limited and specialized role in our constitutional system—even if that role was not fully defined.

In addition to the framers' disapproval of judges participating in the lawmaking function, there were other important pieces of evidence pointing towards this narrow view of the judicial function. During convention debates, South Carolina delegate Charles Pinckney proposed giving both houses of Congress and the president the right to require opinions from the Supreme Court "upon important questions of law, and upon solemn occasions."[336] This proposal was referred to a committee and never discussed or acted upon.[337] Especially in light of the fact that certain contemporary state constitutions, such as the landmark Massachusetts Constitution of 1780 drafted by John Adams (one of the convention delegates from

333. *Id.* at 97 (Elbridge Gerry).

334. *See* 2 THE RECORDS, *supra* note 323, at 73 (James Wilson); *id.* at 78 (George Mason).

335. *See id.* at 298 (John Mercer); *id.* at 299 (John Dickenson).

336. *See, e.g.*, *id.* at 340–41. This language was seemingly copied verbatim from the Massachusetts Constitution of 1780. *See infra* note 338.

337. *See* Cong. Rsch. Serv., *Passage of Orders, Resolutions, or Votes*, CONSTITUTION ANNOTATED [hereinafter CONSTITUTION ANNOTATED], https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE_00001243/ (last visited Oct. 21, 2021).

that State), *did* authorize the political branches to require so-called "advisory opinions" from their supreme court outside of litigation,[338] it seems the framers were making a conscious decision to confine the federal judicial power to resolving actual legal disputes.

Further, according to Madison's notes, when a convention delegate proposed expanding the jurisdiction of the Court from all cases arising under laws passed by Congress to include all cases arising under the Constitution, Madison objected that "it was going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution."[339] Instead, he thought such jurisdiction should be "limited to cases of a Judiciary Nature" and "[t]he right of expounding the Constitution in cases not of this nature ought not to be given to that Department."[340] Madison then recorded that the delegate's proposal was agreed to without objection, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature."[341]

This particular exchange suggests two things. First, not all "cases" or disputes involving the Constitution were thought to be appropriate for judicial resolution. Second, to the extent a constitutional dispute did not involve one traditionally thought to be appropriate for such resolution, it was improper for the Supreme Court to be weighing in on such matters. Why? Presumably, the answer relates to the specialized role of the judiciary and the notion that government officials who are not answerable to the people should not be deciding important questions about the nation's fundamental law except as necessary to adjudicate litigated cases (similar to the concerns expressed about judicial review as noted earlier).

After the Convention, to the extent the state ratification debates addressed these matters, they also supported the vision of a limited and specialized role for the federal judiciary. Most notably, in the face of antifederalist writings expressing alarm that federal courts would exercise too much power under the vague and expansive wording of Article III, Alexander Hamilton penned the famous *Federalist No. 78*. In it, he responded that the judiciary would be the weakest branch of government, especially because its role was limited to rendering judgments (unlike the "will" Congress would exercise and the "force" the executive would wield).[342]

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338. *See* MASS. CONST. of 1780, ch. 3, art. II ("Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court upon important questions of law, and upon solemn occasions.").

339. 2 THE RECORDS, *supra* note 323, at 430.

340. *Id.*

341. *Id.*

342. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may

Certain seminal events following the ratification of the Constitution and the creation of the new federal government confirmed the aforementioned views of the judiciary's role. The 1792 proceedings in *Hayburn's Case*[343] pertained to a law assigning to federal circuit courts the duty of ascertaining the amount of pensions to which disabled military veterans were entitled.[344] The law also provided that the courts' rulings could then be reviewed and possibly altered by the Secretary of War or even Congress.[345] Although the validity of the law was never ruled on by the Supreme Court because Congress changed the law before that could happen, Chief Justice John Jay and a number of other Justices either ruled on the law or expressed their views on it while serving on the circuit courts.[346] These Justices were essentially unanimous that the law was invalid, both because it assigned duties to circuit courts that were not judicial in nature and because the courts' judgments were not final—they were alterable by the executive or legislative branches of the government.[347]

And just a year later, on behalf of President George Washington, Secretary of State Thomas Jefferson wrote a letter to the Justices of the Court asking whether they were willing to provide advice on the construction of treaties and other international legal matters that would ordinarily not come before the Court in the context of litigation.[348] The Justices respectfully answered in the negative, basically explaining that such "extrajudicial[]" activities would be

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truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. This simple view of the matter . . . proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power . . . ."); *see also* CONSTITUTION ANNOTATED, *supra* note 337 ("Although the ratification debates that followed the Convention cast little light on the meaning of Article III's 'Case or Controversy' language, they do at least reveal a consensus that federal judges would operate within a limited sphere. Faced with Anti-Federalist criticisms that the Constitution would empower federal judges to 'enlarge the sphere of their power beyond all bounds,' supporters of the Constitution argued in the Federalist Papers that 'the judicial authority' would have 'precise limits beyond which the federal courts cannot extend their jurisdiction.'" (citations omitted)).

343. 2 U.S. 409 (1792).

344. *Id.* at 409.

345. *Id.* at 410.

346. *Id.* at 410 n.*.

347. *Id.*

348. Letter from Thomas Jefferson, Sec'y of State, to John Jay, Chief Just. of the Sup. Ct. (July 18, 1793), https://www.loc.gov/resource/mtj1.018_1215_1215/?st=text.

inconsistent with separation of powers principles and the Supreme Court's role as a tribunal of last resort.[349]

Over a hundred years later, the Court relied on much of the foregoing history, as well as subsequent developments in the law, to establish the basis for its modern view of the Article III judicial power. In the 1911 case of *Muskrat v. United States*,[350] the Court held that an act of Congress was unconstitutional because it authorized private parties to obtain a ruling from the Court regarding the constitutionality of a related law without being involved in a real dispute regarding it.[351] The Court defined the judicial power as "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[352] Then, the Court stressed that under Article III this power could only be employed to resolve legal disputes: "[B]y the express terms of the Constitution," the Court reasoned, "the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend . . . ."[353]

And in recapping its ruling at the end of a lengthy opinion, the Court reiterated that the

> judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. . . . If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power, and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action,—a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.[354]

Muskrat can be seen as setting the stage for two pillars of the Court's modern justiciability doctrines. The first is a ban on federal courts issuing advisory opinions, which today is basically understood to mean the issuance of rulings outside situations where they are not pronouncing final judgments to resolve disputes between adversarial litigants.[355] As certain scholars have demonstrated, a prohibited

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349. Letter from John Jay, Chief Just. of the Sup. Ct., to George Washington, President of the U.S. (Aug. 8, 1793), http://courses.missouristate.edu/ftmiller/letteradvisoryopin.htm.

350. 219 U.S. 346 (1911).

351. *Id.* at 357–61.

352. *Id.* at 356 (citation omitted).

353. *Id.*

354. *Id.* at 361–62.

355. *See, e.g.*, California v. Texas, 141 S. Ct. 2104, 2116 (2021); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 462 (1996).

advisory opinion in the founding days was thought of as a formal request for a judicial opinion from one of the political branches of government outside of a litigated case—such as occurred in the episode involving President Washington's request for advice.[356] But by casting the law struck down in *Muskrat* as requiring the Court to give "opinions in the nature of advice" whenever the parties to litigation lack a true adversarial posture,[357] the Court laid the groundwork for the more expansive definition of an advisory opinion that it uses today.

The second and related pillar is the requirement of adverse litigants in order to have a justiciable case or controversy (one could view this as the flipside of the ban on advisory opinions).[358] Modernly, the Court implements this requirement by requiring a plaintiff to demonstrate that she has standing, that her claim is ripe for review, and that the claim remains a live controversy through all stages of litigation (the nonmootness requirement).[359] Again, however, some scholars have argued that the requirement of adverse litigants is questionable from an originalist perspective, noting that early courts often adjudicated cases lacking adverse litigants (such as in bankruptcy and immigration matters).[360] Nonetheless, *Muskrat* set the stage for the more restrictive view of justiciable cases or controversies utilized today.

While *Muskrat* emphasized the case or controversy requirement of Article III, the Court more recently decided a case elaborating on that decision's definition of the judicial power (one might say more of a *Hayburn* issue than a "Washington request for advice" issue). In *Plaut v. Spendthrift Farm, Inc.*,[361] the Court held that an act of Congress requiring federal courts to reopen final judgments dismissing certain cases for missing the pertinent statute of limitations (effectively giving litigants a second chance to maintain their actions) violated separation of powers principles because the law essentially made the final judgments alterable by Congress—and hence constituted an improper "assumption of judicial power" by that

356. *See, e.g.*, Pushaw, *supra* note 355, at 442–44.

357. *Muskrat*, 219 U.S. at 362.

358. *See* U.S. CONST. art. III, § 2; *see also* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 297–98 (1979) (explaining that the requirement has been interpreted to only allow consideration of constitutional issues as necessary to resolves live cases).

359. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 94–95 (1968).

360. *See generally*, *e.g.*, James E. Pfander, *Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170 (2018) (providing examples of cases where there was no standing or adverse parties).

361. 514 U.S. 211 (1995).

body.[362] Relying partially on *Hayburn's Case*, the Court reasoned that:

> "[t]he record of history shows . . . the Framers crafted [Article III] with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a judicial Power is one to render dispositive judgments.'"[363]

After *Muskrat*, its progeny, and *Plaut*, it seems clear that the essential predicate for a proper exercise of the judicial power under Article III is the existence of an actual legal dispute between adverse parties that a court can redress through the issuance of a dispositive judgment. Where such conditions do not exist, any ruling would amount to a prohibited advisory opinion. And while legal historians might question whether the modern adversity requirement and this capacious conception of an advisory opinion comport with original understandings of Article III,[364] even these scholars would likely grant that on an accurate historical view the judicial power was not to be exercised outside of some form of legal dispute that a court could definitively resolve—even if some litigants were not truly adversarial.

Notwithstanding this historical debate, the Court justifies its modern reading of Article III in a way that would likely resonate with the founding generation. Time and again, the Court defends its modern justiciability doctrines—and particularly the requirement of standing—as being necessary to confine the judiciary to its proper role in our democratic system and avoid improper encroachments on the political branches of government. As the Court asserted in a recent case, to allow a plaintiff to sue to vindicate a "general interest common to all members of the public"—such as an alleged violation of law by a political branch that did not harm the plaintiff in a special way—"would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. . . . "[365] Continuing, the Court admonished that "[w]e should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch."[366] This is why, the Court declared in another recent case, "federal courts decide only the rights of individuals . . . . [They] do

362. *Id.* at 224.

363. *Id.* at 218–19 (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE WES. L. REV. 905, 926 (1989)).

364. *See supra* note 360 and accompanying text.

365. Carney v. Adams, 141 S. Ct. 493, 499 (2020) (quoting United States v. Richardson, 418 U.S. 166, 188 (1974)).

366. *Id.*

not possess a roving commission to publicly opine on every legal question."[367]

Such justifications sound an awful lot like the reasons why the framers were likely so divided on the issue of judicial review and why Madison expressed concern about the use of vague and broad language to extend the judicial power to disputes involving the Constitution.[368] They also implicate the concern expressed by certain framers that judges had no warrant to be opining on matters of public policy more appropriately left to the political branches of government.[369] And as especially pertinent to the propriety of issuing cert denial ORTOs, these justifications also recognize that the limited and specialized role assigned to the federal judiciary in our system bars judges from "publicly opin[ing]" on legal questions except as necessary to definitively resolve and adjust the rights of formal litigants.

Given that the Court itself recognizes all of this, it is puzzling indeed as to why many of its members do not see the contradiction in issuing what amounts to advisory opinions on important legal questions in connection with orders stating that the Court is denying a petition to take up and decide a case. Clearly, the Court is not rendering any sort of dispositive judgment in a matter when four of its members decline to vote to grant a cert petition. Indeed, one could say that cert denial orders are essentially representations that a petition has failed by inaction—that at least six Justices, and usually more, do not believe high court action on a case is merited or desirable. And even if a cert denial order could somehow be considered a judgment, the Court is certainly not issuing it to resolve a live case or controversy. Rather, that order states that it is explicitly declining to take up the dispute.

While this problem inheres in the issuance of any type of cert denial ORTO, it seems particularly acute for those where a Justice is purporting to criticize and correct a lower court judgment or to signal litigants that a particular challenge would be well received by a majority of the Court. As to the former type, that criticism has no official legal effect whatsoever, comprising, as Justice Stevens contended, "the purest form of dicta."[370] And this is true whether or

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367. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (quoting Marbury v. Madison, 5 U.S. 137, 170 (1803)).

368. *See* 2 THE RECORDS, *supra* note 323 and accompanying text.

369. *See supra* notes 328–32 and accompanying text.

370. Singleton v. Comm'r of Internal Revenue, 439 U.S. 940, 944–45 (1978) (Stevens, J., opinion respecting denial of certiorari). Arguably, where a Justice issues a dissenting cert denial ORTO when it is combined with a dissent to an application for a stay, as certain Justices have done in connection with the Court's denial of stays of execution that typically turn on whether a defendant has raised a certworthy issue that might justify postponing the execution, there is more legal justification for the practice. In such situations, the Court is taking up an appeal

not some lower court judges choose to treat such opinions as controlling. With respect to the latter type, inviting certain legal claims to be brought to the Court is basically the opposite of issuing a final judgment to resolve a live dispute—it is actually creating one where perhaps a particular legal challenge would not have been made in the first place. In other words, far from being the passive resolver of disputes brought to it as the Constitution envisions, Justices are affirmatively acting to generate controversies—conducting themselves more as political actors than judicial ones.

And these problems are only highlighted and exacerbated in cases where a Justice *agrees* that they are not certworthy and the Court should not take cognizance of them. At least where the Justice disagrees with a cert denial and files a dissent, even if she lacks constitutional authority for taking a position on the merits, she can claim some moral or ethical ground for her public proclamation. But even that justification seems to slip away when the Justice is "publicly opining" on legal questions that she herself says do not merit the Court's review. Such concurring or "respecting" cert denial ORTOs appear to be nakedly gratuitous. And, as noted, these types of ORTOs are becoming the most popular type issued by Justices.[371]

In this regard, even Justices Frankfurter and Stevens, the most vocal critics of issuing cert denial ORTOs, fell short. They mainly based their criticisms on the fact that such ORTOs constituted "the purest form of dicta" and were potentially misleading.[372] But they never went beyond these criticisms to question whether the practice was consistent with the Court's Article III constraints. Moreover, as discussed, they themselves appeared unable to resist the temptation to occasionally write statements respecting cert denials that either took or heavily suggested their positions on the merits of the question the Court was declining to answer.[373]

Other legal commentators, although not addressing cert denial ORTOs, have recognized the judicial power problem in the mere practice of promulgating dicta even where the Court *is* deciding a live case or controversy. As Judge Pierre Leval of the U.S. Court of Appeals for the Second Circuit wrote, "[g]iven that the court's sole

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and rendering a dispositive judgment to resolve a live legal dispute by rejecting the defendant's stay application on the merits. On the other hand, even in these cases the merits ruling is essentially a determination that a question is not sufficiently certworthy for the Court to grant review. Hence, one could argue that it is not a definitive resolution of a legal question that might justify the issuance of an individual ORTO. Moreover, even if one took the position that such ORTOs were proper exercises of the judicial power, they still present impartiality and collective action problems that might counsel against their issuance. *See infra* Parts III and IV.

371. *See supra* notes 249–53 and accompanying text.

372. *See, e.g.*, *Singleton*, 439 U.S. at 944–45.

373. *See supra* notes 6–20 and accompanying text.

constitutional authority is to decide cases, what should we make of the constitutional legitimacy of lawmaking through proclamation of dicta? It is simply without justification."[374] In other words, as another commentator put it, "[w]hen a court suggests what the proper result should be under circumstances not before that court, the case or controversy requirement is violated."[375]

The proclamation of dicta in an opinion deciding an actual case is viewed as problematic because dicta is, by definition, an attempt to decree the law outside what is necessary to support the judgment in a case. Hence, including dicta in an opinion is technically not authorized by a judge's power to render a dispositive judgment that resolves a live legal dispute. Dicta constitutes the rendering of an advisory opinion on a set of facts that is not before the court. And where a Justice or set of Justices in a cert denial ORTO opine that a purportedly incorrect ruling by a lower court was legal error, or that a precedent of the Court was incorrectly decided, what are they doing other than attempting to render advisory opinions on a combination of facts and law that the Court has decided not to take cognizance of?

No wonder Justice Stevens called such opinions "the purest form of dicta."[376] But it is more problematic than that. While dicta are issued in connection with a court's otherwise legitimate exercise of the judicial power, cert denial ORTOs are issued despite the fact that the Court has made a conscious decision not to exercise it.

In sum, it seems clear that cert denial ORTOs that take or suggest a position on the merits of an underlying dispute, as they almost always do, exceed the powers vested in federal judges by the Constitution. Accordingly, when, for instance, individual Justices attempt to exercise supervisory powers over the lower courts—such as when Justice Gorsuch declares that a police practice violates the Constitution[377] or Justice Thomas strongly suggests that a novel state abortion regulation is consistent with the Constitution[378]—they are effectively acting outside the proper role of an appointed judge and

374. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259 (2006); *see also* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000–03 (1994) ("[D]icta have no precedential effect because courts have legitimate authority only to decide cases, not to make law in the abstract."). Judge Leval, however, appears to hold the view that there is no problem with judges issuing dicta so long as it is clearly labeled as such to distinguish it from binding law generated by a case. *See* Leval, *supra*, at 1253. Here we part ways. Unless dicta can be justified as an exercise of inherent or supervisory powers, *see, e.g.*, Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 U. GA. L. REV. 411 (2020), Article III clearly limits the exercise of the judicial authority to deciding cases or controversies.

375. Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 228 (2010).

376. *See supra* notes 197 and accompanying text.

377. *See supra* note 15 and accompanying text.

378. *See supra* notes 11–14 and accompanying text.

more as a policymaker opining on matters left to the elected branches of our government (at least until such questions should come before courts in a proper form). As discussed, one important reason the founders confined the judicial power to properly presented cases or controversies was to avoid situations where government officials who are not accountable to the people take it upon themselves to decree rules of conduct outside the context of refereeing live legal disputes.[379]

III. HOW CERTIORARI DENIAL ORTOS VIOLATE THE JUDICIAL INDEPENDENCE REQUIREMENTS OF ARTICLE III

Article III not only vests the "judicial Power of the United States" in a "supreme Court" and any inferior federal courts Congress should choose to create, but the founders took pains to ensure that federal judges exercised that power as dispassionately and free from political influence as possible. Hence, the very next sentence of that Article provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[380] Such life tenure and compensation guarantees were designed to ensure judicial independence so that judges would render dispositive judgments according to laws or rules of behavior established by the people's chosen representatives rather than improper influences from either the executive or legislative branches of government.[381]

The framers of the Constitution purposefully designed Article III this way given their experience with colonial judges, who were essentially agents of the British monarch and part of the executive branch.[382] Indeed, American colonists generally disdained colonial judges and looked to juries to receive justice.[383] This is why, in the

379. *See supra* notes 322–42 and accompanying text.

380. U.S. CONST. art. III, § 1.

381. *See, e.g.*, THE FEDERALIST NO. 78, at 575 (Alexander Hamilton) (J. Cooke ed., 1961) (arguing lifetime tenure was "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws"); *see also* Chandler v. Jud. Council of Tenth Cir., 382 U.S. 1003, 1006 (1966) (Black, J., joined by Douglas, J., dissenting) ("[T]he plan of our Constitution [is] to preserve, as far as possible, the liberty of the people by guaranteeing that they have judges wholly independent of the Government or any of its agents with the exception of the United States Congress acting under its limited power of impeachment.").

382. *See generally* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104 (1976) (describing the history of how judges served conditionally in England and how this practice was transplanted to the British-American colonies).

383. *See, e.g.*, Jon P. McClanahan, *The 'True' Right to Trial by Jury: The Founders' Formulation and Its Demise*, 111 W. VA. L. REV. 791, 799–803 (2009) ("Thus, juries in colonial America had even more power than their British counterparts to render verdicts in accordance with their own views of the law.

Declaration of Independence, a key grievance of the Continental Congress was that King George III had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[384] Another grievance was that he had supported laws "depriving us in many cases, of the benefits of Trial by Jury."[385]

Although the state constitutions adopted in the wake of the Declaration formally separated powers between the law-making, law-executing, and law-interpreting branches of government, early state judges were still generally beholden to the powerful state legislatures formed in reaction to the perceived abuses of the British executive.[386] Hence, the framers of the federal Constitution sought to insulate federal judges from political pressures when interpreting and applying the laws, desiring that judges conduct that task in as fair and impartial a manner as possible.[387] The framers did this through the good behavior and compensation protection provisions noted above.

As described earlier, debates from the constitutional convention highlight the framers' desire for federal judges do their jobs free from partisan influences.[388] The framers rejected a proposal to have judges participate on a council with the executive to review laws before they were adopted.[389] One main objection to such participation was that it would undermine the impartiality of judges should such laws later

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Colonial jurists sometimes used this power to rebel against oppressive British control, with the *Zenger* trial being the most notable example.").

384. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

385. *Id.* at para. 20; *see also* McClanahan, *supra* note 383, at 802–03 ("Faced with increasingly hostile colonial juries, the British government responded by limiting their ability to hear contentious cases. First, the British expanded the jurisdiction of admiralty courts, which did not have juries, to allow the courts to hear cases involving revenue owed to the British. Under the Administration of Justice Act of 1774, English officials charged with crimes could be tried in England instead of the colonies, where they would have undoubtedly faced more hostile juries. In addition, Parliament stated that colonists accused of treason would be tried in Britain instead of in America, effectively denying the accused the right to be tried by a jury of his peers.").

386. *See* Smith, *supra* note 382, at 1156 ("The framers of the various [state] constitutions were not intent upon making the judiciary independent of the legislative branch—'the people.'").

387. *See supra* notes 328–33 and accompanying text.

388. *See supra* notes 328–33 and accompanying text; *see also*, *e.g.*, *Madison Debates: June 5*, AVALON PROJECT (2008), https://avalon.law.yale.edu/18th_century/debates_605.asp ("Mr. WILSON opposed the appointmt. of Judges by the National Legisl: Experience shewed the impropriety of such appointmts. by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences."); *id.* ("Mr. MADISON disliked the election of the Judges by the Legislature or any numerous body. Besides, the danger of intrigue and partiality, many of the members were not judges of the requisite qualifications.").

389. *See supra* notes 323–35 and accompanying text.

come before them for review.[390] Another was that it would undermine the real and apparent integrity of judges by involving them in partisan politics.[391] These objections pointed toward a central concern: the delegates did not want judges participating in the lawmaking process because of its inherently political nature, and they believed judges should interpret and apply the laws as neutrally, impartially, and evenhandedly as possible.

Moreover, when a motion was made to qualify the good behavior tenure provision to allow removal of judges by the executive on the application of Congress, so many delegates objected that the proposal was defeated by a seven to one vote.[392] Among those objections, framer James Wilson asserted that "[t]he Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt."[393] Additionally, Madison recorded that Governor Edmund Randolph of Virginia "opposed the motion as weakening too much the independence of the Judges."[394]

It was clear, then, that the framers gave Article III judges tenure and salary protections to insulate them from being improperly pressured by the political branches in the performance of their duties. Central to this concern was the idea that judges should interpret and apply the law in an impartial and nonpartisan way. The Supreme Court itself has emphasized this point in decisions involving the constitutionality of courts created by Congress that lack Article III independence guarantees. As Justice Brennan asserted in the lead opinion in an important 1982 decision, "[a]s an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch."[395] The Roberts Court recently affirmed this principle in a related decision:

> By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the '[c]lear heads . . . and honest hearts' deemed 'essential to good judges.'[396]

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390. *See supra* notes 331–32 and accompanying text.

391. *See supra* notes 328–30 and accompanying text.

392. 2 THE RECORDS, *supra* note 323, at 429 ("Ayes – 1; noes – 7; absent – 3.").

393. *Id.*

394. *Id.*

395. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (plurality opinion).

396. Stern v. Marshall, 564 U.S. 462, 484 (2011) (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed., 1896)).

Somewhat ironically, this norm of judicial independence and impartiality has manifested itself most prominently in modern times in the context of U.S. Senate confirmation hearings for a person nominated to sit on the Court. Whenever nominees are asked about their views on controversial legal issues—for instance, abortion or gun rights—the rote response has become that it would be improper to answer the question because the issue might come before the Court in an actual case.[397] In other words, because judges are expected to keep open minds about the legal questions they decide—only answering them when necessary to resolve an adversarial proceeding where the questions have been sharpened for consideration—it would be inappropriate to express their views outside of that context. Otherwise, the nominee would be improperly prejudging or committing oneself on a question and thus failing to maintain the open and unbiased mind deemed essential to a fair and impartial judge (or so the story goes).

Many, of course, find this rationale unpersuasive and believe it is used as a pretext by nominees to avoid answering questions on controversial matters that are put to them by senators of the nonnominating political party.[398] After all, it would be possible for nominees to provide their general views on a subject but reserve the right to adjust those views, or apply them more particularly, in the context of an actual dispute.

The fact that Justices routinely take, or strongly suggest, very definite positions on legal questions in cert denial ORTOs seems to favor the latter view. After all, what is a Justice doing in such an ORTO but effectively prejudging a question that may very possibly come before the Court for adjudication? Let us consider the type of ORTO directed at perceived errors committed by lower courts. As discussed earlier, a Justice will frequently argue that the lower court's resolution of a legal question was wrong even though the Court itself declined to answer that question.[399] If the Court were to grant cert on that question in a future case, obviously the Justice who wrote

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397. *See, e.g.*, *Questioning Judicial Nominees: Legal Limitations and Practice*, CONG. RSCH. SERV. (last updated Aug. 30, 2018), https://www.everycrsreport.com/files/20180830_R45300_7632941ec1f97fb78e2901af57dca1b14fc305eb.pdf; Nicolette J. Zulli, *What RBG Says (Or Doesn't Say) Goes: Understanding the Debate Over the Ginsburg Standard's Application in the Upcoming Confirmation Hearings of Supreme Court Nominee Brett Kavanaugh*, SYRACUSE L. REV. (Aug. 12, 2018), https://lawreview.syr.edu/what-rbg-says-or-doesnt-say-goes-understanding-the-debate-over-the-ginsburg-standards-application-in-the-upcoming-confirmation-hearings-of-supreme-court-nominee-brett-kavanaugh/ (noting that Supreme Court Justice nominees withholding from commenting on issues which may arise before the Court is known as "The Ginsburg Standard").

398. *See, e.g.*, Denis Steven Rutkus, Questioning Supreme Court Nominees About Their Views on Legal or Constitutional Issues: A Recurring Issue, CONG. RSCH. SERV. 24–25 (June 23, 2010), https://fas.org/sgp/crs/misc/R41300.pdf.

399. *See supra* notes 6–20 and accompanying text.

the ORTO—and any Justices who joined that opinion—would already be on record as to its resolution. In such a future case, could anyone seriously maintain that a litigant arguing for a different result would be getting a fair and impartial hearing as to those Justices?[400]

Take, for instance, Justice Gorsuch's recent ORTO, joined by Justices Sotomayor and Kagan, arguing that the Vermont Supreme Court got it wrong in ruling that police did not violate the Fourth Amendment when they obtained evidence by looking through a garage window without a warrant.[401] Justice Gorsuch's main complaint was that the state court failed to apply a U.S. Supreme Court precedent that required an opposite result, even though the Vermont Supreme Court's majority must have believed it did not control the outcome since it was cited and relied on in a dissenting opinion.[402] In other words, it seems like it was a debatable issue, and if the Court's denial of cert has any significance, as some commentators have argued,[403] perhaps a number of Justices agreed.

But when and if the question of the legality of "garage window searches" comes to the Court again and is accepted for review, it seems pretty clear that at least three Justices will have prejudged that issue outside the context of an adversarial hearing designed to sharpen the questions being considered. Even if those Justices could theoretically keep an open mind to consider all the facts and

400. In addition to posing fairness and impartiality issues, Justices taking or suggesting positions in cert denial ORTOs may impair the Court's ability to conduct a more effective decision-making process if that legal question later comes before the Court. Psychologists argue that superior problem solving occurs when groups use a consensus process that requires inviting input from all group members, analyzing the problem, and generating and evaluating solutions. Eric Sundstrom et al., *Group Process and Performance: Interpersonal Behaviors and Decision Quality in Group Problem Solving by Consensus*, 1 GRP. DYNAMICS 241, 243–44 (1997). This process requires compromises and shifts in position, and although some individual reservations might remain, the group ultimately reaches higher quality decisions than they would have using less integrative approaches. *Id.*; *see also* Clara E. Hill et al., *Consensual Qualitative Research: An Update*, 52 J. COUNSELING PSYCH. 196, 197 (2005) (explaining how "the use of consensus [process] has been shown to improve decision quality"). Although the Court makes decisions on the basis of a majority rather than full consensus, these principles are still applicable. By prejudging an issue, a Justice has made it increasingly difficult to later change her mind or alter her stance upon exposure to other perspectives or changes in circumstances. Consequently, the Justice's impaired ability to compromise may reduce the quality of the Court's ultimate decision-making on the issue. The author wishes to thank Dr. Sheila Hafter Gray for this important insight.

401. Bovat v. Vermont, 141 S. Ct. 22, 22–24 (2020) (Gorsuch, J., joined by Sotomayor & Kagan, JJ., statement respecting the denial of certiorari).

402. *Id.* at 22–23.

403. *See, e.g.*, Linzer, *supra* note 27, at 1302–05 ("From all of the material we have considered, I conclude that the certiorari process has, in a sizeable number of cases, become the first battleground on the merits.").

arguments in the future case, certainly the appearance of impartiality would be destroyed as to them—an interest just as important to preserving public confidence in the Court as actual impartiality.

These impartiality problems become even worse when Justices write cert denial ORTOs criticizing or calling for an overruling of its own precedent or the rethinking of doctrinal areas in accordance with particular methods of constitutional interpretation that have become popular. Here, the Justice is not just criticizing the lower court result under established precedent, but she is actively advocating for changes in that precedent. The Justice is not even pretending to be an umpire merely "call[ing] balls and strikes" as Chief Justice John Roberts described the proper role of Justices during his confirmation hearings.[404] In essence, the Justice is assuming the role of an advocate rather than a neutral judge. Compounding this problem is the fact that the changes being advocated for are almost always being driven by a Justice's political ideology.[405]

One of the starkest examples of this phenomenon in recent times is Justice Kavanaugh's cert denial ORTO advocating for the Court to take up a new challenge to its nondelegation doctrine.[406] As noted earlier, in a major case argued days before Justice Kavanaugh took his seat on the Court, that tribunal split 4-1-3 to uphold Congress's broad authority to delegate lawmaking powers to executive administrative agencies—essentially reaffirming nondelegation principles established in the 1930s.[407] The lead opinion was written by Justice Kagan and joined by her three liberal colleagues at that time.[408]

Justice Gorsuch, a noted advocate for restricting Congress's delegation authority—believing that under an originalist understanding of the Constitution, Congress is violating separation of powers principles by allowing unelected executive branch actors to make law—filed a vigorous dissent joined by conservative colleagues Chief Justice Roberts and Justice Thomas calling for a narrowing of the nondelegation doctrine.[409] Noted conservative Justice Alito filed a concurrence in the judgment, essentially saying that he supported Gorsuch's effort to narrow Congress's delegation authority, but since there were not five votes to do that in the case, he was voting to

404. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Judge John G. Roberts, Jr., U.S. Court of Appeals for the D.C. Circuit).

405. *See supra* Subpart I.F.

406. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

407. *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

408. *Id.* at 2120.

409. *See id.* at 2131–48 (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., dissenting).

uphold the sex offender law at issue under traditional nondelegation principles.[410] In other words, Alito was saying that he would wait to support a change in the law until Kavanaugh could participate in a future case to give the conservatives five votes to do so.[411]

Near the start of the following Term, a different sex offender convict filed a cert petition with the Court making another nondelegation challenge to the law that had just been upheld.[412] Presumably, the defendant was hoping that since Justice Kavanaugh could now participate in the case, the Court would be willing to revisit the issue and essentially make Justice Gorsuch's dissent the majority opinion in a ruling undoing the prior Term's decision. Apparently, the Court had little desire to make such a major change in constitutional law so transparently dependent on changes in its ideological composition because it denied cert.[413]

Not to be denied his say, however, Justice Kavanaugh filed an ORTO concurring in the denial on the grounds that the Court had recently upheld the sex offender law.[414] However, he was writing an ORTO, he said, to point out that Justice Gorsuch's "scholarly" and "thoughtful" analysis of the nondelegation doctrine in that case "may warrant further consideration in future cases."[415] In other words, Kavanaugh was essentially making a public proclamation responding to Justice Alito's concurrence in the earlier case, strongly signaling that he was on board with supplying the necessary fifth vote to narrow Congress's delegation authority. And it is difficult to understand why Kavanaugh saw fit to go public with a message he obviously could have delivered privately to his Court colleagues, unless, among other possible reasons, he was inviting lawyers to bring a new nondelegation challenge involving a different law so that the new conservative majority could achieve its goal.

Now, just as the U.S. Department of Justice was the putative defendant in the nondelegation challenge to the sex offender law, another federal agency (and derivatively Congress) will likely be the target of the future nondelegation challenge that Justice Kavanaugh subtly invited. And, admittedly, neither Congress nor federal agencies make for the most sympathetic defendants. But the norms of judicial independence and impartiality do not depend on the identity of the parties before the Court. Indeed, they say that the particular identities of the parties should not matter to a Justice's duty to hear the facts of a dispute and apply the law to them in an open-minded and fair way. But once again, can anyone seriously

410. *See id.* at 2130–31 (Alito, J., concurring).

411. *Id.* at 2131.

412. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

413. *See id.*

414. *See id.*

415. *Id.*

contend that the federal government will be facing an open-minded and impartial tribunal in that future nondelegation challenge?

Well, what of it, it might be objected. Everyone knows the Court now has a majority of conservative Justices who want to have stricter separation of powers principles. So isn't it better that they exhibit this desire publicly so everyone is on notice? My response would be a resounding "no." Even if a majority of the Court is currently of this bent, it is better that this position be manifested pursuant to the resolution of disputes in well-reasoned opinions than the public see a majority of Justices as following an ideologically driven agenda to change our fundamental law. Appearances of dispassion and impartiality matter to public confidence in the integrity of the Court just as much as the actual exercise of those traits likewise matter.

Another objection to these arguments might arise from the current practice of Justices attacking or calling for reconsideration of precedents in concurring or dissenting opinions filed in connection with cases the Court actually reviews and decides.[416] Doesn't this practice, it might be contended, harm norms of judicial independence and impartiality just as much as when conducted in the form of cert denial ORTOs? Perhaps, and many commentators have criticized the entire enterprise of issuing such separate opinions as another form of dicta that should be avoided as exceeding the proper exercise of the judicial power.[417] But I would argue that it is one thing to criticize precedent in the course of explaining why a Justice believes a case is being incorrectly decided or should have been reasoned differently, and it is quite another to do this gratuitously by issuing unnecessary opinions in connection with denials of certiorari. Such ORTOs open up many more opportunities for opining on precedent than the relatively few cases the Court decides on their merits each Term, and they take the impartiality problem to a whole new level.

Justices do not only compromise independence and impartiality norms when they write ORTOs criticizing lower court rulings or existing Court doctrine. Modernly, Justices are even using ORTOs to stake out their positions on legal questions that have not even come before the Court but are likely to at some point. For instance, as noted earlier, Justice Thomas recently wrote a cert denial ORTO criticizing both lower courts and the Supreme Court for their handling (or nonhandling) of Second Amendment issues.[418] Even though the Court has not addressed the issue of whether there is a right to carry a firearm in public spaces outside of one's home, Justice Thomas took

416. *See supra* notes 275–94 and accompanying text.

417. *See, e.g.*, Stinson, *supra* note 375, at 228.

418. Rogers v. Grewal, 140 S. Ct. 1865, 1875 (2020) (Thomas, J., joined by Kavanaugh, J., except for Part II, dissenting from denial of certiorari).

the opportunity in his ORTO to explain why he believes there is such a right from an originalist perspective.[419]

When this important question comes before the Court in the next few years, as it likely will,[420] clearly Justice Thomas will have already prejudged that issue. As far as the litigants in the case go, he might as well skip oral arguments and just attend the conference where the Justices cast votes on how the issue should be decided.

Indeed, it is difficult to tell the difference between this type of situation and one where a Justice disqualifies himself after speaking out on a case and the issues being decided. For instance, in 2003, Justice Antonin Scalia voluntarily recused himself from a high-profile case questioning the constitutionality of "under God" in the Pledge of Allegiance after he made public remarks essentially deriding the claim that it was unconstitutional.[421] As one notable legal commentator wrote in connection with the incident, Justices voluntarily agree to abide by a code of judicial conduct providing that "judges 'shall disqualify' themselves in cases where their 'impartiality might reasonably be questioned.'"[422] While Justice Thomas would not be directly exhibiting partiality towards a particular party *qua* party in a case making a claim about a Second Amendment right to public carry, it would be difficult to maintain he would not be indirectly partial to the party advocating for such a right.

In this sense, all cert denial ORTOs where Justices take a position on the merits of a legal question that could compromise their impartiality in a later case not only appear to be in substantial tension with the judicial code of conduct just noted but, even more seriously, arguably violate federal law where such Justices do not later recuse themselves when the question does come before the Court. Section 455 of the U.S. Judiciary and Judicial Procedure Code provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[423] Additionally, it provides that "[h]e shall also disqualify himself . . . [w]here he has a personal bias or prejudice concerning a party . . . [or] [w]here he has served in governmental employment and in such

419. *Id.* at 1868 ("This conclusion not only flows from the definition of 'bear Arms' but also from the natural use of the language in the text.").

420. Indeed, as this Article was in the process of final editing, the Court did grant cert on a major component of this question—the right of concealed carry outside the home. See *supra* notes 38–46 for a further discussion of this matter.

421. *See* Linda Greenhouse, *Justices Take Case on Pledge of Allegiance's Reference to God*, N.Y. TIMES (Oct. 14, 2003), https://www.nytimes.com/2003/10/14/national/justices-take-case-on-pledge-of-allegiances-reference-to-god.html.

422. *Id.* (quoting 28 U.S.C. § 455(a); MODEL RULES OF JUD. CONDUCT r. 2.11(A) (AM. BAR ASS'N 2003)).

423. 28 U.S.C. § 455(a).

capacity . . . expressed an opinion concerning the merits of the particular case in controversy."[424]

Certainly, the general recusal requirement seems to cover such situations. And even though the latter, more specific, provisions apply to particular parties or cases, the generality of the legal questions the Court often decides—such as whether there is a constitutional right to carry firearms in public—often do not depend on a particular party or factual dispute. Hence, to continue with the example of Justice Thomas's ORTO purporting to explain why there is a Second Amendment right of public carry, it would seem that a good case could be made that he would be biased towards the party arguing against the right or that he had expressed an opinion on the merits of the controversy.

Once again, however, one could argue that questioning precedent, or expressing one's view about a legal question, in a concurring or dissenting opinion in the course of deciding an actual case presents many of the same difficulties if a Justice refuses to recuse herself in a later case raising such questions for decision. It would be absurd, the argument would go, to contend that Justices are violating the law when they do not recuse in such circumstances. Perhaps, but as I argued earlier, many have contended that Justices are exceeding the judicial power in engaging in such dicta, and writing gratuitous opinions in connection with cert denials seems to magnify the impartiality difficulties with engaging in such practices.[425]

I am not the only commentator who has expressed the view that cert denial ORTOs present real impartiality difficulties. Harvard Law School Professor Charles Fried, a former Solicitor General of the United States and justice of the Supreme Judicial Court of Massachusetts, has called dissenting from cert denials a "troubling practice."[426] Fried correctly observes that a dissenting cert denial ORTO, "particularly one that signals a Justice's views on the merits—seems quite close to a purely extrajudicial statement of how that Justice would vote if the case did come before him."[427] And as Fried eloquently describes, such judicial precommitments are in conflict with the very reasons we place such power in judges:

> The judge participates in a ritual of sorts—once more the picture of the judge as a priest. It is a ritual that includes the judge and the parties who appear before him. Just as the judge has the last word in the regime of the rule of law, the litigants expect to come before her not as before a bureaucrat or a

424. 28 U.S.C. §§ 455(b)(1), (3).

425. *See supra* notes 374–79 and accompanying text.

426. Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1238 (2004).

427. *Id.* at 1239.

> politician but as someone apart from everything else that has happened. You marshal your arguments and evidence for a new, ultimate cry for justice. The court is a place apart—apart from the marketplace and apart from the halls of political power. Here, reason rules—or rather the law alone rules. It is a manifestation of that apartness that the judgment you will hear will only be in response to the question you ask, and according to the law. So if you have been prejudged, by what the judge already knows about your case, then what happens in court is just a charade, not a fresh and final look. And as in the case of corruption, not only must the judge judge only according to what is put before him in the controlled environment of the adjudication—she must be seen as doing so. Her mind must not only be open—it must appear to be open."[428]

Stated more succinctly, "[t]he judge is supposed to come to the case fresh, to be open to persuasion, and that sense is missing where we have expressed our views beforehand in extrajudicial writings."[429]

Professor Fried also correctly observes that risks exist when a judge takes positions on legal questions outside the process of deciding cases:

> [It] risks inserting him into the fray as another participant in the political and ideological fray, especially these days when the law, the courts and judges have become the subjects of intense political debate. And the more judges are seen as such participants, the less their resolutions will be accepted as something other than political interventions in political struggle.[430]

And so, at least as to the current Court when the "political and ideological fray" seems to be as intense and divisive as ever, we might ask why most of the Justices seem intent on pouring fuel on the fire by issuing unnecessary and ideologically charged cert denial ORTOs? Especially when they could readily attempt to persuade their colleagues of their views outside of public missives if that were their primary goal?

As noted earlier, Professor Suzanna Sherry of Vanderbilt University Law School has recently offered an account of why, among other practices she criticizes, the Justices might be doing this. She argues that a major contributing cause to the Court's current "crisis of legitimacy"—the reality and perception that Justices are deciding critical cases according to their personal political predilections rather than principles of law—is that they have become celebrities in their own right.[431] In her view, "[t]elevision appearances, books, movies,

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428. *Id.* at 1236.
429. *Id.* at 1242.
430. *Id.*
431. Sherry, *supra* note 50, at 182.

stump speeches, and separate opinions aimed at the Justices' polarized fan bases have created cults of personality around individual Justices."[432] Hence, at least as in respect to issuing cert denial ORTOs and even writing separate opinions (often comprising dicta) in decided cases, Justices are motivated by the celebrity treatment and devotion they receive from ideologically driven audiences by expressing more extreme views than their colleagues would concur in if they were writing an opinion for the Court.

While Professor Sherry's arguments are well reasoned and supported, I would contend that the celebrity treatment and partisan group accolades individual Justices are receiving are more an effect than a cause of the Court's heightened ideological polarization in recent times. Certainly, such treatment reinforces partisan inclinations, but my own sense is that the trend towards the current heightened divisions began before, for instance, Justice Ginsburg gained widespread public attention as the "notorious RBG."

Although partisan polarization issues have always accompanied the Court, I would trace the start of the modern heightened era to Justice Scalia's forceful and biting voice exhorting originalism and other conservative ideologies (and, of course, liberal responses thereto). Today, it seems that certain members of the Court sincerely view themselves as Scalia's successors or continuing combatants—ideological warriors fighting the good fight—who hope that by expressing their positions publicly through cert denial ORTOs and the like, their arguments will carry more force and be deemed more persuasive than if made privately to colleagues in a conference discussion or an internally-distributed memo.[433] In a way, these public missives serve as rallying cries similar to a flag on a battlefield, hoping to convince (or mildly pressure) sympathetic colleagues to help them shape constitutional law to their own views of what it should be.

As one recent example of this "tribal" worldview, consider Justice Gorsuch's cert denial ORTO, noted earlier, in a case involving the free speech rights of a Catholic church to buy advertising space on the sides of public buses in Washington, D.C.[434] In an opinion joined by Justice Thomas, Gorsuch declared that the city had violated the First Amendment by accepting secular Christmastime advertisements but

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432. *Id.*

433. *See, e.g.*, Richard Wolf, *Supreme Court Brett Kavanaugh Likes Conservative, and Some Liberal, Justices and Judges*, USA TODAY (July 13, 2018), https://www.usatoday.com/story/news/politics/2018/07/13/supreme-court-pick-brett-kavanaugh-conservative-liberal-friends-mentor/780256002/ (quoting then-Judge Kavanaugh saying, "Justice Scalia was and remains a judicial hero").

434. *See, e.g.*, Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 140 S. Ct. 1198, 1199 (2020) (Gorsuch, J., joined by Thomas, J., statement respecting the denial of certiorari).

not ones religious in nature.[435] Justice Kavanaugh did not participate in the case, perhaps because he attended church within the plaintiff's archdiocese.[436] Remarkably, Gorsuch commenced his opinion with the following statement: "Because the full Court is unable to hear this case, it makes a poor candidate for our review. But for that complication, however, our intervention and a reversal would be warranted for reasons admirably explained [by certain lower court judges.]" But why did an eight-member Court make the case a poor candidate for review? Because the Court would predictably have split evenly along conservative-liberal lines and upheld the lower court ruling by default?[437] And why would a reversal have been warranted had all Justices been available to hear the case? Because Kavanaugh would have assuredly joined his five-Justice conservative "tribe" to further a religious cause? If these prognostications are accurate, rarely has a Justice spoken so candidly and openly about the ideological currents underlying the Court's actions.

Regardless of what one thinks of this particular incident, it seems clear that cert denial ORTOs imbued with ideological casts are exacerbating an already tense period of partisan division on the Court. What else but concerns about partisan decision-making could account for the acrimonious and divisive Senate confirmation battles that accompanied the Merrick Garland[438] and Neil Gorsuch[439] nominations in 2016–2017, the Brett Kavanaugh nomination in 2018,[440] and, most recently, the Amy Coney Barrett confirmation in

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435. *Id.*

436. Paul Schwartzman & Michelle Boorstein, *The Elite World of Brett Kavanaugh*, WASH. POST (July 11, 2018), https://www.washingtonpost.com/local/dc-politics/the-elite-world-of-brett-kavanaugh/2018/07/11/504d945e-8492-11e8-8f6c-46cb43e3f306_story.html.

437. At this time Justice Ginsburg was still participating on the Court, and a divided 4-4 vote would have acted as an affirmance of the lower court ruling. *See, e.g.*, Friedrichs v. Cal. Tchrs. Ass'n, 136 S. Ct. 1083 (2016) (per curiam) ("The [lower court's] judgment is affirmed by an equally divided court"); United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam) (same); *Costco Wholesale Corporation v. Omega, S.A.*, OYEZ, https://www.oyez.org/cases/2010/08-1423 ("The Court deadlocked 4-4, which means that the appeals court['s judgment] stays in place, though the case sets no new high court precedent because it ended in a tie.").

438. *See* Joseph P. Williams, *Garland Looms Over Gorsuch Confirmation Hearing*, U.S. NEWS (Mar. 20, 2017) https://www.usnews.com/news/politics/articles/2017-03-20/merrick-garland-looms-over-neil-gorsuch-confirmation-hearing.

439. *See* Karoun Demirjian & Mike Debonis, *Senate Democrats Slam Republic Bock as Garland Visits Capitol Hill*, CHI. TRIB. (Mar. 17, 2016), https://www.chicagotribune.com/nation-world/ct-supreme-court-nominee-merrick-garland-20160317-story.html.

440. *See* Tom McCarthy, *Q&A: Brett Kavanaugh's Controversial Confirmation Battle Explained*, GUARDIAN (Oct. 5, 2018),

2020?[441] One would think that the Justices would be doing everything in their power to restore public confidence in the integrity of the institution as one dedicated to the rule of law. An important place to start would be by refraining from writing ORTOs pushing a Justice's ideological agenda. As this Part has demonstrated, not only do such writings unnecessarily contribute to the Court's legitimacy crisis, but more importantly, they violate the Article III norms of judicial independence and arguably federal impartiality requirements.

IV. HOW CERTIORARI DENIAL ORTOS VIOLATE THE COLLECTIVE DECISION-MAKING NORMS AND CUSTOMS THAT HAVE GOVERNED THE COURT SINCE ITS INCEPTION

Article III vests the "judicial Power of the United States" in "one supreme Court,"[442] suggesting that the Court must constitutionally act as a body and not as individual Justices. This has certainly been the understanding of Supreme Court Justices themselves ever since Chief Justice John Marshall convinced his colleagues in 1801 to issue an official opinion of the Court when deciding cases.[443] And even in the first decade of the Court's existence, when the Justices were taken to issuing seriatim opinions in the mold of their British forbears, it was understood that the consensus of the majority of Justices on a legal question constituted the holding of the Court in the case.[444] Moreover, with respect to deciding which cases to hear when the Court's jurisdiction became largely discretionary in the early 1900s, it soon became the rule and custom that at least four Justices would need to vote in favor of granting certiorari before that would occur.[445]

It is true that, since 1911, Congress has empowered Justices to act individually in certain circumstances as circuit justices assigned to particular judicial circuits.[446] But this individual authority is bestowed for the purpose of allowing the Court to act collectively in regard to a case. It mainly permits Justices to issue temporary

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https://www.theguardian.com/us-news/2018/oct/05/kavanaugh-confirmation-battle-explainer.

441. *See* Kenneth P. Vogel et al., *Political Groups Begin Dueling Over Barrett in a Costly Clash*, N.Y. TIMES (Sept. 27, 2020), https://www.nytimes.com/2020/09/27/us/politics/amy-coney-barrett-confirmation-battle.html.

442. U.S. CONST. art. III, § 1.

443. Ronald D. Rotunda, *The Fall of Seriatim Opinions and the Rise of the Supreme Court*, VERDICT (Oct. 9, 2017), https://verdict.justia.com/2017/10/09/fall-seriatim-opinions-rise-supreme-court.

444. *Id.* ("Once the justices published their opinions, the lawyers would have to count the justices to try to figure out what propositions of law did the majority support and which propositions were dictum.").

445. *See, e.g.*, Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957).

446. *Circuit Riding*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/circuit-riding#:~:text=In%201911%20Congress%20abolished%20the,on%20applications%20for%20emergency%20actions (last visited Oct. 23, 2021).

orders—usually stays of lower court rulings or injunctions on government action—in order to protect the interests of the parties in a dispute until they can seek review by the full Court.[447] Tellingly, however, individual Justices rarely exercise this authority in modern times.[448] The typical practice is for an individual circuit justice to refer an application she has received for a stay or injunction to the full Court to rule on it.[449] And if the stay or injunction is granted, the order typically contains the following stock verbiage: "Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court."[450]

Hence, collective action by Supreme Court Justices is ingrained into the Court by years of law, practice, custom, and tradition. In this manner, action by the highest court in the land depends on the considered judgment of several Justices instead of one individual. Ideally, this practice produces sounder rulings resulting from a more considered and deliberative process and bolsters public confidence in the legitimacy and wisdom of Court rulings.

When an individual Justice, occasionally joined by one or two other Justices, issues a cert denial ORTO declaring that the lower court erred in its interpretation and application of the law (and often that lower courts should effectively see things the author's way in the future), she appears to be acting outside of her authority even if lower courts are aware the ORTO has no legal effect. The stature and prestige associated with occupying a seat on the Court ensure that lower court judges will feel compelled to give heed to such ORTOs and be responsive to them (as often occurs).[451] And this problem is only exacerbated when such ORTOs have strong ideological overtones, as they usually do, and are written and joined by Justices known to be advocates of that particular system of values and beliefs.

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447. *See* 28 U.S.C. § 2101(f); *see also* Kimble v. Swackhamer, 439 U.S. 1385, 1385 (1978) (Rehnquist, J.) ("It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court of a State; a single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits.").

448. *See, e.g.*, *In-Chambers Opinions*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/opinions/in-chambers.aspx (last visited Oct. 23, 2021) (noting only one in-chambers opinion issued since the 2013 Term).

449. PUBLIC INFORMATION OFFICE, SUPREME COURT OF THE UNITED STATES, A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 3, https://www.supremecourt.gov/publicinfo/reportersguide.pdf (last updated July 2021).

450. *E.g.*, Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578 (2021) (mem.).

451. *See infra* notes 452–53 and accompanying text.

This "individuality" or "personal preference" problem is serious regardless of whether lower court judges actually treat an ORTO as controlling legal authority or as merely being persuasive. In the latter case, the ORTO is still contributing to the shaping of the law. But to the extent inferior court judges do treat a Justice's views as controlling, the problem is seriously exacerbated. And this appears to be occurring quite frequently. For instance, a recent U.S. Court of Appeals for the Sixth Circuit opinion cited to a cert denial dissent of Justice Sotomayor as confirmation of its view that a Supreme Court precedent had not announced a new rule of constitutional law for purposes of evaluating the timeliness of a plaintiff's challenge to his sentence.[452] And in another case involving a plaintiff's burden of proof to obtain relief under a federal habeas corpus statute, a federal district court's only cite to establish that burden was to a different cert denial dissent written by Justice Sotomayor.[453]

A cert denial ORTO apologist might attempt to justify these practices by reference to doctrines the Court has developed to give federal judges certain inherent powers to fully effectuate the judicial power. For instance, the Court has asserted that "[f]ederal courts possess certain 'inherent powers,' not conferred by rule or statute, 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[454] But as reflected in this statement, such inherent powers have been justified as being a necessary incident of exercising the judicial power to effectively resolve cases or controversies.[455] And it is courts as institutions that possess these powers to protect their ability to properly discharge this function, not judges acting in their individual capacities outside the boundaries of official court action (even though at the district court level, the court and the individual judges who staff it and manage their own dockets may appear at times to blur together).[456] As explained, ORTOs attached to cert denials fall outside both of these limits on inherent powers.

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452. *See* Jones v. United States, No. 19-5229, 2020 WL 6129751, at *3 (6th Cir. Oct. 19, 2020).

453. Marshall v. Dunn, Civil Action No. 2:15-CV-1694-AKK, 2020 WL 6262430, at *13 (N.D. Ala. Oct. 23, 2020); *see also*, *e.g.*, Williams v. Dixon, 961 F.2d 448, 451 (4th Cir. 1992) (citing to cert denial dissents of Justices Harry Blackmum and John Paul Stevens for proposition that the government bears the burden of proof in certain situations on ineffective assistance of counsel claims).

454. Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186 (2017) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)).

455. United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812). This does not mean that inherent powers are always properly employed to achieve such ends or that this justification even rationalizes many instances where inherent powers are invoked. For a cogent critique of such powers, see Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 743 (2001).

456. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 64 (1991).

Much the same can be said for the exercise of inherent supervisory powers the Court has asserted it can wield over the actions of lower courts. For instance, the Court has stated that it "has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."[457] But again, this is a power exercised collectively by the Court, and its purpose is to assist the Court in ensuring the fair administration of justice in cases being properly adjudicated by lower federal courts.[458] Such assumed powers provide no basis for granting individual Justices a roving mandate to supervise lower courts outside the context of a legitimate adjudication by the Court acting as a body.

To the extent, as some Justices and commentators have argued,[459] that denials of certiorari do sometimes have significance as an indication that six or more Justices did agree with the lower court ruling on the merits (or at least were not highly troubled by it), a cert denial ORTO disagreeing with that ruling is actually perverse to the extent lower courts treat it as controlling or persuasive authority. In such a case, the minority of Justices willing to speak out through an ORTO may very well be reciting what would have been the *dissenting* position had the Court decided to review it on its merits. Accordingly, they are theoretically pushing a view of the law that is opposite to what it would have been had the case been taken up.

Individual Supreme Court Justices do not act in a unitary capacity the way the founders designed the presidency to operate. After much debate, the framers of the Constitution settled on having one individual in charge of leading the nation so that the people would know who to hold accountable for that important task. Hence, it is not surprising that presidents over time took to the bully pulpit to effectuate that task. Supreme Court Justices, on the other hand, have no mandate or authority to impose their individual views of the law on lower courts or any other bodies. That is a task that the framers wanted done collectively and deliberatively under the parameters laid out in Article III. Cert denial ORTOs, at least to the extent that they purport to declare what the law is, as they frequently do, run contrary to this settled understanding.

CONCLUSION

It may be, as Justice Stevens wrote in his *Singleton* opinion respecting the denial of certiorari in that case, cert denial ORTOs can have some "minimal educational value," even though he concluded

457. Dickerson v. United States, 530 U.S. 428, 437 (2000).

458. *See id.*

459. *See* Singleton v. Comm'r of Internal Revenue, 439 U.S. 940, 942 n.* (1978) (Blackmun, J., joined by Marshall & Powell, JJ., dissenting from denial of certiorari) (quoting Brown v. Allen, 344 U.S. 443, 542–44 (1953)).

the downsides far outweigh any benefits from the practice.[460] Among other things, such ORTOs can provide additional insights into a Justice's thinking on different issues, which can alert future litigants to potential areas she might be interested in and arguments to which she might be receptive.

But this Article has explained why I am squarely in Justice Stevens's camp, albeit out of different and more serious concerns about their legitimacy. While Stevens glimpsed the problem that such ORTOs are not a proper exercise of the judicial power by calling them "the purest form of dicta," he failed to acknowledge that they are worse than dicta—lacking any case or controversy in which to ground them—and really constitute the purest form of advisory opinion. The good Justice also failed to recognize the judicial independence and impartiality difficulties such ORTOs create, as well as the collective action problem inherent in individual Justices telling lower courts that they got the law wrong and to do a better job in the future.

There is, however, one arguable way in which cert denial ORTOs can provide a public service without implicating these concerns. Such an ORTO can help identify an important legal question, or one that is dividing the lower courts, that requires the attention of the Court without taking or suggesting a position on how the question should ultimately be decided. Justice Byron White, almost alone among the Justices, would frequently write cert denial ORTOs of this cast.[461] But even here, that purpose could be served equally well by internal discussions and communications among the Justices. It is not clear what additional purpose is achieved by going public with these complaints about the Court not granting certiorari unless to indirectly pressure or subtly shame one's colleagues into acting under

460. *See id.* at 946 (Stevens, J., opinion respecting denial of certiorari).

461. *See, e.g.*, Spierings v. Alaska, 479 U.S. 1021 (1986) (White, J., dissenting from denial of certiorari); Tex. Ass'n of Concerned Taxpayers, Inc. v. United States, 476 U.S. 1151 (1986) (White, J., joined by Brennan, J., dissenting from denial of certiorari); Pan Am. World Airways, Inc. v. Cook, 474 U.S. 1109 (1986) (White, J., joined by O'Connor, J., dissenting from denial of certiorari). However, Justice White was not entirely consistent in refraining from offering or suggesting his position on the merits. *See* Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014, 1015 (1978) (White, J., joined by Blackmun, J., dissenting from the denial of certiorari) (commenting that the Court should have granted certiorari because a lower court decision in an analogous case "may be at variance with our prior case law"); Warren v. Mississippi, 444 U.S. 956, 956 (1979) (White, J., joined by Brennan & Stewart, JJ., dissenting from the denial of certiorari) (stating that the lower court's judgment should be vacated and remanded as its holding "cannot be squared with our relevant cases"); Blakley v. Florida, 444 U.S. 904, 905 (1979) (White, J., joined by Brennan, J., dissenting from the denial of certiorari) (reporting that the lower court's decision conflicts with Supreme Court precedent such that it "seems sufficiently clear to me to warrant summary reversal of petitioner's conviction").

the threat of publication.[462] Yet Justice White's colleagues may have simply disagreed with him about the importance of the question being presented or the nature or seriousness of a lower court split. In such cases, an ORTO could make the Court look irresponsible since the other Justices would typically not be publishing their reasons for voting to deny certiorari.

In the end, then, it seems like there is little to commend the practice of writing any type of cert denial ORTO and much to condemn it. Accordingly, the current trend in the Roberts Court in favor of their increasing use, particularly as a tool to further an already divisive ideological agenda, would best be arrested. This part of the Court's shadow docket, in other words, would do well to fade completely into the dark.

462. Indeed, Justice Stevens once wrote in a tribute to Justice White following the latter's retirement that unpublished drafts of Justice White's cert denial ORTOs would persuade other Justices to change their "deny" vote on a "significant number of occasions." John Paul Stevens, *"Cheers!" A Tribute to Justice Byron R. White*, 1994 BYU L. REV. 208, 217. But if it was merely the persuasive value of such ORTOs that made a Justice change her mind, it is not clear why White felt the need to circulate them as drafts to be published rather than as internal memoranda prior to the Court's regular weekly conference where it considers and discusses petitions for certiorari.