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On Second Thought: An Empirical Analysis of When the Supreme Court Decides Not to Decide

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Supreme Court Justices have a set of tools that allow them to avoid reaching the merits of a legal dispute even if the Court decides to hear the case by granting a petition for a writ of certiorari. Certain Supreme Court decisions relying on such tools are clear on their face—that is, case dimensions, delimiting the justiciability of a matter, are being evaluated because the Court wants to clarify the viability of the case. This Article looks at other rationales for the Court's decisions not to rule on the merits after granting a case to the merits docket. In particular, it looks at the strategic nature of such decisions and specifically how not deciding a case can help certain Justices achieve alternative goals. One such goal is minimizing a decision's impact by removing the case from the Court's substantive review. A second goal we proffer is deference to Congress's policymaking power in hopes that Congress will enact policy in accordance with the direction of those Justices' preferences.

This Article uses a rational choice framework as a tool to understand the two stages in Supreme Court Justices' analyses of when not to rule on the merits of a decision. In the first stage, the Justices decide whether to examine such requirements. Here, the Justices may account for their own preferences as well as those of other branches of government, of which Congress is the most important. In the second stage, the Justices decide what to do when such concerns are raised. The Justices can either decline to rule on the merits of the case or move forward on the merits and come to a substantive decision notwithstanding these concerns.

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This Article's original dataset proves that the Justices' preferred outcomes and Congress's preferences are factors in many of the Justices' determinations of when and how to raise case dimension concerns. By examining the Rehnquist and Roberts Courts, this Article concludes, all else equal, that Justices are more likely to avoid ruling on the merits in granted cases relating to issues of statutory and constitutional interpretation and when the Justices' ideology is similar to the ideology of the Senate. This study shows that the Justices' attempts to end their analyses before reaching the merits vary across Justices and are at least correlated with the relationship between the ideological preferences of Congress and the Court. These results open the door for further investigation as to how the Justices use Article III and related doctrines to achieve their preferred outcomes.

INTRODUCTION

The Constitution separates the federal government into three coequal branches.[1] In doing so, each branch can potentially check the others.[2] In

1. *See* U.S. CONST. art. I § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); art. II § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); art. III § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

2. For instance, the Court regularly reviews decisions of administrative agencies to see if proper deference is accorded to Congressional delegation in the area. *See, e.g.*, West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587, 2616 (2022) ("[I]t is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of

the past, Congress has adopted legislation to address a Supreme Court decision that found the previous policy unconstitutional.[3] The Court may also push back against Congress's policy choices by overturning them on constitutional grounds.[4] Vice versa, the Court sometimes defers to the judgments of the other branches of the federal government or state governments, often on political question grounds.[5] However, this is not the only method by which the Supreme Court defers cases—and thus whole policy areas—to Congress due to Congress's competence and experience. The Court has a bevy of tools at its disposal to help Justices avoid ruling on the merits of a case even after a case is granted to the merits docket on writ of certiorari.

This Article looks at how and when, even after granting certiorari, the United States Supreme Court may defer to future decision-makers outside the Court rather than ruling on the merits of a case. This Article is one of the first to undertake an empirical analysis of the Justices' choices in this domain.[6] The Article further takes the novel approach of looking at instances where there is theoretical support for and quantitative evidence

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such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

3. *See, e.g.*, Allan Ides, *The Text of the Free Exercise Clause as a Measure of* Employment Division v. Smith *and the Religious Freedom Restoration Act*, 51 WASH. & LEE L. REV. 135, 135 (1994) ("Congress adopted the Religious Freedom Restoration Act of 1993 (RFRA) to overturn the decision of the United States Supreme Court in *Employment Division v. Smith*. In *Smith*, the Court declined to mandate a constitutional exemption from the State of Oregon's drug laws for two members of the Native American Church who had ingested peyote as part of a religious ceremony.").

4. In response to the RFRA, the Court in *City of Boerne v. Flores* held that

> Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.

City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

5. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) ("But the fact that such gerrymandering is 'incompatible with democratic principles,' does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." (quoting Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015))).

6. For other articles empirically analyzing the Supreme Court's approach to justiciability, see Gregory J. Rathjen & Harold J. Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making*, 23 AM. J. POL. SCI. 360 (1979) [hereinafter Rathjen & Spaeth, *Access to the Federal Courts*] (through an analysis using cumulative scaling, Professors Rathjen and Spaeth analyze the policy motivations of the Burger Court, and find that the "Justices . . . march to the beat of individualized drums—a varying admixture of administrative-legal influences, political attitudes, and/or an overall access attitude."); Gregory J. Rathjen & Harold J. Spaeth, *Denial of Access and Ideological Preferences: An Analysis of the Voting Behavior of the Burger Court Justices, 1969–1976*, 36

that, the Court will differentially defer ruling on substantive matters in a case, especially when the Justices' have a greater perceived ideological similarity between themselves and both houses of Congress. In other words, if the Justices think that Congress will potentially legislate (or not, blocking a change to the status quo) on a given issue in a manner favorable to the pool of Justices, they will decline to decide on a case's merits. This Article is premised on the notion that even when there is no direct contact between the Court and Congress, the Court may monitor Congress's preferences and strategically decide when to rule in certain areas based on its understanding of the actions Congress could potentially make in the future.

Most importantly, by delimiting a case's dimensions, the Court can clear it from the docket without actually deciding on the merits. Some cases are predicated on such case dimensions concerns as they were filed specifically to test the jurisprudence surrounding a rule application.[7] In other situations, Justices cite such concerns as the reason for declining to rule on a case's merits.[8] This second scenario begs the question: why does the Court grant certiorari in a large set of cases only to later decide not to rule in the case? This concern is accentuated because presumably the potential concerns were raised in lower court proceedings, in the petition for certiorari, and accompanying documents.

W. POL. Q. 71 (1983) [hereinafter Rathjen & Spaeth, *Denial of Access*] (concluding that access outcomes are a function of the Justices' ideological preferences during the 1969–76 Term).

7. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) ("We can affirm because political districting presents a nonjusticiable question; or we can affirm because we believe the correct standard which identifies unconstitutional political districting has not been met; we cannot affirm because we do not know what the correct standard is.").

8. *See, e.g.*, Defunis v. Odegaard, 416 U.S. 312, 317 (1974) ("[H]e now has also been irrevocably admitted to the final term of the final year of the Law School course. The controversy between the parties has thus clearly ceased to be 'definite and concrete,' and no longer 'touch[es] the legal relations of parties having adverse legal interests.'" (quoting Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240–41 (1937))). Another avenue available to the Court is the possibility of dismissing a writ of certiorari as improvidently granted ("DIG" a case). This tends not to be a preferred method of dismissing cases, as it often comes up for unusual reasons, and often admits the Court made a mistake in granting the case. For example, in *Visa v. Osborn*, the Court begrudgingly wrote of the parties in its final statement of the case that "[H]aving persuaded us to grant certiorari on [one] issue, however, petitioners chose to rely on a different argument in their merits briefing." Osborn v. Visa, Inc., 797 F.3d 1057 (D.C. Cir. 2015), *cert. dismissed as improvidently granted*, 137 S. Ct. 289 (2016) (citations omitted). The method of dismissal based on justiciability grounds seems less of an embarrassing concession on the part of the Court. Clerks have described feeling "embarrassed" or "dread" at the possibility of a DIG. Michael E. Solimine & Rafael Gely, *The Supreme Court and the Sophisticated Use of DIGs*, 18 SUP. CT. ECON. REV. 155, 175 (2010).

The Justices have several potential reasons for ruling in a manner that avoids the merits of a decision. The first is a sincere belief that the concerns create insurmountable hurdles under Article III of the Constitution. Another is a preference of the majority to not rule on substantive issues in the case.[9] If a minority of the Justices feel they cannot gather a majority to rule in favor of their preferences, but can get a majority to avoid ruling on a case's merits due to dimensional concerns, then this would be the preferred outcome for that pool of Justices. By declining to rule on the merits, the Justices essentially delegate the possibility of decision-making to other bodies, including Congress, with the opportunity to create policy related to the issue of concern in the case.[10]

Second, in certain situations, delegation to Congress may be less volitional on the Court's behalf. The Court may squabble with Congress over which is the proper body to regulate a given issue. Congress has the power to strip the Court of jurisdiction from a set of cases.[11] The Court can also check Congress by holding statutes unconstitutional.[12] Such an exchange between the Court and Congress is commonplace. Frequently, the Court finds congressional statutes unconstitutional and Congress attempts to regulate in the interstices of matters that Supreme Court precedent does not resolve.[13]

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9. This is based on the supposition that the Justices do not solely rely on mechanical jurisprudence. *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908) ("Scientific law is a reasoned body of principles for the administration of justice, and its antithesis is a system of enforcing magisterial caprice, however honest, and however much disguised under the name of justice or equity or natural law. But this scientific character of law is a means,—a means toward the end of law, which is the administration of justice. Law is forced to take on this character in order to accomplish its end fully, equally, and exactly; and in so far as it fails to perform its function fully, equally and exactly, it fails in the end for which it exists.").

10. While we posit that Congress may be the likely body to take up a case if the Court chooses not to decide in an area, there are other possible institutions, such as the executive branch, administrative agencies, and state government actors, that may choose to visit a policy area relinquished by the Court as well.

11. *E.g.*, *Ex Parte* McCardle, 74 U.S. 506, 514 (1868) ("What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.").

12. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (holding that the Judiciary Act of 1789 was unconstitutional).

13. *See supra* note 4 and accompanying text (noting the Court's response to the RFRA in *City of Boerne v. Flores*). After the Supreme Court struck down Congress' child labor regulation statute, the Keating-Owen Child Labor Act of 1916, Pub. L. No. 64-249, 39 Stat. 675, in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), Congress responded by passing another statute, The Child Labor Tax Law, prohibiting certain types of child labor. Revenue Act of 1918, Pub. L. No. 65-254, § 1200, 40 Stat. 1057, 1138 (1919).

This concept of deciding not to decide begins with Article III of the Constitution.[14] Several components described in Article III are required for federal judges to decide cases. First, judges decide "cases and controversies" properly brought before the courts.[15] Cases that are not justiciable do not meet these requirements.[16] Justiciability refers to a set of rules including mootness, ripeness, political questions, and standing that all need to be met for a case to properly come before a court.[17] For example, a case is generally no longer justiciable under the mootness doctrine (with a few exceptions) if there is no longer a live controversy.[18]

Take the 2020 case *New York State Rifle & Pistol Association v. New York*, in which the Court analyzed a New York law dealing with gun "premises" licenses.[19] Gun owners possessing this type of license could only remove a gun from their home under particular circumstances. These circumstances did not encompass transporting guns to different premises outside of the narrow band of exceptions. The Court granted certiorari to examine whether the New York City premises licenses law violated the Second Amendment.[20] Before the case was decided, New York City amended the law to allow guns to be transported to second homes and to shooting ranges beyond city limits.[21] In a per curiam opinion, the Justices wrote,

> After we granted certiorari, the State of New York amended its firearm licensing statute, and the City amended the rule so that petitioners may now transport firearms to a second home or shooting range outside of the city, which is the precise relief that petitioners requested in the prayer for relief in their complaint. Petitioners' claim for declaratory

14. U.S. CONST. art. III.

15. U.S. CONST. art. III, § 2, cl. 1.

16. *See id.* (stating that the Court may only hear "cases" and "controversies"). Several elements are necessary for a proper case or controversy including a proper plaintiff with standing. The Supreme Court has ruled that without a proper plaintiff no case or controversy exists. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 470 (1982) (holding that no case or controversy existed because the plaintiffs were not harmed as taxpayers when the Secretary of Health, Education, and Welfare disposed of a parcel of property according to a statutory mandate).

17. *See* Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 677–78 (1989) (describing the various doctrines of justiciability).

18. *See* Defunis v. Odegaard, 416 U.S. 312, 318–19 (1974) (holding that the case was moot because it was not justiciable).

19. New York State Rifle & Pistol Assoc. v. New York, 140 S. Ct. 1525 (2020) (per curiam); *see also* N.Y. PENAL LAW ANN. § 400.00(2)(f) (McKinney 2014) (stating that firearms may be transported when a proper cause exists).

20. *New York State Rifle*, 140 S. Ct. at 1526 (2020).

21. *Id.*

> and injunctive relief with respect to the City's old rule is therefore moot.[22]

The substance of the case was no longer in question, so the case no longer had a "live" component as Article III requires.[23] Congress could respond by drafting federal legislation regulating restrictions on when individuals may lawfully carry firearms outside the house.[24] The case was thus resolved from the perspective of the Court's majority, yet there were also Justices that disagreed with this outcome. In dissent, Justice Alito argued that: "a case becomes moot . . . only 'when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party' . . . '[A]s long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot.'"[25] Justice Alito argued for this position because the petitioners asked for more injunctive relief (on travel restrictions) than was given and because the district court on remand could award damages for any violation against the petitioners' rights.[26]

Once the Court declined to make a substantive decision, two options remained. First, the Court left the door open for Congress or the states to regulate in this area.[27] Second, the Court could also jump back into the contextual fray of mooted area like firearm regulations if a "good vehicle" presented itself that was not mooted by subsequent legislation.[28]

As it happens, even though Congress did not regulate gun control after the Court's initial decision, New York State legislated in this area after the decision in *New York State Rifle*,[29] and the Supreme Court later ruled

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22. *Id.* (citation omitted).

23. U.S. CONST. art. III.

24. Congress has responded to Supreme Court decisions in other areas by drafting clarifying legislation. One example is in the area of religious liberty. After the Supreme Court overturned the Religious Freedom Restoration Act in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress drafted the Religious Land Use and Institutionalized Persons Act of 2000, which is designed to protect individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws. Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc)

25. *New York State Rifle*, 140 S. Ct. at 1533 (2020) (Alito, J., dissenting) (emphasis added) (first quoting Knox v. Service Employees, 567 U.S. 298, 307 (2012); and then quoting Chafin v. Chafin, 568 U.S. 165, 172 (2013)).

26. *Id.* at 1533 n.4.

27. *Id.* at 1533 ("[T]he amended City ordinance and the new State . . . laws did not give [the petitioners] complete relief."). These additional areas not examined by the Court could come in the form of additional legislation at the state or federal level at which point the federal courts could examine the new legislation's constitutionality.

28. *Id.*; a good vehicle is a case without justiciability issues (like standing) that could prevent the Court from ruling on the merits.

29. *See* N.Y. PENAL LAW ANN. § 400.00 (McKinney 2021) (revising language in that code section after the decision in *New York State Rifle* and prior to *Bruen*).

on the new state law.[30] The State of New York enacted Penal Law Ann. § 400.00(2)(f), which designated that an individual who wants to carry a firearm outside their home may obtain an unrestricted license to "have and carry" a concealed "pistol or revolver" if he or she could prove that "proper cause exists" for doing so.[31]

This law was challenged and eventually overturned by the Court across ideological lines in *New York Rifle & Pistol Association v. Bruen*.[32] *Bruen* presents an example of when the Court chose not to decide on an issue and relinquished control back to Congress, at least for legislation at the national level.[33] When Congress chooses not act in such an area, states may act (as New York did in this instance), and the Supreme Court may have further opportunities to deal with an issue if the Justices choose to do so.

This Article proceeds in six parts. Part I examines a theoretical framework for when the Court decides not to decide a case after granting certiorari. In doing so, Part I develops much of the theory regarding the constraints on the decision-making process by looking at the internal processes that may lead the Court to decide not to decide based on a case's dimensions. This is specifically relevant when a group of four or fewer Justices vote to grant certiorari but later become worried that they might not get their preferred outcome. Part I then examines external processes that may lead the Justices to engage in analyses such as examining the Court's relationship with Congress and, specifically, the possibility of

30. *See* New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2134 (2022) (describing how the respondent's description of N.Y. PENAL LAW ANN. § 400.00 in their brief was overly broad and in violation of the Fourteenth Amendment).

31. *See* N.Y. PENAL LAW ANN. § 400.00(2)(f) (McKinney 2021) (stating that firearms may be transported when a proper cause exists).

32. *Bruen*, 142 S. Ct. at 2125.

33. There are examples of the Court deferring on the merits and Congress stepping in to legislate in the vacuum. In *Goldwater v. Carter*, 444 U.S. 996 (1979), the Court considered Senator Barry Goldwater's, and others', challenge to President Jimmy Carter's announcement to withdraw the U.S. from the Mutual Defense Treaty between the United States of America and the Republic of China (i.e., Taiwan) without the consent of Congress. *Id.* at 997. The U.S. Constitution is silent on the issue of which branch has the authority to end treaty relationships. *Id.* 997–98. Despite the competing claims about whether Congress must give consent for treaty withdrawal, the Court—in a number of opinions—decided not to decide the merits on various doctrines including the political question doctrine and ripeness. *Id.* at 1000–01. Justice Powell concluded that the case was not ripe in large part because Congress had yet to act or exhaust its other potential remedies, including legislating on the issue. *Id.* at 1002. Having left open the issue of whether the president may withdraw from a treaty without Congress's consent, President Carter followed through with ending the treaty, and Congress passed legislation to preserve some provisions of the treaty in domestic law. *See* Taiwan Relations Act, Pub. L. No. 96-8, H.R. 2479, 93 Stat. 14 (1979) (preserving the continuation of commercial and cultural relations between the United States and Taiwan).

Congress reaching a more preferred outcome for some Justices than the Court. Finally, Part I presents the principles from *Ashwander v. Tennessee Valley Authority* that are central to understanding when the Court decides not to rule on an issue.[34]

Part II looks at gatekeeping, the process by which the Court decides which petitions to grant and which to deny. It examines the existing empirical literature on case dimensions concerns and the results of previous studies. Part II explains how this Article builds on these prior studies and offers unique empirical insights into this process. Part III then defines the Court's choices of when not to decide in a case through a taxonomy that highlights the various dimensions of such decisions, mainly predicated on case dimensions concerns. Part IV sets out the methodology and presents the data used in this Article's empirical analysis. It explains and breaks down the variables of interest, with a focus on the Court's relationship with Congress, allowing for a more sophisticated and systematic understanding of such decisions than has been previously undertaken.

Part V contains the results of the empirical tests. In examining a select set of years from the Rehnquist and Roberts Courts, the Justices are more likely to employ a case dimensions analysis in cases of statutory and constitutional interpretation (all else equal), and when the Justices' ideology is more similar to that of the Senate. If the Court and the Senate share the same ideology, the Justices are 61 percent more likely to engage in such analyses. The inverse is true regarding the ideology of the Court and the House of Representatives. Although, the Justices are more likely to employ such analyses when the House of Representatives is more conservative. Of course, the results do not establish a causal relationship between the ideological preferences of the Court and Congress and the Justices' implementation of a case dimensions analysis, yet these findings reveal relationships and patterns that open the door to further exploration. Interestingly, Justices Stevens, Thomas, and Alito authored the most opinions in cases where the Court examined the possibility of not ruling on a case's merits.[35]

Further, in both the Rehnquist and Roberts Courts, when considering the issue of standing, the Justices are more likely to continue to rule on the merits of the case.[36] The Justices on the Rehnquist Court were far more concerned about specific case dimensions requirements raised in a

34. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 288 (1936).

35. For the original data coded for this Article, see *infra* Appendix.

36. For a discussion on the Rehnquist and Roberts Courts continuing to rule on the merits when considering standing, see *infra* Part V.

case.[37] Moreover, the Rehnquist Court Justices were more likely to continue to rule on the merits despite addressing a wide range of case dimensions concerns unless the Justices were more conservative.[38] In the Roberts Court, the Justices paid greater attention to the case type when deciding how to address case dimensions issues.[39] When case dimensions concerns are addressed, Justices Alito and Kagan are more likely to continue ruling on the merits notwithstanding these concerns. In contrast, Justices Thomas and Scalia continued to halt their analyses after locating these reasons for not deciding in a case.[40]

Part VI concludes by detailing the significant findings of this Article and foreshadows how future work may build on these findings to help derive new insights into when the Justices grant certiorari and later withdraw from deciding on the case's merits—or decide not to decide.

I. SUPREME COURT DECISION-MAKING

The breadth of discretion held by the Justices in deciding which cases to hear and how to decide them allows for disparate views among the Justices. The Supreme Court's institutional features permit this discretion.[41] These features include the Court's flexibility in choosing cases it hears on petitions for writ of certiorari.[42] With the Supreme Court Case Selection Act of 1988, Congress gave the Court an almost unfettered ability to choose the cases it hears.[43] Wielding this power, the Court hears

37. On the Rehnquist Court's concerns about case dimensions requirements raised in a case, see *infra* Part V.

38. On the conservative Rehnquist Justices' less likely to rule on the merits, see *infra* Part V.

39. For a discussion on the Roberts Court's decisions on how to address case dimensions issues, see *infra* Part V.

40. For a discussion on specific Justices' continuing or halting their analyses, see *infra* Part IV.

41. *See, e.g.*, Supreme Court Case Selections Act, 28 U.S.C. § 1257 (1988) (eliminating appeals as of right from state court decisions).

42. *See, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 389 (2004) ("[T]he Court's muscular authority over case selection in the modem era now gives it the unchallenged prerogative in almost every instance to choose whether to resolve or to bypass important controversies that are brought before it in particular cases.").

43. Act of June 27, 1988, Pub. L. No. 100-352, § 2, 102 Stat. 662 (1988) (codified as amended at 28 U.S.C. § 1257) (empowering the U.S. Supreme Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had," by eliminating the *right* to appeal from certain types of state court judgments). *See also* 28 U.S.C. § 1254 (governing discretionary review of matters pending in the federal courts of appeal). Congress intended to increase the Court's discretion, i.e., gatekeeping, stating explicitly that it was passing an act "[t]o improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes." § 2, 102 Stat. at 662. After passage of the Supreme Court Case Selection Act of 1988, the only appeal as a matter of right to the Court would be from "an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit

approximately seventy cases each term from the 7,000 to 8,000 submitted for consideration.[44]

Historically, another barrier to entry to the Court was financial.[45] The Court requires filing fees and those who could not pay, mainly incarcerated prisoners, had no access to the Supreme Court.[46] Supreme Court Rule 38 governs filing fees that cost upward of $300 per petition.[47] However, Supreme Court Rule 39, which references 28 U.S.C. §1915, waives these fees for those without the ability to pay.[48] The combination of Supreme Court Rule 39 and 28 U.S.C. § 1915 opened the door to thousands of more petitions each Supreme Court term.[49]

Even as these gatekeeping mechanisms limit access to the Court, it may still decline to rule on the merits of a case after it has granted certiorari. This second level of the Court's gatekeeping is defined by the Court's Article III requirements, mainly focusing on justiciability.[50] In a

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or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253.

44. *See, e.g.*, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1271 (2011) (showing the Court's shrinking docket between 1946 and 2008 with a minimum case count of seventy-one cases in 2007).

45. The sharp increase in petitions during the middle of the twentieth century was due to the rise in forma pauperis petitions, which allowed for waiving of filing fees for indigent petitioners. The growth of the Supreme Court's docket as a result of in forma pauperis petitions was evident as far back as the 1950s. *See* William O. Douglas, *Supreme Court and Its Case Load*, 45 CORNELL L. REV. 401, 406 (1960) ("To be sure the total number of cases filed rose from 942 in the 1938 Term, to 1,510 in the 1946 Term, to 1,816 in the 1958 Term. But these totals are not too revealing. The increase has been due almost entirely to the flood of *in forma pauperis* cases which have been filed in increasing numbers since 1938.").

46. *See* Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1506 (2019) ("The IFP process is not meant to serve as an additional, merits-filtering process that is not imposed on other litigants. Its purpose is simply to remove the barrier of poverty for litigants who would otherwise bring a federal lawsuit."); *see also* Stephen Feldman, *Indigents in the Federal Courts: The* in Forma Pauperis *Statute—Equality and Frivolity*, 54 FORDHAM L. REV. 413, 419 (1985) ("[C]ommon sense and reality dictate that the courts must be sensitive to the great potential for abuses in the prisons. This factor merits great weight because so many in forma pauperis plaintiffs are prisoners.").

47. SUP. CT. R. 38.

48. SUP. CT. R. 39 (explaining "Proceedings *In Forma Pauperis*"); 28 U.S.C. § 1915 (2010) (same).

49. SUP. CT. R. 39; 28 U.S.C. § 1915 (2010); *see also* David M. O'Brien, *Managing the Business of the Supreme Court*, PUB. ADMIN. REV. 667, 669 (1985) ("Since World War II, the court's business has increased . . . . Much of the recent increase, however, has been due to the rise in the number of cases filed *in forma pauperis*, in the manner of a pauper, without the usual filing fees based upon the petitioner's oath of indigency. Filings by indigents have grown steadily from 59 in 1935, to over 1,000 by 1960, and to almost half of the present docket—over 2,300—in 1981.").

50. Mark Tushnet and Juan F González-Bertomeu defines justiciability as the following:

seminal concurrence in the case *Ashwander v. Tennessee Valley Authority*, Justice Brandeis described the purpose of such rules by writing: "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[51]

On one hand, the application of justiciability doctrines like those related to Article III may be seen as an abdication of judicial duties. In a practical sense, if the courts do not adjudicate these matters, a high percentage of them will go unresolved.[52] This is especially true with the application of the federal courts' political question doctrines.[53]

On the other hand, these Article III requirements are especially important to the federal government's separation of powers structure.[54] These rules, and the Court's willingness to defer to the other branches on constitutional matters, has the effect of expanding the power of Congress and the president relative to the Supreme Court.[55]

> A constitutional claim is justiciable when the appropriate court or courts will decide it on the merits. The term is more useful in its negative sense: cases or issues are nonjusticiable when courts will refrain from deciding them on the merits, asserting for various reasons that the cases or issues are not suitable for judicial resolution.

ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 111 (Mark Tushnet, Thomas Fleiner & Cheryl Saunders eds., 2013).

51. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346 (1936).

52. *See* THOMAS M. FRANCK, POLITICAL QUESTIONS JUDICIAL ANSWERS 11 (1992) ("The public in America expects that the legitimacy of almost any exercise of political power can be tested by referencing it to the validity of the authority of the judiciary. That makes all the more incongruous a long-standing reluctance of U.S. judges to decide an entire category of serious disputes in which the legitimacy of an exercise of political power is questioned.").

53. A prime example of this is the Court's unwillingness to resolve *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019). Chief Justice John Roberts, writing for the majority in this case, goes as far as recognizing the inequity inherent in not resolving this case when he writes, "Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is 'incompatible with democratic principles,' does not mean that the solution lies with the federal judiciary." *Id.* at 2506 (citation omitted). Even with this result though, he goes on to say, "We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506–07.

54. *See* Robert J. Pushaw Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 469–70 (1995) ("[S]eparation of powers in our democracy is frustrated by justiciability doctrines that permit courts to abdicate their role of enforcing federal law. Federalist principles require federal judges to exercise all their statutory jurisdiction unless (1) the political branches have attempted to obtain legal advice outside the litigation context; (2) Congress or the President has disregarded the finality of judicial orders, especially by reserving power to revise them; or (3) a political question has been presented.").

55. *See* Eric R. Claeys, *Article III, Section 2 Games: A Game-Theoretic Account of Standing and Other Justiciability Doctrines*, 67 S. CAL. L. REV. 1321, 1334 (1993) ("A court decision that such a dispute is justiciable represents a transfer of decisionmaking authority from the Congress

A. Measuring Preferences

For the Justices to decide to decline ruling in a case for any reason beyond a sincere change of mind about whether a case meets Article III criteria, the Justices must be forward-thinking. Forward-thinking implies the possibility that the Justices do not make decisions solely based on the law in a case.[56] In this Article, we assume that the Justices and other political actors have preferences, and that the Court's decision-making is not based entirely on its understanding of the law in a case or, in other words, on mechanical jurisprudence. While political actors are expected to have preferences in reaching decisions, this is not necessarily an expectation for judges.[57] There is strong support for this assumption as the Justices' votes are generally predictable to the extent that we can use prior information about their decision-making to infer how they will vote in future cases.[58] In previous studies, computer models have been able to accurately predict between 70 and 80 percent of the Justices' votes.[59] In one study comparing legal experts' predictions to a computer model, the

and the President, who negotiate to pass a law immune from review, to the judiciary."); Mark Silverstein & Benjamin Ginsberg, *The Supreme Court and the New Politics of Judicial Power*, 103 POL. SCI. Q. 371, 383 (1987) ("This trend continues unabated; a flexible approach to the question of justiciability permits the federal judiciary to screen cases on the basis of the substantive merits of any claim and, if desired, the character of the political interests asserting the claim."); *see also* Jeffrey A. Segal et al., *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 90 (2011) ("[T]he Court is not necessarily driven by the likely legislative response on the individual enactment at issue, but rather appears to appreciate its position in the broader ideological context governing the status quo at the time it renders its decision.").

56. *See* Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSP. 97, 115 (2021) ("Substantial scholarship has documented that the ideology of judges plays an important role in shaping their judicial behavior. The accumulated research goes back decades, to the 1940s and 1950s . . . .").

57. *See, e.g.*, Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 597 (1976) ("That there are political questions—issues to be resolved and decisions to be made by the political branches of government and not by the courts—is axiomatic in a system of constitutional government built on the separation of powers.").

58. *Id.*

59. *See* Theodore Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, COLUM. L. REV. 1150, 1186–87 (2004) ("Despite the degree of discretion afforded the Supreme Court, and despite the Court's often confounding ideological equipoise on many issues, the statistical model succeeded in recognizing patterns in the Justices' behavior sufficient to predict correctly the outcomes of 75% of the cases.").

computer model performed considerably better than the experts' predictions of the outcomes in the same cases.[60] The computer models' prediction is based on a measure of ideology which is defined as "a set of policy preferences or policy position."[61]

For decades, the political party of the president appointing a judge was seen as the most accurate proxy for ideology.[62] However, political party does not always correlate with ideology. In fact, many of the Justices that were appointed to the Court based on a president's assessment turned out to be ideologically out of sync with members of that political party in voting behavior within several years of their appointments.[63] For example, Justice John Paul Stevens, appointed by President Ford, and Chief Justice Earl Warren, appointed by President Eisenhower, show how an appointing president's party does not necessarily dictate a Justice's voting behavior.[64]

Ideology is also a more accurate measure of voting behavior than political party because rather than a binary measure like party affiliation, ideology occurs on a continuous spectrum so that multiple individuals affiliated with the same party will have different ideology scores. The current Supreme Court, for example, has three Democratic nominees and six Republican nominees. The Republican nominees do not always vote as a bloc; the same can be said for the Democratic nominees.[65] These

60. *See id.* at 1159 ("While the experts correctly forecast outcomes in 59.1% of cases, the machine got a full 75% right.").

61. LAWRENCE BAUM, IDEOLOGY IN THE SUPREME COURT 5 (2017).

62. *See, e.g.*, Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 845 (1961) ("Democratic judges were above the average decision score of their respective courts (in what might be considered the liberal direction) to a greater extent than the Republican judges.").

63. *See* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007) ("A Presidents hoping to create a lasting legacy in the form of Justices who share their ideology can be reasonably certain that their appointees will behave in line with expectations—at least during the Justices' first term in office. But even before hitting the first-decade mark, most Justices fluctuate, leading to a degradation of the relationship between their preferences and their votes.").

64. *See, e.g.*, Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. 1891, 1901 (2007) ("A President who is too politically weak to get an ideologically reliable nominee through the confirmation process, or who has other priorities, may resort to outsiders who haven't demonstrated their ideology in the same way: someone like Stevens, Blackmun, O'Connor, Kennedy, or Souter, all of whom have been ideological disappointments to many of their original supporters.").

65. *See, e.g.*, Angie Gou et al., *STAT PACK for the Supreme Court's 2021-22 term*, SCOTUSBLOG 15 (July 1, 2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/J288-GYYM] (showing variations in voting agreements among all pairs of Justices); Nina Totenberg, *Supreme Court Justices Split Along*

voting differences within groups of Justices who tend to espouse similar modes of interpretation provide a reason to believe something other than different starting points, leading to the divergent outcomes.[66]

Furthermore, the Court is not the only institution with an ideological measure of voting. Politicians' votes have been ideologically scaled with NOMINATE and Common Space Scores, which have proven far more accurate in predicting Congress members votes than political party affiliation.[67] Even though ideology scores provide stronger predictors of Supreme Court and congressional votes than party affiliations do, judicial and congressional votes occur in isolation; in other words, ideology cannot be easily compared between branches of government.[68] For the purpose of this Article, we required a measure that allowed us to see whether the ideological distance between both houses of Congress and the Court has an impact on the Court's decisions. To do this, we needed a comparable ideology measure that could be used to measure the ideological distance between the Court and Congress. "The Judicial Common Space" provided this metric, as it maps Supreme Court ideology onto the same scale as that of both houses of Congress.[69] "The Judicial Common

Unexpected Lines In 3 Cases, NAT'L PUB. RADIO (June 17, 2019), https://www.npr.org/2019/06/17/733408135/ supreme-court-justices-split-along-unexpected-lines-in-three-cases [https://perma.cc/3BCK-39S2] ("With less than two weeks left in the U.S. Supreme Court's term, the justices handed down four decisions on Monday. Defying predictions, three were decided by shifting liberal-conservative coalitions.").

66. *See, e.g.*, Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 30 (2011) ("The association of conservative politics with originalism is not accidental . . . and conservatives are generally more likely than liberals to find originalism a normatively attractive approach to constitutional interpretation.").

67. *See* Michael A. Bailey, *Comparable Preference Estimates Across Time and Institutions for the Court, Congress, and Presidency*, 51 AM. J. POL. SCI. 433, 436 (2007) ("In one of the most influential modern studies of Congress, Poole and Rosenthal (1997) find that congressional voting can be explained across long time periods with a one-dimensional spatial model of preferences . . . ."). For a discussion of multidimensional scaling, see Joshua B. Fischman, *Do the Justices Vote Like Policy Makers? Evidence from Scaling the Supreme Court with Interest Groups*, 44 J. LEGAL STUD. S269, S277 (2015) ("Metric multidimensional scaling generates a map of the Court where the spatial distances among the justices approximate their disagreement rates.").

68. *See* Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306 (2007) ("The goal of our measurement strategy is to place Supreme Court justices and Court of Appeals judges into a policy space that we call the JCS. Any measurement strategy that meets this goal should have a number of properties. The measures should be reliable and valid, they should not be issue or time-dependent (e.g., they should be amenable to backdating and updating with the availability of new data), and, ideally, they should be comparable to measures developed for members of Congress and the President.").

69. *Id.*; The approach in "The Judicial Common Space" relies on Supreme Court nominations by certain presidents whose ideologies are close enough to those of the median member of the Senate so that the President is not ideologically constrained by the Senate in selecting a nominee. *Id.* This strategy to merge the Congressional Scores and those for the Supreme Court Justices "also

Space" has been validated by numerous studies applying these measures to make inferences regarding the relationship between judicial and congressional ideologies.[70]

Another benefit of the "Judicial Common Space" measure is that it is dynamic rather than static, as it varies each year rather than staying the same across the life of each Justice or politician.[71] Since Justices are known to shift their voting behavior across time, this measure presents a far more accurate picture than a static measure capturing each Justice's ideology with a single score for their tenure on Court.[72] Using this dynamic metric allows us to demonstrate—more effectively than simple qualitative comparisons—that specific Justices, such as Justice O'Connor, progressively shifted toward a more liberal stance over time.

With an ideological spectrum, mapping Congress and the Justices on the same plane, we are able to test whether the ideological distance between the Justices (measured by the Court's median ideology) and either house of Congress is a significant factor in the Justices' decision for whether or not to relinquish a vote on the merits.

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relies on the unconstrained confirmed nominees to the Supreme Court to *estimate* the transformation between the Martin-Quinn space and the Common Space but we invoke a different transformation (as well as a distinct validation strategy)." *Id.* at 307. "What results from this procedure is a score for each term for each justice (and measures for the Court as a whole, such as its median member) who resides in the JCS." *Id.* at 307–08.

70. *See, e.g.*, Segal et al., *supra* note 55, at 94 ("Of course, the Court will have its own preferences over the legislation as well, preferences that we can capture using Judicial Common Space (JCS) scores." (citation omitted)); Matthew E. K. Hall & Joseph Daniel Ura, *Judicial Majoritarianism*, 77 J. POL. 818, 824 (2015) ("The ideological position of each branch was measured with Judicial Common Space Scores, which are comparable across institutions."); Connor N. Raso & William N. Eskridge Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1777 (2010) ("The ideological position of each branch was measured with Judicial Common Space Scores, which are comparable across institutions."); *see also* Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J.L. ANALYSIS 101, 130 n.33 (2011) ("To measure ideology, we use the Judicial Common Space scores.").

71. *See* Epstein et al., *supra* note 68, at 307 ("[W]e rely on a vote-based measure of Supreme Court ideology developed by Martin and Quinn (2002). These 'Martin-Quinn' scores, which are available for all justices in all terms from 1937 to 2003 . . . are derived from voting patterns on the Supreme Court, and allow justices' ideal points to change over time. They are dynamic in that each justice has an ideal point in each term served.").

72. *See* Epstein et al., *supra* note 63, at 1486 ("Finding that ideological drift is pervasive . . . we develop the implications of our results for . . . the Justices' . . . appointments to the Court and the doctrine they develop once confirmed.").

B. The Role of Preferences

Prior works describe how the Court accounts for other branches' ideological posture in case selection.[73] However, it is less clear whether the Court accounts for these same preferences in the way it decides cases, and whether the Justices intend to defer to the other branches of the federal government when they decide certain cases.[74]

The Court has good reason to account for the preferences of other political actors' ideological positions. First, Congress may legislate to overturn Court decisions, especially when it is ideologically distant from a Court decision.[75] Second, when institutional actors external to the Court change, so do the relative constraints on the Court's decisions, which are reflected in the Court's decision-making.[76] Third, Congressional signals about the Court's level of public support affect the Court's behavior and willingness to decide cases dealing with certain issues.[77] Fourth, when the Court dismisses a given case after accepting it on certiorari, it may signal Congress to become involved in dealing with such an issue.[78]

Fifth, the internal institutional structure of the Court influences its gatekeeping as well. When Justices think they have a majority of the

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73. *See, e.g.*, Segal et al., *supra* note 55, at 102 ("[W]hile the Court's policy preferences continue to exercise an influence over its exercise of judicial review, the justices also appear to moderate the use of this power depending on whether their ideological preferences are inconsistent with those of sitting members of Congress.").

74. *See, e.g.*, Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 AM. J. POL. SCI. 412, 412 (2010) ("Because the Supreme Court can set its own agenda, justices may rationally anticipate political actors' preferences at the agenda setting stage and sift out those cases that will engender political rebuke.").

75. *See* Alicia Uribe et al., *The Influence of Congressional Preferences on Legislative Overrides of Supreme Court Decisions*, 48 L. & SOC'Y L. REV. 921, 926 (2014) ("[G]iven the finite nature of the congressional agenda, we assume that Congress prioritizes the overriding of more 'distant' (i.e., ideologically objectionable) precedents. This suggests that the probability of an override is increasing in the ideological distance between the Court decision and the closest pivotal member.").

76. *See* Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263, 265 (1990) ("Unlike members of Congress, the Court does not necessarily have a relevant constituency whose interests it needs to consider in rendering its opinions. On the other hand, the Supreme Court decisions are not taken in a political vacuum. The ability of other actors to take actions to reverse the Supreme Court decisions is what constrains the scope and power of the Court.").

77. *See* Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 973 (2009) ("[D]espite the Supreme Court's nominal insulation from the American people, the justices have strong incentives to be concerned with their public standing. They recognize that erosion of public support and institutional legitimacy has negative consequences for the Court's power and institutional integrity.").

78. *See* Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1445 (2017) ("[W]hen a federal court dismisses a suit for lack of standing, Congress could understand this dismissal as an invitation to create a non-Article III *federal* process.").

Court's support on an issue, they may be more likely to vote for a case on certiorari.[79] Conversely, if they believe a majority of the Court is opposed to their position on the merits, they may be less likely to vote in favor of certiorari.[80] These maneuvers are referred to as "aggressive grants" and "defensive denials."[81]

Sixth, there is gatekeeping after cases are granted certiorari. Division among the Justices in certain matters may influence the Court to apply Article III rules rather than decide such cases on the merits.[82] In assessing this division, the Justices likely account for the preferences of their fellow Justices.[83] In cases already accepted on certiorari, the Justices may avoid ruling on substantive issues when a ruling on the merits may create "poor policy outcomes" in the minds of some of the Justices.[84] The Justices recognize the disparate views of their colleagues during oral arguments or at conference and raise concerns about a case's viability at any point during the decision-making process.[85]

With these institutional features in mind, this Article highlights the main instances where the Justices are likely to decline ruling in cases already granted certiorari.

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79. *See* Sara Benesh et al., *Aggressive Grants by Affirm-Minded Justices*, 30 AM. POL. RSCH. 219, 232 (2002) ("Although the vote to grant cert does not rest solely on the determination of whether an affirm-minded justice will win or lose, ease in prediction does matter. At least some of the time, the justices look ahead to the final vote before they cast their very first vote.").

80. *See* Saul Brenner, *The New Certiorari Game*, 43 J. POL. 649, 651 (1979) ("If the four justices who vote to grant cert are rational decision-makers they will estimate the odds and their chances of winning prior to voting for certiorari. Justices can be expected to calculate with a high degree of accuracy for they have the motivation, ability, and opportunity to do so.").

81. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 80 (1997) (describing the processes and rationales behind strategic moves at the certiorari stage).

82. *See* Greg Goelzhauser, *Avoiding Constitutional Cases*, 39 AM. POL. RSCH. 483, 489 (2011) ("Delaying or avoiding constitutional disputes may be appealing to a fractured Court for a number of reasons. First, heterogeneous justices might find the costs of negotiating a resolution too high, preferring instead to put off a decision and focus their energy on other tasks. Furthermore, as with the decision to substitute constitutional for statutory cases, there may be benefits to delaying or avoiding cases when the Court cannot produce judgments that are resistant to political pressure.").

83. *See* Owens, *supra* note 74, at 413 ("[J]ustices pursue their goals in an interdependent environment in which their decisions are a function not only of their personal policy preferences, but also the preferences of those with whom they must interact, namely, their colleagues . . . .").

84. *See* Ryan C. Black et al., *Trying to Get What You Want: Heresthetical Maneuvering and U.S. Supreme Court Decision Making*, 66 POL. RSCH. Q. 819, 820 (2013) ("[J]ustices can selectively, and strategically, add these issues to the legal record of a case so they may have the opportunity to derail the Court from reaching what they believe might be a poor policy outcome.").

85. *See id.* at 819 ("[J]ustices raise threshold issues more often during oral arguments when the Court's merits outcome would push policy further from their ideal point than the current legal status quo.").

II. GATEKEEPING

The Supreme Court confines its merits docket to a select few cases each term, and these cases shape the Court's agenda.[86] With the Judiciary Act of 1925, Congress gave the Court the power of discretionary review through the certiorari process.[87] While the Court's certiorari decisions take place largely outside of the public's view, factors such as a conflict between circuits, as described in Supreme Court Rule 10, are known to enhance the Court's consideration.[88] Some Justices also tend to vote in favor of granting certiorari more than others.[89] This variation in behavior is also apparent in the Justices' willingness to decline to decide substantive issues in cases already granted certiorari.[90]

Not all court decisions not to rule in cases based on cases' dimensions take place in the Supreme Court as lower courts may rule that cases lack justiciability as well.[91] However, little empirical work has been undertaken to examine the Supreme Court's application of such principles, and most of such work focuses entirely on the concept of justiciability.[92] The closest scholarly work examining this phenomenon is a dissertation by

86. *See* Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717, 717 (1993) ("From the thousands of candidates each term, the Supreme Court chooses one hundred or so cases for plenary review.").

87. 43 Stat. 936 (1925).

88. *See* S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 910 (1984) ("It may now be suggested that in making up its plenary case agenda, the Court is significantly responsive to . . . conflict—and less governed by case issue variables than one might have thought."); SUP. CT. R. 10 (stating how the presence circuit splits may make granting certiorari more likely).

89. *See* Kevin M. Scott, *Shaping the Supreme Court's Federal Certiorari Docket*, 27 JUST. SYS. J. 191, 203 (2006) ("The beliefs of individual justices have a considerable impact on the size of the Court's docket. Though there is strong evidence that, in deciding whether to grant certiorari, the justices make a series of calculations based on the ultimate outcome of the cases . . . .").

90. *See, e.g.*, Lujan v. Defs. Of Wildlife, 504 U.S. 555, 578 (1992) ("As we said in *Sierra Club*, '[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.' Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain." (alterations in original) (quoting Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).

91. *See* Erin B. Kaheny, *The Nature of Circuit Court Gatekeeping Decisions*, 44 L. & SOC'Y REV. 129, 130 (2010) ("[C]ircuit judges are frequently asked to review the threshold decisions of lower court judges. These threshold or 'access' decisions involve questions of standing to sue, mootness, ripeness, exhaustion, jurisdiction, and so forth. By granting or denying access to a full hearing on the merits, judges act as 'gatekeepers,' regulating the judicial system's 'demand input' . . . .").

92. For examples of previous empirical articles on justiciability, see *supra* note 6.

Dr. Andrew Povtak, now a professor at Kent State University.[93] Povtvak's dissertation makes great strides toward understanding the correlates of decisions related to justiciability in particular, but it is also lacking in four main areas.[94]

First, it uses Supreme Court Database issue codes to discern when justiciability is an issue in a case.[95] The inherent problem here is that Supreme Court Database coders could only apply one issue to each case—such an application often failed to find the justiciability concern as the dominant issue. As a result, the dissertation dataset is greatly underinclusive and overlooks important justiciability cases.[96] The coding in this Article is agnostic to issues aside from justiciability. Second, as related to under-inclusivity, Potvak's dataset focuses only on justiciability concerns that arise in majority opinions.[97] This Article examines when an issue of justiciability arises in majority or separate opinions to help identify all instances when these issues are implicated in a case.

Third, Potvak's dissertation does not model the separation of powers' influence on justiciability decisions.[98] Justiciability decisions do not take

93. *See generally* Andrew Povtak, Deciding to Not Decide: A Longitudinal Analysis of the Politics of Secondary Access on the U.S. Supreme Court (2011) (Ph.D. dissertation, Kent State University).

94. *Id.*

95. *See id.* at 31 ("Justiciability and jurisdiction cases are identified using the Supreme Court Database, an update of the original Spaeth Supreme Court Database. The Database codes all Supreme Court cases from the 1953 term to the 2008 term by issue area using 5-digit codes." (citation omitted)).

96. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 125 (1973) ("We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot."). The dissertation for instance does not highlight mootness cases where the Court evaluated the doctrine but still decided to proceed with a merits review. *See* Povtak, *supra* note 93, at 29–30, 62–73, 83–105, 150–160, 168–170. The same can be said for cases examining the political question doctrine when the Court decides to proceed with merits review. *See id.* For example, *see* Baker v. Carr, 369 U.S. 186, 198 (1962) ("Our conclusion that this cause presents no nonjusticiable 'political question' settles the only possible doubt that it is a case or controversy." (citation omitted)).

97. Cases like *Epperson v. Arkansas*, 393 U.S. 97 (1968), for instance were omitted notwithstanding secondary opinions relating to justiciability concerns. *See Epperson*, 397 U.S. at 109 (Black, J., concurring) ("I am by no means sure that this case presents a genuinely justiciable case or controversy. Although Arkansas Initiated Act No. 1, the statute alleged to be unconstitutional, was passed by the voters of Arkansas in 1928, we are informed that there has never been even a single attempt by the State to enforce it.").

98. *See* Potvak, *supra* note 93, at 144–45 ("An initial logistic regression tests the effects of the two houses of Congress (when controlled by Democrats), the Presidency (also when controlled by a Democrat)."). That model assumes unitary ideology based on party. We use ideal points to model dynamic ideology scores for all actors which captures a more detailed picture of the actors' preferences. For a discussion of the benefits of ideal point modeling, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme*

place in a vacuum, so understanding the role of relative ideologies of the Court and Congress should play a role in modeling justiciability decisions. Fourth, Potvak's dissertation uses static Segal-Cover Scores to determine Justices' ideologies.[99] While Segal-Cover Scores are helpful, they are not as accurate predictors of votes as the dynamic Judicial Common Space Scores used in this Article's study, which are based on the Justices' actual votes.[100] The dynamic ideal points we used based on Judicial Common Space Scores also allow for the Justices' ideologies to be bridged with those of both houses of Congress which is not present in previous studies.[101]

Furthermore, two other studies, both by Gregory Rathjen and Harold Spaeth, stand out in their explicit focus on this Supreme Court's gatekeeping function.[102] First, Rathjen and Spaeth's article, "Access to the Federal Courts: An Analysis of Burger Court Policy Making," looks at access to the Supreme Court as a function of such decisions and shows that the Justices have differing concerns that affect their views on access to the Court and the Court's policymaking decisions.[103] Next, "Denial of access and ideological preferences: An analysis of the voting behavior of the Burger Court Justices, 1969–1976" focuses more on the ideology of the Justices.[104] Spaeth and Rathjen find that of 111 access closure cases, eighty-nine favored a conservative outcome.[105] The authors hypothesize

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Court, 1953–1999, 10 POL. ANALYSIS 134, 152 (2002) ("Not only have we estimated superior measures of judicial preferences, but we provide strong evidence that the ideal points of many justices do change over time. This is not a universal phenomenon, but it is certainly the case that the preferences of some justices change over time. For most justices, this change is monotonic. Our results imply that a constant measure of judicial preferences—such as the measure of Segal and Cover (1989)—is not appropriate for explaining longitudinal judicial decision making.").

99. *See* Potvak, *supra* note 93, at 33 ("The main independent variable testing this hypothesis consists of Segal-Cover scores for each of the justices.").

100. *See id.* at 35 (discussing the strengths and weaknesses of the Segal-Cover Scores).

101. *See generally id.*; *see also* Epstein et al., *supra* note 68, at 306 ("[I]deally, [the Judicial Common Space Scores] should be comparable to measures developed for members of Congress and the President.").

102. For studies conducted by Gregory J. Rathjen and Harold J. Spaeth, see *supra* note 6.

103. Rathjen & Spaeth, *Access to the Federal Courts*, *supra* note 6, at 366 ("[S]ome Justices may be motivated primarily by the political, others primarily by the administrative-legal, while still others may mix the two in such a fashion as to be motivated primarily by an overriding, undifferentiated view of access per se.").

104. *See generally* Rathjen & Spaeth, *Denial of Access*, *supra* note 6, at 76 ("The assessment of [Justices] individual votes . . . allowed for designation of case outcome as liberal, indeterminate, or conservative").

105. *Id.* at 76 ("The 111 access closure decisions are overwhelmingly conservative in substantive effect. Eighty percent (89 cases) either uphold a conservative outcome reached elsewhere or conservatively affect the losing litigants. By contrast, only 12.4 percent (14 cases) produce a liberal result."). Rathjen and Spaeth describe that, "[w]hereas voters in our earlier study were scored as

this outcome is due to the overall conservative nature of the Burger Court.[106]

Other studies are also pushing the understanding of justiciability jurisprudence beyond the qualitative case studies. Mark Silverstein and Benjamin Ginsberg explain that a positive outcome of the liberalization of justiciability rules is the ability for the Justices to develop political ties with constituency groups.[107] Eric R. Claeys develops a game-theoretic model showing that it is possible to estimate how certain justiciability rules allow or diminish judges' abilities to make decisions that conform to their preferences.[108] Furthermore, Ryan C. Black, Rachel A. Schutte and Timothy R. Johnson, elaborate on the use of justiciability rules, conveying that these rules allow Justices a second chance to avoid deciding on an issue—especially when the likely decision does not accord with their policy preferences.[109] Finally, Lawrence Baum presents evidence that Justices are concerned with speaking to particular audiences for personal approval as an end of itself.[110]

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pro (+) or anti (–) access, the same votes are scored as supportive of either a liberal, indeterminate, or conservative outcome." *Id.* at 75.

106. *See id.* at 83 ("Analysis of the 111 decisions in which the Supreme Court denied litigants access during the first seven terms of the Burger Court indicates clearly that the voting of the principally participating justices was motivated by their overall ideological preferences.").

107. *See* Mark Silverstein & Benjamin Ginsberg, *The Supreme Court and the New Politics of Judicial Power*, 102 POL. SCI. Q. 371, 381 (1987) ("Liberalizing the rules of justiciability coupled with the development of new tools of judicial power permitted the Court to forge political links with important constituency groups.").

108. *See* Claeys, *supra* note 55, at 1366 ("With all this information, it is possible to estimate how particular justiciability rules constrain or expand the ability of different federal officials to interpret law to their own preferences.").

109. *See* Black et al., *supra* note 84, at 822 ("[S]hould the Court's opinion end up being out of line with the preferences of a justice who was initially likely to lose on policy grounds, she now has the option of attempting to muster a coalition of justices to decide on a threshold issue rather than on the merits.").

110. *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 43–49 (2008).

Much of the other work in this area is doctrinal rather than empirical.[111] Some argue that justiciability rules are either purposeless or unnecessary.[112] Others argue that the Court should decide potentially nonjusticiable cases if an outcome would benefit public values.[113]

On the opposite end of the spectrum, some argue that by choosing not to decide certain cases on the merits, the Court insulates itself from the scrutiny of the other branches of the federal government.[114] Conversely, Susan Bandes in her work, "The Idea of a Case," and Erwin Chemerinsky with his article, "A Unified Approach to Justiciability," argue that the judicial flexibility in the areas of Article III and justiciability lead to a lack of judicial accountability because it is unclear where and when the courts will apply these various doctrines.[115]

When the Court invokes such rules, it does not entirely abdicate its role in a dispute and to this end, Laurence Tribe writes, "Judicial neutrality inescapably involves taking sides. The judgment of the Court, though it may be to elude an issue, in effect settles the substance of the case. Judi-

111. *See, e.g.*, Chemerinsky, *supra* note 17 (trying to disentangle concept of justiciability based on cases going in various different directions); *see also* Pushaw Jr., *supra* note 54 (attempting to convey and update an approach to justiciability which accords with the principles of the Federalists who founded the nation).

112. *See* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 78 (2007) ("[T]he intricate set of constraints that the Supreme Court has found to be implicit in the terse language of Article III do not serve any apparent purpose. Certainly no one has yet proposed a theory of the purpose behind the justiciability constraints that has achieved general acceptance."); *see also* Chemerinsky, *supra* note 17, at 678 ("[T]his large set of justiciability rules is undesirable and unnecessary. It is undesirable because the multiplicity of rules distorts analysis and engenders confusion. It is unnecessary because ultimately all of the doctrines are animated by a few basic policy questions . . . .").

113. *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 635 (1992) ("Similarly, if the public-values model of adjudication calls for a focus on what makes a case a good candidate for the establishment of precedent to decide questions of standing (rather than a focus on the relatively formalistic criterion of 'personal stake'), it should support the softening of all justiciability doctrines, not just mootness.").

114. *See* Pushaw, *supra* note 54, at 399 ("The Court has gradually come to view elected officials as the only representatives of the People. This distortion of popular sovereignty is a legacy of the New Deal's exigent embrace of the Progressive recommendation that America adopt the British model of decisive, centralized legislative-executive rule. To facilitate such efficient government, the Court has largely insulated the political departments' actions from 'antidemocratic' judicial scrutiny by altering the justiciability doctrines to decrease access to federal courts.").

115. *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229 (1990) ("The failure to define an article III case has atomized the doctrines designed to implement the case limitation. Not surprisingly, this atomization leads to conflicting, unpredictable decisions and impoverishes the field by treating insights about each doctrinal area as nontransferable."); *see generally* Chemerinsky, *supra* note 17.

cial authority to determine when to defer to others in constitutional matters is a procedural form of substantive power . . . ."[116] Sometimes the Justices are not ready to decide an issue when the Court initially grants a petition for certiorari, and if the Court later discards the case due to a case's dimensions, the litigant may seek alternative redress through legislation.[117]

Furthermore, there are cases, such as *Bush v. Gore*,[118] that multiple scholars describe as non-justiciable even though the Justices reached the merits of such disputes.[119] Regardless of the contours of the various justiciability rules, cases like *Bush v. Gore* indicate that these rules are malleable and up to the Justices' discretion.[120] If cases are not clearly justiciable on their faces, this invites the Justices to debate whether or not to proceed in a case that presents potential claims of non-justiciability.[121] In particular areas, such as gerrymandering, the use or non-use of these doctrines has led some to argue that the Court's inconsistency in applying these rules benefits the interests of certain sectors of the population.[122] With these concerns in mind, this Article provides context to the Court's

116. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW iv (1978).

117. *See* MATTHEW STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 159 (2002) ("In raising the cost [through justiciability rules] to potential ideological litigants of trying to vindicate their claims in federal court, standing further encourages them to seek redress in Congress or in state legislatures.").

118. Bush v. Gore, 531 U.S. 98 (2000).

119. *See* Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1097 (2000) ("The Supreme Court has declared that the 'irreducible minimum' of Article III's limit on the judicial power is a requirement that a party 'show that he personally suffered some actual or threatened injury . . . .' George W. Bush did not and could not claim that he was denied equal protection." (quoting Valley Forge Christian Coil. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982))); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1223 (2001) ("Why should Governor Bush have standing to raise this claim? One thing should be obvious: Governor Bush cannot assert standing on the ground that the constitutional flaw in the recount system adversely affected him. The flaw identified by the Supreme Court majority has no systematic relationship to votes for either candidate . . . .").

120. *See generally* Chemerinsky, *supra* note 119.

121. *See* Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1141 (1977) ("Depending upon how one regards the Court's appropriate role, the concept of justiciability may represent a porous I for the exercise of jurisdiction to vindicate essentially public values and interests or an improper obstacle to the protection of contemporary private interests or both.").

122. *See* Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 1011–12 (2019) ("[I]t is not surprising that a conservative Court will also tend to rule in ways that favor the interests of whites over the interests of racial minorities. . . . The Court defers on nonjusticiability grounds when white interests are being advanced, and it intervenes in what it finds to be a justiciable case or controversy to invalidate a gerrymander when racial-minority interests are advanced.").

choices of when not to rule on the merits of a case and defines parameters that lead to the systematic application of such decision-denying doctrine.

III. DECIDING TO NOT DECIDE

Many of the Court's decisions to not rule in a case after accepting it on the merits fall under the Court's justiciability doctrines.[123] While at times a somewhat amorphous concept, the term "justiciability" has come to describe various prudential guidelines the Court employs to decide whether it should rule upon the merits once a case has been granted on certiorari.[124] Russell Galloway synthesizes the various components of justiciability as "the what" (an actual case with adverse parties, no collusion, no advisory opinions, no political questions, and no extra-judicial review); "the when" (sufficient ripeness, not moot, and the rule of necessity); and "the who" (general standing, taxpayer standing, and organization standing).[125]

Although some date these rules back to British practice before the nation came into existence,[126] many scholars attribute the first application of justiciability rules, and specifically the political question doctrine, to Chief Justice Marshall's decision in *Marbury v. Madison*.[127] In *Marbury*, the Court denied the sought-after remedy on the grounds that the Judiciary Act of 1789 unconstitutionally delegated Congress the power to enlarge the Supreme Court's original jurisdiction.[128] This led to the Court's conclusion that it was powerless to decide in that case.[129]

123. *See* Lee, *supra* note 113, at 608 (describing how Article III's case or controversy requirement is a barrier to entry into federal court litigation).

124. *See id.* at 644 ("[T]he Court has used the term as a slogan-in-chief to cover a disparate group of prudential maxims whose philosophical premise is judicial restraint. In other words, much like the current doctrines of standing, mootness, and ripeness, the advisory opinion doctrine has a constitutionally-mandated core and a large prudential curtilage.").

125. Russell W. Galloway, *Basic Justiciability Analysis*, 30 SANTA CLARA L. REV. 911, 912 (1990) (providing an overview of each component of justiciability).

126. *See* Pushaw, *supra* note 54, at 399 ("The Federalist Court's seminal justiciability opinions presuppose familiarity with the Constitution's underlying theory, which adapted English separation-of-powers concepts to the American idea of popular sovereignty." (citations omitted)).

127. *See* Albert, *supra* note 121, at 1161 ("*Marbury v. Madison* established that constitutional questions were subject to judicial inquiry; the political question rubric posits that some are not. Because the political question ruling attaches to a substantive issue rather than the particular parties or timing of a case, it also posits an enduring form of restraint."); *see generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

128. *Marbury*, 5 U.S. at 180 ("The rule must be discharged.").

129. *See id.* at 178 ("So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law,

A. What Makes a Case Adjudicatory?

In *Smith v. Adams*, Justice Fields clarified this by stating, "[b]y those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."[130] Case dimensions also go beyond justiciability principles. In his *Ashwander v. Tennessee Valley Authority* concurrence,[131] Justice Brandeis laid out the following seven prudential principles of akin to justiciability rules but that also go beyond justiciability in certain respects:

> 1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. . . ."
>
> 2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."
>
> 3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."
>
> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application.
>
> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.
>
> 6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.
>
> 7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[132]

In light of these rules, it is not surprising that one of Justice Brandeis' former clerks, Paul Freund, described his interactions with the Justice as, "The most important thing we decide, [Brandeis] used to say, is what not

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the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

130. Smith v. Adams, 130 U.S. 167, 173 (1889).

131. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341–56 (1936) (Brandeis, J., concurring).

132. *Id.* at 346–48 (citations omitted).

to decide."[133] The seven factors enumerated by Justice Brandeis in his *Ashwander* concurrence cover much of the terrain of justiciability aside from the political question doctrine.

The cornerstone of the political question doctrine was not clearly defined until the 1962 case, *Baker v. Carr*.[134] Here, Justice Brennan set forth reasons why the Court may want to defer to another branch of government rather than to decide the merits of a case, including:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[135]

Rather than deference, examining a case's dimensions may be a pretext for the Court's unwillingness to decide certain issues. A particularly illuminating case study looks at the case dimensions of *Gill v. Whitford*.[136] *Gill* is a case that examined partisan gerrymandering.[137] Rather than ruling on the merits, the Court in *Gill* decided the case was non-justiciable based on standing grounds.[138] Authors of a recent *Harvard Law Review* article on *Gill* ask why the Court was unwilling to review the substance of this case.[139] The authors make the following observation: "*Gill v. Whitford* is nominally a case about standing. *Gill* is best understood within a line of cases in which the Court articulated its reluctance to police the political process and its justifications for its posture of nonintervention."[140] In a sense, the authors argue that by not ruling in *Gill*, the Justices either abdicated their professional duty or engaged in their professional duty by nonintervention.[141]

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133. *See* Paul A. Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 HARV. L. REV. 769, 787 (1956).

134. Baker v. Carr, 369 U.S. 186 (1962).

135. *Id.* at 217.

136. *See generally* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 131 HARV. L. REV. 236 (2018); Gill v. Whitford, 138 S. Ct. 1916 (2018).

137. *Gill*, 138 S. Ct. at 1929–31.

138. *Id.* at 1931–33.

139. *See* Charles & Fuentes-Rohwer, *supra* note 136, at 239 (introducing the narrative of nonintervention).

140. *Id.* at 241.

141. *Id.* at 239, 254.

Just a year later, the Court ruled in *Rucho v. Common Cause*,[142] that the Justices would not police partisan gerrymandering moving forward because this issue was best left up to the political branches.[143] These cases exemplify the analytical entanglements in analyzing the impact of deciding a case based on case dimensions grounds. Do the Justices feel the Court is truly ill-suited to decide certain issues, or are the Justices skirting issues that would be best resolved in the Supreme Court? The following analysis looks at one of the rationales behind why the Court potentially applies these very principles—in order to defer to Congress.

IV. DATA AND METHODS

The data for this Article is hand-coded based on coding rules created for the Article that are set forth in the Appendix.[144] The goal is to identify cases where the Court mentioned a reason to not rule in a case, only to either stop its substantive analysis, or in the contrary, address the merits of the case notwithstanding the concern raised.

A. To What Extent are the Justices in this Dataset Engaging in such Analyses?

In looking at the modern practice of the Court, it is helpful to focus on decisions of the Court under the two most recent Chief Justices: William Rehnquist (1986 to 2005) and John G. Roberts, Jr. (2005 to the present). A Chief Justice, along with various constitutional and administrative duties, has significant influence in shaping the culture and agenda of the Court.[145] A Chief Justice sets the initial agenda for the Court's weekly meetings to review petitions for writs of certiorari, and in the majority,

142. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

143. *Id.* at 2506–08.

144. A random sample of the data was double coded for an intercoder reliability check. This double coding technique is performed to make sure that there is more than a random chance that the two coders arrive at the same conclusions. This helps to verify the clarity of the coding rules. The first set of data examined coding for whether a justiciability issue should be coded as arising or not. Intercoder agreement was 96.1% with a Kappa score of .619 and a prob>Z of 0.0. This probability level shows that there is essentially no possibility that the same responses were reached by chance. The second set of data examined the justiciability decisions in the cases to test for intercoder reliability on the justiciability issues raised in the cases. Here the agreement was 82.89% with a Kappa score of .515 and a prob>Z also of 0.0.

145. *See generally* Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1665–1707 (2006).

assigns authorship of the majority opinion.[146] Although the Chief Justice's vote is equal to the other Associate Justices, this agenda-setting power at multiple stages of a case's review bestows the Chief Justice substantial power.[147] Thus, it is sensible to assess the behavior of the Court under the leadership of the two most recent Chief Justices.[148] The Court's jurisprudence under the most recent Chief Justices is most relevant for having the most direct impact on the current state of the law. As an initial effort to assess the theories discussed above, the years for empirical analysis within each Chief Justice era are randomly selected.[149]

Comparisons between the Rehnquist and Roberts Courts are tricky because the Rehnquist Court tended to hear many more cases each term than the Roberts Court.[150] Still, the numbers are similar across both eras. Below are two figures that illustrate the opinions the Justices authored based on different criteria. Figure 1 looks at the opinion types for decisions engaging in case dimensions reviews. The data is broken down into majority, dissenting, or concurring opinions, and are split by Justice.

146. *Id.* at 1617 ("Given the vast number of cert petitions, individual Justices are less able to attend carefully to individual cases, so they may be more willing to defer to the Chief's leadership.").

147. *See id.* 1665 (2006) ("The office of the Chief Justice has been considered 'second in national authority and prestige only to the president.'" (quoting ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT xii (1986))); Timothy R. Johnson et al., *Passing and Strategic Voting on the U.S. Supreme Court*, 39 L. & SOC'Y REV. 349, 351 (2005) (describing Chief Justice Burger's agenda setting and strategic conference voting).

148. Retired Supreme Court Justice John Paul Stevens echoed Byron White, also a previous Justice, in observing that, although historians demarcate the chapters of the Court based on the tenures of the Chief Justices, each confirmation of a new Justice "creates a new Court with significantly different dynamics than its predecessor." JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 7 (2011). As such, it is also sensible to analyze the individual Justices' behavior in addition to the behavior of the Court as a group under the leadership of a Chief Justice.

149. The collection and coding of the data used in this study is resource intensive. Given the findings presented in Part V, further data collection and coding is warranted to expand the number of years and Chief Justice eras to be considered.

150. During the Rehnquist years, the Court averaged 110 decisions per year, with a low of 84 and a high 171 cases. Throughout the Roberts years, the Court averaged 66 decisions per year, with a low of 47 (June 2022) and a high of 116 cases.

FIGURE 1: JUSTICES ANALYSES BY DECISION TYPE

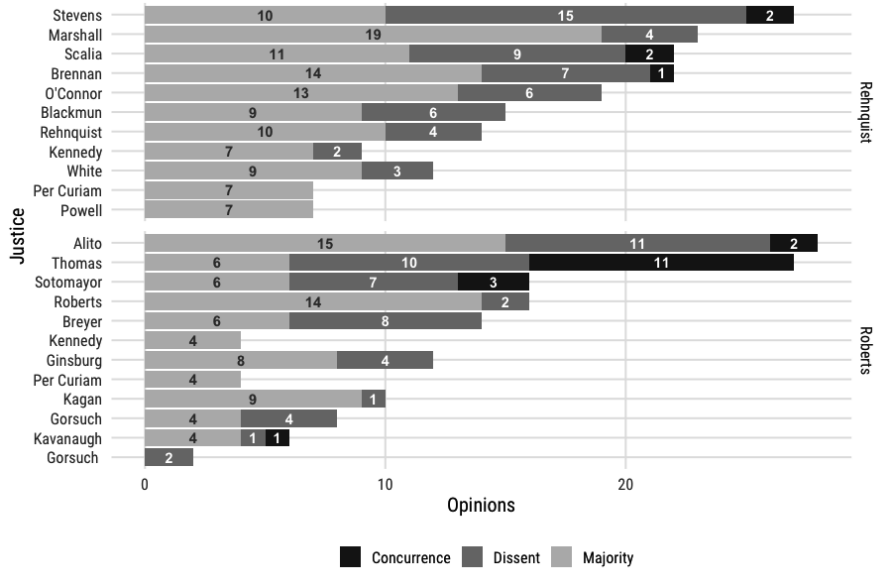
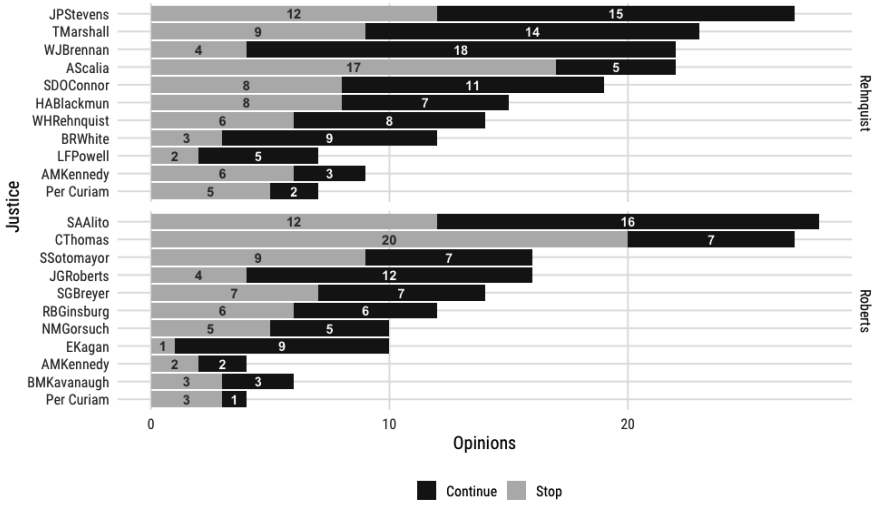


Figure 1 above shows that Justice Stevens and Justice Alito were the two Justices who authored the most opinions raising these concerns during the timeframes of interest. Because Justices tend to author approximately the same number of majority opinions, the distinctions are not necessarily going to arise from majority opinions authored. The two Justices that engaged in the most case dimensions analyses in majority opinions were Justice Marshall during the Rehnquist Court with nineteen and Justice Alito in the Roberts Court with fifteen. Much of the distinction in the number of opinions each Justice authored comes down to their counts of secondary opinions. For example, Justice Stevens had more relevant dissents than any of the other Justices, with fifteen; Justice Alito had the second most with eleven.

Figure 2 looks at the decision direction of each Justice's opinions. That is, each case is coded by a Justice depending on whether the Justice sought to defer resolution in the case based on the case's case dimensions or if the Justice proceeded to the substantive merits of the dispute notwithstanding these concerns.

FIGURE 2: JUSTICES' DECISIONS ON CASE DIMENSIONS ISSUES



The Justice with the most opinions that addressed the merits of the case after addressing case dimensions was Justice Alito. Justice Kagan had the highest percentage of opinions seeking to continue the analyses at 90 percent. In contrast, Justices Thomas and Scalia had the most opinions seeking to end the analyses due to concerns over case dimensions.

The quantitative analyses in this Article explore various facets of the data. A principal facet looks at when the Court rules on case dimensions. The dependent variable in this instance is binary—coded "0" when the Justices did not examine the case dimensions and "1" when issues with case dimensions were raised by at least one Justice. The intuition here is that the Court should focus more on case dimensions in cases like *Gill v. Whitford*, where the Court decides to skirt an issue on case dimensions grounds, leaving it for the political branches to resolve.[151]

The hand-coded data was merged with the United States Supreme Court Database, which provides a comprehensive list of all cases the Supreme Court hears.[152] The data for both The Rehnquist and Roberts Courts were pooled for this initial analysis because the analysis requires looking at the overall determinants for whether case dimensions were an issue in these cases. The observations are based on the individual Justices' votes, so that we can analyze whether individual judicial ideology

151. Gill v. Whitford, 138 S. Ct. 1916, 1917 (2018).

152. Harold J. Spaeth et al., *2022 Supreme Court Database, Version 2022 Release 1*, WASH. U. L., http://supremecourtdatabase.org [https://perma.cc/YFA3-7WV5].

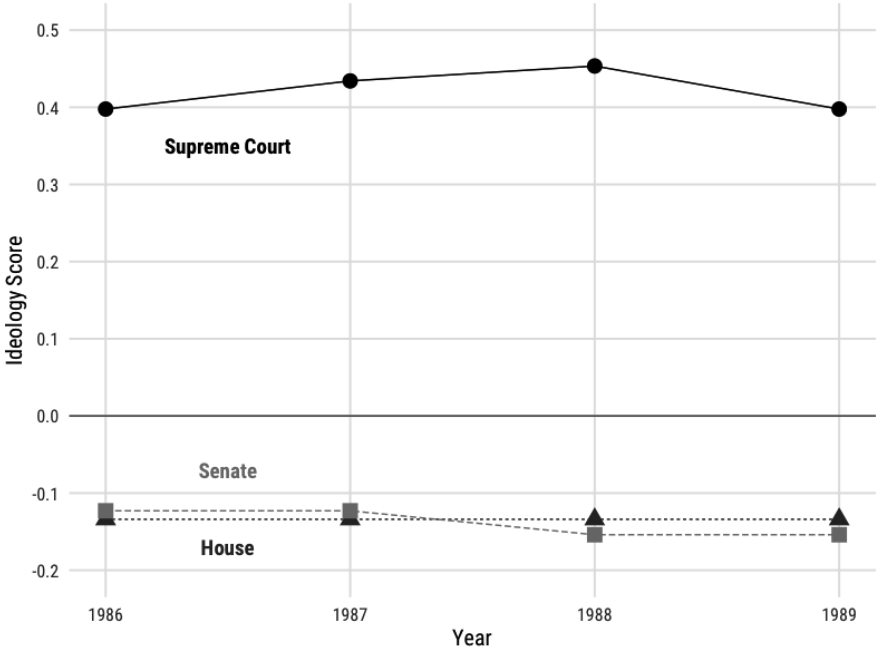
played a role in determining whether to engage a case dimensions analysis (Justice Ideology).

To test the theories presented above, this Article required bridged ideological data between the Supreme Court and Congress. "The Judicial Common Space" provides this bridged data through the Court's 2019 Term.[153]

B. Comparing Ideologies of the Court and Congress

First, Figure 3 below illustrates the ideologies of the Court, Senate, and House of Representatives for the Rehnquist Court.

FIGURE 3: IDEOLOGY BY BRANCH FOR REHNQUIST YEARS



Since the ideologies are all on the same spectrum, Figure 3 shows a lack of ideological alignment during the Rehnquist Court. Positive scores reflect more conservative views, while negative scores correlated with more liberal views. While the median of the Court is in conservative territory for all four Rehnquist Court years, the ideological medians for the Senate and the House are negative, equating to primarily liberal preferences.

153. *See* Lee Epstein et al., *supra* notes 68–72 and accompanying text. For the ideological medians for the Senate, House, and Supreme Court used for each year of coded data, see *infra* Appendix.

On the other hand, ideologies during the Roberts Court look quite different, as illustrated in Figure 4 below.

FIGURE 4: IDEOLOGY BY BRANCH FOR ROBERTS YEARS

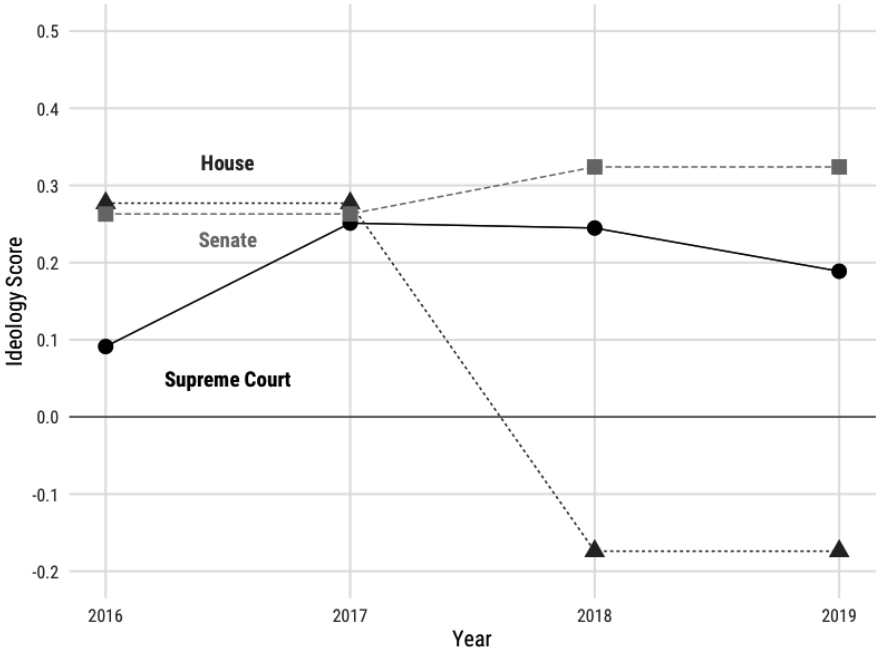


Figure 4 shows that there is much better alignment between the Court and Congress during the Roberts Court, especially within the Senate. For two years (2016 and 2017), the Court, the Senate, and the House all have ideologies in the conservative territory. During the other two years (2018 and 2019), the Court and the Senate have median scores that reflect conservative ideologies. However, the House has a negative, or liberal, median ideology score for the final two years of the Roberts Court. This likely corresponds to the shift in partisan control in the House midway through the Trump presidency.[154]

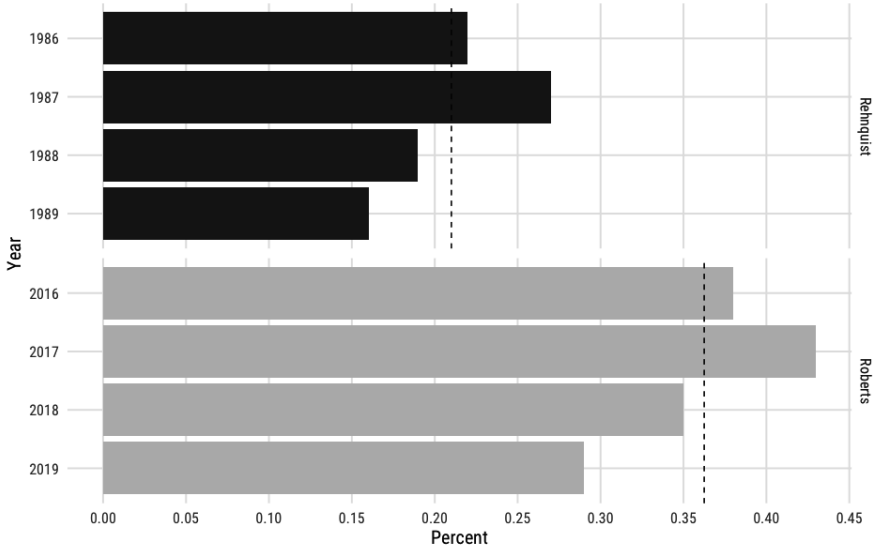
One assumption that might derive from this data is that the Court may be more willing to abdicate providing final decisions in cases and potentially defer to Congress when the majority of the Court is less concerned about Congress's potential action and especially when the Court does not perceive Congressional action as a threat. Alternatively, the Court may

154. *See* Jonathan Martin & Alexander Burns, *Democrats Capture Control of House; G.O.P. Holds Senate*, N.Y. TIMES (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/us/politics/midterm-elections-results.html [https://perma.cc/Q5HQ-C54Q] ("Early Wednesday morning Democrats clinched the 218 House seats needed to take control.").

perceive Congress' preference to refrain from legislating on a particular issue as optimal. In other words, the Court may be well aware that Congress does not prefer to change the status quo.

The key here is that for the Court to begin engaging in a case dimensions analysis relating to Congress, the Court's majority should be ideologically close to the Senate median. This may be because an ideologically proximate Senate should ensure legislation that passes on a given issue aligns with the views of the majority of Justices. When this is the case, the majority of Justices may see more value in deferring to Congress regardless of the Court's ideological distance from the House.[155]

FIGURE 5: PERCENT OF OPINIONS INVOKING CASE DIMENSIONS ANALYSIS



Based on these expectations, we can look to the data to investigate whether the Court's invocation of a case dimension analysis varies similarly to the ideologies of the Court and the two chambers of Congress. Figure 5 shows the percentage of opinions that included a case dimension analysis from Justices who wrote opinions for the Rehnquist and Roberts Courts. Interestingly, the Rehnquist Court invoked case dimension concerns less than the Roberts Court. On average, during the Rehnquist Court, 21 percent of the opinions include case dimension analyses, while

155. *See, e.g.*, Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1489 (2000) ("The results illustrate the complex strategic behavior of individual Justices, tempered as it is by idiosyncrasies. Nonetheless, the overall pattern provides support for strategic behavior among judges.").

36 percent of the opinions during the Roberts Court invoked case dimension analyses. This difference between the Rehnquist and Roberts Courts *may* correspond to the fact that Congress was far removed from the Court ideologically during the Rehnquist Court, and the Senate was ideologically close to the Court during the Roberts Court.[156] Further, based on the ideology scores, as shown previously in Figures 3 and 4, one should expect to see the most use of the case dimension analysis deferring to Congress in 2017 when all three institutions had very close ideologies. As illustrated in Figure 5, the Court's opinions most frequently invoked case dimension analyses in 2017. This all gives the theoretical expectations plausibility.

Before proceeding to the other variables, one aspect of case dimensions application should be noted. If the Court preferred deferring on an issue, it could do so by denying certiorari. The dataset for this Article consists of cases that the Court has already granted certiorari. While a majority of Justices may later decide to defer review on an issue, this does not account for why the Court would engage in such analyses and then rule on the merits. One possible explanation is that the dissent raised the case dimensions issue, and the majority engaged in the analysis in response.[157] Another is that the majority wanted to signal its hesitation based on a concern about case dimensions, even though it ultimately chose to reach the merits of the case. The set of analyses in the first regression model in this Article is agnostic as to whether the Court decided to rule on the merits of the case or to defer rendering a decision on the merits. It only looks to whether the Court engaged in *any* case dimension analyses.

The following variables are crucial in our analyses of when the Court might defer to Congress. The first variable looks at the median ideology of the Supreme Court (Supreme Court Median). Theoretically, since the Court tended toward a more conservative median ideology throughout both periods considered in this study, we might expect that as the median ideology increased (i.e., the Court was more conservative), the Court would feel less constrained to defer decisions to Congress. In other words, the Court would be more confident to rule on the merits of an issue on which it had a policy preference. Conversely, when the median Court

156. *See* Figures 3, 4, *supra* notes 153–54 and accompanying text.

157. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2502 (2019) ("Appellees and the dissent propose a number of 'tests' for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.").

ideology dipped (i.e., became more liberal) and potentially less ideologically homogeneous, we might expect a greater reliance on case dimensions concerns as the Court's power structure has less of a conservative base. As such, the Justices may feel more willing to defer to Congress, or to put another way, may feel that the Court's majority is more fragile.[158]

The second variable looks at the House of Representatives' median ideology (House Median). When the House's ideology is more conservative and thus more ideologically akin to that of the Court, then we may expect the Court to be willing to defer to the House. Even if the House is less conservative than the Supreme Court's Median ideology, the Court is more likely to defer to such a Congress if the Senate is aligned with the Court's median. Thus, the Court should theoretically look to defer when the Senate is similarly conservative. As Figure 4 above demonstrates, during the Rehnquist Court, the Court had a consistently positive or conservative ideological median, while the House of Representatives and the Senate both had liberal ideological medians. The Court also had a conservative ideological median during the Roberts years, but not to the same degree as during the Rehnquist years. The House of Representatives had conservative medians for two years from the Roberts Court and had liberal medians for the other two years. The Senate was consistently conservative during the Roberts Court sample.

The third variable is the ideological distance between the Court and the House's median ideologies. The general logic of considering ideological distance is as follows: less ideological distance corresponds to more similar ideological preferences, and more distance corresponds to fewer shared ideological preferences. If the Court and another actor, for example, Congress, share ideologies and, by extension, policy preferences, the Court should be more comfortable passing an issue to that other actor to rule on the merits. In that scenario, we should see the Court use a case dimension analysis and avoid ruling on the merits (when the case outcome is undesirable) so that another body with a shared ideology can

158. The Court as a whole has generally been ideologically conservative over the last few decades. *See* Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1754 n.94 (2006) (using the Martin-Quinn scores to show that the Court's median "grows significantly more conservative from the 1986 Term to the 1993 Term"); *see also* Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, N.Y. TIMES (Mar. 29, 2012, 8:06 PM), https://archive.nytimes.com/fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/ [https://perma.cc/75W9-AL62]. In a counterfactual reality, the same dynamic would apply if the Court was overall ideologically liberal, but moved right. To the extent ideology drives preferences on outcomes, a hypothetical Justice would be more confident that the other Justices shared similar preferences when the Court's overall ideology moves to the extremes, rather than the center. A Court ideology in the middle is a Court where the outcome is more uncertain.

have the opportunity to act on the issue. Based on this logic, we might expect the Court to defer to the House as the ideological distance between the Court and the House is small. More specifically, in the data, when the usually conservative Court becomes more liberal, and thus the decisional outcomes become less certain, and the House becomes more conservative, this difference should move the Court toward a case dimensions analysis (all else equal).

The fourth variable is the ideological distance between the Court and the Senate's median ideologies (Senate Median). Here, the Court may look at its relationship with the Senate differently than it does with the House. In one respect, the Senate is a smaller legislative body than the House and, thus, faces less of the collective action problems that may arise in the House. Further, the longer terms of the senators and gatekeeping function in the legislative process likely make it more salient for the Justices in determining whether deferring to Congress would further their second-best preferences.[159] The Senate will most likely approve of legislation that accords with the Court's position on an issue if the ideological distance between the Court and the Senate is minimal.

The next set of variables examines whether the Court was engaged in statutory or constitutional analysis (Statutory Interpretation). Statutory construction arises when the Court interprets a federal or state statute.[160] A common question in these cases is whether to clarify the legislature's meaning, or stay out of this part of the political fray.[161] If the Supreme Court Database coded a case's Decision Authority as statutory construction, the first issue-related variable was coded as a "1", and "0" otherwise.

159. By design, the Framers saw the Senate as a gatekeeper to mitigate the passions of the public that would most readily boil over in the House of Representatives. Illustratively, James Madison described the Senate as a "necessary fence" against errors of the House based on "fickleness and passion." Madison Debates in the Federal Convention (June 26, 1787), *in* THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/debates_626.asp [https://perma.cc/YR5K-4D3W]. George Washington is supposed to have described the Senate as a "senatorial saucer" to "cool" legislation. MONCURE D. CONWAY, REPUBLICAN SUPERSTITIONS AS ILLUSTRATED IN THE POLITICAL HISTORY OF AMERICA 47–48 (1872).

160. *See generally* Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185, 1193 (2011); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 223–24 (2010); Frank B. Cross, *The Significant of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1972 (2007).

161. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540, 541–42 (1983) ("If the court always responds to the invocation of this statute by attempting to read the minds of its framers and supply 'more in the same vein,' and makes its share of errors, every one of them will carry the statute to where costs exceed benefits. It will either do nothing or produce too much of a good thing.").

The second issue-related variable (Constitutional Interpretation) was coded "1" when the Supreme Court Database variable for Legal Provision was either the Constitution or constitutional amendments and "0" otherwise. This variable is essential since, as far back as *Marbury v. Madison*, the Justices have seen it as the proper role of the Court to engage in review of provisions under the Constitution.[162]

V. RESULTS

The data show that the Justices are more likely to engage in case dimensions analyses and potentially defer to Congress when the Supreme Court median is more liberal.[163] This conclusion confirms the expectation that the conservative Justices in the majority would prefer deferring certain decisions away from the Court on case dimensions grounds when the outcome is uncertain. If these Justices cannot garner their preferred policy outcome through the courts, they pass Congress the opportunity to legislate (or not) based on this issue by deferring on these grounds. This decision to pass the issue to Congress is likely because the conservative majority would like to move power away from the liberal members of the Court out of concern that they could move the decision away from the conservative Justices' preferred positions.

There is also evidence that the House Median variable is significant when the House's median diverges from the Supreme Court Median. Since there is already evidence that a more liberal (yet still majority conservative) Court prefers deferring to Congress on case dimensions grounds, we now see that the combined members of the Court may agree to defer the issue to Congress, especially as the House becomes increasingly conservative. The conservative Justices are most likely comfortable with this maneuver as long as the Senate remains conservative because a conservative Senate that aligns with the median member of the Court is unlikely to pass particularly liberal legislation.

Table 1 clarifies the direction of the variables, namely whether and when they are more likely to lead to the Court's case dimensions analyses. The table value is coded as "Null" in instances where the variables were not statistically significant.

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162. *See* Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) ("At least since *Marbury v. Madison*, . . . we have recognized that when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

163. For more discussion, including the regression tables that break down each of the multivariate analyses, see *infra* Appendix.

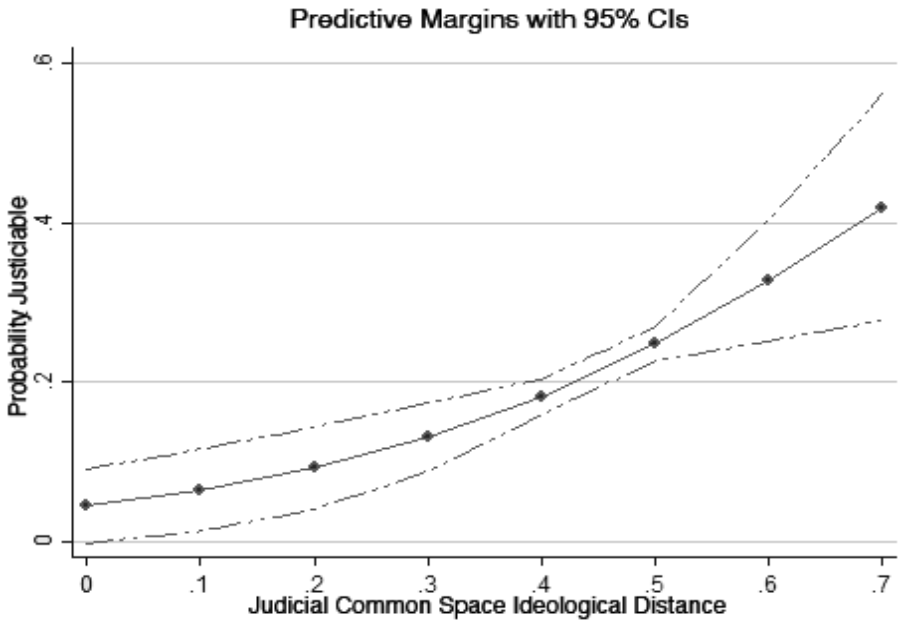
TABLE 1: VARIABLES DETERMINING WHETHER THE COURT EMPLOYS CASE DIMENSIONS ANALYSIS

Variable	Direction	What this means
Supreme Court Median	–	More liberal
House Median	+	More conservative
Senate Median	Null	
Court/House Distance	+	Increasing distance
Court/Senate Distance	–	Decreasing distance
Statutory Interpretation	+	More likely to analyze
Constitutional Interpretation	+	More likely to analyze

With these variables in mind, we can assess their impact—namely, how a certain amount of ideological distance leads to a consequent larger or smaller likelihood that the Court will engage in case dimensions analyses.

Figure 6 below supports the proposition that when the distance between the House median and the Court median grows, the Court is more likely to engage in analyses of case dimensions. Figure 6 conveys this point as it shows that the probability that the Court will engage in case dimensions analyses goes up as the Court's distance from the House of Representatives grows.

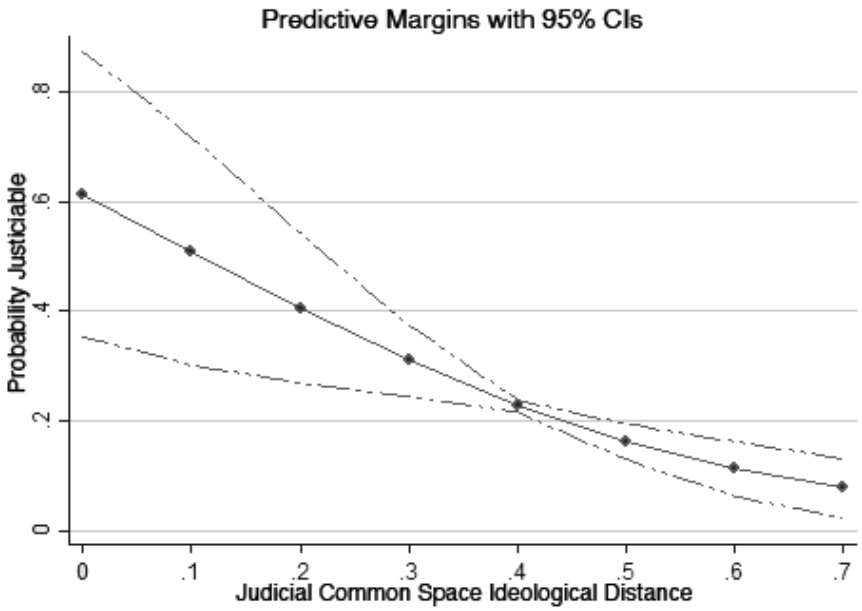
FIGURE 6: PROBABILITY OF CASE DIMENSIONS REVIEW BASED ON THE COURT'S IDEOLOGICAL DISTANCE FROM THE HOUSE



The range of ideological distances between the Supreme Court and the House of Representatives in the Article moves from .026 to .587. The probability analysis (Margins) shows that the Court is only 4 percent more likely to engage in case dimensions analyses when the ideological distance on the horizontal and vertical axes are at zero.

As expected, the data also shows that when the distance between the Senate median and the Court median decreases, the Court is more likely to utilize a case dimensions framework. When the distance is .5, the Court is 25 percent more likely to engage in case dimensions analyses. Figure 7, like Figure 6, looks at the effect of ideological distance, however, differs by looking at the effects of ideological distance between the Court and the Senate.

FIGURE 7: PROBABILITY THAT THE COURT ENGAGES IN CASE DIMENSIONS ANALYSES BASED ON THE COURT'S IDEOLOGICAL DISTANCE FROM THE SENATE



The range of ideological distances between the Senate and the Court in the Article goes from .012 to .607. At an ideological distance of zero the Court is 61 percent more likely to engage in case dimensions analyses. The Margins shrink as the ideological distance increases. When the distance is at .6, the likelihood the Court will engage in case dimensions analyses is only 11 percent.

In statutory and constitutional interpretation cases, the Court is likely to engage in case dimensions analyses. This result goes against an intuition that the Court may be less likely to defer when decisions deal with constitutional matters. This intuition is based on the Court's role as the ultimate arbiter in many constitutional matters.

While the first regression model in this Article looks at the Court's decisions based on when a case dimensions issue is raised, the second regression model examines outcomes of these cases based on the Justices' actual votes. The second model, therefore, is only focused on cases where a case dimensions concern is already raised. In this second model, an additional variable was coded for each case. This dichotomous variable captured whether the majority raised a case dimensions concern: and (1) decided to continue to substantively decide the case; or (2) decided to avoid ruling on the matter due to the case dimensions issue. The dissents in these cases were also coded in the same manner, looking at whether the dissent argued that the Court should cease its analysis or continue to rule on the case's merits. Because each case in the second regression model is one where a case dimensions issue is raised, the dependent variable looks at whether a justice noted a case dimensions concern but decided the Court should proceed to the case's merits or if the Justice took the opposing position arguing that the Court should suspend judgment of a case's merits because of the case dimensions hurdle.

The case *Lamps Plus v. Varela* provides a good case example of how the Justices differ in their views concerning case dimensions.[164] In his dissent, Justice Breyer wrote,

> In my view, the Court of Appeals lacked jurisdiction to hear this case. Consequently, we lack jurisdiction as well. My reason for reaching this conclusion is the following. The Federal Arbitration Act, says that a "court," upon being satisfied that the parties have agreed to arbitrate a claim, "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." Section 16 of the Act then says that "an appeal *may not be taken* from an interlocutory order . . . directing arbitration to proceed under section 4 of this title."[165]

In his majority opinion, Chief Justice Roberts dealt with the jurisdictional question as follows.[166] First, Chief Justice Roberts writes,

164. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).
165. *Id.* at 1422 (Breyer, J., dissenting) (citations omitted).
166. *Id.* at 1413–14.

> Section 16 of the FAA governs appellate review of arbitration orders. Varela contends that the Ninth Circuit lacked statutory jurisdiction because section 16 permits appeal from orders *denying* motions to compel arbitration, but not orders *granting* such motions. This argument is beside the point, however, because Lamps Plus relies for jurisdiction on a different provision of section 16.[167]

Chief Justice Roberts fortifies his argument when he writes the following in direct contradiction to Justice Breyer:

> Justice Breyer repeatedly refers to the order in this case as "interlocutory," but—as the language quoted above makes clear—*Randolph* [a previously decided case] expressly held that such an order is "final" under the FAA. Justice Breyer also claims that *Randolph* "explicitly reserved the [jurisdictional] question that we face now," but *Randolph* reserved a different question.[168]

As these two opinions from *Lamps Plus* make clear, Justices embrace open dialogue with one another where the majority author argues in one direction on the case dimensions issue while the dissenting author argues in the opposite direction.[169]

Other variables in the second regression model differ from the first because the decision-making process differs at this stage of the judicial gatekeeping process. In particular, the Court's decision on how to handle a case once the Court has already decided to engage in case dimensions analyses involves different considerations from the Court's original decision on whether to engage in these analyses. The first set of variables look at the case dimensions doctrines invoked in a given case. These doctrines are derived from a combination of Justice Brandeis' concurrence in *Ashwander v. Tennessee Valley Authority* and from the typology established by Galloway.[170] All of these variables are dichotomous and coded "1" when the doctrine arose in a case, "0" otherwise. Only one of these variables is coded as occurring in each case so if more than one arose, the most prominent one was coded "1".

The variables are as follows: first, Timing, is a combination of mootness and ripeness claims; second, Jurisdiction, looks at when the Court examines whether it has the proper jurisdiction to resolve a case; third, Additional Claims, examines when a Justice looks to narrow the decision by eliminating unnecessary claims from the holding; fourth, Political

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167. *Id.* (citations omitted).

168. *Id.* at 1414 n.1 (second alteration in original) (citations omitted).

169. *Compare id.* at 1413–14 (Chief Justice Roberts majority opinion in *Lamps Plus*), *with id.* at 1422 (Justice Breyer's dissent in *Lamps Plus*).

170. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341–56 (1936) (Brandeis, J., concurring) (outlining the seven prudential principles akin to justiciability rules); Galloway, *supra* note 125, at 912 (discussing "the what," "the when," and "the who" components of justiciability).

Question, marks when a Justice discussed deferring to another branch of the federal government due to the political nature of a case issue; fifth, Standing, was coded when a Justice described the potential that one of the parties was not the proper party for the case; sixth, Case/Controversy, arose when a Justice looked at whether all elements of an actual dispute were present including no collusion and avoiding advisory opinions; and seventh, Federalism, when a Justice applied federalism concerns.

FIGURE 8: TYPES OF CASE DIMENSIONS ISSUE EXAMINED BY JUSTICE

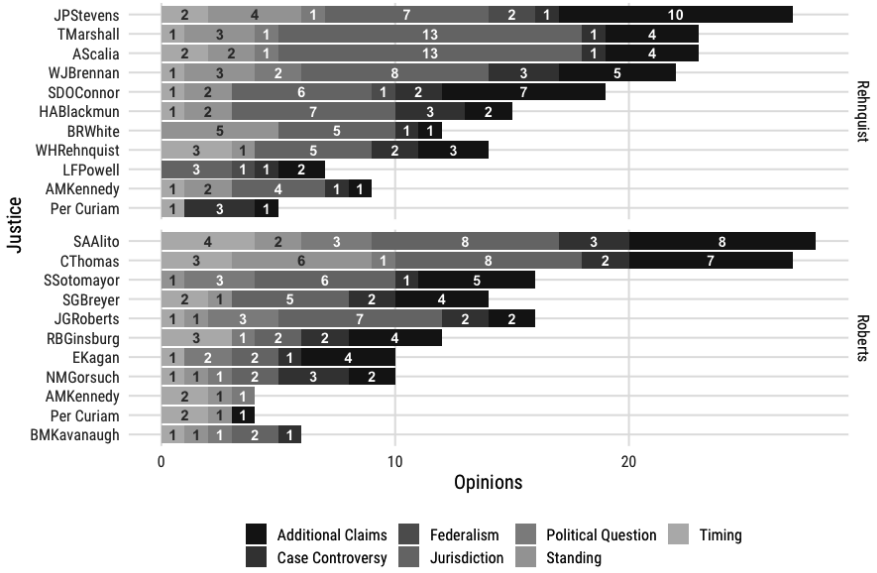

Figure 8 above shows the case dimensions concerns raised by each Justice. The only Justice to author opinions dealing with all seven issue types is Justice Stevens.[171] However, multiple issues come up for a majority of these Justices. Only three Justices (including per curiam opinions) did not author an opinion relating to Timing.[172] Only two Justices did not author an opinion dealing with additional claims.[173] On the other end of the spectrum, only three Justices dealt with Federalism as a case dimensions concern.[174]

The next set of variables focuses on ideological cues that may affect the Justices' decisions in cases where case dimensions concerns were raised. The variables, similar to those in the first model, are the distances

171. Justices Alito and Thomas wrote a similar volume of case dimension opinions as Justice Stevens; however, they did not address federalism as a case dimension concern. *See* Figure 8.

172. *Id.* (Justices White, Powell, and Sotomayor).

173. *Id.* (Justices Kavanaugh and Kennedy).

174. *Id.* (Justices Stevens, O'Connor, and Powell).

between the Court's median ideology and the median ideologies of both the House (Court/House Distance) and the Senate (Court/Senate Distance). Unlike the first regression model which focused on the separation of powers, absolute and relative ideologies are unlikely to play a large role in the Justices' decisions of whether to continue with their analysis once a case dimensions concern has been identified. This expectation is due to the fact that those ideologies already factored into the Justices' initial calculi of whether or not to focus on case dimensions concerns at the outset of the decision.[175]

In these models, positive coefficients (+) denote a likelihood that a Justice looks to continue with the case resolution notwithstanding the case dimensions implications while negative coefficients (–) denote that the Justice was more likely to push for the Court to cease its substantive analysis in a case due to case dimensions concerns. Table 2 below shows the direction of these variables in both Courts when they played a role in the Justices' calculations for that era.

TABLE 2: CASE DIMENSIONS IMPACT ON MERITS DECISION

Issue	Rehnquist Court	Roberts Court
Timing	Null	+
Jurisdiction	+	Null
Limit Claims	+	Null
Political Question	+	Null
Standing	+	+
Case/Controversy	+	Null
Statutory Construction	Null	–
Constitutional Interpretation	Null	–
Court/House Distance	Null	Null
Court/Senate Distance	Null	Null
Justice Ideology	–	Null

What do these results show? For the first set of variables (Timing through Case/Controversy), a positive sign means that these types of cases led the Justices to continue their review of a case at a statistically significant level. The fact that several of the Rehnquist Court's case dimensions type variables are positive indicates that these Justices were more likely to proceed with their analyses when these concerns were

175. Since the regressions in model 1 and model 2 dealt with separate concerns—the decision to engage in justiciability analyses in model 1 and the decision on how to rule on such analyses in model 2, the Tables are treated separately in the body of the Article.

raised. The opposite was true for Roberts Court Justices where only Timing and Standing came up as significant. This means the Roberts Court was more ambivalent about continuing the decision-making process when most case dimensions concerns were raised. Unlike in the Rehnquist Court models, statutory and constitutional case types decreased the likelihood that the Roberts Court would continue the analysis if a case dimensions concern was raised.

Based on this empirical analysis, Justice Ideology has a negative impact during the Rehnquist Court but was not a major factor during the Roberts Court. This means during the Rehnquist Court as the Court was more conservative, Justices were more likely to vote to halt a case's analysis when case dimensions concerns were raised. Justice Ideology did not play a significant role in the Roberts Court years. Since the ideological distance variables are not significant in Table 2 for either set of years, we see that while ideological distance played roles in the Justices' decisions of whether or not to at least employ a case dimensions analysis and to potentially defer to Congress, it does not play a consequential role in whether the Justices chose to continue or halt an analysis once a case dimensions concern was raised.

Even though the Court clearly does not defer to Congress in every instance that it decides not to rule in cases that it has already granted, our results show a distinctive relationship between the Court's aggregate choices of when not to rule and the Justices' ideological proximity to the House and the Senate. As explained next, this highlights the correlation between employing a case dimensions analysis and interbranch relationships.

VI. CONCLUSION

Justices are not bound to decide cases they accept on certiorari, and have a variety of mechanisms, including ruling based on a case's dimensions, to remove granted cases from their merits docket or to rule narrowly in such cases.[176] In certain instances, Justices decide to remove a case from the Court's merits docket hoping to leave issues up to Congress's policy expertise. While the Court has declared its position as the

176. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) ("No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. 'It is emphatically the province and duty of the judicial department to say what the law is.' In this rare circumstance, that means our duty is to say 'this is not law.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

body designed to interpret the Constitution,[177] it tends to abhor the moniker of policymaker.[178]

Justices have several reasons for examining a case's dimensions. First, after granting certiorari, the Justices may recognize a flaw in the case that prevents the Court from retaining Article III jurisdiction. Second, Justices may also be concerned that cases they accepted on certiorari are poor vehicles to resolve issues due to these concerns. Third, certain Justices may prefer not ruling on a case where the Court's majority would rule against their preferred outcome and instead remove the case from merits review. In these situations, they may decide that the only way to reach this preferred outcome is through legislation.

Fourth, while four Justices are needed to grant certiorari in a case, five Justices are needed for a majority decision.[179] It is entirely plausible that the four Justices that voted to grant certiorari in a case want to substantively rule in a case, while the other five Justices want to avoid a merits ruling by focusing on a case's dimensions. Five Justices may also prefer to rule based on case dimensions because this majority would rather not decide in a case than decide in a manner adverse to their preferences.

Fifth, Justices often make strategic calculations when deciding how and when to interpret a case's dimensions. As the separation of powers model shows, Justices likely account for the relative ideologies of both houses of Congress when determining whether they should examine a case's dimensions at the outset. Ideology plays a smaller role in the Justices' decisions of when to skirt a case due to concerns about a case's dimensions, but the Justices' ideologies do play a role in these decisions for some of the years analyzed in this Article.

There are distinct differences in our results for how the Rehnquist and Roberts Courts applied case dimensions doctrines for the years in this Article. The Rehnquist Court was far more concerned about the specific case dimensions doctrine raised in a case. The Justices' ideologies also played a role in their decision-making. On the other hand, the Roberts Court paid greater attention to the case type when deciding how to handle case dimensions-related issues. The variability across these Courts

177. *See Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

178. *See* Boumediene v. Bush, 553 U.S. 723, 806 (2008) (Roberts, C.J., dissenting) ("It is, however, precisely when the issues presented are grave that adherence to the ordinary course is important. A principle applied only when unimportant is not much of a principle at all, and charges of judicial activism are most effectively rebutted when courts can fairly argue they are following normal practices.").

179. *See generally* Brenner, *supra* note 80.

shows how the Justices' decisions on case dimensions are far from consistent over time.

The analyses in this Article leave several avenues open for future scholarly works. One limitation is that it includes eight years of hand-coded data which is only a microcosm of the Court's decisions over the years. This provides a good snapshot of the Court's decisions related to case dimensions in recent years but is also limited in scope. Further research could look at additional years and make additional inferences with a more substantial dataset. Other eras could also be studied to look at the Court's consistency in the application of case dimensions analyses through other years.[180]

As the Justices continue to apply case dimensions analyses in cases like *Rucho v. Common Cause*,[181] it will continue to be important to study how and when these rules are applied. In addition to showing that the Justices strategically decide whether or not to decide cases already accepted on the merits, this Article provides a systematic understanding of when and how the Court delegates policymaking power to Congress, generally through Article III principles, and to leave room for additional research on this subject.

180. Various scholars have assessed the relationship of the Warren Court and Congress in making policy changes, particularly in the arena of civil rights. *See, e.g.*, Gordon Silverstein, *The Warren Court and Congress*, *in* EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 199 (Harry N. Scheiber ed., Lexington Books, 2007). In conceptualizing the dynamics of policymaking between the Warren Court and Congress as a "tennis match", one might expect that similar strategic considerations described in this article during the Rehnquist and Roberts Courts were also at play in earlier courts like the Warren Court. *Id.* Expanding the data to include earlier Courts should strengthen and refine the findings presented here.

181. *Rucho*, 139 S. Ct. at 2484.

APPENDIX

The following were the coding rules used in deciding (1) if case dimensions was an issue in a case, and (2) if so, what case dimensions principle was raised. Text from a case was provided along with each rule to provide examples of when the rules arose.

RULE 1: CASE OR CONTROVERSY

The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions is legitimate only in the last resort, earnest, and vital controversy between individuals.

Questions:

1. Is this a collusive suit?
2. Do the parties seek the same outcome (is this a friendly suit)?
3. Are the parties not still looking for real adjudication?

Case: *Muskrat v. United States*

> It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government.[1]

1. Muskrat v. United States, 219 U.S. 346, 361 (1911).

RULE 2: TIMING (RIPENESS/MOOTNESS)

The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

Questions:

1. Is the suit premature?
2. Are the parties anticipating a future action relevant to the adjudication of the suit?
3. Is the disagreement still too abstract for resolution?
4. Is the case not timed so that the decision will provide the most accurate resolution?
5. Is a party not immediately harmed, or immediately threatened with harm, by the challenged action (also goes to standing)?

Case: *Abbott Laboratories v. Gardner*

> The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.[2]

2. Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967).

RULE 3: LIMIT CLAIMS

The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

Questions:

1. Is the decision not narrowly tailored?
2. Does the decision restrict more than is necessary based on the case?
3. Does the decision extend beyond the facts in the case?
4. Is the case focused on how a statute might be taken as applying to other persons or other situations in which its application might be unconstitutional rather than the one at hand?

Case: *Escambia County v. McMillan*

> The parties have not briefed the statutory question, and, in any event, that question should be decided in the first instance by the Court of Appeals. We conclude, therefore, that the proper course is to vacate the judgment of the Court of Appeals, and remand the case to that court.[3]

3. Escambia Cnty., Fla. v. McMillan, 466 U.S. 48, 51 (1984).

RULE 4: STANDING

The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.

Questions:

1. Is the party not directly affected by the application of the statute?
2. Will harm not continue unless the court grants relief?
3. Is the injury not concrete and particularized?
4. Is the injury not actual or imminent?
5. Is there no causal connection between the injury that can be traced to the statute?

Case: *Lujan v. Defenders of Wildlife*

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed . . . . We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[4]

4. Lujan v. Def. of Wildlife, 504 U.S. 554, 561–62, 573–74 (1992).

RULE 5: POLITICAL QUESTION

The Court will not render a decision in a case that has been textually committed to another branch of government.

Questions:

1. Is there a textually demonstrable constitutional commitment of the issue to a coordinate political department?
2. Is there a lack of judicially discoverable and manageable standards for resolving it?
3. Is there an impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion?
4. Is there an impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government?
5. Is there an unusual need for unquestioning adherence to a political decision already made?
6. Is there the potentiality of embarrassment from multifarious pronouncements by various departments on one question?

Case: *Immigration and Naturalization Service v. Chadha*

> It is correct that this controversy may, in a sense, be termed "political." But the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress. *Marbury v. Madison* was also a "political" case, involving as it did claims under a judicial commission alleged to have been duly signed by the President but not delivered. But "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."[5]

5. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 942–43 (1983) (first citing Marbury v. Madison, (1 Cranch) 137 (1803); and then quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

RULE 6: JURISDICTION:

The Court must have the power to hear the case in the first instance or under appellate review?

Questions:

1. Does the case arise under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority?
2. Does the case affect ambassadors, other public ministers, and consuls?
3. Does the case apply to admiralty and maritime jurisdiction?
4. Is the United States a party?
5. Is the conflict between two or more states, between a state and citizens of another state, or between citizens of different states?
6. Is the suit between citizens of the same state claiming lands under grants of different states or between a state, or the citizens thereof, and foreign states, citizens, or subjects?

Case: *Steel Co. v. Citizens for Better Environment*

> [T]he District Court has jurisdiction if "the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy."[6]

6. Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 89 (1998) (first quoting Bell v. Hood, 327 U.S. 678, 685 (1946); and then quoting Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666 (1974)).

REGRESSION FOR TABLE 1: DETERMINANTS OF WHETHER TO EMPLOY JUSTICIABILITY ANALYSIS

Supreme Court Median	-1.930*	(0.817)	-1.819*	(0.821)
House Median	2.193**	(0.731)	2.196**	(0.733)
Senate Median	-2.357	(1.255)	-2.248	(1.260)
Supreme Court / House Distance	3.915**	(1.220)	3.839**	(1.221)
Supreme Court / Senate Distance	-4.172**	(1.352)	-4.081**	(1.355)
Statutory Interpretation			0.171*	(0.0783)
Constitutional Case			0.248**	(0.0809)
Constant	-0.513	(0.533)	-0.723	(0.542)
N	7905		7905	

The first column represents the variables. Standard errors are reported in parentheses. Statistical significance levels are marked as follows:

* p<0.05, **p<0.01, *** p<0.0001.

REGRESSION TABLE 2: JUSTICIABILITY IMPACT ON MERITS DECISIONS

	Rehnquist 1		Rehnquist 2		Roberts 1		Roberts 2	
Justiciability								
Timing	1.063*	(0.603)	1.093	(0.639)	-0.786*	(0.313)	-0.638	(0.344)
Jurisdiction	1.801**	(0.576)	1.907**	(0.606)	-0.198	(0.273)	-0.0826	(0.298)
Limit Claims	1.253*	(0.584)	1.427*	(0.613)	0.00369	(0.278)	0.0684	(0.307)
Political Question	1.946**	(0.699)	1.777*	(0.738)	0.617	(0.344)	0.812*	(0.368)
Standing	1.568**	(0.591)	1.593*	(0.623)	-0.416	(0.324)	-0.110	(0.346)
Case or Controversy	1.545	(0.594)	1.654**	(0.611)	-	-	-	-
Case Type								
Statutory Construction			-0.0371	(0.194)			-0.466*	(0.238)
Constitutional Interpretation			0.0770	(0.218)			-0.694**	(0.244)
Ideology								
Supreme Court/House Dist.			-9.783	(6.339)			0.520	(0.583)
Supreme Court/Senate Dist.			6.981	(4.905)			-1.942	(1.402)
Justice Ideology			-0.352**	(0.123)			0.0776	(0.150)
Constant	-1.253*	(0.567)	0.226	(1.675)	0.416	(0.231)	0.858*	(0.383)
N	1012		1012		696		696	

Robust standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.0001$