THE SUPREME COURT AND THE DIG: AN EMPIRICAL AND INSTITUTIONAL ANALYSIS

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I. INTRODUCTION

Almost all cases reach the docket of the United States Supreme Court through the discretionary writ of certiorari.[1] In the normal course of events, the vast majority of petitions for a writ are denied.[2] For those few petitions that are granted, the case is then briefed, orally argued, and decided on the merits. However, in a small number of cases the normal course is diverted, and the Court changes its mind by dismissing the writ of certiorari as improvidently granted.[3] This action is usually referred to by the pithy acronym "DIG," a convention we will use as well.[4] Few cases are DIGged. In the past fifty years, the Court has on average only DIGged about two or three cases per Term.[5] Given the paucity of numbers, why should anyone other than the cognoscenti of Court practice be interested in the DIG?

There are several reasons why the DIG is of interest. First, virtually by definition, any case in which certiorari is granted is an

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1. *See* 28 U.S.C. § 1254 (2000) (providing for appeals to the Supreme Court from the United States Courts of Appeals); 28 U.S.C. § 1257 (2000) (providing for appeals to the Supreme Court from state supreme courts). A small number of cases reach the Court by mandatory appeals, *e.g.*, 28 U.S.C. § 1253 (2000) (regarding appeals from three-judge district courts), or are part of the Court's original jurisdiction, *see* 28 U.S.C. § 1251 (2000).

2. H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 39, 106 (1991).

3. *Id.* at 106.

4. *See* Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1074 n.18 (1988) (referring to the colloquial use of the term "DIG"). According to H.W. Perry, who interviewed Justices and their clerks, the term is used at the Court itself, though the past tense used there is "digged," not "dug." PERRY, *supra* note 2, at 39, 106.

5. See *infra* Part II, for a further discussion of the statistics.

important case to the legal community in some way. Declining to review a case, where the initial decision was to do so, is bound to make waves. Consider the recent example of *Nike, Inc. v. Kasky*.[6] In that case, a consumer activist in California sued a prominent manufacturer of athletic gear for alleged misrepresentations the company had made regarding the working conditions in its overseas production plants.[7] The plaintiff relied on California unfair competition and false advertising statutes that also created a private cause of action to enforce the laws.[8] The provisions permitted the plaintiff to sue as a private attorney general.[9] The California Supreme Court permitted the suit to go forward in the face of a First Amendment defense.[10] After certiorari was granted, it was much anticipated that *Nike*, however it came out, would be an important addition to the Court's commercial speech doctrine;[11] after oral argument, however, the Court DIGged the case.[12] As an institution, the Court did so in a per curiam order with no further comment.[13] In a concurring opinion, Justice John Paul Stevens explained why a DIG was appropriate, despite what he acknowledged to be the "novel" and "difficult" First Amendment issues involved.[14] In his judgment, a DIG was appropriate given that the California courts had not entered a final appealable order; the parties did not have standing to raise the federal issues; and resolution of the constitutional issues would be better served by a full factual record, as opposed to a disposition on the pleadings alone, as had occurred in the case.[15] Justice Breyer, dissenting from the DIG decision, contested those points,[16] and argued that the "importance of the First Amendment concerns at stake" counseled in favor of reaching the merits of the case.[17] The Justices who spoke in *Nike* seemed to assume that the case would eventually

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6. 539 U.S. 654 (2003) (per curiam).

7. *Id.* at 656.

8. *Id.*

9. *Id.* at 661.

10. *Id.* at 657.

11. For a general discussion, see Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 592-93 (2005).

12. *Nike*, 539 U.S. at 655.

13. *Id.*

14. *Id.* at 663 (Stevens, J., concurring, joined by Ginsburg, J., and Souter, J., concurring in part) (noting that the difficulty and novelty of the legal issues in fact provided a "good reason" for DIGging the case).

15. *Id.* at 658-64.

16. *Id.* at 667-84 (Breyer, J., joined by O'Connor, J., dissenting).

17. *Id.* at 684. Justice Kennedy also dissented from the DIG, but gave no reasons. *Id.* at 665 (Kennedy, J., dissenting).

return to the docket.[18] The same or similar issue may come back to the Court, but it will have to come through another controversy, as the parties in *Nike* settled their suit.[19] Although observers expect that the issues raised in *Nike* are bound to return to the Court "in some future case,"[20] the use of the DIG delayed their authoritative resolution, at least for a few years.

A second, related reason why the DIG is worthy of attention concerns the Court's most limited resource, its case docket. For most of the twentieth century, the Supreme Court was deciding well over one-hundred cases on the merits each Term.[21] As late as the late 1980s, the Court was deciding, on average, 140 cases each Term.[22] But the numbers inexorably declined starting in the early 1990s, as the Court began accepting fewer cases for review.[23] The Court now routinely

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18. *See id.* at 663 n.5 (Stevens, J., concurring) (asserting that the issues raised "would benefit from further development below"); *id.* at 667 (Breyer, J., dissenting) (stating that the "delay" caused by the DIG will not make "the issue significantly easier to decide later on"). An even more dramatic example of the Court anticipating that an issue in a DIGged case would likely return to the Court occurred last Term in Medellin v. Dretke, 125 S. Ct. 2088 (2005) (per curiam). The issues presented in *Medellin* were whether a federal court in a habeas corpus case is bound by a ruling of the International Court of Justice ("ICJ") on whether there was a procedural default, and, if not, whether as a matter of comity the court should give effect to the ICJ's judgment. *Id.* at 2089. All of the opinions in the case observed that the case could potentially return to the Court's docket after further proceedings in state court. *Id.* at 2090 n.1, 2092 (majority opinion); *id.* at 2095 (Ginsburg, J., concurring); *id.* at 2096 (O'Connor, J., dissenting); *id.* at 2106 (Souter, J., dissenting); *id.* at 2107-08 (Breyer, J., dissenting). Like *Nike*, the disposition in *Medellin* did not lack for attention. *See* Linda Greenhouse, *Justices Drop Capital Case Ruled on by World Court*, N.Y. TIMES, May 24, 2005, at A17; Charles Lane, *High Court Rejects Case of Mexican Death Row Inmate*, WASH. POST, May 24, 2005, at A6. The Justices' suspicion that the issue raised by *Medellin* would return to the Court in the near future was proven right, as the Court recently granted certiorari in two cases, Bustillo v. Johnson, 126 S. Ct. 621 (2005); Sanchez-Llamas v. Oregon, 126 S. Ct. 620 (2005), raising essentially the very same issue as in *Medellin*. *See* Linda Greenhouse, *Two Convicts from Abroad Win Hearings by Justices*, N.Y. TIMES, Nov. 8, 2005, at A22.

19. *Nike Settles Suit by California Activist over Statements on Working Conditions*, 72 U.S.L.W. (BNA) 2160, 2160 (2003). Moreover, the California statutes at issue in *Nike*—providing for private attorney general actions—were modified by the California voters by the passage of Proposition 64 in the fall 2004 elections. *Voters in Florida, Nevada Limit Fee Awards; California Voters Curb Private AG Actions*, 73 U.S.L.W. (BNA) 2291, 2291-92 (2004); Morrison, *supra* note 11, at 638-39.

20. Morrison, *supra* note 11, at 637.

21. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 75-76 tbl.2-8 (3d ed. 2003) (compiling data from the 1926 through 2001 Terms).

22. *Id.* at 76 tbl.2-8.

23. *Id.*

decides only about eighty cases on the merits each Term.[24] Thus, the impact of one or two DIGged cases each recent Term is not trivial, if it ever was.[25]

Finally, a set of intellectually challenging and practically important issues are raised by the Court's exercise of the DIG. Most notably, the Court has long used a "Rule of Four" to determine the minimum number of Justices needed to agree that a writ of certiorari should be granted.[26] How many votes are needed to DIG a case? If it is only five, then the Rule of Four could be undermined by the majority. If it is six or more, then this supermajority rule pays more deference to the Rule of Four by requiring at least one of the four Justices to have changed his or her mind on the propriety of reviewing the case. Then, too, are the jurisprudential questions of what reasons ought to justify a DIG—

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24. *See The Supreme Court, 2004 Term; The Statistics*, 119 HARV. L. REV. 415, 425 tbl.2 (2005) (reporting that the Court decided eighty-three cases on the merits for the 2004 Term); *The Supreme Court, 2003 Term; The Statistics*, 118 HARV. L. REV. 497, 506 tbl.2 (2004) (reporting that the Court decided seventy-eight cases on the merits for the 2003 Term); *The Supreme Court, 2002 Term; The Statistics*, 117 HARV. L. REV. 480, 488 tbl.2 (2003) (reporting the same for the 2002 Term). There has been considerable discussion of the reasons for the decline in the Court's plenary docket. Among the reasons advanced are the almost total elimination of the Court's mandatory appellate jurisdiction (by legislation in 1988), change in Court personnel and the desire of at least some Justices to lessen the role of the Court in American life, changes in the ideological makeup of the lower federal courts and related changes in the percentage of cases the Court might be more inclined to reverse, and less frequent appeals by the federal government. For a fuller discussion of these and other reasons, see generally Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389 (2004) [hereinafter Cordray & Cordray, *Philosophy of Certiorari*]; Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 557-59 (1998) (book review); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 640-44 (2003); Richard A. Posner, *The Supreme Court, 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005); David M. O'Brien, *A Diminished Plenary Docket: A Legacy of the Rehnquist Court*, 89 JUDICATURE 134 (2005).

25. The impact of the DIGged cases is likely to be substantially larger for two reasons. First, as our study demonstrates, *see infra* Part II.C.1, ninety-two percent of the cases are DIGged by the Court after oral argument has taken place. Although this might be unavoidable (that is, the Justices might not be able to realize the necessity to dismiss the writ of certiorari as improvidently granted until after oral arguments have taken place), such an occurrence consumes time and effort and limits the ability of the Court to hear and decide other cases. Second, as we discuss below, *see infra* notes 62-63 and accompanying text, when we compare the cases that the Court DIGged to the cases that the Court appeared to have considered DIGging, the total number of cases is higher, suggesting that the decision to DIG a case is a significant question.

26. Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 975 (1957).

should it be enough that a majority (or supermajority) of the Justices simply think that the original grant of certiorari was wrong? Or should additional or different reasons be necessary, such as circumstances being changed since certiorari was granted? Relatedly, should the Court as an institution, or the Justices individually, always issue opinions explaining their decision to DIG a case?[27]

In this Article, we explore the Supreme Court's use of the DIG from both empirical and institutional perspectives.[28] There has been relatively little empirical analysis of the Court's use of the DIG in the scholarly literature.[29] We begin to fill that gap in Part II. That Part first provides an overview of the Court's certiorari process, specifically the Rule of Four, and the DIG. We then present data we collected on the Court's use of the DIG over the last half-century, from the beginning of the Warren Court in 1954 to the Court's most recent 2004 Term. We examine, among other things, how often the Court DIGs cases and the types of cases typically DIGged.

Part III of the Article addresses a number of institutional and jurisprudential issues raised by the Court's use of the DIG. In contrast to the empirical issues, there is a substantial scholarly literature on this front,[30] but we reexamine the principal issues, informed in part by the empirical analysis in Part II. Specifically, we consider the interrelated issues of whether a majority or supermajority vote should be necessary

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27. For further discussion of these issues, see *infra* Part III.

28. We join a burgeoning literature that examines, from various perspectives, heretofore underappreciated aspects of the Court's procedure and practice. *See, e.g.*, Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643 (2002) (discussing 4-4 decisions); Valerie Hoekstra & Timothy Johnson, *Delaying Justice: The Supreme Court's Decision to Hear Reargument*s, 56 POL. RES. Q. 351 (2003) (discussing reargued cases in the Supreme Court); Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551 (2004) (discussing cases where the Court grants certiorari, vacates the decision below, and remands for further proceedings); Harold J. Spaeth, *Relisting: An Unexamined Feature of Supreme Court Decision Making*, 25 JUST. SYS. J. 143 (2004) (discussing cases where a Justice requested that consideration of a certiorari petition be put over to another conference).

29. The important exception is Scott A. Hendrickson, To DIG or Not to DIG: Using DIGs to Examine Supreme Court Decision Making and Agenda Setting (unpublished paper presented at the Annual Meeting of the Am. Pol. Sci. Ass'n, Aug. 27-31, 2003) (examining the Supreme Court's use of the DIG during the Burger Court era, 1969-1986) (on file with authors), *available at* http://www.artsci.wustl.edu/~sahendri/workingpaper/apsa03.pdf.

30. *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1603-11 (5th ed. 2003); PERRY, *supra* note 2, at 106-12; ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 328-32 (8th ed. 2002); James F. Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 917-37 (1973); Revesz & Karlan, *supra* note 4, at 1082-95; Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74 (2005).

to DIG a case; whether and how the Court should give reasons every time it DIGs a case; what constitutes principled reasons to DIG a case; and whether the DIG practice can or should be regarded as an instance of strategic behavior on the part of the Justices. We conclude the Article in Part IV and suggest avenues of further research and analysis.

II. THE SUPREME COURT'S USE OF THE DIG, 1954-2005: AN EMPIRICAL OVERVIEW

A. Background

The writ of certiorari process in the Supreme Court, and its use of the Rule of Four and the DIG, are relatively esoteric, but the general outlines are familiar enough that an extended discussion is not necessary. The Rule of Four—that only the votes of four of nine Justices is necessary to grant a petition for certiorari—is probably familiar to most of the legal community, but the origins and application of the Rule have been aptly described by Justice Stevens as "somewhat obscure."[31] The Rule has apparently been used by the Court since at least the early part of the last century.[32] It first received public notice in the hearings that preceded the passage of the Judiciary Act of 1925,[33] also known as the Judges' Bill,[34] which statutorily established the discretionary system of review embodied in the writ of certiorari.[35] Testimony from the Justices at those hearings suggested that the submajority Rule was an avenue to ensure that important cases would indeed be reviewed by the full Court, and would prevent arbitrary denials of review.[36]

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31. John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10 (1983) (footnote omitted).

32. *See* Leiman, *supra* note 26, at 981.

33. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (current version at 28 U.S.C. §§ 1251-1296 (2000)).

34. This is because "it was drafted by a committee of Supreme Court Justices." Stevens, *supra* note 31, at 10 n.49.

35. For a description and discussion of those hearings and the related legislative history, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 COLUM. L. REV. 1643, 1674-1704 (2000); Leiman, *supra* note 26, at 978-88; Revesz & Karlan, *supra* note 4, at 1068-72.

36. Leiman, *supra* note 26, at 986-87; Revesz & Karlan, *supra* note 4, at 1068-70. As Vermeule points out, these rationales are at best "underdeveloped." Vermeule, *supra* note 30, at 81. At the hearings the Justices meant to assuage concerns that certiorari would lead to too few cases being decided on the merits. Stevens, *supra* note 31, at 14. Yet in 1925, much less now, there is little consensus on the optimal number of cases the Court should be deciding each Term. Similarly, the Court has

The Court's use of the DIG apparently has a pedigree as long as that of the Rule of Four. In the same hearings on the Judges' Bill, Justice Willis Van Devanter, while describing the certiorari process, stated that under certain circumstances (for example, when facts that came to light after certiorari was granted), the Court had "'dismissed the petition as . . . improvidently granted.'"[37] Later on, in a published opinion DIGging a case in 1955, the Court stated that up to that point it had DIGged "more than sixty" cases, and cited the cases, with the earliest being in 1911.[38] Typically, the Court decides to DIG a case

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never been clear on the criteria it employs in deciding whether to grant certiorari, aside from the generalities found in its rules. *See* SUP. CT. R. 10 (providing as relevant factors in certiorari the presence of a split on an issue in the lower courts and the "importance" of the federal issue presented).

37. Blumstein, *supra* note 30, at 924 (quoting *Procedure in Federal Courts: Hearings on S. 2060 and S. 2061 Before the S. Comm. on the Judiciary*, 68th Cong. 31 (1924) (statement of Willis Van Devanter, J.)) (omission in original).

38. Rice v. Sioux City Mem'l Park Cemetery, Inc., 349 U.S. 70, 78 & n.2 (1955). The Court cited cases spanning a long period of time, including United States v. Rimer, 220 U.S. 547 (1911) through California *ex rel.* Brown v. St. Louis Union Trust Co., 348 U.S. 932 (1955). *Id.* It is not clear, though, that all of these case are DIGs in the classic sense of the term. For example, the *Rimer* case can be read for the proposition that certiorari was dismissed because the Court felt that the procedural posture of the case (as revealed at oral argument) made it not "within the scope of the grant of power to review by certiorari." *Rimer*, 220 U.S. at 548. The Court dismissed the writ of certiorari without using the word "improvidently." *See id.* Later cases make a distinction between those that are DIGged and those where certiorari is dismissed for lack of jurisdiction, *see infra* Part III.C., and *Rimer* might be read to fall into the latter group. On the other hand, cases other than *Rice* cite *Rimer* as an example of a DIG, including the first case that apparently used the language that now constitutes the DIG acronym. Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n, 242 U.S. 430, 431 (1917). The reader might wonder why the Court in *Rice* was moved to cite the large number of cases. One reason might be the apparently controversial nature of the disposition of the *Rice* case, which we discuss *infra* Part III.D., and the Court may have wished to emphasize the legitimacy of DIGging a case. Another reason might be that Justice Felix Frankfurter authored the majority opinion in *Rice*, and he was not hesitant to comment on the administration of the Court's business, either from a scholarly perspective, *see* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927), or in internal discussions with the other Justices, *see* Dennis J. Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946-O.T. 1961*, 1980 SUP. CT. REV. 143. In his book, Frankfurter commented approvingly, albeit briefly, on what we now call the DIG. *See* FRANKFURTER & LANDIS, *supra*, at 287 ("[B]ecause of the quantity of these petitions [for certiorari] and the conditions under which they must be scrutinized, they are sometimes granted when they should have been denied." (footnote omitted) (citing, among other cases, *Rimer*, 220 U.S. 547 and *Furness*, 242 U.S. 430)); *see also infra* Part III.A-B (discussing Frankfurter's views of the votes and reasons necessary for a DIG).

after briefing and oral argument have taken place.[39] Presumably, this is because the briefs and subsequent oral argument can bring new facts or other issues about the case to the Court's attention in a way not apparent from the papers before the Justices at the certiorari stage.[40] Sometimes the Court explains in an opinion (often a relatively short, per curiam disposition, or in a concurring opinion, as in *Nike*)[41] why a case is being DIGged. In those instances, the reasons advanced are often that the case does not squarely present the issue the Court thought it did when certiorari was granted, or that changed circumstances suggest that the case is no longer an appropriate one on which to rule.[42] As we mentioned in the Introduction, a particularly charged issue has been the voting protocols on DIGging a case. Related issues are whether the Court should always explain its reasons for DIGging a case, and what those reasons should be. We postpone those issues for a fuller discussion in Part III. As that Part will reveal, there is already a critical mass of scholarly literature on the Court's use of the DIG. What is lacking is a comprehensive empirical overview of the DIG. Our article seeks to fill that gap in the literature. We seek to answer three particular empirical questions.

First, what are the characteristics of the cases that the Court tends to DIG? In addition to providing a general description of DIGged cases, we are interested in providing some background on several specific issues. For example, we are interested in exploring whether the type of case, broadly defined, influenced the Court's decision to DIG a case. Perhaps the Court is more apt to DIG a case that raises more difficult constitutional issues, as opposed to those that concern construction of federal statutes. Justices may view constitutional cases as a whole as raising more difficult and important issues, and if necessary may be more willing to DIG such cases if, upon reflection, the case does not squarely present the issue. Or the Court may find that it is unable to assemble a majority or coherent position on such a case, and a DIG

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39. *See* Hendrickson, *supra* note 29, at 3 & tbl.1 (explaining that, during the Burger Court, of fifty-eight cases DIGged, fifty were after oral argument took place).

40. For further discussion, see Stephen L. Wasby et al., *The Supreme Court's Use of Per Curiam Dispositions: The Connection to Oral Argument*, 13 N. ILL. U. L. REV. 1, 6 (1992); James L. Walker, Research Note, DIGging on the Supreme Court: Does Oral Argument Make a Difference? (research paper presented at the Interim Meeting of the Int'l Pol. Sci. Ass'n Research Comm. on Comparative Judicial Studies, Aug. 16-18, 1994) (on file with authors).

41. Nike, Inc. v. Kasky, 539 U.S. 654, 656-65 (2003) (Stevens, J., concurring).

42. *See* STERN ET AL., *supra* note 30, at 297-99; Revesz & Karlan, *supra* note 4, at 1082.

enables the Court to postpone consideration of the issue presented.[43] More generally, perhaps the reasons motivating the Court to DIG cluster around certain types of cases, as opposed to being randomly distributed among all cases where certiorari is granted.

We are also interested in exploring whether the Court, by a collective opinion, or by concurring or dissenting opinions by individual Justices, explains its decision to DIG a case. As we discuss in Part III, there has been a significant amount of discussion regarding whether the Court should explain its decision to utilize the DIG. However, there has not been any systematic attempt to provide data on how often the Court does provide an explanation and what sort of explanation it provides when it chooses to do so. Collecting this data will also allow us to explore whether the explanation tends to flow from a majority, concurring, or dissenting opinion, and whether the Court or Justices more often offer official explanations for a DIG in certain types of cases.[44]

Finally, we explore other general characteristics of the cases DIGged by the Court, such as the ideological direction of the lower court under review and the ideological direction of the reviewing Supreme Court decision. These variables help us to paint a better picture of the types of cases that the Court has tended to DIG in recent years.

That picture, however, would be incomplete without a counterexample. Thus, the second empirical issue we address is whether the cases that the Supreme Court tends to DIG are

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43. *See, e.g.*, Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002) (examining the reasons for which the Court may agree to review different proportions of cases raising constitutional or statutory issues); Hendrickson, *supra* note 29, at 18; Posner, *supra* note 24, at 38-40.

44. We only examined when the Court itself explained, via an opinion, why it was DIGging. We did not systematically examine transcripts of oral argument or secondary sources that may have suggested explanations for a DIG when the Court did not offer an explanation (or, for that matter, even when it did). For two examples of the former, see Linda Greenhouse, *Supreme Court to Consider Role of Intent in Age Bias*, N.Y. TIMES, Mar. 30, 2004, at A16 (pointing out that in Adams v. Fla. Power Corp., 535 U.S. 228 (2002) (per curiam), in which no reason for the DIG was given, the Justices dismissed the case "after the argument raised questions about whether the company policies that were the basis for the complaint actually existed"), and Wasby et al., *supra* note 40, at 12 (observing that in Diamond v. Louisiana, 376 U.S. 201 (1964) (per curiam), in which no reason for the DIG was given, the Court was placed in a difficult position where the counsel for a defendant in a civil rights case conceded that the defendant had acted improperly, but the prosecution "was technically deficient," making it awkward for the Court to address the issues in the case) (citing, among other sources, Jack Greenberg, *The Supreme Court, Civil Rights & Civil Dissonance*, 77 YALE L.J. 1520, 1534 (1968))).

systematically different from those cases that the Court decides on the merits. Potentially, every case that the Court decides on the merits represents a case that the Court could have DIGged, and thus, our comparison group could be every case that the Court decides on the merits.[45] In some of the data we present below, we engage in that sort of comparison. Additionally, we use an alternative comparison group. For that comparison group, we use cases that the Court considered DIGging, but that were ultimately not DIGged. These are cases in which a party, most likely the respondent, filed a motion to DIG,[46] or the Court on its own[47] gave some consideration to the possibility of DIGging the case.[48] We refer to this group as the "non-DIGged" cases.

The rationale for using this group of cases as a comparison group is as follows. We assume that for the vast majority of the cases decided on the merits, the option of DIGging the case was never a realistic option, in the sense that neither the parties nor the Justices thought that

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45. Indeed, the paper by Hendrickson analyzes DIGged decisions in the context of all orally argued cases decided by the Burger Court under its certiorari jurisdiction. Hendrickson, *supra* note 29, at 15 n.21.

46. The Supreme Court Rules do not expressly provide for a motion to DIG a case, but parties have filed and the Court has disposed of such motions, anyway. *See, e.g.*, Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 535 n.14 (1978). *Cf.* SUP. CT. R. 21 (authorizing motions to the Court). This fact might suggest that the Court does not always feel an obligation to make note of denials of DIGs in the official reports.

47. The Supreme Court Rules make no mention of sua sponte authority to DIG. However, since the Court does employ the DIG, and there is no evidence to suggest that a DIG is only the result of a motion, it is apparent that the Court does, in fact, DIG cases sua sponte.

48. We relied on reported decisions of the Court to identify these cases. For example, the Court's opinion might note that it denied a motion to DIG. *See Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 535 n.14. Alternatively, the opinions of one or more of Justices in a case may discuss having given some consideration to DIGging the case. *See, e.g.*, Fay v. United States, 421 U.S. 542, 549 (1975) (separate opinion of Douglas, J.). We did not seek to examine motions that may have been filed by one or more parties requesting that the case be DIGged or available papers of retired or deceased Justices that may have addressed this issue.

Examining such papers might be fruitful. For example, one recent study, based in part on Justice Marshall's papers on a well-known case in administrative law, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, indicate that Justice Brennan made an unsuccessful effort to convince his brethren to DIG the case. Gillian E. Metzger, *The Story of* Vermont Yankee*: A Cautionary Tale of Judicial Review and Nuclear Waste, in* ADMINISTRATIVE LAW STORIES (Peter Strauss ed., forthcoming 2005) (manuscript at 47-49, on file with authors). It is nonetheless interesting that the Court in *Vermont Yankee* explicitly discussed why it overruled a motion by the respondent to DIG the case. 435 U.S. at 535 n.14. This is at least suggestive to us that we are not missing a large number of DIGs not reflected in the official reports. *Cf. supra* note 46 (suggesting that not all dispositions of DIGs may be reflected in the U.S. Reports).

to be an available resolution of the case. In contrast, in the subgroup of non-DIGged cases, the parties and the Justices in some way (as revealed in the official reports) grappled with the option to DIG the case.[49]

Finally, we explore the possible strategic use of the DIG process. For example, we are interested in studying the rate at which the legal issue or issues in the DIGged cases return to the Court in a later case. The fact that DIGged cases have already been through the certiorari process provide a strong signal that the Justices thought the issue in the case, in some shape or form, was of importance, or that the case provided the vehicle for advancing a particular doctrinal point. Having a case undergo the certiorari process once, and perhaps, as we discuss below, having the Justices discuss the reasons why a case is now being DIGged, sends information to future litigants as to what issues and strategies are more likely to gain them a hearing before the Court in future cases. Thus, the rate of return of DIGged issues might be reflective of strategic behavior by some of the Justices regarding their shaping of the Court's agenda. Conversely, DIGs might be evidence of some Justices' attempts to *remove* cases from the agenda when those Justices for various reasons do not want the Court to reach the merits.

B. Methodology

Our first task was to generate a list of all Supreme Court cases that were DIGged. To do that, we used a computer search of the Westlaw database of Supreme Court opinions.[50] We examined a fifty-one year period, covering the 1954 through 2004 Terms. That time span covers the Warren (1954-1968 Terms), Burger (1969-1985 Terms) and Rehnquist (1986-2004 Terms) Courts, and enables us to examine and draw conclusions about the Court's use of the DIG in ways that examining only one of those Courts, or a shorter time period, would

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49. One perhaps can think of our non-DIGged sample as the low end in a continuum of a sample of cases in which the Court considers the possibility of a DIG. At the other end of the continuum will be all cases decided on the merits. Our sample might be underinclusive, while the sample that includes all cases decided on the merits might be overinclusive.

50. The search term was "improvident! w/10 grant," to capture the common formulation of the words that make up the DIG acronym. For an example of the use of the same search, see Hendrickson, *supra* note 29, at 13 n.19. Like him, we also examined the case citations found in various secondary sources cited in this Article to determine if the search missed any cases commonly considered to have been DIGged. *Id.* We found none. So, while we cannot say with absolute certainty that we found every single DIGged case, we are confident that we found virtually every one for the time period we are studying.

not.[51] Moreover, it enables us to compare and contrast those different Courts, and to draw on the considerable social-science study of the Court, most of which focuses on the post-World War II era. Our focal point was decisions of the Court DIGging a case, in whole or in part.[52] On those cases, we collected data on a number of variables both from our own reading of the cases and from other available data sources.[53]

We also compiled the cases in our comparison group, which we refer to as the non-DIGged cases. As described above, these are cases ultimately decided on the merits, but where the Court via a majority opinion made references to a denial of a motion to DIG the case, or where a concurring or dissenting Justice argued via a written opinion that the Court should have DIGged the case, or at least, considered this option.[54]

Finally, we examined the post-DIG history of the issue that the Court declined to review because of the DIG. We did not expect to find many examples of the same *case* returning to the Court, though it did happen.[55] Instead, we were interested in determining whether the same

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51. We could also have studied the Court's use of the DIG *prior* to the Warren Court, on which the Court itself has provided some useful information. *See supra* note 38 and accompanying text. But that is another study for another day.

52. A complete DIG dismisses the entire case. In a partial DIG, the Court dismisses one issue, but goes on to decide the remaining issue or issues on the merits. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 n.1 (2001). Usually this is explained by the Court in the decision on the merits. *See, e.g.*, *id.* (DIGging an Eleventh Amendment challenge to the application of Title II of the Americans with Disabilities Act against states). In contrast, Hendrickson did not examine partial DIGs, since his unit of analysis focused on the case (by docket number) and could not accommodate these partial DIGs. Hendrickson, *supra* note 29, at 13 n.20.

53. In particular, we use the database on Supreme Court decisions developed by Harold J. Spaeth. The database originally covered the Warren and Burger Courts, but now has expanded to include the Vinson and Rehnquist Courts. The S. Sidney Ulmer Project U.S. Supreme Court Databases, http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm (last visited Jan. 13, 2006) [hereinafter U.S. Supreme Court Databases]; *see also* Harold J. Spaeth & Jeffrey A. Segal, *The U.S. Supreme Court Judicial Data Base: Providing New Insights into the Court*, 83 JUDICATURE 228, 228 (2000); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 23-24 (2002) (describing this database and its use by other scholars). In three cases, *In Re* Zipkin, 369 U.S. 400 (1962), Stiles v. United States, 393 U.S. 219 (1968), and Holder v. Banks, 417 U.S. 187 (1974), the lower court opinion was not published, and other sources were not available to enable us to characterize the issues in the case or explore whether the court revisited those issues in subsequent cases.

54. *See, e.g.*, Fry v. United States, 421 U.S. 542, 549 (1975) (Douglas, J., writing separately) (arguing that the case should be DIGged since Congress had allowed the statute being considered to expire three months after certiorari was granted).

55. Three of the 155 DIGged cases returned to the Court. Two cases with the same name, Hughes Tool Co. v. Trans World Airlines, Inc., 380 U.S. 248 (1965) and 380 U.S. 249 (1965), were DIGged in 1965, and a separate appeal in the same protracted litigation returned to the Court years later. Hughes Tool Co. v. Trans World

issue returned to the Court in separate, subsequent litigation. If a relatively high number of the same issues did return, then it might suggest, among other things, that the DIG is not as disruptive as sometimes thought. It merely postpones the Court's resolution of an issue. Here, we focused on the issue itself returning to the Court, and it sometimes required difficult judgment calls on what was the same issue.[56] We also did not systematically consider whether the issue had been resolved by means other than returning to the Court via litigation.[57]

Airlines, Inc., 409 U.S. 363 (1973). According to the dissent, the issue presented in the DIGged cases was the same resolved eight years later. *Id.* at 392 & n.9 (Burger, C.J., dissenting). The third case is Atchley v. California, 366 U.S. 207 (1961). Additionally, one case returned to the Court after further proceedings in the lower courts, and the Court vacated and remanded for further consideration in light of the Court's recent decision in a separate case that revisited the issue presented in the DIGged case. Bell v. Abdur'Rahman, 125 S. Ct. 2991 (2005) (vacating and remanding in light of Gonzalez v. Crosby, 125 S. Ct. 2641 (2005)).

56. Many times it was quite clear that the same issue returned to the Court. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 514 (2004) (mentioning that the issue presented had been DIGged in Bd. of Trs. v. Garrett, 531 U.S. 356, 360 n.1 (2001)). Other times it was not so clear, as it depended on the level of generality one gave to the issue in the DIGged case. For example, in a case that was DIGged, New York v. Uplinger, 467 U.S. 246 (1984) (per curiam), the Court was to consider a due process challenge to a New York state law that prohibited loitering in a public place for the purpose of soliciting another for "deviate" sexual behavior. *Id.* at 247. Is that the same issue as the challenges to antisodomy statues of other states that the Court subsequently considered in Bowers v. Hardwick, 478 U.S. 186 (1986) and Lawrence v. Texas, 539 U.S. 558 (2003)? For the suggestion that all these cases, on their merits, presented considerable doctrinal similarities, see Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 SUP. CT. REV. 75, 134-35; Bernard E. Harcourt, *"You Are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers*, 94 J. CRIM. L. & CRIMINOLOGY 503, 538 (2004). But given that *Uplinger* did not deal with an antisodomy statute as such, *see* 467 U.S. at 247 (stating that the issue concerned the legality of a statute at least facially involving loitering for the purpose of soliciting or engaging in "deviate" sex), we concluded that the same issue was not presented in later cases. Needless to say, reasonable people can come out different ways on the characterization issue presented in these and other DIGged cases.

57. The primary means we used to determine what the issue was in the first place was the Court's or the Justices' opinions, if there were any, when the case was DIGged. If that did not provide clarity, we then turned to the opinion of the lower court being reviewed (which was usually, though not always, officially published) or the briefing or the oral argument in the case, when the latter were available in electronic databases. To determine if the same issue had returned to the Court, we variously examined citations to the DIGged case, or the lower court opinion it would have reviewed, or searched later Court cases using WestLaw keywords or head notes of the DIGged case.

C. Analysis

The focal point of our research was to compile and examine the cases that a majority of the Court DIGged, as well as those cases that were a candidate for a DIG but that were ultimately decided on the merits. Appendix I provides a list of the DIGged cases, and Appendix II provides a list of the non-DIGged cases.[58] In this section we discuss our results on the first two of the three empirical issues identified above. The third issue is discussed in Part III.

1. DESCRIBING THE DIGS

From 1954 to 2005, the Court DIGged 155 cases, which averages about three per Term. In absolute terms, fifty-six (36.1 percent) of the cases were DIGged during the Warren Court, while fifty-eight (37.4 percent) and forty-one (26.5 percent) were DIGged during the Burger and Rehnquist Courts, respectively. Only twelve of the 155 cases were DIGged before the Court heard oral arguments, seven of those instances taking place in the Burger Court. Similarly, the Court tended to use the DIG as a way of completely dismissing the case, as opposed to avoiding a particular issue in a case. Only in fifteen of the 155 cases (less than ten percent), did the Court partially DIG a case and go on to decide the remaining aspects of the case on the merits.

By almost a two-to-one margin the cases that were directly DIGged raised, in our judgment, federal constitutional issues, rather than statutory, administrative, or various other nonconstitutional issues. We classified fifty-four of the DIGs as not raising federal constitutional issues, about thirty-six percent of the total. In contrast, over the same period, the Court's plenary docket each Term almost always consisted of over fifty percent nonconstitutional issues.[59]

We were also able to classify the ideological direction of the lower court decision that the Supreme Court was reviewing,[60] as well as the

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58. Appendix I includes the names and cites of the DIGged cases for the period under study. We also include the data that we collected from the cases (whether the case involved a constitutional or nonconstitutional issue, whether the Court explained its decision to DIG, the vote lineup, and whether the same issue was later decided by the Court). Other variables we use in each of the cases are available from the U.S. Supreme Court Databases, *supra* note 53. *See also* Spaeth & Segal, *supra* note 53, at 234 (providing a table of database variables).

59. *See* Epstein et al., *supra* note 43, at 416-17 & fig.2 (providing data for the 1946 through 1992 Terms); Posner, *supra* note 24, at 37-38 & fig.2 (providing data for the 1955 through 2003 Terms).

60. Spaeth classifies both the lower court decision and the Supreme Court decision as liberal or conservative according to the following scheme. For example, "in the context of issues pertaining to criminal procedure, civil rights, First Amendment,

direction of the Supreme Court's decision itself. About eighty-nine percent (137 cases) of the DIGs are classified as involving a conservative outcome at the lower court. Given that when the court DIGs a case that has been conservatively decided by a lower court, the Court in effect is sustaining a conservative outcome, we characterize the direction of the Court's decisions as eighty-nine percent conservative.

In close to half (seventy-three) of the 155 cases, the Court provided an explanation for its decision to DIG the case in a majority opinion. In twelve additional cases, a concurring or dissenting Justice provided an explanation. Though such explanation does not formally speak for a majority of the Court, it does provide insight on what the Court, individually and collectively, was thinking. So in eighty-five of the cases, or about fifty-five percent, there was some sort of explanation provided by the Court or a Justice.

Table 1 shows both the number of DIGs and the number of cases in which the Court, or an individual Justice, explained the decision to DIG. The rate of explanation held fairly constant during the Warren and Burger Courts, but fell dramatically during the Rehnquist Court.

Table 1. Proportion of DIGged Cases in Which the Court Provided an Explanation

Court	DIGged Cases	Cases in Which Explanation Provided	Percent
Warren Court	56	36	64.3%
Burger Court	58	34	58.6%
Rehnquist Court	41	15	36.6%
Total	155	85	54.8%

With regard to the type of issue involved in the DIGged cases for which the Court provided some kind of explanation, our data indicates that about two-thirds (sixty-seven percent) of these eighty-five cases involved constitutional issues. Finally, as described above,[61] we were interested in determining whether the same issue that was DIGged

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due process, privacy, and attorneys," a liberal outcome is, among other factors, "pro-person accused or convicted of crime, or denied a jury trial; pro-civil liberties or civil rights claimant, especially those exercising less protected civil rights (e.g., homosexuality[]); pro-child or juvenile; pro-indigent; pro-Indian; pro-affirmative action; pro-neutrality in religion cases; [and] pro-female in abortion." HAROLD J. SPAETH, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE 1953-2003 TERMS, DOCUMENTATION 58 (2005), *available at* http://www.as.uky.edu/polisci/ulmerproject/allcourt_codebook.pdf.

61. *See supra* notes 55-57 and accompanying text.

returned to the Court in separate, subsequent litigation. We identified sixty-six such cases.

2. EXPLAINING THE DIGS

We then compared those cases that the Court DIGged to the non-DIGged cases—the group of cases that the Court considered DIGging, but that it ultimately decided on the merits. The list we compiled is provided in Appendix II.[62] We identified 171 issue-cases ("cases"),[63] seventy-nine (46.2 percent) during the Warren Court, fifty-eight (33.9 percent) during the Burger Court, and thirty-four (19.9 percent) during the Rehnquist Court.

Our data allow us to provide some insight into some of the factors that could affect the Court's decision to DIG a case. First, we explore the relationship between the decision to DIG and the type of issue involved in the case. Table 2 shows the cross-tabulation of the type of issue involved in the case (using our "constitutional" or "other" categorization) and whether or not the Court DIGged the case. The data demonstrate that the Court is more likely to DIG cases raising constitutional issues. These results are consistent with the view that the Court might prefer to avoid resolving cases on constitutional grounds, or avoid such cases altogether, either because of their complexity or divisiveness on the Court itself, or because of their political saliency. The Court appears to use the DIG as a device, a second opportunity after the certiorari decision itself, to avoid resolving perhaps difficult and contentious constitutional issues.

Table 2. Decision to DIG and Type of Case[64]

	DIGged	non-DIGged	Total
Constitutional	98 (64.5%)	76 (44.4%)	174
Other	54 (35.5%)	95 (55.5%)	149
Total	152	171	323

62. Appendix II provides a list of the names and cites of those cases, as well as the information we collected about those cases. As with the list of DIGged cases, we also used information from the Spaeth data sets. *See* U.S. Supreme Court Databases, *supra* note 53.

63. Spaeth classifies twenty-three of these cases as involving the resolution of multiple legal issues. U.S. Supreme Court Databases, *supra* note 53. Our reading of those cases suggests that the Court could have DIGged any of those issues and resolved the remaining issues. Accordingly, we treated each issue as a separate data point in our list. For the list of the twenty-three cases, see notes to Appendix II.

64. Table 2 presents frequencies and parenthetically presents column percentages. *Chi-Square = 12.99,* significant at the .001 level. We could not classify three of the DIGged cases. For the data sources see *supra* note 53.

When calculated across different Courts, though, the results indicate that the relationship between the type of issue and the decision to DIG a case was statistically significant during the Warren Court, but not significant during either the Burger or Rehnquist Courts. It is not entirely clear why this is the case. Perhaps defying conventional wisdom, there was a higher percentage of nonconstitutional issues on the docket of the Warren Court as compared to the subsequent Courts. But perhaps the constitutional cases that the Warren Court *did* decide were, comparatively speaking, more controversial or difficult than the constitutional cases decided by the Burger and Rehnquist Courts.[65]

In Table 3 we explore the relationship between the Court's decision to DIG and the ideological direction of the lower court's decision. As described above, an overwhelming majority (about eighty-eight percent) of the DIGged cases were decided in a conservative direction by the lower court. Prior research advances the hypothesis that a conservative Supreme Court will be more likely to DIG a conservative lower court decision and that the opposite will hold for a liberal leaning Supreme Court.[66] The rationale is twofold.[67] First, various scholars have noted that a Court benefits more from reversing an unfavorable lower court decision than in upholding a favorable one.[68] Second, DIGging a case eliminates the possibility, however small, that the ideological minority in the Court will convince a member of the ideological majority to switch positions, upsetting the expectations of the balance of that majority.[69]

Our data confirm the "conservative" half of this hypothesis in more ways than one. As shown in panels (B) and (C) of Table 3, both the Burger and Rehnquist Courts were more likely to DIG cases decided conservatively by the lower court, ninety-one percent and eighty-five percent of the time, respectively. On the other hand, less than thirty-seven percent of the non-DIGged cases were decided conservatively by the lower court.

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65. The comparative data on DIGs is on file with the authors. Data on the comparative dockets of the three Courts in question can be found in Epstein et al., *supra* note 43, at 416-17 & fig.2.

66. *See* Hendrickson, *supra* note 29, at 11.

67. *See id.* at 11-12.

68. *Id.* at 11. By this we mean that a Court presumably seeking, in whole or in part, to pursue policy goals will have less incentive, all things being equal, to review a lower court decision that reached the correct decision in the minds of the majority of the Justices.

69. *Id.* at 12.

Table 3. Decision to DIG and Direction of Lower Court Decision

Panel A. Warren Court[70]

	DIGged	Non-DIGged	Total
Conservative Lower Court Decision	51 (91.1%)	66 (86.8%)	117
Liberal Lower Court Decision	5 (8.9%)	10 (13.2%)	15
Total	56	76	132

Panel B. Burger Court[71]

	DIGged	Non-DIGged	Total
Conservative Lower Court Decisions	52 (91.3%)	22 (37.9%)	74
Liberal Lower Court Decision	5 (8.7%)	36 (62.1%)	41
Total	57	58	115

Panel C. Rehnquist Court[72]

	DIGged	Non-DIGged	Total
Conservative Lower Court Decision	34 (85.0%)	11 (33.3%)	45
Liberal Lower Court Decision	6 (15.0%)	22 (66.7%)	28
Total	40	33	73

These results indicate, as suggested in the literature, that a conservative Court is more likely to DIG a conservative lower court decision, and thus advance its presumed ideological preferences by first letting a conservative lower ruling stand, and second using its limited

70. Panel A presents frequencies and parenthetically presents column percentages. *Chi-Square = .57.* This value is not statistically significant.

71. Panel B presents frequencies and parenthetically presents column percentages. *Chi-Square = 35.60,* significant at the .001 level.

72. Panel C presents frequencies and parenthetically presents column percentages. *Chi-Square = 20.41,* significant at the .001 level. There is one missing value for one of the DIGged cases, resulting in one of the cases dropping out of the analysis.

resources in dealing with liberally decided lower court decisions.[73] Notice that about two-thirds of the non-DIGged cases decided by the Burger and Rehnquist Courts were liberally decided by the lower courts. Additional analysis shows that, as one would have expected, the non-DIGged cases were on average decided in a conservative direction by both the Burger Court (56.9 percent) and the Rehnquist Court (63.6 percent).

However, Panel (A) in Table 3 does not support the other half of the hypothesis. The Warren Court, a liberal court, was not more likely to DIG liberal cases. As expected, however, with regard to those cases decided on the merits in the non-DIGged group, the Warren Court reviewed almost six times as many conservatively decided than liberally decided lower court decisions.[74]

3. SUMMARY

Our results shed some new light on the somewhat obscure practice of the DIG. First, while a relatively rare event as compared to the number of cases decided each Term, the DIGs could be considered a somewhat more significant occurrence when compared to what we suggest is the more relevant group of non-DIGged cases. Second, our results indicate that the DIG has been used across Courts of different ideological compositions as a fairly conservative instrument. That is, to a significant extent, cases that have been DIGged have resulted in an outcome that can be described as an ideologically conservative one. Third, the ideological direction of the lower court's ruling appears at the same time to be significantly related to the likelihood of a case being DIGged by the Supreme Court, at least where the Court can be classified as conservative. Finally, our results indicate that the Court might also use the DIG process as a way of avoiding more difficult or contentious constitutional issues.

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73. *See id.* at 11-12.

74. The relatively high percentage of conservative lower court decisions DIGged by the Warren Court is probably related to the fact that, as compared to the Burger and Rehnquist Courts, the Warren Court faced a much higher proportion of conservative lower court cases. Using the Spaeth database, the proportion of conservative to liberal lower court opinions faced by the Warren Court is approximately seventy-five conservative to twenty-five liberal. U.S. Supreme Court Databases, *supra* note 53. That is, the Warren Court was facing conservative lower court opinions by a three-to-one margin. However, for the Burger and Rehnquist Courts the proportion of conservative to liberal lower court decisions is approximately one to one. *Id.* Still, as our results indicate, these two Courts were significantly more likely to DIG conservative lower court decisions, as compared to liberally decided lower court decisions. We thank Scott Hendrickson for bringing this point to our attention.

III. THE DIG AND LEGAL AND INSTITUTIONAL NORMS OF THE SUPREME COURT

Congress bestowed the certiorari power on the Supreme Court by statute, but virtually everything else about the Court's agenda-setting process (and much else) is not created or regulated by positive law—the Constitution, statutes, or even the Court's own rules. Instead, many aspects of the Court's processes are the result of, and governed by, informal agreements among the Justices.[75] These agreements, or norms, have been the subject of increasing attention by scholars,[76] in part because the development of such norms are as much, if not more, important than the application of formal legal rules.[77] In political institutions, norms can structure interactions among participants.[78] They "represent an equilibrium among participants—no actor, given current information and its current position, can improve its position on its own."[79] Norms are subject to self-enforcement, and given their plasticity, are subject to change and even abandonment for various reasons.[80] The most obvious external shock to a norm can be the addition of new Justices who, to varying degrees, disagree with the norm.[81] The Court's agenda-setting process can be profitably examined as an example of the evolution of norms.[82]

In this Part, we reexamine some aspects of the Court's application of the DIG through the lens of the scholarly literature on norms. We have both descriptive and normative agendas in this Part. We consider why certain aspects of the norms governing the DIG are as they are, why they have or have not evolved, and evaluate the soundness of some of those practices and offer suggestions for change.

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75. *See* Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 875-76 (1998).

76. *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS (2000).

77. *See* Caldeira & Zorn, *supra* note 75, at 875 (discussing the "explosion of conflict" that has resulted in "the demise of consensual norms" in the Court).

78. *See id.* at 875-76.

79. *Id.* at 876 (citation omitted).

80. *Id.*

81. *See id.* at 876-77.

82. *See, e.g.*, Merrill, *supra* note 24, at 639-51 (examining the decline of the Court's docket in light of norm theory, and attributing the decline to, among other things, change in membership on the Court). We do not wish to overstate the point regarding the juridical source of the Rule of Four and the DIG. Recall that both were referenced by the Justices in their testimony to Congress prior to the passage of the Judges' Bill. *See supra* notes 36-37 and accompanying text. In some limited sense, then, it might be said that the Bill effectively codified the Rule of Four and the DIG. Even that observation, of course, leaves open for discussion *how* those devices have been or should be used by the Court, the subject of this Part of the Article.

A. How Many Votes to DIG?

It is a well-established norm that only the votes of four Justices are necessary to grant certiorari. What is much less established, as we demonstrate below, is how many votes are necessary to DIG a case. Given the Court's long-standing lack of transparency on many aspects of its decision making, perhaps it is no shock that we do not know the answer (if there is one) to this seemingly simple issue. Instead, to obtain anything near an authoritative answer, we must rely on those instances when one or more Justices have felt moved to comment on the issue in published opinions. These cases have already been the subject of considerable discussion in the literature,[83] so we will forego a lengthy summary and instead focus on the highlights.

Credit for first publicly engaging the Court on this issue belongs to Justice Frankfurter. In 1952, writing separately in a case that the majority resolved on the merits, he stated that he would have DIGged the case, because for him the issues were unique and unlikely to recur, and thus certiorari should never have been granted in the first place.[84] Dissenting on the merits in the same case, Justice William Douglas added that a Justice who votes to deny certiorari should not thereafter be able to vote to DIG a case, absent a change of mind by one of at least four Justices who voted to hear the case.[85] Absent such a requirement, he said, "[t]he integrity of the four-vote rule on certiorari would then be impaired."[86] The five (if there were up to five) Justices who did not vote to grant certiorari could dismiss the case, thus negating the wishes of the other four Justices.[87]

The debate was played out in greater detail four years later, in four cases decided on the same day.[88] The focal point for our purposes is *Ferguson v. Moore-McCormack Lines*.[89] The Justices reached the merits of *Ferguson* and the three other cases;[90] however, Justice

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83. *See* FALLON JR. ET AL., *supra* note 30, at 1603-09; STERN ET AL., *supra* note 30, at 298; Blumstein, *supra* note 30, at 926-28; Revesz & Karlan, *supra* note 4, at 1082-95.

84. United States v. Shannon, 342 U.S. 288, 294-97 (1952) (Frankfurter, J., writing separately).

85. *Id.* at 298 (Douglas, J., dissenting).

86. *Id.*

87. *See id.*

88. Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 (1957); Herdman v. Pa. R.R., 352 U.S. 518 (1957); Rogers v. Mo. Pac. R.R., 352 U.S. 500 (1957); Webb v. Ill. Cent. R.R., 352 U.S. 512 (1957).

89. 352 U.S. 521 (1957).

90. *See id.* at 523-24; *Herdman*, 352 U.S. at 520; *Rogers*, 352 U.S. at 511; *Webb*, 352 U.S. at 517.

Frankfurter dissented in *Ferguson*, refused to cast a vote on the merits, argued that certiorari should not have been granted, and concluded that the case should have been DIGged.[91] Unlike his opinion in the 1952 case, this time he responded to the argument that maintaining the integrity of the Rule of Four required all of the Justices to vote on the merits of the case, at least when "no new factor emerges after argument and deliberation."[92] According to Justice Frankfurter, that argument was incorrect.[93] The initial decision to grant certiorari "must necessarily be based on a limited appreciation of the issues in a case, resting as it so largely does on the partisan claims in briefs of counsel."[94] After oral argument and deliberation, a Justice may feel strengthened in his view that granting certiorari was inappropriate.[95] So a case should be DIGged for that reason as well.[96] Such a posture, he continued, does no violence to the Rule of Four, which he said he would not change.[97] He referenced the "historic" right of a Justice to dissent, which he called "essential to an effective judiciary in a democratic society, and especially for a tribunal exercising the powers of this Court."[98] The Court "operates ultimately by a majority," he continued, and the Justices in that majority do not give up their "right to vote on the ultimate disposition of the case as conscience directs."[99] His assault on the Rule of Four, he argued, had been overstated.[100] In the "usual instance," he said, a Justice will defer to the views of the other members of the Court who desire to hear the case on the merits.[101] But that deference should not hold "when a class of cases is systemically taken for review," such that "insignificant and unimportant questions . . . unduly drain[]" the Court's time.[102] That was true, he said, of the particular issues raised in *Ferguson* and its companion litigation.[103]

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91. *Ferguson*, 352 U.S. at 524-29 (Frankfurter, J., dissenting) (expressing dissent in the decisions of *Ferguson*, *Herdman*, *Rogers*, and *Webb*).

92. *Id.* at 527.

93. *Id.*

94. *Id.*

95. *See id.* at 528.

96. *See id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.*

101. *Id.* at 529.

102. *Id.*

103. *Id.* at 528-29. The cases involved the Federal Employers' Liability Act (FELA) and the Jones Act, which Justice Frankfurter argued at length that the Court had spent entirely too much time on. *Id.* at 529-48. For a further discussion of Justice

Justice John Marshall Harlan responded to Justice Frankfurter. He agreed that certiorari should not have been granted but contended that once it was, all of the Justices had an obligation to reach the merits.[104] The integrity of the Rule of Four, he wrote, requires that the merits be reached, at least "in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted."[105] The right to dissent from the decision to grant certiorari, he continued, "without the presence of intervening factors—is exhausted once the petition has been granted and the cause set for argument."[106] In short, it would "stultify" the Rule of Four "if it were permissible for a writ of certiorari to be annulled by the later vote of five objecting Justices."[107] Six other Justices concurred in the pertinent parts of Justice Harlan's separate opinion.[108]

His opinion did not lack for ambiguity. It was not clear what "intervening factors" would be, or who would decide the presence or relevance of those factors--the five Justices who voted to deny certiorari, or one or more of the four who granted certiorari. Nonetheless, a position agreed to by seven Justices would seem to establish a durable precedent, as indeed it did, for the Court as a whole did not publicly return to the issue until 1971. In that year, five Justices in *Triangle Improvement Council v. Ritchie*[109] DIGged a case over the dissent of the four Justices who voted to grant certiorari.[110] The majority did not deign to collectively provide a reason for the DIG, but

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Frankfurter's views on FELA and related cases, see STERN ET AL., *supra* note 30, at 299 n.42.

104. *Ferguson*, 352 U.S. at 559 (Harlan, J., concurring in *Herdman*, dissenting in *Ferguson*, *Rogers*, and *Webb*).

105. *Id.*

106. *Id.* at 559-60 (footnote omitted).

107. *Id.* at 560. He also argued that Justice Frankfurter's self-imposed caveat of limiting his position to instances when four Justices systematically grant certiorari to a "class of cases" was no limit at all. *Id.* at 561-62. The majority of Justices would still disagree with the minority on the propriety of reviewing that "class of cases." *Id.*

108. Part I of Justice Harlan's opinion is relevant here, as it contained his rebuttal to Justice Frankfurter. *Id.* at 559-62. Part II of Justice Harlan's opinion considered the merits of the four cases in question. *Id.* at 562. Justice Burton concurred in Part I of Justice Harlan's opinion. *Id.* at 564. Chief Justice Warren, and Justices Black, Brennan, Clark, and Douglas concurred in Part I of Harlan's opinion, except as it pertained to Justice Harlan's disapproval of the grant of certiorari in the cases. *Id.* at 564. However, it is most relevant that six justices concurred in Justice Harlan's rebuttal to Justice Frankfurter's insistence that the cases should have been DIGged.

109. 402 U.S. 497 (1971) (per curiam).

110. Normally the Justices do not reveal their votes on whether to grant or deny certiorari in any particular case. The information occasionally surfaces in opinions (if there are any) accompanying a DIGged case. For an example, see *id.* at 508 (Douglas, J., dissenting).

Justice Harlan did in a concurring opinion.[111] He stated that changes to the federal statute under review, coupled with other changes to the factual and legal landscape of the case, as revealed at oral argument and in the briefing on the merits, were circumstances that justified a DIG of the case.[112]

Justice Douglas, writing for the dissenters, argued that the DIG in this case violated earlier guidelines, for none of the four Justices who voted to grant certiorari had changed his mind on the propriety of reviewing the case.[113] He appeared to be saying that the majority of the Court could DIG a case so long as at least one of the Justices originally granting certiorari agreed that there were now changed circumstances. Otherwise, he argued, the Rule of Four would be converted to a Rule of Five.[114] Put another way, Justice Douglas was arguing that a Rule of Six was necessary to DIG a case—the five Justices who denied certiorari, and at least one who did not.[115]

The last major[116] consideration by the Court of these issues was in 1984 in *New York v. Uplinger*.[117] There the Court had granted a writ of certiorari by a county district attorney to review a decision of New York courts striking down a state statute prohibiting loitering for the purpose of soliciting others for various sexual activities.[118] The majority DIGged the case, explaining that the "precise federal constitutional issue" presented by the case was unclear, because the opinion below was "fairly subject to varying interpretations."[119] That, coupled with a brief by the attorney general of New York filed after certiorari was granted, arguing the statute was unconstitutional,[120] meant that the case was "an inappropriate vehicle for resolving the important constitutional

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111. *Id.* at 497 (Harlan, J., concurring).

112. *Id.* at 498-501.

113. *Id.* at 508 (Douglas, J., dissenting).

114. *Id.*

115. It would appear that, under Justice Douglas' position, there would be a Rule of Six even if more than four Justices voted to grant certiorari. According to this position, if all nine Justices voted to hear the case, then a six-Justice majority would still be necessary to DIG the case. To permit only five Justices to DIG under those circumstances would still undermine at least four Justices who desired to hear the case.

116. This is not to say that the Court or individual Justices have been otherwise silent. For example, one year after *Triangle*, Justice Douglas, dissenting alone from a DIG, contended that a DIG should occur "only in exceptional situations and where all nine members of the Court agree." Iowa Beef Packers, Inc. v. Thompson, 405 U.S. 228, 232 (1972) (Douglas, J., dissenting). Such a Rule of Nine departs from his previous views. Revesz & Karlan, *supra* note 4, at 1087 n.89.

117. 467 U.S. 246 (1984) (per curiam).

118. *Id.* at 247.

119. *Id.* at 248.

120. *Id.* at 247 n.1.

issues raised by the parties."[121] In a two-sentence dissent, Justice Byron White, joined by three other Justices, argued that a DIG was "not the proper course," since the federal constitutional issues were "properly before" the Court.[122]

In a concurring opinion, Justice Stevens contended that the DIG made "no change in the Rule [of Four]," but he regarded it "as sufficiently significant to warrant . . . additional comments."[123] In those comments, Justice Stevens contended that "the major reasons [justifying the DIG] were apparent when the certiorari petition was filed" and asserted that the dissent had not contested the arguments for a DIG in the majority's per curiam opinion.[124] "It might be suggested," he continued, "that the case must be decided unless there has been an intervening development that justifies a dismissal."[125] He was "now persuaded, however, that there is *always* an important intervening development that may be decisive."[126] Pointing out that constitutional issues in particular must be addressed with care and restraint, Justice Stevens contended that the Rule of Four did not compel a case to be heard once a majority had examined the full record and arguments and concluded that the case was an "unwise vehicle" to decide the question presented.[127] The Rule of Four, he wrote, grants the power to four Justices to require that a case be "briefed, argued, and considered at a postargument conference," but it does not "compel the majority to decide the case."[128] He concluded that The Rule of Four "is a valuable, though not immutable, device for deciding when a case must be argued, but its force is largely spent once the case had been heard."[129]

What, then, is the legal landscape for the voting protocols of the DIG device after these cases? An easy answer is not possible. Justice Harlan's concurring opinion in *Ferguson* can be read for the proposition that at least six votes are necessary to DIG a case. Yet in *Triangle*, *Uplinger*, and other cases found in our study,[130] the Court

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121. *Id.* at 249.

122. *Id.* at 252 (White, J., joined by Burger, C.J., Rehnquist, J., and O'Connor, J., dissenting).

123. *Id.* at 249 (Stevens, J., concurring).

124. *Id.* at 249-50.

125. *Id.* at 250.

126. *Id.*

127. *Id.* at 251.

128. *Id.* at 250-51.

129. *Id.* at 251.

130. *See* Medellin v. Dretke, 125 S. Ct. 2088 (2005) (per curiam); Parker v. Dugger, 498 U.S. 308 (1991); City of Springfield v. Kibbe, 480 U.S. 257 (1987) (per curiam); New York v. Uplinger, 467 U.S. 246 (1984) (per curiam); NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981); Walter v.

DIGged cases with four Justices dissenting from the action. So the post-*Ferguson* cases can be read to suggest that DIGs are possible with just five votes, at least under some (or many) circumstances. Indeed, in their careful analysis of these cases, Richard Revesz and Pamela Karlan argue that Justice Harlan had shifted his position in *Triangle* from that in *Ferguson*, since in the former case he implicitly argued that only five Justices need to agree on the presence of changed circumstances.[131] Similarly, they contend that the majority opinion and Justice Stevens' concurring opinion in *Uplinger* essentially adopt Justice Frankfurter's dissent in *Ferguson*, as they apparently read both *Uplinger* opinions to permit five Justices to DIG for any reason, not merely for reasons not apparent at the time certiorari was granted.[132]

We do not fully agree with this critique and find more continuity in the cases than these critics suggest. Recall that Justice Harlan's opinion in *Ferguson* did not state that six or more votes were needed to DIG under all circumstances.[133] Instead, he at least implied that five votes would suffice if there were changed or intervening circumstances.[134] There was no majority opinion explaining the DIG in *Triangle*.[135] In that case, Justice Harlan concurred only for himself, but he emphasized what he characterized as the "changed posture of the case,"[136] arising from various issues raised after certiorari was granted. The case put to rest any question that five votes were not enough under *any* circumstances,[137] but we do not read it as adopting Justice Frankfurter's position. Likewise, the majority opinion in *Uplinger* referred to several

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United States, 447 U.S. 649 (1980); Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971) (per curiam); Piccirillo v. New York, 400 U.S. 548 (1971) (per curiam); Miller v. California, 392 U.S. 616 (1968) (per curiam); Hanner v. DeMarcus, 390 U.S. 736 (1968) (per curiam); NAACP v. Overstreet, 384 U.S. 118 (1966) (per curiam); Smith v. Butler, 366 U.S. 161 (1961) (per curiam); Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959); Ellis v. Dixon, 349 U.S. 458 (1955).

131. Revesz & Karlan, *supra* note 4, at 1092-93; *see also Triangle*, 402 U.S. at 508 n.7 (Douglas, J., dissenting) (arguing that the action of the majority was adopting the position of Justice Frankfurter).

132. Revesz & Karlan, *supra* note 4, at 1090-91; *see also* STERN ET AL., *supra* note 30, at 298-99 (suggesting that *Uplinger*, and Justice Stevens' concurrence thereto, can be read as a departure from earlier DIG cases).

133. *See* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 560-61 (1957) (Harlan, J., concurring in *Herdman*, dissenting in *Ferguson*, *Rogers*, and *Webb*).

134. *See id.*

135. *See Triangle*, 402 U.S. at 497.

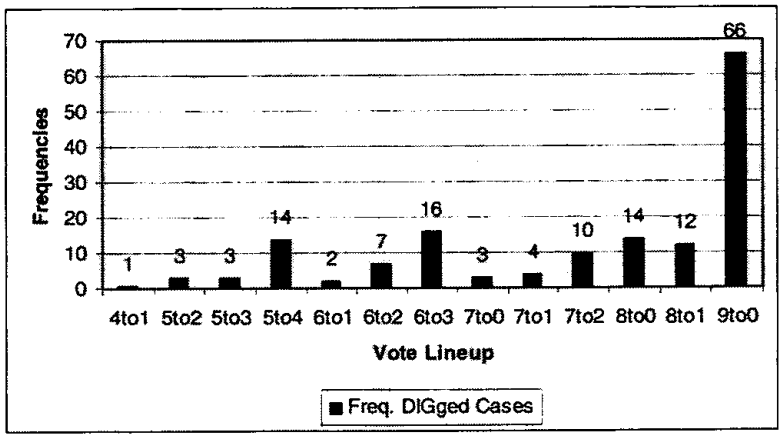
136. *Id.* at 502 (Harlan, J., concurring). He claimed to be faithful to his opinion in *Ferguson*. *Id.* at 497 (citing *Ferguson*, 352 U.S. at 559-62, 564 (Harlan, J., concurring in *Herdman*, dissenting in *Ferguson*, *Rogers*, and *Webb*)).

137. Pre-*Triangle* DIGs had done the same thing. *See supra* note 130 (listing cases).

circumstances that, in its view, had changed since certiorari was granted.[138] In his concurring opinion, Justice Stevens did the same.[139] Justice Stevens went on to make statements (in what may be regarded as dicta) that can be read to suggest that the majority can simply DIG the case, even in the absence of changed circumstances.[140] But even he framed it as a power to be weighed against the normal presumption of reaching the merits of a case once certiorari is granted.[141]

We think these cases can best be read as establishing a presumptive Rule of Six to DIG a case, unless five Justices decide that there are indeed changed circumstances, in which case that is sufficient for a DIG. The five Justices can be the same five who did not vote to grant certiorari.[142] So stated, this may not seem like much of a rule; the exception might be read as swallowing the rule. But what is more remarkable is that, insofar as the Court's opinions tell us, the exception has been invoked relatively infrequently. That is, the vast majority of DIGs are by six or more votes. We collected data on the vote lineup in all the cases that the Court DIGged during the 1954-2005 period. Figure 1 summarizes the findings.

Figure 1. Vote Lineups in DIGged Cases



138. New York v. Uplinger, 467 U.S. 246, 248-49 (1984) (per curiam).

139. *See id.* at 249 (Stevens, J., concurring).

140. *See id.* at 250-51.

141. *See id. Cf.* STERN ET AL., *supra* note 30, at 299 n.42 (reviewing Justice Frankfurter's views in *Ferguson*, but adding that "[n]o other Justice has endorsed this position").

142. Indeed, as a reviewer of an earlier draft of this Article observed, depending on the makeup of those five Justices, a 5-4 decision to DIG may not threaten the Rule of Four at all. If all of the four Justices (if there were only four) who voted to grant certiorari change their minds, and now wish to DIG, joined by at least one other Justice, then it is difficult to characterize that action as undermining the Rule of Four. Given that the Court rarely reveals the votes of individual Justices on certiorari petitions, in the context of DIGs or otherwise, *see supra* note 110, it is difficult to determine from the public record how often this happens.

As Figure 1 illustrates, in only fourteen cases did the Court decide to DIG with less than a "supermajority" of at least sixty percent in favor of a DIG. Even when acting with less than a full Court, the norm of having more than a simple majority held strong in the DIGs. The data in Figure 1 also shows that eighty-three of the 155 DIGs (53.5 percent) were decided without a recorded dissent by the Court,[143] and that the Court went on to explain its decision to DIG the case in only thirty of these eighty-three cases (36.1 percent).[144] The relatively low number of 5-4 decisions (fourteen, or nine percent), the relatively high number of decisions without a recorded dissent (53.5 percent), and the apparent noncontroversial nature of the decision to DIG, as reflected in the relatively low rate of an opinion by the Court explaining the DIG, are consistent with the presence of the Rule of Six.

Why is the norm of the Rule of Six so durable? No doubt, it is for largely the reasons that the Rule of Four is still followed. On its face, it is an agenda-setting device that still leaves the majority in control of the resolution on the merits (even if the majority would have originally denied certiorari).[145] The power to DIG may be attractive to different sets of Justices at different times. Justices know they may not always be in a majority on how to dispose of any given case. Viewed ex ante, the Justices may feel that a Rule of Six should be left in place as a matter of intra-Court reciprocity and harmony.[146]

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143. Following the coding scheme used by Spaeth, *see* U.S. Supreme Court Databases, *supra* note 53, we coded the vote in the decisions in which no dissent was recorded as "7 to 0," "8 to 0," or "9 to 0," as the case might have been. During a comparable time period (1954-2001) the average proportion per Term of unanimous decisions on the merits was 38.4 percent. *See* Epstein et al., *supra* note 43, at 209-10.

144. The proportion of unanimous-DIG cases in which the Court provided an explanation (36.1 percent) is lower that the overall proportion of cases in which the majority of the Court provided an explanation (forty-seven percent).

145. *See* Vermeule, *supra* note 30, at 74.

146. *Id.* at 90, 92. The strength of the norm might be further evidenced by the majority's decision to issue a justificatory opinion when it invokes the exception. This, however, is not always the case. Blumstein, *supra* note 30, at 930. In the fourteen examples of DIGs by 5-4 votes mentioned earlier, *see supra* note 130 and accompanying text, in four cases the majority of the Court did not issue an opinion. *See* Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971) (per curiam); Miller v. California, 392 U.S. 616 (1968) (per curiam); Hanner v. DeMarcus, 390 U.S. 736 (1968) (per curiam); NAACP v. Overstreet, 384 U.S. 118 (1966) (per curiam). And of those four, only in *Triangle* did a member of the majority provide an explanation in a separate opinion. *Triangle*, 402 U.S. at 497 (Harlan, J., concurring). Yet seventy-one percent of those DIGs *were* explained by the majority, a higher percentage than majority explanations for DIGs as a whole. Furthermore, two of these cases involved partial DIGs. Parker v. Dugger, 498 U.S. 308, 323 (1991); Walter v. United States, 447 U.S. 649, 652 n.4 (1980). By our reading, the opinion of the four dissenters in each case did not specifically take issue with the decision to DIG by the majority. Overall, then, the data seems to support the argument "that systematic departures from

Whatever may be the judicial motivations for retaining some version of a Rule of Six, we think it is sound policy as well. The rationale for the Rule is largely derivative of that for the Rule of Four, in that both permit a minority of the Court to place on the docket (or retain it, once there) what it considers an important case.[147] Permitting a minority in a political institution to check the power of the majority resonates with a long-standing antimajoritarian (or, better put, supermajoritarian) impulse in American life.[148] More than that, the Rule of Six, as Adrian Vermeule has argued, "can force majoritarian accountability"[149] and transparency, by preventing "an entrenched 5-Justice majority from simply disposing of disfavored claims through low-visibility procedures."[150] In short, it counteracts "the ability of majorities to exploit various low-visibility techniques for disposing of cases in unprincipled ways."[151]

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the Rule of Four [that is, a DIG by a 5-4 vote] remain rare because they may generate informal sanctions such as a . . . dissent, which would make public otherwise private information about the certiorari vote." LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 121 (1998).

147. *See* Stevens, *supra* note 31, at 21.

148. *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002).

149. *See* Vermeule, *supra* note 30, at 81.

150. *Id.* at 82 (footnote omitted).

151. *Id.* For similar reasons advanced in support of a supermajority requirement for the DIG, see Leiman, *supra* note 26, at 988-90 (arguing that allowing only five Justices to DIG a case undermines the Rule of Four if allowed prior to oral arguments); Revesz & Karlan, *supra* note 4, at 1105 (stating that the Rule of Four, unless compromised by a simple majority rule, can allow "a minority to bring before the Court . . . issues . . . to expose weaknesses in the underpinning of the majority's position and thereby to create a propitious climate for overruling that position").

Writing over two decades ago, Justice Stevens raised the possibility of abandoning the Rule of Four, perhaps for a majority rule. Stevens, *supra* note 31, at 14-21. But he was heavily influenced in that belief by the Court's large docket on the merits at that time, and suggested that the Court was accepting too many cases for review. *Id.* at 16. He further suggested that the Rule of Four "might" be abandoned, or "perhaps" not followed whenever the docket "backlog reaches a predetermined point." *Id.* at 20-21. Though not expressly addressed by Justice Stevens, one corollary of abandoning the Rule of Four for certiorari petitions could be to establish a Rule of Five to DIG all cases. The supermajority rule to DIG could be viewed as unnecessary if there is not a submajority rule to protect. Perhaps these views informed his concurring opinion in *Uplinger*, decided a year after his article was published; he cites the article in his concurring opinion. New York v. Uplinger, 467 U.S. 246, 249 & n.2 (1984) (Stevens, J., concurring). At any rate, the Court's plenary docket has declined considerably since *Uplinger* was decided, and Justice Stevens may not feel as strongly about curbing the Rule of Four (or freeing the DIG from the shackles of the Rule of Six) as he did in 1984. For more recent views by Justice Stevens, see United States v. Williams, 504

From these reasons we need not go so far as to conclude that cases should never be DIGged. To forbid a DIG, even by a unanimous Court, would improperly and unnecessarily entrench an earlier agenda-setting decision, whether by four, or more, Justices. The point is that the DIG power should be permitted to be exercised, but only, as Vermeule puts it, in principled ways.[152] What are those ways? One piece of the answer is a supermajority requirement. Ideally, that would perhaps entirely prohibit the "changed circumstances" exception to the Rule of Six that we glean from the cases. But if the circumstances are indeed changed, it drains the significance of the Rule for that particular case. From our study, we do not find the majority routinely exploiting the exception, suggesting that it is but a marginal inroad on the Rule of Six.[153]

B. Principled Reasons to DIG a Case

Much of the literature addresses what constitutes principled reasons to DIG a case. Yet is it superfluous to address that issue, given the Rule of Six (with or without a narrow exception for a Rule of Five in some instances)? In other words, if there is a supermajority requirement to DIG a case, does it matter what reasons the Court, collectively or individually, may have to DIG? Does that requirement sufficiently protect the Rule of Four, without the additional burden of formulating and articulating reasons to justify the dismissal? Apparently the Court often thinks that it is not burdensome to offer reasons, since it does so in a majority of the DIGs. We think there is good reason for that norm. The voting protocol does protect the Rule of Four, but principled decision making does suggest that the exercise of the power to DIG should be for defensible reasons.

Robert Stern and his colleagues have listed no less than sixteen reasons that the Court itself has offered to justify a DIG.[154] The reasons include, among others, that "an important issue may be found not to be presented in the record"; the Court concludes that it "cannot reach the

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U.S. 36, 60 n.7 (1992) (Stevens, J., dissenting), where he states that "a majority" of the Court can DIG a case, and cites NAACP v. Overstreet, 384 U.S. 118 (1966), DIGged by a 5-4 vote.

152. *Cf.* Vermeule, *supra* note 30, at 82 (discussing how submajoritarian rules, such as the Rule of Four, "counteract . . . the ability of majorities to exploit various low-visibility techniques for disposing of cases in *unprincipled ways*" (emphasis added)).

153. *Id.* at 90 (acknowledging that the "'intervening factors' [exception] is vague," and can be applied in inconsistent and varied ways, but concluding that "the general picture is that strong normative rules dampen the potential instability of the submajoritarian agenda rule; marginal fluctuations in the rules or norms should not impress us too much").

154. STERN ET AL., *supra* note 30, at 329-32.

question accepted for review without reaching a threshold question not presented in the petition"; a "hitherto unsuspected jurisdictional defect" becomes apparent; or that an intervening court decision or change in a statute eliminates the issue or makes it unlikely that it "will arise again, at least in the same context."[155] All of these reasons can more or less be labeled as changed circumstances, especially if the latter phrase is defined to include facts that did exist at the time certiorari was granted, but only came to the Court's attention afterwards through briefing, oral argument, or otherwise. Significantly, what does not appear on the list is a majority of the Court (whether under a Rule of Six or Rule of Five) simply disagreeing with the original decision to grant certiorari. This is the position of Justice Frankfurter and, some charge, of other Justices at least in some instances. That position has found no defenders in the scholarly literature because it smacks of political expediency. James Blumstein has argued that the DIG power should be constrained by an "evolving common law of certiorari dismissals," given the "institutional decision of the Court" to grant review.[156] Again, it appears that the Court itself agrees with this norm, with the evidence being the reasons often proffered by the Court when it DIGs. Indeed, as we have suggested, even those Justices who we label as advancing the mere disagreement rationale did so in a somewhat constrained way.[157]

Still, it is sometimes difficult to distinguish acceptable from unacceptable reasons. Consider again the *Uplinger* case. There, the majority expressly stated that the case was being DIGged "after full briefing and oral argument," because the opinion being reviewed was susceptible of differing interpretations regarding how squarely it presented the federal constitutional issue.[158] But the differing readings of the opinion below could have been made at the time certiorari was granted. Perhaps the five Justices who DIGged only reached that conclusion after certiorari was granted. Even so, it is a stretch to label the reasons offered by the majority as *changed* circumstances. It comes close to the majority simply disagreeing with the decision of four Justices to grant certiorari, a point made more candidly, if obliquely, by Justice Stevens' concurring opinion in the same case.[159] Consider,

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155. *Id.*

156. Blumstein, *supra* note 30, at 929.

157. *See supra* notes 92-103, 123-29 and accompanying text (summarizing the positions of Justices Frankfurter and Stevens in *Ferguson* and *Uplinger*, respectively).

158. New York v. Uplinger, 467 U.S. 246, 248-49 (1984) (per curiam).

159. *Id.* at 249-51. As we already observed, *supra* note 120 and accompanying text, the majority also pointed to an event after the granting of certiorari—the filing of an amicus brief by the attorney general of New York—arguing that the statute was unconstitutional. This placed the Court (and, indeed, the elected officials in New York) in the embarrassing position of possibly upholding a state statute that the highest legal

too, Justice Stevens' concurring opinion in *Nike*. He advanced several reasons in support of the DIG in that case,[160] but all of them could have been apparent at the time certiorari was granted. Perhaps the reasons came into sharper focus after briefing on the merits, augmented by oral argument. That is consistent with the norm that most DIGs take place after briefing and oral argument; but again, the requirement of "changed circumstances" is a broad one if it includes the changing of the perception of the characteristics of the case by a majority of the Justices. Our point is not that such a broad definition is illegitimate, only that it illustrates the fine line between requiring changed circumstances, and the disfavored position of a majority of the Justices simply disagreeing with a decision to grant certiorari.[161]

C. Giving Official Reasons

The development of norms of justification for DIGs would seem to be closely related to the official pronouncement of those reasons. Judges giving reasons for decisions is a central feature of American jurisprudence because, in theory, it cabins the breadth of judicial power.[162] If the Justices were truly developing a common law of justifications for DIGs, it would be odd to shield those reasons from the legal community. Yet that is what the Court often does. The majority gives an explanation for DIGs in slightly less than half of the cases, a figure that rises to about fifty-five percent if we include those cases

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officer in the executive branch of that state argued was unconstitutional. This is a changed circumstance, but not much of one; the views of the attorney general could, and perhaps should, have been apparent before certiorari was granted. The majority relegated the point to a footnote. *Uplinger*, 467 U.S. at 246 n.1.

160. Nike, Inc. v. Kasky, 539 U.S. 654, 658-63 (2003) (per curiam); *see also supra* notes 14-15 and accompanying text.

161. In many of these circumstances, some or all the Justices who voted to grant certiorari, by dissenting from the DIG, registered their disagreement with the conclusion that there were changed circumstances sufficient to justify the DIG. For that reason, Revesz and Karlan argue that "[c]hanged circumstances should be cognizable only if they convince at least one Justice who originally voted to grant certiorari that his earlier decision is no longer appropriate." Revesz & Karlan, *supra* note 4, at 1093. This obviously endorses a strict Rule of Six for DIGs.

162. J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 798 (1989) ("Nothing in the Constitution requires the written justification of judicial decisions, but a judiciary accountable to reason cannot resort to arbitrary acts."). Another reason for the Court to give reasons for DIGging a case is that, otherwise, counsel in that case, and perhaps related litigation, are left in the dark as to the correct resolution of the issue before the Court. *See, e.g.*, Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation:* Bosch, Erie, *and Beyond*, 71 OR. L. REV. 781, 842 n.290 (1992) (commenting on uncertainties left in the wake of the unexplained DIGged case of White v. United States, 493 U.S. 5 (1989)).

when at least one Justice addresses the propriety of the DIG in a separate opinion.[163] Why do the Justices not offer explanations for *all* such cases?

One reason may be that a DIG is the functional equivalent of a denial of certiorari,[164] and the Court has with relatively few exceptions had a practice of not giving explanations for the denial.[165] The Court has frequently reiterated that the denial of certiorari expresses no view on the merits of the decision from which review is sought.[166] Yet there are several reasons why DIGs are different from denials of certiorari. Start with the numbers. There are usually but two or three DIGs a Term, as compared to the thousands of certiorari denials. The inconvenience of composing an explanation for the former is dwarfed by the burdens of preparing explanations for the latter. Unlike the latter, a DIG is preceded by a grant of certiorari. An explanation for the change, however brief, suggests that the Court (that is, the Justices who wish to DIG) is attending to its institutional responsibilities.[167] This is especially appropriate at a time when the dockets of the Court are at historic lows, thus adding jurisprudential weight to actions of the Court placing cases on its agenda.

Another reason to explain DIGs is to differentiate that action from the closely related decision to dismiss a case after certiorari is granted for lack of jurisdiction.[168] The latter decisions are often accompanied by an explanation,[169] and rightly so. The distinction is not a mere formality. It might indicate how a case can properly be placed on the Court's agenda. More importantly, an explanation for a dismissal suggests that the Court is not "discharging its responsibilities in a

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163. *See supra* Part II.C.1.

164. Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 365 n.1 (1973); Revesz & Karlan, *supra* note 4, at 1082 n.59.

165. *See* FALLON, JR. ET AL., *supra* note 30, at 1596-1601.

166. *Id.* (discussing the views of Justices Frankfurter, Jackson, Stevens, and others).

167. Blumstein, *supra* note 30, at 925-26. In his wide-ranging critique of the Judges' Bill, Ed Hartnett argues that it not only granted a great deal of power to the Court, but that the Court, in various ways, has expansively used that power in a manner that calls into question the Court's commitment to the rule of law and the separation of powers. Hartnett, *supra* note 35, at 1646-48. Without accepting his entire thesis—he does not discuss the DIG practice—the concerns raised by his analysis would be ameliorated by the Court's developing and giving principled reasons for the DIG. *Cf. id.* at 1718-26 (criticizing the certiorari practice in part due to the asserted failure of the Court to develop principled reasons to exercise that power).

168. *See* FALLON ET AL., *supra* note 30, at 1585-88.

169. *E.g.*, Johnson v. California, 541 U.S. 428 (2004) (per curiam). The case then returned to the Court in another appeal the following Term, however this time without jurisdictional problems. Johnson v. California, 125 S. Ct. 2410 (2005).

lawless manner,"[170] and instead is acting in a "principled manner."[171] Some cases illustrate disagreement among the Justices over which device is appropriate in a particular case.[172] Providing explanations for DIGs will encourage reasoned resolutions of that distinction.

We propose that the Court explain its decision to DIG in *all* cases. It can do that in the relatively short, per curiam opinions that it typically uses to explain DIGs or other similar dismissals.[173] Making that a regular practice would also have the benefit of making those instances when a mere majority decides to DIG a case more comprehensible and justifiable. In the absence of a per curiam opinion, at least one Justice in the majority should separately explain the decision to DIG the case.

D. Strategic Behavior and the DIG

In this Part of the Article we have argued that the essentially unfettered discretion of a majority of the Court to DIG a case ought to be limited in various ways and that the Court has in part developed and followed such limits. The similarly unlimited power of the Court to grant or deny certiorari has also, for that reason, been the subject of considerable attention by legal scholars and political scientists.[174] In particular, scholars have asked whether the certiorari power has been

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170. Davis v. Jacobs, 454 U.S. 911, 912 (1981) (opinion of Stevens, J., discussing the denial of certiorari).

171. *Id.* at 919 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting).

172. *Compare* Minnick v. Cal. Dep't of Corr., 452 U.S. 105, 126-27 (1981) (dismissing writ of certiorari for lack of a final judgment from the state court), *with id.* at 127 (Brennan, J., concurring) (arguing that the case should be DIGged). Sometimes the Court identifies jurisdictional problems, but proceeds to DIG the case rather than dismiss for lack of jurisdiction. *E.g.*, Howell v. Mississippi, 125 S. Ct. 856 (2005) (per curiam) (DIGging the case where the petitioner did not properly present his claim in federal court as one arising under federal law). Consider, too, the Court's action in *Nike*. Recall that one of the reasons Justice Stevens supported the DIG was that, in his view, there was no appealable judgment, Nike, Inc. v. Kasky, 539 U.S. 654, 658-64 (Stevens, J., concurring) (2003), which would seem to call for a dismissal, not a DIG. These cases illustrate that the line between dismissals and DIGs is a fine one, another reason for the Court to issue explanatory opinions when it decides to DIG.

173. It is of interest that the Court has not only partially incorporated the norm we propose, but usually places such per curiam decisions in the body of the U.S. Reports, close to the decisions on the merits, rather than buried in the back of each volume with the reporting of the hundreds of denials of certiorari. The elevating of per curiam dispositions to some measure of respectability in this way has been traced to Justice Frankfurter. Hutchinson, *supra* note 38, at 163.

174. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 292-95 (2005) (discussing this literature).

exercised in a way that is driven by the formal legal considerations established by the Court itself, that is, whether there is a conflict among cases on a legal issue presented, or whether the issue is one of national importance.[175] In contrast, a Justice might, either in lieu of or in addition to those factors, take his or her own ideological predilections into account when voting to grant or deny certiorari in a particular case. Thus, a Justice might vote to grant certiorari in order to reverse a case below that was decided in a direction that runs counter to the Justice's policy preferences. Or, a Justice might vote to deny certiorari for the opposite reason, or alternatively because he or she was predicting how the other Justices would vote on the merits, and would not want the entire Court to reach the merits of the case. These are examples of strategic or sophisticated voting, which occurs "when a voter does not vote for his or her preferred alternative at an early stage of a voting process in hopes of bringing about a more desirable outcome at a later stage."[176] Can the Court's use of the DIG also be described as strategic behavior?

To begin answering that question, first consider whether the antecedent certiorari process has sometimes or often been driven by strategic considerations. There is a large body of social science literature on this topic,[177] and a full discussion is unnecessary here. Some scholars, based on interviews with the Justices and their clerks, have suggested that while strategic considerations are not totally absent, the legal factors do largely inform the Justices' decision to grant or deny certiorari.[178] On the other hand, careful statistical study of certiorari votes, based on the private papers of several of the Justices, have often come to the conclusion that strategic voting does take place on a routine basis,[179] though in conjunction with identifiable

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175. *See, e.g.*, PERRY, *supra* note 2, *passim; see also* SUP. CT. R. 10 (listing the Court's established considerations for deciding whether to grant certiorari).

176. Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 24, at 411-12 (citing Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 550 (1999)); Epstein et al., *supra* note 43, at 397 n.8.

177. For helpful overviews and discussion of this literature, see Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 24, at 410-22; Epstein et al., *supra* note 43, at 399-401; and Timothy R. Johnson et al., *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC'Y REV. 349, 352-54 (2005). For a general discussion of strategic behavior on the Court, see THOMAS H. HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT (2005).

178. PERRY, *supra* note 2, at 146-66, 198-215.

179. For example, in their 1999 study of such votes from the 1982 Term, Caldeira and his colleagues found, among other things, that "whether liberal or conservative, in grants or denials, members of the Court act with an eye to the behavior of their fellow justices." Caldeira et al., *supra* note 176, at 570.

nonstrategic factors (for example, the presence of a conflict of authority on an issue found in a case subject to review).[180]

Most of this literature says little or nothing about DIGs. One exception is the work of H.W. Perry. In his study based on interviews of Justices and their clerks, Perry concluded that "[u]sually" cases are DIGged for "mundane, jurisprudential considerations."[181] On the other hand, he conceded that the decision to DIG, or not to DIG, can depend on how "messy" the case is, that is, how embedded the case is with issues (which may or may not have been apparent when certiorari was granted), the resolution of which may make it difficult to reach the core merits.[182] Ultimately, Perry concluded that, while

> [i]ntriguing in theory, the ability to use digging as a strategic maneuver is, in reality, quite constrained. To use it strategically, except in a rare instance, would be easily and quickly observed, and it would completely undercut the finality of the cert. conference, which would impose significant costs on all.[183]

There are some anecdotal accounts of DIGging used for seemingly strategic purposes. For example, consider the Court's decision in 1955 in *Rice v. Sioux City Memorial Park Cemetery, Inc.*[184] That case involved a breach of contract claim against a cemetery that refused burial to a Native American based on language in the contract limiting burial privileges to Caucasians.[185] The Iowa courts enforced the

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180. *See* Sara C. Benesh et al., *Aggressive Grants by Affirm-Minded Justices*, 30 AM. POL. RES. 219, 219, 231 (2002) (conducting a study of the Vinson and Warren Courts from the 1946 to 1968 Terms and finding both strategic and nonstrategic factors at work); Cordray & Cordray, *Philosophy of Certiorari*, *supra* note 24, at 391. The authors assert that a review of the docket books of Justices Brennan and Marshall during the Rehnquist Court indicate that strategic factors, "while undeniably important, cannot adequately account for the Justices' voting behavior at the certiorari stage . . . . Even Justices closely aligned in decisions on the merits often have dramatically different voting records on certiorari." *Id.* (footnote omitted).

181. PERRY, *supra* note 2, at 106.

182. *See id.* at 107-08. Perry refers to standing, ripeness, or mootness issues as some of the primary complicating factors that can result in a "messy" case. *Id.* at 107. Perry continues: "The point is that sometimes the Court will dig a case with jurisprudential problems and other times will go ahead and resolve it on some technical issue resulting in no real precedential or doctrinal benefit. And in still other instances, the Court will skip over jurisdictional problems quite cavalierly." *Id.*

183. *Id.* at 109.

184. 349 U.S. 70 (1955).

185. *Id.* at 71; *see also* Blumstein, *supra* note 30, at 935-37. For our discussion of *Rice*, we draw on STEPHEN L. WASBY ET AL., DESEGREGATION FROM *BROWN* TO *ALEXANDER* 136-37 (1977).

contract as written, the Supreme Court granted certiorari, and then affirmed by an equally divided vote.[186] Shortly thereafter, the Court (in a highly unusual move) granted rehearing and proceeded to DIG the case by a five-to-three vote.[187] Justice Frankfurter wrote for the majority and stated that only after rehearing did the Court realize "into proper focus" that Iowa had passed a statute during the course of the litigation that prevented cemeteries (albeit nonretroactively) from enforcing racially restrictive clauses.[188] While the *Rice* case was not moot, the statute's passage made the situation of "isolated significance," and imposed the risk of an "inconclusive and divisive disposition of [the] case when time may [have] further illumine[d] or completely outmode[d] the issues in dispute."[189]

On one reading, the Court's explanation is a principled one for a DIG.[190] The Court prudently hesitated to reach a constitutional question when the State had statutorily cured the alleged error. Moreover, were the Court to uphold the Iowa court's decision, it might "discourage such remedial action by possible condonation of this isolated incident."[191] A quite different reading of *Rice* situates the case in the Court's history. The case was decided shortly after *Brown v. Board of Education*,[192] and given the uproar generated by that case, the Court followed an "informal strategy" of using summary dispositions and other devices to "avoid unnecessary confrontations" with state governments on racially charged issues.[193] *Rice*, the argument runs,[194] was one of those cases. Under these circumstances, Frankfurter's rationale was disingenuous. Then and now, the Court often decides cases that affect only one person or a small group of people.[195] Likewise, the Court often decides cases where the statute involved has been amended or repealed in a nonretroactive way.[196] In short, the

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186. Rice v. Sioux City Mem'l Park Cemetery, Inc., 347 U.S. 942 (1953) (granting certiorari), *aff'd per curiam*, 348 U.S. 880 (1954).

187. *Rice*, 349 U.S. at 79-80.

188. *Id.* at 75-76.

189. *Id.* at 76-77.

190. *See* Blumstein, *supra* note 30, at 936-37 (making this argument).

191. *Rice*, 349 U.S. at 77.

192. 347 U.S. 483 (1954).

193. Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L.J. 1423, 1472 (1994).

194. WASBY ET AL., *supra* note 185, at 137 (making this argument); Dickson, *supra* note 193, at 1474 (same).

195. Dickson, *supra* note 193, at 1474.

196. *Id.* Similar arguments were advanced more delicately by the dissent from the DIG in *Rice*. 349 U.S. at 80 (Black, J., joined by Warren, C.J., and Douglas, J., dissenting). *See also supra* note 38 (discussing Justice Frankfurter's string cite of prior DIGged cases in *Rice*).

Court was trying to avoid the political heat that it might generate were it to decide the case on the merits.

Another possible example of a DIG being used strategically comes from the Burger Court. In *Burrell v. McCray*,[197] the Court DIGged a case that raised the issue of whether any available state administrative remedies would need to be exhausted before a plaintiff could file a civil rights action under 42 U.S.C. § 1983.[198] The majority did not explain the DIG, but Justice Stevens justified it in a somewhat cryptic concurring opinion. In the space of three paragraphs, he variously stated that the opinion below "correctly state[d] the applicable law"; that at least one Justice who originally voted to grant certiorari had changed his mind; and that while the issues raised were "important," the "state of the law applicable to the facts disclosed by this record [was] sufficiently clear" that a DIG was "a permissible exercise of the Court's discretionary power."[199] Dissenting from the DIG, Justice Brennan, pointing out that the majority had not explained its action, argued that the record and oral argument revealed no special circumstances that counseled in favor of a DIG.[200] He also stated, somewhat cryptically, that a Justice (who he did not name) had not voted for certiorari, yet "participate[d] after oral argument in a dismissal that . . . [was] not justified under the governing standard, but which rather reflect[ed] only the factors that motivated the original vote to deny [certiorari]."[201] Justice Brennan concluded that this was a violation of the Rule of Four.

So described, *Burrell* is a rather unexceptional example of a DIGged case. But other accounts offer a more colorful description of the Justices' actions and suggest their possibly strategic character.[202] The lower court in *Burrell* held that exhaustion of state administrative remedies was not required.[203] According to these sources, Chief Justice Burger and Justices Powell and Rehnquist voted to grant certiorari to reverse the lower court decision, while Justice White voted to affirm

197. 426 U.S. 471 (1976) (per curiam).

198. *Id.* at 473 (Brennan, J., joined by Marshall, J., dissenting) (describing questions raised by the petition for certiorari).

199. *Id.* at 471-73 (Stevens, J., concurring).

200. *Id.* at 473-74 (Brennan, J., dissenting).

201. *Id.* at 474-75.

202. *See* THE SUPREME COURT IN CONFERENCE (1940-1985) 598-600 (Del Dickson ed., 2001) (describing the conference in *Burrell* based on the Justices' private papers); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 423-25 (1979) (providing a journalistic account of the deliberations in *Burrell*, citing no sources).

203. McCray v. Burrell, 516 F.2d 357, 365 (4th Cir. 1975).

the decision.[204] At conference, the majority of the entire Court was apparently prepared to affirm the decision below, with the Justices who voted to grant certiorari as the dissenters.[205] After further discussion, Justice Stewart apparently suggested that the case be DIGged, in part because the case presented a difficult substantive Eighth Amendment issue in addition to the exhaustion issue.[206] Justice Stewart eventually recruited four other Justices to vote to DIG: Burger, Powell, Rehnquist, and Blackmun.[207] Justice White, one of the original group of four certiorari-granters, did not vote to DIG and indeed separately dissented from that action with the statement that he "would affirm" the decision below.[208] Justice Brennan's dissent was apparently referring to Justice Stewart voting to DIG, at least in the absence of what Brennan thought were appropriate changed circumstances to overcome the Rule of Four.[209] In other words, Justice Brennan was of the view that, at the least, all four Justices who voted to grant certiorari had to vote to DIG the case. Justice Stevens, as he stated,[210] had not voted at the certiorari stage, since he was not a member of the Court at that time, but concurred in the DIG, seemingly providing a sixth vote for that action.[211] What discomforted Justice Brennan was that, had all of the Justices voted on the merits, it seems the decision below would have been affirmed by a 5-4 vote.[212] To complete the story, the Court eventually decided a case on the merits that rejected an exhaustion requirement in these circumstances.[213]

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204. THE SUPREME COURT IN CONFERENCE, *supra* note 202, at 599; WOODWARD & ARMSTRONG, *supra* note 202, at 423.

205. WOODWARD & ARMSTRONG, *supra* note 202, at 423-24.

206. *See* THE SUPREME COURT IN CONFERENCE, *supra* note 202, at 599; WOODWARD & ARMSTRONG, *supra* note 202, at 424.

207. THE SUPREME COURT IN CONFERENCE, *supra* note 202, at 600; WOODWARD & ARMSTRONG, *supra* note 202, at 424.

208. *Burrell*, 426 U.S. at 471 (White, J., dissenting).

209. *See id.* at 473-75 (Brennan, J., dissenting).

210. *Id.* at 471-72 (Stevens, J., concurring).

211. We qualify our conclusion since Justice Stevens said, in what is labeled as a concurring opinion, that while he "did not vote to [DIG, he did] not dissent from that action." *Id.* at 472.

212. WOODWARD & ARMSTRONG, *supra* note 202, at 424-25.

213. Patsy v. Bd. of Regents, 457 U.S. 496 (1982). Only Justice Powell and Chief Justice Burger dissented. *Id.* at 519-20 (Powell, J., joined by Burger, C.J., dissenting). Another example suggested by the literature of apparent strategic behavior in a DIGged case is the previously discussed *New York v. Uplinger* case. 467 U.S. 246 (1984). Based in part on the private papers of Justice Brennan, two scholars argue that Brennan, who had voted to deny certiorari, "no doubt fearing that his colleagues would reverse the lower court's decision" that had struck down a state law that had the effect of criminalizing certain homosexual conduct, then argued that the case should be

The most systematic study of the use of the DIG as a strategic device is by Scott Hendrickson.[214] He focused on the cases DIGged during the sixteen Terms of the Burger Court, compared DIGged cases to those cases arising under the Court's certiorari jurisdiction decided on the merits, and examined various factors related to DIGs that would be considered extraneous to the strictly legal factors referenced in opinions accompanying DIGged opinions.[215] Thus, he considered, among other things, whether the Court was less likely to DIG as the number of amicus curiae briefs filed by organized interests increased, in cases in which the U.S. solicitor general participated as an amicus, or in cases in which the U.S. government was a party.[216] Conversely, he considered whether the Court was more likely to DIG cases decided in a conservative direction by the lower court.[217] The first three factors bear on the importance of the case, and the hypothesis was that the Justices were more likely to reach the merits of important cases, and more likely to DIG marginal cases.[218] The final factor was based on the premise that the Burger Court, usually described as made up of generally conservative Justices, would be more likely to DIG a case where the lower court opinion leaned in the conservative direction, to leave the holding of that case intact.[219]

Hendrickson found statistical support for these four hypotheses,[220] which seems to lend support to the notion that nonlegal factors contribute to the decision to DIG a case.[221] Still, as Hendrickson himself points out, one must be cautious in interpreting these results.[222] His database, while impressive, did not include some information that might support or undermine a strategic explanation for the Court's DIG behavior. For example, the presence or absence of an intercase or intercourt conflict in the DIGged cases was unavailable;[223] this information might be helpful in evaluating the Court's behavior, as the

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DIGged, "because he thought it would produce the best possible outcome, given his distaste for the law." EPSTEIN & KNIGHT, *supra* note 146, at 119-20.

214. Hendrickson, *supra* note 29.

215. *See id.* at 13-14 (outlining data and methodology).

216. *See id.* at 11.

217. *Id.* at 12.

218. *Id.* at 10-11.

219. *See id.* at 12-15; *supra* notes 67-70 and accompanying text.

220. Hendrickson, *supra* note 29, at 14-15. Only the difference between DIGged and non-DIGged cases on the participation of a solicitor general as amicus was found not to be statistically significant. *Id.* at 14.

221. *Id.* at 18.

222. *Id.*

223. *Id.* Intercase or intercourt conflict occurs where a case presents a conflict between two or more federal courts, between a federal and state court, or with prior Supreme Court precedent. *Id.* at 12 n.18.

Court might be less willing to DIG a case where such a conflict existed.[224] Also, he did not take into account, aside from the filing of amicus briefs, the possible influence of other political actors.[225] An example would be the ideological direction of Congress at the time the case was DIGged.[226] A policy-oriented Court, wishing to protect its decisions from reversal, might be more likely to grant certiorari in cases raising constitutional issues (where congressional reversal is almost impossible) when the Court and Congress differ in ideological direction. Conversely, the Court might be more likely to grant review of cases raising federal statutory issues where congressional reversal is possible, when the ideological direction of the Court and Congress are similar.[227] On this model it would seem to follow that the Court would be more likely to DIG cases that, if resolved on the merits, are candidates to be reversed by Congress. Finally, Hendrickson points out that the Court has other devices to dispose of cases after certiorari is granted.[228] Such other means could include dismissals for lack of jurisdiction, or resolving a case on standing or similar jurisprudential grounds that preclude reaching the merits of a case.[229] A comprehensive examination of these other devices would be necessary to understand the institutional environment in which the DIG operates.[230]

While covering only one of the three Courts that we examined in our study, Hendrickson's analysis is valuable and must inform any treatment of the DIG.[231] Subject to appropriate caveats, he concludes that the DIG has been used, in part, in a strategic way by the Court.[232] Our stance is more equivocal, and for several reasons we do not think

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224. *Id.*

225. *Id.* at 11, 18.

226. *Id.* at 18.

227. For a more complete examination of this thesis, together with supportive evidence, see Epstein et al., *supra* note 43. Professor Epstein and her colleagues do not expressly discuss the DIG device, instead focusing on the granting of certiorari. *Id.* at 395. Also valuable on the strategic interaction of the Court and Congress, especially in statutory cases, is Lawrence Baum & Lori Hausegger, *The Supreme Court and Congress: Reconsidering the Relationship*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 107 (Mark C. Miller & Jeb Barnes eds., 2004). The authors point out some of the potential weaknesses of this model, including the assumptions that both the Court and Congress invariably act in ideological ways, that Congress is highly cognizant of Supreme Court decisions, or that the Court would never welcome a congressional response. *Id.* at 112-16. Professors Baum and Hausegger do not discuss the DIG.

228. Hendrickson, *supra* note 29, at 19 n.28.

229. *Id.*

230. *See id.* at 18-19.

231. *See id.* at 18.

232. *Id.*

the DIG has been used in an aggressively strategic manner. First, on the average, DIGs have only been used about two or three times each Term in the past half-century. If a majority of the Court at any period were patently result-oriented, we might expect the Court to simply abandon the norm of the Rule of Four or, failing that, to use the DIG far more often in its Rule of Five incarnation. Similarly, while the majority only offered explanations in about one-half of the DIGged cases (more if we include concurring or dissenting opinions in those cases), we might expect far fewer, or no, explanations, under a strategic model. A DIG is the functional equivalent of a denial of certiorari, and the Court rarely explains those.

On the other hand, our data are at least suggestive of strategic behavior in one interesting context—agenda setting by the Court. By agenda setting we refer to the issue of whether the Court collectively, or Justices individually, are trying to "time" when to decide a case on the merits by DIGging the case at an earlier time, the Justices may be expecting to decide the case at a later, more appropriate time.

With regard to agenda setting, we looked at whether the issue raised by the DIGged case returned to the Court's docket. Of the 155 cases, by our measure the issue presented in sixty-six cases, or forty-three percent, returned to the Court's docket in separate litigation to be decided on the merits. In the abstract, we are unable to say whether this is a high or low percentage. First, recall that we only determined those issues that returned in cases to the Court's docket. We did not examine those issues that perhaps became moot or were otherwise resolved by statutory amendment or some other means, or remain percolating in the lower courts to the present day.[233] Given the Court's relatively modest docket—even in the heyday of the Warren and Burger Courts—virtually any case in which certiorari is granted can be said to raise issues important in some way to the legal community. Accordingly, one might expect many such issues to come back to the Court in some fashion.[234] Indeed, the fact that the Court granted certiorari to a previous case

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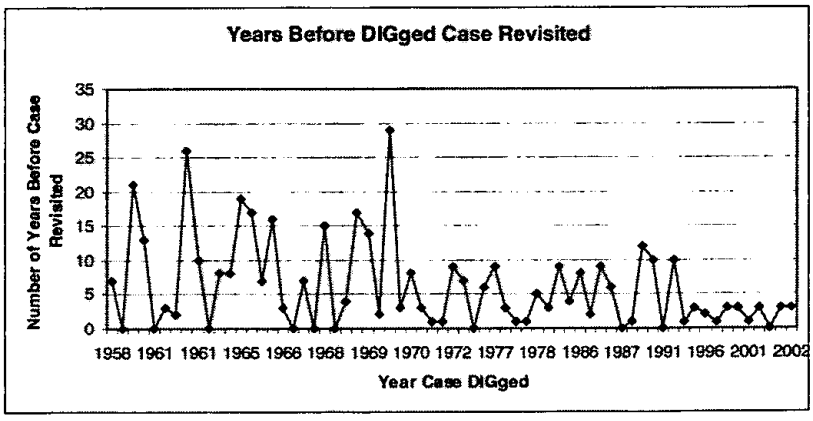
233. For an example of the latter, see McCurdy v. Dodd, 352 F.3d 820, 828 & n.5 (3d Cir. 2003) (pointing out that the Supreme Court has dismissed two cases that raised the issue of whether parental liberty interests under the Due Process Clause "extend to the companionship of independent adult children" (citing O'Dell v. Espinoza, 456 U.S. 430 (1982) (per curiam); Jones v. Hildebrant, 432 U.S. 183 (1977) (per curiam))), and Issac J. K. Adams, Note, *Growing Pains: The Scope of Substantive Due Process Rights of Parents of Adult Children*, 57 VAND. L. REV. 1883, 1902 & n.137 (2004) (same). *Espinoza* was dismissed for lack of jurisdiction. *Espinoza*, 456 U.S. at 430. *Jones* was DIGged. *Jones*, 432 U.S. at 189.

234. *See* Stevens, *supra* note 31, at 19 & n.73 ("[S]ignificant issues decided in [cases where only four Justices vote to grant certiorari] might well have come before the Court in other litigation in due course. The frequency with which an issue arises, of course, is one measure of its significance.").

raising the same issue might suggest that, other things being equal, the Court would remain interested in considering the issue on the merits. Likewise, the granting of certiorari and subsequent decision to DIG a case, would be unlikely to go unnoticed in the legal community.[235] Lawyers in cases raising the same or similar issues might be emboldened to push the cases to and through the appellate process, and perhaps seek certiorari more often than in cases that did not involve a DIG. To put the same point another way: while the Court does not solicit cases, the types of cases it does hear (and their holdings) can serve as a signal to lawyers that it is disproportionately receptive to hearing certain categories of cases.[236] The Court DIGging a case, it would seem, would serve a similar purpose—suggesting that the Court is interested in reviewing an issue, even if the particular DIGged case was ultimately not considered an appropriate vehicle to then reach the merits of that issue.

Finally, we looked at the time lag between the date a case is DIGged and the date a subsequent case reaches the Court on the same issue as evidence of possible strategic behavior by the Court. With our cases, the average time lag to the second decision was six years.[237] More interesting, however, is how this time lag decreases over time during the period under study. Figure 2 depicts on the horizontal axis the year in which the Court DIGged each of the sixty-six cases that it went on to revisit, while the vertical axis represents the number of years it took for that one issue to be revisited by the Court.

Figure 2. Number of Years Before Revisiting DIGged Issue



235. Revesz & Karlan, *supra* note 4, at 1105-06.

236. *See generally* Vanessa A. Baird, *The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda*, 66 J. POL. 755 (2004) (developing this model and providing supporting evidence for it from the 1953 through 2000 Terms of the Court).

237. This compares favorably with Baird's study, which found a time lag of about five years between the Court deciding certain types of cases and further litigation in that subject area reaching the Court. *Id.* at 761-62.

As Figure 2 illustrates, the average number of years that it takes the Court to revisit a DIGged issue has declined from 9.19 years between 1954 and 1969 to about two years since 1992. Thus, while it took an average of close to ten years during the Warren Court for the same issue to resurface in litigation before the Court, during the last thirteen years of the Rehnquist Court it has taken less than two years for DIGged issues to make their way back to the Court.[238]

IV. CONCLUSION

Despite the somewhat increased attention the Supreme Court has received in the last few years, particularly since its highly publicized intervention in the 2000 presidential election, the Court remains, by and large, a rather secluded and sheltered public institution. Perhaps due to that aura of secrecy, some of the procedures that the Court frequently uses have remained outside the full purview of legal scholars. In this Article we have attempted to shed some light onto a procedure with a long-standing practice in Court history, yet one about which we know very little—the practice of dismissing a writ of certiorari as improvidently granted.

Our focus has been on providing both a discussion of the jurisprudential issues surrounding the use of the DIG, as well as presenting and analyzing data regarding the actual practice of the Court's experience with the DIG. We believe that our results provide some useful insights regarding the use of the DIG and inform some of the interesting jurisprudential issues regarding the use of the DIG that other scholars have previously raised.

Regarding the former, we found that across the three Courts we studied, the DIG was used as a "conservative" procedural instrument. The DIG was more likely to be used in constitutional cases, as compared to other cases, perhaps allowing the Court to avoid more difficult cases until future occasions. With respect to the jurisprudential issues, we discussed the propriety of the DIG, and in particular, the

238. There are a number of possible explanations for the trend identified in Figure 2. Perhaps the Supreme Court bar, and the interest groups that promote and support litigation at the Court, have become much more efficient in guiding cases through the lower levels of litigation so as to have an abundant supply of cases ready for review whenever needed. Perhaps the trend is partially explained by the rise, in the same period, of the number of certiorari petitions. A larger number of petitions may make it more likely that *any* issue will reappear on the Court's agenda. Similarly, certain types of issues may be more frequently litigated, irrespective of their being DIGged. The evidence, however, is also consistent with the agenda-setting behavior of the Court itself. A full exploration of these factors is beyond the scope of the present Article.

number of votes required to DIG a case and whether an explanation should be given when DIGging a case. In both instances, we argued that there are currently strong norms in the Court in favor of "supermajority" requirements and providing explanations when DIGging a case, and that sound policy reasons supported the existence of those norms.

Several further avenues of research are suggested by our study. Some examples would be a greater exploration in particular instances of why cases were, or were not, DIGged; an investigation of the stance and votes of particular Justices in DIGged cases, and how that might relate to a Justice's vote on the merits (in a non-DIGged case) or to the stance of the other Justices at that particular time; how and when DIGs lead to the same issues returning to the Court in subsequent litigation; the impact of the filing of amicus briefs in DIGged cases; and how DIGs compare to similar mechanisms used by the Court that have the effect of blocking or limiting resolution of a case on the merits, such as dismissals for lack of jurisdiction or summary affirmances of direct appeals from U.S. District Courts.[239] Exploring these and other questions can shed further light on the Court's use of the DIG.

239. *Cf.* JEFFREY A. SEGAL ET AL., THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM 279 tbl.11.1 (2005) (listing the nonmeritorious resolution of orally argued cases in the 1953-2003 Terms, including DIGs and dismissals for lack of jurisdiction).

APPENDIX I

List of DIGged Cases and Selected Variables

Name	Cite	Type of Case Const./Other	Discussion on DIG	Vote	Issue Revisited in Later Case (Name and Cite)
California *ex rel.* Brown v. St. Louis Union Trust Co.	348 U.S. 932 (1955)	Const.	No explanation	8-0	
Rice v. Sioux City Mem'l Park Cemetery	349 U.S. 70 (1955)	Const.	Majority & Dissent	5-3	
Ellis v. Dixon	349 U.S. 458 (1955)	Const.	Majority & Dissent	5-4	
Reeves v. Alabama	355 U.S. 368 (1958)	Const.	No explanation	8-1	
Wilson v. Loew's, Inc.	355 U.S. 597 (1958)	Const.	Majority	8-1	Swain v. Alabama, 380 U.S. 202 (1965)
Triplett v. Iowa	357 U.S. 217 (1958)	Const.	No explanation	9-0	Beilan v. Bd. of Pub. Educ., 357 U.S. 399 (1958)
Hinkle v. New England Mut. Life Ins. Co.	358 U.S. 65 (1958)	Other	No explanation	9-0	Dunaway v. New York, 442 U.S. 200 (1979)
Joseph v. Indiana	359 U.S. 117 (1959)	Const.	No explanation	9-0	
Monrosa v. Carbon Black Export, Inc.	359 U.S. 180 (1959)	Other	Majority	5-4	M/S Bremen & Unterweser v. Zapata Off-Shore Co., 407 U.S. 1 (1972)
Mitchell v. Or. Frozen Foods Co.	361 U.S. 231 (1960)	Other	Majority	8-0	
McGann v. United States	362 U.S. 214 (1960)	Other	Majority	9-0	
Phillips v. New York	362 U.S. 456 (1960)	Const.	Majority	9-0	
Needelman v. United States	362 U.S. 600 (1960)	Const.	Majority	6-3	
Kimbrough v. United States	364 U.S. 661 (1961)	Other	Majority	9-0	
Hooper v. Bennett	364 U.S. 807 (1961)	Const.	No explanation	9-0	Smith v. Bennett, 365 U.S. 708 (1961)
Bullock v. South Carolina	365 U.S. 292 (1961)	Const.	Majority	9-0	Jackson v. Denno, 378 U.S. 368 (1964)
Newsom v. Smyth	365 U.S. 604 (1961)	Const.	Majority & Dissent	6-1	Douglas v. California, 372 U.S. 353 (1963)

Name	Cite	Type of Case Const./Other	Discussion on DIG	Vote	Issue Revisited in Later Case (Name and Cite)
Smith v. Butler	366 U.S. 161 (1961)	Other	Majority & Dissent	5-4	Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557 (1987)
Atchley v. California	366 U.S. 207 (1961)	Const.	Majority	9-0	Procunier v. Atchley, 400 U.S. 446 (1971)
Binks Mfg. v. Ransburg Electro-Coating Corp.	366 U.S. 211 (1961)	Other	Majority	9-0	
Baldonado v. California	366 U.S. 417 (1961)	Const.	Majority	9-0	
Hodges v. United States	368 U.S. 139 (1961)	Other	Majority	6-3	
Benz v. N.Y. State Thruway Auth.	369 U.S. 147 (1962)	Const.	Majority	7-1	
In re Zipkin	369 U.S. 400 (1962)		No explanation	6-2	
Rudolph v. United States	370 U.S. 269 (1962)	Other	Majority	5-2	
Williams v. Zuckert	371 U.S. 531 (1963)	Const.	Majority	7-2	
Wolf v. Weinstein	372 U.S. 633 (1963)	Other	Majority	7-2	
Smith v. Mississippi	373 U.S. 238 (1963)	Const.	Majority	9-0	Haynes v. Washington, 373 U.S. 503 (1963)
Gotthilf v. Sills	375 U.S. 79 (1963)	Const.	Majority	6-3	
Diamond v. Louisiana	376 U.S. 201 (1964)	Const.	No explanation	9-0	
Dresner v. Tallahassee	378 U.S. 539 (1964)	Const.	Majority	9-0	
Bhd. of Ry. & S.S. Clerks v. United Air Lines, Inc.	379 U.S. 26 (1964)	Other	No explanation	7-0	
Jankovich v. Ind. Toll Rd. Comm'n	379 U.S. 487 (1965)	Const.	Majority	7-2	
Hughes Tool Co. v. Trans World Airlines, Inc.	380 U.S. 248 (1965)	Other	No explanation	9-0	Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)
Hughes Tool Co. v. Trans World Airlines, Inc.	380 U.S. 249 (1965)	Other	No explanation	9-0	Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)
Susser v. Carvel Corp.	381 U.S. 125 (1965)	Other	No explanation	8-0	Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)

Name	Cite	Type of Case Const./Other	Discussion on DIG	Vote	Issue Revisited in Later Case (Name and Cite)
Hicks v. District of Columbia	383 U.S. 252 (1966)	Const.	Concurrence	8-1	Kolender v. Lawson, 461 U.S. 352 (1983)
Mishkin v. New York	383 U.S. 502 (1966)	Const.	Majority	6-3	Roaden v. Kentucky, 413 U.S. 496 (1973)
Holt v. Alleghany Corp.	384 U.S. 28 (1966)	Other	No explanation	4-1	
NAACP v. Overstreet	384 U.S. 118 (1966)	Const.	No explanation	5-4	NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)
Cichos v. Indiana	385 U.S. 76 (1966)	Const.	Majority	6-3	Benton v. Maryland, 395 U.S. 784 (1969)
Heider v. Mich. Sugar Co.	385 U.S. 362 (1967)	Other	No explanation	9-0	
Whitus v. Georgia	385 U.S. 545 (1967)	Const.	Majority	9-0	Jones v. Georgia, 389 U.S. 24 (1967)
Turner v. New York	386 U.S. 773 (1967)	Const.	No explanation	7-0	Eaton v. City of Tulsa, 415 U.S. 697 (1974)
Gilbert v. California	388 U.S. 263 (1967)	Const.	Majority	8-1	Katz v. United States, 389 U.S. 347 (1987)
Umans v. United States	389 U.S. 80 (1967)	Other	No explanation	8-0	
Whitney v. Florida	389 U.S. 138 (1967)	Const.	Dissent	7-2	
Massachusetts v. Painten	389 U.S. 560 (1968)	Const.	Majority	6-3	Illinois v. Gates, 462 U.S. 213 (1983)
Johnson v. Massachusetts	390 U.S. 511 (1968)	Const.	Majority	6-3	Greewald v. Wisconsin, 390 U.S. 519 (1968)
Hanner v. DeMarcus	390 U.S. 736 (1968)	Const.	Dissent	5-4	
Wainwright v. New Orleans	392 U.S. 598 (1968)	Const.	Concurrence	7-1	
Miller v. California	392 U.S. 616 (1968)	Const.	Dissent	5-4	Milton v. Wainwright, 407 U.S. 371 (1972)
Palmieri v. Florida	393 U.S. 218 (1968)	Const.	Majority	9-0	Hayes v. Florida, 470 U.S. 811 (1985)
Stiles v. United States	393 U.S. 219 (1968)		No explanation	9-0	
Skinner v. Louisiana	393 U.S. 473 (1969)	Const.	No explanation	6-3	Morris v. Slappy, 461 U.S. 1 (1983)
Perez v. California	395 U.S. 208 (1969)	Const.	No explanation	7-0	

Name	Cite	Type of Case Const./Other	Discussion on DIG	Vote	Issue Revisited in Later Case (Name and Cite)
DeBacker v. Brainard	396 U.S. 28 (1969)	Const.	Majority & Dissent	6-2	McKeiver v. Pennsylvania, 403 U.S. 528 (1971)
Conway v. Cal. Adult Auth.	396 U.S. 107 (1969)	Const.	Majority	8-0	Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998)
Jones v. State Bd. of Educ.	397 U.S. 31 (1970)	Const.	Majority	6-2	Papish v. Bd. of Curators, 410 U.S. 667 (1973)
Taggart v. Weinacker's, Inc.	397 U.S. 223 (1970)	Const.	Majority	6-2	Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978)
Hester v. Illinois	397 U.S. 660 (1970)	Const.	No explanation	5-3	
Monks v. New Jersey	398 U.S. 71 (1970)	Const.	Majority	6-2	
Moon v. Maryland	398 U.S. 319 (1970)	Const.	Majority	5-2	
Odom v. United States	400 U.S. 23 (1970)	Const.	Majority & Dissent	8-1	Michigan v. Payne, 412 U.S. 47 (1973)
Bruno v. Pennsylvania	400 U.S. 350 (1971)	Const.	No explanation	9-0	
Piccirillo v. New York	400 U.S. 548 (1971)	Const.	Majority & Dissent	5-4	Kastigar v. United States, 406 U.S. 441 (1972)
Johnson v. United States	401 U.S. 846 (1971)	Const.	No explanation	6-2	
Triangle Improvement Council v. Ritchie	402 U.S. 497 (1971)	Other	Concurrence & Dissent	5-4	
Bostic v. United States	402 U.S. 547 (1971)	Other	Majority	9-0	
Romontio v. United States	402 U.S. 903 (1971)	Other	No explanation	9-0	
McClanahan v. Morauer & Hartzell, Inc.	404 U.S. 16 (1971)	Other	Majority & Dissent	6-1	
Duncan v. Tennessee	405 U.S. 127 (1972)	Const.	Majority & Dissent	6-3	Illinois v. Somerville, 410 U.S. 458 (1973)
Iowa Beef Packers, Inc. v. Thompson	405 U.S. 228 (1972)	Other	Majority & Dissent	8-1	Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728 (1981)
Sarno v. Ill. Crime Investigating Comm'n	406 U.S. 482 (1972)	Const.	Majority	5-2	

Name	Cite	Type of Case Const./Other	Discussion on DIG	Vote	Issue Revisited in Later Case (Name and Cite)
Murel v. Balt. City Criminal Court	407 U.S. 355 (1972)	Const.	Majority	8-1	Addington v. Texas, 441 U.S. 418 (1979)
Tacon v. Arizona	410 U.S. 351 (1973)	Const.	Majority	6-3	
Morris v. Weinberger	410 U.S. 422 (1973)	Other	Majority & Dissent	8-1	
Holder v. Banks	417 U.S. 187 (1974)		No explanation	8-0	
United States v. Nixon	418 U.S. 683 (1974)	Other	Majority	8-0	
Roe v. Doe	420 U.S. 307 (1975)	Const.	No explanation	9-0	
United States v. Guana-Sanchez	420 U.S. 513 (1975)	Const.	No explanation	8-0	
Cassius v. Arizona	420 U.S. 514 (1975)	Const.	No explanation	6-2	
Quinn v. Muscare	425 U.S. 560 (1976)	Const.	Majority	8-0	Kelly v. Johnson, 425 U.S. 238 (1976)
Drew Mun. Separate Sch. Dist. v. Andrews	425 U.S. 559 (1976)	Const.	No explanation	9-0	
Burrell v. McCray	426 U.S. 471 (1976)	Other	Concurrence & Dissent	6-3	Patsy v. Fla. Bd. of Regents, 457 U.S. 496 (1982)
Belcher v. Stengel	429 U.S. 118 (1976)	Other	Majority & Concurrence	9-0	
Cook v. Hudson	429 U.S. 165 (1976)	Const.	Majority	9-0	
Maness v. Wainwright	430 U.S. 550 (1977)	Const.	No explanation	9-0	
Darden v. Florida	430 U.S. 704 (1977)	Const.	No explanation	7-2	Darden v. Wainwright, 477 U.S. 168 (1986)
Jones v. Hildebrant	432 U.S. 183 (1977)	Other	Majority & Dissent	6-3	
Bankers Trust Co. v. Mallis	435 U.S. 381 (1978)	Other	Majority	8-0	Rubin v. United States, 449 U.S. 424 (1981)
N.Y. State Parole Bd. v. Coralluzzo	435 U.S. 912 (1978)	Const.	No explanation	7-2	Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1 (1979)
United States v. Jacob	436 U.S. 31 (1978)	Other	No explanation	9-0	
McAdams v. McSurely	438 U.S. 189 (1978)	Const.	No explanation	9-0	Davis v. Passman, 442 U.S. 228 (1979)
Hunter v. Dean	439 U.S. 281 (1978)	Const.	No explanation	9-0	Bearden v. Georgia, 461 U.S. 660 (1983)

Name	Cite	Type of Case Const./Other	Discussion on DIG	Vote	Issue Revisited in Later Case (Name and Cite)
Ramsey v. New York	440 U.S. 444 (1979)	Const.	Majority	9-0	
Estes v. Metro. Branches of Dallas NAACP	444 U.S. 437 (1980)	Const.	Dissent	5-3	
Montgomery v. Century Laminating, Ltd.	444 U.S. 987 (1979)	Other	No explanation	9-0	Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982)
Massachusetts v. Meehan	445 U.S. 39 (1980)	Const.	No explanation	9-0	
Walter v. United States	447 U.S. 649 (1980)	Const.	Majority	5-4	
Kissinger v. Halperin	452 U.S. 713 (1981)	Const.	No explanation	8-0	
NLRB v. Hendricks County Rural Elec. Membership Corp.	454 U.S. 170 (1981)	Other	Majority	5-4	
Consol. Freightways Corp. v. Kassel	455 U.S. 329 (1982)	Other	No explanation	7-1	
Zipes v. Trans World Airlines, Inc.	455 U.S. 385 (1982)	Other	Majority	8-0	
Finley v. Murray	456 U.S. 604 (1982)	Other	No explanation	9-0	
Poythress v. Duncan	459 U.S. 1012 (1982)	Const.	No explanation	9-0	
Eicke v. Eicke	459 U.S. 1139 (1983)	Const.	No explanation	9-0	
Florida v. Casal	462 U.S. 637 (1983)	Const.	Majority	9-0	
Roadway Express, Inc. v. Warren	464 U.S. 988 (1983)	Const.	No explanation	9-0	
Colo. v. Nunez	465 U.S. 324 (1984)	Const.	Majority & Concurrence	9-0	
Westinghouse Elec. Corp. v. Vaughn	466 U.S. 521 (1984)	Other	No explanation	9-0	St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)
New York v. Uplinger	467 U.S. 246 (1984)	Const.	Majority, Concurrence & Dissent	5-4	
United States v. Quinn	475 U.S. 791 (1986)	Const.	Dissent	7-2	

Name	Cite	Type of Case Const./Other	Discussion on DIG	Vote	Issue Revisited in Later Case (Name and Cite)
EEOC v. Fed. Labor Relations Auth.	476 U.S. 19 (1986)	Other	Majority & Dissent	7-1	Dep't of Treasury v. Fed. Labor Relations Auth., 494 U.S. 922 (1990)
Cerbone v. Conway	479 U.S. 84 (1986)	Other	No explanation	9-0	Albright v. Oliver, 510 U.S. 266 (1994)
Springfield v. Kibbe	480 U.S. 257 (1987)	Other	Majority & Dissent	5-4	City of Canton v. Harris, 489 U.S. 378 (1989)
United States v. Merchant	480 U.S. 615 (1987)	Const.	No explanation	9-0	
Missouri v. Blair	480 U.S. 698 (1987)	Const.	No explanation	9-0	Whren v. United States, 517 U.S. 806 (1996)
Lynaugh v. Petty	480 U.S. 699 (1987)	Const.	No explanation	9-0	Lockhart v. Fretwell, 506 U.S. 364 (1993)
Van Drasek v. Webb	481 U.S. 738 (1987)	Const.	No explanation	9-0	United States v. Stanley, 483 U.S. 669 (1987)
California v. Rooney	483 U.S. 307 (1987)	Const.	Majority & Dissent	6-3	California v. Greenwood, 486 U.S. 35 (1988)
Vermont v. Cox	484 U.S. 173 (1987)	Const.	No explanation	8-0	
USPS v. Nat'l Ass'n of Letter Carriers	485 U.S. 680 (1988)	Other	No explanation	9-0	E. Ass'n Coal Corp. v. UMW, 531 U.S. 57 (2000)
Allied Tube & Conduit Corp. v. Indian Head, Inc.	486 U.S. 492 (1988)	Other	No explanation	7-2	
Harbison-Walker Refractories v. Brieck	488 U.S. 226 (1988)	Other	No explanation	9-0	St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)
White v. United States	493 U.S. 5 (1989)	Other	No explanation	8-1	
Parker v. Dugger	498 U.S. 308 (1991)	Const.	No explanation	5-4	
Ohio v. Huertas	498 U.S. 336 (1991)	Const.	No explanation	9-0	Payne v. Tennessee, 501 U.S. 808 (1991)
Gibson v. Fla. Bar	502 U.S. 104 (1991)	Const.	No explanation	9-0	
PFZ Props., Inc. v. Rodriguez	503 U.S. 257 (1992)	Other	No explanation	9-0	
Montana v. Imlay	506 U.S. 5 (1992)	Const.	Concurrence & Dissent	8-1	McKune v. Lile, 536 U.S. 24 (2002)

Name	Cite	Type of Case Const./Other	Discussion on DIG	Vote	Issue Revisited in Later Case (Name and Cite)
Hadley v. United States	506 U.S. 19 (1992)	Other	No explanation	9-0	
Fex v. Michigan	507 U.S. 43 (1993)	Other	No explanation	7-2	
Izumi Seimitsu Kogyo Kaisha v. U.S. Phillips Corp.	510 U.S. 27 (1993)	Other	Majority & Dissent	7-2	U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1996)
Cavanaugh v. Roller	510 U.S. 42 (1993)	Const.	No explanation	9-0	
Tennessee v. Middlebrooks	510 U.S. 124 (1993)	Const.	No explanation	8-1	Loving v. United States, 517 U.S. 748 (1996)
Ticor Title Ins. Co. v. Brown	511 U.S. 117 (1994)	Const.	Majority & Dissent	6-3	
Richards v. Jefferson County	516 U.S. 1167 (1996)	Const.	No explanation	9-0	Jefferson County v. Acker, 527 U.S. 423 (1998)
Grimmet v. Brown	519 U.S. 233 (1997)	Other	No explanation	9-0	Klehn v. A.O. Smith Corp., 521 U.S. 179 (1997)
Ogbomon v. United States	519 U.S. 1073 (1997)	Other	No explanation	9-0	
Adams v. Robertson	520 U.S. 83 (1997)	Const.	Majority	9-0	
Rogers v. United States	522 U.S. 252 (1998)	Other	Majority, Concurrence & Dissent	6-3	Neden v. United States, 527 U.S. 1 (1998)
Ricci v. Vill. of Arlington Heights	523 U.S. 613 (1998)	Const.	No explanation	9-0	Atwater v. City of Lago Vista, 532 U.S. 318 (2001)
Dist. of Columbia v. Tri County Indus., Inc.	531 U.S. 287 (2000)	Const.	No explanation	9-0	
Bd. of Trs. v. Garrett	531 U.S. 356 (2001)	Const.	Majority	9-0	Tennessee v. Lane, 541 U.S. 509 (2004)
Bryan v. Moore	528 U.S. 1133 (2001)	Const.	Majority	9-0	
McCarver v. North Carolina	533 U.S. 975 (2001)	Const.	No explanation	9-0	Atkins v. Virginia, 536 U.S. 304 (2002)
Adarand Constructors, Inc. v. Mineta	534 U.S. 103 (2001)	Const.	Majority	9-0	
Adams v. Fla. Power Corp.	535 U.S. 228 (2002)	Other	No explanation	9-0	Smith v. Jackson, 125 S. Ct. 1536 (2005)

Name	Cite	Type of Case Const./Other	Discussion on DIG	Vote	Issue Revisited in Later Case (Name and Cite)
Mathias v. WorldCom Techs., Inc.	535 U.S. 682 (2002)	Other	Majority	8-0	Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635 (2002)
Ford Motor Co. v. McCauley	537 U.S. 1 (2002)	Other	No explanation	9-0	Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611 (2005)
Abdur'Rahman v. Bell	537 U.S. 88 (2002)	Other	Dissent	8-1	Gonzalez v. Crosby, 125 S. Ct. 2641 (2005)
Nike, Inc. v. Kasky	539 U.S. 654 (2003)	Const.	Concurrence & Dissent	6-3	
Howell v. Mississippi	125 S. Ct. 856 (2005)	Const.	Majority	9-0	
Medellin v. Dretke	125 S. Ct. 2088 (2005)	Other	Majority, Concurrence & Dissent	5-4	

Notes:

1. In three cases, *In re* Zipkin, 369 U.S. 400 (1962), Stiles v. United States, 393 U.S. 219 (1968), and Holder v. Banks, 417 U.S. 187 (1974), the lower court opinion was not published, and other sources were not available to enable us to characterize the issues in the case or explore whether the Court revisited those issues in subsequent cases.

APPENDIX II

List of Non-DIGged Cases and Selected Variables

Name	Cite	Type of Case Constitutional/ Other
Bankers Life & Cas. Co. v. Holland	346 U.S. 379 (1953)	Other
Offutt v. United States	348 U.S. 11 (1954)	Other
McAllister v. United States	348 U.S. 19 (1954)	Other
Williams v. Georgia	349 U.S. 375 (1955)	Constitutional
Gibson v. Lockheed Aircraft Serv., Inc.	350 U.S. 356 (1956)	Other
Schulz v. Pa. R.R.	350 U.S. 523 (1956)	Other
Armstrong v. Armstrong	350 U.S. 568 (1956)	Constitutional
S. Pac. Co. v. Gileo	351 U.S. 493 (1956)	Other
Rogers v. Mo. Pac. R.R.	352 U.S. 500 (1957)	Other
Webb v. Ill. C. R.R.	352 U.S. 512 (1957)	Other
Herdman v. Pa. R.R.	352 U.S. 518 (1957)	Other
Ferguson v. Moore-McCormack Lines	352 U.S. 521 (1957)	Other
United States v. Ohio Power Co.	353 U.S. 98 (1957)	Other
Deen v. Gulf, Colo. & Santa Fe Ry.	353 U.S. 925 (1957)	Other
Thompson v. Tex. & Pac. Ry.	353 U.S. 926 (1957)	Other
Arnold v. Panhandle & Santa Fe Ry.	353 U.S. 360 (1957)	Other
Ringhiser v. Chesapeake & Ohio Ry.	354 U.S. 901 (1957)	Other
McBride v. Toledo Terminal R.R.	354 U.S. 517 (1957)	Other
Gibson v. Thompson	355 U.S. 18 (1957)	Other
Palermo v. Luckenbach S.S.	355 U.S. 20 (1957)	Other
Stinson v. Atl. Coast Line R.R.	355 U.S. 62 (1957)	Other
Honeycutt v. Wabash Ry.	355 U.S. 424 (1958)	Other
Kernan v. Am. Dredging Co.	355 U.S. 426 (1958)	Other
Ferguson v. St. Louis-S.F. Ry.	356 U.S. 41 (1958)	Other
Grimes v. Raymond Concrete Pile Co.	356 U.S. 252 (1958)	Other
Butler v. Whiteman	356 U.S. 271 (1958)	Other
Moore v. Terminal R.R.	358 U.S. 31 (1958)	Other
Baker v. Tex. & Pac. Ry.	359 U.S. 227 (1959)	Other
Magenau v. Aetna Freight Liners, Inc.	360 U.S. 273 (1959)	Other
Harris v. Pa. R.R.	361 U.S. 15 (1959)	Other
Connor v. Butler	361 U.S. 29 (1959)	Other
Sentilles v. Inter-Caribbean Shipping	361 U.S. 107 (1959)	Other
Inman v. Balt. & Ohio R.R.	361 U.S. 138 (1959)	Other
Davis v. Virginian Ry.	361 U.S. 354 (1960)	Other

Name	Cite	Type of Case Constitutional/ Other
Arnold v. Ben Kanowsky, Inc.	361 U.S. 388 (1960)	Other
Ward v. Atl. Coast Line R.R.	362 U.S. 396 (1960)	Other
Cory Corp. v. Sauber	363 U.S. 709 (1960)	Other
Michalic v. Cleveland Tankers, Inc.	364 U.S. 325 (1960)	Other
N.Y., New Haven & Hartford R.R. v. Henagar	364 U.S. 441 (1960)	Other
Maynard v. Durham & S. Ry.	365 U.S. 160 (1961)	Other
NLRB v. Walton Mfg. Co.	369 U.S. 404 (1962)	Other
Lanza v. New York	370 U.S. 139 (1962)	Constitutional
Foman v. Davis	371 U.S. 178 (1962)	Other
Willner v. Comm'n on Character & Fitness	373 U.S. 96 (1963)	Constitutional
Mercer v. Theriot	377 U.S. 152 (1964)	Other
Henry v. Mississippi	379 U.S. 443 (1965)	Constitutional
Crider v. Zurich Ins. Co.	380 U.S. 39 (1965)	Constitutional
Dep't of Mental Hygiene v. Kirchner	380 U.S. 194 (1965)	Constitutional
Simons v. Miami Beach First Nat'l Bank	381 U.S. 81 (1965)	Constitutional
Evans v. Newton	382 U.S. 296 (1966)	Constitutional
United States v. Adams	383 U.S. 39 (1966)	Other
Rosenblatt v. Baer	383 U.S. 75 (1966)	Constitutional
Hoffa v. United States	385 U.S. 293 (1966)	Constitutional
Osborn v. United States	385 U.S. 323 (1966)	Constitutional
Redrup v. New York	386 U.S. 767 (1967)	Constitutional
Smith v. Illinois	390 U.S. 129 (1968)	Constitutional
Stockholder of Ferry v. Anderson	390 U.S. 414 (1968)	Other
Avery v. Midland County	390 U.S. 474 (1968)	Constitutional
AFEU v. Logan Valley Plaza	391 U.S. 308 (1968)	Constitutional
Bumper v. North Carolina	391 U.S. 543 (1968)	Constitutional
Jones v. Alfred H. Mayer Co.	392 U.S. 409 (1968)	Other
Grunenthal v. Long Island R.R.	393 U.S. 156 (1968)	Other
United States v. Grace Estate	395 U.S. 316 (1969)	Other
Noyd v. Bond	395 U.S. 683 (1969)	Other
Benton v. Maryland	395 U.S. 784 (1969)	Constitutional
Sullivan v. Little Hunting Park, Inc.	396 U.S. 229 (1969)	Other
NLRB v. J.H. Rutter-Rex Mfg. Co.	396 U.S. 258 (1969)	Other
Wade v. Wilson	396 U.S. 282 (1970)	Constitutional
Czosek v. O'Mara	397 U.S. 25 (1970)	Other
Nelson v. Georgia	399 U.S. 224 (1970)	Other
Britt v. North Carolina	404 U.S. 226 (1971)	Constitutional
Iowa Beef Packers v. Thompson	405 U.S. 228 (1972)	Other
United States v. Generes	405 U.S. 93 (1972)	Other
Loper v. Beto	405 U.S. 473 (1972)	Constitutional
Mancusi v. Stubbs	408 U.S. 204 (1972)	Constitutional
Neil v. Biggers	409 U.S. 188 (1972)	Constitutional
Gomez v. Perez	409 U.S. 535 (1973)	Constitutional

Name	Cite	Type of Case Constitutional/ Other
Hall v. Cole	412 U.S. 1 (1973)	Other
Schneckloth v. Bustamonte	412 U.S. 218 (1973)	Constitutional
Donnelly v. DeChristoforo	416 U.S. 637 (1974)	Constitutional
Jackson v. Metro. Edison Co.	419 U.S. 345 (1974)	Constitutional
Fry v. United States	421 U.S. 542 (1975)	Constitutional
United States v. Agurs	427 U.S. 97 (1976)	Constitutional
Ohio v. Gallagher	425 U.S. 257 (1976)	Constitutional
Estelle v. Gamble	429 U.S. 97 (1976)	Constitutional
EPA v. Brown	431 U.S. 99 (1977)	Other
Miliken v. Bradley	433 U.S. 267 (1977)	Constitutional
Zacchini v. Scripps-Howard Broad. Co.	433 U.S. 562 (1977)	Constitutional
Mont. Power Co. v. EPA	434 U.S. 809 (1977)	Other
Vt. Nuclear Power Corp. v. NRDCl	435 U.S. 519 (1978)	Other
N.Y. City Transit Auth. v. Beazer	440 U.S. 568 (1979)	Constitutional
Bell v. Wolfish	441 U.S. 520 (1979)	Constitutional
Costle v. Pac. Legal Found.	445 U.S. 198 (1980)	Other
Am. Exp. Lines v. Alvez	446 U.S. 274 (1980)	Other
County of Imperial v. Munoz	449 U.S. 54 (1980)	Other
Federated Dep't Stores v. Moitie	452 U.S. 394 (1981)	Other
Dep't of State v. Wash. Post Co.	456 U.S. 595 (1982)	Other
Middlesex County v. Garden St. Bar Ass'n	457 U.S. 423 (1982)	Other
Nixon v. Fitzgerald	457 U.S. 731 (1982)	Constitutional
Los Angeles v. Lyons	461 U.S. 95 (1983)	Constitutional
Local No. 82 v. Crowley	467 U.S. 526 (1984)	Other
Martinez v. Bynum	461 U.S. 321 (1983)	Constitutional
Michigan v. Clifford	464 U.S. 287 (1984)	Constitutional
Pennhurst State v. Halderman	465 U.S. 89 (1984)	Constitutional
Escambia County v. McMillan	466 U.S. 48 (1984)	Other
Welsh v. Wisconsin	466 U.S. 740 (1984)	Constitutional
New Jersey v. T.L.O.	468 U.S. 1214 (1984)	Constitutional
Darden v. Wainwright	477 U.S. 168 (1986)	Constitutional
United States v. Am. Coll. of Physicians	475 U.S. 834 (1986)	Other
Batson v. Kentucky	476 U.S. 79 (1986)	Constitutional
Connecticut v. Barrett	479 U.S. 523 (1987)	Constitutional
INS v. Cardoza-Fonseca	480 U.S. 421 (1987)	Other
Pennsylvania v. Finley	481 U.S. 551 (1987)	Constitutional
Philips Petroleum Co. v. Mississippi	484 U.S. 469 (1988)	Other
Sheet Metal Workers' Int'l Ass'n v. Lynn	487 U.S. 347 (1989)	Other
Neitzke v. Williams	490 U.S. 319 (1989)	Other
City of Canton v. Harris	489 U.S. 378 (1989)	Other
Dugger v. Adams	489 U.S. 401 (1989)	Constitutional
Zant v. Moore	489 U.S. 836 (1989)	Constitutional
Cal. State Bd. v. Sierra Summit	490 U.S. 844 (1989)	Other

Name	Cite	Type of Case Constitutional/ Other
New York v. Harris	495 U.S. 14 (1990)	Constitutional
U.S. Dep't of Labor v. Triplett	494 U.S. 715 (1990)	Other
Stevens v. Dep't of Treasury	500 U.S. 1 (1991)	Other
Two Pesos, Inc. v. Taco Cabana, Inc.	505 U.S. 763 (1992)	Other
United States v. Williams	504 U.S. 36 (1992)	Other
Lucas v. S.C. Coastal Council	505 U.S. 1003 (1992)	Constitutional
United States v. Granderson	511 U.S. 39 (1994)	Other
Powell v. Nevada	511 U.S. 79 (1994)	Constitutional
Missouri v. Jenkins	515 U.S. 70 (1995)	Constitutional
Fulton Corp. v. Faulkner	516 U.S. 325 (1996)	Constitutional
UFCW Union Local 571 v. Brown Group	517 U.S. 544 (1996)	Constitutional
Blessing v. Freestone	520 U.S. 329 (1997)	Other
United States v. LaBonte	520 U.S. 751 (1997)	Other
City of Boerne v. Flores	521 U.S. 507 (1997)	Constitutional
Knowles v. Iowa	525 U.S. 113 (1998)	Constitutional
Haddle v. Garrison	525 U.S. 121 (1998)	Other
Bank of Am. v. 203 N. LaSalle St. P'ship	526 U.S. 434 (1999)	Other
Illinois v. McArthur	531 U.S. 326 (2001)	Constitutional
Great-West v. Knudson	534 U.S. 204 (2002)	Other
Atkins v. Virginia	536 U.S. 304 (2002)	Constitutional
Newland v. Saffold	536 U.S. 214 (2002)	Other
Tory v. Cochran	125 S. Ct. 2108 (2005)	Constitutional

Notes:

1. The following twenty-three cases were treated as separated data points since they involved multiple legal issues (number of legal issues listed in parentheses): *McAllister v. United States* (two); *Southern Pacific Co. v. Gileo* (two); *United States v. Adams* (two); *Hoffa v. United States* (4); *Osborn v. United States* (three); *Bumper v. North Carolina* (three); *Jones v. Alfred H. Meyer Co.* (three); *Noyd v. Bond* (two); *Benton v. Maryland* (two); *Sullivan v. Little Hunting Park Inc.* (three); *Wade v. Wilson* (two); *Nelson v. Georgia* (two); *Loper v. Beto* (two); *Mancusi v. Stubbs* (two); *Neil v. Biggers* (two); *Fry v. United States* (two); *Estelle v. Gambelle* (two); *Miliken v. Bradley* (three); *New York City Transit Authority v. Beazer* (three); *Bell v. Wolfish* (two); *Costle v. Pacific Legal Foundation* (two); *Department of Labor v. Triplett* (two); and *City of Boerne v. Flores* (two).