

# **The Will of the Minority: The Rule of Four on the United States Supreme Court**

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## **Abstract**

One of the more peculiar aspects of the Supreme Court's agenda setting process is that a minority of justices can have a case placed on the docket against the will of a majority. The rule of four, as it is known, acts as a sharp constraint on majority tyranny at the agenda setting stage. Minority rights are certainly not uncommon in other American political institutions. For example, a minority of senators can filibuster most legislative acts and block the ratification of treaties, while the president can frustrate the will of legislative majorities through astute use of his veto power. However, the rule of four is unique in that it is a positive power—a determined minority of justices can force the Court to hear and decide a case and, in the process, set binding precedent. Thus, while minority rights are typically status quo preserving, the rule of four ensures that, in most cases, the status quo will change. In this paper we develop a formal model that seeks to explain when the rule of four will be invoked as well as the conditions under which the pivotal justice at that stage ultimately wins on the merits. We then use two separate data sets to test these predictions.

# 1 Introduction

Democracies are founded on the principle of majority rule. In the United States, for example, a simple majority of electors chooses the president, concurrent majorities in the Congress pass legislation, and a simple majority of justices on the Supreme Court sets legal doctrine for the entire country. Despite the overwhelming power of majorities in the United States political system, institutional arrangements that advantage minority coalitions persist. For example, a minority coalition in the U.S. Senate can wreak havoc on majority will through the shrewd use of the filibuster. Similarly, presidents often frustrate the will of legislative majorities when they exercise their formal powers to veto power. In these instances the only immediate effect of the minority's action is to preserve the *status quo* policy. To win—with either a filibuster or a veto—the minority simply prevents policy change.

Scholars clearly demonstrate the status quo preserving powers of minority coalitions, such as the Senate filibuster (Koger 2010; Binder and Smith 1997; Krehbiel 1998), and the presidential veto (Cameron 2000), however, little work to date analyzes the one example of *positive* minority power found in the American governmental system—the Rule of 4 on the United States Supreme Court. Under this “rule,” a minority of justices can control which cases end up on the Court's agenda for a term because it takes four votes rather than five (a minimum winning majority coalition) to place a case on the plenary docket.<sup>1</sup>

The Rule of 4 is unique because it allows a minority of justices to both set the agenda of the Supreme Court and to change, rather than preserve, the status quo.

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<sup>1</sup>We note that the Rule of 4 is not a rule *per se*. Rather, it is a norm that has been accepted by Supreme Court justices since 1925. Norms such as this, however, can and do have the same weight as written rules (Epstein and Knight 1998)

That is, by granting a hearing and then issuing a ruling on a case from a lower court, the Supreme Court sets national doctrine by either applying the lower court's ruling to the entire country or by reversing the ruling of the lower court altogether.<sup>2</sup> This is an important power for two main reasons. First, it acts as a sharp constraint on majority tyranny at the Court's agenda setting stage. As Kurland and Hutchinson (1983, 645) put it, "The rule of four is a device which a minority of the Court can impose on the majority a question that the majority does not think it appropriate to address." The potency of this rule is not lost on the justices. As Justice Brennan (1973) put it, choosing cases is "second to none in importance." It also clearly worried at least one justice – Stevens (1983, 19) – who points out:

Every case that is granted on the basis of four votes is a case that five members of the Court thought should not be granted. For the most significant work of the Court, it is assumed that the collective judgment of its majority is more reliable than the views of the minority.

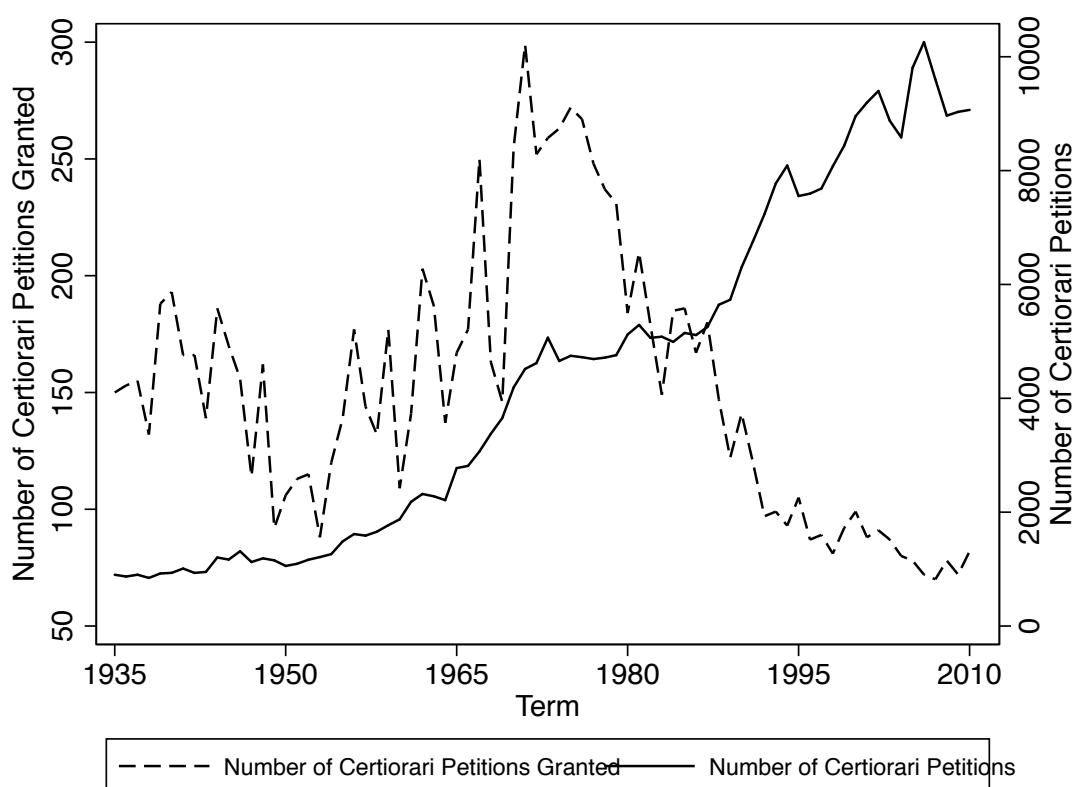
More generally, as Figure 1 reveals, the Court regularly receives thousands of petitions for certiorari while, in recent years, it typically agrees to hear fewer than 100 cases. Thus, understanding what the Court decides to decide is, in many ways, paramount to understanding how the justices decide on the merits of cases they hear. Given the centrality of the Court's agenda to its effect on litigants, citizens, and lawmakers (Black and Boyd 2012; Black and Owens 2009; Hammond et al. 2005), our focus in this article is to understand the dynamics of the Rule of 4. More specifically, we seek to identify the conditions under which a minority of the Court will place a

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<sup>2</sup>The Supreme Court can and does Dismiss as Improvidently Granted (DIG) cases that have been granted *certiorari*, and argued orally, but in these cases the lower court ruling stands and the status quo is preserved.

case on the Court’s docket against the wishes of the majority. Further, we explore the success of minority certiorari coalitions at the merits stage of each case granted. We do so by providing a game-theoretic model of the Rule of 4 along with empirical analyses from a sample of Rehnquist Court cases that make the discuss list in the 1985, 1986, 1987, 1990, 1991, and 1992 terms.<sup>3</sup>

Figure 1: Supreme Court Petitions and Caseload



The paper proceeds as follows. In the next section we review the existing works that explore the Rule of 4 either qualitatively, formally, or quantitatively. From there we provide a model that explores the conditions under which we expect the pivotal justice to invoke the Rule of 4, as well as when granting a case under this rule will

<sup>3</sup>In this way follow the call for analyses that meet the National Science Foundation’s initiative for studying the Empirical Implications of Theoretical Models (EITM) (Granato and Scioli 2004).

be successful. This model leads to explicit hypotheses about these two parts of the process. In the ensuing section we explain the data we use to test our hypotheses, and then present results of the analysis. We conclude by assessing the implications of our model for Supreme Court decision making as well as for what minority rules mean generally for our democratic processes.

## 2 History, Legal Scholarship, and the Rule of 4

As many scholars note, the historical record on the Rule of 4 is incomplete (Stevens 1983; Revesz and Karlan 1988; O’Brien 1997; Epstein and Knight 1998; Hartnett 2000). We know, however, that its origins come sometime after passage of the Evarts Act of 1891. This law established the circuit courts of appeals and codified that no right of appeal to the Supreme Court existed. The result was that the justices had much greater discretion over their appellate docket. As Hartnett (2000) put it, “thus was born the then revolutionary, but now familiar, principle of discretionary review of federal judgments on writ of *certiorari*.” Although there is evidence justices relied on a minority *certiorari* rule through the late 1800s and early 1900s, it was not until 1925 that its use became public when Justice Van Devanter appeared before the House Judiciary Committee during its hearings on the Judges’ Bill.<sup>4</sup> Van Devanter’s purpose was to “assure Congress that increased control over its [the Court’s] own docket would not lead to arbitrary dismissal of cases” (Robbins 2002).

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<sup>4</sup>In 1916, however, Congress passed a law which the Court interpreted as giving it discretion over whether or not to hear appeals from state Courts that raised federal issues. This was a major change, as Hartnett (2000) points out: “. . . the Supreme Court produced a fundamental change in the relationship between itself and state courts in constitutional cases - a change far larger than Congress evidently anticipated. As we shall see, this was not the last time that the Court expanded its discretionary control over its caseload beyond that contemplated by Congress.”

More specifically, to assuage the worry that the Court would reject cases that could be potentially important, Justice Van Devanter explained that:

We always grant petitions when as many as four think that it should be granted and sometimes when as many as three think that way. We proceed upon the theory that, if that number out of nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted.

A decade later, Chief Justice Hughes reiterated Van Devanter's response to the congressional concern that the Court may not take cases important for the law because of the justices' discretion over their docket. In a speech before the American Law Institute he noted, "we are liberal in the application of our rules and *certiorari* is always granted if four justices think it should be, and, not infrequently, when three, or even two, justices strongly urge the grant" (Hughes 1937, 459). The point is that for at least the past 80 years the Supreme Court's agenda setting stage has been controlled by a minority of the justices.

Existing empirical work on the Rule of 4 focuses almost exclusively on how it affects the size of the Court's docket each term. For instance, Stevens (1983) argues that the Rule of 4 comes into play in about 25 percent of all cases that make the discuss list.<sup>5</sup> He concludes that many of these cases are probably unimportant, and should therefore be left off of the plenary docket. O'Brien (1997) obtains similar results in his analysis of Justice Marshall's docket books for the 1990 term. He finds that 22 percent of cases decided during this term were granted *certiorari* with only

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<sup>5</sup>The discuss list is made up of the subset of appeals to the Supreme Court that one or more justices deems worthy of discussion at conference.

four votes.

Perry and Carmichael (1986) take the question of case selection a bit further. They test whether the Rule of 4 protects “important” cases. By their operationalization this does not happen because most important cases almost always receive at least five votes for *certiorari*. Perry and Carmichael point out, however, that if the Court is interested in taking “nearly significant” cases it should not abandon its long lasting rule.

While Perry and Carmichael suggest the Rule of 4 protects somewhat important cases, the normative implication of Stevens’ and O’Brien’s findings is that the Court should consider abandoning this rule. For Stevens, the quarter of all cases docketed with fewer than five votes presented an additional and unnecessary burden on him and his colleagues. Indeed, Stevens believes the Court should only decide the most important cases and therefore the problem of overworked justices could be abated by only taking cases with a majority vote on *certiorari*.

Beyond the debate between legal scholars and justices, the Rule of 4 has drawn scorn from the mass media as its incompatibility with majority rule has come to light in death penalty cases (Liptak 2007). A prisoner sentenced to death needs the vote of a simple majority or 5 justices to stay or postpone his or her execution, yet the Rule of 4 allows a minority of justices to place a prisoner’s appeal on the docket. This sets up the possibility that the Court could simultaneously grant a prisoner’s petition to appeal his or her sentence while refusing to stay the execution that would, in the legal lexicon, “moot” the case if the prisoner was subsequently executed.<sup>6</sup>

Certainly the normative implications of the Rule of 4 are interesting, this line of

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<sup>6</sup>Liptak’s article notes that Luther J. Williams was put to death by the state of Alabama in August 2007 despite four justices having voted to stay his execution.



work has failed to address a fundamental question: why would a minority coalition want to place a case on the docket when five of their colleagues could either vote to dismiss the case as improvidently granted (DIG) at the plenary stage, or simply outvote them at the merits stage?<sup>7</sup> After all, on the surface the Rule of 4 is incompatible with the rule that a simple majority of justices can vote to dismiss. As such, a preference cycle could exist whereby a case was continually granted and then dismissed (Riker 1988). Two explanations have been given in the literature for why this does not happen on the Court. Regarding DIGs, Epstein and Knight (1998, 120) note that a norm exists whereby the five justices who voted against *certiorari* cannot form the five member coalition to DIG a case. While these scholars point out that this norm can be and has been violated, justices do not often do so. The result, we suspect, is that Rule of 4 cases ultimately receive treatment similar to cases granted review with five or more votes.

With respect to the latter point, scholars have offered some answers, albeit not very theoretically satisfying ones. For instance, in her analysis of case selection based on Justice Burton's docket sheets Provine (1980, 157) finds, "that the desire to be agreeable and the leadership responsibility felt by chief justices are the primary reasons some justices vote oftener for review in four vote cases than otherwise." She therefore concludes that, "The hypothesis that four-vote cases reflect the presence of coalitions seeking review on the merits receives no support in this analysis" (Provine 1980, 158). This conclusion is based on the fact that the two most frequent members of four vote *certiorari* coalitions were Justices Burton and Clark, both of whom were considered "affable and outgoing in their personal relationships" (156). The point

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<sup>7</sup>As Revesz and Karlan (1988, 1082) point out, because of the ability to DIG a case after oral arguments, "a grant of *certiorari* is not irrevocable."

for Provine (1980) is that there seems to be nothing strategic about Rule of 4 cases, and that the key explanation for justices joining these minority coalitions comes from a sense of friendship, from wanting to be deferential to their colleagues, or from a desire to lead the Court fairly (for chief justices). Although her data support these conclusions, there is little theoretical justification for why personal relationships or a sense of duty would drive justices to join a minority coalition when, in the end, it takes a majority to win a case.

## 2.1 Strategy and the Rule of Four

Because the analysis provided by legal scholars is both theoretically and empirically unsatisfying, several political scientists have attempted to systematically analyze the Rule of 4. In his seminal work on Supreme Court agenda setting, Perry (1991) argues there are times when justices engage in strategic behavior during the *certiorari* stage, and the Rule of 4 may encourage such behavior. Perry (1991, 98) also provides evidence that there are times when a coalition of four will not force a case onto the docket because the justices in that coalition know they will surely lose on the merits—a strategy known as a defensive denial.

Epstein and Knight (1998) go a step further than Perry by providing convincing evidence to support the argument that the Rule of 4 can be used for strategic purposes. As they point out (1998), “The Rule of 4 invites forward thinking. Policy oriented justices know that if they are to attain their goals they must take those cases they believe will lead to their preferred outcomes and reject those that will not.” The key for them, then, is that justices can use this rule to make “strategic calculations throughout the decision making process” (121).

Beyond the accounts offered by Perry (1991) and Epstein and Knight (1998), two

scholars have formally modeled how the Rule of 4 affects decision making on the Supreme Court—one from an internal perspective, and one from an external perspective. In an unpublished manuscript, Schwartz (1991) develops a game-theoretic model to explain why a Rule of 4 persists. His argument is that if the justices have complete information about the ideal points of their colleagues and the location of the alternative policies, then there is no reason to have a Rule of 4 since a rule of 5 would lead to identical outcomes in equilibrium. He concludes that a Rule of 4 only persists because the justices have incomplete information about the policy outcomes associated with the various alternatives. He further argues that if no new information is revealed during the hearing of a case, a two-stage decision process seems unnecessary.

Schwartz’s model posits the Rule of 4 is most appropriate for cases that are close calls. In his own words, “the conditions are most likely to be met when the two alternatives available to the court are close to one another and when the median justice is close to being indifferent between the two” (1991, 21). The point is that because the median justice could go “either way” the minority coalition of four will be more willing to take the case because it has a higher probability of winning on the merits. Schwartz draws two more explicit implications from his signaling model. First, he argues that, in equilibrium, the median will always change his mind at the merits stage, especially when a case is complicated or there is an overabundance of conflicting information. Finally, Schwartz argues that if the median justice is in the four member *certiorari* coalition, he will change his vote based on the views of the expert justice (in the particular issue area) at the merits stage.

Where Schwartz focuses on the internal effect of the Rule of 4, Lax (2003) assesses

the impact of this minority right beyond the walls of the marble palace. Specifically, Lax analyzes how the Rule of 4 affects lower court compliance with Supreme Court decisions; he finds this rule actually benefits the Court's median justice because it forces lower court decisions to be more compliant with policy set by the High Court.

Schwartz and Lax provide insight into how the Rule of 4 affects Supreme Court decision making but neither of them empirically tests their equilibrium results. Indeed, Lax provides an informative analysis of lower court compliance, and how the Rule of 4 might benefit the median justice if the Supreme Court was primarily concerned with lower court compliance, but he provides no evidence that lower court compliance alone is the chief concern of Supreme Court justices – at the agenda setting stage in particular.

We do not dispute the idea that compliance may be a key motivation for the Rules of 4 but we think other judicial institutions undermine the argument that the Supreme Court would have developed, and would continue to maintain, such a rule solely to ensure lower court compliance. For example, most justices have now joined the *certiorari* pool.<sup>8</sup> This institution provides a more efficient means of disposing of case petitions by having one clerk (instead of one clerk from each chamber) produce a memo that goes to all justices in the pool. This means that in essentially every case the median justice and the two who abut her ideologically are relying on identical information about lower court behavior. As such, it is unlikely that the Rule of 4 would provide a unique signal about lower court compliance to the median.

Overall, we find the previous scholarship on the Rule of 4 informative. However,

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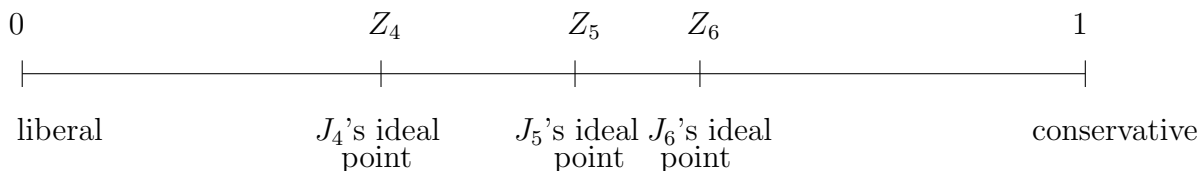
<sup>8</sup>Since 1972 different combinations of justices have joined the Court's cert. pool (Black and Boyd 2012). The decision to join this group is made by each individual justice, and is not mandatory (Stevens 1982). Today, every justice, except for Justice Alito, is in the pool.

it leaves unanswered the important question of why a minority coalition would choose to force a case onto the Court’s agenda. To tackle this question we develop a game-theoretic model to help us better understand the implications of the Rule of 4. To do so we build on two insights from existing literature: (1) justices engage in strategic behavior and a pivotal justice under the Rule of 4 will take into account possible outcomes at the merits stage when deciding whether or not to grant *certiorari*; and (2) incomplete information provides rationale for the existence of the Rule of 4. We then derive hypotheses from the equilibrium results and test them empirically on a sample of *certiorari* petitions voted on by the Rehnquist Court.

### 3 The Model

We assume a one-dimensional and continuous policy space in the Supreme Court. Without loss of generality, we also assume the set of alternatives is  $X = [0, 1]$ , where 0 represents the most liberal and 1 represents the most conservative policy positions, and let  $x_{SQ} \in X$  be the status quo policy. Let  $Z_i$  denote justice  $J_i$ ’s ideal point ( $i = 1, \dots, 9$ ), which is common knowledge. Moreover, assume  $Z = \{Z_1, \dots, Z_9\}$  is ordered so that  $\forall i < 9, Z_i < Z_{i+1}$ . In particular,  $Z_5$  is the ideal point of the median justice,  $J_5$  (Figure 2).

Figure 2: Ideal Points of Justices



At the *certiorari* stage, justices are assumed to be primarily policy oriented with a concern for the opportunity costs incurred from docketing a case. The payoff of justice  $J_i$  from policy  $x \in X$  can be captured by the following utility function:

$$U_i(x) = -(x - Z_i)^2 \tag{1}$$

Note that  $U_i(x)$  decreases as the distance between  $J_i$ 's ideal point and policy  $x$  decreases. Additionally, assume there is a fixed cost  $c$  associated with hearing a case for each justice.

This model is intended to provide insights into the voting behavior of justices in the presence of the Rule of 4 and is not intended to explain its origin or persistence. First, there is a *certiorari* stage where justices vote on whether or not to put a case on the plenary docket. If at least four justices vote to take a case then it proceeds to the merits stage where justices obtain briefed arguments, engage in oral arguments, and then vote on whether or not to reverse or affirm the lower Court decision.<sup>9</sup> It is easy to see the Rule of 4 matters only in those cases where  $J_4$  (or  $J_6$ ) is the pivotal voter at the *certiorari* stage. In addition, as a strategic actor,  $J_4$  (or  $J_6$ ) will only cast a pivotal vote to grant *certiorari* if there is a chance the median justice will vote with him at the merits stage.<sup>10</sup>

In what follows we analyze the general case where  $J_4$  is the pivotal voter under the Rule of 4 (the analysis is identical for the symmetric case where  $J_6$  is the pivotal

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<sup>9</sup>Supreme Court decisions are, of course, typically more complex than a simple “affirm” or “reverse.” In fact, a number of decisions are affirmed in part *and* reversed in part. In addition, the legal reasoning in an opinion can have effects far beyond the simple outcome we model. It is accurate, however, to point out the *primary* concern of many actors in this game is a simple affirmance or reversal. For example, the majority opinion in *NFIB v. Sebelius* (2012) was quite complex but that the Affordable Care Act was left largely intact was the primary concern of most actors involved in the case. Ideally, we would model all of the complexities inherent in these decisions but, in reality, it is not feasible to both do so and retain mathematical tractability.

<sup>10</sup>Because we have used “she” to refer to the median justice, to avoid confusion we use “he” to refer to justice  $J_4$  when necessary.

voter). Suppose a case, or petition,  $P$ , arrives at the Court attempting to reverse the lower court's ruling (i.e. the status quo) and move policy in a liberal direction. At the *certiorari* stage, there is uncertainty regarding the policy implications of  $P$ , which will only be revealed once the case is placed on the Court's docket.<sup>11</sup> In other words, the justices do not know the exact location of the policy outcome  $x$  associated with  $P$  in the policy space; however, they have a prior belief about  $x$  and the belief can be captured by a probability distribution  $F(x)$  over  $X$ , where  $\lim_{x \rightarrow 0} F(x) = 0$  and  $F(x_{SQ}) = 1$ . That is,  $F(x)$  puts positive probability only on  $x \in [0, x_{SQ}]$ , the feasible set of policy revisions from the perspective of the petitioner. We assume generally petitioners do not propose policy revisions that will make them worse off than the status quo. Assume  $f(x)$  is the corresponding probability density function.

If  $J_4$  is the pivotal voter at the *certiorari* stage then the strategic situation unique to the Rule of 4 can be captured by a simple game between  $J_4$  and  $J_5$  (Figure 3). The game has two steps. First,  $J_4$  decides whether or not to grant *certiorari*. If the Courts grants *certiorari* the median justice then decides whether to keep the status quo by affirming the lower court or to change it by reversing and adopting  $P$  after oral argument.

The quadratic utility functions of justices imply that, under the condition of uncertainty, the expected utility for  $J_i$  if the Court rules in favor of  $P$  is:

$$EU_i(P) = -(\mu_P - Z_i)^2 - \sigma_P \quad (2)$$

Where  $\mu_P$  and  $\sigma_P$  are the known mean and variance of  $F(x)$ .  $J_4$  would be the pivotal voter if  $\forall i < 4$ ,  $EU_i(P) - c > U_i(x_{SQ})$ , and  $\forall i > 4$ ,  $EU_i(P) - c < U_i(x_{SQ})$ .<sup>12</sup> The

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<sup>11</sup>Prior work on the Court's decision making process suggests that the justices garner information about the implications of a case from the litigants' briefs and from the oral arguments (see e.g., Johnson 2004).

<sup>12</sup>We impose the usual requirement that justices do not use weakly dominated voting strategies.

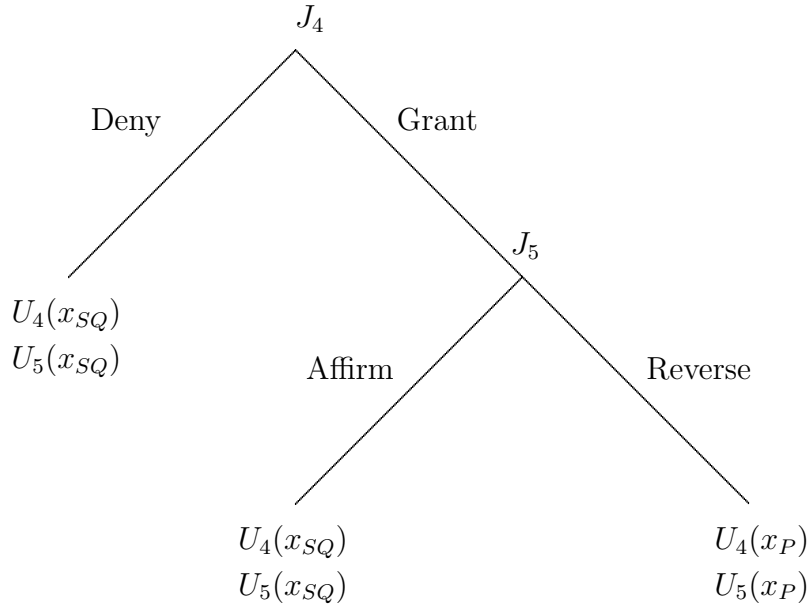


Figure 3: Voting Game When  $J_4$  is Pivotal at the *Certiorari* Stage

strategy of  $J_4$  is to grant or deny *certiorari* to  $P$  where he is the pivotal voter at the *certiorari* stage and the strategy of  $J_5$  is to affirm or reverse the status quo in the merits stage. We solve for the subgame perfect equilibrium by backward induction.

At the merits stage the policy implications of  $P$  are revealed and the justices can locate  $P$  in the policy space at  $x_P$ . The location of the status quo is critical in characterizing the equilibrium, so we discuss the case in which the median justice's ideal point is more liberal than  $x_{SQ}$  and the case in which it is more conservative than  $x_{SQ}$  separately. Suppose  $x_{SQ} \leq Z_5$ , i.e., the status quo is to the left of the median justice's ideal point. Then  $J_5$  will vote against  $P$  in the merits stage since  $x_P$  is farther away from her ideal point than  $x_{SQ}$ . As a result, the status quo will prevail. Given this prospect,  $J_4$  will not grant *certiorari* to  $P$  in the first place since hearing the case is costly and it does not change the final outcome. Proposition 1 characterizes this scenario.



**Proposition 1.** *If  $x_{SQ} \leq Z_5$ , then the equilibrium strategies are that  $J_4$  denies certiorari to a liberal petition and the median justice affirms the status quo at the merits stage.*

The equilibrium outcome of the case is that the status quo prevails. The more interesting case is when  $x_{SQ} > Z_5$ . The median justice will prefer  $x_P$  to  $x_{SQ}$  if  $-(x_P - Z_5)^2 > -(x_{SQ} - Z_5)^2$ .<sup>13</sup> This is equivalent to a strategy for  $J_5$  to cast a vote to overturn on the merits if  $2Z_5 - x_{SQ} < x_P < x_{SQ}$ , which determines the Court's decision. Given  $J_5$ 's strategy,  $J_4$  will vote to grant certiorari to  $P$  if his expected payoff from doing so exceeds that from maintaining the status quo, i.e.,

$$EU_4(\text{grant}) > U_4(x_{SQ}), \quad (3)$$

Where

$$EU_4(\text{grant}) = \int_0^{2Z_5 - x_{SQ}} U_4(x_{SQ})f(x)dx + \int_{2Z_5 - x_{SQ}}^{x_{SQ}} U_4(x)f(x)dx - c. \quad (4)$$

Combining Equations 1–4, we also forward the following proposition.

**Proposition 2.** *If  $x_{SQ} > Z_5$ , then the equilibrium strategies are that  $J_4$  grants certiorari to a liberal petition if  $\int_0^{2Z_5 - x_{SQ}} U_4(x_{SQ})f(x)dx + \int_{2Z_5 - x_{SQ}}^{x_{SQ}} U_4(x)f(x)dx - c > U_4(x_{SQ})$ , and  $J_5$  reverses on the merits if  $2Z_5 - x_{SQ} < x_P < x_{SQ}$  at the merits stage.*

Several outcomes are possible in the equilibrium:  $J_4$  does not vote to grant certiorari;  $J_4$  votes to grant certiorari but the median justice affirms the status quo at the merits stage;  $J_4$  votes to grant certiorari and the median justice reverses the status quo at the merits stage. We can derive a number of hypotheses based on Proposition 2 with respect to  $J_4$ 's strategy at a certiorari stage.

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<sup>13</sup>Note that *ex post*, the sunk cost from hearing a case no longer matters to the median justice's decision.

**Hypothesis 1.** *When the status quo is farther to the right of  $J_4$ 's ideal point the probability that  $J_4$  will vote to grant certiorari to a liberal petition increases.*

To see this, equation (3), the condition for  $J_4$  to grant *certiorari*, can be rewritten and expanded as follows:

$$\begin{aligned}
EU_4(\text{grant}) - U_4(x_{SQ}) &> 0 \\
\int_0^{2Z_5 - x_{SQ}} U_4(x_{SQ})f(x)dx + \int_{2Z_5 - x_{SQ}}^{x_{SQ}} U_4(x)f(x)dx - \int_0^{x_{SQ}} U_4(x_{SQ})f(x)dx - c &> 0 \\
\int_{2Z_5 - x_{SQ}}^{x_{SQ}} [U_4(x) - U_4(x_{SQ})]f(x)dx - c &> 0 \\
\int_{2Z_5 - x_{SQ}}^{x_{SQ}} [(x_{SQ} - Z_4)^2 - (x - Z_4)^2]f(x)dx - c &> 0 \tag{5}
\end{aligned}$$

It is easy to see that equation (5) is an increasing function of  $x_{SQ} - Z_4$ , so as the status quo is further away from  $J_4$ 's ideal point, the condition for  $J_4$  to grant *certiorari* is more likely to be satisfied.

**Hypothesis 2.** *As the distance between the ideal points of  $J_4$  and the median justice decreases, the probability that  $J_4$  will grant certiorari to a liberal petition decreases.*

To see this, let  $\Delta = Z_5 - Z_4$ , and we can rewrite (5) as:

$$\begin{aligned}
\int_{2Z_5 - x_{SQ}}^{x_{SQ}} [(x_{SQ} - Z_5 + \Delta)^2 - (x - Z_5 + \Delta)^2]f(x)dx - c &> 0 \\
\int_{2Z_5 - x_{SQ}}^{x_{SQ}} [(x_{SQ} - Z_5)^2 - (x - Z_5)^2 + 2\Delta(x_{SQ} - x)]f(x)dx - c &> 0 \tag{6}
\end{aligned}$$

Clearly equation (6) is an increasing function of  $\Delta$ , which means that as the distance between the ideal points of  $J_4$  and  $J_5$  increases,  $J_4$  is more likely to grant certiorari to a case; conversely, as the distance decreases,  $J_4$  is less likely to grant *certiorari*.

Perhaps the most interesting hypothesis is when we would expect  $J_4$  to be in the

majority coalition at a merits stage. The probability for this event is:

$$Pr(2Z_5 - x_{SQ} \leq x_P \leq x_{SQ}) = \int_{2Z_5 - x_{SQ}}^{x_{SQ}} f(x)dx. \quad (7)$$

Because the interval  $[2Z_5 - x_{SQ}, x_{SQ}]$  increases as the distance between  $Z_5$  and  $x_{SQ}$  increases, the probability for  $J_4$  in the majority coalition increases, which leads to the following hypothesis:

**Hypothesis 3.** *As the distance between the status quo and the median justice's ideal point increases, the probability  $J_4$  will be in the majority coalition at the merits stage increases.*

Overall, we take the Rule of 4 as given and assume  $J_4$  can force hearing a case by this rule even though the median justice prefers otherwise. Further, once the case is heard, the cost incurred becomes a sunk cost and the median justice is assumed to vote at the merits stage and to disregard the cost. The interesting question, of course, is why would the median justice tolerate such a rule? A possible explanation is that, *ex post*, the median justice is better off revising the status quo to  $x$  even after taking into account the cost of hearing the case. In other words while, *ex ante*, it is not in the interest of the median justice to hear the case, *ex post* it is. And if such cases arise often enough, then it is rational to keep the rule in place. This is consistent with Lax (2003) but without a formal welfare analysis the argument remains a conjecture.

## 4 Data and Empirical Analysis

To test the hypotheses derived from our formal model we rely on discuss list data drawn from Black and Boyd (2007)'s analysis of the Court's agenda setting process

during the 1985, 1986, 1987, 1990, 1991, and 1992 terms of the Rehnquist Court.<sup>14</sup> These data, collected from Justice Harry Blackmun’s papers, contain all cases on the Court’s discuss list. The discuss list is initiated by the chief justice; he places cases on the list to which he thinks the Court should consider granting *certiorari*. In turn, associate justices may add, but not subtract, cases. All cases that do not end up on the discuss list are automatically denied *certiorari* (i.e. they are deadlisted), while those that make it receive a *certiorari* vote at conference.<sup>15</sup>

To test Hypotheses 1 and 2 we need data both on cases granted and denied *certiorari*. In addition, we utilize ideal point estimates in the Judicial Common Space for our ideological measures (Martin and Quinn 2002; Epstein et al. 2007).<sup>16</sup> With these data we estimate the following probit model:<sup>17</sup>

$$J4_{it} = \alpha + \beta_1 CPSQ_{it} + \beta_2 CPCM_{it} \quad (8)$$

The dependent variable,  $J4_{it}$ , is the *certiorari* vote of the pivotal justice in case  $i$ ; it is coded 1 for grant and 0 for deny.<sup>18</sup>  $CPSQ_{it}$ , which we use to test Hypothesis 1, is the distance between the *certiorari* pivot and the status quo in case  $i$ .  $CPCM_{it}$ , which we use to test Hypothesis 2, is the distance between the Court median and the

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<sup>14</sup>For reasons that will become clear below, we only examine cases originating from a Federal Circuit Courts of Appeal.

<sup>15</sup>Note that cases with a summary decision, a grant/vacate/remand, and simple appeals are excluded. Also, note that we excluded 47 cases due to a missing docket sheet in Blackmun’s papers. For a full description of these data and how they were collected, see Black and Boyd (2007).

<sup>16</sup>For a full derivation of how the Common Space Scores are calculated, see Epstein et al. (2007).

<sup>17</sup>We restrict our analysis to cases with fewer than 5 *certiorari* votes. If we include all cases we find similar results for Hypothesis 2, but no empirical support for Hypothesis 1. However, given our theory deals explicitly with cases in which the *certiorari* pivot is *pivotal* we think this is the proper empirical test.

<sup>18</sup>The pivotal justice at the *certiorari* stage is either  $J_4$  (just to the left of the median) or  $J_6$  (just to the right of the median), depending on the ideological direction of the circuit court decision. Thus, because we assume the Court is likely to reverse (Perry 1991), if the lower court decision is liberal, then the pivotal justice is  $J_6$ ; alternatively, if it makes a conservative decision the pivot is  $J_4$ .

*certiorari* pivot.

Table 1: Predicting the Pivotal *Certiorari* Vote

Variable	Coefficient (Std. Err.)
Distance between <i>Certiorari</i> Pivot and Court Median	0.67 (0.24)
Distance between <i>Certiorari</i> Pivot and SQ	0.58 (0.19)
Intercept	-0.76 (0.05)
N	1924
Log-likelihood	-1156.18
$\chi^2_{(2)}$	29.37

The results presented in Table 1 provide considerable support for Hypotheses 1 and 2. First, it is clear that the distance between the *certiorari* pivot  $J_4$  and the status quo affects the *certiorari* pivot’s behavior during the agenda setting process.

Substantively, Figure 4 illustrates that as the distance between the *certiorari* pivot and the status quo moves from its minimum to its maximum value the probability of the pivot voting to grant *certiorari* increases from .25 (with confidence intervals of .22 and .29) to .42 (with confidence intervals of .34 and .52).<sup>19</sup> This is a clear substantive effect and suggests that a pivotal justice who is unhappy with the status quo is much more likely to want to take a case – potentially to reverse the lower court decision. This is consistent with Palmer (1982), who posits the Court is most likely to take cases that the justices want to reverse.

We also find support for Hypothesis 2. Indeed, Figure 5 reveals that as the distance between the *certiorari* pivot and the median justice decreases from its maximum to its

<sup>19</sup>We calculate the predicted probabilities by holding other values at their mean or modal values and by focusing on all cases.

minimum value, the expected proportion of cases in which the pivot will vote to grant decreases from .36 (with confidence intervals of .31 and .42) to .27 (with confidence intervals of .25 and .30). This result is, in some ways, counterintuitive as we might expect the *certiorari* pivot would be hesitant to force cases onto the docket when he is farther away from the median justice because he may fear this policy distance will increase the likelihood of an unfavorable outcome on the merits. However, both our formal and empirical results suggest we are unlikely to see as many cases docketed with only 4 votes when  $J_4$  and  $J_5$  are ideologically close to one another.

The results in Table 1 and in Figures 4 and 5 demonstrate that the *certiorari* pivot plays a critical role at the agenda setting stage of the Court's decision making process. Perhaps the most intriguing aspect of the Rule of 4, however, is why four justices would wish to place a case on the docket if five of their colleagues take the opposite view of the case. As Epstein and Knight (1998) note, the Rule of 4 promotes "forward thinking" on the part of justices. But if the justices' votes or discussion of votes at the *certiorari* stage reveal any information about their preferences at the merits stage, then "forward thinking" might lead them to not place cases with only four *certiorari* votes on the docket. Indeed, the utility of not reviewing a case (thereby maintaining the status quo policy in only one federal circuit or district) is typically higher than to lose and have the winning policy applied nationally.

Additionally, given the long tenure of most justices and the large number of *certiorari* petitions received by the Court each year, a justice facing the prospect of losing on the merits may well find that voting to deny is her best strategy. Thus, the fact that the Rule of 4 is a status quo changing minority right might decrease its utility to a minority. That is, it seems unlikely that a minority coalition would actively try

to change the status quo when a majority is opposed to them doing so. For example, Perry (1991) argues that four justices who regularly voted to grant *certiorari* in obscenity cases, an area in which the Burger Court’s majority was firm, said they would not insist the cases be heard because they knew the other five justices would constitute a regular majority on the merits.

Despite the intuition that a minority should not want to put cases on the agenda, our formal model suggests there are conditions under which the *certiorari* pivot can win on the merits. To test Hypothesis 3, we utilize a different dataset because we are interested in the specific conditions under which the *certiorari* pivot ( $J_4$  or  $J_6$ ) ultimately ends up in the majority coalition on the merits. As such, we use Spaeth’s *Expanded Supreme Court Database* (1999), and his *Burger Court Judicial Database* (2001), so that we can analyze this question on all formally decided cases (with signed opinions) between 1953 and 1985.<sup>20</sup> Using these data we estimate the following probit model.

$$\begin{aligned}
 J4W_{it} = & \alpha + \beta_1 CMSQ_{it} + \beta_2 R4_{it} + \beta_3 R4xCMSQ_{it} \\
 & + \beta_4 MAJ_{it} + \sum_t \beta_{5t} Term_t
 \end{aligned} \tag{9}$$

In this model,  $J4W_{it}$ , the dependent variable, is coded 1 if the *certiorari* pivot is in the winning coalition, and zero otherwise.  $CMSQ_{it}$  is the absolute value of the distance between the Court median and the status quo in case  $i$ , where the status quo is defined as the median of the Circuit Court from which the petition originated.  $R4_{it}$  is a dummy variable coded 1 if a minority coalition forced the case onto the Court’s

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<sup>20</sup>Note that, because we are interested in the two justices immediately to the right and left of the court median, we exclude the 1969 term from this final analysis. There were only 8 justices on the Court for that term and we therefore could not measure the pivots about whom we are interested. Note also, that we use entries with ANALU equal to 0 and 1, and DECTYPE equal to 1, 4, 5, 6, and 7.

docket.  $R4xCMSQ_{it}$  is an interaction term between  $RA_{it}$  and  $CMSQ_{it}$ ,  $MAJ_{it}$  is the number of justices in the majority at the merits stage, and  $Term_t$  are term specific fixed effects.

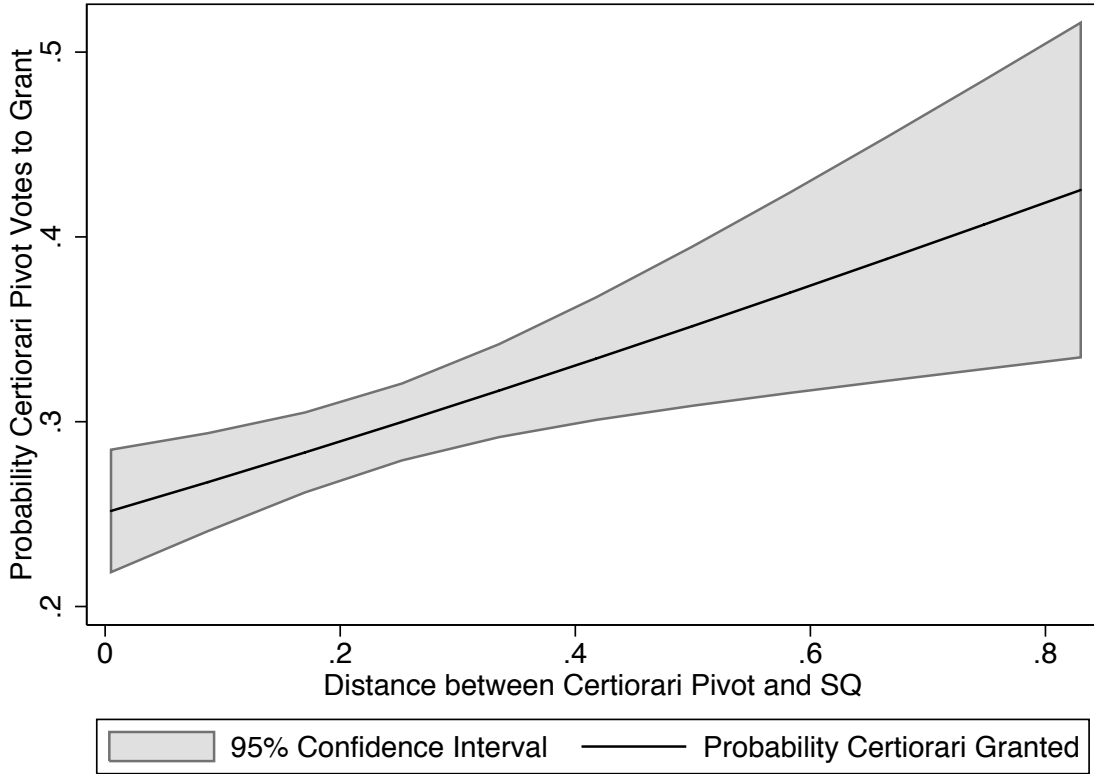
The results we present in Table 2 support Hypothesis 3. Given our interest in the effects of the distance between the Court median and the status quo in cases reaching the Court’s docket with a minority *certiorari* coalition we are most concerned with the combined effect of  $CMSQ_{it}$ ,  $RA_{it}$ , and  $R4xCMSQ_{it}$ . This effect is presented graphically in Figure 6. As the distance between the Court median and the status quo increases, the *certiorari* pivot is both more likely to vote to grant the case and, perhaps more importantly, to end up on the winning side. This suggests the Rule of 4 leads the Court to overturn to ideologically extreme circuit court decisions, which is consistent with Lax’s (2003) model of the Rule of 4.

Table 2: Certiorari Pivot on Winning Side

Variable	Coefficient (Std. Err.)
Distance between Median Justice and SQ	0.57 (0.19)
Rule of 4 Case	0.07 (0.17)
Rule of 4 Case x SQ-Median Distance	-0.19 (0.26)
Number of Justices in Majority	0.61 (0.03)
Intercept	-3.59 (0.41)
N	2674
Log-likelihood	-803.56
$\chi^2_{(37)}$	593.34



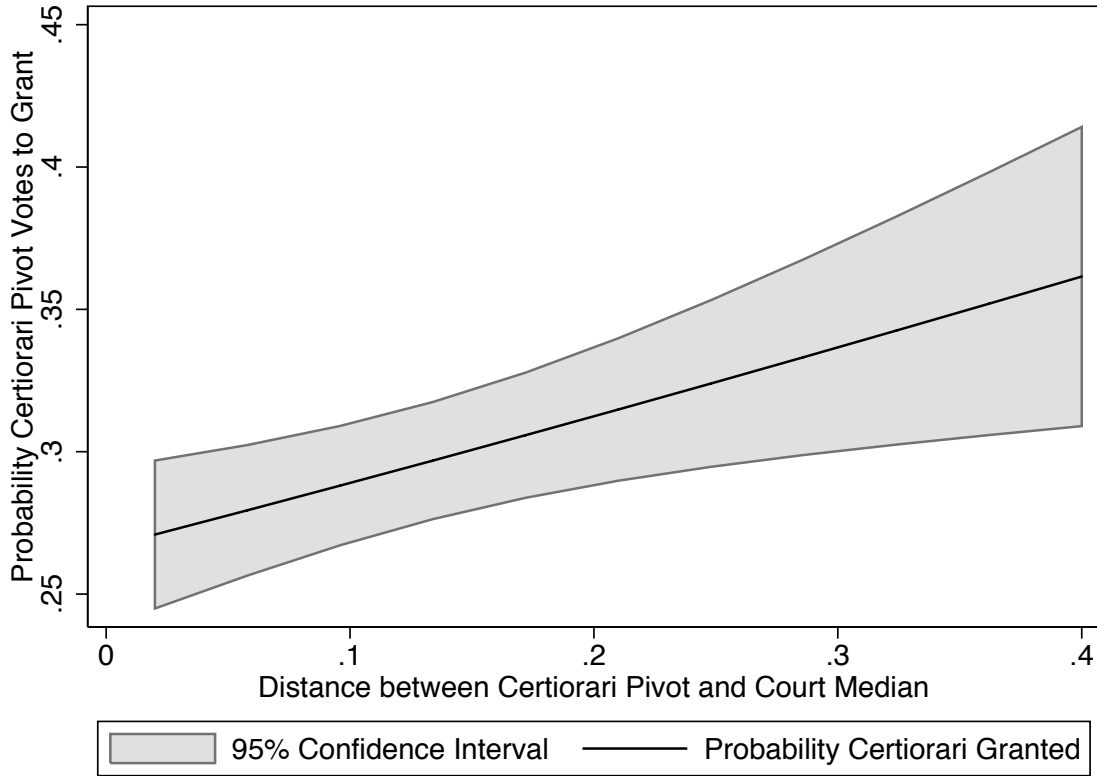
Figure 4: Distance between CP and SQ



## 5 Conclusion

Our analysis of the Rule of 4 reveals important aspects of the strategic interplay of justices during the U.S. Supreme Court’s agenda setting process. We provide the first systematic analysis of when this minority right it is likely to be invoked and when the pivot will be successful in doing so. Thus, we have done exactly what Granato and Scioli (2004) ask that we do—wed formal analysis of political behavior with rigorous empirical tests of the analysis. Second, we forge the way toward solving the selection bias problem inherent in scholarly analyses of the Court’s agenda setting process. In doing so, we follow the lead of Caldeira and Wright (1988); Caldeira and Zorn (1998),

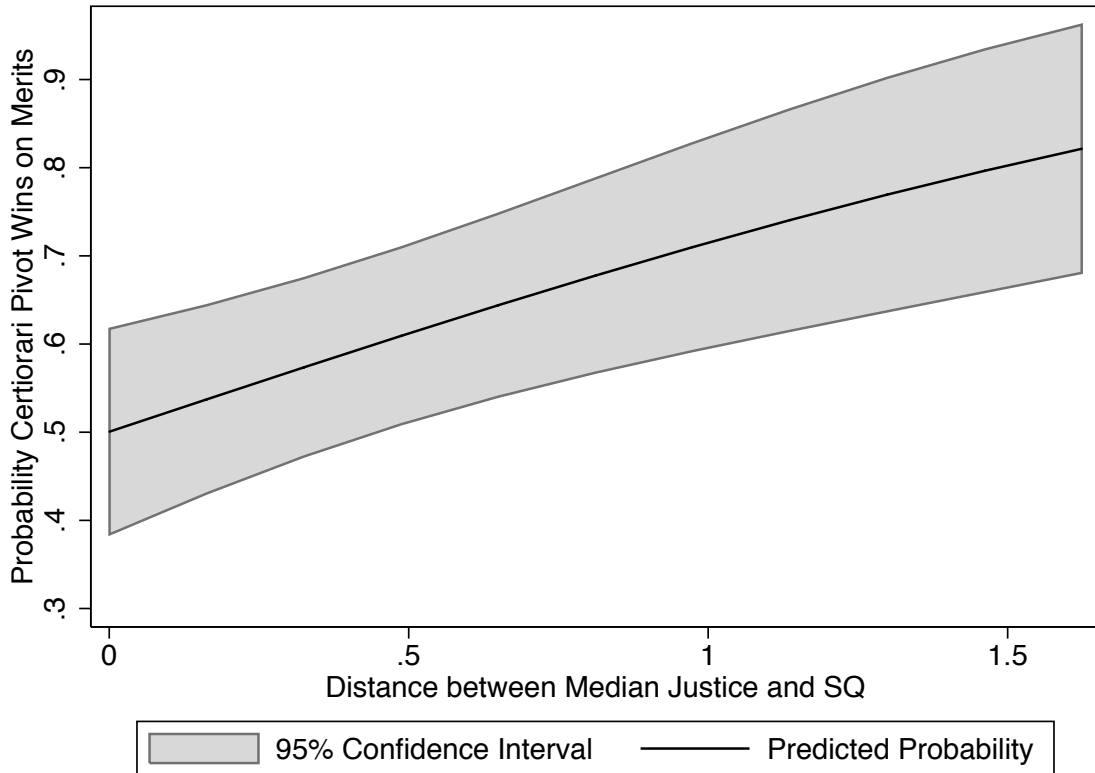
Figure 5: Distance between CP and Median



and Black and Boyd (2007) by utilizing both granted and denied cases in the study of the Rule of 4. In this respect, our findings push our understanding of this process to a new level.

There are also several specific conclusions we highlight here. First, we now understand the conditions that lead the *certiorari* pivot to place a case on the docket against the wishes of a majority of justices. Our formal model predicts that when the *certiorari* pivot is ideologically distant from the status quo policy and/or the median justice, the pivotal justice is more likely to force cases onto the Supreme Court’s plenary docket. We find empirical support for this in our data drawn from a sample of Rehnquist Court discuss list cases. Second, we now understand when the *certiorari*

Figure 6: Does Pivot Win?



pivot is more likely to be on the “winning” side of a case granted with only four votes. Our formal model predicts that this pivotal justice is more likely to win on the merits when the status quo policy and the median justice are ideologically distant. We find considerable empirical support for this prediction as well.

Taken together, our findings demonstrate that the Rule of 4 confers a great deal of power to a “forward looking” minority block of justices. Given that, in a typical term, the Supreme Court hears only around 1 percent of appeals brought to it, the fact that a minority of the justices can force cases onto the agenda gives it substantial agenda-setting power. Our results suggest that the *certiorari* pivot applies this power strategically, typically selecting cases that are the farthest away from his own

ideal point. Additionally, by strategically selecting cases, the *certiorari* pivot uses his agenda power on cases that he is more likely to win. Thus, this is a power that the minority (and other potential) minority coalitions on the Court will continue to use now and into the future.

These findings, then, have implications for the democratic nature of this process. Clearly the Court has anti-democratic tendencies—its justices are not selected by popular election and they sit for life tenure with little or no oversight. These tendencies are exacerbated by the ability of the justices themselves to decide what to decide. As Hartnett (2000) sums up best:

Political scientists are quite blunt about the impact of the Judges' Bill. In short, because of its broad discretion to set its own agenda, the Court is no longer the passive institution with neither force nor will but merely judgment described by Hamilton...The Court also sets its own substantive agenda for policy-making. Indeed, much of the Court's power rests on its ability to select some issues for adjudication while avoiding others. Its ability to set its own agenda permitted it to shed the long-standing image of a neutral arbiter and an interpreter of policy and emerge as an active participant in making policy.

Our results provide competing perspectives on the counter-majoritarian nature of the Court. On the one hand, allowing four justices to set the agenda for the court of last resort in a nation of more than 300 million citizens is vesting enormous power in a small number of individuals. However, our formal and empirical results suggest the primary effect of the Rule of 4 is that minority *certiorari* coalitions choose to grant cases lower courts have decided in a more ideologically extreme manner. In this

sense, the Rule of 4 is unique among minority rights in the United States. The Senate filibuster gained infamy by preserving an extreme status quo—lack of civil rights for African-Americans—despite the legislation being favored by majorities in the United States. Our results on the Rule of 4 suggest that in contrast to the filibuster, this institution allows a minority of justices to force changes to extreme status quo points, thus insuring some sense of moderation for judicial doctrine in the United States. In this way our results are complementary to those of Lax (2003), in that we both find that this minority right serves to nudge policy towards the political center.

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