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The Supreme Court and the Sophisticated Use of DIGs

Michael E. Solimine* and Rafael Gely**

Almost all cases reach the U.S. Supreme Court's merits docket through discretionary grants of writs of certiorari. On rare occasions, the Court will dismiss a writ of certiorari as improvidently granted, or DIG the case. The DIG process has received relatively little attention in the scholarly literature. This article fills that gap in several ways. First, it documents and analyses the 155 cases the Court DIGged in the Warren, Burger, and Rehnquist Courts (1954 through 2004 Terms). Second, the article examines how the Court's decision to DIG a case relates to a number of legal and extralegal factors. Finally, it considers whether DIGs should be conceptualized as, or are sometimes examples of, sophisticated strategic behavior by the Justices.

I. INTRODUCTION

A public institution that is vested with discretion to decide *whether* to decide the merits of a controversy has considerable power on that basis alone. This is true of the U.S. Supreme Court. For over 80 years, since the passage of the Judges' Bill in 1925, the majority of cases reach the merits docket of the Court through discretionary grants of

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writs of certiorari.¹ After certiorari is granted, typically the parties will brief the case, oral argument will be held, the Justices will discuss the case at their conference, and eventually then decide the case through the release of a written opinion. On rare occasions, however, the Court interrupts that process by deciding that they do not want to decide the case, after all. In those instances, they dismiss the writ of certiorari as improvidently granted, or DIG² the case.

Given the importance of the Court's agenda-setting power, legal scholars and political scientists have devoted considerable attention to the certiorari process as a whole.³ They have devoted less attention, however, to DIGs. Some legal scholars have addressed the jurisprudential question of how many votes should be necessary to DIG a case, given the norm that only four votes are necessary to grant certiorari.⁴ Social scientists, addressing the certiorari process, have discussed DIGs in passing.⁵ In both instances, DIGs are usually addressed in an anecdotal fashion, perhaps not surprising given the paucity of numbers of DIGs.

Only recently have DIGs begun to receive systematic treatment in the literature. Hendrickson⁶ documented the DIGs rendered by the Burger Court (1969 through 1985 Terms), and compared the disposition of those cases to the cases decided on the merits by the Court. Among other things, he examined whether the Court was more likely to DIG cases of apparent marginal importance (as determined by the

¹ Almost all of the cases in the past 25 years have reached the Court on a writ of certiorari. Prior to then, a considerable percentage of cases each Term came via putatively mandatory appeals from lower federal courts and state courts. Amendments to jurisdictional statutes in the 1980s reduced such mandatory appeals to a trickle. David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 227 (Norton, 7th ed 2005).

² We use the partial acronym that prevails in the scholarly literature and, apparently, on the Court itself. The common usage for the past tense of a DIG is DIGged, not DUG. H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 39, 106 (Harvard 1991). The term has been characterized as a "rare instance of judicial self-criticism." Michael W. Schwartz, *Our Fractured Supreme Court*, 2008 Pol'y Rev 3, 15 (Feb & March).

³ For a good overview of the considerable literature on the certiorari process, see Barry Friedman, *The Politics of Judicial Review*, 84 Tex L Rev 257, 292-95 (2005).

⁴ For example, Richard L. Revesz and Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U Pa L Rev 1067 (1988); Adrian Vermeule, *Submajority Rules: forcing Accountability upon Majorities*, 13 J Pol Phil 74 (2005).

⁵ For example, Lawrence Baum, *The Supreme Court* 87-88 (CQ Press, 8th ed 2008); Perry, *Deciding to Decide* at 36, 106-09 (cited in note 2); O'Brien, *Storm Center* at 215-16 (cited in note 1).

⁶ Scott A. Hendrickson, *To DIG or not to DIG: Using DIGs to Examine Supreme Court Decision Making and Agenda Setting* (paper presented at 2003 annual meeting of the American Political Science Association).

number of amicus briefs filed in the case), and whether the Court was more likely to DIG, and thus leave intact, a decision below that ruled in an ideological conservative direction. Solimine and Gely⁷ documented all of the DIGs rendered by the Warren, Burger and Rehnquist Courts (1954 through 2004 Terms) and, among other things, examined how often the Court, collectively or through individual Justices, explained why it DIGged a case, and how often the issue raised in a DIGged case returned to the Court in subsequent litigation.

In this article, we extend this literature in several ways. In part II, we provide a brief overview of the certiorari and DIG process, and explore the possible motivations for the Court to DIG a case. In Part III we describe our data, and in Part IV we discuss our results. Part V concludes the paper.

II. A MODEL OF SUPREME COURT DIG DECISIONS

The possibility of the Court DIGging a case has been around as long, it appears, as the certiorari process itself. At hearings in Congress for the Judges' Bill, Justice Willis Van Devanter mentioned that under certain circumstances, such as facts coming to the Justice's attention after certiorari was granted, the Court would DIG the case.⁸ The Court itself stated in 1955, in a case it was DIGging, that it had disposed of over 60 cases that way since 1911.⁹ Often the Court will DIG a case with a simple order so stating. On other occasions, the Court will explain in a published opinion why it is DIGging the case. When it has done so, it has variously stated that a full review of record, often aided by oral argument, reveals that there are jurisdictional or procedural defects that prevent the Court from reaching the issue presented in the writ of certiorari; or that intervening court decisions or statutory changes make it unnecessary or inappropriate to reach the merits of the case; or, in general, that there are changed circumstances that make it appropriate for the Court to DIG the case, rather than decide it on the merits.¹⁰

No statute or formal rule governs the internal processes of the Court in deciding whether to grant certiorari or, subsequently, to

⁷ Michael E. Solimine and Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 Wis L Rev 1421.

⁸ James F. Blumstein, *The Supreme Court's Jurisdiction-Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 Vand L Rev 895, 924 (1973).

⁹ *Rice v Sioux City Memorial Park Cemetery, Inc*, 349 U.S. 70, 78 & n 2 (1955).

¹⁰ For a detailed summary of the various reasons the Court has articulated for DIGging a case, see Eugene Gressman, et al, *Supreme Court Practice* 358-62 (BNA, 9th ed 2007).

DIG a case. Rather, the Court has followed a long-standing informal norm of granting certiorari whenever at least four Justices vote to do so, otherwise known as the Rule of Four. While the voting protocols for DIGs are less clear, it appears that the Court will usually only DIG a case when at least six Justices vote to do so, otherwise known as the Rule of Six. The difference is justified on the basis that if a supermajority vote to DIG a case were not required, then in theory the Rule of Four could be regularly subverted by five Justices who did not vote to hear the case.¹¹

Much of the existing literature on DIGs has been limited to describing the jurisprudential reasons offered by the Justices (when offered at all) in opinions accompanying decisions to DIG. In this article, we extend this literature by exploring various legal and extralegal factors that might be driving the Supreme Court's DIG process and decisions.

There has been a long-standing debate among Supreme Court scholars on whether the Court's *final decision* on a case is primarily motivated by the Justices' "sincere" policy preferences (i.e., the attitudinal model) or by "strategic factors."¹² However, there appears to be widespread agreement that Court's decisions *preceding* the final vote can often be strategic in nature.¹³ For example, scholars from both the attitudinal and strategic camps acknowledge that in deciding whether to grant certiorari on a case, Justices are likely to take into account the anticipated decisions of other actors, including those of other members of the Court. This literature suggests that Justices act strategically in the certiorari stage when they vote based not on their particular policy preferences, but in hopes avoid-

¹¹ Solimine and Gely, 2005 Wis L Rev at 1426-27, 1441-47 (cited in note 7).

¹² The attitudinal perspective assumes that the Justices rely in important and determinative ways on their policy preferences, broadly defined. The strategic perspective assumes that the Justices take into account the anticipated decisions of other political actors, starting with the other members of the Court. Strategic decision makers may sacrifice short-term goals for long-term interests. While the distinction between "strategic" and "attitudinal" models has generated substantial debate in the literature (e.g., Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* 5-21 (Princeton 2006)), recent work suggests that the two models might not be entirely inconsistent. For example, Spiller and Gely argue that to some extent the strategic approach generalizes the attitudinal model. They point out that the strategic model has always recognized that there is a range of policy over which justices may vote their preferences without the fear of reversal. In that sense, the strategic model provides room for other forces (e.g., judicial norms) to affect judicial decision-making process. Pablo T. Spiller and Rafael Gely, *Strategic Judicial Decision Making in The Oxford Handbook of Law and Politics* 34 (Oxford; Keith E. Whittington, R. Daniel Keleman, and Gregory A. Caldeira, eds, 2008).

¹³ Saul Brenner and Joseph M. Whitmayer, *Strategy on the United States Supreme Court* (Cambridge 2009); Thomas H. Hammond, et al, *Strategic Behavior and Policy Choice on the U.S. Supreme Court* (Stanford 2005).

ing or facilitating their most desirable outcome at a later stage. For example, a Justice who might disagree with a lower court decision and would vote to reverse such decision on the merits, might vote to deny certiorari (and forgo the opportunity to reverse) if she believes that the majority of the Court would likely vote to affirm the lower court decision if certiorari is granted.

Given that our focus is on the decision to DIG—one of the type of decisions which as the certiorari decision precedes the final vote on the merits—we adopt the strategic model to the extent that it suggests that the Court's decision regarding whether to DIG a case might be influenced by the Justices' forward looking behavior, which for convenience we refer to as sophisticated behavior.¹⁴

A. Model

The subject matter of the case could affect the decision to DIG. Perhaps certain types of cases are more likely to be DIGged. As any other resource-constrained organization, the Court is likely to consider carefully how to use its limited resources and limited political capital. In order to conserve scarce resources, one would expect the Court to avoid both more complex cases, as well as cases involving particularly politically divisive issues. We can posit that cases raising issues of federal constitutional law are, generally speaking, more momentous and given the indeterminacy of constitutional text more difficult to resolve than those raising federal statutory and other non-constitutional issues.¹⁵ Accordingly, one would expect that the Court may be more willing to DIG constitutional cases, as opposed to non-constitutional ones. Put another way, a DIG may enable the Court to exercise the passive virtue¹⁶ of avoiding decision of a diffi-

¹⁴ For similar nomenclature, see Gregory A. Caldeira, et al, *Sophisticated Voting and Gatekeeping in the Supreme Court*, 15 J L, Econ, & Organ 549 (1999). Spiller and Gely argue that the distinction between the attitudinal and strategic models is particularly blurred at the pre-final vote stages. In particular, they note that it is likely that, forward looking decision making—the essence of the strategic model—is particularly likely at these early decision making stages. Spiller and Gely, *Strategic Judicial Decision Making* at 41 (cited in note 12).

¹⁵ For sources generally advancing this argument, see Lee Epstein, et al, *Dynamic Agenda Setting on the U.S. Supreme Court*, 39 Harv J Legis 395 (2002); Richard A. Posner, *The Supreme Court, 2004 Term, Foreword: A Political Court*, 119 Harv L Rev 31, 38-40 (2005); Richard A. Posner, *The Courthouse Mice*, New Republic at 33 (June 5 & 12, 2006).

¹⁶ We refer here to Alexander Bickel's well-known use of this phrase. He approvingly included a DIG as an example of the Supreme Court periodically declining immediately to decide a difficult or contentious issue of constitutional law. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 126-27 (Bobbs-Merrill 1962).

cult or controversial case of constitutional law, even after an initial decision (by at least four Justices) to review the case. This turn of events might be less likely for lower profile non-constitutional cases.¹⁷ Therefore, under this line of reasoning, we might expect DIG cases disproportionately to consist of constitutional cases, as compared to the Court's merits docket as a whole.

Hypothesis 1: DIGged cases should systematically raise constitutional issues more often than the merits docket as a whole.

We might also expect that the size of the docket will have an effect on the number of DIGged cases. All things being equal, we might expect a larger number of cases to generate more opportunities and incentives for the Justices to DIG cases. As the number of cases which the Court agrees to decide increases, the more strained the Court's resources become. Thus, one would expect that the Court would be more likely to DIG a case when facing a larger docket.

Hypothesis 2: The larger the merits docket, the more likely cases will be DIGged.

¹⁷ Of course, some non-constitutional cases can be complex (e.g., involving indeterminate statutory language) and also politically divisive, and one might expect that the Court might also use the DIG in those cases. Our claim is only that to the extent that the Court is more likely to use the DIG as an avenue to avoid more complex and politically difficult cases, and to the extent that constitutional cases are both more complex and politically momentous than non-constitutional cases, one could use the constitutional/non-constitutional dichotomy as a proxy for the importance of the case. Other scholars have used other measures to gauge the importance of a case, apart from the constitutional/non-constitutional dichotomy we employ. For example, Hendrickson used the rate of amicus filings as a surrogate for the importance of the case, as contrasted to our use of the subject matter of the case. The problem with the use of amicus briefs is that for much of the Rehnquist Court (not studied by Hendrickson) such briefs have been increasingly filed in *all* cases (Ryan J. Owens and Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 *Judicature* 127 (2005)), diminishing its utility to distinguish cases. Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 *L & Soc'y Rev* 807, 829 (2004). Other measures to gauge the significance of Supreme Court decisions that have been advanced are references on the front page of the *New York Times* (Lee Epstein and Jeffrey A. Segal, *Measuring Issue Salience*, 44 *Am J Pol Sci* 66 (2000)), or in law review articles and Congressional hearings (C. Scott Peters, *Getting Attention: The Effect of Legal Mobilization on the U.S. Supreme Court's Attention to Issues*, 60 *Pol Res Q* 561 (2007)). Sometimes a DIG does receive significant attention in the media, such as *Adarand Constructors, Inc v Mineta*, 534 US 103 (2001) (per curiam), which involved the constitutionality of a federal affirmative action program. See Linda Greenhouse, *Supreme Court Dismisses Challenge in Its Main Affirmative Action Case*, *NY Times* at A23 (Nov 29, 2001). Another example is *Medellin v Dretke*, 544 US 660 (2005) (per curiam), which presented the issue of when an American court should give weight to a decision of the International Court of Justice. See Solimine and Gely, 2005 *Wis L Rev* at 1423 n 18 (cited in note 7).

There is a growing literature on the apparent strategic behavior of Supreme Court Justices in general, and regarding the certiorari process in particular.¹⁸ According to this literature, Justices act strategically when they do not vote at an early stage of a voting process for their preferred alternative, in hopes of achieving a more desirable outcome at a later stage. For example, a Justice might vote to *deny* certiorari if she does not want the entire Court to decide the merits of the case, and perhaps affirm a decision she believes was wrongly decided.¹⁹

The cert literature says little about the DIG process as an example, or not, of strategic behavior.²⁰ As discussed earlier, the same reasoning that is made with respect to the strategic certiorari vote could be made regarding the decision to DIG. In theory, the DIG could be used in a strategic way.²¹ For example, if only four Justices vote to grant

¹⁸ For example, Hammond, *Strategic Behavior* (cited in note 13); Caldeira, *Sophisticated Voting* (cited in note 14); Margaret Meriwether Cordray and Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 Ohio St L J 1 (2008).

¹⁹ Margaret Meriwether Cordray and Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 Wash U L Q 389, 411-12 (2004).

²⁰ For example, one book length treatment of the topic makes no mention to DIGs (Hammond, *Strategic Behavior* (cited in note 13)), while another makes only two brief references to the topic (Brenner and Whitmeyer, *Strategy* at 141, 174 (cited in note 13)).

²¹ There are some strictly anecdotal accounts suggesting that Justices might have DIGged a case for what could be called strategic reasons. See Solimine and Gely, 2005 Wis L Rev at 1456-59 (cited in note 7), discussing *Rice v Sioux City Memorial Park Cemetery, Inc.*, 349 US 70 (1955) and *Burrell v McCray*, 426 US 471 (1976) (per curiam). *Rice* involved a challenge to a racially restrictive covenant in contracts involving burial. The Supreme Court eventually DIGged the case after the state passed a law prohibiting such covenants, albeit nonretroactively. The majority explained that the changed circumstances made the case an inappropriate vehicle to render a possibly "divisive" disposition. According to some writers, the outcome is better explained by the time, coming shortly after the controversy generated by *Brown v Board of Education*, 347 US 483 (1954). A majority of the Court may have wished to avoid ruling on a racially charged issue. Stephen L. Wasby, et al, *Desegregation from Brown to Alexander* 134-37 (Southern Illinois 1977); Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 Yale L J 1423, 1472-74 (1994). Two decades later, the Court in *Burrell* DIGged a case raising the important and then-unresolved issue of whether a plaintiff in a civil rights action in federal court must first exhaust all available state administrative remedies. The majority, without an explanatory opinion, DIGged the case. In a cryptic concurring opinion, Justice Stevens variously stated that the opinion below (which held no exhaustion was required) had correctly stated the law, and that at least one Justice who had originally voted to grant certiorari had changed his mind. According to other accounts, different sets of Justices had variously voted to grant certiorari to either affirm or reverse the decision below, but with some vote switching a majority eventually decided to DIG

certiorari, then presumably the remaining five could DIG the case every time. Another possibility is that after a Justice votes at the certiorari stage, the Justice could realize as the case marched on that the vote on the merits will reach an undesirable outcome, so the Justice could try to convince at least four others to DIG the case. Therefore, if the Justices are strategically making the decision to DIG, we would primarily expect to see 5-4 votes. Strategic Justices will presumably ignore the Rule of Six and vote to DIG those cases in which they have voted to deny certiorari.²²

Hypothesis 3: If DIGs are strategic, one would be more likely to observe 5-4 as compared to supermajority DIG votes.

A particularly interesting aspect of Hendrickson's paper is his examination of the ideological direction of the lower court decision being reviewed. Since a DIG leaves the lower court decision intact, a strategic Court might, all things being equal, wish to leave intact a decision that was compatible with an ideological majority of the Court. Moreover, DIGging the case eliminates the possibility that a member of the ideological minority (to put the matter crudely) may be able to convince a member of the majority to switch positions on the merits, thus upsetting expectations that drove the decision to grant certiorari in the first instance. Hendrickson found that 96% of the cases DIGged by the Burger Court were decided conservatively

to avoid confronting the issue. Solimine and Gely, 2005 Wis L Rev at 1458-59 (cited in note 7). A recent exception to the relative lack of attention to DIGs in this literature is Hendrickson (cited in note 6). Focusing on DIGs by the Burger Court, he concluded that the Court was at least in part acting strategically. Not everyone agrees with the strategic account of the decision to DIG. In his study, based primarily on interviews of certain Justices and their law clerks, H.W. Perry concluded that "[u]sually" cases are DIGged for "mundane, jurisprudential considerations." It is quite rare, he continued, for DIGs to be used strategically, because it "would be easily and quickly observed, and it would completely undercut the finality of the cert. conference." Perry, *Deciding to Decide* at 106, 109 (cited in note 2).

²² Arguably, following the Rule of Six could also be considered evidence of strategic behavior where the rule serves as an impediment to DIG cases which five Justices believe, based on legal considerations, should not have been considered at all by the Court. Thus, while one cannot say with absolute certainty that a supermajority DIG vote is nonstrategic, it would appear to be the case that 5-4 DIG votes are likely to be motivated by strategic considerations. To put the point another way, the Rules of Four and Six themselves might be characterized as strategic devices in the first instance, making it difficult to conceptualize all departures from those rules as inevitably strategic. Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* 89-91, 102 (Oxford 2007) (noting that these rules can be used to set institutional agendas and make transparent decisions that are ultimately reached by majority vote). However, given the rules as a baseline, departures from them for anything other than traditional legal reasons can be presumptively characterized as sophisticated behavior.

by the court being reviewed, while only 46% of the cases decided on the merits could be so described. Both measures were statistically significant. Based on these measures and others, Hendrickson concluded that, with various caveats, the DIG process on the Court is motivated by more than the nominal legal considerations.²³

Hypothesis 4: A strategic Court is more likely to DIG cases in which the lower court decision is ideologically consistent with the preferred ideological direction of the majority of the Court.²⁴

Recent work by Hammond, et al. and Maltzman et al. focus on the possibility of strategic decision-making process *within* the Court.²⁵ Hammond et al., identify five stages at which the Justices could behave strategically. First, the Justices must decide whether to hear a case (i.e., the decision to grant a writ of certiorari). Second, after the writ of certiorari has been granted and oral arguments have occurred, the Court meets for what is referred to as the “conference vote,” a preliminary vote on how the case should be decided. Third, at this point the Chief Justice, or the most senior associate Justice in the majority when the Chief Justice is not in the majority, assigns the writing of the majority opinion. Fourth, the author of the majority opinion must try to write an opinion that gains majority support. Finally, each Justice must decide whether to join, concur, or dissent.²⁶

By examining the votes of the individual Justices throughout these five stages, one can identify instances of strategic behavior. For example, Hammond et al. argue that a Court with strategic Justices

²³ Hendrickson, *To DIG or not to DIG* at 18-19 (cited in note 6).

²⁴ Arguably, the broader the applicability of a lower court of appeals decision, the stronger the incentives a strategic Court would have to DIG an ideologically consistent lower court decision. So for example, certain decisions of the U.S. Court of Appeals for the D.C. Circuit are presumably applicable for the entire country, in that review of certain administrative decisions is exclusively vested in that circuit. For example, Clean Air Act, 42 USC § 7607(b)(1) (2000) (review of standards and regulations). See Jacob E. Gersen and Adrian Vermeule, *Chevron as a Voting Rule*, 116 Yale L J 676, 712 n 69 (2007) (giving other examples). In contrast, decisions of the DC Circuit in cases where there is no such exclusive jurisdiction, and almost all decisions of other courts of appeals, are presumably applicable only in the circuit where the court of appeals issuing the decision sits. Samuel Estreicher and Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L J 679, 716, 727 (1989). Accordingly, a liberal Supreme Court might have a stronger incentive to DIG a liberal decision by the DC Circuit, or at least those that fall within that court’s exclusive jurisdiction, than a liberal decision by any other appeals court. In any case, such a liberal court will have a stronger incentive to DIG liberal court of appeals decisions than conservative court of appeals decisions, which is consistent with our hypothesis.

²⁵ Hammond, *Strategic Behavior* (cited in note 13); Forrest Maltzman, et al, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge 2000).

²⁶ Hammond, *Strategic Behavior* at 2 (cited in note 13).

will grant certiorari “if and only if there exists a set of policies that a majority of Justices prefer to SQ [the status quo].”²⁷ That is, strategic Justices will only grant a petition for certiorari if there exists a set of policies that a majority of the Justices prefer to the status quo. If there is no set of policies that the majority of Justices prefer to SQ, it will be wasteful for a strategic Justice to spend any resources hearing and deciding a dispute in which the outcome cannot be changed. In turn, note Hammond et al., in a strategic Court, the Justices that support the grant of certiorari will be the same Justices who support the final opinion, while those who opposed the grant of certiorari will not support the final opinion. Those Justices who voted to grant certiorari are expected to support a final outcome which improves over SQ, while those Justices for whom the final outcome does not improve SQ would have voted to deny certiorari and also against the final outcome itself.

The Hammond et al. model can easily be expanded to incorporate the decision to DIG, particularly as it relates to the certiorari decision. If a Justice who votes to deny certiorari will also vote against the final decision on the merits, it must also be the case that such Justice will also vote to DIG the case since doing so allows that Justice the ability to prevent the realization of a final policy outcome which does not improve over SQ. That is, a Justice that votes to deny certiorari will presumably welcome the opportunity to dismiss the case before the final decision is made. On the other hand, since those Justices that vote to grant certiorari will only do so if there is a set of policies that improve over the SQ, they will not be inclined to DIG a case, since a final vote in the case is better for them than SQ.

Hypothesis 5: If DIGs are strategic, Justices who vote to DIG the case will be the same Justices voting to deny certiorari.

III. DATA

We are interested in providing a fuller and more contextual account of the DIG process on the Supreme Court. To that end, we began by identifying the cases DIGged by the Court during the Warren (1954-1968 Terms), Burger (1969-1985 Terms), and Rehnquist (1986-2004 Terms) Courts, a total of 51 years.²⁸ Like Hendrickson, we coded the cases for several variables, such as the subject matter of the case

²⁷ Id at 221.

²⁸ We used the search term “improvident w/10 grant” in a computer search of the Westlaw database. Given the limits of computer searches, we cannot say with meta-physical certitude that we obtained *every* DIG case, but we are confident we collected virtually every one. Our computer search captured all of the DIG cases cited in the secondary literature cited in this paper.

being DIGged and the voting lineup in the case. We compare the DIGged cases to those where the Court grants certiorari and proceeds to resolve the case on the merits. Similar to Hendrickson, we use the Spaeth's Supreme Court database to test our model.²⁹

From 1954 to 2004, the Court DIGged 155 cases, about three per Term. This represents 2% of all cases decided by the Court during that period. By our measure, 36% of the cases raised at least one issue of federal constitutional law, as compared to non-constitutional issues (e.g., issues of federal statutory or administrative law).³⁰ In 52% of the cases, the Court decision can be characterized as a liberal decision,³¹ while 45% of the cases in that sample involved lower court decisions characterized as liberal.³²

IV. ANALYSIS

We first explore the relationship between the decision to DIG and the type of issue involved in the case. Table 1 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. Consistent with Hypothesis 1, the data demonstrate that compared to all other Court's decisions on the merits during this period, the Court was 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.

Regarding the effect of the docket on the decision to DIG, our results suggest that the docket size does not affect the decision to DIG a case.³³ Figure 1 plots the number of cases decided on the merits

²⁹ The sample was selected using the same criteria as Hendrickson, *To DIG or not to DIG*, at 15 n 21 (cited in note 6).

³⁰ We use the "Auth_Dec" variable in the Spaeth's U.S. Supreme Court Judicial Data Base as the source for the classification. This variable asks a question very similar to the one we ask in our analysis, to wit, "Did the majority determine the constitutionality of some action by some unit or official of the federal government including an interstate compact?"

³¹ We use the "Dir" variable in Spaeth's U.S. Supreme Court Judicial Data Base as the source for the classification.

³² We use the "LCTDIR" variable in Spaeth's U.S. Supreme Court Judicial Data Base as the source for the classification.

³³ We used Lee Epstein et al, *The Supreme Court Compendium: Data, Decisions and Developments* (CQ Press, 4th ed 2007) as the source for the number of total cases decided by the Court per Term.

Table 1. Decision to DIG and Type of Case

	DIGged	Cases Decided on the Merits	Total
Constitutional	98 (64.5%)	2505 (36.12%)	2603
Other	54 (35.5%)	4459 (64.38%)	4513
Total	152	6934	7086

Table presents frequencies. Column percentages in parentheses. *Chi-Square* = 52.09, significant at the .001 level. We could not classify three of the DIGged cases.

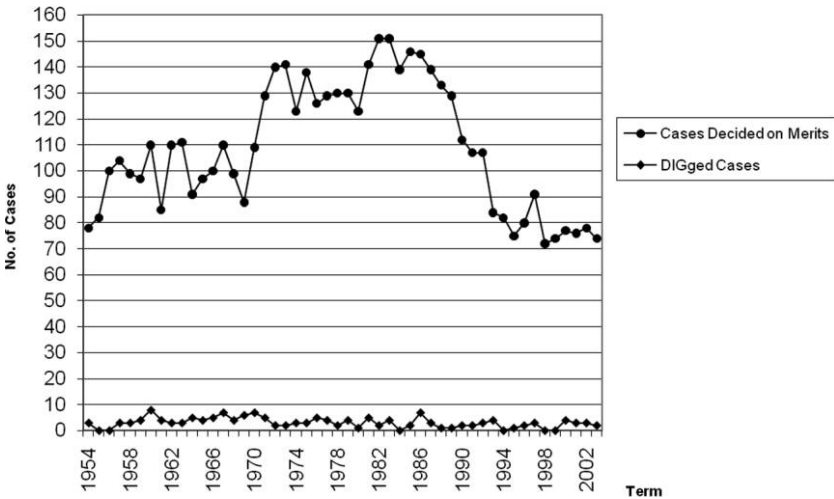


Figure 1. DIGged Cases and Cases Decided on the Merits by Term

and the number of DIGged cases per term. While the number of cases decided on the merits increased from 1954 to 1982 and then decreased to the initial levels (e.g., 78 cases in 1954; 151 cases in 1982; 74 cases in 2004),³⁴ no clear pattern is discernable with regard to the DIGged cases.³⁵ This comparison suggests that contrary to Hypothesis 2, the decision to DIG is not related to the number of cases in the Court’s docket. This somewhat surprising result may suggest that overall number of DIGs are, all things be equal, the result of relatively random and idiosyncratic factors, and that there is not an expected rate of DIGs in any given time period.³⁶

³⁴ Id at 80-81.

³⁵ The two series show a statistically insignificant correlation of $-.02$.

³⁶ This result is interesting since during this same period the Court has changed in several other ways. For example, Calabresi and Lindgren show that during this period the average tenure of service of Supreme Court Justices has increased. Steven G. Cala-

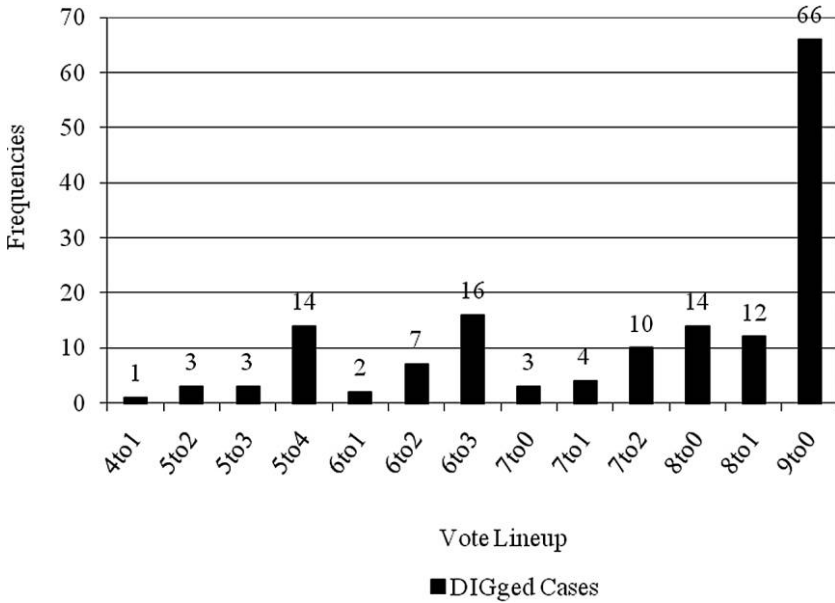


Figure 2. Voting Patterns in DIGged Cases

With respect to the votes on DIGs (Hypothesis 3), our data on point are presented in Figure 2. As documented there, in only fourteen of the 155 cases did the Court DIG with less than a supermajority vote. There were fourteen (9%) examples of a DIG by a 5-4 vote. Eighty-three of the DIGs (53.5%) were decided without recorded dissent. These facts suggest that the norm of a Rule of Six is a durable (though not immutable) one. Knowing that she will not always be in a majority in any given case, or set of cases, it appears that an individual Justice in most instances is willing to leave the Rule of Six intact as an implicit limit on strategic behavior. Individual Justices, and the Court as a whole, may support the Rule of Six to lubricate intra-Court reciprocity and harmony.³⁷

bresì and James Lindgren, *Terms Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv J Law & Pub Pol 770, 777-88 (2006).

³⁷ See Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation, and the Rule of Four*, 15 J Theoretical Pol 61, 70-71 & n 26 (2003); Solimine and Gely, 2005 Wis L Rev at 1448 (cited in note 7); Vermeule, 13 J Pol Phil at 90-92 (cited in note 4). See also Lee Epstein and Jack Knight, *The Choice Justices Make* 121 (CQ Press 1998) (suggesting that “systematic departures from the Rule of Four [i.e., DIGs 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”).

Our data also generally supports the proposition that strategic DIGs will leave intact decisions below that are ideologically compatible with the majority in the Supreme Court (Hypothesis 4). As described earlier, 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.³⁸ Panels (B) and (C) of Table 2 shows that 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, about half of the cases in which the Court issued a decision on the merits were decided conservatively by the lower court. These results indicate, consistent with Hypothesis 4, that a conservative Court is more likely to DIG a conservative lower court decision. The results shown in Panel (A) suggest that a liberally leaning Court is not, however, more likely to DIG liberal Cases. The Warren Court appeared to behave similar to the Burger and Rehnquist Courts, as illustrated by the fact that about ninety-one percent of the DIGged cases were conservative lower court decisions. However, unlike the Burger and Rehnquist Courts, the Warren Court reviewed on the merits more than twice as many conservatively decided than liberally decided lower court decisions.³⁹

In addition to the above descriptive statistics, we conducted logistic regression analysis. Table 3 provides the variable definitions, while Table 4 provides the logistic regression results. We regressed the Court's decision to DIG a case on several variables related to the type of issue involved in the case (ISSUE); the number of cases decided on the merits in a particular term (DOCKET); and the ideological direc-

³⁸ See Hendrickson, *To DIG or not to DIG* at 11 (cited in note 6).

³⁹ 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 decided a much higher proportion of cases where the lower court decision was conservative. Using the Spaeth database, the proportion of conservative to liberal lower court opinions decided by the Warren Court is approximately seventy-five conservative to twenty-five liberal. US Supreme Court Databases. That is, the Warren Court was reviewing conservative lower court opinions more often than liberal ones 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. 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. (Solimine and Gely, 2005 Wis L Rev at 1439 n 74) (cited in note 7). For further discussion of the relationship between the Court's management of its docket and the ideological direction of lower federal court decisions, see Kevin M. Scott, *Shaping the Supreme Court's Federal Certiorari Docket*, 27 Justice Sys J 191, 201-02 (2006).

Table 2(a). Decision to DIG and Direction of Lower Court Decision, Warren Court

	DIGged	Cases Decided on the Merits	Total
Conservative Lower Court Decision	51 (91.1%)	1416 (71.59%)	1467
Liberal Lower Court Decision	5 (8.9%)	562 (28.41%)	567
Total	56	1978	2032

Panel A presents frequencies. Column percentages in parentheses. *Chi-Square* = 10.28 significant at the .001 level.

Table 2(b). Decision to DIG and Direction of Lower Court Decision, Burger Court

	DIGged	Cases Decided on the Merits	Total
Conservative Lower Court Decision	52 (91.3%)	1258 (45.95%)	1310
Liberal Lower Court Decision	5 (8.7%)	1480 (54.05%)	1485
Total	57	2738	2796

Panel B presents frequencies. Column percentages in parentheses. *Chi-Square* = 92.44, significant at the .001 level.

Table 2(c). Decision to DIG and Direction of Lower Court Decision, Rehnquist Court

	DIGged	Cases Decided on the Merits	Total
Conservative Lower Court Decision	34 (85.0%)	974 (48.36%)	1008
Liberal Lower Court Decision	6 (15.0%)	1039 (51.59%)	1045
Total	40	2014	2054

Panel C presents frequencies. Column percentages in parentheses. *Chi-Square* = 21.08, significant at the .001 level.

tion of the lower court decision. This last factor was operationalized with three dummy variables. The variable DIRLCTW captures those cases decided during the Warren court years involving a liberal lower court decision. The variables DIRLCTB and DIRLCTR capture cases decided during the Burger and Rehnquist courts respectively involving a conservative lower court decision.

Consistent with Hypothesis 1, the results indicate that the court is more likely to DIG cases that involve constitutional issues as opposed to non-constitutional issues (ISSUE). Our results also show that

Table 3. Variable Definitions for Analysis in Table 4

Variable	Definition	Mean and S.D.
<i>Dependent Variable</i>		
DIG	Whether the Supreme Court decision in a case is a DIG <i>Source: Solimine & Gely (2005)</i>	$\mu=.02$; s.d.=.15
<i>Independent Variables</i>		
ISSUE	Type of Issue (1=Constitutional; 0=Other) <i>Sources: U.S. Supreme Court Database; Solimine & Gely (2005)</i>	$\mu=.36$; s.d.=.48
DOCKET	Number of Cases Decided on the Merits by Term <i>Source: Epstein, et al. 2007</i>	$\mu=113.52$; s.d.=23.80
DIRLCTW	A dummy variable equal to 1 for cases decided during the Warren Court involving a liberal lower court decision <i>Source: U.S. Supreme Court Database</i>	$\mu=.08$; s.d.=.23
DIRLCTB	A dummy variable equal to 1 for cases decided during the Burger Court involving a conservative lower court decision <i>Source: U.S. Supreme Court Database</i>	$\mu=.19$; s.d.=.39
DIRLCTR	A dummy variable equal to 1 for cases decided during the Rehnquist Court involving a conservative lower court decision <i>Source: U.S. Supreme Court Database</i>	$\mu=.14$; s.d.=.35
Court dummies	Dummy terms for the three courts, with the Warren Court as the excluded group	

contrary to Hypothesis 2, the size of the Court's docket (DOCKET) does not appear to affect the Court's use of the DIGs, as this variable was statistically non-significant. Thus, the smaller dockets of the later Rehnquist Court did not lead to systematically fewer DIGs.

Regarding the ideological direction of the lower court decision, our results show that, as expected, both the Burger and Rehnquist courts were more likely to DIG cases in which the lower court decision was ideologically consistent with the preferred ideological direction of the majority of the Court. That is, both the Burger and Rehnquist courts were more likely to DIG cases involving conservative lower court decisions (DIRLCTB and DIRLCTR). Interestingly, the Warren Court was not more likely to DIG cases in which the lower court

Table 4. Regression Results

Dependent Variable: DIG	
Variable	DIG/ALL SAMPLE (S.D. in parentheses)
INTERCEPT	-3.55*** (.50)
ISSUE	1.26*** (.17)
DOCKET	-.004 (.005)
DIRLCTW	-1.17*** (.47)
DIRLCTB	2.31*** (.43)
DIRLCTR	1.82*** (.42)
BURGER COURT	-2.16*** (.40)
REHNQUIST COURT	-1.79*** (.41)
N	6881
Likelihood Ratio Test	149.09***

*** (significant at .01)

decision was ideologically consistent with a liberal position. The results indicate that the Warren Court was less likely to DIG liberally decided lower court decisions (DIRLCTW).⁴⁰ Thus, to the extent that a decision to DIG an ideologically similar lower court decision is evidence of strategic behavior, the results suggest that the Burger

⁴⁰ Of course, given that the cases the Supreme Court considers is limited by the cases decided by the various lower courts (federal and state court of appeals) the ideological composition of the lower courts could affect the type of cases that the Supreme Court has an opportunity to review. To the extent that the courts of appeals were ideologically homogenous, one might expect them to produce a different mix of cases than what they might produce if they were ideologically mixed. We note, however, than during the period in question, the federal courts of appeals became more homogenous over time, at least as measured in terms of the political composition of the bench. In 1962 (half way through the Warren Court), there were 38 judges appointed by Democratic president, and 37 judges appointed by a Republican president. By 1996 (again about half way through the Rehnquist Court) there were 54 judges appointed by Democratic presidents and 105 judges appointed by a Republican president. This information is gathered from volumes of the Federal Reporter for the respective years.

and Rehnquist courts were more likely to behave strategically than the Warren Court.⁴¹

To explore the relationship between the vote to grant certiorari and the vote to DIG, we collected additional data on how individual Justices' voted from Justice Harry Blackmun's papers ("Blackmun's papers"), on those cases that were DIGged between 1986 and 1994.⁴² The Blackmun papers include "docket sheets" which list all the Justices' votes on certiorari, as well as their votes to DIG a case, among other information.⁴³ Using the docket's sheets we were able to code the individual Justice's certiorari vote (CERTVOTE), as well as the DIG vote (DIGVOTE) in each case. We included the variables used in the earlier analysis: the type of issue involved in the case (ISSUE); the number of cases decided on the merits in each term (DOCKET), and a measure of the ideological direction of the lower court decisions (DIRLCT). We also collected data on three control variables: the ideology of the individual justice as measured by the Martin-Quinn score (IDEOLOGY);⁴⁴ the Justice's tenure at the time the vote to DIG was made (TENURE);⁴⁵ and yearly dummies to account for any time trend effects.

We were able to collect data on a total of 22 cases, which in turn include 189 individual Justices' votes. As described in Table 5, fifty-five percent of the cases in this group involved constitutional issues and 14 percent of the cases involved liberal lower courts decisions. Forty percent of the individual votes involved a vote to grant certiorari and 82 percent of the votes were DIG votes.

⁴¹ Notice also that both court dummy coefficients (BURGER COURT and REHNQUIST COURT) were negative and significant, suggesting that as compared to the Warren Court, the Burger and Rehnquist Courts were less likely to vote to DIG a case.

⁴² The analysis is limited to these eight years since these are the only years currently available on line. We accessed Blackmun's papers online at <http://epstein.law.northwestern.edu/research/Blackmun.html>.

⁴³ The docket sheets include additional information regarding the processing of the case such as the various dates at which decisions were made on the case. Unlike some of the other documents included in the Blackmun's papers, such as the "cert. pool" memos, the docket sheets of the cases we reviewed do not include any extensive annotation by Justice Blackmun.

⁴⁴ Andrew D. Martin and Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 *Pol Analysis* 134 (2002).

⁴⁵ The effect of the TENURE variable is ambiguous. On the one hand, strategic behavior might decrease as a Justice approaches retirement. To the extent that a Justice approaching retirement is less concerned with future retaliation by her colleagues, she might be more likely to engage in strategic behavior. On the other hand, to the extent that the Rule of Six is an institutional norm that is learned and internalized over time, one might observe a more frequent use of DIGs early on the Justices' tenure.

Table 5. Variable Definitions for Analysis in Table 6

Variable	Definition	Mean and S.D.
<i>Dependent Variable</i>		
DIGVOTE	Individual Justice's vote to DIG a case <i>Source: Solimine & Gely (2005)</i>	$\mu=.82$; s.d.=.38
<i>Independent Variables</i>		
ISSUE	Type of Issue (1=Constitutional; 0=Other) <i>Sources: U.S. Supreme Court Database; Solimine & Gely (2005)</i>	$\mu=.55$; s.d.=.50
DOCKET	Number of Cases Decided on the Merits by Term <i>Source: Epstein, et al. 2007</i>	$\mu=121.91$; s.d.=23.04
DIRLCT	Ideological direction of the lower court decision (1=Liberal;0=Conservative) <i>Source: U.S. Supreme Court Database</i>	$\mu=.14$; s.d.=.34
CERTVOTE	Individual Justice's certiorari vote <i>Source: Blackmun's Papers</i>	$\mu=.40$; s.d.=.49
IDEOLOGY	Quinn-Martin Ideology scores <i>Source: Quinn-Martin</i>	$\mu=.07$; s.d.=.2.05
TENURE	Number of years in Court <i>Source: Epstein, et al. 2007</i>	$\mu=13.90$; s.d.=9.03
Year Dummies	Dummy terms for the each year, with 1986 as the excluded group.	

The results presented in Table 6 are consistent with Hypothesis 5. A vote to deny certiorari (CERTVOTE) is positively and significantly associated with a later vote to DIG a case (DIGVOTE). This finding is consistent with strategic voting. If as Hammond et al. suggest, the decision to grant cert. is strategic (in the sense that the Justices who support the grant of certiorari will be the same Justices who support the final opinion, while those who opposed the grant of certiorari will not support the final opinion) then a vote to deny certiorari ought to be positively related to a vote to DIG a case. That is, if the cert. vote is strategic, our results indicate that so is the vote to DIG.⁴⁶

As in the earlier analysis (Table 4), we find that the Justices are less likely to DIG cases involving a liberal decision at the lower court.

⁴⁶ Of course, to the extent that the certiorari vote is non-strategic, then a vote to DIG might not be strategic. If a Justice truly thought a case was not cert-worthy, then she is following her original position by later voting to DIG.

Table 6. Dependent Variable: DIGVOTE

Variable	Coefficient (S.D. in parentheses)
INTERCEPT	-6.47 (7.26)
ISSUE	.36 (.49)
DOCKET	.06 (.05)
DIRLCT	-1.55** (.65)
CERTVOTE	1.10** (.52)
IDEOLOGY	-.07 (.11)
TENURE	-.05* (.03)
N	189
Likelihood Ratio Test	27.00***

***, **, * (significant at .01, .05, .1)

Finally, the TENURE variable, which measures the Justice tenure at the time of the DIG vote is negative and statistically significant, which suggests that Justices are more likely to DIG cases earlier in their careers.⁴⁷ None of the year dummies was significant.

V. CONCLUSION

The DIGs and the Supreme Court's approach when DIGging a case remains, when compared to other aspects of the Supreme Court practice, a relatively unknown procedure. In this article, we explore some issues related to this relatively infrequently used, yet consistent feature, of the Supreme Court docket. Following the work of Hendrickson we seek to provide both a theoretical framework as well as an empirical test of the Court use of this somewhat rare event. In particular, our article seeks to provide a better understanding of DIG process by providing a description of the frequency with which this event occurred during the Warren, Burger and Rehnquist Courts. We also seek to advance the theoretical understanding of those inter-

⁴⁷ As mentioned earlier (note 45) to the extent that the decision to DIG is strategically motivated, a Justice might be more likely to vote to DIG a case as she gets closer to retirement. Our results, however suggests that Justices are more likely to DIG earlier in their tenure. This result suggests that the use of DIG might be affected by institutional norms, which the Justice is more likely to follow as her tenure increases.

ested in Supreme Court decision making, by exploring the factors that are likely to affect the Court's decision to DIG a case.

Our analysis suggests that DIG behavior of the Court is consistent with the strategic model, at least to some extent. The Burger and Rehnquist Courts were more likely to DIG and thus leave intact decisions that were decided in a conservative direction by the lower court. Likewise, cases raising constitutional issues were more likely to be DIGged, suggesting that the Court is apt to use the device to avoid the apparently more difficult and contentious issues raised by those cases. Our examination of the Blackmun papers indicates that a vote to deny certiorari is associated with a later vote to DIG a case, which is suggestive of strategic behavior. On the other hand, the relatively small number of DIGs that are not by supermajority votes indicates that the Court is faithfully following the Rule of Six (albeit with a few exceptions), which we argue is inconsistent with the strategic model of DIG decision making.

Several avenues of additional research are suggested by our analysis. Almost all of the DIGs occur after oral argument has taken place. This suggests that additional information is brought to the Court's attention at that point, relevant to the decision to DIG, which is not found in papers filed at the certiorari stage.⁴⁸ Alternatively, it might suggest that the initial discussions among the Justices at the conference immediately following oral argument lay the groundwork for a DIG. The influence of the Justice's law clerks on the certiorari process has also lately received increased scholarly attention. Some of that literature suggests that the clerks who are part of the "cert. pool" (i.e., the clerks of the Justices other than John Paul Stevens and Samuel Alito who prepare and share memorandum recommending whether certiorari petitions should be granted) are "embarrassed" by or "dread" a case being DIGged.⁴⁹ In a similar fashion, for about the same period there has developed a specialized group of attorneys that regularly represent clients in the Supreme Court, at both the certiorari and merits stages.⁵⁰ Both the certiorari pool and the growth

⁴⁸ See Timothy R. Johnson, et al, *The Influence of Oral Arguments in the U.S. Supreme Court*, 100 Am Pol Sci Rev 99 (2006).

⁴⁹ Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The 'Cert Pool'*, NY Times at A21 (Sept 26, 2008); Peter B. Rutledge, *Clerks*, 74 U Chi L Rev 369, 389 n 48 (2007); David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 Tex L Rev 947, 975 (2007).

⁵⁰ See Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* (Virginia 1993); Richard L. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo L J 1487 (2008); John G. Roberts, Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J Sup Ct Hist 68 (2004); Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and its Effect on Certiorari*, 9 J App Prac & Pro 175 (2007).

of a sophisticated Supreme Court bar might suggest that the Justices, with the aid of their clerks, and of lawyers, would be better able to screen out cases that are liable to be DIGged. Further exploration of these and other influences will give us a fuller picture of the use of the DIG by the Court as a whole and by individual Justices.