

The Will of the Minority: The Rule of Four on the United States Supreme Court¹

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1 Introduction

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

Much attention has been accorded status quo preserving powers of minority coalitions, such as the Senate filibuster, (Binder and Smith, 1997; Krehbiel, 1998), and the presidential veto (Cameron, 2000), however, little work to date has analyzed 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 the term because it takes four votes rather than five (a minimum winning majority coalition) to place a case on the plenary docket. We contend that the Rule of 4 is unique because it allows a minority of justices to both set the agenda of the Supreme Court and to force a change to the status quo rather than simply preserving it. 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 reversing

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the ruling of the lower court altogether.¹

This is a unique power for a minority of justices because it acts as a sharp constraint on majority tyranny at the Court's agenda setting stage. Kurland and Hutchinson (1983, 645) put it succinctly, "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 worries at least one other justice. Justice John Paul Stevens (1983, 19) has pointed out that:

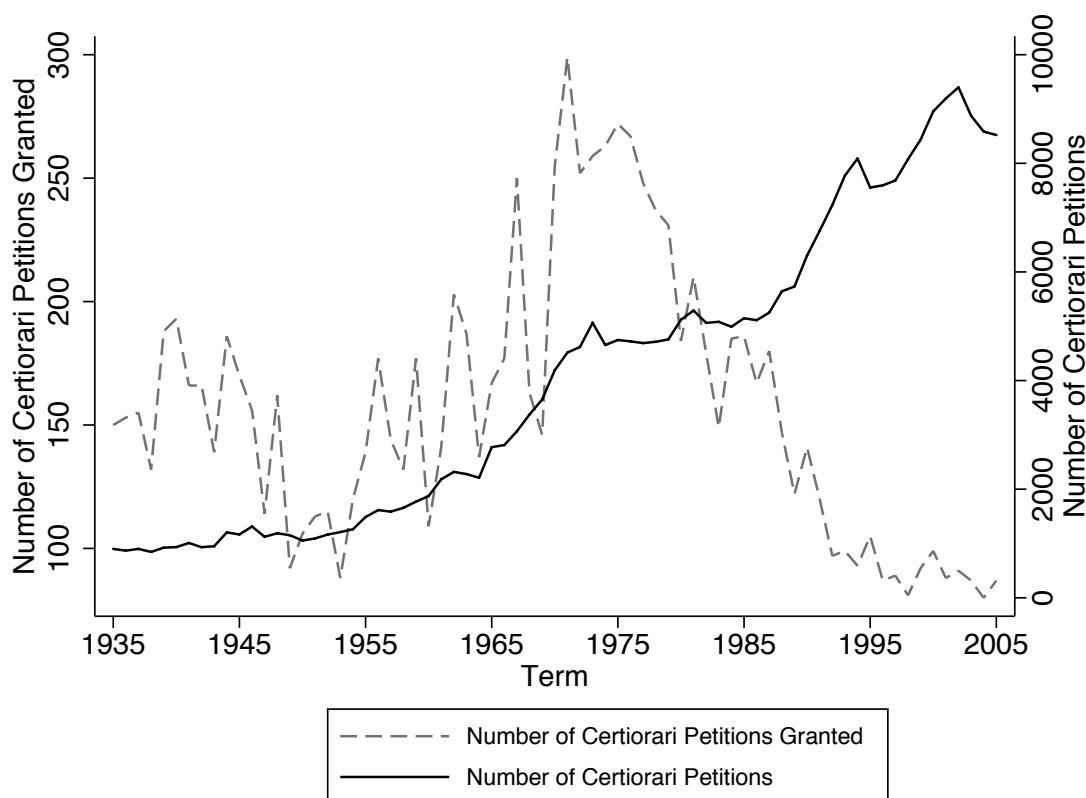
Every case that is granted on the basis of four votes is a case that five members of the Court thought should not be granted. For the most significant work of the Court, it is assumed that the collective judgment of its majority is more reliable than the views of the minority.

Granting agenda-setting power to a minority of justices on the Court is important due to the vast disconnect between the number of petitions that the Court receives and the number they ultimately agree to hear. As Figure 1 reveals, the Court regularly receives thousands of petitions for certiorari while agreeing to hear fewer than 100 typically. Thus understanding what the Court decides to decide is in many ways paramount to understanding how they decide. Given the centrality of the Court's agenda to its impact on litigants, citizens, and lawmakers, 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 case on the Court's docket against the wishes of the majority. In addition, we explore the success of

¹The Supreme Court can and does DIG (Dismiss as Improvidently Granted) cases that have been granted *certiorari*, in these cases the lower court ruling stands and the status quo is preserved.

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 (Granato and Scioli, 2004).²

Figure 1: Supreme Court Petitions and Caseload



The paper proceeds as follows. In the next section we review the few existing works that explore the Rule of 4 either qualitatively, formally, or quantitatively. From there we provide our model that explores the conditions under which we would expect the pivotal justice to invoke the Rule of 4, as well as when granting a case under this rule will be successful. This model leads to explicit hypotheses about these two parts of

²For reasons that will become clear below, we only examine cases originating from one of the Federal Circuit Courts of Appeal.

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 such minority rules mean for democratic processes more generally.

2 Existing Literature

Scholars have written extensively about the Supreme Court’s agenda-setting process (Caldeira et al., 1999; Boucher and Segal, 1995; Perry, 1991; Krol and Brenner, 1990; Palmer, 1990; Brenner and Krol, 1989; Brenner, 1989), but there has been little systematic exploration of the Rule of 4 that governs this process. In this section we review the extant literature, beginning with a synopsis of the rule’s history, and then summarize the relevant legal and political science scholarship on the Rule of 4.

2.1 History, Legal Scholarship, and the Rule of 4

As many scholars note, the historical record on the origination of the Rule of 4 is incomplete (Stevens, 1983; Revesz and Karlan, 1988; O’Brien, 1997; Epstein and Knight, 1998; ?). We do 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 that 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 Willis Van Devanter appeared before the House Judiciary Committee during its hearings on the Judges' Bill.³ 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).

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.

Hartnett (2000) notes that Justice Sutherland, sitting with Justice Van Devanter, tried to highlight this point by questioning his colleague: "Even though a majority be against it?" Van Devanter answered:

Yes. For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case the petition should be granted.

³In 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."

A decade later, Chief Justice Hughes reiterated Justice 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 rather than by a majority.

Existing empirical work on the Rule of 4 has focused almost exclusively on how it affects the size of the Court’s docket each term. For instance, Justice John Paul Stevens (1983) argues that the Rule of 4 comes into play in about 25 percent of all cases that make the discuss list.⁴ 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. Specifically, he finds that 22 percent of cases decided during this term were granted *certiorari* with only four votes.

Perry and Carmichael (1986) take the question of case selection a bit further. They seek to 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 then it should keep the Rule of 4. Thus, normatively, they argue that if the Court believes it should decide more than just the most significant cases it should not abandon its long lasting

⁴The 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.

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 Justice Stevens, the quarter of all cases docketed with fewer than five votes presents 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 if they only take cases with a majority vote on *certiorari*.

Recently 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.⁵

What the scholarship to date has failed to address is why a minority coalition would want to place a case on the docket when five of their colleagues could either vote to dismiss a case as improvidently granted (DIG) at the plenary stage, or simply outvote them at the merits state.⁶ After all, on the surface the Rule of 4 for granting certiorari is incompatible with the rule that a simple majority of justices can vote to DIG or dismiss a case thus setting up a potentially endless cycle between granting

⁵Liptak'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.

⁶As 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."

and dismissing a case (Riker, 1988). Two explanations have been given in the literature for why this is not the case. On the former point 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." Provine (1980, 157) 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." Her conclusions are 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 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). While 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.

2.2 Strategy and the Rule of Four

While the analysis provided by legal scholars is both theoretically and empirically unsatisfying, several political scientists have attempted to systematically analyze the Rule of 4 and, in two instances, have presented formal models of the process. In his seminal work on Supreme Court agenda setting, Perry (1991) argues that 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. Epstein and Knight (1998) go a step further than Perry by providing anecdotal evidence from several cases 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 anecdotal 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 on the Court. 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 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 that 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. Schwartz does not, however, empirically test the predictions derived from his model

Lax (2003) presents the only published formal model of the Rule of 4 in an effort to explain the impact this rule has on lower court compliance with Supreme Court decisions. He finds that the Rule of 4 actually benefits the median justice of the Court because it forces lower court decisions to be more compliant with the Court's majority opinions on the merits.

While Schwartz and Lax provide insight into how the Rule of 4 affects Supreme Court decision making, neither of them empirically tests the equilibrium results.

Certainly, Lax’s analysis is 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 predominant concern of Supreme Court justices. It seems unlikely that the justices would have developed, and would continue to maintain, such a rule simply to ensure lower court compliance. After all, if Stevens (1983) is correct, eliminating the Rule of 4 would reduce the Court’s caseload by 25% and would free up resources of the median justice so that she could monitor lower courts more effectively—without the benefit of a Rule of 4.

Overall, we find the previous scholarship on the Rule of 4 informative, but we think it leaves the important question of why a minority coalition would choose to form to force the hearing of a case unanswered. To tackle this question we develop a game-theoretic model to understand the implications of the Rule of 4 by building on two insights in the existing literature: (1) justices engage in strategic behavior, and a pivotal justice under the rule of four will take into account possible outcomes at the merits stage when deciding whether or not to grant *certiorari* to a case; (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.

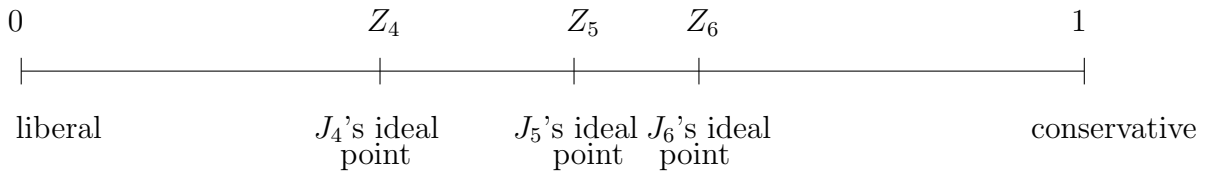
3 The Model

In this section we develop a simple game-theoretic model to study the implications of the rule of four.⁷ We assume that the policy space is one-dimensional and continuous.

⁷In other words, the model is not intended to give an explanation as to why the rule of four exists; rather, it takes the rule as given and examines its implications on the voting behavior of justices.

Without loss of generality, assume that the set of alternatives is $X = [0, 1]$, where 0 represents the most liberal and 1 represents the most conservative policy positions. Let Z_i denote justice J_i 's ideal point ($i = 1, \dots, 9$), and it is common knowledge. Moreover, assume that $Z = \{Z_1, \dots, Z_9\}$ is ordered so that $\forall i < n, Z_i < Z_{i+1}$. In particular, Z_5 is the ideal point of the median justice, or J_5 (Figure 2).

Figure 2: Ideal Points of Justices



At the *certiorari* stage, justices are assumed to be policy oriented with a concern for the cost incurred from docketing a case. Let $x_{SQ} \in X$ be the status quo policy. The payoff of justice J_i from policy $x \in X$ can be captured by the following utility function:

$$U_i(x) = -(x - Z_i)^2 - c \quad (1)$$

Where c is a known fixed cost associated with hearing a case. Note that $U_i(x)$ is decreasing both in the distance between J_i 's ideal point and policy x , and the cost.

Our model mimics the decision-making process on the Supreme Court. First, there is a *certiorari* stage where justices vote on whether or not to put the case on the docket and decide its merits. If at least four justices vote to grant it, then the case proceeds to the merits stage, in which justices hear oral arguments in the case and then vote on whether or not to reverse or affirm the ruling of the lower Court. It is easy to see that the Rule of 4 matters only in those cases where J_4 (or J_6) is

the pivotal voter in 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 that the median justice will vote with him at the merits stage.⁸

In what follows we analyze the case where J_4 is the pivotal voter under the Rule of 4; the symmetric case where J_6 is the pivotal voter can be analyzed similarly. Suppose a case, or petition, P , arrives at the Court attempting to revise the lower court's ruling (i.e. the status quo) in the 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.⁹ 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. In other words, we assume that, in general, petitioners do not propose policy revisions that will make them worse off than the status quo. Assume that $f(x)$ is the corresponding probability density function.

With J_4 as the pivotal voter in a *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 2), where J_4 decides whether or not to grant a hearing to a case at the *certiorari* stage, and in the case a hearing is granted, the median justice decides to keep the status quo by affirming or reversing and adopting P after oral argument.

The quadratic utility functions of justices imply that under the condition of un-

⁸For the ease of exposition, we sometimes refer to justice J_4 as “he” and the median justice “she.”

⁹Prior 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).

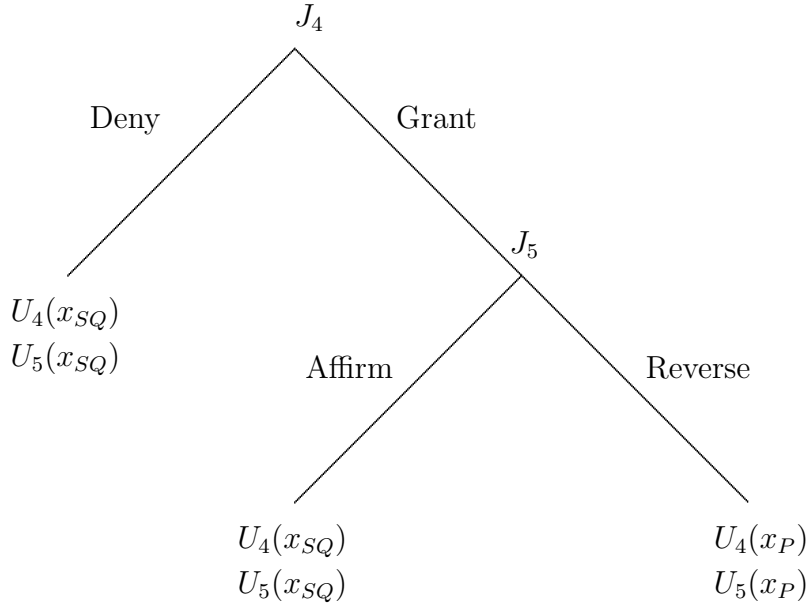


Figure 3: Voting Game When J_4 is Pivotal at the *Certiorari* Stage

certainty, the *expected utility* for J_i if the Court rules in favor of P is:

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

Where μ_P and σ_P are the known mean and variance of $F(x)$. Given the parameters and the common knowledge of justices' ideal points, J_4 knows when he is the pivotal voter at the *certiorari* stage. This would be the case if $\forall i < 4, EU_i(P) > U_i(x_{SQ})$, and $\forall i > 4, EU_i(P) < U_i(x_{SQ})$.¹⁰ The strategy of J_4 is to grant or deny *certiorari* to a case where he is the pivotal voter, 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 of the game by backward induction.

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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

¹⁰We impose the usual requirement that justices do not use weakly dominated voting strategies.

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 in equilibrium J_4 will not vote to grant certiorari to a liberal petition, and the status quo prevails.*

Next, consider the case that $x_{SQ} > Z_5$. The median justice will prefer x_P to x_{SQ} if $-(x_P - Z_5)^2 > -(x_{SQ} - Z_5)^2$.¹¹ 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 policy. Given J_5 's strategy, J_4 will vote to grant *certiorari* in case P if his expected utility from doing so outweighs that from maintaining the status quo, i.e.,

$$EU_4(\text{grant}) > U_4(x_{SQ}), \quad (2)$$

Where

$$EU_4(\text{grant}) = \int_0^{2Z_5 - x_{SQ}} U_4(x_{SQ})f(x)dx + \int_{2Z_5 - x_{SQ}}^{x_{SQ}} U_4(x)f(x)dx. \quad (3)$$

Combining Equations 1–3, we have the following proposition.

Proposition 2. *If $x_{SQ} > Z_5$, then in equilibrium J_4 will vote to grant certiorari to a liberal petition if $\int_0^{2Z_5 - x_{SQ}} U_4(x_{SQ})f(x)dx + \int_{2Z_5 - x_{SQ}}^{x_{SQ}} U_4(x)f(x)dx > U_4(x_{SQ})$. At the merits stage, J_5 will reverse on the merits if $2Z_5 - x_{SQ} < x_P < x_{SQ}$.*

¹¹Note that *ex post*, the sunk cost from hearing a case no long matters to the median justice's utility.

The two propositions give us a number of hypotheses regarding J_4 's voting strategy at a *certiorari* stage. The first hypothesis is derived from Proposition 1 straightforwardly, and the rest are derived from Proposition 2.

Hypothesis 1. *As the distance between the status quo and the median justice's ideal point increases in the conservative direction, the probability that J_4 will vote to grant certiorari increases.*

The reason is that there is a wider range of policies that will receive a reverse vote from the median justice after oral arguments and all these policies are better than the status quo for J_4 . Specifically, the second term in Equation 3 is increasing in $(x_{SQ} - Z_5)$.

Hypothesis 2. *As the distance between the status quo and J_4 's ideal point increases in the conservative direction, the probability that J_4 will vote to grant certiorari increases.*

The intuition is that when the status quo payoff is very low for J_4 , it is easier to satisfy Equation 2; in other words, there are more chances that J_4 can improve his payoff by pushing for a case to be heard.

Hypothesis 3. *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 conservative petition decreases.*

To see this, from Equation 3 J_4 's expected utility from granting certiorari is

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

and J_5 's expected utility from hearing the case is

$$EU_5(P) = \int_0^{2Z_5 - x_{SQ}} U_5(x_{SQ})f(x)dx + \int_{2Z_5 - x_{SQ}}^{x_{SQ}} U_5(x)f(x)dx. \quad (4)$$

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When J_4 's ideal point is very close to J_5 , $EU_4(\text{grant})$ is similar in magnitude to $EU_5(P)$. Given that the median justice finds $EU_5(P) < U_5(x_{SQ})$, and thus votes *against* to grant certiorari, it is unlikely that J_4 finds the condition $EU_4(\text{grant}) > U_4(x_{SQ})$ satisfied in this case.

Perhaps the most interesting hypothesis is regarding when we would expect J_4 to be in the majority coalition in a merits stage. This will be the case when the median justice votes to reverse at the merits stage even though she voted against hearing the case at the *certiorari* stage. The probability for this event is

$$Pr(2Z_5 - x_{SQ} \leq x_P \leq x_{SQ}) = \int_{2Z_5 - x_{SQ}}^{x_{SQ}} f(x)dx \quad (5)$$

Since the interval $[2Z_5 - x_{SQ}, x_{SQ}]$ gets larger as the distance between Z_5 and x_{SQ} gets larger, and thus the probability for J_4 in the majority coalition gets larger. So, we have the following hypothesis:

Hypothesis 4. *As the distance between the status quo and the median justice's ideal point increases in the conservative direction, the probability that J_4 will be in the majority coalition at the merits stage increases.*

In all of the above analysis, we take the Rule of 4 as given and assume that J_4 can force hearing a case on the Court by the rule even though the median justice prefers otherwise. Furthermore, 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 then the median justice would 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, however, the argument remains a conjecture.

4 Data and Empirical Analysis

To determine the relationships posited in our formal model between the *certiorari* pivot, the Court median, and the status quo of a case, we largely 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. These data, which were collected from Justice Harry Blackmun's papers, contain all cases that were on the Court's discuss list. The discuss list is initiated by the Chief Justice who places the cases that he thinks the Court should discuss granting *certiorari* to on the list. Other justices may add, but not subtract, cases to the discuss list. All cases not on the discuss list are automatically denied *certiorari* (i.e. deadlisted), while those on the discuss list receive a *certiorari* vote at conference.

¹² To test Hypotheses 1, 2, and 3 it is necessary to have data both on cases that were granted and denied *certiorari*, thus we can only use data for the limited number of terms in which we have discuss list data. We also employ ideal point estimates in the Judicial Common Space for our ideological measures (Martin and Quinn, 2002; Epstein et al., 2007).¹³ Using these data we test Hypotheses 1, 2, and 3 by estimating

¹²Note that cases with a summary decision, a grant/vacate/remand, and simple appeals are excluded. Also, note that 47 cases were excluded 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).

¹³For a full derivation of how the Common Space Scores are calculated, see Epstein et al. (2007).

the following probit model.

$$\begin{aligned}
 J4_{it} = \alpha + \beta_1 CMSQ_{it} + \beta_2 CPSQ_{it} + \beta_3 CPCM_{it} \\
 + \beta_4 CV_{it} + \sum_t \beta_{5t} Term_t
 \end{aligned} \tag{6}$$

Where $J4_{it}$, the dependent variable, is the *certiorari* vote of the pivotal justice in case i coded 1 for grant and 0 for deny.¹⁴ $CMSQ_{it}$, which is employed to test Hypotheses 1, 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.¹⁵ $CPSQ_{it}$, which is employed to test Hypothesis 2, is the distance between the *certiorari* pivot and the status quo in case i , $CPCM_{it}$, which is used to test Hypothesis 3, is the distance between the Court median and the *certiorari* pivot, CV_{it} is the number of *certiorari* votes cast in the case, and $Term_t$ are term-specific fixed effects. The results of this model are presented in column 2 of Table 1. Column 3 of Table 1 presents an alternative specification in which we only use cases that receive less than 5 *certiorari* votes and we drop the CV_{it} term.

The results provide considerable support for Hypotheses 2 and 3, but little support for Hypothesis 1. The parameter estimate for the distance between the median justice and our measure of the status quo is neither signed in the expected direction, nor is it statistically significant. Thus, we cannot say that the median justice’s ideological distance from the status quo has any bearing on whether the Court is more or less likely to grant *certiorari*.

¹⁴The 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 , while if it makes a conservative decision it is J_4 .

¹⁵This is admittedly an imperfect measure of the status quo, but it is the best alternative available to us at this time. We do think that the blunt nature of this measure biases our results downward. An alternative measure would be to use the status quo as defined by Bonneau et al. (2007), but given that they use *certiorari* votes to determine the status quo, we are not comfortable using their measure due to the fact it is endogenous to our dependent variable.

Table 1: Predicting the Pivotal Certiorari Vote

Variable	All Cases	Non-Majority Cases
	Coefficient (Std. Err.)	Coefficient (Std. Err.)
Distance between Court Median and SQ	-0.22 (0.29)	-0.58 (0.32)
Distance between Certiorari Pivot and SQ	0.76 (0.25)	0.95 (0.27)
Distance between Certiorari Pivot and Court Median	-2.10 (0.35)	-1.95 (0.37)
Number of Certiorari Votes to Grant	0.49 (0.02)	
1986 Term	-0.52 (0.13)	0.14 (0.13)
1987 Term	-0.78 (0.14)	-0.82 (0.14)
1986 Term	-1.01 (0.18)	-1.07 (0.18)
1991 Term	-1.76 (0.15)	-1.58 (0.15)
1992 Term	-0.51 (0.15)	-0.47 (0.15)
Intercept	-0.79 (0.15)	0.25 (0.14)
Number of Cases	2938	1924
Log-likelihood	-1228.1	-1016.76
χ^2	1614.67	308.20

However, we do find considerable support for Hypothesis 2, 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, as Figure 4 illustrates, 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 .43 (with confidence intervals of .38 and .48) to .67 (with confidence intervals of .57 and .78).¹⁶ This is a considerable 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. The results are quite similar when fewer than five justices vote to grant plenary review, although the effect is slightly smaller. When the pivot is closet to the status quo, there is a .20 (with confidence intervals of .16 and .24) probability of him voting to grant, while this increases to .48 (with confidence intervals of .36 and .61) when he is farthest from the status quo. This is consistent with work that suggests the Court is most likely to take cases that the justices want to reverse Palmer (1982).

We also find support for Hypothesis 3. As Figure 5 reveals, as the distance between the *certiorari* pivot and the median justice decreases from its maximum to its minimum value, the expected proportion of cases in which the pivot will vote to grant increases from .29 (with confidence intervals of .22 and .35) to .59 (with confidence intervals of .55 and .66). Similarly, when fewer than five justices vote to grant *certiorari* the expected proportion increases from .12 (with confidence intervals of .08 and .17) to .34 (with confidence intervals of .30 and .37). This results is, in some ways, counterintuitive as we might expect that the *certiorari* pivot would be hesitant

¹⁶Holding other values at their mean or modal values and focusing on all cases.

to force cases onto the docket when he is farther away from the median justice as he may fear that the policy distance would increase the likelihood of an unfavorable outcome for the *certiorari* pivot, but both our formal and empirical results suggest that we are unlikely to see as many cases docketed with only 4 votes and when J_4 and J_5 are ideologically close to one another.

The results in Table 1 and 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 the question of why four justices would wish to place a case on the docket if five of their brethren 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 reveals 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 his/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. In other words, the Rule of 4 may have little substantive impact if forward looking justices fail to exert their power by engaging in defensive denials Perry (1991). That is, it seems unlikely that a minority coalition would ac-

tively try to change the status quo when a majority is opposed to them doing so. For example, 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 that there are conditions under which the certiorari pivot can win on the merits. To test Hypothesis 4, 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 1985.¹⁷ Using these data we test Hypotheses 4 by estimating the following probit model.

$$\begin{aligned}
 J4W_{it} = & \alpha + \beta_1 CMSQ_{it} + \beta_2 RA_{it} + \beta_3 RAxCMSQ_{it} \\
 & + \beta_4 MAJ_{it} + \sum_t \beta_{5t} Term_t
 \end{aligned} \tag{7}$$

Where $J4W_{it}$, 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. RA_{it} is a dummy variable coded 1 if a minority coalition forced the case onto the Court’s docket. $RAxCMSQ_{it}$ is an interaction term between RA_{it} and $CMSQ_{it}$, MAJ_{it} is the

¹⁷Note 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.

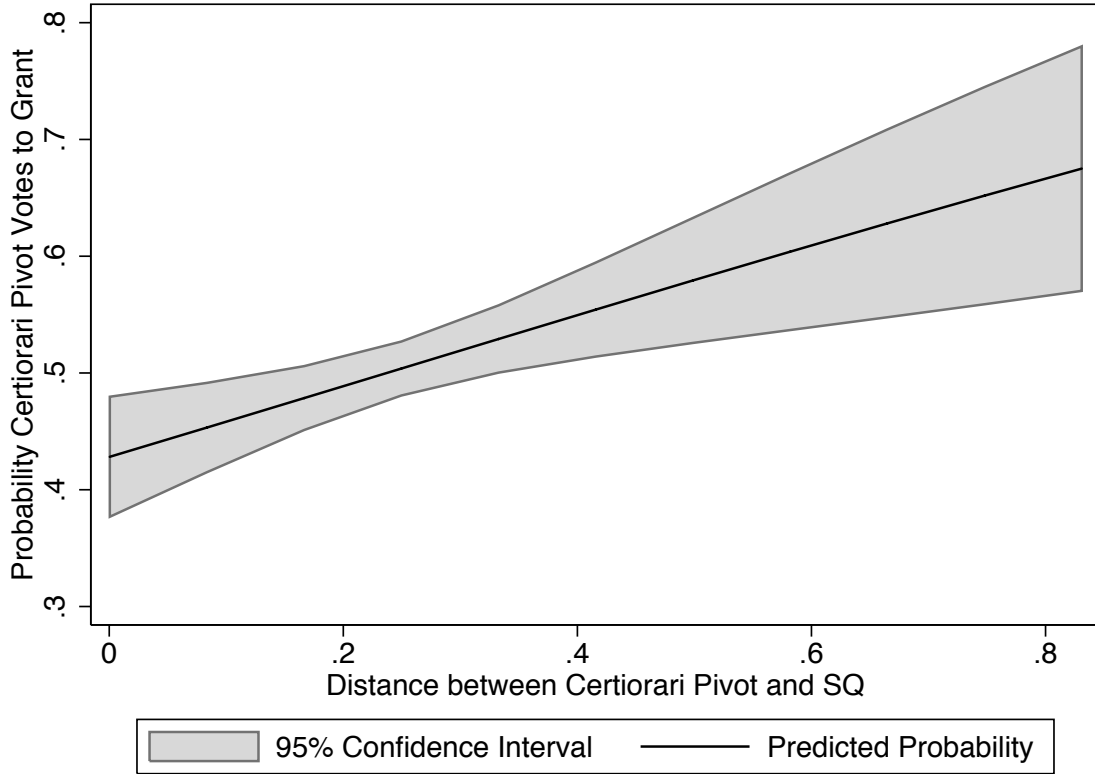
number of justices in the majority at the merits stage, and $Term_t$ are term specific fixed effects. The results are presented in Table 2.

The model in Table 2 does provide confirmation for Hypothesis 4. Given that we are interested 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 interested in the combined effect of $CMSQ_{it}$, RA_{it} , and $RA \times CMSQ_{it}$. This interactive effect is presented graphically in Figure 6 and confirms Hypothesis 4. 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, end up on the winning side. This suggests that the Rule of 4 leads to ideologically extreme decisions of Circuit courts being overturned, 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

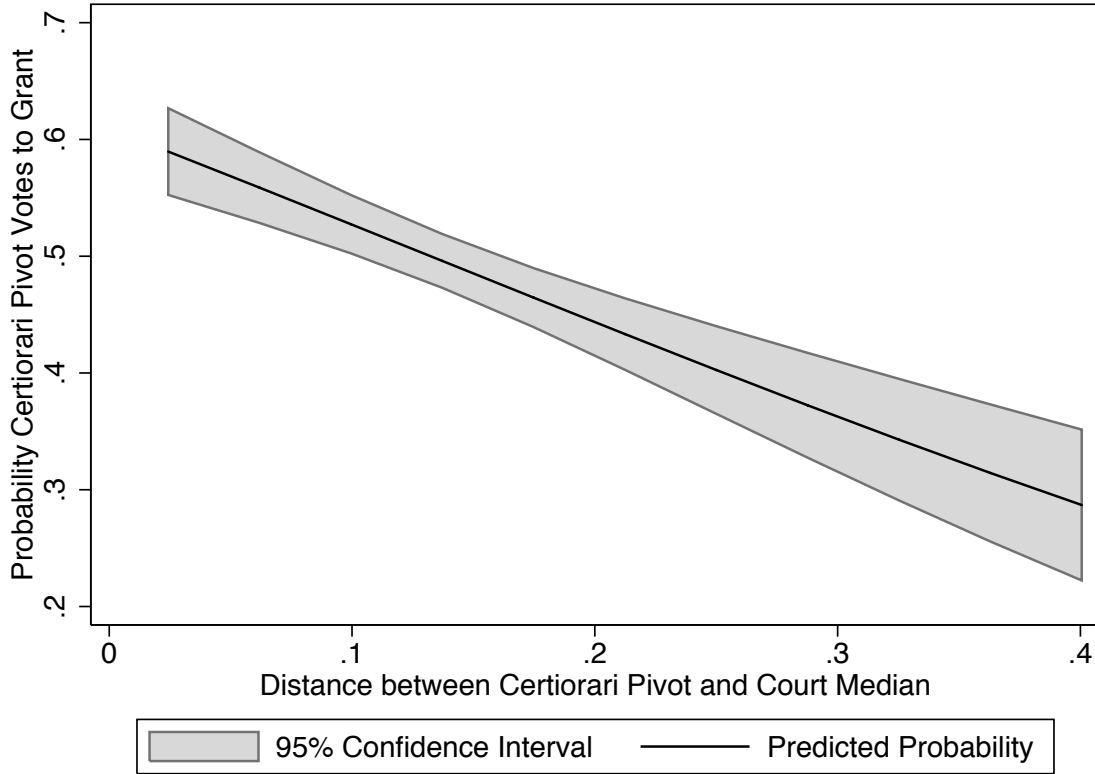
Figure 4: Distance between CP and SQ



5 Conclusion

Our analysis of the Rule of 4 has revealed several important aspects of the strategic interplay of justices during the U.S. Supreme Court’s agenda setting process. First, we provide the first analysis of this minority coalition rule to systematically test when 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—we formal analysis of political behavior with rigorous empirical tests of the analysis. Second, we have helped 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

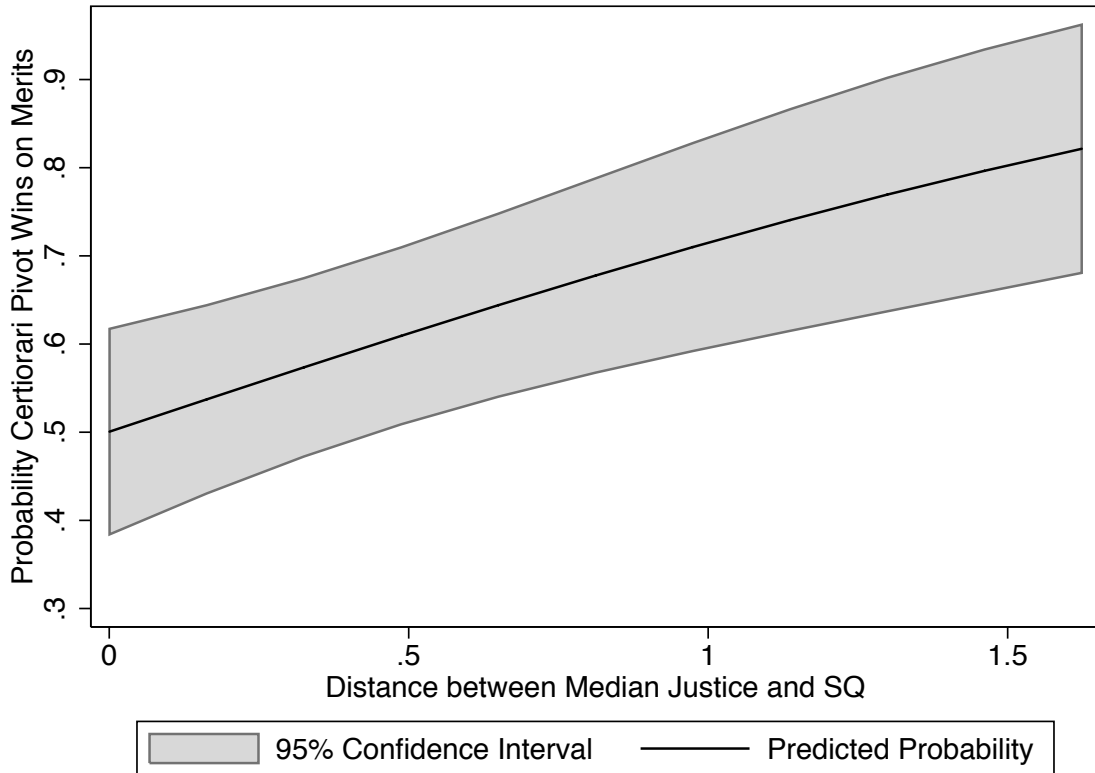
Figure 5: Distance between CP and Median



lead of Caldeira and Wright (1988); Caldeira and Zorn (1998), 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 that 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 suggests that the primary effect of the Rule of 4 is that minority *certiorari* coalitions choose to grant cases that lower courts have decided in a more ideologically extreme manner.

In this sense, the Rule of 4 serves to unify judicial policy throughout the country by moderating the doctrine of more extreme lower courts. 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 it 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.

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