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Book Review: Deciding to Decide: Agenda Setting
in the United States Supreme Court. by H.W. Perry,
Jr.

Dan T. Coenen

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in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—business necessity/cumulation/alternative business practice,¹⁴

and

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The first text could once be read—can perhaps still be read—as a fountain of infinite meaning; the last statement is properly understood not as a text, but as a literally mindless and therefore semantically meaningless utterance: a product of bureaucratic imperatives rather than of any signifying agent.¹⁵

And as for that atrocious middle sentence? No doubt a platoon of dauntless hermeneuticians are already at work, striving to make it the best legal utterance it can be. Nevertheless, we should consider the possibility that, at the end of the millennium, amid the soulless machines that construct our bureaucratized texts, the law's words may not be like our words after all.

DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT. By H.W. Perry, Jr.¹ Cambridge, Mass. and London, England: Harvard University Press. 1991. Pp. ix, 308 (including appendix). \$39.95.

*Dan T. Coenen*²

When Phil Frickey asked me to review *Deciding to Decide*, he predicted I would not be able to set the book down. He was right. Forged from firsthand interviews with five Supreme Court Justices and 64 former Supreme Court clerks, H.W. Perry's book provides a fascinating inside look at the Court's case-selection process. The book was of special interest to me both because I once served as a law clerk and because I did so during the very time period Perry

14. Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1075.

15. As Joseph Vining puts it, "Words themselves cannot speak." For a fascinating meditation on the implications of bureaucratic processes for the production and interpretation of legal texts, see Joseph Vining, *The Authoritative and the Authoritarian* 26 (U. of Chi. Press, 1986).

1. Associate Professor of Government, Harvard University.

2. Associate Professor of Law, University of Georgia. Copyright © 1993, Dan T. Coenen. The author thanks the following friends who commented on this review: Peter J. Kalis, Geoffrey P. Miller, William J. Murphy, Robert V. Percival, Paul Schectman, James C. Smith, David O. Stewart, Michael J. Wahoske and Rebecca H. White.

focused on in his research.³ The book, however, is of such quality and interest that it deserves a far wider audience than the strange stratum of readers I represent.

Three points about the book should be made up front. First, its author is a political scientist. Having read this far, some of my comrades at the bar will promptly scratch this volume from their bedside book list. They shouldn't. Perry shows a sensitivity to lawyers, to lawyering and to the lawyerly aspects of Supreme Court decisionmaking. He also minimizes (although he falls short of avoiding altogether) the jargon and analytic overkill that too often mar the writings of political scientists and legal academicians alike.⁴

Second, the author's distinctive approach to his subject deserves commendation. The book is built around direct quotations—443 of them according to my own unofficial count—of statements made by the interviewed Justices and clerks to Perry under a pledge of anonymity. Problems lurk in basing research on unidentified sources; there is no way, after all, to double-check whether clerk "C34" said what clerk "C34" is said to have said. Unlike its distant cousin *The Brethren*, however, this book will leave behind few suspicions that confidentially supplied information has been recast or presented out of context. The book does contain some useful cocktail-party material.⁵ But a discernible effort to soft-pedal the sensational, together with the inherent plausibility of the statements Perry has collected, signals that this work reflects an appropriate sense of scholarly rigor.

Third, and somewhat surprisingly, the book concentrates on the Supreme Court's case-selection operations more than a decade

3. Perry's study concentrates on the period spanning OT 1976 through OT 1980. I clerked for Justice Blackmun during OT 1979. For the record, Perry did not interview me.

4. For illustrations of these same tendencies, one need only consult the prior work of the author of this review. (*Mea culpa!*)

5. One Justice, for example, was less than wholly complimentary about Chief Justice Burger's handling of the conference "discuss list": "Some [cases] that the chief justice puts on, frankly I don't know why they are on, and sometimes he doesn't know. . . . That is one of the things that make me think his law clerks do it." The clerks of "Justice A" also are singled out for some bad press. Other clerks report that Justice A's clerks "treated the cert. pool more cavalierly than the others," (quoting "C62"), "were more persistently ideological" and seemed "uniquely unsympathetic" to *in forma pauperis* petitions (quoting C48). One clerk opined that this pattern might have reflected the fact that "Justice A is the only justice [she knew] who tried to pick clerks who were ideologically compatible with himself" (quoting C47). Another clerk critical of Justice A's chambers, however, noted that "then again, when I was clerking on the Court, most of the clerks were a lot more liberal than their justices." Perry informs us that the Justices may consider the caliber of counsel in deciding whether to grant cert. We learn also that several D.C. circuit judges "often write a dissent to attract the attention of a particular justice." I was surprised to discover that, at least in former days, clerks outside the cert. pool sometimes would "go swimming" by consulting pool memos before advising their own non-pool Justices about pending petitions.

ago. Much has changed in the meantime, particularly in terms of Court personnel.⁶ It would be too much to say, however, that there has been a fundamental retooling of the Court's case-review process. The principal value of this book thus lies not in its offering of an interesting history, but in its potential to provide useful insights about the workings of the Court today.

I

The key contribution of Perry's book comes from its collection of extensive information about the Justices' behavior in making certiorari decisions. Perry notes the well-known "Rule of Four," but also teaches us that the Court uses a "Rule of Five," a "Rule of Six," a "Rule of Just Four," and a practice of "Joining Three."⁷ Perry explodes the myth that the Justices vote on the basis of "juniority"; in fact, voting begins with the Chief Justice and then proceeds from the most senior to the most junior Justice. Perry also persuasively challenges the common belief that the Chief Justice wields a much stronger influence over Supreme Court agenda setting than do his brother and sister Justices. In particular, although the Chief Justice first formulates the "discuss list" of cases slated for full consideration at conference, each associate Justice may single-handedly and freely add to the list any of the cases that the Chief Justice has omitted.

Perry's research shows that there is virtually no discussion of pending cert petitions among the Justices either before or at the Conference. In the pre-Conference period, "interchamber discussion is rare." One Justice goes so far as to say that: "*Never* have I had anyone call me or suggest how I ought to vote." (Emphasis added.) As to conferring at the Conference itself, one Justice puts it

6. The Court's mandatory appellate jurisdiction also has been largely eliminated, see *infra* note 19, and there have been changes in the size of the cert pool, as well as in the practices of some cert pool participants. See *infra* notes 8 and 10.

7. Perry describes the "Rule of Five" this way: "There are certain issues of law . . . for which coalitions on the Court have rigidified into a 5-4 block. The minority block can muster the four votes to grant cert., but everyone on the Court knows that they will lose on the merits. The result is that the four do not insist that the case be heard. One area where this phenomenon of four dissenters has occurred is obscenity." The "Rule of Six" applies to summary dispositions on the merits; in particular, Perry's research reveals that the Court follows a convention requiring six votes, rather than five, to rule on the merits without briefing and argument. The "Rule of Just Four" (my own term) refers to a "new norm [that] has recently developed" at the Court: "when a case has only four votes, the chief justice may ask if the case can be relisted to see if any of the four want to reconsider." Apparently, relisting in such circumstances is common. The practice of "Joining Three" is a middle-ground manner of voting on cert that an individual Justice may use; instead of voting to grant or to deny, the Justice may vote to "join three" and thus supply the key vote to grant only if three other Justices desire plenary review.

this way: "When we go over [cert petitions], there is not a lot of time Most all of us have our ideas and they are pretty firm when we come in We generally just vote."

Such descriptions will disappoint those who seek high drama in the operations of the Court. Indeed, Perry views his own mission largely in terms of "sensitiz[ing] the reader to the mundane nature of much of the agenda-setting process" At the same time, Perry neither minimizes the importance of that process nor misses the point that it incorporates controversial features. Two of those features—the extensive use of law clerks in the case-selection process and the role played by "political considerations" as the Justices vote—are of special interest to Perry.

II

Perry observes that "one cannot talk about the agenda-setting process without talking about the law clerks." Clerks in all chambers long have been involved in the certiorari process, and the clerks of eight of the Justices now combine their efforts in generating the elaborate work of the cert pool.⁸

The basic operation of the pool is no secret.⁹ For each case before the Court, one pool memo is drafted by one clerk of one Justice who participates in the pool. The completed pool memo—which, according to Perry, is usually two to five pages long—then is distributed to all other participating Justices' chambers. Today, participating Justices handle the circulated pool memo in two different ways. Some Justices require one of their own clerks to review and provide a "markup" of each circulated pool memo before it goes to the Justice. In other chambers, the Justice reviews the pool memo with no markup and involves one of the Justice's own clerks only if a particular memo triggers an interest in a second look. Perry's research indicates that, in either event, Justices in very few cases consult the petition itself.¹⁰

Is this a good way to run a railroad? Perry is skeptical. He wonders, in particular, whether the pool memo system produces the

8. Here lies one significant change in the cert process in the last dozen years. Thus, in 1980, only five Justices (Burger, White, Blackmun, Powell and Rehnquist) were members of the pool. Today, all the Court's members, except Justice Stevens, are pool participants. Interestingly, two of the Justices interviewed by Perry expressed concern about expanding the size of the pool. See pp. 53-55.

9. See, e.g., William H. Rehnquist, *The Supreme Court: How It Was, How It Is* 263-64 (William Morrow, 1987) ("Supreme Court").

10. Notably, during the time period focused on by Perry in his research, all participating Justices required a markup. The emergence of some Justices who review pool memos without markups thus reflects another (and, in my view, undesirable) change in the cert process during the last dozen years.

efficiencies it is designed to achieve in that it requires clerks to prepare full-blown memos even for cases plainly not destined for plenary review. He also floats the recurring question whether the cert pool vests too much power in recent law school graduates not appointed by the President, not confirmed by the Senate, and marked by a noticeable wetness behind the ears.

My own view is that, all things considered, the cert pool works remarkably well. Indeed, the value of the pool lies in its creation of precisely the type of efficiencies that permit the Justices themselves to control the certiorari process. It may be that the cert pool does not create efficiencies for the clerks, for clerks do spend time on cases that are not certworthy. The important point, however, is that the pool creates enormous efficiencies for the Justices. It does so by providing in standardized fashion and concentrated form the key information from all papers filed in each case to the participating Justices themselves. The cert pool, moreover, generates benefits beyond efficiency. In effect, the pool ensures that at least one person at the Court will thoroughly read all important cert-related papers in each case and reflect on them in a focused and relatively unhurried fashion. A proper sensitivity to the human beings who are litigants before the Court—including those who file long-shot petitions—counsels that no less than this measure of process should be afforded.

More fundamentally, the cert pool contributes to the agenda-setting process a heightened level of care and regularity that well serves the overriding end of generating sound cert rulings. A simple way in which the cert pool aids decisionmaking by the Justices is by systematizing the presentation to the Justices of basic information about each case: from what court the case arises; who authored that court's opinion; who else (if the case is from a circuit court) was on the panel; who, if anyone, was in dissent; whether and by whom any amicus brief was submitted; and whether the petition was timely filed. Perry's research teaches that all this information is relevant to the Justices, and the formal pool-memo system ensures that they receive it. Moreover, the key considerations that go into any cert ruling—"conflict with other courts, general importance, and perception that the decision is wrong in the light of Supreme Court precedent"—are few in number and concern the sort of essentially objective "factors . . . that a well-trained law clerk is capable of evaluating."¹¹ The pool system also facilitates a salutary

11. Rehnquist, *Supreme Court* at 266 (cited in note 9). Most important, as Perry observes: "Much of a clerk's time on cert. is spent trying to determine if there is indeed the conflict that the petition alleges." Because this exercise calls more for technical skill than

attention to detail that nine freelancing chambers probably could not provide. The focused attention of the pool-memo drafter, for example, is more likely to disclose beneath-the-surface procedural problems than the necessarily more superficial examination of a larger group of clerks, each of whom must wade through ten times more petitions.

Another advantage of the pool system is that it generates a formal written memorandum for each filed case that, in addition to identifying the facts and the contentions of the parties, sets forth a proposed result and supporting reasons. Each such memo then is reviewed by a number of other clerks, the memo writer's own Justice, and all other Justices participating in the pool. Apart from providing an elaborate safeguard against oversights and misjudgments by the memo writer, this system both facilitates an efficient form of "dialogue" about cases and creates a powerful incentive for the initial memo writer to do careful and honest work. As Perry has learned, law clerks are, by and large, hard-driven high achievers who develop profound loyalties to their own Justices; to such persons, producing written work that brings disrepute on themselves and their chambers is little less than a heart-stopping prospect. In addition, because clerks spend only one short year at the Court, they are largely immune from the ennui and resulting carelessness that long-term exposure to the details of cert work might bring.¹²

Most important, the memo writer's work produces an articulated line of reasoning (indeed, two lines of reasoning if it triggers a markup) to which each participating Justice must consciously respond. Having to deal with a pointed written analysis—more so than leafing through a stack of papers or chatting hurriedly with a clerk—forces the Justice to focus on and formulate with some care her or his own thoughts about each case. In short, the cert pool, like other sound governmental structures, takes advantage of natural human tendencies, and imposes a series of checks on key participants in the decisionmaking process.

There is, I suspect, a widespread belief among practitioners that the certiorari process is not a careful one, given the discretion-

prowess of judgment or responsiveness to a particular Justice's policy concerns, it is well suited to being carried out by the pool memo drafter in the context of the cert-pool structure.

12. Another former clerk, who wrote to me about an earlier draft of this review, expressed much the same point of view: "One of the biggest surprises to me when we were clerking was the extraordinary care given to the processing of cert petitions. I had assumed that the sheer numbers of petitions would guarantee that many worthwhile cases fell through the cracks. Yet I had the clear impression that this simply did not happen. Perhaps that was a product of the cert pool working remarkably well, as you indicate. By implicitly forcing the authors of pool memos to articulate some reason for denying cert, the pool guaranteed that someone took great care in reviewing each individual petition."

ary nature of cert decisions, the Court's enormous caseload, and the greater visibility and perceived importance of merits rulings and opinion writing. My own strong sense, however, is that the Supreme Court's cert work is conducted with considerable care. Indeed, I am tempted to say (particularly now that it is so common for lower appellate courts to decide cases without argument, without publication, and sometimes without opinion) that the Supreme Court's certiorari process affords no less meaningful procedural protection than most litigants receive in most merits decisions in most American appellate courts.¹³

The cert process, after all, involves an elaborate montage of procedures. The cert pool ensures that each case is considered by eight Justices in a regularized process built on a focused, written assessment made by an observer who has strong incentives to do good work. The double-checking of pool memos by clerks in participating Justices' chambers, together with the existence of one Justice who operates entirely outside the pool, provides a safeguard against undue reliance on an incomplete or misleading memo written by a single clerk. In contrast to the situation often faced by lower appellate courts, the Supreme Court usually has at least one useful lower court opinion, and sometimes two or three, to help illuminate the issues in the case. The formulation of the "discuss list" concentrates judicial attention on the most debatable cases, and the ability to file dissents from cert denials further concentrates judicial attention on key cases and cuts down on casualness in making cert decisions. The Supreme Court, unlike other courts, is often able to avail itself of the expert views of the Solicitor General when troublesome cases arise. Perhaps most important, all of this happens in the context of a nine-member decisionmaking body. Given the size of this body, as well as the incentives and competence of its support staff, it will be a rare case that, although deserving of certiorari, falls through the adjudicatory cracks.

Despite these accolades for the current cert system, the Justices might profitably consider one significant reform. After drafting this essay, I distributed it to a number of my co-clerks from the October 1979 term. One of these readers, for whose judgment I have the highest regard, suggested I was too sanguine in my appraisal of agenda-setting process. Recognizing that current safeguards "probably, usually work," he nonetheless expressed concern about the

13. Of course, my point here is not that the Court at this stage scrutinizes the *merits* as carefully as do lower courts that actually rule on the merits. Rather, my point is that the Court considers the *certworthiness* of cases as fairly and fully as lower appellate courts examine the merits.

diffusion of responsibility that comes from allowing all but one of the Justices to participate in the pool, particularly when some Justices do not even involve their own clerks in double-checking other clerks' work. "The glory of the Court," he urged, "always has been that it does its own work; I think the current 8-Justice cert pool undermines that glory." He went on "grudgingly" to suggest that a proper accommodation might support "a structure of three cert pools of three justices each."

This fascinating proposal is one I had not previously considered, although I would reject it because a three-Justice pool strikes me as too small to give each memo drafter enough time to deal adequately with each case. But why not *two* cert pools of *four* Justices each? A two-pool system would directly address the central problem of putting too much responsibility in any *single* clerk's hands. At least sometimes, it would expand appreciably the pre-conference "dialogue" over cert petitions by causing different sets of Justices to look in somewhat different ways at potentially certworthy cases. A two-pool system would provide an added incentive for each memo drafter to do careful work, since each clerk's work would become subject to direct comparison with the work of another clerk. Finally, a four-Justice pool would not seem too small in size to operate successfully. The pool, after all, operated successfully for more than half a decade with only five Justices participating in it.¹⁴

Of course, only the Justices, with their own first-hand knowledge of the pool's operation, can judge whether a four-Justice pool could operate effectively today. The important point is that, if they believe it could, there are significant structural reasons for preferring two smaller cert pools to a single large one.

III

Perry's most intriguing commentary concerns the role of so-called "political behavior" in cert voting. He opens his discussion of this topic by putting it in proper perspective: "The overwhelming impression I received from my research is that there is little bargaining and strategy in the cert. process." At the same time, Perry concludes, "[t]here is some . . . and it is more than most of the clerks, and perhaps some of the justices, acknowledge."

What is this "political behavior" of which Perry speaks? It is not the swapping of one vote for another, sometimes referred to as "horse trading" or "logrolling." "Not a single informant men-

14. See Rehnquist, *Supreme Court* at 263-64 (cited in note 9).

tioned anything resembling horse-trading, and many said explicitly that it never occurred.” Perry wonders why. It is “more understandable,” he opines, that Justices don’t trade votes on the merits because “[t]hat strikes too close to the heart of our norm of ‘justice.’” Because cert decisions say “nothing about the validity of a ruling below,” however, Perry finds “unjustified” the pervasive “normative indignation” at the possibility of vote trading at the certiorari stage.

Here, Perry’s lack of attention to legal process values leads him to take a serious misstep. Although the certiorari decision does not set precedent, it has extraordinary importance for the human beings who are litigants before the Court: it either terminates the appeal process for the petitioner or opens the door for the petitioner to secure total victory on the merits. (In addition, at the least, a grant of certiorari exposes the respondent to all the expense, delay, and inconvenience of full-scale Supreme Court litigation.) For this reason, vote-trading at the certiorari stage, as surely as at the merits stage, would offend the core legal principle that individual cases are to be individually decided based on their individual merits.

This conclusion, however, merely leads to another, more subtle normative inquiry. As Perry explains, all Justices pursue so-called “defensive denials”—that is, they sometimes vote to deny cert out of concern that a grant will produce a bad precedent when the Court rules on the merits. As Perry observes: “It is interesting that every justice denounced and denied any logrolling on cert.; but all admitted that defensive denials occur. Most justices view defensive denials as an acceptable strategy; logrolling is an unacceptable strategy to them all.” The interesting question is why.

Perry theorizes that this difference in attitude has arisen because the Justices “are strongly socialized not to allow outside influence.” Thus “[t]he primary distinction is that logrolling involves two justices whereas a defensive denial involves one.” Although this insight has merit, there is more to the matter than that.

First, as already suggested, the central difficulty with cert-vote logrolling is that it ties together the disposition of two cases in violation of the core principle of case-specific judicial decisionmaking. Defensive denials, which concern a decision on how to vote on one case standing alone, are not afflicted with this vice.¹⁵

15. It might be said in response that the defensively denying Justice violates the norm of case-specific decisionmaking by in effect trading the possibility of reversal in the petitioner’s case for the benefits gained by other future litigants who otherwise will probably feel the effects of an unwanted precedent. Such a tradeoff, however, bears little resemblance to an out-and-out trade under which one Justice swaps her vote in an existing case for another Justice’s changing his vote in another existing and unrelated case. It might even be said that

Second, defensive denials do not raise remotely the same risk of prejudice to the petitioner that a traded vote to grant raises for the respondent. The very reason the Justice makes a "defensive" vote to deny is because the Justice, although sympathetic to the petitioner's position, believes the petitioner will *lose* on the merits. To be sure, the defensively denying Justice cannot be sure the petitioner will lose, and the vote to deny, if successful, removes any possibility the petitioner might win. On the other hand, averting a vote on the merits might be in even the petitioner's own best interest, at least if alternative channels of review (such as federal *habeas corpus* relief) remain open.

Finally, as Perry himself points out, an acceptance of horse trading of cert votes could start the Court perambulating down the path toward horse trading votes on the merits. Countenancing defensive denials carries no similar danger because the Justices cannot and do not vote "defensively" at the merits stage. In short, a tolerance of vote trading in the cert process would carry a far graver risk to the integrity of merits decisionmaking than does a tolerance of defensive denials.

As Perry emphasizes, the "defensive denial" vote occurs only in the extraordinary case. The criteria applied in the usual case are not "political" in any sense. Sometimes the case is a "clear deny." So it is, under unwritten rules of practice, if a convicted criminal defendant petitions for cert based on a claim of insufficient evidence of guilt, ineffective assistance of counsel, or a defective *Allen* charge. The Court also will not review claims that are marked by procedural complexities or are "fact specific" because they involve only application of settled doctrine to a nonrecurring cluster of circumstances.

Perry aptly reminds us that "[w]ithout a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits." Of course, "there are conflicts, and there are conflicts." In much the manner that youngsters recite the Scout Law, Perry's panelists tell us that conflicts must be "genuine," "important," "ripe," "square" and "live." Conflicts should not be "tolerable," "trivial," "strained" or "involving some obscure provision of the Internal Revenue Code." Even if there is a conflict, the Court sometimes will deny cert to permit

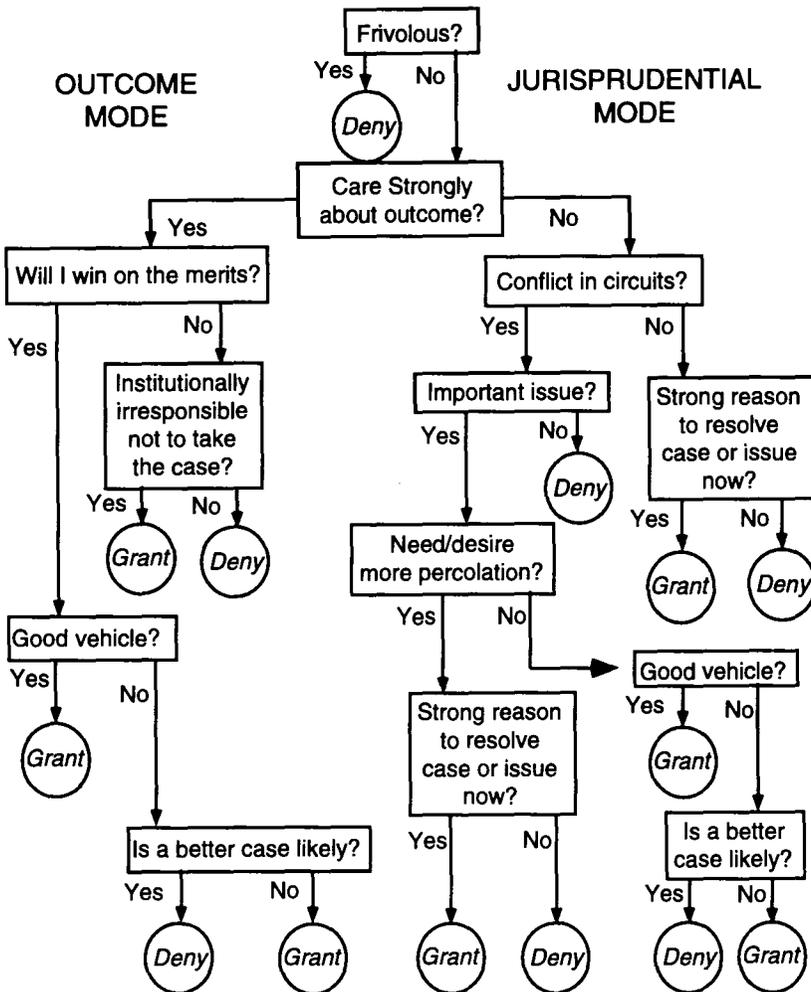
the defensively denying Justice, in deciding how to vote, is doing nothing more than scanning the future social consequences of the Court's action in the field of human activity the case concerns. Looking to such consequences is, moreover, something that Justices, with good reason, do all the time. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Court votes to recognize judicial review in part because contrary rule would have the undesirable future consequence of "giving to the legislature a practical and real omnipotence").

further “percolation” of a legal question in the lower courts or because the petitioned case presents a “bad vehicle” for considering an otherwise certworthy issue.

Notwithstanding the lack of a conflict, the importance of an issue sometimes justifies review. Perry’s informants saw illustrations of this principle in the Nixon-tapes, Iranian-assets and draft-registration cases. In some instances a foursome or more will vote to grant cert because of a lower court’s “flagrant disregard for precedent” or because “a severe injustice occurred”—particularly, we are told, if the injured party is a child. Finally, some Justices play subject-matter favorites. We learn that the Court’s westerners—Justices O’Connor, Rehnquist and White—are “intensely interested” in water rights cases. According to Clerk C16, there is a Justice who feels “that the Court just should never deal with tax cases.” There once “was a time when four members simply weren’t interested in hearing Securities and Exchange Commission cases.” One Justice deems Indian law cases “kind of fascinating.” Another thinks “[t]here are a lot of boring administrative agency cases,” while “all of the justices seemed to exhibit intense interest in First Amendment issues of all types.”

IV

In the end, Perry cannot refrain from advancing a “decision model” that purports to reveal how these many forces interact in the judicial mind. Basically, according to Perry, each Justice in each nonfrivolous case makes a preliminary decision whether he or she “cares strongly about the outcome . . . on the merits.” This decision determines whether the Justice moves into “outcome mode”—which focuses on tactical concerns—or “jurisprudential mode”—which focuses on “the types of things that one learns in law school.” Emphasizing that each Justice sometimes uses each mode, Perry draws the following picture of how each Justice decides how to vote in each case.



There may be some limited value in this roadmap. In particular, it more accurately depicts how the Justices act than do simplistic assertions that they care only about ultimate outcomes or never care about the merits at all. It also properly suggests the potential for differing philosophies toward the cert process, with some Justices focusing at least sometimes on error correction (particularly in the death-penalty context), while other Justices concentrate solely on resolving recurring doctrinal problems (particularly in light of the limited resources of the Court).¹⁶ Beyond this, however, I sus-

16. Several persons who commented on this review suggested that I emphasize the importance of the difference between an error-correction orientation and a national-law-harmo-

pect that Perry's model is neither very enlightening nor even true to the data he has assembled.

Consider, for example, the hypothetical Justice Z, who comes across a cert petition that challenges a circuit court's ruling that municipal truck mechanics do "safety sensitive" work and therefore may be subjected to drug-urine tests without a warrant or reasonable suspicion.¹⁷ Justice Z is a strong believer in privacy rights and is outraged by this result. Justice Z also thinks, however, that there is a 60-40 chance a majority of the current Court will affirm the lower court if cert is granted.

According to Perry's model, Justice Z will vote to deny unless he deems it "institutionally irresponsible" to do so. In fact, however, a purely tactical analysis might well lead Justice Z to vote for a grant. Justice Z, for example, might reason that the result below is so intolerable that it is worth fighting the odds to overturn it. Justice Z might be especially inclined to favor immediate review if a "law and order" president has just taken office so that a delay in reaching the issue only threatens to decrease the chances of prevailing as more "conservative" Justices are appointed to the Court.

Even absent such tactical concerns, Justice Z may vote to grant. Justice Z, for example, might say to himself something like this: "This is a close call on whether to take the case just to correct a bad outcome, but the issue will arise often and there is something of a conflict, so I suppose I'll vote to grant." Such a line of reasoning seems to me wholly plausible, and I find nothing in Perry's data that suggests it will never occur. Under Perry's model, however, such reasoning cannot happen, for Justice Z has entered "outcome mode" in which one considers "jurisprudential factors" only to the extent it is "institutionally irresponsible" not to take the case.

This analysis of our hypothetical drug-test case raises at least three basic concerns about Perry's decisional model. It suggests, first, that the certiorari decision process may be too subtle to be captured in a series of simple yes-no answers. (The possibility of a tactical vote to grant, despite a 60-40 chance of losing on the merits, establishes that much.) It suggests also that the particular "yes-no" categories fixed on in Perry's model may be too quirky and nebulous to have much utility. (Why should we say a loss-predicting outcome-mode Justice will grant only to avoid "institutional ir-

nizer orientation in the case-selection process. The difference between these approaches is extremely important, and I have written of it previously at some length. See Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 Minn. L. Rev. 899, 913-16 (1989).

17. See generally *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989).

responsibility"? What evidence supports that view? And, for that matter, what does it mean to be "institutionally irresponsible"? Finally, the hypothetical suggests that the psychological wall of separation Perry sees between tactical and nontactical considerations may well not exist. (Otherwise, Justice Z, who was very interested in the merits, would not have considered at all the recurring nature of the issue and the arguable circuit-court conflict in deciding to vote for review.)

More fundamentally, Perry's model, and to some extent his entire book, overlook or diminish important considerations in the certiorari process. For example, Rule 10 itself says it matters whether a circuit court has "decided a federal question in a way in conflict with a state court of last resort."¹⁸ Yet Perry's model does not mention this type of conflict. Perry gives no treatment at all to the important category of "held" cases—*i.e.*, petitions held in abeyance pending disposition of another case on the merits. Perry's model also lays no weight on whether the case arises by appeal, rather than by petition, despite the admitted (though, in my view, greatly understated) relevance of this consideration.¹⁹ Finally, Perry's model overlooks a factor he himself identifies as present in the decisional mix: the particular interest or lack of interest of a particular Justice in a particular area of law. (Sometimes Justices just wanna have fun.)

It is true that the questions asked in Perry's model may be read broadly to take account of some of these considerations. It also is true that Perry appropriately acknowledges the great difficulty of constructing a perfect model of the case-review process. Most important, it surely is true that I know how much easier it is to throw rocks than to build a solid and pleasing edifice.

In the final analysis, Perry has given us such an edifice in his study of Supreme Court agenda setting. I encourage him soon to put on his own agenda a similar examination of Supreme Court decisionmaking on the merits.

18. U.S. S. Ct. Rule 10.

19. Of course, this point is of limited practical significance today (as opposed to the time period focused on in Perry's research), because of Congress's removal in 1988 of virtually all mandatory Supreme Court appellate jurisdiction. See generally Gerald Gunther, *Constitutional Law* 52-53 (Foundation, 12th ed. 1991).