See also Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) (refusing to hear challenge to a statute requiring party members to pledge that they were not engaged in "an attempt to overthrow the government by force"; Court notes that the pleadings did not allege that party members have ever refused in the past or will now refuse to sign the oath, which has been in existence since 1941); Poe v. Ullman, 367 U.S. 497 (1961) (refusing to hear challenge to Connecticut prohibition on use of contraceptive devices on ground that there was no allegation that state threatened prosecution).

Mootness. DeFunis v. Odegaard, 416 U.S. 312 (1974), involved a challenge to a preferential admissions program adopted by the University of Washington Law School. By the time the case reached the Court, DeFunis was in his third year of law school as a result of a decision below ordering his admission. According to the law school, his registration would not be cancelled regardless of the Supreme Court's decision. The Court noted that voluntary cessation of allegedly unlawful conduct does not make the case moot; if it did, the defendant would be "free to return to his old ways." Here, however, mootness "depends not at all upon a 'voluntary cessation' of the admissions practices that were the subject of this litigation. It depends, instead, upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled." The lower court found the case moot.

Compare Roe v. Wade, 410 U.S. 113 (1973), involving a challenge to abortion statutes. Roe herself was no longer pregnant by the time the case came to the Supreme Court. The Court nonetheless held that it was not moot, relying on an established exception for cases that are "capable of repetition, yet evading review." If the termination of a pregnancy, the Court said, "makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied."

F. THE JURISDICTION OF THE SUPREME COURT

Note: Jurisdiction, Certiorari, and the U.S. Supreme Court

1. *Jurisdiction in general*. For constitutional purposes, the jurisdiction of the Supreme Court is set out in article III. But Congress has never granted litigants access to the Court in all cases for which article III provides authorization. The governing provisions are set out in 28 U.S.C. §§1251–1257.

These provisions furnish two principal routes to the Supreme Court. The first, abandoned in 1988 except for rare cases, is through an appeal; the second is through certiorari.

It is generally said that the Supreme Court's appellate jurisdiction is "mandatory." If a party who has lost below seeks review, the Court must hear any case that falls within its appellate jurisdiction. Today, the two largest classes of cases falling within the Court's mandatory jurisdiction concern judicial regulation of the political process. Title 28 U.S.C. §2284(a) provides, in pertinent part, that "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the

constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Similarly, section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, also requires the use of three-judge district courts and direct appellate review in cases involving a particularly stringent remedial statute that forbids certain jurisdictions from changing their election laws without prior federal approval. 28 U.S.C. §1253 provides that "[except] as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Consider why Congress retained the three-judge court, direct mandatory appeal process for these cases. Is the decision connected to a desire to resolve cases touching on fundamental questions of state self-government quickly? See Solimine, The Three-Judge District Court in Voting-Rights Litigation, 30 U. Mich. J.L. Reform 79 (1996).

Certiorari jurisdiction, by contrast, is discretionary. The Court may deny certiorari for a range of reasons other than its agreement with the decision below—the unimportance of the issue, the unusual character of the particular facts, the desire to see the issue "percolate" in the lower courts, the controversial character of the problem, or the wish to allow the political process time to consider the problem before an authoritative resolution is obtained. For a classic discussion of the denial of certiorari as an exercise of the Court's "passive virtues," see A. Bickel, The Least Dangerous Branch 115–116 (1965).

2. *The certiorari process*. Litigants seeking certiorari must file a petition for certiorari, setting out the reasons the case deserves plenary consideration. Supreme Court Rule 10, "although neither controlling nor fully measuring the Court's discretion, indicate[s] the character of the reasons" the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rules of the Supreme Court, http://www.supremecourtus.gov/ctrules/ctrules.html (2007). After the petitioner files its petition, the respondents are entitled to file a brief in opposition, explaining why the Court should not consider the case.

Roughly 8,000 petitions for certiorari are filed with the Court each year. The manner of screening cases varies among the justices. For discussions of these practices over time, see, e.g., Caldeira and Wright, The Discuss List: Agenda Building and the Supreme Court, 24 Law & Soc. Rev. 807, 811–812 (1990).

Most of the justices now on the Court participate in a "cert pool," in which one law clerk is assigned responsibility for writing a memorandum circulated to many of the chambers. Some members of the Court supplement the pool by having their own clerks prepare an additional memorandum. Two members of the Court do not participate in the pool, but instead rely on their own clerks. Prior justices sometimes handled the petition review entirely by themselves.

Normally, the Court provides no reason for its denial of a petition for certiorari, although justices who voted to hear the case will on occasion dissent from the denial of certiorari, explaining why they thought the petition should have been granted.

Far less often, justices who voted to deny the petition for certiorari will explain their reasons. See, e.g., Padilla v. Hanft, 547 U.S. 1062 (2006) (giving prudential reasons for voting to deny the petition); McCray v. New York, 461 U.S. 961 (1983) (urging lower courts to continue addressing the question presented).

Until sometime in the 1930s, the justices apparently discussed all petitions for certiorari. Since then, however, the Court has discussed as an institution only those petitions that at least one justice asks to have put on a "discuss list." See Caldeira and Wright, supra, at 812. The vast majority of all petitions are placed instead on a "dead list" and are denied without further discussion.

The general rule is that a denial of certiorari does not have any precedential value. See Teague v. Lane, 489 U.S. 288, 296 (1989). Why might the Court be careful to ensure the perpetuation of that rule?

The Court normally agrees to give plenary consideration to any case that at least four justices wish to hear. For a discussion of the history of the so-called Rule of Four, see Revesz and Karlan, Nonmajority Rules and the Supreme Court, 136 U. Pa. L. Rev. 1067, 1069–1071 (1988). For an evaluation of the rule, consider Justice Stevens's observations. Justice Stevens notes that in recent years somewhere between a quarter and a third of the Court's cases have been granted by the votes of only four justices:

> Mere numbers, however, provide an inadequate measure of the significance of the cases that were heard because of the rule. For I am sure that some Court opinions in cases that were granted by only four votes have made a valuable contribution to the development of our jurisprudence. My experience has persuaded me, however, that such cases are exceptionally rare. I am convinced that a careful study of all of the cases that have been granted on the basis of only four votes would indicate that in a surprisingly large number the law would have fared just as well if the decision of the court of appeals or the state court had been allowed to stand.…
>
> The Rule of Four is sometimes justified by the suggestion that if four justices of the Supreme Court consider a case important enough to warrant full briefing and argument on the merits, that should be sufficient evidence of the significance of the question presented. But a countervailing argument has at least equal force. 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. Arguably, therefore, deference to the minority's desire to add additional cases to the argument docket may rest on an assumption that whether the Court hears a few more or a few less cases in any term is not a matter of first importance.
>
> History and logic both support the conclusion that the Rule of Four must inevitably enlarge the size of the Court's argument docket and cause it to hear a substantial number of cases that a majority of the Court deems unworthy of review.

Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U. L. Rev. 1, 17–20 (1983). At the time Justice Stevens wrote, the Court was hearing roughly 150 cases a year. In recent years, in part as a result of the 1988 change to its jurisdiction, but in part as a result of the justices' voting behavior at the certiorari stage, the Court has dramatically decreased the number of cases it hears, giving plenary consideration to roughly eighty cases each term. See Cordray and Cordray, The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking, 36 Ariz. St. L.J. 183, 201 (2004); O'Brien, Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket, 13 J.L. & Pol. 779 (1997). For a now-classic, if outdated, account of the Supreme Court's workload, see Hart, The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959). For general discussion of the caseload problem of the federal courts, see R. Posner, Federal Courts: Crisis and Reform (1985); for the caseload in the Supreme Court, see the annual Supreme Court issues of the Harvard Law Review.

For comprehensive discussion of the Court's policies and of practice before the Court, see S. Bloch, V. Jackson, and T. Krattenmaker, Inside the Supreme Court: The Institution and Its Procedures (2d ed. 2008); E. Gressman, K. Geller, S. Shapiro, T. Bishop, and E. Hartnett, Supreme Court Practice (9th ed. 2007).

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* [The full text of Section 13 of the Judiciary Act of 1789, 1 Stat. 73, reads:

> *And be it further enacted*, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.]

7 There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government's argument that, even if the other agencies were obliged to consult with the Secretary, they might not have followed his advice.) What respondents' "procedural right" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.

1 [This provision is part of a complex scheme dealing with congressional procedures for the counting of electoral votes, enacted in the wake of the disputed presidential election of 1876. The statute provides that

> [if] any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of [electors] by judicial or other [methods], and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be [conclusive].