

A COURT OF TWO MINDS

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*What do the Justices think they're doing? They seem to act like appeals judges, who address questions of law as needed to reach a decision—and yet also like curators, who single out only certain questions as worthy of the Supreme Court's attention. Most of the time, the Court's "appellate mind" and its "curator mind" are aligned because the Justices choose to hear cases where a curated question of interest is also central to the outcome. But not always. In some cases, the Court discovers that it cannot reach—or no longer wishes to reach—the originally curated question. Looking at what the Justices say and do in such instances offers a revealing glimpse into the interplay between their appellate and curator roles. These cases illustrate how the norms of appellate judging can enhance, rather than constrain, the Court's discretion in choosing which issues to address and which to avoid. Using this discretion, however, entails the risk of distorting legal doctrines beyond those curated for review.*

INTRODUCTION

*"The Court wrongly sidesteps the principal question that we were asked to answer . . . ."*

— Justice Clarence Thomas<sup>1</sup>

*"[W]e believe we should not answer more than is necessary to resolve the parties' dispute."*

— Justice Stephen Breyer<sup>2</sup>

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1. *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1212 (2021) (Thomas, J., dissenting).

2. *Id.* at 1197 (majority opinion).

The way the Supreme Court reviews cases has a dual nature. It has the familiar feel of an appeals process, yet also the distinctive feel of curating questions of law to be answered once and for all. The Justices seem to be of two minds: In an “appellate” frame of mind, they see the task as a circuit judge might—addressing questions of law as needed along the path to a decision. In a “curator” frame of mind, they see the task as answering only those questions deemed worthy of the Court’s attention, based on their selection criteria for certiorari review.<sup>3</sup> These two orientations are usually well-aligned because the Justices carefully choose to hear cases where the curated question is also central to the outcome.

Yet this alignment does break down from time to time. For example, what if the curated question turns out not to really matter for the outcome? Or what if the Justices regret taking up the curated question and now feel stuck with the case? Moments like these can offer insights into how the Justices think about the Court’s proper role. The analysis in Part II will examine the Justices’ reasoning and rhetoric in recent years on such occasions where certiorari has broken down. These instances offer vivid reminders that, although appellate norms are said to constrain the Court’s discretion as a curator by limiting which questions are available for review, the opposite effect is also possible: The norms and techniques of appellate judging can *increase* curatorial choice when the Justices use them to reshape—or even punt—the questions they originally said they would answer.<sup>4</sup>

One has to wonder: Why would the Justices ever use fancy appellate footwork to sidestep a curated question when they can always just dismiss

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3. Readers who think about the work of the federal courts in terms of “law declaration” versus “dispute resolution” will soon notice that the appellate/curator framework cuts across that dichotomy. As Part I shows, both the appellate and curator mindsets allow the Court to choose which questions of law to answer and how broadly to answer them (in the spirit of law declaration), though they differ in the norms and practices that enable such discretion. Moreover, as Part II illustrates, although both mindsets allow a large degree of litigant control over what is contested and what arguments to press (in the spirit of dispute resolution), they also allow the Court leeway to deviate from those argued grounds. These examples offer further reminders of the modern Court’s well-known tendency to focus on law declaration while nodding, at least nominally, to dispute resolution. How to evaluate the many variations of this balancing act remains in the eye of the beholder. See generally Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 *Cornell L. Rev.* 1395 (2020) (arguing for a pragmatic account of judicial legitimacy that centers on the perceptions of the parties in a case about the courts’ approach to dispute resolution and highlighting what may be lost when either courts or commentators overemphasize law declaration).

4. In particular, as close observers of the Court know well, these norms and techniques allow the Justices various alternative paths to disposition of the case. For discussion of such “off-ramps” and other means of punting an issue, see *infra* sections I.B and II.B and Part III.

it, no questions asked?<sup>5</sup> Part III will consider some possible motivations. It will also highlight one of the unintended consequences: When the Court dodges a curated question by answering a different one instead—one chosen out of convenience rather than interest—it runs the risk of distorting that other area of law.

But first, let's set the scene.

## I. APPELLATE MIND, CURATOR MIND

### A. *The Supreme Court as Curator*

Think about how cases before the Court are often said to be “vehicles” for answering questions of law. The suggestion seems to be that the whole point of accepting a case for review (in an appeals-like way) is to allow the Court to answer a specific question about what a law means (in a curator-like way).<sup>6</sup> If there were any doubt, the Court's rules say that the first thing in a petition for certiorari should be a list of “[t]he questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail.”<sup>7</sup> Accordingly, petitions list such “questions presented” (QPs) at the very start of the brief, as if posing those legal questions to the Court were the petitioners' main purpose too (and it just so happens that the right answer to the QP will help them win the case).

Moreover, when the Court grants certiorari, it speaks as if QPs are the obvious unit of analysis<sup>8</sup>—sometimes limiting its grant to one but not

5. Literally, no questions asked: Dismissing a question or a case “as improvidently granted” (DIG) operates in effect as a delayed denial of certiorari. For discussion of this form of dismissal, see *infra* section I.B and Part III.

6. By contrast, one usually does not speak of “vehicles” in relation to the work of the federal circuit courts. Although appellants are well advised to spell out clearly the errors they are challenging, there is not the sort of marketing of specified questions of law as especially important or confounding (e.g., the subject of a split among other courts) that is typical of certiorari at the Supreme Court. Appeals judges tend to see their job as working through just enough of the raised issues to resolve the appeal—and if a tough legal issue disappears along the way, all the better. But mileage may vary on these broad generalizations, and it is easy to find examples of how the circuit courts have adopted practices that may look like curation, such as tracking selected cases for oral argument and for “published” opinion. See, e.g., Bert I. Huang, *Lightened Scrutiny*, 124 *Harv. L. Rev.* 1109, 1117–18 (2011) (noting appeals judges discussing the need for “triage” procedures, such as limiting oral argument and opinion publication to selected cases); Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 *Va. L. Rev.* (forthcoming 2022) (manuscript at 11, 14), <https://ssrn.com/abstract=4035789> [<https://perma.cc/C5G9-KBN2>] (presenting the latest data on variation among circuits in rates of oral argument and opinion publication); Marin K. Levy, *Judging Justice on Appeal*, 123 *Yale L.J.* 2386, 2391 (2014) (reviewing William M. Richman & William L. Reynolds, *Injustice on Appeal: The United States Courts of Appeals in Crisis* (2012), which expounds upon practices amounting to “de facto certiorari” in the federal circuit courts).

7. Sup. Ct. R. 14.1(a).

8. One might also note here the Court's practices of consolidating cases linked by similar QPs—or of “holding” petitions in cases related to a granted QP—for possible later

another of the petitioner's QPs, or even rewriting the QP itself. For good measure, the rules also emphasize that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court."<sup>9</sup>

Parties recognize that their case will mainly be seen by the Court as a potential vehicle for answering those selected questions of law, and it will not be interested unless one of the questions is deemed "certworthy." Although it can't hurt to present other compelling reasons to undo the lower court ruling, petitioners know that the Court is very unlikely to take a case solely for error correction. They know that, instead, the best way to pitch a petition is to highlight the importance of answering the QPs, such as by pointing to splits among circuit courts and state courts. Again, the Court's rules say as much about splits,<sup>10</sup> and Professor Tejas Narechania's impressive new study (in the current issue of the *Columbia Law Review*) sheds empirical light on what catches the Court's eye in cases without splits.<sup>11</sup>

Yet not everyone thinks this way. It seems a fair guess that most of the general public imagines the Court's work to be mainly deciding who wins and who loses a case. Some might notice that the Court does so by deciding whether to overturn an earlier court's decision—that is, like an appeals court. They are not wrong. They are seeing the appellate side of certiorari review.<sup>12</sup> Even if it may be less salient to casual observers that the Court has chosen its cases as vehicles for answering certain QPs dutifully listed by the petitioners, it is also true that, once a lucky petition is granted,<sup>13</sup> the

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orders to grant-vacate-and-remand (GVRs) in light of the resolution of that QP. For an incisive study of GVRs, see generally Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 Mich. L. Rev. 711 (2009).

9. Sup. Ct. R. 14.1(a).

10. Sup. Ct. R. 10 (emphasizing conflicts among lower courts as a key factor the Court would consider in deciding whether to grant a petition for a writ of certiorari).

11. Tejas N. Narechania, *Certiorari in Important Cases*, 122 Colum. L. Rev. 923, 933, 953 (2022) (using computational text analysis to analyze Supreme Court merits opinions for insight about various influences into grants of certiorari in cases not involving splits).

12. There are also cases at the Court that are not vehicles for curated QPs, of course. Summary reversals, for example, are decided with an almost entirely appellate mindset (even though they are brought to the Court on a petition for certiorari). In these cases, the Court notices an error in the lower court ruling that it feels so compelled to fix that not only does it overlook the lack of a split, but it also reverses in a speedy per curiam opinion based on the petition-stage briefing and the record, without need for merits briefing or oral argument. See, e.g., Richard C. Chen, *Summary Dispositions as Precedent*, 61 Wm. & Mary L. Rev. 691, 694–97 (2020) (describing the Court's practice of summary reversals); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 Cardozo L. Rev. 591, 594–607 (2016) [hereinafter Hartnett, *Summary Reversals*] (empirically surveying and classifying summary reversals between 2005 and 2016—and noticing a degree of concentration in habeas cases, including capital cases, as well as qualified immunity cases). There are also a very small number of mandatory appeals and cases of original jurisdiction.

13. Around sixty or seventy cases out of thousands of petitions are chosen and decided this way each year. See *The Supreme Court, 2019 Term—The Statistics*, 134 Harv. L. Rev. 610, 618–19 tbl.II (2020) (showing that the Supreme Court granted plenary review in sixty cases in its 2019 Term, resulting in fifty-nine dispositions by full opinion, out of 5,718

ensuing process does take on the trappings of a typical appeal. Most notably, there will eventually be a formal appellate outcome (reversing, affirming, vacating, or remanding) in nearly all the granted cases;<sup>14</sup> and so, at least in that sense, there will be a winner and a loser.<sup>15</sup> A vehicle is still a real case with real parties.

When a case works well as a vehicle, the appellate and curator characteristics of certiorari review are naturally aligned. There is hardly any tension between answering the QP a certain way (curator-like) and then saying that this answer means the decision must come out a certain way (appeals-like). Maybe because such alignment happens so regularly, the dual nature of certiorari is rarely considered controversial.

But not never. Scholars have observed, with varying degrees of concern, that the Court's agenda-setting powers have been amplified over the past half century as its work has become nearly all certiorari all the time, allowing it almost total control over which questions of law it will or will not decide.<sup>16</sup> A recent, provocative contribution (also in the *Columbia Law Review*) is Professor Benjamin Johnson's history-driven critique of the modern Court's obsession with preselecting and answering QPs. The analysis presses the question (one might say) of whether the Court is overly

petitions considered); The Supreme Court, 2020 Term—The Statistics, 135 Harv. L. Rev. 491, 498–99 tbl.II (2021) (showing that the Supreme Court granted plenary review in seventy-two cases in its 2020 Term, resulting in sixty-two dispositions by full opinion, out of 5,257 petitions considered).

14. Along the way, the Court can do things one regularly sees other appeals courts doing—such as asking for briefing on other issues it has noticed (like jurisdiction), or ignoring an issue or an argument (deemed immaterial to the result or forfeited or waived due to a failure to argue it properly at some stage). Also, although the parties' arguments in their briefs are usually focused on the granted QPs, during oral arguments, the Justices might bring up all sorts of issues having to do with the record, the procedural posture, factual premises, or other aspects of the broader context of the case.

15. Generally speaking, if the result at the Court is affirmance, then the respondent has won; if the result is reversal (and judgment is entered), the petitioner has won. If the case is remanded for further proceedings (with some aspect of the lower court ruling vacated or reversed), it is common to say that the petitioner has "won" in the sense of getting another chance after having lost below. And of course, in the lower courts, eventually the parties will win or lose certain issues (including possibly those where the Court has weighed in) unless there is a settlement, dismissal, or other nonmerits outcome.

16. See, e.g., Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 Cornell L. Rev. 587, 590–91 (2009); Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 Wash. & Lee L. Rev. 737, 751–54 (2001); Daniel Epps & William Ortman, *The Lottery Docket*, 116 Mich. L. Rev. 705, 706 (2018); Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 Colum. L. Rev. 929, 932, 977–78 (2013); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643, 1644–46 (2000); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 Colum. L. Rev. 665, 669 (2012); Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 Wash. & Lee L. Rev. 271, 275–77 (2006); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. Pa. L. Rev. 1, 3, 10–13 (2011).

favoring its curator mind.<sup>17</sup> Just posing this question is eye-opening,<sup>18</sup> as we have all become quite accustomed to cases serving as vehicles for answering curated questions.<sup>19</sup> Moreover, when certiorari is working smoothly, it can go unnoticed that two things are happening at once.

### B. *The Justices as Appeals Judges*

When certiorari misfires, though, things get interesting. What happens when a case turns out to be a poor vehicle for addressing the curated question? This can happen for countless reasons (though the leading treatise counts seventeen).<sup>20</sup> For example, what if a factual ambiguity raises doubts about whether the QP even matters for resolving the case?<sup>21</sup> Such complications—often called “vehicle problems”<sup>22</sup>—tend to be screened out at the certiorari stage, and those cases are denied review.<sup>23</sup> This is why we don’t hear much about them. Yet, some problems

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17. See Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 *Colum. L. Rev.* 793, 800–01 (2022).

18. Posing this question is also highly generative of others. For example, imagine a hypothetical Court that believes it must decide the entire case, rather than focus on preselected questions. Which cases would it—or should it—then prioritize for review? Would its cases come to look more like the ones highlighted in Professor Narechania’s study—cases lacking splits yet deemed certworthy due to various other indicia of importance? See Narechania, *supra* note 11, at 932–34.

19. Johnson, *supra* note 17, at 803 (noting the “uncritical acceptance” of the Court’s question-selection practice); *id.* at 864 (“This practice is so commonplace that it has largely escaped notice, to say nothing of close scrutiny.”).

20. See Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, *Supreme Court Practice* 5-50 to 5-55 (11th ed. 2019). To be more precise, this treatise lists seventeen *categories* of reasons, some of which include varied rationales. This listing is based on reasons the Court itself has given to explain why it was dismissing cases as improvidently granted (and the Court only states reasons some of the time). Among the various reasons are that “[a]n important issue may be found not to be presented by the record”; that “[t]he Court may also conclude that the case is not certworthy based upon the totality of circumstances”; that “[t]he Court may conclude that it cannot reach the question accepted for review without reaching a threshold question not presented in the petition”; that “[a] hitherto unsuspected jurisdictional defect may become apparent”; that “[d]ecision of the question upon which certiorari was granted may prove unnecessary because the judgment below was clearly correct on another ground”; and that “[a]n intervening court decision or change in statute may eliminate the issue or make it unlikely that the question will arise again, at least in the same context.” *Id.*

21. See, e.g., Transcript of Oral Argument at 40–44, *City of Hays v. Vogt*, 138 S. Ct. 1683 (2018) (No. 16-1495), 2018 WL 1368609 (transcribing a colloquy among Chief Justice John Roberts, Justice Stephen Breyer, and counsel Kelsi Corkran about whether an objection had been preserved below). *Hays* was eventually DIG’d. *Hays*, 138 S. Ct. at 1684 (mem.).

22. Readers may get a sense of just how much this term has entered the standard vocabulary of litigating parties at the certiorari stage by searching for “vehicle problem” on the site SCOTUSblog. See, e.g., Search, SCOTUSblog, <https://www.scotusblog.com/?s=vehicle+problem> [<https://perma.cc/5VCS-N5NJ>] (last visited Mar. 8, 2022).

23. They are even more likely to be screened out now than, say, ten years ago, because the Court has apparently started a practice of “relisting” petitions that it might grant, for an

do slip through, and others arise after the case is accepted. For example, what if some real-world fact changes in a way that makes answering the QP less pressing, or even moot?<sup>24</sup> Or, to consider another kind of difficulty that may arise,<sup>25</sup> what if the Court comes to believe that the most prudent course is not to answer the QP at all?<sup>26</sup>

Then the Court is stuck with a case, with possibly no QP it can or wants to address. What are the Justices to do? Should they dismiss the case as improvidently granted (DIG), thereby undoing the grant of certiorari?<sup>27</sup>

extra week or two, to allow time to vet the case for vehicle problems. See Kimberly Strawbridge Robinson, *Supreme Court Adds Layer of Due Diligence: Relists Explained*, *Bloomberg L.* (Jan. 4, 2021), <https://news.bloomberglaw.com/us-law-week/supreme-court-adds-layer-of-due-diligence-relists-explained> [<https://perma.cc/8EXL-PENH>]. Supreme Court practitioner John Elwood deserves the credit for making this practice well-known since around the time that it began through his “Relist Watch” series on SCOTUSblog. See John Elwood, *Relist Watch*, SCOTUSblog, <https://www.scotusblog.com/author/john-elwood/> [<https://perma.cc/5C38-SK6Y>] (last visited Jan. 29, 2022). For more discussion about the possible implications of this relisting practice on how observers might interpret the Court’s DIGs, see *infra* section III.B.

24. See, e.g., *N.Y. State Rifle & Pistol Ass’n. v. City of New York*, 140 S. Ct. 1525, 1526–27 (2020) (per curiam) (dismissing as moot after the city amended the relevant rule concerning the transport of firearms).

25. The term “vehicle problem” usually does not encompass situations where the Court *wants* to leave the QP unanswered (say, for prudential reasons). But for our purposes, there is a useful similarity: If the QP is willingly dumped, the case is no longer a vehicle for that QP. And so the question for the Court remains: Should anything more in the case be decided, and if so, what?

26. A far-too-brief word is in order here about why a Court might prudentially wish to leave a granted QP unanswered. Among the many possible reasons, two sets may be especially notable. First, the Justices, after much reflection and negotiation, may recognize that they cannot reach a useful answer. *First American* offers an illustration of this. See *First Am. Fin. Corp. v. Edwards*, 567 U.S. 756, 757 (2012) (mem.) (per curiam); Pamela S. Karlan, *The Supreme Court 2011 Term—Foreword: Democracy and Disdain*, 126 *Harv. L. Rev.* 1, 58–62 (2012) (noting that the DIG in *First American* deviated from the norm, occurring months after oral argument, and was likely due to an inability to reach a satisfactory result). Second, the Court may regret having granted review of certain contentious or politically fraught issues. The literature on such “passive virtues” and Bickelian avoidance is vast, but articles by Professors Erin Delaney and Tara Leigh Grove offer two insightful places to start, each with an especially thoughtful discussion of certiorari. See Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 *Duke L.J.* 1, 16–19 (2016); Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 *Colum. L. Rev.* 1555, 1607 (2021). For analytical surveys of the related (and also vast) literature on judicial minimalism, see generally Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 *Cornell L. Rev.* 1 (2009); Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 *Va. L. Rev.* (forthcoming 2022), <https://ssrn.com/abstract=3914201> [<https://perma.cc/C6DN-QJYS>].

27. The definitive studies on DIGs are a series by Professors Michael Solimine and Rafael Gely. Michael E. Solimine & Rafael Gely, *The Supreme Court and the Sophisticated Use of DIGs*, 18 *Sup. Ct. Econ. Rev.* 155 (2010) [hereinafter Solimine & Gely, *Sophisticated Use of DIGs*] (presenting empirical tests of hypotheses about decisions to DIG); Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 *Wis. L. Rev.* 1421 [hereinafter Solimine & Gely, *An Empirical and Institutional Analysis*] (presenting quantitative and qualitative analyses of a half-century of

This would seem the most straightforward solution. Yet the Court takes this path only rarely.

To appreciate the range of other options available to the Justices, it helps to say more about the appellate and curator frames of mind. Each involves not only a set of norms but also a set of judicial methods. Familiar techniques of appellate judging include deciding on any available grounds, requesting further briefing from the parties, and remanding a case to a lower court for further proceedings. Meanwhile, special procedures at the Court serve the purposes of curation: denying or granting certiorari, of course, and also DIG'ing, which works like a delayed denial of certiorari.

Consider how the Justices' facility with appellate techniques expands the Court's options when it otherwise might DIG. Should it try to rescue the vehicle by finding a way to keep the QP central to the case, despite emerging doubts? Maybe the Court could ask the parties for supplemental briefing on the ambiguity that is putting the QP's relevance up in the air.<sup>28</sup> Or maybe it can just assume away such doubt for now,<sup>29</sup> relying on an eventual remand for the court below to sort that out.

And what if the Court were now seeking to avoid, rather than rescue, the question it had originally wanted to decide? Instead of DIG'ing, the Court may try to locate an "off-ramp" somewhere else in the case. For example, the Court can sidestep a QP by resolving the case on other grounds,<sup>30</sup> such as a jurisdictional or antecedent question,<sup>31</sup> or maybe even a secondary QP.<sup>32</sup> Or it might decide this case so narrowly, in a one-time-

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DIGs from 1954 to 2004). For more recent data, see Bryan Gividen, *The Roberts Court and DIGs, Above the Law* (Mar. 5, 2021), <https://abovethelaw.com/2021/03/the-roberts-court-and-digs/> [https://perma.cc/4FW7-H42P].

28. See, e.g., *Unite Here Local 355 v. Mulhall*, 571 U.S. 83, 85 (2013) (Breyer, J., dissenting) (suggesting requesting supplemental briefing on the potential vehicle problems of mootness and standing).

29. See, e.g., *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019) ("assum[ing] without deciding" the necessary premise).

30. And the Court may first ask the parties about the alternative grounds (which might be a possible jurisdictional issue, a factual premise for the QP's relevance, a question about waiver or changing arguments, or other ways of resolving the case) at oral argument or even request supplemental briefing on it. This is not a subtle hint, to anyone watching, that the Court is considering punting. See, e.g., *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam) (remanding for the circuit court to address a question of standing, after requesting and receiving supplemental briefing); *Zubik v. Burwell*, 578 U.S. 403, 407–08 (2016) (per curiam) (remanding the case for consideration of a feasible alternative solution, after requesting and receiving supplemental briefing).

31. See, e.g., *Hollingsworth v. Perry*, 570 U.S. 693, 700–01 (2013) (punting on constitutional issues concerning marriage equality, by ruling that petitioners did not have standing).

32. In *Google LLC v. Oracle America, Inc.*, for example, the Court decided the second question presented, thereby avoiding the first. See 141 S. Ct. 1183, 1197 (2021). For another example, see *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (deciding only the



only or fact-bound way,<sup>33</sup> that the QP is left largely unanswered for future cases.<sup>34</sup> Or it can remand the case, asking the lower court to clarify an ambiguity or address an antecedent question.<sup>35</sup> And so forth. When the Court uses such an off-ramp to dodge the issue it said it would address—exercising curatorial choice well after certiorari—the source of this discretion is a repertoire of appellate techniques.

## II. WHEN CERTIORARI BREAKS DOWN

What internal norms at the Court seem to govern this extra dimension of discretion in reconsidering which questions to address? Why do the Justices turn to this source of discretion when a more straightforward option—dismissal—is always available?

One window into these questions is what the Justices themselves say when certiorari breaks down—when a vehicle problem appears, or when answering the originally chosen QP no longer seems like such a good idea. Just as Professor Narechania’s article focuses on what the Court’s opinions say about the reasons for granting certiorari in the first place,<sup>36</sup> the following analysis will look closely at what the Justices say and do as they revisit that choice later on: What sorts of reasoning appear in their disputes over whether to DIG a case, to dodge a QP by taking an off-ramp, or to rescue a troubled vehicle? What ends up happening in these cases, and what can one infer from the Court’s willingness to take these paths?

This Part highlights selected expressions of the Justices over the past decade,<sup>37</sup> focusing on their contestation over internal norms in cases in which a DIG occurred or was contemplated, as well as in other cases

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first of two questions presented and noting that, because the answer to the first would require a new trial, there was no need to answer the second).

33. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1732 (2018) (“The outcome of cases like this in other circumstances must await further elaboration in the courts . . .”); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 *Harv. L. Rev.* 133, 133 (2018) (noting that, in *Masterpiece Cakeshop*, the Court “ducked central questions” about the constitutional limits on religious liberty).

34. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring) (criticizing the majority for skipping over the question presented about whether *Employment Division v. Smith*, 494 U.S. 872 (1990), should be overruled).

35. See, e.g., *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) (per curiam) (remanding for the circuit court to consider in the first instance particular arguments the parties raised in their briefing); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056 (2019) (remanding for the circuit court to consider two antecedent issues); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334 (2016) (remanding for the circuit court to address one specific component of standing).

36. See Narechania, *supra* note 11, at 932–34.

37. For a thorough study of DIGs before this period, see generally Solimine & Gely, *An Empirical and Institutional Analysis*, *supra* note 27. For an update on several quantitative measures, see Gividen, *supra* note 27. Note that, unlike in Professor Narechania’s sophisticated computational analysis, there will be no attempt here to draw systematic inferences or to detect patterns over time.

involving off-ramps. A preliminary question may be on the reader's mind: Does the Court ever explain why it does or doesn't DIG? True, the typical DIG is an unsigned one-liner.<sup>38</sup> But some are in fact accompanied by explanation or by separate writings.<sup>39</sup> Moreover, there are dissenting opinions arguing that a case should have been DIG'd, where the Court issued a merits opinion anyway.<sup>40</sup> Finally, there are occasionally frank discussions at oral argument, among the Justices and counsel, about these options.<sup>41</sup>

#### A. *Deciding Anyway*

Appellate methods can serve the curatorial interest in keeping a QP alive by offering means for rescuing a vehicle in the face of a possible defect. For example, in *McDonough v. Smith*, a statute of limitations case, in an opinion by Justice Sonia Sotomayor, the majority adopts the work-around of “assum[ing] without deciding” the necessary answers to an antecedent question,<sup>42</sup> though the dissent considered this lacuna a serious enough vehicle problem to urge a DIG.<sup>43</sup> And in *Dart Cherokee Basin Operating Co. v. Owens*, a case about removal of class actions to federal court, the majority opinion by Justice Ruth Bader Ginsburg answers an antecedent procedural question in a way that allows the Court to reach the

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38. See Shapiro et al., *supra* note 20, at 5-51 (“It is difficult to ascertain the reasons for a dismissal of the writ as improvidently granted when, as is usually the case, the Court’s order expresses none.”).

39. See Solimine & Gely, *An Empirical and Institutional Analysis*, *supra* note 27, at 1435 (documenting that seventy-three, or roughly half, of the 155 DIGs in the 1954 to 2005 period were accompanied by a majority opinion offering an explanation, and that, in another twelve cases, a suggestive explanation or discussion was offered in a concurring or dissenting opinion).

40. Professors Solimine and Gely make good use of these cases—cases not DIG'd but where the possibility was noticed—in their quantitative analyses. See *id.* at 1430.

41. See, e.g., Transcript of Oral Argument at 76–77, *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021) (No. 20-255), 2021 WL 1667970 (colloquy between Justice Samuel Alito and counsel David Cole, raising possibilities of DIG'ing or else issuing a narrow, fact-bound ruling); Transcript of Oral Argument at 45–47, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (No. 19-7), 2020 WL 1033203 (colloquy between Justice Neil Gorsuch and counsel Paul Clement, raising the possibilities of DIG'ing or else taking an off-ramp, during which Justice Gorsuch comments about the suggested off-ramp that “boy, that sounds a lot like a DIG, but, okay, fine”); Transcript of Oral Argument at 34, *Frank v. Gaos*, 139 S. Ct. 1041 (2019) (No. 17-961), 2018 WL 5635950 (colloquy between Justice Ruth Bader Ginsburg and Principal Deputy Solicitor General Jeffrey Wall about DIG'ing versus remanding).

42. 139 S. Ct. 2149, 2155 (2019). The majority opinion also seems to suggest that “having not granted certiorari to resolve those separate questions” helps to justify assuming—without deciding—the answers. *Id.*

43. Justice Clarence Thomas's dissent, joined by Justices Elena Kagan and Neil Gorsuch, explained: “McDonough asks the Court to bypass the antecedent question of the nature and elements of his claim and first determine its statute of limitations. We should have declined the invitation and dismissed the writ of certiorari as improvidently granted.” *Id.* at 2162 (Thomas, J., dissenting).

question of interest.<sup>44</sup> This move prompted a fierce dissent by Justice Antonin Scalia, arguing that, “[o]nce we found out that the issue presented differed from the issue we granted certiorari to review, the responsible course would have been to confess error and to dismiss the case as improvidently granted.”<sup>45</sup>

In other cases, the Court is accused by the dissent of deciding further issues in order to serve error correction or lower-court supervision, even when the QP originally deemed certworthy is no longer in play. One of the more interesting examples occurs in *Comcast Corp. v. Behrend*, a case about class certification, in which Justice Ginsburg argues vigorously in dissent that the Court should have DIG’d the case due to its own error in rewriting the QP at the time of granting certiorari (a mistake that caused the parties’ argumentation to focus on an issue that had been waived in the court below).<sup>46</sup> The dissent’s quarrel is not so much with that earlier mistake but by Justice Scalia’s *further* restyling of the QP in his majority opinion in order to decide the case anyway in a fact-bound way.<sup>47</sup>

Another strident expression is found in Justice Scalia’s own dissent, joined by Justice Kagan, in *City of San Francisco v. Sheehan*.<sup>48</sup> In this case, after granting two QPs, the Court chose to DIG the first one—the certworthy one—on grounds that the petitioner had changed the focus of its argument after the grant of certiorari.<sup>49</sup> But the Court went on to answer the second question anyway. This latter choice is what the dissent decries, with Justice Scalia noting that he would not “decide the independently ‘uncertworthy’ second question.”<sup>50</sup> That is, the Court DIG’d one question, but the dissenters would have DIG’d both. Justice Samuel Alito’s majority

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44. See 574 U.S. 81, 84–85 (2014).

45. *Id.* at 97 (Scalia, J., dissenting). Justice Scalia was joined in relevant part by Justices Clarence Thomas, Anthony Kennedy, and Elena Kagan. In the dissent’s view, the insuperable vehicle problem was that the posture of the case meant that the Court would be deciding whether the lower court abused its discretion in denying the petitioner permission to appeal a remand order—rather than the curated question about requirements for a notice of removal.

46. See 569 U.S. 27, 38–39 (2013) (Ginsburg, J., dissenting) (“This case comes to the Court infected by our misguided reformulation of the question presented. For that reason alone, we would dismiss the writ of certiorari as improvidently granted.”). Her dissent was joined by Justices Breyer, Sotomayor, and Kagan. The case concerned the certification of a class action against Comcast.

47. See *id.* at 40 (“By treating the first part of our reformulated question as though it did not exist, the Court is hardly fair to respondents. . . . And by resolving a complex and fact-intensive question without the benefit of full briefing, the Court invites the error into which it has fallen.”). Justice Scalia replied in a footnote that the grounds for decision had nonetheless been adequately argued. *Id.* at 36 n.5. It should be obvious to any reader of *Comcast* that the short, fact-bound opinion that resulted was written solely for the sake of decertifying that class action.

48. 575 U.S. 600, 618–20 (2015) (Scalia, J., concurring in part and dissenting in part).

49. *Id.* at 610.

50. *Id.* at 620 (Scalia, J., concurring in part and dissenting in part).

opinion defends the choice of answering the second question (about qualified immunity) by likening it to a summary reversal and citing a group of such decisions granting qualified immunity to officers.<sup>51</sup>

Such an openness to carrying out error correction—even after the curated QP has disappeared, and even in the face of colleagues arguing for a DIG—is not limited to a special regard for corporations facing a class action or for government officers who have been denied qualified immunity. It appears at least to extend to the context of capital punishment:<sup>52</sup> The tables were turned in *Madison v. Alabama*, in which Justice Alito ends up accusing the Court of pursuing error correction;<sup>53</sup> he was now the one pressing for a DIG.<sup>54</sup> In his dissent in *McWilliams v. Dunn*, Justice Alito similarly ascribes to the Court the “most unseemly maneuver” of deciding the case on fact-bound grounds resembling a QP that the Court had denied, rather than addressing the originally granted QP, in order to reverse a denial of habeas relief in a capital case.<sup>55</sup> And in *Flowers v. Mississippi*, Justice Clarence Thomas dissented, urging a DIG on the grounds that the Court had rewritten the QP to serve a desire for error correction.<sup>56</sup>

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51. Id. at 611 n.3 (“[O]ur dissenting colleagues would further punish San Francisco by dismissing question two . . . . But question two concerns the *liability of the individual officers*. . . . Because of the importance of qualified immunity ‘to society as a whole,’ the Court often corrects lower courts when they wrongly subject individual officers to liability.” (internal citation omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982))).

52. Notably, both the qualified immunity and capital contexts are among those identified by Professor Hartnett as relatively more frequent subject areas in the Court’s summary reversals during the 2005–2016 period. See Hartnett, Summary Reversals, *supra* note 12.

53. 139 S. Ct. 718, 737–38 (2019) (Alito, J., dissenting). Justice Alito’s opinion was joined by Justices Thomas and Gorsuch. The majority opinion by Justice Kagan responded as follows: “The dissent is in high dudgeon over our taking up the second question, arguing that it was not presented in *Madison*’s petition for certiorari. But that is incorrect. The petition presented two questions—the same two we address here.” Id. at 726 n.3 (citation omitted).

54. See id. at 732 (Alito, J., dissenting). Justice Kagan wrote the majority opinion (rejecting the proposed DIG) in *Madison*—but recall that she had joined Justice Scalia’s dissent (urging a DIG that was declined) in *Sheehan*.

55. 137 S. Ct. 1790, 1802 (2017) (Alito, J., dissenting). Justice Alito’s opinion was joined by Chief Justice Roberts and Justices Thomas and Gorsuch. It did not directly urge a DIG but suggested that, if counsel had changed the issue in the way the majority arguably did, the case would be DIG’d. See id. at 1807. Justice Breyer’s majority opinion replied: “We recognize that we granted petitioner’s first question presented . . . not his second, which raised more case-specific concerns. Yet that does not bind us to issue a sweeping ruling when a narrow one will do.” Id. at 1800 (citation omitted).

56. 139 S. Ct. 2228, 2254 (2019) (Thomas, J., dissenting) (“[T]he Court granted certiorari and changed the question presented to ask merely whether the Mississippi Supreme Court had misapplied *Batson* in this particular case. In other words, the Court tossed aside any pretense of resolving a legal question so it could reconsider the factual findings of the state courts.”); see also id. at 2254–55 (“The Court does not say why it disregarded our traditional criteria to take this case. . . . Whatever the Court’s reason for taking this case, we should have dismissed it as improvidently granted. . . . [The majority’s] effort proves the reason behind the rule that we do not take intensively fact-specific cases.”). Justice Thomas was joined by Justice Gorsuch. Id. at 2252.

There, the Court reversed an egregious capital conviction.<sup>57</sup>

This turning of the tables, with the same Justices showing up on both sides, is revealing. It suggests that, even if these complaints may be driven by disagreement on outcomes, there does also seem to be a shared institutional self-conception of the Court as curator. Some of the replies are made on those same terms, arguing that the error to be corrected is in fact included within the scope of a granted QP.

But not all replies say this. Most notable is the majority's invocation in *McWilliams* of the appellate norm that a case can be decided on any available grounds—even an issue on which the Court had denied certiorari.<sup>58</sup> As is well known to close observers of the Court's work, and as the next section will also illustrate, a broad interpretation of such a norm can greatly expand discretion for the Court in reconsidering which questions to answer—or not.

### B. *Taking an Off-Ramp*

A classic way of dodging a curated QP using the methods of appellate judging is to decide the case on alternative grounds. This other issue might even be a secondary, independently uncertworthy QP also granted in the case. In *Google LLC v. Oracle America, Inc.*, a high-profile copyright case, the Court avoided the broader of the two granted QPs by addressing the narrower, more fact-intensive QP.<sup>59</sup> In order to reach that second QP (about fair use), Justice Stephen Breyer's opinion explains that the Court “assume[s] but purely for argument's sake” an affirmative answer to the first QP (about copyrightability)—and then answers the second QP in a way that eliminates the need to answer the first QP for real.<sup>60</sup> The dissenting opinion by Justice Thomas asserts that “[t]he Court wrongly sidesteps the principal question that we were asked to answer.”<sup>61</sup> The majority's reply is that a “holding for Google on either question presented would dispense with Oracle's copyright claims” and that “we believe we

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57. *Flowers* is the case in which a 7-2 Court, in an opinion by Justice Brett Kavanaugh, reversed the defendant's conviction after he had been tried six times—with several earlier convictions thrown out for *Batson* problems or other prosecutorial misconduct. See *id.* at 2235. The opinion did not directly respond to the dissent's reference to a DIG but confirmed that it saw its task as error correction: “In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.” *Id.* at 2251.

58. See 137 S. Ct. at 1800. For earlier examples of cases asserting or implying such a norm, see Monaghan, *supra* note 16, at 706.

59. See 141 S. Ct. 1183, 1197 (2021).

60. *Id.* In other words, the Court assumed an answer to the first QP as one step in the path to dodging it.

61. *Id.* at 1212 (Thomas, J., dissenting). Justice Thomas, who was joined in dissent by Justice Alito, argues that one consequence is that, “[b]y skipping over the copyrightability question, the majority disregards half the relevant statutory text and distorts its fair-use analysis.” *Id.* at 1211. For further discussion of the possible distortion to the law of fair use, see *infra* Part III.

should not answer more than is necessary to resolve the parties' dispute."<sup>62</sup> There could hardly be a clearer expression of the credo of the appellate mind.

Closely related in spirit is the appellate method of ruling so narrowly that the curated QP is left largely or wholly unanswered. Two of the Court's recent religion cases, *Masterpiece Cakeshop* and *Fulton*, are well-known examples—the latter drawing a frustrated separate writing from Justice Alito, saying that “[t]his decision might as well be written on the dissolving paper sold in magic shops.”<sup>63</sup>

One further appellate method for avoiding a question is to remand, asking the lower court to clarify an ambiguity or address an antecedent question.<sup>64</sup> In the administrative law case of *PDR v. Carlton Harris*, a concurrence by Justice Brett Kavanaugh observes that, “[r]uling narrowly, the Court does not answer the question presented . . . [but instead] remands the case for analysis of two ‘preliminary issues,’ which, depending on how they are resolved, could eliminate the need for an answer in this case to the broader question we granted certiorari to decide.”<sup>65</sup> Still, the concurrence argues that the Court should just decide the QP anyway.<sup>66</sup>

In the expressions of the Justices in these cases, there seems to be a broadly shared acceptance of the appellate norm that the Court can decide the case on any available grounds (despite having directed the parties to focus their arguments on specific QPs). This gives the Court various ways to sidestep a curated QP that it now regrets taking. It is revealing that the stated objections to these off-ramps take two forms: either debating the merits of that alternative ruling, or else simply saying that the Court should have addressed the curated QP. Nobody is arguing that the Court *must* address the QP it granted; nor is anyone arguing that the Court *can't* also address the QP even while ruling on alternative grounds. The overall effect seems to be maximal discretion for the Court.

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62. *Id.* at 1197.

63. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1887 (2021) (Alito, J., concurring) (arguing that the Court should have addressed the QP concerning overruling *Employment Division v. Smith*, 494 U.S. 872 (1990)); see also *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018). Justice Alito was joined by Justices Thomas and Gorsuch in *Fulton*. Chief Justice Roberts's majority opinion replies that “we need not revisit [*Smith*] here. This case falls outside *Smith* because the City has burdened the religious exercise of [Catholic Social Services] through policies that do not meet the requirement of being neutral and generally applicable.” 141 S. Ct. at 1877.

64. Part III examines, as a cautionary tale, the well-known example of *Spoeko, Inc. v. Robins*, 578 U.S. 330 (2016).

65. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2058 (2019) (Kavanaugh, J., concurring).

66. *Id.* Justice Kavanaugh was joined by Justices Thomas, Alito, and Gorsuch.

## III. IMPROVIDENTLY PUNTED

Unintended consequences may occur, however, when the Court uses appellate moves to dodge a legal question.<sup>67</sup> Although the Justices devote much attention to envisioning the real-world impact of their ruling when they *answer* a curated QP, it may be easy for them to overlook the adverse side effects of the rulings they make as they *avoid* the curated QP.

A. *The Risk of Distortions to Law*

The foremost risk is the possibility of substantive distortion to the legal doctrine used as the off-ramp. Some of the risk arises from the temptation to lean hard on that analysis—say, about jurisdiction or an antecedent legal question—in favor of achieving the desired aim, which is to enable the Court to plausibly say that it cannot (or need not) reach the curated QP. In addition, if the Justices see this analysis as just a way to punt the real issue, the Court might be addressing the issue with little briefing or other information,<sup>68</sup> while also giving it less careful attention than a certworthy QP would receive.

The problem is that such superficial treatment of the alternative grounds nevertheless becomes enshrined in an opinion of the Court that will be cited by litigants and applied by the lower courts. In avoiding the curated question, the Court might end up twisting another question of law, creating distortion and confusion.<sup>69</sup>

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67. Some of the points raised here will also apply to rescuing troubled vehicles, though with different weight, given the distinctive institutional considerations of keeping a case versus dumping one. In some aspects, as one might expect, the contrast between a DIG and rescuing a vehicle is greater than between a DIG and an off-ramp. Most obviously, rescuing a vehicle does not involve the costs of leaving the QP undecided. Another difference is that rescuing a poor vehicle entails an opportunity cost in not being able to use a future, cleaner vehicle to decide the QP. And thus, the problem of “bad cases make bad law” may apply. An off-ramp or a DIG does not entail this opportunity cost; rather, it allows a future case to come along, presenting the earlier-punted question, possibly after a change in the Court’s personnel. See, e.g., *303 Creative LLC v. Elenis*, 142 S. Ct. 1106, 1106 (2022) (mem.) (granting review of a free speech question similar to the one previously punted in *Masterpiece Cakeshop*); see also Amy Howe, Justices Will Hear Free-Speech Claim From Website Designer Who Opposes Same-Sex Marriage, SCOTUSblog (Feb. 22, 2022), <https://www.scotusblog.com/2022/02/justices-will-hear-free-speech-claim-from-website-designer-who-opposes-same-sex-marriage> [<https://perma.cc/X9R4-TYHT>].

68. Asking for supplemental briefing in such situations may help relieve this concern, but it may also feel like throwing good money after bad. When there is no such briefing, however, some of the practical concerns here overlap with those that attend the Court’s reaching out to decide new issues not presented by the parties. See, e.g., Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. Pa. J. Const. L. 161, 177–82 (2011).

69. Such distortions are also possible in rescuing a vehicle (as opposed to taking an off-ramp)—such as answering an antecedent question in a way that allows reaching the curated QP. Consider, for example, the dissenters’ criticisms in *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 96–104 (2014) (Scalia, J., dissenting). For additional analysis, see Ronald Mann, *Opinion Analysis: Court Stretches to Correct Anachronistic*

A well-known example is *Spokeo, Inc. v. Robins*, in which the Court punted on the question of interest<sup>70</sup>—a question it had already avoided before in an earlier case<sup>71</sup>—by remanding the case to the lower court to address one component of Article III standing. But what the *Spokeo* opinion said about standing doctrine along the way, in order to justify this punt, generated enormous confusion and disarray in the lower courts.<sup>72</sup> If *Spokeo*'s slapdash reasoning had seemed passable enough as makeweight inside the Court, the opinion's impact was anything but trivial beyond those walls: *Spokeo* has been cited over 5,000 times in the federal courts.<sup>73</sup>

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Tenth Circuit Pleading Rule, SCOTUSblog (Dec. 16, 2014), <https://www.scotusblog.com/2014/12/opinion-analysis-court-stretches-to-correct-anachronistic-tenth-circuit-pleading-rule/> [<https://perma.cc/MF6R-WZUA>] (noting that readers of *Dart Cherokee Basin* may think the Court allowed its “strong view of the merits to affect its review of the abuse-of-discretion standard” and that the Court might need to repair “the damage to the law of review, steadily limiting the broad review of discretion applied here”).

70. See 578 U.S. 330, 342–43 (2016) (remanding for the circuit court to address the “concreteness” of injury as one of the requirements for standing); see also Jamal Greene, *The Age of Scalia*, 130 Harv. L. Rev. 144, 171 (2016) (writing that *Spokeo* “did no more than punt the case back to the Ninth Circuit”); Allison Grande, *High Court’s Spokeo Punt Sets Bar for Class Action Injuries*, Law360 (May 16, 2016), <https://www.law360.com/articles/796883/high-court-s-spokeo-punt-sets-bar-for-class-action-injuries> (on file with the *Columbia Law Review*). It is thought that the punt in *Spokeo* may have occurred because the Justices found themselves to be split 4-4 (after Justice Scalia passed away) on the real question of interest. See, e.g., Justin Pidot, *Tie Votes in the Supreme Court*, 101 Minn. L. Rev. 245, 299 (2016). Note that the six Justices in the majority would have had the votes to DIG; one might speculate that the etiquette or appearances of undoing certiorari became more complicated due to the passing of Justice Scalia.

71. The prior case involving a similar QP, *First American*, had been DIG’d several months after oral argument—rather than shortly after, as is typical for a vehicle problem—suggesting that the DIG was due to the Justices not reaching an answer on the QP. See Karlan, *supra* note 26; Kevin Russell, *First American Financial v. Edwards: Surprising End to a Potentially Important Case*, SCOTUSblog (June 28, 2012), <http://www.scotusblog.com/2012/06/first-american-financial-v-edwards-surprising-end-to-a-potentially-important-case/> [<https://perma.cc/3E54-HN2N>].

72. See, e.g., Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 Wm. & Mary L. Rev. 2285, 2289 (2018) (“In the wake of *Spokeo*, federal courts have wrestled with how to operationalize the Supreme Court’s pronouncements on the cognizability of intangible harm.”); Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. Rev. (forthcoming 2022) (manuscript at 10), [https://scholarship.law.gwu.edu/faculty\\_publications/1534/](https://scholarship.law.gwu.edu/faculty_publications/1534/) [<https://perma.cc/6MMQ-T7JD>] (“In the wake of *Spokeo*, courts issued a contradictory mess of decisions regarding privacy harm and standing. . . . In the lower courts, no clear principles emerged to guide the harm inquiry for standing in privacy cases. Rather than a circuit split or other clear disagreement in approach, courts produced a jumbled mess by grasping at inconsistent parts of *Spokeo*.”); Jennifer M. Keas, *Supreme Court Will Not Look at Spokeo Again, Leaving Lower Courts to Grapple With Article III Uncertainties*, Foley & Lardner LLP: Consumer Class Def. Couns. (Feb. 8, 2018), <https://www.foley.com/en/insights/publications/2018/02/supreme-court-will-not-look-at-spokeo-again-leavin> [<https://perma.cc/8PWA-DHKU>] (practitioner article noting that “the lower courts have struggled to apply [*Spokeo*’s] guidance, leading to some alarmingly varied results”).

73. *Spokeo, Inc. v. Robins*, Westlaw, <https://1.next.westlaw.com/RelatedInformation/I041b593a1b6011e6a807ad48145ed9f1/kcCitingReferences.html?docSource=a34ea6e6fd8b4171820684d8a1709b3f&pageNumber=1&facetGuid=h57f9aa8d>



It is especially easy to overlook the possibility of distortions when the Justices seem to be taking a minimalist off-ramp—a highly fact-bound resolution of a particular case, or a one-time-only narrow ruling that formally lays down little or no precedent.<sup>74</sup> The thing is, lawyers and the lower courts will still seek out hints from the Court (and follow them), even in fact-bound applications. This should not be surprising as it is very close, after all, to how the common law is made.<sup>75</sup>

Think back to *Google v. Oracle*, in which the Court sidestepped the broader QP (about the copyrightability of a certain kind of code) by assuming *arguendo* an answer to that question, thus allowing it to ground the decision instead on the seemingly fact-bound secondary QP (about the defense of fair use).<sup>76</sup> The dissent warns that the majority opinion, through its application of the fair use defense to the facts of this case, implicitly distorts several aspects of that doctrine.<sup>77</sup> The majority, recognizing this risk of distortion, answers mainly by asserting that its analysis is limited to

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76e9ffd73599200a2cef8cd5&ppcid=5ad5155fadcf4bc8bfde4814c4ce35b7&transitionType=ListViewType&contextData=(sc.Default) (on file with the *Columbia Law Review*) (last visited Apr. 12, 2022). As it turns out, the Court itself later used *Spokeo* to sidestep the QP in *Frank v. Gaos*—remanding the latter case to the lower court in light of what *Spokeo* had said about standing. See 139 S. Ct. 1041, 1043–44 (2019) (per curiam). The limited nature of *Spokeo*'s guidance, however, was not lost on the Justices, including the author of the opinion. See Transcript of Oral Argument at 47–48, *TransUnion v. Ramirez*, 140 S. Ct. 2190 (2021) (No. 20-297) (“You know, *Spokeo*'s discussion of harm is quite clipped and it's potentially subject to different interpretations” (quoting Justice Alito)). One might view *TransUnion* to be the Court's attempt, five years later, to tidy up the mess *Spokeo* made.

74. For example, consider the assessment of Professors Leslie Kendrick and Micah Schwartzman of the Court's fact-bound off-ramp in *Masterpiece Cakeshop*:

In *Masterpiece*, however, the Court's reliance on animus doctrine was troubling for several reasons. First, the Court misread the facts to find intentional hostility in the application of civil rights law where none existed. Second, the Court failed to address standard objections to judicial inquiries into public officials' intentions or motivations. These objections can be answered, but by ignoring them, or dealing with them *en passant*, the Court introduced various distortions into the doctrine.

Kendrick & Schwartzman, *supra* note 33, at 135.

75. Professor Carolyn Shapiro has criticized the Court for often *failing* to offer this sort of guidance—that is, declining to apply abstract declarations of law to the facts at hand, in order to demonstrate their application. See Shapiro, *supra* note 16, at 290.

76. See Mark A. Lemley & Pamela Samuelson, *Interfaces and Interoperability After Google v. Oracle*, 100 *Tex. L. Rev.* 1, 2 (2021) (noting that the “Court's decision to sidestep the copyrightability issue is notable because Google, and all but three of the twenty-seven amicus curiae briefs filed in support of its appeal,” had focused on that issue rather than the fair use question). Professors Mark Lemley and Pamela Samuelson also observe that the Court had previously denied Google's petition for certiorari on the copyrightability issue, in an earlier round of litigation. *Id.* at 1 n.2.

77. *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1211 (2021) (Thomas, J., dissenting) (arguing that the majority “distorts” its fair use analysis); *id.* at 1217–18 (suggesting distortions to the nature-of-the-copyrighted-work and market-effects factors in the fair use analysis); *id.* at 1219 (noting that, “by turns, the majority transforms the definition of ‘transformative’” into one that “eviscerates copyright”).

the software context.<sup>78</sup> Yet that is hardly a trivial domain! And in other copyright contexts, how the lower courts will handle these seeming doctrinal shifts remains to be seen.

B. *New DIGs?*

To avoid such unintended consequences, the simplest solution may seem to be for the Court to use DIGs more often instead. After all, a DIG would not risk the doctrinal distortions described above.<sup>79</sup> Yet, to understand the practical reach of this solution, we must return to the question: Why might the Justices ever rely on the techniques of appellate judging, rather than a DIG, to deal with a vehicle problem or an unwanted QP?

One possible reason is concern about the outcome of the case, as seen in some of the cases in Part II. There is an asymmetry at work: DIG'ing a case leaves the lower court decision in place, just as a denial of certiorari does.<sup>80</sup> Justices may wish to vacate or reverse that decision purely as a matter of not letting it stand—whether for reasons of error correction, of lower-court supervision, or of appearances.

One might say that the Justices should not be concerned about a DIG leaving things in place any more than for typical certiorari denials. But as a practical matter, by the time of a would-be DIG, the case has already come under the Justices' review and into the public spotlight. At that point, it may be hard to unsee a troubling error—and easy for the Court to undo it. In such a case, perhaps the more realistic solution is for the Justices to reverse in a way that is as unlikely to generate distortions as possible, keeping in mind that even seemingly narrow or fact-bound rulings can still create ripple effects for the lower courts.

A second possible reason is that the Court may have a general aversion to DIG'ing.<sup>81</sup> This is because a DIG traditionally has been seen as reflecting

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78. *Id.* at 1208 (majority opinion) (“[T]hat computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world. . . . [H]ere, we have not changed the nature of those concepts. We do not overturn or modify our earlier cases involving fair use—cases, for example, that involve ‘knockoff’ products, journalistic writings, and parodies.”).

79. At most, a DIG decision might have side effects for what one might imagine as a sort of “common law of DIGs” that is internal to the Court and not a matter of setting precedent for everyone else. Cf. Narechania, *supra* note 11, at 990–93 (suggesting the development of a “common law of certiorari”).

80. Cf. Solimine & Gely, *Sophisticated Use of DIGs*, *supra* note 27, at 163, 168 (proposing and testing the hypothesis that a “strategic Court is more likely to DIG cases in which the lower court decision is ideologically consistent with the preferred ideological direction of the majority of the Court”).

81. Whatever aversion there may be is probably not about concerns that the Court would seem lazy in dropping a case. After all, it can credibly convey that any loss of work due to a DIG will be made up for by quickly taking on more future work. In some instances, the Court could prepare for such a situation by granting consolidated cases (should one of

a failure of due diligence at the certiorari stage, one entailing the waste of costly briefing and argumentation from the parties and amici, as well as the time and attention of Court personnel.<sup>82</sup> Indeed, it is part of the folklore that the Justices' law clerks, who make initial recommendations about petitions for certiorari, are mortified if they urged a grant in a case that is later DIG'd due to a vehicle problem they had failed to spot.<sup>83</sup>

But if this possible whiff of embarrassment may be a source of reluctance to DIG, its effect can be expected to fade away. In recent years, the Court has apparently been "relisting" petitions that it is considering granting (that is, delaying a decision on the petition by putting it on the agenda for a later conference of the Justices), thus buying an extra week or two to allow more thorough vetting of potential vehicle problems.<sup>84</sup>

If this new process is working well, and preliminary indications suggest that it is,<sup>85</sup> then the social meaning of a DIG should start to evolve. It may shift away from signifying an earlier failure of due diligence and toward a recognition that when DIGs occur nowadays, they are usually the result of intervening events, new information, or a judgment call. And depending on how these new DIGs come to be used—say, as candidly reasoned decisions not to answer a previously chosen QP—their meaning may even take on the whiff of good judgment.

#### CONCLUSION

Thanks to the Justices' ease in shifting between their appellate and curator frames of mind, the Court gains an extra dimension of discretion in how it decides cases. The Justices tell us as much, in cases where certiorari breaks down—where they find that they cannot or do not want to reach the original question of interest. They also show us as much in these cases, demonstrating how the methods of appellate judging can

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them need to be DIG'd), or perhaps by substituting one of the cases being held for possible GVR in light of that case.

82. True, there may be considerable sunk costs. Yet as far as the parties are concerned, who wins is roughly a zero-sum choice: One side will be pleased, the other not so much. As for the lack of law declaration on the QP that everyone was expecting to hear about, an off-ramp is hardly better than a DIG. Anyone hoping for an answer to the QP will be disappointed—and seeing opinion pages devoted instead to makeweight analyses of an off-ramp issue seems just as likely to aggravate as to mollify. (Better to use those pages explaining a DIG, one might think, not least for improving public understanding of the Court's work.) In thinking about such institutional considerations, it may be useful to compare a DIG with the other occasion when the Court issues no decision in a case that it has granted and possibly heard: when the votes are tied 4-4. For an argument that the Court should DIG cases instead of issuing 4-4 nondecisions, see Pidot, *supra* note 70, at 250.

83. See, e.g., Adam Liptak, A Second Justice Opt[s] Out of a Longtime Custom: The 'Cert. Pool', N.Y. Times (Sept. 25, 2008), <https://www.nytimes.com/2008/09/26/washington/26memo.html> (on file with the *Columbia Law Review*).

84. See Elwood, *supra* note 23.

85. See Gividen, *supra* note 27 (noting a sizeable drop in DIGs since October Term 2014).

create options beyond dismissal. Taking such options may be convenient, face-saving, or even compelling in some cases. But as we have seen, it is not risk-free.