the merits of fundamental questions about the legal nature or scope of the Vietnam War.

True, the Court heard various disputes related to the war. Some of those, like the Pentagon Papers Case (*New York Times Company* v. *United States* in 1971), *Cohen* v. *California* (also in 1971, in which a protester was prosecuted for nothing more than walking through a courtroom wearing a "Fuck the Draft" T-shirt), and *United States* v. *O'Brien* (a 1968 case about burning draft cards), made important contributions to our constitutional doctrine. But every time a litigant, including the Commonwealth of Massachusetts, which tried to invoke the Court's original jurisdiction in one exceptional case, sought to contest the legality of the United States' activities in Southeast Asia, or the means by which soldiers were conscripted, the Court ducked, refusing to review lower-court decisions, either through denials of certiorari or dismissals of mandatory appeals.[53]

Many of the Court's decisions not to decide provoked pointed dissents. But those dissents had no visible effect on the Court's majority, which hardened against intervention as the war dragged on. If the only options for the Court in ruling on these cases were to provide legal sanction for the government's military operations in Southeast Asia or to reject them, the only winning move, from the Court's perspective—to borrow from the 1984 movie *War Games*—was "not to play."[54]

By 1971, the idea that the Supreme Court should have the power to pick and choose which cases it heard, and which issues it decided within those cases, had become an article of faith. Perhaps the best evidence of its ubiquity was that it even pervaded that part of the Court's jurisdiction that had *never* been thought to be up to Congress—the justices' increasingly obscure "original" jurisdiction to act as a trial court of first impression, rather than an appeals court, in cases involving states or foreign ambassadors. Thus, in *Ohio* v. *Wyandotte Chemicals Corporation*, the Supreme Court refused to allow Ohio to bring a suit directly in the Supreme Court against out-of-state

chemical companies that were allegedly responsible for mercury pollution of Ohio's rivers. Because Ohio was the plaintiff, the case clearly fell within the constitutional grant of original jurisdiction, a grant the Supreme Court had long held that Congress could neither expand nor contract. But as Justice John Marshall Harlan II wrote for the Court, it wasn't that Ohio's suit fell outside of the Court's jurisdiction; it was that it was a suit that the Court simply didn't need to hear: "In our opinion, we may properly exercise such discretion, not simply to shield this Court from noisome, vexatious, or unfamiliar tasks, but also, and we believe principally, as a technique for promoting and furthering the assumptions and value choices that underlie the current role of this Court in the federal system."

Harlan did not identify *whose* "assumptions and value choices" should inform the Court's exercise of its discretion, but the implication was obvious: he meant the Court's. *Wyandotte* thus said out loud what a half-century of practice under the Judges' Bill had implied: that underneath the Court's increasing exercise of discretion were the justices' personal preferences for which cases were—and were not—worth their time. Here, in print, was the manifestation of Taft's vision.[55]

And deciding a suit between a state and private parties that was almost certain to turn on questions of state—rather than federal—law, and that could also have been brought in the lower courts, was, from the Court's point of view, inconsistent with those assumptions and value choices. The *Wyandotte* ruling was yet another step along the same path: the justices retained the power to hear such a suit if ever they wanted to, but whether to do so was, and would be, entirely up to them. With amorphous standards invented by the justices to circumscribe that discretion, rather than black-letter rules legislated by Congress, it could hardly be a surprise that the justices increasingly accused each other of manipulating (or, at least, misapplying) their standards for whether to hear a case to suit whatever their aims happened to be.[56]

To drive home just how far the justices saw their discretion as extending, they would even apply it not long after *Wyandotte* to cases brought by states against *other states*. Unlike *Wyandotte*, which Ohio could have brought in the lower federal courts before appealing an adverse ruling to the Supreme Court, in disputes in which *both* parties are states, the Supreme Court's original jurisdiction is not just original; it is also exclusive of any other court in the country. Thus, when one state sues another, it's the Supreme Court or bust. After *Wyandotte*, it was increasingly "bust." The Court never bothered to explain *why* it had the power to decline to hear those disputes; it summarily dismissed them through orders that were invariably unexplained and unsigned. Perhaps the most famous of these was the December 11, 2020, order tossing Texas's challenge to the 2020 presidential election results in four states President Biden won. Although some were surprised to learn for the first time that the justices didn't have to hear cases like Texas's, that ruling was entirely consistent with the Court's post-*Wyandotte* approach.[57]

Of course, if Congress had a problem with the Court exercising its discretion in this way, it had the unquestioned power to tighten up the rules. Instead, through a series of reforms beginning in the mid-1970s and culminating in the late 1980s, Congress went the other way. In 1925, Taft had defended the expansion of discretion as housekeeping—a means of freeing the Court of the burden of frivolous appeals. Six decades later, everyone understood what it would mean in practice to give the justices near-complete control over their docket. Because of the continued proliferation of federal laws, and of claims based on federal constitutional rights, the Court was being forced, in the words of legendary court of appeals judge Learned Hand, to "ration justice." The only question was whether the rationing should be self-imposed or dictated by statute. By the time the Supreme Court Case Selections Act of 1988 came before Congress, it was well established that the justices interpreted their

certiorari power to pick and choose issues within cases, and not just the cases themselves. Thus, unlike in 1925, when it could fairly be said that the Court had pulled a fast one on Congress, the transfer of power here was in broad daylight.[58]

In the 1988 act, Congress all but finished Taft's work. The three-page statute converted all but one of the remaining fonts of the Supreme Court's appellate jurisdiction into discretionary review, a change that had the most immediate effect on appeals from state courts. Only those rare cases that still had to be brought in the first instance before special "three-judge" federal courts, which Congress had limited in 1976 to challenges to the reapportionment of congressional districts and certain campaign finance disputes, were still subject to "mandatory" review. The impact was immediate. Almost overnight, the number of signed opinions handed down by the Court dropped precipitously, from well north of 150 substantive rulings each term to fewer than 90. By the late 1990s, the Court was issuing fewer signed rulings than it had at any time since the 1860s. Chief Justice William Rehnquist had promised Congress, when it was considering the 1988 bill, that eliminating mandatory appeals would allow the Court to grant certiorari in *more* cases. The reality has been decidedly to the contrary.[59]

In its October 2019 Term, for example, the Supreme Court handed down signed rulings in merits cases in only 53 cases (the fewest since the Civil War), representing fewer than 1 percent of the total appeals that it received. Some of that could be chalked up to the COVID pandemic, which, among other things, led the justices to postpone arguments in 10 cases to the October 2020 Term. But there were only 56 signed decisions in that next term, and 58 in the term after that. (The average was in the eighties as late as the 2000s.) Looking at the raw data alone, the effect of Congress's complete transfer of docket control is undeniable.[60]

But the story is not just that the Court is hearing far fewer cases, or that it's picking and choosing which cases to hear, and

which issues to hear within them; it's that the demise of the merits docket has significant—and deleterious—downstream effects. For instance, plaintiffs seeking to recover damages from government officers who violate their constitutional rights, and prisoners seeking to attack a state court conviction in federal court, must show that the relevant action they are challenging was in violation of "clearly established" law. The fewer cases the Supreme Court takes up, the fewer opportunities it has to clearly establish new legal principles, and so the more difficult it is for civil plaintiffs and criminal defendants to prevail. (One of the categories in which the docket has shrunk the most involves appeals from state criminal convictions—the best opportunity for criminal defendants to argue that their convictions ran afoul of their constitutional rights. During the October 2021 Term, for instance, the Court heard only two such cases.) More generally, the fewer the cases the Court is deciding, the more the conflicts between lower-court decisions (and the more errors in lower-court rulings) are necessarily being left unaddressed. And all of this is without regard to the rise, at much the same time, of increasingly significant rulings through the kind of emergency orders that have helped to give the "shadow docket" its name.[61]

Lastly, one cannot truly understand the centrality of certiorari without understanding the extent to which it was hardly a foregone conclusion. For 101 years, the Supreme Court operated, if not always efficiently, without it; it operated without much of a certiorari practice for even longer; and it operated with a robust, if increasingly leaky, mandatory appellate docket until 1988. Nor is certiorari the only way to prevent the Court's docket from swelling beyond control. Among lots of other possible reforms, more justices could be added to handle the workload; the Court could hear most cases in three-justice panels, as is the norm in the intermediate federal appeals courts; Congress could add another layer of appeals courts to further reduce the strain on the Supreme Court; and so on. Indeed, Congress has

experience adopting many of these measures, among others, to handle burgeoning caseloads in the lower courts; there is no obvious practical or constitutional reason why it couldn't pursue the same with the Supreme Court. Simply put, certiorari was not inevitable and is not set in stone. But it's also not a coincidence that its emergence coincided with the emergence of a powerful Supreme Court. The contemporary Supreme Court would be unrecognizable without certiorari; that doesn't mean it was meant to be or must always be so.[62]

In the rise of certiorari, we see how procedural technicalities and formalities can produce massive substantive results, and how, per Hartnett, "the Supreme Court's power to set its agenda may be more important than what the Court decides on the merits." We see how the Supreme Court decides cases often by not deciding them, and that not every Supreme Court decision features seventy-five-page opinions full of soaring rhetoric and penetrating legal analysis. We see how, through its internal procedures and jurisdictional rules, the Court projects and implements its broader vision of its role in our constitutional system, both in the abstract and in relation to the rest of the federal government and the states. We see how, over time, Congress has increasingly left the Court to its own devices. And we see how norms become entrenched even as their usage expands, so that the practice of not providing explanations or vote counts when denying (or granting) certiorari today feels as if it's been true since the time of Henry IV.

But, most of all, the rise of certiorari shows how more of the Court's most important work has moved increasingly into the shadows. That's not just because the orders granting or denying certiorari are themselves inscrutable, but because the drift toward certiorari, and toward an unconstrained agenda-setting power, was gradually accomplished through a series of technical