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CIVIL RIGHTS LITIGATION IN THE LOWER COURTS: THE JUSTICE BARRETT EDITION

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Now that Justice Amy Coney Barrett has joined the United States Supreme Court, most observers predict the law will shift on many issues. This common view presumably contains at least some truth. The conventional wisdom, however, overlooks something important: the Supreme Court's ability to shift the law is constrained by the cases presented to it and how they are presented. Lower courts are thus an important part of the equation.

Elsewhere, the authors have offered a model of certiorari to demonstrate how lower courts in theory can design their decisions to evade Supreme Court review; they also explain why such "cert-proofing" tools are problematic. In this Article, they apply that model to civil rights litigation involving qualified immunity, with particular focus on Justice Barrett's confirmation. On the assumption that Barrett's views will be more like those of the late Justice Antonin Scalia (for whom she clerked) than those of the late Justice Ruth Bader Ginsburg (whom she replaced), the model predicts lower court judges who do not share Barrett's views will be tempted, at the margins, to try to evade Supreme Court review. This temptation may be particularly strong for cases that involve qualified immunity, which present unique cert-proofing opportunities. At the same time, the model predicts judges who do share Barrett's views will be less inclined to use such tools. Thus, although there likely will be no meaningful change in how most cases are decided, the upshot of the model is that in marginal cases it is possible that lower courts will change how they address civil rights litigation.

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INTRODUCTION

Justice Amy Comey Barrett's confirmation to the U.S. Supreme Court has the legal world buzzing about changes to come in U.S. law.[1] Conventional wisdom holds that Justice Brett Kavanaugh may be the Court's new "swing justice" and that Chief Justice John Roberts has suffered a loss of power.[2] Accordingly, many scholars and commentators predict that the law will shift on many issues. After all, the theory goes, with "five staunch conservatives and one moderate conservative," it is "much more difficult for Justices Breyer, Sotomayor, and Kagan to be in the majority," which could potentially shut down a path to "progressive change."[3]

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[1] *See, e.g.*, Erwin Chemerinsky, *The New Supreme Court*, CALIF. L. REV. ONLINE (Jan. 2021), https://www.californialawreview.org/the-new-supreme-court [https://perma.cc/PHS3-ZQRF]; *How Amy Coney Barrett Would Reshape the Court—And the Country*, POLITICO (Sept. 26, 2020, 11:00 AM), https://www.politico.com/news/magazine/2020/09/26/amy-barrett-scotus-legal-experts-422028 [https://perma.cc/7CFZ-ZHUW] (listing predictions from more than "two dozen legal thinkers").

[2] *See, e.g.*, Amelia Thomson-DeVeaux, *The Cases Where Amy Coney Barrett's Presence on the Supreme Court Could Make a Difference Immediately*, FIVETHIRTYEIGHT (Oct. 26, 2020), https://fivethirtyeight.com/features/what-kind-of-supreme-court-justice-will-amy-coney-barrett-be/ [https://perma.cc/JUP8-SCYG] (explaining that "Justice Brett Kavanaugh [c]ould replace Roberts as the court's new median justice, which could lead to a significant rightward turn on the court . . . ."); Liz Mineo, *Do Justices Really Set Aside Personal Beliefs? Nope, Legal Scholar Says*, HARV. GAZETTE (Oct. 15, 2020), https://news.harvard.edu/gazette/story/2020/10/legal-scholar-warns-of-potential-supreme-court-changes/ [https://perma.cc/48BA-93P3] (quoting Michael Karman as predicting that "Roberts will, in a sense, become irrelevant" and that "Brett Kavanaugh will probably be the swing justice").

[3] Chemerinsky, *supra* note 1.

This conventional wisdom likely contains some truth. Assuming that Barrett's views will generally be more like Justice Antonin Scalia's, for whom she clerked, than Justice Ruth Bader Ginsburg's, whom she replaced, one should expect doctrine to shift with all else being equal.[4]

But the full impact of Justice Barrett's confirmation is not so easy to predict—and that is true *even if* predictions about her approach to cases prove accurate. The American judicial system is dynamic. That is, changes at the top may prompt reactions by lower court judges,[5] whose own life tenure insulates them from the most direct forms of top-down "discipline" or "control" by the Supreme Court.[6] Thus, whatever the new equilibrium Barrett's confirmation creates, that equilibrium presumably will be a product not only of the Supreme Court's new views, but also of the lower courts' responses to those new views.

Our forthcoming article entitled *Gaming Certiorari* uses game theory to model the relationship between the Supreme Court and the lower courts in an age of certiorari.[7] As *Gaming Certiorari* explains when the views of lower courts and the Supreme Court diverge, lower court judges may be tempted to use "cert-proofing" tools to prevent Supreme Court review, including issuing unpublished opinions with cursory analysis, fact-bound rationales, or alternative holdings.[8] Perhaps more counterintuitively, our model also suggests that lower court judges may combine those tools with substantive outcomes that in a sense "split the difference" between what the lower court judges want and what a majority on the Supreme Court wants—in other

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[4] Of course, not everything else is equal. Whenever a justice joins the Supreme Court, the institution changes.

[5] As used here, "lower court judges" refers to judges on courts whose decisions the U.S. Supreme Court can review and reverse. Primarily, these judges are found on federal appellate courts and state supreme courts. To be clear, when the Supreme Court reverses a lower court's decision, it does not mean that the lower court was wrong—the Supreme Court makes mistakes. But to the extent that the judiciary is hierarchical, someone has to be on top. *Cf.* Jonathan Remy Nash, *Judicial Laterals*, 70 VAND. L. REV. 1911, 1916 (2017) ("Let us begin with the uncontroversial proposition that most U.S. judiciaries share a common internal hierarchical structure . . . .") (emphasis omitted).

[6] Terms like "discipline" and "control" imply a principal-agent relationship between the Supreme Court and lower courts. Because the Supreme Court is generally the ultimate arbiter of "what the law is" as to constitutional and federal statutory matters, we accept that relationship for the purposes of our model. Whether the "principal-agent" paradigm is always appropriate is a far more difficult issue.

[7] *See* Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 PENN. L. REV. (forthcoming Apr. 2022) (using game theory to model certiorari and the relationship between the Supreme Court and the lower courts).

[8] *See id.* at Section II.C.

words, substantive and non-substantive aspects of an opinion can be traded off of each other.[9] To be sure, *Gaming Certiorari* does not definitively claim that lower court judges try to evade review in this way, much less that it is even possible in every case. Instead, the Article attempts to show that it is theoretically possible to cert-proof some decisions and then explores the implications.[10] It also explains why cert-proofing is problematic, with special focus on the harm that it can impose on third parties.[11]

This Article uses our model for a different purpose: to explore what Justice Barrett's confirmation may broadly mean for civil rights litigation in the United States. We focus on this particular context for four reasons:

1. Because civil rights litigation is often[12] marked by sharp disagreement, our model may be especially relevant in this context. After all, cert-proofing should be most attractive for issues that judges care most about.
2. Because Justice Barrett's views likely will be different from Justice Ginsburg's views for a relatively large number of civil rights issues,[13] lower courts have special reason to expect the Supreme Court with Barrett will resolve such cases differently.
3. Because President Biden will likely appoint many lower court judges,[14] the "gap" between the views of the lower courts and those of the Supreme Court presumably will widen over the next few years for certain types of cases. Thus, to the extent that

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[9] *See id.* at Section II.D.

[10] *See id.* at Sections II.C., IV.

[11] *See id.* at Part IV.

[12] This point should not be overstated. Even at the Supreme Court, many civil rights suits are resolved unanimously or nearly unanimously. *See, e.g.*, Rivas-Villegas v. Cortesluna, No. 20-1539, slip op. at 4 (U.S. Oct. 18, 2021) (per curiam) (reversing decision denying qualified immunity with no recorded dissent); City of Tahlequah v. Bond, No. 20-1668, slip op. at 5 (U.S. Oct. 18, 2021) (per curiam) (same); Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (per curiam) (reversing decision awarding qualified immunity with only one recorded dissent); District of Columbia v. Wesby, 138 S. Ct. 577, 593 (2018) (unanimously reversing decision that denied qualified immunity).

[13] *See infra* p. 9.

[14] *See, e.g.*, Madison Alder, *Georgia Opens Path for Bold Push on Judges—If Biden Wants It*, BLOOMBERG (Jan. 7, 2021, 3:45 AM), https://news.bloomberglaw.com/us-law-week/georgia-opens-path-for-bold-push-on-judges-if-biden-wants-it [https://perma.cc/P8ZL-ZY3Q] (explaining that although only one Supreme Court vacancy seems likely, Justice Breyer's seat, "[a]t least 38 Democratic-appointed appeals court judges will be eligible to take a form of semi-retirement known as senior status in January, according to a Bloomberg Law analysis of Federal Judicial Center data").

cert-proofing occurs in the real world, a focus on civil rights litigation may be a good place to find it.

4. Because civil rights litigation often involves qualified immunity,[15] it carries with it a unique cert-proofing tool. The test for qualified immunity has two steps (was the right violated, and if so, was the right clearly established)[16] which lower courts can apply in a discretionary manner (they can say that even assuming the right exists, it was not clearly established, and thus dismiss the claim, or they can say that the right was not clearly established but then clearly establish it for future cases).[17] This unique tool further complicates the relationship between the lower courts and the Supreme Court.[18]

Our model predicts that Justice Barrett's confirmation will, at the margins, result in some lower court judges—those who do not agree with the views of the new Supreme Court majority—being more tempted to use cert-proofing tools. Additionally, to the extent that a lower court decision that rules against a civil rights plaintiff but also clearly establishes the law for future plaintiffs is less cert worthy than a decision that rules in favor of the plaintiff,[19] our model also predicts at the margins that judges who disagree with the Supreme Court will be more tempted to issue decisions that deny immunity but that clearly establish the right going forward. By contrast, lower court judges with views more aligned with the new Supreme Court majority's views will also face different incentives, including reduced temptation to use cert-proofing tools. To the extent that our model at least sometimes accurately captures incentives and further that sometimes judges

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[15] *See infra* pp. 5–8.

[16] *See* Pearson v. Callahan, 555 U.S. 223, 232 (2009).

[17] *See id.* at 236.

[18] *Cf.* Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 119 (2016).

[19] As a formal matter, review is possible in such a case. The plaintiff, after all, is free to petition for certiorari, but to prevail, the plaintiff must show not only a rights violation, but also that the right at issue was clearly established. This requirement to establish two propositions can create "vehicle" issues for a certiorari petition. *See, e.g.*, Brief in Opposition at 14, Harris v. Williamson County, 141 S. Ct. 849 (2020) (No. 20-353) (raising this objection as a reason to deny certiorari). To be sure, sometimes even if the lower court granted qualified immunity, defendants can still obtain review if they can show that they will be sufficiently affected by the new rule going forward. *See* Camreta v. Greene, 563 U.S. 692, 708 (2011). Nevertheless, it is surely more difficult for defendants to obtain such review than when the lower court rejects qualified immunity. *See, e.g.*, Clement v. City of Glendale, 518 F.3d 1090, 1093 n.4 (9th Cir. 2008) (explaining that decisions granting immunity to a government official but establishing the law going forward may be "effectively, cert-proof").

in fact respond to those incentives, the upshot should be that civil rights litigation will change, even without the Supreme Court itself resolving cases differently.

To be clear, we do not wish to overstate our position. Like any model, ours has limitations, even to the extent that our model reflects the real world. Moreover, our predictions still are only at the margins. In most cases, nothing should change. Even so, there is at least some reason to predict that how lower courts decide civil rights cases *sometimes* may change—which should matter to those who study civil rights in general and qualified immunity in particular.

Part I briefly discuss the basics of civil rights litigation—including qualified immunity—and explores how Justice Barrett's views may diverge from the late Justice Ginsburg's. Part II briefly explains our model from *Gaming Certiorari* and its limitations. Then, Part III applies our model to civil rights litigation to explore what Justice Barrett's confirmation could mean for lower court decision-making.

I. SOME NECESSARY BACKGROUND

To understand what Justice Barrett's confirmation might mean for civil rights litigation in the lower courts, it is necessary to understand at least three things: (i) the basics of civil rights litigation, including qualified immunity; (ii) qualified immunity's discretionary order-of-operations; and (iii) Barrett's substantive views—to the extent anyone knows them.

A. CAUSES OF ACTION AND QUALIFIED IMMUNITY

Civil rights litigation is the subject of a great deal of scholarship. Yet, what falls within the term "civil rights" is complicated. Every aspect of the law can affect individuals[20]—from contracts to evidence to property to securities regulation. This Article uses the term "civil rights" to refer to constitutional rights enforceable under 42 U.S.C. § 1983 (for state officers)[21]

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[20] *See, e.g.*, Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1635–36 (2017) (explaining how civil procedure implicates questions of equality and justice).

[21] 42 U.S.C. § 1983. Section 1983 can be used to enforce more than just constitutional rights. *See, e.g.*, City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 119 (2005) (explaining that § 1983 "authorizes suits to enforce individual rights under federal statutes as well as the Constitution" but that it "does not provide an avenue for relief every time a state actor violates a federal law"). Here, we do not address the murky field of when § 1983 applies to violations of statutory rights. *See id.* at 127 ("The statute books are too many, federal laws too diverse,

and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (for federal officers).[22] Although this definition is underinclusive, other scholars use it[23] and it works here for illustrative purposes.

Section 1983 and *Bivens* are the "backbone of modern civil rights litigation" because they allow individuals to seek damages.[24] When government officials violate an individual's federal constitutional rights, that individual sometimes can sue those officials in their individual capacities for monetary relief, which compensates the injured person and creates disincentives for officials to violate rights more generally.[25] Although aspects of § 1983 and *Bivens* causes of action are debated—*Bivens*, for example, is an implied cause of action,[26] and the Supreme Court has arguably improperly expanded § 1983's scope in some ways[27] while arguably wrongly limiting it in others[28]—they are nonetheless relatively common paths to federal court.[29]

Both § 1983 and *Bivens* are also subject to a qualified immunity defense.[30] Because of qualified immunity, a plaintiff seeking damages must

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and their purposes too complex for any legal formula to provide more than general guidance.") (Breyer, J., concurring).

[22] 403 U.S. 388 (1971).

[23] *See, e.g.*, Laura E. Flenniken, *No More Plain Meaning*: Farrar v. Hobby, 71 DENV. U. L. REV. 477, 479 n.13 (1994) (explaining that "[c]onstitutional tort litigation is a subset of civil rights litigation [that] refers to § 1983 actions and similar suits brought against federal actors pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.").

[24] Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 9 (2015).

[25] *See, e.g.*, *id.* Notably, § 1983 also sometimes authorizes suits against municipalities. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (allowing suit where "official municipal policy" is unlawful). We do not directly address such suits here.

[26] *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) ("Given the notable change in the Court's approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity.").

[27] *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("The § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier.").

[28] *See, e.g.*, Katherine Mims Crocker, *Reconsidering Section 1983's Nonabrogation of Sovereign Immunity*, 73 FLA. L. REV. 523, 525 (2021) (arguing that the Supreme Court wrongly held that states are not subject to suit under § 1983).

[29] *See, e.g.*, U.S. CTS., U.S. DISTRICT COURTS—CIVIL CASES COMMENDED, BY NATURE OF SUIT AND DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2020 1 tbl.C-3, https://www.uscourts.gov/sites/default/files/data_tables/jb_c3_0930.2020.pdf [https://perma.cc/8W37-3J8S].

[30] *See, e.g.*, Andrea Craig Armstrong, *Prison Medical Deaths and Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 79, 94 (2022); Julio Pereyra, Ziglar v. Abassi *and Its Effect*

prove not only that the official violated a constitutional right, but also that the right was "clearly established" at the time of the violation.[31] To be clearly established, "existing law must have placed the constitutionality of the officer's conduct 'beyond debate'" such that "all but the plainly incompetent or those who knowingly violate the law" are immune.[32] Thus, "[i]t is not enough that the rule is suggested by then-existing precedent," but instead "precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply" which typically requires either "'controlling authority' or 'a robust consensus of cases of persuasive authority.'"[33] Due to this high standard, "violations of federal civil rights regularly go without a federal remedy."[34]

B. QUALIFIED IMMUNITY'S DISCRETIONARY ORDER-OF-OPERATIONS

Since 2009, qualified immunity has also had an unusual wrinkle—if it wishes to do so, sometimes a court can create "clearly established" law going forward even though it will not benefit the plaintiff in the litigation.

In *Pearson v. Callahan*,[35] the Supreme Court confronted a puzzle. Recall that a civil rights litigant must show two things to prevail: (i) a violation of a right that (ii) was clearly established at the time of the violation. Ordinarily, a court does not decide a constitutional question if a non-constitutional path is available.[36] Accordingly, some judges believed that if an alleged right was not clearly established, a court should dismiss the claim

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on the Constitutional Rights of Federal Prisoners, 109 J. CRIM. L. & CRIMINOLOGY 395, 409 (2019).

[31] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[32] District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) and Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[33] *Id.* at 589–90 (quoting *al-Kidd*, 563 U.S. at 741–42). Where it is obvious that a constitutional right exists, no precedent is necessary. *See, e.g.*, Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020) (per curiam) (concluding that under "extreme circumstances," it can be "obvious" that conduct is unconstitutional (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002))).

[34] Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 231 (2020).

[35] 555 U.S. 223 (2009).

[36] *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" (quoting Burton v. United States, 196 U.S. 283, 295 (1905))).

without deciding whether the alleged right actually exists.[37] Yet if courts always did that, then "constitutional stagnation" may result as some rights might *never* become clearly established, especially in the context of new technologies.[38] In *Saucier v. Katz*, the Supreme Court held that the best way to prevent constitutional stagnation is to impose an "order-of-operations" rule requiring courts to always decide the constitutional question first.[39] *Saucier* prompted much consternation among many judges who often have sound reasons not to decide a constitutional question that is unnecessary to the ultimate resolution of a case, especially in cases with poor briefing.[40] In *Pearson*, the Supreme Court unanimously overruled *Saucier*.[41] Now, when an alleged right is not clearly established, a court has discretion whether to resolve the constitutional question going forward for the benefit of future litigants or simply dismiss the claim and leave the law unsettled.[42]

In a pair of empirical studies, one of us (Nielson) examined how judges exercise their discretion under *Pearson*.[43] Among other findings, those studies suggest that federal appellate judges appointed by Democratic presidents may be more likely to award qualified immunity to the defendant and clearly establish the law going forward in a way that makes clear that the conduct at issue violates federal law.[44] In contrast, federal appellate judges appointed by Republican presidents may be more likely to dismiss the claim on the ground that the right was not clearly established without proceeding to reach the merits.[45] But when Republican-appointed judges do use their discretion to reach the constitutional question (at least when sitting together), they may be more likely to issue alternative holdings—that the right was not violated and, in any event, the right was not clearly established.[46] Notably, panels with a mix of judges exhibited "no statistically significant differences

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[37] *See, e.g.*, Nielson & Walker, *supra* note 24, at 11–15.

[38] *See, e.g.*, *id.* at 11–12 (describing constitutional stagnation).

[39] *See* Saucier v. Katz, 533 U.S. 194, 200–01 (2001).

[40] *See, e.g.*, Nielson & Walker, *supra* note 24, at 17–19.

[41] *See* Pearson v. Callahan, 555 U.S. 223, 227 (2009), *overruling* Saucier v. Katz, 533 U.S. 194 (2001).

[42] *See, e.g.*, *id.* at 236.

[43] *See* Nielson & Walker, *supra* note 24; Nielson & Walker, *supra* note 18.

[44] *See* Nielson & Walker, *supra* note 24, at 46–48. To be clear, the political party of the nominating president is a very rough and imperfect proxy for understanding a judge's views. Nonetheless, because that characteristic is easy to identify and may have at least some relationship with a judge's views, the literature often relies on it.

[45] *See id.* at 45–47.

[46] *See* Nielson & Walker, *supra* note 18, at 109-10.

as to either creating new constitutional rights or finding no constitutional violation."[47]

C. JUSTICE BARRETT'S CIVIL RIGHTS VIEWS

This Article does not speculate what Justice Barrett will do on the Supreme Court. It is all too easy to make predictions only to have those predictions turn out wrong.[48] That said, the conventional wisdom is that Barrett will hold different views from the late Justice Ginsburg on some issues that fall within the umbrella of "civil rights." In fact, Erwin Chemerinsky stated that it will be "rare" for the Supreme Court to issue decisions with a "liberal result" following Barrett's confirmation.[49]

That view may be overstated. The Supreme Court is complicated; it resolves many difficult cases, sometimes with surprising line-ups.[50] Indeed, qualified immunity's two most aggressive critics are Justices Clarence Thomas and Sonia Sotomayor who do not always agree in civil rights cases.[51] Nevertheless, even if overstated, the conventional wisdom no doubt contains at least some wisdom. Although it is hard to say what Justice Barrett will do

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[47] *Id.* at at 110.

[48] *See, e.g.*, Bruce Ledewitz, *A Call for America's Law Professors to Oppose Court-Packing*, 2019 PEPP. L. REV. 1, 10 (2019)

> The reality that Justices can be unpredictable is not new. Even aside from classic examples like Justice William Brennan, whose appointment President Dwight D. Eisenhower considered a mistake, Justices Harry Blackmun, Anthony Kennedy, Sandra Day O'Connor, and David Souter did not always deliver results that the Presidents who appointed them would have endorsed. Most recently, constitutional jurisprudence has not consistently resulted in conservative outcomes despite the fact that Republican Presidents have appointed the majority of the current Supreme Court.

[49] Chemerinsky, *supra* note 1.

[50] *See, e.g.*, Debra Cassens Weiss, *Is it a 3-3-3 Supreme Court? Barrett Opinion Gives Goldman Sachs Partial Win in Class-Action Case*, ABA J. (June 21, 2021, 1:35 PM), https://www.abajournal.com/news/article/is-it-a-3-3-3-supreme-court-barrett-opinion-gives-goldman-sachs-partial-win-in-class-action-case/ [https://perma.cc/6XMV-AXZ7] ("Three conservative justices—Neil M. Gorsuch, Clarence Thomas and Samuel A. Alito Jr.—did not join the portion of Barrett's ruling favoring the plaintiffs. The split is in keeping with other opinions in which conservatives Roberts, Barrett and Kavanaugh are emerging as a more moderate wing of the court . . . ."); Jonathan H. Adler, *A New Five-Justice Block on the Supreme Court?*, VOLOKH CONSPIRACY (Mar. 25, 2021, 10:41 AM), https://reason.com/volokh/2021/03/25/a-new-five-justice-block-on-the-supreme-court/ [https://perma.cc/2UU4-RRHU] (explaining that "[t]he Supreme Court issued two significant decisions today," and "[i]n both decisions, the Chief Justice and Justice Kavanagh [sic] aligned fully with the Court's three liberal justices . . . .").

[51] *See* Nielson & Walker, *supra* note 34, at 231.

in individual cases, it seems safe to say that her views generally will be closer to Justice Scalia's than Justice Ginsburg's. When she accepted her nomination to the Supreme Court, for example, Barrett stressed that Scalia was her "mentor" and that his "judicial philosophy is mine, too."[52] Likewise, on the Seventh Circuit, Barrett wrote a decision that suggests sympathy for a broader reading of the Second Amendment than the one adopted by Ginsburg.[53] Further, since Barrett received the title "Justice," she has joined decisions suggesting she recognizes a more robust right to religious liberty than Ginsburg did.[54]

II. GAMING CERTIORARI

The Supreme Court's views about the law are important, but so are both the preferences and the decisions of the lower courts. Relevant here, the Supreme Court's ability to decide cases often depends on how cases are resolved in the lower courts. Attorneys file many more petitions for "cert" than the Supreme Court has the ability to review, so the justices must decide which cases merit their scarce time. The justices make that determination through the certiorari process, which requires the Supreme Court to determine whether a particular lower court decision is a good "vehicle" for review.[55] As we explain in *Gaming Certiorari*, it sometimes may be possible for lower courts—fearing reversal—to deliberately make their decisions bad

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[52] President Donald Trump & Judge Amy Coney Barrett, Remarks by President Trump Announcing His Nominee for Associate Justice of The Supreme Court of The United States (Sept. 26, 2020) (transcript available at https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-announcing-nominee-associate-justice-supreme-court-united-states/ [https://perma.cc/8DBM-MUJ8]).

[53] *See* Kanter v. Barr, 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting) ("[A]lthough the right protected by the Second Amendment is not unlimited, its limits are not defined by a general felon ban tied to a lack of virtue or good character." (citation omitted)). The idea that Justice Barrett is more likely to recognize a broader right to bear arms than Justice Ginsburg would have is shared by those who opposed and supported her nomination. *Compare* Carrie Johnson, *Gun Control Groups Voice 'Grave Concerns' About Supreme Court Nominee's Record*, NPR (Oct. 9, 2020, 8:00 AM), https://www.npr.org/2020/10/09/921713631/gun-control-groups-voice-grave-concerns-about-supreme-court-nominee-s-record [https://perma.cc/E2DU-HMFR] (reporting concern) *with* Amy Swearer, *Judge Amy Coney Barrett Scares Gun-Control Advocates for the Right Reasons*, HERITAGE FOUND. (Oct. 13, 2020), https://www.heritage.org/courts/commentary/judge-amy-coney-barrett-scares-gun-control-advocates-the-right-reasons [https://perma.cc/34R9-6FTD] (defending Barrett's perceived broad view).

[54] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (concluding that the lower court erred by not enjoining Covid-related limits on religious activity).

[55] *See* Nielson & Stancil, *supra* note 7, at Section II.B.

"vehicles" for Supreme Court review. For purposes of this Article, we briefly describe our model from *Gaming Certiorari* and identify its limits.

A. THE GAMING CERTIORARI MODEL

Gaming Certiorari develops a spatial model of judicial conduct in which judges—both on the Supreme Court and the lower courts—acting within the confines of a group attempt to make decisions. As the model is spatial rather than formally mathematical, we depict each player's perspective of "best outcome" in terms of an "ideal point" located somewhere within the range of possible outcomes. We first introduce the concept with a single-dimensional analysis that omits transaction costs.[56] In this single-dimensional analysis, each player's ideal outcome appears as a single point on a spectrum; for example, one might evaluate possible resolutions of qualified immunity cases solely based on their location on a spectrum between no-liability and liability outcomes:

[56] Because our model is a single-iteration game, all figures are case-specific. Thus, a single judge's view of the best outcome depends entirely on the nature of the underlying alleged constitutional or statutory right at issue *in that specific case*. Our model does not address how a judge decides what is the "best" outcome, though we believe notions of legal correctness should constrain a judge's view of what is "best." *See generally id.* at Part IV.

Figure 1: Hypothetical Ideal Points

Figure 1 depicts the ideal points of a hypothetical Supreme Court, identified as points CJ (for the Chief Justice) and J2-J9 (for the remaining eight justices, in decreasing order of seniority). Figure 1 also depicts the inherited result R_i. This point represents the status quo against which each justice must evaluate each case to determine if he or she should vote in favor of certiorari. In the simplified "blank slate" or "case of first impression" scenario we explore here, point R_i thus represents the location of the result generated by the lower court.[57]

A player maximizes her utility if the court's decision falls precisely at that player's ideal point, and each player's utility for any other outcome is essentially the inverse of the distance between that outcome and the player's ideal point.[58] Accordingly, in a single-dimensional world without transaction

[57] In later figures, we replace the term R_i with the term *LC'*. Point *LC* represents the lower court's own ideal point; point *LC'* in turn represents the lower court's optimal strategic response to the preferences (and eventually the transaction costs) of the justices of the Supreme Court.

[58] For ease of illustration, we make the simplifying assumption that each player's utility is defined as the inverse of the distance between her ideal point and the outcome being considered, regardless of directionality. For example, in a single-dimensional analysis based on a linear "liberal to conservative" spectrum, a justice would regard an outcome *x* units to

costs, the Supreme Court will grant certiorari when at least four justices anticipate an improvement from P_i if they take the case.[59]

As *Gaming Certiorari* explains, even a single-dimensional analysis yields some potentially surprising and counterintuitive results.[60] Many petitions for certiorari, however, involve two or more potential dimensions. For example, in the context of qualified immunity, individual judges or justices may have one view as to whether the constitutional rights regime in question should be based upon bright-line rules or case-specific standards, and another potentially competing set of preferences with respect to whether the particular defendant should face liability.[61] To demonstrate the implications of a multidimensional game, our model also depicts a two-dimensional range of outcomes:

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the left of her ideal point as having identical utility to an outcome x units to the right of her ideal point. No doubt, the real world is more complicated, but that complication simply makes the analysis harder, rather than defeating the *conceptual* value of the model. *See* Nielson & Stancil, *supra* note 7, at Section II.A.

[59] Figure 1 reflects just such a situation, because a bloc of six justices (CJ, plus J2, J4, J7, J8, and J9) all could improve the outcome in a new case relative to the inherited outcome; that is, this coalition of six justices could craft a majority opinion better from each of their individual perspectives than R_i.

[60] *See* Nielson & Stancil, *supra* note 7, at Section II.A.2.

[61] Different judges, for example, may have different views about whether "even a bad rule is better than no rule at all." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); *cf.* Borden v. United States, 141 S. Ct. 1817, 1836 (2021) (Thomas, J., concurring in judgment) ("I reluctantly conclude that I must accept [a case I disagree with] in this case because to do otherwise would create further confusion and division about whether state laws prohibiting reckless assault satisfy the elements clause."). Note, we model preferences for "liability versus no liability" as a continuum because although the actual final determination will necessarily be binary (the plaintiff will either win or lose), both judicial *views* as to the issue and the effective *rule* established by any Supreme Court decision can and likely will be non-binary. Further, we do not claim that these are the only possible dimensions. We use these two dimensions for illustrative purposes, especially because the math gets very complicated when using three or more dimensions. We also do not address how a judge reaches a preference.

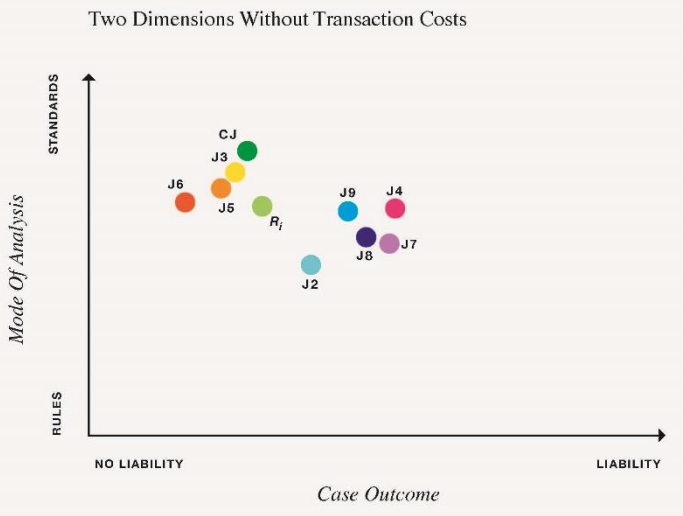

Figure 2-A: Hypothetical Ideal Points

In Figure 2-A, three hypothetical justices (J3, J5, and J6) have a relatively strong preference for standards over rules and lean against liability. However, four other hypothetical justices (J4, J7, J8, and J9) have a slightly stronger preference for rules and lean more strongly toward liability. CJ and J2 are outliers. The hypothetical Chief Justice prefers standards to rules but prefers liability at a level between the two blocs. By contrast, J2 prefers rules to standards more than any other justice. J2's liability preferences also lie in the middle, closest to the Chief Justice's.

The general approach to analyzing a two-dimensional certiorari game is the same as in the one-dimensional context, albeit slightly more complicated. As in the single-dimensional context, the goal is to determine whether a certiorari grant that results in a majority opinion will improve the positions of at least four justices.[62] As before, the model defines each justice's utility

[62] Certiorari is granted on the affirmative vote of four justices; accordingly, certiorari will be granted if at least four justices anticipate a better outcome (from their perspective) of the resulting five-or-greater justice majority in a merits decision. *See* Nielson & Stancil, *supra* note 7, at Part I.B.

for a given outcome by the absolute distance between that outcome and the justice's ideal point. However, because a two-dimensional analysis involves potential tradeoffs between the dimensions, predicting the outcome of a certiorari petition is more difficult:

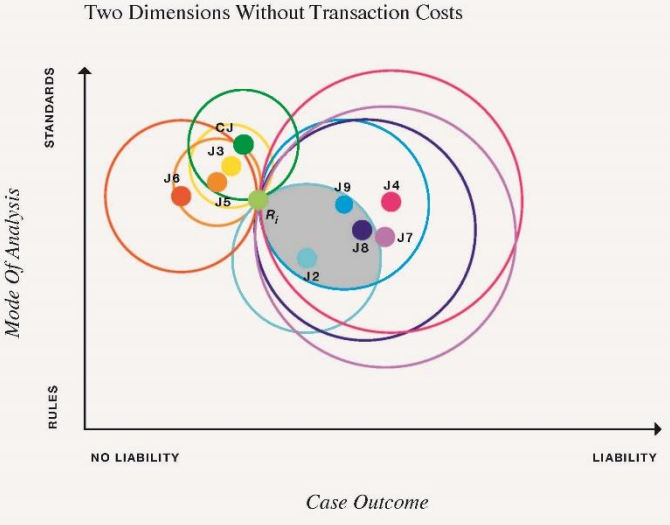

Figure 2-B: Hypothetical Ideal Points

Figure 2-B adds to the model both the circular zones of potential outcomes that would represent an improvement relative to the inherited outcome from each justice's perspective *and* what we call a "Pareto improvement zone"—an area in which any result would represent an improvement for a coalition of five justices.[63] The Pareto improvement zone in Figure 2-B is shaded gray, which is obtained by intersecting the five circles around points J2, J4, J7, J8, and J9. Because each of those circles intersects the inherited result *Ri*, any point closer to a justice's ideal point than on her respective circle represents an improvement from her perspective. By

[63] We assume for simplicity that each justice weights each dimension equally, which allows the use of circles rather than more complex shapes. Again, although this assumption likely abstracts away from reality in many cases, it does not affect the power of the model to deliver insights into the certiorari game. *See* Nielson & Stancil, *supra* note 7, at Section II.A.3.

identifying the intersection of the five listed circles, we identify the policy space within which that five-justice coalition could together obtain a result each regards as superior to the inherited result. Accordingly, in a two-dimensional world without transaction costs, the Supreme Court will vote to grant certiorari if four justices can reliably predict a better outcome than R_i in a merits decision.[64]

Figure 3 adds two additional components into the mix—the "transaction costs"[65] facing the justices and the absolute preferences of the lower court (labeled *LC*):

[64] Some two-dimensional preference mappings may contain more than one potential "minimum winning coalition" that could see a Pareto improvement from the inherited result. In Figure 2-B itself, there are at least two other minimum winning coalitions consisting of the Chief Justice and other combinations of the four justices on the right side of the figure. But for reasons we explain more fully in *Gaming Certiorari*, the minimum winning coalitions involving the Chief Justice in Figure 2-B would not carry the day, in large part because the J2-J4-J7-J8-J9 coalition would be "stronger" than any coalition the Chief Justice could cobble together. *See* Nielson & Stancil, *supra* note 7, at Part II.A.3.

[65] By "transaction costs," we mean all costs a justice must incur as part of deciding a particular case on the merits. *See id*. at Section II.B.1. This includes each justice's opportunity costs (effectively a measure of how important the case in question is to that Justice relative to all other matters on the Supreme Court's docket) as well as error costs (the risk-adjusted expected cost of making a mistake), bargaining costs (the effort and political and/or interpersonal capital expended to negotiate a merits outcome), and search and information costs (the costs to each justice of obtaining the information they need to make informed decisions).

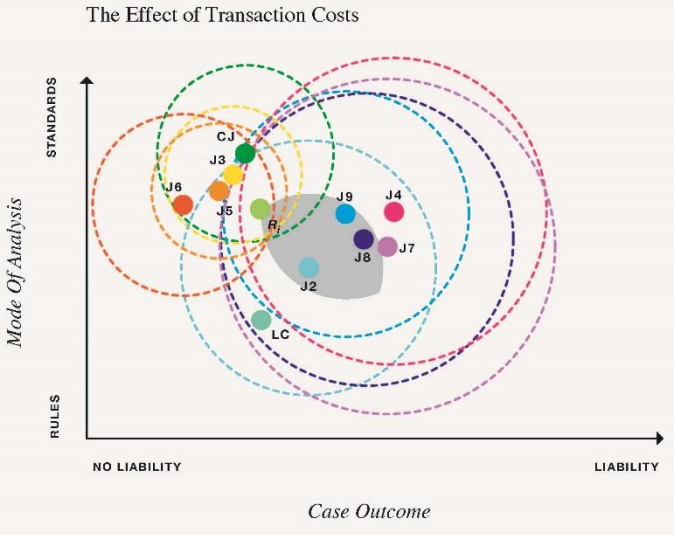

Figure 3: Hypothetical Ideal Points

In this figure, dashed circles replace the solid circles and represent the transaction costs facing each justice. In our model, each justice still has an ideal point representing her preferences in a cost-free world. The dashed circle centered upon her ideal point represents her personal indifference curve once we account for her transaction costs. Thus, although the hypothetical Chief Justice here would still prefer an outcome precisely at point CJ if she does not have to do any work to make it happen, she is ultimately indifferent as between point CJ and any other point on or within the black dashed circle surrounding CJ when she considers her transaction costs. Put slightly differently, while the Chief Justice might still prefer CJ to any other outcome, she will not take action to improve the result if it lies on or within her transaction cost circle.

Point *LC* represents the lower court's ideal point. In a world without transaction costs, the lower court's ideal point is often irrelevant because *any* decision outside the minimum winning coalition's mutual Pareto improvement zone will yield a certiorari grant and an outcome on or within

that boundary. Transaction costs may change the equation, however.[66] The basic model's upshot is that lower courts, in theory, can take advantage of both each justice's multidimensional preferences *and* each justice's own transaction costs to craft outcomes that may evade review despite the existence of a coalition of five or more justices that could otherwise use the petition to improve upon the inherited outcome. Moreover, as *Gaming Certiorari* explains, lower court judges have at least some ability to create transaction costs for the justices. For example, they may issue unpublished opinions with alternative holdings and little analysis that do not finally resolve the case, but instead remand for further analysis. Each of these factors is generally understood to make a case a relatively worse "vehicle" for certiorari.[67]

Figure 3 assumes that the depicted transaction costs are the result of lower court "cert-proofing."[68] In a world without transaction costs, the lower court would not be able to write an opinion at its ideal point *LC* without prompting Supreme Court review. However, given the hypothetical cert-proofing transaction costs we posit, the lower court in Figure 3 *can* safely write precisely at *LC*. This is because there is no minimum winning coalition of justices willing to incur the transaction costs associated with a cert grant and merits opinion given the predicted outcome of a cert grant.[69]

B. LIMITS OF OUR MODEL

To be clear, our model has limits. After all, all models of human behavior depend on simplifying assumptions that make such models reductionist to some degree. Here, our assumptions may diverge from reality in several ways. For example, as with many game theoretical models, we assume each player attempts to maximize her own preferences and knows

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[66] Because lower courts either hear appeals of right (*e.g.*, most cases before federal circuit courts of appeal) or have already sunk their transaction costs (*e.g.*, discretionary review in state courts of last resort), their transaction costs for purposes of our analysis are effectively zero. That no doubt is also an oversimplification but is not ultimately relevant to the analysis here.

[67] *See* Nielson & Stancil, *supra* note 7, at Sections I.B.1, II.B.3.

[68] *See supra* fig.3.

[69] If the Supreme Court decides to grant review—for whatever reason—the justices' transaction costs are no longer relevant. Thus, if the lower court were to write an opinion *outside* a sufficient number of transaction cost boundaries, two things would happen. First, the Supreme Court would grant certiorari. Second, the outcome would be as we described above in the text discussing a zero-transaction-cost world. Thus, for the lower court's opinion to be cert-proof in this hypothetical, it need only fall in a location that will draw three or fewer votes for certiorari *from the zero-transaction-costs winning coalition.* That means it needs to be *inside or on* at least two of that winning coalition's transaction cost boundaries.

both the ideal points and the transaction costs facing every other player. This may not always be accurate. As a result, some lower courts may not engage in the calculus we suggest, and even those that do might get things wrong. Moreover, some judges and justices may be playing a longer game (i.e., thinking about a series of cases over time rather than a single case), such that our single-iteration model fails to capture relevant longitudinal incentives. Relatedly, as noted above, it is possible that cases involve more than one or two potential competing dimensions, and it is likely that multi-dimensional cases involve different relative preference intensities for each dimension (and possibly for each judge or justice). Finally, the model is limited by epistemological limitations on the quality of its inputs—it often will be difficult if not impossible to identify specific ideal points for each player, and it will often be even harder to quantify each player's transaction costs accurately.[70]

For these reasons (and likely for other reasons related to other simplifying assumptions we make), our model is not intended to make precise, fine-grained outcome predictions, especially because lower courts operate in panels, which influences how those courts decide cases. Rather, we designed the model to illustrate the *dynamics* associated with the certiorari decision and the role the lower courts can play in that process.

III. JUSTICE BARRETT AND CIVIL RIGHTS LITIGATION IN THE LOWER COURTS

So long as lower courts disagree with the Supreme Court, judges may be tempted to try to cert-proof their decisions. As explained above, this does not mean that every judge will do so, nor that it is even possible to do so for every case—sometimes an issue is so obviously important that certiorari is essentially a foregone conclusion.[71] But when a lower court and the Supreme Court disagree, the temptation to evade review may arise, even if lower courts do not act upon that temptation. Thus, Justice Barrett's confirmation provides a unique opportunity to explore conceptually the relationship

[70] In fact, taken to its extreme, the model suggests that the Supreme Court will rarely (if ever) grant certiorari, because it always has the lower court placing the opinion in the location that maximizes the lower court's utility while being insulated from Supreme Court review. Obviously, that does not match reality.

[71] *See, e.g.*, Benjamin Johnson, *The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law*, 50 CONN. L. REV. 581, 589 (2018) (explaining that some petitions are "so overwhelmingly important" that it is obvious that the Supreme Court will grant certiorari and that, indeed, it would be "irresponsible" to deny review).

between the Supreme Court and the lower courts. Barrett, after all, replaced the late Justice Ginsburg, in what may be one of the most significant shifts in decades.[72] Because Barrett and Ginsburg almost certainly view some issues differently, other judges no doubt perceive the Supreme Court as being more or less hospitable to certain types of decisions relating to those issues.

This Section uses our model to demonstrate how lower courts sometimes may respond to Justice Barrett's confirmation, with particular focus on cert-proofing. Then, we explore a specific cert-proofing tool that may be used in qualified immunity cases: *Pearson* discretion.

A. THE DYNAMIC EFFECT OF JUSTICE BARRETT'S CONFIRMATION

Gaming Certiorari attempts to explore the general relationship between the lower courts and Supreme Court. Here, however, we use our model for a different purpose: to consider what Justice Barrett's confirmation may mean for civil rights litigation involving qualified immunity.[73] Our model suggests that, all else being equal, we should expect more cases at the margins in which lower court judges attempt to evade review, at least if they hold views closer to Justice Ginsburg's than Barrett's. Similarly, judges who hold views closer to Barrett's may, at the margins, be less inclined to use cert-proofing tools.

In particular, in Figures 4 and 5, we use our *Gaming Certiorari* model to develop a plausible mapping of the justice's views in connection with a hypothetical Free Exercise case (i.e., a case implicating the First

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[72] *See, e.g.*, Mark Sherman, *Barrett Could Be Ginsburg's Polar Opposite On Supreme Court*, AP NEWS (Sept. 27, 2020), https://apnews.com/article/ruth-bader-ginsburg-us-supreme-court-courts-gun-politics-antonin-scalia-726bd0316cd646927b93137575c92966 [https://perma.cc/JRP2-8H5R] ("[T]he replacement of the liberal icon Ginsburg . . . by Barrett . . . would represent the most dramatic ideological change on the Supreme Court in nearly 30 years . . . ."); Adam Feldman, *Empirical SCOTUS: If Ginsburg Leaves it Could be the Liberals' Biggest Loss Yet – A Look Back at Previous Justices Replaced with More Conservative Successors*, SCOTUS BLOG (Jan. 17, 2019, 5:07 PM), https://www.scotusblog.com/2019/01/empirical-scotus-if-ginsburg-leaves-it-could-be-the-liberals-biggest-loss-yet-a-look-back-at-previous-justices-replaced-with-more-conservative-successors/ [https://perma.cc/K7BD-UVJB] (explaining that "[i]f Trump fills Ginsburg's seat . . . the trajectory of the Court, in terms of both case selection and adjudication, could very well look nothing like what we have seen in the past").

[73] *See* Nielson & Walker, *supra* note 18, at 119–20 (urging the Supreme Court to pay greater attention to panel composition in qualified immunity cases and less attention to whether a decision is published); *see also* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 143 (2009) (predicting strategic behavior).

Amendment's Free Exercise Clause) while Justice Ginsburg was still on the Court, and then with Justice Barrett. This model uses the Free Exercise context because the Court's approach to this issue already appears to have changed at least somewhat in a conservative direction after Barrett's confirmation.[74] This model uses individual justices' initials (*e.g.*, "SS" for Sonia Sotomayor, "CT" for "Clarence Thomas," etc.) in lieu of generic seniority-based labels to explore the effects of the Barrett-for-Ginsburg substitution. Because the Chief Justice's status provides him with special power in the game, we have retained the label "CJ." To be clear, however, our mapping is hypothetical and is not based on specific cases or judicial opinions because it is impossible to know for certain how each of the justices would view the legal question. In other words, our mapping is illustrative and is not intended to be a perfect representation of reality.

First, consider a case with Justice Ginsburg and a cert-proofing lower court whose ideal point includes a moderately stronger preference for rules over standards than the preferences of the "liberal" justices, and a substantially stronger preference against liability than the "conservative" justices[75]:

[74] We use "liberal" and "conservative" because the terms are so commonly used in the public discourse but recognize and even emphasize that such terms often cloud more than clarify.

[75] One downside of using this context is that it is (somewhat) unusual: the conservatives may be more willing to side with the plaintiff in a Free Exercise case than the liberals, whereas in other contexts it may be the liberals who are more willing to side with the plaintiff. This may affect which "cert proofing" tools are available, including the role that *Pearson* discretion can play. Nonetheless, the authors elected to use the Free Exercise context because the difference between the opinions of Justice Ginsburg and Justice Barrett have already begun to manifest. *See* Trump & Barrett, *supra* note 54.

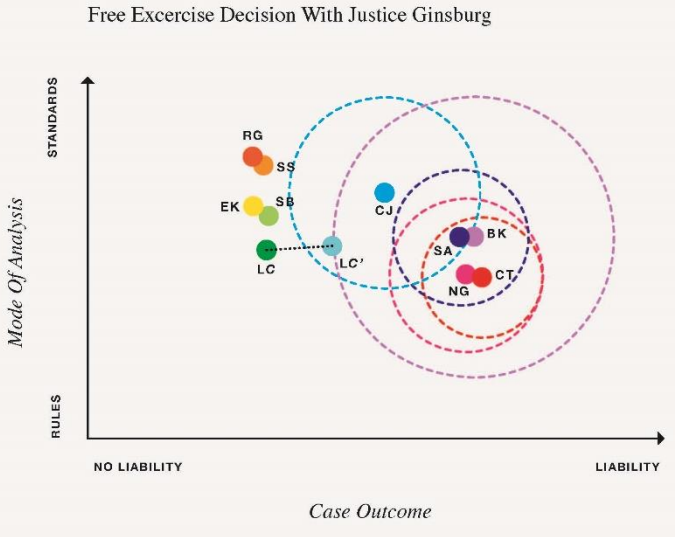

Figure 4: Equilibrium at LC'

A lower court that wishes to establish the rule somewhere other than at point CJ can increase each justice's transaction costs through the use of certain tools (e.g., an unpublished opinion, a ruling on alternative grounds, a fact-bound opinion, etc.). This model depicts those transaction costs as a dash centered upon each relevant justice's ideal point. The basic idea is that once the model factors in transaction costs, a justice who considers whether to vote in favor of certiorari when facing a lower court opinion on or inside her transaction-cost boundary will conclude that to decide that particular case is not worth her time.[76]

Accordingly, in Figure 4, the lower court can place its decision at point *LC'* without risk of Supreme Court review.[77] Although that point lies outside three conservative justices' hypothetical transaction-cost boundaries, it falls

[76] As we explain in *Gaming Certiorari*, not every justice will face the same transaction cost function in connection with every case. *See generally* Nielson & Stancil, *supra* note 7, at Section II.B.

[77] In Figures 4 and 5, we use the labels *LC'* and *LC''* to identify the locations of final policies with Justice Ginsburg and Justice Barrett on the Court, respectively.

inside the Chief Justice's boundary and *on* Justice Kavanaugh's boundary. Even though Justices Thomas, Gorsuch, and Alito would be willing to vote in favor of certiorari in response to an opinion at P_f, they could not obtain the fourth vote; the lower court's opinion is therefore cert-proof at that location.

The dynamics change when we replace Justice Ginsburg with Justice Barrett. In Figure 5, we depict that hypothetical outcome:

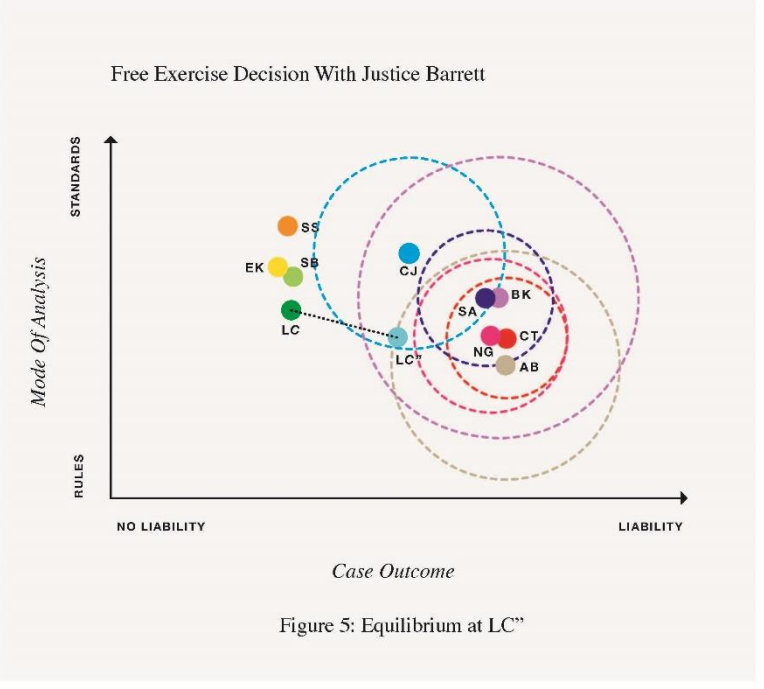

Figure 5: Equilibrium at LC"

In a world *without* transaction costs, Justice Barrett's confirmation would have had enormous effects. With no transaction costs to confound the justices, any lower court result outside the irregular pentagon formed by the ideal points of the five-justice conservative majority would have produced both a certiorari grant and an outcome on or within that pentagon. But *with* transaction costs, the result is different.[78]

[78] Given both the assumptions and the limitations of our analysis, it is not possible to predict the precise outcome in this scenario. If the Chief Justice chooses not to join the majority opinion, he would cede opinion assignment power to Justice Thomas, who could effectively insist upon an opinion written precisely at his own ideal point (whether he assigns

In this hypothetical, the substitution of Justice Barrett for Justice Ginsburg likely will have some impact, even in a world *with* transaction costs. But the extent of that impact likely could be different than many commentators believe because, at least in theory and perhaps at the margins in reality, the availability of cert-proofing tools might allow lower courts that disagree with the perceived views of the new Supreme Court to protect their opinions from review, at least to some extent.

Accordingly, Figure 5 suggests a cert-proof opinion at point *LC''*. To be sure, the shift from Ginsburg to Barrett has an impact—the lower court's closest "safe" result lies somewhat to the right with Barrett on the Court. Nonetheless, the lower court's cert-proofing efforts bear fruit when comparing a cert-proof outcome at *LC''* to a no-transaction cost outcome that would be somewhere far to the right, in the thicket of ideal points associated with the conservative justice bloc that includes Barrett. In other words, to the extent our model sometimes may reflect reality, the law will shift even without a Supreme Court decision, but the law will not shift as much as it would in a world without transaction costs—especially not as much as it would in a world where lower court judges cannot deliberately increase transaction costs.

B. *PEARSON* DISCRETION AND CERT-PROOFING

For reasons explained above, Justice Barrett's confirmation may increase the temptation for some judges to use cert-proofing tools more, and for other judges to use them less. To the extent that judges ever succumb to those temptations, we should expect them to use ordinary cert-proofing tools (e.g., unpublished opinions, alternative holdings, remand, etc.) either more or less. Whatever one's views of cert-proofing, this is a potential development to monitor.[79]

Qualified immunity, however, has a unique cert-proofing tool: *Pearson* discretion. To the extent that lower court judges believe that the Supreme Court is less likely to grant certiorari in a case where qualified immunity is awarded than otherwise, some judges may be more inclined to grant immunity while clearly establishing the law for the future. Likewise, judges

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the opinion to himself or not). If the Chief Justice chooses to *join* the majority in a way that allows him to retain opinion assignment authority (e.g., by voting in favor of liability), the ultimate outcome may change somewhat, though the Chief Justice could not write a majority opinion at his own ideal point.

[79] *See* Nielson & Stancil, *supra* note 7, at Part IV (explaining the costs "cert proofing" imposes but also noting that others may disagree).

who previously might have simply issued a decision that awarded qualified immunity but did not clearly establish the law one way or the other, may be inclined to use their discretion to recognize the right in a way that they believe reflects the new Supreme Court majority's views. Such strategic uses of discretion may counsel in favor of further refinement of *Pearson*, including a reason-giving requirement.[80]

CONCLUSION

Justice Barrett's confirmation to the Supreme Court is significant. It is safe to say that replacing Justice Ginsburg with Barrett will change how the Supreme Court decides at least some cases. The Supreme Court, however, is not an island. Because the Supreme Court is part of a dynamic system, judges on lower courts can anticipate what the justices are likely to do and then adjust accordingly.

This Article used game theory to examine what Justice Barrett's confirmation could mean for how the lower courts decide civil rights cases. This Article's predictions, of course, are only good as our model—and our model has significant limitations. Nonetheless, our model predicts that lower court judges who disagree with the new Supreme Court majority will face stronger incentives to use cert-proofing tools, and that those who agree with it will have less incentives to do so. And of particular relevance here, our model predicts that lower court judges who disagree with the new Supreme Court majority will confront stronger incentives to use their *Pearson* discretion to clearly establish the law going forward while ruling against the plaintiffs before them. In most cases, none of this will matter and the judiciary will act the same as before. In some cases, however, lower court behavior *may* change. In short, Justice Barrett's confirmation may let the public better understand the judiciary as a whole.

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[80] *See* Nielson & Walker, *supra* note 18, at 119 (urging the Supreme Court to adopt a reason-giving requirement for use of discretion in qualified immunity cases).