

## ***YALE SYMPOSIUM ON SUPREME COURT CASE SELECTION PROCESS***

IF IT AIN'T BROKE...

*J. Harvie Wilkinson III*

The most important thing we do,” Justice Brandeis once remarked, “is not doing.”<sup>1</sup> Alexander Bickel showed long ago how the Supreme Court’s discretionary certiorari jurisdiction was the lynchpin of those “passive virtues” that are essential to principled government.<sup>2</sup> We should therefore view skeptically any attempt to alter the Supreme Court’s case-selection process. Although critics in recent years have lodged various complaints about the Court’s docket, the solutions being urged upon us will neither fix the situation nor avoid significant collateral damage. The reformers make two basic assertions: first, that the Supreme Court should decide more cases, and second, that the mechanism by which the Supreme Court selects cases for review should be changed. Both are wrong.

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<sup>1</sup> Quoted in ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 71 (2d ed. 1986).

<sup>2</sup> *See id.*

## A. SEARCHING FOR DRAGONS TO SLAY

The contraction of the Supreme Court's docket over the last eighty years has been abundantly documented.<sup>3</sup> Simply to point out the phenomenon, however, is not to condemn it, or at least, not to condemn it effectively. Our nation and our laws have both changed markedly since the days when the Supreme Court could hear a tenth of all cases where its review was sought. There are four principal reasons to think that the shrunken state of the contemporary Supreme Court's docket is no cause for alarm.

*First*, when the Court takes a big case, it accepts a big risk. The dangers of deciding are often vastly greater than the dangers of letting the political branches and the lower courts wrestle a question through. When the Court overreaches or otherwise errs, the impact of its errors is felt

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<sup>3</sup> See, e.g., Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779 (1997); Linda Greenhouse, *Case of the Dwindling Docket Mystifies the Supreme Court*, N.Y. TIMES, Dec. 7, 2006, at A1. In the last decade, the Court's docket has shrunk to an average of 73 cases per term, down from a high of around 230 cases in the 1930s and about 150 cases as recently as the 1980s. See Akin Gump Strauss Hauer & Feld LLP, Memorandum: End of Term Statistical Analysis—October Term 2008 (June 30, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/07/summary-memo-final.pdf> [hereinafter, Akin Gump Memo]; Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1369 (2006).

throughout the land. It is preferable, however, that the impacts of judicial mistakes be limited and localized. The Court itself understands that the fewer cases it accepts, the fewer opportunities there are for mistakes that cannot be easily rectified.

In many circumstances, therefore, deciding not to decide shows the Court at its statesmanlike best. But the Court, of course, is capable of leading constructively—if, that is, it has the time. For this reason, a highly selective docket is not only acceptable but desirable. In superintending the vast enterprise of judicial business falling within its jurisdiction, the Court must have the time necessary to create thoughtful opinions that take into account the entire picture of federal litigation, and the ability to understand the full range of consequences that its rulings are likely to bring. The possibilities of unanticipated effects are so huge in this complex and interconnected society that a judicial body needs nothing so much as reflection time.

Some commentators seem to believe that the Court should be hearing more cases simply to busy itself.<sup>4</sup> They imply that the justices are un-

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<sup>4</sup> See Philip D. Oliver, *Increasing the Size of the Court as a Partial but Clearly Constitutional Alternative*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME

derworked, pointing to the Court's talented clerks and three-month summer vacation.<sup>5</sup> Judge Kenneth Starr adds a philosophical twist to these complaints, arguing that the Court should hear more cases because the discipline and time required to do so would discourage what he sees as a pattern of judicial activism.<sup>6</sup> These criticisms misunderstand the Supreme Court's job. The Court is not a gerbil on a treadmill, deciding cases just to keep itself occupied. Larding its docket with busywork would seriously threaten the Court's ability to carry out the task assigned to it in our constitutional order. Moreover, I am confident that if the justices are inclined to legislate from the bench, their inclinations will find an outlet, no matter how many cases they have to decide.

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COURT JUSTICES 405, 412 (2006); *see also* Richard Brust, *Supreme Court 2.0*, A.B.A. J., Oct. 2008, at 38 (quoting Professor Carrington stating that justices "don't have to do too much work").

<sup>5</sup> *See* Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1388 (2006); Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1441-42 (2009). In 1983, now Chief Justice Roberts remarked that "only Supreme Court justices and schoolchildren are expected to and do take the entire summer off." Jesse J. Holland, *Roberts: Use Care with Religion*, CHARLOTTE OBSERVER, Aug. 20, 2005, at A17 (quoting an April 19, 1983 memorandum written by Roberts).

<sup>6</sup> *See* Starr, *supra* note 3; *see also* George Alexander et. al., *Four Proposals for a Judiciary Act of 2009*; Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009).

*Second*, the Supreme Court is not failing to decide cases where its intervention is needed. Perhaps the most common complaint is that the Court should be resolving more lower court conflicts.<sup>7</sup> Although it is true that the Court does not resolve all circuit splits,<sup>8</sup> problems of disuniformity are very much overstated. Circuit splits are often more apparent than real, and at any rate, the world won't end because a few circuit splits are left unresolved. The argument that circuit splits should lead to more prolific Supreme Court review may seem appealing in the abstract, but it breaks down when proponents are asked to inventory the actual burdens of such splits on litigants and the public. As Professor Amanda Frost points out, many circuit splits are relatively trivial and impose only minimal costs of compliance on multi-state actors.<sup>9</sup> Many others contribute fruitfully to the dialogic quality of federal law. Often, too, it may be more appropriate for Congress, a democratic body, to resolve circuit splits through legislation.<sup>10</sup>

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<sup>7</sup> See, e.g., George & Guthrie, *supra* note 5, at 1442.

<sup>8</sup> See Starr, *supra* note 3, at 1372 (stating that there are 400 circuit splits per year).

<sup>9</sup> See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1571, 1597–1600 (2008).

<sup>10</sup> See *id.* at 1573. Congress has shown itself willing to do so in a number of cases. *Id.* at 1609 & n.133.

Others assert that the Court should hear more cases filed by *pro bono* attorneys and fewer involving business interests or that access to the Court's docket is unduly restricted by the Solicitor General's Office or the Supreme Court bar.<sup>11</sup> Yet it can hardly be claimed that litigants in this day and age are deprived of their day in court if their claims don't make it all the way to One First Street. America may have many shortages, but litigation is not among them. And the problem of unequal access to courts lies in the ground floors of the judicial edifice, not the Supreme Court.

Still others, such as Senator Arlen Specter, claim that the Supreme Court ought to be deciding more hot-button cases touching on major political issues of the day.<sup>12</sup> But sniffing out political questions is not the Court's job. Its mandate is limited to resolving "cases and controversies." In fact, the more dry and technical the controversy, the more the Supreme Court may appear to be acting like a court of law. And it can

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<sup>11</sup> See Richard L. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1554–62 (2008).

<sup>12</sup> See Arlen Specter, *The Chamber of Secrets*, NAT. L.J., Aug. 3, 2009, at 38 (arguing that the Court should have heard various "high-profile" cases, such as one challenging the constitutionality of former President George W. Bush's warrantless wiretapping program).

hardly be contended that the Court's present docket is devoid of molten issues. The 2008 term featured such topics as: the global war on terror;<sup>13</sup> political activity by labor unions;<sup>14</sup> broadcast indecency regulations;<sup>15</sup> the ability to sue pharmaceutical and tobacco companies;<sup>16</sup> a post-conviction right to DNA evidence;<sup>17</sup> and the Voting Rights Act.<sup>18</sup> Two Supreme Court cases—one dealing with affirmative action<sup>19</sup> and the other with strip-searching schoolchildren<sup>20</sup>—themselves received a substantial measure of public attention,<sup>21</sup> and even the treatment of creditors in Chrysler's bankruptcy proceedings made a cameo appearance on the Court's docket.<sup>22</sup>

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<sup>13</sup> See *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

<sup>14</sup> See *Ysursa v. Pocatello Ed. Assn.*, 129 S.Ct. 1093 (2009); see also *Locke v. Karass*, 129 S.Ct. 798 (2009).

<sup>15</sup> See *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009).

<sup>16</sup> See *Wyeth v. Levine*, 129 S.Ct. 1187 (2009); *Altria Group, Inc. v. Good*, 129 S.Ct. 538 (2008).

<sup>17</sup> See *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308 (2009).

<sup>18</sup> See *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009); *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 129 S.Ct. 2504 (2009).

<sup>19</sup> *Ricci v. DeStefano*, 129 S.Ct. 2860 (2009).

<sup>20</sup> *Safford Unified School Dist. # 1 v. Redding*, 129 S.Ct. 2633 (2009).

<sup>21</sup> See Adam Liptak, *Supreme Court Finds Bias Against White Firefighters*, N.Y. TIMES, (June 30, 2009), at A1; Joan Biskupic, *Strip Searches At School: Discipline Gone Too Far?*, USA TODAY, (Apr. 16, 2009), at 1A.

<sup>22</sup> See *Indiana State Police Pension Trust v. Chrysler LLC*, 129 S.Ct. 2275 (2009).

*Third*, where is the public clamor for Supreme Court docket reform? Granted, the topic is not one likely to fire the public imagination, but it is still worth noting that the clamor for reform comes primarily from elite appellate lawyers and distinguished academics.<sup>23</sup> I intend no disparagement of Washington's premier appellate practice groups in noting that an expanded Court docket is not detrimental to their business.<sup>24</sup> And while academia serves a valued purpose in probing the weakness of the status quo, the burden remains on the reformers to show that more Supreme Court litigation is the answer to some pressing public need. Why in fact is the public not best served on occasion by lowering the Court's profile and trimming the pervasiveness of at least its constitutional presence? The center of action in America need not be always at the nation's highest court. While litigants whose certiorari petitions are denied would no doubt like the Court to hear more cases, their gripe is not with process, but with outcomes. That sort of dissatisfaction, however, is insoluble: there is no reform that has ever been devised that can make both sides in an adversarial contest come out the winner.

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<sup>23</sup> *E.g.* Philip Allen Lacovara, *The Incredible Shrinking Court*, AM. LAW., Dec. 2003, at 53. (article advocating an expanded Supreme Court docket by attorney

*Finally*, even if the Supreme Court's docket really is something we should be worried about, the situation can be counted upon to resolve itself. First of all, the Courts of Appeal are by and large in sync with the Supreme Court.<sup>25</sup> As new appointments make their way onto the circuits, that harmony may or may not fray. If more circuit courts begin to diverge from the Supreme Court in their outlook, more petitions for certiorari will be granted. Furthermore, in recent years, Congress has passed fewer pieces of sweeping legislation, presenting fewer opportunities for the Court to intervene.<sup>26</sup> Again, when the need arises, the Court can be counted upon to weigh in.

At the moment, the Court is evenly balanced in terms of ideology, with the outcome of cert. grants not always easy to forecast.<sup>27</sup> As a result, the justices are sometimes said to engage in "defensive denial,"

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from Mayer, Brown, Rowe & Mawe).

<sup>24</sup> See Lazarus, *supra* note 11, at 1516, 1519–21.

<sup>25</sup> See, e.g., Starr, *supra* note 3, at 1377 (noting that the lower courts do not draw the Supreme Court's "ire"). Justice Souter has also argued that there are fewer inter-circuit conflicts at the moment. See Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 414 (1996) ("[D]ue in large part to the sheer number of Reagan-Bush appointees, greater homogeneity prevails and less conflict abounds among the various courts of appeals.") (quoting Justice Souter).

<sup>26</sup> See Lazarus, *supra* note 11, at 1509; Greenhouse, *supra* note 3.

choosing to deny review rather than risk finding themselves in the minority once the case is decided on the merits.<sup>28</sup> Moreover, the even division of the Court leads to fractured opinions, which take more time to compose, making it harder to hear other cases.<sup>29</sup> If a clear ideological majority emerges, the Court may grant review more often. In short, it is difficult to understand why so many complain about the problem of a reduced Supreme Court docket, a problem whose causes are cyclical and whose resolution by the Court itself seems so foreordained.

#### B. FIRST, DO NO HARM

Even if it were true that the Supreme Court is taking too few of the cases it should be taking, the solutions that are being urged by reformers would do more harm than good. Some critics have called for radical

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<sup>27</sup> See Akin Gump Memo, *supra* note 3 (observing that in almost 70% of 5-4 splits, Justice Kennedy cast the deciding vote and that in over 92% of all cases, Justice Kennedy was in the majority).

<sup>28</sup> See Greenhouse, *supra* note 3; Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1 (2008).

<sup>29</sup> See Michael W. Schwartz, *Our Fractured Supreme Court*, POL'Y REV., Feb.–Mar. 2008 at 3 (“[T]he justices’ dedication of important amounts of their time to producing dissents and concurrences may be part of the reason why, over the last several decades, the number of cases the Court has heard and decided has fallen far below historic norms.”); Akin Gump Memo, *supra* note 3 (noting increased disagreement and more dissents in the most recent Supreme Court term).

changes to the mechanism of Supreme Court review, proposing the creation of a separate body to select the Supreme Court's docket for it.<sup>30</sup> This "Certiorari Division" would be composed of circuit court judges and would be required to select at least eighty cases each term that the Supreme Court would be obliged to decide.<sup>31</sup> Others have proposed expanding the Court's docket by increasing the Court's membership,<sup>32</sup> using three-justice panels to decide cases,<sup>33</sup> and shortening the justices' summer vacations.<sup>34</sup> These are all bad ideas.

*First*, the one result they can be counted upon to produce is more litigation, with all its attendant evils. Encouraging more Supreme Court litigation will undermine the interest of litigants in finality and the interest of the public in certainty, particularly if the Supreme Court is broken up into panels.<sup>35</sup> An expanded docket will create incentives to file more cert. petitions and amicus briefs—costing clients more money.<sup>36</sup> Lawyers may like that, but it's hardly good for litigants or the public. More

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<sup>30</sup> See Alexander, *supra* note 6.

<sup>31</sup> See *id.*

<sup>32</sup> See George & Guthrie, *supra* note 5, at 1442.

<sup>33</sup> See *id.*

<sup>34</sup> See Calabresi & Presser, *supra* note 5, at 1388.

<sup>35</sup> See Frost, *supra* note 9, at 1601.

cert. petitions also drain Supreme Court resources, compromising the Court's ability to give full consideration to each individual case it hears.

Expanding the Court's docket would exacerbate the Court's already-existing scheduling difficulties. The most difficult and significant cases will continue to be pushed back to the end of the term, no matter how long or how short the justices' vacations are, and an expanded docket will subject more cases to end-of-term frenzy. More hurried decision-making is in no one's interest. Even on the bedrock matter of clarity, a fractured Court or unclear opinion may leave the law murkier than it was before. And, of course, the passive virtues celebrated by Bickel have no place in the stampede to decision envisioned by reformers.

*Second*, such proposals would lead to further politicization of the judicial process. Appointments of circuit judges to the Certiorari Division, for example, would inevitably stoke the kind of overheated political agitation that already surrounds federal judicial operations. Furthermore, whatever benefit the Certiorari Division might have for the Supreme Court, it would have collateral costs for the Courts of Appeal. Circuit

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<sup>36</sup> See Lazarus, *supra* note 11, at 1513–15 (discussing the already staggering number of filings).

judges do not have time to pour over hundreds of cert. petitions, and the speculation that would surely arise over the judges' potential motivations in granting or denying review would distract them from their circuit court duties. For one thing, Court of Appeals judges would be reviewing the work of their peers and friends, and that difficulty cannot be entirely resolved by removing judges from the review of cases in their home circuits.

A bit of history may be helpful here. Several decades back, many esteemed legal commentators floated the idea of creating a National Court of Appeals between the circuits and the Supreme Court to resolve circuit conflicts and to relieve the Supreme Court of some of the burden of its work. The idea captivated many in theory, but such practical problems as selecting judges to staff the court and delineating its jurisdiction were so numerous that I can hardly begin to scratch the surface. Because certiorari would still lie from the National Court of Appeals to the Supreme Court, the new court threatened to postpone the day of finality for everyone and to turn federal litigation into a parody of *Jarndyce v. Jarndyce*. So the National Court died the merciful death that every white elephant deserves. The Certiorari Division is but a muted variant of the old

idea of overlaying judicial systems, and it should be rejected by those opposed to bloat in judiciaries as well as bureaucracies.

History sheds a different sort of light upon the practice of the cert. pool. I recognize that, even with Justice Stevens and now Justice Alito outside the pool, it is still decried as placing too much responsibility in the hands of the law clerk preparing the pool memorandum. The time was, however, when the cert. pool was hailed as a salutary innovation. Even the reduced number of petitions in the late '60s and early '70s threatened to burden the justices substantially and the attention they could give to petitions and argued cases. The idea of the pool was to assure that most petitions had at least one hard look and that the justices could supplement with their own internal study any cases about which they had a question. That basic concept still seems to me a sound one, and those who advocate doing away with something, such as the pool, would do well to remember the serious problem that gave it birth.

*Finally*, and perhaps most importantly, tampering with the structure and operations of the Court is nothing less than playing with constitutional fire. While Congress undoubtedly has the power to regulate many aspects of the Court's operations, the controversy over Franklin Roose-

velt's court-packing scheme showed that the power must be used sparingly and claims of benevolent reform should be viewed with deep suspicion. Congressional reform of Supreme Court structure sets a dangerous precedent that can be used to undermine judicial independence and the separation of powers in the future. Establishing a separate Certiorari Division, expanding the Court's membership, limiting the justices' terms, or breaking the Court up into three-justice panels can serve as a divide-and-conquer strategy for dealing with a co-equal branch of government, a strategy whose transparently partisan nature will not be diminished by being draped in the mantle of "reform." The Constitution, after all, vests the judicial power in "in *one* Supreme Court..."<sup>37</sup> It is the legislative branch, not the judicial, that the Constitution breaks in two. And yet panels and Certiorari Divisions and the like would do exactly that.

The administration of justice is a complicated matter. In the absence of clear evidence that things have run amok, we should remember that the perfect is the decided enemy of the good. After all, if we cannot trust the Supreme Court's judgment in deciding what to decide, how can we

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<sup>37</sup> U.S. CONST. Art. III, § 1 (emphasis added).

trust its judgment in deciding what it has decided to decide? At some point, the reformers are simply going to have to let the Court be the Court.

#### CONCLUSION

Perhaps it is well to take a step back. I do not underestimate for a moment the Supreme Court's timeless role in protecting individual liberties and the equal dignity of all citizens. Yet, in my respectful judgment, the judicial hand has also overreached. The great challenge for the Supreme Court is to demonstrate that a tribunal imbued with such vast and final powers can likewise exhibit a basic modesty and respect for the people and their many and varied representative institutions. It is that fundamental respect for the ability of other public and private actors to do their anointed jobs that is needed, and the docket tinkering does nothing—absolutely nothing—to ensure it. The reforms will lead, if anything, to aggrandizement and away from the truth Brandeis and Bickel sought to teach.