

IS IT IMPORTANT TO BE IMPORTANT?: EVALUATING THE SUPREME COURT'S CASE-  
SELECTION PROCESS

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As the Supreme Court's caseload shrinks from 150 cases a year in the 1980s to about 70 now, concern has grown over whether the Court is leaving too many important cases and issues undecided. But the extent to which the concern is justified depends in part on what we mean by "important," and in part on whether it is important that the Supreme Court decide important cases. This Essay addresses these two different but related questions.

I. *The Strategic Importance of Unimportance*

Is it important that the Supreme Court take on the important issues of our times? That the Court has traditionally done so is a commonplace, but whether the commonplace is true depends on how we phrase the question. Whether what much of what the Supreme Court does is important is very different from whether much of what is important is done by the Supreme Court, and without knowing which we are asking we cannot intelligently evaluate the Court's case selection process.

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The difference between how much of what the Court does is important and how much of what is important the Court does emerges upon even a casual glance at the daily newspapers. Although the Court has in recent years addressed important issues of gun control,<sup>2</sup> campaign finance,<sup>3</sup> burdens on interstate commerce,<sup>4</sup> capital punishment,<sup>5</sup> punitive damages,<sup>6</sup> presidential power,<sup>7</sup> detention of enemy combatants,<sup>8</sup> sexual orientation,<sup>9</sup> and religion in the public sphere,<sup>10</sup> among others, it has decided no cases determining the authority of a president to commit troops to combat outside of the United States, whether in Afghanistan, Iraq, Kosovo, or anywhere else. Nor has it directly<sup>11</sup> decided cases involving health care policy, federal bailouts of banks and automobile manufacturers, climate change, and the

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<sup>2</sup>District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

<sup>3</sup>Davis v. FEC, 128 S. Ct. 2759 (2008); Randall v. Sorrell, 126 S. Ct. 2479 (2006). Cf. Caperton v. Massey Coal Co., 129 S. Ct. 2252 (2009).

<sup>4</sup>Kentucky Dept. of Revenue v. Davis, 128 S. Ct. 1801 (2008); United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Auth., 127 S. Ct. 1786 (2007).

<sup>5</sup>Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

<sup>6</sup>Philip Morris v. Williams, 127 S. Ct. 1057 (2007).

<sup>7</sup>Medellin v. Texas, 128 S. Ct. 1346 (2008).

<sup>8</sup>Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

<sup>9</sup>Lawrence v. Texas, 539 U.S. 558 (2003).

<sup>10</sup>Zellman v. Simmons-Harris, 536 U.S. 639 (2002).

<sup>11</sup>The “directly” qualification is important, because I do not deny that the Court’s structural and procedural decisions can have a substantial impact on substantive decision-making. But there is still a difference between deciding issues of presidential war power, for example, and deciding issues of campaign finance that may affect presidential elections, and for purposes of this brief Essay that distinction will have to suffice.

optimal rate of immigration. And nothing the Court has decided for years is even in the neighborhood of addressing questions involving mortgage defaults, executive compensation, interest rates, Israel and Palestine, and the creation of new jobs.

The latter list was not chosen randomly. Rather, it is a list of the issues that today dominate public and political discourse, a list surprisingly (to some) removed from what the Supreme Court is actually doing. A few years ago I noticed this gap between what the public cares about and what the Supreme Court does,<sup>12</sup> and updating the data three years later does not change the general picture. When asked in non-prompted fashion to name the most important issues facing the country, Americans overwhelmingly name the economy first, followed by health care, wars in Iraq and Afghanistan, jobs, immigration, and education,<sup>13</sup> as they have for the past eight years. Indeed, the list resembles those for much of the past three decades. Crime occasionally breaks into the top ten, as in the mid-1960s and mid-1990s, but the most recent lists capture not only the long-standing importance of basic economic and foreign policy issues, but also the persistent non-appearance in the top ten (and usually even in the top twenty) of abortion, sexual orientation, race, gender, and most of the other issues that represent the salient part of the Supreme Court's docket.

When importance is measured by what the public and their elected representatives think is important, therefore, and by what the government actually works on, the Supreme Court's docket seems surprisingly peripheral. That is not to say that what the Supreme Court

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<sup>12</sup>Frederick Schauer, *The Supreme Court, 2005 Term, Foreword: The Court's Agenda – and the Nation's*, 120 Harv. L. Rev. 4 (2006).

<sup>13</sup>See [http://www.harrisinteractive.com/harris\\_poll/index/2009\\_02\\_04](http://www.harrisinteractive.com/harris_poll/index/2009_02_04).

does is not important, but it *is* to say that the Court's actual business is less important to the public and to the public's representatives than lawyers and law professors tend to believe. And it is hardly clear there is anything wrong with this. By dealing either with low-controversy issues or with high-controversy low-salience issues, and thus by generally avoiding high-controversy high-salience issues, the Court may retain public confidence and the degree of empirical legitimacy necessary to secure at least grudging acquiescence in its most controversial decisions.

## II. MEASURING LEGAL IMPORTANCE

It is one thing to recognize the strategic value of avoiding most publicly important issues, but quite another to see much value in the Court's avoidance of *legally* important issues. And although even this claim requires specification of what it is for an issue or case to be legally important, at least one measure would be the extent to which the issue appears frequently in lower court litigation. If that is the measure, however, then there is some evidence that the Supreme Court is little more inclined to take on legally important issues than to take on publicly important ones.

Limitations of space make it impossible here to offer full analysis and empirical support for this claim, but a few examples can suggest a hypothesis. Consider, therefore, the universe of lower court litigation under the First Amendment's speech and press clauses. This is a large universe, with much of that universe occupied by free speech issues arising in public employment and the public schools. Moreover, these domains and their issues -- student and teacher speech, employee speech, organizational membership, and related topics -- vastly

outnumber the quantity of lower court First Amendment cases on obscenity, indecency, incitement, press freedoms, and the numerous other topics that dominate the casebooks. Yet although schools and public employee cases overwhelm the other categories of First Amendment litigation in the lower courts, the Supreme Court takes surprisingly few such cases. It has in forty years taken only four cases involving speech in the public schools,<sup>14</sup> even fewer dealing with speech in colleges and universities,<sup>15</sup> and not many more concerning the free speech rights of public employees.<sup>16</sup>

That the Supreme Court takes few cases in some high-litigation areas would be of less moment if the cases it did take were representative, and the decisions it issued useful in providing guidance to the lower courts. But neither in fact obtains. In *Morse v. Frederick*, for example, the “Bong Hits 4 Jesus” case, the Court, in deciding only its fourth student speech case ever and the first in almost two decades, took and decided a case that was highly unrepresentative of the student speech cases that bedevil the lower courts. And having taken the case, even the majority issued an opinion that was so narrow, so case-specific, and so

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<sup>14</sup>*Morse v. Frederick*, 127 S. Ct. 2718 (2007); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

<sup>15</sup>*Papish v. Board of Curators of Univ. of Missouri*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972).

<sup>16</sup>*Garcetti v. Ceballos*, 547 U.S. 410 (2006); *United States v. Nat. Treasury Employees Union*, 513 U.S. 454 (1995); *Waters v. Churchill*, 511 U.S. 661 (1994); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City Bd. of educ. v. Doyle*, 429 U.S. 294 (1977); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

idiosyncratically about alleged encouragement of drug use as to provide virtually no guidance to the courts that have to deal with the issue.<sup>17</sup>

*Morse v. Frederick* is hardly unusual. On numerous issues of regulatory law, constitutional law, criminal procedure, and others, the Court's cases have been similarly unrepresentative and its decisions similarly unhelpful. And thus if frequency of litigation in the lower courts combined with unanswered questions about the state of the law is some indication of legal even if not political importance, then the Court's record of taking legally important cases is little stronger than its record of taking socially important cases, but with far less justification.

### III. INFORMATION ABOUT IMPORTANCE AND THE IMPORTANCE OF INFORMATION

When appellate courts make decisions, they do two things. First, they determine the outcome of the dispute between the actual parties to the litigation. And, second, they often set forth a rule that governs large numbers of other acts and events. In order to perform the latter adequately, however, courts need to have some sense of the array of events that some putative rule or standard or policy or test will control.<sup>18</sup> The problem, however, is that courts find themselves suffering from a structural inability to obtain just that kind of information.

First, courts are of course not well situated to go out and actually research the potential application of some rule. Occasionally one of the parties help out in a brief, but briefs that

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<sup>17</sup>See Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 Sup. Ct. Rev. 205.

<sup>18</sup>See Frederick Schauer, *Do Cases Make Bad Law?* 73 U. Chi. L. Rev. 883 (2006).

perform this function are rare, and even at the Supreme Court level amicus briefs seldom serve this function. None of the amicus briefs in *Morse*, for example, offered to tell the Supreme Court anything about the array of lower court litigation, nor did they say very much about the non-litigated terrain that the Court's decision would affect.

Second, everything we know about the availability heuristic and related phenomena tells us that a court trying to make a rule in the mental thrall of the particular case before it will likely assume, often inaccurately, that the case before it is representative of the larger field. And the fact that the court is obliged to decide that case as well as, often, to set forth a rule, or at least a precedent, means that the obligations to the case at hand may exacerbate the information distorting effect.

Finally, and most importantly, the selection effect – the process by which cases with certain characteristics get to appellate courts and other cases with different characteristics do not – will almost certainly provide a serious distortion of information. Whenever the Supreme Court – or any court – sets forth a rule, standard, principle, test, or whatever, it creates the possibility of three different forms of behavior on the part of those the rule. One is compliance, another is violation, and the third is what Gillian Hadfield has called “dropping out,”<sup>19</sup> ceasing to engage in the behavior the rule seeks to regulate. So when the Court decided *Miranda v. Arizona*,<sup>20</sup> it created a world in which some police officers complied with *Miranda* by giving the required warnings before custodial interrogation, others violated by conducting custodial

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<sup>19</sup>Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 Geo. L.J. 583 (1992).

<sup>20</sup>384 U.S. 436 (1966).

interrogations with giving warnings, and some simply ceased conducting custodial interrogations.

The selection problem arises, in part, because the courts will never see the dropouts, and rarely see compliance. By seeing only the violations, they find, having seen neither the instances of compliance nor the dropouts, subject to severe information distortion. And insofar as this process is exacerbated as litigation ascends the appellate ladder, the Supreme Court, even taking into account the information provided by amicus briefs, the research done by the Justices and their clerks, and the fact that the Justices read the newspapers, will be at a severe informational disadvantage in deciding which cases to decide and how broadly or narrowly to decide them. Did the Court when it granted certiorari in *Morse* know how often student speech cases arise in the lower courts, and what kinds of cases they were? When the Court decided *Morse* in such idiosyncratic and narrow grounds, did it know what kinds of issues were arising in the cases below that it was not deciding? And, perhaps most importantly, did the Court know any of these things when it decided *not* to grant certiorari in numerous student speech cases in the almost two decades between *Morse* and its previous student speech cases? It is plausible that the answer to all of these questions is “no,” and plausible to suppose that the cause is a combination of structural informational disadvantage and psychological difficulty in seeing beyond the particular case and its particular parties and particular facts.

#### IV. A PARTIAL SOLUTION?

There may not be an easy solution to this informational problem, but informational problems demand informational solutions. Putting aside important resource and resource



allocation issues, could the Court create a process by which a few clerks did serious research about the frequency and nature of litigation below not only for the cases in which certiorari was granted, but about the cases in which certiorari was seriously considered? Or could the Court demand such information from litigants and amici, either formally, or, more plausibly, informally, by signaling that petitions and briefs that did not contain such information would be disfavored in the certiorari process? I do not know the answers to these questions, but they suggest that there are things that might be done to tell the Court about the legally important but publicly invisible issues it is neglecting to address, and about the actual nature of the legal and social terrain that will be affected by the rules it makes, the precedents it creates, the cases it decides, and the issues it ignores.