

HOW DOES ONE ASSESS THE CURRENT CASELOAD OF THE UNITED STATES
SUPREME COURT? CAN ANY ANSWER AVOID REVEALING ONE'S OWN
POLITICS?

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I am extremely grateful to the Yale Supreme Court Advocacy Clinic for giving me the opportunity to participate in its very interesting conference on the Supreme Court's case selection process. It is not false modesty on my part to say that of all the participants, I came closest to filling the "Admiral Stockdale" role with regard to my qualifications for being there. I cannot believe that my stroke-of-lightning good fortune between 1978-1981 in taking a case from the Princeton traffic court to the United States Supreme Court--courtesy of an extraordinarily ill-advised petition filed by Nicholas DeB. Katzenbach in behalf of Princeton University for review of a unanimous decision by the New Jersey Supreme Court rejecting a prosecution for trespass filed by Princeton against our politically-activist client--explains the invitation to join such luminaries as Carter Phillips and Seth Waxman, to name only two of the most prominent Supreme Court litigators of the day, or academics like Lee Epstein and Davis Stras, who study the Court's certiorari grants with far more methodological skills than I will ever possess. So, given my lack of truly expert qualifications, let me offer some general observations about the discussion of whether the Court is in fact disserving the country to reducing the number of cases it hears, over the past fifteen years or so, by roughly one-half. Although I found the discussions extremely illuminating, I confess that I did feel that a particular 800-pound elephant was being ignored, which can be described, basically, as "politics."

I. What, precisely, is or should be the role of the modern Supreme Court?

Begin with the fact that one cannot meaningfully discuss how many cases the Supreme Court should take unless one has a conception of what the Court, as an institution, should be doing in the first place. Is it to provide a "uniform" national law and, therefore, to resolve any circuit splits that may emerge in order to avoid the unseemliness of a federal statute's or, for that matter, the Constitution's, meaning one thing in one part of the country and something quite different elsewhere? (Though, as Fred Schauer noted in his own presentation, if one likes the notion of "diversity" associated with federalism, then leaving splits "uncorrected" functions in some similar ways to more formal federalism.) Or is to weigh in with the "wisdom" presumptively possessed by the members of the Court on the great issues of the day? Indeed, how exactly do we make theoretical sense of the fact that the Court for two decades now has had, courtesy of Congress, almost complete control over its own docket, a discretion enjoyed by no other federal court and, I strongly suspect, by few if any highest courts in the rest of the United States or, for that matter, the world. (Not the least important aspect

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of this remarkable discretion enjoyed by the Court is that it simply cannot any longer quote John Marshall in saying that it is “without force or will” with regard to “having” to decide constitutional (or almost any other) cases. With rare exception, every case is before the Court because it has chosen to take the case.) And some of the participants in the symposium, most notably Lyle Dennison, who has been covering the Court for sixty-one years (!), believe that the Court is derelict in choosing not to take more cases than it currently is. In any event, there are overtones, given the extent of discretion enjoyed by the Court, of Southern sheriffs during the 1960s in having the authority to allow (or disallow) parades or demonstrations based on broad, unhelpful “standards” and, ultimately, on what on occasion seems to be whim.

To be sure, one might offer only empirical descriptions of what the Court has in fact done over the past decades, but it is hard to resist the temptation to add to the descriptions some normative advice as to whether those descriptions should please us or cause us to weep. But the point is that any such normative assessment requires that one have some worked-out view as to the point of the peculiar institutions known as the United States Supreme Court. I am confident that there is today no widely shared—let alone anything that could be called a “consensus”—view as to what the Court’s role has been or should be in our 21st century world. Consider some reigning candidates.

Does/should the Court have a self-conscious sense of where it wants to lead the country and work to achieve that goal, as Robert McCloskey suggested in his widely used (and still in print, in an updated edition that I am responsible for) 1960 book *The American Supreme Court*? In my 2004 revision of the book, I suggested that McCloskey, who basically swooned over Marshall’s cleverness in *Marbury v. Madison* in achieving his political agenda—both establishing judicial review and denouncing Thomas Jefferson—without provoking an institutional crisis for the Court, would have embarrassing difficulty in not offering similar admiration for the Court’s awful decision in *Bush v. Gore*, which, after all, achieved the undoubted political goals of its five-justice conservative Republican majority regardless of the antagonism engendered among liberal law professors, pundits, and others who might warrant Justice Holmes’s famously dismissive phrase “puny anonymities.” And, of course, many hard-core political scientists are satisfied to describe judges as nothing more than politicians in robes who are doing nothing more than doing what they can to maximize their policy preferences. From this perspective, there is nothing at all behaviorally anomalous about *Bush v. Gore*; it was simply a magnificently crude and obvious instance of “attitudinalism” in action (though, as my colleague Scot Powe has noted, it is hard to “code” the opinions in a politically plausible manner, given that the majority adopts to posture of vigorous defenders of equal voting rights, while the presumptively more liberal dissenters embrace the values of federalism).

Does the Supreme Court work best when it basically mirrors public opinion, so that the median justice, by a happy accident, is also close to the median voter or median respondent to the Gallup poll, as Barry Friedman seems to argue in his forthcoming *Will of the People: How the Supreme Court Became Supreme*; or, as my colleague Scot Powe, in his recently published *The Supreme Court and the American Elite, 1789-2008*,

is the Supreme Court best understood and justified in terms of its ability to serve the interests of the elites who manage to establish some degree of hegemony over the other branches of the national government and then need the Court's help, in particular, to crack down on regional "outliers" from the ostensible national consensus articulated by these successful elites? (The hegemony thesis also helps to explain *Bush v. Gore*, inasmuch as the Court knew the election results in Congress and could readily predict that they would make many new friends among Republicans who had been quite critical of the Court for its ostensible derelictions in *Roe v. Wade* and *Casey*.) When there is no such hegemony, incidentally, and government is "divided," the Court may have a remarkably free hand, as Mark Tushnet has argued in *The New Constitutional Order*, to do what it wishes/thinks best, given the probable lack of an effective response that would require some congruence of political interests between (both houses) of Congress and a veto-wielding President. Keith Whittington has argued in his justifiably prize-winning *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, the Court has been most successful when it has basically joined a popular president in fulfilling his agenda for the nation. That is, after all, a major criterion used by most presidents when deciding whom to appoint to the Court, and appointees rarely disappoint their presidential appointers at least in the early years of their term with regard to the issues of greatest salience to the President. (Did Justice Souter really disappoint George H. W. Bush in voting to retain the reproductive rights regime established by *Roe v. Wade*? We won't know until the Bush papers are fully available. We do know that Bush's conversion to an anti-*Roe* position seems to reek of opportunism and that, perhaps more importantly, the Republican Party politically may be far better off having *Roe* to run against than having to exercise genuine responsibility with regard to deciding what aspects of women's reproductive rights to honor or to criminalize.

Needless to say, there are the various more traditional law professors, like Randy Barnett, who calls for the Court to lead the way in *Restoring the Lost Constitution: The Presumption of Liberty*, with its overtone of an original understanding of the Constitution that is, from Barnett's perspective, happily libertarian. And the most recent entrant in the academic conversation is *The Constitution in 2020*, edited by Yale professors Jack Balkin and Reva Siegel, in which academic denizens of the American Constitution Society offer their takes on what Balkin in particular calls a "redemptive" theory of the Constitution. To be sure, several of the contributors downplay the particular role of the Supreme Court in achieving such redemption, but, to put it mildly, none of them joins Mark Tushnet (a contributor to the volume) in his 2000 call for *Taking the Constitution Away from the Courts* and simply abolishing at least national judicial review, i.e., the power of courts to invalidate laws passed by Congress.

Whether one wishes to describe this as a cacophony of dissonant voices or merely the general tone of vigorous academic debate—and I have cited none of the more intemperate books written by non-academics, such as Rosalie Gordon's *Nine Men Against America: The Supreme Court and Its Attack on American Liberties*—it seems undeniable that one gets very different pictures of what the Court should be doing depending on whom one asks. And, concomitantly, one would get very different answers

to questions about how good a job the Court is doing, either in selecting the cases it hears or in deciding them on the merits, from these various scholars or, for that matter, active litigators. Given my own politics, I resonated strongly to the suggestion from one of the speakers that it would be just fine if the Court took a one- or two-year vacation from hearing any cases at all, at least until several members of the current majority chose to retire or were removed by the contingencies of mortality. It would not surprise me, though, if lawyers representing, say, the United States Chamber of Commerce or other major corporations might applaud the Court's remarkable decision to reach out and ask for briefs in the *Citizens United* that portend a willingness to overrule at least a century's worth of regulation of corporate spending in elections and wish that the Court would take at least another 20 or 30 such cases a year while the current majority is able to maintain itself. After all, decisions liberating corporate executives to spend their shareholders' money on elections may forestall President Obama's re-election in 2012 or, at the least, cut into the majorities in both the House and Senate currently enjoyed by the Democratic Party. To be sure, neither Chief Justice Roberts nor Justice Alito were on the Court for *Bush v. Gore*, but they may well be encouraged by their compatriots Justices Scalia, Thomas, and Kennedy to go for the gold while they still have five votes. And one even finds suggestions—not surprisingly on the editorial pages of the *Wall Street Journal*—that the Court should be prepared to cast five votes declaring unconstitutional any health care bill that might survive Congress should it include, for example, a duty of citizens actually to purchase health insurance. I would be prepared to march in the streets and on the Supreme Court should it proffer any such decision, but I presume I would be met by subscribers to the *Journal* or *The Weekly Standard* who would applaud it as the Court's standing up for the Constitution (and standing up to Democrats who, as Glen Beck and Sarah Palin would certainly argue, have no such commitments).

II. Alexander Bickel and the “passive virtues”

So this brings me to considering perhaps the most famous Yale professor of constitutional law over the past half-century, Alexander Bickel, whose seminal article, published as a “Foreword” to the annual survey of the Supreme Court's term in the *Harvard Law Review*, both described and endorsed the importance of the Supreme Court's “passive virtues.” These virtues, not to put too fine a point on it, involved a highly strategic Supreme Court, knowing where it actually wanted to come out on some of the great issues of the day, that chose to take or, more to the point, reject, certain cases because they didn't present the best vehicle for winning popular support because the timing just wasn't right. As to the first, consider William Carnley, convicted, after a trial in which he was unrepresented by a lawyer, of incest with a minor. Can it really be surprising, as Scot Powe notes in his book on the Warren Court, that the Court agreed with Felix Frankfurter's comment that “it is impossible to imagine a worse case, a more unsavory case to overrule a longstanding opinion” and therefore treated his case as coming under the “special circumstances” exception announced in *Betts v. Brady*. No doubt the Court was deliriously happy the following year to find Clarence Earl Gideon's famous hand-written petition that led to the overruling of *Betts* and the adoption of a general right to counsel at least where jail is a possibility. The canonical example of the “timing” problem is the Court's scandalous, though completely understandable,

“decision” in the 1956 case of *Naim v. Naim*, where it violated ordinary norms of legal fidelity in dismissing a case before them on appeal (and not through discretionary grant of certiorari) that would have forced them to acknowledge that its decision in *Brown v. Board of Education*, correctly understood, required the invalidation of laws criminalizing inter-racial marriage in Virginia and an embarrassing number of other states, not all of them Southern.

Bickel’s argument for prudence on the part of the Court in deciding what cases to hear led to the response by my teacher at the Stanford Law School, Gerald Gunther, that Bickel wanted the Court to be 100% principled, but only 20% of the time. That is, if they actually chose to hear a case, they should decide it in accord with some notion of presumptively apolitical legal principles, but they should think basically like ward politicians in deciding whether or not to hear cases in the first place (and, recall, Bickel was writing well before the Court was able successfully to gain almost complete control of its docket by eliminating almost all compulsory jurisdiction). The ultimate word on Bickel’s argument was given by his colleague Jan Deutsch in his brilliant 1969 article in the *Stanford Law Review*, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, which, to the satisfaction of many of us, demonstrated that law, especially at the level of the Supreme Court, was politics all the way down. Perhaps the best recent example of a decision that can be explained only on political grounds was the Court’s dismissal, on spurious “standing” grounds, of a perfectly correct argument that would have forced them to sustain, just before the 2004 presidential election, the Ninth Circuit’s *Newdow* holding that the words “under God” in the Pledge of Allegiance indeed contravened the Establishment Clause of the First Amendment. As it happened, given my own politics, I applauded the Court’s manifest dishonesty, because there is no plausible argument that a decision upholding the Ninth Circuit, however “correct,” would have been good for the electoral interests of the Democratic Party. But I presume that this defense gives pause to those who believe that the Court—and assessments of the Court—should be “above politics.” Similarly, I was quite happy when the Court’s decision in *Heller* removed the Second Amendment as a volatile issue from the 2008 political campaign, inasmuch as there is no conceivable way that Barack Obama might have benefitted from a decision upholding the District of Columbia’s Draconian prohibition of handguns even in one’s own home. That, incidentally, the four moderates/liberals on the Court were prepared, in effect, to torpedo Obama’s campaign is evidence that “politics” is a more complex notion than one might immediately think, inasmuch as there might with some frequency be a tension between the policy preferences of the justices and the actual interests of the political party with whom one imagines a justice belonging to.

If one agrees with either Bickel or the more radical Deutsch, then, once again, any response to the question, “is the Court taking enough cases, or the right cases?” requires that one acknowledge one’s own political commitments and visions, unless one would seriously wish the Court to take cases that would push the country in negative directions (assuming that the Court’s decisions have genuine consequence, the subject of other heated debates among political scientists). So consider the following question: How many readers are so interested to find out what a current five-justice majority thinks

about gay- and lesbian-marriage (in an opinion likely written, in substantial measure, by a 25-year-old law clerk) that they are indifferent to what the actual opinion might say? This is just another way of suggesting that whether one wishes former Solicitor General Theodore Olson well when seeking Supreme Court review of the regrettable decision of the people of California to overturn the California Supreme Court's commendable decision protecting such marriages under the California Constitution depends on one's own views as to the best result (and the likelihood of the current Supreme Court's providing it).

III. A new "certiorari court"?

So is this the end of (at least my) discussion of the current caseload of the Court? Not entirely, inasmuch as I have signed a proposal, prepared by Duke Law School professor Paul Carrington and Cornell Law School professor Roger Crampton, that addresses four quite different problems with the current Court (beginning with life tenure). The final proposal attacks "the excessive independence of the Justices in choosing their own work" and suggests, as the cure, the creation of a new court, composed of "experienced appellate judges empowered and required to designate a substantial number of cases that the Court would then be required to decide on their merits." This would have the additional advantage, besides forcing the Court to decide more cases (though, as noted earlier, this would be an "advantage" only if one, on balance, would tend to like the probable outcomes), of correcting the "visible tendency of the Justices to place greater reliance on their staffs." This latter phrase is a euphemism for the reliance on law clerks to serve as the gate-keepers into the magisterium of the Court. Who are these clerks, incidentally? They are, by and large, extremely talented, and almost completely inexperienced, 25-year-olds. It is overdetermined that one might wish to shift this responsibility from the present pool of Supreme Court clerks. Lest one believe that total discretion would shift from the Supreme Court to the "cert. court," the former would still have the ability to offer additional grants or, after giving full explanation, to reject a case imposed on it by the new intermediate court. Should the proposal be accepted, incidentally, one might well envision cutting back the current number of clerks from four to two or three and thus encouraging the Justices in fact to do more of the hard work in crafting opinions and actually engaging with one another about the issues before them. Paradoxically or not, the sense of the Court as a serious intellectual "community" has also diminished over the past couple of decades, along with the number of cases actually being decided.

Whether any "certiorari court" should be composed only of "experienced appellate judges" is doubtful, however, unless one believes, entirely contrary to the main developments of constitutional theory in the 20th century, the decisions as to which cases to take are entirely "technical" and devoid of politics. So if one wants to go the route of the Carrington-Crampton proposal, which I signed in large part because I think they have identified an important problem well worth public discussion, I suggest that its members should include not only a variety of judges drawn from all levels of the federal and *state* judiciary, but also, and just as importantly, some "public representatives" who would be happily devoid of any legal training whatsoever. If there really is a point to the Supreme

Court's doing anything beyond providing uniform "solutions" to conflicts below, then ordinary citizens should be able to offer their own valuable perspectives as to when intervention is needed (and when it is just fine to leave well enough alone). We are not talking technical rocket science here; instead, we're trying to figure out how the Court can best serve the citizenry in playing its own role in helping to achieve the vision of constitutional government set out in the Preamble to our Constitution.