

FREDERICK SCHAUER

Is It Important To Be Important?: Evaluating the Supreme Court's Case-Selection Process

As the output of the Supreme Court shrinks, from about 150 cases per Term decided with full opinions in the mid-1980's to about seventy now,¹ concern has grown over whether the Court is deciding too few cases and consequently leaving too many important cases and issues undecided.² The extent to which the concern is justified, however, depends in part on what is meant by "important," and in part on whether it is important that the Supreme Court decide important cases. If we distinguish publicly important from legally important cases, we see that the Court rarely takes on the former, nor has it done so to any appreciable extent since the 1930s. But as the Court's docket shrinks, it is also deciding fewer legally important cases, a recent and unfortunate change from past practice. Moreover, and again in a shift from past practice, the Court is even less willing than in the past to provide legal guidance in the legally important cases it does take. This regrettable consequence is caused largely by an information deficit, for little in the Court's current procedures is directed to giving the Court the information it needs to decide which cases are legally important and to know what kind of guidance the lower courts are likely to require.

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1. Adam Chandler & Jennifer Harris, Important Questions of Federal Law: An Empirical Survey of Possible Explanations for the Supreme Court's Declining Docket 1 (Sept. 18, 2009) (unpublished manuscript, on file with The Yale Law Journal), available at http://www.law.yale.edu/documents/pdf/Clinics/Declining_Docket_Student_Conference_Paper_Chandler_and_Harris.pdf.
 2. See, e.g., Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1537-38 (2008); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2006).

I. THE STRATEGIC IMPORTANCE OF UNIMPORTANCE

Is it important that the Supreme Court take on the important policy issues of our times? That the Court has traditionally done so is a commonplace,³ but whether the commonplace is true depends on how we phrase the question. Asking whether much of what the Supreme Court does is important is very different from asking 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.

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,⁴ campaign finance,⁵ burdens on interstate commerce,⁶ capital punishment,⁷ punitive damages,⁸ presidential power,⁹ detention of enemy combatants,¹⁰ sexual orientation,¹¹ and religion in the public sphere,¹² among many 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. And although, of course, the Supreme Court's structural and procedural decisions will have an indirect impact on the substance of policy, the Court has not directly decided cases involving health care policy, federal bailouts of banks and automobile manufacturers, climate change, the minimum wage, and the optimal rate of

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3. See, e.g., David S. Broder, *O'Connor's Special Role*, WASH. POST, Oct. 1, 2003, at A23 (claiming that Justice O'Connor "can and does set more policy than President Bush or all 100 members of the Senate, 435 representatives or 50 governors").
 4. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *United States v. Lopez*, 514 U.S. 549 (1995).
 5. *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) (holding that judicial recusal is constitutionally required when a judge receives substantial campaign contributions from a person or entity with a direct or personal stake in the outcome of the case).
 6. *Ky. Dep't of Revenue v. Davis*, 128 S. Ct. 1801 (2008); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786 (2007).
 7. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).
 8. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).
 9. *Medellín v. Texas*, 128 S. Ct. 1346 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
 10. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan*, 548 U.S. at 557.
 11. *Lawrence v. Texas*, 539 U.S. 558 (2003).
 12. *Locke v. Davey*, 540 U.S. 712 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

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, the nuclear capabilities of Iran and North Korea, gasoline prices, and the creation of new jobs.

This list of issues the Supreme Court has not addressed was not, of course, chosen randomly. Rather, it is a list of the issues that dominate public and political discourse today, a list that might be surprising to some in terms of its distance from what the Supreme Court is actually doing. A few years ago I wrote about this gap between what the public cares about and the issues the Supreme Court engages,¹³ and updating the data three years later does not change the general picture. When asked in nonprompted fashion to name the most important issues facing the country,¹⁴ Americans overwhelmingly name health care and the economy first and second,¹⁵ and also identify as among the most important issues the wars in Iraq and Afghanistan, employment/jobs, education, and, more recently, immigration, an array of topics at the top of the “most important issues” poll that has varied little for the past eight years.¹⁶ In the most recent poll, from September 2009, health care was first, the economy second, employment/jobs third, budget/government spending fourth, and immigration fifth, then followed by education, the war, taxes, the environment, Iraq, homeland/domestic security, and regulation of banking and the financial services industry. Indeed, looked at more broadly, the 2009 list resembles those for much of the past three decades.¹⁷ Crime is occasionally more salient, as it was in the mid-1960s and mid-1990s,¹⁸ and the interrelated issues of pensions, retirement, and Social Security have often ranked high,¹⁹ but the most recent lists capture not only the long-standing importance of basic foreign policy and economic issues, but also the persistent nonappearance

13. Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4 (2006).

14. For a more complete discussion of the methodological issues surrounding use of this and similar polls, see *id.* at 17 n.37.

15. Data come from Press Release, *The Harris Poll, Obama’s Negative Ratings, and Those Who Think Country Is on the Wrong Track Continue To Rise* (Sept. 17, 2009). In September 2009, health care was ranked first, with the economy second, but those rankings were reversed in May 2009, March 2009, and October 2008. Health care was first in October 2007, followed by “the war.” In January 2009, the economy was first, followed by employment/jobs, and health care was third.

16. See *id.* at 5.

17. Schauer, *supra* note 14, at 14-20, 36-44.

18. *Id.* at 29, 39.

19. See Press Release, *The Harris Poll*, *supra* note 16, at 5.

in the top ten (and usually even in the top twenty) of abortion, sexual orientation, race, gender, religion, free speech, and many of the other issues that represent the most salient part of the Supreme Court's docket. In September 2009, for example, abortion ranked twenty-fourth, judicial and legal issues twenty-fifth, same sex rights twenty-eighth, crime and violence twenty-ninth, religion thirty-eighth, and gun rights forty-second.²⁰

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 does is not important. It is to say, however, 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 that there is anything wrong with this. By dealing either with low-controversy issues or with high-controversy, low-salience issues, and thus generally avoiding high-controversy, high-salience issues such as health care and the war in Afghanistan, the Court may possibly be attempting to retain that degree of public confidence and thus that quantum of empirical (or sociological) legitimacy²¹ that is necessary to secure at least grudging acquiescence in its most controversial decisions. We do not know the extent to which the Court's avoidance of high-salience, high-controversy cases is deliberate, but whether deliberate or not it does seem plausible to hypothesize a relationship between the Court's avoidance of these cases and the high esteem in which the Court continues to be held.²²

II. MEASURING LEGAL IMPORTANCE

It is one thing to recognize the strategic value of the Court's avoidance of most of the publicly important issues, but quite another to see much value in Supreme Court avoidance of *legally* important issues—issues and question that are important in litigation and to lawyers and judges. And although even this claim requires further specification of what it means for an issue or case to be legally important, at least one measure would be the extent to which the issue

20. *Id.*

21. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1828 (2005); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1049 (2000).

22. On public opinion about the Court in general, see JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* (2009).

frequently appears in lower court litigation.²³ 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 in the present context to offer a full empirical analysis and support for this claim, but a few examples can suggest a hypothesis. Consider, therefore, the universe of litigation under the First Amendment's Speech and Press Clauses. This is a large universe, especially in the federal courts, and a surprisingly large part of that universe is occupied by free speech issues arising in public employment and the public schools. And the combination of these domains and their issues involving student and teacher speech,²⁴ employee speech, organizational membership, and related topics is substantially larger than the quantity of lower court First Amendment cases dealing with the combination of obscenity and indecency, to say nothing of the even smaller domains of incitement, defamation, and the numerous other topics that dominate the casebooks.²⁵ 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 roughly forty years taken only four cases involving speech in the public schools,²⁶ two dealing directly with speech in colleges and universities,²⁷ and

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23. The existence of a circuit split is neither necessary nor sufficient for legal importance. Because many circuit splits are over technical matters appearing infrequently in lower court litigation, see *Current Circuit Splits*, 5 SETON HALL CIRCUIT REV. 403 (2009), and because we can surmise that many areas of uncertainty produce no circuit splits, the problem in need of a solution is not (only) the Court's underwillingness to resolve circuit splits. See Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1442 (2009).
 24. For data, see Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 225-26 nn.65-66.
 25. The most recent West's *Decennial Digest* includes seventy-eight pages to cases on speech by public employees and contractors, thirty-two pages to free speech issues in schools and colleges, nine pages for defamation, nine pages for incitement or advocacy or encouragement of crime, two pages on challenging or resisting government, and thirty-two pages on sex, including obscenity, child pornography, indecency, and public nudity. See 14 ELEVENTH DECENNIAL DIGEST, Part 3, 333-42, 354-55, 509-18, 519-51 (2008).
 26. *Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The number increases to five if the one school library case—*Board of Education v. Pico*, 457 U.S. 853 (1982)—is added.
 27. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972). Two other cases combine speech and religion issues. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981). And two address First Amendment issues not directly about student speech. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (academic freedom and

eight that concern the free speech rights of various public employees.²⁸ Although the quantity of litigation about speech in the schools and sexual speech is roughly the same (recognizing that there is some overlap), in the same period that the Supreme Court decided its four public school speech cases it decided at least thirty-seven dealing with obscenity, pornography, profanity, and indecency.²⁹

That the Supreme Court tends to take few cases in a number of high-litigation areas would be of less moment if the cases it did take were representative, and the decisions it issued useful in terms of providing guidance. But in fact neither of these occur. In *Morse v. Frederick*,³⁰ for example, the “Bong Hits 4 Jesus” case, the Court, in deciding only its fourth student speech case ever and the first in more than a decade, took and decided a case that was highly unrepresentative of the student speech cases that bedevil the lower courts.³¹ And having taken the case, the majority issued an opinion that was so narrow, so case-specific, and so idiosyncratically about alleged encouragement of drug use as to provide virtually no guidance to the courts that have to deal with student speech issues.³²

Morse v. Frederick is hardly unusual. On a large number of issues of regulatory law, constitutional law, criminal procedure, and others, the Court’s cases have been similarly unrepresentative and its decisions similarly unhelpful.³³ And thus if frequency of litigation in the lower courts combined with unanswered questions about the state of the law is some indication of

military recruiting); *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000) (student activity fees).

28. *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *United States v. Nat’l 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. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968). In addition, there are two cases dealing with government contractors, *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996); *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), and several on political patronage, e.g., *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980).
29. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1172-1223 (6th ed. 2009).
30. 551 U.S. 393 (2007).
31. More representative issues include student criticism of teachers and administrators, e.g., *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007), and racially or religiously offensive student attire, e.g., *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633 (D.N.J. 2007).
32. See Schauer, *supra* note 24, at 219-35.
33. See Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2067-73 (2008). On the Court’s failure of guidance in general, see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807-11 (1982); and Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1465-75 (1995).

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.³⁴

III. INFORMATION ABOUT IMPORTANCE AND THE IMPORTANCE OF INFORMATION

When appellate courts make decisions, they engage in (at least) two tasks. 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 task adequately, however, courts need to have some sense of the array of events that some putative rule, standard, policy, or test will control.³⁵ 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 field of potential application of some rule. Occasionally, one of the parties might do this in a brief, but it is 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, and not even very much about the nonlitigated terrain that the Court's decision would affect.

Second, everything we know about the availability heuristic and related phenomena³⁶ tells us that a court attempting to craft 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

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34. My criticism of the Supreme Court for seemingly abandoning its guidance function is obviously also a criticism of so-called judicial minimalism. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825 (1998). The minimalists appear largely focused on the advantages of Supreme Court delay in confronting broader questions, but life and litigation below both proceed apace while the Court is keeping its options open.
 35. See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006); Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases* (Nat'l Bureau of Econ. Research, Working Paper No. 15279, 2009), available at <http://www.nber.org/papers/w15279.pdf>.
 36. See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973). Useful overviews include SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 125-27, 178-80 (1993); and Steven J. Sherman & Eric Corty, *Cognitive Heuristics*, in 1 HANDBOOK OF SOCIAL COGNITION 189 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1984).

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 informational distorting effect.

Finally, and most importantly, the selection effect³⁷—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 governed by the rule. One is compliance, another is violation, and the third is what Gillian Hadfield has called “dropping out,”³⁸ ceasing to engage in the behavior the rule seeks to regulate. So when the Court decided *Miranda v. Arizona*,³⁹ for example, it created a world in which some police officers complied with *Miranda* by giving the required warnings before custodial interrogation, some violated by conducting custodial interrogations without giving warnings, and others stopped conducting custodial interrogations.

The selection problem arises, in part, because the courts will never see the dropout cases, and will rarely see the compliance cases. By seeing only the violations, therefore, they find themselves subject to a severe information distortion because they have not seen the cases of compliance and have not seen the dropouts. 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* on 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

37. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). For application to issues of appellate litigation, and especially Supreme Court litigation, see Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988). A good overview is Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure To Settle*, 49 CASE W. RES. L. REV. 315 (1999).

38. Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992).

39. 384 U.S. 436 (1966).

is a combination of structural informational disadvantage and psychological difficulty in seeing beyond the particular case and its particular parties and particular facts. More broadly, however, the problem may lie in the Court's unwillingness to recognize fully the costs of nondecision. Judge Wilkinson applauds the Court for minimizing the number of cases it takes, arguing that such an approach reduces the "opportunities . . . for mistakes."⁴⁰ Such a view, however, assumes that Supreme Court mistakes are only mistakes of commission and not of omission. One way of understanding my argument in this Essay, therefore, is as a call to recognize that there can be errors of inaction as well as of action, and that it is an error to engage in a process of institutional design without taking into account the likelihood and harm of errors of mistaken inaction along with those of mistaken action.

IV. A PARTIAL SOLUTION?

There may not be an easy solution to this serious informational problem, but it is nevertheless the case that informational problems demand informational solutions. Putting aside important resource and resource allocation issues, we can ask whether the Supreme Court could create a process by which a few law clerks—a variation on the "cert pool"—did serious research for the use of all of the Justices about the frequency and nature of litigation below—not only for the cases in which certiorari was granted, but for 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 a fair and comprehensive survey of the terrain of lower court litigation would be disfavored in the certiorari process? I do not know the answers to these questions, but they suggest that there are steps that might be taken or procedures that might be established to provide better information to the Court when it is deciding to grant or to deny certiorari, when it is deciding how broadly or narrowly to decide the cases it does take, and when the Justice writing for the majority decides how important it is to write narrowly to keep the Court's options open, or to write broadly in order to provide needed guidance. This information would go a long way towards making available the information the Court needs, or at least should need, in thinking about the legally important but publicly invisible issues it is neglecting to address, and in considering the actual nature of the legal and social terrain that will be affected

40. J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L.J. ONLINE (forthcoming 2009).

by the rules it makes, the precedents it creates, the cases it decides, and the issues it ignores.

Frederick Schauer is the David and Mary Harrison Distinguished Professor of Law, University of Virginia. This Essay is based on remarks delivered at the Yale Law School Supreme Court Advocacy Clinic and The Yale Law Journal Online's conference on "Assessing the Supreme Court's Case Selection Process," held at the National Press Club in Washington, D.C. on September 18, 2009. The author is grateful to Robert Blendon for assistance with poll results.

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