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Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?

I. INTRODUCTION: THE NEED FOR "POLITICAL" ANALYSIS

My participation in the excellent conference on case selection in the Supreme Court was surely based neither on my experience lawyering before the Court,¹ nor on my systematic study of the case selection process as a methodologically sophisticated political scientist.² That being said, I *have* studied and written about the Supreme Court, and I believe that I do have something to contribute to the discussion—I believe that the discussions tended to ignore a particular eight-hundred-pound elephant, which can basically be described as “politics.” There is, I believe, no “neutral” vantage point from which to assess the Court’s decisions as to how many cases it takes and, of course, which particular cases it chooses to hear. Instead, perspectives will inevitably reflect a series of political viewpoints. I should note that “political” in this context is not necessarily synonymous with Democrat or Republican (though on occasion it might be); rather, it refers to the answers one gives to some rather basic questions about how our political institutions should be organized.

I will address three such questions below. The first involves what it is that one expects from the very peculiar institution that is the United States Supreme Court. As we shall see, expectations can differ rather widely, and they will invariably influence one’s perspective on case selection. A second question

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1. Though I had the good fortune of taking a case from the Princeton Traffic Court through the New Jersey Supreme Court and then, because of a notice of appeal filed by Princeton University, to the United States Supreme Court. See *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982) (dismissing the case for want of jurisdiction), *dismissing appeal from People v. Schmid*, 423 A.2d 615 (1980). To put it mildly, this does not put me in the same category as Carter Phillips, Seth Waxman, or Ted Shaw, to name only three of the distinguished litigators whose names I have known for years.
 2. This role was admirably filled by Professors Lee Epstein and David Stras.

concerns the Court's own political judgments when deciding whether or not to grant certiorari. I will focus there on the work of the late Yale Professor Alexander Bickel, whose seminal discussion of "the passive virtues" brought to the fore of the legal academy the inevitably political dimension of the case selection process. Finally, I will discuss briefly one proposed remedy to the Court's ability to manipulate its own docket, which is the creation of a new "cert court" that would in significant measure impose a duty on the Court to consider cases that it might, for political reasons, wish not to.

II. 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 (primarily) to provide a "uniform" national law and, therefore, to resolve circuit splits so that a federal statute (or, for that matter, the Constitution) does not mean one thing in one part of the country and something quite different elsewhere? This was, after all, the justification given by Justice Story almost two-hundred years ago for the Court's being able to review decisions of state courts. He emphasized "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." The absence of a national "revising authority" would generate presumably intolerable "public mischiefs" inasmuch as "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states."³ Note well, incidentally, that this view doesn't necessarily require a belief that the Court's own decision will exhibit any particularly great wisdom or serve the country well. Rather, it is an almost Hobbesian argument that there *must* be a sovereign to resolve controversies, and that such a role should be played, at least where legal controversies are concerned, by the Supreme Court. However, as Fred Schauer noted in his own presentation, if one likes the notion of "diversity" associated with federalism, then leaving circuit splits "uncorrected" functions in some similar ways to more formal federalism. But perhaps one is less purely Hobbesian and, instead, believes that members of the Supreme Court are likely to possess special insight or "wisdom" on various great issues of the day, and they should be eager to dispense such wisdom through the aegis of case law. This optimistic view of the Court and its Justices would presumably lead one especially to wish

3. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816).

that the Court would decide many cases, as one would be getting at the very same time both “uniformity” and, more importantly, wisdom as well. Yet it appears that neither of these interests is crucially important to either Court or Congress. After all, the history of the Supreme Court throughout the twentieth century has been its own largely successful effort to persuade Congress to reduce the number of cases it must hear, effectuated by giving the Court more-and-more discretion over its own docket. Thus the Court for two decades now has had, courtesy of Congress, almost complete control over its own docket. No other federal court enjoys such discretion and, I strongly suspect, few if any highest courts in the rest of the United States or, for that matter, the world can make comparable claims. Not the least important aspect of this remarkable discretion is that the Court simply cannot any longer quote John Marshall in saying that “[c]ourts are the mere instruments of the law, and can will nothing.”⁴ With rare exception, every case is before the Court because it has chosen to take the case.⁵ 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, though I confess I’m not clear exactly why he wishes the Court to hear and decide more cases. That is, what is the precise “mischief” the Court visits upon the country in being so reticent? 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 occasionally seems to be whim.

One of the treats of the conference was hearing the presentation of empirical evidence and accompanying explanatory hypotheses from Professors Stras and Epstein. Professor Stras in particular offered fascinating suggestions about the individual proclivities of the Justices, especially their reduced interest, and especially when compared to former Justice Bryon White, in confronting conflicts among the circuits. It was also suggested, though, that the paucity of cert grants can be viewed as evidence of the frequency of “defensive denials,” which are based on uncertainty by the Justices as to who

4. *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824).

5. See Edward A. Harnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1718-26 (2000) (criticizing the unconstrained discretion involved in certiorari practice); see also Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 25 (2003) (noting that the Supreme Court's appellate jurisdiction is “almost entirely discretionary,” and that “there is neither statutory nor constitutional necessity” for Supreme Court review).

would prevail were cases to be accepted and then decided on the merits.⁶ Better to deny review at all than to take the chance of the Court actually upholding a decision that one abhors or reversing a decision that one applauds.

The empirical evidence and hypotheses are interesting in themselves. But, almost inevitably, one responds to them normatively as well, inasmuch as one is pleased or appalled by what the evidence reveals. We should realize, though, that any such normative assessment requires a worked-out view as to the purpose of the peculiar institution known as the United States Supreme Court. I am confident that there is today no widely shared view—let alone anything that could be called a “consensus”—as to what the Court’s role has been or should be in our twenty-first century world. As already noted, it is not self-evident that even “uniformity” is necessarily desirable. But consider as well some of the contending arguments, both empirical and normative, as to the role of the Supreme Court.

Does/should the Court have a self-conscious sense of where it wants to lead the country, and work to achieve that goal? Robert McCloskey suggested as much in his widely used (and still in print, in an updated edition that I am responsible for) 1960 book *The American Supreme Court*.⁷ In my 2005 revision of the book,⁸ I suggested that McCloskey, who basically swooned over Marshall’s cleverness in *Marbury v. Madison*⁹ 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*.¹⁰ There, after all, its five-Justice conservative Republican majority achieved what was surely one of its principal political goals: to place in the White House someone sure to nominate fellow conservatives to the federal bench. The opprobrium engendered among liberal law professors, pundits, and other observers who perhaps warrant Justice Holmes’s famously dismissive phrase “puny anonymities”¹¹ might have been a relatively small price to pay. And, of course, many hard-core political scientists are satisfied to describe judges as nothing more than politicians in robes who

6. On “defensive denials,” see H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 198-207* (1991); and Mark V. Tushnet, *Defensive Denials*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 256 (Kermit L. Hall ed., 2005).

7. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1st ed. 1960).

8. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 174-78 (4th ed. 2005).

9. 5 U.S. (1 Cranch) 137 (1803).

10. 531 U.S. 98 (2000).

11. *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

do nothing more than maximize their policy preferences.¹² 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 in conversation, it is hard to “code” the opinions in a politically plausible manner, given that the majority presents itself as vigorous defenders of equal voting rights, while the presumptively more liberal dissenters embrace the values of federalism). Inasmuch as George W. Bush received the imprimatur of the general electorate in 2004, whatever one thinks of the 2000 “election,” one might argue that the Court *did* recognize the *zeitgeist* and made its own marginal contribution to making sure that the country would go in its preferred direction.

But perhaps the Supreme Court works best – i.e., most admirably – 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 appears to argue in his recent book.¹³ On the other hand, as Scot Powe has recently argued, perhaps the Court is better analyzed – 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 “outliers” from the ostensible national consensus articulated by these successful elites.¹⁴ The hegemony thesis also helps to explain the decision of the Court’s majority to reach out and grant certiorari in the first place in *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*¹⁵ and *Casey*.¹⁶ When there is no such hegemony, incidentally, and government is “divided,” the Court may have a remarkably free hand, as Mark

12. This is the view often associated with “attitudinalists.” See, for example, two classic works of this school, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); and JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). By no means do Segal and Spaeth represent a consensus even among political scientists. See, e.g., *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* (Cornell W. Clayton & Howard Gillman eds., 1999). A good sense of the variation even among relatively “hard-core” political scientists is provided in *THE PIONEERS OF JUDICIAL BEHAVIOR* (Nancy Maveety ed., 2003).

13. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 367–85 (2009).

14. LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008* (2009).

15. 410 U.S. 113 (1973).

16. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

Tushnet has argued,¹⁷ 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. Or perhaps one might draw normative consequences from Keith Whittington's justifiably prize-winning argument that the Court has been most successful when it has basically joined a popular President in fulfilling his agenda for the nation.¹⁸ That is, after all, a major criterion used by most presidents when deciding who to appoint to the Court. 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.¹⁹

Needless to say, there are more traditional law professors, like Randy Barnett, who call for the Court to lead the way in *Restoring the Lost Constitution*, with its overtone of an original understanding of the Constitution that is, from Barnett's perspective, happily libertarian.²⁰ James E. Fleming agrees with Barnett that the Court has a special role in safeguarding "autonomy," but—given the extent to which Fleming draws on both John Rawls and Ronald Dworkin—he has a very different understanding of what that entails than Barnett.²¹ John Hart Ely's classic *Democracy and Distrust*,²² surely the most important "constitutional theory" book in the past fifty years, called on the Court to be especially attentive to issues of "representation reinforcement" and, concomitantly, to be deferential with regard to socioeconomic legislation that could not plausibly be viewed in "Footnote Four" terms. For Ely, this latter famously included contraceptives (as in *Griswold*²³) and abortion (as in *Roe*²⁴).

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17. MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 22 (2003). Given Tushnet's general skepticism about judicial review and the "progressivism" of the Supreme Court, one can be relatively confident that he does not believe that the Court *should* take advantage of the opportunities offered by divided government.
 18. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).
 19. Did Justice Souter really disappoint George H.W. Bush in voting to uphold *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.
 20. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).
 21. JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006).
 22. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).
 23. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Another book published at the same time as Ely's, by University of California Professor Jesse Choper, eloquently argued that the Court should basically withdraw from exercising any review at all over federalism or separation of powers cases, leaving it to the political process to resolve any such controversies.²⁵ Both Ely and Choper did retain some role, however, for what might be termed judicial activism. Maximalist deferentialism, originally associated with James Bradley Thayer²⁶ and Felix Frankfurter,²⁷ has recently been defended by Adrian Vermeule.²⁸ 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 how best to realize the promise of a "progressive Constitution."²⁹ The methods include (but one suspects are not limited to) "fidelity to text and principle,"³⁰ "democratic constitutionalism,"³¹ and constitutional "miminalism."³² 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 join Mark Tushnet (a contributor to the volume) in his call to abolish the power of courts to invalidate laws passed by Congress.³³

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24. *Roe v. Wade*, 410 U.S. 113 (1973).
 25. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980). Both of them are reviewed in Sanford Levinson, *Judicial Review and the Problem of the Comprehensible Constitution*, 59 TEX. L. REV. 395 (1981) (book review).
 26. See JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* (Boston, Little, Brown & Co. 1893).
 27. See Sanford V. Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973).
 28. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006).
 29. *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009), *sample chapters available at* <http://www.constitution2020.org/>.
 30. Jack M. Balkin, *Fidelity to Text and Principle*, in *THE CONSTITUTION IN 2020*, *supra* note 29, at 11. Elsewhere, Balkin has delineated an ambitious theory of "Original Meaning and Constitutional Redemption." Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).
 31. Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, *supra* note 29, at 25.
 32. Cass R. Sunstein, *The Minimalist Constitution*, in *THE CONSTITUTION IN 2020*, *supra* note 29, at 37.
 33. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); see also JAMES MACGREGOR BURNS, *PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT* (2009). No doubt, incidentally, I have overlooked

In any event, whether one wishes to describe this as a cacophony of dissonant voices or merely the general tone of vigorous academic debate, it seems undeniable that one gets very different pictures of what the Court should be doing depending on who 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 both scholars and 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 order reargument in the *Citizens United v. F.E.C.*³⁴ in a manner that portends a willingness to overrule at least a century’s worth of regulation of corporate spending in elections.³⁵ Indeed, they might hope that the Court would take at least another twenty or thirty such cases a year while the current majority is able to maintain itself against the possibility of a future Supreme Court that would include Democratic (or “progressive”) replacements for the present probusiness conservatives. 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 Democratic majorities in both the House and Senate. To be sure, neither Chief Justice Roberts nor Justice Alito was 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, in terms of achieving the constitutional goals articulated by the modern Republican Party or such groups as the Federalist Society while they still have five votes. And one even finds suggestions—not surprisingly on

other books that might merit mention. But surely the addition of other citations would not affect the principal point, which is the absence of any agreed upon role for the United States Supreme Court as an institutional actor in the American system of government.

34. See Transcript of Oral Argument, *Citizens United v. FEC*, No. 08-205 (U.S. Sept. 9, 2009). For a comprehensive discussion of the case, see also Lyle Denniston, *Citizens United v. Federal Election Commission*, SCOTUSWiki, http://www.scotuswiki.com/index.php?title=Citizens_United_v._Federal_Election_Commission (last visited Dec. 4, 2009).
35. Political scientist H.W. Perry, who coined the term “defensive denial,” also discusses the obverse, “aggressive grants,” to refer to the desire of some justices to strike while they view the iron as hot with regard to the likelihood of their substantive views being adopted by at least four other justices. PERRY, *supra* note 6, at 207-12.

the editorial pages of the *Wall Street Journal*³⁶—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 *Wall Street 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). And so it goes.³⁷

III. 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. Professor Bickel's 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.”³⁸ These virtues featured a highly strategic Supreme Court. Knowing where it actually wanted to come out on some of the great issues of the day, it self-consciously 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. A sterling example is presented by William Carnley, who was convicted of incest with a minor after a trial in which he was not represented by a lawyer. Can it really be surprising, as Scot Powe notes in his book on the Warren Court, that Felix Frankfurter gained ready assent from his colleagues when he commented to them that it was “impossible to ‘imagine a worse case, a more unsavory case to overrule a longstanding decision’” that only “special circumstances” entitled a defendant to representation in a noncapital case?³⁹ No doubt the Court was deliriously happy the following year to find Clarence

36. See David B. Rivkin, Jr. & Lee A. Casey, *Mandatory Insurance Is Unconstitutional: Why an Individual Mandate Could Be Struck Down by the Courts*, WALL ST. J., Sept. 18, 2009, at A23. A debate between Rivkin and Casey and Yale Professor Jack M. Balkin will shortly be published on the website of the University of Pennsylvania Law Review, *PENNumbra*.

37. KURT VONNEGUT, *SLAUGHTERHOUSE FIVE* (1969).

38. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). Much of the argument reappeared in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962), which (in my opinion) is the only serious contender with ELY, *DEMOCRACY AND DISTRUST*, *supra* note 22, for the most influential single book of the past half-century with regard to the role of the Supreme Court.

39. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 382 (2000).

Earl Gideon's famous handwritten petition that led to the overruling of the "special circumstances" case, *Betts v. Brady*,⁴⁰ and the adoption of a general right to counsel at least where jail is a possibility.⁴¹ Perhaps understandably, the case was the subject of a made-for-television movie in 1980 starring Henry Fonda as Clarence Earl Gideon and José Ferrer as Abe Fortas, who was appointed to represent Gideon before the Supreme Court.⁴² But although Gideon and Fortas may be celebrated as iconic figures, they were emphatically not the causal agents pushing the Court where it otherwise did not wish to go. The Court had, after all, no duty to grant certiorari at all.

The canonical example of the "timing" problem and the Court's own exertion of what might be called "will power" is the Court's scandalous, if completely understandable, "decision" in the 1956 case of *Naim v. Naim*.⁴³ In that case, the Court violated ordinary norms of legal fidelity by dismissing a case before them on appeal (and not through a discretionary grant of certiorari) that would have forced them to acknowledge that its decision in *Brown v. Board of Education*,⁴⁴ correctly understood, required the invalidation of laws criminalizing interracial marriage in Virginia (and in an embarrassing number of other states, not all of them Southern). Needless to add, the Court later unanimously invalidated the very same Virginia statute that it was unwilling to confront in 1956 in the aptly named *Loving v. Virginia*.⁴⁵ But a great deal had happened in the intervening decade, including the triumph of the Civil Rights Movement and the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the latter following a declaration by President Lyndon B. Johnson before Congress that "we shall overcome."⁴⁶ What seemed unacceptably risky in 1956 seemed almost a self-evident legal and institutional truth in 1967.

40. 316 U.S. 455 (1942).

41. See generally ANTHONY LEWIS, GIDEON'S TRUMPET (1964) (providing the canonical explication of the human and legal context of *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

42. *Gideon's Trumpet* (Hallmark Hall of Fame television broadcast Apr. 30, 1980). Information about the movie is available at <http://www.imdb.com/title/tt0080789/>.

43. 350 U.S. 985 (1956) (dismissing for want of a substantial federal question an appeal from the Virginia Supreme Court's upholding of the law in *Naim v. Naim*, 87 S.E.2d 749 (1955)). I find it interesting that Chief Justice Warren's opinion in the later *Loving v. Virginia* case cites only to the Virginia decision and utterly fails to mention the altogether "passive" response by the Court (on which, of course, he was already serving). See *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

44. 347 U.S. 483 (1954).

45. 388 U.S. 1 (1967).

46. Special Message to Congress: The American Promise, 1 PUB. PAPERS 281 (Mar. 15, 1965).

Bickel's argument for prudence on the part of the Court in deciding what cases to hear led to the famous response by Gerald Gunther that Bickel wanted the Court to be one-hundred percent principled, but only twenty percent of the time.⁴⁷ That is, if they actually chose to hear a case, they should decide it in accordance with some notion of presumptively apolitical legal principles, but they should think like ward politicians in deciding whether or not to hear cases in the first place (recall that Bickel was writing well before the Court was able successfully to gain almost complete control of its docket by eliminating nearly all compulsory jurisdiction). The ultimate word on Bickel's argument was given by his colleague Jan Deutsch in his brilliant 1968 article⁴⁸ that 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.⁴⁹ Given my own politics, I applauded the Court's manifest dishonesty; 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."

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. To reject this political bias, one would have to admit wishing that the Court take cases whose likely decisions, given the views of sitting justices, would push the country in negative directions.⁵⁰ So consider the following question: how many readers are so interested to find out what a current five-

47. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

48. Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

49. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

50. This point assumes that the Court's decisions have genuine consequences, which is the subject of other heated debates among political scientists. Compare GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008), with MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

Justice majority thinks about gay- and lesbian-marriage that they are indifferent to what the legal effect of the opinion might be? That is, one might well agree with former Solicitor General Theodore Olson that the overturning by referendum of the California Supreme Court's commendable decision protecting such marriages under the California Constitution is invalid under the best interpretation of the Fourteenth Amendment without (at the same time) hoping that this Supreme Court (with its current majority) will choose to hear the case. It would make all the difference if one were confident that Justice Kennedy would join the four moderates on the Court in reading *Lawrence v. Texas*⁵¹ to do what the majority opinion explicitly denied, which is to invalidate state bans on same-sex marriage.

IV. A NEW "CERTIORARI COURT"?

So what is the proper response to this "political" analysis of the Court, especially its own use of political criteria when deciding whether to take or reject what could certainly be described, by independent observers, as "meritorious" cases? One suggestion is that offered by Duke Law School professor Paul Carrington and Cornell Law School professor Roger Crampton, as part of a general proposal addressing four quite different problems with the current Court (beginning with life tenure).⁵² 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."⁵³ This would not only force the Court to decide more cases; it would also correct the "visible tendency of the Justices to place greater reliance on their staffs."⁵⁴ This latter phrase is a euphemism for the reliance on law clerks to serve as the gatekeepers into the magisterium of the Court. Who are these clerks, incidentally? They are, by and large, extremely talented, and almost completely inexperienced, persons in their mid- to late-20s. 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

51. 539 U.S. 558 (2003).

52. See Four Proposals for a Judiciary Act of 2009, available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/02/judiciary-act-of-2009.doc>. The other two proposals involve procedures to respond to physical or mental disabilities of the justices and limiting the particular term of the "Chief Justice" to seven years unless reconfirmed by the Senate for another seven-year term.

53. *Id.*

54. *Id.*

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 to do more of the hard work in crafting opinions and 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 twentieth 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 myself 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). What is at stake is figuring out how the Supreme Court can best serve the citizenry in helping to achieve the vision of constitutional government set out in the Preamble to our Constitution.

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