

ASSESSING THE SUPREME COURT'S CURRENT CASELOAD: QUESTIONS OF LAW OR 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.² 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 Court³--the last courtesy of an extraordinarily ill-advised petition filed by former Attorney General (and Princeton Trustee) Nicholas DeB. Katzenbach in behalf of Princeton University for review of a unanimous decision by the New Jersey Supreme Court⁴ rejecting a prosecution for trespass filed by Princeton against our political-activist non-student client--explains the invitation to join almost infinitely more experienced lawyers, extraordinarily knowledgeable and distinguished journalists, and far more methodologically sophisticated social scientists in discussing the issues raised by the strikingly reduced caseload of the current Court. 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 will try to fill in that gap below.

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 (primarily) 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

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² For those too young to remember, Admiral James Stockdale was the choice of Ross Perot as his vice-presidential running mate in the 1992 presidential election. Although a man of genuine distinction, he is probably best remembered for his opening lines in the debate that year among then-Vice President Dan Quayle, then-Sen. Al Gore, and himself: "Who am I? Why am I here?" See <http://www.debates.org/pages/trans92d.html>

³ See *Princeton University v. Schmid*, 455 U.S. 100 (1982)(dismissed for want of jurisdiction).

⁴ 84 N. J. 535, 423 A. 2d 615 (1980)

thing in one part of the country and something quite different elsewhere?⁵ Note well, incidentally, that this doesn't necessarily require a belief that the Court's own decision will exhibit any great wisdom and serve the country well. Rather, it is an almost Hobbesian argument that there *must* be a sovereign to resolve controversies, and that that 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.⁶ 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 caselaw.

Moreover, we must try to make theoretical sense as well 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 of this remarkable discretion enjoyed by the Court is that it simply cannot any longer quote John Marshall in saying that "courts are the mere instruments of the law, and can will nothing".⁷ With rare exception, every case is before the Court because it has chosen to take the case.⁸ 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.

⁵ After all, this has been a major theme at least since the Supreme Court's decision in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), where Justice Story wrote of

the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution.... If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, 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. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. *Id.* at 348.

⁶ Cite.

⁷ *Osborn v. Bank of United States*, 22 U.S. [9 Wheat.] 738, 866 (1824).

⁸ 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 A. Fallon, *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1 (2003)

To be sure, one might offer only empirical descriptions of what the Court has in fact done over the past decades and then proffer explanations the observed behavior, such as individual proclivities of the justices, as Prof. Stras so ably did, or, as was also suggested, by the contemporary prevalence of “defensive denials” based on uncertainty by the justices as to who would prevail were cases to be accepted and then decided on the merits.⁹ But inevitably one is tempted to add to the empirical descriptions some normative assessment as to whether those descriptions should please us or cause us to weep. We should realize, though, 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. As already seen, 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, 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?*¹⁰ In my 2004 revision of the book,¹¹ I suggested that McCloskey, who basically swooned over Marshall’s cleverness in *Marbury v. Madison*¹² 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*.¹³ 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, and the opprobrium engendered among liberal law professors, pundits, and others who might warrant Justice Holmes’s famously dismissive phrase “puny anonymities”¹⁴ was 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 are doing nothing more than doing what they can to maximize their policy preferences.¹⁵ From this perspective, there is nothing

⁹ On “defensive denials,” see H. W. Perry, Jr., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT __ (1990). See also Mark V. Tushnet, “Defensive Denials,” in Kermit L. Hall, ed., THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 256 (2005).

¹⁰ Robert G. McCloskey, THE AMERICAN SUPREME COURT (first ed. 1960), 5th edition forthcoming, 2010)

¹¹ Robert G. McCloskey, THE AMERICAN SUPREME COURT 174-178 (4th ed. 2004)

¹² 5 U.S. (1 Cranch) 137 (1803).

¹³ 531 U.S. 98 (2000),

¹⁴ *Abrams v. U.S.* 250 U.S. 616, 630 (1919).

¹⁵ This is the view often associated with “attitudinalists.” See, e.g., two classic works by Jeffrey A. Siegel and Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) and THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). By no means do Siegel and Spaeth

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).

Does the Supreme Court work 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,¹⁶ On the other hand, as my colleague Scot Powe has also 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.¹⁷ (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 regard to *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*¹⁸ and *Casey*.¹⁹) When there is no such hegemony, incidentally, and government is “divided,” the Court may have a remarkably free hand, as Mark Tushnet has argued,²⁰ 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.²¹

represent a consensus even among political scientists. See, e.g., Cornell Clayton and Howard Gillman, eds., *SUPREME COURT DECISIONMAKING: NEW INSTITUTIONALIST APPROACHES* (1999). A good sense of the variation even among relatively “hard-core” political scientists is provided in Nancy Maveety, ed., *THE PIONEERS OF JUDICIAL BEHAVIOR* (2003).

¹⁶ See Barry Friedman, *WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

¹⁷ Lucas A. Powe, Jr., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789-2008* (2009).

¹⁸ 410 U.S. 113 (1973).

¹⁹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²⁰ Mark V. Tushnet, *THE NEW CONSTITUTIONAL ORDER* (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.

²¹ Keith Whittington, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U. S. HISTORY* (2007).

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*, with its overtone of an original understanding of the Constitution that is, from Barnett's perspective, happily libertarian.²² 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 does Barnett.²³ John Hart Ely's classic *Democracy and Distrust*,²⁴ 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 socio-economic legislation that could not plausibly be viewed in "Footnote Four" terms. This latter, for Ely, famously included contraceptives (as in *Griswold*²⁵) and abortion (as in *Roe*). Another book published at the same time as Ely's by University of California Prof. 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.²⁶ Both Ely and Choper did retain some role, however, for what might be termed judicial activism. Maximalist deferentialism, originally associated with James Bradley Thayer and Felix Frankfurter, has recently been defended by Adrian Vermeule.²⁷ The most recent entrant in the academic conversation is *The Constitution in 2020*, edited by Yale professors Jack Balkin and Reva Siegel,²⁸ in which academic denizens of the

²² Randy Barnett, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

²³ James E. Fleming, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006).

²⁴ John Hart Ely, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

²⁵ 381 U.S. 479 (1965).

²⁶ Jesse H. Choper, *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 *TEXAS L. REV.* 395 (1981).

²⁷ Adrian Vermeule, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2008).

²⁸ Jack M. Balkin and Reva B. Siegel, eds., *THE CONSTITUTION IN 2020* (2009).

American Constitution Society offer their takes on how best to realize the promise of a “progressive Constitution.” The methods include (but one suspects are not limited to), “fidelity to text and principle,”²⁹ “democratic constitutionalism,”³⁰ and constitutional “miminalism.”³¹ 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 simply abolishing at least national judicial review, i.e., the power of courts to invalidate laws passed by Congress.³² And let me apologize in advance to anybody whose book I have ignored. After all, to offer a comprehensive overview of even all book-length treatments of the role of the Supreme Court limited even to the past several decades would generate an article many times longer than this one.

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 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 order reargument in the *Citizens United v. F.E.C.*³³ in a manner that portends a willingness to overrule at least a century’s worth of regulation of corporate spending in elections; indeed, they might hope that the Court would take at least another 20 or 30 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 pro-business 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 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

²⁹ Jack M. Balkin, *Fidelity to Text and Principle*, in *id.* at 11. Elsewhere Balkin has delineated an ambitious theory of *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENTARY 427 (2007).

³⁰ Robert C. Post and Reva B. Siegel, *Democratic Constitutionalism*, in *id.* at 25.

³¹ Cass R. Sunstein, *The Minimalist Constitution*, in *id.* at 37.

³² Mark V. Tushnet, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000). See also James MacGregor Burns, *PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT* (2009).

³³ *Citizens United v. Federal Elections Commission* (08-205), comprehensively described by Lyle Denniston at http://www.scotuswiki.com/index.php?title=Citizens_United_v._Federal_Election_Commission

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*³⁴—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). And so it goes.³⁵

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.”³⁶ 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 Felix Frankfurter gained ready assent from his colleagues when he commented to them that “it is impossible to imagine a worse case, a more unsavory case to overrule a longstanding opinion” that only “special circumstances” entitled a defendant to representation in a non-capital case?³⁷ 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 the

³⁴ See David B. Rivkin, Jr. and Lee A. Casey, “Mandatory Insurance Is Unconstitutional: Why an individual mandate could be struck down by the courts,,” *Wall Street Journal*, September 18, 2009, available at <http://online.wsj.com/article/SB10001424052970204518504574416623109362480.html>. A debate between Rivkin and Casey and Yale Professor Jack M. Balkin will shortly be published on the web site of the University of Pennsylvania Law Review, *PENNumbra*.

³⁵ See Kurt Vonnegut, *SLAUGHTERHOUSE FIVE* (passim)(1969).

³⁶ Alexander M. Bickel, Foreword, 1960 Term: *The Passive Virtues*, 75 *HARV. L. REV.* 40 (1961). Much of the argument reappeared in *THE LEAST DANGEROUS BRANCH* (1962), which is the only serious contender with Ely’s *Democracy and Distrust* for the most influential single book of the past half-century with regard to the role of the Supreme Court.

³⁷ See Powe, *THE WARREN COURT AND AMERICAN POLITICS* 382 (200_).

“special circumstances” case, *Betts v. Brady*,³⁸ and the adoption of a general right to counsel at least where jail is a possibility.³⁹ Perhaps understandably, the case was the subject of a made-for-television movie in 1980 starring Henry Fonda as Clarence Earl Gideon and Jose Ferrer as Abe Fortas, appointed by the Court to represent Gideon before the Supreme Court.⁴⁰ What is less understandable, though, is believing that Gideon (or Fortas) was the causal agent of pushing the Court where it otherwise did not wish to go. They 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, though completely understandable, “decision” in the 1956 case of *Naim v. Naim*,⁴¹ 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*,⁴² 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. Needless to add, the Court later unanimously invalidated the very same Virginia statute that it was unwilling to confront in 1956 eleven years later in the aptly named *Loving v. Virginia*.⁴³ 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.”⁴⁴ What seemed unacceptably risky in 1956 seemed almost a self-evident legal and institutional truth in 1967.

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 100% principled, but only 20% of the time.⁴⁵ 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

³⁸ 316 U.S. 455 (1942).

³⁹ See generally Anthony Lewis, *GIDEON’S TRUMPET* (1964).

⁴⁰ http://en.wikipedia.org/wiki/Gideon's_Trumpet.

⁴¹ Cite, (dismissing for want of a substantial federal question [!] an appeal from *Naim v. Naim*, 197 Va. 80, 87 S. E. 2d 749 (1955) upholding the Virginia law). I find it interesting that Chief Justice Warren’s opinion in the later *Loving* 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).

⁴² 347 U.S. 483 (1954).

⁴³ 388 U.S. 1 (1967).

⁴⁴ Lyndon B. Johnson, Special Message to Congress: The American Promise, March 15, 1965, available at

<http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650315.asp>

⁴⁵ Gerald Gunther, *The Subtle Vices of the “Passive Virtues”: A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, ___ (1964).

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 article⁴⁶ that, 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.⁴⁷ 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."

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 whose likely decisions, given the views of sitting justices, would push the country in negative directions (assuming that the Court's decision 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 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).⁴⁸ 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,

⁴⁶ *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1969).

⁴⁷ *Newdow v. United States Congress, Elk Grove Unified School District, et al.*, 542 U.S. 1 (2004).

⁴⁸ See "Four Proposals for a Judiciary Act," available at <http://paulcarrington.com/Four%20Proposals%20for%20a%20Judiciary%20Act.htm>

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.