Is it Important to be Important?: Evaluating the Supreme Court's Case-selection Process

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Rezumat:

Cum lucrările Curții Supreme au scăzut, de la aproape 150 de cazuri per Term soluționate fără opinii separate, în perioada anilor 1980 și perioada de început a anilor 1990 până la 70 actualmente, a crescut preocuparea dacă instanța supremă soluționează prea puține cazuri și, în consecință, dacă lasă prea multe cauze importante și probleme nehotărâte. Argumentul pentru care preocuparea este justificată, depinde în parte de ceea ce se înțelege prin termenul „important" și, în parte, de împrejurarea dacă este important că instanța supremă decide cazuri importante. Acest eseu se adresează acestor întrebări diferite, dar conexe.

Abstract:

As the output of the Supreme Court shrinks, from about 150 cases per Term decided with full opinions in the 1980s and early 1990s to about 70 now[584]*, concern has grown over whether the Court is deciding too few cases and consequently leaving too many important cases and issues undecided*[585]*. 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. This Essay addresses these two different but related questions.*

Keywords: Supreme Court, case, importance, selection process, public important issues, unrepresentative case, certiorari process

I. The Strategic Importance of Unimportance

Is it important that the Supreme Court take on the important or great issues of our times? That the Court has traditionally done so is a commonplace[586], but whether the commonplace is true depends on how

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[584] [cite to Chandler & Harris paper, p. 1]

[585] *See, e.g.*, Erwin Chemerinsky, *The Roberts Court at Age Three,* 54 Wayne L. Rev. 947 (2008); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1538 (2008); Kevin M. Scott, *Shaping the Supreme Court's Federal Certiorari Docket,* 27 Just. Sys. J. 191 (2006); Arlen Specter, *The Chamber of Secrets*, Nat. L.J., Aug. 3, 2009, at 38; Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket" The Ghost of William Howard Taft*, 90 Minn. L. Rev. 1363 (2006).

[586] *See, e.g.,* Laura Krugman May, *Judicial Fictions: Images of Supreme Court Justices in the Novel, Drama, and Film,* 39 Ariz. L. Rev. 151, 167 (1997); David R. Stras, *Why Supreme Court Justices Should Ride Circuit,* 91 Minn. L. Rev. 1710, 1712 (2007). And see also the various quotations in Sanford Levinson, Constitutional Faith 16-17 (1988).

we phrase the question. Whether what much of what the Supreme Court does is important is very different from whether much of what is important is done by the Supreme Court, and without knowing which we are asking we cannot intelligently evaluate the Court's case selection process.

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[587], campaign finance[588], burdens on interstate commerce[589], capital punishment[590], punitive damages[591], presidential power[592], detention of enemy combatants[593], sexual orientation[594], and religion in the public sphere[595], 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. Nor has it directly[596] decided cases involving health care policy, federal bailouts of banks and automobile manufacturers, climate change, the minimum wage, and the optimal rate of immigration. And nothing the Court has decided for years is even in the neighborhood of addressing questions involving mortgage defaults, executive compensation, interest rates, Israel and Palestine, 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 what the Supreme Court does[597], and updating the data three years later does not change the general picture. When asked in non-prompted fashion to name the most important issues facing the country[598], Americans overwhelmingly name healthcare and the economy first

[587] District of Columbia v. Heller, 128 S. Ct. 2783 (2008); United States v. Lopez, 514 U.S. 549 (1995).

[588] 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).

[589] Kentucky Dept. of Revenue v. Davis, 128 S. Ct. 1801 (2008); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Auth., 127 S. Ct. 1786 (2007).

[590] Kennedy v. Louisiana, 128 S. Ct. 2641 (2008); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

[591] Philip Morris v. Williams, 127 S. Ct. 1057 (2007); State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003).

[592] Medellin v. Texas, 128 S. Ct. 1346 (2008); Hamdam v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004);

[593] Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[594] Lawrence v. Texas, 539 U.S. 558 (2003).

[595] Locke v. Davey, 540 U.S. 712 (2003); Zellman v. Simmons-Harris, 536 U.S. 639 (2002).

[596] The "directly" qualification is important. It is difficult to deny that the Court's structural and procedural decisions can have a substantial impact on substantive decision-making. Nevertheless, there is still a difference between directly deciding issues of presidential war power, for example, and deciding issues of campaign finance that may affect presidential elections and thus may affect the question of who will actually exercise presidential war powers. The downstream effects of Supreme Court structural and procedural decisions are far more complex than this, of course, but for purposes of this brief Essay the distinction embedded in the foregoing example will have to suffice.

[597] Frederick Schauer, *The Supreme Court, 2005 Term, Foreword: The Court's Agenda – and the Nation's*, 120 Harv. L. Rev. 4 (2006).

[598] For a more complete discussion of the methodological issues surrounding use of this and similar polls, see Schauer, *supra* note 15, at 17 n.37.

and second[599], followed by the wars in Iraq and Afghanistan, employment/jobs, immigration, and education, an array of topics at the top of the "most important issues" poll that has varied little for past eight years[600]. In the most recent poll, from September, 2009, healthcare 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[601]. Crime occasionally breaks into the top ten, as it did in the mid-1960s and mid-1990s, and pensions and Social Security often rank high[602], but the most recent lists capture not only the long-standing importance of basic foreign policy and economic issues, but also the persistent non-appearance 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-fifth, judicial and legal issues twenty-sixth, same sex rights twenty-ninth, crime and violence thirtieth, religion thirty-ninth, and gun rights forty-third[603].

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 by generally avoiding high-controversy high-salience issues such as health care and the war in Afghanistan, the Court may retain that degree of public confidence and thus that quantum of empirical (or sociological) legitimacy[604] that is necessary to secure at least grudging acquiescence in its most controversial decisions.

II. Measuring Legal Importance

It is one thing to recognize the strategic value of 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 is for an issue or case to be legally important, at least one measure would be the extent to which the issue frequently appears in lower court litigation[605]. If that

[599] Data come from The Harris Poll, September 17, 2009, available at http://www.harrisinteractive.com/harris_poll/pubs/Harris_Poll_2009_09_17.pdf. In September 2009, healthcare 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 healthcare was third.

[600] Harris Poll, *supra* note 17, at 5.

[601] Schauer, *supra* note 15, at 14-20, 36-44.

[602] Harris Poll, *supra* note 17, at 5.

[603] Id.

[604] *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787, 1828 (2005); Barry Friedman, *The History of the Counter-Majoritarian Difficulty, Part Four: Law's Politics*, 148 U. Pa. L. Rev. 971, 1049 (2000).

[605] In the context of this Symposium, it is worth noting that I take the existence of a circuit split as neither necessary nor sufficient for a conclusion about legal importance. Many circuit splits are on technical matters that appear infrequently in lower court litigation, and many matters as to which there are large swaths of uncertain law in frequently-litigated areas produce no circuit splits. And thus I do not necessarily subscribe to the view that the problem in need of a solution is 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); Starr, *supra* note 3, at 1372.

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[606], employee speech, organizational membership, and related topics is substantially larger than the quantity of lower court First Amendment issues dealing with obscenity, indecency, incitement, press freedoms, and the numerous other topics that dominate the casebooks[607]. Yet although schools and public employee cases overwhelm the other categories of First Amendment litigation in the lower courts, the Supreme Court takes surprisingly few such cases. It has in forty years taken only four cases involving speech in the public schools[608], three dealing with speech in colleges and universities[609], and twelve that concern the free speech rights of various public employees[610]. 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[611].

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*[612], 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

[606] For data, see Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 S. Ct. Rev. 205, 225-26 nn. 65-66.

[607] Thus, in the most recent version of West's *Decennial Digest*, encompassing all of the state and federal courts, there are, for a three year period, seventy-eight pages devoted to cases on free speech rights of public employees and contractors, thirty-two pages on 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. 13 Eleventh Decennial Digest, Part 3, 363-441, 441-73 (2008); 14 Eleventh Decennial Digest, Part 3, 333-42, 354-55, 509-18, 519-51 (2008).

[608] Morse v. Frederick, 127 S. Ct. 2718 (2007); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). The number increases to five if the one school library case – Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982) – is added.

[609] Papish v. Board of Curators of Univ. of Missouri, 410 U.S. 667 (1973); Healy v. James, 408 U.S. 169 (1972).

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

[611] *See* Geoffrey R. Stone et al., Constitutional Law 1172-1223 (6th ed. 2009).

[612] 127 S. Ct. 2718 (2007).

lower courts. And having taken the case, even 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 the issue[613].

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[614]. And thus if frequency of litigation in the lower courts combined with unanswered questions about the state of the law is some indication of legal even if not political importance, then the Court's record of taking legally important cases is little stronger than its record of taking socially important cases, but with far less justification.

III. Information about Importance and the Importance of Information

When appellate courts make decisions, they 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 or standard or policy or test will control[615]. 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 non-litigated terrain that the Court's decision would affect.

Second, everything we know about the availability heuristic and related phenomena[616] 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 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.

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[613] *See* Schauer, *supra* note 24.

[614] *See* Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 Notre Dame L. Rev. 2045 (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); Frederick Schauer, *Opinions as Rules*, 62 U. Chi. L. Rev. 1455 (1995).

[615] *See* Frederick Schauer, *Do Cases Make Bad Law?,* 73 U. Chi. L. Rev. 883 (2006); Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases*, National Bureau of Economic Research Working Paper 15279 (2009).

[616] *See* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 Cognitive Psych. 207 (1973). Useful overviews include Scott Plous, The Psychology of Judgment and Decision Making 125-27, 178-80 (1993); S.J. Sherman & E. Corty, *Cognitive Heuristics*, *in* 1 Handbook of Social Cognition 189 (1984); Robert M. Reyes, William C. Thompson, & Gordon H. Bower, *Judgmental Biases Resulting from Different Availabilities of Arguments*, 39 J. Personality & Social Psych 1 (1980); S.E. Taylor, *The Availability Bias in Social Perception and Interaction*, *in* Daniel Kahneman, Paul Slovic, & Amos Tversky, Judgment Under Uncertainty: Heuristics and Biases 190 (1982).

Finally, and most importantly, the selection effect[617] – the process by which cases with certain characteristics get to appellate courts and other cases with different characteristics do not – will almost certainly provide a serious distortion of information. Whenever the Supreme Court – or any court – sets forth a rule, standard, principle, test, or whatever, it creates the possibility of three different forms of behavior on the part of those the rule. One is compliance, another is violation, and the third is what Gillian Hadfield has called "dropping out"[618], ceasing to engage in the behavior the rule seeks to regulate. So when the Court decided *Miranda v. Arizona*[619], for example, it created a world in which some police officers complied with *Miranda* by giving the required warnings before custodial interrogation, others violated by conducting custodial interrogations with giving warnings, and some 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?[620] It is plausible that the answer to all of these

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[617] *See* George L. Priest & William 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 Predictions of Failure to Settle*, 49 Case West. Res. L. Rev. 315 (1999).

[618] Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 Geo. L.J. 583 (1992).

[619] 384 U.S. 436 (1966).

[620] In his thought-provoking contribution to this Symposium, J. Harvie Wilkinson III, *If It Ain't Broke ... ,* 119 Yale L.J. Online (2009), Judge Wilkinson applauds the Court for minimizing the number of cases it takes, arguing that such an approach reduces the "opportunities ... for mistakes." 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.

questions is “no,” and plausible to suppose that the cause is a combination of structural informational disadvantage and psychological difficulty in seeing beyond the particular case and its particular parties and particular facts.

IV. A Partial Solution?

There may not be an easy solution to this 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 about the cases in which certiorari was seriously considered? Or could the Court demand such information from litigants and amici, either formally, or, more plausibly, informally, by signaling that petitions and briefs that did not contain such information would be disfavored in the certiorari process? I do not know the answers to these questions, but they suggest that there are 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, on the one hand, to write narrowly to keep the Court’s options open, or to write broadly, in order to provide needed guidance, on the other. This information would go a long way towards making the 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 by the rules it makes, the precedents it creates, the cases it decides, and the issues it ignores.

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