Michigan Law Review

Volume 86 | Issue 6

1988

Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process

Robert S. Whitman
University of Michigan Law School

REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS. By *Samuel Estreicher* and *John Sexton.* New Haven: Yale University Press. 1986. Pp. x, 201. $20.

Observers of the United States Supreme Court have noted for some time the immensity of the Court's workload and the burgeoning number of cases and petitions it faces each term.[1] The justices themselves have made public comments on the Court's heavy case load.[2] Indeed, the Court does face a staggeringly large number of cases: in the 1986-1987 term, for example, the Court's docket included 5,123 cases,[3] up from 937 in 1934 and 1,940 in 1960.[4]

One commonly suggested response to the crisis — or potential crisis[5] — is that Congress, pursuant to its article III power, establish an intermediate court of appeals, situated between the current circuit courts and the Supreme Court.[6] The proposals have included creation of a National Court of Appeals (NCA) that would screen certiorari

1. *See, e.g.,* Baker & McFarland, *The Need for a New National Court,* 100 HARV. L. REV. 1400 (1987); *Rx for an Overburdened Supreme Court: Is Relief in Sight?,* 66 JUDICATURE 394 (1983) (panel discussion); Griswold, *Rationing Justice — The Supreme Court's Caseload and What the Court Does Not Do,* 60 CORNELL L. REV. 335 (1975).

2. *See, e.g.,* W. BURGER, 1984 YEAR-END REPORT ON THE JUDICIARY 6 ("Supreme Court Justices must now work beyond any sound maximum limits."); Brennan, *Some Thoughts on the Supreme Court's Workload,* 66 JUDICATURE 230 (1983); White, *Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections,* 51 ANTITRUST L.J. 275 (1982).

3. *Statistical Recap of Supreme Court's Workload During Last Three Terms,* 56 U.S.L.W. 3102 (Aug. 11, 1987).

4. R. POSNER, THE FEDERAL COURTS 62 (1985).

5. Most observers have discussed the case load situation with some degree of concern for its effects on the quality of the Court's work product. Professor Strauss, for example, suggests that it has forced the Court to issue opinions that focus more on explicating doctrine than on resolving the dispute at bar. This "challenges widely accepted models of and justifications for judicial decision." Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action,* 87 COLUM. L. REV. 1093, 1095 (1987).

6. Article III states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

petitions and resolve intercircuit conflicts[7] and an NCA that would hear only cases referred to it by the Supreme Court.[8]

In response to these proposals, Professors Samuel Estreicher[9] and John Sexton[10] in 1983 undertook a large-scale study of the Court's docket, with an eye toward evaluating the NCA concept (p. ix). This book, a summary of the study results as published in complete form in the *New York University Law Review*,[11] is a brief but thorough and persuasive discussion of the authors' main conclusions, most notably their view that the Court poorly manages its docket and needs to alter fundamentally its vision of its role in the federal judicial system.

After studying in great depth all the cases that the Court agreed to hear, and all "paid" cases it refused to hear, from the 1982 Term,[12] the authors (with the assistance of the *N.Y.U. Law Review* staff) found that the Court is wasting its time hearing and deciding the wrong cases. Specifically, they concluded:

- Almost one-fourth of the cases the Court heard "had no legitimate claim on the Court's time and resources."
- More than one-half of the cases heard were discretionary.
- The Court *denied* review in an insignificant number of cases — less than one percent of the time — where review would have been proper. [p. 6]

These are serious claims that, if true, carry serious implications for the purportedly "overburdened" Court. If Estreicher and Sexton's analysis is correct, the Court's overwork crisis is illusory; the justices need only revise their way of operating and the excess case burden will disappear. The authors' claims emerge from their fundamental assumptions about the Court's role in the federal judicial system, as-

7. This proposal was made by the so-called Freund Committee. *See* Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1972). Chief Justice Burger appointed the committee in 1971.

8. The Hruska Commission, created by Congress in 1972, made this proposal following its study of the federal courts. For its report, see Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975).

The predominant view appears still to be in favor of some additional institutional layer in the federal courts. *See, e.g.*, Baker & McFarland, *supra* note 1 (arguing for an Intercircuit Panel to unify national law). *But cf.* Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1435 (1987) ("No second national court is needed to assist the Supreme Court in doing better what it already does quite well and often enough.").

9. Professor of Law, New York University Law School. B.A. 1970, J.D. 1975, Columbia University, M.S. 1974, Cornell University.

10. Professor of Law, New York University Law School. B.A. 1963, M.A. 1965, Ph.D. 1978, Fordham University, J.D. 1979, Harvard Law School. Both Professor Estreicher and Professor Sexton are former Supreme Court clerks, Estreicher for Justice Powell and Sexton for Chief Justice Burger.

11. *New York University Supreme Court Project*, 59 N.Y.U. L. REV. 677-1929 (1984).

12. The study therefore analyzed a total of 2061 cases. P. 76. The Court's docket is about evenly split between cases that are "paid," and those that are "in forma pauperis," for which costs are waived. A handful of cases arise under the Court's original jurisdiction. *See* 56 U.S.L.W. at 3102.

sumptions they illustrate through a proposed set of specific and limiting criteria for case selection.

The authors challenge what they term "the popular view" of the Court, the view that the Court should be "ever ready to correct the errors of subordinate courts and ensure a just result in each case" (p. 1). They argue instead that the Court's mission should be "to manage the process of national lawmaking," and not "to search for interesting (or even 'important') questions" (p. 6). Under this proposed "managerial" theory, the Court would not view itself as a corrector of lower-court error or as a last refuge for frustrated litigants.[13] Rather, the Court would "accord a presumption of regularity and validity to the decisions of state and lower federal courts," and intervene only "when some structural signal (such as a persistent conflict between subordinates) indicated a problem requiring correction" (p. 50). The authors explain: "A wise manager delegates responsibilities to subordinates and, when there is no indication that something is awry, does not intervene. To do otherwise is to denigrate the authority of subordinate actors" (p. 50).

As part of this managerial function, Estreicher and Sexton argue, the Court should adopt a set of well-defined, specific criteria for selecting cases, thereby moving away from the ambiguity of Supreme Court Rule 17, the current guideline.[14] The initial step would be to divide the Court's docket into three distinct categories: the priority docket (cases the Court *should* or *must* hear), the discretionary docket (cases it *may* hear), and the improvident grants (cases where review is inappropriate) (pp. 44-45).

The priority docket would consist of cases that "press for immediate . . . review" (p. 52), not necessarily cases that present the most important or controversial issues. For example, a pressing case would require the Court to resolve an "intolerable" conflict among the federal appellate courts (p. 53). Disputing the notion that any conflict among the circuits requires Supreme Court attention, the authors argue that only "when litigants are able to exploit conflicts affirmatively through forum shopping or when planning is thwarted by the absence of a nationally binding rule" (p. 57) should the Court step into the fray and provide its own interpretation. The other priority situations present similar "conflicts," some within the judicial branch, and some be-

13. For example, they state in conclusion that the Court "must be demythologized. We no longer have a national court of errors ready to right any wrong committed by a lower court in a federal case. . . . It is not the Supreme Court's job to ensure justice in the particular case." Pp. 135-36.

14. Rule 17 states, in part, that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." SUP. CT. R. 17. Rule 17 does go on to list some criteria that the justices will take into consideration, but cautions that the criteria are "neither controlling nor fully measuring the Court's discretion." *Id.*

tween various branches or levels of government, such as an interstate dispute (pp. 59-62).

Cases grouped under the discretionary docket tend to be those that present "important," but not necessarily crucial issues. Many of the cases that fall within these suggested certiorari criteria involve situations of "plainly erroneous" decisions by federal appeals courts or state supreme courts, often in cases that involve relations among the various levels of government, such as "vertical federalism" disputes.[15] The authors explicate this category by example, listing kinds of cases that, consistent with the managerial theory, the Court may properly hear, but which are subordinate to "priority" cases.[16]

The improvident grant category encompasses the remainder of cases, and consists of little more than cases that do not fall into one of the previous two groups (pp. 69-70). Throughout the book, the authors stress the importance of what they term "percolation": the various initial efforts by state and lower federal courts at resolving novel and difficult legal questions prior to ultimate resolution by the Supreme Court (p. 48). Most improvident grants occur when the Court has not allowed sufficient percolation of an issue, as in the case of a conflict between only two circuits that poses no problems of forum shopping (p. 69). The authors note one improvident grant case[17] in which the granted certiorari petition could point only to one unappealed district court case conflicting with the Eleventh Circuit case at bar. Although the authors believe that the issue presented was "surely one of national significance," and the decision below "palpably incorrect," they claim that the Court should have awaited fuller percolation instead of simply correcting error in the isolated instance.[18]

The apparent simplicity of the authors' argument — their view essentially is that the Court can reduce its workload by *hearing fewer cases* — should not lead one to mistake the importance of their analysis. Although the book purports to be only an evaluation of proposals for an additional layer of the federal courts (p. 71), the authors do

15. A "vertical federalism" dispute involves a conflict of state-federal relations. P. 63. However, "profound" vertical federalism disputes — federal court invalidation of state or local statutes, and state invalidation of federal statutes — are assigned to the priority docket. Pp. 60-61.

16. Some examples of discretionary docket cases include those where the Court is suspicious of a state court's treatment of a federal question, resolution of a national emergency, and cases that require an exercise of the Court's "extraordinary power of supervision." Pp. 62-69.

17. Hishon v. King & Spalding, 467 U.S. 69, *reversing* 678 F.2d 1022 (11th Cir. 1982). The case presented the issue of whether the ban on sex discrimination in employment contained in Title VII of the Civil Rights Act of 1964 applies to law firm partnership decisions.

18. P. 95. Professor Strauss argues that, at least in the administrative law area, the Court is *too* tolerant of circuit conflicts:

> [T]he Court's awareness how frequently it is able to review lower court decisions has led it to be tolerant, even approving, of lower court and party indiscipline in relation to existing law. . . . The result puts added stress on some ideas about obedience to law and on the uniformity of national law administration.

Strauss, *supra* note 5, at 1095.

concede that the implications of their study "radiate well beyond" those proposals (p. 128). Indeed, their proposals embody many specific assumptions about what types of "structural" issues are important enough to warrant Supreme Court review. For example, one criticism the authors anticipate is that their criteria fail to afford adequate protection for individual constitutional litigants (p. 72). They respond, in part, that they "find no compelling need to disturb the presumption of regularity [of a lower court decision] simply because a constitutional question is involved," adding that they "reject the notion that constitutional cases are necessarily more important than other kinds of cases."[19] That appears inconsistent with the authors' placing of some constitutional cases in the priority docket, such as a federal court's invalidation of a state statute, while similar cases, such as a federal court's striking down of a nonstatutory state action on constitutional grounds, are at best candidates for discretionary review, perhaps even improvident grants.[20] This distinction between invalidation of a statutory action and a nonstatutory one risks placing form over substance. Surely the interests of the particular litigants are the same in either case.

Additionally, the authors would include in the discretionary docket cases that would serve as "vehicles for advances in the development of federal law" (p. 65). Presumably, the justices already view most cases they hear as presenting such an opportunity. Moreover, the thrust of the authors' argument calls for a move *away* from the indeterminacy of certiorari grants issued solely to "advance" federal law. The authors attempt to escape any possible contradiction by listing very specific instances of these discretionary grants (pp. 65-69), but the instances they cite may be so refined and specific as to be unworkable.

In addition to the case selection criteria, the authors advocate a number of innovations in the Court's internal processes: ending mandatory appellate jurisdiction (p. 117); adopting a requirement that litigants certify that a case warrants Supreme Court review under the selection criteria (p. 119); and, most interestingly, implementing a "second look" mechanism (p. 120). Under this last procedure, the justices would take an initial unrecorded vote on certiorari petitions, submitting any cases that receive the requisite four positive votes to an independent staff for evaluation. The staff would issue an advisory report recommending a grant or denial of the petition, and would then

19. P. 73. This position stems largely from the authors' view that the Supreme Court long ago ceased to be a court of last resort for individual litigants. *See, e.g.*, pp. 1-2.

20. P. 73. A federal court's *rejection* of constitutional claims likewise is not placed in the priority docket, unless it conflicts with Supreme Court precedent or creates an intolerable circuit split. Pp. 72-73.

submit the case to the justices for reconsideration.[21]

If, as the authors argue, much of the Supreme Court's overwork problem is traceable to the false perception that the Court is a tribunal of last resort, eager to dispense individual justice, then surely the authors are correct in suggesting that the Court require litigants to certify that a case warrants Supreme Court review under the selection criteria. Perhaps an amendment to the Supreme Court Rules would serve to implement those guidelines. Regardless, an affirmative statement from the Court of its approach — whether it followed all, some, or none of this study's recommendations — would greatly help the legal community to adjust to the Court's *own* view of its role in the system, whatever that might be.[22]

Without such a statement from the Court, however, the ultimate value of this study may be difficult to gauge, since so many of the recommended changes involve the internal workings of the Court and the subjective perceptions of the several justices. Justice Stevens, for his part, has called the study "an unusually perceptive study of this Court's docket,"[23] but there is, as yet, no indication that the Court as a whole is moving toward any of the study's recommendations. Perhaps, as suggested by Judge Ruth Bader Ginsburg of the United States Court of Appeals for the District of Columbia Circuit, the imminent changes in the Supreme Court's membership will afford greater opportunities for the justices themselves to rethink the Court's role along the lines the study proposes.[24]

The real value of this study lies not in the particulars of what cases would or would not be heard, but in its attempt to revisit the unspoken assumptions that drive the various NCA proposals. Although the authors state that their goal is merely to stimulate debate — as they put it, to "invite others into the thicket" (p. 75) — the study accomplishes much more. Professors Estreicher and Sexton's provocative analysis not only can aid the Court in relieving its heavy case load, but can be a foundational prescription of the proper function of the Court, in the

21. P. 121. The independent staff would be "of the caliber of the Justices' clerks," and would be led by "a leading member of the Supreme Court bar." P. 120.

Professors Baker and McFarland characterize this "second-look" proposal as "bizarre." Baker & McFarland, *supra* note 1, at 1411.

22. The authors may implicitly recognize this point when they argue that the vagueness of Rule 17 serves as one cause of overgranting. Pp. 106-08.

23. California v. Carney, 471 U.S. 386, 398 (1985) (Stevens, J., dissenting). Justice Stevens cited the study, then unpublished, in its *New York University Law Review* form. *See* note 11 *supra.*

24. "Propitiously timed to coincide with changes in the Court's composition, the work should promote constructive discussion of the Court's core role and attendant responsibilities" (book jacket).

hope of improving the administration and quality of federal justice at its highest level.

— *Robert S. Whitman*