

Essay

The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft

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William Howard Taft genially served as the tenth Chief Justice of the United States.¹ His career was of breathtaking variety. Younger even than current Solicitor General Paul Clement, the buoyant Solicitor General Taft delivered “speech” after “speech” in the Supreme Court in the late nineteenth century. Little did he suspect, one might safely surmise, that one day—after an intervening tour of duty as President of the United States—he would occupy the center chair itself and listen to his successors (many times removed) delivering their “speeches” to the Court in the old English style. In those halcyon, or at least less hurried, days, lawyers were allowed abundant time to present their case, educate the Justices, and perhaps even persuade the Court by the force of oral advocacy.²

Those were also the days when the Court was duty-bound to decide the lion’s share of the cases that came before it.³ The

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1. Chief Justice Taft was appointed by President Warren G. Harding in 1921, and he presided over the Court until 1930. DAVID H. BURTON, TAFT, HOLMES, AND THE 1920’S COURT: AN APPRAISAL 113–14 (1998).

2. See Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court’s Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 193 (2004). Prior to 1873, two counselors on each side were permitted to argue up to two hours individually. *Id.* In 1873, the Court amended its rules, allowing each side to argue for two hours total. *Id.*

3. Although the Judiciary Act of 1916 attempted to lighten the docket by making certain decisions of the state and circuit courts final, there was a “general post-war increase in all judicial business” that “increased the volume of cases coming to the Supreme Court from sources uncontrolled by the 1916 legislation.” FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 255–56 (1928). Unaffected by the 1916 Act were cases from the district courts, cases from the Court of Appeals for the District of Columbia, and perhaps more significantly,

Court's "appellate" docket was a mainstay of High Court practice, sharply cabining the sweeping discretion that the Court came to enjoy in deciding what to decide. But Taft presciently saw into the future. Not only did he persuasively insist that the Court move out of the subterranean quarters in the Capitol and into the building that only symbolically bears his name, Taft persistently maintained that the Court should be vested with broad discretion as to what work it would do.⁴

So it was that eighty years ago, the Court received a mighty boost in charting its own path in being able to decide what to decide. This was a Taftian triumph of a high order. With the passage of the Judiciary Act of 1925, the Supreme Court largely became the master of its domain.⁵ No longer saddled with a caseload dominated by mandatory appeals, the Court was largely free to decide which cases it wanted to hear. To be sure, the Act did not entirely jettison appellate (mandatory) jurisdiction, but review increasingly became a matter entrusted to the Justices' discretion. In the intervening eighty years, the Court's workload has come to be almost wholly dominated by the certiorari docket, carrying with it Chief Justice Taft's dream of (virtually) unfettered mastery over its substantive workload.⁶

Taft's vision, however, has been compromised. His essential message to Congress was "trust us." That is, Congress was to trust the Supreme Court to exercise its discretion responsibly and prudently in order to accomplish two broad objectives: (i) to resolve important questions of law and (ii) to maintain uniformity in federal law. These Taftian values are faithfully embodied in the provision with which Supreme Court practitioners are intimately familiar: Supreme Court Rule 10.⁷

cases from the Court of Claims for the District of Columbia, which adjudicated numerous contract disputes arising from the war. *Id.* at 256.

4. *Id.* at 259.

5. Judiciary Act of 1925, ch. 229, 43 Stat. 936.

6. See Cordray & Cordray, *supra* note 2, at 194–95; Kenneth W. Starr, Op-Ed, *Rule of Law: Trivial Pursuits at the Supreme Court*, WALL ST. J., Oct. 6, 1993, at A17 (stating that modernly "the court enjoys virtually unfettered discretion to select its docket").

7. Supreme Court Rule 10 states,

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in con-

The second prong of Taft's promise, however, has fallen by the wayside. Since the retirement of the late Justice Byron White,⁸ the Supreme Court by and large does not even pretend to maintain the uniformity of federal law.⁹ Curiously enough, this infidelity to the Taftian vision has largely gone unnoticed, save for those sourpusses (such as yours truly) whose efforts to catch the High Court's attention are typically rebuffed.¹⁰ Whining aside, something has been afoot through much of the life of the just-concluded Rehnquist Court. Facts are stubborn things,

flict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

SUP. CT. R. 10.

8. Even the late Justice White failed to bring much-needed attention to the persisting circuit conflicts. In fact, Congress's Commission on Structural Alternatives, chaired by retired Justice White, made no mention of the ongoing conflicts in its 1998 report, instead suggesting that the answer to the burgeoning appellate docket was to divide the Ninth Circuit into three smaller appellate venues. This proposal, if effectuated, would actually increase the number of unresolved circuit disputes. Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 89 (2001).

9. Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1031 (1999) ("Those who advocate structural reform believe that the system too often fails to speak with an 'authoritative legal voice.' As a consequence, appellate outcomes are less predictable and more 'quirky.'"); Arthur D. Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 522-23 (1983) (stating that "respected judges, scholars, and practitioners have begun to question whether nine mortal men and women, constrained by the structure and procedures of appellate adjudication, can do everything that is necessary to maintain clarity and uniformity in the national law").

10. Starr, *supra* note 6.

as Mr. Adams famously argued before the Boston Massacre jury,¹¹ and the facts show beyond the slightest doubt that the Court is willing to allow conflicts in federal law to exist—and, even worse, to persist.

In this Essay, I discuss how the Rehnquist Court, due in large part to its shrinking merits docket, failed to live up to Chief Justice Taft's vision. In Part I, I examine the prevailing theories that attempt to explain the Rehnquist Court's deliberate reduction of its caseload. Though this question of *why* is important, it is not one that I answer on these pages. Instead, I suggest that the reduced merits docket has exacerbated the shortcomings within the Rehnquist Court's grant process of certiorari review, and has had a negative impact on its jurisprudence. In Part II, I suggest that the "cert. pool"—the first level of review for any petition for certiorari—has become too powerful. In short, the law clerks that do the work of the cert. pool, recent law school graduates with little legal experience, exercise an unjustifiable influence over which cases the Supreme Court reviews. In Part III, I argue that the Court's decreased caseload has ironically resulted in less clarity of law, as the Justices seemingly pursue their own particularistic agendas during the much more leisurely opinion-writing process. As a result, the Court is not simply saying what the law is, but instead is using its relaxed merits docket to insert itself into controversial arenas of social discourse. Finally, in Part IV, I argue that living up to Chief Justice Taft's lofty goals is within the reach of the now-Roberts Court. In order to meet its Taftian duties, the Roberts Court should work harder. It should decide more cases, and those cases should be of a less headline-grabbing nature.

I. THEORIES ON THE REHNQUIST COURT'S REDUCED CASELOAD

The great disappearing merits docket has arrested the sustained attention of a handful of Court watchers: the University of Pittsburgh School of Law's Arthur D. Hellman,¹² Capital

11. John Adams, *Rex v. Wemms*, in 3 LEGAL PAPERS OF JOHN ADAMS 98, 269 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); see also David McCullough, *Champion of the Navy*, NAVAL HISTORY, Oct. 2001, at 40.

12. See Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947 (1985); Arthur D. Hellman, *Conference on Empirical Research in Judicial Administration—Foreword: Exploring the Mysteries of the Least Known Branch*, 21 ARIZ. ST. L.J. 33 (1989);

Law School's Margaret Meriwether Cordray and her husband Richard Cordray,¹³ and the University of Virginia's David M. O'Brien.¹⁴ Professor Hellman's empirical analysis of the Court from 1983 to 1995 suggests that the traditional explanations for the Court's shrinking docket do not actually explain the phenomenon.¹⁵ Instead, the shrinkage is the result of a new "Olympian" Court—one that issues fewer, more monumental opinions.¹⁶ The Cordrays take a contrary view. In their opinion, the Rehnquist Court's shrinking docket has been the result of several factors—most importantly that the Court's newest members have been less inclined to grant review than their predecessors, and that the federal government's success in the lower courts has resulted in fewer petitions for certiorari.¹⁷ Professor O'Brien examines the inner workings of the Court's grant process, including the role of the cert. pool. Like the Cordrays, Professor O'Brien suggests that the Rehnquist Court's shrinking docket was influenced by newer Justices more hesitant to grant review—specifically that the Justices were more likely to follow the "Rule of Four" instead of casting "Join-3" votes.¹⁸ Additionally, Professor O'Brien is uncertain

Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795 (1983) [hereinafter Hellman, *Error Correction*]; Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711 (1978) [hereinafter Hellman, *The Business of the Supreme Court*]; Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996) [hereinafter Hellman, *The Shrunken Docket*].

13. See Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001).

14. See David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779 (1997).

15. Hellman, *The Shrunken Docket*, *supra* note 12, at 409–29. Professor Hellman proposes, then ultimately rejects, the repeal of the Court's mandatory jurisdiction, retirement of liberal Justices, homogeneity within the lower courts, the reduced number of cases brought by the federal government, and the conservative nature of the lower courts as reasons why the Supreme Court has been deciding fewer cases.

16. *Id.* at 432–38.

17. Cordray & Cordray, *supra* note 13, at 793–94 (noting that "[c]hanges in the Court's personnel . . . have played a substantial role in shrinking the docket," and that another "important influence that has independently contributed to the decline is the changing pattern of federal civil litigation involving government parties").

18. O'Brien, *supra* note 14, at 798–99 ("In sum, the inflation and contraction in the plenary docket basically registered changes in the Court's composition and case selection process . . ."). Under the "Rule of Four," a petition for certiorari will not be granted unless at least four of the nine Justices agree to hear the case. A "Join-3" vote occurs when one Justice agrees to vote for a

whether the cert. pool has a significant impact on the robustness of the Court's merits docket.¹⁹

What these scholars are seeking to understand is why the Supreme Court's docket has shrunk from 146 signed opinions during Chief Justice Rehnquist's first year occupying the Court's center seat to just 74 signed opinions during his final year.²⁰ While no single answer explains the Rehnquist Court's docket-shrinking behavior, the continual (and consistent) reduction of its caseload has been well documented.

A. MEASURING THE SUPREME COURT'S CASELOAD OVER TIME

Since at least 1878, scholars and Court watchers have cataloged the number of cases on the Court's docket.²¹ The most comprehensive study, *The Supreme Court Compendium*, deconstructs the High Court's docket based on the total number of cases filed each year, the types of cases filed, and the Justices' voting patterns.²² Set forth below is a simple comparison of the total number of cases on the Court's docket with the number of cases the Court actually decides. Different methods of determining the Supreme Court's workload exist, but the "number of cases disposed of by signed opinion" represents a standard measure.²³ Based on these numbers, one thing is clear: the number of cases coming before the Supreme Court grew steadily since 1925, while the number of cases the Court decides has been in steady decline.

grant only if three other Justices vote to grant certiorari—otherwise that Justice will vote against the grant. *Id.* at 784.

19. *Id.* at 802 (stating that "it is unclear that the cert. pool either determines the amount of scrutiny given petitions or was the underlying factor in the increasing and subsequent decreasing in the size of the plenary docket").

20. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA DECISIONS & DEVELOPMENTS* 7 tbl.2-8 (3d ed. 2003); JOHN G. ROBERTS, JR., 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2006). See generally Hellman, *The Shrunken Docket*, *supra* note 12, at 404–05 (attempting to "explain why the Court is accepting only half as many cases for review as it did a decade ago").

21. FRANKFURTER & LANDIS, *supra* note 3, at 296.

22. EPSTEIN ET AL., *supra* note 20.

23. In terms of raw numbers, the Supreme Court's workload can also be determined by examining the number of petitions for certiorari that are granted, the total number of cases disposed of, the total number of cases disposed of on the merits, or the total number of opinions that the Court writes. See Paul E. Parker, *Is a Lower Caseload the Same as a Lower Workload?: Opinion Characteristics of the Burger and Rehnquist Courts*, 20 JUST. SYS. J. 299, 299–302 (1999).

The Supreme Court and Its Docket: 1926–2004²⁴

Term	Total Number of Cases on the Docket ²⁵	Number of Cases Disposed of by Signed Opinion ²⁶	Percent of Cases Disposed of by Signed Opinion ²⁷
1926	1,183	223	18.9 %
1930	1,304	235	18.0 %
1935	1,092	187	17.1 %
1940	1,109	195	17.6 %
1945	1,460	170	11.6 %
1950	1,321	114	8.6 %
1955	1,849	103	5.6 %
1960	2,296	125	5.4 %
1965	3,256	120	3.7 %
1970	4,212	137	3.3 %
1975	4,761	160	3.4 %
1980	5,144	144	2.8 %
1985	5,158	161	3.1 %
1990	6,316	121	1.9 %
1995	7,565	87	1.2 %
2000	8,965	83	0.9 %
2004	8,593	85	1.0 %

B. ANALYZING THE DATA ON THE SUPREME COURT'S CASELOAD

In their respective analyses, Professor Hellman, the Cordrays, and Professor O'Brien have advanced various reasons for the Court's shrinking "merits docket" (as represented by the number of cases disposed of by signed opinion). The first is structural, namely that in 1988 Congress "eliminated virtually all of the remaining elements of the mandatory jurisdiction" left in the wake of the Judges' Bill of 1925.²⁸ Despite the

24. These statistics were compiled from EPSTEIN ET AL., *supra* note 220, at 58–63 tbl.2-2, 64–65 tbl.2-3; ROBERTS, *supra* note 20, at 7; *The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 425 tbl.II (2005).

25. This number exceeds the number of new cases filed each year because the Court holds over a certain number of cases from one term to the next.

26. This number exceeds the total number of signed opinions issued by the Court because some opinions may dispose of more than one case.

27. These numbers have been rounded to the nearest tenth of a percent.

28. Hellman, *The Shrunken Docket*, *supra* note 12, at 409. In 1988, Congress eliminated the mandatory appeals from state supreme courts, as well as appeals from any courts that invalidate state statutes. Act of June 27, 1988,

increased discretion the Court exercised over its own jurisdiction after Congress passed the Judicial Improvements and Access to Justice Act of 1988,²⁹ the sharp decline in the number of cases on the Court's merits docket came as a surprise to many Court watchers.³⁰ After examining the data, Professor Hellman concludes that "the elimination of the mandatory jurisdiction played no more than a minuscule role in the shrinkage of the plenary docket."³¹ The Cordrays agree, calling the 1988 act "ultimately unpersuasive" as a justification for the Court's lighter caseload.³² One reason why the 1988 measure had such a minor impact is that the Justices had long (and sensibly) employed efficiency devices, such as summary affirmances and dismissals.³³ Another reason, suggested by the Cordrays, is that "in the mid-1980s the Court was not giving plenary consideration to appeals that did not warrant certiorari review" because the Court's internal procedures already limited the number of cases the Justices considered.³⁴

The second explanation focuses on the Court's post-1986 membership. Specifically, Professor Hellman examines whether the retirement of the "three stalwarts of the liberal wing of the Burger Court—Justices William J. Brennan, Thurgood Marshall, and Harry A. Blackmun" had the effect of shrinking the

Pub. L. No. 100-352, 102 Stat. 662, (codified as amended at 28 U.S.C. §§ 1252, 1254, 1257, 1258 (2000)); *see also* Cordray & Cordray, *supra* note 13, at 751–52.

29. Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended in scattered sections of 5, 9, 16, 17, 18, 28, and 42 U.S.C.).

30. *See* Cordray & Cordray, *supra* note 13, at 743 (calling the sudden decline of Supreme Court decisions after 1988 an "unexpected development that surprised and puzzled both participants and observers").

31. Hellman, *The Shrunk Docket*, *supra* note 12, at 412. Commenting at the House appropriations hearings in 1996, Justice Anthony Kennedy stated,

We had mandatory jurisdiction over cases that were unimportant. We calculated that there were 35 to 40 of these a year. We told the Congress, please take those cases away from us, and the Congress did. And in part what you see after 1988 is a drop which we projected.

Id. at 409. Despite Justice Kennedy's comments, Professor Hellman suggests that the changes in the Court's docket were not a result of the 1988 statute. *Id.* at 432–38.

32. Cordray & Cordray, *supra* note 13, at 751. The Cordrays' final conclusion is even stronger—they argue that "[t]he 1988 legislative changes thus seem to have had little or no effect on the Court's plenary docket." *Id.* at 758.

33. Hellman, *Error Correction*, *supra* note 12, at 812–20 (discussing how the Supreme Court could dispose of cases from state courts by dismissing them "for want of a substantial federal question").

34. Cordray & Cordray, *supra* note 13, at 758.

merits docket.³⁵ The common understanding was that the Burger Court's "liberal" members were more likely to vote to hear cases involving "new issues."³⁶ According to Professor Hellman, that common understanding is flawed. His comparison of the cases heard prior to 1988 to those heard after 1988 suggests that the "liberal" wing did not exercise a unique influence over the choice of cases heard.³⁷

Professor O'Brien and the Cordrays disagree with Professor Hellman's conclusion. Examining the grant process for the Burger and Rehnquist Courts, Professor O'Brien discerns that the Justices of the Rehnquist Court—specifically Justices Kennedy, Scalia, and Stevens—have been less likely to vote to grant certiorari than their predecessors.³⁸ Professor O'Brien's analysis is based on the propensity of the Justices to cast "Join-3" votes, as opposed to following the "Rule of Four."³⁹ Based on his analysis of internal Court documents,⁴⁰ Professor O'Brien finds that the departure of the "liberal" Justices resulted in fewer "Join-3" votes, which in turn contributed to the Rehnquist Court's reduced caseload.⁴¹ The Cordrays consider the changes in the Court's personnel "[o]ne of the most compelling explanations for the recent decline in the Supreme Court's plenary docket."⁴² By examining the conference votes of the individual Justices, the Cordrays argue, one can determine how a particular Justice's "individual judgments about cases actually translate into expansion or contraction of their plenary docket."⁴³ Like Professor O'Brien, the Cordrays conclude that

35. Hellman, *The Shrunken Docket*, *supra* note 12, at 412.

36. *Id.* In addition, Professor Hellman examined whether, after the "liberal" Justices retired, the Court heard fewer cases where the "lower courts had upheld convictions or rejected civil rights claims." *Id.* at 405.

37. *Id.* at 413.

38. O'Brien, *supra* note 14, at 796 tbl.1.

39. *Id.* at 784–89. Under the "Rule of Four," a petition for certiorari will not be granted unless at least four of the nine Justices agree to hear the case. A "Join-3" vote occurs when one Justice agrees to vote for a grant only if three other Justices vote to grant certiorari—otherwise that Justice will vote against the grant. *Id.* at 784.

40. Professor O'Brien relies on Docket Books, which are stored at the Library of Congress, the personal papers of various Justices, and correspondence between the Justices and himself. *See, e.g.*, O'Brien, *supra* note 14, *passim*.

41. *Id.* at 798–99 (stating that the size of the Supreme Court's docket is a reflection of "the Court's composition and case selection process, specifically the predisposition of certain justices to cast Join-3 votes and to grant review").

42. Cordray & Cordray, *supra* note 13, at 776.

43. *Id.* at 781.

the substitutions of Justice Scalia for Chief Justice Burger and Justice Kennedy for Justice Powell, coupled with the ascension of Justice Rehnquist to the Court's center chair, "played a discernable part in shrinking the docket."⁴⁴

A third hypothesis relates to Chief Justice Taft's vision for the Supreme Court's uniformity-enforcing function. The theory is this: due in large part to the sheer number of Reagan-Bush appointees, greater homogeneity prevails and less conflict abounds among the various courts of appeals.⁴⁵ At the same time, the purportedly "conservative" lower courts are not producing decisions that draw the (more conservative) High Court's ire.⁴⁶ Justice Souter subscribes to this theory. He notes that homogeneity within the lower courts has resulted in "a diminished level of philosophical division . . . from which so much of the conflicting opinions tend to arise."⁴⁷ Based upon their respective studies, however, the Cordrays and Professor Hellman flatly disagree.⁴⁸ Professor Hellman admits that his study does not fully contemplate the total number of existing circuit conflicts, nor does it determine what percent of those conflicts are heard each year.⁴⁹ However, the Cordrays note that "there are approximately 400" circuit splits each year, which suggests that there is no shortage of circuit conflicts for the Supreme Court to resolve.⁵⁰ Even if the lower courts have

44. *Id.* at 784–85.

45. Hellman, *The Shrunken Docket*, *supra* note 12, at 414 (quoting Justice David H. Souter who suggests that during the Reagan and Bush administrations there was a "greater degree of [philosophical] homogeneity in the courts" that resulted in "fewer conflicts in the courts of appeals" (alteration in original)).

46. *Id.* at 419 ("[T]he Supreme Court . . . is viewed as having shifted to 'the right.' Some commentators believe that this convergence goes far toward explaining the shrinkage of the plenary docket in the 1990's.").

47. O'Brien, *supra* note 14, at 781 (quoting Shannon Duffy, *Inside the Highest Court; Souter Describes Justices' Relationship, Caseload Trend*, PA. L. WKLY., Apr. 17, 1995, at 10).

48. Compare Cordray & Cordray, *supra* note 13, at 774–76, with Hellman, *The Shrunken Docket*, *supra* note 12, at 416. Professor Hellman's data "squarely contradict" Justice Souter's own observations about the Court. For example, in cases involving statutory questions, the Court's "conflict" docket actually increased from 1983–1985 to 1993–1995. Hellman, *The Shrunken Docket*, *supra* note 12, at 416.

49. Hellman, *The Shrunken Docket*, *supra* note 12, at 416 (noting that his data "do not tell us whether intercircuit conflicts became more or less numerous . . . [n]or do they enable us to draw any conclusions about homogeneity (or lack of it) in the courts of appeals").

50. Cordray & Cordray, *supra* note 13, at 772 (citing to the Circuit Split Roundup that is regularly printed in *United States Law Week*, "a publication

become more “conservative,”⁵¹ Professor Hellman concludes that the changed profile has little effect on the Supreme Court’s merits docket.⁵²

The final suggested reason is that the number of cases being brought by the United States has been decreasing.⁵³ As the most frequent litigator in the Supreme Court (usually as a respondent), the Solicitor General’s petitions enjoy a 60 percent grant rate.⁵⁴ By comparison, the Supreme Court grants review in less than 2 percent of its total docket each year.⁵⁵ Since 1988, Professor Hellman notes that there has been a substantial decrease in the number of petitions filed by the Solicitor General’s office.⁵⁶ He suggests that this decrease is, in turn, at least partially responsible for the decrease in size of the Court’s docket.⁵⁷ The Cordrays take this analysis a step further to de-

that describes those decisional conflicts which can be identified by examining the face of individual lower court opinions”).

51. Hellman, *The Shrunken Docket*, *supra* note 12, at 420. Professor Hellman notes that his study of the types of cases the Supreme Court heard in the past two decades does “not refute the ‘conservative judges’ thesis, but [his data] do suggest caution in embracing it.” *Id.*

52. *Id.* at 423–24 (stating that the “data strongly suggest that the explanation for the shrunken docket of the 1990’s does not lie in the supposedly conservative predilections of the Reagan-Bush appointees to the federal courts of appeals”).

53. Cordray & Cordray, *supra* note 13, at 764 (citing to statistics from the Solicitor General’s office that demonstrate “that the United States has been seeking plenary review in fewer cases in recent years”).

54. Hellman, *The Shrunken Docket*, *supra* note 12, at 417.

55. In the Court’s 2003 term, there were 7,814 case filings. Of those cases, 91 were argued and 89 were disposed of in 73 signed opinions. In the Court’s 2004 term, there were 7,496 case filings. Of those cases, 87 were argued and 85 were disposed of in 74 signed opinions. For that two-year period, the last two years in which Chief Justice Rehnquist occupied the Supreme Court’s center chair, less than 1 percent of the Supreme Court’s case filings were disposed of by signed opinions. See JOHN G. ROBERTS, JR., 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2006).

56. Professor Hellman notes that in

the 1983–85 Terms, the plenary docket included 123 cases in which the certiorari petition or jurisdictional statement was filed by the Federal Government. A decade later, Federal Government cases numbered only 46. That represents a shrinkage of nearly two-thirds. And it accounts for nearly 40% of the overall reduction in the level of plenary activity.

Hellman, *The Shrunken Docket*, *supra* note 12, at 417.

57. *Id.* at 418 (finding that the “reduction in the number of petitions filed by the Solicitor General does account for a substantial part of the shrinkage of the plenary docket in the 1990s”). The Cordrays also believe that the decrease in the number of cases brought by the Federal Government could account for “as much as half of the overall reduction in the plenary docket.” Cordray &

termine *why* the Solicitor General is not filing as many cases.⁵⁸ They conclude that a combination of factors—that the Solicitor General’s office is simply bringing fewer cases, and that it is winning more of the cases that it does bring—is responsible for the declining role of the United States as a litigant.⁵⁹

After rejecting the most common explanations for the Supreme Court’s shrinking docket, Professor Hellman offers one final suggestion—that the Justices of the Rehnquist Court shared a fundamentally different judicial philosophy than their predecessors as to the administration of justice in the federal system. Quite simply, the Justices of the Rehnquist Court often seemed more content to stay their hands.⁶⁰ Despite the Rehnquist Court’s reduced docket, Professor Hellman believes that the Rehnquist Court lived up to Chief Justice Taft’s vision—that its “function is not to correct errors in the lower courts, but to ‘secure harmony of decision and the appropriate settlement of questions of general importance.’”⁶¹ Professor Hellman argues that the Rehnquist Court lived up to Taft’s vision though a series of “Olympian” decisions.⁶² Rather than “engag[ing] in the process of developing the law through a succession of cases in the common-law tradition . . . Court decisions tend to be singular events, largely unconnected to other cases on the docket and even more detached from the work of lower courts.”⁶³ Because the Court has resorted to boldly “Olympian” efforts, Professor Hellman is concerned that every decision will necessarily promote a substantial advance of legal

Cordray, *supra* note 13, at 794.

58. Cordray & Cordray, *supra* note 13, at 765–71.

59. *Id.* at 794.

60. Hellman, *The Shrunken Docket*, *supra* note 12, at 429–32. For example, Chief Justice Warren E. Burger was known for supporting “Supreme Court review of activist decisions by lower courts.” *Id.* at 429. Justice Byron R. White “took an expansive view of the Court’s role in providing doctrinal guidance to the lower courts.” *Id.* By contrast, the current Justices

take a substantially different view of the Court’s role in the American legal system than the Justices of the 1980s. They are less concerned about rectifying isolated errors in the lower courts . . . and they believe that a relatively small number of nationally binding precedents is sufficient to provide doctrinal guidance for the resolution of recurring issues.

Id. at 430–31.

61. *Id.* at 432 (quoting Hellman, *The Business of the Supreme Court*, *supra* note 12, at 1718).

62. *Id.* at 433.

63. *Id.*

principles, and that the Supreme Court's jurisprudence will leave too many "gaps" in important areas of federal law.⁶⁴

The empirical analyses thoughtfully undertaken by the Cordrays, Professor Hellman, and Professor O'Brien are usefully illuminating. My own, more anecdotal observations suggest two different questions worthy of examination. The first is that, given the reduced number of cases, the process by which the Court decides what to decide has become increasingly important. That decision-making process is deeply informed by the cert. pool. Instead of exercising independent judgment, eight chambers pool their law clerk resources so that a single law clerk "reports" to eight of the nine Justices.⁶⁵ This is an odd way to conduct vitally important business. This efficiency-driven device has been inadequately studied, but what is commonly understood is that the prevailing culture within the pool is to "just say no."⁶⁶ The other question relates to how the Justices are adjudicating cases they actually hear. While the Warren Court was roundly criticized for its less-than-thorough analysis of constitutional issues,⁶⁷ the Rehnquist Court has, in

64. *Id.* at 433–34 (stating that the "paucity" of Supreme Court "decisions will leave wide gaps in the doctrines governing important areas of law").

65. O'Brien, *supra* note 14, at 799. Chief Justice Roberts has agreed to join the cert. pool for his first year, suggesting he may reevaluate that choice after he settles into his new role. Tony Mauro, *Roberts Dips His Toe into Cert Pool*, LEGAL INTELLIGENCER, Oct. 24, 2005, at 7. When questioned about the cert. pool during his confirmation hearing, Justice Alito stated:

If I'm fortunate enough to be confirmed, I think I would assess the situation at that time and talk to the Supreme Court justices and see what their views are, the reasons why they're proceeding in one way or another . . . We cannot delegate our judicial responsibility. But we do need to call on—we need to find ways, and we do find ways, of obtaining assistance from clerks and staff, employees so that we can deal with the large case load that we have.

U.S. Senate Judiciary Committee Holds a Hearing on Judge Samuel Alito's Nomination to the Supreme Court, <http://jurist.law.pitt.edu/alitoday2.php> (Jan. 10, 2006) (statement of Judge Samuel Alito).

66. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 218 (1991). One clerk stated, "We saw our role as clerks to find every reason possible to deny cert. petitions." *Id.* Another commented, "There is enormous pressure not to take a case . . . there is an institutionalized inertia not to grant cert." *Id.* These testimonies are clarified by the statement of another, "You have to screen down to [so few] argument days, so there is a strong presumption for not hearing cases . . . Today the backdrop is: 'is this one of the 160 most pressing cases of the year? Show me.'" *Id.* at 219.

67. *Id.* at 147–48. While it is hard to say that the statement was representative of any other Justice, Perry quotes an anonymous Justice who lays out

its leisure, become a virtual sounding board for varying interpretive methodologies. Burdened with less work, the Rehnquist Court has been marked, not by growing consensus, but by an unhelpful, frustrating cacophony of jurisprudential voices.

II. THE UNJUSTIFIABLE INFLUENCE OF THE CERT. POOL

The role of law clerks is a hearty perennial of an issue. The relevant concern for today's discussion, however, is quite limited—namely that the cert. pool is, in my view, unhealthily powerful. Over ten years ago I had the effrontery to craft a double-header Op-Ed piece in the *Wall Street Journal*.⁶⁸ In those pieces, I lamented the Rehnquist Court's tendency to allow circuit conflicts to fester.⁶⁹ I suggested that the law in general and the business community in particular suffered from the instability and uncertainty infecting various bodies of federal law.⁷⁰ I further suggested that one reason for the Justices' implicit acceptance of this unhappy state of affairs was the expanding role of the growing cadre of law clerks.⁷¹

Those clerks serve as mighty "barriers to entry" to the merits docket. The prevailing spirit among the twenty-five-year old legal savants, whose life experience is necessarily limited in scope, is to seek out and destroy undeserving petitions.⁷² The prevailing ethos is that no harm can flow from "just saying no."⁷³ Self-confident law clerks can rest assured that few, if any, recriminations will attend their providing guidance to the Court to deny certiorari.⁷⁴ Harm can, and indeed does, flow

the criticism quite plainly:

Chief Justice Warren was credited a lot for having a unanimous Court in *Brown*. The cost was having "all deliberate speed" come in. I think it would have been better to have the dissent spelled out . . . have the dissenters tell their problems, and then have a strong opinion to answer the dissent rather than coming down with a weak opinion so that everyone would sign. I think it is better to acknowledge what argument there is on a controversial issue like that.

Id. at 148.

68. Starr, *supra* note 6; Kenneth W. Starr, Op-Ed, *Rule of Law: Supreme Court Needs a Management Revolt*, WALL ST. J., Oct. 13, 1993, at A23 [hereinafter Starr, *Revolt*].

69. Starr, *Revolt*, *supra* note 68.

70. Starr, *supra* note 6; Starr, *Revolt*, *supra* note 68.

71. Starr, *supra* note 6; Starr, *Revolt*, *supra* note 68.

72. See PERRY, *supra* note 66, at 218–20.

73. See *id.*

74. One clerk remarked, "You see, it really didn't matter if the Court

when a hapless clerk recommends a grant of certiorari, and the merits are eventually seen as not all they were cracked up to be.⁷⁵ In short, cert. pool malpractice of sorts attends the woe-be-gone clerk whose recommended grant results in a “DIG” (dismissal of a case because certiorari was improvidently granted).⁷⁶ This, in turn, creates a hydraulic pressure to say no. Along the way, by happy coincidence, the Justices have less work to do and more time to articulate and elaborate upon their pet theories and resolve their “Olympian” cases.

The cert. pool began modestly enough upon the suggestion of the efficiency-minded Justice Louis F. Powell, Jr.⁷⁷ Launched in the early 1970s, the pool comfortably boasted a membership of five Justices, including the Chief.⁷⁸ But now the pool has dominant market power. Of the presently sitting Justices, John Paul Stevens is the lone absentee.⁷⁹

As a practical matter, the cert. pool *does* promote judicial efficiency. However, that efficiency is achieved at the expense of informed judgment. For example, Justice Stevens admits to relying entirely on his clerks’ memoranda and “not even look[ing] at the papers in over 80 percent of the cases that are filed.”⁸⁰ Justice Scalia relies on the cert. pool to an even greater extent—he only reads cert. pool memos in cases where three Justices had voted for a grant.⁸¹ In true Washington, D.C., fashion, this modest government program has grown significantly and now possesses great power. This market power has been magnified by the much-studied fact that the Supreme Court is hearing fewer cases each year. The Justices are doing less and are shifting their focus to resolving “Olympian” disputes.

made a mistake in not taking a case. It is better to let it have a little extra time, because if we didn’t grant cert., the case will come up again . . . the issue will be back up again, so it doesn’t matter if it is not taken.” *Id.* at 221.

75. Pool memos are the primary vehicle for the grant or denial of certiorari in most cases. *Id.* at 70–71. Some Justices have used them as their only tool to make the decision. *Id.*

76. Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1082 (1988).

77. O’Brien, *supra* note 14, at 790.

78. *Id.*

79. *Id.* at 799.

80. *Id.* at 801 (citing DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 164 (4th ed. 1996)).

81. *Id.* at 801 (citing Memorandum for Conference (September 24, 1986) (on file with the Thurgood Marshall Papers, Box 379, in the Manuscripts room of the Library of Congress)).

III. THE SUPREME COURT'S DECREASED CASELOAD AND LESS CLARITY OF LAW

To be sure, the significantly reduced caseload permits the Court to devote careful attention to the cases that comprise its scaled-down merits docket. But one wonders whether this extra capacity has yielded helpful dividends concerning the clarity of federal law. Indeed, the Justices seem skeptical of values such as stability and predictability. Their control—and shrinking—of the merits docket suggests as much.

This deep ambivalence toward the efficacy of legal doctrine stands out as an enduring quality of the Rehnquist Court's tenure of almost two decades. The upshot is lack of predictability. Time and again, and particularly when the practical stakes are high, the Rehnquist Court chose the course of practical wisdom, the Justices following their collective lights instead of engaging in orthodox constitutional analysis.⁸² That is to say, the reduced dialect has created judicial "space" for weaving culture-shaping opinions. Instead of an exacting analysis of text, structure, history, and even its own precedent, the Court was frequently guided by a different polestar—that of mirroring broad cultural and social trends in fashioning what the Rehnquist Court Justices deemed a sensible, practical rule for governing the people.⁸³ Instead of driving the culture, as did the Warren Court, the Rehnquist Court more narrowly demanded the last word on issues that divide the nation.⁸⁴ The Rehnquist Court

82. As an example, Judge Douglas Ginsburg calls *Atkins v. Virginia*, 536 U.S. 304 (2002), "as frankly a legislative decision as the Court has ever rendered. It has nothing to do with the constitutionality of capital punishment and everything to do with the Justices' personal senses of decency." Honorable Douglas H. Ginsburg, *On Constitutionalism*, 2003 CATO SUP. CT. REV. 7, 19 (2003). He explains that his disagreement is not with the Court's chosen policy, "but with the Court's making such choices for us, notwithstanding the lack of any sound basis in the Constitution for doing so." *Id.*

83. In *Dickerson v. United States*, 530 U.S. 428, 443 (2000), the Chief Justice, writing for the Court, explained that there was no justification for overruling *Miranda v. Arizona*, 384 U.S. 436 (1966), partially because the now familiar warnings had "become part of our national culture." *Dickerson*, 530 U.S. at 443. Hence, there was no "special justification" for departing from precedent and stare decisis. *Dickerson*, 530 U.S. at 443.

84. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866–67 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.) ("Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a na-

says, in effect, “we’re in charge.” As it pronounced the final word, the Rehnquist Court’s judgments sought to reflect emerging social and cultural trends.⁸⁵ Whereas the Warren Court was reshaping society’s institutions, the Rehnquist Court served more modestly as a national weathervane. It measured and reflected, but did not drive and shape. It was, in short, the Court carrying out the broad political function envisioned by Madison in Federalist 10⁸⁶—a Court determined to eradicate pockets of perceived oppression, of arbitrariness, of caprice, resulting from the capture of control by a powerful “faction.”⁸⁷ The nation’s highest Court embraced the governance function that Madison (and other Framers) viewed as served by the force of the sheer existence of a vast commercial republic. In the process, the Court evidenced eager willingness to exercise power so as to displace judgments not only of Congress and the President, but of the states.⁸⁸ The supposedly pro-federalism Court relished displacing state power, especially in the dor-

tional controversy to end their national division by accepting a common mandate rooted in the Constitution.”). The *Casey* Court explained, “Liberty must not be extinguished for want of a line that is clear. And it falls to us to give some real substance to the woman’s liberty to determine whether to carry her pregnancy to full term.” *Id.* at 869.

85. Cass Sunstein argues that *Lawrence v. Texas*, 539 U.S. 558 (2003), can best be understood as “judicial invalidation of a law that had become hopelessly out of touch with existing social convictions.” Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27 (2004). Diana Hassel agrees that the Court’s decision to discard its *Bowers* precedent may be explained by “the increasing social and culture [sic] acceptance and integration of lesbians and gay men since 1986.” Diana Hassel, *Lawrence v. Texas: Evolution of Constitutional Doctrine*, 9 ROGER WILLIAMS U. L. REV. 565, 574 (2004).

86. THE FEDERALIST NO. 10 (James Madison).

87. In *Romer v. Evans*, 517 U.S. 620, 634 (1996), the Court struck down the Colorado statute in question because it imposed a disadvantage “born of animosity toward the class of persons affected.” Further, it declared that equal protection must at the least mean that a “bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest.” *Id.* (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). The Court in *Lawrence* struck down Texas’s antisodomy law in part because it demeaned homosexuals. 539 U.S. at 575.

88. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 555–79 (2005) and *Atkins v. Virginia*, 536 U.S. 304, 304–20 (2002) (removing from the states the power to execute those under eighteen or the mentally retarded); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 507–16 (2004) and *Rasul v. Bush*, 542 U.S. 466, 466–73 (2004) (overruling the President’s claim of authority in unlawful combatant cases); *Dickerson*, 530 U.S. at 431 (holding that *Miranda* “may not be in effect overruled by an Act of Congress”).

mant Commerce Clause arena and in substantive due process (ranging from abortion to punitive damages).⁸⁹

A recent example makes the point—namely the Ten Commandments cases from spring 2005. On June 27, 2005, the Court handed down its much discussed, and indeed much lampooned, decisions in *Van Orden* and *McCreary*.⁹⁰ Chief Justice Rehnquist quipped, in his last day to grace the Supreme Court bench where he had served for over thirty years, that there were so many opinions in the two cases that he had not realized there were so many members on the Court.⁹¹ The judicial cacophony was indeed remarkable. The Texas and Kentucky cases not only produced seemingly inconsistent results—Texas Capitol grounds memorial upheld,⁹² Kentucky's courthouse displays struck down⁹³—but the outpouring of opinions embodying clashing constitutional theories was impressively large.⁹⁴

Much merriment, and no small criticism, attended this Solomonic judgment, but whether one agrees or disagrees, the important part for our understanding is that pragmatism carried the day. Unifying principles—such as the neutrality principle embraced by Justices Stevens, Souter and Ginsburg, or standardized constitutional tests such as the purpose prong

89. See, e.g., *Granholm v. Heald*, 125 S. Ct. 1885, 1891–92 (2005) (rejecting state claims of authority to restrict importation of wine from out of state wineries based on the 21st Amendment); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 408–29 (2003) (imposing constitutional limits on punitive damages); *Stenberg v. Carhart*, 530 U.S. 914, 914–22 (2000) (rejecting Nebraska's claim that it had an interest in preventing infanticide by restricting the partial birth abortion procedure).

90. *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

91. David G. Savage, *Former Rehnquist Clerks Recall His Wit, Warmth*, L.A. TIMES, Sept. 7, 2005, at 13.

92. *Van Orden*, 125 S. Ct. at 2858.

93. *McCreary*, 125 S. Ct. at 2754.

94. In *Van Orden*, Chief Justice Rehnquist announced the judgment of the Court and delivered an opinion in which he was joined by Justices Scalia, Kennedy, and Thomas. Justices Scalia and Thomas, though, wrote separate concurring opinions, while Justice Breyer wrote an opinion concurring in the judgment. Justice Stevens authored a dissenting opinion, in which he was joined by Justice Ginsburg. Justice O'Connor filed her own dissent, and Justice Souter wrote a dissenting opinion in which Justices Stevens and Ginsburg joined. *Van Orden*, 125 S. Ct. 2854. In *McCreary*, Justice Souter delivered the opinion of the Court joined by Justices Stevens, O'Connor, Breyer, and Ginsburg. Justice O'Connor filed a separate concurrence. Justice Scalia authored a dissent in which Chief Justice Rehnquist and Justice Thomas joined fully, and in which Justice Kennedy joined in part. *McCreary*, 125 S. Ct. 2722.

(Test One) of the *Lemon v. Kurtzman*⁹⁵ three-part test employed by Justice Souter for the majority in the Kentucky case—gave way to an overall, contextually rich judgment.⁹⁶ Guiding the Court's resolution was a practical, history-sensitive awareness that to uproot a settled practice (such as the Texas half-century old memorial) would lead to political divisiveness.⁹⁷

My suggestion is that, upon more probing analysis, the Rehnquist Court proved over its life deeply unpredictable in a wide array of constitutional arenas, and so much so as to defy accurate characterization in the highly politicized ideological terms of current discourse. At least for the last decade, and in particular since the arrival of Justice Stephen Breyer in 1994, the Court's head-scratching unpredictability in many important areas of constitutional law had less to do with shifting (or moderating) philosophies on the part of the Justices⁹⁸ and more to

95. 403 U.S. 602 (1971).

96. Members of the Court have used the neutrality principle both as its own test, and as part of the three-prong *Lemon* test. Compare *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947), with *Lemon*, 403 U.S. at 612–15. Standing alone, the neutrality principle is “the touchstone” of the Court's Establishment Clause analysis. *McCreary*, 125 S. Ct. at 2733. The “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *McCreary*, 125 S. Ct. at 2733 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Under the *Lemon* test, the neutrality principle is disguised as the “purpose prong”—the first part of a *Lemon* analysis. *Lemon*, 403 U.S. at 612–15. “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.” *McCreary*, 125 S. Ct. at 2733.

97. Like Justice Breyer's decision in *Van Orden*, Justice Souter's decision in *McCreary* is not based on any single interpretive tool. Justice Souter recognizes the value of the neutrality principle, but ultimately concludes that “given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance.” *McCreary*, 125 S. Ct. at 2743. Instead, Justice Souter relies on the political justification for promoting government neutrality in religious matters. “The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate” *McCreary*, 125 S. Ct. at 2742 (internal citations omitted).

98. Indeed, many suggest that differing philosophies are what lead to the Court's divisive, piecemeal decisions. See Linda Greenhouse, *Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, at E1 (stating that with the addition of Justices Breyer and Ginsburg, “there turned out to be virtually no center for these two experienced Federal judges to anchor [as they] joined a Court that, far from converging toward the center, was driven by competing

do with its flexible, case-by-case approach to constitutional interpretation.⁹⁹

IV. CHIEF JUSTICE TAFT'S LOFTY GOALS

What is to be done? This question has been asked on two separate occasions—once in 1972¹⁰⁰ and again in 1975.¹⁰¹ The answer, and one with which I do not entirely agree, was the creation of a new appellate structure within the federal court system.¹⁰² At the urging of Chief Justice Burger, Professor Paul Freund of the Harvard Law School studied the Supreme Court's caseload and suggested the creation of a National Appellate Court.¹⁰³ This new court would resolve "less important" circuit conflicts, and would refer the 400 to 500 most important cases to the Supreme Court for review.¹⁰⁴ In this way, the Su-

visions of the Constitution and the country"). Another scholar suggests that Greenhouse was implying that "[t]he chief functions of pragmatist or moderate stances by Justices on the Rehnquist Court in the mid-1990s . . . was to serve as a brake against efforts by other Justices to institute 'fundamental, even radical change' in constitutional interpretation." G. Edward White, *Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1089, 1092–93 (2005); see also Keith E. Whittington, *Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 606 (2000) (suggesting that many scholars have drawn the plausible conclusion "that judicial decisions simply reflect the political preferences of a majority of the justices on the Court at any given time").

99. See William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 53–55 (2002) (explaining how the Rehnquist Court used stare decisis inconsistently, considering it a "tool useful in protecting the Court as a political institution, rather than a jurisprudential doctrine designed to protect the Court's precedent"); Graeme B. Dinwoodie, *The Trademark Jurisprudence of the Rehnquist Court*, 8 MARQ. INTELL. PROP. L. REV. 187, 207 (2004) (referencing "the Court's inconsistent use of textual interpretation" in trademark conflicts); Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 616 (1990) (arguing that the flexibility that the Rehnquist Court brought to separation of powers jurisprudence solved a few problems left by the Burger Court but also created new ones just as perplexing).

100. Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1972) [hereinafter *Freund Report*].

101. Federal Judicial Center, *Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975).

102. *Id.* at 199–204; see also Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1401, 1410–14 (1987) (arguing that alternatives to a proposed intercircuit panel would be inadequate).

103. O'Brien, *supra* note 14, at 789–90.

104. *Freund Report*, *supra* note 100, at 590–95.

preme Court would be the final word on the most important issues of law, thus maintaining uniformity of federal law, without trying to handle the full brunt of its unwieldy docket.¹⁰⁵ My suggestion, however, is simpler—the Court should decide more cases, and it should avoid governing the polity by forcing a cultural agenda.

To be sure, the Rehnquist Court did not win any gold medals for jurisprudential clarity in constitutional interpretation. What the Rehnquist Court did well was to resolve classic legal issues as contemplated by Chief Justice Taft in the bygone days. Consider statutory interpretation cases. The Court, in its lawyer-like way, has managed to bring considerably greater clarity to the interpretive process with its strong emphasis on textual and structural analysis.¹⁰⁶ On these issues, the internal squabbles tend to be over relatively modest issues such as the appropriate use of legislative history.¹⁰⁷ But is all this below the Court's dignity? Scarcely. My suggestion is that the Court seek to insert itself less in the "Culture Wars," as reflected by its provocative approach in *Lawrence v. Texas*,¹⁰⁸ and tend instead to the second great Taftian charge. Let me illustrate with a case from last Term.

On April 19, 2005, Justice Breyer delivered the Court's unanimous opinion in *Dura Pharmaceuticals v. Broudo*.¹⁰⁹ The *Broudo* Court analyzed the Ninth Circuit's interpretation of "loss causation"—the statutory rule that a "private plaintiff who claims securities fraud must prove that the defendant's

105. *Id.*

106. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1669–70 (2004) ("In matters of statutory interpretation, a defining trait of the Rehnquist Court has been its assiduous observance of the lines drawn by a clear and precise statutory text, even when the outcomes seem difficult to square with the statute's apparent background purpose."). *But see* Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229, 236–37 (2004) (arguing that "the plain language rule [textualism], as used by the Rehnquist Court, fails to provide predictability in statutory construction cases").

107. In support of the argument that legislative history has no part in statutory interpretation, see ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 31–32 (Amy Gutmann ed., 1997). *See generally* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (analyzing the textualist judges' objections to legislative history).

108. 539 U.S. 558 (2003).

109. 125 S. Ct. 1627 (2005).

fraud caused an economic loss.”¹¹⁰ Reversing the Ninth Circuit,¹¹¹ the Supreme Court put an end to uncertainty that had been lingering for almost fifteen years—since 1990, the Second, Third, Seventh, Ninth, and Eleventh Circuits had all weighed in on the issue.¹¹² The Court’s methodology in the case was simple. First, the Court examined the logical underpinnings of the Ninth Circuit’s decision.¹¹³ Citing the same statute that the Ninth Circuit was interpreting, the *Broudo* Court found the “pure logic” behind the Ninth Circuit’s analysis “insufficient.”¹¹⁴ Second, the Court steeped itself in precedent and the common law.¹¹⁵ The Court turned to its own decisions, the decisions of lower state and federal courts, and restatements of the common law before ultimately rejecting the “uniqueness of [the Ninth Circuit’s] perspective.”¹¹⁶ Finally, the *Broudo* Court delved into the relevant statutory language.¹¹⁷ The Court determined that the statute clearly expressed the intent of Congress, and that the Ninth Circuit’s approach was “inconsistent” with the statutory requirements of loss causation.¹¹⁸ Without appealing to their “own independent judgment,” the Justices dismantled the Ninth Circuit’s analysis. The Court, in short, deserves high marks for bringing about much-needed clarity, siding in the process with the vast majority of circuits.¹¹⁹

In *Broudo*, the Supreme Court lived up to its Taftian duties: it promoted uniformity within federal securities law, and it resolved an existing circuit conflict. But why the long wait?

110. *Id.* at 1629 (citing 15 U.S.C. § 78u-4(b)(4) (2000)).

111. *Broudo v. Dura Pharms. Inc.*, 339 F.3d 933 (9th Cir. 2003). The Ninth Circuit held that a claim for “loss causation” can be supported “simply by alleging in the complaint and subsequently establishing that ‘the price’ of the security ‘on the date of purchase’ was inflated because of the misrepresentation.” *Broudo*, 125 S. Ct. at 1629 (quoting *Broudo*, 339 F.3d at 938).

112. *Broudo*, 125 S. Ct. at 1630 (citing *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189 (2d Cir. 2003)) (noting that the Ninth Circuit’s views differ from other circuits); *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997); *Bastian v. Petren Res. Corp.*, 892 F.2d 680 (7th Cir. 1990).

113. *Broudo*, 125 S. Ct. at 1631–32 (examining the “pure logic” behind the Ninth Circuit’s decision).

114. *Id.* at 1632 (citing 15 U.S.C. § 78u-4(b)(4) (2000)).

115. *Id.* at 1632–33 (noting that the “Ninth Circuit’s holding lacks support in precedent”).

116. *Id.*

117. *Id.* at 1633–34.

118. *Id.*

119. *Id.* at 1630 (noting that the Ninth Circuit’s analysis differed from the circuits that had already examined the issue).

Why did the marketplace—and the securities bar—have to wait year after year to secure an authoritative answer to a recurring issue in federal law? Chief Justice Taft, splendid lawyer that he was, might well have joined the thoroughly sensible, unanimous opinion for the Court. But he might have, at the same time, inquired of his modern-day colleagues, “What took you so long to get around to maintaining uniformity in this important body of federal law?” My argument is not merely that the Supreme Court got it right in *Broudo*, but also that the *Broudo* Court got it right for the right reasons. Instead of engaging in the dogmatic inquiries exemplified by the *Van Orden* and *McCreary* decisions, the Justices in *Broudo* properly based their decision on precedent and the actual language of the statute in question. The Roberts Court would do well to take more cases like *Broudo*. Filling its merits docket with *Broudo*-like cases may not increase the Supreme Court’s caseload, but it would allow the Justices to resolve important questions of federal law and maintain uniformity of the law without having to resort to “Olympian” measures. In so doing, the Court would live up to Chief Justice Taft’s vision by applying the law rather than making cultural statements. At the same time, the Court would avoid the politicized pitfalls that have accompanied some of the Rehnquist Court’s more recent decisions.

CONCLUSION

The Court’s docket is a scarce, indeed precious national resource. Perhaps part of the answer to the shrinking docket is for the Court, once again, to put its shoulder to the wheel and work harder. In any event, thoughtful consideration should be given to the manifest problem of nonuniformity in the ever-growing body of federal law. And perhaps Taftian-style training would be helpful for incoming law clerks as to the manifest importance of clarity in federal law.