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"Our overworked Supreme Court," Puck cartoon by Joseph Keppler, 1885, Library of Congress.

## A "PROGRESSIVE CONTRACTION OF JURISDICTION": THE MAKING OF THE MODERN SUPREME COURT

*Carolyn Shapiro*

The Supreme Court in 1888 was in crisis. Its structure and responsibilities, created a century earlier by the Judiciary Act of 1789, were no longer adequate or appropriate. The Court was overwhelmed by its docket, and the justices' responsibilities, which included circuit riding, were impossible to meet. Shaped as it was by a law almost as old as the country itself, the Supreme Court in 1888—and the federal judicial system as a whole—would be barely recognizable to many today.

The Judiciary Act of 1789 established not only the Supreme Court, but also the entire federal court

system. The Act divided the country initially into thirteen districts, which were in turn combined into three circuits. Unlike today's circuit courts, however, the circuit courts created in 1789 had *original* jurisdiction over certain types of cases and provided appellate review of only a few cases heard originally in the district courts. In addition, the Judiciary Act provided for district court judges and Supreme Court justices, but no circuit court judges. Instead, twice a year, two Supreme Court justices would visit each district and, along with one district court judge, would sit as the circuit court. There were six Supreme Court justices, so

that two could be assigned to each circuit. Even after 1793, when subsequent laws provided that only one Supreme Court justice at a time would sit on a circuit courts, meaning that each justice had to make the trip only once a year rather than twice, an enormous portion of Supreme Court justices' time, was spent riding circuit—at a time when travel was slow and difficult. And as the country grew, more circuits were created.

Not only did Supreme Court justices ride circuit, but the Supreme Court itself had no discretion over its docket. Cases were appealed to the Supreme Court as of right, unlike today. This lack of control turned out to be extremely problematic. During the first century of its existence, not only did the United States become geographically larger and more populous, but industry grew, the country's economy became increasingly sophisticated, and new laws and sources of litigation abounded, especially after the Civil War. As a result, the Supreme Court's docket grew dramatically. At the beginning of the 1888 Term, there were 1,563 cases on the docket. The Court simply could not keep up. As Felix Frankfurter and James M. Landis described the situation: "The Supreme Court docket became a record of arrears." Less poetically, it took three years for a case to be heard. The situation was untenable.

Faced with overwhelming case-loads, by 1888 the Supreme Court had already attempted to adjust its standard of review in order to dissuade lawyers and litigants from appealing fact-intensive cases with few implications beyond the particular parties. In *Newell v. Norton and Ship*, an 1865 admiralty case involving a steamboat collision, for example, the Court summarily affirmed the verdict for the plaintiff, holding that there was "ample testimony to support the decision." The Court explained that it would not engage in a searching review of the lengthy record, which included more than 100 depositions:

Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony.

The Court's reluctance to engage in error correction, even at a time when it had no formal control of its docket, continues to this day. Today, Supreme Court Rule 10, Considerations Governing Review on Writ of Certiorari, explains that 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."

Despite the Court's effort to define a very narrow scope of review, it was unable to halt the flood of cases coming to it. Facing both its own swelling docket and the geographic expansion of the country, the justices found circuit riding to be increasingly difficult and they often simply did not do it. As Frankfurter and Landis explain, "[B]y 1890 the statutory duty of the Justices to attend circuit was practically a dead letter."

And it was not the Supreme Court alone that was unable to function properly. Despite some earlier attempts to expand and reform the lower courts, there were still not nearly enough judges. Circuit courts, which were supposed to sit with two judges, often had to function with only one. Even more problematic, that single judge was often a district court judge who was hearing appeals of his own decisions. In 1889, a paper presented at the Annual Meeting of the American Bar Association put it this way:

Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision.

This arrangement could not possibly inspire confidence in an impartial and fair justice system.

Congress finally acted in 1891,

after many years of considering and rejecting proposals for major reform, and the federal judicial system we know today began to emerge. Most significantly, Congress established intermediate appellate courts for the first time. If litigants were required to appeal first to those intermediate courts, the hope was, many fewer of them would subsequently take their cases to the Supreme Court. The law indeed appeared to lessen the tide of cases, at least at first. During 1890, before passage, 623 new cases were docketed at the Supreme Court. In 1892, the number dropped by more than half, to 275.

The 1891 law, known as the Evarts Act, also contained the seeds of today's Court's largely discretionary jurisdiction. For the first time, Congress created a category of cases that the Supreme Court would review only upon certification, or certiorari, although most cases continued to flow to the Court as a matter of right.

The Supreme Court embraced the opportunity to limit the number of cases coming before it. During the first two years after passage of the 1891 act, it granted certiorari in only two cases. While careful to maintain its *power* to grant certiorari in any case pending in the courts of appeals, the Court was, quite deliberately, "chary of action in respect to certiorari," as it explained in *Forsyth v. City of Hammond*, decided in 1897. In *Forsyth*, the Court announced narrow criteria for when



*"The Supreme Court/Men Who Know the Law," October Term, 1895. Designed by the American Lithographic Co., 1896, Collection of the Supreme Court of the United States.*

certiorari would be appropriate:

[The certiorari] power will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

These criteria remain, largely unchanged, the stated criteria for certiorari today as set forth in Supreme Court Rule 10.

The Evarts Act, however, was not successful in its goal of cutting the Court's workload to a manageable size. It did not eliminate most

of the Court's mandatory appellate jurisdiction. The hope that the creation of the intermediate appellate courts would satisfy litigants' need for appellate review, thereby making an appeal to the Supreme Court less attractive, proved largely illusory. (Lawyers and litigants often apparently used the right of an appeal to the Supreme Court simply as a delaying tactic, a possibility that seems entirely obvious to a modern legal audience.) In the years following the enactment of the Evarts Act, the Supreme Court's caseloads increased again to unmanageable proportions, as the nation, its economy, and its judicial business continued to grow. Moreover, even after 1891 and despite the concern for the Supreme Court's caseload that inspired the Evarts Act, Congress continued to create even more categories of man-

datory appeals to the Court. In 1903, for example, it passed the Expediting Act, which created the three-judge district court to hear certain anti-trust cases. Appeals from this type of district court went directly to the Supreme Court as of right. And over the following 10 to 15 years, Congress provided that more and more types of cases follow this procedure. (A handful of cases, such as constitutional challenges to congressional districts, are subject to this procedure even today.)

Although it expanded the Court's mandatory jurisdiction in some areas, Congress did cut back on it in others. In 1916, for example, Congress eliminated mandatory jurisdiction over Federal Employers' Liability Act cases, as well as certain cases arising out of state courts, cases from the Philippines, and cases arising under certain other federal statutes. The most significant overhaul of the Supreme Court's jurisdiction, however, was the 1925 Judges' Bill—so called because it was drafted by members of the Supreme Court itself. The Act dramatically expanded the Court's certiorari jurisdiction, leaving only a few, relatively small categories of cases for mandatory appeals.

The goal of the Judges' Bill, like the Evarts Act, was to free the Court from having to decide cases that were not important to anyone beyond the immediate parties involved and to allow it to focus on more nation-

ally significant matters. The House Committee report on the Judges' Bill explained:

The problem is whether the time and attention and energy of the court shall be devoted to matters of large public concern, or whether they shall be consumed by matters of less concern, without especial general interest, and only because the litigant wants to have the court of last resort pass upon his right.

In a 1925 *Yale Law Review* article, Chief Justice William Howard Taft provided more detail about what sorts of cases he believed the Court should take on certiorari after passage of the Judges' Bill, reiterating the criteria the Court first articulated in the 1890s—and that today are embodied in Rule 10:

The function of the Supreme Court is conceived to be . . . the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court. Such cases should include issues of the Federal constitutional validity of statutes, Federal and State, genuine issues of constitutional rights of individuals, the interpretation of Federal statutes when it will affect large classes of people, questions of Federal jurisdiction, and some-

times doubtful questions of general law of such wide application that the Supreme Court may help remove the doubt. Where there is a conflict of opinion between intermediate appellate courts in the different Circuits or between the Federal intermediate appellate courts and the Supreme Courts of the States, the public interest certainly requires that the Supreme Court hear the cases, if its decision will remove the conflict.

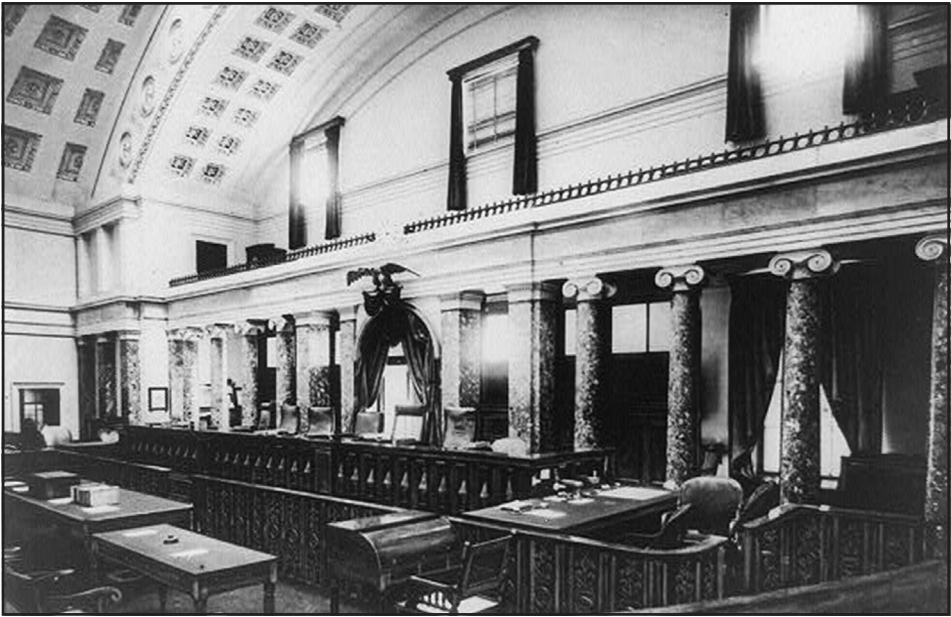
The Judges' Bill did not completely eliminate caseload pressures, of course. Petitions for certiorari alone topped 5,000 a year by the early 1980s. In October Term 2011, the Court considered more than 7,500 petitions, although this number represents a modest decrease from prior years. Despite these massive numbers, however, the Court has not fallen behind in dealing with these filings. Instead, it has adopted a variety of ways of dealing with them efficiently—from eliminating the need to discuss a petition in the justices' conference unless at least one justice wants to consider it, to relying on law clerks to read the petitions and summarize them in brief memos. This latter mechanism relies heavily on the "cert pool"—a cooperative agreement among most of the justices (currently, all but Justice Alito) in which the petitions are divided among the chambers and each petition is assigned to a single law clerk. The

cert pool was introduced in the 1970s.

For cases decided on the merits, however, the Court continued to feel greatly burdened by its workload in the mid- to late twentieth century, even as the number of merits cases shrank. In the 1980s, the Court heard argument and issued written opinions in approximately 150 cases a year. Many observers, and some of the justices themselves, believed that 150 cases were simply too many for the Court to handle well. Moreover, these people argued, the Court was unable to give truly important cases the time and attention they needed in part because of the need to manage the mandatory appeals, which were often not of interest beyond the parties themselves. There was much discussion of some kind of national court of appeals or other panel to assist the Supreme Court with the more mundane cases. Then-Justice William H. Rehnquist explained at his 1986 confirmation hearings to be Chief Justice:

I think if Congress could be persuaded, not ultimately but very presently, there ought to be a new national court, frankly recognized as such, with judges appointed by the President and confirmed by the Senate, who would act as something of a junior chamber of the Supreme Court, to hear primarily statutory cases about which there are presently conflicts in the circuit[s].





*Photo of Supreme Court Room (in the Capitol), c. 1894, Wittemann Collection, Library of Congress.*

As we all know, no such dramatic change occurred. During the 1970s, Congress eliminated mandatory jurisdiction in a number of types of cases and in 1988, once again at the justices' urging, it eliminated almost all of the remaining direct appeals to the Supreme Court. The Court, freed from mandatory appeals and aggressively applying its certiorari criteria, has been hearing argument in fewer and fewer cases a year. In October Term 2011, for example, the number of cases decided after briefing and oral argument reached the historic low of 65 cases.

Not only do these numbers place the Supreme Court caseload at historic lows, but, as Judge Richard A. Posner has pointed out, when measured as a proportion of all cases in the federal judicial system, the case-

load is vanishingly small. He "compare[s] the percentage just of federal court cases in which the Court granted certiorari in 2004—0.11% (64 divided by 56,396)—with the corresponding percentage in 1960—1.6% (60 divided by 3753)" to find that "the Court reviewed, in relative terms, almost 15 times as many federal court cases in 1960 as in 2004."

Put another way, what Frankfurter and Landis said in 1928 remains just as true today:

Perhaps the decisive factor in the history of the Supreme Court is its progressive contraction of jurisdiction. . . . In contrast with the vast expansion of the bounds of the inferior federal courts, the scope of review by the Supreme Court has been steadily narrowed.

This “progressive contraction,” both of mandatory jurisdiction and of the Court’s exercise of its own discretion to hear cases, has reached a point where the concerns expressed today about the Supreme Court’s workload are unprecedented. Commentators and observers today complain that the Court is not taking *enough* cases and that the justices do not work hard enough. In stark contrast to Chief Justice Rehnquist’s statements at his confirmation hearings, then-Judge John G. Roberts indicated at his hearings in 2005 that he thought there was “room for the Court to take more cases.” Nonetheless, since his confirmation, the Court has not in fact done so. As already noted, the Court decided only 65 cases after briefing and argument in October Term 2011. Whether and how Congress—or the Court itself—will ultimately respond to such complaints and observations, and what the next 125 years will bring, remains to be seen. ♦

#### Sources and Further Reading

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**Carolyn Shapiro** earned both her B.A. and J.D. at the University of Chicago. After law school, she went on to clerk for then-Chief Judge Richard A. Posner of the Seventh Circuit Court of Appeals and Justice Stephen G. Breyer of the United States Supreme Court. Following two years as a Skadden Fellow and four years as a civil rights lawyer in private practice, she joined the faculty of Chicago-Kent as a visitor in 2003 and as a tenure-track faculty member in 2004. Her research focuses on federal courts, especially the Supreme Court, and she is the director of Chicago-Kent’s Institute on the Supreme Court of the United States.