A Happy-Go-Lucky Story: The American Supreme Court and Overload Problems

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Abstract Nowadays, the U.S. Supreme Court controls its own docket thanks to the discretion it enjoys to select cases based on the writ of certiorari. As a result, the current court has no serious problems of overload and, in fact, the number of cases has decreased by half compared to previous generations. Furthermore, the reduced caseload has not diminished the prominent role that the Supreme Court plays in American society today. But it was not always so. In its beginnings, the Supreme Court was a ‘feeble institution,’ with justices riding circuit, with almost no cases and with not enough justices showing up anyway. After the Civil War, the federal courts and the Supreme Court gained more jurisdiction on ‘federal questions’ and, consequently, more cases to resolve. This increase in powers was not accompanied by changes in the judicial structure—which produced a case overload problem—until 1891. In that year, the U.S. Congress abolished the task of riding circuit for Supreme Court justices and created the intermediate circuit courts of appeals. This reform, however, brought only temporary relief. Litigants kept an automatic right to appeal to the Supreme Court, increasing its caseload pressures again. In the Judiciary Act of 1925, combined with other reforms in a similar direction, Congress redefined the role of the Supreme Court by giving it near-complete control of its docket. This contribution recounts the long journey through which the U.S. Supreme Court became its own master and how case overload problems are now long forgotten.

1 Introduction

Given the gloomy title of this volume, it may seem odd to have such a cheerful title for the American contribution. After all, the U.S. Supreme Court is ‘the world’s best-known Supreme Court.’¹ But, to get to the bottom line first, the current reality of the

¹Lord Bingham of Cornhill (2002), p. 10.

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U.S. Supreme Court is that it is its own master, and it does not suffer any significant problems of caseload overload. To the contrary, during the last generation the caseload of the court has fallen by about half without seeming to impair its prominence or fame.

It was not always so. The U.S. Supreme Court is an old institution, and it had beginnings that differ greatly from its current eminence. At key points in its development, as explored later in this paper, it experienced severe caseload pressures. But revisions in the role it plays, and in the judicial apparatus, changed all that. Those developments will be described below.

For the present, it seems appropriate to introduce the original court. The Constitution of the United States provides that, ‘The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.’\(^2\) What that court would have done if Congress had not created lower federal courts might be pondered. There was a stark division in drafting the Constitution about whether there should even be lower federal courts. One group preferred that there be only one federal court—the Supreme Court. Another wanted a single federal court system to bind the new nation together. Ultimately, the contending factions agreed to compromise and leave the question of lower federal courts to Congress.

Congress did not tarry long; in 1789 the First Congress adopted the First Judiciary Act,\(^3\) creating lower federal courts organized in judicial districts corresponding to the geographic boundaries of the states, and gave these courts jurisdiction over cases involving litigants from different states (called ‘diversity jurisdiction’). The Supreme Court, meanwhile, had a difficult time during its early years. When it first assembled in New York, it could not muster a quorum because two justices were unable to get to New York in time and two others nominated to the court declined the appointments. And the new court had no cases to hear—the extreme opposite of a case overload problem.

The early court was a ‘feeble institution.’\(^4\) The first Chief Justice, John Jay, left his post on the court to become governor of New York because he thought that a much more important position.\(^5\) John Rutledge, meanwhile, declined a nomination to serve on the court because he preferred to become the Chief Justice of the South Carolina Court of Common Pleas.\(^6\)

But Chief Justice John Marshall cemented the position of the court in the early nineteenth century by affirming the power of judicial review, and the court became, over time, the ultimate arbiter of a variety of American legal matters. That is the tale we have to tell in this paper, and it may be a useful one for others facing either

\(^2\)U.S. Constitution, Article III, §1.
\(^3\)Judiciary Act of 1789, 1 Stat. 73.
\(^4\)Crowe (2011), p. 1.
\(^5\)Cannon (1974), p. 334.
\(^6\)Greenhouse (2012), pp. 8–9.
overburdened courts or under-appreciated ones. Institutional change is possible and, over time, very important.

2 The Purpose Served by the U.S. Supreme Court

Much can flow from the purpose a Supreme Court is to serve, both in a judicial system and, in a different sense, in the governmental structure. Differences in approach to the court’s purpose can affect attitudes toward overload, so it seems a useful place to begin.

There are at least two basic models for appellate review, including review performed by Supreme Courts. As Professor Jolowicz explained, one version—which he calls ‘appeal’—involves a court of second instance that regards the decisions of the court of first instance as nothing more than a brief introduction to the case, and undertakes to ensure that the outcome it reaches is the correct one under the law without much regard for the decision of the first instance court. Such a court will not hesitate to consider evidence and arguments not presented to the court of first instance. And it would not be particularly preoccupied about whether the lower court made mistakes in handling the evidence or arguments presented to it. As Professor Jolowicz explains, ‘Its business is to decide for itself, as a court of second instance, and its decision replaces the first instance decision for all purposes.’

On the face of it, this approach to appellate review would likely produce caseload pressures because it could prompt many disappointed litigants to ‘go it again,’ and might require intense consideration of each case to make certain that the outcome was really correct. On the other hand, it could be justified on the ground that first instance proceedings were brief and inexpensive, and that few litigants even wanted a second instance review after learning the first instance outcome. That attitude might explain how an appellate review process could function efficiently—say in Germany—while the opportunity for such full-dress review might not fare well in systems with substantial delays—Italy might be an example of that.

An alternative approach is often referred to as a court of cassation. This court is concerned with errors, and limited to the record of the proceedings below, but responsible for ensuring that the outcome reached by the lower court was not seriously incorrect. ‘The role of a jurisdiction of cassation is said to be exclusively to examine the legality of the decision under attack . . . and the court has only two options: it must either affirm or annul.’

As Professor Jolowicz recognizes, the distinction between appeal and cassation is not as clear as originally stated, but this distinction sets the scene for the evolution

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7 Jolowicz (2000), Chapter 15.
8 Idem, p. 300.
9 Idem, p. 300.
10 Idem, pp. 320–321.
of the function of the American Supreme Court. As U.S. Supreme Court Chief Justice Rehnquist recognized in 1987:

Many would intuitively say that the task of the ‘highest court in the land’ is to make sure that justice is done to every litigant, or some similarly general and appealing description. The Supreme Court of the United States once played a role in the federal system corresponding fairly closely to that description, but the days when it could do so are long gone.¹¹

For Professor Jolowicz’s purposes,¹² ‘The American appeal is treated as a form of cassation rather than of appeal.’

One could insist that the U.S. Supreme Court at least adhere to its cassation responsibilities despite caseload pressures. Indeed, when in the late nineteenth century the first reform designed to relieve the U.S. Supreme Court of its caseload burden was proposed, a senator protested that such a change would go against the Bible:

I understand that out of some 115 cases that come here the Supreme Court decided that a mistake was made in appealing eighty-odd cases. I submit that if one man’s rights were preserved and safeguarded the Court in that action served a just purpose and it could well afford to consider 100 to 200 cases if necessary, in order to do justice by even one American citizen. The Bible tells us that it were better that 99 guilty persons go free than 1 innocent man should suffer. . . . I am not ready to surrender the average citizen’s right to appeal and accept in its stead discretionary power given to the judges of the Supreme Court.¹³

But Senator Heflin’s colleagues were persuaded that the caseload pressures justified reducing the court’s work burden, and the Supreme Court was in 1891 given some discretion to decline to review cases in which the losing litigant claimed error. By the mid-twentieth century, Chief Justice Vinson (1949) was able to declare that, ‘The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions.’¹⁴ As Professor Provine put it in 1980, ‘The belief that the Supreme Court should not function primarily as an appellate court for correcting lower court errors constitutes an important element of the modern Court’s conception of itself.’¹⁵

Instead, as now set forth in a Supreme Court rule, there are only narrow grounds for review by the court—a conflict among the lower federal courts on a legal principle, or a decision of ‘an important federal question’ by a state court that conflicts with the decision of a lower federal court or the court of another state.

¹¹Rehnquist (1987), p. 267. See also Study Group on the Case Load of the Supreme Court (1972), p. 1 (asserting that the court is ‘not simply another court of errors and appeals’).
¹²Idem, p. 299.
¹³Senator Heflin, quoted in Frankfurter and Landis (1927), p. 261, n. 19.
¹⁴For the same sort of views from Chief Justice Rehnquist, consider Rehnquist (1987), p. 269: ‘Occasionally, these [federal] trial judges make mistakes, but the federal courts of appeals sit to correct these mistakes within the federal system, and state appellate courts sit to do the same in every state system. It would be a useless duplication of these functions if the Supreme Court of the United States were to serve simply as an even higher court for the correction of errors in cases involving no generally important principle of law.’
¹⁵Provine (1980), p. 12.
The rule makes it clear that error is not enough: ‘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.’

The court’s role as supreme arbiter of federal legal issues—constitutional and otherwise—thus is far removed from either version of appellate work outlined by Professor Jolowicz. Instead, it depends on the distinctive—perhaps unique—role this Supreme Court plays in the American legal culture, a topic to which we will return below. As a study group addressing the caseload of the Supreme Court in the 1970s said, the court reflects ‘a process at the opposite pole from the “processing” of cases in a high-speed, high-volume enterprise.’ But before tracing the evolution of the Supreme Court from the error-correction mode to the current regime, it is first necessary to examine the evolution of the American federal judiciary that produced the present arrangements, and the ways in which that evolution has affected appellate caseload burdens.

### 3 The Long Path to the Current U.S. Supreme Court Apparatus

As De Tocqueville observed in the early nineteenth century after studying the U.S. Supreme Court’s role, ‘a more imposing judicial power was never constituted by any people.’ By the time he wrote, the stresses of case overload—or at least of function overload—had already begun to be felt by the Supreme Court. Those stresses were to endure until Congress changed the federal court structure in 1891, and again to lead to a change in the Supreme Court’s responsibilities in 1925.

The original federal judicial structure was very different from the current setup. The first Congress created lower federal courts of first instance, but no courts of appeals. For a nation with a population of slightly more than four million, that seemed sufficient. Instead of providing an appellate court system, the First Judiciary Act directed that Supreme Court justices were to ‘ride circuit,’ reviewing district court decisions on a three-judge panel with local federal judges. For the Supreme Court justices, the duty of riding circuit was a logistical nightmare due in large measure to the difficult travel arrangements of the time. As the nation grew dramatically in geographic size and population, some justices had to traverse many hundreds of miles each year at a time when transportation was rudimentary and roads were bad, and to deal with the increased judicial business that resulted from urbanization and industrialization. Supreme Court justices became increasingly upset at this burden.

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16 U.S. Supreme Court Rule 10, ‘Considerations Governing Review on Writ of Certiorari.’
17 Study Group on the Case Load of the Supreme Court (1972), p. 1.
18 De Tocqueville ([1835] 1990), p. 150.
But a different feature of the original setup might cause even more worry. Owing to the small number of federal judges, it could happen that the three-judge panel reviewing a district court decision would include the judge who made the decision. As one lawyer reported, ‘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.’

Over the course of two centuries, the original arrangement was substantially changed, as detailed in Sect. 4 below. The current focus of the court is as set out in Sect. 2 above—resolving important issues of federal law. Before turning to details about its current operation, it is important to stress that the U.S. Supreme Court is hardly the only Supreme Court in America. To the contrary, all 50 American states have Supreme Courts as well, and under long-established doctrine those courts are the supreme arbiters of the law of their states (with review by the U.S. Supreme Court only on the ground that a state law, as so interpreted, violates federal law). Most of those Supreme Courts are structured like the U.S. Supreme Court, and have discretion to select the cases they decide according to their own criteria. Most of those states also have intermediate courts of appeal that do function as courts of error.

On the contemporary U.S. Supreme Court, there are nine justices, a number that has become somewhat sacrosanct as a result of the ‘court-packing’ effort of President Roosevelt in 1937 (described in Sect. 5.1 below). Considered in comparison to the American population today of around 320 million, that is a very small number of justices. As Professor Uzelac has noted, that works out to one justice per 34 million inhabitants, a vastly different ratio from that found in most countries. Those nine American justices all sit together as one panel to decide all matters collectively unless one of them is recused from a given case. The Constitution directed that there be ‘one supreme Court,’ so operating by panels might even be unconstitutional. Indeed, there is not even a process for replacing a recused justice with another judge, and it can happen that due to recusals the court is unable to decide a case because its vote is tied or there are not enough justices eligible to constitute a quorum.

As detailed later in this contribution, the court now has nearly absolute discretion in deciding which cases to add to its plenary docket, so its main functions are to...

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19Hill ([1889, pp. 289–290] 1927), p. 87.
20See Wright and Kane (2011), p. 14: ‘The court-packing fight of the 1930s was so bitter that it ‘has given the notion of a nine-judge Court such sanctity that it is unlikely that the size will again be changed.’
21Uzelac (2014).
22Putting aside tiny Monaco (with one Supreme Court judge for every 2392 inhabitants), Professor Uzelac shows that the U.S. ratio is nearly 1000 times larger than that of Montenegro (one per 34,446), Bosnia and Herzegovina (one per 40,033) and Greece (one per 41,888). Larger countries also have a much larger supply of Supreme Court judges compared to their populations. For example, France has one per 194,110 inhabitants. The U.S. ratio is about 175 times larger.
23See Wright and Kane (2011), p. 15: ‘The Supreme Court is not authorized to sit in divisions.’
decide which cases to hear and to decide those cases. It operates under the ‘rule of four,’ under which it takes four votes (less than a majority of the nine-member court) to accept a case for hearing. Those decisions are made by the court as a whole, in conference, although (as also detailed later) there has been some sharing of the initial review function by Supreme Court law clerks, who now divide up the thousands of petitions seeking Supreme Court review and provide the justices with one memo per petition rather than (as was true in the past) with a separate memo for each justice about each petition.

The ordinary mode of proceeding is nonetheless fairly atomized. With regard to cases selected for plenary review, the justices do not ordinarily confer at all before the oral argument occurs. As a consequence, the oral argument of a case may depend significantly on exchanges between justices as well as interchanges between counsel and the court. After the oral argument, the justices meet in conference again and vote initially on the outcome, after which one of the justices is assigned the responsibility to prepare an opinion for the court. If the Chief Justice is in the majority, the assignment is made by the Chief Justice, but if not, the senior justice in the majority makes the assignment. Other justices in the majority can circulate their own supplemental opinions, and justices who disagree with the majority can (and usually do) circulate dissenting opinions or join in the dissent of another justice. As a consequence, it can happen that decisions come out without an official opinion of the court because no opinion commands five votes. On some issues, this sort of division has produced uncertainty about important issues that has lasted for decades. 24

The court does not sit to decide fact issues, as noted above, but it may consider materials not submitted by the parties. Indeed, in recent years there has been a proliferation of briefs from amicus curiae, whose role seems often to be to offer additional arguments or authorities not presented by the parties. But the American orientation toward appeals does not encourage anything resembling the full reconsideration at second instance mentioned in Sect. 2 above. 25 The court may affirm or

24 One prominent example deals with due process limits on personal jurisdiction. One view was that any entity that could foresee that its products would reach the forum state via the stream of commerce could be subjected to jurisdiction in a suit in that state for injuries occurring there due to alleged defects in its products. In a globalized world, that rule would obviously be very important. But another view emphasized that in a globalized world it may be ‘foreseeable’ that one’s products could end up almost anywhere, so that more than foreseeability should be required. In Asahi Metal Industry Co. v Superior Court, 480 U.S. 102 (1987), the court decided a case rejecting jurisdiction over a Japanese manufacturer, but the vote was 4-1-4 on the basic legal question. One justice said it was unnecessary to answer that question, so although four endorsed one answer and four others endorsed another answer, there was no opinion for the court on the question. In 2011, the court returned to what it described as ‘decades-old questions left open in Asahi Metal Co. v. Superior Court,’ J. McIntyre Machinery, Ltd. v Nicastro, 564 U.S. 873 (2011). But again it did not decide the question. A plurality of four took one view, three dissenters took another view, and two justices declined to decide the question. So the basic question has remained unanswered for at least a generation.

25 For a discussion of the American approach to appellate review, and limitations on it, see Marcus (2014).
reverse, and may send the case back to the lower courts with instructions to proceed in accordance with the legal rules it has announced. On occasion, it announces a new legal rule to apply prospectively only, and even if portions of its opinions can be described as *dictum* because they are unnecessary to the result it reached in the case before it, Supreme Court pronouncements are likely to have a considerable effect on the lower courts.

Any disappointed litigant can petition the Supreme Court for review without a lawyer, and sometimes those *pro se* petitions lead to important precedents. But when it grants such a petition, the court ordinarily appoints a lawyer to present the case. Any lawyer admitted to practice in any state can be admitted to the court’s bar. In recent years, however, a coterie of experienced and expert advocates has emerged, and they reportedly are more successful in obtaining Supreme Court review of cases than most lawyers. Further details will emerge as we examine the ways in which caseload pressures have prompted changes in the court’s operations over the centuries.

### 4 Caseload Pressure and Institutional Evolution in the U.S. Supreme Court

As noted at the beginning, the U.S. Supreme Court certainly did not originally have a problem with a heavy caseload. To the contrary, when it first met in 1790 it had no cases, and not enough justices showed up to constitute a quorum. But under the original arrangement of the federal court system it developed considerable responsibilities during the nineteenth century, and the burdens of travelling bad roads made the job of Supreme Court Justice a very difficult one. In the period leading up to the Civil War (1861–1865), the federal court ‘machinery was carrying a load beyond its capacity. The existing judicial structure was unequal to the volume and the range of litigation coming to the federal courts. Shortly after the Civil War, Congress added ‘federal question’ cases to the jurisdiction of the federal courts (in addition to ‘diversity’ cases involving citizens of different states), which ‘gave the federal courts a vast range of power which had lain dormant in the Constitution since 1789. But the judicial structure remained unchanged, leaving the Supreme Court ‘staggering under a load which made speedy and effective judicial administration impossible.’

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26 See, e.g., *Gideon v Wainwright*, 372 U.S. 335 (1963), in which a petition from an uneducated, imprisoned man led the court to hold that the Constitution requires the government to provide a lawyer for those unable to employ one in all felony cases. The petitioner did not have to brief his own case. Instead, the court appointed Abe Fortas of the Washington D.C. bar (later appointed a justice of the court himself) to represent him. For an informative book about the case see Lewis (1964).

27 See Lazarus (2008), pp. 1502–1507.

28 Frankfurter and Landis (1927), p. 52.

29 Idem, p. 65.

30 Idem, p. 86.
For decades, the American Congress was deadlocked about whether to change that judicial structure. Many in Congress favored the old circuit-riding activity of justices as a way of keeping them in contact with the country outside the nation’s capital. ‘The result was a continually growing docket at the Court and increasingly more desperate calls—from lawyers, from the American Bar Association, from attorneys general, from presidents, and from the justices themselves—for Congress to unburden the Court.’

Eventually, in 1891, Congress responded by abolishing the circuit-riding responsibilities of the justices and creating a new intermediate system of circuit courts of appeals. Appeal (after final judgment) would first go to the court of appeals for the area of the country in which the district court judgment was entered. Only after that decision could disappointed litigants seek review in the Supreme Court. ‘In terms of unburdening the Supreme Court, the Circuit Courts of Appeals Act was an immediate and unqualified success’ in reducing the court’s docket and resulting delays in decision.

But the respite was temporary, for litigants still had a right to seek ultimate review in the Supreme Court. Due to ‘cumbersome procedures like automatic appeals to the Supreme Court, . . . [by the 1920s] the number of petitions to the Supreme Court for certiorari had nearly doubled (from 270 to 539).’ In 1925, Congress responded with legislation that ‘drastically redefined the role of the Supreme Court by converting much of its obligatory jurisdiction into certiorari jurisdiction.’ ‘By limiting the automatic right of appeal to the Supreme Court and expanding the types of cases that could be heard only with the Justices’ assent, the Judiciary Act of 1925 gave the Court near-complete control over its docket for the first time in history.’ As Frankfurter and Landis noted in 1927, the passage of this act ‘marks a new chapter in the history of the federal judiciary.’

Although there have been significant changes to the federal judicial system since 1925—including the creation of two additional federal circuit courts of appeals and elimination of some obligatory Supreme Court jurisdiction that endured after 1925—the basic framework for the current arrangements dates from that Act. Based on nearly a century of experience under the current arrangements, it is possible to examine the effect of the transformation.

31Crowe (2011), p. 179.
32Idem, p. 185. See also Frankfurter and Landis (1927), p. 101: ‘The remedy was decisive. The Supreme Court at once felt its benefit. A flood of litigation had indeed been shut off.’
33Crowe (2011), p. 199.
34Idem, p. 200.
35Idem, p. 211.
36Frankfurter and Landis (1927), p. 1. This is the first sentence in the book. Frankfurter and Landis (1927), p. 187 added, ‘Perhaps the decisive factor in the Supreme Court is its progressive contraction of jurisdiction. This tendency has been particularly significant since the Civil War. 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.’
5 Caseload Cures and Consequences in the U.S. Supreme Court

The 1925 Act was viewed as a godsend initially, but as time went by some became unhappy with it. Although this story merits telling, it is important to appreciate initially that the structural arrangements for the Supreme Court have remained constant for almost a century. Nonetheless, alarm about caseload pressure has arisen from time to time.

These concerns about caseload pressures have also sometimes had a vaguely ‘political’ flavor. For example, in 1960 Justice Douglas—a notorious fast worker—announced that ‘the idea that the Court is overworked’ was a ‘myth.’ More recently, as detailed below, proposals to revise the federal judicial structure in the 1970s and 1980s were vigorously opposed on the ground that there actually was not a serious overload problem at the Supreme Court.

An eminent panel appointed by the Chief Justice to study the caseload problem opined in 1972 that the 1925 Act’s solutions ‘have become part of the problem’ because ‘the task of coping with discretionary jurisdiction on certiorari overhangs all of the Court’s work.’ As noted, however, no significant actual changes have occurred. So it seems appropriate to focus on possibilities as much as actualities.

5.1 Expanding the Court

One response to an expanding workload is to add more workers. Though in the early nineteenth century the U.S. Supreme Court had a varying number of justices, the number stabilized at nine in 1869, and has remained there ever since. If caseload pressures were to prompt thoughts of expanding the number of justices, the fact that the Constitution calls for ‘one supreme Court’ and therefore that sitting in panels would not be allowed suggests that expanding the cast of justices would not cause the work to diminish. To the contrary, it could even cause the workload to increase, as more justices would have to be persuaded to agree to decisions that might more easily be reached by a smaller group.

Putting aside that reason, there is a political reason why the cast will not likely be increased. Barely a decade after the 1925 Act, President Franklin Roosevelt used

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37Douglas (1960), p. 401.
38See Hellman (1983), p. 29, regarding proposals for ‘the most far-reaching change in the structure of the federal judicial system since the creation of intermediate appellate courts nearly a century ago,’ which the author regarded as unsupported by the caseload reasons advanced.
39Study Group on the Case Load of the Supreme Court (1972), p. 9.
40It is true that a considerable portion of the court’s obligatory jurisdiction that persisted after the 1925 Act has since been made discretionary, but because that was not a large proportion of the court’s work it seems a minor point.
workload as his argument to support expanding the size of the court. During the mid-1930s, several pieces of legislation that were adopted as part of President Roosevelt’s New Deal were held unconstitutional by the Supreme Court. After a huge victory in the 1936 election, the president proposed in 1937 that he be allowed to appoint a new justice for each one then over the age of 70. The rationale was that the elderly justices could not get their work done on time. Many saw a naked political motivation rather than a genuine concern with delayed decisions, and the legislation was eventually retracted. The bitterness of this political fight in the 1930s has persuaded very sophisticated commentators to conclude that the current number of justices has ‘such sanctity that it is unlikely that the size will again be changed.’

A different possibility might be worth mentioning—setting term limits for justices. Professors Crampton and Carrington have for some time urged that this be done. It seems that no country except the United States has bestowed lifetime tenure on its judges. The argument is that the tenure for justices in the late twentieth century far exceeded the average tenure in the early nineteenth century, and that the resulting stability of the court’s membership is a bad thing. That stability results from at least two things—improved medical care and the propensity of presidents to nominate younger candidates to be justices to ‘leave their mark on the Supreme Court.’ But the United States has adopted lifetime tenure for all federal judges, including Supreme Court justices. Particularly given the intensity of the fight over President Roosevelt’s court-packing scheme, it is unlikely that such ideas would be embraced. And if they were, they would almost certainly require an amendment to the Constitution, a very difficult process.

A different problem emerged in February 2016, when Justice Antonin Scalia died. Under the U.S. constitutional structure, all judges with lifetime tenure are nominated by the president and confirmed by the Senate. The president duly nominated a successor in March 2016. Though the judge so nominated was widely applauded as a highly-qualified centrist, the Republican majority in the Senate announced that it would not consider this nomination because the new justice should be selected by the next president. So at least until the election in November 2016, there was an impasse about replacing Justice Scalia. This impasse ended with the confirmation of Judge Neil Gorsuch in April 2017.

While this impasse persisted, the court continued to function with eight justices, raising the prospect of tie votes. But because the court almost always disposes of its entire caseload by the end of its term, a tie vote means the court cannot decide the case, and the decision of the lower court stands. On several occasions in the spring of 2016 that was the result, and the issues presented remained unresolved. Some are

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41 Wright and Kane (2011), p. 14.
42 Crampton and Carrington (2006). See also Calabresi and Lindgren (2005).
43 Greenhouse (2012), p. 84.
44 In rare instances, cases are set for reargument during the next term rather than being decided. In Spring, 2020, due to the coronavirus pandemic, argument and decision of a number of cases was postponed until the following term.
vexed by this situation. The late Justice Ginsburg, for example, told a judicial conference that ‘eight . . . is not a good number for a multimember court.’ But Professor Cass R. Sunstein suggested that the possibility of tie votes might provide a stimulus toward compromise and what he calls judicial ‘minimalism’—avoiding sweeping decisions. That could tend to reduce the court’s valence as a factor in the country’s public life. As The Economist recognized, however, ‘It is hard to see how a denuded court is appealing in the medium or long term. . . . America’s constitutional design is not consonant with confusion about what the law means on controversial questions. . . . [A] Supreme Court with eight judges is not a court that can live up to its name.’

On balance, then, a formal change to the composition of the Supreme Court is unlikely to be adopted, or to have a considerable effect on its caseload.

5.2 Adding Staff

Although the number of justices has remained stable for almost 150 years, the staffing of the Supreme Court has changed a great deal. The area of most pertinence is the position of law clerk, permitting the judge to delegate some decisional tasks to underlings. As Professor Jolowicz notes, ‘It is in the United States that the search for this kind of efficiency has been carried the furthest. There, judicial time is saved, or sought to be saved, by the widespread use of assistants to the judges, not only during the preparatory stages of an appeal but also in the formation of decisions.’ He asks, ‘Is this the way ahead for other systems, or is the provision of extensive assistance to appellate judges something peculiar to the United States?’

The introduction of law clerks at the U.S. Supreme Court did not occur until the late nineteenth century, when Horace Gray, who had been Chief Justice of the Supreme Court in Massachusetts, was appointed to the U.S. Supreme Court. The Massachusetts court had used law clerks to assist its justices, so Justice Gray introduced the idea in Washington. Gradually, the idea took hold, and over time Congress authorized salaries for an increasing number of them, rising to four per justice at present.

Law clerks sift through the mountain of certiorari petitions for a hearing before the court, and thus provide triage for one of the court’s functions—selecting the cases for plenary hearing. In addition, they are given roles to play in the drafting of opinions. Different justices give them different roles in the drafting of opinions.

Presumably, until the late nineteenth century the justices did all their own work. At that time, of course, there was no need to review petitions for hearings as there was a right to Supreme Court review until the 1925 Act. Moreover, in the famous

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45Liptak (2016), p. A10.
46The Economist (2016b).
47Jolowicz (2000), p. 346.
words of Justice Brandeis, the reason that the U.S. Supreme Court received respect was that, ‘We do good work because we do our own work here.’ The court regarded itself as different from other organs of government in which the drafting work was done by underlings.

Since Brandeis’s time, law clerks have had increasingly important roles, and they have often fascinated outsiders. Whole books focus on these staff members. One recent book even called them ‘sorcerers’ apprentices.’ To some extent, that fascination may be due to the fact that a considerable number of American law professors were law clerks for the Supreme Court, and considerably more wish they had been. To some extent that fascination may result from the fact that it seems that law clerks believe that they have broad influence on what the court does.

As Professor Jolowicz noted, Supreme Court law clerks do play a role in drafting the court’s opinions. Some justices allow clerks to provide the initial draft, and others permit clerks only to offer comments or supply citations for opinions drafted by the justice. Certainly some clerks think they play a major role in fashioning the content of the court’s opinions, but it is far from certain whether their confidence on that score is warranted.

Some observers believe that the growing length of the court’s opinions, and the appearance of frequent dissents or concurring opinions, is partly a result of the proliferation of law clerks. Perhaps the role of law clerks contributes to the proliferation of what some call ‘judicial gobbledygook’ in the court’s opinions. One observer recently asserted that ‘legal writing at the Court has become more complex and difficult to read in recent decades.’ But even if that is true, one could respond that the legal questions that the court addresses have become more uniformly complex and difficult. That could be a result of giving the court discretion to select the cases it hears; in the absence of ‘easy’ cases, one might expect that the decisions would be more challenging and involve trickier issues.

And it is not clear that—whatever the extent of delegation of tasks to law clerks—this delegation results from the court’s workload. Instead, some warn of ‘the alluring trap of assuming that increased workload is responsible for the rising amount of delegation to clerks.’

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48 Kester (1982).
49 See Ward and Weiden (2006).
50 Writing in 1980, Provine (1980), p. 24 concluded that there was no evidence that Justices were having difficulty maintaining independence from their law clerks.
51 For discussion see Black and Spriggs (2008).
52 Whalen (2015), p. 200.
53 Stras (2007), p. 962.
5.3 Choosing the Cases: Limiting the Caseload via the Certiorari Decision

The way in which the U.S. Supreme Court now chooses its cases is to decide whether to grant a writ of certiorari, which puts a case on the court’s plenary docket. Each year the court grants a hearing in fewer than 1% of the cases in which it is asked to grant a hearing.54 Indeed, the screening process has recently been startlingly effective in guarding the Supreme Court against overload. As a commentator wrote in 2007: ‘At a time when the lower courts are confronting unprecedented numbers of cases and disposing of more cases summarily, the Supreme Court is deciding, on a relative basis, nearly four times fewer cases than it did in 1986, which is a staggering change in less than twenty years.’55 A New York Times article labelled this development ‘the case of the plummeting Supreme Court docket.’56 But ‘the criteria the Court uses to select cases for decision on the merits have always been shrouded in mystery.’57

The official view is that the court’s denial of certiorari is a matter of no moment to any but the parties to the case; it is not precedent and says nothing about whether the court regarded the decision below to be correct.58 That is consistent, of course, with the idea that the court does not take cases merely to correct errors. Nonetheless, at least some observers urge that the court should provide reasons (mini-opinions?) to explain its decision to reject certain petitions for certiorari.59 That is not likely to happen. Justices regard a considerable percentage of the petitions for certiorari as presenting nothing of substance. And, with something like 10,000 petitions presented each year even though fewer than 100 are granted, the additional workload would obviously be severe. In addition, the court might worry that offering something like an opinion or statement of reasons to accompany certiorari denials could prompt more litigants to seek review in hopes at least of getting that sort of statement of reasons—10,000 petitions might become 20,000 petitions. As noted below, the caseload of the courts of appeals has risen dramatically in recent decades, so the volume of the Supreme Court’s certiorari docket could as well.

The method of dealing with this certiorari docket has, however, produced changes in the way staff are used. For decades, each justice had his or her own staff

54The Supreme Court’s own website reports that it receives approximately 10,000 petitions for certiorari per year, and hears oral argument in 75–80 cases.
55Stras (2007), p. 967.
56Liptak (2009). The article describes an academic conference ‘to explore the mystery of the court’s shrinking docket.’ See also Lazarus (2008), pp. 1507–1520, examining ‘the paradox of the Court’s shrinking docket.’
57Provine (1980), p. 74.
58For discussion see Linzer (1979).
59For a less aggressive argument see Segall (2014). Professor Segall urges that the votes on all petitions for certiorari be made public, while agreeing that ‘requiring the justices to have to agree on reason for more than 7,000 denials annually would not be worth the effort.’
independently review all incoming certiorari petitions. But as Chief Justice Rehnquist explained, by the early 1970s law clerks were frequently pressed for time, scrambling between having memos describing the certiorari petitions ready when they should be, and drafts or revisions of Court opinions or dissents ready when they should have been. The solution, proposed by Justice Lewis Powell, was a ‘cert. pool’ arrangement under which several justices would ‘pool’ their clerks for the purpose of reviewing certiorari petitions, and primary responsibility for drafting a memorandum analyzing a petition would rest with a single clerk for the participating justices, instead of having a clerk for each justice independently review each of the petitions. Initially only some of the justices participated, but participation has become universal in recent years. Some attribute the low rate of certiorari grants to this new arrangement, on the notion that law clerks regard it as much easier to recommend denial than say that a given case warrants a hearing.

Though the certiorari mechanism has surely guarded the court against overload in recent decades (given the dramatic decline in the number of cases it has decided on the merits), it also seems to give an advantage to sophisticated and experienced petitioners, especially the U.S. government. But it is likely that any discretionary selection process would favor those more familiar with the process.

5.4 **Limiting the Court’s Jurisdiction**

Rather than giving the court authority to pick its cases, one could limit its jurisdiction by excluding categories of cases. Various methods of doing so might be imagined—topical limitations might be preferred, or case value might be employed. For U.S. federal courts, there is already one case-value limitation—cases that are filed in federal courts because the parties come from different states must involve a controversy with a value of at least $75,000. To the extent the Supreme Court reviews decisions of the federal courts, then, this limitation may apply. As a general matter, however, external limitations have not played a significant role with regard to the U.S. Supreme Court’s docket.

There is no monetary limitation on the Supreme Court’s authority to review a decision of a state court, although the court’s authority extends only to cases in which state courts have resolved federal law issues. And when a claim arises under federal law it may be in federal court without regard to the amount in controversy.

From time to time, there have been efforts to limit the topics on which the Supreme Court may pass. For example, during the mid-twentieth century there

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60 Rehnquist (1987), pp. 263–264.
61 Provine (1980), pp. 175–176.
62 See 28 U.S.C. § 1332.
63 28 U.S.C. § 1257(a).
64 28 U.S.C. § 1331.
was considerable discussion in Congress of legislation preventing the court from taking further actions on topics that had provoked controversy, such as ordering busing to achieve racial integration in schools.\(^{65}\) Nobody argued for imposing such limitations to enable the court to cope with the burden of its caseload, however. Instead, the political reaction resulted from what the court had done in cases it already had decided. Given that the Supreme Court was created by the Constitution and implicitly was intended to provide judicial review of the constitutionality of actions of the other branches of government, there are strong arguments that efforts to prevent it from doing what the Constitution must have intended that it do are themselves invalid.\(^{66}\)

### 5.5 The Burden of the Plenary Docket

Besides culling petitions for certiorari, the caseload burden of the Supreme Court consists of deciding the cases it chooses to take for plenary review.\(^{67}\) In terms of numbers, the recent ‘incredible shrinking docket’ of the court shows that it is not overwhelmed. In terms of decisional burdens, however, the effort involved can be considerable. The court is regularly rushed to complete the remaining undecided cases on its docket as its annual term comes to a close each June. The ‘hard’ cases that required the most effort are often announced only then. But it is not really possible to characterize this burden as a result of caseload pressures. It may result in part from divisions about basic legal issues among justices. It may result from the difficulty of fashioning principles to decide the most difficult issues. But it does not result from having too many cases.

### 5.6 A Real Caseload Crisis in the U.S. Courts of Appeals?

As a contrast to what one might regard as placid caseload circumstances at the Supreme Court, one might turn to the U.S. courts of appeals. They were created by Congress in 1891 to deal with a Supreme Court caseload crisis, and they worked (see Sect. 4 above). But in the last 50 years they have seen a dramatic rise in the volume of appeals. During the 1980s and 1990s, there were repeated warnings of a caseload crisis in the U.S. courts of appeals.\(^{68}\)

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\(^{65}\) See generally Fallon (2010).

\(^{66}\) For an example of such disputes involving a state court, note that the Kansas Supreme court held that legislation removing its authority over the operation of the lower Kansas state courts was unconstitutional under the Kansas Constitution. The legislature had threatened to defund the entire state court system if the state Supreme Court held the legislation invalid. See Associated Press (2015), p. A10.

\(^{67}\) As noted in Sect. 6.3 below, the Supreme Court—and particularly the Chief Justice—has additional responsibilities.
crisis in the courts of appeals. For example, in 1990 the Federal Courts Study Committee\(^68\) reported that, ‘Few deny that [the] appellate courts are in a “crisis of volume” that has transformed them from the institutions they were even a generation ago.’ Moreover, that report asserted, the decline in Supreme Court plenary review of courts of appeals decisions threatened the uniformity of federal law.\(^69\) These circumstances produced a variety of ‘solutions’ that merit mention here.

**Creating a New Tier of Appellate Courts** In various forms, proposals surfaced in the 1970s and 1980s for creation of additional appellate capacity to bring order to the interpretation of federal law. Some urged that a new fourth level of the federal court system be created between the current courts of appeals and the Supreme Court. Some urged that a composite appellate body be created to receive assignments from the Supreme Court that it regarded as insufficiently important for plenary decision by the court but needing a uniform legal rule.

**Expanding the Size of Courts of Appeals or the Number of Courts of Appeals** Rather than create a new layer of the federal court system, another approach was to subdivide some existing courts of appeals. The vision of the appellate courts of a generation ago invoked by the Federal Courts Study Committee might thus be restored, as courts of appeals might again become small and integrated in a way that some sprawling courts were not. The Fifth Circuit, for example, was split in two in 1982, creating a new Eleventh Circuit. But the Ninth Circuit, the behemoth of the current federal court system, has resisted subdivision, in part because the only way to achieve a meaningfully smaller appellate court would be to split the state of California between two circuits, a remedy rightly regarded as extreme and problematical.\(^70\) Nonetheless, pressure to split the Ninth Circuit persists. In January 2016, the governor of Arizona announced that he would support breaking up the circuit ‘because of the [Ninth Circuit’s] extreme caseload [and] large geographic area.’\(^71\) But increasing the number of circuits likely would increase the number of ‘circuit conflicts’ in interpretation of federal law, potentially increasing the caseload burden of the Supreme Court, if it were required to resolve those conflicts.

**Increasing the Use of Non-precedential Decisions** One way of speeding up decisions in the courts of appeals would be ‘short cut’ decisions. Many courts of appeals adopted a practice of abbreviated opinions or decisions by ‘memorandum opinion.’ Many forbade citation to these decisions on the ground that they did not articulate new legal principles and should not be relied upon as establishing legal principles.

\(^{68}\)Federal Courts Study Committee (1990), p. 109.

\(^{69}\)See Federal Courts Study Committee (1990), p. 111, Table 1, showing that between 1945 and 1989 the proportion of court of appeals merits terminations subject to plenary Supreme Court review declined from 7.9% to less than 1%.

\(^{70}\)To illustrate, assume that a federal judge in northern California orders the state to do something that a judge in southern California orders the state not to do. What should the state do then?

\(^{71}\)Christie (2016).
Although that may look ordinary to those from the civil law background, where *stare decisis* supposedly does not exist, it did not sit well with American common law judges.\(^{72}\) In partial recognition of these problems, the Federal Rules of Appellate Procedure were amended to ensure citation was permitted.\(^{73}\) This rule drew heavy criticism from appellate judges when proposed but it was adopted notwithstanding.

**Upshot – The Crisis Seems to Have Abated** So one concerned about a caseload crisis in the U.S. federal court system probably should not focus on the Supreme Court, but on the courts of appeals. Nonetheless, ‘the doomsday clamor has died away and the sense of urgency has disappeared,’\(^{74}\) because the courts of appeals ‘manage to decide about as many appeals as are filed each year . . . [c]ases are not queuing up on the docket, although disposition times have lengthened appreciably.’\(^{75}\) But all is not necessarily tranquil; a recent study suggested that divergent caseload burdens in different courts of appeals were actually affecting outcomes—courts ‘flooded’ with cases involving deportations. Seemingly as a consequence of this flooding, two courts of appeals ‘began to reverse district court rulings less often’ with the result that ‘deference [to the actions of the district judges] increased, tilting the balance of authority toward the district courts.’\(^{76}\)

## 6 The Role of National Legal Culture

In comparative law circles, relying on national legal culture may sometimes seem the perennial way to duck issues. But the long history of the U.S. Supreme Court means that it has a place in the American legal and political order that affects the range of reforms one might seriously contemplate. The possibility of increasing the size of the court runs into not only the constitutional directive that there be ‘one supreme Court,’ but also the historical-political baggage associated with the ‘court-packing’ effort of President Roosevelt in the 1930s (see Sect. 5.1, second para above). So, other nations might actually have more latitude in revising judicial arrangements than America does. Moreover, as noted above, there is presently no pressing concern with judicial overload on the Supreme Court, even though there is concern about the length of service of justices that has become commonplace in the last few decades, and the consequent reduction in judicial turnover.

\(^{72}\) Indeed, at least one court of appeals held that it was unconstitutional. See *Anastasoff v United States*, 223 F.3d 898 (8th Cir. 2000).

\(^{73}\) Fed. R. App. P. 32.1: ‘A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions.’

\(^{74}\) Baker (2006), p. 102.

\(^{75}\) Baker (2006), pp. 113–114.

\(^{76}\) See Huang (2011), p. 1115.
6.1 Narrowing Judicial Functions: Advisory Opinions and Political Questions

Different countries ask their judges to do different things. The tasks that American judges could perform were not entirely clear at the outset. In 1793, for example, President Washington sent a letter to the Chief Justice and associate justices of the Supreme Court asking for the court’s opinion on the obligations of the United States with respect to the war between Great Britain and France. The justices declined, concluding in a letter that ‘the lines of separation drawn by the Constitution between the three departments of the government’ prohibit the federal courts from issuing such advisory opinions.\(^{77}\) This sort of overture from the other branches has been characterized as an ‘advisory opinion,’ and is something that American federal courts cannot do because the Constitution’s limitation of federal judicial power to ‘Cases’ and ‘Controversies’\(^{78}\) requires a concrete adversary litigation. But it is not anathema to all American states, some of which permit their courts to provide such advice, and other nations do also. But since 1793, the Court has regarded this prohibition as ‘the oldest and most consistent thread in the federal law of justiciability.’\(^{79}\)

Somewhat connected to the prohibition on advisory opinions is the rule against judges deciding ‘political questions.’ This doctrine insulates the justices against deciding what could be very contentious issues. For example, in 1979 a U.S. senator sued, challenging the decision by the president, acting without a vote in the U.S. Senate, to terminate the mutual defense treaty the United States had with Taiwan. The court refused to decide the case on the ground that the method of terminating a treaty was a political question because it was not specifically spelled out in the Constitution.\(^{80}\) By way of contrast, the Philippine Supreme Court recently decided a challenge to an agreement negotiated by the Philippine president on the ground that approval by the Philippine Senate was required.\(^{81}\)

In caseload terms, these limitations on judicial authority in the United States do not reduce the burden on the Supreme Court. But in terms of workload impact (not to mention adverse publicity) they probably are significant. It is said that the Americans transform social issues into legal issues more frequently than other peoples. Perhaps that also has prompted the caution with which the judiciary ventures into such areas. But its abiding responsibility to enforce the Constitution can nonetheless bring it into the line of fire, as efforts to constrict its jurisdiction have suggested (see Sect. 5.4 above).

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\(^{77}\) Campbell Ewald Co. v Gomez, 136 S.Ct. 663, 678 (Roberts, C.J., dissenting).

\(^{78}\) U.S. Constitution, Article III, § 2.

\(^{79}\) Flast v Cohen, 392 U.S. 83, 96 (1968).

\(^{80}\) Goldwater v Carter, 444 U.S. 996 (1979).

\(^{81}\) See Hernandez and Whaley (2016).
6.2 A Broadened View of Finality

Finality may be inherent in the role of a Supreme Court; as Justice Jackson of the U.S. Supreme Court put it, ‘We are not final because we are infallible, but we are infallible because we are final.’ But as Justice Cassese of Italy has recently noted, for many national Supreme Courts (even constitutional courts) this sort of finality or infallibility is no longer guaranteed because there are many supranational organs of review. For the U.S. Supreme Court this possibility does not exist, but for other national courts it may loom in the future.

A more pertinent feature of caseload pressures, however, is the question of finality within the national judicial system. One view might be that no decision is ever final; an extremely vigorous commitment to making sure that every decision was right could support such a view. Indeed, Professor Damaška suggested a generation ago that an ‘activist’ state (probably he had in mind the socialist state of Cold War vintage) would regard stability of judgments as a ‘matter of low priority,’ with the result that there would be almost no finality for decisions. What he called the ‘dispute resolution’ model, on the other hand, would result in much more vigorous finality because ‘the conflict-solving style of proceeding is averse to changing decisions—even if they rest on legal or factual error.’

For one concerned about limiting burdens on appellate courts, and ultimately Supreme Courts, a stronger view of finality would be a godsend. Yet, although most modern European states adopted a laissez faire attitude toward litigation, leaving the conduct of the case mainly up to the parties, it seems that they have a much more diffident attitude toward making the decisions of first instance courts binding. U.S. courts are not so diffident. To the contrary, most U.S. judicial decisions are never subject to appellate review because they can only be reviewed after the first instance court has entered a ‘final judgment,’ and most cases are settled before that happens. Not only may no new matter or arguments be raised against the judgment of the first instance court, but the appellate court may not second-guess the initial decision even when the materials on which it is based are equally available to the court of appeals.

In such a system, there is a natural constraint on the number of appeals because they are extraordinary rather than normal, and reversal is very difficult to justify. Many European systems seem to offer a much-enhanced incentive to seek appellate review. (It should be noted, however, that the American rule that ordinarily the winning litigant must pay its own lawyer may encourage some appeals as compared

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82 _Brown v Allen_, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).
83 See Cassese (2015).
84 Damaška (1986), pp. 178–180.
85 Idem, p. 145.
86 Van Rhee (2005), p. 6.
87 For background on this discussion of American standards of review see Marcus (2014), pp. 117–121.
with a more conventional loser pays system in place elsewhere.) So one move that might constrain the caseload pressures on Supreme Courts in other systems might be strengthening the binding effect of first instance decisions.

But this remedy might be unpalatable outside the United States because European systems have a fundamentally different attitude toward populating their court systems. In Europe, it seems that junior (and therefore first instance) judges are new initiates fresh from their legal education and committed to a career in the judicial bureaucracy. Advancement in that judicial apparatus is then largely or entirely controlled by higher-level judges. In such a system, the idea that first instance decisions should be final may seem inherently wrong. Better to have them regularly and intensely reviewed by more experienced appellate judges.

The U.S. system is dramatically different in ways that bear on appellate (and thus Supreme Court) caseload. The American institution of jury trial emphasizes the commitment to finality. By constitutional command, the ultimate decision in the case is committed to an ad hoc group of lay participants. It is true that they operate under ‘instructions’ from the judge about the legal principles they should apply to decide the case. But unless the evidence is so overwhelming in favor of one side or the other, the judge may do no more than ‘instruct.’ There is a narrow opportunity for the first instance judge to direct a new trial before a different jury when the judge is convinced that the jury’s decision was a ‘ miscarriage of justice’ in light of the weight of the evidence. But the decision whether to grant a new trial is within the discretion of the first instance judge; an appellate court may not review it unless the decision is so obviously wrong that the trial judge can be faulted for abusing his or her discretion.

In criminal cases, the constraints on appellate review are potentially even more limiting. After a trial has commenced, there can be no appellate review of a not guilty decision, whether rendered by a judge or a jury. The Double Jeopardy Clause of the Constitution ensures that such a decision is final. And no judge can enter a judgment of conviction against a defendant who has invoked the right to a jury trial no matter how strong the evidence.

So even though one may, as Professor Jolowicz did (see Sect. 2 above), regard the American system as more akin to cassation than full-fledged appeal, it is cassation with very significant limitations. And those limitations carry over to other issues. Juries must base their decisions on evidence presented at the trial, and the United States accordingly has fairly elaborate rules about what is proper or ‘admissible’ evidence. Technically, appellate courts may review rulings on the admissibility of

88See Fed. R. Civ. P. 50(a), permitting the judge to enter ‘judgment of a matter of law’ against a party only on finding that ‘a reasonable jury would not have a legally sufficient evidentiary basis to find for the party.’

89For a general discussion of the judge’s power to grant a new trial on the ground that the verdict was against the great weight of the evidence see Wright et al. (2012), § 2806. As a leading case said, a judge’s grant of a new trial ‘effects a denigration of the jury system’ and may ‘usurp the function of the jury as the trier of facts.’ Lind v Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir. 1960).

90See, e.g., the Federal Rules of Evidence.
evidence, but those rulings are normally reviewed only for an ‘abuse of discretion.’ A completely wrong interpretation of a rule of evidence is a ground for reversal, but so long as the trial judge evinced a correct understanding of the pertinent evidence rule the decision about admissibility can be reversed only if very clearly—almost always aggressively—wrong.

And this deference carries beyond jury trial. If the case is tried before the judge, the judge’s findings are subject to revision on appeal only if ‘clearly erroneous,’ a limitation that applies even if the findings are based entirely on documentary evidence.91

In sum, the American attitude toward appellate ‘intrusion’ into the first instance handling of cases inherently curtails appellate caseload. Of course, that limitation has not entirely prevented what the United States regards as a serious caseload increase for the federal courts of appeals (see Sect. 5.6, para 1 above). But it does underscore the potential reduction in caseload pressures that result from absolving the appellate courts of the most vigorous cassation requirements. It even more surely guards against the caseload burdens that would result from adopting the more vigorous attitude that appellate courts should routinely start from scratch and decide for themselves whether the right party won, including consideration of additional evidence and arguments not presented to the first instance court.

Besides jury trial, the American willingness to permit first instance decisions to stand without withering appellate scrutiny is also a result of other features of the American legal system. U.S. judges are appointed to trial courts only after they have decades of experience as practicing lawyers, often more experience than the appellate judges who review their decisions. The discretion the procedure and evidence rules afford trial court judges relies on this experience. Moreover, many substantive legal standards rely on a ‘reasonable person’ standard or take account of multiple factors that must be balanced, standards that are peculiarly suited to resolution by on-the-spot deciders (judge or jury) familiar with the entire fabric of a case.

Such an orientation may be incompatible with a vision of the judiciary as engaged in relatively routinized implementation of relatively precise legal standards adopted by the legislature. But this legal culture has a good deal to do with the eventual adoption in the United States of the certiorari system that enables the Supreme Court to limit itself to a manageable number of cases each year; the more one is willing to entrust decisions to lower court judges, the more one can look calmly at a Supreme Court that does not aggressively ride herd on those lower courts.

### 6.3 Ancillary Responsibilities

Caseload may not be the only load a Supreme Court must bear. As the discussion of ‘advisory opinions’ above suggested, courts may be asked to undertake tasks beyond

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91Fed. R. Civ. P. 52(a)(6).
deciding cases. Indeed, in some nations the constitutional court reviews proposed legislation before it goes into effect.

The U.S. Supreme Court does not have significant responsibilities of this nature, so its caseload is almost its only official burden. At least one exception should be noted. Since the 1930s, the Supreme Court has been responsible for developing uniform rules of practice and procedure for the American federal courts. But it has not undertaken this task itself. Instead, it has delegated the task to a set of committees that laboriously develop rule proposals that are subject to final review by the court. Some have deplored the distance between the court and the actual nuts and bolts of rulemaking, but the result has unquestionably been that this ancillary responsibility does not weigh heavily on the justices.

Beyond that, the Chief Justice has considerable administrative powers. The Chief Justice chairs a body called the Judicial Conference that sets policy for the federal court system. He selects the judges and others who serve on rules committees and other important bodies, and also plays a prominent role in the operation of the Administrative Office of the U.S. Courts, the national bureaucracy that facilitates and guides the federal courts. Though these are considerable additional responsibilities, there is no indication that any Chief Justice has regarded them as imposing a heavy burden. To the contrary, the principal reaction has been that too much power is concentrated in one person.

6.4 Receptiveness to Transplants

As noted at the beginning, the U.S. Supreme Court has been around a long time and has evolved a great deal from its eighteenth-century origins. Several stages in that evolution—particularly the ‘court-packing’ effort of the 1930s—have involved considerable political controversy. Making further changes is therefore subject to considerable political constraints. Unlike other national courts, its decisions are not subject to review by any supranational tribunal (see Sect. 6.2 above).

Partly as a consequence, the U.S. Supreme Court is probably not receptive to transplants of the sort that might address caseload concerns. For one thing, the American attitude toward the proper role of appellate courts is dependent on both constitutional constraints and long-standing judicial tradition. But beyond that, there is a sometimes fierce resistance in the United States to accepting legal doctrines
from abroad. For example, between 1799 and 1810 the legislatures of three states passed statutes forbidding their courts from citing cases from English courts.97 Much more recently, members of the U.S. Congress have considered directing by legislation that the U.S. Supreme Court could not cite any foreign law or decision when interpreting the U.S. Constitution.98 (Of course, that legislation itself might be of dubious constitutionality; the court could well consider itself free from congressional meddling with its sources when it is called upon to determine what should be consulted to assist in interpreting the Constitution.)

So the prospects for transplanting non-American legal practices into U.S. judicial systems are not rosy. With regard to Supreme Court caseload, more significantly for present purposes, it seems that there is no urgent reason to consider such transplants. Although other Supreme Courts may labor under backbreaking caseload pressures, that surely is not true of the US Supreme Court, for it has instead experienced in the last generation a ‘shrinking docket.’99 Even were it receptive to borrowing from other systems, then, it would not likely be inclined to do so.

7 Conclusion

Frankly, caseload pressures do not look like the most significant problems for Supreme Courts around the globe right now. Political meddling seems a greater threat. In 2016, the Polish government tried to ‘pack more sympathetic judges on the nation’s highest court and blunt its ability to overturn new laws,’100 and it has continued to apply pressure to that court. The year before, in Venezuela, the outgoing majority in the National Assembly approved an additional 13 judges for the Supreme Court,101 and The Economist forecast that, ‘In the battle that now looms with parliament, the Supreme Court may become the regime’s main weapon.’102 By 2016, the court had blocked four legislators from taking their seats.103 In Argentina, as a transition to the new government occurred in 2016, ‘[a] decision to temporarily appoint Supreme Court judges by decree, bypassing Congress during its summer recess, was criticized as an overreach of executive power.’104 Even the Chief Justice

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97Greenhouse (2012), p. 83.
98See, e.g., Sepp (2006) and Delahunty and Yoo (2005).
99See Lazarus (2008), p. 107.
100Lyman (2016). In June 2016, the European Commission issued a formal opinion stating that the Polish government had failed to uphold the Rule of Law by ‘efforts to blunt the powers of the constitutional court’ (Bilefsky 2016, p. A4).
101Torres and Neuman (2015).
102The Economist (2016a), p. 29.
103San Francisco Chronicle (2016).
104Gilbert (2015), p. A8.
of the U.S. Supreme Court has worried publicly that political disputes are damaging public perceptions of the Court’s fairness.\textsuperscript{105}

Despite that concern, it is still true that this court seems happy-go-lucky. And it is clear that caseload pressures are not the most important challenges after all. The American court’s membership has recently been near an all-time high in terms of age,\textsuperscript{106} and the justices nonetheless do not seem overwhelmed by their caseload. It’s a good life.

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\textsuperscript{105}See Barnes (2016), reporting on a speech by Chief Justice John Roberts that said that ‘partisan extremism is damaging the public’s perception of the role of the Supreme Court.’

\textsuperscript{106}See Bump (2016).
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