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**Precedent Bound?**

We’ve stopped hearing about “justices in the mold of Scalia and Thomas” — and that could be good.

By Nelson Lund & Craig S. Lerner

Does anyone remember that President George W. Bush said he would appoint justices like Antonin Scalia and Clarence Thomas, known for their devotion to the text and original meaning of the Constitution? John Roberts and Samuel Alito were instead presented to the nation as models of respect for judicial precedent. All sides have agreed to quietly substitute this model of conservatism for the one on which Bush campaigned. Comically, liberals now demand that the status quo be preserved, while conservatives fall silent about correcting the violence they claim liberal justices have done to the Constitution.

Whatever the unspoken motives of today’s political actors, much can be said for the new consensus, and on originalist grounds at that. In the *Federalist Papers*, Alexander Hamilton predicted that Supreme Court Justices would be just what today’s politicians say they want: scholastic types, immersed in the tedium of mind-numbing precedents, and thereby rendered cautious and profoundly boring.
In short, our justices were to be classic specimens of the common-law judges familiar to Hamilton’s audience, and Roberts and Alito are expected to act like throwbacks to that golden age.

Were such throwbacks to become the norm, the resulting change would dwarf anything Scalia and Thomas could hope to accomplish by overturning a few of the wilder expressions of liberal exuberance. Even before the Warren Court made judicial activism a hot political issue, the discipline of traditional common law judges had largely been lost. Today, the dominant tradition on the Court is a culture of celebrity judges posturing as pundits.

Both liberals and conservative justices write popular books about legal topics, and even about their own lives. Judicial opinions are increasingly filled with such grandiosity as this: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” (Planned Parenthood v. Casey). The justices freely let us know when they like or dislike a result that the law dictates, how they would have voted if they were legislators, and where they think Congress could improve the law. And sometimes we’re even reminded that if Americans aspire to be a law-abiding people, “their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals” (ibid). Not much humility there.

Perhaps most important, constitutional law is becoming an aggregation of nine idiosyncratic theories and nine bodies of personal precedent. To a degree that would have shocked the Founders, today’s justices care more about fidelity to their own individual past pronouncements than about stability and predictability in the decisions of the Court itself. Even if Roberts and Alito sincerely admire the self-effacing virtues of old-time judges, reversing history will require assistance from outside the Court.

If Congress earnestly desires to make our Court less adventurous and more respectful of precedent, here are four modest proposals to consider:

*Take away their law clerks.* Each justice now has a personal staff of several top law-school graduates who serve for one year. These intelligent, energetic, and intensely ambitious young people are itching to do the hard work of studying precedents and writing opinions. It should be no surprise that modern justices have frequently assumed the more pleasant role of dictating big thoughts and deep feelings to the clerks, and editing the drafts they write.

Truly old-fashioned judges would study the precedents themselves, discuss the law with their colleagues instead of with
their handpicked votaries, and write their own opinions. The Supreme Court once heard hundreds of cases each year, without law clerks to help. Today’s justices should be able to manage the 70 or 80 they consent to decide each term.

**Force them to decide common-law cases.** The Supreme Court, which today has virtually total discretion to choose which cases to hear, once had little or no choice at all. Using the freedom Congress has granted them, the justices focus on the most interesting constitutional and statutory issues arising from “federal question” jurisdiction. Missing are the kind of common-law contract and tort cases that come under “diversity” jurisdiction — that is, disputes involving issues of state law between parties from different states. There are plenty of diversity cases in the lower federal courts, but the Supreme Court almost never agrees to hear one.

We propose to leave the justices free to decide how many cases to hear, and which ones. But Congress should require them to hear at least one diversity case for every federal question case they accept for review. Still free to take all the cases they like on such stimulating topics as nude dancing, flag burning, and abortion, they should have energy left to decide an equal number of cases dealing with such matters as the common law of negligence and breach of contract.

**Bring back circuit riding.** Through the late nineteenth century, Congress required Supreme Court justices to serve part of their time on lower federal courts, “riding circuit” around the country. Restoring this practice would expose the justices to the problems created by muddled Supreme Court decisions, and it would give them something healthier to do in the summer than hobnob with cosmopolites in Salzburg.

**Eliminate signed opinions.** Standard practice now is for judicial opinions to be signed by the justice who wrote the opinion (or hired the clerk who wrote it). Occasionally, the justices revert to an older practice of issuing opinions *per curiam*, or “by the court.” Truly unpretentious judicial servants should have no need to put their personal stamp on the law, and the practice of doing so has contributed to a lot of muddiness in the Court’s work. We propose that Congress require that all Supreme Court opinions, including concurrences and dissents, be issued anonymously. If the justices could be shamed into complying in good faith, we would see fewer self-indulgent separate opinions, less flamboyant majority opinions, and more reason for future justices to treat the resulting precedents respectfully.

Are reforms like these likely to be adopted? Not if the latest paeans to precedent and judicial modesty are mere political posturing. But if that’s all it is, our newest justices might as well deliver what the President promised: conservatism of the modern kind, as represented by Thomas and Scalia.
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