# The Supreme Court Should Become Boring

By **Alexander Klein** (October 11, 2018, 6:02 PM EDT)

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Since 2010, the U.S. Supreme Court has delved into some the most contentious issues in American politics — from upholding gay marriage and the Affordable Care Act to striking down campaign contribution limits and a portion of the Voting Rights Act of 1965. On these subjects, the Supreme Court splits along party lines. It recognized a constitutional right to gay marriage by a vote of 5-4. It sustained Obamacare by a vote of 5-4 (and then 6-3). It decided Citizens United 5-4. And it modified the Voting Rights Act 5-4. Without knowing the legal questions being decided, most observers could predict how nearly every justice decided nearly every one of these cases. This is not a helpful scenario for an institution whose legitimacy is based upon the premise that laws ascend over politics rather than politics ascending over laws.

The Brett Kavanaugh hearings accelerated these concerns. But approaching the abyss, the Supreme Court has one workable solution to its legitimacy crisis: It can slow down. For the near term, the justices should decline review — or deny "certiorari"— of the nation's most polarizing political questions unless and until the legal questions themselves become time-sensitive.

The first reason why the court should exercise this restraint is because the proposed goal is already within reach. Contrary to what the headlines suggest, highly politicized cases are the exception rather than the rule. Observers can predict how most justices would view a case about gun rights or abortion, for example, but ask those same people to guess the outcome of a case concerning civil procedure or patent law. The truth is, the justices agree more than they disagree. In the most recent term, they split 5-4 less than half as often as they decided cases unanimously. And unanimity has proven a more frequent phenomenon than 5-4 splits for every iteration of the court for more than 30 years.

Second, docket restraint will serve the interests of both the left and right sides of the political spectrum. This point is straightforward for Democrats. Delaying action on major social questions will mean at least short-term preservation of the status quo. This is not ideal, but better than the alternative results that liberals are likely to receive with Justice Kavanaugh replacing Justice Anthony Kennedy.

Yet docket restraint will also serve the interests of those who want Kavanaugh to usher in a dominance of conservative ideology. While the left and right both want their views to prevail, they also want legal victories to endure. This is possible when the country has faith in its judicial institutions. But if the court emerges as a mini-Congress, subject to whichever way the political winds are blowing, then Americans will lose faith that Supreme Court doctrines are lasting. Perhaps the court will one day overturn Roe v. Wade or deem affirmative action a violation of the equal protection clause. But on the heels of the most fraught confirmation process in a generation, if the court sprinted toward these lightning rods while polarization still boiled, then these decisions would appear illegitimate to half the country. Moves to pack the court with more than nine justices would become a genuine

possibility.

Third, docket restraint is flexible enough to welcome politically charged cases when time is of the essence. Bush v. Gore is a good example. If the next presidential election were to hinge on a complex question of law, the case would of course shoulder immense political pressure. But because the legal question itself would be time-sensitive, as it would in a variety of other imaginable scenarios, restraint would give way to finality. In these types of cases, the court will have no choice but to appear political. But the court will preserve more slack if it has otherwise proven reluctant — rather than eager — to decide highly charged political questions.

With all of this said, docket restraint carries downsides. Every litigant seeking review from the Supreme Court has real concerns with often major stakes. Denying review of their cases will have consequences for them. Sometimes, these consequences will bleed into other geographic areas, where the same types of legal questions will garner different treatment in different courts. These splits are the type of problem that having one Supreme Court can help resolve — and which a policy of docket restraint will occasionally leave percolating.

However, there is no shortage of litigants seeking review from our nation's highest court. The vast majority of their certiorari applications — typically more than 95 percent of them — get denied. These cases, too, involve real litigants with real concerns, and many of them also involve geographic legal splits that the Supreme Court nevertheless leaves intact. Welcoming more of these bland cases to the docket in lieu of fraught political questions might make the legal news less interesting. But it will aid the healing process for one of the nation's most important institutions.

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