A RESPONSE TO PROFESSORS GEORGE AND GUTHRIE, *REMAKING THE UNITED STATES SUPREME COURT IN THE COURTS' OF APPEALS IMAGE*

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"Form," according to architect Louis Sullivan, "follows function" (he was not the first to say so).[1] So what one wants from the Supreme Court governs its design. In a nutshell, if the aim is error correction resolving circuit conflicts, a fifteen-member Supreme Court sitting in panels might be a good idea,[2] but if one wants something quite different, it could be a bad one. A word first about the first two, and a further word about complaints that the Court's docket has stagnated.[3]

A bench several times the size of the current Supreme Court would not make much of a dent in the thirty thousand or so federal appeals cases decided on the merits each year. One layer of appellate review is a safeguard against error; two layers, when each bench comprises Article III judges, is superfluous. And, in truth, what appellate judges or Justices call error is often, albeit not always, the substitution of one plausible view for another.

Too much time is spent hand-wringing about circuit conflicts. Law in Maine and in Massachusetts is different, and the world goes on. Conflicting legal rulings by two circuits on an issue of federal law may in the abstract be less tolerable; but each *case* gets decided—the prime function of courts. The illusion of a single "right" answer is a good carrot for the judicial donkey, but competing positions get aired,

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1. Louis H. Sullivan, *The Tall Office Building Artistically Considered*, LIPPINCOTT'S MONTHLY MAG., Mar. 1896, at 403, 408.

2. *See* Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1447–51 (2009).

3. *Id.* at 1446–47.

and a consensus often develops without help from the Supreme Court.[4]

As for the Supreme Court's modest-sized docket, the current Court does not need as many cases to reach its goals as in the busier Warren era. An activist Supreme Court (whether on the right or the left) needs more cases because it is altering the law and telling lower courts where and how far to go. The present Supreme Court, less activist than earlier editions (despite a few bursts of inventiveness), does not need the same volume. The Court could fulfill its main task—deciding matters of great national importance—at half its current volume. Charges of stagnation are usually a way of expressing a political viewpoint.

The nationally important cases are often constitutional but not always. Determining generally how far the Employee Retirement Income Security Act preempts state law or what basic rules govern in the various employment discrimination statutes matters to the country. In the nature of things, no *panel* of the Supreme Court could properly have the last word on such matters. A large bench may be unwieldy but it performs a representative function; and constitutional courts in other countries are sometimes even larger.

Time taken by Justices from work on large issues, in order to correct routine errors or resolve tolerable circuit conflicts, would misuse the scarcest judicial of all resources—the time of Justices. That some Justices undertake public speaking or other engagements outside the Court may to some suggest underemployment. Given the nature of the issues that arise in big cases—issues calling for statesmanship as much as technical legal skill—a greater exposure of Justices to the country is perhaps a positive virtue.

An admixture of less important cases is fine; Justices are expected to be judges as well as statesmen. But deciding the big cases has become their *raison d'être*, and for that task a Court of nine Justices is probably about right: large enough to provide representative views but small enough (though barely so) to produce a coherent majority position most of the time. Scholarly assessments are always welcome; but the present Court's existing structure suits the role it has assumed.

4. *See, e.g.*, Clockedile v. N.H. Dep't of Corr., 245 F.3d 1, 6 (1st Cir. 2001).