Discretion, Division, and the Supreme Court's Docket

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Jonathan R. Nash & Michael G. Collins, *The Certificate of Division and the Early Supreme Court*, 94 **S. Cal. L. Rev.** __ (forthcoming 2021), available at SSRN.

The Constitution does not resolve foundational questions about the purpose and mechanics of the Supreme Court's appellate jurisdiction. Should the nation's highest court focus on resolving conflicts between lower courts, correcting errors, or opining on especially salient issues? And who should decide which appeals the Supreme Court will hear: the Justices by exercising discretion, Congress by enacting mandatory criteria, or lower courts by certifying issues for review? The Constitution's flexibility regarding these questions creates leeway for experimentation.

A forthcoming article by Jonathan Nash and Michael Collins explores a fascinating jurisdictional experiment from the Court's formative years. The experiment addressed tie votes arising from the quirky composition of circuit courts. Modern circuit courts sit in panels of three and primarily hear appeals. But for several decades circuit courts sat in panels of two and exercised both appellate and original jurisdiction. Panels typically consisted of one district judge and one Supreme Court Justice. The prospect of disagreement between the judge and Justice required a tiebreaking procedure.

Between 1802 and 1864, the tiebreaker for questions of law within the circuit court's original jurisdiction was the "certificate of division." The panel would certify the divisive legal question to the Supreme Court, which would provide a definitive answer. Certificates of division accounted for roughly 8% of the Supreme Court's appellate docket during the relevant era. This percentage may seem low, but it was only slightly lower than the percentage of cases arriving from state courts by writ of error. Yet scholars have studied review of state court decisions by writ of error far more extensively than review of federal decisions by certificate of division.

Nash and Collins employ several methods to explore the certificate of division. They are historians excavating a largely forgotten past, empiricists analyzing original data, and creative federal courts scholars considering the modern implications of past practices. Each of these roles generates insightful conclusions and grist for future scholarship.

Two historical findings are especially intriguing. First, the article illuminates an underexplored dimension of the Court's famous—and perhaps infamous—*Swift v. Tyson* decision. *Swift* authorized federal courts exercising diversity jurisdiction to apply their own interpretation of general law, even when that interpretation conflicted with otherwise controlling state court decisions. One of the dubious rationales for this rule was that federal court opinions applying general law would promote national uniformity by persuading state courts to adopt similar positions. The Court's optimism about national uniformity raises a puzzling question: why did the Court think that it could harmonize general law decisions from multiple circuits given limits on its appellate jurisdiction over diversity cases? Part of the answer is that the certificate of division allowed the Court to adjudicate diversity cases over which it otherwise would have lacked jurisdiction. *Swift* itself arrived at the Court through a certificate of division. Accordingly, the certificate of division may have helped catalyze the pre-*Erie* approach to vertical choice of law. Future scholarship could quantify this influence by using the Nash and Collins dataset to analyze the role of general law in certified civil cases.

A second historical finding illustrates how discretion can insinuate itself into procedures that do not seem discretionary. The statute authorizing certification ostensibly created mandatory jurisdiction based on the objective fact of division. However, Justices riding circuit sometimes strategically disagreed with the district judge in order to manufacture Supreme Court jurisdiction. Justices acknowledged this contrived disagreement in opinions and private correspondence. For example, Chief Justice Marshall once lamented in a letter that because he was sitting alone as a trial judge, "I have not the privilege of dividing the court" and thereby elevating a "question of great consequence" to the Supreme Court. A certification procedure that in theory eschewed discretion by the Court thus in practice incentivized discretion by individual Justices. Rather than division producing jurisdiction, a desire for jurisdiction produced division.

Nash and Collins build on their historical observations about contrived division to reach empirical conclusions about how individual Justices exercised their discretion. Careful statistical analysis enables Nash and Collins to estimate whether a given Justice generated more or fewer certifications than one would expect from an average Justice. The data implies that some Justices embraced division, while others avoided it. Many factors could have influenced these voting patterns. But the article suggests that some Justices might have been especially inclined to shape the Supreme Court's appellate docket through strategic voting in the circuit court. The certificate of division may therefore interest scholars who study strategic voting by Justices in other contexts, such as when Justices shape the Court's appellate docket through the certiorari process.

The article concludes by discussing how the certificate of division can inform modern scholarship about federal jurisdiction. Nash and Collins propose potentially fruitful inquiries into the utility of interlocutory appeals, the balance between mandatory and discretionary review, and the optimal approach to breaking ties.

A testament to the article's depth is that scholars can adopt it as a case study while addressing topics beyond those that Nash and Collins discuss. For example, certificates of division were designed to grant appellate jurisdiction over discrete aspects of a circuit court case rather than original jurisdiction over the entire case. To police the distinction between appellate and original jurisdiction, the Court developed the "whole case" doctrine. This doctrine considered whether a certificate formally purporting to trigger an appeal functionally shifted an original action from the circuit court to the Supreme Court. The modern and oft-misunderstood *Rooker–Feldman* doctrine requires an analogous effort to disentangle form and function. Under *Rooker–Feldman*, a losing party in a state court action cannot appeal the state court's order to a federal district court under the guise of an original action. The doctrine considers whether a complaint formally purporting to trigger an original action functionally shifts the path of appeal. Thus both the whole case and *Rooker–Feldman*doctrines delineate between appeals and original actions to determine whether one is masquerading as the other. Perhaps the Court's struggle with this problem in the nineteenth century can inform the similar struggle that persists in the twenty-first century.

Nash and Collins have made a welcome contribution to several literatures. Their analysis of certificates of division is intrinsically interesting and concretely helpful for scholars grappling with vexing aspects of federal jurisdiction.

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