Redesigning the Cert Process

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Daniel Epps & William Ortman, *The Lottery Docket*, 116 **Mich. L. Rev.** (forthcoming 2018), available at SSRN.

Every year thousands of parties ask the Supreme Court to hear their cases. Every year the Court disappoints the vast majority of them, selecting only about one percent of cert petitions. And every year scholars decry the Court's choices—arguing that the Justices have taken too few cases and not even the most important ones at that. One can imagine the Justices turning to each other at conference and lamenting, "Everyone's a critic!" But have we been raising the right sorts of criticisms? *The Lottery Docket*, by Daniel Epps and William Ortman, suggests not so much.

In this thoughtful piece, Epps and Ortman challenge both convention and conventional wisdom around case selection at the Court. The Justices fail to take the right cases not because (or not just because) they incorrectly identify which ones are important, as so much scholarship has stated, but precisely because they miss ones that are unimportant. By selecting and then deciding cases based on such factors as whether a given issue has resulted in a circuit split and attracted sufficient attention from amici, the Court has a distorted view of the legal landscape and thus how its decisions might affect parties and the courts below. Epps and Ortman's elegant solution to the problem is to supplement the Court's current docket with some randomly drawn cases from the courts of appeals—a "lottery docket."

Epps and Ortman begin with a brief history of the Supreme Court's agenda, gently reminding readers that for the first hundred years of its life, the Court had no control over the cases it would hear. Beginning in the late 1800s, Congress afforded the Court some discretionary review (largely in response to the Court's substantial caseload). Congress continued to expand the Court's discretionary review over the next century, culminating in the 1988 Judiciary Act, which essentially did away with the Court's mandatory appellate jurisdiction. As a result of these various acts, the Justices are now left to their own devices to select which appeals to review out of the 7000-8000 cases that seek cert every year.

Epps and Ortman next turn to how the Justices go about selecting cases to review. There are numerous factors that go into deciding what to decide, as H.W. Perry's seminal work on the subject demonstrated. Epps and Ortman focus on the factor that seems predominant these days: whether the question raised by the appeal has caused a circuit split. Having this drive the selection process creates a couple critical problems. The first is informational—the Justices end up with a distorted sense of how the law functions "on the ground" and therefore how its decisions might affect litigants and the lower courts deciding their cases. The second implicates accountability—lower-court judges know when deciding run-of-the-mill cases that they will almost certainly be immune from review (and may even take steps when writing their opinions to ensure such immunity).

Having convincingly identified the problems with the current cert process, Epps and Ortman propose a neat solution to it: the creation of a lottery docket. This would supplement the certiorari docket by giving the Court appellate jurisdiction over a small number of cases—possibly twenty to forty—selected at random from the final decisions of the circuit courts. *The Lottery Docket* then devotes some space to how the proposal could be implemented. Questions include whether all cases from the courts of appeals would be automatically entered into the pool or if there would be an opt-in mechanism, and whether

some appeals would be weighted or all would receive an equal chance at selection. Whatever the particulars, the thrust is the same—the Court would be exposed to a much wider swath of cases than it currently sees, thus helping to mitigate the informational and accountability problems identified above.

Stepping back, *The Lottery Docket* is a terrific new piece of scholarship. It persuasively identifies a set of problems afflicting the Court—and the federal judiciary as a whole—and offers a thoughtful response to those pathologies. One can raise questions about the proposal—for example, will having the Court take even forty standard cases really improve accountability given that thousands of appeals will still retain the last word (a point that appellate judges will know)? But part of what makes *The Lottery Docket* a pleasure to engage with is that Epps and Ortman have anticipated most of these questions and have fair responses at the ready.

Stepping back once more, it is exciting to see scholarship in the growing field of judicial administration—what we might want to call the "new legal process." In the legal academy, much of our scholarship and teaching centers around particular substantive areas of law—constitutional law, civil procedure, administrative law, and the like. Yet it remains critical to study our legal institutions and the actors who populate them. As legal scholars, we all may be critics in our own way, but it is important to apply some of our critical thinking to understanding, and improving, our court system. *The Lottery Docket* is a great example of exciting new scholarship in this field and we should look forward to what its authors, and other students of the new legal process school, will offer in the future.

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