Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court

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Introduction: From Obligation to Discretion

Americans today are accustomed to a Supreme Court that has nearly unfettered power over its appellate jurisdiction to choose which cases it hears and which it discards. Indeed, in 2004, the Supreme Court granted a mere 85 certiorari petitions out of the 8,593 before it.[1] This is a far cry from the early days of the Republic when Chief Justice John Marshall unabashedly declared that the Supreme Court had

> no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.[2]

Undeniably, the jurisdictional framework of Marshall's time was considerably different from that of the present day. The law of jurisdiction under which he and his Brethren labored consisted entirely of one piece of legislation: the Judiciary Act of 1789.[3] Besides the limited direction provided in the Constitution itself, for the first century of the Court's existence the 1789 Act defined its entire jurisdictional universe.

By today's standards, Marshall's perceived mandate is striking. Today, the Supreme Court does exactly the opposite of his observation: Given complete discretion over its docket, far more often than not the Court declines to exercise jurisdiction and thus avoids the overwhelming majority of questions put before it. Despite this clear turnaround from the early Republic's jurisprudence, today's Justices routinely extol what they view as the virtues of

the Court's modern discretion versus the earlier system. Justice Arthur Goldberg believed that "the power to decide cases presupposes the power to determine what cases will be decided," as well as "the more subtle power to decide when, how, and under what circumstances an issue should or should not be accepted for review."[4] Justice Thurgood Marshall reasoned that "deciding not to decide is . . . among the most important things done by the Supreme Court."[5]

That is precisely what the Supreme Court increasingly has done throughout the past eighty years: In the vast majority of cases, it has simply decided not to decide. Since 1925, the proportion of certiorari petitions that the Court has granted out of the number put before it steadily has decreased.[6] This represents a profound turnaround from the days when Chief Justice Marshall could state so emphatically that to decline the exercise of jurisdiction would be tantamount to constitutional treason. After all, under his reasoning, the highest court in the land would have become a den of traitors!

Today, of course, this is hyperbole. How, though, did this sentiment transform from being included in a unanimous opinion two hundred years ago to seeming so bizarre today? The Supreme Court's gradual jurisdictional about-face over the past two centuries is owed largely to the efforts of Chief Justice William Howard Taft, who drafted and lobbied for the instrument that made the Court what it is today: the Judiciary Act of 1925.[7] Taft had had his eye on sweeping Supreme Court reform ever since he began his public life. Upon becoming Chief Justice in 1921, he quickly set about on a campaign to implement those desires, putting forth his arguments for Supreme Court jurisdictional reform, making promises, and declaring purposes. Succinctly put, he convinced Congress to agree "to give the Justices of the Supreme Court what [he] had aggressively sought from the moment he took his seat on the Supreme Court: a far-ranging power to pick and choose which cases to decide."[8] Shortly after the passage of the 1925 Act, Taft remarked, "Easily one-half of certiorari petitions now presented have no justification at all,"[9] reinforcing his belief that the Act met his underlying purpose of making the Supreme Court's caseload "clearer and simpler."[10] Although this post-1925 version of the Court is the only one that any living attorney has known, it was an extreme departure from the prior version of the Court.

This article explores the history of the Supreme Court's appellate jurisdiction, beginning with the Supreme Court's original congressional mandate in the new Republic under the 1789 Act. It introduces the jurisprudence of Chief Justice Taft and explores the reasons and purposes underlying his desire for radical reform and that ultimately lead to the 1925 Act. Having grasped the necessary perspective and context, this work reviews the 1925 Act itself and how precisely it altered previous congressional mandates of Supreme Court jurisdiction so as to give the Court the discretionary appellate jurisdiction that it enjoys today.

Part I: The Road to the 1925 Act

A. Supreme Court Jurisdiction in the Early Republic

The earliest provisions for the Supreme Court's appellate jurisdiction were located, of course, in the Constitution itself. The Constitution grants the Supreme Court appellate jurisdiction in "all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[11] Although the Supreme Court determined early on that Congress lacked power under the Constitution to add to the Court's original jurisdiction,[12] Section 2 of Article III commanded that Congress make regulations regarding what the Supreme Court's appellate jurisdiction precisely should be.

When William Howard Taft became Chief Justice in 1921, his first priority was giving the Supreme Court better control of its docket. On instigating passage of the Judiciary Act of 1925, he claimed that "[e]asily one-half of certiorari petitions now presented [to the Court] have no justification at all."

Congress did so barely one year after the Constitution was ratified on June 21, 1788.[13] The first task undertaken by the first Senate in the first Congress was to take up its constitutional mandate and create the third branch of government, a federal judiciary.[14] After five months of work, Congress passed the Judiciary Act and it was signed into law by President Washington.[15] This piece of legislation set forth the Supreme Court's jurisdiction that Chief Justice Marshall knew and from which, when asserting the Court's power to review state judgments in criminal law matters, he could declare that a failure to accept jurisdiction amounted to treason. It was the 1789 Act that gave Marshall and his Brethren that jurisdiction.

The 1789 Act—which was drafted by Oliver Ellsworth, a Framer of the Constitution itself[16]—granted the Supreme Court "appellate jurisdiction from the circuit courts and courts of the several states,"[19] as long as a state decision construed the validity, constitutionality, and/or the construction of "a treaty or statute of, or an authority exercised under the United States . . . a statute of, or an authority exercised under any State . . . any clause of the Constitution . . . or commission held under the United States."[18] On its face, this clearly resembles modern federal-question jurisdiction. The key difference between today's Supreme Court and the Court under the 1789 Act, however, is in *how* the Supreme Court could take up its appellate jurisdiction, be it from a state court or federal circuit court. In either case, the appeal was to be "upon a writ of error."[19]

The writ of error, although a common-law writ, was not used widely before the 1789

Act, either in Britain or in Colonial America.[20] It limited the Court—said to be reviewing "in error"—to questions of law in the appeals brought before it, rather than questions of fact.[21] Under the 1789 Act, this procedure allowed a decision below to "be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error,"[22] so long as the party seeking to proceed in error provided "an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by"[23] the applicable judge who had entered the decision below.

It is worth noting that the 1789 Act also empowered the Supreme Court, along with the lower federal courts, "to issue writs of *scire facias,* habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[24] This, of course, included the writ of certiorari, although it was not the certiorari that every American attorney knows today.[25] In Britain, "the writ of certiorari had been used by the King's Bench to assert jurisdictional control over other Courts,"[26] so necessarily the 1789 Act did not allow for such a thing. Rather, the American common law at the time provided certiorari "as an auxiliary process only, to supply imperfections in the record of a case already before it."[27] Thus, certiorari in 1789 and thereafter plainly "did not provide the Supreme Court with discretionary control over its jurisdiction."[28]

The 1789 Act sought to limit the Supreme Court's appellate jurisdiction in error to "final" decisions from the highest court in a state or a circuit court, and sought to limit the Court to issues of law and not of fact.[29] The Act even went so far as to declare that "there shall be no reversal . . . on such writ of error . . . for any error in fact"[30] in either the federal circuits or the state courts.[31] Shortly after the 1789 Act's passage, however, enterprising attorneys began to find loopholes in its many complicated procedural technicalities, especially to defeat the requirement of finality below and the prohibition on hearing issues of fact. Because the Act did not set down any firm procedures for obtaining writs, but rather simply gave the Supreme Court the power to grant them, "[t]he door was left ajar to Supreme Court reexamination of facts"[32] by the Act's wide-ranging writ provision. Both prohibition[33] and mandamus[34] were used to that effect.

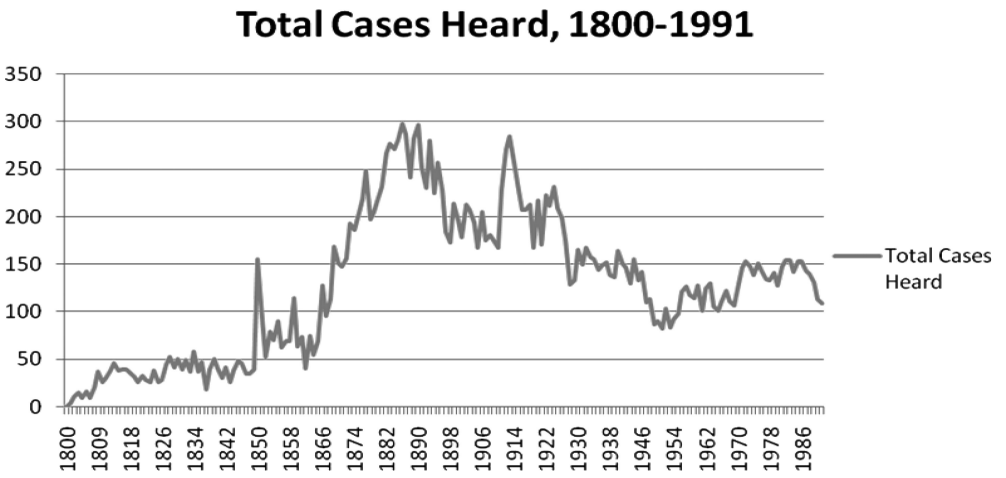
B. Limited Reform Between the Acts of 1789 and 1925

The judiciary set up by the 1789 Act essentially remained untouched by Congress throughout most of the nineteenth century. The Supreme Court's caseload, too, remained fairly static.[35] After the Civil War, however, the number of cases the Court was obligated to decide under the 1789 Act's system "grew dramatically," because of "the array of legal issues multiplied with the growing scale and complexity of federal law in American life."[36]

This resulted both in "a growing number of cases decided each term" and "a growing backlog of delayed cases." For example,

> In 1860, the Court had 310 cases on its docket and decided 91; in 1870, the Court had 636 cases on its docket and decided 280; in 1880, the Court had 1,202 cases on its docket and decided 365; and in 1886, the Court had 1,396 cases on its docket and decided 451. By 1888, the Court was more than three years behind in its work, and when the 1890 Term opened, the Court had "reached the absurd total of 1800" cases on its appellate docket—and was obliged to decide them all.[37]

Congress's initial responses to this problem included increasing the number of Justices from seven to nine and lengthening the Court's annual Term.[38] The Justices themselves responded by limiting the duration of oral argument in most cases to two hours per side[39] and, for the first time, hiring law clerks.[40] Still,



Source: *Extrapolated from* **Congressional Quarterly**

the Court's "incredible" number of decisions remained the "indispensable norm."[41]

Accordingly, in January of 1890, Chief Justice Fuller asked the Senate Judiciary Committee to relieve the Court's growing workload.[42] The Committee sent the Justices several proposals, including "requiring virtually all cases decided in the district court to be appealed to the circuit courts before any review by the Supreme Court,"[43] "authorizing the Supreme Court to sit in panels of three to hear and decide cases that did not present constitutional questions,"[44] increasing the number of Justices to eleven or eighteen,[45] reorganizing the circuit courts,[46] and altering "the allocation of appellate jurisdiction between the circuit courts of appeals and the Supreme Court."[47]

None of Congress's initial proposals mentioned certiorari.[48] When the Senate Judiciary Committee asked the Justices for their views on these proposals, the only one that received unanimous approval was that certain cases were

> not to be brought to the Supreme Court . . . unless the Court of Appeal, or two judges thereof, certify that the question involved is of such novelty, difficulty or importance as to require a final decision by the Supreme Court. But any question shall be so certified, upon which there has been a different decision in another circuit.[49]

Note that this proposal called for "certification," not certiorari. In compromising between Senate and House versions of Supreme Court reform, however, the idea of using writs of certiorari arose in parallel to the above certification scheme.[50]

Thus was produced the Judiciary Act of 1891,[51] which bore the Supreme Court's first discretionary appellate jurisdiction, but only over a large class of decisions from the federal circuits.[52] The 1891 Act limited the Supreme Court to appellate jurisdiction over the circuit courts only if the circuit court certified a question of law to the Supreme Court or if the Supreme Court granted a writ of certiorari to review the circuit court's judgment.[53] The Court still had mandatory appellate jurisdiction through writ of error in many cases, including any that challenged the constitutionality of a statute or in which a capital sentence had been imposed.[54] Jurisdiction over state courts remained the same as it had always been under the 1789 Act.[55]

Under the 1891 Act, then, the Supreme Court was granted discretionary jurisdiction over "the most numerous class of cases," namely "those which depended on the diverse

In 1890, Chief Justice Melville W. Fuller asked the Senate Judiciary Committee to relieve the Court's growing workload. Congress responded by passing legislation giving the Court discretionary review in patent cases, copyright cases, federal trademark cases, admiralty cases, revenue cases, criminal cases, and most bankruptcy cases. Fourteen other categories, however, were exempted from the Justices' discretion, however.

citizenship of the parties as the basis of federal jurisdiction."[56] The discretionary review also included "[p]atent cases, copyright cases, Federal trade-mark cases, admiralty cases, revenue cases, criminal cases, and most bankruptcy cases."[57] In addition to capital cases, however, the 1891 Act still contained fourteen "classes of cases in which a second review as a matter of right could be had in the Supreme Court after prior appeal to the circuit courts," including:

> Civil suits – (1) Brought by the United States, or by any officer thereof authorized by law to sue. (2) Between citizens of the same State claiming lands under grants from different states. (3) Where more than $3,000 is involved and the suit arises under the Constitution or laws or treaties of the United States. (4) Seizures on land or waters not within admiralty or maritime jurisdiction. (5) Cases arising under the postal laws. (6) Suits and proceedings under any law regulating commerce, except such as may be covered in special statutes already mentioned. (7) Civil suits and proceedings for enforcement of penalties and forfeitures and incurred under any law of the United States. (8) Suits for damages by officers and persons for injury done him in protection or collection of United States revenue or to enforce right of citizens to vote. (9) Suits for damages by citizens injured in their Federal constitutional rights. (10) Suits against consuls and vice consuls. (11) Suits under immigration and contract labor laws. (12) Private suits under the antitrust act. (13) Suits by Indians or part blood Indians for allotment under any law or treaty. (14) Suits by tenant in common or joint tenant for partition of land in which the United States is also tenant in common or joint tenant.[58]

Additionally, even after the 1891 Act, the Court "was obligated to review a final judgment rendered by a state court system that denied a federal claim or defense, but had no jurisdiction to review a state court judgment that upheld a federal claim or defense."[59] In 1914, the latter class of cases was opened to discretionary certiorari review.[60] Nonetheless, because of the fourteen mandatory categories and the mandatory review of state court judgments denying a federal claim or defense,[61] by 1916 the Court's workload again had begun to skyrocket.

The class of cases in which a state court had denied a federal claim or defense comprised by far the majority of the Supreme Court's writ of error docket.[62] Of these, the most common were Federal Employers' Liability Act (FELA) cases.[63] In response to this growing writ of error docket, Congress passed another jurisdictional act in 1916 that authorized the Court to decline to review these cases.[64] That statute was fairly ambiguous: The Court's jurisdiction remained by writ of error "(1) where the state court decided against the validity of a treaty, federal statute, or authority exercise under the United States; and (2) where the state court rejected a federal challenge to the validity of a state statute or authority exercised under a state."[65] The 1916 Act provided, however, that where "any right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against" that claim, it was placed under the certiorari jurisdiction created by the 1891 Act.[66]

Whatever Congress might have intended in the 1916 Act, the Court understood it to eliminate from its writ of error jurisdiction both FELA cases and those cases that raised "constitutional objections to state executive action."[67] Accordingly, when reviewing the decision of a state court, only challenges to state statutes under the Constitution and/or federal law remained within the Court's writ of error jurisdiction, although it is doubtful if Congress had this in mind.[68] Thus, with the passage of the 1916 Act, the Court's writ of error jurisdiction consisted only of the fourteen classes of federal cases noted above, as well as state court decisions denying a challenge to the validity of a state statute under the Constitution or federal law. The 1916 Act had the effect of alleviating the spike in the total number of cases that the Court heard. Despite the efforts of 1891 and 1916, however, by 1921 approximately seventy-five percent of the Court's cases still fell within its mandatory jurisdiction.[69]

Part II: The 1925 Act

A. Constructing the 1925 Act

This was the Supreme Court as William Howard Taft found it when, in 1921, President Harding appointed him Chief Justice of the United States,[70] a position to which he had aspired since he first became an attorney thirty-five years earlier.[71]

Taft's career was astonishing. Graduating second in his Yale undergraduate class of 1878, he had returned to his native Ohio and attended the Cincinnati Law School.[72] After beginning his legal career as an assistant prosecutor in Cincinnati,[73] he soon soared through the ranks to become an Ohio Superior Court judge in 1887 at the age of twenty-nine,[74] the youngest-ever Solicitor General of the United States in 1890 at the age of thirty-two,[75] a judge on the United States Court of Appeals for the Sixth Circuit in 1892,[76] dean of the Cincinnati Law School in 1896,[77] president of the First American Commission on the Philippine Islands in 1900,[78] Governor General of the Philippines in 1901,[79] and Secretary of War for President Theodore Roosevelt in 1904.[80] In 1908, with Roosevelt's backing, Taft was elected the twenty-seventh President of the United States.[81]

It was then, during his first presidential campaign, that Taft first publicly expressed an interest in reform of the federal judiciary. In June of 1908, while election season was in full

swing, he wrote a short article titled "The Law of the Country" in the *North American Review*, which was essentially "a point-by-point critique of the judicial system."[82] He argued that "our failure to secure expedition and thoroughness in the enforcement of public and private rights in our Courts was the case in which we had fallen farthest short of the ideal conditions in the whole of our Government."[83] Principally, he believed that "the number of allowable appeals, overelaborate codes of procedure, expense of litigation, and dilatory judges" justified reform.[84] Shortly before the November election, Taft flat-out called for Supreme Court "jurisdictional limitations, either in amount in controversy or in the subject matter of suits," or perhaps by "discretionary writ of certiorari."[85]

As President, Taft continued to press for "a change of judicial procedure, with a view to reducing its expense to private litigants in civil cases and facilitating the dispatch of business and final decisions in both civil and criminal cases."[86] Eventually, he publicly began expressing a desire that Congress confine the Supreme Court's jurisdiction "almost wholly to statutory and constitutional questions."[87] In the first decade of the twentieth century, these statements about finality and jurisdictional limitation must have seemed anathema. After all, the basic three-tiered structure of the federal judiciary had not changed since its inception in the 1789 Act. Indeed, during Taft's one-term administration, Congress passed no legislation dealing with the Court's jurisdiction, despite his repeated urging otherwise.

After finishing third in the 1912 presidential election to Woodrow Wilson and Progressive party candidate Theodore Roosevelt,[88] Taft happily accepted an appointment as professor of law and legal history at Yale Law School, where he remained for eight years, continuing to ponder the future of the federal judiciary.[89] In a 1914 commencement address to the Cincinnati Law School, he remarked,

> The Supreme Court has great difficulty in keeping up with its docket. The most important function of the court is the construction and application of the Constitution of the United States. It has other valuable duties to perform in the construction of statutes and in the shaping and declaration of general law, but if its docket is to increase with the growth of the country, it will be swamped with its burden, the work which it does will, because of haste, not be of the high quality that it ought to have, and the litigants of the court will suffer injustice because of delay.[90]

He believed that the only solution was that Congress limit the mandatory jurisdiction of the Court solely to "questions of constitutional construction" and give "an opportunity to litigants in all other cases to apply for a writ of certiorari," so that the Court "may exercise absolute and arbitrary discretion with respect to all business but constitutional business."

During Taft's time at Yale, two major events dramatically increased the number of cases before federal courts: World War I and the dual passage of the Eighteenth Amendment and the Volstead Act,[91] which implemented nationwide Prohibition.[92] "Litigation arising from prohibition alone accounted for an eight percent rise in the number of [federal] cases."[93] As well, World War I brought "civil and criminal cases involving espionage, civil liberties, wartime business contracts," and the like.[94] Still, Chief Justice Edward White, whom Taft had appointed in 1910, was unwilling to press for congressional action, fearing that further limiting the Supreme Court's mandatory jurisdiction could "break down the separation of the political branches of government from the judiciary."[95] White even expressed a great distaste for the jurisdictional limitations in the 1916 Act.[96]

Taft, however, felt otherwise. Congress confirmed Taft as Chief Justice by unanimous voice vote the same day it received his nomination from President Harding.[97] As soon

as Taft's first Court Term as Chief Justice began in October of 1921, he called together a committee composed of Justices William Day, Willis Van Devanter, and James McReynolds to draft a bill for reform of the Supreme Court's jurisdiction.[98] Taft and the other Justices worked on the bill through February of 1922.[99] In the meantime, Taft published two articles in the *ABA Journal* expressing why he thought jurisdictional change was necessary. He blamed the "congestion" in the judiciary on "the gradual enlargement of the jurisdiction of the courts under the enactment by Congress of laws which are the exercise of its heretofore dormant powers . . . greatly added to by the adoption of the 18th Amendment and the Volstead law."[100] Other examples of this exercise of dormant powers included "the Interstate Commerce Law . . . the Anti Trust Law, the Railroad Safety Appliance Law, the Adamson Law, the Federal Trade Commission Law, the Clayton Act, the Federal Employers' Liability Law, the Pure Food Law, the Narcotic Law, and the White Slave Law."[101]

As a result, Taft believed that the jurisdiction of the Supreme Court under the 1891 Act and 1916 Act had "really become almost a trap to catch the unwary."[102] Hinting that "[s]ome of us are working on a proposed bill to simplify the statement of the jurisdiction of the Supreme Court," he proposed that there be enacted

> some method . . . by which the cases brought before [the] Court shall be reduced in number, and yet the Court may retain full jurisdiction to pronounce the last word on every important issue under the Constitution and the statutes of the United States and on all important questions of general law with respect to which there is a lack of uniformity in the intermediate Federal courts of appeal.[103]

Taft believed that "where there are intermediate courts of appeal," the Supreme Court "is not a tribunal constituted to secure, as its ultimate end, justice to the immediate parties," because the parties "have had all that they have a right to claim when they have had two courts in which to have adjudicated their controversy."[104]

Chief Justice Marshall, though, also had a three-tiered judiciary. Marshall's unanimous opinion that a Supreme Court that declines available jurisdiction commits treason on the Constitution ran precisely at odds with Taft's opposite assertion. It also ran counter to Taft's earlier statement that mandatory jurisdiction should remain for questions of constitutional construction. Taft clearly realized the radical nature of what he was suggesting; indeed, no previous, serious legislative proposal had taken the same position.[105] Accordingly, he promised that a completely discretionary Court would give certiorari petitions "the most careful consideration," declining certiorari only for those cases that either were "frivolous" or involved principles that were already "well settled."[106] He believed that such a system was necessary because of the "critical" situation of litigation from the war and from Prohibition, which threatened to "throw" the Supreme Court "hopelessly behind."[107]

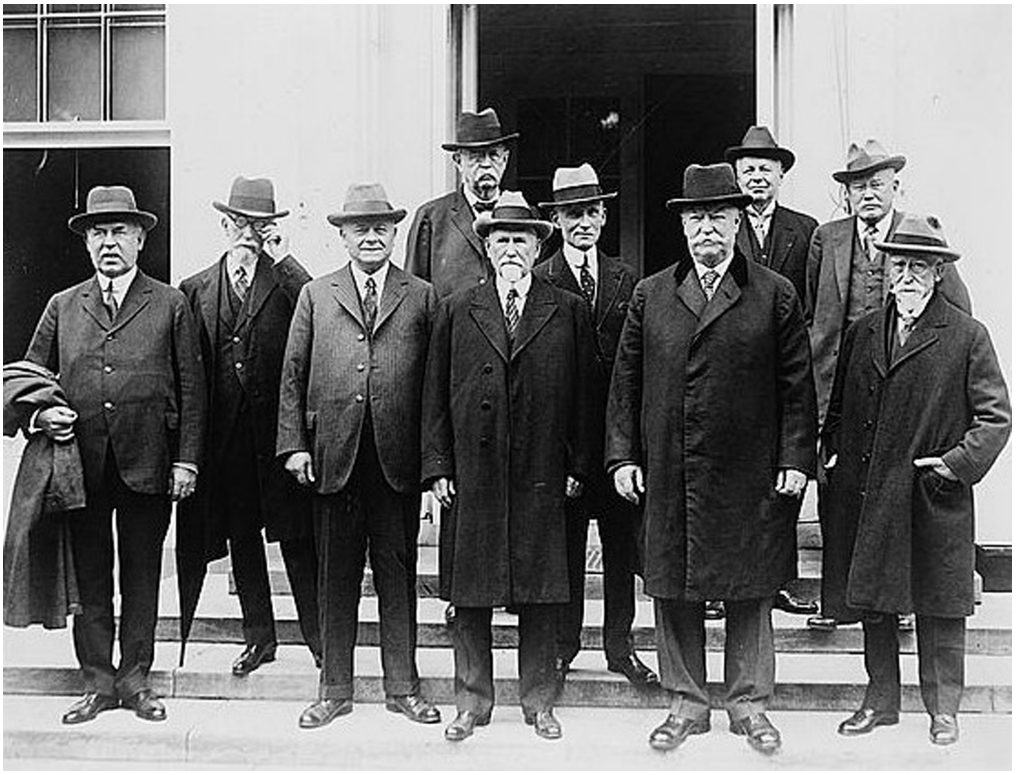
With this in mind, Taft appeared before the House Judiciary Committee in March of 1922 to present the bill that he and his committee had written.[108] There, he argued for the expansion of certiorari, explaining how he thought the Justices would work under a discretionary docket.[109] He theorized that the Supreme Court should not exist "to preserve the rights of the litigants," but rather that its purposes were "expounding and stabilizing principles of law" and preserving "uniformity of decision among the intermediate courts of appeal."[110] He promised that "whenever a petition for certiorari presents a question on which one circuit court of appeals differs from another," the Justices would "let the case come into our court as a matter of course."[111]

Taft did, of course, address other potential ideas for reform that his committee had considered and rejected (although they do not appear anywhere in any of this writings), including

Taft (pictured in 1921) promised Congress that a completely discretionary Court would give certiorari petitions "the most careful consideration," declining certiorari only for those cases that either were "frivolous" or involved principles that were already "well settled."

"dividing the court into parts, imposing high costs on litigants, or relying on amount-in controversy requirements," as well as carefully defining "the character of cases which shall come before the court."[112] Instead, he proposed "letting the Supreme Court decide what was important and what was unimportant."[113] Lastly, he explained why he abandoned his 1914 idea of continuing writ of error jurisdiction in constitutional cases: "there could be just as many frivolous cases on constitutional grounds as on other grounds."

With the cat out of Taft's bag, he began lobbying for his bill. He acknowledged that it was radical, but premised his support on the idea that changes in the country had made it necessary. Taft maintained that although "[i]n the old days when business was light in all the federal courts, the appeals and writs of error that were taken to the Supreme Court were not sufficiently numerous to occupy the full time of the Supreme Court," Congress's passage of new laws had created congestion, almost to the level of that in 1891.[114] He insisted that his bill merely followed the lead of the 1891 and 1916 Acts.[115] Dismissing the objection that the bill gave the Court "too wide discretionary power," he promised that every certiorari petition would be "carefully determined by each member of the Court" and "discussed and voted on."[116] In so doing, he contended that "the use of the writ of certiorari seems to be the only practical method" of preserving the rights of the public and other litigants, due to the "frivolous and unnecessary consumption of the time of the Supreme Court," as delay by



When Taft (center) called on President Calvin Coolidge at the White House in 1929, he brought along U.S. circuit court judges (pictured), who were in town for their annual conference. Coolidge had supported passage of the Judiciary Act of 1925, but many circuit judges had opposed it.

means of appeal imposes "an unfair burden on the poor litigant."[117]

As with any other proposal for radical reform, especially one designed to increase the power of a governmental body, many contemporaries expressed an unfavorable view of the 1925 Act. Shortly after Taft made his first appearance before the House Judiciary Committee to announce the bill he and his colleagues had drafted, District Judge Benjamin I. Salinger of Iowa came to Washington and "testified passionately" before the Committee against eliminating any mandatory review of state court judgments.[118] Like many others, he disagreed with Taft's assertion that the Supreme Court's role was not "to secure, as its ultimate end, justice to the immediate parties," stating instead that "the great function of the Supreme Court is to protect rights given by treaty, the Constitution, or other Federal law" and that Congress need not deal with preventing frivolous cases from coming before the Supreme Court because "a frivolous case can be summarily dismissed."[119]

Initially, the American Bar Association (ABA) also was uncomfortable with the 1925 Act, suggesting as an alternative that the best way to deal with an increased Supreme Court workload was to increase the number of Justices to twelve, with six constituting a quorum and the concurrence of five necessary to render a decision.[120] It only dropped this objection when Taft informed the ABA committee studying the bill that all the Justices were opposed to increasing the number of the Court, likening such a proposal to making the Supreme Court into a "town meeting."

Several senators also initially criticized the bill, deprecating the 1916 Act as being bad precedent and reasoning that certiorari gave

the Court "unrestrained discretion."[121] Senator Thomas Walsh predicted that an entirely discretionary Court "would not be inclined to hear intricate cases involving law with which the judges were not already familiar."[122] He found "it difficult to yield to the idea that the Supreme Court of the United States ought to have the right in every case to say whether [its] jurisdiction should be appealed to or not."[123]

Justice Louis Brandeis also disapproved of the 1925 Act, refusing to lend it his support at any time during its drafting or consideration.[124] His experience since the 1916 Act had "raised in [his] mind grave doubt whether the simple expedient of expanding [the Court's] discretionary jurisdiction is the most effective or the safest method of securing the needed relief."[125] Other common complaints were that the bill made "the circuit courts of appeals courts of last resort on constitutional questions"[126] and that it empowered judges "who may be looking for the least work possible and for longer periods of leisure" to "deny humble citizens' right to appeal."[127]

With Taft's promises of speed, low cost, and careful determination, however, the ABA eventually pledged its support for the bill in the fall of 1923.[128] After considerable further lobbying by Taft and the ABA, as well as by Justices Van Devanter, McReynolds, and George Sutherland, the Senate Judiciary Committee approved the bill in October of 1924.[129] During the intervening 1924 presidential election, President Calvin Coolidge voiced his ardent support for the bill, even mentioning as much in his subsequent 1925 State of the Union address.[130] The House Judiciary Committee recommended the bill to the full House in January of 1925.[131] On February 2, 1925, the House passed the bill by voice vote "almost without discussion."[132] One week later, the Senate passed the bill with only one vote in opposition.[133] President Coolidge signed it into law on February 13[134] and it went into effect one month later,[135] completing William Howard Taft's nearly twenty-year crusade to reform the judiciary.

B. Substance, Interpretation, and Subsequent Reform of the 1925 Act

The portions of the 1925 Act dealing with the jurisdiction of the Supreme Court began by repealing and superseding the relevant parts of the 1789, 1891, and 1916 Acts.[136] Under the 1925 Act, the Supreme Court had jurisdiction to review decisions of the United States courts of appeals only by either discretionary writ of certiorari or certified questions.[137] Certiorari jurisdiction also extended to decisions of the highest state court in which a decision could be had that drew into question the validity of a state statute under the Constitution, statutes, or treaties of the United States.[138] Previously, a grant of certiorari brought the entire decision challenged into the Court's review.[139] After the 1925 Act, however, the Court was empowered to pick and choose the federal questions below that it wished to accept.[140]

The 1925 Act did continue writ of error jurisdiction, albeit very limitedly. Under the 1925 Act, writ of error jurisdiction extended to decisions of the courts of appeals denying the validity of a state statute under the Constitution, treaty, or statutes of the United States.[141] It also covered both interlocutory and final orders of the United States district courts: (1) in antitrust and interstate commerce law cases; (2) in criminal cases in which the decision was adverse to the United States, jeopardy had not attached, and the defendant had not been acquitted; (3) in suits to enjoin the enforcement of a state statute administrative action, as long as the case had been heard by a special three-judge panel containing a circuit judge; and (4) in suits to enjoin orders of the Interstate Commerce Commission, also only when heard by the special three-judge panel.[142] The reason for leaving these very limited cases in was that they "raise[d] issues transcending in importance the immediate interests of litigants and involve[d] those national concerns which are in the keeping of the Supreme Court."[143]

Although these lists of discretionary and mandatory subject matters in the 1925 Act

seemed to overlap in several places, it compensated for these inconsistencies by declaring that any lower case could be reviewed by certiorari, even if a writ of error could be taken instead.[144] Taft promised that if a litigant brought a writ of error when he properly should have petitioned for a writ of certiorari, the Court would consider the writ of error as a certiorari petition.[145] He also gave his assurances that any ambiguities would be cleared up when the Supreme Court circulated its Revised Rules of Court to meet the 1925 Act.[146]

Over the next three years, the Court gradually revised its rules.[147] In 1928, it promulgated a new rule, Rule 12, which required all litigants covered in one of the narrow writ of error categories to file a jurisdictional statement within thirty days of docketing their appeal.[148] The Court immediately proceeded to use the rule "to cover matters not merely of jurisdiction in the conventional sense, that is, the appellate authority of the Court," but rather "counsel were obliged to demonstrate that the federal question involved was substantial and (at least) persuade the Court that the record presents an issue that is not frivolous and is not settled by prior decisions."[149] In 1929, the first year Rule 12 was in effect, the Court used it to dismiss thirty-six appeals that otherwise would have been included in the 1925 Act's writ of error jurisdiction.[150] Very quickly, jurisdictional statements and certiorari petitions became practically the same thing, and the prevailing opinion among Supreme Court practitioners was that as all cases became subject to discretionary review, there was no real distinction between a writ of certiorari and a writ of error.[151]

The other avenue in the 1925 Act for placing an issue in front of the Supreme Court was a certified question from one of the United States Courts of Appeals. Taft had lauded this provision when testifying before Congress.[152] Soon, however, the lower courts began to sense the Supreme Court's "hostility" to certified questions.[153] Although in the first decade after passage of the 1925 Act, the circuits issued seventy-two certificates, in the second decade they only issued twenty.[154] Observers noted that the Court "apparently felt that a broad use of certification would frustrate the Court's proper functioning as a policy-determining body by greatly restricting the time available for the discretionary side of its docket."[155]

The 1925 Act remained untouched by Congress for over sixty years, until, on June 27, 1988, Congress passed the Supreme Court Case Selections Act.[156] The 1988 Act was designed to eliminate "virtually all of the remaining elements of the mandatory jurisdiction left in the wake of" the 1925 Act.[157] Under the 1988 Act, which still governs today,[158] the Court retains mandatory appellate jurisdiction only from a three-judge panel of a court of appeals on the issue of a state's federal legislative apportionment.[159]

The role of the 1988 Act in affecting the Supreme Court, however, was no more than "miniscule."[160] Rather than a piece of sweeping legislation, it simply was an amendment of the 1925 Act to meet the Court's existing practice.[161] After all, "the Justices had long . . . employed efficiency devices, such as summary affirmances and dismissals,"[162] to transform the mandatory into the discretionary, as noted above. By the 1980s, the Court simply "was not giving plenary consideration to appeals that did not warrant certiorari review."[163]

Effectively, then, through some innovative Supreme Court procedures and interpretations, the 1925 Act accomplished what Taft had desired upon becoming Chief Justice. It allowed the Supreme Court to decide by unlimited discretionary certiorari review which cases it wished to take and which it did not wish to take, the other theoretical avenues for placing a case before the Court notwithstanding.

Conclusion

The Framers of the Republic would not have recognized the Supreme Court's jurisdiction in the form that it has taken since 1925.

During more than a century under the 1789 Act, massive changes in both federal law and the makeup of the United States during the Industrial Revolution created a crisis, which reached several zeniths between 1891 and 1925. Anticipating and responding to that crisis, William Howard Taft convinced Congress and the American legal establishment to effect the Judiciary Act of 1925—the most sweeping alteration of the Supreme Court's role ever passed in American history. Although the Court today may not be known for its unanimity, the Justices are unanimous in their praise for the virtues of the discretionary court. They owe those virtues to the struggle that Taft and his colleagues endured to give the Court its defining characteristic in the modern era: the power to decide not to decide.

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ENDNOTES

[1]Kenneth W. Starr, "The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft," 90 MINN. L. REV. 1363, 1369 (May 2006).
[2]*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).
[3]An Act to establish the Judicial Courts of the United States, 1 Stat. 73 [hereinafter 1789 Act].
[4]William J. Brennan, "The National Court of Appeals: Another Dissent," 40 *U. Chi. L. Rev.* 473, 484 (1973).
[5]Thurgood Marshall, "Remarks at the Second Circuit Judicial Conference" (Sept. 8, 1978), in **Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminisences** 177 (Mark V. Tushnet ed., 2001).
[6]**Congressional Quarterly, The Supreme Court Compendium: Data, Decisions, and Developments** 66–69 (Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, Thomas G. Walker eds., 1994).
[7]Act of February 13, 1925, Pub. L. No. 68–415, 43 Stat. 936 [hereinafter 1925 Act]; *see infra* pp. 12–14.
[8]Edward A. Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill," 100 *Colum. L. Rev.* 1643, 1644 (Nov. 2000).
[9]William Howard Taft, "The Jurisdiction of the Supreme Court Under the Act of February 13, 1925," 35 *Yale L.J.* 1, 3 (1925).
[10]Hartnett, *supra* note 12.
[11]U.S. Const. art. III § 2.
[12]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
[13]Wilfred J. Ritz, **Rewriting the History of the Judiciary Act of 1789** 13 (Wythe Holt, L.H. LaRue eds., 1989).
[14]*Id*.
[15]*Id.* at 14.
[16]Hartnett, *supra* note 12, at 1665.
[17]1789 Act, *supra* note 3, at § 13.
[18]*Id.* at § 25.
[19]*Id.* at §§ 22 (from circuit courts), 25 (from state courts).
[20]Ritz, *supra* note 20, at 7.
[21]*Id*.
[22]1789 Act, *supra* note 3, at § 25.
[23]*Id.* at § 22.
[24]*Id.* at § 14.
[25]Hartnett, *supra* note 12, at 1650.
[26]*Id*.
[27]*American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.,* 148 U.S. 372, 380 (1893); *see also* Ritz, *supra* note 20, at 39–40 (discussing the use of certiorari in colonial America and the early Republic).
[28]Hartnett, *supra* note 12, at 1650.
[29]1789 Act, *supra* note 3, at §§ 21–22.
[30]*Id.* at §22.
[31]*Id.* at §25.
[32]Ritz, *supra* note 20, at 70.
[33]*See United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795).
[34]*See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).
[35]*See* **Congressional Quarterly**, *supra* note 8, at 66–69.
[36]Margaret Meriwether Cordray and Richard Cordray, "The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection," 82 *Wash. U. L. Q.* 389, 392 (Summer 2004).
[37]Hartnett, *supra* note 12, at 1650–51 (quoting Felix Frankfurter & James M. Landis, **The Business of the Supreme Court: A Study in the Federal Judicial System** 86 (1928)).
[38]Margaret Meriwether Cordray and Richard Cordray, "The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking," 36 *Ariz. St. L.J.* 183, 191 (Spring 2004).
[39]*Id.* at 193.
[40]*Id.* at 192.
[41]*Id*.
[42]Hartnett, *supra* note 12*,* at 1651.
[43]*Id.* at 1652.
[44]*Id.* at 1653–54. Interestingly, the Justices voiced their disapproval at this proposal, reasoning that it likely would be unconstitutional. *Id.* at 1654.
[45]*Id.* at 1654.
[46]*Id.* at 1654.

[47]*Id.* at 1655.
[48]*Id.* at 1652.
[49]*Id.* at 1651–52.
[50]*Id.* at 1656.
[51]Act of March 3, 1891, 26 Stat. 826 [hereinafter 1891 Act].
[52]Taft, *supra* note 13, at 1–2.
[53]1891 Act, *supra* note 59, at § 5.
[54]*Id*.
[55]*Id*.
[56]Taft, *supra* note 13, at 2.
[57]*Id*.
[58]Felix Frankfurter & James M. Landis, "The Business of the Supreme Court," 40 *Harv. L. Rev.* 834, 840 (Apr. 1927).
[59]Hartnett, *supra* note 12, at 1657.
[60]*Id*.
[61]*Id*.
[62]Hartnett, *supra* note 12, at 1658.
[63]*Id.* at 1658–59.
[64]Act of Sept. 6, 1916, Pub. L. No. 258, 39 Stat. 726 [hereinafter 1916 Act]. The 1916 Act was drafted by Justices James McReynolds and William Day, as well as William Howard Taft. Hartnett, *supra* note 12, at 1664. At the time, Taft was the Kent Professor of Law and Legal History at Yale Law School. Henry F. Pringle, **The Life and Times of William Howard Taft** 856 (2d ed. 1964).
[65]Hartnett, *supra* note 12, at 1658.
[66]1916 Act, *supra* note 73, at § 2.
[67]Hartnett, *supra* note 12, at 1658 (*citing Jett Bros. Distilling Co. v. City of Carrollton*, 252 U.S. 1, 6 (1920) (holding that "a mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of a writ of error")).
[68]*Id.* at 1660.
[69]Stephen C. Halpern and Kenneth N. Vines, "Institutional Disunity: The Judges' Bill and the Role of the U.S. Supreme Court," 30 *W. Pol. Q.* 471, 473 (1977).
[70]*Id*.
[71]Pringle, *supra* note 73, at 102.
[72]William H. Rehnquist, "Lecture: Remarks of the Chief Justice: My Life in the Law Series," 52 *Duke L.J.* 787, 798 (Feb. 2003). Today, Cincinnati Law School is the University of Cincinnati College of Law.
[73]Pringle, *supra* note 73, at 47.
[74]*Id.* at 96.
[75]*Id.* at 108.
[76]*Id.* at 122. Congress had created the Sixth Circuit in the 1891 Act. *Id.* at 121.
[77]*Id.* at 125.
[78]Pringle, *supra* note 73, at 159–160. Later, this would commonly be referred to as the "Taft Philippine Commission." *Id.* at 195 n.42.
[79]*Id.* at 199.
[80]Rehnquist, *supra* note 82, at 798.
[81]*Id.*
[82]David H. Burton, **Taft, Holmes, and the 1920s Court: An Appraisal** 116 (1998).
[83]*Id*.
[84]*Id*.
[85]Hartnett, *supra* note 12, at 1661 n.74.
[86]William Howard Taft, "First Annual Message (1909)," *available at* http://www.presidency.ucsb.edu/sou.php (last visited Jan. 1, 2008).
[87]Burton, *supra* note 92, at 716.
[88]Pringle, *supra* note 73, at 840.
[89]*Id.* at 864.
[90]William Howard Taft, "The Attacks on the Courts and Legal Procedure," 5 *Ky. L. J.* 3, 18 (Nov. 1916).
[91]National Prohibition Act, ch. 85, 41 Stat. 305.
[92]Burton, *supra* note 92, at 117.
[93]*Id*.
[94]*Id*.
[95]*Id*.
[96]Hartnett, *supra* note 12, at 1663.
[97]Rehnquist, *supra* note 82, at 798.
[98]Hartnett, *supra* note 12, at 1662.
[99]*Id.* at 1663.
[100]William Howard Taft, "Adequate Machinery for Judicial Business," 7 A.B.A. J. 453, 453–454 (Sept. 1921).
[101]William Howard Taft, "Three Needed Steps of Progress," 8 *A.B.A. J.* 34 (Jan. 1922).
[102]*Id.* at 35.
[103]*Id*.
[104]*Id*.
[105]Hartnett, *supra* note 12, at 1666.
[106]Taft, *supra* note 111, at 36.
[107]*Id*.
[108]Hartnett, *supra* note 12, at 1663.
[109]*Id.* at 1664.
[110]*Id.* at 1664–65.
[111]*Id.* at 1665.
[112]*Id*.
[113]*Id.* at 1665.
[114]William Howard Taft, "Possible and Needed Reforms in the Administration of Justice in Federal Courts," 8 *A.B.A. J.* 601, 602 (Sept. 1922).
[115]*Id*.
[116]*Id.* at 603.
[117]*Id*.
[118]Hartnett, *supra* note 12, at 1667.
[119]*Id*.
[120]*Id.* at 1668.
[121]*Id.* at 1671.
[122]*Id*.
[123]Hartnett, *supra* note 12, at 1694–95.
[124]*Id.* at 1675.
[125]*Id.* at 1675.
[126]*Id.* at 1694.
[127]*Id.* at 1701.

[128]*Id.* at 1674.
[129]*Id.* at 1681.
[130]*Id.* at 1682.
[131]*Id.* at 1691.
[132]*Id.* at 1695.
[133]*Id.* at 1701.
[134]*Id.* at 1704.
[135]Frankfurter & Landis, *supra* note 66, at 859 n.91.
[136]1925 Act, *supra* note 9, at § 1.
[137]*Id.* All territorial courts and the United States Court of Claims were also included in the same certiorari and certification rubric as the circuits of the Court of Appeals. *Id*.
[138]*Id.* This is substantially the same language as remains today in 28 U.S.C. §1257.
[139]Taft, *supra* note 13, at 5.
[140]*Id*.
[141]1925 Act, *supra* note 9, at § 1.
[142]*Id.* at §§ 1, 3.
[143]Frankfurter and Landis, *supra* note 66, at 842.
[144]1925 Act, *supra* note 9, at § 1.
[145]Hartnett, *supra* note 12, at 1693.
[146]Frankfurter and Landis, *supra* note 66, at 866 n.119.
[147]Hartnett, *supra* note 12, at 1708.
[148]*Id*.
[149]*Id*.
[150]*Id*.
[151]*Id.* at 1709.
[152]*Id.* at 1710.
[153]*Id*.
[154]*Id.* at 1710–11.
[155]*Id.* at 1711.
[156]Pub. L. No. 100–352, 102 Stat. 662 [hereinafter 1988 Act].
[157]Starr, *supra* note 1, at 1369.
[158]*Id.* at 1369–70.
[159]Rosemary Krimbel, "Note: Rehearing *Sua Sponte* in the U.S. Supreme Court: A Procedure for Judicial Policy-making," 65 *Chi.-Kent. L. Rev.* 919, 927 n.50 (1989). *See* 28 U.S.C. § 1253, 2284.
[160]Starr, *supra* note 1, at 1370.
[161]Hartnett, *supra* note 12, at 1709–1710.
[162]Starr, *supra* note 1, at 1370.
[163]Margaret Meriwether Cordray & Richard Cordray, "The Supreme Court's Plenary Docket," 58 *Wash. & Lee L. Rev*. 737, 758 (2001).