The Washington Supreme Court's Shrinking Docket

By: Howard Goodfriend

"Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

Colleagues, especially those suffering losses in the Court of Appeals or Superior Court, frequently ask if it's harder than it used to be to get a case heard in the Washington Supreme Court. The short answer is not really—the percentage of accepted cases is low, but remains on par with its historic norm.[1] But the perception that the Court is hearing fewer cases is accurate. Our state Supreme Court simply does not decide as many cases as it used to.

In 1999, the Washington Supreme Court issued 131 decisions on the merits.[2] The number of written merits decisions. decreased to 98 in 2016. In 2020, it issued just 69 decisions, 70 in 2021, and 68 in 2022.[3] So what accounts for the reduced output? And what does it mean for practitioners and for the development of our common law? I'm not capable of answering these questions, particularly in this short article. But that won't stop me from opining, drawing on the helpful statistics published by our Administrative Office of the Courts and other groups, as well as on perceptions from decades of practice before the Court.

Cases are down across the board.

It's no secret that the judiciary's caseloads are down across the state and across the country. This is true in federal as well as state courts.[4]

There is no shortage of explanations for this trend. Most obviously, the COVID pandemic shut down Washington and federal courts in 2020. The pandemic and the

unrest following the murder of George Floyd combined to reduce criminal filings, froze evictions, and placed additional burdens on those seeking access to the courts. Across Washington state, total superior court filings decreased from 206,000 in 2019 to 145,000 in 2021.[5]

This downward trend was already underway when the pandemic hit in 2020, so other factors must also account for it. On the civil side, scholars and judges have identified the burgeoning cost of litigation, litigation reform that restricts judicial access (including the widespread use and enforcement of arbitration clauses in routine commercial and employment relationships), as well as mandatory mediation, as contributing to the decline in caseloads.[6] And on the criminal side, the Justice Department and FBI documented significant reduction in charged criminal offenses before the pandemic struck in 2020, from their historical highs in the 1990's.[7]

Fewer superior court filings mean fewer cases go to judgment, resulting in fewer appeals. But this "assembly line" theory of justice can't account entirely for the significant decrease in the state Supreme Court's output of decisions. Since the Court's docket is largely discretionary, the Court could simply accept review of a greater number of cases if it wanted to.

The shrinking appellate docket is a national phenomenon.

The Washington Supreme Court is not alone in experiencing a significant reduction in its docket. The diminished output of the U.S. Supreme Court, whose docket also is largely discretionary, has been documented and studied for decades.[8] But many of the reasons posited by U.S. Supreme Court scholars are unique to that body, such as reduction of the Court's mandatory jurisdiction by Congress, widespread use of the "cert

pool," and greater ideological differences amongst the Justices that may diminish their appetite for deciding appeals.[9]

Other state courts of last resort have experienced similar shrinking dockets.[10] Our Supreme Court's output, like those in other states, began its downward trend well before the COVID reduction in the "pipeline" of cases working their way through the court system. State court researchers have posited a number of reasons: diminishing demand for the highest state court to resolve disputes as legislation increasingly preempts the common law, the administrative state's increasing impact on all levels of modern life, and the intermediate appellate courts contribution to a large body of dispositive case law.[11] All of these factors may play a role in our Supreme Court's reduced output.

High courts in states within the Ninth Circuit must also contend with that court's penchant for certifying questions of state law at much a higher rate than its sister circuits.[12] In Washington, as elsewhere, certification of issues by the federal courts make up a larger portion of the high court's docket as the number of other cases accepted for review diminishes.[13]

What's different in Washington?

We can step away from empirical studies and theorize some idiosyncratic reasons why our Supreme Court decides fewer cases than it used to. Some of these reasons may be cultural, and others based on the Justices' evolving notions of the role of a Supreme Court Justice.

Let's start with culture: The Washington Court of Appeals has, in over its half-century of experience, developed an internal culture of collegiality that, to the external observer, may look more like homogeneity.

In contrast to the federal experience, judicial appointments to Washington's intermediate court have steered clear of ideological litmus tests, and have been largely based on intellect, competence and dedication to public service. For the past 25 years, the selection process has been in the hands of Governors Inslee, Gregoire, and Locke, each of whom has considered the ratings of the WSBA in making judicial appointments. Elections to open seats on the intermediate appellate court are low profile, sleepy affairs and challenges to sitting judges are few and far between.

Judges of the Court of Appeals selected by this process arrive on the bench with a set of shared values. Any differences in judicial philosophy get smoothed over as they interact with their colleagues and settle into the job. Dissents are relatively rare (particularly in Division One), as are decisions by one division of the Court of Appeals that take issue with a decision of a different division. It may be that the Supreme Court finds little need to resolve conflicts between divisions or to correct the interpretation of the Court's own precedent.[14] The high Court intervenes only to correct obvious errors, which are relatively rare.

The Court's traditional role in reviewing lower court decisions may also be impacted by the expanding job description of a Washington Supreme Court Justice. Over the past few decades, deciding cases has become a less significant aspect of the Court's work. The Justices promulgate court rules, supervise the practice of law, oversee the state Bar, and lead commissions on any number of issues related to the administration of justice. They have, in recent years, also reached back to correct prior decisions to correct past injustices.[15]

The Court's dedication to redress historical wrongs and to advance the cause of equal justice under the law manifests itself in each of these aspects of the Justices' work. It is a multi-pronged effort and a time-consuming one.

Does it impact the Court's traditional role as Washington's court of last resort? Perhaps so. The reduction in cases means that the Court has stepped back from advancing the development of many areas of the common law—a void that the Court of Appeals cannot fill in the definitive manner that the high court can. But many of the Justices see their efforts in the cause of equal justice as a small step to make up for 150 years when the rule of law was often a means to enhance the privilege of the few at the expense of the many, for whom the promise of equal justice under the law was unfulfilled.

So when asked whether the Court decides fewer cases these days (again, usually by someone unhappy with a lower court's decision), my answer should be yes, it's true, but it might not be a bad thing.

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[1] Even with widespread dissemination of unpublished decisions, the Court is still much more willing to grant review of a published Court of Appeals decision than an unpublished one, particularly in civil (non-criminal, nonfamily) cases. My colleague Jon Collins conducted a review of the Court's 2022 departmental rulings on petitions for review. That analysis showed that the Court took review of 22% of petitions from published civil decisions and only 2% of petitions from unpublished decisions.

[2] Supreme Court 2000 Annual Caseload Report at 17, available online at: https://www.courts.wa.gov/caseload/content/archive/supreme/Annual/2000.pdf

[3] Supreme Court 2022 Annual Caseload Report, available online at: https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=a&freq=a&tab=&fileID=tt9_strend21

[4] *See* United States Courts, Federal Judicial Caseload Statistics 2022, available at: https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022; Court Statistics Project, 2021 Caseload Highlights, Incoming State Trial Court Cases, available at: https://www.courtstatistics.org/__data/assets/pdf_file/0029/89084/CSP-Caseload-Highlights-2021.pdf

[5] *Compare* 2019 and 2020 Superior Court Annual Caseload Reports, available online at: https://www.courts.wa.gov/caseload/content/archive/superior/Annual/2021.pdf; https://www.courts.wa.gov/caseload/content/archive/superior/Annual/2019.pdf

[6] *See* Sarah Staszak, *Explanations for the Vanishing Trial in the United States,* 18 Annual Review of Law and Social Science 43 (2022); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. Empirical Legal Stud. 459 (2004).

[7] *See* John Gramlich, *What the data says (and doesn't say) about crime in the United States* (2020) at: https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/

[8] Justice Douglas famously remarked over 40 years ago, "I think the Court [today] is overstaffed and underworked . . . We were much, much busier 25 or 30 years ago than we are today. I really think that today the job does not add up to more than about four days a week." Quoted in Michael Heise, Martin T. Wells, Dawn M. Chutkow, *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 Notre Dame L. Rev. 1565, 1567 (2020).

[9] *Id.* at 1569-73.

[10] Court Statistics Project, *CSP STAT Appellate Overview* (2023) at: https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-third-row/appellate-overview

[11] *See, e.g.,* J. Lyn Entrikin, *The Death of Common Law,* 42 Harv. J.L. & Pub. Pol'y 351, 448 (2019*);* Kyle Graham, *The Diffusion of Doctrinal Innovations in Tort Law*, 99 Marq. L. Rev. 75 (2015).

[12] *See* Jason A. Cantone & Carly Giffi*n, Certified Questions of State Law: An Empirical Examination of Use in Three U.S. Courts of Appeals,* 53 U. Tol. L. Rev. 1, 44 (2021).

[13] Moreover, newer district court judges may more readily avail themselves of certification than their senior, more tenured colleagues.

[14] *See* RAP 13.4(b)(1) and (2) (authorizing the Supreme Court to review decisions of the Court of Appeals that conflict with a Supreme Court decision or that of another division of the Court of Appeals).

[15] *See. e.g., State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916), *judgment vacated and opinion repudiated by*, 197 Wn.2d 574, 486 P.3d 111 (2020) (on petition of defendant's descendants, vacating any conviction and repudiating 1915 prosecution of Yakama tribal member for fishing without a license).