Fordham Law Review

Volume 52 | Issue 1 Article 1

1983

The Supreme Court of the United States: Managing Its Caseload to Achieve Its Constitutional Purposes

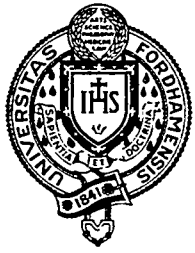
William T. Coleman

The Supreme Court of the United States: Managing Its Caseload to Achieve Its Constitutional Purposes

Cover Page Footnote

This article is adapted from the Thirteenth Annual John F. Sonnett Memorial Lecture, delivered by Mr. Coleman at Fordham University School of Law on May 9, 1983. Donald T. Bliss, also a partner at O'Melveny & Myers, contributed greatly to the preparation of this Article.

FORDHAM LAW REVIEW



1983-1984

VOLUME LII

EDITORIAL AND GENERAL OFFICES
Lincoln Center, 140 West 62nd Street, New York, N.Y. 10023

ISSN 0015-704X

Published six times a year—October, November, December, March, April, and May. Member, National Conference of Law Reviews. Printed by New Jersey Appellate Printing Co., Inc., South Plainfield, New Jersey. Second class postage paid at New York, N.Y. and at additional mailing offices. Postmaster: send address changes to Fordham Law Review, Lincoln Center, 140 West 62 Street, New York, N.Y. 10023.

SUBSCRIPTION PRICE $18.00, SINGLE ISSUE $5.00. Make checks payable to FORDHAM LAW REVIEW. Subscriptions renewed automatically unless notified to contrary.

For price of volumes and single issues prior to Volume XLVII please inquire of William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209.

Unsolicited manuscripts for publication are welcome, but will be returned only if return postage is supplied.

TABLE OF LEADING ARTICLES—TITLES

TABLE OF LEADING ARTICLES—AUTHORS

SYMPOSIUM

NOTES

PROJECT

BOOK REVIEWS

COMMENTARY

INDEX DIGEST

LEGISLATION

LETTERS OF CREDIT

TABLE OF CASES

Cases prefixed with an asterisk are the principal cases of Articles or Notes.

THE SUPREME COURT OF THE UNITED STATES: MANAGING ITS CASELOAD TO ACHIEVE ITS CONSTITUTIONAL PURPOSES

*WILLIAM T. COLEMAN, JR.**

INTRODUCTION

IN his persistent and innovative efforts to improve the administration of justice, Chief Justice Burger has invited public debate about the effect of the Supreme Court's rising caseload on the quality of judicial decision-making.[1] Because Justice Holmes once reminded us that justice and high judicial performance require the company of the bench and the bar acting in concert,[2] commentary from a practicing member of the bar seems appropriate. Thus, in the spirit of the Chief Justice's invitation, this Article will (1) discuss the Supreme Court's excessive workload, (2) survey solutions that have been proposed, primarily by other Justices, and (3) suggest an alternative that may be more consistent with the Court's historic traditions and basic constitutional purposes. This issue transcends the workload question itself; it goes to the essence of the Supreme Court's responsibilities during the next two hundred years of our constitutional democracy. The solution chosen will affect the quality of the Court's contribution to efficient but fair justice and to economic growth with enhanced productivity. Indeed, it will determine how successfully the Court can fulfill the

---

* A.B. *summa cum laude* University of Pennsylvania, 1941; LL.B. *magna cum laude* Harvard Law School, 1946 as of 1943; law clerk to Judge Herbert F. Goodrich, United States Court of Appeals for the Third Circuit, May 1947 to August 1948; law clerk to Justice Felix Frankfurter, 1948 Term; Secretary of Transportation in President Ford's Administration (1975-1977); senior partner of O'Melveny & Meyers of Washington, D.C., Los Angeles, California and Paris, France; member of the American College of Trial Lawyers; Chairman, NAACP Legal and Educational Defense Fund, Inc.; Trustee, Brookings Institution, The Rand Corporation, The Carnegie Institution of Washington, The Urban Institute; and Trustee and Vice President, Philadelphia Museum of Art. This article is adapted from the Thirteenth Annual John F. Sonnett Memorial Lecture, delivered by Mr. Coleman at the Fordham University School of Law on May 9, 1983. Donald T. Bliss, also a partner of O'Melveny & Meyers, contributed greatly to the preparation of this Article.

1. Chief Justice Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A.J. 442, 446 (1983) [hereinafter cited as *Annual Report*].

2. Address by Justice Holmes, Suffolk Bar Association Dinner (February 5, 1885), *reprinted in* M. Lerner, The Mind and Faith of Justice Holmes 29-31 (1943); *see* P. Freund, On Understanding the Supreme Court 78-79 (1950).

constitutional goal of maximizing, as Justice O'Connor said in *Kolender v. Lawson*, "individual freedoms within a framework of ordered liberty."[3]

The Court's excessive workload presents an immediate and serious problem which, if not resolved, will erode the quality of decision-making of the nation's highest tribunal. More importantly, it will deflate the Court's leavening influence in this diverse, vibrant, and contentious democracy. Many of the solutions being discussed, however, would unnecessarily alter the core responsibilities of the Supreme Court. Establishment of a national appellate court,[4] for example, would unwisely delegate the Supreme Court's final authority to decide certain cases or, equally troubling, to select cases for Supreme Court review. Similarly, the selection of a rotating panel of judges from the thirteen federal appellate courts to review conflicts among the circuits[5] would interpose a new level of review and address only part of the problem.

The alternative proposed in this Article consists of four interrelated reforms, each of which would strengthen the Court's ability to identify and decide legal issues of fundamental national importance while optimizing the use of its valuable time. The reforms would: (1) make the Court's appellate jurisdiction entirely discretionary except in certain rare instances where a constitutional challenge involves the denial of fundamental human rights in a way that is the cause of nationwide divisiveness,[6] (2) resolve most inter-circuit conflicts without any Supreme Court involvement in the process, (3) limit Supreme Court review to issues of fundamental national importance, and (4) reinvigorate the traditions of judicial restraint, disciplined opinion writing, and deferential collegiality epitomized by the contributions to prior Courts of, among others, Chief Justice Hughes, and Justices Holmes, Frankfurter, and Brandeis.

These reforms would not only reduce the pressures of the Court's burgeoning caseload but would also regenerate the principal source of its strength—the ability to fashion collegially, with the power of reason alone, the fabric of a just and free society. In this sense, the Supreme Court is a microcosm of a diverse and dynamic populace, the fragile unity of which rests on respect for law and the resolution of disputes through reason. It is the legal system that avoids bitter frac-

---

3. Kolender v. Lawson, 103 S. Ct. 1855, 1858 (1983).

4. See *infra* notes 35-41 and accompanying text.

5. See *infra* notes 42-44 and accompanying text.

6. Cases reviewable under such jurisdiction would involve rights such as those presented in Roe v. Wade, 410 U.S. 113 (1973) (abortion), and Brown v. Board of Educ., 347 U.S. 483 (1954) (equal educational opportunity). The precise definition of this narrow right of mandatory appeal will require further research, debate and refinement.

tionalization by transforming the tensions of a pluralistic society into creative progress toward a more workable civilization. The Court must resolve—or justify—the disparate perspectives of its members through reason and explain its evolving consensus with clarity, force, and detached analysis. Review of some facts and history regarding the Supreme Court's workload will place the issue in perspective and explain why the alternative proposed herein is fully consistent with both the Court's traditions and its constitutional mandate.

I. Facts and History Regarding Supreme Court Caseload

A. *Statistical Analysis*

The increasing burden of the Supreme Court's workload is amply demonstrated by various statistical analyses cited by the Justices themselves.[7] The Chief Justice, for example, recently noted that in 1953, the first year of Chief Justice Warren's tenure, the Court had 1,463 cases on its docket and issued 65 signed opinions.[8] In the Term ending July 1982, the Supreme Court had 5,311 cases on its docket and issued 141 signed Court opinions.[9] This amounts to a docket increase of 270

---

7. Justice Brennan recently noted that during the 1981 Term, the Supreme Court "granted review in 210 cases, which is 26 more than the Term before and 56 more than two Terms ago." Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 230 (1983) (quoting Justice White) [hereinafter cited as Brennan I]. The Justice noted that "for more than 15 of [his] 26 terms starting in 1956, the Court averaged about 100 opinions per term . . . . But since the 1970 term that number has inexorably crept up, first to the high 120's, then to the 130's and last term to 141 signed [opinions] plus 9 per curiam [opinions]." *Id.* In his assessment of the workload crisis facing the federal judiciary, Justice Powell observed that "[c]ivil rights filings in federal district courts have increased from about 270 in 1961 to some 30,000 in fiscal year 1981. Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A.J. 1370, 1371 (1982). Justice O'Connor has noted that in the 1935 Term there were 983 new filings, by 1951 the number had grown to 1,234, and during the 1981 Term there were 4,422 new filings in the Supreme Court. O'Connor, Comments on Supreme Court's Case Load, Joint Meeting of the Fellows of the American Bar Foundation & the National Conference of Bar Presidents, at 7 (Feb. 6, 1983) [hereinafter cited as Comments of Justice O'Connor] (available in files of *Fordham Law Review*).

8. *Annual Report*, *supra* note 1, at 42. "Signed" opinions do not include concurring, dissenting or per curiam opinions. *Id.* at 443 n.1; see *infra* note 17.

9. *Id.* at 442. Some commentators have pointed out that "the statistical rise in applications does not create a proportionate rise in demand on the Justice's time in reviewing applications." Alsup, *A Policy Assessment of The National Court of Appeals*, 25 Hastings L.J. 1313, 1320 (1974). This is because the increase in applications is largely due to *in forma pauperis* cases which are often readily indentifiable as frivolous. *Id.* at 1320-21; Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 476-77 (1973) [hereinafter cited as Brennan II]; Gressman, *Much Ado About Certiorari*, 52 Geo. L.J. 742, 745-46 (1964); Comment, *The National Court of Appeals: Composition, Constitutionality, and Desirability*, 41 Fordham L. Rev. 863, 864-65 (1973) [hereinafter cited as *Composition, Constitution-*

percent and more than a doubling of signed opinions.[10] In the Term ending July 6, 1983, the Court issued 151 signed opinions.[11]

During Chief Justice Burger's tenure, Congress has created over one hundred new statutory causes of action.[12] The Court itself, although to a lesser extent, has also created new causes of action.[13] Further evidence of the growing litigiousness of the American public lies in the number of licensed attorneys, which has almost doubled since the early 1970's, and the number of federal judges, which has increased over the past 30 years from 279 to 647.[14] It is these attorneys and judges who "produce the grist for the Supreme Court 'mill'," [15] yet the number of Supreme Court Justices has remained at nine since 1869.[16]

Other statistics, not as commonly cited, tell a different story. There actually has not been an increase over the long term in the total number of opinions of the Court. In 1882, for example, there were 260; in 1932, there were 168; and in 1982, there were 151.[17] There has

---

ality, and Desirability]; *see* Poe, Schmidt & Whalen, *A Dissenting View*, 67 Nw. U.L. Rev. 842, 846 (1973).

10. *Annual Report*, *supra* note 1, at 442. Of course, it is the lower federal courts, as well as the states' court systems, that fuel the oversized Supreme Court docket. Justice Rehnquist recently illustrated this by noting that in 1937 there were 155 federal district court judges and 46 judges of the federal courts of appeals. Remarks by Justice Rehnquist, Mac Swinford Lecture, University of Kentucky, at 10 (Sept. 23, 1982) (available in files of *Fordham Law Review*). Today there are 515 federal district court judges and 132 federal appellate judges. Annual Report of the Director of the Administrative Office of the United States Courts 1982, at 77, 96 [hereinafter cited as Administrative Office Report].

11. See Appendix, Chart II. Nearly one-third of these opinions were issued during the final three weeks of the Term. N.Y. Times, July 10, 1983, § 1 at 1, col. 2.

12. Wash. Post, Feb. 7, 1983, at A12, col. 1.

13. *Annual Report*, *supra* note 1, at 442-443; *see, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 689-709 (1979) (implied right of action for injunctive relief under § 901(a) of Title IX of the Education Amendments of 1972); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 389 (1971) (implied damage action under the fourth amendment). For a discussion of the recent developments in the area of implied rights of action, see Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 Vand. L. Rev. 1333 (1980); Note, *Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication?*, 50 Fordham L. Rev. 611 (1982).

14. Wash. Post, Feb. 7, 1983, at A12, col. 1.

15. *Annual Report*, *supra* note 1, at 443.

16. Comments of Justice O'Connor, *supra* note 7, at 4. Increasing the number of Justices on the Supreme Court would arguably create more problems than it would solve by exacerbating the already difficult task of reaching a consensus.

17. See Appendix, Chart I. The 1882 figure, however, is somewhat misleading. As Chief Justice Burger has said recently, "[i]f the Court had been authorized to exercise discretionary certiorari jurisdiction in 1882, probably half of what were described in 1882 as 'cases' would have been denials of certiorari," and hence orders rather than opinions. *Annual Report*, *supra* note 1, at 443. Moreover, the figures cited here include only signed opinions and not per curiam opinions, which currently

been a dramatic increase, however, in the number of concurring opinions—4 in 1882, 4 in 1932, and 70 in 1982; and the number of dissenting opinions—17 in 1882, 24 in 1932, and 144 in 1982.[18] Stated another way, in 1882, there were 242 unanimous decisions (93.08 percent of the total); in 1932, there were 133 (79.64 percent of the total); and in 1982, there were 34 (22.52 percent of the total).[19] Since the advent of the Warren Court in 1953, the total number of opinions per Term, including concurring and dissenting opinions, has risen from 138 to 361.[20] Dissension among the Justices contributes to the workload problem not only by spawning separate opinions but also by inspiring prospective litigants to seek to catapult concurring or dissenting views into majority opinions.

B. *History of Reform*

Concern over the Court's workload is as old as the Court itself. Soon after the Judiciary Act of 1789[21] established a six-Justice Supreme Court, thirteen single-judge district courts, and three circuit courts, consisting of one district judge and two Supreme Court Justices "riding circuit,"[22] it became apparent that the Court's workload was

---

constitute a larger percentage of total opinions than in the Court's earlier years. See Appendix, Chart I.

18. See Appendix, Chart I. Betweeen 1948 and 1970, "the court wrote an average of 218 opinions annually; after 1970 it averaged 354. There was not a huge change, however, in the number of 'opinions of the court': they rose from 107 annually to 145. The real rise was in dissents (from 78 to 134) and in separate concurrences (from 33 to 76)." Barone, *Our Overworked Justices Should Fire Some Law Clerks*, Wash. Post, Nov. 24, 1982, at A17, col. 1.

19. See Appendix, Chart I.

20. See Appendix, Charts II and III. The number of opinions issued during the 1953 Term, however, represented "the smallest number of cases decided on the merits in . . . fourteen years." *The Supreme Court, 1953 Term*, 68 Harv. L. Rev. 96, 187 (1954). The number of opinions rose in later years to 200 in 1958, 218 in 1963, 267 in 1968, 339 in 1973, 353 in 1977, and 361 in 1982. See Appendix, Charts II and III.

Whether relevant or not, the increase in the number of separate opinions corresponds to the increase in the number of law clerks. Years ago, some Justices hired one clerk; by the 1950's, most Justices hired two; by 1970, the Justices were allowed three; and in 1978, most had four law clerks. Barone, *supra* note 18, at A17, col. 1; *see* Kester, *The Law Clerk Explosion*, 9 Litigation 20, 61 (Spring 1983) ("With rising case loads, pressure to expand judges' staffs will grow. For any bureaucratic difficulty, bureaucrats prescribe more bureaucracy. But law clerks are not part of the solution; they are part of the problem.").

21. Ch. 20, 1 Stat. 73.

22. *Id.* at 73-75. The Supreme Court's appellate jurisdiction was limited by this Act to two types of cases: (1) appeals from circuit court decisions in civil cases involving sums of more than $2,000; and (2) appeals from final state court rulings upholding a state law against a challenge that it conflicted with the Constitution, federal laws or federal treaties. Congressional Quarterly, Guide to the U.S. Supreme

overwhelming. Congress directed President Washington's Attorney General, Edmund Randolph, to devise a solution. Recognizing that the quality of judicial contemplation was essential to the performance of the Court's function, Randolph reported in 1790: "Sum up all the fragments of their time, hold their fatigue at naught, and let them bid adieu to all domestic concerns, still the average term of a life, already advanced, will be too short for any important proficiency."[23]

Congress' response in subsequent years was to eliminate the circuit-riding duties and increase the size of the Supreme Court.[24] In 1891, Congress established nine circuit courts of appeals and did away with the mandatory right of appeal in some subject areas by introducing the concept of discretionary review by writ of certiorari.[25] Mandatory review was retained in only clearly defined areas.[26] Nevertheless, by the 1923 Term the Supreme Court was more than one year behind in its docket.[27] This delay was intolerable to Chief Justice Taft, who

---

Court 263 (1979). The Supreme Court was not granted appellate jurisdiction in capital criminal cases until 1889. Act of February 6, 1889, ch. 113, 25 Stat. 655, 656. Shortly thereafter the Court's jurisdiction was extended to "infamous crime[s]." Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826, 827; *see* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 32-49 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]; F. Frankfurter & J. Landis, The Business of the Supreme Court 109 (1927).

23. F. Frankfurter and J. Landis, *supra* note 22, at 15 (quoting Rep. Atty. Gen. 1).

24. Judiciary Act of 1875, ch. 137, 18 Stat. 470. This Act broadened the Supreme Court's jurisdiction "almost to the full extent of the constitutional authorization." Hart & Wechsler, *supra* note 22, at 39. Although Congress had, in the meantime, reduced the Justices' circuit-riding duties and raised the number of Justices from six to nine, the 1875 Act dramatically increased the number of cases entering the Court's docket. *See* Comments of Justice O'Connor, *supra* note 7, at 5.

25. Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826. This Act constituted the first major restructuring of the federal judicial system. It granted the circuit courts of appeals jurisdiction over appeals from district courts in virtually all diversity, admiralty, patent, revenue, and non-capital criminal cases. Supreme Court review of circuit court decisions was made mandatory only upon the appellate court's certification of a case to the high court. The Supreme Court also retained discretionary review of courts of appeals decisions by writ of certiorari. Direct appeal to the Supreme Court was reserved by the Act only for cases involving constitutional questions, matters of treaty law, jurisdictional questions, capital crimes, and conflicting laws. *See* Congressional Quarterly, Guide to the U.S. Supreme Court 265 (1979).

26. See *supra* note 24.

27. Frankfurter & Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 Harv. L. Rev. 834, 836 & n.7 (1927). Congress had never, in the past, taken steps to relieve the Court of its workload until there was evidence of a backlog. There was a backlog of a few years prior to the 1891 Act, which established the circuit courts of appeals. Alsup, *supra* note 9, at 1324-25; *see* Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253, 254 (1973).

sponsored a committee of Justices to draft legislative reforms.[28] With uncharacteristic speed, and without the modern congressional tendency to engage in "elegant variation," Congress adopted the Justices' draft in the Judges' Bill of 1925.[29] The bill further narrowed the mandatory jurisdiction of the Supreme Court to a few categories, including appeals from federal court decisions holding state statutes unconstitutional or invalid under federal law or treaties, and state court decisions upholding state statutes against federal constitutional attack.[30] The framework established by the Judges' Bill of 1925 persists today, giving the Supreme Court great flexibility in choosing its cases for review. For, instead of narrowing the Court's jurisdiction, Congress chose, in more and more instances, to delegate to the Court the responsibility for determining which federal issues are of sufficient national importance to warrant Supreme Court review.[31] The process of issue selection, therefore, has become an increasingly crucial part of the review function. While Congress, in 1976, eliminated the right of direct appeal from three-judge district courts in most cases,[32] there have not been any significant statutory changes in the Supreme Court's jurisdiction since 1925.[33]

---

28. F. Frankfurter & J. Landis, *supra* note 22, at 259-60; *see* Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 Vand. L. Rev. 895, 898-99 (1973).

29. Ch. 229, 43 Stat. 936.

30. *Id.* at 937, 939. Direct appeals to the Supreme Court remained available, *inter alia*, in cases under antitrust or interstate commerce laws; appeals by the federal government under the Criminal Appeals Act of 1907; suits to halt enforcement of state laws or official state actions; and suits to halt Interstate Commerce Commission orders. In the 1970's most of the direct appeal jurisdiction was eliminated, except for appeals from a federal district court holding a federal statute unconstitutional, 28 U.S.C. § 1252 (1976), and appeals from a decision of a panel of three district judges, convened pursuant to an act of Congress or in reapportionment cases. 28 U.S.C. § 2284(a) (1976). Congressional Quarterly, Guide to the U.S. Supreme Court 265 (1979).

31. *See* Blumstein, *supra* note 28, at 903. See *supra* notes 25-30 and accompanying text.

32. Pub. L. No. 94-381, § 1, 90 Stat. 1119 (1976) (repealing 28 U.S.C. § 2282 (1976)).

33. President Franklin Roosevelt, of course, tried and failed to increase the number of Justices in his "court-packing" reorganization plan of 1937, but his motives were to outnumber the conservative majority. Some scholars believe, however, that the mere threat had an effect on the decision-making process. L. Baker, Felix Frankfurter 187-91 (1969); *see* M. Parrish, Felix Frankfurter and His Times 272 (1982). In addition, the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127(a), 96 Stat. 37, (current version at 28 U.S.C.A. § 1295 (West Supp. 1983)), transferred the duties of the Court of Claims and Court of Customs and Patent Appeals to the new Court of Appeals for the Federal Circuit, thereby eliminating Supreme Court review of appeals from the previously existing courts. Although decisions of the Court of Appeals for the Federal Circuit are reviewable under

The rising case load, nevertheless, has continued to stimulate discussion.[34] In 1971, the Chief Justice appointed a seven-member study committee, chaired by Professor Paul Freund of the Harvard Law School. The Freund Committee recommended the establishment of a National Court of Appeals to screen all certiorari petitions and appeals, referring approximately 400 to the Supreme Court and denying the rest.[35] Of the cases referred to it, the Supreme Court would decide either to grant or deny certiorari, or to remand the case to the National Court of Appeals for decision.[36] If the National Court of Appeals did not refer a case to the Supreme Court, there would be no procedure by which the Court could review such a decision. Thus, had this proposal been adopted, many issues would never have come to the attention of the Supreme Court in any form, and the choice of factual context in which the issues presented to the Court are reviewed would have been severely restricted.

In 1972, Congress established a commission headed by Roman Hruska. This commission also recommended the establishment of a National Court of Appeals.[37] This proposed National Court, however, would not have screened certiorari petitions, but rather would have heard cases referred to it by the Supreme Court or transferred to it by a court of appeals.[38] The Supreme Court would thus have been forced to expend its time reviewing which cases should go to the National Court of Appeals. The Freund and Hruska proposals generated a flurry of scholarly comment, both favorable and unfavorable.[39] Some

---

the same statute which governs Supreme Court review of other court of appeals decisions, 28 U.S.C. § 1254 (1976), the Act's legislative history suggests that the creation of the new court was inspired at least in part by a desire to relieve the Supreme Court of some of its burdensome workload. *See* S. Rep. No. 275, 97th Cong., 2d Sess. 3, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 13.

34. For a thoughtful analysis of the Supreme Court's caseload see G. Casper & R. Posner, The Workload of the Supreme Court (1976); F. Frankfurter & J. Landis, *supra* note 22; Douglas, *The Supreme Court and Its Case Load*, 45 Cornell L. Q. 401 (1960). For a delightful essay on the workload issue, see Kurland & Hutchinson, *The Business of the Supreme Court, O.T. 1982*, 50 U. Chi. L. Rev. 628 (1983).

35. Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court 47 (1972) [hereinafter cited as Report of the Study Group]. *See* Freund, *A National Court of Appeals*, 25 Hastings L.J. 1301, 1305-09 (1974).

36. Report of the Study Group, *supra* note 35, at 47. The Freund committee also recommended the substitution of certiorari for the Court's mandatory appellate jurisdiction, the elimination of the three-judge district courts (which has been accomplished for the most part, see *supra* note 32), and the establishment of a non-judicial panel to investigate and report on prisoner complaints. *Id.* at 47-48.

37. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 5, 30 (1975) [hereinafter cited as Recommendations for Change].

38. *Id.* at 32.

39. *See, e.g.*, A. Bickel, The Caseload of the Supreme Court and What, If Anything to do About It (1973); Black, *The National Court of Appeals: An Unwise*

critics thought the proposals would be an unconstitutional delegation of authority vested in "one supreme Court"[40] and, more importantly, would deprive the Court of essential functions and information in the selection and resolution of fundamental national issues.[41]

The most recent proposal—currently on the congressional agenda[42]—was made by the Chief Justice at the American Bar Association meeting in New Orleans in February of 1983. The Chief Justice advocates, as an interim step, the establishment of a five-year temporary special panel of the new United States Court of Appeals for the Federal Circuit. The special panel would have the narrow jurisdiction to decide all inter-circuit conflicts.[43] Two judges would be designated from each circuit, creating a pool of twenty-six judges. A panel of seven to nine judges would be drawn from the pool for six months to a year to hear and decide all inter-circuit conflicts and, possibly, a defined category of statutory interpretation cases. The panel could remove 35 to 50 cases a year from the argument calendar of the Supreme Court, which would, however, retain certiorari jurisdiction over these cases.[44] The Chief Justice views his proposal as only an interim and partial solution and, therefore, further consideration of a permanent National Court of Appeals is not entirely moot.

In addition to proposals for reform, the Supreme Court has attempted to alleviate its workload over the last two decades through

---

Proposal, 83 Yale L.J. 883 (1974); Brennan II, *supra* note 9; Freund, *Why We Need a National Court of Appeals*, 59 A.B.A.J. 247 (1973); Gressman, *supra* note 27; Warren & Burger, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721 (1973); *Composition, Constitutionality, and Desirability*, *supra* note 9.

40. U.S. Const. art. III, § 1.

41. Black, *supra* note 39, at 885-87; Warren, *supra* note 39, at 729; *Composition, Constitutionality, and Desirability*, *supra* note 9, at 873-85.

42. Five bills, S. 381 through S. 385, were introduced by Senator Heflin on February 2, 1983, covering such subjects as the establishment of a National Court of Appeals, provision for mandatory Supreme Court review in certain areas, and creation of a Federal Courts Study Commission. 129 Cong. Rec. S892-94 (daily ed. Feb. 2, 1983). These bills were consolidated, amended slightly, and reintroduced as a single bill, S. 645, on March 1, 1983. 129 Cong. Rec. S1845 (daily ed. March 1, 1983). Senator Dole was the primary sponsor of the new bill. The Subcommittee on Courts, Civil Rights and Administration of Justice reported favorably on S. 645 on June 29, 1983. 1983-1984 Cong. Index (CCH) 21,013. Two portions of the Senate legislation—the National Court of Appeals ("Intercircuit Tribunal") and mandatory jurisdiction provisions—were separately introduced in the House by Congressman Kastenmeier on March 8, 1983. 129 Cong. Rec. H940 (daily ed. March 8, 1983). The two bills, H.R. 1968 and H.R. 1970, were considered at hearings held by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice on April 27, 1983. 1983-1984 Cong. Index (CCH) 35,015.

43. *Annual Report*, *supra* note 1, at 447.

44. *Id.*

self-help measures. These include shortening the time for oral argument to half an hour; assigning additional law clerks to the Justices; dispensing with records on petitions for certiorari; and, in some cases, pooling law clerk resources.[45] Despite these efforts, the workload problem persists.

In recent months, most of the Associate Justices have begun to speak out on the workload problem, offering a variety of solutions on the following subjects:

Mandatory Jurisdiction. All the Justices who have spoken publicly agree that the remaining mandatory appellate jurisdiction of the Supreme Court should be eliminated.[46]

Screening Certiorari Petitions. Justice Stevens has recommended that the function of screening certiorari petitions be delegated to a new National Court of Appeals.[47] If a new National Court of Appeals is not created, however, Justice Stevens has suggested that five instead of four votes be required in order to grant certiorari.[48]

Inter-circuit Conflicts. Justice White has suggested that a federal court of appeals be required to hold a hearing en banc before it takes a position on the interpretation of a statute that differs from that of another court of appeals.[49] The first en banc decision would be binding on all the other circuits and reviewable only by the Supreme Court.[50] Justice Stevens has recommended that Congress establish a standing committee to decide between two conflicting judicial readings of a given statute.[51] The committee would propose a statutory revision to resolve the conflict.[52] Justice Brennan has taken issue with Justice Stevens' suggestion because "it overlooks the role of compromise in the legislative process."[53] As previously noted, Chief Justice Burger recommends that inter-circuit conflicts be resolved by a special temporary panel of the new United States Court of Appeals for the Federal Circuit.[54]

---

45. Freund, *supra* note 35, at 1304.

46. Brennan I, *supra* note 7, at 235; Powell, *supra* note 7, at 1371; Stevens, *The Life Span of a Judge-Made Rule*; 58 N.Y.U. L. Rev. 1, 21 (1983) [hereinafter cited as Stevens I]; Proceedings of the Forty-Second Annual Judicial Conference of the District of Columbia Circuit, 93 F.R.D. 153, 162 (1981) (remarks of Chief Justice Burger) [hereinafter cited as Remarks of Chief Justice Burger]; Comments of Justice O'Connor, *supra* note 7, at 12.

47. Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 182 (1982) [hereinafter cited as Stevens II].

48. Stevens I, *supra* note 46, at 21.

49. Brennan I, *supra* note 7, at 232 (quoting Justice White).

50. *Id.*

51. Stevens II, *supra* note 47, at 183.

52. *Id.*

53. Brennan I, *supra* note 7, at 233.

54. *Annual Report*, *supra* note 1, at 4.

Limitations on Jurisdiction. Justices Powell, Rehnquist and O'Connor have suggested a number of limitations on federal courts' diversity, habeas corpus, and Section 1983 jurisdiction[55] that would reduce the flow of cases to the Supreme Court.[56] Justice Powell has noted that the number of civil rights actions filed in federal courts has increased from approximately 270 to 30,000 over the last twenty years.[57]

Approximately half of the over 30,000 civil rights suits filed in 1981 were filed by state prisoners under Section 1983.[58] Justice Powell, therefore, would limit the habeas review to "cases of manifest injustice in which the issue is guilt or innocence."[59]

Greater Selectivity. Other Justices have advocated greater selectivity on the part of the Supreme Court in deciding what cases to take. Justices Stevens and Brennan, among others, would minimize the Supreme Court's role in correcting lower court errors and in the review of cases at an interlocutory stage.[60]

Reforms recommended by the Justices and others fall into three general categories: delegation of Supreme Court authority to another court to select or decide cases,[61] further statutory limitations on the jurisdiction of the Supreme Court or on federal courts in general,[62] and the exercise of greater judicial restraint and discipline by the Supreme Court itself in its selection of issues for review.[63] All three

---

55. *See* Powell, *supra* note 7, at 1372 ("[T]hese three sources of federal court jurisdiction provided nearly 40 per cent of the total district court civil filings.").

56. Justices Powell and O'Connor would require exhaustion of administrative remedies prior to bringing a Section 1983 lawsuit and recommend study of possible elimination or limitation of the diversity jurisdiction of the federal courts. Comments of Justice O'Connor, *supra* note 7, at 14; Powell, *supra* note 7, at 1371-72. Justice Powell would modify further the habeas corpus jurisdiction of federal courts, *see* 28 U.S.C. § 2254 (1976), to create finality of federal review or a statute of limitations, and would make the court of appeals' jurisdiction over certain categories of cases (for example, administrative agency actions) discretionary. Powell, *supra* note 7, at 1371-72. Justice Rehnquist would have Congress review statutes that create a federal cause of action to determine whether access to the federal courts through these statutes should be limited or eliminated. *See* Remarks of Justice Rehnquist, *supra* note 10, at 30.

57. Powell, *supra* note 46, at 1371.

58. *Id.* According to Justice Powell, "no other system of justice [is] structured in a way that assures no end to the litigation of a criminal conviction" the way our system does through unnecessarily repeated use of the federal habeas statute. *Id.*

59. *Id.* at 1372.

60. Brennan I, *supra* note 7, at 231; Stevens II, *supra* note 47, at 180.

61. *See Annual Report*, *supra* note 1, at 447; Stevens II, *supra* note 47, at 182; Recommendations for Change, *supra* note 37, at 30-39; Report of the Study Group, *supra* note 35, at 47.

62. *See* Powell, *supra* note 7, at 1371-72; Comments of Justice O'Connor, *supra* note 7, at 14; Remarks of Justice Rehnquist, *supra* note 10, at 30.

63. Brennan I, *supra* note 7, at 231; Stevens II, *supra* note 47, at 180. Several Justices also have suggested procedural changes to expedite the resolution of some

approaches merit serious study and debate. Emphasis, however, should be placed on the third, with the addition of a fourth that will be advanced with great temerity at the end of this Article.[64] The preferred approaches would concentrate on the fulfillment of the Supreme Court's constitutional mandate to construct a legal consensus on a few issues of fundamental national significance.

II. Analysis

A. *Proposals for an Intermediary Court*

Delegation of the Supreme Court's case selection authority to an intermediary supercourt of appeals seems contrary to the Constitution's provision for "one supreme Court."[65] Constitutional considerations apart, however, delegation of the Supreme Court's power to screen cases would significantly alter the function of the Supreme Court in shaping constitutional law. The power to select cases is a fundamental part of the power to define the issues and trends in the development of constitutional and statutory interpretation.[66]

Life-tenured Supreme Court Justices bring to the issue-selection process a variety of backgrounds—judicial, political, and academic[67]—an experienced ear attuned to monitoring the heartbeat of a living Constitution, and a reasoned interaction of diverse philosophies and interests.[68] Because most Justices are assimilated gradually during extended intervals, the Court provides continuity, knowledge of trends, and collective perspective that simply could not be replicated in a panel of rotating judges with more limited functions and pur-

---

cases. Chief Justice Burger has proposed establishing a grievance procedure in the prison system to reduce the need for prisoners' litigation. Remarks of Chief Justice Burger, *supra* note 46, at 165. Justice O'Connor advocates the institutionalization of alternative forms of dispute resolution outside the court system. Comments of Justice O'Connor, *supra* note 7, at 14. Although opposed to the proposition, Justice Brennan has mentioned that "there is sentiment among some of [his] colleagues" to reduce or eliminate oral argument in certain Supreme Court cases. Brennan I, *supra* note 7, at 232.

64. See *infra* pt. II(B)(4).

65. U.S. Const. art. III, § 1; *see* Black, *supra* note 39, at 885-87.

66. *See* Black, *supra* note 39, at 891 (quoting Hoadly's sermon preached before the King, March 31, 1717) ("Whoever hath an absolute authority to control the nature and scope of questions to be decided is to all intents and purposes controller over the process of decision."); Blumstein, *supra* note 28, at 907.

67. See *infra* note 111 and accompanying text.

68. Justice Brennan once commented: "I expect that only a Justice of the Court can know how inseparably intertwined are all the Court's functions, and how arduous and long is the process of developing the sensitivity to constitutional adjudication that marks the role." Brennan II, *supra* note 9, at 484.

poses.[69] In selecting cases for review, Justices must weigh not only the importance of the issues presented, but the timeliness of their review, the appropriateness of the factual context in which they arise, the adequacy of representation by counsel, the likely views of the other Justices on the merits, the reasons why on previous occasions they may have avoided the issues, and the relationship of the issues presented to issues in other pending cases and doctrinal developments.[70]

As Justice Brennan has stated:

> In my experience over more than a quarter century, the screening process has been, and is today, inextricably linked to the fulfillment . . . of the Court's unique mission. . . .
>
> The choice of issues for decision largely determines the image that the American people have of their Supreme Court. The Court's calendar mirrors the everchanging concerns of this society with ever more powerful and smothering government. The calendar is therefore the indispensable source for keeping the Court abreast of these concerns. Our Constitution is a living document and the Court often becomes aware of the necessity for reconsideration of its interpretation only because filed cases reveal the need for new and previously unanticipated applications of constitutional principles. . . . [T]o limit the Court's consideration to a mere handful of the cases selected by others would obviously result in isolating the Court from many nuances and trends of legal change throughout the land.
>
> The point is that the evolution of constitutional doctrine is not merely a matter of hearing arguments and writing opinions in cases granted review. . . . The screening function is an indispensible and inseparable part of the entire process and it cannot be withdrawn from the Court without grave risk of impairing the very core of the Court's unique and extraordinary functions.[71]

The selection of the appropriate time and factual context in which to address—or readdress—an issue of constitutional or societal importance is uniquely a function of the Supreme Court. The decision to grant the petition for certiorari in *Baker v. Carr*[72] would not inevita-

---

69. In fact, throughout the nation's history only 103 Justices have served on the Supreme Court. Indeed, there are more judges sitting on the circuit courts today—132—than have served on the Supreme Court since its establishment. *See* Administrative Office Report, *supra* note 10, at 77.

70. Justice Frankfurter often remarked that his *personal* reading of the petitions for certiorari and jurisdictional statements was the most important judicial function he performed. *See* L. Baker, *supra* note 33, at 215 (1969). This fortunately relieved his law clerks from having to write thirty or more bench memos each week on certiorari petitions and jurisdictional statements.

71. Brennan I, *supra* note 7, at 235.

72. 369 U.S. 186 (1962).

bly have been the choice of an intermediary supercourt of appeals, given the Supreme Court's clear direction in *Colegrove v. Green*[73] that legislative apportionment was a political matter beyond the province of the Court.[74] Nor is it clear whether an intermediary supercourt of appeals would have considered the question of school desegregation in *Brown v. Board of Education*[75] worthy of the Supreme Court's attention, or whether the doctrine of "separate but equal" in *Plessy v. Ferguson*[76] would have resolved the matter conclusively. Moreover, three years after the Court had held in *Rummel v. Estelle*[77] that the eighth amendment's prohibition of "cruel and unusual punishment" could not be invoked to shorten the length of a sentence, it is equally doubtful that an intermediary court would have thought the Court would again be interested in reviewing the sentence issue. In *Solem v. Helm*,[78] however, the Court held that the eighth amendment proscribes a life sentence without the possibility of parole for a seventh nonviolent felony.[79]

Another example of the dangers presented by separating the screening process from the decisional process is *Gideon v. Wainwright*.[80] During the 1962 Term, many petitions raising the issue of right to counsel were presented and rejected[81] before the Court seized upon *Gideon* as a proper vehicle for carrying out its intention to overrule *Betts v. Brady*.[82] Under the proposed system, not all of those petitions would have been presented to the Court and, as a result, the Court's "menu of vehicles" for reviewing the issue would have been limited, making it less likely that an appropriate case would have been found.[83] Had the Supreme Court been denied access to these and other cases, the shape of constitutional law today would have been drastically altered.[84]

---

73. 328 U.S. 549 (1946).
74. *Id.* at 552; *see* Black, *supra* note 39, at 889-91.
75. 347 U.S. 483 (1954).
76. 163 U.S. 537 (1896).
77. 445 U.S. 263 (1980).
78. 103 S. Ct. 3001 (1983).
79. *Id.* at 3013, 3016.
80. 372 U.S. 335 (1963).
81. *See* Alsup, *supra* note 9, at 1334.
82. 316 U.S. 455 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1963); *see* Alsup, *supra* note 9, at 1334.
83. Alsup, *supra* note 9, at 1334.
84. For other cases that might not have been chosen by an intermediary supercourt of appeals because strong precedent existed, consider: Flast v. Cohen, 392 U.S. 83, 102-03 (1968) (taxpayers have standing to challenge spending programs on the ground that they exceed "specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power"), in light of Frothingham v. Mellon, 262 U.S. 447, 488 (1923) (absent direct injury, taxpayer lacks standing to challenge

Efforts to restrict the jurisdiction of the Supreme Court by statute or to delegate specific issues for final resolution by an inferior court—either a permanent new court or a rotating panel of judges—present additional public policy problems. Lower court judges may not have the stature or detachment required to address the highly explosive social and economic issues of which the Supreme Court is the ultimate arbiter. Justices who reach the pinnacle of the judicial system bring with them, acquire, or have "thrust upon them" (by virtue of their unreviewable, life-tenured authority) an aura of detached wisdom. Such proposals misapprehend the unique function that the Supreme Court plays in our constitutional democracy.[85] The Supreme Court is not the final court of errors and appeals. In the words of the Freund Committee:

> The cases which it is the primary duty of the Court to decide are those that, by hypothesis, present the most fundamental and difficult issues of law and judgment. . . . To maintain the constitutional order the Court must decide controversies that have sharply divided legislators, lawyers, and the public. And in deciding, the Court must strive to understand and elucidate the complexities of the issues, to give direction to the law, and to be as precise, persuasive, and invulnerable as possible in its exposition.[86]

The issue is not whether there should be limitations on access to the Supreme Court; obviously there must be. As the number of cases

---

Acts of Congress); Yates v. United States, 354 U.S. 298, 318 (1957) (abstract advocacy of government overthrow not actionable under Smith Act absent incitement to action), in light of Dennis v. United States, 341 U.S. 494, 516-17 (1951) (advocacy of future government overthrow actionable under the Smith Act); and New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (establishing "actual malice" requirement for recovery by a public official in a libel action), in light of Near v. Minnesota, 283 U.S. 697, 715 (1931) (libelous statements are not protected by first amendment). *See* Black, *supra* note 39, at 888-90 (1974).

Other cases might well have been judged too trivial for Supreme Court review. It is hard to imagine that the proposed intermediary court would have referred to the Supreme Court the "Shuffling Sam" case, Thompson v. City of Louisville, 362 U.S. 199 (1960), in which a loitering conviction was overturned on due process grounds for lack of evidentiary support. Similarly, Cohen v. California, 403 U.S. 15 (1971), would almost certainly have been a casualty of an intermediary supercourt of appeals. How many judges on such a court would have found the First Amendment right to wear a jacket bearing the words "Fuck the Draft" into a courthouse consequential enough to merit the Supreme Court's attention? *See* Alsup, *supra* note 9, at 1313.

85. As Professor Black aptly remarked, "[t]he authors of [the Report of the Study Group] are recommending amputation of the right arm as a cure for overweight" when they suggest that vesting the screening function in another court will cure the Supreme Court's caseload problem. Black, *supra* note 39, at 891.

86. Report of the Study Group, *supra* note 35, at 1.

increases, the percentage which can be reviewed in the Supreme Court correspondingly diminishes. The Supreme Court, however, need not foreclose its power to make important judgments in certain jurisdictional areas. Rather, it should retain the discretion to choose the issues worthy of its review in the broadest possible jurisdictional environment. An inferior court simply cannot bring to significant national issues the experience of collegial interaction and moral authority necessary to sustain the independence of its actions. Nor should a national appellate court be established merely to correct the errors of other appellate courts. If this were its function, the ultimate effect would be an erosion of respect for the federal appellate courts—courts which historically have attracted jurists of great distinction. It is one thing for a great jurist like Learned Hand to be overruled by the Supreme Court; it would be quite a different matter for him to be overruled by a rotating panel of judges. The primary responsibility for correcting errors should rest with the circuit courts. A solution to the Supreme Court's workload problem is needed, however, which both preserves and enhances the ability of the Court to perform its core constitutional responsibilities.

B. *An Alternative Proposal*

The Supreme Court must be freed from the illusion that it has a duty to correct every error and resolve every conflict. At the same time, the Court needs to identify and resolve legal issues of fundamental national significance in a clear and consistent manner. The proposal outlined below achieves these goals and consists of four interrelated parts.

(1) The Supreme Court's remaining mandatory appellate jurisdiction should be limited to constitutional cases in which fundamental human rights raising an issue of nationwide divisiveness are involved.[87] The Court should be the guardian of its docket and not be forced by statute to take for argument and decision any case which it otherwise would determine is not of prime national importance.

(2) Conflicts among the circuit courts that do not involve issues worthy of Supreme Court review should be resolved by the affected circuits without any involvement of the Court.

(3) The Supreme Court should be highly selective in choosing for review only issues of fundamental national significance.

---

87. Rather than completely eliminating mandatory jurisdiction, it is preferable to limit it to narrower circumstances. *See* American Law Division (Congressional Research Service), Report on Mandatory Appellate Jurisdiction of the Supreme Court of the United States 62 (Preliminary Draft June 18, 1982) (available in files of *Fordham Law Review*).

(4) The Supreme Court should reduce the pressure on its caseload by discouraging unnecessary litigation (and invitations to unfocused arguments on the part of the bar) through the exercise of greater judicial restraint, collegial deference, and disciplined opinion writing by the Justices.

The first and second parts of the proposal are intended to reduce the flow of cases that the Supreme Court now feels obligated to review even though they do not involve issues of prime national importance.

1. Reducing the Number of Cases Presented for Review

It has been estimated that mandatory appeals constitute about 25 percent of the Court's caseload.[88] Enactment of H.R. 1968[89] and S. 645[90] would replace the Court's remaining mandatory appellate jurisdiction with discretionary review, thus reducing the number of cases the Court *must* review each year. Elimination of mandatory jurisdiction, except in truly rare situations, is necessary[91] to complete the conversion of the Supreme Court—started by the Act of 1891[92] and accelerated by the Judges' Bill of 1925[93]—from a final court of errors and appeals to the ultimate judicial authority on issues of fundamental national significance. The one exception to the total elimination of mandatory jurisdiction, necessary to preserve the core constitutional responsibility of the Court, would be to mandate review of those cases in which a lower court has upheld the constitutionality of a state or federal statute denying fundamental human rights of a truly divisive national character. Because the Supreme Court is the ultimate vindicator of such rights under the Constitution, it would not be consistent with the Court's constitutional responsibility to avoid such issues through the discretionary denial of review. History teaches that the ability to avoid an issue may be too facile a solution to a politically uncomfortable situation—a solution too readily available and too often seized by the legislative and executive branches of government. Mandatory judicial review has forced some of the great civil rights gains of the past.[94]

---

88. Comments of Justice O'Connor, *supra* note 7, at 12. For an even higher estimate of cases arising out of mandatory appeals see H.R. Rep. No. 824, pt. I, 97th Cong., 2d Sess. 92 app. B. (1982) (36.2%).

89. H.R. 1968, 98th Cong., 1st Sess. (1983).

90. S. 645, 98th Cong., 1st Sess. (1983).

91. The Subcommittee on Courts, Civil Liberties and the Administration of Justice received a letter from all nine Supreme Court Justices recommending that H.R. 6872, a bill curtailing the mandatory appellate jurisdiction of the Supreme Court, be adopted. H.R. Rep. No. 824, pt. I, 97th Cong., 2d Sess. 4 (1982).

92. Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826.

93. Ch. 229, 43 Stat. 936.

94. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Brown v. Board of Educ., 347 U.S. 483 (1954).

2. Alternatives for Resolving Inter-Circuit Conflicts

The second part of the proposal also reduces the number of cases that require Supreme Court review. It simply is not necessary, in the fulfillment of its constitutional responsibilities, for the Supreme Court to act as an arbitrator among conflicting circuit courts unless the issues are of fundamental national significance. Justice O'Connor has estimated that 23.7 percent of the Supreme Court's decided cases during her first term involved "interpretation[s] of statutes on which the lower courts had reached conflicting decisions."[95] Professor Schaefer has concluded that there are more than a hundred conflicting statutory interpretations among circuit court decisions each year.[96] In a recent Term, of the 149 cases in which the Supreme Court granted plenary review, 26 involved conflicts among the circuits on the issue presented.[97] There is a growing consensus that another mechanism is needed to resolve these conflicts. Suggested mechanisms range from the Chief Justice's proposal for a temporary national panel[98] to Justice White's proposal for a mandatory en banc hearing.[99]

The approach suggested in this Article is a variation on these proposals, which is designed to augment the underlying theme of these reforms: the resolution of legal conflict through collegial reason and the search for consensus. Whenever a circuit renders a decision that is in conflict with a prior decision of another circuit, the losing party should be allowed to petition the court issuing the conflicting opinion for a rehearing before a panel of seven judges, three from each of the two circuits which gave rise to the conflict, and a seventh to be assigned from another circuit by the Chief Justice.[100] Judges from the two circuits in conflict thus would participate in an en banc rehearing to resolve the conflict.[101] The decision of the en banc panel would constitute binding precedent on all circuits, subject only to discretionary review by the Supreme Court if an issue of fundamental national importance is presented. Should a third circuit fail to follow the

---

95. Comments of Justice O'Connor, *supra* note 7, at 13.

96. Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A.J. 452, 454 (1983).

97. Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 Calif. L. Rev. 913, 938 (1983).

98. *See Annual Report*, *supra* note 1, at 447.

99. *See* Brennan I, *supra* note 7, at 232 (quoting Justice White). It has also been suggested that the number of inter-circuit conflicts could be reduced by reducing the number of circuits. Wallace, *supra* note 97, at 940.

100. The Chief Justice is authorized to "assign temporarily any circuit judge to act as circuit judge in another circuit." 28 U.S.C. § 291(a) (1976).

101. Circuit judges are authorized by 28 U.S.C. § 46(c) (1976) to sit en banc within a single circuit, but the statute makes no reference to inter-circuit en banc hearings. Hence, legislation would be required to effect this portion of the proposal.

precedent established by the inter-circuit en banc hearing,[102] the petitioner could request an en banc hearing by seven judges, two from each of the three circuits that had addressed the issue and one assigned by the Chief Justice. While this approach would require legislation,[103] it is preferred to the alternatives that have been proposed because:

(1) it avoids the creation of a new court or the enlargement of the new Federal Circuit Court by a special panel of twenty-six judges;

(2) it promotes judicial efficiency and consistency because the issue has already been briefed and argued before at least three of the judges conducting the rehearing;

(3) it forces the judges who disagree with their peers to confront, discuss and, it is hoped, resolve their differences;

(4) it does not elevate a group of circuit court judges to a special panel to sit in judgment on their peers;

(5) it avoids involving the Supreme Court except for the Chief Justice's strictly administrative task of designating one of the circuit judges; and

(6) it does not create the public impression of a "supercourt," without the attributes of the Supreme Court, that would undermine public respect for the circuit courts.

The long-term effect of bringing the differing circuit judges together would be a greater respect on the part of federal appellate judges for the precedents of other circuits. Indeed, such respect should be encouraged by the Supreme Court through its rules and decisions. There are no inherent geographic or political reasons why federal judges in the thirteen circuits should apply federal statutes differently in response to local circumstances.[104] The argument that circuit conflicts help sharpen the issues for Supreme Court review or provide a testing ground for various interpretations is, in a word, foolish. In any event, such an argument is far outweighed by the injustice, chaos, and burden of litigation caused by conflicting statutory interpretations. The words of Eighth Circuit Judge Lay in *Aldens Inc. v. Miller*[105] are instructive:

> As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket. Unless

---

102. The decision of the inter-circuit en banc court would be binding precedent for all other circuits. It is therefore hoped that the need for the further procedure set forth above would be rare indeed.

103. While "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business" under the authority of 28 U.S.C. § 2071 (1976), nowhere are they given express authority to hold inter-circuit en banc hearings. The Court cannot alter its own jurisdiction.

104. *See* Schaefer, *supra* note 96, at 454.

105. 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980).

> our . . . courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework of our national court system.[106]

These two proposals—if the earlier cited estimates of conflict and mandatory jurisdiction cases are correct—could reduce the number of cases argued before the Court by up to 47 percent.[107]

3. Concentrating Supreme Court Decision-Making

The third suggestion is, in large measure, an acknowledgment of what has become a reality. Since Congress enacted the Judges Bill of 1925,[108] the Supreme Court has not been expected to take on the "function . . . of primarily—or even largely—correcting errors committed by other courts."[109] The value of Supreme Court decision-making is not in how many individual disputes are resolved, but rather in the clarity and cohesiveness of the legal guidance it provides the highest courts of the various states, the lower federal and state courts and the political branches of government.

As Congress reacts to media events and special interest pleas, and as the executive branch is consumed by "crisis-coping" and "fire-fighting," the importance of a third and independent branch, committed to reflective reasoning and to a rational search for sometimes elusive constitutional values increases. As Justice Holmes once said:

> The best defense for leaving fundamental responsibilities to this Court came from Brandeis . . . that constitutional restrictions enable a man to sleep at night and know that he won't be robbed before morning—which, in days of legislative activity and general scheming, otherwise, he scarcely would feel sure about.[110]

Individuals selected to fulfill this constitutional mandate need not necessarily be judges by experience, although Justices Holmes and Stewart, among others, demonstrated that appointments from the judiciary often function superbly. Some of the greatest Justices—to

---

106. *Id.* at 541.

107. See *supra* notes 88, 95 and accompanying text (25% of the caseload are cases arising out of mandatory jurisdiction and 23.7% involve inter-circuit conflicts).

108. Ch. 229, 43 Stat. 936.

109. Stevens II, *supra* note 47, at 180. "It is far better to allow the state supreme courts and federal courts of appeals to have the final say on almost all litigation than to embark on the hopeless task of attempting to correct every judicial error that can be found." *Id.*

110. Letter from O.W. Holmes to Felix Frankfurter, Holmes Papers, Harvard Law School (April 20, 1921) (quoted in A. Bickel, The Supreme Court and the Idea of Progress 28 (1970)) [hereinafter cited as A. Bickel I].

speak only of those no longer on the bench—have come from academic halls (Frankfurter), from the practicing bar (Brandeis and Harlan), and from the political process (John Marshall, Warren and Black).[111] Justice Frankfurter once wrote that a Justice must have "poetic sensibilities" and the "gift of imagination."[112] He must "pierce the curtain of the future . . . and give shape and visage to mysteries still in the womb of time."[113] To enable each Justice to contribute a unique perspective and reasoned insight requires "ample time," again in the words of Justice Frankfurter, "and freshness of mind for private study and reflection in preparation for discussion at Conference."[114] As Professor Thomas Reed Powell of the Harvard Law School wrote, "[t]he logic of constitutional law is the common sense of the Supreme Court of the United States."[115]

No Plimsoll line can be established which helps the Court to discharge its difficult responsibilities. With many of the issues with which it deals—for example, due process, just compensation, equal protection—the Court is left with the need for intuitive judgment. According to Justice Powell, however, simply coping with the rising caseload may require a Justice during the busy opinion writing months of May and June to work "twelve to fifteen hours a day, six days [a] week."[116] Such a schedule simply is not conducive to quiet reflection or sound judgment.[117] The answer is not to relegate the Justices, like too many senators and cabinet officers, to the role of managers of an ever-expanding staff.[118] Rather, the Court should limit the number of cases that it decides on the merits each year to a manageable number, allowing sufficient time for discussion, common

---

111. Prior to his service on the Supreme Court, Justice Frankfurter was a professor at the Harvard Law School. Congressional Quarterly, Guide to the Supreme Court 851. Justices Brandeis and Harlan were in private practice. *Id.* at 842-43, 859. Justice John Marshall served in the Virginia House of Delegates, as minister to France, and as a member of the U.S. House of Representatives. *Id.* at 804. Chief Justice Warren served both as attorney general and governor of California. *Id.* at 858. Justice Black was a member of the U.S. Senate. *Id.* at 849.

112. F. Frankfurter, *Of Law and Men* 39 (1956) (quoted in A. Bickel I, *supra* note 110, at 38).

113. *Id.*

114. Dick v. New York Life Ins. Co, 359 U.S. 437, 458 (1959) (Frankfurter, J., dissenting).

115. Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. Phil. Psychology & Sci. Method 645, 646 (1918) (quoted in A. Bickel I, *supra* note 110, at 20).

116. Powell, *supra* note 7, at 1372.

117. Hart, *The Supreme Court, 1958 Term—Forward: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 99-100 (1959).

118. Justice Brandeis once observed: "The reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington who do their own work." C. Wyzanski, Whereas—A Judge's Premises 61 (1965) (remark of Justice Brandeis) (quoted in Remarks of Justice Rehnquist, *supra*, note 10, at 27).

sense reflection and clarity of presentation. As Justice Stevens has noted, the Supreme Court's caseload could be reduced significantly by stricter adherence to the doctrine of judicial restraint.[119] Very simply, if it is not necessary to decide the issue—if the issue is not ripe for review—the Court should not undertake to decide it, for as Alexander Bickel said, "[n]o answer is what the wrong question begets."[120] There are, moreover, some issues that the Court simply need not address. In *Sakraida v. Ag Pro, Inc.*,[121] the Supreme Court granted certiorari to decide the validity of respondent's patent covering a water flush system to remove cow manure from the floor of a dairy barn. The Court's holding that the system "did not produce a 'new or different function' . . . within the test of validity of combination patents"[122] was certainly helpful to the litigants involved but hardly an issue of prime national importance.

Justices Brennan and Stevens have publicly cited the school library case, *Board of Education v. Pico*,[123] as an example of the type of case the the Supreme Court should not take.[124] The issue there was whether the first amendment restrained the school board in the removal of books from a school library.[125] After the district judge granted the school board summary judgment,[126] the Second Circuit reversed on the ground that the case presented a genuine issue of fact as to the school board's motivation.[127] Further proceedings by the trial court would have clarified the constitutional issue and perhaps mooted the entire case.[128] Yet the Supreme Court took the case at the interlocutory stage, disposed of it by affirming the remand for trial and filed seven separate opinions, none of which commanded the votes of a majority. The Supreme Court addressed a constitutional issue prematurely, and in such a confusing and ambiguous manner that it undoubtedly will stimulate a great deal of litigation in search of a clearer set of guiding principles. As Justice Marshall, one of only two Justices who did not write a separate opinion in *Pico*, commented, "it may be pretty difficult for the lower courts, or anyone else, to figure

---

119. Stevens II, *supra* note 47, at 180; *see* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 345-48 (1936) (Brandeis, J. concurring).

120. A. Bickel, The Least Dangerous Branch 103 (1962).

121. 425 U.S. 273 (1976).

122. *Id.* at 282 (*quoting* Anderson's Black Rock v. Pavement Salvage Co., 396 U.S. 57, 60 (1969)).

123. 457 U.S. 853 (1982).

124. Brennan I, *supra* note 7, at 231; Stevens II, *supra* note 47, at 180.

125. 457 U.S. at 855-56.

126. *See id.* at 859.

127. *Id.* at 860-61.

128. Brennan I, *supra* note 7, at 232.

out exactly what the decision stands for."[129] Perhaps when the Court took the case for review it thought that a consensus could be achieved, but after briefing and argument that consensus proved impossible. The Court then should have considered a summary remand.

Another type of case that the Supreme Court need not review involves issues limited to a specific geographical area. In *Watt v. Alaska*,[130] for example, the Supreme Court reviewed a dispute between Alaska and one of its counties over the division of mineral leasing revenues[131]—a dispute that could only arise in the Ninth Circuit. While there may have been an error by the court below, this was not a sufficient reason for Supreme Court review of a decision that did not have any implications beyond Alaska.

Cases which are factually unique also need not be reviewed. In *Oregon v. Kennedy*,[132] for example, five Justices volunteered a new double jeopardy doctrine[133] even though the Oregon Court of Appeals had misapplied the doctrine to a peculiar set of facts unlikely to be duplicated elsewhere.[134] The Supreme Court's pronouncement was totally unnecessary to the resolution of the specific case. Moreover, the Oregon court was free to reinstate its prior judgment by relying on Oregon rather than federal law.[135]

---

129. Remarks of Justice Marshall, Second Circuit Judicial Conference, at 2 (Sept. 9, 1982) (available in files of *Fordham Law Review*).

130. 451 U.S. 259 (1981).

131. *Id.* at 263.

132. 456 U.S. 667 (1982).

133. *Id.* at 679.

134. Stevens II, *supra* note 47, at 180.

135. *Id.* Another example of the Court's lack of judicial restraint may be found in Snepp v. United States, 444 U.S. 507 (1980) (per curiam). There the court below had held that Snepp's publication of a book about Viet Nam had violated his secrecy agreement with the CIA. *Id.* at 508. The government opposed Snepp's petition for certiorari and filed a conditional cross-petition, praying that if the Court granted Snepp's petition it also should consider whether the remedy ordered by the lower court was adequate. *Id.* at 524 (Stevens, J., dissenting). The Supreme Court granted both petitions, but summarily dismissed Snepp's claim, *id.*, and without hearing argument on the merits, issued a per curiam opinion ordering that a constructive trust be imposed on the book's earnings even though there was neither a statutory nor a contractual basis for this novel remedy. *Id.* at 517-18 (Stevens, J., dissenting). Since the government had not even asked the Court to review the remedy issue unless it granted Snepp's petition, this was a clear example of the Court's unnecessary exercise of power. Stevens II, *supra* note 47, at 181. Another example is Michigan v. Long, 103 S. Ct. 3469 (1983), in which the Supreme Court reversed and remanded a decision by the Michigan Supreme Court because the lower court had given too restrictive an interpretation to federal constitutional law. *Id.* at 3478-82. The Court, notwithstanding similar provisions in the Michigan Constitution, held that absent clear evidence in the lower court opinion of adequate state law grounds, the Court will presume that the decision is based on federal law. *Id.* at 3476. Justice Stevens dissented, not only because of the Court's adoption of "presumptive jurisdiction" but because the Court should not be concerned with a state court decision which provides

These cases clearly illustrate the need for more disciplined case selection and opinion writing. Each decision of the Supreme Court should be a uniquely crafted work of art; even the dissenting views, like contrasting colors and off-setting shadows, should contribute to the clarity and vitality of the whole. It is hoped the Court's archetypes would tend more toward the harmony of Monet and clarity of Rembrandt than the harried spontaneity of Pollock or discordance of Kandinsky.

4. Collegial Analysis: Reaching a Consensus

The most significant opportunity to reduce the Supreme Court's caseload may ultimately be through disciplined opinion writing and collegial deference in the rendering of decisions. In selecting cases for review, the Court should consider whether members of the Court are prepared to work together to clarify and advance the state of the law. The subtle judgments and mutual deference involved in this process spring from the Court's deeply embedded traditions and the practical wisdom of its finest members. One such great exemplar was Justice Brandeis, of whom his former law clerk, Paul Freund, has written:

---

greater protection to a citizen than is required by the Constitution. *Id.* at 3489-90. Justice Stevens wrote:

> Even if I agreed with the Court that we are free to consider as a fresh proposition whether we may take presumptive jurisdiction over the decisions of sovereign states, I could not agree that an expansive attitude makes good sense. It appears to be common ground that any rule we adopt should show "respect for state courts, and [a] desire to avoid advisory opinions." . . . And I am confident that all members of this Court agree that there is a vital interest in the sound management of scarce federal judicial resources. All of those policies counsel against the exercise of federal jurisdiction. They are fortified by my belief that a policy of judicial restraint—one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene—enables this Court to make its most effective contribution to our federal system of government.
>
> The nature of the case before us hardly compels a departure from tradition. These are not cases in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather, they are cases in which a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law. The complaining party is an officer of the state itself, who asks us to rule that the state court interpreted federal rights too broadly and "overprotected" the citizen. . . .
>
> Until recently we had virtually no interest in cases of this type. . . . Sometime during the past decade . . . our priorities shifted. The result is a docket swollen with requests by states to reverse judgments that their courts have rendered in favor of their citizens. I am confident that a future Court will recognize the error of this allocation of resources. When that day comes, I think it likely that the court will also reconsider the propriety of today's expansion of our jurisdiction.

Id. at 3490-91 (Stevens, J., dissenting) (footnotes omitted).

> For Brandeis almost the paramount quality of a good judge was the capacity to be reached by reason, the freedom from self-pride that without embarrassment permits a change of mind. It was this quality of open-mindedness which made Justice Pitney, who was in many respects poles apart from Brandeis, an especially respected colleague. The constructive influence of Brandeis in the councils of the Court owed much to his high boiling point, his self-control which, when excessively taxed, was able to convert the fire within him into the heat of dry ice.[136]

The unpublished opinions of Justice Brandeis, as analyzed by Alexander Bickel, provide useful insight into the collegial decision-making of past Courts and the judgment involved in deciding whether to dissent.[137] Brandeis had been assigned to write the Court's opinion in *St. Louis Iron Mountain & Southern Railway Co. v. Starbird*,[138] concerning the question whether the Supreme Court had jurisdiction to review a state court's decision if a federal right had not been expressly asserted in the state court below. Brandeis wrote a draft opinion denying jurisdiction, but several months later Justice Day issued a unanimous opinion for the Court finding jurisdiction and addressing the merits. Why did Brandeis not dissent? Bickel asserts that Brandeis "suppressed his dissenting views on questions which he considered to be of no great consequence."[139] Similarly, although Brandeis disagreed with the majority in *Gooch v. Oregon Short Line Railroad Co.*,[140] he refrained from dissenting on the grounds that the issue presented—whether a railroad pass condition restricted a personal injury claim—was "not important enough to warrant dissent."[141]

In *Starbird*, it is also likely that Brandeis wished to find a more effective context in which to articulate his jurisdictional views, and that he further recognized that a dissent could have focused more sharply the holding with which he differed. As Professor Frankfurter once said: "[T]he scope of a Supreme Court decision is not infrequently revealed by the candor of dissent."[142] Brandeis "suppressed dissents for tactical reasons"[143] and often "referred to Holmes' reluc-

---

136. Freund, *Introduction* to A. Bickel, The Unpublished Opinions of Mr. Justice Brandeis at xx (1957).

137. *See* A. Bickel, The Unpublished Opinions of Mr. Justice Brandeis *passim* (1957) [hereinafter cited as A. Bickel II].

138. 243 U.S. 592 (1917).

139. A. Bickel II, *supra* note 137, at 28.

140. 258 U.S. 22 (1922).

141. A. Bickel II, *supra* note 137, at 28.

142. F. Frankfurter, The Commerce Clause under Marshall, Taney and Waite 106 (1937) (quoted in A. Bickel II, *supra* note 137, at 29).

143. A. Bickel II, *supra* note 137, at 18. Occasionally, however, a dissent may be used tactically to attempt to narrow the precedential value of a decision. Justice

tance to dissent again after he had once had his say on a subject."[144] The Court has often performed magnificently in adjusting the views of its members to avoid dissension on great public issues, particularly when unanimity was important to gain public acceptance. The nation should greatly admire and appreciate the effort, time and talent which was expended in fashioning a single Court opinion in, *inter alia*, *Brown v. Board of Education*,[145] *Brown v. Board of Education II*,[146] *Cooper v. Aaron*,[147] *Swann v. Charlotte-Mecklenburg Board of Education*,[148] *United States v. Nixon*,[149] and in achieving near-unanimity (8-1) in *Bob Jones University v. United States*.[150]

While these cases demonstrate that the Court sometimes has struggled mightily for consensus, there is little public indication that the traditional spirit of collegial deference pervades the Court today. Indeed, as the statistics cited earlier[151] indicate, unanimous decisions may be becoming an "endangered species." Carefully crafted and sparingly used dissents can contribute to the sharpness of the Court's message and even foreshadow its future direction.[152] In some instances, a clear and forceful opinion of the Court accompanied by equally lucid and scholarly concurring and dissenting opinions can provide both clarity and realism in evaluating the underlying societal tensions. The Chief Justice's eloquent opinion for the Court in *Immigration & Naturalization Service v. Chadha*,[153] Justice Powell's lucid

---

Brennan's recent dissent in Brown v. Thomson, 103 S. Ct. 2690 (1983), offers a not too subtle illustration:

> Although I disagree with today's holding, it is worth stressing how extraordinarily narrow it is, and how empty of likely precedental value. . . . Hence, although in my view the Court reaches the wrong result in the case at hand, it is unlikely that any future plaintiffs challenging a state reapportionment scheme as unconstitutional will be so unwise as to limit their challenge . . . .

Id. at 2700 (Brennan, J., dissenting).

144. A. Bickel II, *supra* note 137, at 18.

145. 347 U.S. 483 (1954). The case was first argued on December 9, 1952 but was not decided until May 17, 1954. *Id.* at 483.

146. 349 U.S. 294 (1955).

147. 358 U.S. 1 (1958).

148. 402 U.S. 1 (1971).

149. 418 U.S. 683 (1974).

150. 103 S. Ct. 2017 (1983).

151. See *supra* note 19 and accompanying text.

152. *E.g.*, Plessy v. Ferguson, 163 U.S. 531, 552 (1896) (Harlan, J., dissenting); *see* Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised,"* 59 A.B.A.J. 835, 838 (1973). Justice Brennan's concern that he may not be able to suggest through dissent from a denial of certiorari that substantial issues are presented, *id.*, is countered by Justice Stevens' contention that the Supreme Court "shouldn't waste scarce time and energies writing dissents when it denies petitions for review." Wash. Post, Dec. 5, 1978, at A12, col. 1.

153. 103 S. Ct. 2764 (1983).

concurring opinion, and Justice White's scholarly dissent each contribute to public understanding of the legislative veto issue and the true tensions inherent in any future attempt at a legislative solution.

The Court, however, must confront "that 'great difficulty of all group action'—when to dissent, and when to concede and be silent."[154] While concurring opinions may contribute to the development of the law, concurrences such as the one filed by Justice O'Connor in *Commissioner v. Tufts*[155] do little to sharpen the Court's holding. After reciting at length from Professor Barnett's amicus brief, Justice O'Connor concluded: "Persuaded though I am by the logical coherence and internal consistency of this approach, I agree with the Court's decision not to adopt it judicially."[156] Such persistent fragmentation of views and lack of cohesion erode the Court's moral authority, befuddle the beneficiaries of its guidance, and—most relevant here—invite further pressure on its workload.

The confusion begat by fragmentation can be illustrated by the Court's recent decision on the fourth amendment's protection against illegal search and seizure in *Florida v. Royer*.[157] Mr. Royer had purchased an airline ticket to New York City at Miami Airport under the name "Holt" and had checked two suitcases bearing this appellation.[158] In the airport concourse, a nervous Royer was approached by two detectives who had observed him and believed that he fit the so-called "drug courier profile."[159] Upon request, but without *oral* consent, Royer produced his airline ticket and driver's license, the latter of which bore his correct name.[160] The detectives then informed Royer that they were narcotics investigators and they suspected he was transporting narcotics.[161] Without returning his ticket or license, they asked him to accompany them to a small room adjacent to the concourse where they retrieved his luggage and requested his consent to search it.[162] Royer did not *orally* consent but provided a key which unlocked one of the suitcases in which marijuana was found.[163]

This is not a unique set of circumstances. Last year, in the Detroit Airport alone, drugs were found in 77 out of 141 searches.[164] Because narcotics smuggling is a serious national problem, clear Supreme

---

154. A. Bickel II, *supra* note 137, at 21.
155. 103 S. Ct. 1826, 1836 (1983) (O'Connor, J., concurring).
156. *Id.* at 1837 (O'Connor, J., concurring).
157. 103 S. Ct. 1319 (1983).
158. *Id.* at 1322.
159. *Id.* at 1321-22.
160. *Id.* at 1322.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 1339 n.6 (Rehnquist, J., dissenting).

Court guidance would be helpful to law enforcement officials and to the lower courts.

It is instructive, therefore, to examine the "guidance" the Court provided through its five separate opinions.[165] In a plurality opinion, Justice White concluded that Royer's detention in the airport concourse was legal, but that his removal to the small room constituted an illegal detention.[166] Thus, although Royer *consented* to the search of his luggage, the consent was tainted by the illegal detention, and therefore ineffective to justify the search.[167] Justice Powell concurred, but concluded that in the "small, windowless room—described as a 'large closet' "[168] Royer's mere surrender of his luggage key did not constitute consent.[169] Concurring in the result, Justice Brennan concluded that the initial stop of Royer in the airport concourse was illegal and that everything thereafter was therefore tainted.[170] Justice Blackmun dissented, arguing that society's interest in the detection of drug traffickers is so great that the detectives did not need to have "probable cause" to detain Royer.[171] Justice Rehnquist, joined by the Chief Justice and Justice O'Connor, also dissented, concluding that under the circumstances the two detectives did have "probable cause" to arrest Royer and that the transfer to a small room and interception of the luggage were consistent with the fourth amendment's "reasonableness test."[172]

Despite the five opinions, a law enforcement officer, prosecuting or defense attorney, or lower court has no clear answer to many important questions. For instance, should the law enforcement officers have requested permission to search the suitcases in the open public concourse rather than transfering Royer to a small room? If the room had been large and spacious, rather than small and windowless, would the officers' conduct have been reasonable? If the officers had returned Royer's ticket and driver's license, would the encounter have been consensual? If Royer had orally agreed to open the suitcase, would this have been sufficient?

The Supreme Court's resolution of the *Royer* case, some might say, represents the intellectual jousting of a debating society, each Justice

---

165. Florida v. Royer, 103 S. Ct. 1319 (1983) (plurality opinion of White, J., at 1321; concurring opinion of Powell, J., at 1329; concurring opinion of Brennan, J., at 1330; dissenting opinion of Blackmun, J., at 1332; dissenting opinion of Rehnquist, J., at 1336).

166. *Id.* at 1326.

167. *Id.* at 1326-27.

168. *Id.* at 1330 (Powell, J., concurring).

169. *Id.*

170. *Id.* at 1331-32 (Brennan, J., concurring).

171. *Id.* at 1332. (Blackmun, J., dissenting).

172. *Id.* at 1337 (Rehnquist, J., dissenting).

spinning his own web of procedural distinctions from the Court's esoteric fourth amendment jurisprudence.[173] It fails to exhibit any collegial attempt at consensus on basic principles. It is devoid of real guidance for officers and lawyers, and invites further litigation to resolve the ambiguities it has created. Furthermore, having upheld a similar airport drug search in 1980 in *United States v. Mendenhall*,[174] the Supreme Court was not under any compulsion to revisit the issue.[175]

The Supreme Court should have denied certiorari in *Royer*. If it did not become apparent until after certiorari was granted that the case did not present the best opportunity to revisit the issue of airport drug searches, the Supreme Court could have disposed of the case summarily in a per curiam affirmance of the judgment below (perhaps stating that an opinion would not be written because there was no consensus on the issue). Alternatively, the Court should have admitted its mistake in granting certiorari and reversed the grant. The Court's action in *Illinois v. Gates*,[176] for example, despite criticism from the press,[177] was clearly correct. The Justices simply announced that the Court would not rule on the controversial law enforcement questions presented because "[t]hey had picked the wrong case."[178]

A month after *Royer*, the Supreme Court, in a similar display of fragmentation, applied the "plain view" doctrine to a police officer's seizure of a drug-filled green party balloon from respondent's automobile.[179] Justice Rehnquist, joined by Chief Justice Burger, Justice White and Justice O'Connor, maintained that seizure of the balloon did not constitute a violation of the fourth amendment.[180] Justice Powell, joined by Justice Blackmun, concurred, arguing that the plain view doctrine articulated in *Coolidge v. New Hampshire*[181] was dis-

---

173. *See* Will, *Justice Squints*, Wash. Post, Mar. 31, 1983, at A23, col. 5.

174. 446 U.S. 544 (1980).

175. Subsequent to *Royer*, the Supreme Court again granted certiorari in an airport drug seizure case. In United States v. Place, 103 S. Ct. 2637 (1983), six Justices were able to agree that detaining a suspect's luggage for over 90 minutes was not reasonable in the absence of probable cause. In contrast to *Royer*, this case is a good example of the type of clear guidance a more cohesive opinion can provide.

176. 103 S. Ct. 2317 (1983). The issue in *Gates* was whether the exclusionary rule should be modified to allow the introduction of illegally obtained evidence, when that evidence was obtained in the good faith belief that the search and seizure in question complied with the requirements of the fourth amendment. *Id.* at 2321. The Court declined to decide this issue because it had not been presented to or decided by the Illinois Court. *Id.*

177. *See, e.g.*, Barbash, *High Court Feared Issuing the Right Ruling in the Wrong Case*, Wash. Post, June 10, 1983, at A7, col. 1.

178. *Id.*

179. Texas v. Brown, 103 S. Ct. 1535 (1983).

180. *Id.* at 1541-44.

181. 403 U.S. 443 (1971).

positive of the issue presented.[182] Justice Stevens, joined by Justices Brennan and Marshall, wrote a separate concurring opinion pointing out that the state would have to justify opening the balloon without a warrant before the balloon's contents could be used as evidence.[183] In a one-paragraph concurrence, Justice White noted his continued disagreement with the views of four Justices in *Coolidge* that plain view seizures are only valid if inadvertent.[184] Although there were no dissents, the four separate opinions, none of which reflected the views of a Court majority, completely diffused the practical value of any guidance provided by the Court.

Perhaps the classic example of fragmentation occurred in *Regents of the University of California v. Bakke*.[185] Two different five-to-four majorities decided the two main issues in the case,[186] resulting in six separate opinions.[187] Even though Justices Marshall, White and Blackmun joined Justice Brennan in his opinion, they each also wrote their own separate opinions.[188] The resultant 156 pages left the law regarding affirmative action in medical school admissions in a state of reasoned ambiguity.

The substantial increase in the number of separate opinions in cases like *Royer*, *Brown*, and *Bakke* adds fuel to the flames of a litigious population by inviting litigants throughout the federal system to press for particular points of view that have some support on the Court.[189] As the statistics recited earlier[190] suggest, there is less cohesion and unity of purpose on today's Court. Some of this dissension may be explained by the diversity of backgrounds and perspectives on the present Court, the increased complexity of the social and technical

---

182. Texas v. Brown, 103 S. Ct. 1535, 1544-45 (1983) (Powell, J., concurring).

183. *Id.* at 1547 (Stevens, J., concurring).

184. *Id.* at 1544 (White, J., concurring).

185. 438 U.S. 265 (1978).

186. *Id.* at 271-72; *see* Tribe, *Comment, Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 Harv. L. Rev. 864, 864 (1979).

187. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Opinion of Powell, J., at 269; opinion of Brennan, J., Marshall, J., White, J., and Blackmun, J., concurring in part and dissenting in part, at 324; opinion of White, J., at 379; opinion of Marshall, J., at 387; opinion of Blackmun, J., at 402; opinion of Stevens, J., concurring in part and dissenting in part, at 408).

188. See *supra* note 187.

189. *See* N.Y. Times, July 9, 1982, at A1, col. 2. In the 1981 Term, 33 cases were decided by a one-vote margin as compared to the previous Term in which 17 cases were decided by a one-vote margin. *Id.* In the 1982 Term, 33 cases were decided by a one-vote margin. *See* Appendix, Chart I.

190. Between 1955 and 1982, the Supreme Court issued approximately "three times as many plurality decisions as were issued in the entire previous history of the Court." Wallace, *supra* note 97, at 921 (citing Note, *Plurality Decisions and Judicial Decisionmakings*, 94 Harv. L. Rev. 1127, 1127 n.1, 1147 (1981)).

issues that are presented to the Court today (in contrast to the Courts on which Hughes, Holmes and Brandeis sat), and the tendency of Congress to "punt" on too many controversial issues. But the outside observer sees too little evidence of a genuine effort by the Justices to work out their differences in conference rather than spell them out in separate opinions.[191] Ironically, the Supreme Court, as Justice Frankfurter reminded us, derives its authority not from the exercise of power or control of the purse, but through its capacity to gain the consent of the governed to a reasoned, ordered process of dispute resolution.[192]

It does little to aid the Court's image as the ultimate dispute resolver when the Justices themselves cannot refrain from engaging in attacks on one another's positions. An example of this sort of internal bickering is the five-to-four decision in *FERC v. Mississippi*.[193] Justice Blackmun, writing for the Court, referred to Justice O'Connor's "purported distinctions" as "little more than exercises in the art of *ipse dixit*."[194] Justice O'Connor, in her partial dissent, referred to Justice Blackmun's choice between the states' abandoning regulation of public utilities or complying with a federal statute as "an absurdity, for if [the] analysis is sound, the Constitution no longer limits federal regulation of state governments."[195] Justice Blackmun recently noted that on such close votes, "[y]ou're locked in combat. It's competitive to that degree . . . . But I think, clearly, this is an educational process—and I would hope that one matures as the years go by."[196]

There are, of course, times when a clear and forceful dissent contributes greatly to public understanding of the law, but dissents should be saved for such occasions. One should not advocate that the fiercely independent intellects that constitute today's Supreme Court consign themselves to the lowest common denominator of compromise. Nor should attempts at accommodation resort to intentional ambiguities like the legislative ambiguities created by House-Senate conferences. If clarity and candor are best served by dissenting opinions, then a dissent is preferable to disingenuous accommodation.

---

191. Unless the Justices routinely employ tact and diplomacy in order to establish convincing majorities, court decisions may resemble a "restricted railroad ticket, good for this day and train only." *See* Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). See *supra* notes 18-20 and accompanying text.

192. *See* N. Dawson, Louis D. Brandeis, Felix Frankfurter, and the New Deal 27-28 (1980).

193. 456 U.S. 742 (1982).

194. *Id.* at 762 n.27.

195. *Id.* at 781 (O'Connor, J., concurring in part and dissenting in part).

196. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. Times, Feb. 20, 1983, § 6 (Magazine), at 20.

Often unanimity is not obtained by scientists, even on matters subject to objective proof. One cannot expect that the Justices will always achieve harmonious consent on difficult philosophical, economic, and governmental matters. As Chief Justice Hughes stated in 1936:

> How amazing it is that, in the midst of controversies on every conceivable subject, one should expect unanimity of opinion upon difficult legal questions! In the highest ranges of thought, in theology, philosophy and science, we find differences of view on the part of the most distinguished experts,—theologians, philosophers and scientists. The history of scholarship is a record of disagreements. And when we deal with questions relating to principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty.[197]

But the heritage of the law—particularly the common law—is that objective neutral principles can be applied by well-trained lawyers to reach a correct judgment. It would be less than candid not to suggest that the Supreme Court could do much to reduce the pressures of its workload if the Justices would work a little harder at reaching agreement with each other and a little less hard at writing separate opinions.

Paul Freund's description of Justice Brandeis' approach to decision-making illustrates a tradition that has much meaning for today's Court:

> Brandeis exploited to the full the resources available to a judge . . . . He was not an addict of speed in the work of the Supreme Court. Unlike a Holmes or a Cardozo, he was not impatient to turn off an opinion while the frenzy was on him so much as he was anxious that it persuade and instruct. Time for research, documentation, reflection, and the architecture of an opinion was indispensable. . . . [H]e made a practice of distributing his own drafts early in the week, holding them over if necessary lest they reach the brethren too near the time for decision. . . . What emerges from all this is the image of a judge whose strength lay in his power to blend tradition and change, to find in the heritage of the law resources adequate to the needs of the new day, if only there is imagination to see the resources and understanding to see the needs. . . .
>
> The willingness, indeed the temperamental inclination, of Brandeis to work within the received framework of the law, is a clue to his effectiveness in the collective task of decision-making.[198]

---

197. Address of Chief Justice Hughes, 13 Proc. Am. Litigation Inst. 61, 64 (1936), *quoted in* P. Freund, *supra* note 2, at 117 n.2.

198. Freund, *Introduction* to A. Bickel, The Unpublished Opinions of Mr. Justice Brandeis at xviii-xix (1957).

Conclusion

It is truly ironic for one who feels so deeply that the Court has consistently discharged its constitutional responsibility with more judgment, style and foresight than any other institution of government to suggest any criticism whatsoever. When the President and Congress avoided the issues, the Court had the courage and foresight to end racial segregation in the public school system, to come to grips with the right of a woman to have an abortion, to recognize that sex discrimination is unacceptable in a constitutional democracy, and to insist upon a fair criminal process. Anyone who knows American history must concede that the Court has performed with a higher standard of excellence than any other institution, state or federal, in this constitutional democracy. The libraries at Oxford, Cambridge and Harvard undoubtedly contain more critical theses about Shakespeare or Pushkin than any minor writers or poets; the Court must accept the fact that institutions that excel are the subject of continuing critical pressure to attain even greater standards of excellence—perhaps because they are the repository of so many of civilized society's aspirations. In that spirit this conclusion is written.

Much of the answer to the workload problem lies not in the establishment of new institutions but deep in the traditions of the Supreme Court. Congress should give the Court discretion to choose only those few issues of fundamental national importance for review, delegating to the circuit courts the power to resolve lesser conflicts. Like a microcosm of the larger society it reflects, the Supreme Court's success depends on it taking those limited issues and weaving the diverse strands of a complex society into a cohesive fabric. Thus, the ultimate objective in the management of the Supreme Court's caseload should be to provide the Justices with the freedom to grapple together as wise individualists in search of common principles rooted in the unfulfilled vision of our Constitution. It is a disciplined search which cautions against needless dissent and pointless contention. As Alexander Bickel has said, society "values the capacity of the judges to draw its attention to issues of largest principle that may have gone unheeded in the welter of its pragmatic doings."[199]

---

199. A. Bickel I, *supra* note 110, at 177.

CHART I
STATISTICS: SUPREME COURT OPINIONS*

	1882	1932	1982
1. Total Court Opinions**	260	167	151
—Per Curiam	0	1	11
2. Concurring Opinions	4	4	70
—Concurrences as a percentage of total opinions	1.55%	2.39%	46.35%
3. Dissenting Opinions	17	24	144
—Dissents as a percentage of total opinions	6.58%	14.37%	95.36%
4. Total Separate Opinions	21	28	214
—Separate opinions as a percentage of total opinions	8.13%	16.76%	141.72%
5. Unanimous Decisions	242	133	34
—Unanimous decisions as a percentage of total opinions	93.08%	79.64%	22.52%
6. Five-to-Four Votes	4	3	33
—Five-to-four votes as a percentage of total opinions	1.55%	1.79%	21.85%

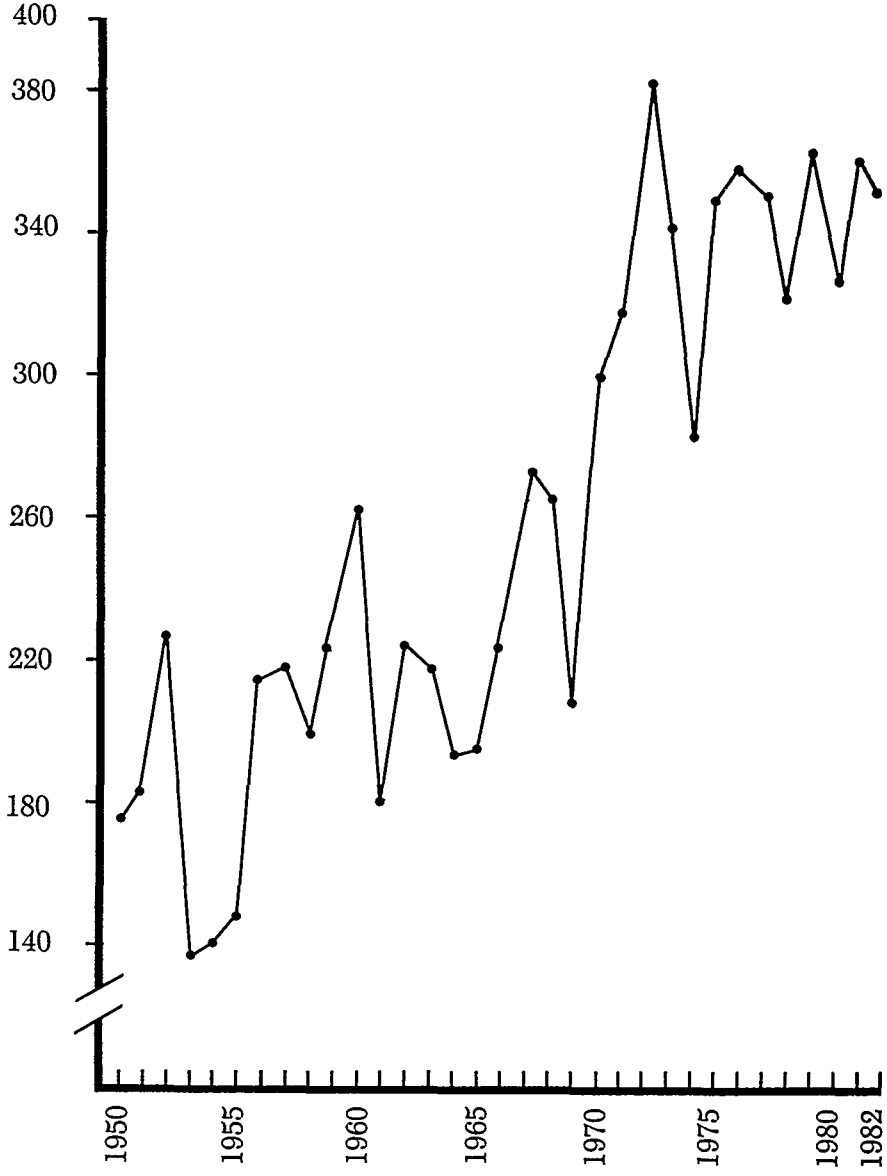
* Figures for 1882 and 1932 Terms were compiled by the author's staff from U.S. Reports for those Terms. Figures for the 1982 Term were obtained from the *Harvard Law Review* and will be published in *The Supreme Court, 1982 Term*, 97 Harv. L. Rev. ___, ___ (1983).
** Does not include per curiam opinions.

CHART II
UNITED STATES SUPREME COURT: OPINIONS WRITTEN*

Term	Opinions of the Court	Concurrences	Dissents	Total
1982	151	70	140	361
1981	141	95	135	371
1980	122	91	119	332
1979	132	79	156	367
1978	130	78	122	330
1977	129	81	143	353
1976	126	91	140	357
1975	138	89	126	353
1974	123	51	101	275
1973	140	57	142	339
1972	140	67	178	385
1971	129	69	130	328
1970	106	82	115	303
1969	83	52	70	205
1968	99	67	101	267
1967	110	75	91	276
1966	100	26	97	223
1965	97	37	74	208
1964	91	46	71	208
1963	111	30	77	218
1962	110	40	76	226
1961	84	31	66	181
1960	109	42	111	262
1959	96	26	99	221
1958	98	30	72	200
1957	96	23	93	212
1956	100	18	83	211
1955	73	21	55	149
1954	78	15	47	140
1953	65	16	57	138
1952	104	32	89	225
1951	83	19	73	182
1950	91	23	60	174
1949	87	18	64	169
1948	114	37	93	244

* Source: *The Supreme Court: The Statistics*, 63-97 Harv. L. Rev., November issues (1949-1983). These figures do not include per curiam opinions.

CHART III
UNITED STATES SUPREME COURT: NUMBER OF OPINIONS*



* Source: *The Supreme Court: The Statistics*, 63-97 Harv. L. Rev., November issues (1950-1983). These figures do not include per curiam opinions.