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PRESERVING THE ESSENTIAL ROLE OF THE SUPREME COURT:

A COMMENT ON JUSTICE REHNQUIST'S PROPOSAL

ARTHUR D. HELLMAN*

Unresolved conflicting decisions of the federal courts of appeals are often cited as a compelling reason for the creation of a new national appellate court. In this Response to Justice Rehnquist's Article, Professor Hellman challenges the assertion that these conflicts are a major problem for the judiciary and the bar. He then discusses the perceived need for more national decision-making capacity, and disagrees with Justice Rehnquist's denial of the value of the "percolation" of issues in the courts of appeals. He argues that the Supreme Court's role in deciding statutory construction issues is an important influence on the internal dynamics of the Court and for public acceptance of the concept of judicial review. Professor Hellman concludes that a new national appellate court would represent a major restructuring of the federal judiciary to meet a need that so far has not been demonstrated.

I. INTRODUCTION

WHEN Chief Justice Burger proposed creation of an "Intercircuit Panel" to assist the Supreme Court in deciding cases, he repeatedly emphasized that his plan was a modest one. As he portrayed it, the new tribunal would represent only incremental change, "nothing more than . . . a national en banc panel of nine judges," and in any event "temporary and experimentally."¹ In an

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1. Burger, *The Time Is Now for the Intercircuit Panel*, A.B.A. J., Apr. 1985, at 86, 88 [hereinafter cited as Burger, *Intercircuit Panel*]; see also Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983) [hereinafter cited as Burger, *1983 Annual Report*]. As will be seen, I do not agree with this characterization. See *infra* Part IV.

As initially described by the Chief Justice, the proposed court did not have a name. When legislation was introduced in Congress to implement his plan, the proposed structure was designated as the "Intercircuit Tribunal of the United States Courts of Appeals." S. 645, 98th Cong., 1st Sess. §§ 601-07 (1983), 129 CONG. REC. S1947-48 (daily ed. Mar. 1, 1983) (remarks of Sen. Dole); H.R. 1970, 98th Cong., 1st Sess. (1983), 129 CONG. REC. H1192-93 (daily ed. Mar. 15, 1983) (remarks of Rep. Kastenmeier). The bill now under consideration in the Senate denominates the proposed court as the "Intercircuit Panel of the United

Article published in this issue of the *Florida State University Law Review*, Justice William H. Rehnquist has articulated a far more ambitious plan. Justice Rehnquist supports the proposed Intercircuit Panel, but not simply as an experiment. Rather, he sees it as the first step in a radical restructuring of the federal judicial system—the establishment of a new court that “will have either by practice or by statute the all-but-final say” on issues of statutory construction.²

In arguing for the creation of this new court, Justice Rehnquist relies on a straightforward syllogism. Constitutional adjudication is more important than statutory adjudication; the Supreme Court cannot resolve all of the undecided federal questions that arise in both areas; therefore cases involving only statutory interpretation should be shunted off to a new tribunal that would “function in effect as a lower chamber of the Supreme Court.”³

Justice Rehnquist deserves full credit for his candor in acknowledging that the proposed Intercircuit Panel does not involve simply a matter of judicial housekeeping, but implicates basic questions about “the proper role of the Supreme Court in our system of government.”⁴ However, both his diagnosis and his prescription are flawed in fundamental respects. First, the available evidence does not support the proposition that “we need today more national decision-making capacity than the Supreme Court as presently constituted can furnish.”⁵ Second, Justice Rehnquist relies on a superficial description of the Supreme Court’s role in the American system of government. When the full measure of that role is taken into account, it becomes apparent that eliminating statutory cases from the Court’s docket could seriously handicap the Court in the performance of its essential responsibilities.

States Courts of Appeals.” S. 704, 99th Cong., 1st Sess. (1985); see 130 CONG. REC. S3313 (daily ed. Mar. 20, 1985) (remarks of Sen. Thurmond). The current House bill continues to use the “Intercircuit Tribunal” designation. H.R. 4238, 99th Cong., 2d Sess. (1986); see 132 CONG. REC. H650 (daily ed. Feb. 26, 1986) (remarks of Rep. Kastenmeier).

2. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U.L. REV. 1, 12 (1986). Justice Rehnquist reiterated his views in comments from the floor during a discussion of the Intercircuit Panel proposal at the 1986 midyear meeting of the American Bar Association. Notwithstanding Justice Rehnquist’s plea, the House of Delegates rejected the plan by a large margin. See *Bar Group Opposes Plan to Establish New Appeals Court*, WALL ST. J., Feb. 12, 1986, at 12, col. 3; *American Bar Association Mid-Year Meeting*, 54 U.S.L.W. 2414, 2415 (1986).

3. Rehnquist, *supra* note 2, at 12.

4. *Id.* at 1.

5. *Id.* at 12.

I shall discuss each of these points in turn,⁶ but before doing so it will be useful to touch briefly on an aspect of the controversy that Justice Rehnquist does not mention at all. Totally absent from his analysis is any suggestion that the Supreme Court is overworked. What makes this so curious is that Chief Justice Burger, whose Intercircuit Panel proposal Justice Rehnquist endorses, has relied almost entirely on the argument that the Supreme Court's caseload has become so burdensome as to threaten "a breakdown of the system—or of some of the justices."⁷ Consistent with this perception of the problem, the Chief Justice contemplates that the new panel would "take as many as 35 to 50 cases a year from the argument calendar of the Supreme Court"⁸ and thereby restore the plenary docket "to some figure at or near the 100 argued cases"⁹ that the Chief Justice believes to be "the maximum caseload that should be carried by the Supreme Court."¹⁰ Under this approach, there would be no increase whatever in the "national decision-making capacity."

Justice Rehnquist's failure to say anything about the burdens imposed by the Court's caseload is no oversight. In an earlier speech endorsing the Chief Justice's proposal, Justice Rehnquist explicitly disavowed the "overwork" argument. He stated that the Supreme Court is busy, "but probably no busier than many other courts and private practitioners."¹¹ And he saw no reason for the Court to cut back from the 150 cases that it now hears even if "fifty or so cases" were being transferred to a new court for decision.¹²

For reasons I have developed elsewhere, I do not think the evidence supports the Chief Justice's contention that the Supreme

6. The editors have asked me to write a brief commentary on Justice Rehnquist's proposal. Many of the issues raised by the plan are discussed at greater length in Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 HASTINGS CONST. L.Q. 375 (1984) [hereinafter cited as Hellman, *Intercircuit Tribunal*]; and Hellman, *Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?*, 67 JUDICATURE 28 (1983).

Unless otherwise attributed, the data in this Article are based on my own research. Lists of the cases included in the various categories are on file with the author.

7. Burger, *1983 Annual Report*, *supra* note 1, at 445.

8. *Id.* at 447.

9. *Id.*

10. Burger, *Intercircuit Tribunal*, *supra* note 1, at 89.

11. Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U.L.J. 1, 6 (1984).

12. *Id.*

Court is overworked.¹³ But because Justice Rehnquist does not rely on the argument, I shall not pursue it here. The important point is that the two Justices who have been most vocal in calling for the creation of a "lower chamber" for the Supreme Court have given different and largely inconsistent explanations of why a new tribunal is needed. Disagreement on a matter so fundamental suggests at the outset that Congress should proceed with great caution before implementing structural change, "experimentally" or otherwise, in the federal judicial system.

II. ADEQUACY OF THE NATIONAL DECISIONAL CAPACITY

In arguing that "we need . . . more national decision-making capacity than the Supreme Court as presently constituted can furnish," Justice Rehnquist advances two propositions, one empirical, the other normative. The empirical proposition is implied rather than stated: the Supreme Court cannot resolve all of the inter-circuit conflicts presented to it.¹⁴ The normative proposition is put more straightforwardly: definitive resolution of important federal questions should not await the development of a conflict, but should come at an earlier stage. Neither argument is persuasive.

On the empirical side, proving a negative is always difficult, and never more so than when the question is one as elusive as whether the Supreme Court is leaving conflicts unresolved because its docket is too full. The difficulty is twofold. In all but the clearest cases, reasonable people can disagree as to whether two rulings are actually in conflict.¹⁵ Even when the presence of a conflict is indisputable, six or more Justices may vote to deny review for a wide variety of reasons other than the lack of decisional capacity.¹⁶ Nevertheless, I think it is now possible to render something stronger than a "not proven" verdict on the claim that numerous unresolved conflicts can be found in the cases the Court does not hear. The reason is epitomized by one of Justice Rehnquist's favorite literary allusions: the dog that did not bark in the nighttime.¹⁷

13. See Hellman, *Intercircuit Tribunal*, *supra* note 6, at 380-92.

14. This is the implication of the discussion in Rehnquist, *supra* note 2, at 11-12.

15. For example, two decisions may be perceived as conflicting with one another if the issue is defined in broad terms, but not if it is defined narrowly. See Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 1018-19 (1985); *infra* note 22 and accompanying text.

16. See Hellman, *Intercircuit Tribunal*, *supra* note 6, at 401-02. Under the "Rule of Four," four votes are required to set a case for plenary consideration. See Hellman, *supra* note 15, at 956-57.

17. See *Harrison v. PPG Indus.*, 446 U.S. 578, 596 (1980) (Rehnquist, J., dissenting).

At least since 1974, prominent judges, lawyers, scholars, and legislators have been asserting that unresolved intercourt conflicts constitute a problem of significant magnitude.¹⁸ Yet in all that time no one has been able to cite more than a handful of conflict cases in which review has been denied.¹⁹ Surely, if the problem were as pervasive as supporters of the proposed new court assert, a lengthy list of cases would have been forthcoming by now.

Within the Court, the most persistent advocate of the view that intercourt conflicts remain unresolved because the Court cannot make room on its docket has been Justice White.²⁰ A casual reader of the Court's weekly order lists might get the impression that Justice White has identified a substantial number of cases in which the Court denied review despite the presence of a conflict. But careful counting reveals that in the four Terms 1981 through 1984 Justice White published no more than sixty opinions dissenting from the denial of certiorari on that ground.²¹ In some of the cases,

18. See, e.g., Meador, *A Comment on the Chief Justice's Proposals*, 69 A.B.A. J. 448, 449 (1983); Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452 (1983). See generally Hellman, *Intercircuit Tribunal*, *supra* note 6, at 393.

19. In the early 1970's, the Commission on Revision of the Federal Court Appellate System (Hruska Commission) sponsored "a major project to determine the extent to which the Supreme Court [was] denying review despite the existence of a conflict." U.S. Comm'n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 221 (1975). The study concluded that "when duplicate issues, cases resolved at the time review [was] denied, and serious procedural problems [were] taken into account," the number of conflicts denied review would come to about 50 per year. *Id.* at 222. However, the Commission's report gave only a few examples of unresolved conflicts. See *id.* at 307-08, 321-24. Contemporary commentators questioned whether the Commission had adequately supported its conclusion "that the Supreme Court has been denying review of cases that truly present conflicts among the circuits." Alsop, *Reservations on the Proposal of the Hruska Commission to Establish a National Court of Appeals*, 7 U. Tol. L. Rev. 431, 441 (1976). More recently, a re-examination of the cases relied on by the Commission's study has cast further doubt on the prevalence of unresolved conflicts in the early 1970's. Note, *Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney's Study of Conflicts in Federal Law*, 59 N.Y.U. L. Rev. 1007 (1984). And a study of all paid cases that were denied review in the 1982 Term found only 19 intercourt conflicts that the Court failed to resolve. Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 778-79 (1984).

20. See, e.g., *Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting from denial of certiorari).

21. This figure does not include cases in which Justice White stated without explanation that he would grant certiorari. Some of these cases appear to have presented intercourt conflicts. See, e.g., *State v. Caminita*, 411 So. 2d 13 (La.), *cert. denied*, 459 U.S. 976 (1982) (presenting issue later resolved in *Mabry v. Johnson*, 104 S. Ct. 2543 (1984)); *Stoica v. Stewart*, 672 F.2d 309 (3d Cir.), *cert. denied*, 459 U.S. 916 (1982) (presenting issue later resolved in *Tower v. Glover*, 104 S. Ct. 2820 (1984)). In a few additional cases, Justice White joined an opinion in which another Justice stated that the Court was denying review despite the

other members of the Court filed concurring opinions disputing Justice White's contention that a conflict existed.²² And several of the issues flagged by Justice White were resolved by the grant of review in subsequent cases.²³

The upshot is that after more than ten years of debate over various national court proposals, there is almost no evidence to support the claim that the incidence of intercircuit conflicts has outgrown the capacity of the Supreme Court to resolve them. The inference is strong that unresolved conflicts are not a problem of great magnitude.²⁴

In this light, it is understandable that Justice Rehnquist places little reliance on the argument that the Court does not have the capacity to resolve all of the intercircuit conflicts that are presented to it.²⁵ Instead, he puts forth a more interventionist con-

presence of a conflict. *See, e.g.,* *Brown v. Chaney*, 105 S. Ct. 601, 605 (1984) (Burger, C.J., joined by White & Rehnquist, JJ., dissenting from denial of certiorari).

22. *See, e.g.,* *Kerr-McGee Chem. Corp. v. Illinois*, 459 U.S. 1049 (1982) (Blackmun, J., concurring in the denial of certiorari). *Compare also* *Green Bay Packaging, Inc. v. Adams Extract Co.*, 105 S. Ct. 3536 (1985) (White, J., dissenting from denial of certiorari) (asserting that decision of court below conflicted with a Fourth Circuit decision) *with In re Corrugated Container Antitrust Litigation*, 752 F.2d 137, 142 (5th Cir. 1985) (decision below) ("Even if the Fourth Circuit doctrine is sound, the rationale of its holding is not applicable here and its dicta approves [sic] the course we take.").

23. *Compare* *Williford v. United States*, 105 S. Ct. 270 (1984) (White, J., dissenting from denial of certiorari), *with* *United States v. Rojas-Contreras*, 106 S. Ct. 555 (1985); *compare* *Jackson v. City of Joliet*, 465 U.S. 1049 (1984) (White, J., dissenting from denial of certiorari), *with* *Daniels v. Williams*, 106 S. Ct. 662, 664 (1986); *compare* *Romero v. United States*, 459 U.S. 926 (1982) (White, J., dissenting from denial of certiorari), *with* *Strickland v. Washington*, 466 U.S. 668 (1984); *compare* *Red Ball Motor Freight, Inc. v. NLRB*, 456 U.S. 997 (1982) (White, J., dissenting from denial of certiorari), *with* *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *compare* *Baxter v. Mouzavires*, 455 U.S. 1006 (1982) (White, J., dissenting from denial of certiorari), *and* *Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994 (1982) (White, J., dissenting from denial of certiorari), *with* *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985); *compare* *Kimble v. D.J. McDuffy, Inc.*, 454 U.S. 1110 (1981) (White, J., dissenting from denial of certiorari), *with* *Kush v. Rutledge*, 460 U.S. 719 (1983); *see also* *Schiavone v. Fortune*, 750 F.2d 15 (3d Cir. 1984), *cert. granted*, 106 S. Ct. 56 (1985) (apparently granting review to resolve issue discussed in *Cooper v. United States Postal Serv.*, 105 S. Ct. 2034, 2036 (1985) (White J., dissenting from denial of certiorari)).

A disproportionate number of Justice White's dissents were issued in the 1984 Term, the most recent of the four in the study; thus very little time has elapsed in which the issues might have returned to the Court. *Cf. Hellman, Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 868 n.372 (1983) (noting resolution of conflicts identified by Justice White in earlier Terms); *Hellman, Intercircuit Tribunal*, *supra* note 6, at 396 n.100 (same).

24. For further discussion of this point, see *Hellman, Intercircuit Tribunal*, *supra* note 6, at 393-402.

25. Consistent with this approach, Justice Rehnquist joined only seven of the opinions in which Justice White dissented from the denial of certiorari on the ground that the Court

ception of the Court's role as ultimate arbiter of the meaning of the federal Constitution and laws. He rejects the premise that the Court should await the development of a conflict before resolving "an important and undecided federal question."²⁶ And he denies the value of "percolation," implying that "definitive" answers to recurring issues should be rendered at the earliest possible moment.²⁷

These propositions are best considered in reverse order, but before turning to that task, I shall address another empirical matter raised by Justice Rehnquist's line of argument: the role of intercircuit conflicts in the case selection process today.²⁸ As Justice Rehnquist no doubt recognizes, it would be a substantial exaggeration to suggest that "only when there is a 'conflict' between two courts of appeals on an important and undecided federal question" does the Court grant review.²⁹ Of the 602 appeal and certiorari cases that reached the plenary docket in the four Terms 1981 through 1984,³⁰ little more than one-third involved intercircuit conflicts.³¹ Even on issues of general federal law and the jurisdiction and procedure of federal courts, where the conflict resolution function looms largest in the selection process,³² conflicts accounted for only half of the grants of review. Cases of first impression can be found among the plenary decisions;³³ so can cases in which the party who sought review did not even attempt to show that issues of general importance were at stake.³⁴

In short, it is true that the Court often will wait for the development of a conflict before resolving a recurring issue. And in some areas of statutory law, the plenary docket is overwhelmingly dominated by conflict cases. But when we look at the docket as a whole,

was failing to resolve an intercourt conflict.

26. Rehnquist, *supra* note 2, at 10.

27. *Id.* at 11.

28. For a more elaborate discussion of this topic, see Hellman, *supra* note 15, at 1014-20.

29. Justice Rehnquist does not quite assert that this is now the Court's practice; he does say that this is the approach that lawyers have been conditioned to expect from the Court. See Rehnquist, *supra* note 2, at 10.

30. Here and elsewhere in this Article, two or more cases consolidated for argument and decision have been counted as a single case. See Hellman, *supra* note 15, at 952-53. The figure in the text excludes 10 original-jurisdiction cases that received plenary consideration during the four Terms.

31. The criteria for identifying conflict cases are described in Hellman, *supra* note 15, at 1015.

32. See *id.* at 1016, 1041-42.

33. See *id.* at 1030-33.

34. See *id.* at 1035-41.

we find that a substantial majority of the cases have received plenary consideration for other reasons and in the absence of a conflict. Thus, not only does the evidence refute the contention that the Supreme Court cannot resolve all of the conflicts presented to it; it also negates the proposition that the Court can intervene only to resolve conflicts. The effect is to further undercut the argument that the "national decision-making capacity" is inadequate.

If the argument is to succeed, then, it must be through redefining the lawmaking role of the Supreme Court. Justice Rehnquist essays this task with characteristic zeal, and he does so primarily by denigrating the value of percolation.

This line of attack comes as something of a surprise. Only two years ago, in an opinion for a unanimous Court, Justice Rehnquist spoke approvingly of "the benefit [the Supreme Court] receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."³⁵ Justice Rehnquist now rejects this position on the ground that courts in performing their lawmaking function "are not engaged in a scientific experiment."³⁶ He argues, in essence, that because problems of statutory interpretation have "no obviously 'correct' solution," there is no value in testing the soundness of the various possible approaches before imposing one of them as the "definitive" answer.³⁷

This is a non sequitur. The argument might be persuasive—in practical terms if not as a matter of logic—if we could assume that Congress would generally act quickly to correct an improvident or less-than-optimal interpretation of a statute. But that assumption would fly in the face of reality.³⁸ And if lawyers, litigants, and people who must act in accordance with federal law will have to live indefinitely with the construction of a statute given by the court of last resort, surely it makes sense for that court to defer a definitive judgment until some "hypothetical and tentative answer[s]" have been tested in the crucible of litigation.³⁹

No great effort is required to find cases in which the Supreme Court's task has been made easier by the work of lower courts in

35. *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

36. Rehnquist, *supra* note 2, at 11.

37. *Id.*

38. See Hellman, *The Supreme Court and Statutory Law: The Plenary Docket in the 1970's*, 40 U. PITT. L. REV. 1, 38 (1978); see also G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 6 (1982).

39. See Rehnquist, *supra* note 2, at 11. For further discussion of the benefits of percolation, see Hellman, *Intercircuit Tribunal*, *supra* note 6, at 404-06.

analyzing the issues and considering possible solutions. For example, in 1981 leading commentators pointed out that “[t]here has been considerable controversy over the question of the res judicata effect to be accorded a state court decision in a subsequent federal court action under [42 U.S.C.] § 1983.”⁴⁰ They suggested that the full faith and credit statute, 28 U.S.C. § 1738, ought to be “[a] starting point for analysis in such cases,” but acknowledged that “many of the judicial discussions of the problem” had failed to recognize this fact.⁴¹ Although several cases raising the issue were brought to the Supreme Court,⁴² none were heard until the 1983 Term. The Court then resolved the question in a brief opinion, joined by all nine Justices, that relied primarily on section 1738.⁴³ It is highly unlikely that the controversy would have been dealt with so easily and with such unanimity if the Court had addressed the issue in one of the earlier cases, before the significance of section 1738 had crystallized.⁴⁴

Apart from rejecting the value of percolation, Justice Rehnquist does not explicitly define what makes a case appropriate for consideration by the Supreme Court. However, he implies that review by a national tribunal should be available whenever the petitioner “raises [an] important federal question[] not foreclosed by any decision of [the Supreme] Court.”⁴⁵ If this standard were applied literally, it would mean that the Court should grant review in many cases where the gain in certainty and predictability from a Supreme Court decision would be minimal. For example, in the 1984 Term the Court denied certiorari to a petition presenting the ques-

40. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 243 (1981 Supp.) [hereinafter cited as *HART & WECHSLER*].

41. *Id.* at 244.

42. See, e.g., *Castorr v. Brundage*, 459 U.S. 928, 930-31 (1982) (White, J., dissenting from denial of certiorari); *New Jersey Educ. Ass'n v. Burke*, 579 F.2d 764 (3d Cir.), cert. denied, 439 U.S. 894 (1978) (discussed in *Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1019 (1978) (White, J., dissenting from denial of certiorari)).

43. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984).

44. For other cases in which much-debated issues proved surprisingly easy when the Court finally addressed them, see *Landreth Timber Co. v. Landreth*, 105 S. Ct. 2297 (1985) (8-1 decision) (validity of “sale of business” doctrine in securities regulation), discussed in Hellman, *Intercircuit Tribunal*, *supra* note 6, at 405 n.132; *Wilson v. Garcia*, 105 S. Ct. 1938 (1985) (7-1 decision) (selection of appropriate state statute of limitations in actions under 1871 Civil Rights Act); *Berkemer v. McCarty*, 104 S. Ct. 3138 (1984) (unanimous decision) (applicability of *Miranda* ruling to interrogations involving minor traffic offenses); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (unanimous decision) (allocation of burden of proof in unfair labor practice cases).

45. Rehnquist, *supra* note 2, at 10.

tion whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against transsexuals.⁴⁶ The question was important, in the sense that it had been litigated in numerous cases, and the result certainly was not foreclosed by any existing Supreme Court decision. But every court of appeals to consider the issue (and most of the district courts) agreed that if transsexuals were to be protected by the civil rights law, "the new definition must come from Congress."⁴⁷ How much would a Supreme Court ruling have added to the ability of lawyers and litigants to know what the law is on that subject?⁴⁸

I do not disagree with Justice Rehnquist's premise that uniformity and predictability in federal law are important goals of the judicial system. But as I have argued more fully elsewhere, decisions by a national court are likely to advance those goals in a substantial way only when the issues they resolve are doubtful, recurring, and discrete.⁴⁹ In a common law legal system, issues of that kind are the exception rather than the rule.

Beyond this, it cannot be assumed that a larger number of Supreme Court decisions in any given area of the law will necessarily make for greater certainty and predictability. Over the last decade, no area of legal dispute has received more consistent or more sustained attention from the Supreme Court than the fourth amendment. In the eight Terms 1977 through 1984, the Court handed down sixty-six decisions on the law of search and seizure—more (by one case) than were devoted to any other specific constitutional guarantee, including the free speech clause of the first amendment. Yet the law of search and seizure remains one of the

46. *Ulane v. Eastern Air Lines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2023 (1985).

47. *Id.* at 1087.

48. For additional illustrations of this pattern, see *United States v. Appoloney*, 761 F.2d 520, 523 (9th Cir.) (joining other circuits that have "uniformly" rejected fifth amendment challenges to the new federal law requiring wagering tax returns), *cert. denied*, 106 S. Ct. 348 (1985); *Germantown Hosp. & Medical Center v. Heckler*, 738 F.2d 631, 633 (3d Cir. 1984) ("The specific constitutional objections raised by appellants in the cases before us now have been . . . uniformly rejected by" all four circuits that have considered them.), *cert. denied*, 105 S. Ct. 906 (1985); *Mid-America Nat'l Bank v. First Sav. & Loan Ass'n*, 737 F.2d 638, 640 (7th Cir. 1984) (finding no implied private right of action under National Flood Insurance Program; noting that "[p]laintiffs do not cite nor does our research disclose any reported decision not overruled that reaches a contrary result."), *cert. denied*, 105 S. Ct. 911 (1985). See also *Connolly v. Pension Benefit Guar. Corp.*, 54 U.S.L.W. 4208, 4211 n.6 (U.S. Feb. 26, 1986) (unanimous affirmance in appeal from three-judge district court) (upholding constitutionality of federal pension statute amendments; noting that decision below was "consistent with the result reached by every other court to have considered the issue").

49. See *Hellman, Intercircuit Tribunal*, *supra* note 6, at 407-13.

most confused and contradictory areas of constitutional adjudication. Doctrines have proliferated to the point where the legality of almost any warrantless search arguably will be controlled by two, three, or even more lines of precedent.⁵⁰

Perhaps there is some pathology about the fourth amendment that has created this unhealthy state of affairs.⁵¹ But the fact remains that the one area in which there is no shortage of nationally binding precedents is one in which there is tremendous confusion and uncertainty.⁵² Unless Justice Rehnquist can explain why this phenomenon is not representative, it would be foolish indeed to create a new structure that would expand the national decisional capacity and thus permit the replication of the fourth amendment quagmire in other areas of the law.⁵³

It is possible that I have misunderstood the thrust of Justice Rehnquist's position; regrettably, he provides no examples of important questions of federal law that have remained unresolved because the Court could not make room on its docket.⁵⁴ But we need

50. See, e.g., *United States v. Owens*, 782 F.2d 146 (10th Cir. 1986) (rejecting, seriatim, government's arguments that defendant had no reasonable expectation of privacy in his motel room; that search was justified by "consent" of motel manager; that search fell within "protective sweep exception" to warrant requirement; that "good faith" exception to exclusionary rule applied; and that contraband could be admitted into evidence under "inevitable discovery" exception to exclusionary rule); *Sharpe v. United States*, 660 F.2d 967 (4th Cir. 1981), *vacated*, 457 U.S. 1127 (1982) (remand for reconsideration in light of intervening Supreme Court decision), *on remand*, 712 F.2d 65 (4th Cir. 1983) (disavowing one holding, but readopting prior opinion with modifications), *rev'd*, 105 S. Ct. 1568 (1985); *People v. Carney*, 668 P.2d 807 (Cal. 1983) (holding that motor home should be treated as a home for fourth amendment purposes; rejecting applicability of "automobile exception"), *rev'd*, 105 S. Ct. 2066 (1985) (holding that "automobile exception" applies); *Castleberry v. State*, 678 P.2d 720 (Okla. Crim. App. 1984) (holding search invalid under "container" precedents; rejecting applicability of vehicle search precedents), *aff'd mem.*, 105 S. Ct. 1859 (1985) (equally divided Court).

51. See Hellman, *supra* note 15, at 1009-10.

52. Another area in which the Court has been extremely active in recent years is that of Indian law. See Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PRRT. L. REV. 521, 593, 619 (1983). Yet a prominent commentator, surveying the Court's work on the important topic of governmental authority over reservation activities of non-Indians, found that the plethora of rulings had not brought greater certainty and predictability; instead, "[e]ach new decision . . . seem[ed] to turn on finer points and to raise more questions." Pelcyger, *Justices and Indians: Back to Basics*, 62 OR. L. REV. 29, 29-30 (1983).

53. I acknowledge that frequent involvement with a particular area of the law can benefit the Court's decision-making processes. See Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1709, 1796 n.305 (1978). However, as the search and seizure cases illustrate, this kind of exposure does not necessarily lead to greater clarity or certainty in the law.

54. Justice Rehnquist does refer in passing to "lawyers and litigants . . . [who] are seeking to know . . . the meaning of a particular subsection of the Internal Revenue Code."

not rely wholly on speculation or read between the lines of his article to identify the kinds of cases he has in mind. To give flesh to Justice Rehnquist's abstract formulations, we can look at his dissents from the denial of certiorari.

During the last eight Terms, Justice Rehnquist has published a dissenting opinion or notation in more than 120 cases in which the Court denied review. By far the largest number of these—more than half the total—consisted of civil rights cases in which the lower court had ruled in favor of the constitutional claimant.⁵⁵ This is a class of cases that already enjoys extraordinary favor with the present Court; more than one-fourth of all such petitions are granted, compared with one-twentieth of all petitions that are filed.⁵⁶

In short, Justice Rehnquist appears to be arguing that we should make a radical change in the structure of the federal judicial system so that the Supreme Court can consider a larger number of

Rehnquist, *supra* note 2, at 11. It is thus relevant to note that in the eight Terms 1977 through 1984, Justice Rehnquist dissented only once from the Court's refusal to consider an issue of this kind. See *Prince Edward School Found. v. United States*, 450 U.S. 944, 944 (1981) (Rehnquist, J., dissenting from denial of certiorari) (arguing that Court should decide "whether the Internal Revenue Service is entitled to deny tax-exempt status to a private school which discriminates in its admissions policy."). In another tax case, three Justices published a dissent arguing that the petitioner-taxpayer had presented an issue "of sufficient importance in the administration of the income tax laws to justify review [by the Supreme Court];" however, Justice Rehnquist declined to provide the fourth vote that would have placed the case on the plenary docket. See *Singleton v. Commissioner*, 439 U.S. 940, 940 (1978) (Blackmun, J., joined by Marshall & Powell, JJ., dissenting from denial of certiorari). The same phenomenon occurred twice in the 1985 Term. See *Mellon Bank v. United States*, 54 U.S.L.W. 3559 (U.S. Feb. 24, 1986) (O'Connor, J., joined by Blackmun & Powell, JJ., dissenting from denial of certiorari) (arguing that lower courts' construction of the Internal Revenue Code "will have a significant impact on the financial vitality of [certain charitable] organizations"); *Bonner v. Commissioner*, 106 S. Ct. 258, 259 (1985) (O'Connor, J., joined by Blackmun & Powell, JJ., dissenting from denial of certiorari) ("seriously question[ing] whether the harsh result reached by the Court of Appeals is consistent with either the letter or intent of the relevant provisions of the [Internal Revenue] Code"); see also *West Central Coop. v. United States*, 758 F.2d 1269 (8th Cir.), *cert. denied*, 106 S. Ct. 375 (1985) (three Justices, not including Justice Rehnquist, noted that they would grant review in tax case). For further discussion, see *infra* note 57.

55. "Civil rights cases" are defined in Hellman, *The Supreme Court and Civil Rights: The Plenary Docket in the 1970's*, 58 OR. L. REV. 3, 4-6 (1979).

During the same eight Terms, Chief Justice Burger dissented from the denial of review in more than sixty cases. All but a dozen or so were civil rights cases in which the lower court had ruled in favor of the constitutional claimant.

56. In the four Terms 1981 through 1984, the Court received about 750 applications for review in civil rights cases in which the court below had ruled in favor of the constitutional claimant. Nearly 200 of these received plenary consideration. Another 25 were summarily reversed, and about 80 were summarily vacated for reconsideration in light of an intervening Supreme Court decision.

cases in which lower courts have found merit in a civil liberties claim.⁵⁷ Even those who are most alarmed by perceived excesses of judicial activism might well question whether such a drastic remedy is necessary.⁵⁸

III. THE SUPREME COURT AND CONSTITUTIONAL ADJUDICATION

Notwithstanding what I have just said, there is a strong intuitive appeal to the proposition that given the vastly expanded role of federal law in the American legal system and the proliferation of litigation in state and federal courts, one Court of nine Justices cannot possibly resolve all of the doubtful recurring federal questions that arise in those courts. And if Justice Rehnquist's proposal for increased decision-making capacity could be implemented with little or no risk to other values, opposition would indeed appear to rest on an unthinking attachment to old ways. In my view, however, remitting statutory issues to a new court would interfere significantly with the Supreme Court's ability to perform its most important functions in the legal system.

57. In further support of this characterization, I note that the tax decisions discussed *supra* note 54 exemplify a broader pattern in Justice Rehnquist's votes on applications for plenary hearing. For example, of the 60 or so cases in which Justice White asserted that the Court was denying review despite the presence of a conflict, *see supra* notes 21-23 and accompanying text, more than one-quarter would have reached the plenary docket if Justice Rehnquist had provided a fourth vote for the grant of certiorari. *See, e.g.,* Cooper v. United States, 105 S. Ct. 2664 (1985) (White, J., joined by Brennan & Marshall, JJ., dissenting from denial of certiorari) (interpretation of federal criminal statute); Mordaunt v. Incomco, 105 S. Ct. 801 (1985) (White, J., joined by Burger, C.J., & Brennan, J., dissenting from denial of certiorari) (interpretation of federal securities laws); Taliaferro v. Maryland, 461 U.S. 948 (1983) (White, J., joined by Brennan & Blackmun, JJ., dissenting from denial of certiorari) (interpretation of compulsory process clause of sixth amendment). In only one of the cases had the lower court upheld a civil rights claim. *See* Novack Inv. Co. v. Setser, 454 U.S. 1064 (1981) (White, J., joined by Brennan & Marshall, JJ., dissenting from denial of certiorari) (right to jury trial in action under 42 U.S.C. § 1981).

58. I use the term "activist" in the sense suggested by Judge Posner: an activist decision is one that augments the power of courts vis-a-vis other institutions of government. *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 208-11 (1985). From this perspective, any decision sustaining a constitutional challenge to action by state or federal governments would be regarded as activist. A decision could be deemed "excessive" if it invalidates governmental conduct that is arguably permissible under existing precedent.

It is plausible to speculate that the flow of activist decisions from the lower federal courts will diminish as appointees of President Reagan come to occupy an ever-larger proportion of the judgeships. If so, Justice Rehnquist may begin to find a smaller number of cases requiring resolution at the national level. *But see, e.g.,* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (Easterbrook, J.) (ordinance that defines "pornography" as "graphic sexually explicit subordination of women" violates first amendment), *aff'd mem.*, 54 U.S.L.W. 3560 (U.S. Feb. 24, 1986) (Burger, C.J., Rehnquist, J., & O'Connor, J., dissenting).

Justice Rehnquist starts off on a sound footing by recognizing that the desirability of his proposal will depend ultimately on one's "concept of the proper role of the Supreme Court in our system of government."⁵⁹ And few would disagree with his premise that the Court's role in constitutional adjudication is more important to the country than its role in statutory adjudication.⁶⁰ Unfortunately, Justice Rehnquist goes no further in defining the Court's role in the decision of constitutional questions.

The cases that invoke the Court's constitutional function are, of course, a varied lot. Most often the Court is called upon to adjudicate claims based on the Bill of Rights, the fourteenth amendment, and other constitutional provisions that protect individual rights against government action. But some of the cases involve the allocation of powers between state and national governments. A distinction can also be drawn between the supremacy function, embracing cases in which an exercise of state power is challenged on the ground of repugnance to federal law, and the checking function, encompassing review of actions by other branches of the national government. Cases from state courts may implicate different aspects of the Court's role than do cases from federal courts, and those implications in turn may depend on whether the court below accepted or rejected the constitutional claim.⁶¹ But the common thread that runs through all of these cases is that the litigant invoking the Constitution is asking the Court to overturn action taken or supported by the executive or legislative branches of government. In other words, "constitutional adjudication" means judicial review; and judicial review, in the phrase made familiar by the late Alexander M. Bickel, is counter-majoritarian.⁶² Thus, if Justice Rehnquist's proposal were to be adopted, nearly every case on the plenary docket would require the Court to second-guess decisions by the representative branches of government.

This arrangement would have several consequences for the Court's performance of its constitutional functions.⁶³ First and

59. Rehnquist, *supra* note 2, at 1.

60. *Id.* at 14.

61. See Hellman, *supra* note 15, at 1036-41.

62. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962); Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L.J.* 1567, 1573-79 (1985).

63. Justice Rehnquist does not actually suggest that the Supreme Court give up *all* responsibility for statutory interpretation; rather, he anticipates that the Court would "largely relinquish its role in *run-of-the-mine* statutory construction cases." Rehnquist, *supra* note 2, at 12 (emphasis added). I surmise that the purpose of this limitation is to exclude most cases arising under statutes like the 1871 Civil Rights Act or the Sherman Antitrust

most important, the elimination of statutory cases from the Court's docket would pose dangers for the way in which the Court's work is perceived by legislators and other citizens. Judicial review is difficult to defend under the best of circumstances, but supporters of the institution as we know it today can emphasize that the Constitution is, after all, law, and that the Court provides authoritative interpretations of the Constitution just as it does for other kinds of laws.⁶⁴ If the Court were to decide only constitutional cases, that analogy would be gone. To the popular eye, the Court would be nullifying decisions by the representative branches of government, not "as a correlative of [its] dual duty to decide those cases over which [it has] jurisdiction and to apply the federal Constitution as one source of the . . . governing legal rules,"⁶⁵ but as a "superlegislature" very much like the Council of Revision rejected by the Framers.⁶⁶

This perception would be reinforced by the heightened degree of divisiveness that could be expected within the Court. Of the constitutional decisions issued in the last four Terms, nearly half drew at least three dissenting votes, and little more than one-fourth were unanimous in result. In contrast, only one-third of the statutory decisions generated three or four dissenting votes; nearly half were unanimous. Even when the Justices were able to agree on the result in a constitutional case, their harmony often turned to discord when they attempted to articulate a rationale. For example, more than 250 civil rights cases were decided on the merits in the four Terms 1981 through 1984, but there were not even forty in which all participating Justices joined in a single opinion.⁶⁷ On the other hand, among the 200 or so statutory decisions, more than seventy fit this description. It is relevant, too, that constitutional issues, including questions of federalism and separation of powers,

Act—statutes that have the breadth of a constitutional provision and offer almost as much latitude for judicial policymaking. See *Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-88 (1978). In any event, the analysis in the text remains valid. See *infra* note 72.

64. See, e.g., D. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1787-1888*, at xii (1985).

65. *Mackey v. United States*, 401 U.S. 667, 678-79 (1971) (Harlan, J., concurring and dissenting).

66. See HART & WECHSLER, *supra* note 40, at 7-8.

67. Even in those cases, it was not uncommon for members of the Court to file separate opinions expressing additional views or explaining their interpretation of the majority opinion. See, e.g., *McDonald v. Smith*, 105 S. Ct. 2787, 2791 (1985) (concurring opinion by Brennan, J., joined by Marshall & Blackmun, JJ.); *California v. Trombetta*, 104 S. Ct. 2528, 2535 (1984) (concurring opinion by O'Connor, J.).

accounted for all but two of the twenty-four cases that were decided by plurality opinions during this period.

From the standpoint of public perceptions, the effect of removing statutory cases from the Court's docket might be even worse than these figures suggest. The reason is that voting blocs within the Court tend to persist across a wide range of constitutional issues, but often break up when less earth-shaking questions of statutory interpretation are presented.⁶⁸ The existence of cases in which the Court finds itself unified—or divided along unexpected lines—thus serves to moderate the tensions that are likely to build up in cases involving the Bill of Rights, the fourteenth amendment, and the division of powers between state and national governments. Conversely, the loss of routine statutory issues could be expected to intensify and make more bitter the divisions that do exist among the Justices. Even today, “[t]he printed abuse of colleagues”⁶⁹ has become a common feature of Supreme Court opinions. If the Justices were disagreeing more often, and generally dividing along the same lines, the rhetoric would likely become even more shrill and intemperate. And because, as Judge Richard Posner puts it, “[a]buse in opinions . . . lowers the reputation of the judiciary in the eyes of the public (the small public that reads opinions, the bigger public that reads newspaper accounts of opinions),”⁷⁰ the legitimacy of the Court's counter-majoritarian decisions would be placed even more at risk.

Finally, the Court would lose an important source of self-discipline if it were able to shunt routine statutory cases to a “lower chamber.” When the Justices consider a constitutional issue, they are guided only by the broad, even cryptic, language of the constitutional text and by the Court's own precedents. In contrast, when the Court decides cases under statutes like the Clean Air Act, the Truth in Lending Act, or the Internal Revenue Code, it must work within the confines of detailed and specific statutory language, and often other legislative materials as well. These cases serve two important functions within the Court. They assure the continued involvement of the Justices in the traditions of the lawyer's craft,

68. For example, in the four Terms 1981 through 1984 the Court divided 5-4 in more than fifty civil rights cases and about forty cases involving matters of statutory law. Chief Justice Burger and Justice Brennan took opposing positions in all but one of the civil rights cases, see *Anderson v. Celebrezze*, 460 U.S. 780 (1983), but they found themselves on the same side in eight cases where issues of statutory law were involved.

69. R. POSNER, *supra* note 58, at 233.

70. *Id.*

and they remind the members of the Court that the Constitution is not the only source of values, and that the decisions of the representative branches of government are entitled to respect.

Some people think that the Court has been rather "activist" over the last two or three decades. Perhaps it has. But it has at least had the anchor to conventional adjudication that comes from having to consider, in each argument session, a few cases of a more obviously and traditionally "legal" nature. That anchor would be gone if all or most of the routine statutory cases were routed to an auxiliary tribunal. In the words of Judge Ralph K. Winter,

[T]he Court [would] be even more free to turn from the judicial role of dispute settler to that of philosopher king. The transformation of the Supreme Court from a court of general jurisdiction with general responsibility for reviewing the work of the lower federal courts to a court free to seek out new areas in which to make major policy declarations [would] . . . almost surely accelerate the expansion of judicial power and the trend toward the constitutionalization of every perceived problem. In the end, the Court [would] do as much work and decide about as many cases as it does now but [would] exert even less self-discipline with regard to the kind of judge-made law it creates.⁷¹

Of course, it is possible that these fears are exaggerated.⁷² And if the Court's role in constitutional adjudication were secure and largely unquestioned, there might be little risk in an "experiment" that would allow the Court gradually to throw off some of its re-

71. R. Winter, Testimony Before the Subcomm. on Courts [of the] Comm. on the Judiciary [of the] United States Senate 8 (Oct. 9, 1985) (to be printed in the record of hearings on S. 704, 99th Cong., 1st Sess. (1985)). Curiously, Justice Rehnquist himself made the same point more than a decade ago. Rehnquist, *Whither the Courts*, 60 A.B.A. J. 787, 790 (1974) ("To the extent that the Court must deal with statutory and other nonconstitutional questions, in which the permissible limits of adjudication are narrower, the . . . Court is kept on its toes and pressed to remain a classical court rather than a branch of government largely freed from the necessity for giving closely reasoned explanations for what it does."). Principally for that reason, he concluded that to assign the Supreme Court's statutory interpretation function to a separate tribunal would be a "signal mistake." *Id.*

72. The analysis in the text posits an arrangement under which the Supreme Court would refer all statutory cases to its "lower chamber." Under Justice Rehnquist's plan, the Court might continue to decide some cases involving statutory interpretation, but almost inevitably these would be precisely the cases that most clearly implicated policy considerations or required a choice between values. See *supra* note 63. While cases of this kind would not ostensibly call upon the Court to second-guess majoritarian determinations, but see Kronman, *supra* note 62, at 1574 n.36, the potential for divisiveness and the freedom from externally imposed constraints would be almost as great as they are in constitutional adjudication.

sponsibilities in the realm of statutory interpretation. But we live in an era when judicial review is being attacked on many fronts. The Court's decisions on school prayer, busing, and abortion have aroused passionate opposition from large and vocal segments of the public. Politicians and religious leaders have denounced the Court's rulings as not only erroneous but illegitimate. The Attorney General of the United States has publicly stated that "[f]ar too many of the Court's opinions . . . have been more policy choices than articulations of long-term constitutional principle."⁷³ Respected scholars have joined in the condemnation of judicial activism.⁷⁴

Under these circumstances, only the clearest showing that the present system is inadequate would justify structural change that might weaken the constraints on the Court's constitutional decision-making or undercut the legitimacy of its constitutional rulings. No such showing has been made.

IV. CONCLUSION

Three years have now passed since Chief Justice Burger revived the national court debate by urging Congress to create a "temporary, experimental" Intercircuit Panel of the United States Courts of Appeals. During that time, subcommittees in the House and Senate have held numerous hearings on the Chief Justice's proposal. But the witnesses at those hearings have concentrated largely on such matters as who should appoint the judges of the panel, how long the judges should serve, and whether there should be a requirement that each circuit be represented among the membership. Justice Rehnquist has now reminded us that these questions are premature. Before we start thinking about the mechanics of a plan to assist the Supreme Court in performing its essential role in our system of government, we must first have a clear idea of what that role is.

From a jurisprudential standpoint, the Court's function is to provide authoritative resolution of recurring issues of federal law.

73. Meese, *In Bar Group Speech, Criticizes High Court*, N.Y. Times, July 10, 1985, at A13, col. 1. See also *Reagan Seeks Judges with "Traditional Approach": Interview with Edwin Meese, Attorney General of the United States*, U.S. NEWS & WORLD REP., Oct. 14, 1985, at 67 (Supreme Court's abortion ruling "usurped . . . a legislative function").

74. See, e.g., Graglia, *The Power of Congress to Limit Supreme Court Jurisdiction*, 7 HARV. J.L. & PUB. POL'Y 23, 23 (1984) (quoting Prof. Kurland) ("[T]he most immediate constitutional crisis' of our time is 'the usurpation by the judiciary of general government on the pretext that its authority derives from the Fourteenth Amendment.'").

Within the realm of federal law, decisions involving constitutional interpretation enjoy a special status, a status that derives ultimately from the delicate and remarkable institution of judicial review. Justice Rehnquist properly emphasizes that both aspects of the Court's role—the horizontal and the vertical, as it were—must be kept in mind as we examine proposals for structural change.

Underlying this approach is a recognition that the proposal now before Congress does not involve merely a routine redistribution of cases among federal courts, but rather a fundamental alteration in the operation of the national legal order. If the legislation is enacted, the power to establish nationally binding precedents, now exercised by the Supreme Court alone, would be shared with a new tribunal. And lawyers and judges who now must reconcile authoritative precedents from two levels of courts would have a third set of decisions to take into account.⁷⁵

Unfortunately, when Justice Rehnquist turns from the general to the particular, his analysis falters. He suggests unpersuasively that every "important" question of federal law should be resolved by a national court. He denigrates the process of percolation that so often has eased the Court's task in formulating a definitive answer to a recurring problem. And although he acknowledges the primacy of the Court's constitutional role, he ignores the probable effects on the Court's ability to perform that role effectively if constitutional adjudication were its only responsibility.

The most telling rebuttal to Justice Rehnquist, however, may come from the supposed victims of the malady he diagnoses in the federal judicial system. Having sensibly disclaimed the contention that the Supreme Court is overburdened, Justice Rehnquist relies entirely on the argument that the Court no longer has the capacity to resolve all of the questions of federal law that require decision at the national level. But if this were so, we would expect to hear outcries of dissatisfaction from lawyers and judges who now experience frequent frustration in their efforts to discover what the law is. Instead, the organized bar, after listening to Justice Rehnquist, voted by a large margin to reject the proposed new court.⁷⁶ And

75. See Hellman, *Intercircuit Tribunal*, *supra* note 6, at 419-22.

76. See *supra* note 2. Chief Justice Burger, criticizing the bar association for voting against his proposal, said that "the House of Delegates . . . is really not qualified to analyze or pass on that question in 30 or 40 minutes." *Burger Argues for New Court*, N.Y. Times, Feb. 18, 1986, at B9, col. 1. In fact, the debate went on for about 90 minutes, and the delegates had previously been furnished with reports and recommendations from ABA committees that discussed the merits of the proposal.

the vast majority of judges who have written or spoken about the Intercircuit Panel idea have strongly opposed the plan.⁷⁷

What Justice Rehnquist proposes, then, is a drastic restructuring of the federal court system that would threaten the institution of judicial review in order to provide more nationally binding decisions for people who are quite satisfied with the flow of precedents they now receive. Perhaps anticipating that this might be regarded as a bad bargain, Justice Rehnquist invokes the words of Tennyson as a warning against blind adherence to the "old order." Less poetic, but more apt, would be the familiar saying of folk wisdom: if it ain't broke, don't fix it.

In the aftermath of the delegates' vote, a representative of the ABA wrote to a House Judiciary subcommittee stating that "[a]fter extensive debate the Association voted . . . to adopt the policy opposing the creation of an intercircuit panel." Among other arguments, the ABA emphasized that "the need to create an intercircuit panel has not been sufficiently demonstrated." Letter from Robert D. Evans, Director of the Governmental Affairs Group, American Bar Association, to Rep. Kastenmeier (Feb. 20, 1986) (submitted for inclusion in the record of hearings on H.R. 4238, 99th Cong., 2d Sess. (1986)).

77. For example, at hearings held by a Senate subcommittee in October 1985, three judges of the Court of Appeals for the District of Columbia Circuit testified against the Intercircuit Panel proposal; none spoke in favor. Judge Winter of the United States Court of Appeals for the Second Circuit, also opposing the plan, noted that in 1983 the active judges of his court had "expressed by a formal vote their unanimous opposition to similar legislation then pending before the Congress." R. Winter, *supra* note 71, at 1. Only one judge testified in favor of the legislation.

At the ABA meeting in February 1986, see *supra* notes 2 & 76, opposition to the Intercircuit Panel was led by the Appellate Judges Conference. See L.A. Daily Leg. J., Feb. 12, 1986, at 1, col. 2.