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# Case Selection in the Burger Court: A Preliminary Inquiry

Arthur D. Hellman

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# Case Selection in the Burger Court: A Preliminary Inquiry\*

*Arthur D. Hellman\*\**

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\*\* Professor of Law, University of Pittsburgh. B.A., Harvard, 1963; LL.B., Yale, 1966. The author acknowledges the research assistance of Eileen Rielly, Class of 1986, and Rodney Griffith, Class of 1987, University of Pittsburgh School of Law. He also expresses his gratitude to the staff of the University of Pittsburgh School of Law Word Processing Center and LuAnn Driscoll, its director.

In examining the record of the Burger Court, it is only natural to concentrate on the results of the Court's decisions (has the Court expanded or narrowed the rights of criminal defendants?) and on the doctrines invoked (does the Court still adhere to the three-part test for establishment clause challenges?). We tend to take as a given the presence of the cases in the Court and to assume, if we think about it at all, that the only tasks for the Justices are to decide the cases and to write opinions explaining the decisions and their relation to existing precedent. But this picture of the Court's work is quite incomplete. With a few exceptions, the cases that become "Supreme Court cases" do so as the result of a selection process that is no less interesting and important than the decisional process that follows.

To appreciate the significance of the selection process, it is only necessary to juxtapose two sets of numbers. In each of the last few Terms, the Court has received about 4,200 applications for review.<sup>1</sup> The number of cases receiving plenary consideration has been about 180 per Term.<sup>2</sup> Plenary consideration means that the case will get full briefing, oral argument, and, almost invariably, an opinion on the merits.<sup>3</sup> The decisions that emerge from this process will be the ones that are analyzed in law reviews, reprinted in casebooks, and relied on by lawyers and lower courts as authoritative explications of the federal Constitution and laws. Some—*Miranda v. Arizona*,<sup>4</sup> *Roe v. Wade*,<sup>5</sup> *Brown v. Board of Education*<sup>6</sup>—will become household words.

The cases that do not reach the plenary docket will experience a very different fate. The parties will not have the opportunity to file full briefs, nor will they present oral argument; instead, the Court will see only the application for review and the response urging the Court not to hear the case.<sup>7</sup> With a few exceptions, the decisions will be announced in bare orders unaccompanied by any kind of opinion<sup>8</sup> and having no precedential value for the future.<sup>9</sup> The very fact that the disputes were brought to the Supreme Court

1 See section I(A) *infra*.

2 See section I(B) *infra*.

3 In the four Terms of the 1980's, only 27 of the 593 plenary decisions were not accompanied by a signed opinion. Most of these were cases in which the Court dismissed an appeal or writ of certiorari on grounds implicating its jurisdiction or in which the judgment was affirmed by an equal division of the Justices. The latter disposition has no precedential value. See *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

4 384 U.S. 436 (1966).

5 410 U.S. 113 (1973).

6 347 U.S. 483 (1954).

7 The initial document will be either a petition for certiorari or a jurisdictional statement, depending on the mode of review. See notes 30-35 *infra* and accompanying text.

8 The exceptions are discussed in section I(C)(2) *infra*.

9 The exceptions are discussed in section I(C) *infra*.

will be forgotten by all but the litigants.<sup>10</sup>

How does the Court select, from among the 4,200 cases filed, the 180 that it will hear and decide? Fully to answer that question would require, at the least, examination of the Justices' private papers and docket books.<sup>11</sup> Perhaps at some time in the future scholars will be given access to those materials. In the meantime, much can be learned by studying the Justices' opinions and orders against the background of the parties' submissions, the holdings of lower courts, and developments elsewhere in the legal system and society generally. That is the approach taken in this article.<sup>12</sup> Because the volume of material to be considered is so large, and the range of hypotheses to be tested so wide, the conclusions offered here can be at best preliminary.<sup>13</sup>

The article is divided into five parts. Part I provides some of the necessary background and sets forth the premises that underlie the analysis. Part II identifies several categories of cases that rarely reach the plenary docket even though they constitute a significant proportion of the Court's overall caseload. Part III analyzes the changes in the issues that have received plenary consideration and the forces that have influenced those changes. Part IV examines the reasons for granting review in particular cases. The article con-

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10 For example, a recent opinion cited three court of appeals cases in which the Supreme Court had denied review; the opinion made no reference to the fact that the cases had been brought to the Court. *Fulton v. Warden*, 744 F.2d 1026, 1035 n.1 (4th Cir. 1984) (Phillips, J., dissenting). Cf. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 231 n.11 (1985) (implicitly rebuking courts that include "cert. denied" in citations to court of appeals decisions "even though the Supreme Court has said time and again that denial of certiorari imports no view on the merits of the decision below.").

11 For a recent attempt along these lines, see D. PROVINCE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* (1980) (reviewed in 92 *ETHICS* 781 (1982)).

12 Unless otherwise attributed, the data in the article are based on my own research. Lists of the cases included in the various categories are on file with the author. In the interest of saving space, I have generally not identified the cases discussed, except where no more than one or two were involved, or where the classification scheme required illustration.

13 The article draws heavily on my earlier studies of the Court's modes of doing business. In order of publication they are:

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 (1978) [hereinafter cited as *Plenary Docket I*].

Hellman, *The Supreme Court and Statutory Law: The Plenary Docket in the 1970's*, 40 *U. PITT. L. REV.* 1 (1978) [hereinafter cited as *Statutory Law*].

Hellman, *The Supreme Court and Civil Rights: The Plenary Docket in the 1970's*, 58 *OR. L. REV.* 3 (1979) [hereinafter cited as *Civil Rights*].

Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 *U. PITT. L. REV.* 521 (1983) [hereinafter cited as *Plenary Docket II*].

Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 *U. PITT. L. REV.* 795 (1983) [hereinafter cited as *Discretionary Review*].

Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 *HASTINGS CONST. L.Q.* 375 (1984) [hereinafter cited as *Intercircuit Tribunal*].

cludes with a brief look at the influence of lower court decisions on the selection process.

## I. Introduction

### A. *Cases Filed: What the Numbers Mean*

Some readers will be surprised to learn that the number of cases filed each Term is just over 4,000. The reason is that many accounts of the Supreme Court's caseload, including recent statements by Chief Justice Burger, have referred to a docket of 5,000 cases.<sup>14</sup> But that figure, while not inaccurate, is misleading because it encompasses all cases that appear on the docket in a given Term, including those carried over from the preceding Term. In effect, it counts some cases twice.

To gauge the magnitude of the Court's total caseload without this kind of distortion, one can count either filings or final dispositions. Because the Court is current in its docket, and has been for many years, the two figures track one another quite closely. In this article, unless otherwise stated, final dispositions will be used as the denominator for analyzing the selection process.<sup>15</sup>

There is, however, one context in which it is easier to look at filings, and that is in tracing the patterns of growth in the Court's overall caseload. Table I shows that, contrary to what is widely believed,<sup>16</sup> the number of filings has not been increasing at an apocalyptic rate. The total for the 1983 Term was only sixteen percent higher than the figure for 1971—an increase, on the average, of

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14 See, e.g., Burger, *The Time is Now for the Intercircuit Panel*, A.B.A. J., Apr. 1985, at 86, 87 ("In the term completed last July, there were 5,100 cases on the docket.") [hereinafter cited as Burger, *Intercircuit Panel*]; Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 442 (1983) ("In the term that ended last July the Supreme Court had 5,311 cases on its docket.") [hereinafter cited as Burger, *1983 Annual Report*]; 131 CONG. REC. S3313 (daily ed. Mar. 20, 1985) (statement of Sen. Thurmond); *id.* at S3314 (statement of Sen. Heflin).

15 Counting final dispositions involves a slight distortion when the object is to compare cases granted with those denied, because about half of the cases that receive plenary consideration in any one Term were granted review in the preceding Term. Thus, for the purpose of analyzing the criteria for selection, it might be more accurate to count plenary cases at the time review is granted rather than at the time of final disposition. But this approach is uncomfortably open-ended; it would also introduce distortions of its own. For example, how should one treat cases that are granted review in one Term, but disposed of before oral argument in the following Term? Moreover, if the analysis covers a period of several Terms, as this one does, any distortion becomes truly minimal. On balance, I have opted for the straightforward method of counting final dispositions as the measure of the Court's total activity with respect to particular kinds of cases.

16 See, e.g., 131 CONG. REC. S3313 (daily ed. Mar. 20, 1985) (statement of Sen. Thurmond) ("As we are all aware, the workload of the Supreme Court has dramatically increased over the last 20 years. Each year the situation seems to become more acute.").

Table I  
The Business of the Supreme Court, 1953-1983 Terms\*

<u>Term</u>	<u>Filings</u>	<u>Dispositions</u>	<u>Plenary Cases</u>	<u>Plenary Decisions</u>
1953	1,302	1,293	115	85
1954	1,397	1,352	102	93
1955	1,644	1,630	122	100
1956	1,802	1,670	134	121
1957	1,639	1,765	151	126
1958	1,819	1,763	144	120
1959	1,862	1,787	131	117
1960	1,940	1,911	147	129
1961	2,185	2,142	122	102
1962	2,373	2,327	150	127
1963	2,294	2,401	142	130
1964	2,288	2,173	121	107
1965	2,774	2,665	130	104
1966	2,752	2,890	147	113
1967	3,106	2,946	178	127
1968	3,271	3,117	131	113
1969	3,405	3,379	126	109
1970	3,419	3,315	148	129
1971	3,643	3,651	166	149
1972	3,755	3,752	178	157
1973	3,943	3,878	169	148
1974	3,661	3,874	162	142
1975	3,939	4,064	176	151
1976	3,873	4,021	176	145
1977	3,839	3,871	163	137
1978	3,893	3,947	161	137
1979	3,985	3,819	155	142
1980	4,174	4,251	152	131
1981	4,422	4,432	181	150
1982	4,201	4,205	182	155
1983	4,222	4,140	180	157

\*Data on filings and dispositions are taken from the following sources: Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 613-14 (1972) (1953 through 1971 Terms); *Discretionary Review*, *supra* note 13, at 806 n.48 (1972 through 1979 Terms); 52 U.S.L.W. 3025 (1983) (1980 through 1982 Terms); 53 U.S.L.W. 3028 (1984) (1983 Term).

little more than one percent a Term.<sup>17</sup> During the same period, filings in the federal courts of appeals nearly doubled.<sup>18</sup>

The extremely modest rate of growth over the last decade represents a major change from what the Court experienced in the

<sup>17</sup> The number of new cases docketed in the 1983 Term was 4,222. See 53 U.S.L.W. 3028 (1984). The figure for the 1971 Term was 3,643. Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 614 (1972) [hereinafter cited as *Freund Study Group*].

<sup>18</sup> See *Intercircuit Tribunal*, *supra* note 13, at 382 n.32.

1960's. In 1972, when the Freund Study Group issued an alarmist report on the Court's ability to cope with its docket,<sup>19</sup> it did so at the end of a decade that saw an increase in the total caseload from 2,185 to 3,643.<sup>20</sup> If filings had continued to grow at that rate in the decade that followed, the number of cases confronting the Court in the 1981 Term would have been 6,074.<sup>21</sup> Instead it was only 4,422.<sup>22</sup> And in the following Term the number dropped substantially, to 4,201.<sup>23</sup> The 1983 Term brought an increase of only 21 cases over 1982,<sup>24</sup> and at this writing the filings for the 1984 Term are actually running slightly behind the pace of 1983.<sup>25</sup>

There is, of course, no way of knowing whether the pattern of rapid growth will resume as suddenly as it ended.<sup>26</sup> For present purposes, it is sufficient to note that the selection process in the 1980's has been carried on against a background of stability in the total number of petitions considered each Term.<sup>27</sup>

### B. *Cases Heard: What the Numbers Mean*

As shown in Table I, the number of cases receiving plenary consideration has ranged in recent years from 152 to 182 per Term. However, these figures too can be misleading, because two or more cases (generally ones arising out of the same lower court proceedings) sometimes will be consolidated for argument and decided in a single opinion. An opinion issued under these circumstances usually will require no more effort on the part of the Justices, and will contribute no more to the national law, than if only one case were involved. Thus, to count "cases" as such—that is, docket numbers—tends to exaggerate the size of the plenary docket.<sup>28</sup>

<sup>19</sup> *Freund Study Group*, *supra* note 17, at 581-82.

<sup>20</sup> *See id.* at 614.

<sup>21</sup> *Cf.* A. BICKEL, *THE CASELOAD OF THE SUPREME COURT* 34 (1973) (quoting prediction by Chief Justice Burger that caseload will increase to 7,000 by 1980).

<sup>22</sup> *See* 53 U.S.L.W. 3028 (1984) (statistical recapitulation of 1981, 1982, and 1983 Terms, based on final statistical sheet issued by the Court at the end of the 1983 Term).

<sup>23</sup> *See id.*

<sup>24</sup> *See id.*

<sup>25</sup> The statistical sheet issued by the Court on May 22, 1985, reported that filings as of that date totalled 3,613. At the same point in the 1983 Term the figure was 3,696.

<sup>26</sup> *See* G. CASPER & R. POSNER, *THE WORKLOAD OF THE SUPREME COURT* 56-62 (1976).

<sup>27</sup> For further discussion of the changes in the total caseload, see G. CASPER & R. POSNER, *supra* note 26; McLauchlan, *An Exploratory Analysis of the Supreme Court's Caseload from 1880-1976*, 64 *JUDICATURE* 32 (1980).

<sup>28</sup> One might want to distinguish between, on the one hand, opinions involving only separate appeals or petitions from the same judgment or order and, on the other, opinions deciding two or more cases coming from different courts or involving different parties. Opinions of the latter kind may well require additional effort because of the need to master and adjudicate two or more sets of facts. Moreover, an opinion applying the governing legal principles to multiple factual situations may provide more guidance to the bench and

The more realistic approach is to count plenary *decisions*, with the "decision" being defined as a case or group of cases decided in a single opinion, memorandum, or order. When this practice is followed, the number of plenary decisions per Term reduces to about 150. In this article, reference will be made to decisions except in Part II, where the plenary docket will be compared with the total docket.

### C. *A Caveat: Other Forms of Disposition*

The focus of this article is on the criteria used by the Court in selecting cases for the plenary docket. But denial of review and grant of review are not the only options available to the Court. Three other modes of disposition deserve brief discussion here: summary affirmances and dismissals in appeal cases; summary opinions; and summary reconsideration orders.

#### 1. Summary Dispositions in Appeal Cases

The Supreme Court exercises both original and appellate jurisdiction, but it is the appellate jurisdiction that generates all but a handful of the cases that reach the plenary docket.<sup>29</sup> In delineating that jurisdiction, Congress has distinguished between two modes of review: appeal and certiorari.<sup>30</sup> The vast majority of cases can be brought to the Court only by writ of certiorari. As to those cases, the Court's jurisdiction is entirely discretionary; the Court may decide the merits of the cause, or it may decline to do so. In contrast, when a case falls within one of the narrow classes in which review by appeal is available,<sup>31</sup> Congress has conferred upon the losing litigant a right of review by the Supreme Court. This means that the Court cannot avoid the obligation to adjudicate the merits—to decide whether the judgment below is erroneous.<sup>32</sup>

The obligation to decide the merits does not, however, carry with it an obligation to accord the case plenary consideration or to write an opinion,<sup>33</sup> and the Court has taken full advantage of that

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bar than an opinion limited to one situation. Nevertheless, because even single-case opinions vary greatly in the quantity of effort required, in the number of issues addressed, and in the breadth of the guidance offered, it does not seem worthwhile to make the distinction.

29 In the four Terms of the 1980's the original jurisdiction accounted for only 9 of the 593 plenary decisions.

30 See *Plenary Docket I*, *supra* note 13, at 1721-23.

31 Two classes of cases account for all but a handful of the appeals that are brought to the Court today: cases in which a state court has upheld a state statute against a claim of repugnance to federal law, 28 U.S.C. § 1257(2) (1982), and cases in which a federal court of appeals has struck down a state statute on federal grounds, 28 U.S.C. § 1254(2) (1982). See *Discretionary Review*, *supra* note 13, at 812-20.

32 See generally Gressman, *Requiem for the Supreme Court's Obligatory Jurisdiction*, 65 A.B.A. J. 1325 (1979).

33 See *Plenary Docket I*, *supra* note 13, at 1722.



freedom. In recent Terms most appeals have been disposed of by summary unexplicated orders affirming the judgment of the court below.<sup>34</sup> In appeals from federal courts, the disposition is one of affirmance *eo nomine*; appeals from state courts are dismissed "for want of a substantial federal question."<sup>35</sup>

The distinction between the two modes of review retains considerable significance both within and without the Court. Internally, as the Justices themselves have informed us, the obligation to decide the merits of an appeal sometimes leads the Court to grant plenary consideration to a case that would have been denied review if it had come up by writ of certiorari.<sup>36</sup> And for lawyers and judges who want to know what the law is, the distinction is crucial to understanding the meaning of the Court's summary dispositions. The denial of certiorari is (at least in theory) totally without precedential significance.<sup>37</sup> Summary dispositions in appeal cases, on the other hand, constitute binding—though narrow and cryptic—precedents for other litigation.<sup>38</sup>

These consequences, however, are likely to be of little interest to the litigant whose application for plenary review has been denied. Whether the piece of paper that comes back from the Clerk's Office states "Appeal dismissed," "Judgment affirmed," or "Certiorari denied," the case is at an end; the judgment of the lower court stands.

In this article, I treat the appeal/certiorari distinction in two ways, depending on the context. In looking at cases that do not reach the plenary docket, I generally do not distinguish between the denial of certiorari and the summary dismissal of an appeal. But in discussing the cases that do reach the plenary docket, I take note of those instances where the obligatory jurisdiction appears to have influenced the selection process.<sup>39</sup>

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34 See, e.g., *Intercircuit Tribunal*, *supra* note 13, at 389 n.71 (of 134 appeals decided on the merits in the 1979 Term, only 32 received plenary consideration).

35 See *Discretionary Review*, *supra* note 13, at 812 n.87.

36 See *Intercircuit Tribunal*, *supra* note 13, at 389-90 (quoting letter signed by all nine sitting Justices).

37 See *Discretionary Review*, *supra* note 13, at 810-11; see generally Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979).

38 See *Discretionary Review*, *supra* note 13, at 817-18.

39 Legislation to eliminate the remaining elements of the obligatory jurisdiction has been approved by both houses of Congress, but in different sessions. See *Discretionary Review*, *supra* note 13, at 799; *Intercircuit Tribunal*, *supra* note 13, at 391-92 & n.83. At this writing the bill has been reintroduced only in the Senate. S. 833, 99th Cong., 1st Sess. (1985); see 131 CONG. REC. S3849 (daily ed. Apr. 2, 1985) (remarks of Sen. Heflin). Senator Heflin pointed out that unlike other proposals for court reform, this legislation "seems to have the unqualified support of all of the affected parties," including all members of the Court, the American Bar Association, and the Attorney General of the United States. *Id.*

## 2. Summary Opinions

In a handful of cases each Term, the Court will write a brief *per curiam* opinion without granting plenary consideration.<sup>40</sup> For the most part, summary opinions are used to reverse lower court decisions that a majority of the Justices believe are plainly contrary to controlling precedent.<sup>41</sup>

Except for a few cases involving procedural issues,<sup>42</sup> most of the summary reversals in recent Terms have been cases in which state officials challenged lower court rulings upholding constitutional claims.<sup>43</sup> Some of the summary opinions are quite significant from a precedential standpoint,<sup>44</sup> but their number is small enough

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40 In the four Terms of the 1980's the Court issued a total of 62 summary opinions. However, 5 of these involved motions to grant or vacate a stay of a sentence of death in cases that had not been docketed. *See, e.g.,* *Alabama v. Evans*, 461 U.S. 230 (1983). Summary opinions thus account for only 57 of the 9,000 cases that received final disposition during this period.

Some of the opinions are so short and uninformative that as an *a priori* matter one would probably not classify them as opinions at all. *Cf. The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 311 n.e (1984) (category of "written opinions" includes "per curiam opinions containing sufficient legal reasoning" to be so classified). However, I have followed the practice of including as "per curiam" opinions all dispositions labelled as such by the Reporter of Decisions and printed in the "front of the book" with the plenary decisions rather than in the "back of the book" with denials of certiorari and other orders. In this connection, I note that the Reporter appears to have modified the classification system described in my earlier articles. Some cases are now printed in the front of the book even though it would be difficult to argue that the decision "lends itself to a headnote." *See Discretionary Review, supra* note 13, at 808 n.64.

41 *See, e.g.,* *Massachusetts v. Upton*, 104 S. Ct. 2085, 2086 (1984) (reversing decision by court that "continued to rely on the approach . . . rejected in [a recent case]"); *NLRB v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 480*, 104 S. Ct. 2081, 2082 (1984) ("As the decision of the Court of Appeals apparently is inconsistent with this Court's precedents, we grant the petition for writ of certiorari and reverse."); *Leeke v. Timmerman*, 454 U.S. 83, 86 (1981) ("Our holding in [an earlier case] controls disposition here."); *Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) ("The holding below . . . cannot be reconciled with the principles set out in [a Supreme Court decision]"). *See also Florida Dep't of Health*, 450 U.S. at 151 (Stevens, J., concurring) ("Apparently recognizing [that the ruling below cannot be reconciled with the Supreme Court decision], respondents urge the Court to grant certiorari and hear argument on the question whether [the Supreme Court decision] should be overruled.").

42 *E.g.,* *Schmidt v. Oakland Unified School Dist.*, 457 U.S. 594 (1982) (holding that court of appeals erred in failing to consider pendent state-law claim); *Mariscal v. United States*, 449 U.S. 405 (1981) (directing court of appeals to reconsider applicability of "concurrent sentence" doctrine). Many of the procedural issues had implications for the Court's own jurisdiction. Typically, the Court's disposition of the procedural question avoided a decision on the merits of the substantive issues. *See, e.g.,* *Capital Cities Media, Inc. v. Toole*, 104 S. Ct. 2144 (1984) (possibility of adequate and independent state ground); *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67 (1983) (mootness); *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982) (dismissing for want of jurisdiction).

43 *See* *Florida v. Meyers*, 104 S. Ct. 1852, 1855-56 & n.3 (1984) (Stevens, J., dissenting) (citing cases).

44 *E.g.,* *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jago v. Van Curen*, 454 U.S. 14 (1981);

that they can be largely ignored in analyzing the selection of cases for plenary consideration.

### 3. Summary Reconsideration Orders

Denials of review, summary affirmances, and dismissals for want of a substantial federal question account for all but a few dozen of the 4,000 cases that do not receive plenary consideration. However, one important category of dispositions remains to be mentioned: the summary order vacating the judgment below and directing the lower court to reconsider its ruling in light of an intervening Supreme Court decision. Orders of this kind account for between 40 and 90 dispositions each Term.

The reconsideration order is used in cases that the Court has previously set aside to await the decision in a plenary case raising similar or related issues. Once the decision is announced, the Court takes a second look at the held case. If, upon reexamination, the Court finds even a superficial inconsistency between the new precedent and the judgment brought for review, the Court will remand the case for further consideration by the lower court. If the ruling below appears clearly in accord with the plenary decision, the Court will simply deny review.<sup>45</sup>

#### D. *The Rule of Four*

In occasional articles published over the years, the Justices have described in some detail the procedures by which the Court selects cases for plenary consideration.<sup>46</sup> For present purposes, however, only one aspect of those procedures is important: the "Rule of Four." Under the Rule of Four, only four votes—not a majority—are required to set a case for plenary consideration.<sup>47</sup> And the available data indicate that a substantial proportion of the cases on the plenary docket receive only the minimum number of votes.<sup>48</sup> The plenary docket is thus shaped by shifting coalitions of

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Immigration & Naturalization Serv. v. Wang, 450 U.S. 139 (1981); Stone v. Graham, 449 U.S. 39 (1980).

45 For further discussion see section II(F) *infra*; Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5 (1983) [hereinafter cited as Hellman, *Second Thoughts*]; Hellman, "Granted, Vacated, and Remanded": *Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389 (1984).

46 See, e.g., Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477-82 (1973); White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. ST. B.J. 346, 349 (1982).

47 See generally Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975 (1957).

48 Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 17 (1983); cf. Brennan, *supra* note 46, at 481-82 (of the cases granted review in the 1972 Term, "approximately 60 percent received the votes of only four or five of the Justices. In only 9 percent of

Justices, each of whom may have a different agenda and a different set of priorities.

### E. *The Criteria for Plenary Review*

At first blush it might seem quite anomalous, and even unjust, that more than ninety-five percent of the cases that come to the Court are disposed of without full briefing, without oral argument, and without an opinion.<sup>49</sup> The anomaly disappears, however, or at least is substantially mitigated, if one accepts the orthodox view of the Supreme Court's role in the American judicial system. In that view, the function of the Supreme Court is not to correct errors in the lower courts, but to "secur[e] harmony of decision and the appropriate settlement of questions of *general importance*."<sup>50</sup>

Underlying this view is the recognition that virtually every case that comes to the Supreme Court has already received at least one level of appellate scrutiny.<sup>51</sup> Admittedly, it is possible that another look by another court might lead to a more "correct" or a more "just" result. But that possibility alone is not a sufficient reason for the Supreme Court to hear a case. To paraphrase Professor Bator, "[a]ssuming that there 'exists,' in an ultimate sense, a 'correct' decision [of a case], we can never be assured that any particular tribunal has in the past made it: we can always continue to ask whether [a better decision could have been reached]."<sup>52</sup> Or in the familiar words of Justice Jackson: "[R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of [the Supreme Court's] reversals of [lower] courts would also be re-

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the granted cases were the Justices unanimous in the view that plenary consideration was warranted.")

49 "[C]an it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation to hear 87 percent of the cases presented to it by private litigants?" Message from the President Transmitting a Recommendation to Reorganize the Judicial Branch of the Federal Government (Feb. 5, 1937), *reprinted in* S. REP. NO. 711, 75th Cong., 1st Sess. 25, 26 (1937).

50 Hughes, *Address of the Chief Justice*, 11 A.L.I. PROC. 313, 315 (1934) (emphasis added).

51 The only exceptions are cases brought by direct appeal from federal district courts. Recent jurisdictional reforms have greatly limited the circumstances under which direct appeals are available, *see Discretionary Review, supra* note 13, at 813-14, and in the first four Terms of the 1980's only 91 cases reached the Court without having been reviewed by another appellate court. About half of these were appeals from three-judge district courts; the remainder (except for a handful of antitrust cases invoking the Expediting Act, 15 U.S.C. § 29(b) (1982)) were cases in which a single district judge had declared a federal statute unconstitutional. *See* 28 U.S.C. §§ 1252, 1253 (1982). Most of the three-judge court appeals did not receive plenary consideration; instead, the Court affirmed summarily. *See* notes 34-35 *supra* and accompanying text.

52 Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 447 (1963).

versed.”<sup>53</sup> Thus it is sound to say, as Chief Justice Hughes did, that litigants who have argued unsuccessfully in the federal courts of appeals or state appellate courts “have had their day in court. If further review is to be had by the Supreme Court it must be because of the public interest in the questions involved.”<sup>54</sup>

The criterion of “public interest” is epitomized in a term first given general currency in a speech by Justice Harlan: “certworthiness.”<sup>55</sup> In the orthodox view, a case is certworthy if it will enable the Court to hand down a decision that will provide authoritative guidance, substantially augmenting what is furnished by existing precedents, for the resolution of a recurring issue of federal law. Typical indicia of certworthiness would be the presence of an inter-circuit conflict or an appellate decision that calls into question the lawfulness of government policy of wide applicability.

Rigid adherence to the orthodox view would mean that immediately upon determining that a certiorari petition raised no issue of general importance, the Justices would reject the case without further consideration. However, as might be expected, the orthodox view does not accurately reflect what the Court does in fact. Few human beings, confronted with error or unfairness that is within their power to correct, would invariably stand by and do nothing simply because the case has no importance to anyone but the litigants, and the evidence shows that in this regard as in others, the Justices are quite human.<sup>56</sup>

Apart from the human element, there may be sound institutional reasons for the Court to engage in review for error in particular classes of cases. For example, the Court’s historic function as guardian of the supremacy clause may require it to hear some otherwise routine cases in which state courts have rejected federal claims or defenses.<sup>57</sup> Less urgently, the Court’s position at the

<sup>53</sup> *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring opinion). Justice Jackson was referring to Supreme Court review of state court decisions, but the point is applicable to federal courts as well.

<sup>54</sup> Letter from Chief Justice Hughes to Senator Wheeler (March 21, 1937), *reprinted in S. REP. NO. 711*, 75th Cong., 1st Sess. 38, 39 (1937).

<sup>55</sup> See Harlan, *Manning the Dikes*, 13 REC. A.B. CITY N.Y. 541, 549 (1958).

<sup>56</sup> *Cf. Dunn v. Immigration & Naturalization Serv.*, 419 U.S. 919, 924 (1974) (Stewart, J., dissenting from denial of certiorari):

Because the factual setting of this case is unusual, the legal questions raised are unlikely often to recur. While this is normally a sound reason to deny review, the judgment before us is grossly unjust. The Service has noted that petitioner has a “penchant for botching up his life.” Perhaps so, but the Government’s botching up this case has served to complete the wreckage.

I would grant certiorari and summarily reverse the judgment.

<sup>57</sup> This does not necessarily mean that the Court should address the merits of all such cases, or even those where the petitioner makes a *prima facie* showing that the state court erred in rejecting his federal claim. For one thing, the cases that would probably arouse the greatest concern are those in which the state court’s ruling has resulted in a deprivation of

apex of the federal judicial system may sometimes justify supervisory action in the interest of hierarchy and order.<sup>58</sup>

Yet even if the Court were to reject the strictures of the orthodox view altogether, it is not clear that the results of the selection process would be significantly different. Over the years, distinguished appellate judges have said that most cases can be decided only one way, and generally on only one line of reasoning.<sup>59</sup> In appellate courts today, a large proportion of the cases involve nothing more than the application of well-established principles to par-

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liberty. But in that situation (unless the claim arises under the fourth amendment, *see* *Stone v. Powell*, 428 U.S. 465 (1976)), the petitioner has an alternate mode of redress: seeking a writ of habeas corpus in federal district court. *See* Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 960-62 (1976). More fundamentally, an occasional error by a state court that results in the deprivation of a federal right does not threaten the supremacy of federal law in a way that necessarily requires Supreme Court intervention. Again to quote Professor Bator, "the possibility of error [is] inherent in any process. The task of assuring legality is to define and create a set of arrangements and procedures which provide a reasoned and acceptable probability that justice will be done, that the facts found will be 'true' and the law applied 'correct.'" Bator, *supra* note 52, at 448; *see also id.* at 451 & *passim*. As long as that standard is met, the Court need not itself consider the merits of every case in which it appears that the state court erroneously denied a federal claim. *But see* *Sweat v. Arkansas*, 105 S. Ct. 933, 938 (1985) (Brennan, J., dissenting from denial of certiorari) (the Court has a duty rigorously to correct "an obviously aberrant failure by a State court to apply settled constitutional principles" so that fundamental rights are not "blurred and then gradually eroded by the tremendous pressures put on those charged with enforcing the criminal law").

When a state court consistently disregards a controlling rule of federal law, the supremacy function does come into play. The distinction between the isolated error and the persistent misunderstanding is illustrated by a recent series of cases from the Missouri state courts arising under the Federal Employers Liability Act (FELA). In each instance, the question presented by the petitioner was whether the state courts had erred in refusing to instruct the jury that any award for lost future earnings must be reduced to present value. The first two times the question came before it, the Court denied review, but when the error was repeated a third time, the Court summarily reversed. *Compare* *Dunn v. St. Louis-San Francisco Ry.*, 621 S.W.2d 245, 253 (Mo. 1981) (holding that present value instruction is impermissible), *cert. denied*, 454 U.S. 1145 (1982); *and* *Bair v. St. Louis-San Francisco Ry.*, 647 S.W.2d 507, 510 (Mo.) (following *Dunn*), *cert. denied*, 104 S. Ct. 107 (1983); *with* *St. Louis Southwestern Ry. v. Dickerson*, 105 S. Ct. 1347 (1985) (reversing Missouri appeals court that followed *Bair*; stating that a 1916 Supreme Court decision had given a "clear answer" contrary to the Missouri court's position). It is interesting to note that the intermediate appellate court that decided *Dickerson* acknowledged the 1916 Supreme Court decision but felt obliged to follow the Missouri Supreme Court's precedents instead. *See* *Dickerson v. St. Louis Southwestern Ry.*, 674 S.W.2d 165, 170 (Mo. App. 1984).

58 *See, e.g.*, *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (summary reversal) ("Needless to say, only this Court may overrule one of its precedents. Until that occurs, [a case that the court of appeals doubted was still good law] is the law, and the decision below cannot be reconciled with it."); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (summary reversal) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

59 *See, e.g.*, Friendly, *Reactions of a Lawyer-Newly-Become-Judge*, 71 YALE L.J. 218, 222 (1961), *reprinted in* H. FRIENDLY, *BENCHMARKS* 1, 6 (1967); Aldisert, *Appellate Justice*, 11 U. MICH. J.L. REF. 317, 318-19 (1978).

ticular facts.<sup>60</sup> Many appeals challenge rulings that are subject to reversal only if clearly erroneous or an abuse of discretion. In short, the vast majority of appellate decisions are clearly correct, or at least within the range of acceptability under the governing law.

These considerations help to explain why seventy percent of the cases filed with the Court are so obviously unworthy of review that not even one Justice requests that they be discussed at the Court's conference.<sup>61</sup> In the next section of this article, I shall identify several classes of cases that receive this treatment far more often than not.

## II. The Cases the Court Does Not Take

Research has identified six categories of cases that very seldom receive plenary consideration, even though they constitute a significant portion of the Court's overall caseload. Four of the categories are defined by the status of the party seeking review: indigent litigants; defendants in federal criminal prosecutions; defendants in state criminal prosecutions; and civil litigants representing themselves. The other two groups of cases are characterized by the nature of the issues presented: state court cases involving spurious federal claims and cases raising issues similar to those that have already been granted review in other cases.

### A. Cases Filed in *Forma Pauperis*

The cases filed in the Supreme Court can be classified in accordance with a wide variety of criteria, but the statistical reports issued by the Court itself recognize only one distinction: between paid cases and cases filed in *forma pauperis* ("FP"), i.e., by indigents.<sup>62</sup> The distinction is purely mechanical, and is reflected in a dual numbering system for docketed cases. Litigants who cannot afford to pay court costs get FP status and docket numbers of 5000 and above. Those who pay go into the numbering system that

<sup>60</sup> See Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 621-22 (1981).

<sup>61</sup> Brennan, *supra* note 46, at 479; White, *supra* note 46, at 349. Curiously, Chief Justice Burger has stated that "every filing is processed in a conference of the Court." Burger, *Intercircuit Panel*, *supra* note 14, at 87 (emphasis added). However, this reference is consistent with other Justices' descriptions if the reader understands, first, that "conference" refers not to an in-person meeting but to the Justices as a group, see Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946-O.T. 1961*, 1980 SUP. CT. REV. 143, 152 ("the Court's name for its institutional self"); and second, that "processed" means just that—not "discussed."

<sup>62</sup> See, e.g., 53 U.S.L.W. 3028 (1984) (reprinting the final statistical sheet for the 1983 Term). Surprising though it may seem, vital data such as the mode of review (appeal or certiorari), court of origin (state or federal), and the nature of the proceeding (civil or criminal) are not reflected in any of the statistical reports regularly issued by the Court.

starts with 1 each Term.<sup>63</sup>

FP cases account for 2,000 of the total filings each year, but only a tiny fraction are given plenary consideration. The total for the first four Terms of the 1980's was 44, an average of 11 per Term. In contrast, paid cases, which generated about 2,200 filings per Term, contributed an average of 160 cases to the plenary docket.<sup>64</sup>

This record is not surprising, nor is it the product of discrimination against the poor. The vast majority of FP cases are filed by indigent criminal defendants who have nothing to lose by seeking Supreme Court review even if their arguments are clearly unworthy of the Court's attention.<sup>65</sup> And this is so whether the applications are judged by certiorari standards or from the more tolerant standpoint of review for error. Even Justice Brennan, who might be expected to have as much sympathy for indigent petitioners as any member of the Court, has written that "in all but a handful of" these cases, "the merits involved are almost certainly insufficient to demand full review."<sup>66</sup>

The FP cases that do reach the plenary docket fall into two well-defined groups, depending on the court of origin. When the Court accepts an indigent's petition from a federal court, the reason almost always is to resolve an intercircuit conflict. Of the 17 federal court cases that received plenary consideration in the first four Terms of the 1980's, 13 involved acknowledged conflicts; in 3 others, strong but arguable claims of conflict were made.<sup>67</sup> And most of the cases raised issues of statutory construction rather than constitutional law.

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63 Recently the Court has begun to give more careful scrutiny to the affidavits of indigency that accompany motions for leave to proceed in forma pauperis, and some motions have been denied. See generally *Brown v. Herald Co.*, 104 S. Ct. 331, 332 (1983) (Brennan, J., dissenting). As a result, a few cases bearing docket numbers in the 5000 series will turn out to be paid cases. Compare *Unterthiner v. Desert Hosp. Dist.*, 104 S. Ct. 330 (1983) (No. 82-6765) (denying motion for leave to proceed in forma pauperis), with *Unterthiner v. Desert Hosp. Dist.*, 104 S. Ct. 973 (1984) (denying certiorari, presumably after the petitioner paid the filing fees). However, cases of this kind constitute such a tiny percentage of the FP applications that they can reasonably be ignored in describing the Court's practices.

64 If the 1980 Term is excluded, the average is 170. For reasons that I cannot fully explain, the number of cases on the plenary docket in the 1977 through 1980 Terms was substantially smaller than in the six Terms that went before or in the four Terms that followed. See *Intercircuit Tribunal*, *supra* note 13, at 418 n.179; *Plenary Docket II*, *supra* note 13, at 526-33, 577-83.

65 See *Intercircuit Tribunal*, *supra* note 13, at 382 & n.32.

66 *Brown v. Herald Co.*, 104 S. Ct. 331, 333 (1983) (Brennan, J., dissenting).

67 See *Segura v. United States*, 104 S. Ct. 3380, 3391 n.9 (1984); *Dixson v. United States*, 104 S. Ct. 1172, 1181-82 (1984). In *Segura*, the government as respondent conceded the conflict and acquiesced in the grant of review. See Brief for the United States at 4-5, 7. In *Dixson* (an opinion that disposed of two consolidated cases), the lower court had distinguished the decisions that provided the basis for the petitioners' claim of conflict, see *United States v. Hinton*, 683 F.2d 195, 197 (7th Cir. 1982), but the Supreme Court's opin-



The state court cases are a very different breed. Few of them involved conflicts; rather, the dominant theme is one of concern that the state court has improperly rejected a federal constitutional claim. In 17 out of 27 cases in the 1980-1983 period the judgment was actually reversed. In 3 other cases there were four votes for reversal, and in 2 additional cases the opinions of the Justices gave reason to believe that members of the Court who did not ultimately vote to reverse might well have been concerned, at the certiorari stage, that federal rights had been denied.<sup>68</sup> It is also worth noting that 3 of the 27 cases were dismissed on jurisdictional grounds; if we look only at the cases decided on the merits, the focus on review for error becomes even more evident.

A somewhat more receptive attitude toward indigent petitions characterized the earlier years of the Burger Court. In fact, three distinct phases can be discerned. From 1969 through 1972 an average of 30 FP cases received plenary consideration each Term. For the next eight Terms the average was 16.<sup>69</sup> The 1981 Term brought a sharp and sudden reduction in the number of FP cases heard, and for the 1981-1983 period the average was only 8.<sup>70</sup> In all likelihood, this development will prove to have been primarily a reflection of a broader trend in the work of the Burger Court: an ever-increasing tendency to adjudicate constitutional issues (particularly those involving criminal procedure) at the behest of government officials rather than in cases brought by persons challenging government action.<sup>71</sup> However, further analysis will be required to test this hypothesis fully.

### B. *Paid Petitions Filed by Federal Criminal Defendants*

Most of the federal criminal defendants who seek Supreme

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ion implied that a conflict did exist, *see Dixon*, 104 S. Ct. at 1181-82, and the dissent said so explicitly, *see id.* at 1185 (O'Connor, J., dissenting).

The one case that did not involve a conflict was *Barefoot v. Estelle*, 463 U.S. 880 (1983), in which the Court granted certiorari before judgment to resolve two recurring issues in the administration of the death penalty.

68 *See Barclay v. Florida*, 463 U.S. 939, 959 (1983) (Stevens, J., joined by Powell, J., concurring in the judgment) (upholding death sentence "[a]fter giving careful consideration to this case and others decided by the Supreme Court of Florida"); *H.L. v. Matheson*, 450 U.S. 398, 414 (1981) (Powell, J., joined by Stewart, J., concurring) (emphasizing questions not decided).

69 The 1972 Term, with 22 FP cases, can be viewed as a transitional one. However, in the preceding Term the remarkable total of 43 indigent cases had appeared on the plenary docket—one-quarter of all cases that received plenary consideration. As a result, the average for 1971 and 1972 is very close to the average for 1969 and 1970. And 1973's total of 16 is identical to the figure for 1974. All in all, it seems accurate to treat the 1969-1972 Terms as one period, and the next eight Terms as another.

70 At this writing it appears that the 1984 Term plenary docket will include 14 indigent cases. However, it would be rash to infer a new pattern from a single Term.

71 For data through the 1979 Term, *see Plenary Docket II, supra* note 13, at 577-78, 581.

Court review do so as indigents, but in each of the last few Terms the Court has also received between 320 and 400 paid petitions challenging federal criminal convictions.<sup>72</sup> Few of these petitions are granted. In the first four Terms of the 1980's, the Court granted plenary consideration to only 9 paid cases filed by federal criminal defendants, an average of little more than 2 per Term. The average for the earlier years of the Burger Court was higher—just under 4 cases per Term—but even then it could hardly be said that applications of this kind constituted a substantial segment of the plenary docket.

When the Court does grant a federal criminal defendant's petition, it usually does so in order to resolve an intercircuit conflict. In the last five years, the Court has never granted a petition of this kind except where a conflict was present. And one must go back to 1977 to find a Term in which more than a single petition was granted in the absence of a conflict.<sup>73</sup>

### C. *Paid Petitions Filed by State Criminal Defendants*

Like their federal counterparts, state criminal defendants generally appear in the Supreme Court in forma pauperis, but a substantial number of paid petitions are also filed. In recent years the figures have ranged from 125 to 195. The proportion of cases that receive plenary consideration is higher than it is for the federal defendants, but still very low. In the four Terms of the 1980's the total number of plenary decisions of this kind was 8, and in the last three Terms of the 1970's it was 7.

When review is granted in a paid case filed by a state criminal defendant, the reason generally is not to resolve a conflict, but rather to permit the vindication of a federal right. Although the judgments were actually reversed in only 4 of the 8 cases in the

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<sup>72</sup> The figures for the first four Terms of the 1980's (rounded to the nearest 5) were 335, 400, 320 and 320. Obviously, the 1981 Term was something of an anomaly, as indeed it was from the standpoint of overall filings. That was the Term in which the total number of new cases was 4,422—200 more than in any subsequent Term.

<sup>73</sup> In the 1984 Term, 5 paid petitions filed by federal criminal defendants reached the plenary docket. Three involved acknowledged conflicts; in the other 2, the defendants could cite decisions from other circuits which, while distinguishable on their facts, certainly reflected a narrower view of the scope of a federal criminal statute. Compare *United States v. Dowling*, 739 F.2d 1445, 1448 (9th Cir. 1984), cert. granted, 105 S. Ct. 901 (1985), with *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982); compare *United States v. Russell*, 738 F.2d 825 (7th Cir. 1984), cert. granted, 105 S. Ct. 1166 (1985), with *United States v. Mennuti*, 639 F.2d 107 (2d Cir. 1981). The Ninth Circuit decision in *Dowling* relied on the same court's earlier ruling in *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), cert. denied, 104 S. Ct. 1275 (1984). Why the Court granted review in *Dowling* after declining to hear *Belmont* remains something of a mystery. See 29 PAT. TRADEMARK & COPYRIGHT J. (BNA) 287 (1985) (summarizing defendant's certiorari petition and government's response; noting that government disputed petitioner's claim of conflict between *Belmont* and *Smith*).

1980-1983 period, there were at least four votes for reversal in all but 2. The pattern is even more pronounced if we look at the Court's work over a somewhat longer span of time. In 6 of the 7 cases that received plenary consideration in the last three Terms of the 1970's the judgments were reversed (5 unanimously), and in the remaining case there were four votes for reversal. Thus, of the 15 cases of this kind that reached the plenary docket in the seven Terms 1977 through 1983, 10 were reversed and 3 others had four votes for reversal.

The Burger Court's approach during its first eight Terms may have been somewhat different. In that period the Court heard a total of 31 cases brought by nonindigent state criminal defendants.<sup>74</sup> Thirteen of the petitioners secured a judgment of reversal, and in 10 other cases there were four votes to reverse. To look at the figures from the other side, the plenary docket included 6 cases which, on the evidence of published votes after argument, do not appear to have been taken for the purpose of correcting an erroneous rejection of a federal claim. Thus it is at least possible that until the mid-1970's the Court was applying a somewhat more flexible set of criteria in considering whether to hear a case of this kind.

#### D. *Civil Cases Filed by Pro Se Litigants*

In each of the first four Terms of the 1980's, the Court received, on the average, 135 paid petitions filed by litigants in civil cases who were representing themselves. These pro se petitions complained of a wide range of grievances, most frivolous by any standard, some fantastic. For example, one litigant twice sought to set aside the 1980 presidential election.<sup>75</sup> Another claimed damages for emotional pain and suffering as a result of injuries to his

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<sup>74</sup> To some degree, the higher average reflects the Court's greater interest in obscenity issues; 10 of the 31 cases arose out of obscenity prosecutions. (However, 3 of the 7 paid petitions filed by state criminal defendants in the 1977-1979 period also sought review of obscenity convictions.) In this connection, it is interesting to note that among the dozens of obscenity cases brought to the Court in the last few years, only a handful were filed by indigents.

<sup>75</sup> *Stroom v. Carter*, 460 U.S. 1007 (1983) (order dismissing appeal for want of jurisdiction) (jurisdictional statement summarized at 51 U.S.L.W. 3638 (1983)); *Stroom v. Carter*, 459 U.S. 866 (1982) (order denying certiorari) (petition summarized at 51 U.S.L.W. 3209 (1982)). Mr. Stroom made another effort in the 1984 Term. *Stroom v. Carter*, 105 S. Ct. 173 (1984) (order denying certiorari) (petition summarized at 53 U.S.L.W. 3161 (1984)). Having failed in that endeavor, he sought to set aside the results of the 1984 election. *Stroom v. Carter*, 105 S. Ct. 1194 (1985) (order denying certiorari) (petition summarized at 53 U.S.L.W. 3556 (1985)).

Other pro se litigants who have filed numerous unsuccessful applications for review include Robert J. Kondrat (8 petitions in the first four Terms of the 1980's) and George L. Karapinka (4 petitions in the first four Terms of the 1980's; 2 more in the 1984 Term). See, e.g., *Kondrat v. United States Dep't of State*, 457 U.S. 1121 (1982) (order denying certiorari) (petition summarized at 50 U.S.L.W. 3972 (1982)); *Karapinka v. Union Carbide Corp.*,

dog.<sup>76</sup> Another asserted that land had been taken illegally from his aunt in 1921.<sup>77</sup>

In this light, it is hardly surprising that during the four Terms 1980-1983, only 2 pro se petitions were granted, and neither was a typical example of the genre. In one, a federal court of appeals had held a state statute unconstitutional, and the case fell within the Supreme Court's obligatory jurisdiction.<sup>78</sup> In the other, the petitioner was a member of the state supreme court's committee on bar admissions who was named as a defendant in an antitrust suit brought by an unsuccessful applicant.<sup>79</sup>

### E. *Spurious Federal Question Cases From State Courts*

Pro se litigants may not know that in reviewing cases from state courts the Supreme Court can consider only the federal questions.<sup>80</sup> But lawyers generally are at least dimly aware of this fact. Thus, when a lawyer loses a state court case that has been litigated and decided entirely on the basis of state law issues, he will recognize that the state court's rulings on these matters do not, of themselves, provide grounds for Supreme Court review. And at that point most lawyers will accept the reality that in our federal system the case has reached the end of the road. But some attorneys are not content to stop there. They attempt to argue that the substance of the state court's judgment or the manner in which it was reached violated some right under the federal Constitution. The due process and equal protection clauses are most often invoked,<sup>81</sup> but in-

459 U.S. 1070 (1982) (order denying certiorari) (petition summarized at 51 U.S.L.W. 3395 (1982)).

76 *Burleson v. Howard*, 449 U.S. 1012 (1980) (order denying certiorari) (petition summarized at 49 U.S.L.W. 3377 (1980)).

77 *Harris v. City of Norfolk*, 104 S. Ct. 529 (1983) (order denying certiorari) (petition summarized at 52 U.S.L.W. 3429 (1983)). See also *Schwarz v. Coastal Resources Management*, 104 S. Ct. 90 (1983) (order denying certiorari); *Moore v. Khourie*, 104 S. Ct. 49 (1983) (order dismissing appeal and denying certiorari). In *Schwartz*, the certiorari petition presented the question, "Does using over 2 million dollars of Clean Water Act Funds to bring millions of gallons of sewage to clean water seem like an atrocious waste of your money?" Petition for Certiorari, Questions Presented (unpaginated). In *Moore*, the appellant argued that the record of proceedings "present[s] a prima facie case that [the lower] Courts have become 'Nobility' as denied [sic] by Article I of the U.S. Constitution." Jurisdictional Statement at 5.

78 *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

79 *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984).

80 According to a recent national survey, 77 percent of the American public "incorrectly believes the Supreme Court can review and reverse every decision made by a state court." Krasno, *National Survey Examines Public Awareness of Judicial System*, 67 JUDICATURE 309 (1984).

81 See, e.g., *Riffe v. International Harvester Co.*, 104 S. Ct. 1599 (1984) (order denying certiorari) (petition summarized at 52 U.S.L.W. 3654 (1984)) (due process); *Wold v. Bull Valley Management Co.*, 96 Ill. 2d 110, 449 N.E.2d 112, cert. denied, 104 S. Ct. 345 (1983) (petition summarized at 52 U.S.L.W. 3347 (1983)) (due process and equal protection); *Bry-*

ventive counsel have also cited the contract clause,<sup>82</sup> the commerce clause,<sup>83</sup> and the seventh amendment.<sup>84</sup>

These are the cases that I have labeled "spurious federal question cases." Their numbers range from 30 to 60 each Term. It is almost needless to say that none of these cases receives plenary review. And until very recently one could have added confidently that the cases took virtually none of the Justices' time. Today, however, this conclusion must be reassessed in light of the fact that the Justices have begun to consider the possibility of awarding damages against litigants who file frivolous petitions.<sup>85</sup>

From the standpoint of workload, the soundness of this approach is very much open to question. While one can understand the Justices' frustration at having to consider cases that clearly do not belong on their docket, the actual imposition on their time is de minimis if review is simply denied. But that will no longer be true if the Court undertakes the task of distinguishing between cases that are merely unworthy of review and those that are frivolous. That determination does involve a question of judgment on which reasonable persons can differ,<sup>86</sup> and it can be expected to consume substantially more time than the cases would otherwise require.<sup>87</sup> Nor can it reasonably be thought that the Court's overall workload will be reduced because fewer cases will be filed. The Court is not likely to impose sanctions very often,<sup>88</sup> and in any event it is difficult

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ant-Poff, Inc. v. Hahn, 454 N.E.2d 1223 (Ind. App. 1982), *appeal dismissed and cert. denied*, 104 S. Ct. 1433 (1984) (jurisdictional statement summarized at 52 U.S.L.W. 3639 (1984)) (equal protection).

82 See, e.g., *Gustine v. Gustine*, 104 S. Ct. 713 (1984) (order denying certiorari) (petition summarized at 52 U.S.L.W. 3493 (1984)).

83 See, e.g., *Moorer v. Clayton Mfg. Co.*, 128 Ariz. 565, 627 P.2d 716 (Ct. App.), *cert. denied*, 454 U.S. 866 (1981) (petition summarized at 50 U.S.L.W. 3207 (1981)).

84 See, e.g., *Taylor v. Lawson Milk Co.*, 104 S. Ct. 153 (1983) (order denying certiorari) (petition summarized at 52 U.S.L.W. 3181 (1983)); *Martin Roofing, Inc. v. Goldstein*, 60 N.Y.2d 262, 457 N.E.2d 700, 469 N.Y.S.2d 595 (1983), *cert. denied*, 104 S. Ct. 1681 (1984) (petition summarized at 52 U.S.L.W. 3691 (1984)).

85 See *Talamini v. Allstate Ins. Co.*, 105 S. Ct. 1824, 1825 (1985) (opinion of Burger, C.J., joined by Rehnquist and O'Connor, JJ.).

86 For example, Chief Justice Burger urged the Court to impose sanctions in two cases in which appeals were dismissed on March 25, 1985. In one of the cases, two other Justices joined in his recommendation; in the other, he was alone. Compare *Talamini v. Allstate Ins. Co.*, 105 S. Ct. 1824, 1825 (1985) (opinion of Burger, C.J., joined by Rehnquist and O'Connor, JJ.), with *Crumpacker v. Indiana Supreme Court Disciplinary Comm'n*, 105 S. Ct. 1829 (1985) (opinion of Burger, C.J.).

87 As four members of the Court have stated, "Any evenhanded attempt to determine which of the unmeritorious applications should give rise to sanctions, and which should merely be denied summarily, would be a time-consuming and unrewarding task." *Talamini v. Allstate Ins. Co.*, 105 S. Ct. 1824, 1827 (1985) (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring).

88 See note 86 *supra*.

to believe that the lawyers who file these petitions undertake a careful cost-benefit analysis before proceeding.

The question, then, is whether the added burden to the Court of devoting more attention to the least certworthy petitions can be justified on the ground that it will permit the Court to compensate litigants who have been exposed to unnecessary legal expenses in responding to a frivolous application.<sup>89</sup> Full discussion is beyond the scope of this article, but an impressionistic survey suggests that the number of petitions that are truly frivolous (as distinguished from being merely uncertworthy) is small enough that the game is not worth the candle. In particular, once we leave the realm of cases involving spurious federal questions (which are relatively few in number) for the cases where the federal questions have been properly raised and preserved throughout the litigation, the frivolous applications are much more difficult to identify.<sup>90</sup>

#### F. *Cases Held for Plenary Decisions*

As previously noted, when a case is filed that raises an issue similar or identical to an issue presented by a case already chosen for plenary consideration, the Court's practice is to put the new case aside rather than to either grant or deny review. Later, when the plenary decision is announced, the Court takes another look at the held case. At that time the Court could, of course, decide that the case warrants review in its own right, but study of the Court's practices shows that the Court rarely takes that course. To explain why this is so, it is necessary to analyze the possible relationships between a held case and a plenary decision and the consequences of those relationships for the exercise of the Court's functions.

First, the judgment of the lower court may be clearly consistent with, or even compelled by, the new precedent. In that event no purpose would be served by plenary consideration; on the contrary, the only sensible course of action is for the Court to deny review. And that is just what the Court has done in about 65 held cases in each of the last four Terms.<sup>91</sup>

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89 See *Park Ave. Inv. & Dev., Inc. v. Barkheimer*, 105 S. Ct. 2171, 2173 (1985) (opinion of Burger, C.J., joined by Rehnquist and O'Connor, JJ.); *Talamini v. Allstate Ins. Co.*, 105 S. Ct. 1824, 1827 (1985) (opinion of Stevens, J.).

90 See note 86 *supra*. Beyond this, as long as the Court continues to grant certiorari and reverse in an occasional case that does not present any issues of "general importance," see note 50 *supra* and accompanying text, it is hard to fault a litigant who, sincerely believing that the lower court has grievously erred in *his* case, asks the Court to correct one more isolated injustice.

91 This number can be only an approximation, because it is not always clear whether a case has been held to await a plenary decision or for some other reason, or indeed whether it has been "held" at all. When the lapse of time between the issuance of the plenary opinion and the denial of review is minimal and the similarity of issues unmistakable, I have

Second, it may be clear, in light of the new precedent, that the judgment brought for review cannot stand. The lower court may have come out on the wrong side of an intercircuit conflict resolved by the plenary decision; it may have relied on a lower court ruling that the Supreme Court reversed or substantially modified; or it may have rested on a Supreme Court decision that the Justices overruled.<sup>92</sup> In any of these circumstances it would be possible—and perhaps desirable—for the Court to reverse outright, citing the new precedent.<sup>93</sup> And under Chief Justice Warren that is probably what the Court would have done.<sup>94</sup> More recently, however, the Court's practice has been to vacate rather than reverse the judgment and to remand the case to the lower court "for further consideration in light of" the intervening decision. But whether the disposition be one of reversal or remand, the one course of action that would make no sense is plenary consideration; by hypothesis, the held case is controlled by the new precedent. Thus these cases, like those in the first group, are unlikely candidates for the plenary docket.

This leaves the held cases in which the effect of the new precedent on the lower court judgment is unclear. Typically, these cases will involve a difference in the factual or legal context that arguably—but not necessarily—calls for a different result from that of the plenary decision. The held case may have been brought under a different statute or legal theory; additional issues may be present that were not raised by the case that received plenary consideration; or the distinctions may be purely factual.<sup>95</sup> In any of these circumstances, the Court might be justified in granting plenary consideration to clarify the scope or application of the new precedent. Thus,

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generally felt confident in inferring the connection, but no doubt there are a few cases where my conclusion is in error. (The inference is particularly vulnerable for petitions that were filed only a short time before the announcement of the plenary decision.) Overall, however, the figure probably errs on the low side, because it does not include FP cases without reported opinions. Indigent petitions in which review is denied are not summarized in *United States Law Week*; thus the issues in these cases could not be identified through published materials.

The figure does include an average of 15 indigent cases per Term in which the court below published an opinion. However, that figure is somewhat misleading because in the 1982 Term the Court set aside an unusually large number of FP petitions to await the announcement of 3 important opinions on death penalty issues. If 1982 is excluded, the average falls to 10.

The held/denied cases also include a per-Term average of 6 paid cases filed by federal criminal defendants and 2 paid cases filed by state criminal defendants.

92 Illustrative cases are cited in Hellman, *Second Thoughts*, *supra* note 45, at 11-13 & nn.35-37.

93 *Id.* at 34 & nn.113-14.

94 *See id.* at 7-8.

95 For illustrative cases, see *id.* at 17-18 & nn.51-53.

in contrast to the cases in the first two groups, plenary review is a real possibility.

An immediate grant of plenary review, however, may have a number of drawbacks. The parties will not have developed the record with the rule of the new precedent in mind. Subsidiary or consequent issues, not addressed by the court below because of its reliance on the prior law, may complicate the disposition or call into question the suitability of the case as a vehicle for elucidating the principles set forth in the plenary decision. For these or other reasons, it may be desirable to give the lower court the opportunity to consider the effect of the new precedent (and, if appropriate, to send the case back to the trial court for further development of the record) before the Supreme Court attempts to do so. Finally, consistent with Court's general preference for allowing an issue to "percolate" in the lower courts before granting review, the Court will often want to hear what other courts have to say about the new precedent before elaborating upon its meaning in any particular case.<sup>96</sup>

In this light, it is hardly surprising that held cases, even those in which the disposition is not controlled by the new precedent, very seldom receive plenary consideration. In the four Terms of the 1980's more than 500 cases were set aside to await plenary decisions;<sup>97</sup> review was granted in no more than a dozen.<sup>98</sup>

96 For discussion of percolation, see *Intercircuit Tribunal*, *supra* note 13, at 404-06.

97 Forma pauperis petitions account for about 60 of the held/denied cases; paid petitions by criminal defendants (federal and state) account for another 30. These groups of cases also contributed 54 of the held cases that were remanded for reconsideration in light of the new precedent. Thus about 150 of the cases in this category overlap with the cases previously discussed.

98 E.g., *Springfield Township School Dist. v. Knoll*, 104 S. Ct. 3571 (1984) (order granting certiorari) (held for *Burnett v. Grattan*, 104 S. Ct. 2924 (1984)); *Shea v. Louisiana*, 104 S. Ct. 2167 (1984) (order granting certiorari) (held for *Solem v. Stumes*, 104 S. Ct. 1338 (1984)); *Solem v. Stumes*, 103 S. Ct. 3568 (1983) (order granting certiorari) (held for *Oregon v. Bradshaw*, 462 U.S. 1039 (1983)); *Allen v. Wright*, 462 U.S. 1130 (1983) (order granting certiorari) (held for *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)); *Herweg v. Ray*, 453 U.S. 921 (1981) (order granting certiorari) (held for *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981)).

The figure in the text does not include cases held for plenary decisions that did not resolve the common issue. See, e.g., *Nixon v. Fitzgerald*, 452 U.S. 959 (1981) (order granting certiorari) (held for *Kissinger v. Halperin*, 452 U.S. 713 (1981) (mem.) (affirmance by equally divided Court)). Compare also *United Bldg. & Const. Trades Council v. Mayor & Council of Camden*, 460 U.S. 1021 (1983) (order noting probable jurisdiction) (raising issues under interstate privileges and immunities clause; held for *White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204 (1983)), with *Massachusetts Council*, 460 U.S. at 214-14 n.12 (pretermitted privileges and immunities issue).

Of course, if a held case that has been remanded for reconsideration returns to the Supreme Court after the lower court has entered a new judgment taking the intervening precedent into account, the Court may grant review of the new judgment. However, the Court does so less often than one might expect. See *Hellman*, *Second Thoughts*, *supra* note 45, at 19.



### G. Conclusion

In summary, the six classes of cases discussed in the preceding pages accounted for an average of 2,800 petitions a Term during the first four Terms of the 1980's—two-thirds of the Court's total caseload. But in all four Terms they contributed only 72 cases to the plenary docket—not even eleven percent.

Moreover, these categories do not come close to exhausting the ranks of the almost-certain losers. Several smaller classes of cases contribute at least a handful of filings each year, but seldom if ever reach the plenary docket. These include cases in which a disappointed entrepreneur has unjustifiably sought to turn a commercial dispute or unsuccessful business venture into an antitrust suit;<sup>99</sup> diversity cases from federal courts that raise no issues of federal substantive law;<sup>100</sup> and paid applications filed by state prisoners whose petitions for federal habeas corpus were denied in the courts below.<sup>101</sup>

### III. The Forces That Shape the Plenary Docket

With only 180 places on the plenary docket and 4,200 cases to choose from (1,260 if we exclude the petitions that are denied unanimously and without discussion);<sup>102</sup> with federal law governing almost every aspect of American life; and with a system under which minority coalitions can control the agenda, it would hardly be surprising if the composition of the plenary docket reflected a degree of randomness and unpredictability. But these centrifugal forces are balanced by others that bring identifiable patterns of change

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99 Typically the unsuccessful plaintiff is a retailer or distributor. *See, e.g.,* *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339 (9th Cir.), *cert. denied*, 104 S. Ct. 83 (1983); *JBL Enters. v. Jhirmack Enters.*, 698 F.2d 1011, 1013 (9th Cir.) (“When their contractual relations broke down, the disappointed parties sought solace (and treble damages) from the court, alleging various antitrust violations and related contract and tort claims.”), *cert. denied*, 104 S. Ct. 106 (1983); *see also* *Galardo v. AMP Inc.*, 104 S. Ct. 278 (1983) (order denying certiorari) (petition summarized at 52 U.S.L.W. 3310) (1983); *Philadelphia Lift Truck Corp. v. Taylor Mach. Works, Inc.*, 104 S. Ct. 154 (1983) (order denying certiorari) (petition summarized at 52 U.S.L.W. 3173) (1983); *Copenhaver v. Harris Enters.*, 104 S. Ct. 149 (1983) (order denying certiorari) (petition summarized at 52 U.S.L.W. 3142) (1983)). However, other business relationships also generate suits of this kind. *See, e.g.,* *L. & L. Howell, Inc. v. Cincinnati Coop. Milk Sales Ass'n*, 104 S. Ct. 1679 (1984) (order denying certiorari) (petition summarized at 52 U.S.L.W. 3690) (1984) (suit by milk hauler against milk cooperatives). In the latter case the lower court commented, “[The plaintiff] apparently made a bad bargain and seeks to utilize the antitrust laws to rectify this unfortunate situation.” *See* *Petition for Certiorari at 7a* (reprinting court of appeals opinion). As is typical of the cases in these categories, the lower court's opinion was unpublished.

100 In the first four Terms of the 1980's only 4 cases of this kind received plenary consideration. More than 25 petitions were filed in the 1983 Term alone.

101 No cases of this kind received plenary consideration in the four Terms 1980-1983. At least 10 petitions were filed in the 1983 Term alone.

102 *See* note 61 *supra* and accompanying text.

and continuity to the work of the Court. Study of those patterns sheds light not only on the process of case selection, but also on the Court's interaction with the other forces that influence the development of American law.

To understand these relationships, it is helpful to divide the Court's work into four broad areas: civil rights, federalism and separation of powers, general federal law, and the jurisdiction and procedure of federal courts.<sup>103</sup> Figure 1 depicts the composition of the plenary docket in each of the ten three-Term periods from 1954 to 1983. The first five periods represent the Warren Court;<sup>104</sup> the last four, the Burger Court. In between is a transitional period<sup>105</sup>—a period marked by the arrival of four new Justices and a Court that for much of the time operated at less than full strength.<sup>106</sup>

103 For a description of the classification scheme, see *Plenary Docket I*, *supra* note 13, at 1739-43 (civil rights), 1760-65 (federalism and separation of powers), 1774-75 (general federal law), and 1785 (jurisdiction and procedure). Because issues of criminal procedure and the constitutionality of police practices occupy such a large part of the civil rights docket, I have given that topic a separate heading in the tables in the Appendix.

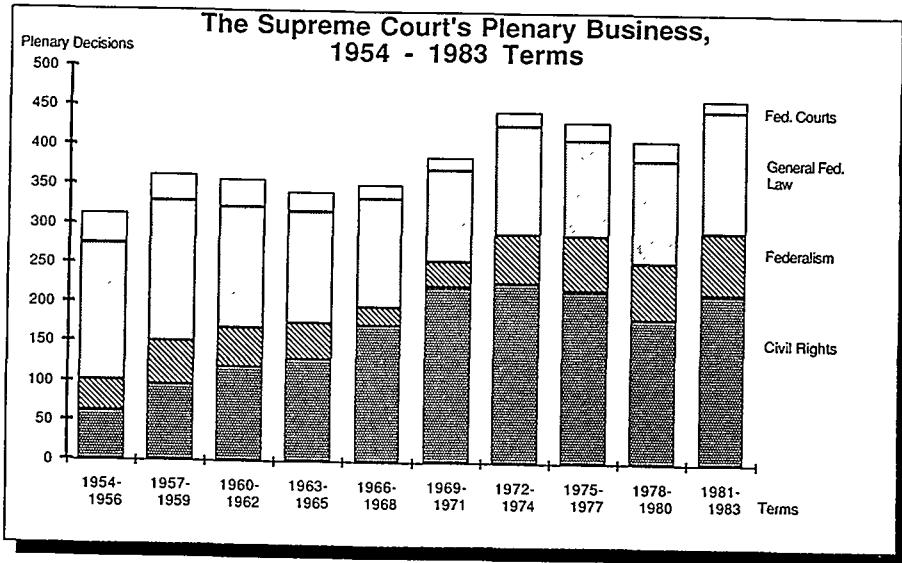
104 The first Term of the Warren Court, 1953, is omitted partly for reasons of symmetry, partly because almost half of the cases decided by the Court in that Term were selected during the tenure of Chief Justice Vinson. In any event, little has been lost. In fact, to have included the 1953 Term would have distorted the picture somewhat, because the number of plenary decisions was only 85—substantially fewer than in any other Term in the Court's modern history. Curiously, Chief Justice Burger has repeatedly used the 1953 Term as a benchmark for assessing the magnitude of the Court's current workload. See, e.g., Burger, *1983 Annual Report*, *supra* note 14, at 442 (noting that the number of signed opinions more than doubled from 1953 through 1982); Burger, *Intercircuit Panel*, *supra* note 14, at 87 (65 signed opinions in 1953 Term). In the *Intercircuit Panel* article the Chief Justice acknowledged that the number of signed opinions rose to 78 in 1954. He did not allude further to the fluctuations in the size of the plenary docket over the last half century. See *Plenary Docket I*, *supra* note 13, at 1730-34, 1789-94.

105 Although Chief Justice Burger took office at the start of the 1969 Term, only a tiny fraction of the cases in this period were selected by the "Burger Court" that came into existence when Justices Powell and Rehnquist took their seats in the middle of the 1971 Term.

106 Chief Justice Burger was sworn in well before the start of the 1969 Term, see Appointment of Mr. Chief Justice Burger, 395 U.S. xv (1969), but the vacancy created by the resignation of Justice Fortas in the midst of the 1968 Term, see *id.* at iii, was not filled until the 1969 Term was almost over. See 398 U.S. iv (1970). Thus the Court operated with only eight Justices for virtually all of the 1969 Term. The Court had a full complement for the 1970 Term, but the vacancies created in the summer of 1971 by the retirements of Justices Black and Harlan were not filled until well into the 1971 Term, when Justices Powell and Rehnquist were sworn in. See 404 U.S. iv (1972).

I do not minimize the significance of the Court's work during this period. In fact, several of the major constitutional initiatives of the last decade and a half were launched in the first three Terms under Chief Justice Burger. Two of them emerged while the Court was at less than full strength. See *Reed v. Reed*, 404 U.S. 71 (1971) (7-0 decision) (sex discrimination), discussed in text accompanying notes 137-42, 306-15 *infra*; *Goldberg v. Kelly*, 397 U.S. 254 (1970) (5-3 decision) (procedural due process in the administration of government programs), discussed in text accompanying notes 151-58 *infra*; see also *Fuentes v. Shevin*, 407 U.S. 67 (1972) (4-3 decision) (due process limitations on creditors' remedies). The modern line of precedents on the rights of aliens began with a decision of the 1970 Term by a full Court. *Graham v. Richardson*, 403 U.S. 365 (1971). And in the realm

Figure 1



Two things stand out immediately. First, the total number of cases receiving plenary consideration is much greater under Chief Justice Burger than it was during the years of the Warren Court. From 1954 through 1968 the Court was deciding an average of 115 cases per Term; from 1972 through 1983 the average was 146. The difference is even more striking if we look at signed opinions alone. The Justices of the Warren Court authored an average of 92 opinions per Term; their successors on the current Court are responsible for 134.<sup>107</sup>

Second, the nature of the cases has changed. Until the mid-1960's, matters of general federal law constituted the largest segment of the plenary docket. However, toward the end of the Warren Court that distinction was usurped by civil rights, and throughout the fifteen years of the Burger Court, civil rights cases have occupied the dominant position. During the first half of the 1970's, issues of civil rights law actually accounted for more than

of criminal procedure, the jurisprudence of guilty pleas was developed largely during the transitional period by a Court of fewer than nine Justices. *See, e.g., Santobello v. New York*, 404 U.S. 257 (1971) (4-3 division on remedy for broken plea bargain); *McMann v. Richardson*, 397 U.S. 759 (1970) (5-3 decision). The abortion cases too were initially argued in the 1971 Term, but instead of issuing a decision by a seven-man Court, the Justices set the cases for reargument. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983); R. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 176-77, 186-89 (1979).

<sup>107</sup> In other words, under Chief Justice Warren 20 percent of the plenary decisions were issued without signed opinions; for the Burger Court Justices, this proportion has been cut by more than half. For speculation as to the possible reasons for this development, see *Plenary Docket I, supra* note 13, at 1732-33.

half of all cases given plenary consideration. For a few years thereafter, the proportion diminished somewhat, but in the 1983 Term it was as close to 50 percent as it could be: in 78 out of 157 plenary decisions, the principal issue decided, addressed, or presented was an issue of civil rights.<sup>108</sup>

The predominance of civil rights cases will come as no surprise to anyone who follows the work of the Court even in a casual way. What is less well known is that matters of federalism and separation of powers (mostly the former) also occupy a much larger segment of the plenary docket than they did in earlier years. Nearly all of the major areas of federalism litigation have experienced growth. For example, challenges to state regulatory laws based on the negative implications of the commerce clause, which accounted for only 9 decisions in all sixteen Terms under Chief Justice Warren, gave rise to 7 decisions in the last three Terms of the 1970's. Another 5 opinions were issued in the four Terms that followed. Cases involving state taxation of interstate commerce dwindled to a handful in the late 1960's, but in the 1980-1983 period alone there were 7 such decisions. These were augmented by 5 cases in which state tax laws were challenged on the basis of federal statutes. Even the full faith and credit clause, which disappeared entirely from the plenary docket between 1966 and 1979,<sup>109</sup> generated 3 decisions in the later Burger Court.<sup>110</sup> The Court also granted review in 2 additional cases, but dismissed the petitions without reaching the merits of the constitutional claims.<sup>111</sup>

In previous articles I have analyzed, issue by issue, the changes in the composition of the plenary docket during the first decade of the Burger Court.<sup>112</sup> While there would be value in bringing that analysis up to date,<sup>113</sup> the more interesting approach is to turn directly to an examination of the institutions and activities that have influenced the selection of cases for plenary consideration. I begin by looking at the effect of forces originating within the Court; thereafter, I note some of the many external influences.

#### A. *Forces Originating Within the Court*

In October 1972, the Court heard oral argument in two cases

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108 At this writing, it appears that civil rights cases will constitute slightly less than half of the plenary decisions in the 1984 Term.

109 See *Plenary Docket I*, *supra* note 13, at 1768-69.

110 See *Plenary Docket II*, *supra* note 13, at 590-92.

111 See *id.* at 592-93 n.299.

112 The Burger Court's work through the 1976 Term is discussed in three articles: *Plenary Docket I*, *supra* note 13; *Civil Rights*, *supra* note 13; and *Statutory Law*, *supra* note 13. Developments through the 1979 Term are analyzed in *Plenary Docket II*, *supra* note 13.

113 Raw figures for the first three Terms of the 1980's are given, without analysis, in *Intercircuit Tribunal*, *supra* note 13 at 447-56.

that attracted wide public attention. *Roe v. Wade*<sup>114</sup> presented the question whether the federal Constitution limits state power to prohibit abortions. *San Antonio Independent School District v. Rodriguez*<sup>115</sup> was a challenge to a school financing system that resulted in higher educational spending in rich districts than in poor ones. Later in the Term, the Court upheld the claims of the abortion plaintiffs and rejected the attack on school financing. In the decade that followed, the Court issued 11 more opinions dealing with abortion,<sup>116</sup> but there were only 2 plenary decisions that involved school financing.<sup>117</sup>

These outcomes underscore the fact that one of the most powerful forces shaping the plenary docket is the course of adjudication within the Court itself. Several patterns can be identified. They are not mutually exclusive; a particular area of doctrinal development may illustrate more than one pattern at different times in its history.

First and most obvious, decisions recognizing new constitutional rights typically require further attention by the Court to clarify the nature and scope of the right. Few rights are self-defining; even fewer are absolute. And because every holding that recognizes a constitutional right limits, pro tanto, the autonomy of the executive and the legislature to act in accordance with the desires of the majority (or the bureaucracy), governmental litigants will seek to cabin the holding in the narrowest way possible. At the same time, potential beneficiaries will seek to expand its contours. Almost invariably, the tensions created by the competing forces will be brought to the plenary docket for resolution.

Abortion is one prominent example of this phenomenon. *Roe v. Wade* and *Doe v. Bolton* struck down abortion statutes that were typical of those adopted by almost all of the states, but they did not put abortion off limits to government regulation.<sup>118</sup> Within a few years many states had adopted new abortion legislation, and four

114 410 U.S. 113 (1973). *Roe* was heard together with a companion case, *Doe v. Bolton*, 410 U.S. 179 (1973).

115 411 U.S. 1 (1973).

116 In addition to 9 cases primarily involving substantive due process issues, abortion controversies generated one opinion addressing an equal protection claim, see *Williams v. Zbaraz*, 448 U.S. 358 (1980); and one that purported to rest on vagueness grounds, see *Colautti v. Franklin*, 439 U.S. 379 (1979). The figure in the text does not include decisions involving adjective law, e.g., *Singleton v. Wulff*, 428 U.S. 106 (1976) (standing), or rights under federal statutes, e.g., *Beal v. Doe*, 432 U.S. 438 (1977).

117 *Martinez v. Bynum*, 461 U.S. 321 (1983); *Plyler v. Doe*, 457 U.S. 202 (1982). The latter case involved the rights of aliens, and the former involved school financing only in an attenuated way: the plaintiffs attacked a Texas statute that allowed school districts to deny tuition-free admission to minors living apart from their parents or guardians if their presence in the school district was "for the primary purpose of attending the public free schools." 461 U.S. at 323 n.1 (quoting state statute). For further discussion, see note 482 *infra*.

118 *Roe*, 410 U.S. at 162-64.

years after *Roe* the Supreme Court took the first in what was to become a long series of cases treating the constitutionality of particular regulations.<sup>119</sup> Some of the cases involved statutes requiring the consent of the parents or husband of the pregnant woman;<sup>120</sup> some dealt with laws limiting state funding for abortions;<sup>121</sup> others considered the constitutionality of laws regulating the procedures for conducting abortions.<sup>122</sup> Abortion laws were directly at issue in 11 of the 31 decisions on substantive due process that were handed down by the Burger Court in the twelve Terms beginning in 1972.<sup>123</sup>

Another example of this pattern is commercial speech. Until about ten years ago, commercial speech—speech that does no more than propose a commercial transaction—was excluded altogether from the protections of the first amendment.<sup>124</sup> The Court repudiated that position in the mid-1970's,<sup>125</sup> but did not assimilate commercial speech with other forms of expression.<sup>126</sup> Commercial speech was accorded a lesser degree of protection, and a distinct mode of analysis was developed for testing the constitutionality of particular regulations.<sup>127</sup> Not surprisingly, over the last decade the Court has taken a fair number of cases to define when, and to what extent, commercial speech will be protected.<sup>128</sup>

The pattern is also exemplified, although in a more complex way, by the Court's decisions on capital punishment. For more than a decade, Justices Brennan and Marshall have argued that "the

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119 *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The Court noted that the statute in question had been enacted not long after the federal courts, in reliance on *Roe* and *Doe*, had struck down the state's previous abortion laws. *See id.* at 55-56. On the same day, the Court considered two other abortion cases, but decided them on procedural grounds. *Bellotti v. Baird*, 428 U.S. 132 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976).

120 *E.g.*, *H.L. v. Matheson*, 450 U.S. 398 (1981).

121 *E.g.*, *Maher v. Roe*, 432 U.S. 464 (1977).

122 *E.g.*, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

123 Two additional cases are scheduled for plenary consideration in the 1985 Term. *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), *prob. juris. noted sub nom.* *Diamond v. Charles*, 105 S. Ct. 2356 (1985); *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984), *juris. postponed*, 105 S. Ct. 2015 (1985).

124 *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *see Bates v. State Bar of Arizona*, 433 U.S. 350, 404-05 (1977) (Rehnquist, J., dissenting in part) (arguing that Court should return to distinction drawn in *Valentine*).

125 The pivotal cases were *Bigelow v. Virginia*, 421 U.S. 809 (1975), and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

126 *See, e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

127 The analytical approach emerged in full-blown form in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-66 (1980).

128 In the later Burger Court, there were 5 decisions that primarily involved commercial speech issues and one that included an important secondary holding on the scope of the doctrine. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 503-12 (1981) (plurality opinion). The changing contours of the doctrine are well described in G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1380-1406 (10th ed. 1980).

death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments."<sup>129</sup> If the full Court had adopted that position, the decision would have required little if any clarification; death penalty cases would have disappeared from the Court's docket altogether. If, on the other hand, the Court had adhered to its 1971 view that the procedures for imposing the death penalty were to be left largely to the discretion of the states,<sup>130</sup> the Justices would probably have taken an occasional case to address the constitutionality of particular procedures, but it is unlikely that capital punishment issues would have come to occupy a major segment of the plenary docket.<sup>131</sup>

In fact, the Court took neither of these approaches. The Court held that the death penalty was not per se unconstitutional, but that the standards and procedures for imposing it would be subjected to strict scrutiny under federal law.<sup>132</sup> The result has been a long series of decisions considering the constitutionality of particular laws and their application to particular situations. The uncertainty inherent in the Court's approach was compounded by the fact that from 1977 through 1982 the Court overturned the death sentence in all but one of the capital cases that received plenary consideration,<sup>133</sup> while denying review (and thus allowing the sentence to stand) in scores of other cases.<sup>134</sup> The 1982 Term, however, saw a distinct shift in attitude that brought the results of the plenary decisions into line with those of the cases not reviewed on the merits.<sup>135</sup> Thus it may be that the era of the Court's intensive involvement with death penalty issues will soon come to an end.<sup>136</sup>

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129 See, e.g., *Villafuerte v. Arizona*, 105 S. Ct. 1234 (1985) (Brennan and Marshall, JJ., dissenting). Justices Brennan and Marshall file a similar statement in every death penalty case, except when they publish opinions addressing other issues. The two Justices first stated their position in *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring); *id.* at 370 (Marshall, J., concurring).

130 *McGautha v. California*, 402 U.S. 183 (1971).

131 See Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 313 ("In the end, [the 1971 opinion] concludes that, morally and intellectually, the Court has nothing to teach the states about capital punishment.").

132 See, e.g., *Barclay v. Florida*, 463 U.S. 939, 958-59 (1983) (Stevens, J., concurring) (citing cases).

133 The exception was *Dobbert v. Florida*, 432 U.S. 282 (1977) (procedural changes in death penalty statute do not constitute ex post facto law). See *Discretionary Review*, *supra* note 13, at 875.

134 In the four Terms 1977 through 1980, the Court denied review in more than 80 death penalty cases from Georgia alone.

135 In the 1982 and 1983 Terms the Court heard a total of 7 cases in which a sentence of death had been imposed. The death penalty was upheld in all of the cases. (One case involved the right to counsel. *Strickland v. Washington*, 104 S. Ct. 2052 (1984). See *id.* at 2071-72 & n.1 (Brennan, J., concurring in part and dissenting in part).) In one additional case the Court affirmed a state court decision that set aside a sentence of death on double jeopardy grounds. *Arizona v. Rumsey*, 104 S. Ct. 2305 (1984).

136 See generally Weisberg, *supra* note 131. The last major battles will probably be fought

Similar sequences can be seen in the Court's work in the realms of equal protection and due process. In the early 1970's the Burger Court issued a series of landmark decisions that provided the precedential grounding for challenges to disparate treatment based on gender<sup>137</sup> or on status as an alien.<sup>138</sup> But neither line of precedents erected a rigid barrier like the one that prohibits governments from discriminating on account of race.<sup>139</sup> Classifications based on sex did not have to meet the standard of "strict scrutiny," though more—ultimately much more—was required than a "rational basis."<sup>140</sup> And while "strict scrutiny" was the general test for classifications based on alienage, a "political function" exception left room for states to exclude aliens from at least some governmental positions.<sup>141</sup> Thus in both areas the Court was called upon to hear a continuing series of cases to define the circumstances that might permit differential treatment.<sup>142</sup> Similarly, the Court held that the states are subject to the constraints of the due process clause in revoking parole or probation or changing the status of

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over the issues of whether jurors who have absolute scruples against the death penalty may be excluded for cause in the guilt phase of a capital trial, *see Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985) (en banc); and whether statistical studies purporting to show racial bias in a state's administration of the death penalty are sufficient to make out a prima facie case of constitutional violation, *see McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc). An intercircuit conflict exists on the first issue, *see Grigsby*, 758 F.2d at 238-42, and the recurrence of the second issue will likely prompt the Court to grant review even in the absence of a conflict. *See also Witt v. Wainwright*, 105 S. Ct. 1415, 1417 (1985) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari) ("This Court will certainly grant certiorari to resolve [the *Grigsby*] issue in the immediate future because it presents a clear split in the courts of appeals on an issue of constitutional law whose importance to the administration of the States' criminal justice systems is undoubted.").

137 *See* text accompanying notes 306-15 *infra*.

138 *See Civil Rights, supra* note 13, at 22.

139 *See Hunter v. Underwood*, 105 S. Ct. 1916 (1985); *Palmore v. Sidoti*, 104 S. Ct. 1879, 1881-82 (1984).

140 *See Heckler v. Mathews*, 104 S. Ct. 1387, 1397-98 (1984) (government must (a) show a legitimate and "exceedingly persuasive justification" for a gender-based classification; and (b) demonstrate a direct and substantial relationship between the classification and the important governmental objectives it purports to serve).

141 *See, e.g., Cabell v. Chavez-Salido*, 454 U.S. 432 (1982).

142 On sex discrimination, compare *Heckler v. Mathews*, 104 S. Ct. 1387 (1984) (permitting differential treatment), with *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (forbidding differential treatment). On alienage discrimination, compare *Bernal v. Fainter*, 104 S. Ct. 2312 (1984) (notaries public do not fall within "public function" exception), with *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (probation officers do fall within "public function" exception).

In the seven Terms of the later Burger Court, one case in each category came within one vote of receiving plenary consideration. *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980) (executive order barring employment of aliens in the federal civil service is constitutional), *cert. denied*, 450 U.S. 959 (1981) (Brennan, White, and Marshall, JJ., dissenting); *A v. X, Y & Z*, 641 P.2d 1222 (Wyo. 1982) (statute limiting rights of natural father is constitutional), *cert. denied*, 459 U.S. 1021 (1982) (Brennan, White, and Blackmun, JJ., dissenting).



prisoners.<sup>143</sup> But the particular interests that would trigger a right to procedural due process, as well as the particular procedures that would be required, were left for development on a case-by-case basis.<sup>144</sup>

Decisions cutting back on existing rights can also lead to further involvement by the Court—here, to clarify the boundaries between the two lines of authority. For example, contrary to the fears of some civil libertarians, the Burger Court has never overruled *Miranda v. Arizona*.<sup>145</sup> What the Court has done is to nibble away at the edges,<sup>146</sup> and every now and then to strengthen the rule.<sup>147</sup> This process has resulted in a steady stream of decisions as the Court has attempted to strike an appropriate balance between the rights of criminal suspects and the needs of law enforcement.<sup>148</sup> Indeed, one of the *Miranda* progeny—the 1981 decision in *Edwards v. Arizona*<sup>149</sup>—itself prompted three additional grants of review in the 1980's.<sup>150</sup>

The Court's reshaping of the *Miranda* doctrine has attracted wide attention because the *Miranda* rules have become such a symbol of the Warren Court's constitutional jurisprudence. A less familiar but more important example of the pattern is found in the Court's decisions on procedural due process outside the areas of corrections and public employment.<sup>151</sup> Although the origins of the "procedural due process revolution"<sup>152</sup> can no doubt be traced to the era of the Warren Court (and perhaps earlier),<sup>153</sup> "the major

143 See *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Wolff v. McDonnell*, 418 U.S. 539, 555-58 (1974) (prison discipline).

144 Compare, e.g., *Olim v. Wakinekona*, 461 U.S. 238 (1983), with *Vitek v. Jones*, 445 U.S. 480 (1980). The Burger Court's approach to procedural due process claims by public employees initially followed a similar pattern, but in that area of law the doctrines appear to have stabilized. See text accompanying notes 164-69 *infra*.

145 384 U.S. 436 (1966).

146 See, e.g., *Oregon v. Elstad*, 105 S. Ct. 1285 (1985); *New York v. Quarles*, 104 S. Ct. 2626 (1984); *Harris v. New York*, 401 U.S. 222 (1971).

147 The most noteworthy example is *Edwards v. Arizona*, 451 U.S. 477 (1981). See also *Smith v. Illinois*, 105 S. Ct. 490 (1984) (summary opinion).

148 In the first four Terms of the 1980's the Court issued 5 plenary decisions on *Miranda* issues. These were augmented by 3 summary opinions. Another summary opinion, although resting judgment on the due process clause, also drew heavily on the *Miranda* doctrine. *Fletcher v. Weir*, 455 U.S. 603 (1982). At this writing the 1984 Term has brought 2 more plenary decisions and one summary opinion.

149 451 U.S. 477 (1981).

150 *Shea v. Louisiana*, 105 S. Ct. 1065 (1985); *Solem v. Stumes*, 104 S. Ct. 1338 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). *Edwards* has also generated 2 summary opinions. *Smith v. Illinois*, 105 S. Ct. 490 (1984); *Wyrick v. Fields*, 459 U.S. 42 (1982).

151 For discussion of the corrections cases, see text accompanying notes 143-44 *supra*; on the public employee cases, see text accompanying notes 164-70 *infra*.

152 G. GUNTHER, *supra* note 128, at 647.

153 See *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Armstrong v. Manzo*, 380

case launching the . . . revolution”<sup>154</sup> was a decision handed down in the first Term of the Burger Court, *Goldberg v. Kelly*.<sup>155</sup> Within a few years, the philosophy of *Goldberg* had been given so expansive an application in so many contexts that Judge Henry J. Friendly was prompted to ask “whether government can do anything to a citizen without affording him ‘some kind of hearing.’”<sup>156</sup> Yet even as Judge Friendly spoke, the Court had begun to pull back from the broadest implications of its initial decisions—without overruling any of them.<sup>157</sup> The stage was thus set for a continuing series of cases delineating the interests protected by the due process clause and the particular procedures required before governments could act. Issues of this kind generated a total of 25 decisions in the seven Terms that began in 1977—and that figure does not include the prison and public employee cases.<sup>158</sup>

These examples alone might suggest that no matter what the nature of the Court’s rulings, their effect will be to create a need for further plenary activity to clarify the meaning of what has gone before. Fortunately, the adjudicative process also works in the other direction. A series of decisions may clarify the law to the point where the Court need intervene only at rare intervals, at least until an entirely new facet of the problem emerges. For example, in Chief Justice Warren’s last Term the Court held for the first time that the fourteenth amendment limits the authority of states to impose limitations on access to the ballot by minor parties and independent candidates.<sup>159</sup> The effect of the decision was to cast doubt on the validity of ballot access restrictions in every state.<sup>160</sup> Thus, unless the Court meant to say that states would have “to place on [their ballots] all persons who claim to be candidates,”<sup>161</sup> it was inevitable that the Court would have to spend some time delineating the scope of the new right. And so it did; ballot access cases appeared on the plenary docket in almost every Term of the

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U.S. 545 (1965); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 160-74 (1951) (Frankfurter, J., concurring).

154 G. GUNTHER, *supra* note 128, at 647.

155 397 U.S. 254 (1970). The Chief Justice himself dissented from this decision, *id.* at 282 (Burger, C.J., dissenting), but so did the father of much of the Warren Court’s constitutional jurisprudence. *See id.* at 271 (Black, J., dissenting).

156 Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1275 (1975).

157 *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

158 Four of the decisions focused on the question of whether “state action” was present. *See, e.g.*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

159 *Williams v. Rhodes*, 393 U.S. 23 (1968). In sharp contrast to the other constitutional initiatives of the Warren Court, this ruling found the Chief Justice himself in dissent. *See id.* at 63.

160 *See Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1133 n.68 (1975).

161 *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 96 (1969).

early Burger Court, with a trilogy of important decisions in the 1973 Term.<sup>162</sup> More recently, however, the Court has given little attention to the topic. The probable reason is that the decisions of the early and middle 1970's have clarified the law to the point that most disputes (to the extent they arise at all) can be settled without resort to the Supreme Court.<sup>163</sup>

Perhaps more surprising, a similar pattern can be discerned in the development of the law on procedural due process for government employees. In the early years of the Burger Court this was a subject of intense interest and great controversy. The seven Terms yielded 7 plenary decisions on the topic, and in most of them the Court divided sharply over the nature of the rights protected by the Constitution and the procedures required for adverse action.<sup>164</sup> But in the later Burger Court the subject virtually disappeared from the plenary docket. From 1977 through 1983 the Justices granted review in only 2 cases involving the due process rights of public employees. One resulted in an affirmance by an equally divided Court;<sup>165</sup> in the other, the Court found that jurisdiction was lacking over the constitutional issue<sup>166</sup> (though the opinion did address it in a footnote that later achieved some significance).<sup>167</sup> And in all seven Terms there were no more than a handful of government employment cases in which one or more Justices dissented from the denial of plenary review.<sup>168</sup>

These developments suggested that notwithstanding the manifestations of controversy in what were then the Court's most recent

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162 For citations and discussion, see *Developments in the Law—Elections*, *supra* note 160, at 1139-48.

163 See, e.g., *Goldman-Frankie v. Austin*, 727 F.2d 603, 605 (6th Cir. 1984) ("Plaintiffs' charge poses no new issue of constitutional law."). A noteworthy exception is *Anderson v. Celebrezze*, 460 U.S. 780 (1983). This, however, was the only case arising out of John Anderson's independent presidential candidacy in 1980 to reach the Supreme Court.

164 See, e.g., *Codd v. Velger*, 429 U.S. 624 (1977); *Bishop v. Wood*, 426 U.S. 341 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974). In addition, early in the 1977 Term the Court issued a summary reconsideration order in a public employee case that prompted an extended dissent joined by four Justices. *Oregon State Penitentiary v. Hammer*, 434 U.S. 945 (1977). On remand, the Oregon court adhered to its prior ruling. The case was again taken to the Supreme Court, but this time the Justices unanimously denied review. *Hammer v. Oregon State Penitentiary*, 283 Or. 369, 583 P.2d 1136 (1978), *cert. denied*, 440 U.S. 935 (1979).

165 *Board of Educ. of Paris Union School Dist. v. Vail*, 104 S. Ct. 2144 (1984), *aff'g mem.* 706 F.2d 1435 (7th Cir. 1983).

166 *Davis v. Scherer*, 104 S. Ct. 3012, 3017 (1984).

167 *Id.* at 3019 n.10; see *Cleveland Board of Educ. v. Loudermill*, 105 S. Ct. 1487, 1493 (1985).

168 In only 2 cases did the dissenting Justices file opinions, and one of them relied more on concepts of substantive due process than on procedural norms. See *Whisenhunt v. Spradlin*, 104 S. Ct. 404 (1983) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting from denial of certiorari) (privacy rights); *Berg v. Berger*, 439 U.S. 992 (1978) (Powell, J., joined by Rehnquist, J., dissenting from denial of certiorari) (urging summary reversal).

encounters with the subject, the decisions had in fact brought a fair degree of stability to the law. That inference was confirmed in the 1984 Term, when the Court, over a single dissent (and with some argument over details), restated the “settled” rules that govern these cases: first, that a public employee’s right to due process “‘is conferred, not by legislative grace, but by constitutional guarantee;’”<sup>169</sup> and second, that the Constitution requires “notice and an opportunity to respond” before the employee is discharged for cause.<sup>170</sup>

Another example of this pattern—from outside the realm of constitutional litigation—is the *Lincoln Mills* line of cases. The Court held in 1957 that federal law, to be fashioned by the courts, should govern the enforcement of collective bargaining agreements.<sup>171</sup> In the years immediately following, the Court was quite busy filling in the contours of that law; indeed, section 301 litigation constituted the second largest segment of the labor law docket in the late 1950’s and the first half of the 1960’s.<sup>172</sup> Once the outlines had been delineated, the Court largely withdrew from the field. Today the Court is active again, though with a new slant: many of the cases involve suits by individual employees against both union and employer—a type of litigation that was relatively rare in the earlier period.<sup>173</sup>

The effect of a clarifying series of decisions on the plenary docket can be particularly dramatic when the clarification points strongly in a single direction.<sup>174</sup> For example, one of the major areas of first amendment activity during the early Burger Court was obscenity. In the seven Terms 1970 through 1976 the Court

169 *Cleveland Board of Educ. v. Loudermill*, 105 S. Ct. 1487, 1493 (1985) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974)). This portion of the opinion was joined by eight members of the Court.

170 *Id.* at 1495. Two members of the Court thought that due process requires additional procedural protections when the employee disputes the facts proffered to support his discharge. *Id.* at 1497 (Marshall, J., concurring in part); *id.* at 1499 (Brennan, J., concurring in part and dissenting in part).

171 *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

172 *See Statutory Law, supra* note 13, at 17; *Plenary Docket II, supra* note 13, at 600 (Table XIV).

173 *See, e.g., DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151 (1983). *DelCostello* largely (though silently) overruled a decision handed down only two years earlier, *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56 (1981). For discussion of the recent proliferation of suits in which employees seek to recover from both union and employer for alleged mishandling of grievances, see Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 *BUFFALO L. REV.* (forthcoming 1985).

174 A variation on this pattern is the single case (or group of cases decided together) that sharply cuts back on a flourishing line of precedent. For example, in the 1984 Term the Court issued a pair of decisions on the “state action” defense in antitrust that appeared to put an end to the approach developed over a decade of intensive attention to the doctrine. *See Sims, High Court Cleans Up Its Own State Action Mess*, *Legal Times*, Apr. 15, 1985, at 17.

handed down a total of 20 decisions addressing the first amendment issues raised by government attempts to regulate or prohibit the distribution of sexually oriented materials.<sup>175</sup> With a few exceptions, these decisions upheld state power and rejected the first amendment claims of the distributors and publishers.<sup>176</sup> In the seven Terms that followed, obscenity issues almost disappeared from the plenary docket; only 3 decisions were handed down. And the single opinion in the first four Terms of the 1980's dealt with a new form of legislation designed to combat a problem that had only recently come to the fore: "the exploitative use of children in the production of pornography."<sup>177</sup>

The dearth of plenary decisions did not come about because

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175 Five of these cases were decided on the same day in the 1972 Term as part of "a re-examination of [the] standards enunciated in earlier cases involving [obscenity]." *Miller v. California*, 413 U.S. 15, 16 (1973). In 4 additional decisions during this period, the Court avoided obscenity issues by upholding other constitutional challenges to governmental action. Six plenary cases in which lower federal courts had ruled against the state on first amendment grounds were reversed or vacated on the authority of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. See *Plenary Docket II, supra* note 13, at 572; see also text accompanying notes 182-85 *infra*.

176 Of particular significance were the 1972 Term decisions in *Miller v. California*, 413 U.S. 15 (1973), and its companion cases, see note 175 *supra*, which began a new era in the law of obscenity. See 413 U.S. at 29 ("[T]oday, for the first time since [the Court's first major obscenity ruling] in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."). The new guidelines provided considerably less protection for sexually oriented materials than did the precedents of 1957 through 1973. See *id.* at 24-25 (material may be proscribed even if not "utterly without redeeming social value"); *id.* at 31-34 (states need not adhere to national standards of offensiveness).

In the four Terms that followed *Miller*, the Court heard 8 additional cases in this area. Five of the decisions upheld state power. The constitutional claimant prevailed in the remaining 3 cases, but in 2 of them the Court did no more than reverse (unanimously) state-court rulings that displayed extreme insensitivity to the first amendment. *McKinney v. Alabama*, 424 U.S. 669, 676 (1976) (petitioner "was convicted and sentenced in a criminal proceeding wherein the issue of obscenity *vel non* was held to be concluded against him by the decree in a civil proceeding to which he was not a party and of which he had no notice"); *Jenkins v. Georgia*, 418 U.S. 153 (1974) (state court upheld criminal conviction for showing film "Carnal Knowledge"). The decisions thus provided only a minor counterweight to the precedents rejecting constitutional claims. Only *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), striking down a ban on nudity in drive-in films visible from public places, upheld a first amendment claim of some controversy. And that case did not involve obscenity in the legal sense. See *id.* at 208.

177 *New York v. Ferber*, 458 U.S. 747, 749 (1982). The Court emphasized that it had not previously considered "a statute directed at and limited to depiction of sexual activity involving children." *Id.* at 753. Thus the grant of review did not constitute a departure from the general pattern of avoiding mine-run obscenity cases.

In the 1981 Term the Court also agreed to hear an appeal challenging, on grounds of prior restraint, the one-year closure provision of a state "moral nuisance abatement act." However, the parties stipulated to a dismissal before oral argument could be heard. *State ex rel. Kidwell v. U.S. Marketing, Inc.*, 102 Idaho 451, 631 P.2d 622 (1981), *prob. juris. noted*, 454 U.S. 1140, *appeal dismissed pursuant to Rule 53*, 455 U.S. 1009 (1982). A similar question was brought to the Court in the 1982 Term, but the case fell one vote short of the four required for plenary review. See note 179 *infra*.

obscenity cases were no longer being brought to the Court. On the contrary, a substantial number of petitions raised issues such as the requirement of scienter, proof of community standards, and the criteria for judging material aimed at deviant audiences.<sup>178</sup> But for a majority of the Court, these cases raised no questions that had not been resolved by the precedents of the 1971-1976 period.<sup>179</sup> As the 1980's progressed, the volume of petitions challenging state laws declined also.<sup>180</sup> And the few cases in which constitutional claims had been upheld were, with one possible exception, clearly uncertworthy.<sup>181</sup>

A similar pattern can be seen in the realm of *Younger* abstention

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178 See *Plenary Docket II*, *supra* note 13, at 552.

179 In all seven Terms of the later Burger Court there was only one obscenity case in which a Justice who had not dissented in *Miller* dissented from the Court's refusal to review a ruling rejecting a constitutional challenge. *Avenue Book Store v. City of Tallmadge*, 459 U.S. 997 (1982) (White, J., joined by Brennan and Marshall, JJ., dissenting from denial of certiorari) (arguing that Court should consider procedural safeguards required in nuisance proceedings).

180 From 1977 through 1982, the number of claimants' petitions seldom fell much below 10 a Term, and in the 1978 Term there were at least 24. However, the 1983 Term saw only 3. As of April 16, 1985, I had found only 4 such cases in which review was sought in the 1984 Term.

181 The arguable exception was *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981), *aff'g mem.* 631 F.2d 135 (9th Cir. 1980). In that case the court of appeals held unconstitutional a Washington state law establishing procedures for enjoining the sale and exhibition of obscene materials. State officials invoked the Supreme Court's obligatory jurisdiction, but the Court affirmed summarily without opinion or citation. Three Justices dissented on the ground that the lower courts "should have declined to act until the parties had exhausted available state remedies," 454 U.S. at 1024 (Burger, C.J., joined by Powell and Rehnquist, JJ., dissenting). But they did not argue that the statute as construed by the court of appeals was constitutional. (In this regard, it is worth noting that the court of appeals decision was a unanimous ruling by judges generally regarded as conservatives.) A few months after the summary affirmance the Washington legislature enacted a new obscenity law to replace the one that had been struck down. The Ninth Circuit held that this statute too was unconstitutional, and again the state officials took an appeal to the Supreme Court. This time the Court granted plenary consideration. *J-R Distrib., Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir.), *prob. juris. noted sub nom.* *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 76 (1984).

In all seven Terms there were only 8 obscenity cases in which the Court rejected a state official's application for review. (Two of these primarily involved issues of *Younger* abstention. See text accompanying notes 182-85 *infra*). No case other than *Brockett* drew even a single dissent. The unanimous denials included one case that on the surface might have appeared certworthy: *Penthouse Int'l, Ltd. v. McAuliffe*, 717 F.2d 517 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1615 (1984). The Fifth Circuit, sitting en banc, had affirmed by an equally divided court a district court judgment that the movie "Caligula" was not obscene under state or federal law. But the controversy among the lower court judges did not necessarily mean that the case warranted the Supreme Court's attention. The equal division in the court of appeals deprived the Justices of the assistance they would have received from a focused appellate analysis of the issues, *cf.* *Taylor v. McKeithen*, 407 U.S. 191, 194 (1972) (remanding case without decision on merits, in part "because we have not had the benefit of the insight of the Court of Appeals"), and the opinion of the district court that was affirmed by operation of law was devoted largely to a detailed analysis of the film to determine whether it was obscene under *Miller* standards. See *Penthouse Int'l, Ltd. v. McAuliffe*,

and other federalism-related limitations on federal court power.<sup>182</sup> Issues of this kind generated 24 decisions in the seven Terms 1970-1976; all but 6 were heard at the behest of state officials after lower courts had allowed plaintiffs to proceed with their challenges to state official action.<sup>183</sup> On balance, the rulings of this period expressed a strong antipathy to the use of the federal courts as a forum for attacking the constitutionality of state laws and practices, at least where equitable relief was sought.<sup>184</sup> The message was clear, and ultimately it reached its intended audience. In the seven Terms that began in 1977, the Court found it necessary to hear only 5 cases in which state officials challenged lower court rulings that upheld the availability of the federal forum for a civil rights claim.<sup>185</sup> And in all seven Terms there were only 10 other cases in which the Court was even asked to review decisions of this kind.<sup>186</sup>

In other areas where the Court has sharply reduced the extent of its activity, there is more room for debate over whether the earlier precedents have significantly clarified the law; by the same token, it is more difficult to identify the reasons for the Court's withdrawal. A good example is school desegregation. The first plenary decision issued by the Burger Court arose out of a desegregation suit,<sup>187</sup> and in the eight Terms 1969 through 1976 school desegregation cases appeared on the plenary docket in every Term but one. After a one-Term hiatus, the 1978 Term brought two im-

7 Media L. Rep. (BNA) 1798 (N.D. Ga. 1981), *rev'd*, 702 F.2d 925 (11th Cir.), *vacated*, 717 F.2d 517 (11th Cir. 1983) (en banc).

The Court summarily reversed one obscenity case brought to it by a prosecutor. *Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90 (1981) (per curiam).

182 *Younger v. Harris*, 401 U.S. 37 (1971); see *Civil Rights*, *supra* note 13, at 36.

183 The cases are discussed in *Civil Rights*, *supra* note 13, at 36-40.

184 *Id.*; see also *Plenary Docket II*, *supra* note 13, at 570-72.

185 In all 5 cases the Court held, in accordance with the contentions of the government officials who had sought review, that the lower courts should not have considered the merits of the plaintiffs' constitutional claims. *E.g.*, *Moore v. Sims*, 442 U.S. 415 (1979). During this period plenary review was also given to 2 cases brought to the Court by plaintiffs. In both instances the Court granted certiorari to resolve an intercourt conflict. *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981).

186 Except for the obscenity case discussed earlier, see note 181 *supra*, there were no cases after the 1978 Term in which even one Justice dissented from the Court's refusal to consider a state official's challenge to a ruling rejecting a *Younger* (or similar) argument. The implication is that in the remaining cases the lower courts clearly had not transgressed the limitations imposed by the precedents of the 1971-1976 period. See, *e.g.*, *Fitzgerald v. Peek*, 636 F.2d 943 (5th Cir.) (unanimously affirming injunction based on finding that state court prosecutions were brought in bad faith), *cert. denied*, 452 U.S. 916 (1981); but see *Sep-tum, Inc. v. Keller*, 614 F.2d 456 (5th Cir.) (2-1 reversal), *cert. denied*, 449 U.S. 992 (1980).

In one case, two Justices dissented from the denial of review on the ground that the lower court "ha[d], in at least two respects, gone beyond our cases in dismissing the action under *Younger*." *Etlin v. Robb*, 458 U.S. 1112, 1113 (1982) (White, J., joined by Brennan, J., dissenting from denial of certiorari).

187 *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) (per curiam).

portant rulings.<sup>188</sup> In both cases the Court affirmed court of appeals decisions that required broad desegregation remedies in northern cities; in both, strong dissents condemned the majority for issuing "Delphic" pronouncements that constituted a drastic departure from prior law.<sup>189</sup> The Court also granted review in one case involving busing for racial balance in a southern city, but after oral argument in the 1979 Term the writ was dismissed without explanation.<sup>190</sup> Three Justices submitted a lengthy dissent arguing that the remedy contemplated by the lower courts would "accelerate the destructive trend toward resegregation"<sup>191</sup> and put the school district "well on the road to . . . 'separate but equal' conditions."<sup>192</sup> Outside the Court, the issues were no less contentious; busing orders in particular aroused great anger among citizens and prompted congressional efforts to enact restrictive legislation.<sup>193</sup>

Given these circumstances, and considering the highly factual inquiries that underlay the two decisions of the 1978 Term, it seemed likely that the Justices would continue to be active in this area.<sup>194</sup> And certainly the Court had ample opportunity to clarify the meaning of its precedents: in the five Terms 1979 through 1983, more than 30 petitions were filed challenging various rulings in desegregation cases.<sup>195</sup> But none reached the plenary docket. The Court did hear 2 cases dealing with the constitutionality of statewide measures adopted by voters to restrict busing for racial balance.<sup>196</sup> And the Court was willing to consider a challenge by black students to a quota plan adopted by a school board to prevent de facto segregation resulting from "white flight."<sup>197</sup> But none of

188 *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

189 See *Columbus*, 443 U.S. at 491-92 (Rehnquist, J., dissenting); *Dayton II*, 443 U.S. at 542 (Rehnquist, J., dissenting). This characterization found some support in scholarly commentary. See, e.g., Kitch, *Color Consciousness and the Constitution: Weber, Dayton, and Columbus*, 1979 SUP. CT. REV. 1, 6-7; Kurland, "Brown v. Board of Education Was the Beginning"—*The School Desegregation Cases in the United States Supreme Court: 1954-1979*, 1979 WASH. U.L.Q. 309, 392-400. Other commentators were not convinced. See, e.g., *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 128-29 (1979).

190 *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437 (1980).

191 *Id.* at 452 (Powell, J., joined by Stewart and Rehnquist, JJ., dissenting).

192 *Id.* at 439.

193 See G. GUNTHER, *supra* note 128, at 185-87 (1984 Supp.).

194 This was certainly the expectation of commentators. See, e.g., G. GUNTHER, *supra* note 128, at 789 n.7; Kurland, *supra* note 189, at 400 n.422 (suggesting that a Delaware case, see note 198 *infra*, was "held for disposition pending elucidation of the Supreme Court's decision in some unidentified case to be decided during the 1979 Term.>").

195 Here and elsewhere in this discussion, multiple petitions from a single court of appeals decision are counted as one case. If each petition were counted separately, the total would be close to 50.

196 *Crawford v. Board of Educ.*, 458 U.S. 527 (1982); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982).

197 *Johnson v. Board of Educ.*, 604 F.2d 504 (7th Cir. 1979), *cert. granted*, 448 U.S. 910



the many cases involving standards of proof or the scope of remedies was able to secure the requisite four votes.<sup>198</sup>

If that were all, it would seem far-fetched to include school desegregation among the areas of the law that have attained relative stability. But it is not all. What is striking about the certiorari petitions refused by the Court is that the overwhelming majority were filed by school officials or other litigants who were arguing that the courts of appeals had erred in finding segregative intent or approving broad remedies.<sup>199</sup> Only a single case was filed by dissatisfied black plaintiffs.<sup>200</sup>

One possible explanation for this phenomenon is that black students and their representatives<sup>201</sup> generally prevailed in the courts of appeals, so that litigants other than school boards had little occasion to seek Supreme Court review.<sup>202</sup> That would seem

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(1980). The case was ultimately remanded to the court of appeals without a decision on the merits. *Johnson v. Board of Educ.*, 457 U.S. 52 (1982) (describing prior proceedings).

198 One case came very close. In *Delaware State Bd. of Educ. v. Evans*, 446 U.S. 923 (1980), three Justices dissented from the denial of certiorari, arguing that the far-reaching remedies imposed by the lower courts constituted an "express departure" from the Supreme Court's precedents. *Id.* at 925 (Rehnquist, J., joined by Stewart and Powell, JJ., dissenting). A fourth Justice agreed that the case merited review, "but only when a full Court is available to consider the important issues presented by the petitions for certiorari." *Id.* at 923 (statement of Burger, C.J.). The Chief Justice was alluding to the fact that Justice Stevens would not participate in the case; thus, on the basis of prior votes, it could be anticipated that the Court would divide equally and so be unable to provide a decision with precedential value.

In view of these statements, it was reasonable to conclude "that there were four Justices who, in an appropriate case, would be willing to grant review in order to reexamine standards of proof and scope of remedies in the desegregation field." G. GUNTHER, *supra* note 128, at 789 n.7. However, as will be seen, the "appropriate case" never came. See notes 211-12 *infra* and accompanying text.

199 See, e.g., *Rapides Parish School Bd. v. Valley*, 104 S. Ct. 276, *denying cert. to* 702 F.2d 1221 (5th Cir. 1983); *Coloma Community School Dist. v. Berry*, 104 S. Ct. 235, *denying cert. to* 698 F.2d 813 (6th Cir. 1983); *South Park Indep. School Dist. v. United States*, 104 S. Ct. 92, *denying cert. to* 699 F.2d 1291 (5th Cir. 1983); *Metropolitan County Bd. of Educ. v. Kelley*, 459 U.S. 1183 (1983), *denying cert. to* 687 F.2d 814 (6th Cir. 1982).

200 The case was *Armour v. Nix*, 446 U.S. 930 (1980) (mem.), in which the Court summarily affirmed an unpublished three-judge court decision that rejected some of the black plaintiffs' arguments. See *Lee v. Lee County Bd. of Educ.*, 639 F.2d 1243, 1259 (5th Cir. 1981).

The statement in the text is based on an examination of all school desegregation cases on the paid docket, as well as all cases of any kind in which one or more Justices noted a dissent from the denial of plenary review. Petitions filed by indigent black plaintiffs and denied without any notation of dissent would not have been uncovered by this method; however, they would have been found in the study of lower court decisions discussed in note 203 *infra*.

Cases involving only claims by teachers and school administrators are excluded from this analysis.

201 In some of the suits the litigant seeking desegregation remedies was the United States government. E.g., *United States v. Texas Educ. Agency*, 647 F.2d 504 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

202 Read literally, the language of the Judicial Code would permit the filing of a certiorari petition by the party who prevailed in the court of appeals. See 28 U.S.C. § 1254(1)

rather implausible, and in fact it is not what happened.<sup>203</sup> What did happen is that black plaintiffs lost very few cases that would have warranted the filing of a certiorari petition. Some of the decisions dealt only with procedural or other peripheral matters.<sup>204</sup> Others involved the closing of a single school.<sup>205</sup> And when minority litigants lost cases in which the issues were substantive and the disputes system-wide, they generally were confronted with unanimous appellate judgments adverse to their arguments.<sup>206</sup> Particularly in view of the deference accorded court of appeals decisions by the Supreme Court's 1979 opinions,<sup>207</sup> the prospect of obtaining further review would have been unpromising indeed. As for the remaining cases, the results did generally favor the claims of the litigants pressing for desegregation.<sup>208</sup> Moreover, although the lower courts were not always unanimous in their consideration of the issues, most of the decisions manifested little disagreement as to the controlling principles or their application.<sup>209</sup>

Taken together, these patterns suggest that however Delphic

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(1982). The Court has never considered whether article III or prudential doctrines might qualify the statutory language, but in any event, "[s]eldom would a winning party want to seek Supreme Court review of a decision favorable to him." R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 58-59 (5th ed. 1978); see also *id.* at 433-34.

203 The conclusions in this paragraph are based on a study of all court of appeals cases from 1978 through 1983 that were classified in West's MODERN FEDERAL PRACTICE DIGEST under the school desegregation key numbers.

204 See, e.g., *Reed v. Cleveland Bd. of Educ.*, 581 F.2d 570 (6th Cir. 1978) (reversing district court order for failure to give notice and an opportunity for hearing); *Bradley v. Detroit Bd. of Educ.*, 577 F.2d 1032 (6th Cir. 1978) (rejecting challenge to proposed use of building as community corrections center).

205 See, e.g., *Mitchell v. McCunney*, 651 F.2d 183 (3d Cir. 1981); *Taylor v. Coahoma County School Dist.*, 581 F.2d 105 (5th Cir. 1978).

206 E.g., *Clark v. Board of Educ. of Little Rock School Dist.*, 705 F.2d 265 (8th Cir. 1983); *Ross v. Houston Indep. School Dist.*, 699 F.2d 218 (5th Cir. 1983). Of the 20 or so decisions in which courts of appeals rejected substantive claims of litigants pressing for desegregation remedies, there were only 3 in which a dissenting opinion was issued. *Taylor v. Ouachita Parish School Bd.*, 648 F.2d 959 (5th Cir. 1981) (dissenting opinion of Brown, J., at 653 F.2d 136); *Lee v. Lee County Bd. of Educ.*, 639 F.2d 1243 (5th Cir. 1981); *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782 (6th Cir. 1980).

207 See *Columbus*, 443 U.S. at 463-64 (refusing to disturb findings of district court "strongly affirmed by the Court of Appeals"); *Dayton II*, 443 U.S. at 534-35 n.8 (finding "no reason . . . to upset" court of appeals judgment that rejected district court's factual findings); Kurland, *supra* note 189, at 395-96.

208 In addition to the 30 or so cases that were brought to the Supreme Court, there were about 20 cases in which school boards accepted court of appeals rulings that desegregation had not been accomplished or that additional remedies were necessary.

209 In the years following *Columbus* and *Dayton II* the courts of appeals handed down more than 60 decisions on substantive issues of school desegregation. All but 9 were unanimous. And one of the dissents addressed only the propriety of imposing a 90-day deadline on the district court for compliance with the court of appeals' mandate. See *Hoots v. Pennsylvania*, 639 F.2d 972, 989 (3d Cir.) (Garth, J., dissenting), *cert. denied*, 452 U.S. 963 (1981).

Of the 22 substantive desegregation cases brought to the Supreme Court from the courts of appeals in the 1979-1983 Terms, 14 were unanimous affirmances. There were 3 affirmances by divided panels and 4 unanimous reversals. In only one case was there a 2-2

and novel the 1978 Term's decisions might have appeared at the time, they (and the Court's earlier rulings) were now providing adequate guidance for the resolution of current controversies. And what is more significant from the standpoint of the Supreme Court, the strong expressions of dissent that accompanied some of the denials of review in the 1978 and 1979 Terms<sup>210</sup> disappeared from the Reports in the Terms that followed. In fact, from 1980 through 1983 there were only two votes for plenary consideration in any of the 26 desegregation cases that were brought to the Court, and both involved the same procedural issue.<sup>211</sup> The implication is that notwithstanding the dissatisfaction voiced by many commentators and legislators, the judiciary was treating the law as settled.<sup>212</sup>

A more subtle kind of internal force than those previously discussed is the occasional emergence of a collective sense (shared by at least four Justices) that the time has come to clarify or reshape the law in a particular area. Thus, in the mid-1970's, the Court handed down a cluster of decisions that addressed several important issues under the federal securities laws. These issues had been percolating for years in the lower courts, but the Court had shown little interest in resolving them.<sup>213</sup> The 1976 Term brought an outpouring of cases interpreting Title VII's prohibition on employment discrimination.<sup>214</sup> One commentator, surveying the results, suggested that "the law under Title VII [had been] completely rewritten."<sup>215</sup> In the late 1970's the Court turned its attention to the double jeopardy clause of the fifth amendment. Several precedents were overruled, including one that had been on the books for only three years.<sup>216</sup>

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split between the federal judges who considered the dispute. See *Kelley v. Metropolitan County Bd. of Educ.*, 687 F.2d 814 (6th Cir. 1982), cert. denied, 459 U.S. 1183 (1983).

210 *E.g.*, *Delaware State Bd. of Educ. v. Evans*, 446 U.S. 923 (1980) (Rehnquist, J., joined by Stewart and Powell, JJ., dissenting from denial of certiorari); *Huch v. United States*, 439 U.S. 1007 (1978) (Rehnquist, J., joined by Powell, J., dissenting from denial of certiorari).

211 *Board of Educ. v. Davis*, 454 U.S. 904 (1981) (Rehnquist, J., dissenting from denial of certiorari) (arguing that article III "case or controversy" no longer existed; urging Court to grant certiorari limited to issues of intervention and mootness); *Board of Educ. v. Davis*, 459 U.S. 881 (1982) (same).

212 One case filed in the 1984 Term appeared to be a promising candidate for plenary consideration, but review was denied without dissent. *Diaz v. San Jose Unified School Dist.*, 733 F.2d 660 (9th Cir. 1984) (en banc), cert. denied, 105 S. Ct. 2140 (1985).

213 *Compare, e.g.*, *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654 (7th Cir. 1973), cert. denied, 416 U.S. 960 (1974) (Burger, C.J., joined by Douglas and White, JJ., dissenting), with *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). For further discussion, see *Statutory Law*, *supra* note 13, at 13-14; *Plenary Docket II*, *supra* note 13, at 605-06.

214 See Edwards, *Labor Law Decisions of the Supreme Court, 1976-77 Term*, 1977 LAB. REL. Y.B. 64.

215 See *id.* at 65, 82.

216 See *Plenary Docket II*, *supra* note 13, at 538-40. The Court's interest in double jeopardy issues has continued unabated. Twelve decisions were handed down in the first four

This phenomenon is also illustrated by the Court's cases construing the due process clause as a limitation on state court jurisdiction over nondomiciliaries. In the 1957 Term, the Court handed down two decisions on this subject. One upheld the exercise of jurisdiction in a brief unanimous opinion that barely hinted at the complexities that the Court had previously found in this branch of the law.<sup>217</sup> The other rejected the jurisdiction by a narrow margin on unusual facts—circumstances that led some commentators to regard the holding as an aberration.<sup>218</sup> But in the remaining eleven Terms of the Warren Court, the Justices did not take a single case on territorial jurisdiction.<sup>219</sup> Nor, for six Terms, did the Burger Court. Meanwhile, decisions proliferated in the state courts and lower federal courts. The dominant trend was toward expansion of state authority to adjudicate the rights of nondomiciliaries,<sup>220</sup> though with so little guidance from the Supreme Court it is hardly surprising that the cases went off in many different directions.<sup>221</sup>

Finally, in the 1976 Term, the Court re-entered the arena with *Shaffer v. Heitner*.<sup>222</sup> But that case involved an egregious exercise of state power;<sup>223</sup> moreover, it was brought to the Court by nondomiciliaries who were able to frame their challenge as an appeal.<sup>224</sup> There was thus no reason to think that the Court's grant of

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Terms of the 1980's; one additional case was ultimately resolved on other grounds. *Thigpen v. Roberts*, 104 S. Ct. 2916, 2918 (1984).

217 *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *cf.* *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (elaborate discussion of relevant considerations).

218 *Hanson v. Denckla*, 357 U.S. 235 (1958); *see Casad, Long Arm and Convenient Forum*, 20 U. KANS. L. REV. 1, 10-11 (1971); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 244.

219 One week after announcing its decision in *Hanson*, the Court denied review in *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957), *appeal dismissed and cert. denied*, 357 U.S. 569 (1958). Although *Atkinson* had obviously been held to await the disposition in *Hanson*, it appears to embrace a more expansive view of state court jurisdiction. The relationship between the two cases was the subject of much discussion during the two decades of Supreme Court silence. *See, e.g., Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 961-65 (1960); *cf. Hanson*, 357 U.S. at 263-64 (Douglas, J., dissenting) (citing *Atkinson* with approval).

220 *E.g., Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); *Anderson v. Luitjens*, 311 Minn. 203, 247 N.W.2d 913 (1976); *State ex rel. White Lumber Sales, Inc. v. Sulmonetti*, 252 Or. 121, 448 P.2d 571 (1968). *See also Steele v. G.D. Searle & Co.*, 483 F.2d 339, 344-49 (5th Cir. 1973) (quasi in rem jurisdiction), *cert. denied*, 415 U.S. 958 (1974); *Buckley v. New York Post Corp.*, 373 F.2d 175, 180-81 (2d Cir. 1967); P. CARRINGTON & B. BABCOCK, *CIVIL PROCEDURE* 237-38 (3d ed. 1983).

221 *See Casad, supra* note 218, at 11-12; Note, *The Long-Arm Reach of the Courts Under the Effect Test After Kulko v. Superior Court*, 65 VA. L. REV. 175, 178-81 (1979) (inconsistent applications of "effect" test).

222 433 U.S. 186 (1977).

223 *See U.S. Industries, Inc. v. Gregg*, 540 F.2d 142, 155-56 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

224 Most nondomiciliary challengers are not so fortunate. *See, e.g., Kulko v. Superior Court*, 436 U.S. 84, 90 n.4 (1978).

review presaged a renewed interest in the subject generally. Within months, however, the Court had taken another case,<sup>225</sup> and by the end of the 1983 Term 6 more jurisdiction decisions had been handed down.<sup>226</sup> Of greater importance, the decisions repudiated much of the law that had been developed by the lower courts during the two decades of Supreme Court silence. Thus, in the realm of products liability litigation, where courts had often gone to great lengths to sustain plaintiffs' forum choices,<sup>227</sup> the Supreme Court insisted on an approach much more protective of defendants' rights.<sup>228</sup> On the other hand, in a case involving a defamation claim, the Court, "without addressing many of the competing policy considerations and without citing a single lower court decision, jettisoned a considerable body of doctrine" that had given media defendants some degree of protection from suits away from home.<sup>229</sup>

To some extent, the reshaping of the law of territorial jurisdiction may have come about fortuitously, as the result of a greater willingness on the part of litigants to seek Supreme Court review of jurisdictional rulings. Most of the leading cases on state court jurisdiction during the period of the Supreme Court's silence were never brought to the Court.<sup>230</sup> But some were.<sup>231</sup> This fact, to-

<sup>225</sup> *Kulko v. Superior Court*, 436 U.S. 84 (1978). The Court granted review in *Kulko* in December 1977. See *Kulko v. Superior Court*, 434 U.S. 983 (1977).

<sup>226</sup> This figure includes *Calder v. Jones*, 104 S. Ct. 1482 (1984), a case that I have classified as primarily involving the first amendment. See note 229 *infra* and accompanying text.

<sup>227</sup> See, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

<sup>228</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

<sup>229</sup> *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 168 (1984), discussing *Calder v. Jones*, 104 S. Ct. 1482 (1984).

<sup>230</sup> E.g., *Buckley v. New York Post Corp.* 373 F.2d 175 (2d Cir. 1967); *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976); *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *Fourth Northwestern Nat'l Bank of Minneapolis v. Hilson Indus.*, 264 Minn. 110, 117 N.W.2d 732 (1962); *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965); *State ex rel. White Lumber Sales, Inc. v. Sulmonetti*, 252 Or. 121, 448 P.2d 571 (1968). All of these are jurisdiction cases that were reprinted or discussed in leading civil procedure casebooks; all except *Hilson* upheld jurisdiction over the nonresident defendant.

In many of the cases where courts declined to exercise jurisdiction over a nondomiciliary, the decision was based on an interpretation of the state's long-arm statute. E.g., *Feathers v. McLucas*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). These holdings would not have been subject to review by the Supreme Court, and no such cases have been included in the compilation above. It is true that some of the statutory decisions were heavily influenced by constitutional considerations, e.g., *O'Brien v. Comstock Foods, Inc.*, 123 Vt. 461, 465, 194 A.2d 568, 571 (1963) ("To require less than this in the construction of the statute would present serious constitutional objections."), but it is doubtful that the Supreme Court would have reviewed a holding of that kind in that era. But see *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952).

<sup>231</sup> See, e.g., *Steele v. G.D. Searle & Co.*, 483 F.2d 339 (5th Cir. 1973) (quasi in rem

gether with the marked shift in doctrine wrought by the decisions, supports the conclusion that the spate of rulings resulted, as much as anything else, from the Justices' own determination that the time had come for some jurisprudential housecleaning in this area.<sup>232</sup>

### B. *Other Influences*

Table II in the Appendix lists more than a dozen areas of federal law that have occupied a substantially more prominent position in the work of the Burger Court than they did in the Warren Court era. To these can be added a somewhat smaller group of issues, listed in Appendix Table IV, that achieved great prominence only in the latter half of the Burger Court. But the process also operates in reverse, as can be seen in Tables I and III: topics that in the not-so-distant past loomed large in the Court's plenary work have now faded into relative (or absolute) obscurity. While some of these changes, particularly in the realm of civil rights, can be attributed largely to forces within the Court, others came about principally as the result of developments elsewhere in the legal system and in the political, economic, and social life of the nation.

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jurisdiction), *cert. denied*, 415 U.S. 958 (1974); *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968) (en banc) (quasi in rem jurisdiction), *cert. denied*, 396 U.S. 844 (1969) (Douglas, J., dissenting); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967) (decision based on long-arm statute), *cert. denied*, 390 U.S. 996 (1968); *Singer v. Walker*, 15 N.Y.2d 443, 464-67, 209 N.E.2d 68, 80-82, 261 N.Y.S.2d 8, 24-27, *cert. denied*, 382 U.S. 905 (1965). It is also possible that some of the less celebrated cases that were brought to the Court between 1958 and 1977 would have provided adequate vehicles for addressing issues of territorial jurisdiction if the Court had been interested in the subject.

232 One commentator has suggested that "an initiative by the Court in the jurisdictional area was inevitable and necessary" in large part because state courts had interpreted the Court's long silence "as a signal that the due process clause had become merely a ritualistic limitation on their jurisdiction." Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. Rev. 407, 422-23 (1980). However, the author goes on to say that the Court was particularly troubled by the "marriage of jurisdiction and choice of law"—decisions that pressed the limits of due process by applying forum law to out-of-state transactions having only minimal connections to the forum. *Id.* at 424-25. This view of the Court's concerns appears to be inconsistent with the later affirmance (by a fragmented Court) in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). See *Plenary Docket II, supra* note 13, at 592. However, it finds some support in the 1984 Term decision in *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965 (1985) (holding that application of Kansas law to every claim in a multistate class action exceeds constitutional limits).

The intensity of the Court's interest in jurisdictional issues is further underscored by the grant of review in *Gillette Co. v. Miner*, 459 U.S. 86 (1982). The petitioner challenged a state court's exercise of jurisdiction over nonresident class plaintiffs in a multistate class action suit. The respondent argued that the state court's judgment was not final, see Respondent's Brief in Opposition at 5-7, but the Supreme Court accepted the case anyway. After oral argument, the Court unanimously agreed that the judgment was not final and dismissed the writ for want of jurisdiction. The issue returned to the Court in the 1984 Term; again review was granted. *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159, *cert. granted*, 105 S. Ct. 242 (1984).

## 1. Congressional Legislation

The most obvious of the external influences is the legislation enacted by Congress. Several major areas of statutory interpretation either did not exist or had barely emerged onto the legal scene prior to 1969. For example, environmental protection laws, which generated 23 decisions in the decade that began in 1974, were largely a product of the late 1960's and early 1970's.<sup>233</sup> The Freedom of Information Act ("FOIA"), which gave rise to 16 decisions in the same period, dates from 1966 but did not become a major subject of litigation until the 1970's.<sup>234</sup>

A striking illustration of this phenomenon is found in the realm of labor law. For the Warren Court, "labor law" meant, more than anything else, review of decisions by the National Labor Relations Board ("NLRB").<sup>235</sup> The Burger Court has continued to scrutinize NLRB rulings,<sup>236</sup> albeit at a slightly slower pace,<sup>237</sup> but in the last few years NLRB cases have been outnumbered by decisions interpreting the federal employment discrimination law, Title VII of the Civil Rights Act of 1964.<sup>238</sup> As with FOIA, Title VII litigation took some time to work its way up to the Supreme Court, but when it did the effect was dramatic.<sup>239</sup> While no subsequent Term has matched the outpouring of 9 decisions in the 1976 Term,<sup>240</sup> the average of 4 decisions a Term makes employment discrimination one of the few statutory areas that consistently receive extensive plenary attention from the Burger Court.<sup>241</sup> Title VII litigation has also accounted

<sup>233</sup> The Court's entry into the realm of environmental legislation is described in *Statutory Law*, *supra* note 13, at 25-26. Later developments are summarized in *Plenary Docket II*, *supra* note 13, at 621-22. Environmental law continues to be a major component of the general statutory segment of the plenary docket; among the various federal "specialties," only a handful have received plenary attention with greater frequency. For further discussion, see notes 399-400 *infra* and accompanying text.

<sup>234</sup> See *Statutory Law*, *supra* note 13, at 24-25; *Plenary Docket II*, *supra* note 13, at 619-20.

<sup>235</sup> In the seven Terms of the later Warren Court there were 29 plenary decisions arising out of NLRB proceedings. These accounted for nearly half of the 64 labor cases that received plenary consideration during that period. (The latter figure includes 3 cases that were vacated or dismissed without a decision on the merits.)

<sup>236</sup> Perhaps it would be more accurate to say that the Supreme Court scrutinizes the review of NLRB rulings by the courts of appeals. See, e.g., *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

<sup>237</sup> The plenary docket in the seven Terms of the later Burger Court included 25 NLRB cases.

<sup>238</sup> In the seven Terms 1977-1983 the Court issued 28 decisions on Title VII issues, compared with the 25 NLRB cases. If we look only at the four Terms of the 1980's, Title VII accounted for 18 decisions, while NLRB proceedings contributed 14. Review was granted in another Title VII case in the 1983 Term, but certiorari was dismissed as improvidently granted. *Westinghouse Elec. Corp. v. Vaughn*, 104 S. Ct. 2163 (1984).

<sup>239</sup> See *Statutory Law*, *supra* note 13, at 18-19.

<sup>240</sup> As previously noted, the decisions of the 1976 Term brought a major revision in the law of employment discrimination. See notes 214-15 *supra* and accompanying text.

<sup>241</sup> In the seven Terms of the later Burger Court, the only area of federal regulation to

for a substantial proportion of the plenary decisions that deal with practice and procedure in the federal courts.<sup>242</sup>

It would be wrong, however, to conclude from these examples that the statutory segment of the plenary docket is the product of a simple sequence: congressional legislation, followed by a proliferation of litigation in the lower courts, followed in turn by a series of Supreme Court decisions. Statutes that establish new regulatory schemes or create new causes of action do not invariably generate a substantial volume of litigation in the lower courts.<sup>243</sup> And laws that contribute significantly to the workload of the lower courts do not necessarily have the same effect on the Supreme Court.<sup>244</sup>

But if the sequence is not inevitable, the question arises: why Title VII? Why has the Court not devoted a similar degree of attention to, for example, the Occupational Safety and Health Act? Or the Age Discrimination in Employment Act? Or the Truth in Lending Act? Each of these important recent enactments has generated a large volume of litigation in the lower courts;<sup>245</sup> yet all three to-

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generate a larger body of plenary decisions was antitrust, and it can be argued that antitrust litigation involves a much wider range of primary conduct. To put the 28 Title VII decisions into further perspective, it is worth noting that during the same period issues of liability and procedure under the Internal Revenue Code gave rise to only 22 cases.

Employment discrimination claims under other statutes accounted for another 9 plenary decisions in the later Burger Court. Two arose under Reconstruction legislation. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979). One involved Title VI of the 1964 Civil Rights Act. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983). A fourth case construed the Rehabilitation Act of 1973. *Consolidated Rail Corp. v. Darrone*, 104 S. Ct. 1248 (1984). The remaining decisions dealt with age discrimination. See notes 298-300 *infra* and accompanying text.

242 Of the 30 decisions on jurisdiction and procedure in civil cases handed down in the later Burger Court, 7 arose out of Title VII suits. All but one of the 5 cases interpreting the Federal Rules of Civil Procedure did so.

243 For example, in 1973 Judge Friendly listed a host of then-recent statutes that created new federal causes of action, established new bases for district court jurisdiction, or authorized proceedings in the courts of appeals for review of agency orders. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 22-27, 34-35 (1973). Some of those statutes have given rise to a substantial volume of litigation in the lower courts, e.g. Fair Credit Reporting Act, 15 U.S.C. § 1681p (1982) (first enacted in 1970), but others have not, e.g., Wholesome Meat Act, 21 U.S.C. §§ 671-74 (1982) (first enacted in 1967).

One statute not cited by Judge Friendly, the Plant Variety Protection Act of 1970, 7 U.S.C. §§ 2321-2583 (1982), established a wide range of remedies for infringement of "plant variety protection." See 7 U.S.C. §§ 2561-69 (1982). Perusal of the 1985 pocket part to the United States Code Annotated, covering decisions through late 1984, indicates that in its entire history the Act has not generated a single reported decision.

244 See *Plenary Docket I*, *supra* note 13, at 1782-83; *Plenary Docket II*, *supra* note 13, at 631-32.

245 A useful measure of the volume of litigation in the lower courts, especially in this context, is the number of headnotes generated by the reported decisions. See *Plenary Docket I*, *supra* note 13, at 1784 n.269. The 1984 pocket part to the United States Code Annotated, covering a period of less than nine years, includes more than 100 pages of headnotes on issues of age discrimination, and another 100 pages on occupational safety. Headnotes of



gether account for no more than a dozen Supreme Court decisions.<sup>246</sup> And there may be other areas of federal regulation in which the contrast between the volume of litigation in the lower courts and the extent of Supreme Court activity is even greater.<sup>247</sup>

Fully to explain the special status of Title VII would require a close examination of the cases that were denied review in these other areas over a period of time. Such a study might well reveal that certworthy petitions simply did not come to the Court very often. For the present, however, we can look only to the Title VII cases that did receive plenary consideration. And that line of inquiry does not disclose any consistent patterns. In fact, the data undercut some of the most plausible *a priori* hypotheses. Less than half of the decisions stated that certiorari was granted because of conflict or disarray in the circuits.<sup>248</sup> Requests for review by the Solicitor General, which dominate some areas of the statutory docket,<sup>249</sup> played only a minor role here. A substantial proportion of the cases involved quasi-procedural issues like attorneys' fees and timeliness requirements,<sup>250</sup> but these were outnumbered by decisions that addressed the merits of the discrimination claim.<sup>251</sup>

Perhaps the explanation for the Court's great interest in employment discrimination litigation lies, at least in part, in the tension between the egalitarian ideals represented by Title VII and the devotion to individual autonomy that has long marked American society. Title VII commits the nation to "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."<sup>252</sup> But the process of achieving that goal through lawsuits and administrative proceedings inevitably interposes a governmental presence in spheres of individual

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decisions interpreting the Truth in Lending regulations filled about 50 pages through 1982; the 1985 pocket part includes 12 additional pages.

246 In the seven Terms of the later Burger Court, there were 3 decisions on occupational safety and 3 interpreting the Truth in Lending Act. For discussion of the Court's work in the realm of age discrimination, see text accompanying notes 298-300 *infra*.

247 See *Plenary Docket I, supra* note 13, at 1782-83.

248 For discussion of the cases in the 1977-1979 Terms, see *Plenary Docket II, supra* note 13, at 612.

249 See text accompanying notes 399-413 *infra*.

250 I hypothesized that the Court would be more inclined to grant a large number of petitions in an area of the law dominated by procedural issues because a Supreme Court ruling on a procedural question is more likely than a substantive ruling to provide a precedent of widespread general applicability. See *Plenary Docket II, supra* note 13, at 621 (discussing environmental cases).

251 Three cases dealt with burdens of proof, a matter that is procedural in one sense, but probably closer to "substance" in the sense used here. Cf. *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (in diversity action in federal court, state law controls burden of proof); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939) (same).

252 *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

decisionmaking and the development of personal relationships, far more than the enforcement of laws governing occupational safety or commercial lending or the issuance of securities.<sup>253</sup> In other words, employment discrimination litigation implicates individual liberty values in a way that distinguishes it from almost all other areas of federal statutory governance. Thus, for a Court that devotes as much attention to civil rights issues as to all other aspects of federal law, a proclivity for hearing Title VII cases rather than other kinds of statutory claims would be only natural.

One other variety of congressional influence deserves mention, although it probably operates more at the level of individual case selection than in the shaping of the plenary docket over a period of time. Much of the Supreme Court's statutory work is devoted to clarifying ambiguities and filling lacunae in congressional legislation.<sup>254</sup> Judges and scholars have been suggesting for years that the preferable way to close a gap of this kind is for Congress to amend the law to explain what it meant (or in any event what it means now).<sup>255</sup> Unfortunately, for a variety of reasons the correction of ambiguities and omissions in statutes already on the books has never ranked high among congressional priorities.<sup>256</sup> In recent years, however, there have been signs that this situation may be changing. Congress and its committees have demonstrated greater awareness of the gaps in existing legislation and a willingness to do something about them. The results can be seen in the Court's 1984 Term plenary docket. Three cases in which certiorari had already been granted<sup>257</sup> and 2 that would probably have received plenary

253 See, e.g., *Vinson v. Taylor*, 760 F.2d 1330, 1331 n.3 (D.C. Cir. 1985) (Bork, J., joined by Scalia and Starr, JJ., dissenting from denial of rehearing en banc) (arguing that under majority ruling in sexual harassment case, employer could avoid liability only by "monitoring or policing his employees' voluntary sexual relationships."); *In re Dinnan*, 661 F.2d 426 (5th Cir. Unit B 1981) (academic freedom), cert. denied, 457 U.S. 1106 (1982); *Snell v. Suffolk County*, 37 Fair Empl. Prac. Cas. (BNA) 1488, 1494, 1496 (E.D.N.Y. 1985) (acknowledging that racial and ethnic joking implicates "some of our most sensitive and deepest conceptions of self and of our relationships with others," but holding that "an absolute prohibition on racial 'joking' [by guards in a county jail] is mandated by the law."). Title VII suits also provide the paradigmatic underpinning for the observation of former District Judge Simon H. Rifkind that "[a] foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment." Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976). See, e.g., *EEOC v. Radiator Specialty Co.*, 15 Fair Empl. Prac. Cas. (BNA) 528, 530-31 (W.D.N.C. 1977); *Blank v. Sullivan & Cromwell*, 16 Fair Empl. Prac. Cas. (BNA) 87 (S.D.N.Y. 1976).

254 See Stevens, *Some Thought on Judicial Restraint*, 66 JUDICATURE 176, 183 (1982).

255 See generally Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963), reprinted in H. FRIENDLY, *supra* note 243, at 41.

256 See *Statutory Law*, *supra* note 13, at 38.

257 *Employers Nat'l Ins. Co. v. Ochoa*, 105 S. Ct. 583 (1984); *United States Dep't of Justice v. Provenzano*, 105 S. Ct. 413 (1984) (per curiam). In *Ochoa*, the Court granted review to resolve an intercircuit conflict on a recurring issue under the Longshoremens'

review<sup>258</sup> were sent back to the lower courts for reconsideration or other action in light of intervening statutes that mooted the controversies in whole or in substantial part.<sup>259</sup>

## 2. Other External Forces

When we leave the realm of congressional legislation and attempt to identify the other external forces that have helped to shape the composition of the plenary docket, the task becomes much more difficult. Congressional legislation tends to be quite particularized in its effect on the Court's business; thus, the impact of labor laws will be felt primarily (though not exclusively) in the labor segment of the docket. In contrast, the influence of political, economic, and social forces will often be spread widely, but thinly, among several areas of the Court's work. The effects may be less visible; they may also be more difficult to isolate. Yet even when these caveats are taken into account, it is surprising how seldom we find a simple pattern of change or expansion in an area of primary activity that correlates neatly with an increase or decrease in the number of plenary decisions growing out of that activity. Important developments in American life—computerization is one example—may scarcely be reflected on the plenary docket at all.<sup>260</sup> Others will generate decisions in one or two areas of the law, but beyond them have little impact on the Court's work. In this section I can do no more than sketch some of the patterns I have discovered.

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and Harbor Workers' Compensation Act. See *Ochoa v. Employers Nat'l Ins. Co.*, 724 F.2d 1171 (5th Cir.) (rejecting view of Seventh Circuit), *vacated*, 105 S. Ct. 583 (1984). The legislation cited by the Court in its remand order resolved the question by adopting the Fifth Circuit's view. See 130 CONG. REC. S11,626 (daily ed. Sept. 20, 1984) (remarks of Sen. Nickles); *Ochoa v. Employers Nat'l Ins. Co.*, 754 F.2d 1196 (5th Cir. 1985) (after remand). In *Provenzano*, the Court had consolidated 2 cases for plenary review so that it could resolve an intercircuit conflict on a Freedom of Information Act issue. Legislation enacted after the grant of certiorari but before oral argument mooted the question.

<sup>258</sup> *Toan v. Cunningham*, 105 S. Ct. 896 (1985); *Heckler v. Lopez*, 105 S. Ct. 583 (1984). See *Lauter, Congress Moots Nearly 40,000 U.S. Court Suits*, Nat'l L.J., Oct. 1, 1984, at 5.

<sup>259</sup> The Court did give plenary consideration to one case in which a statute enacted after the grant of review but before oral argument resolved an intercircuit conflict on the question presented. *Heckler v. Turner*, 105 S. Ct. 1138 (1985); see also *Heckler v. Turner*, 105 S. Ct. 2, 3 (Rehnquist, Circuit Justice, 1984). In a lengthy opinion, a unanimous Court adopted the interpretation of the earlier legislation that had been confirmed for the future by the new enactment. The Court did not explain what purpose was served by a detailed exegesis of the prior law. Cf. *Lascaris v. Shirley*, 420 U.S. 730, 732-33 (1975) (per curiam) ("In light of the resolution of the [issue by intervening legislation], we have no occasion to prepare an extended opinion."). *Lascaris*, like *Turner*, involved the scope of state obligations under the federally funded Aid to Families with Dependent Children program.

<sup>260</sup> Authority is scarcely needed for the proposition that the computer has come to play a pervasive role in virtually every aspect of the nation's economic and social life. Yet except for a handful of decisions involving patents, computer law made no appearances on the plenary docket in the later Burger Court.

a. *Economic Developments*

I begin with one of the most important developments in the nation's economy during the Burger Court years. The Arab oil embargo that brought an end to the era of cheap energy left its mark on almost every institution in American life, and the Supreme Court is no exception. To be sure, energy law, in one form or another, has been part of the Court's work at least since the early years of this century,<sup>261</sup> but the volume of decisions in the last few Terms manifests a degree of involvement not previously seen. The impact has been felt primarily in the federalism segment of the docket.<sup>262</sup> For example, cases in which an exercise of state power was challenged on the ground of preemption by federal energy regulation laws constituted such a minor element of the Court's work in the 1960's and 1970's that it probably would never have occurred to anyone to identify them as a discrete category. But in the first four Terms of the 1980's, issues of this kind generated 6 plenary decisions.<sup>263</sup> Disputes between state and federal governments over rights in land and other property seldom appeared on the plenary docket until the 1970's, but in recent Terms they have become a regular part of the Court's work.<sup>264</sup> Five of the 11 decisions in the later Burger Court involved oil-bearing lands. Disputes arising out of the production or distribution of energy resources resulted in opinions dealing with other federalism issues as well: the delineation of interstate boundaries,<sup>265</sup> limits on state powers under federal regulatory programs and other federal legislation,<sup>266</sup> the scope of national powers,<sup>267</sup> and limitations on state taxation of interstate commerce.<sup>268</sup>

I do not suggest that the issues in these cases necessarily grew out of the energy shocks of the 1970's, although that was certainly true of 2 decisions involving federalism-based challenges to the exercise of national power<sup>269</sup> and at least one case in which a state tax

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261 See *The Pipe Line Cases*, 234 U.S. 548 (1914); see generally *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377-80 (1983).

262 In fact, issues of energy law outside the context of federal-state relations received surprisingly little attention from the Court. See text accompanying notes 271-72 *infra*.

263 *E.g.*, *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984) (nuclear power); *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983) (electric power).

264 See *Plenary Docket II*, *supra* note 13, at 595-96.

265 *Louisiana v. Mississippi*, 104 S. Ct. 1645 (1984) (oil and gas lease in bed of Mississippi River).

266 *Secretary of the Interior v. California*, 104 S. Ct. 656 (1984).

267 See cases cited in note 269 *infra*.

268 See cases cited in note 270 *infra*.

269 *United States v. Ptasynski*, 462 U.S. 74 (1983) (challenge to windfall profit tax imposed on crude oil after marked rise in price of oil on world market); *FERC v. Mississippi*, 456 U.S. 742 (1982) (challenge to provisions of Public Utility Regulatory Policies Act of

was attacked on commerce clause grounds.<sup>270</sup> Rather, the increased cost of fuel and the heightened interest in finding alternate energy sources raised the stakes in almost every activity that involved the production or distribution of energy. As a result, disputes that might not have arisen at all became the subject of litigation; lawsuits that might have come to an end in the lower courts were brought to the Supreme Court. And with so much more at stake, either in the particular case or in the application of the challenged rule of law to other disputes, the Justices had much more reason to grant plenary review.

It is all the more surprising, therefore, that issues of energy law outside the context of federal-state relations received very little attention from the Court in the years following the oil embargo. In the seven Terms 1977-1983 there were only 6 plenary decisions arising out of rulings by the Federal Energy Regulatory Commission ("FERC") and its predecessor the Federal Power Commission ("FPC"). During that same period the Court denied review in 5 cases in which the lower court had rejected the agency's view of the law.<sup>271</sup> This record contrasts sharply with that of the preceding seven Terms, when the Court handed down 12 plenary decisions growing out of FPC proceedings and denied review in only 3 FPC cases brought to it by the federal government. And the Court has consistently refused to hear energy regulation cases from the Temporary Emergency Court of Appeals ("TECA").<sup>272</sup>

These patterns suggest that the legal rules governing the allocation of costs and opportunities among producers and consumers

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1978, enacted as part of a package of legislation designed to combat nationwide energy crisis).

270 *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (upholding high severance tax on output of Montana coal mines). The dissent pointed out that the sharp increase in the severance tax that prompted the constitutional challenge had been enacted by the Montana legislature in the immediate aftermath of the Arab oil embargo. *Id.* at 639-40 (Blackmun, J., dissenting). A concurring opinion noted the connection between "the Nation's energy needs" and "the trend in the energy-rich States to aggrandize their position . . . by imposing unusually high taxes on mineral extraction." *Id.* at 637 (White, J., concurring). The decision in *Maryland v. Louisiana*, 451 U.S. 725 (1981) (striking down tax on "first use" of gas brought into Louisiana, principally from the Outer Continental Shelf), may also fit the description in the text. See Pierce, *The Constitutionality of State Environmental Taxes*, 58 TUL. L. REV. 169, 176 (1983) (proposing replacement for tax struck down by Supreme Court; arguing that the imposition of a tax on the use of oil and gas pipelines is justified because the "state's increased infrastructure expenditures" result from "Louisiana's role as a staging ground" for "the biggest single battle in the United States' war to obtain energy independence").

271 In 4 of the cases the Solicitor General asked the Court to grant review; in one, he did not.

272 The Court's lack of interest is particularly striking in view of evidence that TECA "has inadequately controlled administrative decisionmaking" and has "fail[ed] to secure agency compliance with procedural safeguards." Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113, 119, 151.

of energy do not, of themselves, rank high among the Court's concerns; it is only when the rules implicate federal-state relations that the Justices are likely to intervene. One possible explanation for this dichotomy is that a high proportion of the federalism cases are brought to the Court by appeal or as original jurisdiction cases, whereas the pure federal law disputes can be taken up only by petition for certiorari. However, in view of the broader pattern of interest in federalism issues that cuts across so many substantive areas of the law,<sup>273</sup> I am inclined to think that a concern for preserving the balance between federal and state power is, as much as anything else, the dominant force here.

Other important economic developments have made even less of a mark on the plenary docket. The tremendous expansion in the portion of the nation's economy devoted to health care has been reflected in a booming segment of the legal profession,<sup>274</sup> but for the Supreme Court the effects have been quite modest. The impact has been felt most strongly in the antitrust segment of the docket. In the four Terms of the 1980's, a total of 18 antitrust cases received plenary consideration. Seven of them involved various aspects of the health care industry, including maximum fee arrangements for physicians,<sup>275</sup> exclusive contracts between a hospital and a firm of anaesthesiologists,<sup>276</sup> and the sale of pharmaceutical products to state and local government hospitals.<sup>277</sup> What makes this kind of concentration so striking is that during the same period, in the view of one prominent commentator, the Court was "select[ing] cases of slight antitrust importance and leav[ing] other questions of transcendent significance unreviewed."<sup>278</sup> Nor could it be said that the medical context was merely adventitious; on the contrary, a central theme of the cases was the application of established antitrust rules in the new setting of medical practice and related activities.<sup>279</sup>

273 See text following note 108 *supra*; *Plenary Docket II, supra* note 13, at 598.

274 See Couric, *Health Care: Fertile Field for Lawyers*, Nat'l L.J., Feb. 18, 1985, at 1. Health care expenditures now represent 10.8 percent of the gross national product, compared with 6.1 percent in 1965. 1985 STATISTICAL ABSTRACT OF THE UNITED STATES 96.

275 *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

276 *Jefferson Parish Hosp. Dist. v. Hyde*, 104 S. Ct. 1551 (1984).

277 *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983).

278 Handler, *What to Do with the Supreme Court's Burgeoning Calendars?*, 5 CARDOZO L. REV. 249, 264 (1984). My own analysis of the Court's antitrust work in the late 1970's lends support to this view. See *Plenary Docket II, supra* note 13, at 602-05.

279 One case involved the interaction between the antitrust laws and a statute that specifically regulated health care providers and facilities. *National Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378 (1981). In most of the other cases, the formulation of the questions emphasized the importance of the health care context. For example, in *Jefferson Parish Hosp. Dist. v. Hyde*, 104 S. Ct. 1551 (1984), the Solicitor General filed a brief supporting the petition for certiorari on the ground that "[b]y applying a per se rule of illegality to a common practice, the decision below conflicts with

The business of health care might also have been expected to make a substantial contribution to the labor law segment of the docket. In 1974, Congress amended the National Labor Relations Act ("NLRA") to extend its coverage to employees of nonprofit health care institutions.<sup>280</sup> Because hospitals "give rise to unique considerations that do not apply in the industrial settings with which the [Labor] Board is more familiar,"<sup>281</sup> the Board and the courts were required to reconsider, in this new context, the entire body of rules developed over the years for the governance of labor-management relations.<sup>282</sup> Thus it was not surprising that in the late 1970's the Supreme Court decided 2 cases in rapid succession that involved the validity of no-solicitation rules in hospitals.<sup>283</sup> But those decisions proved to be the end as well as the beginning of the Court's involvement with labor law issues in the health care context. There were no additional cases reviewing the rules governing union organizing drives, nor did the Court address the much-litigated questions of the scope of the appropriate bargaining unit, the employee status of interns and residents, or the 10-day notification requirement for strikes at health care institutions.

Study of the development of the law in these areas indicates that a variety of circumstances accounts for the absence of decisions. With respect to no-solicitation rules, the Court's silence after 1979 is easy to explain: the courts of appeals generally upheld the Board's approach, and none of the hospitals sought further review in the Supreme Court.<sup>284</sup> Union organizers did ask the Court

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the decisions of every other court of appeals that has considered antitrust challenges to exclusive arrangements between hospitals and physicians." Brief for the United States as Amicus Curiae at 5. In *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982), the Court reversed a court of appeals decision that had expressed reluctance to subject the medical profession to per se rules against price-fixing in a way that would preclude physicians from setting maximum fees. And in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), the Court granted certiorari to resolve an acknowledged intercourt conflict on the question whether an insurance company, in using a medical peer review committee to determine whether particular treatments and fees were "necessary" and "reasonable," was engaged in the "business of insurance" within the meaning of the McCarran-Ferguson Act and thus immune from antitrust scrutiny. *Id.* at 122.

280 See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 485 (1978).

281 *Id.* at 508 (quoting *Beth Israel Hosp. v. NLRB*, 554 F.2d 477, 481 (1977)).

282 The Board and the Courts were also called upon to interpret "special [statutory] notice provisions unique to the field of health care," enacted as a result of Congress's "concern with the potential disruption in the delivery of health care services stemming from labor disputes." Zimmerman, *Trends in National Labor Relations Board Health Care Industry Decisions*, in *HEALTH CARE LABOR LAW 7* (I. Shepard & A. Doudera eds. 1981). See notes 286-87, 293 *infra* and accompanying text.

283 *NLRB v. Baptist Hosp.*, 442 U.S. 773 (1979); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978). Between these decisions the Court issued one summary per curiam opinion on the same topic. *NLRB v. Baylor Univ. Medical Center*, 439 U.S. 9 (1978).

284 A 1985 manual of health care labor law cites 4 post-1978 court of appeals decisions that considered the validity of hospital no-solicitation rules. 1 *HEALTH CARE LABOR MANUAL*

to reverse the Board's determination that interns and residents are not "employees" within the meaning of the NLRA, but in a procedural setting that made it almost impossible for the Court to reach the issue.<sup>285</sup> The other two areas of dispute, however, were squarely presented to the Court, and in petitions filed by the Solicitor General. In the 1977 Term, the Government asked the Court to review a Seventh Circuit decision that rejected the Board's broad application of the strike notification proviso.<sup>286</sup> But at that time no other court had ruled on the point raised; thus it is understandable that the Justices chose to allow the issue to percolate further.<sup>287</sup> More surprising is the refusal to address the question of the appropriate bargaining unit in the health care industry. By the time the Solicitor General filed his petition in the 1979 Term,<sup>288</sup> issues of this kind had been litigated in five circuits, four of which had emphatically rejected the Board's approach.<sup>289</sup> Admittedly, there probably was not a square intercircuit conflict,<sup>290</sup> but the courts of appeals had expressed some disagreement among themselves as to

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(Health Law Center) 4:50-56 (1985 revision). In all 4 cases the Board's orders were enforced; in none of them did the employer petition for certiorari. In one case not mentioned in the manual the court of appeals denied enforcement of a Board order invalidating a no-solicitation rule. *Baylor Univ. Medical Center v. NLRB*, 662 F.2d 56 (D.C. Cir. 1981). The case was remanded for further analysis by the Board, but if any further proceedings took place they have not been reported. Curiously, this decision does not appear to have been cited in any of the other court of appeals cases on no-solicitation rules.

285 *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492 (D.C. Cir. 1980) (en banc), *cert. denied*, 450 U.S. 917 (1981). The court of appeals held that the district court had no jurisdiction to consider the organizers' challenge to the Board's decision. Even if the Supreme Court had disagreed with this jurisdictional ruling, it presumably would have remanded the case for consideration of the status issue by the lower courts. The correctness of the Board's ruling was also challenged indirectly in the context of a preemption case. *See NLRB v. Committee of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977) (supporting Board's position that federal law preempted efforts to organize interns and residents under state labor laws), *cert. denied*, 435 U.S. 904 (1980).

286 *NLRB v. International Bhd. of Elec. Workers*, 548 F.2d 704 (7th Cir.), *cert. denied*, 434 U.S. 837 (1977).

287 A few weeks after the denial of certiorari in the Seventh Circuit case, the District of Columbia Circuit reached a similar conclusion. *Laborers' Int'l Union, Local 1057 v. NLRB*, 567 F.2d 1006 (D.C. Cir. 1977). The government did not seek review of this decision.

288 *NLRB v. Mercy Hosp. Ass'n*, 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980).

289 *See Mercy Hosp. Ass'n*, 606 F.2d at 26-27 (describing decisions of Third, Seventh, and Ninth Circuits); *see also NLRB v. HMO Int'l/Calif. Medical Group Health Plan, Inc.*, 678 F.2d 806, 809 (9th Cir. 1982) ("[T]he Board's community-of-interest analysis . . . has . . . led to a nearly perfect record of reversals of the NLRB by the Court of Appeals in review of health care bargaining units."). The Board's bargaining unit determinations were upheld in *NLRB v. Sweetwater Hosp. Ass'n*, 604 F.2d 454 (6th Cir. 1979), and *Bay Medical Center, Inc. v. NLRB*, 588 F.2d 1174 (6th Cir. 1978), *cert. denied*, 444 U.S. 827 (1979). *See also* note 290 *infra*.

290 In the circuit that upheld the Board's selection of an appropriate bargaining unit, the court distinguished the other circuits' cases rather than disagreeing with them. *See Bay Medical Center, Inc.*, 588 F.2d at 1177-78.



the proper tests;<sup>291</sup> perhaps more important, the Board had announced its intention to adhere to its position.<sup>292</sup> Under these circumstances, a Supreme Court decision would have made a significant contribution to clarifying the law. Two Justices did vote to grant review, but they could not persuade two others to join them.<sup>293</sup>

Apart from antitrust, then, only one segment of the docket was affected more than minimally by the emergence of health law as a major area of legal practice. In the four decades of the 1980's the Court heard 5 cases involving statutory questions raised by the Medicare and disability benefit provisions of the Social Security Act.<sup>294</sup> Issues of this kind had generated only a single decision in the preceding decade.<sup>295</sup> Yet it is probably more accurate to view the Social Security cases as a reflection of a related but distinct development in American life: the growing number of old people and their ever-increasing demands for resources and insistence on rights.<sup>296</sup> Here again, however, the consequences for the plenary

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291 See *St. Francis Hosp.*, 271 N.L.R.B. No. 160 at 12-13, 116 L.R.R.M. (BNA) 1465, 1469 (1984) (the courts of appeals "have not been unified upon a proper standard for deciding appropriate units in this industry").

292 See *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965 (3d Cir. 1979).

293 *NLRB v. Mercy Hosp. Ass'n*, 445 U.S. 971 (1980) (Brennan and White, JJ., dissenting).

Five years after the denial of review in *Mercy Hospital*, the Board repudiated the approach condemned by the courts of appeals. In its stead the Board adopted a "disparity of interests" test previously embraced by the Ninth and Tenth Circuits, but with a greater degree of flexibility, as suggested in a Second Circuit opinion. *St. Francis Hosp.*, 271 N.L.R.B. No. 160 at 15-17, 116 L.R.R.M. (BNA) 1465, 1470-71 (1984).

The Board also modified its approach to the strike-notification provision in response to adverse court decisions. See *Painters Local No. 452 (Henry C. Beck Co.)*, 246 N.L.R.B. 970 (1979).

294 *E.g.*, *Heckler v. Day*, 104 S. Ct. 2249 (1984).

295 *Califano v. Yamasaki*, 442 U.S. 682 (1979). In this case the court of appeals had granted relief to the plaintiffs in reliance on the due process clause, but the Supreme Court rested judgment largely on statutory grounds. See also *Richardson v. Perales*, 402 U.S. 389 (1971) (primarily addressing procedural due process issues, but also discussing evidentiary requirements for disability determinations under the statute).

In the last four Terms of the 1970's the Court rejected 3 government petitions in Social Security cases. One involved the same issue as one of the cases that received plenary consideration in the 1980's. Compare *White v. Mathews*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), with *Heckler v. Day*, 104 S. Ct. 2249 (1984). Another of the rejected petitions raised an issue closely related to a question resolved in one of the later plenary decisions. Compare *Whitecliff, Inc. v. United States*, 536 F.2d 347 (Ct. Cl. 1976) (permitting judicial review of health care providers' claims under pre-1973 Medicare Part A), *cert. denied*, 430 U.S. 969 (1977), with *United States v. Erika, Inc.*, 456 U.S. 201 (1982) (rejecting judicial review of claims under Medicare Part B). At this writing, the Court of Appeals for the Federal Circuit, successor to the Court of Claims, adheres to the view that the Supreme Court's decision in *Erika* did not impair the validity of the holding in *Whitecliff*. See *Spokane Valley Gen. Hosp., Inc. v. United States*, 688 F.2d 771, 775-76 (Ct. Cl. 1982).

296 See, e.g., Longman, *Taking America to the Cleaners*, Wash. Monthly, Nov. 1982, at 24; Fallows, *Entitlements*, Atlantic Monthly, Nov. 1982, at 51; Hurd, *'Old' Doesn't Mean 'Poor,'*

docket have not been as great as might have been expected.<sup>297</sup> The other major law invoked by the elderly is the Age Discrimination in Employment Act of 1967 ("ADEA"). Although ADEA issues gave rise to 4 decisions in the two Terms 1977 and 1978,<sup>298</sup> only one ADEA case reached the plenary docket in the five Terms that followed.<sup>299</sup> What made this particularly surprising is that, as already suggested, there was no dearth of litigation in the lower courts; in less than a decade, the reported cases alone generated headnotes that filled well over 100 pages in the United States Code Annotated.<sup>300</sup> The Supreme Court's near-silence came to an end in the 1984 Term, when 3 ADEA cases received plenary consideration, but only time will tell whether this was the start of a period of intensive activity or merely the product of happenstance.

Of course, not all segments of the economy have been expanding during the last fifteen years, and some of the downward trends have been reflected in the composition of the plenary docket. For example, three of the mainstays of the statutory work of the Warren Court were the Interstate Commerce Act, the Railway Labor Act, and the Federal Employers' Liability Act ("FELA"). In the seven Terms of the later Burger Court, all three statutes accounted for only 8 decisions. There can be little doubt that this change resulted in large part from the greatly diminished role of the railroads in the national transportation system. But other forces were at work also. The reduction in the number of decisions reviewing ICC orders coincided almost exactly with the repeal of the legislation that required three-judge district courts, with a direct appeal to the Supreme Court, for challenges to ICC rulings.<sup>301</sup> And the profusion of FELA cases on the plenary docket in the 1950's was not simply a reflection of the significance of railroad accidents in the nation's economy; rather, it was a product of the belief shared by a majority of the Justices that the Court had a special responsibility "to exercise its power of review in *any* [FELA] case where it appears that the litigants have been improperly deprived of" their right to a jury determination.<sup>302</sup> That belief no longer holds sway within the Court.<sup>303</sup> Thus, while the number of em-

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N.Y. Times, Nov. 9, 1982, at A31, cols. 5-6; Passell, *More Gold in the Golden Years*, N.Y. Times, Mar. 12, 1985, at A30 cols. 1-3.

297 Challenges to various provisions of the Social Security Act accounted for 4 of the 33 cases in which the Supreme Court reviewed lower court decisions holding federal statutes unconstitutional. See section IV(B) *infra*.

298 All 4 of the cases involved intercircuit conflicts.

299 *Lehman v. Nakshian*, 453 U.S. 156 (1981).

300 See note 245 *supra*.

301 See *Statutory Law*, *supra* note 13, at 11-13.

302 *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 509 (1957) (emphasis added).

303 The passing of the old era was signaled by an opinion of Justice Douglas dissenting

ployee FELA petitions is undoubtedly smaller than it was decades ago,<sup>304</sup> it is also true that cases that probably would have received plenary consideration or even summary reversal in the 1950's are now denied review without dissent.<sup>305</sup>

### b. *Changes in Social and Political Life*

Of the social and political developments that have marked the decade and a half since Chief Justice Burger took office, none have had as great an impact on the nation as the rise of the women's movement. The Supreme Court has played a major role in that revolution, and the effects can be seen in the composition of the plenary docket. Issues of sex discrimination, which with one exception were entirely absent from the Court's work under Chief Justice Warren,<sup>306</sup> have become a major component of the civil rights docket in the Burger Court. Starting with the pathbreaking opinion in *Reed v. Reed*<sup>307</sup> in the 1971 Term, the Court has issued a total of 21 decisions addressing the constitutionality of governmental distinctions based on gender. In the realm of statutory law, claims of sex discrimination accounted for 14 of the 28 Title VII decisions in the seven Terms 1977 through 1983.<sup>308</sup>

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from the denial of certiorari in two cases brought to the Court in the 1972 Term. In both cases the lower courts had set aside jury verdicts in favor of injured employees. Justice Douglas lamented that "[i]f the voice of Hugo Black were still heard and heeded, these two cases would be granted and reversed outright. That would be my vote. But at the very least we should put [them] down for argument." *Felts v. Seaboard Coast Line R.R.*, 409 U.S. 926, 929 (1972) (Douglas, J., dissenting from denial of certiorari). But Justice Douglas dissented alone. *See also Hartel v. Long Island R.R.*, 414 U.S. 980 (1973) (Douglas, J., joined by Brennan, J., dissenting from denial of certiorari).

304 The only available data are those collected by Dean Casper and Judge Posner for three-Term periods in the 1950's and 1970's. Their figures show that the average number of certiorari petitions filed each Term in FELA cases from state courts declined from 9 in 1956-1958 to 3 in 1974-1976. The average number of petitions from federal courts fell from 10 to 3. Casper & Posner, *The Caseload of the Supreme Court: 1975 and 1976 Terms*, 1977 SUP. CT. REV. 87, 94 (Table 7). These figures of course include employer as well as employee petitions.

305 *See, e.g.,* *Beimert v. Burlington Northern, Inc.*, 726 F.2d 412 (8th Cir.) (upholding jury instruction on causation), *cert. denied*, 104 S. Ct. 2659 (1984); *Conway v. Consolidated Rail Corp.*, 720 F.2d 221 (1st Cir. 1983) (overturning jury verdict for plaintiff), *cert. denied*, 104 S. Ct. 1911 (1984); *Biggs v. Terminal R.R. Ass'n of St. Louis*, 110 Ill. App. 3d 709, 442 N.E.2d 1353 (1982) (directing verdict for railroad), *cert. denied*, 462 U.S. 1133 (1983).

306 The one relevant precedent of the Warren Court was *Hoyt v. Florida*, 368 U.S. 57 (1961). In that case the Court upheld a state statute limiting jury service by women to those who registered with the clerk of court their desire to be placed on the jury list. However, the Court declined to consider the continuing validity of the proposition that a state may constitutionally limit jury duty to males. *See id.* at 60. Rather, in affirming the murder conviction of a woman who had been tried by an all-male jury, the Court found "no substantial evidence . . . that [the state had] arbitrarily undertaken to exclude women from jury service." *Id.* at 69.

307 404 U.S. 71 (1971).

308 Two of the cases involved claims of discrimination on the basis of both race and sex.

It is true that the proliferation of constitutional cases resulted in part from the Court's own decisions—decisions that signalled an end to the long-held view that nothing in the fourteenth amendment “preclude[s] the States from drawing a sharp line between the sexes.”<sup>309</sup> But the Court would hardly have received (or taken) so many opportunities to mark out the limits of the new approach if the egalitarian forces represented by the feminist movement had not seized upon those initial decisions to challenge laws in every realm of human endeavor from marriage to military service.<sup>310</sup> Indeed, although most of the early cases began in the lower courts as “*ad hoc* efforts rather than [as] part of concerted litigation,”<sup>311</sup> the course of argument in the Supreme Court very definitely was not *ad hoc*. On the contrary, the Justices were confronted with—and influenced by—a pattern of advocacy consciously designed not simply to win particular cases, but to effect changes in the legal system and ultimately in society.<sup>312</sup>

This endeavor was substantially aided by the operation of the obligatory jurisdiction. All but 3 of the Court's sex discrimination cases, including the first 9, were brought as appeals. As a result, the only way the Court could avoid granting plenary review was to affirm summarily.<sup>313</sup> But the Justices were not likely to find that an attractive option. If the lower court had accepted the constitutional claim, summary affirmance would disable all governments from enforcing similar laws;<sup>314</sup> if the constitutional claim had been rejected, summary affirmance would fly in the face of the *Zeitgeist*.<sup>315</sup> Thus

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Of course, many of the decisions arising out of sex discrimination claims resulted in rulings applicable to all Title VII suits.

309 *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948). *Goesaert* was disapproved in *Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976).

310 *See, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (military service); *Orr v. Orr*, 440 U.S. 268 (1979) (alimony obligations).

311 J. GREENBERG, *CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE* 371 (1977).

312 *See id.* at 371-72, 381. Professor (now Judge) Ruth Bader Ginsberg and the American Civil Liberties Union (“ACLU”) argued or submitted briefs on behalf of the constitutional claimant in virtually all of the sex discrimination cases of the early 1970's. The influence of the ACLU is particularly visible in the plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973). In that case the Court came within one vote of designating sex as a suspect classification, thus triggering “strict scrutiny” of gender-based discrimination. *See* note 140 *supra*.

313 As previously noted, dismissals for want of a substantial federal question in cases from state courts are tantamount to affirmances. *See* note 35 *supra* and accompanying text.

314 *See, e.g.*, *Geduldig v. Aiello*, 417 U.S. 484 (1974).

315 Admittedly, it is difficult to identify the point at which the *Zeitgeist* would have made it impossible for the Court to summarily affirm a decision rejecting a constitutional challenge to a statutory scheme that discriminated on the basis of sex. In this connection, it is worth noting that only challenges to statutes (as distinguished from attacks on particular executive decisions) can be brought to the Court on appeal. Thus the Court would have

it was to be expected that the Court would grant plenary consideration and confront the constitutional arguments on the merits.

The Court's willingness to address, and largely accept, the claims of the feminists contrasts sharply with its response to the homosexual rights movement. During the past decade, numerous cases have been brought to the Court raising issues of homosexual rights in a variety of contexts, including criminal law enforcement,<sup>316</sup> education,<sup>317</sup> and public employment.<sup>318</sup> The claimants have invoked the due process clause,<sup>319</sup> the equal protection clause,<sup>320</sup> and the first amendment.<sup>321</sup> There can be no doubt that the issues are recurring, and the results in the lower courts have not been uniform. But with two exceptions, and sometimes over strong dissent, the Court has consistently refused to grant plenary consideration to any of the cases.<sup>322</sup> One of the exceptions is simply inexplicable;<sup>323</sup> the other was a case in which a federal court of appeals had struck down a state statute, thus giving the state the opportunity to invoke the Court's obligatory jurisdiction.<sup>324</sup> As fate would have it, however, the obligation imposed by the United States Code was lifted by the fortuity of a Justice's illness.<sup>325</sup> The result was an affirmance by an equally divided Court that allowed the Justices to avoid once again the issuance of a plenary opinion in a homosexual

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been confronted, not with isolated acts of individual officials, but with discriminatory rules embodied in positive law.

316 *E.g.*, *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (Brennan, Marshall, and Stevens, JJ., dissenting); *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

317 *E.g.*, *Ratchford v. Gay Lib*, 434 U.S. 1080 (1978) (Rehnquist, J., joined by Blackmun, J., dissenting from denial of certiorari); *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984), *appeal dismissed and cert. denied*, 105 S. Ct. 1860 (1985).

318 *E.g.*, *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981) (en banc), *cert. denied*, 455 U.S. 909 (1982); *Gish v. Board of Educ.*, 145 N.J. Super. 96, 366 A.2d 1337 (1976), *cert. denied*, 434 U.S. 879 (1977) (Brennan and Marshall, JJ., dissenting); *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977) (Brennan and Marshall, JJ., dissenting).

319 *E.g.*, *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (Brennan, Marshall, and Stevens, JJ., dissenting); *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977) (Brennan and Marshall, JJ., dissenting).

320 *See Rowland v. Mad River Local School Dist.*, 105 S. Ct. 1373, 1376-79 (1985) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

321 *See notes 317-18 supra* and accompanying text.

322 *See, e.g.*, *Rowland v. Mad River Local School Dist.*, 105 S. Ct. 1373 (1985) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari); *Ratchford v. Gay Lib*, 434 U.S. 1080 (1978) (Rehnquist, J., joined by Blackmun, J., dissenting from denial of certiorari).

323 *See New York v. Uplinger*, 104 S. Ct. 2332, 2334 (1984) (Stevens, J., concurring).

324 *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir.), *prob. juris. noted*, 105 S. Ct. 76 (1984).

325 *See Greenhouse, Mysteries of Tie Votes and Calls for Reargument*, N.Y. Times, Apr. 3, 1985, at A20, col. 3.

rights case.<sup>326</sup>

Inability to invoke the obligatory jurisdiction may be one reason why the homosexuals have been unable to secure the place on the plenary docket that fell so easily to the women's movement, but it is not the only reason. The critical distinction, I believe, is that in the view of the Justices the nation is not yet ready for a definitive ruling on homosexual rights. For the Court to hold, for example, that an avowed homosexual has a constitutional right to teach in a public school would engender further disrespect for the Court among a substantial body of citizens who are already disillusioned by the Court's decisions on abortion, school prayer, and busing. On the other hand, for the Court to place its imprimatur on governmental actions that penalize individuals for their sexual preferences might well have the effect of encouraging further displays of intolerance.<sup>327</sup> If the Justices were confident of the proper resolution of the constitutional issues, concern about public reaction probably would not stand in the way,<sup>328</sup> but if they regard the questions as open and difficult, deferring a definitive resolution has two important advantages.<sup>329</sup> It gives the Justices a chance to observe what happens in those states and circuits where homosexual rights have been recognized to one degree or another, and it leaves open the possibility that at some later time the legal issues will be clearer or the attitudes of the public more relaxed.<sup>330</sup>

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326 Board of Educ. v. National Gay Task Force, 105 S. Ct. 1858 (1985) (mem.).

327 Cf. Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773, 1775 (1967) (noting that the Court has never decided whether the police may suppress a demonstration when unrest by a hostile crowd becomes uncontrollable; suggesting that if the Court were to hold that they may, this would encourage the police to underestimate their ability to maintain order, and they would move against the unpopular demonstrators rather than attempting to control the hostile audience). Nearly two decades later, the Court still has not resolved the hostile audience question. See *Smith v. Collin*, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting from denial of certiorari).

328 But see Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 95-96 (1979), quoting Memorandum of Mr. Justice Frankfurter on *Naim v. Naim* (read at Conference, Nov. 4, 1955). In his memorandum Justice Frankfurter suggested that the Court should avoid deciding the constitutionality of a Virginia miscegenation statute. He argued that "due consideration of important public consequences is relevant to the exercise of discretion" in deciding whether to address an issue, and that to strike down the Virginia statute would "very seriously . . . embarrass" the implementation of the school desegregation decisions. The Court ultimately acted in accordance with Justice Frankfurter's view. See *id.* at 62-66; see also S. WASBY, A. D'AMATO, & R. METRAILER, *DESEGREGATION FROM BROWN TO ALEXANDER 132-49, 266-76* (1977) (avoidance of racial issues in other contexts).

329 See G. GUNTHER, *supra* note 128, at 1661-62.

330 The Court may have been following a similar strategy in the 1970's when it repeatedly refused to consider the constitutionality of public school regulations limiting students' hair length, even after the issue had spawned conflicting decisions in eight circuits. See *Freeman v. Flake*, 405 U.S. 1032 (1972) (Douglas, J., dissenting from denial of certiorari) (citing cases). If so, the strategy worked. By the time the Court heard a long-hair case (in the context of public employment, see *Kelley v. Johnson*, 425 U.S. 238 (1976)), the contro-

The examples given thus far have been drawn largely from the realm of civil litigation. This focus is easily explained. The criminal law portion of the Court's work is overwhelmingly dominated by issues of procedure (broadly defined); unlike the lower courts, the Supreme Court very seldom addresses questions involving the definition of crimes and defenses.<sup>331</sup> And while it is predictable that the doubtful and recurring issues of substantive law that arise in criminal prosecutions would reflect changing currents of societal concern, one would probably not expect to find any such thread among the procedural rulings.

Two-thirds of the Court's criminal procedure work in the first four Terms of the 1980's conforms to this expectation. The decisions interpreting the protections accorded defendants by the fifth, sixth, eighth, and fourteenth amendments arose, with a handful of exceptions, out of prosecutions for murder, rape, burglary, and other timeless objects of criminal sanctions. One area of criminal procedure diverges sharply from this pattern, however, and it is the one that occupies by far the largest segment of the docket. In the four Terms of the 1980's the Court handed down 31 decisions interpreting the fourth amendment's ban on unreasonable searches and seizures. Two-thirds of the cases arose out of prosecutions for narcotics offenses—crimes that accounted for only 3 decisions in all other areas of constitutional-criminal procedure. The Court's continuing and intensive involvement with the fourth amendment<sup>332</sup> thus appears to be, in no small part, a product of the escalating war on drug trafficking being waged by the nation's law enforcement agencies.

There remains, however, the question why drug prosecutions are so prominent among the fourth amendment cases and almost invisible everywhere else in the Court's criminal procedure work. The answer, I think, lies in the nature of the crimes. The activities

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versy had died down, and what was once a gesture of defiance had lost its capacity to arouse passions. Cf. 1 COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, SECOND PHASE HEARINGS 332 (1974) (colloquy between Bernard G. Segal, Esq., and Judge Roger Robb):

MR. SEGAL: I would feel that it is the obligation of some court somewhere to see that citizens of the United States on as fundamental a matter as the right to have their hair the length that they want it, and all the more if their parents want the length, shall have that decided and not have it go on month after month and year after year without a decision. . . .

JUDGE ROBB: Maybe the conflict will evaporate when the fad changes. . . .

Nor should it be thought that long hair was not as controversial in its time as the issue of homosexual rights is today. See, e.g., *Breen v. Kahl*, 296 F. Supp. 702, 705 n.3 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

<sup>331</sup> In fact, as will be seen in Part IV, the Court almost never addresses issues of substantive criminal law except to resolve acknowledged intercourt conflicts. See note 363 *infra* and accompanying text.

<sup>332</sup> See *Plenary Docket II*, *supra* note 13, at 533-38.

that are the subject of drug prosecutions—the manufacture, possession, and distribution of controlled substances—are carried on behind closed doors, and in the ordinary course of events no one who knows about the activities will report them to the police. Thus the process of law enforcement does not begin with a known crime, with the efforts of the police being directed to discovering and apprehending the person who committed it; rather, the object is to determine whether a criminal offense has been (or is being) committed.<sup>333</sup> In the context of drug trafficking, that task will require the use of informers, undercover agents, surveillance, and other investigative techniques that are likely to raise issues under the fourth amendment.<sup>334</sup> But if those techniques are successful, guilt will usually be plain—and conviction assured—so that there will be no need for police or prosecutors to resort to practices that raise substantial questions under the fifth, sixth, and fourteenth amendments. In this light, it is not surprising that the litigation of search and seizure issues is so closely linked with the prosecution of drug crimes, and vice versa.

In other areas of federal governance that have been subjected to intensive scrutiny by the Supreme Court over a period of years, the Court has generally succeeded in bringing greater clarity and certainty to the law, thus reducing the need for additional authoritative decisions. That has not been the experience with the fourth amendment. On the contrary, the Court continues to issue a seemingly endless stream of opinions that draw ever-finer distinctions in assessing the lawfulness of police behavior and the admissibility of evidence.<sup>335</sup> To be sure, the dominant trend in recent years has been to give greater leeway to police and prosecutors,<sup>336</sup> but there have been enough decisions upholding defendants' claims<sup>337</sup> to assure further controversy and the development of new issues that will require the Court's attention.<sup>338</sup>

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333 See A. HELLMAN, LAWS AGAINST MARIJUANA: THE PRICE WE PAY 58-59 (1975). Most of what is said in that volume about marijuana law enforcement applies equally to the investigation of other narcotics crimes.

334 See *id.* at 162.

335 Compare *United States v. Sharpe*, 105 S. Ct. 1568 (1985), with *United States v. Place*, 462 U.S. 696 (1983); compare *United States v. Ross*, 456 U.S. 798 (1982), with *United States v. Chadwick*, 433 U.S. 1 (1977).

336 *E.g.*, *United States v. Leon*, 104 S. Ct. 3405 (1984); *Oliver v. United States*, 104 S. Ct. 1735 (1984); *Illinois v. Gates*, 462 U.S. 213 (1983).

337 *E.g.*, *Hayes v. Florida*, 105 S. Ct. 1643 (1985); *Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984); *Florida v. Royer*, 460 U.S. 491 (1983).

338 For example, in *United States v. Chadwick*, 433 U.S. 1 (1977), the Court severely restricted the authority of police to conduct warrantless searches of luggage and other closed containers, while *United States v. Ross*, 456 U.S. 798 (1982), gave wide latitude for warrantless searches of vehicles. Inevitably, the Court was confronted with a case (arising out of a drug prosecution) in which contraband was seized in a warrantless search of a suitcase located in the trunk of a vehicle. The state court held that the case involved a



To some extent, the disarray results from the deep divisions within the Court itself and the divergent responses engendered by particular facts as the Court shapes the legal rules on a case-by-case basis in the manner of the common law.<sup>339</sup> But the shifting contours and emphases can also be attributed to the fact that the predominant context for the decisions is the investigation of narcotics crimes. This is because the investigative techniques used in that pursuit are the very techniques that are most likely to intrude upon the privacy and security of the innocent as well as the guilty.<sup>340</sup> And although the Court might not go as far as it should in protecting those values, it does not ignore them. Thus, as long as the war on narcotics remains a high priority among law enforcement agencies, and as long as the exclusionary rule is retained in some form,<sup>341</sup> the Court will experience no release from the sordid world of drug trafficking and the "not very nice" defendants<sup>342</sup> who invoke the constitutional guarantee that protects the privacy and security of everyone.

#### IV. Reasons for Granting Review in Particular Cases

In the preceding pages I have identified some of the forces that play a role in determining the kinds of issues that will occupy a prominent position on the plenary docket in any given period. Analyzing the reasons for the grant of review in particular cases is a far more difficult task, involving a much greater element of speculation

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"container search" rather than a "vehicle search," and suppressed the evidence. The eight participating Supreme Court Justices divided equally and thus failed to provide an authoritative resolution of the issue. *Oklahoma v. Castleberry*, 105 S. Ct. 1859 (1985), *aff'g mem.* 678 P.2d 720 (Okla. Crim. App. 1984). The vehicle search precedents also stand in sharp contrast to decisions according a high degree of protection against warrantless searches of "the home." *E.g.*, *Welsh v. Wisconsin*, 104 S. Ct. 2091, 2097 (1984). Again, the inevitable happened: prosecutors sought to introduce evidence seized in a warrantless search of a motor home. The state court held that the case was controlled by the "home" precedents rather than the "vehicle" precedents, but the Supreme Court disagreed. *People v. Carney*, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983), *rev'd*, 105 S. Ct. 2066 (1985).

<sup>339</sup> *See, e.g.*, *Segura v. United States*, 104 S. Ct. 3380 (1984) (5-4 decision; five Justices agreed that the challenged evidence was admissible because derived from a source independent of an earlier search; only two Justices upheld the validity of an earlier seizure); *Texas v. Brown*, 460 U.S. 730 (1983) (unanimous reversal; no majority opinion); *Florida v. Royer*, 460 U.S. 491 (1983) (5-4 decision; no majority opinion); *United States v. Sharpe*, 457 U.S. 1127, 1128 (1982) (Stevens, J., dissenting) (Court remanded case for reconsideration in light of *United States v. Ross*, 456 U.S. 798 (1982); author of *Ross* insisted that that opinion "sheds no light on the proper disposition of this case"). *Compare also* *United States v. Knotts*, 460 U.S. 276 (1983) (unanimous reversal; four Justices concurred in result), *with* *United States v. Karo*, 104 S. Ct. 3296 (1984) (6-3 decision) (addressing two questions left unresolved in *Knotts*).

<sup>340</sup> *See* A. HELLMAN, *supra* note 333, at 162-63; *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3314-15 (1985) (Brennan, J., dissenting).

<sup>341</sup> *See* *United States v. Leon*, 104 S. Ct. 3405 (1984) (modifying exclusionary rule).

<sup>342</sup> *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

and subjective evaluation. To be sure, some Court opinions do provide an explanation for the decision to grant plenary consideration. But those cases are a minority.<sup>343</sup> And the brief statements can hardly reflect the different and overlapping reasons that may have prompted individual Justices to vote to hear a case. For example, Justice White may have been swayed by the presence of an intercourt conflict;<sup>344</sup> Justice Stevens may have been unwilling to summarily affirm a case within the obligatory jurisdiction;<sup>345</sup> and Justice Brennan may have been concerned primarily with correcting an erroneous denial of a federal right.<sup>346</sup>

The analysis is made still more problematic by the fact that it is *post hoc*. Almost any Supreme Court decision will have some precedential value (and thus will be cited and relied upon) simply because it is a Supreme Court decision. Thus, from a retrospective standpoint, the criterion of "general importance"<sup>347</sup> is easily satisfied. But that kind of justification can be misleading when the object is to determine how a case looked to the Justices at the time the application for review and responsive papers were filed.<sup>348</sup>

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343 In the four Terms of the 1980's, fewer than half of the plenary decisions gave any explanation at all for the grant of review, and in many of these the Court merely set forth the question it had agreed to decide. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1357-58 (1984) ("We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a creche, or Nativity scene, in its annual Christmas display."). In some of the other cases the Court simply said that the question was "important," without further elaboration. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1037 (1983).

344 Over the last decade, Justice White has often voiced concern about the Court's failure to resolve intercourt conflicts. See *Intercircuit Tribunal*, *supra* note 13, at 396 (citing cases). And Justice White is the only member of the Court who has filed a substantial number of opinions dissenting from the denial of certiorari on conflict grounds without arguing that the judgment below was in error. See *Discretionary Review*, *supra* note 13, at 867 n.369.

345 Justice Stevens takes a very narrow view of the Court's certiorari function and never notes his dissent from the denial of discretionary review. See *Watt v. Alaska*, 451 U.S. 259, 273-76 (1981) (Stevens, J., concurring); *Singleton v. Commissioner*, 439 U.S. 940, 942 (1978) (opinion of Stevens, J., respecting the denial of certiorari); Stevens, *supra* note 254, at 179-80. (Justice Stevens did vote to grant certiorari in one case in which the Court summarily vacated the judgment below. *Rodriguez v. Harris*, 455 U.S. 997 (1982).) However, in the four Terms of the 1980's Justice Stevens dissented from the denial of review in more than 30 cases that came before the Court on appeal.

346 See *Sweat v. Arkansas*, 105 S. Ct. 933, 938 (1985) (Brennan, J., dissenting from denial of certiorari). Cases presenting all three of these features are of course rare, but they do occur. See, e.g., *Southland Corp. v. Keating*, 104 S. Ct. 852 (1984); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

347 See note 50 *supra* and accompanying text.

348 A good illustration of the problem is *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (*Lyons II*). The city, as petitioner, argued that the district court had overstepped the boundaries of federal judicial power in issuing an injunction against the use of "chokeholds" by city police. The petition did not allege an intercourt conflict; did not claim that the issue was a recurring one; and did not even assert that the lower court's decision would have any impact outside the particular case. Amicus briefs in support of the

With these limitations taken into account, it is possible to identify four broad categories of reasons for the grant of plenary review. Three of them are relatively well defined (which is not to say that the classification of particular cases is always easy): intercourt conflicts, compelling interests of the federal government, and doubtful recurring issues. The fourth category embraces all other reasons

petition were filed on behalf of other cities and law enforcement officials, but the amici focused primarily on the anticipated consequences of the chokehold ban. *See, e.g.*, Brief of the Los Angeles Police Protection League at 5-6 (“[J]udicial prohibition of the use of neck control holds by officers except in life-threatening situations will have a severe impact on public and police officer safety.”). To the extent that the amici addressed the legal significance of the case, they did so by emphasizing what would happen if other courts were to follow the Ninth Circuit’s holdings on standing and federalism. *See, e.g.*, Brief of the National Institute of Municipal Law Officers as Amicus Curiae at 7 (arguing that if the Supreme Court allowed the Ninth Circuit decision to stand, this would give a “signal [to all federal courts that] would result in a multitude of lawsuits . . . challenging all kinds of police procedures and, therefore, would force municipalities to constantly defend the internal practices of their law enforcement agencies.”). But the judgment brought for review was a *per curiam* affirmance of a preliminary injunction, with the court of appeals saying only that it found no abuse of discretion. *Lyons v. City of Los Angeles*, 656 F.2d 417, 418 (9th Cir. 1981). Thus it is quite possible that on a different record a different result would have been reached, even by the same court.

Given what has been said thus far, and taking into account the further fact that the Ninth Circuit’s judgment was reversed by the Supreme Court, one might readily conclude that review was granted, not because the case presented a question of “general importance,” but for the purpose of correcting an erroneous judgment. *See also* *City of Los Angeles v. Lyons*, 449 U.S. 934, 937 (1980) (*Lyons I*) (White, J., joined by Powell and Rehnquist, JJ., dissenting from denial of certiorari in an earlier phase of the case raising essentially the same issues) (“Of course, we cannot give plenary consideration to every misapplication of constitutional requirements, but the decision of the Court of Appeals appears so at odds with our precedents that I dissent from denial of certiorari.”). Yet the decision that emerged has proved to be an important precedent on the authority of federal courts to enjoin governmental practices that are alleged to violate constitutional rights, but not in ways that will foreseeably affect particular individuals in the future. *See, e.g.*, *Palmer v. City of Chicago*, 755 F.2d 560, 569-72 (7th Cir. 1985); *Curtis v. City of New Haven*, 726 F.2d 65 (2d Cir. 1984); *Brown v. Edwards*, 721 F.2d 1442, 1446-47 (5th Cir. 1984); *Buie v. Jones*, 717 F.2d 925, 927-29 (4th Cir. 1983).

But that is not the end of the inquiry. The Court held in *Lyons II* (as the dissenters in *Lyons I* had argued) that reversal was compelled by existing Supreme Court precedent, particularly *O’Shea v. Littleton*, 414 U.S. 488 (1974), and *Rizzo v. Goode*, 423 U.S. 362 (1976). If that assessment is correct, it suggests that the later lower court decisions that cited and relied on *Lyons II* would have (or in any event should have) reached the same results even if the Court had denied review in that case as it did in *Lyons I*. Certainly, as I have already pointed out, there was nothing in the certiorari petition or the amicus briefs to indicate that the Ninth Circuit’s decision was anything but an isolated deviation from the course marked out by *O’Shea*, *Rizzo*, and other existing precedents. From that perspective, it can be argued that the frequent invocation of *Lyons II* by the lower courts gives a misleading impression of the “general importance” of the decision.

For the dissenters in the Supreme Court, however, the ruling in *Lyons II* represented a significant extension of existing precedents. *See Lyons II*, 461 U.S. at 123-24 (Marshall, J., dissenting). Some commentators agreed. *See, e.g.*, *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 219 (1983). Thus, ironic though it may seem, the grant of review in *Lyons II* can be most easily reconciled with the orthodox view of the Court’s function if one accepts the interpretation of the decision offered by the dissenters—Justices who, in all likelihood, voted against hearing the case.

for review. By definition, it is an unruly category; cases are consigned to it only when it appears that none of the other three features was present at the time review was granted.

In the pages that follow, I refine and illustrate these categories, with the aim of illuminating the role played by each in the selection process. The analysis is based primarily on a study of the Court's work in the first four Terms of the 1980's. Of course, when it is possible to draw conclusions about the Court's practices over a longer span of time, I do so. However, it is worth emphasizing that for the most part the patterns cannot be described with numerical precision. Rather, each of the categories and subcategories is defined initially by a core of cases in which the probable reason for review can be surmised with a high degree of confidence. Other cases are classified on the basis of whatever evidence is available, including the opinions in the Supreme Court, the opinions of lower courts, the submissions of the parties and amici prior to the grant of review, and scholarly commentary. I make the best judgments I can, but I recognize that someone else looking at the same indicia might well read them differently.

Two other preliminary observations are in order. First, as the nature of the categories may suggest, I tend to begin my examination of a case by looking for reasons for review that comport with the orthodox concept of the Supreme Court's functions. I recognize that the orthodox view does not fully reflect what the Court does in fact, or even (more debatably) what it ought to be doing.<sup>349</sup> Nevertheless, it is a useful starting point. In particular, when a petitioner's claim of intercircuit conflict or general importance is supported by judicial opinions or scholarly commentary, I generally accept the characterization without investigating much further. On the other hand, it would be naive to take such assertions at face value when they fail to gain support outside the adversary process, and in that situation I look for other explanations.

Second, consistency with the orthodox view is probably easier to find in the selection of cases involving matters of general federal law and the jurisdiction and procedure of federal courts than in the segments of the docket devoted to civil rights and federalism. The probable explanation for the difference is that the Burger Court, even more than its predecessors, attaches great importance to maintaining equilibrium between the competing values of state autonomy and national supremacy. This in turn means that the Court is willing to hear some cases that implicate those values but are otherwise lacking in significance "beyond the particular facts and

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349 See notes 50-58 *supra* and accompanying text.

parties involved.”<sup>350</sup> However, further development of this point is best deferred until we have examined the results of the case selection process from the orthodox perspective.<sup>351</sup>

### A. *Intercircuit Conflicts*

Among the orthodox justifications for Supreme Court review, the most firmly established is the intercircuit conflict.<sup>352</sup> For present purposes, a conflict exists when two or more appellate courts have attached different legal consequences to transactions that are identical in all relevant respects.<sup>353</sup> Failure to resolve a conflict can have three undesirable consequences. First, efficient planning and negotiation are frustrated when lawyers, in formulating advice to their clients, must take account of multiple rather than single contingencies at key points in their analysis.<sup>354</sup> Second, the existence of a conflict encourages people to litigate rather than settle their disputes; when each side can point to a favorable precedent that is squarely on point (albeit from a different jurisdiction), both sides are likely to exaggerate the probability of ultimate vindication and thus to resist compromise.<sup>355</sup> Finally, the simultaneous proclama-

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350 See Vinson, *Work of the Federal Courts*, 69 S. Ct. v, vi (1949).

351 See section D *infra*.

352 For example, conflicts are listed first in the Court's own description of "the character of reasons that will be considered" in the exercise of discretionary review. See SUP. CT. R. 17.1.

353 There may appear to be an element of question-begging in this formulation, inasmuch as the very question that divides the parties may well be that of identifying the considerations made "relevant" by existing precedent. For the most part, I am content to accept the characterizations stated or implied by the courts that address the issues. The reasons for this approach are discussed in *Intercircuit Tribunal*, *supra* note 13, at 393-94 n.88. See also note 378 *infra* and accompanying text.

354 To some degree, of course, this difficulty exists whenever the analysis turns on a legal issue that is unresolved, irrespective of whether it has given rise to an actual conflict; in fact, the uncertainty may be present even if no appellate court has considered the point. See Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. ILL. L.F. 615, 630 ("[I]t takes at least two decisions to make a conflict, and the law of the country remains uncertain until the conflict is finally made and then eventually resolved."). Nevertheless, I think there is a difference between the legal issue that is open because there are no controlling decisions, so that the lawyer must reason by analogy or extrapolation from precedents on related issues, and the issue that has been decided differently by two or more appellate courts. The former is inevitable in a common law system, see *Intercircuit Tribunal*, *supra* note 13, at 420; the latter bespeaks a malfunctioning of the system. Moreover, from the standpoint of a lawyer's confidence in his ability to predict what the courts will do in fact, the existence of squarely conflicting appellate decisions will generally be more of an impediment than the total absence of cases on point. Cf. *State Farm Fire & Cas. Co. v. Century Home Components, Inc.*, 275 Or. 97, 108-11, 550 P.2d 1185, 1190-92 (1976) (discussing the analogous problem of nonmutual collateral estoppel when the outstanding determinations are actually inconsistent on the matter sought to be precluded).

355 See Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 271 (1976). The actual consequences for any particular dispute will of course depend on the amount at stake, the parties' aversion to risk, the anticipated costs of litigation, and other factors. See D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 15-18 (1983)

tion of inconsistent interpretations of federal law by appellate courts in different parts of the country tends to cast doubt on the rationality and evenhandedness of the legal system.<sup>356</sup>

In this light, it is not surprising that the largest segment of the plenary docket is devoted to the resolution of intercourt conflicts.<sup>357</sup> Specifically, conflicts were present in more than one-third of the 593 cases that received plenary consideration in the first four Terms of the 1980's. Included in this group are all cases in which the Court explicitly stated that review was granted because of a conflict;<sup>358</sup> cases in which the Court's opinion pointed clearly to the existence of a conflict but did not specify it as the reason for granting review;<sup>359</sup> and cases in which the conflict was acknowledged by one or more of the lower courts.<sup>360</sup> Also included are a few cases in which the petitioner's claim of conflict was persuasive notwithstanding the absence of any of the preceding indicia.<sup>361</sup>

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(arguing that greater legal uncertainty does not increase the likelihood of litigation because uncertainty will "accentuate the parties' aversion to risk" and increase the costs of trying the case). It is not clear how Professor D'Amato's analysis would apply to a situation where there are no cases squarely on point from the particular jurisdiction, but courts in other jurisdictions have resolved the issue in inconsistent ways.

356 See Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 374 (1975) (report of Professor Summers) [hereinafter cited as *Hruska Commission Report*].

357 Most of the cases involve conflicts between courts of appeals; a few involve conflicts between state courts, or between state and federal courts, on issues of federal law. In referring to conflicts, I shall use the terms "intercircuit" and "intercourt" interchangeably.

358 In some of the cases, a reading of the full opinion suggests that the grant of review may have been prompted more by concern about an erroneous ruling in the court below than by the presence of an unresolved conflict. See notes 365-74 *infra* and accompanying text. Nevertheless, rather than speculating about other considerations that may have influenced the Court, I have counted as conflict cases all decisions that cite the existence of a conflict as a reason for review.

359 For example, the Court sometimes refers to a conflict in the lower courts without explicitly saying that the conflict led to the grant of review. See, e.g., *Flanagan v. United States*, 104 S. Ct. 1051, 1053-54 n.2 (1984); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.1 (1981). In *Mitchell* the conflict was called to the Court's attention in a memorandum filed shortly before the grant of review. Supplemental Brief in Support of Petition at 1.

360 See, e.g., *Patsy v. Florida Int'l Univ.*, 634 F.2d 900, 908-09 (5th Cir. 1981) (en banc), *rev'd*, 457 U.S. 496 (1982); *Swank v. United States*, 602 F.2d 348, 350 (Ct. Cl. 1981), *aff'd*, 451 U.S. 571 (1981). Sometimes the acknowledgement of conflict came from a court other than the one whose decision was reviewed. Compare, e.g., *Cose v. Cose*, 592 P.2d 1230, 1231 (Alaska 1979), *cert. denied*, 453 U.S. 922 (1981), with *McCarty v. McCarty*, 453 U.S. 210 (1981) (reversing unreported California decision).

361 See, e.g., *Oregon v. Kennedy*, 456 U.S. 667 (1982). The conflict here was between cases like the decision below, which held that the double jeopardy clause bars reprosecution after a mistrial caused by prosecutorial "overreaching," see *id.* at 670 (quoting lower court), and decisions holding that the prohibition applies only if the prosecutor intentionally sought to provoke the defendant to move for a mistrial, e.g., *United States v. Roberts*, 640 F.2d 225 (9th Cir. 1981), *cert. denied*, 452 U.S. 942 (1981). The conflict is described at length in the amicus brief filed by the Solicitor General after the grant of review, see Brief for the United States as Amicus Curiae at 13-15, but I think it would have emerged with

In several important areas of statutory law, the Court almost never grants review except to resolve a conflict. For example, the Court handed down 20 decisions on federal tax liability in the decade 1974-1983. All but one resolved intercircuit conflicts.<sup>362</sup> During that same period the Court heard 28 cases involving the interpretation of substantive federal criminal statutes. All but 2 or 3 resolved intercircuit conflicts.<sup>363</sup> The Court has given plenary consideration to only 10 bankruptcy cases in the last ten years. Intercircuit conflicts were present in all but one of those cases.<sup>364</sup> Other areas dominated by conflict resolution include tax procedure, admiralty and maritime law, Federal Tort Claims Act litigation, and private civil rights litigation.

Once we move away from these areas, however, the role of conflicts in the case selection process becomes considerably less well defined. At least three kinds of problems stand in the way of confident characterization. First, conflict resolution cannot be entirely separated from review for error. If the Justices hear a case because they agree with the petitioner that the decision below is contrary to sound principles, the odds are good that some court elsewhere will have decided a similar case differently. There is a conflict, and to one degree or another it is genuine, but it is not the reason for the grant of review.<sup>365</sup>

Even when the Justices declare explicitly that they heard a case to resolve a conflict, other indicia may cast doubt on the complete-

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reasonable clarity from examination of the cases cited in the certiorari petition. In any event, the number of cases in which the identification of the conflict is unsupported by court opinions is very small.

362 The exception was *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979). See *Plenary Docket II*, *supra* note 13, at 617-18. The Court has followed this approach for many years. See *Statutory Law*, *supra* note 13, at 21-22; Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1163 (1944).

363 In one case the government as respondent supported the application for review so that the Court could resolve an incipient conflict. See Memorandum for the United States at 10, *Dunn v. United States*, 442 U.S. 100 (1979). However, the Court ultimately decided the case on other grounds. See 442 U.S. at 105. Another case may have presented a conflict, but the conflict probably was not the reason for the grant of review. See *United States v. Bailey*, 444 U.S. 394 (1980), discussed in *Plenary Docket II*, *supra* note 13, at 620-21 n.449. Only in *Busic v. United States*, 446 U.S. 398 (1980), was it clear that no conflict was present. See Brief for the United States at 11 (supporting defendant's petition for review so that Court could "clarify the options available to prosecutors and sentencing courts in light of [an earlier decision]").

364 The exception was *United States v. Moore*, 423 U.S. 77 (1975).

365 See, e.g., *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 & n.4 (1981) (noting in text that "the decision below is all but foreclosed by our prior case law"; adding in footnote that "[t]he decision below also conflicts with those of other Courts of Appeals . . . ."); *United States v. Morrison*, 449 U.S. 361, 363, 367 n.4 (1981) (in sixth amendment case, unanimously reversing Third Circuit's "extraordinary" remedy of dismissal of indictment; noting that Supreme Court's position "finds substantial support in the Courts of Appeals").

ness of this explanation. For example, in *United States v. Rylander*,<sup>366</sup> the Court stated that review was granted “because of a conflict among the various Courts of Appeals.”<sup>367</sup> But the Court never identified the supposedly conflicting cases. The certiorari petition filed by the United States did so,<sup>368</sup> but the respondent controverted the assertions of conflict,<sup>369</sup> and indeed one of the decisions cited repeatedly by the government as being in conflict with the decision below came from a circuit which, more recently, had rejected the government’s position.<sup>370</sup> In view of the fact that the Court reversed the lower court’s judgment with only one dissent, it is plausible to conclude that the Justices would have taken the case even if there had been no other decisions on point.<sup>371</sup>

Sometimes the signals are even clearer. In *Bernal v. Fainter*,<sup>372</sup> the Court granted certiorari to review a Fifth Circuit decision upholding a Texas statute that required notaries public to be United States citizens. The Court did not expressly give a reason for hearing the case, but it did note that the Fifth Circuit’s decision “conflict[ed] with the holding of every other State and federal court decision that has considered the constitutionality of statutes barring aliens from eligibility to become notaries public.”<sup>373</sup> By a vote of 8 to 1 the Court then reversed the Fifth Circuit’s judgment. Without a doubt, the opinion tells us that the Fifth Circuit decision created what the Court regarded as a genuine conflict; but with equal clarity the opinion informs us that the conflict was not the reason the Court granted review.<sup>374</sup>

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366 460 U.S. 752 (1983).

367 *Id.* at 753.

368 Petition for Certiorari at 11, 13, 16-17.

369 Brief in Opposition at 4-9.

370 The government insisted that the decision below was in conflict with *United States v. Hankins*, 565 F.2d 1344 (5th Cir.), *aff’d on rehearing with additional reasons stated*, 581 F.2d 431 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979). See Petition for Certiorari at 13-17. However, the government also asked the Court to review *United States v. Meeks*, 642 F.2d 733 (5th Cir. 1981), a case that in the government’s view embodied the same legal error as *Rylander*. See Petition for Certiorari at 9, *Rylander v. United States*, 460 U.S. 752 (1983). But in *Meeks* the Fifth Circuit, albeit by a divided vote, held that *Hankins* was distinguishable on three separate grounds. *Meeks*, 642 F.2d at 735. The petition in *Meeks* was held to await the decision in *Rylander*; the case was then remanded for reconsideration. *United States v. Meeks*, 461 U.S. 912 (1983). Ultimately the Fifth Circuit accepted the government’s position. *United States v. Meeks*, 719 F.2d 809 (5th Cir. 1983).

371 See also *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 (1983) (Court stated that it granted review because of an intercircuit conflict and the importance of the question, but did not specify the conflicting cases; Court then reversed the judgment below).

372 104 S. Ct. 2312 (1984).

373 *Id.* at 2316 n.4.

374 See also *United States v. Rodgers*, 461 U.S. 677, 690-91 (1983) (stating that Court granted review to resolve an intercircuit conflict on an issue of statutory interpretation; adopting “the prevailing view” and holding that the “restrictive reading” accepted by the court below “flies in the face of the plain meaning of the statute”); *Potomac Elec. Power*



The uneasy relationship between error correction and conflict resolution is not the only obstacle to identifying the cases that are reviewed because of a conflict. A second difficulty is that it is not always clear whether a conflict exists.<sup>375</sup> Half a century ago, Felix Frankfurter and Henry Hart posed the question, "What constitutes a 'conflict'?"<sup>376</sup> The answer, they recognized, "imports into the matter the whole of the lawyer's traditional technique of analysis and distinguishing of cases . . . . [M]any questions of degree inevitably remain."<sup>377</sup> Thus, two decisions may conflict with one another if the issue is defined in broad terms, but not if it is defined narrowly.<sup>378</sup> And as the arguably relevant distinctions grow in

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Co. v. Director, OWCP, 449 U.S. 268, 278-79 (1980) (noting that the decision below was "apparently the first and only federal court decision" to accept a particular construction of the statute; reversing the judgment by a vote of 8 to 1).

<sup>375</sup> Both difficulties are illustrated by *Solem v. Helm*, 463 U.S. 277 (1983). The petitioner, the attorney general of South Dakota, asked the Court to review and reverse an Eighth Circuit decision holding that a life sentence without the possibility of parole for a seventh nonviolent felony constituted cruel and unusual punishment. The Court agreed to hear the case; however, after plenary consideration the judgment below was affirmed by a vote of 5 to 4.

Among other arguments for review, the petition asserted that the Eighth Circuit's ruling conflicted with decisions of the Fifth and Ninth Circuits. In fact, the Eighth Circuit had been ambivalent about the possibility of conflict, stating:

To the extent that the crimes in [the Fifth and Ninth Circuit cases] differ from the relatively minor property offenses at issue here, we believe those cases may be distinguished. To the extent that those cases rejected a disproportionality analysis in reviewing a life sentence without parole, however, we decline to follow them.

*Helm v. Solem*, 684 F.2d 582, 587 n.14 (8th Cir. 1982). Yet it is highly unlikely that the Court's deliberations at the certiorari stage turned on whether the Eighth Circuit was persuasive in distinguishing the allegedly conflicting cases. Rather, I surmise that review was granted because the four Justices who ultimately dissented from the decision on the merits thought that the ruling below could not "rationally be reconciled with" the holding in *Rummel v. Estelle*, 445 U.S. 263 (1980). See *Solem v. Helm*, 463 U.S. 277, 304 (1983) (Burger, C.J., joined by White, Rehnquist, and O'Connor, JJ., dissenting). The dissenters may have been joined by Justice Blackmun, who formed part of the majority in *Rummel*, but now joined the new majority in *Solem*. Indeed, perhaps Justice Blackmun voted to grant review for the purpose of reconsidering the earlier case.

Taking all of these circumstances into account, I have not classified *Solem* as a conflict case. (The Court's opinion—by the Justice who wrote the dissent in *Rummel*—did not give a reason for granting review.)

<sup>376</sup> Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 268 (1934).

<sup>377</sup> *Id.* at 268-69.

<sup>378</sup> For example, in *Farmar v. United States*, 689 F.2d 1017, 1025 (Ct. Cl. 1982), a case involving oil depletion allowances, the Court of Claims acknowledged that its "overall views . . . var[ie]d from those expressed" in a Seventh Circuit decision, but argued that "the ultimate holdings . . . may not necessarily be inconsistent" because the Seventh Circuit dealt with advance royalties, while the Court of Claims case concerned lease bonuses. The Supreme Court granted review in both cases. It affirmed the Seventh Circuit and reversed the Court of Claims, making no distinctions between advance royalties and lease bonuses. *Commissioner v. Engle*, 104 S. Ct. 597 (1984). Thus, although the Court did not explicitly give a reason for review, it is fair to conclude that the Court agreed with the petitioners that the Court of Claims had created an intercourt conflict, and that certiorari was granted for that reason. Similarly, in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the

number or persuasiveness, the “conflict” shades into the “side-swipe”—a difference in approach or emphasis that would not necessarily lead to inconsistent results on identical facts.<sup>379</sup>

Beyond this, the directness of a conflict is only one element—and not necessarily the most important—of what makes a case certworthy. After all, the Supreme Court does not take conflict cases out of an esthetic desire for symmetry in the law or to satisfy an academic interest in finding a principle that will reconcile seemingly inconsistent holdings. Rather, the Court takes conflict cases because a conflict generally—but not invariably—bespeaks a doubtful and recurring legal issue which, if not resolved, will create unnecessary uncertainty for lawyers, lower courts, and those who must govern their activities in accordance with federal law.<sup>380</sup> Thus, if an issue has generated a large body of appellate decisions manifesting a variety of approaches, the fact that the seemingly inconsistent rulings could be reconciled through “the lawyer’s traditional technique of analysis” becomes largely irrelevant. On the other hand, a direct and acknowledged conflict may not warrant review if the inconsistent decisions are not likely to cause uncertainty at the level of primary activity or in the litigation process.<sup>381</sup>

Not surprisingly, cases fitting the latter description seldom reach the plenary docket,<sup>382</sup> while the former pattern is not uncommon. For example, in *Director, OWCP v. Perini North River Associates*,<sup>383</sup> the Court granted review “to consider whether a marine construction worker, who was injured while performing his job upon actual navigable waters, and who would have been covered by

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Solicitor General, opposing the grant of review, insisted that “the ‘conflicts’ alleged by [the] petitioner [were] nothing more than differences in results dictated by the differences in the facts.” Brief for the NLRB in Opposition at 13. But the Court stated that the decision below “appear[ed] to be at odds with decisions of other Courts of Appeals,” 452 U.S. at 672, and that review was granted “[b]ecause of the importance of the issue and the continuing disagreement between and among the [Labor] Board and the Courts of Appeals,” *id.* at 674.

379 See *Intercircuit Tribunal*, *supra* note 13, at 406-13.

380 See *Statutory Law*, *supra* note 13, at 22, 41-44.

381 See Harlan, *supra* note 55, at 552.

382 Three cases that do appear to fit the profile are *Tuten v. United States*, 460 U.S. 660 (1983) (government, as respondent, conceded conflict but argued that the decision rejecting its position was “so clearly aberrational” that the issue did not require Supreme Court resolution, Memorandum for the United States in Opposition at 3; Court granted review anyway and affirmed unanimously); *Standefer v. United States*, 447 U.S. 10 (1980) (government, as respondent, conceded conflict but urged Court to deny review on ground that the decision below was correct and the contrary holdings were “isolated deviations,” Brief for the United States in Opposition at 9; Court granted certiorari anyway and affirmed unanimously); *Butner v. United States*, 440 U.S. 48 (1979) (government, as respondent, conceded conflict but urged Court to deny review because petitioner would lose under either of the competing rules, Brief for the United States in Opposition at 6; Court granted certiorari anyway and affirmed unanimously).

383 459 U.S. 297 (1983).

the [Longshoremen's and Harbor Workers' Compensation] Act before 1972, is 'engaged in maritime employment' and thus covered by the amended Act."<sup>384</sup> The court below, the Second Circuit, had rejected coverage.<sup>385</sup> The Supreme Court noted that the Ninth Circuit was in agreement with the Second, while the Fifth Circuit had taken a contrary position.<sup>386</sup> But the Fifth Circuit decision cited by the Court was an en banc opinion handed down after review was granted in *Perini*. At the time the Court considered the petition in *Perini*, the governing law in the Fifth Circuit was stated by the panel opinion, which argued that the employment activities of the worker in the case before it were "distinguishabl[e]" from those of the workers in the Second and Ninth Circuit cases.<sup>387</sup>

In hindsight, with the benefit of an en banc decision that frankly rejected the views of the Second and Ninth Circuits rather than focusing on factual distinctions, it is easy to say that the conflict was genuine. Yet even if the Fifth Circuit had adhered to its original approach, the Supreme Court would still have been justified in granting review in *Perini*. In one circuit after another, marine employers and their insurers were pressing the argument that an employee injured while working on navigable waters is not covered by the LHWCA unless he can show that his employment possesses a "significant relationship to navigation or to commerce." The courts responding to this contention were not speaking with one voice. A definitive answer from the Supreme Court would clarify the rights of employees and the obligations of insurers whether or not a square conflict existed.<sup>388</sup>

### B. *Compelling Interests of the Federal Government*

In the second group of plenary decisions, about one-third the size of the first, the Court granted review in response to a compelling interest of the federal government. Most prominent are the cases in which the lower court had held a federal statute unconstitutional. In the four Terms of the 1980's there were 33 cases of this

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384 *Id.* at 299.

385 *Churchill v. Perini N. River Assocs.*, 652 F.2d 255 (2d Cir. 1981).

386 *Perini*, 459 U.S. at 302 n.8.

387 *Boudreaux v. American Workover, Inc.*, 664 F.2d 463, 468 (5th Cir. 1981), *on rehearing*, 680 F.2d 1034 (5th Cir. 1982) (en banc), *cert. denied*, 459 U.S. 1170 (1983).

388 For other illustrations of this pattern, see *Eastex, Inc. v. NLRB*, 437 U.S. 556, 562, 567-68 n.17 (1978) (initially stating that Court granted review "[b]ecause of apparent differences among the Courts of Appeals"; later suggesting that all but one of the allegedly conflicting cases could be reconciled on their facts); cases cited in note 378 *supra*. See also *Feldman v. Gardner*, 661 F.2d 1295, 1319 n.200 (D.C. Cir. 1981) (distinguishing decisions of Tenth and Ninth Circuits), *rev'd sub nom.* *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

kind.<sup>389</sup> All but 3 were brought to the Court by appeal,<sup>390</sup> and in all but 3 the United States government was the party seeking review.<sup>391</sup> Of equal importance, there were no cases during this period in which the Court refused to consider a properly presented government claim that a lower court had erred in striking down an act of Congress.<sup>392</sup>

As this discussion suggests, lower court decisions holding federal statutes unconstitutional are usually easy to identify, and the grant of plenary review can be predicted with great confidence. When the subject of an invalidating decision is not an act of Congress but a policy or program of an executive department or administrative agency, and the basis for the ruling is not the Constitution but a statute,<sup>393</sup> analyzing the operation of the certiorari practice becomes somewhat more difficult. The reason lies in the process that brings federal government cases to the Supreme Court.<sup>394</sup> When a government agency loses a case in a court of appeals, it can

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389 Curiously, in the last three Terms of the 1970's the Court confronted only 13 such cases. As an a priori matter, it is tempting to speculate that the increase in the number of lower court decisions holding federal statutes unconstitutional came about as a result of President Carter's appointments to the bench. However, examination of the cases discloses that only a small minority can be attributed to Carter appointees. Probably a more significant factor was the repeal in 1976 of the law requiring a three-judge district court in suits seeking injunctions against the enforcement of federal statutes on the ground of unconstitutionality. Pub. L. No. 94-381, 90 Stat. 1119 (1976) (repealing 28 U.S.C. § 2282). More than half of the appeals from single-judge rulings in the first four Terms of the 1980's were cases that would have been heard by three-judge courts prior to the 1976 reform. That requirement surely would have reduced the likelihood that an act of Congress would be struck down as a result of the idiosyncratic views of a single judge. In this regard it is relevant to note that notwithstanding the wide spectrum of attitudes among the Burger Court Justices, half of the appeals from single-judge courts were reversed with no more than one dissent. This suggests that many of the holdings of unconstitutionality did reflect views far from the mainstream of constitutional thinking.

390 The certiorari cases were *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982) (*UTU v. LIRR*); and *United States v. DiFrancesco*, 449 U.S. 117 (1980). The United States was not a party to *Verlinden* or *UTU v. LIRR*, and *DiFrancesco* was a criminal prosecution. Thus neither case came within the scope of 28 U.S.C. § 1252 (1982). (The government sought leave to intervene in *Verlinden*, but the court of appeals denied the motion.)

391 In 2 of the cases the United States supported the private party's request for review. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982). In *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982), the United States supported the petitioner on the merits but did not file a brief at the certiorari stage, probably because it did not have the opportunity to do so; review was granted only a few weeks after the petition was filed.

392 Two cases were dismissed for want of jurisdiction. *FCC v. League of Women Voters*, 104 S. Ct. 3574 (1984); *EEOC v. Allstate Ins. Co.*, 104 S. Ct. 3499 (1984). The former was a companion case to a plenary decision; the latter drew a dissent from two Justices. One appeal was dismissed by stipulation of the parties after probable jurisdiction was noted. *Schweiker v. Rosofsky*, 457 U.S. 1141 (1982). A fourth case became moot before the Court could reach the merits. *National Org. for Women v. Idaho*, 459 U.S. 809 (1982).

393 See note 398 *infra*.

394 For descriptions of the process, see S. WASBY, *THE SUPREME COURT IN THE FEDERAL*

seek review in the Supreme Court only if the Solicitor General agrees to file the petition. The Solicitor General carefully screens agency requests and files only those he thinks are truly worthy of the Court's attention.<sup>395</sup> Thus the narrow holding or the judgment resting on an unusual set of facts is not likely ever to reach the Court (except perhaps in the realm of criminal procedure),<sup>396</sup> and the cases that do come before the Justices almost always involve issues that at least arguably implicate government policies of some general importance.

In this light, it would be quite defensible to simply assume that every government petition reflects a compelling governmental interest, and leave it at that. However, in classifying the cases in the study, I have taken a more skeptical approach, asking whether the lower court's ruling, if followed, would require the government to revise a policy of general applicability or modify the operation of a national program.<sup>397</sup> In the four Terms of the 1980's, between 25 and 35 plenary decisions appeared to fit this description.<sup>398</sup>

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JUDICIAL SYSTEM 105-07 (2d ed. 1984); Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1453-59 (1969).

395 Rex Lee, who served as Solicitor General during the 1981 through 1984 Terms, stated that his office sought review in "about one of six cases" that government agencies asked him to take to the Supreme Court. Lauter, *Lee Reflects on His Tenure as Solicitor General*, Nat'l L.J., May 13, 1985, at 5.

396 See *United States v. Sharpe*, 105 S. Ct. 1568, 1594 (1985) (Stevens, J., dissenting); *United States v. Hasting*, 461 U.S. 499 (1983), discussed in note 490 *infra*.

397 See, e.g., *Petition for Certiorari* at 12-13, *Regan v. Wald*, 104 S. Ct. 3026 (1984) ("The decision of the court of appeals, which declares invalid the Executive's adjustment of [the United States' wide-ranging Cuban embargo] with respect to one subject—transactions related to tourist and business travel—gives Cuba the opportunity to earn substantial sums of hard currency that it can use to advance activities inimical to the interest of the United States."); *Petition for Certiorari* at 17-18, *Landon v. Plasencia*, 459 U.S. 21 (1982) (The decision below "would . . . require the [Immigration] Service to admit every alien with a claim to lawful permanent resident status, notwithstanding the determination by the immigration inspector . . . that the alien is probably excludable for engaging in such violations as smuggling drugs or aliens."); *Petition for Certiorari* at 11, *Haig v. Agee*, 453 U.S. 280 (1981) ("Henceforth, any person seeking to challenge the revocation or denial of a passport pursuant to [a regulation] will file suit in the District of Columbia. . . . [T]he inability to deny and revoke passports on national security grounds will significantly impair discharge of [the] duties [of the Executive] in the volatile international arena.").

398 In some instances the government sought review not so much to vindicate a policy as to avoid the prospect of litigation or liability in a large number of cases. For example, in *United States v. Erika, Inc.*, 456 U.S. 201 (1982), the government argued that the Court of Claims' holding that it was empowered to review administrative determinations of the amount of benefits payable under Part B of the Medicare program "threaten[ed] to intrude the [court] into the carriers' day-to-day administration of the . . . program" and to "strain the scarce resources of the Secretary in defending against relatively minor monetary claims." *Petition for Certiorari* at 15-16. Along similar lines, the petition in *Ruckleshaus v. Sierra Club*, 463 U.S. 680 (1983), contended that the District of Columbia Circuit, in interpreting the attorneys' fees provision of an environmental statute, "ha[d] established a precedent that threaten[ed] to impose substantial burdens on the federal courts, administrative agencies and the Justice Department by encouraging unproductive, expensive and time-consuming litigation." *Petition for Certiorari* at 8. (Most of the petition, however, was

For the Justices themselves, the government's portrayal of the likely consequences of the decision below carries great weight—more so in some areas of federal regulation than in others. At one extreme is environmental law. In the seven Terms of the later Burger Court there were 14 plenary decisions interpreting modern environmental legislation. All but 2 of these were heard at the behest of the Solicitor General.<sup>399</sup> During this same period the Court did not reject a single government petition in an environmental case.<sup>400</sup> In other words, this segment of the docket was shaped almost entirely by the decisions of the Solicitor General.

No other area of the law quite matches this record, but a few come close. In the same seven Terms the Court handed down 9 decisions involving the rights of armed forces personnel and other issues relating to government employment.<sup>401</sup> All but one had been brought to the Court by the government.<sup>402</sup> And no government petitions were rejected.

I have already pointed out that in the last few years the Court has begun to take a greater interest in the statutory issues raised by the federal government's administration of the Social Security Act.<sup>403</sup> This development can be attributed in large part to the combined effect of lower court decisions rejecting the government's legal position and the Solicitor General's determinations that these rulings were important enough to warrant Supreme Court review. Five Social Security cases reached the plenary docket in the first four Terms of the 1980's. All were brought to the Court

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devoted to showing why the court of appeals was wrong.) In *United States v. Clark*, 454 U.S. 555 (1982), the Solicitor General argued that a Court of Claims ruling on an "important issue involving the pay of federal employees threaten[ed] to impose substantial monetary liability on the United States without Congressional authorization." Petition for Certiorari at 7. I have generally excluded cases of this kind from the category of "compelling governmental interests;" rather, I see them as involving doubtful recurring issues. See section IV(C) *infra*. On the other hand, I have included a few cases in which lower courts overturned administrative or executive practices on constitutional grounds. See, e.g., *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 104 S. Ct. 3479 (1984); *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982).

399 The two exceptions were *Milwaukee v. Illinois*, 451 U.S. 304 (1981), in which the Court reversed the lower court's judgment over the opposition of the Solicitor General; and *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), a criminal prosecution with constitutional overtones. See *Plenary Docket II*, *supra* note 13, at 622.

400 One government petition was summarily vacated for reconsideration in light of a plenary decision in which the Government prevailed. *United States Env'tl. Protection Agency v. Northern Plains Resource Council*, 104 S. Ct. 54 (1983).

401 This figure does not include Title VII cases in which the government was the defendant-employer. E.g., *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

402 The one exception was a case in which the Court resolved a long-simmering issue that had given rise to an intercircuit conflict. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983); see *Hruska Commission Report*, *supra* note 356, at 283-84.

403 See notes 294-96 *supra* and accompanying text.

by the government, and all resulted in government victories. Four additional government cases were reversed or vacated summarily during this period; there were none in which review was denied.<sup>404</sup>

Litigation arising out of proceedings in the Federal Energy Regulatory Commission ("FERC") and its predecessor the Federal Power Commission ("FPC") presents a somewhat more equivocal picture. In the seven Terms 1977-1983, all 6 of the Court's decisions reviewing FERC rulings came in cases brought to the Court by the government. And the government won at least a partial victory in 5 of the 6 cases—the exception being an affirmance by an equally divided Court.<sup>405</sup> But the Court turned down 5 additional cases in which the lower court had overturned a FERC decision and the Solicitor General sought review. These data suggest that on the basis of the petition and response the Justices make a preliminary determination of the correctness of the judgment below, and that ordinarily review is granted only if five or more Justices believe that the lower court erred in rejecting the government's position.

Freedom of Information Act litigation presents an interesting variation on this pattern. From 1977 through 1983 the Court rejected only 2 government petitions involving FOIA issues.<sup>406</sup> And the 5 FOIA cases that reached the plenary docket in the 1980's were all brought to the Court by the government. In the last three Terms of the 1970's only 2 out of 6 decisions were generated by government petitions, but in 3 of the 4 other cases the government supported the private party's application for review (and in the fourth case it supported the petitioner on the merits).<sup>407</sup> In other words, there was only one case in all seven Terms in which certiorari was granted over the government's opposition. And in all but one of the plenary decisions the government won at least a partial victory.<sup>408</sup> Thus, with FOIA as with FERC, the Court seldom grants review except when it is prepared to sustain the government's position.<sup>409</sup>

Another variation on this pattern can be seen in the segment of the docket devoted to residual issues involving government regulation of business, primarily in the areas of banking, finance, and

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404 The picture in the late 1970's was very different. See note 295 *supra* and accompanying text.

405 *FERC v. Shell Oil Co.*, 440 U.S. 192 (1979).

406 *Long v. United States Internal Revenue Serv.*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980); *Willamette Indus., Inc. v. United States*, 689 F.2d 865 (9th Cir. 1982) (relying on *Long*), *cert. denied*, 460 U.S. 1052 (1983).

407 See *Plenary Docket II*, *supra* note 13, at 620 n.448.

408 The exception was *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

409 See Morrison, *The Supreme Court and the Freedom of Information Act*, 239 THE NATION 287 (Sept. 29, 1984).

communications. Government petitions generated 13 out of the 19 plenary decisions in the later Burger Court, while 10 government applications were turned down.<sup>410</sup> In most of the rejected cases the lower court had struck down an agency policy of broad applicability.<sup>411</sup> On the other hand, in the cases that did reach the plenary docket, the results were overwhelmingly favorable to the government: there was only one decision among the 13 in which the agency failed to win at least a partial victory.<sup>412</sup> Here too the data imply that the Justices consider the merits as well as the importance of the decision below in deciding whether to hear a case. But in contrast to the FERC and FOIA segments of the docket, the Court also accepted a few petitions that did not have the support of the Solicitor General, and even took some cases in which the government opposed the grant of review.<sup>413</sup>

These areas, of course, do not mark the full extent to which the composition of the plenary docket is shaped by the Solicitor General's perceptions of what issues require a decision at the national level. For example, in the preceding section of this article, I identified several segments of the Court's statutory work that are dominated by conflict resolution. The two largest of these are taxation and crimes. Only a minority of the cases in those areas were actually brought to the Court by the Solicitor General, but that fact does not tell the full story. In most of the other cases that reached the plenary docket, the government supported the petition for review filed by a private party. And only a handful of the petitions that the government did file failed to receive the requisite four votes.<sup>414</sup>

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410 Only 4 petitions were denied in the four Terms of the 1980's, compared with 6 in the last three Terms of the 1970's. However, it would be wrong to attach much significance to the relatively large number of rejected applications in the 1977-1979 period. For one thing, the cases tend to be *sui generis*. For another, preliminary data on the certiorari practice in the early and middle 1970's suggest that the 1977-1979 Terms were not representative of the full decade.

411 Among the cases in the 1980-1983 Terms, 2 stand out: *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981) (agency exceeded authority by using adjudication rather than rulemaking to establish "new law" on rights of debtor in automobile repossession), *cert. denied*, 459 U.S. 999 (1982) (White and O'Connor, JJ., dissenting); *Gulf Fed. Sav. & Loan v. Federal Home Loan Bank Bd.*, 651 F.2d 259 (5th Cir. 1981) (agency's statutory authority to order savings and loan associations to cease and desist from "unsafe or unsound" practices does not permit agency to impose standard of fairness in S&L loan transactions), *cert. denied*, 458 U.S. 1121 (1982). For discussion of the cases in the last three Terms of the 1970's, see *Plenary Docket II*, *supra* note 13, at 608 & nn.382-83.

412 *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). The government's position did gain the support of three Justices.

413 *Securities Indus. Ass'n v. Board of Governors* (Schwab), 104 S. Ct. 3003 (1984); *Securities Indus. Ass'n v. Board of Governors* (Bankers Trust), 104 S. Ct. 2979 (1984); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

414 In the seven Terms of the later Burger Court, the Justices rejected 6 government petitions in tax cases and 3 involving the definition of federal crimes and penalties. One of



Taken together, these data point to a recurring pattern that dominates the segments of the docket devoted to taxation and crimes; it can also be seen, less prominently, in other areas of statutory law. When the government's position on a recurring issue is rejected by a court of appeals, the government does not ordinarily ask the Supreme Court to grant review unless the decision creates an intercircuit conflict.<sup>415</sup> Rather, the government adheres to its

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the tax cases was, in essence, a cross-petition raising a procedural issue; the government had won on the merits in the court below. *Puerto Rico v. Blumenthal*, 642 F.2d 622 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981). Another tax case and 2 of the criminal cases were held for plenary decisions that rejected the government's position. *Delta Metalforming Co. v. Commissioner*, 632 F.2d 442 (5th Cir. 1980), *cert. denied*, 455 U.S. 906 (1982) (held for *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982)); *United States v. Sher*, 657 F.2d 28 (3d Cir.), *reh'g denied*, 661 F.2d 34 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982) (held for *Williams v. United States*, 458 U.S. 279 (1982)); *United States v. Mearns*, 599 F.2d 1296 (3d Cir. 1979), *cert. denied*, 447 U.S. 934 (1980) (held for *Bifulco v. United States*, 447 U.S. 381 (1980)). The remaining criminal case raised a problem of statutory interpretation created by an inadvertent omission in the codification of the Interstate Commerce Act. *See United States v. RSR Corp.*, 664 F.2d 1249 (5th Cir.), *cert. denied*, 459 U.S. 1016 (1982). Corrective legislation was well advanced in Congress at the time the government's petition was filed (as the government acknowledged), and indeed the bill became law soon thereafter. Pub. L. No. 97-424, § 427, 96 Stat. 2097, 2168 (1983) (amending 49 U.S.C. § 11909(b) (1982)). Denial of review in the other 4 tax cases is more difficult to understand. The 2 cases in the 1977-1979 Terms are discussed in *Plenary Docket II*, *supra* note 13, at 615-17; the more recent petitions are considered in note 415 *infra*.

415 Acknowledged or otherwise indisputable conflicts were present in all but 2 of the cases in these two areas that received plenary consideration at the government's behest. The 2 remaining cases may well have involved conflicts, but other reasons for review were probably of greater concern both to the government and to the Court. Thus, in *United States v. Arthur Young & Co.*, 104 S. Ct. 1495 (1984), the government claimed a conflict with the Fifth Circuit's decision in *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 1927 (1984). But the main thrust of the petition was that the court below, the Second Circuit, had "created an accountant work-product privilege, under the rationale of an accountant-client privilege, that threaten[ed] to impede the Internal Revenue Service's tax investigations of public corporations." *Petition for Certiorari* at 6. Moreover, although the Fifth Circuit had questioned the Second Circuit's reasoning, 682 F.2d at 540-41, it had also stated, "We need not reach the issue of an accountant work product doctrine because the IRS here summoned the tax pool analysis from the taxpayer itself, not from an independent accountant," *id.* at 537-38 n.7. The government also claimed a conflict in *United States v. Bailey*, 444 U.S. 394 (1980), but even more than in *Arthur Young*, other considerations probably prompted both the request for review and the Court's decision to hear the case. *See Plenary Docket II*, *supra* note 13, at 620-21 n.449.

The government filed 4 unsuccessful petitions involving recurring issues of tax law. In 2 of them, the lower court had acknowledged a conflict. *Estate of Van Horne v. Commissioner*, 720 F.2d 1114, 1116 n.1 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2364 (1984); *Hotel Conquistador, Inc. v. United States*, 597 F.2d 1348, 1354 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1032 (1980). (The taxpayer in *Hotel Conquistador* argued, however, that the other circuit's ruling was "no longer viable as precedent" because of an intervening Supreme Court decision. Brief in Opposition at 8-9; *see Plenary Docket II*, *supra*, at 616.) In another of the cases, the court below pointed to disarray in the circuits but expressed doubt that a "true split" existed. *Quinlivan v. Commissioner*, 599 F.2d 269, 273 n.4 (8th Cir. 1979), *cert. denied*, 444 U.S. 996 (1979). The fourth case certainly did not present an acknowledged conflict; nevertheless, the government made a strong argument for review. *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2363 (1984). *See Petition for Certiorari* at 29 (asserting that the lower court's holding "will encourage the prolifera-

position until its view gains acceptance in another circuit. At that point a certiorari petition may well be filed by the party opposing the government. If that happens, the government will acquiesce in the grant of review. If it does not, the government will continue to litigate the issue, either in circuits where its position has already been rejected or in circuits that have not passed on the point. Sooner or later it will lose a case that can be taken to the Supreme Court so that the conflict will be resolved.<sup>416</sup>

### C. *Doubtful Recurring Issues*

In the third group of cases, constituting about one-sixth of the total, there was no acknowledged conflict, nor did the application for review invoke a compelling governmental interest. Rather, what could be found in each case was a discrete issue that was doubtful enough that there would be some efficiency in providing an authoritative resolution that would forestall further litigation or at least narrow the range of uncertainty.

Sometimes the issue had already given rise to two or more appellate decisions, though without a square conflict at the time review was granted.<sup>417</sup> A good example is *Metropolitan Edison Co. v. NLRB*,<sup>418</sup> a decision of the 1982 Term. The question was whether an employer commits an unfair labor practice by disciplining union officials more severely than other union employees for taking part in an unlawful work stoppage. The NLRB held that the employer had violated the Act, and the court of appeals enforced the Board's order.<sup>419</sup> The employer filed a certiorari petition claiming an inter-circuit conflict on the issue.<sup>420</sup> The Solicitor General, in opposi-

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tion of abusive tax shelters, as promoters discover that they can avoid criminal responsibility, *even for knowingly fraudulent schemes*, if they can but devise a variation not anticipated by statute, regulation, or case law.") (emphasis in original).

In *Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981), the government did not seek plenary review; rather, it asked the Court to remand the case to the lower court for reconsideration in light of intervening legislation. The Court acted in accordance with the government's suggestion.

<sup>416</sup> For further discussion of the government's litigation policies, see *Hruska Commission Report*, *supra* note 356, at 349-61; *Intercircuit Tribunal*, *supra* note 13, at 404 n.129 & authorities cited; Bator, *Luncheon Address*, in *AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 61ST ANNUAL MEETING* 66-72 (1984).

<sup>417</sup> In a few cases, a conflict developed after the grant of plenary review. Compare *DelCostello v. International Bhd. of Teamsters*, 524 F. Supp. 721 (D. Md. 1981), *aff'd mem.*, 679 F.2d 879 (4th Cir.), *cert. granted*, 459 U.S. 1034 (1982), with *Stevens v. Gateway Transp. Co.*, 696 F.2d 500 (7th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); compare *Christiansburg Garment Co. v. EEOC*, 550 F.2d 949 (4th Cir.), *cert. granted*, 432 U.S. 905 (1977), with *EEOC v. Bailey Co.*, 563 F.2d 439 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

<sup>418</sup> 460 U.S. 693 (1983).

<sup>419</sup> *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981).

<sup>420</sup> Petition for Certiorari at 20-21, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

tion, argued that the principle of the decision below had been accepted by all of the circuits that had considered the question.<sup>421</sup>

Reasonable people can differ over whether there was a genuine conflict, or whether the various decisions could be reconciled on their particular facts.<sup>422</sup> What could not be disputed was that the question was doubtful and recurring. Five years had passed since a seminal ruling by the NLRB, and in that time the issue had been the subject of several major appellate opinions and had generated substantial disagreement among the judges as to what considerations were relevant and how much weight they should be given.<sup>423</sup> Thus the case was certworthy irrespective of whether or not there was a true conflict.

In cases like *Metropolitan Edison*, review was justified because of disarray in the circuits that arguably stopped short of actual conflict.<sup>424</sup> That kind of disharmony was not present in all of the multiple-appellate-decision cases, but sometimes the petitioner was able to point to other circumstances that pointed to the desirability of Supreme Court intervention. Consider, for example, *Morrison-Knudsen Construction Co. v. Director, OWCP*,<sup>425</sup> another decision of the 1982 Term. In supporting the petition for certiorari, the Solicitor General (representing the nominal respondent) conceded that the decision below was the first to hold that fringe benefits are "wages" for the purpose of computing compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act.<sup>426</sup> But he urged the Court to hear the case anyway and to reverse the judgment. He noted that the court of appeals had "upset[] a long-established administrative construction of the LHWCA."<sup>427</sup> This strongly suggested that the issue was at least doubtful. But the

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421 Brief for the NLRB in Opposition at 8-9.

422 Determining whether an intercircuit conflict existed is made more difficult by the fact that arguably inconsistent decisions had been issued within two of the circuits that had considered the questions. See *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478, 482 n.1 (3d Cir. 1981) (implying conflict with a decision of the Seventh Circuit, but noting that a later Seventh Circuit case "appears to have limited the scope of" the earlier ruling); *id.* at 484 (Van Dusen, J., dissenting) (arguing that majority decision is contrary to Third Circuit precedent).

423 See, e.g., *Hammermill Paper Co. v. NLRB*, 658 F.2d 155 (3d Cir. 1981), *cert. denied*, 460 U.S. 1080 (1983).

424 Other illustrations are *Local No. 82, Furniture & Piano Moving, Furniture Store Drivers v. Crowley*, 104 S. Ct. 2557, 2563 (1984) (Court granted review "[b]ecause of the confusion evident among the lower federal courts"); *EEOC v. Shell Oil Co.*, 104 S. Ct. 1621, 1627 (1984) (similar); *Robbins v. California*, 453 U.S. 420, 423 (1981) (Court granted certiorari "[b]ecause of continuing uncertainty as to whether closed containers found during a lawful warrantless search of an automobile may themselves be searched without a warrant").

425 461 U.S. 624 (1983).

426 Brief for the Federal Respondent at 5.

427 *Id.* at 3.

Benefits Review Board, acquiescing in the court of appeals decision, had announced its intention to apply the decision on a nationwide basis. The Solicitor General argued that this development "will require substantial efforts by insurers to readjust the workers' insurance program to account for the higher benefit payments that will result."<sup>428</sup> Perhaps that prediction was overstated; even so, there could be no doubt that the question would recur, and in fact, while the petition was pending, another circuit endorsed the construction of the statute adopted by the lower court in *Morrison-Knudsen*.<sup>429</sup>

A decision like *Morrison-Knudsen* forestalls the development of a conflict that could otherwise have been anticipated in light of the evidence of plausible contrary views on a recurring issue.<sup>430</sup> The case for immediate review was much weaker in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*,<sup>431</sup> a decision of the 1981 Term. The petition presented the question whether "a state has standing as *parens patriae* to rectify alleged employment discrimination against a small number of its citizens in another jurisdiction."<sup>432</sup> The court below, the Fourth Circuit, had upheld the state's standing. The petitioners did not argue that this ruling created an intercircuit conflict, nor did they point to confusion or disarray in the lower courts. Rather, they emphasized the novelty of the holding below and the prospect that it would "open up the federal courts to a whole new class of lawsuit."<sup>433</sup>

A single decision by one court of appeals did not provide a great deal of support for this dire prophecy. But while the petition was pending, a similar case reached the Second Circuit. Citing *Snapp*, that court too allowed the plaintiff-state to bring suit.<sup>434</sup> The Supreme Court held the *Snapp* petition a few months longer, then granted review.<sup>435</sup> Upon plenary consideration, the Fourth Circuit's judgment was affirmed unanimously.

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428 *Id.* at 5.

429 *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated*, 462 U.S. 1101 (1983).

430 Sometimes the evidence suggesting that a conflict might ultimately develop will be furnished by the holdings of one or more district courts. Thus the cases discussed at note 440 *infra* can be regarded as more akin to the *Metropolitan Edison* or *Morrison-Knudsen* model than to the case of first impression.

431 458 U.S. 592 (1982).

432 Petition for Certiorari at 15.

433 *Id.*

434 *Puerto Rico v. Bramkamp*, 654 F.2d 212 (2d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

435 The *Snapp* petition was filed in February 1981. See 49 U.S.L.W. 3573 (U.S. Feb. 2, 1981). No action had been taken by the Court when the 1980 Term ended in early July of that year. During the summer the Second Circuit issued its decision in *Bramkamp*; also, the Third Circuit handed down a fragmented en banc decision in a case involving a state's *parens patriae* standing in a very different context. *Pennsylvania v. Porter*, 659 F.2d 306 (3d

Some observers may be surprised by the Court's acceptance of an expansive approach toward standing, even in this unique context,<sup>436</sup> but for present purposes what is striking about the case is the fact that the Court agreed to hear it at all. Admittedly, it cannot be said that the question was open-and-shut; the district courts in both cases had rejected the assertion of *parens patriae* standing, and so had a dissenting judge in the Fourth Circuit.<sup>437</sup> To that extent the Court did settle an issue that might have otherwise have continued to generate litigation. Yet in view of the consistent holdings by the only two circuits that had passed on the question, the marginal gain in certainty from a Supreme Court decision—especially an affirmation—was surely very small.<sup>438</sup>

The remaining cases in this group were, in essence, cases of first impression;<sup>439</sup> however, the issue presented was one of wide applicability, so that an authoritative ruling would resolve, to one degree or another, many similar disputes.<sup>440</sup> In each of the cases, the petitioner or appellant persuaded the Court that there were good reasons for deciding the question immediately, rather than awaiting further litigation.<sup>441</sup>

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Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982). Certiorari was not granted in *Snapp* until late November 1981.

436 See, e.g., *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 215-21 (1983).

437 These points were emphasized by the certiorari petition in the Second Circuit case, although the petitioner conceded that "there [was] no conflict between circuits." Petition for Certiorari at 22, *Bramkamp v. Puerto Rico*, 458 U.S. 1121 (1982).

438 In *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976), the court denied *parens patriae* standing to a state, but the Fourth Circuit in *Snapp* cited that decision with approval, and both majority and dissent agreed that it provided the framework for analysis. See *Puerto Rico v. Alfred L. Snapp & Sons*, 632 F.2d 365, 368-69 (4th Cir. 1980); *id.* at 370-71 (Hall, J., dissenting).

439 In a few cases the Court granted review to decide whether to modify or overrule an existing line of precedents. See, e.g., *United States v. Leon*, 104 S. Ct. 3405, 3412 (1984) ("We granted certiorari to consider the propriety of" modifying the fourth amendment exclusionary rule "so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective."); *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2736 (1984) ("We granted certiorari to reexamine the intra-enterprise conspiracy doctrine" in antitrust).

440 In a few of the cases the issue had been addressed by one or more district courts at the time review was granted, sometimes with results contrary to that of the appellate opinion. Compare *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977), with *Hishon v. King & Spalding*, 678 F.2d 1022, 1029 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2229 (1984); compare *Edmondson v. Simon*, 87 F.R.D. 487 (N.D. Ill. 1980), with *Nakshian v. Clayton*, 628 F.2d 59 (D.C. Cir. 1980), *rev'd sub nom. Lehman v. Nakshian*, 453 U.S. 156 (1981).

A difference of opinion between one court of appeals and a district court in another circuit has never been treated as a conflict for the purpose of Supreme Court review. See Harlan, *supra* note 55, at 552; R. STERN & E. GRESSMAN, *supra* note 202, at 278-80. Thus I do not include these among the "conflict" cases. However, the existence of a conflicting district court decision certainly reinforces the point that the question is doubtful and recurring.

441 For reasons I have developed elsewhere, the Court generally prefers to defer resolu-

Sometimes the application for review argued that federalism values were at stake. A state whose law or practice had been struck down by a federal court would emphasize the threat to legitimate policies shared by other states;<sup>442</sup> an enterprise whose federal claim had been rejected by a state court would warn of large-scale interference with national interests.<sup>443</sup> Arguments of this kind had special force when the cases came to the Court, as they often did, on appeal, because summary affirmance would settle the issue, at least provisionally, for the entire nation.<sup>444</sup>

This particular exigency was not present in the cases that were brought to the Court by certiorari. Instead, the petitioner argued that although the lower court's ruling was binding as a precedent only in a single state or circuit, it engendered grave uncertainty at the level of primary activity in an important segment of the nation's economy or political structure. A good example is *Bankamerica Corp. v. United States*,<sup>445</sup> a decision of the 1982 Term. This was a test case of the federal government's position that section 8 of the Clayton Act prohibits interlocking directorates between a bank and a competing insurance company. The practice had been a common one for many years, but the Ninth Circuit held, in agreement with

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tion of a recurring issue until the question has been explored by several circuits. *See Intercircuit Tribunal*, *supra* note 13, at 404-06; *see also* *California v. Carney*, 105 S. Ct. 2066, 2073-74 (1985) (Stevens, J., dissenting); notes 453-54 *infra* and accompanying text.

442 *See, e.g.*, Petition for Certiorari at 7, *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900 (1984) (state, asserting novel eleventh amendment doctrine ultimately adopted by the Court, argued that court of appeals decision, unless reversed, "will give federal courts a free hand in the management of state programs despite the absence of any federal interest at all."); Petition for Certiorari at 45, *Pulley v. Harris*, 104 S. Ct. 871 (1984) (state, challenging Ninth Circuit's decision requiring comparative proportionality review in death penalty cases, argued that the opinion below "raise[d] a whole new stumbling block affecting the majority of death judgments throughout the nation."). *See also* *Washington v. United States*, 460 U.S. 536 (1983) (amicus brief supporting grant of plenary review filed by state of California and by Multistate Tax Commission).

443 *See, e.g.*, Jurisdictional Statement at 25-26, *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983) ("California and other states are establishing [fiscal] barriers" that "conflict[] with federal policy and adversely affect[] foreign commerce"); Jurisdictional Statement at 12, 14, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) ("The [decision] below foreshadows grave practical consequences for this nation in that it can only lead to serious division between those states which have access to energy resources and those which do not. . . . [T]here is a serious danger that other states will follow Montana's lead if the result below is permitted to stand."). Claims of this kind—in cases from federal as well as state courts—sometimes received support from the Solicitor General. *See, e.g.*, Brief for the United States as Amicus Curiae at 19, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) ("The court of appeals' decision sustaining [a state statute], if not reversed, will afford significant encouragement to nascent state efforts to eliminate nuclear power as an alternative source.").

444 *See, e.g.*, *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Washington v. United States*, 460 U.S. 536 (1983); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

445 462 U.S. 122 (1983).

the government, that it violated the statute.<sup>446</sup> The Solicitor General, opposing the grant of review, emphasized that "the decision below [was] the law only of the Ninth Circuit."<sup>447</sup> He also assured the Court that insurance companies, banks, and their directors elsewhere in the nation who disagreed with the Ninth Circuit's decision would not expose themselves to criminal or treble damages liability by maintaining the status quo.<sup>448</sup> The petitioners, on the other hand, insisted that without definitive guidance from the Supreme Court, the lower court's ruling could set in motion "a wholesale reordering of the managing bodies of a large segment of the financial community."<sup>449</sup>

Of particular interest here, the experienced counsel representing the petitioners also sought to anticipate and rebut the objection that Supreme Court review should await further consideration of the issue by other circuits. They argued that the case presented "a pure legal question," that the issue was "precisely framed," and that the majority and dissenting opinions in the court of appeals were "as thorough expositions of the issue as the Court could reasonably expect, however many circuits might plow the same ground."<sup>450</sup>

The opinions below were indeed thorough, but I suspect that the able judges who authored them would have been the first to agree that they had not necessarily said the last word on the subject. In all likelihood, what persuaded the Court to grant certiorari was the probable impact of the Ninth Circuit's decision, coupled with a preliminary view, shared by at least four Justices, that the decision was wrong—the view that ultimately prevailed. The same combination of circumstances probably explains the grant of review in *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*,<sup>451</sup> another 1982 Term case. The question there was whether the Robinson-Patman Act applies to the sale of pharmaceutical products to state and local government hospitals for resale in competition with pri-

446 *United States v. Crocker Nat'l Corp.*, 656 F.2d 428 (9th Cir. 1982).

447 Brief for the United States in Opposition at 19.

448 *Id.*

449 Petition for Certiorari at 8. Elaborating upon this point, the petition stated:

Since corporations may be sued under the antitrust laws wherever they are found or transact business, . . . the court of appeals' decision would have a direct impact on every bank holding company, bank and insurance company that does business within the Ninth Circuit, regardless of its principal location. Thus, it would apply to a significant number of financial institutions throughout the country. . . . Moreover, as the only decision on this question, the court of appeals' opinion would inevitably have a significant impact even on those banks and insurance companies that are not found in the Ninth Circuit.

*Id.* at 7.

450 *Id.* at 14.

451 460 U.S. 150 (1983).

vate pharmacies. The Fifth Circuit, the first appellate court to address the question, held that it did not, but the Supreme Court ruled otherwise. Similarly, in *Steelworkers v. Sadlowski*,<sup>452</sup> the Court reviewed the first decision to consider the validity, under the Labor-Management Reporting and Disclosure Act of 1959, of a union rule prohibiting candidates for union office from accepting campaign contributions from nonmembers. The District of Columbia Circuit found that the rule violated the statute; the Supreme Court disagreed.

When the Court accepts a case of first impression like *Bankamerica Corp.* or *Sadlowski*, the effect is to preempt whatever percolation might otherwise have taken place in other circuits or states.<sup>453</sup> Yet not long ago, all members of the Court joined in an opinion recognizing the benefits to be had "from permitting several courts of appeals to explore a difficult question before [the Supreme] Court grants certiorari."<sup>454</sup> Thus, when the Court does agree to consider the first appellate ruling on a doubtful recurring issue, the inference is strong that four or more Justices, after studying the petition and other preliminary papers, were prepared to conclude that the decision was erroneous. Consistent with this hypothesis, most of the Court's rulings on questions of first impression resulted in reversals.<sup>455</sup>

#### D. *Other Reasons for Granting Plenary Review*

Intercourt conflicts, compelling governmental interests, and doubtful recurring issues account for between two-thirds and three-quarters of the cases that receive plenary consideration. The remaining decisions are a heterogeneous group, but several overlapping patterns can be identified.

I begin with a group of cases that is small in numbers but of great importance from the standpoint of the Court's role in the American system of government. These are the cases involving disputes between sovereigns: state against state, or a state against the federal government. As initially conceived, the category was limited to cases brought to the Court under its original jurisdiction.

452 457 U.S. 102 (1982).

453 See *California v. Carney*, 105 S. Ct. 2066, 2073 (1985) (Stevens, J., dissenting) ("Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles.").

454 *United States v. Mendoza*, 104 S. Ct. 568, 572 (1984). See also *Hruska Commission Report*, *supra* note 356, at 219 (quoting report by Professor Clyde W. Summers) (noting value of "successive considerations by several courts, each re-evaluating and building upon the preceding decisions"). See note 441 *supra*.

455 In addition to the cases previously cited, see, e.g., *Summa Corp. v. California*, 104 S. Ct. 1751 (1984); *Sony Corp. v. Universal City Studios, Inc.*, 104 S. Ct. 774 (1984); *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984); *Arizona v. Manypenny*, 451 U.S. 232 (1981).



Only 9 decisions in the 1980's—19 in all seven Terms of the later Burger Court—fit this description. However, further reflection on the “serious and important concerns of federalism”<sup>456</sup> that underlie the original jurisdiction led me to think that perhaps all cases involving direct clashes between state and federal sovereignties should be included. If so, the category would expand, but it still would not constitute a major element of the Court's plenary work. No more than a dozen additional cases in the 1980's would come within the broader definition,<sup>457</sup> and some of them would surely have received plenary consideration in any event because of an intercircuit conflict, a decision striking down a federal statute, or some other compelling reason.<sup>458</sup>

A somewhat different picture emerges, at least initially, if we look at all of the cases that were brought to the Court by state governments invoking sovereign prerogatives in opposition to an exercise of power by the national government. In the four Terms of the 1980's the Court rejected about 30 petitions of this kind.<sup>459</sup> Many of them invoked the tenth amendment, either explicitly or implicitly;<sup>460</sup> others attacked lower court decisions that upheld claims of national immunity against state regulation or taxation.<sup>461</sup> But only 5 of the cases received any votes for plenary consideration.<sup>462</sup>

456 *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981).

457 *See, e.g., North Dakota v. United States*, 460 U.S. 300 (1983) (holding that state cannot revoke its consent to the federal government's acquisition of easements over wetlands under the Migratory Bird Hunting Stamp Act); *United States v. New Mexico*, 455 U.S. 720 (1982) (holding that contractors managing atomic laboratories owned by the federal government are not instrumentalities of the United States and thus are not immune from state taxation); *Montana v. United States*, 450 U.S. 544 (1981) (rejecting federal government's claim that bed and banks of Big Horn River were held by the United States in trust for an Indian tribe; holding instead that title to the riverbed passed to the state upon its admission into the union).

458 *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (intercircuit conflict); *EEOC v. Wyoming*, 460 U.S. 226 (1983) (government appeal from district court judgment holding federal statute unconstitutional).

459 Cases filed by cities or other political subdivisions are not included in this tally. *E.g., United States v. County of Arlington*, 669 F.2d 925 (4th Cir.), *appeal dismissed and cert. denied*, 459 U.S. 801 (1982). Nor are cases in which state governments sought to avoid obligations imposed by federal regulatory programs, but did not invoke grounds directly implicating state sovereignty. *E.g., United States v. Virginia*, 620 F.2d 1018 (4th Cir.) (Title VII), *cert. denied*, 449 U.S. 1021 (1980). The category also excludes cases in which a federal court rebuffed a state's attempt to invoke the benefits of federal regulation. *E.g., South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir.), *cert. denied*, 449 U.S. 822 (1980).

460 *E.g., South Dakota v. Goldschmidt*, 635 F.2d 698 (8th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981); *New Hampshire Dep't of Employment Security v. Marshall*, 616 F.2d 240 (1st Cir.), *appeal dismissed and cert. denied*, 449 U.S. 806 (1980).

461 *E.g., United States v. California State Bd. of Equalization*, 650 F.2d 1127 (9th Cir. 1981), *aff'd mem.*, 456 U.S. 901 (1982); *United States v. Maryland*, 636 F.2d 73 (4th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1982); *United States v. Colorado*, 627 F.2d 217 (10th Cir. 1980), *aff'd mem. sub nom. Jefferson County v. United States*, 450 U.S. 901 (1981).

462 Only 2 cases garnered more than a single vote. *Maryland v. United States*, 460 U.S. 1001, 1002 (1983) (Rehnquist, J., joined by Burger C.J., and White, J., dissenting from

Given that four members of the present Court have expressed strong sympathy for preserving state prerogatives in exactly this context,<sup>463</sup> it is fair to conclude that the rejected cases did not present substantial challenges to the exercise of national power.

The cases involving disputes between national and state sovereigns can best be seen as part of the larger segment of the Court's work that grows out of the tensions inherent in a federal system. Indeed, if there is a single theme that dominates the cases that do not readily appear to meet orthodox criteria for plenary review, it is that of resolving conflicts between state and national power. This theme finds its principal expression in two classes of decisions: those in which a state court rejected a federal claim, and those in which a federal court invalidated state official action.

About one-third of the otherwise unclassified plenary cases were brought to the Court by individuals or enterprises whose federal claims had been denied in the state courts.<sup>464</sup> Some of the applicants did not even pretend to raise issues of general importance; they asserted only that the state court had failed to follow controlling federal precedents.<sup>465</sup> In other cases, the certiorari petition or jurisdictional statement did suggest broader implications, but focused primarily on the federal error of the decision below.<sup>466</sup>

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summary affirmance) ("I am troubled by the notion that a district court, by entering what is in essence a private agreement between parties to a lawsuit, [can] invoke the Supremacy Clause powers of the Federal Government to preempt state regulatory laws."); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (Brennan and White, JJ., dissenting).

463 See *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005, 1027-33 (1985) (Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, JJ., dissenting).

464 This group includes *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 104 S. Ct. 2267 (1984), a decision that does not fit the classic pattern of Indian rights litigation, *see id.* at 2270 (describing the case as "somewhat unusual in a central respect"), but which is appropriately classified with cases in which a litigant has unsuccessfully invoked federal law in opposition to state power. See Brief for the United States as Amicus Curiae Supporting Petitioners at 3 ("The Supreme Court of North Dakota has closed the courts of that State to suits by Indians against non-Indians concerning matters arising on Indian reservations, even though such suits are not barred by any federal statute and do not impermissibly infringe upon the federally protected sovereignty of the tribes.").

465 See, e.g., *Petition for Certiorari at 8*, *James v. Kentucky*, 104 S. Ct. 1830 (1984) (urging Court to review decision of Kentucky Supreme Court because it "conflicts with the rationale of" *Carter v. Kentucky*, 450 U.S. 288 (1981); describing Kentucky court's opinion as "an obvious attempt . . . to circumvent the mandate of . . . *Carter*"); *Jurisdictional Statement at 18*, *In re R.M.J.*, 455 U.S. 191 (1982) (suggesting summary reversal; arguing that Missouri court's decision "is flatly in conflict with [Supreme Court precedents on commercial speech]" and that "[n]o new constitutional problems are involved."); *Petition for Certiorari at 7*, *Hudson v. Louisiana*, 450 U.S. 40 (1981) (arguing that Louisiana Supreme Court "has applied the . . . double jeopardy clause in a manner not in accord with the applicable decisions of this Court" and that its opinion "ignores the clear ruling of the trial court" on a factual issue).

466 For example, in *Palmore v. Sidoti*, 104 S. Ct. 1879 (1984), the petition made brief unelaborated references to decisions in other states holding impermissible "the consideration of a subsequent interracial marriage in custody litigation." *Petition for Certiorari at*

At first blush, the success of these applications might appear to reflect acceptance by the Court of the idea that providing another level of review for correctness is, without more, an appropriate use of the Justices' time. This interpretation is strengthened by the fact that on the merits the Court reversed a substantial majority of the judgments it had agreed to consider.<sup>467</sup> But there is another way of looking at these cases. When a state court rejects an arguably meritorious federal claim, the possibility of an erroneous decision<sup>468</sup> implicates concerns about the supremacy of federal law. To be sure, the generalized hostility to federal rights that once seemed endemic among state courts has largely disappeared,<sup>469</sup> but the political realities that led the Framers to fear that federal claims would not receive sympathetic treatment at the hands of state judges may still

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18. But the principal argument was that "[t]he holding below, if allowed to stand, would be completely subversive of the numerous decisions throughout the federal judiciary outlawing state-enforced racial distinctions." *Id.* at 19. Similarly, the appellants in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), stated that the issue was "important and substantial," Jurisdictional Statement at 5, but their application for review was devoted largely to showing the error in the Nebraska court's decision.

467 Some of the cases that proved to be easy affirmances for the Court may well have received plenary consideration only because they fell within the obligatory jurisdiction. *E.g.*, *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982). See notes 479-80 *infra* and accompanying text. In other cases where the Court ultimately affirmed, the Solicitor General had filed a memorandum agreeing with the petitioner or appellant that review should be granted to correct an erroneous application of federal law. See, *e.g.*, *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). A few cases were dismissed on jurisdictional grounds. *E.g.*, *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982); *Flynt v. Ohio*, 451 U.S. 619 (1981).

468 In this context, a decision is "erroneous" if the United States Supreme Court would find it to be so. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., dissenting) ("We are not final because we are infallible, but we are infallible only because we are final."); notes 52-53 *supra* and accompanying text.

469 To appreciate the change in attitudes, one need only compare two resolutions adopted by the Conference of State Chief Justices, one in 1958, the other in 1982. In 1958, the state judges contended that the Supreme Court "too often has tended to adopt the role of policy-maker without proper judicial restraint." *Report of the Committee on Federal State Relationships As Affected by Judicial Decisions*, 32 STATE GOV'T 60, 72 (1959). They expressed "grave concern as to whether individual views of . . . a majority [of the Court], as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted." *Id.* at 73; see also *Resolution on Federal-State Relationships As Affecting Judicial Decisions*, 32 STATE GOV'T 74 (1959) (adopting committee report by a vote of 36 to 8). A generation later, when the Supreme Court was again under attack for its decisions favoring civil liberties claims, the state judges spoke out against proposed legislation designed to eliminate the Court's jurisdiction over particular types of constitutional cases. Although the legislation, if enacted, would have put an end to exactly the kind of scrutiny that the state judges of 1958 found so irksome, their successors in 1982 "express[ed their] concern about the impact of these bills on state courts and view[ed] them as a hazardous experiment with the vulnerable fabric of the nation's judicial systems." See 128 CONG. REC. S11,611 (daily ed. Sept. 16, 1982) (remarks of Sen. Baucus). See generally Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 629-31 & *passim* (1981); O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 813-14 (1981).

have their effect in particular controversies.<sup>470</sup> And although the national interest does not require that the Court intervene every time a state court fails to give due recognition to the commands of the Constitution or an act of Congress,<sup>471</sup> the supremacy of federal law would be placed at risk if the corrective process were brought into play so infrequently that it no longer appeared to present a real check on the forces of parochialism.<sup>472</sup> Thus it is understandable—and consistent with the Court's historic mission—that the Justices would give plenary consideration to at least some cases in which state courts have rejected federal claims even in the absence of an issue of broader importance.

When a federal court strikes down state official action by accepting a federal claim of dubious merit, it poses no threat to the supremacy of federal law. But if the decision gives undue weight to the federal interest, it does endanger the countervailing values that Justice Black sought to epitomize by the slogan "Our Federalism."<sup>473</sup> Thus, if one accepts Justice Black's premise that the national government should protect federal rights, but "always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States,"<sup>474</sup> cases of this kind can be seen as the federalism-based counterparts of the supremacy clause cases from state courts.

There can be no doubt that the Burger Court does largely share the vision of the federal system articulated by Justice Black. This attitude can be seen in the substance of the Court's decisions;<sup>475</sup> it also helps to explain the presence on the plenary docket of a substantial cluster of otherwise unclassified cases—about equal in number to the state court cases just discussed—in which federal courts struck down state official action in response to the perceived commands of federal law. Typically, the applications for review were filed by state officials.<sup>476</sup> Some argued only error;<sup>477</sup> others at

<sup>470</sup> See generally Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); but see Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

<sup>471</sup> See note 57 *supra*.

<sup>472</sup> See Bator, *supra* note 469, at 635-36; Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 55 (1981); Stolz, *supra* note 57, at 959-60; Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1062 (1977).

<sup>473</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>474</sup> *Id.*

<sup>475</sup> See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900, 906-08 & *passim* (1984); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *Sumner v. Mata*, 449 U.S. 539 (1981); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

<sup>476</sup> In a few cases, review was sought by officials of a municipality or other political subdivision. See, e.g., *Escambia County v. McMillan*, 104 S. Ct. 1577 (1984). Sometimes the

least made an effort to suggest that the ruling below presented an issue of general importance.<sup>478</sup>

The supremacy and federalism cases have something else in common: a high proportion of them came to the Court by appeal rather than by writ of certiorari. Indeed, appeals probably accounted for more than half of the unclassified decisions reviewing state court rulings that rejected federal claims. But the high percentage of appeals should come as no surprise. To be sure, the Court has the option of affirming summarily in cases that fall within its mandatory jurisdiction; yet as previously pointed out, the obligation to decide the merits (and thus to establish a nationally binding precedent) sometimes leads the Court to give plenary consideration to an appeal even though the same case would have been denied review if it had come up on certiorari.<sup>479</sup> Some appeal cases that would probably have been rejected if the Court had not been con-

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banner of states' rights was carried by a private litigant. See, e.g., *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984).

477 See, e.g., *Patton v. Yount*, 104 S. Ct. 2885 (1984); *McKaskle v. Wiggins*, 104 S. Ct. 944 (1984); *Marshall v. Lonberger*, 459 U.S. 422 (1983); *Smith v. Phillips*, 455 U.S. 209 (1982). In *Yount*, the state as petitioner claimed a conflict with a Supreme Court decision and with a decision of the state supreme court; the latter, of course, is inevitable in any case where a federal court grants habeas relief to a state prisoner. The petitioner in *Wiggins* conceded that the issue presented was "one of first impression; apparently in any jurisdiction"; he argued that the decision below "represent[ed] an unwarranted extension of the principle established by this Court in *Faretta* [v. California, 422 U.S. 806 (1975)]." Petition for Certiorari at 6-7. In *Lonberger*, the petitioner made no suggestion that a similar case had ever arisen in any other court before, let alone that there was any sort of conflict. The application for review in *Smith v. Phillips* was so single-mindedly devoted to the assertion of error that its final paragraph merits quotation in full:

We recognize that certiorari is rarely granted and the record here shows that the trial prosecutor was clearly wrong. But that wrongful conduct did not prejudice Phillips and it makes poor sense and worse law to punish the people of New York State by requiring a new trial twelve years after the crime (with all of the attendant problems) for a corrupt police officer who was convicted of two murders on overwhelming proof of guilt by twelve jurors, not one of whom has been found to be anything but impartial. By seeking certiorari, we seek no vindication for the trial prosecutor. Rather, we seek vindication of the accepted legal principles from which the court below so clearly departed, thereby unjustifiably interfering in a most significant state criminal prosecution.

Petition for Certiorari at 16.

478 See, e.g., *Morris v. Slappy*, 461 U.S. 1 (1983); *Larsen v. Valente*, 456 U.S. 228 (1982). In *Slappy*, the petitioner said in a footnote that the court of appeals decision was "also inconsistent with the requirement of other circuits that prejudice be shown when counsel is substituted over the defendant's objection," Petition for Certiorari at 20 n.6; however, the principal theme of the request for review was that the Ninth Circuit's decision had "created a totally new Sixth Amendment right" and was "contrary to one of this Court's decisions," *id.* at 9. Similarly, the appellant in *Larsen* claimed an intercircuit conflict on an issue of standing, Jurisdictional Statement at 23-24, but primarily argued that the lower court's decision was "a particularly grievous and unjust federal court intrusion into state legislative action," *id.* at 9.

479 See note 36 *supra* and accompanying text.

strained to reach the merits are listed in the margin.<sup>480</sup>

The complementary interests in supremacy and "Our Federalism" are implicated only in an attenuated way when a federal court upholds the exercise of state power or a state court repudiates state official action in response to a federal claim. Consistent with this analysis, neither of these two classes of cases appears in large numbers among the otherwise unclassified plenary decisions. In fact, the total number of cases of either kind that received plenary consideration is rather small. In the first four Terms of the 1980's, there were only 27 cases in which review was granted at the behest of a litigant whose federal challenge to state official action had been rejected by a federal court.<sup>481</sup> And most of these involved intercourt conflicts or other circumstances suggesting an issue of general importance. No more than a handful of claimants' petitions reached the plenary docket in the absence of such considerations.<sup>482</sup>

Cases in which a state court subordinated state law to the perceived commands of federal statutes or constitutional provisions were somewhat more numerous, and a great deal more controversial.<sup>483</sup> In the same four Terms there were 35 plenary decisions of this kind. What is more important, only a minority of them appear to have involved intercourt conflicts or other orthodox justifications for review. Some of the petitioning officials did not even attempt to show that issues of general importance were at stake.<sup>484</sup>

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480 *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); *Blum v. Bacon*, 457 U.S. 132 (1982); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

481 Two of the cases were appeals from three-judge district courts. *McCain v. Lybrand*, 104 S. Ct. 1037 (1984); *Brown v. Thomson*, 462 U.S. 835 (1983).

482 In 4 cases not involving conflicts the Solicitor General supported the request for review, arguing that the decision below was inconsistent with congressional policies. *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984); *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S. Ct. 2237 (1984); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190 (1983); *Herweg v. Ray*, 455 U.S. 265 (1982).

The grant of certiorari in *Martinez v. Bynum*, 461 U.S. 321 (1983) is something of a puzzle. The petitioners challenged a state statute imposing a residency requirement for "minors who wish[ed] to attend public free schools while living apart from their parents or guardians." *Id.* at 322; see also note 303 *supra*. There was no conflict between circuits or between state courts; on the contrary, the decision below was the first to consider a claim such as the plaintiffs'. The lower court had upheld the statute, and the Supreme Court affirmed with only one dissent. Although the Court described the issue as important, 461 U.S. at 325, nothing in the opinion explains why authoritative resolution could not have awaited further consideration in the lower courts.

483 For a sampling of the controversy, compare Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819 (1983) (generally critical of the Court's approach), with Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079 (1984) (generally sympathetic).

484 See, e.g., *Ohio v. Johnson*, 104 S. Ct. 2536 (1984); *Florida v. Casal*, 462 U.S. 637 (1983). In *Johnson*, a double jeopardy case, the state as petitioner asserted that the ruling of

The Court's willingness to hear these cases can be seen as a manifestation of hostility toward the underlying federal rights—for the most part, rights invoked by criminal defendants.<sup>485</sup> This conclusion is further supported by the outcomes of the decisions. In all but 5 of the cases that were decided on the merits, the judgments were reversed.<sup>486</sup> And in 4 of the 5 affirmances there were four votes for reversal.<sup>487</sup> But there are other possible explanations for the presence of these cases on the docket. For example, some commentators have argued that values inherent in our federal system are damaged when a state court "over-read[s] Supreme Court precedents and invalidate[s] state . . . official action on federal grounds when the Supreme Court itself would not do so."<sup>488</sup> It is also worth keeping in mind that the 35 plenary decisions are far outnumbered by cases in which litigants failed to persuade the Court to hear a state court case sustaining a federal challenge to

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the Ohio courts "contravene[d] the rights of the State of Ohio as a litigant" and "severely hamper[ed] the function of Ohio Grand Juries." Petition for Certiorari at 15. In *Casal*, the state argued that three separate grounds existed to validate a search held by the state court to violate the fourth amendment. The petition did not claim a conflict, nor did it assert that the issue was a recurring one; in fact, no cases were cited from any other jurisdiction.

485 Of the 35 cases, 26 arose out of criminal prosecutions. In exactly half of these the defendant had succeeded in invoking the fourth amendment exclusionary rule—a rule that elicits a less than enthusiastic response from the Court. See *United States v. Leon*, 104 S. Ct. 3430 (1984); *Florida v. Rodriguez*, 105 S. Ct. 309, 311 (1984) (Stevens, J., joined by Brennan, J., dissenting) (arguing that summary reversal in fourth amendment case "illustrates how far the Court may depart from its principal mission when it becomes transfixed by the spectre of a drug courier escaping the punishment that is his due."); notes 332-42 *supra* and accompanying text.

A recent comment by Chief Justice Burger can be read as supporting the interpretation suggested in the text. In an interview with the *Miami Herald*, the Chief Justice was asked whether there is any merit to the suggestion made by "a number of legal scholars" that the Supreme Court "is itself responsible for its own crushing caseload, [in] that it selects cases with an eye to advancing its own political agenda rather than simply those that present urgent constitutional questions." The Chief Justice characterized the suggestion as "unmitigated nonsense," but added: "There are some law professors who would like us not to review any criminal cases. But they just don't like to see the Supreme Court reversing what the court majority decides is a miscarriage of justice." *Miami Herald*, May 8, 1985, at 16A, col. 2.

486 In 4 cases the writ was dismissed on procedural grounds without a decision on the merits.

487 Except for the cases disposed of without a decision on the merits, see note 486 *supra*, the only state petition that did not have four or more votes for reversal was *Arizona v. Rumsey*, 104 S. Ct. 2305 (1984). The Court gave no reason for granting review in *Rumsey*; perhaps the four Justices who had dissented in the case relied on by the Arizona court, *Bullington v. Missouri*, 451 U.S. 430 (1981), hoped to secure reconsideration of that decision.

488 Stolz, *supra* note 57, at 971. As Professor Stolz points out, it was precisely this concern that led Congress in 1914 to pass the legislation that for the first time authorized the Supreme Court to review state court judgments that sustained federal claims. See also F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 193-98 (1928).

state official action.<sup>489</sup>

The categories discussed thus far account for all but a few dozen of the plenary decisions that did not involve intercourt conflicts, compelling governmental interests, or doubtful recurring issues. In a handful of cases the federal government sought review of a constitutional ruling that had little importance beyond its particular facts.<sup>490</sup> Another small group of decisions addressed matters of federal court jurisdiction and procedure.<sup>491</sup> Apart from these clusters and a few miscellaneous constitutional cases,<sup>492</sup> what remains is the residuum of the general federal law segment of the docket. But the cases were not spread evenly among the various areas of statutory law. Rather, half of them were concentrated in two areas of federal regulatory power: labor and antitrust.<sup>493</sup>

In fact, a broader pattern can be discerned. Of the 199 general federal law cases in the first four Terms of the 1980's, 123 were filed by litigants other than the federal government. These petitions, in turn, were divided about equally between cases that presented intercourt conflicts and cases that did not. The conflict cases ranged widely among the issues that occupy a substantial position on the plenary docket. But of the nonconflict cases, two-thirds involved issues of labor law or antitrust.

Two conclusions can be drawn from these data. First, in considering applications for review that raise questions of labor or antitrust law, the Court employs a relatively flexible set of criteria. Cases will receive plenary consideration even though the need for an authoritative decision is, from the standpoint of the national law, less than overwhelming.<sup>494</sup>

Second, in all other areas of federal regulation the Court will almost never grant a private petition in the absence of an intercir-

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489 There were nearly 200 such cases in the first four Terms of the 1980's. See notes 505, 515 *infra* and accompanying text.

490 *E.g.*, *United States v. Gouveia*, 104 S. Ct. 2292 (1984); *United States v. Hasting*, 461 U.S. 499 (1983). In *Gouveia*, the Court candidly explained that "[w]e granted certiorari to review the Court of Appeals' novel application of our Sixth Amendment precedents." 104 S. Ct. at 2295. In *Hasting*, the government's certiorari petition emphasized the alleged error of the decision below and suggested that "summary reversal may be appropriate." *Petition for Certiorari* at 8.

491 If there was any one case in the four Terms in which the grant of review came as a surprise to almost all observers, it was *McDonough Power Equip., Inc. v. Greenwood*, 104 S. Ct. 845 (1984) (reversing court of appeals order granting new trial in diversity products liability case).

492 *E.g.*, *Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577 (1982), *discussed in* note 501 *infra*; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), *discussed in* note 526 *infra*.

493 Labor and antitrust issues accounted for two-thirds of the cases in this group that were brought to the Court by litigants other than the federal government.

494 About half of the labor cases involved issues of employment discrimination under Title VII. See notes 238-53 *supra* and accompanying text.



cuit conflict. Moreover, of the 20 or so nonconflict petitions that did receive plenary consideration, about one-fourth had the support of the Solicitor General at the certiorari stage.<sup>495</sup> The upshot is that in the absence of an intercircuit conflict or the backing of the Solicitor General, private litigants in all areas of statutory law other than labor and antitrust accounted for little more than a dozen plenary decisions in all four Terms.

## V. Conclusion

For nearly sixty years, the Supreme Court has operated under a jurisdictional dispensation<sup>496</sup> that gives it a very large measure of discretion in selecting, from among the 4,200 applications for review filed each Term, the 180 that will reach the plenary docket. If, as is to be hoped, Congress acts to eliminate the remaining elements of the obligatory jurisdiction, the Court will have almost total freedom to choose the cases that it will hear and decide on the merits.<sup>497</sup> Yet as one examines the results of the case selection process in the Burger Court, what stands out is the array of external forces that shape and narrow the manner in which the Court exercises its discretion. These forces operate at two levels: some give prominence to particular issues or areas of the law, while others make it more likely that the Court will consider particular controversies.

In Part III of this article, I discussed some of the circumstances that contributed to the changes in the issues that occupied the attention of the Court during the past decade and a half. Part IV examined the selection of individual cases, largely from the perspective of the Court itself. To conclude the analysis, it is appropriate to look briefly at the effect on the plenary docket of small but extremely influential group of decision makers: the judges of the courts whose decisions are subject to review by the Supreme Court.<sup>498</sup>

The effect of lower court rulings can be seen most easily in litigation involving the United States government. Suits to which the government is a party account for more than one-third of the

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495 See, e.g., *Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.*, 104 S. Ct. 2472 (1984); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 104 S. Ct. 1776 (1984); *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

496 This is the phrase used by Professor Frankfurter. See F. FRANKFURTER & J. LANDIS, *supra* note 488, at 287. Although the legislation that made the Court's jurisdiction largely discretionary was enacted in 1925, its effects were not fully felt until the 1927 or 1928 Term. See *Plenary Docket I*, *supra* note 13, at 1730 n.84.

497 See *Intercircuit Tribunal*, *supra* note 13, at 391-92.

498 The courts that fit this description are the federal courts of appeals, see 28 U.S.C. § 1254 (1982), state courts of last resort as defined in 28 U.S.C. § 1257 (1982), and federal district courts whose decisions may be appealed directly to the Supreme Court, see note 51 *supra*.

Court's plenary work—215 of the 584 appellate decisions in the first four Terms of the 1980's.<sup>499</sup> In very large part, cases of this kind reach the plenary docket because of the way they were resolved in the courts below. By holding a federal statute unconstitutional, or striking down a government policy, or refusing to follow the ruling of another circuit, a court of appeals or district court creates a need for clarification of the law that can be met only by action of the Supreme Court. Almost invariably, the Court will respond to that need—whether the jurisdiction invoked be obligatory or (in theory) discretionary. Conversely, if the lower court upholds the government's position or accepts the view of its sister circuits, the decision is very unlikely to receive plenary consideration.

The paradigm is the case in which the constitutionality of an act of Congress is drawn into question. If the lower court finds merit in the challenge, the government almost certainly will take the case to the Supreme Court, and the Court almost certainly will grant review.<sup>500</sup> But if the lower court upholds the statute, the odds are very small that the controversy will receive plenary consideration.<sup>501</sup> Much the same may be said—though not quite as emphatically—about cases in which executive or administrative policies of wide general applicability are attacked on statutory or constitutional grounds. If the lower court holds the policy invalid, there is a very good chance that the case will reach the plenary docket.<sup>502</sup> But if the challenge fails, that is probably the end of the line for the government's adversary.<sup>503</sup>

In government litigation not involving the validity of statutes or executive policies, the courts of appeals influence the composition of the plenary docket in a different way: by deciding whether to follow existing appellate precedents on a recurring issue. If one court rejects the view taken by other circuits that have considered

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499 The latter figure excludes the 9 original jurisdiction cases.

500 See notes 389-92 *supra* and accompanying text (33 cases in 1980-1983 period).

501 In the four Terms of the 1980's the Court heard only 2 cases in which the lower court had rejected a constitutional attack on an act of Congress. Both were brought by appeal under the special provisions governing appellate review in Federal Election Campaign Act cases. *Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577 (1982); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981).

502 The Court granted most of the petitions in which the government sought to vindicate a policy that had been struck down by the lower court; however, in contrast to the appeals from decisions invalidating acts of Congress, perhaps a dozen rulings in this category were allowed to stand. About half of the rejected applications were filed by the Interstate Commerce Commission and the Federal Election Commission, two agencies that litigate independently rather than through the Solicitor General.

503 In the four Terms of the 1980's, the Court granted no more than half a dozen petitions filed by litigants whose attacks on executive or administrative policies had been rejected by the court below. Sometimes the government supported the application for review in order to obtain a definitive national ruling. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

the question, the case becomes a strong candidate for plenary consideration.<sup>504</sup> But if the court agrees with earlier decisions on the same point, the case is unlikely to reach the Supreme Court even if the holding is adverse to the government's position.<sup>505</sup>

A more complex set of variables comes into play in litigation involving the constitutionality of official action by state governments.<sup>506</sup> Certainly the Court, in deciding whether to grant review, is influenced by the outcome of the decision below, but the nature of the case is no less important. Civil suits may be treated differently from criminal prosecutions; state court rulings arouse different concerns than rulings by federal courts.

Consider first the tens of thousands of state court criminal prosecutions in which the defendant invokes the protections of the Bill of Rights or the due process clause of the fourteenth amendment. If the state court rejects the defendant's federal constitutional arguments, his chances of persuading the Supreme Court to hear the case are small indeed.<sup>507</sup> But if the arguments prevail, and

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504 Intercircuit conflicts accounted for almost half of the government litigation cases. Among the decisions that were reviewed at the behest of a litigant opposing the government, the proportion was three out of five; among the government's applications, the figure was two out of five.

Solid figures on conflict cases denied review are not available, but the best available evidence indicates that the number of such cases is very small. See *Intercircuit Tribunal*, *supra* note 13, at 395-98.

505 In the absence of a conflict, litigants opposing the government succeeded in obtaining review in fewer than 30 cases in the four Terms. The number of nonconflict cases heard at the behest of the Solicitor General was larger, but in most of these the government sought to revive a statute or policy that had been struck down by the lower court. See notes 500-02 *supra* and accompanying text. The government did not often obtain—or seek—review on an issue that had been repeatedly litigated in the courts of appeals but with results always adverse to its position.

In a few cases in which the government appeared as nominal respondent, the Solicitor General supported the petitioner on the merits. *Dirks v. SEC*, 463 U.S. 646 (1983); *City of Lockhart v. United States*, 460 U.S. 125 (1983); *Burlington Northern, Inc. v. United States*, 459 U.S. 131 (1982).

506 In most cases where state official action is challenged on federal grounds, the litigant defending the exercise of state power will be an officer, agency, or political subdivision of the state. However, the category also includes some cases in which only private parties participate. Generally these are suits in which federal law is invoked as a defense to a state law claim, *e.g.*, *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982), or (less commonly) as a reply to a state law defense, *e.g.*, *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983).

507 In the first four Terms of the 1980's, only 23 petitions filed by defendants in state criminal prosecutions reached the plenary docket. (Another 35 cases were summarily remanded for reconsideration in light of an intervening plenary decision.) I do not have figures for the total number of defendants' petitions that were filed during this period, but paid cases alone averaged more than 150 per Term. And in the last three Terms of the 1970's—the most recent period for which data are available—the average number of filings, including both paid and indigent cases, was about 600. If this pattern continued in the 1980's (and there is no reason to believe that it did not), the total number of defendants'

the prosecutor is not satisfied with the result, he may well be able to secure the four votes needed for review.<sup>508</sup>

Given what I have said about the Court's function of preserving the supremacy of federal law,<sup>509</sup> it may seem perverse that state prosecutors' petitions are far more likely to receive a hearing than those filed by defendants.<sup>510</sup> However, two considerations may help to explain the Court's preference. First, prosecutors, as "repeat players,"<sup>511</sup> can be expected to exercise some selectivity in the cases they take to the Supreme Court. Cases clearly controlled by existing precedents, or involving only the routine application of established rules to particular facts, generally will not be brought up for review.<sup>512</sup> But for the convicted defendant whose freedom is at stake, only one case matters, and that case is worth pursuing to the highest tribunal without considering very carefully whether it meets articulated standards for review.<sup>513</sup> In this light, we would expect to find a much higher proportion of certworthy cases among prosecutors' petitions than among defendants'.

Second, when a state court rejects a criminal defendant's federal claim, there is another route by which the defendant can secure a hearing in a federal court: habeas corpus.<sup>514</sup> Thus, even if the

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petitions in the four Terms was around 2,400. A case of this kind thus had only one chance in a hundred of receiving plenary review.

508 The Court accepted 26 petitions in which prosecutors challenged state court rulings that favored criminal defendants. Forty additional cases were remanded for reconsideration in light of recent plenary decisions. Obviously, these figures are only slightly higher than the corresponding figures for defendants' petitions; however, they represent a substantially larger proportion of the cases filed. In the same four-Term period the Court rejected only about 125 prosecutors' applications from state courts. In other words, a prosecutor's petition had a one-in-seven chance of gaining plenary review.

The one-in-seven ratio actually understates the Court's propensity for granting prosecutors' petitions. Of the 40 reconsideration orders, 8 were issued in Missouri cases held for the decision in *Albernaz v. United States*, 450 U.S. 333 (1981), and another 8 involved Alabama cases held for *Hopper v. Evans*, 456 U.S. 605 (1982). Four other Missouri petitions were controlled by the decision in *Missouri v. Hunter*, 459 U.S. 359 (1983). And 7 cases filed by prosecutors resulted in summary reversals. Thus, even if we do not consider reconsideration orders as grants of review, the prosecutor's odds were almost one in five.

509 See notes 57, 468-72 *supra* and accompanying text.

510 See *Michigan v. Long*, 463 U.S. 1032, 1067-70 (1983) (Stevens, J., dissenting).

511 See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y REV. 95, 97-107 (1974).

512 That is the behavior one would expect. However, prosecutors do not always live up to that standard. See *California v. Carney*, 105 S. Ct. 2066, 2072 & n.4 (1985) (Stevens, J., dissenting) ("state legal officers [have filed] petitions for certiorari in even the most frivolous search and seizure cases," including some in which the lower court's judgment was explicitly based on independent state grounds); see also cases cited in note 477 *supra*.

513 A nonindigent defendant who must pay his attorney may refrain from filing if the case is truly hopeless. But most applications by state criminal defendants are filed in forma pauperis, either pro se or by court-appointed counsel. While ethical standards do not require the filing of a certiorari petition, see *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983), no doubt many attorneys are willing to do so if the defendant wishes it.

514 Fourth amendment cases are an exception. See *Stone v. Powell*, 428 U.S. 465 (1976).

defendant's certiorari petition appears to warrant scrutiny from the standpoint of review for error, the Court may prefer to leave the task to the district court as long as no issue of general importance is involved.<sup>515</sup>

Consistent with this analysis, the Court takes a very different approach to cases brought from state courts by civil litigants—litigants who are likely to adhere more closely to established criteria for review and who in any event cannot invoke federal habeas corpus. In the first four Terms of the 1980's the Court heard 71 cases in which the state court had rejected a civil litigant's federal claim,<sup>516</sup> and only 9 in which the claim had been accepted. I do not have data on the number of cases in which the Court declined to hear a civil litigant's supremacy-based argument;<sup>517</sup> however, review-denied cases in which state courts had accepted a federal claim numbered about 60.<sup>518</sup> While the gap in the data precludes a firm evaluation, the available evidence suggests that in the realm of civil litigation the Court takes the supremacy function very seriously. This means that when a state court rejects a colorable federal claim outside the context of a criminal prosecution, there is a good chance that the losing litigant will be able to secure Supreme Court review. To the extent that state courts find merit in such claims, the decisions are not likely to reach the plenary docket.<sup>519</sup>

When challenges to state official action are litigated in federal rather than state court, a new element enters the picture: Justice Black's vision of "Our Federalism."<sup>520</sup> We would expect concerns about "Our Federalism" to weigh heavily in favor of cases in which the opponent of state action has prevailed in the court below, and the data indicate that this is precisely what happens. As previously noted, there were only 27 cases in the four Terms 1980-1983 in which the Court reviewed a federal court judgment rejecting a challenge to state official action, and most of these involved intercircuit conflicts.<sup>521</sup> Data are not available on the number of such cases

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515 See Stolz, *supra* note 57, at 960-64. Of course, there is another possible explanation for the Court's propensity for granting prosecutors' petitions rather than defendants': hostility to the underlying constitutional claims. See note 485 *supra*.

516 See note 464 *supra*.

517 For whatever the information is worth, there were about 70 such cases in which one or more Justices dissented from the denial of plenary review.

518 Dissents were filed in 6 of these cases.

519 The difference in selection patterns between civil and criminal cases may reflect, at least in part, a more sympathetic attitude toward the federal rights typically asserted by civil litigants in state courts. But the range of claims is so wide that it is difficult to generalize. For example, economic or property rights were at stake in most of the cases involving the commerce clause, the takings clause, and the preemption doctrines; but the Court also heard a substantial number of state court cases in the realm of family law.

520 See notes 473-74 *supra* and accompanying text.

521 See notes 481-82 *supra* and accompanying text.

filed, but without doubt they are very numerous; one need only look at the weekly order lists to see case after case in which a state or one of its officials (typically a prison warden) is listed as the respondent.<sup>522</sup>

A very different pattern emerges when we look at the cases brought for review from federal courts by state officials or other litigants supporting the exercise of state power. In the first four Terms of the 1980's, 122 cases of this kind received plenary consideration, more than any other category except federal government petitions. Admittedly, the volume of cases denied review was also very large—nearly 400 in all. Nevertheless, the ratio of grants to denials remains quite impressive, especially when one considers that many of the rejected petitions were clearly meritless, and others were controlled by intervening plenary decisions.<sup>523</sup> In other words, consistent with what has been said about the Court's commitment to "Our Federalism," a federal court decision striking down an exercise of state authority stands a very good chance of being reviewed, more so than a state court decision to the same effect.<sup>524</sup> However, in contrast to the state court cases, prosecutors' petitions and civil cases were granted in about equal proportions.<sup>525</sup>

The discussion thus far has encompassed three major types of litigation: suits to which the federal government is a party; state court suits in which state official action is challenged on federal grounds; and federal court suits involving challenges to state official action. What remains are private lawsuits raising only ques-

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522 About 60 cases in the first four Terms of the 1980's drew one or more dissents from the denial of review.

523 The ratio was particularly high in cases that properly invoked the Court's obligatory jurisdiction. Under 28 U.S.C. § 1254(2) (1982), an appeal as of right is available when a federal court of appeals holds a state statute unconstitutional under federal law. In the first four Terms of the 1980's the Court granted plenary review in more than half of the appeals filed under that provision: 31 cases reached the plenary docket, while 25 were summarily affirmed. (Five others were summarily vacated.)

Not surprisingly, the Court takes a very different approach to court of appeals decisions that reject challenges to the constitutionality of state statutes. No data are available on the number of such cases that were brought to the Court, but the number of cases heard was no more than 10. Thus, apart from challenges to federal statutes and executive policies, *see* notes 500-03 *supra* and accompanying text, the suit attacking the constitutionality of a state statute is probably the class of case in which lower court decisions have the greatest influence on the composition of the plenary docket.

524 *See* notes 508, 518 *supra* and accompanying text.

525 The Court heard 28 cases in which state prosecutors sought review of decisions granting habeas corpus to state prisoners (or reversing a district court's denial of the writ). Review was denied in about 90 such cases. Civil suits accounted for the remaining 94 plenary decisions; the number of denials in civil cases was about 300. I emphasize, however, that these raw figures do not tell the full story. For example, the volume of civil cases is swollen by petitions in which state officials challenged federal courts' awards of attorneys' fees. In the first four Terms of the 1980's only 2 such cases received plenary consideration.

tions of general federal law or the jurisdiction and procedure of federal courts.<sup>526</sup> Suits of this kind accounted for 98 plenary decisions in the first four Terms of the 1980's.

About half of the cases in this group followed the pattern seen in federal government litigation not involving the validity of federal statutes or policies: review was granted to resolve an intercourt conflict. Thus it is fair to conclude that if the court below had followed the holdings of other circuits on a recurring issue, the cases almost certainly would not have reached the plenary docket.<sup>527</sup> As for the other decisions, a substantial majority appear to reflect a different kind of lower court influence. In these cases it is plausible to surmise that the Justices granted review because they believed that the court below had wrongly decided an issue of some importance. Included here are most of the cases of first impression discussed in Part IV.<sup>528</sup> Among the topics represented, issues of antitrust and labor law were preeminent.<sup>529</sup>

This is not to say that all of the private lawsuits conform to one or another of the patterns I have described. Here, as in other areas of the Burger Court's work, there are a few decisions that do not readily lend themselves to characterization. Moreover, in each Term one can find some cases that can be classified easily enough after the fact, but whose presence on the plenary docket could never have been predicted on the basis of existing patterns.

From the standpoint of scholarship (and for the litigant who would like to frame a petition in a way that will secure review), these gaps are frustrating. But in a larger sense they are a source of reassurance. The Court is not a computer. Nor is it, to any great extent, a bureaucracy. Half or more of its cases will receive plenary consideration in response to exigent needs of the legal system—needs that would draw a similar response from almost any group of Justices. But the remainder of the plenary docket is shaped in large

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526 Three cases do not quite fit into any of the categories I have described; they were brought to the Court by nongovernmental litigants opposing individuals who were seeking redress against federal official action. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). On the merits, these can be seen as government cases, since the Solicitor General argued for reversal. However, from the perspective of the selection process, another classification is necessary, since the government did not file the applications for review. In fact, in *Valley Forge* the government actually urged the Court to deny certiorari. See Brief for the Federal Respondents in Opposition at 5, 7.

527 The assessment is supported by the fact that the lower court judgments were affirmed in well over half of the conflict cases involving only private litigants. In almost every other group of plenary decisions (except conflict cases in which the federal government was the respondent) the proportion of affirmances was no more than one-third.

528 See notes 445-55 *supra* and accompanying text.

529 See text following note 490 *supra*.

part by the interests and predilections of the Justices now sitting. In short, the Burger Court, like its predecessors, is a very human institution. And although it performs a unique lawmaking function—a function that quite properly dominates the selection process—it is also a Court whose members care about doing justice in individual cases and elaborating upon precedents in the common law tradition. This is not a tidy arrangement, but it is one that has worked remarkably well for nearly two hundred years. '



*Appendix*The Changing Content of the Plenary Docket,  
1955-1983 Terms

The purpose of this Appendix is to portray in concise tabular form the major shifts in the composition of the plenary docket over the three decades that encompass the Warren and Burger Courts. The tables do not present a complete picture of the Court's work; they do list most of the issues that have occupied a substantial place on the docket at one time or another during these years. To focus on broad patterns of change, I have not given year-by-year figures; instead, I have noted the total number of decisions on the various issues in each of four seven-Term periods: "early Warren" (1955-1961), "later Warren" (1962-1968), "early Burger" (1970-1976), and "later Burger" (1977-1983).

This arrangement, of course, omits the first two Terms of the Warren Court and the first Term of the Burger Court. The omission of the 1953 and 1954 Terms probably will not disturb anyone; the 1953 Term's cases were largely selected by the Vinson Court, and as for 1954, that Term too was to some degree transitional, with only eight Justices sitting for most of the Term. Greater regret may be occasioned by the omission of the 1969 Term; yet in some respects the inclusion of that Term (assuming it could be done while still retaining periods of equal length) would have distorted the picture even more. Of the Court's 109 plenary decisions, 13 did not decide or address any of the questions presented by the parties. In addition, 16 cases argued in 1969 were set for reargument in the 1970 Term—far more than in any other recent Term.

Each of the tables except the last lists the issues that achieved greatest prominence during a particular period. Some issues could have been included in more than one table; when this was so, I generally chose the table that emphasized the changes within the Burger Court rather than the one that highlighted the difference from the Warren Court. In borderline situations, I also considered the substance of the decisions as evidence of the degree of the Court's interest in a particular issue or area of the law.

**TABLE I**  
**Issues More Prominent in the Work of the Warren Court**  
**Than in the Burger Court**

Issue	Early Warren Court (1955-1961)	Later Warren Court (1962-1968)	Early Burger Court (1970-1976)	Later Burger Court (1977-1983)
<i>A. Police Practices and Rights of Criminal Defendants</i>				
Confrontation clause	0	8	5 <sup>a</sup>	2
Voluntariness of confessions	13	7	2	1
<i>B. Other Civil Rights Issues</i>				
Reapportionment	0	18	11	7
<i>C. Federalism and Separation of Powers Issues</i>				
Labor preemption	21	15	8	8
Federal tax liens and state law	6	5	0 <sup>b</sup>	1
<i>D. General Federal Law</i>				
Government challenges to mergers	5	17	11	0
Antitrust (other government cases)	18	21	5	6
Review of ICC	29	27	9	5
Review of FPC and FERC	9	14	12	6
Review of NLRB	38	29	24	25
Railway Labor Act	9	9	3	2
Tax liability	37	29	18	15
Immigration and naturalization	31	10	4	5
Federal Employers Liability Act	20	7	1	1
<i>E. Jurisdiction and Procedure of Federal Courts</i>				
Non-constitutional crim. procedure	52	21	14	18

a. Only one decision after 1971.

b. One decision in 1969.

TABLE II  
 Issues More Prominent in the Work of the Burger Court  
 Than in the Warren Court

Issue	Early Warren Court (1955-1961)	Later Warren Court (1962-1968)	Early Burger Court (1970-1976)	Later Burger Court (1977-1983)
<i>A. Police Practices and Rights of Criminal Defendants</i>				
Fourth amendment	14	38	45	55
<i>Miranda</i> issues	0	5	5	8
Right to counsel (sixth amendment)	0	8	12	15
Cruel and unusual punishment	0	0	8 <sup>a</sup>	14
Burden of proof, presumptions	0	4	8 <sup>b</sup>	7
<i>B. Other Civil Rights Issues</i>				
Commercial speech	0	0	5	5
Establishment clause	3	4	12	8
Discrimination against aliens	0	0	6	5
Sex discrimination	0	0	10	11
Substantive due process	5	3	16	15
Due process rights of prisoners, etc.	0	1	7	7
Residual issues of procedural due process	6	8	25	25
Voting rights legislation	1	3	6	7
<i>C. Federalism and Separation of Powers Issues</i>				
Scope of national powers	6	6	7	10
Separation of powers	2	4	9	6
Eleventh amendment limitations	1	1	3	5
Indian treaties and laws as limits on state power	4	3	11	14
State obligations under federally funded programs	0	2	18	13
Federal-state conflicts over property rights	2	4	7	10
Property disputes between states	1	3	8	8
<i>D. General Federal Law</i>				
Private antitrust cases	12	16	16	24
Securities regulation	3	7	16	16
Employment discrimination under Title VII	0	0	20	28
Federal regulation of Indians	3	2	4	7

Issue	Early	Later	Early	Later
	Warren Court (1955-1961)	Warren Court (1962-1968)	Burger Court (1970-1976)	Burger Court (1977-1983)
Freedom of Information Act	0	0	6	12
Modern environmental legislation	0	0	11	14
Private civil rights litigation	0	3	5	10
<i>E. Jurisdiction and Procedure of Federal Courts</i>				
Court of app. juris. (civil cases)	5	1	5	6
a. Only one decision before 1975.				
b. Two decisions in 1969.				

TABLE III

**Issues More Prominent in the Work of the Early  
Burger Court Than in the Later Burger Court**

Issue	Early	Later	Early	Later
	Warren Court (1955-1961)	Warren Court (1962-1968)	Burger Court (1970-1976)	Burger Court (1977-1983)
<i>A. Police Practices and Rights of Criminal Defendants</i>				
Self-incrimination (excluding <i>Miranda</i> )	6	19	20	13
Guilty pleas	0	1	6 <sup>a</sup>	3
Rights of indigent defendants	4	10	8 <sup>b</sup>	1
<i>B. Other Civil Rights Issues</i>				
Regulation of obscenity	6	10	20	3
Defamation and the first amendment	0	6	9	4
School desegregation	1	7	12	2
Other claims of racial discrimination	3	18	11 <sup>c</sup>	6
Rights of illegitimates	0	2	8	4
Voting and access to ballot	1	8	15	4
Residual equal protection	4	5	27	18
Vagueness and fair warning	6	6	12	3
Due process in gov't employment	4	0	7	1
Federalism-related limits on fed. court power	7	6	24	7
a. Three decisions in 1969.				
b. Only one decision after 1973.				
c. Three decisions in 1969.				

TABLE IV

**Issues More Prominent in the Work of the Later  
Burger Court Than in the Early Burger Court**

Issue	Early Warren Court (1955-1961)	Later Warren Court (1962-1968)	Early Burger Court (1970-1976)	Later Burger Court (1977-1983)
<i>A. Police Practices and Rights of Criminal Defendants</i>				
Double jeopardy	9	3	12 <sup>a</sup>	22
<i>B. Other Civil Rights Issues</i>				
Freedom of speech and the electoral process	0	0	4	10
Takings clause/just compensation	7	2	3	11
Due process and interstate federalism	3	2	1	8
Availability of remedies under § 1983	1	2	5	13
Official immunities	0	1	3	16
<i>C. Federalism and Separation of Powers Issues</i>				
State regulation of interstate commerce	3	5	4	12
State taxation of interstate commerce	6	6	8 <sup>b</sup>	12
Federal laws as limit on state taxing power	5	4	1	7

a. Three decisions in 1969.

b. All but 3 after 1973.

**TABLE V**  
**Issues Manifesting No Recent Significant**  
**Patterns of Change**

Issue	Early Warren Court (1955-1961)	Later Warren Court (1962-1968)	Early Burger Court (1970-1976)	Later Burger Court (1977-1983)
<i>A. Police Practices and Rights of Criminal Defendants</i>				
Jury selection and composition (14th Am.)	3	5	5	2
Rights of servicemen	8	1	3	0
<i>B. Federalism and Separation of Powers Issues</i>				
Intergovernmental immunities	8	2	2	2
<i>C. General Federal Law</i>				
Patents, copyrights, trademarks	5	10	8 <sup>a</sup>	8
Fair Labor Standards Act	11	1	3	1
Federal crimes and penalties	26	16	22	21
Tax procedure	12	5	6	7
Government employment	8	3	5	9
Federal Tort Claims Act	7	3	4	5
Bankruptcy	5	12	7	5

a. Two decisions in 1969.