The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's

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The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970’s

Arthur D. Hellman

Abstract

During the last decade, the Supreme Court has been deciding 65 to 70 cases a Term after oral argument. That represents a sharp decline from the 1970s and 1980s, the era of the Burger Court, when the Court was deciding about 150 cases a Term. The Burger Court’s docket, in turn, reflected a shift from the 1960s, when the docket was smaller. In short, what is “normal” for the plenary docket varies from one era to another. The period of the Burger Court retains a special interest in that regard because that was the only period after World War II in which the plenary docket reached the 150-case level.

This article provides a detailed examination of the plenary docket during first six Terms of the full Burger Court, with comparisons to the two preceding six-Term periods. It thus includes ten Terms under the leadership of Chief Justice Warren. The analysis is structured by reference to the four major functions that the Court performs in the life and law of America: delineating the limits of governmental authority against claims of individual liberty (civil rights); defining the boundaries between state and national power and among the branches of the national government (federalism and separation of powers); interpreting and applying the body of statutes and regulations through which the national government exercises its sovereign powers and regulates activity in the private sector (general federal law); and supervising the operation of the federal courts (jurisdiction and procedure).

The study found that the expansion of the plenary docket could be attributed largely to growth in civil rights cases. During the first twelve Terms of the study, the annual total of civil rights cases was gradually increasing, while the size of the plenary docket remained essentially the same. The result was that, as the Court moved through the 1960s, civil rights cases were steadily displacing litigation involving other issues of federal law. By the 1970 Term, all cases primarily involving issues other than civil rights occupied little more than one-third of the plenary docket; their number had been reduced by about forty percent from what it had been a decade earlier. Then, in 1971, the Court suddenly expanded the size of the plenary docket. The consequences were twofold. First, there would be no further displacement of cases that did not involve civil rights issues. Second, as long as the Justices were willing to accept the heavier workload, they could continue to hear a large number of cases that did involve civil rights. It thus appears that the Court expanded the size of the plenary docket in 1971 because the Justices were unwilling to cut back on the number of civil rights cases they were deciding, but recognized that there was a need for a greater number of authoritative
precedents in other areas of federal law. The only way they could satisfy both desires was to increase the total number of cases given plenary consideration.
THE BUSINESS OF THE SUPREME COURT
UNDER THE JUDICIARY ACT OF 1925:
THE PLENARY DOCKET IN THE 1970’s

Arthur D. Hellman

Discussion of altering the Supreme Court’s jurisdiction must begin with a study of which needs are currently being met by the Court’s decisions and which are not. In this Article, Professor Hellman undertakes a comprehensive survey of the plenary docket over the past two decades, concentrating on the years of the Burger Court. Professor Hellman’s analysis sheds light on the expansion and contraction of the Court’s docket as a whole and of the various segments that comprise it, thus illuminating the Court’s efforts to fulfill its role as the authoritative expositor of national law.

“...”"HE [Supreme] Court’s mode of doing business,” wrote Felix Frankfurter and Henry Hart in 1934, “is ultimately determined by the business to be done. Shifting elements in the amount and character of litigation coming to the Court create new problems for which it is the function of procedure to devise new solutions or to adapt old ones.”¹ Less than a decade before these words were written, the “business to be done” had so overwhelmed the Court that Congress was persuaded, for only the second time in the nation’s history, to make major changes in the Court’s jurisdiction. The result was the Judiciary Act of 1925,² the jurisdictional dispensation ³ which has continued, largely unchanged, until this day.

¹Associate Professor of Law, University of Pittsburgh. B.A., Harvard, 1963; LL.B., Yale, 1966. The author served as Deputy Executive Director of the Commission on Revision of the Federal Court Appellate System; however, the views expressed herein do not necessarily represent those of the Commission.

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³This was the term used by Professor Frankfurter. See, e.g., Frankfurter & Landis, The Business of the Supreme Court at October Term, 1928, 43 HARV. L. REV. 33, 33 (1929).
Often known as the "Judges Bill" because it was drafted by a committee of Supreme Court Justices, the Act followed the pattern established by its major predecessor, the Circuit Court of Appeals Act of 1891: it eliminated entire classes of cases from those which the Court had theretofore been obliged to decide. The Act of 1891 had itself been made necessary by conditions of hopeless congestion in the Court's docket. Because virtually all federal civil cases could be brought to the Supreme Court for review as of right, the Court had fallen years behind in the handling of its business, much of which was quite routine and unworthy of the nation's highest tribunal. Congress responded by establishing a system of intermediate appellate courts and vesting them with the jurisdiction to hear the initial appeal in most cases decided by the federal trial courts. Almost immediately, the Supreme Court's docket was reduced by half; a quarter of a century later, however, the caseload had once again grown to the point where it threatened the Court's ability effectively to carry out its functions. The Act of 1925, building upon a series of intervening jurisdictional changes of lesser magnitude, provided relief by giving the Court almost complete discretion to select the cases that it would decide.

Jurisdictional reform, it was thought, could go no further. Indeed, with perhaps one exception, the changes since 1925 have been extremely modest in scope. During that half century, however, the "amount and character of litigation coming to the Court" have shifted in ways scarcely dreamed of by the Justices who drafted the Act or the scholars who analyzed its workings. The

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Footnotes:

7 F. Frankfurter & J. Landis, supra note 4, at 203-10.
9 See F. Frankfurter & J. Landis, supra note 4, at 299:

The Act of 1925 has cut the Supreme Court's jurisdiction to the bone. A still wider use of certiorari has been suggested, whereby all cases from the state courts and the circuit courts of appeals could be reviewed only at the Supreme Court's discretion. Such a step is highly improbable.

volume of cases has increased fourfold; \(^\text{11}\) entirely new classes of litigation have grown up, making new and often onerous demands upon the Court; the Court has come to play an even more prominent role in the public life of the nation; and once again the question is raised whether the burdens imposed on the Justices have become too great for the country’s good. These developments have made it all the more urgent to examine the Court’s mode of doing business, and in particular to consider whether the Court is fully able to perform its role as authoritative expositor of federal constitutional and statutory law. The purpose of this Article is to assist in that inquiry, and thus to shed light on the question whether new procedures—or even new structures—are once again called for.

The plan of the Article is as follows. Part I describes with broad strokes the totality of the Court’s docket and the Court’s modes of doing business during recent Terms. The remainder of the Article concentrates on the Court’s plenary decisions—the cases which receive the fullest consideration and which, ordinarily, have the highest precedential value. Part II discusses the plenary docket generally, and Part III examines in detail the subject matter of that docket and its relation to the development of the national law. The Article concludes with a summary of its findings and their implications for current reform proposals.

I. THE COURT’S MODES OF DOING BUSINESS

A. Two Perspectives on the Court’s Business

In analyzing the Supreme Court’s modes of doing business, one can begin from either of two perspectives. First, one can ask whether the Justices are overburdened—that is, whether the Court’s workload has increased to the point where “the conditions essential for the performance of the Court’s mission” \(^\text{12}\) no longer exist and the quality of the Court’s work has been impaired. This was the approach taken by Professor Henry Hart in a controversial paper published in 1959; \(^\text{13}\) it was also the approach, more than a decade later, of the Study Group on the Case Load of the Supreme Court (generally known as the Freund Study Group after its chairman, Professor Paul Freund of Harvard Law

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\(^{11}\) Compare, e.g., Frankfurter & Landis, supra note 3, at 45 (808 cases disposed of in the 1928 Term), with Table I, pp. 1726–27 infra (3,937 cases disposed of in the 1976 Term).


\(^{13}\) Hart, The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959).
School). The second approach is to inquire whether the Court is adequately fulfilling its role of providing authoritative guidance for the resolution of disputes involving questions of federal law. This perspective is suggested by the report of another study group, the Commission on Revision of the Federal Court Appellate System (known as the Hruska Commission after its chairman, former Senator Roman L. Hruska).

Under the Judiciary Act of 1925, the Justices are called upon to do two kinds of work: deciding cases, and selecting the cases that they will decide. Professor Hart, writing at a time when the number of applications for review was half of what it is today, focused on the former. Attempting "to fit the actual work which the Court does into the time actually available for doing it," Hart estimated that the Justices could spend an average of twenty-four working hours on the research and writing for each Court opinion. This, in his view, was not enough. "[F]ar too few" of the Court's opinions "genuinely illumine[d] the area of law with which they deal[t]. Other opinions fail[ed] even by much more elementary standards." Hart concluded that the Court was "trying to decide more cases than it [could] decide well," and that only by "materially decreas[ing]" the number of cases decided by full opinion could the Court adequately discharge its functions. Nor did Hart think that anything of value would be lost if the Court issued fewer opinions:

The hard fact must be faced that the Justices of the Supreme Court of the United States can at best put their full minds to no more than a tiny handful of the trouble cases which year by year are tossed up to them out of the great sea of millions and even billions of concrete situations to which their opinions relate. . . . [W]hat matters about Supreme Court opinions is not their quantity but their quality.

Today, notwithstanding Hart's admonitions, the Court is writing substantially more opinions than it did in 1959. While no one

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14 See note 12 supra.
16 See pp. 1721–22 infra.
17 Hart, supra note 13, at 84.
18 Id. at 100.
19 Id.
20 Id. at 99.
21 Id. at 96.
22 See pp. 1730–32 infra.
suggests that the Justices ought to increase the number further, little is heard of the argument that the opinions would be of higher quality if their number were reduced. The argument may have merit, but it requires judgments about opinion quality that are far too subjective to be the topic of fruitful debate.

When the members of the Freund Study Group examined the Court’s workload in 1972, they too found that the Justices were overburdened, but unlike Hart they did not suggest that this was because the Court was writing too many opinions. Instead, relying largely on “[t]he bare figures of the Court’s workload,” the Study Group concluded that “the consideration given to the cases actually decided on the merits is compromised by the pressures of ‘processing’ the inflated docket of petitions and appeals.” In other words, because the Justices must use up so much of their time and intellectual energy in screening the 4,000 cases in which review is sought, the cases that are ultimately chosen for review “on the merits” do not receive the thorough collegial deliberation that they deserve. To remedy this situation, the Study Group proposed the creation of a National Court of Appeals to help the Supreme Court in the selection process. The new tribunal would screen all of the applications for review that are now filed in the Supreme Court, deny review in the great majority, and certify to the Supreme Court, for final screening, only the few hundred that were most deserving of review. This proposal aroused nearly universal opposition. Moreover, while some

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23 But see National Court of Appeals Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Sen. Comm. on the Judiciary, 94th Cong., 2d Sess. 115–16 (1976) (remarks of Dean Pollak) [hereinafter cited as Senate Hearings]. Some of the Justices have suggested that it might be desirable for the Court to reduce the number of cases in which it writes full opinions, but they do not argue that this should be done in order to improve the quality of the opinions themselves. Their concern, rather, is with doing “adequate justice” to the issues. See Rehnquist, Whither the Courts, 60 A.B.A.J. 787, 789 (1974); Letter of Mr. Justice White (June 9, 1975), in Hruska Commission Report, supra note 15, at 181, 182; Letter of Mr. Justice Powell (June 10, 1975), in id. at 185, 186.
24 Freund Study Group, supra note 12, at 2, reprinted in 57 F.R.D. at 578.
25 Id. at 6, reprinted in 57 F.R.D. at 581. The Study Group also asserted that “[i]ssues that would have been decided on the merits a generation ago are passed over by the Court today.” Id. However, the report placed little emphasis on this aspect of the Court’s work, and the Study Group proposal that the National Court be empowered to decide some cases on the merits, id. at 592–93, seemed almost like an afterthought. As Judge Friendly put it, the report left the impression that the National Court would “do very little in deciding cases and thus [would] spend most of its time in screening.” H. Friendly, Federal Jurisdiction: A General View 51–52 (1973).
27 The most often heard objections are set forth in. Goldberg, One Supreme Court, New Republic, Feb. 10, 1973, at 14, 16, and Brennan, The National
members of the Court seemed to agree that the task of screening applications for review imposed heavy burdens, others insisted that it did not.²⁸ In any event, it seems that for the present, at least, the plan has virtually been talked to death.²⁹

In contrast to the two earlier studies, the Hruska Commission made no attempt to determine whether the burdens of a heavy caseload have impaired the quality of the work that the Court has been doing. Rather, the Commission asked whether the Court has been doing everything required by its role in our society.³⁰ That role has been variously defined,³¹ but as I conceive it, it encompasses four important tasks, each corresponding to an area of national law. The Court delineates the limits of governmental authority as against claims of individual liberty; it marks the boundaries between state and national power; it interprets and clarifies the vast body of federal statutory and common law; and it supervises the operation of the federal courts. Each of these responsibilities requires the Court to hand down decisions that will provide authoritative guidance for the resolution of disputes in the corresponding area of federal governance. The Hruska Commission concluded that because of the vast expansion of federal law in recent decades, many more decisions of this kind are now needed than one court can be expected to furnish. Like the Freund Study Group, the Commission sought a solution in the creation of a National Court of Appeals, but one with a very different function. The Hruska Commission’s National Court would not screen cases for the Supreme Court; rather, it would furnish additional authoritative decisions on issues of national law through the adjudication of cases referred to it by


the Court. This proposal has received a mixed reception. A number of organizations, including the American Bar Association, support it, while many court of appeals judges have expressed opposition. A bill to create a National Court along the lines urged by the Commission has been introduced in Congress and is pending at this writing.

In this Article, I shall discuss the Court's business largely from the perspective of the formulation of national law. For this reason, unless otherwise stated, references to the proposed National Court of Appeals will mean the Hruska Commission's tribunal, not the Freund Study Group's. While some attention is given to the burdens which various forms and modes of disposition impose on the Justices, there is little utility in discoursing at length on the "overwork" issue when the Justices themselves are in disagreement. Nor is it fruitful to evaluate the quality of the decisions that the Court makes. On the other hand, while it is true that full consideration of the national law problem requires attention to what the Court is not doing, it is at least a necessary

32 Hruska Commission Report, supra note 15, at 32-34, 39. The Commission also proposed a "transfer jurisdiction" which would make it possible "to obtain a nationally binding decision at the first level of appellate review," id. at 34. The transfer jurisdiction came under heavy fire, particularly from court of appeals judges (who would have borne the responsibility for deciding whether cases would be transferred), and the Commission's chairman soon emphasized that "transfer is not integral to the basic proposal." Hruska, The National Court of Appeals: An Analysis of Viewpoints, 9 Creighton L. Rev. 286, 306-07 (1975). Another Commission member, Congressman Charles Wiggins, expressed similar views, as did the Commission's executive director, Professor A. Leo Levin. Wiggins, The National Court of Appeals, Trial, Nov. 1977, at 36, 38-39; Levin, Do We Need a New National Court?, Trial, Jan. 1976, at 32, 39. In these circumstances it seems reasonable to assume that if the National Court proposal is adopted, only the reference jurisdiction will be included, at least initially.


34 See, e.g., Hearings Before the Commission on Revision of the Federal Court Appellate System (Second Phase) 903 (1974-1975) (Hearings conducted pursuant to Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807) (Judge Lay) [hereinafter cited as Hruska Commission Hearings III]; id. at 1311 (Judge Friendly); id. at 1331 (Judge Kaufman); id. at 1372 (Judge Swygert). However, a substantial number of court of appeals judges have supported the proposal. See, e.g., id. at 655 (Judge Hufstedler); id. at 751 (Judge Leventhal); id. at 1077 (Judge Haynsworth); id. at 1164 (Judge Adams); id. at 1303 (Judge Fairchild).


36 For example, there may be intercircuit conflicts that the Court is not resolving. See Levin & Hellman, supra note 31, at 419-23.
first step to find out, in some detail, what the nine Justices are doing to meet the needs that exist. To that inquiry I now turn.

B. The Relevant Variables

During each of its most recent Terms, the Supreme Court has given final disposition to nearly 4,000 cases. Whether one looks at these cases from the national law standpoint or with a view to measuring the burdens on the Justices, three important variables are central to the analysis: the precedential value of the decision, the manner in which the case was considered, and the amount of explanation accompanying the decision.

1. Is There a Decision Which Has Precedential Value? — The function of the Supreme Court, as the Justices have often emphasized, 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." 37 This perception of the Court's role is not easily reconciled with the traditional view of the judicial function, 38 but it is made necessary by the practical fact that only the Supreme Court has "the power to hand down judgments which constitute binding precedents in all state and federal courts." 39 In analyzing the Court's docket, therefore, the most important variable is whether there is a decision with precedential value or, as it is sometimes put, whether the case, or any issue raised by it, 40 is adjudicated on the merits.

The phrase "on the merits" is used here, not in its res judicata sense, but rather as a way of referring to the stare decisis effect of Supreme Court cases. From this standpoint it provides a useful shorthand: a decision on the merits is a precedent that must be followed by other courts until overruled or qualified by the Supreme Court. 41 The resulting body of precedents constitutes the "national law" — those rulings which provide authoritative guidance for lower courts, for attorneys advising their clients, and for persons who must govern their activities in accordance with federal law in its many manifestations. The amount of guidance

40 See pp. 1719–20 infra.
41 This obligation obtains whether the Court has adjudicated a "substantive" issue or only a threshold question such as mootness or justiciability. See id.
actually provided will vary, depending on, among other things, the nature of the issue actually adjudicated and the extent of the Court’s explanation. But whatever the difficulties of ascertaining the scope of the holding, a disposition “on the merits” must be treated as binding authority by bench, bar, and the affected public.

When the Court affirms, reverses, or modifies the judgment below and explains the reasons which underlie its ruling, there is no doubt that the decision has been on the merits; but there are several situations in which the disposition can be ambiguous. Most of the ambiguities disappear, however, if one keeps in mind that the crucial question in this context is not whether a decision resolves the controversy for the parties, but whether it furnishes a precedent that will be available thereafter for the resolution (or avoidance) of other disputes. In other words, I am including not only those decisions which result in a “holding” in the classical sense and thus have precedential status irrespective of the actual guidance provided, but also decisions which, although lacking a true “holding,” nevertheless provide some assistance in predicting what the courts will do in fact, and thus have precedential value.

Three potentially ambiguous forms of disposition deserve brief discussion here. First, when the Court disposes of a case on a threshold issue such as mootness or justiciability, it is often said that the Court has avoided a decision “on the merits.” Although the Court may not have decided the merits of the issue raised by the party seeking review, its decision on the threshold question provides a precedent on that issue, and is thus a decision “on the merits” from the standpoint of the national law. For example, in \textit{DeFunis v. Odegaard}, the Court did not decide or even address the constitutionality of the “reverse discrimination” program challenged by the petitioner, so that the decision provides no guidance on that issue; but in holding that the case was moot, the Court did create a precedent that could be — and has been — used by lower courts in deciding similar cases. For the purposes of this Article, then, a case is considered to have been disposed of “on the merits” as long as the Court adjudicates at

\footnote{See K. Llewellyn, \textit{The Bramble Bush} 58–69 (1951).}
\footnote{See F. Cohen, \textit{The Legal Conscience} 65–74 (1960) (essay first published in 1935).}
\footnote{See, e.g., G. Gunther, \textit{Cases and Materials on Constitutional Law} 746 (9th ed. 1975).}
\footnote{416 U.S. 312 (1974).}
\footnote{See, e.g., Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 315 (9th Cir. 1974); Locke v. Board of Pub. Instruction, 499 F.2d 359, 364–65 (5th Cir. 1974).}
least one issue, whether or not it was raised by the party seeking review.

Second, there are cases in which the Court does not adjudicate any issues, but simply sends the cause back to the lower court for further consideration.\(^{47}\) The lower court may be directed to develop the record further, to consider questions not previously aired, or to reconsider issues in the light of intervening events. When a decision of this kind is accompanied by an opinion or memorandum explaining the circumstances which make further consideration appropriate, it provides at least some guidance for the future by indicating the facts and inquiries which are relevant to the resolution of the issues presented.\(^{48}\) To that extent the decision has precedential value, and from the standpoint of the national law there seems to be no reason not to regard it as a decision on the merits, even though it does not settle the dispute immediately before the Court, would not be considered "on the merits" if the question were one of res judicata, and probably does not contain any sort of "holding" in the classical sense.

Suppose, however, that the Court remands a case for further consideration in light of a particular recent decision, but does so in a bare order unaccompanied by any explanation or discussion. Such dispositions have become quite common in the last two decades. In the 1976 Term, for instance, 82 cases were handled in this manner. Typically, the case cited in the remand order is a decision of the Court handed down subsequent to the lower court's ruling in the case being remanded.\(^{49}\) As an a priori matter, one would probably not regard a disposition of this kind — at once so cryptic and so inconclusive — as being "on the merits" in any sense. Nevertheless, the Supreme Court has indicated that these dispositions do have precedential significance. In a 1964 decision,\(^{50}\) the Court appeared to say that reconsideration orders are issued when the Justices have found enough similarity between the case before them and the intervening decision to indi-

\(^{47}\) Of course, when the Supreme Court expresses its views on the issues presented and states whether or not the lower court has decided them correctly, the decision clearly has precedential value, irrespective of whether the formal disposition accompanying the opinion is one of affirmance, reversal, or remand. See, e.g., NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967), in which the Court said it was "revers[ing]" the judgment below, but the formal disposition was one of remand. The cases discussed in the text are those in which the Court does not hold whether or not there was error in the lower court's decision.


\(^{50}\) Henry v. City of Rock Hill, 376 U.S. 776 (1964). The Court said that remand orders do "not amount to a final determination on the merits," but that they do "indicate that we [find the intervening precedent] sufficiently analogous and, perhaps, decisive to compel re-examination of the case." Id. at 777.
cate, as a prima facie matter, that the judgment below is in error, but that because of other aspects of the case, the Court is not prepared to reverse outright.\textsuperscript{51} The Court’s account thus suggests that a remand order, when read together with the opinion below, may provide lawyers and lower courts with some guidance as to the scope or application of the ruling laid down in the cited case. To that extent, the remand order does have precedential value.\textsuperscript{52}

The crucial question, however, is not the Court’s intentions, but the treatment given to reconsideration orders by the lower courts. Two areas of inquiry are relevant. First, what is the effect of such orders in the cases in which they are issued? Second, what is the treatment given remanded decisions in other cases? Extensive research would be required in order to answer these questions. In the interim, I shall treat the remand for reconsideration as a separate class of disposition, occupying an intermediate position between those that are clearly “on the merits” and those that clearly are not.

A third and more familiar ambiguity has its source in the fact that the Court does not have a free hand in determining when it will decide a case “on the merits.” The Court’s appellate jurisdiction is established by Congress, and in delineating that jurisdiction Congress has distinguished between two types of cases: some may come to the Court only by writ of certiorari, while others may be brought there on appeal.\textsuperscript{53} With respect to cases before the Court on certiorari, the Court’s jurisdiction is discretionary: it may decide the merits of the cause, or it may decline to do so.\textsuperscript{54} In contrast, when a case comes within the appeal

\textsuperscript{51} The cautionary circumstances may involve facts directly bearing on the issue adjudicated in the cited case, or they may relate to alternate grounds that might support the judgment below even if the lower court erred in its conclusion on the common issue. Compare, e.g., United States v. Jacobs, 429 U.S. 909, 909–10 (Stevens, J., concurring), with id. at 910 (Marshall, J., dissenting). See also Oregon State Penitentiary v. Hammer, 434 U.S. 945, 945 (1977) (Stevens, J., dissenting from remand order); The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 93–94 (1961).

\textsuperscript{52} See, e.g., United States v. East Tex. Motor Freight Sys., Inc., 564 F.2d 179, 185 (5th Cir. 1977) (vacate-and-remand order said to give “fairly strong indication” that principles set forth in Title VII case are to be applied to claims under 42 U.S.C. § 1981 (1970)).

\textsuperscript{53} For a brief description of the Court’s appellate jurisdiction, see D. CURRIE, FEDERAL COURTS 291–99 (2d ed. 1975). The “appellate jurisdiction” (embracing all cases not within the original jurisdiction) must of course be distinguished from the appeal jurisdiction, which refers to a particular mode of review.

\textsuperscript{54} Sup. Cr. R. 19 (“A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.”). The considerations governing the grant or denial of certiorari have become the subject of a vast literature. See, e.g., R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 147–93 (4th ed. 1969); Gibbs, Certiorari: Its Diagnosis and Cure, 6 Hastings L.J. 131 (1955); Tanenhaus,
jurisdiction, Congress has conferred upon the losing litigant a right of review by the Supreme Court. But what does it mean to have a right of review? One thing it does not mean is the right to have one's case adjudicated through the traditional panoply of appellate processes. For many years the Court has been disposing of some appeals without oral argument, without full briefs, and without an opinion or other form of explanation. Appeals from state courts are "dismissed for want of a substantial federal question;" in cases from federal courts, the judgment is one of affirmance. No one has ever doubted that these are dispositions on the merits from the standpoint of the litigants, and thus res judicata as to the controversy before the Court. Until recently, however, there was disagreement as to whether such dispositions were also to be regarded as "on the merits" in the sense of being binding precedents for other litigants.

The question was resolved in 1975 when, in Hicks v. Miranda, the Supreme Court held that "the lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'" The Court conceded that


Two components of the obligatory jurisdiction are of particular importance today: state court actions in which the validity of a state statute has been upheld against a challenge on federal grounds, see 28 U.S.C. § 1257(2) (1976), and court of appeals decisions striking down state statutes on the ground of repugnance to the Federal Constitution or laws, see id. § 1254(2). In recent years Congress has substantially reduced the scope of the obligatory jurisdiction. See pp. 1736-37 & notes 104-105 infra.

But see Linehan v. Waterfront Comm'n, 347 U.S. 439 (1954) (per curiam) (Douglas & Black, JJ., dissenting from summary affirmance); Rehnquist, supra note 23, at 790.

The reasons for the differential treatment are shrouded in history. See Note, Supreme Court Per Curiam Practice: A Critique, 69 HARV. L. REV. 707, 712 (1956). Occasionally the Court will reverse a judgment on the appeal papers (i.e., without waiting for full briefing or hearing oral argument), but in such instances the Court usually issues a per curiam opinion, see, e.g., Hess v. Indiana, 414 U.S. 105 (1973) (per curiam), or at least cites the precedents believed to be controlling, see, e.g., Acker v. Texas, 430 U.S. 962 (1977) (mem.). For criticism of this practice, see HART & WECHSLER, supra note 8, at 647, and authorities cited therein.


422 U.S. 332 (1975).

Id. at 344-45 (quoting Port Auth. Bondholders Protective Comm. v. Port of New York Auth., 387 F.2d 259, 263 n.3 (2d Cir. 1967)).
"[a]scertaining the reach and content of summary actions may itself present issues of real substance," but insisted that once the lower court makes that determination, the summary decision is to be treated as no less a binding precedent than a decision accompanied by full explanation.

In light of Hicks and its progeny, it is now fair to say that in recent years the Court has been handing down about 300 "merits" decisions each Term. The vast majority of the Court's dispositions, however, are clearly not on the merits: these are denials of certiorari, dismissals of appeals for want of jurisdiction, and the like — in essence, determinations that the Court cannot or will not decide the case on the merits. Such determinations, the Justices have often emphasized, have no precedential value for anyone.

2. How Are the Justices Informed of the Facts and Issues in the Case Before Them? — In the 1976 Term, the Court received full briefs, and thereafter heard oral argument, in 175 cases out of the 3,937 which had final disposition. These 175 cases can be said to have been given "plenary consideration" — the full range of processes by which the Justices, under the adversary system, are informed about the facts and issues in the cases before them. The remaining cases were disposed of on the basis of the certiorari or appeal papers — the application for review and the opposing party's response. In theory, the function of these preliminary papers is simply to enable the Court to determine whether or not the case deserves plenary consideration; in practice, as stated earlier, a substantial number of cases are decided on the merits with only the preliminary papers in hand.

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62 422 U.S. at 345 n.14. In Mandel v. Bradley, 432 U.S. 173, 176 (1977), the Court went even further, saying that summary dispositions are to be treated as doing no more than "prevent[ing] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions" (emphasis added).

63 Arguably, the dismissal of an appeal for want of jurisdiction should, under the analysis in the text, be considered a decision on the merits. The party seeking review has asserted that the case falls within the Court's obligatory jurisdiction, and the Court has rejected his contention. But the dismissal of an appeal for want of jurisdiction would ordinarily have no precedential value for any court other than the Supreme Court itself. While the dismissal might, in theory, provide guidance for litigants seeking to invoke the Court's obligatory jurisdiction in future cases, the lack of any explanation for the disposition, even a controlling citation, will usually preclude its use for such purposes. Thus the contribution of these dismissals to the national law is almost invariably nil.


65 See Table I, pp. 1726–27 infra.
It would be possible, of course, for the Court to utilize a more flexible set of procedures. For instance, after studying the preliminary papers in a case, the Court could request the submission of full briefs and thereafter decide the case without oral argument. Or the Court could request memoranda from the parties on particular issues. Procedures such as these might be particularly appropriate in cases involving a recurring but straightforward issue of statutory construction. If the only question in a case is what Congress meant, and if the only materials to be consulted are the statute and its legislative history, then the opposing interpretations could probably be brought to the Court's attention as well in a brief as through oral argument. The Court would then obtain at least some of the benefits of the adversary system, without the incursions on the Justices' work schedules that oral argument necessarily entails.

Hybrid procedures such as these, however, have not been adopted. Thus, at the present time there are only two routes by which the Justices are informed about the facts and issues in the cases before them: the summary route, in which the Court has only the certiorari or appeal papers, and the plenary route, in which the Court receives full briefs and hears oral argument.

3. What Form of Explanation Accompanies the Disposition? — When the Court declines to decide a case on the merits, the disposition is typically announced by a bare order, without any explanation or elaboration. One might expect that, conversely, when a case is decided on the merits — that is, when the disposition is one that will serve as a precedent for lower courts — the Court would write at least enough to explain to the bench and bar what was being decided, and why. As suggested earlier, however, the fact that a case is decided on the merits does not necessarily mean that the decision will be accompanied by an explanation of any kind. Several patterns can be discerned. Cases receiving plenary consideration are almost invariably decided by full opinions — opinions containing a full exposition of the relevant facts, the procedural history, and the Court's reasoning. "Full opinions" may be signed by an individual Justice or issued per curiam; for

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66 This suggestion was made in Brown, The Supreme Court, 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77, 94–95 (1958).
68 The most common exceptions are cases in which the judgment is affirmed by an equally divided Court, e.g., Radich v. New York, 401 U.S. 531 (1971), or in which the writ of certiorari is dismissed as improvidently granted, e.g., Darden v. Florida, 430 U.S. 704 (1977).
present purposes the distinction is irrelevant. Additionally, each Term another 20 to 30 decisions, though not receiving plenary consideration, are accompanied by per curiam opinions, labeled as such by the Court.69 Many of these are very short and unilluminating, but others are quite extensive, differing little in length or degree of elaboration from many opinions in argued cases.70 Of the remaining "merits" dispositions, however, all but a handful are accompanied by no explanation whatever; the exceptions are an occasional decision accompanied by one or two citations or a single sentence of explanation.

C. Profiles of the 1975 and 1976 Terms

Table I, using as its framework the analysis set forth in the preceding pages, summarizes the Supreme Court's modes of doing business during the two Terms 1975 and 1976.71 Review of the data discloses that of the 4,000 cases given final disposition during each of the Terms, more than 3,500 constituted, on any analysis, no more than a decision not to decide or address any of the issues presented. These cases thus had no precedential value whatever. While there were some other decisions which arguably should be regarded as having precedential status,72 most of them had so

69 These are the decisions which are published in the front portion of the United States Reports, together with the argued cases. Since May 1970 all other decisions have been published in "the back of the book," together with denials of certiorari, dismissals of appeals, and the like. The reporter's practice is to put a decision in the front of the book if it is "fairly informative" or "something that lends itself to a headnote." Telephone conversation with Henry Putzel, Jr., Esq., Reporter of Decisions (July 6, 1976).


71 Table I is based in part on data furnished by Mr. Kent Bloom, Assistant Clerk of the United States Supreme Court. I am grateful to him and to Dr. Mark W. Cannon, Administrative Assistant to the Chief Justice, for their assistance in obtaining these data.

The analysis here differs from that employed in the Harvard Law Review's annual Supreme Court Note in three respects. First, I consider dismissals for want of a substantial federal question to be dispositions on the merits, whereas the Supreme Court Note does not. See The Supreme Court, 1976 Term, 92 Harv. L. Rev. 70, 298 n.c (1977). Second, when the Court vacates a judgment for reconsideration or other action in light of authority other than a recent Supreme Court decision (e.g., legislation or a state court decision), I do not regard this as a decision on the merits, whereas the Supreme Court Note does. See id. at 298 n.b. Finally, the Supreme Court Note also accords "merits" status to cases vacated for reconsideration in light of an intervening Supreme Court precedent, see id., but as explained in the text I have placed these in a separate category. With these adjustments, the two sets of figures are generally consistent.

### TABLE I

Profiles of the 1975 and 1976 Terms

<table>
<thead>
<tr>
<th>Cases decided on merits</th>
<th>1975</th>
<th>1976</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ARGUED</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Signed opinions</td>
<td>160</td>
<td>154</td>
</tr>
<tr>
<td>Per curiams</td>
<td>12</td>
<td>4</td>
</tr>
<tr>
<td>Memoranda</td>
<td>0</td>
<td>2</td>
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<tr>
<td>Less than memorandum</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td><strong>NOT ARGUED</strong></td>
<td>205</td>
<td>162</td>
</tr>
<tr>
<td>Per curiams</td>
<td>23</td>
<td>19</td>
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<tr>
<td>Memoranda</td>
<td>5</td>
<td>13</td>
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<tr>
<td>Less than memorandum</td>
<td>(177)</td>
<td>(130)</td>
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<tr>
<td>Summary affirmances</td>
<td>56</td>
<td>54</td>
</tr>
<tr>
<td>Dismissals for want of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>substantial federal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>question</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Summary reversals</td>
<td>78</td>
<td>66</td>
</tr>
<tr>
<td>Orders vacating death</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>sentence</td>
<td>43</td>
<td>9</td>
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</table>

<table>
<thead>
<tr>
<th>Cases not deciding or addressing merits of any issue</th>
<th>3516</th>
<th>3522</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ARGUED</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Affirmances by equally divided court</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Orders dismissing certiorari as improvidently granted</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td><strong>NOT ARGUED</strong></td>
<td>3513</td>
<td>3518</td>
</tr>
<tr>
<td>Denials of certiorari</td>
<td>3431</td>
<td>3394</td>
</tr>
<tr>
<td>Dismissed-denied cases</td>
<td>48</td>
<td>66</td>
</tr>
<tr>
<td>Dismissals for want of jurisdiction</td>
<td>19</td>
<td>20</td>
</tr>
<tr>
<td>Other dismissals</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Cases vacated for consideration or other action in light of something other than recent case</td>
<td>11</td>
<td>31</td>
</tr>
</tbody>
</table>
### TABLE I (continued)

<table>
<thead>
<tr>
<th></th>
<th>1975</th>
<th>1976</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ambiguous dispositions:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Argued cases dismissed or</td>
<td>45</td>
<td>90</td>
</tr>
<tr>
<td>remanded, with memoranda</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cases remanded for recons-</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>ideration in light of recently decided case</td>
<td>44</td>
<td>82</td>
</tr>
<tr>
<td>Total cases given final disposition</td>
<td>3938</td>
<td>3937</td>
</tr>
</tbody>
</table>

* Does not include 108 denials of applications for extraordinary writs.
* Does not include 55 denials of applications for extraordinary writs.
* These are cases in which an appeal was dismissed for want of jurisdiction; treating the appeal papers as a petition for certiorari, the Court then denied certiorari. See 28 U.S.C. § 2103 (1976).

Little by way of explanation that they would prove marginally useful at best to anyone attempting to determine what the law is. Even among the cases which clearly had precedential status, more than one third were unaccompanied by any kind of explanation, thus drastically reducing their precedential value. In all, there were only about 200 cases each Term in which the decision could make a substantial contribution to "securing harmony of decision and the appropriate settlement of questions of general importance" in the national law.

## II. THE PLENARY DOCKET IN PERSPECTIVE

In recent years, the Supreme Court has been giving plenary consideration to about 175 cases each Term. These are the cases which, individually, have required the greatest amount of time and energy from the Court; they are also the ones which receive the most extensive and sustained attention from lawyers and lower courts seeking precedents to aid them in the settlement of other disputes. The remainder of this Article will be devoted to a study


73 See p. 1718 supra.

74 Indeed, since 1971 the number of cases receiving oral argument has held remarkably steady: starting with the 1971 Term, the figures were 177, 177, 170, 175, 179, and 176, respectively. See 46 U.S.L.W. 3133 (Aug. 13, 1977) (totals for 1974 through 1976); 43 U.S.L.W. 3086 (Aug. 13, 1974) (1971 through 1973 Terms). These figures include cases set for reargument in the next Term.
of these cases and their relation to the development of the national law.

One preliminary matter requires clarification. It is misleading to count "cases" as such — that is, docket numbers — and to use them as a measure of what the Court is doing. Often two or more cases will be argued together and decided in a single opinion requiring no more effort on the part of the Justices, and producing no more national law, than if only one case were involved. For this reason, it is more realistic to count decisions, with the "decision" being defined as a case or group of cases decided in a single opinion, memorandum, statement, or order. (In the remainder of this Article, "case" will be used as a synonym for "decision," unless the context clearly implies the other meaning.) As shown in Table II, the Court has handed down about 150 decisions with plenary consideration in each of the six most recent Terms.75

This figure — 150 decisions per Term — has received much comment in recent discussions concerning the capacity of the federal judicial system to produce an "adequate" number of authoritative rulings on issues of national law. For instance, former Solicitor General Erwin N. Griswold stated that 150 is "the maximum number [of cases] that the Court can be expected to hear on the merits," but that there are twice as many cases each year that ought to be heard and decided by a court whose precedents have nationally binding effect.76 In a similar vein, Judge Shirley M. Hufstedler has argued that "[n]ot only are one hundred fifty cases too few to permit effective supervision of lower federal courts, they are too few to supply national answers to

<table>
<thead>
<tr>
<th>Term</th>
<th>Number of Plenary Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>149</td>
</tr>
<tr>
<td>1972</td>
<td>157</td>
</tr>
<tr>
<td>1973</td>
<td>148</td>
</tr>
<tr>
<td>1974</td>
<td>142</td>
</tr>
<tr>
<td>1975</td>
<td>151</td>
</tr>
<tr>
<td>1976</td>
<td>145</td>
</tr>
</tbody>
</table>

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75 These figures include all final dispositions in argued cases. Cases set for reargument are counted in the Terms in which they were decided.
76 Griswold, Rationing Justice — The Supreme Court's Caseload and What the Court Does Not Do, 60 Cornell L. Rev. 335, 340, 342-43 (1975).
issues that have become pressing long before circuit disagreements have arisen." The views of Dean Griswold and Judge Hufstedler were quoted, with apparent approval, in the final report of the Commission on Revision of the Federal Court Appellate System. The Commission then went on to propose the creation of a National Court of Appeals which "would be able to decide at least 150 cases on the merits each year, thus doubling the national appellate capacity." Skeptics responded by suggesting that if 150 is too few, then 150 more would not make enough of a difference to justify a structural alteration in the federal judicial system.

This Article will not attempt to answer the question of whether a plenary docket of 150 decisions a year provides an adequate number of nationally binding precedents on issues of federal law — if indeed that question can be answered. The purpose, rather, is to shed light on the antecedent question: what is the nature and extent of the national law that emerges from the plenary docket today? A detailed answer to this question should

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77 Hufstedler, Courtship and Other Legal Arts, 60 A.B.A.J. 545, 547 (1974). As the quotation indicates, Judge Hufstedler was referring to a somewhat different group of cases, also numbering about 150 (i.e., the number of court of appeals decisions reviewed annually by the Supreme Court), but the point was the same.

78 HRUSKA COMMISSION REPORT, supra note 15, at 12.

79 Id. at 39.

80 HRUSKA COMMISSION HEARINGS II, supra note 34, at 1027 (statement of Dean Phil C. Neal).

provide a foundation upon which to pursue the question of whether the need for national law is being fully met.

Before turning to the details, however, it will be useful to put the plenary docket in perspective. I shall address, first, the changes in the size of the plenary docket during the fifty years that the Court has been operating under the Act of 1925; second, the plenary docket in relation to the total caseload; and finally, the effect of the obligatory jurisdiction on the plenary docket.

A. The Plenary Docket Then and Now

It is sometimes said that the number of cases on the plenary docket has remained essentially constant for the last fifty years—that is, ever since the Court began operating under the jurisdictional dispensation introduced by the Act of 1925. This is not quite accurate. It is true that the plenary docket was about the same size in 1928 as it was in 1976 (or for that matter 1946); but what those Terms' figures conceal is that for a period of more than twenty years immediately preceding the arrival of the Burger Court, the plenary docket had only two-thirds to four-fifths the number of cases now regarded as the norm. The figures are given in Table III; because data on "decisions" are not available for all Terms, the number of signed opinions is used as a surrogate.

Three distinct periods can be identified. From 1927 through 1946 the number of signed opinions each Term ranged between 129 and 175, with a median of 149.5 and an average of 149. In the 1947 Term, however, the number dropped (from 142 in 1946) to 110. With the aid of hindsight it becomes apparent that the 1947 Term inaugurated a new era; from 1947 through 1970 the median number of signed opinions was only 99, and the average

82 Hruska Commission Report, supra note 15, at 6; Griswold, supra note 76, at 339. See also Freund Study Group, supra note 12, at 5-6, reprinted in 57 F.R.D. at 581 ("the number of cases in which the Court has heard oral argument before decision has remained substantially constant" for 35 years).

83 Starting with the 1959 Term, the table gives totals for "decisions" as well as signed opinions. As will be seen, p. 1732 infra, during this period, at least, the pattern in signed opinions was not totally congruent with that of the plenary docket as a whole. However, the overall trends are similar, and there is no reason to believe that the three periods discussed in the text would not be as easily identifiable in the figures for all "decisions" as they are in the data on signed opinions. Certainly the shift in 1971 is unmistakable whether one looks at the total plenary docket or at signed opinions alone.

84 Professors Frankfurter and Landis, writing in 1928, expressed the view that "[t]he new era [introduced by the Act of 1925] really [began] with the 1927 Term." Frankfurter & Landis, The Supreme Court Under the Judiciary Act of 1925, 42 Harv. L. Rev. 1, 3 (1928). I have therefore treated 1927 as the first Term of the initial period under the Act, although it can be argued that the honor should fall to the 1928 Term. See Frankfurter & Landis, supra note 3, at 33.
## TABLE III
THE PLENARY DOCKET, 1927–1976 TERMS

<table>
<thead>
<tr>
<th>Term</th>
<th>Plenary Decisions</th>
<th>Signed Opinions*</th>
<th>Term</th>
<th>Plenary Decisions</th>
<th>Signed Opinions*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1927</td>
<td>N.A.</td>
<td>175</td>
<td>1952</td>
<td>N.A.</td>
<td>104</td>
</tr>
<tr>
<td>1928</td>
<td>N.A.</td>
<td>129</td>
<td>1953</td>
<td>N.A.</td>
<td>65</td>
</tr>
<tr>
<td>1929</td>
<td>N.A.</td>
<td>134</td>
<td>1954</td>
<td>N.A.</td>
<td>78</td>
</tr>
<tr>
<td>1930</td>
<td>N.A.</td>
<td>166</td>
<td>1955</td>
<td>N.A.</td>
<td>82</td>
</tr>
<tr>
<td>1931</td>
<td>N.A.</td>
<td>150</td>
<td>1956</td>
<td>N.A.</td>
<td>100</td>
</tr>
<tr>
<td>1932</td>
<td>N.A.</td>
<td>168</td>
<td>1957</td>
<td>N.A.</td>
<td>104</td>
</tr>
<tr>
<td>1933</td>
<td>N.A.</td>
<td>158</td>
<td>1958</td>
<td>N.A.</td>
<td>99</td>
</tr>
<tr>
<td>1934</td>
<td>N.A.</td>
<td>156</td>
<td>1959</td>
<td>117</td>
<td>97</td>
</tr>
<tr>
<td>1935</td>
<td>N.A.</td>
<td>146</td>
<td>1960</td>
<td>129</td>
<td>110</td>
</tr>
<tr>
<td>1936</td>
<td>N.A.</td>
<td>149</td>
<td>1961</td>
<td>102</td>
<td>85</td>
</tr>
<tr>
<td>1937</td>
<td>N.A.</td>
<td>152</td>
<td>1962</td>
<td>127</td>
<td>110</td>
</tr>
<tr>
<td>1938</td>
<td>N.A.</td>
<td>139</td>
<td>1963</td>
<td>130</td>
<td>111</td>
</tr>
<tr>
<td>1939</td>
<td>N.A.</td>
<td>137</td>
<td>1964</td>
<td>107</td>
<td>91</td>
</tr>
<tr>
<td>1940</td>
<td>N.A.</td>
<td>165</td>
<td>1965</td>
<td>104</td>
<td>97</td>
</tr>
<tr>
<td>1941</td>
<td>N.A.</td>
<td>151</td>
<td>1966</td>
<td>113</td>
<td>100</td>
</tr>
<tr>
<td>1942</td>
<td>N.A.</td>
<td>147</td>
<td>1967</td>
<td>127</td>
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</tr>
<tr>
<td>1943</td>
<td>N.A.</td>
<td>130</td>
<td>1968</td>
<td>113</td>
<td>99</td>
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<td>1944</td>
<td>N.A.</td>
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<td>1969</td>
<td>109</td>
<td>88</td>
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<td>1945</td>
<td>N.A.</td>
<td>134</td>
<td>1970</td>
<td>129</td>
<td>109</td>
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<td>1946</td>
<td>N.A.</td>
<td>142</td>
<td>1971</td>
<td>149</td>
<td>129</td>
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<tr>
<td>(Vinson-Warren Era)</td>
<td></td>
<td></td>
<td>1976</td>
<td>157</td>
<td>140</td>
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<tr>
<td>1947</td>
<td>N.A.</td>
<td>110</td>
<td>1973</td>
<td>148</td>
<td>140</td>
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<td>1948</td>
<td>N.A.</td>
<td>114</td>
<td>1974</td>
<td>142</td>
<td>123</td>
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<tr>
<td>1949</td>
<td>N.A.</td>
<td>87</td>
<td>1975</td>
<td>151</td>
<td>138</td>
</tr>
<tr>
<td>1950</td>
<td>N.A.</td>
<td>91</td>
<td>1976</td>
<td>145</td>
<td>126</td>
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<tr>
<td>1951</td>
<td>N.A.</td>
<td>83</td>
<td></td>
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</tbody>
</table>


only 97. Excluding the extraordinarily sparse years at the start of Chief Justice Warren's tenure, the number of signed opinions per Term ranged from 83 to 114 during this period, with an average of 100. The third era began with the 1971 Term, when the Court handed down 129 signed opinions, substantially more than in any previous Term since the end of the first period in 1946.
From 1971 through 1976 the median was 129 and the average 133. Even in 1974, the low point of the current period, the number was larger than in any Term between 1947 and 1970.

This development has had a twofold significance. From the standpoint of workload, the effect has been to impose substantially greater opinion-writing burdens on the Justices. During the Vinson and Warren years, each Justice was responsible, on the average, for 11 signed opinions per Term; since 1971, each Justice has been responsible for 15. At least two members of the present Court have suggested that it may be desirable to reduce the number to the pre-1971 level.\(^6\) The other side of the coin is the effect on the development of the national law. Signed opinions are the decisions to which lawyers and lower courts turn first when looking for authoritative precedents; thus, from the “consumer” viewpoint, this substantial acceleration in the pace at which such decisions are added to the national law is a welcome development.

The contrast between the current era and the preceding Terms becomes somewhat less striking if one considers the totality of the plenary docket—that is, all “decisions.” This study provides data for the eighteen Terms beginning with 1959. As shown in Table III, the twelve Terms from 1959 through 1970 constituted a period of relative stability. The number of plenary decisions per Term ranged from 104 to 130, with 115 as the median and 117 as the average. The 1971 Term then inaugurated a new pattern, just as it had with respect to signed opinions. In that Term the Court handed down a total of 149 plenary decisions, and for the six Terms from 1971 through 1976 the average and the median were both 148.5. The average for the later period thus represented a gain of twenty-six percent over the average for the 1959–1970 Terms. This was certainly a substantial increase, but it was only four-fifths the differential in signed opinions.

What these figures tell us is that the increase in the total number of plenary decisions yielded a disproportionately large increase in the number of signed opinions. Indeed, if we compare the six Terms 1965 through 1970 (the last of the earlier era) with the six Terms that followed, we discover the startling fact that signed opinions accounted for all but 4 of the additional plenary decisions in the later period. That is, the number of plenary decisions was greater by 197; signed opinions grew by 193. Since dispositions without signed opinions are commonly found in cases disposed of on procedural grounds or otherwise having minimal

precedential value, this development might suggest that the Court has become more adept in recent years in selecting cases for plenary consideration. If this hypothesis is correct, the Court’s accomplishment would be remarkable indeed, for the volume of applications for review has grown at an even faster rate than the number of plenary decisions.

In any event, the difference between the 1971–1976 Terms and the Vinson-Warren era reasserts itself dramatically when per curiam dispositions in unargued cases are included in the tally. Until the mid-1960’s, it was very uncommon for cases disposed of without oral argument to receive anything more than a sentence or two in explanation of the Court’s ruling. There were, to be sure, summary affirmances and reversals, but most of these were little more than bare orders; they said nothing about the underlying facts, the specific issues raised, or the reasoning which led to the disposition. On the rare occasions when the Court wrote at greater length, it was usually to deal with a procedural matter or to correct manifest error in the court below. Then, in the mid-1960’s, the Court showed an increased readiness, in cases disposed of without argument, to write per curiam that discussed, at least in outline, the facts and issues involved. Because of the wide fluctuation in the number of cases receiving this treatment each Term, it was not immediately apparent that a new pattern had emerged, but after 1970 there was no room for doubt. During the six Terms starting with 1971, the Justices handed down 148 summary decisions (an average of 25 per Term) in which the Court explained its ruling in enough detail for the decision to be included in the opinion section of the United States Reports. Many of the decisions proved useful in later litigation; a substantial number have been cited more often than some argued cases of the same vintage.

These data raise more questions than they answer. Why did

86 Other explanations are possible. For instance, there may be, among the cases in which review is sought, more cases warranting a signed Supreme Court opinion. Or the Justices today may be willing to write full opinions in cases that in prior years would have been disposed of per curiam. It would be rash to draw any conclusions without careful analysis of the argued cases that do not result in signed opinions as well as those that do.
87 The number of cases filed in 1976 was more than double the number of filings in 1959. See note 94 infra.
88 See, e.g., In re Shuttlesworth, 369 U.S. 35 (1962) (instructions to district court on circumstances constituting exhaustion of state remedies under habeas corpus statute); Dusky v. United States, 362 U.S. 402 (1960) (Court agrees with Solicitor General that record does not support finding that petitioner is competent to stand trial).
89 See note 69 supra.
the Court in 1947 suddenly cut back on the number of cases
given plenary consideration? Why, more than twenty years later,
did the Court reverse the process? Were these changes in the
size of the plenary docket accompanied by changes in the nature
of the cases given a place on the docket? What have the changes
—in the size of the docket or its content—meant from the
standpoint of the national law or the Court’s workload?

Part III of this Article will shed some light on the develop-
ments in the 1970’s, but for explanation of the earlier shift we
must look elsewhere. The most plausible hypothesis is that the
change came about at the urging of the new Chief Justice, Fred
M. Vinson, who succeeded Harlan Fiske Stone during the recess
between the 1945 and 1946 Terms.91 According to one biog-
raper, Vinson believed “that the Justices had been forced to
work too hard” and that in any event the Court “should decide
only cases of high national importance or clear conflict below.”92
Impelled by these beliefs, Vinson “restored the work load to the
level of the midnineteenth century.”93 Whatever the motiva-
tions for the change, the new era began with the 1947 Term and
continued not only through the remaining years of Chief Justice
Vinson’s short tenure, but also through the sixteen Terms of the
Warren Court. As I have indicated, however, in the later years
of the Warren Court the Justices were turning out a good many
summary per curiam’s that were both substantive in content and
substantial in length. Perhaps the Court was taking its first ten-
tative steps toward increasing its output of decisions with useful
precedential value. What is clear is that shortly after Warren E.
Burger took office as Chief Justice, the plenary docket expanded
once again, inaugurating the current era. And since there was also
a slight increase in the output of summary per curiam’s, the result
is that the Justices in the 1970’s are writing more Court opinions
each Term than were written at any time since the Stone years.

B. Plenary Decisions in Relation to the Total Caseload

Another way of looking at the plenary docket is to chart the
changes over the years in the proportion of the Court’s decisions
which receive plenary consideration. Indeed, it has become alm-
most obligatory, in discussions of the Court’s business, to point
out that while the number of cases given plenary review has re-
mained relatively constant, the number in which review is sought

91 329 U.S. at iii n.1 (1946).
92 Kirkendall, Fred M. Vinson, in 4 The Justices of the United States
Supreme Court 2639, 2643 (L. Friedman & F. Israel eds. 1969).
93 Id. See also Chief Justice Vinson and His Law Clerks, 49 Nw. U.L. Rev. 26,
has "burgeoned." The result, of course, is that the percentage of cases receiving plenary consideration has fallen drastically. The significance of this phenomenon, however, is difficult to assess. Dean Griswold, for instance, argues that a substantial number of cases that would have been granted review twenty years ago are not reviewed today, and that the Court's inability to hear these cases tends to prove the need for additional appellate capacity. The Hruska Commission takes a similar view. But the underlying premises of this analysis are open to serious questioning.

In the first place, the argument seems to assume that all of the cases which received plenary consideration twenty years ago were cases that deserved Supreme Court review. Clearly this is a judgment both impressionistic and subjective, and at least one distinguished observer has articulated a different perception. More important, Griswold's argument appears to assume that the proportion of review-worthy cases in the total docket has remained the same over the years, or at least that it has remained at a level that translates into a greater number of review-worthy cases. At first blush this seems reasonable, since one would think that over the years the total docket would include roughly the same proportion of cases meriting plenary consideration. The difficulty is that two-thirds of the increase in the Court's total caseload since 1959 has come in criminal cases, and no one doubts that the overwhelming majority of criminal appeals are not review-worthy by any reasonable standards. In other words, as Professors Casper and Posner point out, "[i]t is possible that the average merit or quality of the applications for Supreme Court review has fallen" as the volume has increased. The question then would be whether the average has fallen so far that it negates an increase in the absolute number of cases worthy of review. At this point, however, the argument bogs down in hopeless disagreement over what makes a case truly review-worthy.

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05 Griswold, supra note 76, at 341, 344.


09 Id. at 78.

100 Id.
Perhaps the most that can be said is that there may well be a greater number of review-worthy cases than there were in earlier years, but that the increase in the number of applications filed does not prove it. In any event, the important question is not how the present compares with the past, but whether the number of plenary decisions today is adequate to meet current needs. And the answer to that question depends ultimately on one’s view of the importance, in varying contexts, of having a definitive resolution of recurring issues. Systematic treatment of this essentially jurisprudential matter is beyond the scope of this Article, although I shall address specific questions as they are raised by the data.

C. The Obligatory Jurisdiction and the Plenary Docket

Finally, a word should be said about the effect of the Supreme Court’s obligatory jurisdiction on the plenary docket. Some critics of the Hruska Commission’s National Court proposal have argued that it is premature to create a new tribunal to enlarge the national appellate capacity until the Supreme Court has been freed of the restraints now imposed on the handling of its business by the continuing flow of appeals as of right.101 The premise of the argument is that by reason of the obligatory jurisdiction, the Court now gives plenary consideration to some cases which do not deserve it and which would not otherwise receive it. Once this compulsion is removed, the critics suggest, the Court would be able to hear other cases that would furnish some of the national law precedents that are now wanting.

While the premise of this argument finds support in statements by some of the Justices,102 it is undercut by the fact that a substantial majority of the appeals do not receive plenary consideration. In other words, as Casper and Posner put it, the Court “is already fairly selective,”103 and one wonders how many of the appeals that receive plenary consideration today would have been denied review if the Court had had that option. This question, however, is not only speculative, but, as of 1978, largely superfluous. The reason is that within the last few years Congress has eliminated all but two of the major elements of the Supreme

102 See, e.g., Brennan, supra note 27, at 474; Marshall, supra note 28; Rehnquist, supra note 23, at 790.
Court's obligatory jurisdiction.\footnote{104} Once the cases filed under the prior dispensation have been disposed of—something that will take a few years at most—it will no longer be possible to argue that the Court's selection of cases for plenary consideration is shaped to any significant extent by the obligatory jurisdiction.\footnote{105}

III. THE SUBJECT MATTER OF THE PLENARY DOCKET

In the remainder of this Article, I shall examine the subject matter of the plenary docket in the six Terms from 1971 through 1976. There are two reasons for starting with 1971. From a


A bill now before Congress would eliminate virtually all of the remaining elements of the Supreme Court's obligatory jurisdiction, including the three just mentioned. S. 3100, 95th Cong., 2d Sess. (1978); see 124 CONG. REC. S7748 (daily ed. May 18, 1978) (statement of Senator De Concini). Hearings on the bill were held in June 1978.

\footnote{105} This proposition must be qualified in one respect. It is quite possible that many of the appeal cases that receive plenary consideration today would come up on appeal even under the new dispensation—that is, because a court of appeals panel has held a state statute unconstitutional. 28 U.S.C. § 1254(2) (1976); see Hellman, The Supreme Court and Civil Rights: The Plenary Docket in the 1970's, forthcoming, 58 Or. L. Rev. 3 (1978). Although the Justices might prefer to allow the issue to "percolate" for a while longer, see note 81 supra, they will have no choice but to decide the case "on the merits," and will probably feel more comfortable doing so after plenary consideration. Cases of this kind are not likely to arise often, however, particularly if the lower courts heed the Supreme Court's recent civil rights decisions, see pp. 1757-58 infra, and many of them would receive plenary consideration even if they came up on certiorari.

As for appeals from state courts, see note 104 supra, the vast majority already receive summary treatment. In the 1976 Term, for instance, only 15 state court appeals were decided after argument, while 72 were decided on the merits without plenary consideration. (These figures were supplied by the Clerk of the Court.)
quantitative standpoint, as explained above, the 1971 Term inaugurated a new period in the Court's handling of its business; \(^{106}\) from a political perspective, that Term was the first of the full "Burger Court."\(^{107}\) But the 1971 Term did not mark a clean break with the past, and it would be impossible fully to assess the significance of the Court's work in the 1970's without some understanding of what went before. Therefore, for purposes of comparison, I shall also examine the two preceding six-Term periods (1959 through 1964 and 1965 through 1970), thus including ten Terms under the leadership of Chief Justice Warren. These Terms are close enough to the present that comparison is useful, but the smaller number of decisions each Term makes it desirable to treat the two earlier periods separately.

The purpose of the analysis is to answer (or at least provide the groundwork for answering) a number of important questions about the work of the Court. To what extent does the plenary docket furnish decisions in the various areas of the national law? How has the composition of the docket changed over the years, and why? What light do these changes, and the circumstances that appear to have brought them about, shed on the need for additional appellate capacity?

The study is based on an examination of all plenary decisions handed down in the eighteen Terms from 1959 through 1976. The cases were initially read and analyzed by student assistants, who recorded data on about twenty different variables. Thereafter, each case was reviewed by the author; the ultimate classifications or characterizations thus rest on my own judgments.\(^{108}\) In the analysis that follows, I have drawn most heavily on the data with regard to one variable: the "principal issue decided, addressed, or presented" in each case.\(^{109}\) I recognize, of course, that there is a certain degree of subjectivity in classifying issues, or in identifying the principal issue when a decision involves more than one, but I am confident that in the vast majority of the cases anyone

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\(^{106}\) See pp. 1731-33 supra.

\(^{107}\) Although Chief Justice Burger took office on the last day of the 1968 Term, see 395 U.S. at xv (1969), the start of the "Burger Court" is most plausibly ascribed to the 1971 Term, when Justices Powell and Rehnquist were sworn in. Only in the 1971 Term and thereafter did the Court's membership include more than two Justices who had not served on the "Warren Court." Professor Israel takes a similar approach. Israel, Criminal Procedure, The Burger Court, and the Legacy of the Warren Court, 75 MICH. L. REV. 1319, 1320 n.1 (1977).

\(^{108}\) See note 119 infra.

\(^{109}\) See notes 119, 132 & 134 infra. 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.
familiar with the Court’s work would find the classifications used here to be at least acceptable.

As stated in Part I, the Supreme Court performs four major functions in the life and law of America. Analysis of the plenary docket can best be structured by reference to these functions and how they are reflected in the work of the Court.\footnote{An alternate approach would be to analyze the cases by reference to the kind of primary activity involved or the class of litigant whose rights are at issue. For instance, one might identify “education cases,” “welfare cases,” “Indian cases,” and so forth. This approach has several drawbacks. First, classifications of the individual cases would tend to be more subjective and result oriented than classifications based on the legal issues involved. Second, the categories tend to be discrete and unrelated — microcategories, so to speak, which do not readily meld into macrocategories. Most important, new categories come and go with relative rapidity, making meaningful comparison over time difficult, and obscuring the essential continuity of the Court’s business. Of course, within issue categories, it will often make sense to further classify the cases in accordance with the primary activity or factual context involved.}

\section*{A. Defining the Scope of Individual Liberty}

Fifty years ago the Supreme Court had “ceased to be a common law court,”\footnote{F. Frankfurter & J. Landis, supra note 4, at 307.} today, in the view of many observers, it has become a civil rights court.\footnote{See, e.g., Griswold, The Supreme Court’s Case Load: Civil Rights and Other Problems, 1973 U. Ill. L.F. 615, 618.} Perhaps this development was inevitable. Ever since the days of John Marshall, the courts have stood as havens for individuals seeking to vindicate their constitutional rights against governmental overreaching.\footnote{See, e.g., Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (contracts clause); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (contracts clause); Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) (habeas corpus). See also W. Nelson, Americanization of the Common Law 89–109 (1975); L. Tribe, American Constitutional Law § 7–1 (1978).} In an era when governments have become more active, while courts have expanded the spheres of individual liberty, the scope and the volume of “civil rights” litigation were bound to increase.\footnote{See Hart & Wechsler, supra note 8, at 950; id. at 149–50 (Supp. 1977); Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge’s Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law & Soc. Ord. 557, 561–62.} And to the extent that individual claims of protection are based upon the Federal Constitution, it is the Supreme Court which ultimately delineates the boundaries between the legitimate demands of governmental authority and the deference due to individual liberty.

For present purposes, a civil rights case will be defined as one in which a litigant seeks redress for, or protection against, some act of government (state or federal) which he claims is depriving him of rights guaranteed by those provisions of the Constitution.
which safeguard individual liberties: the Bill of Rights, the Civil War amendments, and a few provisions of the original Constitution.\textsuperscript{115} Civil rights claims may be asserted by defendants, as in criminal prosecutions, or by plaintiffs invoking the judicial process. Government may or may not be a party, as long as there is a claim of state action.\textsuperscript{116}

\textit{i. Civil Rights Decisions on the Plenary Docket, 1971–1976.} — Civil rights cases are brought to the Supreme Court in a variety of postures. In most of the cases, the Court is asked to adjudicate the merits of a litigant's constitutional claim; but in others, the constitutional issue has dropped out during the course of the litigation, and the Justices are called upon to determine only procedural or jurisdictional questions. Some cases will raise both substantive issues and related issues of adjective law; some will raise issues of federal statutory or common law along with the civil rights questions. Other patterns, too, may be found.\textsuperscript{117}

The dispositions which the Court may make of the cases are equally varied. The Court may avoid the constitutional question and rule only on an issue of adjective or nonconstitutional law. Or the Court may rule on the constitutional question, but make clear, by the manner of its treatment, that it regards the constitutional issue as secondary in importance to the other issues decided.\textsuperscript{118} At the extreme, the Court may decline, even after plenary consideration, to decide any of the issues raised by the case.

In short, it is by no means self-evident which classes of decisions should be included in the "civil rights" component of the Court's docket. Nevertheless, upon examination of the Court's work, three classes of cases stand out: cases which primarily decide or address substantive issues of individual rights; cases involving the procedural, jurisdictional, or remedial issues associated with civil rights litigation; and cases in which the Court avoids the civil rights issue presented, but decides nothing else, except perhaps a question relating to its own jurisdiction.

\textsuperscript{115} The last are listed in G. Gunther, \textit{supra} note 44, at 486–87.

\textsuperscript{116} That is, the category includes all cases in which a litigant asserts that he has been deprived of constitutional rights under color of state or federal law, even though the Court ultimately rejects the claim of "state action." \textit{See}, e.g., Jackson \textit{v.} Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 \textit{v.} Irvis, 407 U.S. 163 (1972). On the other hand, where an individual claims that the government has violated his rights, but invokes a statute or doctrine of general applicability, not requiring a finding of state action, the case is not classified as one involving civil rights. \textit{See}, e.g., Dothard \textit{v.} Rawlinson, 433 U.S. 321 (1977) (state as employer under § 703(a) of Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a) (1970 & Supp. V 1975)).

\textsuperscript{117} For instance, a case may raise an issue of constitutional law only if a statute is interpreted in one way rather than another.

\textsuperscript{118} \textit{See} note 134 \textit{infra}.
(a) Constitutional Decisions Involving Individual Rights. — Foremost among the "civil rights" cases are those in which the principal issue decided or addressed is a constitutional issue involving individual rights.\(^{110}\) In recent years, cases of this kind have constituted, by far, the largest single component of the Court's plenary docket. During the six Terms 1971 through 1976, the Court handed down 892 decisions after plenary consideration; in 383 of these, or 43\%, the principal issue was one of individual rights under the Constitution. In only one of the Terms — 1974 — did the proportion fall below 40\%; but, as will be seen, the 1974 Term included an unusually high number of civil rights cases in which the Court did not decide or address the merits of the substantive claim.\(^{120}\) Except for 1974, the number of cases each Term ranged between 60 and 71, as shown in Table IV.

The individual rights decisions fell into three broad groups. Nearly 40\% of the cases — 150 in all — were dominated by criminal procedure issues, i.e., the constitutionality of police practices and the rights of the accused at trial. Another 85 de-

\(^{110}\) Cases were classified in accordance with the following principles. If the case included a holding on any issue, that issue was ordinarily treated as the principal issue, even where the parties had raised other questions that might be regarded as more important. For example, in Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), the petitioner raised important and novel questions about remedies for violation of constitutional rights, but the Court avoided resolving those issues and instead devoted most of the opinion to a discussion of the respondent's first amendment claims. The Court then held that the courts below had applied an erroneous standard in adjudicating those claims. Since the Court addressed and decided a first amendment issue, the case is classified as a freedom of speech case. On the other hand, in DeFunis v. Odegaard, 416 U.S. 312 (1974), the Court did not decide or even address the petitioner's equal protection claims, but held that the case was moot. Accordingly, the case is classified as a mootness case. I have made occasional exceptions for opinions containing a holding on a procedural matter and a discussion of a substantive question. For instance, in Mandel v. Bradley, 432 U.S. 173 (1977), the only holding is one dealing with the precedential significance of the Supreme Court's summary affirmances, but the opinion goes on to discuss the standards to be applied in resolving challenges to state laws regulating access to the ballot. In these circumstances it seemed most sensible to classify the case as one involving ballot access, even though the Court did not decide whether the particular law passed muster.

When a case decided or addressed more than one substantive issue, I followed the course suggested by Frankfurter and Landis: "the issue that seem[ed] to be the most significant determined the character of the case." F. FRANKFURTER & J. LANDIS, supra note 4, at 307 n.2. Among the relevant considerations were the relative length of the Court's discussions of the various issues, the points which drew expressions of disagreement or doubt in separate opinions, the case with which the results seemed to follow from earlier decisions, and the impact of the holdings in later cases. I emphasize, however, that in the vast majority of the cases there was no difficulty at all in identifying the principal issue.

\(^{120}\) See Table VII, pp. 1748-49 infra.
TABLE IV

INDIVIDUAL RIGHTS DECISIONS ON THE PLENARY DOCKET, 1971–1976 TERMS

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<td>Number of Plenary Decisions</td>
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<td>383</td>
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<td>Percent Involving Individual Rights</td>
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decisions dealt with the first amendment, the seventh amendment, and other “specific” provisions of the Constitution that protect individual liberties other than the rights of the criminal defendant. Finally, there were 148 decisions involving claims under the due process and equal protection clauses of the fifth and fourteenth amendments (again excluding criminal procedure cases).\(^{121}\)

(6) Decisions on Related Issues of Adjective Law. — In civil rights litigation today, consideration of the merits of the constitutional claim is often subordinated to related questions of adjective law — questions involving the permissible role of federal courts in adjudicating such claims or the availability of particular remedies under federal civil rights statutes. These questions of “access to the federal courts” include, most prominently, the threshold requirements applicable to all federal litigation, such as standing and justiciability;\(^ {122}\) federalism-related limitations, such as the doctrine of Younger v. Harris;\(^ {123}\) the availability of federal habeas corpus as a vehicle for raising constitutional claims;\(^ {124}\) the scope of liability under 42 U.S.C. § 1983;\(^ {125}\) the interpretation of voting rights legislation;\(^ {126}\) and a miscellany of issues less often

\(^{121}\) An issue-by-issue breakdown of the cases within these groups is given in Table VII, pp. 1748–49 infra.

\(^{122}\) See, e.g., Warth v. Seldin, 422 U.S. 490 (1975); Gilligan v. Morgan, 413 U.S. 1 (1973).

\(^{123}\) 401 U.S. 37 (1971).


Questions of this kind dominated 56 of the Court’s plenary decisions during the 1971 through 1976 Terms. Thus, for every 7 cases in which the principal issue was one involving the merits of a civil rights claim, there was 1 case dominated by related issues of adjective law. Moreover, in 36 of the 383 cases which principally involved a substantive claim of individual liberty, the Court also decided or addressed an access issue. Some of these issues were clearly insubstantial, but others were doubtful enough to warrant extensive discussion and sometimes a dissenting opinion.

(c) Nondecisions in Civil Rights Cases. — The fact that a civil rights case receives plenary consideration does not necessarily mean that the Court will decide or even address any of the issues raised by it. The Court may conclude that it has no jurisdiction to hear the case. Or facts disclosed at oral argument may suggest that the case has become moot. Or, in cases before the Court on certiorari, changed circumstances or considerations not fully appreciated may persuade the Court to dismiss the writ as improvidently granted. Cases of this kind can appropriately be called civil rights nondecisions: in each of them the principal issue presented is one of civil rights (substantive or adjective), but the Court declines to decide that issue or any other (except perhaps a question relating to its own jurisdiction). Although these cases add little or nothing to the national law, they are part of the civil rights component of the Court’s docket. In the 1971 through 1976 Terms, there were 38 nondecisions in civil rights cases.


E.g., Costarelli v. Massachusetts, 421 U.S. 193 (1975).


Admittedly, it is not always easy to identify the “principal” issue presented, since the party seeking review may have raised several issues, and the Court may dispose of the case without any indication of which one it regards as most important. Indeed, in many of the cases the disposition is by order, with no explanation whatever. In classifying the cases, I have relied on such indicia as the issues treated by dissenting or concurring opinions and the emphasis given to the various questions by the parties.

In 13 of these, the Court dismissed the appeal or vacated the judgment below because the case had become, or might have become, moot. In another 10 cases, the appeal was dismissed or the judgment vacated for other reasons, such as want of jurisdiction or the possibility of an independent state law ground adequate to support a state court’s judgment. In 15 cases, certiorari was dismissed as improvidently granted.
(d) Other Decisions Involving Civil Rights Issues.—The three groups of decisions discussed thus far constitute the core of the civil rights component of the Court's plenary docket; in each of the cases it can be said that the principal issue decided, addressed, or presented was an issue of civil rights law, substantive or adjective. These cases, however, do not measure the full extent to which civil rights issues are present in cases receiving plenary consideration. Two other groups of decisions merit attention.

First, during the six Terms there were 17 cases in which a constitutional issue involving individual rights was a secondary issue. That is, the issue was decided by the Court, but the extent and manner of treatment suggest that the Court regarded it as subordinate to some other issue of federal law.¹³⁴ Similarly, it seems likely that the decision's contribution to the national law will lie primarily in that other area. Cases of this sort are uncommon, because when the Court decides a constitutional issue involving individual rights, that issue tends to dominate the case. But on the few occasions where the constitutional issue is overshadowed by some other question, it would seem misleading to include the case in the civil rights component of the Court's docket.¹³⁵

Finally, there were 20 cases in which both individual rights issues and other issues of federal law were raised, but the Court decided only the other issue. In a few of these cases the undecided issue appears to have been something of a makeweight, so that it would be unrealistic to regard these decisions as having very much to do with the Court's function of delineating the scope of individual liberty.¹³⁶ In most of the cases, however, the constitutional issue was clearly quite substantial, and indeed may well have been what led the Court to grant plenary review.¹³⁷ Yet in all of the cases the nonconstitutional issue had substance enough to provide an adequate ground for decision. That being so, to regard any of the cases as falling within the civil rights compo-

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¹³⁴ This attitude may be evidenced in a number of ways: by the brevity of the discussion accorded the constitutional issue, as compared with the other issues; by the absence of dissent; or by the lack of disagreement with the court below.

¹³⁵ In perhaps half a dozen of the cases, the individual rights holding was significant enough that the case probably should be included in the civil rights segment of the docket. E.g., Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (bill of attainder and fourth amendment); Runyon v. McCrary, 427 U.S. 160 (1976) (freedom of association and right of privacy). However, because cases of this kind occur so infrequently, it seems preferable to exclude them rather than to burden the reader with the complexities of overlapping tallies.


ment of the Court's docket might have the air of second-guessing the Court.

What is often involved in these situations, however, is not the commentator's second-guessing the Court, but the Court's second-guessing itself. In other words, sound analysis requires attention to the temporal perspective from which the cases are considered. A certiorari petition or jurisdictional statement may present a substantial issue of civil rights law, and the Court may grant review to decide that issue. From the standpoint of what the Court is attempting to do at the time of granting review, the case belongs with the "individual liberties" function of the Court. After plenary consideration, however, the Court may conclude that the case can best be used — or can only be used — to decide some other kind of issue. Considered from the standpoint of what actually emerges on opinion day, the case looks very different. The Court has made little or no contribution to the delineation of the scope of individual liberty, but the decision has provided a precedent on some other aspect of the national law. And since the Court's intentions at the time of granting review will often be unknown, and when known may not clearly reflect a single purpose, it seems sensible, on balance, to consider these cases in connection with the particular role of the Court that the decisions actually serve.\footnote{138} For the most part, this approach is followed here.

2. The Emergence of a "Civil Rights Court." — The conclusion that emerges from the data just given is that in a very real sense the Supreme Court has indeed become a "civil rights court": in 53\% of the plenary decisions handed down during the six Terms 1971 through 1976, the principal issue decided, addressed, or presented was an issue of civil rights law, substantive or procedural. Moreover, as shown in Table V, the proportion remained relatively constant throughout the period. If one were to take into account the cases with secondary civil rights issues, or with civil rights issues that were presented but not decided,\footnote{139} the predominance of civil rights litigation in the plenary docket would be even more overwhelming. What has happened, in short, is that

\footnote{138 This approach is particularly compelling in light of the fact that the doctrine of preemption and other federalism-related limitations on state power furnished the actual ground of decision in 1\% out of the 20 cases. As will be seen, pp. 1765-74 infra, federalism issues have played an increasingly important part in the Court's work in recent years. In 6 out of the 20 cases, moreover, the federalism issue involved an allegation that a state social welfare program was being operated in a manner inconsistent with the federal statute under which the program was funded. Claims of this kind have played a particularly important role in the growth of the federalism segment of the docket. See pp. 1762, 1768 infra.}

\footnote{139 See pp. 1744-45 supra.}
one of the Court’s four functions now takes up as much of the Justices’ time as all of the others put together.140

To appreciate the significance of this development, it is necessary to compare the current period with what went before. Table VI shows that at the start of the study, in the 1959 Term, only 27% of the cases primarily involved civil rights issues. Over the next six Terms, the pattern (as revealed by the three-year moving average)141 was one of slow but steady growth, with the proportion stabilizing at about 38% in the 1963–1965 triennium. The 1966 Term then brought a sharp increase; indeed, the emergence of civil rights cases as the dominant component of the plenary docket can be dated, with a precision that is perhaps surprising, to that Term. In 1968, and in all but two of the succeeding Terms, more than half of the plenary docket was devoted to civil rights litigation. The peak was reached in the 1970 Term, when civil rights cases constituted a startling 62% of all plenary decisions.

The discussion up to this point has emphasized the changes in the proportion of the plenary docket devoted to civil rights litigation. More important, from the standpoint of the national law, are the numbers of cases involved. During the 1971–1976

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140 The statement in the text assumes that the different kinds of cases require, on the average, about the same amount of time. In fact, civil rights cases, the overwhelming majority of which involve constitutional issues, are probably more time consuming, on the average, than other types of cases. See G. Casper & R. Posner, supra note 94, at 80–81. Thus, civil rights cases may well take up even more than one-half of the Justices’ time.

141 The moving average is used to minimize the effect of Term-to-Term fluctuation. See generally W. Wallis & H. Roberts, Statistics: A New Approach 575–79 (1956).
TABLE VI

CIVIL RIGHTS CASES ON THE PLENARY DOCKET, 1959–1970 TERMS

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1959–1964

1965–1970

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** Specific rights **

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| Obsecenity                    | 3     | 11    | 3     | 4     | 5     | 5     | 31          | 9      | 7     | 10     | 8      | 5     | 16     | 55           | 11     | 12     | 11     | 7     | 10     | 11     | 62           |
| Libel, other torts            | -     | -     | -     | -     | 1     | 1     | 2           | 2      | 1     | 2      | 1      | 0     | 1      | 7            | 4      | 0      | 1      | 2     | 1      | 1      | 5            |
| Other                         | 2     | 9     | 2     | 3     | 2     | 4     | 22          | 5      | 4     | 7      | 7      | 4     | 8      | 35           | 10     | 4      | 8      | 4     | 7      | 7      | 40           |
| Freedom of religion           | 0     | 5     | 1     | 2     | 0     | 0     | 8           | 0      | 0     | 1      | 2      | 1     | 3      | 7            | 1      | 5      | 0      | 1      | 2      | 1      | 10           |
| Just compensation             | 2     | 1     | 1     | 0     | 0     | 0     | 4           | 0      | 0     | 1      | 1      | 0     | 2      | 0            | 0      | 2      | 0      | 1      | 0      | 0      | 3            |
| Jury trial (civil) | 0 0 2 1 1 0 4 1 0 0 0 1 0 2 0 1 2 0 0 1 4 |
| Other            | 1 0 1 0 1 3 6 0 1 1 1 0 1 4 1 0 0 0 0 5 6 |
| Equal protection | 1 2 1 8 14 6 32 5 6 7 12 8 13 51 14 19 17 7 12 19 88 |
| Racial discrimination | 1 2 0 6 4 2 15 1 2 1 2 3 1 10 1 1 3 0 2 3 10 |
| School desegregation | 0 0 0 1 2 0 3 0 0 3 1 1 4 9 2 2 1 0 1 2 8 |
| Rights of aliens | - - - - - - - - - - - - - - 1 1 0 2 0 0 2 1 5 |
| Sex discrimination | - - - - - - - - - - - - - - - - 1 1 2 3 0 3 10 |
| Illegitimacy      | - - - - - - - - - - - - - - - - 2 0 0 1 3 1 1 1 0 2 2 7 |
| Voting, access to ballot | - - - - - - - - - 2 2 2 0 0 4 2 2 10 2 2 2 6 1 0 3 14 |
| Reapportionment  | 0 0 0 1 7 1 9 1 4 1 3 1 3 13 0 5 0 1 1 1 8 |
| Other            | 0 0 1 0 1 1 3 1 0 0 2 1 1 5 7 5 4 2 4 4 26 |
| Due process      | 3 2 3 6 4 4 4 22 1 2 1 2 2 7 15 11 6 11 8 13 11 60 |
| Substantive due process | 0 1 2 1 2 2 8 0 0 0 0 0 0 0 0 0 2 3 2 4 6 17 |
| Vagueness, fair warning | 0 0 1 2 2 0 5 1 1 0 0 0 3 5 2 0 3 1 1 1 8 |
| Procedural due process | 3 1 0 3 0 2 9 0 1 0 2 2 4 10 9 4 5 5 8 4 35 |
| Related adjective law | 3 3 3 6 1 2 18 4 3 6 5 3 10 31 8 15 7 13 8 5 56 |
| Article III limits | 0 0 1 0 0 0 1 0 0 1 1 0 1 3 2 2 1 1 1 0 7 |
| Jurisdiction     | - - - - - - - - - - - 2 0 0 0 0 0 2 1 0 1 1 1 0 4 |
| Federalism-related | 1 1 1 2 1 1 7 0 0 2 0 1 8 11 2 1 3 6 2 2 16 |
| Habeas: federal custody | 0 0 1 1 0 0 2 0 0 0 1 0 0 1 0 2 0 1 0 0 3 |
| Habeas: state custody | 1 0 0 3 0 0 4 0 1 2 1 1 0 5 1 3 1 2 1 1 9 |
| Procedure        | - - - - - - - - - - - 0 1 0 0 0 0 1 2 3 1 0 0 0 6 |
| Statutory remedies | 0 2 0 0 0 0 2 2 1 1 0 1 0 5 0 3 0 1 2 0 6 |
| Voting rights laws | 1 0 0 0 0 1 2 0 0 0 0 2 0 1 3 0 1 0 1 1 2 5 |
| Nondecisions      | 4 5 3 1 5 5 23 2 3 7 6 13 5 36 6 4 5 11 4 8 38 |
| S. Ct. jurisdiction | - - - - 3 0 3 0 0 0 1 3 1 5 0 0 0 3 0 0 3 |
| State grounds, etc. | 1 0 1 0 1 3 6 0 0 0 2 0 0 2 0 2 1 0 1 2 6 |
| Discretion: appeals | 1 1 0 0 0 2 0 0 0 0 2 1 3 1 0 0 0 0 0 1 |
| Mootness          | - - - - - - - - - 2 2 0 0 0 0 2 0 2 2 1 3 5 0 2 13 |
| Dismissals of certiorari | 2 4 2 1 1 0 10 2 3 7 3 6 3 24 3 1 1 3 3 4 15 |

| TOTAL            | 32 45 30 44 50 41 242 38 52 60 61 58 80 349 85 89 72 67 80 84 477 |

* Dashes are used when an issue did not appear on the plenary docket until several years into the study.
Terms the Court was handing down an average of 80 civil rights decisions each Term, about 20 more than were issued in any Term before 1970, and double the average in the 1959–1964 period. Further examination discloses that the change came about in three stages. From 1959 through 1965, the number of civil rights cases per Term ranged from 30 to 50, with a median of 41 and an average of 40. There followed a transition period of four Terms (1966 through 1969); during these Terms the totals ranged between 52 and 61, with an average of 58. Except for 1969, the trend was steadily upward. The current era began with the 1970 Term. That Term’s total of 80 civil rights cases constituted a substantial increase over any previous Term’s figure, but it also brought an end to the pattern of growth. During the seven Terms 1970–1976 the median and the average were both 80, with the individual Terms’ totals ranging from 67 to 89.

The expansion of the civil rights docket is noteworthy in itself, but the full significance of what happened between 1959 and 1976 emerges only when we look at the figures once again from the perspective of the total plenary caseload. During the first twelve Terms of the study, when the annual total of civil rights cases was gradually increasing, the size of the plenary docket remained essentially the same. The result was that, as the Court moved through the 1960’s, civil rights cases were steadily displacing litigation involving other issues of federal law. By the 1970 Term, all cases primarily involving issues other than civil rights occupied little more than one-third of the plenary docket; their number had been reduced by about forty percent from what it had been a decade earlier. Then, in 1971, the Court suddenly expanded the size of the plenary docket. The consequences were twofold. First, there would be no further displacement of cases that did not involve civil rights issues. Second, as long as the Justices were willing to accept the heavier workload, they could continue to hear a large number of cases that did involve civil rights.\footnote{There is another way of looking at this development. The total number of plenary decisions handed down during the 1971 through 1976 Terms represented an increase of 197 over the number issued during the preceding six Terms—892, compared with 695. The civil rights segment of the docket expanded by 128 cases; all of the other components of the Court’s work accounted for only 69 additional decisions. Thus, civil rights cases accounted for just under two-thirds of the total expansion in the plenary docket.}

3. Circumstances Influencing the Flow of Business. — The developments just outlined deserve to be examined more closely, and with greater attention to the particular kinds of issues addressed. Table VII provides detailed figures for the civil rights segment of the plenary docket during all eighteen Terms. Space does not permit issue-by-issue analysis,\footnote{Such an analysis will be found in Hellman, supra note 105.} but examination of the cases dis-
closes a number of recurring patterns; these in turn shed light on
the circumstances that appear to have influenced the flow of busi-
ness in the various areas.

It comes as no surprise to find that much of the growth in
the civil rights docket can be attributed to the Court’s own de-
cisions. Over the last twenty years the Court has accomplished a
virtual revolution in the law of individual rights. In one case
after another, the Court broke new ground by giving constitu-
tional recognition to rights not previously supported by decisional
laws. While the effect of the holdings on primary conduct may
have been debatable, the impact on the Court’s business was
clear. Each of the decisions was followed, sometimes after an
interval of years, by a period of intensive activity during which
the Court was kept busy elaborating and clarifying the scope of
the newly recognized right.

The point is illustrated by the pattern of litigation involving
the confrontation clause of the sixth amendment. In the first
five Terms of the study the Court did not hand down a single
decision construing the confrontation clause; then, in the eight
Terms from 1964 through 1971, there were 14 decisions on con-
frontation issues. The most plausible explanation for this de-
velopment is that it was not until Pointer v. Texas, in the 1964
Term, that the confrontation clause was first held to apply to the
states. The ruling on incorporation created a need, not previously
felt, for decisions construing the scope of the guarantee; the
Court responded with an unprecedented spate of activity. In
support of this analysis, it should be noted that all but one of the
14 decisions arose out of state trials.

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144 See generally Brennan, State Constitutions and the Protection of Individual
Rights, 90 Harv. L. Rev. 489, 491–95 (1977); Freund, The Judicial Process in

145 The cases are familiar. See, e.g., Fuentes v. Shevin, 407 U.S. 69 (1972);
Reed v. Reed, 404 U.S. 71 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970);
Williams v. Rhodes, 393 U.S. 23 (1968); Levy v. Louisiana, 391 U.S. 68 (1968);
Griswold v. Connecticut, 381 U.S. 479 (1965); Reynolds v. Sims, 377 U.S. 533

146 See generally The Impact of Supreme Court Decisions (2d ed. T. Becker
& M. Feeley 1973); Amsterdam, The Supreme Court and the Rights of Suspects

147 380 U.S. 400 (1965).

148 There is no ready explanation for the paucity of decisions after the 1971
Term. Indeed, as Judge Weinstein has noted, the Court’s holdings have left many
questions which require further clarification. See 4 J. Weinstein & M. Berger,

Other examples abound. In the middle period of the study the Court handed
down a substantial number of decisions construing or applying its holdings in
Williams v. Rhodes, 393 U.S. 23 (1968); New York Times Co. v. Sullivan, 376
U.S. 254 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); and Brown v. Board
of Educ., 347 U.S. 483 (1954). Generative decisions which had a significant
It would be rash to predict the extent to which new rights will receive constitutional recognition in the Terms to come; in this respect the future of the civil rights docket must remain a mystery. One point is clear, however: it would be a mistake to assume that constitutional innovation cannot be expected from the Burger Court. Several important new areas of constitutional litigation have been opened up during the tenure of the present Chief Justice; among the most important are prisoners’ rights, gender-based discrimination, aliens’ rights, and abortion. In addition, it was the Burger Court which for the first time gave constitutional protection to “filthy” speech and which, unlike its predecessors, imposed limitations on government aid to sectarian education. Even on issues of criminal procedure, as Professor Israel has noted, “aside [from] the area of police investigatory practices, the Burger Court’s inclination towards expanding the scope of constitutional guarantees is not substantially weaker than that of the Warren Court.”

The Court’s decisions on individual rights have influenced the flow of business in a second way which to a certain extent counterbalances the first. In shaping (or reshaping) areas of the law, the Court can articulate rules which leave relatively little room for interpretation and which can thus be applied by the lower courts with no more than an occasional clarification from the Supreme Court. Gideon v. Wainwright is the classic example of the successful use of this technique: during the first three Terms of the study, the Court handed down 8 decisions on the right to counsel under the Betts v. Brady “special circumstances” rule; after Gideon, this line of cases disappeared from the plenary docket. Indeed, it has been suggested that the Warren Court impact on the plenary docket in the most recent period included Roe v. Wade, 410 U.S. 113 (1973); Furman v. Georgia, 408 U.S. 238 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Reed v. Reed, 404 U.S. 71 (1971); and Levy v. Louisiana, 391 U.S. 68 (1968).


Israel, supra note 107, at 1349. See also id. at 1416–21.


316 U.S. 435 (1942).

But see White v. Maryland, 373 U.S. 59 (1963), a second case in the 1962 Term, which reversed a state court conviction on the authority of Hamilton v.
was motivated to lay down hard-and-fast rules in the criminal procedure area by its fear that more flexible doctrines would be "manipulat[ed] by triers of fact who were not to be trusted." 158 While the volume of cases was too great for the Supreme Court to provide adequate review. 160 From this perspective, the seemingly procrustean doctrines of the initial reapportionment decisions 161 may be regarded as an attempt — at least partially successful 162 — to avoid the need for a Supreme Court opinion in every case challenging a state redistricting plan. 163

Decisions restricting the scope of constitutional guarantees lend themselves even more easily to per se rules that do not require elaboration. Thus, after holding in the Texas school financing case 164 that wealth was not a "suspect classification," the Court had no need to grant review in additional cases to determine whether the equal protection clause might place constraints on governmental decisions with respect to the allocation of other services among rich and poor districts. Similarly, by holding that the eighth amendment does not apply at all to corporal punishment in the public schools, 165 the Court eliminated the possibility of litigation over the particular circumstances under which such punishment might be unconstitutional.

Even where constitutional doctrines are couched in more open

Alabama, 368 U.S. 52 (1961), a pre-Gideon case, without explicitly referring to the sixth amendment or to Gideon's per se rule.

158 Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 351 (1974). See also Freund, supra note 144, at 499.


162 The number of applications for review in cases involving reapportionment and elections decreased from an average of 44 per Term in 1971–1973 to an average of 28 in 1974–1976. Casper & Posner, supra note 94, at 94 (Table 8). But see p. 1754 infra.

163 To a lesser degree, Miranda v. Arizona, 384 U.S. 436 (1966), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), also fit the pattern. Miranda virtually put an end to voluntariness-of-confession cases on the plenary docket, cf. Kamisar, A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test, 65 MICH. L. REV. 59, 102–03 (1966) (inability of Court to monitor voluntariness), but the Court then had to delineate the scope of Miranda. On Sullivan, see note 170 infra.


ended terms, so that the Court must hand down a series of decisions defining the contours of the rules, the data suggest that after a time the contours become sufficiently well established that the Court can largely withdraw from the particular area. For instance, the Court’s holdings in *Griffin v. Illinois* and *Douglas v. California* raised many questions about the extent of the assistance which the states are required to make available to indigent defendants. These questions led to extensive litigation, with 14 plenary decisions in the seven Terms from 1965 through 1971; but thereafter the issue largely disappeared from the plenary docket. The most plausible explanation is that the issues were by that time largely settled. Similarly, *Reynolds v. Sims*, though unequivocal in its holding that state legislatures must be apportioned on the basis of population, and in its repudiation of considerations which would permit greater flexibility, nevertheless gave rise to a variety of questions on such matters as the degree of deviation permitted from mathematical exactitude and the application of the doctrine to other governmental bodies. In this area, too, the Court was kept busy for several Terms in providing answers, but later was able substantially to reduce the extent of its intervention.

Further inquiry might identify a small number of recurring patterns in the decisional cycles by which new constitutional rights are created, elaborated, and finally domesticated. More important for present purposes, however, is the implication that the successive creation of new constitutional rights need not lead to (or require) an infinitely expanding body of decisions clarifying their scope or application. On the contrary, there comes a point where the new rights have been incorporated into the fabric of the law, and the Court can move on to new issues, except perhaps for an occasional decision made necessary by a novel context or the imaginative use of precedents by lawyers or lower courts.

The growth of the civil rights docket has also been influenced by forces outside the Court, notably the twin currents of egalitarianism and entitlement that have so prominently affected

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166 351 U.S. 12 (1956).
169 See notes 161 & 162 supra.
170 A similar pattern appears in the Court’s decisions construing the first amendment in relation to the law of defamation. The pathbreaking case, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), left very little scope for defamation actions by public officials, but further litigation was required to clarify the application of the doctrine to suits brought by other plaintiffs. A series of decisions in the 1966 through 1970 Terms considerably narrowed the range of uncertainty; the Court then reduced the extent of its activity.
American society in recent years. Differential treatment which in the past would have been accepted as a reasonable or in any event unchallengeable exercise of legislative or executive discretion now triggers the filing of a lawsuit demanding equality of treatment and perhaps even equality of result.\textsuperscript{171} Similarly, individuals who believe that they are entitled to some kind of governmental largess\textsuperscript{172} now assume, if the largess is not forthcoming, that a court may be able to compel a reexamination and perhaps a reversal of the adverse decision.\textsuperscript{173} From these currents has flowed the tide of equal protection and due process cases that were responsible for so large a part of the growth of the civil rights docket in recent years.

Today it is unclear whether the tide is still rolling in, or whether it has begun to recede. The substantive issues have di-

\begin{itemize}

\item \textsuperscript{172} See Reich, \textit{The New Property}, 73 Yale L.J. 733 (1964). I use the term, as Reich does, to encompass all "valuables which derive from relationships to government," \textit{id.} at 734, whether considered to be a "right" or a "privilege."


\end{itemize}

The twin currents have been well summarized by Judge Hufstedler:

Men and women of every race, creed and color, and of every age group, are seeking a place in the sun. All of these people, as insistent as a chorus of cicadas, are demanding that their basic human needs be fulfilled by the societies in which they live, that each shall be treated with human dignity, that each will have access to the material, intellectual and spiritual riches of the world, that each shall be treated justly. This phenomenon is not simply an incident of American life; the movement is global. The range and the strength of the human rights movement has caused it to be aptly dubbed the "International Fairness Revolution."

vided the intellectual community; with some noteworthy exceptions, the present Court has generally resisted efforts to superimpose new constitutional requirements on governmental decision-making. Yet the cases continue to appear on the plenary docket in not inconsiderable numbers. Perhaps these are the last survivors of the Warren Court's constitutional revolution; indeed, many of the cases probably owe their place on the docket to the fact that the lower courts have not yet fully absorbed the new learning. As the Court's approach becomes unmistakably clear, and as reformers look more and more to legislative action, the Court's docket may well include a diminishing number of equal protection and procedural due process cases.

The currents of egalitarianism and entitlement have been accompanied by two other developments, each of which has had a significant effect on constitutional litigation generally. First, individuals and their attorneys have evidenced an increased readiness to use the Constitution as a sword to compel reforms of governmental practices, rather than simply as a shield to aid in resisting governmental overreaching. This tendency has been fostered by lawyers and legal service groups who initiate litigation not so much to secure relief for an individual client as to obtain a judicial decree that will require the government to change its behavior toward an entire class of individuals. For the Supreme Court, the consequence of these developments has been a dramatic shift in the mode of litigation of the civil rights cases receiving plenary consideration. Until the early 1970's, the civil rights docket was dominated by cases that had originated as criminal prosecutions, with the constitutional issue raised by way of defense. Today, criminal prosecutions are outnumbered by cases in which an individual has initiated litigation in order to


175 See pp. 1757–58 infra.


177 See Abbott & Peters, Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program, 47 Iowa L. Rev. 955 (1972); N.Y. Times, Aug. 30, 1969, at 11, col. 2 ("Poverty lawyers at the Columbia University Center on Social Welfare Policy and Law in 1966 began planning a test case to get the 'man in the house' eligibility rule for public assistance declared illegal. . . . Edward V. Sparer, head of the center, planned the case. Howard Thorkelson went to Selma, Ala., and found a client, Mrs. Sylvester Smith."); cf. Naprstek v. City of Norwich, 433 F. Supp. 1359, 1370 (N.D.N.Y. 1977) (refusing to award attorney's fees to attorneys who succeeded in challenge to "antiquated, poorly drafted, rarely-enforced juvenile curfew ordinance" on behalf of plaintiffs "with the barest standing").
vindicate a claim of constitutional right. I suggest elsewhere that this change has probably affected both the grounds on which the cases are decided and the dispositions which the cases receive. More important, the proliferation of plaintiffs' suits may have promoted a skepticism on the part of the Justices about the appropriateness of using constitutional litigation of any kind as a vehicle for achieving reform in governmental activities. Certainly civil rights claims have not fared as well in recent Terms as they did in the 1960's. In the future, this trend may discourage potential litigants from invoking the federal judicial power to obtain redress for their grievances. Thus far, however, there has been no falling off in the volume of plaintiffs' suits on the plenary docket; in fact, their number was higher in 1976 than in any previous Term.

Another important influence on the composition of the civil rights docket is the behavior of lower court judges. During the tenure of Chief Justice Warren, the lower courts tended to be unsympathetic to civil rights claims — or in any event less sympathetic than a majority of the Supreme Court. More recently, however, many judges have exhibited a remarkable willingness to grant relief to litigants who assert that the government has engaged in invidious discrimination or has failed to follow adequate procedures or has otherwise deprived them of their constitutional rights. Meanwhile, the Supreme Court's attitude has also

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178 From 1959 through 1969, criminal prosecutions accounted for about two-thirds of the civil rights docket. In the last seven Terms, the proportion was only 41%, compared with 46% for the plaintiffs' suits. Moreover, virtually the entire growth of the civil rights docket in the most recent period can be attributed to plaintiffs' suits. See generally Hellman, supra note 105.

179 Id.

180 Obviously, other forces are at work also, but the disillusionment can be seen in a number of the Burger Court's opinions. See, e.g., Bishop v. Wood, 426 U.S. 341, 349-50 (1976); United States v. Richardson, 418 U.S. 166, 179-80 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 56-59 (1973); Laird v. Tatum, 408 U.S. 1, 14-15 (1972).

changed, with the consequence that lower courts often grant relief to litigants whose claims the Justices would find to be dubious or altogether without merit. The resulting tension is reflected in the increasing proportion of plenary docket cases in which governmental litigants have gained review of decisions favoring civil rights claims. This pattern is found in all varieties of civil rights litigation: in plaintiffs’ suits and in cases originating as criminal prosecutions, in cases coming up by appeal and in cases reviewed on certiorari, and in all four of the broad substantive areas of civil rights law.\textsuperscript{182} Apparently the Court has felt obliged to grant review in a large number of cases where lower courts have expansively interpreted constitutional guarantees, either to correct erroneous judgments or to set bounds for future litigation.\textsuperscript{183}

This analysis suggests that the expansion of the civil rights docket in the 1970’s can be attributed in large part to the interaction of four developments: the emergence of new demands for equal treatment and fair process in the administration of governmental programs; a new aggressiveness on the part of persons disadvantaged by governmental action; greater receptiveness to civil liberties claims in the lower courts; and a less sympathetic attitude toward these claims in the Supreme Court.\textsuperscript{184} The future is difficult to predict, but it is quite possible that the next few Terms will witness a shrinkage in the volume of civil rights litigation on the plenary docket. Once the lower courts have fully absorbed the principles now followed by the Supreme Court, there will probably be fewer applications for Supreme Court review of judgments favoring debatable civil liberties claims. While the Court might find other kinds of civil rights cases to be worthy of

\textsuperscript{180} F. Supp. 228 (N.D. Ohio 1974) (district court orders city council to approve plan for public housing and prepare comprehensive plan for integration of residential neighborhoods), rev’d, 528 F.2d 867 (6th Cir. 1975), vacated and remanded sub nom. Joseph Skilken & Co. v. City of Toledo, 429 U.S. 1068 (1977), on remand, 558 F.2d 350 (6th Cir.) (adhering to earlier decision), cert. denied, 434 U.S. 985 (1977). See also cases cited note 312 infra.

\textsuperscript{182} In the 1971–1976 period, 48% of the civil rights cases were reviewed at the request of state or federal governments. For the 1965–1970 Terms the figure was 39%; for 1959–1964 it was only 14%. See Hellman, supra note 105.

\textsuperscript{183} See, e.g., Michigan v. Tyler, 98 S. Ct. 1942 (1978) (affirming judgment excluding evidence on fourth amendment grounds, but on narrower basis than lower court’s); Wooley v. Maynard, 430 U.S. 705, 713 & n.10 (1977) (affirming judgment upholding first amendment claim, but casting doubt on lower court’s “symbolic speech” holding).

\textsuperscript{184} One other circumstance deserves mention: the vast and continuing expansion in governmental regulatory activity, which has substantially increased the range of practices subject to constitutional challenge. Yet the importance of this factor in the growth of the civil rights docket can easily be overstated. A large number of the equal protection decisions, for instance, involved attacks on long-established statutory classifications.
review, the more likely consequence is that the number of civil rights cases on the plenary docket will diminish. Moreover, state courts in a number of states now construe state constitutions to accord greater protection to individual rights than the Federal Constitution as interpreted by the United States Supreme Court. If individuals challenging action by state governments can anticipate a more favorable reception in state than in federal court, the Supreme Court would probably not even have the opportunity to consider their claims.

Two caveats are in order. First, to the extent that the Court, in rejecting civil liberties claims, distinguishes rather than overrules precedents which clearly point in the opposite direction, the resulting ambiguities will encourage further litigation, which in turn may require additional decisions to establish the line of demarcation between the two lines of cases. Moreover, lower-court judges who are sympathetic to civil liberties claims will be able to take advantage of the distinctions drawn by the Court to hand down rulings which interpret constitutional guarantees in a more generous fashion than the Justices think is sound. The Court may then feel obliged to grant review in order to make clear where the line is to be drawn. Indeed, perhaps the only kinds of decisions that will not require further elaboration are those which unequivocally reject a constitutional claim that has little or no direct support in the Court's prior holdings. In this situation, the absence of direct precedents minimizes the possibility of ambiguity, while the unequivocal stance leaves little room for development.

Second, it is inevitable that the Court's membership will change from time to time, and if the new Justices are more sympathetic to civil liberties claims than the ones whom they replace, the shifts in attitude will undoubtedly affect the plenary caseload. Restrictive doctrines that are followed today would be open to reconsideration, and individuals seeking constitutional recognition for new claims of entitlement or equality could expect a hearing in the Supreme Court. It is also true, of course, that the Court

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might deny review in some of the cases which are heard today because the lower court has construed a constitutional guarantee too broadly. Yet if the effect of the lower court’s decision is to invalidate a statute, rather than simply to deny legitimacy to particular official conduct, and if the decision is not one compelled by precedent, the Justices, out of concern for state sensibilities, may well feel obliged to give the case plenary consideration anyway. On balance, then, it is likely that the plenary docket would again be heavy with civil rights cases — if indeed it has been otherwise in the interim.

B. Umpiring the Federal System

1. Federalism Litigation Today. — In a federal system, conflict between the state and national governments is almost inevitable. Early in the nation’s history, the Supreme Court became the arbiter of the competing claims of state and national power. Less often, the Court was called upon to resolve conflicts among the three branches of the federal government — in other words, to decide questions involving the separation of powers.

These functions remain important today, although they do not command a substantial amount of the Court’s time. During the

188 See Levin & Hellman, supra note 31, at 411–12. This concern would be especially compelling if the lower court has struck down a federal statute. In that situation, of course, the government can invoke the Court’s obligatory jurisdiction under 28 U.S.C. § 1252 (1976).

It should be remembered, too, that while the decisions of the Burger Court fall short of satisfying the ideals of the American Civil Liberties Union, in a number of important areas the Court has been quite willing to give recognition to new or expanded constitutional rights. See p. 1752 supra; Hellman, supra note 105. For instance, in the Term just ended, the Court once again struck down statutes imposing the death penalty, Lockett v. Ohio, 98 S. Ct. 2954 (1978); reaffirmed that laws significantly interfering with the right to marry will be closely scrutinized, Zablocki v. Redhail, 434 U.S. 374 (1978); and continued to give new life to the contract clause, Allied Structural Steel Co. v. Spannaus, 98 S. Ct. 2716 (1978). The Court also held, overruling a Warren Court precedent, that municipalities may be sued directly under § 1983 for alleged violations of civil rights. Monell v. Department of Social Servs., 98 S. Ct. 2018 (1978). Decisions such as these will encourage further litigation, and the Court will probably grant review in additional cases to clarify the scope of the rights involved.

189 This Section analyzes the shifts in the federalism segment of the docket in much greater detail than is provided either in the Section dealing with civil rights (pp. 1739–60 supra) or in the one dealing with general federal law (pp. 1774–84 infra). The reason is not that federalism issues are uniquely important; rather, through close scrutiny of the federalism segment of the docket I shall illustrate the methodology underpinning the analysis in the remainder of the Article. For application of this methodology to the other major segments of the docket, see Hellman, supra note 105; Hellman, The Supreme Court and Statutory Law: The Plenary Docket in the 1970’s, forthcoming, 40 U. Pitt. L. Rev. 1 (1978) [hereinafter cited as Hellman, Statutory Law].
six Terms 1971 through 1976, the Court handed down only 4 decisions in which the principal issue was whether Congress had exceeded the powers delegated to it under the Constitution.\footnote{Questions of the scope of national powers were decided as secondary issues in 2 cases. In each instance the Court took only one sentence to rebuff the challenge to national authority. See Huddleston v. United States, 415 U.S. 814, 833 (1974); Georgia v. United States, 411 U.S. 526, 535 (1973).} In another 4 cases the Court construed a federalism-related limitation on the national judicial power, the eleventh amendment. On the other side of the ledger, there were 22 decisions in which the principal issue was whether a state had overstepped the constitutional limitations on state power in areas of national concern. Twelve of these decisions concerned the implied prohibitions of the commerce clause; the rest were scattered among a wide range of other federalism-related doctrines. Some of the cases, such as the 2 involving the export-import clause,\footnote{Michelin Tire Corp. v. Wages, 433 U.S. 276 (1976); Kosydar v. National Cash Register Co., 417 U.S. 62 (1974).} entailed interpretation of the constitutional text, while others required the Court to draw inferences from the constitutional structure.\footnote{See generally C. Black, Structure and Relationship in Constitutional Law (1969).} The latter group included the 2 cases in which the Court was called upon to adjudicate claims of intergovernmental immunity.\footnote{United States v. County of Fresno, 429 U.S. 452 (1977); United States v. Tax Comm'n, 421 U.S. 399 (1975). See also note 225 infra.}

Separation of powers issues likewise played but a small role in the plenary docket, giving rise to only 9 cases in the six Terms. Four of the cases dealt with the question whether judicial proceedings were precluded by the speech and debate clause. Of the remainder, 2 cases involved the act-of-state doctrine,\footnote{Alfred Dunhill v. Republic of Cuba, 425 U.S. 682 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).} 2 dealt with executive privilege and related issues (the *Nixon* cases),\footnote{ Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); United States v. Nixon, 418 U.S. 683 (1974).} and 1 involved the presidential pardoning power.\footnote{Schick v. Reed, 419 U.S. 256 (1974).} Obviously, these cases, taken as a group, had an importance far beyond their numbers;\footnote{In addition to the 9 cases principally involving separation of powers, the campaign financing decision, which was primarily concerned with first amendment issues, also contained a major holding on the appointments clause of article I. See Buckley v. Valeo, 424 U.S. 1, 109-43 (1976).} moreover, some of the opinions undoubtedly required a substantially greater investment of time and intellectual
energy on the part of the Justices than the average case. But not all of the separation of powers decisions had such great significance, and, overall, it seems fair to say that this area of the law did not constitute a major component of the plenary docket.

During the six Terms, then, there were only 39 decisions primarily involving federalism-related provisions of the Constitution.\textsuperscript{108} But the Court's role as arbiter of the federal system is not confined to cases involving constitutional interpretation. Account must also be taken of cases in which the Court is called upon to interpret acts of Congress or to apply federal common law in order to determine the permissible scope of state power or the legitimate reach of state sovereignty. Ultimately, these decisions rest upon the supremacy clause, but they do not immediately involve the interpretation of that clause or any other constitutional provision.\textsuperscript{109} The Court handed down 67 such decisions during the six Terms.\textsuperscript{200} As shown in Table VIII, the cases fall into seven broad categories. The largest group of decisions—17 in all—concerned the scope of state obligations under federally funded social welfare programs. All but 3 of the cases involved programs administered by the states pursuant to the social security laws; 11 arose under the Aid to Families with Dependent Children (AFDC) program.\textsuperscript{201}

\textsuperscript{108} As the preceding discussion indicates, I have included separation of powers issues in the "federalism" segment of the docket. Separation of powers, like federalism in its narrower sense, involves the structure of government. Moreover, both separation of powers principles and those invoked to resolve conflicts between the national government and the states derive ultimately from the Framers' efforts to "diffus[e] power among a variety of governmental units," G. GUNNTER, supra note 44, at 81.

\textsuperscript{109} See, e.g., Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 272 n.6 (1977) (preemption claim "is . . . statutory in the sense that it depends on interpretation of an act of Congress, and like any other statutory decision, the result we reach . . . is subject to legislative overruling"). In this context, a claim that state law has been displaced by a federal treaty is similar to a statutory preemption claim. See Zschernig v. Miller, 389 U.S. 429, 445 & n.4 (1968) (Harlan, J., concurring).

\textsuperscript{200} Claims that state law had been preempted by federal nonconstitutional law were also adjudicated in 5 cases principally involving issues unrelated to federalism.

\textsuperscript{201} One curious aspect of the welfare decisions is that in 12 out of the 17 cases, the United States Government argued or submitted a brief in support of the state's position that the challenged regulation did not contravene federal law. This fact might seem to cast doubt on the propriety of treating these as "federalism" cases. Nevertheless, I believe that the characterization is sound. The reason is that the position of the "United States" is presented to the Court by the Solicitor General, an officer of the executive branch, while the issue in each case is the interpretation of a statute passed by the legislature. Support of the state's position by a representative of the national government does not remove the element of federal-state conflict from the litigation; at best, the conflict is made
### TABLE VIII

**Issues in Federalism and Separation of Powers Cases, 1971–1976 Terms**

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<td>19</td>
<td>22</td>
<td>21</td>
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Most of the other federalism cases required the Court to determine the effect of various kinds of federal legislation on state powers of regulation and taxation. In 11 cases, state law was challenged on the ground of repugnance to Indian treaties or federal legislation regulating Indians.\(^{202}\) Another 7 cases adjudicated claims that state legislative or judicial action was preempted by federal laws regulating labor relations. The remaining preemption decisions, 15 in all, were a varied group, fully reflecting

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\(^{202}\) Unlike the social security decisions, this area of litigation exemplifies federal-state conflict in its most acute form: in all but 2 of the decisions on Indian law, the United States Government argued or filed a brief in opposition to the state claim of sovereignty.
the wide scope of state and federal governmental concerns today. In 8 of these cases, litigants challenged the validity of state regulation or taxation of business activity; in 3 other cases, the Court was called upon to determine the extent to which the United States was required to conduct its activities in accordance with state regulations.

Apart from litigation involving statutory preemption in its many contexts, there were 5 cases in which the Court was asked to determine whether state law was to be displaced by federal common law. Federal legislation usually lurked in the background of these cases, but the analytical approach to the "Clearfield problem" is sufficiently different to warrant giving it separate treatment. Finally, the Court handed down 5 decisions (all of them in the 1974 Term) involving federal-state conflicts over land ownership, and 8 involving property disputes between states. Most of these cases required the Court to interpret federal common law; all but 1 were brought under the Court's original jurisdiction.

In all, there were 107 cases in the six Terms which primarily decided or addressed the merits of a federalism or separation of powers issue. But as with civil rights, not all cases ultimately involving federalism or separation of powers were decided on substantive grounds. In the six Terms, there were 11 cases primarily involving related issues of adjective law. Three of these dealt with article III limitations, 3 involved the availability of the original jurisdiction, and the other 5 interpreted statutes and judicially created doctrines restricting the power of federal courts in deference to state sensibilities.

In all six Terms there were only 2 federalism cases in which the Court declined to decide or address any of the questions presented. One was a social security case; the other involved federal environmental regulations that were said to intrude on state autonomy. In both instances the judgments were vacated for consideration of mootness. It is not clear why nondecisions should occur so much less frequently here than in the civil rights segment of the docket. One possibility is that the issues tend to be more clear-cut and less fact-dependent, with the result that the cases that emerge after full briefing and oral argument

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204 In United States v. Alaska, 422 U.S. 184, 186 n.2 (1975), the Court stated, "We are not enlightened as to why the United States chose not to bring an original action in this Court."


207 Compare Table VIII, p. 1763 supra, with Table VII, pp. 1748–49 supra.
will seldom differ from the ones presented in the preliminary papers. This would explain why no certiorari petitions were dismissed as improvidently granted, but it would not explain the paucity of mootness cases. Another possible explanation is that, as a general matter, the Court is less concerned with resolving federalism issues than with resolving civil rights issues, so that the Court will grant plenary review in a federalism case only if a strong and clear showing is made that the case will make a useful contribution to the national law.\textsuperscript{208} Whatever the reasons, the upshot is that in the federalism segment of the docket, 89\% of the cases decided or addressed substantive issues, compared with 80\% in the civil rights docket.

2. Changes in Recent Years. — The preceding data show that during the six Terms 1971 through 1976, the total number of decisions primarily involving issues of federalism or separation of powers was 120, just over one-quarter the number of civil rights decisions in the same period. No one is likely to be startled by this disparity, but what may occasion some surprise is the pattern of activity in the federalism segment of the docket prior to the 1971 Term. During the first period of the study, 1959–1964, the Court handed down 100 decisions in which the principal issue decided, addressed, or presented was an issue of federalism or separation of powers. From the perspective of the 1971–1976 Terms, this figure implies stability. In the middle period, however, the total number of federalism decisions was only 57, less than half the figure for 1971–1976. In other words, there was a sharp decline in the Court’s federalism-related activity, followed by a revival that brought it to even greater heights. The turning-points came, as Table IX indicates, in 1966 and 1972.\textsuperscript{209}

The expansion in the Court’s federalism business after 1971 had a substantial impact on the plenary docket as a whole. It will be recalled that the total number of plenary decisions in the 1971–1976 Terms was larger by 197 than in the middle period, and that civil rights litigation accounted for 128 of the additional cases. The federalism segment of the docket, the data now show, was responsible for all but 6 of the other 69 cases. Moreover, federalism cases occupied a larger share of the plenary docket in the 1971–1976 Terms than in the preceding period — 15\%,

\textsuperscript{208} For further discussion, see Hellman, \textit{Statutory Law}, supra note 189.

\textsuperscript{209} The point emerges more graphically in the following table (number of federalism cases per Term):

\begin{table}
\begin{tabular}{lcc}
& Average & Median \\
1959–1965 & 16 & 16 \\
1966–1971 & 9.5 & 9.5 \\
1972–1976 & 21 & 21 \\
\end{tabular}
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TABLE IX
ISSUES IN FEDERALISM AND SEPARATION OF POWERS CASES,
1959–1976 TERMS *

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TOTAL  17  13  16  21  20  13  100  14  6  10  8  10  9  57  13  21  19  22  21  24  120

* See note * to Table VII, pp. 1748–49 supra.
compared with 8%. The effect was to restore (within 0.6%) the proportion that prevailed during the first six Terms of the study.

What was not restored was the content of the federalism segment of the docket. Most of the growth in the 1970's was attributable to issues that were dormant or nonexistent in the first period of the study. These issues, moreover, were ones that (with a couple of exceptions) experienced stability or even growth during the middle period, when the federalism docket as a whole underwent such a sharp decline. For instance, in the 1959–1964 Terms the Court handed down only 2 decisions on separation of powers. The number edged up to 3 in the second period, and in the most recent Terms it increased to 9. Whether this trend will continue probably depends on the extent of litigation involving the act-of-state doctrine or the speech and debate clause, for the issues in the other separation of powers cases arose out of unique circumstances and are unlikely to appear on the docket in the future.\footnote{See cases cited notes 195–196 supra.}

Cases that were sui generis also characterized three other areas of growth in the federalism segment of the docket: litigation arising out of federal-state conflicts over land ownership, proceedings involving property disputes between states, and cases raising questions of the displacement of state law by federal common law. These issues accounted for 5 decisions in the 1959–1964 Terms, 9 in 1965–1970, and 18 in 1971–1976. Obviously, the total number of cases was not large, even in the most recent period, but the effect on the plenary docket was certainly significant, especially when one considers that the two groups of property dispute cases may well have imposed greater burdens on the Justices than the numbers alone would indicate.\footnote{The cases typically involve technical issues of property law. When the original jurisdiction has been invoked, only a special master stands between the Court and a mass of detail.}

The most noteworthy growth patterns occurred in the area of Indian law and in the decisions on state obligations under federally funded social welfare programs. During the 1959–1964 Terms there were only 4 cases in which the principal issue concerned the effect of Indian treaties or legislation on state power. In the next six Terms the number dipped to 3, but starting in the 1972 Term the Court substantially quickened the pace of its activity, and in the last six Terms of the study (1971–1976) there were 11 decisions arising out of state-Indian conflicts. Given the current activism among Indian groups, the expansion of this segment of the docket probably comes as no surprise. And in view of the continuing controversy over Indian claims to land and natural resources, in the eastern part of the country as well as
the West, it is unlikely that the Court will be reducing its level of activity in this area in Terms to come.

Interest group litigation also underlies the proliferation of cases challenging state social welfare programs as being inconsistent with federal funding statutes. Issues of this kind did not appear at all on the plenary docket until the 1967 Term. There were 6 cases in the four Terms from 1967 through 1970; the number then jumped to 17 in the 1971–1976 period. Most of the increase is attributable to decisions involving the Aid to Families with Dependent Children program of the Social Security Act; these grew from 3 in the 1967–1970 Terms to 11 in the Terms that followed. This was the third area of the docket to feel the impact of welfare litigation; cases brought by persons claiming benefits under social welfare programs also accounted for a substantial part of the increase in equal protection and procedural due process decisions in the later Terms of the study.212

The 4 decisions on eleventh amendment issues during the 1971–1976 Terms may not loom large from the standpoint of the plenary docket as a whole, or even the federalism segment of it, but they are noteworthy nevertheless because there was only 1 case in this category in all twelve of the preceding Terms. The eleventh amendment is of course couched in the language of a restriction on the jurisdiction of the federal courts, and the 4 decisions can thus be seen as part of the broader trend that has led to an expanded role for adjective law in constitutional adjudication generally.213 In this regard it is relevant that the 11 federalism cases decided on adjective law grounds in the 1971–1976 Terms, though unimpressive compared with the corresponding segment of the civil rights docket, represented an increase of 6 cases over the total for the twelve preceding Terms. Thus, not only did federalism litigation experience the increased attention given to adjective law issues; proportionally, the growth in adjective law decisions was much greater than in the civil rights docket.

These eight areas of litigation, which gave rise to only 15 of the 100 decisions that comprised the federalism segment of the docket in the first period of the study, accounted for more than half of the federalism cases in the most recent period. At the other end of the spectrum were two kinds of issues that contributed in a modest way to the Court’s business in the 1959–1964 period, but disappeared completely from the plenary docket in the later Terms. One was constitutional, the other statutory. At the Hruska Commission’s hearings in 1975, Dean Roger Cramton

212 See Hellman, supra note 105.
213 See pp. 1742–43 supra; Table VII, pp. 1748–49 supra. See also Hellman, supra note 105.
noted that the full faith and credit clause of the Constitution is "of considerable practical importance, but the Supreme Court hasn’t had the slightest interest in [it] for many years." This perception is borne out by the data. In the 1959–1964 Terms the Court handed down 5 decisions dealing with the recognition of judgments under the full faith and credit clause; there was 1 case in the 1966 Term, and none thereafter. The significance of this development is suggested by Dean Cramp’s remark that there were "at least three or four decisions of State courts of last resort" that seemed "flatly contrary" to a leading Supreme Court precedent, but that the Justices had denied certiorari in all of them. Dean Cramp went on to suggest that a National Court of Appeals might be able to resolve some of the conflicts in this area.

The disappearing issues of statutory interpretation were those involving the priority or enforceability of federal tax liens as against liens or other property rights created by state law. There were 8 decisions in this area in the 1959–1964 Terms, followed by 1 in 1965, 1 in 1969, and none in the remaining seven Terms of the study. One can hardly blame the Justices for avoiding tax lien cases, especially in view of the fact that a major revision of the federal statutory scheme in 1966 was specifically designed to reverse the approach the Court had been taking.

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214 Hruska Commission Hearings II, supra note 34, at 1018.
215 Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); see Hruska Commission Hearings II, supra note 34, at 1017.
216 Hruska Commission Hearings II, supra note 34, at 1017–18. Professor Ginsburg, writing in 1969, also perceived difficulties flowing from the Supreme Court’s failure to address full faith and credit issues:

The question [of conflicting judgments] will continue to generate occasional unfortunate conflicts between state courts until it is definitely resolved by paramount federal authority. . . . [T]he time may be ripe for a further statement [from the Supreme Court], for some have regarded the Court’s silence as a sign of relinquished control of sister state conflicts of this nature.

Ginsburg, Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments, 82 Harv. L. Rev. 798, 800 (1969). See also id. at 830 (suggesting legislative action because "the perplexing matter of antisuit injunctions running between state courts deserves more federal attention than a single Supreme Court precedent addressed to only one side of the issue"). As noted in the text, there have been no further Supreme Court decisions since Professor Ginsburg wrote. Nor has Congress acted.

On the other hand, one might have expected that the new law would have created a need for authoritative interpretations that the Court has not been providing. Nevertheless, when the American Bar Association Section on Taxation queried its members in 1975 about unresolved tax issues, none of the respondents pointed to issues involving tax liens and state law (or indeed to any questions involving tax liens). 219 Perhaps, as some commentators have suggested, the 1966 Act has been more successful than most complex legislation in establishing rules that are so clear that the great majority of disputes can be resolved without litigation. 220

The other federalism issues followed varying patterns of decline and revival, with one exception. There was a continuing decline in the already small number of cases in which the principal issue was whether Congress had acted beyond the scope of its powers. Little significance can be attached to this fact, however; given the breadth of the precedents upholding the exercise of congressional power, Supreme Court litigation on such questions is bound to be episodic and infrequent. 221 Perhaps after National League of Cities v. Usery 222—the second case in forty years to invalidate an act of Congress on federalism grounds—that segment of the docket will expand. It should be noted, however, that in National League of Cities, as in its predecessor, Oregon v. Mitchell, 223 the challenge to congressional power was brought by the states themselves, rather than by individuals or corporations carrying the banner of states’ rights, as had been true in most of the earlier cases. 224 Litigation of the kind involved in National League of Cities is unlikely ever to be widespread. 225

The one class of cases in which one would probably have ex-

221 Questions of the scope of national powers were adjudicated as secondary issues in 5 cases during the first twelve Terms of the study and in 2 cases thereafter. See note 190 supra. In each of the cases the exercise of national power was upheld; only one of the holdings was in any way controversial, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
225 During all eighteen Terms there was not a single decision involving the extent to which the implied immunity of state governments limits the taxing power of the national government. One such decision was handed down in the 1977 Term. Massachusetts v. United States, 98 S. Ct. 1153 (1978).
pected a substantial increase in Court activity is that of general statutory preemption. Over the last decade, both state and federal governments have vastly expanded their regulation of primary conduct, not only in the kinds of activity covered, but also in the degree of detail found in legislation and administrative rulings. In this situation, frequent claims of conflict between national and local regulations would appear to be inevitable. By the same token, it could be anticipated that established principles would come under increasing strain as lower courts struggled to accommodate them to new kinds of legislation. This process, in turn, would create a need for additional guidance from the Supreme Court. Nevertheless, the number of general preemption decisions actually declined in the 1960’s, and what is more surprising, the pace of activity remained sluggish as late as the 1974 Term. Specifically, there were 32 general preemption decisions in the first six Terms of the study, but only 9 in the six Terms that followed. Supremacy clause attacks on state laws regulating business and commerce declined most precipitously: there were 9 of these in the first period and only 1 in the second. In the four Terms 1971 through 1974, the Court became even less active, handing down a total of only 5 general preemption decisions. It is possible that the established principles were providing more guidance than one would have thought, but the more plausible hypothesis is that there was a need for a greater number of authoritative decisions than were being provided. In any event, the data indicate that the Court now views this area as one requiring greater attention. In the two most recent Terms, the Court handed down 10 decisions primarily involving issues of statutory preemption—as many as were issued in the preceding eight Terms. In 7 of these cases, state regulatory schemes were challenged on the ground of inconsistency with federal law.

A similar pattern can be seen in the labor preemption cases. In the seven Terms 1959–1965, the Court handed down 18 decisions adjudicating claims that federal laws regulating labor relations had preempted or limited state legislative or judicial power. During the subsequent seven-year period, however, only 4 labor preemption cases received plenary consideration. The 1973 Term


\[227\] A similar falling-off can be seen in cases adjudicating the validity of state attempts to regulate federal government activities. Decisions of this kind numbered 6 in the 1959–1964 period, but in the next six Terms there were only 2; moreover, these were companion cases raising related issues, United States v. District Court, 401 U.S. 520 (1971); United States v. District Court, 401 U.S. 527 (1971).
then inaugurated a modest revival, with 7 decisions in the last four Terms of the study.

It is easier to explain the decline after 1965 than to suggest reasons for the renewal of interest in the mid-1970's. In 1959, the Court had only recently handed down its decisions in San Diego Building Trades Council v. Garmon,228 which recast the basic preemption doctrines, and Textile Workers Union v. Lincoln Mills,229 which provided the charter for a new area of federal common law. Both of these rulings entailed a more expansive concept of the federal interest than had previously prevailed, and both required further elaboration and clarification to establish the permissible boundaries of state regulation. The result was a high level of Court activity in the 1959–1966 Terms.230 By 1967, the Court might well have felt — justly or otherwise 231 — that the law was clear enough that no more than an occasional decision was needed. As for the increase after 1973, there are two plausible explanations. The Court may have decided that more guidance was needed after all. Or, some of the Justices may be anxious to reexamine some of the doctrines in this area.232

A pattern of decline and revival is also found in the constitutional analogue to the statutory preemption cases, i.e., the decisions construing the limitations imposed on state power by federalism-related constitutional doctrines. In the first five Terms

229 353 U.S. 448 (1957); see Hellman, Statutory Law, supra note 189.
230 In addition to the 18 decisions in which the principal issue was one of preemption, there were 6 cases (4 of them arising out of suits to enforce collective bargaining agreements) which primarily involved the formulation or application of federal labor law, but in which the Court also decided questions of the extent to which state law had been displaced by federal law.
231 Only 1 out of the 17 labor preemption cases handed down from 1962 through 1970 resulted in affirmance. This fact might be thought to cast doubt on the proposition that the law was generally clear; yet the decline in the number of decisions after 1966 could plausibly be interpreted to mean that there were fewer decisions to reverse.

A 1977 Term decision provides support for the hypothesis that a reconsideration of the basic preemption doctrines is under way. In Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 98 S. Ct. 1745 (1978), the Court appeared to modify the approach of Garmon and to allow greater scope to the operation of state law than Garmon might have suggested. Seven years earlier the Court had reaffirmed Garmon by the narrowest of margins, see Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971); and in Sears, Roebuck the three remaining members of the Lockridge majority all dissented, accusing the new majority of a "drastic abridgement of established principles," 98 S. Ct. at 1767 (Brennan, J., dissenting).
of the study, the Court handed down 16 such decisions, but in the next seven Terms there were only 8. The revival began in 1971, well before the renewal of interest in statutory preemption questions. When the Court finally increased its activity in the preemption area, the pace of adjudication in constitutional cases accelerated still further. The total number of decisions in the 1971–1976 period was 22, of which 15 were handed down in the 1974 through 1976 Terms.

Contrary to what one might have expected, the expansion of this segment of the docket after 1970 did not result from a proliferation of challenges to novel forms of state regulation. In fact, the number of plenary decisions adjudicating commerce clause challenges to state regulatory activity was about the same in each of the three periods of the study. Rather, most of the increase can be attributed to an unexpected resurgence of Supreme Court litigation involving state taxation of interstate commerce. The 1959–1964 period included 6 cases in which state taxes were challenged on commerce clause grounds. The number fell to 3 in the 1965–1970 Terms, but in the most recent period there were 8 such decisions. To these must be added 2 cases interpreting the export-import clause and 2 in which challenges to state taxes were based on the interstate privileges and immunities clause. (There was only 1 export-import decision in all twelve of the preceding Terms, and there were none construing the privileges and immunities clause.) These data suggest, at the least, that Supreme Court litigation over state taxation of interstate activities can no longer be described as “rare.” It is noteworthy, moreover, that 2 of the tax decisions explicitly overruled earlier cases, and a third hinted that another overruling might not be far behind. Perhaps the Justices have concluded that the time has come to bring order to this difficult and confused area of the law.

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tinue its active involvement with these once-neglected issues, for there is much "tangled underbrush" to be cleared out.288

3. General Observations.—The successive fall and rise in the volume of federalism litigation in the Supreme Court presents a striking picture. In part, I suggest, the fluctuation resulted from changes in the needs of the national law. Thus, in the first period of the study, the then-new rulings in Garmon and Lincoln Mills required extensive exegesis to clarify their scope and application; the result was a total of 18 labor preemption decisions in seven Terms. Once the important questions had been answered, however, the Court could turn its attention to other issues. At the other extreme, challenges to state social security programs did not begin to proliferate until the late 1960's; thus, until that time, there was no need for the Court to address issues relating to the extent of state obligations under the federal statute.239 Once the flood of lawsuits began, the Court stepped in with vigor, handing down 17 decisions in the last six Terms of the study. A similar explanation can be offered for the recent growth in the volume of decisions adjudicating state-Indian conflicts.

Yet more was involved. It seems highly unlikely that questions of state power to tax or regulate interstate commerce were so well settled in the 1960's that the lower courts could resolve controversies with little or no further guidance from the Supreme Court. Nevertheless, for a substantial period of time only a trickle of decisions was forthcoming. The most plausible explanation is that issues requiring authoritative resolution were being raised, but that the Court was unable to address them because the plenary docket was fully occupied by cases in other areas of the law. Only by increasing the total number of plenary decisions was the Court able substantially to expand its output of precedents on issues relating to the operation of the federal system. Whether the Court today is fully meeting the needs in this area, I do not know; at the least, for reasons already given, it is unlikely that these needs will be diminishing in the years to come.

C. Interpreting Federal Legislation and Common Law

While decisions involving constitutional rights or the balance of power in the federal system tend to dominate public consciousness of the Court's work, the third of the Court's major functions, that of interpreting and clarifying the vast body of fed-


239 See H. FRIENDLY, supra note 25, at 25 & n.56.
eral nonconstitutional law, has an importance that cannot be underestimated. Today there is hardly any aspect of American life that is not subject to regulation, taxation, or control by national law. This law is largely the product of legislation and administrative action, although in limited areas the judiciary has stepped into a congressional void and created a federal common law.\footnote{240} Whatever its source, the law requires interpretation and application. In theory, of course, Congress retains ultimate control and could resolve disputed issues itself, at least where prospective application is concerned; but in practice Congress is usually occupied with other business.\footnote{241} Thus it falls to the Supreme Court to perform the important functions of “explaining what Congress has said when Congress has spoken, and filling in the interstices when Congress has remained silent.”\footnote{242}

Because the range of federal law is so varied, it is hard to capture this aspect of the Court’s work in a single phrase. One could proceed by exclusion: these are issues that do not involve individual rights, do not involve federalism or separation of powers, and do not involve the jurisdiction or procedures of federal courts (apart from questions of judicial review of administrative action). What remains may perhaps be best described as “general federal law.” During the six Terms 1971 through 1976, there were 256 cases in which the principal issue was an issue of this kind. The number of cases varied remarkably little from Term to Term — until 1976, when it fell to a figure only three-quarters of what it had been.\footnote{243} About one-third of the cases, 85 in all, involved government regulation of business. Another 55 decisions dealt with various aspects of labor relations. There were 21 tax cases, and 26 concerning the scope or application of federal criminal laws. The remaining decisions were scattered among a wide range of federal statutory and common law topics.

This segment of the docket has attained a special prominence in the debate over the need for a National Court of Appeals. Proponents of the new court do not contend that there has been an inadequate number of nationally binding decisions on issues of constitutional law; rather, the concern lies with those areas of nonconstitutional law often referred to as “federal specialties.”\footnote{244}

\footnote{240}{Two of the best-known examples are the federal admiralty law and the law governing the enforcement of collective bargaining agreements. See Hart & Wechsler, supra note 8, at 786.}

\footnote{241}{See pp. 1788–89 infra.}

\footnote{242}{Levin & Hellman, supra note 31, at 419.}

\footnote{243}{See note 292 infra.}

\footnote{244}{See, e.g., Rosenberg, supra note 219, at 9; Carrington, Federal Appellate Caseloads and Judgeships: Planning Judicial Workloads for a New National Forum, in x Appellate Justice, supra note 219, at 168, 175 (“It is generally}
In fact, the argument goes further, suggesting that constitutional (or at any rate civil rights) cases have tended to dislodge non-constitutional cases from the plenary docket. Dean Griswold, for instance, has asserted:

It is not widely recognized how far the work of the Court has become concentrated in the broad field of civil rights. . . .

... It is virtually impossible for an ordinary commercial case to be heard by the Court. ... Some means must be found to enable the Court to concentrate on the most significant of the civil rights cases, while retaining an adequate opportunity to exercise oversight over the development of other fields of the law.\textsuperscript{245}

In a similar vein, the Hruska Commission stated:

The pressure of [the] increased competition for the attention of the Supreme Court is not distributed equally in all categories of cases. Understandably, an increasing proportion of the Court's decisions have involved constitutional issues. . . . While the scope of federal regulatory legislation — typically including provisions for judicial review — has been steadily broadening, the number of definitive decisions interpreting that legislation has been diminishing.\textsuperscript{246}

Consistent with this perception, none of the 20 cases discussed by the Commission as illustrations of the need for additional appellate capacity involved constitutional questions. A few dealt with jurisdiction and procedure, but most involved issues of general federal law.\textsuperscript{247} It thus becomes particularly important to scrutinize the nature and extent of the Court's activity in this area.

In asserting that the Court has been giving issues of general federal law less attention than it once did, the proponents of the National Court look back to an era that antedates the 1970's. For this reason, it seems desirable to forgo further examination of the 1971–1976 Terms alone and to proceed at once to an analysis that includes earlier years. Table X presents figures for the eighteen Terms from 1959 through 1976. The data show that the number of federal law decisions handed down each Term has undoubtedly fallen since 1959, but that the pattern is by no means one of uninterrupted decline. Three phases can be discerned. From 1959 through 1967, the totals per Term ranged between 43 and 58. The median was 50 and the average 51. This was a

\textsuperscript{245} Griswold, \textit{supra} note 112, at 628–19. \textit{See also} Griswold, \textit{supra} note 76, at 343; \textit{Senate Hearings}, \textit{supra} note 23, at 73 (testimony of Dean Griswold).

\textsuperscript{246} \textbf{HRUSKA COMMISSION REPORT}, \textit{supra} note 15, at 17–19.

\textsuperscript{247} \textit{Id.} at 76–90.
period of relative stability, although the three-year moving average shows a slight but steady decline.\textsuperscript{248} The next three Terms — 1968 through 1970 — marked the nadir of this segment of the docket; the federal law case totals were 36, 37, and 36, respectively. Thereafter, the annual figures increased, but they never again regained the pre-1967 level.\textsuperscript{249} Overall, it seems fair to say that the number of federal law decisions to be expected each Term fell from an average of 53 at the beginning of the eighteen Terms to 43 in recent years.

The data also show that the proportion of the plenary docket occupied by general federal law cases suffered a sharp drop in the 1968 Term, and that it has remained at the new, lower level ever since. Specifically, until the 1967 Term, cases involving general federal law constituted, with one exception, at least 40\% of the plenary docket each Term. Thereafter, the proportion generally stayed below the 30\% mark, and only once reached as high as 34\%. This development, however, is simply a function of the relative stability in the number of general federal law cases from 1965 through 1976, combined with the substantial growth in the size of the plenary docket as a whole.

Thus far the data appear to support the perceptions of Dean Griswold and the Hruska Commission. But neither practitioners nor lower court judges are concerned with the fortunes of the general law docket as a whole. Their concern, rather, is with having an adequate number of authoritative precedents in the particular areas in which disputes arise. Table X presents the relevant data. Again, space does not permit detailed area-by-area analysis.\textsuperscript{250} Nevertheless, a review of the decisions yields three insights that may be relevant to the debate over the adequacy of the national appellate capacity.

First, one cannot fail to be struck by the almost Heraclitean pattern of change in the nature of the issues adjudicated. The few patterns of stability were overshadowed by the many shifts in the subject matter of the Court's work. New or recently revitalized statutes came to occupy a prominent place on the docket; meanwhile, familiar areas of statutory construction faded into the background. I have set forth the details elsewhere,\textsuperscript{251} but it is perhaps more important to consider their cumulative effect.

\textsuperscript{248} The average for the first three Terms was 52; for the last three Terms, it was 48.

\textsuperscript{249} As is evident from Table X, the 1976 total represented a sharp decrease from the preceding years, but analysis of the cases argued during the 1977 Term indicates that this was an aberration rather than the beginning of a new era. See note 292 infra.

\textsuperscript{250} Such an analysis will be found in Hellman, Statutory Law, supra note 189.

\textsuperscript{251} Id.
### TABLE X
**Issues in General Federal Law Cases, 1959–1976 Terms**

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*Note: The table above provides a summary of issues in general federal law cases from 1959 to 1976, with the breakdown for each term from 1959 to 1976.
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| Total                            | 58   | 54   |

*See note* to Table VII, pp. 1748-49 supra.
In the last three Terms of the study, more than one-quarter of the general federal law decisions dealt with questions of employment discrimination, environmental protection, or securities regulation—issues that were nonexistent or dormant in the earlier years of the study. On a more modest scale, the Court also handed down decisions construing civil rights statutes, the Freedom of Information Act, and the wiretapping provisions of the Omnibus Crime Control Act; in these areas, too, the legislation was new or the claims had not previously received judicial recognition. The attention given to these matters is significant because it indicates that the Court is capable of responding, at least in some measure, to the needs created by new or newly prominent issues of statutory law. In each of these areas, the law has recently undergone substantial change through legislation or judicial construction, litigation has proliferated in the lower courts, and the need for authoritative resolution of recurring questions has been great. Whether the Court has met the needs fully, I cannot say. What is clear is that these new kinds of litigation have had a major impact on the plenary docket.

At the same time, the Court has substantially reduced the extent of its activity in several established areas of federal law. In the 1971–1976 Terms, the number of decisions involving tax liability, tax procedure, admiralty, and the enforcement of collective bargaining agreements was only half of what it was in 1959–1964. The volume of litigation under the Interstate Commerce Act, the Railway Labor Act, the Immigration and Nationality Act, and the Federal Employers Liability Act fell even more precipitously. There are two possible explanations for this shrinkage. First, the need for authoritative decisions may have diminished. Casper and Posner suggest some of the circumstances that may bring about this result: decline or stagnation in the underlying primary activity; the absence of change in the legal structure, such as amendments to the governing statute or novel interpretations by the courts; and, perhaps most important, “the effect of time in reducing legal uncertainty (and hence litigation) through the accumulation of precedents.”

But there is a second possible explanation: the Court may have cut back on the extent of its intervention in one or more of these areas because other kinds of cases were making more pressing demands on the limited capacity of the plenary docket. Specifically, the Justices may have felt that, as between well-established areas of law, where years of decisions would provide at least some guidance (even if not quite on point) for the bench and bar, and newer areas, as to which virtually no

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252 See Senate Hearings, supra note 23, at 237 (remarks of Judge Friendly).
authoritative decisions were available, the latter should be given priority.

We cannot know to what extent the Court reduced its output of decisions in particular areas because of inadequate capacity and to what extent because of a diminishing need for authoritative pronouncements. But it would be possible, through empirical study, to gauge the magnitude of the unmet needs in the areas in which the Court has — for whatever reason — substantially cut back on its activity. Two kinds of questions would be relevant. First, what is the incidence of recurring, unresolved issues of law? Second, what is their effect on primary activity and lower court decisionmaking? Anyone wanting to make a useful contribution to the debate over national appellate capacity could do no better than to undertake such an inquiry.

The second noteworthy aspect of the general federal law docket is the role of intercircuit conflicts in the Court’s selection of cases for plenary consideration. There has been much controversy over the extent to which the Court has been denying certiorari despite the existence of a conflict.\footnote{254} This study does not shed light on that question, but it does make clear that in several important areas of federal law the Court seldom grants review except when a conflict has arisen. Thus, of the 16 decisions on tax liability handed down in the 1971–1976 Terms, 13 resolved conflicts. In the area of substantive criminal law, 13 out of 21 opinions stated that review was granted because of a difference of views among the circuits. In bankruptcy and reorganization cases, the figure was 4 out of 6. The Court has spoken only 6 times in the past decade on issues of immigration law, and 5 of the decisions were occasioned by conflicts.

These data suggest that in each of these areas, doubtful questions of law will be litigated repeatedly in different circuits without receiving Supreme Court resolution because none of the decisions actually conflict with one another. The significance of this phenomenon, however, is a matter of debate. If one agrees with Casper and Posner that “there is [not], in general, an acute need for further appellate review of cases in which the circuits . . . are in agreement,”\footnote{255} then the predominance of conflict cases will not arouse concern. The difficulty with this approach is that from the standpoint of individuals who must regulate their activities in accordance with federal precedents, the presence or absence of an actual conflict is almost irrelevant; the crucial question is whether there is an issue that is doubtful enough that the


\footnote{255 G. Casper & R. Posner, \textit{supra} note 94, at 86.
possibility of conflict exists. If conflict is possible, uncertainty is inevitable.

Obviously, there are many sources of uncertainty in the law, and I do not pretend to know the extent to which the absence of a nationally binding precedent will be critical. In some areas of law, however, there is evidence that the dearth of authoritative precedents is a cause of uncertainty and wasteful litigation.256 Empirical research would be useful on this question, focusing on the areas of law in which the Court seldom grants review except to resolve conflicts.

Finally, and in a related vein, there are several important areas of general federal law in which the number of recent plenary decisions is extremely small compared with the volume of litigation in the lower courts. For instance, cases under the Miller Act, the statute which protects suppliers on government projects, now average about 1,000 per year in the district courts.257 The 1977 pocket part for the United States Code Annotated, covering a period of about ten years, has thirty-two pages filled with headnotes of reported decisions construing the Act. In those ten years, however, there has been only one plenary Supreme Court decision on Miller Act issues.258 An even larger volume of litigation—measured both by district court filings and by annotations of decisions—has arisen under the Truth in Lending Act; 259 but, again, the Supreme Court has handed down only one decision to provide guidance for the resolution of those cases.260

Nor are these the only examples. Suits arising out of claims for black lung disability benefits under 1969 legislation have proliferated; 261 but the one Supreme Court decision involving

256 See Hruska Commission Report, supra note 15, at 145–51 (tax law); id. at 151–53 (patent law); Hruska Commission, Hearings II, supra note 34, at 1147–48 (testimony of Professor Handler) (trademarks and unfair competition).


259 15 U.S.C. §§ 1601–1667e (1976). District court filings in Truth in Lending Act cases have exceeded 2,000 in each of the last three statistical years. 1977 Annual Report, supra note 257 at 270 (Table 24). The 1977 pocket part to the United States Code Annotated, covering a period of less than three years, has 37 pages of annotations tied to reported decisions under the Act.


the statute dealt largely with constitutional issues.\textsuperscript{262} Reported decisions on admiralty and maritime issues number in the hundreds each year;\textsuperscript{263} Supreme Court opinions are handed down at the rate of about 2 per Term. Lower court decisions interpreting the bankruptcy laws are still more numerous; yet the incidence of Supreme Court decisions is even lower.\textsuperscript{264} On issues of patent, copyright, and trademark law, years may pass without a single Supreme Court opinion, though here, too, the reported decisions number in the hundreds annually.\textsuperscript{265} Of the many federal administrative agencies whose decisions are reviewed by the courts, no more than eight had as many as 3 cases in the Supreme Court during the last six Terms of the study.\textsuperscript{266}

These data show only that the Court has contributed little or nothing to particular areas of the law; they do not tell us whether more guidance was, or is, needed. In some kinds of litigation, such as the black lung cases, it may be that controversies almost


\textsuperscript{263} The 1976 volume of \textit{American Maritime Cases} included reports of 355 federal court decisions. Data collected by Casper and Posner indicate that the number of applications for Supreme Court review in maritime cases increased from an average of 13 per Term in the 1956–1958 triennium to 29 in 1974–1976. Casper & Posner, supra note 94, at 94 (Table 7).

\textsuperscript{264} The 1977 pocket part to \textit{West’s Federal Practice Digest 2d}, covering a period of less than two years, has 94 pages of annotations to points of bankruptcy law adjudicated in reported cases. In the last six Terms of the study there were only 6 Supreme Court decisions primarily involving bankruptcy issues.

\textsuperscript{265} BNA’s \textit{Patent, Trademark & Copyright Journal}, which summarizes significant decisions in all three subject matter areas, reported on more than 300 cases in calendar year 1977. In the six Terms 1971–1976 the Supreme Court handed down 4 plenary decisions on patent issues, 3 on copyright questions (1 an affirmance by an equally divided Court), and none on points of trademark law.

\textsuperscript{266} The only agencies whose rulings were the subject of 3 or more plenary decisions were the Interstate Commerce Commission, the Federal Power Commission, the Environmental Protection Agency, the Internal Revenue Service, the National Labor Relations Board, the Department of Labor, the Department of the Interior, and the Food and Drug Administration. The Interior Department does not really belong in the list, however, because it seems sensible to consider the Bureau of Indian Affairs as a separate entity, and without the decisions on Indian law the Interior Department would not reach the 3-case figure. Inclusion of the FDA is also misleading, since the 4 decisions involving FDA rulings were companion cases handed down on the same day: Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973); Ciba Corp. v. Weinberger, 412 U.S. 640 (1973); Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645 (1973); and USV Pharmaceutical Corp. v. Weinberger, 412 U.S. 655 (1973). Cases primarily involving civil rights or federalism issues were excluded from the tabulations.

If one were to compile a similar list for the 1965–1970 period, only the Environmental Protection Agency would drop out, while several other agencies would be added, including the Federal Trade Commission, the Immigration and Naturalization Service, the Selective Service System, the Federal Maritime Commission, and the Securities and Exchange Commission.
invariably turn on an evaluation of the evidence, and that issues of law play but a small role. In well-established areas of law, decisions handed down by the Court in earlier years may provide adequate guidance for the resolution of contemporary disputes. On other kinds of issues, litigation may be largely localized in one circuit, so that that circuit’s rulings provide guidance which is in fact authoritative. In the absence of such circumstances, however, a dearth of Supreme Court decisions in an area marked by a large volume of litigation in the lower courts — or in any event a large volume of reported cases — would lend support to the hypothesis that more guidance is needed in that area. Further testing of the proposition would require difficult empirical research.


268 The classic example is the Federal Communications Commission, whose rulings are seldom reviewed outside the District of Columbia Circuit. This circumstance results in part from legislation specifying the D.C. Circuit as the exclusive court of review, see 47 U.S.C. § 402(b) (1970), and in part from the preferences of litigants and their attorneys. See Hruska Commission Hearings I, supra note 67, at 83 (testimony of Judge Wright). According to Dean Griswold, however, centralization of review has not led to uniformity of decision. Dean Griswold told the Hruska Commission:

I have recently had occasion to do a purely statistical chart about the handling of review from the Federal Communications Commission by the United States Court of Appeals for the District of Columbia Circuit. I find if you get a certain panel of three judges, there is twice the chance that the . . . Commission will be reversed than there is if you get another panel of three judges.

Hruska Commission Hearings II, supra note 34, at 196. Dean Griswold urged that if a National Court is created, there should be stability in the personnel of the tribunal, and the court should decide cases only en banc. Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 535 n.14 (1978) (“Since the vast majority of challenges to administrative agency action are brought to the . . . District of Columbia Circuit, the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency action than would the decision of another Court of Appeals.”).

269 In some of the preceding examples, I have given data both on the overall volume of litigation and on the volume of reported decisions. The latter is the more significant figure in the present context because a case will not ordinarily give rise to a reported opinion unless it involves some legal question that cannot readily be resolved by reference to existing precedents. Ten years ago the situation may have been otherwise, but in the federal system today even the courts of appeals are not supposed to publish opinions in cases involving merely the routine application of established principles to a particular set of facts. See, e.g., 7TH CIR. R. 35(c). By 1973 a majority of the circuits were publishing opinions in fewer than half of their decisions. Hruska Commission Hearings II, supra note 34, at 451 (statement of Bar Association of Seventh Federal Circuit).

270 But see Senate Hearings, supra note 23, at 190–91 (statement of Professor Rosenberg) (shortage of nationally binding decisions in closely specified areas of law cannot be proved by direct evidence). For a possible approach, see Hellman, Statutory Law, supra note 189.
D. Supervising the Operation of the Federal Courts

The last of the Court's major functions is one which in a sense informs all of the others: that of overseeing the operation of the federal courts. Like the Court's work in interpreting general federal law, this task commonly requires the Court to construe congressional legislation, for it is Congress which delineates the jurisdiction of the federal courts and establishes much of the procedure that they follow. But the Court, by virtue of its position at the head of the federal judicial system, has a special responsibility for assuring that that system is operating smoothly and in accordance with the will of Congress. 271 Moreover, many of the directives that govern practice in the federal courts do not originate in legislation or in Enabling Act 272 rules subject to congressional veto, but rather in decisional law or in rules promulgated under the courts' inherent power. 273 From the standpoint of the national law, too, it makes sense to focus separately on that aspect of the Court's work which involves the forum and manner of dispute resolution, rather than the regulation of primary conduct.

There were 122 cases during the six Terms 1971–1976 in which the principal issue involved the jurisdiction or procedure of the federal courts. In 27 of these, the Court addressed only questions relating to its own jurisdiction, rather than the issues presented by the parties. These cases can be characterized as "nondecisions" on the issues raised. 274 In another 45 cases, the Court was considering procedural matters raised in suits challenging governmental action on constitutional grounds or implicating the operation of the federal system. Most of these decisions dealt with statutes and doctrines invoked primarily, if not exclusively, in constitutional litigation. Because of the close relationship between the substantive challenges and the manner of litigating them, these cases have been treated as part of the individual rights and federalism components of the Court's docket. 275

This means that there were only 39 cases during the six Terms in which the principal issue was one of federal jurisdiction or procedure not directly related to constitutional litigation. 276 Two-thirds of these were civil cases; the remainder were

271 Johnson v. New York, N.H. & H.R.R., 344 U.S. 48, 55 (1952) (Frankfurter, J., dissenting) ("Not the least important business of this Court is to guide the lower courts and the Bar in the effective and economical conduct of litigation.").


274 See pp. 1743, 1764–65 supra.

275 See pp. 1742–43, 1764 supra.

276 Of the 45 procedural cases in the civil rights segment of the docket, 4 dealt with matters of general applicability. These were Bradley v. School Bd.,
criminal prosecutions. Included among the 26 civil cases were 3 that decided questions of plaintiffs' standing to raise non-constitutional issues, and 1 in which the Court, without ruling on any substantive claims, denied a motion for leave to invoke its original jurisdiction. Of the other civil cases, 9 dealt with jurisdiction and venue; 13 involved matters of practice or procedure. The 13 criminal cases ranged widely among procedural topics. Only one area of law—contempt of court—gave rise to as many as 3 decisions.

Comparison between these figures and those of the preceding Terms (both shown in Table XI) reveals stability on the civil side and change in the criminal area. Cases involving jurisdiction, venue, and practice in civil suits totaled 25 in the first period and 23 in the second, compared with 26 in the most recent. Within this category, the distribution of cases remained about the same, except that decisions on jurisdiction and venue accounted for a somewhat larger proportion of the cases in the 1965–1970 Terms than in the other periods.

The criminal cases present a very different picture. If we look only at the twelve most recent Terms of the study, the pattern appears to be one of stability: there were 12 criminal procedure decisions in the 1965–1970 Terms, compared with 13 in the six Terms that followed. It is all the more striking, then, that when we turn to the first six Terms of the study, we find a total of 34 nonconstitutional criminal procedure decisions—substantially more than in the next two periods combined. Of the 34 cases, moreover, 24 were issued during the first three Terms of the study, and only 1 in 1964.

What caused the shrinkage in the criminal procedure segment of the docket after the early 1960's? One possibility is that issues which in the early Terms of the study were adjudicated solely as matters of statutory construction or through the interpretation of Enabling Act rules later acquired constitutional underpinnings and migrated to the individual rights segment of the docket. Examination of the cases tends to undercut this hypothesis, however. Most of the issues were technical, and few if any had constitutional overtones that were not as apparent at the time as they might have become later.

A more plausible explanation is that starting in the mid-1960's


278 In only 6 of the 34 cases were constitutional issues raised but not decided.
### TABLE XI

**Issues in Jurisdiction and Procedure Cases, 1959–1976 Terms** *

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<td>7</td>
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*See note * to Table VII, pp. 1748–49 *supra.*
the Court began to use rulemaking under the Enabling Act to resolve issues of the kind which previously had been settled through adjudication. The rules of criminal procedure took effect in 1946, and for nearly two decades they remained essentially unchanged.270 During this period, or at least the latter part of it, the Court was kept busy deciding nonconstitutional issues of criminal procedure. In 1960, the Court, as part of a general revamping of the rulemaking process, established an advisory committee on rules of criminal procedure.280 Two years later the committee issued its first draft of proposed amendments.281 Since then the committee has remained active, and the Court has adopted several sets of rule changes that it has proposed.282 I suggest that this reliance on the advisory committee to deal with many of the recurring issues has enabled the Court to reduce its adjudicatory role in the area.

This analysis is supported by an examination of the criminal procedure decisions in the 1959–1963 Terms. Nearly half of the cases dealt with questions of sentencing procedure and appellate review, including such matters as the computation of time for appeals and the rights of indigents. These topics were among the first addressed by the new advisory committee, and in 1966 the Enabling Act rules in this area were extensively revised.283 Several of the decisions in the 1959–1963 Terms were cited by the advisory committee as evidence of the need for change.284 Issues relating to appealability and sentencing virtually disappeared from the plenary docket after 1963.

If this analysis is accepted, it suggests that in some areas, at least, there may be ways of resolving recurring issues of national law without calling upon the Supreme Court's limited time. Indeed, in the example just given, it is probable that rulemaking under the Enabling Act provided a more satisfactory means for clarifying or revising the law than successive adjudications would have done. As the Court has said, the Enabling Act procedure permits “comprehensive and integrated treatment” which takes into account “informed opinion from all relevant quarters.” 285 Other kinds of issues, too, might be amenable to resolution.

280 HART & WECHSLER, supra note 8, at 675.
282 HART & WECHSLER, supra note 8, at 668; id. at 116 (Supp. 1977).
through nonjudicial processes. For instance, Justice Douglas once suggested that intercircuit conflicts on questions of tax law "should go to the standing committee of the Congress for resolution." A similar prescription might be offered for recurring questions involving the interpretation of the criminal code, the bankruptcy statutes, and other legislation filled with detail that frequently gives rise to ambiguity.

Yet this approach rapidly reaches its limits. Once we leave the area of judicial procedure, it is questionable whether legislative bodies can be relied on to address the plethora of narrow, often technical issues that require clarification. Perhaps responding to Justice Douglas, Mortimer M. Caplin, former Commissioner of the Internal Revenue Service, told the Hruska Commission, "Anyone who has competed for legislative time and attention knows full well that it is unrealistic to expect Congress to fill in the innumerable interpretative gaps that keep reappearing over the years as the Internal Revenue Code is applied to new and changing circumstances." It is probably even more unrealistic to think that Congress would be able to provide clarification where the issues have broad policy underpinnings; the ambiguities or lacunae may well have been made necessary by stalemate in the Congress that initially enacted the legislation. Thus, as a practical matter, resolution of the uncertainties can come only through the judicial system — in particular, from a court whose precedents have nationally binding effect.

IV. SUMMARY AND CONCLUSIONS

A. Overall Patterns

Any discussion of the plenary docket in the 1970's must begin with the stark fact that the number of plenary decisions being handed down today represents an increase of more than twenty-

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287 A proposal along these lines was offered by Judge Feinberg: "Another alternative would be to create a highly visible body to identify on a continuing basis . . . relatively non-controversial conflicts between the circuits . . . Once identified in this way for Congress, such problems might well be resolved by legislative action." Hruska Commission Hearings II, supra note 34, at 1309. See also Senate Hearings, supra note 23, at 238 (testimony of Judge Friendly); Feinberg, supra note 101, at 627.

288 Hruska Commission Hearings II, supra note 34, at 1183 (testimony of Mortimer M. Caplin).

Another problem with this approach is that actual conflicts are no more than the most visible (and often fortuitous) manifestation of a problem that is somewhat subtler and of broader dimensions: the absence of an authoritative, binding resolution of questions of law. See Hruska Commission Report, supra note 15, at 14, 77–78; Hellman, supra note 81, at 1195.
five percent over the Court's output of a decade ago. However, not all segments of the docket have benefited from this expansion. The data summarized in Table XII reveal a complex relationship between the growth in the total plenary caseload and the changes in the nature of the decisions. In essence, the eighteen Terms of the study encompass two outer periods of relative stability separated by an intermediate period during which the composition of the plenary docket underwent a series of sudden and substantial transformations. The best way to understand what happened is to look first at the two eras of stability, and then to examine the process by which the pattern of the earlier era was supplanted by the one that can be seen today.

The first period began with the 1959 Term and continued through 1965. In a typical Term during this period, the plenary decisions would be distributed as follows:  

<table>
<thead>
<tr>
<th>Nature of Issue</th>
<th>Number of Decisions</th>
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<tr>
<td>Civil rights</td>
<td>41</td>
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<tr>
<td>Federalism, separation of powers</td>
<td>16</td>
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<tr>
<td>General federal law</td>
<td>49</td>
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<tr>
<td>Federal court jurisdiction and procedure</td>
<td>10</td>
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</table>

A new period of stability began in 1972, but in a typical Term during this period the plenary docket would be constituted very differently:

<table>
<thead>
<tr>
<th>Nature of Issue</th>
<th>Number of Decisions</th>
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</thead>
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<tr>
<td>Civil rights</td>
<td>80</td>
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<tr>
<td>Federalism, separation of powers</td>
<td>21</td>
</tr>
<tr>
<td>General federal law</td>
<td>43</td>
</tr>
<tr>
<td>Federal court jurisdiction and procedure</td>
<td>6</td>
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</table>

In comparison with the typical Term of the 1959–1965 period, the number of civil rights decisions has doubled, and federalism cases have increased by one third. On the other hand, cases involving general federal law and those dealing with federal court juris-

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289 The figures in this and the table following in text are based on the medians for the four classes of cases during the two stable periods. The pattern is essentially the same if averages are used, as shown in the following table:

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</tr>
<tr>
<td>Federalism, separation of powers</td>
<td>16</td>
<td>21</td>
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<tr>
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<td>43</td>
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<td>Federal court jurisdiction, procedure</td>
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</tr>
<tr>
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<tr>
<td>TOTAL</td>
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diction and procedure have decreased by 12% and 40% respectively.

These shifts came about in a series of steps. Typically, the transformations began with increases or decreases which fell within the expected range of Term-to-Term variation, but which turned out, in retrospect, to have established new levels of activity. The area of jurisdiction and procedure was the first to feel the winds of change; in fact, the 1972–1976 pattern was established as early as 1964, toward the end of the initial period of stability. But the number of cases was very small, and the effect on the plenary docket as a whole was barely noticeable. The transitional period began in earnest in the 1966 Term, when two significant changes occurred. Civil rights cases increased from 38, a number slightly below the median for 1959–1965, to 52, a figure approached only once in the preceding seven Terms. At the same time, the number of federalism cases fell from 14, which was just under the median for 1959–1965, to 6, less than half the number in any previous Term.

Clearly the two developments were related. The total number of plenary dispositions increased by only 9 from 1965 to 1966, while the volume of general federal law cases and procedural decisions remained at about the same level. The only way the Court could expand the number of civil rights decisions on such a large scale was by cutting back on federalism cases. If only a single Term had been involved, the shift could be regarded as simply the product of the inevitablefortuities of litigation; in actuality, it initiated a new pattern that was to continue — with relative stability, as far as these two segments of the docket were concerned — for a period of four Terms.

There were no major changes in the 1967 Term, but in 1968 the number of general federal law cases fell from 52, a figure just above the median for 1959–1965, to 36, which was 7 fewer than in any previous Term in the study. This new level continued in the next two Terms as well.

Overall, the 1969 Term followed the pattern of 1968 almost exactly, but 1970 brought a major change. Both in 1968 and in 1969 the total plenary caseload had been somewhat below the median for the 1959–1970 period; in 1970, however, the total climbed to 129, a level approached only four times in the preceding eleven Terms. More important, the increase over 1969 was entirely consumed by the growth in the number of civil rights cases. Specifically, the totals for each of the other segments of the docket remained within 1 case of the 1969 figures, but the

— It appears that the 1977 Term brought a revival of the earlier pattern; preliminary analysis indicates that there were 11 decisions on jurisdiction and procedure.
number of civil rights decisions soared from 58 to 80. This development, it turned out, was not an aberration, but rather the inauguration of a new phase in the Court's business.\textsuperscript{291}

The stage was now set for the final steps in the transformation. Decisions on jurisdiction and practice had long ago fallen to the level that they would maintain all through the 1970's. Civil rights cases had now completed the climb from 41, the median for the 1959–1965 Terms, to 80, which would be the median for the new era. But the overall plenary caseload had remained at the same level. Inevitably, the federalism and general federal law segments of the docket had experienced substantial shrinkage; cases in these areas now numbered about two-thirds of what had been the norm a decade earlier. To redress the balance, the Court, in 1971, took a drastic step: it increased the number of cases given plenary consideration from 129—a figure already well above the median for the preceding Terms—to 149, a total unprecedented in the Court's recent history. All segments of the docket expanded, but the principal beneficiary was the area of general federal law. The number of cases in that area climbed from 36 to 43, about halfway between the median for 1959–1965 and the number handed down in the 1968 through 1970 Terms. The effect was to establish a new norm, one which would continue at least through the 1977 Term.\textsuperscript{292} The final adjustment took place in 1972, when a small additional expansion in the docket as a whole permitted a major increase—from 13 to 21—in the number of federalism cases. Although the overall docket never again reached the 1972 figure, the effect was to establish a new level of activity for federalism litigation: starting with the 1972, federalism cases have averaged 21 per Term.

These data thus suggest an answer to the question posed in Part II.\textsuperscript{293} It now appears that the Court expanded the size of the plenary docket in 1971 because the Justices were unwilling to cut back on the number of civil rights cases they were deciding, but recognized that there was a need for a greater number of authoritative precedents in other areas of federal law. The only way they could satisfy both desires was to increase the total num-

\textsuperscript{291} It is quite possible that the change would have taken place in 1969 if the Court had had its full complement during that Term. Justice Blackmun did not take his seat until all of the 1969 Term cases had been argued, so that the Court operated with only eight Justices for the entire Term. Moreover, 16 cases argued in 1969 were set for reargument in the 1970 Term; all of these were civil rights cases.

\textsuperscript{292} Although the number of general federal law decisions declined sharply in the 1976 Term, preliminary analysis indicates that there were about 50 in the 1977 Term, thus leaving the average and the median about the same as in the 1971–1975 Terms.

\textsuperscript{293} P. 1734 supra.
ber of cases given plenary consideration. This is speculation, of
course, but it is supported by the history just outlined.

B. National Appellate Capacity and the Proposed New Court

The Hruska Commission's proposal for a National Court of
Appeals raises two questions. Does the federal judicial system
provide adequate appellate capacity for authoritative resolution
of recurring issues of national law? If not, is creation of a
National Court the best way of meeting the need? A satisfactory
answer to the first question requires, as I have said, an analysis
of the cases that the Supreme Court does not decide, while the
second question calls for consideration of alternate paths to struc-
tural or procedural reform. Notwithstanding these limitations,
however, the findings of this study shed light on some of the
important issues underlying the broad questions.

1. There is good reason to believe that the continuing expan-
sion of federal statutory and constitutional law will not create an
infinitely expanding need for authoritative decisions. It is true
that court rulings creating new constitutional rights tend to re-
quire elaboration and clarification; similarly, legislation intro-
ducing or substantially revising a program of regulation or taxa-
tion will often give rise to troublesome questions of interpret-
ation which in practice can be settled only by the courts. Yet recurrent
patterns in the flow of plenary docket business suggest that there
comes a point when most of the questions about a new constitu-
tional right or statutory scheme have been settled, and the Sup-
reme Court can largely withdraw from the area. This is not to
say that a diminishing need for authoritative precedents will be
found in all of the areas in which the Court has reduced its activ-
ity; it does caution that such declines do not necessarily re-
fect a failure to meet needs, nor do they indicate, without more,
a lack of adequate national appellate capacity. Rather, the signif-
ificance of such changes must be investigated through empirical
research focusing on primary conduct and lower court decision-
making. Studies of this kind were undertaken by the Hruska
Commission in 1974 and 1975, but there has been disagree-
ment over the significance of their findings, and further work
remains to be done.

2. The data suggest that in several areas of law not marked
by the creation of new constitutional or statutory rights, the

294 See note 36 supra. See also Senate Hearings, supra note 23, at 190–91 (state-
ment of Professor Rosenberg); note 81 supra.


296 Compare, e.g., id. at 39 (the Commission's own conclusions), with Alsup,
Reservations on the Proposal of the Hruska Commission to Establish a National
Court has substantially increased its activity in order to permit a rethinking or clarification of existing doctrines and rules. Prominent examples in the realm of constitutional litigation include the double jeopardy clause, state taxation of interstate commerce, and procedural due process. Among issues of statutory construction, employment discrimination and securities regulation stand out. In each of these areas the Court has, in a short period of time, granted review in a substantial number of cases and then handed down a series of decisions effecting major changes in the governing rules or doctrinal approaches.

Obviously, from the standpoint of the nation's legal institutions, the short run consequences of this practice are not optimal: the Court's workload is increased and the law is left in a state of uncertainty. Once the new approach has been made clear, however, it seems likely that the Court would be able to reduce its activity in the particular area and move on to other unsettled issues. But the practice also raises two further questions. First, with respect to each of the areas, does the Court provide sufficient guidance to leave the law more orderly and predictable than it was when the reexamination began? Second, how many such areas does the Court have the capacity to put in order? Professors Carrington, Meador, and Rosenberg have suggested that a

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297 From 1959 through 1973, double jeopardy cases averaged fewer than 1 per Term. The next three Terms brought a total of 9; the 1977 Term alone brought 8 more. The most plausible explanation is that the Justices regard this as an area of law that requires clarification and perhaps a complete overhauling. See Hellman, supra note 105; The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 101–14 (1977).

298 See pp. 1772–74 supra.

299 Following the landmark decision in Goldberg v. Kelly, 397 U.S. 254 (1970), the Court handed down a series of decisions expanding procedural due process rights, to the point where Judge Friendly was prompted to ask "whether government can do anything to a citizen without affording him 'some kind of hearing.'" Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1275 (1975). In the most recent Terms the Court has continued to be active in this area, but virtually all of the decisions have rejected the procedural due process claim. The resulting tension between the two sets of precedents will almost certainly require clarification and further Court involvement.

300 See Edwards, supra note 232; at 330.


302 With the exception of securities regulation, these reappraisals appear to have continued in the 1977 Term.

303 Of course, if the reason for reexamination is not that the law is in a state of disarray, but that the Justices disagree with the prevailing doctrines, then presumably the Court would be content as long as the lower courts were made aware of the new approach, even if there were no gains from the standpoint of clarity.
"National Court dealing with one or two dozen cases a year arising under [a statute such as the National Environmental Protection Act or the Freedom of Information Act] could have a benevolently settling effect on litigation which has been unknown in the federal system for decades." 304 The evidence indicates that the Supreme Court itself has been making efforts to provide this "settling effect?"; whether the Court can do enough remains an open question.

3. While the present study cannot tell us the extent to which the Court has met the need for authoritative decisions in particular areas of law, it can identify those areas in which no authoritative decisions at all have been forthcoming, or in which the number of decisions is so small by comparison with the volume of litigation that one must wonder how useful the Court's contributions are. 305 As might be expected, very few constitutional issues fall into either of these categories. Probably the outstanding example is that of recognition of judgments under the full faith and credit clause. During the last decade the Court has never once

304 P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 216 (1976).
305 This concern rests, in the first instance, on quantity alone; yet more may be involved. When the Court deals with a particular statute or doctrine only in occasional decisions at long intervals, the Justices may not fully appreciate how the cases fit into their broader legal or factual setting. Sound resolution of particular issues may require attention to related doctrines, cognate statutes, or exceptions to rules; yet if the Justices are not familiar with these other contexts, the implications may escape them. Nor could the Justices expect much help from counsel, since the attorneys would ordinarily focus their arguments on the case sub judice. To be sure, the members of the Court will have seen a wide range of related issues and factual situations in the course of considering applications for plenary review, but a few minutes' examination of the preliminary papers to determine if cases are "cert-worthy" provides at best a limited opportunity for understanding how particular suits fit into the overall pattern of litigation. Certainly it is no substitute for the comprehension that comes through mastering the briefs and record, and perhaps writing an opinion, in a case given plenary consideration. Moreover, when the Court rarely takes up issues in a particular area, the cases that do attract the Justices' attention may well be ones that involve extreme or at best idiosyncratic facts or claims. And when a case of that kind becomes the vehicle for the only nationally binding precedent in an area of law for years to come, there is a substantial risk that the law will be skewed in a way that would be avoided if the authoritative decisionmaker regularly adjudicated cases in that area.

These reflections are suggested by the Court's two most recent decisions on state court jurisdiction under the due process clause, Hanson v. Denckla, 357 U.S. 235 (1957), see Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241, 244, and Shafer v. Heitner, 433 U.S. 186 (1977) — decisions separated by an interval of 20 years; see also Kulko v. Superior Court, 98 S. Ct. 1690 (1978). Cf. United States v. Scott, 98 S. Ct. 2187, 2191 (1978) ("[O]ur vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that [a unanimous decision handed down three Terms earlier] was wrongly decided.").
addressed a question of full faith and credit, and in the view of commentators it has even denied review in cases where lower courts had flouted the principles laid down in its earlier rulings. 306 Litigation involving due process limitations on state court jurisdiction experienced a similar eclipse. During a twenty-year period in which state legislatures and courts were constantly expanding the reach of judicial authority over nonresidents, 307 the Supreme Court did not hand down a single decision in this area. Within the last two years, however, the Court has taken 2 cases raising questions of state court power; 308 perhaps the Justices have concluded that the time has come to cut back on the prevailing expansionist trends.

Outside of these two areas, it is difficult to identify important constitutional issues that the Court has not considered with some frequency in recent years. When we turn to the realm of statutory interpretation, however, the situation is quite different. In several areas a large volume of reported litigation is carried on in the lower courts with very little guidance from the Supreme Court; in some areas there is no guidance at all. Probably the outstanding example of the latter phenomenon is occupational safety and health: although decisions under the Occupational Safety and Health Act 309 now fill five thick volumes, the Supreme Court has not granted review in a single case primarily involving the construction of the Act. 310 As I have suggested, discrepancies

306 See pp. 1768–69 supra.
310 At this writing, the collection of OSHA cases published by the Bureau of National Affairs is well into its sixth volume. Those volumes include both agency and court decisions; it is therefore worth noting that in a period of less than two years, the court decisions alone spawned 23 pages of headnotes in the 1977 pocket part to the United States Code Annotated.

The Court has given plenary consideration to two OSHA cases, but both involved constitutional issues. Marshall v. Barlow's, Inc., 98 S. Ct. 1816 (1978)
of this kind are not conclusive, but they do raise troublesome questions as to whether the needs of the national law are being satisfied.\textsuperscript{311}

4. The study provides support for the proposition that civil rights litigation has, to some extent, displaced other kinds of federal law issues from the plenary docket. This is significant because it is probably not realistic to expect any substantial reduction in the volume of civil rights cases that receive plenary consideration. The present Court has been handing down numerous decisions either recognizing new constitutional rights or (paradoxical though this may sound) cutting back on the scope of existing ones. Both kinds of rulings tend to require clarification and elaboration and thus the Court's continuing attention to the issues involved. In particular, today's Court often finds it necessary to grant review because the lower courts have been too expansive in their interpretation of constitutional guarantees. Even after the numerous reversals in the last two Terms, the lower courts have continued to strike down state laws in cases not implicating "suspect" classifications or "fundamental" rights, thus providing additional grist for the plenary docket.\textsuperscript{312} Further, the low incidence of dismissals of certiorari after argument permits the inference that the Court is applying a very rigorous standard in selecting cases for plenary consideration, and perhaps denying review in some borderline cases that might turn out to have warranted it.\textsuperscript{313} These factors suggest that the Court as presently composed will continue to devote a large part of its energies to civil rights issues. But even if changes in the Court's member-

\begin{footnotesize}
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\item \textsuperscript{311} See pp. 1783–84 supra.
\item \textsuperscript{312} See, e.g., Smith v. Fussenich, 440 F. Supp. 1077 (D. Conn. 1977) (state law barring all felons from obtaining licenses to become private detectives or security guards held to violate equal protection clause); Orrin W. Fox Co. v. New Motor Vehicle Bd., 440 F. Supp. 436 (C.D. Cal. 1977) (law prohibiting auto manufacturers from establishing new dealerships without giving nearby dealers an opportunity to protest held to deny manufacturers procedural due process), \textit{prob. juris. noted}, 434 U.S. 1060 (1978) (No. 77–837); Smith v. Idaho Dep't of Employment, 98 Idaho 43, 557 P.2d 637 (1976) (statute denying unemployment benefits to otherwise eligible persons who attend day school, but not to those attending night school, held to deny equal protection), \textit{rev'd}, 434 U.S. 100 (1977). At this writing, it appears that the plenary docket in the 1978 Term will include at least 3 cases in which lower courts upheld procedural due process challenges to state action.
\item \textsuperscript{313} As shown in Table VII, pp. 1748–49 supra, the number of dismissals was much smaller in the 1971–1976 period than it was in the preceding six Terms, even though the total number of civil rights cases on the plenary docket was much greater. \textit{See also} Hellman, supra note 105.
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ship were to bring about a new majority more sympathetic to civil rights claims, it is still unlikely that the volume of civil rights decisions would decline. In all probability the Court would then be granting review in substantial numbers of cases to reconsider current doctrines or to weigh further expansion of constitutional rights.

The Court is also likely to remain active in the area of federalism law. State and federal governments alike continue to expand the scope and density of their regulatory legislation, thus making conflict almost inevitable; at the same time, because of the novelty of many of the laws, existing precedents may provide only limited guidance for the resolution of the conflicts. Meanwhile, state and local governments pursue new sources of revenue, prompting national enterprises to seek exemption through federal constitutional or statutory immunities. These conflicts, too, raise new and difficult issues for the courts.\textsuperscript{314} The same may be said of attempts by states to adjust their role in federally funded social welfare programs. Equally important, the Court appears to be very much interested in addressing questions which relate to the balance of power in the federal system.

5. Suppose, then, that a National Court of Appeals were to be created, with jurisdiction to hear and decide cases referred to it by the Supreme Court. How would the system work? To begin with, I do not think that the Court would refer civil rights cases to the new tribunal. Because decisions in these cases depend so heavily on deep-seated ethical judgments about the competing claims of liberty and authority and the proper role of courts in resolving them, it is highly unlikely that the Justices would be willing to share their jurisdiction with another court, whatever its composition. Even if the Justices were willing, I doubt that the clarity of the law would be enhanced if decisions emanated from two tribunals rather than one. Federalism cases are likewise implausible candidates for referral. Quite apart from the potential for confusion if authoritative decisions were to come from two tribunals, regard for the sensibilities of state and national governments would suggest that the balance between the competing claims of authority should be drawn only by the nation's highest court.\textsuperscript{315}

If this analysis is correct, the only kinds of cases that would

\textsuperscript{314} Litigation is especially likely if the state or municipal taxing authorities have sought to minimize the effect of new taxes on local enterprises. See, e.g., Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977). See also p. 1771 supra.

\textsuperscript{315} Perhaps an exception should be made for issues of full faith and credit. See pp. 1768-69 supra.
be referred to the National Court would be those involving issues of general federal law or federal court jurisdiction and practice. At first glance, this result does not seem objectionable; after all, proponents of the National Court have emphasized, almost exclusively, the needs in these two areas. Yet the matter is not so simple. The Hruska Commission endorsed a suggestion by Justice White, who pointed out that creation of a National Court "would enable [the Supreme Court]... to reduce the total number of cases in which it now hears arguments and writes full opinions, perhaps to the [pre-1970] yearly average of approximately 100." But a plenary docket of 100 cases would be nearly filled by the civil rights and federalism caseloads of recent years. If I am correct in thinking that the Court would not refer cases in these areas, the result would be a Supreme Court whose work was limited almost exclusively to issues of constitutional law and related questions of federal court authority and statutory preemption.

This would not necessarily be an undesirable result; indeed, it is essentially what Professor Kurland has been proposing for several years. Yet others have seen dangers in this approach. For example, Professor Terrance Sandalow has expressed sympathy for the view that "the quality of the Court's consideration of constitutional issues is likely to suffer" unless the Court continues to be involved in "traditional lawyer's work" and to confront the more "structured" issues typically found outside the realm of constitutional law. If a National Court of Appeals were to be created, the Court would no doubt retain some cases involving only statutory construction, and indeed the federalism segment of the docket would itself provide many cases of that kind; yet this would not fully answer Professor Sandalow's concerns. Federalism-related issues of statutory construction are a far cry from "traditional lawyer's work," while the general federal law cases the Court is most likely to retain are those involv-

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310 See pp. 1775–76 supra.
319 Hruska Commission Hearings II, supra note 34, at 739. See also Senate Hearings, supra note 23, at 111 (testimony of Dean Pollak); Rehnquist, supra note 23, at 790. Casper and Posner pose the question whether, conversely, "the Court's predominant emphasis on constitutional adjudication affect[s], perhaps for the worse, the way in which it decides technical issues of federal law." G. CASPER & R. POSNER, supra note 94, at 100–01.
ing statutes such as the Clayton Act or the Norris-LaGuardia Act which have almost the breadth of a constitutional provision.

On the other hand, there are also risks if the Court continues to decide some cases in areas such as taxation or Federal Power Commission review, but refers others to the National Court. Perhaps the Court could refer only cases raising issues that are relatively self-contained, so that the bench and bar would have minimal difficulty in harmonizing the two lines of precedent. Even so, the Court’s continuing involvement in the particular area makes it more likely that the Justices would review some of the National Court’s decisions. If review is granted in any substantial number of cases, the whole purpose of the enterprise would be defeated; yet if review is sporadic, the Court’s intervention is likely to result in confusion rather than clarification. Moreover, the very fact that the Court continued to be interested in the area would create a lingering uncertainty as to whether decisions of the National Court might be overruled or qualified by later rulings of the higher court.320

These difficulties could be largely avoided by making the National Court the exclusive national forum for review of court of appeals decisions in specified areas, subject to further review by the Supreme Court only if constitutional questions were raised.321 Admittedly, the result would be to create a four-tier system, but if the National Court’s areas of primacy were selected carefully, the overwhelming majority of its cases would lack even a ghost of a plausible constitutional question, so that review would in fact end at the National Court level.322 Such an arrangement could well be effectuated through the exercise of the reference jurisdiction proposed by the Hruska Commission. That is, rather than referring cases on a purely ad hoc basis, the Court would announce in advance, preferably through rules subject to Congressional scrutiny, that certain classes of nonconstitutional cases would be referred to the National Court.323 All such cases would thereafter be referred unless the Justices found good reason not to do so. The National Court would then grant or deny review in accordance with what it perceived the needs of the national

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320 Judge Friendly expressed concern about this point. Senate Hearings, supra note 23, at 244.
321 This is essentially the approach proposed by Judge Hufstedler and by Professors Carrington, Meador, and Rosenberg. Hufstedler, supra note 77, at 547; P. Carrington, D. Meador & M. Rosenberg, supra note 304, at 215–16.
322 I think the Court would be able to deal easily with frivolous or make-weight constitutional arguments proffered solely for the purpose of opening the way to Supreme Court review.
323 Leading candidates, of course, would be cases in those areas in which the Court has been completely or virtually inactive in recent years.
law to be. Under this system the two courts together would be able to hand down between 150 and 200 decisions a year on issues of general federal law and federal court procedure. Whether the country needs that many decisions, rather than the 45 to 50 that are issued today, remains to be seen.\footnote{As noted earlier, this is in large part a jurisprudential question. See p. 1729 & note 81 supra. Attention must also be given to the potential difficulties inherent in a scheme under which the Supreme Court would be called upon to play a role in screening cases for the National Court. See generally Senate Hearings, supra note 23, at 243 (testimony of Judge Friendly).}

C. Conclusion

New forms of economic and social activity, new initiatives by governments, and, above all, new aspirations on the part of the nation's citizens—these are the springs from which flow the currents of litigation that eventually bring issues to the Supreme Court for resolution. The Court's decisions, in turn, activate new currents, and these reshape the docket yet again. Thus it is inevitable that the Court's work in 1978 is different from what it was in 1959, just as the profile of the 1959 caseload bears only an attenuated resemblance to that of 1925.

From this perspective, the fact that new kinds of litigation have displaced familiar issues from the plenary docket is not, of itself, grounds for alarm. On the contrary, there would be cause for concern if the Court had not shifted the focus of its attention in the face of widespread change in the social and legal environment. Yet it would be equally rash to conclude that all is well in the Court's stewardship of the national law. At a time when the issues presented to the Justices for resolution are as complex and difficult as any the Court has ever faced,\footnote{See Lewis, The Supreme Court and Its Critics, 45 MINN. L. REV. 305, 326–27 (1961); Rehnquist, supra note 23, at 788–89.} the Court has substantially increased the number of cases given plenary consideration and the number of opinions written by each Justice. Moreover, many of the areas in which the Court has reduced its activity are ones that continue to produce much litigation in the lower courts and to give rise to legal issues that require resolution.

Whether these circumstances call for structural change in the federal judicial system is a question on which reasonable persons can, and do, differ. Yet it is worth recalling that even before the Act of 1925 had become fully effective, Professors Frankfurter and Landis recognized that "future legislation making new disposition of the federal judicial power" was "inevitable," and they predicted that "[i]f anything, changes in the future are likely to
be more rapid than they have been in the past.\textsuperscript{326} After fifty years marked by unprecedented expansion in the scope of federal law and in the responsibilities assigned to our "one supreme Court,"\textsuperscript{327} it would hardly be surprising if the time for change had finally arrived.

\textsuperscript{326} F. Frankfurter & J. Landis, supra note 4, at 1.
\textsuperscript{327} U.S. Const. art. III, § 1.