



Summer 6-1-2001

The Supreme Court's Plenary Docket

Margaret Meriwether Cordray

Richard Cordray

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Courts Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Margaret Meriwether Cordray and Richard Cordray, *The Supreme Court's Plenary Docket*, 58 Wash. & Lee L. Rev. 737 (2001).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol58/iss3/2>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

The Supreme Court's Plenary Docket

Margaret Meriwether Cordray*
Richard Cordray**

Table of Contents

I. Quantitative Changes in the Court's Docket	740
A. The Supreme Court's Plenary Docket	740
B. The Recent Decline in the Plenary Docket	743
C. Historical Perspective on the Plenary Docket	745
II. Possible Explanations for the Recent Decline	750
A. Elimination of the Court's Mandatory Jurisdiction	751
B. Fewer Actions Filed in Particular Subject Areas	758
C. Federal Government Seeking Review Less Frequently	763
D. Greater Homogeneity Among the Courts	771
E. Changes in Personnel on the Supreme Court	776
F. Growth of the "Cert Pool"	790
III. Conclusions About the Changing Docket	793

Twenty-five years ago, controversy raged over the size of the Supreme Court's docket. Two very different concerns animated the critics: first, that the Court's workload was unmanageably large; and second, that the Court's capacity for deciding cases was no longer adequate in light of the burgeoning caseload in the lower courts.¹ These concerns were considered so pressing

* Professor of Law, Capital University Law School. B.A. 1983, University of the Pacific; J.D. 1986, Boalt Hall School of Law; B.C.L. 1988, Oxford University. We wish to thank Jeffry Hartel and Christine Watchorn for their careful help with the research of this Article and Jane Underwood for her assistance in the library. Capital University Law School supported the preparation of this Article with a generous research stipend.

** Member of the Supreme Court bar, Adjunct Professor of Law, The Ohio State University College of Law. B.A. 1981, Michigan State University; M.A. 1983, Oxford University; J.D. 1986, The University of Chicago Law School. Mr. Cordray served as a law clerk to Justice Byron R. White and Justice Anthony M. Kennedy, and as Ohio's first State Solicitor.

1. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, 57 F.R.D. 573, 577-84 (1972) [hereinafter FREUND REPORT] (discussing "Nature and Dimensions of the Problem" of Supreme Court's declining caseload).

that scholars and legislators developed serious proposals to institute a national court of appeals to relieve the Court's burden and to expand the total appellate capacity.²

At that time, the Court was issuing about 150 plenary decisions per Term.³ Just over a decade later, the Court's docket began to plunge, reaching its modern nadir of 76 cases in the 1999 Term.⁴ With the plenary docket reduced so dramatically, concerns about the Court's workload understandably abated. Commentators, however, have remained strangely silent about the second concern – whether the limited size of the Court's docket enables it adequately to supervise and guide the lower courts.⁵ This silence is all the more surprising, given that the Court's production has now fallen so far below the levels that alarmed commentators in the Burger Court era.

We think that issues concerning the appropriate size and shape of the Supreme Court's plenary docket warrant further consideration. But in order to have an informed discussion on those issues, it is first essential to develop a more complete understanding of the causes of the dramatic change that occurred between the Burger and Rehnquist Courts.⁶

2. See *id.* at 590-95 (examining proposal for National Court of Appeals); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, reprinted in 67 F.R.D. 195, 199-247 (1975) [hereinafter HRUSKA REPORT] (discussing proposal in significant detail).

3. See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 84 tbl. 2-7 (2d ed. 1996) [hereinafter SUPREME COURT COMPENDIUM]. The tabulation of "plenary decisions" reflects the Court's own statistics by including both signed opinions and cases resulting in *per curiam* opinions after oral argument.

4. See *id.* at 84-85; *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 69 U.S.L.W. 3134 (Aug. 15, 2000) [hereinafter *Statistical Recap*] (tabulating Supreme Court's caseload); *Statistical Recap*, 66 U.S.L.W. 3136 (Aug. 12, 1997) (same).

5. The last articles that expressed strong support for a national appellate court to reduce the burden on the Supreme Court and still provide needed uniformity in national law were published more than a decade ago. See, e.g., Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673 (1990); Thomas E. Baker & Douglas D. McFarland, *Commentary: The Need for a New National Court*, 100 HARV. L. REV. 1400 (1987).

6. The sharp decline in the Court's docket has been widely recognized. See, e.g., Joan Biskupic, *A Different Sort of Court Awaits Blackmun Successor: Recent Terms Marked by Aversion to Change*, WASH. POST, Apr. 17, 1994, at A1 (discussing reduced docket); Glen Elsasser, *High Court Chooses Not To Decide; Justices Examine Lowest Number of Cases Since 1960s*, CHI. TRIB., July 3, 1994, News Section, at 7 (same); David G. Savage, *Docket Reflects Ideological Shifts: Shrinking Caseload, Cert Denials Suggest an Unfolding Agenda*, 81 A.B.A. J. 40 (Dec. 1995) (same); David O. Stewart, *Quiet Times: The Supreme Court Is Reducing Its Workload – But Why?*, 80 A.B.A. J. 40 (Oct. 1994) (same). There are, however, only two scholarly articles discussing the phenomenon: Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996), and David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779 (1997).

In this Article, we present a comprehensive assessment of the causes of this recent decline in the Supreme Court's plenary docket. We begin by placing it in the broader context of how the plenary docket has ebbed and flowed over the past century, which reveals an interesting historical parallel to the post-war Court.⁷ We then examine in detail six explanations that have been offered for the most recent decline. This leads us to consider a number of diverse influences on the Supreme Court's plenary docket, such as the changing contours of its appellate jurisdiction, the kinds of cases in which applications for review are filed, the Justices' own internal practices, and how the Court interacts with some of its most significant counterparts in the judicial system, such as the Solicitor General and the lower courts. In each instance, we develop and present new data that provides greater insight into the relative merits of each theory, and that incidentally exposes some of the myths that have grown up around the Supreme Court's certiorari practice.⁸

We then turn to examine more carefully how changes in the Court's personnel have affected its plenary docket.⁹ We approach this task by assembling new information on the Justices' conference votes, which is now available in the docket books of some of the recently retired Justices, and which has never before been analyzed for these purposes.¹⁰ We use this information to replicate some of the research that political scientists have conducted on previous eras, which affords a fresh perspective on how the six retirements that occurred between 1986 and 1994 have affected the plenary docket. This approach also yields powerful data about the voting behavior of the Justices in deciding how frequently to grant plenary review, which opens up many interesting areas of inquiry into how the Court functions in setting its own agenda.¹¹ For purposes of this Article, in particular, this data makes it possible to present a more comprehensive explanation of why the Court's caseload has declined to its lowest point in this century.

7. See *infra* Part I.

8. See *infra* Part II.A-II.D.

9. See *infra* Part II.E.

10. The Justices' docket books contain their personal records of the votes that the individual Justices cast in every case at their private conferences both on applications for review and on the merits. The docket books of Justices Powell, Brennan, and Marshall have been made available to the public, either in whole or in part, in recent years. Our efforts to assemble the pertinent figures were greatly facilitated by the generous assistance of personnel at the Program for Law and Judicial Politics at Michigan State University, who have done extensive work in compiling the conference votes. See *infra* note 227.

11. See, e.g., *infra* Part II.F (refuting theory that "cert pool," whereby most Justices now share jointly their clerks' recommendations about whether to grant review in particular cases, has tended to depress Court's plenary docket).

I. Quantitative Changes in the Court's Docket

A. The Supreme Court's Plenary Docket

One feature of the Supreme Court's docket that has been completely dependable over the past century is the steady increase in the number of cases filed. From 386 in the 1895 Term, the number has mounted each decade to 6,597 in the 1995 Term.¹² Interestingly, however, this consistent increase in cases available has not resulted in a corresponding increase in cases selected for plenary review. For the last half-century, that figure has ranged from a low of 76 (in the 1999 Term) to a high of 158 (in the 1972 Term).¹³ The result has been a steady drop in the *percentage* of petitions for certiorari granted by the Court – a number that hovered close to 20 per cent until the 1940s and then commenced its fall to its current rate of about 3 per cent.¹⁴

This state of affairs is understandable: as the overall demand for the Supreme Court's services has grown significantly, the maximum supply of those services has remained virtually constant. It is also largely inevitable: unless the Supreme Court is willing to accept either a large (and continuing) increase in its backlog or a revolutionary (and anti-judicial) streamlining of its procedures for deciding cases, the Court's argument calendar imposes a natural ceiling on the number of plenary decisions that can be issued each Term. As Professor Henry Hart cogently explained, the boundaries of the Court's calendar merely reflect the natural limitations upon the amount of time and work that the Justices themselves can put in over the course of a given Term.¹⁵

There are, of course, changes that can be made to the calendar that would permit the Supreme Court to expand the potential supply of its plenary decisions. In 1970, for example, the Court modified its oral argument procedures, which had presumptively allotted one hour for counsel to argue on each side, by limiting counsel to only a half-hour per side in the typical case.¹⁶ At a

12. See SUPREME COURT COMPENDIUM, *supra* note 3, at 71-76 tbl. 2-2. The following numbers of new cases filed are illustrative: 1895 Term – 386; 1905 Term – 502; 1915 Term – 557; 1925 Term – 790; 1935 Term – 983; 1945 Term – 1,316; 1955 Term – 1,644; 1965 Term – 2,774; 1975 Term – 3,939; 1985 Term – 4,413; 1995 Term – 6,597. *Id.*

13. *Id.* at 84-85 tbl. 2-7; *Statistical Recap*, *supra* note 4, 69 U.S.L.W. at 3134; *id.*, 66 U.S.L.W. at 3136.

14. See SUPREME COURT COMPENDIUM, *supra* note 3, at 80-83 tbls. 2-5 & 2-6. The percentages provided in the text focus on paid petitions; the percentage of *in forma pauperis* petitions granted has always been lower, but has undergone a similar decline over the same period, from about 4% to less than 0.3%. *Id.*

15. See Henry M. Hart, Jr., *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 85-94 (1959) (explaining time necessary for Justices to complete various duties).

16. See David M. O'Brien, *Managing the Business of the Supreme Court*, 45 PUB. ADMIN. REV. 667, 671 (1985) (noting this change). Prior to 1970, however, the Court had

stroke, therefore, the Court increased the number of plenary decisions that could be issued per Term within the limits of its calendar. Around the same time, however, the Court also reorganized its calendar by reducing the number of argument days per week from 4 to 3, and by reducing the number of argument weeks per Term from 15 to 14.¹⁷ The overall increase in capacity was nonetheless substantial, and it presumably encouraged the Court to expand its plenary docket over the course of Chief Justice Burger's tenure.

Discussions about the Supreme Court's docket during this era focused on whether the federal judiciary should undergo a broader institutional restructuring that would add even more capacity to help the Court cope with its rapidly increasing workload.¹⁸ Serious attention was given to proposals to create a new court of appeals that would have national decisionmaking authority, thereby alleviating some of the burden on the Supreme Court, while at the same time providing greater capacity to resolve those cases necessary to achieve broader uniformity in federal law. Although proposals for such a court took a variety of forms,¹⁹ the most prominent was that embodied in the Freund Report, which advocated the creation of a National Court of Appeals to screen all applications for review (referring only the 400-500 deemed most meritorious to the Supreme Court) and to resolve definitively some less important cases involving circuit conflicts.²⁰ Some commentators staunchly

placed an increasing number of argued cases on the so-called "summary docket," which allotted the parties thirty minutes per side. See William O. Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 411-12 (1960) (discussing Court's use of summary docket). The effect of this procedural change was therefore less drastic than it might seem.

17. See SUPREME COURT COMPENDIUM, *supra* note 3, at 22 tbl. 1-1.

18. See Erwin N. Griswold, *Rationing Justice - The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 337-53 (1975) (criticizing lack of nationally binding appellate capacity and proposing new appellate tier); Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 617-33 (1974) (reviewing and making various proposals to alleviate Supreme Court's workload); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 12 (1986) (arguing that there is need for greater national decisionmaking capacity and endorsing new appellate tier).

19. See HRUSKA REPORT, *supra* note 2, at 199-247 (proposing national appellate court with jurisdiction over cases assigned to it by Supreme Court as well as those transferred to it by existing Courts of Appeals); Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 898-99 (1974) (favoring inferior national court of appeals that would resolve questions requiring uniformity, and judgments of which would be subject to review by Supreme Court); Griswold, *supra* note 18, at 349-53 (proposing "National Court of the United States" which would be assigned cases by Supreme Court); Frederick Bernays Wiener, *Federal Regional Courts: A Solution for the Certiorari Dilemma*, 49 A.B.A. J. 1169, 1169-74 (1963) (proposing system of federal regional courts).

20. See FREUND REPORT, *supra* note 1, at 590-95; see also William H. Alsop, *A Policy Assessment of The National Court of Appeals*, 25 HASTINGS L.J. 1313, 1323-42 (1974)

opposed this proposal, contending either that the crisis had been misdiagnosed²¹ or that the functions proposed for the new court encroached too deeply into the essential role of the Supreme Court.²² The Justices also divided over the merits of these proposals for a new appellate tier,²³ and ultimately the idea withered away.

As the enthusiasm for a national court of appeals waxed and waned, the pressure of the Supreme Court's caseload remained. One consequence was that after more than a decade of importuning by the Justices, in 1988 the Congress enacted legislation that eliminated most of the remaining vestiges of the Court's mandatory appellate jurisdiction.²⁴ Both observers and participants judged that this measure would at least relieve the burden of deciding cases presenting relatively trivial issues by granting the Court virtually total control in determining which cases to accord plenary review.²⁵ Indeed, the last time that Congress had enacted major changes in the Court's jurisdictional

(appraising policy arguments for and against proposed National Court of Appeals); Baker & McFarland, *supra* note 5, at 1400-09, 1414-16 (arguing for national appellate court).

21. See Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 634-46 (1974) (arguing that problem lies in ever-increasing number of cases flooding into lower courts and offering proposals to decrease flow); Eugene Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951, 954-56 (1973) (doubting whether Supreme Court is excessively overworked); Arthur D. Hellman, *Preserving the Essential Role of the Supreme Court: A Comment on Justice Rehnquist's Proposal*, 14 FLA. ST. U. L. REV. 15, 17-22 (1986) (contending that Supreme Court is not overworked and that it does have capacity to resolve important circuit conflicts).

22. See Black, *supra* note 19, at 888-91 (arguing that screening function is essential to Supreme Court); Gressman, *supra* note 21, at 951-70 (contending that proposed National Court of Appeals would violate Article III's requirement that there be "one supreme Court"); Hellman, *supra* note 21, at 27-32 (arguing that remitting issues to national appellate court would undermine Supreme Court's ability to function properly); Nathan Lewin, *Helping the Court with Its Work, A Response to Goldberg and Bickel*, THE NEW REPUBLIC, Mar. 3, 1973, at 15, 17-18 (contending that screening function cannot be severed from Supreme Court).

23. See, e.g., William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474-85 (1973) (criticizing proposal for national appellate court on ground that screening function should not be removed from Supreme Court); Rehnquist, *supra* note 18, at 12-14 (endorsing new tier of appellate courts); John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 182-83 (1982) (favoring national appellate court with broader powers to define Supreme Court's docket).

24. See Review of Cases by the Supreme Court, Pub. L. No. 100-352, 102 Stat. 662 (1988) (codified at 28 U.S.C. §§ 1254, 1257-1258, 2104 (1994)).

25. See S. REP. NO. 100-300, at 4 (Mar. 16, 1988) (anticipating that legislation would strengthen Court's "capacity both to control its own docket and to confine its labors to those cases of national importance"); Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 98-99 (1988) (discussing effect of new legislation restricting Court's mandatory jurisdiction). A more complete explanation of these statutory changes, and a consideration of their effects, is presented *infra* in Part IIA.

statutes – in the Judiciary Act of 1925,²⁶ which also reduced the Court's mandatory appellate jurisdiction by transferring many cases over to its discretionary certiorari docket – the Court's workload declined dramatically.²⁷ After passage of that legislation, the number of signed opinions of the Court dropped from 199 in the 1926 Term to 129 in the 1928 Term, though soon thereafter the number rose substantially once again.²⁸

B. The Recent Decline in the Plenary Docket

Beginning in the 1989 Term, the Court's docket – which had remained fairly constant at about 150 plenary decisions for the past decade – suddenly began to decline. In the 1988 Term, the Court issued 145 plenary decisions; in the 1989 Term, the number fell to 132; and in the 1990 Term, it fell to 116.²⁹ It dropped slightly to 110 in the 1991 Term, held steady at 111 during the 1992 Term, then plunged to 90 in the 1993 Term.³⁰ At present, the number of plenary decisions seems to have come to rest at a remarkably low plateau, ranging from 76 to 92 over the seven most recent Terms.³¹

This unexpected development surprised and puzzled both participants and observers. At his confirmation hearings in 1986, then-Justice Rehnquist said, "I think the 150 cases that we have turned out quite regularly over a period of 10 or 15 years is just about where we should be at."³² Indeed, in response to questioning about whether the size of that caseload might be too great for effective administration, he stated more pointedly, "[m]y own feeling

26. Act of Feb. 13, 1925, 43 Stat. 936, 937 (1925).

27. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 163 (7th ed. 1993) [hereinafter STERN & GRESSMAN] (noting that 1925 Act "gave the Court flexible but firm control over the main body of its work" and "substantially reduced the number of mandatory appeals on the Court's docket").

28. SUPREME COURT COMPENDIUM, *supra* note 3, at 84 tbl. 2-7. The number of "signed opinions" is used here, rather than plenary decisions, because the tabulations do not include the number of unsigned *per curiam* opinions until the 1940 Term.

29. *Id.* at 85 tbl. 2-7. It could be suggested that the decline began after the 1986 Term, in which 155 plenary decisions were issued, with the numbers falling to 148 in the 1987 Term and to 145 in the 1988 Term. *See id.* We examine the causes of the decline in order to reassess its chronology *infra* in Part II.E.

30. *Id.* at 85 tbl. 2-7.

31. The precise number of plenary decisions in the most recent Terms is: 1994 Term – 85; 1995 Term – 78; 1996 Term – 83; 1997 Term – 92; 1998 Term – 79; 1999 Term – 76; 2000 Term – 79. *See Statistical Recap*, *supra* note 4, 69 U.S.L.W. at 3134; *id.*, 66 U.S.L.W. at 3136. In 1996, Professor Hellman saw signs that "the era of shrinkage in the plenary docket may be ending," Hellman, *supra* note 6, at 438, but it is now clear that this projection was incorrect.

32. *Hearings before the Committee on the Judiciary United States Senate on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States*, 99th Cong. 143 (1986) (statement of Hon. William H. Rehnquist).

is that all the courts are so much busier today than they have been in the past, that there would be something almost unseemly about the Supreme Court saying, you know, everybody else is deciding twice as many cases as they ever have before, but we are going to go back to two-thirds as many as we did before."³³ Justice Souter, who arrived at the Court in the midst of this dramatic decline, said he has been "amazed" at the trend, which he suggests has "just happened" without any conscious decision on the Justices' part.³⁴

Commentators also recognized and were perplexed by the marked decline.³⁵ Although some offered possible explanations for the decline, most of that discussion was tentative and came too soon to benefit from the kind of detailed investigation of additional data that is necessary to test the various hypotheses adequately.³⁶ Some commentators on the decline expressed frustration that the Court's already precious resources were not being fully utilized,³⁷ whereas others dispensed praise³⁸ or blame,³⁹ according to their views about the proper role of the Supreme Court in national life. The individual Justices who noted the phenomenon offered only vague and uncertain rationales for what may have happened to bring it about.⁴⁰

Two scholarly commentators have examined some possible causes of the current situation, which has led them to suggest that it may be largely attributed to changes in personnel on the Court.⁴¹ Professor David M. O'Brien

33. *Id.* at 173-74.

34. Shannon P. Duffy, *Inside the Highest Court; Souter Describes Justices' Relationship, Caseload Trend*, PA. L. WKLY., Apr. 17, 1995, at 11.

35. See, e.g., Biskupic, *supra* note 6, at A1 (discussing Court's reduced caseload); Ruth Marcus, *High Court's Caseload is Unprecedentedly Light*, WASH. POST, Feb. 5, 1990, at A4 (same); Stewart, *supra* note 6, at 40-44 (same).

36. See Joan Biskupic, *As Appeals Proliferate, Court Takes Fewer Cases; On the Docket: Free Speech, Voting Rights*, WASH. POST, Oct. 4, 1993, at A6 (discussing possible reasons but coming to no definite conclusions); Elsasser, *supra* note 6, at 7 (same); Savage, *supra* note 6, at 40-42 (same).

37. See James J. Kilpatrick, *Slow Days at the Supreme Court*, INDIANAPOLIS STAR, Sept. 7, 1999, at A14; Joan Biskupic, *The Shrinking Docket; Attorneys Try to Make an Issue out of the Dramatic Decline in High Court Rulings*, WASH. POST, Mar. 18, 1996, at A15 [hereinafter *Shrinking Docket*]; Savage, *supra* note 6, at 40-42; Kenneth W. Starr, *Rule of Supreme Court Needs a Management Revolt*, WALL ST. J., Oct. 13, 1993, at A23.

38. See Marcus, *supra* note 35, at A4 (quoting comments by Bruce Fein and Andrew Frey).

39. See Elsasser, *supra* note 6, at 7 (quoting comments by Mark Tushnet and Lawrence Marshall); Starr, *supra* note 37, at A23.

40. See Duffy, *supra* note 34, at 11 (quoting Justice Souter); Biskupic, *supra* note 6, at A1 (quoting Justice White); Hellman, *supra* note 6, at 409 (quoting Justice Kennedy).

41. See Hellman, *supra* note 6, at 429-33 (suggesting "a new court" brought "a new philosophy" to case selection); O'Brien, *supra* note 6, at 788-89, 803-07 (hypothesizing that changes in Court's composition led to changes in plenary docket).

analyzed some of the Court's internal procedural mechanisms in an effort to shed light on the problem.⁴² Professor Arthur D. Hellman took a different approach by scrutinizing the actual mix of cases on the plenary docket in order to evaluate various hypotheses that have been given currency by other commentators or by the Justices themselves.⁴³ Yet neither study uses data available from the dockets books of the retired Justices, which record the Justices' conference votes on whether to grant review in particular cases, to develop direct evidence that would be more definitive about how changes in the Court's membership affected its plenary docket.⁴⁴ Their specific analyses of the decline will be discussed in more detail as we examine its causes below.⁴⁵

C. Historical Perspective on the Plenary Docket

No effort has previously been made to place the recent changes in the docket into a broader historical perspective. In fact, the current trend is not unprecedented. Counting forward from the 1926 Term – the first in which the Supreme Court enjoyed substantial control over its own docket⁴⁶ – the trajectory of the Court's plenary docket divides into five fairly distinct periods.

The immediate effect of the 1925 legislation, as noted previously, was to reduce the number of the Court's signed opinions dramatically, from 199 in the 1926 Term to 129 in the 1928 Term.⁴⁷ Almost immediately, however, these numbers spiked up again, remaining relatively constant at an average of about 150 plenary decisions per Term for the next 15 years.⁴⁸ At that point, the numbers fell precipitously, from 150 in the 1946 Term, to 124 and 132 in the 1947 and 1948 Terms, to 101 in the 1949 Term. For the next seven years, the Court issued an average of slightly more than 100 plenary decisions per Term. Beginning in the 1956 Term, the docket again showed a measurable increase, rising from 100 to 123 plenary decisions. For the next 15 years, the Court issued an average of about 120 plenary decisions per Term. In the 1971 Term, the docket jumped once more, and for almost two decades thereafter the

42. See O'Brien, *supra* note 6, at 784-807.

43. See Hellman, *supra* note 6, at 404-25.

44. Professor Hellman does not refer to conference votes at all. See *id.* Professor O'Brien uses them only to identify one limited type of procedural vote, and even then only in cases where the Court actually granted review. See O'Brien, *supra* note 6, at 797-98.

45. See *infra* Part II.

46. See *supra* note 26 and accompanying text (describing Judiciary Act of 1925, which substantially reduced Court's mandatory jurisdiction).

47. SUPREME COURT COMPENDIUM, *supra* note 3, at 84 tbl. 2-7.

48. *Id.* The figures set forth in this paragraph of the text all derive from this same table.

Court again issued about 150 plenary decisions per Term.⁴⁹ The most recent sharp decline commenced in the late 1980s.

Of particular interest, the current decline in the Supreme Court's plenary docket has a precise analog in the era just after World War II, when Chief Justice Vinson was appointed to preside over the Court. Then, as now, the Court had experienced a prolonged period of relatively full dockets, issuing an average of about 150 plenary decisions per Term. Suddenly, in just three Terms, the numbers fell to around 100 decisions per Term, where they remained for almost a decade. The most recent decline is comparable, and has now proved even more durable. The reasons for this earlier decline may thus offer clues that will help to explain the current decline.

It is assuredly difficult to isolate the reasons that underlie changes effected within an institution as complex and secretive as the Supreme Court. In that era, as in this one, many external factors conceivably could have contributed to the decline in the plenary docket. The volume of litigation may well have diminished during the years in which the United States was engaged in World War II, which would have meant a subsequent decline in cases wending their way to the Supreme Court. The flood of legislative activity on the domestic front during the Great Depression diminished during the next decade, which might also have reduced the number of decisional conflicts among the lower courts. This era also encompassed the waning years of a period of prolonged single-party control of the Presidency, which generally imposes some degree of realignment on the lower courts; the resulting harmony in judicial philosophy would be expected to minimize conflicts among the courts that would justify plenary review.⁵⁰ Finally, the Supreme Court itself had recently announced its withdrawal from two areas of prior contention by overruling its activist precedents on economic due process issues⁵¹ and

49. Professor Hellman notes that during this period, "[o]ne hundred fifty cases per year" came to be regarded both as a maximum and a norm for the plenary docket." Hellman, *supra* note 6, at 403 (quoting Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987)).

50. Presidents Roosevelt and Truman appointed 13 Supreme Court Justices, replacing every seat on the Court. SUPREME COURT COMPENDIUM, *supra* note 3, at 225 tbl. 4-1. When President Truman left office in 1953, 54 of the 64 circuit judges had been appointed either by him or by his predecessor. Compare *Federal Judges*, 199 F.2d vii-xv (1953), with *Federal Judges*, 62 F.2d v-ix (1933).

51. See, e.g., *Olsen v. Nebraska*, 313 U.S. 236 (1941) (overruling *Ribnik v. McBride*, 277 U.S. 350 (1928), to uphold state law setting maximum fee that employment agency could collect for placing employees); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (overruling *Adair v. United States*, 208 U.S. 161 (1908), to uphold federal labor law barring employers from encouraging or discouraging union membership); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), to uphold state minimum wage law for women).

by abandoning virtually all adjudication of common law claims.⁵²

It is doubtful, however, whether any of these explanations – taken alone or together – goes very far to explain the trimming of the docket by the Vinson Court. The pace of litigation was sluggish during the 1930s, perhaps depressed by economic conditions, and though the number of cases filed in the Supreme Court had changed little during that time, it gradually increased during the 1940s by about 25 per cent.⁵³ The extent of congressional action on the domestic front was probably less influential for our purposes than the cumulative growth of federal laws and agency actions, augmented by new legal problems created by wartime conditions. The prospect of judicial realignment may be more to the point, though Presidents often find it surprisingly hard to impose a comprehensive judicial philosophy upon even the Supreme Court itself, let alone upon the judicial system throughout the entire country.⁵⁴ Finally, though the Court did pull back on economic due process and state common law cases, these changes had occurred almost a decade earlier. Moreover, they were probably offset by a profusion of new procedural issues⁵⁵ and by the Court's growing assertiveness in exercising the power of judicial review to determine the constitutional rights of individual citizens.⁵⁶

Indeed, the studies now published on the workings of the Vinson Court,⁵⁷ which include detailed analyses of the approach that the Court took to granting plenary review, point to one overriding factor – changes in personnel – that seems to explain its reduced docket. Upon his appointment to the Court, Chief Justice Vinson viewed it as an important part of his mission to reduce the "conspicuous fractiousness" among its members.⁵⁸ One of his strategies was "to cut down the caseload to more manageable proportions, perhaps in order to reduce opportunities for division."⁵⁹ He thus came to the Court consciously

52. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. 1 (1842), and holding that there is no federal general common law).

53. See SUPREME COURT COMPENDIUM, *supra* note 3, at 73-74 tbl. 2-2.

54. See *infra* Part II.D (discussing concept of judicial realignment).

55. See Rules of Civil Procedure, 308 U.S. 645 (1938) (setting out new rules governing civil procedure in federal courts, which became effective on September 16, 1938).

56. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that "more searching judicial inquiry" is necessary when laws are "within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth," and when laws are "directed at particular religious or national or racial minorities") (citations omitted); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (sanctioning incorporation of Bill of Rights against States when rights asserted are regarded as "implicit in the concept of ordered liberty").

57. See JAN PALMER, *THE VINSON COURT ERA: THE SUPREME COURT'S CONFERENCE VOTES; DATA AND ANALYSIS* (1990); DORIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* (1980).

58. DENNIS J. HUTCHINSON, *THE MAN WHO WAS ONCE WEIZZER WHITE* 201 (1998).

59. *Id.*

determined to exert his influence to reduce the size of the docket, which he could do in part by casting his own vote less frequently in favor of plenary review, and in part by attempting to persuade his colleagues to do the same.

Fortunately, the availability of Justice Burton's docket books (and those of certain other Justices) has permitted scholars to assemble figures on the voting patterns of each Justice on the Vinson Court.⁶⁰ The data confirms that Chief Justice Vinson accomplished at least the first part of his task, voting to grant certiorari review in fewer cases during his first three Terms than anyone other than Justice Jackson, and voting least frequently to note probable jurisdiction in cases on appeal.⁶¹ Although it is not clear that the Chief Justice managed to exert any significant influence on the votes cast by his colleagues, the withholding of his own vote sufficed to cause at least a modest decline in the docket over this period.⁶²

At that juncture, fate took a hand. On July 19, 1949, Justice Murphy died. Less than two months later, on September 10, 1949, Justice Rutledge also died unexpectedly. President Truman thus made two new appointments to the Court between the 1948 and 1949 Terms. The nominees were Tom C. Clark and Sherman Minton, and the Senate promptly confirmed both. Chief Justice Vinson carried great sway with President Truman in nominating the two men – Minton had served with Vinson in the Congress, and Clark had served with Vinson in Truman's Cabinet.⁶³

On the Court, both men immediately proved to be even less inclined to grant plenary review than the Chief Justice, who still ranked below the rest of the Justices in this regard.⁶⁴ Justice Minton, in particular, voted to grant plenary review in far fewer cases than any other member of the Court – 210 times on certiorari and 69 times on appeal over the next four Terms, as compared with 641 and 137 for Justice Black, who topped the list.⁶⁵ Even more important, however, was the fact that the two Justices they replaced had been among the most willing to grant plenary review during the three previous Terms. Justice Murphy, in fact, had cast the most votes for certiorari over that span (462), and Justice Rutledge had tied Justice Douglas for the second most (392).⁶⁶ To put

60. See PALMER, *supra* note 57, at 34-49 (explaining how data on conference votes was gathered from collected private papers of various Justices and describing possible sources of error in particular cases).

61. See *id.* at 56 tbl. 5.1 & 79 tbl. 6.1.

62. See SUPREME COURT COMPENDIUM, *supra* note 3, at 84 tbl. 2-7 (1946 Term – 150 plenary decisions; 1947 Term – 124 plenary decisions; 1948 Term – 132 plenary decisions).

63. See PALMER, *supra* note 57, at 6-14 (providing biographical information of Vinson-era Justices).

64. See *id.* at 57 tbl. 5.2 & 81 tbl. 6.2 (compiling voting data from Vinson Court).

65. *Id.*

66. *Id.* at 56 tbl. 5.1 & 79 tbl. 6.1.

the consequences in starker perspective, the average number of votes for plenary review cast per Term by the two former Justices was 340 (159 by Rutledge, 181 by Murphy), but for the two new Justices, this same figure sank to only 174 (70 by Minton, 104 by Clark).⁶⁷ It is a telling demonstration of the independent significance of these two changes in personnel that over the same period, the average rate at which every one of the holdover Justices (including Chief Justice Vinson) voted to grant plenary review actually *increased*.⁶⁸

The effect on the Court's docket was dramatic. The slight decline initiated by Chief Justice Vinson now took on the aura of a full-scale retreat, as the number of plenary decisions immediately collapsed to 101 cases in the 1949 Term.⁶⁹ It would not climb back above 114 cases until the 1956 Term, after both Vinson and Minton left the Court,⁷⁰ even though the Court was bombarded with academic criticism excoriating the Justices for evading their responsibilities by declining to review and decide major cases.⁷¹

The lessons from this brief case study of the Vinson Court are clear-cut, largely because the figures compiled from the Justices' conference votes have such powerful explanatory force. This data shows that though it is possible that external factors may have contributed modestly to the decline in the plenary docket, the most obvious and compelling explanation is simply that changes in personnel created a Supreme Court that, as a collective body, was much less inclined to grant review.⁷² This state of affairs lasted until the

67. *Id.* at 56-57, 79, 81 (calculated from Tables 5.1, 5.2, 6.1 & 6.2).

68. See PALMER, *supra* note 57, at 56-57 tbls. 5.1 & 5.2 & 79-81 tbls. 6.1 & 6.2 (tabulating voting); PROVINCE, *supra* note 57, at 114-115 & tbl. 4.5 (calculating Justices' "propensity to vote for review").

69. See SUPREME COURT COMPENDIUM, *supra* note 3, at 84 tbl. 2-7 (1949 Term – 101 plenary decisions; 1950 Term – 106 plenary decisions; 1951 Term – 108 plenary decisions).

70. *Id.*

71. See Fowler V. Harper & Alan S. Rosenthon, *What the Supreme Court Did Not Do in the 1949 Term – An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950) (discussing Court's denial of review in many important cases); Fowler V. Harper & Edwin D. Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354 (1951) (same); Fowler V. Harper & George C. Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439 (1953) (same); Fowler V. Harper & Arnold Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427 (1954) (same); John P. Frank, *The United States Supreme Court: 1950-51*, 19 U. CHI. L. REV. 165, 216-17 (1952) (criticizing "the rigidity with which the writ of certiorari is being granted" and wondering: "What is the Court saving itself for?"); Fred Rodell, *Our Not So Supreme Court*, LOOK, July 31, 1951, at 60 (discussing how Court's plenary docket "has plummeted to a new and scandalous low" due in part to "comparative incompetence and part to sheer laziness").

72. See FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955*, at 314 (Vintage Books 1964) (referring to Vinson Court's "new spendthrift use of 'denial of certiorari' to refuse even to hear a lot of important cases and thus to cut the Justices' work-load down to a twentieth-century low"); John P. Frank, *Fred*

personnel changed again; after Earl Warren replaced Vinson as Chief Justice and established himself, and after William Brennan replaced Justice Minton, the plenary docket expanded once again as a consequence of their greater willingness to vote in favor of granting review.⁷³ This analog is illuminating as we turn to evaluate the causes that lie behind the current version of the Court's shrinking docket.

II. Possible Explanations for the Recent Decline

Lawyers, commentators, and even the Justices themselves have hypothesized a variety of causes for the drop in the Supreme Court's plenary docket over the past decade. For the most part, however, these theories have remained mostly speculative and have not been satisfactorily evaluated in light of numerical data that would allow them to be either verified or falsified.⁷⁴ This problem occurs because the close secrecy of the Court's internal deliberations makes it difficult to quantify the Justices' voting behavior in conference. In the discussion that follows, we attempt to draw upon the available data in new ways to amass the kinds of information that make it possible to test hypotheses more carefully and to draw more definite conclusions. In addition, one must consider the timing of each proposed explanation because a theory can be ruled out if its application does not correspond to the actual rise and fall of the plenary docket.⁷⁵

Vinson and the Chief Justiceship, 21 U. CHI. L. REV. 212, 239-40 & n.91 (1954) (noting in his seventh annual article on Supreme Court's work that "the theme of this series of articles" has been that "the Court is turning away too much business with its use of its certiorari discretion").

73. See PROVINCE, *supra* note 57, at 114-15 tbl. 4.5 (comparing voting patterns of Justices); SUPREME COURT COMPENDIUM, *supra* note 3, at 84 tbl. 2-7 (1956 Term – 123 plenary decisions; 1957 Term – 131 plenary decisions; 1958 Term – 122 plenary decisions).

74. The one notable exception in this regard is Professor Hellman, whose work attempts to group the Court's caseload into different substantive categories and to draw conclusions from the rate of change in the number of cases on the plenary docket in each category. See Hellman, *supra* note 6, at 408-29. Indeed, as will be noted, our data tends to confirm some of his conclusions. See *infra* Part II.B (examining number of actions filed in particular subject areas). Yet because his work makes no use of the data available on conference votes from the docket books of various retired Justices, it is necessarily limited, and in particular his discussion of the effect of recent retirements on the direction of the Court is largely anecdotal. See Hellman, *supra* note 6, at 429-32; see also *infra* Part II.E (discussing effect of changes in personnel on Court's docket).

75. For example, it has been suggested that perhaps Congress has been enacting fewer new statutes and thus spawning fewer new cases to interpret them. See, e.g., Duffy, *supra* note 34, at 11 (quoting Justice Souter suggesting this); David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996, § 6 (Magazine), at 65. Yet it is difficult to understand the timing here, since there is no clear correlation between congressional output (or state legislative output) and the recent decline in the plenary docket, particularly when the cumulation of statutes to be construed is taken into consideration. Presumably this explanation would have its roots in the

A. Elimination of the Court's Mandatory Jurisdiction

In seeking explanations for the recent decline in the Court's plenary docket, one obvious (but ultimately unpersuasive) candidate is the almost wholesale repeal of the Court's mandatory jurisdiction.⁷⁶ Prior to 1988, the Supreme Court enjoyed discretion to determine whether to review most of the cases coming before it, but several important statutes gave litigants a right of appeal to the Supreme Court. In 1988, at the Court's urging, Congress eliminated virtually all of these mandatory appeal provisions, substituting instead discretionary review on certiorari.⁷⁷

The 1988 legislation made three major changes: First, it repealed 28 U.S.C. § 1252, which allowed any party in a civil action to appeal directly to the Supreme Court from any decision of any federal court declaring a federal statute to be unconstitutional, if the United States was a party to the lawsuit.⁷⁸ Second, the Act repealed 28 U.S.C. § 1254(2), which allowed a party to appeal to the Supreme Court from a decision of a federal court of appeals striking down a state statute as violative of the federal Constitution, treaties, or laws.⁷⁹ Third, the legislation repealed 28 U.S.C. §§ 1257(1) and (2), which allowed a party to appeal to the Supreme Court from a judgment of a state court of last resort holding either that a federal statute or treaty was invalid, or that a state statute was valid despite a challenge based on the federal Constitution, treaties, or laws.⁸⁰

gridlock created by divided government, yet the only period since 1980 in which partisan control of the Presidency and both houses of Congress was in the same hands was in the 103rd Congress, from 1993-94, which did not correspond to any subsequent rise in the Court's plenary docket.

76. See Hellman, *supra* note 6, at 408-12 (discussing this theory); O'Brien, *supra* note 6, at 781-82 (same).

77. See Review of Cases by the Supreme Court, Pub. L. No. 100-352, 102 Stat. 662 (1988). The same essential change had been recommended for at least two decades. See, e.g., FREUND REPORT, *supra* note 1, at 595-605 (proposing that all cases be brought to Supreme Court by certiorari).

78. See 28 U.S.C. § 1252 (repealed 1988). Under the new regime, codified at 28 U.S.C. § 1254, parties losing at the district court level will now first have to appeal to the circuit court, and any party dissatisfied with the result there will then have to file a petition for certiorari to the Supreme Court. However, if either party believes that the district court's ruling of unconstitutionality warrants immediate review by the Supreme Court, 28 U.S.C. § 1254(1) continues to permit that party to docket the case in the court of appeals and then to immediately file a petition for certiorari that would allow the Supreme Court, in its discretion, to consider the case directly from the district court. See Boskey & Gressman, *supra* note 25, at 95 (discussing and commenting on this procedure).

79. See 28 U.S.C. § 1254(2) (repealed 1988) (permitting this appeal procedure).

80. See 28 U.S.C. §§ 1257(1) & (2) (repealed 1988) (permitting these appeals from state courts); see also 28 U.S.C. § 1258 (repealed 1988) (duplicating these appeal provisions for

These statutory changes stripped away most of the Court's mandatory jurisdiction.⁸¹ All that remains are 28 U.S.C. § 1253, which allows appeals in civil injunctive actions from cases before three-judge district courts,⁸² and the Antitrust Procedures and Penalties Act of 1974, which permits a direct appeal to the Supreme Court in a tightly limited class of civil antitrust cases, but still gives the Supreme Court "discretion" to "deny the direct appeal and remand the case to the court of appeals."⁸³ These few remaining obligations add "very little to the Court's workload."⁸⁴

There were at least three reasons to believe that this virtual elimination of the Court's mandatory jurisdiction might have been a significant factor contributing to the decline in the docket. First, as noted earlier, Congress's 1925 modifications of the Supreme Court's jurisdictional statutes led to an immediate and dramatic drop in the Court's caseload.⁸⁵ Although the amount of mandatory jurisdiction remaining in 1988 was much diminished, it would be sensible to expect some further decline to flow from additional legislative changes made in the same direction. Second, the timing is right, as the enactment of the 1988 legislation occurred around the beginning of the

parties seeking review of judgment of Supreme Court of Puerto Rico). Prior to the repeal of 28 U.S.C. §§ 1257(1) and (2), parties had the option to seek certiorari rather than appeal, *see* 28 U.S.C. § 1257(3) (now redesignated § 1257(a) by 1988 legislation).

81. In addition, the 1988 legislation amended other more specific statutory provisions to substitute certiorari review for appeals as of right. These provisions had previously allowed appeals in cases arising under an array of statutes: the Federal Election Campaign Act of 1971, codified at 2 U.S.C. § 437(h) (amended 1988); the Act of May 18, 1928, codified at 25 U.S.C. § 652 (amended 1988); the Trans-Alaska Pipeline Authorization Act, codified at 43 U.S.C. § 1652(d) (amended 1988); the Regional Rail Reorganization Act of 1973, codified at 45 U.S.C. §§ 719(e)(3) and 743(d) (amended 1988); the Omnibus Budget Reconciliation Act of 1981, codified at 45 U.S.C. § 1105(b) (amended 1988); the International Claims Settlement Act of 1949, codified at 22 U.S.C. § 1631(e) (amended 1988); the Saint Lawrence Seaway Act, codified at 33 U.S.C. § 988(a) (amended 1988); and the Federal Insecticide, Fungicide, and Rodenticide Act, codified at 7 U.S.C. § 136w(a)(4) (amended 1988).

82. *See* 28 U.S.C. § 1253 (1994) (permitting appeals from panels of district judges).

83. 15 U.S.C. § 29 (1994); *see also* STERN & GRESSMAN, *supra* note 27, at 50-55 (discussing this provision).

84. Boskey & Gressman, *supra* note 25, at 97. Indeed, in the ten Terms from 1984 to 1993, there were a total of thirteen plenary appeals from three-judge district courts, amounting on average to only one per Term. The antitrust appeal statute has not brought a case to the Court since the AT&T litigation almost two decades ago. *See* *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). That statute recently regained prominence in the government litigation against Microsoft. *See* *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000) (denying certiorari and remanding case to D.C. Circuit).

85. *See supra* notes 26-28 and accompanying text (describing Judiciary Act of 1925 and its effect on Court's docket).

decline.⁸⁶ Third, the Justices themselves seemed convinced that this change would relieve some of the pressure on their docket, at a minimum by freeing up precious time for cases of greater import.⁸⁷

Indeed, the Justices had pressed Congress hard to eliminate the Court's mandatory jurisdiction in favor of allowing them to exercise almost complete discretion over the docket. In letters to Congress in 1982 and 1978, the Justices offered two rationales for the change.⁸⁸ First, the Justices argued that the mandatory jurisdiction statutes required them to give plenary review to cases that did not necessarily present issues of national importance or concern.⁸⁹ Second, the Justices noted that, because of the crush of work at the Court, they had to decide many appeals through summary dispositions, which are "uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity."⁹⁰ The Justices thus advised Congress of their view that it was "imperative that the mandatory jurisdiction of the Court be substantially eliminated."⁹¹

The Justices' first reason – that the mandatory jurisdiction statutes required them to give plenary review to cases that did not present issues of sufficient import to merit such treatment – strongly suggests that repeal of these statutes would cause the Court to cut back significantly in reviewing these types of cases. In 1987, Chief Justice Rehnquist estimated that the changes would slice off fifteen to twenty cases per Term:

If we look at the cases decided on the merits during the last five terms of our Court, the cases decided on the merits which came by way of appeal rather than

86. The Act took effect on September 25, 1988 and applied to all cases in which the judgment of the relevant lower court had not yet been entered as of that date. See *Review of Cases by the Supreme Court*, Pub. L. No. 100-352, 102 Stat. 662 (1988). As noted earlier, the most significant decline in the Court's plenary docket commenced in the 1989 Term, as the following numbers indicate: 1988 Term – 145 decisions; 1989 Term – 132 decisions; 1990 Term – 116 decisions; 1991 Term – 110 decisions. *Supra* notes 29-30 and accompanying text.

87. See Letter from all nine Justices of the United States Supreme Court to Congressman Kastenmeier (June 17, 1982) (reprinted in H.R. REP. NO. 100-660, appendix (May 26, 1988)) [hereinafter *Justices' 1982 Letter*] ("The more time the Court must devote to [mandatory appeals,] the less time it has to spend on the more important cases facing the nation.").

88. See *id.*; Letter from all nine Justices of the United States Supreme Court to Senator DeConcini (June 22, 1978) (reprinted in Eugene Gressman, *Requiem for the Supreme Court's Obligatory Jurisdiction*, 65 A.B.A. J. 1325, 1328 (1979)) [hereinafter *Justices' 1978 Letter*].

89. *Justices' 1982 Letter*, *supra* note 87; *Justices' 1978 Letter*, *supra* note 88. The Justices further explained that it was necessary to give such cases plenary review because even cases of trivial public import may involve difficult legal issues that require full argument and briefing before the Court can gain sufficient assurance that it is deciding them correctly. *Justices' 1982 Letter*, *supra* note 87; *Justices' 1978 Letter*, *supra* note 88.

90. *Justices' 1978 Letter*, *supra* note 88; see also *Justices' 1982 Letter*, *supra* note 87.

91. *Justices' 1982 Letter*, *supra* note 87; see also *Justices' 1978 Letter*, *supra* note 88.

by way of certiorari averaged about thirty-five per term. That's thirty-five out of roughly a hundred and fifty. Because these cases came by way of appeal, we had much less latitude in dealing with them than we would have had had they come by way of certiorari. . . . Perhaps we would have granted certiorari in some of these cases had they come to us that way rather than by appeal. But if you assume that in only half of them certiorari would have been denied, this change would give us some fifteen or twenty new slots, to use the airport terminology, for other cases which our Court would have considered sufficiently important to warrant granting discretionary review of.⁹²

It is demonstrable that the Court did, at least on occasion, grant full review to an appeal that it would not otherwise have taken on certiorari.⁹³ Some commentators, however, opined that the Court was already applying the functional equivalent of its standards for granting certiorari in deciding whether to accord plenary treatment to cases on appeal.⁹⁴ The Justices accomplished this by disposing of unmeritorious appeals by dismissing them "for want of a substantial federal question,"⁹⁵ which had been a regular practice for

92. Boskey & Gressman, *supra* note 25, at 98-99 (quoting remarks at annual meeting of American Law Institute, May 19, 1987); *see also id.* at 98 (estimating that "between 12 and 20 of the approximately 150 argued cases per term have been mandatory appeals which would not have made their way to the argument calendar if their prescribed route had been by petition for certiorari instead of appeal"). Justice Kennedy later commented that the numbers may have been even higher. *See* Hellman, *supra* note 6, at 409 (quoting Justice Kennedy testifying before Congress).

93. In *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182 (1987), for example, the Court complained:

The issue presented is not the type that would usually merit our attention if presented in a petition for certiorari. The issue has divided neither the federal courts of appeals nor the state courts. Indeed, aside from the Illinois courts, no court has ever considered whether Ginnie Maes are exempt from state taxes. Nor does it appear that this case presents an overly important question of federal law "which has not been, but should be, settled by this Court." This Court's Rule 17.1(c). The fact is that the Illinois property tax imposed here was repealed in 1979. Nonetheless, this case arises under our mandatory jurisdiction, 28 U.S.C. § 1257(2), and Congress has not allowed us to consider these factors in deciding whether to rule on this case on its merits.

Id. at 184 n.3.

94. *See, e.g.,* W.H. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 104-06 (1991) (discussing substantial similarity in treatment between appeals and grants of certiorari); PROVINE, *supra* note 57, at 13-17 (same); Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 50 N.Y.U. L. REV. 681, 799 (1984) (same); *see also* H.R. REP. NO. 100-660, at 12 (May 26, 1988) (noting that Supreme Court "has necessarily come to treat cases that require review as the functional equivalent of, and under the same standards as, cases that are reviewed on a discretionary basis").

95. *See, e.g.,* Colonial Pipeline Co. v. Alabama, 474 U.S. 936 (1985) (dismissing appeal); *Hamilton v. California*, 474 U.S. 1016 (1985) (same). This treatment of an appeal from a state court succeeded in rendering a final disposition, but obviated the need to schedule the case for

decades.⁹⁶ If this view were correct, repeal of the mandatory jurisdiction statutes would still have the beneficial effect of eliminating the need for summary dispositions and the time-consuming task of resolving technical jurisdictional issues, but it would have no appreciable effect on the size of the plenary docket.⁹⁷

Although this debate largely preceded Congress's action, it nonetheless frames the current question: Did the virtual elimination of the Supreme Court's mandatory jurisdiction meaningfully contribute to the decline in its docket? As Chief Justice Rehnquist has noted, "there is no way of knowing how many of the appeals would have been granted as petitions for certiorari."⁹⁸ However, we can develop a close proxy for the answer by comparing: (i) the number of appeals accorded plenary review in the four Terms prior to the 1988 legislation; with (ii) the number of cases granted review on certiorari in which the parties previously would have had a right of appeal, in the four Terms after the legislation had become fully effective.⁹⁹

In order to make the first part of this comparison, we counted the number of appeals on the plenary docket for each Term from 1984-1987. During that period, the Court gave full consideration to a total of 108 appeals.¹⁰⁰

plenary review or to prepare a written opinion that analyzed the legal issues at stake. Appeals from the lower federal courts that were regarded as insubstantial were summarily dispatched in similar fashion by a bare order of affirmance. See ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 108, 239-46, 295 (6th ed. 1986) [hereinafter STERN & GRESSMAN, SIXTH EDITION] (describing this process).

96. See, e.g., Harold B. Wiley, *Jurisdictional Statements on Appeals to U.S. Supreme Court*, 31 A.B.A. J. 239, 240 (1945) (discussing this practice); FREUND REPORT, *supra* note 1, at 595-96 ("The discretionary-mandatory distinction between certiorari and appeal has been largely eroded. The concept that all appeals are argued while most certiorari cases are disposed of summarily has not been true for many years.").

97. See H.R. REP. NO. 100-660, at 11 (May 26, 1988) (citing as reason for repeal of mandatory jurisdiction statutes concern that "the Court is required to spend inordinate amounts of time considering arcane and technical provisions of its jurisdiction").

98. Letter from Chief Justice William H. Rehnquist to Congressman Kastenmeier, Subcommittee Chairman of the House Committee on the Judiciary (Dec. 2, 1987). This excerpt of the letter is reprinted in S. REP. NO. 100-300, at 2 (Mar. 16, 1988). Professor Hellman also felt himself to be stymied in this respect, opining that "[w]e have no way of knowing" whether in the later period the Court denied certiorari in "cases which, if they had come up by appeal, would have received plenary consideration." Hellman, *supra* note 6, at 412.

99. The legislation became effective on September 25, 1988, but cases then pending in the Supreme Court and cases in which the relevant lower court had entered judgment prior to that date were allowed to press forward on appeal. See *Review of Cases by the Supreme Court*, Pub. L. No. 100-352, 102 Stat. 662 (1988). The legislation thus had little effect on the plenary docket in the 1988 Term, and affected only part of the 1989 Term. As a result, the new regime was not fully in place until the 1990 Term.

100. More specifically, the Court heard 22 appeals in the 1984 Term, 30 appeals in the 1985 Term, 31 appeals in the 1986 Term, and 25 appeals in the 1987 Term. In counting, we

In order to make the second part of the comparison, we reviewed every plenary decision that the Court issued during each of the Terms from 1990-1993. In doing so, we applied the appeal criteria that were in place during the 1984-1987 Terms to determine which cases would have been before the Court on appeal, had the now-repealed statutes still been in force.¹⁰¹ We also assumed that any litigant who would have been entitled to file an appeal would have taken advantage of that route rather than petitioning for certiorari, because the Court granted plenary review more often in cases on appeal and was obliged to provide at least some form of review on the merits in such cases.¹⁰²

treated consolidated cases as single appeals, regardless of how many individual cases they included. Further, following the Supreme Court's own practice, we counted all cases that received oral argument and resulted in either a signed opinion or a per curiam opinion. See, e.g., *Statement Showing the Number of Cases Filed, Disposed of and Remaining on Dockets at Conclusion of October Terms, 1994, 1995 and 1996*, 521 U.S. 1154 (1997).

101. In making this determination, we relied primarily on the Supreme Court's own description of how the case reached the Court. In addition, we used the standards that governed from 1984-1987. Thus, for example, in judging whether the finality requirement was met, we used the more flexible standards of that era, see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-86 (1975) (discussing principles of finality); *Pennsylvania v. Ritchie*, 480 U.S. 39, 47-50 (1987) (same), rather than the more rigid regime in place today, see *Jefferson v. City of Tarrant*, 522 U.S. 75, 80-84 (1997) (limiting holding of *Cox Broadcasting* and *Ritchie*).

102. Section 1254(2), which authorized appeals in cases where a federal court of appeals invalidated a state statute on constitutional grounds, permitted review only of the federal questions presented. See 28 U.S.C. § 1254(2) (repealed 1988). Thus, a litigant might choose to petition for certiorari rather than to file an appeal if it wanted the Court to review unrelated issues as well. Nevertheless, even in this situation, a prudent litigant would likely appeal so as not to "diminish the chance of securing review of [the appealable] issue." STERN & GRESSMAN, SIXTH EDITION, *supra* note 95, at 56.

Our proxy figure for the number of imputed "appeals" in the second period is likely to be inaccurate only in two minor respects, which tend to offset one another. Our assumption that any litigant that could have appealed would have done so may inflate this number to some extent, as it is likely that not all litigants would have made this choice (for rational or irrational reasons). Cutting in the other direction, however, is the effect of the repeal of 28 U.S.C. § 1252. That provision had authorized a direct appeal from any federal court judgment that invalidated an Act of Congress. The great majority of cases that received plenary consideration under this provision were from the district courts. (In the four Terms from 1984-1987, 18 of the 24 appeals under this provision were from the district courts.) With the repeal of this provision, such cases must now be vetted through the courts of appeals. See *supra* note 78 (discussing this change). In our review of the 1990-1993 Terms, we counted every case in which either a district court or a circuit court struck down a federal statute (there were 9 such cases; in 3 both the district and circuit courts struck down the statute, in 5 only the circuit court did, and in 1 only the district court did). It is likely that the Supreme Court would have granted plenary review in additional cases under the old regime because a district court had invalidated a federal statute, but did not need to address the issue in the new regime because the decision had been reversed by the court of appeals. This likelihood is borne out by the numbers, which show that the decline in this category was almost twice as steep as the overall decline in appeals (the decline of § 1252 cases was from 24 to 9, or 62%, while the overall decline was from 108 to 70, or 35%).

Within these parameters, we determined that during the four Terms from 1990-1993, the Court granted plenary review in 70 such cases.¹⁰³

A straight comparison of the raw numbers suggests that there was a noticeable decline in appeal-type cases: 108 appeals in the four-year period prior to the 1988 legislation versus 70 "would-have-been" appeals in the four-year period immediately following the legislation, an average of almost 10 fewer cases per year. However, as a percentage of the entire plenary docket during the designated periods, the decline was insignificant. In the 1984-1987 period, the Court issued 609 plenary decisions.¹⁰⁴ The 108 appeals constituted 17.7% of the docket. In the 1990-1993 period, the Court issued 427 plenary decisions.¹⁰⁵ The 70 imputed "appeals" constituted 16.4% of the docket. The reduction in these cases as compared to the remainder of the Court's discretionary docket was thus quite modest, amounting to only one or two cases per Term.¹⁰⁶

Because the decline in the number of appeal-type cases virtually mirrored the decline in the number of traditional certiorari cases, there are two possible ways to explain how curbing the Court's mandatory jurisdiction affected the docket. One possibility is that the Court did exercise its new discretion to cut back significantly on "appeal" cases that were not worthy of certiorari review (at the rate of ten or more per Term), but otherwise continued to take such cases at the same rate that it had in the mid-1980s. At the same time, however, some independent variable was driving down the number of traditional certiorari cases granted plenary review, without affecting the "appeal" cases.

Although this first explanation cannot be ruled out entirely, it is implausible. Far more likely is the possibility that some variable (or variables) independent of the legislative amendments was simultaneously depressing the number of cases granted plenary review in both the traditional certiorari and

103. More specifically, the Court heard 10 cases that would have been appeals in the 1990 Term, 25 such cases in the 1991 Term, 12 such cases in the 1992 Term, and 23 such cases in the 1993 Term. As with the 1984-1987 period, we treated consolidated cases as single appeals, and we counted all cases that received oral argument and led to either a signed opinion or a per curiam opinion. In addition, we treated cases with even one appealable issue as appeals, assuming that the litigant would have chosen the more definite route of appeal over the less definite route of certiorari. See *supra* note 102 and accompanying text (explaining basis for this assumption). We also, of course, included plenary appeals brought pursuant to 28 U.S.C. § 1253, which was unchanged by the 1988 legislation, in the count for both four-year periods.

104. SUPREME COURT COMPENDIUM, *supra* note 3, at 85 tbl. 2-7.

105. *Id.*

106. These results are not called into question by the fact that the percentage of appeals that received plenary consideration regularly exceeded the percentage of petitions for certiorari that were given similar treatment, see FREUND REPORT, *supra* note 1, at 580, because the statutory criteria for mandatory appeals narrowed the band of potential cases to those which were more likely to meet the Court's criteria for granting discretionary review. See PALMER, *supra* note 57, at 77-78 (discussing similarities and differences between appeals and certiorari petitions).

"appeal" categories, to approximately the same degree.¹⁰⁷ This strongly suggests that in the mid-1980s the Court was not giving plenary consideration to appeals that did not warrant certiorari review, except in perhaps one or two cases per Term, because it had already implemented internal procedures that led it to evaluate appeals and petitions for certiorari in similar fashion when deciding whether to grant review on the merits.¹⁰⁸ The 1988 legislative changes thus seem to have had little or no effect on the Court's plenary docket.

B. Fewer Actions Filed in Particular Subject Areas

Justice Souter has suggested that the declining docket may be partly attributable to fewer cases being filed in particular subject areas that are highly susceptible to Supreme Court review, such as antitrust and civil rights.¹⁰⁹ Yet a careful examination of the actual case filings reveals that this theory cannot account for the decline.

At first blush, it seems unlikely that filings would have fallen in *any* subject area, given that the total number of applications for review continued its relentless climb from 4,413 in the 1985 Term to 6,597 in the 1995 Term.¹¹⁰ Nonetheless, most of this growth occurred in the *in forma pauperis* cases, which are granted at a much lower rate, while the number of "paid" cases remained relatively constant.¹¹¹ It is certainly possible, therefore, that the

107. It is possible, of course, that the virtual repeal of the Court's mandatory jurisdiction could explain *part* of the decline in the number of appeal-type cases granted review, while other factors may have had a somewhat greater effect on reducing the number of traditional certiorari cases granted review. Again, however, this seems unlikely. Indeed, the two most persuasive explanations for the shrinking plenary docket, as we will see, are the declining number of civil cases involving government parties, *see infra* Parts II.C & II.D, and changes in personnel on the Supreme Court itself, *see infra* Part II.E. One would expect the former development, however, to have just the *opposite* effect – i.e., it would tend disproportionately to depress the number of appeal-type cases, particularly those brought under the bulk of the Court's previous statutory authority (under 28 U.S.C. §§ 1252, 1254(2), 1257(1), & 1257(2)). The latter development seems likely to be simply neutral as between the two categories of cases.

108. It is rather surprising that the Justices themselves would have so greatly overestimated the effect of the appeals on their docket, as one would expect that, through their repetitive handling of thousands of cases, they would have developed a solid sense of whether they treat mandatory appeals differently from petitions for certiorari in deciding whether to grant plenary review. Yet even the occasional marginal appeal that was given full briefing and argument may have acted as enough of an irritant to skew their view of the matter, and the complex, tedious, and time-consuming process of determining whether cases fell within the mandatory appeal provisions may have contributed as well. Moreover, as Professor Hellman noted, experience shows that "the Justices do not always have an accurate picture of the Court's practices." Hellman, *supra* note 6, at 404.

109. *See* Duffy, *supra* note 34, at 11 (quoting Justice Souter).

110. SUPREME COURT COMPENDIUM, *supra* note 3, at 75 tbl. 2-2.

111. *Id.* at 82-83 tbl. 2-6.

composition of the latter applications may have changed, and thus that fewer cases are being filed in particular areas.

To evaluate this proposed explanation, it is useful first to consider whether any substantive shift has occurred in the mix of cases that the Court has decided on the merits. If fewer cases *are* being filed in certain areas, and this fact is causing the overall docket to shrink, then the number of plenary decisions in these areas should exhibit a corresponding decline.¹¹²

Comparison of the 1983-1985 Terms to the 1993-1995 Terms indicates that the number of plenary decisions in almost all of the major substantive areas declined even more precipitously than the overall docket.¹¹³ The categories that declined the most, in terms of total plenary decisions, were civil rights cases, administrative appeals, and search-and-seizure challenges.¹¹⁴ Other categories that declined significantly were civil cases raising procedural issues, criminal due process cases, capital sentencing cases, criminal right-to-counsel cases, federal tax cases, and antitrust cases.¹¹⁵ Over this period, the only major area that bucked the trend and held its firm grip on the docket was freedom of speech.¹¹⁶

112. Data on decided cases is more readily available than data on cases filed. For example, in its annual recap of the Supreme Court Terms, the *Harvard Law Review* compiles statistics on the decided cases by issue area. See, e.g., *The Supreme Court, 1967 Term - The Statistics*, 82 HARV. L. REV. 93, 301-02, 313-16 (1968) (explaining basis for calculating statistics). Beginning with the 1955 Term, these statistics included a breakdown of the Court's disposition of cases filed on the appellate docket (i.e., the "paid" cases) by issue area, but this practice was discontinued after the 1967 Term. See, e.g., *id.* at 308-09 (Table IV). The *Harvard Law Review* publishes these statistics in the first issue of each volume; Volumes 82-114 include the statistics for the 1967-1999 Terms, respectively, and will be cited collectively hereinafter as "*Supreme Court Statistics*."

113. The total docket fell from 473 plenary decisions in the 1983-1985 Terms to 252 in the 1993-1995 Terms, a decline of 47%. SUPREME COURT COMPENDIUM, *supra* note 3, at 85 tbl. 2-7. The *Harvard Law Review* breaks down the decided cases into dozens of "issue" categories, but fewer than a dozen are "major" categories that consistently contribute any sizeable number of cases to the Court's plenary docket. See *Supreme Court Statistics*, *supra* note 112.

114. From the 1983-1985 Terms to the 1993-1995 Terms, the total number of plenary decisions in each category declined as follows: civil rights cases (56 to 22); administrative appeals (49 to 21); search-and-seizure challenges (25 to 5). *Supreme Court Statistics*, *supra* note 112. "Civil rights cases" include cases raising voting rights and equal protection issues as well as cases that the *Harvard Law Review* identifies as raising civil rights issues. *Id.*

115. Over the same period, the decline in each category was as follows: civil cases raising procedural issues (20 to 4); criminal due process cases (17 to 3); capital sentencing cases (13 to 3); criminal right-to-counsel cases (13 to 3); federal tax cases (12 to 5); antitrust cases (11 to 1). *Id.* For our purposes here, criminal cases include habeas cases.

116. There were 17 such cases decided from 1983-1985, and 16 from 1993-1995. *Id.* Other minor substantive areas, each of which contributes few cases to the plenary docket and which in the aggregate declined much less steeply than the rest of the plenary docket, do not warrant closer examination here.

These figures are troublesome for the hypothesis: they suggest that if fewer cases filed in particular subject areas is the explanation for the shrinking docket, then this has happened on a grand scale, across diverse subjects on the criminal side as well as the civil side of the Court's docket.¹¹⁷ Indeed, the point can be readily tested in one of these areas because the Administrative Office of the United States Courts records the number of applications for Supreme Court review filed in administrative appeals. In fact, this number did not decline over the same period; instead, it increased from 83 applications in the 1986 Term to 131 in the 1994 Term.¹¹⁸ The upshot, at least with respect to administrative appeals, is that the Court simply decided to grant plenary review less frequently in the later period than it did in the earlier period.

The four areas involving issues of criminal law also do not appear to conform to the "fewer cases filed" hypothesis. To begin with, the number of applications for plenary review filed in federal criminal cases nearly tripled over this period,¹¹⁹ and it is implausible that this increase was offset by any corresponding decline in state criminal cases. As there is no reason to think that litigants in this new influx of criminal cases suddenly stopped raising bread-and-butter complaints about improper searches and seizures, deprivation of due process rights, and violation of the right to counsel, the suggested hypothesis simply has no traction in these categories.

Although many of the criminal cases were *in forma pauperis* filings, and the Court grants these at a much lower rate,¹²⁰ the *in forma pauperis* cases were largely exempt from the overall decline in the plenary docket: the Court granted 47 such cases in the 1983-1985 Terms, and 44 such cases in the 1993-

117. Another measure is provided by the U.S. Supreme Court Judicial Database, which groups the Court's plenary decisions in thirteen general categories by subject area. It indicates that the percentage of the docket falling within each of the specified areas has remained relatively constant over the same period, which would mean that the docket has tended to shrink in a fairly uniform manner across the board, except that some shift may have occurred away from cases devoted to civil rights and due process guarantees toward economic litigation and cases involving judicial authority. See SUPREME COURT COMPENDIUM, *supra* note 3, at 88-93 tbl. 2-9.

118. 1995 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 95 tbl. B-2 [hereinafter 1995 JUDICIAL BUSINESS]; 1987 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 146 tbl. B-2 [hereinafter 1987 JUDICIAL BUSINESS]. The figures are kept by fiscal years, which happen virtually to coincide with the Supreme Court's Terms. Unfortunately, the data in this table contains no detailed categories of cases other than U.S. civil, private civil, criminal, and administrative appeals, and does not include cases from the state courts. See 1995 JUDICIAL BUSINESS, *supra*, at 95 tbl. B-2.

119. This figure increased from 633 in the 1986 Term to 2,162 in the 1994 Term. See 1995 JUDICIAL BUSINESS, *supra* note 118, at 95 tbl. B-2; 1987 JUDICIAL BUSINESS, *supra* note 118, at 146 tbl. B-2.

120. SUPREME COURT COMPENDIUM, *supra* note 3, at 82-83 tbl. 2-6.

1995 Terms.¹²¹ Since the vast majority of *in forma pauperis* cases are criminal or habeas cases, the substantial growth in these filings – from 2,082 in the 1984 Term to 4,979 in the 1994 Term¹²² – likely precludes any possibility that fewer meritorious issues are being raised in each of the four criminal categories.¹²³ Indeed, in capital sentencing cases, in particular, *in forma pauperis* cases have always constituted a large portion of the plenary docket; during the 1983-1985 Terms and the 1993-1995 Terms, for example, most plenary decisions in capital sentencing cases were of this type.¹²⁴

It is possible, however, that fewer cases were filed in the remaining subject areas on the civil side, and thus this factor may play some part in the docket's decline. The only way to evaluate this possibility is to categorize and count the individual filings. We have done so by counting the cases filed on the appellate docket in each of these categories – civil rights, civil procedure, antitrust, and federal tax – for the 1983-1985 Terms and for the 1993-1995 Terms.¹²⁵

The resulting figures show that this theory does little to explain the contraction in the plenary docket.¹²⁶ In civil rights cases, which made up the

121. *Id.*

122. *Supreme Court Statistics*, *supra* note 112.

123. Moreover, the number of "recommendations received" by the Solicitor General – that is, the number of requests for authorization to take an appeal to either a circuit court or the Supreme Court – in federal criminal cases also rose over roughly the same period from 693 in the 1987 Term to 946 in the 1994 Term. These figures are taken from the "OSG [Office of the Solicitor General] Workload Report," as compiled through June 24, 1999, at page 7 [hereinafter OSG Workload Report]. The category of "recommendations received" is described more fully in the text accompanying *infra* note 156.

124. More specifically, 8 of the 13 plenary decisions that were categorized as raising "capital sentencing" issues during the 1983-1985 Terms were *in forma pauperis* cases, as were all 3 of these cases during the 1993-1995 Terms. *Supreme Court Statistics*, *supra* note 112. Also, in each of the other criminal categories, the *in forma pauperis* filings contribute a regular sprinkling of cases to the plenary docket. *Id.*

125. As explained earlier, the *Harvard Law Review* compiled these figures annually from the 1955 Term through the 1967 Term. *See supra* note 112. The calculations were based on the case summaries presented in *United States Law Week*, and our tabulations were made the same way. Because *United States Law Week* provides summaries only for cases on the appellate docket (the "paid" cases), and not for those on the miscellaneous docket (the *in forma pauperis* cases), we only considered the former. These figures should be a fair reflection of the whole, however, since the vast majority of the *in forma pauperis* filings are made in criminal or habeas cases, and our count of the 1983-1985 and 1993-1995 Terms shows that the Court grants fewer than one such application per Term in civil cases.

126. We counted all cases in which *United States Law Week* characterized antitrust and (federal) taxation as the primary issue. We defined "civil procedure" cases to comprise all cases identified in the case summaries as involving issues of "Courts and Procedure," "Arbitration," and "Judgments," and we included cases involving issues of "Judges" if they focused on procedural issues affecting particular cases. We defined "civil rights" cases to comprise all cases identified in the case summaries as involving issues of "Civil Rights" and "Employment Dis-

largest group of filings, the number of paid filings actually *increased* over this period.¹²⁷ In the areas of federal tax, civil procedure, and antitrust, there was some decline in the number of cases filed, but nowhere near the decline that occurred in the number of cases that were granted.¹²⁸ These figures thus suggest that the evolving interests of the Justices themselves caused more changes in the substantive mix of cases on the plenary docket than the availability of various cases for review.

It remains possible, of course, that petitioners filed fewer meritorious applications for review in recent years, as litigation continues in certain areas without generating the kinds of significant "agenda" cases that lend themselves most naturally to Supreme Court review. Yet even here, the Court is demonstrably more likely to grant review in cases in which amicus briefs are filed at the petitioning stage, presumably because they indicate the general importance of the issue raised.¹²⁹ As the number of cases in which amici filed such briefs has increased in recent years,¹³⁰ this fact tends to cut against the notion that fewer important cases are now making their way to the Court than in previous years.

It is worth noting, however, that the statistics available on the Court's plenary docket also disaggregate the Court's plenary decisions by party litigants and by whether the cases originated in state or federal court.¹³¹ The figures suggest that the docket has shrunk unevenly in these respects. As the overall docket declined over the decade from the 1983-1985 Terms to the 1993-1995 Terms, for example, civil cases from the federal courts dropped in roughly the same proportion, whereas civil cases from the state courts dropped very little.¹³² Criminal cases from the state courts and federal habeas cases dropped

crimination," unless they raised First Amendment claims. In addition, we included cases categorized as "United States," "States," "Cities and Counties," "Schools and Colleges," "Prisons and Jails," and "Constitutional Law" if they focused primarily on civil rights issues, including due process and equal protection claims, but excluding First Amendment claims.

127. By our count, filings in civil rights cases rose from 723 in the 1983-1985 Terms to 847 in the 1993-1995 Terms.

128. By our count, applications in federal tax cases fell from 161 in the 1983-1985 Terms to 146 in the 1993-1995 Terms, whereas cases granted fell from 12 to 5. Filings in civil procedure cases fell from 596 to 572, whereas cases granted fell from 20 to 4. Antitrust filings dropped off more steeply, from 177 to 79 over the same period, but cases granted fell far more, from 11 to 1.

129. See, e.g., Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1115-22 (1988) (demonstrating this correlation); Stephen M. Shapiro, *Amicus Briefs in the Supreme Court*, 10 LITIG. 21, 24 (Spring 1984) (same).

130. See, e.g., STERN & GRESSMAN, *supra* note 27, at 378-79, 564 (noting this increase).

131. See *Supreme Court Statistics*, *supra* note 112.

132. *Id.*

even more sharply than the overall docket, while criminal cases from the federal courts declined much more gradually.¹³³ Within the category of federal civil cases, cases involving the United States declined at about the overall rate, whereas cases involving state and local governments declined more rapidly, and cases involving private parties declined little.¹³⁴ This shift in the mix of the decided cases raises important issues – distinct from those raised by Justice Souter's observation – that will be examined in the following sections.

C. Federal Government Seeking Review Less Frequently

A factor that is contributing to the declining docket is the smaller number of cases in which the Solicitor General has been seeking plenary review on behalf of the United States.¹³⁵ The Solicitor General is by far the most frequent Supreme Court litigant and the most successful applicant in obtaining plenary review. Indeed, the proportion of the Solicitor General's petitions for certiorari that the Court grants is consistently over fifty percent, whereas paid petitions filed by other parties are granted at a rate of only about three percent.¹³⁶

The Solicitor General enjoys a special status as a party seeking plenary review for several reasons. First, decisional conflicts are least tolerable when they require the unitary federal government to operate differently, and to dispense different brands of justice, in distinct parts of the country.¹³⁷ Second, the key "importance" criterion for granting review on the merits is met, almost *ipse dixit*, when the federal government asserts that it is directly and substantially affected by the outcome or reasoning of a lower court decision, particularly since the Solicitor General's office is understood to exercise its own rigorous "screening function" with respect to potential cases.¹³⁸ Third, the quality of the work done by the Office of the Solicitor General is generally superior to that of almost all other litigants.¹³⁹ For these reasons, the Supreme

133. *Id.*

134. *Id.*

135. See Hellman, *supra* note 6, at 417-19 (analyzing this trend).

136. See STERN & GRESSMAN, *supra* note 27, at 164 & n.6 (noting this difference); see also REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 25 (1992) (noting that between 1959 and 1989, Solicitor General was successful in obtaining plenary review 69.78% of time, whereas private litigants were successful only 4.9% of time).

137. See SUP. CT. R. 10 (stating Court's criteria for granting certiorari).

138. See STERN & GRESSMAN, *supra* note 27, at 164 (remarking that Solicitor General's success "is due both to the fact that government cases are likely to be of more general public importance and to the strictness with which the office screens the cases lost by the government below before deciding to petition for certiorari" by "apply[ing] the Supreme Court's own certiorari standards").

139. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 142 (1996) (describing Solicitor General's office as "superbly staffed"); SALOKAR, *supra* note 136,

Court has developed a unique confidence in its most ubiquitous litigant. Indeed, by tradition, the Solicitor General has come to be regarded as a "Tenth Justice," straddling the gulf between the executive branch and the judicial branch and bearing a keen sense of responsibility toward both.¹⁴⁰

Statistics from the Office of the Solicitor General demonstrate that the United States has been seeking plenary review in fewer cases in recent years. During the four Terms from 1984-1987, for example, the Solicitor General sought review in 213 cases by filing either a petition for certiorari or a jurisdictional statement – an average of more than 53 cases per Term.¹⁴¹ In the next four Terms, however, that number slipped to 137 cases – an average of only about 34 per Term.¹⁴² Since that time, the number has remained at this lower level, falling further to 31 cases per Term from 1995-1998.¹⁴³ The figures suggest that the decline in requests by the Solicitor General has led to a decline in plenary decisions, since the rate at which these requests are granted remains much higher than for all other parties seeking review.¹⁴⁴ In addition, the number of cases in which the Solicitor General filed amicus briefs at the petition stage has also declined from an average of 37 cases per Term from 1984-1991 to only 19 cases per Term from 1992-1999.¹⁴⁵

The Solicitor General's pullback in seeking review accounts for a drop of approximately 15 cases per Term in the Court's plenary docket.¹⁴⁶ In addition, the Solicitor General's less active involvement as amicus at the certiorari stage explains the loss of about 10 more cases per Term¹⁴⁷ because the federal government is just about as successful in supporting another party's applica-

at 33-34 (noting that Solicitor General's office contains "some of the best attorneys in our nation").

140. See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987) (discussing role and importance of Solicitor General in work performed by Supreme Court).

141. The actual numbers were: 1984 Term – 51; 1985 Term – 57; 1986 Term – 56; 1987 Term – 49. OSG Workload Report, *supra* note 123, at 1.

142. These additional numbers were: 1988 Term – 37; 1989 Term – 30; 1990 Term – 35; 1991 Term – 35. *Id.*

143. The numbers for the most recent Terms were: 1992 Term – 38; 1993 Term – 33; 1994 Term – 28; 1995 Term – 41; 1996 Term – 30; 1997 Term – 21; 1998 Term – 32. *Id.*

144. Actual percentages can be derived from the same source by taking the total number of cases in which the Court granted plenary review and dividing it by the number of applications filed, with some adjustment for cases in which the Court disposed of an application by vacating and remanding for further proceedings. The results indicate a slight but noticeable decline in the Solicitor General's success rate in petitioning for review over the past decade. *Id.*

145. *Id.* at 3.

146. Calculating the averages over five Terms, the decline in the number of cases set for plenary review at the request of the Solicitor General has been from 28 per Term (1985-1989 Terms) to 14 per Term (1994-1998 Terms). *Id.* at 1.

147. *Id.* at 3.

tion for review as it is in seeking review in its own right.¹⁴⁸ These figures indicate that the drop in filings by the Solicitor General, which occurred over essentially the same period as the decline in the plenary docket, is an independent factor that made a substantial contribution to the decline.¹⁴⁹

But this fact prompts an even more interesting question: What has caused this decline in the Solicitor General's activity? Three hypotheses, which are not mutually exclusive, warrant examination. First, the Justice Department may have changed its internal petitioning policies or criteria, and as a result may be seeking review in a smaller percentage of cases. Second, the Justice Department may be applying the same criteria, but the federal government may be involved in less litigation than in the past. Third, the Justice Department may be applying the same criteria to fewer cases simply because the federal government is winning more of its cases in the lower courts.¹⁵⁰

There is no indication that the Justice Department has changed its internal petitioning policies or criteria in the last decade.¹⁵¹ The bulk of the recommendations concerning whether to seek Supreme Court review have always been made by attorneys in the agencies and in the rest of the Justice Department who are career officials and by a small group of assistants in the Solicitor General's office who are generally nonpartisan, highly qualified appellate lawyers, and much of the caseload itself is low profile and apolitical in nature.¹⁵² Even more to the point, the decline in requests for Supreme Court review has occurred during a period that spans administrations of both political parties and the tenures of multiple occupants in the top departmental positions.¹⁵³

148. In fact, Professor Salokar's exhaustive statistical data indicates that from 1959 to 1989, the Solicitor General enjoyed an even *higher* success rate in obtaining review as an amicus (87.6%) than as a party (69.8%). See SALOKAR, *supra* note 136, at 25, 27 (noting success rate as party and as amicus, respectively). In past years, the Solicitor General typically endorsed this same assumption by including "cases supported" with "cases filed" in statistics on the federal government's performance in obtaining plenary review from the Supreme Court. See, e.g., 1972 Att'y Gen. Ann. Rep. 26 (reporting work of Solicitor General's Office).

149. In this respect, it is interesting to note that when the plenary docket fell sharply during the Vinson Court era, no such drop in the number of applications for review filed by the Solicitor General occurred, though the rate at which those applications were successful declined noticeably. See 1955 Att'y Gen. Ann. Rep. 28-29 (providing statistics).

150. Professor Hellman also briefly discusses possible causes of the reduction in the number of applications filed by the Solicitor General, touching on the first and third hypotheses, but does not draw any conclusions about them. See Hellman, *supra* note 6, at 418.

151. See, e.g., SALOKAR, *supra* note 136, at 63 (noting that the "well-structured process for handling the cases that flow through the office . . . has changed very little over time despite the different management styles of the various solicitors general"); Marcus, *supra* note 35, at A4 (quoting Solicitor General Starr's statement that "[t]here's no difference in our standards' for deciding when to seek review").

152. See SALOKAR, *supra* note 136, at 63-67, 77-79 (describing Solicitor General's Office).

153. See *id.* at 67 ("[T]here was no dramatic change in the functioning of the office when

To evaluate whether the Solicitor General's office has tightened its standards for seeking review, and thus whether it is doing so in a smaller percentage of cases, it would help to compare, over time, the number of cases in which the Solicitor General's office sought review against the total number of cases in which it might have done so. Although that total number is not available, the statistics compiled currently by the Office of the Solicitor General provide a proxy.¹⁵⁴ By law, the federal government cannot appeal an adverse decision by a district court or a circuit court without the approval of the Solicitor General.¹⁵⁵ The category of "recommendations received" lumps together all such requests for authorization to take an appeal.¹⁵⁶ Assuming that the proportion of recommendations received from adverse district court rulings and adverse circuit court rulings remains constant over time – which seems reasonable, though not inevitable¹⁵⁷ – then plotting the number of cases in which the federal government sought plenary review against the number of recommendations received will yield a rough sense of whether the Solicitor General has been seeking review in a smaller percentage of the cases that are available.¹⁵⁸

The resulting numbers suggest that the Solicitor General has not become more stingy in seeking Supreme Court review. Over the decade from 1987 to

one administration departed and another arrived."). Professor Hellman mentions that some Senators had questioned the zeal of Solicitor General Drew Days in criminal cases. Hellman, *supra* note 6, at 418. As shown below, however, both the number and rate of cases filed by the Solicitor General in criminal cases has remained stable over the past decade. See *infra* notes 171-72 and accompanying text.

154. For many years the Solicitor General reported these statistics annually and they were published as part of the Annual Report of the Attorney General of the United States. The numbers available from the 1936 Term to the 1984 Term indicate that since the mid-1950s – a period of three decades spanning numerous Solicitors General, administrations of both parties, and extensive changes on the Supreme Court – the Solicitor General has authorized applications for plenary review at a relatively constant rate of about 7-11% of all recommendations received, computed in three-Term rolling averages to smooth out fluctuations. See, e.g., 1985 Att'y Gen. Ann. Rep. 5 (reporting number of cases acted upon by Solicitor General's Office); 1984 Att'y Gen. Ann. Rep. 5 (same); 1983 Att'y Gen. Ann. Rep. 5 (same).

155. See 28 C.F.R. § 0.20 (2000) (prescribing functions of Solicitor General's Office).

156. Unfortunately, the figures no longer isolate the number of recommendations received for seeking Supreme Court review, which is the only number that matters here. See OSG Workload Report, *supra* note 123, at 7.

157. The more complete statistics provided in the Annual Reports of the Attorney General prior to 1985, which did isolate recommendations received in potential circuit court cases from those received in potential Supreme Court cases, support the hypothesized correlation. See, e.g., 1985 Att'y Gen. Ann. Rep. 5 (providing these statistics); 1975 Att'y Gen. Ann. Rep. 37-38 (same).

158. Natural time lags mean that some of the recommendations received in a given Term would not generate applications for plenary review in the same Term. Because the point here is to discern trends, however, it is plausible to assume that any such adjustments should remain constant over time, especially when three-year averages are used to smooth out the fluctuations.

1998, the three-Term averages indicate that the Solicitor General sought review in virtually the same percentage of the available cases throughout this period.¹⁵⁹ When the total number of cases is broken down into civil and criminal cases, the same relative consistency appears in both categories.¹⁶⁰ In sum, what has declined is the number of cases available, not the Solicitor General's propensity to seek review in a given case.

This assessment is bolstered by the fact that over this period, even though the Solicitor General's overall caseload declined along with the Court's own shrinking docket,¹⁶¹ the Solicitor General participated on the merits in a higher percentage of the Supreme Court's cases. During the five Terms from 1984-1988, at a time when the Court carried a much larger docket, the United States participated in approximately 60% of the cases that received plenary review.¹⁶² During the most recent five Terms for which statistics are available, from 1994-1998, by contrast, the United States participated in about 75% of such cases – the highest participation rate in the last fifty years.¹⁶³ This development reflects both the pressures and the opportunities of applying the same amount of staff resources to a smaller universe of cases.¹⁶⁴ But it also strongly suggests that there has been no determined withdrawal of the Solicitor General's office from the day-to-day work done by the Supreme Court.¹⁶⁵

159. The proxy figure ranges from a low of 1.36% to a high of 1.73% over this period, with no apparent chronological pattern.

160. The proxy figure for criminal cases ranges from 0.70% to 0.97% over this period, and the same figure for civil cases ranges from 1.88% to 2.19%, with no clear trend line in either instance. It is noteworthy, moreover, that these proxy figures are basically consistent with the figures actually available from the Solicitor General's annual reports on earlier Terms, which are discussed *supra* in note 154.

161. The Solicitor General participated in 91 cases decided on the merits in the 1988 Term, and in 76 such cases in the 1998 Term. OSG Workload Report, *supra* note 123, at 8.

162. *See id.* The percentage figures are derived from the number of "No Participation" cases and the total number of decisions during a Term. These figures are comparable to those generated by a broader survey of the Solicitor General's involvement in plenary decisions over the period from 1959 to 1989. *See* SALOKAR, *supra* note 136, at 22 tbl. 1 (calculating that United States participated in 58.8% of all cases argued in Supreme Court from 1959-1989).

163. OSG Workload Report, *supra* note 123, at 8. Up until 1986, the participation rate could be determined from figures provided in the Attorney General's Annual Reports. *See, e.g.*, 1985 Att'y Gen. Ann. Rep. 5 (tabulating cases in which government participated); 1963 Att'y Gen. Ann. Rep. 53 (same).

164. The participation rate in recent Terms is higher than it was after the plenary docket declined under the Vinson Court: in the 1950-1954 Terms, the Solicitor General participated in 61% of the argued cases. *See* 1955 Att'y Gen. Ann. Rep. 31 (noting rate of participation in each Term).

165. This conclusion is bolstered by the fact that the number of federal civil cases on the Supreme Court's plenary docket involving a state or local government declined even more steeply than U.S. civil cases between the 1983-1985 Terms and the 1993-1995 Terms. *See Supreme Court Statistics*, *supra* note 112.

A second possible explanation for the decline in the Solicitor General's applications for review is simply that the federal government is involved in less litigation.¹⁶⁶ The data that is available suggests that this is a contributing factor, at least with regard to civil cases.

From the 1984 Term to the 1994 Term, the federal government's involvement in new civil cases in the district courts, whether as plaintiff or defendant, was reduced by more than half.¹⁶⁷ Not surprisingly, over this same period there was also a sharp drop in the number of the federal government's cases decided after oral argument in the circuit courts,¹⁶⁸ as well as in the number of recommendations received by the Solicitor General.¹⁶⁹ This decline in the federal government's civil litigation corresponds neatly with the decline in the Solicitor General's applications for review of civil cases in the Supreme Court, which fell by more than half over this period.¹⁷⁰

The impact of the federal government's decreasing involvement in civil litigation on the Solicitor General's activity is highlighted by the contrast with the criminal side of the docket. During this period, the number of criminal cases in the district and circuit courts rose, as did the number of recommendations received by the Solicitor General.¹⁷¹ This trend is reflected in the Solici-

166. For our purposes, cases involving the federal government comprise all litigation in which the parties include the United States, a federal department or agency, or a federal official.

167. In the 1984 Term, the civil cases filed in the district courts in which the federal government was a party totaled 117,488, with 79,371 as plaintiff and 38,117 as defendant. 1987 JUDICIAL BUSINESS, *supra* note 118, at 8 tbl. 4. In the 1994 Term, there were only 43,158 U.S. civil cases, with 14,130 as plaintiff and 29,028 as defendant. 1995 JUDICIAL BUSINESS, *supra* note 118, at 23 tbl. 4.

168. The number of civil cases in which the federal government was a party that were decided on the merits after oral argument (including administrative appeals) fell from 2,392 in the 1986 Term to 1,982 in the 1994 Term, and has continued falling since to 1,728 in the 1998 Term. 1999 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 85 tbl. B-1 [hereinafter 1999 JUDICIAL BUSINESS]; 1995 JUDICIAL BUSINESS, *supra* note 118, at 87 tbl. B-2; 1987 JUDICIAL BUSINESS, *supra* note 118, at 136 tbl. B-1.

169. Recommendations received in civil cases fell from 1,532 in the 1987 Term to 1,183 in the 1993 Term, and stood at 1,084 for the 1998 Term. 1999 JUDICIAL BUSINESS, *supra* note 168, at 85 tbl. B-1; 1995 JUDICIAL BUSINESS, *supra* note 118, at 87 tbl. B-2; 1987 JUDICIAL BUSINESS, *supra* note 118, at 136 tbl. B-1.

170. The three-Term average number of applications for review filed by the Solicitor General in civil cases declined from 46 to 21 between the 1984 and 1998 Terms, with most of the drop occurring during three Terms in the late 1980s. OSG Workload Report, *supra* note 123, at 1.

171. The number of federal criminal cases filed in the district courts more than doubled over two decades, rising from 28,932 in 1980 to 59,923 in 1999. 1999 JUDICIAL BUSINESS, *supra* note 168, at 23 tbl. 3; 1987 JUDICIAL BUSINESS, *supra* note 118, at 13 tbl. 5. In the circuit courts, federal criminal cases decided after oral argument rose from 2,108 in the 1986 Term to 3,686 in the 1994 Term, before receding to 2,918 in the 1998 Term. 1999 JUDICIAL BUSINESS,

tor General's applications for review in criminal cases, which did not decline, but rather held steady or perhaps increased slightly between the 1984 and 1998 Terms.¹⁷²

In addition to the decreasing amount of civil litigation involving the federal government, a further factor contributing to the decline in the number of the Solicitor General's applications for review may be that the federal government is winning more of its civil cases in the lower courts.¹⁷³ No numbers are kept on the federal government's "winning percentage," in part because figures on wins and losses in appellate cases are notoriously difficult to ascertain – given multiple parties, multiple claims, and multiple perspectives on whether a particular disposition constitutes a full or even a partial win.¹⁷⁴ Yet one sound indicator is the number of cases in which the opposing party seeks review from the Supreme Court. In all such cases, the Solicitor General either files or waives its response, and maintains these statistics for each Term.¹⁷⁵ If this figure is taken as a general proxy for the number of circuit court cases that the federal government won, and "recommendations received" is taken as a general proxy for the number of circuit court cases that the federal government lost,¹⁷⁶ then comparing the two figures over time will shed light on how the

supra note 168, at 85 tbl. B-1; 1995 JUDICIAL BUSINESS, *supra* note 118, at 87 tbl. B-1; 1987 JUDICIAL BUSINESS, *supra* note 118, at 138 tbl. B-1. In the Solicitor General's office, recommendations received in criminal cases rose from 693 during the 1987 Term to 1,113 in the 1993 Term, then declined to 870 in the 1998 Term. OSG Workload Report, *supra* note 123, at 7.

172. The five-Term average number of criminal cases filed by the Solicitor General was about 8-9 per Term between the 1984 and 1998 Terms. See OSG Workload Report, *supra* note 123, at 1. The Supreme Court's own docket also reflects the federal government's level of litigation activity. The number of plenary decisions in civil cases involving the federal government, expressed as a five-Term average, fell steadily from 45 to 19 over the 1981-1996 Terms. *Supreme Court Statistics*, *supra* note 112. In contrast, the number of plenary decisions in federal criminal cases, expressed as a five-Term average over the same period, ranged from 10.4 to 13.8, with no discernible trend line. *Id.*

173. See, e.g., Marcus, *supra* note 35, at A4 ("First of all, the government is not losing nearly as many cases as it used to and therefore it's filing fewer petitions.") (quoting former Deputy Solicitor General Andrew Frey).

174. See Hellman, *supra* note 6, at 418 (noting lack of data on "win-loss rate"). Interestingly, however, the Solicitor General did keep such statistics at one time, and as a general matter they indicate that between 1937 and 1966 the federal government's winning percentage did vary somewhat, ranging from approximately 46% to 61% for appeals that it initiated in the circuit courts. See, e.g., 1940 Att'y Gen. Ann. Rep. 48 (listing number of cases won); 1955 Att'y Gen. Ann. Rep. 32 (same); 1966 Att'y Gen. Ann. Rep. 54 (same). These figures are only part of the total picture, however, for they do not include any cases in which the federal government was the appellee in the circuit courts, which do not have to be processed through the Solicitor General's office. See 1940 Att'y Gen. Ann. Rep. 48 (noting this distinction).

175. OSG Workload Report, *supra* note 123, at 2, 6.

176. The basis for the latter proxy figure, which admittedly is nothing more than a very general approximation, is discussed above. See *supra* notes 156-57 and accompanying text (discussing impact of statistics that isolate recommendations).

federal government is faring in such cases. The results of this comparison do indicate that the federal government is winning more of its civil cases than it was ten years ago.¹⁷⁷ Another indication that it is winning more of its cases is that during a period in which the total amount of the federal government's civil litigation was decreasing, the number of applications for review filed *against* the federal government in the Supreme Court more than doubled.¹⁷⁸

This seems plausible enough. Over the course of the last two decades, there is no doubt that the ranks of the federal judiciary have become more conservative and thus probably, on the whole, more "pro-government."¹⁷⁹ Civil libertarians have recognized this development – which itself is an independent factor that discourages certain kinds of lawsuits against government officials and government entities – and openly factor it into their constitutional litigation strategies when it is possible to do so.¹⁸⁰ Even in nonconstitutional cases, new judicial doctrines that explicitly favor the federal government's legal positions have been adopted and established as precedent.¹⁸¹ In this climate, it is to be expected that the federal government would begin to

177. The ratio of the two proxy figures – recommendations received to aggregated waivers and responses filed in civil cases – has fallen from 3.28 in the 1987-1989 Terms to 2.64 in the 1996-1998 Terms. Again, this number has no objective meaning other than as an indicator of the general trend. In order to define the universe of significant cases in a more meaningful way, we did not include waivers filed in the *in forma pauperis* civil cases.

178. The number of applications filed against the federal government in civil cases (including administrative appeals) increased from 391 in the 1986 Term to 863 in the 1996 Term, *see* 1987 JUDICIAL BUSINESS, *supra* note 118, at 146 tbl. B-2; 1997 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 85 tbl. B-2, even though the number of such applications filed by the Solicitor General declined from 56 to 30 over the same period. OSG Workload Report, *supra* note 123, at 1.

179. This is a necessarily crude observation, as some so-called "conservative" legal positions, such as hostility to broad congressional powers, *see, e.g.,* *United States v. Morrison*, 529 U.S. 598 (2000) (striking down provision of Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating Gun-Free School Zones Act), and favoring of state power in disputes over federalism, *see, e.g.,* *Printz v. United States*, 521 U.S. 898 (1997) (declaring provision of Brady Handgun Violence Prevention Act unconstitutional); *New York v. United States*, 505 U.S. 144 (1992) (declaring that "take title" provision in radioactive waste disposal statute is unconstitutional), are antithetical to the interests of the federal government. Nonetheless, in the broad array of cases it is sound enough.

180. *See, e.g.,* Steven A. Holmes, *Frustrated by Change in Federal Courts*, A.C.L.U. to Concentrate on States, N.Y. TIMES, Sept. 30, 1991, at A1 (discussing changes in strategy based on federal courts' antipathy); Robb London, *Gay Groups Turn to State Courts to Win Rights*, N.Y. TIMES, Dec. 21, 1990, at B3 (same).

181. Perhaps the most significant example in this regard is the now-settled principle of "Chevron" deference, whereby the courts will defer to legal judgments made by federal administrative agencies exercising the authority delegated by Congress, *see* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), including positions taken by the Justice Department itself, *see* *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).

prevail more often in the lower courts and, as a consequence, the Solicitor General would have fewer occasions to seek plenary review. This, in turn, would cause the Supreme Court to accept fewer cases, as the federal government's high success rate in seeking plenary review would be replaced by the much lower success rate of all other parties.¹⁸² There is no doubt that this explanation is responsible for as much as one-third of the total decline in the Supreme Court's plenary docket.¹⁸³

D. Greater Homogeneity Among the Courts

Another suggested explanation, which we credit in part, is greater homogeneity among the lower courts.¹⁸⁴ According to this theory, a broad judicial realignment resulting from the steady appointment of like-minded federal judges has contributed to the declining docket. Justice Souter describes this homogeneity as one legacy of "the Reagan-Bush era," and he speculates that it is a "rare" phenomenon that probably will be short-lived.¹⁸⁵

Advocates of this view focus on the possibility that changes within the lower courts have led them to agree more frequently with one another, which we call a "philosophical realignment." This concept is related to but distinct from what we call a "control realignment," which occurs when the Supreme Court exerts greater control over the lower courts by providing clearer guidance that brings them more squarely in line with the direction of its own decisions. If the Presidency, which is the source of all federal judicial appointments, were controlled by the same political party for an extended period, both might occur eventually (at least in the federal system).¹⁸⁶ Either type of realignment would have clear repercussions for the Court's docket: a philosophical realignment would reduce the need to grant review to resolve decisional conflicts, and a control realignment would reduce the need to grant review to correct perceived errors.¹⁸⁷

182. See *supra* note 136 and accompanying text (describing respective success rates).

183. This conclusion is based on a decline of about 20-25 cases per Term that stems directly from the drop in filings by the Solicitor General, see *supra* notes 146-47 and accompanying text, over a period in which the total plenary docket has fallen by about 70-75 cases per Term, see *supra* notes 29-31 and accompanying text. Professor Hellman likewise concludes that the "reduction in the number of petitions filed by the Solicitor General does account for a substantial part of the shrinkage of the plenary docket in the 1990s." Hellman, *supra* note 6, at 418.

184. See, e.g., Hellman, *supra* note 6, at 414-17 (describing this theory); Duffy, *supra* note 34, at 11 (quoting Justice Souter suggesting this theory at Third Circuit Judicial Conference).

185. Duffy, *supra* note 34, at 11 (quoting Justice Souter).

186. One should note that these theories of realignment are ideology-neutral, i.e., they do not depend on whether the supposed realignment occurs in a more "conservative" or a more "liberal" direction.

187. There is, of course, great potential for overlap between these two effects, as a philosophical realignment that extended to the Supreme Court itself would also reduce perceived

There are two empirical reasons to doubt the extent to which a philosophical realignment can explain the shrinking plenary docket.¹⁸⁸ The first concerns timing. On the surface, the recent changes in the docket seem consistent with this possibility, for the decline commenced in the later stages of prolonged one-party control of the Presidency, from 1981-1993, after the Republicans had made extensive appointments to the district courts and the circuit courts. Yet if philosophical realignment *per se* tended to explain the falling caseload, then one would expect the numbers to increase again after several years of a Democratic President, and surely they would have done so by 2000, after eight years of Democratic judicial appointments to the lower courts. In fact, however, this has not happened.¹⁸⁹

Second, a large number of decisional conflicts remain available for the Supreme Court to review. In particular, the "Circuit Split Roundup," a publication that describes those decisional conflicts which can be identified by examining the face of individual lower court opinions, identifies approximately 400 such acknowledged conflicts per year.¹⁹⁰ There appears to be no definitive way to measure whether there are fewer decisional conflicts today than in past years, or whether they may be of lesser significance than in the past. It is certainly clear, however, that even if greater homogeneity among the lower

errors, and a control realignment that caused the lower courts to adhere more consistently to the Supreme Court's philosophy as embodied in its precedents also would reduce the number of conflicts.

188. There are also various conceptual reasons to be skeptical about the extent or breadth of any philosophical realignment. First, a complete realignment would have to include the state courts as well because they are capable of spawning conflicts with each other and with the federal courts on issues of federal law (though this factor would not affect cases involving the federal government, which parties typically either file in or remove to the federal courts). Second, the realignment would have to endure for some time because decisional conflicts can be intertemporal in nature. *See Hellman, supra* note 6, at 414-15 (pointing out that circuit conflicts can arise when, for example, panel with Reagan-Bush judges disagrees with earlier decision by panel with Carter judges). Third, the judges appointed would have to share a judicial philosophy that is clear and comprehensive enough to produce uniform results even in cases involving intricate issues of statutory construction and procedure in such diverse areas as criminal law, bankruptcy, administrative law, and the like. These concerns, however, do not mean that philosophical realignment could not have had some effect in particular areas of the law.

189. Moreover, a similar decline should be discernible during the latter part of Franklin Roosevelt's Presidency, when he had been appointing judges for more than a decade. As we have seen, however, no such development occurred until President Truman made three appointments that dramatically shifted the philosophical balance on the Supreme Court. *See supra* notes 58-71 and accompanying text (discussing voting patterns of Vinson Court).

190. This compilation has been published monthly, with some regularity, based on circuit decisions rendered since January of 1998. *See, e.g., Legal News – Notable New Developments in the Law, Circuit Split Roundup*, 66 U.S.L.W. 2575 (Mar. 24, 1998). The number of conflicts identified was about 30 per month in 1998, rising to about 40 per month in 1999 and 2000, with some slight redundancy as new decisions occasionally acknowledge the same unresolved conflicts. *Id.*

courts has created some form of a philosophical realignment, plenty of conflicts remain. At the very least, lower courts continue to create many more decisional conflicts each year than are being reconciled by the Supreme Court.¹⁹¹

Nonetheless, the discussion in Part C suggests that one particular form of judicial realignment may have had a tangible effect on the Supreme Court's docket. That is, an apparent realignment in the lower federal courts toward more "pro-government" results – i.e., a "statist realignment" – has led the Solicitor General to seek review less often in civil cases, with a corresponding decline in such cases granted.¹⁹² Once again, this realignment seems to have made itself felt both by deterring lawsuits against the federal government and by affording less opportunity for it to seek review of adverse decisions.¹⁹³ Consequently, the number of plenary decisions in civil cases involving the federal government has sunk dramatically: it averaged 40 cases per Term from 1983-1985, but only 19 cases per Term from 1993-1995.¹⁹⁴

A similar development is manifest in federal litigation that involves state and local governments. Indeed, it is striking that the number of plenary decisions in federal civil cases involving state and local governments has fallen even more steeply than in cases involving the federal government: from an average of 35 cases per Term from 1983-1985 to fewer than 11 cases per Term from 1993-1995.¹⁹⁵ And it is interesting that the same pattern does *not* hold for civil litigation involving state and local governments from the state courts: the average number of plenary decisions in such cases per Term was 7 from 1983-1985 and was still 7 from 1993-1995.¹⁹⁶ Although it is conceivable that the

191. See Hellman, *supra* note 6, at 414-17 (comparing number of "conflict grants" for periods 1983-85 and 1993-95). Professor Hellman concluded that "the Supreme Court is taking somewhat fewer conflict cases than it did in the 1980s, but that the reduction in conflict grants accounts for only a small part of the overall shrinkage in the plenary docket." *Id.* at 416.

192. See *supra* notes 179-83 and accompanying text (discussing trend among federal judiciary towards "pro-government" decisions).

193. See *supra* notes 166-78 and accompanying text (discussing reduction in federal government's participation in litigation).

194. *Supreme Court Statistics*, *supra* note 112.

195. *Id.* Over the same period, the numbers of petitions filed by state and local governments in civil cases also declined, though less sharply, from an average of 89 per Term to 78 per Term. We derived these figures from counting the cases filed on the appellate docket, based on the case summaries presented in *United States Law Week*. See *supra* note 125. The consequences of the Court's Eleventh Amendment jurisprudence, which protects the states against lawsuits in the federal courts, are probably at work here also. See generally Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997) (discussing both historical and recent interpretations of Eleventh Amendment).

196. These figures are skewed somewhat by the fact that no such cases were decided during the 1985 Term, yet the rolling three-Term averages range from 7 to 12 over this period, with no obvious trend line. *Supreme Court Statistics*, *supra* note 112. The Court's decisions construing the Eleventh Amendment may also have an effect here by pushing more of these civil lawsuits

state courts (which are not immune to the same political forces felt in the federal courts) could have moved in the same pro-government direction as the lower federal courts, these numbers at least suggest that the state courts did not experience a statist realignment to nearly the same degree.¹⁹⁷

Outside the arena of government litigation, however, any theory of realignment confronts mixed results. The decline in the number of plenary decisions in private civil litigation has been much less pronounced, with federal civil cases falling only from an average of 23 per Term in 1983-1985 to 19 in 1993-1995, and civil cases from the state courts falling only from 5 to 4 over the same periods.¹⁹⁸ Although the matter is fairly speculative, one might surmise that uniformity is harder to achieve in private civil cases, in which the issues involved are more diverse and thus do not fall into clear and consistent patterns. The resulting uncertainty in the Supreme Court's own precedents would make it harder for the lower courts to discern its general direction, and the extent of homogeneity within the lower courts themselves would be reduced. Thus, the Court may have more occasion, and may feel more of a need, to intervene and provide guidance in these categories of cases.

This statist realignment therefore does reflect an increased commonality of approach among the judges on the lower federal courts in certain types of cases. It is harder to pin down whether this result flows more from a shared outlook of the Reagan-Bush nominees or from the lower courts' conformance to a pro-government philosophy that the Supreme Court has imposed on them. In practice, the effects of these influences are difficult to separate, and it seems most likely that both have played an important part.

It should be noted, however, that a statist realignment in the lower federal courts will cause fewer cases to come to the Supreme Court for review, and thus fewer to be granted review, only if the Court itself is comfortable with these pro-government results.¹⁹⁹ If the Court is dissatisfied with this trend, it

into the state courts. See generally Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767 (1998) (discussing how recent Eleventh Amendment decisions forced actions to enforce federal laws into state courts).

197. Professor Hellman analyzes the issue of greater "conservatism in the lower courts" by focusing almost exclusively on state criminal cases and habeas cases, which leads him to suggest that realignment in the lower federal courts has had little to do with the shrinking docket. See Hellman, *supra* note 6, at 419-25; see also *infra* note 201 (discussing interaction between Supreme Court and lower courts). As we have seen, however, a larger portion of the decline is attributable to changes that have occurred in federal civil cases, which is part of the reason why we reach a contrary conclusion.

198. *Supreme Court Statistics*, *supra* note 112. The number of private civil cases from the state courts has fallen even more in the wake of *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), which tightened the finality requirement for Supreme Court review of state decisions. See *id.* at 80-84. This reduction has been offset, however, by an increase in private civil cases from the federal courts. See *Supreme Court Statistics*, *supra* note 112.

199. Further, during a period of realignment on the Supreme Court itself, its internal strug-

will exert its authority over the lower courts by granting more such cases, which in turn will encourage litigants to seek plenary review in more such cases. Thus a statist realignment can only succeed in depressing the Supreme Court's plenary docket when it is conjoined with some version of a control realignment – i.e., if it is in conformity with the Court's own prevailing philosophy as expressed in its precedents. This seems to be an accurate description of the current state of affairs, at least in cases in which government entities and officials are parties.²⁰⁰ For three decades, the Court has been gravitating in favor of government litigants, and the lower courts have surely gotten the message by now.²⁰¹ This discussion of judicial realignment thus

gles may lead to more decisional conflicts in certain areas of the law, as the Court's changing philosophy creates departures from precedent that are difficult to interpret and anticipate in the lower courts. One plausible example is the uncertain contours of the much-anticipated judicial "counter-revolution" during the Burger Court era, which may have contributed to the Supreme Court's own higher caseload. See generally VINCENT BLASI, *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (1983). This point, which merits further study, differs from, but is compatible with, Professor O'Brien's argument that the Burger Court's "'workload problem' was one of its own making." O'Brien, *supra* note 6, at 808; see also *id.* at 788-89 (discussing effects of Court's internal procedures and its composition).

200. See, e.g., Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 56-59, 61-74 (1989) (describing Court as having pro-government or statist orientation). It is also possible, however, that a rise in the Court's caseload can occur *after* an internal realignment, as the Justices come to expect a majority of the Court to move in a predictable direction and thus can "set an agenda" with some degree of confidence. An example is the recent upsurge in cases that the Supreme Court has granted on federalism issues, reflecting the new majority on the Court favoring state authority in such cases. See, e.g., 146 Cong. Rec. S7758-01 (daily ed. July 27, 2000) (statement of Sen. Leahy) (discussing "a growing trend of judicial second-guessing of congressional policy decisions" on grounds of federalism); Linda Greenhouse, *High Court Faces Moment of Truth in Federalism Cases*, N.Y. TIMES, Mar. 28, 1999, § 1, at 34 (opining that "flood of new [federalism] cases is the direct result of the Court's recent federalism initiatives").

The general ramifications of internal realignment for the Court's plenary docket would also present a fruitful subject for further examination. The impetus for an increase in judicial activity would be dissatisfaction either with lower court decisions or with the Court's own precedents. The former impetus is exemplified by the Court's aggressive treatment of state criminal decisions in the 1980s, which caused the number of plenary decisions in this area to rise substantially – from an average of 13 per Term in 1979-1984 to 20 per Term in 1985-1990. *Supreme Court Statistics*, *supra* note 112. The latter impetus has not been an abiding concern in recent years; the number of cases in which the Court overruled its own precedents was lower in the 1990s than in any decade since the 1950s. SUPREME COURT COMPENDIUM, *supra* note 3, at 179-89 tbl. 2-14. This data has been updated for subsequent Terms by personnel at the U.S. Supreme Court Judicial Database, see *infra* note 227.

201. See, e.g., D.F.B. TUCKER, *THE REHNQUIST COURT AND CIVIL RIGHTS* 211 (1995) (concluding that current Court is "resolve[d] to abandon the conception of the role of the Court as a legitimate policymaker"); DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 453 (1992) (concluding that "change in membership" has eliminated support for "the old agenda"). In the criminal area, with its control now presumably

points to the need to consider how changes in the Supreme Court itself likely affected the size and shape of its plenary docket.

E. Changes in Personnel on the Supreme Court

One of the most compelling explanations for the recent decline in the Supreme Court's plenary docket stems directly from changes in personnel. Recall that when a similar decline occurred fifty years ago, the primary cause was the retirement of Justices who had voted aggressively to review cases and their replacement by new Justices who were far less inclined to do so.²⁰² Two facts about the figures demonstrate irrefutably that these personnel changes were independent causes of the decline in the plenary docket in that era. First is the immediate magnitude of the change in the numbers from the former Justices to their replacements: in the 1950 Term, Justices Clark and Minton cast only 103 and 69 grant votes, respectively, whereas in the 1948 Term Justices Murphy and Rutledge had cast 186 and 143 such votes, respectively.²⁰³ Second is the unique direction of the change in the numbers: in the span comprising the 1949-1952 Terms, every holdover Justice voted to grant review *more* frequently than he did in the 1946-1948 Terms, yet in the later period Justices Clark and Minton cast an average of only 103 and 70 grant votes per Term, respectively, whereas in the earlier period Justices Murphy and Rutledge had cast an average of 181 and 159 such votes, respectively.²⁰⁴

reestablished, the Court's preoccupation with correcting lower court rulings has abated, as the number of plenary decisions in criminal cases from the state courts fell sharply from an average of 20 per Term in 1985-1990 to 6 per Term in 1991-1999. *Supreme Court Statistics*, *supra* note 112. Habeas cases also dropped, though less significantly – from 10 per Term to 7 per Term over the same period. *Id.* The substantial decline in state criminal cases tends to suggest that the statist realignment is explained more by a control realignment than by a homogeneity brought about by a uniform course of judicial appointments to the lower federal bench. *See* Hellman, *supra* note 6, at 420 (suggesting control realignment theory). One should note, however, that part of the explanation here may also be that the state courts are learning to interpret and apply the jurisdictional rules laid down in *Michigan v. Long*, 463 U.S. 1032 (1983), which permit them to insulate more "liberal" criminal decisions from Supreme Court review by placing such rulings on adequate and independent state constitutional grounds. *See generally* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985) (discussing this interaction between state courts and Supreme Court). By contrast, the number of plenary decisions in federal criminal cases actually *increased* over the same period, from 10 per Term to 12 per Term, *see* *Supreme Court Statistics*, *supra* note 112, though this was undoubtedly due to the steep increase that has occurred in federal criminal litigation. *See supra* notes 171-72 and accompanying text (describing increase in number of federal criminal cases).

202. *See supra* notes 57-73 and accompanying text (describing decline in docket during Vinson Court era).

203. *See* PALMER, *supra* note 57, at 229-58; 291-317 (tabulating votes by each Justice during 1948 Term and 1950 Term, respectively).

204. *See id.* at 56-57 tbls. 5.1 & 5.2, 79-81 tbls. 6.1 & 6.2 (tabulating voting rates).

Around the period of the most recent decline there were six retirements: Chief Justice Burger in 1986, Justice Powell in 1987, Justice Brennan in 1990, Justice Marshall in 1991, Justice White in 1993, and Justice Blackmun in 1994. The question posed here is whether these changes in personnel, taken singly or together, caused any systematic change in the frequency with which the Court decides to grant review.

Two previous studies provide indirect support for the view that such changes may have played an important role in the decline. In a 1996 article, Professor Hellman analyzed five potential external causes of the shrinking docket.²⁰⁵ He concluded that they did little to explain the phenomenon, and went on to speculate from comments made by individual Justices that, following the recent retirements, the Court had become more comfortable with using fewer precedents to supervise the lower courts.²⁰⁶ Professor O'Brien reached a similar conclusion after examining some of the internal procedures that the Court employs in exercising its discretionary power to grant plenary review.²⁰⁷ Extrapolating from the Justices' published dissents from denial of review, as well as the growth and subsequent decline of a new and seemingly permissive procedure – the "Join-3" vote – he surmised that "changes in the Court's composition and case selection process" probably caused the recent contraction of the plenary docket.²⁰⁸

The difficulty in gauging the impact of changes in personnel stems from the secrecy of the Supreme Court's internal deliberations in disposing of applications for review. Although Justice Douglas urged otherwise, the Court does not publish even the votes cast in cases not accepted for argument.²⁰⁹ Thus, in

205. See Hellman, *supra* note 6, at 408-25 (examining repeal of mandatory jurisdiction, retirement of liberal Justices, homogeneity of circuit courts leading to fewer circuit conflicts, fewer appeals by federal government, and conservative lower courts handing down fewer "activist" opinions).

206. See *id.* at 425-32 (discussing this theory). Because Professor Hellman does not use any data concerning the Justices' conference votes, his considerable analysis of other potential causes arrives at personnel changes almost as a default explanation, without any direct evidence to confirm that it is correct. See *id.* at 408-32.

207. See O'Brien, *supra* note 6, at 784-807 (discussing mechanisms Supreme Court uses in deciding to grant review).

208. *Id.* at 799. The Court has long employed the "Rule of Four," under which the Court will grant certiorari if at least four Justices vote to do so. See *id.* at 784-86 (describing history of Rule of Four). Some Justices have cast "Join-3" votes, which is a vote to grant review if, but only if, at least three other Justices vote in favor of review. See *id.* at 788-99 (describing rise and subsequent decline of Join-3 vote).

209. See WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975*, at 39 (1980) (describing Justice Douglas's desire to reveal votes). Two policy justifications are offered for this secrecy: disposing of applications for review without indicating their views of the merits tends to minimize the burden of the Justices' internal deliberations as well as maximize their freedom by not confining their future decisionmaking in any way. See, e.g., John M. Harlan, *Manning*

order to get a sense of whether certain Justices are more prone to grant review than others, it is necessary to read such tea leaves as are available.

Professor O'Brien points out that notations of votes to grant and dissents from denial of review – in which individual Justices state publicly how they cast their vote in conference – are one indicator, since they at least display a willingness to press the Court to grant review in that one additional case. They may also (but need not) be coupled with expressions of impatience about the Court's reluctance to grant review more frequently.²¹⁰ Professor O'Brien's research demonstrates that Justices White, Marshall, and Brennan noted votes to grant review and dissented from denial of review far more frequently than the Justices who replaced them, which he took as suggesting that these newer Justices are less inclined to grant review in general.²¹¹

These signs must be read with caution, however, because there is no necessary correlation between a willingness to vote for plenary review and a willingness to register that vote publicly.²¹² In other words, a Justice might be

the Dikes, 13 REC. A.B. CITY N.Y. 541, 556-57 (1958) (discussing certiorari process). Because these justifications would never be accepted in disposing of cases on the merits, this view seems to rest on an assumption that the Court's agenda-setting work is less important than its merits work, and thus the former should not interfere with the latter. *See id.* at 559 ("On the other hand, certiorari would be self-defeating if its demands upon the Court's time were allowed to impinge upon the adjudicatory process. For after all the Court exists to adjudicate cases, and certiorari is but an ancillary process designed to promote the appropriate discharge of that duty."). Although this assumption is fairly widespread, as indicated by proposals that have been made to delegate much of the Court's screening function to a different tribunal, *see, e.g.*, FREUND REPORT, *supra* note 1, at 590-95 (discussing proposal for national appellate court), it deserves further scrutiny. *See, e.g.*, Harper & Leibowitz, *supra* note 71, at 457 (stating that "[t]he work which the Supreme Court does not do is as important as the work which it does"); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1737 (2000) ("Indeed, the Supreme Court's power to set its agenda may be more important than what the Court decides on the merits."); *see also id.* at 1723-25 (discussing effects of secrecy).

210. Justice White's dissents from denial of certiorari sometimes urged the Court to adopt a systematic policy of granting review in more cases. *See, e.g.*, *Beaulieu v. United States*, 497 U.S. 1038 (1990) (White, J., dissenting from denial of certiorari) (arguing for review of cases presenting issues that divide courts of appeals); *Metheny v. Hamby*, 488 U.S. 913 (1988) (White, J., dissenting from denial of certiorari) (same). Other Justices have urged the Court to grant review in certain categories of cases, *see, e.g.*, *Apelby v. California*, 439 U.S. 1051 (1978) (Brennan, Stewart & Marshall, JJ., dissenting from denial of certiorari) (obscenity); *Smith v. Hopper*, 436 U.S. 950 (1978) (Brennan & Marshall, JJ., dissenting from denial of certiorari) (capital punishment), or simply registered their dissent on a case-by-case basis, *see, e.g.*, *Berg v. Berger*, 439 U.S. 992 (1978) (Powell, J., dissenting from denial of certiorari). *See generally* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1266-77 (1979) (discussing and analyzing different types of such dissents).

211. *See* O'Brien, *supra* note 6, at 805-07 & fig. 6 (discussing these votes).

212. Indeed, Justice Douglas stated that he and Justice Black shared the view that all such votes should be made public, *see* WILLIAM O. DOUGLAS, *GO EAST YOUNG MAN* 452 (1974), yet

willing to announce all such votes and yet still might support plenary review less often than another Justice who refuses to make any disclosure at all.²¹³ Thus this supposed indicator could turn out to be quite misleading, and in fact it is. Most notably, as our data on the Justices' conference votes shows, Justices Brennan and Marshall frequently were public dissenters from denial of review on the Burger and Rehnquist Courts, yet it turns out that they voted relatively infrequently to grant review during this same period.²¹⁴

Professor O'Brien also pierced the judicial veil to a limited extent by using The Thurgood Marshall Papers to shed light on the Justices' voting behavior at conference, though he evaluated only how often individual Justices cast Join-3 votes in those cases where the Court granted plenary review.²¹⁵ His premise was that such votes lower the threshold for granting plenary review by breaching the traditional "Rule of Four," which requires four Justices to vote in favor of review before the Court will accept a case on the merits.²¹⁶ He found that, during the 1979 to 1990 Terms, the Justices placed at least twelve percent of the cases on the plenary docket with fewer than four outright votes to grant plus one or more Join-3 votes.²¹⁷ He then noted that several of the Justices most inclined to use the Join-3 vote retired in the early 1990s, which he offered as further evidence that the decline in the Court's plenary docket is attributable to changes in the Court's composition.²¹⁸

he dissented from denial of certiorari more than five times as often as Justice Black did in the 1969 and 1970 Terms. See HRUSKA REPORT, *supra* note 2, at 326 tbl. II (presenting these statistics).

213. Moreover, simply counting the number of dissents from denial of certiorari can be quite misleading as an indicator of how much the Court would affect the plenary docket by granting review in those cases, as the Justices who cast what have been described as "irredentist" votes in specific categories of cases (e.g., Justices Brennan and Marshall in capital punishment cases) do so not primarily to prompt the Court to grant review in all such cases, but rather to encourage the Court to grant a few such cases to shift the direction of the Court's jurisprudence. See Linzer, *supra* note 210, at 1269-73; cf. *id.* at 1258 n.221 (noting that eliminating so-called "irredentist" dissents by Justices Brennan, Marshall, and Stewart brings their numbers "in line with their colleagues").

214. See O'Brien, *supra* note 6, at 805-07 & fig. 6 (noting particularly Justices Brennan and Marshall's dissents from denial of review in death penalty cases); see also *infra* notes 254-64 and accompanying text (discussing effects of Justices Brennan and Marshall's retirements on Court's docket).

215. See O'Brien, *supra* note 6, at 797-98 (using Justice Marshall's Bench Memos to determine which cases made their way to plenary docket with help of Join-3 votes). Because some of Justice Marshall's Bench Memos were missing, Professor O'Brien was unable to obtain a complete count. *Id.* at 797 & n.121.

216. See *id.* at 798 (describing use of Join-3 votes).

217. *Id.*

218. *Id.* at 799. Justice Blackmun cast such votes far more frequently than any other Justice. See *id.* at 795-99 tbl. 1 & fig. 4 (tabulating these votes). Although Chief Justice Burger

It bears emphasis, however, that the usefulness of this data on Join-3 votes turns on the meaning of such votes. If Justices casting a Join-3 vote would have cast a vote to grant review had Join-3 not been an option, then the data reveals little about the Justices' overall inclination to grant cases. If, on the other hand, a Join-3 vote is cast in lieu of a vote to deny, then it does suggest a willingness to erode the Rule of Four. Although there is little information on what the individual Justices meant by their Join-3 votes, Chief Justice Rehnquist did opine in a letter to Professor O'Brien that: "It may be that this vote has various meanings, depending on who casts it. But my sense has always been that it is a more tentative vote than a 'grant,' and that if there are three to join, the person who casts the vote may nonetheless reconsider it."²¹⁹

In practice, however, a Join-3 vote functions in the same manner as a vote to grant review. When a Justice votes to grant certiorari (or to note probable jurisdiction over an appeal), this vote is precisely a statement of willingness to join at least three colleagues in setting the case for full review. The "Join-3" formulation is simply more explicit in placing the vote on a basis that appears more collegial. This point is demonstrated by cases in which two Justices voted to grant review and two Justices cast Join-3 votes, which the Court counted as the four votes needed to accept the case on the merits, even without the presence of three grant votes for anyone to "join."²²⁰ This is not to say that the procedural innovation has no consequences: perhaps the availability of the "Join-3" phrasing led Justices with less definite views on particular cases to opt for this more accommodating option rather than voting to deny, and perhaps this more diplomatic phrasing was taken as more inviting of the other Justices' consideration, thus inclining them more toward voting to grant themselves.²²¹ But there is no necessary correlation between frequent use of the Join-3 vote and a high overall grant rate. Indeed, our data on conference votes demonstrates that Join-3 votes are *not* a reliable indicator of a

and Justices O'Connor, Marshall, Rehnquist, White, Powell, and Brennan cast Join-3 votes with some frequency, Justices Stevens, Scalia, and Kennedy rarely, if ever, did. *See id.*

219. *Id.* at 788.

220. *See id.* at 798 (concluding that "Join-3 votes clearly lowered the threshold for granting cases").

221. This potential effect would be similar to the phenomenon described in Justice Van DeVanter's comment from more than a half-century ago (outside the context of Join-3 votes, which seem to be a peculiarity of the Burger Court era) that "if two or three justices strongly desired to hear a case, the necessary remaining votes were sometimes volunteered by other members of the Court." *PROVINE, supra* note 57, at 33. In this instance, plainly, the accommodating Justices changed their votes from a denial to a grant. Professor Perry encountered the same phenomenon in interviewing one of the Justices from the Burger Court era. *See PERRY, supra* note 94, at 169 (discussing this process). As these examples show, however, the Justices can and do make accommodations for one another without regard to whether they are casting Join-3 votes.

Justice's willingness to grant review. For example, on the Burger Court it turns out that Justice Blackmun cast by far the most Join-3 votes, followed by Chief Justice Burger, yet both lagged far behind Justices White and Rehnquist in voting to grant review.²²²

A better way to measure an individual Justice's willingness to grant review would be, of course, to look directly at the number of such votes that he or she cast in conference. As with the later scholarship analyzing the changing docket of the Vinson Court, data on the actual votes cast would provide direct evidence of how the Justices' individual judgments about cases actually translate into expansion or contraction of their plenary docket.²²³

The grant rate for a particular Justice is likely to reflect many subtle elements of his or her outlook on the role that the Supreme Court should play in the judicial system, the government as a whole, and American life. It combines aspects of personality, judicial philosophy, practical administration, political theory, and historical perspective. Justices who subscribe to very different viewpoints on these matters have made comments that illustrate this point. Justice Douglas asserted that "the job here [deciding whether to grant plenary review] is so highly personal, depending on the judgment, discretion, and experience and point of view of each of the nine of us."²²⁴ Justice Harlan stated that "[f]requently the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules."²²⁵ Chief Justice Rehnquist agreed that "[w]hether or not to vote to grant certiorari strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment."²²⁶

The availability of the private papers of some of the recently retired Justices, which include the conference votes recorded in their docket books, offers new opportunities to compile grant rates at least for those Justices who served on the Court before Justice Marshall's retirement at the end of the 1990 Term. Although these sources do not allow calculation of grant rates for all of the current Justices, they offer ample information to enable us to draw much more definitive conclusions than have previously been possible. With invaluable assistance from personnel at the Program for Law and Judicial

222. See *infra* notes 237-39 and accompanying text (discussing voting behavior of these Justices). We should emphasize here that the figures we have compiled for grant votes *include* each Justice's Join-3 votes. See *infra* note 239 and accompanying text (discussing treatment of Join-3 votes by Justices).

223. See generally PALMER, *supra* note 57 (discussing case selection by Vinson Court); PROVINE, *supra* note 57 (same). See also *supra* notes 60-73 and accompanying text (discussing data on conference voting behavior from Vinson Court).

224. DOUGLAS, *supra* note 209, at 175-76.

225. Harlan, *supra* note 209, at 549.

226. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 265 (1987).

Politics at Michigan State University, who work regularly with the U.S. Supreme Court Judicial Database and its expanded version,²²⁷ we have been able to determine the rate at which each Justice voted to grant plenary review (of appeals and petitions for certiorari) during the Burger Court era. We then supplemented this information for the Rehnquist Court by counting the conference votes from Justice Marshall's docket books, which cover the ensuing years until his retirement after the 1990 Term.²²⁸

The cumulative data suggests that the grant rates of individual Justices, relative to one another, tend to remain fairly constant over time, reflecting a general outlook that does not vary appreciably from one Term to the next. Careful analysis of the conference votes from both the Vinson and Warren Courts, for example, demonstrated that the Justices "tended to be consistent in the strength of their propensity to vote for review" and so the "rank order of the justices thus remained fairly constant over the entire period."²²⁹ The data now available from the Judicial Database, supplemented by our own data, demonstrates that the same was largely true for the Burger and Rehnquist Courts.²³⁰ Indeed, the two clear exceptions to the general rule occurred with the transition from the Warren Court to the Burger Court, when the sharp change in the direction of the Court appears to have correlated with a decline

227. The U.S. Supreme Court Judicial Database, compiled by Professor Harold J. Spaeth in the Department of Political Science at Michigan State University, provides the basis for much of the careful statistical information found in the invaluable *Supreme Court Compendium*. See SUPREME COURT COMPENDIUM, *supra* note 3. The Database itself originally contained massive amounts of information about Supreme Court cases decided on the merits. In recent years, the Database has been expanded to include data on conference votes painstakingly compiled from docket books in the private papers of various retired Justices. We are indebted to Professor Spaeth for his willingness to share with us some of this information that is not yet published, and to Professor Reginald S. Sheehan, the Director of the Program for Law and Judicial Politics at Michigan State University, for his willingness to allow us broad access to the computerized database. Finally, we want to express our thanks to Kirk A. Randazzo, a graduate student in the Program, for his careful and persistent efforts in generating the particular data that we needed to analyze the Justices' conference votes for purposes of determining their relative grant rates.

228. We are also indebted to Professor Gregory A. Caldeira of the Department of Political Science at The Ohio State University, who shared with us the data he had developed from conference votes in the 1982 and 1990 Terms, and who generously took time to discuss and explain the data. Professor Caldeira was also the source of the initial suggestion that we seek access to the expanded U.S. Supreme Court Judicial Database. All of this aggregated information on the Justices' conference votes, including our own compilations from the docket books of Justice Brennan and Justice Marshall, will be cited hereinafter simply as "Judicial Database."

229. PROVINE, *supra* note 57, at 114-15; see also *id.* at 104-72 (discussing differences among individual Justices); PALMER, *supra* note 57, at 50-96 (discussing case selection practices).

230. See Judicial Database, *supra* note 228.

in the number of votes cast for review by Justice Brennan and an increase in the number cast by Justice White.²³¹

To some extent, this relative consistency of each Justice's voting behavior compared to that of his or her colleagues is not surprising, for at the threshold stage of granting or denying review there is much less collective deliberation (and no public recordkeeping), which might tend to influence or shape an individual Justice's voting behavior over time.²³² Certainly the extent to which the nine Justices operate as "nine little law firms" is maximized here,²³³ for the sheer number of separate decisions about whether to grant review in particular cases means that, unlike in cases decided on the merits, there is virtually no extended discussion at conference before individual votes are cast and hence "there is little opportunity for leadership."²³⁴ Indeed, at the height of the Court's supposed caseload crisis, Justice Stevens noted the lack of collegial discussion about the Court's docket-setting function, wryly commenting that "[w]e were too busy to decide whether there was

231. *See id.* (noting voting rates of Justices). Justice Brennan went from being consistently in the top tier of the Court in numbers of votes cast for review in the 1960s (averaging about 200 grant votes per Term) to the high end of the lower tier in the 1980s (averaging about 120 such votes per Term). Justice White's voting behavior was the reverse; he moved from the high end of the lower tier in the 1960s (averaging about 150 grant votes per Term) to the very top of the Court in the 1980s (averaging about 210 such votes per Term). Each was fairly consistent within each era. *See id.* These exceptions to the rule raise interesting questions about how each Justice's voting behavior in granting review correlates with voting behavior on the merits, and the extent to which concerns about the likely result on the merits affects the former. Both points are worthy subjects for further study from the standpoint of the individual Justices' grant rates. As we will see, Justice Rehnquist's ascension to Chief Justice presents a third and unique exception to the general rule of consistency. *See infra* notes 243-44 and accompanying text (discussing change in Justice Rehnquist's voting behavior after he became Chief Justice).

232. For example, Professor Perry quotes one justice as stating that "there are plenty of strategic considerations, but I think those are really made in the individual chambers." PERRY, *supra* note 94, at 201.

233. BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 6 (1996) (attributing this formulation to "a number of" Justices). Justice Jackson may have originated this observation when he wrote in 1955 that "the Court functions less as one deliberative body than as nine, each Justice working largely in isolation" and thus tending "to cultivate a highly individualistic rather than a group viewpoint." ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 16 (1955).

234. PERRY, *supra* note 94, at 91; *see also* Harlan, *supra* note 209, at 556 (stating that "the great volume of petitions" precludes "the giving of reasons for denial in individual cases"). For decades, the Court's use of an administrative mechanism known as the "discuss list" has allowed most applications for review to be denied with no discussion at all, which happens when no Justice identifies the case as meriting a vote in the conference. *See, e.g.*, PERRY, *supra* note 94, at 85-91 (describing this process); *see generally* Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 *LAW & SOC'Y REV.* 807 (1990) (same).

anything we could do about the problem of being too busy."²³⁵ The upshot is that in the Court's modern era the Justices have rarely, if ever, made any conscious choices about changing their internal standards for granting plenary review; instead, the number of cases granted and hence their overall caseload simply reflects the cumulative effect of each of their independent decisions.²³⁶

The data on conference votes demonstrates that changes in the Court's personnel have had a dramatic effect on the recent decline in the plenary docket. In the last decade of the Burger Court, the two Justices who consistently voted most frequently to grant plenary review were Justices White and Rehnquist, sometimes by a wide margin over their colleagues.²³⁷ Justices Blackmun, O'Connor, and Powell (usually in that order) were in the middle of the Court, followed by Chief Justice Burger; throughout this period, Justices Brennan, Marshall, and Stevens uniformly voted least often to grant review.²³⁸ The figures for Justice Blackmun and Chief Justice Burger are regularly fortified by their more frequent use of the Join-3 vote, which functions in our compilations the same way it does at the conference, when the Justices themselves count it as a vote to grant plenary review.²³⁹

In 1986, Chief Justice Burger retired and Justice Scalia replaced him on the Court. The nomination and confirmation process was an unusual tandem arrangement, because at the same time President Reagan filled the vacancy on the Court, he elevated Justice Rehnquist to the position of Chief Justice.²⁴⁰

235. Stevens, *supra* note 23, at 179; see also Duffy, *supra* note 34, at 11 (quoting Justice Souter's observations that Justices "hadn't done anything about [the docket] whatsoever; it had in fact just happened," and that "nobody sets a quota, nobody sits at the conference table and says 'We've taken too much. We must pull back.' It simply has happened.").

236. See, e.g., PROVINCE, *supra* note 57, at 104-72 (reaching similar conclusions); PALMER, *supra* note 57, at 50-96 (same). Justice Souter stated of the recent decline in the docket that "I know of no one on my court who thinks that we're turning away cases which by traditional standards of grants of certiorari we should be taking." Duffy, *supra* note 34, at 11. In 1983, Justice Stevens suggested that the Court consider temporarily or permanently abandoning the Rule of Four as one way to tighten its criteria for granting discretionary review, see John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10-21 (1983), but the suggestion was never adopted. It is unclear when the Rule of Four itself originated, but such evidence as exists suggests that it was already firmly in place, and perhaps had been for decades, when Congress enacted the Judiciary Act of 1925. See Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 976, 981-82 & n.37 (1957) (discussing origins of Rule of Four).

237. In the 1982 Term, for example, these two Justices voted to grant review in more than 230 cases each, whereas no other Justice cast as many as 170 votes to grant review. Judicial Database, *supra* note 228.

238. *Id.*

239. *Id.*; see also *supra* note 220 and accompanying text (discussing use of Join-3 vote).

240. See generally SAVAGE, *supra* note 201, at 3-25 (describing transition between Chief Justice Burger and Chief Justice Rehnquist and appointment of Justice Scalia).

The next year, Justice Powell retired and was replaced by Justice Kennedy, after months of delays caused by confirmation battles in the Senate.²⁴¹ The numbers reveal that each of these three changes on the Court played a discernible part in shrinking the docket. Over the course of the next several Terms, both Justice Scalia and Justice Kennedy settled into abnegating roles in the discretionary review process, voting to grant review less often than any other Justice, including Justices Brennan, Marshall, and Stevens.²⁴² Two Justices from the middle tier of the Court were thus replaced by two Justices who voted much less frequently to grant review. At the same time, the voting behavior of now-Chief Justice Rehnquist underwent a dramatic change; from keeping pace with Justice White in an aggressively pro-review first tier on the Court, his total votes for plenary review gradually slipped to where he eventually relinquished the second place to Justice Blackmun.²⁴³ This sudden and marked change in an individual Justice's voting behavior stands as one further exception to the rule of general consistency, though it seems to be directly linked to Justice Rehnquist's perception of his new and distinct role as the Chief Justice.²⁴⁴

The consequent shift in the Court's direction was quite significant. The replacement of Chief Justice Burger and Justice Powell with Justices Scalia and Kennedy had the overall effect of almost erasing the complement of votes cast by an average Justice for plenary review in a given Term.²⁴⁵ In addition, the relocation of Chief Justice Rehnquist from the high end of the spectrum to somewhere in the middle had a comparable effect in diminishing the total number of grant votes cast in a given Term.²⁴⁶ In effect, the aggregate result of these changes in personnel was roughly as if the Rule of Four were now being made to operate on a court composed of slightly more than seven of its

241. See generally *id.* at 128-82 (describing this transition).

242. In our tabulations of the 1989 and 1990 Terms, for example, Justice Kennedy voted on average to grant review in about 95 cases per Term, and Justice Scalia did so about 85 times per Term. Judicial Database, *supra* note 228. Justice Stevens had the next lowest total, averaging about 100 such votes per Term. *Id.*

243. *Id.* From voting to grant plenary review more than 240 times as an Associate Justice in the 1982 Term, for example, as the Chief Justice, Rehnquist averaged only about 120 such votes in the 1989-1990 Terms. *Id.*

244. See Hellman, *supra* note 6, at 430 n.57 (noting that Chief Justice Rehnquist has since stated that "he no longer votes to take a case just because it is 'interesting'" (quoting Biskupic, *supra* note 37, at A15)). Professor O'Brien also points out that Chief Justice Rehnquist has published far fewer dissents from denial of certiorari than he had as Associate Justice. See O'Brien, *supra* note 6, at 807.

245. See, e.g., O'Brien, *supra* note 6, at 807 (noting that there were 272 votes for plenary review by Chief Justice Burger and Justice Powell in the 1982 Term versus 162 such votes by Justices Scalia and Kennedy in the 1989 Term).

246. See *supra* note 243 (discussing change in Chief Justice Rehnquist's voting behavior).

former members, rather than nine.²⁴⁷ The Court's docket bears out this observation, as the number of plenary decisions fell from 156 in the 1985 Term to 132 in the 1989 Term.²⁴⁸

The effect on the Court's docket, though substantial, was not immediately recognized. Neither Chief Justice Burger nor Justice Powell had been outspoken advocates for deciding more cases; on the contrary, both had expressed concern about the Court's workload, and the Chief Justice had led the institutional efforts to gain relief from a docket he viewed as overcrowded.²⁴⁹ The first article noting this new development did not appear until midway through the 1989 Term, when a reporter for the *Washington Post* drew attention to the Court's unusually light caseload.²⁵⁰ And indeed, the real impact was not felt right away because the decline in Chief Justice Rehnquist's vote totals occurred gradually over his first four Terms.²⁵¹ Thus the numbers were initially deceiving – 155 plenary decisions in the 1986 Term, 148 in the 1987 Term, and 145 in the 1988 Term, before falling to 132 in the 1989 Term.²⁵²

At this point, two more retirements occurred: Justice Souter replaced Justice Brennan after the 1989 Term, and Justice Thomas replaced Justice Marshall after the 1990 Term. The erosion of the Court's docket had continued even before these events occurred, as approximately half of the argument calendar for the 1990 Term was already set before Justice Brennan's retirement, and the number of plenary decisions declined again to 116 in that Term.²⁵³ Although there has been some speculation that the retirements of these two most liberal Justices caused or accelerated the docket's decline,²⁵⁴

247. This vivid illustration of the effect of the personnel changes is necessarily somewhat crude, as it is not obvious that probability theory would conclude that the chances of garnering at least four votes in a given case are exactly the same if the same total number of votes is spread among nine participants than if it is concentrated among seven – a point that warrants further analysis in considering how some of the practical mechanics of agenda-setting may differ between the federal and state supreme courts.

248. SUPREME COURT COMPENDIUM, *supra* note 3, at 85 tbl. 2-7.

249. See Warren E. Burger, *The Time is Now for the Intercircuit Panel*, 71 A.B.A. J. 86, 86-91 (Apr. 1985) (reiterating his concerns about Court's workload and proposing modification of Freund and Hruska proposals for national court of appeals); Alsup, *supra* note 20, at 1322 (noting that Chief Justice Burger had emphasized that "something must be done to stem the swelling tide of applications for review," and that Justice Powell had expressed concern that "the Court is now inundated and some plan of relief is sorely needed").

250. See Marcus, *supra* note 35, at A4 (discussing reduction in Court's caseload).

251. Judicial Database, *supra* note 228.

252. SUPREME COURT COMPENDIUM, *supra* note 3, at 85 tbl. 2-7.

253. *Id.*

254. See, e.g., Elsassner, *supra* note 6, at 7 (quoting law professors opining that "liberalism is dead" on current Court and that retirements of Justices Brennan and Marshall had "a profound effect" on decline in docket); O'Brien, *supra* note 6, at 799 (suggesting similar reasons for decline); Starr, *supra* note 37, at A23 (same).

in retrospect the evidence for this view appears scant. To begin with, for many years both Justice Brennan and Justice Marshall had established themselves at the low end of the spectrum in voting to grant review.²⁵⁵ And figures from Justice Souter's partial participation in conference votes for the 1990 Term suggest that he may support plenary review about as often as Justice Brennan did.²⁵⁶ Even if Justice Thomas's voting behavior on discretionary review were similar to that of Justices Scalia and Kennedy, which seems plausible but not inevitable,²⁵⁷ it is hard to envision how these two changes in personnel, taken together, would have caused any appreciable decline in the Court's docket.²⁵⁸

The numbers again seem to bear this out, as the number of plenary decisions briefly stabilized at 116 in the 1990 Term, 110 in the 1991 Term, and 111 in the 1992 Term.²⁵⁹ Of course, it is quite plausible that Justices Brennan and Marshall may have cast different *kinds* of votes on discretionary review, and hence their departure from the Court might have depressed the numbers in certain categories of cases that were set for plenary review.²⁶⁰ The records for their conference votes show, for example, that these two Justices voted more frequently than any other Justice to grant review of criminal cases filed *in forma pauperis*.²⁶¹ In the first four Terms of the Rehnquist Court, Justices

255. By the beginning of the Rehnquist Court, for example, Justice Brennan was averaging about 120 votes to grant review per Term, and Justice Marshall was averaging about 110 such votes per Term, fewer than any Justice other than Justice Stevens. Judicial Database, *supra* note 228.

256. Justice Souter was not sworn in until October 9, 1990, shortly after the commencement of the 1990 Term, *see* SUPREME COURT COMPENDIUM, *supra* note 3, at 348 tbl. 5-2 (noting date Justice Souter's service began), which means that, as is often true of new Justices, he did not cast conference votes on many of the cases that had built up over the summer recess. *See* Judicial Database, *supra* note 228. Over the balance of the Term, his grant rate was comparable to Justice Brennan's in his last several Terms.

257. During each of his first seven Terms on the Court, Justice Thomas voted more often with Justice Scalia on the merits than with any other Justice, *see Supreme Court Statistics, supra* note 112, though voting behavior on the merits does not necessarily translate directly into similar voting behavior on discretionary review.

258. For example, if Justice Souter were to fall near the low end of the middle tier, then even if Justice Thomas were as sparing as Justice Scalia in voting for review, substituting Justices Souter and Thomas for Justices Brennan and Marshall would yield overall vote totals that were roughly equivalent. *See* Judicial Database, *supra* note 228.

259. SUPREME COURT COMPENDIUM, *supra* note 3, at 85 tbl. 2-7.

260. *See, e.g.,* Savage, *supra* note 6, at 40 (stating that "the Court has no active liberal faction inclined to reach out to take on new issues"); Elsasser, *supra* note 6, at 7 (noting that Justices Brennan and Marshall were "moved by the individual results in a case" and were willing to take cases with unfair results even if they did not meet Court's "general criteria for granting review") (quotation omitted).

261. During the 1988 and 1989 Terms, for example, Justices Brennan and Marshall averaged more than 30 votes per Term to grant review in such cases, and Justices Stevens (28),

Brennan and Marshall formed part of a four-vote bloc (usually with Justices Stevens and Blackmun) to grant review in about five such cases per Term.²⁶² One might thus have expected at least this many *in forma pauperis* cases, and perhaps even more, to vanish from the plenary calendar after they left the Court. Yet there was no significant decline in the number of *in forma pauperis* cases: the Court granted 74 such cases in the 1986-1989 Terms, and 62 such cases in the 1991-1994 Terms – a drop of only three cases per Term.²⁶³ Even from this perspective, it thus seems that these retirements had only a limited effect on the continuing decline in the docket.²⁶⁴

The final round of retirements came in 1993, when Justice Ginsburg replaced Justice White, and in 1994, when Justice Breyer replaced Justice Blackmun. Although no data is available yet to enable us to calculate individual grant rates for these new Justices, it is clear that these two changes had a profound influence on the shrinking of the docket. For many years, Justice White had been the Court's most outspoken advocate for granting review in more cases, particularly those involving conflicts among the lower

White (27), and Blackmun (18) also cast such votes with some frequency. By contrast, the other four Justices averaged only about 10 such votes per Term. Judicial Database, *supra* note 228. At the same time, however, it is likely that Justices Brennan and Marshall often engaged in "defensive denials" by voting not to grant review in such cases when they were concerned about an adverse result on the merits. See, e.g., PERRY, *supra* note 94, at 198-207 (discussing this practice). The interesting subject of strategic voting in deciding whether to support review in particular cases has spawned a considerable political science literature, built in part on the conference data available from Justice Burton's docket books, but not yet updated in light of the more recent data that since has become available. See, e.g., *id.* at 12-15 (discussing voting strategies at certiorari stage); S. Sydney Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision "on the Merits,"* 4 POLITY 429 (1972) (same); Saul Brenner, *The New Certiorari Game*, 41 J. POL. 649 (1979) (same); Gregory A. Caldeira, *The United States Supreme Court and Criminal Cases, 1935-1976: Alternative Models of Agenda Building*, 11 BRIT. J. POL. SCI. 449 (Oct. 1981) (same).

262. Judicial Database, *supra* note 228. This number may underrepresent the influence of Justices Brennan and Marshall, insofar as the other Justices' awareness of the four-vote bloc may have inclined them to vote to grant more frequently in such cases, thus causing fewer cases to be granted with the bare minimum of votes.

263. SUPREME COURT COMPENDIUM, *supra* note 3, at 82-83 tbl. 2-6. Moreover, in cases in which the Court granted review on a bare four votes during the 1988 and 1989 Terms, neither Justice Brennan nor Justice Marshall provided the essential fourth vote in an unusual number of cases; indeed, both Justices were about at the Court's average in this regard. Judicial Database, *supra* note 228.

264. The data from the docket books thus tends to confirm Professor Hellman's view that the retirements of the three most liberal Justices (including Justice Blackmun) was not a major factor in the shrinking docket, which he bases on his finding that "the total number of 'liberal grants,'" even when they served on the Court, was so small that "any decline could not possibly have played a major role in the reduction in the overall level of plenary activity." Hellman, *supra* note 6, at 413.

courts.²⁶⁵ His voting behavior mirrored his public comments; throughout the first five Terms of the Rehnquist Court, he consistently had far and away the highest grant rate on the Court, routinely casting almost twice as many such votes as the average for the other Justices.²⁶⁶ Justice Blackmun had always been at the high end of the Court's middle tier, making far more frequent use of the Join-3 vote than his colleagues.²⁶⁷ By the 1990 Term, he was voting for review more often than any Justice other than Justice White.²⁶⁸

The retirement of these two Justices caused an immediate further decline in the number of plenary decisions, to levels never before seen in the Court's modern era. The Court issued 90 plenary decisions in the 1993 Term, 85 in the 1994 Term, and only 78 in the 1995 Term.²⁶⁹ The numbers have remained at this level as the composition of the Court has remained unchanged, eventually reaching a new low of 76 plenary decisions in the 1999 Term.²⁷⁰ In light of the conference data now available, these unprecedented results are understandable. Justice White's voting behavior was so extraordinary that replac-

265. Most often, Justice White pressed his point by dissenting from the denial of certiorari in specific cases, though he occasionally made a broader point by urging the Court to grant review in more cases across the board. See, e.g., *Beaulieu v. United States*, 497 U.S. 1038 (1990) (White, J., dissenting from denial of certiorari) (arguing that Court should take more cases involving circuit conflicts); *Metheny v. Hamby*, 488 U.S. 913 (1988) (White, J., dissenting from denial of certiorari) (same). Professor O'Brien notes that the number of Justice White's dissents in this regard "increased significantly in the late 1980s and early 1990s." O'Brien, *supra* note 6, at 792; see also *id.* at 793 & fig. 3 (noting number of cases Justice White would have added to Supreme Court's docket). There also can be little doubt that Justice White is the "Justice G" referred to in Professor Perry's book, who felt "that many cases the Court denies should be granted" and thus took "a very strong and leading role on cert." in the discussions at conference. PERRY, *supra* note 94, at 89-90; see also HUTCHINSON, *supra* note 58, at 355-56, 382, 400-01, 419-21, 431 (discussing Justice White's influence, particularly in setting agenda for Court's docket).

266. In the 1988-1989 Terms, Justice White averaged almost 200 grant votes per Term, whereas his colleagues averaged just over 100. Judicial Database, *supra* note 228. Moreover, in cases that were granted on a bare four votes during those Terms, Justice White provided the essential fourth vote for review more frequently than any other Justice. *Id.*

267. *Id.*; see also O'Brien, *supra* note 6, at 795-99 & fig. 4 (tabulating use of Join-3 votes).

268. Judicial Database, *supra* note 228. Our tabulations indicate that in the 1988-1989 Terms, Justice Blackmun averaged about 120 votes to grant review per Term, far behind Justice White and slightly behind Chief Justice Rehnquist, but considerably ahead of every other Justice. *Id.* Over the same period, Justice Blackmun trailed only Justice White in providing the essential fourth vote for review, and both of them did so far more often than any other Justice. *Id.*

269. SUPREME COURT COMPENDIUM, *supra* note 3, at 85 tbl. 2-7. Since Congress enacted the Judiciary Act of 1925, the only previous Terms in which the Court had issued fewer than 100 plenary decisions were the 1953 Term (88) and the 1954 Term (94). *Id.* at 84.

270. See *Statistical Recap*, *supra* note 4, 69 U.S.L.W. at 3134 (tabulating caseload of Supreme Court).

ing him by someone with even an average grant rate would be tantamount to eliminating the votes cast by a typical Justice for plenary review in a given Term.²⁷¹ At the same time, it is highly unlikely that the retirement of Justice Blackmun led to any increase in total grant votes, as he had become firmly established toward the high end of the spectrum.²⁷² In addition, the tenor of their academic writings suggests that neither Justice Ginsburg nor Justice Breyer would press for any expansion in the Court's plenary docket.²⁷³ Aggregated with the effects of the 1986-87 retirements, therefore, the effect of these changes was to squeeze the Rule of Four even further, as if it were now being made to operate on a court composed of fewer than six of the former members of the Burger Court.

The cumulative effect of these changes in the Court's membership thus appears to have been dramatic. Quite apart from issues about who was winning and losing in the lower courts, and what parties were seeking review in which cases from one Term to the next, it is now evident that the Court's personnel changes over this decade were a substantial independent cause of the remarkable decline in its docket.

F. Growth of the "Cert Pool"

The foregoing analysis also helps dispel another explanation that has been offered for the declining docket – the allegedly excessive influence of law clerks in screening out cases through operation of the "cert pool."²⁷⁴ In 1972, Chief Justice Burger instituted a new procedure for "pooling" the law clerks of Justices who were willing to have them share the task of preparing

271. Judicial Database, *supra* note 228; see also *supra* note 266 and accompanying text (discussing Justice White's voting behavior).

272. Judicial Database, *supra* note 228. In fact, as mentioned earlier, by the 1989 and 1990 Terms, Justice Blackmun had moved ahead of Chief Justice Rehnquist for second place on the Court, behind only Justice White in total votes cast for plenary review. *Id.*

273. Before her appointment to the Supreme Court, Justice Ginsburg explicitly noted that the Court could manage any excess in its discretionary merits docket by simply cutting back the number of plenary decisions on its own. See Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1418 (1987) (discussing Supreme Court's workload). In the same vein, Justice Breyer had opined that having "too many decisions is, in a sense, the same as having too few," and that it is thus desirable to keep "the important law-declaring decisions limited to a number that the legal community can take notice of, criticize, and elaborate upon." Stephen Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29, 40 (1990). We are left to rely on this anecdotal evidence, *cf. supra* note 74 (noting Professor Hellman's reliance on anecdotal evidence in absence of data), at least until the docket books of Justice Blackmun and any future retired Justices may be opened to the public.

274. See, e.g., Biskupic, *supra* note 36, at A6 (noting argument that "cert pool" substantially affects docket size); Savage, *supra* note 6, at 42 (same); Starr, *supra* note 37, at A23 (same).

memoranda summarizing the applications for plenary review.²⁷⁵ This new approach was intended to spread the burden of assisting the Justices in screening cases more equitably and efficiently. Traditionally, the Chief Justice's clerks bore the entire task of preparing such memoranda for the *in forma pauperis* cases, and clerks in each chambers would write separate memoranda in the paid cases.²⁷⁶ The cert pool included the paid cases also, which meant that only one law clerk performed an initial screen in every case for participating Justices.²⁷⁷

The mechanism of the cert pool was controversial from its inception, and it remained so for years. Initially, five Justices joined the pool, though Justices Brennan, Douglas, Marshall, and Stewart declined.²⁷⁸ Justice Douglas was highly critical of the pool during his final years on the Court,²⁷⁹ and various commentators have since voiced concerns that it delegates too much authority to law clerks and has the undesirable effect of largely homogenizing the Court's consideration of applications for review.²⁸⁰

It seems unlikely, however, that the cert pool has had much systematic influence on the votes cast by individual Justices to grant or deny plenary review, at least when compared to the dominant factor of the Justices' own predispositions.²⁸¹ All of the Justices had individualized screening mechanisms in place prior to the cert pool, which made varying use of the law clerks.²⁸² Such supplemental procedures also remained after the pool was in place, and it appears that the varying levels of scrutiny that individual Justices give to the applications does not correlate with their participation in the pool.²⁸³ Moreover, the actual voting behavior of the Justices in the pool has been far from uniform. For example, Justice White belonged to the pool for

275. See O'Brien, *supra* note 6, at 790 (noting that Chief Justice Burger instituted change upon suggestion of Justice Powell).

276. See GERHARD CASPER & RICHARD A. POSNER, *THE WORKLOAD OF THE SUPREME COURT* 72-73 (1976) (discussing Chief Justice's traditional role with respect to unpaid cases).

277. See O'Brien, *supra* note 6, at 790 (noting this change in policy).

278. See CASPER & POSNER, *supra* note 276, at 72-73 (explaining origins of cert pool).

279. See SCHWARTZ, *supra* note 233, at 257 (quoting Justice Douglas calling law clerks "Junior Supreme Court"); DOUGLAS, *supra* note 209, at 175-76 (criticizing growth of cert pool).

280. See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 83-84 (1986) (noting that clerks review hundreds of petitions before Term even begins); SCHWARTZ, *supra* note 233, at 257-58 (noting criticisms of cert pool).

281. See O'Brien, *supra* note 6, at 799-803 (arguing that pooling of clerks in certiorari process does not determine amount of scrutiny given by Justices and concluding that it is unclear whether this feature plays role in setting size of plenary docket).

282. See CASPER & POSNER, *supra* note 276, at 73 (describing these processes).

283. See O'BRIEN, *supra* note 280, at 131 (discussing views of Justices Brennan and Stevens); PERRY, *supra* note 94, at 51-64 (discussing pool process in detail); REHNQUIST, *supra* note 226, at 264-67 (describing Chief Justice Rehnquist's process).

his last two decades on the Court, yet he consistently supported plenary review in many more cases than the other pool members.²⁸⁴ Justice Blackmun, though less extreme in this regard, also compiled a high grant rate relative to the other pool members.²⁸⁵ At the same time, from outside the pool, Justice Stevens has had an index that is regularly below that of the average pool member.²⁸⁶ The supposed boundary between those Justices who do and do not belong to the cert pool is further blurred by frequent consultations among their law clerks.²⁸⁷

Indeed, for the first fifteen years after the cert pool made its debut, the number of cases granted plenary review remained in the range of 150 cases per Term.²⁸⁸ The single period of decline during this period occurred after Justice Stevens replaced Justice Douglas in 1975.²⁸⁹ Neither belonged to the pool, however, and the drop in the caseload is traceable instead to their very different views of the Court's optimal capacity to hear and decide cases.²⁹⁰ Notably, after Justice O'Connor arrived at the Court in 1981 – and joined the cert pool, unlike her predecessor, Justice Stewart – the plenary docket *rose* again to about 150 cases per Term, and remained there for the next eight Terms.²⁹¹ This pattern defies explanation if the excessive influence of a larger cert pool is an important factor in depressing the Court's docket. It is more likely that the clerks' initial screening simply helps in weeding out the great mass of cases that are universally viewed as marginal and in focusing attention on the remainder.²⁹²

284. Judicial Database, *supra* note 228.

285. *Id.*

286. *Id.*; see also O'Brien, *supra* note 6, at 795 & n.119 (noting that Justice Stevens urged Court not to take cases "pointlessly").

287. See PERRY, *supra* note 94, at 54-55 (discussing this collaboration).

288. SUPREME COURT COMPENDIUM, *supra* note 3, at 85 tbl. 2-7.

289. Justice Stevens joined the Court during the 1975 Term. *Id.* at 347 tbl. 5-2. The number of plenary decisions that Term was 154, which declined to 148, 137, 138, 142, and 131 over the next five Terms. *Id.* at tbl. 2-7.

290. Justice Douglas regularly had one of the highest grant rates on the Court, see PROVINCE, *supra* note 57, at 114-15 tbl. 4.5, whereas Justice Stevens has consistently opined that the Court's caseload crisis was of its own making, the result of granting review in more cases than it should, see Stevens, *supra* note 236, at 16 ("For I think it is clear that the Court now takes far too many cases. Indeed, I am persuaded that since the enactment of the Judges' Bill in 1925, any mismanagement of the Court's docket has been in the direction of taking too many, rather than too few, cases.").

291. SUPREME COURT COMPENDIUM, *supra* note 3, at 85 tbl. 2-7. Beginning with the 1981 Term, the number of plenary decisions recovered to 151, 157, 157, 150, and 156 over the next five Terms. *Id.*

292. See O'BRIEN, *supra* note 280, at 190-91 (noting high percentage of cases unanimously rejected); REHNQUIST, *supra* note 226, at 264-67 (describing one to two thousand certiorari

The only evidence that has been cited to the contrary is that when Justices Brennan and Marshall left the Court in 1990 and 1991, the number of Justices in the cert pool rose from six to eight, with only Justice Stevens remaining out.²⁹³ Because this change occurred during the period of general decline, it has been speculated that this factor may have played a significant role in the changing docket.²⁹⁴ Yet the steep decline actually was well underway by this time, though there had been no other change in the level of participation in the pool, and the decline intensified after Justices White and Blackmun retired, even though both had been pool members and again no change in pool participation resulted.²⁹⁵ Even more decisive, however, is the simple fact that Justices Brennan and Marshall themselves were voting to grant fewer cases than most of their colleagues on the Rehnquist Court, though neither belonged to the cert pool.²⁹⁶ Indeed, the only Justice outside the pool whose index has *ever* been above the Court average was Justice Douglas, and his voting behavior in this regard was well entrenched long before the advent of the pool.²⁹⁷ It thus seems virtually certain that the number of Justices in the cert pool has had little or nothing to do with the Court's declining docket.

III. Conclusions About the Changing Docket

The above analysis thus points to a multifaceted explanation for the recent decline in the Supreme Court's plenary docket. At the outset, the much-anticipated legislation restricting the Court's mandatory jurisdiction appears to have had little or no effect on the caseload. Changes in the Court's personnel, however, have played a substantial role in shrinking the docket. To begin with, the substitution of Justice Scalia for Chief Justice Burger and Justice Kennedy for Justice Powell, along with Justice Rehnquist's promotion to Chief Justice, provided a considerable impetus to reduce the docket. This

petitions per year as "patently without merit"); Arthur J. Goldberg, *One Supreme Court*, NEW REPUBLIC, Feb. 10, 1973, at 15 (suggesting many cases are unworthy of review).

293. See O'Brien, *supra* note 6, at 800 (noting that cert pool reached eight members with Justice Thomas's addition). Professors Casper and Posner advocated such an expansion of the cert pool in their 1976 monograph on the Supreme Court's workload. See CASPER & POSNER, *supra* note 276, at 108-09.

294. See O'Brien, *supra* note 6, at 799-800 (relating concerns expressed by Justices Kennedy and Blackmun about having almost all Justices participating in cert pool); Starr, *supra* note 37, at A23 (criticizing cert pool).

295. See *supra* notes 253-73 and accompanying text (discussing correlation between changes in personnel and reduction of Court's caseload).

296. See Judicial Database, *supra* note 228.

297. See *id.*; see also PALMER, *supra* note 57, at 57 tbl. 5.2 & 81 tbl. 6.2 (showing that Justice Douglas had highest grant rate on Court for 1949-1952 Terms).

was followed in short order by the retirements of Justices Brennan and Marshall, which had less impact than might have been expected, even though it cost the Court two votes and a more extensive lobbying effort for granting review in certain kinds of cases. The final substantial shift occurred with the retirements, soon afterwards, of Justices White and Blackmun. By their votes at conference, as well as by Justice White's frequent prodding both in public and private statements, these two Justices had strongly supported the Court granting review on the merits in more cases. When Justices who appear to have more moderate viewpoints on this issue replaced Justices White and Blackmun, the docket immediately plunged. Not since 1949 – the year in which Justices Clark and Minton replaced Justices Murphy and Rutledge – had such a massacre of certiorari votes occurred on the Court.

In addition, an important influence that has independently contributed to the decline is the changing pattern of federal civil litigation involving government parties. Over the same period, the federal government was winning more of its fewer civil cases in the lower courts and thus was seeking plenary review less frequently. Similar factors were also at work in civil litigation involving the state and local governments and in criminal cases (though the numbers here were partially offset by a rising tide of federal criminal prosecutions), as for a generation the Supreme Court had asserted its control over the direction of the lower courts and presided over some version of a judicial realignment. Our analysis indicates that these factors – even apart from any changes in the Court's personnel – may have been responsible for as much as half of the overall reduction in the plenary docket.

Given these explanations for the declining docket, it is likely that the current situation will endure for some time to come, unless or until significant changes occur from new appointments to the Court. The consequences of the changes in personnel to date have been so great that it would take a real and sustained shift in the Court's direction to reverse them. Barring the appointment of a jurist whose approach to certiorari is cast in the highly unusual mold of a Justice White or a Justice Douglas, it will take several new members with a definite inclination to grant more cases to effect a substantial increase in the Court's caseload. At the same time, the confirmed pattern of government attorneys bringing fewer cases to the Court is likely to persist, for though they can anticipate paddling into rougher waters again at some point in the future, there is no apparent reason to believe that this will happen any time soon. For the time being, therefore, the Supreme Court's plenary docket has stabilized at levels that are unprecedented in the modern era.