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*James F. Blumstein**

Judicial reform is in the air. Almost fifty years have elapsed since the statutory basis for Supreme Court jurisdiction[1] has been altered substantially,[2] but court reform seems to be a current topic of conversation at bar association meetings,[3] in popular journals of opinion,[4] on public television,[5] and, to some extent, even in the

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1. U.S. CONST. art. III, § 2 provides, *inter alia*, that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*" (emphasis added). *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). *See generally* Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U.L. REV. 1 (1951).

2. *See* note 19 *infra* and accompanying text.

3. *See, e.g.*, Address by Chief Justice Warren E. Burger, American Bar Association Annual Meeting, August 1972, in 58 A.B.A.J. 1049 (1972); Address by Chief Justice Warren E. Burger, American Bar Association Annual Meeting, July 5, 1971, in 57 A.B.A.J. 855 (1971).

4. *See, e.g.*, Bickel, *The Overworked Court: A Reply to Arthur J. Goldberg*, THE NEW REPUBLIC, Feb. 17, 1973, at 17-18; Goldberg, *One Supreme Court: It Doesn't Need Its Cases Screened*, THE NEW REPUBLIC, Feb. 10, 1973, at 14-16; 74 U.S. NEWS & WORLD REPORT, Jan. 1, 1973, at 29; N.Y. Times, May 16, 1973, at 23, col. 1; N.Y. Times, May 7, 1973, at 29, col. 2; N.Y. Times, May 2, 1973, at 50, col. 3; N.Y. Times, Feb. 12, 1973, at 13, col. 3; Wall Street Journal, Jan. 2, 1973, at 20, col. 1; N.Y. Times, Dec. 20, 1972, at 1, col. 4; N.Y. Times, Nov. 14, 1972, at 27, col. 1; N.Y. Times, Nov. 13, 1972, at 36, col. 1.

5. The public broadcasting network program "The Advocates" devoted a session to judicial reform in early 1973.

scholarly reviews.[6]

Since the enactment of the Judges' Bill in 1925,[7] many specific aspects of Supreme Court practice have come under close scrutiny. For example, Professor Fowler Harper and his associates investigated the Supreme Court's certiorari practices in a series of articles in the early 1950's;[8] Professor Albert Sacks[9] criticized the Court's summary per curiam opinion practice in the wake of the *Segregation Cases;*[10] and Professor Ernest Brown questioned the validity of the practice whereby the Court granted certiorari and simultaneously reversed the decision of a federal court of appeals or state supreme court without briefs or oral argument.[11] This paper will discuss first some of the issues involved in reforming Supreme Court jurisdiction and then examine the Court's practice of dismissing certiorari as improvidently granted after briefs and oral argument.

## *Proposed Judicial Reform*

Since the appointment of Warren Burger as Chief Justice of the United States in 1969, the mechanics of judicial administration have received increased attention. Chief Justice Burger has instituted an annual State of the Judiciary message[12] and generally has

6. *See, e.g.*, Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Poe, Schmidt, & Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U.L. REV. 842 (1973); Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Precedent*, 52 B.U.L. REV. 373 (1972); Note, *National Court of Appeals: Composition, Constitutionality, and Desirability*, 41 FORDHAM L. REV. 863 (1973).

7. Judiciary Act of 1925, ch. 229, 43 Stat. 936, *as amended*, 28 U.S.C. §§ 1254, 1256-57 (1970).

8. *See* Harper & Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427 (1954); Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439 (1953); Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354 (1951); Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950).

9. *See* Sacks, *The Supreme Court, 1953 Term—Foreword*, 68 HARV. L. REV. 96, 99-103 (1954).

10. The *Segregation Cases* include: Brown v. Board of Educ., 349 U.S. 294 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954). *See* Florida *ex rel.* Hawkins v. Board of Control, 347 U.S. 971 (1954) (Court refers to the "Segregation Cases").

11. *See* Brown, *The Supreme Court, 1957 Term—Foreword: Process of Law*, 72 HARV. L. REV. 77 (1958). *See also* Note, *The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts*, 63 COLUM. L. REV. 688 (1963).

12. *See* note 3 *supra*.

taken a leadership role in promoting legislative efforts at judicial reform. In addition, the Federal Judicial Center, established in 1968,[13] has prospered under the new Chief Justice, and its resources and responsibilities have expanded considerably over the past three or four years.[14] Charged with the duty of examining the operation of the federal courts,[15] the Judicial Center in 1971 assembled a group to study the case load of the Supreme Court. In December 1972 the Freund Committee[16] released its report, which recommended the establishment by Congress of a National Court of Appeals to ease the workload of the Supreme Court.[17] By reviewing cases from lower federal courts and passing along to the Supreme Court only a relatively small number from which the high court would select cases for actual hearing,[18] the new court would take over much of the screening now done by the Supreme Court.

In his preface to the Study Group's Report, Alfred P. Murrah, Director of the Federal Judicial Center and Senior United States Circuit Judge, noted that since the 1925 Congressional expansion of the Supreme Court's discretionary control over its docket, there has not been a significant alteration in the basis of the Court's jurisdic-

13. "There is established within the judicial branch of the Government a Federal Judicial Center, whose purpose it shall be to further the development and adoption of improved judicial administration in the courts of the United States." Act of Dec. 20, 1967, 28 U.S.C. § 620(a) (1970); *see* Clark, *Reflection on the Present Footing of Judicial Administration*, 60 KY. L.J. 828, 832-33 (1972). *See also* Address by Chief Justice Warren E. Burger, American Bar Association Annual Meeting, August 1972, in 58 A.B.A.J. 1049, 1053 & n.5 (1972).

14. For a discussion of some of the programs and accomplishments of the Federal Judicial Center see Clark, *The Federal Judicial Center*, 26 Mo. B.J. 570 (1970).

15. *See* 28 U.S.C. § 620(b)(1) (1970).

16. The study group is named after its Chairman, Professor Paul Freund of Harvard Law School. In addition to Professor Freund, the members of the Study Group included Professors Alexander M. Bickel and Charles A. Wright, Dean Russell D. Niles and Messrs. Peter D. Ehrenhaft, Bernard G. Segal, and Robert L. Stern.

17. REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT, at 18, 47-48 (Fed. Judicial Center ed. 1972) [hereinafter cited as REPORT]. The proposed tribunal would be composed of 7 federal circuit judges assigned for 3-year staggered terms by a system of automatic rotation. *Id.* at 19.

18. *Id.* The Committee recommended that "all cases now within the Supreme Court's jurisdiction, excepting only original cases, be filed initially in the National Court of Appeals, preferably on certiorari, but in any event on papers having the same form and content they would have if they continued to be filed in the Supreme Court directly." *Id.* at 20. While under the Committee proposal denial of review by the National Court of Appeals would be final, the new court could, with the concurrence of a sufficient number of judges, certify cases to the Supreme Court for additional screening and possible adjudication there. *Id.* at 21. For an earlier proposal that a new court be established with final screening authority in nonconstitutional matters see Strong, *The Time Has Come to Talk of Major Curtailment in the Supreme Court's Jurisdiction*, 48 N.C.L. REV. 1 (1969).

tion.[19] Restructuring the appellate jurisdiction of the Supreme Court was initiated in the 1920's under the banner of judicial reform by another reform-minded Chief Justice, William Howard Taft.[20] The culmination of Taft's efforts to reshape the appellate docket of the Supreme Court was the Judges' Bill of 1925, which curtailed the Court's obligatory jurisdiction and invested it with more discretion in handling its docket.[21] Although the story of the development of the federal judiciary has been told too well to warrant repetition,[22] a brief recounting of the events leading to the enactment of the Judges' Bill is in order.

William Howard Taft, a longtime advocate of limiting the Supreme Court's workload, evidently considered it his duty as Chief Justice to take the lead in promoting change.[23] With his encouragement, a committee of Supreme Court justices[24] drafted a bill designed to reduce the number and kinds of cases that the Court was obligated to review. At the urging of the Chief Justice and the Justices on the drafting committee, and apparently out of deference to the members of the Court, Congress enacted the proposed statute with only minor revisions.[25]

The 1925 Act seems to have been promoted as a means of enabling the Court to keep abreast of its current business.[26] At that time the Court was about two years behind in its docket,[27] and there was

19. REPORT, *supra* note 17, at v.

20. *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 228, 255-86 (1928). *See also* Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. No. 2, 3 (1916).

21. *See generally* Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2-10 (1925).

22. *See, e.g.*, F. FRANKFURTER & J. LANDIS, *supra* note 20; H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953); Note, *The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts*, 63 COLUM L. REV. 688, 701-03 (1963). *See also* Dick v. New York Life Ins. Co., 359 U.S. 437, 448 (1959) (Frankfurter, J., dissenting).

23. F. FRANKFURTER & J. LANDIS, *supra* note 20, at 259; *see* Burton, *"Judging Is Also Administration": An Appreciation of Constructive Leadership*, 33 A.B.A.J. 1099, 1165 (1947).

24. The committee was composed of Justices Van Devanter, McReynolds, and Day, who was succeeded on his retirement from the bench by Mr. Justice Sutherland. *See* F. FRANKFURTER & J. LANDIS, *supra* note 20, at 260.

25. *Id.* at 273-80.

26. *See* Frankfurter & Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1 (1928). For a description of the Court's case load and work immediately prior to the enactment of the Judges' Bill see Frankfurter & Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 HARV. L. REV. 431, 834 & 1110 (1926, 1927); Shelton, *The Danger of the Increased Burden Upon the Federal Supreme Court from Its Continually Expanding Docket*, 92 CENT. L.J. 279, 280 (1921).

27. *See* Frankfurter & Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 HARV. L. REV. 834, 836 & n.7 (1927).

an understandable feeling that this delay was intolerable. In the House hearings on the proposed legislation, Chief Justice Taft stated that "[i]t is primarily a bill to bring within the jurisdiction of the Supreme Court all the business of the country in such a way that it can keep up with its docket."[28] In an analysis of the bill prepared by the Justices for Congress, two major needs were identified—limiting the Court's docket and codifying the various jurisdictional statutes governing Supreme Court review.[29]

The Freund Committee recommendations respond to similar concerns of docket overcrowding. As the Report states on the first page, "[t]he indispensable condition" for the maintenance of quality work by the high court is "adequate time and ease of mind for research, reflection, and consultation in reaching a judgment . . . ."[30] From the figures that show an increased number of cases filed with the Court,[31] the Committee concluded that the case load of the Court barred adequate time for carrying out its responsibilities.[32]

These conclusions about the oppressiveness of the case load mirror those of some current members of the Court. The Chief Justice, for example, consistently has maintained that "something must be done to arrest the constant increase in docketed cases in the Supreme Court or the quality of the Supreme Court's work would become impaired, and the Court would be unable to perform its historic role in the American system of government."[33] Another Court member, Justice Rehnquist, also has cited the difficulties

28. *Hearings on H.R. 8206 Before the House Comm. on the Judiciary*, 68th Cong., 2d Sess. 25-29 (1924) [hereinafter cited as 1924 *House Hearings*].

29. "The primary object of the bill is to relieve the congestion resulting from the present overcrowded docket of the Supreme Court . . . ." *Hearings on S. 2060 & 2061 Before a Subcomm. of the Senate Comm. on the Judiciary*, 68th Cong., 1st Sess. 6-7 (1924) [hereinafter cited as 1924 *Senate Hearings*]. "The bill has the further purpose of revising and restating in one enactment the complete appellate jurisdiction of the Supreme Court . . . ." *Id.* at 21.

30. REPORT, *supra* note 17, at 1.

31. *Id.* at 2-9. For a discussion of the burgeoning number of cases filed for review in the federal courts of appeals see Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

32. "The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist . . . . [T]he pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions." REPORT, *supra* note 17, at 5.

33. Address by Chief Justice Warren E. Burger, American Bar Association Annual Meeting, August 1972, in 58 A.B.A.J. 1049, 1053 (1972).

imposed on the Justices by the large volume of cases they must screen.[34]

Critics of the Freund Committee Report note, however, that petition-screening is not as time-consuming as the raw numbers of petitions filed might indicate.[35] They argue that since at least one Justice must express a desire to talk about a case, the vast majority of petitions never come up for discussion at conference.[36] A better measure of overwork, they contend, is whether the Court is current with its docket[37]—as it was not prior to the enactment of the Judges' Bill in 1925. Justice Douglas has been outspoken in his belief that the Supreme Court is not overworked,[38] and Justice Stewart also has stated that the case load is "neither intolerable nor impossible to handle."[39] Moreover, former Chief Justice Warren[40] and Justice Brennan[41] both agree that the burden of screening is manageable.

In any case, discussion of the merits of any judicial reform proposal should not be confined to a debate over whether the Supreme Court is "overworked," however that subjective concept is defined. Overwork, as Nathan Lewin has put it, "is about as measurable as a migraine headache—and like a headache its cause and cure depend on highly personal factors."[42] Like many measures that

34. Rehnquist, *The Supreme Court: Past and Present,* 59 A.B.A.J. 361 (1973). In addition, Justice Stewart was quoted as saying after a single term of service on the court that the increased case load "means, I am sorry to say, that there simply is not so much time as ideally there should be for the reflective deliberation so essential to the judicial process." *See* Griswold, *The Supreme Court, 1959 Term, Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold,* 74 HARV. L. REV. 81, 84 (1960).

35. *See, e.g.,* Address by Justice Brennan to the First Circuit Judicial Conference, in 59 A.B.A.J. 835 (1973); Goldberg, *supra* note 4, at 15; Gressman, *Much Ado About Certiorari,* 52 GEO. L.J. 742, 744 (1964); Poe, Schmidt & Whalen, *supra* note 6, at 846-48; Address by Retired Chief Justice Warren at the Association of the Bar of the City of New York, May 1, 1973, in 59 A.B.A.J. 724, 726-27 (1973).

36. *See* Brennan Address, *supra* note 35, at 837-38. Justice Harlan once observed that "[o]f the total petitions acted on I think it must be said that more than one-half were so untenable that they never should have been filed." Harlan, *Manning the Dikes,* 13 RECORD OF N.Y.C.B.A. 541, 547 (1958); *accord,* Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923) (Taft, C.J.); S. REP. No. 711, 75th Cong., 1st Sess. 38 (1937) (letter from Chief Justice Hughes to Senator Wheeler).

37. *See* Gressman, *supra* note 35, at 747; Warren Address, *supra* note 35, at 727; Westen, *Threat to the Supreme Court,* N.Y. REV. OF BOOKS, Feb. 22, 1973, at 29-30.

38. *See, e.g.,* Douglas, *Managing the Docket of the Supreme Court of the United States,* 25 RECORD OF N.Y.C.B.A. 279, 297-98 (1970); Douglas, *The Supreme Court and Its Case Load,* 45 CORNELL L.Q. 401, 402 (1960). *See also* Tidewater Oil Co. v. United States, 409 U.S. 151, 174 (1972) (Douglas, J., dissenting).

39. 55 HARV. L. RECORD No. 8, at 1 (1972).

40. *See* Warren Address, *supra* note 35, at 726-27.

41. *See* Brennan, *supra* note 6, at 476-77; Brennan Address, *supra* note 35, at 836.

42. Lewin, *Helping the Court With Its Work: A Response to Goldberg and Bickel,* THE NEW REPUBLIC, Mar. 3, 1973, at 15.

proceed under the nonpartisan label of administrative reform, important policy objectives underlie one's evaluation of any alteration in existing jurisdictional practice. Frankfurter and Landis make this point at the beginning of their work on the federal system:

> The mechanism of law . . . cannot be disassociated from the ends that law subserves. So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instrumental; it is the means of effectuating policy. Particularly true is this of the federal courts. The Judiciary Acts . . . are the outcome of continuous interaction of traditional political, social, and economic forces . . . . [T]he legislation governing the structure and function of the federal judicial system is one means of providing the accommodations necessary to the operation of the federal government.[43]

The recognition of this fact in the current debate is a mark of the increased sophistication that has attended public policy dialogue over the last decade or so.

### *Institutional Role of the Supreme Court*

To its credit, the Freund Committee acknowledges at the outset the basic policy judgment underlying its recommendations. This perspective is critical in understanding the committee's proposals and in analyzing the criticisms of its suggested institutional changes:

> Any assessment of the Court's workload will be affected by the conception that is held of the Court's function in our judicial system and in our national life. We accept and underscore the traditional view that the Supreme Court is not simply another court of errors and appeals. Its role is a distinctive and essential one in our legal and constitutional order: to define and vindicate the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union.
>
> The cases which it is the primary duty of the Court to decide are those that, by hypothesis, present the most fundamental and difficult issues of law and judgment.[44]

The critics of the Freund Committee Report take issue with this formulation of the Supreme Court's institutional place in the United States. Former Justice Arthur Goldberg has stated most eloquently what for many represents another important function of the Court:

> It is perhaps the greatest virtue of the Supreme Court as it now functions that it serves as a guarantee to all citizens of whatever estate, race or color, that our highest court is open for consideration of their claim that equal and relevant justice under the Constitution is being denied them.

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43. F. FRANKFURTER & J. LANDIS, *supra* note 20, at 2.

44. REPORT, *supra* note 17, at 1.

> . . . The Committee's proposal would deny to Americans their historic right to take every case raising substantial constitutional questions to the highest court in the land.
>
> I profoundly believe that the Supreme Court as it now functions in discharging its great responsibilities under the Constitution is the ultimate guardian of our liberties.[45]

Another critic has cautioned that "[u]nder the Freund proposal, those doors will close. Power will shift to the palace guard. Citizens will stop appealing to the Supreme Court, stop listening to it and believing in it, and eventually stop obeying it."[46]

Responding to such criticism, Professor Bickel, a member of the Freund panel, contends that these lofty goals, though desirable, are not realistic.[47] Bickel points out that throughout history a gradual erosion in access to the Supreme Court has been a necessary concomitant to population growth, industrialization, and bureaucratization.[48] In view of the increased volume of Court business, Bickel believes that restricted access is a "fact of life" that we must acknowledge and with which we must learn to cope.[49]

The pivotal difference between the Freund Committee's position and that of its critics lies in the particular weights each assigns to the Court's largely symbolic role as the ultimate dispenser of justice within the American judicial system.[50] Identifying the sacrifices that are acceptable in order to maintain this limited function seems to constitute the crucial point of disagreement between those who advocate a National Court of Appeals and those who wish to preserve the right of litigants to seek Supreme Court review. Interestingly enough, this same conflict surfaced at the time the Judges' Bill was considered by Congress. Chief Justice Taft, a spokesman for the viewpoint that the Supreme Court should involve itself only in matters of public importance,[51] provided major leadership in the

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45. Goldberg, *supra* note 4, at 16.

46. Westen, *supra* note 37, at 32.

47. "[Y]es, it is pretty to think so. But it is not true. It cannot be true in a nation of 220,000,000 people . . . served by one Supreme Court." Bickel, *The Overworked Court: A Reply to Arthur J. Goldberg*, THE NEW REPUBLIC, Feb. 17, 1973, at 18.

48. *Id.*

49. *Id.*

50. *Compare* note 45 *supra* and accompanying text *with* note 47 *supra* and accompanying text.

51. *See Hearings Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess., ser. 33, at 2 (1922); Taft, *Possible and Needed Reforms in the Administration of Civil Justice in the Federal Courts*, 57 AM. L. REV. 1, 5-6 (1923). *See generally* F. FRANKFURTER & J. LANDIS, *supra* note 20, at 255-86. Prior to his accession as Chief Justice, Taft had urged similar views about the Court's appropriate role. *See* 10 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 7903-04 (1914). For a case analysis of the degree of importance of questions presented

ultimate drafting and adoption of the Judges' Bill. It was entirely consistent with his philosophy of the Court's role that its obligatory jurisdiction could be restricted without significant loss. Opponents of the Taft position, on the other hand, like the modern critics of the Freund Committee proposal, feared that limiting access to the high court would diminish its role as the guardian of cherished values.[52]

The 1925 Act was characterized early as a total victory for the Taft position—that the Supreme Court sat to resolve legal questions of national significance rather than to do justice in particular cases.[53] In their respected work on the Supreme Court, Frankfurter and Landis described the triumph as follows:

> At the heart of the proposal was the conservation of the Supreme Court as the arbiter of legal issues of national significance. But this object could hardly be attained so long as there persisted the obstinate conception that the Court was to be the vindicator of all federal rights. This conception the Judges' Bill completely overrode. Litigation which did not represent a wide public interest was left to state courts of last resort and to the circuit courts of appeals, always reserving to the Supreme Court power to determine that some national interest justified invoking its jurisdiction.[54]

As the maelstrom over the Freund Committee proposal aptly demonstrates, however, the victory was somewhat less than total.

### *Discretionary Review*

The original justification for expanding the Supreme Court's screening function was the necessity of reducing the excessive backlog of cases, which under then existing jurisdictional statutes[55] required plenary disposition by the Court. The 1925 Act sought to make more manageable the workload of the Court by placing docket control largely in the hands of the Justices.[56] Unfortunately, very little discussion about the specific method of controlling the docket apparently occurred during congressional consideration of the Judges' Bill.[57] Presumably because judicial reform has such a nonpartisan ring to it—especially when the lobbyists are sitting Su-

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to the Court during one term see Note, *The Court, the Bar, and Certiorari at October Term, 1958*, 108 U. PA. L. REV. 1160, 1169 (1960).

52. *E.g.*, 66 CONG. REC. 2928 (1925) (remarks of Senator Heflin of Alabama).

53. *See* note 51 *supra* and accompanying text.

54. F. FRANKFURTER & J. LANDIS, *supra* note 20, at 260-61.

55. For a summary of the jurisdictional legislation that regulated Supreme Court review prior to the Judiciary Act of 1925 see F. FRANKFURTER & J. LANDIS, *supra* note 20, at 255-73.

56. *See generally* Strong, *supra* note 18.

57. *See* Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 985 (1957).

preme Court Justices—Congress accepted uncritically the statute presented by the draftsmen. Although Senator Spencer did enquire in the Senate hearings whether Congress should attempt to define more precisely the situations in which certiorari should be granted,[58] the Justices resisted such restriction of their discretionary authority. Noting that the Court would not exercise a "choice or will in granting or refusing the writ," Justice Van Devanter characterized the process as "a sound judicial discretion" in which the members of the Court would review the briefs and screen "according to recognized principles."[59]

Frankfurter and Landis evidently realized that the ambiguity inherent in the process of determining what matters were of "national concern" was a potential source of conflict, but they justified the flexibility on the ground that further precision was impossible.[60] It should be recognized, however, that the kind of decisions a Justice makes in determining whether to grant review are significantly different from the considerations relevant to a decision on the merits.

The standard of "importance" articulated by Chief Justice Taft and embraced by the Freund Committee members is deceptive. When screening a petition a Justice not only must weigh the significance of the legal issues involved, but also must consider such ancillary questions as whether the particular case raises the issues in a suitable way, whether the parties are adequately represented by counsel, how the other Justices likely will view the merits of the case, and how legal theory and precedent are developed at the particular time.[61] Admittedly, the Court has attempted to establish standards to guide its exercise of certiorari discretion;[62] but most

58. 1924 *Senate Hearings* 31-32.

59. *Id.* at 32.

60. "[S]uch issues appear in myriad forms and no general classification of cases can hope to forecast the specific instances deserving the Court's ultimate judgment." F. FRANKFURTER & J. LANDIS, *supra* note 20, at 257; *cf.* McGautha v. California, 402 U.S. 183 (1971) (standardless imposition of death penalty not violative of due process in view of the historical difficulty of anticipating and codifying those situations in which death sentence is appropriate).

61. "Importance is a relative factor, dependent upon the type of issue involved, the way in which it was decided below, the status of the law on the matter, the correctness of the decision below, and the nature and number of persons who may be affected by the case. . . . Where the writ of certiorari is granted, a combination of factors is usually present to lead the Court to believe that the case is sufficiently important to warrant further review." R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 167 (4th ed. 1969).

62. U.S. Sup. Ct. Rule 19, 398 U.S. 1030 (1969), which outlines the types of reasons that will be considered by the Court in passing upon a certiorari petition, reads in part as follows:

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The

authorities now would agree that the guidelines hardly provide a penetrating insight into the kinds of cases the Court will consider important and on what basis.[63]

The unpredictable nature of the certiorari granting process is nothing new. Lawyers faced with drafting certiorari petitions long have felt that favorable action on their petitions was at best a hit or miss proposition.[64] The annual surveys conducted twenty years ago by Professor Harper and his associates[65] have made it abundantly apparent that considerably more is involved in the screening function than the supporters of the Judges' Bill were willing to admit to Congress. The principles that Justice Van Devanter had called "recognized"[66] in fact were quite unarticulable and opaque to Professor Harper's searching inquiry into the Court's certiorari practice. Clearly much more is at stake in determining the "certworthiness" of a particular case than application of the standard of importance.[67] Indeed, in even the most clearly defined area in which the Supreme Court has said that review is appropriate—the resolution of conflicts among circuits[68]—the Court often has refused to grant review.[69]

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following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

*Id.* at 1030-31.

63. *See* R. STERN & E. GRESSMAN, *supra* note 61, at 152-54; *cf.* Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933,* 48 HARV. L. REV. 238, 262 (1934). *See also* Harlan, *supra* note 36, at 549 (noting that "[f]requently the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules").

64. *See* R. STERN & E. GRESSMAN, *supra* note 61, at 153. *See generally* Prettyman, *Petitioning the United States Supreme Court—A Primer for Hopeful Neophytes,* 51 VA. L. REV. 582 (1965).

65. *See* note 8 *supra.*

66. *See* note 59 *supra* and accompanying text.

67. *See* Gressman, *The National Court of Appeals: A Dissent,* 59 A.B.A.J. 253, 256-57 (1973); Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines,* 82 HARV. L. REV. 63, 88-92 (1968).

68. *See* note 62 *supra*; Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States,* 33 AUSTL. L.J. 108, 111 (1959).

69. *See, e.g.,* Olff v. Eastside Union High School Dist., 404 U.S. 1042 (1972) (Douglas,

If these docketing decisions actually were "legal" in the sense that they sought to apply generally recognized principles to the issue of "importance," they would be indefensible as unprincipled, especially in view of the increasingly stringent demands by the Court itself for certainty and predictability in the exercise of discretionary powers by government officials.[70] Surely if petition screening itself were based on "recognized principles," the Court could develop more precise rules to govern its own management of the process. After all, only a decade after they had prepared the 1925 statute broadening their own discretionary powers, those same Justices who opposed any legislative guidance or restrictions on the Court's exercise of discretionary power voted to hold New Deal legislation[71] unconstitutional as an illegal delegation of congressional power.

The screening function has evolved into an important element of the Court's work that requires the Justices to perform a jurisdictional role in reviewing cases. Although Congress might have reduced the Court's case load by circumscribing the Court's jurisdiction, what Frankfurter and Landis[72] call the "obstinate conception" of the Court as the "vindicator of all federal rights" remained with many members of Congress.[73] The legislative branch was even unwilling to grant total discretion to the Court and specified areas where appellate jurisdiction was to remain obligatory.[74] The Justices may have perceived expanded certiorari jurisdiction as a politically expedient means of avoiding sensitive dialogue with Congress about the specific ground rules that would govern certiorari procedure. The more specific the Justices had been, the more likely they would have run into resistance from those who still felt that the High Court

J., dissenting). *See generally* Stern, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465 (1953).

70. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of federal aid by welfare officials violates due process absent pre-termination evidentiary hearing); Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968) (due process requires that city housing authority allocate low-rent public housing pursuant to ascertainable standards); Hornsby v. Allen, 330 F.2d 55 (5th Cir. 1964) (licensing authority cannot select licensees on basis of uncontrolled discretion and whim or without established standards); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969) (standard of misconduct overly vague to support suspension).

71. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Bituminous Coal Conservation Act of 1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (§ 3 of the National Industrial Recovery Act of 1933 held an unconstitutional delegation of legislative power to the executive); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (National Industrial Recovery Act).

72. *See* note 54 *supra* and accompanying text.

73. *See* note 52 *supra* and accompanying text.

74. *See* note 7 *supra*. *See also* Note, *supra* note 11, at 703.

should remain the ultimate guardian of individual rights.[75] The strategy employed by the Justices in 1925, then, in fact skirted a political flap with Congress by asking essentially for a vote of confidence in the institution of the Supreme Court while leaving to the Justices the task of defining and refining the jurisdictional priorities on the High Court's time and energies.[76] The kinds of jurisdictional decisions that Congress normally makes for the federal judiciary as a whole it delegated to the Justices through passage of the 1925 Act. The political strategy and the result accomplished thereby are a classic outcome of the delegation of political authority by one branch of government to another.

Inasmuch as procedure often is a means of effecting substantive policy,[77] the significance of the jurisdictional power conferred on the Court cannot be minimized. The current critics of the Freund Committee proposal have learned from the experience of the past fifty years that power to control screening is the power to modify the role of the Supreme Court. The legislative abdication of 1925, far from being a total victory for the forces of limited review, merely shifted the forum of contention from the political arena of Congress to the less visible, but nonetheless political, chambers of the Supreme Court. In short, the reform mechanism of discretionary jurisdiction resulted in a compromise by which the Court itself became more politicized. The certiorari procedure permitted the Justices to thrash out internally and on an *ad hoc* basis the appropriate role of the Court. Rather than institutionalizing the viewpoint of Taft and Frankfurter that the Court had a restricted role, the ambiguity of the jurisdictional legislation merely transferred from the Congress to the Court the locus of decision-making authority as to what cases would be heard, and simultaneously transformed a very substantial portion of the Court's work into outright political decision-making.

Following the passage of the 1925 Act, the Taft institutional position was pressed by the Chief Justice and then-Professor Frankfurter.[78] After his appointment to the Court, Frankfurter took up the fight from within. The early cases arising under the Federal Em-

75. *See* Freund, *Why We Need the National Court of Appeals,* 59 A.B.A.J. 247, 249 (1973).

76. *See* 59 A.B.A.J. 724, 728 (1973) (remarks of retired Chief Justice Warren): The purpose of certiorari jurisdiction is "to permit the Court not only to achieve control of its docket but also to establish our national priorities in constitutional and legal matters."

77. *See* F. FRANKFURTER & J. LANDIS, *supra* note 20, at 2.

78. Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1928,* 43 HARV. L. REV. 33 (1929).

ployer's Liability Act (FELA)[79] and the Jones Act[80] epitomize the fundamental disagreement that arose among the Justices in determining what cases warranted review.[81] The division these cases created within the Court evidenced the internal power struggle that discretionary jurisdiction helped to promote. The decision to grant review as a matter of "sound judicial discretion" left the Justices free to vote for or against review on the basis of their own perceptions of the appropriate role of the Court.

A bloc of Justices with sufficient power to control the review-granting process felt that the Court should hear a significant number of the FELA and Jones Act cases that were presented for review.[82] Under FELA, which is the exclusive source of reimbursement for a covered worker who sustains a work-related injury,[83] railroad liability to workers rests upon a finding of negligence.[84] Although the federal statute eliminates such common law defenses as contributory negligence[85] and assumption of risk,[86] the worker must show some breach of duty to recover.[87] In the controversial FELA cases, the issue facing the Court normally involved the propriety of a lower court determination that the evidence adduced by the worker-plaintiff was insufficient to warrant submission of the case to the jury.[88] Indeed, all but one of the 37 certiorari petitions granted in FELA cases during the seventeen terms of court from 1938 to 1954 were filed by employees who had lost on this issue below.[89]

79. 35 Stat. 65 (1908), *as amended,* 45 U.S.C. §§ 51-60 (1970).

80. Merchant Marine Act of 1920, 46 U.S.C. § 688 (1970) (extends the provisions of the FELA to seamen). *See generally* Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960).

81. *See, e.g.,* Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959); Harris v. Pennsylvania R.R., 361 U.S. 15 (1959) (per curiam); Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957); Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956); Wilkerson v. McCarthy, 336 U.S. 53 (1949). *See also* Gallick v. Baltimore & O.R.R., 372 U.S. 108 (1963).

82. *See* Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA,* 69 HARV. L. REV. 1441-47 (1956).

83. New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917).

84. *See* Wilkerson v. McCartby, 336 U.S. 53, 69 (1949).

85. 35 Stat. 65 (1908), *as amended,* 45 U.S.C. § 53 (1970); *see* Ganotis v. New York Cent. R.R., 342 F.2d 767 (6th Cir. 1965).

86. 35 Stat. 65 (1908), *as amended,* 45 U.S.C. § 54 (1970); *see* Schirra v. Delaware, L. & W.R.R., 103 F. Supp. 812 (M.D. Pa. 1952).

87. *See* Kernan v. American Dredging Co., 355 U.S. 426 (1958).

88. *See, e.g.,* New York, N.H. & H.R.R. v. Henegan, 364 U.S. 441 (1960), *rev'g per curiam* 272 F.2d 153 (1st Cir. 1959); Lavender v. Kurn, 327 U.S. 645 ( 1946), *rev'g* 354 Mo. 196, 189 S.W.2d 253 (1945); Tenant v. Peoria & P.U. Ry., 321 U.S. 29 (1944), *rev'g* 134 F.2d 860 (7th Cir. 1943). *See generally* De Parcq, *The Supreme Court and the Federal Employers' Liability Act, 1960-1961 Term,* 39 CHI.-KENT L. REV. 127 (1962).

89. *See* Harris v. Pennsylvania R.R., 361 U.S. 15, 16 (1959) (Douglas, J., dissenting); Note, *supra* note 82, at 1446. For a further breakdown of the relevant statistics with respect

The FELA cases brought an anguished and sometimes embittered response from Justice Frankfurter, who eventually refused to participate in the decision-making process.[90] Frankfurter argued that the FELA cases entailed the resolution of specific factual questions and therefore were not sufficiently generalized in terms of principle to warrant Supreme Court review.[91] Chief Justice Hughes, a supporter of the Frankfurter-Taft conception of the Supreme Court's role, stated in 1937 that "[i]f further review is to be had by the Supreme Court it must be because of the public interest in the questions involved . . . . Review by the Supreme Court is thus in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants."[92] Chief Justice Vinson similarly asserted in 1949 that the "Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions."[93] Notwithstanding the objections of some of its members, the Court noted in the FELA cases that it was "[c]ognizant of the duty to effectuate the intention of the Congress

to the FELA cases see Douglas, *The Supreme Court and Its Case Load,* 45 CORNELL L.Q. 401, 404 (1960).

90. *See, e.g.,* McBride v. Toledo R.R., 354 U.S. 517 (1957); Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 ( 1957); Anderson v. Atlantic Coast Line R.R., 350 U.S. 807 (1955); United States v. Shannon, 342 U.S. 288 (1952); Moore v. Chesapeake & O. Ry., 340 U.S. 573 (1951); Affolder v. New York, C. & St. L.R.R., 339 U.S. 96 (1950); Hill v. Atlantic Coast Line R.R., 336 U.S. 911 (1949). *See also* Frankfurter & Landis, *The Supreme Court Under the Judiciary Act of 1925,* 42 HARV. L. REV. 1 (1928). Justice Frankfurter did participate on occasion, however, where his fifth vote was required for a ruling in favor of the employer. *See* Inman v. Baltimore & O.R.R., 361 U.S. 138 (1959).

91. "For the Supreme Court of the United States to spend two hours of solemn argument, plus countless other hours reading the briefs and record and writing opinions, to determine whether there was evidence to support an allegation that it could reasonably be foreseen that an ice-cream server on a ship would use a butcher's knife to scoop out ice cream that was too hard to be scooped with a regular scoop, is surely to misconceive the discretion that was entrusted to the wisdom of the Court for the control of its calendar.

. . . .

"It is, I helieve, wholly accurate to say that the Court will he enabled to discharge adequately the vital . . . responsibility it bears for the general welfare only if it restricts its reviewing power to the adjudication of constitutional issues or other questions of national importance . . . ." Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 546-47 (1957) (Frankfurter, J., dissenting); *see* Rogers v. Missouri Pac. R.R., 352 U.S. 500, 530 (1957) (Frankfurter, J., dissenting); *cf.* Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) (Justice Frankfurter, dissenting, argues that the circuit courts of appeals are final arbiters in diversity cases and accordingly that Supreme Court review of such cases should not be granted). *See also* Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System* (pt. v.), 39 HARV. L. REV. 1046, 1065-67 (1926).

92. S. REP. No. 711, 75th Cong., 1st Sess. 39 (1937).

93. Address by Mr. Chief Justice Vinson Before the American Bar Association, Sept. 7, 1949, in 69 S. Ct. v, vi (1949).

to secure the right to a jury determination"[94] and expressed its desire to be "vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination."[95]

In a foreword to the *Harvard Law Review's* survey of the 1957 Term, Professor Brown observed that the "present Court views its certiorari jurisdiction as having a different, or at least an added, function—that the Court now sits also, if not principally, as a Court of Selected Error."[96] Moreover, former Chief Justice Warren recently has acknowledged explicitly that rendering "summary justice" where the Justices deem it "appropriate" is an essential function of the Court.[97] The FELA cases indicated that the victory claimed by Frankfurter and Taft in the aftermath of the 1925 Act was instead a step in the direction of increased Court autonomy which led to politicization of the decisions of docket control. Since decisions of "importance" in granting or denying review were never considered decisions of the Court for purposes of stare decisis,[98] whenever a sufficient number of Justices felt that the Court should hear a case, regardless of its scope, the open-ended certiorari procedure enabled that faction to prevail on purely political grounds. Accordingly, an individual Justice's vote on certiorari legitimately could reflect his own views without the institutional restraints normally imposed by precedent. Because there could be no resort to "principle," the issue was decided solely on the basis of the political influence and power of individual Justices or factions within the Court.[99]

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94. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 509 (1957).

95. *Id.*

96. Brown, *supra* note 11, at 78.

97. 59 A.B.A.J. 721, 729 (1973); *cf.* Miller v. California, 93 S. Ct. 2607, 2614 n.3 (1973); Redrup v. New York, 386 U.S. 767 (1967).

98. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." United States v. Carver, 260 U.S. 482, 490 (1923); *see* Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 379 n.8 (1957) (Harlan, J., dissenting); Brown v. Allen, 344 U.S. 443, 497 (1953); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-20 (1950) (opinion of Frankfurter, J.). *See also* Harper & Rosenthal, *supra* note 8, at 297; Address by Justice Brennan, Pennsylvania Bar Association Annual Meeting, Feb. 3, 1960, in 31 PA. B.A.Q. 393, 402-03 (1960).

99. The kind of restraint imposed by precedent is well illustrated by the concurring opinions of Chief Justice Burger and Justices Powell and Rehnquist in White v. Weiser, 93 S. Ct. 2348 (1973) (a congressional redistricting case). In Kirkpatrick v. Preisler, 394 U.S. 526 (1969), the Court had established mathematical precision as the standard of population equality for congressional apportionment. In Mahan v. Howell, 410 U.S. 315 ( 1973), the Court held that the *Kirkpatrick* rigidity did not apply to state apportionment situations. In *Weiser* the Court distinguished *Mahan,* reaffirming the principle established in *Kirkpatrick*; the

*Screening as a Passive Virtue*

The early advocates of discretionary Supreme Court review apprehended the ambiguity of the guidelines and the uncertainty of the practice, but justified on grounds of expediency the failure to develop a common law of petition review.[100] The mystery of the review-granting process is exacerbated by the failure of the Court to indicate its grounds for refusing to grant a hearing.[101] Indeed, stating reasons for each denial of certiorari doubtless would add an intolerable burden to the work of the Justices and their clerks.[102] But if the screening process does turn so heavily on political factors, the members of the Court might find being bound by such "legal" precedent unacceptable. This concern may more accurately explain the Court's reluctance to specify its grounds for denying certiorari. As things stand, the mystery of the procedure retains a maximum of flexibility for the Court and for the individual Justices and permits them to rely on subjective factors like expediency that traditionally have not been deemed appropriate considerations in the judicial realm.

In an influential article written about ten years ago,[103] Professor Bickel attempted to come to grips with the not-so-judicial modes of decision-making sometimes utilized by the Supreme Court. Bickel expressly advocated that the Court employ techniques of expediency in disposing of cases that otherwise might establish unwanted principles.[104] For Bickel, the Court's certiorari jurisdiction

concurring justices found *Kirkpatrick* controlling and voted with the other members of the Court, but they noted that they disagreed with the rule enunciated in *Kirkpatrick*. Only in deference to the constraint of precedent did they vote for affirmance. *Cf.* Perkins v. Matthews, 400 U.S. 379, 397 (1971) (Blackmun, J., concurring).

100. "[I]t bas been suggested from time to time that the Court indicate its reasons for denial. Practical considerations preclude. . . . If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive, apart from the fact . . . tbat different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable." Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J.). *See also* Chemical Bank & Trust Co. v. Group of Institutional Investors, 343 U.S. 982 (1952); Bondholders, Inc. v. Powell, 342 U.S. 921 (1952).

101. *See* Harper & Leibowitz, *supra* note 8, at 432; Harper & Pratt, *supra* note 8, at 440.

102. The Freund Committee does suggest, however, that brief statements about reasons for granting or denying review would be useful to the bar. REPORT, *supra* note 17, at 23.

103. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

104. *Id.* at 56-57. Professor Bickel has stated that "[o]ur democratic system of government exists in [the] . . . tension between principle and expediency, and within it judicial review must play its role." A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 68 (1962).

represented an excellent mechanism to avoid deciding cases for reasons of political expediency through open political manipulation of the Court's docket.[105] Far from apologizing for the lack of standards and ambiguity, Bickel viewed them as virtues—albeit passive ones.[106] In this respect, Bickel's position departed from earlier explanations of the Court's exercise of its certiorari power.

Professor Bickel begins his article with the observation that a society cannot long survive unless it makes liberal use of the art of compromise.[107] He concedes that the Supreme Court must decide the merits of a case according to neutral principles,[108] since in its decision-making process the Court derives its legitimacy from its use of principle in contrast to the expediency that often informs the legislative process in the face of a need for compromise.[109] He argues, however, that requiring neutral principles for the preliminary determination of whether to make a decision on the merits would eliminate the flexibility necessary for compromise. This decision—when to refrain from confronting a case or an issue—need not be principled in the same way that decisions on the merits are.[110]

Bickel notes that the Court has open to it three courses of action in any situation: it can validate (and therefore legitimate); it can invalidate; or it can do neither.[111] Application of the rule of neutral principles to the determination of whether to decide a case would effectively reduce the Court's ability to avoid legitimating, on the basis of principle, political decisions made by the political institutions on the ground of expediency. Thus Bickel argues that a Court may not be able to articulate a satisfactory principle that would allow invalidation of a political act. By the same token, however, it

105. Bickel, *supra* note 103, at 46. A "literal reliance on *Marbury v. Madison,*" Bickel observes, would lead to a "rampant activism" on the part of the Court. *Id.* at 47.

106. Professor Gunther has described Bickel's "prudential considerations" as "law-debasing." Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 COLUM. L. REV. 1, 13 (1964). The emphasis on political consequences, Gunther believes, "confuses the probable impacts of adjudication with the proper ingredients of the adjudicatory process," and jeopardizes the "integrity of the Court's principled process." *Id.* at 15-16.

107. "No good society can be unprincipled; and no viable society can be principle-ridden." Bickel, *supra* note 103, at 49.

108. *See* Bickel, *supra* note 103, at 48. "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is resolved." Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 19 (1959). *See also* Hart, *the Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices,* 73 HARV. L. REV. 84, 99 (1959).

109. Bickel, *supra* note 103, at 49.

110. *Id.* at 51.

111. *Id.* at 50; *see* A. BICKEL, *supra* note 104, at 69.

should avoid for political reasons the added sanction that would result from putting the prestige of its imprimatur of principle behind a politically expedient decision.[112] As Bickel indicates, the compromise of avoidance is one way of side-stepping the establishment of unwanted principle.[113]

The Bickel thesis is an extension of the Taft view that the Supreme Court should concern itself only with issues of broad constitutional significance. Bickel, however, goes well beyond the original Taft thrust in stating candidly that the "mediating devices" by which the Court avoids decision-making cannot themselves be principled. For Bickel, this does not mean "unchanneled, undirected, unchartered discretion;"[114] nor does it mean "impulse, hunch, sentiment, [or] predilection . . . ."[115] What it does represent is "prudence."[116]

Treatment of the Supreme Court's certiorari jurisdiction as expressly political is perhaps the logical culmination of Taft's philosophy that the Court should function solely as the arbiter of issues of national significance, rather than as the "vindicator of all federal rights."[117] Labeling the process political, however, does not resolve the basic question of when a case—if not unimportant—is inappropriate for Supreme Court consideration and resolution.[118] An assumption that the members of the Supreme Court have a homogeneous view of desirable social policy seems to underlie Bickel's thesis.[119] Accordingly, Professor Bickel's position, while a good deal

112. "It is no small matter . . . to 'legitimate' a legislative measure. The Court's prestige, the spell it casts as a symbol, enables it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution. The Court, regardless of what it intends, can generate consent and may impart permanence." Bickel, *supra* note 103, at 48.

113. *Id.* at 56-57.

114. *Id.* at 51.

115. *Id.*

116. *Id. See* note 106 *supra; cf.* note 59 *supra* and accompanying text.

117. *See* note 54 *supra* and accompanying text.

118. For an incisive critique of Professor Bickel's arguments see Gunther, *supra* note 106.

119. For example, it is likely that Justices Douglas and Rehnquist have different political views concerning sound social policy, and President Nixon has made it clear in his public statements that the Justices he appoints to the Supreme Court will have political philosophies at variance with those of the Warren era. The unanimous jury cases point up the problem. *See* Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972). Only a relatively few states provided for criminal convictions by less than unanimous vote. Deciding that these non-unanimous jury statutes were constitutional had the legitimating effect that Bickel described; but while this may be an "unwanted principle" to some, it is apparent that others sought to establish the constitutional legitimacy of non-unanimous criminal juries precisely because of the ripple effect that such a decision would have in

more sophisticated than that advanced at the time of the enactment of the Judges' Bill, suffers from the notion that there is a single well-defined end for society. Although the questionable validity of this assumption may raise serious doubts about the value of the Bickel formulation for institutional guidance, it does, of course, assist individual Justices in deciding when to vote in favor of review.

*Screening and the Court's Legitimacy*

In 1925, discretionary jurisdiction was envisaged as a means of enabling the Court to single out matters of "importance." It was assumed that members of the Court could agree easily on which cases fell into this category. Experience has shown, however, that this basis for determining certworthiness was an invitation for politicizing the review-granting process. In recognition of this fact, Bickel has urged that the process be treated as frankly political and sets forth an institutional rationale for so treating it.[120] The passive virtues concept, however, relies heavily on Bickel's belief that the proper role of the Supreme Court is to define and vindicate broad constitutional principles, rather than to do justice in individual cases. Accordingly, the concept does not seem to give adequate consideration to conflicting views about the Court's appropriate role.

Professor Deutsch indicates this in explaining that acceptance of Supreme Court decisions does not derive solely from their being principled adjudications, but also comes from the credibility of the Court as a safeguarder of constitutional liberties.[121] Deutsch uses this analysis to argue that Bickel's line-drawing between the Court's avoidance of decision on the merits and its per curiam practice[122] (early examined and criticized by Professor Brown)[123] is artificial because the per curiams—though formally decisions on the mer-

numerous states. *Cf.* Branzburg v. Hayes, 408 U.S. 665 (1972) (no newsman's testimonial privilege under the first amendment).

120. *See* note 107 *supra*.

121. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science,* 20 STAN. L. REV. 169, 216 (1968). *See also* Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal,* 59 A.B.A.J. 724, 730 (1973) (remarks of retired Chief Justice Warren); Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L.J. 517, 562-66 (1966).

122. Per curiam adjudication of the type discussed is a method of disposing of cases on the basis of preliminary papers normally without full briefing and argument. *See* Harper & Pratt, *supra* note 8, at 446-51.

123. *See* Brown, *supra* note 11, at 82-93. *See also Per Curiam Decisions of the Supreme Court: 1958 Term,* 27 U. CHI. L. REV. 128 (1959).

its—are simply devices for re-establishing the Court's credibility.[124] In this way, Deutsch argues, the per curiams are also "mediating devices" and thus should be evaluated in political terms, free from the requirement of principled adjudication.[125] The important point for the present discussion is that there still exists significant disagreement whether avoidance invariably entails compromise, and if so, whether the competing value of credibility often might not be sacrificed in the process.[126] A realization of this confiict points up both the continuing controversy of the FELA cases—whether the Court should sit to remedy specific injustices—and the naivete of the Bickel assumption that somehow the members of the Court will be able to reach a consensus on what is a desirable policy outcome.[127]

Professor Deutsch's critique of Bickel also provides a useful perspective for the controversy between the Freund Committee and its critics. As previously discussed, the Study Group Report acknowledges that the proposed National Court of Appeals closely conforms to the Taft-Frankfurter conception of the Supreme Court's role.[128] By placing initial screening responsibilities with an intermediate body, the proposal imposes restraint on the Supreme Court. The institutionalized system of selecting sitting federal appellate judges would make the National Court of Appeals less susceptible to political influence through the process of appointment.[129] Moreover, since the high court would retain its ability to deny review even of cases passed on to it by the lower court, the intermediate court could not bind the Supreme Court to hear any case or review any issue. While a petitioner under the proposed system would have to clear a double hurdle before obtaining review, a party seeking to block review would need to prevail only at one level. Thus the

124. Deutsch, *supra* note 121, at 212. *Cf.* note 97 *supra.*

125. Deutsch, *supra* note 121, at 221.

126. *Cf.* Henkin, *supra* note 67, at 87. Professor Henkin questions whether the Court's avoidance of the controversial legal issues posed by the Vietnam War did not undermine its credibility. Similarly, the Court's refusal to have resolved the Pentagon Papers Case, New York Times Co. v. United States, 403 U.S. 713 (1971), or the Amchitka nuclear detonation case, Committee on Nuclear Responsibility v. Schlesinger, 404 U.S. 917 (1971), would have raised serious doubts about the Court's credibility. For the same reasons, people confidently predict that the Court ultimately will hear and decide the question of executive privilege raised by the Watergate tapes.

127. If there is significant disagreement among members of the Court as to a desirable policy outcome, then the use of unprincipled mediating devices becomes highly questionable since it resolves intra-Court conflict according to a process that may endanger the integrity of the Court's work. *See generally* Gunther, *supra* note 106, at 15-16.

128. *See* note 44 *supra* and accompanying text.

129. *See* REPORT, *supra* note 17, at 19-20.

screening function, admittedly politicized, would be less exposed to political influences, and the new court would establish a structural bias against review.

Even more striking in the ongoing controversy is the notion that the Supreme Court's credibility might be compromised by implementation of the Freund Committee proposal. As recognized some fifteen years ago by Professor Brown[130] and as reiterated by former Chief Justice Warren,[131] the Court can play an important role as a Court of Selected Error. Professor Deutsch has observed that such a function helps to build support for the Court's decisions because of the increased credibility it achieves as a doer of justice.[132] Indeed, the function of the Court as a safeguarder of individual liberties is emphasized consistently by critics of the Freund Committee,[133] and it is very clear that the National Court of Appeals effectively would cut off from Supreme Court review those cases in which the principles involved might not be of general significance but in which specific individual liberties might have been compromised.[134] On the other hand, the position taken by Bickel, and evidently by the Freund Committee collectively, is that the legitimacy of the Court's actions stems from its use of neutral principles in deciding cases and resolving disputes.[135] If the Freund Committee's critics and Professor Deutsch are correct that part of the Court's legitimacy derives from the credibility it builds by dispensing justice in individual cases, then the Committee's proposal might impair the effectiveness of the Court and undermine its national respect. The Committee seems to have been aware of the need to allow the Supreme Court to decline review of cases certified by the National Court of Appeals as a means of achieving compromise by avoiding decisions.[136] The question posed by the critics and this analysis, however, is whether the Committee was sufficiently sensitive to another sort of accommodation necessary for political ends—the necessity that the Court's "door . . . remain open to all people and to all claims of injustice."[137]

130. Brown, *supra* note 11, at 78.
131. 59 A.B.A.J. 721, 729 (1973).
132. *See* Deutsch, *supra* note 121, at 216; Gunther, *supra* note 106, at 25.
133. *See, e.g.*, Goldberg, *supra* note 4, at 16; Gressman, *supra* note 67, at 257.
134. *See* REPORT, *supra* note 17, at 18.
135. *See* A. BICKEL, *supra* note 104.
136. *See id.* at 22.
137. 59 A.B.A.J. 721, 730 (1973) (remarks of retired Chief Justice Warren).

### *The Rule of Four*

When the Justices presented their reform bill to Congress, they indicated that every petition for review would be examined by each member of the Court[138] and that the votes of four Justices would suffice for a grant of review.[139] Justice Van Devanter, as a spokesman for the Court, assured members of Congress that the vote of four Justices would always grant review and that in some instances the vote of three would suffice.[140] In the opinion of Professor Freund, these assurances were necessary to allay the serious misgivings that existed about the substitution of discretionary for obligatory Supreme Court jurisdiction.[141]

Although remarkably little has been written about the so-called rule of four,[142] there has been considerable divergence of opinion about what effect the rule should have on the review granting process.[143] This disagreement about the meaning of the rule of four is

138. *See* H. R. REP. No. 1075, 68th Cong., 2d Sess. 3 ( 1925).

139. "For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case the petition should be granted. This is the uniform way in which petitions for writs of certiorari are considered." 1924 *Senate Hearings* 32 (remarks of Mr. Justice Van Devanter).

140. H.R. REP. No. 1075, 68th Cong., 2d Sess. 3 (1925); *see* note 139 *supra* and accompanying text. *See also Hearings on S. 1392 Before the Senate Comm. on the Judiciary,* 75th Cong., 1st Sess., pt. 3, at 490 (1937) (letter of Chief Justice Hughes).

141. *See* Freund, *Why We Need the National Court of Appeals,* 59 A.B.A.J. 247, 249 (1973).

142. Leiman, *supra* note 57, at 981 ("Research has yielded no evidence of its origins or early history."); *see* Bailey v. Central Vt. R.R., 319 U.S. 350, 359 (1943); *Hearings on S. 2176 Before the Senate Comm. on the Judiciary,* 74th Cong., 1st Sess., at 8, 9 (1935) (wherein Mr. Justice Van Devanter observed that the rule of four "originated before almost all the members of the Court thought of being there").

143. In some situations four Justices who feel that a case commends itself for review might not insist on setting the case for argument because of their belief that the majority's contrary view of the merits is unchangeable. *See, e.g.,* LaValle v. Delle Rose, 410 U.S. 690, 695 (1973) (Brennan, Douglas, Marshall, and Stewart, JJ., dissenting); Lippitt v. Cipollone, 404 U.S. 1032 (1972) (Douglas, Brennan, White, and Powell, JJ., dissenting). Moreover, four Justices might agree that the Court should remand a case and consequently dissent from a denial of certiorari. In Gay v. United States, 93 S. Ct. 2152 (1973), for example, Justices Brennan, Douglas, Marshall, and Stewart dissented from a denial of certiorari although recoguizing that no federal statute or constitutional issue was involved. They believed that the Court should exercise its supervisory power over the federal courts to remand a case in which they felt that the integrity of the disinterestedness of the judiciary was at stake. Evidently the dissenting Justices believed that a full argument would have been futile in view of the majority's attitude toward the merits of the case. The *Gay* case does, however, illustrate how the Court can assume a role both as a doer of justice and as a preserver of judicial propriety.

yet another illustration of the different conclusions that follow from different premises regarding the Supreme Court's function. The issue arose most acutely in the FELA cases, in which Justice Frankfurter adopted the view that the rule of four was not a binding command on the Court, but rather a working rule of thumb to which the majority deferred.[144] Thus, for Justice Frankfurter, the fact that four justices voted to grant review was "ample proof" that a case raised a question of national importance and that the majority accordingly should accept this determination as a matter of policy.[145] But Justice Frankfurter refrained from voting on the merits in FELA cases,[146] which he felt did not warrant Supreme Court review, because as a class they involved individualized rather than generalized problems.[147] In his dissenting opinions he stated his belief that the "reason for deference to a minority view no longer holds when a class of litigation is given a special and privileged position."[148]

Justice Harlan, however, took a different view. In his opinion the vote of four Justices sufficed to place a case properly before the Court and to impose on the Court an obligation for principled adjudication.[149] This obligation was especially strong where a class of cases systematically was taken for review against the wishes of the majority because in those instances the majority could undercut the principle of minority control of the screening process.[150]

In her article on the rule of four, Leiman concluded that Justice Frankfurter's view—that the rule of four was not binding on the majority but only a useful guide deserving of some deference—was preferable.[151] While recognizing that the Court's exercise of discretion in screening requires some safeguard, Leiman viewed Harlan's approach as extreme and preferred to regard the four-vote rule as a tool of delay, a means to force majority consideration but not disposition of a case or an issue.[152]

144. *See* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting). *See also* United States v. Shannon, 342 U.S. 288, 296-97 (1952) (Frankfurter, J., dissenting).

145. Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 529 (1957).

146. *See* note 90 *supra* and accompanying text.

147. *See* note 91 *supra* and accompanying text.

148. Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 529 (1957).

149. *Id.* at 559 (Harlan, J., dissenting); *see* Rogers v. Missouri Pac. R.R., 352 U.S. 500, 559 (1957) (Harlan, J., dissenting); *accord,* Bailey v. Central Vt. R.R., 319 U.S. 350, 358-59 (1943) (Stone, C.J., concurring).

150. 352 U.S. at 560; *accord,* Sentilles v. Inter-Caribbean Corp., 361 U.S. 107, 111 (1959) (Stewart, J., concurring).

151. Leiman, *supra* note 57, at 988.

152. *Id.*

Justice Douglas, who believes that the rule of four represented a compromise by the Justices of the Court in return for Congressional approval of expanded discretionary review, sees the rule of four as a legally binding procedure governing screening.[153] Without this safeguard of minority control over access to the Court, Congress, according to Douglas, would not have delegated to the Justices such broad discretionary authority.[154] Professor Freund seemingly concedes this.[155] The fear that discretionary review would eliminate the function of the Court in administering "essential justice"[156] led to institutionalizing a minority rule on granting review. From this perspective the four-vote rule provides an objective measure of "importance." As Justice Douglas has written, "[m]inority control, therefore, makes the present docket control tolerable."[157]

Consistent with his position that the rule of four institutionalizes minority control of screening, Justice Douglas has stated that when the Court has seven Justices sitting, only three must vote for a grant of review.[158] Although at the Senate hearings on the Judges' Bill Justice Van Devanter mentioned that the vote of three Justices would suffice for granting review in some circumstances, he was not precise in explaining what those situations were.[159] When only seven Justices can participate in a case—either because of recusals or vacancies on the Court—faithfulness to the minority control concept would lead to a rule of three. Justice Douglas has revealed that this is in fact the Court's practice.[160]

153. *Cf.* Bickel, *supra* note 103, at 58.

154. *See* Harris v. Pennsylvania R.R., 361 U.S. 15, 18 & n.3 (1959) (Douglas, J., concurring).

155. *See* Freund, *supra* note 141, at 249. *See also* Burton, *Judging Is Also Administration,* 21 TEMP. L.Q. 77, 84-85 (1947).

156. *See* Gressman, *supra* note 67, at 257.

157. Douglas, *Managing the Docket of the Supreme Court of the United States,* 25 RECORD OF N.Y.C.B.A. 279, 298 (1970).

158. *Id.*

159. *See* notes 139 & 140 *supra* and accompanying text.

160. *See* Douglas, *supra* note 157, at 298. This practice was disregarded recently, however, in Stanley v. United States, 404 U.S. 996 (1971), wherein certiorari was denied despite the strong dissents of Justices Brennan, Marshall, and Stewart. The deaths of Justices Black and Harlan at the outset of the 1971-72 Term left the court with only seven members, three of whom should have been able to grant review. Petitioners in *Stanley,* who had been convicted for the possession and manufacture of LSD, sought Supreme Court review of an affirmance of their convictions by the Court of Appeals for the Ninth Circuit. United States v. Stanley, 427 F.2d 1066 (9th Cir. 1970). With three justices dissenting, the Supreme Court granted certiorari, Stanley v. United States, 400 U.S. 936 (1970), but remanded the case to the Ninth Circuit in accordance with suggestions contained in a memorandum filed by the Solicitor General. On remand, the lower court adopted the rationale of Justice Douglas, who,

Examples of built-in mechanisms for minority control of review in other areas are numerous. For many years the Selective Service System has allowed appeal of a draft classification to the President as a matter of right if at least one member of the appeals board has dissented from the registrant's classification.[161] Similarly, certain cases are appealable of right to the New York State Court of Appeals if a single judge in the intermediate appellate court dissents.[162] Evidencing its apparent awareness of the popular appeal of the minority rule screening device, the Freund Committee suggested that a rule of three govern certification of cases to the Supreme Court from the proposed seven-member National Court of Appeals.[163] This would be one way of institutionalizing the Committee's belief that "where there is serious doubt, the National Court of Appeals should certify a petition rather than [deny] review."[164] As Justice Douglas has written about the rule of four,[165] the Freund Committee seems to regard the minority rule provision as a safeguard built into its reform.[166]

Thus, the rule of four seems implicitly related to the concept of minority control of the docket, and the rule of three when only seven Justices are sitting seems to confirm the connection.[167] Given the vast authority conferred on the Supreme Court by the Judges' Bill and the persistently "obstinate conception" that the Supreme Court is a court of last resort for individuals deprived of federal rights, the Douglas view of the binding, institutionalized effect of the rule of four should be adopted.[168]

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in dissenting from the Court's grant of certiorari, had expressed an opinion on the merits of the case. *See* United States v. Stanley, 446 F.2d 374, 376 (9th Cir. 1971). When review of the Ninth Circuit's disposition of the case again was sought, Chief Justice Burger apparently voted with the previous dissenting Justices to deny certiorari. Why the case was not set for argument was never explained by the Court. *See also* Donaldson v. California, 404 U.S. 968 (1971).

161. *See* 32 C.F.R. § 1627.1(b) (1972).

162. *See* N.Y. Civ. Prac. § 5601(a) (McKinney 1963), *as amended in part*, N.Y. Civ. Prac. § 5601(a) (Cum. Supp. 1972).

163. *See* Report, *supra* note 17, at 21 & 23.

164. *Id.* at 21.

165. *See* Douglas, *supra* note 157, at 298.

166. "We believe our recommendation minimizes the chances of an erratic subjectivity. There are safeguards in the method of designation of the judges; and if the vote of three of the seven judges were to suffice for certification to the Supreme Court the concurrence of five of the seven would be required to deny the certification." Report, *supra* note 17, at 23.

167. *But see* Leiman, *supra* note 57, at 982. The cases cited by Leiman arose when eight members of the Court were sitting. Josephson v. United States, 333 U.S. 838 (1948); Scarborough v. Pennsyvania R.R., 326 U.S. 755 (1945).

168. Of course, those who share the limited Frankfurter view of the Supreme Court's appropriate function likely would reject as a matter of policy the institutionalization of the

*Dismissal of the Writ as Improvidently Granted*

The foregoing discussion of the Supreme Court's discretionary jurisdiction, the Freund Committee's proposal for reform, and the rule of four provides a framework within which to discuss a specific practice used in disposing of a number of cases. The analysis now turns to the Court's practice of issuing writs of certiorari that are dismissed after full briefing and argument, without a decision on the merits. Dismissals of certiorari as improvidently granted[169] can influence the kinds of cases that receive principled adjudication on the merits. Since a dismissal has the same effect as a denial of certiorari in the first place, the question addressed in this section is whether the same procedure and decision-making mode that characterize the initial screening process should be applied also to dismissals of certiorari as improvidently granted.

The recent case of *Hughes Tool Co. v. Trans World Airlines, Inc.*,[170] is a forceful illustration of the potentially serious economic consequences of a writ dismissal. In 1961 TWA filed an antitrust suit against Hughes Tool Company. The district court[171] and the Second Circuit[172] both found that TWA had stated grounds for recovery and that the order of the Civil Aeronautics Board affecting the relationship between TWA and its large stockholder, Hughes Tool, did not constitute a valid defense to TWA's suit. Although it granted certiorari[173] in 1964, the Supreme Court subsequently dismissed the writ as improvidently granted after hearing argument.[174] Returned to the district court for further proceedings to determine the amount of TWA's damages,[175] the case again was affirmed by the Second Circuit.[176] The Supreme Court, which granted certiorari in 1972,[177] rendered a decision in January 1973, wherein it held that

rule of four to govern the screening process; but recognition of the "obstinate conception" that Frankfurter deplored leads to the conclusion that any other view of the four-vote rule would have been unacceptable politically in 1925 and probably would be so today. *Cf.* 59 A.B.A.J. 835 (1973) (comments of Justice Brennan); Goldberg, *supra* note 4; Gressman, *supra* note 67; 59 A.B.A.J. 724 (1973) (comments of Retired Chief Justice Warren); Westen, *supra* note 37.

169. *See* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 526-27 n.4 (1957) (Frankfurter, J., dissenting).

170. 409 U.S. 363 (1973).

171. 32 F.R.D. 604 (S.D.N.Y. 1963).

172. 332 F.2d 602 (2d Cir. 1964).

173. 379 U.S. 912 (1964).

174. 380 U.S. 248 (1965). *See* 409 U.S. at 365 n.1.

175. 308 F. Supp. 679 (S.D.N.Y. 1969). *See also* Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970) (determination of award of attorney's fees).

176. 449 F.2d 51 (2d Cir. 1971).

177. 405 U.S. 915 (1972).

the actions of Hughes Tool were immunized[178] from the charges of TWA because of the role played by the Civil Aeronautics Board. Since the 1965 writ dismissal had no substantive precedential weight, the Court dismissed the entire lawsuit.[179] As Chief Justice Burger's dissent vividly points out, the issue of immunity was raised before the Court in 1964,[180] and the precedent that the 1973 Court found dispositive already had been decided in 1963.[181] Yet the costs incurred during the years of protracted litigation were staggering.[182]

Although the *Hughes Tool* case underscores the potential economic impact of dismissing a writ as improvidently granted, the significance of certiorari dismissals is not limited to the substantial effects it may have on the individual litigants. As an element of docket control, certiorari dismissals can affect the substance of the Court's work. Timing of review and determining whether specific substantive issues will be accorded principled adjudication can be affected by the rules and procedures governing writ dismissal. In 1970, for example, the Supreme Court granted certiorari[183] to consider the question whether the fifth amendment privilege against self-incrimination requires transactional or testimonial immunity before a witness can be compelled to give self-incriminating testimony. In *Piccirillo v. New York*[184] petitioner, who had been convicted of criminal assault on a policeman, was summoned before a New York investigating grand jury to testify about the assault and alleged conspiracies arising in connection with it. Refusing initially on fifth amendment grounds to testify, petitioner was granted immunity. Shortly thereafter, a policeman testified to the grand jury that Piccirillo had offered him money as an inducement to dispose of the incriminating weapons. Subsequently indicted and convicted of bribery, Piccirillo urged on appeal that even though he did not actually discuss the attempted bribe in his own testimony, the fifth amendment barred conviction for any transaction revealed by testimony compelled under a grant of immunity.

After having heard full argument on the case, five members of the Court voted to dismiss the writ as improvidently granted. Jus-

178. Section 414 of the Federal Aviation Act of 1958, 49 U.S.C. § 1384 (1970), immunizes from antitrust liability any conduct approved by a Civil Aeronautics Board (CAB) order issued pursuant to the provisions of § 408 of the Act.

179. 409 U.S. at 365 n.1.

180. 409 U.S. at 392, n.9 (dissenting opinion).

181. *See* Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963).

182. Plaintiff's attorneys' fees amounted to $7.5 million and its costs were $336,605.12.

183. Piccirillo v. New York, 397 U.S. 933 (1970).

184. 400 U.S. 548 (1971) (per curiam).

tices Brennan, Marshall, Douglas and Black, dissenting, expressed their belief that dismissal was inappropriate.[185] Justice Brennan, in a dissenting opinion joined by Justice Marshall, explained in detail why the procedural posture of this immunity case was peculiarly well suited for a determination of the scope of the fifth amendment privilege.[186] Since Piccirillo had been prosecuted for an offense that was related to his testimony, the issue before the Court was whether the conviction, "given the substance of the compelled testimony, falls within the constitutionally required immunity."[187] As Justices Brennan and Marshall noted, such a case comes complete with a detailed factual record that shows the substance of the compelled testimony, the way in which the prosecutor used that information, and the crime for which the defendant subsequently was convicted.[188] This background "provides important considerations to anchor and inform the constitutional judgment."[189] At the other extreme, an immunity question can arise when a witness refuses to testify on the ground that the immunity statute is not co-extensive with the fifth amendment privilege. Because no testimony has in fact been compelled, the Court in such circumstances is required to analyze the particular statutory immunity provisions on a barren record. In the absence of specific testimony by which to examine the fifth amendment privilege, any decision in that situation necessarily must emphasize nuances in abstract statutory interpretation. In short, the record in *Piccirillo* provided an excellent and rare opportunity to adjudicate the constitutional issues in the context of a concrete factual setting.

As the dissenting Justices predicted, when the court subsequently accepted review on the scope of immunity issue, it dealt with cases in which witnesses had refused to testify and were facing contempt citations.[190] Moreover, the deaths of Justices Harlan and Black before the beginning of the 1971-72 term markedly changed the composition of the Court. One never knows whether it is the Court's different posture or a change in personnel that affects the outcome of a particular case.[191] Nonetheless it is clear that since

185. *Id.* at 549, 552.
186. *Id.* at 552-61.
187. *Id.* at 557.
188. *Id.* at 557-58.
189. *Id.* at 558.
190. *See* Kastigar v. United States, 406 U.S. 441 (1972), *rehearing denied,* 408 U.S. 931 (1972); Zicarelli v. New Jersey Comm'n of Investigation, 406 U.S. 472 (1972).
191. Neither Justice Rehnquist nor Justice Brennan participated in *Kastigar* or *Zicarelli.*

dismissal of certiorari can have a significant effect on the timing and posturing of issues, the ground rules on which such dismissal power is exercised should be of considerable concern.

In the Senate hearings on the Judges' Bill, Justices McReynolds[192] and Van Devanter[193] described the practice of dismissing writs as improvidently granted, and it is therefore certain that some awareness of the practice existed at the time Congress elected to expand discretionary Supreme Court jurisdiction. As Justice Van Devanter explained to Congress, the Court had dismissed as improvidently granted writs in several cases during the October 1922 term: "[T]hat is to say, the court found after a full hearing that the case really turned upon some matter which afforded no reasonable or appropriate basis for granting the writ."[194] As Justice Van Devanter went on to note, although the preliminary papers stated that an important question of law was involved, counsel on argument "conceded that it turned entirely upon a question of fact and that this was all that was involved. We then dismissed the petition as . . . improvidently granted."[195] Justice McReynolds observed that "if those facts had been clearly pointed out to us to start with the petition never would have been granted; this is what is meant by saying that the petition was improvidently granted."[196]

Locating cases in which the Supreme Court has dismissed writs as improvidently granted is not an easy task because there is no applicable research tool that isolates them.[197] Moreover, the recent *Harvard Law Review* studies of the Supreme Court's docket omit reference to such cases.[198] Accordingly, one cannot be sure that his research is complete. Nevertheless, with that caveat in mind, one can conclude that until the 1950's the Court's use of writ dismissal was decidedly uncontroversial.[199] While the Court did dismiss cases after briefing and argument, a dissent was a rare occurrence.[200] The

192. *See* 1924 *Senate Hearings* 31.

193. *See id.* Justice Van Devanter also noted that "[g]ranting writs means, and only means, that the court finds *probable* cause for a full consideration of the case in ordinary course." *Id.* at 30 (emphasis added).

194. *Id.* at 31.

195. *Id.*

196. *Id.*

197. A collection of pre-1954 cases involving writ dismissals as improvidently granted may be found in Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 78 n.2 (1955). *See also* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 227-30 (4th ed. 1969).

198. *See, e.g., The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 344-53 (1971).

199. *Compare* Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955), *with* cases cited at 349 U.S. 78 n.2.

200. *See* Harper & Rosenthal, *supra* note 8, at 296.

situations described by Justices Van Devanter and McReynolds seemed to characterize accurately early dismissals as improvidently granted.[201] In these kinds of cases, further review of the entire record revealed that different issues were involved than the Justices originally had suspected.[202] In some situations, too, the Justices have indicated that they had been misled at the screening stage.[203]

If writ dismissals were confined to the circumstances outlined by Justices Van Devanter and McReynolds, there would be no need for further discussion or analysis. Despite the time already expended, dismissal where the screening process goes awry seems justifiable[204] for two reasons: first, there is still a considerable time saving if the Court can dispose of cases per curiam without a full opinion on the merits; secondly, and more importantly, by granting review the Court identifies for the bar its docket interests. Deciding an improperly screened case might produce additional static in this already imprecise system of communication. Although the Court could indicate in an opinion on the merits that the case was improperly screened, such an opinion likely would not be accorded great weight by members of the bar. Moreover, such disposition might create an incentive for misrepresentation by parties at the screening stage on the assumption that even if it became apparent on further consideration by the Justices in conference that the issues were not as they had been represented to the screener, a properly packaged case could get past the initial screening and thereby receive full Supreme Court review. Accordingly, dismissals as improvidently granted are not controversial in such circumstances, provided that the Court adequately explains the basis on which it erred in the screening process.

While writ dismissal is uncontroversial where the facts are mis-

201. Certiorari writs issued to settle a supposed conflict between circuits have been dismissed as improvidently granted when further examination revealed the absence of such a conflict. *See, e.g.,* Sanchez v. Borras, 283 U.S. 798 (1931); Wisconsin Elec. Co. v. Dumore Co., 282 U.S. 813 (1931); Keller v. Adams Campbell Co., 264 U.S. 314 (1924); Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923). *See also* The Sao Vicente, 260 U.S. 151 (1922).

202. *E.g.,* Phillips v. New York, 362 U.S. 456 (1960); The Sao Vicente, 260 U.S. 151 (1922).

203. *See, e.g.,* Bostic v. United States, 402 U.S. 547 (1971) (writ of certiorari issued to review affirmance of petitioner's conspiracy conviction dismissed as improvidently granted when shown, contrary to Government's representation, that petitioner neither was charged nor convicted of the offense); The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959).

204. *See, e.g.,* Iowa Beef Packers, Inc. v. Thompson, 405 U.S. 228 (1972), *dismissing cert. as improvidently granted,* 404 U.S. 820 (1971); McClanahan v. Morauer & Hartzell, Inc., 404 U.S. 16 (1971), *dismissing cert. as improvidently granted,* 402 U.S. 1008 (1971).

perceived or misrepresented at the screening stage, it is not understood so easily in other situations. One must recall that the proffered rationale for discretionary jurisdiction was judicial overwork as reflected by a backlog of cases.[205] One must also recall our conclusion that the rule of four should mean minority control of the screening process, with the attendant power to impose a duty of principled adjudication on the majority.[206] Other things being equal, a vote to grant review by four Justices, or three when only seven Justices participate, should be considered a decision of the Court and accorded some degree of respect by the institution in its processes. As a decision, the grant of review should as a minimum impose on the Court an obligation to explain the basis on which it ultimately decides to dismiss a case. Commentators often have noted that the acceptability of Supreme Court action frequently hinges upon the explanation the Court offers for its decisions and that the failure to give reasons for certiorari dismissals increases the notion of Supreme Court arbitrariness,[207] especially when there are dissenting opinions.[208] As Professor Sacks has written in the context of the per curiam practice of the Court, "It might be well for the Court, as a matter of general though not invariable practice, to give an explanation of its views whenever a dissenting opinion is written . . . ."[209]

*Individual Justices' Views on Dismissals*

It may be helpful at this point to set forth the views taken by certain members of the Court on the subject of writ dismissal. Justice Frankfurter, for example, asserted in the by now familiar FELA cases that he did not feel bound by the decision of four Justices to grant review and exercised what he called the "historic" right of a Justice to dissent according to his conscience from an action of the Court.[210] Accordingly, he refused to participate in these cases, which he felt were improper subjects of Supreme Court review.[211] Although Justice Harlan (joined by Justice Stewart)[212] did not approve the

205. *See* notes 26-28 *supra* and accompanying text.

206. *See* notes 167-68 *supra* and accompanying text.

207. *See, e.g.*, Henkin, *supra* note 67, at 90.

208. *See, e.g.*, Linehan v. Waterfront Comm'n, 347 U.S. 439 (1954); Alaska Steamship Co. v. Petterson, 347 U.S. 396 (1954).

209. Sacks, *supra* note 9, at 103.

210. Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 528 (1957) (Frankfurter, J., dissenting). *Cf.* McBride v. Toledo Terminal R.R., 354 U.S. 517, 517-20 (1957) (dissent).

211. *See* note 90 *supra* and accompanying text.

212. *See* Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 111 (1959) (Stewart, J., concurring).

grant of certiorari in the FELA cases, he felt that dismissal of certiorari would impair the integrity of the rule of four unless considerations appeared upon plenary review "which were not manifest or fully apprehended at the time certiorari was granted."[213] Arguing that Justice Frankfurter's right of dissent was exhausted once certiorari was granted, Justice Harlan felt that any other view would undermine the rationale of the rule of four that a minority could compel a principled adjudication by the Court.[214]

In *United States v. Shannon*[215] Justice Douglas announced his disagreement with Justice Frankfurter's approach to dismissal of certiorari. Justice Douglas thought that a

> . . . Justice who has voted to deny the writ of certiorari is in no position after argument to vote to dismiss the writ as improvidently granted. Only those who have voted to grant the writ have that privilege. . . . If four can grant and the opposing five dismiss, then the four cannot get a decision of the case on the merits. The integrity of the four-vote rule on certiorari would then be impaired.[216]

Although they both disagreed with the Frankfurter stance, the positions of Harlan and Douglas were hardly identical. The difference was highlighted in 1971 when Justice Harlan concurred in a dismissal as improvidently granted[217] on the ground that "[s]ince certiorari was granted, a number of events have occurred that, in my judgment, have rendered this case wholly inappropriate for our review."[218] In a dissenting opinion, Justice Douglas objected to the dismissal because the four dissenters were the only Justices who originally had voted to set the case for argument.[219] Noting that the rule of four "allows any four Justices to . . . set the case for consideration on the merits,"[220] Justice Douglas asserted that it is improper for the majority "to dismiss the case after oral argument unless one of the four who voted to grant moves so to do, which has not occurred here."[221] According to Douglas, that material information arose subsequently or that the posture of the case changed is not sufficient to warrant dismissal. Rather, the duty of the five

213. Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 559 (1957) (Harlan, J., dissenting).

214. *Id.* at 559-61; *accord,* Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 111 (1959) (Stewart, J., concurring).

215. 342 U.S. 288 (1952).

216. *Id.* at 298.

217. Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971) (per curiam).

218. *Id.* at 498.

219. *Id.* at 508.

220. *Id.*

221. *Id.*

opposing Justices is to persuade the others at conference, "but, failing that, to vote on the merits of the case."[222]

In *Iowa Beef Packers, Inc. v. Thompson*,[223] Justice Douglas modified his previous view somewhat. The lone dissenter in that case, he argued that the Court "should 'dismiss as improvidently granted' only in exceptional situations and where all nine members of the Court agree. In all other cases the merits of the controversy should be decided."[224]

### *Grounds for Dismissal*

There are three ways in which dismissal of certiorari as improvidently granted can occur. First, one or more of the Justices who originally voted to grant review can change his mind. Second, one or more of the Justices who originally voted to grant review could leave the Court and be replaced by a new Justice who does not share his predecessor's view of the certworthiness of a particular case.[225] Third, there might be no alteration in the position of any Justice, but the majority could still vote to dismiss certiorari by a five-four vote.[226]

Dismissal is appropriate where one or more Justices alters his view about the certworthiness of a particular case, provided that the reason for the change of mind is expressed by opinion. This conclusion finds support in the position taken by Justices Harlan and White that a Justice who votes to grant review should vote on the merits unless an intervening factor "so diminishes a case's public significance, when viewed in light of the difficulty of the questions presented, as to justify . . . dismissing the writ."[227] Moreover, it is consistent with the early Douglas position that writ dismissal can occur when one of the four who vote to hear the case changes his mind. It does not conform, however, to Justice Douglas's latest opin-

222. *Id. See also* United States v. Generes, 405 U.S. 93, 115-16 (1972) (Douglas, J., dissenting).

223. 405 U.S. 228 (1972) (per curiam).

224. *Id.* at 232.

225. *E.g.*, Duncan v. Tennessee, 405 U.S. 127 (1927).

226. *See* Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971); Piccirillo v. New York, 400 U.S. 548 (1971); Miller v. California, 392 U.S. 616 (1968); Hanner v. DeMarcus, 390 U.S. 736 (1968); NAACP v. Overstreet, 384 U.S. 118 (1966); Smith v. Butler, 366 U.S. 161 (1961); The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959); Ellis v. Dixon, 349 U.S. 458 (1955); Hammerstein v. Superior Court, 341 U.S. 491 (1951); *cf.* Jacobs v. New York, 388 U.S. 431 (1967). *See also* Holt v. Allegbany Corp., 384 U.S. 28 (1966); Rudolph v. United States, 370 U.S. 269 (1962).

227. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 477 (1968) (Harlan, J., dissenting).

ion as expressed in *Iowa Beef Packers* that all must agree on a writ dismissal.[228] Requiring unanimity for writ dismissal might very well have the opposite effect from the one presumably intended by Justice Douglas. Because a single Justice could compel the Court to render a decision on the merits, such restrictiveness could operate to discourage fence-sitting Justices from voting to grant review in borderline cases.

Except where the change of mind occurs because of misrepresentation by the parties in the preliminary papers,[229] the members of the Court should treat the grant of review as an institutional decision of the Court and should bear a burden of justifying and explaining any deviation from that original position. While the grant of review may reflect more a Justice's "feel"[230] than any articulable principle, a dismissal after full argument should elicit a principled response from a Justice who no longer deems the case appropriate for review. Because the majesty of the Court's process of principled decision-making is invoked with the decision to grant plenary review, unprincipled (that is, "prudent" in Bickel's parlance)[231] considerations should be suppressed in the process of deciding whether to dismiss certiorari. Since plenary review has already been voted in these cases, they are also distinguishable from the per curiams that Professor Deutsch has suggested might be viewed as political devices of building institutional credibility.[232] While this is not to say that principles of prudence should not be developed to guide the dismissal process,[233] Justices who consider reversing their positions on certworthiness should be constrained by an evolving common law of certiorari dismissals. This deference to precedent would tie the decision-making process to principled adjudication even though the principles evolved were ones of "prudence,"[234] and

228. *See* note 224 *supra* and accompanying text. It is doubtful whether Justice Douglas himself followed this rule in earlier cases. *See, e.g.,* NLRB v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258, 266 (1969) (Douglas, J., dissenting); The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959).

229. *See* note 203 *supra* and accompanying text.

230. *See* Harlan, *supra* note 36, at 549.

231. *See* note 116 *supra* and accompanying text.

232. *See* notes 122-26 *supra* and accompanying text.

233. *Cf.* Sanks v. Georgia, 401 U.S. 144 (1971) (appeal dismissed on ground that subsequent developments had rendered it inappropriate for resolution of issues originally raised); Parker v. County of Los Angeles, 338 U.S. 327 (1949) (certiorari writs dismissed on ground that pending state litigation rendered issues raised unripe for adjudication).

234. It is also important to rememher that many devices for nondecision, such as abstention, have an intellectual content of their own. *See generally* Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); Wright, *The Abstention Doctrine Reconsidered,*

it would impose an institutional limitation on the otherwise unfettered discretion of the Justices to vote for or against certiorari *ab initio*.[235]

If the decision to grant review is to receive deference as an institutional position of the Court, then it follows that an alteration in the composition of the Court should not be an acceptable basis on which to dismiss certiorari. When a newly appointed Justice's assessment of the certworthiness of a case differs from that of his predecessor, the institution, which has committed itself to a decision on docketing priorities, should abide by its screening decision unless one of the four Justices who voted for review changes his mind or some other intervening circumstance alters the propriety of hearing the case. Thus a disagreement by the new Justice with the substantive policy decision to review a particular case or issue should not be an acceptable basis for dismissal.[236]

The most difficult writ dismissal cases to understand or justify are those like *Triangle Improvement Council v. Ritchie*,[237] wherein five Justices disregarded the obligation of principled adjudication imposed on them by the rule of four. Moreover, in some of these five-four decisions the majority does not even write a per curiam opinion to explain its action.[238] In at least one other, the five member majority informed the four dissenting Justices upon further examination of the record that the basis on which the dissenters had voted to grant review did not exist, even though the dissenters believed that an issue on which they sought review was in fact raised by the record.[239] If the rule of four is to effect minority control of the screening process, as all but Justice Frankfurter seem to have conceded, then dismissal of certiorari as improvidently granted is inappropriate and indefensible where four Justices dissent. The view taken by Justice Harlan in *Ritchie* is particularly puzzling.[240] If, as he

37 TEXAS L. REV. 815 (1959); Note, Abstention: An Exercise in Federalism, 108 U. PA. L. REV. 226 (1959).

235. This seems to have played some role in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

236. *Cf.* Gressman, *supra* note 35, at 760 (noting that despite changes in Court personnel, "a high degree of continuity in basic decisional direction seems to be maintained").

237. 402 U.S. 497 (1971) (per curiam).

238. *E.g.*, Hanner v. DeMarcus, 390 U.S. 736 (1968); NAACP v. Overstreet, 384 U.S. 118 (1966).

239. Smith v. Butler, 366 U.S. 161 (1961).

240. In his concurring opinion, Mr. Justice Harlan stated that "[s]ince certiorari was granted, a number of events have occurred that, in my judgment, have rendered this case wholly inappropriate for our review." 402 U.S. at 498.

seems to have conceded in the FELA cases,[241] the rule of four dictates that the minority can compel the majority to dispose of a case on a principled basis, then it is difficult to see the relevance of the change in a case's posture for purposes of writ dismissal, provided that four Justices do not find that this different situation has persuaded them to change their mind about the desirability of Supreme Court review. Nor is it clear what bearing Justice Harlan's exposition of the new legislative situation should have in light of his inability to persuade any of the four dissenters of the importance of this altered state of affairs. Had Justice Harlan been one of the four who voted to grant review, then his concurrence would make eminent good sense as an explanation of what persuaded him to change his mind about the certworthiness of the case; but as a member of the majority, Justice Harlan's analysis of the certworthiness of the case should have no bearing.[242] Justice Douglas makes this point in dissent.[243]

### *Criteria for Dismissal*

If a Justice who changes his mind about the certworthiness of a case must articulate his reasons therefor, some discussion of criteria is called for. The following discussion does not pretend to be comprehensive but only raises tentatively some relevant factors. First, Justice Harlan's position that an intervening event could legitimately alter a Justice's view of the propriety of review[244] appears sound, provided that the Justice identifies the intervening factor and explains how it infiuenced his screening decision. Secondly, different Justices may vote initially to grant review of a case for different reasons.[245] If upon further analysis a Justice discovers that the questions for which he voted to grant review are not raised by the case, then he should feel free to vote for dismissal, on the condition that he articulate the question he finds worthy of plenary consideration.

This evidently occurred in *Tacon v. Arizona*,[246] where the Court

241. *See* notes 149-50 *supra* and accompanying text.

242. It follows, therefore, that a 5-4 dismissal would be improper where no majority opinion is written. *See* cases cited note 238 *supra.* Dismissals without opinion should be eschewed, particularly in the case of 5-4 dismissals where the question of the minority's power to compel a principled decision is threatened.

243. 402 U.S. at 508.

244. *See* note 240 *supra* and accompanying text.

245. *See* Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.).

246. 410 U.S. 351 (1973) (per curiam).

dismissed the writ on the ground that the record did not raise the broad issues that at least one Justice must have found worthy of review. The petitioner in *Tacon*, who was arrested in Arizona and charged with the unlawful sale of marihuana while on active military duty, was discharged prior to trial and voluntarily went to New York. Lacking sufficient funds to finance the return trip to Arizona, he was unable to appear on the date set for his trial. In dismissing the writ, the Court admitted that the petition raised a question concerning the constitutional limitations on state authority to try *in absentia* a person who voluntarily has left the state and who for financial reasons cannot return on time. That broad issue had not been raised below, however, and the Court therefore felt unable to address it.[247]

Justice Douglas, with whom Justices Brennan and Marshall concurred in dissent, urged that the case raised important sixth amendment right of confrontation issues and the question whether Tacon in fact voluntarily had waived that right.[248] Although it acknowledged that a waiver issue was involved, the majority was nonetheless unwilling to review the case on the ground that waiver "is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction . . . ."[249] The dissenters responded that although waiver always raises factual questions, waiver problems are far from frivolous and should not be treated "cavalierly."[250] In short, while the dissenters felt that the issue of sixth amendment waiver *vel non* was ready for decision, four Justices did not share that view of the screening priority of the waiver issue on its own. To some extent this contrariety of opinion might reflect differing attitudes among the Justices concerning the Court's appropriate role in deciding whether specific actions amount to a waiver of constitutional rights. As long as discretionary review and the rule of four prevail, however, it would seem that a Justice who on broad constitutional grounds votes in favor of review should be able to vote for dismissal if the record in fact does not raise that issue.[251]

As a general rule, however, a Justice who has voted to review a

247. *Id.* at 352.
248. *Id.* at 353.
249. *Id.* at 352.
250. *Id.* at 354.
251. *Cf.* Skinner v. Louisiana, 393 U.S. 473 (1969), *dismissing cert. as improvidently granted*, 391 U.S. 963 (1968); Wainwright v. New Orleans, 392 U.S. 598 (1968), *dismissing cert. as improvidently granted*, 385 U.S. 1001 (1967).

case should vote on the merits. At least three circumstances appear to have arisen in the cases and deserve discussion: cases in which one or more Justices conclude after argument that while the legal issue is the one he had originally identified, the significance of that issue is less critical than he had believed;[252] cases in which one or more Justices conclude after argument that the specific facts do not provide an optimal vehicle for addressing the underlying issues of importance;[253] and cases in which one or more Justices conclude that political expediency dictates avoiding a decision on the merits.[254]

Since the original justification for discretionary review was docket overcrowding, and since the initial screening decision deserves respect as an institutional decision of the Court, a Justice's reevaluation of the subjective importance of an issue should not, absent other factors, warrant a vote of dismissal. Since the "feel" that is so necessary at the initial screening stage seems to underlie such a change, and since a Justice incurs a duty to explain on principled grounds a change in his vote, it would be very difficult to develop a principled common law based on such inherently subjective considerations as diminished importance. In light of the justification for discretionary jurisdiction, although little is sacrificed by an adjudication of this type of case on the merits, the integrity of the Court's process might suffer from attempts at explaining the inexplicable.

The situation encountered by a Justice who concludes that a case is not a good vehicle for resolving an issue presents a closer question.[255] Absent a strong and articulable reason not to decide a case, however, a Justice should consider himself bound by the initial screening determination. The "vehicle" concept certainly is germane to the Court's responsibility of establishing national priorities in constitutional and legal matters,[256] but since the propriety of a case's serving as a vehicle is such a difficult concept to explain in a

252. *See, e.g.*, Monks v. New Jersey, 398 U.S. 71 (1970), *dismissing cert. as improvidently granted*, 395 U.S. 903 (1968).

253. *See, e.g.*, Jones v. State Bd. of Educ., 397 U.S. 31 (1970) (per curiam), *dismissing cert. as improvidently granted*, 396 U.S. 817 (1969); Wainwright v. New Orleans, 392 U.S. 598, *dismissing cert. as improvidently granted*, 385 U.S. 1001 (1967); Massachusetts v. Painten, 389 U.S. 560 (1968), *dismissing cert. as improvidently granted*, 386 U.S. 931 (1967).

254. *See, e.g.*, Johnson v. Massachusetts, 390 U.S. 511 (1968), *dismissing cert. as improvidently granted*, 389 U.S. 816 (1967); Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955), *dismissing cert. as improvidently granted*, 347 U.S. 942 (1954).

255. *See, e.g.*, Wainwright v. New Orleans, 392 U.S. 598, 599 (1967) (Fortas, J., concurring).

256. *See* Lewin, *supra* note 42, at 17-18.

principled way, the construct should be invoked sparingly. Moreover, since the "vehicle" concept has no foundation in the overcrowding rationale for certiorari jurisdiction, such an administrative justification is not relevant.

Of course, it is not always easy to find a suitable case[257] in which to decide an issue[258] that four members of the Court agree should be addressed on the merits. For example, the Supreme Court granted certiorari in two cases[259] to determine whether *North Carolina v. Pearce*,[260] which proscribes the punitive imposition of stiffer sentences by a judge on retrial, should be applied retroactively. In both cases, however, the standards set forth in *Pearce* were met and the issue of retroactivity therefore did not arise. Because they were inappropriate vehicles for deciding the retroactivity issue,[261] the Court properly dismissed certiorari in those cases.

A case like *Jones v. State Board of Education*[262] is more difficult. Petitioner, a student at Tennessee State University, was suspended indefinitely for distributing leaflets urging blacks to boycott the fall registration. By a six-three vote, the Court dismissed certiorari as improvidently granted because the record revealed that the suspension may have been based in part on a finding that petitioner at the hearing on the charges against him had lied.[263] The record, however, did not preclude a disposition of the first amendment claims in conjunction with a remand to determine the extent to which the alleged dishonesty had influenced the outcome of the suspension hearing.[264] Since the issue on which certiorari was

257. *Compare* Sanks v. Georgia, 401 U.S. 144 (1971) *and* Simmons v. West Haven Housing Authority, 399 U.S. 510 (1970), *with* Lindsey v. Normet, 405 U.S. 56 (1972).

258. *See* Lewin, *supra* note 42, at 17-18. *See also* Benton v. Maryland, 395 U.S. 784, 801 (1969) (Harlan, J., dissenting) (the Court has been "at pains to 'reach out' to decide" the question of the incorporation of the double jeopardy clause).

259. *See* Odom v. United States, 400 U.S. 23 (1970); Moon v. Maryland, 398 U.S. 319 (1970); *cf.* Michigan v. Payne, 93 S. Ct. 1966 (1973); Chaffin v. Stynchcombe, 411 U.S. 903 (1973).

260. 395 U.S. 711 (1969).

261. Since the *Pearce* standards were effectively applied in *Odom* and *Moon*, the Court could not appropriately determine whether the standards themselves should apply retroactively.

262. 397 U.S. 31 (1970) (per curiam).

263. "This fact sufficiently clouds the record to render the case an inappropriate vehicle for this Court's first decision on the extent of First Amendment restrictions upon the power of state universities to expel or indefinitely suspend students for the expression of views alleged to be disruptive of the good order of the campus." *Id.* at 32; *cf.* Papish v. Board of Curators, 410 U.S. 667 (1973); Healy v. James, 404 U.S. 983 (1971).

264. The alleged dishonesty apparently was revealed at oral argument. Interview with Robert H. Roberts. Assistant Attorney General of Tennessee, in Washington, D.C., Nov. 16, 1971. Justices Black, Douglas, and Brennan addressed the merits.

granted certainly was raised at least in part by the facts,[265] a resolution of the issue on the merits would have represented a more principled response by the Court. The dismissal in *Jones* might be attributable, however, to another consideration—that *Jones* was an inappropriate vehicle because Jones himself may have lied and therefore the Court's decision could not definitively resolve the controversy. Far from striking a blow for first amendment guarantees, such a decision might afford the university an opportunity to undercut the Supreme Court's enunciation of first amendment doctrine by a later ruling that Jones was suspended for lack of candor. This basis for dismissal therefore falls more appropriately into the category of political expediency. Although considerations of institutional prudence can serve as legitimate bases for a principled decision to dismiss certiorari, the Court did not articulate clearly those concerns in *Jones*. While there was an intimation of political sensitivity, there was no explicit explanation.[266]

No discussion of political expediency as a rationale for writ dismissal would be complete without some mention of *Rice v. Sioux City Memorial Park Cemetery, Inc.*,[267] perhaps the most well known case in which certiorari was dismissed as improvidently granted. Petitioner, the wife of a serviceman killed during the Korean War, purchased a cemetery lot for her husband. When cemetery officials learned that Rice was an Indian, they refused burial on the ground that the lot contract limited burial privileges to Caucasians. Mrs. Rice sued for damages, but the Iowa courts rejected her claim, based on the language in the contract. The Supreme Court granted certiorari[268] and divided four-four on the merits,[269] thereby upholding the decision of the lower court. On rehearing, however, the Court vacated its previous order and by a five-three vote dismissed the writ as improvidently granted.[270]

The constitutional issue raised in *Rice* was extremely sensitive in light of the recently decided *Segregation Cases*.[271] Whether state

265. 397 U.S. at 32 (Douglas, J., dissenting).

266. *Cf.* Parker v. County of Los Angeles, 338 U.S. 327 (1949); Rescue Army v. Municipal Court, 331 U.S. 549 (1947).

267. 349 U.S. 70 (1955). For a more complete recital of the facts of this controversy see Rice v. Sioux City Memorial Park Cemetery, Inc., 245 Iowa 147, 60 N.W.2d 110 (1953).

268. 347 U.S. 942 (1954).

269. 348 U.S. 880 (1954). An affirmance by an equally divided court "deprive[s] the decision of all prececential value. . . ." Inman v. Baltimore & O.R.R., 361 U.S. 138, 146 (1959) (Douglas, J., dissenting).

270. 349 U.S. 70 (1955).

271. *See* note 10, *supra*. *See also* Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

action was involved so as to warrant a finding that equal protection had been violated presented a ticklish constitutional matter that had long divided the Court.[272] On rehearing the Justices saw "in proper focus" for the first time a statute which Iowa had passed during the course of the *Rice* litigation and which the Iowa court had used "in tangential support" of its decision.[273] Although it barred the kind of burial discrimination involved in *Rice*, the new law specifically did not "affect the rights of any parties to any pending litigation."[274] While the particular controversy before the Court was still very much alive, the majority concluded that the statute made the facts so unusual that the case would be of "isolated significance."[275] In view of its diminished importance and the risk of an "inconclusive and divisive disposition,"[276] the Court dismissed the case.

The changed disposition on rehearing did not affect the rights of the parties, and "neither disposition has any weight as a precedent on the merits,"[277] but the proffered explanation of the Court conforms to the norms espoused herein for principled adjudication.[278] The case for dismissal, however, did not really rest on the diminished importance argument. Justice Frankfurter's opinion is a clear judicial expression of the considerations of prudence that Professor Bickel subsequently labeled the "passive virtues."[279] Frankfurter relied on two considerations of prudence: first, he reasoned that if the action of the state were unconstitutional, the Court "should hesitate to pass judgment on Iowa for unconstitutional ac-

272. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 470 (1953) (Frankfurter, J., concurring); Snowden v. Hughes, 321 U.S. 1, 13 (1943) (Frankfurter, J., concurring); Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907).

273. 349 U.S. at 75.

274. *Id.* at 76.

275. *Id.*

276. *Id.* at 77.

277. Braucher, *Foreword to the Supreme Court, 1954 Term*, 69 HARV. L. REV. 120, 125 (1955); *see* Neil v. Biggers, 409 U.S. 188 (1972) (affirmance by an equally divided court is not entitled to precedential weight).

278. The argument advanced that the case is of reduced national significance because of the Iowa statute is, however, unsupportable. The cemetery apparently conceded that approximately 90 percent of the private cemeteries in the United States used the same racial restriction. Accordingly, "legislation in Iowa hardly makes the problem moot in the rest of the country." Braucher, *supra* note 277, at 125.

Furthermore, the fact that a case involves only the interests of the individual litigants should not be the basis for a writ dismissal, although it would be a proper basis for an original vote to deny review.

279. *See* notes 103 & 106 *supra* and accompanying text. It is interesting to note that Professor Bickel clerked for Mr. Justice Frankfurter during the 1952 Term.

tion . . . when it has already rectified any possible error;"[280] secondly, he theorized that even if the state's actions were constitutional, they would not necessarily be proper, and the Court "should not unnecessarily discourage such remedial action by possible condonation of this isolated incident."[281] Cognizant of the legitimation that attaches to Supreme Court decisions, Justice Frankfurter expressly articulated the Court's collective judgment that even if the Court cannot properly eradicate a particular instance of discrimination through principled decision-making, racial discrimination should not be encouraged by the Court as an institution. Professor Braucher properly perceived the intensely political nature of Frankfurter's rationale, claiming that discouraging legislation by condonation was an inappropriate function for a court.[282] Nevertheless, it seems abundantly clear from the current flap about the Freund Committee proposals that the discretionary authority of the Supreme Court to hear whatever cases it wishes invests it with a political power that must be recognized. When dismissing certiorari for reasons of prudence, however, the Court must express those reasons in a principled fashion. The *Rice* Court seemed to be making a valiant effort at doing just that.[283]

### *Conclusion*

With judicial reform a matter of intense public debate, it is essential that one understand the political consequences that may result from the adoption of various reform measures. Moreover, it is important to recognize that an evaluation of any proposed change must proceed from one's conception of the role of the Supreme Court in our society and one's perception of the foundations of its legitimacy. Similar considerations also must shape one's analysis of the rule of four and the Court's practice of dismissing certiorari as improvidently granted.

While discretionary review increasingly has politicized a large portion of the Court's work, a political decision to grant review

280. 349 U.S. at 77.

281. *Id.*

282. "[S]uch lobbying strategy sounds more like legislative discretion than 'sound judicial discretion.'" Braucher, *supra* note 277, at 126.

283. There is some question how the Court can formulate principles such as in *Rice*—namely, that the Court opposes racial discrimination. Presumably, the considerations of prudence are easily applied in clear situations like *Rice;* but the Court is evidently not willing to stay its hand in all cases in which discrimination exists and in which its actions would have the effect of condonation. *See, e.g.,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Evans v. Abney, 396 U.S. 435 (1970).

should be treated with the respect due an institutional determination of the Court. Before proceeding to reverse itself by dismissing certiorari, the Court should articulate reasons for its ultimate refusal to hear a case. In this way, a common law of precedent will evolve that would limit this form of dismissal; since other techniques for avoiding adjudication on the merits, such as the abstention doctrine, have an intellectual content of their own, so should writ dismissals. In deference to the principle of minority control of the screening process, however, certiorari should not be dismissed as improvidently granted if four of nine or three of seven Justices dissent.