A Speculation as to Whether Judicial Burdens Are Self-Imposed

Warner W. Gardner

In March 1983, Warner Gardner sent the paper reproduced here to Chief Justice Warren Burger and the eight other members of the U.S. Supreme Court. (The cover letter is reproduced in Appendix B on page 30 below.) We now share it with an audience wider than the one Gardner sought, but one which we hope and believe will find his speculation interesting, and perhaps even useful.

—*The Editors*

Chief Justice Burger on February 6, 1983, made to the American Bar Association his "Annual Report on the State of the Judiciary."[1] It forcefully presented these principal points: (a) the Supreme Court Justices are grievously overburdened; (b) this is because of an almost explosive increase in the volume of their business; and (c) it

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Warner Gardner (1909-2003) led an extraordinary life in the law, beginning with study at Columbia Law School and then a clerkship with Justice Harlan Fiske Stone (1934-35), followed by more than a dozen years in various departments of the federal government (including decorated military service during World War II), and then more than a half-century at Shea & Gardner, the Washington, DC law firm he co-founded in 1947. Thanks to the Gardner family, and especially Hannah Gardner, for letting us publish more of his work. See, e.g., Warner W. Gardner, Memories of the 1937 Constitutional Revolution, Parts I & II, 22 Green Bag 2d 219 & 293 (2019).

[1] It is reprinted at 69 A.B.A. J. 442 (Apr. 1983), with a multi-colored table and chart added.

should be remedied according to the advice of still another study commission and should be ameliorated by a five-year experiment with a temporary appellate court to deal with the inter-circuit conflicts.

None can doubt that the Justices are overburdened. I have wondered, however, with an effrontery better suited to the young than to the aged, whether those burdens are not due more to the attitudes and traditions that have developed within the Court itself, over the past generation, than to the multiplication of the docket numbers. That has led to the further speculation that the remedy for the judicial burdens may lie more within the Court itself than in the creation of new courts.[2]

I.
THE VOLUME OF BUSINESS

As the Chief Justice says, "The best single measurement of the Court's work is its signed Court opinions." He notes "that in 1953, the first year of tenure of my distinguished predecessor Chief Justice Warren," the Court issued 65 signed Court opinions whereas in the October 1981 Term the Court issued 141 signed Court opinions, more than double the 1953 number.[3]

It chances, however, that fewer signed Court opinions were issued in the October 1953 Term than at any other Term in the past half-century.[4]

I have chosen the October 1934 Term as a better basis for comparison. This is in part because it is reasonably typical of its time, and more largely

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[2] I take comfort, as did then-Professor Frankfurter, in the words of Justice Brewer: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death." Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1934*, 49 Harv. L. Rev. 68 (1935).

[3] 69 A.B.A. J. at 442.

[4] Appendix A to this paper lists the basic data as tabulated by the *Harvard Law Review* for the 1924-1938 and 1948-1980 Terms. The *Review* said, of the 1953 Term, that it had the "smallest number of cases decided on the merits in at least the past 14 years." 68 Harv. L. Rev. at 187. This bridges the apparent 1939-1947 gap in the "Harvard Series."

as a matter of personal comfort since I clerked for Justice Stone during that Term. At that time each Justice had one law clerk (with only three Justices accepting the hardship of an annual turnover). Oral arguments were ordinarily two hours per case, double the contemporary practice. This would seem to require another five weeks of argument as compared with the present practice. The 1934 Term ended on June 3; the 1981 Term on July 2, four weeks later than the 1934 Term. Although there was in result about nine weeks less for in-chambers work, I do not believe that any of the Justices was overworked in the 1934 Term, and am confident that neither Justice Stone nor his clerk was.[5]

There were in the 1934 Term 147 signed Court opinions,[6] about five percent *more* than in the critically overburdened 1981 Term.

The production of signed opinions of the Court in the two Terms may be encapsulated as follows:

1934 Term			**1981 Term**	
Hughes	21		Burger	16
VanDevanter	3		Brennan	16
McReynolds	13		White	18
Brandeis	13		Marshall	15
Sutherland	14		Blackmun	15
Butler	18		Powell	16
Stone	21		Rehnquist	17
Roberts	20		Stevens	15
Cardozo	24		O'Connor	13
Total	147		Total	141

[5] It is my recollection that Justice Stone's working day was roughly 8:30 a.m. to 6:00 p.m. and did not include work in the evening or on Sunday. The same may be said of his clerk, partly inhibited from a greater industry by the circumstance that his workplace was at the home of the Justice.

[6] I exclude from this count nine brief opinions in companion cases and 13 per curiam opinions. In the 1981 Term there were no companion opinions and 27 per curiams.

If, to take care of the special circumstance of Justice Van Devanter, one looks only to the eight most productive Justices, he obtains an average of 18 signed opinions for each member of the 1934 Court and 16 for the 1981 Court.

It seems fair to conclude that some explanation beyond the bare numbers of signed opinions is required to demonstrate a catastrophic overburden for the present Court. I discuss below the two factors which the Chief Justice has cited and then the two quite different circumstances which make their own and possibly larger contribution to the overburden.

II.
The Accepted Explanations of Increased Burden

The Chief Justice ascribes the mounting burden upon the Court primarily to a dramatic increase in the number of docketed cases, coupled with an increasing complexity of the particular cases. He is obviously correct on both counts, yet it is far from clear that these are the major causes of the Court's burdens.

A. Certiorari and Appeal

In the October Term 1981, the Chief Justice tells us, "the Supreme Court had 5,311 cases on its docket." I am not sure what is counted as a docketed case;[7] if one looks to petitions for certiorari and jurisdictional statements on appeal, which are the time-consuming components of the Court's routine, a fair comparison might be 817 "cases" seeking review in 1934 and 4,305 – about 5.25 times as many – in 1981.[8] While practice will vary with the individual Justice, that with which I am familiar is probably still reasonably typical. The law clerk prepared a two- to four-paragraph summary memorandum to accompany the papers; the Justice started with

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[7] The table ("Source: United States Supreme Court") given at 69 A.B.A. J. at 444 shows 4,434 "cases" disposed of during this Term.

[8] The 1934 figures derive from a hand-count by the author and will accordingly have some inaccuracy. The 1981 data is found at 69 A.B.A. J. at 444 (4,333 certiorari and appeal less 28 dismissed under Rule 53).

the memorandum and occasionally looked at the underlying papers as need might indicate. It was not a major component of the Justice's work, and would not have been had the numbers been five times as great. So far as concerns the clerks, it was in 1934 rather less than half-time work for one man to dispose of the 817.[9] This would suggest (using a 40% figure) that slightly more than two clerks would be required to dispose of the 1981 flood. As the current allotment is four clerks per Justice it would seem, on the basis of this freehand arithmetic, that the current Justice has almost two clerks for other work, as compared to three-fifths of a clerk in 1934.[10]

B. Complexity

I have no doubt that, as the Chief Justice explains, the economic and social changes over the past half-century have tended to increase the complexity of the cases on the Supreme Court docket. There will in addition be some unmeasurable increase in the burden of the Court to the extent that 140 cases selected for plenary review will probably be more difficult when selected from 4,300 rather than from 800 candidates.

But it may also be true that the opinion-writing customs of the present period, which I address below, have contributed as much or more to the apparent complexity of the Court's work as have the changes in the external world. In any case, it is well to remember, in our comparison with the 1934 Term, that the Court in that year had to deal with the *Panama*, *Schechter*, and *Gold Clause* cases,[11] any of which considerably exceeded in national importance, and in a consequent need for caution, any case on the 1981 docket.

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[9] My guess has no foundation at all for the "tenured" clerks of six Justices and is quite loose for the transient clerks of Justices Brandeis, Stone, and Cardozo.

[10] I cannot quantify two factors, each of which points to the conclusion that I have overstated the 1981 burdens. (a) Several Justices now use "pooled" certiorari memoranda. (b) There were 38 *forma pauperis* petitions for certiorari in the 1934 Term and 1,892 in the 1981 Term, all of which were denied. Only a few of the 1934 petitions were circulated to all of the Justices in pre-Xerox 1934. On the other hand, one may suppose that most of the 1,892 petitions in 1981 required less than average attention.

[11] *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Corp. v. United States*, 295 U.S. 495 (1935); *Norman v. B. & O. R. Co.*, 294 U.S. 240 (1935).

C. The Work Habits of the Court

1. Concurrence and Dissent

The Court in the three Terms 1934-1936 suffered from a philosophic or ideological division that went to the basic views of Government and was probably as sharp and deep as during any other period of the 20th century. Yet in the October Term 1934, 123 – or 84 percent – of the signed opinions for the Court were unanimous; there was dissent in 18 cases and concurrence in another six.

The contrast of the 1981 Term is startling. Then only 21, or five percent, of the 141 signed opinions for the Court were unanimous. There were dissenting opinions in 93 of the cases and concurring opinions in another 27.

There were in addition 40 concurring or dissenting opinions appended to the Court's denial of petitions for writs of certiorari and 11 concurring or dissenting opinions added to summary case dispositions. The dissent from denial of certiorari is a custom of comparatively recent vintage[12] which has no explanation discernible to me.[13]

In all, the Justices wrote 403 opinions during the 1981 Term. Only 35 percent were for the Court (141) while 65 percent were in dissent (176) or concurrence (86).

The attractions of a separate statement vary somewhat but not dramatically among the individual Justices:

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[12] Justice Stevens in *Singleton v. Commissioner*, 439 U.S. 940, 944 (1978), reported that he found no such dissents in the 1945 and 1946 Terms and one in the 1947 Term.

[13] "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 also the cases collected in Stern & Gressman, *Supreme Court Practice* 535 (5th ed., 1978). One would suppose that a dissent to such a denial would have still less significance.

SEPARATE, SIGNED OPINIONS, OCTOBER TERM, 1981

	On the Merits		Summary Disposition		Certiorari Denial	
	Concur	**Dissent**	**Concur**	**Dissent**	**Concur**	**Dissent**
Burger	5	11	-	1	-	-
Brennan	10	19	-	-	-	5
White	6	17	-	1	-	15
Marshall	4	13	-	-	-	6
Blackmun	14	10	1	1	-	1
Powell	10	16	-	-	-	1
Rehnquist	7	14	1	1	-	10
Stevens	15	20	-	5	2	-
O'Connor	11	9	-	-	-	-
Total	82	129	2	9	2	38

The count excludes notations of dissent without opinion and also the invariable dissent of principle by Justices Brennan and Marshall on denial of certiorari in death penalty cases.

An examination of Appendix A (pages 28-29 below) indicates that during the 15 years 1924-1938 there was a high degree of consensus on the Court; in the average Term there were only 22 concurrences and dissents as compared to 164 majority opinions. In the post-war era, looking only at signed opinions on the merits, only five of the 24 Terms showed fewer concurrences and dissents than majority opinions. The last five years of the "Vinson Court" averaged 96 majority, 26 concurring, and 76 dissenting opinions. The "Warren Court," 1953-1968, was only slightly more divisive, averaging 96 majority opinions, 34 concurrences, and 79 dissents a Term. The "Burger Court," 1969-1981, showed a substantial increase in all categories, and averaged 127 majority, 78 concurring, and 130 dissenting opinions.[14]

[14] If one wished to push the numbers far enough, he could construct an "index of intransi-

I speak of the "Vinson," "Warren," and "Burger" courts only to use convenient milestones. Appendix A shows a gradual change in practice and tradition which has developed without any discernible correlation with the tenures of the Chief Justices. I am confident, for one example, that the high incidence of unanimity in the pre-war period reflected an institutional tradition; an explicit effort by Chief Justice Hughes to contain or reduce dissent would probably have been counter-productive.

I should suppose all would agree that one of the major responsibilities of the Supreme Court is to achieve a consistent and intelligible body of law, through its guidance to the lower courts and to the practicing bar. That function has been seriously eroded by the profusion of dissent and special concurrence.[15] It is hard to exaggerate the despair of the practitioner with a filing deadline at hand, or of the hard-pressed judge who discovers that a key authority must be fitted together like a jigsaw puzzle.[16] If each

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gence," using the percentage of concurring and dissenting opinions to total signed. This would give 12% pre-war, 52% for the Vinson, 54% for the Warren, and 62% for the Burger Courts.

[15] My view that the Court's divisiveness results in unsatisfactory adjudication has impressive support in the comments of Erwin Griswold and Philip Kurland as quoted in *Its Own Fault: Critiquing the Supreme Court*, 69 A.B.A. J. 424 (Apr. 1983).

[16] The most extreme example which lies at my hand did not arise in the 1981 Term but was *Wolman v. Walter*, 433 U.S. 229 (1977), the headnote in which concludes:

> BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, V, VI, VII, and VIII, in which STEWART and STEVENS, JJ., joined; in which as to Part I, BURGER, C.J., and BRENNAN, MARSHALL, and POWELL, JJ., also joined; in which as to Part V, BURGER, C.J., and MARSHALL and POWELL, JJ., also joined; in which as to Part VI, BURGER, C.J., and POWELL, J., also joined; in which as to Parts VII and VIII, BRENNAN and MARSHALL, JJ., also joined; and an opinion with respect to Parts II, III, and IV, in which BURGER, C.J., and STEWART and POWELL, JJ., joined. BURGER, C.J., dissented in part. BRENNAN, J., post, p. 255, MARSHALL, J., post, p. 256, STEVENS, J., post, p. 264, filed opinions concurring in part and dissenting in part. POWELL, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, post, p. 262. WHITE and REHNQUIST, JJ., filed a statement concurring in the judgment in part and dissenting in part, post, p. 255.

Alignments of almost equal complexity are presented in *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980), and *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980). *Industrial Union Dept. v. American Petrol Inst.*, 448 U.S. 607 (1980), was not quite so complex but had its own idiosyncrasy: the Court devoted 117 pages to discussion of 11 topics

such case requires an additional hour to master, there is a resulting tax upon the profession of perhaps thousands of man-hours during the active life of the opinion as a precedent.

I suggest, too, that the significance of the dissenting opinion has been seriously diluted by its ubiquity. When only one opinion in ten was accompanied by dissent, one read the dissent with attention in order the better to judge the strength and the direction of the opinion for the Court. When nine cases out of ten have attached dissents or special concurrences, one tends to stop when he has read the majority opinion.

It would be presumptuous to attempt from outside the Court to specify the causes of this divisiveness. But one can hardly avoid noting that some important virtues have been lost. We have been taught that collegial discussion and deliberation offers a surer path to wisdom than does individual brilliance. Those of the Quaker faith have been taught that consensus offers better decision than vote tabulation. Those who look to effective group performance might give low marks to the Court's current capacity for what might be called institutional unity, team spirit, or *esprit de court*.[17]

This paper is directed primarily at the impact of this divisiveness upon the burdens borne by the Justices. I consider that it has two impacts, each severe and each unfortunate.

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only one of which recruited support from a majority of the Justices and that one pointed to reversal of the decision below rather than the affirmance which in fact was ordered.

[17] Random examples of my point are: In *Milwaukee v. Illinois*, 451 U.S. 304, 331 (1981), the majority accuses the dissent of misquoting the *Congressional Record*; one wonders why a quiet pre-publication word would not have been better. In *United States v. Crews*, 445 U.S. 463, 474-77 (1981), one would have thought it better to strike a collateral dictum than to have five members of the Court dissent from an otherwise unanimous opinion. In *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 43-45 (1981), the concurring opinion does not differ with anything in the majority opinion but offers an additional ground for reaching the same result. In *Herweg v. Ray*, 455 U.S. 265, 277, 279 (1982), the concurring opinion attacks a single paragraph in a ten-page opinion which could have been dropped without affecting the majority reasoning. One would not expect a fellow-justice to describe the opinion for the Court as "sheer demagoguery." *Engle v. Isaac*, 456 U.S. 107, 147 (1982). On March 28, 1983, even the lay press was led to deplore the perhaps unseemly vigor with which the dissent attacked the literary and syllogistic qualities of the majority opinion. *Profiles of Peddlers, and Justice*, N.Y. Times, at A14.

(a) My count, which may have imperfections, indicates that in the 1981 Term the signed opinions occupied 2,256 pages for majority opinions, 246 for concurring, and 3,240 for dissenting opinions, plus another 162 pages dissenting from summary dispositions and the denial of certiorari.[18] While the number of pages written is a very primitive measure of difficulty, there is no evident reason why a dissenting opinion should be easier to compose than a majority opinion. The mechanical or numerical indications, then, are that only 38 percent of the Court's writing in the 1981 Term was directed to opinions for the Court, and 62 percent was directed to qualification of or objection to those opinions as prepared by others. If it were possible to achieve the comparative harmony of the 1934 Term, a full 89 percent of the writing would, on the same page-count simplification, be directed toward the production of opinions for the Court.[19] This would suggest, without doubt too mechanistically, that about 50 percent of the Court's opinion-writing work may be attributed to the post-war increase in the divisive attitudes of the Justices.

(b) The profusion of dissent and special concurrence may also have a secondary or reflected effect in increasing the burdens of the Court. In somewhat overstated terms, a unanimous decision need only explain the reasoning, and can do so in simple and magisterial terms. A decision which carries with it a vigorous dissent will be likely to succumb to the advocate's temptation, and develop alternative grounds of decision, to show that even if the dissent were right on Point A it is wrong on Point B. There would seem likely also to be additional work on the majority opinion, to elaborate the buttresses of the argument, and to expound the answers to the dissenting arguments.

I find confirmation for my point in the opinions of March 8 and April 20, 1982. Each day was remarkable, by contemporary standards, in that on each three opinions were handed down and each opinion was unanimous. In each case the opinion of the Court was clear, dispositive, and comparatively brief.[20]

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[18] In counting pages I have used the Court's preliminary prints through April 21, 1982, and have taken one *Lawyers' Edition* page as 1.5 Court pages thereafter.

[19] My count indicates that in the 1934 Term 1,168 pages, or 89 percent of the total, were found in majority opinions, 18 pages in concurrences, and 132 pages in dissents.

[20] March 8: *Marion Bank v. Weaver*, 455 U.S. 551 (Burger, C.J., 9 pages); *UMWA Health* &

2. Length of Opinions

I start my discussion of the second principal cause of judicial over-work with the following comparison between the customs prevailing in the 1934 and 1981 Terms:

OPINIONS FOR THE COURT

	1934 Term			1981 Term	
	No.	**Avg. Length**		**No.**	**Avg. Length**
Hughes	21	11	Burger	16	10
Van Devanter	3	9	Brennan	16	17
McReynolds	13	4	White	18	15
Brandeis	13	10	Marshall	15	16
Sutherland	14	8	Blackmun	15	19
Butler	18	7	Powell	16	14
Stone	21	9	Rehnquist	17	14
Roberts	20	8	Stevens	15	19
Cardozo	24	9	O'Connor	13	16
Total	147	8	Total	141	16

It took in the 1934 Term some 1,298 pages of majority, concurring, and dissenting opinions to dispose of 147 cases decided by signed opinion, an average of nine pages for each case, including all opinions. In the 1981 Term the 141 cases required 3,663 pages, an average of 26 pages per case, almost three times the 1934 level.

Retirement Funds v. Robbins, 455 U.S. 563 (Stevens, J., 13 pages); and *Bread Political Action Committee v. FEC*, 455 U.S. 577 (O'Connor, J., 8 pages). April 20: *Schweiker v. McClure*, 456 U.S. 188 (Powell, J., 11 pages); *United States v. Erika*, 456 U.S. 202 (Powell, J., 9 pages); and *Longshoremen v. Allied International, Inc.*, 456 U.S. 212 (Powell, J., 15 pages).

Two disclaimers should be appended to these data. The first is that the 1934 record falls a little short of being wholly admirable. In particular, many of the two- and three-page opinions of Justice McReynolds had an enigmatic terseness that was sometimes less than satisfactory. In the second place, I do not suggest that the Court's burdens would be halved if it could manage to reduce its opinions to half their current length. It often takes longer to write a short document than a longer one.

But, after having made full allowance for these qualifications, it is still hard to believe that the burdens on the Justices would not be lightened if they could fall into the practice of composing shorter, more didactic opinions.

I have already indicated my belief that the prevalence of dissent and special concurrence of itself leads to longer opinions. A second cause might be called the prevalence of law clerks. There are now close to three dozen young lawyers fresh from the law reviews roaming the Court's marbled halls. They are not destructive, as would be a plague of locusts, but instead are creative; each has an urge to write. Typically, they write well and their research is sound. I should suppose it might often be difficult to reject or to blue-pencil work of first quality simply because it was unnecessary.

3. Certiorari Grants

Justice Stevens, in his James Madison Lecture of last fall,[21] indicated that over 25 percent of the certiorari grants in the 1946 and 1947 Terms were (according to the docket book of Justice Burton) on the vote of four justices, and that the percentages were about the same in the 1979-1981 Terms.[22] Justice Brandeis, apparently in 1932, Chief Justice Hughes in 1937, Justice Jackson in 1944, and Justice Stevens in 1982 have each expressed the view that the Court on balance granted too many petitions for writs of certiorari.[23] The Judiciary Act of 1925 converted the bulk of the Court's appellate docket into one which rested upon a discretionary grant

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[21] At the New York University School of Law, on October 27, 1982.

[22] John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 NYU L. Rev 1, 16-17 (1983) Twenty-three percent in the 1979 Term, 30 percent in 1980, and 29 percent in 1981. Id. at 17.

[23] Id. at 15-16.

or denial of certiorari.[24] If too many petitions are granted, then the Court is not employing its flexible certiorari powers as effectively as had been hoped in 1925.[25]

4. Mandatory Jurisdiction

So far as I know, everyone would agree that the remaining mandatory jurisdiction of the Supreme Court should be changed from appeal to the discretionary certiorari. All of the sitting Justices so advised the Congress in 1978.[26] A quarter of the cases heard on the merits during the 1981 Term were appeals.[27] The ratio was about the same in the 1934 Term.[28] Since these are the cases that under present practice have survived testing as to whether to dismiss or affirm, only some of them would be passed over if the mandatory jurisdiction were changed to discretionary. This jurisdictional change would clearly, however, produce some reduction in the cases given plenary consideration, and its cost would seem to be negligible.

D. The Remedy

If I should be right as to the cause of the Court's burdens, three remedial actions could be taken. One could be taken immediately, another probably in the course of a year or two, and the third at such time as the Court considered that its situation had in truth become intolerable.[29]

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[24] 43 Stat. 936.

[25] I note in passing that the Court's burdens would have been quite intolerable if the dissenters had had their way on the 38 petitions for certiorari which were denied over their protest, assuming there had not been a compensating reduction in the grants of other petitions.

[26] Their letter of June 22, 1978, recommending the passage of S.3100 (95th Cong.), is reprinted in Gressman, *Requiem for the Supreme Court's Obligatory Jurisdiction*, 65 A.B.A. J. 1325, 1326 (1979).

[27] Burger, 69 A.B.A. J. at 443.

[28] Of the 147 signed opinions, 23 percent were appeals and another four percent certificates and original actions.

[29] I have not considered it the office of this paper to make critical examination of the proposal for an intermediate appellate court. I note, however, if only to confirm the obvious, that any who shared my views would have a marked lack of enthusiasm for creating a new court in order that the Justices of the Supreme Court could avoid the necessity of revision of their more time-consuming habits. It is also possible that the circuit judges, most of whom are also sadly overburdened, might be unenthusiastic about drafting seven to nine of their

1. Rule of Four

Justice Stevens' lecture did not in terms advocate an internal Court rule requiring five votes before certiorari was granted, but it did at least bring into sharp focus the effect of the "Rule of Four" in adding to the Court's docket for plenary consideration. A change to a "Rule of Five" would entail some cost in preventing High Court review of meritorious cases which fail by only a single vote to have a majority on the summary consideration given the certiorari petitions. Those costs may well be overborne, if the Court's burdens are as threatening as its members seem to believe, by the fact that the change in practice would afford quite significant relief to its plenary docket and may be accomplished by the Court itself without further ado.

2. Mandatory Jurisdiction

A roughly comparable reduction of the Court's plenary docket would be available in legislation which replaced appeals with petitions for writs of certiorari. Legislation to accomplish this has several times been considered in recent years, producing both little opposition and little progress. One may assume that the passage of several more years is required before its enactment could be achieved.

3. Changed Traditions

As the foregoing pages have indicated, it is at least possible that the Court has in its own hands much the major portion of the relief which it needs. If three-quarters of the dissents and special concurrences were withheld because they were unlikely in any way to change the course of the law, and if explanation rather than elaboration became the accepted objective of opinion-writing, it is hard to believe that each Justice would not have reduced his bondage by a third or a half. At the same time, since it involves recasting attitudes and practices built up over the past generation, this remedy faces what are probably the most intractable obstacles of all.

I believe it likely that anthropologists and historians would agree that cooperative action or united institutional behavior arises not because men

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numbers each year in order that the Supreme Court might avoid time-saving steps perhaps less Draconian than those already instituted by many of the courts of appeals.

are amiable but only when survival itself makes its imperative demands. So it was, I have been told, with the tree people who began to hunt on the savannah. So it was with the Continental Congress. So it has always been, for three millennia past, with the military. I have, accordingly, much hope that at such time as its situation should become truly desperate, the Court itself will ease the burdens of its docket by adopting work habits of the sort which I have suggested, and which prevailed in the pre-war period. If it should do so, it would be able to derive some added gratification from the chorus of approval which would swell across the land from the bar, the lower court judges, and perhaps even the professors, each of whom would have correspondingly lightened burdens in assimilating the law as announced by the Highest Court.

APPENDIX A
WORK OF THE SUPREME COURT

October Term	Signed Opinions	Concurring Opinions	Dissenting Opinions	Harv. L. Rev. Reference
1924	232	0	13	43/45
1925	209	0	11	43/45
1926	199	7	21	43/45
1927	175	2	31	43/45
1928	129	2	13	43/45
1929	134	3	13	44/48
1930	166	1	12	45/290
1931	150	1	16	46/246
1932	168	1	17	47/264
1933	158	4	18	48/254
1934[†]	156	4	14	49/84
1935	146	3	20	51/605
1936	149	1	17	51/605
1937	152	10	25	53/596
1938	139	14	36	53/596
. . .	. . .	. . .	. . .	. . .
1948	114	37	93	63/125
1949	87	18	64	64/162
1950	91	23	60	65/181
1951	83	19	73	66/179
1952	104	32	89	67/171
1953	65	16	57	68/192
1954	78	15	47	69/204
1955	82	21	55	70/101
1956	100	18	83	71/102
1957	104	23	93	72/102

October Term	Signed Opinions	Concurring Opinions	Dissenting Opinions	Harv. L. Rev. Reference
1958	98	30	72	73/132
1959	96	26	99	74/104
1960	109	42	111	75/88
1961	84	31	66	76/84
1962	110	40	76	77/86
1963	111	30	77	78/182
1964	91	46	71	79/108
1965	97	37	74	80/144
1966	100	26	97	81/130
1967	110	75	91	82/306
1968	99	67	101	83/278
1969	83	52	70	84/251
1970	106	82	115	85/350
1971	129	69	130	86/300
1972	140	67	178	87/303
1973	140	57	142	88/274
1974	138	89	126	89/276
1975	135	86	117	90/276
1976	126	91	140	91/295
1977	129	81	143	92/327
1978	130	78	122	93/275
1979	132	79	156	94/289
1980	122	91	119	95/339
1981	141*	82*	129*	
49-year-average	125	35	74	-

† The 156 signed opinions in the 1934 Term include nine brief opinions in companion cases which have been excluded in the statistical matter in the text of this paper.
* Hand count by the author.

APPENDIX B
COVER LETTER TO CHIEF JUSTICE BURGER

1800 MASSACHUSETTS AVENUE, N. W.
WASHINGTON, D. C. 20036

March 31, 1983

My dear Mr. Chief Justice:

I have read with much interest your "Annual Report on the State of the Judiciary" as made to the Bar Association last month. That most effective address has led me to try to crystallize my own rather different views. It seems proper that I visit upon you the resulting paper.

As the audience which I seek to reach consists of only nine persons, I have seen no occasion for publication of this paper. I have, however, taken the liberty of marking a copy to each of the other Justices.

Respectfully yours,

Warner W Gardner

Warner W. Gardner

Honorable Warren E. Burger
Chief Justice of the United States
Supreme Court of the United States
Washington, D. C.

cc: The Associate Justices