THE INTERCIRCUIT TRIBUNAL AND PERCEIVED CONFLICTS: AN ANALYSIS OF JUSTICE WHITE'S DISSENTS FROM DENIAL OF CERTIORARI DURING THE 1985 TERM

> It is, of course, not possible to explain the reasons supporting every order denying a petition for a writ of certiorari. An occasional explanation, however, may allay the possible concern that this Court is not faithfully performing its responsibilities.
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> Castorr v. Brundage, 495 U.S. 928, 928 (1982) (opinion of Stevens, J., respecting denial of certiorari).

INTRODUCTION

Much has been written recently about former Chief Justice Burger's proposal[1] to create an Intercircuit Tribunal (ICT)[2] which would reduce the Supreme Court's workload by hearing cases involving intercircuit conflicts. This attention to Chief Justice Burger's proposal is part of a larger inquiry into the nature of the Supreme Court's workload,[3] and the

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[1] Burger, Annual Report on the State of the Judiciary, 69 A.B.A. J. 442 (1983). Chief Justice Rehnquist also supports the creation of an ICT. See Letter from Justice Rehnquist to Representative Kastenmeier (June 8, 1984), reprinted in The Supreme Court Workload: Hearings on H.R. 1968, 1970 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 382 (1983) [hereinafter Hearings].

[2] See Estreicher & Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681 (1985) (this work also appeared in book form, see S. Estreicher & J. Sexton, Redefining the Supreme Court's Role (1986)); Baker & McFarland, The Need for a New National Court, 100 Harv. L. Rev. 1400 (1987); Cameron, Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem, 1981 B.Y.U. L. Rev. 545; Ginsburg & Huber, The Intercircuit Committee, 100 Harv. L. Rev. 1417 (1987); Goldberg, Managing the Supreme Court's Workload, 11 Hastings Const. L.Q. 353 (1984); Handler, What To Do With The Supreme Court's Burgeoning Calendars?, 5 Cardozo L. Rev. 249 (1984); Rehnquist, The Changing Role of the Supreme Court, 14 Fla. St. U.L. Rev. 1 (1986); Rx for an Overburdened Supreme Court: Is Relief in Sight?, 66 Judicature 394 (1983) (symposium); S. Hufstedler, The Quiet Collapse: The Crumbling of the Federal Appellate Structure 13-17 (unpublished address at dedication of Annual Survey of American Law, Apr. 7, 1983) (on file at New York University Law Review); see also Annual Judicial Conference of the Second Judicial Circuit of the United States, 109 F.R.D. 441, 453 (1985) (discussing opposition of active judges of Second Circuit to Intercircuit Tribunal).

[3] See, e.g., Bradley, The Uncertainty Principle in the Supreme Court, 1986 Duke L.J. 1;

question of whether the Court is overworked.

A number of crucial events in the debate over the creation of the ICT have recently occurred. A bill to create the ICT was approved by the Subcommittee on Courts of the Senate Judiciary Committee on June 29, 1983.[4] The bill has faced continuous opposition. The strongest criticism occurred in House testimony on the bill on February 27, 1986[5] and in the Senate on October 9, 1985,[6] when Professors Sexton and Estreicher presented their conclusion that there is no need for an ICT because the Supreme Court is not overworked.[7] Furthermore, the American Bar Association House of Delegates voted against endorsing the establishment of an ICT,[8] notwithstanding the unprecedented[9] appearance of (now Chief) Justice Rehnquist at the ABA Convention to speak in favor of the ICT.

Over the course of the 1985 Supreme Court Term[10] Associate Justice Byron White issued or concurred in forty[11] dissents from denial of

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Matasar & Bruch, Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine, 86 Colum. L. Rev. 1291, 1385-89 (1985); Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543 (1985); Comment, Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court, 134 U. Pa. L. Rev. 967 (1986); Estreicher, Conserving the Federal Judiciary for a Conservative Agenda? (Book Review), 84 Mich. L. Rev. 569 (1986) (reviewing R. Posner, The Federal Courts: Crisis and Reform (1985)).

[4] See S. 645, 98th Cong., 1st Sess. §§ 601-07 (1983), 129 Cong. Rec. D923 (daily ed. June 29, 1983).

[5] The Supreme Court and its Workload Crisis: Hearings on H.R. 4149 and H.R. 4238 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 55 (1986) [hereinafter House Hearings].

[6] Intercircuit Panel of the United States Act: Hearing on S. 704 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 159 (1986) [hereinafter Senate Hearings].

[7] Their testimony was based on their study of the Supreme Court's workload. See Estreicher & Sexton, supra note 2. A number of court of appeals judges have also testified against the bill, all of whom have argued that another layer of appellate review is both cumbersome and unnecessary. See Hearings, supra note 1, apps. II, III (statements of Judges Friendly, Lay, Swygert, and Garth).

[8] Blodgett, Intercircuit Panel, A.B.A. J., Apr. 1, 1986, at 17.

[9] ABA Won't Back Proposal for New "Intercircuit" Court: Rehnquist Rebuffed, L.A. Daily J., Feb. 12, 1986, at 1.

[10] Although Justice White has been issuing large numbers of dissents from denial of certiorari since 1983, 1985 was chosen for this study because it was the most recent Supreme Court Term completed at the time of this research. There is no reason to believe that the 1985 Term was not representative of the past four years. For an analysis of the dissents from denial of certiorari issued during the 1984 Term commissioned by Chief Justice Burger, see L. Beck, An Analysis of the 1984 Supreme Court Term 74-84 (1986) (unpublished manuscript on file at New York University Law Review). In the 1986 Term Justice White issued 26 dissents from denial of certiorari.

[11] Baker & McFarland, supra note 2, at 1406 n.37. The word "certiorari" will be used throughout this Note to refer to either a writ of certiorari or a grant of appeal. For a discussion of the historical difference between certiorari and appeal, see R. Stern, E. Gressman & S.

Shapiro, Supreme Court Practice 41-57 (6th ed. 1986) [hereinafter Supreme Court Practice].

The forty cases in which Justice White wrote or concurred in a dissent from the Supreme Court's refusal to hear the case are: (1) Kansas Gas & Elec. Co. v. Brock, 106 S. Ct. 3311 (1986) (No. 85-1403) (White, J., dissenting from denial of certiorari, joined by Blackmun & O'Connor, JJ.); (2) Mulligan v. Hazard, 106 S. Ct. 2902 (1986) (No. 85-1641) (White, J., dissenting from denial of certiorari, joined by Marshall, J.); (3) Franklin & Marshall College v. EEOC, 106 S. Ct. 2288 (1986) (No. 85-1439) (White, J., dissenting from denial of certiorari, joined by Blackmun, J.); (4) Ramirez v. California, 106 S. Ct. 2266 (1986) (No. 85-1321) (White, J., dissenting from denial of certiorari, joined by Brennan & Powell, JJ.); (5) Texas Ass'n of Concerned Taxpayers v. United States, 106 S. Ct. 2265 (1986) (No. 85-1262) (White, J., dissenting from denial of certiorari, joined by Brennan, J.); (6) Private Truck Council of Am. v. Quinn, 106 S. Ct. 1997 (1986) (No. 85-1423) (White, J., dissenting from denial of certiorari, joined by Brennan & O'Connor, JJ.); (7) Raymark Indus. v. Bath Iron Works, 106 S. Ct. 1994 (1986) (No. 85-1246) (White, J., dissenting from denial of certiorari); (8) Hibernia Nat'l Bank v. Chung Yong Il, 106 S. Ct. 1802 (1986) (No. 85-1281) (White, J., dissenting from denial of certiorari); (9) Euroquilt, Inc. v. Scandia Down Corp., 106 S. Ct. 1801 (1986) (No. 85-1038) (White, J., dissenting from denial of certiorari); (10) Wilsey v. Eddingfield, 106 S. Ct. 1660 (1986) (No. 85-1314) (White, J., dissenting from denial of certiorari, joined by Brennan & Marshall, JJ.); (11) Poythress v. Kessler, 106 S. Ct. 1659 (1986) (No. 85-1235) (Burger, C.J., dissenting from denial of certiorari, joined by White, J.); (12) Gray v. Office of Personnel Management, 106 S. Ct. 1478 (1986) (No. 85-969) (White, J., dissenting from denial of certiorari); (13) Petty Motor Co. v. United States, 475 U.S. 1056 (1986) (No. 85-798) (White, J., dissenting from denial of certiorari, joined by Burger, C.J.); (14) Davis v. United Auto, Aerospace & Agric. Implement Workers, 475 U.S. 1057 (1986) (No. 85-844) (White, J., dissenting from denial of certiorari); (15) River Rd. Alliance, Inc. v. Corps of Eng'rs of the United States Army, 475 U.S. 1055 (1986) (No. 85-785) (White, J., dissenting from denial of certiorari); (16) Missouri Farmers Ass'n v. United States, 106 S. Ct. 1281 (1986) (No. 85-727) (White, J., dissenting from denial of certiorari); (17) Lane v. Enoch, 475 U.S. 1053 (1986) (No. 85-539) (White, J., dissenting from denial of certiorari, joined by Burger, C.J. & Rehnquist, J.); (18) Amrep Corp. v. Federal Trade Comm'n, 475 U.S. 1034 (1986) (No. 85-633) (White, J., dissenting from denial of certiorari); (19) Adkins v. Times-World Corp., 474 U.S. 1109 (1986) (No. 85-888) (White, J., dissenting from denial of certiorari, joined by Brennan, J.); (20) Pan Am. World Airways v. Cook, 474 U.S. 1109 (1986) (No. 85-878) (White, J., dissenting from denial of certiorari, joined by O'Connor, J.); (21) Preuit & Mauldin v. Jones, 474 U.S. 1105 (1986) (No. 85-794) (White, J., dissenting from denial of certiorari); (22) Mason v. Continental Group, 474 U.S. 1087 (1986) (No. 85-847) (White, J., dissenting from denial of certiorari, joined by Brennan, J.); (23) Young v. Arkansas, 474 U.S. 1070 (1986) (No. 85-391) (White, J., dissenting from denial of certiorari, joined by Brennan, J.); (24) Caylor v. City of Red Bluff, 474 U.S. 1037 (1985) (No. 85-586) (White, J., dissenting from denial of certiorari, joined by Brennan, J.); (25) Henry v. City of Detroit Manpower Dep't, 474 U.S. 1036 (1985) (No. 85-237) (White, J., dissenting from denial of certiorari, joined by Blackmun, J.); (26) Nyflot v. Minnesota Comm'r of Pub. Safety, 474 U.S. 1027 (1985) (No. 85-636) (White, J., dissenting from dismissal of appeal, joined by Stevens, J.); (27) Kemp v. Blake, 474 U.S. 998 (1985) (No. 85-188) (White, J., dissenting from denial of certiorari); (28) Moran v. Pima County, 474 U.S. 989 (1985) (No. 85-58) (White, J., dissenting from denial of certiorari); (29) Greber v. United States, 474 U.S. 988 (1985) (No. 85-35) (White, J., dissenting from denial of certiorari); (30) Adams v. United States, 474 U.S. 971 (1985) (No. 85-5046) (White, J., dissenting from denial of certiorari, joined by Burger, C.J.); (31) North Side Lumber Co. v. Block, 474 U.S. 931 (1985) (No. 85-59) (White, J., dissenting from denial of certiorari); (32) Kerr v. Finkbeiner, 474 U.S. 929 (1985) (No. 85-6792) (White, J., dissenting from denial of certiorari, joined by Marshall, J.); (33) Green v. United States, 474 U.S. 925 (1985) (No. 84-2032) (White, J., dissenting from denial of certiorari, joined by Brennan, J.); (34) Jackson v. United States, 474 U.S. 924 (1985) (No. 84-1914) (White, J., dissenting from denial of certiorari); (35) Oettinger v. Oettinger, 474 U.S. 912 (1985) (No. 84-2011) (White, J., dissenting from dismissal of

certiorari.[12] In thirty-eight of these dissents Justice White claimed that the Supreme Court should have granted certiorari in order to resolve a conflict between lower courts.[13] These dissents are being used by supporters of the ICT to demonstrate that there are a large number of unresolved intercircuit conflicts that the Supreme Court is too busy to resolve. These conflicts, they argue, could be resolved by an Intercircuit Tribunal.[14]

The most obvious example of the use of these dissents to demonstrate the existence of unresolved conflicts can be found in the testimony of Leo Levin, the director of the Federal Judicial Center and a supporter of the ICT. Levin repeatedly quoted Justice White and his dissents from denial of certiorari during his testimony to the Senate Subcommittee on Courts.[15]

Furthermore, Justice White himself stated that "[d]uring the 1984

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appeal, joined by Brennan, J.); (36) Lucas v. New York, 474 U.S. 911 (1985) (No. 85-5116) (White, J., dissenting from denial of certiorari); (37) Saville v. Westinghouse Elec. Corp., 474 U.S. 911 (1985) (No. 84-2034) (White, J., dissenting from denial of certiorari); (38) Greyhound Lines v. Wilhite, 474 U.S. 910 (1985) (No. 84-2016) (White, J., dissenting from denial of certiorari); (39) Pacific Employers Ins. Co. v. M/V Capt. W.D. Cargill, 474 U.S. 909 (1985) (No. 84-1928) (White, J., dissenting from denial of certiorari); (40) Fein v. Permanente Medical Group, 474 U.S. 892 (1985) (No. 85-19) (White, J., dissenting from dismissal of appeal).

[12] The fact that Justice White has dissented from denial of certiorari 40 times in the 1985 Supreme Court Term is in itself surprising. According to a recent Westlaw search, over the last five years there have been fewer than 300 dissents from denial of certiorari with a written opinion (less than seven per Justice per year). This does not include the more than 700 pro forma dissents by Justices Brennan and Marshall over the death penalty issue.

[13] This Note excludes two of Justice White's dissents from denial of certiorari because they do not concern intercircuit conflicts. These two dissents are Oettinger v. Oettinger, 474 U.S. 912 (1985), denying cert. to 463 So. 2d 875 (La. 1985) and Young v. Arkansas, 474 U.S. 1070 (1986), denying cert. to Young v. State, 286 Ark. 413, 692 S.W.2d 752 (1985). The first is an equal protection case, the second a first amendment case. In neither case did Justice White allege a conflict among the lower courts on the issues presented. A third case, EEOC v. Federal Labor Relations Auth., 106 S. Ct. 1678, 1681 (1985), dismissing cert. to 744 F.2d 842 (D.C. Cir. 1984), is also not included in this study. This case was initially granted certiorari, but was later dismissed due to lack of jurisdiction. Justice White dissented, saying, "Because I agree with Justice Stevens that the Court should decide the merits of this case, I cannot join the Court's opinion or judgment." 106 S. Ct. at 1681. Justice Stevens did not allege an intercircuit conflict. See 106 S. Ct. at 1681-82.

[14] See Senate Hearings, supra note 6, at 144-50 (statement of Leo Levin); Baker & McFarland, supra note 2, at 1406; L. Beck, supra note 10, at app. 1.

[15] See Senate Hearings, supra note 6, at 146 (statement of Leo Levin).

> I would like to describe briefly some new material, which I believe further underscores the need for the Intercircuit Panel.
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> Toward the end of the Supreme Court's 1984 Term, i.e., in the spring of 1985, Justice White was asked whether the need for an "Intercircuit Tribunal" could "be eased simply by the Court exercising greater selectivity in accepting cases." His response was unequivocal:
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> "Decidedly not. . . . In my judgment it [the Supreme Court] is now denying certiorari in many other cases that should be reviewed."

Id.

Term, I publicly dissented 54 times from the Court's refusal to review a case raising an issue that I believe it should address."[16] This statement is consistent with Justice White's stated opinion that "[t]he chief justification for the Intercircuit Tribunal is to provide a court to which the Supreme Court could refer cases that it does not have the capacity itself to hear and decide."[17] According to Justice White, if the Supreme Court attempted to resolve all of the conflicts it would add to the Court's already substantial workload.[18] Simply put, Justice White believes that the Supreme Court is not equipped to resolve all of the conflicts presented to it, as is needed to manage the federal judicial system. This helps explain Justice White's support of the ICT,[19] as well as the use of his dissents by others to press the argument that the Supreme Court is overworked and that the ICT is an appropriate remedy.[20]

Justice Stevens has understood the dissents from denial of certiorari to be an attempt to create the impression that the Court is not managing its docket soundly, and replied to this allegation[21] in a concurrence to a denial of certiorari. "I add these few words only because of my concern that unanswered dissents from denial of certiorari sometimes lead the uninformed reader to conclude that the Court is not managing its discretionary docket in a responsible manner."[22]

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16 Id. at 147.

17 Id. at 146.

18 If all of the cases in which Justice White dissented had been heard, there would have been a 22% increase in cases heard during the 1985 Term. See 55 U.S.L.W. 3038 (July 29, 1986) (summary of 1985 docket).

19 See Letter from Justice White to Representative Kastenmeier (March 6, 1984), reprinted in Hearings, supra note 1, at 360.

20 See, e.g., Senate Hearings, supra note 6, at 144 (statement of Leo Levin).

21 Perhaps Justice White does not actually want the Supreme Court to hear all of these cases, but rather, is building a record supporting the creation of an ICT. Parenthetically, if the Supreme Court had granted certiorari and resolved all of the alleged conflicts with dispatch, that too would prove the lack of need for an ICT.

22 Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140, 1140 (1985) (Stevens, J., concurring in denial of certiorari). On other occasions, Justice Stevens has used harsher language in reference to the issuing of dissents from denial of certiorari.

> One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest form of dicta, since they have even less legal significance than the orders of the entire Court which, as Mr. Justice Frankfurter reiterated again and again, have no precedential significance at all.
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> . . . Since the court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover, since they often omit any reference to valid reasons for denying certiorari, they tend to imply that the court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference.

Singleton v. Commissioner, 439 U.S. 940, 944-45 (1978) (opinion of Stevens, J. respecting denial of certiorari); see also Castorr v. Brundage, 459 U.S. 928, 928-30 (1982) (opinion of Stevens, J., respecting denial of certiorari) ("[O]ccasional explanation [of reasons for denying

Part I of this Note summarizes recent developments in the debate over the ICT, current claims of the ICT proponents as to the Supreme Court's workload crisis, and the results of the study published in the New York University Law Review (the Supreme Court Project).[23] Part II establishes technical and procedural criteria for determining if a case merits the granting of certiorari (is "certworthy"), and applies these criteria to the cases in which Justice White dissented from denial of certiorari. It concludes that thirteen of the cases in which Justice White dissented were correctly denied certiorari because they did not satisfy the minimum technical or procedural requirements needed before a case should be decided by the Supreme Court. Part III evaluates the remaining cases in which Justice White dissented from denial of certiorari due to a perceived conflict and concludes that twelve of the cases do not contain substantive conflicts in the holding of the cases. Part IV develops criteria for evaluating the tolerability of conflicts among the lower courts and applies them to the thirteen remaining cases in which Justice White dissented from denial of certiorari. This Note concludes that only two of the thirty-eight cases in which Justice White dissented from denial of certiorari on the grounds of intercircuit conflicts are actually worthy of Supreme Court review. The existence of two unresolved conflicts during the 1985 Term does not support the creation of an Intercircuit Court of Appeals.

I
THE PROPOSAL FOR AN INTERCIRCUIT TRIBUNAL: ITS HISTORY AND DEVELOPMENT

For close to twenty years, Chief Justice Burger has been advocating the creation of an ICT.[24] The recent resurgence of this idea was spotlighted in his 1983 address to the American Bar Association[25] and the introduction soon thereafter of bills in each house of Congress to create an Intercircuit Tribunal.[26] Burger's proposed ICT would consist of twenty-six judges, two from each circuit. Subpanels of seven judges would sit for up to a year to "hear and decide all intercircuit conflicts

certiorari] may allay the possible concern that this Court is not faithfully performing its responsibilities.").

[23] Estreicher & Sexton, supra note 2.

[24] In 1971 Chief Justice Burger created the Freund Committee to study the issue of the Supreme Court's workload. 57 F.R.D. 573, 576 (1972); see also text accompanying notes 47-50 infra (discussing committee's conclusions).

[25] Burger, supra note 1, at 443.

[26] The Senate bill is the Court Improvements Act of 1983, S. 645, 98th Cong., 1st Sess., 129 Cong. Rec. S1947-56 (daily ed. Mar. 1, 1983) (statement of Sen. Dole). The House bill is the Intercircuit Tribunal of the United States Courts of Appeals Act, H.R. 1970, 98th Cong., 1st Sess. (1983), reprinted in Hearings, supra note 1, at 9.

and possibly, in addition, a defined category of statutory interpretation cases."[27] The Supreme Court would maintain certiorari jurisdiction over cases heard by the ICT.[28]

A definition of what the Supreme Court's role should be is crucial to any attempt to determine if the Supreme Court is overworked. It is impossible to assess whether the Court is doing its job without first determining what that job is. The Supreme Court Project presented one such model of the Supreme Court's role—a managerial one.[29] Under a managerial model the Supreme Court's role is to provide guidance to the lower federal courts on issues of law rather than to be either an error corrector or a resolver of conflicts between courts.[30] An examination of the Court's workload under this model reveals that the Supreme Court is not overworked; in fact, it is working nowhere near its maximum capacity, and is wasting valuable resources hearing cases that it ought not hear.[31]

Two other models of the Supreme Court's role exist, although one of them has been discarded since at least 1925. The first model is that of conflict resolver; the second is that of final court of appeals, or error corrector. According to the conflict resolver model, the Supreme Court's goal is to guarantee the uniform application of federal law by the state courts as well as the uniform application of all law by the federal courts.[32] Under this model, the Supreme Court should resolve all conflicts of federal law between lower courts. This model has many adherents,[33] perhaps among them Justice White.[34] This model maintains that there are two fundamental reasons for the Supreme Court to promote legal uniformity. The first is fundamental fairness: when substantive law differs within the federal system, litigants in front of different courts are treated differently, resulting in inconsistent outcomes—and that is simply unjust.[35] Second, they argue that the immediate resolution of almost all

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27 Burger, supra note 1, at 447. In Chief Justice Burger's 1984 modification of the proposal, nine, rather than seven judges, would sit in each panel. Burger, 1984 Year-End Report on the Judiciary 9 (1985) (on file at New York University Law Review).

28 Burger, supra note 1, at 447.

29 See Estreicher & Sexton, supra note 2, at 710-44.

30 Id. at 715-17.

31 See id. at 774-78, 787-93.

32 See Baker & McFarland, supra note 2, at 1404-09; see also Levin & Leeson, Issue Preclusion Against the United States Government, 70 Iowa L. Rev. 113, 128 (1984) (criticizing government litigation strategy of "fomenting inconsistency" among numerous circuits rather than petitioning for writ of certiorari (quoting Goodman's Furniture Co. v. United States Postal Serv., 561 F.2d 462, 465 (3d Cir. 1977) (Weis, J., concurring))).

33 See Baker & McFarland, supra note 2, at 1404 (listing adherents).

34 At least Leo Levin believes this to be Justice White's image of the Court's role. See Senate Hearings, supra note 6, at 144-50.

35 See Baker & McFarland, supra note 2, at 1407-09.

conflicts promotes the economically efficient resolution of disputes.[36]

The second potential model for the Supreme Court is that of error corrector. Under this model it is the role of the Supreme Court to correct any and all injustices that occur in any court and over any issue.[37] Although this image of the Court has a certain amount of historical validity,[38] since the passage of the Judges Act of 1925[39] no Justice or scholar has accepted this model as a role appropriate for the Supreme Court,[40] given the incredible volume of lower court cases in the twentieth century.[41] In 1924 the Supreme Court reviewed about ten percent of all Court of Appeals decisions.[42] In the 1984 Term it reviewed approximately one in two hundred, or one-half of one percent.[43]

Advocates of the Intercircuit Tribunal have refused to accept a managerial model of the Supreme Court. The Court, in their view, should assume the only other role available, that of conflict resolver. Thus, ICT

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[36] See id. at 1407 and sources cited therein.

Dean Erwin Griswold, in testimony before the House Subcommittee on the Courts, argued in favor of uniformity. "[T]here are a host of . . . cases on which there should be established at a relatively early date, a rule which will have national validity, and which will be applied throughout the country by the several courts of appeals." House Hearings, supra note 5, at 36. Dean Griswold then offered the case of Mellon Bank, N.A. v. United States, 475 U.S. 1032 (1986), denying cert. to 762 F.2d 283 (3d Cir. 1985), as a model case for the proposed ICT to hear. House Hearings, supra note 5, at 30, 37-38. This case involved the question whether a bequest to a not-for-profit cemetery association qualifies for a deduction under the Internal Revenue Code. According to ICT proponents, this is the type of case that presents a pressing need for early, nationally binding law and should be heard by the ICT. However, all the federal appellate courts to rule on this issue agree on the law. *Mellon Bank*, 106 S. Ct. at 1244. Thus, a uniform law already exists. But Justices O'Connor, Blackmun, and Powell believe the judgment of all of the courts of appeals is wrong. Id.

It is hard to see how the ICT would solve a problem of this sort. Presumably the ICT (composed of the same court of appeals judges who have erred on this issue in the past) would err once again, and Justice O'Connor and her colleagues would then want to review that decision. Thus, *Mellon Bank* does not support the need for an ICT—nor does it demonstrate how an ICT will reduce the Supreme Court's workload.

[37] Estreicher & Sexton, supra note 2, at 711 n.112.

[38] See Judiciary Act of 1789, ch. 20, 1 Stat. 73; Judiciary Act of 1802, ch. 8, 2 Stat. 132. Both of these acts encouraged the Justices, through the institution of circuit-riding, to act in an error-correcting capacity. See generally Warren, New Light On The History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923) (discussing Act in light of newly-discovered original draft and amendments).

[39] Ch. 229, 43 Stat. 936 (codified as amended at scattered sections of 10 U.S.C., 11 U.S.C., and 28 U.S.C.).

[40] See Supreme Court Practice, supra note 11, at 221-24.

[41] See also (Chief Justice) Taft, The Jurisdiction of the Supreme Court under the Act of February 13, 1925, 35 Yale L.J. 1, 2 (1925) ("The function of the Supreme Court is conceived [in the Judges Act] to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest."); see also (Chief Justice) Vinson, Work of the Federal Courts, 69 S. Ct. vi (1949) (role of Court is as conflict resolver).

[42] Baker & McFarland, supra note 2, at 1405-06.

[43] Id.

proponents claim that the Supreme Court is unable to resolve all the conflicts in law confronting the lower courts because it is overworked.[44] ICT proponents rely on the two major studies of the Supreme Court workload done prior to the Supreme Court Project to support their contention—the reports of the Freund Committee[45] and the Hruska Commission.[46] The invocation of these two reports in support of the ICT, however, is inappropriate.

Although the Freund Committee did propose a National Court of Appeals (NCA),[47] the proposed court was totally different from the ICT. The proposed NCA's function was to select applications for the Supreme Court to review.[48] It would not have heard any cases at all, but would have acted instead as an advisory court to the Supreme Court.[49] In contrast, the ICT would hear its own cases and would not directly influence the Supreme Court docket.[50]

The Hruska Commission, however, did propose a court similar to the ICT.[51] The proposed court would have consisted of seven judges,[52] and would have had a mandate to resolve intercircuit conflicts.[53] Cases could also be referred to it by the Supreme Court, which would control the NCA's docket.[54] The Hruska Commission's endorsement of an intercircuit court relied heavily on a study done by Professor Floyd Feeney that concluded that there were many conflicts between the federal courts of appeals that the Supreme Court failed to resolve.[55] As part of the

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[44] See id. at 1404-09.

[45] Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972), reprinted in 57 F.R.D. 573 (1972) [hereinafter Freund Committee Report].

[46] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (1975), reprinted in 67 F.R.D. 195 (1975) [hereinafter Hruska Commission Report].

[47] Freund Committee Report, supra note 45, at 590-95.

[48] Id. at 590-91.

[49] See id. at 590-95. The NCA was attacked almost universally. See, e.g., Alsup, A Policy Assessment of the National Court of Appeals, 25 Hastings L.J. 1313 (1974); Blumstein, The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals, 26 Vand. L. Rev. 895 (1973); Warren & Burger, Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal, 59 A.B.A. J. 721 (1973).

[50] The details of current proposals for an ICT are summarized in Estreicher & Sexton, supra note 2, at 684-89.

[51] Hruska Commission Report, supra note 46, at 236-38. It is noteworthy that Professor Arthur Hellman, who helped direct the Hruska Commission's work, is now opposed to the creation of the ICT. See Rx for an Overburdened Supreme Court: Is Relief in Sight?, 66 Judicature 394 (1983). For a summary of the Hruska Report, as well as other reform proposals, see Estreicher & Sexton, supra note 2, at 813-22.

[52] Hruska Commission Report, supra note 46, at 237.

[53] Id. at 247.

[54] Id. at 238-41.

[55] Feeney, Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court (June 4, 1975) (unpublished report on file at New York University Law Review).

Supreme Court Project, the Feeney study was reexamined by a student Note.[56] Although Professor Feeney alleged that approximately sixty conflicts a year were improperly denied certiorari, the Supreme Court Project found that many of the conflicts were so insignificant that the questions they addressed have not arisen since.[57] Other conflicts disappeared after a brief period of percolation;[58] still other conflicts contained procedural defects that made them unsuitable for Supreme Court review.[59] Some cases were listed as presenting conflicts when none in fact existed.[60] In the final analysis, no more than fifteen conflicts existed that were ripe for Supreme Court review.[61] As the Note examining the Feeney Study concluded: "[T]he existence of even fifteen intolerable conflicts hardly warrants the creation of a new tribunal that would sit primarily to resolve conflicts."[62]

Given the failure of advocates of the ICT to advance alternative models of the Supreme Court's role, this Note will examine Justice White's dissents from denial of certiorari in light of the only two images of the Court that have been advanced—that of conflict resolver, the image accepted by proponents of the ICT, and that of manager of the federal judiciary, the image advocated by Professors Estreicher and Sexton.

Recently, Justice White has written dissents from denial of certiorari intended to re-create Professor Feeney's argument—that there are so many conflicts between the different courts of the land that the Supreme Court is unable to fulfill its role as conflict resolver.[63] The following Parts will analyze Justice White's dissents from denial of certiorari utilizing a number of criteria: procedural regularity, the existence of a true conflict, and the appropriateness of resolution by the Supreme Court.

II

TECHNICAL AND PROCEDURAL REQUIREMENTS FOR A GRANT OF CERTIORARI

In order to establish a framework for analyzing the correctness of a

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Although Feeney's study was never published in its entirety, most of it is reprinted in the Hruska Commission Report, supra note 46, at 301-90.

[56] See Note, Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney's Study of Conflicts in Federal Law, 59 N.Y.U. L. Rev. 1007 (1985).

[57] Id. at 1032-34.

[58] Percolation is the process by which various lower courts consider an issue in light of other court's prior pronouncements on an issue. See Estreicher & Sexton, supra note 2, at 719; Baker & McFarland, supra note 2, at 1408.

[59] Note, supra note 56, at 1009-19.

[60] Id. at 1011-13.

[61] Id. at 1040.

[62] Id.

[63] See Senate Hearings, supra note 6, at 145-48 (testimony of Leo Levin (quoting Justice White)).

denial of certiorari, one must first advance criteria for what cases of conflict the Supreme Court should hear. This Note will analyze Justice White's dissents according to traditional criteria, and broader criteria that will be developed by this Note.[64]

In order for an issue to be classified as a square conflict, four initial procedural requirements must be met. First, the cases in conflict must be from final courts in their jurisdictions.[65] This criterion is grounded on the belief that a conflict merits Supreme Court review only when courts in a given jurisdiction, either a federal circuit or a state, are bound to follow a legal rule contrary to a rule that must be followed in another jurisdiction.[66] Nonfinal courts rarely, if ever, create binding rules.

Second, the conflict may not be based on dicta or alternative holdings.[67] Such a conflict is not a square conflict for two reasons. First, the lower courts within a jurisdiction are usually not obligated to adhere to dicta or alternative holdings.[68] Second, legal positions stated in dicta or in alternative holdings typically are not the product of the same thorough deliberation that characterizes holdings that are the sole basis for a court's decision.[69]

Third, the issue raised before the Supreme Court must have been raised before the lower courts that heard the case, and either petitioner or respondent must raise the issue in its brief to the Supreme Court.[70] This requirement ensures that the Supreme Court is never the first court to consider an issue and that at least a minimal amount of percolation has occurred.

Finally, the legal issue must also be relevant to the petitioner's claim.[71] In an adversarial system it is important that the litigant actually have an incentive to litigate the issue in the most complete manner.[72] Litigants whose fates are already sealed for reasons unrelated to the issue under litigation will not advocate the claim to its fullest.[73]

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64 See text accompanying notes 250-343 infra.

65 See Estreicher & Sexton, supra note 2, at 722. Final courts are the highest appellate courts authorized to decide an issue. See Sup. Ct. R. 17. United States courts of appeals are considered final courts vis-a-vis the courts of appeals of other circuits, but not vis-a-vis other panels within the same circuit. See text accompanying notes 224-28 infra.

66 Estreicher & Sexton, supra note 2, at 722.

67 Id. at 723.

68 See Restatement (Second) of Judgments § 27 comment i (1987).

69 Estreicher & Sexton, supra note 2, at 721. But see Union Pac. Co. v. Mason City Co., 199 U.S. 160, 166 (1905) (despite alternative holding, Court considered prior judgment "fully argued and elaborately considered").

70 Estreicher & Sexton, supra note 2, at 801.

71 See Supreme Court Practice, supra note 11, at 708-09.

72 The Supreme Court "has always required that a litigant have 'standing' to challenge the action sought to be adjudicated." Valley Forge College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982).

73 For a fascinating example of the legal travesties that occur when this rule is violated, see

The application of these criteria to cases in which Justice White dissented from denial of certiorari reveals that thirteen of the thirty-eight cases were correctly denied certiorari because they failed to meet one or more of the four procedural requirements necessary for Supreme Court review.

A. Nonfinal Courts

In two of Justice White's dissents from denial of certiorari he alleged a conflict between courts that are not final in their jurisdictions.[74] The first of these cases is *Nyflot v. Commissioner of Public Safety*.[75] In this case, the Minnesota Supreme Court had ruled that the sixth amendment right to counsel does not attach at the time of a police stop to conduct a breath analysis for intoxication.[76] This ruling was in conflict with three lower courts: a vacated-as-moot federal district court case,[77] a Vermont Supreme Court case which was superseded by statute,[78] and an overruled Texas Court of Appeals case.[79] Thus, because none of these three cases still had precedential value, no conflict among current final courts existed and certiorari was properly denied.

The second example of a conflict between nonfinal courts is *Caylor v. City of Red Bluff*,[80] in which one of the California state courts of appeal ruled that exhaustion of state administrative remedies is a prerequisite for bringing an action in state court under 42 U.S.C. section 1983. The California court of appeal that issued this opinion declined to publish the case; thus, the opinion may not be "cited or relied on by a court or party in any other action or procedure."[81] The California Supreme Court also declined to publish both the case and its own decision not to review it.[82] This court of appeal case is contrary to *Fetterman v. Univer-*

Lombardo, Three Generations, No Imbeciles: New Light on Buck v. Bell, 60 N.Y.U. L. Rev. 30 (1985).

[74] See text accompanying notes 65-66 supra.

[75] 474 U.S. 1027 (1985).

[76] Nyflot v. Commissioner of Pub. Safety, 369 N.W.2d 512 (Minn.), appeal dismissed, 474 U.S. 1027 (1985).

[77] Heles v. South Dakota, 530 F. Supp. 646 (D.S.D), vacated as moot, 682 F.2d 201 (8th Cir. 1982).

[78] State v. Welch, 135 Vt. 316, 376 A.2d 351 (1977), superseded by statutorily created right to counsel, Vt. Stat. Ann. tit. 23, § 1202(b) (1978), see State v. Duff, 136 Vt. 537, 540, 394 A.2d 1145, 1147 (1978).

[79] Forte v. State, 686 S.W.2d 744 (Tex. Ct. App. 1985), aff'd in part and rev'd in part, 707 S.W.2d 89 (Tex. Crim. App. 1986).

[80] 474 U.S. 1037 (1985).

[81] Cal. Ct. R. 977.

[82] Both cases can be found in the appendix to the petition requesting a grant of certiorari. Appellant's Petition for Certiorari, Caylor v. City of Red Bluff, 474 U.S. 1037 (1985) (No. 85-586).

sity of Connecticut,[83] in which the Connecticut Supreme Court ruled that exhaustion of administrative remedies is not required before a section 1983 suit may be filed in state court. However, because of the clear lack of precedential value given to the California case, even by its own judicial system, this conflict does not merit Supreme Court review.[84]

B. Dicta or Alternative Holdings

Two of the cases in which Justice White dissented were correctly denied certiorari because they were conflicts stemming from dicta or alternative holdings of various courts and therefore failed to meet the second procedural requirement for Supreme Court review.[85] *Fein v. Permanente Medical Group*[86] is one such case. The issue in this case was whether a state may constitutionally impose a $250,000 cap on damages for noneconomic losses in medical malpractice cases. The California Supreme Court upheld the law against a federal constitutional equal protection challenge.[87] *Fein* was alleged to be in conflict with *Simon v. St. Elizabeth Medical Center*,[88] an Ohio case that considered a similar law on alternative federal and state constitutional equal protection grounds. Since a conflict exists only between one of two alternative holdings of *Simon* and the direct sole holding of *Fein*, the case ought not to be heard.[89]

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[83] 192 Conn. 539, 473 A.2d 1176 (1984).

[84] This is not to say that courts can prevent Supreme Court review of their cases merely by not publishing them. However, in a system with clear rules of precedent and no history of devious use of these rules, it is proper that the Supreme Court should also follow them.

[85] See text accompanying notes 67-69 supra.

[86] 474 U.S. 892 (1985).

[87] Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985). The Indiana Supreme Court has upheld similar legislation. See Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 404 N.E.2d 585 (1980).

[88] 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Com. Pl. 1976).

[89] Justice White's dissent in this case is particularly flawed. Justice White cites erroneously three additional cases that he claims are in conflict with the California Supreme Court. See 474 U.S. at 893. Two of the three cases, Carson v. Maurer, 120 N.H. 925, 940-41, 424 A.2d 825, 836 (1980), and Arneson v. Olson, 270 N.W.2d 125, 132, 136, 137 (N.D. 1978), overturn statutes similar to the California statute on explicitly state constitutional grounds rather than on federal constitutional grounds. The third case, Baptist Hosp. v. Baber, 672 S.W.2d 296 (Tex. Ct. App. 1984), aff'd, 714 S.W.2d 310 (Tex. 1986), was decided in the lower court on both statutory and constitutional grounds. However, on appeal the Supreme Court of Texas upheld the statutory holding but stated that, as the case could have been decided on statutory grounds alone, the lower court should not have addressed the constitutional issues. 714 S.W.2d at 310. Therefore, the constitutional prong of the lower Texas court's opinion is dicta and fails the requirement that a judgment be from the highest court of the state. See text accompanying notes 65-66 supra. Also, the Fifth Circuit in Lucas v. United States, 807 F.2d 414 (5th Cir. 1986), question of state law certified, 811 F.2d 270 (5th Cir. 1987), stated that it was unclear whether *Baptist Hospital* was decided on state or federal constitutional grounds, 807 F.2d at 419, and subsequently certified to the Texas Supreme Court the question of the constitutionality under the Texas Constitution of the statute considered in *Baptist Hospital.*

Another example of a conflict based on alternative holdings is *Private Truck Council of America v. Quinn*.[90] In this case, the Supreme Judicial Court of Maine held that an allegation that a state has violated the commerce clause is not cognizable in an action under 42 U.S.C. section 1983.[91] Almost all of the case law supports this position.[92] In *Kennecott Corp. v. Smith*,[93] however, the Third Circuit stated in a footnote, as an alternative holding to the case, that commerce clause violations are in fact actionable under section 1983.[94] No reported decision of an appellate federal court or state court of last resort has ever relied on *Kennecott*. This conflict, between an alternative holding in a footnote of a seven-year-old case and every other appellate court in the country that has considered the issue, does not warrant a grant of certiorari.[95]

C. *Not Raised in Court Below*

Justice White's dissent in *Kemp v. Blake*[96] is flawed because the issue Justice White wanted the Court to hear was not raised before the lower court.[97] Justice White wanted to grant certiorari on a Federal Rule of Civil Procedure 54(b) issue—whether, in a habeas corpus proceeding presenting multiple claims for relief, a court of appeals has jurisdiction to review an order of the district court without also disposing of all of the rest of petitioner's claims. As the respondent noted in his brief to the Supreme Court: "This issue of procedural default was neither raised nor briefed by Petitioner-Warden in the Circuit Court below; it is therefore jurisdictionally barred from being an issue available for review by certiorari."[98]

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811 F.2d at 271. Thus, only *Simon* discusses the question in light of federal law, and then only as an alternative holding. Furthermore, the *Simon* court cheerfully admitted that its discussion was dicta, because the plaintiff had failed to ask for damages in excess of the amount prescribed by statute, and thus lacked standing to challenge that provision of the statute. *Simon*, 355 N.E.2d at 905.

90 106 S. Ct. 1997 (1986).

91 Private Truck Council of Am. v. Secretary of State, 503 A.2d 214, 222 (Me.), cert. denied, 106 S. Ct. 1997 (1986).

92 See, e.g., J&J Anderson, Inc. v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985); Gould, Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations, 750 F.2d 608 (7th Cir. 1984), aff'd, 475 U.S. 282 (1986); Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir. 1984), cert. denied, 469 U.S. 834 (1985).

93 637 F.2d 181 (3d Cir. 1980).

94 Id. at 186 n.5.

95 Justice White presented a second issue as ripe for certiorari in this case. This issue, whether unconstitutional taxes that are already collected must be refunded, is unrelated to this study of intercircuit conflicts and hence is not discussed here.

96 474 U.S. 998 (1985).

97 See Blake v. Kemp, 758 F.2d 523 (11th Cir.), cert. denied, 474 U.S. 998 (1985); text accompanying note 70 supra.

98 Brief of Respondent at 6, Kemp v. Blake, 474 U.S. 998 (1985) (No. 85-188).

Justice White's dissent in *Green v. United States*[99] is also procedurally flawed. In *Green*, the petitioner requested that the Supreme Court overturn his conviction on the grounds that he was denied a specific jury instruction, although at the time of his trial he did not request that instruction.[100] The Federal Rules of Criminal Procedure state that one must contest a jury instruction at trial in order for it to be grounds for an appeal.[101] Because the defendant in *Green* did not contest the instruction at trial, certiorari was appropriately denied.

D. Importance to Litigants

One final technical requirement exists. The Supreme Court should only hear cases where there is a real issue of actual importance to the *litigants*, rather than merely an issue of importance to the nation.[102] Seven of Justice White's dissents involve cases where the conflict to be resolved is not of importance to the litigants. One such case is *Adams v. United States*.[103] *Adams* asks whether a defendant can be convicted of violating the Racketeer Influenced and Corrupt Organizations Act[104] upon evidence that the defendant merely agreed to the commission of two predicate acts of racketeering activity as opposed to a showing that the defendant agreed to commit those acts personally. There is disagreement among the circuit courts on this question,[105] and the issue appears ready for Supreme Court review. However, the defendant in this case was convicted of committing the acts personally, notwithstanding the judge's instructions that the jury need only believe that he agreed to the commission of the two acts in order to convict.[106] The dispute in law is

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99 474 U.S. 925, denying cert. to 745 F.2d 1205 (9th Cir. 1985).

100 See Brief of Respondent at 12, Green v. United States, 474 U.S. 925 (1985) (No. 84-2032).

101 Fed. R. Crim. P. 30.

102 See text accompanying notes 71-73 supra. Constitutionally, there is little doubt that litigants may raise issues on appeal only marginally relevant to the ultimate disposition of a case. See Benton v. Maryland, 395 U.S. 784 (1969) (petitioner has standing to contest conviction based on second count of conviction, even though sentence for second count runs concurrently with first count, correctness of which petitioner concedes). When the issues are only tangentially related to the claim for relief, these litigants are weak advocates for their legal claim and should not be permitted to be the sole representative of a position to the Supreme Court. See Supreme Court Practice, supra note 11, at 708-09.

103 474 U.S. 971 (1985).

104 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985).

105 Compare United States v. Ruggiero, 726 F.2d 913 (2d Cir.) (government must prove that defendant himself agreed to commit predicate acts), cert. denied, 469 U.S. 831 (1984) with United States v. Winter, 663 F.2d 1120 (1st Cir. 1981) (charging defendants with conspiracy to violate RICO sufficient to support RICO charge), cert. denied, 460 U.S. 1011 (1983) and United States v. Carter, 721 F.2d 1514 (11th Cir.) (defendant need not agree to personally commit predicate acts), cert. denied, 469 U.S. 819 (1984).

106 "[I]n Adams' case, . . . the jury found that he had actually committed two predicate acts." Appellant's Brief Opposing Certiorari at 7, Adams v. United States, 474 U.S. 971

therefore irrelevant to this petitioner because his conviction would be affirmed under either standard. Thus, certiorari was correctly denied.

Euroquilt, Inc. v. Scandia Down Corp.[107] concerns the legal standard of review to be used when reviewing district court rulings on trademark law. As Justice White noted, the circuits are hopelessly divided.[108] Seven of the circuits believe that "likelihood of confusion," one of the key elements of any trademark infringement suit, is a question of fact, reversible only if clearly erroneous.[109] Five circuits adopt the position that "likelihood of confusion" is a question of law and is reviewable as such.[110] This issue is ready for review. However, the circuits that have ruled on the issue unanimously agree that the factors considered in evaluating likelihood of confusion are issues of fact and are only reversible if clearly erroneous.[111] The Seventh Circuit, where *Euroquilt* originated, considers seven factors in evaluating the likelihood of confusion.[112] In *Euroquilt*, the district court made findings of fact on six of the seven in the respondent's favor.[113] The seventh factor was not mentioned. In any case, because the court found the existence of *actual* confusion,[114] no

(1985) (No. 85-5046). The district court case is not reported.

107 106 S. Ct. 1801 (1986), denying cert. to 772 F.2d 1423 (7th Cir. 1985).

108 106 S. Ct. at 1801. See also Justice White's dissent from denial of certiorari in Elby's Big Boy, Inc. v. Frisch, 459 U.S. 916 (1982).

109 The leading decisions in these seven circuits are: Euroquilt, Inc. v. Scandia Down Corp., 772 F.2d 1423, 1431 (7th Cir. 1985), cert. denied, 106 S. Ct. 1801 (1986); Fuji Photo Film Co. v. Shinohara Shoji Kabushiki Kaisha, 754 F.2d 591, 595 n.4 (5th Cir. 1985); WSM, Inc. v. Hilton, 724 F.2d 1320, 1331 (8th Cir. 1984); Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1536 (4th Cir. 1984); Jellibeans, Inc. v. Skating Clubs, 716 F.2d 833, 839-40 (11th Cir. 1983); Purolator v. EFRA Distribs., 687 F.2d 554, 559 (1st Cir. 1982); Hot Shot Quality Prods. v. Sifers Chems., Inc., 452 F.2d 1080, 1081 (10th Cir. 1971).

110 See Kimberly-Clark Corp. v. H. Douglas Enter., 774 F.2d 1144, 1146 (Fed. Cir. 1985); Lindy Pen Co. v. Bic Pen Corp., 725 F.2d 1240, 1243 (9th Cir. 1984), cert. denied, 469 U.S. 1188 (1985); Plus Prods. v. Plus Discount Foods, 722 F.2d 999, 1004-05 (2d Cir. 1983); Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc., 670 F.2d 642, 651 (6th Cir.), cert. denied, 459 U.S. 916 (1982); Scott Paper Co. v. Scott's Liquid Gold, Inc., 589 F.2d 1225, 1229-30 (3d Cir. 1978).

111 See *Kimberly-Clark Corp.*, 774 F.2d at 1166; *Euroquilt*, 772 F.2d at 1427-28; *Fuji Photo Film Co.*, 754 F.2d at 595; *Pizzeria Uno Corp.*, 747 F.2d at 1536; *Lindy Pen Co.*, 725 F.2d at 1243; *WSM, Inc.*, 724 F.2d at 1329; *Plus Prods.*, 722 F.2d at 1004-05; *Jellibeans, Inc.*, 716 F.2d at 839-40; *Purolator*, 687 F.2d at 559; *Frisch's Restaurants*, 670 F.2d at 651; *Scott Paper Co.*, 589 F.2d at 1229-30; *Hot Shot Quality Prods.*, 452 F.2d at 1081.

112 These factors are: (1) the degree of similarity between the marks in appearance and suggestion; (2) the similarity of the products for which the name is used; (3) the area and manner of concurrent use; (4) the degree of care likely to be exercised by the consumer; (5) the strength of the complainant's mark; (6) the existence of actual confusion; and (7) the intent of the alleged infringer. Helene Curtis Indus. v. Church & Dwight Co., 560 F.2d 1325, 1330 (7th Cir. 1977), cert. denied, 434 U.S. 1070 (1978).

113 The district court decision is not reported. It can be found in Appellant's Brief Petitioning for Certiorari app. B, Euroquilt, Inc. v. Scandia Down Corp., 106 S. Ct. 1801 (1986) (No. 85-1038).

114 See Respondent's Brief Opposing Certiorari at 6, *Euroquilt*, 106 S. Ct. 1801 (No. 85-

matter what standard of review used—either question of law, or question of fact—it is beyond doubt that likelihood of confusion actually existed in this case. Hence, the judgment would be affirmed by either standard, and certiorari was appropriately denied.

Greber v. United States[115] is another case where the legal issue was not relevant to the petitioner's case. The question the petitioner wanted the Supreme Court to resolve was whether the issue of materiality in prosecutions for making false statements "in any matter within the jurisdiction of any department or agency of the United States"[116] should be submitted to the jury or decided by the judge. A majority of the circuits, including the Third, where this case originated, believe the issue should be decided by the judge, rather than the jury.[117] The Ninth Circuit has stated that the issue should be decided by the jury.[118] However, the Ninth Circuit has also stated that failure to submit the issue to the jury is not reversible error.[119] Petitioner thus had no chance for reversal under the Ninth Circuit standard and would have lost in all of the other circuits.[120] Certiorari was properly denied, as the resolution of the intercircuit dispute presented did not affect the outcome of the case.

Justice White's dissent in *Texas Association of Concerned Taxpayers v. United States*[121] is similarly flawed. The intercircuit conflict for which Justice White would grant certiorari concerns the origination clause of the Constitution.[122] The petitioner in *Concerned Taxpayers* challenged the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[123] alleg-

1038) ("[T]he district Court found the existence of substantial actual confusion . . . and an intent by Euroquilt to willfully infringe Scandia's trademark.").

115 474 U.S. 988, denying cert. to 760 F.2d 68 (3d Cir. 1985).

116 18 U.S.C. § 1001 (1982).

117 See Greber v. United States, 760 F.2d 68, 72 (3d Cir.), cert. denied, 474 U.S. 988 (1985); United States v. Hausmann, 711 F.2d 615, 617 (5th Cir. 1983); United States v. Hicks, 619 F.2d 752, 758 (8th Cir. 1980); United States v. Bernard, 384 F.2d 915, 916 (2d Cir. 1967); United States v. Ivey, 322 F.2d 523, 529 (4th Cir.), cert. denied, 375 U.S. 953 (1963); United States v. Clancy, 276 F.2d 617, 635 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961); Weinstock v. United States, 231 F.2d 699, 703 (D.C. Cir. 1956).

118 See United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979). The Tenth Circuit has expressed agreement with this proposition in dicta. See United States v. Irwin, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982).

119 *Valdez*, 594 F.2d at 729.

120 The conflict between the Tenth Circuit and the other circuits is unimportant because the language is dicta. It is also likely that the Tenth Circuit would agree with the Ninth on the issue of reversibility as the Tenth Circuit's initial position is based on the Ninth Circuit's prior discussion of this issue. See *Irwin*, 654 F.2d at 677 n.8.

121 106 S. Ct. 2265 (1985).

122 This clause provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills." U.S. Const. art. I, § 7, cl. 1.

123 Pub. L. No. 97-248, 96 Stat. 324 (codified as amended in scattered sections of 26 U.S.C.).

ing that it violated the origination clause because when the bill originated in the House it was not a bill to raise revenue; the Senate amended it by adding the revenue-raising provisions.[124] The Fifth Circuit held that this was a nonjusticiable political question.[125] This conflicts with rulings of both the Ninth[126] and Sixth[127] Circuits that did not find this issue to be a political question and decided the case on the merits. However, every appellate court that has reached the merits of the case has held that the actual enactment of TEFRA through senatorial amendments did not violate the origination clause.[128] Consequently, no matter what the result on the preliminary issue of the nonjusticiable political question, no conflict exists on the final result. In the final analysis, the Supreme Court cannot award petitioner the relief it seeks; the most it could grant would be an opportunity to litigate the merits before the Fifth Circuit in the face of uniformly unfavorable precedent from the other circuits. Thus, this litigant's interest in arguing before the Supreme Court is too attenuated to merit a hearing. No certiorari should be granted in such a case.

Pacific Employers Insurance Co. v. M/V Capt. W.D. Cargill[129] is yet another case in which the issue of law is irrelevant to the petitioner. Although Justice White does correctly note an apparent conflict over the standard of review respecting the dismissal of a declaratory action,[130] this conflict had no bearing on the case. Whatever standard of review is applied, dismissal was appropriate in this case since an insurer was seeking a declaratory judgment that the insured was not liable to the injured person. In such a situation, a declaratory action would not be allowed to proceed because the insurer is suing only in order to litigate the claim in a preferred forum and is acting solely as an agent for the insured.[131]

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124 Texas Ass'n of Concerned Taxpayers v. United States, 772 F.2d 163, 164-65 (5th Cir.), cert. denied, 106 S. Ct. 2265 (1985).

125 Id. at 165-67.

126 Armstrong v. United States, 759 F.2d 1378, 1380 (9th Cir. 1985).

127 Wardell v. United States, 757 F.2d 203, 205 (6th Cir. 1985); Heitman v. United States, 753 F.2d 33, 35 (6th Cir. 1984).

128 See *Armstrong*, 757 F.2d at 205; *Heitman*, 753 F.2d at 35; Moore v. United States House of Representatives, 733 F.2d 946, 951 (D.C. Cir.), cert. denied, 469 U.S. 1106 (1984).

129 474 U.S. 909, denying cert. to 751 F.2d 801 (5th Cir. 1985).

130 Id. at 910.

131 See C. Wright, A. Miller & M. Kane, 10A Federal Practice and Procedure § 2760 (1986).

> A distinction should be noted in the liability insurance cases. It frequently will be useful to have a declaration whether an accident is covered by a policy and whether the insurer is thus obligated to defend a tort action against its insured. . . . It is very different if the insurer does not deny that if its insured is liable, the insurer must pay, and instead seeks only a declaration that the insured is not liable to the injured person. Here the declaration serves no useful purpose and is only a procedural attempt, which the courts ought to rebuff, to litigate the claim against the insured in a forum of the insurer's choice.

Therefore, certiorari was appropriately denied.

Another of Justice White's dissents from denial of certiorari was mistaken because it represented an intercircuit conflict as being relevant to the petitioner, when in fact the petitioner would have lost under either circuit's standard. The Court denied certiorari to *River Road Alliance v. Corps of Engineers of the United States.*[132] The Seventh Circuit's opinion below pointed out the circuit split concerning the standard of review of a federal agency's decision not to prepare an environmental impact statement in connection with actions "significantly affecting the quality of the human environment"[133] under the National Environmental Policy Act of 1969.[134] As Justice White correctly noted in an earlier dissent from denial of certiorari,[135] there is a clear conflict between the circuits on this issue.[136] In *River Road Alliance*, however, the conflict was not relevant to the petitioner because, as the Seventh Circuit observed, it would lose regardless of the standard applied. Accordingly, certiorari was appropriately denied.

Similarly, Justice White would have granted certiorari, even though the issue of law was not relevant to the petitioner, in *Adkins v. Times-World Corp.*[137] The petitioner requested certiorari on the issue of whether the circuit court had jurisdiction under 28 U.S.C. section 1292(a)(1)[138] to hear an appeal of a district court order granting a stay of arbitration. Resolution of this issue would not have affected the outcome for the petitioner. In the court of appeals, the petitioner had raised several issues but had conceded that if the court found for respondent on a narrow question of fact related to the validity of the contract in dispute, all the legal issues would be moot.[139] The court of appeals did find for

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Id.

132 475 U.S. 1055 (1986).

133 River Rd. Alliance v. Corps of Engineers of the United States, 764 F.2d 445, 449 (7th Cir. 1985), cert. denied, 475 U.S. 1055 (1986).

134 42 U.S.C. § 4332 (1982).

135 See Gee v. Boyd, 471 U.S. 1058 (1985).

136 Some circuits, like the Seventh in *River Road Alliance*, will reverse the decision of a federal agency only if it is arbitrary and capricious. See *River Rd. Alliance*, 764 F.2d at 449-50; Webb v. Gorsuch, 699 F.2d 157, 159 (4th Cir. 1983); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980); Hanly v. Kleindienst, 471 F.2d 823, 829 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). Other circuits apply a reasonableness standard. See Foundation for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982); Winnebago Tribe v. Ray, 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836 (1980); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1248-49 (10th Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973). It is unclear what standard the D.C. Circuit has adopted. See Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-88 (D.C. Cir. 1982).

137 474 U.S. 1109 (1986).

138 28 U.S.C. § 1292(a)(1) (1982).

139 Adkins v. Times-World Corp., 771 F.2d 829, 831 (4th Cir. 1985), cert. denied, 474 U.S.

the respondent on this question of fact as well as on the question of appealability.[140] Notwithstanding this finding of fact, which made the questions of law irrelevant, the petitioner appealed. However, he appealed only the issues of law, without mentioning the explicit findings of fact made by the court of appeals that made the legal issues irrelevant to his case. Since the determination of the issue of fact decided the outcome, no change in the rule of appealability could salvage the petitioner's case, and the Supreme Court therefore correctly denied certiorari.[141]

In summary, thirteen of the thirty-eight dissents from denial of certiorari issued by Justice White did not pass even the threshold procedural test of the appropriateness of Supreme Court review. Seven of the thirteen cases did not raise issues relevant to the petitioners; two represented conflicts between nonfinal courts; two cases represented conflicts involving dicta or alternative holdings; and, finally, in two cases the issues for which Justice White would have granted certiorari were not raised in the lower courts.

The remaining twenty-five cases meet the threshold procedural requirements of a square conflict and deserve further analysis on the merits. The next Sections will address these cases.

III
SUBSTANTIVE REQUIREMENTS FOR A GRANT OF CERTIORARI

Having sifted out the cases that fail to meet the threshold procedural requirements for Supreme Court review, this Note will now turn to its sole substantive requirement for Supreme Court review of putative conflicts—that of square conflict. Conflicts in general may be classified into three groups:

(1) two or more courts applying different legal standards to similar sets of facts;

1109 (1986).

[140] Id. at 832.

[141] Even if Justice White's conclusion of conflict in this case had been correct, certiorari still should have been denied, as the putative conflict was with two cases in the Second Circuit, one 12 years old and the other 26. See 474 U.S. 1109 (citing Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962); Diematic Mfg. Corp. v. Packaging Indus., 516 F.2d 975 (2d Cir.), cert. denied, 423 U.S. 913 (1975)). This conflict would have been tolerable under the criteria advanced by this Note, which recommends that judicial trends be allowed to percolate before the Supreme Court attempts to resolve the conflict. See text accompanying notes 251-343 infra.

This case is an excellent example of the need for the Supreme Court to institute an analogue to Rule 11 of the Federal Rules of Civil Procedure (which imposes sanctions for bringing frivolous actions) and create sanctions on frivolous petitions. See Kurland & Hutchinson, The Business of the Supreme Court, O.T. 1982, 50 U. Chi. L. Rev. 628, 646 (1983); Estreicher & Sexton, supra note 2, at 800.

(2) two or more courts applying the same legal standard to similar but not identical facts and reaching different results; and

(3) one or more courts failing to articulate the legal standard applied and reaching a different result from another court on similar facts.

A square conflict, however, occurs only when different courts adopt different legal rules,[142] not when they apply the same legal standard to similar but not identical facts and reach different results.[143] Similar fact patterns resulting in different legal standards can sometimes be distinguished on the basis of the particular facts of the case. When this occurs, review ought not to be granted.[144] Finally, when a court does not provide a legal standard, no square conflict of law exists. Any differences in result between one court and another should be assumed to be fact-specific.[145]

Nine of Justice White's remaining twenty-five dissents from denial of certiorari involve cases that are not in square conflict. One example is *North Side Lumber Co. v. Block*.[146] The issue in this case was the applicability of a provision of the Tucker Act,[147] which bars declaratory relief against the United States in certain kinds of actions, to an action for a declaratory judgment that a contract between the United States and a private party was void.[148] The Ninth Circuit held that the Act did apply, and therefore found that it lacked jurisdiction to hear the claim for declaratory relief.[149] In his dissent from denial of certiorari,[150] Justice White claimed that this ruling conflicted with the decision of the Second Circuit in *B.K. Instrument, Inc. v. United States*[151] that it could hear a similar claim for declaratory relief. The two cases do not represent a square conflict because their facts are different. *North Side Lumber* involves a suit by a successful bidder on a federal contract, asserting claims

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142 Estreicher & Sexton, supra note 2, at 722-23.

143 Id. at 722. Supreme Court review of such conflicts turns the Court into a court of errors and final appeals, whose purpose would be to do justice in individual cases. This is a role the Supreme Court must surely avoid. See text accompanying notes 37-43 supra.

144 For an example, see text accompanying notes 107-14 supra.

145 Since the legal reasoning of the court is not provided, the courts below it are free to follow their own reasoning, and therefore free to follow a rule that has been adopted in another jurisdiction.

146 474 U.S. 931 (1985).

147 28 U.S.C. §§ 1346, 1491 (1982 & Supp. III 1985).

148 474 U.S. at 932-33. This type of case is now effectively moot because of the passage of the Federal Timber Contract Payment Modification Act, Pub. L. No. 98-478, 98 Stat. 2213 (1984) (codified at 16 U.S.C. §§ 539f, 618, 619 (Supp. II 1984)), which addresses the same issues presented in *North Side Lumber*.

149 North Side Lumber Co. v. Block, 753 F.2d 1482, 1484-85 (9th Cir.), cert. denied, 474 U.S. 931 (1985).

150 474 U.S. at 933.

151 715 F.2d 713, 726-28 (2d Cir. 1983).

under the terms of the contract,[152] while *B.K. Instrument* involved suits by disappointed bidders on federal contracts who did not have a contract under which to assert their claims.[153] Certiorari was correctly denied since the cases are factually distinguishable on a significant aspect of their holdings.

Another non-square conflict that Justice White thought the Supreme Court should hear was *Lucas v. New York*.[154] The conflict was not square because the facts of *Lucas* and those of putatively conflicting cases were distinguishable. The question in *Lucas* was whether a statement taken from a criminal defendant without the presence of counsel could be used to impeach his testimony.[155] Justice White found a conflict between the New York Court of Appeals, which had decided the case below,[156] and the Second[157] and Tenth[158] Circuits. However, the New York Court of Appeals cases involved admission of pre-indictment statements for impeachment purposes,[159] while the federal cases involved the admission of post-indictment statements.[160] As the Second Circuit has observed, the two time periods are not constitutionally analogous because there is no sixth amendment right to counsel before indictment, as there is after indictment.[161] Furthermore, it is probable that the protections granted to the defendant in the pre-indictment stage were based on independent state grounds and therefore unreviewable by the Supreme Court.[162]

Davis v. United Automobile, Aerospace and Agricultural Implement Workers of America[163] is another case in which Justice White's assertion that certiorari should have been granted because cases are in square conflict is incorrect. Justice White found a conflict between the Eleventh Circuit in *Davis*[164] and the First Circuit in *Doty v. Sewall*.[165] Although

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152 See *North Side Lumber*, 753 F.2d at 1483.

153 See *B.K. Instrument*, 715 F.2d at 715.

154 474 U.S. 911 (1985).

155 Id. at 911-12.

156 People v. Lucas, 53 N.Y.2d 678, 421 N.E.2d 494, 439 N.Y.S.2d 99 (1981), cert. denied, 474 U.S. 911 (1985); accord People v. Ricco, 56 N.Y.2d 320, 437 N.E.2d 1097, 452 N.Y.S.2d 340 (1982).

157 United States v. Brown, 699 F.2d 585 (2d Cir. 1983).

158 United States v. McManaman, 606 F.2d 919 (10th Cir. 1979).

159 See *Ricco*, 56 N.Y.2d at 323-24, 437 N.E.2d at 1099, 452 N.Y.S.2d at 342; *Lucas*, 53 N.Y.2d at 679, 421 N.E.2d at 495, 439 N.Y.S.2d at 100.

160 See *Brown*, 699 F.2d at 588; *McManaman*, 606 F.2d at 922.

161 *Brown*, 699 F.2d at 590. Furthermore, *McManaman* is possibly not good precedent because it was decided prior to a major Supreme Court decision on the same issue, New Jersey v. Portash, 440 U.S. 450 (1979).

162 See *Lucas*, 53 N.Y.2d at 679-80, 421 N.E.2d at 495-96, 451 N.Y.S.2d at 100-01.

163 475 U.S. 1057 (1986).

164 765 F.2d 1510 (11th Cir. 1985), cert. denied, 475 U.S. 1057 (1986).

165 784 F.2d 1 (1st Cir. 1986).

the two cases differed as to what statute of limitations to apply in actions under section 101 of the Labor-Management Reporting and Disclosure Act of 1959,[166] the *Doty* court found that the facts in the cases differed and therefore called for a different result.[167] Hence, certiorari should not have been granted.

Hibernia National Bank v. Chung Yong Il[168] is another case in which no square conflict existed, notwithstanding Justice White's assertion to the contrary. Justice White found a conflict between the court of appeals decision in this case[169] and the Fourth Circuit's decisions in *Compton v. Alton Steamship Co.*[170] and *Eaton v. Steamship Export Challenger.*[171] The issue in *Hibernia* was whether the penalty wage provisions of 46 U.S.C. section 596,[172] which compensate seamen whose wages are not timely paid, apply to wages earned aboard a docked vessel.[173] No conflict actually exists, as was correctly noted by the Eleventh Circuit.

> We think our position is reconcilable with the Fourth Circuit's cases decided under the port-time doctrine. . . . Both *Compton* and *Eaton* involved seamen whose service aboard a vessel had terminated according to their signed articles. . . . Hence, even assuming we were to adopt the port-time doctrine [of *Compton* and *Eaton*], it would not apply to this case.[174]

Justice White also found a second conflict between *Hibernia* and Third and Fourth Circuit cases on the issue of whether penalty wages continue to accrue against an employer who has not paid wages due even after he has deposited the contested monies with the court. The Third Circuit in *Swain v. Isthmian Lines*[175] and the Fourth Circuit in *Southern Cross Steamship Co. v. Firipis*[176] ruled that penalty wages stop accruing upon deposit with the court. However, *Hibernia* is factually distinguishable from the Third and Fourth Circuit cases. In *Hibernia* the petitioner had not offered to deposit the monies with the court. Rather, he offered only to submit a letter of undertaking to guarantee the in rem claims against the ship.[177] This is factually distinguishable from, and therefore

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166 29 U.S.C. § 411 (1982 & Supp. III 1985).

167 See 784 F.2d at 9-10 ("[O]ur decision need not be read as in direct conflict with . . . *Davis.*").

168 106 S. Ct. 1802 (1986).

169 Chung Yong Il v. Overseas Navigation Co., 774 F.2d 1043 (11th Cir. 1985), cert. denied, 106 S. Ct. 1802 (1986).

170 608 F.2d 96 (4th Cir. 1979).

171 376 F.2d 725 (4th Cir. 1967).

172 46 U.S.C. § 596 (1982).

173 106 S. Ct. at 1802.

174 774 F.2d at 1051.

175 360 F.2d 81 (3d Cir. 1966).

176 285 F.2d 651 (4th Cir. 1960), cert. denied, 365 U.S. 869 (1961).

177 *Hibernia*, 774 F.2d at 1053.

not in conflict with, the Fourth Circuit's rulings that once the money is actually deposited the penalties stop accruing.[178] Thus this "conflict" does not warrant resolution by the Supreme Court.[179]

Amrep Corp. v. Federal Trade Commission[180] is another case that did not present an actual square conflict for Supreme Court resolution. In *Amrep*, the Federal Trade Commission (FTC) ordered a corporation that was engaged in consumer land fraud to send notification letters to all purchasers informing them of their prospective legal rights.[181] The court of appeals held[182] that this action did not exceed the authority of the FTC under section five of the Federal Trade Commission Act (the Act).[183] Justice White maintained that there was a conflict between the circuits on this issue. The Fourth Circuit in *Barrett Carpet Mills v. Consumer Product Safety Commission*,[184] and the Ninth Circuit in *Congoleum Industries v. Consumer Product Safety Commission*[185] held that the Act authorizes only cease and desist orders, and not notification orders, while the Tenth Circuit in *Amrep* allowed both.[186] However, the conflict perceived by Justice White does not actually exist. In *Amrep*, the notification of legal rights ordered by the FTC was for the purpose of informing buyers of their prospective legal rights, a purpose within the scope of the FTC's authority.[187] In contrast, in *Congoleum* and *Barrett* the FTC ordered the notification as part of a general plan to force the guilty company to make amends for its past mistakes by effecting a recall.[188] While the FTC maintains that it has the power to order retrospective relief such as a recall or restitution,[189] the circuit courts have

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178 The cases arguably do not meet even the procedural threshold, since neither the Third nor the Fourth Circuit appears to have actually held on the issue. The Third Circuit's statement on the issue appears in a footnote and is clearly dicta. See *Swain*, 360 F.2d at 88 n.26. The Fourth Circuit opinion stated merely that it was within the district court's authority to stop the accrual of penalty payments if the monies were paid into the court. It did not say that this action was mandated. See *Southern Cross*, 285 F.2d at 659-60.

179 Justice White advances a third reason why certiorari should be granted. See *Hibernia*, 106 S. Ct. at 1802. This reason, however, does not allege an intercircuit conflict and therefore is not dealt with in this Note.

180 475 U.S. 1034 (1986).

181 Amrep Corp. v. Federal Trade Comm'n, 768 F.2d 1171, 1179-81 (10th Cir. 1985), cert. denied, 475 U.S. 1034 (1986).

182 Id. at 1180.

183 15 U.S.C. § 45 (1982 & Supp. II 1984).

184 635 F.2d 299 (4th Cir. 1980).

185 602 F.2d 220 (9th Cir. 1979).

186 See *Amrep*, 768 F.2d at 1180.

187 Id. at 1179-80.

188 *Congoleum*, 602 F.2d at 226; *Barrett*, 635 F.2d at 301-02.

189 See Macmillan, Inc., 96 F.T.C. 208, 304 (1980); Ford Motor Co., 94 F.T.C. 564, 622-23 (1979), order vacated, 673 F.2d 1008 (9th Cir. 1981), cert. denied, 459 U.S. 999 (1982); Raymond Lee Org., 92 F.T.C. 489, 647-50 (1978).

repeatedly held that the FTC does not have that power.[190] The scope of the FTC's power to order prospective relief is not analogous to its power to order retrospective relief.[191] Thus, no conflict exists.[192]

Missouri Farmers Association v. United States[193] is another case in which Justice White alleged a square conflict when none actually exists. The Eighth Circuit held that the Farmers Home Administration (FmHA) retains a continuing security interest in collateral sold with FmHA consent,[194] even though Missouri law provides that a secured creditor's consent to a sale of collateral automatically terminates the security interest.[195] The Eighth Circuit ruled that adopting Missouri law "would conflict with the federal interests present in the FmHA loan program."[196] Justice White stated that this ruling conflicts with *United States v. Tugwell*,[197] in which the Fourth Circuit followed North Carolina law in a case where the FmHA did not consent to the sale.[198] In *Tugwell*, however, the North Carolina law applied was compatible with the goals of the FmHA loan program because it allowed the FmHA security interest to continue even after a sale to a third party.[199] Hence the Court could apply state law without infringing on federal interests. Both cases agree that state law should be applied when compatible with FmHA goals, and not applied when incompatible. Certiorari was correctly denied because no conflict exists between these two cases.[200]

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190 See *Barrett*, 635 F.2d at 301; *Congoleum*, 602 F.2d at 226; Heater v. Federal Trade Comm'n, 503 F.2d 321, 324-25 (9th Cir. 1974).

191 The FTC may require letters to be sent out as part of a plan to inform consumers of their future rights as they interact with their defrauders. See *Amrep*, 768 F.2d at 1180; Warner-Lambert Co. v. Federal Trade Comm'n, 562 F.2d 749, 757 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978). However, the FTC may not require letters to be sent out as part of a recall plan. *Congoleum*, 602 F.2d at 226; *Barrett*, 635 F.2d at 301-02. Both *Congoleum* and *Barrett* rely on *Heater*, which held that the Federal Trade Commission could not issue a refund order under the Act. *Heater*, 503 F.2d at 324-25.

192 The FTC's understanding is that *Amrep* is not in conflict with *Congoleum* and *Barrett*, which both stand for the proposition that the FTC may not order retrospective relief. See Orkin Exterminating Co., slip op. at 101 (FTC Dec. 15, 1986) (Westlaw, FABR-FTC database).

193 106 S. Ct. 1281 (1986).

194 United States v. Missouri Farmers Ass'n, 764 F.2d 488 (8th Cir. 1985), cert. denied, 106 S. Ct. 1281 (1986).

195 See CharterBank Butler v. Central Coops., Inc., 667 S.W.2d 463, 465-66 (Mo. Ct. App. 1984).

196 *Missouri Farmers*, 764 F.2d at 489.

197 779 F.2d 5 (4th Cir. 1985).

198 *Missouri Farmers*, 106 S. Ct. at 1282.

199 See id. at 7 (citing N.C. Gen. Stat. § 25-9-306(2)).

200 Justice White also claimed that this case was in "obvious tension" with United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979). *Missouri Farmers*, 106 S. Ct. at 1282. This assertion does not appear to be correct. *Kimbell Foods* held that state law should be applied when it is compatible with federal goals. 440 U.S. at 726. *Kimbell Foods* did not hold that state law is binding when it is incompatible with federal goals.

Poythress v. Kessler[201] is another example of a non-square conflict where the Court properly denied certiorari. Justice White found that there is a conflict among the circuits over whether a plaintiff who brings suit under section two of the Civil Rights Attorney's Fees Award Act of 1976,[202] and who is herself an attorney, may recover attorney's fees if she acted in her own defense. However, all of the circuit court cases cited in the dissent were either brought under different statutes,[203] or granted attorneys' fees to people who were not attorneys (typically jailhouse lawyers)[204] in section 1988 suits. No circuit court, as yet, has disagreed with the Eleventh Circuit's position that attorneys who function in their own defense in section 1988 suits may receive fees.[205] Justice White also cited two district court cases that reach opposite conclusions regarding attorneys' fees under section 1988,[206] but these cases do not satisfy the requirements of finality.[207] No square conflict exists and certiorari should not be granted.

Wilsey v. Eddingfield[208] is a Seventh Circuit case dealing with diversity-of-citizenship jurisdiction in the federal courts. According to Justice White, the Seventh Circuit determined

> that a special administrator under Illinois law has no personal stake in the proceeds of a wrongful death action but merely distributes those proceeds to the statutory beneficiaries. Consequently, the statutory beneficiaries and not the special administrator are the real parties in interest whose citizenship is determinative for diversity purposes.[209]

Justice White believed that this holding was contrary to *Hackney v. Newman Memorial Hospital*,[210] a Tenth Circuit case. The Seventh Circuit in *Wilsey*[211] specifically dealt with this potential conflict. The Seventh Cir-

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201 106 S. Ct. 1659 (1986).

202 42 U.S.C. § 1988 (1982).

203 See Falcone v. Internal Revenue Serv., 714 F.2d 646 (6th Cir. 1983) (attorney-litigant denied fees under Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982 & Supp. II 1984)), cert. denied, 466 U.S. 908 (1984); Cazalas v. United States Dep't of Justice, 709 F.2d 1051 (5th Cir. 1983) (attorney-litigant entitled to fees under same provision).

204 See Turman v. Tuttle, 711 F.2d 148 (10th Cir. 1983); Pitts v. Vaughn, 679 F.2d 311 (3d Cir. 1982); Lovell v. Snow, 637 F.2d 170 (1st Cir. 1981); Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. Unit B June 1981); Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1984); Davis v. Parratt, 608 F.2d 717 (8th Cir. 1979).

205 Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), cert. denied, 106 S. Ct. 1659 (1986).

206 See *Poythress*, 106 S. Ct. at 1660 (citing Rybicki v. State Bd. of Elections, 584 F. Supp. 849 (N.D. Ill. 1984) (attorney-plaintiff entitled to fees); Lawrence v. Staats, 586 F. Supp. 1375 (D.D.C. 1984) (attorney-plaintiff denied fees)).

207 See notes 65-66 and accompanying text supra.

208 106 S. Ct. 1660 (1986).

209 Id. at 1660.

210 621 F.2d 1069 (10th Cir.), cert. denied, 449 U.S. 982 (1980).

211 Wilsey v. Eddingfield, 780 F.2d 614 (7th Cir. 1985), cert. denied, 106 S. Ct. 1660 (1986).

cuit believed that the Oklahoma statute discussed in *Hackney* was facially different from the Illinois law in *Wilsey*.

> The Illinois Wrongful Death Act gives neither the personal representative nor the decedent's estate the right to share in the proceeds of the recovery. The representative's sole duty under the Act is to distribute the proceeds to the statutory beneficiaries in the event of recovery. . . . Under Oklahoma law, the administrator, to whom the cause of action belongs, has full authority to conduct the litigation; the beneficiaries have no right to settle, control or otherwise dispose of the action. The *Hackney* court further found that the administrator, by virtue of her status as a beneficiary under the Oklahoma wrongful death act, had a substantive stake in the litigation.[212]

Thus, the Seventh Circuit decision was not in conflict with *Hackney*, but rather resulted from a legally significant difference between the two wrongful death statutes. Therefore, certiorari was correctly denied, as no conflict exists.

Gray v. Office of Personnel Management[213] is a case in which one circuit mistakenly believed itself to be in conflict with another. The issue in *Gray* was whether a district court has jurisdiction to hear the nonconstitutional personnel grievance claims of federal employees.[214] The Civil Service Reform Act of 1978[215] established the Office of Special Counsel at the Merit Systems Protection Board in order to facilitate the resolution of federal employment disputes involving personnel actions. Since that time, nine circuits have held that the Office of Special Counsel has exclusive jurisdiction for nonconstitutional personnel grievance claims of federal employees.[216] In *Dugan v. Ramsay*,[217] the First Circuit held that in a case of refusal to hire, the Special Counsel's jurisdiction is not exclusive.[218] The District of Columbia Court of Appeals in *Gray* believed that its holding was in conflict with *Dugan*.[219] In fact, the cases can be easily distinguished. The plaintiff in *Dugan* was an applicant who claimed that he was denied a position for an arbitrary reason.[220] This type of action is

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212 Id. at 614 (citation omitted).

213 106 S. Ct. 1478, denying cert. to 771 F.2d 1504 (D.C. Cir. 1985).

214 Id. at 1478.

215 Pub. L. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

216 See Weatherford v. Dole, 763 F.2d 392, 394 (10th Cir. 1985); Schrachta v. Curtis, 752 F.2d 1257, 1260 (7th Cir. 1985); Pinar v. Dole, 747 F.2d 899, 913 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Veit v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984); Hallock v. Moses, 731 F.2d 754, 757 (11th Cir. 1984); Braun v. United States, 707 F.2d 922, 925-27 (6th Cir. 1983); Carter v. Kurzejeski, 706 F.2d 835, 840 (8th Cir. 1983); Broadway v. Block, 694 F.2d 979, 986 (5th Cir. 1982).

217 727 F.2d 192 (1st Cir. 1984).

218 Id. at 194-95.

219 Gray v. Office of Personnel Management, 771 F.2d 1504, 1510 (D.C. Cir.), cert. denied, 106 S. Ct. 1478 (1985).

220 *Dugan*, 727 F.2d at 193-94.

inappropriate for the Office of Special Counsel because it is a dispute between a citizen and the government, not between the government and a federal employee. The other court of appeals cases all involved jurisdiction over matters concerning current federal employees.[221] An analogous distinction has been pointed out in *Tucker v. Defense Mapping Agency*,[222] a later district court case in the First Circuit. Thus, *Gray* is not in conflict with *Dugan* because the facts of the two cases are different in a legally significant way. The Supreme Court properly declined to hear the case, because no square conflict actually exists.[223]

Three additional cases that Justice White claimed were in conflict with other cases are not ready for Supreme Court review because they concern conflicts between panels within the same court of appeals, and not intercircuit conflicts. These three cases, *Mason v. Continental Group*,[224] *Saville v. Westinghouse Electric Corp.*,[225] and *Greyhound Lines v. Wilhite*,[226] were thus properly denied review. In the words of Justice Harlan, "[D]ecisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself."[227] Furthermore, an intracircuit dispute does not create a situation in which courts in a given jurisdiction are bound to follow a legal rule contrary to the rule that must be followed in another jurisdiction.[228]

Mason upheld the rule that beneficiaries of an Employee Retirement Income Security Act of 1974 (ERISA)[229] plan must exhaust all internal plan remedies before suing plan fiduciaries for an alleged violation of duties imposed by the statute.[230] The Seventh Circuit has agreed.[231] How-

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221 See, e.g., Weatherford v. Dole, 763 F.2d 392 (10th Cir. 1985); Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984); Broadway v. Block, 694 F.2d 979 (5th Cir. 1982).

222 607 F. Supp. 1232, 1241 n.7 (D.R.I. 1985) (distinction between regular and probationary employees).

223 There is another reason for not hearing this case. Gray sued for a promotion to Administrative Law Judge GS-16 from grade GS-15. He was promoted before the petition for certiorari was filed. Even if he had won the suit, he would not have received back pay. See United States v. Testan, 424 U.S. 392, 403 (1976) (denying back pay but ordering reclassification of plaintiffs seeking promotion). Hence, the issue in front of the Court was actually unimportant to the litigant. See text accompanying notes 102-36 supra.

224 474 U.S. 1087 (1986).

225 474 U.S. 911 (1985).

226 474 U.S. 910 (1985).

227 Harlan, Manning the Dikes, 13 Rec. N.Y.C.B.A. 541, 552 (1958); see also Wisniewski v. United States, 353 U.S. 901, 902 (1957) ("It is primarily the task of a court of appeals to reconcile its internal difficulties.").

228 See notes 65-66 and accompanying text supra.

229 Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., and 29 U.S.C.).

230 Mason v. Continental Group, 763 F.2d 1219, 1227 (11th Cir. 1985), cert. denied, 474

ever, the Ninth Circuit, in *Amaro v. Continental Can Co.*,[232] disagreed with this result and held that all remedies need not be exhausted in order to sue.[233] On the basis of this conflict, Justice White argued in favor of granting certiorari.[234] However, in *Amato v. Bernard*[235] the Ninth Circuit ruled in accordance with *Mason*. Thus, we have a dispute between the Eleventh and Seventh Circuits and one Ninth Circuit panel and another panel in the Ninth Circuit. This is nothing but an intracircuit dispute, and certiorari ought not be granted.

The last two cases, *Greyhound Lines* and *Saville*, both deal with the same issue: Should actions already filed under section 301 of the Labor-Management Relations Act,[236] which the Supreme Court recently announced had a six month statute of limitations,[237] be governed by the old or the newly announced statute of limitations?[238] In *Greyhound*, the Ninth Circuit ruled that *DelCostello v. International Brotherhood of Teamsters*,[239] the case in which the Supreme Court announced the new statute of limitations, should not be applied retroactively.[240] *Saville*, which involved the identical issue before the Third Circuit, ruled that the limitation should be applied retroactively.[241] At the time Justice White issued his dissent, the Third Circuit ruling was in harmony with those of the eight other courts of appeals that have commented on this issue.[242] The Ninth Circuit ruling in *Greyhound* stood without support in any other court of appeals.[243] Two other opinions of the Ninth Circuit are

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U.S. 1087 (1986).

231 See Kross v. Western Elec. Co., 701 F.2d 1238, 1244 (7th Cir. 1983).

232 724 F.2d 747 (9th Cir. 1984).

233 Id. at 752.

234 See *Mason*, 474 U.S. at 1087-88.

235 618 F.2d 559 (9th Cir. 1980).

236 29 U.S.C. § 185 (1982).

237 See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 171 (1983). This new statute of limitations was taken from § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982).

238 Prior to *DelCostello*, these actions were governed by the state statute of limitations that was most closely analogous in tort law. See *DelCostello*, 462 U.S. at 154.

239 462 U.S. 151 (1983).

240 Wilhite v. Greyhound Lines, 760 F.2d 278 (9th Cir.), cert. denied, 474 U.S. 910 (1985).

241 Saville v. Westinghouse Elec., 760 F.2d 261 (3d Cir.), cert. denied, 474 U.S. 911 (1985).

242 See Smith v. General Motors, 747 F.2d 372 (6th Cir. 1984) (overruled by Thomas v. Shipka, 829 F.2d 570 (6th Cir. 1987)); Landahl v. PPG Indus., 746 F.2d 1312 (7th Cir. 1984); Graves v. Smith's Transfer Corp., 736 F.2d. 819 (1st Cir. 1984); Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2d Cir.), cert. denied, 469 U.S. 1036 (1984); Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983), cert. denied, 469 U.S. 916 (1984); Lincoln v. District 9, 723 F.2d 627 (8th Cir. 1983); Rogers v. Lockheed-Georgia Co., 720 F.2d 1247 (11th Cir. 1983), cert. denied, 469 U.S. 916 (1984); Edwards v. Sea-Land Serv., 720 F.2d 857 (5th Cir. 1983).

243 Prior to its ruling in *Greyhound*, the Ninth Circuit had held that *DelCostello* was not to be applied retroactively. See Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 465 U.S. 1102 (1984).

also in disagreement with *Greyhound—Glover v. United Grocers*[244] and *Aragon v. Federated Department Stores*[245]—both 1985 cases. Given this disagreement within the Ninth Circuit, the Supreme Court correctly did not grant certiorari.

As the analysis of these cases has shown, twelve of the remaining twenty-five dissents from denial of certiorari issued by Justice White do not involve actual square conflicts between two courts of final jurisdiction. Of these twelve, nine are not actual conflicts[246] and three are actual conflicts but are intra- rather than intercircuit.[247] Adding these twelve cases to the previous thirteen cases that fail the threshold procedural requirements, only thirteen of Justice White's thirty-eight dissents from denial of certiorari present cases in which there is an actual, legitimate conflict between two or more circuits over a legal issue relevant to the petitioners—and a record in front of the Supreme Court without procedural flaws.

IV
THE TOLERABILITY OF INTERCIRCUIT CONFLICTS

Under a managerial theory of the Supreme Court, a case should be reviewed by the Supreme Court only when the costs of continued nonuniformity in the law exceed the benefits of additional percolation,[248] that is, when continued intercircuit conflicts become intolerable. The mere existence of a conflict among lower courts does not indicate that a case warrants Supreme Court review.[249] This Section will briefly describe the costs and benefits of conflict percolation and apply the Supreme Court Project's tolerability model,[250] as well as a more comprehensive tolerability model, to the remaining thirteen cases that Justice White thinks the Supreme Court ought to have heard.

A. Tolerability Defined

"The many circuit courts act as the 'laboratories' of new or refined legal principles . . . providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments."[251] According to this manage-

244 746 F.2d 1380 (9th Cir. 1984), cert. denied, 471 U.S. 1115 (1985).

245 750 F.2d 1447 (9th Cir.), cert. denied, 474 U.S. 902 (1985).

246 See text accompanying notes 146-223 supra.

247 See text accompanying notes 224-245 supra.

248 Estreicher & Sexton, supra note 2, at 716.

249 If the Supreme Court were a court of errors and not a managerial court, it would have to hear every conflict in law, as one of the two courts is obviously wrong. See text accompanying notes 37-43 supra.

250 See Estreicher & Sexton, supra note 2, at 731-37.

251 Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a

rial model, as opposed to an error-correcting or conflict-resolving model, it is in the best interests of the Supreme Court to allow broad comment on any legal issue by a wide range of courts before resolving the issue itself.[252] Conflict percolation, however, has certain costs, the most significant of which are nonuniformity of legal treatment and forum shopping.[253] Temporary nonuniformity is not necessarily a serious price to pay. Most litigants live and work within one circuit and are thus only affected by the legal pronouncements of one circuit.[254] As Justice White himself has stated, "Each of the courts of appeals therefore is for all practical purposes the final expositor of the Federal Law within its geographical jurisdiction."[255] For the vast majority of litigants there is a uniform federal law in spite of the many intercircuit disputes.[256]

Forum shopping, a problem that results from nonuniformity,[257] can result in serious injustice. Forum shopping occurs when a litigant chooses the substantive legal treatment he will receive by bringing suit in a favorable forum. A similar problem occurs when multistate actors are required simultaneously to fulfill conflicting legal standards of different circuits. Obviously not all legal conflicts create forum shopping; on many occasions the venue statutes allow for no forum shopping at all.[258]

Under the Supreme Court Project's criteria, all square conflicts involving three or more circuits are priority grants and do not require tolerability analysis.[259] Two-court conflicts are also intolerable when there is a substantial opportunity for forum shopping or multicircuit actors are unable to plan their affairs.[260] Discounting the twenty-five cases that, for the reasons given above, are inappropriate vehicles for Supreme Court review,[261] seven of Justice White's dissents from denial of certiorari in-

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Mountain or a Molehill?, 71 Calif. L. Rev. 913, 929 (1983) (footnote omitted).

252 See Note, Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court, 97 Harv. L. Rev. 307, 315 (1983) ("To place great emphasis on the early articulation of national rules risks accepting decisions whose broad utility and practical wisdom are unproved.").

253 See Marcus, Conflicts Among Circuits and Transfers Within the Federal Judicial System, 93 Yale L.J. 677 (1984); Note, Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable, 59 N.Y.U. L. Rev. 1078 (1984).

254 See Wallace, supra note 251, at 931.

255 White, Dedication, 15 Tex. Tech L. Rev. ix (1985).

256 See Wallace, supra note 251, at 931.

257 If the system of law imposes uniformity, forum shopping is only a marginal concern.

258 For example, forum shopping is very difficult in federal criminal cases. See Fed. R. Crim. P. 18 (limits venue in criminal trials to district where crime is committed); see also U.S. Const. amend. VI, § 2 (accused has right to trial in "State and district wherein the crime shall have been committed").

259 See Estreicher & Sexton, supra note 2, at 725-28.

260 Id.

261 See text accompanying notes 74-245 supra.

volve square conflicts between three or more circuits,[262] and six are two-circuit conflicts.[263] Only one of the two-court conflicts either involves an opportunity for forum shopping or prevents multicircuit actors from planning their affairs.[264] Accordingly, under the Supreme Court Project's criteria, eight cases in which Justice White dissented from denial of certiorari should have been heard and decided by the Supreme Court.

B. Modified Tolerability

Professors Sexton and Estreicher admit that a rule requiring the Supreme Court to grant certiorari for *all* three-court conflicts is deliberately overinclusive.[265] Thus, this Note adopts a more extensive tolerability model that involves a more detailed study of the nature of each of the thirteen individual multicircuit conflicts that remain.[266] Five factors are to be considered in analyzing the tolerability of conflicts.

1. Trends

A conflict sometimes develops between several courts that recently considered an issue and a single court that considered the issue at some time in the past. When the first court has not yet reconsidered its position, the conflict is tolerable. No nonuniformity occurs because the recent cases are all in agreement. Once the first court reaffirms its position, however, the Supreme Court ought to hear that case. The rationale for this approach is that the first circuit to hear the case might reconsider its position in light of the newer conflicting opinions.

Pan American World Airways v. Cook[267] is a case in which such a conflict exists. Although the District of Columbia Circuit ruled in the 1974 case of *Carey v. O'Donnell*[268] that airline mergers approved by the Civil Aeronautics Board cannot be collaterally attacked, the Second Cir-

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262 These seven cases are: Kansas Gas & Elec. Co. v. Brock, 106 S. Ct. 3311 (1986); Franklin & Marshall College v. EEOC, 106 S. Ct. 2288 (1985); Petty Motor Co. v. United States, 106 S. Ct. 1284 (1986); Lane v. Enoch, 106 S. Ct. 1281 (1986); Henry v. Detroit Manpower Dep't, 474 U.S. 1036 (1985); Moran v. Pima County, 474 U.S. 989 (1985); Kerr v. Finkbeiner, 474 U.S. 929 (1985).

263 These six cases are: Mulligan v. Hazard, 106 S. Ct. 2902 (1986); Ramirez v. California, 106 S. Ct. 2266 (1986); Raymark Indus. v. Bath Iron Works, 106 S. Ct. 1994 (1986); Pan Am. World Airways v. Cook, 474 U.S. 1109 (1986); Preuit & Mauldin v. Jones, 474 U.S. 1105 (1986); Jackson v. United States, 474 U.S. 924 (1985).

264 See Pan Am. World Airways v. Cook, 474 U.S. 1109 (1986), is analyzed in text accompanying notes 267-70 infra.

265 Estreicher & Sexton, supra note 2, at 727.

266 Cf. Note, supra note 56, at 1012. In that Note, eight criteria are adopted for evaluating cases' tolerability. This Note uses only five.

267 474 U.S. 1109 (1986).

268 506 F.2d 107 (D.C. Cir. 1974), cert. denied, 419 U.S. 1110 (1975).

cuit in *Cook*[269] has argued persuasively that *Carey* is wrong. Judicial efficiency is well served by allowing this issue to percolate through the judicial system to see how the Second Circuit ruling is received by other circuits, rather than resolving the conflict between the Second Circuit and a twelve-year-old precedent from its sister circuit.[270]

2. *Ground-Breaking Conflicts*

Sometimes a court will devise a novel legal rule that differs radically from all previous appellate court analyses of an issue. Although a real conflict might exist, the Supreme Court should allow the new rule to percolate to see both how other courts react to it and how the new rule actually functions in the judicial system.[271]

Franklin & Marshall College v. EEOC[272] is an example of such a case. Most of the circuits have addressed the issue in this case: How much (if any) special protection from Equal Employment Opportunity Commission (EEOC) investigations should be given to the secret tenure deliberations of academic institutions?[273] Prior to the Third Circuit ruling,[274] all previous decisions held that academic tenure deliberations are entitled to some first amendment protection from judicial review.[275] The Third Circuit claimed that this approach was not correct.[276] Colleges, it claimed, are to be treated like all other businesses when deciding the scope and power of the EEOC.[277] This approach, unique in the nation, ought to be allowed to be evaluated by the other circuits to see what results it produces and how much it actually differs from the standards of the other courts of appeals. Short-term percolation, even at the price of nonuniformity, is valuable.

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269 771 F.2d 635 (2d Cir. 1985), cert. denied, 474 U.S. 1109 (1986).

270 There is another reason for denying certiorari in this case. It is unclear if *Carey* is still good law, even within the D.C. Circuit. See Beins v. United States, 695 F.2d 591 (D.C. Cir. 1982), which undermined, if not overruled, *Carey*.

271 Reasonable jurists will obviously disagree on a case-by-case basis on the exact moment that the value of uniformity outweighs the value of further percolation.

272 106 S. Ct. 2288 (1986).

273 See EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983); Gray v. Board of Higher Educ., 692 F.2d 901 (2d Cir. 1982); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982); Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980); Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977).

274 EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985), cert. denied, 106 S. Ct. 2288 (1986).

275 See cases cited in note 273 supra.

276 *Franklin & Marshall College*, 775 F.2d at 112-16.

277 Id. at 114-18.

3. *Administrative Experimentation Conflicts*

Administrative experimentation conflicts occur when the Supreme Court chooses to encourage circuit-by-circuit experimentation on a procedural issue that it is not itself immediately prepared to solve.[278] One example is *Lane v. Enoch*,[279] where the issue before the Supreme Court was when, if ever, a state court may exclude a defense witness on the basis of the defense's failure to meet a procedural deadline. The Supreme Court has twice declined to hear this issue.[280] The courts of appeals have not taken contrary positions on this issue; rather, they have issued a spectrum of opinions concerning the exact detailed parameters of the administrative balance needed between a defendant's sixth amendment rights and the states' right to make reasonable procedural rules.[281] The courts argue over the minimum number of extensions and delays a defendant is entitled to before a state court may exclude exculpatory evidence. Experimentation within the circuits over the issue of how much procedural failure is needed before a witness may be excluded should continue, as the "correct," workable rule can only be established by experimentation.[282]

4. *Trivial Conflicts*

Trivial conflicts are conflicts whose resolution does not substantially advance federal law. *Jackson v. United States*[283] involves a conflict that can properly be categorized as trivial. The issue is how to define the scope of 18 U.S.C. section 649(a),[284] which makes it a crime to have "money of the United States" under one's control, and fail to deposit it when required to do so. The Fourth Circuit ruled that checks are money[285] while the Tenth Circuit ruled that they are not.[286] Since the

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278 For an example of this phenomenon, see Sand & Reiss, A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit, 60 N.Y.U. L. Rev. 423 (1985).

279 475 U.S. 1053 (1986), denying cert. to 768 F.2d 161 (7th Cir. 1985).

280 See Smith v. Jago, 470 U.S. 1060 (1985); Taliaferro v. Maryland, 461 U.S. 948 (1983). On both of these occasions Justice White dissented from the denial of certiorari.

281 Compare Ronson v. Commissioner of Correction, 604 F.2d 176 (2d Cir. 1979) (excluding witness in support of insanity defense because of failure to give notice of intention to raise defense violates sixth amendment) and United States v. Davis, 639 F.2d 239 (5th Cir. Unit B Mar. 1981) (excluding defense witnesses solely to enforce discovery rules violates sixth amendment) with United States v. Rogers, 475 F.2d 821 (7th Cir. 1973) (refusal of government witness to answer questions on cross-examination did not require striking witness's testimony under sixth amendment).

282 This conclusion is consistent with Judge Leventhal's procedural experimentation rules. See Leventhal, A Modest Proposal for a Multi-Circuit Court of Appeals, 24 Am. U.L. Rev. 881 (1975).

283 474 U.S. 924 (1985).

284 18 U.S.C. § 649(a) (1982).

285 United States v. Jackson, 759 F.2d 342 (4th Cir.), cert. denied, 474 U.S. 924 (1985).

286 United States v. Fernando, 745 F.2d 1328 (10th Cir. 1984).

enactment of the statute in 1846,[287] only these two cases have addressed the question of whether "money" includes checks within the meaning of the statute.[288] Although there is a direct two-circuit conflict, this issue is trivial and not worthy of the allocation of Supreme Court time needed to resolve it.

Another example of a trivial case is *Moran v. Pima County*.[289] This case deals with the awarding of attorneys' fees under section two of the Civil Rights Attorney's Fees Awards Act of 1976,[290] to plaintiffs who are only nominally triumphant.[291] There is some dispute over whether attorneys' fees may be denied in the case of nominally victorious plaintiffs. Some courts maintain that a nominally victorious plaintiff is not a "prevailing party" and therefore is not entitled to attorneys' fees under the Act.[292] Other courts have held that any verdict in the plaintiff's favor entitles the plaintiff to attorneys' fees under the Act, unless the court finds that awarding of fees is inappropriate.[293] In *Moran*, the trial court denied attorneys' fees without stating a reason. On appeal, the Arizona appellate court ruled that a reason should have been given;[294] it then gave two reasons for the denial of fees, stating that obvious reasons appeared in the record.[295] The petitioner did not contest the validity of the reasons, but rather maintained that the case should have been remanded to the trial court so that the trial judge could give reasons[296]—in all likelihood the same ones given by the appellate court. Petitioner asked that the Supreme Court "summarily remand this case to the trial court for a proper determination on the question of attorney fees or in the alternative grant this Petition for Certiorari."[297] Thus, the issue confronting the court was whether, in a case where the trial court erred and did not advance reasons for denying attorneys' fees under 42 U.S.C. section 1988, the appellate court may do so if it feels that the reasons are obvious and appear on the record. This narrow issue does not warrant a grant of

287 Act of Aug. 6, 1846, ch. 90, § 16, 9 Stat. 59, 63.

288 See *Fernando*, 745 F.2d at 1329.

289 474 U.S. 989 (1985), denying cert. to 145 Ariz. 183, 700 P.2d 881 (1985).

290 42 U.S.C. § 1988 (1982).

291 See *Moran*, 145 Ariz. at 184, 700 P.2d at 882-83. In *Moran* the plaintiff won $500 in damages, but was denied attorneys' fees. Id.

292 See Fast v. School Dist., 712 F.2d 379 (8th Cir. 1983); Huntley v. Community School Bd., 579 F.2d 738 (2d Cir. 1978) (per curiam).

293 See Skoda v. Fontani, 646 F.2d 1193 (7th Cir. 1981) (per curiam); Burt v. Abel, 585 F.2d 613 (4th Cir. 1978) (per curiam).

294 See Appellant's Brief Petitioning for Certiorari at 25a app. A, Moran v. Pima, 474 U.S. 989 (1985) (No. 85-58).

295 Id.

296 Appellant's Brief Petitioning for Certiorari at 18-19, Moran v. Pima, 474 U.S. 989 (1985) (No. 85-58).

297 Id. at 19.

certiorari due to the triviality of the issue. Furthermore, since the appellate court advanced valid reasons for the denial of fees, the case is an inappropriate vehicle for the Supreme Court to address the broader dispute concerning the denial of fees without reason to nominally victorious plaintiffs.

5. Conflicts Presenting Issues Not Ready for Resolution

In some cases, the Court does not wish to take a position on an issue creating a conflict. Although the Court occasionally declines to hear such cases for political reasons,[298] typically there are efficiency reasons for denying certiorari. At first blush, an ICT would appear to be useful to help resolve these problems, as it would create uniform law. In fact, however, on any significant political issue it is not uniformity that is desired but the blessings of the highest court in the land.[299]

Also included under this heading are conflicts among lower courts resulting from extremely recent Supreme Court pronouncements or in the face of impending legislative changes. The system itself benefits by allowing the circuit courts at least a year to attempt to understand and harmonize their own rulings with those of the Supreme Court. Nor does the Supreme Court allocate its resources in an appropriate manner when it hears cases that are functionally moot due to pending statutory changes.

Four cases fit under this latter categorization. *Petty Motor Co. v. United States*[300] dealt with the statutory remuneration to be granted to marshals of the court under 28 U.S.C. section 1921.[301] There is a clear dispute among the circuits as to whether state or federal law defines the terms "levying" or "seizing" in section 1921.[302] However, this issue does not currently warrant resolution because the Department of Justice has submitted legislation to Congress to solve this problem.[303] It would be a waste of Supreme Court resources for it to allocate precious time to hear arguments on a minor case that will never come up a second time due to a legislative solution.

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[298] See, e.g., Mora v. McNamara, 389 U.S. 934 (1967) (constitutionality of Vietnam War), denying cert. to 387 F.2d 862 (D.C. Cir. 1967).

[299] See id.

[300] 475 U.S. 1056 (1986).

[301] 28 U.S.C. § 1921 (1982).

[302] The Tenth Circuit in United States v. Petty Motor Co., 767 F.2d 712, 714-15 (10th Cir. 1985), cert. denied, 475 U.S. 1056 (1986), and in Hill v. Whitlock Oil Serv., 450 F.2d 170, 173 (10th Cir. 1971), maintains that federal law governs this issue. The Ninth Circuit, Travelers Ins. Co. v. Lawrence, 509 F.2d 83, 87-88 (9th Cir. 1974); Eighth Circuit, James T. Barnes & Co. v. United States, 593 F.2d 352, 353 (8th Cir. 1979) (per curiam); and Sixth Circuit, Federal Land Bank v. Hassler, 595 F.2d 356, 358 (6th Cir. 1979) (per curiam), all maintain that state law governs.

[303] See H.R. 3870, 99th Cong., 1st Sess. (1985).

Henry v. City of Detroit Manpower Department[304] presents the issue of the immediate appealability of orders denying appointment of counsel of choice for pro se civil rights plaintiffs. In the twenty-four months prior to Justice White's dissent from denial of certiorari in *Henry*, the Supreme Court has issued three opinions on the immediate appealability of orders relating to the disqualification or appointment of counsel—*Flanagan v. United States*,[305] *Richardson-Merrell Inc. v. Koller*,[306] and *Mitchell v. Forsyth*.[307] The cases with which *Henry* was said to conflict were decided in 1977[308] and 1984.[309] In light of the three recent opinions, it is proper for the Supreme Court to let these issues percolate among the lower courts for at least a term.[310]

In *Preuit & Mauldin v. Jones*[311] the Supreme Court was asked to decide which of two similar state statutes of limitations apply to section 1983[312] claims.[313] This case is a derivative of *Wilson v. Garcia*,[314] which was decided in the 1985 Term. The Court stated in *Wilson* that federal law governs the characterization of section 1983 actions for the purpose of selecting the appropriate state statute of limitations,[315] and held that a section 1983 action should be considered a personal injury action when looking for the analogous state statute of limitations.[316] The district courts, therefore, should apply the statute of limitations that courts of the state in which they sit would apply to personal injury actions.[317] There appears to be some confusion among the circuit courts over *Wilson*.[318] Immediate review should not be granted to allow for greater per-

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304 474 U.S. 1036 (1985), denying cert. to 763 F.2d 757 (6th Cir.) (en banc).

305 465 U.S. 259 (1984) (disqualification of counsel in criminal case not immediately appealable).

306 472 U.S. 424 (1985) (disqualification of counsel in civil case not immediately appealable).

307 472 U.S. 511 (1985) (denial of absolute immunity for former Attorney General immediately appealable).

308 Caston v. Sears, Roebuck, & Co., 556 F.2d 1305 (5th Cir. 1977).

309 Slaughter v. City of Maplewood, 731 F.2d 587 (8th Cir. 1984).

310 A strong argument could also be made that no square conflict exists among the circuits on this issue as none of them have as yet issued an opinion that considers the most recent Supreme Court pronouncements.

311 474 U.S. 1105 (1986), denying cert. to 763 F.2d 1250 (11th Cir. 1985).

312 42 U.S.C. § 1983 (1982).

313 Alabama has two personal injury statutes of limitation. Alabama Code § 6-2-34(1) applies to actions for "trespass to person or liberty," while Alabama Code § 6-2-39(5) governs actions for "injury to the person or rights of another not arising from contract and not specifically enumerated in this section."

314 471 U.S. 261 (1985).

315 Id. at 268-71.

316 Id. at 276.

317 See id. at 264, 280.

318 No square conflict has occurred as of yet among the courts of appeals that have considered the issues after the Supreme Court's pronouncement in *Wilson*. It is possible that *Preuit*

colation of this issue among the various lower courts.

Mulligan v. Hazard,[319] another case relating to *Wilson*, presented the issue of whether the rule of *Wilson* may be applied retroactively. Although two courts of appeals have addressed this issue[320] and two others have applied *Wilson* retroactively without discussing the issue,[321] no case decided after *Wilson*[322] has held that *Wilson* always warrants only prospective application—the holding necessary for a conflict with *Mulligan*.[323]

C. *Intolerable Conflicts*

Four cases remain. All of them are both procedurally and technically ready for Supreme Court review as well as in clear conflict with at least one other final appellate court. These four cases are briefly summarized here.

(1) *Kerr v. Finkbeiner*.[324] This case deals with the issue of whether all violations by state governments of articles III and IV of section two of the Interstate Agreement on Detainers Act[325] result in dismissal of the charges against a criminal defendant, or only those violations that result in prejudice. Two circuits have held that all violations present cognizable claims for a habeas petition.[326] Five circuits disagree and maintain that only prejudicial errors are cognizable in a habeas petition.[327]

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does conflict with three cases decided by the Tenth Circuit before *Wilson*: McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1985) (all § 1983 claims should be characterized as actions for injuries to rights of another); Mismash v. Murray City, 730 F.2d 1366 (10th Cir.) (same), cert. denied, 471 U.S. 1052 (1985); Hamilton v. City of Overland Park, 730 F.2d 613 (10th Cir. 1984) (en banc) (same), cert. denied, 471 U.S. 1052 (1985). Because these three cases were decided before the Supreme Court decided *Wilson*, however, a square conflict does not exist.

319 106 S. Ct. 2902 (1986).

320 See Mulligan v. Hazard, 777 F.2d 340, 343-44 (6th Cir. 1985) (*Wilson* implicitly mandates retroactive application), cert. denied, 106 S. Ct. 2902 (1986); Gibson v. United States, 781 F.2d 1334, 1338-40 (9th Cir. 1986) (*Wilson* will not be applied retroactively where result would be to shorten statute of limitations).

321 See Gates v. Spinks, 771 F.2d 916 (5th Cir. 1985), cert. denied, 106 S. Ct. 1378 (1986); Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. 1985), cert. denied, 474 U.S. 1105 (1986).

322 It is possible that a series of Tenth Circuit cases is contrary to *Mulligan*. However, these cases predate *Wilson*. See Jackson v. City of Bloomfield, 731 F.2d 652 (10th Cir. 1984); *McKay*, 730 F.2d 1367; *Mismash*, 730 F.2d 1366; *Hamilton*, 730 F.2d 613.

323 Justice White also dissented in *Mulligan* for the same reason he dissented in *Preuit & Mauldin*, 474 U.S. 1105. See text accompanying notes 313-20 supra. His dissent here is no more correct than it was there.

324 474 U.S. 929 (1985), denying cert. to 757 F.2d 604 (4th Cir.).

325 18 U.S.C. app. § 2 (1982).

326 See Cody v. Morris, 623 F.2d 101 (9th Cir. 1980); United States v. Williams, 615 F.2d 585 (3d Cir. 1980).

327 See Greathouse v. United States, 655 F.2d 1032 (10th Cir. 1981) (per curiam), cert. denied, 455 U.S. 926 (1982); Mars v. United States, 615 F.2d 704 (6th Cir.), cert. denied, 449 U.S. 849 (1980); Fasano v. Hall, 615 F.2d 555 (1st Cir.), cert. denied, 449 U.S. 867 (1980); Huff v. United States, 599 F.2d 860 (8th Cir.), cert. denied, 444 U.S. 952 (1979); Edwards v.

(2) *Raymark Industries v. Bath Iron Works.*[328] The issue in this case was the scope of the maritime jurisdiction of the United States. In *Drake v. Raymark Industries*,[329] the First Circuit held that shipbuilders could not be sued in tort for asbestos poisoning under a provision of the Longshore and Harbor Workers' Compensation Act,[330] because shipbuilders are not within the admiralty jurisdiction of the United States.[331] The Fifth Circuit disagreed, claiming that injuries suffered by employees while constructing a vessel in navigable waters are within the scope of the provision.[332]

(3) *Ramirez v. California*[333] is a case that deals with the ex post facto clause of the Constitution.[334] The California Supreme Court held that a state may constitutionally increase the punishment for prison rule violations by inmates who were imprisoned under a more lenient system.[335] This ruling is in direct conflict with *Beebe v. Phelps*,[336] where the Fifth Circuit held an almost identical Louisiana plan unconstitutional.

(4) *Kansas Gas & Electric Co. v. Brock*[337] deals with whether termination of a quality control inspector, because the inspector filed internal safety complaints, violates a provision of the Atomic Energy Act.[338] The Tenth Circuit held that such termination violates the Act.[339] This is in accord with a ruling of the Ninth Circuit.[340] The Fifth Circuit, in *Brown & Root, Inc. v. Donovan*,[341] explicitly ruled contrary to the Ninth Circuit on this issue. The Tenth Circuit acknowledged that it is in conflict with *Brown & Root*.[342]

Of the four cases described above, only two, *Kansas Gas & Electric* and *Kerr v. Finkbeiner*, involve conflicts between more than two forums. These two cases are intolerable conflicts according to the criteria adopted by this Note and certiorari should have been granted. The remaining two cases involve conflicts between only two forums and do not present

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United States, 564 F.2d 652 (2d Cir. 1977) (per curiam).

328 106 S. Ct. 1994 (1986), denying cert. to 772 F.2d 1007 (1st Cir. 1985).

329 772 F.2d 1007 (1st Cir. 1985), cert. denied, 106 S. Ct. 1994 (1986).

330 33 U.S.C. § 905(b) (Supp. III 1985).

331 *Drake*, 772 F.2d at 1012-18.

332 Hall v. Hvide Hull No. 3, 746 F.2d 294, 300-03 (5th Cir. 1984).

333 106 S. Ct. 2266 (1986).

334 U.S. Const. art. I, § 10.

335 In re Ramirez, 39 Cal. 3d 931, 705 P.2d 897, 218 Cal. Rptr. 324 (1985), cert. denied, 106 S. Ct. 2266 (1986).

336 650 F.2d 774 (5th Cir. 1981) (per curiam).

337 106 S. Ct. 3311 (1986).

338 42 U.S.C. § 5851(a) (1982).

339 Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505 (10th Cir. 1985), cert. denied, 106 S. Ct. 3311 (1986).

340 See Mackowiak v. University Nuclear Sys., 735 F.2d 1159 (9th Cir. 1984).

341 747 F.2d 1029 (5th Cir. 1984).

342 See *Kansas Gas & Elec.*, 780 F.2d at 1513.

any chance of forum shopping. These cases are tolerable conflicts according to the criteria of this Note,[343] and therefore certiorari was appropriately denied.

CONCLUSION

Justice White's thirty-eight dissents from denial of certiorari over the issue of intercircuit conflicts appear to be an attempt to present for public display a large number of conflicts in the hope that this will motivate Congress to establish an Intercircuit Court of Appeal. In fact, after detailed analysis, Justice White's thirty-eight cases break down into four groups:

(1) Cases that are procedurally flawed by the Court's own guidelines and thus should not be heard by the Supreme Court. There are thirteen such cases, which account for thirty-four percent of Justice White's dissents from denial of certiorari.

(2) Cases in which the conflict alleged is not a square intercircuit conflict. There are twelve such cases—nine non-square conflicts and three intracircuit conflicts—which account for thirty-two percent of Justice White's dissents from denial of certiorari.

(3) Cases that, once analyzed for the tolerability of their conflicts, result in the conclusion that a managerial court should let these cases percolate through the system rather than decide them immediately. There are eleven such cases, which account for twenty-nine percent of Justice White's dissents from denial of certiorari.

(4) Cases that are actual conflicts requiring immediate Supreme Court resolution. There are two such cases, and they account for five percent of Justice White's dissents from denial of certiorari in the 1985 Supreme Court Term. If one does not accept the tolerability analysis of this Note, then there are eight cases that fall into the group requiring review. These eight cases would represent twenty-one percent of Justice White's dissents from denial of certiorari.[344]

Whether one accepts the procedural and substantive criteria for certworthiness of cases advocated by the Supreme Court Project or the broader tolerability model advocated by this Note, it is immediately apparent that Justice White has not demonstrated that there are a large number of unresolved appellate court conflicts being denied certiorari.

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[343] See text accompanying notes 251-323 supra.

[344] Even if one accepts none of the criteria developed in this Note, and acknowledges only that the Supreme Court should not allocate its resources to hear cases that are either procedurally flawed or do not contain an actual conflict, 25 of the 38 denials from which Justice White dissented, 66%, were correctly denied certiorari. Under this criterion, 13 cases remain that should have been resolved by the Supreme Court. Even 13 intolerable conflicts going unresolved each year does not warrant the creation of an Intercircuit Tribunal.

The existence of two, or even eight such intolerable conflicts does not warrant the creation of an Intercircuit Tribunal whose mandate would be the resolution of intercircuit conflicts.

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