REVIEW

Amici Curiae


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The publication of the third edition of Henry M. Hart, Jr.’s and Herbert Wechsler’s The Federal Courts and the Federal System is a trebly welcome event: It reminds us that Hart and Wechsler is a partnership whose impact on American law has been no less consequential than that of Lincoln and Herndon, or Langdell and Ames, or even the two Hands. It invites us to think again about the enduring conundrums of federal structure and judicial role that have defined our constitutional experience for the two centuries since the establishment of the federal courts. And it offers assurance, as the federal courts enter their third century, that those who will serve in and on those courts in coming decades will be prepared to address the old conundrums afresh and to fashion new ones.

I.

The first edition of Hart & Wechsler was published in 1953.1 Professors Hart and Wechsler dedicated their book, most appropriately, “to Felix Frankfurter who first opened our minds to these problems.”2

The second edition was published in 1973.3 Hart had died in

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2 Id at ix.

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the 1960s, and in Hart's stead Wechsler had enlisted, as co-workers, Professors Paul Bator and David Shapiro, who had studied under Hart, and Professor Paul Mishkin, who had studied under Wechsler. The second edition tracked the structure of the first, meticulously updating and expanding (by two hundred pages) what had gone before. The second edition was dedicated, most appropriately, to Hart, "profound and passionate student and teacher."

Fifteen years have elapsed between the second and third editions. Bator and Shapiro, together with Professor Daniel Meltzer, performed the "active work in preparing [the third] edition . . . with . . . Mishkin and Wechsler providing important advice and commentary." The preface to the third edition, like the preface to the second and unlike the preface to the first, tells the reader which "active" editor had principal responsibility for each particular chapter or portion thereof. (p xxiii) It seems, nonetheless, a fair surmise that each of the three "active" editors and both of those who provided "advice and commentary" read every page of the galleys. Herbert Wechsler knows no other modus operandi, and he instills such dedication in those who work with him. The third edition is dedicated to Henry J. Friendly, "man for all seasons in the law; master of this subject." (p xix)

In the main, the third edition follows the organizational path of its predecessors. But it breaks free at critical junctures. The first large-scale evidence of this is the creation of a new chapter VII. (pp 849-959) The title of the chapter is "Federal Common Law," which previously was the caption of a section of the second edition's chapter entitled "The Law Applied in Civil Actions in the District Courts." The new chapter, however, does more than furnish valuable expanded discussions of the problems reflected in Clearfield Trust, Lincoln Mills, Bivens and Sabbatino. It also

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* Id at xv.
* Clearfield Trust Co. v United States, 318 US 363 (1943), reproduced in the 3d ed at 854-57 and discussed thereafter.
Amici Curiae enlarges the canvas "to draw a rough organizational distinction between federal court exercise of substantive common law authority to define primary legal obligations . . . and the exercise of remedial authority to enforce those obligations . . . ." (p 849) Brought into play are, among other things, materials on governmentally initiated litigation that in the first two editions appeared later in the book. Chapter VII also deals extensively with the burgeoning esoterica of judicial implication, in the interstices of federal regulatory legislation, of private causes of action not advertently formulated by Congress. (pp 917-59) In the aggregate, it seems a fair surmise that the upgrading, elaboration, and refinement of the materials on federal common law would have met with Henry Friendly's warm approval.

A new chapter IX, "Suits Challenging Official Action," constitutes the most significant reordering of what went before. (pp 1090-1307) In prior editions, litigation directed at the federal government and litigation directed at state and local governments were treated in separate chapters. Chapter IX brings these problems under the same roof, but carefully maintains their critically distinct aspects. Particularly welcome is the detailed attention given to the Eleventh Amendment, (pp 1159-1221) including *Pennhurst*, and to Section 1983. (pp 1229-77)

Chapter X, (pp 1308-1464) "Judicial Federalism: Limitations on District Court Jurisdiction or Its Exercise," complements the portion of chapter IX that deals with litigation challenging state and local governments. Chapter X first canvasses the federal statutes, (pp 1309-45) most especially 28 USC § 2283, that mandate deference to state processes. Then Chapter X addresses judge-fashioned doctrines of passivity, (pp 1346-1464) highlighting abstention (pp 1354-83) and equitable restraint. (pp 1383-1438) As

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11 In the next edition, it would be gratifying if a few additional pages could be allocated to the absorbing antecedents and context of *United States v Hudson & Goodwin*, 11 US (7 Cranch) 32 (1812), and *United States v Coolidge*, 14 US (1 Wheat) 415 (1816), which, early on, put a quietus on federal judicial deployment of a non-statutory armory of federal crimes.


15 28 USC § 2283 (1982) provides:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments.
with Chapter IX, Chapter X both stands on and advances beyond the earlier editions.

Special note should be taken of chapter XII, (pp 1598-1655) "Advanced Problems in Federal Jurisdiction: Herein of Res Judicata and Other Aspects of Concurrent or Successive Jurisdiction." Here, the authors address certain problems that have surfaced since the second edition, such as the interplay between Section 1983 and res judicata reflected in *Allen v McCurry* and subsequent cases. Of equal interest is the analysis of that most highly improbable of recent cases, *Pennzoil Co. v Texaco, Inc.*

Ultimately, then, the third edition has addressed, with signal success, new issues, or new facets of old issues, rooted in and devolving from enduring problems thoughtfully canvassed in the first edition and revisited, but not significantly revised, in the second.

II.

A.

The third edition has also helped to fill a significant gap in the first edition that was insufficiently papered over in the second. Unlike the first and second editions, the third edition contains a full discussion of Justice Story's view, most elaborately expounded in *Martin v Hunter’s Lessee,* of the extent of Congress's obligation to insure that there are federal courts vested with jurisdiction over the cases and controversies listed in Article III of the Constitution. (pp 366-68) As Akhil Amar has pointed out in his penetrating review of the third edition, the excerpts from *Martin v Hunter’s Lessee* that appeared in the first edition did not convey Justice Story's most particularly telling point. In *Martin,* Story contended that, as a matter of objective textual construction, Article III's recital of the extent of the federal judicial power distinguishes between "all [federal question, admiralty and ambassadorial] cases" and "controversies" defined by the status of the parties (e.g., suits between litigants of diverse citizenship, or between citi-

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17 107 S Ct 1519 (1987). The Court's decisions in *Pennzoil* and *D.C. Court of Appeals v Feldman,* 460 US 462 (1983), have served to lend new luster to *Rooker v Fidelity Trust Co.,* 263 US 413 (1923), an opinion by Justice Van Devanter that had long escaped the spotlight. (pp 1632-38) *Rooker* is not listed in the index of the first or second edition; in the third edition it is a leading case, reproduced almost in full. *Pennzoil,* which raised several different abstention and judicial federalism questions, is discussed at 1634-38.
18 14 US (1 Wheat) 304 (1816).
zens and aliens).\textsuperscript{21} The distinction Story pointed to has more than antiquarian interest. The distinction lends added weight to the proposition that Congress, in establishing federal courts and defining their jurisdiction, must insure that every suit that turns on a question of federal law is cognizable, either in the first instance or on appeal, in a federal court. That proposition has, of course, crucial bearing on the endlessly vexed questions of whether Congress, in the exercise of its discretionary authority to establish and disestablish "inferior" federal courts and to define their jurisdiction and the appellate jurisdiction of the Supreme Court, could: (1) dismantle all federal courts other than the Supreme Court and confine that Court to its constitutionally declared original jurisdiction; (pp 366-69) or (2) engage in some intermediate but nonetheless radical jurisdiction-stripping process such as closing all "inferior" federal courts, and the Supreme Court on appeal, to all law suits involving school prayers or abortion. To the extent that the Story thesis is supportable, it runs counter to the pronouncement by Hart, which is the capstone of his famed "Dialectic," that "[i]n the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."\textsuperscript{22} (p 423)

The second edition replicated the undernourished \textit{Martin v Hunter's Lessee} that appeared in the first edition. In a footnote, the authors credited Henry Wheaton\textsuperscript{23} with advancing an exegesis of Article III similar to the unmentioned Story exegesis.\textsuperscript{24} The third edition at last gives Story's own statement of the matter. (p 367) And a footnote reference to Professor Amar's 1985 article\textsuperscript{25} notes that "Professor Amar has advocated acceptance of [Story's] position." (p 368 n 2) I think one may be permitted to add that the continuing—and critical—debate on the scope of Congressional authority to cut away at the jurisdiction of federal courts has been measurably broadened by Amar's \textit{Two Tier} scholarship.\textsuperscript{26}

\begin{footnotes}
\item[21] Emphasis added, referring to \textit{Martin}, 14 US at 334-37.
\item[23] Henry Wheaton, known to lawyerly posterity as "Wheat," was a friend of Story's, and \textit{Martin v Hunter's Lessee} appeared in the first volume of his reports.
\item[26] Another recent and significant contribution to the debate is the following colloquy between Senators Specter and Leahy and Justice Rehnquist, on July 31, 1986, in the course of the hearings on the Justice's nomination to be Chief Justice:

Senator Specter. . . . It seems to me that questions of jurisdiction are much more,
B.

Professor Amar's concern that the first edition short-changed Justice Story is part of a larger quarrel with a work Amar characterizes as "beautiful and brilliant—probably the most important and influential casebook ever written," but, "nevertheless, deeply problematic in its vision of federalism, separation of powers, and 'cases and controversies.'" Essentially, Amar sees the first and second editions of Hart & Wechsler as downplaying federal courts vis-à-vis state courts and vis-à-vis Congress. Amar perceives, on the one hand, an over-reverence for Erie and, on the other hand, a too-grudging acceptance of Marbury v Madison. Amar claims infinitely more, fundamental than how you interpret due process or equal protection, because the Court cannot get to that question or those questions until the court decides it has the power to decide the case.

And it is in that context that I do press, for an answer on the issue of whether the Congress, in your view, has the authority to say the Supreme Court does not have jurisdiction on first amendment issues of freedom of speech, press and religion, because if the Congress has that authority, then it seems to me there is nothing left of Marbury v Madison.

Justice Rehnquist. Senator, you said yesterday that you thought Justice O'Connor in her hearings had answered a similar question. I still have considerable reservations about it, whether I ought to do it, but I am sure you are correct, if one of my colleagues has felt that that was proper, I certainly will resolve doubts and try to give you an answer.

The answer obviously is not one that comes with the benefit of reading briefs, hearing arguments, conferring. It is very much of a horseback opinion; it has to be in a situation like this.

And I think that it would be very hard to uphold a law which carved out certain provisions of the Constitution such as you are describing, the first amendment, and said the Court should have jurisdiction over everything except first amendment cases.

Senator Leahy. Well, the statute could be enacted which would say the Court shall not have jurisdiction over first amendment cases involving freedom of speech, press, or religion. That is my area of concern, specifically stated. And I take it from your answer you think that the Congress would not have that authority.

Justice Rehnquist. That is correct.

Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States, Hearings Before the Committee on The Judiciary, United States Senate, 99th Cong, 2d Sess 268 (1986).

Later on, Senator Specter inquired whether he might, on the basis of the quoted colloquy, "assume that your view would be that Congress would lack the authority to deprive the Court of jurisdiction if it involved a genuine constitutional issue" such as "the privilege against self-incrimination, and the right to 'counsel.'" Id at 319. Justice Rehnquist very properly declined to pursue what he characterized as "a totally abstract question as you propose it and as I would have to answer it. We do not know what context it comes up in. I have not had a chance to read whatever the framers may have said in connection with the article III, section 2, with such exceptions that Congress may provide." Id.

27 Amar, 102 Harv L Rev at 688 (cited in note 20).
28 Id at 698-700.
29 Id at 709, referring to Erie R. Co. v Tompkins, 304 US 64 (1938).
30 5 US (1 Cranch) 137 (1803).
that the first two *Hart & Wechler* editions hedged *Marbury* around with limiting doctrines of justiciability and the like designed to move judicial review out of a place of centrality on the governmental stage and into the wings.\(^3\) He claims this approach inappropriately reduced judicial review to “merely the unavoidable side effect of deciding private law disputes.”\(^32\)

Although Amar’s insights are important, I think they may be overstated. Both Hart and Wechsler appear to have subscribed to *Erie*’s basic teaching—and who, other than Justices Butler and McReynolds\(^3\) and Professor Crosskey\(^4\) has not?—but they have not been devotees of all its doctrinal sequelae. Indeed, Hart was one of the most vehement challengers of the *Klaxon* gloss on *Erie* that a federal district court sitting in diversity must follow the choice-of-law rules of the state in which the federal court is situated.\(^35\) Writing in 1954, Hart put the matter in characteristically pointed fashion:

> The Rules of Decision Act says that “the laws of the several states” are to be followed only “in cases where they apply.” The federal courts are in a peculiarly disinterested position to make a just determination as to which state’s laws ought to apply where this is disputed. By disabling them from doing this, the Supreme Court has not only impeded the development of a sound body of private interstate law but has placed it within the power of a plaintiff who can find the defendant in a state where he wants him to make the choice of law for himself. Justice is not ordinarily served by putting it in the hands of one of the litigants.\(^36\)

But Hart’s message had been foreshadowed by his and Wechsler’s

\(^{31}\) Amar, 102 Harv L Rev at 700-02 (cited in note 20).

\(^{32}\) Id at 702.

\(^{33}\) Both Justices concurred in *Erie* but stridently disavowed Justice Brandeis’s opinion for the Court. *Erie*, 304 US at 88-90 (Butler, joined by McReynolds, concurring). Justice Reed, who also concurred separately, is not to be counted in the anti-*Erie* camp; he agreed with the Court that *Swift v Tyson*, 41 US (16 Pet) 1 (1842), should be overruled, but he preferred to limit the reason for overruling to what he saw as the *Swift* Court’s erroneous construction of Section 34 of the Judiciary Act of 1789. Moreover, three years later, Justice Reed wrote the Court’s opinion in *Klaxon Co. v Stentor Co.*, 313 US 487 (1941), discussed in text at note 35.

\(^{34}\) William Winslow Crosskey, 2 Politics and the Constitution in the History of the United States 912-37 (Chicago, 1953).

\(^{35}\) *Klaxon Co. v Stentor Co.*, 313 US 487, 496 (1941).

"Note" on *Klaxon* a year before, in the first edition.\(^{37}\)

As for judicial review, I think Amar is right in saying that the first edition of *Hart & Wechsler*\(^{38}\) is suffused with a caution substantially in tension with the robust conception that has informed our law since *Brown v Board of Education*.\(^{39}\) But the first edition appeared a year before *Brown*. Amar contends, however, that "the now-famous footnote four" in *Carolene Products*,\(^{40}\) decided the same day as *Erie*, but not cited in *Hart & Wechsler*, "clearly fore-shadowed both increasing incorporation and the outcome of the segregation cases."\(^{41}\) Perhaps so. But I'm inclined to think that in 1953 the bench and bar generally had not perceived that assertedly patent adumbration.\(^{42}\) This professional myopia is authoritatively reflected in the fact that, on the reargument of *Brown* and the other school cases in the fall of 1953, *Carolene Products* was not cited either in the supplemental briefs filed on behalf of the plaintiffs or in the supplemental brief filed by the United States as amicus curiae. Moreover, *Carolene Products* was not mentioned in the course of any of the oral arguments.\(^{43}\)

It is, however, somewhat beside the point to debate whether *Carolene Products* should, prior to *Brown*, have been recognized, by Hart and by Wechsler, or by anyone else, as a harbinger of huge constitutional innovation managed by the federal courts.\(^{44}\)


\(^{38}\) And, hence, the essentially static second edition.


\(^{40}\) *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938).

\(^{41}\) Amar, 102 Harv L Rev at 706 (cited in note 20).

\(^{42}\) Contributing to the delay in the canonization of footnote four may have been the fact that it was endorsed by only four members of the Court. Justice Black, the fifth member of the *Carolene Products* majority, did not join the "Third" part of the opinion, the part that contains the footnote. Justice McReynolds dissented; Justice Butler concurred in the result; and Justices Cardozo and Reed did not participate in the decision. See *Carolene Products*, 304 US at 155.


\(^{44}\) Although Amar says that "*Carolene Products* and its footnote held out a vision of federal courts as irreplaceable structural guardians of certain constitutional rights against both Congress and the states," Amar, 102 Harv L Rev at 706 (cited in note 20) (footnote omitted), it is not evident from the footnote that Justice Stone saw a distinction between the expected role of federal courts and that of state courts. *Brown* itself was not an unequivocal demonstration that federal courts were more hospitable than state courts to claims of deprivation of constitutional rights. Up to the Supreme Court's decision in 1954, the only one of the five school segregation cases consolidated in *Brown* in which plaintiffs had prevailed was the one case brought in a state court, *Belton v Gebhart*, 32 Del Ch 343, 87 A2d
point, effectively made by Amar, is that Hart & Wechsler was in its inception a book about federal judicial process, and that it took as a given that, as a general matter, federal courts, including the Supreme Court, were to exercise the awesome power of judicial review very infrequently and, concomitantly, were to fashion remedies of very modest scope. That premise has been significantly—and, it seems fair to say, salutarily—undercut by Brown and thirty-five years of subsequent litigation, including one major expansion of constitutional liberty, New York Times v Sullivan, in which the creative lawyering of Herbert Wechsler proved decisive.

Superb an achievement as it was, the first edition of Hart & Wechsler would have been of even greater merit had it more substantially anticipated and nurtured the future. As it was, that role fell to another extraordinary and similarly pioneering casebook, Political and Civil Rights in the United States, by Professors Thomas I. Emerson and David Haber. The first edition of Emerson & Haber appeared in 1952, a year before Hart & Wechsler. In his Preface to Emerson & Haber, Robert Hutchins wrote: “This is the only comprehensive collection of cases and materials on the most important subject in the world today.”

862 (1952), aff’d as Gebhart v Belton, 33 Del Ch 144, 91 A2d 137 (1952), in which Delaware’s Chancellor Collins Seitz had entered the first American school desegregation decree. In due course, Chancellor Seitz was to be appointed to the Third Circuit, where he has been one of the leading federal judges in the nation for over twenty years.

Amar, 102 Harv L Rev at 691-94 (cited in note 20).

Id at 698-700.


Wechsler, as co-counsel for The New York Times with Herbert Brownell and Thomas E. Daly, did far more than win the case. A review of Wechsler’s remarkable brief shows that he not only blazed the intellectual trail that led the Court to its vast new constitutional domain but also identified by metes and bounds the particular terrain on which the Court, through the medium of Justice Brennan’s painstakingly grounded, subtly developed, and memorably phrased opinion, ultimately raised its standard in the case at bar. See, generally, Brief for the Petitioner, New York Times v. Sullivan, 376 US 254 (1964), reprinted in Philip B. Kurland and Gerhard Casper, 58 Landmark Briefs and Arguments of the Supreme Court of the United States 391-493 (Univ Pubs of Am, 1975).

Thomas I. Emerson and David Haber, Political and Civil Rights in the United States iii (Dennis & Co., 1952). That no significant effort was made before the middle of the twentieth century to locate and even to survey as a coherent area—let alone map in detail—this large sector of the legal landscape is an extraordinary indictment of our profession, and especially of the academy. For the particular, and particularly devastating, dearth of scholarship on civil rights prior to 1950, see A. Leon Higginbotham, Jr., Book Review, 122 U Pa L Rev, 1044, 1052-56 (1974).
In concluding his essay-review, Professor Amar ventures the "prediction that future editions of Hart & Wechsler will be profoundly influenced by the general character of legal scholarship, which the book has always sought to synthesize. The first edition's weaknesses and omissions were in large part reflective of omissions in 'golden age' legal scholarship generally."\(^5\) I have no quarrel with that prediction. But I venture the added thought that some portion of the future scholarship of those concerned with process and with substance in the federal courts will have to address, on an urgent basis, questions of a sort that hitherto would have been regarded as too mundane—too much like plumbing—to merit sustained academic attention. The questions I have in mind are those relating to the distribution of judicial business between federal and state courts and among the federal courts.

I say "on an urgent basis" because I think a time of crisis is not far distant, and we are already laggard in planning for what lies ahead. The recent establishment, by Congress, of the Federal Courts Study Committee should serve as a catalyst for such planning. Under the able leadership of Judge Joseph F. Weis, Jr., the Committee is already at work.

In an address to the American Bar Association in early February of this year, Chief Justice Rehnquist identified the central problem with which the Committee, Congress, the Executive Branch, and our profession as a whole must come to grips. The Chief Justice set the stage by invoking the celebrated image of the closing of the frontier with which Frederick Jackson Turner altered America's self-perception at the close of the nineteenth century:

Just about a century ago, the noted American historian Frederick Jackson Turner in a seminal article proclaimed the disappearance of the American frontier. Studying the patterns of westward migration in this country, he concluded that the supply of free or relatively cheap land which had encouraged debt-ridden Americans, and wave after wave of immigrants, to settle the west had been exhausted. In my view, a similar situation obtains today with respect to the federal court system. There is virtually no unused capacity in the system as it presently exists, and the difficulties of creating substantial addi-

\(^5\) Amar, 102 Harv L Rev at 719 (cited in note 20).
tional capacity counsel caution, to say the least, in attempting it. We are in a position where we must think not about creating new federal causes of action, but of remitting to state courts some of the business now handled by the federal courts, and of revising the way of handling some of the business which is retained by the federal courts.\textsuperscript{51}

Then, having stated his thesis, the Chief Justice illustrated the change that has transpired in his professional lifetime through a personal anecdote that took him back in time to his novitiate as a lawyer in 1953, the year that the first edition of \textit{Hart & Wechsler} was published:

This is a fairly recent development in the federal court system. When I began practicing thirty-five years ago, it was not so. In 1953 when I was driving from my home in the midwest to Phoenix, Arizona, to take my first job with a law firm, I stopped off en route in Fort Smith, Arkansas, because I had become interested in the history of the federal court for that district. One morning I simply went over to the federal courthouse and asked if I could see Judge John Miller, the resident district judge in Fort Smith. I was admitted into his presence at once, and found him and the Clerk of the Court preparing to go fishing. The three of us talked for about half an hour about fishing, and about the history of the court which had once had jurisdiction over the entire length and breadth of the Indian Territory. At the end of this time I left and Judge Miller and the Clerk went fishing. Judge Miller was not indolent, so far as I know, nor was he neglectful of his jurisdiction; indeed, he was a former member of Congress and while there had authored the Miller Act, which still serves as a basis for federal jurisdiction in suits on construction bonds. But there was simply no business to be transacted in his court that day.

The same situation obtained in many of the courts of appeals at that time. A friend of mine who spoke from first-hand knowledge described the work of a federal appeals judge as a dignified form of semi-retirement for a practicing lawyer. But those days are long gone. While most federal judges do not put in the equivalent of the billable hours that associates in large law firms say they put in, they work hard at their jobs. I know of no way that is both reasonable and humane to get

more work out of the existing complement of judges.\textsuperscript{52}

The besetting problem is that, notwithstanding that the number of federal judges has risen sharply in recent decades,\textsuperscript{53} filings per judge have risen, and continue to rise, precipitously. Taking as a base point the year 1960, trial filings per district judge have increased by a third, and appellate filings per circuit judge have almost quadrupled.\textsuperscript{54} As population builds, and regulatory legislation proliferates, the caseload will continue to mount; and there is no basis for assuming that the rate of increase will moderate.

With judge-hours stretched so tight, further significant increases in the caseload, especially at the appellate level where the growth in the filings has been most ominous, will mean that the job is done less well. Moreover, over time, it will mean that the standing and caliber of the federal judiciary will be diminished. Speaking in early 1987, less than a year after his elevation from the D.C. Circuit, Justice Scalia made the point well:

\ldots I think [the] stature [of the federal judiciary] has come from the fact that we have dealt, by and large, with cases of major importance, and had enough time to give them the attention they deserved. As that changes; as we deal with more and more cases of less and less import; as we become case processors and caseload managers; it is inevitable—I suggest utterly inevitable—that once the image catches up with the reality the stature of the job, and the quality of the people it attracts, will decline.\textsuperscript{55}

The long term solution should not be the doubling and redoubling of the already swollen cohort of trial judges to keep pace with doubled and quadrupled trial filings. As the Chief Justice pointed out in his address to the American Bar Association, adding trial judges would entail a concomitant increase in the number of appel-

\textsuperscript{52} Id at 2-3.

\textsuperscript{53} As of June 30, 1987, there were 575 authorized district judgeships, and 188 authorized circuit judgeships. Annual Report of the Director of the Administrative Office of the United States Courts 51 (GPO, 1987) ("1987 Administrative Office Report"). There were also 167 senior district judges and 51 senior circuit judges. Id. Most judges, on achieving senior status, continue to devote all or most of their time to judging.


\textsuperscript{55} Antonin Scalia, An Address by Justice Antonin Scalia, United States Supreme Court 34 Fed Bar News & J 252, 253 (July/August 1987).
late judges. But the courts of appeals are already so large that traditional collegial modes of appellate adjudication are becoming hard to maintain, and significant increases in the numbers of cases decided by the courts of appeals would in turn augment the Supreme Court's already mountainous certiorari docket. Thus, in the words of the Chief Justice, "the federal court system is like a city in the arid part of this country which is using every bit of its water system to supply current needs. We must think not of building subdivisions, but of conserving water."

In aid of conservation, the Chief Justice made four illustrative, but not exhaustive, proposals: (1) eliminating diversity jurisdiction over cases brought by an in-state plaintiff against an out-of-state defendant; (2) confining FELA and Jones Act cases to the state courts, whose jurisdiction over these cases is now concurrent; (3) providing that appeals from decisions of administrative law judges denying Social Security benefits proceed directly to the courts of appeals, bypassing the district courts, on the ground that "[t]o have two separate courts addressing merely questions of law in a matter like this is wasteful;" and (4) cutting back on civil RICO, as recommended by the American Bar Association.

The Chief Justice is clearly right that in-state diversity plaintiffs have no proper claim on the limited time of the federal courts. I think he is also right that, whatever may have been the case at the beginning of the century when those federal causes of action were created, there is no longer a compelling reason to make a federal forum available to FELA and Jones Act plaintiffs. State courts are surely as competent as federal courts to try these claims of employer negligence. And civil RICO should indeed be substantially limited; too many civil RICO claims are ordinary commercial cases ornamented with in terrorem allegations of criminality.

However, I must respectfully part company with the Chief Justice on his proposal to channel Social Security appeals directly to the courts of appeals. The courts of appeals process approximately 30,000 cases each year. Of these, about 1,000 are Social

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66 Rehnquist, Remarks at 6 (cited in note 51).
67 Id at 8.
68 Id at 10.
69 Id at 10-11.
70 Id at 11.
71 Id at 11.
72 In the year ending June 30, 1987, there were 29,604 appeals terminated and 30,798 commenced. 1987 Administrative Office Report at 142 (cited in note 53). Civil cases outnumber criminal cases by about five-to-one.
Security and kindred appeals. But district court Social Security filings number upwards of 13,000 annually. If Social Security appeals were to bypass the district courts, the courts of appeals would drown. The Chief Justice's objective might, however, be substantially realized if court of appeals review of district court dispositions of Social Security cases were made discretionary. In that way, courts of appeals could intervene in that small number of Social Security cases that present significant issues of law, or in which district judges have completely lost their way, but they would not have to review the large cohort of mine-run cases in which the central question is whether the determination of the administrative law judge is supported by substantial evidence.

Taken together, the Chief Justice's proposals with respect to diversity, FELA/Jones Act, and civil RICO cases should, if adopted by Congress, achieve a perceptible, albeit not dramatic, diminution in (or, at a minimum, a slowing in the rate of increase of) district court filings. Their impact at the appellate level, however, would be more attenuated since diversity and FELA/Jones Act cases are less demanding components of appellate dockets than of trial dockets. Yet it is, in my judgment, the appellate caseload that should be the priority target of remedial proposals.

My concern is not, however, with the Supreme Court. I recognize that the much debated proposals for a national court of appeals, advanced in one form by the Freund Committee (1972) and in another form by the Hruska Commission (1975), were conceived of as modes of helping the Supreme Court meet its onerous and awesome responsibilities. But the Supreme Court can take care of itself. As Justice Scalia observed two years ago, "There are still only nine of us, and we can control our own docket so that only significant cases occupy our attention." So one can confi-

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63 In the year ending June 30, 1987, 1,109 Social Security appeals were terminated and 982 were commenced. Id.
64 In the year ending June 30, 1987, the figure was 13,322; in the preceding year the figure was 14,407. Id at 8.
65 One reason that district courts are able to handle so many Social Security appeals is that, in many districts, these cases are frequently reviewed initially, and in depth, by magistrates.
66 In so characterizing the "mine-run" cases, I do not mean to suggest that the decisions denying Social Security benefits that are appealed to the district courts are routinely sustained. On the contrary, approximately half the appeals result in reversals or remands for further proceedings, a fact that illustrates the importance of a system under which administrative adjudications of such vital consequence are subject to review by tribunals external to the administrative process.
67 Scalia, Address at 253 (cited in note 55). The Court's control of its own docket was made even more secure by legislation enacted last year that places almost every facet of the
dently assume that the Supreme Court will continue to limit itself to 150 or fewer plenary reviews each year. And the Court should so limit itself. Reaching for more cases would risk a calamitous weakening of that fragile, and immeasurably precious, ultimate arbiter.

It is the courts of appeals that most need help. As noted above, a circuit judge in 1988 must address almost four times as many appeals as a circuit judge did in 1960. And in the same time span—because the Supreme Court has, wisely, not undertaken to expand the number of cases given plenary consideration—the fraction of circuit court decisions reviewed by the Supreme Court has become minuscule. For all practical purposes, the courts of appeals are no longer intermediate appellate tribunals; they are now "quasi-supreme" for they utter the last word in 99 percent of their cases. In short, their importance has grown with their caseloads, and they thus have less and less time to do more and more important work. Yet the little time at their disposal for the thoughtful consideration of thousands of significant cases is inordinately eaten into by their obligation simultaneously to adjudicate thousands of cases of relatively little consequence. To characterize cases as being of "relatively little consequence" does not mean that they do not matter to the litigants. They do matter to the litigants, and for that reason they matter to all of us: Due process must be done and be seen to be done. Such cases, however, do not involve significant issues of law. And so, in most circuits, they are not set down for oral argument; and, typically, they are decided by judgment order or by an unpublished opinion. They are, in short, cases that should not consume the fleeting time of "quasi-supreme" tribunals.

To remedy this, I propose that we build into the federal judicial structure, between the district courts and the circuit courts, a truly intermediate appellate tribunal. To this new tribunal appeals from the district courts would be taken as of right; from it review could be had in the circuit courts only by certiorari, a discretionary review to be exercised by the circuit courts just as the Supreme Court has exercised its discretion since 1925. Under this proposal, the circuit courts could husband their resources in the same way that, for example, the New York Court of Appeals and the Pennsylvania Supreme Court can. The burden of initial, and frequently final, federal appellate review would fall on the new tribunal, which would be much like New York's Appellate Division or Penn-

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Court's appellate jurisdiction in the certiorari, that is, discretionary, category. See Bennett Boskey and Eugene Gressman, The Supreme Court Bids Farewell To Mandatory Appeals, 121 FRD 81 (1988).
sylvinia’s Superior Court.

The “new tribunal” that I have hypothesized need not—and, indeed, probably should not—be an entirely new judicial entity. It could, in emulation of New York, be an appellate “division” of the trial court. That is to say, a sufficient number of new district judges could be appointed so as to free up enough district judge time to perform this initial appellate function.8

CONCLUSION

Writing this book review has enabled me to pursue two objectives. The first is to pay tribute to a work of scholarship that, for thousands who labor in and for the law, has had and continues to have inestimable value. The second is to identify what I believe to be a serious and worsening problem in the administration of federal justice, namely, the plight of our courts of appeals, and to propose a partial solution. I harbor no illusion that my proposal will be widely endorsed. I will be more than satisfied if it stimulates further attention to the problem.

These two objectives are closely related. What links them is a conviction that, in the American republic, the well being of the federal courts is a matter of enormous public consequence. To this conviction Felix Frankfurter and Henry Friendly dedicated their professional lives. The same is true of Henry Hart and Herbert Wechsler; there have not been any better amici curiae since 1789.

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This book review was completed shortly before Paul Bator’s untimely death. The editors of the Review have kindly allowed me to add a brief word of tribute:

Over the span of thirty years, Paul Bator was an exemplary teacher of law, an ornament of the Harvard and Chicago faculties. Late in his career, he took two years leave from the academy to serve with great distinction as Deputy Solicitor General of the United States, bringing the great weight of his learning and insight to bear on large questions of public law pending before the Supreme Court. Both as a scholar and as a government lawyer, Paul Bator devoted his remarkable abilities single-mindedly to the betterment of the law.

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8 Three-judge panels would suffice, as in the courts of appeals. District judges could be assigned permanently, or on extended rotation, as full time appellate judges; or they could interweave trial and appellate assignments.