Hart and Wechsler's The Federal Courts and the Federal System by Paul M. Bator, Paul J. Mishkin, David L. Shapiro, and Herbert Weschler

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Certainly it is the height of presumption to undertake a review of this new edition of a work which has come to be regarded by courts and practitioners, as well as by the academic fraternity, as the most penetrating delineation and description of problems of federal jurisdiction and of the allocation of power between state and national courts. The justification for such a review is that this work has hitherto been a national resource: it has been the work from which a generation of law students has gained appreciation of the workings of the federal system as it relates to the business of courts and it has been the swiftest and surest guide for judges and practitioners in the same sphere. To the extent that judicial discussions of problems of jurisdiction retain any intellectual coherence in an age of mindless activism, both conservative and liberal, that coherence is in large measure due to the disciplined consideration of jurisdictional problems encouraged by this book.

The initial edition declared that “though this book was planned and executed in the hope that it might be of use in practice as well as in the schools, it is primarily a teaching book, designed to lay the basis for an advanced course in public law.” Any appraisal of the second edition must include an assessment of the extent to which it imparts to students an appreciation of the fact that “the jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and the federal government.” Certainly the more recent case books in this field, many of which are little more than handbooks on how to “get into” federal court, are not calculated to instill, in the coming generation of lawyers, an appreciation of the proposition of Mr. Justice Story, quoted by Professor Frankfurter in his introduction to the first modern case book on these problems, that “questions of jurisdiction are questions of power.” Yet, as the authors of the first edition appropriately noted, “federal jurisdiction, as our subject is usually called, would surely be a sterile topic were it not explored

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2 Id. Preface at xii.
in this perspective. . . .” The second edition, therefore, must meet two tests: First, is its emphasis such as to impress upon a new generation of law students an appreciation of the workings and values of federalism? Second, is its coverage of developments since 1953 in sufficient depth to cause the work to retain its value to judges and practitioners and its consequent influence on the development of the law? The answer to both these questions must be generally affirmative. The new work, however, unlike its predecessor, is a collaborative effort in which “ultimately responsibility for various parts of the book was divided among the four [editors] . . . .”3 In consequence, differing chapters warrant differing appraisals which to be just must take note of the authors’ disclaimer that “[t]his volume is a second edition; it does not purport to be a new book.”4 Accordingly, the several chapters will be considered in turn:

I

The revision of the chapter on the development of the federal judicial system undertaken by Professor Bator makes few changes in the earlier familiar text. The earlier discussion of the debates on the ratification of the Constitution is retained verbatim and supplemented by a listing without discussion of the recently published historical literature on the subject.5 One recently published work which might usefully have been cited for its value to students and to practitioners and judges is the summary description by Ms. Folsom of the available primary and secondary sources dealing with the ratification debates and of the appropriate methods of legal research into “the original understanding”.6 It may be that a brief discussion of the much mooted question of whether the debates of the federal convention or the debates of the state ratifying conventions are entitled to greater weight could have been included here.7 The earlier summary of the provisions of the Federalist Papers relating to the organization of the federal judiciary is repeated verbatim. The discussion includes no reference, however, to numbers 45 and 46 of the Federalist with their bearing on the anticipated contours of federal criminal jurisdiction; nor does the specialized discussion of federal criminal jurisdiction undertaken by Professor Wechsler in Chapter IX include any discussion of the original understanding of this subject. The subsequent

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3 Id. Preface at xvii.
4 Id.
7 Id. at 93-96.
commentary on the growth of the judicial system again repeats without change the work of the earlier edition, with the addition of a brief reference to the reform of the Supreme Court's jurisdiction worked by the Act of February 13, 1925. For some reason the supplementation of the bibliographical notes does not contain any reference to Professor Mason's accessible and readable biography of Chief Justice Taft which, for students at least, is a useful road to appreciation of this statute. The only other consequential change in the notes is the addition of references to the three judge court provisions contained in recent civil rights acts, and to the creation of the Temporary Emergency Court of Appeals, together with reference to the recent changes in the jurisdiction and organization of the courts of the District of Columbia. There is no reference in this section to the recent creation of the Coordinating Committee on Multiple Litigation, in principle and practice a not unimportant change.

The discussion of the business of the courts retains the previous format, substituting tabulations of suits commenced in 1970 for the previous tabulations for 1951. Comparative figures for fiscal 1960 are also given. It would have been illuminating to obtain also for purposes of comparison the figures for the earlier year, since that comparison dramatizes the explosion in private federal question litigation and in bankruptcy cases. The detailed notes appropriately spotlight the explosion of litigation in the antitrust, civil rights, and other fields. A new provision is a comparative table of shifts in federal criminal case loads. The text appropriately stresses that the earlier increases in the federal criminal case load were produced in the prohibition period, and in the war years by price control and rationing cases. The text discussion does not spotlight the increased case load in the civil rights, narcotics, robbery, and weapons and firearms area, which does not yet present problems of the prohibition and wartime dimensions. On the other hand there has been a sharp decline in liquor tax prosecutions, and a more modest decline, resulting from shifts in federal prosecution policy, for auto theft.

This section of the chapter contains new, but unfortunately inade-

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8 See Hart & Wechsler at 41.
9 Id. at 46 n.65.
10 Id. at 49 n.94.
12 From 8,653 cases in 1951 to 13,175 in 1960 and 34,846 in 1970.
14 Civil rights prosecutions increased from 8 in 1961 to 192 in 1970; narcotics prosecutions from 1,524 in 1961 to 3,511 in 1970, not including an additional 3,268 petitions under the Narcotic Addict Rehabilitation Act; robbery prosecutions from 479 in 1961 to 1,580 in 1970 and weapons and firearms prosecutions from 205 in 1961 to 1,547 in 1970.
quate, treatment of the Federal Magistrates Act of 1968. There is no disclosure of the tenure of federal magistrates or the provisions for their compensation. It declares in unfortunately misleading terms that "in addition they are given jurisdiction to try 'minor offenses' under 18 U.S.C. Section 3401," while failing to mention the fact that the jurisdiction thus conferred is essentially elective with the defendant, since he retains the right to elect trial by a federal district court. The elective nature of the criminal jurisdiction of United States Magistrates is more adequately discussed by Professor Wechsler in the chapter on Federal Criminal Jurisdiction. The constitutional problems which lurk in any effort to remove jurisdiction to try federal criminal offenses committed within the states (as distinct from the District of Columbia and unorganized territories) to judges not possessing life tenure or irreducible compensation are, however, not discussed in this chapter nor, save in cursory form, later in the book. Regrettably absent also is any discussion of whether the requirement of independent judges with life tenure for all proceedings in which the federal government seeks to deprive a citizen of his liberty is a constitutional safeguard of significant proportions. Nor does the work reach the question whether the "election" provided between trial by magistrate and trial by judge is in fact a true election or whether in fact, the right to trial by judge may be so burdened by court delays and other collateral consequences as to be increasingly nugatory. It is doubtful that the coming generation of practitioners and law students will be emboldened to raise such questions by the cursory discussion of the Federal Magistrates Act contained in this book. It is true that the new magistrates are not appointed by the executive but by federal judges. It was, however, arguably a purpose of the constitutional provisions dealing with the federal judiciary to limit the size and scope of the federal judicial establishment.

There is a brief analysis of the recent expansion in the work load of the Court of Appeals (unfortunately unaccompanied by references to recent pertinent literature) and a reference to the current expansion of the case load of the Supreme Court which is supplemented

16 HART & WECHSLER at 1290.
17 One may recall the remonstrance of the Declaration of Independence:
He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries. He has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.
by a more elaborate discussion in the eleventh chapter which is edited
by Professor Shapiro. Finally, there is a note on the administration of
the federal courts similar to the note in the first edition. This discus-
sion includes no reference to the source and limits of local rule-
making powers, an important subject in light of recent developments
concerning the right of jury trial in civil cases. The elaborate boiler
plate description of the various divisions of the Department of Justice
contained in the initial edition is omitted, which is certainly no loss.

II

The chapter on the case and controversy limitation is primarily
the work of Professor Mishkin. Unlike the first chapter it constitutes
a substantial rewriting and supplementation of the materials in the
first edition. The chapter commences with a discussion of advisory
opinions adapted from the earlier edition. A subtly ironic note
observes that “the speed with which the Supreme Court passed on
the constitutionality of the 18 year old voting provisions in Oregon v.
Mitchell” was analogous to the purposes sought to be served by ad-
visory opinions; a shrewd insight. Certainly that case, in which large
and novel constitutional questions were decided by the court before
the normal process of public and professional debate had fairly begun
provides a striking illustration of the dangers of dilution of the case
and controversy requirement or of efforts to unduly expedite and
contract the process of constitutional adjudication. The default in
that case was especially regrettable in light of the similar failure
of the legislative process in most of its stages which, along with the
possibility of executive veto, were circumvented by recourse to legisla-
tive rider. The best comment on this episode remains that of one of
the new measure’s proponents uttered in another context:

Our age is contentious and frenetic, inclined to distrust the force
of standards that one’s adversaries may choose to ignore, inclined to
seize its own innings and impatiently mark up victories and defeats
day by day. And yet who can say that we may safely stake our
vision of the future on the accumulation of little triumphs of the
day, unless they are earned by what I have ventured to call
morality of the mind—by understanding, respect for the limitations
as well as the creative opportunities of authority, and the even-
handed application of principle.

The new edition repeats the useful and extended discussion of
opinions of the Attorney General as well as the previous discussion of
Marbury v. Madison. There is then a useful added discussion of the

rhetoric in Cooper v. Aaron, referring to Supreme Court decisions and the interpretation announced in them as "the supreme law of the land". Certainly that the rhetoric of the court was in some measure extravagant is almost universally acknowledged. There is a useful collection of the later writings on the decision, though not including Professor Lusky's possibly relevant discussion.  

Certainly the expressions of courts must be viewed as disciplined and conditioned by the facts of the cases before them. To read a decision as thus confined where this is done without disingenuous distinction certainly does not constitute a defiance of "the supreme law of the land" in a nation whose legal system is or purports to be a system of case law. It is doubtful, moreover, that those who would support a more expansive interpretation of the binding authority of Supreme Court dicta in legitimately distinguishable cases are prepared to live with the consequences of such a view of authority as applied to the discretion of district courts.  

In the end, literal interpretation of the rhetoric of Cooper v. Aaron must be rejected if one holds, as the authors of the second edition in some measure do, that the courts are neither authorized nor competent to engage in lawmaking ex nihilo. As Judge Learned Hand observed in a different context, that of the limits on the federal injunction:  

no court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. . . . It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court. . . . This is far from being a formal distinction; it goes deep into the powers of a court of equity. . . . It is by ignoring such procedural limitations that the injunction of a court of equity may by slow steps be made to realize the worst fears of those who are jealous of its prerogative.  

In the end extravagant expressions as to the authority of judicial dicta are inconsistent with the maintenance of procedural due process, process which, as Professor Hurst has pointed out, has as one of its objects a sharpening of judicial appreciation of gains and costs. Professor Mishkin's notes on Cooper v. Aaron, brief though they are, adequately expose the problem to the new generation of law students.  

The second portion of the second chapter deals with the problems presented by executive revision of judicial decisions and the require-
ment of adverse parties, in terms largely drawn from the first edition. Regrettably, the section omits, though it refers to, the extended discussion of the issues presented by extra-judicial service by federal judges contained in the first edition. It is not likely that appreciation of the value of the separation of powers is going to be enhanced by this not insignificant omission.

The chapter continues with a lengthy discussion of legislative revision of money judgments which refers to numerous cases and to some of the literature. The discussion of feigned and moot cases has been significantly updated. Professor Mishkin has displayed a shrewd eye for some of the more bizarre recent federal cases resulting from the conduct or default of parties. The editor also shrewdly makes note of the oft-cited opinion in the "case" of Pennsylvania Association for Retarded Children v. Pennsylvania, in which, after a new state administration abandoned the defense of the case, a consent decree was entered by the court granting virtually all the prayers of the plaintiff.

The three judge court approved the settlement, without passing on the merits of the constitutional claims, but finding them sufficiently cognizable to found federal question jurisdiction. The court held that the state's change of position did not make the case non-justiciable, and, on further motion, issued its injunction to enforce the settlement agreement against the school district members of the class who had not participated directly in the original proceedings.

In this fashion state powers of legislative appropriation and executive administration were transferred by consent of the state executive to the federal judiciary, a surely bizarre proceeding, with the consequences for due process and rights of third parties spelled out by Professor Mishkin. More remarkably still, the resulting "precedent" has been enthusiastically cited by other courts and commentators. Nor is this the only recent performance of this kind by the Attorney General of Pennsylvania; the authors might have, but did not, cite the failure of the same officer, the Pennsylvania Attorney General, to test

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24 Hart & Wechsler at 88 n.1.
25 Hart & Wechsler (1st ed.) at 102 et seq.
27 See, e.g., General Elec. Co. v. Bootze Mfg. Co., 289 F. Supp. 504 (S.D. Ind. 1968), where a collusive federal court replevin proceeding was instituted in order to enlist the aid of United States marshals in transporting goods across a picket line.
a judgment against the State in the Supreme Court, which failure resulted in a holding throwing the national law relating to prejudgment garnishment into a state of continuing confusion. This section of the chapter might also have contained a reference to the recent practice of some state attorneys general of filing briefs in the Supreme Court contesting state powers to enact challenged legislation.

The section of the chapter on mootness has been completely updated and reflects a shift (as does the Supreme Court's work) from private to public law cases. The section on declaratory judgments also has been rewritten though less extensively. As before, little stress is given to the discretionary character of declaratory judgments and of the factors properly influencing the exercise of discretion. Nor is there much discussion of the case law bearing on the exercise of discretion. The discussion of the use of declaratory judgments in public litigation follows the earlier edition. There is added to this discussion a note of only one sentence on preventive relief in the criminal law:

Traditional doctrine was that "equity could not enjoin a prosecution" though it is a doctrine often honored in the breach. Should there be any special reluctance to entertain preventive attacks on criminal law? Cf. Note, Declaratory Relief in the Criminal Law, 80 Harv. L. Rev. 1490 (1967).

Surely a more adequate treatment of this issue was called for. The opinion of Justice Frankfurter in Stefanelli v. Minard, characterizes the doctrine not as "a doctrine often honored in the breach" but rather as "summarizing centuries of weighty experience in Anglo-American law" and as "impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are at issue." It is set out in full text in the first edition but receives only note reference in the second edition. As in the first edition, another important limitation on federal declaratory judgments, the proposition of Skelly Oil Company v. Phillips Petroleum Company, is neglected. Skelly Oil Company pointed out that:

Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain

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31 Comment, An Attorney General's Standing before the Supreme Court to Attack the Constitutionality of Legislation, 26 U. CHI. L. REV. 624 (1959), for example, was not cited by the authors.
32 324 U.S. 117 (1951).
33 HART & WECHSLER at 890.
litigation within the restricted area to which the Constitution and Acts of Congress confine them, "jurisdiction" means the kinds of issues which give right to entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act.

It is true that the American Law Institute federal jurisdiction proposals dispense with this doctrine, but it is not the function of a treatise to anticipate adoption of these proposals.

The discussion of standing questions is not enhanced by omission in the new edition of the extended discussion of the several opinions in the Joint Anti-Fascist case included in the first edition, particularly Justice Frankfurter's concurring opinion. Nor is the loss of this expression of the values underlying the standing doctrines remedied by inclusion of more contemporary statements of similar views, for few such are included, notwithstanding the availability, for example, of Solicitor General Griswold's influential argument in Sierra Club v. Morton generously printed as an appendix to Justice Douglas' dissenting opinion in that case. The somewhat general discussion of standing assimilates standing under the Administrative Procedure Act and standing in the absence of express statutory provision and tends to confuse in the mind of the student the statutory and constitutional issues. This treatment is not surprising in light of the authors' view that:

[C]larity would be gained by viewing standing as involving problems of the nature and sufficiency of the litigant's concern with the subject matter of the litigation, as distinguished from problems of the justiciability—that is, the fitness for adjudication—of the legal questions which he tenders for decision. More precisely stated, the question of standing in this sense is the question whether the litigant has a sufficient personal interest in getting the relief he seeks, or is a sufficiently appropriate representative of other interested persons, to warrant giving him the relief, if he establishes the illegality alleged—and, by the same token, to warrant recognizing him as entitled to invoke the court's decision on the issue of illegality. So viewed, the question becomes inextricably bound up with the whole law of rights and remedies, does it not? The difficulty is that, under this view, standing doctrine as an independent limitation on the power of courts disappears. For Justices Brandeis and Frankfurter, perhaps the principal architects of the standing doctrines which constitute the subject matter of the chapter,
the doctrines had as their prime purpose maintenance of the separation of powers and the exclusion of classes of issues from judicial consideration, not merely a marginal sharpening of advocacy or the marginal particularization which results from the standing doctrine suggested by the authors and some of the more recent Supreme Court decisions. This view of standing need not be shared but should not have been concealed. The later portions of the chapter do something to remedy the defect. The quoted reference to the question whether a litigant is "a sufficiently appropriate representative of other interested persons" is also not an adequate substitute for more extended consideration of the standing questions presented by amended Rule 23.

The discussions of standing of voters, legislators, and competitors do not significantly expand upon the discussion in the prior edition. The discussion of standing in reapportionment cases in the dissenting opinion of Justice Frankfurter in Baker v. Carr, however, is caricatured rather than summarized. The discussion of standing of legislators unaccountably omits the recent cases according them standing to assail or defend reapportionment plans.40

There is an extended and useful discussion of the doctrine allowing statutes in the first amendment and related areas to be challenged on their face. The stress is on the cases supporting such challenges. The principal limiting case cited is the 1963 decision in United States v. National Dairy Products Corp.41 involving Section 3 of the Robinson-Patman Act. The discussion of the doctrine in Dandridge v. Williams42 surely warranted at least note mention here.

The discussion of the "political question" doctrine does not explicitly discuss its purported limitation to questions within the purview of the federal political branches, nor the early signs of its revival,43 under the guise of justiciability if not under its original label, with respect to state government questions in dicta in James v. Valtierra44 and Gordon v. Lance,45 nor the applicability of the "coordinate federal branch" limitation of the doctrine to state legislative and executive action under joint federal and state programs. These questions have been dramatically revived by the reemergence of the political question doctrine in the recent Ohio National Guard case.46

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44 402 U.S. 137, 142 (1971).
45 403 U.S. 1, 6 (1971).
46 Gilligan v. Morgan, 413 U.S. 1 (1973). The compatability of this decision with Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966), is an interesting subject for discussion.
The third and fourth chapters by Professor Bator dealing with the original jurisdiction of the Supreme Court comprehensively updates the prior edition. Though quite relevant, the chapter does not include the recent decision in *Illinois v. City of Milwaukee*,\(^{47}\) nor the discussion of *prens patriae* suits in District Courts in *Hawaii v. Standard Oil Co.*,\(^{48}\) which receives only note reference, presumably because of its appearance shortly before press time. The suggestion in *Hawaii v. Standard Oil* that a state might be a suitable class representative in consumer class action is not discussed or pursued, nor is the question whether the state’s entitlement to serve as such a representative is a question of federal or state law.

The discussion of *Chandler*\(^{49}\) includes a list of articles on the case, omitting the important article by Professor Kurland.\(^{50}\)

The discussion in the first edition relating to cases affecting ambassadors, public ministers, and consuls has been drastically truncated to the detriment of the reference value of the work in this sphere.

The famous dialogue on the power of Congress to limit the jurisdiction of federal courts is retained essentially unchanged in the fourth chapter with some footnote supplementation by Professor Bator.

The discussion of “Developments since the Dialogue” omits mention of Chief Justice Burger’s separate opinion in the *Three Sisters* case,\(^{51}\) as well as the literature generated by the busing controversy. The following discussion of legislative courts appropriately commences with a discussion of *Glidden Co. v. Zdanok*.\(^{52}\) The section goes on to inquire:

Do criminal prosecutions by the federal government present a special case? (Recall the special mention of such cases in Article III itself.) Note that Congress could presumably have such cases tried in the state courts (at least if it chose not to create federal trial courts); note, too, that the territorial courts exercised criminal as well as civil jurisdiction. Nevertheless, legislation assigning the trial of federal criminal cases, prosecuted within the United States, to federal tribunals unprotected by the guarantees of Article III could not be justified today, could it? Review, in this connection, the cases discussed in the *Note on Court Martial Jurisdiction*, p. 372, *supra*. The language in some of them—naturally Toth and O’Callahan—clearly suggest that the Court will view with the highest disfavor any attempts to encroach on the jurisdiction of the Article III courts over federal criminal cases.

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\(^{48}\) *405 U.S. 251* (1972).


\(^{52}\) *370 U.S. 550* (1962).
The recent decision in *Palmore v. United States* makes clear that this statement does not apply to the District of Columbia, but we may assume that it does apply with respect to the fifty states, notwithstanding the generally loose language of the prevailing opinion.

V

The chapter on review of state court decisions by the Supreme Court substantially supplements the earlier edition. The "Note on Enforcement of the Mandate of the Supreme Court" takes cognizance of the recent decision in *In re Herndon* relating to contempt proceedings against state court judges acting in their nonjudicial capacity. The new edition pertinently asks:

Should state judges in their judicial role be less amenable to a contempt sanction in a case of clear defiance than sheriffs or other officials? Does Martin v. Hunter's Lessee and the history that it exemplifies have any bearing on the issue. See also the opinion of Justice Baldwin in Holmes v. Jennison, 14 Pet. (Appendix) 614, 632 (U.S. 1840).

There perhaps should have been mention here of the important pending case of *Littleton v. Berbling*, involving an attempt by federal district judges to place state judges under an injunction requiring specified future judicial conduct under pain of contempt penalties in a proceeding under the civil rights acts. It is not easy to see how such an order can be viewed as consistent with the rejection in 1789 and subsequently of proposals to subject state court judgments to review in the inferior federal courts, or with the constitutional provisions relating to the oath of state judges, or, for that matter, with the traditional limits on "criminal equity".

The section of the chapter on "The Relation Between State and Federal Law" begins with the penetrating observation that:

Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary.

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53 Palmore v. United States, 411 U.S. 389 (1973). The quoted passage was the subject of a supplemental brief filed by the appellant in *Palmore*.
for the special purpose. Congress acts, in short, against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

That this is so was partially affirmed in Section 34 of the First Judiciary Act, now 28 U.S.C. Section 1652, but an attentive canvass of the total product of the Congress would establish its surprising generality and force. Indeed, the strength of the conception of the central government as one of delegated, limited authority is most significantly manifested on this mundane plane of working, legislative practice.

This passage parenthetically makes exceptionally clear the extraordinary departure from American practice—a change of constitutional dimensions if the view is taken that “the Constitution is something more than the Supreme Court has to do with” represented by the proposed federal criminal code which avowedly undertakes “to write the new federal penal code very much like a state penal code.”

The ensuing discussions of state incorporation of federal law, ambiguous state decisions, federal incorporation of state law and federal protection of state-created rights fully update the treatment in the prior edition. The same is true of the thoughtful treatment of the “adequate state ground” question in federal habeas corpus. Similarly, there is a careful treatment of the increasingly misused “no evidence” doctrine of Thompson v. Louisville which has increasingly been pressed into service as a substitute for substantive due process as a means of dealing with statutes whose policy the court finds unjustifiable. Assessment of such statutes under substantive constitutional restrictions at least has the merit of candor; the use of the Thompson doctrine or the more recent misuse of the doctrine of Tot v. United States has the effect of obscuring issues rather than clarifying them.

There is a thoughtful discussion of the extent to which dismissals for want of a substantial federal question possess precedential value. The unappreciated distinction between cases within the obligatory jurisdiction coming from state courts and cases within that jurisdiction coming from federal courts is pointed out by a quotation from an address by Chief Justice Warren:

It is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary...

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59 319 U.S. 463 (1943).
As regards appeals from state courts our jurisdiction is limited to those cases which present substantial federal questions. . . . 40

This distinction of course does not excuse the recent mistreatment by the California Supreme Court in Serrano v. Priest 61 of the prior summary affirmances in cases reaching the Supreme Court from three judge federal courts as to which the Supreme Court's summary actions clearly would seem to possess precedential value. Connoisseurs of quotations out of context will also find it instructive to compare the references to Stern and Gressman's treatise on Supreme Court practice quoted in the Serrano opinion with the cited work itself. The authors might have commented, though they did not, on the paradox presented by the conduct of lower courts which on the one hand acclaim the principle of Cooper v. Aaron, stretched to mean that the language as well as holdings of Supreme Court opinions are the "supreme law of the land" while on the other hand rejecting, when it is convenient to do so, summary affirmances by the Supreme Court of cases within its obligatory jurisdiction as sources of compelling authority. This is a strange approach to precedent in a nation whose legal system is a system of case law and whose constitution restricts the jurisdiction of courts to "cases and controversies".

VI

The sixth chapter, primarily the work of Professor Shapiro, addresses the Erie doctrine and related matters. There is an extended and useful discussion of the federal rulemaking power, discussion given greater point by the recent controversy over the Federal Rules of Evidence. Certainly the action recently taken by Congress constitutes a vindication of the viewpoint as to the appropriate scope of the federal rulemaking power espoused by Justice Frankfurter in his dissenting opinion in Sibbach, 62 where he observed that:

a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts.

Had this admonition been heeded, the Court would have confined its recent efforts to reform of the hearsay rule, and like matters, as distinct from wholesale impairment of the common law privileges and

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disposition of much vexed matters concerning state secrets and the like.

The new edition contains an interesting note on agreements not to resort to the federal courts, a subject which has assumed potential importance in light of the recent decision in *Bremen v. Zapata Offshore Company.* In that case, the Supreme Court held that clauses in private agreements providing for forum selection "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." It had been clear, at least since 1874, that clauses attempting to oust the federal courts of diversity jurisdiction were invalid by reason of what was then described as a common law doctrine that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void." The 1972 case, however, distinguishes the early decision on the basis that it involved a situation "in which a state's statutory requirement was viewed as imposing an unconstitutional condition on the exercise of the federal right of removal" and accordingly restricted its applicability to purely contractual arrangements. It is safe to predict that this issue will be litigated in the future as parties with particular interests in adherence to certain types of state procedure or in avoiding the effect of the federal discovery rules or restrictions on federal jurisdiction such as those of the Norris-Laguardia Act secure inclusion in private contracts of clauses ousting diversity jurisdiction.

The discussion of *Swift v. Tyson* and *Erie v. Tompkins* is largely drawn from the earlier edition. The newly added note on the rationale of the *Erie* decision gives rather short shrift to Justice Brandeis' apparent conclusion that the rule was constitutionally compelled. The accompanying note on ways of ascertaining state law tracks the earlier edition, but omits the brief note in the earlier edition relating to the appropriate weight to be given to rules and rulings on questions of state law by state administrative agencies (first edition, page 630). The discussion of the constitutional basis of *Erie* perhaps should have made reference to the statement in *Hanna v. Plumer,* that:

we are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant

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64 Id. at 10.
of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Nor does it refer to Justice Harlan's observation in his concurring opinion in *Hanna v. Plumer* relating to "primary decisions respecting human conduct which our constitutional system leaves to state regulation."

The new edition's note on "Forum Shopping and the Federal Rules" raises some pertinent questions relating to the applicability of the provisions of the proposed Federal Rules of Evidence modifying evidentiary privileges in diversity litigation.

The section of the chapter previously entitled "Federal Government and Federal Question Litigation" is now significantly recaptioned "Federal Common Law." This section greatly extends the discussion in the first edition. It refers to none of the extensive discussions of implied federal remedies under the federal securities statutes other than the treatise discussion by Professor Loss. It notes that liability was upheld "in a casual footnote", in *Superintendent of Insurance v. Bankers Life and Casualty Company*. There is no discussion as to whether the implication here was an implication from the jurisdictional grant (as in the case of *Case v. Borak*), from the rescission provision, or from the common law doctrine implying tort liability from criminal statutes. The discussion includes a quotation from the dissenting opinion of Mr. Justice Frankfurter in *Farmers' Education and Co-operative Union v. WDAY, Inc.* with its unanswered reference to Hamilton's statement in Number 32 of the Federalist relating to congressional powers under the supremacy clause where it was observed that a state's powers would be superseded if continued authority in the state would be:

absolutely and totally contradictory and repugnant. . . . I use these terms to distinguish this case from another which it might appear to resemble, but which would, in fact, be essentially different: I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority.

In the few months elapsing since the publication of this new edition there have, of course, been highly significant developments in this

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69 HART & WECHSLER at 802.
field, including by way of example, the recent case on state copyright laws limiting the scope of the Stiffel-Compco doctrine.\textsuperscript{70}

There is a discussion of the decision by the Supreme Court in Illinois v. Milwaukee,\textsuperscript{71} applying federal common law to pollution cases, notwithstanding the earlier decision in Wyandotte Chemicals Corporation.\textsuperscript{72} The authors appropriately inquire as to "whether federal common law governs a suit to abate interstate pollution brought by private persons."

The discussion of the opinion in Moragne v. State Marine, Inc.\textsuperscript{73} does not focus upon the problems created by that opinion's use of closely related statutes as sources of law\textsuperscript{74} or the greater scope for judicial latitudinarianism afforded by this adoption of the suggestions of Dean Landis.\textsuperscript{75} This may be a question of jurisprudence properly so-called rather than a question of federal jurisdiction. But it is unlikely that there is a better place in the law school curriculum for students to be confronted with the problem.

\section*{VII}

The discussion of challenges to federal jurisdiction and elements of federal question jurisdiction is primarily the work of Professor Mishkin. The discussion of the basic rule that jurisdictional questions may be raised at any time during the course of the proceeding is supplemented by a reference to the recent proposal of the American Law Institute (A.L.I. Study, Section 1386, now before Congress as Senate Bill 1776), which would preclude the raising of jurisdictional issues by the parties after the beginning of trial except in special circumstances. The authors appear sympathetic to this proposal. The difficulty with it is simply that it would for all practical purposes result in the elimination of any clear division between areas of responsibility of the federal and state courts. Unfortunately, not all lawyers, and particularly not all lawyers engaged in the defense of state government litigation, have a clear understanding of the principles discussed at such length in this book. It is clear that much of the litigation presently excluded from the federal courts is excluded as a result of belated recognition of jurisdictional problems or by

\begin{itemize}
\item \textsuperscript{71} 401 U.S. 91 (1972).
\item \textsuperscript{72} 401 U.S. 493 (1971).
\item \textsuperscript{73} 398 U.S. 375 (1970).
\item \textsuperscript{74} Comment, \textit{The Legitimacy of Civil Law Reasoning in the Common Law}, 82 \textit{Yale L.J.} 258 (1972).
\item \textsuperscript{75} J. Landis, \textit{Statutes and the Sources of Law}, in \textit{Harvard Legal Essays} 213 (1934).
\end{itemize}
action by courts sua sponte. When a substantial number of courts have exercised jurisdiction over a given subject matter of litigation, parties promptly raising the jurisdictional question in other cases will, it is safe to predict, be met with diminishing sympathy. Adoption of the proposal will lead to a condition in which improvident exercises of federal jurisdiction feed upon themselves. Many jurisdictional questions, moreover, do not become apparent until trial or until questions of relief are being considered.

There is a valuable critical discussion (at 890) of the provision, only narrowly adopted by the American Law Institute, which would permit removal on the basis of federal defenses. Given the recent broadening of the fourteenth amendment and the extension of the fourteenth amendment procedural due process requirements in the areas of landlord-tenant relations, replevin, termination of welfare benefits and like matters, the “federal defense” provision of Section 1312 will clearly multiply the number of questions which are potentially removable to the federal courts. In addition, the federal defense provision has another serious consequence. It would operate to virtually oust the state courts of a large number of readily identifiable areas of present jurisdiction. For example, under the National Labor Relations Act state courts retain the power at present to enjoin or award damages against violence in the context of labor disputes. In any such case where an injunction against violence is sought, preemption is raised as a defense and the question of state court jurisdiction resolves itself into a question of fact. The provisions of Section 1312(A)(2) would operate to permit all such cases to be automatically removed to the federal courts since it can scarcely be said that in such cases preemption is not a substantial defense. The states will thus be denied their power to preserve domestic order through their own officers in the context of labor disputes. Recent case law also provides substantial potential federal defenses based upon the New York Times rule to virtually all action for libel and slander, an effect welcomed by the draftsmen, though not by other commentators who believe that the state courts serve a useful role in this field.\(^7\)

The effect of the provision allowing removal on the basis of federal defenses will be to almost totally oust the state courts of their libel and slander jurisdiction. And this is by no means an exhaustive listing of potential problems. It is clear that a reasonably imaginative lawyer will be able

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to remove virtually any sort of lawsuit to the federal courts. This is recognized by the draftsmen of the American Law Institute proposal who continue to provide a jurisdictional amount requirement in order to prevent the removal of small claims. However, the Constitution of the United States does not contemplate that the state courts should retain effective civil jurisdiction only over small claims. Nor is it easy to share the apparent view of the draftsmen that only the federal courts are competent to adjudicate claims and defenses arising under the Constitution of the United States and the fourteenth amendment guarantees of due process. It was not such a constitutional design that induced the framers of the Constitution to include in article VI a provision that "all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution. . . ."

The note on Monroe v. Pape and actions against state officers lists the cases declaring that Section 1983 actions may not be defeated because state law remedies were not first exhausted, but does not suggest the possible limitations that will be placed upon the doctrine urged by Judge Friendly and others; nor does it indicate that the doctrine, which had its origins in Damico v. California, was developed almost entirely in cases where either there was no plenary hearing in the Supreme Court or jurisdictional questions were not raised or argued. One somewhat startling feature of this development is alluded to by the authors in a footnote quoting Professors Gellhorn and Byse,

Personal actions now do lie in federal court against the state functionaries for deeds that, if performed by a federal employee, would probably be held non-actionable.78

The authors perceptively note that the sixth footnote of the recent decision in Lynch v. Household Finance Corporation effectively leaves open the question whether a remnant of the previous personal rights-property rights distinction may (apart from the Tax Injunction Act) bar federal jurisdiction over challenges to state taxes even in instances where there is no plain and efficient state remedy.

There is, as before, an extended discussion of the requirements of the Three-Judge Court Acts. There is, however, little or no discussion of the appropriateness of the courts' holdings, all of them without consideration of the legislative history and without argument of the point, that the Three-Judge Court Acts cannot be waived by state officials. No case yet decided appears to squarely hold that a state

77 399 U.S. 416 (1967).
78 HART & WECHSLER at 950 n.3.
may not, by solemn and formal waiver in its first initial pleading, dispense with protections accorded it by the Three-Judge Court Acts; the attempt seems never to have been made. Numerous cases recognize that the acts were enacted for the protection of the state government and not of plaintiff, a proposition which finds ample support both in the writings of commentators and in legislative history. It may be possible for a court in a suitable case, if aided by state counsel, to judicially draft limitations upon the applicability of the statute which would reduce the administrative problems which it presents to the federal judiciary and which will restore it to its originally intended purpose. There is yet another possible limiting construction of the statute not entirely foreclosed by the cases. This derives from the avowed purpose of the statute to prevent what Justice Frankfurter in the Phillips case referred to as the “improvident state-wide doom” of a state’s public policy. It is now clear that the “doom” of a statute, as distinct from an injunction against its application to a particular individual or a limited class of persons, can only result in the limited class of cases where a statute may be attacked on its face, chiefly first amendment cases. It is therefore arguable that the provisions of the Three-Judge Court Acts ought not be applied save in cases where the nature of the claim makes possible entry of a decree totally invalidating a statute. To so hold, however, would involve a greater departure from present case law than would a holding that states might solemnly and formally waive the protections of the Act.

The authors barely hint at the functional objections to three-judge courts. Certainly it must be conceded that the quality of justice obtained by both the state and private litigants where the three-judge court mechanism is used is markedly inferior, both on trial and appeal, to the quality of justice which would have been obtained had most of these cases been initially heard before a single judge with the right to appeal to the Court of Appeals. The three-judge court provisions place the litigants on either side under heavy pressure to stipulate to facts which in many instances should not be stipulated to and to sharply limit the length of trials, usually to one day, in order to avoid interference with the other judicial business of the participating judges and the calendars of their respective courts. In consequence, the usual three-judge court case involving important constitutional issues generally receives less attention from both court and counsel than even the garden variety personal injury case, let

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80 See Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966).
alone the garden variety antitrust case or a case involving equally substantial questions. Further, the fact that the judges of the three-judge district courts are usually geographically scattered importantly operates to limit the degree of collective deliberation that actually goes into the preparation of opinions. The requirement of Rule 52 of the Federal Rules of Civil Procedure for the making of detailed findings of fact is usually, because of the difficulties of judicial administration presented, honored more in the breach than in the observance by these tribunals. The rendition of the ultimate opinion is frequently delayed. The mechanism could not be better calculated to produce superficiality in the disposition of great public questions since the pressures toward cursory presentation at trial are so great. The provisions for direct appellate review by the Supreme Court multiply and aggravate these ills, since not only are the trials truncated trials but the appeals are in reality discretionary appeals rather than appeals as of right in consequence of the state of the Supreme Court docket. The broadening and sharpening of issues that can and should result in the appellate process to the benefit of the courts and counsel for both sides is not really present in three-judge court cases.

It must be conceded that history indicates that a strong case does exist for allowing the states the right to request a three-judge court in actions involving the validity of state legislation. This may in exceptional circumstances be a desirable safeguard, particularly in judicial districts where the number of sitting federal judges is limited and the provision thus guards against an excessive concentration of judicial power over a state's legislation. For this reason the American Law Institute proposal would seem preferable to the alternate proposal put forward by Chief Justice Burger in his State of the Judiciary message before the American Bar Association in August, 1972.82

The discussion of the Johnson Act and the Tax Injunction Act overlooks the extended discussion of Tax Injunction Act issues in the otherwise unrelated case of Samuels v. Mackell,83 which clearly reasserted the applicability of the provisions of the Act to actions for declaratory judgment as well as for injunction. The discussion of the Tax Injunction Act gives only limited treatment of the question as to what is a tax injunction, a question which arises in cases involving attacks on the relationship between taxes and expenditures and in cases attacking inequality in assessment practices.

The discussion of exhaustion of state administrative requirements

under the Civil Rights Act appropriately notes the perfunctory nature of many of the recent Supreme Court opinions on the subject. The recent decision of the Supreme Court declining to dispense with exhaustion requirements in a Civil Rights Act action attacking confinement of a prisoner may mark the end to this wooden application of the Civil Rights Act. Again, the treatise appropriately notes the total inconsistency of these holdings with the original federal design:

The court's casual evading of the requirement of exhaustion in Civil Rights Act cases is to be contrasted with its careful articulation of the exhaustion requirements and its exceptions in cases challenging federal administration action.84

Professor Davis pertinently inquires:

Comparing federal court review of federal administrative action and federal court review of state administrative action, must federal administrative remedies be exhausted in circumstances in which state administrative remedies need not be exhausted, and if so, why? Why not precisely the opposite?85

The discussion of the abstention doctrine carefully notes the more recent developments including the cases holding that abstention may be appropriate, even in cases founded on equal protection claims under the fourteenth amendment. The discussion also suggests that in light of Burford v. Sun Oil Company,86 abstention may sometimes be appropriate even in the absence of uncertainty in the state law which would eliminate the need of deciding a federal issue. This facet of the abstention doctrine has not been recognized by all courts, some of whose precedents are divided among themselves on these questions.87

The authors enumerate ten factors which might appropriately be thought to bear on the use of the abstention doctrines. To these factors might be added the effect of federal court intervention upon state budgetary and fiscal schemes by analogy to the Tax Injunction Act and its policy. Abstention in such circumstances may be peculiarly appropriate since remedies may be available to the state courts which are denied the federal courts by the eleventh amendment, the Tax Injunction Act and other provisions of the law.

The newly provided certification procedure adopted by some states is discussed. The note purporting to supply a definitive listing of such state provisions overlooks the provisions of at least one state.88

84 HART & WECHSLER at 985.
86 319 U.S. 315 (1943).
There is an extended and able discussion of *Younger v. Harris* and related cases. There is also a discussion of the important issues presented by the American Law Institute recommendations for modification of the present anti-injunction law.\(^9\) That proposal would significantly undermine the holding of *Younger v. Harris* by permitting federal court injunctions
to restrain a criminal prosecution that should not be permitted to continue either because the statute or other law that is the basis of the prosecution plainly cannot constitutionally be applied to the parties seeking the injunction, or because the prosecution is so plainly discriminatory as to amount to a denial of the equal protection of the laws.

Professor Wright, one of the draftsmen of the American Law Institute proposals, has told the Senate Committee that this proposal "may require re-examination to be sure that it does not reopen the door to federal injunctions of this kind any more widely than it was left open by *Younger v. Harris*.\(^10\) *Younger v. Harris* provides for the availability of federal injunctions generally only when the statute challenged is unconstitutional on its face. The proposed new head of federal injunction jurisdiction would be a fertile breeder of litigation, and would, in all probability, impair the capacity of the states to enforce their criminal law with reasonable dispatch. The draftsmen of the American Law Institute proposals recognized that expansion of the federal removal jurisdiction in criminal cases was inadvisable, and the considerations there adduced by them would seem to be equally applicable to federal injunctive relief, by which the federal courts, unlike their role in removal cases, exercise power without responsibility for the further conduct of proceedings. Certainly there is no more vital area of state power than the power of the states over criminal cases, the effectiveness of which must be maintained if we are not to have government by national policing agencies. The delays which would be produced by litigation under the American Law Institute's proposed Section 1372(7), particularly in controversial cases, would in all probability operate to discredit the criminal laws and discredit the power of the states to enforce the criminal law.

The discussion of federal diversity jurisdiction is the work of Professor Shapiro. The discussion of the history of diversity jurisdiction is supplemented by a discussion of the currently pending American Law Institute proposals. In summarizing the respects in which the American Law Institute diversity proposals would expand diversity

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\(^9\) *ALI Study, § 1372(7).*  
\(^{10}\) *Hart & Wechsler at 1049-50.*
jurisdiction the new edition does not stress the effect of the proposals (Proposed Sections 1302(b)(1) and (3)) relating to diversity jurisdiction in cases involving unincorporated associations. These proposals would make such associations citizens of only the place where their national headquarters is situated unless such associations maintain a "local establishment". The definition of local establishment in the proposals is such as to, in effect, exclude most political and social action organizations and, probably, most unions from the local establishment provisions. One effect of the American Law Institute proposals relating to diversity jurisdiction in respect to voluntary associations would thus be to make it possible for any voluntary association with standing to sue to invoke the diversity jurisdiction of the district courts to vindicate claims arising purely under state law where the necessary jurisdictional amount is present. It is not unlikely that the effect of such a provision would be to thrust into the federal courts an ever increasing number of environmental, land use, and zoning controversies which the present provisions exclude from them. It is also likely that these provisions would operate to allow the processes of the federal courts to be invoked in cases involving state employee labor relations excluded from the National Labor Relations Act and hence from the present jurisdiction of the federal courts.

Neither the American Law Institute commentary nor the new edition of the Hart and Wechsler Treatise (apart from cursory discussion at 1093-94) recognize the practical significance of the proposed changes in jurisdiction in cases involving voluntary associations. In light of the liberalization of standing doctrine worked by such cases as Sierra Club v. Morton and Association of Data Processors v. Camp, this consequence of any change in the rules governing the place of residence of voluntary associations should scarcely be overlooked.

There is an extended additional note on ancillary and pendent jurisdiction in diversity cases. There is also an extended new note on corporate citizenship discussing developments under Section 1332 (C) of the Judicial Code and added subsequent to the first edition. There is only limited discussion of the issues surrounding the application of the diversity jurisdiction to corporations, and the summary of arguments supporting and opposing diversity adapted from the original edition with its quotations from an article by Professor Wechsler omits what appear to this writer to be some of the more significant points that may be made against retention of the jurisdiction. The growth of businesses of national scope, far from supplying an argument in favor of jurisdiction, has increasingly had the effect of all but eliminating important commercial litigation from the state courts, save in major industrial centers or states such as New Jersey and
Delaware. In consequence such businesses and the counsel that represent them have little inducement to take a keen interest in the operation of state court systems and in the selection of state court judges. In many portions of the country a considerable portion of the Bar of the state has its practice almost entirely in the federal courts. The failure to impose limits upon the invocation of diversity jurisdiction by corporations in an era in which an ever increasing number of commercial cases falls within its potential scope will have the result of virtually denuding the state courts of important commercial litigation and will cause them to increasingly become courts of general jurisdiction in name only. It is not in my view desirable that the jurisdiction of state courts be effectively restricted to criminal cases, small claims, and cases involving real property and domestic relations, nor will the capacity of state courts to attract competent judges to deal with these concededly vitally important subjects be enhanced by acquiescing in the almost total removal of important constitutional and commercial litigation from their courts. The affirmative arguments for diversity jurisdiction appear likewise increasingly attenuated in an age distinguished by national communications and a high degree of personal mobility in which problems founded on local prejudice are of increasingly small importance. The extraordinarily complex nature of the American Law Institute proposals to restrict diversity jurisdiction is noted, though not in detail; even "abolitionists" will experience a difficult time in defending the "commuter" provision: it is academic draftsmanship at its worst.

VIII

The discussion of general problems of district court jurisdiction is the work of Professor Shapiro. The portions of the chapter dealing with the bringing of unincorporated associations into court has been drastically truncated to the detriment of its reference value. There is an extended and able discussion of forum non conveniens which makes repeated reference to the important article by Professor Kitch.91 Only one paragraph, however, is devoted to the important provisions of 28 U.S.C. § 1407, establishing the Judicial Panel on Multi-District Litigation. No discussion of the case law under this provision is included, though there is a quotation of a law review article which asserts that "the practical result of transfer under Section 1407 has been a transfer for all purposes." That statement, in this commentator's experience, is accurate. The authors do not discuss how

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91 Kitch, Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice, 40 Ind. L.J. 99 (1965).
compatible this development is with the policy of the underlying venue statutes or, for that matter, with due process of law. The effect of the provision is to require plaintiffs with a right to institute suit in a given jurisdiction to litigate cases at the other end of the country and to have their mode of proceeding, the time table of their cases and the course of discovery proceedings in them made dependent upon the procedures and trial tactics of counsel in dozens of other consolidated cases. The authors do not discuss in detail the developments giving rise to enactment of this Section or its implications for the future of a system of justice hitherto based upon individualized determination of legal rights. Nor is there discussion of the possible alternatives to use of this device, which include: (a) the broadening of doctrines of res judicata and collateral estoppel following the example of *Bernhard v. Bank of America*;\(^\text{92}\) (b) restriction of the provisions of Rule 23, which have supplied a major impetus to the creation of the caseload which required enactment of the new section; (c) restriction of the right to sue for antitrust damages following a government judgment and the replacement of actions by parties damaged only as consumers, and not more specially damaged, with a more adequate government fine structure resembling that of the Common Market countries; and (d) alteration of the venue statutes insofar as they bear on "mass tort" cases.

The discussion of jurisdictional amount is appropriately expanded. This discussion once more notes the paradox that the federal courts are afforded jurisdiction of civil rights actions against state officers irrespective of jurisdictional amount while actions against federal officers based on analogous claims are frequently excluded from the federal courts in consequence of the jurisdictional amount requirement.\(^\text{93}\) It is noted that the Administrative Conference of the United States has recommended that the requirement of jurisdictional amount be deleted in "any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States or any agency thereof acting under color of federal law."\(^\text{94}\)

There is also an able discussion of the issues presented by the *Snyder* case relating to aggregation of claims in class actions. One salutary effect of the *Snyder* decision is the effective exclusion of many class actions from the federal courts. The total elimination of jurisdictional amount requirements in federal question litigation would

\(^{92}\) 122 P.2d 892 (Cal. 1942).

\(^{93}\) E.g., Giancana v. Johnson, 335 F.2d 336 (7th Cir. 1964).

\(^{94}\) *Hart & Wechsler* at 1162.
have marked effects upon the federal court caseload. It is true that many of the most important categories of class actions may already freely be brought in the federal courts by reason of the judicial expansion of the provisions of 28 U.S.C. § 1337, ably described by the authors. But that fact can scarcely justify the further loosening of restraints on federal class actions. Even defenders of the class action rule and advocates of additional federal class action statutes have recognized the necessity of numerous additional restrictions to prevent abuse. Reversal of Snyder v. Harris, without more, would aggravate the presently existing problems without curing perceived evils. It is for this reason that it is difficult to applaud Section 1311 of the American Law Institute proposals which in totally dispensing with jurisdictional amount requirements in federal question cases would aggrandize the volume of federal class actions. The commentators appropriately noted that "elimination of the requirement of satisfying the jurisdictional amount would nullify the risk of damaging restrictions on the effective operation of the [class action] rule." Alteration of the Snyder rule would thus not seem an appropriate part of the present consideration of the proposals by the Senate Judiciary Committee and indeed, given the pendency of class action issues in other committees of the Congress, would be "sleeper" legislation at its worst. The present writer has commented elsewhere on the difficulties surrounding class actions;95 little can be added to what was said in a different context by Dean Allen of the University of Michigan Law School:

The courts are well adapted to weigh the competing claims of individual litigants; but they are poorly equipped to resolve broad issues of policy involving, for example, the reallocation of resources among large social groups or classes. Judicial lawmaking in the latter areas is confronted with a dual peril: it may ignore considerations relevant to intelligent policy formation, or in taking them into account, it may inspire doubts about the integrity of the judicial process.96

The discussion of federal jurisdiction over condemnation cases, matters of probate and administration, and domestic relations matters is usefully updated.

The note on removal jurisdiction has likewise been usefully updated. The discussion of the civil rights removal jurisdiction impliedly endorses Professor Amsterdam's analysis of the history of the statute. The significant recent holding of the Fourth Circuit in South Carolina

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v. Moore,\textsuperscript{97} though cited in the earlier general discussion, is not cited in the context of the civil rights removal statute. It deserves quotation:

Since Section 1443 permits the filing of a removal petition at any time before trial in a state court, the conclusion that subsequent proceedings in the state court, before remand, are absolutely void creates a great potential for disruption of judicial proceedings in the state courts. It permits one wishing to delay a state trial to do so, even though his removal petition is subsequently found to be frivolous. It is a situation which deserves congressional attention for that kind of disruption of state court proceedings seems wholly unnecessary and unwarranted. There are many approaches an amendatory statute might take. Perhaps the one which would best preserve the utility and protect the purpose of the civil rights removal act would be a provision foreclosing the right to file such a removal petition within a ten day period preceding any scheduled trial, provided the defendant had failed to act earlier after a reasonable opportunity to obtain and consult a lawyer. Perhaps by statute Congress could simply revive the Rives-Metropolitan rule, so that a state court might proceed at its own risk, knowing that a subsequent remand order would validate its proceedings. If the state judge thought the petition frivolous, he might well conclude to go on with the proceedings in the state court. The solution, however, appears one for congressional choice.

In discussing Professor Amsterdam's view of the removal statute, the text of the new edition notes that he "dramatically emphasized the harm to the civil rights movement that can be caused by groundless and discriminatory prosecutions, even if all convictions are ultimately set aside." Inexplicably, however, there is no reference to the harm that can be caused to existing state law, and to the power of states to administer any public policy, by the sort of wholesale removals possible under the present law and undertaken repeatedly in the early 1960's. The authors appropriately note that Professor Amsterdam "was involved in the litigation of a number of civil rights removal cases" but failed to note that this is, in light of their numbers and significance, perhaps the understatement of the decade. In fact, it is accurate to say that the enforcement of existing trespass laws in many of the southern states prior to enactment of the Civil Rights Act of 1964 was effectively brought to a halt by use of the federal removal device at a time when no action, legislative or judicial, had invalidated that particular adjustment of personal property rights. The treatise's discussion of the issues presented by the removal statute thus seems somewhat one-sided. The authors observe that the American Law Institute study would leave

\textsuperscript{97} 447 F.2d 1067 (4th Cir. 1971).
the civil rights removal provisions almost unchanged, but do not note the change that would be worked by § 1382(e), which would provide that a petition for removal of a criminal case may not be filed after the commencement of the trial. It is difficult to understand why this proposed reform measure fails to go further and to deal with the more pressing problem of the filing of petitions for removal immediately prior to the commencement of a state criminal trial.98

There is a useful discussion of the history of § 2283 of the Judicial Code. The decisions of the Supreme Court in the Leiter Minerals99 and Nash-Finch100 cases underline the traditional indulgence of the federal courts to the federal government's right to sue for injunctive relief, and the tendency to read statutory restrictions upon that power narrowly.101

IX

The chapter on federal government litigation by Professor Wechsler is in many respects the most disappointing chapter in the book. In this respect, the book resembles the first edition.102 The chapter begins with the discussion of the Hudson and Coolidge cases and the doctrine denying federal jurisdiction over common law crimes. This is followed by a thorough discussion of federal criminal jurisdiction in federal enclaves. The discussion does not stress what is for the author the most compelling argument against special federal statutes for enclaves: that a federal statute not assimilating state law can constitute the enclave an island within the state undermining state policy, particularly with respect to sumptuary offenses.

The discussion of non-territorial federal crimes is highly inadequate. There is a brief notation that most federal prosecutions involve the enforcement of "national penal statutes enacted in the exercise of the constitutionally defined powers of Congress, generously supplemented by the necessary and proper clause." There is no discussion of the possible constitutional limitations upon federal criminal jurisdiction. The only cases cited on the substantive reach of federal criminal jurisdiction are the Screws103 case, the Rutkin104 case and the Kahriger105 case, all cited in the first edition. No mention is made

102 HART & WECHSLER (1st ed.) at 1086-1107.
of such important subsequent decisions as United States v. Guest,108 Stirone v. United States,107 Katzenbach v. McClung,108 and Perez v. United States,109 supporting expansive federal criminal statutes, nor is there any discussion of the negative inferences that may be drawn from expressions in these opinions relating to the limits upon federal criminal jurisdiction or the three important cases declining to broadly read the federal criminal statutes in the gambling,110 firearms, and labor racketeering111 contexts, in part because of problems of constitutional dimension which would arise upon a broad reading. The discussion of double jeopardy problems has been somewhat updated, though without reference to the thoughtful work by Miller on double jeopardy and the federal system.112

Almost the entire remainder of the discussion is devoted to a lengthy discussion of the proposed new federal criminal code prepared by the National Commission on Reform of Federal Criminal Laws. Again, the appropriateness of anticipating the enactment of such sweeping proposals, in place of a discussion of the existing law, is at the least doubtful. The discussion notes that "the views Professor [Louis B.] Schwartz expressed in his [1948] article are reflected in the new Federal Criminal Code proposed by the National Commission." Reference might appropriately have been made here to the even more expansive views as to the appropriate scope of federal criminal jurisdiction expressed by Professor Schwartz in another context,113 and to the views of his co-commentators at the symposium in question. The chapter is bereft of any account of the historical development of federal criminal jurisdiction and while there is a paucity of literature in this field, there are a number of works which deserve mention at least in a bibliographical footnote.114 The extended excerpt from the proposed code is likely to seriously mislead the student as to the present status of the law. Thus, the code's defense of its proposed piggy-back jurisdiction is set out in detail, but the treatise

112 L. Miller, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM (1968).
includes no discussion of the limited case law supporting the constitutionality of the proposal which as yet includes no Supreme Court cases.\textsuperscript{115} No mention is made of the great practical increase in federal theft jurisdiction created by the proposals. The discussion of the proposal to eliminate any culpability requirement with respect to any fact which is solely a basis for federal jurisdiction, by quoting the Brown Commission Commentary, creates the impression that the cases relied upon by the Brown Commission in support of its proposal stand alone, but the student is not informed that the cases reflect the minority view.\textsuperscript{116} Similarly, the Brown Commission's citation of United States v. Kellerman\textsuperscript{117} in support of its proposal to eliminate any requirement of culpability as to jurisdictional facts in inchoate offenses is presented to the student, but no reference is made to the other decisions of the Second Circuit, including opinions of Judge Learned Hand,\textsuperscript{118} which limit the Kellerman rule. The footnote appropriately criticizes the Brown Commission proposal which would erect an absolute bar to subsequent state prosecutions where there has been a prior federal prosecution but which would permit a federal prosecution to go forward following a state prosecution if approved by the Attorney General. There is a bibliographical note on the code noting criticism of it including articles by the present reviewer. It is also noted that the bases of federal auxiliary jurisdiction as set out in the proposed code are broader than "the criteria suggested by Professor Schwartz" in his 1948 article as justifying federal action." There is a summary reference to the significance to the defendant of federal as distinct from state prosecution with respect to matters such as venue and place of imprisonment, but there is no discussion of the significance of the differences as respects the size and role of federal policing agencies. The discussion does, however, significantly suggest that the proposals for discretionary restraint in the exercise of federal jurisdiction contained in § 207 of the Brown Commission report should be regarded as litigable standards at least in prosecutions under a "piggy-back" base. One infers that Professor Wechsler does not agree with the somewhat frantic and unconvincing efforts that have been made to demonstrate the unconstitutionality of

\begin{footnotes}
\footnotetext{115}{Hearings on Reform of the Federal Criminal Laws, Before the Senate Subcomm. on Criminal Laws and Procedures, 92d Cong., 1st Sess. 3245 (1971).}
\footnotetext{116}{Id. at 3246. The sweeping proposals relating to the law of attempt are criticized by Judge Aldisert in United States v. Berrigan, 482 F.2d 171, 172 (3d Cir. 1973).}
\footnotetext{117}{431 F.2d 319 (2d Cir. 1970).}
\footnotetext{118}{E.g., United States v. Alsondo, 486 F.2d 1339 (2d. Cir. 1973); United States v. Sherman, 171 F.2d 619 (2d Cir. 1948).}
\end{footnotes}
such an approach—efforts difficult to understand in light of other modern instances providing for judicial review of delegated authority.

The strange, indeed bizarre, Brown Commission proposals relating to regulatory offenses are set out verbatim without great discussion. A pertinent question is asked: "[I]s criminal conviction appropriate for conduct which is not commonly regarded as intrinsically anti-social, in the absence of a showing of deliberate defiance or disregard of the law?" There is no discussion here of the important questions relating to the extent to which mens rea may be a constitutional requirement. Obviously the present work is not a case book on criminal law. On the other hand, the constitutional limits upon federal criminal jurisdiction receive virtually no discussion in criminal law case books or even in those on constitutional law. Under these circumstances some discussion might have been included here at least as to jurisdictional limitations properly so-called. Likewise, one finds no discussion whatever of the original constitutional understanding with respect to the criminal jurisdiction of the national government as reflected in the Federalist Papers and the ratification debates, though such discussions do appear in the portions of the treatise concerned with civil rather than criminal jurisdiction.

There is a short paragraph on the Federal Magistrates Act which notes, referring to the Brown Commission proposals, that "the utility of the procedure for those regulatory offenses that the proposed code would reduce to class A or class B misdemeanors is apparent... such a development has long been urged." The student is not likely to glean from this brief discussion the idea that many people regard the right to require the federal government to hold proceedings against the individual before a judge with life tenure and irreducible compensation to be an important right and an important part of our working Constitution; rather, the matter is treated as some sort of administrative technicality.

The implicit criticism of the Brown Commission proposals in the very brief notes on them is to be welcomed. One must regret that none of these observations were repeated in Professor Wechsler's testimony before the McClellan Committee on the Commission proposals. There is a pertinent note on federal criminal venue which notes the failure of the new federal criminal code to address itself to venue problems and the possible implications for venue of the altered approach of the proposed code. Again, the practical and

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119 Supra note 115, at 3389.
120 Id. at 520.
political importance of venue restrictions underlined by Justice Jackson's opinion in Krulewich is not pointed out to the student. The discussion of venue also omits the significant dictum in Smith v. United States.  

The discussion of civil actions instituted by the federal government commences with the discussion on the implication of rights of action by the United States and hints that non-statutory executive authority to bring suit is virtually unlimited in cases involving a widespread public interest. There is no reference here to the recent thorough Harvard Law Review note reaching a contrary conclusion. There follows a brief note on primary jurisdiction, not notably up to date. There is a useful note on intervention by or on behalf of the government and on cumulative remedies and the control of government litigation. There is a discussion of the authority of the government to settle or compromise government cases of a civil nature. This discussion points up the absence of a comparable discussion of issues surrounding nolo contendere pleas in criminal litigation and the question—reopened by the recent proposed amendments to the Federal Rules of Criminal Procedure—concerning the right of a defendant without government consent to plead to a lesser included offense. There is a brief reference to the issues presented by qui tam actions, which is not significantly updated to reflect developments under the Federal Refuse Act, the area of greatest practical importance of such actions.

There is a note on special doctrines favoring the United States as plaintiff which appears new to this edition. The section points up the reluctance of the courts to generously construe restrictions upon the powers of the national government to seek injunctive relief.

There is also an extended discussion of actions against federal agencies which does not take particular note of the American Law Institute's proposals for changes in the removal jurisdiction in suits against federal officers.

The discussion of sovereign immunity begins by discussing the possible bases of such immunity, which it summarizes as:

the traditional immunity of the sovereign, . . . the inability of the courts to enforce a judgment, . . . that there can be no legal right

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122 360 U.S. 1, 3 n.1 (1959).
123 Comment, Nonstatutory Executive Authority to Bring Suit, 85 HARV. L. REV. 1566 (1972). There is also no discussion of the limits on federal criminal equity, compare 5 J. MOORE, FEDERAL PRACTICE § 38.24[3].
125 ALI Proposals, § 1383(a).
as against the authority that makes the law on which the right depends, . . . [and] avoidance of interference with governmental functions and with the government's control over its instrumentalities, funds, and property.

It may be that students of the doctrine might have more sympathy for its at least limited preservation if reference were made to its significance as a protection of the legislative power of the purse and its importance for the separation of powers.

Reference is made to the original rule precluding the liability of the United States for costs in the absence of an authorizing statute and to the continued exclusion of attorneys' fees from costs recoverable against the federal government. Again, the paradox may be noted that in recent years federal courts have, without consideration of either sovereign immunity or eleventh amendment questions, commenced awarding attorneys' fees against state governments.

There is an extended discussion of mandamus jurisdiction and of the changes made by the Mandamus and Venue Act of 1962. The discussion of the Youngstown case in the earlier edition, an admirable treatment, is carried forward verbatim. There might usefully have been included a discussion of subsequent judicial treatment of the Youngstown precedent. There is an extended discussion of official immunity of federal officers which concludes with the pertinent questions:

Is there any conceivable justification for according state officials under Section 1983 a narrower immunity than is accorded federal officials sought to be held accountable under the standing law? Is the historic purpose of the civil rights laws any more compelling than the provisions of the Constitution and the Acts of Congress governing, and therefore limiting, federal official action?

The recent development under the Bivens case and particularly the recent decision of Judge Medina on remand may alter this condition at least as to federal officers with policing responsibilities, a timely development in light of the concurrently impending proposals to expand the criminal jurisdiction of the national government. It has not yet been determined whether Judge Medina was correct in his statement that in Bivens "the Supreme Court recognized a right of action against federal officers that is roughly analogous to the right of action against state officers that was provided when Congress enacted the Civil Rights Act," although two recent dicta of the Su-

128 456 F.2d 1337, 1339 (2d Cir. 1973). See also Bethea v. Reid, 445 F.2d 1163, 1166 (3d Cir. 1971).
The chapter on federal habeas corpus is primarily the work of Professor Bator and reflects the present uncertainty in the state of the law. It notes the reference of proposed changes in habeas corpus procedure to the Advisory Committee on Criminal Rules following the decision of the Court in *Harris v. Nelson*, and the provisions of the Federal Magistrates Act authorizing or purporting to authorize the delegation to federal magistrates of the task of giving preliminary review to post conviction petitions. Subsequent to publication, the Advisory Committee on Criminal Rules published proposals which would give federal magistrates a very large role indeed in the disposition of federal habeas corpus petitions. Mr. Justice Jackson's observation that he who is required to look for a needle in a haystack is likely to conclude that the needle is not worth the search thus appears fully vindicated by the response of the federal judiciary to the burdens placed upon it by the great expansion of the availability of the writ to state prisoners. It surely ought to be of some concern that one effect of this over-extension of the great writ has been the debasement of the procedural protections which it provides and the proposed removal of its practical administration from judges with life tenure to officers of less independence and competence. The proposed rules, it should be noted, extend not only to federal habeas corpus for state prisoners but also to § 2255 proceedings, and the consequence of the extension of the habeas rules in state proceedings has been a proposed debasement of the checks placed upon abuses in federal prosecutions.

Professor Bator also appropriately notes the difficulties into which the Supreme Court has been led by its failure to distinguish between the scope of review available with respect to constitutional questions on direct appeal and the scope of review available with respect to such questions on federal habeas corpus. The consequence of this failure has been the growth of an increasingly confused body of law concerning retroactivity of Supreme Court decisions:

Suppose a state court correctly decides an issue of constitutional law in a criminal case; but after that case becomes 'final' the Su-

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The Supreme Court changes the governing constitutional principle. Is the person to be deemed to be unlawfully detained for purposes of federal habeas corpus? This question has never been answered (or even addressed) as such by the Court. Rather it has merged into a novel, growing and staggering intricate body of law governing the question whether new constitutional doctrines should be "retroactively" or "prospectively" applied. The most striking feature of this body of law is the court's assertion of a general power to decide whether and to what extent new doctrines of constitutional law should apply retrospectively; and no distinction—or at least no distinction in principle—has been drawn for this purpose between cases involving collateral attack and cases still open to direct attack (or even untried) when the new doctrine was announced.\footnote{131 HART & WECHSLER at 1477-78.}

The treatise appropriately notes the highly persuasive separate opinion by Justice Harlan in Williams v. United States.\footnote{132 401 U.S. 646, 667 (1971).} It is obvious that if Justice Harlan's view were accepted most of the problems associated with the retroactivity of new decisions would disappear. The problems remaining—those relating to the status of the limited number of cases pending on direct review at the time a new decision was rendered—would not appear appropriately dealt with by a doctrine of non-retroactivity; rather, as Justice Black insisted, the cases involving such litigants should be appropriately entitled to reversal. The present practice of allowing the court to select the effective date of its opinions and dispensing with the doctrine that the court declares and does not invent law has the consequence of bringing about the virtual obliteration of the line between judicial and legislative responsibility. The fact that a limited number of reversals of cases on direct appeal will result from a new decision, absent this practice, is scarcely to be regretted. Rather the prospect of such reversals will and should operate as a limited but not prohibitive deterrent to excessive and unsignaled judicial lawmaking.

With respect to the oft-repeated suggestion that states should make their post conviction remedies coextensive with the federal habeas corpus remedy, the authors also have some pertinent questions:

Why should the states be required to create special remedies for the litigation of federal claims if those claims are in any event going to be relitigated in a federal district court? Whatever the duty should it not in any event be allowed to remain inchoate until such time as the federal courts are unavailable to hear such claims?\footnote{133 HART & WECHSLER at 1493.}
The current suggestion seems little more than a request that the states provide special masters to the federal judiciary. There is something peculiarly anomalous about suggestions of this sort, since the scope of federal habeas corpus review is largely the product of historical accident. Certainly it is anomalous that retroactive application of new constitutional standards can result in reversal of a criminal conviction even in the absence of a reason to believe that the "improperly" admitted evidence affected determination of the case at a time when the three subjects most clearly excluded from federal habeas corpus review are (a) the sufficiency of the evidence, (b) newly discovered evidence (save that bearing on deprivation of constitutional right) and (c) the fairness of the sentence. To ask state governments to reconstruct their apparatus of appellate and post conviction review to duplicate the anomalies of federal habeas corpus is a strange suggestion for any advocate of reform.

The new edition discusses at length the powerful attack by Judge Friendly on the decision of the Supreme Court in *Kaufman v. United States*,34 a decision which occupies a precarious position in light of recent expressions by new members of the court.

XI

The chapter on appellate review of federal decisions is primarily the work of Professor Shapiro. The discussion of finality for purposes of appeal makes only cursory mention of the cases involving finality problems under Rule 23.

A valuable note has been added on congestion in the Courts of Appeals and on possible and proposed measures to deal with such congestion. There is no discussion here of the extent to which the terms of the federal statutes giving a right of appeal may operate to limit or confine the adoption of some of these suggestions.135 The bibliographical note at 1574 probably should also have included the valuable article by Judge Hufstedler.136

The discussion of the obligatory jurisdiction of the Supreme Court has been significantly updated. The valuable note on the two court rule in the first edition appears to have disappeared in the new edition, notwithstanding the continuing vitality of the rule. The discussion of the Supreme Court’s certiorari policy eliminates the material relating to the 1937 court packing fight contained in the first edition, an un-

fortunate omission. However, the note on Rule 38 and the general discussion of factors bearing upon the grant of certiorari have been significantly expanded and updated.

Conclusion

In summary, the new edition appears, despite occasional weaknesses, to be a worthy successor to the original edition and little of value in the original edition has been omitted from its successor. Both it and contemporary case books on constitutional law might have profited from inclusion of some of the literature relating to the values served by federalism under modern conditions and by some comparative reference to the resolutions of similar problems in other federal systems, such as those of Australia, Canada, West Germany and Switzerland. Much has traditionally been said about the experimental or empirical value of the federal system, though less has been said in recent years of its more traditional justifications as a means of limiting the issues that are the subject matter of national politics and limiting the depth of political divisions on a national scale, even though this feature of federalism provides its greatest appeal to many foreign observers.137 Little has been said also of the significance of a horizontal division of authority in limiting, particularly in the spheres of education and criminal law, the growth of federal institutions and bureaucracies which would be uncontrollable by anyone including the national legislature. Notwithstanding the disclaimers of the preface, the present work will seem largely a technical exercise to many students not exposed to these larger questions and issues. Such students are likely to accept uncritically the frequently reiterated proposition that Wickard v. Filburn and its progeny marked the passing of any functional divisions between the appropriate powers of the national and state governments and are likely also to accept equally uncritically the frequently reiterated statements about the passing of dual federalism and the accompanying assurances that the political safeguards of federalism delineated by Professor Wechsler provide an adequate substitute for any sort of judicial control of the expansion of national government powers. The increasing nationalization of the presidential nominating and election process, together with the changes wrought by provision for the direct election of Senators and the development of agencies of mass communication, have in any realistic view greatly attenuated these safeguards. Nor do decisions

rendered in the context of national regulation of business enterprise have compelling force where the central questions at issue are questions relating to the maintenance of public order, as Mr. Justice Jackson reminded us shortly before his death.\textsuperscript{138} The mechanical application of the Wickard principle in these other areas appears to give force to Whitehead's observation that the liberating principles of one generation are the confining principles of the next. It should also be striking that the prevailing view about the unlimited nature of the commerce powers of the national government is one which in extraordinary and striking measure does not command the acquiescence of the modern intellectual leaders of the courts, notwithstanding its repeated reiteration by commentators. Neither for Justice Brandeis nor for Justice Cardozo nor for Justice Frankfurter nor for Justice Jackson nor for Justice Black nor for Judge Learned Hand nor for Judge Friendly were the commerce powers of the national government as unlimited as the fashionable conception would today represent them as being.\textsuperscript{139}

It is not unlikely that among the principal legislative and constitutional issues of the next ten years will be the issues surrounding the power of the federal government to extend its role in the maintenance of public order and enforcement of the criminal law. This review adequately exposes the present writer's conviction that the maintenance of restrictions upon this role and the correlative avoidance of excessive restrictions upon state authority which would vitiate its effectiveness are essential functions of the federal judiciary—functions vital to the maintenance of liberty and to the avoidance of creation of institutions uncontrollable by any democratic process. The present work, as has been noted, chronicles an increasing realization that the federal courts have been a good deal more lax in recent years in imposing necessary restrictions upon activities of federal officials and the national government, the limitation of which was originally conceived as their central function, than in vigorously confining the authority of state officers. It is fair to predict that recent developments will lead to an adjustment of this balance through increasing rejection


of the naive view that in the long run "democratic participation and individual liberty . . . have been threatened less by expanding federal power than by small unpolicing concentrations of power."\textsuperscript{140} Local abuses are subject to national correction. Checking the abuses of national bureaucracies is, however, a more difficult matter.\textsuperscript{141} The present work affords the new generation of lawyers and law students valuable aid in the fulfillment of this central obligation of their profession, and notation of its omissions is not intended to imply lack of gratitude for the great services it has afforded and will continue to afford.

\textit{George W. Liebmann*}

\textsuperscript{140} Comment, \textit{Theories of Federalism and Civil Rights}, 75 \textit{Yale L.J.} 1007, 1029 (1966).

\textsuperscript{141} J. \textsc{Mill}, \textit{Utilitarianism, Liberty, and Representative Government} 224-26 (Everyman ed. 1950). The authors might have, but do not, note the rapid expansion in the last five years of federal activities and assertions of authority of a policing nature. See \textit{Attorney General's First Annual Report, Federal Law Enforcement and Criminal Justice Assistance Activities} 1972, at 139 (creation in January, 1971, of "special operations group" of 114 United States Marshals with a nationwide response time of 6 hours), at 285 (creation in 1970 of a Consolidated Federal Law Enforcement Training Center), at 139 (creation by the General Services Administration of "specially trained and equipped mobile cadres", with an authorized strength of 160 men, to be available on immediate notice to cope with civil disorders), at 537 (creation in November, 1970, of a Court Protection Program with 428 guards and a Major Facilities Program with 989 guards as a Postal Service Security Force with a unified training program), at 249 (creation of an Interdepartmental Committee on Internal Security on March 11, 1971, under the Assistant Attorney General in charge of the Internal Security Division), at 136 (creation of an "inherent legal right of the United States Government—a sovereign national entity under the Federal Constitution—to insure the maintenance of public order and the carrying out of governmental operations within its territorial limits, by force if necessary" even in the absence of danger to federal property or functions or a request from a Governor or State Legislature).

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