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Book Review

BOOK REVIEW

Hart & Wechsler's The Federal Courts and the Federal System. (Second Edition). By Paul M. Bator, Paul J. Mishkin, David L. Shapiro and Herbert Wechsler. The Foundation Press, Inc.; 1973. Pp. 1657. $22.00

The viability of federalism depends upon all of us caring, and caring deeply, about making it work. It is incumbent upon law schools to awaken in their students a keen interest in the functioning of the system and to provide them with a generous perspective of our political and legal institutions to be carried with them to the practice of law. HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM is unsurpassed as the casebook to be used to that end.

For those who believe that law school should shed itself of all pretension and confine its purpose to training students in the technicalities of the law, HART & WECHSLER's length must seem to exceed its worth. Although the book's treatment of the technical aspects of federal jurisdiction is consummately skillful, its purpose is far more august than to provide a ready guide to the intricacies of federal practice. Its subject is the very nature of the federal judicial system, and it "open[s] up the whole range of questions as to the appropriate relationship between the federal courts and the other organs of federal and state government."[1]

HART & WECHSLER is not, of course, a law student's first exposure to the principles of federalism and the separation of powers. From the time of his earliest civics class in elementary school a student is taught the rudimentary aspects of those principles, and in high school and college he receives at least a smattering of Montesquieu, Hamilton and Madison. In the first or second year of law school itself, he takes a course in constitutional law in which he reads, probably too hurriedly, the landmark cases arising from the bald confrontations of power between the different branches of government and the competing state and federal sovereignties. From none of these courses, however, can a student learn the true nature of the American system of government.

The genius of that system is that it avoids, to a remarkable degree, unabated clashes between conflicting authorities and resolves the problems which it faces under the principles of what

1. THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at xx.

Justice Cardozo called "a benign and prudent comity"[2] and by the use of the tools of a lawyer's trade. The federal system is a work of art, grounded in the good-will and common sense of the American people, and its fabric is woven day by day in the ordinary course of private, as well as public, litigation. It cannot be understood by studying its bare outlines through a survey course, but only by focusing carefully upon its evolution through cases otherwise routine, and by proceeding haltingly from the specific to the general. In pedagogical terms, our legal institutions, like our law, can best be comprehended by the casebook method, and HART & WECHSLER is the classic in the field.[3]

There is a broader aspect of the contribution which HART & WECHSLER can make to legal education. As history and law have each become an increasingly technical discipline, there has evolved a separation, if not a divorce, of those two bodies of knowledge whose marriage is natural, and, at least in common-law jurisdictions, ultimately necessary. To the extent that "legal history" has come to mean the study of ancient English institutions, this separation is understandable, because it takes a student with an interest in things "historical" and a rich historical imagination to perceive, in the conflicts between the seventeenth-century chancery and law courts, much significance to the concerns of the modern world. But history should not be relegated to such an esoteric role in law school education. The doctrine of *stare decisis* can remain as the bedrock of our legal system only as long as it breathes the spirit of history. It is not sufficient that lawyers be taught simply to manipulate precedent to suit the interest of their clients or to support a conclusion otherwise reached. Whether it be in a position of public responsibility or as a professional adviser, a lawyer must exercise sound judgment, and, in order to do so, he must be able to approach the past with empathy and to learn from the experience of history the true nature of the principles which govern our actions and our institutions.

The intimacy of the relationship between law and history is clearly demonstrated by *Erie Railroad Co. v. Tomkins*,[4] the import and ramifications of which are thoroughly explored in HART & WECHSLER. On the simplest level, the Court's partial reliance

2. Mutual Life Ins. Co. v. Johnson, 293 U.S. 335, 339 (1934).

3. The case book provides a wealth of background material to highlight the issues presented in the major cases which it reprints, and the questions which it asks the readers to ponder are invariably searching and on the mark.

4. 304 U.S. 64 (1938).

in *Erie* upon Charles Warren's article on the Federal Judiciary Act of 1789 emphasizes the contribution which sound historical scholarship can bring to the legal process. Of greater note, however, is the fact that in *Erie* the Court for the first time properly delineated the outlines of the spheres of federal and state competence by recognizing that the application of state substantive law in federal diversity cases is required by the principles of federalism. *Erie* was no talisman, as is attested by the tedious and awkward course followed by its progeny attempting to articulate the "substantive-procedural" distinction which the case requires to be drawn. However, *Erie* did place subsequent analysis of the decision-making authority of the federal and state courts upon a foundation firmly supported by our constitutional and political traditions, and in this sense *Erie* is a decision of profound historical significance.[5]

The validity of *Erie's* perception into the nature of the principles of federalism is confirmed by the fact that, although its immediate purpose was to require the federal courts to apply state law in diversity cases, its ultimate effect was to sow the seeds for the growth of a new federal common law. Once it was recognized that in areas of state competence the decisions of state courts reign supreme, it necessarily followed that in areas of fed-

5. It may be legitimately asked why it took the Court a hundred and fifty years to recognize the constitutional necessity of the *Erie* holding if it was so clearly dictated by the principles of federalism. A partial answer to this question may be that in the swirl of intellectual currents running through nineteenth-century American jurisprudence, the issue was simply not focused upon in these terms. There was sound basis for Justice Story stating, as he did in Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1824), that "[t]he law respecting negotiable instruments may be truly declared . . . to be in a great measure, not the law of a single country only, but of the commercial world"; and it was not unreasonable in a nation whose commerce was still nascent to conceive of the federal courts as the source of a uniform commercial law just as they were the source of a uniform maritime law. Moreover, it is understandable that until the supremacy of the national government was finally assured in fact and in theory by victory in civil war, the federal courts were not sufficiently sure of their power to abnegate a part of that power as they eventually did in *Erie*. For these reasons, *Swift v. Tyson* appears to be more justifiable historically than does its extension, at the close of the century, to tort cases in Baltimore & O.R.R. v. Baugh, 149 U.S. 368 (1893). A chink in the armor then did appear because the decision in *Baugh* was reached only over Justice Field's vigorous dissent. During the next four and a half decades *Swift v. Tyson* was openly challenged and perceptibly eroded. Along the way, a landmark in intellectual history was provided by Justice Holmes' dissent in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532 (1928), which constituted a clear demarcation between nineteenth-century conceptualist and twentieth-century legal realist thinking. However, as HART & WECHSLER suggests in a characteristically cogent query, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at 701, the fundamental flaw in *Swift v. Tyson* is not philosophical but constitutional, and it was not until *Erie* itself that this flaw was clearly exposed.

eral competence judicial decision-making must be made in the context of federal law. This proposition, born in *Erie*, has become a truism, and the growth of the federal common law in the past two decades has been dramatic. It is now well established that state and federal courts must both refer to federal law where Congress directs, the Constitution implies or an overriding national interest demands,[6] and by this full turn of a circle, *Erie* has reached its logical conclusion.

A simple inference to be drawn from *Erie* and the post-*Erie* development of the federal common law is that state and federal courts should speak exclusively in their respective areas of competence and interfere as little as possible in the affairs of the other. This is the inference which has been drawn by Professor Wechsler, who is in the forefront of those who propose a drastic reduction in the federal courts' diversity jurisdiction and a simultaneous increase in their "federal question" jurisdiction.[7] Here I part company with him whose casebook I extol, and I do so, cautiously and with deference, on the ground that he has read history too narrowly. I cannot quarrel with Professor Wechsler's premise that the original justification for diversity jurisdiction—possible prejudice to the out-of-state litigant—for the most part no longer obtains. However, the dominant theme of the broader history of federalism is that the federal system has worked because of the constant interplay between the state and federal courts. This interplay would necessarily decrease if, as is inevitable were federal diversity jurisdiction to be restricted, the litigation bar were to become divided between state practitioners and those expert in an area of federal specialty.

The bar would certainly be the poorer if this were to occur. All of us relish the opportunity to appear in federal court, if only for the variety of experience which it affords, and I think we are better lawyers for it.[8] The administration of justice in the state

6. *See, e.g.*, Illinois v. Milwaukee, 406 U.S. 91 (1972); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *Cf.* Zschernig v. Miller, 389 U.S. 429 (1968).

7. *See, e.g.*, AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969); *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 92-109 (1971).

8. Although I have little statistical data to support the assertion, I firmly believe that the vast majority of practicing lawyers are opposed to a restriction of federal diversity jurisdiction. John P. Frank, a practicing lawyer in Phoenix, Arizona, has written a very

courts would likewise be adversely affected by a reduction of the exposure of state practitioners to federal courts. The greatest crisis facing the courts today is the need to improve the efficiency of the judicial machinery. Although, as I am sure federal judges would be the first to point out, the administrative procedures in the federal courts are less than ideal, the federal courts have been exceedingly progressive in instituting reforms to expedite the flow of cases. The single-assignment system, the regular holding of rigorous pre-trial conferences, the use of six-man juries in civil cases and the procedure for multi-district litigation are but a few of the many measures which the federal courts have adopted to improve their efficiency. The familiarity of state practitioners with these reforms should make them advocates of, or at least receptive to, similar reforms in the state courts where their need is as equally crying.

Detrimental as the effects of a restriction of federal diversity jurisdiction would be on the bar and state courts, it might be the federal courts themselves which would be most harmed by such a change. Federal courts have been held in high repute in the localities in which they sit because all lawyers who practice before them know the excellence of the justice which they dispense. It may be fairly said that in this instance familiarity has bred respect. If the federal courts become solely a forum for specialists, there is a clear and present danger that lawyers whose practice becomes relegated to state courts will come to think of federal judges as aliens in their midst and, because of a lack of contact,

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succinct and persuasive article criticizing the ALI proposals. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963). At the most recent Fourth Circuit Judicial Conference Mr. Frank, who was a participant in the program, conducted an informal poll on the question of whether diversity jurisdiction should be restricted. Out of the approximately three hundred lawyers in the room, only two raised their hands in support of such a restriction.

Two law review discussions also obliquely demonstrate that many practicing lawyers do not concur with the ALI's thinking on this issue. Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962); Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965). The Iowa Law Review study and, to a lesser extent, the Virginia Law Review study both indicate that federal courts are frequently chosen as the forum in diversity cases for reasons other than bias against the out-of-state litigant. Proponents of the ALI proposals would, of course, contend that these studies show that lawyers have abused federal diversity jurisdiction by their utilizing it for purposes other than that for which it was originally intended. However, this contention adds nothing to their initial premise that potential bias against an out-of-state litigant remains as the only valid justification for diversity jurisdiction. In any event, an inference to be drawn from these studies is that those lawyers who have other reasons to invoke the diversity jurisdiction of the federal courts would be opposed to the ALI proposals.

will cease to engage in the process of evaluating the performance of the federal bench which has heretofore been so favorable to it. Moreover, there is a potential danger that the federal judges, as a consequence of no longer being exposed to non-specialized questions of law and fact, will lose the sensitivity to the commonplace which is essential to sound judgment and will fall victim to the narrowness of outlook which is the *bête noir* of the specialist.

In short, one of the subtle benefits of diversity jurisdiction has been that it has prevented the federal courts from becoming isolated from the community of which they are a part and has protected them from a haughtiness, either real or perceived, inherent in their position of formal superiority in the federal system. By nurturing a close relationship between the federal courts and all the members of the bar, diversity jurisdiction has encouraged each to maintain an interest in the concerns of the other. If this interest were to flag, the lessons taught by HART & WECHSLER would soon be forgotten, and federalism would suffer immeasurably.

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