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## The Appellate Jurisdiction Of The Supreme Court: Reflections On The Law And The Logistics Of Direct Review

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## THE JOHN RANDOLPH TUCKER LECTURE

HERBERT WECHSLER\*

### THE APPELLATE JURISDICTION OF THE SUPREME COURT: REFLECTIONS ON THE LAW AND THE LOGISTICS OF DIRECT REVIEW

I am honored by the invitation to present the John Randolph Tucker lecture for this year and grateful for the opportunity to join you as you dedicate this gracious building to the cause of law and legal education.

Those who have heard or read the Tucker lectures through the years need not be told they are held in high esteem, both for the tribute they express and for the contributions they have made. Since the inaugural in 1949 by John W. Davis, a son of Washington & Lee who was assuredly the greatest advocate of our century, your lecturers, including in their number friends whose memory we cherish, set a standard it is difficult to meet.

My subject, as you know, concerns the jurisdiction of our highest court, the tribunal that is certainly without an analogue throughout the world in the magnitude of its responsibilities, measured by the difficulty and importance of the issues it confronts, the finality of many of its most transforming judgments short of constitutional amendment, the number of judicial systems from which cases on its docket may derive and the complexity of the mixed legal system in the ordering of which it has the final voice.

The vehicle through which the Supreme Court discharges this responsibility is its appellate jurisdiction, which presents in our time two different but related types of challenge. The Court is vested, on the one hand, with the old authority to review state court judgments turning on the interpretation or the application of the Constitution, laws and treaties of the Nation. It is, secondly, the ultimate authority

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with respect to judgments of the "inferior" federal tribunals, the two-tiered system of District and Circuit Courts endowed with jurisdiction to enforce the ever-growing corpus of congressional enactments, to hold the federal government, including Congress, within the legal limits of its charters and (subject to complex standards governing the timing and appropriateness of its intervention) to afford redress against the state officialdom when it has infringed or, in some cases, threatens to infringe rights guaranteed by the supreme law.

On the face of things, this dual task recalls what Dr. Johnson said about a very different matter: "it is like a dog walking on its hind legs. It is not done well; but you are surprised to find it done at all." If this sounds like irreverence, I assure you that it is not so intended. I mean only to express in the most graphic terms my sense for the enormous difficulties of the role in our polity and legal system that we have accorded to the highest court. It is, indeed, precisely that abiding sense that leads me to invite you to reflect on the establishment and growth of the appellate jurisdiction, on some major issues posed in the delineation of its scope and, finally, on the question whether current problems of logistics (to conscript a military term that has the overtones I seek) make a case for legislative action.

## I

### *Establishment and Growth*

The jurisdiction as it stands derives from almost two centuries of controversy, growth and change. The main elements in that development may profitably be recalled.

It will be well to start at the beginning. The Constitution, as you know, provides in Article III that "the judicial power of the United States" shall be vested in "one supreme court" and "such inferior courts as the Congress may from time to time ordain and establish." It then lists nine categories of "cases" and "controversies" to which "the judicial power shall extend," including most importantly "all cases, in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." In two of the nine categories of cases, it provides that the Supreme Court shall have "original jurisdiction." In all the others it is said that "the supreme court shall have appellate jurisdiction, both as to Law and Fact, which such exceptions and under such Regulations as the Congress shall make." This is, with minor additions, the full text that has generated over time the court structure and enormous jurisdiction we now know.

The agent of this creation was, of course, the Congress, which, starting in 1789, properly considered that, apart from the mandate

to establish a supreme court vested with the two categories of original jurisdiction, the Constitution posed questions of legislative policy as to whether courts "inferior" to the supreme court should be established and, if so, how much of the possible range of the federal judicial power should be encompassed in their jurisdiction, what "exceptions" should be made to the appellate jurisdiction of the supreme court and what "regulations" on its exercise imposed.

The first Judiciary Act took up the option to establish lower courts but vested them with narrow jurisdiction, not including any general competence in cases arising under federal law. The choice was rather to leave such litigation for the most part to the state judiciaries, subject under famous section 25 to review and reversal by the supreme court of a final judgment of the highest state tribunal having jurisdiction to decide if, but only if, such judgment wrongly held invalid a treaty or an Act of Congress or other national authority, wrongly sustained a state statute or authority against a federal claim of invalidity, or more generally, construed federal law or a federal commission so as to hold against a right asserted thereunder, provided that the error assigned appeared on the face of the record and "immediately" involved one of the enumerated federal rulings.

The net of this was that neither the jurisdiction of the lower courts nor that of the highest court, nor both in combination, came close to encompassing the full extent of the judicial power described in the Constitution. The deficiency was promptly challenged in the courts and the challenge no less promptly held unfounded. As to the lower courts, the Supreme Court said in 1799: "Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant."<sup>1</sup> As to the Supreme Court, the affirmative delineation of the scope of jurisdiction in the Judiciary Act was read to negative by implication all jurisdiction not conferred, and thus to exercise *pro tanto* the power explicitly conferred on Congress to make exceptions to and regulate the Court's appellate jurisdiction.<sup>2</sup> These conclusions were foreshadowed by Hamilton's exposition of the judiciary article in Nos. 81 and 82 of *The Federalist* and reflect the Framers' premises and purposes as since revealed by Madison's notes on the proceedings of the Convention.<sup>3</sup>

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<sup>1</sup> *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 10 (1799).

<sup>2</sup> *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810); *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321 (1796).

<sup>3</sup> The principal steps in the development of the judiciary article are summarized in P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART & WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1-21 (2d ed. 1973) [hereinafter cited as *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*].

These dispositions were at first accepted without question but they soon evoked a cross fire of attack from both friends and foes of national authority. Mr. Justice Story, writing *obiter* in *Martin v. Hunter's Lessee*,<sup>4</sup> floated the nationalist critique, insisting that the constitutional words "the judicial power . . . shall be vested" are "used in an imperative sense", meaning that the "whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority". In the same case, however, the Virginia Court of Appeals had held below that the appellate jurisdiction of the Supreme Court could not constitutionally be exerted to review a state court judgment, because the "term appellate . . . necessarily includes the idea of superiority" and "one Court cannot be correctly said to be superior to another, unless both of them belong to the same sovereignty."<sup>5</sup> The Supreme Court's disagreement was, of course, reflected in its judgment and reaffirmed in the great cases of succeeding years.<sup>6</sup>

I shall not dwell upon the nationalist critique put forth by Justice Story, though its echoes still find some receptive ears.<sup>7</sup> As Justice White put it simply in a recent opinion "it did not survive later cases."<sup>8</sup> Story was engaged in a sustained campaign to stimulate the Congress to enlarge the jurisdiction of the lower courts and to expand the fragmentary corpus of the national statutory law;<sup>9</sup> and his dictum must be viewed in that perspective. Even he did not consider the constitutional "imperative" that he proclaimed (with only Justice Johnson voicing disagreement) to be self-executing as a legal matter, judged by his decisions sitting in the Circuit Court.<sup>10</sup>

It is worth pausing for a moment on the stance taken by the

<sup>4</sup> 14 U.S. (1 Wheat.) 304, 329-30 (1816).

<sup>5</sup> *Hunter v. Martin*, Devisee of Fairfax, 18 Va. (4 Munf.) 1, 12 (1815).

<sup>6</sup> *E.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Craig v. Missouri*, 29 U.S. (4 Pet.) 410 (1830); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). *See* Warren, *Legislative and Judicial Attacks on the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 161 (1913).

<sup>7</sup> *See, e.g.*, R. BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969); 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 785-814 (1953); J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 240-47 (1971); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201-02 (1960); *cf.* Redish & Woods, *Congressional Power to Control Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975).

<sup>8</sup> *Palmore v. United States*, 411 U.S. 389, 401 n.9 (1973).

<sup>9</sup> *See* 1 THE LIFE AND LETTERS OF JOSEPH STORY 271, 293 (W. W. Story ed. 1851).

<sup>10</sup> *See, e.g.*, *White v. Fenner*, 29 F. Cas. 1015 (C.C.R.I. 1818) (No. 17,547).

Virginia court against Supreme Court review of state court judgments, for it presents a puzzle I am not sure I can solve. Unlike the later theorists of nullification and secession, the Court of Appeals did not deny that federal judicial power could be used to achieve and to enforce against litigants a nationwide interpretation of the federal law which the Constitution explicitly declared to be supreme and binding on state judges. It maintained rather that this uniformity could only be attained by drawing cases to the original jurisdiction of the lower national tribunals, whose judgments, it was granted, the Supreme Court could review. That would have meant, however, as John Randolph Tucker put it critically in his treatise on the Constitution, "a great abridgement of State jurisdiction in the primary stages of the litigation, and a need for constant removal from the State to the Federal courts, even in the midst of a trial when the Federal question first emerged."<sup>11</sup>

Why should the protagonists of state autonomy have preferred to the marginal intrusion of direct review, with all the limitations it imported, an alternative so plainly pointing to a larger federal preemption? Was it a stratagem, based on the judgment that the legislation necessary to expand the jurisdiction of the lower courts could be obstructed in the Congress (as the expansion in the Federalist Judiciary Act of 1801 had been aborted promptly by repeal when the Republicans obtained control) — with the result that the state courts would actually have the final word within the boundaries of each state? This seems a likely explanation until it is remembered that precisely the same issue, the review of state court judgments, so divided the Congress of the Confederacy that the Supreme Court mandated by its Constitution never was established.<sup>12</sup> Is the clue to understanding simply that in this case, as no doubt in many others, what to some was at the most a point of protocol for others was a point of principle, transcending any practical considerations?

The crucial fact, in any case, was that the constitutional position articulated in the early days survived the attacks from both directions, permitting the scope of federal judicial jurisdiction — both initial and appellate — to be shaped by Congress over time, responding as in other legislative matters to felt needs for the displacement of state competence and law by the exercise of national authority.

There was little change in the initial legislative plan before the Civil War but I need hardly note that change was very rapid in its

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<sup>11</sup> 2 THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT AND INTERPRETATION 799 (Henry St. George Tucker ed. 1899).

<sup>12</sup> See W. ROBINSON, JUSTICE IN GREY 437 (1941).

wake. The power vested in the Nation's courts soon equaled and transcended the ideal of Justice Story, with a strength, however, that his view could not have possibly conferred. For the expanded jurisdiction did not derive only from the mandate of the generation that approved and ratified the Constitution but also from a continuous, contemporaneous approval, expressed in the statutes as they stood at any time. Charles L. Black, Jr., in his Tucker lecture of two years ago spoke of this role of Congress as "the rock on which rests the legitimacy of judicial work in a democracy"<sup>13</sup> and that for me is not an overstatement.

It would more than exhaust my time to trace all the steps by which judicial jurisdiction was enlarged to the enormous scope it has today,<sup>14</sup> but I shall mention some. The Civil Rights Acts of 1866, 1870 and 1871, enacted under the enforcement clauses of the War Amendments, the surviving parts of which have grown so strong in their old age, began the practice of resorting to the lower courts rather than to state tribunals for enforcement of the rights conferred. So too federal habeas corpus was extended by the Act of 1868 to prisoners in state custody who averred that their confinement was illegal under federal law. Beyond this, the Act of 1875 conferred federal question jurisdiction across the board in civil cases, subject only to a jurisdictional amount. The significance of these initial steps has steadily increased with the enormous growth of federal enactments and judicial extrapolation of the constitutional restraints upon state action. Within our lifetimes, the magnitude of federal regulation of enterprise and of existence, with concomitant reliance on the federal courts for review and for enforcement, surely has been the most striking fact of legal life. Its magnitude is no doubt growing even as we pause for these reflections.

Needless to say, this great development has placed a burden on the federal courts that always has grown heavier more quickly than judicial personnel has been enlarged; congressional neglect upon this score has not only been a recent scandal. The burden on the Supreme Court was, however, lightened when the Evarts Act of 1891 established the circuit courts of appeals, which increasingly became the only forum for appellate review of federal judgments as of right, with further access to the Supreme Court only on certiorari in the Court's discretion. The culmination of that progression in the Judges' Bill of

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<sup>13</sup> Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975).

<sup>14</sup> The progressive legislative expansion is traced in detail in *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, *supra* note 3, at 439-41 (Supreme Court), 844-50 (federal question: inferior courts), 1424-30 (federal habeas corpus), 1326-39 (civil actions against federal government and officials). *See also id.* 125, 218-19 (Supp. 1977).

1925, sponsored by the Court itself, has recently become more meaningful as legislation, including significant enactments of the last three years, has done away with the requirements of three-judge district courts, and direct appeal of their judgments to the Supreme Court, in almost all the cases for which that alternate system had been established and for many years maintained.<sup>15</sup> The few remaining categories in which the Supreme Court still is obliged to assume jurisdiction over federal decisions should have small practical importance and may soon succumb to the extension of the present legislative trend.

The statute governing appellate jurisdiction over state court judgments is still closer to its formulation in the Act of 1789 but here too there has been important change. The jurisdiction was enlarged in 1914 to include cases where the federal claim was sustained by the state court as well as those in which it was denied. In such case, however, review was made discretionary on certiorari, a plan that was adopted on a wider scale in the Judges Bill of 1925. Review as of right (the term "appeal" being substituted for writ of error in 1928) was preserved only when the state court final<sup>16</sup> judgment holds invalid a treaty or an Act of Congress or sustains a state statute<sup>17</sup> challenged on federal grounds. That is the present situation.

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<sup>15</sup> The recent enactments are: P.L. No. 93-528, §§ 4 & 5 (1974), 15 U.S.C. §§ 28, 29, 49 U.S.C. §§ 44, 45 (Expediting Act); P.L. No. 93-584, § 7 (1975) *repealing* 28 U.S.C. § 2325 (review of I.C.C. orders); P.L. No. 94-381 (1976) *repealing* 28 U.S.C. §§ 2281, 2282 and adding § 2284 and § 2403(b) (three judge court preserved only in actions challenging constitutionality of apportionment of congressional districts or state-wide legislative body or otherwise "required by act of Congress"). The latter reference encompasses Civil Rights Act of 1964, 42 U.S.C. §§ 1971(g), 2000a-5(b), 2000e-6(b) (1970), and Voting Rights Act of 1965, 42 U.S.C. §§ 1973b(a), 1973c, 1973h(c) (1970).

<sup>16</sup> The Supreme Court's interpretation of the finality requirement, importing significant relaxation of its rigor, is summarized by Mr. Justice White in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 466, 477-86 (1975).

<sup>17</sup> The term "statute" is interpreted to include not only state constitutional provisions and legislative enactments but also municipal ordinances and administrative regulations or orders. *Jamison v. Texas*, 318 U.S. 413 (1943); *Hamilton v. Regents of Univ. of California*, 293 U.S. 245 (1934); *Sultan Ry. v. Department of Labor*, 277 U.S. 135 (1928); *King Mfg. Co. v. Augusta*, 277 U.S. 100 (1928). Moreover, "validity" is held to have been drawn in issue and sustained by rejection of a challenge to a statute "as applied" in the particular case, *i.e.*, to the determinative facts before the court, notwithstanding its validity upon its face, *i.e.*, in its general application. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). The point must have been raised explicitly, however, as an issue of validity, as distinguished from a claim of immunity to the attempted application. *See, e.g.*, *Marcus v. Search Warrant*, 367 U.S. 717, 721 (1961); *Hanson v. Denckla*, 357 U.S. 235, 244 (1958); *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 650-51 (1942).



## II

*Problems of Scope*

In sketching the development of the appellate jurisdiction, I have painted necessarily with a broad brush, omitting matters of detail. I turn now to a closer scrutiny of the scope of the authority implicit in the granted jurisdiction.

Few questions of this order should arise in the review of federal decisions. The system now established for that function, with the virtual elimination of direct appeals from district courts, should present a minimum of legal problems. Cases will derive almost entirely from the federal appellate courts; and whether to review, how far and when (for certiorari may be granted before judgment) are questions to be answered in the Court's discretion. How such discretion can be best employed, and what its full potentialities may be, are matters of immense importance for the legal system that have recently commanded much attention, as you know.<sup>18</sup> I pass them, however, to consider the scope of jurisdiction to review decisions of state courts. Here legal questions of importance have arisen and quite plainly will continue to arise.

1. *Adequate State Ground: Substantive.* The initial question is the old one of how far the tradition that confines review to the adjudication of controlling federal questions (a point you will recall that was explicit in the Act of 1789 though the proviso was repealed in 1867)<sup>19</sup> precludes the Court from passing upon issues of state law. This always has been viewed as a matter of much moment for the dual system, epitomized by the much quoted statement by Justice Benja-

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<sup>18</sup> See, e.g., the materials and references collected in *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, *supra* note 3, at 1600-31, and at 1-4, 278-79 (Supp. 1977).

<sup>19</sup> In *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875), and companion cases it was argued that the effect of the repeal of the proviso was to extend the scope of Supreme Court review of a state judgment beyond the claim that a federal right had been denied to the entire case, including independent issues of state law. Mr. Justice Curtis, who had resigned from the Supreme Court after the decision in *Dred Scott*, filed a brief *amicus* in support of this submission, see 87 U.S. (20 Wall.) at 602-06; B. CURTIS, *JURISDICTION, PRACTICE AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES* 54-58 (1880), which enlisted the votes of three of the eight sitting justices (Bradley, Clifford and Swayne), notwithstanding the useless distortion of the dual system such a change would have involved. The majority declined to attribute to Congress a purpose to accomplish that result, reserving the question of its constitutionality.

The repeal was, however, accorded one effect of prime importance, that of including the state court opinions in the record on review. It is hard to understand today how the system was administered for eighty-five years without recourse to state court opinions in appraising what the state decision held and on what grounds.

min R. Curtis that "questions of jurisdiction were questions of power as between the United States and the several States."<sup>20</sup> The regime of *Swift v. Tyson* posed an analogous problem that my generation studied with great passion, hailing its demise in 1938.<sup>21</sup> The issue was, however, even more intense in the setting of direct review, since by hypothesis the state court then had expounded the state law not merely in its earlier decisions but in the very case at bar. It was clear nonetheless that complete state autonomy was inadmissible and that the answer had to turn on the relationship of the state ruling to the federal right that was asserted and denied.

To illustrate, I turn again to *Martin v. Hunter's Lessee*, though it was not the first case that provided an example.<sup>22</sup> The Treaty of Paris of 1783 ending the Revolutionary War embodied a guarantee against "future confiscations" by either nation of property belonging to individuals with allegiance to the other. The Jay Treaty of 1794 enhanced the safeguard by explicitly assuring the security of such alien land titles "according to the nature and tenure of their respective estates," with the aliens accorded the right to "grant, sell or devise" to anyone "as if they were natives." Lord Fairfax had died in 1781, devising his huge estate in the Virginia Northern Neck to his British nephew, Martin, who in turn assigned his interest to a syndicate including John Marshall and his brother James. The question litigated was whether Martin had a title when the treaties came in force. If he did, it was common ground that it received protection. But Hunter, claiming under a grant from the Commonwealth in 1789 denied that there was any title to protect, claiming that the property had escheated or been confiscated by the state before the treaties could apply. Though Virginia judges differed on the point, the Court of Appeals sustained Hunter. The Supreme Court reversed,<sup>23</sup> holding that the question of title, and not merely the uncontroverted meaning of the treaties, was subject to review. Justice Johnson dissented on the ground that "the interest acquired under the devise was a mere *scintilla juris*" that had been "extinguished by the grant of the state" but he shared the view of the Court (Marshall, C.J., not participating) that under the Judiciary Act, as he put it, an inquiry into "the title of the parties" was necessary and "must, in the nature of things, precede the consideration how far the law, treaty, and so forth, is applicable to it; otherwise, an appeal to this court would be worse than nugatory."<sup>24</sup>

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<sup>20</sup> Tribute to Chief Justice Taney, October 15, 1864, reprinted in, 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS 336, 340-41 (B. Curtis ed. 1879).

<sup>21</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>22</sup> See, e.g., *Smith v. Maryland*, 10 U.S. (6 Cranch) 286 (1810).

<sup>23</sup> *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813).

<sup>24</sup> *Id.* at 631-32.

This was a treaty case but note its analogue in many areas of constitutional litigation. Article I, section 10 forbids a state to pass any law impairing the obligation of contract, but whether particular transactions or events created a contract and, if so, what its obligations were, surely are matters governed usually by state law.<sup>25</sup> A state may not deprive of "property" without due process of law and presumably may not take it for a public use without payment of just compensation. But apart from exceptional cases where entitlements may be derived from Acts of Congress, must not the property interest claimed to be impaired or taken derive its existence from the law established or accepted by the state?<sup>26</sup> Other examples might be given, such as full faith and credit cases or the recent judgments as to when the due process clause demands a hearing,<sup>27</sup> but these illustrations should suffice to make the point.

In such situations, where, to put the matter analytically, the existence or the application of a federal right turns on a logically antecedent finding on a matter of state law, it is essential to the Court's performance of its function that it exercise an ancillary jurisdiction to consider the state question. Federal rights could otherwise be nullified by the manipulation of state law. How rigorous the scrutiny of the state finding is or ought to be presents a harder question. The decisions cover a wide range from Justice Story's wholly independent judgment on the title issue in the *Hunter* case, often duplicated in the contracts cases,<sup>28</sup> to a more lenient criterion, phrased as whether there was "a fair or substantial basis"<sup>29</sup> for the state court's judgment or even whether it was "manifestly wrong."<sup>30</sup> I should suppose that some degree of deference is plainly due to the state finding but that, whatever formula is used, any meaningful review obliges the Supreme Court to consider whether, given the relevant state materials, it clearly would have judged the issue differently if it were the state's highest court. When dubiety persists, the state determination should prevail and normally it does.

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<sup>25</sup> See, e.g., *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Appleby v. City of New York*, 271 U.S. 364 (1926).

<sup>26</sup> See, e.g., *Demorest v. City Bank Co.*, 321 U.S. 36 (1944); *Muhlker v. Harlem R.R.*, 197 U.S. 544 (1905); cf. *Broad River Power Co. v. South Carolina*, 281 U.S. 537, *aff'd on rehearing*, 282 U.S. 187 (1930).

<sup>27</sup> E.g., *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972); cf. *Meachum v. Fano*, 427 U.S. 215 (1976).

<sup>28</sup> See note 25 *supra*; see also, e.g., *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942); *Columbia Ry., Gas & Elec. Co. v. South Carolina*, 261 U.S. 236 (1923).

<sup>29</sup> E.g., *Demorest v. City Bank Co.*, 321 U.S. 36, 42 (1944).

<sup>30</sup> *Hale v. State Board*, 302 U.S. 95, 101 (1937).

2. *Adequate State Ground: Procedural.* I have referred thus far to situations where the antecedent question involves the substantive law of the state, property, contract and the like. But since federal claims in state proceedings must, like other claims, be put forth in accordance with the state procedure (the statute says they must be "drawn in question"),<sup>31</sup> there is an important class of cases where the antecedent state law finding is that the requirements of state procedure were not met, with the results that the claim was not considered on the merits. The case is easy if the state procedural requirement does not afford a reasonable opportunity to raise the claim at all. It will be rejected as invalid on due process grounds,<sup>32</sup> and also probably a disrespect for federal supremacy, and thus will not obstruct review, since an improper state refusal to adjudicate a federal contention is equivalent to its denial.<sup>33</sup> This is, however, the rare case. The more common case, where the state procedural requirement invoked by the state court is not itself unconstitutional, presents the problem with which we are here concerned. It was long considered that unless the procedural determination imposed a novel ruling in the case at hand without substantial basis in the prior state materials,<sup>34</sup> the Supreme Court could not review the merits of the federal assertion.<sup>35</sup> Procedural rulings were, in short, treated very much in the same way as substantive rulings on antecedent issues of state law. Indeed, my colleague, Alfred Hill, concluded after a long study of the cases that the high Court probably had shown more deference to state decisions on procedure than to those on substance in considering such ancillary questions.<sup>36</sup>

In *Henry v. Mississippi*<sup>37</sup> in 1965, the Supreme Court by a bare majority took a contrary view. The Mississippi Supreme Court had held, after some vacillation on the question, that the failure to object to evidence obtained in violation of the fourth amendment when the evidence was offered barred consideration of the question, even though the point was taken later on a motion for directed verdict. In

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<sup>31</sup> 28 U.S.C. § 1257 (1970). The phrase derives from § 25 of the Act of 1789, 1 Stat. 85.

<sup>32</sup> *E.g.*, *Reece v. Georgia*, 350 U.S. 85 (1955); *Saunders v. Shaw*, 244 U.S. 317 (1917).

<sup>33</sup> *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 282 (1932).

<sup>34</sup> *See, e.g.*, *Barr v. City of Columbia*, 378 U.S. 146, 149-50 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 294-302 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958).

<sup>35</sup> *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 n.4 (1964) (involuntary general appearance as waiver of objection to personal jurisdiction).

<sup>36</sup> Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 991 (1965).

<sup>37</sup> 379 U.S. 443 (1965).

reversing and remanding, Mr. Justice Brennan's opinion distinguished between rulings on substance and procedure on the surprising ground that in the substantive situation, decision of the federal question by the Supreme Court would amount to an advisory opinion only, because the ruling on the state law question is not subject to review (and accordingly would stand) whereas "a procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right."<sup>38</sup>

The opinion suffers, in my view, from a patent analytical defect in the significance that it attaches to the distinction between substance and procedure. State court rulings on substantive state questions obviously may prevent "the implementation" of a federal right no less than state procedural determinations, witness the title issue in the *Hunter* case, the contract issue when impairment is asserted, the property issue when a deprivation without due process is claimed, and other illustrations I have given. In such cases, as in those where the state ruling found procedural default, the point is simply that the existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law. Because of that relationship the state court does not speak the final word on the state question, though the state materials remain controlling in the Supreme Court's review. The problem of federal-state relations is the same, moreover, whether the antecedent state law issue is substantive or procedural. It is difficult to understand, therefore, why there should be a difference in the nature or the scope of the Supreme Court's examination of the state determination. The thrust of the decisions before *Henry* was, indeed, to find a common measure of review for all such antecedent questions.<sup>39</sup>

Nonetheless, the principle advanced in *Henry* that a state procedural rule that bars a federal challenge must be one that serves "a legitimate state interest"<sup>40</sup> may be regarded as constructive, whatever one may think of its application in that case. In criminal cases especially, where under *Fay v. Noia*,<sup>41</sup> decided in 1963, federal collateral

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<sup>38</sup> *Id.* at 447.

<sup>39</sup> See, e.g., *Demorest v. City Bank Co.*, 321 U.S. 36 (1944); *Broad River Power Co. v. South Carolina*, 281 U.S. 537 (1930); see also, e.g., *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 654-55 (1942).

<sup>40</sup> 379 U.S. 443, 447 (1965).

<sup>41</sup> 372 U.S. 391 (1963) (holding that a procedural default that would constitute an adequate state ground precluding direct review of the federal claim asserted does not bar post-conviction review of the claim on petition for a writ of habeas corpus, subject to a "limited discretion" to deny relief to a petitioner who "has deliberately by-passed

attack is broader than federal direct review, the system presents an anomaly<sup>42</sup> that *Henry* would reduce to some extent. That was undoubtedly a factor in its motivation, unless we are to think that it was merely an *ad hoc* decision in an especially appealing case. But whether the *Henry* principle has really been established may still be an open question. The decisions of the last twelve years do not dispel the possibility that it is merely being treated with intelligent neglect.<sup>43</sup> Congress might, however, make a contribution here if it should ever legislate to limit federal collateral attack, as many, including notably Judge Henry Friendly,<sup>44</sup> have been urging for so long, by also legislating against hypertechnical refusal by state courts to rule on constitutional objections, opening the issue in such cases to direct review. Some adaptation of the *Henry* concept might be used in drafting such a safeguard. Congress traditionally has been hesitant to impose procedural requirements on state courts, even with respect to litigation that has federal dimension, but its power to do so seems entirely clear on principle as well as on authority.<sup>45</sup>

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the orderly procedure of the state courts and in so doing has forfeited his state court remedies" *id.* at 438).

<sup>42</sup> The extent of the anomaly was reduced to some extent by the decisions in *Stone v. Powell*, 428 U.S. 465 (1976) (claims under exclusionary rule of fourth amendment not litigable on federal habeas when petitioner had opportunity for "full and fair" litigation of claim in state courts) and *Francis v. Henderson*, 425 U.S. 536 (1976) (federal habeas corpus unavailable to litigate constitutional challenge to composition of state grand jury where petitioner failed to raise the question before trial as required by state procedural rule similar to FED. R. CRIM. P. 12(b)(2), *see* *Davis v. United States*, 411 U.S. 233 (1973), absent showing of cause for non-compliance with state rule and prejudice resulting from alleged federal deprivation. *See also* *Estelle v. Williams*, 425 U.S. 501 (1976); *Tollett v. Henderson*, 411 U.S. 258 (1973).

Since this lecture was delivered, the availability of federal habeas in cases involving state procedural default has been curtailed in general by the Supreme Court's abandonment of the "deliberate by-pass" test of *Fay v. Noia* in favor of the "cause" and "prejudice" requirements of *Francis v. Henderson*. *Wainwright v. Sykes*, 97 S. Ct. 2497 (1977). How far federal collateral attack will still be broader than direct review turns on the content that is given these new terms. The Court went no further than to say that the new formula "will afford an adequate guarantee . . . that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." 97 S. Ct. at 2508.

<sup>43</sup> The cases are collected in *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, *supra* note 3, at 557-62 (2d ed. 1973), 99 (Supp. 1977).

<sup>44</sup> Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

<sup>45</sup> No direct holding on the proposition can be adduced but this surely is the necessary implication of decisions such as *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952); *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949); *Testa v. Katt*, 330 U.S. 386 (1947); *cf.* *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966). *See also* C. WRIGHT, *THE LAW OF FEDERAL COURTS* 196 (3d ed. 1976).

What I have said is not addressed at all to cases that present state and federal contentions that are wholly independent of each other, so that either, if sustained, would be dispositive.<sup>46</sup> The simple illustration is the case where a litigant relies on both the national and the state constitutions to support a claim of invalidity of a state action. Here it is true that if the state court sustains the claim on the state ground, or even on both state and federal, the Supreme Court quite properly disclaims all jurisdiction.<sup>47</sup> The ruling on state law neither evades nor threatens rights deriving from the national authority, and a finding of error on the federal ground would not undermine the state law basis of the judgment. There is, in short, no pendant jurisdiction on direct review because, unlike the situation as to cases in the lower courts, it would serve no valid purpose in the dual system. This is, indeed, one of the major virtues of direct review, its marginal intrusion upon state authority; federal adjudication is confined to cases where it is a bare necessity to maintain the effectiveness and uniformity of the federal law. Far from expanding jurisdiction in this area, the tempting course is to find ways to induce state courts to forego federal determinations until and unless dispositive state grounds have been eliminated from the case. That seems to me what a responsible state court should do, contrary to some recent illustrations,<sup>48</sup> but whether Congress or the Supreme Court could require that result, without penalizing litigants who by hypothesis are not at fault, is a puzzle, I confess, I have not solved.

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<sup>46</sup> That was the case, for example, in *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) cited by Justice Brennan in *Henry v. Mississippi*, 379 U.S. 443 (1965), as the prototype of "cases involving state substantive grounds." The point was, however, that the state ground was separately and independently dispositive, rather than logically antecedent as in *Hunter*.

<sup>47</sup> *E.g.*, *New York City v. Central Savings Bank*, 306 U.S. 661 (1939); see *Minnesota v. National Tea Co.*, 309 U.S. 551, 556-57 (1940); *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849, 2852-54 (1977); *cf.* *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 200-01 (1965).

<sup>48</sup> See, *e.g.*, *Oregon v. Hass*, 420 U.S. 714 (1975); *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973).

Compare the incredible attack on the Supreme Court of California by the State Attorney General for that Court's invalidation of capital punishment under the "cruel or unusual" clause of the state constitution (*People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972)), while the issue of federal validity was pending in other cases in the Supreme Court. See Falk, Jr., *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 274 n.5 (1973). For a general discussion of the issue see Falk, Jr., *supra*; Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Barrett, Jr., *Anderson and the Judicial Function*, 45 S. CAL. L. REV. 739 (1972). See also Linde, *Without "Due Process"*, 49 ORE. L. REV. 125 (1970).

3. *Review of Factual Findings.* Another aspect of review of state court judgments is the question of how far findings of fact in the state system are open to review when they control the disposition of the federal claim. This was a problem that hardly could arise under the old practice that employed the writ of error with its narrow limitation of the record. Under modern practice it presents a frequently recurring issue.

I need not tell you how important this can be. In *Norris v. Alabama*,<sup>49</sup> for example, the 1935 seminal decision on racial exclusion from juries, the Alabama Court had held that a trial court finding that no exclusion had been practiced was sufficiently supported by the testimony of the jury commissioners to that effect. The unanimous reversal, with opinion by Chief Justice Hughes, held that "whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." If "this requires an examination of evidence, that examination must be made."<sup>50</sup> In the particular case the Court concluded that discrimination had been clearly proved, notwithstanding the "mere general asseverations"<sup>51</sup> of the commissioners, as their testimony was pungently described.

A multitude of cases in the modern Court attest the vitality and the importance of this concept of the scope of review, especially in cases that have constitutional dimension: contempt, libel, obscenity, protest and political agitation, other first amendment areas, coerced confessions and pleas, involuntary waiver of counsel or other protections and the evergrowing field in which purposeful discrimination is forbidden.<sup>52</sup> It is certainly a modest judgment that the scope and intensity of the Supreme Court's scrutiny of state fact findings in such cases has steadily expanded through the years.

A further principle has been developed that has bearing on this matter, the rule that a state court judgment, at least a criminal conviction, even though it has no other federal dimension, entails a deprivation of procedural due process if there was "no evidence" to support a finding that was necessary under the state law to sustain the judgment rendered. This was declared in *Thompson v.*

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<sup>49</sup> 294 U.S. 587 (1935).

<sup>50</sup> *Id.* at 590.

<sup>51</sup> *Id.* at 595.

<sup>52</sup> For an extensive collection of the cases, see *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, *supra* note 3, at 574-610 (2d ed. 1973), 100-02 (Supp. 1977).



*Louisville*,<sup>53</sup> decided unanimously in 1960, in opinion by Justice Black (a case in which my colleague Louis Lusky was counsel for the petitioner). The principle was invoked and applied, some may believe, as I do, somewhat excessively applied, in many cases of importance during the civil rights struggle of recent memory,<sup>54</sup> avoiding thereby a pronouncement on constitutional contentions with respect to which there was a close division in the Court.<sup>55</sup> It is apparently a settled interpretation of the meaning of "due process," not to be avoided, as it would have been in former years, by reading the affirmance of the judgment by the highest state court as an implied ruling that the element on which there was no evidence had been excluded from the state rule involved. The case for perceiving such an implication was put strongly in a recent dissent by Justice Rehnquist, but he was supported only by the Chief Justice and by Justice White.<sup>56</sup> If the *Thompson* principle is settled, I should suppose that it may apply to civil cases also;<sup>57</sup> indeed, Thompson's sentence was no more than a small fine. But I know of no civil applications thus far handed down.

An even more significant review of facts may yet be found appropriate in criminal cases. This was suggested in a very recent dissent to a denial of certiorari by Mr. Justice Stewart.<sup>58</sup> The case was one that Mr. Justice Marshall thought deserved review on the issue of no evidence. Justice Stewart did not agree with that but thought that a more fundamental question ought to be considered. Since *In re Winship*<sup>59</sup> held that due process forbids a criminal conviction under any lesser standard of evaluation of the evidence than proof beyond a reasonable doubt, does not any criminal conviction violate due process "where the evidence cannot fairly be considered sufficient to establish guilt beyond a reasonable doubt?" That is not, as I see it,

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<sup>53</sup> 362 U.S. 199 (1960) (conviction of loitering and disorderly conduct based solely on evidence that defendant had been in cafe half an hour without buying anything, was "on the floor dancing by himself" and argued with policeman after they arrested him for loitering).

<sup>54</sup> See, e.g., *Johnson v. Florida*, 391 U.S. 596 (1968); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Garner v. Louisiana*, 368 U.S. 157 (1961).

<sup>55</sup> Cf. *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964).

<sup>56</sup> *Vachon v. New Hampshire*, 414 U.S. 478, 484 (1974).

<sup>57</sup> There is a suggestion, however, in *Bouie v. City of Columbia*, 378 U.S. 347, 354-56 (1964), that the principle is rooted in the due process requirement that a criminal statute give fair notice of the conduct proscribed as a crime, but the rationale of *Thompson* was not so limited. See *Thompson v. Louisville*, 362 U.S. 199, 206 n.13 (1960).

<sup>58</sup> *Freeman v. Zahradnick*, 97 S. Ct. 1150 (1977).

<sup>59</sup> 397 U.S. 358 (1970).

a question that can easily be turned aside; federal review not only tests a standard on its face but also in its application. An affirmative response would, however, mean that even though no other federal dimension is presented by the case, a submission that the evidence did not suffice for a rational determination of guilt beyond a reasonable doubt would present a federal question. All state convictions would thus be subject to no less evidential scrutiny by the federal courts than state systems normally provide upon a state appeal. It is worth keeping such a possibility in mind in turning, as I now propose to do, from the legal scope of the appellate jurisdiction to the practical limits on its exercise, given the size of the Supreme Court's docket in our time.

### III

#### *The Problem of Logistics*

The jurisdiction I have attempted to delineate has, as you know, produced a dramatic increase in the number of cases filed in recent years in the Supreme Court, reflecting the explosive growth of litigation in the country, particularly in the lower federal courts. In 1950, for example, the Supreme Court filings totaled 1181. In 1971, they had risen to 3643; in 1975 to 3939. The growth in the number of cases filed in the federal courts of appeals, from which almost three quarters of the cases of the high Court's docket now derive, was no less spectacular: from 3899 in 1960 to 18,408 in 1976. Some twenty-six percent of Supreme Court filings were from the state courts in 1972, compared to almost fifty percent in 1962.

Most of the cases filed in the high court are, to be sure, petitions for discretionary review. Some are, however, appeals, invoking review that the statute conceives to be obligatory, i.e., to entitle the appellant to a decision on the merits of his claim of error. Precise data are not available, but it would seem that appeals in recent years have not exceeded ten percent of all the cases filed and the number should substantially diminish with the virtual elimination now of direct appeals from three-judge district courts.<sup>60</sup> There were, however, in 1971, according to one study, appeals on the docket from state courts in 158 cases.<sup>61</sup>

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<sup>60</sup> That diminution may, however, be accompanied by an increase in appeals under 28 U.S.C. § 1254(2) (1970) from Court of Appeals decisions holding state statutes invalid on federal grounds.

<sup>61</sup> REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, Table VII-a, at A 11 (1972). Petitions for certiorari in state cases totaled 1183.

Despite this increase in the number of cases seeking to be heard, the Supreme Court allows, and in the nature of things is able to allow, plenary hearings in a very small number, determined quite inexorably by the number of hours in the day, days in the week and weeks in the year, together with the time required for adequate deliberation, reasoned decision and the preparation of opinions that will both explain results and provide guidance to all other courts.<sup>62</sup> The number of cases thus decided in recent terms has ranged from perhaps 130 to 160, with a norm below 150, exclusive of multiple causes dealt with together. At the 1975-76 term, there were 135 signed opinions of the Court, not counting concurrences or dissents, and 21 *per curiam* opinions of substantial length, disposing in all of 181 cases. There were, in addition, 175 dispositions without opinion, mostly in unargued cases, and an as yet uncounted number of dismissals of appeals that constitute adjudication on the merits.<sup>63</sup> It seems clear, therefore, that given present volume the great functions of the Court must be performed by denying most of the petitions for discretionary review and by summary disposition on the initial papers of a great part of the business claiming the right to a decision on the merits.

In last year's Tucker lecture, former Dean and Solicitor General Erwin N. Griswold spoke critically of the Court's summary disposition (without full briefs and oral argument) of cases reviewable as of right upon appeal.<sup>64</sup> If he meant that this is never permissible, I disagree. It was a reasonable view of the statute to treat the substantiality of the federal question as jurisdictional and to determine that preliminarily. That was, indeed, what happened in the Court when John Randolph Tucker represented the Chicago anarchists, a great episode in the history of our profession.<sup>65</sup> As a Supreme Court rule of 1876 expressed the point, a motion to dismiss or affirm would be entertained on the ground that "the question on which the jurisdiction depends is so frivolous as not to need further argument."<sup>66</sup> The jurisdictional statement was required by rule in 1928 to raise the

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<sup>62</sup> Cf. Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

<sup>63</sup> *The Supreme Court 1975 Term*, 90 HARV. L. REV. 56, 276, 279 (1976).

<sup>64</sup> Griswold, *Equal Justice Under Law*, 33 WASH. & LEE L. REV. 813, 818-21 (1976).

<sup>65</sup> *Spies v. Illinois*, 123 U.S. 131 (1887) (denying a motion made in open court to allow a writ of error to the Supreme Court of Illinois, which had denied the application). The Court in its discretion heard oral argument in support of the motion but that practice was unusual, since, as Chief Justice Waite said, it had been settled that "the writ ought not to be allowed by the court, if it appears from the face of the record that the decision of the Federal question which is complained of was so plainly right as not to require argument . . ." *Id.* at 164.

<sup>66</sup> 91 U.S. vii (1876) (amendment to Rule 6).

question for the Court even in the absence of a motion. That basic concept is reflected and elaborated in the current rules.

It follows therefore, and was never doubted when I was a law clerk in 1932, that a dismissal on the ground that a federal submission is not substantial is a disposition on the merits. Justice Brennan articulated this in 1959<sup>67</sup> and the Court reaffirmed the proposition quite explicitly in 1975.<sup>68</sup> That means that, as the *Hicks* case squarely held, the dismissal creates a precedent binding on lower courts until and unless the Supreme Court overrules it.<sup>69</sup> There may be difficulty, to be sure, in ascertaining precisely what was decided<sup>70</sup> but whatever was decided is the law. It is, therefore, hard to understand the recent statement by Mr. Justice Clark, sitting in this Circuit, that during his eighteen years of service on the Supreme Court, "appeals from state decisions received treatment similar to that accorded petitions for certiorari . . ." <sup>71</sup> If that was so, and I well know, of course, that others have asserted that it was,<sup>72</sup> the Court simply disregarded its statutory duty to decide appealed cases on the merits. It may be hoped the practice now has changed. It is simply inadmissible that the highest court of law should be lawless in relation to its own jurisdiction. On that point, I agree entirely with Dean Griswold.

Whether the statute ought to be amended is, however, as Dean Griswold recognized, a different question. Lawyers will understand-

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<sup>67</sup> *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959).

<sup>68</sup> *Hicks v. Miranda*, 422 U.S. 332 (1975); see also *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 646 (1976); *Port Auth. Bondholders Protective Comm. v. Port of New York Auth.*, 387 F.2d 259 (2d Cir. 1967) (Friendly, J.). *But cf. Serrano v. Priest*, 5 Cal. 3d 584, 615-16, 487 P.2d 1241, 1263-64, 96 Cal. Rptr. 601, 623-24 (1971).

<sup>69</sup> Though the Supreme Court has announced that it accords less precedential weight to summary dispositions than to decisions supported by opinion, see *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), it has not agreed with Justice Brennan that the same latitude should be allowed to state and lower federal courts. See *Colorado Springs Amusements Ltd. v. Rizzo*, 428 U.S. 913 (1976) (Brennan, J., dissenting from denial of certiorari); *Sidle v. Majors*, 97 S. Ct. 366, 367 (1976) (Brennan and Marshall, JJ., dissenting from denial of certiorari).

<sup>70</sup> *Mandel v. Bradley*, 97 S. Ct. 2238 (1977); cf. *Fusari v. Steinberg*, 419 U.S. 379, 390-92 (1974) (Burger, C.J., concurring) (summary affirmance extends to the lower court's judgment but not to the lower court's reasoning and should not be read, therefore, as a renunciation of any previously announced Supreme Court opinion); see also, e.g., *Torres v. Department of Labor*, 405 U.S. 949 (1972).

<sup>71</sup> *Hogge v. Johnson*, 526 F.2d 833, 836 (1975) (Clark, J., concurring).

<sup>72</sup> See, e.g., G. CASPER & A. POSNER, *THE WORKLOAD OF THE SUPREME COURT 1* (1976); *REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 25* (1972); Remarks of Mr. Justice Marshall, *Acceptance of Learned Hand Medal*, May 1, 1975, at 10. The most informative study is that of Levin & Hellman, *The Many Roles of the Supreme Court and the Constraints of Time and Caseload*, 7 U. Tol. L. Rev. 399, 404-17 (1976).

bly be reluctant to surrender any right of access to the Court that the law now allows, but the problem of volume places a heavy burden of persuasion on those who would support the present rule. It is hard to argue that every case in which a state statute or ordinance is sustained against a substantial federal attack, especially if it is only challenged as applied,<sup>73</sup> merits priority in the selection of the very finite number of cases that the high Court can decide.

I should myself place emphasis, however, on a different question. Given the intrinsic quantitative limits on the adjudications that the Court can make, the need for authoritative settlement of issues that divide the courts of appeals, the importance of a viable procedure to correct egregious error by state courts in applying principles and standards the Supreme Court has developed, especially in constitutional interpretation, can the Supreme Court's options be enlarged in a constructive way?

The Commission on the Revision of the Federal Court Appellate System (the Hruska Commission, on which I served) recommended some two years ago the creation of a National Court of Appeals, whose jurisdiction would be limited to cases referred for adjudication by the Supreme Court (or transferred to it by a regional court of appeals).<sup>74</sup> The purpose was primarily to enlarge the appellate capacity of the federal courts to settle questions that are not now settled soon enough because of docket pressures in the Supreme Court.<sup>75</sup> This was a wholly different proposition from that offered by the Study Group on the Caseload of the Supreme Court<sup>76</sup> (Freund Committee) whose main target was to relieve the Court of most of the burden involved in screening petitions for review. That proposal met insuper-

<sup>73</sup> See note 17 *supra*.

<sup>74</sup> S. 2762, 94th Cong., 1st Sess., embodying the recommendations of the Commission, included provision for such transfers. That feature of the plan drew such widespread opposition that it was withdrawn in the revised bill, S. 3423, 94th Cong., 2d Sess., which limits the jurisdiction of the National Court to cases referred by the Supreme Court. See *Hearings on S. 2762 and S. 3423, The National Court of Appeals Act*, 94th Cong., 2d Sess., at 52 (1976) [hereinafter cited as *Hearings*].

<sup>75</sup> Some members of the Commission, myself included, were concerned as well to enhance the capacity of federal courts to correct egregious state court errors in applying settled federal standards, a matter given insufficient attention in the Commission's report. Cf. Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943 (1976). I do not agree, however, with the proposal of Professor Stolz that the National Court of Appeals should be given obligatory jurisdiction to review state court judgments involving federal questions, subject to discretionary review by the Supreme Court. The Supreme Court's power to refer state as well as federal cases, as the Commission recommended, serves the purpose adequately, in my view.

<sup>76</sup> See note 61 *supra*.

able opposition, grounded in the view that the Court should not be deprived of the control of its own docket. Under the Commission plan, such control would be maintained. Judgments of the National Court would bind the country as a whole but they would be reviewable by the Supreme Court on certiorari. It was anticipated, however, that, having referred the case, the high Court would not often grant review. No one, of course, can predict with confidence whether or how soon the new Court's docket would be full<sup>77</sup> but nothing would be lost if the development were slow. The judges could devote their extra time to sitting in the circuits on assignment; their assistance there would certainly be welcome for as far ahead as we can see.

There are objections to the plan, of course: it would add to rather than diminish the screening task of the Supreme Court because of the option to refer; it would diminish somewhat the prestige of the regional courts of appeals; it would add a fourth appellate tier in the federal system if the Supreme Court were subsequently to review a case it had referred; and it would offend the highest state courts to have their judgments subject to reversal by a court inferior to the Supreme Court.

These are all points of substance, I admit, but the great question is if there is an alternative that presents lesser difficulties. Judge Henry Friendly argues strongly that there is: avert "the flood by lessening the flow."<sup>78</sup> He would eliminate diversity of citizenship jurisdiction, cut back on civil rights cases by requiring exhaustion of administrative remedies and greater abstention, limit the scope of federal habeas corpus, transfer much litigation to administrative agencies and processes, reduce the ambit of the federal criminal law, and establish specialized courts, at least for tax and patent cases.<sup>79</sup> This is a solid program, with a great deal of which I find myself in full agreement. The trouble is that it is most improbable that much of it can be enacted, or so it seemed to me as I heard testimony in the hearings of the Hruska Commission. Time may, however, prove

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<sup>77</sup> For varying forecasts, see, e.g., G. CASPER & A. POSNER, *THE WORKLOAD OF THE SUPREME COURT* 106 (1976); Feinberg, *Foreword — A National Court of Appeals?*, 42 *BROOKLYN L. REV.* 611, 619-25 (1976); Owens, *The Hruska Commission's Proposed National Court of Appeals*, 23 *U.C.L.A. L. REV.* 580, 603 (1976); Alsup, *Reservations on the Proposal of the Hruska Commission to Establish a National Court of Appeals*, 7 *U. TOL. L. REV.* 431, 435 (1976); *Hearings, supra* note 74, at 135 (Judge Lay), 172, 184 (Judge Coffin), 248, 256 (Judge Friendly).

<sup>78</sup> Friendly, *Averting the Flood by Lessening the Flow*, 59 *CORNELL L. REV.* 634 (1974); see also *Hearings, supra* note 74, at 250-56; cf. *THE NEEDS OF THE FEDERAL COURTS: REPORT OF THE DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM* (1977).

<sup>79</sup> See generally H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

me wrong on this, as all too often it has proved me wrong before, but thus far I perceive no reason for confessing error.

The crucial point is that alternatives be canvassed with a will to getting something done. The appellate jurisdiction of the Supreme Court is a great national achievement, but we do not honor it by failing to perceive and to respect its limitations of capacity. We must reduce the burden it is asked to carry in the legal system or accord it supplementary resources. The promise that is spoken to the ear will otherwise be broken to the hope.

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