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# CONSERVING THE FEDERAL JUDICIARY FOR A CONSERVATIVE AGENDA?†

*Samuel Estreicher\**

THE FEDERAL COURTS: CRISIS AND REFORM. By *Richard A. Posner*. Cambridge, Mass.: Harvard University Press. 1985. Pp. xvii, 365. \$25.

In his new book, *The Federal Courts: Crisis and Reform*, Judge Richard A. Posner, who while on the University of Chicago faculty revolutionized the academic study of law in this country,<sup>1</sup> now takes on the cause of the federal courts of appeals. As others have noted,<sup>2</sup> Judge Posner has really written two books, with the first five chapters describing and analyzing an alleged caseload crisis confronting the appeals courts, and the remaining chapters devoted to his views of the proper role of federal courts in the making of federal constitutional, statutory, and common law. There is no obvious tether connecting the two sections, for (aside from a halting attempt in the sixth chapter) Judge Posner never explicitly suggests that adoption of his conception of the federal judicial process will lessen the burdens on federal appellate judges. Perhaps the search for a unitary theme overstates the author's own objectives, which may simply have been to combine into a single volume his recent musings on the federal courts.

If there is an underlying connective tissue, however, I suspect it lies in Judge Posner's concept of "judicial self-restraint." In a widely publicized article<sup>3</sup> (which re-emerges as the seventh chapter of this book), Posner argues that the truly conservative judge owes no particular fidelity to *stare decisis* or "strict constructionism" — tenets of traditional conservatism. Rather, in cases that admit of no "right answer,"<sup>4</sup> the truly conservative judge should opt for those rules that

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1. See, e.g., R.A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (2d ed. 1977).

2. See, e.g., Monaghan, *Taking Bureaucracy Seriously* (Book Review), 99 HARV. L. REV. 344 (1985).

3. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983).

4. Posner assumes the existence of "an area in which a judge cannot decide cases simply by reference to the will of others — legislators, or the judges who decided previous cases, or the

minimize judicial interference with the decisions of the elected branches of government. The caseload explosion, Posner intimates, provides an additional reason for adopting the "judicial self-restraint" position. Strong medicine is needed, we are told, for clogged appellate dockets that threaten to undermine the system's capacity to render well-considered, uniform law; procedural tinkering and other "palliatives" will simply not do. What is called for is a "rethinking" of the role of federal courts. The unstated thesis of this book seems to be: the need to husband or "conserve" federal judicial resources requires a truly "conservative" agenda for the federal judiciary.

Although an immensely interesting effort brimming with information and insight, *The Federal Courts: Crisis and Reform* is for a number of reasons ultimately unsatisfying. First, neither the existence of a caseload crisis nor the futility of limited procedural reform is persuasively demonstrated. Second, even the more interesting second half of the book does not offer a fully elaborated presentation of Posner's views on the role of federal courts. Finally, because the author leaves unstated the connection between the first five chapters (and part of the sixth) and the rest of the book, we either have a book without a unifying thesis or one with a thesis only barely intimated and developed.

#### I. DO WE HAVE A CASELOAD CRISIS IN THE COURTS OF APPEALS?

I undertook this review with some trepidation, for I (with John Sexton) have explained at length elsewhere why the Supreme Court faces no workload crisis.<sup>5</sup> A major premise of our study was that the responsibility for correction of error in federal cases lies primarily with the federal courts of appeals (and state supreme courts), and that these courts should also assume a greater role in maintaining a uniform federal law than in the past. If there is a "crisis" in the federal courts — certainly, a widespread perception of students of the federal judiciary — and we have said it is not at the Supreme Court, then surely it must be found in the courts of appeals, if we are not to be held guilty of an elaborate "shell" game.

On one level, the numbers portend a problem of crisis proportions. Much as with the literature on the Supreme Court's caseload, the focus is on the dramatic increase in case filings, which here acquires a

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authors of the Constitution. Within that area, the judge must bring in his own values and preferences in order to make decisions." Pp. 206-07. This is an "open area of judging, where by definition a correct decision cannot be made without bringing in personal policy preferences." P. 207.

5. See Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984). We have recast our study in book form intended for a wider audience, see S. ESTREICHER & J. SEXTON, *REDEFINING THE SUPREME COURT: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (Yale Univ. Press, forthcoming).

particular urgency because we are dealing with courts of mandatory appellate jurisdiction. Whereas cases filed in the district courts more than tripled from 1960 to 1983, from 80,000 to 280,000, cases docketed at the appellate level during the same period increased eightfold, from 3,765 to 25,580 (pp. 63-65). If this trend continues — and the combined operation of population gain and new federal laws suggest that it will — the surge in filings at the district court level will produce a threefold (or, as the late Judge Henry Friendly predicted, a fourfold<sup>6</sup>) increase in the appellate caseload. Apparently, the declining likelihood of obtaining reversal will not dampen the rate of appeal, for appellate dockets have increased during this period despite declining reversal rates.<sup>7</sup> Given annual growth rates since 1960 of 5.6% in district court filings and 9.4% in appeals court filings, Posner projects<sup>8</sup> that by the year 2000 the district court docket will swell to 700,000 cases and the appellate docket to 136,236 cases (p. 93).<sup>9</sup>

The crisis, Posner tells us, is primarily at the appellate level, for while the number of district judges can be increased at tolerable cost, there is a limit to the system's ability to expand federal appellate capacity, if the courts of appeals are to remain collegial, reflective bodies capable of maintaining a fairly uniform body of law within each circuit. Without apparent empirical justification, he sets the optimal appeals court size at nine judges,<sup>10</sup> to ensure a credible incidence of supervision of panel rulings by the *en banc* court and, secondarily, to preserve an elite position sufficiently prestigious to attract outstanding members of the profession.

For Posner, the crisis is reflected not only in the rise in the average number of signed opinions per judge — from thirty-one in 1960 to

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6. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 39 (1973).

7. Filings in the courts of appeals have risen from 3,765 in 1960 to 25,580 in 1983, despite a drop in the reversal rate during the same period from 24.5% to 15.9%. Pp. 68-69. Professor Howard's empirical work suggests that circuits with higher rates of appeal tend to exhibit lower rates of reversal. See J.W. HOWARD, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 38 (1981).

8. Posner does qualify this projection: "Of course, these are entirely mechanical extrapolations. Since we do not have a very clear idea of the causes of caseload growth, we cannot predict future growth with any confidence." P. 93. This qualification, does not, however, deter Judge Posner from continued reliance on the prediction of a caseload crisis in framing the arguments made in this book.

9. Increased filings do not necessarily indicate incremental additions to the appellate judge's workload, for the cases may be largely frivolous appeals not meriting extended consideration. See note 20 *infra* and accompanying text. What is needed is a measure of "a case's weighted average difficulty" and a corresponding tally of the rate of growth of difficult appeals. See Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 *UCLA L. REV.* 432, 436 (1976).

10. Granted, there has been no systematic analysis of the difference between a 9-man and an 11-man court (the objection to an even number is obvious), though there is an interesting literature on the psychology of small-group interaction that might be consulted. . . . But the fact that no one proposes to enlarge the Supreme Court beyond nine is pretty good evidence that a greater number is unwieldy for judicial deliberation.

P. 100 n.2 (citations omitted).

forty-two in 1983 (p. 71) — but more importantly in the increasing resort to case-management devices which threaten radically to transform the courts of appeals into relatively unaccountable bureaucracies. From judges who do their own work with an acute sense of accountability not only to their brethren on the court but to the readers of their opinions, we are inexorably moving to a world in which decisionmaking is delegated to others — visiting judges, law clerks, or circuit staff attorneys — and decisions either are bureaucratic efforts or take the form of unpublished memoranda or *per curiam* rulings not exposed to public scrutiny.

This portrait of crisis, while not inherently implausible, is certainly overdrawn and, in some places, entirely speculative. On the face of things, an average of forty-two signed opinions a year per judge seems quite manageable. This is about twice as many signed opinions as are produced on the average by a Supreme Court Justice, who is expected to produce fully elaborated pronouncements of national law. By contrast, the court of appeals judge decides cases within a more restricted domain of precedent (as she is not expected to overrule or reconsider Supreme Court law) and normally renders opinions relatively unencumbered by the expectations of solemnity and enduring significance that many attach to the ruminations of the High Court. Though a modest increase over the 1960 output, forty-two signed opinions a year, standing alone, offers no measure of overload unless it can be demonstrated that circuit judges were working at full capacity in the earlier period. And the examples of Judge Posner and his colleague on the Seventh Circuit, Frank Easterbrook, as well as those of Judges Jon Newman and Ralph Winter on the Second Circuit and Harry Edwards, Antonin Scalia, Ruth Ginsburg, Patricia Wald, and Robert Bork on the D.C. Circuit (a court that daily deals with quite complicated regulatory cases), suggest that time may be available for speeches, legal scholarship, and some part-time teaching.<sup>11</sup>

Judge Posner wisely premises the overload argument on other indicia: the increasing use of visiting judges and the accompanying prospect of inconsistent law within the same circuit; the expansion in the number of “elbow clerks” and other substitute decisionmakers; and the apparently surging propensity to dispose of ever-larger portions of the appellate docket by unpublished memoranda or *per curiam* opinions. These developments, Posner warns, portend a future in which appeals judges will not be able to supervise meaningfully the district courts while ensuring consistent law within the circuit and producing opinions with a high level of craftsmanship.

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11. Certainly, if judges have the time they should be encouraged to engage in such activities, which provide intellectual replenishment and an important service to the legal community. Nevertheless, the fact that some of our most highly regarded judges do find the time for these worthwhile pursuits suggests that perhaps appellate dockets are not quite as pressing as Judge Posner suggests.

Posner has identified important problems that deserve further study, but the picture may not be as gloomy as the one he has painted. The literature he cites on the use of visiting judges<sup>12</sup> and intracircuit inconsistency<sup>13</sup> is largely impressionistic and spotty; one finds no conclusive demonstration that such inconsistency regularly occurs, or indeed that the situation has worsened over the last quarter of a century.

It is a characteristic of this book that Posner fails to explore in any serious way the possibility that incremental reforms might alleviate whatever problem is thought to exist. Apparently, some circuits have taken steps to review the selection of visiting judges as a means of maintaining quality control.<sup>14</sup> The infrequency of *en banc* consideration in most circuits does suggest that, to an undesirable extent, ad hoc three-member panels operate with little accountability to the circuit as a whole. Here, too, there are steps that can be taken short of major surgery. The practice followed in some circuits of circulating panel rulings before they are handed down should be required in all circuits. As John Sexton and I propose in our forthcoming book,<sup>15</sup> procedures could be developed to enable parties complaining of a panel ruling that has created a conflict within the circuit to seek rehearing not by the same panel but rather by a sitting motions panel or an entirely new panel. Lawyers in the office of the circuit executive might also be charged with the responsibility of screening such complaints for rehearing by the second panel. Whatever the merits of these ideas, it is plain that Posner assumes the existence of a problem of crisis proportions without convincing proof, and shows only passing interest in evaluating reforms that would not require radical restructuring of the system.

The same can be said about the use of law clerks and reliance on

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12. As Posner acknowledges, the only empirical study cited on the use of visiting judges reports no decline in quality of decisionmaking. See p. 101 & nn.5-6 (discussing Green & Atkins, *Designated Judges: How Well Do They Perform?*, 61 JUDICATURE 358 (1978)). As for the extent of reliance on such judges, Posner found by sampling from reported decisions that visiting judges sat on 31% of the panels in 1983, compared to 22% in 1960. Emulating Posner's methodology, I looked at the reported decisions in volume 763 of the Federal Reporter, 2d (1985), and found that 52 of 145, or 35.8%, of the reported decisions involved the participation of judges sitting by designation; by contrast, less than five percent of the reported decisions in volume 342 of the Federal Reporter, 2d (1965), involved the use of such judges. In my 1985 sample, I found only five split decisions involving the participation of such judges, three of which were dissents from the panel decisions — a finding consistent with Green & Atkins, *supra*, at 369.

13. The only citation offered by Posner is Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343 (1979), which offers a few examples of inconsistency in the Ninth Circuit. This unwieldy court of appeals having 28 active judges may also be a special case. See note 23 *infra* and accompanying text.

14. Chief Judge Feinberg of the Second Circuit reports that he personally decides who may serve as a visiting judge, and that, under 28 U.S.C. §§ 291(a) & 292(d), he must present a "certificate of necessity" and secure the approval of the Chief Justice of the United States before he can utilize judges from outside the circuit. See Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 370, 380 (1984).

15. See S. ESTREICHER & J. SEXTON, *supra* note 5.

unpublished opinions. Discounting for any myopia to which I may have fallen prey as a law clerk, I find unpersuasive the "judicial bureaucracy" literature<sup>16</sup> to which Posner adverts, which equates the law clerk phenomenon with an emerging bureaucratic style of opinion writing. True, many opinions of federal judges suffer from a deadly style and surfeit of footnotes. Law clerks, typically unseasoned lawyers, are partially to blame; the availability of word processors and computerized legal research also may be culpable.

Before these stylistic problems can be ascribed to a presumably crushing workload, one must demonstrate that the situation was indeed better in earlier times, when appeals judges faced less demanding dockets. My impressionistic sense of the opinions in the Federal Reporter volumes of the 1950s and early 1960s is that, with relatively few exceptions, they were shorter in length but also perceptibly short of analysis and explication.

I suspect that given the usual criteria of judicial appointment, few chosen for article III status are consummate masters of the art of opinion writing. The likes of Learned Hand, Henry Friendly, and Harold Leventhal are few and far between in any era. Typically, appointees to the federal bench come from the ranks of senior partners in law firms or holders of important elective or appointive government positions, who long ago lost the knack or taste for writing first drafts and who find congenial the availability of bright, recent law graduates capable of generating editable, well-researched first drafts. Indeed, even if the federal appellate caseload were halved, one should expect no dramatic change in the style of opinions or the extent of footnoting.

The data on the extent to which cases are decided per curiam or by unpublished opinions appears somewhat more troubling.<sup>17</sup> Here, too, Judge Posner cannot say that the present situation is terribly different

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16. See, e.g., J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986); Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981).

17. Judge Harry Edwards of the D.C. Circuit reports that in the twelve months preceding June 30, 1982, 46% of the 23,760 appeals terminated in the federal courts of appeals were disposed of without oral argument or submission of briefs; and in 54% of those cases, with no statement of reasons whatsoever. See Edwards, *The Rising Workload and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 894 (1983). His colleague, Judge Patricia Wald, similarly reports that in 1982, 51.2% of the D.C. Circuit's dispositions were by order or judgment accompanied by brief unpublished statements. See Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 782 n.38 (1983).

The literature on unpublished appellate opinions is extensive, critical, and largely unilluminating. See, e.g., Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405 (1981); Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981) [hereinafter cited as *An Evaluation of Limited Publication*]; Reynolds & Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807; Reynolds & Richman, *The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978).

from the "one-liner" practice of the past.<sup>18</sup> Certainly, the single right of appeal provided by the federal system must ring hollow to litigants who learn that their carefully wrought objections to the judgment below have been rejected without even the solace of a statement of reasons. It was in part the desire to give the parties some statement of reasons in cases previously disposed of by unilluminating one-liners that led many of the circuits to authorize disposition by unpublished memoranda that may not serve as precedent in future cases. Judge Posner is certainly correct that some undetermined number of these cases merits a full-fledged opinion that would benefit from the accountability inherent in openly announcing law of the circuit, and that requiring publication in all cases is impossible under current (and maybe past) caseloads.

One must question, however, Posner's apparent premise that universal publication is necessarily a good thing because it will add to the existing "stock of precedents."<sup>19</sup> Other than the specious allure of the market analogy, it is not clear that publishing opinions in the overwhelming percentage of cases presently disposed of by unpublished memorandum or one-liner would be a useful expenditure of anyone's time and energy. Appeals courts decide essentially two different types of cases: one calling simply for resolution of a narrow, often fact-specific dispute of little interest to anyone other than the immediate parties; the other requiring a ruling on some unsettled point of law. For the former, a statement of reasons in the form of an unpublished memorandum that is circulated to the full court and is available to the public suffices to ensure a responsible decision; there is no useful law-declaration, exegetical function in requiring publication. Full-blown opinions constituting binding precedent are necessary only for the latter category of cases, where the judge's role is not only to explain the exercise of power but also guide the development of the law. Yet, neither Posner nor the authorities he cites has shown that the courts of appeals are failing to meet their responsibilities in those cases. Based on my experience as a law clerk on the D.C. Circuit in 1975-1976, I suspect that aside from plainly frivolous appeals, the lion's share of summary dispositions occurs in cases in which the issue involves the application of settled circuit law to particular facts, or in which appeals court review is only one additional check on a decision that already has been exposed to extensive, possibly multi-tiered review, as would be true of administrative agency adjudicatory proceedings.<sup>20</sup>

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18. Neither Posner nor Professors Reynolds and Richman, *supra* note 17, attempt such a comparison.

19. *See, e.g.*, pp. 125-26.

20. *See* Leventhal, *supra* note 9, at 441 ("Summary dispositions without printed opinions, which account for over half of our court's disposition after consideration, may be used wisely and properly. They expedite the process and help delay the swelling of law libraries. . . . It bears repetition that summary dispositions, preferably with some citation or indication of reasons, for

Moreover, it remains to be demonstrated that even if there were time to write published opinions in all cases, more decisional law in such cases would necessarily promote predictability or doctrinal coherence. Indeed, the converse may be true, for more opinions may create new points of divergence and yet additional pleas for harmonization. This may be a situation in which, contrary to Posner's usual microeconomic assumptions, there is a law of diminishing returns: more is not necessarily better.

The fifth chapter, entitled "Palliatives," rounds out the portrait of a system in crisis. Here, Judge Posner offers a number of interesting suggestions — experimentation with modest district court filing fees and imposing attorneys' fees on losing parties — as well as the old standby, abolition or limitation of diversity jurisdiction (by raising the amount-in-controversy requirement to \$50,000 and restricting federal-court access to nonresidents of the forum state).<sup>21</sup> But as these measures can at best provide only modest relief, he goes on to evaluate proposals for more fundamental change. Specialized federal courts of appeals offer the promise of diverting cases away from the circuit courts. Except for areas of limited public controversy such as tax law, Posner argues that they are distinctly less desirable than courts staffed by generalist judges, who are likely to be more faithful to the original spirit of the laws and less likely to be the captive of interest groups ascendant at a particular time. It would be better, he urges, to strengthen the appellate process within the agencies themselves.<sup>22</sup> As for proposals for a national court of appeals, which conceivably might

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the bulk of cases iners that opinion time can be devoted to cases that really require extended reflection and analysis.").

Even Reynolds and Richman, though critics of limited publication, "discovered no widespread 'hiding' of law-declaring opinions": "Although nonpublication of law-declaring opinions does occur, our review of the opinions in our sample has convinced us that it is not a major problem with limited publication. The handful of examples we discovered constituted less than 1% of the nearly 900 opinions in our sample." See Reynolds & Richman, *An Evaluation of Limited Publication*, *supra* note 17, at 608, 609.

21. Apparently, diversity cases are relatively time-consuming and difficult to process on the district-court level, but they represent relatively easy cases to dispose of on appeal, usually without need of a published opinion. Hence, Posner suggests, eliminating diversity jurisdiction would cut 20% of the district courts' caseload, but "might have a smaller impact on the workload of the courts of appeals than is implied by the fact that 14 percent of the cases appealed to those courts in 1983 were diversity cases." P. 139.

22. Posner urges curtailment of federal appellate review of agency adjudications that already have been subject to internal agency review (pp. 161-62), a proposal difficult to square with his opposition to specialized federal courts of appeals (pp. 147-60) and his acknowledgment that agency review "very often is performed in so perfunctory and unconvincing a manner that the review has little credibility with many federal judges and has to be repeated by them." P. 161. The integrity of agency adjudications, in my view, depends on the existence of federal court oversight, even if this rarely results in published opinions. Judge Friendly's more limited 1973 proposal preserved "one judicial look at the action of a disinterested governmental agency." He recommended that where review of agency action lies in the district court and the district court has affirmed, further review by the court of appeals would be possible only by leave of that court. See H. FRIENDLY, *supra* note 6, at 176.

provide a means of supervising ad hoc circuit panels and promoting greater uniformity of federal law, we are told that this cure for inter-circuit conflicts would not itself stem the flood of appellate cases, and would, moreover, eliminate desirable competition among the circuits in the formulation of rules of national law (pp. 162-66).

## II. PROPOSALS FOR THE CIRCUITS IN CRISIS

Having demonstrated the crisis and exposed conventional reforms as "palliatives," Judge Posner opens his sixth chapter:

The difficulty of solving the federal courts' caseload problems by the measures considered in the last chapter invites a different kind of approach . . . — a more general reconsideration of the federal judicial process. Of course, such reconsideration may have value apart from its contribution to alleviating the caseload crisis; but the crisis gives this kind of fundamental analysis an urgency it would otherwise lack. [p. 169]

What unifies the proposals Posner is willing to take up as part of this "more general reconsideration" (apart from some useful suggestions in Chapter Eight for promoting a greater sense of institutional responsibility among circuit judges) is that they involve either reducing the role of federal courts in administering federal law or reducing the role of federal law.

Caseload reduction is a rather odd basis for a radical redistribution of the respective roles of federal and state courts or for major changes in federal substantive law. Such measures would seem weakly justified by caseload considerations alone. At the very least, one would require a more powerful demonstration of the existence of a crisis than Posner has ventured to offer. Even then, as Owen Fiss has asked, if the system is really in danger of overload, is it not the better course to add circuit judges (and, possibly, split up further the existing circuits in order to facilitate rehearing by the *en banc* court)?<sup>23</sup> Would, say, a doubling of the existing circuit judgeships so cheapen the coin<sup>24</sup> that men and women of distinction would not be attracted to the federal bench?

Even on its own terms, Judge Posner's "more general reconsideration" offers little, if any, caseload relief. In Chapter Six, he subjects virtually all of federal law to an "economic federalism" test. He finds

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23. See Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1463-64 (1983) (increasing the number of judges may dilute institutional responsibility but preserves individual responsibility for decisionmaking); H. FRIENDLY, *supra* note 6, at 41 & n.131 (arguments against single-state circuits are not particularly compelling, for the chief virtue is political not geographic diversity).

24. This is Justice Rehnquist's metaphor. See Rehnquist, *Are the True Old Times Dead?* (Mac Swinford Lecture at the University of Kentucky, Sept. 23, 1982), cited in Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 10-11 (1983).

that federalization of the law has occurred — in areas such as bank fraud and civil rights — despite the absence of any danger of states discriminating against nonresidents or otherwise imposing not fully internalized costs on out-of-state actors — what Posner calls “interstate spillovers” or “externalities.” Applying a similar test for determining whether the federal courts have to be involved in the enforcement of federal law, he finds that state courts can be relied upon to enforce vigorously federal concerns having counterparts in familiar common law concepts (*e.g.*, federal fraud crimes), federal rules that seek to ferret out innocence in criminal prosecutions, and federal norms that protect the civil rights of individuals who enjoy competitive access to the state political system (*e.g.*, procedural due process claims by state employees and age discrimination suits). Yet, even “[i]f the theory were applied rigorously, perhaps 20 percent of the federal district courts’ cases, and 21 percent of the courts of appeals’ cases, would be reassigned to the state courts. The resulting relief of federal caseload pressures, though welcome, would only postpone the ultimate crisis a few years” (p. 189). Moreover, Posner acknowledges, a rigorous application of “economic federalism” might even argue for expansion of federal responsibility over certain areas now left wholly to the states, such as product liability suits against interstate manufacturers and distributors.

There are additional problems with the “economic federalism” approach. One is the obvious difficulty of any reform proposal that spells relief for the federal courts at the expense of state courts which face even more demanding dockets.<sup>25</sup> Posner’s answer is candidly elitist: any accretion to state dockets will not detract significantly from the quality of decisionmaking by state courts because (i) state systems are larger and can absorb these additional federal cases, and (ii) “attending to the quality of the federal court system is a more urgent priority than attending to the quality of the state systems — which anyway is something that only the states can do effectively” (pp. 134-35).

On the doubtful assumption that state courts would not be terribly burdened by the proposed reallocation of responsibility, Posner slights some of the other important reasons for making federal courts principally responsible for the enforcement of federal laws. Federal rights necessarily displace state regulation and, certainly with respect to the civil rights statutes which Posner identifies as prime candidates for diversion to the state courts, they impose norms that may be politically unpopular in the locality or that impose costs on actors — such as private businesses or state governments — who may be particularly

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25. See, *e.g.*, Meyer, *Justice, Bureaucracy, Structure, and Simplification*, 42 MD. L. REV. 659, 674-75 (1983) (abolition of federal diversity jurisdiction should be accompanied by corresponding tradeoff limiting state responsibility for enforcement of federal rights).

influential in the area. Federal courts staffed by individuals enjoying lifetime tenure are inevitably going to be more receptive to the assertion of claims based on such rights. Federal courts are also more likely to be familiar with federal law, conditioned to viewing federal law as a unitary system, and hence more attentive to pronouncements in other circuits. Indeed, adoption of Posner's approach would create considerable pressure on the Supreme Court to police actively the administration of federal law in state courts, diverting it from its more central lawmaking function — perhaps ultimately requiring a national court of appeals, which Posner opposes.

The coda to Chapter Six ("Federalism and Substantive Due Process") and all of Chapter Seven give us Posner's views on reducing the role of federal courts in constitutional adjudication. The theme here is "judicial self-restraint": in cases of "open texture," where the available decisional materials yield no "right answer," the judge who truly believes in self-restraint will defer to the decisions of the politically accountable branches. Posner never clearly comes out and says that judicial self-restraint, so understood, is always the right approach, and thus never really mounts a defense of it. Indeed, he seems somewhat ambivalent, arguing at times that "judicial self-restraint is a contingent, a time-and-place-bound, rather than an absolute good" (p. 211); arguments based on the undemocratic character of the judiciary do not justify deference; and, indeed, "restraint is only one factor in responsible judicial decision making" (p. 220), for truly great judges like Oliver Wendell Holmes showed greatness in their responsiveness to "the big ideas" of their time (p. 222).

It is difficult to come away with very much from this discussion, other than a definitional advance over more traditional views of "self-restraint" that were premised on respect for *stare decisis* and notions of strict constructionism. As a theory for what courts should do in hard cases, it is incomplete and, in its present form, unpersuasive. Posner concedes that the framers of the Constitution wanted "a nondemocratic branch" to police the democratic legislature (pp. 212-13), that the Constitution contains several openly textured provisions which require judges to exercise discretion rather than decide cases "simply by reference to the will of others" (pp. 206-07), and that other reasons conventionally given for deference, flowing from considerations of institutional competence, carry little weight. Yet, Posner never really tells us why self-restraint in his separation-of-powers sense is the preferred approach, save where judges are permitted to bring wayward legislatures and executives into conformity with the "big ideas" of the age. The reason cannot be political conservatism in the usual sense, for, as exemplified by the writings of his former colleague, Richard Epstein, a political agenda would argue for activist enforce-

ment of particular norms.<sup>26</sup>

I suspect — and it is only a suspicion, for Judge Posner does not come and say it in so many words — that the caseload crisis is being offered as an unstated yet powerful additional reason for self-restraint. An overburdened federal judiciary should not make more work for itself by overriding the actions of the politically accountable branches in “open texture” cases; restraint thus not only advances separation-of-powers values but also frees up the docket. If so, we are being offered a peculiarly weak argument for reading the fundamental text of our society in a particular way. We are also not likely to make much of a dent in the purported caseload crisis.

### III. POSNER'S MUSINGS ON THE FEDERAL JUDICIAL CRAFT: THE CASE OF STATUTORY INTERPRETATION

The remainder of the book has even less to do with relieving appellate dockets. Rather, these chapters present Judge Posner's views on the proper way to read statutes and the Constitution. He assumes that his proposals have been adopted and the caseload crisis has subsided:

If the proposals advanced in Chapters 5 through 8 were adopted, we would be some way toward solving the federal court's caseload crisis; it would then be possible to move on to those problems that would exist even if the caseload pressures were no greater today than they were 25 years ago. [p. 261]

Time and space do not permit a discussion of all that is interesting in these concluding chapters. My focus will be on Posner's view of the judge in statutory cases.

On one level, Posner adopts an “interest-group” conception of the legislative process, similar to that of his colleague Frank Easterbrook.<sup>27</sup> He is quite skeptical of the ability or desire of legislators to promote the public interest, other than as a serendipitous by-product of political logrolling. Departing from the Pound-Landis school,<sup>28</sup> he states that courts are wise not to reason from one statute to another, “if a realistic view of the legislative process is taken” (p. 268); that resort to legislative history should go no further than statements of the sponsors' intentions; and that generally private rights of action should not be judicially implied, for often the legislative compromise involves

26. See, e.g., R.A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); see also B.H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

27. See Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). Easterbrook's writings are much influenced by the work of George Stigler. See G. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

28. See Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934); Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

the deliberate creation of rights without effective enforcement mechanisms. In a particularly effective discussion, he urges disregard of many of the conventional canons of construction, because they impute an unrealistic rationality to the legislative process. Like Easterbrook's writings, this approach supports strict constructionism for statutes. As the product of legislatures is no more than compromises between competing interest groups, the job of the courts is simply to implement the deal that was struck and to go no further.

Posner's views, on further reflection, appear to be more textured, more sophisticated than Easterbrook's. In categorizing statutes, he is willing to find that statutes might be directed to the "public interest" not only in the economic sense but also "in terms of some widely-held conception of the just distribution of wealth" (p. 265), as in the case of progressive taxation; and some statutes of the "public sentiment" variety may ultimately be found in the public interest but cannot now "be justified on economic or conventional equity grounds, but perhaps only because not enough is known about [their] consequences" (p. 266).

More significantly, in offering his alternative to interpretation based on canons of construction, Posner seems to be suggesting something akin to the Hart-Sacks Legal Process school.<sup>29</sup> The first stage for Posner is "the method of imaginative reconstruction": "the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him" (pp. 286-87). If this method fails to yield a clear answer, the second stage asks the judge to come up with "the most reasonable result in the case at hand — always bearing in mind that what seems reasonable to the judge may not have seemed reasonable to the legislators, and that it is their conception of reasonableness, to the extent known, rather than the judge's, that should guide decision" (p. 287). Despite the "obvious affinities" between his methodology and the Hart-Sacks "attribution of purpose" approach (p. 288), Posner cautions that his point of departure is to recognize the role of "interest groups, popular ignorance and prejudice" and urge the judge to follow the lines of the legislative compromise, if discernible — in short, "to implement not the purposes of one group of legislators but the compromise itself" (pp. 288-89).

Judge Posner is certainly a more muted critic of the legislative process than Professor Posner.<sup>30</sup> His present views, though more appropriate to the judge's modest office, are difficult to square with the "interest group" model of legislation that he otherwise espouses. If statutes are no more than political logrolling, why should judges engage at all in "imaginative reconstruction"? And certainly when this

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29. See H. Hart & A. Sacks, *The Legal Process* 1144-74 (1958) (unpublished).

30. Compare R.A. POSNER, *supra* note 1, at 408-17.

technique fails to provide an answer, should not the judge who takes a "realistic" view of the process simply declare that the case is beyond the "statute's domain," rather than attempt to come up with a "reasonable result," which presumably was no concern of the legislators in the first place?

There may be here the seeds of an interesting reconception of the legislative process — one that better reflects the fuzzy interplay of "interest group" pressures and "public interest" aspirations which informs most legislation, and one that assigns to judges a role that maximizes the influence of the latter.<sup>31</sup> But the discussion is too summary and too uncritical of "interest group" premises — ultimately, the reader is left in the dark.

Given the book's overall theme, it is also surprising that Posner does not explain how the caseload crisis should inform the process of statutory interpretation. This would seem an obvious place to have attempted a linkage between the two books he has written, yet we are left only with questions. For example, should the securities laws be construed to reach instances of fraud not directly affecting the operation of markets, where such a reading will create additional work for federal courts?<sup>32</sup> How should courts deal with claims for extending avowed "public interest" measures that delegate decisionmaking to, and measurably expand the business of, the federal courts, such as the Sherman Act<sup>33</sup> or 42 U.S.C. § 1983?<sup>34</sup> Are caseload considerations ever an appropriate basis for declining to extend a statute's reach?

In sum, Judge Posner does not deliver on the book's subtitle: the "crisis" in the courts of appeals is unproven, and the "reform" offered has little to do with ameliorating the crisis. Posner has written a probing work on the "federal courts," but one lacking a coherent thesis on the proper role of courts in federal constitutional, statutory, and common law cases.

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31. For an interesting recent attempt, see Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

32. See, e.g., *Yoder v. Orthomolecular Nutrition Inst.*, 751 F.2d 555 (2d Cir. 1985) (application of antifraud provisions of securities laws to employment disputes).

33. See, e.g., *California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). See generally Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

34. See, e.g., *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).