Michigan Law Review

Volume 87 | Issue 6

1989

Siskel and Ebert at the Supreme Court

Thomas E. Baker
Texas Tech University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Courts Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472 (1989).
Available at: <https://repository.law.umich.edu/mlr/vol87/iss6/24>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

SISKEL AND EBERT AT THE SUPREME COURT

Thomas E. Baker*

REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS. By *Samuel Estreicher* and *John Sexton*. New Haven: Yale University Press. 1986. Pp. 201. \$20.

INTRODUCTION

Gene Siskel and Roger Ebert are movie critics appearing together on "Siskel and Ebert: At the Movies," a popular syndicated television program. These critics have become celebrities in their own right, yet they have never produced, directed, or acted in a movie; they make their living passing judgment on those who do. Professors Samuel Estreicher and John Sexton are "two sharp young law professors" with "impressive"¹ credentials who have functioned as Siskel and Ebert by reviewing critically the work of the Supreme Court. They also have attained the celebrity status of Siskel and Ebert: their study has been cited and widely discussed,² even in the work of the Justices them-

* Professor of Law, Texas Tech University. B.S. 1974, Florida State University; J.D. 1977, University of Florida. — Ed.

1. Mikva, *Cutting the Problem Down to Size* (Book Review), 39 HASTINGS L.J. 229, 231 (1987). Estreicher and Sexton each served as law clerk to a Supreme Court Justice — the former for Justice Powell during the 1977 Term, and the latter for Chief Justice Burger during the 1980 Term.

2. Estreicher and Sexton set out "to alter the terms of the debate over the (Supreme Court) overload problem," p. 71, and they have succeeded. See P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 45-46 n.79, 1874 (3d ed. 1988) [hereinafter HART & WECHSLER]; Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Möbius Strip*, 19 GA. L. REV. 799, 841 n.199 (1985); Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1411-12 nn.62 & 64 (1987); Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 7 n.30, 11 n.60 (1986); Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1267 n.241 (1987); Davis, "There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 HARV. L. REV. 1539, 1604 n.389 (1987); Dreyfuss, *Dethroning Lear: Licensee Estoppel and the Incentive to Innovate*, 72 VA. L. REV. 677, 750 n.265 (1986); Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1418 n.6, 1450 n.100 (1987); Lawlor, *Court Packing Revisited: A Proposal For Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967, 989 n.114, 995 n.137 (1986); Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1384 n.431, 1386 n.439, 1388 n.445 (1986); Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 100 n.4 (1986); Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 340 n.338 (1987); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 563 n.118 (1985); Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of*

selves.³ These previous reviews have been remarkably favorable.⁴

Redefining the Supreme Court's Role is, for the most part, a revision of the 1253-page report of the New York University Supreme Court Project that Professors Estreicher and Sexton initiated.⁵ This 201-page effort, according to the authors, "presents the findings of the [*New York University Law Review*] project in a manner more accessible to the nonlawyer with additional material exploring some of the broader implications of our study" (p. 4). I accept their repeated invitations to join in the debate over federal court reform (pp. 75 & 136), but my chief purpose is to perform as critic for the curious reader who, as the moviegoer depends on Siskel and Ebert, depends on book reviewers to help decide if a book is worth reading. In that sense I write this review — with the hubris of a movie critic — so that *my* reader need not read *their* book. Although Professors Estreicher and Sexton give the proposal for an Intercircuit Panel two thumbs-down — in the style of Siskel and Ebert — I give their effort one thumb-up and one thumb-down.⁶

As an initial matter, the authors' title, *Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process*, is thrice flawed. First, it seems presumptuous. Second, while the Supreme Court is the highest court in the federal judicial system, it is only one level of a complex federal judiciary. A focus on the Supreme Court is much too narrow to expect needed systemic relief. There are

Agency Action, 87 COLUM. L. REV. 1093, 1093 n.1, 1097 n.15, 1108 n.65, 1110 n.71 (1987); Wallach, *Intercircuit Conflicts and the Enforcement of Extracircuit Judgments*, 95 YALE L.J. 1500, 1502 n.8, 1508 n.28 (1986); Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1022 n.137 (1985).

3. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 283 n.78 (1985) (Brennan, J., dissenting); *California v. Carney*, 471 U.S. 386, 398 & n.8 (1985) (Stevens, J., dissenting).

4. See, e.g., Strauss, *supra* note 2, at 1093 n.2 (study is a "disciplined and catholic analysis"); Rowe, *Book Review*, 4 CONST. COMMENTARY 417, 418, 420 (1987) (book "develops a framework for analysis" and is "an important contribution to the debate"); Mikva, *supra* note 1, at 231 (book is "a model for academics seeking to influence the legal topography").

5. Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984). See also Estreicher & Sexton, *Improving the Process: Case Selection by the Supreme Court*, 70 JUDICATURE 41 (1986).

6. I should disclose that in previous writings I have endorsed the proposal to create a new intermediate court. See Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. FLA. L. REV. 225, 287-88 (1985); Baker & McFarland, *supra* note 2, at 1416. And I have been accused, by a fellow reviewer, of criticizing these authors' work "perhaps too stridently but with some justification." Rowe, *supra* note 4, at 421.

I feel some obligation toward further disclosure. During 1985-1986, I served as a Judicial Fellow in the Office of the Administrative Assistant to Chief Justice Warren E. Burger; from September 1986 to January 1987, I served as Acting Administrative Assistant to Chief Justice William H. Rehnquist. For a summary of the duties of a Judicial Fellow and an Administrative Assistant, see generally D. O'BRIEN, *STORM CENTER* 144-46 (1986); Cannon & Morris, *Inside the Courts: The Judicial Fellows Program*, 12 PS 6 (Winter 1979). However, I do not have an axe to grind. I do not view myself as a "minion" of either Chief Justice I have served, in either sense of the word, although I suppose myself to be as "loyal" an "alumnus" of their judicial "empire" as Judge Mikva supposes the coauthors to be. Mikva, *supra* note 1, at 231.

many profound challenges facing federal court reformers who more properly recognize that the federal courts articulate as a system and, still more properly, recognize that the federal and state judiciaries are inextricably linked.⁷ Third, the subtitle is misleading. The last chapter on implications and conclusions, eight pages in all, simply does not justify their subtitle. They should have promised less or done more. The title of their article was more modest and more accurate.

A "NEW VISION"

The authors begin with a clarion call for a new "vision" of the Supreme Court (p. 5). Lamentably, their offering is neither new nor visionary. Their straw person is the age-old myth that wronged litigants may take their cases "all the way to the Supreme Court." The authors seem to patronize their readers to admit that "[n]o sophisticated observer would argue that the Court today sits merely to correct error at the behest of disappointed litigants"⁸ Yet that is their major, though negative, premise: the proper role for the Supreme Court does not include error correction. Their minor premise is that this "vision" is inadequately observed by the Justices and by those who, like me, argue that there is a need for greater unity in the national law. Their syllogistic conclusion is a rather sophomoric "managerial model" of the Supreme Court:

Recognizing that the Court has a finite capacity to hear cases, we argue that the Court's principal objectives in selecting cases for plenary consideration should be to establish clearly and definitively the contours of national legal doctrine once the issues have fully "percolated" in the lower courts, to settle fundamental interbranch and state-federal conflicts, and to encourage the state and federal appellate courts to engage in thoughtful decisionmaking, mindful of their own responsibility in the national lawmaking process. Following our managerial model, the Court would not select cases because of the presence of error or the ostensible importance of the substantive issue involved. [pp. 4-5]

The problem, we are told, is not one of workload but of "role definition."⁹

Indeed.

7. See sources cited in Baker, *supra* note 6, at 226 n.6.

8. P. 2. In calling for the Court to "recast" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the authors reject the notion that the Supreme Court *qua* court makes law only in the course of deciding actual disputes, insofar as it portrays the Court as available to correct error. Pp. 129-30. The implications of their super-court theory for separation of powers, federalism, and constitutionalism are profound. These issues of role and legitimacy go far beyond the scope of my review, and fortunately the authors' expressed purpose. I was relieved to read the authors' nod to the notion of limited government when they said, "We agree that the Court's legitimacy is ultimately traceable to its role in deciding actual controversies — and for reasons more fundamental than the formal notion that the 'judicial power' granted by Article III extends only to 'cases and controversies.'" P. 129.

9. P. 7. To me, it smacks of ill-grace, at least preliminarily, for two former law clerks to dismiss so blithely the testimonials of every member of the Court that workload is a serious

While many commentators, including the two authors and this reviewer, have attempted to describe the ideal appellate function, all contemporary writers should admit that Karl Llewellyn and Roscoe Pound "long ago uttered every pertinent observation."¹⁰ Llewellyn and Pound identified two primary appellate court functions as the correction of errors (or pronouncing correctness) in specific disputes and the declaration of law by creation, clarification, elaboration, or overruling. In the error-correction function, the controlling principles of law are settled and the decision is whether the appeal presents a correct or incorrect application; in the declaration function, the emphasis is on the creation and harmonization of legal principles.

Since the Evarts Act of 1891,¹¹ the design of the federal system has assigned error-correction to the courts of appeals, which were expressly created for that task, and the declaration function to the Supreme Court. Congress reiterated this division of appellate function in the Judges' Bill of 1925,¹² which dramatically reduced the Supreme Court's mandatory jurisdiction.

Many of the problems with the federal court system are traceable to this division of appellate labor. The courts of appeals have become somewhat like regional supreme courts because the effectiveness of Supreme Court supervision has diminished with the dramatic increases in the circuits' caseloads. The need for uniformity and certainty is exacerbated further by the volume of federal questions arising in decisions by the fifty state supreme courts. It must therefore be conceded that the Supreme Court operates as a "Court of Selected Error."¹³ But there remains a seemingly irresistible urge to have the Supreme Court act as a court of general errors. That there are poorly selected instances of error correction or, perhaps more accurately, disagreements over particular exercises of jurisdictional discretion,¹⁴ may be an inevitable cost of this most important value in case selection, which we all agree must be considered central to the role of the Supreme Court.

The authors are not to be criticized for calling for a new vision of the Court. But to strive for a single all-encompassing and timeless vision of the role of the Supreme Court is to search for the Holy Grail. We may be ennobled in the effort, but we should not be disheartened

worry, even though I acknowledge that the Justices do not agree on the cause or the solution. See Baker & McFarland, *supra* note 2, at 1402.

10. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 8 (1976) [hereinafter *JUSTICE ON APPEAL*]. See generally K. LLEWELYN, *THE COMMON LAW TRADITION — DECIDING APPEALS* (1960); R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941).

11. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

12. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

13. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE* § 4004, at 525 (1977).

14. *E.g.*, *Florida v. Rodriguez*, 471 U.S. 386, 395-401 (1985) (Stevens, J., dissenting).

by the futility of our quest. Compare Chief Justice Marshall's vision of judicial review and the Court with Judge John Bannister Gibson's. Or compare the strong views of Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin D. Roosevelt. There is not much of a shared vision among constitutional law scholars over the generations. Certainly at our most recent constitutional lyceum, the Senate consideration of the nomination of Judge Robert H. Bork, no unitary vision of the Court and Constitution emerged.¹⁵

I suppose this is as it should be. The Court is, after all, a human institution; the vision actually portrayed by the Court in performing its role, to be distinguished from some idealized vision, must be some amalgam of nine chambers. When five or more happen to coincide there is a prevailing vision, for a time and for one object. That may be all that we can expect from such a powerful institution with its scope of discretion and responsibility of decision.

EARLIER PROPOSALS

Professors Estreicher and Sexton rightly credit Chief Justice Burger as the catalyst for consideration of reform of the federal court structure. Contrary to their implication, however, the efforts to create a new national appellate court did not originate with him.¹⁶ But the authors begin with the 1972 report of the Freund Committee,¹⁷ which recommended creation of a national court of appeals. Next, the so-

15. See generally SENATE COMM. ON THE JUDICIARY, NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. 7, 100th Cong., 1st Sess. (1987); *The Bork Nomination — Essays and Reports*, 9 CARDOZO L. REV. 1-530 (1987).

16. The first contemporary study of federal jurisdiction was instigated by Chief Justice Warren and focused on the proper division between the federal and state courts. It had little to say about federal appellate concerns, except that a reduction in original jurisdiction would result in fewer appeals. AMERICAN LAW INST. STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Official Draft 1969). Another report, published under the auspices of the American Bar Association, focused on the burgeoning federal appellate caseloads. It suggested various efficiency reforms for handling appeals and posited sequential responses, including creation of regional panels of the courts of appeals or subject matter appeals courts or some new national court. AM. B. FOUND., ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS (1968).

Chief Justice Burger did not specifically endorse the proposal for a new intermediate court until 1983. See Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 447 (1983). And the proposal was but a small part of his broad effort to improve the administration of justice. See Gazell, *Chief Justice Burger and the Administrative Side of Justice: A Retrospective*, 13 WM. MITCHELL L. REV. 737 (1987); Tamm & Reardon, *Warren E. Burger and the Administration of Justice*, 1981 B.Y.U. L. REV. 447. See also *A Tribute To Chief Justice Warren E. Burger*, 100 HARV. L. REV. 969-1001 (1987) (Tributes by William H. Rehnquist, Kenneth W. Starr, Alex Kozinski, John Edward Sexton, Mark W. Cannon, George E. MacKinnon).

17. *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1972) (Prepared for the Federal Judicial Center). Named after its chairman, Paul A. Freund, the committee was a group of jurists, scholars, and attorneys, and was commissioned by the Federal Judicial Center under the aegis of Chief Justice Burger. Its recommendations met with a hailstorm of controversy.

called Hruska Commission proposed a national court of appeals with jurisdiction between the existing courts of appeals and the Supreme Court.¹⁸

Three other studies, not discussed by the authors, also have analyzed the problems of the federal court system. In liaison with the Federal Judicial Center and the National Center for State Courts, the Advisory Council on Appellate Justice conducted a four-year study. This council of judges, lawyers, and law professors in 1975 developed guidelines consistent with the Hruska Commission.¹⁹ The Action Commission to Reduce Court Costs and Delay, created in 1978 by the American Bar Association, recognized a federal court workload crisis and recommended immediate changes to increase appellate efficiency.²⁰ And a committee within the Department of Justice, appointed by Attorney General Levi and chaired by Solicitor General Bork, issued a report in 1977 that emphasized the problems of the federal court system and recommended various reforms.²¹

Study after study, committee after committee, has told us the chief needs of this generation for federal appeals are not being met.²² Professors Estreicher and Sexton tell us that this is not so. The lesson they draw from this history "is that sweeping changes in the structure of the federal judiciary have not been forthcoming without a consensus among the Justices themselves and the scholarly and legal communities that a problem of sufficient magnitude exists" (p. 20). But there are additional reasons why federal court reform is difficult to accomplish. The Congress always has shown a separation-of-powers skepticism toward proposals from the third branch and something of an agnosticism toward academic proposals for court reform. Court reform has no natural constituency beyond the judges themselves and, perhaps, a few motivated lawyers. Even a consensus that a problem exists coupled with agreement on the appropriate solution cannot ensure a prompt legislative response. Witness the longstanding consensus that the Court's mandatory appellate jurisdiction should be abolished, a change not realized until 1988.²³ The Evarts Act, creat-

18. See Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 237-47 (1975). An earlier report had recommended various reforms for the courts of appeals. Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973).

19. See Meador, *The Federal Judiciary — Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617, 628-29.

20. See Hufstедler & Nejelski, *ABA Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965 (1980).

21. DEPT. OF JUSTICE COMM. ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, *THE NEEDS OF THE FEDERAL COURTS* (1977).

22. The literature is surveyed in Gazell, *The National Court of Appeals Controversy: An Emerging Negative Consensus*, 6 N. ILL. U. L. REV. 1 (1986).

23. See *infra* text accompanying notes 95-100.

ing the circuit courts of appeals in 1891, was passed after a century of complaints about various features of the First Judiciary Act, and more than forty years after it was first proposed.²⁴ Once begun, Congress took another twenty years to complete the creation of an autonomous intermediate court.²⁵ We should expect legislative consideration of structural reforms of the federal courts to be purposeful and deliberate, and so it has been. Any implications by Professors Estreicher and Sexton that the proposal is dead or any suggestion by others that their study has killed it²⁶ are, like Mark Twain's premature obituary, "greatly exaggerated."

THE PRESENT DEBATE

The authors next map the "Contours of the Present Debate" (p. 31). They ably summarize the debate over the Freund Committee and Hruska Commission proposals, and they canvass the arguments over more recent permutations. They conclude, first, that proponents of a new national court have "assumed without question the need for a new appellate court" and have merely focused on "details" such as whether the new court should be temporary or permanent and how it should be staffed and what jurisdictions it should be given (p. 31). Second, they criticize opponents of the latest proposal for offering the "same criticisms earlier advanced" against quite different proposals (p. 31).

Their first conclusion is, at best, inaccurate and, at worst, unfair. Proponents of a new national court have not merely "assumed" that the Supreme Court has a workload problem; we have simply failed to convince Professors Estreicher and Sexton. During the 1928 Term, fifteen cases were filed each week; during the 1958 Term, thirty-five; during the 1970 Term, sixty-six; during the 1985 Term, eighty-five. It seems to me to lack grace to deny the public comments of all the current Justices (except Justice Kennedy) who have expressed concern about growing workload. Nor do the authors find the work of other commentators persuasive.²⁷ That Professors Estreicher and Sexton re-

24. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 (1891). See CONG. GLOBE, 30th Cong., 1st Sess. 398-99 (1848).

25. See Act of Mar. 3, 1911, Pub. L. No. 61-475, 36 Stat. 1087.

26. See pp. 25-31. See also Editorial, *At Year's End*, Natl. L.J. Jan. 18, 1988 at 12 (urging Chief Justice Rehnquist to "drop this idea"); Kamen, *National Appeals Court Appears to be Lost Cause*, Wash. Post May 13, 1988 at A21 (calling it "an idea whose time has come and gone").

27. Thirty years ago, Professor Fowler V. Harper and four collaborators analyzed the Court's workload and concluded the Court had more work to do than it could do well. See Harper & Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427 (1954); Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439 (1953); Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354 (1951); Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term: An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950). Although there appear to me great similarities between the Harper efforts and the efforts of

main unconvinced is attributable to the fact that other commentators have not persuaded them, not that the others have not tried. My concern is that the authors seem unpersuadable as they dismiss each and every reasoned argument to the contrary.

I could not agree more with the authors' second conclusion. The opposition to the creation of a new national court has been characterized by a peculiar and frustrating dissonance.²⁸ Opponents say there is no "need" for a new court with such and such a feature, but they mean to say that they oppose only the particular feature.²⁹

THE "MANAGERIAL" THEORY

The heart and soul of *Redefining the Supreme Court's Role* is found in the chapter entitled "A Managerial Theory of the Supreme Court's Docket: Criteria for Case Selection" (pp. 41-70). Charging that "[w]riting and thinking about the Court is marked by an unwillingness or inability to resolve conflicting visions of the Court's respon-

Professors Estreicher and Sexton, the latter two dismiss the former effort as lacking a "systematic framework" and as incomplete. Pp. 168-69 n.5.

Professor Henry M. Hart prepared his famous time chart for the Justices to conclude "the Court has more work to do than it is able to do in the way in which the work ought to be done." Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, (1959). The authors, however, choose to side with Justice Douglas' hastily considered and eccentric response and Thurmond Arnold's polemic against Hart. Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 411 (1960). Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1310-14 (1960). See also Griswold, *The Supreme Court, 1959 Term — Foreword: Of Time and Attitudes — Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 83-86 (1960).

My coauthor and I recently recalculated Professor Hart's figures on the Justices' work week to arrive at "9.6 hours on a six-day week, or more likely 8.2 hours daily on a seven-day work week." Baker & McFarland, *supra* note 2, at 1401-02. See also *id.* at 1403 (estimates of the quantity of work for one Term totalling over 400,000 pages of materials and in excess of 800 hours). One recent estimate is that the Court's caseload and conference schedule now allows an average of six minutes at Conference for each case on the Discuss List and just under one-half hour for the consideration of each case granted plenary review. D. O'BRIEN, *supra* note 6, at 231. Is it any wonder why Supreme Court Justices more and more resemble singers of "rounds," with a profusion of separate voices in concurring and dissenting opinions? *E.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Bowen v. Roy*, 476 U.S. 693 (1986).

28. See Baker & McFarland, *supra* note 2, at 1414-15.

29. Then Circuit Judge Bork made the appropriate distinction in his explanation of his own conversion:

I have been opposed to the concept of a National Court of Appeals since I first studied the proposal in 1976.

That view, however, has been shaken. Members of the Supreme Court whose judgment I respect have endorsed the idea in very positive terms. They are certainly more familiar with the problem of inadequate national appellate capacity than I am. If they say there is a real problem, I cannot plausibly dispute their assertion.

This has forced me to rethink my position and to ask how much of my dislike of the proposal stems from the basic concept and how much from the specific features of the proposal now before you. Upon reflection, I think it is the specifics of the bill rather than the fundamental idea that trouble me.

To Establish an Intercircuit Tribunal of the U.S. Courts of Appeals: Hearings on H.R. 4238 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 23 (1986) (prepared statement of Judge Robert H. Bork).

sibilities" (p. 41), Professors Estreicher and Sexton set out "to improve significantly upon the generalities of [Supreme Court] Rule 17," the Court's published standard of discretion.³⁰ They do so despite the warning by the acknowledged leading experts on Supreme Court procedural lore that "[a]ny attempt to restate these criteria with greater precision is somewhat temeritous"³¹ in light of the cautions by the Justices over the years that no rule could capture all the nuance in the exercise of this discretion to select cases.

The authors begin with the heuristic assumption that the Court's jurisdiction should be wholly discretionary (p. 44). Further, they conveniently control for several complications by announcing their intention not to address them. Thus, they decline to weight cases for importance and time demand; they do not consider how the screening burden adds to the workload and takes away from the quality of decisionmaking; they ignore the frequently expressed concern that the Court is unable to decide a sufficient proportion of cases to achieve a satisfactory coherence in federal law; they seemingly reject out of hand the announced perceptions by all the Justices that they have too much to do and the suggestion by some Justices that referring cases to a new national court would give the Court greater influence over the national law; and most important, they omit any implications for the caseload problems of the district courts and courts of appeals (pp. 45-46).

What Professors Estreicher and Sexton do describe is their "managerial model" of the Supreme Court; properly viewed, the Court is the "manager of a system of courts involved in the development of sound, nationally binding federal law" (p. 49). This is not particularly upsetting, on first reading. Indeed, a "managerial perspective" admittedly is acceptable intuitively as being consistent with a host of principles in American constitutional history.³² But it is intuitively acceptable, in

30. P. 43. Rule 17 provides, in part:

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

SUP. CT. R. 17.

31. P. 43. See R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* 195 (6th ed. 1986) [hereinafter *SUPREME COURT PRACTICE*].

32. See Strauss, *supra* note 2, at 1097. One could broadly describe the Supreme Court's role as "defining and vindicating general constitutional rights, maintaining a reasonable degree of uniformity in federal law, and preserving the constitutional distribution of powers between the

part, because it is so indeterminate. Such a syncretism would deny Professors Estreicher and Sexton any meaning for their model, however, as it would encompass conflicting visions of the Court's responsibilities. And I am certain that they do not mean for it to have that quality.³³ This is their most grievous error. I do not care for their metaphor or its functional and structural implications.

First, I resist the metaphor itself: the Court as a "wise manager" (p. 50). It may have the veneer of modernism and an interdisciplinary gloss, but I find it pseudoscientific and artificial. The Court's role is probably better described in poetry and art than in M.B.A. jargon. I would suggest to Professors Estreicher and Sexton that their efforts and the whole constitutional enterprise would be better off with fewer metaphors. Perhaps the problem is that no metaphor adequately captures the essential role of the Court.³⁴ Eschewing metaphors, Professor Herbert Wechsler, a great student of the Court, once described "our highest court" as

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.³⁵

More important, the functional implications of the managerial metaphor are unsettling. The Supreme Court of Professors Estreicher and Sexton eclipses even the role of legislature and becomes the signal institution for planning and managing public policy. The authors, in effect, finesse away the richness of the contemporary debate over the proper role for the judiciary in the separation of powers with their managerial metaphor.

The principle of federalism provides another functional vantage on the changing role of the Supreme Court and the rest of the federal courts that the authors overlook. Given the narrow focus of their book, perhaps this oversight may not be faulted. Recent debate, however, raises several far-ranging questions. What are the contending views on the role of the states in the federal system? Have the three branches of the federal government honored federalism? Has the Supreme Court performed its proper institutional role regarding the States? Have the lower federal courts performed their proper institu-

states and the national government and among the three coordinate federal branches." Baker & McFarland, *supra* note 2, at 1405.

33. See p. 41.

34. See Powell, *Constitutional Metaphors*, THE NEW REPUBLIC 314 (Feb. 11, 1925) (Reviewing J. BECK, THE CONSTITUTION OF THE UNITED STATES (1925)).

35. Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1043 (1977).

tional role regarding the states? How have the federal courts affected state sovereignty? At least, I think I may fairly criticize the authors for ignoring the interrelatedness of the Supreme Court and the state judiciaries.³⁶

Alarms go off in my head when I read Professors Estreicher and Sexton's Freudian references to the Court's "agenda." My chief concern is that functional limits in separation of powers and federalism are left behind as one begins to think that the Supreme Court no longer is a federal court — and need not act as a court or only in the federal sphere — and begins to think about managing an "agenda."

My final criticism of the managerial model is also structural and relates to the Supreme Court's proper role in maintaining uniformity in federal law — the problem of conflicts. Professors Estreicher and Sexton emphasize a "presumption of regularity" to be accorded decisions of federal and state appellate courts (p. 50). Their assumption, the current *certiorari* assumption, is that it is proper to grant Supreme Court review in few cases. This places a special responsibility on the lower courts which, as a practical matter, would finally decide most cases. Although Professors Estreicher and Sexton say their model "is prepared to take seriously [the Court's] responsibility to resolve conflicts" (p. 54), their further elaboration belies it. They unremarkably argue that the Court need not "act to eradicate disuniformity as soon as it appears" (p. 48), but quite remarkably go on to contend that

disuniformity, at least in the short run, may be tolerable and perhaps beneficial. It may be that such disuniformity was an unintended by-product of a geographically dispersed, decentralized judicial structure; but it is a feature that has endured, we submit, because the system's commitment to uniformity is qualified by a policy in favor of intercircuit experimentation. Disagreement in the lower courts facilitates percolation — the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule.³⁷

◦ Nonsense.

Intercircuit conflicts may be inevitable given our court structure, but they are an evil nonetheless.³⁸ Uniformity in matters of a federal

36. The authors give disappointingly short shrift to the fifty state court systems and their complex relation with the federal courts — a single paragraph of less than 200 words. P. 135. This is remarkable given the profound tensions for federalism in these relations. See, e.g., S. FINO, *THE ROLE OF THE STATE SUPREME COURT IN THE NEW JUDICIAL FEDERALISM* (1987). They deal with the issue of the independent and adequate state ground doctrine in a wholly unsatisfactory manner. Unaccountably, they ignore the most recent in a long line of cases, the landmark opinion in *Michigan v. Long*, 463 U.S. 1032 (1983), which revamped the methodology for deciding whether to remand such cases to the state court. *Long* was decided just before the *N.Y.U. Law Review* study was published, but well before this book.

37. P. 48 (footnote omitted).

38. See generally Baker & McFarland, *supra* note 2, at 1404-09.

law has been the overriding policy since the drafting of the Supremacy Clause³⁹ and the creation of a role for one Supreme Court.⁴⁰ A policy of uniformity undergirded the unpopular but long surviving requirement that Justices ride circuit,⁴¹ the last remnant of which is the current practice of designating a Circuit Justice.⁴² It was uniformity, in large part, that compelled the Court to uphold the constitutionality of its authority to review state decisions.⁴³ A concern for uniformity persuaded Congress to expand the jurisdictional statute of the Supreme Court in 1914, the single such expansion in history.⁴⁴ And the Judges' Bill of 1925 was deemed a measure to allow the Court to achieve greater uniformity.⁴⁵

Additionally, there is a growing number of conflicts resulting from two contemporary characteristics of the circuit courts. First, the individual courts of appeals have developed an artificial autonomy in their *stare decisis*.⁴⁶ When created in 1891, the courts of appeals were to function "to correct individual injustice and control erroneous or lawless behavior by judges or other officials. . . ."⁴⁷ Soon their dockets exceeded their capacities, and Congress responded by adding judges. As the number of judges grew, more permutations of three-judge panels became possible. This threatened the institutional values of uniformity among panel decisions and majority control over the law of the circuit. The first mechanism for preserving these values was the *en banc* rehearing before all the active judges. *En banc* rehearings proved inefficient, however, as they resulted in cumbersome delay and expense for the litigants and consumed scarce judicial resources.⁴⁸ The rule of

39. U.S. CONST. art. VI, cl. 2. See also THE FEDERALIST No. 80 (A. Hamilton).

40. At the Philadelphia Convention, John Rutledge articulated the consensus reason for the establishment of one supreme national court: "to secure the national rights and uniformity of Judgments." Quoted in Vinson, *Work of the U.S. Supreme Court*, 12 TEXAS B.J. 551, 551-52 (1949).

41. See generally Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687, 689-94 (1981).

42. 28 U.S.C. § 42 (1982).

43. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816); see also *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 631-32 (1874).

44. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

45. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

46. See Baker, *supra* note 41, at 720-23.

47. JUSTICE ON APPEAL *supra* note 10, at 200.

48. Recognizing the problems with *en banc* rehearings, Professors Estreicher and Sexton later in the book suggest a number of alternate approaches to police circuit panels. One is requiring publication of an opinion in each appeal on rehearing in which a party claims the panel did not follow circuit precedent. P. 133. A second is a rule that rehearings be conducted by a panel different from the one that originally decided the appeal, p. 134, and a third would require the panel to circulate a draft opinion to the parties for comment. P. 135. The first suggestion is naive. Requiring an opinion that says the panel followed precedent will not ensure that it did. See Baker, *supra* note 6, at 246-56. Published written opinions on the merits assure the litigants and the public that the decision is the result of reasoned judgment and not mere fiat. Second opinions on rehearing add marginally, if at all, to these purposes. The second suggestion is

interpanel accord, a variant of *stare decisis*, developed and grew in prominence as an alternative to preserve those two institutional values. Sometimes referred to as the "law of the circuit," this rule obliges a three-judge panel to treat earlier panel decisions as binding absent intervening *en banc* or Supreme Court considerations. Decisions of other courts of appeals, by contrast, are deemed merely persuasive. As a result, parallel and independent hierarchies of precedent have developed for each circuit. This ersatz independence raises the potential for conflicting decisions among the circuits.

Although the policy of one national law is preserved, at least in theory, by the supervisory or "managerial" power of the Supreme Court over the courts of appeals, docket growth creates the realistic likelihood for conflicts. The real villain is the docket growth at the intermediate level.⁴⁹ The number of appeals has increased nearly tenfold in the last three decades, from 3,713 in 1960 to 35,700 in 1987.⁵⁰ Congress has more than doubled the number of circuit judges,⁵¹ though judgeships have not kept pace with increased filings.

All those federal appellate decisions from all those federal appellate judges, along with the countless decisions on federal law by the highest courts in the fifty states, are reviewable, if at all, by only one Supreme Court of nine Justices. As recently as 1924, the Supreme Court reviewed about one in ten decisions of the courts of appeals. Twenty-five years ago, the rate had dropped to between 2% and 3%, in recent years the rate has dwindled to less than 1%.⁵² As then-Justice Rehnquist observed:

The Court cannot review a sufficiently significant portion of the decisions of any federal court of appeals to maintain the supervisory authority that it maintained over the federal courts fifty years ago; it simply is not able or willing, given the other constraints upon its time, to review all the decisions that result in a conflict in the applicability of federal law.⁵³

In recent Terms, intercircuit conflicts have comprised approxi-

inefficient. Having a second panel review petitions for rehearing might not add much administrative work, but the rehearing panel still would have to evaluate unfamiliar issues on an unfamiliar record, adding to an already burdensome workload. The third suggestion is oblivious to the circuit reality. Circulating opinions to the parties for comment, a technique tried in the District of Columbia Circuit, *see Alabama Power Co. v. Costle*, 606 F.2d 1068, *superseded in* 636 F.2d 323, 343-44 (D.C. Cir. 1979) (Leventhal, J.), obliges a kind of petition for panel rehearing in every case without regard to appropriateness and thus is overinclusive. It prolongs the appeal, increases costs, and wastes already scarce judicial resources.

49. *See generally* Baker, *supra* note 6, at 234-38.

50. DIR. OF THE ADMIN. OF. OF THE UNITED STATES CTS., 1960 ANN. REP. 3; *see also* ADMIN. OF. OF THE UNITED STATES CTS., FEDERAL JUDICIAL WORKLOAD STATISTICS 1 (1987).

51. *See* Act of May 19, 1961, Pub. L. No. 87-36, 75 Stat. 80 (1961); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201, 98 Stat. 333, 346 (1984).

52. Baker & McFarland, *supra* note 2, at 1405-06.

53. Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U. L.J. 1, 4-5 (1984).

mately 5% of the entire docket and about one-third of the signed opinions. This suggests a certain priority being given to conflict resolution, as would be expected. Justice White recently has endeavored to leave a trail of unresolved conflicts in the *U.S. Reports* by dissenting from the denial of *certiorari* when the case presents an unresolved conflict.⁵⁴ By my count, there were fifty-four such dissents by Justice White in the 1984 Term, forty in 1985, seventeen in 1986, and twenty-seven in 1987. Some studies of the Supreme Court docket find fewer, some find more.⁵⁵ The point is that conflicts in national law are accumulating.

Justice White has best described the mischief of unresolved conflicts:

[D]enying review of decisions that conflict with other decisions of Courts of Appeals o[r] State Supreme Courts results in the federal law being enforced differently in different parts of the country. What is a crime, an unfair labor practice or an unreasonable search and seizure in one place is not a crime, unfair practice or illegal search in another jurisdiction. Or citizens in one circuit do not pay the same taxes that those in other circuits must pay. . . . And this is to say nothing of those cases involving no conflict but obviously important statutory or constitutional issues that warrant authoritative review.⁵⁶

This creates an incentive to engage in forum shopping and "races to the courthouse"⁵⁷ and to refuse to acquiesce in the first court's adverse ruling in the hope that another court's subsequent ruling will be favorable. My favorite example is the controversial and complex issue whether the U.S. Postal Service is immune from state court garnishment proceedings. Before the Supreme Court finally decided the issue, the government had urged its view twenty times in district courts and

54. See generally Varat, *Justice White and the Breadth and Allocation of Federal Authority*, 58 U. COLO. L. REV. 371 (1987); Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610 (1987).

55. See L. BECK, *INTER-CIRCUIT CONFLICTS AND THE SUPREME COURT OF THE UNITED STATES: A STUDY OF THE 1984 TERM* (Feb. 1986) (unpublished manuscript available in the Office of the Administrative Assistant to the Chief Justice).

There are only estimates of the conflicts on the dockets of the courts of appeals. A 1982 study of one of the twelve regional circuits estimated that ninety decisions of that single court that year were in conflict with another court of appeals and of that number thirty-six created a first-time conflict. See Hearings on H.R. 1968 and H.R. 1970 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 170 (1983) (Statement of Chief Judge Godbold). Multiplying that number by some factor of twelve and adding some number from an even more removed speculation for the 50 state supreme courts suggests that there are a large number of decisions in conflict with other decisions which never make it into the *United States Reports*, even for a "*cert. denied*." Just how many, I am unwilling even to guess.

56. *Establishing an Intercircuit Panel: Hearings on S. 704 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 147-48 (1985) (prepared statement of A. Leo Levin quoting Justice White).

57. See Selection of Court for Multiple Appeals Act of 1987, Pub. L. No. 100-236, 1988 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1731 (to be codified at 28 U.S.C. § 2112).

eight times in different courts of appeals.⁵⁸

Beyond the inefficiencies in percolation, I simply do not believe the authors' rationalization that somehow a better decision will emerge when the Supreme Court waits for two courts to decide the same issue of federal law differently. Horizontal conflicts between different circuits, rather than a "policy" for intercircuit experimentation, are the result of a design defect in the federal system and of imperfect mechanisms to achieve one law of the circuit. Furthermore, the circuits are not appropriate laboratories. Their "boundaries are quite arbitrary, the product of historical accident."⁵⁹ Theirs is a false sovereignty, an autonomy of happenstance and convenience.

If Professors Estreicher and Sexton mean to compare the circuits to the state courts, they are fundamentally incorrect. The states' experimental role — following the familiar federalism canard that likens states and state courts to laboratories of policy⁶⁰ is in the exercise of their police power, however, not in federal constitutional law or federal statutory law. And the state courts are courts of general sovereigns worthy of deference under our system of federalism. The circuits, mere creatures of statute by comparison, are profoundly inferior experimenters vis-à-vis each other. One could argue that when a state court is in a conflict with a lower federal court on an issue of federal law — what might be called a horizontal mixed conflict — the federalism tension between state sovereignty and national supremacy makes a strong claim for Supreme Court resolution. And when an inferior federal court or a state court does break rank to conflict with a Supreme Court precedent — creating a vertical conflict — the claim is equally strong. I do not question that federal questions and federal rights are appropriately decided in state courts and inferior federal courts.⁶¹ The difference between Professors Estreicher and Sexton and myself may be in our expectations — or visions — of how prominent the Supreme Court ought to be in performing the essential, unique role as final arbiter of federal law.

58. *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 519 n.12 (1984). See generally Levin & Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113, 128-29 (1984).

59. Baker, *supra* note 6, at 282. See also Baker, *supra* note 41, at 736-39 (chronological table).

60. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

61. Indeed, a strong argument could be made that when a state court varies the federal law a concern for the principle of the supremacy clause dominates any concern for experimentation-uniformity. "Supremacy conflicts directly implicate questions of federalism — the tension between state sovereignty and national supremacy — and present a challenge to the constitutional role of the Supreme Court far greater than that posed by the de facto lawmaking power of the federal courts of appeal." Baker & McFarland, *supra* note 2, at 1408 (footnote omitted). See also Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943 (1976); Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913 (1983).

Ultimately, I cannot accept the underlying premise of percolation. I believe that "[t]he framers of the Constitution and the drafters of federal statutes did not intend that our national law have 'more variations than we have time zones.'"⁶² Chief Justice Rehnquist illustrated the artificiality and absurdity of such an exaggerated circuit sovereignty with a practical geography lesson: "We are thus reduced to a situation where the statutes of the United States may mean one thing in Kansas City, Kansas, and another thing in neighboring Kansas City, Missouri; where the statutes mean one thing on the Vermont side of the Connecticut River and another thing on the New Hampshire side."⁶³ Conflicts that go unresolved are hurtful to the inherent nature of a national law.

DISCRETIONARY CASE SELECTION

The authors give substance to their managerial metaphor in the form of a new version of Supreme Court Rule 17, or what might be described as "Supreme Court jurisdiction according to Professors Estreicher and Sexton." Like Caesar did Gaul, the authors divide the Court's docket into three parts: "the kinds of cases the Court ordinarily should hear, the kinds of cases it may hear, and the kinds of cases it ordinarily should not hear" (p. 44). The authors label these, respectively, the priority docket, the discretionary docket, and the improvident grant segment. Their terminology is modern. Their logic and reasoning is sound. I had a distinct feeling of *déjà vu*, however, being reminded of the existing scheme of statutes and court rules.⁶⁴ Their proposal is characterized by discretion in each category and its strength lies in its realistic view of the current system of case selection.

The "priority docket" consists of cases that require an immediate and definitive resolution, irrespective of the substantive issue (pp. 52-53). These include cases involving "intolerable intercircuit conflicts," "conflicts with Supreme Court precedent," "profound vertical federalism disputes," "interbranch disputes," and "interstate disputes" (pp. 53-62). The last two categories are self-evident. Disputes between two states come within the Court's current exclusive and original jurisdiction,⁶⁵ and invalidation of a federal statute or an executive order until recently came within the Court's appeal jurisdiction.⁶⁶ "Profound vertical federalism disputes," for the most part, consist of federal court

62. Baker & McFarland, *supra* note 2, at 1408 (quoting W. BURGER, 1985 YEAR-END REPORT ON THE JUDICIARY 13).

63. Remarks of the Chief Justice at the 64th Annual American Law Institute Meeting 6 (May 19, 1987).

64. See, e.g., P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING — CASES AND MATERIALS 1381-90 (2d ed. 1983).

65. 28 U.S.C. § 1251(a) (1982).

66. 28 U.S.C. § 1252 (1982), repealed by Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 662. The authors have no

invalidation of state or local statutes and state court invalidation of federal action. Both categories until recently were covered by "appeal as of right" statutes.⁶⁷ When a lower federal court or state court has disregarded a controlling and authoritative Supreme Court precedent, the case requires review, according to the authors and current practice.⁶⁸ The authors' category "intolerable intercircuit conflicts" needs further elaboration (pp. 53-59). Cases in this category become "square conflicts" only when the courts in one jurisdiction (federal circuit or state) are *bound* by a legal rule contrary to another jurisdiction; summary actions, dicta, and alternative holdings do not count (p. 54). "Square conflicts" become, in turn, "intolerable" when they are exploitable by forum shoppers or when they frustrate those who are subject to multiple jurisdictions, such as national companies (p. 57). Still, the issue becomes a priority only "when the marginal costs of continued disuniformity in the legal standard exceed the marginal benefits of additional percolation" (pp. 57-58). If *this* is an improvement over Rule 17, I am missing something. The authors provide some "rules of thumb": "square conflicts" that allow forum shopping or create planning difficulty, and three-court conflicts, have priority. Although the authors upgrade "intolerable conflicts" cases that meet their rule of thumb from the current Rule 17 discretion to the highest priority, their priority docket remarkably resembles the appellate jurisdiction in the statutes that portrayed the Court's role when the book was written: "When the division of powers among the branches of the federal government, between federal and state governments, or between states is threatened by a lower court ruling, the Court's role as arbiter — its unique ability to render a decisive resolution — is called into play" (p. 53).

Discretionary review, according to the authors, "need not be arbitrary" (p. 62). They list guidelines (pp. 62-69) for their discretionary docket highly reminiscent of the current state of the *certiorari* art: "*suspicion* of the forum's consideration of a federal question";⁶⁹ "*considerations* of vertical federalism" that "press for Supreme Court review";⁷⁰ "*significant* interference with federal executive re-

quarrel with the Court's historical willingness to decide inter-branch disputes. *E.g.*, *United States v. Nixon*, 418 U.S. 683 (1974).

67. 28 U.S.C. §§ 1254(2) & 1257(1) (1982), repealed and modified by Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 662.

68. *See, e.g.*, *Jaffree v. Board of School Commrs.*, 554 F. Supp. 1104 (S.D. Ala.), *modified* 705 F.2d 1526 (11th Cir. 1983), *aff'd.*, 472 U.S. 38 (1985).

69. P. 62 (emphasis added). When a state court sustains a state action against a federal constitutional or statutory challenge, until recently the matter was appealable. 28 U.S.C. § 1257(2) (1982), amended by Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, U.S. CODE CONG. & ADMIN. NEWS (102 STAT.) 662.

70. P. 63 (emphasis added).

sponsibility";⁷¹ "exercise of the Court's *extraordinary* power of supervision";⁷² "resolution of a national *emergency*";⁷³ and "vehicles for *advances* in the development of federal law."⁷⁴ Professors Estreicher and Sexton have substituted these categories, their weasel words in my italics, for the indefinite and more general Rule 17 now on the books. The authors fall prey to the very vision of the Court they earlier criticized, for in two of the guidelines — considerations of vertical federalism ("involving a major departure from Supreme Court precedent or a plainly erroneous extension of doctrine" (p. 63)) and the extraordinary power of supervision ("occasional review of egregious error in order to ensure responsible actions by lower courts" (p. 64)) — they evidently succumb to the inevitable pressure the Court feels to perform selectively as a court of errors.⁷⁵ Indeed, the Court often has answered prophecies of dire consequences with Justice Holmes' rejoinder not "while this Court sits," to invoke the constitutional *in terrorem* of judicial review reserved for the rare occasion.⁷⁶

The third division of the Court's docket on those cases in which review is "improvident" (pp. 69-70). Given their self described "exhaustive and generous" priority and discretionary categories, they label anything else improvident, including, but not limited to: two-court conflicts; nonconstitutional federal questions decided by a federal court; questions of state law; state court invalidations of a state action on a federal ground; and mere errors, even constitutional errors. Resistance to review of such cases is aspirational; the authors concede "some inappropriate grants are bound to occur" (p. 70). Their argument, however, is that if the number of improvident grants exceeds the number of priority cases denied review, then those who complain

71. P. 63 (emphasis added). The interference must be "significant"; the federal action must be "important." The authors urge a two-court conflict rule of thumb. Pp. 63-64.

72. P. 64 (emphasis added).

73. P. 64 (emphasis added). This describes current practice. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

74. P. 65 (emphasis added). "Vehicles" come in several models: "prior reservation of the issue or prior fractionated ruling;" "doctrinal incoherence;" "overruling precedent;" review of cases related to other cases granted review by priority or by discretion; "review of court of exclusive jurisdiction;" and "application of settled Supreme Court precedent to situations presenting a risk of serious dislocation." Pp. 65-68. Again, the authors seem to describe the current approach. See pp. 65-69 nn. 50-57. Notably, they do part company with the Court over grants on the basis of "serious economic dislocation," p. 68, cf. *Pennzoil & Co. v. Texaco Inc.*, 481 U.S. 1 (1987); election procedures cases, p. 68, cf. *Davis v. Bandemer*, 478 U.S. 109 (1986); and, "with some disquiet," death penalty cases, p. 69, cf. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

75. See *supra* text accompanying note 13. Later, in applying their criteria, the authors take a more pragmatic view of the need for uniformity in the national law to conclude "[w]here the percolation process has resulted in doctrinal incoherence, the Court need not await a square conflict to review a ruling that is difficult to reconcile with Supreme Court doctrine." P. 88.

76. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting). E.g., *Cole v. Richardson*, 405 U.S. 676, 686 (1972); *Trop v. Dulles*, 356 U.S. 86, 127 (1958) (Frankfurter, J., dissenting).

about the Supreme Court workload and unresolved conflicts should lose the debate over the need for a new national court (p. 70).

While I necessarily have omitted many of the nuances and qualifications, I have tried not to be unfair in my summary of the authors' model. As for a critique, Professors Estreicher and Sexton have devoted their own separate chapter to "Probable Criticisms of the Criteria" (pp. 71-75).

Their first listed self-criticism is that the managerial model is at odds with what the authors might call the "quaint" vision of the Supreme Court as a judicial body. Traditionally, a denial of review, under the Rule of Four,⁷⁷ has meant only that the Court does not have the capacity to hear the case. The authors would reinterpret a denial to mean that the Justices have determined that review is "premature" before adequate percolation.⁷⁸ Second, the authors anticipate a criticism that they have "understated the importance of uniformity in federal law" (p. 72). I already have made my pitch for greater uniformity. The tendency toward geographical dispersion of the national law, constitutional and statutory, is worrisome to me and I disagree with the authors' notion that it is something to be encouraged. Most significantly overlooked is that in the modern administrative state, sending conflicting messages from courts to administrative agencies "appears truly destructive to the ideal of agency obedience to law expressed in the hierarchical relationship between agencies and courts."⁷⁹ Third, the authors admit to vulnerability to the challenge that their priority docket is underinclusive and does not adequately emphasize the Court's role to define and vindicate constitutional rights (p. 72). They rightly respond that their discretionary docket is flexible and adequate. However, they would have been more straightforward had they given the same content to the "important issue" basis for grants that they have given to the conflict basis. Perhaps this is a concession that "importance" is so discretionary as to be left inevitably to the will of four Justices no matter what is announced as a standard. Fourth, they suggest that a critic might complain that they have "overstated the benefits of percolation" (p. 73). I agree that the choice today is not between the Supreme Court hearing every case or hearing just some. That choice was made in 1925. The current choice is between the inadequate capacity for uniformity and coherence and the promise of some proposed structural reform. I am convinced my side

77. See Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983).

78. P. 72. I am wary of too elaborate a system of appellate writs that would introduce unnecessary complexity and ambiguity with little other purpose. See generally Simpson, *Notations Used on Applications for Writs of Error*, 12 TEXAS B.J. 547 (1949).

79. Strauss, *supra* note 2, at 1110. "Varying instructions from different courts of appeals not only interfere with the instruction to achieve uniformity, but also make it more difficult for the agency to manage its own resources and to guide and motivate the enormous bureaucracy for which it is responsible." *Id.* at 1112 (footnote omitted).

has the better arguments in favor of a new intermediate court; I am unconvinced by their judo-like logic that identifies a weakness in the current structure and turns it into a strength to resist reform. Fifth, the authors rightly dismiss anticipated criticisms that their suggested reforms are too difficult to implement or unlikely to be implemented, since, they say, such nay-saying "dooms most proposals for reform" (p. 74) — including the proposal to create a new national court.

A further apology is against the charge that their docket criteria are "hopelessly presumptuous" (p. 75). Their cogent argument is that the criteria for case selection should not remain wholly indeterminate. That is not presumptuous. It is somewhat presumptuous, however, for the authors to announce that "the only constructive way to criticize our criteria is . . . to develop alternative ones" (p. 74). I happen to find my own critique constructive.

To their prescient list of probable criticisms I add a few of my own. I do find it somewhat presumptuous to dismiss 200 years of thoughtful reflection on the role of the Supreme Court by calling for a "new vision" reminiscent of a Madison Avenue advertising agency campaign on behalf of some "new and improved" product. I find it somewhat presumptuous to pretend to write on a *tabula rasa* so far as discretionary jurisdiction is concerned. There is much accumulated wisdom of jurists and scholars on the subject, all of which is left begging by the authors' hubris to construct an original and elaborate docket model.⁸⁰ There is another, far more serious shortcoming of their model. Like so many products today, "new and improved" is a claim on the box that is not supported by the contents. The authors' unconscious virtue is that apparently they have internalized the structure of the leading treatise on Supreme Court practice.⁸¹ Their vice is that they seem to expect to receive the mantle of radical reformers. The point is not lost that their model, or any model including the actual current practice, must proceed on a case-by-case basis and must be characterized by broad categories, flexible concepts, and loose definitions. I conclude that Professors Estreicher and Sexton's model is more descriptive and less prescriptive than they are willing to admit.

The authors' claim to originality may rest chiefly on their conflicts/percolation discussion and their so-called "rules of thumb." The failing there is their artificial quantitative approach required by a qualitative failure to define importance as a criteria for grants. I have no quarrel with a two-court-conflict or three-court-conflict rule, so long

80. *E.g.*, D. PROVIN, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980); Tanenhaus, Schick, Muraskin & Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISIONMAKING 111 (G. Shubert ed. 1963). See also HART & WECHSLER, *supra* note 2, at 1855-78; SUPREME COURT PRACTICE, *supra* note 31.

81. SUPREME COURT PRACTICE, *supra* note 31. To say later that "the Supreme Court bar does not perceive any normative set of principles guiding case selection (and hence does not frame argument within any such context)," is to blink at these 1030 pages in the sixth edition.

as it is recognized that the importance of the issue in conflict is being ignored. We could just as well agree that conflicts between odd-numbered circuits should be reviewed but not those between even-numbered circuits. Why not?

It has been said of gifted advocates that they are capable of presenting the opposing arguments more persuasively than their opponent as they make their case. Would that I were a better advocate to do for the authors' side of the debate what they have done for mine.

THE EMPIRICAL EVIDENCE

"The Criteria Applied" (pp. 76-103) is the most impressive chapter of the book. There the authors detail their empirical examination of the Court's workload during the October Term 1982. During that Term, the authors note, several Justices expressed concerns over workload and, therefore, would have approached case selection sensitively and cautiously.⁸² The professors examined only the grants themselves; their students examined the 1860 paid cases denied review. They reviewed the complete *certiorari* file and evaluated lower court opinions for conflicts. They found nearly one-half priority cases (78, or 48%), more than one-fourth discretionary cases (47, or 28%), and about one-fourth improvident grants (39, or 24%) (p. 81). The high incidence of intercourt conflicts among the cases given plenary review (42%) confirms that conflict resolution is a high priority for the Justices (p. 85). The authors provide a painstakingly detailed description of their assessments of the three categories complete with tables and appendices. They explain their categorization of each and every case with a completeness that honestly impressed and intimidated this reader.

Most significant was their determination that about one-fourth of the grants were classifiable as "improvident." The authors blame the then existing mandatory jurisdiction, hasty review of state court invalidations, undue deference to the Solicitor General, and premature resolution of conflicts, among other reasons (pp. 91-110). Mere error correction, however, did not account for a large number of improvident grants (8, or 21%).⁸³ This seems to confirm my accusation that the authors rail against error correction as some kind of bogeyman, even though they somewhat sheepishly explain that, "[i]t is difficult to say anything conclusive about the error-correction thesis from this type of gross numerical comparison."⁸⁴ Accepting the characterization of improvident grants, the authors conclude there is additional capacity currently available to the Court (pp. 101-02): among the

82. P. 77. The authors also admit the possibility that O.T. 1982 was atypical and challenge readers to verify their criteria for other Terms. Pp. 77-78.

83. P. 98. They suspect their figures to understate the problem. P. 99.

84. P. 99. Some of their illustrative improvident grants are, at least, arguable examples of their criteria.

1860 cases denied review, the student assistants found only twelve intolerable conflicts and nineteen total conflicts (pp. 102-03).

When I read this book, I was grading my semester examinations in Constitutional Law. If Professors Estreicher and Sexton were to re-grade my students' papers, I suppose they would grade some higher and some lower, and most about the same. That is similar to the performance rating their study gave the Supreme Court: During the 1982 Term, some grants should not have been granted; some denials should not have been denied; and most grants and most denials were proper. The authors' case for a serious overgranting problem depends on elaborate statistical breakdowns with tables analyzing their own theoretical construct of the Court's docket. Yet their conclusion is rather simple: they found thirty-nine cases they would not have granted review, and their students found only twelve, at most nineteen, cases improperly denied review.⁸⁵ My own armchair reaction to their statistics is that the Court's plus-or-minus factor of twenty cases out of a docket of more than 5000 is quite impressive, even remarkable. There is little room for improvement. Given the nature of the case selection process, if only 10% of the roughly 200 cases granted review are controverted grants, I still give the Court an "A." As a scholar who evaluated various studies of the *certiorari* procedure observed: "The decisions that are made, not surprisingly, sometimes fail to satisfy the outside academic commentator, but there is no alternative to some human process, inevitably subjective, sifting the applications down to a manageable size."⁸⁶

Case selection is a necessary and important function. It is also time consuming. Through the years of docket growth the Justices have reduced their personal time and attention to each petition. Once upon a time, every case was discussed. Then the Chief Justice kept a list of "dead cases," which required no discussion, although any Justice could remove a petition from the list. Today, the Chief Justice maintains a "discuss list" to which any Justice can add a petition, the operative assumption being for denial of review. In recent years, six Justices have participated in a "cert pool" in which law clerks share the duty to draft memoranda on ten to twenty discuss-list cases out of approximately 100 cases docketed each week. This account of the case selection process is the basis of the authors' speculation on the avoidable causes of overgranting: a lack of particularized criteria and the Court's internal screening procedures themselves.

The authors conclude that a major cause of avoidable overgranting is the "hopelessly indeterminate and unilluminating" standard in Rule

85. The authors were careful not to vouch for the law students' independent screening in every case. P. 182 n.98.

86. R. HODDER-WILLIAMS, *THE POLITICS OF THE U.S. SUPREME COURT* 67 (1980) (citations omitted).

17 which breeds subjectivity (p. 106). To me, this subjectivity is a virtue of the system. I am not sure why else we nominate and confirm and provide life tenure for Justices if not for their best individual judgment. Contrary to the authors' naiveté, I believe that the case selection process is, and should be, as much a political process as decisions on the merits.⁸⁷ How is it untoward for some Justices to "join three" to vote for review because of the nature of the case or the influence of a colleague (p. 107)? Is it a surprise that lack of a dominant philosophy allows for grants by free-forming coalitions (p. 107)? Should we not expect more grants from the Court if its philosophy is at variance with the courts being reviewed (p. 107)? By comparing Rule 17 with their criteria, the authors anticipated my own conclusion: "Even were the Justices wholeheartedly to endorse [the] criteria, nine Justices operating on a Rule of Four are bound to produce an application of the criteria at variance with the results of [the] study" (p. 108).

A NEW NATIONAL COURT AND OTHER REFORMS

In an altogether too brief chapter, entitled "Unsuitable Remedies: The Proposals for a New Appellate Court," (pp. 111-15) the authors argue that a new national court would not address any of their speculated causes for overgranting and would add problems of its own. It is almost as if Professors Estreicher and Sexton believe that their foregoing analysis is fatal to the proposal for a new intermediate court and they offer us this chapter as an epitaph. There is not much wrong with their five pages that has not been explained already elsewhere in this review.

First and foremost, the authors are guilty of the kind of dissonance I complained about above.⁸⁸ They blur the important distinction between the issue whether there is a need for a new national court and with the debate over the form and jurisdiction of such a court.

The authors are correct to suggest that creating the opportunity to refer a case to the new court would further complicate Supreme Court screening, which today is limited to choosing to grant or to deny review (pp. 111-12). Of course, the authors themselves would do this by dividing the docket into their priority, discretionary, and improvident categories. My weak rebuttal is that I have confidence in the Justices. What is more, I would suggest to the authors that their elaborate structure with multiple sub-categories would formalize a great deal of complexity in the name of determinant case selection.

87. There is some parallel between screening criteria and standards of constitutional law on the merits. Positing on "uncertainty principle," Professor Bradley has suggested that "any attempt to achieve certainty regarding any important constitutional issue is unlikely to succeed and — even if it does succeed in the short run — will inevitably create uncertainty as to more issues than it settles." Bradley, *supra* note 2, at 2.

88. See *supra* text accompanying notes 28-29.

They also baldly assert that the new national court "would be unlikely to promote greater coherence in the law," and they express a concern that the present courts of appeals would be "devalue[d]" (p. 112). I say they are wrong about the first point and I frankly am not too concerned about the second.⁸⁹ The authors simply leave me behind when they argue that the new court "would be unlikely . . . to render decisions with sufficient authoritativeness . . . to improve upon the stability and coherence of federal law" (p. 112). Their most telling argument is that the proposed new court would enjoy a special prominence and visibility that would make a special claim on Supreme Court review (p. 113). Assuming that there would be such review jurisdiction,⁹⁰ the authors should hope that the Supreme Court Justices would be possessed of the same discipline in dealing with the new court as would be required in their own scheme to differentiate priority, discretionary, and improvident grants. Moreover, the referring of the case ought to be understood as the Supreme Court's final delegation to the new court in all but the most compelling instances. Without that understanding, the reference over would be nonsensical. The authors are correct to suggest that if this added too greatly to the Court's workload that would cut against the proposal. I do not think this would happen.⁹¹ Supreme Court workload, however, is not the only relevant consideration. They ignore the other justification for some slight increase in Supreme Court workload, *i.e.*, the new court would add to the certainty and uniformity of the national law. What seems evident is that the new court would add more capacity for certainty and uniformity to the federal court system than it would take away and the proposed new court could reduce the Supreme Court workload by taking over the task of conflict resolution. The proposed new national court is the only suggestion under consideration that would meet both of these two pressing needs.

The authors' last and most serious concern is that the judges on the new court might have a judicial philosophy different from the Justices, and that the result would be more uncertainty, not less, and more conflicts, not fewer (pp. 114-15). First, divergent judicial philos-

89. This reminds me of a story Chief Justice Burger used to tell. He was at a Circuit Conference and a circuit judge came up to tell the Chief why the proposal for a new national court was a bad idea. It seems the circuit judge's wife was proud of explaining to others that her husband was on the federal court "second only to the Supreme Court" and that she had told her husband that she did not want to have to explain that his court was only the third highest.

90. Some argue that this is required by the Constitution. See Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 51 IND. L.J. 327, 329-33 (1976). The relationship between the Supreme Court and the Court of Appeals for the District of Columbia Circuit in administrative law is analogous. See Note, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and Its Implications for a National Court of Appeals*, 59 N.Y.U. L. REV. 1048 (1984).

91. Compare Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1 (1986) with Hellman, *Preserving the Essential Role of the Supreme Court: A Comment on Justice Rehnquist's Proposal*, 14 FLA. ST. U. L. REV. 15 (1986).

ophies have become a way of life in the High Court and they cannot justify opposition to systemic reform. Second, that problem sometimes occurs in the present system of regional courts of appeals.⁹² Third, the political process of nomination and confirmation remains the long term constitutional answer.

Having argued against the creation of a new national court, the authors return to the problem of overgranting to try their hand at "Tailoring the Remedy to the Problem" (pp. 116-27). It rightly has been pointed out before that one of the "distinctive strengths" of this book raises a basic difficulty: For the most part the authors eschew legislative reform in favor of more modest changes in attitude and procedures on the part of the Justices themselves.⁹³ Consequently, the inherent discretion and judgment required for case screening may render their hope in the Conference more naive than my faith in Congress. Professor Strauss best expressed the chief concern with relying on the Court itself by concluding that "[t]he problem is that . . . without interposing a new tribunal of such modest dimensions that the Supreme Court can have some reasonable hope of controlling it, the Court's incentives to a management orientation, with all that entails, will remain unaddressed."⁹⁴

After the book was written, Congress finally eliminated most all of the Court's mandatory jurisdiction.⁹⁵ The authors are correct to suggest the significance of abolition has been "overstated" (p. 117). Eliminating mandatory jurisdiction theoretically reduces both the screening and deciding workload of the Court, but the reality is that the Court used to approach jurisdictional statements quite similarly to *certiorari* petitions.⁹⁶ Many cases given plenary review under the recently repealed statutes would have a legitimate claim under the authors' priority discretionary dockets. The authors are also right to disapprove of the increasing reliance on summary dispositions.⁹⁷ The tradition of a separate screening stage and a separate merit decision

92. See generally Spaeth, *Supreme Court Disposition of Federal Circuit Court Decisions*, 68 JUDICATURE 245 (1985); Uelmen, *The Influence of the Solicitor General Upon Supreme Court Disposition of Federal Circuit Decisions: A Closer Look at the Ninth Circuit Record*, 69 JUDICATURE 361 (1986).

93. Rowe, *supra* note 4, at 421. See also Estreicher & Sexton, *Improving the Process*, *supra* note 5. Over its six editions, various suggestions in SUPREME COURT PRACTICE have been adopted as Supreme Court rules. L. CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 17 (1987). It remains to be seen whether Professors Estreicher and Sexton's book will have an impact on the way the Justices order their internal operating procedures.

94. Strauss, *supra* note 2, at 1136.

95. Pub. L. No. 100-352, 102 Stat. 662 (1988). See generally Boskey & Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 109 S. Ct. LXXXI (Nov. 1, 1988).

96. See SUPREME COURT PRACTICE, *supra* note 31, at 411-13. Only thirty-six cases that came to the Court on appeal in O.T. 1985 were decided by signed opinions. Baker & McFarland, *supra* note 2, at 1412. The authors' own modeling criteria assumed away the jurisdiction.

97. P. 117. See generally SUPREME COURT PRACTICE, *supra* note 31, at 246-52, 293-300.

stage well serves the Court and litigants;⁹⁸ plenary review, with attendant argument and briefing, should be preserved.⁹⁹

Expectedly, Professors Estreicher and Sexton urge the formulation of specific criteria for case selection to remedy overgranting and overpetitioning (p. 118). Generally, the Court has three choices of approach: (1) general criteria such as current Rule 17 ("special and important reasons," "important question[s] of federal law," and conflict cases); (2) determinate and illuminating criteria, with the authors viewing their own as the best example; or (3) specific guidelines, similar to a Restatement, with elaborate principles, exceptions and qualifications, and perhaps examples and commentary. The last is academic and not judicial, would bleed the Court of scarce resources, would require updating as the Court membership changed, and, most likely, would be so divisive as to be futile. Human decisionmaking, at this level, resists a quasi-scientific formulaic approach. The realistic choice then is between (1) and (2). I already have suggested that there is less difference between them than the authors would care to admit.¹⁰⁰ I also have suggested that the current structure, choice (1), is not as barren and formless as the authors pretend.¹⁰¹ I am skeptical of what would be gained by incorporating their 34-page model or the more complete 1030-page *Supreme Court Practice* into the Supreme Court Rules. I simply do not agree that such a change would send clearer signals to the bar or would constrain the Justices in the exercise of their discretion (p. 118). There is something to be said for settled expectations and accumulated experience under the current criteria.

98. See, e.g., *Commissioner v. McCoy*, 108 S. Ct. 217, 219-20 (1987) (per curiam) (Marshall, J., dissenting):

My doubts about summary dispositions encompass concerns about both the parties who seek our review and the integrity, perceived and actual, of our proceedings. The Rules of this Court urge litigants filing petitions for certiorari to focus on the exceptional need for this Court's review rather than on the merits of the underlying case. Summary disposition thus flies in the face of legitimate expectations of the parties seeking redress in this Court and deprives them of any opportunity to argue the merits of their claims before judgment. Moreover, briefing on the merits should be encouraged not only because parties expect and deserve it, but because it leads to greater accuracy in our decisions. Briefing helps this Court to reduce as much as possible the inevitable incidence of error and confusion in our opinions each Term. Finally, the practice of summary disposition demonstrates insufficient respect for lower court judges and for our own dissenting colleagues on this Court.

99. The courts of appeals regrettably have abandoned this commitment to cope with their dockets. See generally *Baker*, *supra* note 6, at 234-43.

100. See *supra* text accompanying notes 64-76.

101. See *supra* text accompanying note 81.

The authors would require that petitions for review include a kind of checklist that might include identification of the appealable judgment and a procedural history. Pp. 118-19. It would link the request for review and the explicit criteria. If a conflict is alleged, the statement would include the precise issue and the case(s) in conflict. Whether or not the criteria are elaborated along the lines they suggest, these are good suggestions, which I assume would occur to and would be followed by the careful attorney anyway. My understanding is that the Clerk's Office already employs paralegals to conduct a similar kind of pre-screening. See generally *SUPREME COURT PRACTICE*, *supra* note 31, at 357-77.

Before we scrap it all in favor of a "managerial model," I submit the authors must sustain a burden of proof that their book does not.

Among the other reforms the authors suggest is a certification requirement to avoid frivolous petitions, and they encourage the Court to consider sanctions, including perhaps censure, awards of costs, or attorneys' fees.¹⁰² I agree but hold out little hope for any appreciable impact.¹⁰³ They also suggest that the Court create a "second look" mechanism. Under this approach, once the Justices vote to grant review, a panel of staff attorneys "of the caliber of Justices' clerks" would assess the grant against the same standards the Justices and their law clerks presumably had applied.¹⁰⁴ The proposal is simply unlikely to work. It is unclear why the staff clerks will do better than the elbow clerks or why the Justices would or should listen to the second guess. If the authors mean to suggest that something done twice is done better, my own preference is for proposals that would help get it right the first time.¹⁰⁵

I agree with three other suggestions, however. Less frequent conferences on petitions might give the Justices a better overview (monthly rather than weekly) of their docket (p. 122), replicating the more effective screening suggested by the September conference statistics. This also would play to a strength of Chief Justice Rehnquist as a presider; accumulations that took a week in recent years have been handled in a couple of days. Second, improved transfer and venue rules at the intake courts would prevent forum shopping and would lessen the burden on parties subject to the law of several circuits.¹⁰⁶ Third, the Court should continue efforts to modernize its operations by further data collection and research (p. 122).

As a kind of postscript, Professors Estreicher and Sexton add suggestions they deem problematical but still preferable to a new national

102. Pp. 119-20. The authors are careful to note that other commentators, not themselves, have concluded that an "irresponsible bar" and "unscrupulous" petitioners are a source of a significant number of frivolous petitions. P. 186 n.14.

103. The Courts of Appeals have experimented with such requirements to little avail. *See* FED. R. APP. P. 35; FIFTH CIR. R. 35.2.2. *See generally* Baker, *supra* note 6, at 271-73. *See also* FED. R. APP. P. 38. Supreme Court determinations of sanctions are possible, but have been rarely used. SUP. CT. R. 49.2; *Tatum v. Regents of Nebraska-Lincoln*, 462 U.S. 1117 (1983). And frequent imposition would require articulable standards and deliberation and agreement in application, thus expending scarce Court resources. Rowe, *supra* note 4, at 421.

104. Pp. 120-21. While I am confident that no one but law clerks believe in the influence of "law clerk justice" on the decisions on the merits, I share an old skepticism of any mechanism that increases staff influence on the screening process. *See* Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REPORT 74 (Dec. 13, 1957).

105. Another example of their tendency to ask the Court to return again and again to the file is their proposal for a "straw vote" on the merits before granting review to determine if a given case presents a proper vehicle for establishing doctrine by a clear majority. P. 121.

106. Pp. 122-23. Venue procedures currently are much too complex and too metaphysical. *See, e.g., Ellis v. Great Southwestern Corp.*, 646 F.2d 1099 (5th Cir. 1981). *See generally* Note, *Intercircuit Conflicts and the Enforcement of Extracircuit Judgments*, 95 YALE L.J. 1500 (1986).

court. I agree that the "Rule of Four" should not be changed to a "Rule of Five."¹⁰⁷ It is somewhat doubtful that the Justices themselves could properly effect this change in tradition.¹⁰⁸ And a Rule of Five likely would create the appearance that screening foreshadowed the decision on the merits, might increase the reversal rate, and most important, would end the tradition of an agenda set by a minority, all for little gain.

The authors do not favor the creation of appellate courts specialized by subject matter because such courts would "sacrifice the benefits of percolation," would be "vulnerable to capture by special interests," and "if given responsibility over controversial subjects would require active Supreme Court supervision" (p. 127). I tend to agree. A specialized tax court might be appropriate today. And some day, we may see a quite different structure of specialized intermediate courts.¹⁰⁹ But I prefer a new national court in the generalist American appellate tradition.¹¹⁰

The authors also would move away from the paradigm of party control and case determination (pp. 130-31), since their view of the Court's role is to chart national policy. Limited grants of review, even reformulating the issues presented, might allow the Court to better shape its agenda (p. 131). They would place greater reliance on *amici*

107. Pp. 123-24. See generally Stevens, *supra* note 77.

108. The Court members in 1924 made representations to Congress that access would be preserved through this device, representations which are part of the legislative record of the Judges' Bill and create a kind of separation of powers estoppel. See *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearings on H. R. 8206 Before the House Comm. on the Judiciary*, 68th Cong., 2d Sess. 8, 26-27 (1924) (statements of Justice Van Devanter and Chief Justice Taft).

109. See Griswold, 71 JUDICATURE 52 (1987); Address by Justice Antonin Scalia before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987), reprinted in 34 FED. B. NEWS & J. 252-54 (1987).

110. The authors explore other techniques to resolve conflicts short of creating a new national court. I see problems with each alternative, in turn. Congress realistically cannot be expected to monitor and resolve statutory conflicts and would have no power over constitutional conflicts. P. 126. But see Ginsburg & Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1429-34 (1987). A second alternative is to establish a rule that if after one circuit decides an issue and a panel in a second circuit disagrees, the second court of appeals must go *en banc* and the *en banc* decision then is binding nationally. P. 124. See Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals*, 87 YALE L.J. 1219 (1978). For the authors this does not allow sufficient percolation. I worry that a majority of one court of appeals — a three-judge majority on the First Circuit with its complement of five judges — would set national policy. Also lost would be the valuable background and expertise of some circuits, such as the District of Columbia Circuit in administrative matters. The same and similar problems freight other variations, such as constituting random ad hoc panels to resolve conflicts, providing the Supreme Court with a reference power to randomly designated *en banc* courts, p. 126, or declaring that the first court of appeals to decide an issue *en banc* binds the others. See Coleman, *The Supreme Court of the United States: Managing Its Caseload to Achieve Its Constitutional Purpose*, 52 FORDHAM L. REV. 1, 18-20 (1983); Goldberg, *Managing the Supreme Court's Workload*, 11 HASTINGS CONST. L.Q. 353 (1984). Already, the *en banc* mechanism has proven more of a problem than a solution for the courts of appeals. The solution must be on the same order of magnitude as the conflict problem.

curiae, such as the Solicitor General, relevant interest organizations (they list the ACLU and the AFL-CIO), and "academic experts," especially in the initial phase of determining whether to grant review (p. 131). Just how the *amici* would participate is left to our imagination. I would have thought the effort should be to reduce the screening burden, not to add to it or to make it more complicated. Besides the institutional litigators and the legion of national organizations who rain green briefs on the Court already, the authors would have the Justices invite still others to lodge their views on the merits. The "expertise of interested amici and scholars" would assist "the Justices [who now must] fend for themselves" with only the help of "law clerks, however talented they may be . . ." (p. 132). The Justices could borrow from the administrative process and "issue tentative opinions in the hope of eliciting written comments from affected organizations and academic experts" (p. 132).

Enough, I say, enough.

It is difficult to believe that the authors are serious, and, therefore, I need not be. Why not give up this whole pretense of judging cases and become a full-fledged manager of public policy? Cases and the dockets would give way to policy issues on the agenda. Oral arguments, briefs and records on appeal would give way to public hearings with testimony from witnesses who bring prepared statements and reports. Lobbyists could then visit the Court in formal session and the Justices individually. Brilliant professors, typically former law clerks, could be hired as staff to plan the hearings and help draft the Court's regulations and report. The Court might award research grants to academic institutions, like the *New York University Law Review*, to conduct independent studies, and might hire consultants and auditors to oversee its work. While such a system would "expand substantially the informational base upon which national law is made" (p. 131), its name is not "the Supreme Court as Manager" but "Congress." These are silly proposals, for the most part, and they should not take away too much from the authors' better previous efforts.

I have two further, more serious, responses. First, doctrines such as standing, ripeness, mootness, nonjusticiability, *et cetera*, have the purpose of separating the judicial power from the legislative and executive. This is both constitutional and wise. It cannot be gainsaid that the Supreme Court must remain a court to have a legitimate role. Second, the remaining tinkering changes the authors suggest by way of intramural reforms have a distinctly marginal potential. In the last thirty years, the Justices have added staff and clerks, have modernized equipment, have streamlined procedures, and have developed administrative capacity. Anyone familiar with the Court must agree that there are not many tinkering changes left that promise much greater

efficiency. The commentator's responses "Do more!" and "Do better!" fall flat.

CONCLUSION

The authors admit that "undoubtedly" their suggestions are "in need of further refinement" (p. 135). I agree. Their theme still is that "[i]t is not the Supreme Court's job to ensure justice in the particular case" (pp. 135-36). "What is needed," Professors Estreicher and Sexton tell us, "is a systematic, hard-headed appraisal of how the Court can best employ its scarce decisional resources to perform its essential function" (p. 136). I could not agree more. This review essay is meant to suggest strengths and weaknesses in their effort. In this review essay, I have accepted their invitation to the dialogue.

Professor Estreicher and Sexton's work has already influenced the larger debate over the role of the Supreme Court and the more immediate proposals to reform the structure of the federal court system, and it will continue to do so. Ultimately, if Congress does not ordain and establish a new national court, we must ask "whether we are prepared for the consequences of a Court four times as remote from the rest of the nation's judiciary as it was when a perceived caseload crisis prompted creation of its current jurisdictional relationships."¹¹¹ The authors accept that scenario and I do not.

My objection to the authors' orientation is fundamental. At the last annual conference of the Association of American Law Schools, Judge Harry T. Edwards of the District of Columbia Circuit made the point in his keynote speech.¹¹² He argued that legal education was "falling short of any meaningful effort to 'shape the legal profession.'"¹¹³ He identified the caseload crisis as one of the major problems facing the legal system. He chastised his audience of law professors that "the academic response to the caseload crisis . . . is largely a denial that such a problem exists."¹¹⁴ Jurist after jurist says there is a problem;¹¹⁵ the academics deny it.¹¹⁶ Professor Estreicher and Sexton's book is the latest ostrich-like denial.

I am on Judge Edwards' side. I ask how many statistics and stud-

111. Strauss, *supra* note 2, at 1135. Professor Strauss concludes that without a new tribunal the Supreme Court has insufficient incentive toward a managerial model. *Id.* at 1136.

112. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285 (1988). See also Hufstedler, *Bad Recipes for Good Cooks — Indigestible Reforms of the Judiciary*, 27 ARIZ. L. REV. 785 (1985).

113. Edwards, *supra* note 112, at 285.

114. *Id.* at 287.

115. *E.g.*, H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 15-54 (1973); R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59-129 (1985). See generally Gazell, *supra* note 22 (citing more than 70 articles); *The Supreme Court Workload*, 11 HASTINGS CONST. L.Q. 353 (1984).

116. See *supra* note 91.

ies and testimonials will it take? If I be accused of having a closed mind, I defend myself by challenging those who would wait for a judicial gridlock and who would support reforms only on an absolute guarantee that they will be perfect solutions. A great dramatist and student of human nature once observed:

The open mind never acts: when we have done our utmost to arrive at a reasonable conclusion, we still, when we can reason and investigate no more, must close our minds for the moment with a snap and act dogmatically on our conclusions. The man who waits to make an entirely reasonable will dies intestate.¹¹⁷

Rather than accept the review of two law professors, who spent a year at the Supreme Court as law clerks and who analyzed the papers for one October Term with the help of law students, I myself prefer the views of Chief Justice Burger and Chief Justice Rehnquist, who between them served on the Supreme Court of the United States for one-third of a century.¹¹⁸

Siskel and Ebert seem to be interesting, articulate, and informed, and their efforts to review films are thoughtful and sincere. Sometimes I agree with their reviews and sometimes I do not. Likewise, Professors Estreicher and Sexton seem to be interesting, articulate, and informed. Their efforts to review the Supreme Court are thoughtful and sincere. As I have explained at some length, I disagree with much of what they have written, but I agree with several of their ideas. That is why I give *Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process* one "thumb down" and one "thumb up."

117. G. B. SHAW, *ANDROCLES AND THE LION* 107 (1957 ed.).

118. Both Chief Justices have strongly endorsed the proposal for a new national court. See W. BURGER, 1985 YEAR-END REPORT ON THE JUDICIARY 15-20; W. REHNQUIST, 1987 YEAR-END REPORT ON THE JUDICIARY 7.