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CUTTING THE CLOAK TO FIT THE CLOTH: AN APPROACH TO PROBLEMS IN THE FEDERAL COURTS*

Erwin N. Griswold**

Americans are rightly fascinated by their Supreme Court. There is no other tribunal in the English-speaking world which has such great power and prestige. It plays a unique role in our constititional and federal republic. Almost from the beginning, it has been the subject of controversy and concern.

I. A LITTLE BACKGROUND—THE PROBLEMS ARE NOT NEW

More than fifty years have passed since Professors Felix Frankfurter and James M. Landis published their remarkable work, The Business of the Supreme Court.1 The occasion for this book was the adoption of the Judiciary Act of 1925,2 which was the latest of a long series of statutory changes made from time to time in the Court's history, designed to recognize and deal with problems arising out of the workload of the Court. The authors said that this statute was

the temporary culmination of a continuous process of empiric legislation by which the federal judiciary has been adapted, more or less, to the changing needs of time and circumstance. The Act of February 13, 1925, will be no more permanent than was its most recent predecessor, the Circuit Courts of Appeals Act. If

* In a letter written to Felix Frankfurter on February 6, 1925, Justice Brandeis said that the Supreme Court was "venerated throughout the land" because "the official coat has been cut according to the human cloth." In other agencies of government, he said, too much work was piled up "regardless of human limitations. The high incumbents—in many instances—perform in name only. They are administrators—without time to know what they are doing or to think how to do it. They run human machines." (Quoted in Howard, Jr., Are Heavy Caseloads Changing the Nature of Appellate Justice?" 66 JUDICATURE 57, 59 (1982)). And Justice Brandeis wrote 58 years ago!

This address was delivered at the Brendan F. Brown Lecture at the Columbus School of Law, The Catholic University of America on March 23, 1983.


anything, changes in the future are likely to be more rapid than they have been in the past...  

The concluding chapter of the Frankfurter and Landis book is entitled "The Future of Supreme Court Litigation." On this they said:

The Act of 1925 has cut the Supreme Court's jurisdiction to the bone. A still wider use of certiorari has been suggested, whereby all cases from the state courts and the circuit courts of appeals could be reviewed only at the Supreme Court's discretion. Such a step is highly improbable.  

They continued with the observation that

the limited class of cases which can now go to Washington as of right are cases which concern issues of far-reaching public importance. Their disposition is precisely the raison d'être of the Supreme Court. That the review of such issues should be made to depend on grace and not on right is not within the limits of likely Congressional action.  

But that change, for all practical purposes, has now been made. With a few exceptions, there is no longer any right of access to the Supreme Court. Its jurisdiction now is almost entirely discretionary. For better or for worse, it does "depend on grace and not on right." And yet, the Supreme Court is still hard-pressed.  

Discussion about the Supreme Court caseload, and what to do about it, has been proceeding with increasing intensity over the past ten or twelve years. Perhaps the closest parallel in Supreme Court history was in the ten years, beginning in 1881, preceding the adoption of the Act of March 3, 1891, which established the Circuit Courts of Appeals, the first truly intermediate courts in our federal history. As Frankfurter and Landis recorded: "The Supreme Court docket got beyond all control." The Supreme Court's caseload nearly doubled in the ten years after its 1880 Term, and in 1890, its docket reached "the absurd total of 1800."

Beginning in 1875, numerous bills were introduced in Congress to cut

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3. F. Frankfurter & J. Landis, supra note 1, at 1.  
4. Id. at 299.  
5. Id. at 299-300.  
6. Prior to 1891 (and continuing until 1912) we had two trial courts, the district courts and the circuit courts, and the circuit courts had some appellate jurisdiction. Frequently, though, the circuit court was held by the district judge, so that he would be sitting in the circuit court "in sole judgment upon himself." As a contemporary address recorded, "[s]uch an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision." Quoted in F. Frankfurter & J. Landis, supra note 1, at 87.  
7. Id. at 86.  
8. Id.
down the jurisdiction of the federal courts on removal. In the 1880's, bills
were frequently introduced which would have eliminated corporate citi-
zenship as a means of access to the federal courts. Attorney General Gar-
land had previously been a Senator from Arkansas and, as a member of
the Senate Judiciary Committee, sought to curtail jurisdiction of the fed-
eral courts. Such a bill was enacted on March 3, 1887. This legislation
considerably reduced the number of cases in the local courts, but it had
little effect on the number of cases going to the Supreme Court. Beginning
in 1883, bills had been introduced in Congress establishing intermediate
appellate tribunals and these were strongly supported by Attorney General
Garland in his reports for 1887 and 1888. Numerous articles supporting
such bills were written by members of the Bar and Bench. In this and
other ways, the situation is quite parallel with the present time. Justices
of the Supreme Court participated in the discussion. Chief Justice Waite,
Mr. Justice Harlan, and Mr. Justice Field gave their voices in support
of congressional action. Attorney General Miller in 1889 and 1890 re-
peated the urging of his predecessor, Attorney General Garland. The
newly-formed American Bar Association, though divided as to just what
should be done, urged the need for some action and secured the support of
President Harrison in his first annual message. At last, a bill establishing
nine intermediate courts of appeals was introduced by Congressman John
H. Rogers. As Frankfurter and Landis said: "The debate upon the bill
threshed over old straw. The opposition repeated the arguments of the
1882 debate. Nine appellate courts, it was urged, would lead to diversity
of decisions with the courts' area of finality." The bill passed the House
and was strongly supported in the Senate by William M. Evarts. After

10. Eleven of these are listed in F. Frankfurter & J. Landis, supra note 1, at 96 &
n.177.
12. Mr. Justice Harlan, The United States Supreme Court, 20 Chi. Legal News 208
(1887).
13. Address of Mr. Justice Field, The Centenary of the Supreme Court of the United
States, 24 Am. L. Rev. 351 (1890).
338. See 9 J. Richardson, Messages and Papers of the Presidents 42-43 (1917).
15. 21 Cong. Rec. 3049, 3130 (1890).
16. F. Frankfurter & J. Landis, supra note 1, at 98. Two footnotes are omitted, one
of which notes support for the bill from a congressman who said it would put an end to the
"judicial despotism exercised by circuit and district judges." Id. at 98 n.188. The other
recorded an observation of Congressman Breckenridge of Kentucky that "it would be im-
possible to limit the number of appellate courts to nine." Id. at 98 n.189. He was, of course,
correct, but he did not foresee the great expansion of the number of judges on each of
several courts of appeals.
much discussion and compromise, including an extensive conference between the House and Senate committees, the bill was passed by both Houses and was signed by the President on March 3, 1891. It provided the most significant structural change in our federal judicial system since its establishment one hundred years before. Now, ninety-two years have passed since 1891.

The problem in the period preceding the adoption of the Circuit Court of Appeals Act in 1891 was massive overload in the Supreme Court. The Justices of the Court had given up all of their circuit duties, but the Court had thousands of cases pending on its docket, and cases waited for two or three years before they could be heard. This, of course, was a direct result of the great increase in population in the country. It had reached 75 million by 1890. It also resulted from the greatly increased industrial and commercial activity in the country which produced a kind of quantity of litigation very different from that which existed in 1789 when the federal court system was set up.

II. THE PROBLEM BURSTS INTO BLOOM AGAIN

Now we are approaching one hundred years since the establishment of the circuit courts of appeals, and the same forces are in operation. The population of the country is about three times what it was in 1891, and the nature and volume of litigation in the federal courts has also dramatically changed.

For some time, concerns have again been expressed about the workload of the Supreme Court, and much thought and consideration have been given to the problem. Although constructive, it has not produced major results. I will not undertake here to review these prior considerations in detail. They begin with the 1972 report of the Freund Committee established by the Chief Justice in 1970. It recommended, among other things, the establishment of an intermediate court which would screen petitions for certiorari, and select the cases for decision by the Supreme Court. This led to much opposition, based essentially on the thought that the Constitution provides for “one supreme Court”; but it also led to the establishment by law of a Commission on Revision of the Federal Court Appellate System, with Senator Roman L. Hruska as chairman. The com-

18. The literature on the current stage of the problem is already very large. I do not review it in detail in this paper or cite all of the contributions which have been made. Reference will be made to some of the discussions when they are relevant to my presentation here.
mission had sixteen members: four senators appointed by the Senate, four congressmen appointed by the House, four citizens appointed by the President, and four persons (two judges and two citizens) appointed by the Chief Justice. The commission held extensive hearings, in various cities of the country, and published substantial final reports.20

Despite the stature of the commission, and the care with which its work was done, there was no immediate major result from the effort. This was partly due to opposition by several Justices of the Supreme Court. A number of statutory changes were made, however. Direct appeals to the Supreme Court from decisions of the district courts were largely eliminated, and appeals from decisions of the United States Courts of Appeals were sharply cut down. The result is that the Supreme Court's jurisdiction now is largely discretionary. The prophecy made by Frankfurter and Landis more than fifty years ago that this would never happen inevitably yielded to the pressure of events and, specifically, to the implacable fact that the Supreme Court simply could not hear and decide all of the cases that would be brought before it without some sort of protective action by Congress.

This is how the matter stood until last summer. At that time, there were a number of public statements by Justices of the Supreme Court, surprising to some because of their concern and vigor. A number of these were made in connection with the annual meeting of the American Bar Association held in San Francisco in August 1982. As of today, all nine members of the Court have now spoken on this subject.21

III. THE PROBLEM IS REAL—BUT IT IS NOT PRIMARILY A PROBLEM OF THE SUPREME COURT

The problem is a very real one. There can be no doubt about that. Those who say there is no problem seem to me to be largely unaware of its ramifications and insensitive to its consequences.

There is, however, an aspect of the matter which has not been widely recognized in the discussions to date. This is, as I see it, the fact that the problem is not primarily one relating to the Supreme Court. One of the reasons why we have had difficulty in coming to grips with the issues is that we have been focusing too much of our thought and effort in the wrong place. There are some things that can be done about the Supreme Court—but not much more. We have already done a large part of what can be done, for the Supreme Court's jurisdiction now is very largely discretionary. The Court has been given the means to protect itself. With some remaining exceptions, which should be eliminated, it need not now undertake to decide any case which does not, first, merit its attention and, second, fall within the limits of its capacity. There is, of course, the certiorari problem, that is, the sheer mass of applications to the Court to grant review. But that can be helped, I believe, if appropriate steps are taken to reduce the flow of cases into the federal court system and to make the decisions of the courts of appeals more meaningful.22

Of course, it is not a very happy situation to have virtually all of the decisions of the Supreme Court available only as a matter of grace. That carries overtones of monarchical practice and brings to mind the image of Haround al Raschid dispensing justice while sitting under a tree, and this should give us some concern.23 We have been forced into this situation by successive steps over a period of nearly two hundred years. Until 1891, the Supreme Court had to hear all cases that were brought to it—though not all cases could be brought to it. Beginning in 1891, with the establishment of the United States Courts of Appeals, the concept of discretionary review was introduced. This was expanded on several occasions, particularly in 1925; and, especially in the past ten years, a considerable volume of cases has been transferred from the compulsory jurisdiction (appeal) to discretionary jurisdiction (certiorari).

Before going further, the constitutional provision establishing “one supreme Court” should be addressed. It is true that the Constitution establishes “one supreme Court.” But the Constitution also provides that the Supreme Court’s jurisdiction, in nearly all cases, shall be “appellate,” and

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22. That the problem is one applicable to the federal court system generally is clearly recognized by Justice Powell, supra note 21, at 1370. As Justice Powell observed, “In the federal system, the fundamental need is to reduce the rate of flow of cases into the district courts.” Id. at 1371. And he makes a number of important suggestions as to how this can be done. Id. at 1372.

“with such Exceptions and under such Regulations as the Congress shall make.” There has, of course, been considerable discussion over the past year as to the scope of this “Exceptions” clause. To me, it is clear and important that it does not authorize Congress to take steps which will have the effect of undercutting or forestalling decisions of the Supreme Court on particular issues. But it is equally clear that this provision gives Congress broad powers to regulate the jurisdiction of the Supreme Court, including the limitation of its jurisdiction when these “Exceptions” and these “Regulations” are enacted as a part of a general plan for appellate procedure and review, not designed to have special impact on certain of the Court’s constitutional decisions.

The question of “one supreme Court” is important, because much has been made of it, particularly by Chief Justice Warren who, in his felicitous and vigorous way, argued against the proposals of the Freund Committee and of the Hruksa Commission on the ground that they would violate this constitutional provision. But the Constitution gives no one a “right” to take a case to the Supreme Court. This is shown clearly enough by the chief route to the Supreme Court now, which is only by the discretionary grant of certiorari. But there is no “right” even to knock on the door of the Supreme Court, and beg leave for a hearing. Even in the days of virtually unlimited right of review in the Supreme Court, there was no right of appeal in criminal cases. Indeed, it was not until 1889 that provision was made for the appeal of capital cases to the Supreme Court. And in all cases appeal to the Supreme Court was limited to controversies involving more that $5,000, an amount which must have been equivalent to at least $50,000 now.

The jurisdiction of the Supreme Court is now largely discretionary. This is undoubtedly necessary, but it, standing alone, leaves a situation which is not very satisfactory. Discretionary jurisdiction means that Supreme Court review is now, in virtually every case, a matter of grace. As I have already indicated, there is a certain element of the royal prerogative in this state of affairs. I believe that the phrase for monarchical justice is “grace and favor”—and that is not really a very satisfactory way to administer justice, and it is not helped by the fact that the grounds for bestowing grace are inevitably very far from clear.

26. Act of February 16, 1875, ch. 77, 18 Stat. 315 (1875). There were different limits for appeals from the Court of Claims, the District of Columbia, and the Territories. See F. Frankfurter & J. Landis, supra note 1, at 1.
Indeed, speaking of course as an outsider, and with great respect, it has occurred to me that one source of the pressure that the Supreme Court obviously feels is the number of cases they see where review really should be granted in the general public interest, but which they feel simply unable to grant within the limits of their physical capacity. Thirty years or so ago there were 1,000 petitions, and the Court heard about 150 cases, or 15%. Now there are over 4,000 applications, and the Court can still hear only about 150 cases. Yet 15% of 4,000 applications would be 600 cases. There must be many cases in those falling outside the 150 today which would have been thought worthy of a grant a generation ago. We have not yet found a way to resolve this situation, but it exists, despite occasional denials, and it is not a happy one.

As I previously noted, we have done about all that we can do directly about the Supreme Court's problem. The Justices are under no obligation to hear more cases on the merits than they think they can adequately handle. There are, I think, three more things that can be done, and that should be done. If done, they would help the situation, but would by no means remove the problem.

These three things are:

1. The remaining jurisdiction of the Supreme Court on appeal, that is, its mandatory jurisdiction, should be repealed, except possibly for the obligation of the Court to review directly the decision of any court holding a federal statute to be unconstitutional. There are not a great many such cases, and they are generally of considerable importance.

2. The second thing that should be done is to eliminate generally the jurisdiction of the federal courts based on diversity of citizenship. Such jurisdiction has now become an anachronism. It would be pleasant to continue it if we really had the facilities to handle it; and there are certain elements of the bar which value it highly. As events have developed, though, it is a vestige of another day, at least in its domestic application. We can no longer afford the congestion which it produces, and the time is well past when it should be repealed.

3. The Federal Employers Liability Act and the Jones Act should both be repealed and replaced with a modern workmen's compensation act. This was done long ago for longshoremen and harbor workers,27 and there is no respectable reason why railroad workers and seamen should be treated differently. As Judge Friendly has well said, "To urge the retention of personal injury and wrongful death actions based on fault for rail-

road workers and seamen is sheer antiquarianism." 28 The volume of cases in the lower courts is considerable, 29 and they do not belong there. 30

The second and third of these suggestions affect the Supreme Court by reducing the flow of cases in the whole federal system. 31 In practical terms, what it would accomplish as far as the Supreme Court is concerned would be the reduction of the number of petitions for certiorari which the Supreme Court must consider. Such petitions have multiplied considerably in recent years, and now aggregate over 4,000 new petitions in each term. Counting in terms of a fifty-week year, with two weeks of vacation, this means a steady flow of eighty petitions per week, or well over ten every working day. At best, dealing with these is a very heavy burden, and anything that can be done to reduce the number should be carefully considered. 32 It would not seem to be the same sort of burden as that involved in hearing cases on the merits and in writing opinions. Indeed, with my background, it seems somewhat analogous to the chore of reading bluebooks in an academic institution. I have often had to read more than 500 of those in the space of five or six weeks. In some ways, reading a petition for certiorari must be somewhat easier, for it will be readily apparent to an experienced justice that a high proportion of them cannot be granted. I have no doubt that dealing with petitions for certiorari is a very wearing chore, but it does not seem to me to be the heart of the problem.

As I have already indicated, there has been too much concentration on the problem as being a Supreme Court problem. This has been true over the years with both the Freund Committee and the Hruska Commission, and it is also true with respect to most of the recent discussions of the problem, which have largely come from the Justices of the Supreme Court.


29. In fiscal year 1982, there were 2,017 employers liability cases and 4,441 Jones Act cases filed in the district courts, a total of 6,458. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF UNITED STATES COURTS 215 (1982) [hereinafter cited as Annual Report].

30. Nor do appeals from determinations of disability under the Social Security law, or from denials of awards for Aid to Families with Dependent Children, belong in the article III Federal Courts. There should be tribunals established under article I to hear such cases. There were 10,380 disability and supplemental security income cases filed in the district courts in 1982. Id.

31. See Friendly, supra note 28, at 634. See also H. Friendly, supra note 28.

I venture to suggest that the problem of burden on the courts is substantial and serious, and that the place where it most significantly impinges is on the United States Courts of Appeals. The problem there is a massive one, but there has been very little discussion of it at that level. My thought is that we should focus now on finding ways to cut down on the flow of cases into the courts of appeals. They are the principal gateway through which cases enter the Supreme Court, and if the volume of cases in the courts of appeals can be reduced, a reduction of petitions which have to be considered by the Supreme Court will inevitably follow. Of course, cases come to the Supreme Court from state courts as well, and this problem will be addressed later.

IV. WHAT CAN WE DO TO CUT DOWN THE FLOW OF CASES INTO THE COURTS OF APPEALS?

As I have already suggested, we should remove diversity of citizenship as a way of entry into the federal courts. This would reduce the volume of cases in the district courts by 25%. Eliminating these cases would reduce the load on the courts of appeals, and would have an appreciable effect on the number of petitions filed with the Supreme Court.

What more can be done? On this, I think, the Supreme Court itself can provide a good deal of help. Some of these suggestions may seem somewhat intangible, and they can hardly be quantified, but I think they would help substantially if the Court could find the ways to put them into consistent operation. They are matters of mores and approach, but they are real. They fall under several headings:

1. More clearly recognizing an "institutional responsibility."

My first point is hard to state, and particularly hard to state in a way which will not be misunderstood. It is presented with deference, and with great respect. I have about as much a basis as any outsider to appreciate the burdens on the Justices of the Supreme Court, and the nature of their work. I have also been in a position to have some views on the impact of that work on the legal system.

The basic point I want to make is that it does not seem to be that the

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33. In the fiscal year 1982, a total of 205,193 civil cases were filed in the district courts. Of these, 50,555 were based on diversity of citizenship. ANNUAL REPORT, supra note 29, at 215.

34. In 1982, a total of 23,551 cases were filed in the courts of appeals, of which 3,217, or 14% were based on diversity. ANNUAL REPORT, supra note 29, at 207-08.
Supreme Court always shows an adequate "institutional" sense. Of course, the justices thoroughly understand the "institution" of the Supreme Court. This point addresses something else, namely, the "institution" of the legal system of the country, of which the Court is only one of many administrators, though it is the primary and most influential one. The bottom administrators are the lawyers, not only the lawyers who appear in court, but the lawyers at work in the law offices. It is, I think, clearly true that the overwhelming proportion of the law is administered by lawyers. As Justice Holmes said: "Shall I ask what a court would be unaided? The law is made by the Bar even more than by the Bench."\(^{35}\) And Justice Jackson, a great practicing lawyer himself, wrote: "It is too often overlooked that the lawyer and the law office are indispensable parts of our administration of justice."\(^{36}\)

Unfortunately, when lawyers become judges, many of them overlook this fact or fail to provide the tools required by practicing lawyers in their task of administering the law. The more and better the lawyers are aided in their basic role as administrators of the legal system, the less work there will be for the courts. If the legal system can be made more intelligible, there will be fewer cases in the lower courts, and from this will follow a reduction in the number of cases where review is sought from the Supreme Court.

My favorite illustration of this point is *Commissioner v. Duberstein*,\(^{37}\) a federal income tax case. It involved an individual who gave some "tips" as to potential customers to the president of a business corporation. The information proved valuable, and the corporation gave Duberstein a Cadillac, charging the cost as a business expense on the corporate tax return. The question was whether the value of the Cadillac should be treated as income to Duberstein.

This rather unimportant case wended its way to the Supreme Court, because of an asserted conflict with another case in which the Comptroller of Trinity Church in New York, charged with managing the church's real estate holdings, resigned after ten years of service. The officers of the church then voted to give him a gratuity of $20,000.

The Court could have handled these cases by one or the other of two rules, either of which would have been readily administrable. It could have said that payments in such circumstances are always income, in view of the clear commercial element in the picture. Or, it could have said that

\(^{35}\) O.W. Holmes, *Toast to the Law* in *Speeches* 16 (1913).
such payments are never income since they are made without consideration and are designated as gifts. Instead, the Court recited a number of factors that might be taken into consideration and then stated its conclusion in these words: “Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal’s experience with the mainsprings of human conduct to the totality of the facts of each case.” And it concluded that “primary weight in this area must be given to the conclusions of the trier of fact.” Thus, it is anybody’s guess. What are the “mainsprings of human conduct”? How can such a test be administered in a law office—that is, how can a lawyer give, with confidence, specific advice to a client on a question in this area? How can the officers of the Internal Revenue Service administer such an approach without taking every case to court? When the cases are in court, how shall they be decided?

It really would not make much difference which way the decision went. On such a question, though, I submit that the Court should have provided a clear rule. If Congress did not like the rule, it could have changed it. But as long as the rule stood, lawyers could have known what to do, Internal Revenue officers would have known what to do, and very few cases would have gone to court.

2. The importance (within limits) of “correcting errors”

There are other aspects of this matter. We are frequently told that it is not the function of the Supreme Court to correct errors which are made in the lower courts. Indeed, this has been asserted in rather strong terms by Justice Stevens in his speech last August before the American Judicature Society. He said, for example, that “[f]ar too often we are guilty of voting to grant simply because we believe error has been committed.” The Supreme Court cannot correct all errors in the lower courts—though the fact that there are uncorrectable errors should give us pause. The important point is that outstanding and unreviewed erroneous decisions spawn further litigation. Lawyers have a sense about cases. If there is a decision in the “X” circuit which a lawyer thinks is really quite wrong, he will be encouraged to litigate the question. Even if the decision is in his own circuit, he may well proceed, for he is very likely to get a different panel of judges, and that panel may perceive the error in the decision and find a way to get around it. Or, while his case is pending, a conflict may develop, and he may proceed accordingly. As I have already indicated, the

38. 363 U.S. at 289.
Supreme Court cannot correct all errors. But likely error in a decision which does not turn on isolated facts is, in my view, a relevant factor in determining whether to grant \textit{certiorari}. And, as the Supreme Court is able to correct errors, the volume of litigation in the lower courts will be reduced, with a corresponding effect on applications to the Supreme Court.

3. \textit{Clarity of decision, without prolixity}

There is another aspect of the same point. Supreme Court decisions can help to reduce litigation in the lower courts to the extent that the decisions are clear and definitive. Alas, for a number of reasons, decisions of the Supreme Court are often not clear and definitive. Many of them—one might say most of them—are \textit{much too long}. In the second place, there are \textit{too many} opinions, so that very frequently no rationale can be divined for what the Court has done. On the contrary, a good many ideas have been presented, which careful counsel can try to develop into a new case, which will add to the litigation level. There are many reasons for this, and it must be recognized that the blame is by no means wholly with the Court. Many of the questions presented to the Court have become more complicated than in years gone by. Congress has enacted a great many important statutes, often in complex and confusing terms. We probably can never get back to the page and a half opinions of Justice Holmes. But there can be no doubt that the opinions written today are, from the point of view of the "institution" of the legal system, too long and too many.

It is difficult to know the reason for this. Some feel that the proliferation of law clerks has a good deal to do with it. They are able young men and women with limited experience, who turn out a large volume of work which is generally very thoroughly done. An outsider might think that too many judges find it difficult to suppress this work,\textsuperscript{40} and the result is long opinions and too many opinions.\textsuperscript{41}

To be sure, the Court need not always speak with one voice. The ques-

\textsuperscript{40} J. Woodford Howard, Jr., in \textit{Courts of Appeals in the Federal Judicial System} 200 (1981), quotes a court of appeals judge with a large caseload in these words: "I take what I like. I have little chance to do otherwise. We discuss the case. I tell them what I want—give them the slant. If the style differs too much, I have been known to write myself."

\textsuperscript{41} The recent opinions in Hillsboro Nat'l Bank v. Commissioner of Internal Revenue, 103 S. Ct. 1134 (1983), decided by the Supreme Court on Mar. 7, 1983, may be thought by some to be an example. There are many others. Incidentally, if we had a court for deciding conflicts, as suggested by the Chief Justice and urged below, the \textit{Hillsboro} case need never have gone to the Supreme Court, and the justices need not have devoted their time and effort to defining the contours of the "tax benefit rule"—a matter of considerable importance to the tax law, but hardly one of the questions of public importance for which we need the careful consideration of the Supreme Court.
tions before it are close and difficult. It would be misleading to have only a
single opinion in every case, and I certainly do not make that suggestion.
On the other hand, is there any real reason for having seven opinions in a
case? Is it necessary for every justice to state precisely his view in each
case? Would it not be adequate in a great many cases to follow the practice
often used in the past, a simple “Mr. Justice Brandeis dissents” or “Chief
Justice Hughes concurs in the result.” That practice is rare these days.
The length of opinions, and the multiplicity of opinions, make it difficult
for lawyers to administer the law in the law offices and for the lower courts
to know what they should do. It is also a significant element in the cost of
legal services, both because of the increasing masses of material which
must be added to office law libraries, and because of the time it takes for a
careful lawyer to plow through seventy or eighty pages of opinions and to
try to evaluate them.

4. “Activism”—a self-repeating phenomenon

A further factor which leads to increased litigation in the lower courts is
the tendency towards what is called “activism.” Over the past generation,
the courts have been constantly “reaching out.” I do not want to be mis-
understood; this is not a question of black and white. There are situations
where the Court should recognize needs for normal development of the
law and should take steps to provide for it. In recent years, though, the
courts have gone very far in this, and have done it frequently. Old doc-
trines designed to hold down the number of controversies heard by courts,
such as mootness, standing, justiciability, political question, and so on,
have been largely swept away. Section 1983 has been expanded and ap-
plied to situations which were never dreamed of when it was enacted more
than a hundred years ago. Class actions have been greatly expanded
under rules adopted by the Court, and have been applied to what some
would think an absurd extent. All of this adds to the volume of work in
the lower courts and thus, eventually, to the number of cases which come

42. See Board of Educ., Island Trees Union Free School Dist. v. Pico, 102 S. Ct. 2799
43. See Canon, A Framework for the Analysis of Judicial Activism, in S. Halpern & C.
Lamb, Supreme Court Activism and Restraint (1982); Canon, Defining the Dimensions
of Judicial Activism, 66 Judicature 236 (1982).
44. See Wallace, The Jurisprudence of Judicial Restraint: A Return to the Moorings, 50
GEO. WASH. L. REV. 1, 15 (1981); Markey, On the Cause and Treatment of Judicial Activism,
28 FED. BAR NEWS 296 (1981); Agresto, The Limits of Judicial Supremacy: A Proposal for
Problems in Federal Courts to the Supreme Court.46

There is also the impact of the "realist" view, which has been fashionable in recent years. The realists say that opinions do not decide cases, they only provide plausible reasons for decisions which are in fact reached on other grounds. To the extent that the realist approach is followed, or appears to be followed, it stimulates increased litigation. Here again, there is no black and white. Everyone knows that judges do make law, and should make law. It is rather a question of how much law they should make. Some observers may feel that the courts have been making too much law in recent years, and that this has had some impact on the litigation explosion, and thus on the volume of cases in the lower courts and in the Supreme Court. A recent writer has trenchantly observed that:

The crucial defect in American Legal Realism is that it stops at the courthouse door. It has no meaning for either an advocate or a judge. The judge trying to decide a case will not be helped by the reflection that the law is anything he says it is, nor will the lawyer serve his clients' cause by arguing it in these terms.47

I have tried elsewhere to develop this theme under the rubric of "Equal Justice Under Law."48 This maxim combines the two principal aspects of the judging process, "equal justice" and "under law." Both of these are important. They are not always reconcilable, and one of the principal problems of judging is to find the proper balance between them. It is emotionally easy to place chief reliance on "equal justice." One recalls the praise which was given to Chief Justice Warren because he questioned "Is it fair?" But deciding simply in terms of "justice" makes law unpredictable. It makes it turn upon the reaction of individual judges, in the light of all of the circumstances. It is very difficult, though, for lawyers in the law offices to administer the law on that basis, or for judges in the lower courts to perform their functions. It may be that more weight should be given to the element of "under law" in the reaching of decisions. This was nicely highlighted by a former justice of the Court who said in a television inter-

46. See generally J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-34 (1980). The extent to which the Court can "reach out" is shown strikingly in its actions in Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co., 395 U.S. 464 (1969). This led Justice Harlan to open his dissenting opinion with these words: "The action taken by the Court today will be dismaying to all who are accustomed to regard this institution as a court of law." Id. at 472 (Harlan, J., dissenting).


view that he "would rather create a precedent than find one." There is much to be said for that—in rare cases. But if it is applied too often, there ceases to be much "law," and "equal justice under law" becomes simply "equal justice." We should not be surprised if such an approach stimulates litigation, and increases the flow of cases through the lower courts and into the Supreme Court.

This raises an aspect of judging which is as old as the task of judging itself. More than 600 years ago, this interchange occurred in the courts of England:

R. Thorp (counsel): You will do as others in the same case, otherwise we shall not know what the law is.

Hillary (J.): [Law is] volunté de Justices.

Stonore (J.): Nanyl; ley est resoun. Both of these aspects have their place in the development of the law. Judges act professionally. They are not free to act on their own choice or whim. But, it is still true that in some cases which come before appellate courts, the law, in professional terms, does not provide a clear answer. At this point the judge must make a choice. Much of the problem arises because some judges do not keep this part of their role as narrow as they should.

5. Independent review of facts by the courts of appeals

One troublesome aspect of this which gives me concern is the extent to which appellate courts in our system now make independent review of the facts found by the district courts. Our system is supposed to proceed on a division of labor. The fact determinations are made in the district courts, either by the jury or by the judge, and the courts of appeals are responsible for seeing that the law was correctly applied. Rule 52 of the Federal Rules of Civil Procedure, promulgated by the Supreme Court, provides that "findings of fact shall not be set aside unless clearly erroneous." And a similar rule applies with respect to an exercise of discretion by the district courts.

In recent years, however, the courts of appeals have more and more been undertaking comprehensive review of factual determinations by the district courts, and the Supreme Court has done little to change this practice. What are the consequences of this? They are numerous, but one of them is that very few counsel feel that they can drop a case even though


the facts have been found against them in the district court. Under current practice, there is a considerable chance that counsel can persuade the court of appeals to undertake a general review of the facts, and to reach its own conclusion. This is an example of the "reaching out" which has become endemic among the courts in recent years. It is, I suggest, a considerable factor in the volume of cases coming to the courts of appeals, and thus to the Supreme Court.

6. Summary on the "intangible" suggestions

What we need is to "tighten ship" and, in particular, to recognize the need for tightening the ship and to understand that the fairly free and easy practices of recent years have a great deal to do with the litigation explosion and the volume of cases in the courts of appeals, and thus in the Supreme Court. These are matters largely of outlook, approach, and atmosphere which have substantially affected the volume of cases being litigated in the federal system. It will be extremely difficult to change these matters, and it cannot be done without clear leadership from the Supreme Court—where most of the leadership over the past generation has gone in the other direction.

The volume of cases in the courts of appeals could be cut by close to 15% by eliminating diversity of citizenship jurisdiction. Another 20% could be reduced by changes in practice and outlook—by a more disciplined approach, self-discipline. This would make the law more understandable and predictable, and thus more administrable in the law offices and in the lower courts. I know of no way to prove that 20% figure, but, as an active practitioner, I have seen many cases go forward simply because of the uncertainties of the law. The present system has a great deal of lottery in it—forum shopping, which circuit, who is on the panel, will there be review *en banc*, and finally, the highly unpredictable *certiorari* process. If you reach the Supreme Court, you finally get a stable bench of judges. But the chances taken along the road are considerable, and the chances of getting there are slim. It would be a better system, and more administrable, if some way could be found to reduce the impact of chance. The simple fact, obvious to any practitioner, is that judges are not fungible. As I suggest below, we could provide more permanence and stability in the courts below the Supreme Court.

V. MORE CONCRETE STEPS THAT CAN AND SHOULD BE TAKEN

The suggestion that we should have a national Court of Appeals, though
having, in my view, much to be said for it,\textsuperscript{51} has not yet met with favor, and I do not advance it here. For many it is too much of a bite all at once. I suggest, though, that there are a number of nibbles that we can and should take, and that in the aggregate these steps would do much to alleviate the problem and to make a single National Court of Appeals unnecessary.

\section{A court for deciding conflicts}

One such step, worthy of wholehearted support, has been recently suggested by the Chief Justice.\textsuperscript{52} This is the establishment, on a temporary, experimental basis, of a court associated with the United States Court of Appeals for the Federal Circuit and given the assignment of deciding conflicts between the courts of appeals. This court would be, for the time being, composed of present judges of the courts of appeals. There should, of course, be clear provision that its decisions would be binding on all of the lower federal courts.

I see nothing to be lost by this experiment, and much to be gained. Under our present system, litigation goes on and on. A decision by one court of appeals does not mean much except to the parties to the case. If the same question comes up in another court, the decision is interesting, but in no sense binding. Eventually a conflict develops, and the Supreme Court then may or may not grant \textit{certiorari}. In the meantime, lawyers cannot administer the law in the law offices. Government lawyers do not know how to carry out their duties. And the lower courts have no authoritative or controlling decision. Many of the questions involved are not of great fundamental importance. They often turn on questions of the construction of statutes, such as the tax laws or the labor laws, and so on. It is very much in the interest of all concerned to obtain a definitive decision, with nationwide effect, as soon as possible.

There are some problems which will have to be resolved. How, for example, is a “conflict” to be defined? Without exploring the problem in detail, I would suggest that the statute establishing such a court should provide that there is a conflict whenever a panel of a court of appeals cites a specific case from another circuit (or perhaps even in the same circuit) and says in some sort of specific terms that it rejects that decision, declines to follow it, or recognizes that its decision is in conflict with the other case. This would be a clear and administrable rule, and it would eliminate com-

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2. Expand the number of courts of appeals with "topical" jurisdiction

The present organization of our courts of appeals, in large part, facilitates uncertainty in our law and fosters litigation. This is because the courts of appeals are, for the most part, arranged on a geographical basis. There is the United States Court of Appeals for the First Circuit, which hears cases in the northeastern states. There is the United States Court of Appeals for the Tenth Circuit, which hears cases in the mountain states, and so on. This is the system which produces conflicts, which proliferates decision in the law reports, and which makes it possible to find authorities to support almost any position that comes into a law office.

We should have more courts organized on a topical basis, that is, in accordance with the subject matter of the case. We do have three such courts now. Two of these are little-known, and the other is very new.

(a) The oldest of the little-known courts with topical jurisdiction is the United States Court of Military Appeals.53 This court sits in Washington, D.C. and has jurisdiction to review the decisions of the several tribunals in the extensive and far-flung system of military justice. It has performed this task quietly and with great success for more than thirty years. Its decisions are final. There is no right of review by the Supreme Court (or any other court) except to the extent that review may be sought through a writ of habeas corpus, and that has very rarely happened. When it has occurred, the questions raised have been fully worthy of Supreme Court consideration.54

(b) The other little-known court is the Temporary Emergency Court of Appeals, which has exclusive jurisdiction to review decisions of all of the district courts in the United States in the energy field. Following a precedent established with respect to price-control laws during World War

II,\textsuperscript{55} the present Temporary Emergency Court of Appeals was set up under an amendment to the Economic Stabilization Act of 1970 to deal with wage and price stabilization.\textsuperscript{56} That authority has now expired, but the jurisdiction of the court was extended to actions under the Emergency Petroleum Allocation Act of 1973.\textsuperscript{57}

It is important at this point to observe that one reason that the Temporary Emergency Court of Appeals is so little-known is because it has worked so well. There are no conflicts in the energy field, because energy cases cannot come before any other court. In the twelve years since the court was established, apparently no decision of the court has been reviewed by the Supreme Court.\textsuperscript{58} Petitions for \textit{certiorari} are very rare. As a consequence, the petroleum laws are administrable in the law offices. Once the Emergency Court of Appeals has spoken, the law offices—and the Government officers—know what the law is. This has clearly reduced overall litigation, as well as the volume of cases in the Supreme Court.

(c) The other court is the recently established United States Court of Appeals for the Federal Circuit.\textsuperscript{59} This court combines the previously existing United States Court of Claims and the United States Court of Customs and Patent Appeals. With some qualifications, it has exclusive jurisdiction to review the decisions of the International Trade Commission, the United States Court of International Trade, sitting in New York, and the decisions of the district courts throughout the country in cases under the Tucker Act, involving claims against the United States in amounts of $10,000 or less.

The time has come, I think, when we should have more national courts of appeals with topical jurisdiction. Nearly forty years ago, I wrote an article proposing that there should be a United States Court of Tax Appeals.\textsuperscript{60}

\textsuperscript{55} See Yakus v. United States, 321 U.S. 414 (1944).
\textsuperscript{58} Cf. Bray v. United States, 423 U.S. 73 (1975) (reviewing a Ninth Circuit decision affirming a conviction for criminal contempt and holding that question did not fall within the exclusive jurisdiction of the Temporary Emergency Court of Appeals).
\textsuperscript{60} Griswold, \textit{The Need for a Court of Tax Appeals}, 57 \textit{Harv. L. Rev.} 1153 (1944). We now have a fine and highly regarded United States Tax Court, with nationwide jurisdiction. If its decisions were final, the administration of the tax laws would be much simplified, and resolution of disputed questions on a national basis would be greatly accelerated. But, in-
I still think it would be a good idea. It might now be combined with the United States Court of Appeals for the Federal Circuit, but it would be better to have a separate Court of Tax Appeals. We could also have courts of appeals with exclusive jurisdiction over labor cases, over commerce, including the Interstate Commerce Commission, the Federal Trade Commission, and antitrust.\textsuperscript{61}

It would also be highly desirable to have a United States Court of Appeals with jurisdiction to review appeals and petitions from state courts in criminal cases, decisions of federal district courts in habeas corpus proceedings, and cases involving prison regulations and conditions. This would leave direct appeals from federal criminal convictions to go to the existing courts of appeals, which seems desirable.

I do not undertake to expand on these suggestions here. All of them present problems which would have to be resolved. But they are, I think, solvable.

\section*{VI. Summing Up}

If these suggestions were adopted, there would be several consequences. The volume of litigation coming to the courts of appeals and thus to the Supreme Court would be sharply reduced. Fewer conflicts would be produced, and those which would arise would be promptly resolved. Even more important is the fact that, in considerable measure, conflicts would be eliminated, so that issues of statutory construction and other questions would be much more quickly resolved, and on a national basis. All of this would have the further consequence of substantially reducing the volume of litigation.

Much of the approach to these problems depends upon one's background. I approach it with the background of a law teacher and also of a practitioner, much of whose practice has been before the Supreme Court. In the course of my career I have known many judges and have been familiar with the work of many of them, both in state and federal courts. It

\textsuperscript{61} I have already suggested that we should have a set of courts established under art. I to hear all cases involving claims for government entitlements for disability under the Social Security Act and related statutes, with a single appellate court to deal with appeals from such decisions.
has been my observation that all judges in this country, with few exceptions, work very hard and conscientiously, and that, in particular, the workload of all of the judges of the federal courts, and especially of the courts of appeals, has increased enormously. That load is now very nearly overwhelming, and it has already led to practices which have caused criticism and which may well change the character of the administration of justice in this country. We have, alas, moved very far from the time when Justice Brandeis could say that the distinctive thing about the judiciary is that they "do their own work." The time has come when we should give our judges once again more adequate time to reflect, to ponder, to think—to make up their own minds, without finding themselves often the senior member of a staff operation, reviewing the work of others who hold no commission from the President.

It is hard for the judges to speak out, though I am glad that most of the Justices of the Supreme Court have done so within the past year. I fully agree with these Justices that the problem is both real and serious, though, as I have indicated, the problem may be even more intense with the courts of appeals than it is with the Supreme Court.

In this situation, it is the responsibility of the bar to work with the Congress to find ways and means to deal with the problem and to take steps to alleviate some of the difficulties. In this lecture, I have tried to suggest some ways in which this might be done. There can be no doubt that the time has come when talk is no longer enough, and active steps should be taken. There is no panacea, but there are significant things which can be done, and which would help significantly.


64. Justice Stevens tells us: "I have found it necessary to delegate a great deal of responsibility in the review of certiorari petitions to my law clerks. . . . As a result, I do not even look at the papers in over 80 per cent of the cases that are filed." Stevens, Some Thoughts on Judicial Restraint, 66 JUDICATURE 177, 179 (1982). This is refreshing frankness, but what does it do, one may ask, to "one supreme Court"?